

**IN THE SUPREME COURT
IN THE STATE OF NORTH DAKOTA**

Jim Kost

Appellee,

v.

Allen M. Kraft

Appellant.

**Appeal from the District Court
South Central Judicial District
Burleigh County, North Dakota
The Honorable Gail Hagerty**

**SUPREME COURT NO. 20100159
BURLEIGH COUNTY NO. 08-08-C-02172**

BRIEF OF APPELLANT

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2. STATEMENT OF THE ISSUES

- ISSUE I :** Whether the district court erred in granting summary judgment as to Kraft's counterclaims for leased harvesting equipment, when it made findings of fact to conclude that the part performance exception to the statute of frauds did not apply?
- ISSUE II :** Whether the district court erred in granting summary judgment as to Kraft's counterclaims, when it concluded the counterclaims did not appear to be properly disclosed during bankruptcy proceedings?

3. STATEMENT OF THE CASE

Nature of the Case.

4. This is an appeal of the Judgment of March 23, 2010.

Course of Proceedings/Disposition of the Court Below.

5. On August 26, 2008, a Summons and Complaint was filed by Jim Kost (“Kost”) with the district court. (Docket Nos.: 1-2). On September 5, 2008, an Answer, Counterclaim, Demand for Jury Trial was filed by Allen M. Kraft (“Kraft”) with the district court.(Docket No.: 6). On September 5, 2008, Kost filed a Reply to the Counterclaim. (Docket No.: 5).
6. By stipulation of the parties filed on June 1, 2009, (App. pp. 4-5), a Second Amended Complaint was filed by Kost on June 1, 2009. (App. pp. 6-12 (without attachments)). An Amended Answer to the Second Amended Complaint, Amended Counterclaim, and Demand for Jury trial was filed by Kraft on June 9, 2009. (App. pp. 13-18). An Amended Reply to the Amended Counterclaim was filed by Kost on June 1, 2009. (App. pp. 19-21).
7. On November 13, 2009, Kost filed a Motion for Summary Judgment and attachments on all of Kraft’s counterclaims. (Docket No.: 55). On December 15, 2009, Kraft filed his Brief resisting Kost’s Motion for Summary Judgment and attachments. (Docket No.: 62). On December 21, 2009, Kost filed his Reply Brief. (Docket No.: 63). [Note: this case also included other motions not being appealed by Kraft]
8. The Hon. Gail Hagerty issued an Order on January 14, 2010, granting Kost’s Motion for Summary Judgment as to Kraft’s counterclaims. (App. pp. 22-27). A pretrial conference was held on February 5, 2010 discussing the Order. (Tr., Feb. 5, 2010).
9. On February 18, 2010, a jury trial was held on the matter. (Tr. Jury Trial). The jury

returned a special verdict determining the distribution of proceeds to Kost and Kraft as to the sale of a grain cart and found that Kost did not prove his conversion claim against Kraft on a JD 7200 planter. (App. pp. 28-29). Order for Judgment was entered by the Hon. Gail Hagerty on March 23, 2010. (App. pp. 30-31). Judgment was entered on March 23, 2010. (App. pp. 32-33). Notice of Entry of Judgment was entered on April 5, 2010. (App. p. 34).

10. On May 11, 2010, the Hon. Gail Hagerty issued an Order concluding that no attorney fees would be awarded, but that costs would be awarded to Kost. (App. p. 35). Kraft filed his Notice of Appeal on May 28, 2010. (App. p. 38). Notice of Filing of the Notice of Appeal was filed on May 28, 2010. (App. p. 36).

11. STATEMENT OF FACTS

[NOTE: the facts are limited to Kraft's counterclaims.]

Counterclaims for Leased Harvesting Equipment.

12. Kraft sought damages against Kost for damages from several verbal lease contracts wherein he claimed that he had provided equipment to Kost which was used by Kost for the harvest seasons of 2003 and 2004. (Amended Counterclaim (App. pp. 13-18), Motion for Summary Judgment and attachments (Docket No.: 55), and Brief resisting Kost's Motion for Summary Judgment and attachments, (Docket No.: 62)
13. Portions of Kraft's deposition testimony was attached to Kost's motion for summary judgment wherein he testified that he had shared equipment with Kost in 2003 and 2004, that Kost told him that he was going to pay him for the equipment, and that he asked Kost several times to pay him. (Docket No.: 55)(Exhibit A, Tr. Kraft Depo., p. 44, lines 3-25, p. 48, lines 1-25).

