

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

In Re:	:	Chapter 11
	:	
FLEMING COMPANIES, <u>et al.</u> ,	:	Case No. 03-10945(MFW)
	:	
Debtor.	:	Jointly Administered
	:	
PCT	:	
	:	
Plaintiff	:	
v.	:	
	:	
NEW ENGLAND CONFECTIONARY COMPANY a/k/a NECCO, A SUBSIDIARY OF UIS, INC.	:	
	:	
Defendant	:	Adversary No. 05-78096(KJC)

ORDER

AND NOW, this 20th day of April, 2006, upon consideration of the Defendant’s Motion to Dismiss Second Amended Complaint (“Second Amended Complaint”)(Docket No. 27)(“Motion”) and the Plaintiff’s Response thereto (Docket No. 31), it is hereby

ORDERED that the Motion is DENIED and Defendant directed to file an answer to the Complaint within ten days of the date hereof.¹

¹This adversary proceeding was filed on March 28, 2005 against “Necco Security Company,” seeking to avoid and recover approximately \$110,869.48 in allegedly preferential or fraudulent transfers pursuant to §§ 547, 554, 548, and 550, and disallowance of claims under §502(d) (Docket No. 1).

The plaintiff, PCT, filed a Motion to Enlarge the Time for Service on July 8, 2005 (Docket No. 14). The Court granted the Motion, allowing the PCT an additional 120 days from the date of the entry of the Order to effect service, or until December 9, 2005 (Docket No. 23). PCT filed a First Amended Complaint as of right on July 20, 2005 to change the name of the defendant (Docket No. 16). PCT also obtained Court permission to file a Second Amended Complaint to name instead the present defendant, New England Confectionary Company (“NEC”), which was deemed filed contemporaneously with the

entry of the Order allowing the amendment on September 26, 2006 (Docket No. 24).

NEC argues that the Second Amended Complaint should be dismissed because 1) the statute of limitations ran on April 1, 2005 and the Second Amended Complaint does not relate back under Fed.R.Civ.P. 15(c), made applicable by Fed.R.Bankr.P. 7015; 2) NEC did not have notice of this action until August 26, 2006, after the Fed.R.Civ.P. 4(m) (made applicable by Fed.R.Bankr.P. 7004) period had run; and 3) the Order Enlarging the Time for Service should not apply to NEC when NEC did not have notice of that motion (or the Motion to File a Second Amended Complaint) and NEC states that “the Court does not have jurisdiction or authority to override a clear and specific limitations period enacted by Congress.”

PCT argues that the Second Amended Complaint relates back to the original Complaint and is not time barred because the Court granted an extension to effect service.

Rule 15(c) provides, in pertinent part, that:

An amendment of a pleading relates back to the date of the original pleading when

....

(3) the amendment changes the party or the naming of the party against whom a claim is asserted if the forgoing 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)(3).

In *McGuire v. Turnbo*, 137 F.3d 321 (5th Cir. 1998), the Court held that while the notice provided to the defendant in that case did not fall within the original 120-day period under Rule 4(m), it did fall within the enlargement of time the court granted. The Court, therefore, held that the amended complaint did relate back to the original complaint. *Id.*, at 325. The enlargement of time in *McGuire* was granted prior to the plaintiff’s amending the complaint.

Here, NEC had notice of the action on August 26, 2005 when PCT faxed a letter to NEC stating that it was an intended defendant. This was within the extension of time granted by the Court to effect service of process. Although NEC avers that it was not related in any way to the prior named defendant, Necco Security Company, NEC had actual knowledge of the PCT’s mistake within the Rule 4(m) period. The transfers on the Second Amended Complaint appear to be the same transfers alleged in the original and First Amended Complaint, so there does not appear to be a Rule 15(c)(2) issue. NEC has not alleged any prejudice in maintaining a defense.

As to NEC’s argument that “the Court does not have jurisdiction or authority to override a clear and specific limitations period enacted by Congress,” Rule 4(m) explicitly states, in part:

BY THE COURT:



KEVIN J. CAREY
UNITED STATES BANKRUPTCY COURT

Courtesy copies mailed from Chambers to Interested Counsel:

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If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; *provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period* [emphasis added].

Furthermore, the 1993 Advisory Committee Notes to Rule 4(m) clearly indicate that Rule 4(m) authorizes a court to extend the time for service of the summons and complaint at its discretion.

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