Dated: January 11 2006

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No. 02-37161
	)	
Medi-Care Orthopedic and Hospital Equipment, Inc.,	)	Chapter 11
	)	
Debtor.	)	JUDGE MARY ANN WHIPPLE

MEMORANDUM OF DECISION AND ORDER GRANTING MOTION TO VACATE ORDER

The matter before the court is a Motion to Vacate Order Disallowing the Claim of National City Bank ("Motion") [Doc. # 945] filed by National City Bank ("National City"). The Motion raises the issue of the proper service of an objection to a claim where the creditor did not file a proof of claim form. After reviewing the Motion and considering the arguments of counsel, the court will grant National City's Motion.

FACTUAL BACKGROUND

Except as otherwise indicated, the following facts are not in dispute. On October 21, 2002, Debtor filed a Chapter 11 bankruptcy petition. In its Schedule F, Debtor scheduled a debt owed to National City as an undisputed general unsecured claim in the amount of $25,137.63. National City,

therefore, was not required to, and did not, file a proof of claim. However, on October 13, 2004, Debtor filed an objection to National City's claim ("Objection"), the basis for which was that Debtor believed the guarantor of the obligation to National City had made substantial post-petition payments. [Doc. # 725].[1] The Objection was served on National City by regular first class mail addressed to a P.O. Box in Louisville, Kentucky. The court scheduled the matter for hearing on November 30, 2004, and set November 23, 2004, as the deadline for filing a response to the Objection. The clerk sent notice of the hearing and response deadline by first class mail to the same P.O. Box. [Doc. #750].

Although National City filed no response to the Objection, Debtor's counsel contacted the court before the hearing and indicated that a status report would be filed within fourteen days. [Doc. #766]. The November 30 hearing was, therefore, not held. Debtor's counsel acknowledges that he had received a phone call from Geoffrey Peters, an attorney with Weltman, Weinberg, & Reis Co., L.P.A. ("WWR"), which prompted his request for leave to file a status report. WWR had not at that time made an appearance in this case on behalf of National City. It had, however, filed an entry of appearance on behalf of another creditor, CIT Technology Financing ("CIT"). According to Peters, WWR discovered that the Objection to National City's claim was filed by Debtor while reviewing the court's docket in this case, presumably on behalf of CIT, thus prompting his call to Debtor's counsel the day before the hearing was scheduled to take place.

On Thursday, December 16, 2004, Debtor filed a Status Report stating that Peters had entered an appearance on behalf of National City after the November 30, 2004, hearing date but that National City had made no contact with Debtor.[2] Debtor, therefore, requested that the court enter a default against National City and disallow its claim in full. [Doc. # 776]. The Certificate of Service indicates that the Status Report was sent to Peters by first class mail on December 16, 2004. [*Id.*]. On Monday, December 20, 2004, the court entered an order disallowing National City's claim. [Doc. # 779]. Also on that same date, WWR filed an entry of appearance of counsel on behalf of National City and notification to add National City Bank, c/o Weltman, Weinberg & Reiss Co., L.P.A., to the creditors'

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[1] The court refers throughout this Memorandum of Decision to documents filed in this case, taking judicial notice of the contents of its case docket. Fed. R. Bankr. P. 9017; Fed. R. Evid. 201(b)(2); *In re Calder*, 907 F.2d 953, 955 n.2 (10th Cir. 1990).

[2] Although National City's counsel did not file a Notice of Appearance with the court until December 20, 2004, the Certificate of Service indicates that Debtor's counsel was served with the Notice on December 15, 2004.

matrix "[f]or the purpose of general notification only." [Doc. # 778].

On September 16, 2005, National City filed the motion now before the court to vacate the December 20 order disallowing its claim. No explanation is offered for the delay.

