UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO

In Re	)	
	)	**JUDGE RICHARD L. SPEER**
Todd/Tracey White	)	
	)	Case No. 04-3264
Debtor(s)	)	
	)	(Related Case: 04-33289)
Greg Trala, et al.	)	
	)	
Plaintiff(s)	)	
	)	
v.	)	
	)	
Todd White, et al.	)	
	)	
Defendant(s)	)	

MEMORANDUM OPINION AND DECISION

This cause comes before the Court on the Plaintiffs' motion seeking permission to proceed with their adversary complaint as to the nondischargeability of a judgment they obtained against the Defendants. In the alternative, the Plaintiffs seek permission to amend their pleadings to allow for proper service of summons. On these matters, the Parties filed arguments respecting the merits of the Motion. The Court has now reviewed these arguments, as well as the entire record in the case. Based upon that review, and for the following reasons, the Court finds that the Plaintiffs are not entitled to the relief sought.

FACTS

The facts relevant in this matter are as follows: The Plaintiffs filed a timely complaint to determine dischargeability on August 9, 2004. No responsive pleading was ever filed. Here, the facts show service upon the Debtors, as Defendants, was attempted at an address other than that listed on the bankruptcy petition, but with the Debtors' attorney being sent, via e-mail, notice of the action through the Court's electronic filing system.

On November 17, 2004, a default judgment was issued against the Debtors for failure to answer or otherwise respond to the complaint. But in April of 2005, the Plaintiffs came to realize that their service was improper under Bankruptcy Rule 7004(b)(9). The Plaintiffs then filed a motion to have the default judgment set aside, with the Court granting the Motion on May 3, 2005. With their case again in a procedural posture to proceed on the merits, the Plaintiffs, in anticipating certain objections which would be raised by the Debtors, brought this motion. Therein, they argued that they should be allowed to proceed with their claim, or otherwise amend their pleading to allow for proper service, based upon the procedural flexibility inherent in the Bankruptcy Rules, which incorporate most of the Federal Rules of Civil Procedure. In this regard, the Plaintiffs point out that their mistake in service was the result of a clerical error, and that Debtors' counsel had notice of this action through the Court's electronic mail system.

DISCUSSION

In the instant matter, the Plaintiffs seek to correct a defect related to procedure. As the underlying action in this matter is a complaint to determine dischargeability, this is a core proceeding over which this Court has been conferred with jurisdictional authority to enter final orders. 28 U.S.C. §157(b)(2)(I); 28 U.S.C. §1334.

The relief sought by the Plaintiffs in this case centers on the ability of a party to correct defects in the service of process. Service in a matter such as this, where an individual has filed a bankruptcy petition and is represented by an attorney, is governed by Bankruptcy Rule 7004(b)(9). This Rule requires that service must be made by first class mail upon both the debtor and to the attorney at the attorney's postoffice address. Though they admittedly did not comply with Bankruptcy Rule 7004(b)(9), the Plaintiffs first contend, in essence, that strict compliance is not necessary for them to be able to proceed with their complaint.

But generally courts, including this one, have held that strict compliance with Bankruptcy Rule 7004(b)(9) is necessary to effectuate proper service upon the debtor. *Waterman v. Zacharias (In re Zacharias)*, 60 B.R. 142, 143 (Bankr. N.D. Ohio 1986).[1] There are some limited exceptions to strict compliance including fraud[2] and waiver. However, fraud does not exist in the instant case; for example, there is no evidence that the Debtors tried to deceive the Creditors or Court as to their proper address. Similarly, there is also no evidence of waiver, such as may occur by acknowledging receipt of the complaint,[3] or somehow answering the complaint without raising the defense of insufficiency of process.[4]

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[1]For further support of this interpretation *see Drier v. Love*, 242 B.R. 169, 171 (E.D. Tenn. 1999); *In re Bloomingdale*, 137 B.R. 351, 354 (Bankr. C.D. Cal. 1991).

[2]"It is the debtor's responsibility to apprise the bankruptcy court of his forwarding address." *Hammer v. Drago (In re Hammer)*, 940 F.2d 524, 526 (9th Cir. 1991).

