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IT IS SO ORDERED.

Dated: January 11, 2007


Lawrence S. Walter
United States Bankruptcy Judge

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

In re:

AMANDA ALDRIDGE,

Debtor

The Huntington National Bank,

Plaintiff,

v.

Amanda Aldridge,

Defendant.

Case No. 06-30753

Adv. No. 06-3306

Judge L. S. Walter
Chapter 7

**DECISION AND 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. 9] filed by Plaintiff The Huntington National Bank (“Plaintiff”) on December 8, 2006, *Defendant Amanda Aldridge’s Response* [doc. 15] filed by Defendant/Debtor Amanda Aldridge (“Debtor”) on December 27, 2006, and the *Reply* [doc. 16] filed by Plaintiff on January 8, 2007. 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 September 18, 2006 with the filing of a complaint requesting that a certain debt be determined to be nondischargeable pursuant to § 523(a)(4) and that Debtor's discharge be denied pursuant to § 727(a)(5). Well after the deadline for filing such complaints set by Fed. R. Bankr. P. 4007(c) and as further extended by court order, Plaintiff filed its *Motion for Leave to File Amended Complaint* primarily seeking to substitute a cause of action under § 523(a)(6) in place of the § 523(a)(4) claim set forth in the original complaint. The initial pretrial conference in the case has not yet been held and the court has not yet established a discovery cutoff date or a trial date.

The allegations of the complaint and proposed amended complaint relevant to the *Motion for Leave to File Amended Complaint* are quite simple. Plaintiff was a secured lender to The Gardening Group at Cherry Hill, Inc. ("Cherry Hill"). Debtor was the sole shareholder and president of Cherry Hill and she guaranteed repayment of the funds loaned by Plaintiff. While Cherry Hill was insolvent, Debtor caused Plaintiff's collateral to be sold and used the proceeds to pay certain of her personal liabilities.

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 (6th 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 (6th 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 May 4, 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)(4) are essentially the same facts underlying the new amended claim under § 523(a)(6). Except for some minor elaborations, the “Statement of the Facts” portion of the amended complaint remains unchanged. The original Count One alleged that Debtor breached her fiduciary duty to creditors of Cherry Hill when she paid corporate funds to herself instead of to the corporation’s creditors. Amended Count One alleges that Debtor willfully and maliciously injured Plaintiff when she paid the proceeds of Plaintiff’s collateral to her personal creditors instead of to Plaintiff, a creditor of the corporation. Under very similar procedural circumstances, another court in this district recently allowed an amendment to state a claim under § 523(a)(6) rather than § 523(a)(4) where the factual predicate remained the same. *In re Ruhe*, 2005 WL 4041312, *1 (Bankr. S.D. Ohio June 6, 2006). While the amended count in the instant case is a bit more specific than the

original, it still arises from the same operative facts: Debtor converted corporate assets to her own use rather than paying creditors of the corporation. Consequently, Debtor 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 (9th Cir. B.A.P. 1981), *aff’d*, 687 F.2d 307 (9th 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 (6th Cir. 2001), *cert. denied*, 534 U.S. 994 (2001).

In this case, Debtor complains that Plaintiff has been exceptionally dilatory and has thereby greatly prejudiced her. It is true that Plaintiff was slow to file its initial complaint and then filed its *Motion to Amend* immediately after Debtor filed her *Motion for Summary Judgment*. But, delay in filing suit is preferable to a hasty misinformed filing, and amendment to recast a legal theory is sometimes necessary when discovery uncovers new facts. Because no deadlines have been set in this case and the trial has yet to be scheduled, Debtor has sufficient time to prepare her defense. *See In re Wahl*, 28 B.R. 688, 689 (Bankr. W.D. Ky. 1983) (court denied motion to amend complaint filed shortly before discovery deadline). There appears to be no undue prejudice to Debtor nor any bad faith or chronic deficiencies on the part of the Plaintiff.

Debtor has correctly pointed out that it may be difficult for Plaintiff to prove its case under § 523(a)(6) given the legal standards that must be met under Supreme Court and Sixth Circuit precedent. However, such potential difficulty does not equate to futility and cannot be

the basis for disallowing an amendment to the complaint. At some point, Plaintiff and its counsel must make a good faith assessment of the viability of their claims. The continued prosecution of baseless claims may be grounds for sanctions, but Plaintiff must be given a reasonable period of time to complete its discovery and analysis.

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

SO ORDERED.

Copies to:

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