

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)
)
WILLIAM MARK OLSEN,) CASE NO. BK98-40929
)
Debtor.) A01-4009
_____)
JONI SUE OLSEN,)
) CH. 7
Plaintiff,)
vs.)
)
WILLIAM MARK OLSEN,)
GRACE L. OLSEN, & GLO, INC.,)
)
Defendants.)

MEMORANDUM

Hearing was held in Lincoln, Nebraska, on July 25, 2001, on the Motion to Dismiss and alternative Motion to Strike filed by defendants Grace L. Olsen and GLO, Inc. (Fil. #17), and Resistance by the Plaintiff (Fil. #23). Robert Brenner appeared for the plaintiff, James Nisley appeared for the debtor, and Susan Williams appeared for the movants. This memorandum contains findings of fact and conclusions of law required by Fed. R. Bankr. P. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(H).

This adversary proceeding was filed on March 9, 2001, to avoid alleged fraudulent transfers by the debtor to Grace Olsen and GLO, Inc. Plaintiff alleges numerous transactions having to do with farmland and farming operations between and among the defendants, which were allegedly undertaken to hinder, delay, or defraud creditors such as Plaintiff, who is the debtor's former wife. The plaintiff asserts that she and defendant Grace Olsen are the only secured creditors in the bankruptcy case.

Defendants Grace Olsen and GLO, Inc. have moved to dismiss the complaint for failure to state a claim against them, or, in the alternative, to strike those portions of the complaint which are beyond the applicable statute of limitations.

The first issue is standing. Actions to avoid fraudulent

transfers are covered in 11 U.S.C. §§ 544 and 548. Those sections give the bankruptcy trustee the power to take action to avoid certain transfers of the debtor's interest in property. That power is granted only to the trustee, not to creditors. See Glenny v. Langdon, 98 U.S. 20, 27-28 (1878):

Creditors can have no remedy which will reach property fraudulently conveyed, except through the assignee [trustee], for two reasons: 1. Because all such property, by the express words of the Bankrupt Act, vest in the assignee by virtue of the adjudication in bankruptcy and of his appointment. 2. Because they cannot sustain any suit against the bankrupt.

See also Hall v. Sunshine Mining Co. (In re Sunshine Precious Metals, Inc.), 157 B.R. 159, 162 (Bankr. D. Idaho 1993):

. . . A creditor of a debtor does not have standing to assert an action against a third party if the creditor has only suffered a general injury, common to all creditors and derivative of injury to the debtor, and if the trustee (or debtor in possession) has standing to assert the cause of action against the third party.

See also Best Mfg., Inc. v. White Plains Coat & Apron Co. (In re Daniele Laundries, Inc.), 40 B.R. 404, 408 (Bankr. S.D.N.Y. 1984):

It is axiomatic that a duly qualified trustee in bankruptcy represents the estate and is the only proper party to maintain any action under Code § 544(b), or the predecessor provision in § 70(e) of the former Bankruptcy Act, and that the creditors of the estate have no right to proceed independently in their own names or on behalf of the estate.

In the case at bar, the complaint contains no reference to authorization of any kind by the trustee to prosecute this action in his stead. In fact, the trustee abandoned all but four specified assets; this cause of action was not one of the assets claimed for administration and distribution. Moreover, the court's Journal Entry of December 29, 2000 in Joni Sue Olsen v. William Mark Olsen, Case No. A99-4067 (Fil. #25), specifically paragraph two of that order, impliedly authorized the plaintiff to bring this action on behalf of the trustee. Therefore, the

motion to dismiss for lack of standing is denied.

The second issue is the statute of limitations. Section 546(a) of the Bankruptcy Code governs the time frame for bringing an avoidance action:

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 . . . ; or
- (2) the time the case is closed or dismissed.

