

**COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO**

WELLS FARGO BANK, N.A., AS TRUSTEE FOR MASTR ASSET BACKED SECURITIES TRUST 2003-OPTI	:	
Plaintiff	:	CASE NO. 2012 CVE 00122
vs.	:	Judge McBride
RICKY B. FONTAINE, et al.,	:	
Defendant	:	DECISION/ENTRY
	:	

The Law Office of Manbir S. Sandhu, Manbir S. Sandhu, attorney for the plaintiff Wells Fargo Bank, N.A., 1370 Ontario Street, Suite 600, Cincinnati, Ohio 44113.

The Law Offices of Lance Denha, Feisul M. Kahn, attorney for the defendant Ricky Fontaine, 1675 Old Henderson Road, Columbus, Ohio 43220.

This cause is before the court for consideration of a motion for leave to file an amended answer filed by defendant Ricky Fontaine.

The foreclosure complaint in this case was filed on January 24, 2012 and the defendant Ricky Fontaine's answer was filed on March 5, 2012. On September 10, 2012, the plaintiff Wells Fargo Bank, N.A. filed a motion for summary judgment as to its claims against Fontaine. The defendant filed both his response to the motion for

summary judgment and a motion for leave to amend answer on October 10th. The case was set for oral argument on the motion for summary judgment on October 12th and, on that date, the court granted a continuance to allow the plaintiff's counsel time to respond to the defendant's filings. On October 29th, the court held a hearing on the defendant's motion for leave to amend his answer, at which time the plaintiff's counsel indicated that the plaintiff was opposing the motion but had not filed a memorandum on the matter. The court allowed the plaintiff to file a memorandum in opposition to the motion to amend by November 2nd, and the plaintiff did, in fact, file a memorandum on November 1st.

Upon consideration of the motion, the record of the proceeding, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

LEGAL ANALYSIS

In his short motion for leave to amend his answer, Ricky Fontaine states that his request for leave to file an amended answer is based on the fact that “[p]laintiff's responses to his discovery request and qualified written request have revealed significant additional defenses that were not apparent or known when the original answer was filed.” Attached to the defendant's motion are the proposed amendments to his answer, which are three additional defenses, namely that the plaintiff is not the real party in interest in the case at bar and that the original lender committed RESPA (Real Estate Settlement and Procedures Act) and Truth in Lending Act violations.

Specifically, the proposed amendments allege, as to the real party in interest defense, that the pooling and service agreement associated with the MASTR Asset-Backed Securities Trust 2003-OPTi required that a delinquent loan could not be accepted into the trust and that this requirement was not followed in the within case. The defendant alleges that the original lender violated RESPA by failing to provide services for which he was charged and for failing to fully comply with the qualified written requests which were made. Finally, the defendant alleges that the original lender violated the Truth in Lending Act by changing essential terms of the loan without the defendant's consent or knowledge, such as changing the loan from a fixed-rate loan to an adjustable-rate loan.

Pursuant to Civ.R. 15(A):

“A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within twenty-eight days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party. Leave of court shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within fourteen days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.”

Leave to amend must be sought in good faith and, when examining that issue, “[t]here must be at least a prima facie showing that the movant can marshal support for the new matters sought to be pleaded, and that the amendment is not simply a delaying

tactic, nor one which would cause prejudice to the defendant.”¹ “While Civ.R. 15(A) allows for liberal amendment, the trial court does not abuse its discretion if it denies a motion to amend pleadings if there is a showing of bad faith, undue delay, or undue prejudice to the opposing party.”²

“In considering a plaintiff’s request for leave to amend, ‘a trial court’s ‘primary consideration is whether there is actual prejudice to the defendants because of the delay.’ ”³ Although the Ohio Supreme Court has held “ that the plaintiff must make ‘at least a prima facie showing [of] support for the new matters sought to be pleaded,’ that consideration is meant to aid in determining whether the amendment is ‘simply a delaying tactic, [or] one which would cause prejudice to the defendant.’ ”⁴

The plaintiff argues that it will be prejudiced if leave to amend is granted because the motion for leave was filed after the plaintiff filed its motion for summary judgment and that motion remains pending, which prevents it from being able to respond to the newly-asserted defenses. At the hearing on October 29th, counsel for the plaintiff indicated that he was not aware when the discovery was provided which the defendant now claims prompted him to seek leave to file these new defenses, and neither party addressed this issue in its memoranda, so the court cannot say whether there was undue delay in the filing of the motion to amend.

¹ *Indep. Furniture Sales, Inc. v. Martin*, 184 Ohio App.3d 562, 921 N.E.2d 718, 2009-Ohio-5697, ¶ 24 (Ohio App. 8th Dist., 2009), quoting *Wilmington Steel Products*, 60 Ohio St.3d 120, 122, 573 N.E.2d 622, quoting *Solowitch v. Bennett* (1982), 8 Ohio App.3d 115, 117, 8 OBR 169, 456 N.E.2d 562.

² *Scovanner v. Ohio Valley Voices* (Aug. 13, 2012), 12th Dist. No. CA2012-02-017, 2012-Ohio-3629, ¶ 28, quoting *Wagoner v. Obert*, 180 Ohio App.3d 387, 905 N.E.2d 694, 2008–Ohio–7041, ¶ 111 (Ohio App. 5th Dist., 2008), citing *Hoover v. Sumlin* (1984), 12 Ohio St.3d 1, 465 N.E.2d 377.

³ *Darby v. A-Best Products Co.* (2004), 102 Ohio St.3d 410, 811 N.E.2d 1117, 2004-Ohio-3720, ¶ 20, quoting *Helman v. EPL Prolong, Inc.* (2000), 139 Ohio App.3d 231, 251, 743 N.E.2d 484, citing *Schweizer v. Riverside Methodist Hosp.* (1996), 108 Ohio App.3d 539, 546, 671 N.E.2d 312.

⁴ *Id.*, quoting *Wilmington Steel* at 122, 573 N.E.2d 622, quoting *Solowitch* at 117.

After reviewing the proposed amended pleading attached to the motion, the court finds at this early stage that the movant has made a *prima facie* showing of being able to marshal support for the new defenses sought to be pleaded and that the motion to amend is not merely a delaying tactic. While there may be legal issues that will need to be addressed with regard to these defenses, such as whether the RESPA and Truth in Lending Act violations alleged to be committed by the original lender can be asserted against the plaintiff⁵, any such issues will be best addressed in subsequent substantive motions.

The court further finds that the plaintiff will not be unduly prejudiced by the granting of the motion to amend. The court agrees that its granting of this motion will affect the plaintiff's pending motion for summary judgment. However, the court will allow the plaintiff to withdraw its current motion for summary judgment and to file a new motion for summary judgment when it feels it is prepared to adequately address the three new defenses.

CONCLUSION

Based on the above analysis, the defendant's motion for leave to amend answer is well-taken and shall be granted.

The court will direct the Assignment Commissioner to schedule a Telephone Status Conference in 60 days and counsel will receive notice of this date. If a

⁵ See, e.g., 15 U.S.C. § 1641(a), which states “[A]ny civil action for a violation of this subchapter or proceeding under Section 1607 of this title which may be brought against a creditor may be maintained against any assignee of such creditor only if the violation for which such action or proceeding is brought is apparent on the face of the disclosure statement, except where the assignment was involuntary.”

dispositive motion is filed in the interim, the court will vacate that telephone conference and set the motion for hearing. The hearing on the Motion for Summary Judgment set for November 8, 2012 shall be vacated.

IT IS SO ORDERED.

DATED: _____
Judge Jerry R. McBride

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the within Decision/Entry were sent via Facsimile/E-Mail/Regular U.S. Mail this 7th day of November 2012 to all counsel of record and unrepresented parties.

Administrative Assistant to Judge McBride