

remaining for adjudication is whether Trustee may avoid Galbreath's transfer to the Spiveys of his one-third interest in real estate located on Hutchinson Island, Georgia ("the Hutchinson Island property").

I. PROCEDURAL HISTORY

The transactions at issue in this Proceeding prior to its bifurcation were:

- 1) Debtor's execution of a \$1.5 million note to DAC ("the 1998 Note");
- 2) Debtor's execution and DAC's recording of debt deeds on three parcels of real estate owned by Debtor ("the Debt Deeds"); and
- 3) Debtor's conveyance to the Spiveys of his ownership interest in the Hutchinson Island property.

Upon joint consent motion of Defendants DAC and the Spiveys and Trustee, the Court bifurcated the Proceeding with respect to the claims against DAC and the Spiveys into two phases for trial ("Phase One" and "Phase Two"). The trial in Phase One, which was held in January 2002, concerned allegations of constructive fraud under 11 U.S.C. § 548(a)(1)(B) against DAC with respect to the 1998 Note, the Debt Deeds, and DAC's defense that it had acted in good faith within the meaning of 11 U.S.C. § 548(c). At the conclusion of Phase One, the Court ruled in favor of Trustee and against DAC. That decision was affirmed by the District Court and an appeal is now pending in the Eleventh Circuit Court of Appeals.

Pursuant to the bifurcation Order, issues regarding the transfer of the Hutchinson Island property were reserved for adjudication in Phase Two. Those issues concerned Trustee's allegations of actual fraud under 11 U.S.C. § 548(a)(1)(A) and O.C.G.A. § 18-2-22(2)¹ and Trustee's claim for attorney fees and expenses of litigation under O.C.G.A. § 13-6-11. The Order also provided that following the conclusion of Phase One, the Court would enter an order "permitting the Trustee and the Spivey-DAC Defendants to conduct such expert discovery as the parties were entitled to conduct pursuant to the Amended Scheduling Order." In executing the Order, the Court found that "all discovery in this matter other than certain expert witness discovery, which evidence relates only to the claims asserted in counts other than Count Two, Count Three, Count Four, and Count Five" had been completed. In addition, the Court found that such expert witness discovery "relates to the claims that will be addressed in the second phase of pre-trial matters and the second trial, if the same are necessary following the outcome of the first phase of the trial." Bifurcation Order at pp. 2-5 (filed Nov. 15, 2001).

II. MOTIONS IN LIMINE

The parties have filed motions regarding (1) the effects of bifurcation on the Phase Two trial, (2) whether collateral or judicial estoppel should be applied to preclude Trustee's litigation in Phase Two of the value of the Hutchinson Island property, (3) whether certain Trustee expert testimony is admissible in Phase Two, (4) whether character testimony is admissible as to the Spiveys in Phase Two, and (5) whether Trustee should be permitted to amend allegations in the Complaint relating to payment of consideration.

¹This code section was repealed by Ga. L. 2002, p. 141, § 2 (effective July 1, 2002).

1. Effects of Bifurcation

The Spiveys and DAC contend that Phase One and Phase Two should be treated as entirely separate trials, while Trustee contends that the two phases are parts of a single trial. In particular, the Spiveys object to the inclusion of any portion of the record in Phase One in the record in Phase Two.

The language in the consent Order and the motion to bifurcate, which was approved and submitted by all the parties, clearly shows that the expectation of all parties was to treat the bifurcated proceedings as a single trial to be handled in two phases. The jointly submitted motion to bifurcate recited:

The Trustee and the Spivey-DAC Defendants agreed to request that the Court enter an order . . . *bifurcating . . . the trial* of the claims asserted against the Spivey-DAC Defendants . . . into *two separate phases*; and modifying the existing scheduling order . . . [with respect to] the preparation and *trial* of the claims asserted against the Spivey-DAC Defendants

Wherefore, the Trustee and the DAC Defendants respectfully and jointly request [that] the Court: (a) enter an order substantially in the form of that attached hereto which . . . *bifurcates the trial* of the remaining claims against the Spivey-DAC Defendants

Joint Mot. (filed Nov. 6, 2001) (emphases added). In keeping with that language, the consent Order that was submitted with the motion and approved by the Court also referred to the bifurcated portions

of the trial as separate "phases" of a single trial.²

The parties also clearly anticipated the bifurcation to "expedite or facilitate disposition of the remaining segment of the case," Parks v. Poindexter, 723 F.2d 840, 843 (11th Cir. 1984). The consent Order justifies bifurcation as follows: "[I]t would be more *convenient, economical, and efficient* for the parties and this Court to bifurcate into two phases the handling of remaining pre-trial matters and the trial of certain claims asserted by the Trustee in the Second Amended Complaint against the Spivey-DAC Defendants." This purpose would not be served by treating the second phase as an entirely separate trial in which the evidence already received must be reintroduced.

Conclusion: I conclude, therefore, that the entire Record in Phase One is part of the Record in Phase Two. However, the record regarding issues pertinent to Phase Two shall remain open until all evidence has been presented. To the extent that the parties wish to supplement or rebut any evidence which was introduced in Phase One with additional evidence or testimony relevant to the Phase Two issues, such supplementary evidence or testimony may be introduced in Phase Two.

