UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Not For Publication

In re:	:	Chapter 11
ENRON CORP., *et al*.,	:	Case No. 01-16034 (AJG)
	:	(Confirmed Case)
Reorganized Debtors.	:	
ENRON CORP.,	:	
Plaintiff,	:	
v.	:	Adv. Pro. No. 03-92677
J.P. MORGAN SECURITIES INC., *et al*.	:	
Defendants.	:	

OPINION DENYING MOTION FOR LEAVE TO AMEND COMPLAINT AGAINST FAR EAST NATIONAL BANK

A P P E A R A N C E S:

VENABLE L.L.P.
Special Litigation Counsel for the Reorganized Debtors
1800 Mercantile Bank & Trust Building
Two Hopkins Plaza
Baltimore, MD 21201

Richard L. Wasserman, Esq.
Michael Schatzow, Esq.
Robert L. Wilkins, Esq.
Of Counsel

TOGUT, SEGAL & SEGAL LLP
Attorneys for the Reorganized Debtors
One Penn Plaza, Suite 3335
New York, NY 10119

Albert Togut, Esq.
Frank A. Oswald, Esq.
Scott E. Ratner, Esq.
Of Counsel

DAVIDOFF MALITO & HUTCHER LLP
Attorneys for Far East National Bank
605 Third Avenue, 34th Floor
New York, NY 10158

Evan M. Eisland, Esq.
Of Counsel

CLEARY GOTTLIEB STEEN & HAMILTON LLP
Attorneys for Goldman, Sachs & Co.
One Liberty Plaza
New York, NY 10006

Lindsee P. Granfield, Esq.
Of Counsel

ARTHUR J. GONZALEZ
United States Bankruptcy Judge

FACTUAL AND PROCEDURAL HISTORY

A. The Debtors

Commencing on December 2, 2001, and from time to time continuing thereafter, Enron Corp. ("Enron") and its affiliates (the "Debtors") filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). On July 15, 2004, the Court entered an Order confirming the Debtors' Supplemental Modified Fifth Amended Joint Plan of Affiliated Debtors (the "Plan") in these cases. The Plan became effective on November 17, 2004.

B. Motion for Leave to Amend the Complaint

On October 13, 2003, Goldman, Sachs & Co. ("Goldman") produced to Enron trade confirmations bearing bates numbers 0001-00153, among them, the Nos. 00064 and

00101, which mentioned Far East National Bank ("FENB") as a party in the A2/P2 commercial paper transactions. On the trade confirmations, FENB's information with CUSIP Number 29356AXX9 appeared as follows:

> FAR EAST NATIONAL BANK (HIC)
> ATTN: JANIE HUANG
> 41ST FLOOR
> 350 SOUTH GRAND AVENUE
> LOS ANGELES CA 90071.

On November 6, 2003, Enron initiated this adversary proceeding to recover more than one billion dollars that was allegedly prepaid or redeemed to certain financial institutions prior to the maturity of the A2/P2 commercial paper. FENB was not named a defendant in the original complaint. On the same date, Enron filed a motion seeking the Court's assistance regarding the production of documents that identified transferees and beneficiaries of the prepayment.

On November 18, 2003, the Court issued an order (the "November 18 Order"), which directed certain parties to initially disclose to Enron the names, and if available, the addresses and telephone numbers of the transferees and beneficiaries in connection with the commercial paper transactions. Through the November 18 Order, Goldman was directed to make limited Fed.R.Civ.P. 26(a)(1)(A) initial disclosures on an expedited basis of the information regarding the entity with CUSIP Number 29356AXX9.

On December 1, 2003, Enron filed the first amended complaint to add transferees or beneficiaries of the commercial paper transactions followed by the initial disclosures from certain defendants as required under the November 18 Order.

On May 13, 2004, at Enron's request, the Court issued an order directing certain defendants in this adversary proceeding to comply with the November 18 Order (the

"May 13 Order"). Goldman was not required to make limited initial disclosures under the May 13 Order. On May 13, 2004, the Court also issued an order to grant Enron's Motion for Extension of Time for Service of the Amended Complaint (the "Order for Extension of Time"), which extended the time for service of the First Amended Complaint to and including September 30, 2004.

FENB did not receive actual notice of this adversary proceeding before September 30, 2004. On October 19, 2005, Enron filed a motion for Leave to Amend its Complaint (the "Motion for Leave to Amend"), requesting, among the others, to add transferees and beneficiaries of the prepayment of commercial paper, including FENB, as new defendants in this adversary proceeding.

On November 29, 2005, FENB filed an objection to the Motion for Leave to Amend. A hearing was held on December 15, 2005.

