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IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

UNPUBLISHED OPINION

In re	)	Bankruptcy Case No. 84C-00180
LOWELL J. STONE,	)	
Debtor.	)	
LEW JOSEPH; RALPH VANDERHEIDE; JUDITH K. VANDERHEIDE; and all others similarly situated,	)	Civil Proceeding No. 84PC-0988
Plaintiffs.	)	
-vs-	)	MEMORANDUM OPINION AND ORDER
LOWELL J. STONE, dba 550 LTD. a Utah Limited Partnership,	)	
Defendant.	)	

APPEARANCES

Joseph H. Bottum, Ogden, Utah for the plaintiffs; Richard F. Bojanowski, Salt Lake City, Utah for the defendant.

FACTUAL AND PROCEDURAL BACKGROUND

On May 18, 1984 Lew Joseph, Ralph Vanderheide, and Judith K. Vanderheide commenced a class action against Lowell J. Stone, a debtor under Chapter 7 of the Bankruptcy Code. The plaintiffs claim to be representatives of a class of investors in 550 Ltd.,

a limited partnership in which the debtor is a general partner. According to the complaint, the defendant obtained money, property, or credit from the plaintiffs by means of:

> false pretenses, and/or a false representation, and/or actual fraud . . . and/or . . . statements . . . in writing, that are or were materially false respecting the debtors [sic] and/or 550 Ltd's financial condition, which statements were reasonable [sic] relied upon by plaintiffs and others similarily [sic] situated and that were made by defendant, and/or caused to be made by defendant with intent to deceive plaintiffs and others similarily [sic] situated.

The complaint further alleges that the plaintiffs sustained damages as a direct result of the defendant's "fraud and/or defalcation . . . while acting in a fiduciary capacity and/or in the alternative . . . embezzlment [sic] or larceny committed by defendant."

The defendant responded with a motion to dismiss for failure to state a cause of action and requested a ruling pursuant to Local Rule 5(i), which provides for the disposition of unopposed motions without a hearing.

The Court, because it could not find the underlying motion in the file, entered an order on September 13, 1984 striking the request for a ruling. The motion was subsequently discovered in the file of a related matter. With the motion now before it, the Court vacates its earlier order of September 13, 1984 and rules on the merits of the motion.

DISCUSSION

This motion to dismiss attacks the cause of action on two counts: (1) that the plaintiffs have failed to certify their class action, and (2) that they have failed to plead fraud with sufficient particularity.

Failure to Certify a Class Action

The Court finds that failure to certify a class action is not grounds for the dismissal of this proceeding. Rule 23 of the Federal Rules of Civil Procedure, a provision made applicable to this proceeding by Bankruptcy Rule 7023, sets forth a complex set of prerequisites and qualifications to the maintenance of class actions. It contains the following language in subparagraph (c)(1):

> As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

This language makes clear that certification is necessary for the maintenance of a cause of action in the form of a class

action. The rule does not say, however, that failure to certify is grounds for dismissal.

The Advisory Committee Note to Rule 23 states:

> A negative determination means that the action should be stripped of its character as a class action . . . . Although an action thus becomes a nonclass action, the court may still be receptive to interventions before the decision on the merits.

(Emphasis added.) This note clearly contemplates that claims originally filed as class actions may be maintained as nonclass actions and that dismissal is not the necessary or even appropriate consequence of failure to certify.

The plaintiffs' failure to certify their class action is not determinative of whether or not they have a claim upon which relief can be granted. The Court will not grant the defendant's motion to dismiss on this ground.

Failure to Plead Fraud with Particularity

Rule 9(b) of the Federal Rules of Civil Procedure, which applies here because of Bankruptcy Rule 7009, provides: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." This requirement normally means that "the pleader must state the time, place and content of the false misrepresentation, the fact

misrepresented and what was obtained or given up as a consequence of the fraud." 2A MOORE'S FEDERAL PRACTICE ¶ 903(2d ed.).

The plaintiffs have failed to comply with Rule 9(b). As can be seen from the portions of the complaint quoted above, the plaintiffs allege that the defendant's actions fit into several categories of fraudulent activity described in Section 523 of the Bankruptcy Code, but they supply absolutely no facts or circumstances to support their allegations. The plaintiff's cause of action must be dismissed for this lack of specificity.

The Court is aware that the particularity required under Rule 9(b) is often interpreted with greater liberality in a bankruptcy setting. In re Germain, 144 F.Supp. 678 (S.D. Cal. 1956); Annot. 27 A.L.R.Fed 452 (1976). A liberal application of the rule is most appropriate where the plaintiff is the trustee or another third party who must plead fraud on secondhand knowledge of the facts. In re O.P.M. Leasing Service, Inc., 32 B.R. 199, 203 (Bky. S.D. N.Y. 1983). Here, however, the plaintiffs were parties to the alleged fraudulent transactions. If they do not have complete knowledge of the facts, they are at least sufficiently acquainted with the transactions in which they themselves participated to be able to state a few of the facts with particularity. For this reason, the Court is not inclined to apply Rule 9(b) with liberality in this proceeding.

Accordingly, it is hereby ORDERED that the complaint be and is herewith dismissed without prejudice.

DATED this 10 day of December, 1984.

BY THE COURT:

Glen E. Clark

GLEN E. CLARK
UNITED STATES BANKRUPTCY JUDGE