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Not For Publication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 INVESCO INSTITUTIONAL (N.A), INC.

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ARTHUR J. GONZALEZ
United States Bankruptcy Judge

FACTUAL AND PROCEDURAL HISTORY

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.

Motion for Leave to Amend the Complaint

AIM Floating Rate Fund ("AIM") was a management investment company. INVESCO Institutional (N.A.), Inc. ("INVESCO") was appointed as the investment "sub-sub-advisor" with respect to certain assets of AIM, including commercial paper transactions. INVESCO, as an agent to AIM, was responsible for placing buy or sell orders with dealers, such as Goldman, Sachs & Co. ("Goldman"). Once a transaction was accepted by the dealer, INVESCO would generate trading confirmations that would be sent and would instruct AIM's custodian bank to settle the transaction through the depository trust company. The custodian bank would wire or receive funds through AIM's custody account once the depository trust company cleared the transaction.

On October 13, 2003, Goldman produced to Enron trade confirmations bearing bates numbers 0001-00153. According to INVESCO, INVESCO Management and Research, an entity which merged with and became part of INVESCO, was mentioned in trade confirmations as a party in the A2/P2 commercial paper transactions. Enron did not dispute this fact.

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. INVESCO was not named as 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. The November 18 Order did not direct Goldman or AIM to disclose the information regarding the identity of INVESCO. Rather, it instructed Goldman and AIM to provide notice of this adversary proceeding and a copy of the Complaint to defendants who were in the following categories (1) a recipient of any part of cash transfer relating to the AIM's alleged commercial paper transactions, (2) a person or entity for whose benefit any such cash transfer was made, or (3) a person or entity who exercised dominion and control over any such case transfer and its proceeds.

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 under the November 18 Order. AIM was one of the added defendants. It is alleged to have received prepayment in excess of $9.9 million from the commercial paper transactions.

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"). The May 13 Order required AIM to make limited initial disclosures of information regarding defendants who fell into one of the following three categories relating to the AIM's commercial paper transactions (1) a recipient of any part of cash transfer relating to the AIM's alleged commercial paper transactions, (2) a person or entity for whose benefit any such cash transfer was made, or (3) a person or entity who exercised dominion and control over any such case transfer and its proceeds. 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.

On October 19, 2005, Enron filed a motion for Leave to Amend its Complaint (the "Motion for Leave to Amend"), requesting, *inter alia*, to add transferees and beneficiaries of the prepayment of commercial paper, including INVESCO, as new defendants in this adversary proceeding.

On November 29, 2005, INVESCO 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, INVESCO, 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)"). 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 INVESCO was not a strategic decision, and that its exclusion of INVESCO from the "Original Pleadings" was attributable to its lack of knowledge of INVESCO's identity. Moreover, citing *Byrd v. Abate*, 964 F.Supp.140 (S.D.N.Y. 1997), Enron argues that it made efforts to request information regarding INVESCO's identity from AIM. However, because AIM did not respond to its request, the failure to name INVESCO in the Original Pleadings was a "mistake" under Rule 15(c)(3).

In response, INVESCO argues that Enron does not meet its burden of satisfying the requirements of Rule 15(c)(3) for its failure to include INVESCO in its Original

Pleadings. INVESCO argues Enron's failure to include INVESCO was not a "mistake" under Rule 15(c)(3) because Goldman submitted trade confirmations to Enron voluntarily, which mentioned INVESCO as a party involved in the AIM's commercial paper transactions, before Enron filed its first complaint on November 6, 2003. Further, INVESCO contends that because INVESCO never received any cash transfer relating to the AIM's commercial paper transactions, INVESCO did not fall into any of the three categories set forth in the May 13 Order with respect to the request for the limited initial disclosures. As a result, according to INVESCO, AIM fully complied with the May 13 Order. Additionally, INVESCO argues that Enron's claim against INVESCO is futile on the ground that INVESCO was not a transferee or beneficiary of the AIM's commercial paper, resulting in sections 550, 547 and 548 of the Bankruptcy Code being inapplicable to INVESCO.

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 and second requirements under Rule 15(c). The contested issue presented 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.

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 sections 550, 547 and 548 of the Bankruptcy Code are inapplicable to INVESCO on the ground that INVESCO was not a transferee or beneficiary of the AIM's commercial papers.

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 by the statute of limitations from naming that defendant due to lack of 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 INVESCO 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 INVESCO 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 INVESCO as a party in the commercial paper transactions. INVESCO asserts that those trade confirmations clearly identified INVESCO as a party involved in the alleged commercial papers. Enron does not dispute or present any evidence to state otherwise. The evidence indicates that Enron was aware of INVESCO's identity and its involvement in the commercial paper transactions. Thus, Enron had sufficient information to timely name INVESCO as a defendant. Further, Enron did not provide plausible evidence to demonstrate that it made a mistake that prevented it from correctly identifying INVESCO 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 INVESCO until after the statute of limitations expired is inconsistent with the facts presented. Since Enron had detailed information regarding a defendant and its involvement in the transaction, the failure to name INVESCO 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 INVESCO 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 INVESCO as a defendant in a timely manner, the Court finds 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 INVESCO as a defendant in a timely manner. The Court has found that Enron possessed sufficient information concerning the identity of INVESCO. 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. As discussed previously, 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 regarding INVESCO. Enron simply did not name INVESCO 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 INVESCO. 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 INVESCO 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 INVESCO than was provided on the trade confirmations to include it as a defendant in the Original Pleadings, the Court does not need to address the issues raised regarding the application of the *Byrd* analysis.

Therefore, the Court finds that because Enron had sufficient information to include INVESCO in the Original Pleadings, the omission of INVESCO 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 INVESCO's objection to Enron's Motion for Leave to Amend.

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

Dated: New York, New York
May 30, 2006

s/Arthur J. Gonzalez
UNITED STATES BANKRUPTCY JUDGE