UNITED STATES BANKRUPTCY APPELLATE PANEL
FOR THE FIRST CIRCUIT

BAP No. 01-063
BAP No. 01-064

Bankruptcy Case No. 99-47760-JBR

IN RE: BANKVEST CAPITAL CORP.,
Debtor.

OLIVES D.C., LLC, and THE OLIVE GROUP,
Appellants, Cross-Appellees,

v.

JRS ASSOCIATES, INC.,
Appellee, Cross-Appellant.

BAP No. 01-072

Bankruptcy Case No. 99-47760-JBR

BANKVEST CAPITAL CORP.,
Appellant,

v.

JRS ASSOCIATES, INC.,
Appellee

Appeal from the United States Bankruptcy Court
for the District of Massachusetts
(Hon. Joel B. Rosenthal)

LAMOUTTE, VAUGHN, and CARLO, U.S. Bankruptcy Appellate Panel Judges.

Melvin S. Hoffman and Pamela A. Harbeson of Looney & Grossman, LLP on brief for Olives D.C., LLC and The Olive Group.

Gregory A. Cross and Heather Deans Foley of Venable, Baetjer and Howard, LLP on brief for JRS Associates, Inc.

John J. Monaghan, Lynne B. Nowak, and David G. Sobol of Holland & Knight, LLP on brief for BankVest Capital Corp.

May 31, 2002

Per Curiam.

INTRODUCTION

Olives D.C., LLC ("Olives Restaurant"), The Olive Group ("Olive Group")(collectively "Olives"), BankVest Capital Corp. ("BankVest") and JRS Associates, Inc. ("JRS") all appeal a summary judgment order of the bankruptcy court: awarding JRS damages for breach of contract against Olive Group; determining that JRS has a first priority security interest in certain restaurant equipment sold to Olive Group; denying the claims of JRS for quantum meruit and unjust enrichment; and determining that BankVest does not have title to the restaurant equipment, which JRS sold to Olive Group. For the reasons set forth below, we affirm the judgment, except as to the claims by JRS, for quantum meruit and unjust enrichment.

PROCEDURAL BACKGROUND

This bankruptcy case was commenced as an involuntary proceeding against BankVest on December 17, 1999. Olives Restaurant filed this adversary proceeding as an interpleader against, among others, BankVest and JRS on October 10, 2000. The primary relief sought was a determination of the rights of the defendants in certain restaurant equipment and a ruling as to which of the defendants is entitled to receive payment for the equipment. Olives seeks to avoid being held liable to more than one party for the equipment.

JRS filed a counter-claim against Olives Restaurant, including claims for quantum meruit and unjust enrichment. JRS also filed a third-party complaint against Olive Group for breach of contract. JRS sought to enforce a mechanic's lien against Olives and sought a declaratory judgment that it holds a first priority perfected security interest in the equipment.

BankVest also filed a counterclaim against Olives Restaurant primarily for breach of its

equipment lease with BankVest. In addition, BankVest filed a cross-claim against JRS, seeking a declaratory judgment that it holds title to the equipment free and clear of any liens or encumbrances. BankVest claims that JRS violated the automatic stay by filing a mechanic's lien and a UCC-1 Financing Statement as to the equipment after the commencement of the bankruptcy petition.

JRS moved for summary judgment on its crossclaims, counterclaims and third-party claims. Both BankVest and Olives opposed the motion. BankVest also filed a cross-motion for summary judgment as to the declaratory judgment count of its cross-claim against JRS. On August 23, 2001, the bankruptcy court entered an order granting, in part, the motion for summary judgment filed by JRS. On the counts which the court did not find in favor of JRS, the court entered judgment against JRS and in favor of the defendants. The judgment determines that Olives breached its contract with JRS and is liable to it in the sum of $175,538.19 and that JRS has a first priority security interest in the equipment. The judgment denies the claims by JRS for enforcement of a mechanic's lien, quantum meruit and unjust enrichment. Through a previous order entered on June 20, 2001, the court also denied BankVest's cross motion for summary judgment. Olives, JRS and BankVest all seek review.

