NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE DONALD ALVIN CARLSON, also known as DC Production Services, Debtor.	BAP No. WY-05-080
COBRA WELL TESTERS, LLC, Plaintiff – Appellant, v. R. MICHELE RUSSELL, Trustee, Defendant – Appellee.	Bankr. No. 04-22255 Adv. No. 05-2020 Chapter 7 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the District of Wyoming

Before McFEELEY, Chief Judge, BOHANON, and MICHAEL, Bankruptcy Judges.

MICHAEL, Bankruptcy Judge.

The parties did not request oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal.[1] The case is therefore ordered submitted without oral argument.

Cobra Well Testers, LLC ("Cobra"), a creditor in the above-captioned

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

1 Fed. R. Bankr. P. 8012.

Chapter 7 case, appeals an order of the Bankruptcy Court for the District of Wyoming granting summary judgment in favor of the trustee on Cobra's complaint for turnover of funds. Cobra argues that the bankruptcy court erred when it refused to impose a constructive trust on funds held by the trustee in favor of Cobra. For reasons set out below, the decision of the bankruptcy court is affirmed.

I. Background

The facts in this case are not in dispute. On August 2, 2004, Cobra entered into an asset purchase agreement with Donald Carlson ("Debtor") to purchase specified oilfield equipment and vehicles (the "Equipment"). At the time Cobra inspected the Equipment, it was found to be acceptable. Subsequent to the inspection, a closing was held at which Debtor delivered a Bill of Sale to Cobra and sale proceeds of $155,000 were delivered to the trust account of Debtor's attorney. Debtor retained possession of the Equipment until Cobra could pick it up. When Cobra arrived to accept delivery, it found that some of the Equipment was missing. The missing assets were valued by Cobra at $30,500.

On November 18, 2004, Debtor filed a petition for relief under Chapter 7 of the Bankruptcy Code. On the date of filing of the petition, Debtor's attorney held $24,086.17 (the "Funds") of the sale proceeds in her trust account. Those Funds were subsequently turned over to Ms. Russell ("Trustee"), the Chapter 7 trustee in this case.

Cobra filed a compliant for turnover of funds against the Trustee, claiming that the Funds were traceable to the purchase of the Equipment and subject to a constructive trust in favor of Cobra and thus not property of Debtor's estate.[2] The Trustee responded that the Funds were an asset of the estate to be administered by

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[2] Complaint for Turnover of Funds, *in* Appendix to Appellant's Brief at 66-67.

the Trustee. Both Cobra and the Trustee filed motions for summary judgment seeking judgment as a matter of law.

After a hearing, the bankruptcy court issued an order granting the Trustee's motion, denying Cobra's motion, and granting the Trustee judgment against Cobra on the complaint.[3] The court found that the monies Cobra paid to Debtor were pursuant to the asset purchase agreement and any failure of Debtor to deliver property was a breach of contract, with its concomitant state-law remedies. The bankruptcy court found no evidence of a confidential relationship between Cobra and Debtor, nor any evidence that Cobra paid monies to Debtor with the expectation that Debtor would act in Cobra's interests, that would warrant the imposition of a constructive trust on the Funds.

II. Appellate Jurisdiction

This Court has jurisdiction to hear timely-filed appeals from "final judgments, orders, and decrees" of bankruptcy courts within the Tenth Circuit, unless one of the parties elects to have the district court hear the appeal.[4] Neither party elected to have this appeal heard by the United States District Court for the District of Wyoming, thus consenting to review by this Court.

III. Standard of Review

We review a bankruptcy court's grant of summary judgment *de novo*.[5] "Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law."[6] "Only disputes over facts that might affect the outcome of the suit under the governing

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[3] Summary Judgment, *in* Appendix to Appellant's Brief at 7-9.

[4] 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002.

[5] *Taylor v. Meacham*, 82 F.3d 1556, 1559 (10th Cir. 1996).

[6] *Stat-Tech Int'l Corp. v. Delutes (In re Stat-Tech Int'l Corp.)*, 47 F.3d 1054, 1057 (10th Cir. 1995).

law will properly preclude the entry of summary judgment."[7]

IV. Discussion

Cobra claims that the bankruptcy court erred when it failed to impose a constructive trust on the Funds held by the Trustee in favor of Cobra. Specifically, Cobra finds error in the court's conclusion that it may not impose a constructive trust where there is no evidence of a confidential relationship between the parties and no showing that Cobra expected Debtor to act in Cobra's interest with respect to the Funds. We find no error.

