UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re	Chapter 7
MARTIN STUART LEVINE,	Case No. 00-15511 (PCB)
Debtor.	

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YANN GERON, as Chapter 7 Trustee of the Estate of Martin Stuart Levine	
Plaintiff,	Adversary No. 02-03492
v.	
MARTIN STUART LEVINE, Trustee for the benefit of Logan Levine under TUA Logan Ariel Levine 1991 Trustee and as Trustee for the benefit of Brett Levine under TUA Brett Andrew Levine 1991 Trust and as Custodian under the Uniform Gift to Minors Act for Ariel Levine and Brett Levine; CYNTHIA LEVINE, individually and as Trustee for the benefit of Ariel Levine under TUA Logan Ariel Levine 1991 Trust and as Trustee for the benefit of Brett Levine under TUA Brett Andrew Levine 1991 Trust and as Custodian under the Uniform Gift to Minors Act for Ariel Levine and Brett Levine; LOGAN LEVINE; BRETT LEVINE; TUA LOGAL ARIEL LEVINE 1991 Trust; TUA BRETT ANDREW LEVINE 1991 TRUST; VARIOUS ACCOUNTS held under the Uniform Gift to Minors Act by Logan Levine, minor; and VARIOUS ACCOUNTS held under the Uniform Gift to Minors Act by Brett Levine, minor.	
Defendants.	

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MEMORANDUM DECISION

BEATTY, Prudence Carter, U.S.B.J.

The Defendants have moved to dismiss the present action on the grounds that the original plaintiff, RBA Southampton Hills, LLC ("RBA") lacked standing to bring this action

and that the Chapter 7 Trustee (the "Trustee") failed to timely commence this adversary proceeding pursuant to Bankruptcy Code ("Code") § 546(a) and other applicable statutes of limitation. Specifically, the Defendants request that this Court enter an order holding that the Trustee's substitution as plaintiff for RBA on May 18, 2004, does not relate back to commencement of this litigation and that the Trustee's substitution as plaintiff be deemed to have occurred on May 18, 2004 for the purposes of calculating all statutes of limitation. The Defendants further request that the First, Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh causes of action as stated in the Complaint be dismissed for the Trustee's failure to timely commence the claims pursuant to their respective statutes of limitation. The Trustee opposes this motion and argues that the Complaint was in fact timely filed, that the Court's substitution of the Trustee as plaintiff relates back to the time of the filing of the Complaint and that RBA had standing to initiate the action. For the reasons stated below, the Court finds that the substitution of the Trustee as plaintiff relates back, *nunc pro tunc*, to the filing of the Complaint.

BACKGROUND

On November 22, 2000 (the "Petition Date") Martin Stuart Levine (the "Debtor") filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code (the "Code"). The Trustee was appointed in this case on November 27, 2000, and subsequently became the permanent Chapter 7 trustee of the Debtor's estate. In 2001, RBA commenced a discharge action (the "Discharge Action") against the Debtor, asserting claims that were based on the Debtor's alleged transfer or concealment of and failure to disclose his alleged interest in a certain parcel of real property.[1] On November 21, 2002, RBA commenced this adversary proceeding by

[1] On October 30, 2003, the Court granted summary judgment to the Debtor in the Discharge Action because RBA failed to sustain its burden of proof.

filing a complaint (the "Complaint")[2] against the Debtor and various co-Defendants asserting eleven causes of action on the following grounds: conversion, unjust enrichment, turnover, constructive trust, fraudulent conveyance (four counts), conspiracy, preference, and salary (the "Claims").[3] The Complaint primarily asserts that the Debtor has transferred assets to third parties and other trusts that would otherwise be used to pay his creditors. RBA would not be the sole beneficiary of this suit as other pre-existing claims are filed against the Debtor totaling approximately $13,636,903.35.[4]

Simultaneously with the filing of the Complaint, the Trustee and RBA agreed that the Claims would be sold to RBA subject to higher and better offers (the "RBA Stipulation").[5] On April 24, 2003, the Trustee filed a motion to approve this sale (the "Sale Motion") before this Court, but subsequently withdrew it.[6] Following that hearing, and on August 14, 2003, the Trustee and RBA entered into a stipulation (the "Substitution Stipulation"), which stated that the

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[2] The RBA initiated this adversary proceeding one day prior to the expiration of the statute of limitations on the claims pursuant to Code § 546(a) which states:

> "An action or proceeding under section 544, 545, 547, 548 or 553 of this title may not be commenced . . . 2 years after the entry of the order for relief."

[3] Pre-petition, on January 27, 1993, a judgment was entered in the Supreme Court of the State of New York in Suffolk County in favor of River Bank America, formerly known as East River Savings Bank, against, among others, the Debtor in the amount of $3,070,582.03, together with interest thereon from the date of the judgment. In February 1999, pursuant to a partial assignment of the judgment, RB Asset Inc., as successor-in-interest to River Bank assigned to RBA fifty percent of all its right, title and interest in the judgment. As such, RBA is one of the Debtor's largest creditors.

[4] The claims include: RBA's claim of $5,231,430.49, Israel Discount Bank's claim of $1,806,885.15 and the United States Small Business Administration's claim of $6,569,977.71.

[5] The RBA Stipulation provided for, among other things, that the Trustee's Claims (as stated in the Complaint) would be assigned to RBA, and that the future assignment of the Trustee's claims would be deemed *nunc pro tunc* as of immediately prior to the filing of the Complaint. The RBA Stipulation was signed by RBA and the Trustee on November 21, 2002.

[6] During the April 24 hearing, the Trustee stated, "I'm not prepared to step into a Complaint that I don't believe in." Transcript, 18:5-6. He further said, "I did not believe [the claims] were viable economically . . ." *Id.* at 5:13-15. In response, the Court made several observations including the fact that the Trustee had the right to conduct an examination to determine whether there are valid fraudulent conveyance claims against the Debtor and that the assignment of claims that a Trustee does not believe in would constitute a breach of his fiduciary duties. Further, the Court noted that the Trustee was indeed the proper plaintiff in this action.

Trustee would be substituted as the plaintiff in this adversary proceeding pursuant to this Court's approval. On November 3, 2003, the Debtor filed an objection to the Substitution Stipulation and on November 4, 2003, the co-Defendants filed a joinder to the Debtor's objection. The Court, however, granted the Substitution Stipulation on May 18, 2004, "without prejudice" and the Trustee was thereby substituted in the adversary proceeding as the plaintiff. Subsequently, the Defendants answered the Complaint on June 23, 2004 and raised several affirmative defenses including failure to state a cause of action and failure to timely seek relief under the applicable statue of limitations.

Following the approval of the Substitution Stipulation, on May 18, 2004, the Court entered an order authorizing the retention of special litigation counsel[7] to the Trustee. Also on that date, the Court approved a financing order authorizing borrowing with priority over administrative expenses secured by liens on property of the estate pursuant to Code § 364(b) (the "Financing Agreement"). Under the Financing Agreement, the Trustee was permitted to enter into a certain loan and security agreement with RBA with up to an aggregate amount of $300,000 available to satisfy litigation costs.[8]

On July 8, 2004, the Trustee filed a demand for a jury trial. Although the parties to the adversary proceeding filed a joint statement of consent to have a jury trial conducted by this Court, the parties withdrew this consent on September 23, 2004. On September 25, 2004, the parties filed a joint motion to partially withdraw the reference (the "Stipulation of Withdrawal") so that the jury trial in this proceeding would be conducted by the United States

[7] This order was later amended on July 21, 2005.

[8] This was later amended to a total aggregate principle amount of $500,000 to satisfy the litigation costs, and approved by this Court on July 21, 2005.

District Court for the Southern District of New York (the "District Court") but permitting this Court to retain jurisdiction over pre-trial matters.[9]

On April 4, 2005, the Defendants filed a motion to dismiss all causes of action as stated in the Complaint, with the exception of the turnover claim, for failure to timely commence an action pursuant to Code § 546(a). Specifically, the Defendants contend that since the Trustee neither initiated the lawsuit nor expressly authorized RBA to do so, RBA was without standing at the time it commenced the action. The Defendants further state that RBA had no standing since RBA's action was not in the "best interest" of the estate and that the litigation was not "necessary and beneficial" to the fair and efficient resolution of the bankruptcy proceedings. On April 14, 2005, the Trustee filed a response to the motion to dismiss. The Trustee opposes the Defendants' claims and contends that RBA had standing to bring this adversary proceeding and that his substitution pursuant to the Substitution Stipulation should be deemed *nunc pro tunc* and relate back to the date on which the Complaint was filed.

DISCUSSION

The Defendants argue that RBA did not have standing to bring the various Claims they seek to have dismissed because the Trustee's standing to assert the Claims derives from

[9] The Trustee later moved to withdraw the reference of this adversary proceeding to the District Court pursuant to 28 USC § 157(d), Bankruptcy Rule 5011, and Local Rule 5011-1. On February 27, 2007, The District Court denied this motion (06 Civ. 1601) on the grounds that removal would violate the terms of the Stipulation of Withdrawal, which required the Bankruptcy Court to maintain jurisdiction of all pre-trial matters.

