Docket #0118 Date Filed: 8/21/2023

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re: Tehum Care Services, Inc., Debtor.	Case No. 23–90086 (CML) Chapter 11
Anant Kumar Tripati, Plaintiff, v. Sarah Tirschwell, *et al.*, Defendants.	Adv. Pro. No. 23–03072 (CML)

M2 LOANCO LLC'S OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE:

Defendant M2 LoanCo LLC ("M2 LoanCo") files this opposition (the "Opposition") to the *Motion for Leave to File Second Amended Complaint* (the "Motion") [Dkt No. 96] filed by the Plaintiff, Anant Kumar Tripati (the "Plaintiff). In support of this Opposition, M2 LoanCo respectfully states as follows:

I. PRELIMINARY STATEMENT[1]

The Motion should be denied because it fails to establish why leave should be granted, particularly where M2 LoanCo has moved to dismiss the First Amended Complaint and the proposed Second Amended Complaint suffers from the same uncurable defects as the First

[1] Capitalized terms used but not defined in the Preliminary Statement shall have the meanings ascribed in Section II. below.

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Amended Complaint. The proposed Second Amended Complaint does not add any additional factual allegations or legal causes of action against M2 LoanCo and fails to include additional support for the Plaintiff's claims against M2 LoanCo as set forth in the First Amended Complaint. Thus, the proposed amendment is futile, and for the reasons more fully set forth below, the Court should deny the Motion and grant M2 LoanCo's Motion to Dismiss.

II. BACKGROUND

On February 13, 2023 (the "Petition Date"), Tehum Care Services, Inc. (the "Debtor") filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") with this Court commencing the above-captioned chapter 11 bankruptcy case (the "Chapter 11 Case"). The Debtor is operating as a debtor in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

The Plaintiff commenced this adversary proceeding by filing a complaint on May 1, 2023 (the "Original Complaint"). The Clerk of the Court issued a summons (the "Summons") with respect to the Original Complaint on May 4, 2023. [Dkt No. 2]. The Original Complaint asserts two claims for relief under RICO and Arizona law.

On May 15, 2023, the Plaintiff filed but did not serve upon M2 LoanCo the *Omnibus Motion to Amend Adversary and Consolidate ECF 244; 261; 280 and Proofs of Claims*, which attached an Amended Complaint (the "First Amended Complaint") as an exhibit [Dkt No. 4]. The First Amended Complaint adds a third claim for relief for a declaratory judgment.

On May 19, 2023, the Plaintiff filed a certificate of service reflecting service of the Summons and Original Complaint on May 10, 2023 upon M2 LoanCo at "1450 Brickell Ave #1900, Miami FL 33131." [Dkt Nos. 17, 24]. The Clerk of the Court has not issued a summons

with respect to the First Amended Complaint. To date, the Plaintiff has not served a copy of the First Amended Complaint upon M2 LoanCo.

On June 5, 2023, M2 LoanCo filed its *Motion to Dismiss the Plaintiff's Complaint* (the "Motion to Dismiss") [Dkt No. 32] pursuant to Rule 12(b)(1), (5), and (6). In the Motion to Dismiss, M2 LoanCo argued that the Court lacked subject matter jurisdiction to adjudicate the declaratory judgment claims, the Court lacked personal jurisdiction over M2 LoanCo because the Complaint was improperly served, and the Plaintiff had failed to adequately plead plausible claims for relief.[2] As exhibits to the Motion to Dismiss, M2 LoanCo attached true and correct copies of records from the Florida Secretary of State showing M2 LoanCo's current mailing address[3] and the docket sheets for various lawsuits involving the Plaintiff.[4]

On June 26, 2023, the Plaintiff filed his *Response to ECF 32* [Dkt. No. 58], responding to M2 LoanCo's Motion to Dismiss and asserting that the Amended Complaint "properly sets forth claims for Fraud, fraudulent retention, fraudulent transfer, fraudulent conveyance, fraud, deceit, fraudulent concealment, constructive fraud, constructive taking, unjust enrichment, breach of fiduciary duty, deceptive business practice, fraud upon the court, and conspiracy to engage in these torts."[5] The Motion to Dismiss has been fully briefed but has not been set for hearing or decided by the Court.

On July 31, 2023, the Plaintiff filed his Motion, seeking to file a further amended complaint (the "Second Amended Complaint") [Dkt. No. 96]. In the Motion, the Plaintiff alleges that the Second Amended Complaint amends the First Amended Complaint by: (1) "set[ting] forth clearly

[2] Although the Plaintiff failed to properly serve either the Original Complaint or the Amended Complaint and no summons has been issued for the Amended Complaint, M2 LoanCo nevertheless presumed the Amended Complaint (referred to herein as the "Complaint" where applicable) to be the operative pleading for the purpose of the Motion to Dismiss in the interest of expeditiously resolving this adversary proceeding.
[3] Motion to Dismiss, Exhibit 1.
[4] Motion to Dismiss, Exhibits 2–4.
[5] Response, p. 4.

the 'cooperation agreements' that show this court has jurisdiction (paras 61-74);" (2) restating actions from the First Amended Complaint "together" in "para 128 through 257" to satisfy Rules 8 and 9; (3) "set[ting] forth in para 80-83 the litigation chicanery by defendants;" and (4) "add[ing] claims for declaratory relief against the Liability Insurers, bad faith settlement and underwriting practices (Para 264-287; 333-344)."[6]

No scheduling order has been issued by the Court nor have the parties conducted a Rule 26(f) conference.

III. LEGAL STANDARD

Rule 15 directs courts to "freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2). "Though that's a generous standard, 'leave to amend can be properly denied where there is a valid justification.'" *Robertson v. Intratek Computer, Inc.*, 976 F.3d 575, 584 (5th Cir. 2020). Valid justifications include undue delay, bad faith or dilatory motive, repeated failure to cure previous amendments, undue prejudice, and futility. *New Orleans Ass'n of Cemetery Tour Guides & Cos. v. New Orleans Archdiocesan Cemeteries*, 56 F.4th 1026, 1034 (5th Cir. 2023). "The existence of one of these factors is sufficient to deny leave." *Id.* "Leave to amend is properly denied if amendment would be futile, i.e., if the proposed complaint could not 'withstand a renewed motion to dismiss.'" *City of Cambridge Retirement Sys. v. Altisource Mgmt. Corp.*, 908 F.3d 872, 878 (3d Cir. 2018). Ultimately, "the decision whether to grant leave to amend is within the sound discretion of the district court." *Pierce v. Aircraft Fin. Corp. LLC*, 512 F. Supp. 3d 753, 770 (S.D. Tex. 2021) (Eskridge, J.).

[6] Motion, p. 4-8.

IV. ARGUMENT

The Court should deny the Plaintiff's Motion because the Plaintiff's First Amended Complaint is already subject to M2 LoanCo's Motion to Dismiss, which has been fully briefed, and the proposed Second Amended Complaint does not cure any of the defects identified in the Motion to Dismiss. Thus, the proposed amendment is futile and should not be permitted.

M2 LoanCo argued in its Motion to Dismiss that the First Amended Complaint should be dismissed because, among other things, (1) the Plaintiff failed to properly serve M2 LoanCo with a copy of the Summons and Complaint; (2) the Court lacks subject matter jurisdiction to decide the Plaintiff's declaratory judgment claim with respect to M2 LoanCo; and (3) the Plaintiff fails to adequately state claims for relief against M2 LoanCo because the Plaintiff does not connect M2 LoanCo to any of the complained activities. The Second Amended Complaint does not cure any of these defects; namely, there are no additional facts to either support subject matter jurisdiction of the Plaintiff's claims against M2 LoanCo or tie M2 LoanCo to any alleged wrongdoing. In fact, the only new mention of M2 LoanCo is in paragraph 138 of the proposed Second Amended Complaint, which states:

> 138. After discussions with Tirschwell, M2 HoldCo LLC,; M2 LoanCo LLC; M2 EquityCo LLC, Tehum Care Services Inc aka Corizon a Texas Corporation; YesCare Corporation, a Texas Corporation and CHS Tex, a Texas Corporation, Valitas Intermediate Holdings Incorporated, a Delaware Corporation; by emails and orally, Ankura consulting through Russell Perry submitted false declarations, and did not include in it, all the assets transferred to Valitas for concealment, as well as all the liability.

Notably, this paragraph does not assert any new allegations against M2 LoanCo; rather, it alleges wrongdoing by Ankura, a separate newly named defendant, and not M2 LoanCo. This additional

reference to M2 LoanCo is insufficient to allow the Plaintiff to survive M2 LoanCo's motion to dismiss, and therefore, the Motion should be denied.

Further, the Plaintiff's "four reasons" for the proposed Second Amended Complaint are nonsensical. The Plaintiff first alleges that "cooperation agreements" show that this Court has subject matter jurisdiction. He goes on to argue that all of the Defendants "are alter egos of each other" due to "cooperation agreements" allegedly signed by the CEO of Wexford, the CEO of Corizon, the CEO of Centurion, and the CEO of Naphcare. Again, none of these alleged cooperation agreements relate even remotely to actions by M2 LoanCo, and, as more further set forth in M2 LoanCo's Motion to Dismiss, the Court lacks subject matter jurisdiction to adjudicate the Plaintiff's third claim for relief for a declaratory judgment, a defect that is not remedied by the proposed Second Amended Complaint.

The Plaintiff's "second reason" is that he has reorganized his First Amended Complaint to "set together" acts that allege fraud. Once again, the Plaintiff references defendants other than M2 LoanCo, listing in his "second reason" acts allegedly committed by Quintairos Prieto Wood & Boyer PA; Nichole Rowey; Joseph Scott Conlon; Renaud Cook Drury Mesaros PA; Betty Ulibarri; Julia Erwin; Diane Bohuszewicz; Centurion of Arizona; Sarah L. Barnes; Broening Oberg Woods & Wilson Pc; Michael E. Gottfried; Daniel P. Struck; Corizon Inc.; Wexford Health Sources, Inc.; Weber Gallagher Simpson Stapleton Fires & Newby LLP; Jones Skelton Hochuli; Kelley Morrrissey, and Daryl Johnson. None of these actions or defendants relate to M2 LoanCo, and the allegations that were already present in the First Amended Complaint fail to meet the request pleading standards for the Plaintiff to adequately state a claim for relief against M2 LoanCo.

The "third reason" references "litigation chicanery" and references paragraphs 80-83 of the proposed Second Amended Complaint. These paragraphs state:

> 80. During the litigation and the time frames when the judgment could be collaterally attacked, Defendants stated the evidence that is a subject matter of the spoliation did not exist. Appendix A, B, C and D show their business model is inextricably intertwined. When one leaves, the other steps in.
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> 81. In CN 18-0066RM Corizon Quintairos Prieto Wood & Boyer; Nichole Rowey; aggressively during the litigation and the time frames when the judgment could be collaterally attacked, Defendants stated the evidence that is a subject matter of the spoliation did not exist. CR 186, 187, 188, 191, 195, 200, 205, 208, 209, 210, 212, 217, 220, 234, 236, 237, 238, 240, 241, 242, 245, 246, 248, 249, 250, 251, 255, 256, 257, 314, 318, 337, 352, 363, 383, 392, 414, 421, 425, 427, 434
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> 82. In CN 13-0615 TUC DCB Corizon through Joseph Scott Conlon; Renaud Cook Drury Mesaros PA During the litigation and the time frames when the judgment could be collaterally attacked, Defendants stated the evidence that is a subject matter of the spoliation did not exist.
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> 83. In CN 13-0140 TUC DCB Wexford Health Sources, Inc; Weber Gallagher Simpson Stapleton Fires & Newby LLP; Jones Skelton Hochuli During the litigation and the time frames when the judgment could be collaterally attacked, Defendants stated the evidence that is a subject matter of the spoliation did not exist.

None of these paragraphs involve M2 LoanCo, as M2 LoanCo was not involved in or a party to the prior litigation.

Lastly, the Plaintiff's "fourth reason" is that he has "added claims for declaratory relief against the Liability Insurers, bad faith settlement and underwriting practices." Again, this additional claim for relief does not relate to M2 LoanCo and would not allow the Plaintiff's claims and causes of action to survive M2 LoanCo's Motion to Dismiss. Accordingly, for all of these reasons, the Court should deny the Motion and grant M2 LoanCo's Motion to Dismiss for the reasons stated therein.

V. CONCLUSION

For all the foregoing reasons, M2 LoanCo respectfully requests that the Court deny the Motion, grant M2 LoanCo's Motion to Dismiss, and grant M2 LoanCo such other and further relief as to which it may be entitled.

[*Remainder of page intentionally left blank*]

Dated: August 21, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true and correct copy of the foregoing document was served upon the counsel and parties of record, electronically through the Bankruptcy Court's Electronic Case Filing System on those parties that have consented to such service on the 21st day of August, 2023. The undersigned attorney further certifies that a true and correct copy of the foregoing was served on the Plaintiff by first class U.S. mail on the 21st day of August, 2023.

/s/Kristian W. Gluck
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