

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE

In re:

No. 97-11851

Chapter 7

PAUL GREGORY GILLIS

Debtor

CARLA B. GILLIS

Plaintiff

v

Adversary Proceeding

No. 97-1111

PAUL GREGORY GILLIS

Defendant

MEMORANDUM AND ORDER

Appearances: Richard A. Dorris, McMinnville, Tennessee, Attorney for Plaintiff

Keith S. Smartt, McMinnville, Tennessee, Attorney for Defendant

**HONORABLE R. THOMAS STINNETT,
UNITED STATES BANKRUPTCY JUDGE**

The plaintiff commenced this action by filing a complaint against the debtor to determine whether certain debts should be excepted from his discharge under § 523(a)(5) of § 523(a)(15) of the Bankruptcy Code. 11 U.S.C. § 523(a)(5), (15). The debtor has filed a motion to dismiss on the ground that the plaintiff has not properly served the complaint and summons. *Fed. R. Bankr. P. 7012(b)*; *Fed. R. Civ. P. 12(b)(5)*. Both parties have filed briefs and affidavits. The facts are as follows.

The plaintiff filed the complaint on June 12, 1997. Attached to the complaint is a certificate of service. It certifies that the plaintiff's lawyer served a copy of the complaint on the debtor and the debtor's lawyer on June 10, 1997. The court issued a summons on the day the complaint was filed, June 12, 1997. The plaintiff's lawyer filed proof of service on June 26, 1997. It consists of a return receipt from certified mail. The receipt shows the debtor's signature and is dated June 20, 1997. The debtor has not denied that he received the complaint and summons and signed the receipt on June 20, 1997.

The debtor's motion to dismiss relies on Bankruptcy Rule 7004(b)(9). *Fed. R. Bankr. P. 7004(b)(9)*. The rule provides that during a bankruptcy case service on the debtor can be made by first class mail to the debtor and the debtor's attorney. The debtor must be served at the address shown in the petition or statement of affairs or another address designated by the debtor in a filed writing. The debtor, of course, does not dispute the service on him. The debtor contends service of process was ineffective because the debtor's attorney was not served.

The plaintiff contends service was made because a copy of the complaint was served on the debtor's attorney as shown by the certificate of service filed with the complaint. The certificate is dated two days before the complaint was filed. It does not certify service of a copy of the *filed* complaint. Furthermore, service of a copy of the filed complaint without a summons would still be incomplete service of process. Service of the copy of the filed complaint, without a summons, is relevant only to whether the incomplete service can be excused or more time granted. Compare *Kazmarczik v. Van Meter (In re Van Meter)*, 175 B.R. 64 (Bankr. App. 9th 1994) and *Attorney Registration and Discipline Commission v. Betts (In re Betts)*, 142 B.R. 819 (Bankr. N. D. Ill. 1992).

Nevertheless, the motion to dismiss should not be granted at this time. Two time limits apply to summons. A summons must be served within 10 days after issuance. *Fed. R. Bankr. P. 7004(e)*. Service of a stale summons is not effective service. *Miller v. Cappuccilli (In re Cappuccilli)*, 193 B.R. 483 (Bankr. N. D. Ill. 1996); *Ingala v. Sciarretto (In re Sciarretto)*, 170 B.R. 33 (Bankr. D. Conn. 1993). A proceeding can be dismissed for failure to obtain complete and effective service within 120 days after filing of the complaint. *Fed. R. Bankr. P. 7004(a)*; *Fed. R. Civ. P. 4(m)*; *Kadlecek v. Ferguson (In re Ferguson)*, 204 B.R. 202 (Bankr. N. D. Ill. 1997); *Ingala v. Sciarretto (In re Sciarretto)*, 170 B.R. 33 (Bankr. D. Conn. 1993) (how not to obtain effective service).

A plaintiff, however, is not restricted to just one opportunity within the 120 days to make effective service of process. The plaintiff can obtain an alias summons and serve it within the 10 day limit and within the 120 day limit. The plaintiff has much time left to obtain an alias

summons and make a complete and effective service of process. *Attorney Registration and Discipline Commission v. Betts (In re Betts)*, 142 B.R. 819, 826 (Bankr. N. D. Ill. 1992).

The motion to dismiss also asserted that the complaint fails to state a claim upon which relief can be granted. *Fed. R. Bankr. P. 7012(b); Fed. R. Civ. P. 12(b)(6)*. This contention was not addressed in the debtor's brief. Accordingly,

It is ORDERED that the debtor's Motion to Dismiss is DENIED.

ENTER:

BY THE COURT

R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE

[entered 8/13/97]