Code § 544[10] and 548[11] which have a statute of limitations of two years pursuant to § 546(a). Since the Trustee did not originally commence the action and was not substituted as plaintiff until May 18, 2004, after the expiration of the statute of limitations, the Debtor contends that the Trustee does not have standing to pursue the various Claims and, that they should be dismissed. The Court disagrees.

Federal Rule of Civil Procedure ("FRCP") 15(a), as made applicable by Bankruptcy Rule 7015, provides that leave to amend a party's pleading "shall be freely given when justice so requires." FRCP 15(a). In the present case, this Court adhered to FRCP 15(a)'s mandate by granting the Substitution Stipulation, permitting the Trustee to replace RBA in the suit as the plaintiff. The substitution was allowed because the Trustee was, in fact, the "real party in interest" and, as such, was the proper party to pursue such claims against the Debtor.

This comports with FRCP 17(a), as made applicable by Bankruptcy Rule 7017, which states that

> "Every action shall be prosecuted in the name of the real part in interest. * * * No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or * * * substitution of, the real party in interest; and such * * * substitution shall have the same effect as if the action had been commence in the name of the real party in interest."

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[10] Code § 544(a) provides:

> "The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor * * *."

[11] Code § 548(a)(1)(A) provides:

> "The trustee may avoid any transfer * * * of an interest of the debtor in property, or any obligation incurred by the debtor * * * if the debtor voluntarily or involuntarily 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."

FRCP 17(a). In doing so, this Court ruled solely on the issue of substitution and left open the present matter: whether the Substitution Stipulation should be deemed *nunc pro tunc* and, therefore, relate back to the date of the Complaint, or whether the statute of limitations bars the present claim since the Trustee was substituted as the plaintiff after the statute of limitations expired on the Claims.

FRCP 15(c) allows a pleading to be amended only when:

> "(1) the relation back is permitted by the law that provides the statute of limitations applicable to the action, or (2) the claim * * * asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading,
> (3) the amendment changes the party or the naming of the party against whom a claim is asserted if * * * provision (2) is satisfied * * * [and] the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party."

Here, the circumstances of the case do fit within the parameters of FRCP 15(c) since the various enumerated elements are satisfied. Accordingly, the substitution can be allowed *nunc pro tunc*.[12]

Under the case law cited by both parties, no set of facts arose in which the substitution of a trustee as plaintiff, in place of the creditor's committee or creditor, was not permitted *nunc pro tunc*. *In re STN Enterprises*, 779 F.2d 901 (2d Cir. 1985); *In re Commodore Int'l. Ltd.*, 262 F.3d 96 (2d Cir. 2001); *In re Housecraft Industries, USA, Inc.*, 310 F.3d 64 (2d Cir. 2002); *In re YES! Entertainment Corp.*, 316 B.R. 141 (D.Del. 2004). While these cases do not include an explicit analysis of the reasons for granting the relation back of the pleadings, the substitution was approved, *nunc pro tunc*, in each of them. Instead, these decisions relied on a broad view of the standing necessary to bring fraudulent conveyance claims under

[12] *Nunc pro tunc* is defined as "now for then" and construed as "an entry made now of something actually previously done to have effect of former date." Black's Law Dictionary 631 (8th ed. 2004).

§ 548 and 549.

Although not explicitly authorized in the Code, the Second Circuit has previously ruled in *In re STN Enterprises*, 779 F.2d at 904, that "an implied, but qualified" right exists for creditors' committees to commence adversary proceedings where the trustee or debtor in possession "unjustifiably failed to bring suit or abused its discretion in not suing to avoid a preferential transfer." The court further ruled that such a right to initiate a suit is permitted only if the committee presents a colorable claim for relief that on appropriate proof would support a recovery, and the action asserting such claim(s) is likely to benefit the estate. *Id.* at 905. The Second Circuit expanded this holding in *Commodore*, 262 F.3d at 98 to allow creditors' committees derivative standing to initiate suits in circumstances not limited to those where the debtor has unjustifiably refused to bring the action. In doing so, the court held that a creditors' committee may acquire derivative standing to pursue the debtor's claims if "(1) the committee has the consent of the debtor in possession or trustee, and (2) the court finds that the suit by the committee is (a) in the best interest of the bankruptcy estate, and (b) is 'necessary and beneficial' to the fair and efficient resolution of the bankruptcy proceedings." *Commodore*, 262 F.3d at 100 (citing favorably *In re Spaulding Composites Co.*, 207 B.R. 899, 904 (9th Cir. 1997)); *see also In re Applied Theory Corporation*, 2007 WL 1965012, at *2 (S.D.N.Y. July 9, 2007). The Second Circuit adhered to the approach of *Spaulding*, which stated that "rather than a flat prohibition [on whether a creditors' committee may gain standing], impartial judicial balancing of the benefits of a committee's representation better serves the bankruptcy estate." *Id.* at 99 (quoting *Spaulding*, 207 B.R. at 904). Subsequently, the Second Circuit further extended *Commodore* to provide

individual creditors derivate standing to pursue claims against the Debtor.[13] *Housecraft*, 310 F.3d at 70.

