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
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ORDER

This matter is before the Court on Motion for Partial Judgment on the Pleadings filed by Aiden Emmett Barnes, III, ("Debtor"). This is a core matter within the meaning of 28 U.S.C. § 157(b)(2)(I). Based on the evidence presented by the parties in this Motion and the accompanying legal memoranda, the Court will deny Debtor's Motion. These findings of fact and conclusions of law are published in compliance with Fed.R.Bankr.P. 7052.

FINDINGS OF FACT

This adversary proceeding was originally filed by Plaintiff Zurich Insurance Company, et. al. ("Zurich") as a complaint to determine dischargeability of debt under 11 U.S.C. § 523(a)(4).

Zurich, in its "Amendment To Pretrial Order" seeks to add a new theory of recovery. Zurich alleges that Barnes ("Debtor") tortiously interfered with the contract between Zurich and certain insurance agencies owned by Debtor. Such interference, Zurich alleges, constitutes a nondischargeable debt for willful and malicious injury under 11 U.S.C. § 523(a)(6). The amended pleading which Zurich relies upon to provide its cause of action for tortious interference provides:

> If Barnes was not himself a fiduciary with respect to the premiums collected on behalf of the Zurich Insurance Companies, then Barnes wrongfully induced Barnes & Barnes, Public School Underwriters, and Local Government Underwriters to breach their Agency Agreements with Zurich and tortiously interfered with the Agencies'

> performance of their contractual and statutory fiduciary duties to the Zurich Insurance Companies. Accordingly, Barnes is personally liable for all premiums not properly accounted for and paid by the Agencies, and that obligation, since it stems from a wilful and malicious injury to Zurich's property rights, is nondischargeable pursuant to 11 U.S.C. § 523(a)(6).

O.C.G.A. § 51-12-30.

Zurich never sought permission of the Court or Debtor prior to filing its amendment pursuant to F.R.Civ.P. 15.[1] Debtor has specifically stated that he does not consent to the amendment to the pleadings. The first time Zurich raised this section 523(a)(6) issue and its attendant state law tort claim was in its attempt to amend its pleadings via the proposed amended pre-trial order.

Debtor claims that allowing the amendment will unduly prejudice its case. Zurich counters stating that 1) the amendment has already been approved;[2] 2) Debtor cannot truthfully claim to be surprised or prejudiced because the trial was three months away when the amendment was "granted" and the Court allowed Debtor ample time to complete discovery on the issue.

Zurich has taken the opportunity during the course of this dispute over the pleadings to assert additional theories of

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

[2] Zurich states in its brief that the amendment was approved by the Court on November 4, 1994. A review of the pertinent documents reveals that the amendment has not been approved.

recovery beyond those contained in its amendment to pretrial order. Zurich also seeks to assert liability under joint tortfeasor theories pursuant to O.C.G.A. § 51-12-30 as well as common law notions that an officer of a corporation is personally liable for the torts of the corporation.

CONCLUSIONS OF LAW

Zurich has proceeded in this matter under the factual premise that Debtor was deeply involved with the workings of the Barnes insurance companies. Debtor asserts as a defense to the section 523(a)(4) claim that he was not heavily involved in the management of the insurance companies at the time of the alleged fraud. Zurich seeks to turn this defense around and prove that Debtor, as a "stranger" to the contract, tortiously interfered with the contract. This appears to be the basis for the section 523(a)(6) claim.

Rule 15 of the Federal Rules of Civil Procedure is a threshold issue in this matter. Pursuant to Rule 15, Zurich may attempt to amend the pleadings either before the trial (a) or at trial (b).

Rule 15(a) provides in pertinent part:

> (a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a 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....

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

Subsection (b) provides:

> (b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not effect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

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

Both parties agree that it is within the Court's discretion to allow amendments to the pleadings under Rule 15. The Supreme Court has stated:

> `The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.' Conley v. Gibson, 355 U.S. 41, 48, 78 S.Ct. 99, 103, 2 L.Ed.2d 80. The Rules themselves provide that they are to be construed `to secure the just, speedy, and inexpensive determination of every action.' Rule 1....
>
> Rule 15(a) declares that leave to amend `shall be freely given when justice so requires'; this mandate is to be heeded. See generally, 3 Moore, Federal Practice (2d ed. 1948), 15.08, 15.10. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason--such as 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.--the leave should, as the rules require, be `freely given.' Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely an abuse of that discretion and inconsistent with the spirit of the Federal Rules.

Foman v. Davis, 371 U.S. 178, 181-183, (1962).

The Eleventh Circuit has interpreted the Foman decision to find that there must be a justifying reason for the Court to deny a party leave to amend. Rudolph v. Arthur Anderson & Co., 800 F.2d 1040, 1041-1042 (11th Cir. 1986)(citing Halliburton & Assoc. v. Henderson, Few & Co., 774 F.2d 441, 443 (11th Cir. 1985)(reason must be `substantial')). Various treatises have echoed this standard stating that leave to amend should be freely granted unless the Court finds "undue prejudice to the adverse party, undue delay, lack of good faith, and sufficient opportunity to state a claim encompassing several failed attempts to do so."[3]

At this stage of the proceedings, Rule 15(a) is implicated. Zurich has not sought permission of the Court or Debtor, the adverse party, to amend its' pleadings. Nowhere in Zurich's amendment to the pretrial order is Rule 15 even mentioned. Hence, Rule 15(a) is inapplicable. Rather than proceeding under Rule 15, Zurich filed an amendment to the pretrial order containing additional allegations which in turn was incorporated

[3] 8 L. King, Collier on Bankruptcy, § 7015, ¶ 7015.06 (15th ed. 1994)(citing 3 Moore's Federal Practice, ¶ 15.08[4] (Matthew Bender 2d ed.)).

into Zurich's proposed amended pretrial order. The proposed amended pretrial order itself is silent about amended pleadings, and merely states that Zurich's "amendments" are allowed.

