Minutes of Proceedings

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Date: May 11, 2006	:	
In re Enron Corp., *et al.*,	:	
Debtors.	:	Case No. 01- 16034 (AJG)
ENRON CORP. and NATIONAL ENERGY PRODUCTION CORPORATION,	:	Adv. Pro. No. 03-93172 (AJG)
Plaintiffs,	:	
- against -	:	
GRANITE CONSTRUCTION CO,	:	
Defendant.	:	

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

Debtors: Enron, Corp., *et al.* Counsel: Togut, Segal & Segal LLP, By: Jonathan Hook, Esq.

Defendant: Granite Consturction Co. Counsel: Mound Cotton Wollan, By: Sanjit Shah, Esq.

Proceeding: Opinion on motion to dismiss filed by the defendant, Granite Construction Co.

Order: For the reasons set forth in the opinion attached hereto as Exhibit A, the relief sought is:

Granted in part and denied in part.

FOR THE COURT: Kathleen Farrell, Clerk of the Court

BY THE COURT:

s/Arthur J. Gonzalez 5/15/2006 Jacqueline De Pierola
United States Bankruptcy Judge Date Courtroom Deputy

Exhibit A

The issue now before the Court is whether to grant the motion to dismiss (the "Motion to Dismiss") the amended complaint (the "Amended Complaint") pursuant to Rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure filed by the defendant Granite Construction Company (the "Defendant," alternatively, "Granite") against plaintiffs Enron Corp. ("Enron") and one of its affiliates, National Energy Production Corporation ("NEPCO," collectively with Enron, the "Plaintiffs").

On or about August 31, 2001, Defendant sent an invoice (the "Invoice") to NEPCO demanding a payment of $374,777.50 for construction work provided to NEPCO in connection with site preparation at NEPCO's Panda Gila River, L.P. project ("Panda Gila"). The Invoice required payment upon receipt.

By an electronic transfer (the "Transfer") ordered October 31, 2001, and completed on November 2, 2001, Enron satisfied the Invoice for the full amount of $374,777.50. The Transfer occurred as part of a larger wire transfer of funds to Granite. The total amount of that wire transfer was $756,913.66.

As indicated in Enron accounts payable computerized ledger reports and the bank statement, the funds were drawn and electronically transferred from bank account number 4080-7423 (the "Bank Account") to Defendant. Enron opened the Bank Account and held legal title to the Bank Account until it transferred ownership thereof to Enron Engineering & Construction Company ("EECC"), on November 26, 2001, almost one month after the date of the Transfer.

On December 2, 2001, Enron and certain of its various affiliates (the "Debtors") filed voluntary petitions for relief under chapter 11 of Title 11 of the United States Code,

11 U.S.C. § 101, et seq. (the "Bankruptcy Code"). On May 20, 2002, NEPCO filed its Chapter 11 petition.

On July 15, 2004, the Court entered an order confirming the Debtors' Supplemental Modified Fifth Amended Joint Plan of Affiliated Debtors (the "Plan"). The Plan became effective on November 17, 2004. The assets of Enron and NEPCO were not substantively consolidated under the Plan.

In the financial statements initially filed with the Court, neither Enron nor NEPCO named Granite as a creditor to whom a transfer was made within ninety days of the filing of the respective petitions. Rather, NEPCO's statement names Granite as a subcontractor to whom payment was made by a project owner on behalf of NEPCO.

On November 18, 2003, Plaintiffs commenced the Adversary Proceeding against Granite by filing the original complaint (the "Original Complaint") seeking to recover the Transfer as a preferential and/or a fraudulent transfer pursuant to sections 547(b), 548(a)(1)(B) and 550 of the Bankruptcy Code. The Original Complaint, in an attached exhibit, Exhibit A, listed the Transfer in the amount of $37,906.38.

Thereafter, Plaintiffs discovered what it listed as the amount in the Original Complaint was a clerical error and, subsequently, on February 25, 2004, Plaintiffs amended the Original Complaint to reflect what the Plaintiffs assert is the correct amount of the Transfer – $374,777.50.

