UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEW MEXICO

In re:

MANUELA Q. FRANCO, Case No. 03-13492 tr7

Debtor.

Consolidated with:

In re:

MANUELA Q. FRANCO, Case No. 13-12941 tr7

Debtor.

HIPOLITO Q. FRANCO and
CARLA FRANCO,

Plaintiffs,

v. Adv. No. 16-1074 t

MANUELA Q. FRANCO,
HV FRANCO MINERALS,
ROBERT DENNIS HOUGLAND,
CELIA FRANCO HOUGLAND, and
CLARKE C. COLL,

Defendants.

OPINION

Before the Court is the plaintiff Carla Franco's motion for leave to amend her complaint to add a count for slander of title and to vacate an order dismissing a similar claim. Having reviewed the pleadings in this removed adversary proceeding, the briefs, and the arguments of counsel, the Court concludes that the motion is not well taken and should be denied.

I. BACKGROUND[1]

Debtor Manuela Franco is a 90-year old widow. Her husband Epolito Franco died in 1997 after suffering a series of strokes. Debtor and Epolito had two children, Celia Hougland[2] and Hipolito Franco.[3]

In 1969, Debtor and Epolito Franco acquired 240 acres in Eddy County, New Mexico, including a half interest in oil, gas, and other minerals on and under the land. On October 8, 1996, they conveyed 122 acres of the land to Hipolito Franco, as his sole and separate property (the "Property"). The deed, which was signed by Epolito Franco and Debtor (the "Original Deed"), did not reserve any oil, gas, or other minerals associated with the Property (the "Disputed Mineral Rights").

The understanding of the parties in October 1996 is disputed. Carla Franco testified that she and Hipolito paid for the Disputed Mineral Rights and always intended to acquire and keep them. Debtor, on the other hand, testified that she and Epolito conveyed the Property so they could obtain medical care for Epolito, but that they had always intended to bequeath their mineral rights, including the Disputed Mineral Rights, to their children in equal shares. Celia Hougland testified in a deposition that Hipolito confirmed Debtor's understanding, i.e., that Hipolito was expected to

[1] The Court takes judicial notice of the docket in the main bankruptcy case and the associated adversary proceedings. In addition, some of the findings are from the Court's opinion entered July 28, 2017, in the main bankruptcy case, doc. 54. Finally, several of the undisputed facts are taken from the pending summary judgment motion in adv. Pro. 17-1001.

[2] Née Celia Franco, now married to Robert Hougland.

[3] Hipolito was married to Carla Franco. He died in April 2015. Carla Franco is now the sole plaintiff in the adversary proceeding, acting individually and as the personal representative of Hipolito Franco's probate estate.

reconvey the Property and Disputed Mineral Rights to his parents once Epolito got the health care he needed.[4]

In 1998, Hipolito and Carla Franco applied for a loan from Western Commerce Bank. The loan was to be secured by a mortgage on the Property. On July 23, 1998, Guaranty Title Company issued a commitment to insure the bank's first priority mortgage on the Property. The title commitment described the Property as "fee simple in the surface estate only." The metes and bounds description of the Property differed to some extent from that in the Original Deed.[5] More importantly, the title commitment's legal description begins with "The surface estate only of . . . ." One of the requirements for issuing a final policy of title insurance was:

> Record a correction warranty deed from Manuela Q. Franco, widow of Epolito V. Franco (record his death certificate) to Hipolito Q. Franco, a married man dealing in his sole and separate property.

One of the exceptions to insured title was:

> 11. Title to all of the water, oil, gas and other minerals and mineral substances, together with all right, privileges and easements appurtenant thereto.

On August 7, 1998, Debtor signed a warranty deed in favor of Hipolito Franco (the "Correction Deed"). The deed states on page one that it is "given to correct legal description on [the 1996 warranty deed]." The legal description attached to the Correction Deed is identical to the description in the title commitment, including the "surface estate only" language. Hipolito Franco did not sign the deed.

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[4] Deposition of Celia Hougland, p. 23-24, taken March 23, 2015, in the State Court Action. *See* Adv. Pro. No. 17-1001, doc. 57-3.

