UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

JUDGE PETER J. WALSH

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June 22, 2004

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Re: The Official Committee of Unsecured Creditors, on Behalf of the Estates of Polaroid Corporation, et al. v. James Barron Adv. Proc. No. 03-56404 (PJW)

Dear Counsel:

This is with respect to the Defendant's motion to dismiss (Doc. # 7) the above referenced adversary proceeding. For the reasons briefly summarized below, I will deny the motion.

The Defendant moves to dismiss the complaint on the grounds that: (1) the Committee did not have standing to bring the

complaint; (2) Bankruptcy Code § 502(d) precludes the commencement of the adversary proceeding; and (3) the fraudulent transfer count of the complaint is not pled with sufficient specificity.

The Debtor's chapter 11 case was filed on October 12, 2001. On April 29, 2002 the Debtor's plan of reorganization (the "Plan") was filed. In February 2003 an examiner was appointed in the case. Principally because of the examiner's undertaking, consideration of the Plan was significantly delayed. The examiner filed his report on August 22, 2003. Thereafter the Debtor moved forward with the Plan process and a disclosure statement hearing was scheduled for October 8, 2003. On September 16, 2003 the Committee filed a motion seeking authorization to commence and prosecute avoidance actions on behalf of the Debtor's estate. The authorization motion was heard on October 8, 2003 and the Court signed an order on that date granting the motion. On that same date, the Committee filed its complaint against the Defendant. The order granting the authorization was not docketed by the clerk's office until October 10, 2003. The two year statute of limitations period under Bankruptcy Code § 546 for the filing of avoidance actions ended on October 12, 2003. The Plan was confirmed on November 18, 2003.

In reliance upon Fed. R. Bankr. P. 5003 and 9021, the Defendant takes the position that the authorization order was not effective until docketed and since it was docketed after the

commencement of the adversary proceeding, the Committee had no standing. Since the statute of limitations has run, the Defendant asserts that the complaint must now be dismissed.

I do not find the reported cases relied on by the Plaintiff or the Defendant to be helpful in resolving this dispute. I conclude, however, that the Defendant's analysis is hyper-technical, producing a result which exults form over substance.

First, a bit of background is appropriate. There was an 18-month hiatus between the filing of the Plan and its confirmation. As noted above, much of this delay was occasioned by the Court's decision to hold up consideration of the Plan pending receipt of the examiner's report. The authorization motion pointed out that under the terms of the Plan, the Committee had authority to appoint a plan administrator and the plan administrator had authority to pursue avoidance actions on behalf of the Debtor. (Case No. 01-10864, Doc. # 3034 at 5-6.) Because of the delay in the confirmation hearing and because the chapter case was approaching the two-year anniversary of the petition date, the authorization motion sought the appointment authority for the Committee. As noted above, that authority was granted with the order having been signed on October 8, 2003 and docketed on October 10, 2003. But for the appointment of the examiner, the Committee's authority, pursuant to the Plan, would have been in place months before the October 12, 2003 deadline for filing avoidance actions.

The Defendant's position rests on the premise that the Committee's standing must be authorized by an order docketed in the chapter case prior to the filing of the adversary complaint. As I read Official Committee of Unsecured Creditors of Cybergenics Corp. v. Chinery, 330 F.3d 548 (3d Cir. 2003), that sequence of events is not dictated. The Third Circuit Court of Appeals merely found that "bankruptcy courts can authorize creditors' committees to sue derivatively to avoid fraudulent transfers for the benefit of the estate." 330 F.3d at 580. Had the Debtor filed the complaint this Court certainly could have later granted authorization to the Committee to pursue the action.

In Official Committee of Unsecured Creditors ex rel. Valley Media, Inc. v. Cablevision Systems Corp. (In re Valley Media, Inc.), No. 02-04553, 2003 WL 21956410, at *2 (Bankr. D. Del. Aug. 14, 2003), I noted that there is no specific procedure prescribed in Cybergenics for obtaining standing for the Committee to pursue avoidance actions. In that case, I granted nunc pro tunc relief authorizing the committee to pursue an avoidance action where the debtor previously consented to the committee's standing because of a conflict of interest had debtor's counsel pursued the matter. The Defendant has alleged no prejudice resulting from the two-day delay in the entry of the authorization order. I believe it would be entirely appropriate in the matter before me to grant nunc pro tunc relief had it not already been obtained by the order

that was signed on October 8, 2003 and entered on October 10, 2003.

To the extent there was an infirmity in the complaint on October 8, 2003, that infirmity was cured on October 10, 2003 when the authorization order was docketed. The authorization order was docketed prior to the running of the statute of limitations. Thus, prior to the running of the statute of limitations, the Committee, with standing, had filed an avoidance action complaint.

What occurred here is the kind of situation addressed in Fed. R. Bankr. P. 8002(a) dealing with appeals. That Rule provides: "A notice of appeal filed after the announcement of a decision or order but before entry of the judgment, order, or decree shall be treated as filed after such entry and on the day thereof." The procedure for a committee authorization to file avoidance actions is not addressed in any rule, but Fed. R. Bankr. P. 8002(a) certainly suggests a common sense solution to the situation here.

