



that same date, Plaintiff Marous Brothers Construction, Inc. filed Plaintiff's Response to Motion to a [sic] Dismiss ("Response") (Doc. # 10). For the reasons stated below, the Court will deny the Motion to Dismiss.

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**

The Plaintiff commenced this adversary proceeding on November 12, 2010, by filing Complaint to Determine Dischargeability ("Complaint") (Doc. # 1). The Plaintiff failed to serve a copy of the Summons and Complaint upon the Defendant. On March 29, 2011, the Court, *sua sponte*, ordered Plaintiff to (i) serve a copy of the Summons and Complaint on the Defendant within fourteen days and (ii) establish good cause for failing to timely serve the Defendant within fourteen days ("14-Day Order") (Doc. # 2). Two days later, on March 31, 2011, the Plaintiff filed Summons and Notice of Pretrial Conference in an Adversary Proceeding ("Summons Request") (Doc. # 4) requesting the Court to issue a Summons in this adversary proceeding. The Court issued the Summons and Notice of Pretrial Conference in an Adversary Proceeding on March 31, 2011 (Doc. # 5).

On April 8, 2011, the Plaintiff filed Certificate of Service, indicating that Joseph N. Isabella, Attorney, executed service of the Summons and Complaint on April 6, 2011, upon Bruce R. Epstein, Attorney ("Summons Service Executed") (Doc. # 9). Attached to the Summons Service Executed is a letter indicating that Plaintiff's counsel, Joseph N. Isabella, Esquire, served the Defendant directly by both regular and certified mail. (Summons Service Executed at 3.)

In the Motion to Dismiss, the Defendant argues that the Plaintiff failed to comply with Federal Rule of Bankruptcy Procedure 7004<sup>1</sup>. (Mot. to Dismiss at 1.) Plaintiff's attorney responds that he was unfamiliar with the Court's CM/ECF filing system and that he "was mistaken in believing that [the Defendant's attorney] would be automatically served [with the] complaint via CM/ECF filing system . . . [and mistakenly believed] that I scanned the Summons and Notice of Pretrial Conference in an Adversarial Proceeding within the same PDF file as said complaint, . . ." (Resp. at 1.) Mr. Isabella further explains that he was "taken by surprise" when he received the Court's 14-Day Order, and that he filed the Summons Request two days later. (*Id.* at 1-2.) Mr. Isabella also states that he "asked Ms. Cathy McClain [a case administrator in the Clerk's Office] what would be required on my behalf in order to

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<sup>1</sup> The Defendant incorrectly moves the Court to dismiss the instant adversary proceeding for failure to comply with Federal Rule of Bankruptcy Procedure 7004(b)(9) as well as 7004(m). The Federal Rules of Bankruptcy Procedure do not include a rule denominated as 7004(m). The Court assumes that the Defendant is referring to Federal Rule of Civil Procedure 4(m) which is made applicable to adversary proceedings through Rule 7004(a)(1). FED. R. BANKR. P. 7004 (West 2010).

establish good cause, and she informed me that my filing of Complaint and Summons upon the Defendant with fourteen (14) days of said Order would show just cause and satisfy said requirement."<sup>2</sup> (*Id.* at 2.)

## II. LAW & ANALYSIS

Federal Rule of Bankruptcy Procedure 7004 governs service of summons and complaints in adversary proceedings, and incorporates by reference Federal Rule of Civil Procedure 4:

(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. Personal service under Rule 4 (e)-(j) F.R.Civ.P. may be made by any person at least 18 years of age who is not a party, and the summons may be delivered by the clerk to any such person.

(2) The clerk may sign, seal, and issue a summons electronically by putting an "s/" before the clerk's name and including the court's seal on the summons.

