

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

THE BENNETT FUNDING GROUP, INC.

Debtors

CASE NO. 96-61376

Chapter 11

Substantively Consolidated

RICHARD C. BREEDEN, as Trustee for
THE BENNETT FUNDING GROUP, INC.
and THE PROCESSING CENTER, INC.

Plaintiff

vs.

ADV. PRO. NO. 97-70049A

SPHERE DRAKE INSURANCE PLC, SPHERE
DRAKE UNDERWRITING MANAGEMENT
(BERMUDA) LIMITED,
TRIANGLE INSURANCE MANAGEMENT LIMITED,
LLOYD THOMPSON LIMITED, THE BENNETT
FUNDING CORPORATION, BRIGHTON SECURITIES
CORP., HALPERT AND COMPANY, WEINER ABRAMS
& COMPANY INC., BANKERS FINANCIAL CORP.,
INTERNATIONAL FINANCE BANK, AMERICAN
TRAFFIC SAFETY SERVICE ASSOCIATION, INC.,
SUMMIT FINANCIAL SECURITIES INC., HEFREN
TILLOTSON, INC., HORIZON SECURITIES, SAGE-RUTTY
& COMPANY, MID-STATE ADVISORS, ANDREW
ANDREAS SPECIAL NEEDS TRUST, RICHARD H.
REYNOLDS PROFIT SHARING PLAN, INC.,
SOUTHEASTERN PAPER PROFIT SHARING PLAN,
FIRST FEDERAL SAVINGS BANK OF LAGRANGE,
GREATER DELAWARE VALLEY SAVINGS BANK,
MERCHANTS NATIONAL BANK OF WINONA,
FARMERS STATE BANK, THE COMMERCIAL BANK,
FIRST NORTHERN BANK & TRUST, LAFAYETTE
SAVINGS BANK, DOLLAR CAPITAL CORPORATION,
and JOHN DOES 1 through 10,000

Defendants

APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

AMENDED ORDER

On August 6, 1999, the Court issued a Memorandum-Decision, Findings of Fact, Conclusions of Law and Order in the above-captioned adversary proceeding (“August 6 Order”), which granted in part motions to dismiss certain claims set forth in the Second Amended Complaint, filed on July 29, 1998 (“Complaint”) by Chapter 11 Trustee Richard C. Breeden (“Trustee”), and various cross claims filed by a number of the defendants therein pursuant to Rules 7009 and 7012 of the Federal Rules of Bankruptcy Procedure (“Fed.R.Bankr.P.”). Presently before the Court is a motion by Triangle Insurance Management Limited (“Triangle”) requesting that the Court amend its August 6 Order.¹

On page 13 of the August 6 Order the Court stated that “Triangle has not moved to dismiss any of the claims asserted against it by The Commercial Bank.” On page 15 the Court also found that Triangle “has not moved to dismiss the second cross claim [of Merchants National Bank of Winona]”

Upon review of the various documents filed in this adversary proceeding, the Court finds that the above statements were in error. On December 10, 1998, a somewhat unique Amended Notice of Motion was filed jointly by Lloyd Thompson, Ltd. and Triangle, seeking the dismissal of

(1) Count II of the Answer to Second Amended Adversary Complaint, Counterclaim and Crossclaim of Defendant The Merchants National Bank of

¹ Although not referenced in Triangle’s papers, the Court will treat the motion as one made pursuant to Rule 60(b) of the Federal Rules of Civil Procedure (“Fed.R.Civ.P.”), as incorporated in Fed.R.Bankr.P. 9024.

Winona, pursuant to Rule 12(b)(6), Fed.R.Civ.P., for failure to state a claim upon which relief can be granted, on the ground that defendant has failed to allege its fraud claim with the particularity required by Rule 9(b), Fed.R.Civ.P.; and

(2) The First, Second and Third Crossclaims of the Answer, Counterclaims and Crossclaims of The Commercial Bank to the Second Amended Adversary Complaint, pursuant to Rule 12(b)(6), Fed.R.Civ.P., for failure to state a claim upon which relief can be granted, on the ground that defendant has failed to allege its fraud claim with the particularity required by Rule 9(b), Fed.R.Civ.P.

The Court granted the motion with respect to Lloyd Thompson but overlooked the fact that Triangle had joined Lloyd Thompson in the same motion seeking said relief.²

As was once pointed out by Judge Learned Hand, there is no reason why the orders of a bankruptcy court “should be as immutable as the Twelve Tables, once the ink is dry.” *In re Pottasch Bros., Inc.*, 79 F.2d 613, 616 (2d Cir. 1935). Accordingly, the Court hereby grants Triangle’s motion and will amend the third ordering paragraph of the August 6 Order to read as follows:

ORDERED that Triangle’s motion to dismiss is hereby GRANTED with respect to Count II of the Trustee’s Second Amended Adversary Complaint; the First and Second Cross Claims of Halpert; the First and Second Cross Claims of Dollar; the Third Cross Claim of Brighton; the Third, Fourth and Fifth Cross Claims of The Commercial Bank³; and the Second Cross Claim of Winona.⁴

² The Court notes that the Amended Notice of Motion was supported by a single affidavit supplied by counsel to Lloyd Thompson and was affixed to a backer supplied by that same counsel.

³ Said “Cross Claims” of The Commercial Bank are incorrectly referred to at p. 37 of the August 6 Order as “Counterclaims.” The Court also notes that the Third, Fourth and Fifth Cross Claims of The Commercial Bank, as referenced in the ordering paragraphs of the August 6 Order, are so numbered as to Sphere Drake Insurance PLC and Sphere Drake Underwriting Management (Bermuda) (together “Sphere Drake”), and are actually identified in the “Answer, CounterClaims

IT IS SO ORDERED.

Dated at Utica, New York

this 28th day of October 1999

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge

and Cross-Claims of The Commercial Bank to Second Amended Adversary Complaint,” filed on November 2, 1998, at ¶¶ 64-72 as the First, Second and Third Cross-Claims against Lloyd Thompson and Triangle.

⁴ Labeled in the “Answer to the Second Amended Adversary Complaint, Counterclaim and Cross Claim of Defendant The Merchants National Bank of Winona,” filed August 17, 1998, at p. 11 as “Count II - Misrepresentation and Fraud Claims against Sphere Drake Defendants, Triangle Insurance Management Limited, and Lloyd Thompson Limited.”