

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re AVN Corporation,

Debtor.

Case No. 98-20098

Chapter 11

Samuel K. Crocker, Trustee,

Plaintiff,

v.

Adv. No. 98-0434

David Namer, Sandra Namer, and
Grace Russo,

Defendants.

MEMORANDUM

Before the Court is the Plaintiff-Trustee's motion to strike the amended counterclaim of Defendant David Namer. The Trustee's motion was filed on March 18, 1999, and Defendant Namer filed an opposition to the motion on March 30, 1999. This Court conducted a hearing in this contested matter on April 12, 1999, pursuant to Fed. R. Bankr. P. 9014. This is a core proceeding. 28 U.S.C. § 157(b)(2)(A). The following Memorandum contains the Court's findings of fact and conclusions of law. FED. R. BANKR. P. 7052.

FINDINGS OF FACT

On April 13, 1998, Sentinel Trust Company initiated this adversary proceeding by filing a complaint against the Debtor, AVN Corporation, and Grace Y. Russo alleging that the Debtor fraudulently conveyed corporate assets to Grace Russo for the improvement of certain real property owned by Ms. Russo. On October 15, 1998, Sentinel Trust filed an amended complaint providing additional facts regarding the alleged fraudulent conveyances and adding David Namer, president of

the Debtor, and Sandra Namer, his spouse,¹ as Defendants.

On October 21, 1998, an agreed order was entered by the Court substituting Samuel K. Crocker, the Chapter 11 Trustee, as Plaintiff in this adversary proceeding. Thereafter, Defendant David Namer filed an answer to the amended complaint denying the allegations in the complaint and a counterclaim alleging that Sentinel Trust filed a false unsecured claim against the Debtor and that the Trustee and Sentinel Trust were attempting to hinder the Defendants from the quiet enjoyment of their property. The Trustee filed an answer to Namer's counterclaim on December 30, 1998 denying the allegations in the counterclaim and asserting as an affirmative defense that the counterclaim fails to state a cause of action. Defendant, AVN Corporation was dismissed from the adversary proceeding pursuant to a consent order entered January 19, 1999.

On February 1, 1999, a status conference was held to consider the administration of the adversary proceeding. In light of the substitution of Crocker as Plaintiff and the dismissal of AVN Corporation, the Court entered a scheduling order allowing Namer until March 1, 1999 to file an amendment to the counterclaim or to assert a third- party claim. An amended counterclaim was filed on February 22, 1999, and the Plaintiff-Trustee filed a motion to strike the amended counterclaim on March 18, 1999.

The Trustee submits that he brought the instant action in his official capacity as a representative of the estate to recover assets of the Debtor. In contrast, the Trustee argues that the counterclaim filed by Namer is not an action against the assets of the Debtor's estate or an action

¹ Sandra Namer denies that she is related, by blood or marriage, to either of the other Defendants.

against the Trustee in his official capacity, but instead a claim against the Trustee, individually, for negligent conduct in the administration of the estate. Such claims, according to the Trustee, are properly brought by separate complaint and generally, may not be maintained without leave of court.

As such, the Trustee asserts that Namer's claim is an improper counterclaim. Alternatively, the Trustee contends that the allegations of the counterclaim fail to state a cause of action and should therefore, be dismissed pursuant to FED. R. CIV. P. 12(b)(6) made applicable herein by FED. R. BANKR. P. 7012(b). Finally, at the hearing in this matter, the Trustee argued for the first time that the portion of the Defendant's counterclaim seeking sanctions pursuant to Bankruptcy Rule 9011 should be stricken in light of the mandate of Rule 9011(c)(1)(A) that a request for sanctions be brought by separate motion.

In opposition, the Defendant Namer asserts that leave of court to sue the Trustee is required only when suing in state court or in another forum. Namer admits that his counterclaim against the Trustee is not a claim against the assets of the estate, but rather is a claim against the Trustee, individually, based on his alleged negligence in the administration of the estate. While Namer argues that leave of court is not required to file a counterclaim and that a Trustee may be sued in his individual or official capacity for certain violations of fiduciary duties, Namer does not offer any authority for the proposition that a Trustee may be sued in his individual capacity, in a proceeding in which he is acting on behalf of the bankruptcy estate. Additionally, Namer asserts that his counterclaim clearly sets forth allegations of negligence in the performance of the Trustee's duties, specifically acts willfully and deliberately taken in violation of his fiduciary duties.

