

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF TENNESSEE

In re:

No. 398-11304

Chapter 7

SCOTT AND TIFFANY TAYLOR

Debtor

BRIANT HUMPHREY, MAXINE LOGAN,  
and PEGGY CAMERON

Plaintiffs

v.

Adversary Proceeding

No. 399-0107-A

SCOTT AND TIFFANY TAYLOR

Defendant

**MEMORANDUM**

Appearances: Briant Humphrey, Maxine Logan, and Peggy Cameron, *pro se*, Redondo Beach, California, Plaintiffs  
Lynda Jones, Bruce, Weathers, Corley, Dughman & Lyle, Nashville, Tennessee, Attorney for Defendants

HONORABLE R. THOMAS STINNETT  
UNITED STATES BANKRUPTCY JUDGE

This adversary proceeding is before the court on the defendants' motion for dismissal. The affidavit of one of the debtors, Scott Taylor, is annexed to and in support of the motion. The motion also relies upon matters within the chapter 7 case file. Thus, the motion to dismiss shall be treated as a motion for summary judgment in accordance with *Fed. R. Civ. P. 56* made applicable to these proceedings by *Fed. R. Bankr. P. 7056*.

This adversary proceeding was filed by Mr. Briant Humphrey, Maxine Logan and Peggy Cameron, as plaintiffs, without the benefit of counsel. The motion to dismiss is on the basis of insufficiency of service of process. For the following reasons, the adversary proceeding will be dismissed.

This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).

When the proceeding was filed, a Summons and Notice of Pretrial Conference in an Adversary Proceeding was delivered to Mr. Humphrey for service in accordance with *Fed. R. Civ. P. 4* incorporated to these proceedings by *Fed. R. Bankr. P. 7004*. The certificate of service on the return of the summons indicates that Michelle Milford mailed the summons back to the United States Bankruptcy Court. The issue of insufficiency of service of process was raised at the pretrial conference. No attempt has been made by the plaintiffs to correct the service of process.

Judge Stair of the United States Bankruptcy Court for the Eastern District of Tennessee has recently published an extensive opinion regarding the requirements of proper service of process under the Rules. *In re Love*, 232 B.R. 373 (Bkrcty. E.D. Tenn. 1999). Quoting Judge Stair:

“The Federal Rules of Civil Procedure direct that the "plaintiff is responsible for service of a summons and complaint within the time allowed under subdivision (m)...." *Fed.R.Civ.P.* 4(c)(1), incorporated into *Fed.R.Bankr.P.* 7004(a). The procedures for completing service upon a debtor who is the named defendant in an adversary proceeding are simple and may be complied with easily. During the pendency of the debtor's case, service of process upon the debtor may be made by mailing a copy of the summons and complaint to the debtor at the address shown in the petition or statement of affairs or to such other address as the debtor may designate in a filed writing and, if the debtor is represented by an attorney, to the attorney at the attorney's post-office address. *Fed.R.Bankr.P.* 7004(b)(9). Pursuant to *Fed.R.Bankr.P.* 9006(e), "[s]ervice of process ... is complete on mailing.

Two time limitations apply for service of process in an adversary proceeding. First, *Fed.R.Bankr.P.* 7004(e) directs in material part that if service is made by any authorized form of mail, the summons and complaint shall be deposited in the mail within 10 days following issuance of the summons. If a summons is not timely delivered or mailed, another summons shall be issued and served. Second, *Fed. R. Civ. P.* (4)(m), incorporated into *Fed.R.Bankr.P.* 7004(a), provides in material part:

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.

[1][2] Rule 7004(b)(9) unambiguously provides that service of process upon a debtor is not sufficient unless both the debtor and his attorney are served with

the summons and a copy of the complaint. See, e.g., *Ingala v. Sciarretto (In re Sciarretto)*, 170 B.R. 33, 35 (Bankr.D.Conn.1994) ("[S]ervice [by mail] upon a debtor is not sufficient until both the debtor and his attorney are served with copies of the summons and complaint."); *United States Escrow v. Bloomingdale (In re Bloomingdale)*, 137 B.R. 351, 354 (Bankr.C.D.Cal.1991) (holding that service upon debtor is not proper until debtor's counsel is served); *Longmeadow Motor Co., Inc. v. Heinz (In re Heinz)*, 131 B.R. 38, 40 (Bankr.D.Md.1991) (Attempted service on debtors "ineffectual because debtors' counsel was not served"). Anything short of strict compliance with Rule 7004(b)(9) is insufficient. See *Meganck v. Coutts (In re Coutts)*, 188 B.R. 949, 953 (Bankr.E.D.Mich.1995) ("[A]ctual knowledge of a \*378 suit is not a substitute for proper service of process and does not cure a technically defective service of process.") (citing *Friedman v. Estate of Presser*, 929 F.2d 1151, 1155-56(6th Cir.1991)).

It is clear in this adversary proceeding that the plaintiffs did not properly serve either the debtors or their attorney. As indicated, the defect of service of process was raised by the debtors early in this proceeding. Like Judge Stair, "this court finds that nothing in the facts before it to warrant a finding that any neglect on the part of the plaintiffs is 'excusable'." Accordingly, the adversary proceeding should be dismissed. An order to that effect will be entered.

This memorandum constitutes findings of fact and conclusions of law as required by *Fed. R. Bankr. P.* 7052.

ENTER:

BY THE COURT

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R. THOMAS STINNETT  
UNITED STATES BANKRUPTCY JUDGE

entered Aug. 26, 1999