

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

PATRICK R. BENNETT

Debtor

CASE NO. 97-65399
Chapter 7

RICHARD C. BREEDEN, Trustee of The
Bennett Funding Group, Inc., et al.

Plaintiff

vs.

ADV. PRO. NO. 98-70876A

PATRICK R. BENNETT

Defendant

APPEARANCES:

SIMPSON THACHER & BARTLETT
Attorneys for Plaintiff
425 Lexington Avenue
New York, New York 10017

JAMES G. GAMBLE, ESQ.
Of Counsel

RICHARD CROAK & ASSOCIATES
Attorneys for Debtor/Defendant
90 State Street
Albany, New York 12207-1705

RICHARD CROAK, ESQ.
of Counsel

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

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

Presently before the Court is a motion by Patrick R. Bennett (“P. Bennett” or “Defendant”), seeking dismissal of an adversary complaint filed against him by Richard C. Breeden (“Trustee” or “Plaintiff”), as chapter 11 trustee of the consolidated estates of The

Bennett Funding Group, Inc. (collectively, the “Bennett Group companies”)¹ on July 20, 1998. Defendant’s motion, filed on August 21, 1998, was adjourned several times over the course of a year on consent of both parties. On October 14, 1999, the Court finally heard oral argument on the motion, and the matter was submitted for decision on October 20, 1999.

JURISDICTIONAL STATEMENT

The Court has jurisdiction over the parties and subject matter of this adversary proceeding pursuant to 28 U.S.C. §§ 1334, 157(a), (b)(1), (b)(2)(I) and (J).

FACTUAL BACKGROUND

On June 6, 1996, the Trustee commenced an adversary proceeding in the Bennett Group companies’ case against numerous defendants, including P. Bennett (“First Complaint”). The First Complaint contains allegations illustrative of what this Court has previously characterized as a “financial superweb” of dealings involving , *inter alia*, companies owned and/or controlled by the Bennett family of Syracuse, New York, including P. Bennett. Among other things, the Trustee alleges in the First Complaint that

[t]he Bennetts, either directly and with actual knowledge, or negligently and recklessly in their capacity as officers and

¹ The Bennett Group companies are comprised of eight related entities, including The Bennett Funding Group, Inc., Bennett Receivables Corporation, Bennett Receivables Corporation II, Bennett Management & Development Corporation, The Processing Center, Inc., Resort Service Company, Inc., American Marine International, Ltd., and Aloha Capital Corporation.

directors of the Bennett Group companies, and aided and abetted by others, perpetrated or oversaw the perpetration of what the U.S. Securities and Exchange Commission . . . has described as the largest Ponzi scheme ever carried out against individual investors and financial institutions in U.S. history. In breach of their statutory and common law duties to the Debtors, the Bennetts and others conducted or permitted to be conducted the affairs of the Bennett Group in a manner that resulted in their reaping unlawfully and fraudulently, hundreds of millions of dollars in funds from investors and financial institutions . . .

See ¶ 1 of the First Complaint.

On September 5, 1997, P. Bennett filed a voluntary petition pursuant to chapter 7 of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 (“Code”). P. Bennett served as an officer and director of a number of the Bennett Group companies up until the time that petitions were filed on their behalf in 1996 pursuant to chapter 11 of the Code. On July 20, 1998, the Trustee, on behalf of the Bennett Group companies, commenced an adversary proceeding in the chapter 7 case against P. Bennett by filing a complaint pursuant to Code §§ 523 and 727 (“Second Complaint”).

In the Second Complaint the Trustee seeks a determination that a debt allegedly owed to the Bennett Group companies is non-dischargeable pursuant to Code § 523(a)(4) and (6). Attached to the Second Complaint as Exhibit “A” is a copy of the First Complaint, which the Trustee wishes to incorporate by reference pursuant to Rule 10(c) of the Federal Rules of Civil Procedure (“Fed.R.Civ.P.”), incorporated in Rule 7010 of the Federal Rules of Bankruptcy Procedure (“Fed.R.Bankr.P.”), to support his allegations concerning the Defendant’s fraud and the resulting injury to the Bennett Group companies. The Trustee also seeks a denial of the Defendant’s discharge pursuant to Code § 727(a)(2), (3), (5) and (7).

