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UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

FILED

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U.S. BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
CLEVELAND

In re: ) Case No. 03-12436  
)  
RALPH W. DAFFNER, ) Chapter 7  
)  
Debtor. ) Judge Pat E. Morgenstern-Clarren  
)  
\_\_\_\_\_)  
RICHARD A. BAUMGART, TRUSTEE, ) Adversary Proceeding No. 03-1132  
)  
Plaintiff, )  
)  
v. )  
)  
RALPH W. DAFFNER, et al., ) MEMORANDUM OF OPINION  
)  
Defendants. )

The plaintiff-trustee moves for leave to supplement the complaint as to defendant Carol Daffner. (Docket 53, 55). Defendants Ralph Daffner and Carol Daffner oppose the motion. (Docket 54). They also move to strike the trustee's expert report, a request opposed by the trustee. (Docket 50, 52).

FACTS

The debtor Ralph Daffner and his brother Frank Daffner each acquired a one-half interest in property located at 3492 W. 54<sup>th</sup> St., Cleveland, Ohio (the property) when their mother died. In 1993, Ralph signed a warranty deed conveying his one-half interest to Frank, but reserving a life estate for himself. The deed states that the consideration paid by Frank was \$10.00. Ralph delivered the deed to Frank at that time. Frank did not, however, record the deed until April 30, 2002. Ralph filed his chapter 7 case on March 3, 2003, within one year of the recording date.

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The county auditor values the Property at \$36,200.00. *See* Memorandum of Opinion denying cross-motions for summary judgment. (Docket 38).

The chapter 7 trustee filed this adversary proceeding against debtor Ralph Daffner, his brother Frank Daffner, and Frank Daffner's wife Carol Daffner seeking to set aside the debtor's transfer of property to his brother and sister-in-law or to recover the value of the property transferred on the ground that it was a fraudulent conveyance.<sup>1</sup> Frank Daffner died on December 14, 2003 and the defendants filed a notice of that fact on January 24, 2004. (Docket 49). The trial which had been set for January 28, 2004 was adjourned to accommodate the time limits set forth in bankruptcy rule 7025. *See* FED. R. BANKR. P. 7025 (incorporating FED. R. CIV. P. 25(a)). (Docket 51).

Frank Daffner's interest in the property was bequeathed to Carol Daffner. On March 22, 2004 an application to probate his will was filed with the probate court. An application to relieve the will from administration was also filed. The property has now been transferred to Carol Daffner.

**DISCUSSION**<sup>2</sup>

**I. Motion to Supplement the Complaint**

The trustee requests leave to supplement the complaint under federal civil rule 15(d) which provides that:

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<sup>1</sup> The trustee dismissed count III of the complaint which objected to the debtor's discharge. (Docket 37).

<sup>2</sup> Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2)(H).

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**(d) Supplemental Pleadings.** Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

FED. R. CIV. P. 15(d) (applicable under FED. R. BANKR. P. 7015). “Rule 15(d) . . . plainly permits . . . supplemental amendments to cover events happening after suit[.] . . . Such amendments are well within the basic aim of the rules to make pleadings a means to achieve an orderly and fair administration of justice.” *Griffin v. County Sch. Bd. of Price Edward County*, 377 U.S. 218, 227 (1964) (footnote omitted).

The trustee seeks to supplement the complaint to substitute Carol Daffner in place of Frank Daffner based on Frank Daffner’s death and the transfer of the property to Carol Daffner under her husband’s will during the pendency of this proceeding. This is a reasonable request because supplementing the complaint will allow the trustee to more accurately assert the claim which he now has against Carol Daffner based on these new factual developments.

The objection of Carol and Ralph Daffner is misplaced. Their objection is based on federal civil rule 25(a), which deals with substitution upon the death of a party:

(a) DEATH

(1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons, and may be served in any judicial district.

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Unless the motion for substitution is made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.

FED. R. CIV. P. 25(a)(1) (applicable under FED. R. BANKR. P. 7025). The Daffners argue that the action against Frank Daffner should be dismissed and that the trustee should not be permitted to substitute Carol Daffner for Frank Daffner because he failed to comply with the time requirements of this rule. However, based on the transfer of the property to Carol Daffner, there is no need to substitute defendants in this proceeding because Carol Daffner now owns the entire interest in the property. Moreover, although it is true that the action against Frank Daffner should be dismissed under civil rule 25(a)(1) based on his death and the absence of a timely request to substitute another party for him, that result does not preclude the relief which the trustee requests.

Frank Daffner is one of three defendants named in this action and his death does not cause the entire action to lapse. *See* FED. R. CIV. P. 25(a)(2) (providing that an action does not abate in the event of the death of one of the defendants and that the action is to proceed against the surviving defendants). *See also, Berland v. Mussa (In re Mussa)*, 218 B.R. 428, 431 (Bankr. N.D. Ill. 1998) (noting that the death of a co-defendant in a fraudulent conveyance action did not abate an action against his spouse who became sole owner of the disputed property by reason of his death). As Carol Daffner is already a party to this action, the trustee has not requested nor does he need leave to substitute her for Frank Daffner in this proceeding. What the trustee has requested is leave to supplement his claims against Carol Daffner based on the new factual

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developments. The trustee's request for leave to supplement his claims against Carol Daffner is appropriate under the rules and is reasonable under the circumstances.

Based on civil rules 15(d) and 25(a), the trustee's motion to supplement his complaint against Carol Daffner is granted and the trustee's complaint against defendant Frank Daffner is dismissed.

II. Motion to Strike Trustee's Expert Report

The defendants ask that the trustee's expert report be stricken because it does not meet the requirements of bankruptcy rule 7026(a)(2)(B). The trustee opposes that request and has submitted a supplement to the report which addresses the defendants' concerns. Based on this supplementation and the prejudice which striking the report would cause to the trustee in light of the imminent trial of this matter, the defendants' motion to strike is denied.

CONCLUSION

For the reasons stated, the trustee's motion to supplement his complaint against Carol Daffner is granted. The supplemental pleading is to be filed by noon on June 9, 2004. The response is to be filed on June 10, 2004 by 4:00 p.m. Additionally, the trustee's complaint against Frank Daffner is dismissed. Finally, the defendants' motion to strike the trustee's expert report is denied. A separate order will be entered reflecting this decision.

Date: 7 June 2004

  
\_\_\_\_\_  
Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge

To be served by clerk's office email and the Bankruptcy Noticing Center on:  
Susan Gray, Esq.  
Richard Baumgart, Esq.

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RICHARD A. BAUMGART, TRUSTEE,	)	Adversary Proceeding No. 03-1132
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
RALPH W. DAFFNER, et al.,	)	<b><u>ORDER</u></b>
	)	
Defendants.	)	

For the reasons stated in the memorandum of opinion filed this same date, the plaintiff-trustee's motion for leave to supplement his complaint against defendant Carol Daffner is granted and the supplemental pleading is to be filed on or before noon on **June 9, 2004**. (Docket 53). The response is to be filed by 4:00 p.m. on **June 10, 2004**. Additionally, the defendants' motion to strike the plaintiff-trustee's expert report is denied. (Docket 50).

IT IS SO ORDERED.

Date: 7 June 2004

  
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 Pat E. Morgenstern-Clarren  
 United States Bankruptcy Judge

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