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

IN RE:	)	
	)	
Cornerstone Residential Development Corporation,	)	Case No. 97-52476C-7W
	)	
Debtor.	)	
	)	
A. Gregory Rosenfeld,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adversary No. 99-6034
	)	
Lee Beason and Centura Bank,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

This adversary proceeding came before the court on March 29, 2001, for hearing upon a motion by Lee Beason for summary judgment. John A. Meadows appeared on behalf of the plaintiff and R. Bradford Leggett appeared on behalf of Lee Beason.

FACTS

The depositions and other materials submitted by the parties in support of and in opposition to the motion, read in the light most favorable to the plaintiff, reflect the following undisputed facts. Prior to its bankruptcy, Cornerstone Residential Development Corporation ("Cornerstone") was a North Carolina corporation located in Hickory, North Carolina. Cornerstone was operated and managed by its president and sole shareholder, Todd Sides. The primary business of Cornerstone was the construction

and sale of residences. In some instances, Cornerstone purchased the existing residences from its new-home customers and held these "trade homes" until they could be sold. In purchasing such homes, Cornerstone intended to resell the trade homes for a profit.

During 1997, Cornerstone had a banking relationship with Centura Bank which included a substantial line of credit. Cornerstone's primary contact at Centura Bank was Lee Beason, a loan officer at Centura Bank. By approximately June or July of 1997, Cornerstone was at the limit of its line of credit and additional advances from Centura Bank were not available. Cornerstone had a number of projects underway at that time and the unavailability of further credit from Centura Bank created a cash flow problem for Cornerstone, which prompted Cornerstone to look elsewhere for funding.

During 1997, the plaintiff also had a banking relationship with Centura Bank. Plaintiff's personal banker at Centura was Mr. Beason. Mr. Beason had been plaintiff's personal banker at two previous banks while Mr. Beason was employed at those banks, going back to 1991. The two men regarded each other as friends, as well as business associates. In addition to banking matters, Mr. Beason and the plaintiff had discussions concerning possible investments and on occasion had exchanged stock tips.

In the Spring of 1997, Mr. Beason mentioned Cornerstone to the plaintiff as an investment opportunity that he ought to consider.

Thereafter, Mr. Beason arranged two meetings attended by Mr. Sides, the plaintiff and Mr. Beason for the purpose of discussing Cornerstone as a possibility for an investment by the plaintiff. At these meetings the nature of Cornerstone's business was discussed, including the trade homes program. The plaintiff also was furnished with various documents, including a list of Cornerstone homes under contract with the projected profit for each home, a list of homes under construction with the anticipated gross profit for each, and a list of trade homes available for purchase from Cornerstone customers and the estimated profit available with each trade home. The plaintiff was offered an opportunity to purchase a trade home or to invest or loan money directly to Cornerstone. Both Mr. Sides and Mr. Beason participated in making a presentation to the plaintiff that was favorable to Cornerstone and which encouraged the plaintiff to invest in or loan money to Cornerstone. However, plaintiff was told by Mr. Sides and Mr. Beason that Cornerstone had "maxed out" on its line of credit at Centura and needed funding from another source because Cornerstone was unable to obtain further loans from Centura or any other banks. Following these two meetings, the plaintiff had a couple of telephone conversations with Mr. Sides before deciding to advance funds to Cornerstone.

The funds that plaintiff advanced to Cornerstone came from a loan that the plaintiff obtained from Catawba Valley Bank. The

Catawba Valley Bank loan was arranged by Mr. Beason on behalf of the plaintiff, using copies of documents that plaintiff earlier had submitted to Centura Bank. Although the loan was closed on August 4, 1997, after Mr. Beason had been terminated by Centura Bank, the arrangements for the loan were made by Mr. Beason while he was still employed at Centura Bank.

The plaintiff decided to structure his relationship with Cornerstone as a loan. On August 8, 1997, plaintiff made his first loan to Cornerstone in the amount of $100,000.00, pursuant to a promissory note that obligated Cornerstone to repay $115,000.00 on September 15, 1997, consisting of principal of $100,000.00 and interest of $15,000.00. On August 28, 1997, plaintiff loaned Cornerstone an additional $200,000.00 pursuant to a promissory note that obligated Cornerstone to repay $220,000.00 on September 25, 1997, consisting of principal of $200,000.00 and interest of $20,000.00. After receiving a $30,000.00 payment from Cornerstone on September 9, 1997, and a $25,000.00 payment on September 26, 1997, the plaintiff obtained from Cornerstone a September 29, 1997 renewal note that called for a payment of $300,000.00 on October 27, 1997. The last payment received by the plaintiff was in the amount of $4,000.00 which was made in December of 1997.

On December 27, 1997, an involuntary bankruptcy petition was filed against Cornerstone. Thereafter, an order for relief was entered in the bankruptcy court and a Chapter 7 trustee was

appointed for Cornerstone. No further payments were made to the plaintiff after the $4,000.00 payment in December of 1997.

This adversary proceeding was filed on October 1, 1999. The plaintiff alleges claims for securities fraud, fraud, unfair trade practices, breach of fiduciary duty as to both defendants and, as to Centura Bank alone, a claim alleging negligent retention and supervision of Mr. Beason as an employee of Centura. In the motion for summary judgment, Mr. Beason seeks summary judgment as to all of the claims alleged by the plaintiff.

