UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

IN RE:	)	
	)	
Lee Memory Gardens, Inc.,	)	Case No. 02-82662C-7G
	)	
Debtor.	)	
	)	
	)	
Charles M. Ivey, III, Trustee for Lee Memory Gardens, Inc.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adversary No. 04-9025
	)	
Crown Memorial Park, LLC,	)	
	)	
Defendant.	)	
	)	

ORDER

This adversary proceeding came before the court on November 9, 2004, for hearing upon the defendant's motion to dismiss which seeks dismissal pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction and pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted. Robert L. McClellan appeared on behalf of the plaintiff and Robert S. Adden, Jr. appeared on behalf of the defendant. Having considered the motion to dismiss and plaintiff's complaint, the supporting memorandum filed on behalf of the defendant, the memorandum submitted by the plaintiff and the arguments of counsel, the court has concluded that the motion to dismiss should be denied.

In the Rule 12(b)(1) portion of the motion to dismiss, the defendant relies upon the Rooker-Feldman doctrine based upon an

order that was entered in a state court proceeding in October of 2001. The defendant argues that the state court order decided the issues raised by the plaintiff and is preclusive in this proceeding under Rooker-Feldman. The Rooker-Feldman doctrine holds that lower federal courts lack jurisdiction to review final state court decisions. District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413, 416, 44 S. Ct. 149, 68 L. Ed. 362 (1923). The doctrine is based on the principle that "district courts have only original jurisdiction; the full appellate jurisdiction over judgments of state courts [containing a federal question] in civil cases lies in the Supreme Court of the United States." Gash Assocs. v. Vill. of Rosemont, Ill., 995 F.2d 726, 728 (7th Cir. 1993). However, the Supreme Court has held that the Rooker-Feldman doctrine does not apply to a federal court suit brought by a non-party to the earlier state court suit. Johnson v. De Grandy, 512 U.S. 997, 1006, 114 S. Ct. 2647, 129 L. Ed. 2d 775 (1994) ("[T]he invocation of Rooker/Feldman is just as inapt here, for unlike Rooker or Feldman, the United States was not a party in the state court. It was in no position to ask this Court to review the state court's judgment and has not directly attacked it in this proceeding.... The United States merely seeks to litigate its ... case for the first time."). See also Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 364 F.3d 102, 105 (3rd Cir. 2004) ("[W]e have

consistently (and recently) held that Rooker-Feldman does not bar claims of plaintiffs who were not parties to the state court proceeding.").

It is undisputed that the Debtor, Lee Memory Gardens, Inc., was not a party to the state court proceeding giving rise to the order relied upon by the defendant. Not being a party to the state court proceeding, the Debtor could not, and cannot, seek review of such order in a higher state court. Thus, based upon the record now before the court, there is no basis for applying the Rooker-Feldman doctrine in this adversary proceeding which was brought by the plaintiff as the Chapter 7 trustee for the Debtor, Lee Memory Gardens, Inc.

In reviewing a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted, a court must accept as true all of the factual allegations in the complaint as well as the reasonable inferences that can be drawn from them, and a court may dismiss the complaint "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984). "As a practical matter, a dismissal under Rule 12(b)(6) is likely to be granted by the district court only in the relatively unusual case in which the plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to securing relief."

5B WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357 (3rd ed. West 2004). See also Bramlet v. Wilson, 495 F.2d 714, 716 (8th Cir. 1974); First Fin. Sav. Bank, Inc. v. American Bankers Ins. Co. of Fla., Inc., 699 F. Supp. 1158, 1161 (E.D. N.C. 1988). The plaintiff's allegations are to be construed "liberally, because the rules require only general or 'notice' pleading, rather than detailed fact pleading." 2 JAMES WILLIAM MOORE, MOORE'S FEDERAL PRACTICE § 12.34[1][b] (3rd ed. Matthew Bender 2004). When viewed in accordance with this standard, all of the causes of action alleged in plaintiff's complaint include allegations that are sufficient to state claims upon which relief can be granted.

Contrary to defendant's assertion, there is no requirement at the pleading stage of this adversary proceeding that there be consistency among the various claims for relief alleged by the plaintiff. Rule 8 of the Federal Rules of Civil Procedure states that "[r]elief in the alternative or of several different types may be demanded." The Rule further provides:

> A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses.... A party may also state as many separate claims or defenses as the party has regardless of consistence and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.

Fed. R. Civ. P. 8(e)(2).

Under Federal Rule of Civil Procedure 11(b)(3), as adopted by Federal Rule of Bankruptcy Procedure 9011, a party's allegations

and factual contentions must have evidentiary support, or be likely to have evidentiary support after further investigation and discovery. As explained in the 1983 Advisory Committee Notes to Rule 11, the standard is one of "reasonableness under the circumstances" and to satisfy the Rule, all that is required is some pre-filing inquiry into the facts and law. In tandem, Rules 8 and 11 must be construed to allow counts in a complaint, which at the outset might be inconsistent, but which are nonetheless reasonable contentions under the existing evidence. 2 JAMES WILLIAM MOORE, MOORE'S FEDERAL PRACTICE § 8.09[2] (3rd ed. Matthew Bender 2004) (stating that alternative, hypothetical, and inconsistent counts may be alleged so long as those counts have some evidentiary support). It would be inappropriate for a court to construe one claim in a complaint as an admission against the propriety of another alternative or inconsistent claim in the same complaint. Henry v. Daytop Vill., 42 F.3d 89, 95 (3rd Cir. 1994).

Related to the availability of alternative pleadings is the doctrine of election of remedies, "which refers to situations where an individual pursues remedies that are legally or factually inconsistent. Alexander v. Gardner-Denver Co., 415 U.S. 36, 49, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974). The doctrine does not apply to the assertion of inconsistent claims; rather, the doctrine is meant to prevent double recovery based on the same wrong. X-It Prods. LLC v. Walter Kidde Portable Equip., Inc., 227 F. Supp.2d

494, 524 (E.D. Va. 2002) ("The doctrine is remedial in nature and does no more than prevent double recovery."). At the pleading stage, Federal Rule of Civil Procedure 8(e)(2) has completely abolished the doctrine of election of remedies. Olympia Hotels Corp. C. Johnson Wax Dev. Corp., 908 F.2d 1363, 1371 (7th Cir. 1990). In this case, the Trustee's alternative pleadings are not so untoward as to violate Federal Rules of Civil Procedure 8 and 11. Accordingly, defendant's argument based upon alleged inconsistency between some of the claims in plaintiff's complaint is not accepted.

Now, therefore, it is ORDERED, ADJUDGED AND DECREED that defendant's motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6) is hereby overruled and denied.

This 12th day of November, 2004.

William L. Stocks

WILLIAM L. STOCKS
United States Bankruptcy Judge