Dated: February 06 2006

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No. 03-31195
	)	
Leatherland Corp.,	)	Chapter 11
	)	
Debtor.	)	
	)	JUDGE MARY ANN WHIPPLE

MEMORANDUM OF DECISION AND ORDER GRANTING MOTION FOR RELIEF FROM ORDER

The court held a hearing on the Motion of Urban Retail Properties Co. for Relief from the Order Granting Amended Motion for Turnover ("Motion for Relief") [Doc. # 1542] and Debtor's objection to the Motion [Doc. # 1549]. After considering the testimony and evidence presented, the briefs of the parties, and the arguments of counsel, the court will grant the Motion.

FACTUAL BACKGROUND

On October 14, 2005, Debtor filed a motion for turnover by Urban of $90,000, the amount of an inducement payment that Debtor contends is owed to it under a lease agreement between Debtor and Urban. [Doc. # 1531]. Because the motion failed to indicate the time by which an objection to the motion must be filed, as required under Local Rule 9013-1, a Notice of Filing Deficiency was entered. Debtor then filed

an Amended Motion for Turnover of Property [Doc. # 1539] on October 28, 2005. It is undisputed that Debtor did not serve the original or amended motion on Urban itself or on Urban's Chicago attorneys who, on March 3, 2003, had filed a notice of appearance and request to receive all notices and pleadings. The certificates of service for both the original motion for turnover and the amended motion state that H. Buswell Roberts, local counsel for Urban, was served with the motions through "the Court's electronic filing system and/or via regular U.S. mail" on the date each was filed. [Doc. # 1531, p. 8 and # 1539, p.8]. Roberts had previously appeared in this case on behalf of Urban on matters relating to the lease between Urban and Debtor. [*See* Doc. ## 895, 1104]. Urban did not file an objection or otherwise respond to the original or amended motion for turnover and, noting its default, on November 14, 2005, the court entered an order granting the amended motion for turnover and ordering Urban to turnover the sum of $90,000 to Debtor. [Doc. # 1540]. Urban filed the instant Motion for Relief on November 21, 2005.

At the hearing on the Motion for Relief, Urban offered the testimony of Roberts and David Coyle, both partners in the law firm of Shumaker, Loop & Kendrick, LLP, as well as Roberts' administrative assistant. Coyle testified that Roberts was on vacation during the week that the amended motion for turnover was filed and mailed and that he reviewed all of Roberts' U.S. mail during that week. He further testified that the amended motion was not among the documents he reviewed during that time period.

Roberts' administrative assistant testified regarding procedures for handling U.S. mail addressed to Roberts at the law firm. She ultimately reviews all of his mail and testified that neither the original nor the amended motion for turnover were received. Roberts' administrative assistant also receives copies of all of Roberts' emails received from the court's electronic filing system. After receiving email notification of the court's order granting the amended motion for turnover, she searched her email records and found no email notification of either the original or the amended motion for turnover. She also testified that, per her request, the law firm's Information Technology department searched the firm's email records and found nothing relating to the turnover motions.

Roberts testified that he does not delete any of his email notifications and that, after learning of the court's order granting the amended motion for turnover, he reviewed all of his emails. He testified that he did not receive an email notification relating to the original or the amended motion for turnover. He did, however, find an email from the bankruptcy court in the Southern District of Ohio, dated October 28, 2005, the same date that the amended motion was filed, stating that certain "high-volume items" filed in the court's electronic filing system are not electronically served by the court. Instead, notices for these items are generated by the Bankruptcy Noticing Center ("BNC") in Reston, Virginia. The email explained that

"a bug" had been discovered in the BNC system and that the filing notices for these items were not correctly identifying the underlying filing transaction. The email further explained that the "bug" was a national problem that the BNC and others were working to resolve. [Creditor's Ex. A]. Finally, Roberts testified that he did not receive either turnover motion by U.S. mail.

While there is no evidence that the original or the amended motion for turnover were items affected by the BNC "bug," the court finds the testimony of Roberts and his administrative assistant credible with respect to the lack of any email notification of those motions. The court also credits their testimony, as well as that of Coyle, that Roberts did not receive the motions by regular U.S. mail. The certificates of service on the motions do not specifically state that the motions were served by U.S. mail, instead stating that they were served through "the Court's electronic filing system *and/or* via regular U.S. mail." [Doc. # 1531, p. 8 and # 1539, p.8 (emphasis added)]. The court finds it more likely than not that the U.S. mail was not used to serve the turnover motions.[1]

LAW AND ANALYSIS

Urban moves for relief from the court's turnover order under Rule 60(b) of the Federal Rules of Civil Procedure, made applicable in bankruptcy cases by Rule 9024 of the Federal Rules of Bankruptcy Procedure. It argues that the motion for turnover was procedurally defective in that a request for turnover must be filed as an adversary proceeding. It further argues that it received no notice of the Motion before the court entered its order granting the Motion.

