

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE  
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 99-35320

CUSTOM-PAK MEATS, INC.

Debtor

JOHN P. NEWTON, JR., TRUSTEE  
for the bankruptcy estate of  
Custom-Pak Meats, Inc., Debtor

Plaintiff

v.

Adv. Proc. No. 01-3207

LINGO PACKING COMPANY

Defendant

**MEMORANDUM ON DEFENDANT'S MOTION TO DISMISS  
AND PLAINTIFF'S MOTION TO AMEND**

APPEARANCES: WALKER & WALKER, P.C.  
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Attorneys for Plaintiff

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Attorneys for Lingo Packing Company, Inc.

**RICHARD STAIR, JR.  
UNITED STATES BANKRUPTCY JUDGE**

On December 21, 2001, the Plaintiff filed a Complaint to Recover Avoidable Payments Under 11 U.S.C. §§ 547 and 550 (Complaint). Presently before the court is the Motion to Dismiss for Failure to State a Claim (Motion to Dismiss) filed by Lingo Packing Company, Inc. (Lingo) on January 30, 2002.

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(F) (West 1993).

## I

The Complaint seeks to recover \$58,521.00 in allegedly preferential transfers made by the Debtor to the named Defendant, "Lingo Packing Company." At Paragraph 2, the Complaint alleges that "[t]he Defendant is a corporation whose address is 134 Lingo Road, Jonesborough, TN 37659."

In its Motion to Dismiss, Lingo states that it, "Lingo Packing Company, Incorporated, affirmatively avers that it is not the above named Defendant, Lingo Packing Company." In its supporting brief, Lingo denies any "knowledge of any entity named Lingo Packing Company that is organized under the laws of the State of Tennessee." In other words, Lingo (Lingo Packing Company, Incorporated) denies that it is the same corporation as the "Lingo Packing Company" named in the Complaint. Lingo further asserts that there is no such entity as "Lingo Packing Company" and that, as a non-existent entity, "Lingo Packing Company" does not have the capacity to be sued.

Issues of capacity are properly raised under FED. R. CIV. P. 9(a), made applicable to adversary proceedings by FED. R. BANKR. P. 7009. Rule 9(a) provides in material part:

When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued . . . the party desiring to raise the issue shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

FED. R. CIV. P. 9(a). “[A] specific denial based on information and belief should suffice if there is no reason to doubt the good faith of the pleader.” 5 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 1294, at 569 (1990). If necessary, the issue may be reserved for determination at trial. *See id.* at 572.

The issue of lack of capacity may be raised by a Rule 12(b)(6) motion. *See id.* at 570-71. Rule 12(b)(6) of the Federal Rules of Civil Procedure, through FED. R. BANKR. P. 7012(b), authorizes dismissal for “failure to state a claim upon which relief can be granted.” FED. R. CIV. P. 12(b)(6). When deciding a Rule 12(b)(6) motion, the court “must construe the complaint in the light most favorable to the plaintiff, accept all factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claims that would entitle him to relief.” *Allard v. Weitzman (In re DeLorean Motor Co.)*, 991 F.2d 1236, 1240 (6<sup>th</sup> Cir. 1993).

## II

Also before the court is the Plaintiff's Motion for Leave to File an Amendment to Trustee's Complaint to Recover Avoidable Payments Under 11 U.S.C. §§ 547 and 550 (Motion to Amend) filed on January 31, 2002. Of material import, the Motion to Amend seeks to modify the Complaint by adding the following sentence: “The defendant ‘Lingo Packing Company’ is one and

the same entity as ‘Lingo Packing Company, Incorporated’ which has a Secretary of State identification number ‘0018576’ and a principal office at 134 Lingo Road, Jonesborough, Tennessee 37659.”

In support of his Motion to Amend, the Plaintiff attached the results of a “Secretary of State Business Information Search” printed January 29, 2002, from the website of the Tennessee Secretary of State. The form confirms that the address of “Lingo Packing Company, Incorporated” is 134 Lingo Road, Jonesborough, Tennessee 37659.<sup>1</sup> The Plaintiff further attached an invoice which, according to the Affidavit of Plaintiff’s counsel, is a representative sample of every invoice relevant to the present preference litigation. The invoice, purportedly prepared by Lingo (Lingo Packing Company, Inc.), is captioned:

LINGO PACKING COMPANY

134 Lingo Road • Jonesborough, TN 37659

**III**

Motions to amend are governed by FED. R. CIV. P. 15, which provides in relevant part:

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.

FED. R. CIV. P. 15(a) (made applicable by FED. R. BANKR. P. 7015). Rule 7 of the Federal Rules of Civil Procedure defines the seven types of pleadings permitted in federal practice:

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<sup>1</sup> In its brief, Lingo acknowledges receiving service at that address.

There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

FED. R. CIV. P. 7(a) (made applicable by FED. R. BANKR. P. 7007). In response to the Complaint, Lingo has filed only its Motion to Dismiss, which is not a responsive pleading for purposes of FED. R. CIV. P. 15(a) and 7(a). See *Ohio Cas. Ins. Co. v. Farmers Bank of Clay, Ky.*, 178 F.2d 570, 573 (6<sup>th</sup> Cir. 1949). Because no responsive pleading has been filed, the Plaintiff is therefore entitled to amend his Complaint as a matter of right. See FED. R. CIV. P. 15(a).

The Motion to Amend as filed, however, was not accompanied by an actual copy of the amended Complaint. See E.D. Tenn. LBR 7015-1 (“A party who moves to amend a pleading in a proceeding shall attach a copy of the proposed amended pleading as an exhibit to the motion.”). Accordingly, the Plaintiff must still file an amended complaint with the court.

#### IV

In light of the documentation attached to the Motion to Amend, the court is unpersuaded by Lingo’s “affirmative averments” that it is not, and has no knowledge of, Defendant Lingo Packing Company. Construing the Complaint in the light most favorable to the Plaintiff, the court cannot at this time find that Lingo Packing Company and Lingo Packing Company, Incorporated, are not, in fact, the same entity.

In summary, the Plaintiff's failure to include the word "Incorporated" in the caption of his Complaint is simply insufficient cause for the dismissal of an otherwise legally sufficient pleading. Lingo's Motion to Dismiss must be denied. Additionally, the Plaintiff will be directed to file his amended complaint within ten days. An appropriate order will be entered.

FILED: February 14, 2002

BY THE COURT

RICHARD STAIR, JR.  
UNITED STATES BANKRUPTCY JUDGE

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LINGO PACKING COMPANY

Defendant

**ORDER**

For the reasons stated in the Memorandum on Defendant's Motion to Dismiss and Plaintiff's Motion to Amend filed this date, the court directs that the Motion to Dismiss for Failure to State a Claim filed by Lingo Packing Company, Incorporated, on January 30, 2002, is DENIED.

The court further directs that the Plaintiff file his amended complaint within ten (10) days.

SO ORDERED.

ENTER: February 14, 2002

BY THE COURT

RICHARD STAIR, JR.  
UNITED STATES BANKRUPTCY JUDGE