2. The Spiveys' Motion to Exclude Expert Valuation Testimony

One of the determinative issues addressed in Phase One involved a question of

²The same consent Order provided for an entirely separate trial of the claims against defendant Jean Galbreath. Compare the parties' use of the singular "trial" regarding the Spivey-DAC claims with the plural "trials" in petitioning the Court to separate the claims against Ms. Galbreath from the claims against the Spiveys and DAC: "The Trustee and the Spivey-DAC Defendants agreed to request that the Court enter an order directing [] *separate trials* of the claims asserted against Defendant Jean Galbreath and the Spivey-DAC Defendants . . ." Joint Mot.

insolvency – whether Galbreath either was insolvent on the dates on which he entered into certain transactions with DAC or transferred certain properties to DAC or was rendered insolvent by those transactions or transfers. In making that determination, this Court made a finding regarding value of the Hutchinson Island property. The Spiveys now contend that collateral estoppel or judicial estoppel applies to preclude the Trustee (but not the Spiveys) from re-litigation of the value of the Hutchinson Island property in Phase Two. Pursuant to the discussion below, I conclude that neither collateral estoppel nor judicial estoppel applies.

a. Collateral Estoppel

Collateral estoppel applies when, in the sound discretion of the trial court, the identical issue sought to be litigated in the action at bar was “actually and necessarily decided” in the prior action. Brown v. Felsen, 442 U.S. 127, 139 n.10, 99 S. Ct. 2205, 2213 (1979). Application of collateral estoppel requires that

(1) the issue at stake must be identical to the one involved in the prior litigation; (2) the issue must have been actually litigated in the prior suit; (3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in that action; and (4) the party against whom the earlier decision is asserted must have had a full and fair opportunity to litigate the issue in the earlier proceeding.

CSX Transp., Inc. v. Bhd. of Maint. of Way Employees, 327 F.3d 1309, 1317 (11th Cir. 2003).

Arguably, none of the four requirements listed in CSX for applying collateral

estoppel have been met. It is particularly clear, however, that the first and fourth requirements have not been met: The issues at stake are not identical, and Trustee did not have a full and fair opportunity in Phase One to litigate a specific value of the property at issue.

(i) Non-Identity of Issues at Stake

The Findings of Fact in this Court's Memorandum and Order of March 14, 2002, addressed the Hutchinson Island property value as follows:

Spivey was questioned concerning the value of the Hutchinson Island property in August 1998 and acknowledged that it would have had some value above the indebtedness owed on that date to SunTrust. In fact, [Spivey] listed its market value on a financial statement dated December 31, 1998, as \$2.4 million. Based on Spivey's financial statement, *although I have no expert testimony as to the land value*, I infer that the Hutchinson Island property was worth no more than \$2.4 million on this date and that the debt was \$1.8 million. Since Galbreath had a one-third interest, his share of the equity would have amounted to no more than \$200,000.00 and, together with the equity in the [Bulloch County] farm, would not in any event change the conclusion that he was insolvent on August 20 or was rendered insolvent by the execution of the [1998] note.

Wessinger v. Spivey (In re Galbreath), 286 B.R. 185, 196 (Bankr. S.D. Ga. 2002) (emphasis added).

The issue in Phase One that required the Court to address the value of the Hutchinson Island property was whether the value was great enough to place Debtor in solvent positions (1) in August 1998, at the time he executed the promissory note with DAC and transferred the debt deeds to DAC, and (2) in November 1998, at the time DAC perfected its interests in the debt

deeds. Relying on Galbreath's testimony that the property was probably worth slightly more than the purchase price, I still concluded that its value was not high enough to render Debtor solvent on either occasion. The March 14, 2002, Memorandum and Order explained:

An individual is "insolvent" if his financial condition is "such that the sum of [his] debts is greater than [the value of] all of [his] property, at a fair valuation," without taking into account exempted or fraudulently conveyed property. [11 U.S.C.] § 101(32).

The evidence shows that Galbreath's execution of the 1998 Note rendered him insolvent and that DAC perfected its security interest in the Three Parcels while he was insolvent. *First, Galbreath admitted he was insolvent.* Second, Galbreath testified that the information in financial statements prepared for The Coastal Bank, which showed a \$1 million net worth, was accurate except for the omissions of a \$500,000 debt to The Coastal Bank and the DAC obligations. His execution of the 1998 Note in the amount of \$1.5 million, together with the Coastal debt, reduced that net worth to a negative \$1 million, thus rendering him insolvent. Finally, Galbreath's testimony shows that he remained insolvent from August 20, 1998, at least until the Security Interest Transfers were perfected on November 22, 1998. None of this evidence was refuted.

DAC contends that Trustee failed to value Galbreath's interest in the Hutchinson Island property, and that that failure is fatal to Trustee's case. The evidence before the Court, however, shows that Galbreath's Hutchinson Island equity had at least some positive value, perhaps \$200,000, but not enough value to place Galbreath in a solvent position. The amount of the encumbrance on the property was less than the original purchase price, and Galbreath testified that in August, 1998, the property was probably worth slightly more than the purchase price. Galbreath was still insolvent as a result of the execution of the 1998 Note.

DAC also argues that Trustee failed to determine whether Galbreath owned other property omitted from the financial statement. As to this point, the solely significant asset in

evidence was Galbreath's interest in the Bulloch County Farm. From the evidence as to its value, I conclude that Galbreath's equity was approximately \$240,000.00. He still was rendered insolvent as a result of the execution of the \$1.5 million note. His financial statement net worth shortly after August 20 was \$1 million. Subtracting the Coastal note of \$500,000.00 yields \$500,000.00 Adding, at most, \$200,000.00 for his Hutchinson Island equity and \$240,000.00 for his farm equity yields \$940,000.00 in approximate net worth before the note was executed. Subtracting the \$1.5 million dollar note obligation yields a negative net worth of \$560,000.00.

Therefore, neither the 1998 Note nor the Property Transfers can survive the insolvency test.

Id. at 212-13 (emphasis added).

Collateral estoppel simply does not "fit" this situation. In the first place, a finding of the value of a fractional interest in property or of the property as a whole as of a certain date does not preclude a finding of different respective values on a later date. Moreover, a court must rely on the evidence before it, and the preponderance-of-evidence standard is the measure for making the necessary factual findings, *see Grogan v. Garner*, 498 U.S. 279, 286, 111 S. Ct. 654, 659 (1991). In the March 14, 2002, Order, I recognized the lack, at that time, of any expert testimony regarding the value of the Hutchinson Island property, and my conclusions as to that value were based upon the preponderance of credible evidence then available for purposes of arriving at a legal conclusion as to Galbreath's solvency. The parties had agreed to postpone discovery of their respective experts until Phase Two. Clearly, this leads to an inescapable conclusion that the Court would rule on Phase One without the benefit of expert testimony and on Phase Two with the benefit of experts.

