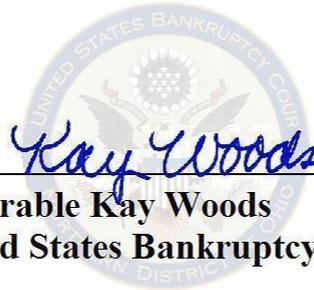


IT IS SO ORDERED.



Dated: October 15, 2007
09:30:05 AM

Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
	*	
RANDALL J. HAKE and	*	
MARY ANN HAKE,	*	CASE NUMBER 04-41352
	*	
Debtors.	*	
	*	

BUCKEYE RETIREMENT CO., LLC.,	*	
LTD.,	*	ADVERSARY NUMBER 06-04153
	*	
Plaintiff,	*	
	*	
vs.	*	
	*	
RANDALL J. HAKE and	*	
MARY ANN HAKE,	*	
	*	HONORABLE KAY WOODS
Defendants.	*	
	*	

MEMORANDUM OPINION DENYING PLAINTIFF'S
MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT
NOT INTENDED FOR NATIONAL PUBLICATION

The following opinion and order are not intended for national publication and carry limited precedential value. The availability of this opinion by any source other than www.ohnbuscourts.gov is not the result of direct submission by this Court. The opinion is

available through electronic citation at www.ohnb.uscourts.gov pursuant to the E-Government Act of 2002 (Pub. L. No. 107-347).

This cause is before the Court on Plaintiff's Motion for Leave to File First Amended Complaint (Doc. # 136) ("Motion to Amend") filed by plaintiff Buckeye Retirement Co., L.L.C., Ltd. ("Buckeye") on September 28, 2007. Attached to the Motion to Amend as Exhibit A is a forty-four page First Amended Complaint Objecting to Discharge (11 U.S.C. § 727), which Buckeye seeks permission to file.

Debtors filed Memorandum in Limited Opposition to Motion of Buckeye to File Amended Complaint ("Memorandum in Opposition") (Doc. # 145) on October 8, 2007, which opposes Buckeye's request for leave to file the amended complaint.

On October 9, 2007, Chapter 7 Trustee Mark Gleason ("Trustee") filed Trustee's Response and Memorandum in Support of Buckeye Retirement Company, LLC, Ltd.'s Motion for Leave to File First Amended Complaint ("Trustee's Response") (Doc. # 146), which supports the Motion to Amend.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334. Venue in this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

I. FACTS

On March 25, 2004 ("Petition Date"), Debtors Randall J. Hake and Mary Ann Hake ("Debtors") filed a voluntary petition pursuant

to chapter 11 of title 11 of the United States Code. This case was converted to a case under chapter 7 on April 26, 2006.

The instant adversary proceeding was commenced by the filing of Complaint Objecting to Discharge (11 U.S.C. §727 (sic))("Complaint") (Doc. # 1) on August 21, 2006, by Buckeye against Debtors. Debtors filed Answer of Defendants, Randall J. Hake and Mary Ann Hake (Doc. # 11) on October 2, 2006. Pursuant to this Court's Case Management Order, the parties filed Proposed Discovery Plan (Doc. # 13) on October 25, 2006, which proposed that all discovery would be completed by June 21, 2007.

On October 20, 2006, Buckeye filed Plaintiff's Motion to Withdraw the Reference. (Doc. # 12.) The Motion to Withdraw the Reference was heard by the United States District Court Judge Peter C. Economus, Northern District of Ohio at Youngstown. (Doc. # 19.) On April 27, 2007, Judge Economus denied the Motion to Withdraw the Reference. (Doc. # 77.)

On February 5, 2007, Debtors filed Motion for Leave to File Counterclaim Seeking Declaratory Judgment ("Debtors' Motion for Leave") (Doc. # 37). The Court conducted a hearing in Debtors' main bankruptcy case (Case No. 04-41352) on February 8, 2007, at which counsel for Debtors and counsel for the Trustee were in attendance. During the course of that hearing, counsel for Trustee expressly stated that Trustee supported Debtors' Motion for Leave because the issues presented in such motion would need to be resolved in order to bring the bankruptcy case to conclusion.

Based upon the contents of Debtors' Motion for Leave, and Trustee's support for such motion, this Court determined that, consistent with Rule 15(a), leave should be freely granted. As a

consequence, this Court entered the February 8, 2007 Order (Doc. # 38), which granted Debtors' Motion for Leave. On February 8, 2007, Debtors filed Counterclaim Seeking Declaratory Judgment ("Counterclaim") (Doc. # 39.) The Counterclaim put the following property at issue: business interest with William Kerfoot, interest in Mauro Circle Limited Partnership, \$6,000.00 loan owed by Edward Hrosar, \$12,000.00 loan due from Bruce Berry, \$147,000.00 payment to Christopher Hake, Applecrest Village Limited Partnership, Woodland Park Retirement Housing Limited Partnership, Hake Family Irrevocable Trust, Christopher R. Hake Irrevocable Trust, Mauro Circle Limited Partnership, Churchill Commons Corporation, Cynthia Corporation and partnership or other interest in Eastgate Technology Park, Ltd., Newco Development Corporation, Northeast Printing Services, Inc., Founders Square, L.L.C. and HHH Construction Services, Inc. (collectively "Disputed Interests")(Amended Counterclaim, ¶¶ 5-6). Debtors prayed this Court determine that (i) Debtors, the bankruptcy estate, and Trustee did not, and currently do not, have any rights, claims or interests - including equitable interest - in the Disputed Interests at the time of the filing (*Id.*, ¶¶ 5-7) and (ii) the Hake Family Irrevocable Trust is a valid spendthrift trust (*Id.*, ¶¶ 6, 8). Debtors prayed for a finding that the Disputed Interests should not have been listed in Debtors' schedules and the Trustee does not have the right to sell such interests.

On February 20, 2007, Buckeye filed Plaintiff's Motion to Reconsider and Alternative Motion to Dismiss Defendants' Counterclaim. (Doc. # 41.) On February 23, 2007, the Court issued Order Denying Plaintiff's Motion for Reconsideration and

Alternative Motion to Dismiss Defendants' Counterclaim and Providing Defendants with Twenty Days to Amend Counterclaim ("Order Denying Reconsideration")(Doc. # 44), which (i) denied the motion to reconsider, (ii) denied the motion to dismiss, and (iii) granted Debtors twenty days to amend the Counterclaim to include all necessary parties. Pursuant to the Order Denying Reconsideration, on March 7, 2007, Debtors filed Motion for Order Joining Trustee as Plaintiff. (Doc. # 48.) On March 14, 2007, the Court issued Order Granting Motion for Order Joining Trustee as Plaintiff. (Doc. # 51.) Consequently, on March 15, 2007, Debtors filed Amended Counterclaim Seeking Declaratory Judgment ("Amended Counterclaim") (Doc. # 52.)

Additionally, on May 30, 2007, Trustee moved to consolidate *Mark Gleason, Chapter 7 Trustee v. Randall Joseph Hake, et al.* (Adversary Case No. 06-4172) with the instant adversary proceeding, because both proceedings object to Debtors' discharge on similar grounds. The Court conducted a hearing on the motion to consolidate on June 8, 2007. Counsel for all parties - Debtors, Trustee, and Buckeye - were present at the hearing and represented that there was no opposition to the motion to consolidate. Hence, on June 12, 2007, the Court issued Order of Court granting the motion to consolidate case no. 06-4172 into the instant adversary proceeding. (Doc. # 94.) After numerous extensions of time, Trustee, on June 19, 2007, filed Trustee's Answer to Defendants' Amended Counterclaim Seeking Declaratory Judgment ("Trustee's Answer") (Doc. # 99.)

The Court held a Final Pretrial on August 9, 2007 and issued its Trial Order on August 10, 2007. (Doc. # 120.) Trial of these

consolidated cases is scheduled to begin on October 29, 2007, and is estimated to last five days.

II. STANDARD FOR REVIEW

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 (S.D. Ohio 1999), quoting *Forman v. Davis*, 371 U.S. 178, 182 (1962). Accord, *Fisher v. Roberts*, 125 F.3d 974, 977 (6th Cir. 1997).

III. ANALYSIS

Buckeye requests leave to amend its Complaint in order to "add additional factual support for [its] existing claims based on additional facts uncovered through discovery and to remove a few claims which [Buckeye] no longer seeks to pursue." (Motion, ¶ 3.) Buckeye contends that it "does not seek leave to add any new causes

of action." (*Id.*) Buckeye argues that the "interests of justice would be served by granting [it] leave to file the . . . First Amended Complaint." (*Id.*, ¶ 4.)

Buckeye's original Complaint consisted of 17 pages and 35 paragraphs. The proposed First Amended Complaint consists of 44 pages and 40 paragraphs. Although the paragraphs in the proposed First Amended Complaint detailing the causes of action appear to be identical or nearly identical to those in the original Complaint, the additional allegations cover additional documents and instances of alleged fraud and concealment. The facts alleged in support of Buckeye's causes of action have grown from 13 pages in the original Complaint to 37 pages in the proposed First Amended Complaint.

Buckeye postulates that Debtors will not be prejudiced by the proposed First Amended Complaint because all of the additional facts asserted in the proposed First Amended Complaint were produced by Debtors in connection with discovery in this adversary proceeding.

Debtors' Memorandum in Opposition, however, counters that Buckeye's proposed First Amended Complaint asserts new claims, which would cause prejudice and undue burden to Debtor Randall J. Hake. Debtors argue that the Motion to Amend was filed too late to assert any new claims. Debtors characterize as "new claims" Buckeye's added allegations in paragraphs 15, 16, and 17 of the First Amended Complaint, that Debtors made false oaths in their disclosure statements and monthly operating reports.¹ (Memorandum

¹Debtors argue that these allegations are based on "information in documents not previously mentioned in the original Complaint," and that they constitute "a whole new theory of false oaths [supported by a] completely new set of facts." (Memorandum in Opposition, ¶ 3.)

in Opposition, ¶ 2.) Debtors assert that defending these new claims would require additional evidence and witnesses.² (*Id.*, ¶ 4.)

Debtors cite *Duggins v. Steak 'N Shake, Inc.*, 195 F.3d, 828, 834 (6th Cir. 1999) (affirming the District Court's decision to deny plaintiff's motion for leave to amend the complaint after the deadline had passed for both discovery and dispositive motions), in support of their argument that Buckeye's Motion to Amend should be denied because of prejudice to Debtor. (*Id.*, ¶ 5.)

Despite Buckeye's bald assertion that there will be no prejudice, this Court finds that it would be prejudicial to permit Buckeye to amend its Complaint at this late juncture in the case. As set forth above, trial is scheduled to begin on October 29, 2007. Buckeye filed its Motion to Amend a mere month prior to the commencement of trial and more than thirteen months after it filed the original Complaint.

Rule 15 provides that "leave [to amend] shall be freely given when justice so requires." FED. R. CIV. P. 15(a) (West 2006). Buckeye cites to this Court's Order Denying Reconsideration, which upheld leave for Debtors to amend their Answer to assert the Counterclaim. (Motion to Amend, ¶ 2.) The implication is that this Court is required, in like measure, to grant Buckeye leave now to amend its Complaint. The circumstances of the two requests to amend pleadings, however, are significantly different. As the Court noted in the Order Denying Reconsideration, at the time

²Debtors alleged that the additional evidence would include "numerous checks issued by Randall J. Hake PE, LLC documenting its payment of the [disputed] charges as business expenses, and deposits showing the reimbursement of such charges, and possibly testimony from the United States Trustee's representative [who instructed Mr. Hake in the process to be used for such expenses]." (*Id.*, ¶ 4.)

Debtors sought leave to amend, the matter was not on the trial calendar and the discovery cutoff was four months away. Here, in contrast, trial is only a couple of weeks away and the parties are required to be complying with the Trial Order. If Buckeye were granted leave to amend, Debtors' time to respond to the allegations in the proposed First Amended Complaint would not run until after the trial began.

Trustee states that he is "concerned that [Debtors'] Opposition to the Amended Complaint is merely an attempt to delay the trial of this action due to [Debtors'] mounting frustration with Buckeye and the process in general." (Trustee's Response, ¶ 16.) The Court finds this assertion somewhat puzzling since Debtors have not sought an extension of the trial schedule. Indeed, by filing the Motion to Amend so close to the trial date, it appears that it is Buckeye, rather than Debtors, who may be trying to delay the trial.

Although it might be possible to continue the trial - something for which no party has moved - Buckeye is well aware of the difficulty in scheduling a trial that all parties estimated (before assertion of the new allegations in the proposed First Amended Complaint) to last at least five days. Buckeye contends that it learned, through discovery, the facts it seeks leave to add to the Complaint. Most of these facts, however, were known to Buckeye at the Final Pretrial on August 9, 2007. Despite that knowledge, at the Final Pretrial, counsel for Buckeye represented that a motion to amend the complaint might be forthcoming, with the following statement:

We will probably also file a motion to amend the Complaint. But fear not, it would be to cull it down to the evidence which has been adduced by the conclusion of discovery with a view towards streamlining the trial.

(Trans. of August 9, 2007 Final Pretrial, p. 52 (Doc. # 139)(emphasis added).) Contrary to that assertion, however, the Motion to Amend does not cull down the evidence. Instead, the Motion to Amend seeks to add facts that more than double the length of the original Complaint. It is difficult for this Court to understand how Buckeye's Motion to Amend could possibly be construed as an effort to cull down the evidence and/or streamline the trial.

Leave to amend is to be freely given when justice so requires that it be given. In the instant situation, justice not only does not require that leave be given, but justice would be better served by denying Buckeye's Motion to Amend.

