UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Briggs Transportation Company,

Debtor. BKY 4-83-2083

Sheridan J. Buckley, Trustee of the Bankruptcy Estate of Briggs Transportation Company, ADV 4-90-231

Plaintiff,

v. ORDER DENYING MOTION TO DISMISS

United States of America,

Defendant.

At Minneapolis, Minnesota, October 1, 1993.

This adversary proceeding came on for hearing on the motion of the defendant to dismiss on the grounds that the court lacks jurisdiction over the subject matter. Tracy A. Anagnost, trial attorney with the Tax Division of the United States Department of Justice, appeared for the defendant and the plaintiff, Sheridan J. Buckley, appeared in propria persona.

The defendant has confused the concepts of jurisdiction and a statute of limitations. The defendant points out that the trustee brought this action after the time provided in Section 546(a) which provides:

> An action or proceeding under section 544, 545, 547, 548, or 553 of this title may not be commenced after the earlier of--
>
> (1) two years after the appointment of a trustee under section 702, 1104, 1163, 1302, or 1202 of this title; or
>
> (2) the time the case is closed or dismissed.

11 U.S.C. Section 546(a). Section 546(a) obviously is a classic statute of limitations and has nothing to do with jurisdiction. Jurisdiction over the subject matter has been granted by Congress pursuant to 28 U.S.C. Section 1334(b) and 157 and, in fact, the defendant admitted the court's jurisdiction in its answer. While a number of courts have concluded that the timely filing of a notice of appeal is a jurisdictional matter for appellate courts, the statute of limitations is clearly an affirmative defense and is designated as such by Fed. R. Civ. P. 8(c) and was pled as such by the defendant in its answer.

While the defendant correctly argues that jurisdiction may not be conferred on a federal court by stipulation, consent, or

waiver, citing United States v. Mississippi Valley Barge Line, Co., 285 F.2d 381, 387 (8th Cir. 1960), a statute of limitations, as an affirmative defense, can be waived. The defendant does not deny that it waived its statute of limitations defense, but rather has, as noted, attempted to characterize its defense as a jurisdictional matter, which it was unable to effectively waive. Its latter proposition is wrong and its failure to deny its own waiver is the only thing that it can do since it clearly has waived its statute of limitations defense.

The defendant's motion and brief ignore much of the history of this adversary proceeding. This case was originally a chapter 11 case and an identical action was brought by the debtor in possession to avoid the defendant's tax liens. My attempts to bring the proceeding to trial in 1983 were consistently met with resistance by the parties who requested a whole series of continuances. The case was ultimately converted to a chapter 7 case and the plaintiff was appointed the trustee. He thus inherited the adversary proceeding but on conversion it appeared that the adversary proceeding may be moot since Section 724 subordinates the defendant's tax liens to the holders of unsecured priority claims. When the case was converted, it appeared that such priority claims would exhaust the estate and thus the issue of the defendant's tax lien would never have to be addressed. As the case dragged on, I became concerned about the age of the adversary proceeding and thus wrote to both parties regarding a disposition of the proceeding so that it would not remain on my docket indefinitely. I wrote a letter to the plaintiff and to the defendant's attorney, which read in its entirety:

> This adversary proceeding is over two years old. Because final distribution may render the adversary moot, nothing has been done in the adversary proceeding in that time. I'm writing to see if perhaps the adversary proceeding could not be dismissed without prejudice with the understanding that the trustee could bring the same action again if he determined it necessary. I am not aware of any statutes of limitation which would apply nor any other prejudice to either party which a dismissal would cause.
>
> I would appreciate hearing from both of you your opinion on a dismissal. Thank you for your consideration.

The dismissal I proposed obviously was one of administrative convenience which would be without prejudice to rebring the action. I specifically noted by lack of knowledge of any applicable statute of limitations. It now appears that I was incorrect and that there was one which has now run. However, I specifically requested an opinion of both lawyers about the appropriateness of my proposed course of action. Both parties consented in writing. On May 8, 1986, I received a letter from the defendant's attorney dated May 2, 1986, which read in its entirety:

> On April 23, 1986, the Court wrote to the parties to inquire whether this adversary proceeding could be dismissed without prejudice, with the understanding that the trustee could bring the same action again if he determined it necessary. The Court noted

> nothing has been done in this action for two years because this adversary proceeding could be rendered moot by the final distribution.
>
> We are writing to inform the Court that the United States has no objection to the dismiss of this action.

The defendant clearly consented to a dismissal of the original adversary proceeding on the conditions stated in my letter: that the trustee would be allowed to rebring it if it seemed necessary. No mention is made of a statute of limitations problem in the defendant's letter.(1)

Footnote 1
I refuse to consider the possibility that the defendant was aware of the statute of limitations and intentionally failed to call it to my attention.
End Footnote

In short, I consider that the defendant, by its conduct and by its express statements, has waived its statute of limitation defense.

THEREFORE, IT IS ORDERED: The motion of the defendant to dismiss this adversary proceeding is denied.

ROBERT J. KRESSEL
CHIEF UNITED STATES BANKRUPTCY JUDGE