Treating Zurich's present opposition to the Motion for Partial Judgment on the Pleadings as a substitute for compliance with Rule 15 would encourage parties to disregard the rule anticipating that any dispute would be construed as placing the effected party in compliance with the rule. A response to an allegation as to the violation of a rule should not be construed as compliance by the allegedly offending party. This is especially so when the offending party does not even make a colorable attempt to comply with the rule by separate motion. Moreover, the pretrial order is not a pleading within the meaning of Rule 15(a), and Zurich's amendment to the pretrial order did not effect the pleadings. C.f. McLellan v. Mississippi Power & Light Co., 526 F.2d 870 (5th Cir. 1976)(motions are not pleadings capable of amendment under Rule 15(a)).[4] Zurich has not filed a motion to amend its pleadings in conformity with Rule 15, and this Court will not construe Zurich's present opposition to the Motion for Partial Judgment on the Pleadings as a substitute for compliance with Rule 15.

Motions for judgment on the pleadings are governed by

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[4] Pleadings capable of amendment include: "a complaint, an answer, a reply to a counterclaim, an answer to a cross-claim, a third-party complaint, a third-party answer, and pursuant to a court order, a reply to an answer or third-party answer." 6 Wright, Federal Practice and Procedure, § 1475, p. 554 (West 1990)(citing F.R.Civ.P. 7(a)).

F.R.Civ.P. 12(c),[5] which provides:

> (c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

"The motion for a judgment on the pleadings only has utility when all material allegations of fact are admitted in the pleadings and only questions of law remain." 5A Wright, Federal Practice and Procedure, § 1367, p. 510 (West 1990). Rule 12(c) is focused on providing judgment as a matter of law. Because the pleadings which Debtor attacks with this motion have not been affirmatively established, a motion for judgment on the pleadings is not ripe for determination. Simply stated, Debtor's attack lacks a target.

Although the Court declines to treat Zurich's actions as an attempt to amend its pleadings, this does not mean that Zurich is necessarily prohibited from submitting a proper Rule 15 motion or later amending its pleadings in conformity with the evidence as presented at trial. Rule 15(b) governs the proceedings at trial when a party attempts to raise issues not contained in the pleadings. Regardless of what occurs before trial, Zurich may raise the issue at trial over the objection of Debtor where 1) "the presentation of the merits of the action

[5] Made applicable by Fed.R.Bankr.P. 7012.

will be subserved thereby", and 2) "the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits." F.R.Civ.P. 15(b). "Prejudice under the rule means undue difficulty in prosecuting a law suit as a result of a change in tactics or theories on the part of the other party." Deakyne v. Commissioners of Lewes, 416 F.2d 290, 300 (3rd Cir. 1969).

Although Rule 15(b) is not yet implicated, eventually the evidence presented at trial may support Zurich's additional contentions. The elements of a cause of action for tortious interference with a contractual relationship are "the existence of a contractual relationship, interference with the relationship by one who is a stranger to the contract, and resulting damage to the contractual relationship." Hylton v. American Assoc. for Vocational Instructional Materials, Inc., 214 Ga. App. 635, 638, 448 S.E.2d 741, 744 (1994)(citing St. Mary's Hosp. of Athens v. Radiology Prof. Corp., 205 Ga. App. 121, 124, 421 S.E.2d 731 (19XX)). The question regarding tortious interference hinges on whether Debtor could be characterized as a stranger to the contract. Moore v. Barge, 210 Ga. App. 552, 436 S.E.2d 746 (1993). The parties have demonstrated familiarity with both the legal issues involved in the tortious interference claim and the facts as they relate to that claim. Of particular note is the fact that Debtor's own defense forms the basis for the additional theories of liability

asserted by Zurich. The possibility that this or similar issues may arise after a presentation of the evidence should not now come as a surprise to either party.

In sum, Zurich's attempted amendment to the pretrial order is not a fait accompli. Rule 15 has not been satisfied, and the Court is unwilling to construe Zurich's reply to Debtor's motion as compliance with Rule 15 when Zurich has not initiated any formal presentation aimed at compliance with Rule 15. Because there are no pleadings against which to evaluate Debtor's Motion, Debtor's Motion for Partial Judgment on the Pleadings is denied. If a motion under Rule 15(a) is brought before trial, it will be heard and decided on its merits. If the Court allows the pleadings to be amended prior to trial, the Court will then entertain any motion for judgment on those revised pleadings which might be filed.

If Zurich should choose to urge the application of Rule 15(b) during the trial, the question will be heard and determined at that time. To the extent that either party asserts surprise as an argument in opposition to the application of Rule 15(b), any such allegation would have to relate to matters not already addressed in this motion, its supporting brief, and the brief in opposition to the motion. Any allegation of prejudice should be urged with due regard to the opportunity now available to the parties to deal with the issues raised in the motion and briefs. The Court will be reluctant to grant any continuances at trial to a party who fails to take

steps which could have been reasonably foreseen to be a necessary element of pretrial preparation.

SO ORDERED, this 23rd 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 _____ day of January, 1995.

_____
Cheryl L. Spilman
Deputy Clerk
United States Bankruptcy Court