IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

Case No. 01-33042

PAMELA LEE BARZALY
f/d/b/a EMOTION ALLEY

Debtor

ANN MOSTOLLER, CHAPTER 7 TRUSTEE

Plaintiff

v. Adv. Proc. No. 02-3197

WENDY STRELITZ, WELLS FARGO BANK MINNESOTA, NATIONAL ASSOCIATION, as Trustee, ALBERT P. OCUTO, GLORIA A. OCUTO, and PAMELA LEE BARZALY

Defendants

MEMORANDUM ON MOTION FOR LEAVE TO AMEND COMPLAINT

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RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

Before the court is the Motion for Leave to Amend the Complaint (Motion to Amend) filed by the Plaintiff on March 26, 2004, requesting leave to amend the Complaint filed in this adversary proceeding in order to add a count alleging that the initial transfer of the subject real property was void for lack of consideration, and seeking a declaratory judgment thereon. The Defendants, Albert P. Ocuto and Gloria A. Ocuto, filed the Defendants' Response to Plaintiff's Motion to Amend Complaint (Response) on April 14, 2004, opposing the Motion to Amend, averring that there is not good cause to grant the Motion to Amend and that any amendment would be futile.

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(A) and (O) (West 1993).

I

The Plaintiff's claims against the various Defendants are based upon the following undisputed facts.[1] In 1999, the Debtor owned real property located at 524 Asa Street, Sevierville, Tennessee (the Real Property). On January 12, 1999, she executed a General Warranty Deed, conveying the Real Property to the Defendant Wendy Strelitz, which was recorded with the Sevier County Register of Deeds on January 12, 1999. In connection with this conveyance, Ms. Strelitz executed a Deed of Trust to secure a $200,000.00 promissory note made by Ms. Strelitz to the Debtor (the Barzaly Deed of Trust). The Barzaly Deed of

[1] These facts are taken from the record before the court made in conjunction with the summary judgment motions filed by the Plaintiff and Defendants, Wells Fargo Bank Minnesota, National Association, and Albert and Gloria Ocuto.

Trust was recorded with the Sevier County Register of Deeds on June 28, 2000, and secured a first mortgage on the Real Property.

On November 6, 2000, Ms. Strelitz obtained a $238,000.00 loan from New Century Mortgage Corporation (New Century) which was also secured by a Deed of Trust against the Real Property. This loan was subsequently assigned to the Defendant Wells Fargo Bank Minnesota, National Association (Wells Fargo). Prior to the November 6, 2000 New Century loan to Ms. Strelitz, the Debtor, on November 3, 2000, executed a Release of the Barzaly Deed of Trust which was never recorded with the Sevier County Register of Deeds. The court, in its Order and Memorandum on Motions for Summary Judgment entered on February 4, 2004, found this release was non-binding on third parties without notice under the Tennessee recording statutes, including the Plaintiff.[2] Additionally, a Release dated January 5, 1999, executed by the Debtor was recorded with the Sevier County Register of Deeds on April 23, 2002, after the Debtor filed her bankruptcy case. In its February 4, 2004 Order and Memorandum, the court found that this release was invalid on its face and not binding on any party.

The Debtor filed the Voluntary Petition commencing her Chapter 7 bankruptcy case on June 12, 2001, and the Plaintiff is the duly-appointed trustee. She thereafter initiated foreclosure proceedings against the Real Property, pursuant to the Barzaly Deed of Trust, and scheduled a foreclosure sale for April 5, 2002. After receiving notice of the foreclosure sale,

[2] Wells Fargo, the assignee, states that New Century reasonably relied upon the November 3, 2000 Release of the Barzaly Deed of Trust in advancing the $238,000.00 to Ms. Strelitz, believing it would hold a first mortgage on the Real Property.

Ms. Strelitz faxed a letter to the Trustee on March 6, 2002, advising that she had sold the Real Property for $280,000.00 in January 2002. In fact, Ms. Strelitz had conveyed the Real Property to the Ocutos on January 12, 2002. By virtue of this sale, the New Century Deed of Trust securing the $238,000.00 loan to Ms. Strelitz on November 6, 2000, was fully satisfied.

The Plaintiff filed the Complaint commencing this adversary proceeding on December 12, 2002, seeking to determine the validity of liens on the Real Property, to recover funds, and to have the release recorded post-petition declared invalid. The Plaintiff then filed an Amended Complaint on May 12, 2003, adding counts to avoid the November 2000 pre-petition release as either a preference or fraudulent transfer. After the pretrial conference was held on October 30, 2003, the parties submitted a Pretrial Order, which was entered by the court on December 5, 2003. The Pretrial Order set forth fourteen issues to be addressed at trial concerning whether the Barzaly Deed of Trust was an enforceable lien on the Real Property, the validity and subsequent effect of the two releases on the Barzaly Deed of Trust, the Plaintiff's ability to avoid either of the two releases, priority issues concerning the Barzaly Deed of Trust versus the New Century Deed of Trust, whether the proceeds received by Wells Fargo from Ms. Strelitz upon the sale of the Real Property to the Ocutos were property of the Debtor's bankruptcy estate and subject to turnover, the extent to which the Plaintiff retains any interest in the Real Property, whether there was actually a debt between the Debtor and Ms. Strelitz and if so, whether it had been satisfied,

and whether the Plaintiff was required to execute a release of the Barzaly Deed of Trust, clearing the Real Property's title for the Ocutos.[3]

Motions for Summary Judgment were filed by the Plaintiff and by the Defendants, Wells Fargo and the Ocutos. The court's February 4, 2004 Order granted in part and denied in part the Plaintiff's motion, dismissed Wells Fargo from the adversary proceeding, and held that the only remaining issues to be determined at trial were those counts contained in the Ocutos' counterclaim: (1) whether any debt owed by Ms. Strelitz to the Debtor, if it actually existed, has been satisfied; and (2) whether, if any debt has been satisfied, the Plaintiff must provide the Ocutos with a release of the Barzaly Deed of Trust to clear their title on the Real Property. On February 10, 2004, the court entered an Order setting the trial on the remaining issues for March 23, 2004, and directed the parties to file any supplemental briefs by March 16, 2004.

On March 17, 2004, the court held a conference call with counsel for the Plaintiff and the Ocutos to clarify its February 4, 2004 Order and Memorandum. During this conference call, the Plaintiff's counsel sought permission to further amend the Complaint. Pursuant to this request by the Plaintiff, the court entered an Order on March 18, 2004, allowing the Plaintiff time to file a motion to amend her Complaint, with time allocated to the Ocutos to file a response, and continuing the March 23, 2004 trial to be reset.

[3] These issues also include those set forth in the Ocutos' counterclaim filed on January 13, 2003.

The Plaintiff filed her Motion to Amend and supporting memorandum of law, arguing that she should be allowed leave to amend under Federal Rule of Civil Procedure 15 because facts and arguments pled by the Ocutos in defense of her Motion for Summary Judgment gave rise to an additional count not previously pled by the Plaintiff. She avers that the Ocutos argued that the original transfer of the Real Property between the Debtor and Ms. Strelitz was a "sham," intended for the sole purpose of keeping the Real Property out of the hands of the Debtor's former spouse. Because these allegations were based upon information learned at the discovery depositions of the Debtor and Ms. Strelitz, which had not been conducted at the time the Complaint was filed, the Plaintiff argues that she could not have raised this cause of action earlier. The Plaintiff argues that, in order to protect her rights in the Real Property, it is necessary to amend the Complaint, and doing so would not unduly prejudice the Ocutos.

The Ocutos oppose the Motion to Amend, arguing that the Plaintiff has unreasonably delayed in moving to further amend the Complaint, while offering no good cause to do so after the entry of the Pretrial Order by the court setting forth all issues for trial. Further, the Ocutos argue that any amendment would be futile, because even if the court were to find that the initial transfer of the Real Property was invalid, the Ocutos were third party bona fide purchasers for value, and thus, the Plaintiff could not recover the Real Property from them.

