Minutes of Proceedings

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Date: June 1, 2006		
In re ENRON CORP., *et al.*,		
	Debtors,	Case No. 01-16034 (AJG)
ENRON CORP. and NEPCO POWER PROCUREMENT COMPANY		Proceeding No. 03-93246
	Plaintiffs,	
v.		
REXEL SOUTHERN ELECTRICAL SUPPLY.		
	Defendant.	

Present: Hon. Arthur J. Gonzalez, Bankruptcy Judge; Jacqueline De Pierola, Courtroom Deputy; _____, Court Reporter

Plaintiffs: Enron Corp. and NEPCO Power Procurement Company — Counsel: Togut, Segal & Segal LLP, By: Daniel Ceoghan, Esq.

Defendant: Rexel Southern Electrical Supply — Counsel:

Proceeding: Defendant's Motion to Dismiss and Motion for More Definite Statement

Order: For the reasons set forth in the decision attached hereto as Exhibit A, the relief sought is PARTIALLY GRANTED AND PARTIALLY DENIED.

FOR THE COURT: Kathleen Farrell, Clerk of the Court

BY THE COURT:

s/Arthur J. Gonzalez
United States Bankruptcy Judge

06/01/2006
Date

Jacqueline De Pierola
Courtroom Deputy

Exhibit A

Before the Court are a motion to dismiss and a motion for a more definite statement, both filed by Rexel Southern Electrical Supply ("Rexel" or "Defendant").

Rexel sold electrical materials to NEPCO Power Procurement Company ("NEPCO"), a subsidiary of Enron Corp. ("Enron"), and submitted invoices to NEPCO for a total amount of $117,829.00. (Compl. Ex. 1; Def.'s Mot. to Dismiss Compl. And Mot. For More Definite Statement Ex. A.) The invoices were paid by checks with NEPCO's name on their face on September 25 and 26, 2001 ("the Transfers"). (Pls.' Resp. in Opp'n to Def's Mot. to Dismiss Ex. 1.) Rexel received the Transfers. (Def.'s Mot. to Dismiss Compl. And Mot. For More Definite Statement Ex. B.)

On December 2, 2001, Enron filed for bankruptcy in this Court. The next day, the Court ordered procedural consolidation and joint administration of Enron's case with the cases of its affiliates. These cases were not substantively consolidated.[1] On May 20, 2002, NEPCO filed for bankruptcy in this Court. On July 15, 2004, the Court confirmed Enron's and its affiliates' Supplemental Modified Fifth Amended Joint Plan of Affiliated Debtors, which took effect on November 17, 2004. The assets of Enron and NEPCO were not substantively consolidated under the Plan.

Enron and NEPCO (together "Plaintiffs") filed a complaint against Rexel on November 18, 2003, seeking to avoid and recover the Transfers as preferences or

[1] "Unlike joint administration (also referred to as procedural consolidation), which does not affect the substantive rights of claimants or the respective debtor estates, substantive consolidation merges the separate estates into one estate for distributive purposes. Usually, the assets and liabilities are shared, with duplicate claims being eliminated and intercompany claims being extinguished." *Moran v. H.K. & Shanghai Banking Corp. (In re DeltaCorp.)*, 179 B.R. 773, 777 (Bankr. S.D.N.Y. 1995) (footnotes omitted) (citing *FDIC v. Colonial Realty Co.*, 966 F.2d 57, 58-59 (2d Cir. 1992)). The Enron-related bankruptcy cases in this Court have only been procedurally consolidated.

fraudulent transfers pursuant to sections 547, 548 and 550 of title 11 of the United States Code.

On March 5, 2004, Rexel filed a motion to dismiss the complaint and a motion for a more definite statement. *See* Fed. R. Civ. P. 12(b)(6), (e). Rexel contends that Enron's preference action under section 547(b) fails because NEPCO, an entity distinct from Enron, made the Transfers. Rexel argues that the checks used for the Transfers displayed NEPCO's name, not Enron's, and that the funds transferred to Rexel, as payment for the invoices, belonged to NEPCO, not Enron. Rexel concludes that Enron's preference claim should be dismissed because Enron was not the party in interest or, in other words, the Transfers did not involve "an interest of the debtor [Enron] in property" under section 547 of the Bankruptcy Code.

