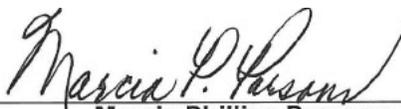




SO ORDERED.

SIGNED this 24th 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 plaintiffs' motion filed on May 11, 2018, as supplemented on May 21, 2018, requesting relief from the order granting the defendant's motion to dismiss entered on May 2, 2018. The plaintiffs' motion is made pursuant

to Fed. R. Civ. P. 52(b) (amended or additional findings), Fed. R. Civ. P. 59(e) (alter or amend judgment), and Fed. R. Civ. P. 60(b)(1) (relief from judgment or order for mistake, inadvertence, surprise, or excusable neglect), as made applicable with certain exceptions by Fed. R. Bankr. P. 7052, 9023, and 9024. The defendant filed a response in opposition to the plaintiffs' motion on May 22, 2018.

In the May 2 order, the court ruled that there were three bases for dismissal of the plaintiffs' complaint:

- Fed. R. Civ. P. 12(b)(5) because the plaintiffs failed to serve the defendant in accordance with Fed. R. Bankr. P. 7004(e) and (g);
- Fed. R. Civ. P. 4(m) because more than 90 days had elapsed from the filing of the complaint without the plaintiffs having properly served the defendant or requested an additional period of time to effectuate service of process; and
- Fed. R. Civ. P. 12(b)(6) because the plaintiffs' complaint failed to properly set forth allegations against the defendant within the pleading standard of Fed. R. Civ. P. 8(a) by attempting to incorporate an entire and separate state court complaint against third parties.

The court will revisit these conclusions in light of the plaintiffs' current motion, and then address the additional arguments made by the plaintiffs.

First, as to the plaintiffs' failure to properly serve the defendant, the court notes that Fed. R. Bankr. P. 7004 permits nationwide service of process by first class mail in bankruptcy proceedings such as this one. Thus, all that the plaintiffs had to do to serve the defendant was to request that the clerk of the court issue a summons and then, within seven days of its issuance, send a copy of the summons and complaint by first class mail, postage prepaid, to the defendant at its address listed in the bankruptcy petition and to its bankruptcy attorney at his office address. *See* Fed. R. Bankr. P. 7004(a), (b)(9), (e), and (g). If a summons is served more than seven days after it is issued, service of the stale summons and complaint is ineffective. *See, e.g., Menges v. Menges (In re Menges)*, 337 B.R. 191, 194 (Bankr. N.D. Ill. 2006). If a summons has become stale, a plaintiff may simply request that another summons be issued. *See* Fed. R. Bankr. P. 7004(e). And, if service of process is not completed on a defendant and more than 90 days have

elapsed after the complaint was filed, the court must dismiss the action against that defendant or order that service be made within a specified time. *See* Fed. R. Civ. P. 4(m), made applicable by Fed. R. Bankr. P. 7004(a)(1).

As set forth in the court's May 2 order, the plaintiffs failed to serve the defendant and its attorney in accordance with Fed. R. Bankr. P. 7004 despite more than five months having passed from the filing of the plaintiffs' complaint. In their present motion, the plaintiffs argue that they in fact served the defendant's attorney on November 23, 2017, within seven days of the filing their complaint on November 22, 2017, and that they served the defendant on February 12, 2018, within the required 90 days. However, according to the docket in this case, the only service on the defendant's attorney was when the plaintiffs mailed him a copy of the complaint after it was filed, as evidenced by the certificate of service attached to the complaint. Mailing a copy of the complaint to defendant's attorney without a properly issued summons does not equate to valid service of process. *See, e.g., Yesh Diamonds, Inc. v. Yashaya (In re Yashaya)*, 403 B.R. 278, 283 (Bankr. E.D.N.Y. 2009) (service of complaint without summons on debtor's attorney is insufficient to satisfy Fed. R. Bankr. P. 7004(g)). As to service on the defendant, the record reflects that the summons and complaint were sent by certified mail to the defendant on February 12, 2018, more than 80 days after the summons had been issued on November 22, 2017. Because the summons was stale when it was served on the defendant, the defendant was never properly served.

The plaintiffs also argue in their present motion that they were unable to request the issuance of a new summons to properly serve the defendant because the court denied on May 2, 2018, their request for an extension of time to respond to the defendant's motion to dismiss. This contention is nonsensical, because the former has nothing to do with the later. Regardless of whether the plaintiffs were granted additional time to file a response to the defendant's motion, once they were given notice of the deficiencies in service as described in the defendant's motion to dismiss, they could have simply requested and served a new summons. The plaintiffs maintain that they were not put on notice of defendant's motion to dismiss until the court entered an order on April 2, 2018, advising them of the 21-day response time under E.D. Tenn. LBR 7007-1. However, the revised certificate of service filed by defendant's counsel indicates that he

served the plaintiffs with the motion on March 26, 2018. So the plaintiffs had over a month to correct the service problem before entry of the May 2 order.

Lastly as to service, the plaintiffs argue generally that their service failures should be excused under Fed. R. Civ. P. 60(b)(1) “because of inadvertence, mistake, surprise and/or excusable neglect,” and ask the court to alter or amend its May 2 order to grant them leave to obtain and serve a new summons. However, the plaintiffs set forth no factual basis in their twenty-page motion as to why they were unable to complete service of process upon the defendant and they do not otherwise set forth any claim of inadvertence, mistake, surprise, or excusable neglect regarding the service problem. Accordingly, the plaintiffs’ motion requesting relief from the dismissal rulings under Fed. R. Civ. P. 12(b)(5) or Fed. R. Civ. P. 4(m) for failure to effect service of process must be denied.

Turning next to the deficiencies in the plaintiffs’ complaint, the plaintiffs attached to their complaint in this adversary proceeding their state court complaint against the owners of the defendant and others, and then attempted to incorporate those allegations and claims into their complaint against the defendant. In the May 2 order, this court stated that “[a]lthough 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 court further noted that because of the plaintiffs’ impermissible attempt to incorporate their state court complaint in order to supply their allegations and claims in this action, the complaint in this action failed to meet the pleading standard of Fed. R. Civ. P. 8(a), citing *Davis v. Bifani*, No. 07-cv-00122, 2007 WL 1216518, at *1 (D. Colo. Apr. 24, 2007). The plaintiffs now argue that Fed. R. Civ. P. 10(c) “does not require the contents of an attached instrument to be restated in the Adversarial Proceeding,” because “[a] copy of a written instrument that is an exhibit to a pleading is part of the pleading for all purposes” under the rule. Fed. R. Civ. P. 10(c). However, the court is not convinced that the state court complaint is a “written instrument” for the purposes of the rule. *See In re Emphyrean Biosciences, Inc. Securities Litigation*, 219 F.R.D. 408, 413 (N.D. Ohio 2003) (“The Court finds that where a securities fraud complaint is otherwise lacking in substantive allegations, an affidavit provided by plaintiffs’ counsel [attached as exhibit to complaint], which contains evidentiary support for the absent allegations, is not a

“written instrument” for purposes of Rule 10(c).”); *Copeland v. Aerisyn, LLC*, 2011 WL 2181497, *1 (E.D. Tenn. June 3, 2011) (quoting *Black’s Law Dictionary* (9th ed. 2009) definition of “instrument” for purposes of Rule 10(c) as a “written legal document that defines rights, duties, entitlements, or liabilities, such as a contract, will, promissory note, or share certificate”). Accordingly, the plaintiffs’ requested relief pursuant to Fed. R. Civ. P. 52(b) and 59(e) concerning the dismissal pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim must be denied.

As further grounds for relief, the plaintiffs contend that their untimely motion for extension of time to file a response to the defendant’s motion to dismiss should have been granted because of excusable neglect, in that they inadvertently misread, overlooked or miscalculated the required response deadline set forth in the docket entries, the court’s April 2 order, and the local rules of court. As stated in the May 2 order, the deadline for the plaintiffs to file a response to the defendant’s motion to dismiss filed March 23, 2018, was April 13, 2018, as imposed by E.D. Tenn. LBR 7007-1(a) (“any objection to the relief sought in a motion must be filed within 21 days after the filing of the motion”). The plaintiffs argue that because the court’s April 2 order was served on the plaintiffs on April 4, 2018, they believed that the deadline ran from this date plus three days for the mail-box rule of Fed. R. Civ. P. 9006(f), such that their response was due April 28, 2018.

The court questions whether the plaintiffs’ neglect was in fact excusable. As addressed in the May 2 order, Local Rule 7007-1(a)’s deadline for filing a response to a motion in an adversary proceeding is a fixed 21-day period that expressly runs from the date a motion is filed, not from the date it is served. This court’s April 2 order, which was a courtesy to the pro se plaintiffs to advise them of the deadline under the local rules, plainly set forth the March 23, 2018 filing date of the defendant’s motion and stated that “[p]ursuant to E.D. Tenn. Local Rule 7007-1, the plaintiffs have 21 days after the date the motion was filed to respond.” Moreover, Fed. R. Civ. P. 9006(f), which adds three extra days when the prescribed period of time begins to run from service, is inapplicable because the 21-day period of Local Rule 7007-1 runs from the date of filing rather than service. *See, e.g., In re Antell*, 155 B.R. 921, 928-29 (Bankr. E.D. Penn. 1992) (“When a time period is measured from the occurrence of an event other than service by mail, then, the rule will not serve to extend the time to act.”). In any event, the plaintiffs

responded to the defendant's motion to dismiss in their motion for an extension of time and in the present motion, and there is no suggestion that they were unable to raise an argument that they otherwise would have raised if they had had more time. As a result, it is unnecessary for the court to consider whether "excusable neglect" has been shown as argued.

As its last ground for relief in their motion, the plaintiffs state, supported by their affidavit, that they were not served with the defendant's response to their motion for an extension, such that they were unable to address or refute alleged misstatements in the defendant's response. Contrary to this assertion, the certificate of service attached to the defendant's response indicates that the plaintiffs were served with a copy of the response on April 26, 2018, by United States mail. Regardless of whether the plaintiffs were in fact served, the court did not rely on any factual statements in the defendant's response in its May 2 order granting the defendant's motion to dismiss. Accordingly, the alleged error had no impact on the court's decision. For all of the foregoing reasons, the plaintiffs' motion filed on May 11, 2018, seeking relief from the May 2 order is denied.

One final, important addition must be made. While the plaintiffs' motion fails to establish a legal basis for disturbing any of the court's rulings in its May 2 order, the plaintiffs have made the court aware of a possible effect that the court never intended: that the May 2 order may have effectively operated as an adjudication on the merits of the plaintiffs' alleged claim against the defendant since the court failed to expressly state in the order whether the dismissal was with or without prejudice. *See* Fed. R. Civ. P. 41(b) ("Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits."). The court notes that Fed. R. Civ. P. 4(m) states that if a defendant is not served within 90 days after the complaint is filed, the court "must dismiss the action without prejudice against that defendant or order that service be made within a specified time." Because the court omitted to state its intention that the dismissal be without prejudice, the court will correct this omission on its own motion pursuant to Fed. R. Civ. P. 60(a). Accordingly, the May 2 order is corrected and amended such that its last sentence now reads: "Based on the foregoing, the plaintiffs' motion for extension of time is denied, the defendant's motion to dismiss is granted, and this adversary proceeding is dismissed without prejudice."

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