On March 3, 2005, the Defendant filed the Motion to Dismiss claiming, among other things, that Plaintiffs have failed to state a cause of action for which relief may be granted. The Defendant argues that Enron's preference claim should be dismissed on the grounds that Enron has no standing under section 547(b) to avoid a transfer by NEPCO

and, since NEPCO is the proper party to bring this claim under section 547, it should be dismissed because the transfer occurred more than ninety days before NEPCO's May 20, 2002 petition. Furthermore, the Defendant argues that if the case were considered in the context of substantive consolidation the most the plaintiffs could recover would be the amount listed in the Original Complaint, $37,906.38. The Defendant makes the assertion because the Amended Complaint was filed more than two years after the December 2, 2001 petition date, and the Original Complaint is too vague to give notice and too indefinite for the Amended Complaint to relate back to the Original Complaint pursuant to Rule15(c)(2). Further, the Defendant argues that Enron and NEPCO's fraudulent conveyance claims should be dismissed on the grounds that, pursuant to Rule 9(b), fraud must be pleaded with particularity; and that the Amended Complaint should be dismissed with prejudice because NEPCO's preference claim on the Transfer was made more than ninety (90) days prior to NEPCO's filing for Chapter 11 relief and because Enron did not make the Transfer.

On March 28, 2005, Plaintiffs submitted their response. The Plaintiffs claimed that the monies paid were property of Enron, and that ample evidence supported the constructive fraudulent conveyance allegations contained in the Amended Complaint. Furthermore, Plaintiffs contend that the liberal pleading requirements as set forth in Rule 8(a) would not suggest that this case be dismissed and that Rule 8(a) applies to pleadings in constructive fraud claims and not Rule 9(b). The Plaintiffs also counter the charge that the fraudulent conveyance claim was not sufficiently pleaded. The Plaintiffs assert that the Amended Complaint sets forth the date, amount and mode of the Transfer of Enron property. Furthermore, Plaintiffs argue that Defendant's assertion, that the amount of any

recovery should be limited to the amount stated in the Original Complaint, $37,906.38, rather than the amended amount, $374,777.50, is misguided. If the Court considers whether the amended pleading here "relates back" to the earlier pleading for the purposes of Rule 15(c)(2), Plaintiffs argue the Defendant was given sufficient notice of the correct amount. The Plaintiffs assert that the Amended Complaint alleges sufficient facts to sustain Enron's fraudulent transfer claim. However, should the Court deem it appropriate, Plaintiffs request it be permitted to provide Defendant with a more definite statement, with an opportunity to replead as to Enron's fraudulent transfer claim.

On March 30, 2005, the Defendant submitted memorandum of law in support of its Motion to Dismiss the Amended Complaint with prejudice. The Defendant argues that the Transfer could not be considered property of Enron's estate; therefore, the preference action should be dismissed. Additionally, NEPCO's section 547 preference claim should be dismissed because the Transfer occurred more than ninety days before NEPCO's May 20, 2002 bankruptcy petition. Furthermore, the Defendant asserts that the Amended Complaint cannot relate back to the Original Complaint, thus fulfilling the notice requirements of Rule 15(c)(2), since the Original Complaint provided no detail about the Transfer. Furthermore, the Amended Complaint should be dismissed because it does nothing more than allege "bald assertions and conclusions of law," which is insufficient to withstand a Rule 12(b)(6) motion to dismiss.

On March 31, 2005, the Court heard arguments regarding the Motion to Dismiss.

At this time, the Court addresses the Defendant's Motion to Dismiss the Amended Complaint pursuant to Rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure.

Fed. R. Bankr. P. 7012 has made Rule 12(b)(6) applicable in bankruptcy proceedings. Under 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) (citing *Tarshis v. Riese Org.*, 211 F.3d 30, 35 (2d Cir. 2000)).

