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Northern District of Illinois
Eastern Division**

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Bankruptcy Caption: *In re Spero A. Poulos*

Bankruptcy No.: 20-05379

Adversary Caption: Republic Bank of Chicago v. Spero A. Poulos

Adversary No.: 20-00388

Date of Issuance: August 18, 2021

Judge: Deborah L. Thorne

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUDGE	Deborah L. Thorne	Case No.	20-05379
DATE	August 18, 2021	Adversary No.	20-00388
CASE TITLE	In re Spero A. Poulos; Republic Bank of Chicago v. Spero A. Poulos		
TITLE OF ORDER	Order Granting Motion for Leave to File Amended Complaint		

This matter comes before the court on Republic Bank of Chicago's ("Republic") Motion for Leave to File Amended Complaint. For the reasons stated below, the motion is granted.

BACKGROUND

On October 29, 2020, Republic filed a Complaint to Determine Dischargeability of Debt under 11 U.S.C. §523(a)(2)(A) (the "original complaint") against Poulos, debtor and defendant. On December 29, 2020, Poulos filed an answer to the original complaint. On January 14, 2021, Poulos filed an amended answer to the original complaint. After this, Poulos provided his counsel with copies of bank statements of his company, Poulos Inc., that revealed certain of his amended answers were incorrect. As a result, Poulos filed a motion for leave to file a second amended answer to correct these inaccuracies on February 23, 2021. The inaccuracies primarily related to the mechanism by which Poulos Inc. drew on its line of credit with Republic. The answer was amended to reflect that these draws were done via direct transfers into Poulos Inc.'s checking account and not done by checks drawn upon the line of credit. The Second Amended Answer denied Plaintiff's allegations that checks "were drawn upon the line of credit at Republic Bank." The motion was granted, and Defendant filed his second amended answer on February 23, 2021.

On February 22, 2021, Defendant's First Request for Admission was sent to the Plaintiff's attorney and Request No. 1 stated, "Republic never provided Poulos Inc. checks in relation to the Line of Credit." On March 19, 2021, Republic served its response where it denied that "Republic never provided Poulos Inc. checks in relation to the Line of Credit." On June 8, 2021, and June 9, 2021, Defendant's attorneys deposed employees and officers of Republic. In questioning the deponents about Republic's denial, counsel elicited answers acknowledging and admitting that "Republic never provided Poulos Inc. checks in relation to the Line of Credit" and that the allegations in the Adversary Complaint alleging that advances under its line of credit were accomplished by writing checks "drawn upon the line of credit" were not true and correct allegations.

Thereafter on June 10, 2021, Republic filed its motion for leave to amend its original complaint "to rectify an inaccuracy contained in the original complaint. Specifically, in the original complaint it is alleged that Poulos, Inc. received loan proceeds directly from Republic Bank by writing a check drawn against the Poulos, Inc.'s business checking account. This however is inaccurate."

DISCUSSION

Whether to grant or deny leave to amend is within the court's discretion. *Campbell v. Ingersoll Mill. Mach. Co.*, 893 F.2d 925, 927 (7th Cir.1990). The "spirit of the Federal Rules" is to ensure "decisions on the merits," *Foman v. Davis*, 371 U.S. 178, 181 (1962), and the Rules reflect "a liberal attitude towards the amendment of pleadings," *Campania Mgmt. Co. v. Rooks, Pitts & Poust*, 290 F.3d 843, 849 (7th Cir.2002); *see also In re Stavriotis*, 977 F.2d 1202, 1204 (7th Cir.1992).

Although a party's ability to amend is not automatic and is subject to limitations, leave to amend should be freely given when justice requires. Under Fed.R.Civ.P. 15(a), leave is inappropriate where there is an undue delay, bad faith, 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, or futility of the amendment. *Foman v. Davis*, 371 U.S. at 183.

Poulos argues that Republic's motion should be denied because it is made in bad faith, will result in undue delay, would unduly prejudice Poulos, and is futile. For the reasons set out below, these arguments fall short and Republic's motion for leave to amend the original complaint will be granted.

Undue Delay and Bad Faith

A delay amounts to "undue delay" when a party has waited an unreasonably long period of time to amend, or where the delay in filing the amendment is unwarranted. *See, e.g., Chitimacha Tribe of La. v. Harry L. Laws Co.*, 690 F.2d 1157, 1164 (5th Cir.1982) (affirming district court's determination that request for leave to amend should be denied when the party seeking to amend had access to the information beforehand and the information had not "only recently come to light"). "[I]n exercising its discretion to deny leave to amend a complaint, a trial court may properly consider (1) an 'unexplained delay' following an original complaint, and (2) whether the facts underlying the amended complaint were known to the party when the original complaint was filed." *Southmark Corp. v. Schulte Roth & Zabel*, 88 F.3d 311, 316 (5th Cir.1996) (quoting *Daves v. Payless Cashways, Inc.*, 661 F.2d 1022, 1025 (5th Cir.1981)).

Whether a motion to amend an original complaint is made in bad faith depends on "the plaintiff's motives." *Adams v. Gould, Inc.*, 739 F.2d 858, 868 (3rd Cir. 1984). "As with undue

delay, in assessing bad faith, courts look to the reasons as to why a party did not seek to amend earlier.” *Mortgage Lenders Network USA, Inc. v. Wells Fargo Bank*, 395 B.R. 871, 879 (Bankr. D. Del. 2008). When the reason for not amending earlier is the plaintiff’s desire to obtain additional information necessary ensure the accuracy or relevance of the amendment, and when the plaintiff seeks to amend promptly after such information is obtained, that suggests the motion is not made in bad faith. *Id.*

At the time of filing the original complaint, there was confusion regarding the mechanism used to disburse funds to Poulos Inc. Now, after discovery has been completed, Republic seeks leave to amend so that its complaint fully reflects its current understanding of the facts. It did not seek to amend each time it completed a step of discovery. Rather, it waited until discovery was complete so as not to require multiple motions for leave to amend. Poulos’ obligation to send Republic various documents regarding the drawing of checks was not completed until April 29, 2021, due to Poulos’ own delays in complying with discovery deadlines. Republic filed its motion for leave 41 days after receiving all relevant documents from Poulos. Both the rationale behind and the timing of the amendment suggest that there is no undue delay or bad faith.

Further, this amendment should come as no surprise because the depositions on June 8 and June 9, 2021, unveiled certain inaccuracies in the original complaint. Poulos was aware of this inaccuracy contained in the original complaint, and it only makes sense to allow an amendment to correct this inaccuracy.

Undue Prejudice

In determining what constitutes “prejudice,” courts “generally consider whether the assertion of the new claim or defense would ‘(i) require the opponent to expend significant

additional resources to conduct discovery and prepare for trial; (ii) significantly delay the resolution of the dispute; or (iii) prevent the plaintiff from bringing a timely action in another jurisdiction.” *Monahan v. New York City Dept. of Corr.*, 214 F.3d 275, 284 (2d Cir.2000) (quoting *Block v. First Blood Assocs.*, 988 F.2d 344, 350 (2d Cir.1993)).

Poulos claims he will be subject to undue prejudice if leave is granted to amend the complaint because he will need to conduct additional discovery regarding the amendments. Republic has already produced all the documents concerning the transactions at issue. It has also provided three officers who were familiar with the transactions. Poulos has not suggested what additional discovery he requires. Granting the motion for leave to amend the complaint would not result in undue prejudice to Poulos.

Futility

Poulos argues that amending the original complaint would be futile because the amended complaint fails to state a claim upon which relief can be granted under Rule 12(b)(6) and does not have the required specificity for a fraud claim under Rule 9(b).

“An amendment to a complaint is futile if the proposed claim could not withstand a motion to dismiss pursuant to [FRCP] 12(b)(6).” *Lucente v. Int'l Bus. Machs. Corp.*, 310 F.3d 243, 258 (2d Cir.2002) (citing *Dougherty v. N. Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 88 (2d Cir.2002)). “A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) challenges the viability of a complaint by arguing that it fails to state a claim upon which relief may be granted.” *Camasta v. Jos. A. Bank Clothiers, Inc.*, 761 F.3d 732, 736 (7th Cir. 2014). “To survive a motion to dismiss under Rule 12(b)(6), the complaint must provide enough factual information to ‘state a claim to relief that is plausible on its face’ and ‘raise a right to relief above the speculative level.’” *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570

(2007)). “While all well-pled facts are taken as true and viewed in a light most favorable to the plaintiff, “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.* (alteration in original) (citation omitted) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)) (citing *Hatmaker v. Mem'l Med. Ctr.*, 619 F.3d 741, 742–43 (7th Cir. 2010)).

With respect to “claim[s] ... of fraud ..., the sufficiency of [a] complaint is analyzed under the heightened pleading standard set forth in Federal Rule of Civil Procedure 9(b)”, which “requires a pleading to ‘state with particularity the circumstances constituting fraud.’” *Id.* at 736–37 (quoting Fed. R. Civ. P. 9(b)). “While the precise level of particularity required under Rule 9(b) depends upon the facts of the case, the pleading ‘ordinarily requires describing the who, what, when, where, and how of the fraud.’” *Id.* at 737 (quoting *AnchorBank, FSB v. Hofer*, 649 F.3d 610, 615 (7th Cir. 2011)).

Republic’s claim against Poulos is brought under § 523(a)(2)(A). The threshold requirement is that Poulos owes Republic a debt, *Zirkel v. Tomlinson*, 1999 WL 294879 at 7 (Bankr. ND Ill. May 10, 1999), and that the debt at issue must have been incurred for money, property, services or an extension, renewal, or refinancing of credit. 11 USC § 523(a)(2)(A). Relief under the statute must be based upon false pretenses, a false representation or actual fraud.

Here, the debt Poulos incurred was for money and it is evidenced by the Business Loan Agreement. Republic alleges that Poulos intended to deceive Republic that he was in compliance with the Business Loan Agreement which required that the funds be strictly used for Poulos Inc.

To prove false pretenses or a false representation, Republic must show that Poulos: (1) made a false representation or omission, which he either knew was false or made with reckless disregard of the truth; (2) that he intended to deceive Republic; and (3) Republic justifiably

relied on the representation or omission. *Reeves v. Davis*, 638 F.3d 549, 553 (7th Cir. 2011). To prove actual fraud, Republic need not demonstrate that Poulos made a false representation. Rather, “any deceit, artifice, trick or design involving direct and active operation of the mind, used to circumvent and cheat another” is sufficient. *McClellan v. Cintrell*, 217 F.3d 890, 893 (7th Cir. 2000). Often, conduct does not fit neatly into one category or another but instead amounts to a combination of the three. *Merchs. Nat’l Bank of Winona v. Moen*, 238 B.R. 784, 794 (8th Cir. BAP 1999).

Direct evidence of intent is rarely available, so courts often look to the “totality of the circumstances of the case.” *Cent. Credit Union of IL. v. Logan*, 327 B.R. 907, 911 (Bankr. ND Ill. 2005). The transfers from Poulos Inc.’s accounts with Republic that eventually ended up in Poulos’ personal accounts have not been explained. Poulos has offered no explanation and the circumstances seem to indicate that these transfers were for his own pecuniary benefit, for his own personal use.

The final element of a claim for fraud based on false representation or omission is that it must be “justifiable”. *Field v. Mans*, 516 U.S. 59, 74-75 (1995). Justifiable reliance is a subjective standard that depends on the circumstances of the particular case. *Id.* at 71. This element does not impose an affirmative duty on the creditor to investigate. *Id.* at 70. The circumstances in this case indicate that Republic justifiably relied on Poulos’ representations. There are no alleged facts that indicate that Republic was asleep at the wheel in light of Poulos’ alleged fraud.

Further, Republic specifically alleges each of the transactions at issue and follows the trail of each of these transactions from Poulos Inc.’s account with Republic to eventually Poulos’ own accounts. Republic provides the amount and the date of each transfer. Republic has alleged

the who, what, where, and how of the fraud as required by Rule 9(b). *Anchorbank FSB v. Hofer*, 649 F.3d 610, 615 (7th Cir. 2011).

Republic has satisfied Rule 12(b)(6) and Rule 9(b) in its amended complaint; thus the amendment is not futile. Republic's motion for leave to amend the complaint is granted.

CONCLUSION

Republic's motion for leave to amend the complaint is granted.

Dated: August 18, 2021

Honorable Deborah L. Thorne
United States Bankruptcy Judge