

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

IN RE:	§	
	§	
ART WILLIAMSBURG, INC.,	§	Case No. 03-43909-BTR
	§	(Chapter 11)
Debtor.	§	
<hr style="width: 45%; margin-left: 0;"/>		
AMERICAN REALTY TRUST, INC.,	§	
ET AL.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	Adv. No. 03-4256
	§	
SUNSET MANAGEMENT, L.L.C.,	§	
ET AL.,	§	
	§	
Defendants,	§	
	§	

ORDER GRANTING SUNSET'S MOTION FOR LEAVE TO AMEND

Sunset Management, L.L.C. ("Sunset") has claimed that its co-defendant, Commonwealth Title of Dallas, Inc. ("Commonwealth") is liable to it for breach of contract and breach of fiduciary duty. This matter is before the Court on Sunset's request for leave to amend its answer to the "Plaintiffs' and Intervenor's Sixth Amended Complaint" (the "Sixth Amended Complaint") for the purpose of adding its cross-claims against Commonwealth (the "Motion to Amend"). American Realty Investors, Inc. ("ARI"), one of the intervenors, opposes Sunset's Motion to Amend. Additionally, after Sunset filed a reply to ARI's opposition in which it pointed out to the Court that Commonwealth had not opposed its Motion to Amend, Commonwealth filed an objection to Sunset's Motion to Amend.

ARI and Commonwealth raise the same arguments in opposition to Sunset's Motion to Amend. Among other things, they point out that Sunset's answer to the Sixth Amended Complaint, which replaces and supercedes Sunset's answers to prior complaints, does not include any cross-claims against Commonwealth. Thus, they argue that Sunset has deliberately and intentionally dismissed the cross-claims that Sunset had asserted against Commonwealth in its prior answers to the plaintiffs' and intervenors' complaint, as amended. *See* FED. R. CIV. P. 41(a); FED. R. BANKR. P. 7041. ARI and Commonwealth also argue that an amendment to include the omitted cross-claims against Commonwealth would be futile, since the cross-claims are without merit – thereby attempting to revive arguments previously rejected by this Court in its prior order regarding Commonwealth's request for summary judgment.

Federal Rule of Bankruptcy Procedure 7015 states that Federal Rule of Civil Procedure 15 applies in adversary proceedings. Federal Rule 15(a) states, in pertinent part:

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 20 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; and leave shall be freely given when justice so requires.

See FED. R. CIV. P. 15(a). *See also* FED. R. CIV. P. 13(g) (permitting cross-claims); *and see, e.g., State Teachers Retirement Bd. v. Fluor Corp.*, 589 F.Supp. 1268, 1269-70 (D.C. N.Y. 1984) (applying Federal Rule 15(a) to determination of whether to grant leave to add a cross-claim).

In discussing a district court's discretion to deny a litigant leave to amend under Federal Rule 15(a), the Fifth Circuit has concluded that this “discretion is limited because

[Federal] Rule 15 evinces a bias in favor of granting leave to amend.” *S. Constructors Group, Inc. v. Dynalectric Co.*, 2 F.3d 606, 611 (5th Cir. 1993); *Little v. Liquid Air Corp.*, 952 F.2d 841, 846 (5th Cir.1992). However, the Fifth Circuit has also stated that leave to amend under Federal Rule 15 is by no means automatic. *S. Constructors*, 2 F.3d at 612. For example, the Fifth Circuit has upheld the denial of leave to amend when the moving party engaged in undue delay, *Little*, 952 F.2d at 846, or attempted to present theories of recovery *seriatim* to the district court. *S. Constructors*, 2 F.3d at 612. Grounds for the denial of a party’s request for leave to amend also include bad faith, dilatory motive, repeated failure to cure deficiencies through prior amendments, undue prejudice to the opposing party by virtue of allowance of the amendment, or futility of the amendment. *See Foman v. Davis*, 371 U.S. 178, 182 (1962).

Here, Sunset’s cross-claims against Commonwealth are not new to this case. The cross-claims were included in Sunset’s answer to the “Plaintiffs’ and Intervenor’s Fifth Amended Complaint,” among other things. Sunset has never expressed a desire or intent to drop its claims against Commonwealth. To the contrary, even after Sunset filed its answer to the Sixth Amended Complaint, counsel for Sunset stated at hearings before this Court that Sunset was asserting cross-claims against Commonwealth. Sunset’s omission of the cross-claims from its answer to the Sixth Amended Complaint appears to have been inadvertent. As such, the dismissal of the cross-claims against Commonwealth — as ARI and Commonwealth seem to urge — would be unduly rigid. Sunset promptly filed the Motion to Amend when it realized that Commonwealth was taking the position that Sunset had dismissed or “non-suited” the cross-claims against Commonwealth. Moreover, the amendment of Sunset’s answer to the Sixth Amended Complaint to

include the omitted cross-claims against Commonwealth will not delay trial or unduly prejudice the parties to this litigation.

For the foregoing reasons, the Court finds good cause for granting Sunset's Motion to Amend. Accordingly, it is

ORDERED that the Motion to Amend shall be, and it is hereby, **GRANTED**, and that Sunset shall have ten (10) days from the entry of this Order to amend its answer to the Sixth Amended Complaint to include the cross-claims against Commonwealth.

Signed on 7/11/2006

Brenda T. Rhoades MD
HONORABLE BRENDA T. RHOADES,
UNITED STATES BANKRUPTCY JUDGE