ARGUMENTS

The Defendant argues that the Second Complaint should be dismissed based on a failure by the Trustee to state a cause of action.² In addition, the Defendant asserts that the Trustee has failed to plead fraud with particularity as required by Fed.R.Civ.P. 9(b), as incorporated in Fed.R.Bankr.P. 7009.³ In support of his motion, the Defendant contends that the Court should not allow the Trustee to incorporate the First Complaint by reference in the Second Complaint. Defendant points out that the allegations in the First Complaint are made not just against P. Bennett but against numerous individuals. Defendant argues that the Second Complaint should specifically identify the portions of the First Complaint which the Trustee wishes to incorporate in the Second Complaint in order for the Defendant to properly answer the Second Complaint.

The Trustee takes the position that pursuant to Fed.R.Civ.P. 10(c), he is entitled to incorporate the First Complaint into the Second Complaint with respect to the allegations of fraud on the part of the Defendant in connection with the Trustee's first two claims for relief pursuant

² Although the Defendant does not cite to the procedural basis for such relief, the Court will assume his motion is being made pursuant to Fed.R.Civ.P. 12(b)(6), as incorporated in Fed.R.Bankr.P. 7012.

³ In his motion, the Defendant argues that if the Court should deny his request to dismiss the Second Complaint that the Court should "hold the matter in abeyance until the criminal prosecution has been completed" and allow the Defendant an extension of time to answer the Second Complaint. *See* ¶ 10 of the Defendant's motion. At the time the motion was initially made, P. Bennett had been indicted on a variety of felony charges. After two separate criminal trials, P. Bennett was found guilty on 49 counts, including perjury, obstruction of justice, securities fraud and money laundering. Therefore, Defendant's request that his time to answer be held in abeyance is now moot. In fact, the Court notes that on September 7, 1999, the Defendant filed an answer to the Second Complaint which was subsequently amended on September 13, 1999.

to Code § 523(a)(4) and (6). According to the Trustee, the incorporation of the First Complaint into the Second Complaint eliminates having to reiterate the approximately 95 pages of allegations found in the First Complaint.

DISCUSSION

In considering a motion to dismiss a complaint pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a cause of action, the Court is to examine not only the facts stated in the complaint but also facts “in documents appended to the complaint or incorporated by reference” *Allen v. WestPoint-Pepperell, Inc.*, 945 F.2d 40, 44 (2d Cir. 1991) (citation omitted). Fed.R.Civ.P. 10(c) specifies that “statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion.” The rule further states that “any copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.” The Court of Appeals for the Second Circuit has held that “the complaint is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference.” *See Cortec Indus., Inc. v. Sum Holding, L.P.*, 949 F.2d 42, 47 (2d Cir. 1991) (citations omitted).

Dismissal is only appropriate if “it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Allen*, 945 F.2d at 44, quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957). Pursuant to Fed.R.Civ.P. 10(c) and the holding of the Second Circuit, the Court concludes that it may consider the First Complaint, which is attached as Exhibit “A” to the Second Complaint, in

responding to the Defendant's motion. A review of both complaints leaves little doubt in the Court's mind that the Trustee has certainly set forth sufficient factual allegations, that if determined to be true, would support his claims for relief. Therefore, the Court will deny the Defendant's motion to dismiss the Second Complaint for failure to state a cause of action.

However, the Court does find some merit in the Defendant's concerns in allowing the Trustee to incorporate the entire First Complaint into the Second Complaint. At least two district courts have found that in incorporating one pleading into another, the "later pleading must 'specifically identify which portions of the prior pleading are adopted therein.'" *Lowden v. William M. Mercer, Inc.*, 903 F.Supp. 212, 216 (D. Mass. 1995), citing *Federal National Mortgage Ass'n v. Cobb*, 738 F.Supp. 1220, 1227 (N.D. Ind. 1990). The First Complaint is 97 pages in length and includes 357 paragraphs of allegations. The bulk of those allegations are levied against P. Bennett. To the extent that they do not involve P. Bennett, either directly or indirectly, the Court deems it appropriate that the Trustee amend the Second Complaint to indicate which paragraphs of the First Complaint, if any, he believes need not be incorporated by reference for purposes of the litigation in the chapter 7 case. For example, ¶¶ 79-84 of the First Complaint address themselves to activities of Michael Bennett, P. Bennett's brother. There is no mention of P. Bennett in the five paragraphs.

