UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
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DIANE ELAINE BARBER,	*	
	*	**CASE NUMBER 03-40045**
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Debtor.	*	
	*	
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DIANE ELAINE BARBER,	*	
	*	
Plaintiff,	*	
	*	
vs.	*	**ADVERSARY NUMBER 03-4162**
	*	
COUNTRYWIDE HOME LOANS, INC.,	*	
***et al.*,**	*	
	*	
Defendants.	*	
	*	

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ORDER GRANTING PLAINTIFF'S MOTION FOR LEAVE TO AMEND HER COMPLAINT

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The matter before the Court is Plaintiff's Motion for Leave to Amend Her Complaint ("Motion to Amend") and Defendant Countrywide Home Loans, Inc.'s Opposition to Plaintiff's Motion for Leave to Amend Complaint ("Opposition"). For the reasons set forth below, this Court grants the Motion to Amend.

PROCEDURAL HISTORY

Debtor/Plaintiff Diane Barber ("Debtor") filed a petition pursuant to Chapter 7 of the Bankruptcy Code on January 6, 2003. Debtor received a discharge on May 8, 2003 and a final decree was entered on July 14, 2003. The case was closed on July 17, 2003. On July 25, 2003, Debtor moved to reopen the case in order to

commence an adversary proceeding against America's Wholesale Lender and Countrywide Home Loans, Inc. (collectively, "Countrywide"). The Court granted the motion to reopen by Order dated July 28, 2003.

On August 4, 2003, Debtor commenced this adversary proceeding by filing the Complaint against Countrywide, alleging a violation of the Truth in Lending Act. Although the Complaint and Summons were duly served on Countrywide on August 22, 2003, Countrywide failed to answer or otherwise plead in response to the Complaint. On November 24, 2003, Debtor filed Plaintiff's Motion for Summary Judgment ("Debtor's S.J. Motion"). On December 31, 2003, after expiration of the time to respond to Debtor's S.J. Motion, Countrywide filed Motion of Defendants Countrywide Home Loans, Inc. and America's Wholesale Lender for Leave to Answer Plaintiff's Complaint Out of Time ("Motion for Leave to Answer"). Countrywide also filed Affidavit of Karen E. Navarro, which stated that service of the Complaint was made at an address at which Countrywide did not normally receive court papers and that Countrywide had only become aware of the lawsuit in late November 2003. In addition, Countrywide filed Rule 56(f) Motion of Defendants Countrywide Home Loans, Inc. and America's Wholesale Lender for Additional Time to Respond to Plaintiff's Motion for Summary Judgment ("Motion for Additional Time"). On March 19, 2004, this Court granted Countrywide leave, until March 31, 2004, to answer the Complaint. Countrywide filed Answer of Defendants Countrywide Home Loans, Inc. and America's Whole Lenders ("Answer") on March 31, 2004.

After three months of discovery, on June 17, 2004, Countrywide filed a second motion to extend time to respond to Debtor's S.J. Motion. No action occurred in this adversary proceeding until March 7, 2005, at which time the Court scheduled a telephonic status conference for March 21, 2005. At the telephonic status conference, the Court granted Countrywide seven (7) additional days to file a response to Debtor's S.J. Motion. Nearly a year after it filed its Answer and more than a year and a quarter after first seeking leave to respond to Debtor's S.J. Motion, on March 26, 2005, Countrywide filed Defendants' Motion for Leave to File Memorandum in Opposition to Plaintiff's Motion for Summary Judgment with Attached Affidavit of Joshua Romanelli. On that same date, Countrywide filed Defendant's [sic] Memorandum in Opposition of Motion for Summary Judgment with Attached Affidavit of Joshua Romanelli ("Memorandum in Opposition"). In addition, on March 26, 2005, Countrywide filed Defendants' Motion for Summary Judgment with Attached Affidavit of Joshua Romanelli ("Countrywide's S.J. Motion"). This Court granted Countrywide leave to file the Memorandum in Opposition on April 4, 2005. On April 22, 2005, Debtor filed Motion to Extend Time to File Response to Defendants' Motion for Summary Judgment. That motion was granted and Debtor was given until May 27, 2005 to file the response. On May 26, 2005, Debtor filed Response to Defendants' Motion for Summary Judgment and Plaintiff's Cross Motion for Summary Judgment.[1] Thereafter, the

[1]Debtor's "cross motion" is somewhat confusing since Debtor already had a motion for summary judgment pending.

parties filed a joint motion to extend time for Countrywide to respond to Debtor's opposition to Countrywide's S.J. Motion. Subsequently, each of the parties filed their own motions seeking additional time to respond and reply to each other's summary judgment motions. The last of these motions was an "Agreed" motion to extend Countrywide's time to respond to Debtor's supplemental reply to Countrywide's S.J. Motion. On January 12, 2006, this Court entered Order Denying Motion for Extension of Time and Cross Motions for Summary Judgment.

As a result of the denial of the cross motions for summary judgment, the Court scheduled a telephonic status conference for February 27, 2006. At that telephonic status conference, Debtor's counsel stated that he had drafted, but not yet filed, an amended complaint. The Court permitted Debtor to file a motion for leave to amend the complaint, to which Countrywide would have ten (10) days to file a memorandum in opposition if it chose to do so. That Motion to Amend and Opposition are currently before this Court.

DISCUSSION

Rule 15(a) of the Federal Rules of Civil Procedure, made applicable to this case by Federal Rule of Bankruptcy Procedure 7015, provides that, after a responsive pleading has been made, "a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and such leave shall be freely given when justice so requires." (FED. R. CIV. P. 15(a).) Countrywide opposes the Motion to Amend on the grounds that it will be unfairly prejudiced by Debtor's delay in amending the

Complaint to add four additional defendants and more than ninety (90) additional paragraphs. Countrywide alleges that all of the facts in the amended complaint were known or should have been known to Debtor at the time she filed her original Complaint. Countrywide asserts that, even if Debtor did not know about the facts underlying the allegations in the amended complaint until they were revealed in discovery, that fact does not justify the proposed amendment. (Opposition at p. 5.) Countrywide also states that Debtor originally filed a "premature" motion for summary judgment and did not serve Countrywide with any discovery until August 2006. As a consequence, Countrywide declares that this is a "classic case of undue delay and unfair prejudice." (Opposition at p. 8.)

Despite Countrywide's assertion of prejudice, it offers no basis for the Court to find that Countrywide will be prejudiced by Debtor's amendment to the Complaint. Although the amended Complaint does assert claims against new defendants and new causes of action, they all relate to the same transaction – the loan made by Countrywide to refinance Debtor's principal residence. Countrywide asserts that Debtor knew or should have known many of the facts that are the basis for the amended complaint because such facts were included within documents provided to Debtor at the time of the loan transaction. Although that may be true regarding some of the facts, it is doubtful that Debtor knew or understood the relationship by and between Countrywide and the proposed new defendants. These facts almost certainly came out during discovery. Countrywide further asserts that, even if Debtor has only recently discovered

the facts giving rise to the amendment, she has only herself to blame because Debtor failed to serve any discovery until August 2006.

Countrywide fails to acknowledge that it had any part in what it calls "undue delay," but that is clearly the case. Countrywide did not timely respond to the Complaint, even though it never claimed that it was not properly served and even admitted that it was aware of the Complaint in late November 2003. Instead, Countrywide waited for more than a month after becoming aware of the adversary proceeding and then filed its motion for leave to answer. Despite being granted leave to file a late answer and leave to respond to what Countrywide characterizes as a "premature" motion for summary judgment, Countrywide did not file any response to Debtor's S.J. Motion for more than one year. Indeed, Countrywide's failure to timely answer – despite having been properly served – is at least part of the reason that this case is in its current posture. Debtor appropriately filed Debtor's S.J. Motion because Countrywide's failure to answer provided the basis that there were no genuine issues of material fact. Countrywide later filed its own motion for summary judgment. With "dueling" motions for summary judgment pending, both parties then sought and obtained additional time to respond, reply, and attempt to surreply. Despite the fact that it was glaringly apparent that there were genuine issues of material fact, both parties continued to "paper" this Court with their arguments. Countrywide prolonged this process as much as Debtor did.

Upon receipt of the denial of the cross motions for summary judgment, Debtor sought to amend the Complaint. Although Debtor could have sought and obtained discovery at an earlier time in this litigation, this Court does not find that Debtor's delay in that regard is any more significant regarding the current posture of this case than any other act of either party.

"It is settled that the grant of leave to amend the pleadings pursuant to Rule 15(a) is within the discretion of the trial court." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330 (1971). Countrywide concedes that delay alone may not be enough to deny a motion to amend a complaint. (Opposition at p. 6.) Here there has certainly been delay since the original Complaint was filed, but, as set forth above, Debtor is not responsible for all of the delay. Indeed, some of the delay can be squarely placed at the door of Countrywide. The standard for exercising discretion regarding a motion to amend was articulated by the United States Supreme Court in *Forman v. Davis*, 371 U.S. 178 (1962), as follows:

> 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.

Williams v. Northcut & Edwards, P.C., 1999 U.S. Dist. LEXIS 12980 at 4, *quoting Forman v. Davis*, 371 U.S. 178, 182 (1962). Accord, *Fisher v. Roberts*, 125 F.3d 974 (6th Cir. 1997).

Utilizing the *Forman* standard, above, Debtor's Motion to Amend should be granted. Although there has been delay, the delay is not all attributable to Debtor. Countrywide has made no allegations that Debtor's Motion to Amend has been made in bad faith or is based on dilatory motives and the Court discerns none. Debtor has neither previously amended the Complaint nor sought prior leave to amend. There is no issue of previously uncured deficiencies in prior amendments. There is no indication that the proposed amendment would be futile. As set forth above, Countrywide contends that it will be prejudiced by this late amendment, but this Court believes that, based upon weighing the competing potential prejudice and harm to both parties, justice requires that leave to amend the Complaint be given.

As a consequence, this Court finds that justice requires Debtor be given leave to amend her Complaint. The Court hereby grants the Motion to Amend and overrules the Opposition thereto. Debtor shall file the amended complaint and seek issuance of appropriate summons within ten (10) days.

IT IS SO ORDERED.

HONORABLE KAY WOODS
UNITED STATES BANKRUPTCY JUDGE