[5] Some survey work may have been done to prepare the legal description in the title commitment. One of the calls in the title commitment legal description is longer by 47.02 feet than the analogous call in the 1996 deed, while another call is shorter by the same amount.

On August 7, 1998, Hipolito and Carla Franco granted Western Commerce Bank a mortgage on the Property (the "Mortgage"). The Mortgage uses the same legal description as the Correction Deed and the title commitment (including the "surface estate only" language). The Mortgage secures a promissory note payable to Western Commerce Bank, with a maximum indebtedness of $99,000. The Correction Deed and Mortgage were recorded one minute apart, on August 13, 1998.

Debtor filed a chapter 7 case on April 30, 2003, and a second chapter 7 case on September 9, 2013. She received a discharge in each case. The latter case was closed on December 30, 2013. No mineral rights were listed in the bankruptcy schedules in either case.

II. PROCEDURAL BACKGROUND

On October 8, 2014, Hipolito and Carla Franco filed a complaint in New Mexico's Fifth Judicial District Court, commencing *Hipolito Q. Franco and Carla Franco v. Manuela Q. Franco, HV Franco Minerals, Robert D. Hougland, and Celia F. Hougland,* cause no. D-503-CV-2014-00865 (the "State Court Action"). The complaint asserted counts to quiet title to the Disputed Mineral Rights; for damages for disparagement of title;[6] and for injunctive relief.

On November 12, 2014, Defendants answered the complaint. On the same date, they also filed a motion to dismiss the disparagement of title and injunction counts. Plaintiff's responded on December 1, 2014, and defendants filed a supporting reply on December 8, 2014.

[6] There is no "disparagement of title" cause of action under New Mexico law. The state court properly construed the claim as one for slander of title. The misnomer was corrected in Plaintiff's proposed amended complaint. Strangely, however, the counterclaim asserted by Carla Franco in adv. Pro. 17-1001 is again titled "disparagement of title."

The state court held a hearing on the motion to dismiss on March 23, 2015. On April 5, 2015, the state court entered an order dismissing the disparagement of title count (the "Dismissal Order").

Over a year later, on May 4, 2016, plaintiff Carla Franco filed a Motion for Leave to Amend Pleadings and Motion to Vacate Order of Dismissal (as amended, the "Motion to Amend and Vacate"). In the motion Plaintiff alleges:

> Since October 8, 2014, the original filing date, and the date of this motion, Plaintiffs have become aware of additional information that is material and relevant to their claim for disparagement of title, such that Plaintiffs are now able to plead specific acts reflecting malice on the part of Defendants and to plead special damages with the required degree of particularity.

Defendants responded to the motion on May 19, 2016. Plaintiff did not file a reply in support.

Defendants filed a notice of bankruptcy and automatic stay on August 30, 2016.[7] On December 23, 2016, Carla Franco removed the State Court Action to this Court, commencing this adversary proceeding.

On February 21, 2017, Plaintiffs filed in the main bankruptcy case a motion for *nunc pro tunc* relief from the automatic stay, or for a ruling that the stay did not apply, to the state court's entry of a quiet title judgment in the State Court Action. After a trial held in Roswell, New Mexico on April 13, 2017, the Court on July 28, 2017 entered an order denying the stay relief motion and ruling that the ownership of the Disputed Mineral Rights was a matter of bona fide dispute.

On March 20, 2018, the Court held a hearing on the Motion to Amend and Vacate and ordered Plaintiff to amend the motion and attach the proposed amended complaint. Plaintiff did so, Defendants timely responded, and Plaintiff timely replied.

[7] The bankruptcy cases were reopened in June 2016 (13-12941) and October 2016 (03-13492). Clarke Coll was appointed as the case trustee in both cases, which were consolidated in November 2016.

III. DISCUSSION

A. The Dismissal Order is Not a Final Order.

The rules of civil procedure[8] are somewhat unclear about the nature of the Dismissal Order. State Rule 41(b) provides:

> B. Involuntary Dismissal; Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this paragraph and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 1-019 NMRA, operates as an adjudication upon the merits.

