



SO ORDERED.

SIGNED this 14 day of September, 2004.

Dale L. Somers

Dale L. Somers
UNITED STATES BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

In Re:

VERNON KEITH REED,

DEBTOR.

**BOILERMAKER-BLACKSMITH
NATIONAL PENSION TRUST, et al.,**

PLAINTIFFS,

v.

VERNON KEITH REED,

DEFENDANT.

**CASE NO. 02-10109-7
CHAPTER 7**

ADV. NO. 02-6028

**ORDER DENYING DEFENDANT'S MOTION TO DISMISS, AND
GRANTING PLAINTIFFS' MOTION TO SUBSTITUTE PARTIES**

This proceeding is before the Court on the defendant's motion to dismiss for failure to state a claim for relief, and the plaintiffs' motion to substitute parties. The defendant-debtor appears by counsel Thomas M. Franklin. The plaintiffs appear by counsel Charles R. Schwartz and Justice B. King. The Court has reviewed the relevant pleadings and is now ready to rule.

FACTS

Before he filed a Chapter 7 bankruptcy in January 2002, debtor Vernon Keith Reed was the executive administrator for the Boilermaker-Blacksmith National Pension Trust, the Boilermakers National Health and Welfare Fund, and the Boilermakers National Annuity Trust, a position that the plaintiffs contend made him a fiduciary of each entity. In April 2002, a dischargeability complaint was filed that named each of those entities and the "Trustees of" each of them as the plaintiffs. No personal name of any individual who was such a trustee was stated in the caption or the body of the complaint. In May, the Debtor filed a timely answer that raised no objection about the absence of the trustees' personal names. A scheduling order was entered, and the parties proceeded with discovery. In February and March 2003, the parties filed briefs addressing certain questions raised by the Court.

In February 2004, the Debtor filed an amended answer in which he asserted that the individual trustees had not been named as parties. In May 2004, the Debtor filed a motion to dismiss the complaint for failure to state a claim on which relief can be granted.

The same day, the plaintiffs filed a motion to substitute parties, seeking to add the personal names of two trustees of each of the entities identified in the complaint. The parties have now fully briefed both motions.

DISCUSSION

The Debtor contends the plaintiffs' complaint fails to state a claim on which relief can be granted¹ because no eligible plaintiff is named as a party in the complaint, as required by Federal Rule of Civil Procedure 10(a).² He alleges that the entities named in the complaint as plaintiffs are governed by the Employee Retirement Income Security Act³ ("ERISA"), and that, as relevant here, Congress conferred standing to pursue the types of claims asserted in the complaint only on "a participant, beneficiary or fiduciary" of such entities.⁴ The entities themselves are clearly named in the complaint, but appear to concede that they do not have standing to bring it.⁵ The trustees of the entities would have standing as fiduciaries under ERISA, but, the Debtor contends, they have not been

¹See Fed. R. Bankr. P. 7012(b), making Fed. R. Civ. P. 12(b)(6) apply to adversary proceedings.

²Fed. R. Bankr. P. 7010 makes Fed. R. Civ. P. 10 apply to adversary proceedings.

³29 U.S.C.A. § 1001, *et seq.*

⁴See 29 U.S.C.A. § 1132(a)(2) & (3).

⁵See *Local 159 v. Nor-Cal Plumbing, Inc.*, 185 F.3d 978, 983 (9th Cir. 1999), *cert. denied* 528 U.S. 1156 (2000) (ERISA plan itself had no standing under §1132(a)); *Bowles v. Reade*, 198 F.3d 752, 761 (9th Cir. 1999) (same); *but see Saramar Aluminum Co. v. Pension Plan for Employees of Aluminum Indus. and Allied Indus.*, 782 F.2d 577, 581 (6th Cir. 1986) (plan as party before court necessarily includes those who must act for plan).

named in the complaint since only the collective “Trustees” is used and none of their personal, individual names were included in the complaint.

The Debtor has cited no decision in which a court dismissed a complaint because no personal name of the plaintiff-trustee was given. The plaintiffs have cited a number of decisions where the appellate case caption indicates the plaintiffs were identified only as “trustees of” a specified entity, as was done in this case.⁶ However, none of those opinions addressed the propriety of bringing a complaint that way, so it appears the question was not raised. The Court notes that the plaintiffs’ complaint informed the Debtor of that the trustees were suing him in their representative capacities and identified the entities on whose behalf they were suing. The fact the Debtor did not raise this argument for so long indicates that the absence of the trustees’ personal names did not prevent him from appreciating the substance of the claims being made against him.

The Court notes that a leading treatise on federal procedure declares that dismissal for a violation of Rule 10(a) is not appropriate because a defective caption is “merely a formal error and never should be viewed as a fatal defect.”⁷ The Court has also located one reported decision, *Trustees of the Hotel Employees and Restaurant Employees*

⁶See *Trustees of the Colorado Pipe Indus. Pension Trust v. Howard Elec. & Mech., Inc.*, 909 F.2d 1379 (10th Cir. 1990); *Trustees of Wyoming Laborers Health & Welfare Plan v. Morgen & Oswood Constr. Co., Inc.*, 850 F.2d 613 (10th Cir. 1988); *Trustees of Nat’l Elevator Indus. Pension, Health Benefit & Educ. Funds v. Lutyk*, 332 F.3d 188 (2d Cir. 2003); *Trustees of the Constr. Indus. & Laborers Health & Welfare Trust v. Desert Valley Landscape & Maint., Inc.*, 333 F.3d 923 (9th Cir. 2003); *Trustees of Am. Fed’n of Television & Radio Artists Health Fund v. Bondi*, 303 F.3d 765 (7th Cir. 2002).

⁷5 Wright & Miller, *Fed. Prac. & Pro.: Civil 2d*, § 1321 at 730 (1990).

International Union v. Amivest Corporation,⁸ in which an argument essentially identical to the Debtor's was rejected. That court explained:

This argument ignores the relationship between a trust and its trustee. A trust cannot litigate on its own behalf; the trustee is the proper party to litigate issues on behalf of the trust. [Citations omitted.] While the trustee is the named plaintiff, it is the interest of the trust that is actually being litigated. Thus, it should not surprise [the defendant] that the interests of the [trust entity] are the focal point of the allegations included in the complaint. While it may be appropriate for the Trustees to be named individually in the caption and for internal references within the complaint to specify that the Trustees are actually the plaintiffs, we decline to dismiss the complaint on these technical grounds. Instead, we grant the Trustees leave to amend the complaint to reflect these matters.⁹

This Court agrees with this reasoning, and will likewise grant the plaintiffs' motion to amend the complaint to include the personal names of the trustees.

The Debtor's motion to dismiss is hereby denied. The plaintiffs' motion to substitute parties is hereby granted.

IT IS SO ORDERED.

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⁸733 F.Supp. 1180, 1184-85 (N.D. Ill. 1990).

⁹*Id.*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the above **ORDER DENYING DEFENDANT'S MOTION TO DISMISS, AND GRANTING PLAINTIFFS' MOTION TO SUBSTITUTE PARTIES** were served electronically and via facsimile on the 14th day of September, 2004 to the following:

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