United States Bankruptcy Court
Northern District of Illinois
Eastern Division

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Bankruptcy Caption: In re Rudy J. Mulder

Adversary Caption: Ilene 1500 LLC and Elaine 1500 LLC v. Rudy J. Mulder

Bankruptcy No. 03 B 36574

Adversary No. 03 A 4505

Date of Issuance: April 7, 2004

Judge: A. Benjamin Goldgar

Appearance of Counsel:

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	Chapter 11
	)	
RUDY J. MULDER,	)	No. 03 B 36574
	)	
Debtor.	)	
	)	
	)	
ILENE 1500 LLC and ELAINE 1500 LLC,	)	
	)	
Plaintiffs,	)	
v.	)	No. 03 A 04505
	)	
RUDY J. MULDER,	)	Judge Goldgar
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

In this adversary proceeding, plaintiffs Ilene 1500 LLC and Elaine 1500 LLC complain that debtor Rudy Mulder defrauded them in connection with the sale of interests in an investment property. Although Mulder is the only defendant, the plaintiffs' 15-count complaint contains essentially the same claims as the complaint the plaintiffs filed against some of Mulder's business associates in the Circuit Court of Cook County. In many of the counts here, the plaintiffs also request determinations that Mulder's debt to them is nondischargeable under sections 523(a)(2)(A) and (6) of the Bankruptcy Code, 11 U.S.C. §§ 523(a)(2)(A), (6).

Mulder now moves to dismiss seven counts of the complaint under Rule 12(b)(1),

Fed. R. Civ. P. 12(b)(1) (made applicable by Fed. R. Bankr. P. 7012(b)), for lack of jurisdiction; to dismiss the remaining nondischargeability counts under Rule 12(b)(6), Fed. R. Civ. P. 12(b)(6) (made applicable by Fed. R. Bankr. P. 7012(b)), for failure to state a claim; and to dismiss the entire complaint under Rule 12(b)(7), Fed. R. Civ. P. 12(b)(7) (made applicable by Fed. R. Bankr. P. 7012(b)), for failure to join necessary parties.

For the reasons set forth below, Mulder's motion is denied in its entirety.

1. Jurisdiction

This court has subject matter jurisdiction over this case pursuant to 28 U.S.C. §§ 1334(a) and 157(a), and the district court's Internal Operating Procedure 15(a). To the extent the plaintiffs seek to have their claims liquidated and allowed, this is a core proceeding under 28 U.S.C. § 157(b)(2)(B). Proceedings to determine the dischargeability of debts are also core proceedings under 28 U.S.C. § 157(b)(2)(I).

2. Background

The complaint alleges the following.[1/] On August 28, 2000, plaintiffs purchased interests in a business endeavor known as the Honeywell Project (the "Project") from a group made up of Mulder, Urban Investment Trust, Inc., John Terzakis, Roxanne

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[1/] In considering a motion under Rule 12(b)(6) the court "assume[s] the truth of the material facts as alleged in the complaint." *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 633 (1999). All reasonable inferences from the facts are drawn in the plaintiff's favor. *Hernandez v. City of Goshen*, 324 F.3d 535, 537 (7th Cir. 2003).

Gardner, Wayne Hannah III and Tax Deferred Services, LLC (collectively the "Promoter Group"). Compl., ¶¶ 2 -3. The Promoter Group solicited the plaintiffs and others in order to purchase an office building in suburban Cook County (the "Property"). *Id.*, ¶ 4.

According to the plaintiffs, they purchased shares in the Project expecting to make a profit on their investment. *Id.*, ¶ 3. To convince the plaintiffs to make their investment, the Promoter Group made numerous representations concerning the Project. They included: (1) that the Promoter Group owned the Project; (2) that Invensys, PLC had leased a large portion of the premises for 10 years; (3) that plaintiffs would receive monthly income from rentals; and (4) that the Promoter Group would pay the real estate taxes on the Property. *Id.,* ¶¶ 17, 24, 72 86, 93. The Promoter Group did not disclose other facts, such as the existence of a large number of "parking lot" or "put contracts," information that would have had a negative impact on plaintiffs' investment decisions. *See id.,* ¶ 17(k). Relying on the Promoter Group's representations, plaintiffs invested $200,000 in the Project. *Id.,* ¶ 19.