CONCLUSIONS OF LAW

Federal Rule of Civil Procedure 13, made applicable herein through Federal Rule of

Bankruptcy Procedure 7013, provides in part:

(b) Permissive Counterclaims. A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

Rule 13 unequivocally requires that a counterclaim be asserted against an "opposing party." It appears well-settled that in an action brought by a plaintiff in his representative capacity, a defendant cannot assert a counterclaim against the plaintiff in his individual capacity because it would not be a counterclaim against an "opposing party." See *Pettigrew v. Graham (In re Graham)*, 16 B.R. 606, 611 (Bankr. N.D. Ga. 1981)(striking counterclaim against Trustee in his personal capacity); *In re Williams Contract Furniture*, 148 B.R. 799, 803 (Bankr. E.D. Va. 1992); *Eisenberg v. Casale (In re Casale)*, 62 B.R. 899 (Bankr. E.D.N.Y. 1986)("It is fundamental that in an action brought by a party in a representative capacity, a counterclaim cannot be asserted against the plaintiff in his individual capacity."); *Rogers v. Virgin Land, Inc.*, No. 1996-13M, 1996 WL 493174, at *1 (D. V.I. May 13, 1996)("When a trustee sues in his representative capacity as a fiduciary of an estate, a counterclaim against him in his individual capacity is not proper.").

Claims brought against a trustee in his individual capacity seek recovery from the trustee personally for conduct exceeding the scope of his representative authority. Therefore, a counterclaim against a trustee who has sued in his representative capacity is not properly filed if recovery on the claim will come from the personal assets of the trustee. Conversely, a counterclaim against a trustee acting in his representative capacity is properly filed against an opposing party within the meaning of Bankruptcy Rule 7013 if it seeks recovery from the assets of the estate the trustee represents. See *id.* See also 6 CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 1404 (2d ed. 1990).

The instant adversary proceeding is being prosecuted by the Chapter 11 Trustee in his representative capacity to recover alleged fraudulent conveyances on behalf of the Debtor's estate. It is undisputed that Namer's counterclaim is a claim against the Trustee in his individual capacity. At the April 12, 1999 hearing in this matter Namer stated: "I am not making a claim against the Trustee based on his administration of the estate. I'm only making a claim against him for his egregious, willful, and negligent conduct in his actions. I am not making a claim against the estate." Because the Defendant's counterclaim is premised on the trustee's breach of his fiduciary duty to the estate, the Court finds that it is a claim against the trustee in his individual capacity and may not properly be asserted as a counterclaim against him in this adversary proceeding.

Although not specifically argued by Mr. Namer, the Court has considered whether his claim against Mr. Crocker can stand as a third-party claim. The Court has concluded that it cannot. By definition, a third-party complaint is a complaint filed by a defendant against a person not presently a party to the lawsuit. *See* BLACK'S LAW DICTIONARY 1480 (6th ed. 1990). Specifically, Bankruptcy Rule 7014(a) states in part:

At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff.

Fed. R. Bankr. P. 7014(a)(1998).

Although the Chapter 11 Trustee, in his individual capacity, is not a party to the lawsuit, the Defendant has not asserted, nor could he maintain that the Trustee is or may be liable for all or part of the underlying fraudulent conveyance claim brought against Namer. Consequently, a third-party complaint against the Trustee, in his individual capacity, premised on dereliction of fiduciary duties

likewise would be improper in this adversary proceeding.

The final matter for consideration by the Court is whether leave of court is required prior to a party instituting suit against a trustee. There are two statutory provisions concerning this issue. First, 11 U.S.C. § 323(b) states that “The trustee in a case under this title has capacity to sue and be sued.” On its face, the statute contains no requirement that leave of court be obtained prior to instituting an action against a trustee. The implication, therefore, is that none is required. *See Estate of Reich v. Burke (In re Reich)*, 54 B.R. 995, 997 (Bankr. E.D. Mich. 1985)(finding no requirement of prior authority to sue chapter 7 trustee). Additionally, 28 U.S.C. § 959(a) states that “Trustees, receivers or managers of property, including debtors in possession, may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property.” To the extent that any of the Defendant’s claims against the Trustee come within the ambit of section 959(a), the statute unequivocally provides that leave of court is not necessary. Since the Chapter 11 Trustee in the instant proceeding has offered no authority or rationale to support his argument that prior approval is required to bring suit against the Trustee, the Court finds that no such prior authority is necessary. This finding does not alter the conclusion that this particular counterclaim is improper for the reasons previously stated.

Because the Defendant’s amended counterclaim, which incorporates the original counterclaim, fails to meet the requirements of Federal Rule of Civil Procedure 13(b) the Court concludes that the counterclaim is improper and will be stricken. In light of the foregoing, it is not necessary for the Court to address the merits of the underlying counterclaim or the Defendant’s compliance with Rule 9011(c)(1)(A).

Accordingly, this Court concludes that the Trustee’s motion to strike the amended

counterclaim should be GRANTED.

A separate order will be issued in accordance with this memorandum.

BY THE COURT:

Jennie D. Latta
United States Bankruptcy Judge

Date: 4/26/99