Minutes of Proceedings

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Date: **February 14, 2008**	:	
In re:	:	
	:	Case No. 01-16034 (AJG)
ENRON CREDITORS RECOVERY CORP., *et al*.,	:	Chapter 11
	:	
Reorganized Debtors.	:	Confirmed Case
ENRON CREDITORS RECOVERY CORP., *et al*.	:	
	:	
Plaintiffs,	:	
v.	:	Adversary Proceeding No. 03-09266A
	:	
CITIGROUP, INC., *et al*.,	:	
	:	
Defendants.	:	

Present: Hon. Arthur J. Gonzalez (Bankruptcy Judge) _____ (Courtroom Deputy) _____ (Court Reporter)

Appearances: **As set forth on the record of the Hearing**

Proceedings: ☒ Motion (the "Summary Judgment Motion") filed seeking summary judgment on count 73A of the Complaint subordinating the Yosemite/CLN Trusts' claims against the Debtors' estates.

Orders: ☒ For the reasons set forth in the Court's ruling on the record [as set forth on Exhibit "A"], the Summary Judgment Motion is DENIED.

FOR THE COURT: Kathleen Farrell, Clerk of the Court

BY THE COURT:

s/Arthur J. Gonzalez	02/14/08	Jacqueline De Pierola
United States Bankruptcy Judge	Date	Courtroom Deputy

Exhibit "A"

Enron Corp. and its affiliated reorganized debtors filed a motion seeking summary judgment (the "Summary Judgment Motion") on Count 73A of the plaintiffs' complaint subordinating the Yosemite Trusts' claims against the Debtors asserted by

Yosemite Securities Trust I;
Yosemite Securities Co., Ltd.;
Enron Credit Linked Notes Trust;
Enron Credit Linked Notes Trust II;
Enron Sterling Credit Linked Notes Trust; and
Enron Credit Linked Notes Trust (collectively, the Yosemite/CLN Trusts).

The Yosemite/CLN Trusts and The Bank of New York, as Indenture Trustee and Collateral Agent opposed the Summary Judgment Motion.

Argument on this matter was heard before the Court, after which it was taken under advisement. Effective March 1, 2007, Enron Corp. changed its name to Enron Creditors Recovery Corp. Thereafter, on April 4, 2007, an order was entered authorizing the change of the caption of the Reorganized Debtors' cases.

Pursuant to Fed. R. Evid. 801(d)(2), pleadings may be treated as admissions and are admissible not only in the case in which originally filed but also in any subsequent litigation involving that party. *Rosenburg v. Curry Chevrolet Sales & Service, Inc.*, 152 F.3d 920 (2d Cir. 1998) (citing, *United States v. McKeon*, 738 F.2d 26, 31 (2d Cir. 1984). Although cognizable as an admission in a subsequent litigation, a pleading is neither binding nor conclusive. *Enquip v. Smith McDonald Corp.*, 655 F.2d 115, 118 (7th Cir. 1981). Rather, it is controvertible. *Zitz v. Pereira*, 119 F.Supp.2d 133, 140 (E.D.N.Y. 1999).

Although a prior pleading may not have great probative value or be reliable, as would be the case where it is not based on the personal knowledge of the speaker, it is nevertheless admissible. *McKean*, 738 F.2d at 32. As the fact-finder is allowed to "consider the earlier

pleadings as admissions in due course," *Zitz v. Pereira*, 119 F.Supp at 140, any shortcomings, in regard to probity and reliability, go to the weight to be accorded the evidence. The pleading is admitted to be considered by the fact-finder with all the other evidence in the case. *Rottmund v. Continental Assur. Co.*, 761 F.Supp. 1203, 1206-07 (E.D. Pa. 1990). Thus, if a statement was made without adequate information, it goes to the weight accorded that evidence and not to its admissibility. *Zitz v. Pereira*, 119 F.Supp at 141.