The Promoter Group's representations were knowingly false and made with the intent to mislead potential investors. *Id.*, ¶¶ 18, 28, 67-68, 129, 142. In reality, the interests in the Project were worthless. *Id.*, ¶ 20. The Promoter Group did not own the Property when the interests were sold, *id.,* ¶ 72, and there was no lease with Invensys, *id.*, ¶¶ 29, 67. Contrary to investors' expectations, the Promoter Group diverted monies from a lease buyout and tenant rentals, *id.*, ¶¶ 74-76, and the Property's manager (an affiliate of Urban Investment Trust) did not pay real estate taxes or the costs of maintaining and

insuring the Property,[2/] *id.* at 34, ¶¶ 139-40. Unsuccessfully, plaintiffs tried to rescind the transaction and tender back their shares to the Promoter Group. *Id.*, ¶¶ 21-22.

Plaintiffs acknowledge that they have made these same allegations in an action they filed in 2002 against Mulder and the Promoter Group in the Circuit Court of Cook County.[3/] P. Resp. After Mulder's September 5, 2003 bankruptcy filing stayed the circuit court case with respect to Mulder, plaintiffs brought this adversary proceeding. *Id.* The litigation in the circuit court continues as to the remaining defendants. *Id.*

In fact, the complaint here is apparently the circuit court complaint all over again, but with two prefatory paragraphs tacked on at the beginning. These paragraphs cite sections 523(a)(6) and 523(a)(2) of the Code, respectively, and then assert simply that Counts V through XI and XIII are "not dischargeable in bankruptcy." Compl. at 2.

3. Analysis

a. Jurisdiction

Mulder first challenges the court's jurisdiction to entertain those counts of the complaint that do not contest dischargeability, observing that "[n]o bankruptcy statutes are cited in support of holding Counts one through four, twelve, fourteen and fifteen of

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[2/] A page reference is inserted because the numbers 139 through 146 are used to designate paragraphs in Count VII as well as paragraphs in Counts VIII and IX of the complaint.

[3/] The circuit court action, No. 02 CH 17421, apparently names as defendants members of the Promoter Group, as well as 119th and Dan Ryan/Urban, an Illinois corporation, and Centerpoint Properties Trust, a Maryland Real Estate Investment Trust.

the Complaint nondischargeable." Mot. at ¶ 5. Mulder concludes that these counts should be dismissed "for lack of jurisdiction over the subject matter . . . ." *Id.* The plaintiffs respond that they are not interested in a finding that the alleged debts in Counts I-IV, XII, and XIV-XV are nondischargeable; their purpose in bringing those counts is merely to liquidate the claims. *Id.* at 6-7.

The court has jurisdiction over the plaintiffs' claims. Bankruptcy courts have jurisdiction to liquidate the claims of creditors, 11 U.S.C. § 157(b)(2)(B); *Shaw v. Santos (In re Santos),* 304 B.R. 639, 647 (Bankr. D. N.J. 2004), and state law issues are routinely decided in the claims allowance process, *see, e.g., In re Hildebrand*, 205 B.R. 278, 285 (Bankr. D. Colo. 1997). Although claims are not properly determined in an adversary proceeding, *see* Fed. R. Bankr. P. 7001 (listing proper adversary proceedings), the objection here is jurisdictional, not procedural. Jurisdiction is "the power to decide." *In re Chicago, R.I. & P. R.,* 794 F.2d 1182, 1188 (7th Cir. 1986); *see also Hay v. Indiana St. Bd. of Tax Comm'rs,* 312 F.3d 876, 879 (7th Cir. 2002). The court plainly has the *power* to liquidate all the claims in plaintiffs' complaint – though only to the extent, of course, that they are directed at Mulder.[4/]

Mulder's motion to dismiss Counts I-IV, XII and XIV-XV for lack of jurisdiction will be denied.

