ORIGINAL

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
ENTERED
OCT 25 2002
TAWANA C. MARSHALL, CLERK
By _____
Deputy

IN RE:	§	
	§	
HARBOR FINANCIAL GROUP, et al.,	§	CASE NO. 99-37255-SAF-7
DEBTORS.	§	
	§	
JOHN H. LITZLER, TRUSTEE,	§	
PLAINTIFF,	§	
	§	
VS.	§	ADVERSARY NO. 01-3025
	§	
CHASE MANHATTAN MORTGAGE CORP.,	§	
DEFENDANT.	§	

MEMORANDUM OPINION AND ORDER

Chase Manhattan Mortgage Corporation and Chase Mortgage Company filed a total of four proofs of claims against the bankruptcy estates of Harbor Financial Mortgage Corporation (HFMC) and NAF, Inc., debtors. John H. Litzler, the Chapter 7 trustee of the bankruptcy estates, objected to the claims and filed counter-claims against the Chase entities. Guaranty Bank F.S.B., on behalf of a group of bank creditors, intervened. In a second amended complaint Litzler added fraudulent conveyance avoidance causes of action under 11 U.S.C. §§ 544 and 548

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pertaining to a November 1998 sales agreement between Chase and HFMC. Chase moves to dismiss those claims, pursuant to Fed. R. Civ. P. 12(b)(6), made applicable by Bankruptcy Rule 7012, as untimely. Litzler and Guaranty Bank oppose the motion. The court conducted a hearing on the motion on October 7, 2002.

Litzler filed his objections to the Chase claims and his counter-claims on January 16, 2001. Litzler filed an amended complaint on October 22, 2001. Litzler, with leave of court but without prejudice to a Chase motion to dismiss, filed the second amended complaint on September 3, 2002. The second amended complaint added causes of action under 11 U.S.C. §§ 544 and 548 regarding transfers under an agreement dated November 30, 1998, between Chase and HFMC, known as the November 1998 sales agreement. Chase contends that the causes of action under §§ 544 and 548 are timed barred by 11 U.S.C. § 546.

Under § 546(a), an action or proceeding under § 544 or § 548 "may not be commenced after the earlier of (1) the later of (A) 2 years after the entry of the order for relief; or (B) 1 year after the appointment or election of the first trustee . . .; or (2) the time the case is closed or dismissed." 11 U.S.C. § 546(a). The underlying bankruptcy case has not been closed or dismissed. Consequently, the formula under § 546(a)(1) establishes the bar date. The court entered the order for relief

on October 14, 1999. Litzler was appointed trustee on December 14, 1999. Section 546(a) applies to state law fraudulent conveyance actions invoked by the trustee pursuant to § 544. In re Topcor, Inc., 132 B.R. 119, 124 (Bankr. N.D. Tex. 1991). Under § 546(a)(1), the bar date for commencing an avoidance action under § 544 or § 548 was, therefore, October 14, 2001.

Chase contends that the complaint filed on September 3, 2002, was untimely, and the causes of action under §§ 544 and 548 pertaining to the November 1998 sales agreement must be dismissed. The trustee and Guaranty Bank respond that the complaint may stand pursuant to Fed. R. Civ. P. 15(a) and (c), made applicable by Bankruptcy Rule 7015.

Fed. R. Civ. P. 15(a) provides that leave to amend pleadings "shall be freely given when justice so requires." The rule "evinces a bias in favor of granting leave to amend." In re Southmark Corp., 88 F.3d 311, 314 (5th Cir. 1996). By order entered September 3, 2002, the court granted the trustee leave to file his second amended complaint, without prejudice to a motion by Chase challenging the timeliness of the fraudulent conveyance avoidance claims.

An amended complaint cannot add a claim upon which the statute of limitations has run, unless covered by Rule 15(c). "[U]nder Rule 15(c), an amendment to a complaint will relate back

to the date of the original complaint if the claim asserted in the amended pleading arises 'out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.'" F.D.I.C. v. Conner, 20 F.3d 1376, 1385 (5th Cir. 1994).

> The theory that animates this rule is that 'once litigation involving particular conduct or a given transaction or occurrence has been instituted, the parties are not entitled to the protection of the statute of limitations against the later assertion by amendment of defenses or claims that arise out of the same conduct, transaction, or occurrence as set forth in the original pleading.' . . . Permitting such an augmentation or rectification of claims that have been asserted before the limitations period has run does not offend the purpose of a statute of limitations, which is simply to prevent the assertion of stale claims.

Id.

