

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT COVINGTON
CIVIL ACTION NO. 14-125-WOB-JGW**

UNITED STATES OF AMERICA

PLAINTIFF

V.

\$11,000.00 IN UNITED STATES CURRENCY

DEFENDANT

MEMORANDUM ORDER

Pending is claimant Charles Clarke's motion to amend answer. Doc. 24. After considering the record and applicable law, the Court concludes the motion to amend will be granted.¹

Factual and Procedural History

This forfeiture action was filed by the United State in July 2014. Doc. 1. The complaint asserts in relevant part that the currency at issue "was furnished or intended to be furnished in exchange for controlled substances, was proceeds traceable to such an exchange, or was intended to be used to facilitate the illegal sale of narcotics and is, therefore, subject to forfeiture" *Id.* at p. 2. Clarke filed a pro se answer in September 2014, the core of which is a denial that the currency in question "was furnished or intended to be furnished in exchange for controlled substances, was proceeds traceable to such an exchange, or was intended to be used to facilitate the illegal sale of narcotics." Doc. 9, p. 2.

The record reflects no action thereafter having been taken in the case until December 2014, when the Court ordered the parties to file a status report. Doc. 10. The United States' status report indicated only that it was in the process of serving discovery requests upon

¹ The Court's order setting a briefing schedule afforded claimant a brief amount of time to file a reply. However, the issues and the law are sufficiently clear without claimant having to submit a reply.

claimant. Doc. 11. The Court then issued an initial scheduling order. Doc. 13. About a month later Court-facilitated settlement negotiations were conducted, during which discovery was ordered stayed. Doc. 16.

In late February 2015, after it had become apparent that no settlement would be reached, the Court issued a new scheduling order requiring discovery to be concluded by May 26, 2015. Doc. 18. In March 2015, claimant retained counsel (doc. 21) and the Court agreed to extend briefly the discovery deadline to June 1, 2015. Doc. 23. None of the scheduling orders contained an explicit deadline for seeking to amend the pleadings.

In late April 2015, claimant filed the pending motion to amend his original pro se answer. Doc. 24. The motion states that an amended answer is necessary to “cure deficiencies in his [claimant’s] *pro se* answer, clarify his responses to the allegations in the Complaint, and raise affirmative defenses under the Civil Asset Forfeiture Reform Act and the U.S. Constitution.” Doc. 24, p. 2. Review of the tendered amended complaint shows that claimant wishes to assert several new affirmative defenses, including, among others, allegations that the complaint was not filed timely and that forfeiture would be an unconstitutional violation of claimant’s right to due process. Doc. 24-3, p. 5-6.

The United States’ response in opposition to the motion to amend is only three paragraphs long, and it mainly asserts that the motion to amend was not timely filed. Doc. 26. The response also tangentially asserts in passing that defendant’s discovery responses were tardy and incomplete and vaguely opines at its end that “the proposed amended answer provides no remedy to the Claimant that is no [sic] already available.” *Id.* at p. 2.

Analysis

Rule A(2) of the Supplemental Rules for Admiralty or Maritime Claims and Asset

Forfeiture Actions provides in relevant part that the Federal Rules of Civil Procedure generally apply to forfeiture actions. Fed.R.Civ.P. 15(a)(2) provides that a court should “freely give leave” to amend “when justice so requires.” Delay alone is not a complete bar to granting leave to amend, absent prejudice to the opposing party. *Duggins v. Steak ‘N Shake, Inc.*, 195 F.3d 828, 834 (6th Cir. 1999). However, “[w]hen amendment is sought at a late stage in the litigation, there is an increased burden to show justification for failing to move earlier.” *Wade v. Knoxville Utilities Bd.*, 259 F.3d 452, 459 (6th Cir. 2001). “Although Rule 15(a) indicates that leave to amend shall be freely granted, a party must act with due diligence if it intends to take advantage of the Rule’s liberality.” *United States v. Midwest Suspension and Brake*, 49 F.3d 1197, 1202 (6th Cir. 1995). Among the factors a court should consider when ruling on a motion for leave to amend a complaint is whether the opposing party would suffer prejudice if leave to amend is granted. *Leary v. Daeschner*, 349 F.3d 888, 909 (6th Cir. 2003).²