In considering a Rule 12(b)(6) motion to dismiss for failure to state a claim for relief, the court accepts as true all material facts alleged in the complaint and draws all reasonable inferences in favor of the plaintiff. *Walker v. City of New York*, 974 F.2d 293, 298 (2d Cir. 1992). The motion to dismiss is granted only if no set of facts can be established to entitle the plaintiff to relief. *Id.*

In considering such a 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). Pursuant to Rule 8(a), which is made applicable to adversary proceedings by Fed. R. Bankr. P. 7008, 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; *Brass v. Am. Film Technologies, Inc.*, 987 F.2d 142, 150 (2d Cir. 1993); and documents of which plaintiff has notice and on which it relied in bringing its claim or that are integral to its claim. *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 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 as to which the court may properly take judicial notice under Fed. R. Evid. 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 Amended Complaint.

The Court will first consider the fraudulent conveyance claim asserted against the Defendant by the Plaintiffs. Specifically, the Court must initially determine the amount of specificity that needs to be plead at this stage of litigation for a constructive fraudulent conveyance cause of action under section 548(a)(1)(B), to survive the Defendant's Motion to Dismiss. The Defendant contends that the more stringent pleading requirements as set forth in Rule 9(b) should be applied while the Plaintiffs argue for the more liberal application found in Rule 8(a). "While there is authority to the contrary, the

better and majority rule is that a claim for constructive fraud under § 548(a)(1)(B) need not be pleaded with particularity, as the claim is not premised on fraud but on a transfer made for inadequate consideration at a time the transferor was insolvent." *In re Ticketplanet.com*, 313 B.R. 46, 68 (Bankr. S.D.N.Y. 2004). The reason behind the more liberal application in Rule 8(a) is due to *scienter* not being an element of constructive fraud. *In re Ticketplanet.com*, 313 B.R. at 68, quoting *China Resource Prods. (USA), Ltd. v. Fayda Int'l, Inc.*, 788 F.Supp. 815, 819 (D. Del. 1992). "Constructive fraudulent conveyance claims do not require proof of fraud or even wrongdoing. The cause of action is based on the transferor's financial condition, the value given in exchange for the transfer, and the terms and conditions of the transaction. *In re White Metal Rolling & Stamping Corp.*, 222 B.R. at 428. The purpose behind Rule 9(b), to protect the defendant's reputation and to guard against strike suits, has little relevance where the claim is not based on any kind of fraud. As the Court in *White Metal* stated, 'the sole consideration should be whether, consistent with the requirements of Rule 8(a), the complaint gives the defendant sufficient notice to prepare an answer, frame discovery and defend against the charges.' Rule 9(b) does not apply to the constructive fraud claims …." *In re Actrade Financial Technologies Ltd.*, 337 B.R. 791, 802 (Bankr. S.D.N.Y. 2005), quoting *In re White Metal Rolling & Stamping Corp.*, 222 B.R. 417, 428 (Bankr. S.D.N.Y. 1998) citing *SIPC v. Stratton Oakmont*, 234 B.R. 293, 319 (Bankr. S.D.N.Y. 1999).

This Court has recognized the use of Rule 8(a) when dealing with a motion to dismiss, under Rule 12(b)(6), for a constructive fraud cause of action brought under section 548(a)(1)(B). *In re Enron Corp.*, 323 B.R. 857, 861-862 (Bankr. S.D.N.Y. 2005).

The Court does not see any reason to break with its precedent in applying Rule 8(a) in evaluating the pleadings in a constructive fraudulent conveyance matter herein. Therefore, the Court finds the applicable pleading standard in this matter is the one set forth in Rule 8(a).

The Bankruptcy Rules only require a petitioner to set forth a short and plain statement of the claim showing that the pleader is entitled to relief. Rule 8(a), which is made applicable herein by Fed. R. Bankr. P. 7008. 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.*, 355 U.S. 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.*

The power of the debtor in possession to bring a fraudulent conveyance action is found in section 548(a)(1)(B). "Section 548 of the Bankruptcy Code, 11 U.S.C. § 548, sets forth the powers of a trustee in bankruptcy (or, in a Chapter 11 case, a debtor in possession) to avoid fraudulent transfers. It permits to be set aside not only transfers infected by actual fraud but certain other transfers as well-so-called constructively fraudulent transfers. The constructive fraud provision at issue in this case applies to transfers by insolvent debtors. It permits avoidance if the trustee can establish (1) that the

debtor had an interest in property; (2) that a transfer of that interest occurred within one year of the filing of the bankruptcy petition; (3) that the debtor was insolvent at the time of the transfer or became insolvent as a result thereof; and (4) that the debtor received 'less than a reasonably equivalent value in exchange for such transfer.'" *BFP v. Resolution Trust Corp.,* 511 U.S. 531, 535 (1994), quoting 11 U.S.C. §548.

The first element of this analysis is one that has been heavily called into question in these proceedings. The Court must consider whether the Amended Complaint properly alleged that the Transfer in this matter actually involved property of Enron being transferred to the Defendant. More specifically, the Court considers whether the Bank Account from which the Transfer was made was sufficiently alleged to be property of the Enron estate.

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 v. I.R.S.,* 496 U.S. 53, 58-59 (U.S. 1990).

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 the requisite control

over those funds. *In re Southmark Corp.*, 49 F.3d 1111, 1117 (5th Cir. 1995), citing *Coral Petroleum, Inc. v. Banque Paribas-London,* 797 F.2d 1351, 1358 (5th Cir.1986), *In re Coutee,* 984 F.2d 138, 141 & n. 3 (5th Cir.1993), *In re Kemp Pac. Fisheries, Inc.*, 16 F.3d 313, 316-17 (9th Cir.1994), and *In re Chase & Sanborn Corp.,* 813 F.2d 1177, 1181 (11th Cir.1987).

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. *In re Southmark Corp.,* 49 F.3d 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).

Here the similar question is whether the Amended Complaint sufficiently alleges facts related to Enron's control of the funds for the Court to evaluate the legal feasibility of the complaint while recognizing that a plaintiff need not make the complaint itself prove the allegations. *Koppel*, 167 F.3d at 133; *Cooper,* 140 F.3d at 440.

Enron contends that it owned the checking account at the time of the Transfer, and, therefore, the monies transferred to the Defendant in payment of the Invoice were property of Enron. To support its contention, it offers two affidavits by corporate officers of Enron asserting the control that Enron and its officers had over the account. Additionally, Enron has submitted bank account statements that show Enron on the account and the transfer papers that eventually turned over control of the account in question from Enron to it subsidiary. The Court will not make determinative 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 that of its subsidiaries.

Under the liberal pleading requirements of Rule 8(a), the Court finds that the Plaintiffs have adequately plead that Enron had ownership in and controlled the account from which the Transfer was made. Thus, the Court accepts, for the purposes of this motion, that property of Enron was transferred to the Defendant.

As to the other elements of the constructive fraudulent conveyance action, the Court finds that the Amended Complaint put the Defendant on notice as to the Plaintiffs' cause of action brought under section 548(a)(1)(B). The Amended Complaint set the date of the alleged fraudulent conveyance as October 31, 2001, the amount as $374,777.50, and the mode of the Transfer as wire. In looking at the time period of the transfer, it is clear that the Transfer occurred within one year of the date of Enron's petition. The Plaintiffs also allege in their Amended Complaint that it received less than the equivalent value in exchange for the Transfer. Additionally, the Plaintiffs assert, upon information and belief, the insolvency of the Plaintiffs at the time of the Transfer. Since the issue of Enron's insolvency comes before the Court as part of a Rule 12(b)(6) motion, in consideration with Rule 8(a), the Court finds that this element has been plead adequately.

Thus, the Amended Complaint contains allegations for each of the four elements of a fraudulent conveyance action and does more then "parrot" the language of the statute.