(ii) Lack of Full and Fair Opportunity to Litigate Value

The sole purpose for Trustee's arguments and elicitation of testimony in Phase One was to show Galbreath's insolvency to support his constructive fraud case in Phase One. Their purpose was not to "sponsor" a specific valuation of the Hutchinson Island property without benefit of expert testimony. Indeed, because of the parties' agreement to postpone until Phase Two the introduction of expert testimony as to valuation, Trustee did not have a fair opportunity to fully litigate in Phase One the issue of the precise value of the property.

b. Judicial Estoppel

Under the doctrine of judicial estoppel, a party may not assert a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding. *E.g.*, Burnes v. Pemco Aeroplex, Inc., 291 F.3d 1282, 1285 (11th Cir. 2002). The Spiveys contend that Trustee is judicially estopped from "sponsoring" in Phase Two any valuation of the Hutchinson Island property other than \$2.4 million that he allegedly sponsored in Phase One.

The Burnes court identified and approved two factors that comply with Supreme Court guidance and provide flexibility in applying the doctrine in light of all the circumstances of a particular case: (1) whether the allegedly inconsistent positions were made under oath in a prior proceeding; and (2) whether the inconsistencies are "shown to have been calculated to make a mockery of the judicial system." Id. at 1285-86 (acknowledging that identified factors are not "inflexible or exhaustive" and instructing courts to give due consideration to all circumstances of particular case when considering doctrine's applicability).

In this situation, applying judicial estoppel is not warranted. Not only has Trustee never “sponsored” any valuation of the Hutchinson Island property as of February 12, 1999 (the date of the Hutchinson Island property transfer at issue in Phase Two), but the record in Phase One shows that he never sponsored a specific valuation of the property as of the dates in question in Phase One – August 20, 1998, and November 24, 1998.

First, in the pre-trial order in Phase One, Trustee’s stated position regarding the value on those dates was expressed as a range of possible values “between \$2.4 million and \$4.5 million.” Ex. 3-A, Phase One Pre-Trial Order ¶ 13 at p.3 (filed Dec. 13, 2001). Second, in his opening statement, Trustee argued that the debt deed transfer of Galbreath’s interest in the Hutchinson Island property “diminished the estate by a significant amount which is at issue, but which is somewhere between (sic) \$300,000 and up.” Tr. at 16-18 (Jan. 4, 2002). For this to be true, the entire parcel would have had a value of at least \$2,700,000.00, in light of the \$1,800,000.00 debt to SunTrust.

Third, Trustee’s examination of Joel Spivey shows that he was not sponsoring a particular value in Phase One. He asked Spivey about an appraisal Spivey had commissioned on the whole property yielding a value of \$2,500,000.00 and whether the property was in fact worth more than the appraised value. He asked Spivey whether Spivey had actually listed the property for \$4,500,000.00 and whether he had declined an offer to purchase the property for \$3,000,000.00. He asked Spivey whether he had listed the property on his financial statement as having a value of \$2,400,000.00. *See* Tr. at 115-118, 121-124 (Jan. 4, 2002). These probing questions do not indicate that Trustee intended to “sponsor” a particular valuation.

c. Conclusion

Neither collateral estoppel nor judicial estoppel is applicable in this case to prevent Trustee from proffering his valuation experts as an aid in this Court's attempt to definitively set the value of the tract in question.

3. Motion to Exclude Expert Testimony and Report of Johnny Ganem on Rule 403 Grounds

The Court previously overruled the Spiveys' motion to exclude Ganem's opinion for lack of relevance, which ground was the first of two bases for exclusion sought by the Spiveys. *See* Order Denying Spivey Defs.' Mot. for Exclusion (filed Nov. 5, 2002).³ The second basis was that, to the extent that Ganem's opinion may be relevant, it should be excluded because its probative value is substantially outweighed by the danger that admission of the evidence would cause unfair prejudice, confusion of issues, or misleading the jury, *see* Fed. R. Evid. 403.

Because of the Spiveys' then pending motion to withdraw the reference from this Court, the Court declined to address the Spiveys' second ground for exclusion. The District Court having since denied the Spiveys' motion to withdraw the reference, *see* Order, CV402-132 (S.D. Ga. Feb. 28, 2003) (Moore, J.), there is no danger of misleading a jury. Accordingly, I find that the probative value of Ganem's testimony and evidence is not substantially outweighed by the danger of unfair prejudice or confusion of the issues by the Court in a bench trial.

Conclusion: The Spiveys' motion to exclude Ganem's testimony and opinion is

³The Court subsequently held that all disclosures made prior to the close of discovery by Ganem regarding valuation were timely. (Mem. & Orders Denying Mots. for Summ. J., slip op. at 8 (Dec. 6, 2002)).

denied in its entirety.

4. Spiveys' Motions to Exclude Portions of Engineers' Evidence and Trustee's Motion to Amend Scheduling Order to Supplement Expert Reports

Discovery in Phase Two began after the Phase One issues had been adjudicated. Pursuant to the discovery disclosure requirements, Trustee provided names of witnesses on whose opinions he expected to rely as experts. Two of the experts were Clifton L. Kennedy and Timothy D. Baumgartner of EMC Engineering Services, Inc. (collectively, "the Engineers"), whom Trustee engaged to provide "cost estimates for water and sanitary sewer services for the subject property as well as to analyze the feasibility and cost of developing the property for alternative uses" and to act as expert witnesses at trial if needed. Trustee produced an engineering report entitled "Concept Development With Water and Sanitary Sewer Feasibility" ("the Report") that was prepared by the Engineers. The Report contained opinions regarding the availability, feasibility, and estimated cost of water, sanitary sewer, and other infrastructure for development of the Hutchinson Island property under three development scenarios⁴ and the basis for those opinions. The Spiveys deposed the Engineers, and discovery was subsequently closed.

