

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

IN RE

MILLERS COVE ENERGY CO., INC.,
Debtor.

THE OFFICIAL COMMITTEE OF
UNSECURED CREDITORS OF
MILLERS COVE ENERGY CO., INC.,
Plaintiff,

v.

AMERICAN IRON CARBIDE COLORADO;
DANIEL H. ISRAEL; IRON CARBIDE
STEEL CORP.; C&L PEA RIDGE; and
AMERICAN IRON CARBIDE CORP.,
Defendants.

No. 90-34050
Chapter 11

Adv. Pro. No. 93-3012

M E M O R A N D U M

APPEARANCES:

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The Official Committee of Unsecured
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American Iron Carbide Corporation

MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE

This is an action for the avoidance and recovery of certain alleged fraudulent conveyances from the debtor to the various defendants brought by the Official Committee of Unsecured Creditors of the debtor, Millers Cove Energy Co., Inc., (the "Committee"), pursuant to 11 U.S.C. § 544(b). Pending before the court is a motion for judgment on the pleadings, or in the alternative, for summary judgment filed by American Iron Carbide ("AIC") on December 7, 1994, wherein AIC asserts that this action is barred by the applicable statute of limitations, 11 U.S.C. § 546(a). This court agrees and will enter an order dismissing this adversary proceeding.*

The pertinent facts in this action are not in dispute. On October 12, 1990, an involuntary chapter 7 bankruptcy petition was filed against the debtor. An agreed order converting the case to chapter 11 was entered on November 30, 1990. Thereafter, on April 3, 1992, the Committee moved for leave to prosecute in the name and on behalf of the debtor certain adversary proceedings including the proceeding *sub judice*. After notice and a hearing, the court by order entered *nunc pro tunc* to April 3, 1992, granted the Committee's motion to prosecute the adversary proceedings and the Committee commenced this adversary proceeding on January 14, 1993. No trustee was ever appointed in this chapter 11 case, and the debtor obtained confirmation of its plan on April 25, 1994.

*Defendant C&L Pea Ridge was dismissed from this action by order entered December 16, 1994, on the Committee's motion for voluntary nonsuit with respect to C&L Pea Ridge.

On April 26, 1994, the Committee filed a motion for leave to amend its complaint to add AIC as an additional defendant, which motion was granted by order entered May 16, 1994. On June 16, 1994, AIC filed an answer raising the statutes of limitations of 11 U.S.C. § 546(a) and/or Tenn. Code Ann. § 28-3-105 as affirmative defenses. Although it appears from the record that defendants Daniel Israel, Iron Carbide Steel Corp., and American Iron Carbide Colorado were also served with process, no answers or other appearances have been filed on their behalf, nor has the Committee moved for default judgment against them.

In its motion for judgment on the pleadings or in the alternative, for summary judgment, AIC asserts that the two-year statute of limitations set forth in 11 U.S.C. § 546(a)(1), which provides that a bankruptcy trustee must bring any § 544 avoidance action within two years of the date of his appointment or before the case is closed or dismissed, whichever is earlier, had run prior to the filing of this action. Although admitting that § 546(a) speaks in terms of trustee, AIC argues that a chapter 11 debtor in possession or any creditors committee acting on its behalf is the functional equivalent of a trustee and that they likewise have only two years to bring avoidance actions. AIC notes that when it was added as a defendant to this action on May 16, 1994, more than two years had passed since the order for relief was entered on November 30, 1990, and since the date (April 3, 1992) the Committee was authorized by the court to bring this action.

Recently, this court addressed this exact question in another adversary proceeding arising out of this chapter 11 case, *The Official Committee of Unsecured Creditors of Millers Cove Energy Co., Inc. v. David Audus (In re Millers Cove Energy Co., Inc.)*, ___ W.L. ___, ___ B.R. ___, Adv. Pro. No. 93-3013 (Feb. 24, 1995), and concluded, after carefully considering the identical arguments raised by the present motion, that the two-year statute of limitations provided by 11 U.S.C. § 546(a) is applicable to a debtor in possession who commences an action or proceeding under § 544 of the Code, and to a creditors committee acting in its place and stead. There is no reason for ruling differently in this action. Accordingly, the court will grant AIC's motion for summary judgment. Moreover, since 11 U.S.C. § 546(a) is a jurisdictional provision, see *Martin v. First National Bank of Louisville (In re Butcher)*, 829 F.2d 596, 600-601 (6th Cir. 1987), cert. denied, 484 U.S. 1078 (1988), the court has no jurisdiction to hear this matter and will dismiss the adversary proceeding in its entirety.

An order will be entered in accordance with this memorandum opinion.

ENTER: March 15, 1995

BY THE COURT


MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE