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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

_____| |
IN RE: CASE NO. 03-76058

Webusenet, Inc.,

Debtor. CHAPTER 7
JUDGE MASSEY
_____| |

Dale R. F. Goodman, Trustee,

Plaintiff,
v. ADVERSARY NO. 05-6532

Highwinds Software, LLC,

Defendant.
_____| |

ORDER DENYING MOTION TO DISMISS

Webusenet, Inc., the Debtor in case no. 03-76058, voluntarily filed its bankruptcy petition on November 20, 2003. Dale R. F. Goodman, the Chapter 7 Trustee, filed this adversary proceeding on November 18, 2005 in which she seeks to avoid and recover a preference from Defendant Defendant Highwinds Software, LLC pursuant to 11 U.S.C. §§ 547 and 550. The Trustee obtained a summons from the Clerk on December 8, 2005 and served it on Defendant with the complaint on December 15, 2005.

The complaint alleges that in December 2002, Debtor paid Defendant \$79,200.00 in respect of an antecedent debt owed by Debtor to Defendant, that Debtor was insolvent at the time, that the transfer was made within one year of the petition date and that the transfer enabled Defendant to receive more that it would have received in a Chapter 7 case if the transfer had not

been made. These allegations track the elements of a preference under section 547, although the complaint does not specifically allege that Defendant is an insider.

Defendant moves to dismiss on three grounds. First, it contends that because the complaint fails to allege that Defendant is an insider, the 90-day preference period must be applicable, and, therefore, the complaint is time-barred. But the complaint also does not allege that Defendant is not an insider. Defendant's argument assumes the result it wishes to reach by assuming that the absence of a specific allegation concerning whether the recipient is an insider must mean that the recipient was not an insider. A much more logical inference is that because the alleged transfer is said to have occurred more than 90 days after the petition date, because the Trustee seeks to avoid a preference, and because a preference received over 90 days after the petition date is avoidable only if the recipient is an insider, Plaintiff necessarily must be alleging that Defendant is an insider.

Section 547 does not specifically require an allegation that the alleged transferee was an insider. Instead, section 547(b)(4) merely requires that the transfer have been

(4) made—

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider[.]

The Eleventh Circuit has clearly articulated the standards for ruling on a motion to dismiss.

When considering a motion to dismiss, all facts set forth in the plaintiff's complaint "are to be accepted as true and the court limits its consideration to the pleadings and exhibits attached thereto." *GSW, Inc. v. Long County*, 999 F.2d 1508, 1510 (11th Cir.1993). A complaint may not be dismissed pursuant to Rule 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would

entitle him 1232 to relief.” *Lopez*, 129 F.3d at 1189 (internal quotations and citation omitted).

Grossman v. Nationsbank, N.A., 225 F.3d 1228 (2000), 1231-1232 (11th Cir. 2000). Although dismissal under Rule 12(b)(6) is appropriate if the complaint shows on its face that the claim is time barred,

[a]t the motion-to-dismiss stage, a complaint may be dismissed on the basis of a statute-of-limitations defense “only if it appears beyond a doubt that Plaintiffs can prove no set of facts that toll the statute.” *Knight v. E.F. Hutton & Co.*, 750 F.Supp. 1109, 1112 (M.D.Fla.1990); see *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957); *Summer v. Land & Leisure, Inc.*, 664 F.2d 965, 969 (5th Cir. Unit B 1981).

Tello v. Dean Witter Reynolds, Inc., 410 F.3d 1275, 1288 (fn. 13) (11th Cir. 2005).

Ms. Goodman’s complaint does not show on its face that it is time-barred. Construing it with every inference in her favor, as the Court must, the Court infers that in alleging a preference that occurred more than 90 days prior to the petition date, Plaintiff is in effect alleging that Defendant is an insider. Defendant has not shown that Plaintiff could not prove facts to support her contention that the alleged transfer was a voidable preference, and hence the first ground on which Defendant seeks dismissal is without merit.

Defendant’s second argument for dismissing the complaint is that it is time-barred because service of process occurred more than two years after the petition date. It cited no case or other authority to support its theory that the summons and complaint had to be served within two years of the petition date. This argument is also completely without merit. Section 546(a) of the Bankruptcy Code states:

(a) 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 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.

“The commencement of a voluntary case under a chapter of [title 11] constitutes an order for relief under such chapter.” 11 U.S.C. § 301. Hence, the last day on which the Trustee could commence a preference action was two years after November 20, 2003.

Under Fed. R. Civ. P. 3, made applicable by Fed. R. Bankr. P. 7003, “[a] civil action is commenced by filing a complaint with the court.” Because this adversary proceeding was commenced by the filing of the complaint on November 18, 2005, which was less than two years after Debtor filed its voluntary petition, it is timely. *In re Tower Metal Alloy Co.*, 193 B.R. 266 (Bankr. S.D.Ohio 1996) (amended complaint filed and after the expiration of the two-year statute of limitations period of § 546(a) was timely, even though original complaint filed within two year period was never served). Defendant suggests that Civil Rule 4(m), made applicable by Fed. R. Bankr. P. 7004, which requires a summons to be served within 120 days of its issuance, might somehow be implicated in determining when the proceeding was commenced. It is obvious, however, that Civil Rule 4(m) has nothing to do with determining the date of the commencement of this adversary proceeding for purposes of section 546(a) or otherwise.

Defendant’s final argument is that the complaint is too vague for it to file a responsive pleading because it fails to specify the exact date of the alleged preferential transfer and does not allege fraud with specificity. Again, Defendant’s argument is totally without merit. Defendant argues, “[i]f this alleged payment were made on a date just over ten (10) days prior to the

"December of 2002" range of dates set forth in Plaintiff's Complaint, this alleged payment would fall outside of the extended one-year preference period, even if Defendant were alleged to be an 'insider.'" This argument is logical but absurd because it is totally irrelevant. If the transfer were made in 1492, it would be outside the one-year preference period; so what? The point is that the complaint alleges that the transfer occurred in December 2002, and every day in December 2002 was within the preference period. The complaint alleges there might have been other preferences, but if so, they would not be avoidable if they occurred within one year prior to the petition date, assuming that Defendant is an insider or within 90 days prior to the petition date, assuming it is not an insider.

The complaint alleges a voidable preference, not fraud. So, Defendant's argument that Fed. R. Civ. P. 9(b) is applicable is likewise off the mark. Whatever details Defendant desires to know, it can obtain by discovery. Or, since it probably has a good idea whether or not it is an insider, it can move for summary judgment after it files its answer, as required by this Order.

For these reasons, it is

ORDERED that Defendant's motion to dismiss is DENIED. Defendant shall have thirteen (13) days from entry of this Order within which to answer the complaint.

Dated: March 7, 2006.



JAMES E. MASSEY
U.S. BANKRUPTCY JUDGE