



Dated: August 24, 2018
The following is SO ORDERED:


David S. Kennedy
UNITED STATES CHIEF BANKRUPTCY JUDGE

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

In re

William H. Thomas, Jr.,

Case No. 16-27850-K

Debtor.

Chapter 11

SSN: xxx-xx-8251

**MEMORANDUM AND ORDER RE JOINT MOTION FOR AUTHORIZATION TO
MAINTAIN AND PROSECUTE ADVERSARY PROCEEDINGS TO AVOID
FRAUDULENT AND/OR PREFERENTIAL TRANSFERS COMBINED WITH ENTRY
OF THE NOTICE THEREOF**

INTRODUCTION

On June 4, 2018, Creditors Tennison Brothers, Inc. and Clear Channel Outdoor, Inc. (collectively "Movants") filed a joint motion for authorization to maintain and prosecute certain adversary proceedings seeking to avoid asserted fraudulent and/or preferential transfers. (Dkt.

no. 374.) On June 10, 2018, Debtor, William Thomas, Jr. ("Debtor" or "Debtor-In-Possession"), filed an objection to this motion. (Dkt. no. 383.) Whereupon Movants responded to this objection on June 16, 2018. (Dkt. no. 389.) For the reasons discussed below, Movants' motion is hereby granted.

JURISDICTION

This Court has jurisdiction to hear and determine the instant proceedings under 28 U.S.C. §§ 157 and 1334. This is a core proceeding under 28 U.S.C. § 157(b)(2)(F) and (H).

BACKGROUND FACTS

The parties have spent a great deal of time and energy arguing about the circumstances concerning the transfers made by Debtor prior to filing this Chapter 11 case; however, for the purpose of determining if derivative standing is appropriate here, the following background facts are the only facts the Court needs to consider.

Debtor filed this Chapter 11 petition on June 2, 2016. (Dkt. no. 1.) Movants subsequently filed a motion seeking derivative standing on June 4, 2018. (Dkt. no. 374.) Movants also filed adversary proceeding number 18-00131 seeking to recover alleged fraudulent transfers and/or preferences on June 4, 2018. (Dkt. no. 375.)

In their motion and complaint, Movants allege that Debtor transferred certain real property to his wife for little or no consideration. Movants further allege that Debtor also transferred \$170,000 in cash to his wife without receiving equivalent value in return. At Debtor's deposition on May 8, 2018, he indicated, as debtor-in-possession, that he had no plans to pursue the recovery of these transfers.

Movants additionally allege that these transfers are voidable under the Tennessee Uniform Fraudulent Transfer Act, the Bankruptcy Code, or both.

DISCUSSION

In order to have derivative standing to pursue an avoidance action, a creditor must: 1) make a demand upon the statutorily authorized party to take action (e.g., the trustee, or debtor-in-possession)¹; 2) the demand is declined; 3) a colorable claim that would benefit the estate if successful exists; and 4) the inaction is unjustified in light of the debtor-in-possession's duties in a Chapter 11 case. *See, for example, In re Trailer Source, Inc.*, 555 F.3d 231, 245 (6th Cir. 2009).

Movants allege, and Debtor has not denied, that a demand to pursue these avoidance actions was made and that the Debtor, acting as debtor-in-possession, declined to pursue such actions. Debtor's contentions for why derivative standing should not be granted are twofold. First, that Movants were not granted derivative standing prior to initiating their adversary proceeding and that derivative standing cannot be granted retroactively. Second, that Movants have not presented a colorable claim.

1. Must Derivative Standing Be Granted Before An Adversary Proceeding Can Be Filed?

Debtor argues that a plaintiff must obtain derivative standing before filing an adversary proceeding. While the instant matter was pending, the Sixth Circuit Court of Appeals ruled on this very issue, noting:

[Creditor argues that Debtor] lacks derivative standing because she did not seek it until after filing her adversary complaint. **This argument fails, however, because such a bright-line rule would be inconsistent with the equitable nature of derivative standing.** As we have previously recognized, “the ability to confer derivative standing ... is a straightforward application of bankruptcy courts’ equitable powers,” among which is the power “to craft flexible remedies in situations where the [Bankruptcy] Code’s causes of action fail to achieve their

