IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In Re:	)	Chapter 7
	)	
WORLDSPACE, INC., et al.,	)	Case No. 08-12412(PJW)
	)	(Jointly Administered)
Debtors.	)	
_____	)	
	)	
Charles M. Forman, chapter 7 trustee for WorldSpace, Inc., et al.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adv. Proc. No. 10-53286(PJW)
	)	
Mentor Graphics Corporation,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

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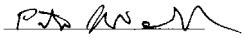
Dated: June 5, 2014

WALSH, Judge 

This opinion is with respect the Motion to Dismiss of defendant Mentor Graphics Corporation. (Doc. No. 83). This Court rules on three grounds. First, the Court takes issue with the strategic use of motions to extend time to serve process coupled with a lack of proper notice thereof to named defendants. Second, paragraph five of the Stipulation Scheduling Time to Answer/Respond to Amended Complaint and Addressing Related Relief (Doc. No. 69-1) does not salvage the service issues presented. Lastly, this Court does not believe that pursuant to Federal Rule of Civil Procedure 15(c) there is proper grounds for utilization of the relation back doctrine. The Motion to Dismiss is granted.

Procedural Background and Statement of Facts

This adversary proceeding was filed on October 15, 2010 to avoid and recover certain preferential transfers. The named defendant in the original adversary complaint was Mentor Graphics (Ireland) Limited (hereinafter "Mentor Ireland"). At that point in time, the case was a Chapter 11 reorganization, and the debtor WorldSpace, Inc. ("WorldSpace") was the entity prosecuting these claims through various adversary proceedings. WorldSpace filed its Chapter 11 on October 17, 2008 and was subsequently converted to a Chapter 7 on June 12, 2012. Prior to its conversion, WorldSpace filed five motions to extend the time to serve process relating to

the complaints to avoid and recover preferential transfers, including the complaint at issue here. In total, WorldSpace initiated fourteen adversary proceedings, and by and through its five motions extended the service of process deadline on all fourteen adversary proceedings.

Upon conversion to Chapter 7, a Trustee was appointed who subsequently filed four additional motions to extend the time to serve process in those same fourteen adversary proceedings. In total, this Court granted nine motions to extend the time to serve process. Outlined below are the dates of the motions to extend.

1. The First Motion to Extend Time was filed on 02/11/2011
2. The Second Motion to Extend Time was filed on 06/09/2011
3. The Third Motion to Extend Time was filed on 10/07/2011
4. The Fourth Motion to Extend Time was filed on 02/07/2012
5. The Fifth Motion to Extend Time was filed on 05/25/2012
6. The Sixth Motion to Extend Time was filed on 10/04/2012
7. The Seventh Motion to Extend Time was filed on 01/08/2013
8. The Eighth Motion to Extend Time was filed on 06/03/2013
9. The Ninth Motion to Extend Time was filed on 09/23/2013

Below are the details of the service, or lack thereof, of the motions to extend in relation to Mentor Ireland.

1. Mentor Ireland was served with the first motion to extend time, as well as served with the signed Order of this Court granting that motion. Service was sent to an address listed as: Mentor Graphics Ireland Limited, East Park Shannon Free

Zone, County Clare Shannon, Ireland pursuant to an affidavit of service (Doc. No. 8).

2. Mentor Ireland was served with the second motion to extend. Service was sent to an address listed as: Mentor Graphics Ireland Limited, East Park Shannon Free Zone, County Clare Shannon, Ireland pursuant to an affidavit of service (Doc. No. 11) However, Mentor Ireland was not served with the Order of this Court granting the motion.

3. Mentor Ireland was not served with the third motion to extend. An affidavit of service was filed (Doc. No. 18) without listing Mentor Ireland as a recipient of service.

4. Mentor Ireland was not served with the fourth motion to extend. An affidavit of service was filed (Doc. No. 25) without listing Mentor Ireland as a recipient of service.

5. Mentor Ireland was not served with the fifth motion to extend. An affidavit of service was filed (Doc. No. 30) without listing Mentor Ireland as a recipient of service.

6. Mentor Ireland was not served with the sixth motion to extend. The docket does not reflect any affidavit of service of the sixth motion. The docket does reflect an affidavit of service of the signed Order, however Mentor Ireland was not on that service list (Doc. No.42).

