UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION
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In re: Case No. 8:11-bk-01927-CED
Chapter 7

Frank Michael Mongelluzzi,

Debtor.
_____/

Angela Welch and
Christine Herendeen,
as Chapter 7 Trustees,

Plaintiffs,

v. Adv. Pro No. 8:14-ap-653-CED
Lead Case

Regions Bank,

Defendant.
_____/

ORDER DENYING PLAINTIFF, ANGELA WELCH'S, MOTION FOR LEAVE TO FILE THIRD AMENDED COMPLAINT
(Doc. No. 557)

The issue before the Court is whether Plaintiff, Chapter 7 Trustee Angela Welch, ("Plaintiff") should be granted leave to amend her complaint more than four years after her original complaint was filed and shortly before the deadline for completing fact discovery. Federal Rule of Civil Procedure 15 provides that leave to amend pleadings should be liberally granted. However, the Court finds that allowing the amendment will cause undue prejudice and delay and that the amendment is futile. Accordingly, the Court will deny the motion.

I. Background

To briefly summarize the facts,[1] Debtor Frank Mongelluzzi and his wife Anne Mongelluzzi owned about 100 corporations and limited liability companies (the "Mongelluzzi Entities"). Many of the Mongelluzzi Entities maintained bank accounts at Regions and some of the Mongelluzzi Entities were obligors on loans from Regions.

Plaintiff is the trustee in Mr. Mongelluzzi's Chapter 7 case. In May 2013, Plaintiff filed Chapter 7 cases on behalf of 16 of the Mongelluzzi Entities (the "Corporate Cases").[2] Christine Herendeen ("Trustee Herendeen") is the trustee in the Corporate Cases.

In January 2014, Plaintiff initiated this adversary proceeding by filing a complaint against Regions Bank ("Regions") in the United States District Court for the Middle District of Florida to avoid and recover alleged fraudulent transfers.[3] While the case was pending in the District Court, Plaintiff filed an amended complaint.[4] In July 2014, the District Court referred the case to this Court.[5]

In January 2015, Trustee Herendeen filed complaints against Regions in the Corporate Cases to recover alleged fraudulent transfers.[6] In November 2016, the pending adversaries were consolidated for administrative and discovery purposes only (the "Adversary Proceedings"), with the adversary proceeding initiated by Plaintiff

[1] The facts are set forth in more detail in this Court's *Memorandum Opinion Granting in Part and Denying in Part Plaintiff's [Christine Herendeen's] Motions for Partial Summary Judgment*, Doc. No. 577.
[2] Case Nos. 8:13-bk-06864-CED; 8:13-bk-06866-CED; 8:13-bk-06867-CED; 8:13-bk-06868-CED; 8:13-bk-06869-CED; 8:13-bk-06875-CED; 8:13-bk-06879-CED; 8:13-bk-06881-CED; 8:13-bk-06883-CED; 8:13-bk-06891-CED; 8:13-bk-06894-CED; 8:13-bk-06896-CED; 8:13-bk-06897-CED; 8:13-bk-06888-CED; 8:13-bk-06899-CED; and 8:13-bk-06902-CED.
[3] Case No. 14-cv-188-EAK-TGW.
[4] Doc. No. 15.
[5] Doc. No. 31.
[6] Adv. Proc. Nos. 8:15-ap-00111-CED; 8:15-ap-00112-CED; 8:15-ap-00113-CED; 8:15-ap-00114-CED; 8:15-ap-00115-CED; 8:15-ap-00116-CED; 8:15-ap-00117-CED; 8:15-ap-00118-CED; 8:15-ap-00119-CED; 8:15-ap-00120-CED; 8:15-ap-00121-CED; 8:15-ap-00122-CED; 8:15-ap-00123-CED; 8:15-ap-00124-CED; 8:15-ap-00125-CED; and 8:15-ap-00126-CED.

(8:14-ap-00653-CED) serving as the lead adversary proceeding.[7]

In their complaints, Plaintiff and Trustee Herendeen both allege that Mr. Mongelluzzi and the Mongelluzzi Entities were engaged in a fraudulent check-kiting scheme. Among other allegations, Plaintiff and Trustee Herendeen allege that transfers to Regions made after Mr. and Mrs. Mongelluzzi signed a Forbearance Agreement on July 15, 2010 (the "Forbearance Agreement") and related Payoff Letter are voidable as fraudulent transfers under Chapter 726 of the Florida Statutes, the Florida Uniform Fraudulent Transfer Act, and 11 U.S.C. § 544(b).

