

FILED
UNITED STATES
DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

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MARKUS B. ZIMMER
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| In re |) | BY |
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| PAUL ARLIN JENSEN, |) | Bankruptcy No. 85A-00763 |
| Debtor. |) | |
| <hr/> | | |
| KENNETH A. RUSHTON, Trustee, |) | Adversary Proceeding Nos. |
| Plaintiff/Appellee |) | 88PA-0769, 88PA-0783 |
| |) | 88PA-0837, 88PA-0796 |
| |) | 88PA-0763, 88PA-0841 |
| |) | 88PA-0839 |
| v. |) | District Court Nos. |
| |) | 89-C-688J (Consolidated) |
| HOLY LAND CHRISTIAN MISSION; |) | 89 Misc.-087J |
| RICHARD LEE HILL, et al.; |) | 89 Misc.-089G |
| LYNN JENSEN and DONELLE JENSEN; |) | 89 Misc.-090W |
| BRIAN JENSEN; BARBARA JENSEN; |) | 89 Misc.-092W |
| JOE JENNINGS as Personal |) | 89 Misc.-093S |
| Representative for the Estate |) | 89 Misc.-094G |
| of Bjornar Fredriksen; and |) | 89 Misc.-095S |
| STEVEN K. HORTIN, |) | |
| Defendants/Appellants. |) | MEMORANDUM OPINION |
| |) | AND ORDER |

These consolidated appeals were taken from orders of the United States Bankruptcy Court for the District of Utah granting trustee Kenneth A. Rushton's motions to strike defendants' statute of limitations defense and denying defendants' motions to dismiss the bankruptcy trustee's adversary actions against defendants as time-barred.

The court is called upon to decide when the statute of limitations set forth in 11 U.S.C. § 546(a)(1)¹ begins to run. Does

¹The statute of limitations in § 546(a) provides in pertinent part:

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

(1) two years after the appointment of a

it begin to run from the date of the trustee's actual appointment, or does it run from the time when the trustee should have been appointed had the meeting of creditors been timely held? After careful consideration of the parties' briefs and oral arguments, the court enters the following Memorandum Opinion and Order.

I.

The facts are essentially undisputed. On March 11, 1985, Paul Arlin Jensen ("Debtor") filed in the United States Bankruptcy Court for the District of Utah a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code. On August 11, 1986, the bankruptcy court entered an order converting debtor's Chapter 11 case to a case under Chapter 7 of the Bankruptcy Code. That order also appointed plaintiff/appellee Kenneth A. Rushton ("Plaintiff" or "Trustee") interim trustee in the case. The first creditors' meeting as required under 11 U.S.C. § 341² was held thereafter on October 14, 1986, following notice served on all interested parties by the Bankruptcy Court Clerk. At the meeting, the creditors did not elect a permanent trustee, and plaintiff therefore was appointed trustee by operation of law pursuant to 11

trustee under section 702...of this title....
11 U.S.C. § 546(a)(1) (1988).

²Section 341 creditors' meetings are held pursuant to statutory mandate:

(a) Within a reasonable time after the order for relief in a case under this title, the United States trustee shall convene and preside at a meeting of creditors.

11 U.S.C. § 341(a) (1988). 2

U.S.C. § 702(d).³

The trustee filed the instant adversary proceedings between October 7 and 14, 1988, seeking to obtain an accounting and to avoid and recover for the benefit of the estate alleged fraudulent conveyances from debtor to defendant/appellants. These avoidance actions were brought pursuant to §§ 544, 548, and 550 of the United States Bankruptcy Code. Each defendant answered the complaint and raised as an affirmative defense that the trustee's action was untimely under § 546(a)(1) of the Code. Each defendant asserted that the proceeding was commenced more than two years from the date the trustee should have been appointed pursuant to 11 U.S.C. § 702 and Bankruptcy Rule 2003(a).⁴ On November 30, 1988 the trustee filed motions to strike defendants' statute of limitations defense. On December 28, 1988, defendants filed motions to dismiss the

³Section 702 of the Bankruptcy Code provides the mechanism for election or appointment of trustees:

(b) At the meeting of creditors held under section 341 of this title, creditors may elect one person to serve as trustee in the case if election of a trustee is requested by creditors that may vote under subsection (a) of this section....

* * *

(d) If a trustee is not elected under this section, then the interim trustee shall serve as trustee in the case.
11 U.S.C. § 702 (1988).

⁴Bankruptcy Rule 2003(a), as promulgated by the Supreme Court, provides in pertinent part:

(a) **Date and Place.** The court shall call a meeting of creditors to be held not less than 20 nor more than 40 days after the order for relief. If there is an appeal from or a motion to vacate the order for relief, or if there is a motion to dismiss the case, the court may set a later time for the meeting.

Bankruptcy Rule 2003(a).

avoidance actions on the ground that they were time-barred under the two year limitations period of 11 U.S.C. § 546(a)(1).

On January 31, 1988, the bankruptcy court heard argument by the parties and ruled from the bench that the trustee was to be afforded two years following his appointment at the creditors' meeting during which to commence adversary proceedings. The court granted the trustee's motion to strike and denied defendants' motions to dismiss, entering these orders on April 3 and 6, 1989. This court subsequently granted defendants' motions for leave to appeal, and the proceedings have been consolidated for appellate review. In addition to their briefs, the parties presented oral argument to this court on September 1, 1989. The court reviews de novo the bankruptcy court's legal conclusion regarding the running of the statute of limitations. See In re Schneider, 864 F.2d 683, 685 (10th Cir. 1988).

II.

The sole issue on appeal is whether the two year limitations period set forth in 11 U.S.C. § 546(a)(1) begins to run from the date of the trustee's actual permanent appointment at the the first meeting of creditors, or from an earlier date if the creditors' meeting is held later than the twenty to forty day time period dictated by Bankruptcy Rule 2003(a). The issue is a relatively simple and narrow one, though it does appear to be one of first

impression.⁵

Defendants argue that the language of §§ 546(a)(1) and 702(d) of the Bankruptcy Code, coupled with Bankruptcy Rules 2003(a) and 9006(b)(2),⁶ requires that the two year limitations period commence running from the last date that the creditors' meeting should have been held and a trustee appointed. Defendants urge that any other result would run counter to legislative intent and to policies of judicial efficiency and litigant repose. The trustee, on the other hand, argues that the clear language of § 546(a)(1) dictates that the limitations period begins to run only upon the actual appointment of the trustee at the first creditors' meeting, even if that meeting is not held within the twenty to forty day time window set forth in Bankruptcy Rule 2003(a). The trustee contends that such construction is consonant with legislative intent.

The court begins by examining the relevant statutory language. Section 546(a) of the Bankruptcy Code, the applicable statute of limitations, provides as follows:

(a) An action or proceeding under section 544, 545, 547, 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...of this title; or

⁵Although the parties have directed the court to a number of analagous cases, none of these precedents appears to have addressed specifically the issue as to when the § 546(a)(1) two year limitations period begins to run when the § 341 creditors' meeting inadvertently is held more than forty days after entry of an order for relief.

⁶The salient language in Bankruptcy Rule 9006(b)(2) provides simply that "[t]he court shall not enlarge the time for taking action under [Rule]...2003(a) and (d)...."

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

Since the case has not been "closed or dismissed" as per subsection (a)(2), the language of subsection (a)(1) grants a period of two years from the time of the trustee's "appointment" under § 702 of the Bankruptcy Code. The result in this case, then, must turn upon what constitutes an "appointment" under the Bankruptcy Code and Rules.

Section 546(a)(1) refers to an "appointment...under section 702." Section 702 of the Bankruptcy Code provides for an election or appointment of a permanent trustee at the creditors' meeting held pursuant to § 341. Under § 702, the creditors may elect a trustee at the meeting, or, if they do not elect a trustee (as happened in this instance), the interim trustee is authorized by law to serve as trustee in the case. 11 U.S.C. § 702(d) (1988). Nevertheless, it is well-established in this jurisdiction and in others that, even if the interim trustee becomes the permanent trustee by operation of § 702(d), the two year period does not begin to run until the actual appointment by law of the interim trustee as permanent trustee pursuant to the creditors' meeting. See In re Afco Development Corp., 65 B.R. 781, 785 (Bankr. D. Utah 1986). See also Smith v. Moody (In re Moody), 77 B.R. 566, 573-74 (S.D. Tex. 1987), aff'd, 862 F.2d 1194 (5th Cir. 1989); In re Chequers, Ltd., 59 B.R. 177, 178 (Bankr. W.D. Pa. 1986); Matter of Killian Construction Co., 24 B.R. 848, 849 (Bankr. D. Idaho 1982).

Defendants contend, however, that these authorities do not settle the question. Defendants correctly point out that, in this case, the creditors' meeting which effected the trustee's appointment was held more than forty days after the bankruptcy court entered an order for relief. The delinquent meeting, therefore, contravened Bankruptcy Rule 2003(a), which requires that the bankruptcy court "call a meeting of creditors to be held not less than 20 nor more than 40 days after the order for relief." Defendants also direct the court to Bankruptcy Rule 9006(b)(2), which prohibits the bankruptcy court from enlarging the twenty to forty day time period set aside for the creditors' meeting. Taken as a whole, defendants argue, the Bankruptcy Code and Rules establish a framework requiring that the two year period set forth in § 546(a)(1) begins to run at the end of the forty day period. Thus, in this case, defendants insist that the trustee's "appointment" for purposes of the statute of limitations must be deemed to have occurred on the forty-first day after the order for relief, not on the actual date of the late creditors' meeting. In other words, the trustee would receive a maximum of two years and forty days from the date of the order for relief in which to bring avoidance actions, and by that standard the trustee's action would be time-barred.

Upon careful consideration of the facts, the relevant statutory language, and the policies behind the Bankruptcy Code and Rules, the court holds that the two year statute of limitations in § 546(a)(1) began running from the date of the trustee's actual

appointment, and not from the forty-first day following the order for relief.

The court bases its decision on several factors. First, the court relies upon the plain statutory language of § 546(a)(1). The statute specifies that the two year limitations period is to commence running only upon the "appointment of a trustee under section 702." (Emphasis added). As is detailed supra, § 702 specifically governs the appointment of trustees at creditors' meetings. Hence, the term "appointment" in § 546(a)(1) refers not to some illusory appointment "deemed" to have occurred, but to the actual permanent appointment of the trustee which occurred at the meeting of creditors.

The court is aware of Bankruptcy Rules 2003(a) and 9006(b)(2), requiring that the creditors' meeting be held within forty days of the order for relief. These rules are not concerned, however, with the power of the trustee to commence adversary actions. The legislative history of § 546(a) is silent with respect to the consequence of creditors' meetings held beyond the prescribed

time.⁷ Thus, in the absence of any specific provision in Rules 2003(a) and 9006(b)(2) concerning the statute of limitations, and without any meaningful legislative history, the court reads the plain language of § 546(a)(1) to mean that the statute of limitations begins running from the date of the actual permanent appointment of the trustee, even if the creditors' meeting is held beyond the forty day period prescribed by Rule 2003(a).

Though no court has faced the precise issue presented herein, several courts have confronted similar sets of facts. For example, this court, in Albrecht v. Robison, 36 B.R. 913 (D. Utah 1983), decided that a Chapter 11 trustee had not received an "appointment" for purposes of the § 546(a)(1) statute of limitations when a minute entry was made of an orally announced ruling. The court reasoned that the two year period should not begin to run until a written order appointing the trustee could be entered by the court. In reaching that result, this court emphasized the importance of an unambiguous, "discrete time frame" during which the trustee may commence any actions. Id. at 916.

⁷The court in In re Afco Development Corp., 65 B.R. 781, 783-85 (Bankr. D. Utah 1986), undertook a detailed discussion of the legislative history of § 546(a) and the two year statute of limitations. That discussion uncovered very little that would shed light on the meaning of § 546(a) in general or on the question in this case in particular. The Afco court did emphasize, however, that two year statutes of limitations "have long been integral parts of our federal bankruptcy statutes." Id. at 783-84 (citing Herget v. Central National Bank & Trust Co., 324 U.S. 4, 5 (1945)). The court then went on to hold that a Chapter 7 trustee, initially appointed under Chapter 11, had two years from the date of his second, Chapter 7 appointment during which to bring avoidance actions. Id. at 787.

In In re Metro Shippers, Inc., 95 B.R. 366 (Bankr. E.D. Pa. 1989), another court had to decide whether the § 546(a)(1) statute of limitations began to run from the date that a trustee election dispute was resolved by court order or from the earlier date of the creditors' meeting. The Metro Shippers court distinguished between the functions of interim trustees and permanent trustees, holding that the statute of limitations begins to run only when an election dispute is finally resolved and the trustee is given permanent authority to act. See id. at 369-70. Similarly here, the trustee functioned merely as an interim trustee until his actual permanent appointment on the date of the creditors' meeting. Thus, the interim trustee could be expected to do little more than "protect the assets of the estate and insure continuity of administration of the estate before the qualification of the regularly elected or designated trustee." Matter of Killian Construction Co., 24 B.R. at 849-50 (Bankr. D. Idaho 1982) (citing 4 Collier on Bankruptcy § 701.01 (15th ed. 1980)).

