

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

In re:	)	Chapter 11
	)	
NEWPAGE CORPORATION, <i>et al.</i> ,	)	Case No. 11-12804(KG)
	)	
Reorganized Debtors.	)	
<hr/>		
PIRINATE CONSULTING GROUP, LLC,	)	
AS LITIGATION TRUSTEE OF THE	)	
NP CREDITOR LITIGATION TRUST,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adv. Proc. No. 13-52430(KG)
	)	
CASCADES SONOCO INC. AND	)	
CASCADES CONVERSION, INC.	)	
(D/B/A CASCADES SONOCO KINGSEY	)	
FALLS DIVISION),	)	
	)	
Defendant.	)	<b>Re DktNo.17</b>

**MEMORANDUM OPINION**

The Court is deciding a motion to dismiss an adversary proceeding against one defendant who, plaintiff alleges, received preferential transfers. The plaintiff is Pirinate Consulting Group, L.L.C. ("Pirinate"), as Liquidating Trustee (the "Liquidating Trustee"). The Defendants are Cascades Sonoco, Inc. ("C. Sonoco") and Cascades Conversion, Inc. ("C. Conversion"). C. Conversion has moved to dismiss.

**Background**

Pirinate is serving as the Litigation Trustee of the New Page Creditor Litigation Trust, pursuant to the Court confirmed plan in the voluntary chapter 11 cases of New Page Corporation

and its affiliated reorganized debtors (collectively, the "Debtors"). The Litigation Trustee and C. Sonoco, one of Debtors' creditors, entered into a tolling agreement (the "Tolling Agreement") to extend the two-year statute of limitations for filing an avoidance action from September 7, 2013, to October 31, 2013. The Litigation Trustee thereafter filed a complaint ("Complaint") on October 29, 2013, against C. Sonoco, seeking to avoid and recover a number of allegedly preferential transfers totaling at least \$2,268,145.40. [Adv. Pro. Dkt. No. 1].

Soon after filing the Complaint, C. Sonoco informed the Litigation Trustee that it did not receive certain transfers listed in the Complaint but, instead, C. Conversion received such transfers. The Litigation Trustee investigated and thereafter filed an amended complaint (the "Amended Complaint") on December 10, 2013, to add C. Conversion as a defendant and as a recipient of alleged preferential transfers. The Litigation Trustee maintained the claims against C. Sonoco. [Adv. Pro. Dkt. No. 8].

### **The Motion to Dismiss**

On February 18, 2014, C. Sonoco filed an answer [Adv. Pro. Dkt. No. 12] and on March 24, 2014, C. Conversion filed a Motion to Dismiss the Amended Complaint pursuant to Fed. R. Bankr. P. 7012 and 11 U.S.C. § 546(a)(1)(A). (the "Motion") [Adv. Pro. Dkt. Nos. 17, 18]. C. Conversion requests dismissal of all claims against it, arguing that, even if the Amended Complaint relates back to the date of the Complaint, the statute of limitations had already expired since it, C. Conversion, was not a party to the Tolling Agreement.

The Litigation Trustee responds, stating the Amended Complaint relates back to the Complaint because the Litigation Trustee provided a list of preferential transfers months before filing the Complaint. Furthermore, since C. Sonoco and C. Conversion (collectively, "Defendants") have retained the same counsel, and therefore C. Conversion had knowledge of the Amended Complaint. Additionally, the Litigation Trustee argues that C. Conversion is equitably estopped from arguing the Amended Complaint is time-barred. Alternatively, the statute of limitations to commence a preference action against C. Conversion should be equitably tolled to the date the Liquidation Trustee filed the Original Complaint.

C. Conversion claims the relation back doctrine is inapplicable because the Litigation Trustee has not satisfied the requirements, and because the Litigation Trustee deliberately omitted it from the Complaint. Furthermore, C. Conversion argues equitable estoppel and equitable tolling are unwarranted on several grounds.

### **Jurisdiction and Venue**

The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and 157 (a) and (b)(1). Venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409. Consideration of the Motion constitutes a core proceeding under 28 U.S.C. § 157(b)(2)(F).

### **Standard of Review**

To properly plead a claim, Federal Rule of Civil Procedure 8 requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8.

