

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

JUDGE PETER J. WALSH

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August 28, 2001

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**Re: Official Committee of Unsecured Creditors vs. Hurberries
Mining and Auto Supply
Adv. Proc. No. 00-1650**

Dear Mr. Hurley and Counsel:

This is the Court's ruling on the Defendant's motion to dismiss (Doc. # 4) and Plaintiff's motion to amend its complaint (Doc. # 5). For the reasons discussed below, I will allow Plaintiff to amend its complaint and will deny the motion to dismiss.

Paul Hurley ("Hurley"), as owner of Hurberries Mining & Auto Supply, Inc., moves pro se to dismiss the Official Committee of Unsecured Creditors' complaint to avoid and recover preferential transfers under 11 U.S.C. §§ 547 and 550. Hurley attacks the

sufficiency of service of process based on Plaintiff's failure to properly designate the Defendant as a corporation in the caption of its complaint. Hurley also argues that an amendment correcting the name of the Defendant may not relate back to the date of the original pleading because the amendment changes the named party and the action is therefor time barred under 11 U.S.C. § 546(a)(1)(A).

Plaintiff filed its complaint to avoid and recover an allegedly preferential payment of \$25,779.00 on October 12, 2000. Plaintiff intended to sue Hurberries Mining & Auto Supply, Inc., a Virginia corporation ("Hurberries"). Plaintiff omitted "Inc." from the caption of the complaint and erroneously sued "Hurberries Mining & Auto Supply." The description of Defendant in the complaint confirms that Plaintiff intended to sue Hurberries Mining and Auto Supply, Inc. and that the incorrect heading is an oversight.

On November 9, 2000, Hurley accepted personal service of the complaint and summons at Hurberries' business address. In his Affidavit Response to Plaintiff's Motion to Amend (Doc. # 8), Hurley represents himself as "Owner of Hurberries Mining & Auto Supply, Inc." He maintains, however, that there is no legal entity known as "Hurberries Mining & Auto Supply" and that he has never held Hurberries out as a sole proprietorship or non-corporate entity.

Federal Rule of Civil Procedure 15¹ provides in relevant part that,

- (a) **Amendments.** . . . [A] party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.
- (c) **Relation Back of Amendments.** An amendment of a pleading relates back to the date of the original pleading when
 - (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or
 - (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, or
 - (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and,
 - (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 (emphasis added).

¹

Fed.R.Bank.P. 7015 makes Fed.R.Civ.P. 15 applicable to adversary proceedings in bankruptcy.

I hold that Rule 15(c) on its face permits Plaintiff's proposed change and the amended complaint relates back to the date of the original pleading. Plaintiff seeks to correct a misnomer. It does not attempt to change parties or plead new causes of action. The amendment therefore relates back to the date of the original pleading.

Even if adding "Inc." to the caption could be interpreted as adding a "new" corporate defendant, Fed.R.Civ.P. 15(c) permits relation back under the circumstances. Because the proposed amendment does not assert any new facts or claims it arises "out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Fed.R.Civ.P. 15(c)(2). Hurley does not dispute that he accepted personal service of the complaint and summons within the period provided by Fed.R.Civ.P. 4(m). It therefore follows that the corporate Defendant received notice of the institution of the action and will not be prejudiced in maintaining a defense on the merits. Furthermore, it knew or should have known that, but for a mistake omitting "Inc." as Defendant's corporate designation, this action would have been brought against it. Accord Dandrea v. Malsbary Mfg. Co., 839 F.2d 163, 164 (3d Cir. 1988) (amendment including corporate defendant's new name does not change party under Rule 15(c) and amended pleading relates back to date of original pleading for statute of limitations purposes); Greiss v. Main Line Auto Wash, 1989 WL 81514

(E.D. Pa. 1989) (Plaintiff's amended complaint correcting defendant's name from "Peugot, Incorporated" to "Peugeot Motors of America, Inc." relates back under Rule 15(c)).

In sum, all the elements that permit amendment and relation back under Fed.R.Civ.P. 15(c) are met. I accordingly deny Hurley's motion to dismiss. Plaintiff has leave to amend the complaint to indicate that Hurberries is a corporation. Plaintiff's amended complaint will relate back to the date of the original filing.

SO ORDERED.

Very truly yours,

/s/ Peter J. Walsh

Peter J. Walsh

PJW:ipm