

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

IN RE:	)	Chapter 7
)	
U.S. WOOD PRODUCTS, INC.,)	
)	
Debtor.	)	Case Nos. 00-3198 (MFW)
)	
<hr style="width: 30%; margin-left: 0;"/>)	
MONTAGUE CLAYBROOK, Chapter 7 Trustee,	)	(Jointly Administered)
)	
Plaintiff,)	
)	
v.)	
)	
PONDEROSA INDUSTRIAL DE MEXICO,	)	Adv. Proc. No. 03-53670
)	
DARLINGTON VENEER CO., INC.	)	Adv. Proc. No. 03-53569
)	
ATLANTIC VENEER CORPORATION,	)	Adv. Proc. No. 03-53544
)	
GEORGIA-PACIFIC CORPORATION,	)	Adv. Proc. No. 03-53597
)	
LIBERTY WOODS INTERNATIONAL, INC.,	)	Adv. Proc. No. 03-53625
)	
PANOLAM INDUSTRIES, INC.,	)	Adv. Proc. No. 03-53656
)	
Defendants.)	

OPINION¹

Before the Court are Motions filed by Ponderosa Industrial de Mexico, Darlington Veneer Co., Atlantic Veneer Corporation, Georgia-Pacific Corporation, Liberty Woods International, Inc., and Panolam Industries, Inc., (collectively "the Defendants") to Dismiss the preference complaints filed by the Trustee as time

¹ This Opinion constitutes the findings of fact and conclusions of law of the Court pursuant to Federal Bankruptcy Procedure 7052.

barred by section 546(a) of the Bankruptcy Code. The Motions will be consolidated and, for the reasons set forth below, denied.

I. FACTUAL BACKGROUND

On July 31, 2000 ("the Petition Date"), U.S. Wood Products, Inc. ("the Debtor") filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. On July 29, 2002, on motion of the Official Unsecured Creditors' Committee, the case was converted to a case under chapter 7 of the Bankruptcy Code. On July 30, 2002, Montague S. Claybrook ("the Trustee") was appointed interim trustee in the case. The section 341 meeting of creditors in the chapter 7 case was not held until April 7, 2004. Since a trustee was not elected under section 702, the Trustee continues to serve as the chapter 7 trustee. On June 4 and 5, 2003, the Trustee commenced these adversary proceedings to avoid and recover alleged preferential transfers.

II. JURISDICTION

This Court has jurisdiction over this matter, which is a core proceeding pursuant to 28 U.S.C. §§ 1334 & 157(b)(2)(F) & (H).

III. DISCUSSION

A. Standard of Review

The Defendants seek dismissal pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, made applicable to bankruptcy proceedings pursuant to Rule 7012 of the Federal Rules of Bankruptcy Procedure. In deciding a motion to dismiss, the court is required to determine whether, under any reasonable reading of the pleadings, the plaintiff is entitled to relief, and must accept as true the factual allegations in the complaint and all reasonable inferences that can be drawn from them.

Langford v. City of Atlantic City, 235 F.3d 845, 847 (3d Cir. 2000).

B. Section 546(a)

The Defendants assert that the adversary proceedings should be dismissed because the statute of limitations passed before they were commenced. Section 546(a) currently provides:

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 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(a).²

The Defendants argue that the adversary proceedings, which were filed on June 4 and 5, 2003, are time barred under section 546(a)(1)(A) because the statute of limitations expired on July 31, 2002, or two years after the order for relief in this case.

The Trustee, on the other hand, argues that the actions are covered by section 546(a)(1)(B) which provides for a one year extension of the statute of limitations from the time the Trustee was appointed. The Trustee was appointed under section 701(a)(1) which provides that "[p]romptly after the order for relief under this chapter, the United States trustee shall appoint one disinterested person . . . to serve as interim trustee." 11 U.S.C. § 701(a)(1). Section 702 provides for the election of a trustee but states that "[i]f a trustee is not elected under this section, then the interim trustee shall serve as trustee in the case." 11 U.S.C. § 702(d). In this case, no trustee was elected and the Trustee continues to serve as the trustee. Consequently, the Trustee argues that he is the first trustee appointed in the case for purposes of section 546.