Thus, a dismissal of a claim under State Rule 12(b)(6), which is an involuntary dismissal, operates as an adjudication upon the merits. That language might lead one to conclude that the Dismissal Order is a final order, which can be modified only pursuant to the strict requirements of State Rule 60(b). However, State Rule 54(b) requires a different conclusion:

> B. Judgment on Multiple Claims or Involving Multiple Parties. When an action presents more than one claim for relief--whether as a claim, counterclaim, crossclaim, or third-party claim--or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. *Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities*.

(italics added). The italicized language means that orders entered in cases such as this one, even claim dismissals, are not final unless they are so designated. *See, e.g., Perington Wholesale, Inc.*

[8] The issue before the Court is complicated somewhat because the proceeding originated in state court, where the state rules of civil procedure applied, and was then removed to this Court, where the federal rules apply. Fortunately, the state and federal rules at issue are nearly identical, so the result is the same under either. "State Rule" refers to the New Mexico Rules of Civil Procedure for the District Courts, while "Rule" refers to the Federal Rules of Civil Procedure, incorporated into the Federal Rules of Bankruptcy Procedure by the 7000 series.

v. Burger King Corp., 631 F.2d 1369, 1370, n. 2 (10th Cir. 1979) (in multi-party actions, unless the trial judge expressly directs entry of a final judgment on less than all the parties, an order granting a Rule 12(b)(6) motion does not become final until entry of judgment adjudicating all the claims); *Dooley v. United Technologies Corp.*, 152 F.R.D. 419, 424 (D.C. Cir. 1993) (same); *Green v. Kearny*, 739 S.E.2d 156, 161 (N.C. App. 2013) (same).

The Court may reconsider interlocutory orders at any time before making a final determination of the claims of all of the parties. *See, e.g., C & A Const. Co. v. DHC Dev.*, 501 Fed. Appx. 763, 779 (10th Cir. 2012) ("The district court should ... remain free to revisit its interlocutory conclusions, if necessary, at any time prior to entering final judgment."); *Pedroza v. Lomas Auto Mall, Inc.*, 258 F.R.D. 453 (D.N.M. 2009) ("[D]istrict courts generally remain free to reconsider their earlier interlocutory orders"); *Raytheon Constructors, Inc. v. ASARCO, Inc.*, 368 F.3d 1214, 1217 (10th Cir. 2003) (quoting the rule).

The standard for reviewing interlocutory orders is different than for final orders. *See, e.g., Estate of Jacoby v. Nancy Akbari-Shahmirzadi (In re Akbari-Shahmirzadi)*, 2013 WL 1099794 (Bankr. D.N.M. 2013) (discussing the different standards and citing cases). In general, Rules 59 and 60 apply to motions to reconsider final orders and judgments, while interlocutory orders may be modified in the Court's sound discretion. *Id.* at *4-5.

Whether to grant a motion to reconsider an interlocutory order is left to the Court's sound discretion. *See Elephant Butte Irrigation Dist. v. United States Dep't of Interior*, 538 F.3d 1299, 1306 (10th Cir. 2008) (under Rule 54(b), "'every order short of a final decree is subject to reopening at the discretion of the district judge'") (quoting *Price v. Philpot*, 420 F.3d 1158, 1167 n. 9 (10th Cir. 2005)); *see also Buckner v. United Parcel Service, Inc.*, 2011 WL 1134219, at *1 (E.D.N.C.) (court has wide discretion whether to set aside interlocutory orders); *Frank v. L.L. Bean*

Inc., 377 F. Supp. 2d 229, 231, n. 2 (D. Me. 2005) (wide discretion). Because the Dismissal Order is interlocutory, it is not necessarily a bar to granting a motion to amend, as it may be set aside in the discretion of the Court.

