



IT IS ORDERED as set forth below:

Date: August 14, 2012

Mary Grace Diehl

**Mary Grace Diehl
U.S. Bankruptcy Court Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION**

In re:	:	Case No. 08-43724-MGD
	:	
LINDA COTY BULLOCK,	:	Chapter 7
	:	
Debtor.	:	Judge Diehl
	:	
KYLE A. COOPER, TRUSTEE,	:	
	:	Adversary Proceeding
Plaintiff,	:	
	:	No. 10-04111-MGD
v.	:	
	:	
LINDA COTY BULLOCK, LENOX	:	
FINANCIAL MORTGAGE, LLC,	:	
GINA PAIGE BULLOCK,	:	
	:	
Defendants.	:	
	:	

**ORDER DENYING MOTION TO AMEND
THE AMENDED COMPLAINT TO ADD PARTY**

Plaintiff Trustee seeks to amend his once-amended complaint to add a new defendant but not to assert new claims. The motion to amend was filed eight months after the close of discovery, one

month after the Court's entry of summary judgment on two counts of the complaint (which Plaintiff seeks to reintroduce as to the new defendant), and less than thirty days prior to the required submission of a proposed consolidated pretrial order. Plaintiff's motion to amend is untimely in that it will unduly delay the final resolution of the matter with respect to the existing defendants. This undue delay is all the more problematic because the only viable claim Plaintiff pleads against the proposed defendant is unnecessary to resolve this adversary proceeding. Moreover, allowing Plaintiff to amend the complaint as to the remaining claims, which are not viable, is futile.

BACKGROUND

Plaintiff, the Trustee in the underlying Chapter 7 case, commenced this adversary proceeding on December 21, 2010. Asserting claims under both federal and state law, Plaintiff seeks to avoid and recover transfers of interests in real property against three defendants. On July 13, 2012, Plaintiff filed his Motion to Amend Complaint to Add Defendant ("Motion to Amend") for the purpose of adding a fourth defendant to the complaint: Generation Mortgage Company ("Generation"). For the reasons set forth below, Plaintiff's Motion to Amend is DENIED.

The relevant procedural and factual history of this adversary proceeding is as follows. Linda Coty Bullock ("Debtor") filed a petition for relief under Chapter 11 of the Bankruptcy Code on November 3, 2008. On July 20, 2009, a Chapter 11 Trustee was appointed in Debtor's case in accordance with 11 U.S.C. § 1104. On December 17, 2009, Debtor's case was converted to Chapter 7. Plaintiff was appointed the Chapter 7 Trustee in Debtor's case on December 23, 2009. Just under a year later, on December 21, 2010, Plaintiff filed a complaint ("Complaint") initiating the above-styled adversary proceeding. Plaintiff amended the Complaint ("Amended Complaint") as of right under Federal Rule of Civil Procedure 15(a)(1) on that same day.

Plaintiff's Amended Complaint named three defendants: Debtor, Gina Paige Bullock, and Lenox Financial Mortgage, LLC ("Lenox"). As to Lenox, the Trustee asserted a claim for conversion under Georgia common law, a claim for fraudulent transfer under O.C.G.A. § 18-2-74, and a claim for an unauthorized post-petition transfer under 11 U.S.C. § 549.¹ These claims seek to avoid and recover a transfer of an interest in real property, namely, the granting of a security deed in favor of Lenox on real property at 411 Billy Bullock Road, Dallas, Georgia. Debtor granted the security deed to Lenox in connection with taking out a reverse mortgage loan in July 2010, after the commencement of the case. On January 18, 2011, Defendant Lenox was the first party to appear and file an answer. Pursuant to local rule, discovery commenced on February 8, 2011, and motions to join other parties or amend the pleadings were due by March 10, 2011. Additionally, discovery was scheduled to close on April 18, 2011. Through several consent orders, Plaintiff and Lenox extended the discovery period through November 18, 2011.

At the close of discovery, Lenox moved for summary judgment, and the Court granted summary judgment to Lenox on the conversion and fraudulent transfer claims. (Docket No. 44). The Court denied Lenox summary judgment on the unauthorized post-petition transfer claim under 11 U.S.C. § 549. (Docket No. 44). One month after the summary-judgment ruling, Plaintiff filed the Motion to Amend to add Generation as a defendant and to assert against Generation the three claims in the Amended Complaint that had already been asserted against Lenox. Plaintiff contends that Generation may also be liable on these claims based on documents produced by Lenox and arguments made by Lenox. It is not clear whether Lenox produced these documents for Plaintiff during discovery, but at the latest, Lenox filed these documents on the record on December 2, 2011.

¹ In the prayer for relief, Plaintiff requested to recover the transfer, if avoided, under 11 U.S.C. § 550.

