

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

CSC, LTD.,

Debtor.

ANDREW W. SUHAR, TRUSTEE,

Plaintiff,

vs.

MERCER CO.,

Defendant.

CASE NUMBER 01-40096

ADVERSARY NUMBER 03-4365

M E M O R A N D U M O P I N I O N

On or about January 12, 2001, Debtor, CSC, Ltd. ("CSC"), filed a voluntary petition pursuant to Chapter 11 of Title 11 of the United States Bankruptcy Code. On April 11, 2002, CSC filed a motion to voluntarily convert its case from Chapter 11 to Chapter 7. On the same day, the Bankruptcy Court entered an order converting the case to a case under Chapter 7 of the Bankruptcy Code. On April 15, 2002, the United States Trustee filed a notice of appointment of Andrew W. Suhar ("Suhar") as the interim trustee pursuant to § 701 of the Bankruptcy Code in the Chapter 7 case. The notice of appointment

of interim trustee specifically said: "Unless creditors at the meeting of creditors held under 11 U.S.C. Section 341 elect another trustee, the interim trustee appointed herein shall serve as trustee without further appointment or qualification." The first meeting of creditors was scheduled for June 11, 2002, but was not held until August 6, 2002. There was no election of a permanent trustee at the § 341 meeting of creditors and, accordingly, Suhar became the permanent Chapter 7 Trustee as of August 6, 2002.

On August 5, 2003, Suhar filed approximately 234 complaints to avoid and recover preferential and fraudulent transfers. One of those fraudulent transfer complaints was filed against Defendant, Mercer Co. ("Mercer"), in this adversary proceeding.

Mercer filed a motion to dismiss the complaint on January 15, 2004, asserting that the complaint was barred by the statute of limitations. Mercer argues that § 546(a)(1)(B) requires Suhar to have filed the action within one year of his appointment as the interim trustee and that, therefore, he had until April 15, 2003 to commence the avoidance actions. As a consequence, because the complaint was not filed until August 5, 2003, Mercer asserts that Suhar's complaint is time barred and the Court should dismiss the complaint.

On January 26, 2004, Suhar filed a response to Mercer's

motion to dismiss, arguing that the complaint was not time barred and should not be dismissed. Suhar argues that Mercer misinterprets the statute of limitations under § 546 because § 546(a) does not mention the appointment of an interim trustee under § 701 when referring to the limitations, but rather explicitly refers to the first trustee under § 702. On February 3, 2004, Mercer filed a reply to Suhar's response to motion to dismiss reiterating its argument and providing its explanation of the "plain meaning" of § 546(a) of the Bankruptcy Code.

This adversary proceeding constitutes a core proceeding under 28 U.S.C. § 157. The following constitutes the Court's findings of fact and conclusions of law under FED. R. BANKR. P. 7052.

The controlling statute is 11 U.S.C. § 546(a), which reads 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) the later of--

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

(B) 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 period specified in subpara-graph (A); or

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

In the present case, the Chapter 11 case was filed on January 12, 2001 and, thus, two years after the entry of the order for relief would be January 12, 2003. The case was converted from Chapter 11 to Chapter 7 on April 11, 2002, and Suhar was appointed as interim trustee on April 15, 2002, pursuant to § 701 of the Bankruptcy Code. The § 341 meeting of creditors was held on August 6, 2002 and, because there was no election of a different trustee, Suhar became the permanent trustee as of that date. As a consequence, using either the date of the appointment of the interim trustee (*i.e.*, April 15, 2002) or the permanent trustee (*i.e.*, August 6, 2002), Suhar first became a trustee before "2 years after the entry of the order for relief[.]" As a consequence, the timeliness of this adversary proceeding is governed by the language in § 546(a)(1)(B): "1 year after the appointment or election of the first trustee under section 702, 1104, 1163, 1202, or 1302 of this title[.]" Section 546 was amended in 1994; however, the legislative history of the amendment does not provide any illumination about the meaning of the change.¹

The current version of § 546 - and thus the controlling

¹The prior statute provided in relevant 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) 2 years after the appointment of a trustee under section 702, 1104, 1163, 1202, or 1302 of this title; or

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

statute - refers to the "appointment or election" of the first trustee under "section 702, 1104, 1163, 1202, or 1302 of this title[.]" Section 702 provides for the election of a trustee. Each of the other sections provides for the appointment of a trustee. Because the statute has been amended to insert the words "or election" and because § 701 is not referenced in the revised statute, this Court believes that the most logical reading (*i.e.*, the "plain meaning") of § 546 means that the statute of limitations runs one year after the election of the first trustee under § 702.

