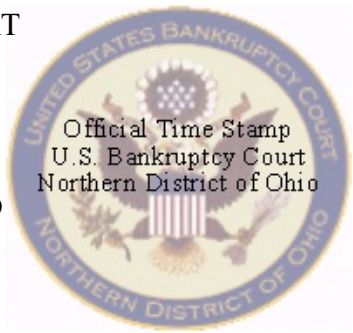
UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:	)	Case No. 10-15099
	)	
KIEBLER RECREATION, LLC,	)	Chapter 7
	)	
Debtor.	)	Chief Judge Pat E. Morgenstern-Clarren
	)	
	)	
DAVID O. SIMON, TRUSTEE,	)	Adversary Proceeding No. 12-1168
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
APOLLO PROPERTY MANAGEMENT, LLC,	)	**MEMORANDUM OF OPINION**[1]
	)	**AND ORDER**
Defendant.	)	

In this proceeding, the plaintiff chapter 7 trustee David Simon seeks to avoid certain transfers to the defendant Apollo Property Management, LLC that he alleges were preferential and/or fraudulent. The defendant moves to dismiss, arguing that the trustee did not file the complaint within the time limits set by Bankruptcy Code § 546(a).[2] The dispute turns on whether that statute began to run on the date the United States trustee selected the trustee or on the date on which the court approved the selection. For the reasons stated below, the court finds that the statute did not begin to run until the court approved the selection and that the trustee timely filed this action.

[1] This opinion is not intended for publication, either electronic or print.

[2] Docket 13 and 17.

I. JURISDICTION

The court has jurisdiction over this proceeding under 28 U.S.C. § 1334 and General Order No. 2012-7 entered by the United States District Court for the Northern District of Ohio on April 4, 2012. This is a core proceeding under 28 U.S.C. § 157(b)(2)(B), (F), and (H). The analysis in *Stern v. Marshall*, 131 S.Ct. 2594 (2011) does not apply to this motion to dismiss because the court is not making factual findings and its legal conclusions are subject to de novo review on appeal. *Lehman Bros. Holdings Inc. v. JPMorgan Chase Bank, N.A.*, 469 B.R. 415, 424 (Bankr. S.D.N.Y. 2012).

In addition to arguing that the statute of limitations expired before the trustee filed the complaint, the defendant argues that the statute is jurisdictional and cannot be expanded by the court. The court does not need to resolve the jurisdictional issue based on the conclusion that the trustee timely filed the complaint. *See Martin v. First Nat'l Bank of Louisville (In re Butcher)*, 829 F.2d 596, 600 (6th Cir. 1987) (holding that § 546(a) is jurisdictional), abrogated on other grounds in *Bartlik v. United States Dept. of Labor*, 62 F.3d 163 (6th Cir. 1995) (en banc), which decision has been interpreted as abandoning the view that § 546(a) is jurisdictional, *see Frentz v. Stites & Harbison (In re Thermoview Indus., Inc.)*, 381 B.R. 225, 228-29 (Bankr. W.D. Ky. 2008); *Word Invs. Inc. v. Bruinsma (In re TML, Inc.)*, 291 B.R. 400, 432 n. 68 (Bankr. W.D. Mich. 2003).

II. FACTUAL BACKGROUND

The debtor Kiebler Recreation, LLC filed a chapter 11 petition on May 26, 2010. On June 3, 2011, the United States trustee (UST) and the Official Committee of Unsecured Creditors moved for an order directing the appointment of a trustee. On June 8, 2011 the court entered an agreed order granting the UST's motion, and the UST filed a report stating that David Simon had

been selected for the appointment that same day. The court signed an order approving the selection on June 20, 2011. The case converted to chapter 7 on May 16, 2012, with David Simon continuing to serve as trustee. The trustee filed this adversary proceeding on June 15, 2012.

III. PROCEDURAL BASIS FOR THE MOTION

The defendant moves to dismiss under Federal Civil Rule 12(b)(6) for failure to state a claim on the ground that the plaintiff did not file the complaint within the time set by statute. *See* FED. R. CIV. P. 12(b)(6) (made applicable by FED. R. BANKR. P. 7012(b)). The statute of limitations defense is appropriately considered under Rule 12(b)(6) because the complaint alleges that it is timely filed. *See Cataldo v. United States Steel Corp.*, 676 F.3d 542, 547 (6th Cir. 2012) (noting that a defendant may raise a statute of limitations defense under rule 12(b)(6)).