14. Moreover, in support of his resistance to summary judgment, Kraft provided further excerpts from his deposition testimony wherein he claimed he had provided equipment to Kost (Docket No.: 63)(Exhibit A, Tr. Kraft Depo., p. 28, line 1 through p. 33, line 25). In addition, Kraft provided the district court with his list of identified damages, including the lease claims. (Docket No.: 63)(Exhibit A).

Counterclaims.

15. Including the damages for leased harvesting equipment, Kraft also sought damages for a planter and custom work he did for Kost. On June 30, 2009, Kost filed companion motions to dismiss and for summary judgment as to Kraft's counterclaims, arguing that they were the property of the Kraft's Bankruptcy Estate, unless abandoned by the estate, and that the Trustee was the only one with the power over these claims. (Docket No.: 28)(Also see Docket No.: 41, Brief Resisting Motion to Dismiss and Motion for Summary Judgment and attachments).
16. Upon receipt of the Kost motions, Kraft's attorney contacted Trustee Wagner to determine the position of the trustee as to such claims and the pending motions. (Docket No.: 41, Brief Resisting Motion to Dismiss and Motion for Summary Judgment and attachments). The Trustee emphasized that his only interest in the matter was the requirement that he needed to maximize the return to the bankruptcy estate to the extent reasonably possible. (Docket No.: 41, Brief Resisting Motion to Dismiss and Motion for Summary Judgment and attachments).
17. To this end Trustee Wagner notified legal counsel for Kost and Kraft that he would convey and assign the Kraft claims to the highest bidder. (Docket No.: 41, Brief Resisting Motion to Dismiss and Motion for Summary Judgment and attachments).

On August 24, 2009, a telephonic bidding process was held involving Kost, Kraft, Wagner, and legal counsel. (Docket No.: 41, Brief Resisting Motion to Dismiss and Motion for Summary Judgment and attachments, Exhibit A-B).

18. At the conclusion of the bidding process Kraft was the successful bidder and on that same date, he later executed a settlement agreement with Trustee Wagner and delivered to Wagner the agreed upon bid price of \$12,000.00. (Docket No.: 41, Brief Resisting Motion to Dismiss and Motion for Summary Judgment and attachments)(Docket No.: 62, Brief Resisting Motion for Summary Judgment, Exhibits B-E). On September 21, 2009, the Bankruptcy Court approved the settlement agreement. (Docket No.: 62, Brief Resisting Motion for Summary Judgment, Exhibits B-E).
19. Kost then again moved for summary judgment on November 13, 2009, arguing that Kraft did not properly disclose his counterclaims during bankruptcy proceedings. (Docket No.: 55). On December 15, 2009, Kraft filed his Brief resisting Kost's Motion for Summary Judgment and attachments. (Docket No.: 62). Kraft again provided documentation of the settlement agreement on Kraft's counterclaims against Kost, a copy of Kraft's payment check of \$12,000.00 to Trustee Wagner, and Order of the Bankruptcy Court approving the settlement agreement. (Docket No.: 62, Brief Resisting Motion for Summary Judgment, Exhibits B-E).
20. The district court concluded that the counterclaims did not appear to be properly disclosed during bankruptcy proceedings and granted summary judgment against Kraft. (App. pp. 22-27).

21. STANDARD OF REVIEW

22. Whether a grant of summary judgment was proper is a question of law reviewed de novo by this Court. *Red River Wings, Inc. v. Hoot, Inc.*, 2008 ND 117, ¶ 16, 751 N.W.2d 206.

23. LAW AND ARGUMENT

ISSUE I : Whether the district court erred in granting summary judgment as to Kraft's counterclaims for leased harvesting equipment, when it made findings of fact to conclude that the part performance exception to the statute of frauds did not apply?

24. "Summary judgment is a procedural device for promptly resolving a controversy on the merits without a trial if there are no genuine issue of material fact or inferences that can reasonably be drawn from undisputed facts, or if the only issue to be resolved are questions of law." *Red River Wings, Inc., supra* at ¶ 16, 751 N.W.2d 206. The Court must view the evidence in the light most favorable to the resisting party. *Hasper v. Ctr. Mut. Ins. Co.*, 2006 ND 220, ¶ 5, 723 N.W.2d 409, 411.
25. "By definition the granting of summary judgment is improper where it is necessary for the court to make a finding of fact." *Hoops v. Selid*, 379 N.W.2d 270, 272 (N.D.1985)(reversing summary judgment). The proceeding on motion for summary judgment is in the nature of an inquiry in advance of the trial for the purpose of determining whether there is a genuine issue of fact and not for the purpose of determining an issue of fact. *Albers v. NoDak Racing Club, Inc.*, 256 N.W.2d 355, 359 (N.D. 1977)(vacating summary judgment).
26. In *Albers*, this Court stated:
- By taking into consideration the pleadings, the depositions, and the answers to the interrogatories, we conclude that there is a genuine issue of material fact remaining, and as such neither party is entitled to a summary judgment as a matter of law. A

