

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

IN RE:)
)
LIVEMERCIAL AVIATION HOLDING, LLC) CASE NO. 10-20051
) Chapter 7
Debtor.)
*****)
DANIEL L. FREELAND,)
)
Plaintiff,)
)
V.) ADVERSARY NO. 12-2168 JPK
)
CPA WAREHOUSE and)
JOHNNY MATHIS,)
)
Defendants.)

ORDER OF PARTIAL DETERMINATION OF
MOTION TO DISMISS/ORDER FOR HEARING

This Adversary Proceeding was initiated by a complaint filed by Daniel L. Freeland, Trustee of the Chapter 7 bankruptcy estate of Livemercial Aviation Holding, LLC (“Trustee”), on August 31, 2012. An amended complaint was filed on September 18, 2012. On October 14, 2012, the defendants CPA Warehouse [“CPA”] and Johnny Mathis [“Mathis”] filed a Motion to Dismiss the amended complaint. The parties have complied with the court’s orders concerning submission of legal memoranda with respect to the motion to dismiss.

The Motion to Dismiss asserts that the amended complaint should be dismissed on three separate grounds:

1. That the court lacks subject matter jurisdiction over the adversary proceeding because the Trustee has failed to adequately state the basis upon which the court’s jurisdiction is premised in the pleadings which he has filed in this case. The motion to dismiss and its accompanying memoranda essentially seek to characterize this alleged failure as precluding

subject matter jurisdiction by the court. Thus, the court will deem this motion to have been filed pursuant to Fed.R.Bankr.P. 7012(b)/Fed.R.Civ.P. 12(b)(1).

2. CPA and Mathis assert that the amended complaint fails to plead allegations of fraudulent conduct with the specification required by applicable pleading rules. This issue is addressed by the defendants under Fed.R.Bankr.P. 7012(b)/Fed.R.Civ.P. 12(b)(6).

3. CPA and Mathis assert that this action by the Trustee is barred by the limitation provisions of 11 U.S.C. § 546(a). Pursuant to Fed.R.Bankr.P. 7008(a), the provisions of Fed.R.Civ.P. Rule 8 apply in adversary proceedings. Fed.R.Civ.P. 8(c)(1) includes the defense of “statute of limitations” as an affirmative defense. The court deems this affirmative defense to be within the scope of grounds which may be asserted under Fed.R.Bankr.P. 7012(b)/Fed.R.Civ.P. 12(b)(6), and this assertion will be so considered.

The first two grounds for dismissal asserted by CPA and Mathis will be summarily determined in this order. The final ground will require further consideration.

First, Fed.R.Bankr.P. 7052 applies Fed.R.Civ.P. 52 in adversary proceedings. Fed.R.Civ.P. 52(a)(3) states that the “court is not required to state findings or conclusions when ruling on a motion under Rule 12...” Thus, this memorandum of decision is short.

With respect to lack of subject matter jurisdiction, the court determines that the amended complaint sufficiently complies with applicable rules concerning pleading of the basis for the court’s jurisdiction. Even if it did not do so, the failure to specifically assert grounds for the court’s jurisdiction would not deprive the court of subject matter jurisdiction, but rather would be more in the nature of a Rule 12(b)(6) motion to dismiss, in response to which the court would allow the plaintiff to file an amended complaint which asserted the necessary jurisdictional basis. The court determines that this basis for asserted dismissal of the adversary proceeding is denied.

With respect to pleading of sufficient “facts” with particularity in relation to 11 U.S.C. § 548 and I.C. § 32-18-2 et seq, the court determines that the amended complaint is sufficient to satisfy the requirements of Fed.R.Bankr.P. 7008(a)/Fed.R.Civ.P. 8(a) and of Fed.R.Bankr.P. 7009/Fed.R.Civ.P. 9(b). The court determines that the asserted basis for dismissal of the complaint on this ground is denied.