(Docket No. 40).

DISCUSSION OF LAW

Joinder of parties in adversary proceedings is governed by Federal Rules of Bankruptcy Procedure 7015, 7019, 7020, and 7021, which in turn apply Federal Rules of Civil Procedure 15, 19, 20, and 21. Rule 21 states that the “the court may at any time, on just terms, add or drop a party.” FED. R. CIV. P. 21. Rule 19 addresses the necessary joinder of parties and Rule 20 addresses the permissive joinder of parties. Plaintiff does not allege that Generation is a necessary party to this litigation, and thus rule 20 governs the amendment to add Generation as a party. To add a party, Rule 20 requires (1) that the claim against the defendants “aris[e] out of the same transaction, occurrence, or series of transactions or occurrences,” and (2) that “ any question of law or fact common to all defendants will arise in the action.”

Before meeting the requirements of Rule 20, a plaintiff must first meet the requirements of Rule 15, which governs the general amendment of pleadings. *Addison v. Reitman*, 2011 WL 4336693, *3 (E.D.N.Y. Sept. 9, 2011). If a party seeks to amend the pleadings outside of the period when amendment is allowed as a matter of course, Rule 15 provides that the “court should freely give leave” to amend “when justice so requires.” FED. R. CIV. P. 15. Rule 15 thus provides for liberal amendment of the pleadings, and leave to amend should be granted unless a substantial reason exists to deny leave to amend. *Shipner v. Eastern Air Lines, Inc.*, 868 F.2d 401, 407 (11th Cir. 1989). Still, a trial court has “extensive discretion” to decide whether to grant leave to amend. *Hargett v. Valley Federal Sav. Bank*, 60 F.3d 754, 761 (11th Cir. 1995). Indeed, there are “numerous grounds” on which a court may deny leave, including “undue delay, undue prejudice to the defendants, and futility of the amendment.” *Abraham v. Gonzalez*, 949 F.2d 1567, 1581 (11th

Cir. 1992) (citing *Forman v. Davis*, 371 U.S. 178, 182 (1962)). In the case before the Court, Plaintiff is denied leave to amend the Amended Complaint on the bases of undue delay and futility.

1. Undue Delay

Plaintiff's Motion to Amend is denied on the basis of undue delay. Granting Plaintiff leave to amend the Amended Complaint at this late stage in the proceedings will improperly delay resolution of this adversary proceeding.² The Motion to Amend was filed approximately eight months after discovery closed and approximately one month after the Court ruled on Lenox's motion for summary judgment. Further, the proposed pretrial order was originally due on the day Plaintiff filed the Motion to Amend, although this due date has been extended. This adversary proceeding is therefore ready to proceed to trial. Binding case law holds that "[p]rejudice and undue delay are inherent in an amendment asserted," as in this adversary proceeding, "after the close of discovery and after dispositive motions have been filed, briefed, and decided." *Campbell v. Emory Clinic*, 166 F.3d 1157, 1162 (11th Cir. 1999) (citations omitted). Indeed, undue delay has been found when a motion to amend was filed on the last day of an extended discovery period, even before motions for summary judgment were filed. *Maynard v. Board of Regents*, 342 F.3d 1281, 1287 (11th Cir. 2003); *Keeler v. Florida Dept. of Health*, 324 Fed. Appx. 850, 857-58 (11th Cir. 2009) (finding undue delay when discovery was closed and deadline to file motions to amend had passed). An amendment made after discovery has closed would have "produced more attempts at discovery, delayed disposition of the case, and likely prejudiced [the defendant]." *Id.* Here, as in *Maynard*, amendment of the Amended Complaint will likely cause more discovery, will delay the ultimate resolution of a case

² The Amended Complaint alleges discrete claims against Debtor and Gina Paige Bullock which are ready for trial, as discovery has closed and no dispositive motions have been filed.

ready for trial, and will likely prejudice other parties. Consequently, the Court denies Plaintiff's Motion to Amend on the basis of undue delay.

In addition to the undue delay caused by making amendments generally, undue delay is here especially present and problematic with respect to the claim under § 549. To avoid a transfer under § 549, the Plaintiff must show a (1) transfer of estate property (and hence an initial transferee); (2) that the transfer occurred post-petition; and (3) that the transfer was not authorized by the Bankruptcy Code or the Court. 11 U.S.C. § 549. In the Second Amended Complaint, Plaintiff alleges that Debtor transferred a security interest in her residence (which was estate property) to Lenox post-petition, and that this transfer was unauthorized. Plaintiff also alleges that Lenox then assigned the security interest to Generation. Plaintiff does not allege that Generation was the initial (i.e., the original or the actual) transferee from Debtor.

On the basis of these allegations, Plaintiff has set forth allegations to avoid a transfer to Lenox under § 549. But § 549 does not allow Plaintiff to avoid a transfer as to a party that was not the initial transferee. Plaintiff cannot use § 549 to avoid the transfer as to Generation, the subsequent transferee. To obtain any relief against Generation, Plaintiff must proceed under 11 U.S.C. § 550 to recover an avoided transfer from Generation as a subsequent transferee. Section 550(a) provides that, with respect to § 549,

the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from—

(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or

(2) any immediate or mediate transferee of such initial transferee.

In order to recover from Generation, then, Plaintiff must successfully avoid the transfer to Lenox under 11 U.S.C. § 549. Only then can Plaintiff seek to recover that avoided transfer from Generation

as a subsequent transferee pursuant to 11 U.S.C. § 550.

Plaintiff's success on the § 549 claim against Lenox, however, is in dispute; Lenox already asserted two relevant defenses well before Plaintiff's Motion to Amend. First, Lenox alleges that it merely acted as a broker of the reverse mortgage and was not a transferee at all. Second, Lenox asserts a defense under § 549(c), alleging that it received the transfer in good faith, without knowledge of Defendant's bankruptcy, and for present fair equivalent value. As explained above, the Second Amended Complaint alleges that Lenox was the initial transferee of the security deed and that Lenox then assigned the security deed to Generation. Thus, Plaintiff's Second Amended Complaint disputes Lenox's first defense (i.e., the defense that Plaintiff is suing the wrong party). By alleging that Lenox was the initial transferee, Plaintiff's Second Amended Complaint only places Plaintiff in a position to recover the avoided transfer from Generation based on the allegation of an assignment to Generation, in accordance with § 550. Given this posture, Plaintiff is not yet in a position requiring him to add Generation as a defendant. If Lenox prevails on one of its defenses and the transfer is not avoided, then Plaintiff cannot recover against Generation on the facts alleged in the Second Amended Complaint. If Plaintiff prevails against Lenox, then Plaintiff can seek to recover the avoided transfer under § 550(a). Because § 550(f) gives Plaintiff one year from the date the transfer is avoided to recover the transfer from Generation, the addition of Generation as a defendant is unnecessary at this time.

In summary, the analysis above shows that adding Generation as a defendant at this stage in the litigation is unnecessary, thereby exacerbating the undue delay described above. Plaintiff has not set out an independent claim under § 549 as to Generation alone. Plaintiff must therefore seek to recover from Generation under § 550, after first avoiding the transfer to Lenox under § 549. This

adversary proceeding is ready to proceed to trial on Plaintiff's § 549 claim against Lenox. Adding Generation as a defendant will only further delay the resolution of the adversary proceeding as to Lenox; further discovery and motions are likely to be required before Generation – and the parties – can adequately prepare a proposed consolidated pretrial order all together. Indeed, Plaintiff and Lenox have already sought to extend the deadline to file the next pretrial order for another two months beyond the previous extension. Such an undue delay is unwarranted. If Plaintiff prevails against Lenox, then Plaintiff will have one year to file a complaint against Generation to seek to recover the avoided transfer from Generation. As stated above, Plaintiff's Motion to Amend is therefore denied on the basis of undue delay.

2. Futility of the Amendment

Plaintiff's Motion to Amend is also denied on the basis of futility as to the conversion and state-law fraudulent transfer claims. Leave to amend need not be granted if the amendment would be futile. *Abraham*, 949 at 1581. An amendment is futile if the amended claim is subject to dismissal on its face. *Homes by Michelle, Inc. v. Federal Sav. Bank*, 733 F.Supp. 1495, 1500-01 (N.D. Ga. 1990). Here, Plaintiff seeks to assert against Generation the exact same three claims that were asserted against Lenox. Two of these claims – conversion and fraudulent transfer – have already been adversely decided as to Plaintiff. In the Court's Order Granting In Part and Denying in Part Lenox's Motion for Summary Judgment, the Court granted Lenox summary judgment on both the conversion and fraudulent transfer claims. Summary judgment was granted to Lenox because, on the facts alleged (that is, a post-petition transfer), Plaintiff could not prevail as a matter of law on the conversion or fraudulent transfer claims. Plaintiff's Second Amended Complaint does not materially change the alleged facts. In fact, the Second Amended Complaint hardly changes

anything at all; rather, it merely reasserts the same claims in the Amended Complaint as to Generation. But the conversion and fraudulent transfer claims have already been rejected on summary judgment as a matter of law – regardless of the defendants – and Plaintiff is barred from relitigating these rulings in this case. *Cummings v. Cummings (In re Cummings)*, 277 Fed. Appx. 946, 949 (11th Cir. 2008) (citing *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 815-16 (1988)). As a result, it is futile for Plaintiff to assert the conversion and fraudulent transfer claims against Generation.

