

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)
)
BILLY GENE ANTHONY and) CASE NO. 03-34359 HCD
KIMBERLY ELAINE ANTHONY,) CHAPTER 13
)
DEBTORS.)
)
)
DEBRA L. MILLER, TRUSTEE,)
)
PLAINTIFF,)
vs.) PROC. NO. 06-3085
)
OCWEN LOAN SERVICES, LLC, AS)
SERVICING AGENT FOR JP MORGAN CHASE)
BANK, N.A., AS TRUSTEE, SUCCESSOR IN)
INTEREST TO BANK ONE, N.A., AS TRUSTEE)
OF THE AMORTIZING RESIDENTIAL)
COLLATERAL TRUST, 2002-BC1,)
SUCCESSOR IN INTEREST TO THE CIT)
GROUP/CONSUMER FINANCE, INC.,)
)
DEFENDANT.)

Appearances:

Thomas E. Panowicz, Esq., counsel for Standing Chapter 13 Trustee, P.O. Box 11550, South Bend, Indiana 46634; and

Carl A. Greci, Esq., counsel for defendant, Baker & Daniels LLP, First Bank Building, Suite 250, 205 West Jefferson Boulevard, South Bend, Indiana 46601.

MEMORANDUM OF DECISION

At South Bend, Indiana, on July 27, 2007.

Before the court in this adversary proceeding is the Motion to Dismiss filed by the defendant Ocwen Loan Services, LLC, as Servicing Agent for JP Morgan Chase Bank, N.A., as Trustee, Successor in Interest to Bank One N.A., as Trustee of the Amortizing Residential Collateral Trust, 2002-BC1, Successor in Interest to the CIT Group/Consumer Finance, Inc. (“Ocwen” or “defendant”). The defendant moves to dismiss the

Complaint filed by the plaintiff Debra L. Miller, Trustee (“Trustee” or “plaintiff”). After the parties briefed the issues, the court took the matter under advisement. For the reasons that follow, the court now grants the defendant’s Motion to Dismiss and dismisses the plaintiff’s Complaint.

Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and determination. After reviewing the record, the court determines that the matter before it is a core proceeding within the meaning of § 157(b)(2)(K) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rules of Bankruptcy Procedure 7052 and 9014. Any conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

Background

The underlying facts in this case are undisputed. The debtors Billy Gene Anthony and Kimberly Elaine Anthony filed their petition for relief under chapter 13 on August 1, 2003. The Trustee was appointed on the same day. The debtors’ real property in Medaryville, Indiana, in which they hold a fee simple interest, is the subject of this adversary proceeding. On November 10, 2003, Ocwen filed a Proof of Claim in the amount of \$66,375.34, claiming that it was a secured creditor under the note and mortgage on the property. The debtors’ chapter 13 plan was confirmed by special confirmation order on February 3, 2004.

On August 29, 2006, the Trustee Debra L. Miller filed a Complaint pursuant to 11 U.S.C. § 544 to avoid the defendant’s lien on the debtors’ Medaryville property. *See* R. 1. The Trustee explained in the Complaint that she had determined, after a title search, that the mortgage and note attached to Ocwen’s proof of

claim were never properly recorded and thus were not perfected. In Count I, the Trustee sought to avoid the unrecorded, unperfected mortgage lien. In Count II, she sought to disallow Ocwen's claim as a secured claim and to deem it an unsecured claim. In Count III, she requested the turnover of \$19,338.15 in funds paid to Ocwen before the determination that Ocwen did not have a valid lien on the property. The Trustee claimed that the returned funds would be distributed to other creditors of the debtors.

The defendant then filed a Motion to Dismiss the plaintiff's Complaint. *See* R. 14. It asserted that the Complaint was barred by the applicable statute of limitations, 11 U.S.C. § 546, and therefore that it failed to state a claim upon which relief could be granted. *See id.* at 1 (citing Fed. R. Civ. P. 12(b)(6); Fed. R. Bankr. P. 7012(b)). The defendant sought dismissal with prejudice. The parties briefed the matter and the court took it under advisement.

Discussion

The question before the court is whether the plaintiff's Complaint must be dismissed as a matter of law pursuant to Rule 7012(b) of the Federal Rules of Bankruptcy Procedure and Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted.¹ In order to state a claim for relief, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief."² Fed. R. Civ. P. 8(a)(2). Until recently, courts relied on the Supreme Court's analysis of Rule 8(a) in *Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99, 2 L.Ed.2d 80 (1957), and in particular on its mandate that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can

¹ Federal Rule of Bankruptcy Procedure 7012(b) states that Rule 12 (b)-(h) of the Federal Rules of Civil Procedure are applicable in adversary proceedings. Rule 12(b)(6) is the affirmative defense that the complaint must be dismissed for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6).

