

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE: *
*
3710 HENRICKS ROAD CORP., *
* CASE NUMBER 05-43771
*
Debtor. *
*

*
THE LAMSON & SESSIONS COMPANY, *
*
Plaintiff, *
*
vs. * ADVERSARY NUMBER 05-4131
*
YSD INDUSTRIES, INC., et al., *
*
Defendants. *
*

MEMORANDUM OPINION GRANTING IN PART AND DENYING IN PART TRUSTEE'S
AMENDED MOTION FOR ORDER SUBSTITUTING TRUSTEE AS PLAINTIFF

On October 19, 2005, this Court held a hearing on the Trustee's Amended Motion for Order Substituting Trustee as Plaintiff (the "Substitution Motion") in this adversary proceeding. The Lamson & Sessions Company ("Lamson"), the original plaintiff in this action, filed Objection of The Lamson & Session Company to the Chapter 7 Trustee's Amended Motion for Order Substituting Trustee as Plaintiff ("Lamson's Objection"). The original action was brought in the Cuyahoga County Court of Common Pleas (the "State Court Action") by Lamson against YSD Industries, Inc., now known as 3710 Henricks Road Corporation and the debtor herein ("Debtor"), and William Munding

and William Peters, the two directors and shareholders of Debtor. Immediately after Debtor filed a voluntary petition pursuant to Chapter 7 of Title 11 of the United States Code on June 26, 2005, Debtor removed the State Court Action to this Court.

In addition to the Substitution Motion and Lamson's Objection, the Court considered other responsive pleadings, as follows: (i) Debtor's Memorandum (A) in Support of the Motion of the Trustee to be Substituted as the Plaintiff in the Pending Shareholder Adversary Proceeding; (B) in Opposition to the Motion of The Lamson & Sessions Co for an Order Dismissing the Debtor's Bankruptcy Case; and (C) in Opposition to the Motion of The Lamson & Sessions Co for an Order Compelling 2004 Examination of the Debtor; (ii) Response by the Trustee to the Objection of Lamson and Sessions Company to the Chapter 7 Trustee's Motion for Order Substituting Trustee as Plaintiff and Supplemental Response to the Objection of The Lamson & Sessions Company to the Chapter 7 Trustee's Motion for Order Substituting Trustee as Plaintiff; and (iii) Response of Defendants Munding and Peters in Support of Trustee's Motion for Order Substituting Trustee as Plaintiff.

The following constitutes the Court's findings of fact and conclusions of law as required by FED. R. BANKR. P. 7052.

The State Court Action was initiated by Lamson as a breach of contract action, to recover alleged fraudulent transfers and for breach of fiduciary duty. The Amended Complaint in the State Court Action asserts that it is for "breach of contract, to set aside fraudulent transfers, for breach of fiduciary duty and/or for unjust

enrichment." (Amended Complaint ¶ 1.) The Substitution Motion argues that the Chapter 7 Trustee is the real party in interest and that the Trustee should be substituted as plaintiff in the adversary proceeding because the "causes of action set forth in Counts II, III, IV, V and VI of the Complaint are causes of action which belong to the Bankruptcy Trustee as representative of all unsecured creditors." (Substitution Motion ¶ 4.)¹ Lamson does not contest that the Trustee, pursuant to § 544 of the Bankruptcy Code, is the appropriate party to bring the causes of action relating to the alleged fraudulent conveyances (Counts III and IV), but argues that the other causes of action are personal to it and cannot be asserted by the Trustee. At the hearing, Lamson withdrew its objection to the Trustee being substituted as plaintiff for the breach of fiduciary duty cause of action (Count V). Accordingly, the Court need only determine whether one or more of the causes of action denominated in the Complaint as Count II - Breach of Contract Against Mundinger and Peters - and Count VI - Unjust Enrichment Against YSD, Mundinger and Peters - are appropriately brought by the Trustee or Lamson. After reviewing all of the pleadings and considering the arguments of counsel, this Court finds that the cause of action in Count II is personal to Lamson and that Lamson may also continue the cause of action in Count VI against Mundinger and Peters (but not Debtor).²

¹The Trustee acknowledges that Lamson's cause of action in Count I for breach of contract against Debtor is personal to Lamson, but asserts that such action is stayed pursuant to § 362 of the Bankruptcy Code and that Lamson should file a proof of claim setting forth its alleged damages, which the Trustee will deal with at a later date.

²To the extent Count VI asserts a cause of action against Debtor, it is stayed.

Section 323 of the Bankruptcy Code describes the role and capacity of the trustee, as follows: "(a) The trustee in a case under this title is the representative of the estate. (b) The trustee in a case under this title has capacity to sue and be sued." 11 U.S.C. § 323. Accordingly, although it is clear that the Trustee has the capacity to be a plaintiff in an adversary, the question is whether he is the proper plaintiff to assert the causes of action that Lamson has already brought in this adversary proceeding. A trustee represents the estate and the creditors as a whole, but he is not authorized to bring or maintain a lawsuit against third parties on behalf of one creditor.

As a creature of statute, the trustee in bankruptcy has only those powers conferred upon him by the Bankruptcy Act. Under the statute the trustee steps into the shoes of the bankrupt and generally would have standing to bring any action which the bankrupt could have brought had it remained solvent.

