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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re
LEASING SYSTEMS, INC.,
Debtor.

Case No.93-56534-JRG
Chapter 7

ASSOCIATES COMMERCIAL
CORPORATION,
Plaintiff,

Adversary No.96-5693

vs.

**ORDER ON CROSS-MOTIONS FOR
SUMMARY JUDGMENT**

MOHAMED POONJA, Chapter 7
Trustee,
Defendant.

I. INTRODUCTION

The court has before it cross-motions for summary judgment as to all six claims for relief contained in the Second Amended Complaint filed by plaintiff Associates Commercial Corporation. The defendant in the action is Mohamed Poonja, the Chapter 7 trustee.

The crux of the complaint is that unbeknownst to secured

1 creditor Associates, the trustee took possession and control of
2 13 vehicles in which Associates is the lienholder. The trustee
3 then leased the vehicles out for monthly compensation to third
4 parties unknown to Associates without paying Associates the
5 monthly payment due on its loans. While Associates has had full
6 relief from the automatic stay to repossess the vehicles since
7 February 1994, it nevertheless contends that it has been unable
8 to locate or repossess the vehicles. Associates states that it
9 only learned in approximately July 1997 that the vehicles have
10 been in the control of the trustee. Associates contends the
11 amount owed to it is about \$50,000.

12 The six claims for relief pled in the complaint are: (1)
13 for an accounting; (2) for turnover of the truck revenues; (3)
14 for declaratory relief to determine whether the truck revenues
15 are property of the estate; (4) for an administrative claim; (5)
16 for the imposition of a constructive trust due to unjust
17 enrichment; and (6) for truck revenues based on a third party
18 beneficiary contract.

19 **II. FACTS**

20 Debtor Leasing Systems, Inc. was in the business of leasing
21 tractor-trucks and trailers to commercial trucking companies.
22 Debtor financed the purchase of 13 trucks through Associates.
23 Associates took security interests in the 13 trucks and three
24 other trucks that Debtor already owned. Five security
25 agreements entered into from 1988 to 1993, all pre-petition,
26 memorialized the financing transactions.

27 On October 12, 1993, Debtor filed its Chapter 11 petition.
28

1 Shortly thereafter, on January 3 and February 4, 1994,
2 Associates obtained orders granting relief from the automatic
3 stay regarding all 16 trucks. Associates then foreclosed on two
4 of the trucks.¹ On May 15, 1994, the debtor-in-possession
5 entered into a lease with Pacific National Lease ("PNL"),
6 wherein it leased 13 trucks on which Associates had a lien along
7 with 86 other trucks to PNL. The original lease required PNL to
8 make one payment of \$9,461.51 per month to the estate. The
9 lease was then amended which increased the total payments to
10 \$12,735.43. Under this amendment, PNL was to pay \$6,547.84 per
11 month directly to Associates and also was to pay \$6,187.59 per
12 month to the estate (\$9,461.51 per month minus a \$3,273.92
13 reduction).

14 On June 20, 1994, the case was converted to Chapter 7 and
15 Mohamed Poonja was appointed trustee. In May 1995, the trustee
16 assumed the PNL lease. At this time PNL was current with its
17 payments to Associates. On June 20, 1995, all payments to
18 Associates from PNL ceased. Nevertheless, Associates did not
19 foreclose on any of the remaining trucks. Associates states
20 that it attempted to locate the 13 trucks in order to foreclose
21 but it was unsuccessful. At no time did Associates ask the
22 trustee where its collateral may be located despite non-payment
23 on the contract.

24 At the initial hearing on these cross-motions for summary
25 judgment the trustee contended that it did not receive any
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27 ¹ Both parties concede that the one remaining truck of the 16 trucks has
28 not been accounted for and thus will not be addressed here.

1 payments from PNL relating to the trucks on which Associates had
2 a lien. Associates conceded that if the trustee was correct,
3 the first through fifth claims for relief would be moot. The
4 hearing was continued in order for the parties to file
5 additional declarations with respect to receipt or non-receipt
6 of payments. At the subsequent hearing on the motions, the
7 trustee was unable to demonstrate that no portion of the
8 payments received by the trustee from PNL were attributable to
9 the trucks on which Associates had a lien. The court finds
10 that, for purposes of these motions, the trustee may have
11 received payments of an undetermined, however, de minimis amount
12 from PNL relating to Associate trucks. Even though the amount
13 of money the trustee may have received is de minimis, it is
14 sufficient to defeat the trustee's argument of mootness.

15 **III. APPLICABLE LAW**

16 The parties have moved for summary judgment under Federal
17 Rule of Civ. Proc. 56, which is made applicable to this
18 adversary proceeding by Federal Rule of Bankruptcy Procedure
19 7056.

20 Summary judgment is appropriate where no genuine issue of
21 material fact exists and a party is entitled to prevail in the
22 case as a matter of law. Fed.R.Civ.P. 56(c); Bhan v. Nme
23 Hospitals, Inc., 929 F.2d 1404, 1409 (9th Cir. 1991), cert.
24 denied, 502 U.S. 994 (1991), citing, Anderson v. Liberty Lobby,
25 Inc., 477 U.S. 242, 250 (1986).

26 The party requesting summary judgment has the initial
27 burden to show that there are no genuine issues of material
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1 fact. Bhan v. Nme Hospitals, Inc., 929 F.2d at 1409. The
2 nonmovant's version of the facts must be accepted and all
3 inferences from the underlying and undisputed facts are to be
4 drawn in favor of the nonmovant. Bishop v. Wood, 426 U.S. 341,
5 348 (1976); United States v. Diebold, Inc., 369 U.S. 654, 655
6 (1962).

7 "[The] party seeking summary judgment always bears the
8 initial responsibility of informing the district court of the
9 basis for its motion, and identifying those portions of 'the
10 pleadings, depositions, answers to interrogatories, and
11 admissions on file, together with the affidavits, if any,' which
12 it believes demonstrate the absence of a genuine issue of
13 material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323
14 (1986); quoting Fed. R. Civ. P. 56(c). If the moving party
15 satisfies this initial burden, the opposing party must go beyond
16 the pleadings and by affidavit, deposition, answers to
17 interrogatories, and admissions on file, designate specific
18 facts showing that there is a genuine issue for trial. Id. at
19 324.

20 **IV. DISCUSSION**

21 After finding that the trustee may have received de minimis
22 payments for use of the trucks on which Associates had a lien,
23 the court finds that there are no genuine issues of material
24 fact and these motions can be decided as a matter of law.

25 In Associates' Motion for Summary Judgment, Associates sets
26 forth four legal theories on which it claims a right to recover
27 truck revenues paid to the trustee. Associates claims truck
28

1 revenues based on: (1) a security interest in "proceeds"; (2)
2 entitlement to an administrative expense claim; (3) the
3 imposition of a constructive trust due to unjust enrichment; and
4 (4) a third party beneficiary contract. The insufficiency of
5 all four of these legal theories will be addressed below.

6 **A. ASSOCIATES DOES NOT HAVE A SECURITY INTEREST IN, AND**
7 **THUS IS NOT ENTITLED TO, TRUCK REVENUES BECAUSE THEY**
8 **ARE NOT "PROCEEDS" OF ASSOCIATES' COLLATERAL.**

9 Associates contends that it has a security interest in the
10 truck revenues pursuant to its security agreement because the
11 revenues are "proceeds" under the California Commercial Code.
12 However, the truck revenues are not proceeds because they were
13 not received in exchange for the sale or other complete
14 disposition of the trucks on which Associates had a lien.

15 It is not disputed that Associates has a security interest
16 in the proceeds of its collateral. Each of the Leasing Systems-
17 Associates' security agreements at issue provides for a security
18 interest in:

19 ... the following described property, complete with all
20 present and future attachments, accessories,
21 replacement parts, repairs, additions, and all proceeds
22 thereof, all hereinafter referred collectively as
23 'collateral'.

24 It is also well established that a secured creditor's
25 interest in collateral continues in proceeds after disposition
26 of the collateral. John D. Ayer, Secured Transactions in
27 California Commercial Law Practice, § 4.54 (1986). A security
28 interest in proceeds is most useful when the creditor
anticipates that the original collateral will be sold in the
ordinary course of business, as when the security interest

1 covers inventory. In that case, the security interest in the
2 original collateral is ordinarily lost when sold, and the
3 proceeds may be the only collateral that the secured creditor
4 can look to. Proceeds may be available to a creditor if the
5 collateral is equipment that the debtor transfers without the
6 creditor's consent. In that situation, the creditor may retain
7 a security interest in both the transferred collateral and the
8 proceeds. Id.

9 However, the issue is whether the truck revenues are in
10 fact "proceeds." "Proceeds" is defined by California Commercial
11 Code § 9306 as:

12 (1) ... whatever is received upon the sale, exchange,
13 collection or other disposition of collateral or
14 proceeds. Insurance payable by reason of loss or
15 damage to the collateral is proceeds... Money, checks,
16 deposits, accounts, and the like are "cash proceeds."
17 All other proceeds are "non cash proceeds."

18 (2) Except where this division...otherwise provides, a
19 security interest continues...in any identifiable
20 proceeds including collections received by the debtor.

21 Associates contends that the revenues received from leasing
22 the trucks on which Associates had a lien are "proceeds" because
23 the leasing of the trucks was a "disposition of collateral."
24 Associates relies on Western Decor & Furnishing v. Bank of
25 America, 91 C.A.3d 293, 301 (Cal.App. 1 Dist. 1979) to support
26 its contention that because a security interest in "proceeds"
27 can result in a security interest in accounts receivables, a
28 security interest was created in the truck revenues. However,
Western Decor does not support Associates' interpretation of the
statute. In Western Decor the debtor argued that the phrase
"proceeds thereof" was never intended to cover accounts

1 receivables but instead, referred to insurance proceeds. The
2 Court held that accounts receivables can be part of the
3 definition of proceeds under the appropriate facts. In its
4 analysis of the plain language of the California statute, the
5 Court stated:

6 '[p]roceeds' ...is whatever is received when the
7 collateral...is sold. Accordingly, when respondent
8 sold any of the collateral, it received cash or a right
9 to payment at a future date--an account. Thus it is
10 clear that accounts resulting from any sale of
11 respondent's inventory are indeed proceeds....'"
12 Western Decor at p. 302 citing Matthews v. Arctic Tire,
13 Inc., 106 R.I. 691 (1970).

14 In this case, the collateral was not sold and did not
15 produce account receivables. Associates would like to extend
16 the decision in Western Decor to revenues because both account
17 receivables and revenues are "an identifiable fund of money"
18 (Associates' Motion for Summary Judgment, p. 13). The court is
19 not persuaded that Western Decor supports Associates' contention
20 that revenues from a lease are tantamount to an account
21 receivable generated by the sale of collateral.

22 Moreover, under Cal. Comm. Code § 9306(1) and other state
23 commercial codes with the same or similar statutory language,
24 revenues earned through the use of collateral are not proceeds.
25 In re S & J Holding Corp., 42 B.R. 249, 250 (Bankr.S.D.Fla.
26 1984) (income generated from use of video machines is not
27 proceeds under U.C.C. § 9306(1). "Proceeds" are generated by
28 the "sale, exchange, collection, or other disposition" of the
pre-petition collateral. Hence, a replacement asset will
qualify as "proceeds" only if the original collateral has been

1 substituted and the new asset is what the debtor received in
2 exchange. See In re Minza, 192 B.R. 313, 319 (Bankr.D.Mass.
3 1996) (income distributions are not proceeds of lender's lien on
4 partnership interest.); In re Rumker, 184 B.R. 621, 626
5 (Bankr.S.D.Ga. 1995) (proceeds are generated when collateral is
6 transformed by sale/exchange under U.C.C. § 9306(1).); In re
7 Vermont Knitting Co., Inc., 111 B.R. 464 (Bankr. D.Vt. 1990)
8 ("proceeds" did not exist because debtor retained title to the
9 collateral.)

10 Thus, while Associates has a security interest in
11 "proceeds," the truck revenues are not "proceeds" because they
12 were not received in exchange for the sale or other complete
13 disposition of the trucks. Hence, Associates has no security
14 interest in the truck revenues. Associates continues to have a
15 security interest in the trucks themselves which have been
16 available to Associates for foreclosure since February 1994.

