

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE: INFOTOPIA, INC.,

Debtor.

MARC P. GERTZ, TRUSTEE,

Plaintiff,

vs.

PALI FINANCIAL GROUP, INC.
et al,

Defendants.

CASE NUMBER 02-44356

ADVERSARY NUMBER 05-4020

HONORABLE KAY WOODS

MEMORANDUM OPINION

This cause is before the Court on the Motion to Dismiss Party ("Motion to Dismiss") filed by Defendant UCN, Inc.¹ ("Defendant"). Defendant's Motion to Dismiss has two bases, as follows: (1) Plaintiff/Trustee Marc P. Gertz ("Trustee") failed to perfect service in 120 days following the filing of the case as required by FED. R. CIV. P. 4(m) made applicable by FED. R. BANKR. P. 7004; and (2) the claims of fraud are not pled with

¹Buyers United Inc., which was one of the named defendants in this case, went through several name changes. This defendant was originally named Buyersonline and then officially changed its name to Buyersonline.com, Inc. on March 30, 2000. (Affidavit of Doug Bauer in Support of UCN's Motion to Dismiss (hereafter "Bauer Aff.") ¶ 6.) On November 1, 2001, Buyersonline.com, Inc. changed its name to Buyers United, Inc. (Bauer Aff. ¶ 8.) On June 30, 2004, Buyers United changed its name to UCN, Inc. (Bauer Aff. ¶ 9.)

particularity, as required by FED. R. CIV. P. 9(b), made applicable by FED. R. BANKR. P. 7009. Trustee filed Objection of Marc P. Gertz, Trustee in Bankruptcy to the Motion to Dismiss Filed by Defendant UCN, Inc. (Trustee's Response). Trustee's Response alleges Defendant has waived the defense of statute of limitations, but fails to address whether proper and timely service was made on Defendant. Defendant filed UCN's Reply Memorandum in Support of its Motion to Dismiss ("Defendant's Reply"), which adds nothing new, but merely reiterates the arguments in the Motion to Dismiss.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334. Venue in this Court is proper pursuant to 28 U.S.C. §§ 1391, 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(H). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

I. STANDARD FOR REVIEW

In determining whether to grant a motion to dismiss, the Court must analyze the complaint. To withstand dismissal, the complaint must provide a plain and clear statement of the claim that shows the plaintiff is entitled to relief, provide the defendant with notice of the claim, and the grounds upon which the claim rests. See FED. R. CIV. P. 8(a); *Conley v. Gibson*, 355 U.S. 41, 47 (1957). "The complaint need not specify all the particularities of the claim, and if the complaint is merely

vague or ambiguous, a motion under Fed. R. Civ. P. 12(e) for a more definite statement is the proper avenue rather than a motion made pursuant to Fed. R. Civ. P. 12(b)(6)." *Aldridge v. United States*, 282 F. Supp. 2d 802, 803 (2003) (citing 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1356 (2d. ed. 1990)).

In determining the sufficiency of a complaint, the Court must construe the complaint in the light most favorable to the plaintiff, accept the allegations set forth as true, and resolve any ambiguities in favor of the plaintiff. *Jackson v. Richards Med. Co.*, 961 F.2d 575, 577-78 (6th Cir. 1992); *Aldridge*, 282 F. Supp. 2d. at 803. However, the Court is not required to accept "sweeping unwarranted averments of fact," *Official Committee of Unsecured Creditors v. Austin Financial Services, Inc. (In re KDI Holdings, Inc.)*, 277 B.R. 493, 502 (Bankr. S.D. N.Y. 1999) (quoting *Haynesworth v. Miller*, 820 F.2d 1245, 1254 (D.C. Cir. 1987)), or "conclusions of law or unwarranted deduction." *KDI Holdings Inc.*, 277 B.R. at 502 (quoting *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 771 (2d Cir. 1994)); see also *Lewis v. ABC Bus. Servs., Inc.*, 135 F.3d 389, 405-06 (6th Cir. 1998).

II. FACTS

On September 30, 2002, Bowne of New York, LLC, a creditor of Infotopia, Inc. ("Debtor"), filed an involuntary petition for

relief against Debtor under Chapter 11 of the Bankruptcy Code. By order dated February 4, 2003, the petition against Debtor was granted and the case was converted to a Chapter 7 proceeding under the Bankruptcy Code. Marc P. Gertz was subsequently named as Trustee.

