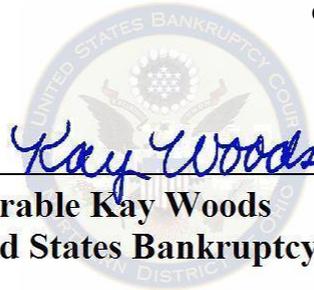


IT IS SO ORDERED.



Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
	*	
TWO SPRINGS MEMBERSHIP CLUB,	*	
	*	CASE NUMBER 04-44837
Debtor.	*	
	*	
*****	*	
	*	
ELAINE B. GREAVES, Trustee,	*	
	*	ADVERSARY NUMBER 06-4112
Plaintiff,	*	
	*	
vs.	*	
	*	
OFFICE OF THE DELAWARE	*	
ATTORNEY GENERAL, et al.,	*	
	*	HONORABLE KAY WOODS
Defendants.	*	
	*	

MEMORANDUM OPINION DENYING MOTION FOR SUMMARY JUDGMENT
Not Intended for National Publication

The following Memorandum Opinion is not intended for national publication and carries limited precedential value. The

availability of this Opinion by any source other than www.ohnbuscourts.gov is not the result of direct submission by this Court. The Opinion is available through electronic citation at www.ohnb.uscourts.gov pursuant to the E-Government Act of 2002 (Pub. L. No. 107-347).

Before the Court is Motion for Summary Judgment (Doc. # 54) filed by Defendant Camp Coast to Coast, Inc. and Affinity Group, Inc. (collectively, "Coast") on April 4, 2008. The United States ("Government"), also a defendant in this adversary proceeding, filed United States' Response in Opposition to Motion for Summary Judgment Filed by Camp Coast To Coast, Inc., and Affinity Group, Inc. ("Government Response") (Doc. # 59)¹ on April 24, 2008. Coast also filed Answer, Counterclaim and Crossclaim of Camp Coast to Coast, Inc. and Affinity Group, Inc. ("Coast Counterclaim") (Doc. # 15) on July 20, 2006, and Designation of Issues (Doc. # 43) on January 25, 2008. Both Coast and the Government jointly filed Stipulation on Documents and Facts ("Stipulation") (Doc. # 42) on January 14, 2008, and Exhibit List ("Exhibit") (Doc. # 58) on April 24, 2008. Having reviewed all the documents,² the Court finds that Coast's Motion for Summary Judgment

¹Unless otherwise noted, all Docket numbers in this Opinion refer to documents contained in the docket of this Adversary Proceeding, Case No. 06-4112.

²The Government also filed United States' Motion for Summary Judgment on Count I ("Gov. Motion for Summ. J.") (Doc. # 55) on April 4, 2008, and Coast filed Coast's Reply Memorandum to Motion for Summary Judgment of the IRS (Doc. # 57) on April 24, 2008.

must be denied.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and the general order of reference (General Order No. 84) entered in this district pursuant to 28 U.S.C. § 157(a). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(O). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

I. STANDARD FOR REVIEW

The procedure for granting summary judgment is found in FED. R. CIV. P. 56(c), made applicable to this proceeding through FED. R. BANKR. P. 7056, which provides, in part, that

[t]he judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

FED. R. CIV. P. 56 (West 2008). Summary judgment is proper if there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). A fact is material if it could affect the determination of the underlying action. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue of material fact is genuine if a rational fact-finder could find in favor of either party on the issue. *Liberty Lobby*, 477 U.S. at 248-49. Thus, summary judgment is inappropriate "if the evidence

is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248.

In a motion for summary judgment, the movant bears the initial burden of establishing an absence of evidence to support the nonmoving party's case. *Celotex*, 477 U.S. at 323. The burden then shifts to the nonmoving party to demonstrate the existence of a genuine dispute. *Matsushita Elec. Indus. Co., Ltd v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). The evidence must be viewed in the light most favorable to the nonmoving party. *Matsushita*, 475 U.S. at 587. However, in responding to a proper motion for summary judgment, the nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'" *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989) (quoting *Anderson*, 477 U.S. at 257). That is, the nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact. *Street*, 886 F.2d at 1479-80.

