



ENTERED

TAWANA C. MARSHALL, CLERK
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The following constitutes the order of the Court.

Signed July 7, 2004.

United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	
WESTERN NATURAL GAS, L.L.C.,	§	CASE NO. 01-36710-SAF-7
DEBTOR(S).	§	
	§	
SCOTT M. SEIDEL, CHAPTER 7	§	
TRUSTEE,	§	
PLAINTIFF,	§	
	§	
VS.	§	ADVERSARY NO. 03-3630
	§	
DENNIS G. McLAUGHLIN, III,	§	
et al.,	§	
DEFENDANTS.	§	

MEMORANDUM OPINION AND ORDER

Dennis G. McLaughlin, III, one of the defendants, moves the court to dismiss the complaint pursuant to Fed. R. Civ. P. 12 (b)(6), made applicable by Bankruptcy Rule 7012. Scott Seidel, the plaintiff and the Chapter 7 trustee of the bankruptcy estate of Western Natural Gas, L.L.C., the debtor, opposes the motion. The court conducted a hearing on the motion on June 2, 2004.

According to the complaint, McLaughlin and the other defendants had been the directors, officers and/or shareholders of Western Natural Gas, were involved in the business, and were insiders of the debtor. Seidel alleges that the defendants authorized and/or failed to protect the debtor from improper preferential and fraudulent transfers. Seidel further alleges that the defendants authorized improper loans to or on behalf of insiders, in violation of their fiduciary duties to the debtor. Seidel contends that the defendants approved transactions resulting in a conflict of interest and a violation of their duty of loyalty and care to the debtor. Complaint par. 14-22. Seidel alleges claims for breach of trust fund duties, breach of fiduciary duty, negligence and gross negligence, exemplary damages and attorney's fees. McLaughlin moves to dismiss all five claims.

Counts 1, 2 and 3

Count one alleges a claim for breach of trust fund duties. Count two alleges a claim for breach of fiduciary duties. Count three alleges a claim for negligence and gross negligence. At the hearing, McLaughlin moved to dismiss all three counts under Fed. R. Civ. P. 8(a), made applicable by Bankruptcy Rule 7008, and Rule 12(b)(6).

Rule 8(a) requires that a pleading alleging a claim for relief contain "a short and plain statement of the claim showing

that the pleader is entitled to relief." Rule 12(b)(6) permits a defendant to move to dismiss a pleading for failure to state a claim upon which relief may be granted. The court must determine, in the light most favorable to the plaintiff, whether the complaint states any valid claim for relief. Cinel v. Connick, 15 F.3d 1338 (5th Cir. 1994). A complaint may not be dismissed for failure to state a claim "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." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The court must accept as true all well-pleaded allegations contained in the plaintiff's complaint. Albright v. Oliver, 510 U.S. 266, 268 (1994). The facts pled must be specific, however, and not merely conclusory. Guidry v. Bank of La Place, 954 F.2d 278, 281 (5th Cir. 1992).

Seidel premises count one on the Texas trust fund doctrine. Texas law imposes fiduciary duties on an officer and/or director of a corporation, which include duties of care, obedience and loyalty. Gearhart Indus., Inc. v. Smith Int'l, Inc., 741 F.2d 707, 719-21 (5th Cir. 1984). In addition, the directors have a minimum "duty and responsibility to protect the corporation against acts adverse to the interest of the corporation, whether perpetrated by fellow directors or by strangers to the corporation." Int'l Bankers Life Ins. Co. v. Holloway, 368 S.W.2d 567, 580 (Tex. 1963).

For a solvent corporation, the duty applies to the corporation and its shareholders. Upon insolvency, the fiduciary duty owed to the shareholders may shift to the creditors. Under the Texas trust fund doctrine, "when a corporation (1) becomes insolvent and (2) ceases doing business . . . [t]he officers and directors hold the corporate assets in trust for the corporate creditors ." Hixson v. Pride of Texas Distrib. Co., Inc., 683 S.W.2d 173, 176 (Tex. App.--Fort Worth 1985, no writ).

Applying these standards, Seidel alleges that the debtor was insolvent during all relevant times. Seidel does not allege that the debtor had ceased doing business during the relevant times. The complaint therefore does not state a claim under the trust fund doctrine.

In count two, Seidel alleges that the defendants were directors and officers of the debtor and, while acting in that capacity, breached their fiduciary duty to the debtor for the transactions generally described in paragraphs 14 to 22 of the complaint. The complaint does not state a short and plain statement of the claim as it pertains to McLaughlin. While the complaint alleges that all the defendants were directors or officers and/or shareholders and insiders of the debtor, the complaint contains no specific allegation concerning McLaughlin. The complaint does not specifically allege that he was an officer or director at the time of the transactions. The complaint does

not allege when the transactions occurred or who had been involved. The complaint does not contain a short and precise statement of what McLaughlin is alleged to have done. The complaint does not allege McLaughlin's involvement in any specific action or transaction. As a result, the complaint does not comply with Rule 8(a) and, consequently, does not state a claim for relief.

In count three, Seidel alleges claims for negligence and gross negligence. For negligence, Seidel must establish a duty for a person to conform to a certain standard of conduct for the protection of others against unreasonable risks, a failure of the person to conform to that duty, a reasonably close causal connection between the conduct and resulting injury, and actual loss or damages. Eimann v. Soldier of Fortune Magazine, Inc., 880 F.2d 830, 834 (5th Cir. 1989). Gross negligence, on the other hand, is an entire want of care that would raise the belief that the act or omission complained of was the result of a conscious indifference to the rights or welfare of the person affected by it. Jones v. Texaco, Inc., 945 F.Supp. 1037, 1048 (S.D. Tex. 1996)(citing Burk Royalty Co. v. Walls, 616 S.W.2d 911, 920 (Tex. 1981)).

Seidel alleges that the defendants, as officers and directors of the debtor, owed the debtor a duty of reasonable prudence. Seidel alleges that the defendants breached that duty

by their acts, errors and omissions, thereby damaging the debtor. As with his allegations concerning breach of fiduciary duties, Seidel does not lodge any specific allegation against McLaughlin. He does not allege how McLaughlin failed to conform to the duty of reasonable prudence. He does not allege what McLaughlin's conduct had been. He does not allege facts from which the court could infer that McLaughlin acted with a conscious indifference to the rights or welfare of the debtor. As a result, the complaint does not comply with Rule 8(a) and, consequently, does not state a claim for relief.

Counts 4 and 5

At the hearing, McLaughlin moved to dismiss counts four and five under both Rules 8(a) and 12(b)(6). In count four, Seidel requests the recovery of exemplary damages, alleging that the defendants have caused harm to the debtor by their malicious, willful, and fraudulent conduct and/or gross negligence. During the hearing on the motion to dismiss, Seidel clarified that he did not allege a fraud claim against McLaughlin. Texas law permits recovery of punitive damages for gross negligence. Tex. Civ. Prac. & Rem. Code § 41.003 (2003) ("[E]xemplary damages may be awarded only if the claimant proves by clear and convincing evidence that the harm with respect to which the claimant seeks recovery of exemplary damages results from: (1) fraud; (2) malice; or (3) gross negligence." Because the court has found

that count three does not meet the standards of Rule 8(a), the premise for count four fails.

In count five, Seidel alleges a claim for attorney's fees. Under Texas law, attorney's fees may be recovered on certain claims, namely if the claim is for "(1) rendered services; (2) performed labor; (3) furnished material; (4) freight or express overcharges; (5) lost or damaged freight or express; (6) killed or injured stock; (7) a sworn account; or (8) an oral or written contract." Tex. Civ. Prac. & Rem. Code § 38.001 (1997). Given the above holdings, the court cannot find a basis for the award of attorney's fees.

Leave to File Amended Complaint

In the event this court dismisses the complaint, Seidel requests that he be given an opportunity to amend the complaint. Leave to amend should be freely granted. McLaughlin cannot complain about the timing of this request, as the court scheduled the hearing on the motion to dismiss based on motions of the parties. Seidel should be given an opportunity to address the Rule 8(a) defects and, in doing so, he may address the Rule 12(b)(6) issues as well. The court finds cause to permit Seidel to file an amended complaint. Fed. R. Civ. P. 15(a), made applicable by Bankruptcy Rule 7015.

Order

Based on the foregoing,

IT IS ORDERED that the motion to dismiss filed by Dennis G. McLaughlin, III, is **GRANTED**.

IT IS FURTHER ORDERED that the plaintiff, Scott Seidel, may serve and file an amended complaint within fourteen days from the date of entry of this order.

IT IS FURTHER ORDERED that, in the event Scott Seidel serves and files an amended complaint, Dennis G. McLaughlin, III, shall serve and file an amended answer with affirmative defenses within fourteen days of service of the amended complaint.

IT IS FURTHER ORDERED that the pretrial conference is continued to August 9, 2004, at 2:30 p.m.

###END OF ORDER###