A more interesting issue is presented with respect to the assertions of CPA and Mathis that the Trustee’s action was not timely under the provisions of 11 U.S.C. § 546(a). The issue in this context centers on 11 U.S.C. § 546(a)(1)(B); under the circumstances of this case, the provisions of 11 U.S.C. § 546(a)(1)(A) and of 11 U.S.C. § 546(a)(2) are out of play. In the context of 11 U.S.C. § 546(a)(1)(B), the issue distills down to when the Trustee was appointed or elected as a permanent Trustee in this case under 11 U.S.C. § 702. In turn, that issue concerns the application of 11 U.S.C. § 702(d) in Case No. 10-20051, i.e., when did the Trustee cease being an interim Trustee and become the “permanent” Trustee in this case under that provision. This inquiry, in turn, depends upon when the ability of creditors to elect a “permanent” Trustee ended under 11 U.S.C. § 702 – as long as creditors were able to elect a “permanent” Trustee, an interim Trustee is not deemed to be a “permanent” Trustee. This issue, in turn, has as its focus the proceedings conducted by the interim Trustee with respect to Section 341 meetings over which he presided, and when any of those meetings was “concluded” in a manner which resulted in the Trustee’s transition from an interim Trustee to the “permanent” Trustee under 11 U.S.C. § 702(d). Implicated in this inquiry is Fed.R.Bankr.P. 2003(e), and case law which has developed under that Rule as to when a Section 341 meeting is actually concluded.¹ In the context of Fed.R.Bankr.P. 2003(e), an issue is when the present version of that Rule became effective and applicable to cases, particularly in the context of the

¹ Also implicated in a parallel manner, are cases which address when a section 341(a) meeting is concluded for the purposes of the deadline to object to exemptions stated in Fed.R.Bankr.P. 4003(b)(1).

“presiding official” filing a “statement specifying the date and time to which the meeting is adjourned.” In this context, the United States Supreme Court’s order of April 26, 2011 [See introductory notes preceding Rule 1001 in the 2012 of Bankruptcy Code, Rules and Forms by West Publishing Company] may, or may not, have implemented the present version of Rule 2003(e) with respect to this case. In the context of this case, that order provided that the amendments to Fed.R.Bankr.P. 2003 took effect on December 1, 2011, and “shall govern in all proceedings in bankruptcy cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.” Finally, even if a notice of adjournment of the § 341 meeting should have been filed, if the meeting was in fact adjourned, does a failure to file the notice have any substantive effect on deadlines.

The present record does not provide the court with sufficient factual information upon which it may base a determination of the third ground for dismissal advanced by CPA and Mathis. It is possible that an issue of law arises as to the applicability of the second sentence of present Fed.R.Bankr.P. 2003(e) to this issue. A factual issue may derive from matters which transpired at the Section 341 meeting conducted by the Trustee on August 30, 2011, with respect to adjournment of that meeting to December 28, 2011; the “hearing tapes” of the August 30, 2011, and December 28, 2011, meetings may be relevant.

At this point, the court determines the following:

A. The contentions of CPA and Mathis stated in the Motion to Dismiss that the court lacks subject matter jurisdiction are denied, and the Motion to Dismiss on that basis is denied.

B. The contentions of CPA and Mathis under Rule 12(b)(6) that the amended complaint does not satisfy the pleading requirements of Rule 8 and/or of Rule 9(b) are denied, and the Motion to Dismiss based on those contentions is denied.

C. Further proceedings are necessary with respect to the contention that the amended complaint is barred by 11 U.S.C. § 546(a)(1)(B). A hearing to address the manner in

which those further proceedings will be conducted will be held on **April 12, 2013, at 9:00 A.M.**

Dated at Hammond, Indiana on March 20, 2013.

/s/ J. Philip Klingeberger
J. Philip Klingeberger, Judge
United States Bankruptcy Court

Distribution:
Attorneys of Record