

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

IN RE: CASE NO. 06-10633)
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DOUGLAS ALAN BREINER)
)
Debtor)
)
)
DOUGLAS ALAN BREINER)
)
Plaintiff)
)
vs.) PROC. NO. 06-1116
)
)
UNITED STATES DEPARTMENT OF)
EDUCATION)
)
Defendant)

DECISION ON MOTION TO DISMISS

At Fort Wayne, Indiana, on October 25, 2006.

The plaintiff initiated this proceeding on May 3, 2006, by filing a complaint requesting a discharge of his student loan debt pursuant to § 523(a)(8). When the defendant did not timely respond, the plaintiff filed a motion for default judgment. That motion was denied by the court's order of August 10, 2006, because the plaintiff had failed to serve the summons and the complaint upon the United States Attorney for the Northern District of Indiana and United States Attorney General as required by Fed. R. Civ. P. Rule 4(i), which is made applicable to bankruptcy proceedings by Fed. R. Bankr. P. Rule 7004. On September 14, 2006, the defendant filed a motion to dismiss, because it had not been properly served with a copy of the summons and complaint and the time for doing so had expired. It is that motion which is presently before the court. There has been no response to the motion within the time required by the court's local rules. See, N.D. Ind. L.B.R. B-

7007-1(a).

The defendant's motion is well-taken. Where, as here, the defendant is an agency of the United States, the plaintiff was required to serve the summons and complaint not only upon the United States Department of Education, but also upon the United States Attorney for the Northern District of Indiana and the United States Attorney General. Fed. R. Civ. P. Rule 4(i). This the plaintiff failed to do. The action is now more than 120 days old, and, to date, the plaintiff has yet to effectuate proper service or make any attempt to correct that deficiency, despite the court's order denying the plaintiff's earlier motion for default judgment and receipt of the defendant's motion to dismiss. Absent some justification from the plaintiff as to the cause for the failure to effectuate service within the time required, it is now too late. See, Fed. R. Civ. P. Rule 4(m)(complaint may be dismissed if service of the summons and complaint is not made within 120 days after the filing of the complaint). Not only has the plaintiff failed to properly serve the summons and complaint, he has also failed to show any cause for that failure which might permit him an extension of time within which to effectuate proper service. See, Fed. R. Civ. P. Rule 4(m). Defendant's motion to dismiss is GRANTED and this adversary proceeding will be dismissed, without prejudice.

An order doing so will be entered.

/s/ Robert E. Grant
Judge, United States Bankruptcy Court