



IT IS ORDERED as set forth below:

Date: November 28, 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. 11-42363-MGD
	:	
Buddy Bryant Presley and	:	Chapter 7
Kristy Lynn Brown-Presley	:	
Debtors.	:	Judge Mary Grace Diehl
	:	
Old Republic National Title	:	
Insurance Company,	:	
	:	
Plaintiff,	:	
v.	:	Adversary Proceeding No. 12-4012
	:	
Buddy Bryant Presley and,	:	
Kristy Lynn Brown-Presley	:	
	:	
Defendants.	:	
	:	

ORDER GRANTING PLAINTIFF'S MOTION TO AMEND COMPLAINT

Before the Court is Plaintiff's Motion to Amend Complaint ("Motion"). (Docket No. 22).

Plaintiff filed a Memorandum in Support of its Motion. (Docket No. 23). Plaintiff seeks permission to assert additional facts and to clarify facts previously alleged, regarding the property located at 8004 Rosemere Way, Chattanooga, Tennessee 37421 (the “Property”). Defendants filed an Objection to Motion to Amend Complaint (“Objection”). (Docket No. 24).

Plaintiff moves for leave to amend the complaint under Rule 15(a) of the Federal Rules of Civil Procedure, made applicable to this adversary proceeding by Rule 7015 of the Federal Rules of Bankruptcy Procedure. Plaintiff also seeks to have the amendment relate back to the date of filing the original complaint, January 31, 2012 (“Complaint”). (Docket No. 1). Defendants assert that the Amended Complaint should not relate back to the original, and therefore, the amendment is barred by the statute of limitations.

I. Background

Plaintiff filed this adversary proceeding seeking a determination that all or part of the debts owed to Plaintiff were nondischargeable pursuant to 11 U.S.C. § 523(a)(2), (4), and (6). The limit on the time to file a complaint to determine nondischargeability is sixty days after the first date set for the meeting of creditors. FED.R.BANKR.P. 4007(c). That date, as extended by the Court, was January 31, 2012. (Docket No. 119, Case No. 11-42363). As such, if the amendment does not relate back, it will be time-barred. One portion of the Complaint describes transactions regarding the Property. It is this portion of the Complaint which Plaintiff now seeks to amend.

The thrust of this portion of the Complaint is that Plaintiff issued a policy of title insurance based on a false representation by Defendants and Gateway Title Company¹ (“Gateway”) as to the

¹ The Complaint alleges that Defendant, Buddy Presley, was the owner of Gateway and that both Defendants were involved in its operation and worked in its offices.

lender's priority.² Defendants executed a deed of trust in favor of Novastar Mortgage, Inc. ("Novastar"), and Defendants and Gateway falsely represented that Novastar would hold a first priority deed of trust, when a senior lien actually existed on the Property. The Complaint also describes a deed of trust executed in 2007 (the "2007 deed") by Defendants in favor of US Bank and Trust Company ("US Bank") and states that Defendants misrepresented the existence of a senior lien in this transaction as well. Plaintiff was harmed by relying on Defendants' misrepresentations, claiming damages of "\$380,000, more or less."

In the proposed amended complaint ("Amended Complaint"), Plaintiff recounts the Novastar and US Bank transactions, except that it does not state that Old Republic issued a title insurance policy to these entities. The Amended Complaint adds that Defendants executed a deed of trust in favor of Gateway Bank & Trust ("Gateway Bank") in 2008 and borrowed \$319,500 to refinance the Novastar mortgage (the "2008 loan"). US Bank agreed to subordinate their 2007 deed to Gateway Bank's deed as part of this transaction. The 2008 loan proceeds were meant to be applied to the balance of the Novastar mortgage, leaving Gateway Bank with first priority. Plaintiff issued a title insurance policy to Gateway Bank based on Defendants representations that the Novastar mortgage was paid. On or about December 23, 2009, Defendants transferred the Property to Woilf, LLC³ by quitclaim deed. On or about December 18, 2009, Defendants, as members of Woilf, LLC, executed a deed of trust in favor of Gateway Bank and borrowed \$321,373 to refinance the 2008 loan (the "2009 deed"). US Bank did not agree to subordinate its 2007 deed to the 2009 deed, and Defendants did not pay off the debt owed to US Bank as part of the refinance. Defendants represented to

² It is not clear based on the facts alleged in the Complaint whether Plaintiff alleges that it issued title insurance to Novastar or US Bank, or both.

³ Plaintiff alleges that both Defendants were involved in the operation of Woilf, LLC's business and worked in its offices.

Gateway Bank that the property was free and clear of all other encumbrances, and Plaintiff, relying on this misrepresentation, issued a title insurance policy for the 2009 deed to Gateway Bank. Plaintiff ultimately paid off the Novastar and US Bank mortgages in order to honor the policy. The damages claimed are “\$380,000, more or less.”