Additionally, the conversion and fraudulent transfer claims Plaintiff seeks to assert against Generation are subject to the statute of limitations defense. While the statute of limitations is an affirmative defense, a claim can be dismissed under Rule 12(b)(6) if “‘it is apparent from the face of the complaint’ that the claim is time-barred.” *La Grasta v. First Union Sec., Inc.*, 358 F.3d 840, 845-46 (11th Cir. 2004); *AVCO Corp. v. Precision Air Parts, Inc.*, 676 F.2d 494, 495 (11th Cir. 1982). For this reason, amending a complaint to add a claim is futile if, on the face of the complaint, the claim is barred by the statute of limitations and does not relate back to a timely filed complaint. *Mackenworth v. S.S. American Merchant*, 28 F.3d 246, 251-52 (2d Cir. 1995); *Sokolski v. Trans Union Corp.*, 178 F.R.D. 393, 397 (E.D.N.Y. 1998).

Here, the Court denied on summary judgment Plaintiff’s conversion claim, brought under Georgia common law, and fraudulent transfer claim, brought under Georgia statutory law. (Docket No. 44). Here, the Trustee does not specifically plead that he is proceeding under the strong arm power of 11 U.S.C. § 544(b); rather, the Trustee simply asserts two state law causes of action. Presumably, however, Plaintiff seeks to bring these claims under 11 U.S.C. § 544, which allows a trustee to step into the shoes of an unsecured creditor and bring any claim under state law that the

unsecured creditor could assert. *Westgate Vacation Villas, Ltd. v. Tabas (In re Int'l Pharmacy & Discount II, Inc.)*, 443 F.3d 767, 770 (11th Cir. 2005). Yet the conversion and fraudulent transfer claims – brought under § 544 – are clearly barred on their face by the statute of limitations contained in 11 U.S.C. § 546. Section 546 provides that a claim under § 544 must be brought before the later of (1) two years after the filing of the bankruptcy case or (2) one year after the appointment or election of the first trustee under § 702 or § 1104. Here, Debtor filed her petition for relief on November 3, 2008. Two years after the petition date is November 3, 2010. And the first trustee was appointed under § 1104 on July 20, 2009. One year after July 20, 2009 is July 20, 2010. The later of the two relevant dates is November 3, 2010, and that date is therefore the bar date for bringing a claim under § 544. Plaintiff filed the Complaint and Amended Complaint on December 21, 2010. On its face, Plaintiff's Amended Complaint was filed after the statute of limitations in § 546 had run. The conversion and fraudulent transfer claims in the Amended Complaint against Generation do not relate back to a timely filed complaint under Rule 15, and those claims are therefore subject to dismissal under Rule 12(b)(6). Plaintiff's Motion to Amend is, with respect to the conversion and fraudulent transfer claims, denied as futile.

CONCLUSION

In conclusion, Plaintiff's Motion to Amend the Amended Complaint is denied on two grounds. The first ground is undue delay: Plaintiff waited until eight months after discovery closed and one month after the a motion for summary judgment was ruled on to seek to amend the Amended Complaint. Granting Plaintiff leave to amend now would unduly delay the resolution of this adversary proceeding. This undue delay is exacerbated by the fact that the only viable claim Plaintiff could assert against Generation – recovery of an avoided transfer under § 550 – need not

be resolved at this time. If Plaintiff prevails in avoiding the transfer to Lenox, then Plaintiff has a year to file an action to recover the avoided transfer from Generation. Second, even if Plaintiff were granted leave to amend the Amended Complaint, the other claims Plaintiff seeks to assert against Generation are subject to dismissal under Rule 12(b)(6). Plaintiff's Complaint and Amended Complaint were filed after the statute of limitations had run on the conversion and fraudulent transfers claims brought under § 544, and thus any amendment to the Amended Complaint cannot relate back to a timely filed complaint. For these reasons, it is

ORDERED that Plaintiff's Motion to Amend the Amended Complaint to Add Party is **DENIED**. It is further

ORDERED that all parties to this adversary proceeding should prepare and submit a proposed consolidated pretrial order by August 20, 2012. A pretrial conference will be held on **SEPTEMBER 12, 2012** at **9:25 a.m.** in **Room 342, United States Courthouse, 600 East First Street, Rome, Georgia 30161**, at which time the Court will schedule this adversary proceeding for trial.

The Clerk of Court is directed to serve a copy of this Order on Plaintiff, Defendants, and their respective counsel.

END OF DOCUMENT