¹ It is noted here that 11 U.S.C. § 1107(a) places a debtor-in-possession in the fiduciary shoes of a bankruptcy trustee in every way. As further explained by the Historical and Revision Notes accompanying § 1107(a), the debtor-in-possession is given the same rights and powers of a Chapter 11 trustee. *See also* 11 U.S.C. § 1106(a). By virtue of 11 U.S.C. § 323(a)-(b), the trustee (or debtor-in-possession) is the statutory representative of the § 541(a) estate and has the capacity to sue or be sued.

intended purpose.” *Hyundai Translead, Inc. v. Jackson Truck & Trailer Repair, Inc.* (*In re Trailer Source, Inc.*), 555 F.3d 231, 242 (6th Cir. 2009) (ellipsis in original) (quoting *Official Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery*, 330 F.3d 548, 567, 568 (3d Cir. 2003)). A bright-line rule that bankruptcy courts may never authorize derivative standing after a debtor has filed an adversary complaint would frustrate this flexible equitable power. Moreover, such a rule would deviate from the practice of the “[n]umerous federal courts [that] have allowed retroactive grants of derivative standing under appropriate circumstances.” *Official Comm. of Unsecured Creditors of Nat’l Forge Co. v. Clark* (*In re Nat’l Forge Co.*), 326 B.R. 532, 545–46 (W.D. Pa. 2005) (collecting cases); *see also PW Enters. v. N.D. Racing Comm’n* (*In re Racing Servs., Inc.*), 540 F.3d 892, 903–04 (8th Cir. 2008).

In re Isaacs, 895 F.3d 904, 916 (6th Cir. 2018). In that case, the debtor did not seek derivative standing until seven months after the adversary was filed and the Sixth Circuit Court of Appeals nonetheless allowed derivative standing to be granted.

In this case, Movants filed their motion for derivative standing the same day on which they filed the adversary proceeding. Therefore, the Court believes under a totality of the particular facts and circumstances and applicable law that the motion for derivative standing here was timely and derivative standing may be granted in favor of Movants if they can otherwise satisfy the requirements of derivative standing.

2. Have Movants Made a Colorable Claim?

Movants must show that a colorable claim exists and that such a claim will benefit the estate. *In re Trailer Source, Inc.*, 555 F.3d 231, 245 (6th Cir. 2009). To make such a determination, courts look to the face of the complaint. *Id.* This is important because both Debtor and Movants spent a large portion of their pleadings debating about the sufficiency of evidence; however, this is not the appropriate stage of these actions for the Court to be weighing evidence. Instead, the appropriate standard at this time is akin to that used to determine if a complaint has failed to state a claim. *See, for example, In re Grand Eagle Companies, Inc.*, 310

B.R. 79, 95 (N.D. Ohio 2004); *In re America's Hobby Center, Inc.*, 223 B.R. 275, 282 (Bankr.S.D.N.Y.1998); *see also In re KDI Holdings, Inc.*, 277 B.R. 493 (Bankr.S.D.N.Y.1999).

To this end, any factual allegations made by Debtor in his response are ignored and the Court should only consider the allegations contained in the proposed complaint. Just as it would for a motion to dismiss for failure to state a claim, the Court will accept all well-pled allegations as true when determining if Movants have made a colorable claim.

Movants allege that Debtor transferred a 100% interest in certain real property to his wife for \$10.00. They allege the property was worth significantly more than \$10.00. Accepting the allegations as true, this is a colorable claim that a fraudulent transfer may have occurred under 11 U.S.C. § 548(a)(1)(B)(IV). Movants also allege that this transfer occurred while Debtor was appealing a Tennessee State Court judgment in favor of Movants and that the transfer constitutes an intent to hinder, delay, or defraud them; this is a colorable claim under 11 U.S.C. § 548(a)(1)(A).

Movants further allege that Debtor transferred, gifted, or paid \$100,000 and \$70,000 to his non-filing spouse on June 26, 2015 and April 20, 2016 respectively. These are also colorable claims under 11 U.S.C. § 548(a)(1)(B)(IV).