7. Mentor Ireland was not served with the seventh motion to extend. The docket does not reflect any affidavit of service of the seventh motion. The docket does reflect an affidavit of service of the signed Order, however Mentor Ireland was not on that service list (Doc. No.48).

8. Mentor Ireland was served with the eighth motion to extend time. Service was sent to an address listed as: Mentor Graphics Ireland Limited, East Park Shannon Free Zone, County Clare Shannon, Ireland pursuant to an affidavit of service (Doc. No. 50).

9. Mentor Ireland was served with the ninth motion to extend time. Service was sent to an address listed as: Mentor Graphics Ireland Limited, East Park Shannon Free Zone, County Clare Shannon, Ireland pursuant to an affidavit of service (Doc. No. 58).

Based on the record, Mentor Ireland was only served with the following: the first motion and corresponding Order, the second motion, the eighth motion, and the ninth motion. Notably, it is unclear whether or not the sixth and seventh motions were served on any interested party, as the docket does not reflect any affidavit of service in connection with those two motions.

On December 12, 2013, the Trustee filed a Summons and Certificate of Service (Doc. No. 63) in order to effectuate the prosecution of the adversary proceeding. The Certificate of Service was mailed to Mentor Graphic Corporation, Attn: Helen Lushenko, 8005 S. W. Boeckman Road, Wilsonville, OR 97070. This appears to be the first time that Mentor Graphics Corporation is mentioned as a (potential) defendant by either WorldSpace or the Trustee. In response to the summons, Mentor Ireland filed a Motion to Quash Service of Process. Subsequently, Trustee filed an amended complaint. (Doc. No. 68). Trustee amended the complaint to substitute the original defendant (Mentor Ireland) with a new defendant, Mentor Graphics Corporation (hereinafter "Mentor Oregon"). Upon that amendment, Mentor Oregon filed the Motion to Dismiss.

Jurisdiction

This Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 157 and 1334. This proceeding involves core matters under 28 § 157(b)(2). Venue is proper in this

Court pursuant to 28 U.S.C. §§ 1408 and 1409.

Standard of Review

Defendant brought the Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(5) and 12(b)(6). Both are made applicable to the instant proceeding by Federal Bankruptcy Rule 7012. See Fed. R. Bankr. P. 7012. Federal Rule 12(b)(5) provides that a defendant may move to dismiss a complaint when a plaintiff fails to properly serve the defendant. Fed. R. Civ. P. 12(b)(5). Rule 12(b)(6) governs a motion to dismiss for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6).

When a motion challenging sufficiency of service is filed pursuant to Rule 12(b)(5), "the party asserting the validity of service bears the burden of proof on that issue." Tani v. FPL/Next Era Energy, 811 F. Supp. 2d 1004, 1025 (D. Del. 2011) (citing Grand Entm't Group, Ltd. v. Star Media Sales, Inc., 988 F.2d 476, 488 (3d Cir.1993)). In a bankruptcy context and adversary proceeding, service of process must be made in accordance with Bankruptcy Rule 7004 . Accordingly, in determining the sufficiency of service of process, Federal Rule of Civil Procedure 4 applies to this bankruptcy case pursuant to Bankruptcy Rule 7004. See Fed. R. Bankr. P. 7004. Here, the objection under Rule 12(b)(5) is an argument that the plaintiff failed to comply with the procedural requirements for proper service of the summons and complaint as set

forth in Rule 4, specifically subsection (m).

This Court has broad discretion "[u]pon determining that process has not been properly served on a defendant" to dismiss the complaint in its totality or to instead quash service of process. Umbenhauer v. Woog, 969 F.2d 25, 30 (3d Cir. 1992). Dismissal is not appropriate if it is reasonable and possible to rectify the service deficiency. Id.

In assessing a Rule 12(b)(6) motion to dismiss, this Court must "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." Eid v. Thompson, 740 F.3d 118, 122 (3d Cir. 2014) (citations omitted). A plaintiff must, to successfully rebuff a motion of this nature, provide factual allegations which "raise a right to relief above the speculative level...." Id. (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, (2007)). As a result, a complaint must state a plausible claim for relief to defeat a motion to dismiss. Id. (citing Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009)).