[4/] Complicating this effort considerably, the complaint makes little or no attempt to distinguish Mulder's actions or statements from those of his associates. As a consequence the representations alleged in the complaint appear to be joint statements made by the Promoter Group.

b. The Section 523(a) Claims

Mulder next contends that the complaint's other counts fail to state claims under sections 523(a)(2)(A) and (6) and must be dismissed under Rule 12(b)(6). According to Mulder, the complaint neglects to allege facts essential to the nondischargeability objections. The plaintiffs' only allegations specifically mentioning section 523(a) appear on the second page of their complaint in the general heading "counts which are not dischargeable in bankruptcy." Nonetheless, Mulder's motion to dismiss must be denied.

i. Section 523(a)(2)(A)

Section 523(a)(2)(A) of the Code exempts from discharge any debt "for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by . . . false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's . . . financial condition." 11 U.S.C. § 523(a)(2)(A). To sustain a claim under section 523(a)(2)(A), a creditor must prove (1) that the debtor made a false representation of fact (2) that the debtor (a) either knew to be false or made with reckless disregard for its truth and (b) also made with an intent to deceive, and (3) that the creditor justifiably relied on the false representation. *In re Sheridan,* 57 F.3d 627, 635 (7th Cir. 1995); *Citibank (S. Dakota), N.A. v. Michel,* 220 B.R. 603, 605 (N.D. Ill. 1998); *Golant v. Care Comm, Inc.,* 216 B.R. 248, 253 (N.D. Ill. 1997); *Bednarsz v. Brzakala (In re Brzakala),* 305 B.R. 705, 710 (Bankr. N.D. Ill. 2004).

Mulder does not argue that the plaintiffs' claims lack any particular element

required to state a claim under section 523(a)(2)(A). Rather, Mulder contends that "[m]ere conclusory allegations without a description of the underlying fraudulent conduct may warrant dismissal. The Plaintiffs have not pleaded the fraudulent circumstances with particularity sufficient to withstand a motion to dismiss." Mtn., ¶ 13. This is an argument that plaintiffs have failed to comply with Rule 9(b), Fed. R. Civ. P. 9(b) (made applicable by Federal Rule of Bankruptcy Procedure 7009).

Rule 9(b) says that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b). "[P]articularity means 'the who, what, when, where, and how: the first paragraph of any newspaper story.'" *Katz v. Household Int'l, Inc.*, 91 F.3d 1036, 1040 (7th Cir. 1996) (quoting *DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir. 1990)). Put differently, the complaint must identify who made the misrepresentation; state the time, place and content of the misrepresentation; and describe how the misrepresentation was communicated. *Kennedy v. Venrock Assocs.*, 348 F.3d 584, 593 (7th Cir. 2003).

The plaintiffs' complaint provides all the information that Rule 9(b) requires. The complaint specifies the content of the misrepresentations. It identifies the Promoter Group as the party that made them.[5/] And it alleges that the false statements were made

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[5/] By lumping the defendants together, the complaint effectively alleges either that each member of the Promoter Group individually made the misrepresentations, or that the misrepresentations of the member (or members) who made them are attributable to the other members. *Cf. BancBoston Mortgage Corp. v. Ledford (In re Ledford)*, 970 F.2d 1556, 1561 (6th Cir. 1992) (for purposes of section 523(a)(2)(A) fraud of one partner may be imputed to other partners); *Citibank v. Hyland (In re Hyland)*, 213 B.R. 631, 633

before the plaintiffs invested in the Project – at a minimum, in written offering materials as well as in a false "rent roll" furnished to potential investors. Compl., ¶¶ 23-25, 68.

Because the complaint alleges fraud with sufficient particularity to satisfy Rule 9(b), Mulder's motion to dismiss the claims under section 523(a)(2)(A) will be denied.

ii. Section 523(a)(6)

Section 523(a)(6) exempts from discharge a debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 512(a)(6). To prevail on their section 523(a)(6) claims, the plaintiffs must show that Mulder owes them a debt (1) resulting from an injury Mulder caused to another entity, (2) that Mulder's actions in causing the injury were willful, and (3) that his actions in causing the injury were malicious. *Glucona America, Inc. v. Ardisson (In re Ardisson)*, 272 B.R. 346, 356 (Bankr. N.D. Ill. 2001).

The courts have taken some pains to explain these last two terms. An act is "malicious" if it is taken "in conscious disregard of one's duties or without just cause or excuse." *In re Thirtyacre*, 36 F.3d 697, 700 (7th Cir. 1994). An action is "willful," the Supreme Court clarified not long ago in *Kawaauhau v. Geiger*, 523 U.S. 57 (1998), if both the action itself and the resulting injury – "the consequences of [the] act" – are intended. *Id.* at 61-62; *Rizzo v. Passialis (In re Passialis)*, 292 B.R. 346, 352 (N.D. Ill. 2003) (noting

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(Bankr. W.D.N.Y. 1997) (same). Regardless of which it is, Mulder is on notice that he has been charged with having made the misrepresentations, and so he is able to answer.

that willfulness means "intent to cause injury").

Mulder does not challenge plaintiffs' allegations of injury or malice.[6/] Instead, he argues that plaintiffs "have failed to allege either the Debtor's specific intent to harm the Plaintiffs or the Debtor's specific belief that he was substantially certain to cause harm to the Plaintiffs sufficient to state a cause of action under § 523(a)(6)." Mtn., ¶ 12. Mulder, in other words, contends that Baker has not alleged willfulness.

The court disagrees. Certainly, as Mulder points out, Counts V through XI and XIII allege neither facts supporting willfulness nor the conclusion that the Promoter Group acted willfully. The only allegations of intent in the complaint are the plaintiffs' assertions that the Promoter Group wanted to persuade the plaintiffs to purchase interests in the Project. *See, e.g.,* Compl., ¶¶ 28, 62, 66, 86, 94, 158. And the term "willful" does not appear anywhere.

Moreover, the plaintiffs do little to defend their section 523(a)(6) claims except to assert that "intent under Rule 523(a)(6) [*sic*] is no more than that required for the tort of fraud." P. Mem. at 6. According to the plaintiffs, "Mulder's knowledge of the true state

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[6/] Some post-*Geiger* decisions hold that "willful and malicious" conduct is a unitary concept, so that a finding of willfulness necessarily includes a finding of malice. *See, e.g.*, *Miller v. J.D. Abrams Inc. (In re Miller)*, 156 F.3d 598, 605-06 (5th Cir. 1998); *cf. Cutler v. Lazzara (In re Lazzara)*, 287 B.R. 714, 725 n.5 (Bankr. N.D. Ill. 2002) (mentioning but declining to reach the issue). Citing the Restatement definition in willfulness in *Geiger*, other decisions hold that a defendant acts willfully if he knows there is a "substantial certainty" his actions will cause injury. *See, e.g., Banks v. Gill Distrib. Ctrs., Inc. (In re Banks)*, 263 F.3d 862, 869(9th Cir. 2001); *Rizzo*, 292 B.R. at 353. The Seventh Circuit has yet to address either question.

of the Honeywell Project indirectly establishes willful injury." *Id.*

It does not. "Willfulness" for purposes of section 523(a)(6) means an intent to cause injury. *Geiger*, 523 U.S. at 61-62; *Rizzo,* 292 B.R. at 352. Intent for purposes of common law fraud means an intent to induce reliance on a false statement. *Orix Credit Alliance, Inc. v. Taylor Mach. Works, Inc.,* 125 F.3d 468, 479 n.5 (7th Cir. 1997); *Szajna v. General Motors Corp.,* 115 Ill. 2d 294, 322-23, 503 N.E.2d 760, 773 (1986). The two are not the same. Someone may have fraudulent intent and yet not act willfully in the section 523(a)(6) sense.[7/] *See, e.g., Kingvision Pay Per View, Ltd. v. DeMarco (In re DeMarco)*, 250 B.R. 681, 685 (Bankr. N.D. Ill. 2000); *KV Pharmaceutical Co. v. Harland (In re Harland),* 235 B.R. 769, 779 (Bankr. E.D. Pa. 1999).