Under Rule 60(b), the court may relieve a party from a final judgment, order, or proceeding for any one of several reasons. Although Urban does not specify the particular subdivision of Rule 60(b) that is the basis for the relief it seeks, its arguments that the amended motion for turnover was procedurally defective and that it received no notice of the amended motion raise issues under both Rule 60(b)(1) and (4). The court may grant relief under Rule 60(b)(1) in the event of "mistake, inadvertence, surprise, or excusable neglect" or under Rule 60(b)(4) if the judgment is void. Because the court finds that Urban is entitled to relief from the court's turnover order under Rule 60(b)(4), it does not address the issues as they relate to Rule 60(b)(1).

"A judgment is void under 60(b)(4) 'if the court that rendered it lacked jurisdiction of the subject

[1] The court notes that there is a presumption that an addressee receives a properly mailed item when the sender presents proof that the item was properly addressed, stamped, and deposited in the mail. *See Hagner v. United States*, 285 U.S. 427, 430 (1932). But there is no such proof before the court. In fact, even the certificate of service is ambiguous as to how the Motion was served, providing only that it was served "electronically through the Court's electronic filing system *and/or* via regular U.S. mail. . . ." [Doc. # 1539]. Moreover, even when a presumption does arise, it may be rebutted by testimony of non-receipt. *Bratton v. Yoder Co. (In re Yoder Co.)*, 758 F.2d 1114, 1118 (6th Cir. 1985).

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)).

Urban's arguments present the due process issue of whether Debtor provided notice that was reasonably calculated to apprise Urban that its rights were in jeopardy. Lack of notice and sufficient service of process resulting in a lack of due process properly renders a judgment void. *In re Chess*, 268 B.R. 150, 155 (Bankr. W.D. Tenn. 2001). As the Supreme Court of the United States has explained, "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

Under Bankruptcy Rule 7001, "a proceeding to recover money or property, other than a proceeding to compel the debtor to deliver property to the trustee, or a proceeding under § 554(b) or § 725 of the Code, Rule 2017, or Rule 6002," must be brought by adversary proceeding, which is commenced by a properly filed and served complaint. Fed. R. Bankr. P. 7001(1) and 7003; *see, also, Camall Co. v. Steadfast Ins. Co. (In re Camall Co.)*, 16 Fed. Appx. 403 (6th Cir. 2001) (affirming bankruptcy court's decision denying a motion for turnover because it was filed as a motion rather than as an adversary proceeding as required under Rule 7001); *In re Perkins*, 902 F.2d 1254, 1258 (7th Cir. 1990) (finding that a turnover order entered in an action commenced by motion rather than by complaint must be vacated) ; *In re Wheeler Tech., Inc.*, 139 B.R. 235, 239 (B.A.P. 9th Cir. 1992) (vacating bankruptcy court's order for turnover because proceeding was "inappropriately brought by . . .motion where an adversary proceeding is required"); *In re Barringer*, 244 B.R. 402, 410 (Bankr. E.D. Mich. 1999); *In re Riding*, 44 B.R. 846, 859 (Bankr. Utah 1984) (stating that "[t]he Bankruptcy Rules mandate that the court await the commencement of an adversary proceeding before determining whether turnover shall be required"). None of the exceptions to Rule 7001(1) are applicable in this case. Thus, Rule 7001 required Debtor to file its request for turnover as an adversary proceeding, subject to the procedural rules governing such proceedings, including rules governing service of a summons and complaint in Bankruptcy Rule 7004.

The court rejects Debtor's argument that it properly brought its request for turnover by motion rather than by commencing an adversary proceeding. It contends that the Sixth Circuit recognized in *Camall* that there are circumstances when a request for turnover may be made by motion. The court disagrees. In

Camall, the Sixth Circuit clearly stated that the "Bankruptcy Rules require that a party seeking a turnover file that request as an adversary proceeding rather than as a motion . . . ." *Camall*, 16 Fed. Appx. at 407. Although it distinguished several other cases on their facts, including *In re Eagle-Picher Indus., Inc.*, 134 B.R. 248 (Bankr. S.D. Ohio 1991), cited by Debtor, nowhere does it indicate its approval of proceeding by motion in contravention of Rule 7001(1). Neither are the facts in *Camall* a basis for distinguishing the court's determination that Rule 7001 requires a request for turnover of property from a non-debtor party to be brought as an adversary proceeding.