A motion to dismiss for failure to state a claim upon which relief can be granted, pursuant to Federal Rule of Civil Procedure 12(b)(6), requires a two-part analysis. *Fowler*

*v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009). A court must first separate the factual and legal elements of a claim, accepting all of the complaint's well-pleaded facts as true, and drawing all reasonable inferences in favor of the non-moving party. *Id.* However, the Court may "disregard any legal conclusions" *Id.* at 210-11, "bald assertions," *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997), "unsupported conclusions and unwarranted inferences," *Schuylkill Energy Res., Inc. v. Pa. Power & Light Co.*, 113 F.3d 405, 417 (3d Cir. 1997), or allegations that are "self-evidently false." *Nami v. Fauver*, 82 F.3d 63, 69 (3d Cir. 1996). A court "may also consider matters of public record, orders, exhibits attached to the complaint and items appearing in the record of the case." *Keystone Redevelopment Partners, LLC v. Decker*, 631 F.3d 89, 95 (3d Cir. 2011).

The court must then determine "whether the facts alleged in the complaint are sufficient to show that the plaintiff has a 'plausible claim for relief.'" *Fowler*, 578 F.3d at 211 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)). This is a case specific determination, which requires the court "to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679. Essentially, "[t]he complaint must state enough facts to raise a reasonable expectation that discovery will reveal evidence of [each] necessary element of a claim." *Wilkerson v. New Media Tech. Charter Sch. Inc.*, 522 F.3d 315,321 (3d Cir. 2008) (internal quotation marks omitted). If, however, the court determines that no matter how true the allegations in the complaint may be, they could not entitle the plaintiff to relief, this basic deficiency should "be exposed at the point of minimum expenditure of time and money by the parties and the court." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007) (internal quotation marks omitted).

## Issues Presented

Whether the statute of limitations against Cascades Conversion should be equitably tolled to allow the Amended Complaint to be timely?

Whether the amended complaint relates back to date of the original complaint thereby adding Cascades Conversion to the action in a timely manner?

Whether Cascades Conversion is equitably estopped from arguing the Amended Complaint is time-barred by § 546(a) since Cascades Sonoco did not mention Cascades Conversion should be included in the tolling agreement?

## Discussion

### **1. Equitable Tolling of the Statute of Limitations is Appropriate**

Equitable tolling stops the running of the statute of limitations in view of equitable considerations. Equitable tolling may be appropriate where (1) the defendant has actively misled the plaintiff respecting the plaintiff's cause of action, (2) the plaintiff, in some extraordinary way, has been prevented from asserting his or her rights, or (3) where the plaintiff has timely asserted his or her right mistakenly in the wrong forum. *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1125-26 (3d Cir. 1997) (quoting *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1387 (3d Cir. 1994)).

Considering the standard of review for a motion to dismiss, the Court need only find that the Litigation Trustee sufficiently pled the application of the doctrine. In *Perelman v. Perelman*, 545 Fed. Appx. 142, 151 (3d Cir. 2013), the Third Circuit affirmed the District Court's order denying an equitable tolling of the statute of limitations because the plaintiff had not made any

factual allegations in his complaint that would support a court order to equitably toll the limitations period. The Litigation Trustee argues that equitable tolling applies because either "(i) the Defendants were both at least negligent in failing to timely reveal the true recipient of the majority of the Preferential Transfers and the Litigation Trustee acted with due diligence or (ii) the Defendants intentionally concealed which entity actually received the Preferential Transfers until after the Tolling Expiration Date had expired." [Adv. Pro. Dkt. No. 21 at p. 23].

The Litigation Trustee sent a demand letter to C. Sonoco in care of its attorney in July 2013, making C. Sonoco aware of transfers the Litigation Trustee was investigating. At that time, C. Sonoco's counsel (also C. Conversion's lawyer) asked the Litigation Trustee if it would be bringing any claims against any other related entities. In the following month, August 2013, the Court approved the final, negotiated form of the Tolling Agreement, extending the extension of time to bring suit for actions against C. Sonoco. Therefore, in drawing all reasonable inferences in favor of the Litigation Trustee, it is plausible to find that Litigation Trustee's actions and the honest error which the Litigation Trustee earnestly investigated could toll the statute of limitations.

