SO ORDERED.
SIGNED this 28th day of January, 2021

Suzanne H. Bauknight
UNITED STATES BANKRUPTCY JUDGE

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

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

In re

Case No. 20-bk-30700-SHB
Chapter 7

CHARLES L. GIVENS
dba AMERICAN HOME BUILDERS

Debtor

TERRY PHILLIPS
JENNIFER PHILLIPS

Plaintiffs

v.

Adv. Proc. No. 20-ap-3018-SHB

CHARLES L. GIVENS
dba AMERICAN HOME BUILDERS

Defendant

MEMORANDUM AND ORDER ON
MOTION TO DISMISS ADVERSARY COMPLAINT

Before the Court is the Motion to Dismiss Adversary Complaint ("Motion to Dismiss") filed by Defendant on December 11, 2020 [Doc. 38] for failure to timely serve the summons and complaint as required by Federal Rule of Civil Procedure 4(m), as made applicable to this

proceeding by Federal Rule of Bankruptcy Procedure 7004(a)(1).

Plaintiffs filed the Complaint of Terry and Jennifer Phillips Objecting to Dischargeability of Debt ("Complaint") on May 11, 2020 [Doc. 1], seeking a nondischargeable judgment against Defendant under 11 U.S.C. § 523(a)(2), (a)(4), and (a)(6). The clerk issued a summons on May 12, 2020 [Doc. 4], the return for which reflects service on May 15, 2020, by personal service "at there [*sic*] home at 1376 Snappwood dr. [*sic*] Sevierville TN 37862."[1] [Doc. 5.] After the October 7, 2020 entry of the Order directing Plaintiffs to appear and show cause why the adversary proceeding should not be dismissed for failure to prosecute [Doc. 8], Plaintiffs requested entry of default, which the clerk entered on October 8, 2020 [Doc. 11], immediately after which Plaintiffs filed an Application for Default Judgment ("Plaintiffs' Application") [Doc. 16].

Defendant then filed a Motion to Set Aside Entry of Default ("Set Aside Motion") because his attorney was not served with a copy of the summons and Complaint as required by Federal Rule of Bankruptcy Procedure 7004(g). [Doc. 21.] Following a hearing on Plaintiffs' Application and the Set Aside Motion on November 5, 2020, the Court denied Plaintiffs' Application and granted the Set Aside Motion "for failure to properly serve the Complaint on counsel for the Debtor as provided by Bankruptcy Rule 7004(g)." [Doc. 28; *see also* Doc. 29.]

On November 9, 2020, Plaintiffs requested issuance of an alias summons, which was issued on November 10, with Plaintiffs effecting service on Defendant and his attorney via United States Mail on the same day – 183 days after this adversary proceeding was filed. [Docs. 35, 36, 37.]

[1] At the time the Complaint was filed, Plaintiffs were represented by Katlyn Jones and Andrew Farmer of The Law Offices of Andrew Farmer, PLLC. As reflected in the Notice of Appearance filed August 17, 2020 [Doc. 6], they are now represented by T. Lynn Tarpy, and Tarpy, Cox, Fleishman & Leveille, PLLC.

The Defendant's response to the Complaint, thus, was due on December 10. *See* Fed. R. Bankr. P. 7012(a). In his Motion to Dismiss filed one day late [Doc. 38], Defendant argues that Plaintiffs did not meet the service requirement under Federal Rule of Civil Procedure 4(m) because the Complaint was served more than 90 days after it was filed. [Docs. 38, 39.] Plaintiffs filed a response to the Motion to Dismiss ("Response") [Doc. 40], asserting that Defendant was personally served with a copy of the summons and Complaint on May 15, 2020, within the Rule 4(m) requirement, and that Defendant's counsel "also received the [C]omplaint when it was filed by the Court's electronic notification system upon filing." [Doc. 40 at p. 1.][2] Plaintiffs note that Mr. Tarpy also served a copy of the original summons and Complaint on Defendant's counsel on August 17, 2020 (the day that Mr. Tarpy filed his Notice of Appearance). [*Id.* at p. 2; *see* Docs. 6, 7.][3]

Plaintiffs correctly note that their service of the summons and Complaint on Defendant by hand delivery to his residence on May 15, 2020, would have been sufficient service of process under Rule 4 if not for Defendant's bankruptcy case. Nevertheless, because they did not serve the summons and Complaint on Defendant's counsel, Plaintiffs' attempt at service in May 2020 did not effectuate service of process. Rule 7004(g) requires that "[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[.]" Fed. R. Bankr. P. 7004(g); *see also Cutuli v. Elie (In re Cutuli),* 389 F. Supp. 3d 1051, 1058-59 (M.D. Fla. 2019) ("Because [the plaintiff] failed to serve [the defendant's] attorney with an active summons, [the plaintiff] failed to effect service on [the

[2] Plaintiffs' Response also was filed one day beyond the 21-day deadline of E.D. Tenn. LBR 7007-1.

