

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON DIVISION

IN RE:

PAMELA M. TOLLIVER

DEBTOR

CASE NO. 09-21742

PAMELA M. TOLLIVER

PLAINTIFF

VS.

ADV. NO. 09-2076

BANK OF AMERICA, NATIONAL
ASSOCIATION; OCWEN LOAN
SERVICING, LLC

DEFENDANTS

MEMORANDUM OPINION AND ORDER

The Defendants herein filed a Motion to Amend Answer to Adversary Complaint (the "Motion to Amend") (Doc. # 54) on May 27, 2010, seeking to add affirmative defenses to the Complaint filed by the Plaintiff. The Amended Answer to Adversary Complaint and Response to Objection to Secured Claim (the "Amended Answer") (Doc. # 55) was filed on the same date. The Plaintiff filed an Objection to the Motion to Amend (the "Objection") (Doc. # 57), and the matter was heard on June 8, 2010. The Amended Order for Trial (Doc. # 11) entered in this proceeding sets May 27, 2010 as the deadline for the amendment of pleadings. Consequently, the Amended Answer must be considered to have been timely filed.

The Amended Answer asserts multiple affirmative defenses, including that "Plaintiff's claims for relief under state law are barred, in whole or in part, because state law has been preempted by federal enactment including, but not limited to, the Depository Institutions Deregulation

and Monetary Control Act . . . , National Bank Act, and Home Owners Loan Act (HOLA). . .[.] (¶ 19). The Defendants also assert that they “are not a ‘debt collector’ as defined in 15 U.S.C. Sec. 1692a(5), and therefore neither is subject to or liable under the F.D.C.P.A. . . .” (¶ 23).

The Plaintiff objects to the Motion to Amend on the basis of undue delay which would prejudice her by allowing the Defendants to raise new defenses after the time when she could serve the discovery necessary to properly challenge these defenses. Fed.R.Civ.P. 15, made applicable in bankruptcy by Fed.R.Bankr.P. 7015, governs amended pleadings. Under Rule 15(a)(2), “a party may amend its pleading only with the opposing party’s written consent or the court’s leave. The should freely give leave when justice so requires.” Fed.R.Civ.P. 15(a)(2). The Plaintiff cites several cases in support of her position, but for the most part these cases involve extremely long, egregious delays. In *U.S. v. Midwest Suspension and Brake*, 49 F.3d 1197, 1202 (6th Cir. 1995), the defendant, having amended its answer once, did not seek further amendment until two years after the complaint had been filed. In *Zubulake v. UBS Warburg LLC*, 231 F.R.D. 159, 162 (S.D. N.Y. 2005), the amendment was offered after a 22 month delay, on the eve of trial. Further, former counsel for the defendant had effectively waived the defenses set out in the amended answer earlier in the proceedings.

The Plaintiff maintains that allowing the Defendants to amend their Answer a week prior to the cut-off of discovery in this proceeding would be unduly prejudicial because new issues are raised therein which she will not have a sufficient opportunity to rebut. This concern may be addressed by allowing the Plaintiff to serve additional discovery.

The court concludes that the Defendants’ filing of their Motion to Amend and their Amended Answer within the time set by the court in its

Amended Order for Trial brings them within the confines of Rule 15(a)(2)'s direction that leave to amend be given when justice so requires. The court further concludes, however, that the Plaintiff should be allowed additional discovery time to address the affirmative defenses raised in the Defendants' Amended Answer. It is therefore hereby ordered as follows:

1. The Plaintiff's Objection to Defendants' Motion to Amend Adversary Complaint is overruled, and Defendants' Motion to Amend is GRANTED;
2. The Plaintiff is allowed until June 17, 2010 to serve additional discovery on the Defendants, limited to the new defenses raised in the Amended Answer; and
3. The Defendants shall respond to such additional discovery on or before July 1, 2010.

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***The affixing of this Court's electronic seal below is proof this document has been signed by the Judge and electronically entered by the Clerk in the official record of this case.***



**Signed By:**  
**Tracey N. Wise**  
**Bankruptcy Judge**  
**Dated: Thursday, June 10, 2010**  
**(tnw)**