Claimant filed the motion to amend only about a month after retaining counsel, and claimant retained counsel only about a month after the settlement talks ceased. The Court concludes, therefore, that the motion was brought with reasonable due diligence, especially as discovery has not yet closed and no dispositive motions have been filed. In addition, the timing of the motion to amend is not, standing alone, a reason to deny it—especially considering the

² Because there was no set deadline for seeking leave to amend the pleadings, the Court will analyze the motion under Rule 15. However, the result would be the same if the motion were to be analyzed under Rule 16. “Once the scheduling order’s deadline passes, a plaintiff first must show good cause under Rule 16(b) for failure earlier to seek leave to amend before a court will consider whether amendment is proper under Rule 15(a).” *Leary*, 349 F.3d at 909. “[I]n addition to Rule 16’s explicit ‘good cause’ requirement, we hold that a determination of the potential prejudice to the nonmovant also is required when a district court decides whether or not to amend a scheduling order.” *Id.* “The primary measure of Rule 16’s ‘good cause’ standard is the moving party’s diligence in attempting to meet the case management order’s requirements.” *Inge v. Rock Financial Corp.*, 281 F.3d 613, 625 (6th Cir. 2002) (quotation marks and citation omitted). Claimant sought to amend his answer only about one month after retaining counsel, and retained counsel entered an appearance only about one month after settlement negotiations ended. The Court therefore concludes that claimant has shown good cause for not seeking to amend earlier. Moreover, other than the general delay which is an inevitable result of any pleading being amended, the United States has demonstrated no specific prejudice.

fact that the United States has articulated no specific prejudice it would suffer if the motion were to be granted.

The correlation between claimant's discovery responses and the motion for leave to amend is unclear. If the United States is dissatisfied with claimant's discovery responses, it should bring the matter to the Court's attention separately (after complying with LR 37.1's requirements).

Finally, the United States' seeming assertion to the contrary notwithstanding, the explicit assertion of affirmative defenses in the tendered amended complaint also helps clarify claimant's position and protects his ability to assert fully his claim to be the legal owner of the currency at issue. *See, e.g., Old Line Life Ins. Co. of America v. Garcia*, 418 F.3d 546, 550 (6th Cir. 2005) ("As a general rule, failure to plead an affirmative defense results in a waiver of that defense."). In short, given the recent appearance of counsel and the fact that the motion was filed shortly thereafter and before the expiration of the discovery deadline, leave to amend will be granted. *See, e.g., Daniels v. Loizzo*, 174 F.R.D. 295, 298 (S.D.N.Y. 1997) ("Although Plaintiff waited nine years to submit the proposed amendments, the delay, by itself, provides no basis to deny Plaintiff's motion to amend. Aside from Defendants' passing reference to undue prejudice, they have offered no evidence of prejudice or bad faith to overcome the liberal amendment policy of Rule 15(a). In contrast, Plaintiff has offered a reasonable explanation for the delay: his limited knowledge of the law as a *pro se* litigant, the three-year suspension of his case pending the appointment of pro bono counsel, and Former Counsel's woefully inadequate representation. Thus, the Court refuses to deny Plaintiff leave to amend based upon Defendants' bare allegations of delay.") (citations omitted).

Granting the motion to amend will likely result in the parties engaging in a limited

amount of additional discovery. Therefore, on its own motion, the Court will extend discovery by one month and will concomitantly extend the dispositive motion deadline.

Accordingly,

IT IS ORDERED:

1. Claimant's motion for leave to amend his answer (doc. 24) is **granted** and the tendered amended answer (doc. 24-3) shall be deemed filed as of the entry of this memorandum order; and

2. Discovery shall be completed by July 1, 2015, with joint or separate status reports to be filed that same date; and

3. Dispositive motions shall be filed by July 31, 2015.

This the 5th day of May, 2015.



Signed By:

J. Gregory Wehrman *J. G. W.*

United States Magistrate Judge