Determining when an amendment will relate back can be difficult. "If a plaintiff attempts to interject *entirely* different conduct or different transactions or occurrences into a case, then relation back is not allowed." Conner, 20 F.3d at 1385 (emphasis added). If the alteration of a statement of a claim contained in an amended complaint is "so substantial that it cannot be said that the defendant was given adequate notice of the conduct, transaction or occurrence that forms the basis of the claim or defense, then the amendment will not relate back." Id. at 1386. "In the end though, the best touchstone for

determining when an amended complaint relates back to the original pleading is the language of Rule 15(c): whether the claim asserted in the amended pleading arises 'out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.'" Id.

Chase filed a proof of claim against HFMC for $71,987,636, later amended to $1,643,456.27, based on the November 1998 sales agreement. Litzler objected to the claim and asserted, in his initial complaint, several counter-claims. Litzler alleged that Chase breached the November 1998 sales agreement by not paying the agreed consideration. Litzler also alleged that certain "holdbacks" were owing by Chase to HFMC under the November 1998 sales agreement, and asserted a turnover cause of action under 11 U.S.C. § 542. Invoking 11 U.S.C. § 502(d), Litzler further alleged that Chase's claim must be disallowed if Chase did not return the property of the estate to the trustee. In re Consol. Capital Equities Corp., 143 B.R. 80, 84 (Bankr. N.D. Tex. 1992). Litzler did not, however, assert fraudulent conveyance avoidance causes of action under § 544 or § 548 regarding the November 1998 sales agreement. Litzler did allege fraudulent conveyance avoidance causes of action regarding other matters. Nevertheless, contrary to Chase's argument, the proof of claim and the responding objection to the claim and the counter-claims

alleged in the initial complaint by the trustee asserted claims regarding the November 1998 sales agreement transaction. With a § 546(a) bar date of October 14, 2001, Litzler timely filed his original complaint on January 16, 2001.

In his first amended objection to claims and first amended complaint, filed October 22, 2001, Litzler continued to allege his objection to the Chase claim based on the November 1998 sales agreement, as well as his claims of breach of contract and turnover of "holdbacks" due under the same agreement, and the defense under § 502(d). Litzler added an equitable subordination claim under 11 U.S.C. § 510(b) pertaining to a later transaction and avoidance claims under § 544 and § 548 pertaining to a different transaction or a subsequent and related transaction. Nevertheless, the first amended complaint continued to assert claims based on the November 1998 sales agreement. The November 1998 sales agreement, which formed a basis for the objection to the Chase claim and the trustee's counter-claims in the original pleading, remained. The first amended complaint, as here relevant, related back to the timely filed original complaint.

This brings the court to the second amended objection and second amended complaint filed by Litzler on September 3, 2002. The second amended complaint added, for the first time, fraudulent conveyance avoidance causes of action under § 544 and

§ 548 pertaining to transfers under the November 1998 sales agreement. Even though the second amended complaint adds a new legal theory on which the action initially was brought, the transaction remains the same. Litzler continued to object to the Chase claim based on the November 1998 sales agreement. Litzler continued to allege his claims for breach of contract and turnover of "holdbacks" due under the November 1998 sales agreement, and the defense under § 502(d).

By adding the fraudulent conveyance avoidance causes of action based on transfers under the November 1998 sales agreement, Litzler has not interjected an "entirely different ...transaction." Conner, 20 F.3d at 1385. To the contrary, the avoidance causes of action arise out of the same transaction, the November 1998 sales agreement, set forth in the original pleading. The amendment adds a new claim based on the same transaction. As stated above, once litigation involving a given transaction has been instituted, the statute of limitations does not bar the later assertion of claims that arise out of that transaction. Id. The original complaint placed Chase on notice that the trustee disputed that HFMC owed Chase money under the November 1998 sales agreement. The trustee alleges that Chase owed the bankruptcy estate money under the transaction. Even though the second amended complaint raises a new legal theory for

recovery by the trustee, the new theory of recovery arises out of the transaction set forth in the original complaint. F.D.I.C. v. Bennett, 898 F.2d 477, 480 (5th Cir. 1990)(citing United States v. Johnson, 288 F.2d 40, 42 (5th Cir. 1961)).

Chase refers to other transactions or related transactions between the parties or related parties. The court need not consider those allegations by the trustee, as the original complaint set forth claims based on the November 1998 sales agreement. Chase also presents the court with case authority from outside the Fifth Circuit. The Fifth Circuit's instructions for the application of Rule 15(c) govern. The second amended complaint, as here relevant, relates back to the timely filed original complaint.

Based on the foregoing,

IT IS ORDERED that the motion of Chase Manhattan Mortgage Corporation and Chase Mortgage Company to dismiss is **DENIED.**

Dated this 22nd day of October, 2002.

Steven A. Felsenthal
United States Bankruptcy Judge