

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

In re

Case No. 99-32193

WEST POINTE PROPERTIES, L.P.

Debtor

ANN MOSTOLLER, TRUSTEE

Plaintiff

v.

Adv. Proc. No. 99-3193

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT and
CONTINENTAL WINGATE
ASSOCIATES, INC.

Defendants

MEMORANDUM ON UNITED STATES' MOTION TO DISMISS

APPEARANCES: JENKINS & JENKINS, ATTORNEYS PLLC

Brian C. Quist, Esq.
2121 First Tennessee Plaza
Knoxville, Tennessee 37929
Attorneys for Plaintiff

HARRY S. MATTICE, JR., ESQ.
UNITED STATES ATTORNEY
Pamela G. Steele, Esq.
Assistant United States Attorney
Howard H. Baker, Jr. United States Courthouse
800 Market Street, Suite 211
Knoxville, Tennessee 37902

Jud E. McNatt, Esq.
40 Marietta Plaza, Third Floor
Atlanta, Georgia 30303
Attorneys for United States Department of
Housing and Urban Development

HODGES, DOUGHTY & CARSON
Thomas H. Dickenson, Esq.
Post Office Box 869
Knoxville, Tennessee 37901
VORYS, SATER, SEYMOUR AND PEASE, L.L.P.
Phillip J. Smith, Esq.
Post Office Box 0236
Cincinnati, Ohio 45201
Attorneys for Continental Wingate Associates, Inc.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

The Debtor, as debtor-in-possession under Chapter 11, filed the present Complaint on November 4, 1999. Subsequently, by Order entered December 9, 1999, the court converted the Debtor's case from a Chapter 11 to Chapter 7. Ann Mostoller, Trustee (Trustee), was later substituted as Plaintiff in this adversary proceeding by Order entered October 16, 2001.

The Complaint, in part, alleges four separate counts against the United States of America Department of Housing and Urban Development (HUD) sounding in contract and tort.¹ The Complaint also asks the court to enjoin HUD from foreclosing on a certain commercial Deed of Trust.

Now before the court is HUD's "The Government's Motion to Dismiss Complaint" (Motion to Dismiss) filed on November 30, 2001. By her December 19, 2001 Trustee's Response to The Government's Motion to Dismiss Complaint, the Trustee concedes some portions of the Motion to Dismiss.² In light of those concessions, the issues remaining before the court are:

1. Does the court have jurisdiction over HUD pursuant to 11 U.S.C.A. § 106(b) and (c), or is that jurisdiction defeated by provisions of the Federal Tort Claims Act [FTCA]?
2. Should the Trustee's breach of contract claim be dismissed due to insufficient privity of contract between the Debtor and HUD?

¹ The Complaint alleges, against HUD, breach of contract, negligent misrepresentation, interference with contract, and violation of the Administrative Procedure Act.

² By a December 9, 1999 Order entered in the Debtor's case, the court authorized foreclosure by HUD, and the foreclosure subsequently occurred. No other nonmonetary relief is sought by the Complaint. Accordingly, the Trustee agrees that the Administrative Procedure Act is no longer a potential basis for the court's jurisdiction over HUD. See 5 U.S.C.A. § 702 (West 1996) ("An action in a court of the United States *seeking relief other than money damages* . . . shall not be dismissed nor relief therein be denied on the ground that it is against the United States" (emphasis added)).

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(B), (C) (West 1993). To the extent the Plaintiff's action may also involve issues that are noncore but related to the Debtor's bankruptcy case, the Plaintiff and Defendants have not yet complied with the provisions of FED. R. BANKR. P. 7008(a) and 7012(b), respectively, by stating that they do or do not consent to the entry of final orders or judgments by the bankruptcy judge. See 28 U.S.C.A. § 157(c) (1993).³

I

The facts material to this adversary proceeding have been previously set forth by the court:

On August 7, 1996, Continental Wingate Associates, Inc., made a loan to the Debtor in the principal amount of \$2,222,900.00 pursuant to the terms of a Deed of Trust Note, which was insured by HUD pursuant to § 207 of the National Housing Act, 12 U.S.C.A. § 1713 (West 1989 & Supp. 1999). The Debtor was not required to nor did it draw down the full amount of the loan. As security for the loan, the Debtor granted Continental Wingate Associates, Inc., a lien on its Oak Ridge Highway acreage through a Deed of Trust also executed on August 7, 1996. The record gives the court little insight on the Debtor's development of the property other than to allow it to conclude that whatever work was commenced ceased in the fall of 1997. The Deed of Trust Note was thereafter declared in default and on January 13, 1998, Continental Wingate Associates, Inc., assigned its rights under the Deed of Trust Note and Deed of Trust to HUD. HUD commenced foreclosure proceedings and the Debtor filed its Voluntary Petition under Chapter 11 on May 26, 1999, causing HUD to cancel a foreclosure scheduled for May 27, 1999. As of the date the Debtor filed its Chapter 11 petition, it was indebted to HUD in the

³ In the Complaint, the Plaintiff alleges that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(B), (C) and (O). The Defendant Continental Wingate Associates, Inc., although not in terms required by FED. R. BANKR. P. 7012(b), has generally denied the core nature of the Plaintiff's action in its Answer filed on November 16, 2001. The filing of HUD's answer has been deferred by its present Motion to Dismiss. See FED. R. BANKR. P. 7012(a). While the court will not use HUD's Motion to Dismiss as a forum to discuss the core/noncore nature of the Plaintiff's action, it seems clear that the Trustee's claims, all of which arose through actions of the Defendants alleged to have occurred prior to the commencement of the Debtor's bankruptcy case, and all of which involve nonbankruptcy law, are fundamentally noncore. See generally, *Beneficial Nat'l Bank USA v. Best Receptions Sys., Inc. (In re Best Reception Sys., Inc.)*, 220 B.R. 932, 942-949 (Bankr. E.D. Tenn. 1998). Whether the Trustee's actions are subsumed in the claims resolution process thus making them exclusively core in nature remains to be seen. See 28 U.S.C.A. § 157(b)(2)(B), (C) (West 1993). Again, as the resolution of HUD's Motion to Dismiss will not result in the entry of a final order by the court, the core/noncore issue need not be resolved at present.

amount of \$1,146,642.93. It has never made any payments on the August 7, 1996 loan.

In re West Pointe Properties, L.P., No. 99-32193, slip op. at 3 (Bankr. E.D. Tenn. Dec. 9, 1999) (footnote omitted). HUD filed its \$1,146,642.93 claim on September 28, 1999, as “[a]ssignee of note and first mortgage.”

According to the Complaint, Continental Wingate Associates, Inc. (CWA), was the party that declared the Deed of Trust Note to be in default. See Complaint, ¶¶ 46, 69(b). As to HUD, the Complaint alleges breach of contract, subsequent to the assignment from CWA, relating to HUD’s “declar[ing] the loan to be in default, [accelerating] the balance due, and [attempting] to foreclose on the mortgage[.]” See *id.* at ¶¶ 81-82.

II

Section 106 of the Bankruptcy Code sets forth the United States’ partial waiver of sovereign immunity against suit in bankruptcy court, providing in material part:

(b) A governmental unit that has filed a proof of claim in the case is deemed to have waived sovereign immunity with respect to a claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which the claim of such governmental unit arose.

(c) Notwithstanding any assertion of sovereign immunity by a governmental unit, there shall be offset against a claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.

11 U.S.C.A. § 106(b)-(c) (West Supp. 2001).

HUD does not argue that the Trustee’s claims fail to satisfy any element of § 106(b) or (c). Instead, it contends that the Congressional waiver of sovereign immunity found in § 106 is defeated

in this case by the FTCA, which waives sovereign immunity for certain torts but not for “[a]ny claim arising out of . . . misrepresentation . . . or interference with contract rights[.]” See 28 U.S.C.A. § 2680(h) (West 1994).

