

IN THE UNITED STATES BANKRUPTCY COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

IN RE:

WASHINGTON MANUFACTURING
COMPANY, ET AL.,

Debtors.

Nos. 388-01467-WHB
388-01468
388-01469

Jointly Administered
Judge William H. Brown

TIMOTHY F. FINLEY,
Trustee

Plaintiff,

v.

Adversary Proceeding
No. 390-088A

JEMISON SPORTSWEAR, INC.

Defendant.

**MEMORANDUM OPINION AND ORDER ON
MOTION TO DISMISS AMENDED COMPLAINT**

This cause is before the court on the Motion of Jemison Sportswear, Inc. ("Jemison") to dismiss the Trustee's amended complaint. At issue is whether the complaint's amendments "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original" complaint pursuant to Federal Rule of Bankruptcy Procedure ("F.R.B.P.") 7015(c). The controversy arises in a core proceeding under 28 U.S.C. §157(b)(2)(F). The following constitutes findings of fact and conclusions of law pursuant to F.R.B.P. 7052.

FACTUAL AND PROCEDURAL SUMMARY

The record reflects that a voluntary petition for Chapter 11 relief was filed by the debtors, Washington Manufacturing Company, et al., ("debtor"), on March 1, 1988. The cases were administratively

consolidated and Timothy F. Finley was appointed Chapter 11 Trustee ("Trustee") on March 18, 1988. This adversary proceeding was commenced with the filing of a complaint by the Trustee to recover alleged preferences against Jemison and others¹ on March 17, 1990.

Alleging insufficient process and jurisdiction, Jemison filed a motion to dismiss the complaint, which motion was denied. Thereafter, in response to the Trustee's attempt to increase the amounts of the preferential transfers originally asserted, Jemison filed a motion to dismiss any such increased claims for relief as barred by the applicable statute of limitations.² This motion was likewise denied and consistent with F.R.B.P. 7015(a), the Trustee was allowed to file an amended complaint with the burden of satisfying F.R.B.P. 7015(c). The complaint as originally filed contains the following pertinent language:

5. Within the 90 days prior to the Debtors' bankruptcy filing, Debtors made a transfer or transfers (hereinafter "transfer") of a portion of their property to Jemison Sportswear, Inc., a creditor of Debtors ("Defendant Jemison"). Debtors paid Defendant Jemison by check at least the amount of \$6,415.63.
6. Such transfer was for or on account of an antecedent debt owed by Debtors before the transfer was made.
7. Such transfer was made while Debtors were insolvent.
8. Such transfer was made on or within 90 days before the date of the filing of the petition commencing this case.

¹ Additional defendants were named in the original complaint. Per this Court's order of January 29, 1991, the claim against Jemison was severed from those against other defendants for purposes of trial.

² The applicable statute of limitations, 11 U.S.C. §546(a)(1), provides that an action to recover preferential transfers may not be commenced after two years after the appointment of a trustee in a given bankruptcy case. Thus, as will be discussed further, preferential transfers which a trustee attempts to recover must be complained of within the 2 year time period or relate back to those asserted within the two year period.

9. Such transfer enabled Defendant Jemison to receive more than it would receive as a creditor if (a) the case were under chapter 7 of title 11, (b) the transfer had not been made, and (c) Defendant Jemison received payment of its debt to the extent provided by the provisions of said title 11.

10. On November 22, 1989, the Trustee, by certified mail, demanded repayment from Defendant Jemison of the \$6,415.63

...

WHEREFORE, Plaintiff requests the following:

1. That judgment be entered against the defendant Jemison directing Defendant Jemison to return said preference in an amount to be proven at trial but believed to be at least \$6,415.63 to Plaintiff, together with the costs and expenses of this action and the interest that has accrued since the Trustee's first demand for return of the preferential payment on November 22, 1989;

...

In comparison, the complaint, as amended, provides in pertinent part:

4. By this action, the Trustee seeks to recover all transfers by the Debtor to Jemison Sportswear, Inc. ("Jemison") which occurred during the ninety days preceding the Debtor's bankruptcy filing which are preferential within the meaning of 11 U.S.C. §547 . . .

6. In 1982 or 1983, Debtor first requested Jemison to cut some cloth for it for further manufacturing purposes. Jemison agreed to perform the requested services, and did so. Jemison then invoiced the Debtor for the cut goods on terms of "ten days net." After receiving the invoices, Debtor paid Jemison by check for the services Jemison had rendered. Debtor and Jemison repeated this course of dealing over the years until the bankruptcy filing.

