

FEB 2 - 2006

U.S. BANKRUPTCY COURT  
FOR THE DISTRICT OF ARIZONA

**UNITED STATES BANKRUPTCY COURT**  
**DISTRICT OF ARIZONA**

In re )  
)  
LYNWOOD D. HALL and BRENDA A. HALL, )  
husband and wife, )  
)  
Debtors. )

Chapter 12  
No. 4-05-04423-EWH

\_\_\_\_\_  
O. RAY OSBORN and CAROLYN OSBORN, )  
husband and wife, both in their individual )  
capacity and as Trustees of the Osborn Family )  
Trust, )

Adv. No. 05-00195

Plaintiffs, )

**MEMORANDUM DECISION**

v. )  
)  
LYNWOOD D. HALL and BRENDA A. HALL, )  
husband and wife; THE PICNIC BARREL )  
LIQUOR MART, INC., an Arizona corporation; )  
D. JOE BARNES and PATRICIA G. BARNES, )  
husband and wife; and FIRST AMERICAN TITLE )  
AGENCY OF PINAL COUNTY, an Arizona )  
corporation, a/k/a First American Title Insurance )  
Company, a/k/a First American Title and Trust, )  
)  
Defendants. )

**INTRODUCTION**

A broker provided services to the Debtors and the buyers of their farm both pre and postpetition. Because the contract which established the broker's right to a commission was

1 entered into prepetition, the broker's claim is a prepetition claim which cannot be paid  
2 postpetition or given administrative priority status. The reasons for this conclusion are set  
3 forth in the balance of this Memorandum Decision.  
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6 **FACTUAL AND PROCEDURAL HISTORY**

7 Debtors own a 320-acre farm ("Farm") in Cochise County, Arizona. The Farm was  
8 encumbered by a number of liens, including the lien in favor of O. Ray and Carolyn Osborn  
9 ("Osborns"). In the spring of 2005, tensions developed between the Debtors and the Osborns<sup>1</sup>  
10 and the Osborns began to take enforcement actions to collect their debt. In response to the  
11 Osborns' collection efforts, the Debtors decided to sell the Farm.  
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14 On April 11, 2005, the Debtors executed an Offer and Acceptance Agreement  
15 ("Agreement") prepared by Kirk McCarville of Palo Verde Land & Investments (collectively  
16 "Broker") to sell the Farm to their friends of 30 years, Donald Joe and Patricia G. Barnes  
17 ("Barnes" or "Buyers") for \$960,000. The Agreement provides that, at the close of escrow the  
18 Broker is to be paid 5% of the sale price from the Debtors' proceeds of sale ("Commission").  
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20 The Agreement was executed by the Debtors and the Barnes. It was not signed by the  
21 Broker. There was no separate listing agreement between the Broker and the Debtors.  
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27 <sup>1</sup> The Osborns are Brenda Hall's parents.

1 The Buyers are long-standing clients of the Broker, who specializes in non-residential  
2 land sales, including 1031 exchange sales.<sup>2</sup> The Debtors had never met the Broker before the  
3 date they executed the Agreement.  
4

5 After the Agreement was executed, the Broker assisted the Buyers, during the  
6 Agreement's due diligence period, in determining if the purchase price was fair by undertaking  
7 an analysis of the value of the Farm. He assisted the Debtors by working with the title  
8 company to identify and resolve lien issues. However, before the sale could close, the  
9 Osborns filed suit in Cochise County state court to foreclose their lien.  
10

11 By the time the Osborns filed that foreclosure suit, a major dispute had arisen regarding  
12 the amount of the Osborns' lien claim. On August 10, 2005, shortly after the Osborns filed  
13 suit, the Debtors filed for Chapter 12 relief.<sup>3</sup> On August 31, 2005, the Debtors filed a motion  
14 to sell the Farm to the Buyers. The Osborns filed an objection to the sale. The Broker came  
15 to court to testify in support of the sale. His testimony was not, however, needed because the  
16 parties agreed to let the sale proceed with \$400,000 of the sale proceeds being immediately  
17 distributed to the Osborns, and an additional \$400,000 being held in an interest-bearing  
18 account subject to the determination of the amount of the Osborns' claim.  
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24 <sup>2</sup> Section 1.1031 of the Internal Revenue Code sets out the procedures for "like kind" exchanges  
25 of real property. Exchanges which fall within the provisions of a "1031 exchange" are exempt from  
26 capital gains tax.

27 <sup>3</sup> Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy  
28 Code, 11 U.S.C. § 101-1330 and to the Federal Rules of Bankruptcy Procedures, Rules 1001-9036

1 On September 22, 2005, an order ("Sale Order") was entered approving the sale  
2 pursuant to the terms of the Agreement, as modified, to permit the payment to the Osborns and  
3 pay off of another lien holder. Another modification was that the payment of the Commission  
4 was not to be made from escrow. After the Sale Order was entered, the Broker, at his own  
5 expense, flew to Oklahoma to obtain the Barnes' signatures on all of the sale documents to  
6 assure that the sale closed during the six-month reinvestment period required for 1031  
7 exchanges.  
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10 On October 3, 2005, an application was filed to approve payment of the Commission.  
11 The Osborns objected. A hearing on the objection was held and testimony taken on  
12 November 28, 2005. All post-hearing briefs have been filed. The matter is now ready for  
13 decision.  
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### 16 **JURISDICTIONAL STATEMENT**

