

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

IN RE:)
)
AIDEN EMMETT BARNES, III,) CHAPTER 11 BANKRUPTCY
) CASE NO. 93-51514
DEBTOR)
)
ZURICH INSURANCE COMPANY,)
AMERICAN ZURICH INSURANCE)
COMPANY, ZURICH AMERICAN)
INSURANCE COMPANY OF ILLINOIS)
and AMERICAN GUARANTY AND)
LIABILITY INSURANCE COMPANY,)
)
PLAINTIFFS)
)
VS.) ADVERSARY PROCEEDING
) NO. 93-5072
A. EMMETT BARNES, III,)
)
DEFENDANT)

BEFORE

JAMES D. WALKER, JR.

UNITED STATES BANKRUPTCY JUDGE

COUNSEL:

For the Debtor/Defendant: CHARLES E. CAMPBELL
J. MICHAEL LEVENGOOD
JEFFERY W. CAVENDER
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285 Peachtree Center Avenue, N.E.
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For the Plaintiffs: JAMES H. ROLLINS

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ORDER ON MOTION TO AMEND THE PLEADINGS

The present dispute arises in the context of an adversary proceeding filed by Plaintiffs Zurich Ins. Co., et. al., ("Plaintiffs") to object to the discharge of debt of A. Emmett Barnes ("Debtor") under section 523(a)(4) of the Code. Plaintiffs bring this motion to amend the pleadings pursuant to Rule 15 of the Federal Rules of Civil Procedure.¹

Prior to trial, Rule 15(a) applies to motions to amend the pleadings. That rule provides:

(a) Amendments. A party may amend the party's pleading once as a matter of right at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

F.R.Civ.P. 15(a) (Law. Co-op. 1994).

The adverse party, Debtor in this matter, has not consented

¹ Made applicable by Fed.R.Bankr.P. 7015.

to the amendment of the pleadings. Accordingly, Plaintiffs seek leave of this Court.

The Court should "freely" grant leave to amend the pleadings "when justice so requires." F.R.Civ.P. 15(a). However, leave to amend should not be granted when the Court finds "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc....." Foman v. Davis, 371 U.S. 178, 181-183 (1962).

The Court is concerned with prejudice to both parties. The trial is less than a week away. If the Court were to grant this motion to amend, Debtor would be forced to defend against a new theory of recovery possibly requiring additional discovery. The fact that Debtor has not requested additional discovery to date is immaterial, since Plaintiffs had not yet made a colorable attempt to amend its pleadings prior to the present motion. It is late in the game to be asserting a whole new theory of recovery which asserts facts diametrically opposed to those contained in Plaintiffs' original pleadings. Such considerations have led courts to find undue prejudice in similar cases. See Hall v. Aetna Cas. & Sur. Co., 617 F.2d 1108 (5th Cir. 1980).

On the other hand, the Court is reluctant to preclude

Plaintiffs from pursuing a theory of recovery which does not appear to be without merit. The underlying facts as presented in various documents submitted to the Court "may be a proper subject of relief...." Foman at 182. Debtor has had notice of Plaintiffs' new theory of recovery through Plaintiffs previous failed attempts to amend its pleadings. Debtor has also demonstrated a familiarity with the legal concepts involved as evidenced by his Motion for Judgment on the Pleadings. The Court finds itself called upon to balance the inequities to the parties.

Upon consideration of the facts of this case, the Court concludes that the Rule 15(a) motion should be denied. Plaintiffs have had the opportunity to submit a Rule 15 motion for some time, but instead opted to attempt to amend the pretrial order to add additional pleadings without permission of the adverse party or leave of the Court. While such an abortive attempt to amend the pleadings succeeded in bringing the issues to the Court's attention, it did not satisfy the requirements of the Federal Rules of Civil Procedure. The Court finds undue delay in bringing this motion less than a week before the forthcoming trial. The Court acknowledges Plaintiffs prompt response to this Court's previous order determining that an attempt to amend a pretrial order is not equivalent to or in compliance with Rule 15. This does not, however, change the

fact that Plaintiffs possessed facts relevant to the asserted cause of action and failed to attempt to amend the pleadings until the pretrial order. Now, with less than a week before trial, the Plaintiffs for the first time submit a Rule 15 motion.

The prejudice to Plaintiffs lies only in the possibility that they may not be able to present evidence to the Court in their case in chief tending to show that Debtor was a stranger to the contract between Plaintiffs and the Barnes insurance companies. Due to the unique nature of the facts of this case the Court is satisfied that Plaintiffs will not be precluded from eliciting evidence relevant to its claim for tortious interference with a contract.

Plaintiffs originally pled that Debtor committed fraud or defalcation in a fiduciary capacity in violation of 11 U.S.C. § 523(a)(4). Debtor responded by distancing himself from the operations of the Barnes insurance companies. Plaintiffs have taken Debtor's defense and turned it into a separate cause of action for interference with a contract. The additional theory of recovery asserted by Plaintiffs is asserted in the alternative to their original pleadings, and is based on Debtor's own defense.

The Court notes in Count Three of the Plaintiffs' complaint in paragraphs 27 the following allegation:

The acts described above constitute willful and malicious injury by Debtor to the Plaintiffs or to the property of the Plaintiffs.

Plaintiffs argue and correctly recall the discussion on November 4, 1994, during which it was urged that the above-stated allegation was sufficient to assert the claim which Plaintiffs now seek to add by way of amendment. Defendant contended at the hearing that the complaint as originally cast was not sufficiently specific to assert the claim. The question was not resolved at the hearing. The amendment to the pretrial order did not solve the problem. If the claim was sufficiently stated, no further amendment to the pretrial order would have been necessary. If it were not sufficiently stated, the problem could not be remedied by an amendment to the pretrial order but must, as has been stated in the Court's previous order, be addressed by a motion pursuant to Rule 15(a).

The parties will be best served by a Court which faithfully interprets the rules and applies them to a proceeding without extrapolating among rules and devising results which might be thought by the Court to approximate the intentions of the parties. A complaint has been stated under 11 U.S.C. § 523(a)(6). The Debtor relies upon facts as a defense which may support Plaintiffs' claim in this respect. It appears quite likely to the Court that the facts related to the Plaintiffs' cause of action as stated in the proposed amendment to the

complaint will be presented to the Court. Once Debtor's degree of involvement with the Barnes insurance companies come into issue, Plaintiffs will be able to introduce evidence relevant to their alternative cause of action. Plaintiffs always have the option to submit a motion under Rule 15(b) to amend the pleadings to conform to the evidence.

Plaintiffs' undue delay in bringing this motion is not outweighed by the possibility that evidence supporting Plaintiffs' additional cause of action will not be heard. The Court is convinced that the question is not whether evidence relevant to Plaintiffs' cause of action will be heard, but rather that in what context the evidence will be forthcoming. Without fully understanding the significance of the context to either party, the Court must conclude that justice is best served by proceeding to trial without last minute adjustments to the pleadings. The equities in this case weigh in favor of denying the Rule 15(a) motion.

SO ORDERED, this 30th day of January, 1995.

James D. Walker, Jr.
United States Bankruptcy Judge

CERTIFICATE OF SERVICE

I, Cheryl L. Spilman, certify that a copy of the attached and foregoing was mailed to the following:

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This 30th day of January, 1995.

Cheryl L. Spilman
Deputy Clerk
United States Bankruptcy Court