

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE: \*  
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DIANE ELAINE BARBER, \*  
\* CASE NUMBER 03-40045  
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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MEMORANDUM OPINION REGARDING MOTIONS TO DISMISS AND MOTION  
OF TRUSTEE TO JOIN ADVERSARY ACTION AS A PARTY PLAINTIFF  
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A hearing was held on June 29, 2006 on the following four motions. The first three motions are pending in this adversary proceeding filed by Debtor Diane Barber ("Debtor"), Case No. 03-4162. The last application is pending in Debtor's main bankruptcy case (Case No. 03-40045).

1. Defendants Countrywide Home Loans, Inc. and America's Wholesale Lender's Motion to Dismiss ("Countrywide's Motion to Dismiss") filed by Countrywide Home Loans, Inc. and America's Wholesale Lender (collectively, "Countrywide") on May 3, 2006.
2. Motion of Trustee to Join Adversary Action as a Party Plaintiff with Ten Day Notice Attached ("Trustee's Motion to Join") filed by Mark A. Beatrice, Chapter 7

Trustee ("Trustee") on June 14, 2006.

3. Defendant The Mortgage Zone, Inc.'s Motion to Dismiss Amended Complaint ("TMZ's Motion to Dismiss") filed by The Mortgage Zone, Inc. ("TMZ") on June 22, 2006.
4. Application to Employ Special Counsel With Affidavit Attached ("Application to Employ"), which was filed by Trustee on May 24, 2006.

No party has filed a response or objection to the Application to Employ<sup>1</sup> or TMZ's Motion to Dismiss. The Court scheduled TMZ's Motion to Dismiss on the same day as the other pending motions even though there was no request for an expedited hearing or request for a shortened notice period because TMZ's Motion to Dismiss asserts the same basis for dismissal, *i.e.*, lack of standing, that is the basis of Countrywide's Motion to Dismiss. As a consequence, since the ten-day time period in Local Bankruptcy Rule 9013-1 for responding or objecting to TMZ's Motion to Dismiss had not passed at the time of the hearing, only the issue of standing (in both motions) was argued at the hearing. Debtor's Reply to Defendant Countrywide's Motion to Dismiss and Motion for an Extension of Time ("Debtor's Reply") was deemed also to be a reply to the first argument in TMZ's Motion to Dismiss. Countrywide has objected to Trustee's Motion to Join by filing Brief in Opposition to Motion of Trustee to Join Adversary Action as Party Plaintiff ("Countrywide's Brief in Opposition").

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<sup>1</sup>Even though the Application to Employ is unopposed and, under the circumstances, would ordinarily be granted without a hearing, because the need for the Trustee to employ special counsel is directly related to and will be impacted by this Court's decision regarding the Trustee's Motion to Join, the Court set the matter for hearing with the other motions.

The following constitutes this Court's findings of fact and conclusions of law as required by FED. R. BANKR. P. 7052.

**LACK OF STANDING AND MOTION TO JOIN**

Countrywide and TMZ (collectively, the "Defendants") move to dismiss the Amended Complaint on the ground that Debtor does not have standing to bring the action. The gravamen of the argument is that, after filing her Chapter 7 petition, Debtor no longer had the ability to bring the causes of action set forth in the Amended Complaint because such causes of action became property of the bankruptcy estate pursuant to 11 U.S.C. § 541(a)(1). *In re Cottrell*, 876 F.2d 540, 542 (6th Cir. 1989). As a consequence, Defendants contend that only the Chapter 7 Trustee, as the representative of the bankruptcy estate, is empowered to bring such causes of action. 11 U.S.C. § 323. Defendants argue that, because Debtor did not originally schedule the alleged causes of action when she filed her bankruptcy petition, the Trustee did not have the ability to administer such assets. Defendants contend that Trustee has not abandoned these causes of action. Since these causes of action were neither administered nor abandoned, Defendants argue that they remain property of the bankruptcy estate and that only the Trustee has standing to bring the instant adversary proceeding.

Except for the argument of standing, the propositions set forth by Defendants are not disputed by Trustee or Debtor. In Debtor's Reply, she correctly points out that the causes of action were scheduled as an asset on April 14, 2006 - belatedly, but before Defendants filed their Motions to Dismiss. Debtor further contends

that there has not been sufficient time for the Trustee to act with respect to these claims. Likewise, Trustee, in the Motion to Join, explicitly agrees that "Debtor Diane Barber's Claims Became Property Of The Bankruptcy Estate on [April] 14, 2006,"<sup>2</sup> When Debtor Amended Her Bankruptcy Schedule B." (Motion to Join, Memorandum Heading A, at p. 1.) On May 16, 2006, Trustee filed a Notice of Assets and Request for Notice to Creditors. This action demonstrates that Trustee has not abandoned the causes of action, but, instead, affirmatively indicates an intention to administer such assets. Indeed, all of the Trustee's actions since Debtor amended Schedule B - including filing the Application to Employ and the Motion to Join - are consistent with an intent to pursue and administer the causes of action as assets of the bankruptcy estate. Thus, there is no dispute that (i) the asserted causes of action in the Amended Complaint are property of the bankruptcy estate, or (ii) Trustee has not abandoned such property.

Pursuant to 11 U.S.C. § 323(a), a "trustee in a case under this title is the representative of the estate." Section 323(b) provides that a "trustee in a case under this title has the capacity to sue and be sued." Consequently, it is black letter law that the Trustee has the ability to sue Defendants on behalf of the bankruptcy estate, setting forth the causes of action in the Amended Complaint. Not only do the Defendants not dispute Trustee's right and ability to sue on the causes of action in the Amended Complaint,<sup>3</sup> Defendants insist that

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<sup>2</sup>The Trustee incorrectly states that the amendment was filed on May 14, 2006.

<sup>3</sup>This Court is aware that TMZ also asserts that some of the causes of action are time-barred, but that is a separate issue to be dealt with later.

only the Trustee can be the plaintiff in this action. Since all parties are in agreement that the Trustee is the real party in interest, the only issue is whether Debtor lacks standing so as to deprive this Court of jurisdiction of the Amended Complaint and, thus, require dismissal of the action. For the reasons set forth below, this Court determines that dismissal of the adversary proceeding is not required.

Countrywide argues in its Motion to Dismiss that "there are good policy reasons underlying the rule that only a trustee has standing to bring causes of action owned by a bankruptcy estate." (Countrywide Motion to Dismiss, p. 6.) Countrywide then quotes *In re Price*, 173 B.R. 434, 440 (Bankr. N.D. Ga. 1994) for the proposition that multiple prosecutions would lead to confusion and unilateral intervention by a party might conflict with the trustee's strategy. Here, however, there is no risk of multiple prosecutions or an affront to the trustee's strategy because the Trustee has moved to join as a party plaintiff in this action.

Defendants rely on *Whitfield v. Ford Motor Co.*, 1995 WL 871142 (E.D. Mich. Feb. 27, 1995) to support their argument that lack of standing is a jurisdictional bar and, as a result, the Trustee cannot be joined or substituted in this action because there is no basis for the action to exist. Trustee counters that Defendants have confused the issue of standing with the issue of who is the real party in interest. According to *Black's Law Dictionary*, "[t]o have standing in federal court, a plaintiff must show (1) that the challenged conduct has caused the plaintiff actual injury, and (2) that the

interest sought to be protected is within the zone of interests meant to be regulated by the statutory or constitutional guarantee in question." (*Black's Law Dictionary* 1443 (8th ed. 2004).) Under this definition, there can be no doubt that, but for the bankruptcy filing, Debtor would have standing to assert the causes of action that she sets forth in the Amended Complaint. Debtor is not a stranger to these causes of action; it is just that, as a result of the bankruptcy filing, the Trustee, as the representative of the bankruptcy estate, is the real party in interest.<sup>4</sup>

The facts in *Whitfield* are distinguishable from the facts in the instant case. In *Whitfield*, the debtor failed to schedule his cause of action. Approximately four months after his bankruptcy case was closed, Whitfield filed a lawsuit in state court asserting that cause of action. A year later (apparently after the defendant moved to dismiss on the basis of lack of standing), Whitfield filed a motion to reopen his bankruptcy case for the purpose of amending his schedules. Here, unlike the debtor in *Whitfield*, Debtor moved to reopen her bankruptcy case a mere eight days after the case was closed in order to bring this adversary proceeding. Countrywide states that Debtor received her discharge on May 5, 2003 and didn't file this adversary proceeding until "several months later" on August 4, 2003. (Countrywide's Brief in Opposition, p. 1.) The date of Debtor's

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<sup>4</sup>Trustee could have consented to Debtor bringing the causes of action on behalf of the bankruptcy estate as a derivative action. See *Canadian Pacific Forest Products Limited v. J.D. Irving, Limited (In Re The Gibson Group, Inc.)*, 66 F.3d 1436 (6th Cir. 1995). Additionally, under circumstances such as these, the Court could have granted such derivative standing *nunc pro tunc* to the date the adversary proceeding was originally filed by Debtor. See *Official Committee of Unsecured Creditors v. Hudson United Bank (In re America's Hobby Center, Inc.)*, 223 B.R. 275 (Bankr. S.D. N.Y. 1998).

discharge is not the operative date. Bankruptcy cases can - and frequently are - administered after discharge. The Chapter 7 case was closed on July 17, 2003; almost immediately, Debtor moved to reopen the case on July 25, 2003. The motion to reopen was granted by this Court on July 28, 2003 and Debtor filed this adversary proceeding a week later. The conduct of Debtor does not demonstrate delay.

Debtor brought the lawsuit in this Court rather than state court or another federal court with the express intention that this Court would oversee and decide this matter. There was no attempt by the Debtor to conceal the causes of action in order to preserve them for herself as opposed to the creditors of the estate. It is true that Debtor should have originally scheduled her cause of action so that Trustee could have administered that property before issuing his final report. Debtor alleges she was unaware of the extent of her causes of action until she initiated the adversary proceeding and found out certain facts during the discovery process. Debtor's contention that she did not know the extent of the causes of action does not absolve her of the responsibility to schedule the cause[s] of action about which she was aware. In this case, however, Debtor amended Schedule B to include the causes of action before Defendants raised the issue of standing in their Motions to Dismiss. Thus, Debtor's timing in scheduling the causes of action as property of the estate, although late, is not suspect.

One of the clearly distinguishable features between this case and *Whitfield*, however, is that Countrywide waited almost three years after Debtor commenced this adversary proceeding before raising the

issue of lack of standing. Countrywide actively participated in this litigation and filed numerous motions and pleading over several years without ever raising the issue of lack of standing.<sup>5</sup> Although Countrywide opposed Debtor's Motion for Leave to Amend Complaint, Countrywide asserted only unfair prejudice based upon delay and never raised the issue of lack of standing as a reason that motion should not be granted. Countrywide posits that the defense of lack of jurisdiction cannot be waived, which is true. However, the long delay by Countrywide is raising the issue and, thus, permitting this Court (not to mention the Debtor and Trustee) to timely address it does bear upon the proper remedy. Substitution of Trustee for Debtor as the plaintiff in these proceedings will cure any defect of lack of standing. See *In re James*, 120 B.R. 802, 807 (Bankr. E.D. Pa. 1990) ("While the Debtor does lack standing, dismissal is not required. Joinder of the Trustee as a necessary plaintiff is a proper means of remedying the jurisdictional defect.")

In *Bauer v. Commerce Union Bank, Clarksville, Tenn.*, 859 F.2d 438 (6th Cir. 1988), the Sixth Circuit Court of Appeals permitted substitution of a chapter 7 trustee in a tort case that was originally commenced by a debtor after discharge. The Court affirmed the trial court's substitution of the trustee as the party plaintiff pursuant to FED. R. CIV. P. 25(c).

As the District Court held in *Martin v. U.S. Bank*, 2005 WL 3107722 (E.D. Mo. Nov. 18, 2005), lack of standing does not mean that

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<sup>5</sup>Indeed, Countrywide's Motion to Dismiss is docket number 76 in the adversary proceeding.

the case has to be dismissed. There, the District Court relied upon FED. R. CIV. P. 17(a) as the basis for substitution.

Defendant is correct that because Plaintiff's claim against Defendant was property of the estate when the present complaint was filed, the Trustee was the real party in interest under Federal Rule of Civil Procedure 17(a), and Plaintiff did not have standing to assert the claims. See *Parker v. Wendy's Int'l, Inc.*, 365 F.3d 1268, 1272 (11th Cir. 2004); *Wieburg v. GTE Sw. Inc.*, 272 F.3d 302, 306 (5th Cir. 2001); *Harris [v. St. Louis Univ.]*, 114 B.R. [647] at 649. This, however, does not mean that the Trustee cannot now be permitted to be substituted as the real party in interest. Rule 17(a) provides that '[n]o action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection' by substitution of the real party in interest.

*Id.* at \*5.

Granting Defendants' Motions to Dismiss would work an injustice on Debtor's creditors and the bankruptcy estate. Trustee acted within a "reasonable time" after Schedule B was amended to move the Court for permission to join this adversary proceeding as a party plaintiff. In *Nagle v. Commercial Credit Business Loans, Inc.*, 102 F.R.D. 27 (E.D. Pa. 1983), the District Court held that the original stockholder/bondholder plaintiffs were not the proper plaintiffs in a lawsuit for breach of contract and other causes of action on behalf of the corporation. Having held that the stockholders and bondholders did not have an enforceable cause of action against the defendant, the court held that the bankruptcy trustee was the real party in interest.