As the parties participated in final pre-trial discussions and prepared materials for submission to the Court, Trustee indicated that he was planning to use the Engineers' testimony to show that the Hutchinson Island property could be partitioned or subdivided. The Spiveys, asserting that the Report did not address "in any way the feasibility, availability, or costs of partitioning or

⁴The three scenarios were (1) "Use as Heavy Industrial"; (2) "Use as a mixed use with commercial, retail, and hotel site"; and (3) "Use as high-end condominium units with a motor yacht basin." Engineers' Report.

subdividing the [property] into three equal parts" (Spiveys' Mot. & Br. ¶¶ 7, 8 at p.4), object to introduction of such testimony and, accordingly, now move the Court to exclude any expert testimony by the Engineers regarding partitioning or subdividing the property. Trustee, asserting that any possible prejudice to Defendants is curable and that Trustee has a great need to rebut Defendants' expert evidence regarding a discount in the value of Galbreath's one-third property interest, moves the Court to amend its scheduling order in order to allow Trustee's experts to supplement their Report.

The Federal Rules of Civil Procedure provide the mechanism for discovery of expert witness opinions to be offered in evidence at trial. Rule 26 requires that a party must, "at the times and in the sequence directed by the court," disclose the identity of any expert witness and provide a written report prepared by that witness which report "shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor." Fed. R. Civ. P. 26(a)(2)(B) & (C). The reasons for requiring expert reports are "the elimination of unfair surprise to the opposing party and the conservation of resources." Sylla-Sawdon v. Uniroyal Goodrich Tire Co., 47 F.3d 277, 284 (8th Cir. 1995). Expert reports should be "sufficiently complete, detailed and in compliance with the Rules so that surprise is eliminated, unnecessary depositions are avoided, and costs are reduced," Reed v. Binder, 165 F.R.D. 424, 429 (D.N.J. 1996); *see also* Fed. R. Civ. P. 26(b)(4)(A) (providing that report precedes deposition); Sylla-Sawdon, 47 F.3d at 284 (noting that providing reports prior to deposition should either eliminate need for deposition or reduce length of deposition).

Expert opinions which are not disclosed in accordance with Rule 26 may be excluded when offered at trial. Rule 37(c)(1). However, the Rule is not absolute. To qualify for exclusion, the proponent must have (1) failed to disclose information required by Rule 26(a) or 26(e)(1) without "substantial justification" or (2) failed to amend a prior response as required by Rule 26(e)(2). Rule 26(e)(1) permits supplementation of expert testimony up until 30 days prior to trial - the time the party's disclosures are due under Rule 26(a)(3). Even after that time previously undisclosed opinions may be admitted if the failure to disclose earlier was "harmless." Rule 37(c).

Here, it is quite likely that allowing any additional opinion of the Engineers is entirely harmless. It is no surprise that Trustee will proffer evidence that the tract is partitionable. While the Engineers' Report did not include any express opinion regarding the feasibility of subdividing or partitioning the Hutchinson Island property, that Report did set forth the Engineers' opinion as to the feasibility of providing adequate water and sewer to the site, assuming three different scenarios, one of which involved a high density, mixed use development. Furthermore, the issue of partitionability is addressed by another of Trustee's experts, John Ganem, *see* Dep. of Ganem at 161-167, whose testimony and report are admissible, *see* Part 3, *supra*. Ganem expressed an opinion at his deposition that the property could be partitioned. Ganem Dep. at 161-66. In addition, Trustee's counsel examined Defendants' experts Neill McDonald and George Reeves and questioned each regarding the possibility and feasibility of dividing the property into three parts. *See* McDonald Dep. at 26-27; Reeves Dep. at 92-94. The sufficiency of the Engineers' Report is not challenged for what it contains within its four corners or as a foundation for Ganem's testimony

that the tract could be partitioned; rather, its sufficiency is challenged to the extent that the Engineers might render an opinion similar to Ganem's opinion concerning subdividing, rezoning, or partitioning.

Had this issue been raised at trial it would have presented a close question as to whether the additional opinion should be excluded. But the issue arises at pre-trial and on a date which falls far earlier than the deadline set in Rule 26(a)(3) - 30 days prior to trial - in light of the fact that the trial date has been continued and has not been rescheduled. As a result, any potential harm with respect to "surprising" evidence coming to light at trial can readily be cured by reopening discovery.

The Spiveys contend that conducting additional depositions of the Engineers does not prevent them from being harmed by the Report's deficiencies, in that they would necessarily incur additional attorney fees and other deposition expenses, and they assert that only one sanction is appropriate - exclusion of testimony regarding any undisclosed aspect of the subject of the Engineers' opinions to be proffered at trial.⁵ Normally, as provided in Rule 26(b)(4)(C), "[u]nless manifest injustice would result," the party seeking discovery must pay reasonable expert fees incurred in discovery. Congress, however, having included the phrase "unless manifest injustice would result," gives conditional discretionary authority to courts to require a party other than the discovering party to pay the cost of deposing expert witnesses. Worley v. Massey-Ferguson, Inc.,

⁵Defendants could have moved for sanctions in lieu of exclusion. See Fed. R. Civ. P. 37(c)(1) (providing, on motion, "other appropriate sanctions[, including] . . . requiring payment of reasonable expenses, including attorney's fees, caused by the failure").

79 F.R.D. 534, 542 (N.D. Miss. 1978); *see also* Reed v. Binder, 165 F.R.D. 424, 427-28 (D.N.J. 1996).

In light of the manner in which this issue unfolded, and because it is an appropriate alternative sanction, I conclude Trustee should bear all expenses incurred as a result of the supplementation of the Engineers' opinion including attorney fees for the attendance of one attorney representing the Spiveys at any supplemental deposition.

