UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 11-14887
	)	
JOLYNN ACKLEY,	)	Chapter 7
	)	
Debtor.	)	Chief Judge Pat E. Morgenstern-Clarren
	)	
_____	)	
	)	
JOLYNN ACKLEY,	)	Adversary Proceeding No. 11-1294
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
CASE WESTERN RESERVE UNIVERSITY,	)	**MEMORANDUM OF OPINION AND ORDER**[1]
	)	
Defendant.	)	

The plaintiff-debtor JoLynn Ackley (debtor), who is representing herself, filed this adversary proceeding asking that her student loan debt incurred to attend Case Western Reserve University (CWRU) be discharged based on undue hardship. Ms. Ackley moves for leave to amend her complaint and defendant CWRU opposes the request. (Docket 18, 22, 24).[2] For the reasons stated below, the debtor's motion is denied.

[1] This opinion is not intended for commercial publication, either in print or electronically.

[2] Jurisdiction over this matter exists under 28 U.S.C. § 1334 and General Order No. 2012-7 entered by the United States District Court for the Northern District of Ohio on April 4, 2012. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I), and it is within the court's constitutional authority as analyzed by the United States Supreme Court in *Stern v. Marshall*, 131 S.Ct. 2594 (2011).

DISCUSSION

Factual Background

The debtor filed her complaint on October 13, 2011 and requested a determination that student loan debt, which she had scheduled as secured debt owed to CWRU, be determined to be dischargeable based on undue hardship.[3] CWRU filed a timely answer. The parties filed a joint pretrial statement on December 29, 2011, stating that it was not contested that the debtor "owes student loans to Defendant" and that the disputed issue of fact was whether undue hardship justified discharge of the loans under federal law.[4] The debtor now seeks to revise that stipulation.[5]

After consulting with the debtor and CWRU's counsel at the initial pretrial held on January 5, 2012, the court entered a scheduling order setting dates to govern further proceedings in the matter.[6] The order set January 17, 2012 as the date for amending pleadings and April 1, 2012 as the discovery cutoff, as well as deadlines for dispositive motions, a final pretrial, and a trial date. The debtor filed her motion for leave to amend the complaint on April 3, 2012.

The Applicable Federal Civil Rules

Federal Civil Rule 15 governs the debtor's request to amend her complaint. FED. R. CIV. P. 15 (made applicable by FED. R. BANKR. P. 7015). As that rule applies here, the debtor may amend her complaint "only with the opposing party's written consent or the court's leave . . .

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[3] The debtor also filed a document titled "Hardship Letter in Support of Discharge of Private Student Loans." (Docket 3).

[4] Docket 12.

[5] Docket 16.

[6] Docket 13.

[and] [t]he court should freely give leave when justice so requires." FED. R. CIV. P. 15(a)(2). Leave to file an amended complaint should not be denied in the absence of undue delay, bad faith or dilatory motive on the movant's part, undue prejudice to the non-movant, futility, or repeated failure to cure deficiencies. *Roskam Baking Co. v. Lanham Mach. Co.*, 288 F.3d 895, 906 (6th Cir. 2002) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)). An amendment is considered to be "futile" if it fails to state a claim upon which relief may be granted. *Riverview Health Inst. LLC v. Med. Mut. of Ohio*, 601 F.3d 505, 512 (6th Cir. 2010). CWRU argues here that the amendment is barred under the futility doctrine.

The debtor filed her motion after the deadline for amending pleadings set in the scheduling order. Because the court entered that order under Federal Civil Rule 16, the requirements of that rule must also be considered. *See* FED. R. CIV. P. 16 (b) (made applicable by FED. R. BANKR. P. 7016) (requiring the court to issue a scheduling order after consulting with counsel and any unrepresented parties). Under Rule 16, the amendment date "may be modified only for good cause and with the judge's consent." FED. R. CIV. P. 16(b)(3)(A) and (4). Moreover, as the scheduling order's deadline has passed, the debtor is required to show good cause under Rule 16 before the court will consider whether amendment is proper under Rule 15(a). *Leary v. Daeschner*, 349 F.3d 888, 909 (6th Cir. 2003). The court must also consider whether there is any potential prejudice to the non-movant. *Id.*

The Debtor's Motion

The debtor requests leave to add these four paragraphs to the complaint:[7]

[7] Docket 18.

> 8. As per FRBP 7001(2) the Debtor/Plaintiff requests the court to determine the validity and extent of the lien against the Plaintiff's property in the form of her official transcripts.
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> 9. The Debtor/Plaintiff seeks relief through the court under FRBP 7001(1) since she has reason to believe that the block of student loans that were owed to Case Western Reserve University and listed on Schedule D Creditors Holding Secured Claims has been paid in full as of February 2005. Case Western Reserve University maintains to this date that these loans are in collection and refuses to turn Plaintiff's property over to the Plaintiff.
>
> 10. The Debtor/Plaintiff wishes to exercise her right to a trial by jury under rule 38 of the Federal Rules of Civil Procedure.
>
> 11. The Debtor/ Plaintiff seeks damages in the amount of $400,000.00 in compensation for the years she was barred from continuing her education and prevented from working in her chosen profession. Debtor/Plaintiff seeks damages to compensate for the time and money expended by the Plaintiff in seeking to recover her property from the Defendant including court costs and fees.

