The following constitutes the order of the Court.

Signed June 4, 2004.

United States Bankruptcy Judge

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

IN RE:	§	
	§	
CARESELECT GROUP, INC.,	§	CASE NO. 01-81127-SAF-7
	§	
D E B T O R.	§	
	§	
JOHN H. LITZLER, TRUSTEE FOR THE ESTATE OF CARESELECT GROUP, INC., and TEXAS CSG, LLC, and DANIEL J. SHERMAN, TRUSTEE FOR SELECT PRACTICE MANAGEMENT, L.P.,	§	
PLAINTIFFS,	§	
	§	
VS.	§	ADVERSARY NO. 03-3999
	§	
GREGORY SAMBERSON, et al.,	§	
DEFENDANTS.	§	

MEMORANDUM OPINION AND ORDER

Three defendants, Gregory Samberson, Marshall V. Rozzi and Thomas Erickson, move to dismiss the complaint pursuant to Fed. R. Civ. P. 8(a), 9(b) and 12(b)(6), made applicable by Bankruptcy

Rules 7008, 7009 and 7012. The plaintiffs, John H. Litzler and Daniel J. Sherman, oppose the motion. The court conducted a hearing on the motion on March 30, 2004.

Litzler is the trustee of the Chapter 7 bankruptcy estate of CareSelect Group, Inc. According to the complaint, CareSelect had been a holding company for entities providing management, administrative and overhead-type services for medical practices. The complaint alleges that Samberson, Rozzi and Erickson had been officers and directors of CareSelect. CareSelect owned 100 percent of Texas CSG, LLC, which was the general partner of Select Practice Management, L.P. Sherman is the trustee of the Chapter 7 bankruptcy estate of Select Practice. The complaint alleges that Select Practice implemented management service agreements with medical practices. The complaint further alleges that Erickson had been the manager of Texas CSG, Select Practices' general partner. CSG Nevada, LLC, had been the limited partner of Select Practice. Samberson had been the manager of CSG Nevada.

Litzler and Sherman allege that the defendants devised a divestiture package for CareSelect and Select Practice, called "unwind transactions," that transferred assets for insufficient value, preferentially paying some creditors while not paying other creditors, terminating a contractual relationship with medical providers, yet leaving the debtors insolvent. In a

seven-count complaint, Litzler and Sherman allege claims for breach of fiduciary duty to creditors, breach of fiduciary duty to the debtors, waste and negligence, receipt and approval of payments for less than fair value, procurement of a breach of contract, fraudulent transfer and attorney's fees. The defendants move to dismiss these claims. Count six, fraudulent transfer, does not apply to these defendants and is, therefore, not considered by the court on this motion.

Counts 1, 2 and 3

Count one alleges a claim for breach of fiduciary duty to creditors. Count two alleges a claim for breach of fiduciary duty to the debtors. Count three alleges a claim for waste and negligence by the defendants as officers and directors. The defendants move to dismiss all three counts under Rules 8(a) and 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 plaintiffs, 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).

Litzler and Sherman premise 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). The duties apply to persons in control of the general partner of a partnership as well. LSP Inv. P'ship v. Bennett (In re Bennett), 989 F.2d 779, 789 (5th Cir. 1993). 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). Logically, it follows that the doctrine would apply in a wind-down or dissolution of a corporation.

Applying these standards, the complaint states a short and plain statement of the claim. Litzler and Sherman allege that the defendants, as officer and directors, and as control persons, liquidated the assets of the debtors, in an "unwind" transaction, while the debtors were insolvent. In the process, Litzler and Sherman allege that the defendants violated their duty to the creditors of the debtors. They allege that the liquidation paid some creditors in preference over others, leaving some creditors unpaid while obtaining less than fair value for the assets of the debtors. Accepting the allegations as true, the court cannot conclude that the plaintiffs cannot prove a set of facts for recovery under count one. The motion to dismiss count one will be denied.

The defendants contend that, assuming the application and violation of the doctrine, Litzler and Sherman may only recover the value of corporate assets transferred to or held by them. See N. Am. Sav. Ass'n v. Metroplex Dev., 931 F.2d 1079-80 (5th Cir. 1991). Litzler and Sherman do not allege in count one that the defendants received or held assets of the debtor. But, in

count four, Litzler and Sherman attempt to allege transfers to the defendants. As discussed below, the court is providing the plaintiffs with an opportunity to replead that count. Given that opportunity, it is premature to dismiss count one on this issue.

In count two, Litzler and Sherman allege that the defendants breached their fiduciary duty to the debtors and, in count three, allege that the defendants committed acts of waste and negligence. The defendants contend that the Texas business judgment rule protects their acts. Litzler and Sherman counter that the rule either does not apply or, if it applies, the defendants failed to perform under the rule.

Under the Texas business judgment rule, "Texas law imposes liability only for grossly negligent violations of the duty of care." Resolution Trust Corp. v. Acton, 844 F.Supp. 307, 313 (N.D. Tex. 1994). "The negligence of a director, no matter how unwise or imprudent, does not constitute a breach of duty if the acts of the director were 'within the exercise of their discretion and judgment in the development or prosecution of the enterprise in which their interests are involved.'" Id. at 313-14, quoting Cates v. Sparkman, 11 S.W. 846, 849 (1889). If the director or officer is not an interested person, Texas law does not impose liability unless the challenged action is ultra vires or tainted by fraud or unless the director or officer abdicates his responsibilities and fails to exercise any judgment.