Discussion

I. Deficiencies in Notice of Motions to Extend Time to Serve Process

The most important aspect of the lack of notice present in this case stems from the lack of notice of the third motion to extend. That specific service oversight is significant. Mentor

Ireland was never made aware of the fact that the second extension motion was granted, nor made aware of any other extension requests thereafter until it was served with the eighth motion to extend, a full two years later. Any notice that Mentor Ireland had at one point concerning the possibility of being named in a lawsuit logically ended when it was never provided with the second signed Order extending service. Once the extension period stemming from the second extension motion ended, and Mentor Ireland was not served in a lawsuit, nor served with another extension motion, it had no reason know that it should take pre-litigation precautions, preserve evidence, consult with employees or take any other measure to ensure that it could defend itself on the merits of a claim. Moreover, during the two year gap period between the service of the second motion to extend and the eighth motion to extend, the statute of limitations on the underlying action expired.

Neither party has cited cases or rules which describe the notice requirements for motions to extend the service period. Due to their very nature, these types of motions can be granted on an *ex parte* basis, thus negating the notion that there exists a hard-and-fast rule that service was required upon Mentor Ireland. However, that does not end this Court's inquiry, and cannot satisfy the equitable issue before the Court.

Instances of service extension motions going forward on an *ex parte* basis do so because service cannot be effectuated by a

plaintiff, due to a defendant evading service, lack of knowledge of a defendant's whereabouts or address, or the like. See e.g. In re Global Crossing, Ltd., 385 B.R. 52, 82 (Bankr. S.D.N.Y. 2008) ("The cause for securing a Rule 4(m) order has historically been difficulties in serving a named defendant with process including such things as difficulties in finding the defendant, or a defendant's ducking service."). That is distinguishable from the case at bar. The address of Mentor Ireland was known (as exemplified by the fact that the first two extension motions were sent to their address) and the new defendant, Mentor Oregon, filed a proof of claim with a contact address in September of 2012.[1]

This Court was never apprised of the fact that service was being delayed without the full knowledge of all named defendants. This Court was under the impression that the strategic use of the extension motions was to facilitate the cases procedurally, with all interested parties aware of the proceedings.

That impression was represented to this Court and garnered from the pleadings. In the second motion to extend, in order to persuade this Court to grant another extension motion, it was pled that the first motion to extend was "served upon interested parties." (Doc. No. 10, ¶ 3). That was a true statement as noted above, Mentor Ireland was served with the first motion to extend. In the third motion to extend, it was pled to this Court

[1] Trustee filed four motions to extend the time to serve process after Mentor Oregon's proof of claim was filed.

that the second motion to extend was "served upon interested parties." (Doc. No. 17, ¶ 4). Again, that was a true statement. In the pleadings requesting a fourth motion to extend, it was represented to this Court that the third motion to extend was "served upon interested parties." (Doc. No. 24, ¶ 5). As it turns out, that is not a true statement. In the Fifth motion to extend, it was represented to this Court that the fourth motion to extend was "served upon interested parties." (Doc. No. 28, ¶ 6). Again, that is not a true statement. The last four motions to extend do not address notice to named defendants.

It bears emphasis that there is nothing inherently improper concerning the use of extension motions in a bankruptcy context to facilitate a reorganization or for some other procedural or equitable endeavor. See e.g. In re Interstate Bakeries Corp., 460 B.R. 222, 230 (B.A.P. 8th Cir. 2011) aff'd, 476 F. App'x 97 (8th Cir. 2012) (discussing that extension of service deadline was proper and discussing further in *dicta* that the debtor "obtained an extended [service] deadline from the court and provided all potential defendants with notice and the opportunity to be heard" and that the interested defendant "was afforded six separate opportunities to object to the extension of time[.]").

Had this Court known that four years after the original complaint was filed, service would be made for the first time, alerting a corporation to the existence of a potential lawsuit for

the first time, this Court would have questioned in a different manner the existence of due diligence in service, due diligence in prosecution, good cause and prejudice when reviewing the nine extension motions. The issues stated above are outcome determinative in this matter as they affect the relation back doctrine, discussed below.

II. Misplaced Reliance on Stipulation Agreement

On behalf of Mentor Ireland and Mentor Oregon their counsel consented to the filing of the amended complaint (Doc. # 68). However, that stipulation provides that "Nothing in this Stipulation shall be deemed a waiver of any defense or argument which Defendant Mentor Graphics Corporation might raise in this adversary proceeding." (Doc. # 69, ¶ 5).