HUD’s position is not supported by the case law. Courts have consistently determined that the FTCA does not control the waiver provisions of § 106. See, e.g., *Anderson v. FDIC*, 918 F.2d 1139, 1144 (4th Cir. 1990); *Prudential Lines, Inc. v. United States Maritime Admin. (In re Prudential Lines, Inc.)*, 79 B.R. 167, 183 (Bankr. S.D.N.Y. 1987); *Inslaw, Inc. v. United States of America (In re Inslaw, Inc.)*, 76 B.R. 224, 234 (Bankr. D.D.C. 1987); *Kenny v. Block (In re Kenny)*, 75 B.R. 515, 521 (Bankr. E.D. Mich. 1987). “[T]he Bankruptcy Code’s explicit waivers of sovereign immunity are entirely distinct, separate and independent from and in addition to those found in any other statute, including the FTCA.” *Inslaw*, 76 B.R. at 234.

To permit HUD to participate in the claims process without subjecting itself to any liability it might have to the Trustee would be unfairly one-sided. See *Anderson*, 918 F.2d at 1143; see also *United States of America v. Rhodery (In re R&W Enters.)*, 181 B.R. 624, 645 (Bankr. N.D. Fla. 1994). Section 106 was enacted to prevent a governmental entity from receiving “a distribution from the estate without subjecting itself to any liability it has to the estate within the confines of a compulsory counterclaim.” *Kenny*, 75 B.R. at 521 (quoting H. R. REP. NO. 595, at 317 (1977); S. REP. NO. 989, at 29-30 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5814-15). The court also notes the principle of statutory construction that, where a conflict exists, the more recent statute - in this case the Bankruptcy Code - should control because it is the most current expression of Congressional intent. See *Anderson*, 918 F.2d at 1143 n.4.

To the extent that it seeks dismissal based on the jurisdictional restrictions of the FTCA, HUD's Motion to Dismiss must therefore be denied.

III

HUD also argues that insufficient privity of contract existed to support the Trustee's breach of contract claim. The court will construe this argument as one for dismissal based upon "failure to state a claim upon which relief can be granted" pursuant to FED. R. CIV. P. 12(b)(6) and FED. R. BANKR. P. 7012(b).

When deciding a Rule 12(b)(6) motion, the court must regard as true every factual allegation contained within the complaint. *See Windsor v. The Tennessean*, 719 F.2d 155, 158 (6th Cir. 1983). "The claim should not be dismissed unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.*

The present Complaint alleges that the Debtor and HUD were in contractual privity following the Deed of Trust's assignment to HUD. The Complaint goes on to allege that HUD breached its contractual duty, post-assignment, by wrongly proceeding with its foreclosure plans. Accepting these allegations as true, it does not appear beyond doubt that the Trustee would be unable to prove some set of facts warranting relief.

Accordingly, to the extent that it seeks dismissal of Count Three (breach of contract), HUD's Motion to Dismiss must be denied. Additionally, for the reasons previously discussed, the Motion to Dismiss must also be denied to the extent that it seeks dismissal of Counts Four

(negligent misrepresentation) and Five (interference with contract). Lastly, to the extent HUD seeks dismissal of Count Six (violation of Administrative Procedure Act), the Motion to Dismiss will be granted.⁴

An order consistent with this Memorandum will be entered.

FILED: January 16, 2002

BY THE COURT

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

⁴ See *supra* n.2.

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

In re

Case No. 99-32193

WEST POINTE PROPERTIES, L.P.

Debtor

ANN MOSTOLLER, TRUSTEE

Plaintiff

v.

Adv. Proc. No. 99-3193

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT and
CONTINENTAL WINGATE
ASSOCIATES, INC.

Defendants

ORDER

For the reasons stated in the Memorandum on United States' Motion to Dismiss filed this date, the court directs that to the extent the Defendant United States of America, on behalf of its agency, the Department of Housing and Urban Development, by The Government's Motion to Dismiss Complaint filed November 30, 2001, seeks to dismiss the Plaintiff's Complaint for lack of jurisdiction under the Administrative Procedure Act, the Motion is, without objection, GRANTED. The Government's Motion to Dismiss Complaint is in all other respects DENIED.

SO ORDERED.

ENTER: January 16, 2002

BY THE COURT

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE