IT IS ORDERED as set forth below:

Date: May 6, 2016

James R. Sacca
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

In re:	)	
	)	Case No.: 11-51759-JRS
Brian Lee Willis,	)	
Debtor.	)	Chapter 7
	)	
Elite Investors, LLC (Series E),	)	
as assignee of John L. Rocker,	)	Case No.: 15-5433-JRS
Plaintiff,	)	Adversary Proceeding
	)	
v.	)	
	)	
Partnership Liquidity	)	
Investors IV, LLC, Keith H. Brookings,	)	
and Brian Lee Willis,	)	
Defendants.	)	
Partnership Liquidity Investors IV, LLC,	)	
Counter-Claimant, Counter-Claimant,	)	
and Third-Party Claimant,	)	
v.	)	
	)	
Elite Investors, LLC (Series E), as	)	
assignee of John L. Rocker,	)	
Counter-Defendant,	)	
Brian Lee Willis,	)	
Cross-Defendant,	)	
John Rocker,	)	

3rd party Defendant.)

ORDER

This case is presently before the Court on the Elite Investors, LLC (Series E) ("Elite Investor's) Motion to Amend Complaint (the "Motion") (Doc. 41) and the responses in opposition thereto filed by the chapter 7 trustee (the "Trustee") and Partnership Liquidity Investors IV, LLC ("Partnership Liquidity"). (Docs. 45 & 53).

Facts

Elite Investors filed this adversary proceeding on November 12, 2015 in response to a dispute in the bankruptcy case regarding the Trustee's motion to sell the estate's economic interest in Spring Creek Apartments, LLC ("Spring Creek") to Partnership Liquidity for, initially, $450,000 (the "Motion to Sell"). The dispute involves, among other things, whether the Debtor held a 40% interest in Spring Creek, a 19.5% interest, or an interest somewhere in between by way of an alleged trust agreement in which the Debtor allegedly held John Rocker's ("Rocker") interest in trust in order for Spring Creek to obtain a loan. In the Trustee's Motion to Sell she acknowledged the conflicting allegations regarding whether the Debtor owned a 40% interest or some lesser amount, did not seek to sell any more than the actual economic interest owned by the estate, and made no warranties as to the actual interest being sold. Spring Creek and Rocker made written and oral objections to the Motion to Sell which, among other things, related to the dispute regarding the size of the interest in Spring Creek the Debtor, and therefore the estate, owned (the "Objections"). After a couple of hearings on the Objections, the Court concluded it would allow the Trustee to conduct an auction to sell the estate's interest in Spring Creek, and the auction took place on November 18, 2015, at which Partnership Liquidity made the final high bid for $605,000 (the "Auction").

In the meantime, on November 12, 2015, Elite Investors, as assignee of Rocker's alleged interest in Spring Creek, filed the present adversary proceeding seeking a declaratory judgment regarding its ownership interest in Spring Creek, abandonment of that interest by the Trustee, and a preliminary injunction. Soon after, on November 17, 2015, Elite Investors filed a motion for preliminary injunction in this case (the "Motion for Preliminary Injunction") asking the Court to enjoin the Trustee from closing on any sale of the disputed portion of the estate's interest in Spring Creek pending the resolution of this adversary proceeding, and requested that it be heard on an expedited basis.

On November 18, 2015, after the conclusion of the Auction, the Court held a hearing first on the Motion for Preliminary Injunction and then on the Motion to Sell. The Court denied Elite Investor's Motion for Preliminary Injunction and granted the Trustee's Motion to Sell the estate's economic interest, whatever it may be, in Spring Creek to Partnership Liquidity for $605,000. The Order granting the Motion to Sell specifically stated that it did not adjudicate the dispute regarding the estate's, and consequently Partnership Liquidity's, interest in Spring Creek.[1] The sale of the estate's economic interest in Spring Creek to Partnership Liquidity was closed on November 27, 2015 for $605,000.

After various pleadings were filed, on February 3, 2016, the Trustee filed a Motion to Dismiss as to her only which, after hearing, the Court granted as to the counts set forth in the original Complaint. Elite Investors filed the present Motion seeking to amend its complaint on February 29, 2016. The Court did not address the Motion to Amend in the motion to dismiss Order as the response time had not run at the time of the hearing.

