UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT
HARTFORD DIVISION

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| In re: | : | Chapter 7 |
| SAVE HOME ENERGY, INC. | : | Case No. 14-20301 (JJT) |
| Debtor | : | |
| BONNIE C. MANGAN, TRUSTEE, Plaintiff | : | Adversary Pro. No. 15-02048 (JJT) |
| V. | : | |
| ROBERT K. MASON AND ROSEMARY F. MASON, Defendants | : | RE: ECF Nos. 31, 35, 40 |

**RULING ON TRUSTEE'S MOTION TO WITHDRAW COUNT TWO**

I. INTRODUCTION

The matters pending before the Court are a Motion for Leave to Withdraw Without Prejudice Count Two of the Trustee's Amended Complaint ("Motion to Withdraw", ECF No. 35) filed by the Chapter 7 Trustee ("Trustee"), and the related Objection (ECF No. 40) filed by Robert K. Mason and Rosemary F. Mason ("Defendants"). The First Count of the Trustee's Amended Complaint seeks to avoid a number of alleged preferential transfers by the Debtor, Save Home Energy, Inc., to the Defendants. Count Two seeks to subordinate Robert K. Mason's Claim No. 2-1. The Motion to Withdraw was filed following this Court's ruling on the Defendants' Motion for Summary Judgment (ECF No. 32) wherein the Court, confounded by the Trustee's unilateral deferral of a response to the Defendants' argument on Count Two, reserved its judgment and invited the Trustee to file appropriate responsive papers, request permission to withdraw the subordination claim, or present a stipulation. The Trustee responded by filing the instant motion and the Defendants objected, claiming prejudice and delay. Counsel for the respective parties were fully

heard and examined by the Court at a hearing on May 4, 2017.

For the reasons set forth herein, the Trustee's Motion to Withdraw is denied.

## II. LEGAL STANDARD

### A. **Motions to Amend**

Fed. R. Civ. P. 15, applicable to bankruptcy proceedings under Federal Rule of Bankruptcy Procedure 7015, dictates that courts should grant motions to amend "when justice so requires." *See Foman v. Davis*, 371 U.S. 178, 182 (1962). The decision to grant or deny a motion to amend rests within the "sound judicial discretion of the trial court." *Adelphia Recovery Trust v. FPL Grp., Inc. (In re Adelphia Commc'ns Corp.),* 452 B.R. 484, 489 (Bankr. S.D.N.Y. 2011) (citation omitted). A court may "deny a motion to amend a pleading: (i) if there has been undue delay, bad faith or a dilatory motive on the part of the movant; (ii) if there has been repeated failure to cure a deficient pleading; (iii) if there would be undue prejudice to the opposing party; or (iv) if the amendment would be futile." *Tronox Inc. v. Kerr McGee Corp. (In re Tronox Inc.*), 503 B.R. 239, 340 (Bankr. S.D.N.Y. 2013). "Mere delay… absent a showing of bad faith or undue prejudice, does not provide a basis for a district court to deny the right to amend." *State Teachers Ret. Bd. v. Fluor Corp.*, 654 F.2d 843, 856 (2d Cir. 1981); *see also Middle Atl. Utils. Co. v. S.M W Dev. Corp.*, 392 F.2d 380, 384-85 (2d Cir. 1968).

"Amendment may be prejudicial when, among other things, it would require the opponent to expend significant additional resources to conduct discovery and prepare for trial or significantly delay the resolution of the dispute." *AEP Energy Servs. Gas Holding Co. v. Bank of Am., N.A.*, 626 F.3d 699, 725-26 (2d Cir. 2010) (internal quotations and citation omitted).

### B. **Dismissal Without Prejudice**

Pursuant to Fed. R. Civ. P. 41(a)(2), made applicable to these proceedings by Federal Rule of Bankruptcy Procedure 7041, the dismissal of a complaint, without prejudice, may only be achieved

by an order of this Court once an answer or a motion for summary judgment has been filed.