By agreement of the parties, the consolidated Adversary Proceedings are set for trial on December 10, 2018, with the original deadline for fact discovery set for April 30, 2018.[8] Counsel for the parties have agreed to extend the fact discovery deadline to July 31, 2018.[9]

The parties previously agreed to earlier trial settings and earlier discovery deadlines.[10] The Court's March 18, 2015 *Amended Agreed Order Setting Trial and Establishing Pretrial Procedures*[11] provided for the close of the pleadings in the Adversary Proceedings by December 14, 2015. Plaintiff timely filed a motion for leave to file a second amended complaint,[12] which was granted by agreement of the parties.[13] Plaintiff's Second Amended Complaint was deemed filed as of March 24, 2016.[14]

The record reflects that Mrs. Mongelluzzi's deposition was taken on July 27, 2017.[15] Mr. Mongelluzzi has not been deposed.[16] The Court believes that Mr. and Mrs. Mongelluzzi now reside in North Carolina.[17] Plaintiff's counsel has represented to the Court that he is in contact with Mr. and Mrs. Mongelluzzi and intends to call them as witnesses at trial.[18]

II. The Proposed Third Amended Complaint

More than four years after Plaintiff filed her initial complaint, and over two years after Plaintiff filed her Second Amended Complaint, Plaintiff seeks leave to file a Third Amended Complaint (the "Motion for Leave to Amend") to include an entirely new claim for relief.[19]

In Count XVII of her proposed Third Amended Complaint,[20] Plaintiff seeks to rescind the Forbearance Agreement and related Payoff Letter. Plaintiff alleges that these documents were obtained by Regions through acts of extortion and blackmail so that Regions could obtain Mr. Mongelluzzi's consent to transfers from "Non-Obligor Account Balances" in payment of Regions' outstanding loans.[21]

In paragraph 161 of the proposed Third Amended Complaint, Plaintiff alleges that

> Regions made the conscious and calculated decision to confront F. Mongelluzzi about his checking-kiting scheme during a meeting it demanded and conducted at its attorney's office on Sunday, July 11, 2010, "as leverage to get [his agreement to the] set-off" of the Non-Obligor Account

[7] *Order Consolidating Adversary Proceedings for Administrative and Discovery Purposes* Only (Doc. No. 200).
[8] Doc. No. 427.
[9] Transcript, Doc. 581, p. 23.
[10] Doc. Nos. 64, 84, 165.
[11] Doc. No. 84.
[12] Doc. No. 139.
[13] Doc. No. 154.
[14] Doc. No. 156.
[15] Doc. No. 447-1. The Court recalls some difficulties regarding the scheduling of Mrs. Mongelluzzi's deposition, due, in part, to her representation by the Federal Public Defender (Doc. No. 447-1, p. 3) in connection with pending criminal cases, *USA v. Anne Mongelluzzi*, Case No. 8:15-cr-00325-EAK-MAP and *USA v. Frank Mongelluzzi*, Case No. 8:17-cr-00025-VMC-JSS.
[16] Doc. No. 581, p. 28, ll. 2-3.
[17] Case No. 8:15-cr-00325-EAK-MAP, Doc. No. 51; Case No. 8:17-cr-00025-VMC-JSS, Doc. No. 48.
[18] Doc. No 581, p. 31, ll. 23-25.
[19] Doc. No. 557.
[20] Doc. No. 557, Ex. A.
[21] Doc. No. 557. The term "Non-Obligor Account Balances" relates to the balances of bank accounts at Regions held by Mongelluzzi Entities that were not obligors on Regions' loans. (Doc. No. 557, Ex. A, ¶ 37.)

> Balances to satisfy the Obligor Indebtedness.

Plaintiff supports this allegation with Exhibit 14 to the proposed Third Amended Complaint, a handwritten note dated July 7, 2010, written by a Senior Vice President of Regions Business Capital. Exhibit 14 states "[S]o let's have discussion with Company and attys, bring up the kiting to use as leverage to get set-off [sic] . . . ." The record reflects that the Court ordered that Regions produce Exhibit 14 to Plaintiff on May 8, 2017.[22]

In paragraph 163 of the proposed Third Amended Complaint, Plaintiff further alleges that Regions' actions were unlawful and/or wrongful because they violated Section 836.05, Florida Statutes, reciting the statute as follows:

> Whoever, either verbally or by a written or printed communication, maliciously threatens to accuse another of any crime or offense, or by such communication maliciously ***threatens an injury to the person, property or reputation of another, or maliciously threatens to expose another to disgrace, or to expose any secret affecting another, or to impute any deformity or lack of chastity to another,*** with intent thereby to extort money or any pecuniary advantage whatsoever, or with intent to compel the person so threatened, or any other person, to do any act or refrain from doing any act against his or her will, shall be guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Plaintiff goes on to allege that Mr. Mongelluzzi did not have a reasonable alternative course of action in the face of Regions' blackmail and extortion,[23] that he would not have executed the Forbearance Agreement but for Regions' blackmail and extortion,[24] that the execution of the Forbearance Agreement and Payoff Letter were not the product of an arm's-length negotiation nor a knowing and voluntary act,[25] and that shortly after Mr. Mongelluzzi's execution of the Forbearance Agreement and Payoff Letter, Regions effectuated setoffs of the Non-Obligor Account Balances in the approximate amount of $12 million.[26]

Regions, naturally, opposes the Motion for Leave to Amend.[27] Trustee Herendeen filed a limited response[28] seeking to clarify that Plaintiff's new claims are not intended to make any of the Corporate Debtors parties to the proposed Third Amended Complaint and that the claims that Trustee Herendeen has asserted on behalf of the Non-Obligor Debtors are not and cannot be affected by the relief sought by Plaintiff. The Court heard arguments on the Motion for Leave to Amend on June 18, 2018.

III. Analysis

Under Federal Rule of Civil Procedure 15(a), incorporated by Federal Rule of Bankruptcy Procedure 7015, a party may amend its pleading with the opposing party's consent or with leave of court. The decision to grant leave to amend is within the sound discretion of the court, and should be given when justice so requires.[29] However, the Eleventh Circuit has held that the denial of a motion for leave to amend is squarely within the trial court's discretion.[30] In *Henson v. Columbus Bank & Trust Co.*,[31] the court stated:

> A district court has great discretion when determining whether an amendment to the complaint should be allowed once responsive pleadings have been filed. This

[22] Doc. No. 319, referring to the document marked Bates-stamp number Priv_00005256-1.
[23] Doc. No. 557, Ex. A., ¶ 164.
[24] *Id.*, ¶ 165.
[25] *Id.*, ¶ 166.
[26] *Id.*, ¶ 167.
[27] Doc. No. 573.
[28] Doc. No. 571.
[29] *Lowe's Home Centers, Inc. v. Olin Corp.*, 313 F.3d 1307, 1315 (11th Cir. 2002); *Henson v. Columbus Bank & Trust Co.*, 770 F.2d 1566, 1574 (11th Cir. 1985).
[30] *Carruthers v. BSA Advert., Inc.*, 357 F.3d 1213, 1218 (11th Cir. 2004); *see also Brewer-Giorgio v. Producers Video, Inc.*, 216 F.3d 1281, 1284 (11th Cir. 2000) (quoting *Abramson v. Gonzalez*, 949 F.2d 1567, 1581 (11th Cir. 1992)).
[31] 770 F.2d 1566, 1574 (11th Cir. 1985).

> court will only reverse a district court's denial of a motion to amend in instances in which the district court has clearly abused its discretion.

The Eleventh Circuit in *Brewer-Giorgio v. Producers Video, Inc.*, found no abuse of discretion in the district court's denial of leave to amend on grounds of undue delay where movant failed to show good cause for delay.[32]

This case has been pending for over four years. Plaintiff has already twice amended her complaint. The deadline for fact discovery–extended several times by agreement of the parties–runs on July 31, 2018. If this Court were to grant the Motion for Leave to Amend, additional discovery would likely be required, including retaking Mrs. Mongelluzzi's deposition, taking Mr. Mongelluzzi's deposition, and, possibly retaking the depositions of some of Regions' current as well as former employees, who are outside the subpoena power of this Court.[33]

Plaintiff has offered no explanation for her delay in bringing the Motion for Leave to Amend. Although in argument Plaintiff's counsel referred to the recent deposition of a Regions employee regarding Exhibit 14, Plaintiff has had access to Exhibit 14 for over a year. And the date of Mrs. Mongelluzzi's deposition, July 27, 2017, evidences that Plaintiff's counsel had the opportunity to discuss the July 11, 2010 meeting with her.

For these reasons, the Court finds that allowing the amendment will cause undue prejudice and delay. Therefore, the Court will exercise its discretion and deny the Motion for Leave to Amend.

But there is another reason why the Court should deny the Motion for Leave to Amend: because to permit the amendment would prove to be futile.[34]

Plaintiff alleges that the Forbearance Agreement and Payoff Letter are subject to rescission because they were obtained by Regions through acts of extortion and blackmail. Assuming that Plaintiff can establish all the other elements of a claim for rescission,[35] she must establish that the Forbearance Agreement and resulting Payoff Letter were procured through extortion or blackmail. Here, Plaintiff's allegations regarding the alleged blackmail and extortion are purely conclusory. The only fact that Plaintiff has alleged to support her claims is that Regions intended to "confront" Mr. and Mrs. Mongelluzzi with its knowledge of their check-kiting scheme and to leverage that into the Forbearance Agreement. But "confrontation" alone does not equate to extortion or blackmail.

The proposed Third Amended Complaint fails to allege any of the elements of extortion as outlined in Section 836.05, Florida Statutes. Plaintiff does not allege that Regions threatened injury to Mr. Mongelluzzi, his property or his reputation; that Regions maliciously threatened to expose Mr. Mongelluzzi to disgrace; that Regions threatened to expose any secret affecting another; or that Regions imputed any deformity or lack of chastity to another. In short, Plaintiff has failed to allege that Regions did anything other than to confront Mr. Mongelluzzi with its knowledge of his alleged check-kiting scheme on Sunday, July 11, 2010, and that Mr. Mongelluzzi executed a Forbearance Agreement four days later on July 15, 2010.

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[32] 216 F.3d. 1281, 1284 (11th Cir. 2000).

[33] The record reflects that Plaintiff noticed the taking of depositions of at least two of Regions' former employees. (Doc. No. 531.)

[34] Denial of leave to amend on the grounds of futility is reviewed *de novo*, because it is a conclusion of law that the amendment would necessarily fail. *City of Miami v. Citigroup, Inc.*, 801 F.3d 1268, 1275 (11th Cir. 2015).

[35] The elements of a claim for rescission are: (1) the character or relationship of the parties; (2) the making of the contract; (3) the existence of fraud, mutual mistake, false representations, impossibility of performance, or other ground for rescission or cancellation; (4) that the party seeking rescission has rescinded the contract and notified the other party to the contract of such rescission; (5) if the moving party has received benefits from the contract, he should further allege an offer to restore these benefits to the party furnishing them, if restoration is possible; and (6) that the moving party has no adequate remedy at law. *Reyes v. Foreclosure Asset Sales & Transfer P'ship*, No. 13-22829-CIV, 2014 WL 12623071, at *4 (S.D. Fla. Mar. 5, 2014).

Plaintiff clearly knows the elements needed to prove blackmail and extortion. In addition to quoting § 836.05 in paragraph 163 of the proposed Third Amended Complaint, the footnotes to paragraph 41 recite *Black's Law Dictionary*'s definitions of blackmail and extortion. But the proposed Third Amended Complaint fails to allege any of the actions that meet those definitions of blackmail and extortion.

Plaintiff has not alleged that Regions, at the July 11, 2010 meeting or thereafter, made an unlawful demand of money or property from Mr. Mongelluzzi under "threat to do bodily harm, to injury property, to accuse of crime, or to expose disgraceful defects."[36] Nor has Plaintiff alleged that Regions threatened to:

> (1) inflict bodily injury on anyone or commit any other criminal offense; or (2) accuse anyone of a criminal offense; or (3) expose any secret tending to subject any person to hatred, contempt or ridicule, or to impair his credit or business repute; or (4) take or withhold action as an official, or cause an official to take or withhold action; or (5) bring about or continue a strike, boycott or other collective unofficial action, if the property is not demanded or received for the benefit of the group in whose interest the actor purports to act; or (6) testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or (7) inflict any other harm which would not benefit the actor.[37]

In short, Count XVII fails to state a claim for rescission. If Plaintiff had any evidence to make factual allegations in support of its claims, it would have made those allegations. After all, Plaintiff has had evidence of Regions' intent to confront the Mongelluzzis with its knowledge of their check-kiting since Exhibit 14 was produced to it shortly after May 8, 2017. Plaintiff's counsel attended Mrs. Mongelluzzi's deposition in July 2017, and is in contact with Mr. and Mrs. Mongelluzzi. Plaintiff has had every opportunity to explore her claims of blackmail and extortion. And it is late in the day for Plaintiff to now embark on a discovery quest to uncover evidence to support its claims.[38]

The Court finds that because Plaintiff cannot establish the requisite elements for extortion or blackmail, the only theory under which she seeks rescission of the Forbearance Agreement and Payoff Letter, granting leave to file the Third Amended Complaint would prove to be futile.

Accordingly, for the foregoing reasons, it is

ORDERED that Plaintiff, Angela Welch's, Motion for Leave to File Third Amended Complaint is **DENIED**.

DATED: June 26, 2018.

/s/ Caryl E. Delano

Caryl E. Delano
United States Bankruptcy Judge

[36] Definition of "blackmail" in *Black's Law Dictionary*, 170 (6th ed. 1990) as cited by Plaintiff. (Doc. No. 557, Ex. A., fn. 3.)

[37] Definition of "extortion" in *Black's Law Dictionary*, 170 (6th ed. 1990) as cited by Plaintiff. (Doc. No. 557, Ex. A., fn. 4.)

[38] Actually, Plaintiff contends that no further discovery is required with regard to the rescission claim. (Doc. No. 557, p. 5, ¶ 15.)