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18 Jurisdiction is proper under 28 U.S.C. § 1334 and § 157(b)(2)(A) and (B).  
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### 20 **ISSUES**

- 21
- 22 1. Is the Broker entitled to be immediately paid the Commission as a third-party  
23 beneficiary of the Agreement?
  - 24 2. Is the Broker entitled to an administrative claim for the Commission?  
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1 DISCUSSION

2 Under Arizona law, a real estate commission is earned when a ready, willing and able  
3 buyer is produced by the broker. Gyler v. Daly, 70 Ariz. 135, 217 P.2d 583 (Ariz. 1950). That  
4 rule has been enforced by the Ninth Circuit. In re Munple, Ltd., 868 F.2d 1129, 1130-31 (9th  
5 Cir. 1989).  
6

7 In this case, the Broker and the Debtors argue that the Commission was not based on  
8 procuring a buyer, but on providing services to assist both the Buyers and the Debtors in the  
9 consummation of the Agreement. Under their analysis, the Commission was not earned until  
10 after the Broker had provided services and escrow closed. Because escrow did not close until  
11 after the petition was filed and because the Broker provided services to the Debtors and the  
12 Buyers after the Agreement was executed, they argue that the Broker is entitled to the  
13 Commission either as a third-party beneficiary of the Agreement or as an administrative claim.  
14

15 However, even if the Broker was a third-party beneficiary to the Agreement, the  
16 Agreement was a prepetition contract. The Debtors did not assume the Agreement by selling  
17 the Farm. Assumption of an executory contract is possible, only after notice and a hearing,  
18 pursuant to the provisions of § 365 and only after the assumption is approved by court order.  
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20 See In re Snowcrest Dev. Group, 200 B.R. 473, 477 (Bankr. D. Mass. 1996). In this case, no  
21 § 365 hearing was held and no court order has been entered approving assumption of the  
22 Agreement. There was only an order approving the sale of the Farm under the terms of the  
23 Agreement “as modified” to exclude payment of the Commission from escrow. Even if the  
24 Broker is a third-party beneficiary of the Agreement, because the Agreement was not assumed  
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1 by the Debtors, any claims that exist under the Agreement are prepetition claims. Id. To the  
2 extent that the Agreement could be characterized as a non-executory option contract, the  
3 Broker's claim to the Commission, as a third-party beneficiary of a non-executory contract,  
4 is still a prepetition claim. See In re Stewart Foods, Inc., 64 F.3d 141, 144-145 (4th Cir.  
5 1995) (holding that claims based on non-executory contracts are prepetition unsecured  
6 claims).  
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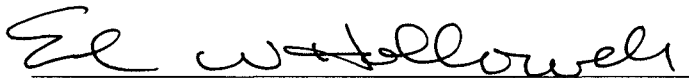
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9 Furthermore, the Broker has not demonstrated that the Agreement required him to do  
10 anything to receive the Commission. The Broker did render services to both the Buyers and  
11 the Debtors after the Agreement was executed, including services rendered postpetition, but  
12 no evidence was presented that indicated that the failure to provide such services would vitiate  
13 the Broker's rights to the Commission. The fact that services were rendered postpetition does  
14 not elevate the Broker's prepetition claim to an administrative expense priority unless the  
15 Broker could be employed as a professional by the Debtors. In re HSD Venture, 178 B.R. 831,  
16 835 (Bankr. S.D. Calif. 1995). Because the Broker's rights to the Commission were  
17 established by the prepetition Agreement which was either (1) non-executory or (2) not  
18 assumed by the Debtors, the Broker holds only a prepetition claim against the Debtors' estate.  
19 As a result, the Broker does not qualify as a disinterested person under § 327 and is, therefore,  
20 not eligible to be retained as a professional by the Debtors. Id. at 834. A professional who is  
21 ineligible to be paid under § 503(b)(2) cannot receive an administrative claim under  
22 § 503(b)(1). In re Weibel, Inc., 176 B.R. 209, 213 (9th Cir. B.A.P. 1994).  
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1 Finally, at the hearing the court, sua sponte, raised the question of whether the Broker  
2 had a potential quantum meruit claim for the postpetition services he provided by flying to  
3 Oklahoma to obtain the Buyers' signatures on all documents necessary to consummate the sale  
4 of the Farm. However, unjust enrichment or quantum meruit claims are not administratively  
5 viable under the holdings of Weibel and HSD Venture.  
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9 **CONCLUSION**

10 The Broker is not entitled to an immediate payment of the Commission as a third-party  
11 beneficiary to the Agreement because it was not assumed by the Debtors. The Broker, as a  
12 prepetition creditor, is unqualified to be a professional for the Debtors' bankruptcy estate and,  
13 therefore, is not entitled to an administrative expense claim. The foregoing constitutes the  
14 court's findings of fact and conclusions of law pursuant to Rule 7052. Counsel for the  
15 Osborns is directed to submit an order consistent with the terms of this Memorandum  
16 Decision.  
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19 Dated this 2nd day of February, 2006.  
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21   
22 Eileen W. Hollowell  
23 U.S. Bankruptcy Judge  
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1 Copy of the foregoing served as indicated  
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