[3] Defendant replied to the Response [Doc. 41]; however, because replies are not authorized by the Local Rules for the Eastern District of Tennessee and Defendant did not seek permission to file a reply to Plaintiffs' response to his Motion to Dismiss, the Court will not consider the January 26, 2021 reply.

defendant] and failed to subject [the defendant] to the bankruptcy court's jurisdiction."); *Dreier v. Love (In re Love)*, 232 B.R. 373, 377 (Bankr. E.D. Tenn. 1999) (holding that this Rule "unambiguously provides that 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"). Defendant's counsel's receipt of the Complaint through the Court's CM/ECF system when it was docketed in the main bankruptcy case [*see In re Givens*, No. 3:20-bk-30700-SHB, ECF No. 28] did not effect service under Rule 7004 because Plaintiffs must serve both the Complaint and a summons.[4] *See First Heritage Credit of Tenn., LLC v. Johnson (In re Johnson)*, No. 13-3052, 2014 WL 61415, at *2 (Bankr. E.D. Tenn. Jan. 7, 2014) ("There is no question that the Plaintiff failed to properly serve the Defendant . . . because it did not also serve the Defendant's attorneys with the Complaint and Summons in compliance with Rule 7004(g) . . . . Even if the Defendant's attorneys received electronic notice of the Complaint and Summons, actual knowledge of the adversary proceeding is not a substitution for service of process, nor does it cure 'technically defective service of process' effectuated by the Plaintiff.'" (quoting *LSJ Inv. Co., Inc. v. O.L.D., Inc.*, 167 F.3d 320, 322 (6th Cir. 1999))).

Although Plaintiffs requested issuance of an alias summons on November 9, 2020 [Doc. 34], service of the alias summons and Complaint on both Defendant and Defendant's counsel on November 10, 2020, occurred more than 90 days after the Complaint was filed, thus failing to meet the requirements of Rule 4(m).

> If a defendant is not served within 90 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a

[4] The Court notes that Federal Rule of Bankruptcy Procedure 7004(g) expressly permits service on the defendant's attorney "by any means authorized under Rule 5(b)" and that Federal Rule of Civil Procedure 5(b)(2)(E) allows for service of a paper by "sending it to a registered user" of the Court's CM/ECF system. The May 12, 2020 summons, however, was not served on Defendant's counsel until August 17, 2020 [Doc. 7], well after it had expired. *See* Fed. R. Bankr. P. 7004(e).

> 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. Rule 4(m).

Under Sixth Circuit authority, courts take a two-step analysis when service is not accomplished within 90 days.

> First, the Court "must determine whether the plaintiff has shown good cause for the failure to effect service," and if so, must grant a mandatory extension of time. Second, if the plaintiff has not shown good cause, the Court must exercise its discretion in either dismissing the action without prejudice or ordering that service be accomplished within a specified time.

Tanksley v. Tenn. Valley Auth., No.: 1:16-CV-487-TAV-SKL, 2017 WL 6391473, at *3 (E.D. Tenn. Dec. 14, 2017) (quoting *Stewart v. Tenn. Valley Auth.*, No. 99-5723, 2000 WL 1785749, at *1 (6th Cir. Nov. 21, 2000), and citing *Henderson v. United States*, 517 U.S. 654, 663 (1996); *Treadway v. Cal. Prods. Corp.*, No. 2:13-cv-120, 2013 WL 6078637, at *5 (E.D. Tenn. Nov. 19, 2013)).

