

UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT

ORDER ENTERED ON:

4/19/03

Perry B...
DEPUTY CLERK

In re

STANWICH FINANCIAL SERVICES
CORP.

Ch. 11

Debtor

Case No. 01-50831

OFFICIAL COMMITTEE OF
UNSECURED CREDITORS,

Plaintiff,

v.

AP No. 02-05023

JONATHAN H. PARDEE, CAROL P.
HAVICAN, INDIVIDUALLY AND AS
TRUSTEE OF THE JONATHAN H.
PARDEE CHARITABLE REMAINDER
TRUST, OGDEN H. SUTRO, VIRGINIA
S. MORSE, INDIVIDUALLY AND AS
CO-TRUSTEE OF THE DUNBAR
HEELER TRUST, PETER M. DODGE,
INDIVIDUALLY AND AS CO-TRUSTEE
OF THE DUNBAR WHEELER TRUST,
BEAR, STEARNS & CO., INC., FIRST
UNION CAPITAL MARKETS
CORPORATION, HINCKLEY, ALLEN
& SNYDER, LLP, CAMERON &
MITTLEMAN, LLP, SCOTT A. JUNKIN,
PC, ROBINSON- HUMPHREY CO., LLC:

Defendants

Re: 61 + 51

APPEARANCES:

Robert U. Sattin, Esq.
Carol Felicetta, Esq.
Reid and Riege, PC
One State Street
Hartford, CT 06103-3185

Attorneys for the debtor

Standard for dismissal under 12(b)(1) and (6)

In considering a motion to dismiss under Rule 12(b)(1) and (6),² courts “must accept the material facts alleged in the complaint as true and construe all inferences in the plaintiff’s favor.” *Hirsch v. Arthur Andersen & Co.*, 72 F.3d 1085, 1088 (2nd Cir.1995); *Grant v. Wallingford Board of Education*, 69 F.3d 669, 672 (2nd Cir. 1995). As the United States Supreme Court has instructed, “a court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 507 (2002), *citing Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

Rule 12(b)(6) motion to dismiss Counts I and II

Counts I and II seek the avoidance of transfers to the movants on the basis that they engaged in intentional and constructive fraud as defined by Rhode Island General Laws 6-16-4 and 6-16-5, made applicable to this case by code § 544(b)(1). Counts I and II seek the same result under code § 548. The movants argue the fraud theories advanced by the plaintiff in those counts are barred by the applicable statutes of limitations. The Committee responds that the statutes of limitations were equitably tolled. The movants counter that the factual predicate for equitable tolling either was not alleged or not available as a matter of law.

The movants contend that while the Rhode Island statute of limitations specifically recognizes the applicability of equitable tolling in the context of actual fraud, it is silent as to constructive fraud. *See February 27, 2003 hearing record* at 11:36. That argument ignores Rhode Island General Law § 9-1-20, which provides that if any cause of action, *e.g.*, for actual or constructive fraud, is concealed, the limitation period will not begin to

²Rule 12 (b) provides, in pertinent part: “Defenses and Objections . . . the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter . . . (6) failure to state a claim upon which relief can be granted”

accrue until the cause of action has been discovered.³ See *Waters v. Salt Disney World Co.*, 237 F.Supp.2d 162, 167 (D. R.I. 2002).

Here, Counts I and II allege that Pardee and Sutro concealed certain facts, had actual or constructive knowledge of other facts, and participated in a scheme to deplete the debtor's assets. See *Complaint* at ¶¶ 6, 9, 33, 34, 37, 47, 52, 54-58, incorporated into Count I by ¶ 72 and Count II by ¶ 80. The Committee has alleged that it "did not discover nor could [it] have discovered with reasonable diligence the facts giving rise to this Complaint any earlier than one year prior to the date [it was filed]." *Complaint* at ¶2.⁴

The movants argue that code § 548 provides a fixed one year window within which a fraudulent transfer must have occurred to avoid the transfer.⁵ As the Committee correctly

³Rhode Island General Law § 9-1-20 provides "if any person, liable to an action by another, shall fraudulently, by actual misrepresentation, conceal from him or her the existence of the cause of action, the cause of action shall be deemed to accrue against the person so liable at the time when the person entitled to sue thereon shall first discover its existence."

