UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DMSION

INRE:	
Charlotte Commercial Group, Inc.,	**Case Number: 01-52684**
Debtor.	
Charlotte Commercial Group, Inc.,	**Ad. Proc. No.: 01-6044W**
Plaintiff,	
vs.	
Fleet National Bank,	
Defendant.	
vs.	
Charlotte Commercial Group, Inc.,	
Counterclaim-defendant.	
and	
Robert M. Sauls and Sam Stark	
Third-party defendants.	

MEMORANDUM OPINION

THIS MATTER coming on before the undersigned bankruptcy judge in Winston-Salem, North Carolina upon the Third-Party Defendants' Motion to Dismiss. During a scheduling conference on July 11, 2002, the parties agreed to waive oral argument unless requested by the court. Upon examination, the court agreed that oral argument would not aid the decision process because the facts and legal contentions are adequately presented in the materials before the court. After considering the matters set forth in the pleadings and the supporting briefs, the court makes the following findings of fact and conclusions **of law:**

BACKGROUND FACTS

Charlotte Commercial Group, Inc. ("CCG") was engaged in the business of purchasing automobile financing receivables from retail vendors of motor vehicles. On September 24, 1998, CCG entered into a Loan and Security Agreement with Fremont Financial Corporation pursuant to which Fremont provided a revolving loan to CCG which was secured by automobile receivables. Subsequently, this loan was assigned to Summit Bank and the parties entered into an amended agreement (hereinafter referred to as the "Finance Agreement") which provided for a maximum principal amount of $10,000,000 with all interest treated as an advance and added to the principal balance on a monthly basis. The termination date for the Finance Agreement was September 24, 2003. The terms of the Finance Agreement obligated Summit and its successor, Fleet National Bank ("Fleet"), to make advances to CCG based upon a formula contained within the Finance Agreement. The Finance Agreement provided that advances were to be based upon a monthly Borrowing Base Certificate prepared in accordance with sound accounting practice, as defmed in the Finance Agreement.

Commencing on or about August 16, 2001, Fleet asserted that CCG inaccurately and fraudulently prepared the Borrowing Base Certificates for the months of June and July of 2001. Accordingly, Fleet did not make any further advances and demanded that CCG immediately pay the sum of $769,561, which Fleet asserted was an over advance. Fleet further claimed that it was entitled to exercise its powers pursuant to the Finance Agreement upon default to foreclose upon its collateral. CCG maintains that the Borrowing Base Certificates for the months of June (submitted July 13, 2001) and July (submitted on August 15, 2001) were prepared in accordance with sound accounting practice, and that those certificates correctly certified that funds were available to CCG for advance.

On October 29, 2001, Fleet filed suit in the Eastern District of Pennsylvania and alleged that the unpaid balance of the loan was due and that the CCG's Chief Executive Officer, Robert M. Sauls ("Sauls"), breached a validity guaranty agreement and committed fraud by knowingly submitting incorrect Borrowing Base Certificates. CCG filed a voluntary petition under Chapter 11 of the Bankruptcy Code in the Middle District of North Carolina on November 13, 2001. On March 15, 2002, the court entered an order appointing William P. Miller as Chapter 11 Trustee. On April 26, 2002, the court entered an order converting the Debtor's case to a case under Chapter 7 of the Bankruptcy Code and appointing William P. Miller as the Chapter 7 Trustee.

PROCEDURAL HISTORY

The present action arises as an adversary proceeding filed on December 17, 2001 by CCG against Fleet for breach of the Finance Agreement, breach of the duty of good faith and fair dealing, and violation of North Carolina's Unfair Trade Practices Act (UTPA) pursuant to N.C.G.S. § 75-1.1.[1] These claims arise out of the termination of credit by Fleet, and the default and ensuing bankruptcy of CCG. In response to CCG's complaint, Fleet filed a counterclaim against CCG for amounts due under the Note and Finance Agreement.