Based on the discussion above, the Court also finds it appropriate to consider the First Complaint in addressing the Defendant's motion seeking dismissal of the Second Complaint pursuant to Fed.R.Civ.P. 9(b). Fed.R.Civ.P. 9(b) states that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."

In another adversary proceeding in the Bennett Group companies' chapter 11 bankruptcy,

this Court dismissed a defendant's Rule (9b) challenge, noting that the Trustee's complaint contained "specific allegations about the Debtors' allegedly fraudulent behavior, including the manner in which the Ponzi scheme was operated, the means by which it defrauded investors of their money, and the relationship between the transfers to the Defendants and the operation of the scheme. In short, this complaint provides the Defendants with notice of the exact facts which the Trustee will attempt to prove in support of his allegation of actual fraud." *See Breeden v. Walnut Street Securities (In re The Bennett Funding Group, Inc.)*, Case No. 96-61376, Adv. Pro. No. 98-70256, slip op. at 7 (Bankr. N.D.N.Y. Nov. 24, 1998).

Applying the same standard to the present adversary proceeding, the Court must reach a similar conclusion. In the First Complaint, the Trustee has gone into great detail in setting forth factual allegations concerning the Defendant's involvement in what the Trustee describes as a Ponzi scheme. The Second Complaint, which incorporates the First Complaint, contains specific allegations of alleged fraudulent conduct by the Defendant. It describes the Defendant's involvement in the Ponzi scheme, as well as other alleged fraudulent conduct on his part. For example, in ¶ 41 of the First Complaint, the Trustee alleges that P. Bennett "caused Bennett Funding Group to assign leases to individual investors on leases that Bennett Funding Group did not own or that were nonexistent." Paragraph 49 of the First Complaint alleges that P. Bennett "fraudulently and in breach of his fiduciary duties repeatedly caused Bennett Funding Group (a) to pledge to financial institutions, as collateral for loans, leases that were also assigned to individual investors; and (b) to assign to individual investors leases that were also pledged to financial institutions as collateral for loans." The Court finds that the Trustee has satisfied the requirements of Fed.R.Civ.P. 9(b).

Based on the foregoing, it is hereby

ORDERED that the Defendant's motion seeking dismissal of the Second Complaint pursuant to Fed.R.Civ.P. 12(b)(6) is denied; it is further

ORDERED that the Defendant's motion seeking dismissal of the Second Complaint pursuant to Fed.R.Civ.P. 9(b) is denied; it is further

ORDERED that the Trustee amend the Second Complaint to identify, which, if any, paragraphs from the First Complaint are not incorporated by reference in the Second Complaint and shall serve the Amended Second Complaint on the Defendant within twenty (20) days of this Order,⁴ it is further

ORDERED that the Defendant shall have twenty (20) days from the service of the Amended Second Complaint to serve and file his Answer; and it is finally

ORDERED that the Trustee's request for attorneys' fees in connection with the Defendant's motion is denied.⁵

Dated at Utica, New York

⁴ If the Trustee prefers, he may identify the paragraphs from the First Complaint that he wants incorporated into the Second Complaint, but in reviewing the former, it appeared to the Court that there were far more paragraphs referencing activities of P. Bennett than not.

⁵ The Trustee in his Reply to the Defendant's motion, filed September 7, 1999, the same day that the Defendant filed his Answer, seeks attorney's fees based on the failure of Defendant's counsel to respond to a request by the Trustee to withdraw the motion or adjourn it to permit the parties an opportunity to discuss its withdrawal. This, the Trustee asserts, would have eliminated the need for the Trustee to file a response to the Defendant's motion. There is no evidence that the Defendant and/or his counsel have in any way acted in bad faith in this regard, and the Court finds that Defendant was entitled to his day in court to present his arguments and respond to the Trustee's objections.

this 2nd day of February 2000

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge