

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE  
SOUTHERN DISTRICT OF GEORGIA  
Augusta Division

IN RE:	)	Chapter 7 Case
	)	Number <u>89-10866</u>
NORRIS EUGENE BLAIR	)	
a/k/a SONNY BLAIR	)	
	)	
Debtor	)	
	)	
MOORE-HANDLEY, INC.	)	
	)	
Movant	)	
	)	
vs.	)	Filed
	)	at 11 O'clock & 31min. AM
NORRIS EUGENE BLAIR	)	Date: 3-21-90
	)	
Respondent	)	

**ORDER**

Moore-Handley, Inc., holder of an unsecured claim in this Chapter 7 proceeding, seeks relief from the automatic stay of 11 U.S.C. 362(a) in order to proceed with a pending action in the Superior Court of Richmond County, Georgia against the debtor and the debtor's spouse to recover a contended fraudulent transfer under state law. The facts are not in issue. On or about June 23, 1986, the debtor transferred his interest in certain real property located in Richmond County, Georgia to his wife. On July 25, 1988, Moore-Handley, Inc. obtained a judgment against the debtor in the Civil

Court of Richmond County, Georgia. Subsequent to obtaining the judgment, Moore-Handley, Inc. ascertained that the transfer of June 23, 1986 had occurred, and on April 13, 1989, brought the action in the Superior Court of Richmond County, Georgia against the debtor and the debtor's wife to set aside the conveyance. According to Moore-Handley, Inc., the trustee has declined to take up the prosecution of the avoidance action in either the state or bankruptcy forum. Moore-Handley, Inc. contends that the trustee's inaction constitutes an abandonment of the estate's interest.

Moore-Handley, Inc.'s abandonment contention is governed by 11 U.S.C. §554<sup>1</sup> and Bankruptcy Rule 6007<sup>2</sup>. There is no evidence

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<sup>1</sup>11 U.S.C. §554 provides:

(a) After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate that is of inconsequential value and benefit to the estate.

(b) On request of a party in interest and after notice and a hearing, the court may order the trustee to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.

(c) Unless the court orders otherwise, any property scheduled under section 521(1) of this title not otherwise administered at the time of the closing of a case is abandoned to the debtor and administered for purposes of section 350 of this title.

(d) Unless the court orders otherwise, property of the estate that is not abandoned under section (a) or (b) of this section and that is not

that the trustee has abandoned the State law fraudulent conveyance cause of action. Moore-Handley, Inc. has failed to act to require the trustee to abandon the cause of action.

The commencement of a case under 11 U.S.C. 301 creates an estate which estate includes any interest in property that the trustee recovers pursuant to 11 U.S.C. §550(a).<sup>3</sup> 11 U.S.C.

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administered in the case remains property of the estate.

<sup>2</sup>Bankruptcy Rule 6007 provides:

(a) **Notice of Proposed Abandonment or Disposition; Objections.** Unless otherwise directed by the court, the trustee or debtor-in-possession shall give notice of abandonment or disposition of property to all creditors, indenture trustees and committees appointed or elected pursuant to the Code. An objection may be filed and served by a party in interest within 15 days of the mailing of the notice, or within the time fixed by the court.

(b) **Motion by a Party in Interest.** A party in interest may file and serve a motion requiring the trustee or debtor-in-possession to abandon property of the estate.

(c) **Hearing.** If a timely objection is made as prescribed by subdivision (a) of this rule, or if a motion is made as prescribed by subdivision (b), the court shall set a hearing on notice to the entities as the court may direct.

<sup>3</sup>11 U.S.C. §550(a) provides in pertinent part:

(a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544 . . . of this title, the trustee may recover for the benefit of the estate, the property transferred, or

§541(a)(3) The property recovered under §550 which is property of the estate includes any interest in property the transfer of which is avoided pursuant to 11 U.S.C. §544(b).<sup>4</sup> "Section 544(b) confers upon the trustee, with certain restrictions, the power to avoid any of the debtor's transfers or obligations that are avoidable for fraud or any other reason under applicable, state or federal law. 4 Collier on Bankruptcy ¶544.03 (L. King 15th ed. 1989). The trustee may recover property to the extent that the transfer has been avoided under §544. The trustee is charged with the duty of collecting and reducing to money the property of the estate and to close such estate as expeditiously as is compatible with the best interests of the parties in interest. 11 U.S.C. §704. Upon the filing of the bankruptcy petition, the trustee is the only entity with standing to pursue the collection of the assets of the estate. See, Flip Mortgage Corporation v. McElhone, 841 F.2d 531 (4th Cir.