Total exclusion is, in this case, an unnecessarily harsh sanction. Exclusion would not serve the overarching purpose of the discovery rules, which should be construed not only to provide for the "speedy and inexpensive" determination of every action, but also for the "just" determination of every action. Fed. R. Civ. P. 1; Herbert v. Lando, 441 U.S. 153, 177, 99 S. Ct. 1635, 1649 (1979); *see also, e.g.*, Brown Badgett, Inc. v. Jennings, 842 F.2d 899, 902 (6th Cir. 1988); ("The purposes underlying the federal rules are to avoid surprise and the possible miscarriage of justice and to eliminate the sporting theory of justice." (internal punctuation omitted) (citing, *inter alia*, 8 Wright & Miller, Fed. Practice & Procedure § 2001 at 14, 17-19 (1970))); *c.f. also* Hawthorne v. Michelin Tire Corp., 100 F.3d 962, 1996 WL 640481, *4 (9th Cir. 1996) (unpublished opinion) (noting that balance must be struck between costs and benefits of ascertaining true facts).

Conclusions: Because the trial will not be rescheduled for at least 3 months, it is no imposition on the Court to reopen discovery, it will not delay these proceedings, and the transfer

of the costs to Trustee insulates the Spiveys from an unjust result. In the end, it will insure that all issues necessary to this Court to arrive at the truth will be aired. If Trustee decides that he wishes to rely upon additional opinions from the Engineers, then the Spiveys are entitled to re-depose those witnesses in order to avoid any suggestion of unfair surprise at trial, and Trustee must bear the expenses of those depositions. Accordingly, Trustee's motion to supplement will be granted with conditions, and Defendants' motion to exclude will be denied.

5. Trustee's Motion to Exclude Testimony of Character Witnesses

Trustee objects to the admissibility of testimony of potential character witnesses for the Spiveys. Such testimony is limited under the Federal Rules of Evidence. Except when the "character of the accused" is "in issue," character testimony is generally precluded by application of Federal Rule of Evidence 404, which rule provides in pertinent part:

Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused.—Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same

Fed. R. Evid. 404(a)(1).

a. Meaning of "accused"

Although 404(a)(1) contemplates criminal prosecutions rather than civil

proceedings, an exception is recognized whereby character evidence regarding a civil defendant may be admitted:

Although the literal language of the exceptions to Rule 404(a) applies only to criminal cases, we agree with the district court here that, when the central issue involved in a civil case is in nature criminal, the defendant may invoke the exceptions to Rule 404(a). In a case of this kind, the civil defendant, like the criminal defendant, stands in a position of great peril.

Perrin v. Anderson, 784 F.2d 1040, 1044-45 (10th Cir. 1986) (citing: Carson v. Polley, 689 F.2d 562, 575-76 (5th Cir.1982) (holding that exceptions to Rule 404(a) apply in 42 U.S.C. § 1983 action alleging assault and battery); Crumpton v. Confederation Life Ins. Co., 672 F.2d 1248, 1253 (5th Cir.1982) (holding that exceptions to Rule 404(a) apply in civil action focusing on whether rape had occurred); Hackbart v. Cincinnati Bengals, Inc., 601 F.2d 516, 525-26 (10th Cir. 1979) (considering Rule 404(a) exceptions in civil action examining whether plaintiff was "dirty football player").

In the case at bar, the Spiveys are not "accused" in the strict sense. Because a major issue regarding the Spiveys in this Phase is their knowledge of Galbreath's allegedly fraudulent intent and because such knowledge, even if proven is not "in nature criminal," the Rules would not permit character testimony as to the Spiveys. However, the issue may be broader than mere knowledge- it may suggest cooperative acts in the nature of conspiracy with Galbreath in an attempt to hinder, delay or defraud. This borders very closely on acts which are in the nature of criminal acts, and evidence of their character is admissible.

b. Method of Proving Character

Once it is determined admissible, Rule 405 permits evidence as to reputation and opinion, but restricts the use of evidence of specific instances of conduct to "cases in which character is, in the strict sense, in issue . . ." Fed. R. Evid. 405 advisory committee's note. Character is deemed to be in issue when it is "a material fact that under the substantive law determines rights and liabilities of the parties." Perrin, 784 F.2d at 1045 (quoting McCormick on Evidence § 187, at 551 (3d ed. 1984)). The evidence is not being proffered to prove that the defendant acted in conformity with the character trait; it is the existence or nonexistence of the trait that will determine any rights and liabilities. Id. For example, in an action for negligently entrusting a motor vehicle to an incompetent driver, the competency of the driver would be a character trait in issue. Fed. R. Evid. 404 advisory committee's note.

The Spiveys propose to offer character evidence as circumstantial evidence that they did not have knowledge of the Galbreath's allegedly fraudulent intent. When character is used circumstantially, reputation and opinion evidence are the only acceptable forms of proof. Fed. R. Evid. 405 advisory committee's note. Here the evidence will be limited to testimony as to the Spiveys' reputation and the opinions of the witnesses. However, "[o]n cross-examination, inquiry is allowable into relevant specific instances of conduct." Fed. R. Evid. 405(a).

c. Conclusion

Because a primary issue regarding the Spiveys' knowledge borders on acts which are criminal in nature, the Trustee's motion is denied. The Court will allow character evidence, in the

form of reputation or opinion, of two witnesses, unless further witnesses' evidence can be demonstrated not to be merely cumulative. See Fed. R. Evid. 403.

6. Trustee's Motion to Amend Complaint Regarding Amount of Consideration Paid in Exchange for Galbreath's Transfer to Spiveys of Property Interest in Hutchinson Island Property

Trustee requests that the Court grant leave to amend the Complaint regarding the amount of consideration paid by the Spiveys to Galbreath in exchange for conveying his one-third interest in the Hutchinson Island property to the Spiveys. The Complaint alleged that "[o]n February 12, 1999, the Debtor transferred his interest in the Hutchinson Island Property to the Spiveys for non-cash consideration of \$752,000.00," Compl. ¶ 18, and that "the Debtor's interest in the Hutchinson Island Property was worth substantially more than the stated consideration on the date of transfer," *id.* ¶ 19. The recitation of consideration apparently was based on the figures shown on the relevant closing statement which revealed the payment or credit of those sums as of February 12, 1999.

Trustee requests leave to amend the Complaint by substituting the following in place of paragraph 18:

18. On September 11, 1997, Galbreath and the Spiveys purchased the Hutchinson Island Property for . . . \$2 million. At that time, they borrowed \$1.8 million from SunTrust Bank . . . jointly and severally, and they granted SunTrust a deed on the property. The SunTrust Debt was unconditionally guaranteed by Douglas Asphalt.

18.1 On February 12, 1999, the Debtor transferred his interest in the Hutchinson Island Property to the Spiveys. The

closing statement . . . stated that the consideration was \$752,000.

[] The Hutchinson Closing Statement showed that \$608,654.16 was "Credit on SunTrust Bank Debt."

18.2 No payment was made on the SunTrust Bank debt at the time of the closing, and SunTrust Bank did not release Galbreath from his personal liability on the debt. The Spiveys did not refinance the debt until September 27, 1999, approximately three months after the filing of the involuntary bankruptcy petition against Galbreath.

18.3 The Hutchinson Island Closing Statement also showed that \$141,339.61 was "Credit on Debt Owed by Spivey's."

18.4 Prior to the Hutchinson Island closing, Galbreath had not executed any note, security deed, or other evidence of any indebtedness to the Spiveys. Thus, any payment which was made to the Spiveys as part of the closing was a payment on an unsecured debt.

Pl.'s (proposed) 1st Am. to Pre-Trial Order for Phase Two ¶ 18-18.4 (filed Aug. 5, 2003).

The Spiveys object to allowance of Trustee's requested amendment to the Complaint. They contend that amending the Complaint requires amending this Court's scheduling Order entered on September 18, 2002, which order limited filing of pre-trial motions in Phase Two as follows:

[I]t is hereby ordered that . . . the time within which the parties may file and serve any dispositive motions (including motions for summary judgment) and any other pre-trial motions shall be extended through and including September 20, 2002.

The Spiveys further contend that mandatory application of Federal Rule of Civil Procedure 16

precludes Trustee from amending the scheduling Order to allow him to file a motion to amend the Complaint without a showing of "good cause." Finally, the Spiveys contend that Rule 15 applies to preclude Trustee from amending the Complaint in light of prejudice to which the Spiveys would be subjected should the Court permit Trustee to amend the Complaint.

a. Evaluation of Parties' Positions

Trustee, by characterizing his proposed amendment as simply an attempt "to conform the Complaint to the facts which have been established during the discovery phase of the case,"⁶ understates the significance of granting his amendment. However, the Spiveys incorrectly characterize the amendment as an attempt to add a claim or a new theory of recovery, and they overstate the impact of granting the amendment. As discussed below, even though Trustee's proposed amendment introduces a new factor into the "equivalent value" question, that amendment neither (i) amounts to the assertion of an entirely new theory of recovery nor (ii) adds or alters a dispositive element in proving Trustee's claim.

⁶Trustee points to the following testimony in Galbreath's deposition as having established facts during discovery:

Q . . . [P]art of the consideration was credit for a debt that you owed to SunTrust, is that right?

A That's right.

Q And you and Spivey jointly owned, owed a million eight, as I recall, to SunTrust. Is that correct?

A I believe, I'm not sure. But that sounds right.

Q All right. No did you ever get released from the SunTrust note?

A I was supposed to. I can't remember, but when I signed off [on] it, I was coming off the note.

Q But do you know if you ever got a release from SunTrust of your personal liability on that note?

A I don't recall, in writing, seeing it.

Q Okay. Was that part of your agreement with the Spivey's that you were supposed to get released from that loan?

A I really don't remember what, discussing it.

Galbreath's Dep. at p. 92 (June 8, 2001).

(i) Trustee's theory of recovery is not new.

Trustee's theory of recovery has not changed. He asserts that Galbreath fraudulently intended to harm or delay other creditors by transferring his Hutchinson Island property interest to the Spiveys. One asserted "badge" of Galbreath's alleged fraudulent intent is the transfer of the Hutchinson Island property to the Spiveys for allegedly less-than-equivalent value.

Recognizing that diminution of estate property and other proof that creditors have in fact been hindered or delayed are important considerations; courts have recognized lack of payment of equivalent value as one of the "badges of fraud," the absence of which may weigh against a finding of fraudulent intent. *See, e.g., In re Model Imperial, Inc.*, 250 B.R. 776, 794 (Bankr. S.D. Fla. 2000). To the extent that lack of reasonably equivalent value may affect the ultimate result in an actual fraud determination, the Complaint asserts that "[t]he transfer of the Hutchinson Island Property was made for less than reasonably equivalent value," Compl. ¶ 20. Therefore, Trustee's proposed amendment does not introduce a new theory for recovery, but at most, a lower threshold for showing lack of equivalent value.

(ii) Trustee's proposed amendment does not add or alter a dispositive element in proving his basis for recovery.

Lack of equivalent value is not an essential element for avoidance on the basis of actual fraudulent intent. While it is a factor to be considered in making a determination regarding actual fraudulent intent, the plain language of § 548(a)(1)(A) does not expressly condition avoidability of a transfer or transaction on a finding of actual harm to the estate but only upon a debtor's proven intention to hinder, delay or defraud creditors. *See Tavenner v. Smoot*, 257 F.3d

401, 407 (4th Cir. 2001) (“[I]f a debtor enters into a transaction with the express purpose of defrauding his creditors, his behavior should not be excused simply because, despite debtor’s best efforts, the transaction failed to harm any creditor.”); Brown v. Third Nat’l Bank (In re Sherman), 67 F.3d 1348, 1355 n.6 (8th Cir. 1995) (“While ordinarily there is no reason for a trustee to seek . . . to avoid a transfer which has not harmed anyone, it is to be emphasized that fraud may be committed under section 548(a)(1) even though a fairly equivalent consideration may pass to the transferor and even though creditors are merely hindered or delayed.” (quoting 4 Collier on Bankruptcy, ¶ 548.02, 548-38 (15th ed. 1995)); In re Model Imperial, 250 B.R. at 793 (“Under the plain language of § 548(a)(1), the inquiry is not whether [creditors] were harmed by the [transaction at issue] but whether [the debtor] intended to hinder, delay or defraud its creditors when it made [transfers].”).