III. There is No Ability to Relate Back Pursuant to Rule 15(c)

Trustee's Rule 15(c) relation back argument is unpersuasive. Federal Rule 15(c) is written in the conjunctive, and as such courts conclude that all of the conditions of this Rule must be met for a successful relation back of an amended complaint that seeks to substitute newly named defendants. Singletary v. Pa. Dep't of Corr., 266 F.3d 186, 194 (3d Cir.2001). The Trustee bears the burden of proof on these requirements. Markhorst v. Ridgid, Inc., 480 F. Supp. 2d 813, 815 (E.D. Pa. 2007). The purpose of the relation back doctrine is to balance the interests of the defendant, which are protected by the statute of limitations, with

the general preference to resolve disputes on the merits and not on mere technicalities. Krupski v. Costa Crociere S. p. A., 560 U.S. 538, 550 (2010). Rule 15(c) provides:

> (c) Relation Back of Amendments.
>
> (1) When an Amendment Relates Back. An amendment to a pleading relates back to the date of the original pleading when:
>
> (A) the law that provides the applicable statute of limitations allows relation back;
> (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.

Civ. P. 15(c).

The original complaint filed on October 15, 2010 named Mentor Ireland as the defendant, but was never served. The amended complaint named Mentor Oregon, and was filed and served on January 29, 2014.

A. Same Transaction or Occurrence in Original Pleading

The first applicable requirement is 15(c)(1)(B)'s mandate that the amended pleading can only relate back as long as it

asserts a claim that arose out of the conduct, transaction or occurrence which was set out or attempted to be set out, in the original pleading. Fed. R. Civ. P. 15(c)(1)(B). This requirement is met in part. The original complaint outlines claims that arose from three preference transactions, totaling approximately $234,390.00. Exhibit A of the original complaint outlined the three transactions in more detail, claiming a payment of $77,908.50 was made on 7/31/2008; a payment of $74,012.00 was made on 8/22/2008 and a payment of 82,469.50 was made on 9/4/2008. No other details nor evidence of the three transactions were provided. The amended complaint asserts the same preference transactions, but it identifies a different transferee.

Rule 15(c) outlines the seemingly complex hurdles that a plaintiff must jump to allow an amended claim to relate back. Relation back allows a plaintiff to evade the otherwise applicable statute of limitations. See Glover v. F.D.I.C., 698 F.3d 139, 145 (3d Cir. 2012) (citing Krupski, 560 U.S. 538). That extraordinary result potentially allowed under Rule 15(c) is premised on fair notice. Fair notice comes into play to balance the rights provided under Rule 15(c) with the protections defendants receive from the statute of limitations. Glover, 698 F.3d at 145-46 ("Though not expressly stated, it is well-established that the touchstone for relation back is fair notice, because Rule 15(c) is premised on the theory that a party who has been notified of litigation concerning

a particular occurrence has been given all the notice that statutes of limitations were intended to provide.") (citations omitted).

B. The Applicable Rule 4(m) Time-Period

Under Rule 15(c)(1)(C), in order to add a new defendant the notice requirements within the rule are tied to the timing requirements of Rule 4(m). See Fed. R. Civ. P. 15. Rule 4(m) requires that a defendant is served within 120 days after the complaint is filed. Fed. R. Civ. P. 4(m). If that deadline expires before service occurs, the court must dismiss the action or order that service be effectuated. Id. However, if good cause exists for the failure to serve, a court can also extend the time to serve. Id. This Court granted the nine extension motions in part pursuant to Rule 4(m).

Thus, in analyzing Rule 15(c), an amendment relates back when, during the above described Rule 4(m) period, a party to be brought in by amendment: (i) received notice of the action and will not be prejudiced defending on the merits and (ii) knew or should have known the action would be brought but for a mistake. See Fed. R. Civ. P. 15. Upon careful review of the facts specific to this case, and the Federal Rules of Civil Procedure, this Court needs to decide exactly what the relevant 4(m) time period is to determine whether Mentor Oregon can be added as a defendant.

Trustee argues that for the purposes of relation back, the relevant Rule 4(m) period extended through January 30, 2014

which includes all nine motions to extend. Mentor Oregon believes that none of the motions to extend should allow the relation back, and the relevant Rule 4(m) period ended 120 days after the filing of the original complaint which expired on February 12, 2011.

This Court is mindful of the fact that in most situations, motions to extend are included in a relation back analysis. See Wright and Miller, 6A Fed. Prac. & Proc. Civ. § 1498.1 (3d ed.) ("[N]otice required under the rule . . . is linked to the federal service period of 120 days or any additional time resulting from a court ordered extension." Even the comments to the Rules themselves seemingly contextualize that this is the appropriate result. See Fed. R. Civ. P. 15, Advisory Committee Notes to 1991 Amendment ("In allowing a name-correcting amendment within the time allowed by Rule 4(m), this rule allows not only the 120 days specified in that rule, but also any additional time resulting from any extension ordered by the court pursuant to that rule, as may be granted . . . ."). Numerous other courts addressing only the issue of the relevant Rule 4(m) period, without the service failures present here, have also come to the same conclusion. See Robinson v. Clipse, 602 F.3d 605, 608 (4th Cir. 2010)("Rule 15(c)'s notice period incorporates any extension of the 120-day period under Rule 4(m)."); Williams v. City of New York, 06-CV-6601 NGG, 2009 WL 3254465 at *5 (E.D.N.Y. Oct. 9, 2009); Sciotti v. Saint-Gobain Containers, Inc., 06-CV-6422 CJS, 2008 WL

2097543 at *5 (W.D.N.Y. May 19, 2008). See also In re Global Link Telecom Corp., 327 B.R. 711, 715 (Bankr. D. Del. 2005) (stating that service was sufficient to survive a 12(b)(5) motion and defendant was bound by the Rule 4(m) extension motion when defendant was served with notice of the motion, did not object, and a hearing was held to address concerns of other defendants who did raise objections).

This Court felt that is was prudent to analyze the Rule 4(m) period in depth, considering the specific facts of this case which detail significant notice failures.

It would, for all intents and purposes, defeat the purpose of the relation back doctrine if it was a stead-fast rule that motions to extend were deemed ineffective as against previously unknown or unnamed defendants or unnamed in all situations. However, this Court cannot ignore the inherent injustice in failing to serve a named defendant with an extension motion, which operates to keep a claim alive years after the statute of limitations would have already expunged the issue. This Court should not allow a motion which was not served on an original, named defendant, to extend the time applicable to sue a new defendant.

As such, the relevant time period for analyzing Rule 15(c) does not include any motion to extend which was not served on

Mentor Ireland. The relevant period ends after the expiration of the second motion to extend on October 10, 2011.

C. Notice to Avoid Prejudice in Defending on the Merits

Notice to avoid prejudice in defending itself can be either actual or imputed. Garvin v. City of Philadelphia, 354 F.3d 215, 222-23 (3d Cir. 2003). The notice must be received such that there is no prejudice to the newly named defendant which would prevent them from maintaining a defense on the merits. Miller v. Hassinger, 173 F. App'x 948, 955 (3d Cir. 2006). Relation back can only occur if on or before October 10, 2011 Mentor Oregon had notice to prevent prejudice. It is clear from the evidence that actual notice was not had.

Without actual notice, there can be instead imputed or constructive notice. In the Third Circuit, imputed notice requires a showing of either a shared attorney or an identity of interest. In re Joey's Steakhouse, LLC, 474 B.R. 167, 179 (Bankr. E.D. Pa. 2012) (citing Garvin, 354 F.3d at 222–223). There is no feasible argument that during the relevant time period, the shared attorney theory of imputed notice provided notice to Mentor Oregon. No evidence was proffered that Mentor Oregon had retained, spoke with or conferred with counsel during all relevant times. Additionally, no evidence was proffered that Mentor Ireland retained counsel during that same time period. Thus, imputed notice fails under this theory. See Singletary, 266 F.3d at 196 ("The 'shared attorney'

method of imputing Rule 15(c)(3) notice is based on the notion that, when an originally named party and the party who is sought to be added are represented by the same attorney, the attorney is likely to have communicated to the latter party that he may very well be joined in the action.").

Notice under identity of interest also fails to provide notice. To meet imputed notice under this theory, "the newly named Defendant and the original Defendants may be so closely intertwined in their business operations or other activities that the filing of suit against one effectively provides notice of the action to the other." Joey's Steakhouse, 474 B.R. at 180. Again, there has been no evidence that these entities are sufficiently intertwined. This inquiry is a fact intensive determination. There has been no evidence presented to the Court that these two entities share service agents, share officers, board members or directors, nor do they share offices or addresses. The sole piece of evidence proffered of the shared identity of the two entities is a document which was printed on 3/10/2014 that states that, pursuant to the website of Mentor Graphics Worldwide, the Irish corporation appears to now be named "Mentor Graphics Corporation." (Doc. No. 77). However, Trustee did not provide this Court with a date or time line of when the name change occurred. It was simply stated that it was "post-petition." (Doc. No. 91). Accordingly, its evidentiary value is negligible.