17 **B. ASSOCIATES IS NOT ENTITLED TO AN ADMINISTRATIVE EXPENSE**
18 **CLAIM.**

19 Associates contends that it is entitled to an
20 administrative expense claim under 11 U.S.C. § 503.
21 Essentially, Associates claims that because its collateral was
22 used by the trustee and Associates was not paid by PNL,
23 Associates is now entitled to an administrative expense claim
24 against the estate.

25 The burden of proving an administrative expense claim is on
26 the claimant. In re DAK Industries, Inc., (In re DAK) 66 F.3d
27 1091, 1094 (9th Cir. 1995) citing In re Sinclair, 92 B.R. 787,
28

1 788 (Bankr.S.D.Ill. 1988). To meet its burden, Associates
2 merely cites two non-controlling bankruptcy cases, In re
3 Nordyke, 43 B.R. 856 (Bankr.D.Or. 1984)² and In re Prime, Inc.,
4 37 B.R. 897 (Bankr.W.D.
5 Mo. 1984)³, without otherwise espousing a theory for relief. As
6 the cases are not controlling, the court will address
7 Associates' legal authority.

8 The Nordyke creditors were secured by farm equipment and
9 were entitled to an administrative expense claim under § 503
10 resulting from the withholding of its collateral by the debtor.
11 The Court granted claims to the secured creditors based on
12 previously existing adequate protection orders. An
13 administrative expense claim under § 503 is one of the many
14 possible methods of providing adequate protection under § 361.
15 Adequate protection is a device intended to provide additional
16 protection against loss to a secured creditor arising from
17 continuation of the automatic stay of § 362. In re Nordyke, 43
18 B.R. at 860.

19 In this case, Associates requested and was granted full
20 relief from the automatic stay in February 1994. Associates did
21 not require the additional protection of an administrative
22 expense claim because it could foreclose on its collateral at
23

24 ² In re Nordyke has been disagreed with by In re Carmichael, 109 B.R. 849
25 (Bankr.N.D.Ill. 1990).

26 ³ The court notes that besides being non-controlling case law in the 9th
27 Circuit, In re Prime, Inc. has been widely criticized in other circuits. See
28 Matter of Provincetown-Boston Airline, Inc., 66 B.R. 632 (Bankr.M.D.Fla.
1986); In re Advisory Information and Management Systems, Inc., 50 B.R. 627
(Bankr.M.D.Tenn. 1985); In re Rife, 71 B.R. 129 (Bankr.W.D.Va. 1987).

1 any time. When to foreclose was solely within Associates'
2 discretion. A secured creditor is entitled to its collateral or
3 to adequate protection. 11 U.S.C. § 362(e). In re Prime, 37 B.R.
4 at 899. It would be absurd to allow a secured creditor to have
5 both full relief from the stay and adequate protection.

6 Acquiescing in relief from stay is tantamount to the trustee
7 saying he or she does not want to be further burdened with the
8 subject property. It chose its relief by obtaining relief from
9 the stay. Associates cannot now ask for retroactive adequate
10 protection because it unilaterally chose not pursue the relief
11 it obtained.

12 Associates also cites In re Prime in which an
13 administrative expense claim was granted to a secured creditor
14 whose collateral was leased to the debtor and used without any
15 payments being made to it. Again, the Prime case revolves
16 around the concept of adequate protection. The Prime Court
17 holds that when there is no demand for adequate protection, an
18 allowance of an administrative claim in the amount of the debt
19 is inappropriate. Id. at 37 899. Further, in the absence of a
20 demand by the creditor or voluntary payment by the debtor, the
21 court may not fashion adequate protection arrangements. In re
22 Prime, 37 B.R. 899, citing In re San Clemente Estates, 5 B.R.
23 605 (Bankr.S.D.Cal. 1980).⁴

24 In this case, there was no adequate protection order and
25 Associates did not make a demand for such an order. Associates

26 _____
27 ⁴ The court notes that In re Prime may be internally inconsistent because
28 the Prime Court then proceeds to fashion adequate protection arrangements
despite the lack of a demand.

