

**UNITED STATES BANKRUPTCY COURT  
FOR THE  
WESTERN DISTRICT OF KENTUCKY**

IN RE:	)	
	)	
THERMOVIEV INDUSTRIES, INC.	)	
	)	
Debtor(s)	)	Case No. 05-37123
	)	
THOMAS W. FRENTZ, TRUSTEE	)	
	)	
Plaintiff(s)	)	AP No. 07-3435
	)	
vs.	)	
	)	
CASH SAVER COUPONS	)	
	)	
Defendant(s)	)	

**MEMORANDUM-OPINION**

This matter is before the Court on the Motion for Leave to File First Amended Complaint to Avoid Transfers Pursuant to 11 U.S.C. §547 and to Recover Property Transferred Pursuant to 11 U.S.C. §550 by Trustee Thomas W. Frentz (“Trustee”). The Court considered the Trustee’s Motion and Supporting Memorandum and the Objection of Defendant Cash Saver Coupons (“Cash Saver”) to Motion to File Amended Complaint, the Trustee’s Reply to Cash Saver’s Objection to Motion to File Amended Complaint and the comments of counsel at the hearing held on the matter. For the following reasons, the Court will **GRANT** the Trustee’s Motion. An Order accompanies this Memorandum-Opinion.

## **PROCEDURAL BACKGROUND**

On or about September 29, 2007, Trustee instituted this adversary proceeding against Cash Saver seeking to recover an alleged preferential transfer.

On October 3, 2007, the Trustee filed his Summons showing that Cash Saver received service of process on October 3, 2007.

On or about November 2, 2007, Cash Saver filed its Answer to the Complaint and asserted numerous affirmative defenses including, “wrong defendant” “insufficiency of service of process” and “Defendant is not an entity capable of suing or being sued.”

On or about February 6, 2008, the Trustee filed his Motion for Leave to File the First Amended Complaint. The proposed Amended Complaint changes the named Defendant from Cash Saver Coupons to Pac Mail, Inc. d/b/a Cash Saver Coupons. This is the only substantive proposed change to the Complaint. Trustee indicates that after reviewing a canceled check, he discovered that while the check was made payable to Cash Saver Coupons, the endorsement was made for deposit to a Pac Mail, Inc. bank account. Pac Mail, Inc. and Cash Saver Coupons are the same entity with Pac Mail, Inc. doing business as Cash Saver Coupons. They are both represented by the same attorney who was involved with settlement negotiations with the Trustee prior to the filing of the proposed Amended Complaint.

## **LEGAL ANALYSIS**

Rule 7015 of the Federal Rules of Bankruptcy Procedure governs the amendment to pleadings. The pertinent provision states:

(c)(1) When an Amendment Relates Back. An amendment to a pleading relates back to the date of the original pleading when:

.....

(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) receives 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.

Rule 15(c) is intended to permit a party who has mistakenly sued the wrong party to amend its complaint after the limitations period has run to substitute the proper party for the wrongly sued one. The Rule permits amended pleadings to correct a mere misnomer to relate back to the date the original pleading was filed. Matter of Metropolitan Co., 85 B.R. 783 (Bankr. S.D. Ohio 1988).

In order for an amendment to relate back to the date of the original complaint, four requirements must be met. They are: (1) the claim asserted in the amended pleading must arise out of the same conduct, transaction or occurrence set forth in the original pleading; (2) the party brought in by the amendment received notice of the institution of the action so the party is not prejudiced in maintaining a defense on the merits; (3) the party brought in by the amendment 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; and (4) elements (2) and (3) must occur within the period provided by Rule 4(m) for service of the summons and complaint (within 120 days from the date of the filing of the complaint). Lovelace v. O'Hara, 985 F.2d 847, 849-850 (6<sup>th</sup> Cir. 1993); In re Hupp Industries, Inc., 165 B.R. 836 (Bankr. N.D. Ohio 1994). Clearly, the proposed amended complaint establishes that the claim therein arose out of the same transaction set forth in the original

complaint. On October 3, 2007, summons was executed and Cash Saver Coupons received the Complaint, hired counsel and filed an answer with affirmative defenses. Since Cash Saver Coupons is simply the d/b/a of Pac Mail, Inc., Pac Mail, Inc. received notice within 120 days of service of the summons and complaint required by Rule 4(m). Cash Saver and Pac Mail, Inc. are represented by the same counsel and they are, in effect, the same entity. There is no reason why Pac Mail, Inc. would be prejudiced and no undue delay has occurred in service of the proposed Amended Complaint. In this instance, Trustee is not seeking to bring in a new defendant, but merely seeks to correct a misnomer. This is precisely the scenario contemplated by the Rule. But for a mistake concerning the identity of the proper party, the action would have originally been brought against Pac Mail, Inc. These events all occurred within the 120 day period set forth in Rule 15(c)(1)(c), by reference to Rule 4(m) for relation back. The elements for relation back under Rule 15(c)(1)(c) are met and the Amended Complaint relates back to the date of the original filing of the Complaint, September 29, 2007.

### CONCLUSION

For all of the above reasons, the Motion for Leave to File First Amended Complaint to Avoid Transfers Pursuant to 11 U.S.C. §547 and to Recover Property Transferred Pursuant to 11 U.S.C. §550 by Trustee Thomas W. Frentz, is **GRANTED**. An Order incorporating the findings herein accompanies this Memorandum-Opinion.

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THERMOVIEW INDUSTRIES, INC.	)	
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Plaintiff(s)	)	AP No. 07-3435
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vs.	)	
	)	
CASH SAVER COUPONS	)	
	)	
Defendant(s)	)	

**ORDER**

Pursuant to the Memorandum-Opinion entered this date and incorporated herein by reference,

**IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that the Motion for Leave to File First Amended Complaint to Avoid Transfers Pursuant to 11 U.S.C. §547 and to Recover Property Transferred Pursuant to 11 U.S.C. §550 by Trustee Thomas W. Frentz, be and hereby is, **GRANTED.**

**IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that Defendant Pac Mail, Inc. shall have fifteen (15) days from the date of this Order to answer the Amended Complaint.