

UNPUBLISHED OPINION
IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH

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In re)	
)	
IML FREIGHT, INC., a Utah corporation,)	Bankruptcy Case No. 83C-01950
)	
Debtor.)	
)	
MAIN HURDMAN, Trustee,)	
)	
Plaintiff,)	Chapter 7
)	
v.)	
)	
A & W INVESTMENTS, INC., a Utah corporation (formerly LEECO ENTERPRISES, INC., an Oklahoma corporation);)	Civil Proceeding No. 85PC-1265
IMLEE CORPORATION, an Oklahoma corporation; YANKEE OIL COMPANY, an Oklahoma corporation; S.W. LEE; M.S. LEE, individuals;)	
THE GATES RUBBER COMPANY, a Colorado corporation; and GATES CORPORATION, a Colorado corporation,)	
)	
Defendants.)	MEMORANDUM OPINION

Appearances: Weston L. Harris, Watkiss & Campbell, Salt Lake City, Utah, and John N. Hermes and Dee A. Replogle, Jr., McAfee & Taft, Oklahoma City, Oklahoma, for defendants S.W. Lee, M.S. Lee, A & W Investments, Inc., Imlee Corporation, and Yankee Oil Company; Robert D. Merrill, Van Cott, Bagley, Cornwall & McCarthy, for Main Hurdman, trustee.

This matter came before the Court on February 21, 1986 on the motion of defendants Imlee Corporation, Yankee Oil Company, S.W. Lee and M.S. Lee to dismiss the trustee's complaint on the ground that it fails to state a claim against them upon which relief may be granted and is barred by the applicable statutes of limitations.

FACTS AND PROCEDURAL BACKGROUND

The Chapter 7 trustee of the estate of IML Freight, Inc. commenced this adversary proceeding on October 15, 1985. The complaint states two separate causes of action. The first cause of action alleges that from September 2, 1980 to June 1, 1981 the debtor transferred approximately \$685,330.00 to defendant A & W Investments, Inc. ("A & W") in connection with a "leveraged buyout scheme" under which A & W intended to acquire all or substantially all of the debtor's stock. The trustee alleges that these transfers constitute fraudulent conveyances which may be set aside and recovered for the benefit of the debtor's estate pursuant to Section 548 of the Bankruptcy Code and the Utah Uniform Fraudulent Conveyances Act, as made applicable by Section 544 of the Code.

The second cause of action alleges that defendants S.W. Lee and M.S. Lee, who were officers and/or directors of the debtor, breached their fiduciary duties, misapplied corporate assets, and

improperly disbursed corporate funds to entities in which they held an interest in connection with the "leveraged buyout scheme."

On December 20, 1985, defendants filed a motion to dismiss the trustee's complaint. Their principal arguments are: (1) none of the moving defendants were the direct or indirect recipients of the alleged fraudulent conveyances; and (2) the claims for breach of fiduciary duty are time barred under the applicable statute of limitations. In its memorandum in opposition to the defendants' motion to dismiss, the trustee refutes both of these arguments, arguing that the moving defendants received the benefit of the transfers by virtue of their ownership interests in A & W.

The Court heard oral argument from the parties on February 21, 1986 and the matter was taken under advisement. Now, having read and considered the memoranda of law filed by the parties and their arguments, and upon its own review of the applicable statutes, the Court renders its decision as follows.

DISCUSSION

The purpose of a motion under Rule 12(b)(6), as made applicable to adversary proceedings by Bankruptcy Rule 7012, is to test the formal sufficiency of the complaint. 5 C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE § 1356, at 590 (1969).

At the hearing on a Rule 12(b)(6) motion, the Court considers only the complaint itself. Id. at 592. For purposes of the motion to dismiss, the complaint is construed in the light most favorable to the plaintiff and its allegations are taken as true. Id. § 1357, at 594; Hishon v. King & Spaulding, 467 U.S. 69, 104 S.Ct. 2229, 81 L.Ed.2d 594 (1984); Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738, 740, 96 S.Ct. 1848, 48 L.Ed.2d 338 (1976); Jenkins v. McKeithen, 395 U.S. 411, 421, 89 S.Ct. 1843, 23 L.Ed.2d 404 (1969).

With respect to the first cause of action, to set aside alleged fraudulent conveyances, a reading of the complaint establishes that defendant A & W was the initial transferee of the debtor's funds and defendant Gates may have been a mediate transferee. Paragraph 19 states:

19. Subsequent to defendant A & W's acquisition of all or substantially all of Debtor's stock, and more specifically, from September 2, 1980, to June 1, 1981, Debtor transferred substantial sums of money on a monthly basis to defendant A & W, in a total amount of not less than \$658,330.00. Said transfers of money were used by defendant A & W to pay off its debt, evidenced by the \$8,000,000.00 Note which resulted from the leveraged buyout scheme, to defendant Gates.

Paragraph 19 refers only to two transfers, an initial transfer from the debtor to A & W, and a secondary transfer from A & W to Gates. The trustee's other allegations do not state any facts tending to show that defendants Imlee, Yankee, S.W. Lee, or M.S.

Lee were subsequent transferees or an entity for whose benefit the transfers were made within the meaning of Section 550(a)(1). The prayer for relief in the trustee's first cause of action asks for judgment "against defendants" without specifying the defendants to which it pertains. Technically, the prayer for relief is not part of the complaint at all, at least in cause-of-action terms, so the trustee has not clearly asserted any claim against Imlee, Yankee, S.W. Lee or M.S. Lee. See Paul v. Prudential Ins. Co., slip op., No. 86C-0235 (N.D. Ill. Jan. 23, 1986). More importantly, none of the allegations contained in paragraphs 13 through 26, which comprise the trustee's first cause of action, mentions or refers to any of these four defendants. Therefore, the Court grants the motion to dismiss as to the four defendants, and gives the trustee leave to amend the complaint within 10 days, if it chooses, to state a claim against these defendants.

On the second cause of action, for breach of fiduciary duties, the complaint likewise fails to specify to which defendants it applies. Only S.W. Lee and M.S. Lee are mentioned by name, but the prayer refers to unnamed "individual defendants." To the extent the trustee is asserting its claims against defendants A & W, Imlee, or Yankee for breach of fiduciary duties, the Court grants their motion to dismiss, and

gives the trustee leave to amend the complaint within 10 days, if it chooses.

The main thrust of defendants' argument for dismissal of the second cause of action is that the statute of limitations has expired. This Court disagrees. Section 108(a) of the Code provides that the period for bringing suit for causes of action arising under nonbankruptcy law is two years after the order for relief, unless applicable nonbankruptcy law states a longer period.¹ Utah Code Ann. § 78-12-27 (1953, as amended) contains the statute of limitations applicable to actions against corporate directors and stockholders. It gives the "aggrieved party" three years to commence an action from the time he discovered the facts constituting the liability.²

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In contrast, periods of limitation for causes of action arising under the Bankruptcy Code itself, e.g., preferences and fraudulent conveyances, are governed by Sections 546(a), 549(d), and 550(e). 2 COLLIER ON BANKRUPTCY ¶ 108.02, at 108-3 (15th ed. 1986). Cf. Stuart v. Pingree, (In re Afco Development Corp.), B.R. _____, slip op. No. 85PC-0795 (Bkrtcy. D. Utah Aug. 22, 1986).

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Section 78-12-27 provides:

Action against corporate stockholders or directors.--Actions against directors or stockholders of a corporation to recover a penalty or forfeiture imposed, or to enforce a liability created by law must be brought within three years after the discovery, by the aggrieved party, of the facts upon which the penalty or forfeiture attached, or the liability accrued, and in case of actions against stockholders of a bank pursuant to levy of assessment to collect their statutory

In this case, the breaches of fiduciary duty alleged in the complaint coincided with and resulted in the transfer of \$658,330.00 to A & W between September 2, 1980 and June 1, 1981. The trustee was appointed by an order entered on October 25, 1983, and this adversary proceeding was commenced on October 15, 1985. The trustee is the "aggrieved party" for purposes of Section 78-12-27, as representative of the corporation or its creditors. See In re Western World Funding, Inc., 52 B.R. 743, 765 (Bkrcty. D. Nev. 1985). Therefore, this action is not barred by the statute of limitations.

Defendant A & W shall file an answer to the trustee's first cause of action, and defendants S.W. Lee and M.L. Lee shall file answers to the trustee's second cause of action, within 10 days. Counsel for the trustee shall set and give notice of a scheduling conference with the Clerk of the Court within 20 days. Counsel for the trustee shall prepare and submit an appropriate form of order in accordance with the foregoing, pursuant to Local Rule 13.

DATED this 4th day of September, 1986.

BY THE COURT:



GLEN E. CLARK
UNITED STATES BANKRUPTCY JUDGE

liability, such actions must be brought within three years after the levy of the assessment.