Resolution Trust, 844 F.Supp. at 314. But, "the business judgment rule extends only as far as the reasons which justify its existence. Thus, it does not apply in cases, e.g., in which the corporate decision lacks a business purpose, is tainted by a conflict of interest, is so egregious as to amount to a no-win decision, or results from an obvious and prolonged failure to exercise oversight or supervision." Id. at 314, quoting Joy v. North, 692 F.2d 880,886 (2d Cir. 1982), cert. denied, 460 U.S. 1051 (1983)(discussing Connecticut business judgment rule). Case law suggests that while the business judgment rule may apply to the decisions of solvent corporations, it does not apply to a conservatorship. Unsecured Creditors Comm. v. General Homes Corp. (In re General Homes Corp.), 199 B.R. 148, 151-52 (S.D. Tex. 1996). That, in turn, suggests that the rule would not apply to a wind-down of an insolvent corporation. Mims v. Kennedy Capital Mgmt., Inc. (In re Performance Nutrition, Inc.), 239 B.R. 93, 111 (Bankr. N.D. Tex. 1999). Furthermore, the rule does not apply to transactions outside the ordinary course of business for the entity. General Homes, 199 B.R. at 151-52.

In counts two and three, Litzler and Sherman allege that the defendants did not maximize the value of assets while winding down the affairs of the insolvent entities; that they favored some creditors over others; that they permitted preferential or fraudulent transfers to be made by the debtors; that they had

conflicts of interest; and that they mismanaged the business. The complaint contains a short and plain statement of both claims. Accepting the allegations as true, the court cannot conclude that the plaintiffs cannot establish a set of facts that would either make the business judgment rule inapplicable or, if applicable, would not support a conclusion that the defendants violated the rule. The plaintiffs have alleged insolvency and transactions outside the ordinary course of business. The plaintiffs have further alleged conflicts of interest, negligence, and failure to exercise care and supervision over the transactions. The motions to dismiss these counts must be denied.

Count 4

In count four, Litzler and Sherman allege that the defendants received and approved payments for assets at less than fair value. They allege that the defendants, as officers and directors, "may have received and/or approved payments to themselves or some of them for less than fair value." Litzler and Sherman seek a judgment for the return of these alleged payments.

The defendants move to dismiss under both Rules 8(a) and 12(b)(6). Litzler and Sherman have not met the standard of either rule. Alleging what the defendants "may" have done does not amount to a short and plain statement of what they did.

Similarly, if the plaintiffs prove something may have happened would not entitle them to judgment unless the event did happen. The count sounds as if Litzler and Sherman are asserting claims under 11 U.S.C. §§ 544 and 548 or possibly the Texas trust fund doctrine, but they have not alleged the application of those statutes or doctrine. Consequently, the count must be dismissed, but with leave to replead within fourteen days from the date of entry of this order.

Count 5

In count five, Litzler and Sherman allege that the defendants procured the breach of Select Practice's partnership agreement. They allege that the defendants caused or allowed the breach of the partnership agreement, thereby further causing the disposition of assets for less than fair value. The defendants move to dismiss under Rules 8(a) and 12(b)(6). The complaint contains a short and plain statement of the claim. Accepting the allegations of the complaint as true, the plaintiffs may establish that the three defendants were officers and directors of CareSelect, the parent corporation, with control over the subsidiaries, with one of them in control of the general partner of Select Practice and another one of them in control of the limited partner. In these positions, the court cannot conclude that the plaintiffs cannot prove a set of facts that the method of disposition of the assets, if at the direction of the

defendants, did not breach the partnership agreement. The motion to dismiss must be denied.

Count 7

In count seven, Litzler and Sherman request the recovery of attorney's fees. The defendants move to dismiss this count under Rule 12(b)(6). Under Texas law, attorney's fees may be recovered on a contract claim. Tex. Civ. Prac. & Remedies Code § 38.001. Accepting the allegations of the complaint as true, the court cannot conclude, at this stage of the proceeding, that the plaintiffs can prove no contract claim. The motion must therefore be denied.

Other issues

The defendants move to dismiss several counts under Rule 9(b). Litzler and Sherman respond that they have not intended to allege a claim for fraud or misrepresentation. The motion will therefore be denied as moot. The defendants observe that Rozzi was not an officer or director or member of Select Practice or its general or limited partner. The point is noted but does not impact the ruling on the motion to dismiss.

Order

Based on the foregoing,

IT IS ORDERED that the motion to dismiss counts one, two, three, five and seven is **DENIED**.

IT IS FURTHER ORDERED that the motion to dismiss count four

is **GRANTED**, but the plaintiffs may replead count four within fourteen (14) days from the date of entry of this order.

IT IS FURTHER ORDERED that the motion to dismiss does not apply to count six.

###END OF ORDER###