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UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

FILED

SEP 15 2015 9:54

NORTHERN DISTRICT OF OHIO  
CLEVELAND

In re:	)	Case No. 89-3906
	)	
	)	Adversary Proceeding No. 93-1064
NON-FERROUS METALS	)	
FABRICATING COMPANY,	)	Chapter 7
	)	
Debtor.	)	
	)	
	)	Judge Pat E. Morgenstern-Clarren
MARY ANN RABIN, TRUSTEE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	<b><u>MEMORANDUM OF OPINION</u></b>
	)	
AKRON ANODIZING, et al.,	)	
	)	
Defendants.	)	

Plaintiff filed a Complaint in this adversary proceeding to avoid and recover preferences and unauthorized post-petition transfers from numerous defendants. The only unresolved claim is that against Defendant Akron Foundry Co. ("Akron Foundry") in which Plaintiff seeks to recover a post-petition transfer pursuant to § 549 of the Bankruptcy Code. This matter is before the Court on Akron Foundry's Motion for Summary Judgment requesting dismissal on the ground the action is barred by the statute of limitations. The Chapter 7 Trustee opposes the Motion, as did the former Chapter 11 Trustee. For the reasons set forth below, Akron Foundry's Motion should be granted.

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**FACTS**

The relevant facts are not disputed and are set forth in the file, the Briefs filed by the parties, and in the Affidavit of former Chapter 11 Trustee Robert M. Greenwald, as follows:

On September 25, 1989, Non-Ferrous Metals Fabricating Company filed a petition under Chapter 11 of the Bankruptcy Code. George Opalich, Debtor's President, managed the Debtor's affairs until February 28, 1991, when Robert M. Greenwald was appointed Chapter 11 Trustee based, in part, on Opalich's mismanagement. (Affidavit of Robert M. Greenwald ("Aff.") ¶ 2). Mr. Greenwald ("Trustee"), who is both a certified public accountant and a lawyer, was at the time of appointment familiar with bankruptcy proceedings and tax law. (Report of Selection for Appointment as Trustee, Docket 108, Case No. B89-3906).

For several months after his appointment, Trustee focused on complying with the United States Trustee's reporting requirements, dealing with the taxing authorities, and stabilizing Debtor's operations. (Aff. ¶ 3). On March 19, 1991, Trustee began his investigation into Debtor's business practices in an effort to determine whether the Debtor had engaged in any transactions in violation of the bankruptcy laws. (Aff. ¶ 4). Shortly before that date, and at other times, Opalich stated to Trustee that no unauthorized post-petition transactions had taken place. (Aff. ¶ 2). There is no evidence that Opalich made any statement to Trustee concerning whether any payments were made to Akron Foundry.

In December of 1991, Trustee began to focus on preferences and post-petition payments and the investigation continued through the spring of 1992. (Aff. ¶ 4). The efforts were hindered by poorly kept and missing records. (Aff. ¶ 4). On February 26, 1993, Trustee filed this

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Adversary Proceeding seeking to recover \$8,450 paid by Debtor to Akron Foundry on December 13, 1989. There is no evidence to establish when Trustee learned of the payment at issue.

The Court entered an Order on October 19, 1994 authorizing conversion of the case to Chapter 7, after which time Mary Ann Rabin was appointed Trustee in the Chapter 7 case. Trustee Rabin is now the Plaintiff in this proceeding by virtue of a Notice of Substitution filed on October 10, 1995. The case has not been closed.

**ISSUES**

1. Whether the statute of limitations set forth in 11 U.S.C. § 549 begins to run only when a trustee discovers, or should have discovered, the challenged transfer.
2. Whether equitable doctrines can extend the statute of limitations set forth in 11 U.S.C. § 549.
3. Whether any such doctrine extends the statute of limitations under the facts of this case.

**DISCUSSION**

**I.**

This Court has jurisdiction to hear this matter pursuant to 28 U.S.C. § 1334 and General Order No. 84 entered on July 16, 1984 by the United States District Court for the Northern District of Ohio. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(O).

**II.**

Summary judgment is appropriate only where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Federal Rule of Civil Procedure 56(c), made applicable to this proceeding by Bankruptcy Rule 7056; *Celotex Corp. v.*

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*Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The movant must initially demonstrate to the court the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. at 323. The burden then is on the nonmoving party to show the existence of a material fact which must be tried. *Id.* The nonmoving party must oppose a proper summary judgment motion “by any of the kinds of evidentiary material listed in Rule 56(c), except the mere pleadings themselves . . . .” *See Celotex Corp. v. Catrett*, 477 U.S. at 324. All reasonable inferences drawn from the evidence must be viewed in the light most favorable to the party opposing the motion. *Hanover Insurance Co. v. American Engineering Co.*, 33 F.3d 727, 730 (6th Cir. 1994). Conclusory allegations of an affidavit do not, however, create specific fact disputes for summary judgment purposes. *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888-889 (1990). The issue at this stage is whether there is evidence on which a trier of fact could reasonably find for the nonmoving party. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1477 (6th Cir. 1989).