At least one court in addressing this issue has read § 701 into § 546.² The bankruptcy court in *Burtch v. Georgia-Pacific Corp. (In re Allied Digital Technologies Corp.)*, 300 B.R. 616 (Bankr. D. Del. 2003) held that the one year statute of limitations in § 546(a)(1) begins to run from the appointment of the first interim trustee under § 701 where the interim and permanent trustees were one and the same individual. "Although section 701 is not expressly included in section 546(a)(1)(B), the Court concludes that Congress intended to grant an additional one year to an Interim Trustee because to read the statute

²In *Avalanche Maritime, Ltd. v. Parekh (In re Parmetex, Inc.)*, 199 F.3d 1029 (9th Cir. 1999), which interpreted the pre-1994 version of § 546, the court concluded that the limitations period should apply to the interim trustee because such trustee was the first trustee. This Court is persuaded that the dissent in *Parmetex* is more persuasive than the majority opinion. "The statute says nothing about § 701 (interim trustee) and neither should we - to do so is to rewrite the statute." *Parmetex* dissenting opinion, 199 F.3d at 1034.

otherwise leads to absurd or futile results inconsistent with the overall structure of the statutory scheme." *Id.* at 619. The court based its decision on the fact that "[s]ection 702(d) ratifies the appointment of the trustee done under 701, and as a result, a section 701 trustee becomes a section 702 trustee via section 702(d)." *Id.*

Faced with a somewhat different case, the bankruptcy court in *Singer v. Kimberly-Clark Corp. (In re American Pad & Paper Co.)*, 307 B.R. 459 (Bankr. D. Del. 2004) held that § 546(a)(1) did not encompass § 701 when someone other than the interim trustee was elected permanent trustee under § 702 after the expiration of two years following the entry of the order for relief. The facts in *Singer* are as follows: the debtor commenced a Chapter 11 case on January 14, 2000. On December 21, 2001, a motion was granted converting the case to one under Chapter 7 of the Bankruptcy Code. An interim trustee was appointed on January 3, 2002 (before two years after entry of an order for relief) and a different person was elected permanent trustee on February 13, 2002 (more than two years after entry of an order for relief) pursuant to 11 U.S.C. § 702. The complaint against *Singer*, which was filed November 15, 2002, was held to be untimely.

The court stated:

The wording of § 546(a)(1)(B) does not grant an extension to a trustee elected more than

two years after the order for relief. Furthermore, although that section specifically refers to "the first trustee under section 702", it also provides that "such appointment or election" must occur before the expiration of the time period in subsection (a)(1)(A).

Id. at 461. The court further found that there was no helpful legislative history that would allow it to interpret that Congress intended § 546(a)(1)(B) to include § 701.

I find the language of § 546(a)(1)(B) to present a similar interpretive problem by its omission of any reference to § 701, but am constrained to follow the dictates of the Supreme Court and apply the language of the statute as written. That is, I cannot read into § 546(a)(1)(B) a reference to § 701 with respect to appointment of interim trustees who do not become trustees.

Id. at 462.

This Court can find no rationale to distinguish between a trustee elected under 11 U.S.C. § 702 who is different from the trustee appointed pursuant to 11 U.S.C. § 701 and an interim trustee who becomes the permanent trustee under § 702 because there is no election of someone different. The operative language in § 546(a)(1)(B) is "the appointment or election of the first trustee under section 702[.]"³ If Congress had intended to incorporate § 701 into § 546(a)(1)(B), it could easily have done so when the statute was amended in 1994. There is no indication

³The language regarding "appointment" does not have to refer to § 702 since each of the other Code sections cited - i.e., §§ 1104, 1163, 1202 and 1302 all provide for the appointment of a trustee.

that Congress' omission of reference to § 701 was an oversight. There is no rationale to support a different statute of limitations for avoidance actions based solely on whether or not the person who becomes the first permanent trustee under § 702 was appointed as interim trustee under § 701. Thus, this Court holds that it is when the trustee becomes the permanent trustee under § 702 (whether by election or default), rather than the interim trustee under § 701, that the additional one year statute of limitations begins to run. This means that in the present case, the additional one year statute of limitations began to run when Suhar became the first permanent trustee under § 702 on August 6, 2002.

For the foregoing reasons, this Court finds that Suhar's preference complaint against Mercer is not time barred.

An appropriate order shall enter.

**HONORABLE KAY WOODS
UNITED STATES BANKRUPTCY JUDGE**

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O R D E R

For the reasons set forth in this Court's memorandum opinion entered this date, the motion of Mercer Co. to dismiss is denied. Trustee Andrew W. Suhar's preference complaint against Mercer Co. is not time barred.

IT IS SO ORDERED.

HONORABLE KAY WOODS
UNITED STATES BANKRUPTCY JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Opinion and Order were placed in the United States

Mail this _____ day of November, 2004, addressed to:

ANDREW W. SUHAR, ESQ., 1101 Metropolitan Tower, P. O. Box 1497, Youngstown, OH 44501.

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