Moving forward, this notice analysis is inextricably intertwined with a prejudice analysis. Abdell v. City of New York, 759 F. Supp. 2d 450, 454 (S.D.N.Y. 2010) ("Indeed, the linchpin of relation back doctrine is notice within the limitations period, so that the later-named party will not be prejudiced in defending the case on the merits.") (citations omitted). Notice itself is not sufficient, it must be notice such that the defendant is not the victim of an unfair surprise. Without notice, there is inherent prejudice, which makes the actual prejudice Mentor Oregon faces clear. The transaction outlined in the complaint occurred in 2008, the complaint was filed (but never served) against a different entity (Mentor Ireland) in 2010, and the newly added defendant was not aware of the suit until the fall of 2013. The claims are stale and the evidence is lost or eroded. There is no evidence that pre-litigation precautions were taken by Mentor Oregon.

This is a perfect example of winning the battle, only to lose the war. While the relevant time period was extended for WorldSpace and the Trustee to effectuate service, it is that precise time period which undoubtedly harms Mentor Oregon's ability to defend itself. The notice requirement exists so that the new defendant has the ability to "anticipate and therefore prepare for his role as a defendant." In re Integrated Res. Real Estate Ltd. Partnerships Sec. Litig., 815 F. Supp. 620, 648 (S.D.N.Y. 1993) ("A firm or an individual may receive notice that the lawsuit exists

. . . without recognizing itself as the proper defendant and so without knowledge that it would be sued . . . just as a firm or individual may be the proper party without receiving any notice at all. The former is as thoroughly barred by Rule 15(c) as the latter."). Those unserved motions to extend the time to serve did not place Mentor Oregon in a position upon which it knew to initiate any type of preservation of evidence process. There is no evidence that employees of Mentor Oregon involved in the transaction were questioned, nor were files preserved on a litigation hold.

It is inconceivable under these facts that Mentor Oregon could be called upon to defend itself. That is why it would be particularly prudent for a party using Rule 4(m) motions to strategically and tactfully extend the time to serve process to ensure that before years go by without service, that adequate notice is given. See Nelson v. Cnty. of Allegheny, 60 F.3d 1010, 1014-15 (3d Cir. 1995) ("The emphasis of the first prong of this [Rule 15(c)] inquiry is on notice. The 'prejudice' to which the Rule refers is that suffered by one who, for lack of timely notice that a suit has been instituted, must set about assembling evidence and constructing a defense when the case is already stale.")(citations omitted); Bryant v. Vernoski, CIV.A. 11-263, 2012 WL 1132503 at *2 (M.D. Pa. Apr. 4, 2012) ("The second condition, requiring notice in order to avoid prejudice, is the

heart of the relation back analysis.") (citing Schiavone v. Fortune, 477 U.S. 21, 31 (1986)).

D. Mistake Concerning the Proper Party's Identity

This last requirement for adding a new defendant and relating it back to an original complaint is wholly separate from the notice and prejudice element discussed above. Under Rule 15(c)(1)(C)(ii), the change relates back if the new defendant "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)(C)(ii). Thus, Trustee needs to proffer evidence that Mentor Oregon knew or should have known during the 4(m) period that it should have been the target of the original complaint. The Supreme Court has made it clear that the accurate inquiry is what the party to be added knew or should have known, and should not focus on the plaintiffs knowledge or timeliness in amending the complaint. Krupski, 560 U.S. at 541.

