

In re: FIRST NLC FINANCIAL SERVICES, LLC, et al, Debtor
DEBORAH C. MENOTTE, Trustee

Plaintiff,

v.

NLC HOLDING CORP., FNLC FINANCIAL
SERVICES, INC., BLUE BOY LIMITED
PARTNERSHIP, NSH VENTURES II,
L.P., and FRIEDMAN BILLINGS RAMSEY
GROUP, INC.,

Defendants

Case No.:08-10632-BKC-PGH
ADV. NO.:08-01327

The Trustee filed a Motion to Strike the Defendants' Motion to Dismiss the Plaintiff's complaint, for failure to state a claim for which relief can be granted. The Court granted the Trustee's Motion to Strike without prejudice to the Defendants filing a motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12 (c). The Defendants then filed a Motion for Judgment on the Pleadings in which they advanced three arguments. First, the Defendants argued that the parol evidence rule barred the Trustee's evidence regarding the Defendants' intent in entering into the transaction. The Court ruled that the parol evidence rule did not bar evidence outside the four corners of the documents because the evidence sought to be introduced would not be used to vary a party's performance or change the terms of the agreements. Second, the Defendants argued that the Court could not dispense with the mandatory requirement that Defendants obtain regulatory approvals before becoming controlling shareholders of the Debtor. The Court ruled that regulatory approval for a change of control of the Debtor did not inhibit the Court's equitable power to recharacterize a loan. Third, the Defendants asserted that causes of action for recharacterization were no longer viable following the Supreme Court's decision in *Travelers Cas. & Sur. Co. v. Pac. Gas & Elec. Co.*, 127 S.Ct. 1199 (2007). The Court determined that *Travelers*, which did not address recharacterization, did not prohibit causes of action for recharacterization.

The Court adopted the Fourth Circuit's reasoning in *In re Official Comm. of Unsecured Creditors for Dornier Aviation, Inc.*, 453 F.3d 225, 231 (4th Cir.2006) that recharacterization was necessary to the implementation of the Bankruptcy Code and found its analysis was consistent with *Estes v. N & D Prop., Inc.*, 799 F.2d 726 (11th Cir. 1986) . The Court recognized that §§ 105(a) and 726 of the Bankruptcy Code, as well as the definitions set forth in §101(5),(12),(16) & (17) support recharacterization. The Court also noted that recharacterization serves a different function than equitable subordination pursuant to § 510 or claims disallowance pursuant to § 502(b). Thus, the Court denied the Defendants' joint motion for Judgment on the Pleadings, finding that the Plaintiff's complaint stated sufficient facts to state a claim that was plausible.