LAW AND ANALYSIS

In this case, National City moves to vacate the court's order disallowing its claim, arguing that Debtor failed to properly serve National City with its Objection to National City's claim. Debtor, on the other hand, argues that the issue regarding proper service is moot since National City had actual notice of the Objection before the date of the hearing and since National City entered an appearance in this case. Debtor further argues that National City failed to file its Rule 60(b) motion in a timely manner before confirmation of Debtor's Chapter 11 plan so as to avoid any prejudice to other creditors.

Rule 60(b) of the Federal Rules of Civil Procedure, made applicable to this case by Rule 9024 of the Federal Rules of Bankruptcy Procedure, provides in relevant part as follows: "On motion and upon such terms as are just, the court may relieve a party. . . from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . (4) the judgment is void . . . ." Fed. R. Civ. P. 60(b)(1) and (4). Although National City cites Rule 60(b)(1) as the basis for its motion, its argument raises issues under Rule 60(b)(4) rather than 60(b)(1). The court, therefore, construes the motion as brought under Rule 60(b)(4). *See Snyder v. Smith*, 736 F.2d 409, 419 (7th Cir. 1984) (finding that "[t]he Federal Rules are to be construed liberally so that erroneous nomenclature in a motion does not bind a party at his peril"), overruled on other grounds, *Felzen v. Andreas*, 132 F.3d 873 (7th Cir. 1998); *Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 527 (9th Cir. 1983) (holding that "nomenclature is not controlling" and stating that "[t]he court will construe [a motion], however styled, to be the type proper for the relief requested").

"A judgment is void under 60(b)(4) 'if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or if it acted in a manner inconsistent with due process of law.'" *Antoine v. Atlas Turner, Inc.*, 66 F.3d 105, 108 (6th Cir. 1995) (citing *In re Edwards*, 962 F.2d 641, 644 (7th Cir. 1992)). Under such circumstances, "it is a *per se* abuse of discretion for a district court to deny a movant's motion to vacate the judgment under Rule 60(b)(4)." *Id*. (citing *In re Edwards*, 962 F.2d 641, 644 (7th Cir. 1992).

By arguing that it was not properly served with Debtor's Objection, National City argues, in effect, that the court's judgment is void for lack of personal jurisdiction. Debtor's argument that this

issue is moot due to the fact that counsel that represented National City in other matters had actual notice of the Objection and hearing on the Objection is without merit. Addressing a court's exercise of personal jurisdiction over a party, the Supreme Court explained as follows:

> "The requirement that a court have personal jurisdiction flows not from Art. III, but from the Due Process Clause.... It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty."
> . . . .
> Before a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied. "[S]ervice of summons is the procedure by which a court having venue and jurisdiction of the subject matter of the suit asserts jurisdiction over the person of the party served." . . . . Thus, before a court may exercise personal jurisdiction over a defendant, there must be more than notice to the defendant and a constitutionally sufficient relationship between the defendant and the forum.

Omni Capital Intern., Ltd. v. Rudolf Wolff & Co., Ltd., 484 U.S. 97, 104 (1987). Citing *Omni Capital Intern.*, the Sixth Circuit agreed with the majority rule that actual knowledge of an action does not substitute for proper service of process under Rule 4 [of the Federal Rules of Civil Procedure] and does not cure a technically defective service of process. *Friedman v. Estate of Presser*, 929 F.2d 1151, 1155-56 (6th Cir. 1991); *see also LSJ Investment Co. v. O.L.D., Inc.*., 167 F.3d 320, 322 (6th Cir. 1999)(stating that the court "will not allow actual knowledge of a lawsuit to substitute for proper service under Fed. R. Civ. P. 4"). "Due to the integral relationship between service of process and due process requirements," the court concluded that "the requirement of proper service of process 'is not some mindless technicality.'" *Friedman*, 929 F.2d at 1156 (quoting *Del Raine v. Carlson*, 826 F.2d 698, 704 (7th Cir. 1987)).

In determining whether National City was properly served with Debtor's motion objecting to its claim, the court first considers Bankruptcy Rule 9014. That rule provides, in relevant part, as follows:

> (a) Motion. In a contested matter not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought. No response is required under this rule unless the court directs otherwise.
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> (b) Service. The motion shall be served in the manner provided for service of a summons and complaint by Rule 7004.

Fed. R. Bankr. P. 9014(a) and (b). Debtor's objection to National City's claim is clearly a contested matter. It is therefore governed by Rule 9014 unless it is "otherwise governed by these rules."

The only other rule that may arguably govern Debtor's objection is Rule 3007, which specifically addresses objections to claims and provides, in relevant part, as follows:

> An objection to the allowance of a claim shall be in writing and filed. A copy of the objection with notice of the hearing there on shall be mailed or otherwise delivered to the claimant, the debtor or debtor in possession and the trustee at least 30 days prior to the hearing.

Fed. R. Bankr. P. 3007. At first blush it appears that Rule 3007 "otherwise govern[s]" Debtor's objection. But a closer analysis of the plain language of the rule leads the court to a conclusion to the contrary. Rule 3007 requires that the objection and notice of hearing be "mailed or otherwise delivered to the *claimant*." (Emphasis added). The court finds it significant that Rule 3007 uses the term "claimant" rather than "creditor." "Creditor" is defined in the Bankruptcy Code as an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor." 11 U.S.C. § 101(10)(A). And "claim" is defined as a "right to payment. . . ." 11 U.S.C. § 101(5)(A). The Bankruptcy Code does not define "claimant." However, the dictionary definition is "one who asserts a right or title." Webster's Third New Int'l Dictionary 414 (Merriam-Webster, Inc. 1986); *see also* Black's Law Dictionary 247 (6th ed. 1990). While National City may be a creditor of Debtor, at the time Debtor filed its motion objecting to National City's claim, it was not a claimant in the case since it had not *asserted* a claim or "right to payment" by filing a proof of claim form. [3] Thus, Rule 3007 does not govern service of the objection filed by Debtor in this case.

Generally, an objection to a claim is filed after a creditor has filed its proof of claim form. At that point, the creditor has become a "claimant." There is conflict in case law addressing the proper method of commencing a contested matter in which an objection to claim is asserted and the proper method of serving the objection. C*ompare Boykin v. Marriott Int'l, Inc. (In re Boykin),* 246 B.R. 825 (Bankr. E.D. Va. 2000) (finding that service of an objection to proof of claim is a contested matter governed by Bankruptcy Rule 9014) and *United States v. Oxylance Corp.*, 115 B.R. 380 (N.D. Ga. 1990) (same) *with In re Anderson*, 330 B.R. 180, 186 (Bankr. S.D. Tex. 2005) (finding that Bankruptcy Rule 3007 is a specific rule concerning objections to claims and controls service of such

[3] The Debtor listed National City in its schedule of liabilities, and did not identify the debt as disputed, contingent or unliquidated. Under Bankruptcy Rule 3003(b), the schedule constitutes prima facie evidence of the validity and amount of the claim and it was not necessary for National City Bank to file a proof of claim form to participate in any distributions to which it would be entitled through the Chapter 11 plan. Fed. R. Bank. P. 3003(b).

objection rather than the more general Rule 9014), *Jorgenson v. State Line Hotel, Inc. (In re State Line Hotel, Inc.)*, 323 B.R. 703, 711 (B.A.P. 9th Cir. 2005) (finding that a contested matter objecting to a claim is commenced by filing an objection rather than a motion and is governed by Rule 3007 rather than 9014) and *In re Hawthorne*, 326 B.R. 1, 3 (Bankr. D.C. 2005) (finding Rule 3007, rather than Rule 9014, sets forth the required manner of service). But those cases are all distinguishable from this case in that the creditor in each case had filed a proof of claim form. There is no question therefore that the creditor was also a claimant in the case. In each case in which the court found that Rule 3007 governed rather than Rule 9014, the debtor had mailed the objection and notice of hearing to the name and address listed for receipt of notices by the creditor in its proof of claim form. Unlike the creditors in the cases cited above, National City had not submitted itself to the bankruptcy court's jurisdiction by filing a proof of claim, nor was it required to do so. National City was not a "claimant" and, therefore, Rule 3007 does not apply.

Because Debtor's motion objecting to National City's claim is not "otherwise governed" by the Bankruptcy Rules, Rule 9014 applies. Under Rule 9014, Debtor was required to serve the motion "in the manner provided for service of a summons and complaint by Rule 7004." Fed. R. Bankr. P. 9014(b). While neither *Friedman* nor *LSJ Investment Co.* cited above specifically address Rule 7004 of the Federal Rules of Bankruptcy Procedure, the basis for the courts' holdings is equally applicable. The heightened service of process requirements of Rules 9014 and 7004 are particularly appropriate under such circumstances as are presented in this case where a debtor schedules a claim as undisputed and liquidated and then later objects to payment of the claim.

National City Bank is a federally insured depository institution. Rule 7004(h) provides in pertinent part as follows:

> Service on an insured depository institution . . . in a contested matter or adversary proceeding shall be made by certified mail addressed to an officer of the institution unless –
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> (1) the institution has appeared by its attorney, in which case the attorney shall be served by first class mail. . . .

In this case, Debtor did not properly serve National City with its Objection by certified mail addressed to an officer of the institution. *See Hamlett v. Amsouth Bank (In re Hamlett)*, 322 F.3d 342, 346-47 (4th Cir. 2003). Instead, it sent its Objection by first class mail to a P.O. Box. *Cf. Beneficial California, Inc. v. Villar (In re Villar)*, 317 B.R. 88, 92-93 (B.A.P. 9th Cir. 2004)(service of motion to avoid lien on corporation at P.O. Box insufficient under Rule 7004). Although it is true, as Debtor

argues, that National City entered an appearance through its attorney, that did not cure Debtor's previously defective service. Under Rule 7004(h)(1), Debtor was then required to serve National City's attorney by first class mail in order to perfect service. As National City's attorney filed a Notice of Appearance just three hours before the court entered its order disallowing National City's claim, Debtor obviously did not perfect service before National City's claim was disallowed.

In addition to Debtor's failure to properly serve National City with its Objection, the court has procedural due process concerns regarding the manner in which the court entered its order disallowing National City's claim. Fundamental requirements of due process are adequate notice and an opportunity to be heard. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985). The opportunity to be heard must be granted at a meaningful time and in a meaningful manner. *Id.* at 547; *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965). That did not occur in this case.

Debtor requested in its Status Report that the court enter a default against National City and disallow its claim. The Status Report was filed on Thursday, December 16, 2004, and, on that date, was sent by regular mail to National City's counsel, who had not yet filed its Notice of Appearance in this case. On the following Monday, December 20, 2004, the court entered its order disallowing National City's claim. Even assuming that the Status Report and, thus, the request for default, was properly served on National City by sending it to its attorney, National City did not have a meaningful opportunity to respond before the court's entry disallowing its claim.

Accordingly, the court finds that its December 20, 2004, order disallowing National City's claim is void under Rule 60(b)(4) because the court lacked personal jurisdiction over National City and because the court's order was entered in a manner inconsistent with due process of law. The court further finds that any prejudice to creditors is insufficient to defeat the Motion given the circumstances of this case. The Motion will therefore be granted.

THEREFORE, for the foregoing reasons, good cause appearing,

IT IS ORDERED that National City's Motion to Vacate Order [Doc. # 945] be, and hereby is, **GRANTED**; and

IT IS FURTHER ORDERED that the court's Order Disallowing the Claim of National City [Doc. # 779] be, and hereby is, **VACATED.**