III.

Under § 549 of the Bankruptcy Code, a trustee has the power to avoid certain post-petition transfers. 11 U.S.C. § 549. The applicable statute of limitations provides that:

An action or proceeding under this section may not be commenced after the earlier of -

- (1) two years after the date of the transfer sought to be avoided; or
- (2) the time the case is closed or dismissed.

11 U.S.C. § 549(d).

The parties agree that the disputed transfer was made on December 13, 1989 and the Complaint was not filed until February 26, 1993. If the statute of limitations began to run on the

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date of transfer, the action is barred unless that statute is extended. Plaintiff raises a number of arguments in an effort to save this cause of action. First, Plaintiff contends that the statute of limitations did not begin to run until Trustee could have discovered the transfer, which is no earlier than the date of his appointment. Alternatively, Plaintiff asserts the statute of limitations should be extended under equitable principles based on Opalich's deceptive practices and misrepresentations regarding payments which allegedly hindered discovery of the transfer. She claims further that the existence of other pressing business on behalf of Debtor excuses the late filing. Again in the alternative, Plaintiff contends that the facts presented create a genuine issue of material fact as to whether Debtor concealed this transfer. Akron Foundry argues that the statute cannot be extended for any reason and must be read literally to bar any filing outside of two years from the transfer date.

There are three interrelated doctrines that are relevant to the issues in this case: the discovery rule, equitable tolling, and equitable estoppel. Although the parties did not distinguish among these principles, each will be addressed.

**A. The Discovery Rule**

The discovery rule "postpones the beginning of the limitations period from the date when the plaintiff is wronged to the date when he discovers he has been injured." *Allen v. Diebold, Inc.*, 807 F. Supp. 1308, 1314 (N.D. Ohio 1992), *aff'd.* on other grounds, 33 F.3d 674 ( 6th Cir.1994), citing *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446 (7th Cir. 1990), *cert. denied*, 501 U.S. 1261 (1991). Trustee argues that a plaintiff should be allowed to pursue transfers under 11 U.S.C. § 549(d) so long as the action is filed within two years of the date that the transfer was or could have been discovered. Here, Trustee contends the earliest date of discovery was the date

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on which he was appointed, or February 28, 1991. He then argues that he had two years, or until February 28, 1993, in which to commence this suit. (Plaintiff's Brief in Opposition to Akron Foundry's Motion for Summary Judgment at 4; Docket 26). Akron Foundry counters that this runs against the express language of the statute.

Under Plaintiff's argument, any time a trustee is appointed in a Chapter 11 case the trustee would have a full two years from the appointment date in which to file § 549 actions. While the statute of limitations in a different Code section is specifically linked to the date on which a trustee is appointed, see 11 U.S.C. § 546(a)(1)(B), the Code section at issue does not contain such a provision.

The only case cited by Trustee in support is *In re Dakota Drilling, Inc.*, 135 B.R. 878 (Bankr. D. N.D. 1991). Without discussion, that case applied the discovery rule to postpone the beginning of § 549's limitation period. The *Dakota Drilling* case is not persuasive because it does not consider the plain language of § 549 or the ramification of the rule adopted. This Court declines to re-write the statute in such a fashion. See *Karnes v. First Bank & Trust Co.*, 80 B.R. 944, 946 (Bankr. S.D. Ill. 1987) (acknowledging that under some circumstances, a late-appointed Chapter 7 trustee may be barred from recovering post-petition transfers, but declining nevertheless to find that § 549's limitation period only begins to run from the date of that appointment). The statute of limitations in this case, therefore, began to run on the transfer date of December 13, 1989.

**B. Equitable Tolling and Equitable Estoppel**

Given that the statute began to run on the date of transfer, and the Complaint was filed more than two years later, the question becomes whether the two years is extended by any

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equitable principles. The tolling doctrines of equitable estoppel and equitable tolling are grafted onto every federal statute of limitations. *Holmberg v. Armbrecht*, 327 U.S. 392 (1946). While courts and litigants sometimes use the two terms interchangeably, the doctrines are not identical. In general, equitable tolling permits a plaintiff to avoid the bar of the statute of limitations “if despite all due diligence he is unable to obtain vital information bearing on the existence of his claim.” *Allen v. Diebold, Inc.*, 807 F. Supp. 1308, 1315 (N.D. Ohio 1992), *aff’d* on other grounds, 33 F.3d 674 (6th Cir.1994), citing *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446 (7th Cir. 1990), *cert. denied*, 501 U.S. 1261 (1991). This doctrine balances the equities as between two innocent parties. Equitable estoppel, on the other hand, applies if the defendant takes active steps to prevent the plaintiff from suing in time. *Id.* at 450-451. Both doctrines are available to toll the statute of limitations set forth in § 549 of the Bankruptcy Code. *Smith v. Mark Twain Nat’l Bank*, 805 F.2d 278 (8th Cir. 1986) (doctrine of equitable estoppel tolls the provisions of § 549(d)); *In re Olsen*, 36 F.3d 71 (9th Cir. 1994) (doctrine of equitable tolling applies to § 549(d)).

The distinction between the doctrines is significant in this case, both because the facts necessary to invoke the doctrines are different and because they offer different relief to a plaintiff. In the event equitable tolling is applicable, plaintiff obtains “a reasonable time” after discovery in which to file the complaint. *Allen v. Diebold, Inc.*, 807 F. Supp. 1308 at 1317; *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446 at 453. This is in contrast to equitable estoppel which entitles the plaintiff to the full amount of time allowed for commencement of the action undiminished by any period of time in which it appears he was unlawfully induced not to file the action. *Ott v. Midland Ross Corp.*, 600 F.2d 24 (6th Cir. 1979).

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Trustee asserts the two-year period should be extended due to lack of cooperation from Debtor and the existence of more pressing business. Trustee admits that Akron Foundry did not in any way prevent him from identifying that the payment at issue had been made by Debtor or from filing suit. There is no evidence of fraud or collusion between Debtor and Akron Foundry. Since Akron Foundry did not do anything to prevent Trustee from suing within the limitations period, the doctrine of equitable estoppel does not apply under the facts of this case.

Similarly, the doctrine of equitable tolling is inapplicable to the facts presented. Once Akron Foundry established that the two-year limitations period had expired, Trustee had the burden to come forward with evidence from which a trier of fact could reasonably conclude that despite "all due diligence" he was "unable to obtain vital information" in time to meet the filing deadline. Construing the relevant facts in a light most favorable to Trustee, Trustee took over Debtor's operations at a difficult time and made preliminary decisions as how best to proceed with his responsibilities. Trustee, setting his own priorities, waited ten months before he began to analyze potentially improper payments (February 28, 1991 to December 1991). Trustee does not claim in his Affidavit that he delayed starting this investigation based on Opalich's statements that no unauthorized transfers took place. In any event, Trustee could not reasonably have relied on those statements because Trustee knew Opalich had, to some extent, mismanaged the company. Trustee states that his efforts were "hindered by poorly kept and missing records," but this is simply a conclusory statement that is not linked in any fashion to the challenged payment to Akron Foundry. Significantly, Trustee makes no statement at all as to when he actually discovered this payment. He says only that he did not "fully appreciate the scope of the Debtor's preferential, fraudulent and post-petition payment practice" until after March 1992. (Aff. ¶ 5).

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These facts show that Trustee had ample opportunity to obtain the information needed before the statute of limitations ran on December 13, 1991, but he failed in the exercise of due diligence to do so.

Moreover, even if Trustee's explanation is accepted, Trustee still has the burden under the equitable tolling doctrine of proving that he filed suit within a reasonable time after he learned of the transfer. As noted above, Trustee fails to present any evidence as to when he discovered this specific payment. He acknowledges, however, that his investigation into this category of payments concluded in spring of 1992. (Aff. ¶ 4). Giving Trustee the benefit of the doubt by assuming that "spring" goes through the month of May and that he discovered this payment on May 31, 1992, Trustee did not file this adversary proceeding until February 26, 1993, or nine months later. In light of the fact that the allegations of the complaint are simple and the theory of recovery routine, this complaint was not filed within a reasonable period of time.

**CONCLUSION**

The two-year statute of limitations set forth in 11 U.S.C. § 549(d) began to run on the date of the transfer to Akron Foundry. Trustee's Complaint seeking to recover money from Akron Foundry was filed more than two years after the transfer. Although both equitable estoppel and equitable tolling are potentially available to extend the statute of limitations, neither

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applies under the facts of this case. Akron Foundry's Motion for Summary Judgment should, therefore, be granted. A separate judgment will be issued in accordance with this Memorandum of Opinion.

Dated: March 15, 1996

  
\_\_\_\_\_  
Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge

Served on: Mary Ann Rabin  
Robert M. Stefancin

By: Joyce L. Gordon, Secretary

Date: 3/15/96

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Plaintiff, )  
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v. )  
)  
AKRON ANODIZING, et al., )  
)  
Defendants. )

Case No. 89-3906  
Adversary Proceeding  
No. 93-1064  
Chapter 7

Judge Pat E. Morgenstern-Clarren

**JUDGMENT**

For the reasons stated in the Memorandum of Opinion filed contemporaneously with this  
Judgment,

IT IS, THEREFORE, ORDERED that summary judgment is granted in favor of  
Defendant, Akron Foundry Co., on the Trustee's Complaint for recovery of post-petition  
transfers pursuant to § 549 of the United States Bankruptcy Code.

Dated: March 15, 1996

Pat E. Morgenstern-Clarren  
Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge

Served on: Mary Ann Rabin  
Robert M. Stefancin

By: Joyce L. Gordon, Secretary

Date: 3/15/96