Nonetheless, these many deficiencies in the complaint do not warrant its dismissal. Rule 8 of the Federal Rules (made applicable by Fed. R. Bankr. P. 8(a)) adopts a system of notice pleading meant to do away with the pleading of specific facts to state specific legal theories. *Bartholet v. Reishauer A.G. (Zurich),* 953 F.2d 1073, 1078 (7th Cir. 1992). In federal courts, the rules "do not require plaintiffs to plead either facts or law." *Johnson v. Wattenbarger,* ___ F.3d ___, ___, 2004 WL 549465 at *3 (7th Cir. March 22, 2004); *see also McCormick v. City of Chicago*, 230 F.3d 319, 323-24 (7th Cir. 2000); *Higgs v. Carver,*

[7/] The court respectfully disagrees with the Seventh Circuit's apparent dictum to the contrary in *Berkson v. Gulevsky (In re Gulevsky)*, ___ F.3d ___, 2004 WL 626538 at *2 (7th Cir. March 31, 2004) (describing the difference between the two forms of intent as "vanishingly thin" and stating that "[a] debtor who obtains money through false statements intended to deceive by definition intends the financial injury he causes").

286 F.3d 437, 439 (7th Cir. 2002) (declaring that a complaint "cannot be dismissed on the ground that it is conclusory or fails to allege facts").

The omission of certain facts, then, does not doom a complaint. "A complaint need only state the nature of the claim; details can wait for later stages." *Alliant Energy Corp. v. Bie,* 277 F.3d 916, 919 (7th Cir. 2002). Factual gaps do not necessitate dismissal as long as it is "possible to hypothesize facts . . . that would make out a claim." *Graehling v. Village of Lombard,* 58 F.3d 295, 297 (7th Cir. 1995). Although the plaintiffs here have not alleged facts that if proved would amount to willfulness, it is simple enough to imagine some: that Mulder made the alleged misrepresentations intending, not just to enrich himself, but to damage the plaintiffs.

The pursuit of an incorrect legal theory also is not the end – provided, at least, that a correct theory exists. "A drafter who lacks a legal theory is likely to bungle the complaint (and the trial); you need a theory to decide which facts to allege and prove. But the complaint need not identify a legal theory, and specifying an incorrect theory is not fatal." *Bartholet,* 953 F.2d at 1078; *see also Tolle v. Carroll Touch, Inc.,* 977 F.2d 1129, 1134 (7th Cir. 1992). The plaintiffs here have an erroneous notion of what actions are "willful" under section 523(a)(6), true enough. But at trial they may yet be able to prove facts amounting to "willful" conduct on Mulder's part.

The question on a motion to dismiss is not whether the complaint alleges the right facts or the right law, but merely whether the complaint alleges enough to give the defendant notice of the nature of the claim. *Thompson v. Illinois Dep't of Prof. Reg.,* 300

F.3d 750, 753 (7th Cir. 2002); *McCormick,* 230 F.3d at 323-24 (stating that plainitff need only plead enough "to allow the court and the defendant to understand the gravamen of the plaintiff's complaint") (internal quotation omitted). The complaint here gives Mulder notice of the nature of the plaintiffs' section 523(a)(6) claims.

Mulder's motion to dismiss the section 523(a)(6) claims will also be denied.

c. Necessary Parties

Finally, Mulder's motion under Rule 12(b)(7) to dismiss the complaint for failure to join necessary parties will be denied, as well.

Under Rule 12(b)(7), a defendant may move to dismiss an action for "failure to join a party under Rule 19." "Rule 19" is Rule 19 of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 19 (made applicable by Fed. R. Bankr. P. 7019), captioned "joinder of persons needed for just adjudication." As its title suggests, Rule 19 allows a federal court to join all materially interested parties in a single action in order to protect the interests of those parties and to preserve judicial resources. *Davis Cos. v. Emerald Casino, Inc.*, 268 F.3d 477, 481 (7th Cir. 2001).