As officers and employees of CCG, the Third-Party Defendants, Sauls and Sam Stark ("Stark"), were also sued by Fleet. In the Third-Party Complaint filed on April 29, 2002, Fleet asserts a claim against Sauls for any amounts owed under a validity guaranty ("Validity Guarantee"). Specifically, Fleet alleges that in the Validity Guarantee, Sauls warranted that "[t]o the best of [his] knowledge, information and belief, all facts, figures and representations given by Guarantor or any officers or employees of Borrower under the supervision of Guarantor with respect to the value of Borrower's Accounts . . . or with respect to any other fact in any report

[1] In a prior order, the court dismissed CCG's claim for unfair and deceptive trade practices. CCG has appealed this decision.

required under the Loan Documents are and at all times will be, true and correct in all material respects." (Def.'s Third-Party Compl. ¶ 95). Fleet further alleges that, pursuant to the Validity Guarantee, Sauls agreed to indemnify Fremont (now Fleet) for any damages or losses it might incur as a direct result of Sauls' breach of any warranty made therein. (Def.'s Third-Party Compl. ¶ 96). Fleet claims damages in the amount of all unpaid advances to CCG under the Finance Agreement, plus interest, fees and costs.

Fleet has also asserted a fraud claim against Stark. Fleet alleges that in signing and submitting to Fleet the July, August and September Borrowing Base Certificates, Stark knowingly made false representations of material fact which Fleet relied upon. (Def.'s Third-Party Compl. ¶ 103). Fleet claims damages in the amount of all unpaid advances to CCG under the Finance Agreement, plus interest, fees and costs.

On May 28, 2002, Sauls and Stark filed a motion to dismiss for lack of subject matter jurisdiction, and in support thereof, argue that the Third-Party Complaint constitutes a common law claim for indemnity which falls outside the jurisdiction of this court under 28 U.S.C. § 1334, because the adjudication of these claims will not affect either the size or the administration of the bankruptcy estate. In opposition to the Third-Party Defendants' motion, Fleet filed a brief denying that it is asserting indemnity claims contingent upon a finding of liability against Fleet. In its brief, Fleet clarifies that it asserts two free-standing claims, one against each Third-Party Defendant, both of which would have an effect on the bankruptcy estate.

In a reply dated August 22, 2002, Sauls and Stark contend that Fleet has placed itself in an indefensible procedural dilemma on the basis that: (1) if Fleet's claims are free-standing claims, the Third-Party Complaint has not been property brought under Rule 14 of the Federal Rules of Civil Procedure; and (2) if Fleet's claims are for indemnity, the outcome will have no affect on the

bankruptcy estate and must be dismissed for lack of subject matter jurisdiction. Furthermore, the Third-Party Defendants request that their reply be treated as a motion to dismiss for failure to state a proper third-party claim pursuant to Rules 12(b)(6) and Rule 14(a) of the Federal Rules of Civil Procedure made applicable to these proceedings by Federal Rules of Bankruptcy Procedure 7012(b) and 7014.

Fleet contends that the Third-Party Defendants Rule 12(b)(6) motion should be denied as procedurally improper. In the alternative, Fleet requests that the court deem the Third-Party Complaint an independent complaint against Sauls and Stark and consolidate that independent action with the CCG-Fleet proceeding pursuant to Rule 42(a) of the Federal Rules of Civil Procedure. In short, the parties have spun a procedural and jurisdictional web, each in an effort to entangle the other, which the court will attempt to unravel to the extent possible at this juncture.

ANALYSIS

A. Timeliness of Third-Party Defendants' Rule 12(b)(6) Motion to Dismiss

As a preliminary matter, Fleet argues that the Third-Party Defendants' motion to dismiss for failure to state a claim pursuant to Rules 12(b)(6) and Rule 14 is procedurally improper pursuant to Rule 12(g) because it follows a Rule 12(b)(1) motion objecting to subject matter jurisdiction. Rule 12(g) states: "If a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted." Fed.R.Civ.P. 12(g). Rule 12(h)(2) provides an exception to Rule 12(g) as follows: "[a] defense of failure to state a claim upon which relief can be granted . . . may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits." Fed.R.Civ.P. 12(h)(2).

