

APR 4 1995

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA J. BARON CROSHON
BY: _____

Deputy Clerk

In Re:

COLLEGE WALK LIMITED,

Debtor.

DAVID R. HILLIER, Trustee,

Plaintiff,

v.

BLUE RIDGE SAVINGS BANK, INC.,
JOHN A. MCCOY AND ROSALIND M.
MCCOY,

Defendants.

and

HEALTH CARE ASSOCIATES, INC.,

Additional Party Defendant

Case No. A-B-91-10110
Chapter 7

Adversary Proceeding
No. 93-1118

JUDGEMENT ENTERED ON APR 4 1995

ORDER DENYING SUMMARY JUDGMENT

This matter came before the Court on the Joint Motion for Summary Judgment by defendants John A. and Rosalind M. McCoy and additional party defendant Health Care Associates, Inc. The Court granted Summary Judgment as to Health Care Associates in a separate Order.

The McCoy's argue that they are entitled to summary judgment on the plaintiff's Complaint and their Counterclaim; however the McCoy's have failed to demonstrate the lack of any genuine issue

of material fact with respect to the defenses that they have raised or any Counterclaim they have asserted in the pleadings.

The McCoys specifically assert that they are entitled to summary judgment because the Trustee's claims are time barred. This argument is without merit.

The applicable limitations period for the Trustee's claims for avoidance of fraudulent conveyances under 11 U.S.C. §544 is governed by 11 U.S.C. §546(a). Section 546(a) requires the commencement of an action within two years after the appointment of the Trustee. The Fourth Circuit has recently applied §546 in a case which, like this case, was converted from Chapter 11 to Chapter 7. The Fourth Circuit held that the limitations period for an avoidance action does not begin to run until the appointment of a Trustee. Maurice Sporting Goods v. Maxway Corp., 27 F.3d 980, 984 (4th Cir. 1994). In the case at bar, the Trustee was appointed on November 21, 1991, and this action was commenced under 11 U.S.C. §544 on March 17, 1993. Consequently, the Trustee's claims under 11 U.S.C. §544 against the McCoys and Blue Ridge Savings Bank were timely and are not barred by the statute of limitations.

As to the Trustee's remaining claims that are not based on bankruptcy law, the Defendants argue that these claims were not timely filed pursuant to 11 U.S.C. §108(a). Section 108(a) requires the Trustee to bring actions pursuant to applicable nonbankruptcy law before the later of the expiration of the applicable statute of limitations period (as if the bankruptcy

case had not been filed) or "two years after the order for relief." The Trustee's Complaint was timely filed under either of these measures.

First, the Trustee filed his original Complaint on March 17, 1993, one day before the expiration of the two year time period that began with the entry of the Order for Relief on March 18, 1991. The Defendants argue that the Order for Relief was dated March 15, 1991, and thus, the two year statute of limitations expired on March 15, 1993, two days before the Trustee filed his Complaint.

This argument is without merit. Although the Order for Relief was signed on March 15, 1991, it was not entered until March 18, 1991, and therefore the two year time period at issue did not begin to run until March 18, 1991. Pursuant to Bankruptcy Rule 9021, "a judgment is effective when entered as provided in Bankruptcy Rule 5003." Bankruptcy Rule 5003 provides that the entry of a judgment or order in a docket shall show the date the entry was made. There is no provision in the Rules that supports the defendant's contention that the effectiveness of an order should be dated from the Judge's signature rather than from the date of entry. Consequently, this Court concludes that the Trustee's original Complaint, filed March 17, 1993 was timely pursuant to 11 U.S.C. §108.

On August 5, 1993, the Trustee moved to amend the Complaint and relies on Rule 15 of the Federal Rules of Civil Procedure to relate the claims contained in the Amended Complaint back to the

date of the original Complaint. Rule 15(c)(2) provides that an Amended Complaint may relate back to the date of the original Complaint for filing purposes if the allegations in the Amended Complaint are based on the same conduct, transactions, or occurrences alleged in the original Complaint.

In this case, the original Complaint states that the Trustee seeks to recover "numerous other fraudulent transfers that defendant John McCoy caused the debtor to make to or for the benefit of the McCoy's." The payments and transfers of property that are the subject of the claims all arose from a series of transactions allegedly planned and carried out by John McCoy. Without exception, the claims asserted in the Trustee's Amended Complaint arise out of and seek damages for the same conduct set forth in the original Complaint. All of these claims arise from McCoy's transfers or use of the debtor's property, without the authority of the Debtor or any consideration, while the Debtor was insolvent, to the benefit of McCoy and his wife. The Amended Complaint asserts claims for intentional and malicious interference with contract, breach of fiduciary duty, constructive fraud, fraud, unfair and deceptive trade practices, punitive damages, and equitable subordination. McCoy was put on notice in the original Complaint of the conduct for which the Trustee sought recovery, and consequently, the Amended Complaint relates back to the March 17, 1993 filing date and none of the Trustee's claims are barred by the statute of limitations.

Assuming arguendo that the Trustee had failed to file the original Complaint within two years of entry of the Order for Relief, the Complaint was nevertheless timely filed because each of the Trustee's claims was filed within the otherwise applicable statute of limitations.

The statute of limitations for the Trustee's claims does not begin to run until the Debtor reasonably should have discovered McCoy's conversion of its property. Each claim in the Amended Complaint alleges that McCoy was a fiduciary of both the Debtor's property and accounting records during the relevant time period and that McCoy submitted numerous false financial reports to the Debtor's other partners for the purpose of concealing McCoy's conversion of the Debtor's property. Claims for fraudulent conduct are subject to a three year statute of limitations that does not begin to accrue until the date the fraud is discovered. N.C.Gen. Stat § 1-52(9) (1991). The Amended Complaint alleges that the Debtor had no notice of McCoy's misconduct. The only evidence related to the Debtor's discovery of the conversion establishes that the earliest that the Debtor knew of McCoy's alleged actions is mid 1991. The Complaint was timely filed pursuant to the applicable statute of limitations when measured from this date given that the Trustee had four years, or until mid 1995, to assert the claim for unfair and deceptive trade practices and until 1994 to assert all other claims.

For the foregoing reasons, the Court concludes that the McCoy's are not entitled to the relief requested.

THEREFORE, it is ORDERED that the McCoy's MOTION FOR SUMMARY JUDGMENT IS DENIED.

This the 30 day of April, 1995.



George R. Hodges
United States Bankruptcy Judge