

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

In re:	§	
	§	Chapter 11
Fleming Companies, Inc., <i>et al.</i> ,	§	Case No. 03-10945 (MFW)
	§	
Debtors.	§	(Jointly Administered)
	§	
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PCT,	§	
	§	
Plaintiff,	§	Adversary Proceeding No.
	§	
v.	§	A 05-78249 (PBL)
	§	
Elmer's Products, Inc.,	§	Related Documents: 22, 26, 27, 30
	§	
Defendant.	§	
	§	
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**MEMORANDUM AND ORDER DENYING MOTION OF PCT FOR LEAVE  
TO AMEND THE COMPLAINT AND FOR AN ORDER ENLARGING  
THE DEADLINE TO EFFECT SERVICE OF PROCESS**

This adversary proceeding was filed on March 28, 2005 against Elmer's Products Inc. (hereinafter referred to as "Defendant"), seeking to avoid and recover approximately \$615,000.00 in allegedly preferential transfers pursuant to §547(b) of the Bankruptcy Code. Defendant answered on July 6, 2005. Plaintiff, PCT, (hereinafter referred to as "Plaintiff"), filed its Motion to Amend the Complaint and for an Order Enlarging the Deadline to Effect Service of Process (hereinafter referred to as the "Motion"), on August 5, 2005.

**A. Leave to Amend the Complaint**

Plaintiff asks for leave to amend its Complaint to include or substitute Elmer Candy Corporation (hereinafter referred to as “Elmer Candy”) for Defendant, and for ten days to serve Elmer Candy with the Amended Complaint after leave has been granted. In its Motion, Plaintiff states that it served Defendant in Wilmington, Delaware believing that it had the correct defendant and had effected proper service. Upon receiving no response to the complaint, Plaintiff then served Defendant at its Columbus, Ohio headquarters on June 6, 2005. Defendant contacted Plaintiff and indicated that it did not believe that it had received most of the transfers in question. Defendant answered the Complaint on July 6, 2005. Plaintiff states that it researched the transfers and found that there were three similarly named transferees (Elmer’s Products, Elmer Products Canada, and Elmer Candy Corporation) and that the bulk of the claim related to Elmer Candy. An alias summons was issued on July 28, 2005 for Elmer Candy.

In support of its Motion, Plaintiff argues that no prejudice exists here because this adversary proceeding is in its early stages. As a Later-Served Defendant,<sup>1</sup> Elmer Candy will be subject to the next procedures order to be entered at the omnibus hearing in October, and therefore, will have the same amount of time for discovery as all other defendants. Plaintiff also argues that the amendment will not be futile because it requests the Court to grant additional time to effect service of process. By doing so, the Amended Complaint will therefore, not be barred by the statute of limitations. Lastly, Plaintiff argues that it was in no way motivated by or acted

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<sup>1</sup> The Procedures Order defines a “Later-Served Defendant” as a defendant in an avoidance action who is served by the PCT with a copy of the Motion for an Order Establishing Procedures Governing Adversary Proceedings Commenced by the PCT on or after March 31, 2005.

in bad faith in bringing the amendment.

Elmer Candy opposes the Motion for Leave to Amend on the grounds that this proceeding is time-barred, and that the amendment to include Elmer Candy would be futile. Elmer Candy argues, and Plaintiff concedes, that Defendant, Elmer Products, Inc., and Elmer Candy are two entirely separate and unrelated entities. Elmer Candy is a small family owned business in Ponchatoula, Louisiana, which is engaged in manufacturing and selling chocolates and candies. Elmer Products, Inc. is based in Wilmington, Delaware, and manufactures Elmer's white glue. Elmer Candy states that it did not receive notice of this action until July 29, 2005.

Plaintiff's basis for its Motion is Federal Rule of Civil Procedure 15(a), which provides that a party may amend a pleading only by leave of the court once a responsive pleading has been filed and that "leave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). Plaintiff seeks to add Elmer Candy as a new defendant and therefore, must meet the requirements under Rule 15(c) for relation back. It provides:

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 pleading 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).

It is abundantly clear that Plaintiff has not satisfied its burden under Rule 15(c). According to the pleadings, Elmer Candy did not receive notice of this action until July 29, 2005, after the statute of limitations had expired, and after the time for service under Rule 4(m). Furthermore, Defendant and Elmer Candy are completely separate and unrelated business entities and therefore, there is no evidence to show that Elmer Candy knew or should have know that but for Plaintiff's mistake in bringing the action against Defendant, this proceeding would have been brought against Elmer Candy. Elmer Candy has clearly shown that subsection (3) has not been satisfied and hence, the amendment does not relate back to the original complaint.

**B. Extension of Time to Effect Original Service of Process**

Plaintiff's counter argument is that an amended complaint relates back so long as the Court grants an extension of time to serve under Rule 4(m). Plaintiff urges this Court to use its discretion to extend the time for service after the expiration of the statute of limitations. To substantiate its position, Plaintiff relies upon *McGuire v. Turnbo*, 137 F.3d 321 (5<sup>th</sup> Cir. 1998), where the Court of Appeals 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. It should be noted, however, that the enlargement of time in *McGuire* was granted prior to the plaintiff amending the complaint and was not made contemporaneously with the amendment after the statute of limitations had expired.

Plaintiff also argues that Rule 4(m) allows a Court to grant an extension even when good cause has not been shown and the Court may do so in its discretion. *Wilke v. Bob's Route 53 Shell Station*, 36 F.Supp.2d 1068 (N.D.Ill. 1999). Plaintiff contends, however, that good cause has been shown here because the Third Circuit and this District has equated good cause with excusable neglect. Plaintiff argues that the delay was the result of excusable neglect because Plaintiff simply ran out of time to investigate the facts. Furthermore, Plaintiff maintains that the two-day delay was de minimus and that no prejudice will result to Elmer Candy from the extension of time for service, but that, in fact, Plaintiff will be prejudiced because the statute of limitations has run.

Elmer Candy also opposes the Motion to Extend the Time for Service and argues that the request should be denied because Plaintiff is attempting to circumvent the requirements of Rule 15(c). Elmer Candy further contends, that good cause does not exist to extend the time for service, because Plaintiff had notice that it sued the wrong defendant almost a month before the 120-day period expired. Elmer Candy therefore asks the Court to deny the Motion to Amend as futile.

Plaintiff served the alias summons on Elmer Candy 122 days after the filing of the Complaint. Plaintiff now urges this Court to excuse this delinquency by granting a discretionary extension to properly effect service on Elmer Candy. However, in this Court's view, Plaintiff has not shown sufficient evidence of good cause for its failure to serve Elmer Candy within the time period prescribed. Moreover, if the Court grants a retroactive extension of Rule 4(m) with relation back under Rule 15(c), it would completely nullify the statute of limitations under § 546(a). This Court, in its discretion, therefore declines to extend the deadline for original service

of process. The Motion to Amend the Complaint and for an Order Enlarging the Deadline to Effect Service of Process is **DENIED**.

Dated: October 12, 2005  
Wilmington, DE

BY THE COURT:

A handwritten signature in cursive script, reading "Paul B. Lindsey". The signature is written in black ink and is positioned above the printed name and title.

PAUL B. LINDSEY  
UNITED STATES BANKRUPTCY JUDGE