

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
RONALD C. SCHWARTZ and)	CASE NO. 07-32786 HCD
LUCINDA K. SCHWARTZ,)	CHAPTER 13
)	
DEBTORS.)	
)	
)	
DEBRA L. MILLER, TRUSTEE,)	
)	
PLAINTIFF,)	
vs.)	PROC. NO. 08-3013
)	
KEYBANK NATIONAL ASSOCIATION,)	
)	
DEFENDANT.)	

Appearances:

Rebecca Hoyt Fischer, Esq., attorney for plaintiff, Laderer & Fischer, P.C., 112 West Jefferson Boulevard, Suite 310, South Bend, Indiana 46601; and

Harley K. Means, Esq., attorney for defendant, Kroger, Gardis & Regas, LLP, 111 Monument Circle, Suite 900, Indianapolis, Indiana 46204-5125.

MEMORANDUM OF DECISION

At South Bend, Indiana, on August 15, 2008.

Before the court are the Motion for Default Judgment, filed by the chapter 13 Trustee Debra L. Miller, plaintiff (“Trustee”), and the Motion to Set Aside Entry of Default and Request for Hearing, filed by the defendant KeyBank National Association (“KeyBank” or “Bank”).¹ The court, having considered the motions and the parties’ arguments in light of the record in this case, now denies the Trustee’s Motion for Default Judgment and grants the Bank’s Motion to Set Aside Entry of Default.

¹ The defendant, by counsel, identifies itself as KeyBank, N.A. See R. 12.

Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and determination. After reviewing the record, the court determines that the matter before it is a core proceeding within the meaning of § 157(b)(2)(K) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rules of Bankruptcy Procedure 7052 and 9014. Any conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

Background

This adversary proceeding was commenced on February 29, 2008, with the Trustee's filing of a Complaint to Avoid Lien pursuant to 11 U.S.C. § 544. The mortgage lien the Trustee seeks to avoid is held by KeyBank. The Trustee served the summons and Complaint by first class mail to "KeyBank National Association, Attn: Legal Department" at two addresses: 800 Superior Avenue E, Basement 3, Cleveland, OH 44114-2617; and P.O. Box 94968, Cleveland, Ohio 44101-4968. When no timely response to the Complaint was made, the Clerk's Entry of Default was entered. Service of the Entry of Default was made by the Bankruptcy Noticing Center to the same two addresses. The Bank did not respond to that notice of default. The Trustee then filed a Motion for Default Judgment.

Two months later, counsel for the Bank entered an appearance on behalf of the defendant and filed three documents: Response in Opposition to the Trustee's Motion for Default Judgment and Request for Hearing; Motion to Set Aside Entry of Default and Request for Hearing; and Brief in Support of Motion to Set Aside Entry of Default. The court, having considered the arguments of both counsel and having reviewed the record in full, now determines that the Entry of Default was not effectively served and must be set aside.

Discussion

A court considering a Motion for Default Judgment usually begins with Rule 7055 of the Federal Rules of Bankruptcy Procedure, which governs defaults. The bankruptcy rule applies Rule 55 of the Federal Rules of Civil Procedure in adversary proceedings. Rule 55 distinguishes between an “entry of default” and “judgment by default.” See *Lowe v. McGraw-Hill Cos., Inc.*, 361 F.3d 335, 339 (7th Cir. 2004). In this case, the Clerk of the Bankruptcy Court entered the Bank’s default on April 14, 2008. See Fed. R. Bankr. P. 7055; Fed. R. Civ. P. 55(a). The Trustee now requests a judgment by default, and the Bank requests the setting aside of the previously issued entry of default. See Fed. R. Civ. P. 55(b)(2), (c).

For a plaintiff to be entitled to a default judgment against the defendant, the court must verify that she followed the procedures required to claim that relief. The record in this case indicates that the Trustee served the Complaint and summons by first class United States mail upon the Bank, to the attention of its legal department, at two addresses in Cleveland, Ohio. It is clear, however, that the “obligation to answer the adversary proceeding complaint is not triggered until the complaint is ‘duly served.’” *Educational Credit Management Corp. v. Mersmann (In re Mersmann)*, 505 F.3d 1033, 1043 (10th Cir. 2007) (citing Fed. R. Bankr. P. 7012(a)). A party initiating an adversary proceeding “must fulfill the highly specific service of process requirements” when serving the summons and complaint upon the defendant. *Id.* (citing Fed. R. Bankr. P. 7001(6), 7003, 7004); see also *Ingala v. Sciarretto (In re Sciarretto)*, 170 B.R. 33, 34 (Bankr. D. Conn. 1994) (“The federal rules place responsibility for service of process on the plaintiff.”). “Without proper service, the defendant cannot be said to have ‘failed to plead or otherwise defend as provided by these rules.’” *In re Mersmann*, 505 F.3d at 1043-44 (citing Fed. R. Civ. P. 55(a), Fed. R. Bankr. P. 7055).

