UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In re:

JAY JONAS RUBIN,

Debtor.
_____/

Case No.: 3:11-bk-9348-JAF
Chapter 7

ROBERT TUKE,

Plaintiff,

v.

JAY JONAS RUBIN,

Defendant.

_____/

Adversary No.: 3:12-ap-292-JAF

ORDER GRANTING PLAINTIFF'S MOTION TO ADD A PARTY PLAINTIFF AND GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO AMEND HIS ANSWER TO ADD AFFIRMATIVE DEFENSES AND A PLEA FOR ATTORNEY'S FEES

This proceeding is before the Court on Plaintiff Robert Tuke's ("Plaintiff") Motion to Add a Party Plaintiff (Doc. 28, the "Motion to Add a Party"). Defendant Jay Jonas Rubin ("Defendant") filed a response in opposition (Doc. 35), to which Plaintiff filed a reply memorandum (Doc. 51). Also pending before the Court is Defendant's Motion to Amend his Answer and Affirmative Defenses (Doc. 34, the "Motion to Amend the Answer"), to which Plaintiff filed responses in opposition (Docs. 49, 51).

For the reasons stated herein, Plaintiff's Motion to Add a Party (Doc. 28) is granted and Defendant's Motion to Amend the Answer (Doc. 34) is granted in part and denied in part as provided herein.[1]

I. Plaintiff's Motion to Add a Party

By way of the Motion to Add a Party (Doc. 28), Plaintiff seeks to add his ex-wife, Jill M. Tuke ("Ms. Tuke") as a necessary party to the action pursuant to Rule 19(a)(1)(B)(ii) of the Federal Rules of Civil Procedure (made applicable in this proceeding by Rule 7019 of the Federal Rules of Bankruptcy Procedure). By way of the Complaint (Doc. 1), Plaintiff seeks to hold Defendant liable, under the Florida Security and Investor Protection Act, Fla. Stat. § 517.01, *et seq*., for losses suffered by Plaintiff in connection with an investment in a company known as Extreme Impact Shutter Supply, Inc. ("EISS"). In addition, Plaintiff seeks to except his claimed damages from discharge under the provisions of the Bankruptcy Code.[2]

At the time of the investment, *supra*, Plaintiff and Ms. Tuke were married. They jointly owned the EISS investment during the time they were married and reported it as a joint asset on their joint income tax returns for the years 2009, 2010, and 2011 (Doc. 35 at 2). As such, the Tukes held the investment as tenants by the entireties. Plaintiff's and Ms. Tuke's marriage was dissolved by Final Judgment Of Dissolution Of Marriage With Property But No Dependent Or Minor Children (the "Marriage Dissolution Order"), entered August 29, 2012. The Marriage

[1] Plaintiff additionally filed a document entitled "Notice of Transfer of Claim and Incorporated Memorandum of Law" (Doc. 50, the "Notice"). In the Notice, Plaintiff requests that the Court enter an Order acknowledging the transfer of interest denoted therein (Doc. 50 at 3). Court approval, however, is not required to transfer a claim. Consequently, to the extent the Notice contains a motion that the Court acknowledge the subject transfer of interest, it is denied as moot.

[2] Unless otherwise indicated, all references to the "Bankruptcy Code" or "Code" are to 11 U.S.C. § 101, *et seq*., and all references to a "Bankruptcy Rule" or "Rule" are to the Federal Rules of Bankruptcy Procedure.

Dissolution Order did not state whether the EISS investment was to be retained by either Plaintiff or Ms. Tuke (Doc. 35 at 3). Consequently, Plaintiff's and Ms. Tuke's ownership of the investment appears to have been converted into a tenancy in common by operation of law. *See* Fla. Stat. § 689.15.

In his response in opposition to the motion, Defendant acknowledges that, at present, Ms. Tuke is a necessary party to the action (Doc. 35 at 5). Defendant, however, argues that even under Rule 15 of the Federal Rules of Civil Procedure, her addition as a party plaintiff would not relate back to the filing of the Complaint (*id.* at 5).[3] Therefore, Defendant argues, any claim by Ms. Tuke would be time-barred (*id*.). The Court is not persuaded.

The Eleventh Circuit Court of Appeals has not enunciated a precise test for whether the addition of a party plaintiff may relate back to the filing of a complaint. *Cliff v. Payco Gen. Am. Credits, Inc.*, 363 F.3d 1113, 1131-33 (11th Cir. 2004). In *Cliff*, the court noted that when an amendment seeks to add a party defendant, Rule 15(c) introduces considerations of both prejudice and notice. *Id*. at 1131. The court further stated that it is clear that Rule 15(c) does not expressly contemplate an amendment that adds or changes a party plaintiff. *Id.* The court noted that when faced with such a situation, courts typically consider notice and prejudice. *Id*. at 1132. In *Cliff*, however, the Court explicitly stated that it would not determine the precise test to be used.

Under the facts of this case, the Court finds that whatever the proper test for relation back of the addition of a party plaintiff, *see id*. at 1131-33, it is satisfied here. Defendant has known

[3] Plaintiff's motion to add Ms. Tuke as a party plaintiff was brought solely under Rule 19 of the Federal Rules of Civil Procedure. Rule 19 appears to be the basis by which Plaintiff seeks to amend his pleading. Therefore, to the extent Plaintiff's motion should have additionally been brought pursuant to Rule 15 of the Federal Rules of Civil Procedure, the Court will construe it as such.

from the outset of this proceeding that Ms. Tuke has an interest in the claim. In addition, defendant has not shown that he would suffer prejudice by the amendment. This is an appropriate circumstance for the relation back of the addition of Ms. Tuke as a party plaintiff. Therefore, Plaintiff's motion to add Ms. Tuke as a necessary party to the action is granted.

II. Defendant's Motion to Amend the Answer

By way of the Motion to Amend the Answer (Doc. 34), Defendant seeks to add two affirmative defenses and a plea for attorney's fees.

Rule 15(a) of the Federal Rules of Civil Procedure (made applicable in this proceeding by Rule 7015 of the Federal Rules of Bankruptcy Procedure) states that leave to amend a pleading "shall be freely given when justice so requires." As set forth in *Foman v. Davis*, 371 U.S. 178, 182 (1962):

> 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."

The first affirmative defense Defendant seeks to add is Plaintiff's purported failure to add an indispensable party (*id* at 1). As the Court permitted Plaintiff to add Ms. Tuke as a party, and further found that her addition would relate back to the filing of the Complaint, Defendant's amendment in this regard would be futile. Consequently, the Court will deny Defendant's motion to amend his answer to add an affirmative defense of failure to add an indispensable party.

The second affirmative defense Defendant seeks to add is a defense based on the statute of limitations related to Plaintiff's claims under the Florida Security and Investor Protection Act.

Specifically, in Counts I and II of the Complaint, Plaintiff alleges two causes of action under Section 517.211 of the Florida Statutes. Defendant maintains the statute of limitations applicable to such causes of action is two years "with the period running from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence…." *See* Fla. Stat. § 95.11(4)(e). Defendant states as follows:

> Discovery has revealed that Plaintiff and Jill M. Tuke received an email dated May 19, 2009, in which they were told they would be receiving a stock certificate for their investment in EISS and that they have never received any certificate. Clearly, within a short time after not receiving the promised stock certificates evidencing their sizable investment in EISS, the exercise of due diligence would have required that Plaintiff and Jill M. Tuke undertake some action that likely would have led to the discovery of facts giving rise to their causes of action for violations of the Florida Securities and Investor Protection Act. Accordingly, Plaintiff should be permitted to raise the affirmative defense that Counts I and II of the Complaint are barred by the statute of limitations.

In his response in opposition (Doc. 49), Plaintiff asserts that Defendant has waived any assertion of the statute of limitations defense because it was not asserted in his original answer. This argument fails for at least two reasons. First, the Court does not find that Defendant has waived this defense. More particularly, Defendant states that he became aware of his ability to possibly assert this defense during the discovery process. Where a party discovers additional facts after diligent investigation, they should be permitted to amend their pleadings accordingly. *See NCI Group v. Cannon Services, Inc.*, 2009 WL 2411145, at *4 (N.D. Ga. Aug. 4, 2009).

Second, Defendant requests leave of Court to assert this affirmative defense pursuant to Rule 15(a)(2), which states leave to amend should be freely given. The Court does not find leave to amend should be denied in this instance because of any of the suspect reasons provided by the *Foman* court, *supra*. Accordingly, Defendant's motion to add the affirmative defense of the statute of limitations will be granted.

If Defendant were to prevail under Counts I or II of the Complaint, under the Florida Security and Investor Protection Act, he would be entitled to an award of attorney's fees. *See* Fla. Stat. § 517.211(6). Thus, the Court will grant Defendant's motion to add a plea for attorney's fees.

III. Conclusion

Based on the foregoing, it is **ORDERED**:

1. Plaintiff Robert Tuke's Motion to Add a Party Plaintiff (Doc. 28) is granted.

2. The Clerk is directed to add Jill M. Tuke as a plaintiff to this adversary proceeding. Service of an amended complaint will not be required.

3. Defendant's Motion to Amend his Answer and Affirmative Defenses (Doc. 34) is granted in part and denied in part.

4. Defendant is permitted to serve an amended answer and affirmative defenses, to the extent permitted by this Order, within fourteen (14) days.

DATED this 25th day of April, 2013 in Jacksonville, Florida.

/s/ Jerry A. Funk
JERRY A. FUNK
United States Bankruptcy Judge

Copies to:

All interested parties