² Federal Rule of Bankruptcy Procedure 7008 states that Rule 8 of the Federal Rules of Civil Procedure applies in adversary proceedings. Rule 8(a) states that a pleading "shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends . . . , (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks." Fed. R. Civ. P. 8(a).

prove no set of facts in support of his claim which would entitle him to relief.” *Id.* at 45-46; 78 S. Ct. at 102. However, the Court recently criticized the “no set of facts” language in *Conley* and set forth what it considered a more plausible test for satisfying Rule 8(a)(2):

While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide the “grounds” of his “entitle[ment] to relief” requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.

Bell Atlantic Corp. v. Twombly, _ U.S. _, 127 S. Ct. 1955, 1964-65, 75 U.S.L.W. 4337 (U.S. May 21, 2007) (citations omitted) (effectively overruling *Conley v. Gibson*). According to the Court, “Rule 8(a)(2) still requires a ‘showing,’ rather than a blanket assertion, of entitlement to relief.” *Id.* at 1965 n.3.

The defendant in this case has not challenged the sufficiency of the factual allegations in the plaintiff’s pleading. Instead, it has argued that relief is barred altogether by the applicable statute of limitations. The basis for the defendant’s claim is 11 U.S.C. § 546, the statute limiting avoidance actions brought under § 544. It states:

§ 546(a). An action or proceeding under section 544 . . . 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 . . . 1302 .

. . .; or

(2) the time the case is closed or dismissed.

11 U.S.C. § 546(a). Section 301 clarifies § 546(a)(1)(A): “The commencement of a voluntary case under a chapter of this title constitutes an order for relief under such chapter.” 11 U.S.C. § 301.

The facts of this case indicate that the debtors’ chapter 13 petition was filed on August 1, 2003, and that the Trustee was appointed under § 1302 on or about that same date. The entry of the order for relief, therefore, was August 1, 2003. The defendant pointed out that the “two-year window” for filing an avoidance action under § 544 began on August 1, 2003 and ended on or around August 1, 2005. R. 15 at 3. It argued that

the Trustee's avoidance action in this case, filed on August 29, 2006, thus was "time barred by the statute of limitations." *Id.*

The court finds that the Trustee's avoidance powers under § 544 are subject to the time limitations found in § 546. Courts have found that the language of § 546(a) is plain. *See Singer v. Franklin Boxboard Co. (In re American Pad & Paper Co.)*, 478 F.3d 546, 552 (3d Cir. 2007) (citing cases). The statute unambiguously provides a two-year time frame during which a trustee can pursue avoidance actions. *See Gleischman Sumner Co. v. King, Weiser, Edelman & Bazar*, 69 F.3d 799, 801 (7th Cir. 1995) (noting that § 546(a) defines "when a power may be exercised"); *Moglia v. Inland Plywood Co. (In re Outboard Marine Corp.)*, 299 B.R. 488, 498 (Bankr. N.D. Ill. 2003) ("The very purpose of a statute of limitation is to prevent overly stale claims and to provide defendants with certainty that[,] after a set period of time, they will not [] have to come to court to defend time-barred claims."). However, the Trustee's Complaint herein was filed more than a year later than the 2-year time limit established in the statute. The § 546 statute of limitation has expired.

Nevertheless, the limitations periods of the statute may be extended by the parties, waived, or equitably tolled. *See In re Outboard Marine Corp.*, 299 B.R. at 496-500; *see also IBT Int'l, Inc. v. Northern (In re International Admin. Servs., Inc.)*, 408 F.3d 689, 700-01 (11th Cir. 2005). In this case, however, the parties did not agree to an extension and the defendant raised rather than waived its statute of limitations defense. Moreover, there is no evidence that the Trustee exercised due diligence but was prevented from learning that the mortgage was not recorded because of some fraud or misrepresentation. In fact, the Trustee conceded that equitable tolling did not apply to extend the deadline. *See R. 20, ¶ 1*. The court determines, therefore, that the Trustee's Complaint, to the extent it was brought pursuant to § 544, was required by § 546 to have been commenced on or before August 1, 2005. Because it was filed on August 29, 2006, the Complaint's § 544 claims were barred by § 546.

The Trustee argued that only Count I of the Complaint was based on § 544 and that Counts II and III were not time-barred. *See R. 20, Response at 1-2, Brief at 5-6*. She insisted that she was not barred from filing

an action (1) to object to claims under § 502(a); (2) to challenge the validity of the defendant's lien; and (3) to recover money or property of the estate. The court first finds that the terms of the Complaint itself do not support the Trustee's claim that only Count I was brought under § 544. The first line of the Complaint states that the Trustee brings the "Complaint to Avoid the Lien pursuant to 11 U.S.C. § 544." R. 1, p.1. The "General Allegations" section is introduced with the statement that "the Trustee is bringing this action pursuant to the Trustee's avoidance powers found under 11 U.S.C. § 544." *Id.*, ¶ 6. Count I concludes with the Trustee's request "that this Court order[,] pursuant to 11 U.S.C. § 544, the unrecorded Mortgage, unrecorded note and whatever lien held by the Defendants be avoided." *Id.* at 4. In addition, neither Count II nor III cites to another provision of the Bankruptcy Code.