The Defendants, however, argue that section 546(a)(1)(B) does not consider the appointment of an interim trustee under section 701 a triggering event for the additional one year period

² As a result of multiple interpretations by various courts, section 546(a)(1) was revised in 1994.

because section 546(a)(1)(B) does not mention section 701. Instead, section 546(a)(1)(B) references only sections 702, 1104, 1163, 1202, or 1302. The Defendants argue that section 546(a)(1) is clear and unambiguous³ and that the exclusion of section 701 demonstrates congressional intent that the additional one year statutory period apply only in limited circumstances, namely, the election of the permanent trustee under section 702.

The Defendants cite Singer v. Kimberley-Clark Corp., d/b/a Neenah Papers (In re American Pad & Paper Co.), 307 B.R. 459 (Bankr. D. Del. 2004) as supportive of their position. In that case, Judge Fitzgerald, sitting as a visiting judge in this District, stated that the Court "cannot read into § 546(a)(1)(B) a reference to § 701 with respect to appointment of interim trustees who do not become [permanent] trustees." Id. at 462.

We do not, however, find that the decision of Judge Fitzgerald in American Pad mandates granting the motions to dismiss in these cases. In that case, an interim trustee was appointed within two years from the petition date. Id. at 460.

³ "[W]here as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989) (quoting Caminetti v. United States, 242 U.S. 470, 485 (1917)). Therefore, the plain meaning of the statute will govern, "except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of the drafters'." Ron Pair, 489 U.S. at 242 (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982)).

However, a permanent trustee was later elected (after the two years had expired). Id. No suit was filed by the interim trustee, although suit was filed by the permanent trustee within one year from the permanent trustee's election (and the interim trustee's appointment). Id. Judge Fitzgerald concluded that this filing was beyond the time permitted by section 546. Id. at 462. Nonetheless, Judge Fitzgerald noted that if the facts were the same as those presented in this case, the filing would be timely: "The language of § 702(d) is such that if the interim trustee remains as the case trustee and if the interim trustee files an action within one year of being appointed (assuming the appointment was within two years after the bankruptcy was filed) the action would be timely." Id. at 460-61. Thus, the American Pad case supports the Trustee's position rather than the Defendants' position.

In a recent opinion, Judge Case, also sitting as a visiting judge in this District, came to the same conclusion on facts very similar to these cases. Burtch v. Georgia-Pacific Corp. (In re Allied Digital Technologies Corp.), 300 B.R. 616 (Bankr. D. Del. 2003) (holding that statute of limitations extension under section 546 runs from appointment of first interim trustee). Judge Case stated that, although section 546(a) does not specifically reference the appointment of a trustee under section 701, "Section 702(d) ratifies the appointment of the trustee done

under [section] 701, and as a result, a section 701 trustee becomes a section 702 trustee via section 702(d)." Id. at 619.

Thus, there is no real division in this District over the application of section 546 under the circumstances presented in this case. Under both cases, the courts agree that where no permanent trustee is elected the interim trustee has the benefit of the extension of the statute of limitations. But see Turner v. J.P. Bolduc, et al. (In re Crowe Rope Industries, LLC), 311 B.R. 313, 314 (Bankr. D. Me. 2004) (holding that statute of limitations is extended for interim trustee but only when he is appointed the permanent trustee by operation of § 702(d) at the § 341 meeting of creditors if that occurs within two years from the order for relief).

In a case decided under the prior version of section 546, the Ninth Circuit concluded that the phrase "first trustee" mandates that the statute of limitations begin on the appointment of the interim trustee because the interim trustee is the "first trustee." The Court explained:

an interim trustee appointed under § 701 is the "functional equivalent" of a permanent trustee elected under § 702. This is so because the Bankruptcy Code does not require the permanent trustee to do anything different than that which he had already been doing as the interim trustee. . . . Indeed, all Chapter 7 trustees, including the interim trustee, have the same rights, powers, and duties, including the power to assert claims governed by § 546(a)(1).

