UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

THE BENNETT FUNDING GROUP, INC.	CASE NO. 96-61376
BENNETT RECEIVABLES CORPORATION	96-61377
BENNETT RECEIVABLES CORPORATION II	96-61378
BENNETT MANAGEMENT AND DEVELOPMENT CORPORATION	96-61379
	Chapter 11
Debtors	Jointly Administered

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

Plaintiff

vs. ADV. PRO. NO. 96-70264

BANK OF HERRIN, et al.

Defendants

APPEARANCES:

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ANDRE BOUFFARD, ESQ.

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

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

The Court considers herein the motion filed on October 16, 1996, by the law firm of Deily, Testa & Dautel, LLP ("Deily firm"), as well as the subsequent motions filed by various other law firms/attorneys, including Green & Seifter, P.C. (October 18, 1996), Bond, Schoeneck & King, LLP (October 21, 1996), Kilpatrick & Cody (November 4, 1996), and David Ganje, Esq. (November 8, 1996) (hereinafter jointly referred to as "Movants"), on behalf of numerous banks, seeking *inter alia* dismissal of the complaint ("Complaint") filed by Richard C. Breeden ("Trustee") on September 18, 1996.

The motion of the Deily firm was heard at the Court's motion term on November 14,

1996, in Utica, New York. At that time, the Court was apprised that similar motions had been filed and were scheduled to be heard on December 12, 1996. For purposes of judicial economy, the Court reserved decision on the motion and indicated that the matter would not be submitted until the other motions had been heard. The matter was submitted for decision on December 12, 1996.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of these adversary proceedings pursuant to 28 U.S.C. §§ 1334(b), 157(a), (b)(1) and (b)(2)(E), (H), (K) and (O).

FACTS

Voluntary petitions were filed by four related corporate entities, namely Bennett Funding Group, Inc. ("BFG"), Bennett Receivables Corporation, Bennett Receivables Corporation II, and Bennett Management and Development Corporation (hereinafter jointly referred to as "Debtors"), on March 29, 1996.[1] On April 18, 1996, Richard C.Breeden was appointed Trustee by the Office of the U.S. Trustee pursuant to §1104 of the Bankruptcy Code (11 U.S.C. §101-1330) ("Code") in the cases of the Debtors and said appointment was approved by this Court the same day.

On September 18, 1996, the Trustee commenced an adversary proceeding against sixty banks, including those on whose behalf the motions herein have been filed. Pursuant to §§ 541,

[1]The Court approved the joint administration of the Initial Debtors on May 3, 1996.

542, 544, 547, 548 and 550 of the Code, Trustee's Complaint alleges sixteen causes of action against all sixty banks, and a seventeenth cause of action has also been asserted against fifteen of the sixty banks. The Trustee seeks a determination of the nature and extent of the defendants'/banks' interests in various property and recovery of certain property on behalf of the Debtors' estates.

The Movants seek dismissal of the Complaint or, in the alternative, an order requiring the Trustee to file more definite statements pursuant to Rule 7012(b) of the Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P."), which incorporates by reference Rule 12(e) of the Federal Rules of Civil Procedure ("Fed.R.Civ.P."). As a basis for dismissal the Movants have asserted improper service of the summons and complaint pursuant to Fed.R.Bankr.P. 7004(f) and 7004(h). They have also alleged misjoinder of the parties pursuant to Fed.R.Civ.P. 21, incorporated by reference in Fed.R.Bankr.P. 7021.

With respect to their request for a more definite statement, the Movants make the argument that the Trustee has failed to comply with the requirements of Fed.R.Bankr.P. 7008, 7009 and 7010. They contend that the Trustee fails to state a claim upon which relief may be based. In particular, they assert that the Trustee has merely set forth the statutory predicates for a number of his claims, without setting forth sufficient facts to which the Movants might respond. For instance, in many instances the Trustee has not identified specific dates of transactions or the amounts involved in the particular transactions. The argument is also made that the Trustee, while citing to Article 10 of the New York Debtor & Creditor Law, has not identified the sections of the statute on which he is relying. With respect to the seventh through the sixteenth causes of action, Movants also point out that the legal issues that have been raised in the Complaint are

those already raised by the Banks in their motions seeking relief from the automatic stay pursuant to Code § 362(d) and should be dismissed.

