

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW HAMPSHIRE**

In re:

Bk. No. 01-10700-JMD  
Chapter 11

Clarkeies Market, L.L.C.,  
Debtor

Clarkeies Market, L.L.C.,  
Plaintiff

v.

Adv. No. 03-1310-JMD

Estate of Karl C. Kelley,  
Ruth C. Kelley, Personal Representative,  
Kelley's Food Town, Inc., and  
K&R Supermarkets, Inc.,  
Defendants

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**MEMORANDUM OPINION**

**I. INTRODUCTION**

The Defendants filed their second Motion to Dismiss this adversary proceeding on December 29, 2003 (the "Motion to Dismiss") (Doc. No. 25). The Debtor objected (Doc. No. 26) and the Court held a hearing on the Motion to Dismiss on February 9, 2004. This Court has

jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the “Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire,” dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

## **II. FACTS**

On November 30, 1998 the Debtor purchased certain business assets from one or more of the Defendants. In connection with that purchase, the Defendants entered into a non-competition agreement with the Debtor. In its Amended Complaint (Doc. No. 18) the Debtor alleges that the Defendants breached the non-competition agreement on November 30, 1998. Under New Hampshire law, the statute of limitations, without application of the discovery rule, would require an action for a breach of the non-competition agreement to be filed on or before November 29, 2001. NH RSA 508:4(I).

The Debtor filed its petition under chapter 11 of the Bankruptcy Code on March 13, 2001. Under the provisions of section 108(a) of the Bankruptcy Code, the time for the Debtor to commence an action for breach of the non-competition agreement was extended until the later of November 29, 2001 or March 12, 2003. On April 17, 2002 the Debtor filed its objections to the Defendants’ proofs of claim (the “Claims Objections”) (Bk. No. 01-10700-JMD, Doc. Nos. 267, 268 & 269). On June 14, 2002 the Defendants objected to the Debtor’s inclusion of a claim for breach of the non-competition agreement in the Claims Objections on procedural grounds by filing a motion requesting the Court to require the Debtor to bring such claims in an adversary proceeding under Fed. R. Bankr. P. 7001. (the “Motion to Require”) (Bk. No. 01-10700-JMD, Doc. No. 338). On July 9, 2002, the Court granted the Motion to Require (Bk. No. 01-10700-JMD, Doc. No. 355). On May 8, 2003, the Debtor commenced this adversary proceeding.

### III. DISCUSSION

The Defendants contend that the Debtor's claims are barred by the statute of limitation because this adversary proceeding was not filed on or before March 12, 2003, the date to which the statute of limitations was extended under section 108(a) of the Bankruptcy Code, and the Debtor has not presented any evidence to support its contention that the discovery rule under NH RSA 508:4 tolled the statute of limitations. The Debtor contends that the discovery rule under NH RSA 508:4 is applicable to actions for breach of contract, citing The Black Bear Lodge v. Trillium Corp., 136 N.H. 635, 637 (1993), and that this adversary was filed within three years after the Debtor discovered the breach. The Debtor also contends that its action was timely because it was timely commenced on April 17, 2002, by the filing of the Claims Objections before the statute of limitations under section 108(a) expired.

Under Fed. R. Bankr. P. 7001(1) a proceeding to recover money or property is an adversary proceeding. However, Fed. R. Bankr. P. 3007 provides that "[i]f an objection to claim is joined with a demand for relief of the kind specified in Rule 7001, it becomes an adversary proceeding." If the Claims Objections had been treated as a complaint, the instant motion to dismiss would be without merit. The Court could have treated the Claims Objections as contested matters, ordered the application of Part VII of the Bankruptcy Rules and proceeded in a manner substantively and procedurally identical to the current posture of this adversary proceeding. See Halverson v. Estate of Cameron (In re Mathiason), 16 F.3d 234, 238 (8<sup>th</sup> Cir. 1994) (objection to claim including a kind of claim specified in Rule 7001 automatically became an adversary proceeding under Rule 3007); In re Metiom, Inc., 301 B.R. 634, 639 (Bankr. S.D.N.Y. 2003) (claims objection raising issues under Rule 7001 automatically becomes a contested matter under Rule 9014 subject to the application of the adversary proceeding rules under Part VII).

In this case the Defendants asked the Court to compel the Debtor to bring the claim as an adversary proceeding in order that proper discovery and preparation for a contested evidentiary hearing or trial could proceed under the provisions of Part VII of the Bankruptcy Rules. See Motion to Require. The Defendants could not have been surprised by the commencement of this adversary proceeding because they were warned about it in a timely way through the Claims Objections, and the filing of the complaint in this adversary proceeding directly resulted from the Defendants' Motion to Require. This Court had the discretion to grant the Motion to Require or to treat the Claims Objections as a complaint and apply the provisions of Part VII of the Bankruptcy Rules. The exercise of that discretion should not result in the elevation of form over substance to prejudice a party when the provisions of Rules 3007 and 9014(c) would have permitted the same result without prejudice to the Defendants' substantive rights. Metiom, 301 B.R. at 640.

#### **IV. CONCLUSION**

For the reasons set forth above, the Court shall enter a separate order denying the Motion to Dismiss. In view of the Court's decision in this matter the Debtor's arguments regarding the extension of the statute of limitations under various state law theories need not be considered. This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052.

ENTERED at Manchester, New Hampshire.

Date: February 23, 2004

/s/ J. Michael Deasy  
J. Michael Deasy  
Bankruptcy Judge