

IT IS SO ORDERED.



Dated: March 25, 2009  
04:03:06 PM

Honorable Kay Woods  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE:

RICHARD NEFF and  
GERALDINE NEFF,

Debtors.

RICHARD NEFF and  
GERALDINE NEFF,

Plaintiffs,

vs.

INTERNAL REVENUE GROUP *et al.*,

Defendants.

CASE NUMBER 08-41617

ADVERSARY NUMBER 08-04226

HONORABLE KAY WOODS

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MEMORANDUM OPINION REGARDING UNITED STATES' MOTION TO DISMISS  
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This cause is before the Court on United States' Motion to Dismiss ("Motion to Dismiss") (Doc. # 7) filed by Defendant United

States of America ("Government") on January 27, 2009. For the reasons given below, the Court finds the Motion to Dismiss should be granted.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and the general order of reference (General Order No. 84) entered in this district pursuant to 28 U.S.C. § 157(a). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1391(b), 1408, and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (I) and (O). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

#### I. FACTS

Debtors Richard I. Neff and Geraldine C. Neff ("Debtors") filed their voluntary chapter 7 petition on June 4, 2008, and commenced this adversary proceeding on November 15, 2008, by (i) filing Complaint to Determine Dischargeability of Income Taxes; and (ii) requesting issuance of summons from the Clerk of Courts against all defendants.<sup>1</sup> On November 17, 2008 ("Issuance Date"), the Court issued the requested summons ("November Summons")

On December 23, 2008, thirty-six (36) days after the Issuance Date, Debtors filed Certificate of Service (Doc. # 5), certifying that "service of this summons and a copy of the complaint was made 12/23/08" by certified first class United States mail sent to, *inter alia*, (i) Internal Revenue Service Insolvency Group 3 at a

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<sup>1</sup>The Complaint also named the State of Ohio Department of Taxation as a Defendant in this case.

Cleveland, Ohio address; (ii) Attorney General of the U.S., U.S. Department of Justice Tax Department Civil Trial Section, Northern Reg. in Washington, D.C.; and (iii) Office of the U.S. Attorney at the U.S. Courthouse in Cleveland (collectively, "Federal Addressees").

The Government filed the Motion to Dismiss on January 27, 2009. On March 5, 2009, 108 days after the Issuance Date, Debtors filed Amended Certificate of Service (Doc. # 8), certifying that service of the November Summons and a copy of the complaint was made by certified first class United States mail sent on March 5, 2009, to the same Federal Addressees. Debtors did not request issuance of a new summons from the Clerk of Courts.

**II. LAW**

"Pursuant to Federal Rule 12(b)(5), which is applicable to adversary proceedings under Bankruptcy Rule 7012, a party may submit the defense of 'insufficiency of service of process' by motion prior to serving a responsive pleading." *MAS Litig. Trust v. Plastech LDM (In re Meridian Auto. Serv.)*, 2007 Bankr. LEXIS 4079, \*5 (Bankr. D. Del. Dec. 5, 2007). Service of process in bankruptcy cases must be made in accordance with FED. R. BANK. P. 7004 ("Rule 7004"), which reads in pertinent part -

**(a) SUMMONS; SERVICE; PROOF OF SERVICE.**

(1) Except as provided in Rule 7004(a)(2), Rule 4(a), (b), (c)(1), (d)(1), (e)-(j), (l), and (m) F. R. Civ. P. applies in adversary proceedings. . . .

. . . .

(e) **SUMMONS: TIME LIMIT FOR SERVICE WITHIN THE UNITED STATES.** Service made under [FED. R. CIV. P. 4(i)] 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. BANK. P. 7004 (West 2008) (emphasis added).<sup>2</sup> As noted above, Rule 7004 incorporates portions of FED. R. CIV. P. 4 ("Rule 4"),

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<sup>2</sup>Service may be made by first class United States mail, pursuant to Rule 7004(b), which states in pertinent part:

Service by first class mail. Except as provided in subdivision (h), in addition to the methods of service authorized by Rule 4(e)-(j) F.R.Civ.P., service may be made within the United States by first class mail postage prepaid as follows:

. . . .

(4) Upon the United States, by mailing a copy of the summons and complaint addressed to the civil process clerk at the office of the United States attorney for the district in which the action is brought and by mailing a copy of the summons and complaint to the Attorney General of the United States at Washington, District of Columbia, and in any action attacking the validity of an order of an officer or an agency of the United States not made a party, by also mailing a copy of the summons and complaint to that officer or agency. The court shall allow a reasonable time for service pursuant to this subdivision for the purpose of curing the failure to mail a copy of the summons and complaint to multiple officers, agencies, or corporations of the United States if the plaintiff has mailed a copy of the summons and complaint either to the civil process clerk at the office of the United States attorney or to the Attorney General of the United States.

