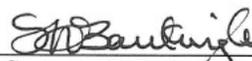




**SO ORDERED.**  
**SIGNED this 30th day of June, 2015**

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

  
Suzanne H. Bauknicht  
UNITED STATES BANKRUPTCY JUDGE

---

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

In re

Case No. 3-14-bk-33384-SHB

DANIEL VICTOR VELER

Debtor

DON AND WENDY FOX

Plaintiffs

v.

Adv. Proc. No. 3:15-ap-3003-SHB

DANIEL VICTOR VELER

Defendant

**MEMORANDUM AND ORDER ON  
MOTION TO DISMISS ADVERSARY COMPLAINT**

Plaintiffs filed the Complaint Objecting to Discharge of Debtor and/or in Alternative Exception to Discharge of Claim of Creditors Don and Wendy Fox (Complaint) on January 20, 2015, objecting to Defendant's discharge under 11 U.S.C. § 727(a)(3), (4), and (5), or, in the alternative, seeking a nondischargeable judgment against Defendant under 11 U.S.C. § 523(a)(2) and (4). Upon Plaintiffs' request, the court clerk issued a Summons on January 28, 2015. On

February 2, 2015, Plaintiffs filed the return, evidencing that on January 28, 2015, the Summons and Complaint were personally served on Defendant's bankruptcy counsel, John Fowler, at his office. Nothing further occurred, and the court issued an Order on May 27, 2015, directing Plaintiffs to appear on July 2, 2015, to show cause why the adversary proceeding should not be dismissed for failure to prosecute. Defendant filed a Motion to Dismiss Adversary Complaint (Motion to Dismiss) on May 28, 2015, arguing that Plaintiffs did not properly serve the Summons and Complaint because they did not serve Defendant with the Summons and Complaint. Pursuant to E.D. Tenn. LBR 7007-1(a), because Plaintiffs did not file a response to the Motion to Dismiss within the 21-day response time set forth in the Rule, their failure to respond timely is construed by the court to mean that they do not oppose the relief requested in the Motion to Dismiss.

Because they did not serve the Summons and Complaint on Defendant himself, either personally or through United States Mail, Plaintiffs did not effectuate service on January 28, 2015. Rule 7004 of the Federal Rules of Bankruptcy Procedure requires service of a summons and complaint, and if the defendant is the debtor, service may be accomplished via United States Mail, first class, postage prepaid "by mailing a copy of the summons and complaint to the debtor at the address shown in the petition or to such other address as the debtor may designate in a filed writing." Fed. R. Bankr. P. 7004(b)(9).

Service on Debtor's counsel did not effect complete service on Debtor under Rule 7004. "If the debtor is represented by an attorney, whenever service is made upon the debtor under this Rule, service shall *also* be made upon the debtor's attorney by any means authorized under Rule 5(b) [of the Federal Rules of Civil Procedure]." Fed. R. Bankr. P. 7004(g) (emphasis added). Accordingly, under the Federal Rules of Civil and Bankruptcy Procedure, as well as this court's

Administrative Procedures (*i.e.*, section II.C.2., which excepts service of a summons and complaint from the rule allowing electronic service on a Registered User), “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.” *Dreier v. Love (In re Love)*, 232 B.R. 373, 377 (Bankr. E.D. Tenn. 1999); *see also Yesh Diamonds, Inc. v. Yashaya (In re Yashaya)*, 403 B.R. 278, 283 (Bankr. E.D.N.Y. 2009); *Target Nat’l Bank v. Redmond (In re Redmond)*, 399 B.R. 628, 632 (Bankr. N.D. Ind. 2008). “Anything less than strict compliance with [Rule 7004] does not constitute effective service and actual knowledge of a bankruptcy case or adversary proceeding does not cure a technically deficient service of process.” *Hogrobrooks v. Educ. Credit Mgmt. Co. (In re Hogrobrooks)*, No. 99-00618, 2006 WL 6630689, at \*3 (Bankr. W.D. Tenn. Dec. 6, 2006). Thus, service on Defendant’s attorney of record in his bankruptcy case, although required by Rule 7004(g), did not negate the added requirement for Plaintiffs to personally serve Defendant.

If a plaintiff fails to serve a complaint within 120 days after it is filed, on motion of the defendant, “the court . . . must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.” Fed. R. Civ. P. 4(m). Unless a plaintiff proves good cause for the delay and an extension is required, the court has equal discretion to dismiss or extend time, with the burden of proving good cause upon the plaintiff. *Little v. Nationwide Children’s Hosp., Inc.*, No. 2:09-cv-190, 2009 WL 4261215, at \*1, 2009 U.S. Dist. LEXIS 109991, at \*3-4 (S.D. Ohio Nov. 25, 2009); *Williams v. Smith*, No. 98-1700, 1999 WL 777654, at \*1, 1999 U.S. App. LEXIS 23202, at \*3-4 (6th Cir. Sept. 17, 1999). “[W]hether the plaintiff made a reasonable and diligent effort to effect service” is a consideration

for good cause; however, “[m]istake of counsel or ignorance of the rules is not enough to establish good cause.” *First Heritage Credit of Tenn., LLC v. Johnson (In re Johnson)*, No. 13-3052, 2014 WL 61415, at \*2, 2014 Bankr. LEXIS 51, at \*6 (Bankr. E.D. Tenn. Jan. 7, 2014) (citations omitted).

Plaintiffs have not offered the court with any proof whatsoever that good cause exists to extend the time for them to obtain proper service of process. To the contrary, they filed the Complaint on January 20, 2015, but did not request issuance of the Summons until January 28, 2015. After filing the Summons Return on February 2, 2015, Plaintiffs have taken no action with respect to this adversary proceeding, necessitating entry of an Order by the court on May 27, 2015, setting a show cause hearing for failure to prosecute, which was 127 days after the Complaint was filed and 119 days after the Summons was issued. One day later, on May 28, 2015, Defendant filed the Motion to Dismiss, to which Plaintiffs did not respond or otherwise defend, the result of their inaction being construed by the court, under its Local Rules, to mean that they do not oppose dismissal as requested. For these reasons, the court does not find good cause to extend the time for Plaintiffs to effect proper service on Defendant.

Defendant’s Motion to Dismiss is GRANTED. The Complaint Objecting to Discharge of Debtor and/or in Alternative Exception to Discharge of Claim of Creditors Don and Wendy Fox filed by Plaintiffs on January 20, 2015, is DISMISSED.

###