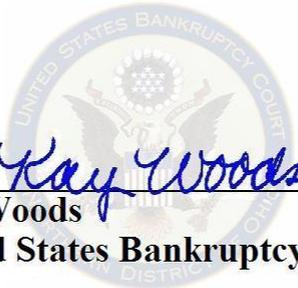


IT IS SO ORDERED.



Dated: December 26, 2010
10:30:03 PM

Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
	*	
	*	
	*	
ERNEST G. EARL,	*	CASE NUMBER 10-40010
	*	
Debtor.	*	
	*	
* * * * *	*	
	*	
WILLARD SMITH,	*	ADVERSARY NUMBER 10-4096
	*	
Plaintiff,	*	
	*	
v.	*	
	*	
ERNEST G. EARL,	*	HONORABLE KAY WOODS
	*	
Defendant.	*	
	*	

MEMORANDUM OPINION

This cause is before the Court on Motion to Dismiss filed by Defendant/Debtor Ernest G. Earl (Doc. # 8) on November 1, 2010. 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). The following constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

I. FACTS

Debtor/Defendant Ernest G. Earl filed a voluntary petition pursuant to chapter 11 on January 4, 2010 (Main Case, Doc. #1). On April 29, 2010, Plaintiff Willard Smith filed Complaint to Determine Dischargability of Debts and to Obtain Other Relief Pursuant to § 523 (a)(2); § 523 (a)(6); and § 727 et seq. ("Complaint") (Doc. # 1). Fifty-five (55) days later, on June 23, 2010, Smith filed First Request for Issuance of Summons and Notice of Pretrial Conference ("Summons Request") (Doc. # 2). On June 24, 2010, the Court issued the requested summons ("Issuance Date") (Doc. # 3).

On September 1, 2010, sixty-nine (69) days after the Issuance Date, Plaintiff filed a Certificate of Service (Doc. # 7), certifying that "service of this summons and a copy of the complaint was made 8/2/10" by certified mail, return receipt requested on Defendant at 9302 Mahoning Ave., North Jackson, Ohio 44451.

Defendant filed the Motion to Dismiss on November 1, 2010 (Doc. # 8), alleging that he "did not receive proper service of

Plaintiffs' [sic] Complaint." (Mot. to Dismiss at 1.) On November 5, 2010, Defendant filed Response in Opposition to Defendant/Debtor's Motion to Dismiss and a Motion for Leave to File an Alias Service ("Response") (Doc. # 9).

II. STANDARD OF REVIEW

"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. Del. Dec. 5, 2007). Service of process in bankruptcy cases must be made in accordance with Fed. R. Bankr. P. 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. . . .

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

(1) Upon an individual other than an infant or incompetent, by mailing a copy of the summons and complaint to the individual's dwelling house or usual place of abode or to the place where the individual regularly conducts a business or profession.

. . . .

(e) SUMMONS: TIME LIMIT FOR SERVICE WITHIN THE UNITED STATES. Service made under [Fed. R. Civ. P.] 4(e) . . .

shall be by delivery of the summons and complaint within 14 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 14 days after the summons is issued. If a summons is not timely delivered or mailed, another summons shall be issued and served. . . .

. . . .

(g) SERVICE ON DEBTOR'S ATTORNEY. If the debtor is represented by an attorney, whenever service is made upon the debtor under this Rule, service shall also be made upon the debtor's attorney by any means authorized under Rule 5(b) F. R. Civ. P.

FED. R. BANK. P. 7004 (West 2009) (emphasis added).

III. ANALYSIS

A. Service of Process

Defendant asserts that he did not receive proper service of the Complaint. (Mot. to Dismiss at 1.) In support of this assertion, Defendant notes,

The Plaintiff filed its [sic] Complaint on April 29, 2010. The Plaintiff requested the Court's issuance of a Summons on June 23, 2010. The Court issued its Summons on June 24, 2010. . . . The Defendant was not timely served with a copy of the Summons, Complaint or the Court's Adversary Case Management Initial Order. The Summons, Complaint and Adversary Case Management Initial Order was [sic] not served on the Defendant until August 2, 2010, approximately 28 days after the issuance of the Summons.

(Mot. to Dismiss at 2.)

In response, Plaintiff concedes that he "cannot contradict the time line [sic] of the service on [sic] said complaint."

(Resp. at 1.) Plaintiff attempts to excuse his failure to properly serve Defendant within the time required by Rule 7004. "Counsel . . . was involved in a litigation matter that took him out of the

area several weeks during this time period, and it appears service was not sent within the 10days [sic] pursuant to the statute [sic]."

(*Id.*) Despite his admission that service was never properly made on the Defendant, Plaintiff argues that

the complaint should not be dismissed for this reason [because a] dismissal of the complaint would cause a great injustice and be prejudicial to the plaintiff. . . . [Further,] since it was rather difficult to perfect service on the debtor previously, . . . as time [passes,] it may become even more difficult if the debtor has changed addresses or otherwise does not receive mail at the same address.¹

(Resp. at 2.) Plaintiff then attempts to argue the merits of the Complaint rather than provide the Court with any reason why the Complaint should not be dismissed. (*Id.*)

Pursuant to Rule 7004, the Complaint must be served on Defendant within 14 days after the Summons was issued. Here, the Summons was issued on June 24, 2010, which required Plaintiff to serve the Complaint on or before July 8, 2010. Plaintiff did not serve the Complaint until August 2, 2010, twenty-five (25) days late. Accordingly, the Complaint was not properly served pursuant to Rule 7004.

B. Defendant's Motion to Grant Leave to Re-Serve the Plaintiff

Although Plaintiff provides neither statutory nor other legal authority to support the request, he asks this Court for alternative relief. "Alternatively, plaintiff requests this Court to grant leave to attempt to re-serve the complaint by alias service of

¹ All of these arguments are speculative. Moreover, it appears Plaintiff was able to serve Defendant at the address listed on the Petition.

process.” (Resp. at 2.)

Despite failure to cite to any authority, the Court assumes that Plaintiff attempts to invoke either Fed. R. Bankr. P. 9006(b)(1) or Fed. R. Civ. P. 4(m) - both of which require a showing of good cause and/or excusable neglect for the Court to grant an extension of time. Rule 9006(b)(1) provides, in pertinent part,

the court **for cause shown** may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the **failure to act was the result of excusable neglect.**

(West 2009) (emphasis added). Civil Rule 4(m), which is applicable to this proceeding under Bankruptcy Rule 7004, states,

If a defendant is not served within 120 days after the complaint is filed, the court . . . 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.

(West 2009) (emphasis added). Although the Complaint was served within the 120-day time period contemplated by Rule 4(m)², Plaintiff has not shown good cause to extend the time for service.

Plaintiff fails to assert any reason that can be construed as excusable neglect or good cause to support an enlargement of time to re-serve Defendant under either Rule 4(m) or Rule 9006(b)(1).

² Rule 4(m) does not require the Court to allow Plaintiff 120 days to serve the Complaint. Rather, Rule 4(m) mandates that the Court dismiss the action if the Complaint is not served within 120 days after filing.

Rather, Plaintiff merely states that his Counsel was out of town, but concedes that "the onus is still on counsel to see to it that all matters are taken care of on a timely basis." (Resp. at 2.) Accordingly, Plaintiff has not asserted any basis upon which the Court may grant leave for Plaintiff to re-serve the Complaint.

IV. CONCLUSION

Because Plaintiff did not comply with Rule 7004, service upon Defendant was defective. The Court finds the Motion to Dismiss well taken and hereby grants the Motion to Dismiss. An appropriate Order will follow.

#

date, the Court hereby grants the Motion to Dismiss.

#