The Spiveys contention that Trustee must prove, in addition to Debtor’s fraudulent intent, “that there was a creditor, either at the time of the transfer or after the transfer, who was adversely impacted by the transfer,” is not well-founded. Since proof of equivalent value is only one of many badges of fraud, and has at all times been in issue, proof of what value was actually given and what the parties believed had been given is highly relevant.

b. Rules 15 and 16

Federal Rules of Civil Procedure 15 and 16 set out the applicable guidelines for amending pleadings after the deadline set in the scheduling order has passed.

(i) Rule 16 Standards in Granting Request to Amend Scheduling Order

If Trustee's motion for leave to amend had been filed within the time prescribed by the scheduling order, Rule 15 would be the primary analysis. However, because Trustee's motion to amend the pleadings was untimely in light of the scheduling order issued by this Court, Trustee must first demonstrate good cause under Rule 16(b) before the Court will consider whether amendment is proper under Rule 15(a), Sosa v. Airprint Systems, Inc., 133 F.3d 1417, 1419 (11th Cir. 1998). Rule 16, which governs pre-trial conferences, scheduling, and management of cases, provides that the trial judge shall enter a scheduling order that limits the time to file motions and that a motion sought to be filed after the appointed date may be granted only upon a showing of "good cause" for the delay. *E.g.*, Cardona v. Girard Mitsubishi, Inc., No. 3:99CV948, 2000 WL 306437, *1 (D. Conn. 2000); *see also* Forstmann v. Culp, 114 F.R.D. 83, 83 (M.D.N.C. 1987) (noting that required showing of good cause indicates that total inflexibility is undesirable).

"The primary measure of Rule 16's 'good cause' standard is the moving party's diligence in attempting to meet the case management order's requirement." Bradford v. DANA Corp., 249 F.3d 807, 809 (8th Cir.2001) (citing Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 609 (9th Cir.1992)). The standard "precludes modification unless the schedule cannot 'be met despite the diligence of the party seeking the extension.'" Sosa, 133 F.3d at 1418 (quoting Fed.R.Civ.P. 16 advisory committee's note). In this case, there is good cause to amend the complaint. Trustee's delay in filing the motion to amend is not a result of ambivalence or carelessness. Since September 20, 2002, when the deadline for filing "any dispositive motions (including motions for summary judgment) and any other pretrial motions" expired, Trustee has been diligently pursuing his case as Phase One proceeds at the appellate level and in responding to the Spiveys' motions in Phase Two of

this complex, bifurcated trial.⁷ The Trustee reasonably relied from the inception of the case on the accuracy of the closing statement. It later came to light that those figures were possibly false. While the timing of Galbreath's actual release by SunTrust has been known to Trustee since his deposition, the bifurcation order made it irrelevant in Phase One. As Phase Two advanced, Trustee's review of the discovery, focusing on Phase Two evidence, revealed that the scheduling order needed to be amended to allow an amendment to the pleadings. I find that good cause to do so exists.

(ii) Rule 15 Standards for Granting Leave to Amend Complaint

Rule 15, which governs allowance of amendments and supplemental pleadings, provides that

[a] party may amend the party's pleading . . . by leave of court . . . ; and leave shall be freely given when justice so requires. . . . 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 . . . defense upon the merits.* The court may grant a continuance to enable the objecting party to meet such evidence.

Fed. R. Civ. P. 15(a), (b) (emphases added).

⁷Those motions included (1) the Spiveys' motion for exclusion of Turstee's valuation expert testimony and report, (2) DAC's motion for partial summary judgment in Phase Two counts, (3) the Spiveys' motion for summary judgment, and (4) the Spiveys' motion for leave to appeal this Court's denial of the Spiveys' motion to exclude valuation expert testimony and report.

"It is settled that the grant of leave to amend the pleadings pursuant to Rule 15(a) is within the discretion of the trial court." Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 330, 91 S.Ct. 795, 802 (1971); *see also* Campbell v. Emory Clinic, 166 F.3d 1157, 1162 (11th Cir. 1999) (noting court's "extensive" discretion in denying or granting leave to amend complaint under Rule 15(a)); Adams v. Gould Inc., 739 F.2d 858, 864 (3d Cir. 1984) (observing that "liberal amendment philosophy" of Rule 15(a) "*limits* the district court's discretion to *deny* leave to amend" (emphases added)). A court's exercise of its discretion is limited expressly in Rule 15 only by the necessity for determining that "the presentation of the merits of the action will be subserved" by granting leave to amend and that the objecting party has failed to show that it would be prejudiced in maintaining its defense on the merits. Fed. R. Civ. P. 15(a), (b).

Because leave to amend should be granted freely, the "*refusal to allow amendment must be based on valid ground* in order to withstand the test for abuse of discretion," Lockett v. Gen. Fin. Loan Co. of Downtown, 623 F.2d 1128, 1131 (5th Cir. 1980) (emphasis added), and an "[o]utright refusal to grant the leave without any justifying reason for the denial is an abuse of discretion." Jin v. Metro. Life Ins. Co., 310 F.3d 84, 101 (2d Cir. 2002).

Factors to be considered in granting or denying leave to amend are: (1) whether, and to what comparative degree, amendment would prejudice the opposing party, Doherty v. Davy Songer, Inc., 195 F.3d 919, 928 (7th Cir. 1999) (noting that "degree of prejudice" is "significant factor in determining whether the lateness of the request [to amend] ought to bar the filing") (remanding for findings regarding how request to amend complaint would result in unfair surprise or

expenditure of additional resources); Bell v. Allstate Life Ins. Co., 160 F.3d 452, 454 (8th Cir. 1998) (“Any prejudice to the nonmovant must be weighed against the prejudice to the moving party by not allowing the amendment.”); (2) whether the amendment would be futile, Campbell v. Emory Clinic, 166 F.3d at 1157, 1162 (11th Cir. 1999); and (3) whether the amendment would cause undue delays, id.

