

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

IN RE: CASE NO. 01-13525)
)
MICHAEL JOSEPH MAY)
JEAN ANN MAY)
)
Debtors)
)
)
FIFTH THIRD BANK)
)
Plaintiff)
)
vs.) PROC. NO. 05-1250
)
MICHAEL JOSEPH MAY, et al)
)
Defendants)

DECISION AND ORDER ON MOTION TO DISMISS

At Fort Wayne, Indiana, on July 28, 2006

By this adversary proceeding the plaintiff has asked the court to determine that its claim to funds in possession of the trustee is superior to that of the other defendants, and to order the trustee to pay that money over to it. The money in question represents proceeds from the sale of property in which the bankruptcy estate may have an interest. The defendants include the debtor, the trustee and creditors of the debtor who either had or may be able to claim liens upon the property. In response to the complaint, one of those defendants, Bank One, has filed a motion asking that it be dismissed because it disclaims any interest in the proceeds.¹ It is that motion which is presently

¹Why the Bank's counsel would go to the trouble of filing a motion, together with a brief in support thereof, all of which require the court to decide the issue, when a simple phone call to plaintiff's counsel and an appropriate stipulation would seem to offer a more direct path to his goal is a bit of a mystery. Perhaps lawyers do not communicate with one another anymore, except through the formalities of litigation, motions, briefs and the like.

before the court.

Neither the motion nor the brief filed in support thereof identify the procedural rule upon which it is based or articulate the legal standard the court is to apply in passing upon it. See, In re King, 2006 WL 1994679 (Bankr. N.D. Ind. 2006). As a motion to dismiss filed prior to its answer, the court assumes that Bank One is proceeding under Rule 12(b) of the Federal Rules of Civil Procedure, and presumably Rule 12(b)(6) – the failure to state a claim upon which relief may be granted – since the motion says nothing about things like jurisdiction or venue or the service of process.² A motion to dismiss for the failure to state a claim can only be granted if it is clear from the face of the complaint that there is no set of facts plaintiff could prove in support of its claim which would entitle it to relief. See, Caldwell v. City of Elwood, 959 F.2d 670, 671-72 (7th Cir. 1992) (citing Mosley v. Klincar, 947 F.2d 1338, 1339 (7th Cir. 1991)). The complaint easily passes this test. It alleges that both the plaintiff and Bank One are able to assert claims to the funds in the trustee’s possession and the court is asked to declare that the plaintiff’s claim is the better of the two. It may well be that Bank One does not care to contest that proposition, but that is a reason to enter judgment in the plaintiff’s favor – not to dismiss its claim. The motion to dismiss is, therefore, DENIED and Bank One shall file its answer to plaintiff’s complaint within ten (10) days of this date.

SO ORDERED.

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

²It may be that counsel is asking for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Procedure, but that does not seem to be the case because the motion asks the “court to dismiss Bank One as a party” not enter judgment for one party or another. Furthermore, Bank One has yet to answer the complaint so the only pleadings the court has before it would be the complaint, see, Fed. R. Civ. P. Rule 7(a), bringing things back to Rule 12(b).