genuine issue of fact remains, particularly as to the manner in which the funds were to be distributed, and more specifically whether or not the distribution of the funds constituted a bonus, and, if so, was it done in such a manner so as to constitute a contract by implication, which in itself raises a question of fact, if not also an inference. Under the principles of law it was error for the court to issue the summary judgment. We express no views on the merits of either plaintiff's claim or defendant's position.

Id.

27. In this case, the district court had evidence that Kraft had fully performed his part of several verbal lease contracts in providing equipment to Kost which was used by Kost for the harvest seasons of 2003 and 2004. Kraft's deposition testimony was attached to Kost's motion for summary judgment wherein he testified that he had shared equipment with Kost in 2003 and 2004, that Kost told him that he was going to pay him for the equipment, and that he asked Kost several times to pay him. (Docket No.: 55)(Exhibit A, Tr. Kraft Depo., p. 44, lines 3-25, p. 48, lines 1-25).
28. Moreover, in support of his resistance to summary judgment, Kraft provided further excerpts from his deposition testimony wherein he claimed he had provided equipment to Kost (Docket No.: 63)(Exhibit A, Tr. Kraft Depo., p. 28, line 1 through p. 33, line 25). In addition, Kraft provided the district court with his list of identified damages, including the lease claims. (Docket No.: 63)(Exhibit A).
29. Despite this proof, the district court made findings of fact that payment was not required for the equipment and that instead it appeared that the agreements between Kraft and Kost "consisted mostly of the exchange of work and/or equipment." (Order, App. p. 25). Due to this finding, the district court found that the part performance exception did not apply to validate the oral contracts. *Id.*
30. First of all, it was error to conclude that payment was not required for the equipment.

Viewing the evidence in the light most favorable to Kraft, a genuine issue of fact remains as to whether payment was required for the leasing of his equipment to Kost. The district court accepted Kraft's explanation and erroneously made factual findings on this issue when it should have been left to the jury's determination.

31. Moreover, if this Court concludes the district court erred in making findings of fact, then the part performance exception to the statute of frauds applies. Under the Uniform Commercial Code, the statute of frauds relating to goods is a relaxed statute of frauds and is carefully drafted as such. *Hofmann v. Stoller*, 320 N.W.2d 786, 790 (N.D.1982). Indeed, the Uniform Commercial Code statute of frauds relating to goods permits enforcement of oral contracts when the goods have been "received and accepted." *Hofmann, supra* at 790. As this Court stated in *Hofmann, supra* at 789, "[T]his 'received and accepted' exception to the statute of frauds [is] a delineation of the part performance necessary to make enforceable an oral contract not in compliance with the statute of frauds..."

32. While *Hofmann* dealt with the statute of frauds exception in N.D.C.C. § 41-02-08(3)(c), the same identical exception is also found in N.D.C.C. § 41-02.1-10(1), which provides:

A lease contract that does not satisfy the requirements of subsection 1, but which is valid in other respects, is enforceable

c. With respect to goods that have been received and accepted by the lessee.

Id. Also see Herman Oil, Inc. v. Peterman, 518 N.W.2d 184, 190, n. 5 (N.D.1994).

33. Viewing the evidence in the light most favorable to Kraft, a genuine issue of fact remains as to whether the equipment was "received and accepted" by Kost. Given

this exception, the statute of frauds cannot bar Kraft's counterclaims for leased harvesting equipment. Summary judgment should not have been granted.

ISSUE II : Whether the district court erred in granting summary judgment as to Kraft's counterclaims, when it concluded the counterclaims did not appear to be properly disclosed during bankruptcy proceedings?