In its response, the Defendant makes the following statement:

> The Plaintiff in this case could have easily avoided its standing problem by either (i) asking the Court to have the Standing Order immediately entered on the docket when it was signed on October 8, 2003 or (ii) waiting to file the Complaint until October 10, 11, or 12, after the Standing Order had been entered on the docket and before the statute of limitations had run.

(Doc. # 11 at 4.)

A variation of the second alternative solution would be the filing of an amended complaint on October 10, 11 or 12, 2003. What has actually happened here is effectively the same as the second alternative solution suggested by the Defendant.

Also, I believe that the matter here is analogous to the situation addressed in Fed. R. Civ. P. 17(a) where there is a substitution by a real party in interest.

> For statutes of limitations purposes, the presence of the real party relates back to the date of the original pleading. The salutary rule, like similar provisions in Rule 15 regarding relation back of amended pleadings, permits correction of a formal defect without risk that the case will be barred as untimely.

4 James Wm. Moore et al., Moore's Federal Practice § 17.12[1][b] (3d ed. 1999) (citations omitted).

The Defendant's second basis for the motion to dismiss is his claim that Bankruptcy Code § 502(d) precludes commencement of this adversary proceeding. Citing to several recent opinions in this Court, the Defendant argues that under § 502(d) once a bankruptcy court enters an order resolving a creditor's claim that creditor cannot be subjected to a subsequently filed avoidance action. In the chapter case, the Defendant filed four proofs of claims, three of which were disallowed prior to the filing of the avoidance action.

While the cases cited by the Defendant support his position, in a subsequent decision by undersigned, I disagreed with the positions expressed in those opinions. See TWA, Inc. Post

Confirmation Estate v. City and County of San Francisco Airport's Comm'n (In TWA Inc. Post Confirmation Estate), 305 B.R. 221 (Bankr. D. Del. 2004). The Defendant spends a great deal of effort in his reply brief attempting to distinguish the facts here from those underlying the TWA decision. The facts may be different but I believe the correct application of the law is as I set forth in the TWA decision, namely, § 502(d) is not a bar to a preference action commenced after the defendant in that action has had a claim allowed or disallowed. Of course, this does not preclude parties to the allowance or disallowance process from stipulating as to the disposition of any preference action. The Defendant does not suggest that any such stipulation occurred here.

As his third basis for the motion to dismiss, the Defendant argues that the fraudulent transfer cause of action should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) because it does not meet the pleading requirements of Fed. R. Civ. P. 8(a).

While the complaint is not a model of compliance with Fed. R. Civ. P. 8(a), it seems clear to me from the wording of the complaint that the alleged fraudulent transfers are the same transactions as the alleged preferential transfers. The one sentence constituting paragraph 1 of the complaint identifies the preferential transfers as payments made "on account of certain incentive compensation, stock awards, sales bonuses, severance payments, transitional assistance payments, pension payments,

dividend equivalents, and/or deferred compensation owed to Defendant." (Doc. # 1 at 1-2.) That sentence goes on to identify the amounts sought to be recovered pursuant to §§ 544, 548, and 550 as "incentive compensation, stock awards, sale bonuses, severance payments, transitional assistance payments, pension payments, dividend equivalents, and deferred compensation." Id. at 2. Thus, the complaint identifies the "fraudulent transfers" as being the same transactions as the "preferential transfers". Under the preferential transfer count, the complaint refers to Exhibit A which identifies the transactions by date, type of transfer and amount. The fraudulent transfer count does not reference Exhibit A. The Defendant essentially concedes that Exhibit A to the complaint provides sufficient information to satisfy the pleading requirements for a preference action. In its response to the motion the Plaintiff advises that it is prepared to amend the complaint to specifically clarify that the fraudulent transfer transactions are the same transactions as listed in Exhibit A. The response also indicates that the Plaintiff will clarify that as to one state law fraudulent transfer assertion it will rely upon Massachusetts law. Since the Defendant has already been put on notice of the specific transactions which are the subject of the complaint, I see no impediment to allowing the Plaintiff to amend the complaint pursuant to Fed. R. Civ. P. 15 and allowing that amendment to relate back to the original filing date.

> [A]n amendment may set forth a different statute as the basis of the claim or change a common law claim to a statutory claim or vice versa, or shift from a contract theory to a tort theory, or delete a negligence count and add or substitute a claim based on warranty, or change an allegation of negligence in manufacture to continuing negligence in advertising."

6A Charles Alan Wright et al., Federal Practice and Procedure § 1497 (2d ed. 1990)(citations omitted).

The attached form of order has been entered.

Very truly yours,

Peter J. Walsh

PJW:ipm

Attachment

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
POLAROID CORPORATION, et al.,	)	Case No. 01-10864(PJW)
	)	
Debtors.	)	Jointly Administered
	)	
	)	
THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS, on Behalf of the Estates of Polaroid Corporation, et al.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adv. Proc. No. 03-56404(PJW)
	)	
JAMES BARRON,	)	
	)	
Defendant.	)	

ORDER

For the reasons set forth in the Court's letter ruling of this date, the Defendant's motion to dismiss (Doc. # 7) the above referenced adversary proceeding is DENIED and the Plaintiff may file an amended complaint.

Peter J. Walsh
United States Bankruptcy Judge

Dated: June 22, 2004