Fed.R.Civ.P. 20 and 21 - Joinder of Defendants

Fed.R.Civ.P. 20, incorporated by reference in Fed.R.Bankr.P. 7020, addresses permissive joinder of parties. While the rule is to be liberally construed, *In re Lee Way Holding Co.*, 104 B.R. 881, 884 (Bankr. S.D.Ohio 1989) (citations omitted), nevertheless there are two tests set forth in the rule that must be met in order for joinder to be permitted (*see Kenvin V. Newburger, Loeb & Co.*, 37 F.R.D. 473, 475 (S.D.N.Y. 1965)). First, the right to relief that the Trustee seeks must be "in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences." Fed.R.Civ.P. 20. Second, there must be a question of law or fact that is common to all the banks. *See id.*

The cases reviewed by the Court in this regard make it clear that joinder of defendants is not to be permitted simply because a plaintiff had similar dealings with all the defendants. *See e.g. id.* (indicating that even if there had been a common factoring arrangement of which all the defendants had knowledge in connection with the extension of credit to the plaintiff for the purchase of securities, the right to relief did not arise out of the same transaction or series of transactions. The court noted that the transactions involved different amounts and different securities and occurred on different dates.); *In re Cofrancesco*, 191 B.R. 370, 371 (Bankr. N.D.Ohio 1996) (stating that debtor had not demonstrated any connection between the student loans received from one lender and those received from other lenders who had been named as defendants); *but see Lee Way Holding Co.*, 104 B.R. at 184 (finding that although there was no

relationship between the defendants and each claim arose out of a separate and distinct transaction, there was a sufficient similarity in the situations to satisfy Rule 20, particularly in light of the fact that the defendants had filed a combined answer and affirmative defenses).

Trustee attempts to distinguish *In re M & L Business Mach. Co., Inc.*, 132 B.R. 433 (Bankr. D.Colo. 1991), a case cited by the Movants. In *M & L* the trustee filed a complaint against several defendants in an effort to recover funds allegedly transferred by the debtor to the defendants postpetition. Eleven of the fourteen causes of actions were asserted against individual defendants. For instance, the ninth claim for relief sought recovery of the proceeds of nineteen checks issued to one defendant by the debtor. The court concluded that joinder was not proper.

In the matter *sub judice* the Trustee asserts that unlike the case in *M & L* all but the last cause of action are equally applicable to all of the named defendants and that joinder should be permitted. Whether or not the Trustee's argument has merit is difficult to ascertain as the Complaint sets forth very little in the way of factual background, perhaps under the assumption that the Court, as well as the Banks, are familiar with the events which occurred prepetition between BFG and the Banks. Trustee does assert that the "[d]efendants are financial institutions that have asserted interests in certain leases . . . in certain office equipment leased pursuant to the leases . . . and in the proceeds thereof." *See* ¶6 of the Complaint. However, this statement is insufficient to demonstrate to the Court the basis for joinder of these particular defendants. *See Abdullah v. Acands, Inc.*, 30 F.3d 264, 268 n.5 (1st Cir. 1994) (finding that the complaint "was bereft of factual allegations" as to why the plaintiffs and defendants belonged in the same action).

There are no facts alleged in the Complaint that the defendants were involved in the same transaction or same series of transactions with the Debtors. Indeed, at least one of the Movants

has alleged that "[t]here is absolutely no connection whatsoever between the defendants except that the defendants have filed lift stay motions involving very separate and distinct lease transactions with one or more of the Debtors." *See* Motion of Bond, Schoeneck, King, LLP, dated October 21, 1996.