Under Rule 19(a), the court first determines whether the absent party is necessary – that is, one who should be "joined if feasible." *Davis,* 268 F.3d at 481. To do so, the court must decide (1) if it is impossible for complete relief to be granted to existing parties without the absent party; and (2) if failure to join the absent party will either (a) impair that party's interest, or (b) expose the existing parties to the risk of multiple and

potentially inconsistent adjudications. *North Shore Gas Co., Inc. v. Salomon, Inc.*, 152 F.3d 642, 647-48 (7th Cir. 1998). If any of these three conditions is present, the absent party should be joined. *Id.* at 648. If not, the analysis ends.[8/] *Davis*, 268 F.3d at 485.

Mulder maintains that all the defendants in the plaintiffs' circuit court action are necessary parties here. Mulder observes that the plaintiffs allege actions he took jointly with the circuit court defendants, and he protests that as things stand he cannot defend the actions of the other parties and cannot protect any claims he might have against them. If the circuit court defendants are not joined in this action, Mulder says, both they and he will also be subject to the risk of multiple or inconsistent obligations. Mtn., ¶ 11.[9/]

In this court's view, Mulder has not remotely demonstrated that the circuit court defendants are parties "to be joined if feasible" here. Fed. R. Civ. P. 19(a).

• First, there has been no showing that complete relief cannot be granted to the plaintiffs or to Mulder without adding the circuit court defendants as parties. *Id.* The plaintiffs will either win in the bankruptcy court, or they will not. In either case, they and

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[8/] If the omitted party is a necessary party whose joinger is not feasible, the court must decide whether the action can proceed at all in the party's absence, weighing the factors in Rule 19(b). *Thomas v. United States,* 189 F.3d 662, 667 (7th Cir. 1999). If the court determines that it would be against "equity and good conscience" to allow the litigation to proceed, the court may dismiss the action. *Rhone-Poulenc Inc. v. Int'l Ins. Co.*, 71 F.3d 1299, 1301 (7th Cir. 1995).

[9/] Despite Mulder's desire to have the plaintiffs' claims against him tried with the claims against the circuit court defendants, Mulder has not sought relief from the automatic stay so he can participate in the circuit court action. Nor, for some reason, have the plaintiffs sought relief from the stay to return Mulder to the circuit court action – ignoring what would seem to be the obvious burden of duplicative litigation.

Mulder will receive complete relief.

- Second, there has been no showing that failing to join the circuit court defendants will impair their interest in the subject matter of the action. *Id.* Indeed, it is not at all evident what interest they could possibly have other than to be found not liable to the plaintiffs. That is an interest they can vindicate – and are trying to vindicate – in the circuit court. They certainly have no interest in trying to vindicate it in this court at the same time.

- Third, it does not appear that Mulder can be subjected to inconsistent outcomes or obligations if the circuit defendants are not added here. Like the plaintiffs, he will either win in the bankruptcy court, or he will lose. Meanwhile, however, the circuit court action against him has been stayed. There will be no outcome for him there. With Mulder's only obligations the ones that will be decided here, there is no risk to Mulder from allowing this action to proceed without the company of the circuit court defendants.

Although the legal bases of the plaintiffs' claims against Mulder vary, he and the circuit court defendants are alleged primarily to have been joint tortfeasors. Joint tortfeasors have long been held not to be necessary parties. *Temple v. Synthes Corp., Ltd.*, 498 U.S. 5, 7 (1990); 7 C. Wright, A. Miller & M. Kane, *Federal Practice & Procedure* § 1623 at 361 (2001) (noting that current version of Rule 19 is consistent with "the long standing practice of not requiring the addition of joint tortfeasors"). A plaintiff is entitled to sue one joint tortfeasor without suing the others, as the plaintiffs here have done.

Because the circuit court defendants are necessary parties to this action, Mulder's

motion to dismiss the complaint under Rule 12(b)(7) will be denied.

4. Conclusion

The motion of defendant Rudy Mulder to dismiss the complaint is denied in its entirety. Mulder's answer to the complaint is due April 21, 2004.

Dated: April 7, 2004

ENTER: _____
A. Benjamin Goldgar
United States Bankruptcy Judge