

**IN THE UNITED STATES BANKRUPTCY COURT**  
**FOR THE EASTERN DISTRICT OF TENNESSEE**

In re

ASSOCIATED SERVICES/  
68 STEEL, INC.,

Debtor.

No. 95-33157  
Chapter 7

---

MAURICE K. GUINN, TRUSTEE,  
  
Plaintiff,

vs.

Adv. Pro. No. 96-3263

THE WALLACE MEMORIAL BAPTIST  
CHURCH; THE TRUSTEES OF THE  
WALLACE MEMORIAL BAPTIST  
CHURCH; TOM JENSEN; EQUITABLE  
CHURCH BUILDERS, INC.; and  
JIMMY EARL KELLEY,

Defendants.

**M E M O R A N D U M**

APPEARANCES:

WILLIAM T. ALT, ESQ.  
WILLIAM T. ALT, P.C.  
300 Forest Avenue  
Chattanooga, Tennessee 37405  
*Attorneys for Maurice K. Guinn, Trustee*

MICHAEL S. KELLEY, ESQ.  
BASS, BERRY & SIMS PLC  
Post Office Box 1509  
Knoxville, Tennessee 37901-1509  
*Attorneys for Jimmy Earl Kelley*

**MARCIA PHILLIPS PARSONS**  
**UNITED STATES BANKRUPTCY JUDGE**

In this adversary proceeding commenced on November 26, 1996, plaintiff Maurice K. Guinn, Trustee (the "Trustee"), seeks to recover money allegedly owed to the debtor Associated Services/68 Steel, Inc. ("68 Steel") for work performed under steel fabrication and erection contracts with defendant Wallace Memorial Baptist Church (the "Church") along with other damages allegedly resulting from acts and omissions of the various defendants during the Church's sanctuary construction project. Pending before the court is the motion to dismiss of defendant Jimmy Earl Kelley ("Kelley") filed on February 5, 1997. The motion requests that the Trustee's claims for "Fraud and Misrepresentation" [count III. b. 2.] and for "Intentional Interference With Contractual Relations" [count III. b. 4.] be dismissed for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6), as incorporated by Fed. R. Bankr. P. 7012(b). The Trustee filed an amended complaint in response to the motion on February 26, 1997. Having considered the amended complaint in evaluating the merits of Kelley's motion to dismiss, the court concludes that the motion should be denied. This is a core proceeding. 28 U.S.C. § 157(b)(2)(E) and (O).

I.

In considering a Rule 12(b)(6) motion to dismiss for failure to state a claim, the court must construe the complaint in the light most favorable to the plaintiff, accept as true the factual allegations in the complaint, and determine whether the plaintiff undoubtedly could prove no set of facts in support of his claims that would entitle him to relief. *See, e.g., Allard v. Weitzman (In re DeLorean Motor Co.)*, 991 F.2d 1236, 1240 (6th Cir. 1993), *reh'g denied* (1993). A complaint need only give fair notice of what the plaintiff's claim is and the grounds upon which it rests. *Id.* Although this standard is extremely liberal, the plaintiff may not simply assert legal conclusions. Rather, the complaint must contain either direct or inferential allegations respecting all material elements to sustain a recovery under some viable legal theory. *Id.* Of course, the burden of demonstrating that a complaint does not state a claim is on the moving party. *See, e.g., Riumbau v. Colodner (In re Colodner)*, 147 B.R. 90, 92 (Bankr. S.D.N.Y. 1992).

II.

In pertinent part, the Trustee alleges in his amended complaint that in late 1989 the Church decided to construct a new sanctuary. Defendant Tom Jensen ("Jensen"), co-chair of the

Church's expansion committee, was authorized to act as the Church's representative in regard to all matters with respect to the construction project. Defendant Equitable Church Builders, Inc. ("Equitable") was selected to be the construction manager for the project and Kelley was ostensibly designated by Equitable as its on-site construction superintendent. The Trustee avers that at all times, 68 Steel was led to believe that Kelley was acting on behalf on Equitable and Equitable was the construction manager for the Church's sanctuary project.

