

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW HAMPSHIRE**

In re:

Bk. No. 04-11408-JMD  
Chapter 11

Wrenn Associates, Inc.,  
Debtor

Wrenn Associates, Inc. and  
The Official Committee of  
Unsecured Creditors,  
Plaintiffs

v.

Adv. No. 04-01231-JMD

John J. Paonessa Company, Inc.,  
Defendant

*William S. Gannon  
William S. Gannon, PLLC  
Attorney for Debtor*

*Paul M. DeCarolus  
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Unsecured Creditors*

**MEMORANDUM OPINION**

**I. INTRODUCTION**

In response to the complaint filed by Wrenn Associates, Inc. (the “Debtor”) seeking to avoid a prepetition attachment by John J. Paonessa Company, Inc. (the “Defendant”), the Defendant filed a counterclaim (the “Counterclaim”). This matter came before the Court on

Plaintiff's Motion to Dismiss Defendant's Counterclaim (the "Motion to Dismiss") for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6) made applicable to adversary proceedings by Bankr. R. 7012(b). The Counterclaim asserts the Debtor held funds in constructive or resulting trust for the benefit of the Defendant. Debtor seeks dismissal of the Counterclaim because the Defendant did not allege facts to support a claim upon which relief can be granted. The Debtor specifically argues the Defendant has failed to allege the elements to support a constructive trust theory. The Court heard arguments on the Motion to Dismiss and Objection thereto and took the matter under advisement.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

## **II. FACTS**

The Debtor is a general contractor who hired the Defendant as a sub-contractor to work on a site owned by 300 Main Street Realty, LLC ("the Owner"). There was a dispute over the Defendant's work and the Debtor's failure to pay the Defendant, which led to the Defendant serving a state court Writ of Summons upon the Debtor in early 2004 seeking \$247,418.00 in damages. The parties negotiated a settlement reducing the balance due to \$230,644.00. Terms of the settlement, agreed to by the Owner, the Debtor, and the Defendant, were outlined in a letter from Debtor's counsel dated February 23, 2004, and the final change order.

Pursuant to the settlement, the Defendant signed and delivered to Debtor's counsel mechanic's lien waivers and a final change order reflecting a credit on the account and a reduction in the final balance. Under the terms of the settlement, Debtor's counsel was to disburse the agreed upon balance to the Defendant from his client trust account. The Owner disbursed funds to the Debtor. However the Debtor did not pay the Defendant. The Defendant returned to Court and, on March 30, 2004, the Hillsborough County Superior Court granted an ex-parte petition to attach monies held in the Debtor's account at Sovereign Bank in the amount of \$201,175.13. On April 16, 2004, the date of the filing of the bankruptcy petition, the Defendant had a valid legal attachment on monies held in the Debtor's bank account.

The Debtor and the Official Committee of Unsecured Creditors filed a Complaint to Set Aside the Attachment as a Preferential Transfer. The Defendant filed a counterclaim asserting, among other things, that the Debtor held the monies in constructive trust or resulting trust for the benefit of the Defendant. The Debtor filed a Motion to Dismiss the Defendant's constructive trust counterclaim.

### **III. DISCUSSION**

In order to grant a motion under Federal Rule of Civil Procedure 12(b)(6), the Court "must accept the allegations of the [Counterclaim] as true, and if, under any theory, the allegations are sufficient to state a cause of action in accordance with the law, [it] must deny the motion to dismiss." Vartanian v. Monsanto Co., 14 F.3d 697, 700 (1st Cir. 1994). The Plaintiff contends the Defendant has not alleged the necessary elements supporting a constructive trust claim.

Although federal bankruptcy law defines property of the estate, state law defines property rights. Butner v. United States, 440 U.S. 48, 54 (1979); Morton v. National Bank (In re Morton), 866 F.2d 561 (2nd Cir. 1989). The Court looks to state law to define the dimensions of the Debtor's interest in property on the petition date. In re Bank of New England Corp., 165 B.R. 972, 977 (Bankr. D. Mass. 1994). "When a debtor is in possession of property impressed by a trust – express or constructive– the bankrupt estate hold the property subject to the outstanding interest of the beneficiaries" Conn. Gen. Life Ins. Co. v. Universal Ins. Co., 838 F.2d 612, 618 (1st Cir. 1988).

Generally, under New Hampshire law, the Court may impose a constructive trust if it finds a confidential or fiduciary relationship existed between the parties and the potential that the person holding the property would be unjustly enriched if equitable relief is not granted. Carroll v. Daigle, 123 N. H. 495 (1983). A confidential relationship exists if there is a personal relationship of such character that the transferor is justified in believing that the transferee will act in his interest. Cornwell v. Cornwell, 116 N.H. 205, 209 (1976) (citing Kachanian v. Kachanian, 100 N.H. 135, 137). It is not necessary to allege and prove a fiduciary relationship, fraud or undue influence to establish a constructive trust. Kachanian, 100 N.H. at 137. Rather it is sufficient to establish the character of a personal relationship is such that the party seeking to establish the trust was justified in believing that a transferee would act in his interest and that the transferee failed to perform that promise. Id.

The Debtor asserts a contractor/subcontractor relationship is a business relationship and cannot be a confidential relationship thus the Defendant did not and cannot plead facts to support the finding of a confidential relationship. However, the nature of a personal relationship is a

question of fact. Manchester Bank v. Conn. Bank and Trust Co., 497 F.Supp. 1304, 1316 (D.N.H. 1980). The nature of the relationship, as opposed to the definition of the relationship, will control the outcome. See Higgins v. Higgins, 125 N.H. 806 (1984) (father/son business relationship not a confidential relationship); Carroll v. Daigle, 123 N.H. at 501 (friendship between landlord/tenant not a confidential relationship). Just as the Court will not necessarily find a confidential relationship if there is a family relationship, nor will it preclude a finding of a confidential relationship just because there is a business relationship. See Manchester Bank v. Conn. Bank and Trust, Co., 497 F.Supp. at 1316 (relationship between two banks a question of fact for trial); Wheelan v. Robinson 117 N.H. 1032, 1034-35 (1977) (transfer based in part upon friendship and in part upon desire to preserve a business relationship did not rise to level of confidential relationship).

The Counterclaim does not contain detailed factual allegations defining the personal relationship. Nonetheless, it does sufficiently allege facts surrounding the settlement of a disputed claim involving the execution and delivery, to the Debtor or its counsel, of a mechanic's lien waiver and final change order, in return for a promise of payment from funds to be received from the Owner. These allegations, coupled with the allegation of a constructive trust are sufficient to constitute a claim to a personal relationship under the standard for a motion to dismiss.<sup>1</sup>

The Court notes that, even if the Defendant can prove the elements of a constructive trust by clear and convincing evidence at trial, it must then identify the trust fund or property and, if

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<sup>1</sup> At trial, the party seeking to establish a constructive trust must do so by clear and convincing evidence. Hopwood v. Pickett, 145 N.H. 207, 208 (2000); Manchester Bank v. Conn. Bank and Trust, Co., 497 F.Supp. at 1316.

the trust funds have been commingled with general property of the Debtor, it must also sufficiently trace the funds of the trust. Conn. Gen. Life Ins. Co. v. Universal Ins. Co., 838 F.2d 612, 618 (1st Cir. 1988). While the establishment of a constructive trust is generally a question of state law, the identification and tracing of the funds of the trust is exclusively a question of federal law because it pertains to distribution of assets from an entity in a federal bankruptcy proceeding. Id.

Whether a relationship rises to the level of a confidential relationship is a question of fact. At this juncture of the case, the Counterclaim does sufficiently allege a claim on which relief may be granted. Accordingly, the Court is satisfied that the Counterclaim meets the minimal standard necessary to survive the Debtor's Motion to Dismiss.

#### **IV. CONCLUSION**

For the reasons set forth in this opinion, the Motion to Dismiss shall be denied. This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate order consistent with this opinion.

ENTERED at Manchester, New Hampshire.

Date: July 7, 2005

/s/ J. Michael Deasy  
J. Michael Deasy  
Bankruptcy Judge