

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

IN RE: CASE NO. 06-11033)	
)	
INDUSTRIAL FINISHING SERVICE, INC.)	
)	
Debtor)	
)	
MARK A. WARSCO, TRUSTEE)	
)	
Plaintiff)	
)	
vs.)	PROC. NO. 08-1113
)	
IFS, INC.)	
LYLE NEELEY)	
)	
Defendants)	

DECISION

At Fort Wayne, Indiana, on February 17, 2010.

By this adversary proceeding, the trustee seeks to recover \$160,091 from the defendant, IFS, Inc., either a debt due or as the result of fraudulent transfers.¹ The matter is before the court following trial and the submission of post-trial briefs. The only dispute is whether the trustee is entitled to the entire amount sought or whether that amount should be reduced by various offsets and credits the defendant argues it should receive.

The debtor and IFS, Inc. were related companies owned and operated by Lyle Neeley's father, Larry Neeley, who paid little or no heed to corporate formalities or the separate existence of the two corporations. Neither company maintained much in the way of books and records, much less separate ones. Funds were often taken from one to pay the liabilities of the other; their affairs and

¹The claims against the individual defendant, Lyle Neeley, were dismissed at the conclusion of trial.

operations were co-mingled so that it was difficult to determine what assets and liabilities belonged to each. Not until after the bankruptcy was filed² was any attempt made to sort out the situation. An accountant was hired to review the available records and bank statements, and, based upon that information as well as discussions with both Neeleys, determined that the defendant was the net beneficiary of the transactions involving the two corporations, having received \$160,091 more than it gave. The trustee seeks to recover that amount, under some sort of account or quantum meruit theory or as fraudulent transfers.

Indiana courts use the terms quantum meruit, quasi-contract, implied contract, constructive contract and contract implied in law synonymously. Biggerstaff v. Vanderburgh Humane Society, 453 N.E.2d 363, 364 n.1 (Ind. Ct. App. 1983). The concepts “provid[e] a remedy to prevent unjust enrichment, thereby promoting justice and equity.” Id. at 364.

Any benefits, commonly the subject of pecuniary compensation, which one, not intending it as a gift, confers upon another, who accepts it, is an adequate foundation for a legally implied or created promise to render back its value. . . . Where there is no express contract, the right to recover may rest upon an implied contract or an implied promise to pay. Such a contract may be inferred from the conduct, situation, or material relations of the parties and enforced by law. The intention to pay and the expectation of compensation may be inferred from the conduct of the parties and where equity, justice, and fair dealing require compensation. Grose v. Bow Lanes, Inc., 661 N.E. 2d 1220, 1225 (Ind. Ct. App. 1996) (citations omitted). See also, Biggerstaff, 453 N.E. 2d at 364 (plaintiff may recover for benefits provided at defendant’s express or implied request, unless plaintiff acted gratuitously or officiously).

Because the court concludes that the trustee is entitled to recover on this basis, it does not need to address the fraudulent transfer arguments.

There is no dispute that, as of the end of December 2005, IFS Inc. had received \$160,091

²The case was originally filed under chapter 11. It was converted to chapter 7 after Larry Neeley’s death.

more in benefits from the debtor than it had given in return. All of those benefits represented something it would have had to provide or pay for itself, had not the debtor provided them. Furthermore, the court is satisfied that the debtor did not act officiously³ or gratuitously in doing so. Rather than intending to make a gift to the defendant, the situation was the result of incredibly sloppy bookkeeping and the elder Mr. Neeley's complete failure to make a meaningful distinction between the two corporations, undoubtedly based upon the assumption that they were both his and everything would probably even out in the end. It did not and the time has now come to settle accounts.

Defendant argues that the amount sought by the trustee should be reduced or offset by various credits it claims it should receive. The first of these is due to the fact that the accountant's report ended with the 2005 calendar year, but the debtor did not file bankruptcy until July 7, 2006. During the months leading up to the petition the elder Mr. Neeley's business habits remained unchanged and his disregard of the distinctions between his two corporations continued; yet the value of the payments, services, and exchanges during those months is not reflected in the accountant's report. IFS contends it should receive credit for various expenditures it made on the debtor's behalf during those months, including labor costs for services the defendant provided, payroll taxes, and deductions for health insurance premiums it paid. These credits, according to the defendant, total \$73,510.84.

Despite the precision which seems to come from calculating the claimed credit down to the penny, defendant's seventy three thousand dollar credit is little more than a guesstimate, based upon assumptions, estimates and even some speculation about the transactions between the two

³“‘Officiousness’ is a term traditionally used to describe interference in the affairs of others that is not justified under the circumstances.” Biggerstaff, 453 N.E.2d at 364. As the head of both corporations, acting on their behalf Larry Neeley could not unjustifiably interfere in their affairs.

corporations and what some taxing authorities might do as a result. That is not enough to justify or to prove the reduction sought. At its best, the argument considers only what the defendant might have provided to the debtor and fails to consider anything it might have received, giving only half the equation. The defendant had access to the same records and information the accountant used to determine the state of affairs as of the end of 2005 and it could have used those records to make a similar determination for the first half of 2006. It did not. It did not even try. While the court recognizes that the record keeping situation involving the two corporations was not ideal, not to take advantage of what was reasonably available in the quest for accuracy was not appropriate.

The second credit defendant seeks is based upon the argument that the trustee sold equipment and scrap metal which belonged to IFS, not the debtor – often for a much lower price than the defendant says it could have obtained – and that the value of this property should be credited against what is owed. The success of the argument depends upon credibility determinations the court is not willing to make. Regardless of the ownership question, if property, such as the scrap located at debtor's Lisbon Road facility, had the substantial value the defendant contends, the elder Mr. Neeley undoubtedly would have sold it long before bankruptcy in an effort to ease the debtor's financial woes. As for the ownership issue, prior to the sale Lyle Neeley had ample access to the debtor's facilities and the defendant had ample opportunity to identify and remove property which belonged to it. Yet, during all this time, no claim was ever made to the property in question. Defendant was also given notice of the proposed sale, but offered no objection to it. It was not until after the sale and after this suit was filed that the issue was raised for the first time. By then, it was too late to have sufficient credibility to be accepted.

Defendant's arguments for various credits or setoffs against the amounts sought by the trustee

are all in the nature of affirmative defenses, which it has the burden of proving. In re Gregg, 371 B.R. 817, 819 (Bankr. E.D. Tenn. 2007); In re Garden Ridge Corp., 338 B.R. 627, 631-32 (Bankr. D. Del. 2006). Since it has failed to do so, no reduction will be made. The trustee is entitled to recover the sum of \$160,091 from the defendant, IFS, Inc. Judgment will be entered accordingly.

/s/ Robert E. Grant
Chief Judge, United States Bankruptcy Court