Fed. R. Evid. 403 provides an exception to the admission of the evidence from consideration when the probative value of the admission is outweighed by the danger of unfair prejudice. *Rosenburg v. Curry*, 152 F.3d at 920. However, absent unfair prejudice, the prior pleading is admitted and considered along with the entire record before the Court. The pleading "remains . . . a statement once seriously made [and] is competent evidence of the facts stated, though controvertible, like any other extra-judicial admission made by a party." *Zitz v. Pereira*, 119 F.Supp at 140.

Further, when considering a summary judgment motion, in determining whether there is an issue of material fact present, a court must consider the entire record before it. *Enquip*, 655 F.2d at 118. The party opposing use of a prior pleading must be given a full opportunity to explain the purported admission to show if there is a genuine issue of fact. *Id*. This is especially important when considering a "complex third-party situation," *Id*., where the admission was made in a prior proceeding against a different opponent. *Rottmund*, 761 F.Supp. at 1206.

Fed. R. Civ. P. 56(c) incorporated into bankruptcy practice by Fed. R. Bankr. P. 7056 provides that summary judgment shall be rendered "if the pleadings, depositions, answers to interrogatories, and admissions of file, together with the affidavits, if any, show that there is no

genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." On considering a motion for summary judgment, the evidence is viewed in the light most favorable to the non-moving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-159, 90 S.Ct. 1598, 1609, 26 L.Ed.2d 142 (1970).

Ordinarily, when a motion for summary judgment is supported as provided for in Fed. R. Civ. P. 56, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e). If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

The Court concludes that based upon the entire record before it, there remains a genuine issue of material fact in dispute. The fact pattern is similar to the *Enquip* and *Rottmund* cases where the courts refused to grant summary judgment based solely on the allegations contained in pleadings in prior actions against different opponents. *Enquip*, 655 F.2d at 119; *Rottmund*, 761 F.Supp. at 1207. Inasmuch as the Court must consider the entire record before it, it is clear that the assertion concerning Citigroup's alleged inequitable conduct is contested by Citigroup both in the other proceeding filed by the Yosemite/CLN Trusts against Citigroup, as well as in the proceeding before the Court. Moreover, the Yosemite/CLN Trusts pleadings are not alternative because they do not make any statements before the Court that are inconsistent with the allegations pled in the other proceeding that they have against Citigroup. Rather, the Yosemite/CLN Trusts argue that despite Citigroup's alleged inequitable conduct, the Yosemite/CLN Noteholders claims, based on their status as transferees, are not subject to equitable subordination.

The Yosemite/CLN Trusts opposition makes clear that the issue concerning Citigroup's alleged inequitable conduct is contested both in the other proceeding and in the proceeding before the Court. When considering a motion for summary judgment all reasonable doubt are resolved in favor of the non-moving party and, in addition, defenses are liberally construed both in terms of substance and form. *Enquip*, 655 F.2d at 118. Further, summary judgment is proper only if otherwise appropriate. *See* Fed. R. Civ. P. 56(e). In distilling the essence of the matter, a court should not eliminate matters before it which show the presence of an issue of material fact. *Enquip*, 655 F.2d at 119. The fact that the allegations concerning Citigroup's conduct are actively being contested in both this and the other proceeding shows that the issue is disputed. Thus, there is a genuine issue concerning a material fact and summary judgment is not appropriate.

The allegation in the pleadings in the action by the Yosemite/CLN Trusts against Citigroup does not prove that allegation. While that pleading is admissible in this action, it is not binding or conclusive. Enron Creditors Recovery Corp has the burden of proving the allegation which it has not met merely by introducing evidence that in the other action, the Yosemite/CLN Trusts alleged that Citigroup had engaged in inequitable conduct inasmuch as that allegation is currently being actively contested by Citigroup both in the other action, as well as in the proceeding before the Court. As the allegation in the pleading of the other action is not a binding admission and not conclusive of any facts in the case, and because there is countervailing evidence before the Court that Citigroup is contesting that allegation, there is a material fact in dispute and Enron Creditors Recovery Corp is not entitled to summary judgment. Therefore, the Summary Judgment Motion is denied.