UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

IN RE: Warner Advertising, Inc., Debtor.	C/A No. 95-72771-W Adv. Pro. No. 95-8151
Warner Advertising, Inc., Plaintiff, v. The Cabral Company, Inc., Defendant.	**JUDGMENT** Chapter 11

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, the Plaintiff/Debtor's "Motion For An Order Permitting The Amendment Of The Amended Complaint Pursuant To Rule 15(a), FRCP, And Providing That The Said Amendment Relates Back To The Date Of The Original Complaint Pursuant To The Provisions Of Rule 15(c), FRCP" is denied.

John E. Waites
UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
March 6, 1996.

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IN RE: Warner Advertising, Inc., Debtor.	C/A No. 95-72771-W Adv. Pro. No. 95-8151
Warner Advertising, Inc., Plaintiff, v. The Cabral Company, Inc., Defendant.	**ORDER** Chapter 11

THIS MATTER comes before the Court upon the Plaintiff/Debtor's "Motion For An Order Permitting The Amendment Of The Amended Complaint Pursuant To Rule 15(a), FRCP, And Providing That The Said Amendment Relates Back To The Date Of The Original Complaint Pursuant To The Provisions Of Rule 15(c), FRCP" (the "Motion"). After reviewing the Motion and responses to the Motion and based upon the exhibits and affidavits attached to the memorandums in support of the Motion and in support of the responses to the Motion, the Court makes the following Findings of Fact and Conclusions of Law pursuant to Rule 52 of the Federal Rules of Civil Procedure, made applicable by Rule 7052 of the Federal Rules of Bankruptcy Procedure.[1]

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[1] The court notes that to the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such, and to the extent any Conclusions of Law constitute Findings of Fact, they are so adopted.

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FINDINGS OF FACT

On November 5, 1990, the Plaintiff/Debtor Warner Advertising, Inc. ("Warner Advertising") entered into two Advertising Services Agreements (jointly referred to as the "Agreements"), one with Cabral Realty d/b/a Hot Springs Factor Outlet and the other with Cabral Realty d/b/a North Hampton Factory Outlet Center. Monica Warner signed the agreements on behalf of Warner Advertising and Susan E. Allen signed the Agreements on behalf of Cabral Realty. On August 28, 1992, the Plaintiff/Debtor commenced a lawsuit in the Court of Common Pleas for Beaufort County, case number 92-CP-07-1520, against The Cabral Company, Inc. seeking the collection of the outstanding debts based upon the Cabral Realty Agreements. The Cabral Company, Inc. filed its answer and alleged the defense of accord and satisfaction. On November 11, 1993, the Honorable Thomas Kemmerlin, Jr., Master-in-Equity and Special Circuit Judge for the Beaufort County Court of Common Pleas (the "State Court"), issued an order granting summary judgment to The Cabral Company, Inc. on the grounds that, as a matter of law, the parties had entered into an accord and satisfaction of the debts. Warner Advertising appealed Judge Kemmerlin's order to the South Carolina Court of Appeals. The South Carolina Court of Appeals, in its initial opinion affirmed the order. Warner Advertising then filed a petition for a rehearing at which time the South Carolina Court of Appeals reversed itself and remanded the case for trial. On April 3, 1995, the Defendant's petition for a rehearing of that rehearing was denied.

On May 26, 1995, Warner Advertising filed a Chapter 11 bankruptcy petition. On June 28, 1995, Warner Advertising filed a Notice of Removal of the State Court litigation to this Court pursuant to 28 U.S.C. § 1441, which became the within adversary proceeding.