The Trustee recognized that Count I, undeniably brought under § 544, was time-barred by the § 546 statute of limitations. Nevertheless, her position was that the unrecorded mortgage was indeed invalid under Indiana law and that this defendant, holding an invalid lien, should be reduced to the position of a general unsecured creditor by means of the salvageable other counts: Count II could be viewed as a cause of action brought pursuant to Rule 7001(2) or 11 U.S.C. § 502(a), and Count III could be viewed as the Trustee's duty to recover overpayments under § 1302(b)(1). *See* R. 20 at 1-2, Brief at 5-6. It is evident to the court, though, that Rule 7001(2) simply delineates which types of proceedings must be brought as adversary proceedings; it is not, in itself, a cause of action. It is equally clear that Count II does not and cannot rely on § 502(a). That section does provide that "a proof of claim is deemed allowed unless a party in interest objects," as the plaintiff states. *Id.*, Brief at 6. However, objection to a proof of claim filed pre-confirmation generally must be raised before confirmation of a chapter 13 plan. Once a plan is confirmed, as this plan was on February 3, 2004, the parties are bound by its provisions, including the valuations and priority or secured status of the claims.³ *See Adair v. Sherman*, 230 F.3d 890, 894-95 (7th Cir. 2000) (upholding the barring of a post-confirmation objection to proof

³ In this case, the defendant filed its proof of claim on November 10, 2003. The Trustee raised objections to the debtors' plan on October 18, 2003, and to another creditor's claim on December 31, 2003. The defendant's claim was not challenged. After the objections were satisfied, the court confirmed the plan on February 5, 2004.

of claim); *In re Ayre*, 339 B.R. 684, 687-89 (Bankr. C.D. Ill. 2006) (upholding claims determinations made under terms of chapter 13 plan and through confirmation process).

The Trustee's final argument, that she has a duty to account for the property of the bankruptcy estate and to recover overpayments to the creditor, must fail, as well. Any demand for a turnover of funds paid to the defendant under the debtors' chapter 13 plan is based upon the Trustee's ability to avoid the unrecorded, unperfected mortgage held by the defendant, but the Trustee's avoidance power was extinguished by the § 546 statute of limitation. The court concludes that the plaintiff's attempt to characterize Counts II and III as "something other than an avoidance action," so that § 546 did not apply, was unsuccessful and futile. *See Murphy v. Wray (In re Wray)*, 258 B.R. 777, 784 (Bankr. D. Idaho 2001).

In the view of the court, the Trustee filed this adversary proceeding to contest the validity of the mortgage lien and to avoid the invalid lien under § 544. The Complaint's allegations focused on the Trustee's title search, which revealed that the mortgage and note were not properly recorded. On the ground that the mortgage was neither recorded nor properly perfected under Indiana law, the Trustee requested avoidance of the defendant's lien under § 544 in Count I. Count II (which asked the defendant's claim to be disallowed and treated as unsecured) and Count III (which sought turnover of the funds received by the defendant under the debtors' chapter 13 plan) assumed that the defendant's lien was avoided under Count I. Only after the mortgage lien was found to be invalid and thus avoided by the Trustee could the results sought in Counts II and III occur. Indeed, Count II reiterated that the proof of claim should be disallowed as a secured claim because the mortgage and note attached to it were not properly recorded. *See* R.1, ¶¶ 21, 22. Count III also sought turnover based entirely upon the invalid lien. *See id.*, ¶ 24. The court finds that all three counts of the Complaint depended upon the discovery that the mortgage was not recorded properly and, as a result, could be avoided under § 544. Because the Trustee's power to avoid the mortgage in this case was limited to a two-year window, the court determines that the entire Complaint is barred by the expired § 546 limitation period and that dismissal of the Complaint under Rule 12(b)(6) for failure to state a claim therefore is appropriate.

In her Plaintiff's Response To Defendants' [sic] Motion to Dismiss, the Trustee presented an alternative request: If the defendant's motion to dismiss should prove valid, she asked that the court grant the Trustee leave to amend the Complaint pursuant to Federal Rule of Bankruptcy Procedure 7015. See R. 20, ¶ 8. The court finds, however, that the plaintiff failed to file separately a motion to amend the complaint, as its local rule requires. See N.D. Ind. L.B.R. B-9013-1; see also *Patrick v. Massachusetts Port Authority*, 141 F. Supp.2d 180, 186 n.4 (D.N.H. 2001) (citing its local rules requiring separate filing of motions to amend); *In re Minton*, not reported in B.R., 2006 WL 533352 at *1 (Bankr. N.D. Ind. 2006) (finding that motions making numerous separate requests fail to comply with local rule B-9013-1). Because that request of the Trustee is not in proper form, it cannot be considered as a motion to amend. The court therefore denies the request to amend that was appended to the Plaintiff's Response.

Conclusion

For the reasons stated above, the court grants the defendant's Motion to Dismiss with prejudice and dismisses the plaintiff's Complaint as time-barred pursuant to 11 U.S.C. § 546.

SO ORDERED.

/s/ HARRY C. DEES, JR.
Harry C. Dees, Jr., Chief Judge
United States Bankruptcy Court