As for NEPCO's own preference action, Rexel notes that the Transfers occurred at the end of September 2001, more than ninety days before NEPCO's petition for relief on May 20, 2002. Rexel asserts that, therefore, the Court should dismiss NEPCO's preference claim.

Regarding Plaintiffs' action under section 548, Rexel contends that the Court should dismiss Enron's claim because, for the same reasons as for Enron's preference claim, Enron is not the party in interest.

Rexel takes issue with the complaint for not clearly distinguishing between the two plaintiffs, Enron and NEPCO. Rexel requests the Court to compel Plaintiffs to provide "a more definite statement of the facts attributable to each plaintiff." (Def.'s Mot. to Dismiss Compl. And Mot. For More Definite Statement ¶ 26.)

Plaintiffs filed a response on May 6, 2004. They argue that Enron has a property interest in the Transfers because "[t]he payments were made to Rexel from accounts that were owned and controlled by Enron." (Pls.' Resp. in Opp'n to Def's Mot. to Dismiss ¶ 2.) Accordingly, they "concede that NEPCO's preference cause of action should be dismissed." (Id.) They also assert that the complaint satisfies the pleading rules and that "[i]f any remedy is called for here – which Plaintiffs strongly dispute – a more definite statement may be appropriate for the purported technical violations of the pleading rules." (Id. ¶ 3; *see* Fed. R. Civ. P. 8(a).)

Plaintiffs explain that Enron opened and owned the account from which the funds for the Transfers came, the "Disbursement Account," and that these funds in the Disbursement Account came from another account belonging to Enron, "the Concentration Account." (Id. ¶ 5, Ex. 2-3.) Plaintiffs conclude that the Transfers involved "an interest of the debtor in property" under sections 547 and 548 of the Bankruptcy Code.

Plaintiffs argue that the presence of the name "NEPCO Power Procurement Power Co." on the face of the checks used for the Transfers is irrelevant given that the account from which the funds came belonged to Enron and came from Enron's cash management system. Plaintiffs also note that the check bore the Enron logo.

A hearing was held regarding the instant adversary proceeding on May 13, 2004, during which Rexel additionally argued that NEPCO's fraudulent transfer claim should be dismissed because "there was consideration and there was debt and it was paid" and "the work was done and…it was trade debt and it was paid." (Transcript of Oral Argument at 98, 100, *In re Enron Corp.*, No. 01-16034 (Bankr. S.D.N.Y. May 13,

2004)). In other words, Rexel contends that NEPCO did receive "reasonably equivalent value in exchange for" the Transfers. *See* 11 U.S.C. § 548(a)(1)(B)(i) (2000). Rexel also asserted during oral argument that Enron's preference claim should be dismissed "because there was no antecedent debt." (Tr. 98.) Further, Rexel noted during the hearing that none of the authorized signatories for the Disbursement and Concentration Accounts appeared on the checks to Rexel (Tr. 99.)

Finally, during the hearing, Plaintiffs said regarding the funds used for the Transfers that if this Court "does find that it is Enron's property, then we will concede that NEPCO did not have a property interest in the transfers." (Tr. 105.)

Under Federal Rule 12(b)(6), "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief…. When determining the sufficiency of the plaintiff's claim, the court 'must accept as true all of the factual allegations set out in plaintiff's complaint, draw inferences from those allegations in the light most favorable to plaintiff, and construe the complaint liberally.'" *In re Sharp International*, 278 B.R. 28, 33 (Bankr. E.D.N.Y. 2002) (quoting *Gregory v. Daly*, 243 F.3d 687, 691 (2d Cir. 2001)).