As stated previously, the Court finds that under the liberal pleading standard as set forth in Rule 8(a), the Plaintiffs have met the requirements to provide the Defendant with sufficient notice as to the allegations it will be called upon to defend. Therefore, drawing all factual inferences in favor of Enron, Enron has alleged a legally cognizable claim, and consequently, the Motion to Dismiss is denied, with respect to Enron.

With regard to NEPCO's constructive fraudulent conveyance action the Court grants the Defendant's Motion to Dismiss. The Plaintiffs argument centers on the checking account being property of Enron's estate. Although the Plaintiffs in the Original and Amended Complaint assert that the property is that of the "Plaintiffs," collectively Enron and NEPCO, the Plaintiffs only appear to argue in its memorandum of law and at the hearing held on March 31, 2005, that the Bank Account belonged to and was control by Enron. Assuming, in the alternative, the Plaintiffs also argue that the Bank Account was also part of NEPCO's estate, that cause of action is dismissed for insufficient pleadings under Rule 12(b)(6) in accordance with Rule 8(a), as the Plaintiffs have not plead all the elements of section 548(a)(1)(B) regarding NEPCO as plaintiff. Specifically, the Plaintiffs have failed to allege that NEPCO did not receive "reasonable equivalent value," as such is an element of a constructive fraud cause of action. Therefore, the Motion to Dismiss as to NEPCO's fraudulent conveyance action is dismissed.

The next issue is whether the preference action brought by the Plaintiffs under section 547(b) should be dismissed. "Under 11 U.S.C. § 547(b), the trustee for the debtor may void certain money transfers from the debtor to a creditor if those transfers occurred during the 90 days prior to the bankruptcy petition." *Gold Force Intern., Ltd. v.*

Official Committee of Unsecured Creditors of Cyberrebate.com, Inc., 2004 WL 287144, 1 n. 1 (E.D.N.Y. 2004).

Even assuming the liberal pleading standards and deference that is granted in a motion to dismiss, the Court finds that the preference action should be dismissed. During the course of the oral arguments held on March 31, 2005, the Plaintiffs conceded that this was essentially a constructive fraudulent conveyance case and not a preference action under section 547. The Plaintiffs also noted during oral arguments that the preference action for the Transfer was clearly outside the ninety-day look back period for NEPCO. The debt here was for a legitimate debt owed by the debtor, NEPCO, but the Transfer does not appear to involve the transfer of NEPCO's property and was not within the ninety-day look back period from NECPO's petition date. Alternatively, in the case of Enron, this was a debt paid within the look back period of ninety days from Enron's date of petition, and appears to involve property of Enron, but the payment was not for a debt of Enron.

Assuming all of the facts, including those conceded at the oral argument held on March 31, 2005, in the light most favorable to the Plaintiffs, and drawing all reason inferences in favor of the Plaintiffs, the Court finds that the motion to dismiss regarding the preference action should be granted as no set of facts can be established to entitle the Plaintiffs to relief. *Walker*, 974 F.2d at 298.

The Defendant also notes that Enron did not list Granite as a creditor to whom Enron made a transfer within ninety days of it filing. Rather, NEPCO's statement names Granite as a subcontractor to whom a payment was made by a project owner on behalf of NEPCO. The objection to this lack of information appears to primarily revolve around

the preference action brought by Enron, in that Granite is not listed as a creditor to whom Enron made a transfer within ninety days of filing its petition.

In a chapter 11 case, the debtor has the obligation to file by the required schedules and statements; the debtor in possession then inherits the schedules filed the debtor. §§1107(a) and 1106(a)(2). "The schedules and statements should be prepared with reasonable diligence … [while] minor errors that do not result in giving a deceptive impression or other prejudice should not be the basis for limiting the debtor's rights." 9 *Collier on Bankruptcy* ¶ 1007.03[1], at 1007-11 (15th Ed. 2004). To obtain the overall benefits of chapter 11 reorganization, the Bankruptcy Code should not be construed as a "minefield" to the debtor. *In re Landing Assocs., Ltd.*, 157 B.R. 791, 811 (Bankr. W.D. Tex. 1993).