In this case, the relevant dates include:

- Order for relief May 1, 1998
- Appointment of Ch. 13 Trustee . . . May 1, 1998
- Case converted to Ch. 7 &
Ch. 7 Trustee appointed May 28, 1999
- Successor trustee appointed . . . June 7, 1999
- This adversary case filed March 9, 2001

Although the debtor has been discharged, the case has not been closed because of the pending adversary proceedings.

Under § 546(a), this fraudulent conveyance action should have been filed, at the latest, on or before May 1, 2000, the second anniversary of the order for relief. If the deadline used is one year from the date of the trustee's appointment, that period expired on May 1, 1999, because the time period as calculated from the appointment of a trustee begins to run upon the appointment of the first trustee, and does not begin anew with the appointment of subsequent trustees. Lee v. National Home Ctrs., Inc. (In re Bodenstein), 248 B.R. 808, 814 (Bankr. W.D. Ark. 2000) (citing McCuskey v. Central Trailer Svcs., Ltd., 37 F.3d 1329, 1332 (8th Cir. 1994)).

Plaintiff asserts that she relied on orders of this court regarding the filing of this action. Specifically, the court's Journal Entry of December 29, 2000 in the case of Joni Sue Olsen v. William Mark Olsen, Case No. A99-4067 (Fil. #25), directed Plaintiff's counsel to decide whether to proceed to trial on non-dischargeability in A99-4067, or "file a fraudulent transfer case to be combined for trial with this case in the summer of

2001." Id. at ¶ 2. Plaintiff's counsel notified the court that he expected to file a fraudulent transfer case in late February 2001. See Letter from Mr. Brenner (Fil. #27 in A99-4067).

The limitations period in § 546(a) had long expired as of the date of the court's order in December 2000 and the filing of this case in early 2001. The statute of limitations was not raised by any party, however, and was not considered by the court before authorizing Plaintiff to proceed with the present lawsuit. The court could not have ruled on the applicability of the statute of limitations in a particular case without the appropriate pleadings filed in an adversary proceeding.

In summary, then, the statute of limitations under 11 U.S.C. § 546(a) bars this lawsuit as against defendants Grace L. Olsen and GLO, Inc.

The issues of a state statute of limitations applicable to fraudulent transfer actions, its effect on the claims in this case, and any state court remedies the plaintiff may have, are not addressed here.

IT IS ORDERED the Motion to Dismiss (Fil. #17) by Grace L. Olsen and GLO, Inc. is granted, and the claims against defendants Grace L. Olsen and GLO, Inc. are dismissed.

Separate journal entry to be filed.

DATED: October 26, 2001

BY THE COURT:

/s/Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

Copies faxed by the Court to:

*Susan Williams, Atty. for Co-defendants, 308/532-9792
Robert Brenner, Atty. for Plaintiff, 308/436-7262
James Nisley, Atty. for Debtor/Defendant, 308/534-7666

Copies mailed by the Court to:

United States Trustee

Movant (*) is responsible for giving notice of this journal entry to all other parties not listed above if required by rule or statute.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)
)
WILLIAM MARK OLSEN,) CASE NO. BK98-40929
)
 Debtor.) A01-4009
_____)
JONI SUE OLSEN,)
) CH. 7
 Plaintiff,)
vs.)
)
WILLIAM MARK OLSEN,)
GRACE L. OLSEN, & GLO, INC.,)
)
 Defendants.)

JOURNAL ENTRY

IT IS ORDERED the Motion to Dismiss (Fil. #17) by Grace L. Olsen and GLO, Inc. is granted, and the claims against defendants Grace L. Olsen and GLO, Inc. are dismissed.

DATED: October 26, 2001

BY THE COURT:

/s/Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

Copies faxed by the Court to:

*Susan Williams, Atty. for Co-defendants, 308/532-9792
Robert Brenner, Atty. for Plaintiff, 308/436-7262
James Nisley, Atty. for Debtor/Defendant, 308/534-7666

Copies mailed by the Court to:

United States Trustee

Movant (*) is responsible for giving notice of this journal entry to all other parties not listed above if required by rule or statute.