II

After a responsive pleading has been filed, a party may amend its pleadings only by leave of court, which is governed by Federal Rule of Civil Procedure 15, made applicable to adversary proceedings by Federal Rule of Bankruptcy Procedure 7015. Leave to amend "shall be freely given when justice so requires[,]" as it is preferable to decide a case on its merits. FED. R. CIV. P. 15(a); *see also Joe Powell & Assocs., Inc. v. Int'l Tel. & Tel. Corp. (In re Joe Powell & Assocs., Inc.)*, 23 B.R. 329, 334 (Bankr. E.D. Tenn. 1982). "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.'" *Foman v. Davis*, 83 S. Ct. 227, 230 (1962). Nevertheless, while the court has discretion whether to grant leave to amend, "[an] 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." *Foman*, 83 S. Ct. at 230.

The Ocutos oppose the Motion to Amend based upon undue delay in the Plaintiff's failure to assert the fraudulent conveyance claim previously and futility. "Delay that is neither intended to harass nor causes any ascertainable prejudice is not a permissible reason, in and of itself to disallow an amendment of a pleading," *Moore v. City of Paducah*, 790 F.2d 557, 561 (6th Cir. 1986). In determining delay, "[n]otice and substantial prejudice to the opposing

party are critical factors in determining whether an amendment should be granted." *Head v. Jellico Housing Auth.*, 870 F.2d 1117, 1123 (6th Cir. 1989).

The Plaintiff avers that she is now compelled to amend the Complaint based upon allegations made by the Ocutos during the litigation of the motions for summary judgment concerning the validity of the initial transfer of the Real Property between the Debtor and Ms. Strelitz in January 1999. The Plaintiff argues that there has been no undue delay because she only recently learned of the facts involved during the depositions of the Debtor and Ms. Strelitz and because the Ocutos have only recently made it clear that they intend to challenge the validity of the debt supporting the Barzaly Deed of Trust.

In support of their opposition to the amendment, the Ocutos argue that the Motion to Amend was filed (1) two years and nine months after the Plaintiff was appointed as Trustee; (2) two years and seven months after the Plaintiff completed the Debtor's meeting of creditors; (3) more than fifteen months after this adversary proceeding was initially commenced; (4) approximately six months after the completion of the Debtor's and Ms. Strelitz's depositions; and (5) approximately four months after the Pretrial Order was entered.

In addition to those cited by the Ocutos, the court also notes the following pertinent dates. More than nine months before the Motion to Amend was filed, the Plaintiff filed her first Amended Complaint. In December 2003, the parties began filing and litigating their various motions for summary judgment, which the court decided five weeks prior to the filing

of the Motion to Amend. In connection therewith, the court then expressly stated the remaining issues for trial and rescheduled trial for March 23, 2004. Less than one week prior to trial, on the day after trial briefs were due, the Plaintiff's counsel initiated a conference call with the court and the Ocutos, and at that time, orally requested leave to amend the Complaint. The court then allowed the Plaintiff to file the Motion to Amend, subject to allowing the Ocutos twenty days to respond thereto.

In *Duggan v. Steak 'N Shake, Inc.*, 195 F.3d 828 (6th Cir. 1999), the Sixth Circuit stated the following in affirming the district court's denial of a motion to amend:

> In this case, the district court named both undue delay in missing deadlines and undue prejudice to the opponent in allowing amendment after the close of discovery in coming to its decision. The plaintiff was obviously aware of the basis of the claim for many months, especially since some underlying facts were made a part of the complaint. Plaintiff delayed pursuing this claim until after discovery had passed, the dispositive motion deadline had passed, and a motion for summary judgment had been filed. There appears to be no justification for the delay, and the plaintiff proposes none. Allowing amendment at this late stage in the litigation would create significant prejudice to the defendants in having to reopen discovery and prepare a defense for a claim quite different from the sex-based retaliation claim that was before the court. The district court did not abuse its discretion in denying leave to amend the complaint at such a late stage of the litigation.

Duggan, 195 F.3d at 834. For similar reasons, the Plaintiff's Motion to Amend in this case shall be denied.