In considering a 12(b)(6) motion, although a court accepts all the factual allegations in the complaint as true, the court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286 (1986). Thus, where more specific allegations of the complaint contradict such legal conclusions, "[g]eneral, conclusory allegations need not be credited…." *Hirsch v. Arthur Andersen & Co.*, 72 F.3d 1085, 1092 (2d Cir. 1995). Rather, to withstand a

motion to dismiss, there must be specific and detailed factual allegations to support the claim. *Friedl v. City of New York*, 210 F.3d 79, 85-86 (2d Cir. 2000).

"Although bald assertions and conclusions of law are insufficient, the pleading standard is nonetheless a liberal one." *Cooper v. Parsky*, 140 F.3d 433, 440 (2d Cir. 1998). Under Federal Rule 8(a), in asserting a claim, the pleader need only set forth a short and plain statement of the claim showing that the pleader is entitled to relief. The purpose of the statement is to provide "fair notice" of the claim and "the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957). The simplicity required by the rule recognizes the ample opportunity afforded for discovery and other pre-trial procedures, which permit the parties to obtain more detail as to the basis of the claim and as to the disputed facts and issues. *Id.* at 47-48. Based upon the liberal pleading standard established by Rule 8(a), even the failure to cite a statute, or to cite the correct statute, will not affect the merits of the claim. *Northrop v. Hoffman of Simsbury, Inc.*, 134 F.3d 41, 46 (2d Cir. 1997). In considering a motion to dismiss, it is not the legal theory but, rather, the factual allegations that matter. *Id.*

In reviewing a Rule 12(b)(6) motion, a court may consider the allegations in the complaint, exhibits attached to the complaint or incorporated therein by reference, matters of which judicial notice may be taken, and documents of which the plaintiff has notice and on which it relied in bringing its claim or that are integral to its claim. *Brass v. Am. Film Technologies, Inc.*, 987 F.2d 142, 150 (2d Cir. 1993); *Cortec Indus. v. Sum Holding, L.P.*, 949 F.2d 42, 48 (2d Cir. 1991). However, mere notice or possession of the document is not sufficient. *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002). Rather, a necessary prerequisite for a court's consideration of the document

is that a plaintiff relied "on the terms and effect of a document in drafting the complaint." *Id.* As such, the document relied upon in framing the complaint is considered to be merged into the pleading. *Id.* at 153 n.3 (citation omitted). In contrast, when assessing the sufficiency of the complaint, courts will not consider extraneous material because considering such material would run counter to the liberal pleading standard which requires only a short and plain statement of the claim showing entitlement to relief. *Id.* at 154. Nevertheless, in considering a Rule 12(b)(6) motion, a court may consider facts of which the court may properly take judicial notice under Federal Rule of Evidence 201. *In re Merrill Lynch & Co., Inc.,* 273 F.Supp.2d 351, 357 (S.D.N.Y. 2003) (citing *Chambers,* 282 F.3d at 153.)

To survive a motion to dismiss, a plaintiff only has to allege sufficient facts, not prove them. *Koppel v. 4987 Corp.,* 167 F.3d 125, 133 (2d Cir. 1999). A court's role in ruling on a motion to dismiss is to evaluate the legal feasibility of the complaint, not to undertake to weigh the evidence, which may be offered to support it. *Cooper v. Parsky,* 140 F.3d at 440.

Thus, for the purposes of the motion to dismiss, the Court accepts as true all of the material allegations in the complaint. The Court must then ascertain whether the complaint contains sufficient allegations to state a claim under sections 547 and 548 of the Bankruptcy Code.

Both sections 547 and 548 apply to a transfer of "an interest of the debtor in property." 11 U.S.C. §§ 547(b), 548(a)(1) (2000). The Court discussed the parameters of determining property of the bankruptcy estate in *Begier v. I.R.S.,* 496 U.S. 53 (1990) noting, "[t]he Bankruptcy Code does not define 'property of the debtor.' Because the

purpose of the avoidance provision is to preserve the property includable within the bankruptcy estate -- the property available for distribution to creditors – 'property of the debtor' subject to the preferential transfer provision is best understood as that property that would have been part of the estate had it not been transferred before the commencement of bankruptcy proceedings. For guidance, then, we must turn to § 541, which delineates the scope of 'property of the estate' and serves as the postpetition analog to § 547(b)'s 'property of the debtor.'" *Begier*, 496 U.S. at 58-59.