DISCUSSION

A. Summary Judgment Standard.

Under Rule 56 of the Federal Rules of Civil Procedure, which is incorporated into Rule 7056 of the Federal Rules of Bankruptcy Procedure, summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. "Where the moving party has carried its burden of showing that the pleadings, depositions, answers to interrogatories, admissions and affidavits in the record construed favorably to the nonmoving party, do not raise a genuine issue of material fact for trial, entry of summary judgment is appropriate." Gutierrez v. Lynch, 826 F.2d 1534, 1536 (6th Cir. 1987)(citing Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986)); In re Specialty Concepts, Inc., 108 B.R. 104, 107 (W.D.N.C. 1989); In re Caucus Distribs., Inc., 83 B.R. 921, 923

(Bankr. E.D. Va. 1988).

In order to carry this burden, a party moving for summary judgment must show through affidavits, depositions or admissions all facts required to support each element of the claim or defense and that none of those facts are disputed. Moore's Federal Practice, § 56.13. p. 56-134 (3d ed. 1998)(movant must make a prima facie case for summary judgment by establishing (1) the apparent absence of any genuine dispute of material fact and (2) movant's entitlement to judgment as a matter of law on the basis of the undisputed facts). In determining whether the evidence is sufficient to establish the claim, the court must apply the substantive evidentiary standard that would be applicable at trial. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1968).

The evidence must be viewed in the light most favorable to the nonmoving party, and inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. In re Graham, 94 B.R. 386, 388 (Bankr. E.D. Pa. 1988); In re Trauger, 101 B.R. 378, 381 (Bankr. S.D. Fla. 1989). However, the existence of a factual dispute is material and precludes summary judgment only if the disputed fact is determinative of the outcome under applicable law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). The party seeking summary judgment bears the

initial responsibility of informing the court of the basis of its motion, and also must identify those portions of the record that it believes demonstrates the absence of a genuine issue of material fact. Only after the movant has sustained the initial burden of production does the burden shift to the nonmovant to show the court that there is a genuine issue for trial. However, once this is done, the opposing party must set forth the specific facts showing there is a genuine issue for trial. Only when the entire record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, can the court find there is no genuine issue for trial. In re Trauger, 101 B.R. at 381 (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986)).

B. Application of the Standard.

All of the claims asserted against Mr. Beason are based upon his allegedly having made false representations regarding Cornerstone or having knowingly failed to disclose material facts regarding Cornerstone under circumstances in which such failure was misleading and actionable. The record is sufficient to support the inference that certain representations were made to the plaintiff by Mr. Beason in the context of Mr. Beason recommending Cornerstone to the plaintiff as a good investment. Although the time of the representations is disputed, in the light most favorable to the plaintiff the representations by Mr. Beason were in the Spring of

1997.[1] As described by the plaintiff, the representations were that Cornerstone had a booming business, that it had reached a kind of "bottleneck as far as funding [was] concerned" because the bank [Centura] had "maxed out" the amount of money that it could lend Cornerstone, that Cornerstone had all these projects that were "getting ready to be finished and once he'd get over that hurdle of finishing those projects and getting some more cash infused into the business that it looked like it would be smooth sailing because he just had so much work to do and not enough cash flow to do all the work that needed to be done and complete the projects."[2] The alleged "problems" relating to Cornerstone that were not disclosed were that some unauthorized construction loans were made to Cornerstone by Mr. Beason, resulting in his being placed on probation by Centura, that some of Cornerstone's construction loans at Centura were over-funded for the amount of work completed, that the Cornerstone loan at Centura was a "problem loan" because of a combination of things, including financial condition and overdrafts in checking accounts and that Cornerstone was involved with a loan in which sale proceeds that should have gone to Centura went to Cornerstone, leaving the loan unpaid.[3] Although the complaint alleges that Cornerstone had substantial debts to suppliers and was

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[1]Deposition of G. Rosenfeld, p. 57.

[2]Deposition of G. Rosenfeld, pp. 60-61.

[3]Deposition of T. Clawson, pp. 37, 45, 47 and 51-53.

substantially behind on multiple projects, there was no evidence to support these allegations. However, the record does reflect that Cornerstone was placed in involuntary bankruptcy in December of 1997, some six months after the discussions with Beason in the Spring of 1997.

When the plaintiff is given the benefit of the favorable inferences that can be drawn from the foregoing circumstances, it cannot be said as a matter of law that a rational trier of fact could not find for the plaintiff. It follows that defendant Beason, therefore, is not entitled to summary judgment. Accordingly, an order will be entered contemporaneously with the filing of this memorandum opinion denying his motion for summary judgment.

This 8th day of June, 2001.

WILLIAM L. STOCKS

WILLIAM L. STOCKS
United States Bankruptcy Judge

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ORDER

In accordance with the memorandum opinions filed contemporaneously herewith, it is ORDERED, ADJUDGED AND DECREED as follows:

(1) The motion for summary judgment filed on behalf of Lee Beason is denied; and

(2) The motion for summary judgment filed on behalf of Centura Bank is granted and this adversary proceeding is dismissed with prejudice as to Centura Bank.

This 8th day of June, 2001

WILLIAM L. STOCKS

WILLIAM L. STOCKS
United States Bankruptcy Judge