

2001 BNH 038 Note: This is an unreported opinion. Refer to AO 1050-1 regarding citation.

**UNITED STATES BANKRUPTCY COURT
FOR THE
DISTRICT OF NEW HAMPSHIRE**

In re:

Bk. No. 91-10983-MWV
Chapter 7

R & R Associates of Hampton,
Debtor

Dennis Bezanson, Trustee,
Plaintiff

v.

Adv. No. 98-1174-MWV

Thomas J. Thomas, Jr.; Mitchell P. Utell;
Marc L. Van De Water; Glenn C. Raiche;
Thomas & Utell; Thomas, Utell, Van De Water & Raiche;
Thomas, Utell, Van De Water & Raiche, P.A.
Defendants

Dennis Bezanson, Trustee
Plaintiff

v.

Adv. No. 98-1090-MWV

Thomas J. Thomas, Jr.; Mitchell P. Utell;
Marc Van De Water; Glenn C. Raiche;
Thomas & Utell; Thomas, Utell, Van De Water & Raiche;
Thomas, Utell, Van De Water & Raiche, P.A.
Defendants

Dennis Bezanson, Trustee
Plaintiff

v.

Adv. No. 98-1136-MWV

Thomas J. Thomas, Jr.; Mitchell P. Utell;
Marc Van De Water; Glenn C. Raiche;
Thomas & Utell; Thomas, Utell, Van De Water & Raiche;
Thomas, Utell, Van De Water & Raiche, P.A.
Defendants

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Mitchell P. Utell, Esq., Glenn C. Raiche, Esq., Thomas & Utell,
Thomas, Utell, Van De Water & Raiche, and
Thomas, Utell, Van De Water & Raiche, P.A.*

MEMORANDUM OPINION

Before the Court are motions for partial summary judgment filed by the Trustee and by the above captioned defendants (hereinafter the “Law Firm Defendants”). For the reasons set forth below, both motions for partial summary judgment are denied.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. § § 1334 and 157(a) and the “Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire,” dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

DISCUSSION

In the three above captioned adversary proceedings the Trustee seeks to recover from the Law Firm Defendants damages for negligent misrepresentation, breach of fiduciary duty and fraud on the court. The Trustee brought his motion seeking partial summary judgment on the issues breach of fiduciary duty and negligent misrepresentation. The Law Firm Defendants brought motions for partial summary judgment on the issues of whether financial statements provided to the Trustee were false and misleading and on the grounds that the claims for negligence and breach of fiduciary duty were barred by the doctrine of res judicata. At the hearing on the motions, held on August 2, 2001, the Court denied the Law Firm Defendants’ motion for summary judgment based on res judicata and reserved judgment on the other motions.

At the outset, it is necessary to identify the nature of the motions. The Trustee's motion was brought to the Court as a "Partial Motion for Summary Judgment on the Issue of Liability." The Federal Rules of Bankruptcy Procedure make applicable Rule 56 of the Federal Rules of Civil Procedure. A motion for summary judgment may be awarded under Rule 56(c) on the issue of liability alone leaving for trial the issue of damages only. However, here the Trustee's motion does not completely dispose of all liability issues as the fraud on the court claim still remains for trial regardless of the Court's findings regarding negligent misrepresentation and breach of fiduciary duty. Where a party seeks resolution of less than all of the relief sought by the complaint, the court may grant interlocutory summary adjudication of those issues pursuant to Rule 56(d). The Court can modify an order made pursuant to Rule 56(d) at any time prior to final adjudication on the entire adversary proceeding. See *Alberty-Velez v. Corporacion De Puerto Rico Para La Difusion Publica*, 242 F.3d 418 (1st Cir. 2001). Thus, the Court will treat the Trustee's motion for partial summary judgment as one under Rule 56(d). Likewise, Rule 56(d) will govern the Law Firm Defendant's motion for partial summary judgment on the issue of the financial statements.

A motion pursuant to Rule 56(d) is appropriate where the Court can narrow the issues and facts for trial. See *In re Bright*, 1994 WL 496577 *4 (Bankr.N.D.Ill.1994). The advisory committee notes to Rule 56 state that Rule 56(d) is similar to a pretrial order in that it "serves the purpose of speeding up litigation by eliminating before trial matters wherein there is no genuine issue of fact." Fed. R. Civ. P. 56(d) Advisory Committee Notes. In order to accomplish this, the motion for partial summary judgment should present to the Court a pure issue of law, the resolution of which economizes the Court's time. "[I]t's purpose is totally frustrated if determination of the motion would require as much time as a full trial on the merits." *Elliott v. Elliott*, 49 F.R.D. 283, 284 (S.D.NY1970).

Such is the case here. For the Trustee's part, he has supported his motion for partial summary judgment with literally volumes of documents that he asserts support judgment on the issues of negligent misrepresentation and breach of fiduciary duty. If it were likely that the affidavits, admissions, pleadings, records and other documents could significantly narrow the issues for trial, the Court would be inclined to

delve more deeply into their contents. However, for several reasons, it is highly unlikely that making a determination based upon the Trustee's motion would bring any measurable benefit to the Court or the parties. First, as the complaint clearly states, the Trustee's theories of negligence and breach of fiduciary duty are both tied to representations made by the Law Firm Defendants in documents submitted to the Court and made orally before the Court. Likewise, integral to the fraud on the court claim are allegations that the Debtors made false and misleading statements before the court and in their retention application. Thus, each of the claims involve litigation of several identical issues. It is foreseeable that even if summary judgment is granted with regard to the issues of negligent misrepresentation or breach of fiduciary duty, as much time would be spent at trial arguing about what actually has been adjudicated as litigating the merits of the remaining issues. Indeed, even at oral argument on summary judgment there appeared to be significant confusion about what issues were actually before the Court and what exactly would or could be accomplished by a ruling on the Trustee's motion.

Furthermore, summary judgment is simply not an appropriate vehicle for disposing of the Trustee's negligent misrepresentation claim. In order to sustain his burden under New Hampshire law, the Trustee must show that the Law Firm Defendants made negligent misrepresentations of material facts on which the Trustee justifiably relied. Snierson v. Scruton, 761 A.2d 1046, 1049-50 (N.H. 2000). Summary judgment is often difficult to obtain by any party in an action involving negligence due to matters that are more appropriately left to the trier of fact, such as reasonableness and state of mind. See 10A Wright & Miller, Federal Practice and Procedure § 2729 (3d Ed. 1998). Where the motion is brought by a Plaintiff, however, summary judgment is particularly unlikely absent a clear showing of strict liability or negligence per se, neither of which are present here. Id.

Similarly, the Court finds that the issue of whether the Law Firm Defendants are liable for a breach of fiduciary duty should be addressed at trial. The Trustee's complaint is premised on the assertion that the Law Firm Defendants knew or should have known of the existence of deficiency claims against the general partners of the Debtor and that the failure to commence these actions or to bring the actions to the Trustee's

attention amounted to a breach of their fiduciary duty. An inquiry into what the Law Firm Defendants knew about possible claims against the general partners necessarily involves questions of the state of mind of the individual defendants. “Inasmuch as a determination of someone’s state of mind usually entails the drawing of factual inferences as to which reasonable people might differ - a function traditionally left to the jury - summary judgment often will be an inappropriate means of resolving an issue of this character.” 10B Wright & Miller, Federal Practice and Procedure, § 2730 (3rd Ed. 1998). Furthermore, as previously stated, part of the Trustee’s fiduciary duty claim involves allegations of misrepresentations to the Court and interested parties. Thus, the fiduciary duty claims are intertwined with the fraud on the court and negligent misrepresentation claims and are better developed at trial.

Finally, although the Law Firm Defendants’ motion for partial summary judgment on the issue of financial statements could significantly narrow an issue for trial, the Court finds that it is not appropriate for summary judgment. The Law Firm Defendants contend that the Trustee cannot meet his burden of showing knowledge of the falsity of financial statements forwarded to the Trustee. The Trustee vigorously denies that the Law Firm Defendant’s knowledge cannot be proved. As noted above, the issue of knowledge on the part of the Law Firm Defendants is a matter involving state of mind and is best determined by the development of evidence at trial. Therefore, the Court denies summary judgment on this issue.

Accordingly, because the Court finds that the matters raised in the competing motions for partial summary judgment are best left to trial on the merits of the entire adversary proceeding, the motions of the Trustee and the Law Firm Defendants are DENIED.

CONCLUSION

All motions for partial summary judgment are denied. This opinion constitutes the Court's findings and conclusions of law. A separate order will be entered.

DONE and ORDERED this 20th day of August, 2001, at Manchester, New Hampshire.

BY THE COURT:

Mark W. Vaughn, Chief Judge