Courts have generally held that for certain funds held in a bank or checking account to be considered property of the estate the debtor must have control over those funds. *In re Southmark Corp.*, 49 F.3d 1111, 1116-17 (5th Cir. 1995).

Evidence of controlling ownership interest in a bank account has been found where one party holds the legal title thereto, "all indicia of ownership, and unfettered discretion to pay creditors of its own choosing, including its own creditors," even where the same account contains commingled funds. *In re Southmark Corp.*, 49 F.3d at 1116. For purposes of sections 547(b) and 548(a) of the Bankruptcy Code, it is the transferor's control of the funds in the account and not the actual ownership that is dispositive. *Id.* at 1117; *Cassirer v. Herskowitz (In re Schick)*, 234 B.R. 337, 342 (Bankr. S.D.N.Y. 1999); *Stevenson v. J.C. Bradford Co. (In re Cannon)*, 277 F.3d 838, 849 (6th Cir. 2002). "[T]he primary consideration in determining if funds are property of the debtor's estate is whether the payment of those funds diminished the resources from which the debtor's creditors could have sought payment." *In re Southmark Corp.*, 49 F.3d at 1116-1117.

Where the account is a cash management account, with proper bookkeeping allocations, the holder of all the indicia of control is the holder of the interest. *In re*

Regency Holdings (Cayman), Inc., 216 B.R. 371, 377 (Bankr. S.D.N.Y. 1998). In contrast, a parent's control, through an ownership structure or other corporate governance mechanism, of a subsidiary entity, does not constitute control of the subsidiary's assets, such as a bank account, where there is no legal title to a subject asset held by the parent. *Id.* at 376. A bankruptcy trustee has the burden of demonstrating that the debtor held the legal title to a bank account and control over the use of the account. *In re Schick*, 234 B.R. at 343.

In *In re Amura Corp.*, 75 F.3d 1447, 1451 (10th Cir. 1996), the Tenth Circuit presumed, despite arguments to the contrary, that the deposits in a bank to the credit of the debtor were property of the estate. The court in *Amura*, considered the debtor's pre-petition right to spend the money entirely as it saw fit. The account in question in *Amura*, was held in the name of the parent company, over that of its subsidiaries. The court in *Amura* did not find it fatal, to the contention that the account was property of the parent corporation, that the parent corporation used the funds in the account to meet its own obligations and that of its subsidiary. *In re Amura Corp.*, 75 F.3d 1447, 1451 (10th Cir. 1996).

In the instant matter, the complaint alleges sufficient facts to show Enron controlled the funds used for the Transfers. Enron contends that it owned the Disbursement and Concentration Accounts at the time of the Transfers, and that, therefore, the monies transferred to Defendant in payment of the invoices were property of Enron. To support its contention, Enron offers evidence of the opening of the Disbursement and Concentration Accounts. (Pls.' Resp. in Opp'n to Def's Mot. to Dismiss Ex. 2-3.) The Court will not make conclusions of fact at this stage of the

proceeding. Rather, the Court considers only, for the purposes of alleging sufficient facts, that at this time the submissions would suggest that, at the time of the pre-petition transfer, the debtor had the requisite control over the account to make payments for itself and its subsidiaries.

Thus, the Transfers did involve "an interest of the debtor [Enron] in property" under sections 547 and 548 of the Bankruptcy Code. Consequently, Plaintiffs concede, for purposes of the instant proceeding, "that NEPCO did not have a property interest in the transfers." (Tr. 105.) Even assuming NEPCO has a property interest under section 547, its preference claim must be dismissed because the Transfers occurred at the end of September 2001, more than 90 days before NEPCO filed for bankruptcy on May 20, 2002. *See* 11 U.S.C. § 547(b)(4)(A) (2000). Given the same assumption, NEPCO's fraudulent transfer claim cannot stand either. The check payments satisfied NEPCO's obligation to Rexel and the pleadings do not appear to allege NEPCO did not receive "reasonably equivalent value" under section 548. Therefore, NEPCO's preference and fraudulent transfer claims must be dismissed.

Enron's preference action under section 547 must be dismissed as well because the Transfers were not "for or on account of an antecedent debt *owed by the debtor [Enron]*." *See* 11 U.S.C. § 547(b)(2) (2000) (emphasis added). This language "requires that the Court determine that at the time of the transfer there was a recognizable 'claim' that was…against the debtor, rather than only against a third party…." *Breeden v. L.I. Bridge Fund, L.L.C. (In re Bennett Funding Group, Inc.)*, 220 B.R. 739, 742 (B.A.P. 2d Cir. 1998). The debt to Rexel paid by the Transfers was owed by NEPCO, not Enron.

Therefore, Enron's preference claim fails to meet the requirement of section 547(b)(2) and must be dismissed.

As for the remaining action, Enron's fraudulent transfer claim, the applicable statutory language provides the following:

> The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily--
>
> (A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or
>
> (B) (i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and
>
> (ii) (I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;
>
> (II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or
>
> (III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

11 U.S.C. § 548(a)(1) (2000), *amended by* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 1402, 119 Stat. 23, 214.

There is no allegation that Enron had any actual fraudulent intent at the time of the Transfers. *See* 11 U.S.C. § 548(a)(1)(A) (2000). Enron seeks to state a claim for constructively fraudulent transfer under section 548(a)(1)(B). (Compl. ¶¶ 19-25.) "A transaction may be avoided as a constructively fraudulent transfer under federal bankruptcy law if it is proved that (1) the debtor had an interest in the property

transferred; (2) the transfer occurred within one year of the petition date; (3) the debtor was insolvent at the time of the transfer or became insolvent as result of it; and (4) the debtor received less than a reasonably equivalent value in exchange for the transfer." *Breeden v. L.I. Bridge Fund, L.L.C. (In re Bennett Funding Group, Inc.)*, 232 B.R. 565, 570 (Bankr. N.D.N.Y. 1999) (citing 11 U.S.C. § 548(a)(1)(B); *Mellon Bank v. Official Comm. of Unsecured Creditors of R.M.L., Inc. (In re R.M.L., Inc.)*, 92 F.3d 139, 144 (3d Cir. 1996)).

The Court has established that the Transfers involved Enron's interest in property. Further, the Transfers occurred at the end of September 2001 within a year before Enron filed for bankruptcy on December 2, 2001. Enron may have been insolvent at the time of the Transfers or become insolvent as a result of them, and, presumably, Enron may not have received "reasonably equivalent value" for the Transfers because NEPCO, not Enron, obtained consideration from Rexel in exchange for the Transfers. In any event, this Court will not decide the issues of insolvency and "reasonably equivalent value," which both require weighing the evidence, in the context of a motion to dismiss. *Cooper*, 140 F.3d at 440. For the same reason, the Court expresses no opinion at this stage about the alleged absence of any authorized signatories' names on the checks submitted by Plaintiffs as evidence. Enron's allegations at this point are sufficient to state a claim for constructively fraudulent transfer against Rexel.

A party may move for a more definite statement "[i]f a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading." Fed. R. Civ. P. 12(e). The issue is whether the pleading is intelligible, not whether it has enough details. *See, e.g., Bunker*

Exploration Co. v. Clarke (*In re Bunker Exploration Co.)*, 42 B.R. 297, 300-01 (Bankr. W.D. Okla. 1984). As only Enron's fraudulent transfer claim against Rexel remains, Rexel cannot argue anymore that there is confusion as to the attribution of facts to either of the two plaintiffs, and Rexel's motion for a more definite statement is moot.

In conclusion, Rexel's motion to dismiss is granted as to NEPCO's preference and fraudulent transfer claims and Enron's preference claim. Rexel's motion to dismiss is, however, denied as to Enron's fraudulent transfer claim. Finally, Rexel's motion for a more definite statement is denied.