Although misjoinder does not provide a basis for dismissal, Fed.R.Civ.P. 21, the Court concludes that in the absence of any factual basis for joinder of the defendants, all defendants except the first-named defendant, Bank of Herrin ("Herrin"), should be dropped from this adversary proceeding. This conclusion should in no way prejudice the Trustee from commencing separate adversary proceedings against the other banks since he has until March 29, 1998, to bring any avoidance actions under Code §§ 544, 545, 547, 548 or 553 pursuant to Code §546(a)(1)(A).

Dismissal pursuant to Fed.R.Civ.P. 12(b)(4) or (5)

The Court must next examine whether dismissal of the Complaint is appropriate with respect to Herrin. Bond, Schoeneck & King LLP ("Bond Schoeneck"), on behalf of Herrin, asserts that the Complaint should be dismissed pursuant to Fed.R.Civ.P. 12(b)(4) and 12(b)(5), incorporated by reference in Fed.R.Bankr.P. 7012, based on improper service of the summons and complaint pursuant to Fed.R.Bankr.P. 7004(f).[2]

Rule 7004(f) requires that delivery of the summons and complaint be made within ten (10) days following the issuance of the summons. In this case, the summons was issued on

[2]Unlike some of the other Movants, Bond Schoeneck has not asserted improper service pursuant to Fed.R.Bankr.P. 7004(h), which requires service on an insured depository institution be made by certified mail addressed to an officer of the institution.

September 18, 1996. According to the Affidavit of Service filed with the Court on October 9, 1996, the summons and complaint were served on Ed Goodwin, The Bank of Herrin, P.O. Box B, Herrin, Illinois 62948, by regular first class mail on September 27, 1996 (*see* Exhibit "A" of Trustee's Objection to Motion to Dismiss by Various Banks, filed December 9, 1996). In the absence of any evidence to the contrary, the Court concludes that there is no basis to dismiss the Complaint pursuant to Fed.R.Civ.P. 12(b)(4) or (5).

Dismissal pursuant to Fed.R.Civ.P. 12(b)(6) or a More Definite Statement pursuant to Fed.R.Civ.P. 12(e)

Bond Schoeneck also asserts that dismissal of the Complaint is appropriate pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted. In the alternative, Bond Schoeneck seeks an order requiring the Trustee to file a more definite statement pursuant to Fed.R.Civ.P. 12(e).

A motion seeking dismissal of a complaint pursuant to Fed.R.Civ.P. 12(b)(6) early on in the litigation is to be carefully scrutinized. *See In re Mr. Goodbuys of New York Corp., Inc.*, 164 B.R. 24, 27 (Bankr. E.D.N.Y. 1994) (citation omitted). In considering the motion the Court is to focus its inquiry solely on the legal sufficiency of the Complaint, including any statements or documents attached thereto as exhibits or "clearly incorporated by reference in the pleading." *Id.* (citations omitted). Furthermore, the Complaint is to be viewed in the light most favorable to the plaintiff. *Id.* (citations omitted).

Whether or not the Trustee will prevail on his causes of action is not for the Court to decide in connection with a motion to dismiss. *See Scheur v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974). The important consideration for the Court is whether the

Trustee is entitled to offer evidence in support of each of his claims set forth in the Complaint. *See id.* Dismissal should not be granted unless "'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Id.* (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957)); *see also In re Houbigant, Inc.*, 188 B.R. 347, 352 (Bankr. S.D.N.Y. 1995) (citations omitted).

Fed.R.Civ.P. 8(a), made applicable to this proceeding by Fed.R.Bankr.P. 7008, requires that the Complaint provide "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2). All that is required is a "general summary of a claim, not the pleading of fact or detail . . . " *In re Rave Communications, Inc.*, 138 B.R. 390, 394 (Bankr. S.D.N.Y. 1992) (citation omitted).

Fed.R.Civ.P. 9(b) requires that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." The courts have been inclined to be more flexible in bankruptcy cases in applying the rule, recognizing that often it is the trustee that is alleging fraud based on secondhand information. *See In re O.P.M. Leasing Services, Inc.*, 32 B.R. 199, 202 (Bankr. S.D.N.Y. 1983). In *O.P.M.* the court attempted to reconcile the particularity requirements of Fed.R.Civ.P. 9(b) with the short and plain statement requirement of Fed.R.Civ.P. 8(a) by insisting that if the trustee pleads "upon information and belief" when alleging fraud that he provide a statement of the facts upon which the belief is based. *See id.* at 204 (citations omitted).