Fleet maintains that Rule 12(h)(2), in setting out the ways in which a party may raise a failure to state a claim argument after the initial pre-answer motion, precludes the filing of a second 12(b) motion to dismiss after an initial motion to dismiss. Although Rule 12(h)(2) sets forth the medium by which a 12(b)(6) motion can be raised, numerous district courts have applied this rule permissively and have allowed defendants to raise 12(b)(6) defenses in a subsequent pre-answer motion to dismiss. See, e.g., Fed. Express Corp. v. United States Postal Serv., 40 F. Supp. 2d 943, 948-949 (W.D. Tenn. 1999); Mylan Lab.. Inc. v. Akzo. N.V., 770 F. Supp. 1053, 1059 (D. Md. 1991), rev'd on other grounds sub nom. Mylan Lab., Inc. v.Matkari, 7 F.3d 1130 (4th Cir. 1993); Sharma v. Skaarup Ship Management Corp., 699 F. Supp. 440,444 (S.D.N.Y. 1988), aff' d, 916 F.2d 820 (2nd Cir. 1990), cert. denied, 499 U.S. 907 (1991); Thorn v. New York City Dep't of Soc. Serv., 523 F. Supp. 1193, 1996 n.1 (S.D.N.Y. 1981); American Chiropractic Assoc. v. Trigon Healthcare. Inc., 2001 WL 420602, *1 (W.D. Va . 2001).

In this case, it does not appear that the successive motion is for the purpose of delay and the court has not yet ruled on the original motion. Furthermore, the court notes that in this instance, a second pre-answer motion is not unwarranted. Given the complex procedural history and the copious pleadings in this case, the legal issues are constantly shifting and evolving. Consequently, it is understandable that the Third-Party Defendants were unable to anticipate and address the Rule 14 issue in the first motion. The court finds that the Third-Party Defendants' motion is not barred by Rule 12(g).

Fleet further argues that the Third-Party Defendants' motion is improperly raised because a party may not raise an argument for the first time in its reply brief. At the time of filing, the Third-Party Defendants requested that their reply brief be treated as a motion to dismiss. Accordingly, the court entered an order on September 4, 2002 that granted Fleet thirty (30) days to file a

response to the Third-Party Defendants' 12(b)(6) argument. Fleet will not be prejudiced by the court's consideration of this motion. The court will proceed to address the merits of the Third-Party Defendants' motion to dismiss.

B. Rule 14 Third-Party Practice

As stated previously, Fleet impleaded Stark as a third-party defendant on a theory of fraud and Sauls as a third-party defendant on a theory of breach of contract pursuant to the Validity Guarantee. Rule 14 provides in pertinent part that "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 plaintiffs claim against the third-party plaintiff." Fed.R.Civ.P. 14(a). Rule 14(a) allows a defendant to file a claim against third-parties who are derivatively liable to the defendant. The third-party defendant's liability must be dependant on the defendant's liability to the plaintiff. United States v. Olavarrieta, 812 F.2d 640 (11th Cir. 1987), cert. denied, 484 U.S. 851; United States v. Joe Grasso & Son, Inc., 380 F.2d 749 (5th Cir. 1967); Watergate Landmark Condominium Unit Owners' Ass'n v. Wiss. Janey, Elstner Assocs., 117 F.R.D. 576,577 (E.D. Va. 1987)

A separate and independent claim against a third-party cannot be brought under Rule 14 even if it involves the same transaction or facts. United States v. Olavarrieta, 812 F.2d at 643; Baltimore & Ohio Railroad Co.. v. Central Railway Services, Inc., 636 F. Supp. 782, 786 (E.D. Pa. 1986) (impleader of third-party defendant is improper where based upon a counterclaim by the defendant against the plaintiff, and not on the plaintiffs claim against the defendant); DirectTV, Inc. v. Amerilink Corp., 2002 WL 3 1165149 (M.D.N.C. 2002) (the presence of common issues of fact does not demonstrate the third-party defendants' derivative liability to the third-party plaintiff). A claim that is simply related to the plaintiffs claim against the defendant, but is not

based on secondary or derivative liability, is not proper under Rule 14.