C. Standards for Ruling on Motions to Amend.

Under Rule 15(a)(2), 21 days after an answer has been filed, a plaintiff may amend her complaint only with the opposing party's written consent or leave of court. Leave to amend a pleading should be freely granted "when justice so requires." Rule 15(a)(2). *See also MTGLQ Investors, LP v. Wellington*, 2018 WL 3862740, at *2 (D.N.M.) (quoting the rule). It is within the Court's discretion to determine whether to grant such leave. *See Foman v. Davis*, 371 U.S. 179, 182 (1962); *see also Triplett v. LeFlore Cty., Okl.*, 712 F.2d 444, 446 (10th Cir. 1983) (whether to grant such leave is within the discretion of the trial court and will not be disturbed, absent an abuse of that discretion). The Supreme Court has held that trial courts may withhold leave to amend for reasons such as "'undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of [the] amendment.'" *U.S. ex rel. Ritchie v. Lockheed Martin Corp.*, 558 F.3d 1161, 1166 (10th Cir. 2009) (quoting *Foman v. Davis*).

1. Undue Delay. Rule 15(a) does not provide a time limit in which a party must apply to a court for leave to amend. However, "in keeping with the underlying purpose of Rule 15(a), which is to facilitate a determination of the action on its merits, courts have typically found that motions to amend should be made as soon as it becomes apparent that an amendment is necessary." Wright, Miller & Kane, 6 Fed. Prac. & Proc. Civ. § 1488, n. 12 and accompanying text.

In the Tenth Circuit, it is well settled that untimeliness alone is a "sufficient reason to deny leave to amend." *Frank v. U.S. W., Inc.*, 3 F.3d 1357, 1365 (10th Cir. 1993). The Tenth Circuit has

ruled that a district court acts within its discretion when it denies leave to amend because of "undue delay" or "untimeliness," even where no prejudice to the opposing party is shown. *First City Bank, N.A. v. Air Capitol Aircraft Sales, Inc.*, 820 F.2d 1127, 1133 (10th Cir. 1987). Untimeliness or delay by itself is a sufficient reason to deny leave to amend. *Id.*; *see also Woolsey v. Marion Labs., Inc.*, 934 F.2d 1452, 1462 (10th Cir. 1991) (court denied leave to amend based on untimeliness where appellant filed motion to amend 17 months after the filing of the original complaint); *Panis v. Mission Hills Bank, N.A.*, 60 F.3d 1486, 1495 (10th Cir. 1995) (untimeliness by itself can be a sufficient reason to deny leave to amend, particularly if no adequate explanation for delay is given); *Frank*, 3 F.3d at 1365–66 (10th Cir. 1993) (denial of leave to amend is appropriate "when the party filing the motion has no adequate explanation for the delay."); *Durham v. Xerox Corp.*, 18 F.3d 836, 840 (10th Cir. 1994) ("[U]nexplained delay alone justifies the district court's discretionary decision."); *Las Vegas Ice & Cold Storage Co. v. Far W. Bank*, 893 F.2d 1182, 1185 (10th Cir. 1990) (same).

Here, plaintiffs waited 13 months after their "disparagement of title" count was dismissed before seeking leave to file an amended complaint for slander of title. Plaintiffs argues that "since the original filing date, and the date of this motion, plaintiffs have become aware of additional information that is material and relevant to their claim for disparagement of title, such that Plaintiffs are now able to plead specific act reflecting malice on the part of Defendants and to plead special damages with the required degree of particularity." Yet, plaintiffs do not explain why it took them more than a year to discover the new information proving malice and special damages that is now presented to the Court, nor why the information was unavailable in 2014.

Courts have denied motions to amend where the party seeking leave to amend knew, or should have known, the facts upon which the proposed amendment was based but failed to

previously plead them. *See Childress v. Liberty Mutual Ins. Co.*, 2018 WL 2016858 at *2 (D.N.M.), adopted, 2018 WL 2303107 (D.N.M.) (denying motion to amend because plaintiff "already knew or should have known the facts upon which his proposed amendment is based but failed to plead them previously"); *Frank*, 3 F.3d at 1366 ("[w]here the party seeking amendment knows or should have known of the facts upon which the proposed amendment is based but fails to include them in the original complaint, the motion to amend is subject to denial") (citing *Las Vegas Ice*, 893 F.2d at 1185.