II. FACTUAL AND PROCEDURAL BACKGROUND

Two Springs Membership Club ("Debtor") is one of several campgrounds owned and/or operated by Raymond Novelli and various associates (collectively, "Novelli Group"). (Mot. for Summ. J. at 2; Gov't Resp. at 11.) Many of the Novelli Group campgrounds have

filed for one or more bankruptcies. (Mot. for Summ. J. Ex. A; Gov't Resp. at 17.) Debtor filed a chapter 11 voluntary petition in this Court on October 4, 2004 (Case No. 04-44837) ("Debtor's Case"). Revcon Motorcoach, Inc. ("Revcon NV"), another Novelli Group campground, also filed a chapter 11 voluntary petition in this Court on October 4, 2004 (Case No. 04-44836) ("Revcon NV Case"). Both cases were converted to chapter 7 on June 30, 2005.

Debtor did not list Coast as a creditor in its voluntary petition, but Revcon NV listed Coast as its largest creditor, with an unsecured claim of \$3,880,038.54. The Court entered Notice of Need to File Proof of Claim Due to Recovery of Assets in each case, setting the last date to file claims. The claims deadline for the Revcon NV Case was December 28, 2005 (Revcon NV Case, Doc. # 43), and the claims deadline for the Debtor's Case was November 9, 2005 (Debtor's Case, Doc. # 61). Coast filed claims for \$3,880,038.54 in the Revcon NV Case (Revcon NV Case, Claim # 3) on April 17, 2007, and the Debtor's Case (Debtor's Case, Claim # 10) on April 18, 2007. The Revcon NV chapter 7 trustee, Michael Buzulencia ("Revcon NV Trustee"), filed Trustee's Final Report on January 17, 2008 (Revcon NV Case, Doc. # 57), in which he noted that nothing was paid on the Coast claim because it had been filed late.

Debtor's estate included real property located at 14300 Indian Avenue, North Palm Springs, California 92258 ("Indian Avenue Property"). On October 24, 2005, the Court entered Order Authorizing Sale of Property Free and Clear of All Liens,

Encumbrances, Claims and Other Interests ("Sale Order") (Debtor's Case, Doc. # 75), which (i) authorized Elaine B. Greaves, Debtor's chapter 7 trustee ("Trustee"), to sell the Indian Avenue Property; and (ii) directed Trustee to thereafter "commence an adversary proceeding seeking a determination of the validity, priority and extent of the Encumbrances against the Property[.]" (Sale Order at 6.) After the Indian Avenue Property was sold, in compliance with the Sale Order, Trustee filed Complaint to Determine Validity, Priority, and Extent of Liens and and [sic] Determination of Income Tax Liability ("Complaint") (Doc. # 1), which commenced this Adversary Proceeding on June 1, 2006. The Complaint names 20 defendants who are "potential parties in interest to the real estate and hence to the proceeds of sale." (Compl. ¶ 4.)

Coast is one of the defendants named in the Complaint. The following facts are relevant to Coast's claim. Revcon NV purchased the Indian Avenue Property from Miles Shook on March 5, 1993, and recorded the grant deed on May 19, 1993. (Stip. at 7; Ex. 2.) Revcon NV paid for the Indian Avenue Property with a \$1,080,000.00 promissory note secured by a deed of trust for such property. (Stip. at 7; Ex. 75.)

Revcon NV and other Novelli Group entities filed suit against Coast and other defendants ("California Case") in the Superior Court of the State of California in and for the County of Orange ("California Court") on January 28, 1998. (Stip. at 8; Ex. 6.) The California Court ruled in favor of all defendants on

October 10, 2000. (Stip. at 8; Ex. 9.) Coast obtained a joint and several judgment against Revcon NV and the other California Case plaintiffs for \$3,880,038.54 ("Judgment") on February 14, 2001. (*Id.*) Debtor was not a party to the California Case.

Debtor was incorporated as a Delaware corporation on March 28, 2001. (Stip. at 9; Ex. 16.) Revcon NV transferred the Indian Avenue Property to Debtor for no consideration on April 21, 2001. (Mot. for Summ. J. at 10.) Debtor recorded a grant deed for the Indian Avenue Property on April 25, 2001. (Stip. at 9; Ex. 17.) Thereafter, on October 15, 2001, Coast filed an abstract of the Judgment. (Stip. at 9; Ex. 10.) Coast has not claimed, nor provided any evidence to this Court, that it took any action to collect on the Judgment prior to filing a claim in the Revcon NV bankruptcy case on April 17, 2007.