(5) Upon any officer or agency of the United States, by mailing a copy of the summons and complaint to the United States as prescribed in paragraph (4) of this subdivision and also to the officer or agency. If the agency is a corporation, the mailing shall be as prescribed in paragraph (3) of this subdivision of this rule. The court shall allow a reasonable time for service pursuant to this subdivision for the purpose of curing the failure to mail a copy of the summons and complaint to multiple officers, agencies, or corporations of the United States if the plaintiff has mailed a copy of the summons and complaint either to the civil process clerk at the office of the United States attorney or to the Attorney General of the United States. If the United States trustee is the trustee in the case and service is made upon the United States trustee solely as trustee, service may be made as prescribed in paragraph (10) of this subdivision of this rule.

FED. R. BANK. P. 7004 (West 2008).

including subdivision 4(m), which states:

(m) Time Limit for Service. If a defendant is not served within 120 days after the complaint is filed, the court--on motion or on its own after notice to the plaintiff--must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1).

FED. R. CIV. P. 4 (West 2008) (emphasis added).

### III. ANALYSIS

The Government asserts that it did not receive proper service because the November Summons was not served within ten days of its issuance. The November Summons was first served thirty-six days after its issuance, which was after the Government's Answer was due. The Government then reasons that this Court lacks jurisdiction over the Government because it was not properly served. The Government is correct.

As noted above, "[t]wo time limitations apply for service of process in an adversary proceeding." *Dreier v. Love (In re Love)*, 232 B.R. 373, 377 (Bankr. E.D. Tenn. 1999). Rule 7004(e) states that no more than ten days may elapse between issuance of a summons and deposit of that summons, with the complaint,<sup>3</sup> in the mail. Rule 4 establishes 120 days after a complaint is filed as the outside limit for completing service. Debtors have failed to comply

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<sup>3</sup>The Government asserts that Debtors did not, in fact, serve a copy of the Complaint upon the United States. (Mot. to Dismiss at 1, n1.) However, the Court need not reach this issue in granting the Motion to Dismiss.

with either procedural rule.

Debtors failed to serve the Government with a summons and complaint mailed within ten days of issuance of that summons. Instead, Debtors served the November Summons twice: (i) on December 23, 2008, thirty-six days after the Issuance Date; and (ii) again on March 5, 2009, 108 days after the Issuance Date. Neither of these actions constituted proper service.

March 15, 2009, marked the expiration of the 120-day time limit imposed by Rule 4(m). Debtors failed to properly serve the Government within that time period. Pursuant to Rule 4(m), "[i]f a plaintiff establishes good cause for failure of service the court must grant additional time [beyond the 120 days] for service." *Evans v. DiBartolo (In re DiBartolo)*, 2006 Bankr. LEXIS 3021, \*7 (Bankr. N.D. Ohio Oct. 30, 2006). In determining good cause, courts in the Sixth Circuit should "consider whether a plaintiff made a reasonable and diligent effort to effectuate service." *Id.* at \*7-8. Plaintiffs bear the burden of establishing good cause. *Habib v. General Motors Corp.*, 15 F.3d 72, 73 (6th Cir. 1994).

Debtors have not filed anything with the Court that would explain their failure to effectuate proper service. Further, it appears that Debtors have not been "reasonable and diligent" in their attempts at service. The Federal Rules in question are clear and specific. The Motion to Dismiss even indicated the step necessary to obviate the Motion: "Rule 7004(e) requires that a new summons be issued and served upon the United States of America."

(Mot. to Dismiss at 2.) Debtors' failure to take this necessary step is inexplicable.

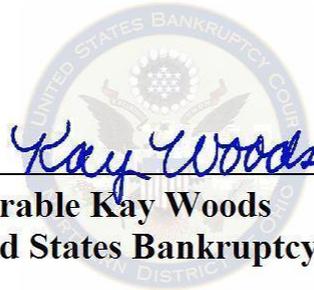
Nor is Debtors' case saved by the Government's awareness of the Complaint. "Ohio courts agree with the Sixth Circuit that actual knowledge and lack of prejudice cannot take the place of legally sufficient service." *LSJ Inv. Co., Inc. v. O.L.D., Inc.*, 167 F.3d 320, 324 (6th Cir. 1999) (citations omitted).

#### IV. CONCLUSION

Because Debtors did not comply with Rule 7004, service upon the Government was defective. The Court finds that the Motion to Dismiss is well taken and hereby grants the Motion to Dismiss without prejudice. An appropriate Order will follow.

# # #

IT IS SO ORDERED.



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04:03:07 PM

Honorable Kay Woods  
United States Bankruptcy Judge

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