A court must look to state law to determine when to apply a constructive trust.[8] Under Wyoming law,

> [a] constructive trust arises by construction of the court when equity so demands. It is an equitable remedy imposed to compel a person who unfairly holds a property interest to hold property in trust for the person for whom in equity and good conscience it should be held. There must be some or all of the following elements: a promise, either express or implied, a transfer made in reliance of that promise, and unjust enrichment.[9]

In addition, Wyoming courts have required the presence of a confidential relationship between the parties in order to impose a constructive trust.[10] In *Thomasi v. Koch*, the Wyoming Supreme Court addressed the type of relationship required to impose a constructive trust.[11] That court found that neither a fiduciary nor a close family relationship between the transferor and transferee was required

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[7] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

[8] *Amurda Nat'l Distrib. Co. v. Amdura Corp. (In re Amdura Corp.)*, 75 F.3d 1447, 1452 (10th Cir. 1996); *Albuquerque Plaza Partners ex rel. Sholer v. Carmichael (In re PKR, P.C.)*, 220 B.R. 114, 118 (10th Cir. BAP 1998).

[9] *Rossel v. Miller*, 26 P.3d 1025, 1028 (Wyo. 2001) (citing 76 Am. Jur. 2d *Trusts* § 200 (1992)).

[10] *Thomasi v. Koch*, 660 P.2d 806 (Wyo. 1983) (close, warm and friendly relationship); *Rossel*, 26 P.3d at 1026 (siblings); *Kerper v. Kerper*, 819 P.2d 407 (Wyo. 1991) (family trust administered by one of four siblings).

[11] *Thomasi*, 660 P.2d at 809.

to impose a constructive trust on transferred property, and went on to emphasize the element of unjust enrichment in the imposition of a constructive trust.[12] Cobra relies on that statement to conclude that a constructive trust may therefore be applied in the present case. What Cobra neglects to recognize is that the facts in *Thomasi* established that the parties had a "close, warm and friendly relationship," which was repeatedly referred to in the opinion as a "confidential relationship."[13] We find the following language found in *Thomasi* instructive on this point:

> "A constructive trust is imposed even though there is no fiduciary relation such as that between attorney and client, principal and agent, trustee and beneficiary; *it is sufficient that there is a family relationship or other personal relationship of such a character that the transferor is justified in believing that the transferee will act in his interest.*"[14]
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> When other courts have been called to deal with the issue presented by this case they have eschewed any attempts to define and circumscribe the types of confidential relationships which may give rise to the imposition of a constructive trust in any sort of comprehensive or precise rules. Instead it appears that each case is to be considered in the light of *the general requirement that the relationship be of the sort which would justify the transferor in placing confidence in and relying upon his transferee to act in his interests*, and the case then resolved upon the application of that proposition to its particular facts. . . . Where actual confidence and trust is reposed in the transferee to act in the transferor's interests, as is true in this instance, a constructive trust should be and will be imposed if it is necessary to prevent unjust enrichment.[15]

It is clear from *Thomasi* that the nature of the confidential relationship required to create a constructive trust must be addressed by the court on a case-by-case basis.

In *Rossel v. Miller*, the Wyoming Supreme Court enumerated the elements of a constructive trust without mention of the necessity for a confidential

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12 *Id.*

13 *Id.* at 809-11.

14 *Id.* at 810 (quoting 1 Scott on Trusts § 44.2, at 337-39 (3rd ed. 1967)).

15 *Id.* at 810-11 (citations omitted) (emphasis added).

relationship.[16] The facts of *Rossel* show that the parties involved in that case were brother and sister; hence the nature of their close personal relationship was not at issue. We do not read the court's failure to specifically mention the nature of the parties' relationship in that case to indicate that a close personal relationship is no longer required under Wyoming law as a prerequisite to imposing a constructive trust. To the contrary, reading *Thomasi* and *Rossel* together makes it clear that a "personal relationship of such a character that the transferor is justified in believing that the transferee will act in his interest" is a threshold element to finding a constructive trust in Wyoming.[17]

The requirements for a constructive trust must be established by clear and convincing evidence.[18] Moreover, "[t]he party seeking imposition of a constructive trust bears the burden of establishing the trust requirements."[19] Cobra has made no suggestion, either to the bankruptcy court or to this Court, that anything more than an arms-length business relationship existed between Cobra and Debtor.[20] The allegations made by Cobra, if viewed in the light most favorable to Cobra, would establish that Debtor breached the parties' contract when it failed to deliver all of the Equipment per the asset purchase agreement.