The trustee in bankruptcy sought to join the original plaintiffs, relying on Fed. R. Civ. P. 17(a). . . . The dismissal of the original plaintiffs means the trustee has no entity to join. However, the trustee can be substituted as plaintiff for the original plaintiffs. Federal Rule 17(a) provides that '[e]very action shall be prosecuted in the name of the real party in interest.' . . . Since the

trustee in bankruptcy is the real party in interest in this suit, the court finds that the case can proceed with the trustee substituted as plaintiff for the dismissed class of stockholders and bondholders. . . . The real party in interest principle is a means to identify the person, who according to the governing substantive law, is entitled to enforce the right.

*Id.* at 31.

Defendants not only concede - they insist - that Trustee has standing and is the real party in interest to bring the causes of action asserted by Debtor. Given that fact, the only apparent reason to oppose joinder or substitution of Trustee as a party plaintiff would be to defeat the ability of the Trustee from asserting these causes of action on the basis that he is time-barred. As set forth in this Court's Order dated March 22, 2006 granting Debtor leave to file the Amended Complaint, this case has been replete with delay, but the blame for such delay falls squarely upon Countrywide, as well as Debtor. Countrywide's unwarranted delay of nearly three years in failing to bring the issue of lack of standing to the Court's attention defeats the remedy of dismissal that it seeks.<sup>6</sup> In the interests of justice, as well as the best interests of the creditors and this bankruptcy estate, the issue of lack of standing can be remedied by permitting substitution of Trustee as the party plaintiff in lieu of dismissal.

For the reasons set forth above, pursuant to FED. R. CIV. P. 17(a) and 25(c), incorporated into this proceeding by FED. R. BANKR. P. 7017

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<sup>6</sup>TMZ has not been a party to this lawsuit for the same extended period of time and the actions of Countrywide are not being attributed to TMZ. Nevertheless, the remedy of dismissal versus joinder/substitution of the Trustee as plaintiff is one that applies to the entire case and cannot be parsed out as to certain defendants only.

and 7025, Trustee shall be permitted to be substituted as the plaintiff in this adversary proceeding.

**CAUSES OF ACTION ALLEGED TO BE TIME-BARRED**

TMZ argues that certain of the causes of action asserted against it in the Amended Complaint are barred by the applicable statute of limitations. As set forth above, the time for Debtor to respond to this argument had not run at the time of the hearing. To the extent the Trustee has just now been substituted as the plaintiff in this case, it is appropriate to permit Trustee twenty days to respond to those arguments. Accordingly, Trustee has twenty days from the date of this Order to respond to the argument in TMZ's Motion to Dismiss relating to whether certain claims are time-barred.

**APPLICATION TO EMPLOY SPECIAL COUNSEL**

As set forth above, there has been no opposition to the Application to Employ. Since trustee has been substituted as the party plaintiff in this adversary proceeding, he will require special counsel to prosecute such action. As a consequence, this Court finds that the Application is well taken and grants the Application *nunc pro tunc* to May 17, 2006.

An appropriate Order will follow.

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**HONORABLE KAY WOODS  
UNITED STATES BANKRUPTCY JUDGE**

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE: \*  
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DIANE ELAINE BARBER, \*  
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Debtor. \* CASE NUMBER 03-40045  
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DIANE ELAINE BARBER, \*  
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Plaintiff, \*  
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vs. \* ADVERSARY NUMBER 03-4162  
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COUNTRYWIDE HOME LOANS, INC., \*  
et al., \*  
\*  
Defendants. \*  
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O R D E R  
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For the reasons set forth in the Court's Memorandum Opinion Regarding Motions to Dismiss and Motion of Trustee to Join Adversary Action as a Party Plaintiff, this Court denies in whole Defendants Countrywide Home Loans, Inc. and America's Wholesale Lender's Motion to Dismiss and denies in part (the argument dealing with dismissal for lack of standing) Defendant The Mortgage Zone, Inc.'s Motion to Dismiss Amended Complaint ("TMZ's Motion to Dismiss"). The Court grants Motion of Trustee to Join Adversary Action as Party Plaintiff.

Trustee has twenty (20) days from the date of this Order to file a response or objection to the portion of TMZ's Motion to Dismiss that remains outstanding (the argument asserting that certain claims are time-barred). Defendants have twenty (20) days from the date of this

Order to answer the Amended Complaint. The parties shall have until thirty (30) days after this Court rules on the remainder of TMZ's Motion to Dismiss to file the proposed discovery plan in the adversary proceeding.

**IT IS SO ORDERED.**

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**HONORABLE KAY WOODS  
UNITED STATES BANKRUPTCY JUDGE**