While these allegations may not be true or Debtor may have some other defense, weighing the evidence at this stage of the litigation is not appropriate. At this stage of the proceedings, the Court must simply look to the complaint to determine if a colorable claim has been made. Considering a totality of the particular facts and circumstances and applicable law, the Court finds that Movants have made a colorable claim.

3. Were Movants Time Barred From Filing Their Complaints?

Debtor argues that Movants cannot file their complaints because the statute of limitations had expired. Section 546 limits when an avoidance action may be brought. Under § 546(a)(1)(A), if such an action is brought within 2 years of the filing of the petition, it is considered timely. Debtor filed his Chapter 11 petition on June 2, 2016. Movants filed their avoidance actions on June 4, 2018. While this appears to be outside of the two-year period, Federal Rule of Bankruptcy Procedure 9006(a)(1)(C) states that "if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday." Therefore, because June 2, 2018 was a Saturday, Movants had until the end of day June 4, 2018 to file their complaint. Because the complaint was filed on June 4, 2018, it was timely.

4. Is The Debtor-In-Possession's Refusal To Seek Recovery Of The Transfers Unjustified?

The Debtor-In-Possession has a statutory obligation and a fiduciary duty to act in the best interest of the estate. 11 U.S.C. § 1106(a). If we accept the allegations in the complaint as true, the Debtor-In-Possession has an obvious conflict of interest. Potentially, the estate could recover hundreds of thousands of dollars, while Debtor's wife would lose an equal amount. Based on the allegations in the complaint, the alleged transfers appear to be of the type this Court would expect a traditional bankruptcy trustee, were one appointed, to pursue. Considering all of the facts and circumstances and applicable law, the Court finds that the Debtor-In-Possession's refusal to seek recovery is sufficiently unjustified.

CONCLUSIONS

Movants have met their burden for achieving derivative standing. They made a demand upon the Debtor-In-Possession to take action; the demand was declined; a colorable claim that would benefit the estate if successful exists; and the Debtor-In-Possession's inaction is

unjustified in light of the Debtor-In-Possession's statutory duties to the estate and creditors.

Additionally, it is expressly noted that derivative standing may be granted retroactively.

Accordingly, based on all the foregoing, IT IS ORDERED AND NOTICE IS HEREBY GIVEN that:

1. Tennison Brothers, Inc. and Clear Channel Outdoor, Inc.'s Joint Motion for Authorization to Maintain and Prosecute Adversary Proceedings to Avoid Fraudulent and/or Preferential Transfers is hereby **GRANTED**.
2. The Bankruptcy Court Clerk shall cause a copy of this Memorandum, Orders, and Notice of the entry thereof to be sent to the following interested entities:

Michael P. Coury, Esq.
Attorney for the Debtor-In-Possession
Glankler Brown PLLC
Suite 400
6000 Poplar Avenue
Memphis, TN 38119

Mr. William H. Thomas, Jr.
Debtor-In-Possession
13599 Perdido Key Dr.
Unit T-SH2A
Pensacola, FL 32507

Kathy Baker Tennison, Esq.
Attorney for the Tennison Brothers, Inc.
8295 Tournament Drive, Suite 150
Memphis, TN 38125

Robert J. Spence, Jr., Esq.
Attorney for Clear Channel Outdoor, Inc.
80 Monroe Avenue, Garden Suite One
Memphis, TN 38103

Kristinia Woo, Esq.
Attorney for Clear Channel Outdoor, Inc.
80 Monroe Avenue, Garden Suite One
Memphis, TN 38103

Sean M. Haynes, Esq.
Assistant US Trustee for Region 8
One Memphis Place
200 Jefferson Ave., Suite 400
Memphis, TN 38103

Additional courtesy copies to:

Jessica Lyn Indingaro, Esq.
Glankler Brown, PLLC
6000 Poplar Avenue, Suite 400
Memphis, TN 38119

Adam Michael Langley, Esq.
Butler Snow, LLP
PO Box 171443
Memphis, TN 38187

Jonathan T. Skrmetti, Esq.
Butler Snow LLP
6075 Poplar Ave, Suite 500
Memphis, TN 38119

Stuart B. Breakstone, Esq.
1661 International Place Drive, Suite 400
Memphis, TN 38120