On February 4, 2005, Trustee filed a Complaint (the "Original Complaint") to Avoid and Recover Fraudulent Transfers against (i) Pali Financial Group, Inc. ("Pali") and (ii) Defendant under 11 U.S.C. §§ 548(a)(1)(A) and 548(a)(1)(B).

The Certificate of Service states that the Original Complaint was served on Pali, Attn: Matt Schultz, 563 W. 500 S., Suite 420, Bountiful, Utah 84010.

The Original Complaint was sent to Defendant at the following address listed on the Request for Issuance of Summons (Doc. No. 2.): Buyers United, Inc. at 563 W. 500 S., Suite 420, Bountiful, UT 84010, which - as set forth above - is the same address at which Pali was served. Defendant asserts that the Summons and Complaint were not sent to it at a valid address and that Defendant's principle place of business is 14870 So. Pony Express Drive, Bluffdale, Utah 84065.² (Bauer Aff. ¶ 7.) Defendant

²Defendant contends that Trustee had this correct address for Defendant at the time the Original Complaint was filed because such address is expressly set forth on page 5 of the Loan Agreement, which is the basis for the fraudulent transfer suit. (The Loan Agreement by and between Buyersonline.com, Inc. and Infotopia, Inc., dated June 7, 2001, is attached to Motion to Dismiss as Ex. A.)

never received the Original Complaint or the Summons by mail. (Bauer Aff. ¶ 14).

On October 5, 2005, Trustee filed a Motion for Default Judgment. The Court conducted a hearing on November 10, 2005 and adjourned the hearing for Trustee to establish a definite sum due and owing pursuant to the allegations in the Original Complaint. On November 30, 2005, Trustee withdrew his Motion for Default Judgment.

On January 4, 2006, the Court issued an Order [for Trustee] to Appear and Show Cause why the adversary proceeding should not be dismissed for failure to prosecute because neither Pali nor Defendant had filed an answer. On January 9, 2006, the Trustee filed an Amended Complaint (the "Amended Complaint"), which identified Defendant as "Buyers United, Inc. d.b.a. Buyersonline, d.b.a. United Carriers Network, n.k.a. UCN, Inc., 14870 S. Pony Express Drive, Bluffdale, UT 84065." (Amended Compl. p. 1.) The docket reflects that Trustee failed to request the issuance of a new Summons. Defendant contends that it did not receive notice that it was a party to the lawsuit until February 2006, when counsel for Trustee sent a proposed discovery plan to Defendant's management. (Bauer Aff. ¶ 14.) On June 16, 2006, Defendant filed the Motion to Dismiss based on (i) Trustee's failure to serve Defendant within 120 days of filing the

Complaint³, and (ii) failure to plead fraud with particularity. After numerous extensions, Trustee filed the three-page Trustee's Response that fails to address the issue of (un)timely service upon Defendant. Instead, Trustee's Response focuses on whether Debtor waived the statute of limitation pursuant to an agreement between Debtor and Defendant. Defendant's Reply Brief, filed on August 25, 2006, reiterated the allegation that Trustee failed to serve it.

III. LEGAL ANALYSIS

Defendant asserts that this case should be dismissed because Trustee failed to timely serve it with the Complaint and Summons. FED. R. BANKR. P. 7004 governs service of process in adversary proceedings and incorporates Rule 4 of the Federal Rules of Civil Procedure, which states in pertinent part:

(a) Form. The summons shall be signed by the clerk, bear the seal of the court, identify the court and the parties, be directed to the defendant, and state the name and address of the plaintiff's attorney or, if unrepresented, of the plaintiff. It shall also state the time within which the defendant must appear and defend, and notify the defendant that failure to do so will result in a judgment by default against the defendant for the relief demanded in the complaint. The court may allow a summons to be amended.

(b) Issuance. Upon or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is in proper form,

³Within this argument, Defendant also contends that the Amended Complaint does not relate back to the Original Complaint under FED. R. CIV. P. 15(c). Thus, Defendant argues that Trustee's Amended Complaint is barred by the two-year statute of limitations in 11 U.S.C. § 546(a).

the clerk shall sign, seal, and issue it to the plaintiff for service on the defendant. A summons, or a copy of the summons if addressed to multiple defendants, shall be issued for each defendant to be served.

. . .

(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(emphasis in original).