Olives does not seek reversal of the bankruptcy court's order. Rather its main contention is that it should not be held liable to multiple claimants for the same obligation. BankVest claims that it holds title to the equipment free and clear and that Olives Restaurant is liable to it for lease payments. JRS argues that the bankruptcy court erred in denying summary judgment on certain counts of its third party complaint.

FACTUAL BACKGROUND

In February of 1999, Olive Group and JRS began negotiations for the design and installation

of restaurant equipment for a new restaurant to be opened in Washington D.C. as Olives, D.C., ("Olives Restaurant"). Olives Restaurant was incorporated in March of 1999. On June 24, 1999, Olive Group and JRS executed a document titled "Sales Order" (hereinafter "Sales Order") containing a list of restaurant equipment to be installed by JRS at Olives Restaurant. The Sales Order called for seven progress payments totaling $373,398.09 and included a statement that JRS reserved title to the equipment until it was paid in full. Olives began looking for lease/financing for the equipment. A first attempt to obtain lease/financing through Easy Lease Company failed. From June 24 through September 7, 1999, the specific list of equipment to be provided by JRS changed numerous times.

Olives Restaurant reached an agreement with BankVest for the financing of the equipment. On September 13, 1999, Olives Restaurant signed a Master Lease (hereinafter "Master Lease") with BankVest. In a letter to JRS, dated September 15, 1999, BankVest indicated that the lease was split into three lease agreements and that BankVest wanted to be invoiced separately for each of the agreements. Each installment pertained to a portion of the equipment identified in the attachment to the Sales Order executed between Olive Group and JRS, as modified. The list of items was divided into the three groups to match the corresponding lease agreements between BankVest and Olives Restaurant. In the letter, BankVest also instructed JRS to send the invoices to BankVest including the words "'sold to' BankVest Capital and 'Ship to' Olive's D.C., LLC." With the letter, BankVest supplied JRS with its Multi State Resale Certificate, which exempts it from state sales tax. BankVest also transmitted an E-mail to JRS reiterating the language that should be included in the invoices.

JRS shipped and installed the equipment pertaining to the first two schedules of the Master

Lease. Two invoices were sent to BankVest pertaining to these schedules. Olives Restaurant issued "Delivery and Acceptance" certificates to BankVest for this equipment. Both invoices were paid by BankVest and Olives has made lease payments to BankVest for these lease agreements. The third and final schedule of equipment was delivered and installed by JRS. JRS completed the contract work on November 5, 1999. Upon BankVest's bankruptcy petition on December 17, 1999, the third invoice was never issued; nor did Olives Restaurant issue the delivery and acceptance certificate. On February 22, 2000, JRS filed a UCC-1 as to the Olive Group.

LEGAL THEORY

Olives seeks to avoid being held liable to both JRS and BankVest for the equipment pertaining to the third installment. JRS contends that Olive Group, through Olives Restaurant, attempted to delegate its performance obligations under the Sales Order to BankVest. The reasoning of JRS is as follows: BankVest partially performed with respect to the first and second groupings. BankVest breached its obligation to take title to and pay for the third grouping of equipment. BankVest's breach amounted to a breach by the Olive Group of its contract with JRS. Because Olive Group's delegation of performance to BankVest was unsuccessful, Olive Group remains liable to JRS. JRS contends that it only took instructions from Olives; that BankVest was merely a designee and that the contract between JRS and Olives provided that it could only be amended through an agreement in writing between the parties. JRS takes the position that it had no agreement with BankVest and that it merely agreed to facilitate Olive Group's financing arrangement by sending invoices to BankVest. JRS delivered the third shipment of equipment but never billed BankVest for the shipment because BankVest was having financial problems. Moreover, JRS points out that Olives did not enter into a lease agreement with BankVest for the third installment since the

acceptance certificate was not signed by Olives and this certificate included the terms of the lease and the payment amount. JRS also looks to the conduct of the parties after the obligation was breached. Olives began looking for alternative financing. Olives acknowledged the debt and JRS issued demand letters to Olives seeking payment.