DISCUSSION

Parties' Contentions

Enron seeks to add a new defendant, FENB, relating back to its original complaint and its first amended complaint (the "Original Pleadings") pursuant to Federal Rule of Civil Procedure 15(c)(3) ("Rule 15(c)(3)"). Enron argues that pursuant to Rule 4(m), the 120-day period for the service of defendants does not apply to foreign entities; as a result, the notice requirement under Rule 15(c)(3) is not applicable for FENB, a foreign entity who received notice beyond the 120-day period. Further, although FENB did not receive actual notice of this adversary proceeding prior to the expiration of the 120-day period, Enron argues that FENB received constructive notice of this adversary proceeding because Enron believes in good faith that Goldman conferred with its customers about

the production of those trade confirmations to Enron and the filing of this adversary proceeding. According to Enron, because FENB is a foreign entity and it received constructive notice, the notice requirement under Rule 15(c)(3) was not violated. Further, Enron also seems to argue that even if FENB were not a foreign entity, the notice requirement would still have been met by the constructive notice referenced above.

Moreover, citing *Randall's Island Family Golf Ctr. v. Acushnet Co. (In re Randall's Island),* 2002 WL 31496229 (Bankr. S.D.N.Y. Nov. 8, 2002), Enron argues that its failure to include FENB was not a strategic decision, and that its exclusion of FENB from the Original Pleadings was attributable to its lack of knowledge of FENB's identity. In addition, citing *Byrd v. Abate*, 964 F.Supp.140 (S.D.N.Y. 1997), Enron argues that the lack of knowledge of FENB's identity was a "mistake" that satisfies Rule 15(c)(3).

In response, FENB argues that Enron did not meet its burden to satisfy the requirements of Rule 15(c)(3) for its failure to include FENB in its Original Pleadings. FENB argues that the120-day service period set forth in Rule 4(m) is applicable here because FENB is not a foreign entity, but a federally chartered national bank in the United States, which was amenable to being served with the complaints. According to FENB, it did not receive notice of this adversary proceeding within the statutory period or before September 30, 2004, a date extended by the Order for Extension of Time; as a result, Enron's delay in proceeding has prejudiced FENB. FENB further argues Enron's failure to include FENB in its Original Pleadings was not a "mistake" under Rule 15(c)(3) because Goldman submitted trade confirmations to Enron voluntarily, which

mentioned FENB as a party of the commercial paper transactions, before Enron filed its first complaint on November 6, 2003.

Analysis

Rule 15(c) provides, in pertinent part, that:

> An amendment of a pleading relates back to the date of the original pleading when
>
> . . .
>
> (2) 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, or
>
> (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

Fed. R. Civ. P. 15 (c) (2)-(3).

The Court has previously held that the moving party who asserts the relation back bears the burden of proof. *In re Enron Corp*., 298 B.R. 513, 522 (Bankr. S.D.N.Y. 2003) (citation omitted). Under Rule 15(c)(3), a plaintiff can amend original pleadings by adding a new party after the statute of limitations has expired only if each of three requirements is satisfied. *Barrow,* 66 F.3d at 468 (stating "[s]uch an amendment may only be accomplished when all of the specifications of Fed. R. Civ. P. 15(c) are met." (citation omitted)). First, the claims asserted against the new party "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." *Enron Corp*., 298 B.R. at 522. Second, the new party "has received such notice of the institution of the action" within the period for service of the summons and

complaint pursuant to Rule 4(m), so that "the party will not be prejudiced in maintaining a defense on the merits." *Id.* Third, the new party "knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against it." *Id*.

In the instant matter, none of the parties dispute the satisfaction of the first requirement under Rule 15(c) that the claims against FENB arose out of the conduct, transaction or occurrence set forth in the original complaint dated November 6, 2003. The contested issues are (1) whether FENB was prejudiced in maintaining a defense on the merits because it did not receive notice within the 120-days period for the service of defendants, and (2) whether the third requirement under Rule 15(c)(3) - the "mistake" test - is satisfied.

Because Enron has failed its burden of proving that it made a mistake concerning the identity of the proper party, the Court will not address the issue as to whether FENB was prejudiced in maintaining a defense on the merits because it did not receive notice within the 120-day period for the service of defendants set forth in Rule 4(m).

The issue is whether a mistake under Rule 15(c) has occurred so that a plaintiff's claim against a new defendant can relate back to the original complaint.

To establish a "mistake" under Rule 15(c)(3), a plaintiff must show either a factual mistake (for example, he or she misnamed a party or misidentified the party [it] wished to sue) or a legal mistake (for example, he or she misunderstood the legal requirements of his or her cause of action). *Enron,* 298 B.R. at 524; *see also Soto v. Brooklyn Corr. Facility*, 80 F.3d 34, 36 (2d Cir. 1996).

The Second Circuit has found that the "mistake" requirement "presupposes that in fact the reason for [a new defendant] not being named was a mistake in identity." *Cornwell v. Robinson*, 23 F.3d 694, 705 (2d Cir. 1994); *see also Richardson v. John F. Kennedy Mem'l Hosp.*, 838 F. Supp. 979, 987 (E. D. Pa. 1993) (stating that "the type of mistake with which Rule 15(c) is concerned" is a mistake "in identifying the party whom he wanted to sue").

Courts, including the Second Circuit, have held that there is no mistake in identifying a new party when the plaintiff possessed information related to the identity of such party and its involvement in the alleged transactions. *Cornwell*, 23 F.3d at 705*; see also Richardson*, 838 F. Supp. at 987. In *Cornwell*, the plaintiff, who initially did not include certain individuals as defendants in the original complaint but knew that they participated in the alleged actions, sought to relate back those individuals under Rule 15(c)(3). *Cornwell*, 23 F.3d at 700. The *Richardson* case discussed a different scenario, in which the plaintiff dismissed the claims against the original defendant and substituted a new defendant. *Richardson* 838 F. Supp. at 986. The *Richardson* court held that a "mistake" exception was not available when a plaintiff knew of the identity of the new defendant and its possible role in the alleged transaction, but "chose" not to sue the new party at the time of the original complaint. *Id*. at 987.

Moreover, the Second Circuit has held that the failure to identify the new defendant cannot be characterized as a mistake when a plaintiff knew that such defendant must be named at the time of the original complaint, even though the plaintiff was barred from naming that defendant due to lack of the knowledge of its identity. *Barrow*, 66 F.3d at 470 (stating that "Rule 15(c) explicitly allows the relation back of an amendment due

to a 'mistake' concerning the identity of the parties (under certain circumstances), but the failure to identify individual defendants when the plaintiff knows that such defendants [individual officers rather than a department head] must be named cannot be characterized as a mistake"). The *Barrow* court also held that the "mistake" requirement was not satisfied if adding the new defendant was not to correct a mistake, but to correct a lack of knowledge. *Id.*

The instant matter involves a plaintiff, who seeks to add a new party whom the plaintiff missed at the time of the original complaint, but argues that the failure to name the new defendant was attributable to its lack of knowledge of the identity of such defendant. The Court will examine whether the factual situation in the instant matter satisfies the *Cornwell* and the *Barrow* tests related to the plaintiff's argument regarding its lack of knowledge of the defendant's identity.

The *Cornwell* court considered the failure to name the new defendants as a matter of choice, not mistake, after it found that the plaintiff possessed obvious knowledge of the identity of the new defendants and of the detailed nature of their involvement in the alleged transactions. *Cornwell*, 23 F.3d at 705. To determine whether Enron's failure to name FENB at the time of the Original Pleadings, under the *Cornwell* test, was a mistake or was considered a matter of a choice, the Court will consider whether Enron had knowledge of the identity of FENB and its involvement in the commercial paper transactions before the statute of limitations expired.

Prior to the commencement of this adversary proceeding on November 6, 2003, Goldman's counsel produced to Enron trade confirmations mentioning FENB as a party

in the commercial paper transactions. On these trade confirmations, FENB's information with CUSIP Number 29356AXX9 was shown as follows:

> FAR EAST NATIONAL BANK (HIC)
> ATTN: JANIE HUANG
> 41ST FLOOR
> 350 SOUTH GRAND AVENUE
> LOS ANGELES CA 90071.

The complete name and address information regarding FENB were listed on the trade confirmations. Moreover, these trade confirmations revealed the names of the principal, issuer and beneficiary, and the dates, amount and terms of the commercial paper transactions. The evidence indicates that Enron was aware of FENB's identity and its involvement in the commercial paper transactions. Thus, Enron had sufficient information to timely name FENB as a defendant and would have been able to serve FENB with complaints and notices. Further, Enron did not provide plausible evidence to demonstrate that it made a mistake that prevented it from correctly identifying FENB as a defendant at the time of its Original Pleadings.

Enron's argument that it was not aware of the identity and the involvement of FENB until after the statute of limitations expired is simply inconsistent with the facts presented. Since Enron had detailed information regarding a defendant and its involvement in the transaction, the failure to name FENB in the Original Pleadings is not related to a mistake in identity under the *Cornwell* test. *Cornwell,* 23 F.3d at 705. Even assuming that Enron establishes that its failure to name FENB was not intentional, it nonetheless must establish a mistake in identity under the *Cornwell* test. Because Enron had sufficient information that would have led it to include FENB as a defendant in a

timely manner, the Court considers that Enron's failure to do so is not a mistake under the *Cornwell* test. *Id*.