7. Within the 90 days prior to Debtor's bankruptcy filing, Debtor made a transfer or transfers ("hereinafter transfer") of a portion of its property to Jemison, a creditor of debtor. Debtor made several payments by check to Jemison in payment of Jemison invoices. These payments constituted transfers of the Debtor's property to Jemison. Debtor paid Jemison by check the amount of \$101,197.68, including, but not limited to, the following Washington Manufacturing Company checks:

Check No.	Check Dates	Check Amount	Invoices Paid
092143	01-22-88	\$ 6,415.63	2192
091392	12-24-87	\$18,140.42	2172; 2176
091032	12-11-87	\$15,334.58	2158
091234	12-18-87	\$ 4,769.05	2164

090826 12-04-87	\$10,989.22	2152
089722 11-20-87	\$30,302.78	2129; 2134
091937 01-15-88	\$15,245.00	2179

8. Each of the invoices paid by these checks was issued by Jemison in the normal course of the parties dealings . . .

WHEREFORE, the Trustee requests the following:

1. That judgment be entered against Jemison directing Jemison to return all preferential transfers in an amount to be proven at trial but believed to be at least \$101,197.68 to the Trustee, together with the costs and expenses of this action and the interest that has accrued since the Trustee's first demand for return of the preferential payment on November 22, 1989; . . .

Of the transfers complained of by the amendment, only the first for \$6,415.63 was specifically referenced in the initial complaint. However, the original complaint indicates that this is the least amount the Trustee would attempt to recover. As previously concluded by the Court, this indication coupled with the complaint's reference to "transfers" was "sufficient to put the defendant on notice that more than one payment totalling \$6,415.63 may have been made during the ninety days preceding the debtors' bankruptcy filing, and thus, maybe subject to attack as preferential." See, Timothy F. Finley, Trustee v. Jemison Sportswear, Inc. (In re Washington Mfg. Co., et al.), unpub. BK. No. 388-01467, 01468, 01469, Adv. No. 390-0088A, "Memorandum Opinion and Order," January 29, 1991.

As such, the Trustee was allowed to file an amended complaint given that F.R.B.P. 7015(a) provides that leave to amend shall be freely granted. However, as noted above, the Trustee was left with the burden of establishing that any alleged preferential transfers raised by the amendments arose out of the same conduct, transaction or occurrence as that originally asserted in compliance with F.R.B.P. 7015(c). Whether this burden has been met is at issue in this proceeding.

DISCUSSION AND CONCLUSIONS

As mentioned above, it is Jemison's position that the amendments to the complaint are not permissible because they do not meet the requirements of F.R.B.P. 7015(c). As also noted above, the requirements of F.R.B.P. 7015(c) are applicable here because the amendments have been made subsequent to expiration of the statute of limitations posed by 11 U.S.C. §546(a)(1).

In pertinent part, F.R.B.P. 7015(c) provides as follows:

(c) Relation Back of Amendments.

Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. . .

This rule is based on the rationale that a party who has been notified of litigation concerning a particular transaction or occurrence has been given all the notice that statutes of limitations are intended to afford. In re Bellanca Aircraft Corp., 850 F. 2d 1275, 1283 (8th Cir. 1988); In re Marlar, 120 B.R. 51, 54 (Bankr. N.D. Miss. 1989). Therefore, even though leave to amend pleadings is to be freely granted, in order for amendments consisting of additional claims to relate back to the original complaint they must be part of the conduct or occurrence originally pled. In re Kam Kuo Seafood Corp., 67 B.R. 304, 307 (Bankr. S.D.N.Y. 1986). As such, it has been held that where an amendment seeks to add truly separate, additional transactions from those originally pled, it will not be allowed as the additional transactions are not considered part of the conduct or occurrence originally pled. Id. The fact that all the transactions are labeled preferential is of no significance. Id. at 308.

Conversely, "if the original complaint indicates an intention to pursue all transactions, the adding of such transactions will relate back." In re Kam Kuo Seafood Corp., 67 B.R. at 306, citing Siegal v. Converters Transportation, Inc., 714 F. 2d 213 (2nd Cir. 1983).

Thus, in the preference context, "where new transactions are alleged, the inquiry concerns 'conduct' and 'occurrences.'" In re Metzeler, 66 B.R. 977, 983 (Bankr. S.D.N.Y. 1986). As such,

preference claims concerning an additional transaction do not relate back if the transaction is different in kind from that originally alleged and if the

original pleading did not put into issue conduct to which the additional transactions relate.

Id.

In the instant proceeding, the amended complaint specifies transactions additional to that specified in the original complaint. However, the original complaint indicates an intention to pursue recovery of alleged preferential "transfer or transfers" in "at least the amount of \$6,415.63" paid to Jemison. Therefore, preferential transfers of at least \$6,415.63 is the conduct originally pled. The additionally specified transfers of more than \$6,415.63 are clearly encompassed by the original complaint's reference to "transfers." Thus, such language clearly puts into issue conduct to which the additionally specified transfers relate. Consequently, the Court is satisfied that the additionally specified transfers relate back to the conduct originally asserted.

From the above findings and conclusions, it is hereby ordered that the defendant Jemison's Motion to Dismiss the Amended Complaint in this proceeding is DENIED.

So ordered this 10th day of September, 1991.

WILLIAM HOUSTON BROWN
UNITED STATES BANKRUPTCY JUDGE

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