The Litigation Trustee points out that it exercised reasonable diligence in investigating and bringing claims. In *New Castle County*, 111 F.3d at 1126, the court denied a request to equitably toll the statute of limitations because the appellants discovered that the alleged negligence had occurred six months before the expiration of the statute of limitations and two years before filing their lawsuit. Here, in contrast to the appellants in *New Castle County*, the Litigation Trustee made timely efforts to file a complaint in good faith as evidenced by the Litigation Trustee's demand letter and request for a tolling agreement. After investigating, the Litigation Trustee

timely filed the Original Complaint and later expeditiously amended the complaint to include C. Conversion when C. Sonoco provided new information *after* the tolling agreement expired.

## **2. The Amended Complaint Relates Back to the Original Complaint**

The Litigation Trustee filed the Amended Complaint after the statute of limitations had expired, relying on Federal Rule of Civil Procedure 15(c)(1)(C) to relate the Amended Complaint back to the original filing date. Defendant C. Conversion claims Rule 15(c)(1)(C) is inapplicable and thus the Amended Complaint is time-barred. In relevant part, Rule 15(c)(1)(C) provides that an amendment to a pleading relates back to the date of the original pleading when:

(B) the amendment asserts a claim or defense that arose out of the conduct, transaction or occurrence set out – or attempted to be set out – in the original pleading; or

(C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, **the party to be brought in by amendment:**

(i) **received such notice of the action that it will not be prejudiced in defending on the merits; and**

(ii) **knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.**

Fed. R. Civ. P. 15(c)(1) (emphasis supplied.)

Defendant C. Conversion alleges the Litigation Trustee has not met the requirements. It is uncontested that the Amended Complaint asserts claims that arose out of the same conduct or transaction. C. Conversion argues that although they received notice of the action against C. Sonoco, they did not have any reason to know that the Litigation Trustee mistakenly failed to name it as a defendant in the action.

Use of Fed. R. Civ. P 15(c) is the procedure for adding parties to an action after the statute of limitations has expired. 3-15 MOORE'S FEDERAL PRACTICE - CIVIL §15.19. It provides an opportunity for a claim to be tried on its merits instead of being dismissed on procedural grounds. *Id.* At the same time, the requirements in Rule 15(c) prevent stale claims from being brought to court. *Mackensworth v. S.S. Am. Merchant*, 28 F.3d 246, 252 (2d Cir. 1994). It is uncontested that the Amended Complaint asserts claims that arose out of the same facts as the Original Complaint. Thus, the decision turns on whether C. Conversion had notice of the claim that the Litigation Trustee is asserting, if the Litigation Trustee will rely on the same kind of evidence, or if it is an unfair surprise to C. Conversion. *See Glover v. FDIC*, 698 F.3d 139, 145-46 (3d Cir. 2012); *In re Dominguez v. Miller*, 51 F.3d 1502, 1510 (9th Cir. 1995).

Fed. R. Civ. P. 15(c)(1)(C)(i) requires that a party received notice of the original action before it was named in the amended complaint. This notice requirement can be satisfied if the party received either express or constructive notice. *Lundy v. Adamar of N.J. Inc.*, 34 F.3d 1173, 1182 (3d Cir. 1994). Constructive knowledge of the action satisfies the notice requirement provided the new party is still able to maintain a defense. *Nelson v. Adams USA Inc.*, 529 U.S. 460, 467 n.1 (2000). In *In re Integrated Res. Real Estate Ltd. P'ship Sec. Litig.*, the court found sufficient notice was received when a newly named party was made aware of the issues in the original complaint. 815 F. Supp. 620,647 (S.D.N.Y. 1993). Additionally, notice will be deemed received if a newly named party shares an attorney with an original defendant. *Singletary v. Pa. Dep't of Corr.*, 266 F.3d 186, 196 (3d Cir. 2005). C. Conversion has retained the same counsel as C. Sonoco, the originally named defendant. It is therefore completely plausible if not certain that C. Conversion was aware of the issues in the Original Complaint.

Consequently, C. Conversion has received constructive and/or implied notice of its role as a defendant in the case.