The Plaintiff argues that she only recently became aware that the Ocutos were challenging the validity of the debt underlying the Barzaly Deed of Trust and that she only became aware that the January 1999 transfer of the Real Property might be subject to avoidance. However, the Pretrial Order, prepared by Plaintiff's counsel, expressly states that

"[t]he issues to be addressed by the Court in the counter-claim of the [Ocutos] are[:] [w]hether any debt owed by Defendant Strelitz to Defendant Barzaly, if it ever existed, has been satisfied." Additionally, the discovery depositions of Ms. Strelitz and the Debtor were conducted in October 2003, *prior* to the entry of the Pretrial Order. Nevertheless, the Plaintiff did not seek to amend the Complaint to add the possible avoidance action regarding the actual transfer of the Real Property for almost six months. Further, she waited until the eve of trial to seek leave to amend. Taking all of the delays denoted above, in connection with these facts, the court finds that the Plaintiff has unduly delayed in seeking leave to amend the Complaint.

The court further agrees that allowing the Plaintiff to amend the Complaint would result in prejudice to the Ocutos, also weighing in favor of the court's determination not to grant the Plaintiff's Motion to Amend.

> In assessing prejudice, courts should consider whether the amendment would "require the opponent to expend significant additional resources to conduct discovery and prepare for trial" or "significantly delay the resolution of the dispute." The longer the unexplained delay, the less prejudice the adverse party will be required to show to defeat the motion. Moreover, a motion to amend a complaint is properly denied if it fails to state a cause of action and is therefore futile.

Gen. Elec. Co. v. Advance Stores Co., Inc., 285 F. Supp. 2d 1046, 1048 (N.D. Ohio 2003) (quoting *Phelps v. McClellan*, 30 F.3d 658, 662 (6th Cir. 1994)) (other citations omitted). "'Futility' of amendment is shown when the claim or defense is not accompanied by a showing of plausibility sufficient to present a triable issue. Thus a trial court may appropriately deny a motion to amend where the amendment would not withstand a motion to dismiss." *Quality*

Botanical Ingredients, Inc. v. Triarco Indus., Inc. (In re Quality Botanical Ingredients, Inc.), 249 B.R. 619, 629 (Bankr. D.N.J. 2000); *see also Yuhasz v. Brush Wellman, Inc.*, 341 F.3d 559, 569 (6th Cir. 2003) ("[L]eave to amend may be denied where the amendment would be futile.").

In this case, the court believes that it would be futile for the Plaintiff to amend her Complaint for the sole purpose of seeking to avoid the initial transfer of the Real Property from the Debtor to Ms. Strelitz in January 1999, and therefore, forcing the Ocutos to further defend such an action would result in prejudice to them. The facts in the record establish that when the Ocutos purchased the Real Property on January 12, 2002, they paid a purchase price of $280,000.00. Although the Debtor testified in her deposition that she believed the Real Property was worth $470,000.00, based upon improvements that she had made thereto, and Ms. Strelitz testified in her deposition that she believed the Real Property was worth $400,000.00, they offered no basis for those assumptions. Additionally, they testified that the Real Property was offered and sold through a real estate agent. The Debtor also testified in her deposition that she purchased the Real Property in 1998 for $400,000.00; however, when it was sold in 2002 to the Ocutos, there is no question that the property was distressed because foreclosure was imminent.

Federal Rule of Civil Procedure 12(b)(6) allows a defendant to move for dismissal of a complaint for "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6) (applicable in adversary proceedings pursuant to FED. R. BANKR. P. 7012(b)). Under Rule 12(b)(6) the court should "construe the complaint in the light most favorable to the plaintiff, accept all the factual allegations as true, and determine whether the plaintiff can

prove a set of facts in support of its claims that would entitle it to relief." *Bovee v. Coopers & Lybrand, C.P.A.*, 272 F.3d 356, 360 (6th Cir. 2001). Nevertheless, even though all factual allegations are accepted as true, the court is not required to accept legal conclusions or unwarranted factual inferences as true. *Mich. Paytel Joint Venture v. City of Detroit*, 287 F.3d 527, 533 (6th Cir. 2002). Instead, the court should focus on "whether the plaintiff has pleaded a cognizable claim[,]" *Marks v. Newcourt Credit Group, Inc.*, 342 F.3d 444, 452 (6th Cir. 2003), and the complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [its] claim which would entitle [it] to relief." *Buchanan v. Apfel*, 249 F.3d 485, 488 (6th Cir. 2001) (quoting *Conley v. Gibson*, 78 S. Ct. 99, 102 (1957)).

