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

In re

ROBERT HENRY WADDELL,

Debtor.

No. 03-32076
Chapter 7

ROBERT VALIGA,

Plaintiff,

vs.

Adv. Pro. No. 03-3179

ROBERT HENRY WADDELL,

Defendant.

M E M O R A N D U M

APPEARANCES:

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MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE

This discharge adversary proceeding is before the court on the plaintiff's motion pursuant to Fed. R. Civ. P. 4(m) and Fed. R. Bankr. P. 7004 for an extension of time to obtain service of process and the debtor/defendant's motion to dismiss under Fed. R. Bankr. P. 7012(b) for insufficiency of service of process in that the defendant was not served within ten days of the issuance of the summons, his counsel has not been served with the summons, and more than 120 days has transpired since the filing of the complaint. For the reasons discussed below, the plaintiff's motion for an extension will be granted, and the defendant's motion to dismiss will be denied. This is a core proceeding. *See* 28 U.S.C. § 157(b)(2)(J).

I.

The debtor Robert Henry Waddell filed for bankruptcy relief under chapter 7 on April 14, 2003. Thereafter, on October 16, 2003, Robert Valiga timely commenced the instant adversary proceeding, alleging that the debtor's discharge should be denied pursuant to 11 U.S.C. § 727(a)(3) and (5). The complaint was accompanied by a certificate of service from plaintiff's counsel wherein he stated that he mailed a copy of the complaint to debtor's attorney. On October 16, 2003, the clerk of the court issued the summons. Subsequently, on November 6, 2003, a certificate of service was filed which indicated that the debtor had been served with copies of the summons and complaint on

October 28, 2003.

No further activity occurred in the adversary proceeding until February 5, 2004, when the court *sua sponte* issued an order directing plaintiff to appear for hearing on February 20, 2004, and show cause why the complaint should not be dismissed for failure to prosecute. The court noted in the show cause order that the certificate of service did not reflect service of the summons on debtor's counsel as required by Fed. R. Bankr. P. 7004(b)(9) and that the summons served on the debtor had been stale because service had occurred more than ten days after issuance of the summons. *See* Fed. R. Bankr. P. 7004(e).

At the show cause hearing, the parties brought to the court's attention that the 120-day period provided by Fed. R. Civ. P. 4(m) for serving the summons and complaint had expired. Plaintiff's counsel explained that he and his family were experiencing an acute family crisis at the time the complaint in this adversary proceeding was filed, that these problems were ongoing, and caused him to inadvertently fail to notice the deficiencies in service. Counsel requested and was given the opportunity to file a motion for extension of time to effect service. Plaintiff's motion was filed on February 27, 2004 and met with defendant's motion to dismiss filed March 17, 2004.

II.

Resolution of the two motions requires an examination of the pertinent rules of bankruptcy procedure. Fed. R. Bankr. P. 7004, which governs service of process in adversary proceedings, provides in paragraph (b)(9) that service may be made upon the debtor by mailing a copy of the summons and complaint to the debtor and "if the debtor is represented by an attorney, to the attorney at the attorney's post-office address." Subdivision (e) of Rule 7004 states that if service is by mail, "the summons and complaint shall be deposited in the mail within 10 days after the summons is issued" and that "[i]f a summons is not timely delivered or mailed, another summons shall be issued and served." Rule 7004(a) incorporates certain provisions of Fed. R. Civ. P. 4, including Rule 4(m) which provides in pertinent part:

> 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.

There is no dispute in the instant proceeding that the plaintiff has failed to comply with these procedural requirements. The certificate of service filed by the plaintiff indicates that the summons and complaint were mailed to the debtor more than ten days after the summons was issued, twelve days to be exact, and thus the requirements of Rule 7004(e) have not been met. Furthermore, debtor's

counsel was not served with a copy of the summons as required by Fed. R. Bankr. P. 7004(b)(9), even though he was sent a copy of the complaint when it was filed. As noted by District Judge Leon Jordan in *Dreier v. Love (In re Love)*, 242 B.R. 169 (E.D. Tenn. 1999), "[t]he bankruptcy courts interpreting [Rule 7004(b)(9)] have uniformly found that service of process is insufficient unless both the debtor and his or her attorney are served with the summons and complaint." *Id.* at 171. Lastly, the 120-day period provided by Rule 4(m) for serving the complaint and summons expired on February 13, 2004, without the plaintiff having timely and properly served the debtor and his attorney with the complaint and summons. Under these circumstances, Rule 4(m) directs the court to "dismiss the action without prejudice ... or direct that service be effected within a specified time."

The defendant, of course, argues for the former action by this court; the plaintiff seeks an order for the latter. Courts construing Rule 4(m) agree that if the plaintiff establishes good cause for its failure to timely effect service, the court must grant additional time for service. In addition, the overwhelming majority of courts which have considered the issue have concluded that a court has the discretion to extend the service time even in the absence of good cause. *See* 4B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1137 (3d ed. 2004). This conclusion is based on the peculiar wording of Rule 4(m) which rather than mandating dismissal if

timely service is not accomplished, gives the court the option of extending the time for service. *Id.* This construction is supported by the Advisory Committee Notes to Rule 4(m) which expressly states that subdivision (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." Even the United States Supreme Court, albeit in dictum, has acknowledged this reading. *See Henderson v. United States*, 517 U.S. 654, 663 (1996)("[I]n 1993 amendments to the Rules, courts have been accorded discretion to enlarge the 120-day period, 'even if there is no good cause shown.'").

Although the plaintiff cites counsel's "severe family crisis" as the reason for his failure to comply with the service requirements, he makes no attempt to argue that this crisis constitutes "good cause," conceding that "[a] lawyer's personal life should not be allowed to affect his professional performance." Indeed, the treatise FEDERAL PRACTICE AND PROCEDURE observes that courts have rejected excuses such as office moves, personal problems, or inadvertence of counsel. *See* 4B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1137 (3d ed. 2004) and cases cited at n.5 and 6. Rather, the plaintiff contends that even absent good cause, the court should exercise its discretion to grant him additional time based on a consideration of the factors found relevant by other courts in considering this issue. Plaintiff cites *Donaldson v. Lopez (In re Lopez)*, 292 B.R. 570 (E.D.

Mich. 2003), wherein the court identified several factors as pertinent to its decision, including whether:

> (1) a significant extension of time was required; (2) an extension of time would prejudice the defendant other than the inherent "prejudice" in having to defend the suit; (3) the defendant had actual notice of the lawsuit; (4) a dismissal without prejudice would substantially prejudice the plaintiff; i.e., would his lawsuit be time-barred; and (5) the plaintiff had made any good faith efforts at effecting proper service of process.

Id. at 576 (quoting *Slenzka v. Landstar Ranger, Inc.*, 204 F.R.D. 322, 326 (E.D. Mich. 2001)).

Applying these factors to the present case, the plaintiff maintains that no significant extension of time would be required in that an alias summons would be immediately obtained with service by mail within 24 hours thereafter. As to the second factor, whether the extension would prejudice the defendant, the plaintiff contends that his pursuit of the discharge objection will not prejudice the debtor because no discharge has been granted in this case and thus, there has been no reliance by the debtor upon a discharge in continuing with his business affairs. Regarding the defendant's actual notice of the lawsuit, the plaintiff observes that both the defendant and his attorney had actual notice within twelve days after the complaint was filed. With respect to prejudice to the plaintiff if the extension were denied, plaintiff asserts that it is "obvious" that he would be substantially prejudiced by a dismissal because the statute of

limitations for filing a discharge proceeding against the defendant has now run. Similarly, the plaintiff contends that his good faith efforts to effect proper service are obvious in that he obtained a summons on the very day that the complaint was filed and thereafter promptly turned the summons over to the process server although admittedly neither counsel nor the process server recognized the staleness of the summons when served.

In response to these assertions, the defendant does not deny that the court has the discretion to extend the time for service even in the absence of good cause and that "the overwhelming majority of the cases ruling on the issue of extension of time after the 120 day period have exercised their discretion in favor of the plaintiff and have allowed late service." The defendant contends, however, that all but one of these cases involved a determination of dischargeability rather than an objection to discharge. According to the defendant, because "the primary purpose behind the Bankruptcy Code" is to give a debtor a "fresh start" with relief from his indebtedness, *see In re Krohn*, 886 F.2d 123, 125 (6th Cir. 1989); a party seeking to deny the fresh start must strictly follow all procedural requirements and any exercise of discretion by the court should be extremely limited.

In addition to the foregoing policy argument, the defendant appears to dispute the plaintiff's contention that he made good faith efforts to effect service within the 120-day period. The defendant

notes that the court's show cause order, which identified the service deficiencies, was entered prior to the expiration of the 120-day period. Thus, argues the defendant, the plaintiff could have timely corrected the service problems, yet took no action to do so even though his attorney is an experienced bankruptcy attorney. Accordingly, the defendant maintains that the court should deny the request for an extension and dismiss this adversary proceeding so that the defendant can be granted a discharge.

This court disagrees with the defendant. Although, granted, there are more reported decisions addressing the extension issue in the context of dischargeability proceedings than discharge actions, the disparity is not surprising because more complaints seek a determination of dischargeability than a denial of discharge. While the court appreciates the distinction which the defendant is attempting to make, the court finds no basis for limiting its discretion or subjecting the plaintiff to a higher standard of rule compliance in the context of discharge objections. Regardless of whether this is a discharge or dischargeability proceeding, dismissal of the adversary proceeding will deny the plaintiff the opportunity to have his claim against the defendant evaluated on the merits. In applying Rule 4(m), courts must balance the rule's goal of timely service and efficient litigation with the desire to provide litigants their day in court. *See Garland v. Peebles*, 1 F.3d 683, 686 (8th Cir. 1993); 4B CHARLES ALAN

WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1137 (3d ed. 2004). *See also Vergis v. Grand Victoria Casino & Resort*, 199 F.R.D. 216 (S.D. Ohio 2000)("[G]ranting Plaintiff an extension of time to re-serve the summons and complaint in this particular circumstance would be in keeping with the overall policy in this Circuit of resolving disputes on their merits, rather than disposing of them on procedural or technical grounds."); *Westfield Ins. Cos. (In re Madar)*, 218 B.R. 382, 384 (Bankr. E.D. Mich. 1998)("a strong preference for trials on the merits in federal courts"); *Casey v. Kasal (In re Kasal)*, 213 B.R. 922, 929 (Bankr. E.D. Penn. 1997) ("[I]t is important to the integrity of the bankruptcy process to require that dismissals of challenges to debtors' discharges be on their merits.").

It must also be remembered that Rule 4(m) "is not a statute of limitations" but rather "a procedural rule dictating the procedures or time for service of process." *Kadlecek v. Ferguson (In re Ferguson)*, 210 B.R. 785, 790 (Bankr. N.D. Ill. 1997). As noted by the court in *Madar*, "[t]he 120-day service requirement is not meant to be enforced harshly or inflexibly." *In re Madar*, 218 B.R. at 384 (citing 4B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1137 (3d ed. 2004)). While under a previous version of Rule 4(m) the absence of good cause for failure to effectuate service within 120 days was fatal, the current version of the rule which permits enlargement even without a showing of good cause is designed to permit a court "to avoid

draconian penalties for technical mistakes." *Id.* "Dismissal is 'only appropriate where there has been a clear record of delay or contumacious conduct.'" *Durns v. Dawson (In re Dawson)*, 2001 WL 753807 (Bankr. N.D. Iowa 2001)(quoting *Dahl v. Kanawha Inv. Holding Co.*, 161 F.R.D. 673, 678 (N.D. Iowa 1995)).

Consideration of the foregoing principles in conjunction with an application of the relevant factors set forth in *Lopez* leads this court to conclude that an extension of the service period is appropriate. As argued by the plaintiff, little additional time will be needed by the plaintiff to effectuate service and there is no indication that the defendant will be prejudiced by the extension. *See Barr v. Barr (In re Barr)*, 217 B.R. 626 (Bankr. W.D. Wash. 1998)("Prejudice in this context contemplates loss of evidence, unavailability or other material alteration caused by the delay that would prevent the Debtor from presenting his case."). Both the defendant and his attorney had actual notice of the discharge complaint early in the 120-day period and "thus will not be unfairly surprised by having to defend this action." *Vergis v. Grand Victoria Casino & Resort*, 199 F.R.D. at 218 (noting that although actual notice is not a substitute for proper service, it is an equitable factor weighing in favor of affording the plaintiff another opportunity to effect service)(citing *Henderson v. United States*, 517 U.S. at 671 ("[T]he core function of service is to supply notice of the pendency of a legal action, in a manner and at a time

that affords the defendant a fair opportunity to answer the complaint and present defenses and objections.”)). Dismissal of this action will highly prejudice the plaintiff since the statute of limitations has now run, precluding him from refiling. *See In re Dawson*, 2001 WL 753807, *2 (“While it is not mandatory that the court extend the deadline for effecting service of summons solely because of the running of the substantive limitations statute, the fact that the suit cannot be resolved on the merits is a factor that must be given close attention.”).

Lastly, the court finds that the plaintiff made good faith efforts to timely accomplish service, even though he failed to correct the service deficiencies upon receiving the court’s show cause order. While the order did note the staleness of the summons and the failure to serve defendant’s counsel, it did not alert the plaintiff that the 120-day service period was about to expire on February 13, 2004. Moreover, because the order was entered on February 5, 2004, only eight days before the expiration deadline, and then transmitted to the plaintiff by mail service, it is doubtful that the plaintiff had more than a few days in which to respond. In making these observations, the court in no way condones plaintiff’s inattentiveness nor suggests that it was the responsibility of the court or the defendant to advise the plaintiff of any service problems. Rather, the court seeks to contrast the conduct in the present case with that of plaintiffs’ counsel in

Dreier v. Love (In re Love), 232 B.R. 373 (Bankr. E.D. Tenn. 1999), *aff'd*, 242 B.R. 169 (E.D. Tenn. 1999), wherein the service deficiencies were noted 34 days before the deadline by the defendant in responding to the plaintiffs' motion for default judgment and by the court at a hearing on the motion. *Id.* at 380. In fact, when cautioned by the court to pay close attention to the procedural rules, plaintiffs' counsel appeared to arrogantly dismiss the instruction, commenting, "We're not rookies at this; we have done this in other courts." *Id.* at 376. Upon appeal of the bankruptcy court's dismissal for failure to effectuate timely service, the district court noted that the plaintiffs had never moved for an extension of time to perfect service and concluded that the plaintiffs had not acted in good faith because they refused to accept responsibility and continued to incorrectly place the blame for their errors on the defendant and his attorney. *In re Love*, 242 B.R. at 171-72.

In the present case, counsel for the plaintiff recognized his service deficiencies by the time of the show cause hearing and appropriately requested the opportunity to move for an extension. This response, along with his earlier, timely attempts to effect service and the reason for his failure, satisfies the court of the plaintiff's good faith.[1] While this court would have preferred that plaintiff's counsel

[1]In addition to the five factors from *Lopez* cited by the plaintiff, the *Lopez* court also noted that it was "appropriate to

had "awakened" to the service defects more promptly, when all other facts and circumstances in this case are considered and weighed, those being the actual notice, the prejudice to the plaintiff, the lack of prejudice to the defendant, and the preference for disputes being resolved on the merits, the court is confident that the equities lie in favor of granting the plaintiff an additional opportunity to properly serve the defendant. This is simply not a case where the plaintiff has engaged in a clear pattern of delay or "contumacious conduct."

III.

Accordingly, the court will enter an order granting the plaintiff's extension motion and denying the defendant's dismissal motion. The order will provide that the plaintiff will have twenty days from entry of the order to serve the defendant and his counsel in a manner that complies with Fed. R. Bankr. P. 7004 and file a certificate evidencing such service. Absent proper service within this

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consider the effect an extension would have on the administration of justice, and whether an extension would undermine any policy considerations explicitly or implicitly contained in the procedural rules urging the prompt disposition of the particular type of matter." *In re Lopez,* 292 B.R. at 576. As to the former consideration, there is no indication that a limited extension of the service deadline in this case will adversely affect the administration of justice. Similarly, an extension will not undermine any policy considerations behind the procedural rules. As noted in the text of this memorandum, in resolving this issue, the court has attempted to balance these policies with the competing one of permitting disputes to be resolved on the merits rather than on procedural technicalities.

time frame, the court will *sua sponte* dismiss this proceeding.

FILED: May 14, 2004

BY THE COURT

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MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE