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Supplemental Order on Motion for Leave to Assert
Defendant McDiapers, Inc.'s Omitted
Counterclaim (United Community
Bank_McDiapers)

John J. Goger
Fulton County Superior Court

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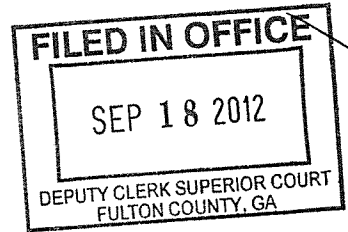
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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA



UNITED COMMUNITY BANK,)
)
Plaintiff,)
)
v.)
)
MCDIAPERS, INC., RICHARD J. WIELER,)
GAEL COAKLEY, JR., and COLLIN)
BROWN, III,)
)
Defendants.)
)

Civil Action File No.
2011CV207946

COPY

**SUPPLEMENTAL ORDER ON MOTION FOR LEAVE TO ASSERT DEFENDANT
MCDIAPERS, INC'S OMITTED COUNTERCLAIM**

This matter is before the Court on Defendant McDiapers, Inc.'s Motion for Leave to Assert Omitted Counterclaim. On August 14, 2012, this Court entered the "Order on Motion for Leave to Assert Defendant McDiapers, Inc.'s Omitted Counterclaim" (the "Order"), which directed the parties to submit further briefing on the scope of a waiver provision in a promissory note that, according to Plaintiff, prevented Defendant from asserting the proposed counterclaims at the subject of the instant motion. Upon consideration of the supplemental briefs, the motion and initial briefs submitted therewith and the record of the case, the Court finds as follows.

Defendant McDiapers, Inc. ("McDiapers") seeks leave of Court to assert counterclaims against Plaintiff United Community Bank ("UCB") for 1) Breach of Trust; 2) Negligent Trust Administration; 3) Negligent Maintenance of Collateral (the Ex-Im Insurance Policy); 4) Negligent Administration of Collateral (the Lockbox Account); 5) Breach of Contract; 6) Conversion; 7) Equitable Accounting; and 8) Treble Damages/Attorneys' Fees under RICO.

“When a pleader fails to set up a counterclaim through oversight, inadvertence or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment.” O.C.G.A. § 9-11-13(f). “When justice requires” the trial court should exercise its discretion to permit the late counterclaim by freely giving leave to amend to assert such claim. The courts should be very liberal in allowing amendments to assert compulsory counterclaims where no prejudice would result. See Kitchens v. Lowe, 139 Ga. App. 526 (1976); Blount v. Kicklighter, 125 Ga. App. 159 (1971).

In the Order, the Court held that “it is in the interests of justice to allow McDiapers to assert the counterclaims at issue, which, if true, set forth wrongs committed by UCB for which McDiapers may deserve recourse.” However, the Court requested that the parties provide supplemental briefs addressing Plaintiff UCB’s argument that it would be prejudiced by the addition of counterclaims, which UCB argued would be futile based on a waiver contained in a promissory note issued by McDiapers.

On or before August 29, 2012, the parties submitted supplemental briefs, as requested. UCB contends that the following waiver found in the promissory note prevents McDiapers from asserting claims for impairment of collateral: “All such parties...agree that Lender may ...release any...collateral; or impair, fail to realize upon or perfect Lender’s security interest in the collateral.”

UCB argues that Georgia appellate courts draw no distinction between a waiver that permits a secured party to impair a security interest and a waiver that authorizes a secured party to impair collateral, itself.

In contrast, McDiapers argues that the language of the waiver is ambiguous, but even if it were construed to mean that it waived claims based on UCB’s conduct that impaired collateral

(as opposed to a *security interest* in collateral), this would only impact its ability to bring Count Three—Negligent Maintenance of Collateral with respect to the Ex-Im Bank Policy. McDiapers further objects to the Court’s application of a futility test at this stage, when the Court is considering a defendant’s right to assert omitted counterclaims, because it is unsupported by Georgia law and violates Georgia’s policy behind liberal admittance of omitted compulsory counterclaims.

For the reasons set forth below, the Court hereby **GRANTS** McDiapers’ motion. The promissory note, which contains the waiver at issue, includes a paragraph called “COLLATERAL” that provides: “Borrower acknowledges this Note is secured by UCC File #44200803005 Filed September 29, 2008, on enhanced assignment of policy proceeds of Export-Import Bank of the United States Small Business Multibuyer Export Credit Insurance Policy # ENB25347.”

Regardless of whether the waiver in the promissory note can be interpreted in the manner advanced by UCB to prevent McDiapers from asserting claims based on impairment of collateral, the Court finds that it would have to go outside the Amended Complaint and the exhibits thereto to determine the nature of the collateral subject to the waiver.¹

The cases cited by UCB in support of the futility argument do not clearly support the imposition of this test for the assertion of a counterclaim; neither do they suggest that it would be proper for the Court to conduct an evidentiary analysis at this stage. See Bush v. Bank of N.Y. Mellon, 313 Ga. App. 84 (2011) (Court of Appeals, in a footnote, reversed the trial court’s denial of motion to add a new defendant because it was futile, holding that such a determination was

¹ The financing statement referenced in the promissory note is not attached to either the Complaint or the Amended Complaint.


premature in light of the fact that the plaintiff should have been given permission to re-plead); Interlochen Estates, Inc. v. Bank of Atlanta, 206 Ga. 570 (1950) (Court of Appeals held that an amendment to a complaint was futile because “there is nothing left to amend” after the court granted a demurrer on the merits in favor of a defendant); Thrift Brothers v. Baker, 144 Ga. 508 (1916) (Court of Appeals held that it would be futile to allow a plaintiff to amend its complaint to add a new party plaintiff because neither party had standing to bring the suit).

Moreover, of the federal courts that apply a futility test, it is not clear to the Court that a clear majority of those courts delve into an evidentiary analysis before allowing a party to amend a pleading, especially while discovery is still open. See PIC, Inc. v. Prescon Corp., 77 F.R.D. 678 (D. Del. 1977) (when an amendment to a counterclaim was proposed early in the litigation and presented a claim not palpably insufficient without close consideration, it would be inappropriate to deny leave to amend on the ground that the amendment was legally insufficient); see also Sound of Music Co. v. Minnesota Min. & Mfg. Co., 477 F.3d 910 (7th Cir. 2007) (district court did not abuse its discretion in denying motion to amend the complaint after the close of discovery to state a new claim, in light of absence of evidence to support the claim, such that the claim would not have survived summary judgment); Rose v. Hartford Underwriters Ins. Co., 203 F.3d 417 (6th Cir. 2000) (a district court abused its discretion in denying a motion to amend the complaint, even if the claim would not have survived summary judgment, because the test for futility does not depend on whether the proposed amendment could potentially be dismissed on summary judgment but whether it could withstand a Rule 12(b)(6) motion to dismiss).

Accordingly, the Court declines to exercise its discretion to apply a futility test that is not clearly supported by Georgia law and would require the Court to go beyond the pleadings into

the consideration of evidence more akin to a summary judgment analysis. Therefore, McDiapers is authorized to file “Defendant McDiapers, Inc.’s Counterclaim against United Community Bank” in the form attached as Exhibit A to its motion.

SO ORDERED this 17 day of September, 2012.


 JOHN J. GOGER, JUDGE
 Superior Court of Fulton County
 Atlanta Judicial Circuit

Copies to:

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