

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE  
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 01-33233

TERESA DIANNE LONG

Debtor

MBNA

Plaintiff

v.

Adv. Proc. No. 01-3157

TERESA LONG

Defendant

**MEMORANDUM ON DEFENDANT'S MOTION TO DISMISS**

APPEARANCES: CYNTHIA NICHOLSON ASBURY, P.C.  
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Attorneys for Plaintiff

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Attorneys for Defendant

**RICHARD STAIR, JR.**  
**UNITED STATES BANKRUPTCY JUDGE**

The court has before it the Defendant's December 13, 2001 Motion to Dismiss. The Defendant seeks dismissal, under FED. R. CIV. P. 12(b)(5) and FED. R. BANKR. P. 7012(b), for insufficient service of process.

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(I) (West 1993).

## I

On October 9, 2001, the Plaintiff filed its Complaint for Determination that Debt Is Nondischargeable. The clerk issued a summons on October 18, 2001. Pursuant to FED. R. BANKR. P. 7004(e), the Plaintiff then had ten days to deliver or mail the summons following its issuance. Identical Certificates of Service were filed by Plaintiff's counsel on December 7 and December 19, 2001.<sup>1</sup> In these documents, Plaintiff's counsel, "under penalty of perjury," certified that the Defendant and Defendant's counsel were served with the Summons and a copy of the Complaint by regular first class mail on October 19, 2001. See FED. R. BANKR. P. 7004(b)(9).

The Defendant alleges that the certificates are, at best, inaccurate. By affidavit filed with her Motion to Dismiss, the Defendant states that she did not receive service of the Complaint and Summons until November 19, 2001. Her affidavit further states that the envelope containing the Summons and Complaint shows a postmark of November 16, 2001.<sup>2</sup> The Defendant also contends

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<sup>1</sup> By Memorandums dated November 5 and November 19, 2001, the clerk twice had to request proof of service from the Plaintiff. See E.D. Tenn. LBR 7004-2 ("The plaintiff must certify service of the complaint and summons within fourteen days after the issuance date.").

<sup>2</sup> The Defendant filed a copy of an envelope addressed to her bearing the return address of Plaintiff's counsel. The copy shows a November 2001 postmark. The day of the month, although not fully legible, appears to be either the 6<sup>th</sup> or the 16<sup>th</sup>. A handwritten notation, "Postmarked Nov. 16<sup>th</sup>," appears without explanation on the envelope.

that her attorney did not receive service until November 20, 2001.<sup>3</sup> The Plaintiff has not filed a countervailing affidavit nor has it even responded to the Motion to Dismiss.<sup>4</sup>

## II

Rule 7004(e) provides one of two time limits applicable to service of process in adversary proceedings. *See Dreier v. Love (In re Love)*, 232 B.R. 373, 377 (Bankr. E.D. Tenn. 1999). Of relevance to the present motion is Rule 7004(e)'s directive that "[i]f 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." FED. R. BANKR. P. 7004(e). The evidence submitted by the Defendant is sufficient to create serious doubt in the court's mind as to whether service was properly effected in this proceeding.

However, Rule 7004(e) does not authorize dismissal for a plaintiff's failure to meet the ten-day mailing deadline. Instead, the rule provides only that "[i]f a summons is not timely delivered or mailed, another summons shall be issued and served." *See id.*; *see also Barr v. Barr (In re Barr)*, 217 B.R. 626, 631 (Bankr. W.D. Wash. 1998); *Kadlecek v. Ferguson (In re Ferguson)*, 204 B.R. 202, 207 (Bankr. N.D. Ill. 1997).

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<sup>3</sup> The Defendant filed a copy of an envelope addressed to her attorney bearing the return address of Plaintiff's counsel. However, because this copy bears a completely illegible postmark date, it is of no assistance to the court. Although the Defendant's attorney did not file an affidavit, he signed the Motion to Dismiss which states that "[t]he postmark on the letter sent to the attorney for the defendant in the bankruptcy proceeding . . . is postmarked November 16, 2001. The attorney received the Complaint without the Summons on November 20, 2001." The court accepts this statement as having evidentiary support. *See* FED. R. BANKR. P. 9011(b)(3).

<sup>4</sup> Rule 7007-1 of the Local Rules of the United States Bankruptcy Court for the Eastern District of Tennessee provides that "[a] failure to respond [to a motion in an adversary proceeding] shall be construed by the court to mean that the respondent does not oppose the relief requested by the motion."

The second relevant time limit is set by FED. R. CIV. P. 4(m), which is made applicable to adversary proceedings by FED. R. BANKR. P. 7004(a). Unlike Rule 7004(e), Rule 4(m) does not authorize dismissal, expressly mandating such relief if proper service is, absent "good cause for the failure," not made within 120 days after the filing of the complaint.

The proof stands before the court unrefuted by the Plaintiff. The declaration on the Certificate of Service that the Summons and Complaint were served on the Defendant and her attorney on October 19, 2001, is false. The Summons and Complaint were not served until November 16, 2001. Service did not, therefore, take place within the ten days required by Bankruptcy Rule 7004(e).

Notwithstanding that the Plaintiff could seek the issuance of an alias summons and still obtain timely service on the Defendant, its failure to respond means that it does not oppose the granting of the Motion to Dismiss.<sup>5</sup> The court will oblige. The Plaintiff's Complaint will be dismissed.

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<sup>5</sup> See *supra* n.4.

An appropriate order will be entered.

FILED: January 16, 2002

BY THE COURT

RICHARD STAIR, JR.  
UNITED STATES BANKRUPTCY JUDGE

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**ORDER**

For the reasons stated in the Memorandum on Defendant's Motion to Dismiss filed this date, the court directs that the Motion to Dismiss filed by the Defendant on December 13, 2001, is GRANTED. The Plaintiff's Complaint for Determination that Debt Is Nondischargeable filed October 9, 2001, is DISMISSED.

SO ORDERED.

ENTER: January 16, 2002

BY THE COURT

RICHARD STAIR, JR.  
UNITED STATES BANKRUPTCY JUDGE