The docket reflects that Trustee failed to meet the requirements of Rule 4. The Original Complaint was filed on February 4, 2005. Trustee's Request for Issuance of Summons and the Issuance of Summons lists the wrong address for Defendant. The address listed on the Request and the Summons is the address for co-defendant Pali - not the address of Defendant.

Trustee's Response alleges that "[u]pon information and belief and the basis for asserting joint and several liability, Pali Financial acted as agent for [Defendant]." (Trustee's Response, unnumbered page 2.) Trustee then states that the Original Complaint was served upon Pali. The unstated implication from Trustee's Response is that service upon Pali constitutes proper service upon Defendant. The problem with this sketchy argument is that it is not supported by facts. Taking the

allegations of the Complaint as true, there is no allegation or inference that Pali is or was Defendant's agent. The mere assertion of joint and severable liability does not lead to the conclusion that Pali was Defendant's agent for purposes of service of process. Indeed, Trustee's assertion in his Response is only "upon information and belief." Based upon the Original Complaint, Defendant and Pali are unrelated parties.

Trustee never requested the clerk to reissue the Summons on Defendant at the correct address within 120 days following filing of the Original Complaint. Therefore, Trustee failed to serve Defendant within 120 days after filing the Original Complaint, as required by FED. R. CIV. P. 4(m).

Trustee filed the Amended Complaint on January 9, 2006. The docket reflects that Trustee did not request issuance of a new Summons on Defendant. As previously discussed, Trustee never served Defendant with the Original Complaint. Defendant disputes that it received the Amended Complaint. (Bauer Aff. ¶ 19.) Even if, *arguendo*, Trustee mailed the Amended Complaint to Defendant at Defendant's proper address, Trustee failed to request issuance of a new Summons. FED. R. CIV. P. 4(c), made applicable by FED. R. BANKR. P. 7004, requires service of a summons and complaint to commence a lawsuit. At the time the Motion to Dismiss was filed, the 120 day period referenced in FED. R. CIV. P. 4 had lapsed. As a result, Trustee failed to timely serve Defendant with the Amended

Complaint.⁴ Accordingly, pursuant to FED. R. CIV. P. 4(m), this Court is required to either dismiss the action as to Defendant without prejudice or direct that service be effected within a specified time. In order for the Court to extend time for service, the plaintiff (*i.e.* Trustee) must show good cause for failure to timely serve.

Trustee has not demonstrated good cause for his failure to timely serve Defendant. Trustee's Response fails to allege that he served Defendant at all. Moreover, Trustee fails to assert that Defendant waived service, as set forth by FED. R. CIV. P. 4(d). Trustee merely argues - without support - that Pali was Defendant's agent and that Defendant "has not been prejudiced in any way upon receipt of the Amended Complaint at this time." (Trustee's Response unnumbered page 2.) Rule 4 does not include an exception for timely service in the absence of prejudice. Trustee fails to allege any reason why the Court should extend time for service. Trustee only argues that Defendant waived its right to assert a defense based on the statute of limitations. However, that issue is not currently before this Court due to

⁴Since Debtor was not served with either the Original Complaint or Amended Complaint, the Court does not need to address whether the Amended Complaint relates back to the Original Complaint. (*See supra* footnote 3.)

Trustee's failure to timely serve Defendant with the Original Complaint and/or Amended Complaint.⁵

IV. CONCLUSION

As set forth above, Trustee failed to serve the Defendant with the Original Complaint and failed to request - or serve - a Summons for the Amended Complaint. More than 120 days have passed since the Original Complaint and Amended Complaint were filed. FED. R. CIV. P. 4(m). Trustee has offered no reason to extend his time to serve the Original Complaint or the Amended Complaint. As a consequence, the Court dismisses, without prejudice, Defendant as a party. Defendant's motion to dismiss is hereby granted.

An appropriate order will follow.

Honorable Kay Woods
United States Bankruptcy Judge

⁵To the extent Defendant may have waived the statute of limitations, Trustee can refile a complaint against Defendant. Although Trustee has made this argument, it has not been fully briefed and this Court offers no opinion as to the validity or viability of the argument.

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HONORABLE KAY WOODS

ORDER

For the reasons set forth in this Court's memorandum opinion entered this date, Defendant's Motion to Dismiss Party is granted. UCN, Inc. is hereby dismissed, without prejudice, as a party in this adversary proceeding.

IT IS SO ORDERED.

Honorable Kay Woods
United States Bankruptcy Judge