Alternatively, notice will be sufficient if received through a party's "identity of interest." *Id.* at 197. The identity of interest exists when "parties are so closely related in their business operations or other activities that the institution of an action against one serves to provide notice of the litigation to the other." *Id.* Case law does not provide a clear precedent to define "closely related." *See Ayala Serrano v. Lebron Gonzalez*, 909 F.2d 8 (1st Cir. 1990) (noting that the act held there was a sufficient identity of interest between prison guards and prison officials); *Jacobsen v. Osborne* 133 F.3d 315 (5th Cir. 1998) (finding an insufficient identity of interest between newly named police officers and the City of New Orleans to infer notice because they did not share a sufficient nexus of interests). However, a shared attorney is considered evidence for the identity of interest method. *Singletary*, 266 F.3d at 197.

The preferential transfers at issue involve checks written to C. Sonoco but allegedly cashed by C. Conversion. With discovery incomplete, the Court's fundamental inquiry in a Rule 12(b)(6) motion to dismiss context is "not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheur v. Rhodes*, 416 U.S. 232,236 (1974). Although the Court is not certain whether the Defendants have an "identity of interest," viewing the facts in the light most favorable to the non-movant, the Court finds that because both defendants are represented by the same counsel, the Litigation Trustee "has a plausible claim for relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

C. Conversion claims that it did not know, and had no reason to know, that it would have been named in the Amended Complaint but for a mistake in identity. However, the Third Circuit has held that a plaintiff's lack of knowledge of a particular defendant's identity may be an excusable mistake under Fed. R. Civ. P. 15(c)(1)(C)(ii). *Varlack v. SWC Caribbean, Inc.*, 550 F.2d 171, 175 (3d Cir. 1977) (allowing an amendment to change "unknown employee" as named in the complaint to the employee's real name). Furthermore, the Supreme Court held the application of the relation back rule depends on what the party to be added knew or should have known and not on the amending party's knowledge or timeliness in seeking to amend the pleading. *Krupski v. Costa Crociere S. p. A.*, 560 U.S. 538, 539 (2010).

C. Conversion allegedly does business under the trade name "Cascades Sonoco Kingsey Falls Division." [Amended Complaint, ¶ 18]. This business name is quite similar and may easily be confused for "Cascades Sonoco." For this reason, the Court finds that C. Conversion knew or should have known that the Litigation Trustee would have named C. Conversion in an adversary proceeding to avoid preferential transfers but for a mistake in identity.

### **3. Application of Equitable Estoppel is not Appropriate**

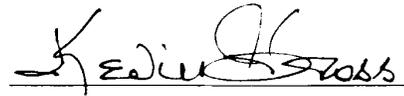
Equitable estoppel is most often invoked and frequently applied when a denial of estoppel under the facts of the case would permit a defendant to take advantage of his wrong. Equitable estoppel arises when "a defendant has attempted to mislead the plaintiff and thus prevent the plaintiff from suing on time." *Oshiver*, 38 F.3d at 1389. Thus, a party seeking application of equitable estoppel must show inequitable conduct. *Id.* at 1390. Requiring a party

to show that the defendant was actively taking steps to prevent the plaintiff from suing in time is a greater burden of proof compared to equitable tolling where a plaintiff need only show that the essential information could not have been discovered with the exercise of reasonable diligence. *Id.* The Court is satisfied that estoppel does not apply here as Defendants did not actively mislead the Litigation Trustee.

**CONCLUSION**

For the foregoing reasons, this Court will deny C. Conversion's motion to dismiss the adversary proceeding.

Dated: August 22, 2014

A handwritten signature in black ink, appearing to read "Kevin Gross", written over a horizontal line.

KEVIN GROSS, U.S.B.J.

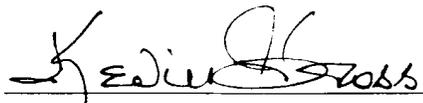
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CASCADES CONVERSION, INC.	)	
(D/B/A CASCADES SONOCO KINGSEY	)	
FALLS DIVISION),	)	
	)	
Defendant.	)	<b>Re Dkt No. 17</b>
	)	

**ORDER**

Defendant Cascades Conversion, Inc., d/b/a Cascades Sonoco Kingsey Falls Division, has moved to dismiss the Complaint against it. For the reasons contained in the Memorandum Opinion of even date, the Court denies the Motion.

Dated: August 22, 2014



KEVIN GROSS, U.S.B.J.