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NOT FOR PUBLICATION

ENTERED <u>SEP 27 2007</u>
FILED
SEP 26 2007
CLERK, U.S. BANKRUPTCY COURT SOUTHERN DISTRICT OF CALIFORNIA BY _____ DEPUTY

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re
UC LOFTS ON 4TH, LLC, AND UC
LOFTS ON 5TH, LLC,
Debtors.

Bankruptcy No. 05-15409-JM7
Adversary No. 07-90139-JM

LESLIE T. GLADSTONE, Chapter 7
Trustee,
Plaintiff,
v.
CHARLES MC HAFFIE, et al.,
Defendants.

AMENDED NOTICE OF INTENDED
DECISION DENYING MOTIONS TO
DISMISS

The motions by Defendant James Warner, ("Warner") and Defendants Frank Schaefer, Frank Schaefer Construction Co., and Frank Schaefer Construction, Inc. Pension Plan, (collectively "Schaefer") to dismiss the complaint were heard on August 3, 2007, and taken under submission. For the following reasons, the motions to dismiss are denied.

At Movants' urging, the Court reexamined the complaint through the lense of the plausibility standard of pleading announced by the

1 Supreme Court in Bell Atlantic Corp. V. Twombly, __ U.S. __, 127 S.Ct.
2 1955, 167 L.Ed.2d 929 (2007). To survive a motion to dismiss under
3 this standard, the complaint must include sufficient factual
4 allegations to raise a right to relief above the speculative level,
5 which requires more than labels and conclusions. A "formulaic
6 recitation of a cause of action's elements will not do." Bell
7 Atlantic, 127 S.Ct. at 1959.

8 Even under the plausibility standard, the complaint in this
9 proceeding passes with flying colors. The complaint contains many
10 specific facts concerning transfers of the Debtors' assets, including
11 dates, amounts and recipients. It describes accounts controlled by
12 Schaeffer on behalf of the Debtors and a close relationship with Mr.
13 McHaffie, a primary insider of the Debtors. Whether the control or
14 relationship were such to treat Schaefer as a partner with fiduciary
15 duties, or an insider subject to the extended preference period are
16 issues which can only be determined after weighing evidence presented
17 to support or refute the allegations in the complaint. Such issues
18 are properly raised after Schaefer has filed an answer to the
19 complaint through motions for summary judgment or at trial.

20 Similarly, Schaefer's reference to loan documents as the basis
21 to dismiss the usury claims is inadequate without referring to
22 declarations outside the complaint. To fall within the exemption to
23 the California Constitution's usury prohibition, the loan at issue
24 must have been arranged by a licensed broker acting as a third party
25 intermediary. Cal.Const., art. XV, Section 1. For a secured loan to
26 be "arranged by" a licensed broker, the broker acts with the
27 expectation of compensation for soliciting, negotiating or arranging
28 a loan for another. Stoneridge Parkway Partners, v. MW Housing

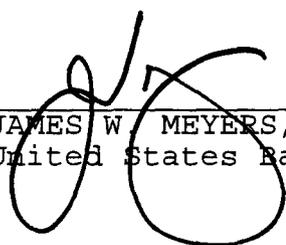
1 Partners III, 153 Cal.App.4th 1373, 64 Cal.Rptr.3d 61 (2007);
2 Cal.Civ.Code Section 1916.1. Without additional information, a
3 reference to an entity in loan documents is not sufficient to conclude
4 that the entity is separate from the borrower, or that the entity
5 solicited, negotiated or arranged the loan.

6 The complaint also contains sufficient factual allegations
7 against Warner to withstand a motion to dismiss. The Trustee claims
8 that Warner was negligent and breached his duty to the Debtor by
9 providing advice to Mr. McHaffie that he was free to use the loan
10 proceeds described in the complaint for any purpose he chose, whether
11 of benefit to the Debtors or not. Further, a resolution of the
12 statute of limitations defense raised by Warner also requires
13 information beyond the complaint, and is not a sufficient basis to
14 dismiss any of the claims in this case.

15 The Trustee's complaint includes many specific facts in
16 paragraphs 5 - 20, and several other places throughout the following
17 123 paragraphs. The facts included provide the context to support
18 plausible grounds for the claims against Schaefer and Warner. This
19 is a far cry from a pleading that "does not set forth a single fact
20 in a context that suggests an agreement" as the Court described the
21 complaint in Bell Atlantic. 127 S.Ct. at 1969.

22 The motions to dismiss filed by Warner and Schaefer are denied,
23 and those movants should answer the complaint. Counsel for the
24 Trustee is instructed to submit an order in accordance with this
25 decision within 14 days of issuance.

26 Dated: **SEP 26 2007**

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JAMES W. MEYERS, Judge
United States Bankruptcy Court