Cissell v. Am. Home Assurance Co., 521 F.2d 790, 792 (6th Cir. 1975), cert. denied, 96 S. Ct. 857 (1976). (Internal citations omitted.) See also *O'Neil v. New England Rd., Inc. (In re Neri Bros. Constr. Corp.)*, 323 B.R. 540, 542 (Bankr. D. Conn. 2005) ("Under the Bankruptcy Code, the trustee stands in the shoes of the bankrupt corporation and has standing to bring any suit that the bankrupt corporation could have instituted had it not petitioned for bankruptcy. . . . It is well settled that a bankruptcy trustee has no standing generally to sue third parties on behalf of the estate's creditors, but may only assert claims held by the bankrupt corporation itself.")

Count II of the Complaint asserts as follows: "Due to Mundinger's and Peters' control over [Debtor], they are the alter ego of [Debtor] and [Debtor's] corporate veil may be pierced, such that Mundinger and Peters are responsible and liable to Lamson for the breaches of contract by [Debtor], in an amount to be proved at trial." (Amended Complaint ¶ 32.) The Trustee argues that he is the appropriate party to bring Count II because a trustee can assert claims under the theory of alter ego. He cites the case of *Baillie Lumber Co. v. Thompson*, 413 F.3d 1293 (11th Cir. 2005) for this proposition. The case cited, however, is distinguishable from the instant facts. In *Baillie*, the Eleventh Circuit Court of Appeals stated: "We held that in order for the alter ego action to be property of the bankruptcy estate, the 'claim should (1) be a general claim that is common to all creditors and (2) be allowed by state law.'" *Id.* at 1295. The Trustee asserts that Count II belongs to all of the creditors because the breach of contract is related to the alleged fraudulent transfers and that there is only "one pot" from which to collect.

Lamson acknowledges that the Trustee's causes of action for fraudulent transfer and Lamson's cause of action for breach of contract based on alter ego are both directed at Mundinger and Peters, but asserts that just because the defendants are the same, it does not follow that both causes of action are trying to collect the same pot of money. Lamson also argues that alter ego is a remedy - not a separate cause of action. The question here is whether Lamson's cause of action for breach of contract based on alter ego is one that Debtor

would have been entitled to bring and, thus, constitutes property of the estate.

Here, the Trustee admits that neither he nor Debtor are the appropriate party to bring Lamson's breach of contract action against Debtor. Although the Trustee argues that Debtor may maintain an action based on alter ego against its shareholders, that is not the situation here. Lamson asserts that Munding and Peters exercised such control over Debtor that the corporate veil should be pierced and they should be held personally liable for the alleged breach of contract. As the Court noted at the hearing, no discovery has been conducted in this case and it is not clear from the face of the Complaint and the Answer whether Lamson, indeed, has damages for breach of contract against Munding and Peters based on a theory of alter ego. Whether that theory can be sustained remains to be established. What is evident is that, prior to filing the bankruptcy petition, Debtor did not have a cause of action against Munding and Peters for the alleged breach of contract with Lamson. Since Count II is also based on this same breach of contract, the Trustee does not have a cause of action against Munding and Peters. Accordingly, the Trustee cannot be substituted as plaintiff for Count II.

Lamson concedes that the Trustee may have its own cause of action against Munding and Peters for unjust enrichment, but the issue here is whether the Trustee can maintain the cause of action that Lamson has asserted against Munding and Peters for unjust enrichment. Lamson argues that its unjust enrichment claim is based

on Lamson's assumption of Debtor's retiree health plan obligations, forgiveness of Debtor's debts and Lamson's provision of funds to Debtor. Lamson argues that Munding and Peters have been unjustly enriched and Lamson has been damaged by such actions in an amount to be determined at trial. The allegations supporting the unjust enrichment cause of action in Count IV are all based on conduct by Lamson that allegedly conferred a benefit on Munding and Peters. Since the Trustee concedes that it has no standing regarding Lamson's breach of contract action, the Trustee cannot be the appropriate party to assert a claim for this same conduct on the theory of unjust enrichment. Again, although it is too early in the litigation to determine if Lamson is entitled to damages from Munding and Peters, it is still Lamson's cause of action to assert rather than the Trustee's.

This Court therefore grants the Substitution Motion in part, as to Counts III, IV and V, and denies it in part, as to Counts II and VI.

An appropriate Order will follow.

HONORABLE KAY WOODS
UNITED STATES BANKRUPTCY JUDGE

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ORDER GRANTING IN PART AND DENYING IN PART TRUSTEE'S AMENDED
MOTION FOR ORDER SUBSTITUTING TRUSTEE AS PLAINTIFF

For the reasons set forth in this Court's Memorandum Opinion entered this date, the Trustee's Amended Motion for Order Substituting Trustee as Plaintiff ("Substitution Motion") is granted in part (Counts III, IV and V), and denied in part (Counts II and VI). The Trustee has 30 days from entry of this Memorandum Opinion and Order to amend the complaint to assert additional causes of action, if any. A telephonic status conference is scheduled for December 5, 2005, at 10:00 a.m., at which time the parties should have discussed and be prepared to propose a discovery schedule and cutoff date.

IT IS SO ORDERED.

HONORABLE KAY WOODS
UNITED STATES BANKRUPTCY JUDGE