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16 *Rossel*, 26 P.3d at 1028.

17 *Thomasi*, 660 P.2d at 810; *see Rossel*, 26 P.3d at 1025.

18 *Thomasi*, 660 P.2d at 811; *Amendola v. Bayer*, 907 F.2d 760, 763 (7th Cir. 1990) (applying Illinois law).

19 *Hill v. Kinzler (In re Foster)*, 275 F.3d 924, 926 (10th Cir. 2001).

20 In its brief to this Court, Cobra suggests that "[in] this case there was a relationship of trust created between Debtor and Cobra as reflected by Debtor's warranties to Cobra in his Bill of Sale . . ." and that Debtor had a duty of good faith to Cobra under Wyo. Stat. Ann. § 34.1-1-203. These statements only serve to support the conclusion that the only relationship between the parties was contractual and that Cobra has state-law remedies available to address any breach of contract that has taken place. Cobra's suggestion that a "constructive bailment" or "involuntary bailment" was created is also without merit, given the myriad state-law remedies for breach of a sales agreement found in Wyoming's Uniform Commercial Code. *See* Wyo. Stat. Ann. § 34.1-2-701 to -725 (1977).

As one court has stated:

> The only wrongful conduct alleged in Count One is the breach of an (unenforceable) agreement by [Defendant]. This conduct is not analogous to the wrongful activity that has been found to warrant the imposition of a constructive trust. Indeed, a breach of contract specifically has been found to *not* warrant the imposition of a constructive trust.[21]

The allegations relied upon by Cobra may serve to create a creditor-debtor relationship between the parties, but that is a far cry from the type of relationship required to impose a constructive trust.[22]

There are two other reasons that we are reluctant to reverse the decision of the bankruptcy court. All of the cases cited by both parties note that the doctrine of constructive trust is an equitable remedy. As a general rule, the imposition of an equitable remedy is a matter left to the discretion of the court.[23] Secondly, our prior decisions have noted the basic inconsistency between the distribution schemes outlined in the United States Bankruptcy Code and the doctrine of constructive trust:

> If the retention of funds or goods by an insolvent debtor were sufficient to support a claim for a constructive trust, the entire bankruptcy system would be unworkable. As one court noted:
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> > [A]ny claim of unjust enrichment must take into account the circumstances in which it is made. . . . Whenever a debtor retains a benefit afforded it by a creditor without paying that creditor in full, the estate is arguably "unjustly enriched." Yet this situation is a result of a congressional policy choice incorporated into the Bankruptcy Code, and born of the reality that an insolvent debtor, by definition, is unable to satisfy in

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[21] *Amendola*, 907 F.2d at 763 (footnote omitted). *See also Oxford Org., Ltd. v. Peterson (In re Stotler & Co.)*, 144 B.R. 385, 390 (N.D. Ill. 1992).

[22] *See Albuquerque Plaza Partners ex rel. Sholer v. Carmichael (In re PKR, P.C.)*, 220 B.R. 114, 118 (10th Cir. BAP 1998) (applying New Mexico law).

[23] *See e.g., Am. Metal Forming Corp. v. Pittman*, 52 F.3d 504, 508 (4th Cir. 1995) ("Because a constructive trust is equitable relief, we review its imposition under an abuse of discretion standard.").

full the debts owed to its creditors.[24]

It is difficult to understand how the bankruptcy court erred in refusing to apply an equitable remedy, choosing instead the distributive policies embodied in the Code.

V. Conclusion

We find no error in the bankruptcy court's finding that the nature of the relationship between Cobra and Debtor was not sufficient to warrant the imposition of a constructive trust on the Funds held by the Trustee. There being no genuine issue of material fact present in this case, the court was also correct to grant summary judgment in favor of the Trustee, finding that the Funds were property of the estate. The decision of the bankruptcy court is affirmed.

[24] *In re PKR, P.C.*, 220 B.R. at 118-19 (quoting *First Sec. Bank v. Gillman*, 158 B.R. 498, 507 (D. Utah 1993)).