The court in In re Conco Building Supplies, Inc., 102 B.R. 190 (9th Cir. BAP 1989), also faced an analagous set of circumstances. There, the creditors' meeting was scheduled for April 9, 1984 but was continued until April 30, 1984. At the April 30, 1984 meeting the interim trustee was designated as the permanent trustee. Almost two years later, on April 28, 1986, the trustee filed an avoidance action, and defendants asserted as a defense the time-bar of § 546(a)(1). Defendants argued that the two year limitations period began to run from the date of the originally

scheduled April 9, 1984 creditors' meeting. At trial, the bankruptcy court held that the complaint was, in fact, barred by the statute of limitations. However, on appeal, the bankruptcy appellate panel ruled that the action was not barred and that the statute of limitations began to run from the trustee's actual appointment on the April 30 date of the rescheduled creditors' meeting. Id. The Conco court stressed that the statute of limitations "should not begin to run until the trustee has had the opportunity to examine the debtor [at the actual creditors' meeting] to assist in determining whether preferential transfers have occurred." Id.

The court's ruling in this case is similar to the holdings in Albrecht, Metro Shippers, and Conco. Those courts expressed concern that the trustee be given two full years from the time of his or her actual appointment to uncover and defend the interests of the estate. As the court noted in Afco:

The Chapter 7 trustee is the main administrator of the case. Her duties are formidable. To represent the estate, the trustee must uncover all property comprising the estate, protect the property of the estate, defend the legal rights and interests of the estate, preserve the value of the property of the estate, liquidate the property of the estate, and distribute the proceeds to parties in interest.

65 B.R. at 786 (citations omitted). In order properly to fulfill these weighty responsibilities, the trustee must be afforded the full two year period provided by § 546(a)(1).

Defendants correctly point out that statutes of limitations are designed to offer defendants repose and freedom from stale

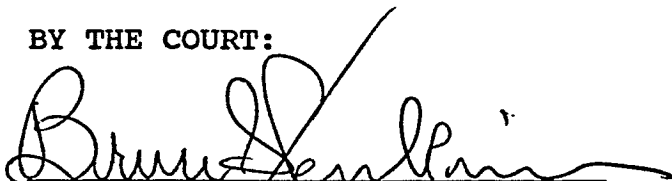
claims. But where, as here, the inadvertence of the court resulted in a late creditors' meeting, the error should not shorten the two year time period within which a properly appointed trustee must act. Defendants' attempt to link the failure of the court to schedule a timely meeting of creditors to the power of a trustee, once appointed, to pursue a lawsuit for a period of two years mixes persons and responsibilities which, although related in function, are separate and distinct.⁸ The failure of the court to schedule a timely meeting and the consequences to the court for failing to do so simply are unrelated to the power of a trustee to commence a lawsuit and the termination of that power by the passage of time.

Based, then, upon the plain statutory language of §§ 546(a)(1) and 702(d), the weight of analagous authority, and the responsibility of a bankruptcy trustee in Chapter 7 cases, the court hereby holds that the two year statute of limitations began to run from October 14, 1986, the actual date the trustee was appointed. Trustee Kenneth A. Rushton's adversary actions were timely filed. The orders of the bankruptcy court are affirmed.

⁸In essence, defendants ask the court to read Bankruptcy Rules 2003(a) and 9006(b)(2) as addenda to the two year statute of limitations found in § 546(a)(1). However, neither the Rules nor the statute of limitations contain language that would suggest such a connection. While the Rules are directed toward the bankruptcy court and the expeditious scheduling of creditors' meetings, the two year statute of limitations is directed toward the trustee and is intended to provide an "easily applied" bright line rule of procedure for trustees seeking to commence adversary actions. See Afco, 65 B.R. at 787.

Dated this 7 day of November, 1989.

BY THE COURT:



BRUCE S. JENKINS, CHIEF JUDGE
UNITED STATES DISTRICT COURT