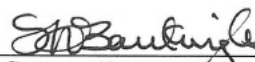




**SO ORDERED.**  
**SIGNED this 7th day of June, 2019**

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

  
Suzanne H. Bauknicht  
UNITED STATES BANKRUPTCY JUDGE

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

In re

JOSEPH I. SMITH  
ASHLEY NICOLE MCINTOSH-SMITH  
aka ASHLEY MCINTOSH  
aka ASHLEY SMITH

Debtors

DAVID JOHNSON

Plaintiff

v.

JOSEPH I. SMITH

Defendant

Case No. 18-bk-31379-SHB  
Chapter 7

Adv. Proc. No. 18-ap-3034-SHB

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

Before the Court is Defendant's Motion to Dismiss Adversary Complaint ("Motion to Dismiss") [Doc. 21] 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).

Plaintiff filed a Complaint to Determine Dischargeability [*sic*] [Doc. 1] on August 27, 2018, as amended on August 28, 2018 (collectively, “Complaint”). [Docs. 1, 5.] Plaintiff seeks a nondischargeable judgment against Defendant under 11 U.S.C. § 523(a)(2)(A). The clerk issued a summons on August 28, 2018 [Doc. 6], the return for which [Doc. 7] reflects service sixteen days later (on September 13, 2018) by leaving process with Defendant’s wife, Ashley Smith<sup>1</sup> at their residence.<sup>2</sup> On November 12, 2018, Plaintiff requested entry of default, which the clerk entered the next day.

Defendant, however, filed a motion to set aside the entry of default 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. 11.] On November 28, 2018, the Court granted the motion and set aside the entry of default “for failure to properly serve the Amended Complaint on counsel for the Debtor as provided by Bankruptcy Rule 7004(g)” (the “November Order”). [Doc. 12.] The Court additionally found “that service was defective under [Rule] 7004(e) because the summons and complaint were not delivered to Defendant within 7 days after the summons was issued.” [*Id.*]

Seventy-five days after entry of the November Order, the Court issued a show-cause order for Plaintiff’s failure to prosecute this proceeding (the “Show-Cause Order”). [Doc. 14.] Twenty-three days after entry of the Show-Cause Order, Plaintiff requested issuance of an alias

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<sup>1</sup> Ms. Smith is a co-debtor in Defendant’s Chapter 7 case but is not a defendant in this adversary proceeding.

<sup>2</sup> The return of service [Doc. 7] reflects service at 3013 Esquire Drive, Maryville, Tennessee, but Court records reflect Defendant’s residence address as 1303 Esquire Drive, Maryville, Tennessee. [*In re Smith*, No. 18-bk-31379-SHB, Doc. 1 at p. 2.]

summons on March 6, 2019, and Plaintiff served Defendant and his attorney via United States Mail<sup>3</sup> on the same day, 191 days after this proceeding was initiated. [Docs. 16, 18.]

On April 8, 2019, Defendant filed the instant Motion to Dismiss, arguing that because the Complaint was served more than 120 days<sup>4</sup> after it was filed, Plaintiff did not meet the service requirement under Federal Rule of Civil Procedure 4(m). [Doc. 21.] Plaintiff timely responded to the Motion to Dismiss, asserting that Defendant was properly served with a copy of the summons and Complaint on September 13, 2018, within the Rule 4(m) requirement. [Doc. 23.]

Plaintiff correctly notes that his service of the summons and Complaint on Defendant through hand delivery to his residence on September 13, 2018 would qualify as service under Rule 4 – outside of bankruptcy. Nevertheless, because he did not serve the summons and Complaint on Defendant’s counsel, Plaintiff did not effectuate proper service under Rule 7004(g), which 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 Dreoyer 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”). Therefore, service was not proper under the Federal Rules of Bankruptcy Procedure because Defendant’s counsel was not also served with the summons and Complaint. *See First Heritage Credit of Tenn., LLC v. Johnson (In re Johnson)*, No. 13-3052,

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<sup>3</sup> The Court notes that the return of service [Doc. 18] reflects service on an address that is not Defendant’s address. Thus, arguably, Defendant still has not been properly served.

<sup>4</sup> Defendant incorrectly references the prior 120-day time limit allowed for service of a complaint and summons under Rule 4(m). In 2016, Rule 4(m) was amended to shorten the time for service to 90 days. *See* Fed. R. Civ. P. 4(m). Additionally, Defendant’s reference to Rule 7004(g) [Docs 21, 22], which requires service of a summons and complaint on a debtor-defendant’s attorney, is misplaced; Rule 7004(a)(1) makes Rule 4(m) applicable in adversary proceedings.

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.” (citing *LSJ Inv. Co., Inc. v. O.L.D., Inc.*, 167 F.3d 320, 322 (6th Cir. 1999))).

Moreover, even though the Motion to Dismiss does not raise this issue, as noted by the Court in the November Order, initial service on September 13 was also deficient under Rule 7004(e) because the summons had expired on September 5 when it was not served within seven days of issuance. Accordingly, even if Rule 4(m) could be fulfilled by service of a summons and complaint on only the debtor-defendant with later compliance with Rule 7004(g) by service on counsel, the September 13, 2018 service on Defendant was wholly insufficient under Rule 7004(e) because the summons had expired.

Although Plaintiff requested issuance of an alias summons on March 6, 2019, his service of the summons and Complaint on March 6, 2019, was not sufficient because it 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 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).

“In determining whether a plaintiff has shown good cause, courts weigh the plaintiff’s reasonable efforts and diligence against the prejudice to the defendant resulting from the delay.”

*Deluca v. AccessIT Group, 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 (Bankr. E.D. Tenn. Aug. 14, 2006).

Plaintiff first argues that service was proper, but if the Court finds that it was not, then service on Defendant on September 13, 2018, should constitute good cause for the Court to extend the 90-day rule. As previously stated, Rule 7004(g) is unambiguous in its requirement that service of process must be issued on Defendant’s counsel. Similarly, Rule 7004(e) is unambiguous in that it requires service of a summons and complaint within seven days of issuance of the summons. Finally, Rule 4(m) is unambiguous in its requirement that a defendant must be served within 90 days or good cause must be shown why the Court should extend the service requirement.

Here, the November Order setting aside the entry of default should have caused Plaintiff to read and timely comply with the rules. Although 93 days had already passed as of entry of the November Order, had Plaintiff made a “reasonable effort” and acted “diligently” to serve Defendant and counsel after entry of the November Order, the Court would be inclined to allow this case to proceed. However, Plaintiff failed to prosecute this matter for an additional 77 days, even waiting an additional three weeks following entry of the Show-Cause Order to request issuance of and serve the alias summons.<sup>5</sup> Simply, Plaintiff’s good-cause argument (that “actual service upon Defendant [with an expired summons] constitutes good cause” [Doc. 23 at p. 3]) is insufficient. *See Pearson v. Pinkerton’s Inc.*, 90 F. App’x 811, 812-13 (6th Cir. Jan. 23, 2004).

For these reasons, the Court directs the following:

1. The Motion to Dismiss is GRANTED.

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<sup>5</sup> And, the alias summons contains an incorrect address for Defendant. *See supra* notes 2, 3.

2. The Complaint filed by Plaintiff on August 27, 2018 [Doc. 1], as amended on August 28, 2018 [Doc. 5], is DISMISSED.

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