BankVest contends that the shipment by JRS of the equipment was an acceptance of the sale to BankVest. BankVest argues that usually there are no writings and that performance is evidence of the contract. BankVest contends that the Sales Order between JRS and Olive Group was abandoned. No party proceeded as if the agreement was in effect. There was no deposit made and no invoices were issued to Olives. Moreover, JRS did not file a UCC-1 form at the time that the equipment was delivered to Olives Restaurant. BankVest claims that it has title to the equipment; Olives Restaurant is liable to it for lease payments; and, JRS has a general unsecured claim against the bankruptcy estate. BankVest's position is that there is no difference between the first two groupings of equipment and the third. None of the parties dispute that BankVest has title to the first two groupings.

DECISION BELOW

At the hearing of June 18, 2001, the bankruptcy court concluded that there was a purchase contract between Olive Group and JRS. Olive Group agreed to take title to and pay for the equipment supplied and installed by JRS. The contract provided that JRS would retain title to the equipment until fully paid, which allowed JRS to retain a security interest in the equipment. JRS fully performed its obligations under the contract and properly perfected its security interest in the equipment. Olive Group delegated its performance obligations under the contract to BankVest. JRS

accepted the delegation. BankVest partially performed on behalf of Olive Group with respect to the first and second groupings of equipment. BankVest breached its obligation to take title to and to pay for the third grouping of equipment. BankVest's breach amounted to a breach by the Olive Group of its contract with JRS because the delegation does not relieve the delegator of its contractual obligations. The court concluded that a novation did not occur to release Olive Group of its obligations to JRS. The court found that JRS is owed the sum of $175,538.19 for the work it completed. Although Olives Restaurant, Olive Group and JRS were before the court, the court found that not all necessary parties were before the court on the claims by JRS for quantum meruit and unjust enrichment.

JURISDICTION

We have jurisdiction over these appeals pursuant to 28 U.S.C. § 158(a) and (b). An order granting summary judgment is a final order from which appeal to the Bankruptcy Appellate Panel is proper. 28 U.S.C. § 158(a)(1); Weiss v. Blue Cross/Blue Shield of Delaware, 206 B.R. 622, 623 (B.A.P. 1st Cir. 1997).

STANDARD OF REVIEW

Summary judgment is properly granted when no genuine issue of material fact exists and the movant has successfully demonstrated an entitlement to judgment as a matter of law. See Fed. R. Civ. P. 56(c), made applicable by Fed. R. Bankr. P. 7056; Desmond v. Varrasso (In re Varrasso), 37 F.3d 760 (1st Cir. 1994). A bankruptcy court's legal conclusion to grant summary judgment is reviewed *de novo*. Baybank v. Vermont Nat'l Bank, 118 F.3d 30, 32 (1st Cir. 1997); Campana v. Pilavis (In re Pilavis), 244 B.R. 173, 174 (B.A.P. 1st Cir. 2000).

DISCUSSION

The parties do not dispute the facts, rather they dispute the legal significance given to them.[1] The bankruptcy court properly determined that Olive Group and JRS entered into a contract for the sale and installation of restaurant equipment on June 24, 1999. There was a Sales Order executed by the parties. The Sales Order indicated the location where the equipment was being installed; included a choice of laws clause; provided for payment to JRS for the work performed; and, included terms and conditions as to warranties, additional costs, title to the equipment, changes to the agreement, etc. While the equipment to be provided was revised pursuant to Change Orders, the contract itself was not amended. The contract provided that all amendments were required to be in writing, on a form provided by JRS and signed by all parties.

Furthermore, after the Sales Order was signed on June 24, 1999, Olive Group was never relieved of its obligation to make payment to JRS for the work performed. JRS is owed $175,538.19 for the third grouping of equipment. Olive Group and JRS always acted as if the contract were valid. Olive Group first identified Easy Lease as a source of financing for the equipment. When that financing did not work out, Olive Group sought the assistance of BankVest. While the parties