III. ANALYSIS

A. Coast's Claim

Coast's Motion for Summary Judgment asks the Court to find that its claim against the Indian Avenue Property sale proceeds "constitutes the first and best claim against such proceeds, subject only to the administrative claims of the Trustee and superior to the claim of the United States of America, Internal Revenue Service[.]" (Mot. for Summ. J. at 1.) The Motion for Summary Judgment is based solely on Coast's assertion that Revcon NV's transfer of the Indian

Avenue Property was fraudulent.³

Coast has no standing to assert a claim for fraudulent transfer against Debtor. Coast's Judgment is against Revcon NV, but not against Debtor. Revcon NV's transfer of the Property to Debtor occurred in 2001, but Coast never commenced a fraudulent transfer action regarding the Indian Avenue Property. Even if Coast could establish that the transfer was fraudulent,⁴ it is too late for Coast to recover from Debtor, as transferee. Any fraudulent transfer claim would have to have been brought: (i) pre-petition by Coast under applicable state law, or (ii) post-petition by Revcon NV, as Debtor In Possession, or the Revcon NV Trustee, as authorized by 11 U.S.C. §§ 544, 546, and/or 548. Neither Coast nor the Revcon NV Trustee commenced a fraudulent transfer action, and, as discussed below, the relevant statutes of limitation have now run. Because the Indian Avenue Property belonged to Debtor before Coast filed its abstract of judgment (which was obtained against Revcon NV), Coast's lien cannot be the first and best lien.

Coast asserts that "but for the transfer, on April 25, 2001, by Revcon [NV] . . . to this Debtor, . . . [Coast's Judgment Lien] would have directly encumbered the [Indian Avenue P]roperty." (Mot. for Summ. J. at 10 (emphasis added).) Coast also maintains that said transfer was "an actual fraudulent transfer." (Mot. for

³Coast's Counterclaim also includes a claim based upon alter ego theory (Coast Countercl. at 4-5), but this argument is not addressed in the Motion for Summary Judgment.

⁴The Court does not need to decide whether the conveyance was fraudulent to find that Coast's Motion for Summary Judgment must be denied.

Summ. J. at 11.) From this jumping off point, Coast then argues that California law provides it with "two avenues of relief." (*Id.*) Coast cites California Civil Code ("Cal. Civ. Code") § 3439.08 as the source of its first avenue of relief. Cal. Civ. Code § 3439.08 is part of the California Fraudulent Transfer Act. While Coast fails to cite any additional California statute or case law to support a second avenue of relief, its argument appears to arise from Cal. Civ. Code § 3439.07, which states in relevant part:

(a) In an action for relief against a transfer or obligation under this chapter, a creditor, subject to the limitations in Section 3439.08, may obtain:

(1) Avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim.

(2) An attachment or other provisional remedy against the asset transferred or its proceeds in accordance with the procedures described in Title 6.5 (commencing with Section 481.010) of Part 2 of the Code of Civil Procedure.

Cal. Civ. Code § 3439.07 (Deering 2008). In turn, Cal. Civ. Code § 3439.08(b)(1) provides:

(b) Except as otherwise provided in this section, to the extent a transfer is voidable in an action by a creditor under paragraph (1) of subdivision (a) of Section 3439.07, the creditor may recover judgment for the value of the asset transferred, as adjusted under subdivision (c), or the amount necessary to satisfy the creditor's claim, whichever is less. The judgment may be entered against the following:

(1) The first transferee of the asset or the person for whose benefit the transfer was made.

Cal. Civ. Code § 3439.08 (Deering 2008).

However, Coast overlooks the statute of limitations governing all causes of action brought under the California

Fraudulent Transfer Act, which is contained in Cal. Civ. Code § 3439.09:

A cause of action with respect to a fraudulent transfer or obligation under this chapter is extinguished unless action is brought pursuant to subdivision (a) of Section 3439.07 or levy made as provided in subdivision (b) or (c) of Section 3439.07:

(a) Under paragraph (1) of subdivision (a) of Section 3439.04, within four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant.

(b) Under paragraph (2) of subdivision (a) of Section 3439.04 or Section 3439.05, within four years after the transfer was made or the obligation was incurred.

(c) Notwithstanding any other provision of law, a cause of action with respect to a fraudulent transfer or obligation is extinguished if no action is brought or levy made within seven years after the transfer was made or the obligation was incurred.

Cal. Civ. Code § 3439.09 (Deering 2008) (emphasis added). Coast may pursue neither avenue of relief because the California statute of limitations for a cause of action based on fraudulent transfer ran in 2005, four years after the transfer was recorded by the Riverside County Assessor. Indeed, even assuming the longest possible statute of limitations of seven years, any alleged fraudulent conveyance action was extinguished in April 2008.