1 instead obtained relief from stay and then delayed in recovering
2 its collateral. There is no evidence that the trustee withheld
3 or concealed the trucks. Thus, Associates has failed to show
4 that it is entitled to an administrative expense claim.

5
6 **C. ASSOCIATES IS NOT ENTITLED TO TRUCK REVENUES UNDER A
7 THEORY OF CONSTRUCTIVE TRUST.**

8 Associates contends that it entitled to the truck revenues
9 under a theory of constructive trust. It argues there has been
10 unjust enrichment because the trustee has wrongfully obtained
11 some truck revenues which might belong to Associates.

12 Constructive trust is a remedy used by a court of equity to
13 compel a person who has property to which he is not justly
14 entitled to transfer it to the person entitled thereto. The
15 trust is passive, the only duty being to convey the property. 11
16 Witkin, Summary of California Law, Trusts § 305 (9th ed. 1997).

17 In addition, Witkin states that the wrongful act giving
18 rise to a constructive trust need not amount to fraud or
19 intentional misrepresentation. Id. All that must be shown is
20 that the acquisition of the property was wrongful and that the
21 keeping of the property by the defendant would constitute unjust
22 enrichment. See Calistoga Civic Club v. Calistoga (1983) 143
23 C.A.3d 111 (Cal.App. 1 Dist. 1983).

24 The principal constructive trust situations in California
25 are covered by two general code sections, Calif. Comm. Code §§
26 2223 and 2224, which provide that:

27 One who wrongfully detains a thing is an involuntary
28 trustee thereof, for the benefit of the owner,

1 and

2 One who gains a thing by fraud, accident, mistake,
3 undue influence, the violation of a trust, or other
4 wrongful act is, unless he or she has some other and
5 better right thereto, an involuntary trustee of the
6 thing gained, for the benefit of the person who would
7 otherwise have had it.

8 Under a theory of constructive trust, Associates must show
9 that (1) Associates is somehow legally entitled to the truck
10 revenues, (2) the acquisition of the truck revenues by the
11 trustee was somehow wrongful, and (3) the keeping of the
12 property by the trustee would constitute unjust enrichment.

13 First, Associates is not legally entitled to the truck
14 revenues. As discussed above, Associates has no security
15 interest in the truck revenues.

16 Second, the acquisition of the truck revenues by the
17 trustee was not wrongful. Associates contends that The trustee
18 committed a wrongful act, that is, the trustee collected
19 revenues produced by trucks on which Associates had a lien
20 without paying Associates its monthly payment for financing the
21 purchase. Associates received payments from PNL for financing
22 the purchase for over one year after the debtor entered into the
23 lease. The trustee, at best, collected a di minimus amount of
24 revenue from the trucks on which Associates had a lien. There
25 is no wrongful act.

26 In contrast, the inaction of Associates to protect its
27 secured interest should be noted. Associates requested and
28 obtained relief from stay to foreclose on its collateral in
February 1994 but failed to foreclose for over three years after

1 receiving relief and two years after payments from PNL ceased.
2 Associates claims that it in good faith searched for the trucks
3 but never found them. However, Associates never contacted the
4 trustee to inquire about the location of the trucks or non-
5 payment from PNL. Associates has had the legal ability to
6 foreclose on its collateral for three years, however it has
7 failed to take any action. Instead, Associates has chosen to
8 seek compensation from the estate.

9 Third, the keeping of the property by the trustee does not
10 constitute unjust enrichment. Associates must have some right
11 to the truck revenues before it can claim the trustee or estate
12 was unjustly enriched by detaining the revenues. Because
13 Associates has not shown any legal entitlement to the revenues,
14 there can be no unjust enrichment. Thus, Associates has not
15 made the requisite showing to prove a claim under unjust
16 enrichment.