Upon being advised by Warner Advertising's special counsel for the adversary proceeding that Warner Advertising may no longer be actively engaged in business and that the primary means of funding the Chapter 11 plan, which at the time had not been filed, was through the successful prosecution and collection of a judgment in this adversary proceeding, the Court continued the trial date of November 30, 1995 and *sua sponte* scheduled a hearing for January 9, 1996 to determine the feasibility of the proposed reorganization and if cause existed for the dismissal or conversion of this Chapter 11 case. As a result of the hearing, and upon request of the Court, Warner Advertising inquired into the collectibility of any judgment and conducted an asset search of The Cabral Company, Inc. which indicated very limited assets that would be available to satisfy any potential judgment. Warner Advertising then advised the Court that they would be filing the within motion to amend the Amended Complaint to change the Defendant from The Cabral Company, Inc. to Richard A. Cabral, d/b/a Cabral Realty.[2] The Cabral Company, Inc. and Richard A. Cabral ("Mr. Cabral"), as the proposed new Defendant, each filed objections to the Motion.

CONCLUSIONS OF LAW

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[2] As indicated at the status hearing on January 9, 1996, upon the Court's inquiry, the parties agreed to have the Motion ruled upon through the pleadings rather than having a supplemental hearing scheduled. The only documentation provided with the Motion and Responses was from Warner Advertising which included an affidavit of Joseph R. Barker, Esquire with an attachment of an "Application for Registration of Trade Name and Application for Reregistration of Trade Name by Richard A. Cabral d/b/a Cabral Realty", an affidavit of Joseph R. Barker, Esquire with an attachment of an excerpt of the transcript of the deposition of Susan Allen and an excerpt of the transcript of the deposition of Edward W. Huminick and the affidavit of John A. Birgerson, Esquire with an attachment of various correspondence.

Rule 15(a) of the Federal Rules of Civil Procedure[3], made applicable to adversary proceedings by Rule 7015 of the Federal Rules of Bankruptcy Procedure provides as follows:

> A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

Federal Rules of Civil Procedure, Rule 15(a). The Federal Rules of Civil Procedure provide that leave to amend "shall be freely given when justice so requires."

> However, leave to amend is "by no means automatic." Addington v. Farmer's Elevator Mut. Ins. Co., 650 F.2d 663, 666 (5th Cir. Unit A), cert. denied, 454 U.S. 1098, 102 S.Ct. 672, 70 L.Ed.2d 640 (1981). Instead, the decision to grant or deny leave is one left to the sound discretion of the trial court. In deciding whether leave should be granted, the district court can consider factors such as "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party ... [and] futility of amendment." Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962).

Ashe v. Corley, 992 F.2d 540 (5th Cir. 1993). Paragraph (c) of Rule 15 captioned "Relation Back of Amendments" states:

> An amendment of a pleading relates back to the date of the original pleading when

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[3] Further references to the Federal Rules of Civil Procedure shall be by Rule number only.

> (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or
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> (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
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> (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing 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. The delivery or mailing of process to the United States Attorney, or United States Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of subparagraphs (A) and (B) of this paragraph (3) with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

Federal Rules of Civil Procedure, Rule 15(c). The Honorable Henry M. Herlong, Jr. of the District Court for the District of South Carolina has recently provided the guidelines for the test pursuant to Rule 15(c):

> Federal Rule 15(c), which was amended in 1991, allows an amendment of a pleading that changes a party to relate back to the date of the original pleading when certain requirements are met. First, the claim asserted in the amended pleading must arise out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading. Fed.R.Civ.P. 15(c)(3) (incorporating the requirement of 15(c)(2)). That requirement is met in this case. Next, the party to be brought in by the amendment, within 120 days of the original pleading, (1) must have received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (2) must have known or should have known that, but for the mistake concerning the identity of the proper party, the action would have been brought against the party. See Fed.R.Civ.P. 15(c)(3)(A)-(B); Wilson v. United States, 23 F.3d 559, 562-63 (1st Cir.1994)...The third requirement for relation back is that the added

> party must have known or should have known that, but for the mistake concerning the identity of the proper party, the action would have been brought against the party. The Fourth Circuit, construing the same language in an older version of Rule 15(c), has ruled that this requirement presupposes a mistake regarding the identity of the proper party, and does not permit relation back where there is a " 'lack of knowledge of the proper party.' " See Western Contracting Corp. v. Bechtel Corp., 885 F.2d 1196, 1201 (4th Cir.1989) (quoting Wood v. Worachek, 618 F.2d 1225, 1230 (7th Cir.1980)). Other circuits, construing the current version of Rule 15(c), have reached the same conclusion. See Wilson v. United States, 23 F.3d 559, 563 (1st Cir.1994); Worthington v. Wilson, 8 F.3d 1253, 1256 (7th Cir.1993).