[3]A return receipt was conclusive proof that debtor received summons and complaint though sent to a different address than was listed in the bankruptcy petition. *Tullock v. Hardy (In re Hardy)*, 187 B.R. 604, 609 (Bankr. E.D. Tenn. 1995).

[4]*Robinson v. Lefler (In re Lefler)*, 319 B.R. 538, 541 (Bankr. E.D. Tenn. 2004).

The normal remedy for improper service is for the plaintiff to re-attempt to perfect service, usually through the issuance of an alias summons. However, this remedy is limited by Federal Rule of Civil Procedure 4(m), incorporated by Bankruptcy Rule 7004(a), which sets a limit of 120 days to perfect service. The failure to do so results in dismissal without prejudice of the complaint. In this case it is well past the 120-day period.

There are two exceptions to this 120-day period. First, FED.R.CIV.P.4(m) directs the court to extend the time for service for an appropriate period if the plaintiff can show "good cause" for the failure to properly effectuate service within the 120-day period. Second, the Rule also inherently allows the court to use its discretion to extend the period even in the absence of "good cause." *Henderson v. United States*, 517 U.S. 654, 658 *n*.5 (1996). In this matter, the Plaintiffs raise arguments that go to both of these exceptions and therefore the Court will address each in turn.

The Plaintiffs premise their argument for "good cause" on an instance of clerical error. In arguing for "good cause" they put forth in their brief: "The case at bar is little different from a situation where defendants or their address were unknown at the time the case was filed." (Doc. No. 20, at pg. 3). While not directly stated, the Plaintiffs are apparently relying on FED.R.CIV.P. 15(c)(3). This Rule allows an amendment of a pleading which "changes the party or naming of the party against whom a claim is asserted" as long as it is within the period provided for service under 4(m), the party would not be prejudiced in maintaining a defense on the merits, and they "knew, or should have known but for a mistake concerning the identity of the proper party that the action would have been brought against the party." However, this case is different from the hypothetical situation put forth by the Creditors and envisioned by Rule 15.

The Debtors were known parties with a known address, both of which were set forth in the bankruptcy petition. The Debtors' address was also clearly listed on the "Notice of Chapter 7 Bankruptcy

Case" that was sent to all creditors notifying them of the § 341 meeting-of-creditors and other pertinent deadlines. The Plaintiffs even include this document as Exhibit A in their brief. Here, where the address is clearly stated, it is incumbent on the movant to show evidence of extenuating circumstances as to why the error was made. Law office neglect alone is insufficient to establish "good cause" for failure to effectuate proper service within the 120-day time period. *Ingala v. Sciaretto (In re Sciaretto)*, 170 B.R. 33, 37 (Bankr. D. Conn. 1994), *Stinnett v. Wilson (In re Wilson)*, 96 B.R. 301, 303 (Bankr. E.D. Cal 1989). Instead law office neglect needs to be coupled with evidence showing extenuating circumstances as to why the clerical error made by the law office was other than pure oversight. Here, no such evidence has been offered. And in the absence of such evidence, the Plaintiffs, having the burden to establish "good cause" for purposes of Rule 4(m), are not entitled to an extension of the 120-day period to effectuate proper service.

The next issue for the Court to address is whether, in the absence of "good cause," this Court should exercise its discretionary authority to extend the period allowed for service under 4(m). In *Henderson v. United States*, 517 U.S. at 658, the Supreme Court explained in footnote five that Rule 4(m) "permits a district court to enlarge the time period for service even if there is no good cause shown." Although the *Henderson* case did not involve a bankruptcy matter, its holding has been applied to bankruptcy cases.[5]

In determining whether to exercise their discretionary authority, and extend the period allowed for service under Rule 4(m), courts have considered this nonexclusive list of factors:

(1) whether a significant extension of time is required;

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[5]*Lopez v. Donaldson (In re Lopez)*, 292 B.R. 570 (E.D. Mich. 2003).