As to the first consideration, "[e]stablishing good cause is the responsibility of the party opposing the motion to dismiss . . . and 'necessitates a demonstration of why service was not made within the time constraints.'" *Nofziger v. McDermott Int'l, Inc.*, 467 F.3d 514, 521 (6th Cir. 2006) (quoting *Habib v. Gen. Motors Corp.*, 15 F.3d 72, 73 (6th Cir. 1994)). "[C]ourts weigh the plaintiff's reasonable efforts and diligence against the prejudice to the defendant resulting from the delay." *Deluca v. AccessIT Grp., Inc*, 695 F. Supp. 2d 54, 66 (S.D.N.Y. 2010). Mere "[m]istake of counsel or ignorance of the rules is not enough to establish good cause." *Massey v. Hess*, No. 1:05-cv-249, 2006 WL 2370205, *4 (E.D. Tenn. Aug. 14, 2006); *see also Treadway v. Cal. Prods. Corp.*, No. 2:13-CV-120, 2013 WL 6078637, at *4 (E.D. Tenn. Nov. 19, 2013) ("Inadvertence or negligence on the part of a plaintiff's attorney and the attorney's clerical employees does not constitute good cause." (citations omitted)). "Actual notice and lack

of prejudice to the defendant are likewise insufficient to establish good cause." *Slenzka v. Landstar Ranger, Inc*., 204 F.R.D. 322, 324 (E.D. Mich. 2001).

These authorities establish unambiguously that Rule 7004 requires service of process on a defendant's counsel, that such service must be accomplished within seven days of the issuance of the summons, and that failure to effect service properly within 90 days is ground for dismissal of an adversary proceeding. And, the record before this Court makes clear that Plaintiffs did not properly serve Defendant's counsel initially and that the alias summons was issued beyond the Rule 4(m) deadline.

Plaintiffs do not assert any "good cause" for the failure to comply with Rule 4(m). Instead, they argue that "even if there is no good cause, the Court still has the discretion to extend the time." [Doc. 40 at p. 2 (quoting Fed. R. Civ. P. 4(m) advisory committee's note to 1993 amendment). Plaintiffs correctly note that dismissal of this adversary proceeding would be "fatal" because the deadline for filing nondischargeability actions has passed. They point the Court to the Advisory Committee's Note to the 1993 amendment to Rule 4(m): "Relief may be justified, for example, if the applicable statute of limitations would bar the refiled action[.]" Finally, Plaintiffs also argue that the Court should exercise its discretion to grant them an extension of the Rule 4(m) deadline because Defendant was personally served and his attorney had actual knowledge of the adversary proceeding such that Defendant's constitutional due process rights were satisfied. [Doc. 40 at p. 3]

Courts may exercise discretion to permit service outside the Rule 4(m) deadline by considering various factors, 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.

Slenzka, 204 F.R.D. at 326.

Under the circumstances here, the Court finds that the factors weigh in favor of granting an extension and denying the Motion to Dismiss. The adversary proceeding was filed and a summons was issued and served on Defendant in May 2020, with both Defendant and Defendant's counsel receiving actual notice of the Complaint even though nothing more occurred until August 17, 2020, when Plaintiffs' current counsel filed his notice of appearance and served a copy of the Complaint with the original (expired) summons on Defendant's counsel. After another short period of inactivity, immediately after the Court entered its Order on October 7, 2020, Plaintiffs' new counsel took action by requesting entry of default and moving for a default judgment. Shortly after the Court set aside the entry of default, Plaintiffs' counsel made a "reasonable effort" and acted "diligently" to cure the deficient service by requesting issuance of an alias summons and serving it on the same day with the Complaint on Defendant and Defendant's counsel. Thus, Plaintiffs' efforts do not reflect the kind of lack of reasonable effort or diligence that should result in dismissal.[5] This is especially so given that the deadline for objecting to dischargeability under 11 U.S.C. § 523 expired in June 2020 so that dismissal of this adversary proceeding would be with prejudice to Plaintiffs' refiling.

Based on these facts, the Court will exercise its discretion and extend the time for service. The Court, accordingly, directs the following:

1. The Motion to Dismiss is DENIED.

2. The time for service under Rule 4(m) of the Federal Rules of Civil Procedure,

[5] For an example of a lack of reasonable effort and diligence, *see Johnson v. Smith*, No. 20-5505 (6th Cir. Jan. 28, 2021), ECF No. 18-2 (slip op.).

applicable to this adversary proceeding pursuant to Federal Rule of Bankruptcy Procedure 7004(a)(1), is extended to November 10, 2020.

3. Defendant shall file an Answer within thirty days from entry of this Memorandum and Order.

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