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if the court so orders, the value of such property, from -

- (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or
- (2) immediate or mediate transferee of such initial transferee.

<sup>4</sup>11 U.S.C. §544(b) provides in pertinent part:

(b) The trustee may avoid any transfer of an interest of the debtor in property . . . that is avoidable under applicable law by a creditor holding an unsecured claim that is allowable under 502 of this title or that is not allowable under 502(e) of this title.

1988); In re: V. Savino Oil & Heating Co., 91 B.R. 655 (Bankr. E.D. N.Y. 1988); K.D. Homes v. Fritz (In re: Fritz), 88 B.R. 434 (Bankr. S.D. Fla. 1988). See also Nordberg v. Sanchez (In re: Chase and Sanborn Corp.), 813 F.2d 1177, 1180 N.1 (11th Cir. 1987). "Standing to invoke the avoidance powers contained in §544(b) . . . rests with the trustee by the express provisions of those statutes." In re: V. Savino Oil & Heating Co., supra at 656.

The responsibility of the trustee to pursue property of the estate under the transfer avoidance provision of the Bankruptcy Code under §544(b) is permissive by its terms and not mandatory. The responsibility of the trustee to collect assets and to effectuate the policy of equality of distribution does not per se compel litigation by the trustee at every instance where a transfer may potentially be avoidable. To the contrary, a trustee has a substantial degree of discretion to sue or not to sue. In re: V. Savino Oil & Heating Co., supra.

In V. Savino Oil & Heating Co., the court determined that in a Chapter 11 proceeding in the event a trustee or debtor-in-possession unjustifiably fails to employ its statutory arsenal of avoiding powers or otherwise abuses its discretion in not suing, a creditor's committee has implied authority to bring an action on behalf of the estate in bankruptcy with the

approval of the bankruptcy court. The court, citing 11 U.S.C. 1103(c)(5), found that the committee's right to "perform such other services as are in the interests of those represented" included the standing to bring an avoidance action. No such statutory authority exists within the Bankruptcy Code implied or otherwise for an individual creditor holding an unsecured claim to assert such a cause of action in a Chapter 7 proceeding.

The Bankruptcy Code, Title 11 United States Code, creates the position of trustee to collect the assets of a debtor's estate in a Chapter 7 liquidation, and a forum, this court, to resolve competing claims in interest against those assets. The trustee has the responsibility of collecting the property of the estate and should the trustee fail to perform his duties and responsibilities, then pursuant to 11 U.S.C. 324(a)<sup>5</sup> any party in interest may move for removal of the trustee. A for cause basis for removal includes the refusal or unreasonable delay by the trustee in the institution of suits to recover voidable transfers. See, Zimmerman v. Farmington Shoe Co., 31 F.2d 405 (1st Cir. 1929); Fred Reuping Leather co. v. Fort Green National Bank of Brooklyn, New York, (In re: Honesdale Union Stamp Shoe Co.) 102 F.2d 372 (3rd Cir. 1939). However, great deference must

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<sup>5</sup>11 U.S.C. §324(a) provides in pertinent part:

(a) The court, after notice and a hearing, may remove a trustee . . . for case.

be given to the trustee's exercise of judgment when, after weighing the potential expense to the estate

of pursuing litigation against the probability of recovery, the trustee determines that litigation is not in the best interests of the estate. The mere suggestion by a creditor that the trustee should take up pending voidable transfer litigation and the trustee's refusal is insufficient to establish a basis for removal. The party seeking removal carries the burden of proving that the refusal by the trustee was without justification.

Any potential recovery of property or the value of property as a result of a successful voidable transfer action is property of the estate, and the collection of this property is the responsibility of the trustee. The trustee has not voluntarily, nor by court order, abandoned any voidable transfer action. An individual creditor lacks standing to pursue such action. If a creditor is dissatisfied with the inaction of the trustee, the available remedy is to seek removal of the trustee. No basis exists for the granting of the relief from stay requested by Moore-Handley, Inc. It is therefore ORDERED that motion for relief from stay is denied.

JOHN S. DALIS  
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia

this 21st day of March, 1990.