

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)

PAUL F. BALTENSPERGER and)
BEVERLY J. BALTENSPERGER,)

DEBTORS)

PAUL F. BALTENSPERGER and)
BEVERLY J. BALTENSPERGER,)

Plaintiffs)

vs.)

TRAVELERS INSURANCE COMPANY;)
OTTO WELLENSIEK; FIRST NATIONAL)
BANK OF SYRACUSE; IRVING J.)
STUBBENDICK; JEFFRY A. ANDERSON,)
Attorney; MAX KELCH, Attorney;)
LARRY VOLKMER and CAROL J.)
VOLKMER, husband and wife;)
LeROY M. KREIFELS and VELDA A.)
KREIFELS, husband and wife;)
JOHN STUKENHOLTZ; and GRESS)
FARM, INC., a corporation,)

Defendants)

CASE NO. BK86-1358

A88-243

CH. 11

MEMORANDUM

Plaintiffs have filed a complaint against numerous parties, each of whom apparently have had some contact with or interest in land which was an asset of these plaintiffs' bankruptcy case. The only exception is defendant, Max Kelch, an attorney who filed a claim for a client that plaintiffs allege is a false claim.

All defendants moved to dismiss or strike or to require a more definite statement.

Hearing was held on September 19, 1988. Plaintiffs appeared by Paul Baltensperger, pro se. Defendants appeared by counsel. Argument was had. The Court took most matters under advisement pending ~~FIBED~~ review of authorities cited by the parties.

DISTRICT OF NEBRASKA
AT _____ M
OCT 21 1988
Judith M. Napier
Clerk, U.S. Bankruptcy Court
By _____ Deputy

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This memorandum concerns the disposition of the pending motions and each defendant or related group will be referred to separately.

1. Travelers Insurance Company and Jeffrey A. Anderson. Plaintiffs have filed at least two bankruptcy cases since 1986. After notice and hearing, this Court granted Travelers relief from the automatic stay in each case. Travelers proceeded to state law foreclosure judgment and sale of the Baltensperger real estate. Appeals of this Court's order granting relief did not stay the state law action. The Nebraska Supreme Court dismissed the appeal of the state court judgment and other state court orders. Sale was held.

Plaintiffs then filed this complaint alleging fraudulent conduct on behalf of Travelers and its attorney, Jeffrey Anderson, alleging procedural irregularities in state court and alleging that the state court obtained no jurisdiction over plaintiffs or over the real estate because the real estate was property of a bankruptcy estate and the automatic stay in bankruptcy either was improperly lifted or, even if it was properly lifted, debtors as debtors-in-possession were not properly served with the state court summons, thereby creating a problem with the state court proceedings.

The Court has reviewed the complaint. The Court finds that any allegations that Travelers or Anderson breached a duty to plaintiffs fails to state a claim upon which relief can be granted. Travelers and Anderson were adversaries of plaintiffs and, at least with regard to the allegations in the complaint, had no duty to plaintiffs.

The Court finds all allegations concerning the lifting of the automatic stay and the Nebraska state court procedures must be stricken. Such allegations are a collateral attack on final judgments. They do not state a claim for which relief can be granted. The appropriate forum for such relief was in the federal and state appellate system.

Plaintiffs allege conduct by Anderson concerning a motion for sanctions against plaintiffs' bankruptcy counsel has "risen to a violation of 18 U.S.C. § 1341 and 1343, with constructive intent to defraud the estate." However, the actual statutes are criminal statutes and, since the complaint apparently is based upon the fact that the Court sustained the motion for sanctions and no appeal was taken, such allegations seem to be a collateral attack on the Court's judgment sustaining the motion. In addition, the complaint seems to be asking this Court to sanction Anderson for filing a motion to sanction plaintiffs' lawyers. This Court can conceive of no legitimate claim from such allegations which would enable any relief to be granted.

Plaintiffs' complaint also contains general allegations of fraud by Travelers in Paragraph 5. Federal Rule of Civil Procedure 9(b) requires fraud to be pled with particularity. This includes the need for allegations of time, place and specific content of alleged fraudulent acts or statements.

