U.S. BANKRUPTCY COURT
District of South Carolina

Case Number: 07-04074

ADVERSARY PROCEEDING NO: 07-80165

Order

The relief set forth on the following pages, for a total of 7 pages including this page, is hereby ORDERED.

FILED BY THE COURT
03/20/2009

US Bankruptcy Court Judge
District of South Carolina

Entered: 03/23/2009

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

In re, Charles J. Cole, Debtor(s).	C/A No. 07-04074 Adv. Pro. No. 07-80165 Chapter 7 **ORDER**
Prospect Capital Corporation, Plaintiff(s), v. Charles J. Cole, Defendant(s).	
Robert F. Anderson, as Trustee for the Estate of Charles J. Cole, Third Party Plaintiff, v. Prospect Capital Corporation, Third Party Defendant.	

This matter came before the Court for consideration of a motion to amend pleadings pursuant to Fed. R. Civ. P. 15 and Fed. R. Bankr. P. 7015, and the objection thereto.

Charles J. Cole filed a Chapter 11 petition for bankruptcy relief, subsequently converting to Chapter 7. Prospect Capital Corporation initiated this adversary proceeding to challenge dischargeability, and to demand judgment on a guaranty agreement executed by Cole to secure credit extended to ESA Environmental Specialists, Inc., his former

employer. Cole was also a stockholder of ESA. Cole answered the complaint denying certain allegations and asserting counterclaims against Prospect based on facts related to the loan transaction and guaranty agreement. The initial counterclaims alleged causes of action for fraud, constructive fraud, negligence, negligent supervision, breach of fiduciary duty, tortuous interference and breach of the covenant of good faith and fair dealing. Those counterclaims were previously dismissed pursuant to Rule 12(b)(6) because they asserted damages to ESA, not actionable damage suffered directly by Cole.[1]

With leave of Court, Cole filed amended pleadings alleging causes of action for fraud, constructive fraud, negligence, negligent supervision, breach of fiduciary duty, breach of contract, intentional infliction of emotional distress, and defamation. The Chapter 7 Trustee was allowed to join the adversary as a third party plaintiff by order dated September 2, 2008. Prospect again moved to dismiss the counterclaims pursuant to Rule 12(b)(6) and on October 17, 2008, the Court granted Prospect's motion in part and denied it in part. The Court declined to dismiss Cole's counterclaims for negligence, breach of fiduciary duty and intentional infliction of emotional distress, and granted the motion to dismiss counterclaims for fraud, constructive fraud, negligent supervision, breach of contract and defamation.

The Court scheduled a status conference for January 29, 2009, to set a discovery schedule. Shortly before the status conference, Cole filed this motion to amend, and the Chapter 7 trustee joined in as to his counterclaims. The proposed amendments include fraud and constructive fraud allegations. The Court's prior order found that Cole failed to plead fraud and constructive fraud with specificity as required by Rule 9(b) of the Federal Rules of Civil Procedure, and failed to allege resulting damage to Cole with

[1] ESA filed for bankruptcy protection in the Western District of North Carolina on August 1, 2007.

sufficient certainty. Further, the Court noted that alleged misrepresentations recited in the counterclaims to form the foundation of the fraud causes of action were made to Cole after he signed the personal guaranty and therefore could not have induced him to execute that agreement. The proposed amendment adds detail to the answer, alleges misrepresentations made to Cole prior to execution of the guaranty agreement to support the fraud and constructive fraud causes of action, and Cole's counsel represented to the Court that the amendment adds facts discovered since the prior dismissal.

Motion to Amend

Rule 15 of the Rules of Civil Procedure, made applicable by Federal Rule of Bankruptcy Procedure 7015, provides that amendments may be made "with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." Fed. R. Civ. Pro. 15(a)(2). "[P]leadings are not an end in themselves, but are only a means to the proper presentation of a case; and that at all times they are to assist, not deter, the disposition of litigation on the merits." 10-7015 Collier on Bankruptcy-15th Edition Rev. P 7015.03.

> 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 amendment, etc.—the leave sought 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 abuse of that discretion and inconsistent with the spirit of the Federal Rules.

Foman v. Davis, 371 U.S. 178, 182 (U.S. 1962).

Bad Faith or Dilatory Motive

Prospect primarily objected to the request to again amend to include fraud and constructive fraud. The counterclaimants have consistently asserted these causes of action throughout the course of this litigation and there is no evidence before the Court suggesting that movants are seeking to amend as a result of bad faith or dilatory motive.

Repeated Failure to Cure Deficiencies by Amendments Previously Allowed, Undue Delay

Delay may be characterized as undue where the movant has had numerous opportunities to amend, or where the delay has prejudiced the court or a party. In re Liberty Logistics, 320 B.R. 291, 294 (Bankr. E.D. Pa. 2005). But delay alone should not justify a denial of leave to amend. See id.; see also Matter of Greenwald, 107 B.R. 28, 30 (Bankr. S.D.N.Y. 1989). A motion to amend may be denied if there is no reasonable explanation for the delay and/or the amendment does not contain any newly discovered facts. In re Southmark Corp., 88 F.3d 311, 316 (5th Cir. 1996); see also In re Fleming Companies, Inc., 323 B.R. 144, 149 (Bankr. D. Del. 2005) (citing In re Vision Metals, Inc. v. SMS Demag, Inc., 311 B.R. 692, 702 (Bankr. D. Del. 2004).

There is no evidence that the proposed amendment has or will cause undue delay or prejudice to Prospect—other than the hardship of contesting the counterclaims on the merits. Many of the factual allegations objectionable to Prospect are based on information recently discovered by Cole. Although there have been numerous motions, amendments and hearings in this case in an attempt to close the pleadings, there is no evidence before the court that Prospect has unduly suffered from the repeated attempts to correct the pleadings. The allegations added in the amendments appear to arise from the

same or related incidents and facts as the current pleadings, and discovery is only beginning.

Futility

"[A] trial court may . . . deny a motion to amend where the amendment would not withstand a motion to dismiss." In re NuMed Home Health Care, Inc., 326 B.R. 859, 864-65 (Bankr. M.D. Fla. 2005); see also In re Money, 375 B.R. 704, 708 (Bankr. N.D. Ga. 2007). A pleading should survive a dismissal motion if it provides facts allowing the court to find "that all the required elements of the cause of action are present." City of Charleston, S.C. v. Hotels.com, LP, 520 F.Supp.2d 757, 763-64 (D.S.C. 2007).

The motion to amend should not be granted to allow counterclaimants to plead fraud and constructive fraud unless "the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby" are sufficiently alleged. Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 784 (4th Cir. 1999). The proposed amendments contain these details, and allege misrepresentations that occurred prior to the execution of the guaranty agreement. There are therefore sufficient facts pled in the proposed amendment to overcome a 12(b)(6) motion. Rule 12(b)(6) relief is appropriate only if there is a clear showing "that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S.Ct. 2229, 2232 (1984). Movants' proposed amendments meet this minimal standard.

Conclusion

There is nothing in the record indicating that movants have acted in bad faith or with a dilatory motive, the proposed amended pleading has not and should not cause undue delay, and the allegations of that amendment appear to satisfy minimal pleading requirements.

IT IS THEREFORE ORDERED that Cole and Third Party Plaintiff Anderson's Motion for Leave to File Second Amended Answer and Counterclaims is **GRANTED**. The amendment should be filed within 10 days from the entry of this Order.