

In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

DIRECT TRANSIT INC.

Bankruptcy No. 96-52691XS

Debtor(s).

Chapter 11

OFFICIAL COMMITTEE OF GENERAL
UNSECURED CREDITORS

Adversary No. 98-9250S

Plaintiff(s)

vs.

NYEMASTER GOODE VOIGTS WEST
HANSELL & O'BRIEN

Defendant(s)

RULING MOTION TO DISMISS

Nyemaster, Goode, Voigts, West, Hansell & O'Brien (Nyemaster), the defendant, moves to dismiss the amended complaint. Plaintiff, the Official Committee of General Unsecured Creditors (Committee), resists. The matter was submitted to the court without oral argument. For the reasons stated hereafter, the motion to dismiss will be denied.

Direct Transit, Inc. (debtor) filed its chapter 11 petition on October 21, 1996. The Committee was given authority by the court to file actions to recover preferences and fraudulent conveyances. It filed a complaint against Nyemaster on October 20, 1998, seeking to avoid as preferences four transfers to Nyemaster aggregating \$74,767.67.

On October 21, 1998, the Committee filed an amended complaint (docket no. 3). Under its Count I, Committee again sought to avoid the same four transfers as preferences under § 547(b). Count II of the amended complaint was new. It alleged that 15 transfers by debtor to Nyemaster were avoidable as fraudulent conveyances under § 548(a) and under § 544(b) which implicates state law. It sought to avoid them. The 15 transfers, which took place in the year prior to the bankruptcy petition, totaled \$99,886.93 (Committee's total is \$99,887.83), and the total includes the transfers of \$74,767.67 alleged as preferential in the original complaint and in Count I of the amended complaint.

Nyemaster filed an answer to the original complaint (docket no. 10) on December 3, 1998. Later, it was served with the amended complaint. It moved to dismiss the amended complaint on December 18, 1998 (docket no. 9).

Nyemaster contends that the two-year statute of limitations for filing proceedings to avoid preferences and fraudulent conveyances expired in this case on October 20, 1998. As a result, it says, the amended

complaint should be dismissed. I take the motion to mean that Count II of the amended complaint should be dismissed, as Nyemaster makes no argument that the original preference claim was not timely filed.

Committee resists the motion, asserting that the amended complaint itself was timely filed, but that even if it were not, under Fed.R.Civ.P. 15(c), the amendment would relate back to the date of the original complaint which was timely. Nyemaster contends that the amendment should not relate back.

Section 546(a) is the relevant statute of limitations. It provides that

[a]n 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.

11 U.S.C. § 546(a).

The parties appear to agree that this proceeding could not have been timely commenced under the statute after two years after the order for relief in the case. Debtor's bankruptcy filing was voluntary, so its case was commenced by the filing of its petition. 11 U.S.C. § 301. The commencement of the case on October 21, 1996 constituted an order for relief. Id. The committee had two years thereafter to timely file this proceeding. The dispute involves how the two-year period is computed.

Committee contends that the time computation must be done in accordance with Fed.R.Bankr.P. 9006 (a). The Rule provides that in computing a time period prescribed by an applicable statute, the day of the act or event from which the time period runs is not counted, but the last day of the period is counted unless it is a weekend day or holiday. Under the Rule, October 22, 1996 would be the first day of the period; two years after that date would expire October 21, 1998. If Rule 9006(a) is applicable in determining the limitations period under § 546(a), then the last day for filing the complaint in this case was October 21, 1998.

Nyemaster argues that October 21, 1996 is counted as part of the period and that the statute expired October 20, 1998. To support its argument, Nyemaster cites Mattson v. U.S. West Communications, Inc., 967 F.2d 259 (8th Cir. 1992). In that case, the Circuit Court counted the day of the alleged violation in determining whether an action was timely filed under the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 et seq. Section 1692k(d) of the Act prescribed a one-year time period from the date of a violation of the Act for filing actions in federal courts. The Circuit Court ruled that § 1692k (d) was jurisdictional. Mattson, 967 F.2d at 262. Relying on Fed.R.Civ.P. 82, it ruled that Fed.R.Civ.P. 6(a) could not be used to determine if jurisdiction existed. Id. Rule 6(a) provides the same method of computing time as does Fed.R.Bankr.P. 9006(a).

I do not believe that Mattson applies to this proceeding. The time limits of § 546(a) are not jurisdictional. Support for this is found in Smith v. Mark Twain National Bank, 805 F.2d 278, 293-94 (8th Cir. 1986)(limitations period for bringing an action under § 549 of the Bankruptcy Code is not jurisdictional). The basis of this court's jurisdiction is 28 U.S.C. § 1334 and the reference by the district court under 28 U.S.C. § 157(a). Bankruptcy Rule 9006(a) provides the appropriate computation method. Southern Technical College, Inc. v. Arkansas Television Co. (In re Southern Technical College, Inc.), 172 B.R. 253, 254 (Bankr. E.D. Ark. 1994)(denying motion to dismiss and motion to reconsider).

In this case, the statute of limitations under § 546(c) expired on October 21, 1998. The Committee's amended complaint was timely filed and should not be dismissed. I do not reach the Rule 15(c) arguments.

IT IS ORDERED that the defendant's motion to dismiss is denied.

SO ORDERED THIS 10th DAY OF FEBRUARY 1999.

William L. Edmonds

Chief Bankruptcy Judge

I certify that on ____ I mailed by U.S. mail or provided a copy of this order to Thomas Flynn, Stephen Garcia, Wil Forker, and U.S. trustee.