When addressing a voluntary motion to dismiss without the defendant's consent, courts consider: "(1) the plaintiff's diligence in bringing the motion; (2) any undue vexatiousness on plaintiff's part; (3) the extent to which the suit has progressed, including the defendant's effort and expense in preparation for trial; (4) the duplicative expense of relitigation; and (5) and the adequacy of plaintiff's explanation for the need to dismiss." *Zagano v. Fordham Univ.*, 900 F.2d 12, 14 (2d Cir. 1990). "These factors are not necessarily exhaustive and no one of them, singly or in combination with another, is dispositive." *Kwan v. Schlein*, 634 F.3d 224, 230 (2d Cir. 2011). "Although voluntary dismissal without prejudice is not a matter of right, the presumption in this circuit is that a court should grant a dismissal pursuant to Rule 41(a)(2) absent a showing that defendants will suffer substantial prejudice as a result." *Shaw Family Archives, Ltd. v. CMG Worldwide, Inc.*, 2008 WL 4127549, at *5 (S.D.N.Y.,2008) (citing *Banco Central de Paraguay v. Paraguay Humanitarian Foundation, Inc.*, 2006 WL 3456521, at *7 (S.D.N.Y. Nov. 29, 2006)).

**C. <u>Failure to Properly Support or Address a Fact on Summary Judgment</u>**

Fed. R. Civ. P. 56(e), made applicable to these proceedings by Federal Rule of Bankruptcy Procedure 7056 provides in pertinent part:

> If a party fails to property support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the Court may:
>
> 1) give an opportunity to properly support or address the fact;
> 2) consider the fact undisputed for purposes of the motion;
> 3) grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it; or
> 4) issue any other appropriate order.

III. DISCUSSION

The conundrum at issue here arises from the Trustee's failure to properly address the facts and legal arguments presented in the Defendant's Motion for Summary Judgment regarding Count Two. The Trustee ostensibly contemplated that as a matter of efficiency, judicial economy and

logical sequencing of its prosecution that such a contest would proceed at a later date, related to her pending objection to the Defendants' proof of claim ("Objection to Claim 2", ECF No. 71) in the bankruptcy case. That perspective was not adequately, properly or squarely addressed prior to the summary judgment motion, nor in the response thereto. While such inaction might appear lacking in diligence, the Court believes, based on the arguments presented to it, that there may have been an earnest misunderstanding of the posture of the proceedings and a belief that addressing Count Two before a disposition on the Objection to Claim 2 would be premature, thus occasioning the Trustee's decision to defer a summary judgment argument on Count Two.

The Court weighs in its consideration of this Motion to Withdraw that the prejudice to the Defendants is nominal because the arguments set forth in their Motion for Summary Judgment, as well as any discovery undertaken therein, will not be wasted, as these matters can and will proceed in due course. While the Court is not pleased with the Trustee's timing or her failure to adequately address Count Two in her response to the Defendants' Motion for Summary Judgment, the Court has determined that, whether assessing the parties' arguments under Fed. R. Civ. P. 15, 41 or 56(e):

1) there is no undue prejudice to the Defendants,
2) the absence of a response was not in bad faith, and
3) the entry of summary judgment in favor of the Defendants is unwarranted, where as a matter of efficiency, logic and fundamental fairness, the adjudication of Count Two should more properly be joined with further proceedings on the Objection to Claim 2.

Addressing equitable subordination claims at this time and in this procedural posture is manifestly premature, and the issue is not yet ripe for adjudication. Count Two should have been filed and maintained as a separate adversary proceeding related to the Objection to Claim 2. The Court weighs heavily that withdrawal of Count Two here would likely achieve that effect, *see Catanzo v. Wing*, 277 F.3d 99, 109 (2d Cir. 2000) (allowing withdrawal where the moving's party's

explanation is to streamline litigation), however, the same result can be achieved otherwise. Rather than allow for a withdrawal of Count Two, and the refiling of a new adversary proceeding advancing a subordination claim, the Court will defer consideration of the merits of Count Two and proceed as delineated below, pursuant to its authority under Fed. R. Civ. P. 56(e)(4). Such a remedy best serves fairness, judicial efficiency and provides an opportunity to address the merits of the Trustee's claims in the appropriate procedural context.

Accordingly, the Motion to Withdraw is denied. Summary Judgment on Count Two of the Amended Complaint is, for the reasons stated herein, denied without prejudice. The Court directs the scheduling of a status conference regarding further proceedings on these matters, including the setting of a combined trial on Count Two with the Objection to Claim 2 under the terms of a Final Pretrial Order. Consistent with this Ruling, a separate supplemental order will enter forthwith regarding the denial of Summary Judgment on Count Two of the Amended Complaint.

Dated at Hartford, Connecticut this 18th day of May 2017.

James J. Tancredi
United States Bankruptcy Judge
District of Connecticut