IT IS SO ORDERED.

Dated: 03:41 PM May 25 2012

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	CASE NO. 10-55621
	)	
DEAN R. BRADLEY	)	CHAPTER 7
CYNTHIA E. BRADLEY,	)	
	)	JUDGE MARILYN SHEA-STONUM
DEBTOR(S)	)	
	)	
KRAUS ANDERSON CAPITAL, INC.,	)	**ADVERSARY NO. 11-5082**
	)	
PLAINTIFF(S),	)	
	)	**ORDER GRANTING PLAINTIFF'S MOTION TO AMEND COMPLAINT [DOCKET #36]; EXTENDING DISCOVERY DEADLINE AND SCHEDULING TELEPHONIC PRE-TRIAL CONFERENCE**
vs.	)	
	)	
DEAN R. BRADLEY	)	
	)	
DEFENDANT(S).	)	

This matter is before the Court on plaintiff's motion to amend its complaint [docket #36] (the "Motion to Amend") and defendant-debtor's objection thereto [docket #39]. In its complaint [docket #1] plaintiff alleges two counts against defendant-debtor for non-dischargeability of a debt based upon 11 U.S.C. § 523(a)(4) and (a)(6). Through the Motion to Amend, plaintiff seeks to add an additional count based upon § 523(a)(2)(A). Based upon the following, the Court finds the Motion to Amend to be well taken.

I. BACKGROUND[1]

1. Plaintiff is a Minnesota corporation with its principal place of business in Minneapolis, Minnesota.

2. Defendant-debtor is the owner of Bradley Machinery, LLC ("Bradley Machinery").

3. Plaintiff and Bradley Machinery entered into various loan and security agreements (the "Loan Documents") whereby plaintiff provided financing for Bradley Machinery's purchase of equipment used in Bradley Machinery's business. The equipment purchased with financing from plaintiff was subject to security interests in favor of plaintiff.

3. Defendant-debtor personally guaranteed the performance of Bradley Machinery's obligations under the Loan Documents pursuant to a written guaranty dated January 27, 2005.

4. In the spring of 2008, Bradley Machinery's bank required a modification to the terms and an increase in the monthly payment amount of Bradley Machinery's loan, which caused cash flow problems for Bradley Machinery.

5. By the summer of 2008, Bradley Machinery was experiencing cash flow problems and was unable to pay its bills in the ordinary course of business.

6. Defendant-debtor and Bradley Machinery did not tell plaintiff that, starting in the summer of 2008, Bradley Machinery could not pay its bills in the ordinary course of business.

7. In December 2008, defendant-debtor met with plaintiff's representatives in defendant-debtor's offices and, at that meeting, defendant-debtor informed plaintiff that he had caused Bradley Machinery to sell certain equipment subject to plaintiff's security interest but did not pay the proceeds

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[1] Paragraphs 1-16 of this Background section are taken from the parties' stipulations [docket #35].

to plaintiff. Defendant-debtor did not at that time disclose that three other pieces of equipment subject to plaintiff's security interests has also been sold.

8. An amendment to the Loan Documents was entered into between plaintiff, Bradley Machinery and defendant-debtor on December 8, 2008.

9. At the time the amendment to the Loan Documents was signed, defendant-debtor and Bradley Machinery knew that plaintiff was upset about the non-payment of the proceeds from the equipment sales in 2008.

10. Within weeks after meeting with plaintiff's representatives and signing the amendment to the Loan Documents, defendant-debtor caused Bradley Machinery to sell equipment subject to plaintiff's security interests without paying the proceeds to plaintiff.

11. A settlement agreement (the "Settlement Agreement") was agreed to in the December 2008 meeting and entered into between plaintiff, Bradley Machinery and defendant-debtor on March 27, 2009.

12. As part of the Settlement Agreement, Bradley Machinery and defendant-debtor executed a confession of judgment which authorized plaintiff to enter judgment against Bradley Machinery and defendant-debtor in the amount of $308,828.12 or the portion of that amount that remained unpaid if Bradley Machinery and defendant-debtor defaulted in any payment due under the Settlement Agreement.

13. In 2010, defendant-debtor met with plaintiff's auditors, Quiktrak, for the purpose of verifying the location of equipment subject to plaintiff's security interests. Defendant-debtor lied to the auditors about the location of three pieces of equipment and failed to tell them that the equipment had already been sold and was no longer in his possession or under his control. Defendant-debtor

instead told the auditors that the equipment was leased at certain job sites. Defendant-debtor knew that plaintiff would rely on the information he provided to plaintiff's auditors.

14. The equipment sold or caused to be sold by Bradley Machinery (collectively, the "Equipment") is listed in paragraph 18 of the parties' stipulations [docket #35]. Upon the sale the Equipment, the obligations to plaintiff that were secured by the Equipment were not paid in full.

15. Defendant-debtor knew the Equipment was sold because he helped to sell the Equipment.

16. When he sold the Equipment, defendant-debtor knew that both he and Bradley Machinery were experiencing financial problems.

17. Defendant-debtor and his wife filed a joint, voluntary chapter 7 bankruptcy petition on November 30, 2010.

18. This adversary proceeding was commenced on March 21, 2011 and an initial pre-trial conference was scheduled for May 25, 2011. That pre-trial conference was held as scheduled and attorney Steven Malynn appeared on behalf defendant-debtor. During the pre-trial conference certain deadlines, including a discovery deadline of September 16, 2011, were set. Mr. Malynn filed an answer on behalf of defendant-debtor on June 1, 2011 [docket #10].

19. On August 2, 2011, plaintiff filed a motion seeking to compel discovery and extend the discovery deadline [docket #12] based upon defendant-debtor's alleged failure to respond to plaintiff's written interrogatories and requests for admission. Plaintiff also filed a motion seeking entry of a default judgment against defendant-debtor [docket #14] based upon defendant-debtor's alleged failure to comply with outstanding discovery requests.

20. A hearing and further pre-trial conference was held on October 19, 2011 at which only counsel for plaintiff appeared. Another hearing and pre-trial conference was then set for December 7, 2011.

21. On December 7, 2011 (prior to the time scheduled for the pre-trial conference), Mr. Malynn filed a motion seeking to withdraw as counsel for defendant-debtor [docket #21] citing personal medical reasons. Pursuant to that motion Mr. Malynn acknowledged that all discovery requests had not been complied with and requested, on behalf of defendant-debtor, that the matter be stayed for 60 days to allow his client to obtain competent counsel and complete discovery.

22. The December 7, 2011 hearing and pre-trial conference was held as scheduled and, in addition to counsel for plaintiff, both Mr. Malynn and defendant-debtor appeared. Mr. Malynn indicated that he was working with his client to obtain replacement counsel. Replacement counsel for defendant-debtor entered his appearance on January 19, 2012.

23. A further pre-trial conference was held on January 25, 2012 at which counsel for both plaintiff and defendant-debtor participated. The deadline for discovery was extended until March 16, 2012 and a further pre-trial conference was scheduled for March 21, 2012. The March 21st pre-trial conference was held as scheduled and, pursuant to the request of counsel, the discovery deadline was again extended until April 6, 2012. A further pre-trial conference, for the purpose of setting trial, was set for May 9, 2012.

24. Plaintiff filed its Motion to Amend on April 23, 2012 and defendant-debtor filed his objection thereto on May 2, 2012.

25. The May 9th pre-trial conference was held as scheduled and both counsel for plaintiff and defendant-debtor participated. During that pre-trial conference, counsel for plaintiff indicated

that if the Motion to Amend is granted, no additional discovery or trial time would be needed by plaintiff. To date, defendant-debtor has not initiated any discovery.

II. THE MOTION TO AMEND

Plaintiff seeks to add an additional count to its complaint pursuant to 11 U.S.C. § 523(a)(2)(A) based upon information acquired during discovery and contends that its proposed amendment relates back to the filing date of the original complaint because the conduct and transactions that support the § 523(a)(2)(A)[2] count are the same conduct and transactions that support the counts already raised.

> On April 3, 2012, Plaintiff took the Defendant's deposition. In that deposition, Defendant testified that in December 2008, when he signed the Amendment to the Loan Documents, he lied to Plaintiff about the location and status of certain equipment subject to Plaintiff's security interest. He testified that he knew Plaintiff would rely on his misrepresentation.

Motion to Amend at unnumbered pg. 5. In his objection, defendant-debtor contends that the Motion to Amend should be denied as it will cause undue delay and prejudice to him because the § 523(a)(2)(A) count concerns facts which took place prior to the facts relevant to the original complaint.

> The complaint, as filed, seeks a finding that the debt is nondischargeable based upon actions alleged to have been taken by the defendant subsequent to the agreement. Now, on the eve of trial, [plaintiff] seeks to change the focus to the facts and mental states of the parties at the time the agreement was entered. The "bait and switch" will clearly prejudice the defendant who has conducted discovery . . . based upon the original claims against him. . . . Furthermore, the proposed amended complaint would make the mental state of [plaintiff] and the defendant at the time the Settlement Agreement was entered an element to be proven at trial. In order to prevail on fraud,

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[2] Section 523(a)(2)(A) excepts from discharge a debt "for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by . . . false pretenses, a false representation, or actual fraud, ..."

> [plaintiff] must demonstrate that the defendant had the intent to deceive and that [plaintiff] reasonably relied on the written statement at issue. This will require discovery to be reopened and both [plaintiff] and the defendant to be deposed.

Objection at unnumbered page 2.

Rule 15(c)(2) of the Federal Rules of Civil Procedure (made applicable to bankruptcy pursuant to Federal Rule of Bankruptcy Procedure 7015) provides that "[a]n amendment to a pleading relates back to the date of the original pleading when . . . the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out . . . in the original pleading." Rule 15 embodies a liberal amendment policy so that, generally, leave to amend is "freely given when justice so requires." *Keweenaaw Bay Indian Cmty. v. State of Michigan*, 11 F.3d 1341, 1348 (6th Cir. 1993); *Morse v. McWhorter*, 290 F.3d 795, 800 (5th Cir. 2002). Denial may be appropriate, however, where there is "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." *Morse v. McWhorter*, 290 F.3d at 800 (*citing Forman v. Davis*, 371 U.S. 178, 182 (1962)).

The same set of facts set forth in the original complaint form the basis for the count sought to be added by plaintiff through the Motion to Amend. Accordingly, such amendment relates back to the original complaint. The only potential prejudice raised by defendant-debtor in his objection is the need for additional depositions to ascertain the mental state of the parties when they entered into the Settlement Agreement. As noted, plaintiff's counsel indicated at the May 9th pre-trial conference that it required no additional discovery regarding this matter. Given that defendant-debtor's mental state would be known to him without the need for a deposition, the only additional deposition needed would be that of the individual acting on behalf of plaintiff relative to the

Settlement Agreement. There is nothing before the Court to indicate that such a deposition could not be scheduled and taken within a short amount of time.[3]

III. CONCLUSION

Based upon the foregoing the Court finds that the count raised in the Motion to Amend relates back to the original complaint. The Court further finds that granting the Motion to Amend would not unduly prejudice defendant-debtor. Accordingly, the Motion to Amend is hereby **GRANTED**.

The discovery deadline is hereby extended until **June 22, 2012** to accommodate defendant-debtor's discovery needs based upon the amended complaint. A further telephonic pre-trial conference will be held on **Wednesday, June 27, 2012 at 4:00 pm** to schedule a trial in this matter. Counsel shall contact the Court by not later than noon on June 26, 2012 if they will not be at the telephone number listed in their pleadings.

# # #

cc (*via* electronic mail):
JOSEPH WENTZELL, counsel for plaintiff
MICHAEL MORAN, counsel for defendant-debtor

[3] The Court notes that the liberal amendment policy of Rule 15 must be balanced against the fairly short period of time in which to bring an action challenging dischargeability pursuant to § 523(a)(2), (4) and (6) of the Code. *See* 11 U.S.C. § 523(b); Fed. R. Bankr. P. 4007(c). *See also In re Waldner*, 183 B.R. 879, 881 (9th Cir. B.A.P. 1995) ("The purpose of this relatively short statute of limitations is to further both the prompt administration of the estate and the fresh start goals of bankruptcy relief, allowing the debtor to enjoy finality and certainty of relief from financial distress as quickly as possible."). Based upon the facts in the case at bar, however, this short limitations period does not outweigh the liberality of Rule 15.