[1] The Order stated: "This Order shall be WITHOUT PREJUDICE to the claims asserted by Elite [Investors] in the Adversary Proceeding as well as any and all defenses of the Defendants in the Adversary Proceeding. All claims and defenses as to the Disputed Spring Creek Economic Interest are hereby preserved for subsequent adjudication."

The Motion seeks leave to amend the Complaint to add an additional count for slander of title against both Partnership Liquidity and the Trustee. The proposed amended complaint (the "Amended Complaint") alleges that the Trustee and Partnership Liquidity "falsely and maliciously published assertions that "(i) Elite is not the true owner of the Rocker Membership Interest, (ii) that [Partnership Liquidity] is the true owner of the Rocker Membership Interest, and (iii) that any portion of the Rocker Membership Interest that became part of the bankruptcy estate was sold to [Partnership Liquidity] and not retained by Elite, Mr. Rocker, Mr. Willis, or the bankruptcy estate." Am. Compl. ¶ 57. As to the Trustee's alleged false and malicious assertions, Elite Investors points to the Bill of Sale (the "Bill of Sale") which represents that she is granting, conveying, and releasing to Partnership Liquidity "[a]ny and all interests that the bankruptcy estate may have in the Debtor's membership interest in Spring Creek" together "with all of the estate's membership and/or ownership interest which the said Debtor, had in the Property at the time of the filing of the Debtor's [Petition] . . . and also all of the estate's interest in the Property which the [Trustee] had or has power to convey or dispose of as Trustee." Am. Compl. ¶ 38, Ex. D. As to Partnership Liquidity's alleged false and malicious assertions, Elite Investors points to a correspondence from Partnership Liquidity to Spring Creek which asserted that Partnership Liquidity purchased the Debtor's "40% Membership Interest in Spring Creek" from the Trustee (the "Correspondence"). *Id.* Elite Investors alleges that it possesses an estate in the membership interest slandered by Partnership Liquidity and the Trustee and such statements caused and are causing Elite Investors to suffer special damages. Am. Compl. ¶¶ 58-59.

Discussion

Under Federal Rule of Civil Procedure 15(a)(1), applicable to this proceeding pursuant to Federal Rule of Bankruptcy Procedure 7015, a party may amend a pleading once as a matter of

right within a certain time. If the party has already filed an amended pleading or the time to file an amended pleading as a matter of right has expired, then pursuant to Federal Rule of Civil Procedure 15(a)(2) "a party may amend its pleading only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2). "The court should freely give leave when justice so requires." *Id.* However, leave to amend is not automatic. *Lecroy v. Wilbros, LLC,* 2014 WL 221211 at *2 (N.D. Ga. Jan. 21, 2014). "The trial court has 'extensive discretion' in deciding whether to grant leave to amend. *Id.* (citing *Campbell v. Emory Clinic*, 166 F.3d 1157, 1162 (11th Cir. 1999)). "[T]he Court may deny leave to amend for a variety of reasons including undue delay, bad faith, undue prejudice to the Defendant, a repeated failure to cure deficiencies by amendments previously allowed, or futility." *Cline v. Advanced Neuromodulation Sys., Inc.*, 921 F. Supp. 2d 1374, 1377 (N.D. Ga. 2012) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962) and *Hall v. United Ins. Co. of Am.*, 367 F.3d 1255, 1263 (11th Cir. 2004)). A court may deny a motion for leave to file an amended complaint due to futility when the complaint as amended is still subject to dismissal. *Hall v. United Ins. Co. of Am.*, 367 F.3d 1255, 1263 (11th Cir. 2004). "Unless a substantial reason exists to deny leave to amend, the discretion of the [trial court] is not broad enough to permit denial." *Fla. Evergreen Foilage v. E.I. DuPont De Nemours & Co.*, 470 F.3d 1036, 1040 (11th Cir. 2006).