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[1]Although all of the parties make arguments as to the fairness of various alternatives, the Panel notes that none of the parties is in a sympathetic position. Each of the parties could have and should have been more careful in protecting its interests. Olives could have signed the Sales Order and Master Lease under the same corporate entity and could have required BankVest to specifically assume the obligation to pay JRS and request JRS to accept the substitution of parties to the agreement prior to the delivery and installation of the equipment. JRS likewise could have signed an agreement with BankVest maintaining a security interest in the equipment, and JRS should have filed a UCC-1 on June 24, 1999, when it signed the Sales Order with Olive Group for the purchase of the equipment. BankVest also could have benefitted from a signed agreement between it and JRS and a Lease Schedule and a Delivery and Acceptance certificate from Olives for the third grouping of equipment. This dispute arose largely due to the failure of the parties to protect themselves.

quibble over the degree of performance that JRS had rendered prior to BankVest's arrival on the scene, they do not dispute that JRS had already commenced performance.

The Sales Order contains an agreement that it is to be construed under the laws of the state of Maryland. See Olives' Appendix at Exhibit S-2. As BankVest agrees, section 2-210 of the Uniform Commercial Code does envision a party delegating its performance to another. This section states that "[a] party may perform his duty through a delegate . . ." Md. Code Ann., Com. Law I § 2-210 (1).[2] Maryland authority provides that where a party to a contract agrees to accept payment from a third party, the legal obligations of the contracting party are not affected. The Maryland Uniform Commercial Code states that; "[n]o delegation of performance relieves the party delegating of any duty to perform or any liability for breach." Id. See also Holzman v. Fiola Blum, Inc., 726 A.2d 818, 829-30 (Md. 1999); P/T, Ltd. II v. Friendly Mobile Manor, Inc., 556 A.2d 694, 698 (Md. 1989). Olive Group attempted to delegate its performance to BankVest under its agreement with JRS. BankVest failed to perform as to the third grouping of equipment. Thus, JRS's right to receive payment from Olive Group was undisturbed by the Master Lease between BankVest and Olives Restaurant. Accordingly, the bankruptcy court correctly granted summary judgment in favor of JRS as to its claim for breach of contract against the Olive Group.

The bankruptcy court found that JRS has a validly perfected, first priority security interest in the third grouping of equipment. Pursuant to the terms of the Sales Order executed by Olive Group and JRS, JRS retained title to the equipment until fully paid. The bankruptcy court properly concluded that under the Uniform Commercial Code, retention of title reserves a security interest.

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[2]BankVest states that the lease agreement it executed with Olives Restaurant is inconsistent with an attempt to delegate or a failed delegation as the bankruptcy court stated, but the sections on delegation do not indicate the form in which a delegation may take place.

Maryland law provides that "[a]ny retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest." Md. Code Ann., Com. Law I § 2-401(1). See also HEK Platforms and Hoists, Inc. v. Nationsbank, 759 A.2d 293, 305 (Md. 2000); Tilghman Hardware, Inc. v. Larrimore, 628 A.2d 215, 221 (Md. 1993). It is undisputed that Olive Group executed a financing statement in favor of JRS for the equipment on June 24, 1999. See JRS's Appendix, Volume I at Tab 7, Exhibit 23. To perfect a security interest in the District of Columbia, a party must file a financing statement in the land records in the Office of the Recorder of Deeds. D.C. Code Ann. § 28:9-301, -310, -501 and -502. JRS filed its UCC-1 Financing Statement in the land records of the Washington, D.C. Office of the Recorder of Deeds on February 22, 2000, properly perfecting a lien against the Olive Group's interest is in the third grouping of equipment.

The bankruptcy court correctly denied BankVest's request for a declaratory judgment that it owns the third grouping of equipment. BankVest did not obtain title to the third grouping of equipment from Olives. The Master Lease executed between BankVest and Olives Restaurant provides that "the terms and conditions of this Lease shall be construed and interpreted as to each Lease Schedule as if a separate but identical lease shall have been executed between the parties, with regard to the Equipment on such Lease Schedule . . ." See JRS's Appendix, Volume I at Tab 7, Exhibit 6 at ¶ 1. The Master Lease further provides that the terms of each lease shall not commence until a Delivery and Acceptance Certificate is completed with respect to such Equipment and that the payment amounts and due dates are established in the applicable Lease Schedule. Id. at ¶ 2. BankVest admits that the third Lease Schedule and the Delivery and Acceptance Certificate was never executed by Olives Restaurant and that the Master Lease provisions did not become effective

