

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

In re

Case No. 01-30058

JAMES A. COLEMAN, JR.  
d/b/a JAC PROPERTIES  
VICKIE LYNN COLEMAN

Debtors

FIRST NATIONAL BANK OF LAFOLLETTE

Plaintiff

v.

Adv. Proc. No. 01-3052

JAMES AL COLEMAN, JR.

Defendant

**MEMORANDUM ON MOTION TO DISMISS AND  
MOTION FOR EXTENSION OF TIME TO SERVE PROCESS**

APPEARANCES: TROUTMAN & TROUTMAN, P.C.  
C. Mark Troutman, Esq.  
Post Office Box 1757  
LaFollette, Tennessee 37766  
Attorneys for Plaintiff

MOSTOLLER, STULBERG & WHITFIELD  
Ann Mostoller, Esq.  
136 South Illinois Avenue  
Suite 104  
Oak Ridge, Tennessee 37830  
Attorneys for Defendant

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

Plaintiff First National Bank of LaFollette (First National) filed a Complaint Objecting to Discharge (Complaint) on April 13, 2001. First National submits that the Defendant Debtor's discharge should be denied under 11 U.S.C.A. § 727(a)(4) (West 1993) or that the debts owed it by the Defendant Debtor should be excepted from discharge under 11 U.S.C.A. § 523(a)(2), (4), or (6) (West 1993).

The Defendant has not filed a response to the Complaint. As a result, First National filed a Motion for Entry of Default on August 15, 2001, pursuant to FED. R. BANKR. P. 7055 and FED. R. CIV. P. 55.

Presently before the court is the Debtor's Special Appearance for the Limited Purpose of Responding to the Plaintiff's Motion for Default Judgement and Motion to Dismiss (Motion to Dismiss) filed on August 29, 2001. The Defendant moves the court to dismiss the Complaint pursuant to FED. R. CIV. P. 4(m) and FED. R. BANKR. P. 7004(a) for ineffective service of process.

Also before the court is Plaintiff's Response to Motion to Dismiss and Motion for Extension of Time to Serve Process (Motion for Extension of Time) filed on September 19, 2001. Each party has briefed its position to the court.

## I

Rule 7004 of the Federal Rules of Bankruptcy Procedure approves several methods for service of a complaint and summons. It authorizes, in relevant part, service:

Upon the debtor, after a petition has been filed by or served upon the debtor and until the case is dismissed or closed, by mailing a copy of the summons and complaint to the debtor at the address shown in the petition or statement of affairs or to such other address as the debtor may designate in a filed writing and, if the debtor is represented by an attorney, to the attorney at the attorney's post-office address.

FED. R. BANKR. P. 7004(b)(9). In other words, if a debtor is represented by counsel, service of any complaint and summons must be mailed both to the debtor and to the debtor's attorney.<sup>1</sup>

First National admittedly did not comply with Rule 7004(b)(9). The circumstances of the actual service are explained by First National's counsel, C. Mark Troutman, in his Supplemental Affidavit in Support of Entry of Default (Troutman Affidavit) filed August 30, 2001.

Mr. Troutman states that prior to the filing of the Complaint he had numerous discussions with the Defendant's attorney, James Webster.<sup>2</sup> According to the Affidavit, Mr. Webster asked that a copy of the summons and Complaint not be sent to the Defendant because "notices such as process upset Mr. Coleman's wife and elderly mother." The Affidavit further states that Mr. Webster asked for the documents to be faxed to his office.

According to the Affidavit, the original summons prepared by Mr. Troutman was refused by the Bankruptcy Court Clerk's office because the Defendant Debtor's name in the bankruptcy case caption was given as "James Al Coleman, Jr." instead of "James A. Coleman, Jr." as contained in the official bankruptcy case caption. Mr. Troutman states that he prepared a corrected

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<sup>1</sup> See *Waterman v. Zacharias (In re Zacharias)*, 60 B.R. 142, 143 (Bankr. N.D. Ohio 1986).

<sup>2</sup> The Defendant's counsel in the joint bankruptcy case and in this adversary proceeding is Ann Mostoller. Mr. Webster represented the Defendant in prior state-court litigation with First National.

summons which was issued by the clerk on April 30, 2001. Mr. Troutman further avers that a copy of the Complaint and corrected summons were mailed to Mr. Webster's office on May 3, 2001, with sufficient address and postage, and that the mailing was not returned to him as undeliverable.<sup>3</sup> Copies were also faxed to Mr. Webster.