17 **D. ASSOCIATES IS NOT ENTITLED TO TRUCK REVENUES AS A THIRD**
18 **PARTY BENEFICIARY.**

19 Associates contends that although it was not a party to the
20 amended lease between the debtor and PNL, Associates can sue the
21 trustee on the amended lease as a third party beneficiary. The
22 prevailing American rule, laid down in Lawrence v. Fox, 20 N.Y.
23 268 (1859), permits a third party beneficiary under a contract
24 to enforce it by suit in his own name. 1 Witkin, Summary of
25 California Law, Contracts § 653 (9th ed. 1997). Associates
26 takes the position that pursuant to the amended lease agreement
27 between the debtor and PNL, Associates was effectively a third
28

1 party beneficiary.

2 A third party is a creditor beneficiary and can enforce the
3 contract, if the promisee's primary intent was to discharge a
4 duty owed to the third party. In this case, the third party
5 beneficiary contract is the "Amendment to Lease Agreement"
6 entered into by the debtor and PNL on May 15, 1994. The amended
7 lease provides that the debtor would lease a group of 99 trucks,
8 including the 13 trucks on which Associates had a lien, to PNL.
9 It also provided that:

10 Pacific National Lease, Inc. will assume responsibility
11 for and pay Associates Commercial Corporation for
12 payments due for Equipment financed by Associates
13 Commercial Corporation and owed by Leasing Systems,
14 Inc. Pacific National Lease, Inc. will make the
15 payment (\$6,547.84) [to Associates] and then deduct ½
16 (one half) from the amounts due Leasing Systems, Inc.
17 (\$3,273.92).

18 Thus the lease provided that PNL (the promisor) was to pay
19 \$6,187.59 per month to the debtor/trustee (the promisee) and PNL
20 was also to pay \$6,547.84 per month to Associates (the third
21 party beneficiary). By requiring PNL to pay Associates
22 directly, the debtor's primary intent was to discharge a pre-
23 existing duty owed to Associates, that is, the duty to pay money
24 to Associates for financing the trucks. Hence, Associates is a
25 creditor beneficiary and may be able to enforce the contract as
26 a creditor beneficiary.

27 Under a third party beneficiary contract, if the promisor
28 fails to pay the beneficiary, the beneficiary can sue the
promisor for a failure to perform. The beneficiary can also sue
the promisee on the pre-existing obligation. Thus, the
beneficiary "can sue either the promisor or the promisee, or may

1 join them and obtain judgment against both, for the promisee is
2 indebted to him on the old obligation and the promisor on the
3 new promise." 1 Witkin, Summary of California Law, Contracts §
4 661 (9th ed. 1997). See also Kraus v. Willow Park Glen Public
5 Golf Course, 73 Cal.App.3d 354, 371 (Cal.App. 1 Dist. 1977).

6 In this case, Associates contends that the trustee is the
7 promisor under the amended lease and thus it may sue the trustee
8 on the amended lease. Associates misunderstands the third party
9 beneficiary theory. In fact, the trustee is the promisee, not
10 the promisor, under the amended lease because PNL (the promisor)
11 promised the debtor (the promisee) to pay Associates directly.
12 Therefore, Associates may not seek recovery from the trustee on
13 the amended lease.

14 **V. CONCLUSION**

15 Associates' four legal theories upon which it claims a
16 right to recover truck revenues fail. Accordingly, since the
17 court finds that Associates is not entitled to the truck
18 revenues, Associates' claims for relief for an accounting and
19 turnover are moot. In addition, Associates has requested
20 declaratory relief to determine whether the truck revenues are
21 property of the estate. Because Associates is not entitled to
22 the truck revenues, whether the revenues are property of the
23 estate is not relevant here.

24 For the foregoing reasons, Associates is not entitled to
25 judgment as a matter of law as to all six claims for relief in
26 its Second Amended Complaint. Its motion for summary judgment
27 is denied. The trustee is entitled to judgment as a matter of
28

1 law as to all six claims for relief in Associates' Second
2 Amended Complaint. The trustee's motion for summary judgment is
3 granted.

4 The foregoing shall constitute the court's findings of fact
5 and conclusions of law pursuant to Bankruptcy Rule 7052 and
6 Federal Rule 52. Counsel for the defendant shall lodge a
7 proposed form of judgment with the court within 15 days. It
8 need not contain the findings of fact and conclusions of law
9 which the court has made herein.

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