The court will accept all allegations in the Plaintiff's proposed Amendment to Complaint as true; however, she has offered no facts or evidence to support a finding by the court that the January 1999 conveyance of the Real Property from the Debtor to Ms. Strelitz was void, and thus, avoidable for the benefit of the Debtor's bankruptcy estate. Assuming, however, that the Plaintiff could prove the voidability of the transfer, she has offered no factual allegations, nor has the court found any evidence that the $280,000.00 purchase price paid for the Real Property by the Ocutos was not for value or that the sale was anything other than bona fide. To the contrary, the purchase price seems to be in line with the New Century mortgage in the amount of $238,000.00, and it is only $30,000.00 less than the $310,000.00

that the Debtor paid for the home in 1998, despite the necessity that Ms. Strelitz sell the Real Property for a distressed value occasioned by the pending Wells Fargo foreclosure sale.[4]

Based upon that finding, even if the Plaintiff were to avoid the January 1999 conveyance of the Real Property from the Debtor to Ms. Strelitz, she could not recover it for the benefit of the bankruptcy estate from the Ocutos. 11 U.S.C.A. § 550 provides in material part:

> (a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544 . . . [or] 548 . . . of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from—
>
> > (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or
> >
> > (2) any immediate or mediate transferee of such initial transferee.
>
> (b) The trustee may not recover under section (a)(2) of this section from—
>
> > (1) a transferee that takes for value, including satisfaction or securing of a present or antecedent debt, in good faith, and without knowledge of the voidability of the transfer avoided; or
> >
> > (2) any immediate or mediate good faith transferee of such transferee.

11 U.S.C.A. § 550 (West 1993 & Supp. 2004) (footnote omitted).

"Section 550 protects a mediate or immediate transferee who has taken for value in good faith without knowledge of the voidability of the transfer." *Ragsdale v. Bank South, N.A.*

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[4] As previously noted, *see* note 2 *supra*, New Century relied, reasonably or unreasonably, upon the November 3, 2000 Release of the Barzaly Deed of Trust when it loaned Ms. Strelitz $238,000.00 on November 6, 2000. The court cannot, therefore, infer a value of the Real Property solely on the face value of the two mortgages that encumbered the Real Property.

(In re Whitacre Sunbelt, Inc.), 206 B.R. 1010, 1024 (Bankr. N.D. Ga. 1997). The initial transfer of the Real Property occurred when the Debtor conveyed it to Ms. Strelitz, the initial transferee, in January 1999. The Ocutos, having acquired the Real Property from Ms. Strelitz, are clearly immediate transferees. As previously stated, there is no evidence that the Ocutos did not pay fair value for the Real Property, especially in light of the fact that Ms. Strelitz knew that a foreclosure was imminent. The Real Property was marketed and sold through a real estate agent, and the Ocutos did not know either the Debtor or Ms. Strelitz. Likewise, there is no evidence that would have led the Ocutos to have knowledge that the initial January 1999 transfer was voidable by the Chapter 7 Trustee for the Debtor's bankruptcy case, particularly when the Debtor had yet to file her petition.

Based upon these facts, even if the Plaintiff were to avoid the January 1999 transfer of the Real Property from the Debtor to Ms. Strelitz, she could not then recover the Real Property from the Ocutos for the benefit of the bankruptcy estate pursuant to § 550(b). Therefore, allowing her to amend the Complaint to avoid the January 1999 transfer would be futile, would further expend assets of the bankruptcy estate, would not be an exercise in judicial economy, and would force the Ocutos to further defend an action to which the outcome is already known. Because the court finds that the Plaintiff's Amendment to Complaint would not survive a Rule 12(b)(6) motion to dismiss, it would be futile to allow the amendment.

Moreover, once the Pretrial Order was entered by the court on December 5, 2003, all requests to amend under Rule 15 must also be read in concert with Rule 16, which is

applicable to adversary proceedings pursuant to Federal Rule of Bankruptcy Procedure 7016. Rule 16 was "designed to ensure that 'at some point both the parties and the pleadings will be fixed.'" *Leary v. Daeschner*, 349 F.3d 888, 906 (6th Cir. 2003) (quoting FED. R. CIV. P. 16 1983 advisory committee's notes); *accord Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992); *see also Inge v. Rick Fin. Corp.*, 281 F.3d 613, 625 (6th Cir. 2002). Under Rule 16, after the pretrial order is entered, "[t]he order following a final pretrial conference shall be modified only to prevent manifest injustice." FED. R. CIV. P. 16(e). The court has discretion to amend a pretrial order, and relevant factors "in the exercise of that discretion include: '(1) prejudice or surprise to the party opposing trial of the issue; (2) the ability of that party to cure any prejudice; (3) disruption to the orderly and efficient trial of the case by inclusion of the new issue; and (4) bad faith by the party seeking to modify the order.'" *103 Investors I, L.P. v. Square D Co.*, 222 F. Supp. 2d 1263, 1268 (D. Kan. 2002) (quoting *Koch v. Koch Indus., Inc.*, 203 F.3d 1202, 1222 (10th Cir. 2000)).

The Pretrial Order in this case was entered by the court on December 5, 2003. It is five pages long and enumerates fourteen issues to be determined at trial. Additionally, it was prepared by the Plaintiff's counsel following the pretrial conference held on October 30, 2003, at which time the parties discussed the issues to be contained therein. The Pretrial Order expressly provides that the issue of the validity of the debt underlying the Barzaly Deed of Trust, raised by the Ocutos in their Counterclaim, was one of the issues to be determined at trial. The Plaintiff cannot now argue that she was unaware that the Ocutos would raise that argument. In addition, when she filed the Motion to Amend, approximately five months had

passed since the depositions of the Debtor and Ms. Strelitz were taken and, in fact, the Plaintiff relied upon that testimony in her Motion for Summary Judgment. Yet, she did not attempt to amend the Complaint until the eve of trial on the remaining issues after summary judgment. The Plaintiff cannot now argue that she only recently learned of the facts to justify the amendment to the Complaint.

While there is no bad faith on the Plaintiff's part, she has failed to show the type of "manifest injustice" necessary to require the court to modify the Pretrial Order entered on December 5, 2003, setting forth the issues to be tried in this adversary proceeding, especially at this late date. All of the facts and circumstances that the Plaintiff required for challenging the validity of the January 1999 conveyance of the Real Property from the Debtor to Ms. Strelitz were at her disposal months ago. As already outlined previously, allowing modification at this time would result in prejudice to the Ocutos, further depletion of the assets of the bankruptcy estate, the unnecessary consumption of judicial resources, and an exercise in futility based upon § 550(b).

For the foregoing reasons, the court will deny the Plaintiff's Motion to Amend filed on March 26, 2004, seeking to add additional counts challenging the validity of the January 1999 conveyance of the Real Property from the Debtor to Ms. Strelitz, in order to recover the Real Property for the benefit of the Debtor's bankruptcy estate. This decision, however, does not change the fact that, as explained in the court's Memorandum and Order entered February 4, 2004, the Ocutos purchased the Real Property subject to the Plaintiff's lien against the Real Property, by virtue of the Barzaly Deed of Trust, which includes a right to

execute thereon once the amount is determined. A new trial date to determine the remaining issues will be set.

An order consistent with this Memorandum will be entered.

FILED: April 26, 2004

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

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Debtor

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Plaintiff

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WENDY STRELITZ, WELLS FARGO BANK MINNESOTA, NATIONAL ASSOCIATION, as Trustee, ALBERT P. OCUTO, GLORIA A. OCUTO, and PAMELA LEE BARZALY

Defendants

O R D E R

For the reasons set forth in the Memorandum on Motion for Leave to Amend Complaint filed this date, the court directs the following:

1. The Motion for Leave to Amend Complaint filed by the Plaintiff on March 26, 2004, is DENIED.

2. The trial on the remaining issues in this adversary proceeding, as identified by the court in the February 4, 2004 Order accompanying the Memorandum on Motions for Summary Judgment, and on the Application for Judgment by Default filed December 2, 2003, by the Plaintiff against the Defendants Wendy Strelitz and Pamela Lee Barzaly, is

RESCHEDULED for June 15, 2004, at 1:30 p.m., in Bankruptcy Courtroom 1-C, First Floor, Howard H. Baker, Jr. United States Courthouse, Knoxville, Tennessee.

SO ORDERED.

ENTER: April 26, 2004

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE