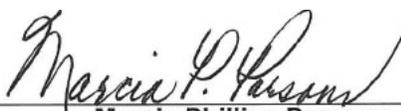




SO ORDERED.

SIGNED this 2nd day of May, 2018

**THIS ORDER HAS BEEN ENTERED ON THE DOCKET.
PLEASE SEE DOCKET FOR ENTRY DATE.**



Marcia Phillips Parsons
CHIEF UNITED STATES BANKRUPTCY JUDGE

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

In re

SOUTHERN DESIGN GROUP, INC.,

Debtor.

No. 16-51628 MPP

Chapter 11

ERNEST H. FLOHE, JR. and
KRISTI THOMAS-FLOHE,

Plaintiffs,

vs.

Adv. Pro. No. 17-5020 MPP

SOUTHERN DESIGN GROUP, INC.,

Defendant.

ORDER

This adversary proceeding is before the court on the defendant's motion filed on March 23, 2018, requesting dismissal of the complaint, the plaintiffs' motion filed on April 24, 2018,

requesting an extension of time to respond to the defendant's motion, and the defendant's response in opposition to the plaintiffs' motion filed on April 26, 2018. Under the local rules of this court, "any objection to the relief sought in a motion must be filed within 21 days after the filing of the motion." E.D. Tenn. LBR 7007-1(a). Thus, the plaintiffs' deadline for filing a response to the defendant's motion to dismiss was April 13, 2018. Rule 9006(b) of the Federal Rules of Bankruptcy Procedure provides that the court may enlarge the time for filing a response for cause shown if the request is made before expiration of the period originally prescribed, or on motion made after expiration of the specified period where the failure to act was the result of excusable neglect. In this case, the plaintiffs' motion for an extension of time to respond was not filed until April 24, eleven days after the deadline for responding to the defendant's motion to dismiss had expired. As such, in order for an extension to be granted, the plaintiffs' failure to timely request the extension must be the result of excusable neglect. In their motion, the plaintiffs make no claim of excusable neglect, and in fact give no reason for their admitted failure to timely file their request. Accordingly, the plaintiffs' request for extension of time to file a response to the defendant's motion is denied.

As to the merits of the defendant's Fed. R. Civ. P. 12(b) motion, the first stated ground for dismissal is the failure of the plaintiffs to properly effectuate service of process. Subsections (e) and (g) of Federal Rule of Bankruptcy Procedure 7004 require a plaintiff to serve the complaint and summons within seven days after the summons is issued upon a defendant and, if the defendant is the debtor as is the case here, the debtor's attorney. *See* Fed. R. Bankr. P. 7004(e) and (g). Here, the summons was issued on November 22, 2017, but was not served along with the complaint until February 12, 2018, and then only upon the defendant, according to the filed certificate. "Service of a stale summons is no service at all." *Menges v. Menges (In re Menges)*, 337 B.R. 191, 194 (Bankr. N.D. Ill. 2006). Even had the defendants timely served the summons before it expired, the failure to serve the defendant's attorney renders service of process ineffective. *See, e.g., Dreier v. Love (In re Love)*, 232 B.R. 373, 378 (Bankr. E.D. Tenn. 1999); *In re McMillan*, No. 09-3073, 2010 WL 234241, at *2 (Bankr. E.D. Tenn. Jan. 13, 2010) (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). For either of these reasons, the defendant has established grounds for dismissal under Fed. R. Civ. P. 12(b)(5), as incorporated by Fed. R. Bankr. P. 7012(b).

As an additional ground for dismissal for failure to timely effect service of process, Rule 4(m) of the Rules of Civil Procedure, made applicable under Fed. R. Bankr. P. 7004(a)(1), provides that if a defendant is not served within 90 days after the complaint is filed, the court must dismiss the action against that defendant or order that service be made within a specified time. Notwithstanding the passage of the 90-day period, and notice to the plaintiffs as set forth in the defendant's motion to dismiss that service against the defendant has never been properly effectuated as required by the rules, the plaintiffs have not taken any action to remedy the deficiencies or sought an additional time to effectuate service of process.

Beyond the service of process errors, the plaintiffs also failed to properly set forth allegations against the defendant in their complaint. Rather, the plaintiffs attached to their complaint their state court complaint against the owners of the defendant and attempted to incorporate allegations in that state court action into their complaint against the defendant. Although Fed. R. Civ. P. 10(c) "permits reference to pleadings and exhibits in the same case," it does not permit "the adoption of a [pleading] in a separate action in a different court by mere reference." *Tex. Water Supply Corp. v. Reconstruction Fin. Corp.*, 204 F.2d 190, 196 (5th Cir. 1953). This prohibition against such incorporation by reference triggers yet another violation of the Federal Rules of Civil Procedure—because no cause of action is properly asserted, the adversary complaint fails to meet the pleading standard of Fed. R. Civ. P. 8(a), which requires a short and plain statement of the claims being asserted or a clear articulation of the relief sought. *See Davis v. Bifani*, No. 07-cv-00122, 2007 WL 1216518, at *1 (D. Colo. Apr. 24, 2007) (finding that attempting to "incorporate by reference . . . the allegations in a complaint a completely separate action, even if . . . between the same parties[,] . . . violates the Fed. R. Civ. P. 8(a) requirement for "a short and plain statement of the claim[.]" and further stating that "[t]he Court does not believe that it should be required to look to a separate complaint filed years ago in Colorado state court and determine exactly what additional claims for relief [the p]laintiff intends to plead in this case"). Accordingly, these procedural failures constitute cause for dismissal of plaintiffs' complaint pursuant to Fed. R. Civ. P. 12(b)(6).

The court having found cause for granting the defendant's request for dismissal of the plaintiffs' complaint, it is unnecessary for this court to address any of the other bases of the

dismissal request or the motion to strike. Based on the foregoing, the plaintiffs' motion for extension of time is denied and the defendant's motion to dismiss is granted.

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