The amended complaint further states that unknown to 68 Steel, after construction began and following the award of subcontracts for work requiring a long lead time, Equitable, with the concurrence of the Church, abdicated its obligations as construction manager by, among other things, relinquishing control and employment of Kelley to the Church. As an employee of the Church, Kelley then began to report to and receive his orders from Jensen. Thereafter, Jensen also began to make all day-to-day decisions involved in the administration and supervision of the construction project, while Equitable and Kelley became observers on the construction site, reporting to Jensen. The Trustee alleges that Kelley and Jensen were required, individually as to the roles they had assumed and on behalf of the entities they were held out to represent, to

disclose any problems or delays related to the project which would affect the subcontractors' performance of their respective subcontracts.

Of the two contracts entered into between 68 Steel and the Church, the first was for fabrication of 391 tons of steel for the sum of \$195,952.66, representing 68 Steel's largest single endeavor to date. Prior to the award of that subcontract on November 14, 1989, Jensen and Kelley conducted an extensive evaluation of 68 Steel's business and financial condition. As a result of that evaluation and certain discussions which Jensen and Kelley had with representatives of 68 Steel, the Trustee alleges that the defendants knew that 68 Steel's financial viability would depend upon timely progress payments, the prompt response to request for change orders, and that the underlying work or work that was required to be performed by other subcontractors be timely and accurate. The Trustee alleges it was foreseeable that 68 Steel's financial condition would be severely damaged upon the failure of the Church, Equitable, Kelley, or Jensen to timely and accurately perform the obligations which they had assumed or represented they would be discharging.

As stated in the amended complaint, 68 Steel's second contract with the Church was entered into on May 1, 1990, and

involved the erection of the structural steel for the sanctuary. Another entity, Willis & Sons, previously contracted to perform this work and had begun erecting some of the steel. The defendants allegedly advised 68 Steel that Willis & Sons left the job due to family problems and asked 68 Steel to finish the erection work. The Trustee avers that only later did 68 Steel learn that the real reason Willis & Sons had left the job was because of concerns about the dimensions of the physical layout of parts of the project, the inability to fit the structural steel in the erection process and the resulting inability to actually complete the erection in a safe and proper manner, all of which was known to the defendants, but not revealed to 68 Steel.

### III.

Although the complaint contains sixteen counts, the only two which are before the court on Kelley's motion is the claim for misrepresentation/fraud and the claim for intentional interference with contractual relations. Concerning the misrepresentation/fraud claim, the Trustee alleges that Kelley, as superintendent of the construction project, was in charge of and dictated the means, methods and procedures by which such subcontractors as 68 Steel performed their work. Specifically,

Kelley was responsible for establishing the line and grade at the project, from which all the installations would be measured. The Trustee alleges that Kelley knew or should have known that the building foundation was not installed in accordance with the plans, that the anchor bolts for the structural steel were incorrectly located, that the dimensions to locate column lines and elevations were not as depicted by the contract drawings, and that the drawings themselves had numerous errors in elevations and dimensions. Despite this knowledge, Kelley allegedly insisted that 68 Steel proceed to detail the steel in the form of shop drawings to be submitted using the incorrect dimensions and elevations of the contract drawings, and thereafter, required that the steel be fabricated pursuant to those shop drawings even though he knew from other fabricators of items to be used at the project that the contract drawings and field dimensions contained inconsistencies which would prevent the submittal of correct shop drawings by 68 Steel.

The Trustee alleges that when the steel arrived at the construction project, Willis & Sons informed Kelley the anchor bolts and other foundation locations were in error and that the steel could not be erected. When Willis & Sons left the job because of these problems, Kelley allegedly concealed this from 68 Steel and claimed that the previous erector left because of

family problems. Upon 68 Steel's agreement to perform the erection work, Kelley was allegedly asked if the anchor bolts needed checking as to location and elevation, and falsely responded that they had been checked many times and were correctly installed.

The Trustee also alleges that Kelley concealed from 68 Steel that the steel joist fabricator had brought to his attention the fact that there were numerous discrepancies in the field dimensions and contract drawings by its revocation of its shop drawings and refusal of responsibility for the inability of the joists to fit in the field. The Trustee avers that Kelley was required to advise 68 Steel of this problem since those joists rested on the steel frame which was then being both fabricated and erected by 68 Steel. When 68 Steel could not bring the fabricated steel to bolt up in the field, Kelley allegedly continued to falsely state that there was no error in the foundation of anchor bolt locations and the problem was due to the incorrect fabrication of the steel.