## II

By the Affidavit of James M. Webster filed with the Motion to Dismiss, the Defendant acknowledges only that the faxed "James Al Coleman, Jr." summons and Complaint were received by Mr. Webster. Regardless of whether or not Mr. Webster was served by mail, First National's method of service does not satisfy Rule 7004(b)(9) because no copy of the summons and Complaint was ever mailed to the Defendant or his attorney.<sup>4</sup> See *Dreier v. Love (In re Love)*, 232 B.R. 373, 377-78 (Bankr. E.D. Tenn.), *aff'd sub nom. Drier v. Love (In re Love)*, 242 B.R. 169 (E.D. Tenn. 1999), *aff'd sub nom. Dreier v. Love (In re Love)*, No. 00-5038, 2001 WL 182373 (6<sup>th</sup> Cir. Feb. 12, 2001) ("[A]ctual knowledge of a suit is not a substitute for proper service of process and does not cure a technically defective service of process.") (quoting *Meganck v. Coutts (In re Coutts)*, 188 B.R. 949, 953 (Bankr. E.D. Mich. 1995)).

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<sup>3</sup> Mr. Troutman states that he also mailed letters to Ms. Mostoller and Mr. Webster on June 18, 2001, requesting that the Defendant file an answer to the Complaint. According to the Affidavit, neither attorney responded to the mailing nor was either letter returned as undeliverable.

<sup>4</sup> The Defendant's attorney for purposes of Rule 7004(b)(9) is his bankruptcy attorney, Ann Mostoller, and not Mr. Webster, who has no connection with the bankruptcy case. See *Edwards v. Goforth (In re Goforth)*, 183 B.R. 560, 562 (Bankr. W.D. Ark. 1995) (Rule 7004(b)(9) requires service on the debtor's bankruptcy attorney of record.).

Accordingly, the Defendant moves for dismissal of the Complaint pursuant to FED. R. CIV. P. 4(m), made applicable to this adversary proceeding by FED. R. BANKR. P. 7004(a). Rule 4(m) provides in material 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.

Because more than 120 days have passed since the filing of the Complaint,<sup>5</sup> Rule 4(m) directs that the court must either dismiss the Complaint without prejudice or “direct that service be effected within a specified time,” giving consideration to good cause shown for the failure to perfect service. Additionally, “courts have been accorded discretion to enlarge the 120-day period even if there is no good cause shown.” *Henderson v. United States*, 116 S. Ct. 1638, 1643 (1996) (citation omitted). In reaching its decision, the court should consider “the danger of prejudice to the debtor, the length of delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.” *In re Love*, 242 B.R. at 171 (quoting *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership*, 113 S. Ct. 1489, 1498 (1993)).

Mr. Troutman’s Affidavit indicates that his noncompliance with Rule 7004(b)(9) was an accommodation to the Defendant, so as to not distress the Defendant’s wife and elderly mother. This justification is hardly indicative of bad faith by First National or its counsel. Further, Mr. Webster acknowledges pre-Complaint discussions with Mr. Troutman regarding the potential

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<sup>5</sup> August 11, 2001, was the 120<sup>th</sup> day after the filing of the Complaint.

adversary proceeding and admits receipt of the faxed Complaint and summons. To dismiss First National's Complaint at this juncture will deprive it of its day in court.<sup>6</sup>

Accordingly, for the reasons enumerated herein, the Defendant's Motion to Dismiss will be denied and First National's Motion for Extension of Time will be granted. First National will be directed to effect service upon the Defendant within thirty days. An order consistent with this memorandum will be entered.

FILED: October 1, 2001

BY THE COURT

RICHARD STAIR, JR.  
UNITED STATES BANKRUPTCY JUDGE

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<sup>6</sup> In discharge and dischargeability actions, the dismissal "without prejudice" language of Rule 4(m) holds little meaning. Here, the bar date for filing such actions expired on April 16, 2001. There is no saving statute. See, e.g., *Gillette v. Crumley (In re Crumley)*, 73 B.R. 996, 998 (Bankr. E.D. Tenn. 1987); *In re Manuel*, 67 B.R. 825, 826 (Bankr. E.D. Mich. 1986).

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**ORDER**

For the reasons stated in the Memorandum on Motion to Dismiss and Motion for Extension of Time to Serve Process filed this date, the court directs the following:

1. The Debtor's Special Appearance for the Limited Purpose of Responding to the Plaintiff's Motion for Default Judgment and Motion to Dismiss filed by the Defendant on August 29, 2001, is, to the extent the Defendant seeks to have the Plaintiff's Complaint Objecting to Discharge dismissed, DENIED.

2. The Plaintiff's Response to Motion to Dismiss and Motion for Extension of Time to Serve Process is, to the extent the Plaintiff requests additional time to effect service of process on the Defendant, GRANTED.

3. The Plaintiff will effect service of process on the Defendant within thirty (30) days.

SO ORDERED.

ENTER: October 1, 2001

BY THE COURT

RICHARD STAIR, JR.  
UNITED STATES BANKRUPTCY JUDGE