In the proposed amended complaint, Plaintiff alleges thirteen acts that allegedly show defendants' malice. All of the acts occurred before plaintiffs filed their original complaint in 2014. Many of the acts were alleged in the original complaint and can be seen from reviewing the title record. To the extent the alleged acts support a claim of malice, the original complaint could have supported such a claim.

2. Futility of amendment. Court may deny motions to amend as futile if the pleading as amended would be subject to dismissal. *Fields v. City of Tulsa*, 753 F.3d 1000, 1012 (10th Cir. 2014); *See also Burke v. New Mexico*, 2018 WL 3054674, at *3 (D.N.M.) (citing *Fields*); *Gonzalez v. Franco*, 163 F. Supp. 3d 1049 (D.N.M. 2016) (quoting *Beach v. Mut. Of Omaha Ins. Co.*, 229 F. Supp. 2d 1230, 1234 (D. Kan. 2002)). ("[A] court may choose to withhold leave to amend if the proposed amendment would be futile; that is, if it 'would not withstand a motion to dismiss or if it otherwise fails to state a claim.'").

In New Mexico, recovery "for the tort of slander of title may be had upon proof of special damages arising from the willful recording or publication of matter which is untrue and disparaging to the complainant's property rights in land, by one who acts with malice and without the privilege to do so." *Superior Const., Inc. v. Linnerooth*, 103 N.M. 716, 720 (S. Ct. 1986) (citing

Den-Gar Enters. v. Romero, 94 N.M. 425, 430 (Ct. App. 1980)). *See also Ortiz v. New Mexico Fed. Sav. And Loan Ass'n*, 2018 WL 4346160, at *7 (D.N.M.) (quoting *Linnerooth*). New Mexico has a four-year statute of limitations claim in slander of title actions. N.M.S.A. § 37-1-4.

"In actions . . . for injuries to . . . property, the cause of action shall not be deemed to have accrued until the . . . injury . . . shall have been discovered by the party aggrieved."[9] There are two possible dates after which plaintiffs were on notice of a slander of title claim. The first is on August 13, 1998, when plaintiffs closed on the loan from Western Commerce Bank. In the Mortgage plaintiffs signed, the Property was clearly described as "SURFACE ESTATE ONLY." In addition, the Correction Deed, filed immediately before the Mortgage, states that Hipolito Franco was receiving "SURFACE ESTATE ONLY." These facts indicate that plaintiffs first had actual notice of a slander of title claim on August 13, 1998.

The second date is January 22, 2001, when the State of New Mexico moved to name Hipolito Franco as a defendant in an unrelated water rights adjudication action, in substitution for Epolito Franco and Debtor. Attached to the substitution motion are copies of the Original Deed and the Correction Deed. The motion and attached deeds were mailed to Hipolito Franco at his home address on January 22, 2001. Nothing in the record suggests that Hipolito Franco did not receive them.

[9] N.M.S.A. § 37-1-7. While property owners are not required to be cognizant of the status of their title at all times, *see Brown v. Behles & Davis*, 135 N.M. 180, 184 (Ct. App. 2004), they have a duty of reasonable diligence. *Roscoe v. U.S. Life Title Ins. Co.*, 105 N.M. 589 (S. Ct. 1987) (statute of limitations is tolled until the right of action is discovered or until, by the exercise of ordinary diligence, it could have been discovered); *Albuquerque Nat'l Bank v. Albuquerque Ranch Estates*, 99 N.M. 95 (S. Ct. 1982) (exercise of reasonable diligence required); *Hardin v. Farris*, 87 N.M. 143 (Ct. App. 1974) (ordinary diligence required). Here, the only reasonable diligence required of Hipolito Franco was to read the Mortgage he signed, understand the nature of his mortgage loan, and/or read the Corrective Deed when it was mailed to him. Especially given the fact that the adverse claimant was his mother, that is not too much to ask.

