

Br. in Opp'n to Def. Mot. to Dismiss. The clerk's office in Cleveland received the complaint on February 10, 2003. *See* Item 4, Ex. A, Br. in Opp'n to Def. Mot. to Dismiss. The clerk's office in Cleveland then forwarded the complaint to the clerk's office in Canton for filing. The clerk's office in Canton received the complaint on February 14, 2003. Compl. The bar date was February 10, 2003. Not. of Chapter 7 Bankr. Case, Mtg. of Creds., & Deadlines.

The clerk's office issued the summons and notice of pretrial conference in an adversary proceeding on March 12, 2003. Summons and Not. of Pretrial Conf. in an Adv. Pro. Counsel served the summons and complaint on Defendant on April 2, 2003 by certified mail, return receipt requested. Ex. A, Br. in Opp'n to Def. Mot. to Dismiss. Defendant received the summons and complaint on April 2, 2003. Item 5, Ex. A, Br. in Opp'n to Def. Mot. to Dismiss.

In his motion to dismiss, first Defendant argues that Plaintiff failed to timely file the complaint to determine dischargeability and objection to discharge, and therefore, the complaint should be dismissed as being untimely pursuant to Federal Rule of Bankruptcy Procedure 4007(c).² Second, Defendant argues that the complaint should be dismissed because Counsel failed to serve the summons and complaint within the time prescribed by Federal Rule of Bankruptcy Procedure 7004(e). Defendant argues that Federal Rule of Bankruptcy Procedure 7012(b), which incorporates Federal Rule of Civil Procedure 12(b), provides for dismissal of a complaint for insufficiency of service of process.

In her defense, Plaintiff argues that the receipt of the complaint by the Cleveland clerk's office on the bar date requires that the complaint be treated as timely filed by this court. Further, Plaintiff argues that Rule 7004 does not warrant the dismissal of an adversary proceeding where the summons and complaint have not been served within ten days of the issuance of the summons if the defendant has been personally served. Plaintiff argues that the slight delay in receiving the summons and complaint is not prejudicial, and if it is, the prejudice can be remedied by a reissuance of the summons and complaint and new service on Defendant.

ANALYSIS

I. Timeliness of filing of the complaint

As Counsel's purported failure to file Plaintiff's complaint to determine dischargeability and to object to discharge within the time limits prescribed by Federal Rules of Bankruptcy

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²Federal Rule of Bankruptcy Procedure 4004(a) fixes the time within which a party may file a complaint objecting to a debtor's discharge under 11 U.S.C. § 727(a). This deadline is the same as that for filing a complaint to determine dischargeability under 11 U.S.C. § 523(a)(2) and (4); 60 days after the first date set for the meeting of creditors under 11 U.S.C. § 341(a).

Procedure 4004(a) and 4007(c) would toll the bell of death for Plaintiff's case, the court must first determine if Plaintiff's tendering of the complaint to the clerk's office of the Cleveland Court on the bar date can be considered a timely filing of the complaint.

Federal Rule of Bankruptcy Procedure 5005(a)(1) dictates the place at which a bankruptcy filing must occur. That rule reads in pertinent part:

(1) Place of Filing. The lists, schedules, statements, proofs of claim or interest, complaints, motions, applications, objections and other papers required to be filed by these rules . . . shall be filed with the clerk in the district where the case under the Code is pending. The judge of that court may permit the papers to be filed with the judge, in which event the filing date shall be noted thereon, and they shall be forthwith transmitted to the clerk. The clerk shall not refuse to accept for filing any petition or other paper presented for the purpose of filing solely because it is not presented in proper form as required by these rules or any local rules or practices.

Fed. R. Bankr. P. 5005(a)(1). The term "clerk" "means bankruptcy clerk, if one has been appointed, otherwise clerk of the district court." Fed. R. Bankr. P. 9001(3).

A safe harbor provision exists to correct pleadings that are erroneously filed in the wrong location. Federal Rule of Bankruptcy Procedure 5005(c) provides in relevant part:

(c) Error in Filing or Transmittal. A paper intended to be filed with the clerk but erroneously delivered to the United States trustee, the trustee, the attorney for the trustee, a bankruptcy judge, a district judge, or the clerk of the district court shall, after the date of its receipt has been noted thereon, be transmitted forthwith to the clerk of the bankruptcy court. A paper intended to be transmitted to the United States trustee but erroneously delivered to the clerk, the trustee, the attorney for the trustee, a bankruptcy judge, or the clerk of the district court shall, after the date of its receipt has been noted thereon, be transmitted forthwith to the United States trustee. In the interest of justice, the court may order that a paper erroneously delivered shall be deemed filed with the clerk or transmitted to the United States trustee as of the date of its original delivery.

Fed. R. Bankr. P. 5005(c). A case out of Mississippi, Bank of Winona v. Butler (In re Butler), 237 B.R. 611 (Bankr. N.D. Miss. 1999), which applied this rule, is instructive. In this case, a third year law student, clerking at a law firm, unwittingly delivered a dischargeability complaint

to the clerk of a district court where it was stamped “received” by a clerk two days before the bar date. Id. at 613. The law clerk then withdrew the complaint from the district court clerk and mailed the complaint to the bankruptcy court. Id. The complaint arrived at the bankruptcy court several days after the bar date had run. Id. The complaint had a district court cover sheet attached, rather than a bankruptcy court cover sheet, and was not accompanied by the requisite filing fee. Id. The bankruptcy court “pre-filed” the complaint and notified counsel of the deficiencies. Id. On the date the filing fee was received, the bankruptcy court stamped “filed” on the complaint. Id. The defendant filed a motion to dismiss. Id. The court did not dismiss the complaint, reasoning that although the law clerk’s actions had been “unwitting,” they were sufficient to meet the safe harbor provision of Rule 5005(c). Id. at 617. The court deemed the complaint filed as of the district court’s date of receipt and denied the defendant’s motion to dismiss. Id.

A plaintiff can receive the protection of the safe harbor provision by providing “proof that it made its misdelivery on or before the deadline.” Kamrath v. Kamp (In re Kamp), 207 B.R. 193, 197 (Bankr. D. Minn. 1997). This can be established through a notation made on the face of the subject paper by the recipient of the misdelivery where the notation is done “with enough specificity to indicate the identity of the recipient and the date of its receipt.” Id.

Where the recipient has not, it is still open to a plaintiff to prove up the receipt by other means. This could be an affidavit by the recipient of the misdelivery, or its employee or agent, acknowledging the date of the misdelivery and its circumstances; a return receipt attesting to mail delivery; or, if the misdelivery was effected by in-hand means, the affidavit of the person who made it. In the absence of the contemporaneous endorsement mandated by the rule, however, it is incumbent on a plaintiff to produce this sort of proof to gain the protection of the rule.

Id.

In the present case, Exhibit A, Counsel’s affidavit and the FedEx shipment detail, letter, and cancelled check attached, prove that Counsel tendered the complaint timely, albeit to the wrong court. The court determines that the interest of justice requires that the safe harbor provision of Rule 5005(c) extends far enough to protect Plaintiff from the unfortunate consequence of Counsel’s having addressed the cover letter to the appropriate court but having sent it to the wrong court. Plaintiff’s complaint is deemed to be filed as of February 10, 2003, the date of receipt by the clerk’s office in Cleveland. Defendant’s motion to dismiss on this basis is denied.

II. Timeliness of service of the summons and complaint

Federal Rule of Bankruptcy Procedure 7004, which incorporates Federal Rule of Civil Procedure 4(a), (b), (c)(1), (d)(1), (e)-(j), (l), and (m), governs service in adversary proceedings. Fed. R. Bankr. P. 7004(a). Federal Rule of Bankruptcy Procedure 7004(e) provides in pertinent part:

(e) Summons: Time Limit for Service Within the United States.
Service made under Rule 4(e) . . . shall be by delivery of the summons and complaint **within 10 days after the summons is issued**. If service is by any authorized form of mail, the summons and complaint shall be deposited in the mail within 10 days after the summons is issued. If a summons is not timely delivered or mailed, another summons shall be issued and served.

Fed. R. Bankr. P. 7004(e) (emphasis added). Service in this case would have been made under Federal Rule of Civil Procedure 4(e), which covers service upon individuals within a judicial district of the United States. Fed. R. Civ. P. 4(e).

Counsel admits that service of the summons and complaint on Defendant did not occur within the ten-day time frame, however, Counsel argues that this failure should not be punishable by a dismissal of the complaint. Instead, Counsel argues that the clerk's office should reissue the summons, and Plaintiff should be allowed to reserve it, with the complaint, within the appropriate time period. This curing of the default is consistent with Rule 7004(e).

There is no counterpart to Fed.R.Bank.P. 7004(f)³ in the Federal Rules of Civil Procedure. This absence further confirms the purpose of Fed.R.Bank.P. 7004(f). An initial ten-day opportunity for service is unnecessary under the Federal Rules of Civil Procedure because the responsive pleading window thereunder (20 days) begins to run only from the date a defendant is actually served. Fed.R.Civ.P. 12(a)(1)(A). By contrast, because the Bankruptcy Rule responsive pleading window runs from the date of summons issuance, Fed.R.Bank.P. 7012(a), a ten-day rule such as Fed.R.Bank.P. 7004(f) is necessary to relieve a defendant from an unduly shortened responsive pleading window.

Union Trust Co. v. Anderson (In re Anderson), 179 B.R. 401, 404, fn. 4 (Bankr. D. Conn. 1995). Defendant's motion to dismiss is denied on this basis as well, and Plaintiff is directed to request

³This decision was issued prior to the 1996 amendment to Federal Rule of Bankruptcy Procedure 7004. At that time, Federal Rule of Bankruptcy Procedure 7004(f) was what Federal Rule of Bankruptcy Procedure 7004(e) is known as today.

the clerk's office reissue the summons.

However, Plaintiff must make effective service within the time frame set forth in Federal Rule of Civil Procedure 4(m). Federal Rule of Civil Procedure 4(m) provides:

(m) Time Limit for Service. If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period.

Fed. R. Civ. P. 4(m). The advisory committee's note explains:

The . . . subdivision explicitly provides that the court shall allow additional time if there is good cause for the plaintiff's failure to effect service in the prescribed 120 days, and authorizes the court to relieve a plaintiff of the consequences of an application of this subdivision even if there is no good cause shown. . . . Relief may be justified . . . if the applicable statute of limitations would bar the refiled action.

Fed. R. Civ. P. 4(m) advisory committee's note. Plaintiff must also make proof of service to the court. Fed. R. Civ. P. 4(l).

The directive to Plaintiff to request the clerk's office reissue the summons and to reserve the complaint within the appropriate time period may run afoul of the 120-day time requirement set forth in Federal Rule of Civil Procedure 4(m). Therefore, the court allows Plaintiff until July 29, 2003 to effectuate service and to provide proof thereof without running afoul of the time limitation and placing Plaintiff's case in jeopardy of dismissal under Federal Rule of Civil Procedure 4(m).

CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss for Plaintiff's failure to file the complaint to determine dischargeability and objection to discharge within the bar date and failure to serve the complaint within the time period prescribed by the rules is not well taken.

An appropriate order shall enter forthwith.

/s/ Russ Kendig

**RUSS KENDIG
UNITED STATES BANKRUPTCY JUDGE**