In this case, in his fifth and sixth causes of action the Trustee alleges upon information and belief that there were fraudulent conveyances made to Herrin in the form of substituted leases for which no consideration was given (*see* ¶29 and ¶35 of the Complaint). The Trustee should

be required to amend his Complaint with respect to these two causes of action to provide Herrin with the facts upon which the general allegations were made.

With respect to all the other causes of action in the Complaint, except for the seventeenth which is not applicable to Herrin, the Court agrees with the Trustee that the pleadings conform to the requirements set forth in Fed.R.Civ.P. 8(a) and do not require further amendment at this stage of the litigation. Herrin has failed to establish that the Trustee will be unable to prove any facts to support his various claims as alleged in the Complaint.

With respect to Bond Schoeneck's request for a more definite statement pursuant to Fed.R.Civ.P. 12(e), the Court finds no basis for granting the request. Fed.R.Civ.P. 12(e) is intended to provide a method for clarifying ambiguities in the Complaint in order for the defendant to formulate a more intelligent response. *See Kellogg v. Great Am. Indemnity Co., 11 F.R.D. 168, 169 (W.D.La. 1951).* With the dropping of the other defendants from the proceeding there is no longer a need to clarify, for example, "to which of the 60 unrelated defendants a debt is owed" or whether Trustee is claiming "that each of the 60 defendants are equally liable for payments allegedly made by an unidentified debtor", as alleged in his first cause of action. Herrin should be able to respond to the averments in the Complaint without concerns as to whether the statement is actually applicable to other banks than itself. The fact that the Trustee has not identified which of the Debtors actually was involved in the alleged transactions is a matter which may be resolved more appropriately through discovery. *See id.* (stating that Rule 12(e) is not a mechanism by which to obtain information that is more appropriately gleaned from discovery).

In regards to Herrin's argument that the seventh through sixteenth causes of action raise

the very issues found in Herrin's lift stay motion and should be dismissed, the Court also concurs with the Trustee's position that the affirmative relief he seeks in the context of this adversary proceeding would not be available to him in the context of Herrin's motion for relief from the automatic stay. Even if the Court were to deny the relief sought by Herrin in connection with its lift stay motion, the Trustee would still find it necessary to have the Court determine ownership issues and lien avoidance issues raised by the Trustee in his Complaint which are not ripe for decision in the context of Herrin's lift stay motion.[3]

Based on the foregoing, it is hereby

ORDERED that all the defendants except Herrin are hereby dropped from this proceeding without prejudice to the Trustee to refile individual adversary proceedings against such defendants; it is further

ORDERED that Bond Schoeneck's motion on behalf of Herrin for dismissal of the Complaint pursuant to Fed.R.Civ.P. 12(b)(4), (5) and (6) is denied, except to the extent that the Trustee is required to amend his Complaint pursuant to Fed.R.Civ.P. 9(b) with respect to the fifth and sixth causes of action alleging fraudulent conveyances in compliance with the decision herein; and it is further

ORDERED that Bond Schoeneck's motion on behalf of Herrin for a more definite statement pursuant to Fed.R.Civ.P. 12(e) is denied.

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[3]At the status conference on December 12, 1996, held in connection with the banks' motions to lift the automatic stay, the Court was assured that discovery would be complete by the end of the year. The Court indicated that it intended to begin hearings on the motions in February or March 1997. It would appear that any issues germane to the adversary proceeding herein will have been resolved in advance of any trial. Therefore, the Court deems it unnecessary to impose any sort of stay with respect to the issues raised in the seventh through sixteenth causes of action as Bond Schoeneck has suggested might be appropriate.

Dated at Utica, New York

this 2nd day of January 1997

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge