

The court incorporates by reference in this paragraph and adopts as the findings and orders of this court the document set forth below. This document has been entered electronically in the record of the United States Bankruptcy Court for the Northern District of Ohio.

2008 Nov 26 PM 04:06

CLERK U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
TOLEDO



Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:)	Case No.: 06-32473
)	
Rettig Enterprises, Inc.,)	Chapter 11
)	
Debtor.)	Adv. Pro. No. 07-3149
)	
Rettig Enterprises, Inc.,)	Hon. Mary Ann Whipple
)	
Plaintiff,)	
v.)	
)	
CadleRock Joint Venture, L.P.,)	
)	
Defendant.)	
)	

MEMORANDUM OF DECISION AND ORDER

This adversary proceeding is before the court on Plaintiff's Motion to File Amended Complaint [Doc. #21] and Defendant's response [Doc. #25]. After reviewing the motion and having considered the arguments presented by counsel at the hearing, the court will grant Plaintiff's motion.

Plaintiff is a debtor in an underlying Chapter 11 bankruptcy case filed on September 12, 2006. [See Case No. 06-32473]. On July 17, 2007, Plaintiff filed its complaint in this proceeding, alleging that

Defendant is the assignee of a note, mortgage and judgment from RFCBC, Inc., that arise from a loan obligation incurred, and security interests granted, by Plaintiff on April 1, 2003, but for which it received no consideration. In its original complaint, Plaintiff seeks to avoid the underlying transactions as fraudulent conveyances under 11 U.S.C. § 548(a)(1)(B) and Ohio Revised Code §§ 1336.01 et seq. On March 3, 2008, Defendant filed a Motion for Summary Judgment and Motion to Dismiss, arguing that Plaintiff's claims are time-barred, and barred by the doctrines of res judicata and laches. On April 4, 2008, Plaintiff filed a response to the motion for summary judgment and also filed the instant motion to amend its complaint.

Federal Rule of Civil Procedure 15(a), made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7015, provides that after a responsive pleading has been served, a party may amend his complaint "only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Sixth Circuit case law generally manifests "liberality in allowing amendments to a complaint." *Janikowski v. Bendix Corp.*, 823 F.2d 945, 951 (6th Cir. 1987). The Sixth Circuit has explained that the thrust of Rule 15 "is to reinforce the principle that cases should be tried on their merits rather than on the technicalities of pleadings." *Id.* (quoting *Tefft v. Seward*, 689 F.2d 637, 639 (6th Cir. 1982)). However, "leave to amend is properly denied 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.'" *PR Diamonds, Inc. v. Chandler*, 364 F.3d 671, 698 (6th Cir. 2004) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

In its amended complaint, Plaintiff abandons its claim under 11 U.S.C. § 548 and alleges in more detail its fraudulent conveyance claim under the Ohio Revised Code. Plaintiff also alleges claims of fraudulent inducement and breach of contract relating to the underlying transactions. There is no claim that the motion to amend is brought in bad faith or for dilatory purposes and the court finds that there is no undue delay. *See Janikowski*, 823 F.2d at 951 ("Delay that is not intended to harass the defendant is not in itself a permissible reason to refuse leave to amend."). Although Defendant argues that, as an assignee, it was not a party to the underlying transactions and, therefore, that Plaintiff's additional claims of breach of contract and fraudulent inducement will require additional discovery, this does not constitute *undue* prejudice as such discovery clearly would have been required even had Plaintiff amended its complaint at an earlier date. And the fact that the discovery cut off date has passed can be remedied by an order extending discovery for a reasonable time.

While Defendant does not argue in his response to Plaintiff's motion to amend the complaint that the proposed amendment would be futile, it does argue in its summary judgment motion that Plaintiff's fraudulent conveyance claim under the Ohio Revised Code is time-barred and barred by the doctrines of res judicata and laches. The court, however does not find these arguments well taken.

In arguing that Plaintiff's fraudulent conveyance claim is time-barred, Defendant relies on the applicable four-year limitation period set forth in Ohio Revised Code § 1336.09. Because this adversary proceeding was commenced on July 17, 2007, more than four years after the April 1, 2003, execution of documents constituting the transfers at issue in this case, Defendant contends that Plaintiff's fraudulent conveyance claim is untimely. However, the Bankruptcy Code provides for an extension of the state law limitation period. 11 U.S.C. § 108(a). Section 108(a) provides in relevant part as follows:

If applicable nonbankruptcy law . . . fixes a period within which the debtor may commence an action, and such period has not expired before the date of the filing of the petition, the trustee may commence such action only before the later of –

- (1) the end of such period . . .; or
- (2) two years after the order for relief.

Plaintiff's Chapter 11 case was filed on September 12, 2006, before the expiration of the four-year limitation period. Plaintiff, as a debtor-in-possession, has the powers of a trustee, *see* 11 U.S.C. § 1107(a), and, as such, receives the benefit of the extended limitation period. Plaintiff's complaint is, therefore, timely since the limitation period did not expire until September 12, 2008.

The court also considers Defendant's res judicata argument in determining whether Plaintiff's proposed amendment would be futile. Under 28 U.S.C. § 1738, the federal full faith and credit statute, a federal court must accord a state court judgment the same preclusive effect the judgment would have in state court. *Corzin v. Fordu (In re Fordu)*, 201 F.3d 693, 703 (6th Cir. 1999). Under Ohio law, a claim is barred by the doctrine of res judicata if the following elements are present: "(1) a prior final, valid decision on the merits by a court of competent jurisdiction; (2) a second action involving the same parties, or their privies, as the first; (3) a second action raising claims that were or could have been litigated in the first action; and (4) a second action arising out of the transaction or occurrence that was the subject matter of the previous action." *Portage Cty. Bd. of Commrs. v. Akron*, 109 Ohio St.3d 106, 123 (2006).

In this case, Defendant relies on the state court order denying a Rule 60(b) motion to set aside a cognovit judgment against Plaintiff, [*See* Doc. # 19, Dugic Aff., Ex. H], and the subsequent dismissal of an appeal of that order, [*Id.*, Ex. J]. The Rule 60(b) motion was filed not only by Plaintiff but also by several

others against whom the judgment had also been entered. In ruling on the motion, the state court noted that Plaintiff had filed for bankruptcy relief and expressly stated that its ruling does not address any issues concerning Plaintiff. [*Id.*, Ex. H, p. 2]. Moreover, the state appellate court dismissed the appeal of the denial of the Rule 60(b) motion because it was not a final appealable order. [*Id.*, Ex. J, p. 2]. As no final order was entered against Plaintiff, its claims are not barred by the doctrine of res judicata.

Finally, the court finds that Defendant has failed to show that the equitable defense of laches is appropriate in this case. “Laches does not result from a mere lapse of time but from the fact that, during the lapse of time, changed circumstances inequitably work to the disadvantage or prejudice of another if the claim is now to be enforced.” *Chirco v. Crosswinds Cmtys., Inc.*, 474 F.3d 227, 231 (6th Cir. 2007). While the court disagrees with Plaintiff’s assertion that the defense of laches never applies to a statutory action with an explicit limitation period, *see Wright v. Oliver*, 35 Ohio St. 3d 10 (1988) (finding that laches may be applicable to an action commenced within the statutory time frame where there is a showing of material prejudice), Defendant has nevertheless failed to show any prejudice resulting from the lapse of time in Plaintiff asserting its claims.

For all of the foregoing reasons, the court will grant Plaintiff’s motion to amend the complaint. The court will, however, extend the time to complete any additional discovery and to file any dispositive motions.

THEREFORE, good cause appearing,

IT IS ORDERED that Plaintiff’s Motion to File Amended Complaint [Doc. #21] be, and hereby is, **GRANTED**. Plaintiff shall file the proposed First Amended Complaint within fourteen days of the date of this order; and

IT IS FURTHER ORDERED that the deadline to complete all discovery in this case is extended to **February 16, 2009**; and

IT IS FINALLY ORDERED that any dispositive motions shall be filed on or before **March 16, 2009**.