UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Not for Publication

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

OPINION AND ORDER DENYING MOTION FOR SUMMARY JUDGMENT BY DEFENDANT MERRILL LYNCH INVESTMENT MANAGERS, L.P.

The Motion for summary judgment before the Court concerns an adversary proceeding commenced by Enron Corp. ("Enron") in which it seeks to recover, after avoiding as preferential or fraudulent conveyances, certain payments it made in transactions concerning its own commercial paper.

In the complaint filed in this adversary proceeding, Enron alleges that in certain transactions (the "CP Transactions") involving payments for Enron commercial paper, Merrill Lynch Investment Managers, L.P. ("Merrill IM") was either (i) an initial transferee of these payments or an entity for whose benefit such transfer was made, or (ii) an immediate or mediate transferee of such payments.

In its motion for summary judgment, Merrill IM argues that because it is an investment advisor, as a matter of law, it is not a transferee, recipient, beneficiary or owner of Enron commercial paper. As such Merrill IM contends that Enron cannot recover the value of the alleged transfer of funds and that

summary judgment should be granted in its favor.

Alternatively, Merrill IM argues that even if it could be considered a transferee in connection with the CP Transactions, Merrill IM was not involved with them. Rather, according to Merrill IM, Merrill Lynch Investment Managers, Co., Ltd. ("Merrill Japan") was the investment advisor involved with those transactions. Merrill maintains that Merrill Japan is a separate entity licensed as a Japanese investment trust management company and investment advisory firm. As such, Merrill IM argues that the claims concerning the CP Transactions cannot be asserted against Merrill IM.

Merrill IM further argues that the claims based upon fraudulent transfer should be dismissed because Enron received reasonably equivalent value and was given fair consideration in connection with the CP Transactions which Merrill IM characterizes as repurchases.

Enron argues that it has not had any opportunity to engage in any discovery with any of the defendants, including Merrill IM. Enron further argues that the facts that it needs to discover in order to respond to the factual allegations in the summary judgment motion are in the exclusive possession of defendants, including Merrill IM. As such Enron contends that Merrill's request for summary judgment is premature. Enron further argues that Merrill IM's contention that Enron's fraudulent transfer claims fail as a matter of law cannot be decided as a matter of law because such claims involve quintessential fact issues.[1]

Fed. R. Civ. P. 56(c) incorporated into bankruptcy practice by Fed. R. Bankr. P. 7056

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[1]Along with numerous other defendants, Merrill IM previously filed a motion to dismiss this adversary proceeding pursuant to Fed. R. Civ. P. 12(b)(6). On June 15, 2005, this Court issued an Opinion denying the various motions to dismiss.

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."

After the non-moving party to the summary judgment motion has been afforded a sufficient time for discovery, summary judgment must be entered against it where it fails to make a showing sufficient to establish the existence of an element essential to its case and on which it has the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317,322 106 S.Ct. 2548, 2552 (1986). It is said that there is no genuine issue concerning any material fact because "a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." 477 U.S. at 323, 106 S.Ct. at 2552. The summary judgment standard is interpreted in a way to support its primary goal of "dispos[ing] of factually unsupported claims or defenses." *Celotex*, 477 U.S. at 323-24, 106 S.Ct. at 2553.

Fed. R. Civ. P. 56(f) provides that when a party opposing a motion for summary judgment submits an affidavit which sets forth the reasons why, at that time, it is unable to present by affidavit those facts that are essential to justify its opposition, "the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

FED. R. CIV. P. 56(f); *Meloff v. N. Y. Life Ins. Co.*, 51 F.3d 372, 375 (2d Cir. 1995). Thus, under Rule 56(f), summary judgment is considered inappropriate when the nonmoving party "shows that it cannot at the time present facts essential to justify its opposition." *Miller v. Wolpoff & Abramson L.L.P.*, 321 F.3d 292, 304 (2d Cir. 2003). Rather, as a safeguard against a premature grant of

summary judgment, the nonmoving party must first be afforded the opportunity to conduct discovery of the information essential to its opposition. *Id*.

The Rule 56(f) affidavit must show

1) what facts are sought to resist the motion and how those facts will be obtained,
2) how those facts are reasonably expected to create a genuine issue of material fact,
3) what effort affiant has made to obtain those facts, and
4) why the affiant was unsuccessful in those efforts.

*Miller v. Wolpoff & Abramson L.L.P.*, 321 F.3d 292, 303 (2d Cir. 2003) (citing *Gurary v. Winehouse*, 190 F.3d 37, 43 (2d Cir. 1999); *Melloff v. N. Y. Life Ins. Co*, 51 F.3d at 375).

Merrill IM argues that Enron has failed to make a showing on an essential element of its case with respect to which it has the burden of proof and therefore summary judgment should be granted. However, summary judgment can be granted against a non-moving party based on its failure to make such a showing only after it has been afforded an opportunity for discovery related to the facts essential to its opposition. *Miller*, 321 F.3d at 303-04. In is inappropriate for the non-moving party to "be 'railroaded' into his offer of proof in opposition" to the summary judgment issue. *Id*. at 304.

Here, Enron has provided a Rule 56(f) affidavit detailing the efforts it made to obtain the facts essential to its opposition and the reasons that it was unsuccessful in those efforts, including Merrill IM's resistance to discovery and Enron's efforts to preserve its right to discovery with respect to any summary judgment motion. The Court concludes that Enron has met the showing for those elements.

With respect to the first two elements, Enron contends that it needs discovery, *inter alia*, of whether Merrill IM and Merrill Japan exercised control over, had title to, had discretion or authority concerning, or benefitted from the payments made in the CP Transactions. Enron further contends that

it needs to depose the individuals whose supporting declarations were submitted by Merrill IM to determine whether Merrill IM was involved at all with the CP Transactions at issue. Enron further argues that such discovery will show whether there is a genuine issue of material fact as to whether Merrill IM is a transferee or beneficiary of those payments and whether Merrill IM is a proper defendant.

The Court concludes that it is premature to consider the motion for summary judgment prior to affording Enron an opportunity to conduct discovery. Moreover, under the circumstances of this case where the essential facts are within the control of Merrill IM, "a rigid adherence to the requirements of the first and second elements would be unjust and would offend the general policy in favor of liberal discovery." *Roebuck v. Hudson Valley Farms, Inc.* 208 F.R.D. 34, 36 n.5 (N.D.N.Y. 2002). Here, the debtor cannot be faulted for failing to "precisely" inform the Court what information it might obtain from discovery as the facts it seeks to obtain are within Merrill IM's control. *Miller*, 321 F.3d at 303. Further, the debtor has adequately detailed its efforts to obtain the information and how its efforts were resisted.[2]

As Merrill IM has not filed any proofs of claim against the Debtors, the parties agree that the cause of action in the Complaint seeking disallowance of any claims filed by Merrill IM should be dismissed. Otherwise, Enron must be afforded an opportunity for discovery concerning those facts that are essential to its opposition and, as such, summary judgment should be denied as premature. Based upon the foregoing, it is hereby

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[2]In addition, Merrill IM's request to dismiss the fraudulent transfer claims is denied as premature.

Ordered, that the cause of action seeking disallowance of any claims filed by Merrill IM is dismissed as against Merrill IM, and it is further

Ordered, except as specifically provided in the first decretal paragraph, that the motion for summary judgment by Merrill IM is denied without prejudice to renewal after Enron has had a reasonable opportunity to conduct discovery.

Dated: New York, New York
August 29, 2005

*s/ Arthur J. Gonzalez*
UNITED STATES BANKRUPTCY JUDGE