In considering these factors, the Court concludes that Trustee should be granted leave to amend. Primarily, it is evident that the Spiveys’ defense will not be prejudiced by the Trustee’s announced intention to challenge the stated non-cash consideration allegedly given in exchange for Galbreath’s Feb. 12, 1999, conveyance to the Spiveys. The Trustee’s amendment does not add a new claim or change the theory of recovery; therefore, the Spiveys will not be compelled to undertake extensive additional discovery. The Spiveys have free access to their own witnesses, including Galbreath (scrutiny of whose deposition testimony triggered Trustee’s motion to amend the pleadings), and for the limited additional discovery that may be necessary, the Court will reopen discovery. Second, Trustee’s proposed amendment would not be futile, in that failure to provide a contemporaneous exchange of consideration is evidence of lack of equivalent value, which is one asserted “badge” of Galbreath’s alleged fraudulent intent. Finally, in that the trial date has been postponed due to the parties’ continuing wrangling over substantive portions of the pre-trial order, the amendment will not cause undue delay.

Both Rules 16 and 15 serve the overarching purpose of the Rules of Civil Procedure, which is “to secure the just, speedy, and inexpensive determination of every action.”

Fed. R. Civ. P. 1. Rule 16, in providing that at any pre-trial conference, "consideration may be given, and the court may take appropriate action, with respect to . . . the necessity or desirability of amendments to the pleadings," Fed. R. Civ. P. 16(c)(2), clearly anticipates the need for certain amendments to the pleadings throughout the pre-trial proceedings. Certainly, "amendments to pleadings" is a universe that includes very substantial and claim-altering amendments as well as more simple amendments which seek, prior to the start of trial, to narrow and distill the precise issues that must be determined by the facts in evidence. In addition, Rule 15 anticipates that amendments to the pleadings may be made even at trial and even after judgment has been rendered, and if the admissibility of evidence that is contrary to the pleadings is challenged, "[t]he court may grant a continuance to enable the objecting party to meet such evidence." Fed. R. Civ. P. 15(b).

Although "[a]t some point in the course of litigation, an unjustified delay preceding a motion to amend goes beyond excusable neglect, even when there is no evidence of bad faith or dilatory motive," Daves v. Payless Cashways, Inc., 661 F.2d 1022, 1025 (5th Cir. 1981), and although "[a]t some point in time delay on the part of a plaintiff can be procedurally fatal," Gregory v. Mitchell, 634 F.2d 199, 203 (5th Cir. 1981), that point has not been reached in this case. The trial has not yet begun. The final pre-trial order has not been agreed upon in substance by the parties. The requested amendment does not add a claim, a party, or change a theory of recovery; rather, the amendment merely adds a new fact concerning valuation that Trustee discovered in reviewing the deposition of Galbreath.

c. Conclusion

Because good cause exists for allowing Trustee to amend paragraph 18 of the Complaint, and because the Spiveys' defense will not be prejudiced at trial if the Complaint is amended as requested, Trustee's request for leave to amend will be granted.

ORDERS

Pursuant to the foregoing conclusions, this Court hereby issues the following ORDERS.

The entire Record in Phase Two shall include the record from Phase One. No findings or conclusions in the Order shall be conclusive as to the Spiveys' knowledge of Galbreath's alleged fraudulent intent. The parties may supplement or rebut any evidence introduced in Phase One.

Defendants' motion to judicially or collaterally estop Trustee from sponsoring in Phase Two a valuation of the Hutchinson Island property other than \$2.4 million is hereby DENIED.

Defendants' motion to exclude the expert testimony and report of Johnny Ganem is hereby DENIED in its entirety.

Defendants' motion to exclude the testimony of engineers Clifton L. Kennedy and Timothy D. Baumgartner of EMC Engineering Services, Inc., regarding rezoning,

partitioning or subdividing the Hutchinson Island property is **CONDITIONALLY DENIED**.

Trustee's Motion to Amend the Scheduling Order to permit Trustee's experts to supplement their report is **CONDITIONALLY GRANTED**.

Trustee's counsel shall advise the Spiveys' counsel by September 15, 2003, whether he will limit the Engineers' testimony to the scope of their report and depositions or whether he intends to elicit the additional opinions concerning partitionability, rezoning or subdivisibility and by that date shall file a supplemental report. The Spiveys' counsel shall advise Trustee's counsel by October 1, 2003, whether they wish to redepose the Engineers or retain a rebuttal expert.

Discovery shall be **RE-OPENED** and shall remain open until November 3, 2003, for the purpose of allowing the Spiveys to conduct supplemental depositions of Mr. Kennedy and Mr. Baumgartner with respect to their expert opinions regarding the feasibility of partitioning, rezoning or subdividing the Hutchinson Island property, and for Trustee to depose any expert of the Spiveys offered in rebuttal.

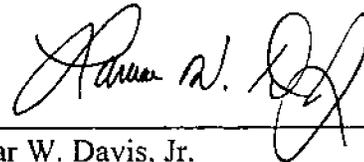
Trustee shall pay the costs of conducting any deposition of Mr. Kennedy and Mr. Baumgartner, including their reasonable hourly expert fees and the reasonable hourly fees incurred by one attorney representing the Spiveys at such depositions. All other costs connected with this Order shall be borne by the respective parties.

Trustee's objection to admissibility of character witnesses for the Spiveys is hereby DENIED.

Trustee's motion to amend paragraph 18 of the Complaint is hereby GRANTED.

Discovery is reopened until November 3, 2003, for the Spiveys to obtain any documents or take any deposition necessitated by the grant of this Motion. A final joint consolidated proposed pre-trial order is to be filed no later than November 17, 2003. The Clerk will assign this case for trial for December 29, 2003, commencing at 10:00 o'clock a.m.

This Order constitutes, as applicable, an Amended Scheduling Order.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 26th day of August, 2003.

cc: Debtor - GALBREATH
Debtor's Atty. - BULOVIC
Creditor - HORNE/MILLS
Creditor's Atty.
Trustee - WESSINGER
U.S. Trustee
ATTY MARBES 33
ATTYS STILLWELL/DILLARD