Bankruptcy Rule 7004(h) governs service of a summons and complaint on a bank which is an “insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act).” Fed. R. Bankr. P. 7004(h). Congress, recognizing a need to grant safeguards to federally insured banks that are named as defendants, added the requirements that service “shall be made by certified mail” and shall be “addressed to an

officer of the institution.” *Id.*; *see also Hamlett v. Amsouth Bank (In re Hamlett)*, 322 F.3d 342, 346 (4th Cir. 2003) (describing legislative history of Rule 7004(h)); *In re Hanson*, 397 F.3d 482, 487 (7th Cir. 2005) (holding that, “where the Bankruptcy Code and Bankruptcy Rules require a heightened degree of notice, due process entitles a party to receive such notice before an order binding the party will be afforded preclusive effect”) (quoting *In re Banks*, 299 F.3d 296, 302 (4th Cir. 2002)). The court notes that there are three exceptions to the Rule 7004(h) requirements (that service may be made to the institution’s attorney, if an appearance was made, or by other means if the court so orders or if the institution files a written waiver of the requirements) but that none of the exceptions applies in this adversary proceeding. Although the court was not informed that KeyBank qualified as an insured depository institution until it filed its Response, *see* R. 12, the Bank now has confirmed that it is an institution that falls within the mandate of Rule 7004(h).

The record reflects that service of process on the Bank failed in each of those additional requirements under Rule 7004(h). First, service was made by first class mail and not by certified mail. Service upon a banking institution by United States mail is ineffective. *See Veliz v. Citibank (In re Veliz)*, 187 B.R. 392, 393 (Bankr. S.D. Fla. 1995). When service is not made by certified mail, and when none of the three specific exceptions of Rule 7004(h) applies, then service is defective. *See In re Jackson*, No 07-12763, 2007 WL 4893519 at *1 (Bankr. N.D. Ind. Dec. 6, 2007). Second, service upon the defendant Bank was addressed to the “attention of the Legal Department” and not to an officer of the Bank. “Rule 7004(h) clearly requires service on an ‘officer’ of an insured depository institution.” *In re Hamlett*, 322 F.3d at 346 (affirming that service of process on a registered agent did not satisfy Rule 7004(h)); *see also Faulknor v. Amtrust Bank (In re Faulknor)*, No. R04-43921-PWB, 2005 WL 102970 at *2 (Bankr. N.D.Ga. Jan. 18, 2005) (finding that service to the attention of “President” was not adequate service); *cf. In re Schoon*, 153 B.R. 48, 49 (Bankr. N.D. Cal. 1993) (finding that service on an unnamed officer did not meet the requirements for service of a corporation under Rule 7004(b)(3)). In the court’s view, when service of a summons and complaint is made to a “legal department” of an insured depository institution, there is no indication that the recipient was authorized to receive service or, more importantly, was

the officer designated with the responsibility for receiving service. *Cf. Larsen v. Mayo Medical Center*, 218 F.3d 863, 868 (8th Cir.) (holding that service of a summons and complaint mailed by first class mail and addressed to the “Medical/Legal Department, Mayo Clinic,” was not personally served on an officer or authorized agent and was ineffective under Rule 4(h)), *cert. denied*, 531 U.S. 1036 (2000); *United States v. Johnson Matthey PLC*, No. 2:06-CR-169DB, 2007 WL 2254676 at *2 (D. Utah Aug. 2, 2007) (quashing service of summons to “legal department”); *Foels v. Countrywide Home Loans (In re Foels)*, No. 05-9093, 2005 WL 2850407 at *1 (Bankr. N.D. Iowa Oct. 12, 2005) (vacating Clerk’s Entry of Default on ground that service of defendant’s “legal department” did not conform with Rule 7004(b)). The court determines, therefore, that the Trustee has not duly served the summons and Complaint on the Bank.

