

# Not Intended for Publication or Citation

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
FORT WAYNE DIVISION

IN RE: CASE NO. 10-10047	)	
	)	
ACTGG PARTNERSHIP, LLP	)	
	)	
Debtor	)	
	)	
	)	
ACTGG PARTNERSHIP, LLP	)	
	)	
Plaintiff	)	
	)	
vs.	)	PROC. NO. 11-1053
	)	
RAY ALEXANDER	)	
BRUCE L. NELSON	)	
	)	
Defendants	)	

## DECISION AND ORDER DENYING MOTION TO DISMISS

At Fort Wayne, Indiana, on May 24, 2011.

By its complaint in this adversary proceeding, the plaintiff seeks to recover \$300,000, plus interest, for the loss of the bargain on the sale of real estate which was owned by the debtor. The matter is before the court on a motion to dismiss filed by one of the defendants, Bruce Nelson. The motion has been filed pursuant to Rules 12(b)(2) and 12(b)(6) of the Federal Rules of Civil Procedure and asserts that this court lacks personal jurisdiction over him and that the complaint fails to allege facts necessary to support a claim for the relief sought. The plaintiff responded by filing a motion to strike to which the defendant responded by filing an amended motion to dismiss.

Turning first to the plaintiff's motion to strike, except as contemplated by Rule 12(f), the purpose of a motion to strike should be limited to removing things from the docket that are so woefully inadequate they do not deserve to be filed. It is not the proper vehicle to deal with things

which qualify for filing but are simply not sufficient to accomplish their ostensible purpose. See, Colodny v. Iverson, Yoakum, Papiano & Hatch, 838 F. Supp. 572, 575 (D. M.D. Fla. 1994) (motion to strike is not an appropriate way to challenge the basis of factual allegations). Such deficiencies should be addressed in one's normal response or reply to the submission, rather than by filing a separate motion asking the court to strike the offending document.<sup>1</sup> Knudsen v. Liberty Mutual Ins. Co., 411 F.3d 805 (7th Cir. 2005) ("we hope that in the future [parties] will address the issues directly rather than move to strike the [opponent's] papers."). See also, S.D. Ind. L.R. 56.1(f) ("Collateral motions in the summary judgment process, such as motions to strike are disfavored."). The plaintiff's motion to strike is based upon perceived deficiencies in the defendant's brief. Those arguments should have been made in the formal response to the plaintiff's motion, not by filing a separate motion to strike. The plaintiff's motion to strike is, therefore, DENIED.

The defendant's motions fare no better. His challenge to this court's personal jurisdiction over it is easily disposed of. His resistance is based upon the argument that he lacks sufficient "minimum contacts" with the State of Indiana to be amenable to process here. The argument must fail. Bankruptcy Rule 7004(d) authorizes nationwide service of process. Thus, the defendant's contacts with the State of Indiana are "simply irrelevant." Diamond Mortgage Corp. of Illinois v. Sugar, 913 F.2d 1233, 1244 (7th Cir. 1990) cert. denied 498 U.S. 1089, 111 S.Ct. 968 (1991); Cytomedix, Inc. v. Bennett, 299 B.R. 878, 880 (N.D. Ill. 2003); Morris v. Martino, 1995 WL 347947 \*2 n.4 (N.D. Ill. 1995) ("where a federal statute provides for nationwide service of process,

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<sup>1</sup>The improper use of a motion to strike only creates procedural confusion. Here, for example, does the court have one motion to dismiss, a response (the motion to strike) and a reply (the amended motion), as contemplated by its local rules, see, N.D. Ind. L.B.R. B-7001-1(a), or does it have three separate motions, each with an independent briefing schedule? Id. The court chooses the first interpretation of the parties' filings.

personal jurisdiction may be obtained over any defendant having minimum contacts with the United States as a whole’); In re Brooks Fashion Stores, Inc., 124 B.R. 436, 440 (Bankr. S.D. N.Y. 1991) (“Since Congress has the power to provide for nationwide service of process, and has apparently vested that ability in the bankruptcy courts, no inquiry into due process or “minimum contacts” is required.”). This court may properly exercise in personam jurisdiction over the defendant without regard to the extent of his contacts with the State of Indiana. Id.

As to the remainder of the defendant’s motion, the current standard for a motion to dismiss pursuant to Rule 12(b)(6) requires that:

First, the complaint must describe the claim in sufficient detail to give the defendant “fair notice of what the . . . claim is and the grounds upon which it rests” . . . Second, its allegations must plausibly suggest that the plaintiff has a right to relief raising the possibility above a “speculative level”; if they do not, the plaintiff pleads itself out of court. E.E.O.C. v. Concentra Health Services, Inc., 496 F. 3d 773, 776 (7th Cir. 2007) (quoting Bell Atlantic v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 1964)(internal citations omitted). See also, Ashcroft v. Iqbal, \_\_\_ U.S. \_\_\_, 129 S.Ct. 1937 (2009); In re Eisaman, 387 B.R. 219, 222 (Bankr. N.D. Ind. 2008); In re Schmucker, 376 B.R. 256, 258 (Bankr. N.D. Ind. 2007).

This determination is made based upon the factual allegations in the complaint. In other words, only the complaint may be the focus of the court’s evaluation. Given this focus and the standard established by Twombly and Iqbal, the defendant’s motion is DENIED. While the defendant’s brief may have competently expounded upon their requirements, it never takes the trouble to apply them to the facts of this particular situation. See, In re King, 2006 WL 1994679, 2006 Bankr. LEXIS 1416 (Bankr. N.D. Ind. 2006) (a proper brief identifies the rules governing a particular situation and then advances an argument in which those rules are applied to the facts of the matter at hand). In other words, although the defendant’s brief tells us what Twombly and Iqbal require, it never explains why the complaint does not satisfy those requirements. It simply asserts that it does not. That is not

enough. Moreover, having read the complaint the court sees no deficiencies in it.

The motion to dismiss is DENIED and defendant, Bruce Nelson, shall file an answer to the plaintiff's complaint within fourteen (14) days of this date.

SO ORDERED.

*/s/ Robert E. Grant*  
Chief Judge, United States Bankruptcy Court