UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

THE BENNETT FUNDING GROUP, INC.	CASE NO. 96-61376
	Chapter 11
Debtors	Substantively Consolidated

RICHARD C. BREEDEN, as Trustee for
THE BENNETT FUNDING GROUP, INC.,
and THE PROCESSING CENTER, INC.

Plaintiff

vs. ADV. PRO. NO. 97-70049A

SPHERE DRAKE INSURANCE PLC, SPHERE DRAKE UNDERWRITING MANAGEMENT (BERMUDA) LIMITED, TRIANGLE INSURANCE MANAGEMENT LIMITED, LLOYD THOMPSON LIMITED, THE BENNETT FUNDING CORPORATION, BRIGHTON SECURITIES CORP., HALPERT AND COMPANY, WEINER ABRAMS & COMPANY INC., BANKERS FINANCIAL CORP., INTERNATIONAL FINANCE BANK, AMERICAN TRAFFIC SAFETY SERVICE ASSOCIATION, INC., SUMMIT FINANCIAL SECURITIES INC., HEFREN TILLOTSON, INC., HORIZON SECURITIES, SAGE-RUTTY & COMPANY, MID-STATE ADVISORS, ANDREW ANDREAS SPECIAL NEEDS TRUST, RICHARD H. REYNOLDS PROFIT SHARING PLAN, INC., SOUTHEASTERN PAPER PROFIT SHARING PLAN, FIRST FEDERAL SAVINGS BANK OF LAGRANGE, GREATER DELAWARE VALLEY SAVINGS BANK, MERCHANTS NATIONAL BANK OF WINONA, FARMERS STATE BANK, THE COMMERCIAL BANK, FIRST NORTHERN BANK & TRUST, LAFAYETTE SAVINGS BANK, DOLLAR CAPITAL CORPORATION, and JOHN DOES 1 through 10,000

Defendants

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

On August 6, 1999, the Court issued a Memorandum-Decision, Findings of Fact, Conclusions of Law, Order and Recommendation ("August 1999 Decision") in Adversary Proceeding 97-70049, which, *inter alia*, granted the motions of Sphere Drake Insurance, PLC (now known as Odyssey RE (London) Limited), Sphere Drake Underwriting Management (Bermuda) Limited (now known as Odyssey RE (Bermuda) Limited) (jointly referred to as "Sphere Drake") and Lloyd Thompson Limited ("Thompson") (collectively the "Insurance Defendants") to dismiss the Second Cross-claim of Merchants National Bank of Winona (the "Bank").[1] On October 28, 1999, the Court amended its August 1999 Decision to grant the same relief to Triangle Insurance Management Limited ("Triangle") (hereinafter also one of the "Insurance Defendants").

Presently before the Court is a motion for reconsideration filed by the Bank on August 16, 1999, and a supplemental motion filed on November 5, 1999[2] (hereinafter both are referred to as the "Motion") pursuant to Rules 59 and 60 of the Federal Rules of Civil Procedure ("Fed.R.Civ.P."), as incorporated by reference in Rules 9023 and 9024 of the Federal Rules of

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[1] The Cross-claim was filed against the Insurance Defendants in the context of an adversary proceeding commenced by the chapter 11 trustee, Richard C. Breeden ("Trustee") in the consolidated case of The Bennett Funding Group, Inc. ("BFG"). On July 29, 1998, the Trustee filed his Second Amended Adversary Complaint, which was the subject of the August 1999 Decision.

[2] The supplemental motion addresses itself to the relief granted in the Court's amended decision with respect to Triangle.

Bankruptcy Procedure ("Fed.R.Bankr.P.").[3] By letter dated August 25, 1999, the Court advised the parties that it would not hear oral argument on the Motion but would issue a written decision based upon the parties' pleadings and memoranda. Opposition to the Motion was filed on behalf of Thompson on September 3, 1999, on behalf of Sphere Drake on September 8, 1999, and on behalf of Triangle on November 17, 1999.

The Bank urges the Court to reconsider its decision to dismiss the Bank's Second Cross-claim for lack of subject matter jurisdiction. The Bank asserts that because subject matter jurisdiction was raised by the Court *sua sponte.* The Bank contends that neither party had an opportunity to brief or argue the issue and "fundamental fairness, case law and the liberal pleading and amendment policies embodied in the Bankruptcy and Federal Rules require that the Bank be given an opportunity to amend its claims before they are dismissed." *See* ¶ 7 of the Motion.

The Second Cross-claim asserts the Trustee's allegations found in ¶¶ 57-77 of the Second Amended Adversary Complaint and goes on to assert that the Insurance Defendants "affirmatively made material misrepresentations and further made material misrepresentations by omission which were reasonably relied upon by [the Bank], entitling the Bank to compensatory damages." *See* ¶¶ 28 and 29 of the Bank's Answer, Counterclaim and Cross-Claim, filed August 17, 1998.

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[3] The Motion also sought permission to amend the Bank's Answer, Counterclaim and Cross-claims based on discovery obtained after the Bank's original pleading was filed on August 17, 1998, with respect to the Trustee's Second Amended Adversary Complaint. By letter dated December 29, 1999, the Bank indicated that that portion of the Motion was rendered moot by the fact that the Bank had incorporated said amendments into its Amended Answer filed in response to the Trustee's Third Amended Complaint.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of this adversary proceeding pursuant to 28 U.S.C. §§ 1334(b), 157(a), (b)(1) and (b)(2)(A) and (O).

DISCUSSION

Whether or not to grant a motion for reconsideration is within the discretion of the Court. *See Mellon Bank, N.A. as Trustee for First Plaza Group Trust v. U.S. Trustee (In re Victory Markets, Inc.)*, 1996 WL 365675 slip op. at *2, 29 B.C.D. 317, 319 (N.D.N.Y. 1996); *see also Atlantic States Legal Foundation, Inc. v. Karg Bros., Inc.*, 841 F.Supp. 51, 55 (N.D.N.Y. 1993) (citation omitted). In seeking such relief, a party must rely on one of three grounds: "(1) there is an intervening change in the controlling law; (2) new evidence not previously available comes to light; or (3) it becomes necessary to remedy a clear error of law or to prevent injustice." *Id.* (citations omitted). At the same time, a party seeking relief is cautioned against using the motion to "re-litigate issues previously decided by the Court, or to attempt to 'sway the judge' one last time." *See id.* (citation omitted). The fact that a party may disagree with the Court's interpretation of the law is not a ground for reconsideration. As noted by the district court in *In re Sherrell*, 205 B.R. 20 (N.D.N.Y. 1997), "[t]he standards for reconsideration are strict 'in order to avoid repetitive arguments on issues that have already been fully considered by the Court.'" *Id.* at 21 (citation omitted).

In this case, the issue of the Court's jurisdiction to address the Second Cross-claim was

raised *sua sponte* by the Court in its August 1999 Decision. Therefore, the arguments now being made by the Bank are certainly not repetitive and were not previously considered by the Court.

In its August 1999 Decision, the Court determined that the Trustee had no standing to assert a cause of action based on "the financial losses suffered by the BFG investors . . ." because "the right to redress [that] harm belongs to the defrauded creditor exclusively." *See* August 1999 Decision at 21-22. In its August 1999 Decision, the Court, *inter alia*, also dismissed the Bank's Second Cross-claim "[b]ecause the Cross Claimants have failed to allege facts demonstrating that their tort claims against the Defendants either arise under bankruptcy law, arise in this bankruptcy case, or are related to this bankruptcy case . . . ." Indeed, the Bank's jurisdictional statement in connection with its Cross-claims merely asserts that "[t]his is a core proceeding." *See* the Bank's Answer, Counterclaim and Cross-Claim at 6.

Looking at the three grounds for reconsideration, it is clear that the first two are inapplicable to the matter herein. The question is whether it is appropriate for the Court to reconsider its dismissal of the Bank's Second Cross-claim in order to remedy a clear error of law or prevent injustice. Fed.R.Civ.P. 60, incorporated by reference in Fed.R.Bankr.P. 9024, clearly vests the Court with broad discretion to reconsider a prior order if it is determined that justice requires it. *See Matarese v. LeFevre*, 801 F.2d 98, 106 (2d Cir. 1986). In this case, the Court's *sua sponte* dismissal of the Bank's Second Cross-claim admittedly denied the Bank an opportunity to present the arguments it is now making that while the Court certainly lacks jurisdiction to hear the Bank's Second Cross-claim as a core matter, it is within the Court's jurisdiction to hear it as a related-to proceeding.

Without the benefit of argument by the Bank, the Court viewed the Second Cross-claim

as an action between nondebtors for which any recovery would inure only to the benefit of the Bank. The Bank argues that "the damages sought by the Bank in its cross-claims against [the Insurance Defendants] are measured largely by the amount of the Bank's claim against the estate . . . . Because the Bank cannot have more than a single recovery, any recovery it makes from the crossclaim defendants . . . will necessarily reduce its claim against the estate. Moreover, if the Bank prevails in its crossclaims, the [Insurance Defendants] will undoubtedly seek reimbursement from the estate under any number of potential contribution, indemnity and/or subrogation theories." *See* Motion at ¶ 6. The Bank also alludes to the increased cost to the Estate should the Trustee be required to participate in a proceeding in another forum with respect to its Second Cross-claim.

In *In re Turner*, 724 F.2d 338, 340-41 (2d Cir. 1983), the Second Circuit Court of Appeals held that in order to be found to be "related to," the proceeding must have a "significant connection" to the debtor's bankruptcy case.[4] The Second Circuit subsequently clarified its position in this regard in *In re Cuyahoga Equip. Corp.*, 980 F.2d 110 (2d Cir. 1992), in which it indicated that "[t]he test for determining whether litigation has a significant connection with a pending bankruptcy proceeding is whether its outcome might have any 'conceivable effect' on the bankruptcy estate." *See id.* at 114 (citations omitted).

As pointed out by Thompson, the fact that the Insurance Defendants may at some point seek contribution from the Debtor if they were to be found liable to the Bank is not a sufficient

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[4] This approach was found by some courts to be rather narrow. *See e.g. In re Gen. Am. Communications Corp.*, 130 B.R. 136, 156 (S.D.N.Y. 1991). The more frequently cited test is that found in *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984), which required the court to consider whether the outcome of the proceeding would have any "conceivable effect" on the bankruptcy estate.

basis to confer "related to" jurisdiction on the Court in connection with the Second Cross-claim. *See In re Videocart, Inc.*, 165 B.R. 740, 744 (Bankr. D. Mass. 1994). However, none of the Insurance Defendants appear to dispute the Bank's argument that if the outcome of the Bank's Second Cross-claim would affect the amount available for distribution or allocation among the unsecured creditors, then it is related to the bankruptcy case. *See Trager v. IRS (In re North Star)*, 146 B.R. 514, 516 (Bankr. S.D.N.Y. 1992); *Carver v. Beecher (In re Carver)*, 144 B.R. 643, 646 (Bankr. S.D.N.Y. 1992). The cost to the Estate in having the Trustee participate in litigation in a separate forum from the main proceeding also is a factor that the Court must consider. Based on these factors, the Court reconsiders its *sua sponte* dismissal of the Bank's Second Cross-claim and concludes that it has subject matter jurisdiction pursuant to 28 U.S.C. § 157(c)(1) to hear that claim against the Insurance Defendants as a related to matter.

Under the circumstances, the Bank has established that it would be manifestly unjust to dismiss its Second Cross-claim as it is a matter related to the bankruptcy case. The Trustee recently filed his Third Amended Adversary Complaint and, based on discussions with counsel at a pretrial conference held in Utica, New York, on January 13, 2000, it is evident that discovery is ongoing and far from being completed. Therefore, the Court finds no prejudice to the Insurance Defendants by its reinstatement of the Bank's Second Cross-claim.

Based on the foregoing, it is hereby

ORDERED that the Bank's Motion seeking reconsideration of the August 1999 Decision, as amended, is granted; it is further

ORDERED that the Bank's Second Cross-claim is reinstated with respect to its Answer, Counterclaim and Cross-claim in response to the Trustee's Second Amended Adversary Complaint based on a finding by the Court that it has jurisdiction pursuant to 28 U.S.C. § 157(c)(1).[5]

Dated at Utica, New York

this 23rd day of February 2000

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge

[5] The Court recognizes that such relief is actually moot given the fact that the Bank has included a similar cross-claim in its Answer, Counterclaim and Cross-claim filed in response to the Trustee's Third Amended Adversary Complaint. However, the Court deems it appropriate to include the relief if only to clarify that it has subject matter jurisdiction to address it.