In a chapter 11 case, section 1107(a) of the Bankruptcy Code grants the debtor in possession the powers of the trustee, including the power to avoid transfers of a debtor's interest in property under sections 547(b) and 548. §§1107(a), 547(b)(a). "The purpose of the requirement of filing a statement of financial affairs is to furnish the trustee … with detailed information about the debtor's financial condition, thereby saving the expense of a … long and protracted examination." 4 *Collier on Bankruptcy* ¶ 521.09.9, at 521-35 (15th Ed. 2005)(noting *United States v. Stone*, 282 F.2d 547 (2d Cir. 1960).

While sections 547 and 548 of the Bankruptcy Code refer to "transfers," neither section references section 521(1) or rule 1007(b). *See e.g. In re DeLash*, 260 B.R. 4,10 (Bankr. E.D. Cal. 2000). Therefore, nothing in sections 547 or 548 limits the avoidable interest of the debtor in property to payments scheduled pursuant to section 521(1). *In re Delash*, 260 B.R. at 10.

Because a trustee, or under certain circumstances a debtor in possession, may often face obstacles in sorting through books and records of a distressed debtor, the Court will not seek to impose a heightened pleading standard for constructive fraudulent conveyance matters. Instead, as noted above, the Court will apply the general standard as set forth in Rule 8. Therefore, whether Granite was listed, as a creditor to whom Enron made a transfer to on Enron's statement of financial affairs is not dispositive.

The allegations set out in the Amended Complaint were sufficient to provide Granite with notice of the claim because the allegations sufficiently allowed the defendant to answer upon a search of its records for the relevant receipt of the Transfer. Consequently, whether the payment appeared in the Plaintiffs' Statement of Financial Affairs would add little to the sufficiency of the Complaint and, therefore, the failure to list the transfer at issue in not determinative.

Finally, the Court considers whether the amount of $374,777.50 as sought in the Amended Complaint will be allowed to "relate back" under Rule 15(c) or whether the amount of $37,906.38 as listed on the Original Complaint will be the amount at issue. The primary issue for the Court in determining whether the Amended Complaint should relate back to the previously filed complaint is whether or not the earlier Original Complaint put the Defendant on notice of the cause of action being brought against it. Rule 15(c), made applicable by Fed. R. Bankr. P. 7015, provides in relevant part: "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." Courts will not consider the subjective state of mind of what one party was thinking

when it filed their original pleadings but will rather objectively consider whether the original pleadings put the other party on notice as to the cause of action being asserted against it. *In re Kam Kuo Seafood Corp.,* 67 B.R. 304, 306 (Bankr. S.D.N.Y. 1986). "Under Fed. R. Civ. P. 15(c)(2), an amended pleading 'relates back' to an earlier pleading if the amended pleading sets forth claims arising out of the same conduct, transaction or occurrence set forth or attempted to be set forth in the earlier pleading. 'The principal inquiry is whether adequate notice of the matters raised in the amended pleading has been given to the opposing party 'by the general fact situation alleged in the original pleading.'" *In re Alicea,* 230 B.R. 492, 498-499 (Bankr. S.D.N.Y. 1999), citing *In re Chaus Sec. Litig.,* 801 F.Supp. 1257, 1264 (S.D.N.Y. 1992) (quoting *Contemporary Mission, Inc. v. New York Times Co.,* 665 F.Supp. 248, 255 (S.D.N.Y. 1987).

Courts generally allow amending pleadings to relate back where the new submissions only further expand upon a prior factual assertion already made. "New allegations in the amended pleading relate back if they amplify the facts alleged in the original pleading or set forth those facts with greater specificity. A revised pleading will also relate back if it asserts new legal theories based on the same series of transactions or occurrences. Conversely, the amended complaint will not relate back if it is based on new facts and different transactions." *In re Alicea,* 230 B.R. at 498-499 (internal citations omitted).