Leave to amend is not appropriate because the debtor failed to establish cause under Rule 16. She did not satisfactorily explain why she failed to amend her complaint within the time set by the scheduling order or why she did not request additional time to do so within that time frame. The focus of the proposed amendment is whether the debtor is obligated to CWRU for the student loan debt which she incurred more than 15 years ago. While the debtor argues that she only recently discovered evidence regarding the loans which supports her request for leave to amend, that argument is not persuasive because she freely admits that this is a long-standing issue, she has had ample time to conduct discovery, she acknowledges that she is still seeking evidence which would support her new claims, and the time for discovery in this matter has elapsed. Based on these facts, the debtor has not been diligent. Additionally, there is a strong likelihood that CWRU would be prejudiced because the debtor initially stipulated that she owed

a debt to it and the time for discovery has passed. Consequently, cause does not exist to permit amendment of the complaint at this late date.

Even if the court were to find cause to extend the time for filing an amended complaint, leave to amend under Civil Rule 15 is only appropriate "when justice so requires." To establish whether amendment is appropriate, a movant must provide the court with the substance of the amendment. *See Roskam Baking Co.*, 288 F.3d at 906 (stating that the "court must be able to determine whether 'justice so requires,' and in order to do this, the court must have before it the substance of the proposed amendment"). The debtor did not include a copy of the proposed amended complaint or requisite information as to the substance of the proposed amendment, which makes the court's task more complicated. In light of the debtor's *pro se* status, however, the court will try to project what the debtor has in mind.

In doing so, the court concludes that the debtor's proposed amendment would not survive a motion to dismiss under Civil Rule 12(b)(6). *See* FED. R. CIV. P. 12(b)(6) (applicable under FED. R. BANKR. P. 7012(b)). The United States Supreme Court discussed the standard for a Rule12(b)(6) motion in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and provided further guidance in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). As to that standard, the Sixth Circuit has stated that:

> A complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Although the complaint need not contain "detailed factual allegations," *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), Rule 8(a)(2) of the Federal Rules of Civil Procedure "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 129 S.Ct. at 1949. As the Supreme Court explained in *Iqbal*: "A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertions

> devoid of further factual enhancement." *Id.* (internal quotation marks, citations, and alterations omitted). Following *Twombly* and *Iqbal*, it is well settled that "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Twombly*, 550 U.S. at 570, 127 S.Ct. 1955). A claim is plausible on its face if the "plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (quoting *Twombly*, 550 U.S. at 556, 127 S.Ct. 1955). Plausibility is not the same as probability, but rather "asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (stating that factual allegations "merely consistent with liability stop[ ] short of the line between possibility and plausibility").

Center for Bio-Ethical Reform, Inc. v. Napolitano, 648 F.3d 365, 369 (6th Cir. 2011). A *pro se* plaintiff's complaint is liberally construed and held to a less stringent standard than a pleading drafted by a lawyer. *Haines v. Kerner*, 404 U.S. 519, 520 (1972); *Jourdan v. Jabe*, 951 F.2d 108, 110 (6th Cir. 1991). However, this lenient treatment does not mean that a plaintiff's *pro se* status entitles her to take her case to trial. *Pilgrim v. Littlefield*, 92 F.3d 413, 416 (6th Cir. 1996).

The debtor seeks to assert three requests for relief, all of which depend in large measure on the debtor's contention that the loans at issue were paid in full at some point. However, the complaint as filed does not make any factual allegations to support the requests and the debtor's motion and supporting brief do not provide them. While the motion and brief discuss the debtor's attempts to get information about the loans, they do not include any affirmative factual allegations. Rather, they show only that the debtor is currently trying to get information about the loans, including evidence that they were paid. The debtor fails to allege additional facts for the claims she wishes to assert, and does not provide any substantive discussion as to the claims. Viewing the debtor's request with the leniency accorded to a *pro se* litigant, the court concludes that the proposed amendment is futile because she has not pled sufficient factual matter, which accepted as true, states a claim to relief that is plausible on its face.

Finally, the debtor also requests leave to amend her complaint to request a jury trial. This request, however, is untimely. A party who claims entitlement to a jury trial must make such a demand no later than 14 days after the last pleading directed to that issue is served. *See* FED. R. CIV. P. 38(b) (made applicable by FED. R. BANKR. P. 9015(a)). A failure to make a timely demand results in waiver. FED. R. CIV. P. 38(d). The debtor's motion to amend does not change this result because the motion is being denied; consequently, there are no new issues to be tried by a jury. *See Irvin v. Airco Carbide*, 837 F.2d 724, 727 (6th Cir. 1987) (indicating that amendment under Rule 15 cannot be used to avoid the time requirements for demanding a jury).

CONCLUSION

For the reasons stated, the court concludes that the interests of justice would not be served by granting the debtor leave to amend the complaint. The debtor's motion to amend is, therefore, denied.

IT IS SO ORDERED.

Pat E. Morgenstern-Clarren
Chief Bankruptcy Judge