Once Revcon NV filed its voluntary petition, the potential fraudulent transfer action became property of the Revcon NV estate

under 11 U.S.C. § 544(b).⁵ "Essentially, this provision permits the trustee to 'stand in the shoes' of an unsecured creditor and assert causes of action understate [sic] fraudulent conveyance laws for the benefit of all creditors." *Lyon v. Eiseman (In re Forbes)*, 372 B.R. 321, 330 (B.A.P. 6th Cir. 2007). Section 544(b) allows the trustee to "avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502[.]" 11 U.S.C. § 544 (West 2007). Section 544 actions are governed by the statute of limitations in 11 U.S.C. § 546(a), which prohibits the commencement of such actions 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 subparagraph (A); or

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

11 U.S.C. § 546 (West 2007). The "commencement of a voluntary case under a chapter of [the Bankruptcy Code] constitutes an order for relief under such chapter." 11 U.S.C. § 301 (West 2007). Revcon NV filed its chapter 11 voluntary petition on October 4, 2004. The

⁵The trustee's ability to avoid fraudulent transfers under 11 U.S.C. § 548 is not applicable here because § 548 is limited to transfers made within two years prior to the petition date. Revcon NV filed its chapter 11 voluntary petition on October 4, 2004, more than three years after transferring the Indian Avenue Property to Debtor.

Revcon NV Trustee was appointed on August 11, 2005. The Revcon NV case has not been closed or dismissed. Therefore, the last date that the Revcon NV Trustee could have brought a § 544 action was October 4, 2006; however, the Revcon NV Trustee brought no such action.

In the Motion for Summary Judgment, Coast cites one case in support of its position: *Coleman v. J&B Enters., Inc. (In re Veterans Choice Mortgage)*, 291 B.R. 894 (Bankr. S.D. Ga. 2003). However, *Veterans Choice* addresses an issue different from that raised by the Motion for Summary Judgment. The *Veterans Choice* trustee brought an adversary proceeding against a creditor to reclaim property for the estate under 11 U.S.C. §§ 547 and 548. Pre-petition, the creditor had obtained and filed a judgment against the debtor in state court, after which the state court issued a Writ of Fieri Facias, which was recorded in the appropriate county. *Veterans Choice*, 291 B.R. at 896. The trustee filed a motion to determine whether the creditor's claim was secured or unsecured. *Id.*

Here, on the other hand, the Revcon NV Trustee never attempted to recover the Indian Avenue Property for the Revcon NV estate. Furthermore, Coast has no lien against the Indian Avenue Property because Coast did not file its judgment until after Revcon NV transferred the Indian Avenue Property to Debtor. Under California law, "a judgment lien on real property is created . . . by recording an abstract of a money judgment with the county

recorder."⁶ California Code of Civil Procedure ("CAL. CODE CIV. P.") § 697.310 (Deering 2008). In California, "an abstract of judgment attaches to all interests . . . in real property in the county in which the abstract is recorded. . . . But the abstract does not attach until it is recorded and it therefore cannot affect previously transferred property." *Casey v. Gray*, 16 Cal. Rptr. 2d 538, 539 (Cal. Ct. App. 1993) (citing CAL. CODE CIV. P. § 697.340) (emphasis added). The *Casey* court held that "an executed and delivered (but unrecorded) quit-claim deed conveys title free and clear of a subsequently recorded abstract of judgment" even where the judgment was obtained prior to execution of the quit-claim deed. *Id.*

Finally, Coast's Motion for Summary Judgment is filed in the Debtor's case, not the Revcon NV case. Coast has no judgment against Debtor and, therefore, no claim against Debtor.⁷ Coast's argument in its Motion for Summary Judgment hinges on a finding that the transfer of the Indian Avenue Property was fraudulent and, thus, Coast can recover from Debtor as the transferee. Because it is too late for any viable fraudulent conveyance action, this argument fails.

⁶In contrast, the *Veterans Choice* court applied Georgia law. In Georgia, "[a] creditor acquires a lien against defendant as soon as he obtains a judgment." *Veterans Choice*, 291 B.R. at 896, n.1 (citing Official Code of Georgia Annotated § 9-12-80).

⁷It is unclear why Trustee has not objected to the proof of claim filed by Coast. It is not only untimely, but the judgment upon which it is based is against an entirely different entity.