The allegations in the complaint are not specific and do not meet Rule 9(b) requirements.

Therefore, as to Travelers and Anderson, this complaint is dismissed for failing to state a claim upon which relief can be granted and for failure to allege fraud with specificity.

2. United States Government. Plaintiffs stipulated that the government motion to dismiss could be sustained.

3. First National Bank and Otto Wellensiek, its attorney. For the same reasons and following the same analysis as in the Travelers and Anderson matters, the Court dismisses all claims by the plaintiffs alleging fraud by the defendant bank and Wellensiek.

For the same reasons and following the same analysis as in the Travelers and Anderson matter, the Court dismisses all portions of the complaint which allege violation of the automatic stay or procedural improprieties in the state court proceedings.

Plaintiffs, at Paragraph 6, allege the bank and Wellensiek are in contempt of court for failing to do certain acts. No relief can be granted on such an allegation. Contempt matters must be brought by motion and in any event, even if the acts are contemptuous, no damages are alleged.

Count III alleges at Paragraph 25-34 certain acts by Wellensiek which have harmed debtors. Considering the allegations in the light most favorable to plaintiffs for purposes of a Rule 12(b)(6) motion, such allegations could be construed as a tort claim of "interference with business relations or contract rights." Therefore, these claims will not be dismissed but debtors must amend such claims within thirty (30) days to state more specifically the claim and the damages.

4. Max Kelch and Wellensiek. Count III Paragraphs 35-38 allege Kelch and Wellensiek filed a false claim and used the mails with constructive intent to defraud. The "use of mails to defraud" seems to be based upon some criminal statute. It is not sufficiently specific and, therefore, Paragraphs 37 and 38 are stricken. The proper forum to determine the validity of a claim is in the underlying bankruptcy case. Until it is properly brought before the Court in the bankruptcy case, there can be no relief granted. Therefore, Paragraphs 35 and 36 are stricken and the complaint is dismissed as to Kelch and Wellensiek on the allegations in Paragraphs 35 and 36.

5. Irving Stubbendick. This defendant apparently is acting as a state court appointed receiver in the foreclosure case. Plaintiffs challenge his appointment. Such challenge is a collateral attack on the state court orders and cannot be litigated in this forum. Plaintiffs claim he has improperly disbursed funds. This is a state court matter and cannot be litigated in this forum. Plaintiffs claim he committed waste, failed to rent land during a certain year, and failed to pay property taxes as required or agreed upon. All of these claims arise under the receiver's state court authorized and state statute mandated duties. Since the automatic stay was lifted, the state court had the power to appoint a receiver. Any breach of duties by the receiver must be brought to the attention of the state court.

Receiver's motion to dismiss is sustained.

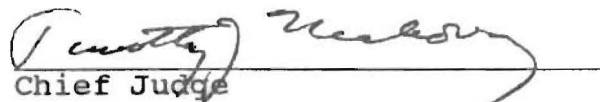
6. Larry Volkmer, Carol J. Volkmer, LeRoy Kreifels, Velda Kreifels and John Stukenholtz. These defendants purchased the real estate at foreclosure sale. The motions to dismiss and to strike Paragraphs 15, 16, 17 and 18 are sustained. As recited above, this Court granted relief from the automatic stay, foreclosure was completed, sales were held, appeals were not successful. This Court does not have subject matter jurisdiction to set aside such sales and return the land to plaintiffs. No relief can be granted.

In summary, the case is dismissed as to Travelers, Anderson, Bank, Kelch, U.S. Government, Stubbendick, Larry Volkmer, Carol Volkmer, LeRoy Kreifels, Velda Kreifels and John Stukenholtz. All claims against Wellensiek are dismissed except those allegations in Paragraphs 25-34. Plaintiffs are granted thirty (30) days to amend such paragraphs to make a more definite statement of their claim.

Journal entry shall be filed.

DATED: October 20, 1988.

BY THE COURT:


Chief Judge