II. Discussion

1. Amendment of the Original Complaint

When a party seeks to amend its complaint after the defendant has answered, it may do so “only by leave of the court or by written consent of the adverse party.” The Federal Rules of Civil Procedure provide for liberal amendment of pleadings. FED.R.CIV.P. 15(a) (“The court should freely give leave when justice so requires.”). A court cannot deny a motion to amend merely on its own discretion; a “substantial reason” must exist for a court to deny leave to amend. *See Shipner v. Eastern Air Lines, Inc.*, 868 F.2d 401, 407 (11th Cir. 1989). However, a motion to amend may be denied on “numerous grounds,” including “undue delay, undue prejudice to the defendants, and futility of the amendment.” *Abramson v. Gonzalez*, 949 F.2d 1567, 1581 (11th Cir. 1992); *see also Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 230 (1962); *Williams v. Little Rock Mun. Water Works*, 21 F.3d 218 (8th Cir. 1994).

Permitting Plaintiff to amend its complaint is warranted based upon the liberal standard favoring amendments under Rule 15. Furthermore, Defendants’ Objection appears to be aimed at the relation back of the amendment, as opposed to the amendment itself. Defendants do not allege that there has been undue delay or bad faith, or that undue prejudice will result, or that the amendment would be futile, except to the extent that the amendment does not relate back and is therefore time-barred. Based on the foregoing, Plaintiff will be allowed to amend the Complaint.

2. Relation Back to Original Complaint

Rule 15(c)(1)(B) provides that the amended pleading relates back to the date of the original pleading when “the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out - or attempted to be set out - in the original pleading.” FED.R.CIV.P. 15(c)(1)(B). Courts distinguish between an amendment asserting a new claim from one asserting new facts. *See e.g. In re Brown*, 467 B.R. 536, 540 (Bankr. M.D.Ga. 2012) (“There is a difference between amendments adding a new claim and amendments merely adding detail supporting existing claims.”); *Guerrero v. RJM Acquisitions LLC*, 499 F.3d 926, 933 (9th Cir. 2007) (distinguishing between an amendment adding a new claim and an amendment adding facts to the conduct alleged in the original complaint). Relation back is allowed “[w]here the amended complaint does not allege a new claim but renders prior allegations more definite and precise” *Slayton v. American Express Co.*, 460 F.3d 215, 228 (2d Cir. 2006). In other words, where the facts alleged in the amended complaint are the “natural offshoot” of the scheme alleged in the original complaint, relation back is allowed. *Id.*

On the other hand, relation back is not allowed where the allegations in the original complaint do not put the defendant on notice of the claims asserted in the amendment. *Moore v. Baker*, 989 F.2d 1129, 1132 (11th Cir. 1993). Congress intended Rule 15(c) to be used for a “relatively narrow purpose,” and not to “add an entirely new claim based on a different set of facts.” *Farris v. U.S.*, 333 F.2d 1211, 1215 (11th Cir. 2003). The new claim must not have arisen from separate conduct different in “both time and type.” *Id.*

Plaintiff’s amendment seeks to add facts, and does not assert new claims or additional damages. Furthermore, the property at issue is the same, and the crux of Plaintiff’s claim remains unchanged - that it was induced to issue a policy of title insurance on the Property based on Defendants’ misrepresentations as to the lender’s priority. Although there are new facts alleged,

which describe additional transactions on the Property, and an additional lender - Gateway Bank - these facts are more appropriately characterized as “render[ing] prior allegations more definite and precise,” rather than adding “an entirely new claim based on a different set of facts” or describing separate conduct in “both time and type.” The amendment clarifies Plaintiff’s claim for nondischargeability by adding or clarifying facts relating to the title insurance policy issued by Plaintiff for the Property. Thus, the amendment arises out of the conduct, transaction, or occurrence set out in the original pleading. Therefore, the Amended Complaint shall relate back to the date of the original Complaint, January 31, 2012. Accordingly, it is

ORDERED that Plaintiff’s Motion to Amend Complaint is hereby **GRANTED**.

It is **FURTHER ORDERED** that the Plaintiff shall serve its Amended Complaint within fourteen (14) days of the entry of this Order, and the Plaintiff’s Amended Complaint shall relate back to January 31, 2012. Defendant shall plead in response to the Amended Complaint within fourteen (14) days after service of the Amended Complaint, as provided in FED.R.CIV.P. 15(a)(3).

The Clerk shall mail a copy of this Order to counsel for Plaintiff, counsel for the Defendants, and the United States Trustee.

END OF DOCUMENT