Expanding upon a cause of action that was already asserted in the original pleadings is permissible. This includes increasing the amount of damages sought on the originally filed cause of action. "It has thus been established that an amended complaint will relate back notwithstanding the bar of the statute of limitations if it merely adds a

new legal ground for relief, changes the date and location of the transaction alleged, or spells out the details of the transaction originally alleged. An amendment merely increasing the *ad damnum* clause also will relate back." *In re Kam Kuo Seafood Corp.*, 67 B.R. at 305-306 (internal citations omitted).

This Court follows the view of the Second Circuit of not dismissing a matter on a technicality. Rather, Rule 15 should be construed liberally, so a pleading can be amended where the opposing party should have already been on notice as to a special allegation. "The text of Rule 15 makes explicit Congress's intent that leave to amend a complaint 'shall be freely given when justice so requires.' Fed. R. Civ. P. 15(a). The purpose of Rule 15 'is to provide maximum opportunity for each claim to be decided on its merits rather than on procedural technicalities.'" *Siegel v. Converters Transp., Inc.*, 714 F.2d 213, 216 (2d Cir. 1983), quoting 6 C. Wright & A. Miller, Federal Practice and Procedure, § 1471, at 359 (1971). Accordingly, Rule 15(c) provides in part, "[w]henever 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, the amendment relates back to the date of the original pleading. We held over forty years ago that Rule 15(c) was to be liberally construed, particularly where an amendment does not 'allege a new cause of action but merely ··· make[s] defective allegations more definite and precise.'" *Siegel v. Converters Transp., Inc.*, 714 F.2d at 216, quoting *Glint Factors, Inc. v. Schnapp*, 126 F.2d 207, 209 (2d Cir. 1942), citing *Foman v. Davis*, 371 U.S. 178, 182 (1962).

The general factual allegations made in the original pleading must be enough to put the opposing party on notice as to the potential action that awaits it. "One test that

many courts have employed in order to determine whether an amendment to pleadings will relate back is to determine whether the initial complaint put the defendants, both current and proposed, on notice of what must be defended against in the amended pleadings … This test does not require that the prior complaint put the defendants on notice of new or additional legal theories that the plaintiffs seek to assert against the defendants, but it must inform the defendants of the facts that support those new claims." *In re Everfresh Beverages, Inc.*, 238 B.R. 558, 573- 574 (Bankr. S.D.N.Y. 1999).

The Defendant here had notice of the potential action that awaited it in the Amended Complaint. The amount alleged in the Original Complaint was based upon a payment made by a wire transfer that the Plaintiffs identified. It satisfied, among other things, a specific invoice, previously defined as the Invoice, issued by Granite to NEPCO. When the Defendant looked at its records upon receipt of the Original Complaint, it would have found a record of a wire transfer in the amount of $756,913.66 on or around the date of October 31, 2001, as indicated in the Original Complaint. Presumably, Granite would have checked to see what invoice, or invoices, regarding Enron and NEPCO may have been satisfied as a result of that wire transfer. That inquiry would have revealed that an amount due of $374,777.50 regarding the Invoice issued to NEPCO was satisfied. Therefore, the Court finds that the Defendants knew, or should have known, that but for the mistake of the Plaintiffs, that the amount at issue would have been $374,777.50, not $37,906.78 as indicated in the Original Complaint. Given the liberal manner in which courts generally allow for pleadings to relate back, the Court finds that the Amended Complaint relates back to the Original Complaint for the purposes of establishing the amount at issue.

For the foregoing reasons, the Motion to Dismiss is granted regarding both NEPCO causes of action. The Defendant's Motion to Dismiss is granted as to the preference action brought by Enron, but is denied as to the fraudulent conveyance action brought by Enron. The Amended Complaint will relate back for purposes of the amount at issue. Therefore, the amount at issue is $374,777.50.