

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF WISCONSIN

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U.S. BANKRUPTCY COURT

In re: Case Number:  
RHINEHART CONSTRUCTION, INC. WF7-82-01029  
Debtor.

FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND  
ORDER ALLOWING NON-PRIORITY UNSECURED CLAIM

Trustee Lee A. Bernstein having filed an objection to priority claim; and a hearing having been held; and the Trustee appearing on his own behalf; and Claimant James W. Fry appearing on his own behalf; and the matter being submitted on briefs; the Court, being fully advised in the premises, FINDS THAT:

1. In September of 1980, Claimant James W. Fry contracted with Debtor Rhinehart Construction, Inc., for the installation of a "Hot Mix Driveway". The \$2,815 contract price included "Hot Mix" (a coating designed for roads bearing heavy motor vehicles), gravel and grading.

2. The Debtor installed a driveway and Mr. Fry paid the contract price. Shortly thereafter, Mr. Fry experienced problems with the driveway and began discussions with the Debtor regarding repair or replacement of the driveway.

3. The Court will assume, without deciding, that the product the Debtor applied to Mr. Fry's driveway was not "Hot Mix".

4. On June 11, 1982, the Debtor filed for relief under Chapter 7 of the Bankruptcy Code.

5. On August 25, 1982, Mr. Fry filed a \$2,815 priority claim.

6. On November 13, 1984, the Trustee filed an objection to Mr. Fry's claim of priority status.

7. Timeliness. Fed.R.Bankr.P. 3007 establishes procedures for making objections to claims. Rule 3007 sets no time limit because there is no reason to litigate the validity of a claim in a Chapter 7 proceeding unless a dividend is to be paid--a circumstance which may not be determined until the conclusion of the administration of the estate. 3 L. King, Collier on Bankruptcy para. 502.01[3] (15th ed. 1984). See In re Van Holt, 28 B.R. 577, 578, 10 B.C.D. 494, 494 (Bankr.W.D.Mo. 1983) (under former Fed.R.Bankr.P. 306: "[t]he objection has to be made prior to distribution"); but see Advisory Committee Note to Rule 3007 (" . . . a dividend may be paid on a claim which may thereafter be disallowed on objection . . . [and recovered by the trustee]"). Cf. In re Hart Ski Mfg. Co., 18 B.R. 154, 159 (Bankr.D.Minn. 1982) (under former Fed.R. Bank.P. 306: "The filing of a proof of claim under the Bankruptcy Code was purely a ministerial or administrative act. Judicial consideration of the claim occurred only in respect to its allowance, sua sponte, or upon an objection being filed . . ."), amd'd on other grounds, 22 B.R. 762, aff'd, 22 B.R. 763 (D.Minn.), aff'd, 711 F.2d 845 (8th Cir. 1983).

8. Mr. Fry has alleged no grounds for the application of the doctrine of laches.

9. Constructive Trust. Mr. Fry claims a priority status by virtue of a constructive trust arising from the Debtor's failure to deliver "Hot Mix". See 11 U.S.C. sec. 541(d) (property of the estate does not include non-debtor equitable interests).

10.

A constructive trust will be imposed only in limited circumstances. The legal title must be held by someone who in equity and good conscience should not be entitled to beneficial enjoyment. Title must also have been obtained by means of actual or constructive fraud, duress, abuse of a confidential relationship, mistake, commission of a wrong, or by any form of unconscionable conduct. Gorski v. Gorski, 82 Wis.2d 248, 255, 262 N.W.2d 120 (1978); Prince v. Bryant, 87 Wis.2d at 667, 275 N.W.2d at 676.

Wilharms v. Wilharms, 93 Wis.2d 671, 678-679, 287 N.W.2d 779, 783 (Sup. 1980). See 76 Am.Jur.2d Trusts sec. 221 (1975) ("a constructive trust does not arise on every moral wrong").

Cf. Wis. Stats. sec. 779.02(5) (contractor holds monies in statutory trust only to the amount of all claims due and owing for labor and materials used).

11. The facts before the Court do not establish that the Debtor engaged in fraud, intentional wrongdoing or other unconscionable conduct. See 76 Am.Jur.2d Trusts sec. 224 (1975) ("A distinction exists, in respect of the creation of a constructive trust, between the breach of a promise not fraudulently intended and the breach of a promise made with no intention of performing it." (footnote omitted)).

12. Deposit. Under 11 U.S.C. sec. 507(a)(5), certain claims "arising from a deposit . . . of money in connection with the purchase of . . . property, or . . . services . . . that were not

delivered" are given priority over other unsecured claims (emphasis added).

13. Here, there was a payment for property and services which were not as contracted for but which were, nevertheless, delivered.

CONCLUSION OF LAW

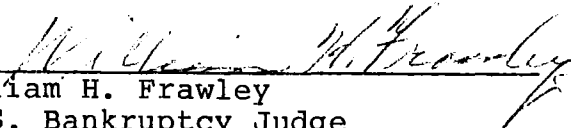
Mr. Fry's claim should be allowed as a non-priority unsecured claim.

ORDER

IT IS ORDERED THAT the \$2,815 claim filed in this matter by James W. Fry be, and the same hereby is, allowed as a non-priority unsecured claim.

Dated: February 6, 1985.

BY THE COURT:

  
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William H. Frawley  
U. S. Bankruptcy Judge

cc: Attorney Lee A. Bernstein  
Attorney James W. Fry