

In re McGinnis, BAP No. OR-92-1604-JOR
McGinnis v. McGinnis, Adv. No. 91-3315
In re McGinnis, Case No. 386-05563-P11

9/27/93

Unpublished

Reversed

The bankruptcy court granted summary judgment for the debtor-in-possession on his claim to avoid a lien under 11 U.S.C. § 544(a). The bankruptcy court determined that the two year statute of limitations of 11 U.S.C. § 546(a) (a) did not apply to a debtor-in-possession because the time period does not start running until the entry of an order appointing a trustee. The BAP reversed, determining that under In re Software Centre Int'l, Inc., 994 F.2d 682 (9th Cir. 1993), the two year limitations period applied to debtors-in-possession.

NOT FOR PUBLICATION

U.S. BANKRUPTCY COURT
DISTRICT OF OREGON
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OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

9	In re)	BAP No. OR-92-1604-JOR
)	
10	LEW STEWART MCGINNIS, dba)	BK. No. 386-05563-P11
	LEW MCGINNIS CO.,)	
11)	ADV. No. 91-3315
	Debtor.)	
12	_____)	
)	
13	KELLY MCGINNIS AND DANNY)	
	MCGINNIS,)	
14)	
	Appellants,)	
15)	
	v.)	<u>MEMORANDUM</u>
16)	
	LEW S. MCGINNIS AND)	
17	MICHAEL R. MASTRO,)	
)	
18	Appellees.)	
19	_____)	

Argued and Submitted on February 17, 1992
at Portland, Oregon

Filed - SEP 27 1993

Appeal from the United States Bankruptcy Court
for the District of Oregon

Honorable Elizabeth L. Perris Bankruptcy Judge, Presiding

Before: JONES, OLLASON and RUSSELL Bankruptcy Judges.

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1 BACKGROUND

2 In the early 1980s defendant Lew McGinnis ("Lew") and
3 Credit Finance, Inc.¹ owned a real property interest in land
4 sale contracts known as the "Seattle Receivables". In July 1983
5 Lew executed and recorded deeds of trust giving a security
6 interest in all of his interest in the Seattle Receivables to
7 his children, Kelly and Danny McGinnis ("Plaintiffs"). The
8 trust deeds were recorded in the real property records, but no
9 financing statements were ever filed with the Washington
10 Department of Licensing as required by state law.

11 Thereafter Lew executed deeds of trust giving a security
12 interest in all of his interest in the Seattle Receivables to
13 defendant Michael R. Mastro ("Mastro"), who recorded the deeds
14 of trust and filed financing statements with the Department of
15 Licensing. On January 31, 1985, a subordination agreement was
16 executed on behalf of the Plaintiffs subordinating their
17 security interest to Mastro's security interest.²

18 On October 16, 1986, Lew filed for Chapter 11 protection
19 listing the Plaintiffs as secured parties in the Seattle
20 Receivables. Lew's Fifth Amended Plan of Reorganization was
21 confirmed on July 13, 1990. No trustee was ever appointed in
22 the case.

23 / / /

24
25 ¹Credit Finance, Inc., is apparently closely held by Lew.

26 ²This subordination agreement was redundant, since Mastro's
interest was perfected, and the Plaintiffs' interest was not.

1 The Plaintiffs filed an adversary complaint based on waiver
2 and estoppel seeking to invalidate the Mastro subordination
3 agreement and to establish the priority of their own liens. The
4 Defendants moved for summary judgment,³ arguing that the
5 Plaintiffs' liens were not properly perfected under Washington
6 law and therefore avoidable by Lew as debtor-in-possession under
7 § 544(a).⁴ The bankruptcy court granted Lew's motion for
8 summary judgment avoiding the Plaintiff's lien under § 544(a).
9 The Plaintiffs appeal. We reverse.

10 STANDARD OF REVIEW

11 We review the granting of a motion for summary judgment de
12 novo. E.g., In re Swanson, 36 B.R. 99 (9th Cir. BAP 1984).

13 DISCUSSION

14 The Plaintiffs argue that Lew's avoiding powers cannot be
15 exercised because of the expiration of the two-year statute of
16 limitations.

17 The Plaintiffs cite In re Johnson, 46 B.R. 167 (Bankr. E.D.
18 Pa. 1985) for the proposition that Lew, as the debtor in
19 possession, failed to comply with the two-year statute of
20 limitations provision found in § 546.

21 The bankruptcy court found the § 546 statute of limitations
22 applicable to trustees, but not to debtors-in-possession. She
23

24 ³Each defendant filed his own respective motion for summary
25 judgment. Mastro's motion was denied for lack of standing, and is
not before this panel on appeal.

26 ⁴Unless otherwise noted, all statutory citations refer to the
Bankruptcy Code, 11 U.S.C. §§ 101 to 1330.

1 found the plaintiff's reference to Zilkha Energy Co. v.
2 Leighton, 920 F.2d 1520 (10th Cir 1990), unpersuasive:

3
4 Under the reasoning of Zilkha, if a trustee
5 were appointed in Chapter 11 more than two years
6 after the petition, he or she would be barred from
7 commencing such actions even though the trustee had
8 no prior opportunity to assert the claim. While the
9 underlying Zilkha court suggests that such a
10 scenario is distinguishable, the language of the
11 statute provides no basis for such a distinction.
12 Either the words, "after the appointment of a
13 trustee," in section 546 also mean the creation of a
14 Chapter 11 debtor-in-possession by virtue of a
15 Chapter 11 order for relief or they do not. I
16 believe that they do not.

17 * * *

18 I, therefore, conclude that the statute means
19 what it says, and the limitation period in section
20 546 does not start to run until the entry of an
21 order appointment [sic] a trustee. Since no trustee
22 has been appointed in the case, Kelly and Danny are
23 not entitled to prevail as a matter of law in their
24 statute of limitations defense.

25 Trustees are distinct entities from debtors-in-possession,
26 the latter concerned with rehabilitating the company with a
confirmable plan while the former is concerned with obtaining
the maximum return for creditors. In re Hunt, 136 B.R. 437,
447-448 (Bankr. N.D. Tex. 1991). Although we might otherwise
agree with the bankruptcy court's reasoning, a recent Ninth
Circuit case holds that the statute of limitations also applies
to debtors in possession. In re Software Centre Int'l, Inc.,
994 F.2d 682 (9th Cir. 1993).

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CONCLUSION

The debtor in possession is precluded from exercising his § 544 powers. Accordingly, the bankruptcy court's entry of summary judgment is reversed and this matter is remanded.