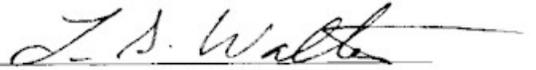


This document has been electronically entered in the records of the United States Bankruptcy Court for the Southern District of Ohio.

IT IS SO ORDERED.

Dated: December 26, 2006

  
Lawrence S. Walter  
United States Bankruptcy Judge

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UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION AT DAYTON

In re:

JAMES M. STRIPLIN and  
KATHY J. STRIPLIN,

*Debtors*

Case No. 05-37795  
Adv. No. 05-3469

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Fifth Third Bank,

*Plaintiff*

Judge L. S. Walter  
Chapter 7

v.

James M. Striplin, III and  
Kathy J. Striplin,

*Defendants*

**ORDER GRANTING MOTION FOR  
LEAVE TO FILE AMENDED  
COMPLAINT**

This matter is before the court on the *Motion for Leave to File Amended Complaint* [doc. 20] filed by Plaintiff Fifth Third Bank (“Plaintiff”) on September 26, 2006, the *Memorandum in Opposition* [doc. 21] filed by Defendants/Debtors James and Kathy Striplin (“Debtors”) on

October 5, 2006, and the *Reply Memorandum* [doc. 22] filed by Plaintiff on October 9, 2006.

The court has reviewed the pleadings, memoranda, and other filings of the parties and is prepared to render its decision.

### **Factual Background**

This adversary proceeding was commenced on December 2, 2005 with the filing of a complaint requesting that certain debts be determined to be nondischargeable pursuant to §§ 523(a)(2)(A), (4) and (6). Of particular relevance here is the § 523(a)(2)(A) claim objecting to dischargeability on the basis of alleged false pretenses, false representations and/or actual fraud. Well after the December 5, 2005 deadline for filing such complaints, Plaintiff filed its *Motion for Leave to File Amended Complaint* seeking to add an additional claim pursuant to the companion subsection, § 523(a)(2)(B), alleging fraud based upon a statement in writing. Specifically, Plaintiff alleges that Debtors prepared and submitted a written personal financial statement that was materially false and misleading upon which Plaintiff relied in extending the loan to QuestCare and in determining the credit worthiness of the Debtors as guarantors. The discovery cut off date is not until January 15, 2007 and trial is set for May 1, 2007.

The undisputed facts as stated in the complaint concern Plaintiff's funding of loans to QuestCare of Dayton on or about November 1, 2004 and the securing of those loans. In July of 2002, Debtors executed guaranties in favor of Plaintiff which made them personally liable for the loan amounts if QuestCare defaulted. QuestCare did in fact default and judgment was taken against Debtors in state court prior to their bankruptcy filing.

### **Analysis**

Fed. R. Civ. P. 15(a), made applicable by Fed. R. Bankr. P. 7015, provides that leave to amend should be freely granted when justice so requires. Both the rule and Sixth Circuit

precedent require a liberal approach to permitting amendments. *Ellison v. Ford Motor Co.*, 847 F.2d 297, 300 (6<sup>th</sup> Cir. 1988); *Justice v. State of Ohio (In re Justice)*, 224 B.R. 631, 636 (Bankr. S.D. Ohio 1998). Generally, a party may propose an amendment containing a new legal theory of recovery unless the defendant can demonstrate undue prejudice. *Teft v. Seward*, 689 F.2d 637, 639 (6<sup>th</sup> Cir. 1982); *Staats v. United States (In re Frederick Petroleum Corp.)*, 144 B.R. 758, 764 (Bankr. S.D. Ohio 1992). However, amendments to pleadings are limited when, as here, the statute of limitations has run on the newly alleged claims.

When the statute of limitations has run, it is essential that the amended claim relate back to the original complaint. To establish such relation back, the moving party must show that “the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.” Fed. R. Civ. P. 15(c)(2). In other words, for a new claim to relate back, it must arise from the same general facts as the claims set forth in the original complaint. *DeLong v. International Union*, 1992 WL 1259391, \*3 (S.D. Ohio, 1992), *citing Hageman v. Signal L.P. Gas, Inc.*, 486 F.2d 479 (6th Cir. 1973).

In this case, it is quite clear that the facts underlying the original claim under § 523(a)(2)(A) for actual fraudulent activity are essentially the same facts underlying the new amended claim under § 523(a)(2)(B) for fraud committed with a false document. It should be noted that these two statutory claims are very similar in nature and are set forth in the same subsection of the statute rather than in separate subsections like most of the discharge exceptions itemized in § 523(a). That similarity alone distinguishes most of the cases cited by Debtors which generally involve an attempted amendment containing a discreet cause of action derived from a distinct subsection of § 523(a) or § 727.

The undisputed facts of the complaint outlined above pertain to the basic transaction underlying the amended claim: the loan, the guaranties, and the default. In addition, paragraph number 25 of the complaint contains the following allegation:

25. Prior to funding the 2004 extension and renewal of credit to QuestCare, as set forth more fully in the Promissory Notes and Security Agreement attached hereto, Debtors/Defendants *made various agreements and representations to Plaintiff Fifth Third upon which Fifth Third relied.* (emphasis added)

Construing this language liberally, as the court is constrained to do, it provides the basis for Plaintiff's claim under § 523(a)(2)(B) that it relied upon the representations of the Debtors contained in their personal financial statement. Based upon the terms of the original complaint, Debtors should have been able to "fairly perceive some identification or relationship between what was pleaded in the original and amended complaints." *In re Dean*, 11 B.R. 542, 545 (9<sup>th</sup> Cir. B.A.P. 1981), *aff'd*, 687 F.2d 307 (9<sup>th</sup> Cir. 1982).

In making its determination as to whether to grant leave to amend, the court must also consider a variety of extrinsic factors. According to the Sixth Circuit, the court must consider "the delay in filing, the lack of notice to the opposing party, bad faith by the moving party, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party, and futility of amendment." *Perkins v. American Electric Power Fuel Supply, Inc.*, 246 F.3d 593, 605 (6<sup>th</sup> Cir. 2001), *cert. denied*, 534 U.S. 994 (2001).

In this case, the delay in filing the amendment was due to the late discovery of the Debtors' financial statement. Plaintiff promptly filed its motion to amend upon discovering the document. Because the trial of this matter is still several months away, Debtors should have sufficient time to prepare their defense. There appears to be no prejudice to the Debtors nor any bad faith or chronic deficiencies on the part of the Plaintiff. Debtors had sufficient notice of

Plaintiff's new claim in that the original complaint involved the same operative facts and contained a statement sufficient to apprise them that they might be held responsible for written representations they had made at the time of the loan. As discussed above, the amendment relates back to the original complaint which was timely filed, and there is no other obvious basis on which the claim could be dismissed, so allowing amendment of the complaint is not a futile endeavor.

For the foregoing reasons, Plaintiff's *Motion for Leave to File Amended Complaint* is hereby **GRANTED**.

**SO ORDERED.**

copies to:

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Office of the U. S. Trustee, 170 North High Street, Suite 200, Columbus, OH 43215

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