To satisfy the first element of *Commodore*, the RBA must have had the Trustee's consent to commence the suit. The Defendants argue that the Trustee did not consent to the suit because RBA did not commence the present litigation either as the Trustee's surrogate or for the estate's benefit. In the alternative, the Defendants contend that even if RBA Stipulation constitutes consent, it is void since the Court stated during the April 23, 2003 that the assignment of claims, which a Trustee does not believe in, is a violation of his fiduciary obligations.

The Trustee expressly stipulated to RBA commencing the present litigation in the RBA Stipulation, thereby demonstrating more than mere awareness of RBA's intention to pursue the various Claims. Further, while the Complaint's *ad damnum* clause refers solely to recovery for RBA, the RBA Stipulation expressly provided for payment to the estate from any recovery. Finally, although the Court made several observations during the April 23 hearing, these comments did not constitute rulings on the merits of the present motion.

Second, to acquire derivative standing RBA must show that the suit is in the best interests of the estate. In *Housecraft*, the Second Circuit held that this is demonstrated where "the estate incurred no risk of loss since the creditor * * * was required to pay for all litigation expenses, regardless of whether the suit was successful." 310 F.3d at 71. The Second Circuit further noted that "while the [action] did not guarantee the estate any recovery, the estate could not have recovered anything * * * in its absence." *Id.* The Defendants argue that the "best interest" prong should be evaluated at the time the Complaint was filed in November 2002, citing

[13] The Second Circuit permitted individual creditors to assert derivative standing without additional requirements, as is necessary in other circuits, since such standing is granted only where the suit is consistent with the "best interest of the estate." *See* 310 F.3d 64, 71, n.7.

that the *ad damnum* clause provided only for the benefit of RBA. The Defendants, however, fail to consider that the RBA Stipulation, which was signed on the same day the Complaint was filed, did indeed provide for the estate's recovery, should the suit be successful.

Moreover, parallel to *Housecraft*, this estate lacked the resources to bring this adversary proceeding. As a result, RBA initiated the action prior to the expiration of the applicable limitations period pursuant to the RBA Stipulation. At the same time, the Trustee entered into the RBA Stipulation in order to receive proceeds of the action. Moreover, had RBA failed to provide the economic backing to litigate the present issues, the estate would not have been able to recover on the Claims in its absence. Therefore, RBA's suit was in the best interests of the estate.

Finally, standing ought not to be granted under *Commodore* unless the suit is "'necessary and beneficial' to the fair and efficient resolution of the bankruptcy proceedings." 262 F.3d at 100. *See also Housecraft*, 310 F.3d at 71. In *Housecraft*, the Second Circuit considered the financial assistance that the creditors gave to a trustee in bringing the action to recover a portion of the fraudulent transfers. *Id.* at 72. Additionally, the Second Circuit stated that the agreement between the creditor and trustee included fair terms for the division of assets and also "promoted the efficient resolution of the proceedings" and "prevented the likelihood of future litigation" between the estate and the trustee. *Id.*

The present case parallels *Housecraft*. Although the Defendants claim this suit should not be permitted since the summary judgment was awarded to the Debtor on the Discharge Action, here, different claims are being prosecuted. Additionally, RBA provided financial support in bringing this action to recover on the alleged fraudulent transfers. Under the RBA Stipulation, the parties and the Court have agreed that the Debtor's estate would benefit

from any potential recovery. Under the Substitution Stipulation, a Financing Agreement was entered into by the parties and approved by this Court as a fair division of any recovery. Accordingly, the Court finds that RBA has satisfied all of the requirements for standing as established in *Commodore*, and the Substitution Stipulation relates back, *nunc pro tunc*, to November 21, 2002.

CONCLUSION

For the foregoing reasons, this Court holds that the Trustee is deemed, *nunc pro tunc*, to have the requisite standing to bring the present adversary proceeding. The Defendants' motion to dismiss the First, Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh causes of action is denied.

Settle Order.

Dated: New York, New York
July 10, 2007

/s/ Prudence Carter Beatty
United States Bankruptcy Judge