



**SO ORDERED.**

**SIGNED this 4th day of March, 2021**

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

  
Suzanne H. Bauknight  
UNITED STATES BANKRUPTCY JUDGE

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

In re

TIMOTHY ALAN ROSENBERGER  
VIRGINIA MARIE ROSENBERGER

Case No. 20-bk-31813-SHB  
Chapter 7

Debtors

ADVANCIAL FEDERAL CREDIT UNION  
ITS ASSIGNEES AND/OR SUCCESSORS IN INTEREST

Plaintiff

v.

Adv. Proc. No. 20-ap-3048-SHB

TIMOTHY ALAN ROSENBERGER  
VIRGINIA MARIE ROSENBERGER

Defendants

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

Before the Court is the Motion to Set Aside Entry of Default (“Motion to Set Aside”) filed by Defendants on December 8, 2020 [Doc. 8], asking the Court to set aside the Entry of Default entered by the Clerk’s office on December 7, 2020 [Doc. 7], because Plaintiff did not

serve a copy of the Summons and Complaint on Defendants' attorney of record in their bankruptcy case as required by Federal Rule of Bankruptcy Procedure 7004(g).<sup>1</sup> Plaintiff filed a Response to the Motion to Set Aside also on December 8, 2020 [Doc. 9], stating that Defendants' counsel was served with the Summons and Complaint via email on November 10, 2020, and also filed a Certificate of Service reflecting the same on December 10, 2020 [Doc. 11].

The record reflects the following timeline. Plaintiff filed the Complaint to Deny Discharge of Certain Debts ("Complaint") on October 20, 2020 [Doc. 1], seeking a nondischargeable judgment against Defendant under 11 U.S.C. § 523(a)(6). The clerk issued a summons on November 2, 2020 [Doc. 4], the return for which reflects Defendants were served on November 2, 2020, by United States Mail, as authorized by Rule 7004(b) [Doc. 5]. Plaintiff requested entry of default, which the Clerk entered on December 7, 2020 [Doc. 7], immediately after which Defendants filed the Motion to Set Aside based solely on Plaintiff's failure to serve Defendants' counsel of record as required by Rule 7004(g). [Doc. 8.]

Although the record reflects that Defendants' counsel was served with the Summons and Complaint on November 10, 2020, Rule 7004(e) requires that service shall be accomplished within seven days after a summons is issued and, if it is not, an alias summons can be requested. Although Plaintiff served Defendants with the Summons and Complaint within the seven days after the Summons was issued on November 2, 2020, Plaintiff's service on Defendants without service on Defendants' counsel before the summons expired under Rule 7004(e) did not effectuate proper, complete service. 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

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<sup>1</sup> Although counsel attached an order to the Motion on the docket, an order was not uploaded to the Court's e-Orders system as required by E.D. Tenn. LBR 9072-1(b).

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 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"). Defendants' 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 Rosenberger*, No. 3:20-bk-31813-SHB, ECF No. 27] did not effectuate service under Rule 7004(g) because Plaintiff must serve both the Complaint and a summons.<sup>2</sup> *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))).

Plaintiff has not requested issuance of an alias summons, and the 90-day deadline under Rule 4(m) of the Federal Rules of Civil Procedure expired on January 28, 2021. Nevertheless,

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<sup>2</sup> The Court notes that Federal Rule of Bankruptcy Procedure 7004(g) expressly permits service on a 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 Summons issued November 2, 2020, however, was not served on Defendants' counsel until November 10, 2020 [Docs. 9-1, 11], one day after it had expired. *See* Fed. R. Bankr. P. 7004(e).

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)).

Here, the Court finds that good cause exists to extend the time for Plaintiff to achieve proper service. First, the Motion to Set Aside has been pending resolution,<sup>3</sup> and until such time as a decision was issued, Plaintiff could reasonably rely on the Entry of Default entered on December 7, 2020, and any failure to act before the Court’s decision does not reflect a lack of reasonable effort or diligence that should result in dismissal, and dismissal would, in fact, be prejudicial to Plaintiff.<sup>4</sup> Additionally, even though Plaintiff did not properly serve Defendants’ counsel within the seven days required by Rule 7004(e), Defendants’ counsel did receive actual notice of the Complaint on October 30, 2020, via CM/ECF, as well as on November 10, 2020, by email from Plaintiff’s counsel (albeit with an expired summons).

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<sup>3</sup> Because the Motion to Set Aside was filed without compliance with E.D. Tenn. LBR 9072-1(a), which requires the provision (by filing and uploaded) of a proposed order, the Court’s usual internal systems did not notify the Court of the filing, which resulted in a delay in adjudication of the motion.

<sup>4</sup> The deadline for objecting to dischargeability under 11 U.S.C. § 523 expired in November 2020 (and Defendants received a discharge on November 13, 2020), so that dismissal of this adversary proceeding would be with prejudice to Plaintiff’s refiling.

Based on these facts, the Court finds that service was not accomplished in accordance with Rule 7004; however, it will exercise its discretion and extend the time for service. The Court, accordingly, directs the following:

1. The Motion to Set Aside Entry of Default filed on December 8, 2020 [Doc. 8], is GRANTED.
2. The Entry of Default entered by the Clerk on December 7, 2020 [Doc. 7], is SET ASIDE and is of no force or effect.
3. The time for Plaintiff to request issuance of an alias summons and effectuate service under Rule 4(m) of the Federal Rules of Civil Procedure, applicable to this adversary proceeding pursuant to Federal Rule of Bankruptcy Procedure 7004(a)(1), is extended to March 19, 2021.

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