The third-party claims in this instance do not satisfy the requirements of Rule 14. Fleet alleges Sauls is liable based upon a Validity Guarantee which includes an indemnity provision. At first blush, this claim appears to be a typical third-party claim for which impleader is proper because of the existence of an indemnity provision. However, Fleet seeks damages in the amount of all unpaid advances made to CCG under the Finance Agreement, plus interest, fees and costs. These are the same damages that Fleet will be entitled to if Fleet prevails in its counterclaim against CCG. Fleet has not asserted a claim of secondary liability such that, if CCG prevails, Sauls will be liable to Fleet under a theory of derivative liability for the damages Fleet must pay to CCG. In other words, Fleet is not seeking indemnification for damages it must pay out to CCG. Fleet is seeking indemnification for losses it has sustained as a result of CCG's default. Fleet's claim against Sauls is not dependent upon a finding that Fleet is liable to CCG. Fleet removed any doubt about the basis for Sauls' potential liability in its own brief in response to the Third-Party Defendants' motion to dismiss for lack of subject matter jurisdiction in which it characterized its claim against Sauls as an independent breach of contract claim based upon the Validity Guarantee.

Similarly, Fleet's claim against Stark is not dependent upon a finding that Fleet is liable to CCG. Fleet alleges that Stark is liable to Fleet because of his fraudulent representations to Fleet. The third-party complaint does not assert that if Fleet is found liable to CCG for breach of the Finance Agreement or breach of their duty of good faith and fair dealing, such liability stems from the misrepresentations of Stark. Fleet does not allege that Stark is in some way responsible for Fleet's alleged breach of contract with CCG. Rather, Fleet alleges that Stark is responsible for Fleet continuing to make advances under the Finance Agreement for as long as it did. In essence, Fleet is seeking an additional source from which to recover the amount it is owed under the

Finance Agreement.

The Third-Party Complaint consists of claims which stem from Fleet's failure to receive payment under the Finance Agreement and are based upon Fleet's counterclaim against CCG. The fact that these claims arise out of the same transaction is not sufficient to support a proper third-party complaint. Neither of these claims are for losses that Fleet may sustain as a result of the Plaintiffs claims. Consequently, while Fleet may have a viable fraud claim against Stark and a viable indemnity claim against Sauls for those expenses that Fleet does not recover directly from CCG, these claims are not proper third-party actions pursuant to Rule 14 because Sauls' and Stark's liabilities to Fleet are not derivative of Fleet's liability to CCG.[2]

Fleet has requested that in the event the court determines that these actions should not be maintained as a third-party complaint, the court deem the Third-Party Complaint an independent complaint and consolidate it with the CCG-Fleet action. The Federal Rules of Civil Procedure do not indicate that the appropriate remedy for an improper third-party claim is to simply convert the complaint to the appropriate type of action. Given the tangled procedural and jurisdictional issues that the parties have created in this case, the court will not further complicate matters by fashioning new claims on behalf of the parties.

For the reasons discussed above, an Order will be entered contemporaneously with the entry of this Memorandum Opinion granting the Third-Party Defendants' motion to dismiss for

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[2] Because the court finds that the Third-Party Complaint must be dismissed as violative of Rule 14, the court need not decide whether these claims by Fleet against Sauls and Stark fall within the scope of bankruptcy court jurisdiction. Third-party claims which involve neither the debtor nor the trustee usually do not have an impact upon the underlying bankruptcy case. In re Foundation for New Era Philanthropy, 201 B.R. 382,390 (Bankr. E.D. Pa. 1996)(citing Matter of Zale Corp., 62 F.3d 746,753 (5" Cir. 1995) and Matter of Walker, 169 B.R. 601,604 (E.D. La. 1994)). In its memorandum of law, Fleet argued that Sauls and Stark may have indemnification claims against the CCG estate if they are found liable to Fleet, however neither Sauls nor Stark have filed a proof of claim in the bankruptcy case.

failure to state a proper third-party claim pursuant to Rules 12(b)(6) and Rule 14(a) of the Federal Rules of Civil Procedure. Since the Third-Party Complaint will be dismissed, it is unnecessary to rule on the Third-Party Defendants' motion to dismiss for lack of subject matter jurisdiction.

This the 4 day of December 2002.

CATHARINE R. CARRUTHERS

Catharine R. Carruthers
United States Bankruptcy Judge

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WINSTON-SALEM DIVISION

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Ad. Proc. No.: 01-6044W

ORDER

Pursuant to the Memorandum Opinion filed contemporaneously herewith, IT IS ORDERED, ADJUDGED, AND DECREED that Fleet National Bank's Third-Party Complaint is DISMISSED.

This the 9 day of December 2002.

CATHARINE R. CARRUTHERS

Catharine R. Carruthers
United States Bankruptcy Judge