The Tenth Circuit considers service by mail accomplished, "for purposes of Rule 5[b], when documents are placed in the hands of the United States Post Office or in a Post Office Box." *United States v. Clingman*, 288 F.3d 1183, 1185 (10th Cir. 2002) (citing *Theede v. United States Dep't of Labor*, 172 F.3d 1262, 1266 (10th Cir.1999).[10] Plaintiffs were put on notice of a competing claim to the Disputed Mineral Rights, and thus a possible slander of title claim, on January 22, 2001.

The four-year statute of limitations started to run by January 22, 2001, and expired January 22, 2005. Plaintiffs did not bring their slander/disparagement of title claim until more than nine years later. Plaintiff's slander of title claim is time barred, so granting the Motion to Amend and Vacate would be futile.

Another significant problem with Plaintiff's slander of title claim is that, since 1998, Manuela Franco has had (and the estate now has) a colorable claim to the Disputed Mineral Rights. *See, e.g., In re Franco*, 574 B.R. 730, 736 (Bankr. D.N.M. 2017) (ownership of the minerals is in bona fide dispute). While the estate may (or may not) prevail at trial, its claim to the Disputed Mineral Rights is not frivolous. Because of that, it is hard to see how asserting the claim is malicious.

3. Undue Prejudice. Another factor in deciding whether to allow an amendment is whether the opposing party would be prejudiced. *Minter v. Prime Equip. Co.*, 451 F.3d 1196, 1207–08 (10th Cir. 2006). *See also United States v. Hougham*, 364 U.S. 310, 316 (1960) ("Rule

[10] In addition, the nonreceipt or nonacceptance of the papers by the person served by mail generally does not affect the validity of service. *See* Wright, Miller & Kane, 4B Fed. Prac. & Proc. § 1148, n. 2 and accompanying text; *see also Khan v. Chevrolet*, 2010 WL 5477268, at *4, n. 2 (E.D.N.C. 2010) ("[T]he issue is not whether [the plaintiff] actually received the Motion, but instead whether the Motion was properly mailed."); *Jordan v. Lusk*, 2007 WL 858623, at *6 (S.D. W. Va. 2007) (because an answer was properly mailed to plaintiff's last known address, his nonreceipt was irrelevant).

15 ... was designed to facilitate the amendment of pleadings except where prejudice to the opposing party would result."); *Evans v. McDonald's Corp.*, 936 F.2d 1087, 1090–91 (10th Cir.1991) ("As a general rule, a plaintiff should not be prevented from pursuing a valid claim . . . provided always that a late shift in the thrust of the case will not prejudice the other party in maintaining his defense upon the merits.").

Here, allowing plaintiffs to resurrect their slander of title claim at this stage of the litigation would prejudice defendants. The claim was disposed of in 2015, leaving the parties free to concentrate on the remaining, significant issue of who owns the Disputed Mineral Rights. Requiring defendants to again take up a slander of title defense after so long, instead of focusing on who rightfully owns the Disputed Mineral Rights, would prejudice them. This is especially true given the Court's prior ruling that ownership of the Disputed Mineral Rights is in bonda fide dispute.

The Court believes that the standard for granting a motion to amend should be higher when the claim sought to be asserted was previously dismissed after briefing and a contested hearing. If, as so often happens, pre-trial discovery reveals that a claim or defense needs to be amended, such amendments should be "freely given." On the other hand, if a defendant seeks dismissal of a claim, the plaintiff opposes it, and the court dismisses the claim after briefing and a hearing, the burden on the plaintiff should be higher. Had Plaintiffs' motion to amend been filed in late 2014 (after defendants pointed out the pleading deficiencies), it would and should have been granted at that time. At this late date, especially given the Court's ruling that ownership of the Disputed Mineral Rights is in bonda fide dispute, granting the Motion to Amend and Vacate would prejudice defendants.

IV. CONCLUSION

The Court will deny Plaintiff's Motion to Amend and Vacate, because of undue delay, futility, and prejudice. A separate order will be entered.

Hon. David T. Thuma
United States Bankruptcy Judge

Entered: October 3, 2018

Copies to: counsel of record