> (2) whether an extension of time would prejudice the defendant other than the inherent "prejudice" in having to defend the suit;
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> (3) whether the defendant had actual notice of the lawsuit;
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> (4) whether a dismissal would substantially prejudice the plaintiff; i.e., would his lawsuit be time-barred; and
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> (5) whether the plaintiff had made any good faith efforts at effectuating proper service.[6]

Applying now the first consideration, the extension of time the Plaintiffs seek is anything but insignificant. The 120-day period to serve the Defendants commenced on August 9, 2004, when the complaint was filed and expired on December 7, 2004. However, the Plaintiffs did not bring their mistake in service to the Court's attention until April 7, 2005, a full 241 days after the complaint was filed and more than twice the time period specified for service under Rule 4(m).

This significant amount of time elapsed does not bode favorably for the Plaintiffs when also considering the second factor. For the type of action brought by the Plaintiffs, there are strict time limits in which a creditor can bring a complaint. (Bankruptcy Rule 4007(c), sets this time limit at 60 days after the date first set forth § 341 meeting-of-creditors). The purpose of such a time limit is to promote a basic bankruptcy goal: the speedy resolution of the debtor's financial affairs. *In re Ozai*, 34 B.R. 764, 766 (B.A.P. 9th Cir.1983). But here, given the long elapse of time, this goal will not be fulfilled as under any set of circumstances, the Debtors had the right to assume that any claim the Plaintiffs held against them would have become stale.

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[6] *Id.*, at 576, *quoting Slenzka v. Landstar Inc.*, 204 F.R.D.322, 326 (E.D. Mich. 2001).

Of course this factor may also be construed to operate in the Plaintiffs' favor. Because, despite Rule 4(m)'s directive of a dismissal without prejudice, the Plaintiffs will be time barred by the Bankruptcy Rules from refiling their complaint, thus prejudicing the Plaintiffs in accord with the fourth of the above considerations. Recognizing this, the Court gives considerable weight to this factor. But at the same time it is not dispositive. "It is well settled that inability to refile a suit does not bar dismissal under Rule 4(j) [now Rule 4(m)]." *Traina v. United States*, 911 F.2d 1155, 1157 (5th Cir. 1990). And here, tipping the balance in the Defendants' favor, is the application of the final consideration: good faith at attempting to perfect service.

In this matter, the Plaintiffs' mistakenly sent notice to a wrong address. While this, alone, does not constitute a lack of good faith per se, the Debtors' proper address was easily discernable, being listed on numerous documents. Notwithstanding, the Plaintiffs contend that, since the U.S. Postal Service did not return the notice as undeliverable, they cannot be faulted, suggesting then that service may be presumed. In making this argument, the Plaintiffs apparently rely on the principle set forth in FED.R.CIV.P 5(b)(2)(B) which provides that service by mail is complete upon mailing. (Doc. 20, at pg. 4). And while this Rule is not technically applicable in this matter, applying only to pleadings subsequent to the original pleading, the Rule goes on to provide that service must be mailed to the last known address of the person served. But in the present case, this was not accomplished, notice having been sent to address other than that listed in the Debtors' bankruptcy petition.

The Plaintiffs also seem to argue that "good faith" exists because service upon the Debtors' attorney was made by e-mail upon the Debtors' attorney through the court's electronic filing system. However, unlike what occurred here, "good faith" envisions that a party take some affirmative step to accomplish their objective, and not rely, as here, upon acts taken by others. Thus, considering the lack of good faith to effectuate proper service in this case, together with the cumulative weight of those preceding considerations

bearing negatively on the Plaintiffs, the Court cannot find cause to exercise its discretion and extend Rule 4(m)'s 120-day time period.

In reaching the conclusions found herein, the Court has considered all the evidence, exhibits, and arguments of counsel, regardless of whether or not they are specifically referred to in this Decision.

Accordingly, it is

ORDERED that the motion of the Plaintiffs seeking permission to proceed with their adversary complaint and to amend their pleadings be, and is hereby, DENIED.

It is ***FURTHER ORDERED*** that this adversary proceeding, be, and is hereby, DISMISSED.

Dated:

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Richard L. Speer
United States
Bankruptcy Judge