

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE**

In re:

Bk. No. 00-11892-JMD
Chapter 7

Charles C. Brewster,
Debtor

Victor W. Dahar,
Chapter 7 Trustee
Plaintiff

v.

Adv. No. 02-1102-JMD

Paul Brewster,
Estate of Paul Brewster, and
Barbara Brewster
Defendants

*S. William Dahar, II, Esquire
Victor W. Dahar, P.A.
Manchester, NH
Attorney for Plaintiff*

*James G. Nucas, Jr., Esquire
Law Offices of Nucas & Keenan, P.A.
Portsmouth, NH
Attorney for Defendants*

MEMORANDUM OPINION

I. INTRODUCTION

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the “Standing Order of Referral of Title 11 Proceedings to the United States

Bankruptcy Court for the District of New Hampshire,” dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

II. FACTS

On June 26, 2000, Charles Brewster (the “Debtor”) filed for Chapter 7 Bankruptcy and Victor W. Dahar was appointed as the Chapter 7 Trustee (the “Trustee”). On June 26, 2002 the Trustee filed a Complaint to Avoid Transfer of Funds (the “Complaint”) (Doc. No. 1) against Paul Brewster and/or the Estate of Paul Brewster. The Complaint alleges that the Debtor transferred monies to Paul Brewster within one year of filing bankruptcy with the intent to hinder, delay and defraud creditors in violation of 11 U.S.C. § 548. Additionally, the Trustee alleges that the Debtor transferred monies to Paul Brewster in violation of NH R.S.A. 545.

Paul Brewster died in Florida on March 9, 2000. According to the Answer (Doc. No. 2) filed on behalf of Paul Brewster and/or his Estate, there were no assets within the Estate of Paul Brewster and the Estate was closed without probate. On November 12, 2003 the Estate of Paul Brewster filed a Motion to Dismiss (Doc. No. 18) asserting that a Florida statute of limitations barred claims against a decedent’s estate after two years.

On October 21, 2002 the Trustee filed a Motion to Amend Complaint to Add Barbara Brewster as a Co-Defendant (Doc. No. 7). The Trustee contends that Barbara Brewster, Paul Brewster’s wife, was a joint owner of the bank accounts where the alleged fraudulent transfers transpired. On October 22, 2002 the Court granted the Trustee’s Motion to Amend (Doc. No. 8). On October 30, 2002 the Estate of Paul Brewster filed a Motion to Strike the Court’s order (Doc. No. 9) stating that the two-year statute of limitations in 11 U.S.C. § 546 had expired on June 26, 2002. A hearing was held on the Motion to Dismiss and Motion to Strike on December 12, 2002.

III. DISCUSSION

Motion to Strike (Barbara Brewster)

“When a plaintiff amends a complaint to add a defendant, but the plaintiff does so *subsequent* to the running of the relevant statute of limitations, the Rule 15(c)¹ controls whether the amended complaint may ‘relate back’ to the filing of the original complaint and thereby escape a timeliness objection.” Wilson v. U.S. Government, 23 F.3d 559, 562 (1st Cir. 1994) (emphasis in original).

Rule 15(c)² expressly provides that an amendment to a complaint that changes the parties relates back to the date of the original pleading if certain conditions are satisfied. This alters the generally accepted rule that new parties cannot be added to an action by amendment after the applicable limitations period has expired. See 6A Wright & Miller, Federal Practice & Procedures 1498 (2d ed. Supp. 2003). Rule 15(c) permits an amendment adding a party to relate back to the date of the original pleading if three conditions are met: (1) the claims against the new party arise out of the same occurrence as the claims in the original pleading, (2) the new party received “notice of the institution of the action” before the limitations period expired, and (3) the new party “knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.” Hernandez Jimenez v. Calero Toledo, 604 F.2d 99, 102 (1st Cir. 1979) *quoting* 6 Wright & Miller, Federal Practice & Procedures 1498 at 507 (1971).

Interestingly, neither party discussed nor cited to Rule 15(c). Regardless, Rule 15(c) does not save the Trustee’s claim against Barbara Brewster from being time-barred. See, e.g.,

¹“Rule” hereinafter refers to Federal Rule of Civil Procedure.

²Rule 15 is made applicable to bankruptcy proceedings through Bankruptcy Rule 7015.

Hernandez Jimenez, 604 F.2d 99; Wilson, 23 F.3d 559. An added defendant must have notice of the action, either actual or constructive, before the running of the statute of limitations.

Fed.R.Civ.P. 15(c); Schiavone v. Fortune, 477 U.S. 21, 29, (1986). The Trustee never argued in his Motion to Amend, Objection to Motion To Dismiss Filed on Behalf Of Barbara Brewster or at the hearing on December 11, 2002 that Barbara Brewster had notice prior to June 26, 2002; nor is this a circumstance where constructive notice typically is found. See Hernandez Jimenez, 604 F.2d at 102-103 (finding identity of interest principle is most often applied to parent/subsidiary corporations or closely related corporations).

Moreover, there were no assertions that, “within the period provided by law for commencing the action against [her] ... [Barbara Brewster] knew or should have known that, but for a mistake concerning the identity of the proper party,” Fed.R.Civ.P. 15(c), she would have been a named party. She might well have thought that she was not named in the action “for tactical reasons or because [the Trustee] lacked evidence ... when he filed the complaint.” Hernandez Jimenez, 604 F.2d at 103.

The Court finds that Rule 15(c) cannot serve to bring the amendment within the limitations period. Accordingly, Barbara Brewster’s Motion to Strike Order Granting Motion to Amend Complaint is GRANTED.

Motion to Dismiss (Estate of Paul Brewster)

Section 733.710 of the Florida Statutes has been construed by the Florida Supreme Court to be “a jurisdictional statute of nonclaim that automatically bars untimely claims and is not subject to waiver or extension in the probate proceeding.” May v. Illinois Nat’l Ins. Co., 771 So.2d 1143, 1157 (Fla. 2000). The Trustee argues that there are exceptions to the two year bar. However, the Florida Supreme Court has made it clear that a claimant cannot avoid § 733.710 by showing fraud,

estoppel or insufficiency of notice. Id. at 1156. In fact, the court points out that the “lapse of the two-year period erects an absolute jurisdictional bar to late-filed claims that the probate judge lacks the power to ignore.” Id. Additionally, § 733.710 is “an absolute bar-akin to a statute of repose, that the court lacks the power to avoid.” Comerica Bank & Trust F.S.B. v. SDI Operating Partners, L.P., 673 So.2d 163, 164 (Fla. 4th DCA 1996).

Notwithstanding, this is not a Florida probate court and the Trustee is not making a claim in the Estate of Paul Brewster. The Trustee is seeking to avoid certain transfer of funds between the Debtor and Paul Brewster. The Trustee has met all the applicable statute of limitations for this Court.³ While ultimately the Trustee will be left with a judgment that cannot be enforced, it is not up to this Court to dictate trial strategy to trustees, even if the Court believes that the Trustee is tilting at windmills. If the Debtor was a party to this action and estate funds were at stake the Court would have no choice but to dismiss this imprudent action as inevitably futile.

Accordingly, the Court DENIES the Estate of Paul Brewster’s Motion to Dismiss.

IV. CONCLUSION

This opinion constitutes the Court’s findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue separate orders consistent with this opinion.

DATED this 16th day of May, 2003, at Manchester, New Hampshire.

/s/ J. Michael Deasy

J. Michael Deasy
Bankruptcy Judge

³The Court notes that the Trustee filed his complaint on June 26, 2002 exactly two years after his appointment, but still in compliance with 11 U.S.C. § 546.