as to the third grouping of equipment. BankVest's Brief at 27. The obligation that Olives Restaurant had to execute the third Lease Schedule and the Delivery and Acceptance Certificate was an obligation dependent upon JRS invoicing BankVest and BankVest paying for the equipment. Upon that obligation being satisfied, Olives was willing to transfer title to BankVest and obligate itself to making lease payments to BankVest for the equipment. Since the Sales Order between Olive Group and JRS is valid and enforceable, the Master Lease Agreement fails as to the third grouping of equipment because BankVest breached its obligation to take title to and pay for the equipment.

BankVest did not obtain title to the third grouping of equipment from JRS. BankVest sent a letter and an E-mail to JRS concerning invoicing instructions for the financing BankVest was providing to Olives Restaurant. These communications by BankVest were not enough to create a contract between BankVest and JRS. Neither communication was executed by JRS, Olive Group or Olives Restaurant. BankVest correctly argues that the lack of an executed written agreement alone is not enough to find that a contract does not exist, but under the circumstances, BankVest's argument attempts to diminish the significance of the agreement which existed between JRS and Olive Group when BankVest entered into the picture. BankVest's arguments as to the existence of a contract between it and JRS, assume that all the parties began on a blank slate. To the contrary, the design, shipment and installation of the equipment was already underway pursuant to the Sales Order executed by Olive Group and JRS. BankVest was aware of this. BankVest states that "Olives Restaurant presented BankVest with a document executed by Olive Group and JRS, on its face providing for Olive Group to purchase restaurant equipment enumerated on a lengthy schedule, and to pay for that equipment . . ." BankVest's Brief at 11. BankVest took the list of the equipment attached to the Sales Order and broke it into three separate groupings for invoicing and leasing

purposes. BankVest agreed with Olives Restaurant to purchase the equipment and lease it back to Olives Restaurant. BankVest failed to do this.

There was no novation of the agreement between JRS and Olive Group. "In Maryland, it is well settled that a novation 'is a new contractual relation that extinguishes the contract that was previously in existence between the parties.'" Holzman, 726 A.2d at 830 (quoting Mercantile Club, Inc. v. Scherr, 651 A.2d 456 (Md. 1995))(other citations omitted). "To establish a novation, the party asserting it must prove four necessary requirements: '(1) A previous valid obligation; (2) the agreement of all the parties to the new contract; (3) the validity of such new contract, and (4) the extinguishment of the old contract, by the substitution of a new one.'" Holzman, 726 A.2d at 830 (quoting I.W. Berman Properties v. Porter Bros., Inc., 344 A.2d 65 (Md. 1975))(other citations omitted). To demonstrate the substitution of a new contract, the conduct of the parties "must be such to establish that the intention to work a novation was clearly implied." Holzman, 726 A.2d at 830 (quoting I.W. Berman Properties v. Porter Bros., Inc., 344 A.2d 65 (Md. 1975))(other citations omitted). BankVest failed to obtain a confirmation from JRS that the equipment at issue, which is the same equipment subject to the Sales Order, was no longer being sold to the Olive Group, but rather to BankVest.[3] To the contrary the parties continued as if the original agreement between Olive Group and JRS were valid. Prior to BankVest's arrival on the scene, JRS began performing. Olives twice sought a source of financing for the equipment. BankVest agreed to finance it and ultimately

[3]Although BankVest complains forcefully that it can not and should not be impacted by the Sales Order because it was not a party to the agreement, in truth, BankVest is not being impacted for better or worse. As to the third grouping, BankVest is in the same position that it would have been in had Olives Restaurant never contacted it seeking financing. Olives may keep the equipment and JRS may obtain payment for it. Although BankVest wants title to the third grouping of equipment and payments from Olives, it gave no consideration for it.

partially financed it. JRS sought payment from Olive Group for the remainder. BankVest itself states that "[JRS] indeed did attempt to bill or receive payment, in accordance with the Conditional Sales Contract it entered with Olive Group." BankVest's Brief at 26. Olives and JRS also state that JRS sent demand letters for payment to Olives after the BankVest financing fell through. When BankVest did not provide financing for the remainder of the equipment, Olive Group also began looking for alternative financing. These actions are not consistent with a novation.[4]