Partnership Liquidity and the Trustee both argue that the Motion should be denied because the amendment would be futile. They contend that Georgia does not recognize a claim for slander of title against personal property because, they allege, such a cause of action is known as trade libel and, according to *State Farm Mutual Auto Ins. Co. v. Hernandez Auto Painting and Body Works, Inc.*, 719 S.E.2d 597 (Ga. Ct. App. 2011), a tort for trade libel does not exist in Georgia. Indeed, the Georgia Court of Appeals did decline to create a separate tort of trade libel

under Georgia law because such a tort is subsumed by interference with business relations and defamation. However, the court cited the Restatement (Second) of Torts for its definition of trade libel. According to the Restatement (Second) of Torts, slander of title is the "publication of a false statement disparaging another's property rights in land, chattels or intangible things." Restatement (Second) of Torts § 624. Trade libel, however, is the "publication of matter disparaging the *quality* of another land, chattels or intangible things." Restatement (Second) of Torts § 626 (emphasis added). Elite Investors is not alleging that Partnership Liquidity or the Trustee published a false statement regarding the *quality* of its interest in Spring Creek. It is clear that Elite Investors alleges the false statements were regarding its property rights in Spring Creek. Nevertheless, the Georgia slander of title statute is contained in Chapter 9 entitled "Injuries to Real Property" of Title 51. No such slander of title cause of action exists in Chapter 10 of Title 51, which is titled "Injuries to Personalty." Moreover, the Court has neither found case law regarding whether a claim for slander of title to personal property exists in Georgia nor has it found case law applying the slander of title law to personal property.

Pursuant to O.C.G.A. § 51-9-11, "[t]he owner of any estate in lands may bring an action for libelous or slanderous words which falsely and maliciously impugn his title if any damage accrues to him therefrom." A claim for slander of title requires the plaintiff to prove: "(1) publication of slanderous or libelous statements; (2) that the statements were false and malicious; (3) that the plaintiff sustained special damages thereby; and (4) that the plaintiff possessed an estate in the property slandered or libeled." *Executive Excellence, LLC v. Martin Bros. Investments, LLC*, 710 S.E.2d 169, 173 (Ga. Ct. App. 2011).

"Special damages are those that actually flow from a tortious act." *Veatch v. Aurora Loan Servs., LLC*, 771 S.E.2d 241, 244 (Ga. Ct. App. 2015). "A plaintiff asserting a slander of title

claim is entitled to only such special damages as he actually sustained as a consequence of the wrongful acts, which damages must be pled and proven with particularly." *Id.* "Generalized allegations of damages are insufficient to establish special damages." *Id.* "Costs of litigation and attorney fees arising from slander of title do not constitute such special damages." *Lee v. Washington Square Homeowners' Ass'n, Inc.*, 615 S.E.2d 210, 214 (Ga. Ct. App. 2005).

To the extent that a claim exists for slander of title to interests other than in real property in Georgia, the Court concludes that the amendment requested by Elite Investors would be futile. To state a claim for slander of title, special damages must be pled with particularity; generalized allegations of damages are insufficient. The Amended Complaint fails to plead with any particularity or specificity the special damages that are flowing from the statements made in the Correspondence or Bill of Sale. Instead it makes a general allegation that Elite Investors suffered or continues to suffer special damages in amount to be proven at trial. Am. Compl. ¶ 58. As the Amended Complaint does not sufficiently plead the claim for slander of title, the amendment would be futile as it would be subject to dismissal upon amendment. *See Cornelius v. Bank of America, N.A.*, No. 1:12-cv-0585-JEC, 2012 WL 4468746, at *4 (N.D. Ga. Sept. 27, 2012) (dismissing slander of title claim because "simply claiming[ing] damages . . . without further explanation is wholly insufficient to properly plead special damages . . . [t]he failure to adequately plead special damages dooms his claim for slander of title.") (citing *Jackman v. Hasty*, No. 1:10-cv-2485-RWS, 2011 WL 854878 (N.D. Ga. Mar. 8, 2011)).

In addition, as to the Trustee, the Bill of Sale states precisely what the Court authorized the Trustee to sell and the Trustee did, in fact, sell the interest stated in the Bill of Sale. The Bill of Sale makes clear that the Trustee sold the interest the Debtor, and therefore the estate, had in Spring Creek. That is exactly what the Court authorized the Trustee to sell; such statements are

not false. The Bill of Sale does not refer to any interest that Elite Investors may or may not have in Spring Creek. It specifically states that it is *only* transferring the interest that the Debtor and Debtor's bankruptcy estate had in Spring Creek.

Conclusion

Accordingly, for the reasons stated herein, it is hereby

ORDERED that Elite Investor's Motion to Amend is DENIED.

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