

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF NEW YORK

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IN RE:

THE BENNETT FUNDING GROUP, INC.

Debtors

CASE NO. 96-61376

Chapter 11

Substantively Consolidated

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

Plaintiff

vs.

ADV. PRO. NO. 98-70039A

MERCHANTS NATIONAL BANK OF WINONA

Defendant

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APPEARANCES:

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

MEMORANDUM-DECISION, FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

By a motion filed on April 9, 1998, defendant Merchants National Bank of Winona (hereafter, "Bank") seeks an order pursuant to Rule 7012 of the Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P.") dismissing the Amended Adversary Complaint filed in the above-captioned adversary proceeding by Richard C. Breeden ("Trustee"), as Chapter 11 Trustee of the Consolidated Estate of The Bennett Funding Group, Inc. ("Debtors"). Also before the Court is a cross-motion filed by the Trustee on May 4, 1998, which seeks consolidation of the present adversary proceeding with a prior pending adversary proceeding pursuant to Fed.R.Bankr.P. 7042.

The Court heard argument on the motion and cross-motion on June 11, 1998. As each party had previously submitted memoranda of law, the matter was reserved for decision as of the date of oral argument.

From the allegations contained in the Trustee's Amended Adversary Complaint, it appears that in a series of transactions characterized by the parties as loans, the Bank provided funds in the total amount of \$14,828,367.32 to the Debtors. (Am. Adv. Comp. at ¶ 175). The Amended Adversary Complaint further alleges that a total of \$11,966,370.59 was repaid to the Bank by the Debtors pursuant to the above transactions. (Am. Adv. Comp. at ¶ 176).

The Amended Adversary Complaint asserts twenty-seven causes of action against the Bank. A review of the Court's docket reveals that all but the Twenty-Fourth, Twenty-Fifth, Twenty-Sixth and Twenty-Seventh of these causes of action are substantially identical to counterclaims asserted by the Trustee against the Bank in the previously-filed pending adversary

proceeding captioned as *Merchants National Bank of Winona v. The Bennett Funding Group, Inc.* (*In re The Bennett Funding Group, Inc.*), Adv. No. 96-70097A. The Twenty-Fourth Cause of Action seeks to avoid the Bank's interest in certain allegedly substituted leases, the Twenty-Fifth Cause of Action seeks to impose a surcharge against the Bank, the Twenty-Sixth Cause of Action seeks to avoid certain payments made by the Debtors to the Bank as actual and constructive fraudulent transfers pursuant to § 548(a) of the Bankruptcy Code (11 U.S.C. §§ 101-1330)("Code") and the Twenty-Seventh Cause of Action seeks to avoid the payments as fraudulent transfers pursuant to §§ 271-281 of the New York Debtor and Creditor Law.

Upon review of the pleadings in this adversary proceeding, the Court determines that the issues raised by the Bank's motion are factually and legally identical to those presented to the Court in its recently-issued decision of *Breeden v. Gloucester Bank & Trust Co.* (*In re The Bennett Funding Group, Inc.*), Adv. No. 98-70037A (February 9, 1999). Accordingly, the findings of fact and conclusions of law of the *Gloucester* decision are incorporated into the present decision in their entirety, except with respect to the specific transaction amounts stated above.

Based on the foregoing, the Bank's motion to dismiss Adversary Complaint No. 98-70039A is hereby

GRANTED with respect to the First through Twenty-Third Causes of Action of the Complaint, provided, however, that such dismissal is granted without prejudice to the Trustee's rights with regard to any pending counterclaims in Adversary Proceeding No. 96-70097A;

GRANTED with respect to the Twenty-Sixth Cause of Action of the Complaint, but only to the extent that such cause of action is based on the constructively fraudulent transfer provisions

of Code § 548(a)(1)(B);

DENIED with respect to the remainder of the Twenty-Sixth Cause of Action; and

DENIED with respect to the Twenty-Fourth, Twenty-Fifth, and Twenty-Seventh Causes of Action of the Complaint; and it is further

ORDERED that the within Adversary Proceeding No. 98-70039A is hereby consolidated with Adversary Proceeding No. 96-70097A pursuant to Rule 7042 of the Fed.R.Bankr.P., except to the extent that any part of Adversary Proceeding No. 98-70039A has been dismissed by virtue of this order.

Dated at Utica, New York

this 17th day of March 1999

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STEPHEN D. GERLING  
Chief U.S. Bankruptcy Judge