United States Bankruptcy Court
Western District of Wisconsin

Cite as: [Unpublished]

Gleischman Sumner Company Designated Person, Plaintiff,
v.
King, Weiser, Edelman & Bazar, Defendant
(In re Carley Capital Group, James E. Carley, David Carley, Debtors)
Bankruptcy Case Nos. MM11-89-00587, MM11-89-00588, MM11-89-00589
Adv. Case. No. 94-3018-11

United States Bankruptcy Court
W.D. Wisconsin

November 15, 1994

Susan V. Kelley, Lee, Kilkelly, Paulson & Kabaker, S.C., Madison, WI, for plaintiff.
Leonard A. Goldman, Goldman, Gordon & Lipstone, Los Angeles, CA, for defendant.

Robert D. Martin, United States Bankruptcy Judge.

MEMORANDUM DECISION

On March 10, 1989, involuntary bankruptcy petitions were filed against the Carley Capital Group, James Carley and David Carley (collectively "Carley"). The cases were later converted to chapter 11 on April 10, 1989. A plan was confirmed on August 1, 1990. The plan provided for an appointment of a designated person to serve as debtor in possession. On May 7, 1992, the "designated person" made demand on King, Weiser, Edelman & Bazar ("King") for the recovery of $42,754.29 in preferential payments. On January 20, 1994, the designated person initiated this proceeding. King moved for summary judgment alleging that the statute of limitations for the recovery of preferential transfers expired and therefore Carley would be time barred from bringing this action. The motion was denied. The parties have now requested a written opinion on the statute of limitations issue.

King's summary judgment motion requires this court to determine the applicability of 11 U.S.C. § 546(a)(1)[(1)] to debtors in possession. Section 546(a) provides:

(a) An action or proceeding under section 544, 545, 547, 548, or 548, or 553 of this title may not be commenced after the earlier of-

(1) two years after the appointment of a trustee under section 702, 1104, 1163, 1302, or 1202 of this title; or

(2) the time the case is closed or dismissed.

Currently, the circuits are split on the applicability of § 546(a)(1) to debtors in possession. The Second, Third, Ninth, and Tenth Circuits have all held that the two year limitation found in subsection (1) applies to debtors in possession. In re Century Brass Prods., Inc., 22 F3d 37 (2nd Cir 1994) (holding that debtor in possession exercising

powers of trustee is subjected to "any" restrictions that Bankruptcy Code imposes on trustees); In re Coastal Group, Inc., 13 F3d 81 (3rd Cir 1994) (holding that limitation period applicable to trustee's avoidance proceeding applies to debtor in possession); In re Softwaire Centre Int'l, Inc., 994 F2d 682 (9th Cir 1993) (holding that § 546(a) must be read in conjunction with § 1107); Zilhka Energy Co v Leighton, 920 F2d 1520 (10th Cir 1990) (holding that debtor in possession is subject to limitations of § 546). The Fourth Circuit, however, has recently adopted the rule of a majority of lower courts holding that the section is not applicable to debtors in possession. See In re Maxway, 27 F3d 980 (4th Cir 1994); see, eg Brin-Mont Chems., Inc. v Worth Chem. Corp., 154 BR 903 (MDNC); In re Hooker Invs., 162 BR 426 (Bankr SDNY 1993); Official Unsecured Creditors' Comm. v Leviton Mfg. Co., 160 BR 1018 (Bankr WD Mo 1993).

The clear language of § 546(a) provides for two points in time to measure the bringing of a preference action; two years from the date a trustee is appointed, or when the case is closed or dismissed, whichever occurs earlier. It is not a limitation on the trustee's authority, but rather only marks a period in time. Where a statute is clear and unambiguous, its plain meaning should be given effect. Patterson v Shumate, 112 S Ct 2242, 2247 (1992); U.S. v Ron Pair Enterprises, 489 US 235, 241 (1989). To date, no trustee has been appointed and the case has not been closed or dismissed. Therefore, under § 546(a), the designated person is within the time allowed to bring this action.

In suggesting that the two year limitation applies to debtors in possession, King asserts that the clear language of § 1107 places the debtor in possession in the shoes of an appointed trustee. The section provides:

Subject to any limitations on a trustee serving in a case under this chapter, and to such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties, except the duties specified in sections 1106(a)(2), (3), and (4) of this title, of a trustee serving in a case under this chapter.

11 U.S.C. § 1107 (1993). Thus, under King's argument, any limitation on the trustee is a limitation on the debtor in possession.

Support for King's argument is found in In re Century Brass Prods., Inc., 22 F3d 37. In Century, the debtor had filed for reorganization in 1985. No trustee was appointed. In 1990, an administrator filed a complaint seeking the recovery of a preference. The defendant moved for summary judgment dismissing the complaint, arguing that § 546 barred the administrator's claim because it was filed more than two years after the date of filing. The Second Circuit agreed, holding that § 546(a)(1) applies to debtors in possession as well as appointed trustees. Id at 37. Section 1107 ". . . subjects the DIP exercising the powers of a trustee to 'any' restriction that the Code imposes on trustees." Id.

While a debtor in possession is limited to the authority a trustee may exercise, subsection (a) is not directed at limiting the authority of a trustee. Rather, subsection (a) functions to establish a time period for which an action may be commenced. In re Maxway Corp., 27 F3d at 983. Delaying the start of the two year statute of limitations until the appointment of a trustee prevents any delay in the commencement of the action from penalizing unsecured creditors. Id at 984. The deadline for filing potential claims has not yet been tolled. Therefore, Carley is not time barred in bringing its action as § 546(a)(1) does not function as a limitation on a trustee's authority.

This written opinion is intended only to supplement reasons stated from the bench at trial and does not constitute the basis for the entry of any further order or judgment.

END NOTE:

1. This case was decided prior to the passage of the Bankruptcy Amendments of 1994. Section 217 of the Amendments amends § 546(a) by striking "earlier" and inserting "later" and amending paragraphs (1) and (2) by providing:

"(1) 2 years after the entry of the order for relief; or

(2) 1 year after the appointment or election of the first trustee under section 702, 1104, 1163, 1202 or 1302 of this title if such appointment or such election occurs before the expiration of the specified period in subparagraph (1)."

Under the new legislation, the maximum amount of time to bring a preference action is three years minus one day, with the statute of limitations beginning to run from the date of order for relief.