⁴The movants assert that as the sole owner and shareholder of the debtor, Charles E. Bradley's knowledge of the scheme should be imputed to the debtor under principles of agency. That result is not warranted in the context of a motion to dismiss, because Bradley's interest was arguably adverse to the debtor. See, e.g., *In re Candor Diamond Corp.*, 76 B.R. 342, 350-1 (Bankr. S.D.N.Y. 1987). See also *February 27, 2003 hearing record* at 12:12.

⁵Section 548 provides:

(a)(1) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily—

(A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

(B)(i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(ii) (I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor

observes, however, the doctrine of equitable tolling is generally read into every federal statute, unless Congress expressly provides to the contrary in clear and unambiguous language.

It is hornbook law that limitations periods are customarily subject to equitable tolling . . . Congress must be presumed to draft limitations periods in light of this background principle. That is doubly true when it is enacting limitations periods to be applied by bankruptcy courts, which are courts of equity and apply the principles and rules of equity jurisprudence.

Young v. United States, __ U.S. __, 122 S.Ct. 1036, 1039 (2002) (internal citations, ellipses and quotation marks omitted); *Atlantic City Elec. Co. v. General Elec. Co.*, 312 F.2d 236, 239 (2nd Cir.1962).⁶

Under the doctrine of wrongful concealment, “the statute of limitations will be tolled if the plaintiff proves three elements: (1) wrongful concealment by the defendant, (2) which prevented the plaintiff’s discovery of the nature of the claim within the limitations period, and (3) due diligence in pursuing discovery of the claim.” *Butala v. Agashiwala*, 916 F.Supp. 314, 319 (S.D.N.Y.1996) (cited in *G-I Holdings v. Baron & Budd*, 238 F.Supp.2d. 251 (2002).

As noted, the Committee has alleged in Counts I and II that the movants engaged in a systematic course of conduct which thwarted its discovery of the instant causes of action. See *Complaint* at ¶¶ 6, 9, 33, 34, 37, 47, 52, 54-58, as incorporated by ¶¶72 and 80. Accepting those material allegations and construing them in the Committee’s favor, as required in this analysis, see *supra* at 3, the motion to dismiss Counts I and II must be denied.

was an unreasonably small capital; or

(III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor’s ability to pay as such debts matured.

It is undisputed that the transfers at issue occurred more than one year before the petition date.

⁶Movants’ reliance on *Hassett v. Zimmerman (In re O.P.M. Leasing Services, Inc.)* 32 B.R. 199 (Bankr. S.D.N.Y. 1983) for the proposition that the lookback provision in §548 is inelastic, is misplaced since that case did not involve an issue of equitable tolling. See *Sutro Memorandum in Support of Motion to Dismiss* at 4 and *February 27, 2003 hearing record* at 12:31:50.

Rule 12(b)(1) motion to dismiss Count VIII

The movants contend that the Committee lacks standing to bring Count VIII (unjust enrichment) because it alleges only that creditors have been harmed and not the debtor.⁷ See *Complaint* at ¶¶111-115. Again, construing that count in the Committee's favor, it plainly alleges that the debtor has been harmed by the movants' conduct, see *Complaint* at ¶¶1, 65, 70. Indeed, as a remedy, Count VIII seeks the imposition of a constructive trust "for the benefit of the *debtor's* estate." *Id.* at ¶115 (emphasis added).

Accordingly, the motions to dismiss are DENIED, and it is

SO ORDERED.

Dated at Bridgeport, CT this 9th of April, 2003.


Alan H. W. Shiff
United States Bankruptcy Judge

⁷Without requisite standing, the court lacks subject matter jurisdiction and the unjust enrichment count must be dismissed pursuant to Rule 12(b)(1), F.R.Civ.P. See, e.g., *Faibish v. University of Minnesota*, 304 F.3d 797, 800 (8th Cir. 2002).

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT

In Re: Official Committee of Unsecured Creditor et al. v. Carol P. Havican e

Case No: 1 - 50831
Adversary No: 02 - 05023

CERTIFICATE OF MAILING

The undersigned Clerk in the Office of the United States Bankruptcy Court hereby certifies that a copy of the document attached hereto was mailed this date to:

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Bridgeport, CT 06605, Defendant's Attorney

Office of the United States Trustee
Copy of Order placed in court mailbox

Dated: 04/09/03

By: pbb