Since we are affirming the bankruptcy court's finding that a contract existed between JRS and Olive Group, JRS does not wish to pursue a claim against Olive Group for quantum meruit or unjust enrichment. JRS's brief at 23. JRS does wish to proceed against Olives Restaurant. The bankruptcy court found that it did not have all necessary parties before the court and granted judgment against JRS in favor of all other parties as to these claims. We conclude that Olives Restaurant and JRS are the only parties necessary to entertain these issues. Olives Restaurant filed the initial complaint in this case. JRS filed a counter-claim against Olives Restaurant, including claims for quantum meruit and unjust enrichment. Thus, these two parties are properly before the court.[5]

Generally, one seeking quantum meruit recovery must show, "'(1) that valuable services were

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[4]These same factors negate BankVest's theory that the contract between Olive Group and JRS was somehow abandoned. Citing Alessandri v. April Indus., Inc., 934 F.2d 1, 2 (1st Cir. 1991) and the Restatement (Second) of Contracts § 238, BankVest argued that JRS and Olive Group showed their intent to abandon the Sales Order by their conduct. BankVest's Brief at 26.

[5]No contract existed between JRS and Olives Restaurant, thus the law of Maryland does not necessarily apply to these issues. JRS is a Maryland corporation. Olives Restaurant is a Delaware corporation. Olives Restaurant and the equipment for which JRS seeks recovery for quantum meruit and unjust enrichment are located in the District of Columbia. We do not need to determine which jurisdiction's laws apply for the purposes of this opinion.

rendered, (2) to the person from whom recovery is sought, (3) which services were accepted by that person, and (4) under such circumstances as reasonably notified the person that the plaintiff expected to be paid by that person.'" Dorsky Hodgson & Partners, Inc. v. National Council of Senior Citizens, 766 A.2d 54, 58 (D.C. 2001)(quoting Vereen v. Clayborne, 623 A.2d 1190, 1193-94 (D.C. 1993)). See also Mogavero v. Silverstein, 790 A.2d 43, 53-4 (Md. 2002)(discussing elements necessary to establish contract implied in fact). As to Olives Restaurant, JRS alleged that it furnished valuable labor, materials and services to Olives Restaurant, with the intention of receiving a fee. JRS alleged that Olives Restaurant accepted JRS's service and knew that JRS expected to be paid. Olives Restaurant has failed to pay. We conclude that JRS states a claim for quantum meruit recovery.

Unjust enrichment is "'a rule of law that requires restitution to the plaintiff of something that came into defendant's hands but belongs to the plaintiff in some sense.'" Mogavero, 790 A.2d at 52 (quoting Mass Transit Admin. v. Granite Constr. Co., 471 A.2d 1121 (Md. App. 1984)). The principle of unjust enrichment is defined under Maryland law as "[a] person who receives a benefit by reason of an infringement of another person's interest, or of loss suffered by the other, owes restitution to him in the manner and amount necessary to prevent unjust enrichment.'" Mogavero, 790 A.2d at 53 (quoting Berry & Gould v. Berry, 757 A.2d 108, 113 (Md. 2000). JRS alleges that it provided commercial food service equipment to Olives Restaurant; that Olives Restaurant has used the equipment without paying for it; and, that Olives Restaurant has received an inequitable benefit. We conclude that JRS states a claim for unjust enrichment.

CONCLUSION

The bankruptcy court properly concluded that JRS was entitled to summary judgment awarding JRS damages for breach of contract against Olive Group and determining that JRS has a

first priority security interest in the third grouping of restaurant equipment sold to Olive Group. The bankruptcy court also properly determined that BankVest does not have title to the third grouping of restaurant equipment, which JRS sold to Olive Group. Accordingly, as to these issues, the judgment of the bankruptcy court is AFFIRMED. Because JRS states a claim against Olives Restaurant for quantum meruit and unjust enrichment, the judgment of the bankruptcy court denying these claims, is REVERSED and REMANDED for further proceedings consistent with this opinion.