In addition, Buckeye seeks leave to "remove a few claims which [Buckeye] no longer seeks to pursue." (Motion to Amend, ¶ 3.) The claims that Buckeye seeks to remove, however, all relate to the Counterclaim asserted by Debtors. Buckeye unsuccessfully moved to dismiss the Counterclaim, which was denied by this Court's Memorandum Opinion and Order dated July 11, 2007 ("July 11 Order") (Doc. ## 106 and 107.) By seeking to "remove" these claims - and the basis for Debtors' Counterclaim - Buckeye is attempting an end-run around this Court's July 11 Order. Buckeye previously offered to "stipulate" about the items that are the subject of Debtors' Counterclaim (the same ones that Buckeye seeks to "remove" from this litigation); however, when Debtors attempted to accept Buckeye's offer to stipulate, Buckeye "clarified" the stipulation.

After Buckeye clarified its position, Debtors asserted that they could not agree and wanted to pursue the Counterclaim. (See, generally, July 11 Order, pp. 13-15.)

Buckeye's attempt to remove the allegations that underlie Debtors' Counterclaim constitutes bad faith. Having failed to obtain the relief it sought in the motion to dismiss, Buckeye now desires to remove the foundational allegations for the Counterclaim.

Buckeye cites to *Joe Powell & Associates v. International Tel. and Tel. Corp.*, (*In re Joe Powell & Associates*) 23 B.R. 329 (Bankr. E.D. Tenn. 1982) in support of the Motion to Amend. The *Powell* court permitted plaintiffs in four adversary proceedings to amend their complaints more than fifteen months after the original complaints were filed to assert new factual allegations and to delete one paragraph. The *Powell* decision does not indicate whether those cases had been set for trial, and, indeed, does not even discuss whether discovery was closed. The *Powell* court found no evidence or suggestion of either bad faith or a dilatory motive on the part of the parties requesting amendment. As a consequence, the court granted leave to amend. The court also addressed the requested deletion from the complaint of a paragraph that the defendant characterized as a judicial admission. Despite noting the "paucity of reported decisions on the issue of whether a party should be allowed to amend his pleading to delete allegations[,]" the *Powell* court permitted the deletion of the single paragraph. *Id.* at 333.

This situation is distinguishable from the *Powell* case in that the paragraphs Buckeye seeks to remove form the basis for Debtors'

Counterclaim. The Court finds that Buckeye's attempt to remove these paragraphs evidences bad faith in light of this Court's July 11 Order. Unlike the instant case, bad faith was found to be lacking in the *Powell* case. As a consequence, justice requires that leave to remove these paragraphs be denied.

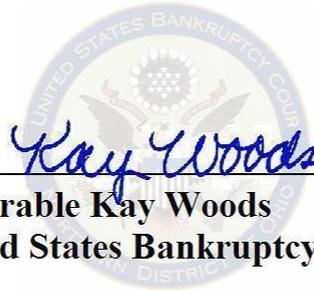
IV. CONCLUSION

As set forth above, the Motion to Amend is denied on the basis that the interests of justice would not be served by granting leave at this time. Buckeye's proposed amendment attempts to include new facts, circumstances, and documents so as to constitute new causes of action. Amendment of the Complaint at this time would be prejudicial to Debtors in light of the fact that trial was a mere month away at the time Buckeye filed the Motion to Amend. In addition, Buckeye's conduct in attempting to remove the paragraphs that undergird Debtors' Counterclaim constitutes bad faith. To the extent that, in support of the alleged causes of action in the original Complaint (but not facts to supports new causes of action), Buckeye adduces trial evidence of facts that are not set forth in the Complaint, Buckeye can seek to have the pleadings amended to conform to the evidence pursuant FED. R. CIV. P. 15(b).

An appropriate order will follow.

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IT IS SO ORDERED.



Dated: October 15, 2007
09:30:05 AM

Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
	*	
RANDALL J. HAKE and	*	
MARY ANN HAKE,	*	CASE NUMBER 04-41352
	*	
Debtors.	*	
	*	

	*	
BUCKEYE RETIREMENT CO., LLC.,	*	
LTD.,	*	ADVERSARY NUMBER 06-04153
	*	
Plaintiff,	*	
	*	
vs.	*	
	*	
RANDALL J. HAKE and	*	
MARY ANN HAKE,	*	
	*	HONORABLE KAY WOODS
Defendants.	*	
	*	

ORDER DENYING PLAINTIFF'S
MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT

For the reasons set forth in this Court's Memorandum of Opinion entered this date, the Plaintiff's Motion for Leave to File First Amended Complaint is denied on the basis that the interests of justice would not be served by granting leave at this time.

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