Courts addressing the constitutional notice requirement in the bankruptcy context have held that where the Bankruptcy Code and Bankruptcy Rules specify the degree of notice required before entry of an order, due process entitles a party to receive the notice specified. *See, e.g.*, *In re Hanson*, 397 F.3d 482, 486 (7th Cir. 2005) (finding that due process entitles student loan creditor to the heightened notice provided for by the Bankruptcy Code and Bankruptcy Rules); *Ruehle v. Educ. Credit Mgmt. Corp. (In re Ruehle)*, 412 F.3d 679, 683-84 (6th Cir. 2005) (same, quoting and citing *In re Hanson*, 397 F.3d 482, 486 (7th Cir. 2005)); *Banks v. Sallie Mae Serv. Corp. (In re Banks)*, 299 F.3d 296, 302 (4th Cir. 2002) (same);*CIT Group/Business Credit Inc. v. Official Committee of Unsecured Creditors (In re E-Z Serve Convenience Stores, Inc.)*, 318 B.R. 631, 636 (M.D.N.C. 2004) (finding that due process requires debtor to commence an adversary proceeding rather than proceed by motion in order that creditor receive the degree of notice specified in the Bankruptcy Rules where the avoidance of a creditor's lien is at issue); *In re Julien Co.*, 120 B.R. 930, 938 (Bankr. W.D. Tenn. 1990) (finding that proceeding by motion in action "to recover money or property" or for "other equitable relief" did not provide creditors adequate due process protections where Bankruptcy Rules 7001(1) and (7) require commencement of an adversary proceeding). Thus, the specific issue before this court is whether the court's turnover order was entered in violation of Urban's due process rights as a result of Debtor failing to commence an adversary proceeding. The court finds that it was.

In this case, as indicated above, Debtor was required to commence an adversary proceeding by filing a complaint and then serving a summons and the complaint in accordance with Rule 7004. Under Rule 7004(b)(3), service on a corporation may be made by first class mail "by mailing a copy of the summons and complaint to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process. . . ." *See also* Fed. R. Civ. P. 4(e) and (i), applicable through Fed. R. Bankr. P. 7004(b) (authorizing other methods of service of process not effected by Debtor here). Other than counsel for the United States Trustee and counsel for the Unsecured Creditors' Committee, the only other person indicated on the certificates of service for both the original and the amended motion

for turnover was Urban's local counsel, Roberts. There is no evidence that Roberts was an agent authorized to receive service of process on behalf of Urban. And even if the court assumes that he was so authorized, *see, e.g., Rubin v. Pringle (In re Focus Media Inc.),* 387 F.3d 1077 (9th Cir. 2004) (finding that attorney for debtor's principal who appeared extensively on his behalf in involuntary bankruptcy proceedings had implied authority to accept service of process), as the court found above, Debtor did not use the U.S. mail to serve the motions as required under Rule 7004(b)(3). While the court also finds that Roberts did not actually receive electronic notification of the motions, such notification would nevertheless not satisfy the due process requirement of adequate notice as it did not comply with the heightened notice requirement of Rule 7004. *Cf. Friedman v. Estate of Presser*, 929 F.2d 1151, 1156 (6th Cir. 1991) (concluding that "[d]ue to the integral relationship between service of process and due process requirements . . . the requirement of proper service of process 'is not some mindless technicality'"); *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").

Accordingly, the court finds that its November 14, 2005, order granting Debtor's amended motion for turnover and ordering Urban to turnover the sum of $90,000 is void under Rule 60(b)(4) because it was entered in a manner inconsistent with due process of law. The court further finds that Urban requested relief within a reasonable time by filing its motion for relief within five days of receiving notice of the turnover order.

THEREFORE, for the foregoing reasons, good cause appearing,

IT IS ORDERED that the Motion of Urban Retail Properties Co. for Relief from the Order Granting Amended Motion for Turnover [Doc. # 1542] be, and hereby is, **GRANTED**; and

IT IS FURTHER ORDERED that the court's Order Granting Amended Motion for Turnover of Property [Doc. # 1540] be, and hereby is, **VACATED**.