FED. R. BANKR. P. 7004(a)(1) (West 2010). Federal Rule of Civil Procedure 4(m) ("Rule 4(m)") provides:

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

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<sup>2</sup> The Clerk's Office staff cannot offer legal advice. Mr. Isabella, as an attorney, knew or should have known that he could not rely on the Clerk's Office staff to tell him what would constitute "just cause," which is a legal – not a procedural – issue.

foreign country under Rule 4(f) or 4(j)(1).  
FED. R. CIV. P. 4(m) (West 2010). Rule 4(m) encourages courts to engage in a two-part analysis. First, the court must determine whether a plaintiff has shown good cause for the failure to effectuate service, and if the plaintiff has shown good cause, the court "must extend the time for service for an appropriate period." *Id.* Second, if a plaintiff has not shown good cause, the court must either (i) dismiss the action, without prejudice, or (ii) "order that service be made within a specified time." *Id.*; see *Henderson v. United States*, 517 U.S. 645, 662 n.10 (1996); *Vitek v. AIG Life Brokerage*, 2007 U.S. Dist. LEXIS 18814 \*13 (S.D. Ohio Feb. 27, 2007) ("[b]efore dismissal of an improperly served complaint [Rule 4(m)] requires the undertaking of a two-part analysis to determine whether [the plaintiff] is entitled to an extension of time for service."); *Stewart v. Tennessee Valley Authority*, 2000 U.S. App. LEXIS 29904 (6th Cir. 2000); *Fulgenzi v. Wyeth, Inc.*, 2010 U.S. Dist. LEXIS 57188 \*4 (N.D. Ohio June 10, 2010).

Here, the 120-day time period prescribed by Rule 4(m) expired on March 12, 2011. Because the Plaintiff did not serve the Defendant or the Defendant's attorney until April 6, 2011, the Court must determine whether the Plaintiff can establish good cause for failing to effectuate service.

**A. Good Cause.**

"Good cause necessitates a demonstration of why service was not

made within the time constraints of Fed. R. Civ. P. 4(j)<sup>3</sup>. The determination of good cause is left to the sound discretion of the district court." *Habib v. General Motors Corp.*, 15 F.3d 72, 73 (6th Cir. 1994) (internal citations omitted). "Establishing good cause is the responsibility of the party opposing the motion to dismiss, and 'necessitates a demonstration of why service was not made within the time constraints.'" *Fulgenzi*, 2010 U.S. Dist. LEXIS 57188 at \*4-5 (quoting *Habib*, 15 F.3d at 73). Although Rule 4(m) does not specifically define "good cause," some courts consider whether a plaintiff made a reasonable and diligent effort to effectuate service. *Habib*, 15 F.3d at 74. "The Sixth Circuit has established that inadvertent failure or 'half-hearted' efforts to serve a defendant within the statutory period do not constitute good cause." *Vitek*, 2007 U.S. Dist. LEXIS 18814 at \*16 (internal citations omitted).

Here, the Plaintiff has not established good cause for its failure to serve the Defendant within 120 days after filing the Complaint. Mr. Isabella contends that the failure to properly serve the Defendant was his error, which "will not prejudice either party to this cause of action." (Resp. at 2.) However, "[m]istake of

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<sup>3</sup> Former Fed. R. Civ. P. 4(j) compelled dismissal of an action as to any defendant that had not been timely served absent a showing of good cause. In 1993, subsection (j) was amended and relocated to subsection (m). The new language of Rule 4(m) confers discretion upon the Court to enlarge the 120-day period for service, even absent a showing of good cause. Thus, many courts that have addressed the issue have concluded that good cause is no longer necessary to forgive untimely service. See, e.g., *De Tie v. Orange County*, 152 F.3d 1109, 1111-12, n.5 (9th Cir. 1998); *Panaras v. Liquid Carbonic Indus. Corp.*, 94 F.3d 338, 340 (7th Cir. 1996); *Petrucelli v. Bohringer & Ratzinger*, 46 F.3d 1298, 1307-08 (3d Cir. 1995); *Fulgenzi v. Wyeth, Inc.*, 2010 U.S. Dist LEXIS 57188 \*5-6, (N.D. Ohio June 10, 2010).

counsel or ignorance of the rules is not enough to establish good cause . . . ." *Lively v. Knight (In re Knight)*, 2006 Bankr. LEXIS 3627 \*8-9 (Bankr. E.D. Tenn. Sept. 14, 2006) (internal citations omitted). The Response establishes that it was Plaintiff's counsel's lack of familiarity with the Court's CM/ECF filing system that led to the failure to timely serve the Summons and Complaint. (See Resp. at 1.) This unfamiliarity is no excuse for the failure of Plaintiff's counsel to act with reasonable diligence.

Plaintiffs must "be held accountable for the acts and omissions of their attorneys." *Knigh*t, 2006 Bankr. LEXIS 3627 at \*9 (quoting *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 396 (1993)). Therefore, since mistake of counsel is insufficient to establish good cause, this Court is not required to grant the Plaintiff an extension of time to effectuate service. See FED. R. CIV. P. 4(m) (West 2010).

The Plaintiff further claims that Defendant's counsel received some notice of the Complaint (Resp. at 2); however, even if, *arguendo*, the Court takes this assertion as true, actual notice is insufficient to establish good cause. See *Evans v. DiBartolo (In re DiBartolo)*, 2006 Bankr. LEXIS 3021 \*8 (Bankr. N.D. Ohio Oct. 30, 2006) ("[t]he fact that [Plaintiff] had actual notice of the adversary proceeding because her attorney was served with at least some of the documents via mail and the complaint via the court's CM/ECF e-mail notification system is not enough to establish good cause.") Furthermore, a lack of prejudice against the other party

does not automatically constitute "good cause." *Fulgenzi*, 2010 U.S. Dist. LEXIS 57188 \*10 (N.D. Ohio June 10, 2010). Thus, despite alleged actual notice to Defendant's counsel, the Plaintiff's failure to properly serve the Complaint does not constitute good cause within the meaning of Rule 4(m). As a consequence, the Court is not required to grant the Plaintiff an extension of time.

**B. The Court's Discretion.**

"A plain reading of the first clause [of Rule 4(m)] reveals that a district court generally possesses the discretion to dismiss a complaint or allow service to be perfected within a specified time, regardless of the absence of good cause, whenever a plaintiff fails to perfect service within 120 days after filing a complaint." *Osborne v. First Union Nat'l Bank of Del.*, 217 F.R.D. 405, 406 (S.D. Ohio 2003). If, as in the instant adversary proceeding, no good cause is shown, the Court must still determine whether it should exercise its discretion to further expand the time for service. *Fulgenzi*, 2010 U.S. Dist. LEXIS 57188 at \*10. The Advisory Committee Notes to Rule 4(m) state that Rule 4(m) "authorizes the court to relieve a plaintiff of the consequences of an application of this subdivision even if there is no good cause shown." *Dibartolo*, 2006 Bankr. LEXIS 3021 at \*8-9 (citing FED. R. CIV. P. 4(m)).

In determining whether to extend the 120-day period for service, the Court will consider the following five factors:

- (1) whether a significant extension of time was required;

- (2) whether an extension of time would prejudice the defendant other than the inherent "prejudice" in having to defend the suit;
- (3) whether the defendant had actual notice of the lawsuit;
- (4) whether a dismissal without prejudice would substantially prejudice the plaintiff and
- (5) whether the plaintiff had made any good faith efforts at effecting proper service of process.

*Id.* at \*9 (citing *Donaldson v. Lopez (In re Lopez)*, 292 B.R. 570 (E.D. Mich. 2003)). The Sixth Circuit Court of Appeals has stated a "'strong preference that claims be adjudicated on their merits.'" *Vitek*, 2007 U.S. Dist. LEXIS 18814 at \*17 (quoting *Coleman v. Shoney's, Inc.*, 79 Fed. Appx. 155, 157 (6th Cir. 2003)). The Court will evaluate each of the five factors, above, in turn.

Because the Plaintiff does not provide a compelling reason why the time extension was required (*i.e.*, the Plaintiff did not demonstrate good cause for failing to comply with the requirements of Rule 4(m)), factor (1) does not weigh in favor of granting the Plaintiff additional time to effectuate service.

However, factors (2) - (5) do weigh in favor of granting the Plaintiff additional time to effectuate service. In the Response, the Plaintiff alleges that the failure to properly serve the Defendant within the 120-day period will not prejudice either party. The Court agrees with the Plaintiff. The Defendant has now been properly served and an extension of time would not prejudice the Defendant unfairly, beyond the "inherent" prejudice of defending the lawsuit. Similarly, Defendant's counsel did have "actual" notice

of the lawsuit, as he received notification via the Court's CM/ECF system at the commencement of the adversary proceeding. Although the Plaintiff did not properly serve the Defendant or Defendant's counsel, Plaintiff's counsel does allege that he "was mistaken in believing that [the Defendant's attorney] would be automatically served [with the] complaint via CM/ECF filing system." (Resp. at 1.) The Court finds that Plaintiff's counsel's mistake is not indicative of bad faith. Therefore, factors (2), (3) and (5) weigh in favor of granting the Plaintiff additional time to properly serve the Defendant.

Factor (4) strongly supports the Plaintiff, as dismissal of the case would substantially prejudice the Plaintiff. The Advisory Committee Notes to Rule 4(m) state that an extension may be justified "if the applicable statute of limitations would bar the refiled action." See *DiBartolo*, 2006 Bankr. LEXIS 3021 at \*9 (citing FED. R. CIV. P. 4(m)). "After all, the whole point of the rule change was presumably to allow the court to avoid draconian penalties for technical mistakes." *Westfield Ins. Co. v. Madar (In re Madar)*, 218 B.R. 382, 384 (Bankr. S.D. Ohio 1998) (internal citations omitted). Furthermore, there is a general preference in the Sixth Circuit to decide disputes on the merits, instead of disposing of them on procedural or technical grounds. *Id.* Here, the Plaintiff seeks a determination that the debt owed to it by the Defendant is non-dischargeable based on actual fraud pursuant to 11 U.S.C. § 523(a)(2)(A). (Compl. at 5.) A cause of action under

§ 523(a)(2)(A) must be filed no later than sixty days after the first date set for the meeting of creditors, otherwise the action is time-barred. 11 U.S.C. § 523(c) (West 2010); FED R. BANKR. P. 4007(c) (West 2010); see also *DiBartolo*, 2006 Bankr. LEXIS 3021 at \*11. In this case, the first date set for the meeting of creditors was November 9, 2010; thus, the last date for filing a complaint under § 523(a)(2)(A) in this bankruptcy proceeding was January 8, 2011. Taken together, the Court finds that dismissing this adversary proceeding would substantially prejudice the Plaintiff.

### III. CONCLUSION

The Court concludes that the five factors weigh in favor of granting the Plaintiff an extension of time to properly serve the Summons and Complaint. The Defendant does not allege, nor does the Court find, that the Defendant is prejudiced by allowing the Plaintiff additional time to properly serve the Defendant and Defendant's counsel. Because the Summons and Complaint have now been properly served on both the Defendant and the Defendant's counsel, the service effectuated on April 6, 2011, is deemed to be timely.

Based on the foregoing, the Court will deny the Motion to Dismiss.

An appropriate order will follow.

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that same date, Plaintiff Marous Brothers Construction, Inc. filed Plaintiff's Response to Motion to a [sic] Dismiss ("Response") (Doc. # 10).

For the reasons stated in this Court's Memorandum Opinion, entered on this date, the Court hereby denies the Motion to Dismiss and deems the service effectuated on April 6, 2011, to be timely. As a consequence, the Defendant has thirty (30) days - *i.e.*, until September 1, 2011, to answer or otherwise respond to the Complaint.

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