Burgin v. LaPointe Machine Tools Co., 161 F.R.D. 44 (D.S.C. 1995).

As in the Burgin case, it appears that the first requirement pursuant to Rule 15(c) has been met as the claim most certainly arises out of a common transaction. It also appears that based upon the affidavits of counsel for Warner Advertising, Mr. Cabral, as the party to be added as the new defendant, did have notice of the proceedings within the 120 days following the filing of the original Complaint in State Court. However, the third requirement under Rule 15(c) is that the party to be brought in by the amendment, "(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 that party." This is a separate requirement from the requirement that the party have received such notice of the institution of the action. Judge Herlong has also provided the standard to be applied for this third requirement:

> [A]mendment with relation back is generally permitted in order to correct a misnomer of a defendant where the proper defendant is already before the court and the effect is merely to correct the name under which he is sued. But a new defendant cannot normally be substituted or added by amendment after the statute of limitations has run. Worthington, 8 F.3d at 1256 (quoting Wood v. Worachek, 618 F.2d 1225, 1229 (7th Cir.1980)).

Burgin v. LaPointe Machine Tools Co., 161 F.R.D. at 47.[4] Warner Advertising takes the position that the substitution of Mr. Cabral for The Cabral Company as the proper Defendant is merely to correct a misnomer and that Mr. Cabral as the owner of The Cabral Company is already before the Court. In support of this position, Warner Advertising alleges that Mr. Cabral and his various entities used the different names of the entities in a misleading manner in an attempt to cover up the identity of the correct Defendant, Mr. Cabral. However, according to the Agreements, which are attached as exhibits to the proposed Second Amended Complaint, Warner Advertising knew in November of 1990 that the party to the Agreements was Cabral Realty and not the separate corporation of The Cabral Company, Inc. Additionally, the correspondence attached to the affidavit of John A. Birgerson, the attorney for Warner Advertising who initially brought the State Court litigation, reflects that his demand letters of July 23, 1992 and August 7, 1992 were addressed to Mr. Dick Cabral at Cabral Realty. The Application for Registration of Trade Name filed with the New Hampshire Secretary of State on January 31, 1989 clearly reflects that Cabral Realty is a trade name of Richard A. Cabral. "As the Seventh Circuit has stated: Rule 15(c)(2) permits an amendment to relate back only where there has been an error made concerning the identity of the proper party and where that party is chargeable with

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[4] Warner Advertising admits in its memorandum in support of its Motion that an action against Mr. Cabral would now be barred by the Statute of Limitation unless the amendment relates back to the date the original Complaint was filed on August 28, 1992. Warner Advertising also argues that an action against Mr. Cabral would not be barred under S.C. Code Ann. §15-3-90 (1976). However, this statute provides relief for a plaintiff who commenced an action against the proper parties during the limitations period, but whose judgment was reversed requiring a new action against those parties. It does not provide relief where the Defendant's judgment is reversed or where a new action is not required. It does not provide a second chance for plaintiffs who fail to bring an action against the proper parties initially.

knowledge of mistake, but it does not permit relation back where, as here, there is a lack of knowledge of the proper party." Western Contracting Corp. v. Bechtel Corp., 885 F.2d 1196 (4th Cir. 1989) citing Wood v. Worachek, 618 F.2d 1225, 1229 (7th Cir.1980).

In Burgin, Judge Herlong relied upon the First Circuit's Wilson v. United States, 23 F.3d 559, 563 (1st Cir.1994) decision, in which a plaintiff had sued his private employer for alleged injuries sustained while performing duties for the private employer on a vessel owned by the United States. After the statute of limitation had expired, the plaintiff filed a motion to amend his complaint and have it relate back to the filing date pursuant to Rule 15(c) to be able to bring a cause of action against the United States as the owner of the vessel. The First Circuit denied the motion finding that the plaintiff made no attempt to find out who owned the vessel prior to the expiration of the statute of limitations or who the owner of the vessel was through routine discovery procedures. The First Circuit stated:

> We see no basis for extending the exceptional doctrine of equitable tolling to a party who, by all accounts, merely failed to exercise his rights. Cf. Puleio v. Vose, 830 F.2d 1197, 1203 (1st Cir.1987) ("The law ministers to the vigilant, not to those who sleep upon perceptible rights."), cert. denied, 485 U.S. 990, 108 S.Ct. 1297, 99 L.Ed.2d 506 (1988). In sum, the record before us reflects that Wilson failed to exercise due diligence in pursuing his claim, and thus we see no grounds for applying the doctrine of equitable tolling.

Wilson v. United States, 23 F.3d at 562. As Judge Herlong stated in the Burgin opinion following the Wilson decision,

> In Wilson, the First Circuit found that Rule 15(c) did not apply because there was no "mistake concerning the identity of the proper party," as required by Rule 15(c)(3). Rather, Wilson merely lacked knowledge of the proper party. In other words, Wilson fully intended to sue [the original defendant], he did so, and [the

> original defendant] turned out to be the wrong party. We have no doubt that Rule 15(c) is not designed to remedy such mistakes. Wilson, 23 F.3d at 563.

Burgin v. LaPointe Machine Tools Co., 161 F.R.D. at 47. The facts in Wilson seem very similar to the facts within. Warner Advertising knew that the contracts were with Cabral Realty but instead decided to sue The Cabral Company, Inc., a separate legal entity. Warner Advertising sued The Cabral Company, Inc. in litigation in the State Court, and now the Federal Court, for a period of almost four years and only now after apparently determining the limited nature of that Defendant's assets does it assert that The Cabral Company, Inc. is the wrong party. Even the most basic exercise of diligence in bringing the action or in the State Court discovery process would have led the Plaintiff to sue the correct party to the Agreements, namely Cabral Realty. It does not appear that Rule 15(c) is available in this situation.

Additionally, the Court is very concerned about the prejudice that Mr. Cabral will suffer if he is brought into the litigation at this late date. As stated in the Findings of Fact, while the Notice for Removal was filed with this Court on June 28, 1995, the State Court litigation has been pending since August 28, 1992. Under the facts of this case, adding Mr. Cabral personally to this action which is almost four years old appears prejudicial to his ability to defend this action.

CONCLUSION

Pursuant to Rule 15(a), leave shall be freely given to amend the pleadings when justice so requires, however, in this instance, the Plaintiff has not met its burden of demonstrating that such a late amendment to add Mr. Cabral is in the interest of justice. Warner Advertising seeks to amend its Amended Complaint to substitute Mr. Cabral as a party Defendant beyond the statute

of limitations and almost four years after the commencement of this action by the Plaintiff in State Court in August 1992. The impetus for this late amendment does not appear to be caused by some new discovery of facts or correction of mistake to bring the proper parties into court; rather, the amendment is designed to bring in a party who may have assets. For the reasons stated within and based upon the requirements as set forth in this District by the Burgin decision, it is therefore,

ORDERED, that the Plaintiff/Debtor's "Motion For An Order Permitting The Amendment Of The Amended Complaint Pursuant To Rule 15(a), FRCP, And Providing That The Said Amendment Relates Back To The Date Of The Original Complaint Pursuant To The Provisions Of Rule 15(c), FRCP" is denied.

AND IT IS SO ORDERED.

UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
March 6, 1996.