Further, Enron did not explain what specific knowledge it lacked that prevented it from naming FENB in a timely manner. The Court has found that Enron possessed sufficient information concerning the identity of FENB. The failure to identify the new defendant cannot be characterized as a mistake when a plaintiff knew that such defendant must be named at the time of the original complaint. *Barrow*, 66 F.3d at 470. The *Barrow* court stated that "Rule 15(c) explicitly allows the relation back of an amendment due to a 'mistake' concerning the identity of the parties (under certain circumstances), but the failure to identify individual defendants when the plaintiff knows that such defendants [individual officers rather than a department head] must be named cannot be characterized as a mistake." *Id*.

Here, Enron does not seek to correct a mistake in identity. Accordingly, Enron has also failed the *Barrow* test, in which the "mistake" requirement is not satisfied if adding the new defendant was not to correct a mistake, but to correct a lack of knowledge. *Barrow*, 66 F.3d at 470.

Additionally, the facts in the instant matter are distinguishable from those in the *Randall's Island* case cited by Enron. In *Randall's Island*, there was no evidence to support that the plaintiffs knew the new defendant was involved in the alleged transactions, but nonetheless decided to sue another defendant at the time of the original complaint. *Randall's Island*, at *5, 2002 WL 31496229. The plaintiffs in *Randall's Island* intended to sue the new defendant and incorrectly identified another defendant as the party that was involved in the alleged transactions. *Id.* In that case, the plaintiffs

corrected the error by adding a new defendant after discovering the misidentification. *Id.* The *Randall's Island* case involved a situation where the plaintiffs misidentified the correct defendant by error. *Id.* By contrast, here, there was no misidentification in the identity of FENB. Enron simply did not name FENB as a defendant in the Original Pleadings even though Enron was aware of its identity and involvement in the alleged commercial paper transactions.

Moreover, citing *Randall's Island,* Enron argues that the "mistake" requirement under Rule 15(c) is satisfied on the ground that it did not engage in any strategic tactic to delay the litigation and did not act in bad faith by adding a new defendant after the statute of limitations expired. However, this state of mind alone is not sufficient to establish "mistake" when sufficient information was available to the plaintiff to have named the new defendant before the statute of limitations expired. As stated previously, there was no plausible explanation provided as to why Enron failed to timely name FENB. The fact that the failure may not have been intentional does not provide a rationale for extending the mistake exception under Rule 15(c)(3). Rather, Enron must meet its burden to demonstrate that the failure to name FENB was the result of a mistake in identity in order to satisfy Rule 15(c)(3).

Lastly, as discussed earlier, because Enron did not need further information regarding FENB than was provided on the trade confirmations to include it as a defendant in the Original Pleadings, the Court finds that the *Byrd* case does not support Enron's position. According to Enron's interpretation of the *Byrd* case, the "mistake" requirement is satisfied if the plaintiff "made a series of efforts to obtain the identity of the individual officer without prompting and well before the end of the limitations

period." *Byrd*, 964 F. Supp. at 145. To establish relief under the *Byrd* case, the information must be repeatedly requested by the plaintiff and the defense counsel must repeatedly refuse to cooperate by not providing any information about the new defendant.[1] *Id.* at 145-46. In *Byrd*, the defense counsel "did not reveal the name of the individual officer, nor turn over log books, as had been requested by plaintiff's counsel." *Id.* at 143. In fact, the defense counsel in *Byrd* did not comply with the plaintiff's repeated requests to disclose the name of the new defendant until after the limitations period ran. *Id.* at 146.

The instant case presents a different scenario from *Byrd*. In *Byrd*, the plaintiff did not have sufficient information to identify the new defendant, whereas Enron did in the instant matter. The *Byrd* exception simply does not apply.

Therefore, the Court finds that because Enron had sufficient information to include FENB in the Original Pleadings, the omission of FENB in this adversary proceeding was simply a failure to use the information available to name a defendant and such omission was not the result of a mistake under Rule 15(c)(3).

CONCLUSION

For the foregoing reasons, the Court concludes that Enron fails to meet its burden to satisfy the "mistake" test under Rule 15(c) for relation back to the original complaint. Therefore, the Court sustains FENB's objection to Enron's Motion for Leave to Amend.

Counsel for FENB is directed to settle an order consistent with this Opinion.

[1] In *Byrd*, plaintiff's counsel first requested disclosure of the name of the defendant. After the first request was rejected by the Corporation Counsel, plaintiff's counsel requested log books. *Byrd*, 64 F. Supp. at 143. The counsel's second request was rejected until "either Byrd agreed to bifurcate the trial or bifurcation was determined by motion to the Court." *Id.* "Despite the resolution of the bifurcation issue, Corporation Counsel did not reveal the name of the individual officer, nor turn over log books, as had been requested by plaintiff's counsel." *Id.*

Dated: New York, New York
May 22, 2006

s/Arthur J. Gonzalez
UNITED STATES BANKRUPTCY JUDGE