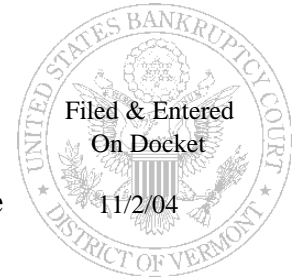


**UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT**



In re:

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

**Chapter 7 Case
03-11517**

**MIDDLEBURY EQUITY PARTNERS, LLC
and DEACON'S DEN, INC.,**

Plaintiffs,

**Adversary Proceeding
04-1054**

v.

**GERARD M. AND KATHLEEN D. COSTELLO
and DEACON'S TWO, INC.,**

Defendants.

**ORDER
DIRECTING CLARIFICATION OF PLEADINGS
AND AMENDING SCHEDULING ORDER**

Currently pending before this Court is the Plaintiffs' Motion to Sever Counterclaim and Third-Party Claims (doc. # 13), and the Joint Objection of the Trustee and Debtors to that motion (doc. # 21). At the hearing held on this motion today the Court reserved decision on the merits, noting that it would enter an Order directing clarification of the pleadings and would rule on the motion after reviewing the supplemental information to be filed.

The complaint filed in the instant adversary proceeding seeks a judgment declaring certain property of Deacon's Den, Inc., including property listed on that corporation's tax returns and on asset schedules provided to lenders, is not and never has been the property of the bankruptcy estate (doc. #1). The Plaintiffs also seek injunctive relief compelling the Defendants to return all misappropriated assets to Deacon's Den, Inc.; to cease using the name Deacon's Den; to refrain from making any representation that they or the bankruptcy estate owns or has any interest in the assets of Deacon's Den, Inc.; to provide operating reports for Deacon's Den, Inc. from the date the bankruptcy was filed; and to render a complete accounting of all revenues and expenses of Deacon's Two, Inc. since June 16, 2004, when the assets of Deacon's Den, Inc. were purportedly transferred (doc. # 1). The allegations in the above-referenced adversary proceeding arise out of a \$60,000 promissory note, and related pledge agreements, that were executed by the Debtors and Middlebury Equity Partners, L.L.C. ("MEP") on April 29, 2003 (the "\$60,000 Note"). For purposes of clarity, the instant adversary proceeding, A.P. # 04-1054, will be referred to as "the Declaratory Judgment Action."

In response to the Complaint initiating the Declaratory Judgment Action, the Defendants have raised numerous counterclaims and third party claims asserting lender liability related allegations (doc. #10). In a separate adversary proceeding, A.P. # 04-1016, the Debtors have raised similar, if not identical, claims arising from numerous promissory notes including the \$60,000 Note, a note in the amount of \$532,955.63 and a note in the amount of \$100,000. For purposes of clarity, A.P. # 04-1016 will be referred to as “the Lender Liability Action.”

The Plaintiffs’ Motion to Sever in the Declaratory Judgment Action asserts that the Defendants’ counterclaim and third party claim in the instant action should be severed because they are identical to the Debtors’ asserted causes of action against the Plaintiffs in the Lender Liability Action and hence, will be litigated in the Lender Liability Action. MEP wishes to proceed on their complaint distinct from the litigation regarding the lender liability type allegations.

After considering the papers and representations of counsel in these two adversary proceedings, as well as in the main case, it has become abundantly clear to the Court that further clarification of both the facts and the allegations is necessary. It appears to the Court that there are important issues to be addressed in these proceedings which could have a significant impact on the estate. Since the case has been converted to chapter 7, the burden of identifying, amassing and exercising control over all assets of the estate falls on the chapter 7 Trustee. Particularly in a cash business such as is at issue, the Trustee must administer the estate mindful that time is of the essence. Moreover, effective administration of the estate, and of these adversary proceedings, requires cooperation among the professionals involved. Based upon the arguments presented in the Declaratory Judgment Action, the Lender Liability Action, and various motions for relief from stay that have been tried (and are currently the subject of a motion for sanctions that is under advisement by the Court), the Court observes that the parties’ relationship is strained, to say the least. It is critical that the professionals in these proceedings rise above the differences between the parties and produce the factual support and clear legal arguments needed for an expeditious resolution of the pending motion, orderly conduct of the remaining litigation in this case, and effective administration of the estate.

AFTER DUE CONSIDERATION of the history and status of the instant Declaratory Judgment Action, as well as the Lender Liability Action and the bankruptcy case, and in an effort to streamline the litigation and assist the Trustee in obtaining the information he needs in order to proceed on behalf of the estate in each of the pending adversary proceedings,

THE COURT FINDS that the pleadings filed herein must be supplemented. Therefore,

IT IS HEREBY ORDERED that the Chapter 7 Trustee shall file a supplement to the counterclaim **no later than Monday, November 8, 2004**

- (1) clarifying the counterclaim allegations in the Declaratory Judgment Action, specifically articulating how those allegations relate to the \$60,000 Note; and
- (2) clarifying the Complaint allegations in the Lender Liability Action articulating how they specifically relate to the \$60,000 Note and to each of the other two notes.

IT IS FURTHER ORDERED that Plaintiff, MEP shall, **no later than Monday, November 8, 2004,**

- (1) submit a supplement to the complaint
 - (A) identifying with specificity the state statutes under which it proceeded when it foreclosed on the collateral pledged to secure the \$60,000 Note;
 - (B) describing all of the steps it has taken in connection with its foreclosure of the pledged securities of Deacon's Den, Inc. and the membership interests of West Dover Realty Group, L.L.C.; and
 - (C) articulating how such steps constitute compliance with applicable state statutes; and also
- (2) file any documentary evidence it has to substantiate its position that it has complied with state law and is now the rightful owner of the property in dispute.

IT IS FURTHER ORDERED that any responses to the supplements shall be filed with the Court **no later than noon on Thursday, November 11, 2004;**

IT IS FURTHER ORDERED that the time is of the essence herein and all papers directed to be filed by this Order must be filed and served on time; untimely papers shall not be considered by the Court unless an Order is entered prior to the expiration of the relevant time period, extending the time, and such relief shall not be granted unless good cause is shown or all parties stipulate to the requested enlargement of time.


IT IS FURTHER ORDERED that in light of the need for the parties to file clarifying supplements, the Court's Scheduling Order of October 22, 2004 (doc. #) is hereby amended and now directs as follows:

1. Disclosures under Fed. R. Bankr. P. 9026(a)(1) shall be made on or before October 27, 2004.
2. Both parties are to file supplements clarifying their pleadings by November 8, 2004.
3. Any responses to the supplemental clarification of pleadings shall be filed by November 11, 2004.
4. All written discovery requests shall be served and filed by November 19, 2004.

5. All depositions shall be completed by December 9, 2004.
6. All discovery shall be completed by December 13, 2004.
7. All dispositive motions shall be filed by December 17, 2004.
8. The Final Pre-Trial Statement is to be filed by 3:00 P.M. on December 20, 2004.
9. The final pre-trial hearing shall be held at **11:30 a.m. on December 21, 2004** at the United States Bankruptcy Court, at The Opera House, Rutland, Vermont.
10. The trial shall be set at the December 21st hearing, and will be held in January or February, 2005.

SO ORDERED.

November 2, 2004
Burlington, Vermont



Colleen A. Brown
United States Bankruptcy Judge