The analysis begins by "taking note of the elements a plaintiff must plead to state a claim[.]" *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1947 (2009). The Sixth Circuit has stated that:

> Under Rule 8(a)(2) of the Federal Rules of Civil Procedure, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Although this standard does not require "detailed factual allegations," it does require more than "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Rather, to survive a motion to dismiss, the plaintiff must allege facts that, if accepted as true, are sufficient "to raise a right to relief above the speculative level," *id.*, and to "state a claim to relief that is plausible on its face," *id*. at 570, 127 S.Ct. 1955; *see also Ashcroft v. Iqbal*,129 S.Ct. 1937, 1949-50, 173 L.Ed.2d 868 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S.Ct. at 1949. And although we must accept all well-pleaded factual allegations in the complaint as true, we need not "'accept as true a legal conclusion couched as a factual allegation.'" *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955 (quoting *Papasan v. Allain*, 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986)); *see also Iqbal*, 129 S.Ct. at 1949.

Hensley Mfg. v. Propride, Inc., 579 F.3d 603, 609 (6th Cir. 2009) (footnote omitted). And, "there is no reason not to grant a motion to dismiss where the undisputed facts conclusively establish an affirmative defense [such as a statute of limitations defense] as a matter of law." *Id.* at 613.

IV. THE BANKRUPTCY CODE PROVISIONS

A. 11 U.S.C. § 546(a)

The complaint seeks to avoid preferential transfers under Bankruptcy Code § 547 and fraudulent transfers under Bankruptcy Code § 548. The applicable statute of limitations is found in Bankruptcy Code § 546(a):

> (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 subparagraph (A); or
>
> (2) the time the case is closed or dismissed.

11U.S.C. § 546(a).

Stated somewhat differently, this proceeding could not be timely filed after the earlier of: (1) case closing or dismissal; or (2) the later of two years after entry of the order for relief or one year after the appointment of the first trustee. Here, the parties agree that the only issue is

whether the complaint is untimely because it was filed more than one year after the appointment of the first trustee.

B. 11 U.S.C. § 1104

Section 1104(a) provides in relevant part that the "court shall order the appointment of a trustee" for cause or if such appointment is in the interests of creditors and other interests of the estate "on request of a party in interest or the United States trustee[.]" 11 U.S.C. § 1104(a). Once such a court order is entered, § 1104(d) requires that "the United States trustee, after consultation with parties in interest, shall appoint, subject to the court's approval, one disinterested person other than the United States trustee to serve as trustee . . . in the case." 11 U.S.C. § 1104(d). Additionally, "[o]n the request of a party in interest made not later than 30 days after the court orders the appointment of a trustee under subsection (a), the United States trustee shall convene a meeting of creditors for the purpose of electing one disinterested person to serve as trustee in the case." 11 U.S.C. § 1104(b)(1). If an eligible disinterested trustee is elected at the meeting of creditors, the United States trustee must file a report certifying the election, and upon that filing the elected trustee "shall be considered to have been selected and appointed" for purposes of § 1104 and "the service of any trustee appointed under subsection (a) shall terminate." 11 U.S.C. § 1104(b)(2).

V. ISSUE AND THE POSITIONS OF THE PARTIES

The issue is whether the § 546(a)(1)(B) limitation period began to run on the date the United States trustee appointed the trustee under § 1104(d) or, instead, on the date that the court approved the appointment.

The defendant acknowledges that courts considering this issue have held that the governing date is the one on which the court approves the appointment. Still, he argues, a plain

reading of the statute requires the conclusion that the statute began to run on the date the UST appointed the trustee. Using that date, the adversary proceeding filed on June 15, 2012 is untimely because it was filed more than one year after the June 8, 2011 notice of appointment. The trustee, on the other hand, contends that the limitation period began to run on the date the court entered the order approving the United States trustee's selection of a trustee. Using that date, the complaint is timely because it was filed less than a year after the court signed its June 20, 2011 court order approving the appointment.[3]

VI. DISCUSSION

In construing any statute, the court must begin with the language of the statute itself. *Palmer v. United States (In re Palmer)*, 219 F.3d 580, 583 (6th Cir. 2000) (citing *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989)). "If the language of the statute is clear, this court's inquiry is at an end: 'where . . . the statute's language is plain, the sole function of the courts is to enforce it according to its terms.'" *Id.* (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235 at 241). "Only in those rare instances in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters . . . or when the statutory language is ambiguous will [the court] look beyond the statute's plain wording to divine the intent of its drafters." *Id.* at 584 (internal quotation marks and citations omitted).

