United States Bankruptcy Court
District of New Jersey
Mitchell H. Cohen U.S. Courthouse
P.O. Box 2067
Camden, New Jersey 08101

JUDITH H. WIZMUR
Chief, U.S. Bankruptcy Judge

(856) 757-5126

December 20, 2007

Jason N. Sunkett, Esq.
Liebling, Malamut & Sunkett, LLC
1939 Route 70 East, Suite 220
P.O. Box 3836
Cherry Hill, New Jersey 08034-0592

Re: In re Curriden
Case No. 05-38352/JHW

Steven R. Neuner and Gwen Curriden v. Innovate Mortgage. Solutions, et al.
Adv. No. 06-1761

Dear Mr. Sunkett:

I am in receipt of your correspondence dated November 28, 2007 questioning the procedural posture of this case. As you will remember, in this court's opinion of September 6, 2007, I concluded that I was unable to reach the issue of whether or not the defendants Danette Thomas and Trinity Title were liable to the plaintiffs based on an aiding and abetting cause of action because it had not been properly pled. I noted that two days prior to the trial, "the plaintiffs [had] filed a trial brief in which they sought to amend the original complaint to charge Trinity Title, Danette Thomas and others with aiding and abetting the other defendants in the case." Slip Opin. at 43. However, the proposed amended pleading was never filed and the issue regarding the amendment of the complaint was not raised again by the plaintiffs.

Accordingly, I directed the plaintiffs to move to amend the pleadings to

reflect whatever additional causes of action that they believed had already been tried against Danette Thomas and Trinity Title. The defendants were afforded an opportunity to defend against the motion. On September 18, 2007, the plaintiffs moved to amend their complaint to include allegations of aiding and abetting against Ms. Thomas and Trinity Title.

A month later, on October 23, 2007, you objected to the motion to amend, asserting that Rule 15(b) was inapplicable in the absence of a final judgment and that it could only be used to make the pleadings conform to a judgment that had already been entered. Because a final judgment had not been rendered on the question of aiding and abetting, you claimed that amending the complaint was an inappropriate remedy. Your conclusion in this regard does not comport with the clear language of the rule.

Rule 15(b) of the Federal Rules of Civil Procedure allows a complaint to be amended to conform to the evidence at any time upon motion. See Fed.R.Bankr.P. 7015. In pertinent part, the rule provides:

> (b) Amendments to Confirm to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.

Fed.R.Civ.P. 15(b). An amendment is thus permissible under Rule 15 if the issues in question were already "tried by express or implied consent of the parties." There is no requirement that a judgment first be entered. The intent of the Rule is to conform the pleadings to the issues that were actually tried to

allow for a more complete resolution of the matter.

We revisited the status of the aiding and abetting causes of action on November 13, 2007. Mr. Katz, Mr. Neuner and Mr. Rinaldi made appearances on the record. You had asked that your arguments be considered on the papers. I directed the parties at that time to make final submissions on the application of aiding and abetting as to the defendants. By letter dated November 28, 2007, you questioned procedurally the need to address the potential aiding and abetting allegations in the absence of a decision on the motion to amend. In the defendants' brief opposing joint and several liability and comparative negligence, dated December 3, 2007, you also objected to the amendment because it would essentially allow the plaintiffs "a second chance to litigate the issue" of liability. I must disagree with both of your conclusions.

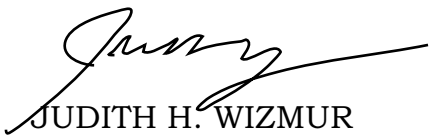
It is important here to understand the intent and impact of Rule 15(b). First, the rule provides that in the event that issues are tried in court, either by implied or express consent of the parties, that were not raised in the pleadings, those issues "shall be treated in all respects as if they had been raised in the pleadings." Fed.R.Civ. 15(b) (emphasis added). This does not necessitate a reopening of the case nor does it provide an opportunity for reargument or retrial. Instead, the rule provides a mechanism through which the issues that have already been tried, whether pled first or not, can be recognized. Upon such recognition, by motion of any party or by the court sua sponte, the pleadings can then be amended "as may be necessary to cause them to conform to the evidence and to raise these issues." Id. Notably, the rule states that a failure to amend "does not affect the result of the trial of that issue." Id. The question then is whether or not implied consent has been shown.

To establish implied consent, "we look to 'whether the parties recognized that the unpleaded issue entered the case at trial, whether the evidence that supports the unpleaded issue was introduced at trial without objection, and whether a finding of trial by consent prejudiced the opposing party's opportunity to respond.'" Foraker v. Chaffinch, 501 F.3d 231, 244 (3d Cir. 2007) (quoting Douglas v. Owens, 50 F.3d 1226, 1236 (3d Cir. 1995)). See also Bernback v. Greco, 69 Fed.Appx. 98, 102 (3d Cir. 2003); Ajax Enterprises v. Fay, No. 04-4539, 2007 WL 576449, *5 (D.N.J. Feb. 21, 2007) ("Rule 15(b) mandates liberal amendments to conform pleadings to the evidence."). For our purposes herein, it is important to also note that "[e]ven when a party does not move for leave to amend, a court may constructively amend pleadings on unpleaded issues in order to render a decision consistent with the trial." 3 James Wm. Moore, Moore's Federal Practice, Third Edition, § 15.18[3] at 15-81 (2007). See Torry v. Northrop Grumman Corp., 399 F.3d 876 (7th Cir. 2005) (explaining use of constructive amendments); Nanavati v. Burdette Tomlin Memorial Hosp., 857 F.2d 96, 104 (3d Cir. 1988); In Re Meyertech Corp., 831 F.2d 410, 422-23 (3d Cir. 1987).

Here, I afforded the plaintiffs an opportunity to formally amend the complaint to include any causes of action that they felt were expressly or impliedly tried. The expected focus of course was on an aiding and abetting cause of action against the defendants. The plaintiffs have now moved to add an aiding and abetting count, and the defendants have been afforded an opportunity to dispute that the matter has been expressly or impliedly tried. Because an official amendment by the plaintiffs is not required to rule on the substance of the matter tried, I also directed that the parties address the substance of the aiding and abetting motion. Whether or not the plaintiffs successfully supported that cause of action during trial is a separate issue.

An order allowing the amendment of the pleadings has been entered.

Very truly yours,



JUDITH H. WIZMUR
CHIEF U.S. BANKRUPTCY JUDGE

JHW:tob

c: Steven R. Neuner, Esq.
Mark A. Rinaldi, Esq.
Michael A. Katz, Esq.
Keith Owen Campbell, Esq.
Stephanie Ritigstein, Esq.