

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT**

In re:

**GERARD M. COSTELLO and
KATHLEEN D. COSTELLO,
Debtors.**

**Chapter 11 Case
03-11517**

**GERARD M. COSTELLO and
KATHLEEN D. COSTELLO,
Plaintiffs,**

v.

**TODD ENRIGHT and
MIDDLEBURY EQUITY
PARTNERS, LLC,
Defendants.**

**Adversary Proceeding
04-1016**



ORDER
CONDITIONALLY GRANTING
DEFENDANTS' MOTION FOR DISMISSAL AND MORE DEFINITE STATEMENT

On March 9, 2004, the Plaintiffs filed a Complaint seeking a declaratory judgment on allegations of fraudulent conveyance, consumer fraud, breach of contract and violation of the automatic stay. See doc. #1. On April 8th the Defendants responded by filing a motion to Dismiss Adversary Proceeding Under Fed. R. Civ. P. 9(b) and For More Definite Statement Under Fed. R. Civ. P. 12(e), and a Supporting Memorandum of Law. See docs. #4 & 5. The Plaintiffs have not responded to the Defendants' Motion. For the reasons stated below, the Court conditionally grants the Defendants' Motion.

Upon consideration of the Defendants' Motion and the Plaintiffs' Complaint, and accepting all the allegations in the Complaint as true and drawing all inferences in favor of the Plaintiffs, see Suez Equity Investors v. Toronto-Dominion Bank, 250 F.3d 87, 95 (2d Cir. 2001), the Court makes the following findings.

A. Regarding Count 1 (Fraudulent Conveyance) and Count 2 (Consumer Fraud)

The Defendants seek the dismissal of Counts 1 and 2 of the Complaint, the Plaintiffs' fraud-based causes of action, arguing that the Plaintiffs have failed to plead these causes of action with particularity, as required by Fed. R. Civ. P. 9(e). Upon careful examination of the Plaintiffs' fraud claims, the Court finds the Plaintiffs have failed to plead those claims with the requisite particularity. See Fed. R. Civ. P. 9(e); Fed. R. Bankr. P. 7009. In Suez Equity Investors, 250 F.3d at 95, the Second Circuit has explained that this standard:

imposes an obligation on plaintiff to 'specify the statements it claims were false or misleading, give particulars as to the respect in which plaintiff contends the statements were fraudulent, state when and where the statements were made, and identify those responsible for the statements.'

Id. (quoting Cosmas v. Hassett, 886 F.2d 8, 11 (2d Cir. 1989)). The Court specifically finds the following to be examples of this lack of particularity in Plaintiffs' Complaint:

- (1) The Plaintiffs have not identified the loans to which they refer. See Compl. at ¶11.
- (2) There is no identification of the "entities" related to Defendant Enright that allegedly made loans to the Plaintiffs. See id.
- (3) The Plaintiffs fail to identify the "various representations and promises" that Defendant Enright allegedly made to them and upon which they allegedly relied. See id. at ¶¶17, 18.
- (4) There are no particulars provided as to the control the Defendants exercised over the Plaintiffs that allegedly resulted in damages to the Plaintiffs. See id. at ¶20.
- (5) The Plaintiffs fail to provide any details regarding "various refinancings" between themselves and the Defendants; likewise there are no details provided as to the "various obligations" which were allegedly paid or transfers which were made without adequate consideration. See id. at ¶21.

In light of the lack of particularity set forth with regard to the fraud allegations, the Defendants are entitled to the dismissal of Counts 1 and 2. However, in the interest of justice, the Court will provide the Plaintiffs one opportunity to amend their Complaint to remedy the deficiencies of their fraud-based pleadings. See, e.g., Luce v. Edelstein, 802 F.2d 49, 57 (2d Cir. 1986) (instructing that plaintiffs must be allowed an opportunity to amend to remedy deficiencies under Rule 9(b)).

B. Regarding Count 3 (Declaratory Judgment-Deacons), Count 4 (Breach of Contract), Count 5 (Violation of Automatic Stay) and Count 6* (Declaratory Judgment-Loans void)

Arguing that Counts 3 through Count 6 of the Complaint are so vague that the Defendants are not able to frame a good-faith response, the Defendants also request a more definite statement from the Plaintiffs, pursuant to Fed. R. Civ. P. 12(e), with regard to these causes of action. The Court finds the Defendants have sufficiently pointed out the defects complained of and the details desired. See Fed. R. Bankr. P. 7012(e). For example, the Defendants contend:

- (1) "It is impossible to tell from the Complaint what 'loan and brokerage activities . . . perpetrated in knowing and willful violation of Vermont's lending statutes' Plaintiffs may be referring to." Defs' Mem Supp. Mot. Dismiss at 3 (citing Comp. at ¶¶15, 16).
- (2) The Plaintiffs make vague reference to "'various obligations which were void' and unspecified 'contract of adhesion' and 'exorbitant fees and expenses.'" See id. (citing Comp. at ¶21).

* Plaintiffs' Complaint contains two "Count 5"s; to avoid confusion, the Court has re-numbered the second "Count 5" (identified as "Declaratory Judgment - Loans void") as "Count 6".

Its own review of the Plaintiffs' Complaint persuades the Court that the Plaintiffs' Complaint as to Counts 3 through 6 is vague and ambiguous. Even accepting all the allegations in the Plaintiffs' Complaint as true and drawing all inferences in favor of the Plaintiffs, as it must, the Court finds the Complaint is scantily pled. Thus, a more definite statement is warranted before the Defendants can frame a responsive pleading to the Plaintiffs' Complaint. See, e.g., Wallett v. Anderson, 198 F.R.D. 20 (D. Conn. 2000) ("Rule 12(e) is designed to enable a litigant to answer a complaint and is targeted at 'unintelligibility in a pleading, not just a claimed lack of detail.'" (quoting Stanton v. Manufacturers Hanover Trust Co., 388 F. Supp 11711174 (S.D.N.Y. 1975)). The Court believes a more definite statement would enhance the clarity of the Complaint. See id. at 25. Since it has already indicated that it will allow the Plaintiffs an opportunity to amend their Complaint to address deficiencies regarding Counts 1 and 2, , the Court will also direct the Plaintiffs to provide the Defendants with a more definite statement upon which the Defendants can interpose a responsive pleading to Counts 3 through 6. Accordingly,

IT IS HEREBY ORDERED that, if they wish to proceed with their fraud-based causes of action (Counts 1 and 2), the Plaintiffs shall file an amended Complaint that pleads those cause of action with the particularity required by the federal rules within two weeks of the date of this Order.


IT IS FURTHER ORDERED that, if they wish to proceed with their non-fraud causes of action (Counts 3-6), the Plaintiffs shall file a more definite statement as to each of those causes of action within two weeks of date of this Order.

IT IS FURTHER ORDERED that if the Plaintiffs file such an Amended Complaint, the Defendants' responsive pleading shall be due within two weeks of the filing of that Amended Complaint.

IT IS FURTHER ORDERED that the Defendants' motions are granted under the following terms: (1) if the Plaintiffs fail to file an Amended Complaint which complies with the directives set forth above by the close of business on May 11, 2004, and (2) the Defendants thereafter file an affidavit specifying the Plaintiffs' failure to comply with this Order, the Court shall enter an Order dismissing the Plaintiffs' Complaint with prejudice.

SO ORDERED.

Burlington, Vermont
April 27, 2004



Colleen A. Brown
United States Bankruptcy Judge