IT IS ORDERED as set forth below:

Date: July 26, 2013

James R. Sacca
U.S. Bankruptcy Court Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	}	CASE NO. 12-69799-JRS
	}	
OXLEY DEVELOPMENT COMPANY, LLC,	}	CHAPTER 11
	}	
Debtor.	}	

GERMAN AMERICAN CAPITAL CORPORATION,	}	
	}	
Plaintiff,	}	ADVERSARY PROCEEDING
	}	
v.	}	NO. 12-05568-JRS
	}	
OXLEY DEVELOPMENT COMPANY, LLC, CARL M. ("CHIP") DRURY, TIDEWATER PLANTATIONS, INC., DUCK POINT, LLC, and MARITIME FORESTS HOLDINGS, LLC,	}	
	}	
Defendants.	}	

ORDER

Before the Court is the Defendants' Motion to Voluntarily Dismiss Counterclaims. [Doc. 62]. The issue here is whether the Defendants should be allowed to voluntarily dismiss their counterclaims under the facts of this case while a motion for judgment on the pleadings with respect to these counterclaims is pending.

Background

German American Capital Corporation ("GACC") agreed to lend the Debtor, Oxley Development Company ("Oxley"), up to $37 million to develop certain property on Laurel Island in Camden County, Georgia (the "Property"). After the real estate market collapsed and Oxley defaulted, GACC filed suit in the Supreme Court of New York County, New York and eventually won summary judgment against Oxley and several other Defendants, who were guarantors on the loan. In that case, Oxley alleged that GACC had breached their loan agreement by failing to reimburse escrowed funds as they were allegedly required to do. The Appellate Division of the Supreme Court of New York upheld the judgment, and required that Oxley repay the loan notwithstanding GACC's alleged breach. *German Am. Capital Corp. v. Oxley Dev. Co., LLC*, 958 N.Y.S.2d 49 (N.Y. 2nd Dept. 2013).

GACC domesticated this judgment and moved to foreclose on the Property, but the foreclosure sale was thwarted when Oxley filed for Chapter 11 protection in the Southern District of Georgia—where the Property is located—the day before the scheduled sale. That bankruptcy case was eventually dismissed, but not before that bankruptcy court lifted the automatic stay so that GACC could again attempt to foreclose on the Property. After GACC again advertised the Property for a foreclosure sale, Oxley again filed for bankruptcy on the eve of foreclosure, this time in this Court. The next day—the day of the scheduled foreclosure

sale—this Court ordered that the stay be lifted so that the sale could go forward. GACC alleges that it purchased the Property at this foreclosure sale.[1]

On October 25, 2012, GACC filed a Complaint and brought this adversary proceeding against the named Defendants, seeking to quiet title to the Property and seeking a declaratory judgment that, among other things, "GACC is now the title owner of the property, free and clear of any liens or interests of any of the Defendants." (Compl. ¶ (j) [Doc. 1]). The Defendants timely filed an Answer to the Complaint on November 23, 2012. [Doc. 5]. In their Answer, the Defendants asserted three counterclaims (the "Counterclaims"): (1) conversion of funds held in escrow, (2) breach of contract based on the failure of GACC to deliver funds to Oxley in a timely manner, and (3) fraud based on allegations that GACC made false representations to induce Oxley to spend funds in a "scheme to bring about Oxley's default . . . so that GACC could foreclose on the property." (Counterclaims ¶ (27) [Doc. 1]). The Defendants also asserted various affirmative defenses based on what appear to be the same facts as those set forth in the Counterclaims. GACC filed a timely Answer and affirmative defenses to these Counterclaims on December 14, 2012. [Doc. 7].

Litigation of this adversary proceeding ensued. On January 10, 2013, GACC and the Defendants filed a joint stipulation regarding discovery. [Doc. 8]. Among other things, this stipulation set certain discovery deadlines, including that the discovery period would expire on or about March 23, 2013.[2] According to GACC's Motion to Compel Discovery [Doc. 25], GACC served interrogatories, requests for production of documents and requests for admissions on the Defendants on January 24, 2013. On February 15, 2013, GACC filed a Motion for Judgment on

[1] The Defendants argue that the sale could not have been properly cried, and thus no valid sale took place.

[2] The discovery period within which GACC could complete discovery has been extended by orders of the Court, and will now conclude on August 16, 2013. [*See* Docs. 46, 76 and 111].

the Pleadings, seeking to have the Counterclaims dismissed. [Doc. 9]. On February 27, 2013, GACC served notice scheduling the depositions of each of the Defendants on March 15, 18, and 20, 2013. [Docs. 10–14]. On February 28, 2013—the day after the Defendants' responses to discovery were due—they informally made a request to GACC for an extension of time to respond to the discovery until March 7, 2013, to which GACC agreed. [Doc. 25]. Despite obtaining this extension to respond to discovery, the Defendants failed to respond (even to the requests for admission), which prompted GACC to file a Motion to Compel discovery responses on March 13, 2013. [Doc. 25]. On April 5, 2013, the Court entered an Order for the most part granting the Motion to Compel. [Doc. 46].

While missing several discovery deadlines, Carl M. "Chip" Drury—who controls Tidewater Plantations, Inc., which owns 100% of the membership interests in Oxley—did find time to file motions and responses in the case. On February 28, 2013, Drury—acting *pro se*—filed a motion seeking to extend the time to respond to GACC's Motion for Judgment on the Pleadings.[3] [Doc. 15]. GACC objected to Drury's motion for an extension of time, and this Court held a hearing on the matter on March 12, 2013. That same day, the Court entered an Order granting Drury an extension through March 15, 2013 to file his response to GACC's Motion for Judgment on the Pleadings. [Doc. 24]. Just before this deadline, Drury delivered to the Court a 24-page response in the form of an affidavit signed by him, along with hundreds of pages of supporting documents. The following Monday, he delivered to the Court an amended response in the form of an amended 35-page affidavit and hundreds more pages of supporting documents.

[3] A few days later, Drury filed a Notice of Replacement of Counsel indicating that he would be representing himself *pro se* going forward. [Doc. 17]. GACC filed an objection to Drury's effort to replace his counsel and represent himself, alleging that Drury's efforts were procedurally deficient and were merely an attempt to further delay proceedings. Drury has since hired another new attorney to represent him and the other Defendants.

Meanwhile, Drury filed a *pro se* Motion to Dismiss this adversary proceeding—asserting a lack of subject matter jurisdiction—on March 11, 2013.[4] [Doc. 23]. The Court ultimately denied this motion after determining that subject matter jurisdiction exists and that it was proper to retain jurisdiction over this adversary proceeding despite having dismissed the underlying bankruptcy case. *See German Am. Capital Corp. v.Oxley Dev. Co., LLC (In re Oxley Dev. Co., LLC)*, --- B.R. ----, 2013 WL 2250133 (Bankr. N.D. Ga., May 16, 2013) [Doc. 84].

While this Motion to Dismiss and GACC's Motion for Judgment on the Pleadings were both pending, the Defendants—represented by new counsel[5]—filed a Motion to Voluntarily Dismiss Counterclaims on April 22, 2013. [Doc. 62]. GACC responded to this motion [Doc. 80]; the Defendants filed a reply [Doc. 95]; and this matter is ripe for adjudication.

Discussion

Federal Rule of Civil Procedure 41—which Bankruptcy Rule 7041 makes applicable to this adversary proceeding—provides that a claimant asserting a counterclaim may dismiss that counterclaim as a matter of right by filing a notice of dismissal before a responsive pleading is served or before evidence is introduced at a hearing or trial. Fed. R. Civ. P. 41(c). But this provision is not relevant here because the Defendants did not file their Motion to Dismiss Counterclaims [Doc. 62] until several months after GACC had filed its Answer to the Counterclaims [Doc. 7] in December 2012. Therefore, the Defendants need a court order authorizing them to voluntarily dismiss the Counterclaims without prejudice.

[4] Drury claims he was injured during this time, which prevented him from responding to the discovery and Motion for Judgment on the Pleadings, but the Court notes that he did have time to file the Motion to Dismiss and travel around the state conducting other business.

[5] Drury has so far employed three different attorneys during the course of Oxley's bankruptcy case and this adversary proceeding, in addition to representing himself at one point.