Avalanche Maritime, Ltd. v. Parekh (In re Parmetex, Inc.), 199 F.3d 1029, 1033 (9th Cir. 1999).

This reasoning is equally applicable under amended section 546. Moreover, section 701(c) expressly states that "[a]n interim trustee serving under this section is a trustee in a case under this title." 11 U.S.C. § 701(c). If the creditors do not elect a trustee, the interim trustee becomes the permanent trustee by virtue of section 702(d).

The Trustee also argues that this conclusion is supported by the language of section 546(a)(1)(B) which states that the additional one year is triggered by the "appointment or election of the first trustee." Thus, he argues that section 546(a)(1)(B) is triggered by the election of a permanent trustee under section 702 or by the appointment of an interim trustee under section 701 and 702(d).

The Defendants, however, argue that this interpretation is not mandated by the language of section 546. They note that the "appointment or election" language is included because the other sections listed in section 546(a)(1)(B) - sections 1104, 1163, 1202 and 1302 - provide for both appointment and election of trustees. See General Elec. Capital Auto Lease, Inc. v. Broach (In re Lucas Dallas, Inc.), 185 B.R. 801, 806 n.5 (B.A.P. 9th Cir. 1995) ("Every section listed, other than section 702, refers to the 'appointment' of a trustee. Congress thus used 'appointment' as a generic term to indicate the event under the relevant sections that triggers the two-year statute of

limitations.").

We agree with the Trustee that if the trigger date for extending the statute of limitations is only the "election" of a trustee under section 702, which practically never happens, then it would not be consistent with the language of section 546. Section 546 gives an extension of the statute of limitations to trustees who are elected or appointed under, inter alia, section 702. An interim trustee is appointed and becomes a section 702 trustee if no trustee is elected. Therefore, we conclude that an interim trustee, who is appointed within two years of the order for relief and who becomes the permanent trustee by operation of section 702(d), is entitled to the extension of the statute of limitations provided by section 546(a)(1)(B).

Since the Trustee was appointed within the two years of the order for relief and became the permanent trustee under section 702(d) when no trustee was elected, he is entitled to the one year extension of time to file avoidance actions granted by section 546(a)(1)(B). The complaints in these cases were filed within one year of the appointment of the Trustee (July 30, 2002). Therefore, there is no basis to dismiss the complaints.

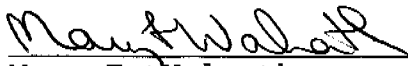
IV. CONCLUSION

For the reasons set forth above, the Motions to Dismiss will be denied.

An appropriate order is attached.

BY THE COURT:

Dated: August 20, 2004



Mary F. Walrath
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE


IN RE:	)	Chapter 7
)	
U.S. WOOD PRODUCTS, INC.,)	
)	
Debtor.	)	Case Nos. 00-3198 (MFW)
)	
<u>MONTAGUE CLAYBROOK, Chapter 7</u>)	(Jointly Administered)
<u>Trustee,</u>)	
)	
Plaintiff,)	
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v.)	
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PONDEROSA INDUSTRIAL DE)	Adv. Proc. No. 03-53670
MEXICO,)	
)	
DARLINGTON VENEER CO., INC.)	Adv. Proc. No. 03-53569
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ATLANTIC VENEER CORPORATION,)	Adv. Proc. No. 03-53544
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GEORGIA-PACIFIC CORPORATION,)	Adv. Proc. No. 03-53597
)	
LIBERTY WOODS INTERNATIONAL,)	Adv. Proc. No. 03-53625
INC.,)	
)	
PANOLAM INDUSTRIES, INC.,	)	Adv. Proc. No. 03-53656
)	
Defendants.)	

ORDER

AND NOW, this 20th day of August, 2004, upon consideration of the Motions to Dismiss filed by the Defendants and the responses thereto filed by the Trustee and for the reasons set forth in the accompanying Opinion, it is hereby

ORDERED that the Motions to Dismiss are DENIED.

BY THE COURT:



Mary F. Walrath
United States Bankruptcy Judge

cc: Michael G. Menkowitz, Esquire¹

¹ Counsel shall distribute a copy of this Order to all interested parties and file a Certificate of Service with the Court.

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