In § 548(a)(i)(B), Congress wrote that the limitation period starts when the chapter 11 trustee is appointed under § 1104. The issue then becomes, when is a chapter 11 trustee

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[3] Although the order was docketed a day later on June 21, 2011, both parties reference the date the order was signed and there is case law to support using that date. *See for example Ford v. Union Bank (In re San Joaquin Roast Beef)*, 7 F.3d 1413, 1416-18 (9th Cir. 1993). Because a day one way or the other is not critical under the facts of this case, the court also will reference the June 20, 2011 date as the date of the court's order.

appointed under that section? The defendant focuses narrowly on the language in § 1104(d), which states that " [i]f the court orders the appointment of a trustee . . . then the United States trustee, after consultation with parties in interest, *shall appoint*" the trustee. 11 U.S.C. § 1104(d) (emphasis added). However, this approach is somewhat wooden because it does not take into account the multiple step process required under § 1104, which process is not complete until the court approves the appointment.

As one court noted, "the appointment process under § 1104 is a collaborative three-step process. Step one occurs when the bankruptcy court orders the appointment of a trustee on a party's motion after notice and a hearing; step two is the appointment by the United States Trustee, subject to the court's approval; [and] step three is the court's approval of the appointment[.]" *Boatman v. Furnia (In re Sutera)*, 157 B.R. 519, 521 (Bankr. D. Conn. 1993). Consequently, "[t]he operative date of a trustee's appointment under § 1104 is the one when the court enters an order which approves the United States trustee's appointment of a trustee." *Id.*; *see also Slone-Stiver v. Sec. Nat'l Bank & Trust Co. (In re Tower Metal Alloy Co.)*, 193 B.R. 266, 271 n. 4 (Bankr. S.D. Ohio 1996) (same); *Hargis v. Cone (In re Glenco Int'l Corp.)*, 115 B.R. 308, 311 (Bankr. W.D. Okla. 1990) ("Since any appointment of a trustee under § 1104 must be ordered by the court, but made by the U.S. Trustee subject to the court's approval, this court is of the opinion that no such appointment can be effective until the bankruptcy judge's approval is obtained.").

Courts, where possible, must give effect to every word in a statute. *See Seafort v. Burden (In re Seafort)*, 669 F.3d 662, 673-74 (6th Cir. 2012); *Bank of Montreal v. Am. HomePatient, Inc., (In re Am. HomePatient)*, 414 F.3d 614, 618 (6th Cir. 2005). Reading the statute in this manner gives effect to the phrase "subject to the court's approval." Reading it to mean that the

appointment is final when the UST announces his selection would read these words out of the statute.

This interpretation finds further support by contrasting the provisions for *appointing* a trustee under § 1104(d) with the provisions for *electing* a trustee under § 1104(b). A § 1104(d) appointment by the United States trustee always requires court approval. If the court does not approve the selection, the process begins anew. In contrast, if a trustee is elected to serve at a meeting of creditors, the trustee is considered to have been selected and appointed at the time the United States trustee files a report certifying the election, with the court only becoming involved if there is a dispute regarding the election. *See* 11 U.S.C. § 1104(b)(2).

This result is also consistent with the legislative intent behind the statute. Congress added these provisions to § 1104 under the Bankruptcy Judges, United States Trustees, and Family Farm Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3088 (1986) (the 1986 Act). Before the 1986 Act, § 1104 provided that the court appointed the trustee.[4] The 1986 amendment changed the procedure to: (1) permit the United States trustee to request the appointment of a trustee, and (2) provide for the United States trustee to appoint the trustee, subject to court approval under 11 U.S.C. § 1104(c), later re-designated as § 1104(d). The legislative history behind this change indicates that Congress intended to separate judicial and administrative functions. To achieve that, Congress transferred the administrative power of appointment to the United States trustee, while allocating to judges the responsibility for approving the selection as a safeguard against impropriety in the appointment process. *See In re*

[4] For this reason, decisions addressing the earlier version of the statute, such as *MortgageAmerica Corp. v. Am. Fed. Sav. & Loan (In re MortgageAmerica Corp.)*, 831 F.2d 97 (5th Cir. 1987), provide little guidance here, other than to suggest that reference to the entry of a court order provides certainty as to the limitation of actions.

Plaza de Diego Shopping Ctr., Inc., 911 F.2d 820, 827-33 (1st Cir. 1990) (providing an extensive discussion of the applicable legislative history). In doing so, Congress instructed the court to continue to play a significant role in the process. As a result, it is consistent with legislative intent to define the trustee's appointment date as the date on which the court approved the UST's appointment.

Based on this discussion, the trustee filed his June 15, 2012 complaint within one year after the court approved the trustee's appointment on June 20, 2011. Thus, the complaint is timely under § 546(a).

VII. CONCLUSION

For the reasons stated, the defendant's motion to dismiss is denied.

IT IS SO ORDERED.

Pat E. Morgenstern-Clarren
Chief Bankruptcy Judge