After a responsive pleading has been filed, a claimant may dismiss an action voluntarily "only by court order, on terms that the court considers proper."[6] Fed. R. Civ. P. 41(a)(2). The Eleventh Circuit has pointed out that a "voluntary dismissal without prejudice is not a matter of right." *Fisher v. Puerto Rico Marine Mgmt., Inc.*, 940 F.2d 1502 (11th Cir. 1991) (citations omitted). A trial court "enjoys broad discretion in determining whether to allow a voluntary dismissal under Rule 41(a)(2)." *Pontenberg v. Boston Scientific Corp.*, 252 F.3d 1253, 1255 (11th Cir. 2001) (citation omitted). Usually, "a voluntary dismissal should be granted unless the defendant will suffer clear legal prejudice, other than the mere prospect of a subsequent lawsuit, as a result." *Id.* (citation, quotations, and emphasis omitted). The Court must "weigh the relevant equities and do justice between the parties" when "exercising its broad equitable discretion under Rule 41(a)(2)." *Id.* at 1256. (citation and quotations omitted). But the movant's interest in dismissal "is of little concern." *Farmaceutisk Laboratorium Ferring A/S v. Reid Rowell, Inc.*, 142 F.R.D. 179, 181 (N.D. Ga. 1991) (*citing LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 604 (5th Cir.1976)). Instead, the purpose of this rule "is primarily to prevent voluntary dismissals which unfairly affect the other side, and to permit the imposition of curative conditions."[7] *McCants v. Ford Motor Co., Inc.*, 781 F.2d 855, 856 (11th Cir.1986) (citation omitted). Thus the "crucial question" is whether the non-moving party would "lose any

[6] A claimant may also dismiss an action by filing "a stipulation of dismissal signed by all parties who have appeared." Fed. R. Civ. P. 41(a)(1)(A)(ii). GACC has not agreed to any such stipulation here.

[7] Were the Court inclined to do so, it could allow dismissal while also ordering the Defendants to pay for the attorneys' fees and costs that GACC has incurred in dealing with the Counterclaims. *See McCants v. Ford Motor Co., Inc.*, 781 F.2d 855, 860 (11th Cir. 1986) ("A plaintiff ordinarily will not be permitted to dismiss an action without prejudice under Rule 41(a)(2) after the defendant has been put to considerable expense in preparing for trial, except on condition that the plaintiff reimburse the defendant for at least a portion of his expenses of litigation. . . . Costs may include all litigation-related expenses incurred by the defendant, including reasonable attorneys' fees.") (citations omitted).

substantial right by the dismissal." *Pontenberg*, 252 F.3d at 1255 (citation and quotations omitted).

Although the Eleventh Circuit has not explicitly adopted factors to consider, courts in this circuit have denied motions for dismissal without prejudice while relying on these factors: (1) dilatory tactics by the moving party, (2) amount of time and money spent by the non-moving party litigating the case, and (3) the presence of a dispositive motion pending at the time dismissal is requested. *See BMC-The Benchmark Mgmt. Co. v. Ceebraid-Signal Corp.*, 1:05-CV-1149WSD, 2007 WL 2126272 (N.D. Ga. July 23, 2007) *aff'd in part*, 292 F. App'x 784 (11th Cir. 2008) (citations omitted).

All of these factors are present to some extent in this case. Nearly four years have already passed since Oxley defaulted on its loan from GACC. During this time, Oxley has litigated its underlying liability on the note and appealed the New York judgment against it on that issue. Oxley has raised the issues in the Counterclaims in the New York courts—only to be rebuffed in its efforts to do so. Oxley filed for bankruptcy on the eve of foreclosure in two different districts in Georgia and filed the Counterclaims and affirmative defenses based on the Counterclaims in this adversary proceeding. The Defendants have failed to respond to discovery, forcing GACC to file procedural motions to compel production, all of which has led to delays and increased costs for GACC. GACC has filed a Motion for Judgment on the Pleadings with respect to the Counterclaims, which is currently pending. The matter has been extensively briefed, and the Defendants have submitted hundreds of pages in support of their position on that motion, which GACC had to review in order to craft and file a reply brief.

At this point, it would be unfair to GACC to allow the Defendants to simply dismiss the Counterclaims without prejudice to re-file, which would almost certainly lead to more delays and

more expense. The Defendants have previously raised the claims in New York and are asserting the same claims as found in the Counterclaims as affirmative defenses in this adversary proceeding; therefore, it appears appropriate to the Court that it is time to reach the merits of these claims. In sum, the Defendants' dilatory and litigious tactics and the presence of a pending dispositive motion have caused GACC to incur substantial legal costs on top of the many delays that have already occurred, and to allow the Defendants to voluntarily dismiss their Counterclaims at this point would inflict unfair prejudice on GACC. Accordingly, the Court will not allow the Defendants to dismiss the Counterclaims without prejudice.

Conclusion

For the reasons stated above, it is hereby

ORDERED that the Defendants' Motion to Voluntarily Dismiss Counterclaims is DENIED.[8]

[END OF ORDER]

[8] In the event that a higher court should determine that this Court did not have constitutional authority to enter this Order, then the findings of fact and conclusions of law contained herein should be treated as a report and recommendation to the District Court.