There is no evidence that Mentor Oregon had reason to believe it was incorrectly omitted from the original lawsuit or that but for an error, it should have been the defending party. Both Mentor Ireland and Mentor Oregon signed separate contracts at separate times with WorldSpace. To be clear, Mentor Ireland was never served, and thus never saw the complaint at issue. All it received was two extension motions. Those extension motions did not outline the claims that would be potentially asserted, or specify

the contracts under which avoidance was sought. More importantly, calling into question the potential avoidability of one contract does not impute potential avoidability of a different contract. So Mentor Ireland was never appraised of any fact upon which they knew the wrong transferee was being sued. The same logic applies to Mentor Oregon; it was never appraised of a fact that would alert them that a potential mistake was made.[2]

Other than a similarity in name, Trustee has not provided any evidence that these two separate entities had any reason to believe that a preference action against could possibly be a mistake for a preference against the other. Both corporations have separate and distinct addresses. The post-petition name change of Mentor Ireland, outlined above, again does not satisfy the Trustees burden that these two entities should have known they could be mistaken for each other. The document which outlines an undated change is essentially irrelevant. More importantly, calling into question the payments stemming from one contract with a debtor does not impute a potential preference action of a different contract. See In re 360networks (USA) Inc., 367 B.R. 428, 434 (Bankr. S.D.N.Y. 2007) ("[T]he mere fact that all of these transactions are potentially preferential transfers is of no consequence when

[2] Due to the fact that the original complaint and amended complaint are seeking avoidance on the same set of three payments, had Mentor Ireland been served, it would not have taken long for them to inform all other interested parties that the wrong transferee is being sued. This is the risk taken when waiting years to finally effectuate service.

performing a Rule 15(c)(2) analysis. In the context of preference actions, each potential preferential transfer is a separate and distinct transaction: a preference action based on one transfer does not put defendant on notice of claims with respect to any other unidentified transfers.").

Further, there has been no argument proffered by Trustee that a mistake was made, as opposed to a deliberate choice to sue one entity over the other. Krupski, 560 U.S. at 549 ("making a deliberate choice to sue one party instead of another while fully understanding the factual and legal differences between the two parties is the antithesis of making a mistake concerning the proper party's identity."). Trustee's answering brief did not even address this element. No argument was made that it was a mistake to send notices of the extension motions to an address in Ireland, to recover on claims against a corporation in Oregon. This Court is not convinced that the mistake in naming the wrong defendant was due to a technicality or confusion between the two corporate entities. See Joseph v. Elan Motorsports Technologies Racing Corp., 638 F.3d 555, 560 (7th Cir. 2011) ("A potential defendant who has not been named in a lawsuit by the time the statute of limitations has run is entitled to repose—unless it is or should be apparent to that person that he is the beneficiary of a mere slip of the pen, as it were."). While Mentor Ireland was a subsidiary of Mentor Oregon, they each had independently contractual

relationships with WorldSpace. The alleged preferences arose out of those separately contractual relationships with WorldSpace.

The awareness of both Mentor Ireland and Mentor Oregon does not foreclose the possibility that a mistake still occurred in choosing which entity to sue; and it does not conclusively determine whether Mentor Oregon knew or should have known that there was an error. However, even after the Trustee was appointed, service of the motions to extend continued to be served on Mentor Ireland; underscoring a reasonable perception that it was the transactions between WorldSpace and Mentor Ireland which were being prosecuted. See Krupski, 560 U.S. at 552. ("When the original complaint and the plaintiff's conduct compel the conclusion that the failure to name the prospective defendant in the original complaint was the result of a fully informed decision as opposed to a mistake concerning the proper defendant's identity, the requirements of Rule 15(c)(1)(C)(ii) are not met.").

Conclusion

To summarize. The complaint was filed on October 15, 2010 with respect to transactions that occurred in July, August and September 2008. Plaintiff sought and obtained nine extensions of time to serve the complaint. A number of these extensions were procedurally improper. The last extension order set a cutoff date of January 30, 2014. Summons was served On Mentor Ireland on December 12, 2013. The amended complaint which dropped defendant

Mentor Ireland and substituted Mentor Oregon as the defendant was filed on January 29, 2014, over five years after the relevant transactions took place.

For the reasons stated above, the Motion to Dismiss of Mentor Oregon will be granted.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In Re:	)	Chapter 7
	)	
WORLDSPACE, INC., et al.,	)	Case No. 08-12412(PJW)
	)	(Jointly Administered)
Debtors.	)	
	)	
	)	
Charles M. Forman, chapter 7 trustee for WorldSpace, Inc., et al.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adv. Proc. No. 10-53286(PJW)
	)	
Mentor Graphics Corporation,	)	
	)	
Defendant.	)	

ORDER

For the reasons set forth in the Court's memorandum opinion of this date, the motion of Defendant Mentor Graphics Corporation to dismiss (Doc. # 83) is granted.

Peter J. Walsh
United States Bankruptcy Judge

Dated: June 5, 2014