The amended complaint additionally states that Kelley represented to the Church that the structural steel dilemma was due to 68 Steel's performance despite the alleged knowledge that his work and that of others was the cause of the problem. As a result, the Church refused to pay 68 Steel, which in turn forced

68 Steel to abandon the construction project. The Trustee avers that 68 Steel in attempting to perform its contracts reasonably relied to its detriment upon the foregoing alleged misleading and false information which was known only to the Church and its designated representatives, including Kelley.

To prove fraud under Tennessee law, a plaintiff must establish that (1) the defendant made a representation of an existing or past fact; (2) the representation was false; (3) the representation was in regard to a material fact; (4) the representation was made knowingly, or without belief in its truth, or recklessly; (5) the plaintiff reasonably relied on the representation; and (6) the plaintiff suffered damages as a result. See, e.g., *Rally Hill Productions, Inc. v. Bursack (In re Bursack)*, 163 B.R. 302, 305 (Bankr. M.D. Tenn. 1994), *aff'd*, 65 F.3d 51 (6th Cir. 1995), (citing *Edwards v. Travelers Insurance*, 563 F.2d 105, 110-113 (6th Cir. 1977)). The amended complaint sets out the specific misrepresentations allegedly made by Kelley, including certain facts which the Trustee maintains Kelley concealed from 68 Steel. There are also particularized allegations that would indicate the misrepresentations and omissions were material, made or omitted knowingly, or at a minimum, recklessly, and were reasonably relied upon by 68 Steel to its detriment. Accepting the

allegations in the amended complaint as true, the Trustee has alleged sufficient facts to establish a *prima facie* misrepresentation cause of action against Kelley.

Concerning the claim for intentional interference with contractual relations, the Trustee alleges that Kelley maliciously interfered with 68 Steel's valid contracts with the Church for the fabrication and erection of steel, causing the contracts to be breached. Kelley maintains in his motion to dismiss that the Trustee's assertions are conclusory only and do not set forth specific facts supporting such a cause of action.

The necessary elements for pleading a cause of action for interference with contractual relations are (1) the existence of a valid, enforceable contract; (2) the wrongdoer's knowledge of the contract; (3) an intent to induce breach of the contract; (4) malice; (5) breach of the contract; (6) proximate cause between the malicious act and the breach; and (7) damages as a result. *See, e.g., Oak Ridge Precision Industries, Inc. v. First Tennessee Bank N.A.*, 835 S.W.2d 25, 29 (Tenn. App. 1992), *perm. to appeal denied* (Tenn. 1992). As for the first two elements, there has been no assertion that the fabrication and erection contracts were not valid and enforceable, or that Kelley did not have knowledge of these contracts.

With respect to the remaining elements, the Trustee avers

in ¶s 82 and 83 of the amended complaint that at some point "it became the intent of the defendants to force 68 Steel to leave the Project, so that any cost overruns, or difficulties with the Project could then be blamed totally on 68 Steel. Expecting 68 Steel to be put out of business by their actions, the defendants believed this would prevent the revelation of the real reasons for the Project's problems. As a direct and proximate cause of the wrongful actions ..., 68 Steel was forced to abandon the Project and cease doing business, causing substantial losses and damages, all of which were foreseeable by the defendants." These statements, along with the allegations previously referenced, supply the remaining elements of an intentional interference with contractual relations cause of action.

In his memorandum in support of his motion to dismiss, Kelley questions how he, an agent and employee of the Church, could have interfered with the Church's contracts. However, there appears to be some question as to Kelley's exact status and whether his alleged actions and omissions were undertaken as an employee of Equitable or the Church or both. The Trustee in ¶ 8 of his amended complaint asserts that at all times relevant to the complaint, Kelley acted "individually and/or as an employee and agent of Equitable and/or the Church." Construing the amended complaint in the light most favorable to the

Trustee, and accepting as true the factual allegations in the complaint (even if pleaded in the alternative), the court cannot conclude that the Trustee has not alleged a *prima facie* claim against Kelley for intentional interference with 68 Steel's contracts with the Church.

IV.

In summary, the motion to dismiss filed by Jimmy Earl Kelley will be denied. An order to this effect will be entered contemporaneously with the filing of this memorandum opinion.

FILED: March 12, 1997

BY THE COURT

---

MARCIA PHILLIPS PARSONS  
UNITED STATES BANKRUPTCY JUDGE