34. Although Kost moved for summary judgment, arguing that Kraft did not properly disclose his counterclaims during bankruptcy proceedings, Kraft provided documentation of the settlement agreement on Kraft's counterclaims against Kost, a copy of Kraft's payment check of \$12,000.00 to Trustee Wagner, and Order of the Bankruptcy Court approving the settlement agreement. (Docket No.: 62, Brief Resisting Motion for Summary Judgment, Exhibits B-E). While Kraft argued that the asset was administered by the estate, the district court concluded that the counterclaims did not appear to be properly disclosed during bankruptcy proceedings and granted summary judgment against Kraft. (App. pp. 22-27).
35. The district court however, erroneously relied upon *Littlefield v. Union State Bank, Hazen*, N.D., 500 N.W.2d 881, 883 (N.D.1993) and the cases cited therein for the holding that a debtor is equitably estopped from bringing an action which they have failed to disclose in a bankruptcy proceeding. The underlying premise of these decisions is that when a debtor files for bankruptcy, they are estopped from their rights to existing causes of action as those actions become an asset of the bankruptcy estate. These cases all involve factual settings which differ markedly from this case. Here, there was no doubt as to the existence of the counterclaims, and Kraft did not "deprive the trustee of adequate knowledge of the pending litigation so as to preclude [him] from performing [his] duties. *In re Atkinson*, 62 B.R. 678, 679 (Bkrtcy

D.Nevada 1986).

36. The Bankruptcy Code broadly defines the property of a debtor's estate to include "all legal or equitable interests of the debtor and property as of the commencement of the case." *Miller v. Shallowford Community Hospital*, 767 F.2d 1556, 1559 (11th Cir.1985)(quoting 11 U.S.C. § 541(a)(1); *In re Mahendra*, 131 F.3d 750, 755 (8th Cir.1997). "The legislative history indicates that this definition includes causes of action existing at the time of the commencement of the bankruptcy action." *Miller, supra* at 1559; *In re B.J. McAdams, Inc.*, 66 F.3d 931, 935 (8th Cir.1995); *In re Ozark Restaurant Eqt. Co., Inc.*, 816 F.2d 1222, 1224 (8th Cir.1987). "Any portion of a debtor's property that is unencumbered by mortgage-the equity-is part of the bankrupt's estate." *Mahendra, supra* at 755. It does not matter whether the interest is future, possessory, contingent, speculative or derivative; they all are interest that are swept up by the broad reach of § 541(a). *In re Osterwalder*, 407 B.R. 291, 294 (Bkrtcy N.D.Ohio 2008).
37. It is clear that the trustee in bankruptcy succeeds to all causes of action held by the debtor at the time the bankruptcy petition is filed, and "[I]t is well settled that the right to pursue [prepetition] causes of action formerly belonging to the debtor...vests in the trustee for the benefit of the estate." *Bauer v. Commerce Union Bank, Clarksville, Tennessee*, 859 F.2d 438, 441 (6th Cir.1988). "It is equally clear that the trustee in bankruptcy acts as representative of the estate." *Id.* at 441. "It is the trustee who 'has capacity to sue and be sued.'" *Id.* (quoting 11 U.S.C. § 323 (b). A trustee under Chapter 7 administers the assets of the estate, by collecting them and reducing them to money. *In re Southern Kitchens, Inc.*, 216 B.R. 819, 831, n. 25

(Bkrtcy D.Minn.1998), citing 11 U.S.C. § 704(1).

38. With his appointment, the chapter 7 Trustee became the sole representative of Kraft's estate. *In re Lansberry*, 177 B.R. 49, 55 (Bkrtcy w.D..Penn 1995), *citing Vreugdendhil v. Hoekstra*, 773 F.2d 213, 215 (8th Cir.1985). As Trustee, he became the successor-in-interest to all prepetition causes of action belonging to Kraft. *Lansberry, supra* at 55, *citing Jones v. Harrell*, 858 F.2d 667, 669 (11th Cir.1988). The interest in the counterclaims against Kost passed to the chapter 7 Trustee even though they were not listed on Kraft's bankruptcy schedules. *Lansberry, supra* at 55, *citing Carolock v. Pillsbury Co.*, 719 F.Supp. 791, 856 (D.Minn.1989). Therefore, Kraft's counterclaims vested in the trustee for the benefit of the bankruptcy estate.
39. Further, the equitable estoppel decisions rely primarily upon the well-established requirement that a debtor seeking the benefits of bankruptcy must fulfill the companion duty of fully disclosing and scheduling all property interests and rights so that the bankruptcy court and creditors can make an informed decision about the debtor's proposed reorganization plan. *Littlefield, supra; Matter of Baudoin*, 981 F.2d 736, 740 (5th Cir.1993)(to try and ensure that creditors get their share).
40. The reason that the district court erred in relying upon these equitable estoppel decisions is that they have no application to this case, as those cases involved assets that had not been administered by the bankruptcy estate for the benefit of creditors. "[W]hen a debtor does not disclose potential claims against its creditors in the bankruptcy petition, the interests of both the creditors and the bankruptcy court are impaired." *Stallings v. Hussman Corp.*, 447 F.3d 1041, 1048 (8th Cir.2006).

41. Here however, the counterclaims were an asset which was owned by and administered by the bankruptcy estate for the benefit of the creditors and with approval from the bankruptcy court. Indeed, the creditors gained an additional \$12,000.00 when the Trustee sold the rights to the counterclaims. The key inquiry is whether there is any prejudice to the creditors for any assets omitted from the schedules. *Rosinski v. Boyd (In re Rosinski)*, 759 F.2d 539, 541-42 (6th Cir.1985). Here it cannot be argued that the creditors were impaired when in fact they gained a huge benefit.
42. The trustee in bankruptcy has the power to sell, assign, or transfer the assets that become part of the bankruptcy estate. *John C. Flood of Virginia, inc. v. John C. Flood, Inc.*, 700 F.Supp.2d 90 (D.Columbia 2010); 11 U.S.C. § 363. “The trustee may avoid a transfer of property of the estate ... that occurs after the commencement of the case; and ... that is not authorized ... by the court.” *Mahendra, supra* at 755, citing 11 U.S.C. § 549. Indeed, the trustee may even abandon to the debtor property that is burdensome to the estate or that is of inconsequential value to the estate. *Atkinson, supra*, at 679 (Bkrcty D.Nevada 1986), citing 11 U.S.C. § 554.
43. The trustee abandons property by giving notice of the proposed abandonment, *Atkinson, supra* at 679, quoting 11 U.S.C. § 554(a), Bankr. Rule 6007(a), after court order upon motion by a party in interest, *Atkinson, supra* at 679, quoting 11 U.S.C. § 554(b), Bankr. Rule 6007(b), or simply by leaving an asset unadministered at the close of the case. *Atkinson, supra* at 679, quoting 11 U.S.C. § 554 (c). In fact, the bankruptcy court has the power to reopen a closed case in order to administer a previously unadministered asset, although reopening is discretionary with the court.

Atkinson, supra at 679, citing 11 U.S.C. § 350(b). Here it cannot be argued that the bankruptcy court was impaired when in fact the trustee fully administered the asset, and indeed sold it for a huge profit to the benefit of the creditors.

44. In his motion for summary judgment, Kost emphasized the date of discharge. (Docket No. 55). However, the discharge is merely a clerical step in the bankruptcy process. In actuality, a bankruptcy case is not closed until, “after an estate is fully administered and the court has discharged the trustee.” 11 U.S.C. § 350. It is entirely irrelevant that Kraft was the debtor, as upon the filing of his bankruptcy, he lost any and all rights to his counterclaims, unless the trustee abandoned the asset.
45. What is most significant, however, is that Kraft became the successor in interest to the bankruptcy estate when the estate sold the counterclaims to him. *See SFC Valve Corporation v. Wright Machine Corporation*, 105 B.R. 720 (Bkrcty S.D.Florida 1989)(A debtor’s successor cannot pursue an action not listed without first obtaining an abandonment from the bankruptcy court.) In fact, the bankruptcy court had exclusive jurisdiction to determine whether to approve the sale to Kraft, and this Court should not have jurisdiction to question that sale. *See generally In re Civic Center Realty Co.*, 26 F.2d 825 (D.Mld 1928); *In re Liquidation, Inc.*, – B.R.–, 2010 WL 3087443 (Bkrcty D. Del 2010).
46. By lawfully purchasing the asset as a successor in interest, Kraft became the lawful owner of all rights to the counterclaims. It no longer matters that he was once the debtor. He now holds full and lawful ownership to the counterclaims against Kost, claimed lawfully by the Trustee from him, sold lawfully by the Trustee back to him, and most significantly...with full approval from the bankruptcy court. The cases

regarding equitable estoppel simply have no application to this case. Summary judgment should not have been granted.

47. CONCLUSION AND PRAYER FOR RELIEF

48. WHEREFORE, the Appellant, Allen M. Kraft, by and through his attorney, Chad R. McCabe, respectfully requests that this Court reverse summary judgment and remand for trial on his counterclaims.

49. Dated this 27th day of September, 2010.

/s/ Chad R. McCabe
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50. CERTIFICATE OF SERVICE

A true and correct copy of the foregoing document was sent by electronic transmission on this 27th day of September, 2010, to the following:

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