B. Summary Judgment Sua Sponte

The Complaint prays the Court enter judgment “[f]or determination of validity, priority and extent of all liens, encumbrances and other interests attributable to the net sale proceeds [from sale of the Indian Avenue Property].” (Compl. at 6.) No party has expressly requested the Court to find that Coast’s asserted lien, which is based on a theoretical fraudulent transfer, has no basis in law.⁸ Despite the absence of any such request or motion, the Court finds that this issue is ripe for summary judgment.

“It is permissible for [federal] courts to enter a summary judgment *sua sponte* in favor of a nonmoving party as long as the court ‘afford[s] the party against whom *sua sponte* summary judgment is to be entered ten-days notice and an adequate opportunity to respond.” *Meyer v. AmerisourceBergen Drug Corp.*, Nos. 06-4456/4457, 2008 U.S. App. LEXIS 3382, *22 (6th Cir. 2008) (quoting *Yashon v. Gregory*, 737 F.2d 547, 552 (6th Cir. 1984)). See also, *Harrington v. Vandalia-Butler Board of Educ.*, 649 F.2d 434, 436 (6th Cir. 1981) (A court entering summary judgment *sua sponte* “must still ‘afford the party against whom summary judgment will be entered advance notice as required by [FED. R. CIV. P.] 56 and an adequate opportunity to show why summary judgment should not be granted.’” (quoting *Kistner v. Califano*, 579 F.2d 1004, 1006 (6th Cir. 1978));

⁸However, the Court notes that “[t]he United States disputes Coast’s position that its lien attached to the property that was sold to generate the proceeds at issue.” (Gov. Mot. for Summ. J. at 2.)

Butcher v. Gerber Prods. Co., 88 F. Supp. 2d 788, 798 (W.D. Mich. 2000) ("Although [FED. R. CIV. P.] 56 does not expressly authorize it, a [federal] court may raise and grant summary judgment *sua sponte* as a method of expediting litigation.").

The Court believes that the ten day notice standard has already been met⁹ in this case because Coast has presented all relevant summary judgment evidence in support of its own Motion for Summary Judgment. Nevertheless, the Court hereby gives notice of its intent to grant summary judgment in favor of the Trustee on the issue of whether Coast's fraudulent transfer claim is invalid as a matter of law. In other words, the Court proposes to dismiss Counts I and II of Coast's Counterclaim. The ten days' notice will run from entry of this Opinion and Order. This notice is provided so that Coast may respond "with whatever arguments and evidence in the record that [it can] muster." *Yashon*, 737 F.2d at 552.

IV. CONCLUSION

For the reasons given above, Coast's Motion for Summary Judgment will be denied.

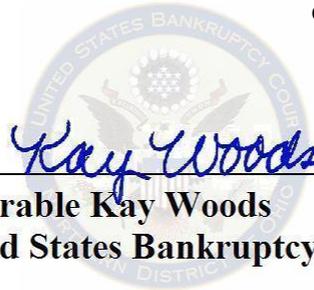
Coast shall have ten days after entry of this order to respond to the Court's *sua sponte* consideration of summary judgment as to the denial of its fraudulent transfer claim.

An appropriate order will follow.

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⁹See, e.g., *Herman v. Neely (In re Herman)*, 315 B.R. 381, 398 (Bankr. E.D. Tex. 2004).

IT IS SO ORDERED.



Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
	*	
TWO SPRINGS MEMBERSHIP CLUB,	*	
	*	CASE NUMBER 04-44837
Debtor.	*	
	*	
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ELAINE B. GREAVES, Trustee,	*	
	*	ADVERSARY NUMBER 06-4112
Plaintiff,	*	
	*	
vs.	*	
	*	
OFFICE OF THE DELAWARE	*	
ATTORNEY GENERAL, et al.,	*	
	*	HONORABLE KAY WOODS
Defendants.	*	
	*	

ORDER DENYING MOTION FOR SUMMARY JUDGMENT

For the reasons set forth in this Court's Memorandum Opinion entered on this date, the Court hereby denies the Motion for Summary Judgment (Doc. # 54) filed by Camp Coast to Coast, Inc. and Affinity Group, Inc. (collectively, "Coast").

The Court also hereby gives ten days notice of its intent to (i) grant summary judgment in favor of the Trustee on the issue of whether Coast's fraudulent transfer claim is invalid as a matter of law and, consequently, (ii) dismiss Counts I and II of Coast's Counterclaim (Doc. # 15). Coast shall have ten days after entry of this order to respond to the Court's *sua sponte* consideration of summary judgment in favor of Trustee regarding Coast's fraudulent transfer claim.

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