The court also finds that the Complaint and summons have not been timely served. More than 120 days have passed since the filing of the Complaint on February 29, 2008, and the defendant still has not been properly served with the Complaint that initiated this adversary proceeding. *See U.S. v. McLaughlin*, 470 F.3d 698, 699-700 (7th Cir. 2006); *In re Sciarretto*, 170 B.R. at 35. As a consequence, this action is subject to dismissal pursuant to Federal Rule of Civil Procedure 4(m).² Under Rule 4(m), “if good cause for the delay is shown, the court *must* extend the time for service, while if good cause is not shown, the court has a choice between dismissing the suit and giving the plaintiff more time.” *McLaughlin*, 470 F.3d at 700.

In this case, several facts are relevant. First, the Clerk’s Entry of Default was not returned to the court as undeliverable mail. Therefore, although service of process clearly was defective, someone at the Bank received

² Federal Rule of Civil Procedure 4(m), made applicable in adversary proceedings by Federal Rule of Bankruptcy Procedure 7004, provides in pertinent 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.

Fed. R. Civ. P. 4(m).

the Entry of Default, and eventually it was shown to counsel for the Bank, who filed an appearance in the adversary proceeding. The documents filed by the defendant's attorney reflect that the Trustee's Complaint and Motion reached the Bank's counsel, as well. Second, the Bank's Response and Motion were filed July 18, 2008, three weeks after the 120-day deadline had expired. The court finds that the facts before it are similar to those before the Seventh Circuit in *McLaughlin*: In that case, the government lawyer (not a process server) attempted unsuccessfully to serve McLaughlin at his home and office, and finally left the complaint with his daughter (also a defendant) at McLaughlin's office. By the time the lawyer discovered the error in service, the 120-day deadline had expired. In this case, the Trustee attempted to serve the Bank at two addresses without following the procedural requisites; by the time she discovered the error, the Rule 4(m) time period had elapsed.

In choosing whether, under these circumstances, to dismiss this Complaint or to give the plaintiff more time for service to be effected, this court follows *McLaughlin* and excuses the plaintiff's delay in service. The plaintiff made a reasonable, albeit deficient, attempt to serve the Complaint, and the defendant did in fact receive a copy of the Complaint. Because the issues raised in the Complaint are legal ones concerning the acknowledgment of the mortgage, the court believes that the Bank is not prejudiced by the lack of timely service. It need not defend facts that might have become harder to defend by passage of time. *See McLaughlin*, 470 F.3d at 701 (finding that the defendant was not prejudiced by the government's service fumbles). "When delay in service causes zero prejudice to the defendant or third parties (or the court itself), the granting of extensions of time for service, whether before or after the 120-day period has expired, cannot be an abuse of discretion." *Id.* Therefore, the court grants the plaintiff a thirty-day extension of time in which to effect proper service.

The Trustee's deficient service on the Bank has created a loss of the court's jurisdiction over the defendant. "[S]ervice of process is the vehicle through which a court can properly exercise its adjudicatory power over an individual or entity in a particular case." *Cruisehone, Inc. v. Cruise Ships Catering & Servs., N.V. (In re Cruisehone, Inc.)*, 278 B.R. 325, 332 (Bankr. E.D.N.Y. 2002). A court is deprived of personal jurisdiction, or its right to exercise judicial power, over the defendant when it has not been properly served the complaint and

summons that initiated the adversary proceeding. *See id.*; *see also Moglia v. King Marine, Inc. (In re Outboard Marine Corp.)*, 369 B.R. 353, 358 (Bankr. N.D. Ill. 2007) (citing *Trustees of Local Union No. 727 Pension Fund v. Perfect Parking, Inc.*, 126 F.R.D. 48, 51 (N.D. Ill. 1989)); *Smith v. Khalif (In re Khalif)*, 308 B.R. 614, 618 (Bankr. N.D. Ga. 2004); *Kadlecek v. Ferguson (In re Ferguson)*, 204 B.R. 202, 207 (Bankr. N.D. Ill. 1997). Accordingly, this court determines that it has no personal jurisdiction over the defendant Bank herein until proper service of the Complaint and summons is made.

As a result of its lack of authority over the Bank, the court was unable to issue orders concerning it. *See In re Teknek, LLC*, 512 F.3d 342, 346 (7th Cir. 2007) (stating that a person not served with process is not a party and that a judge lacks authority over her). However, unaware of the defective service of the Trustee's Complaint, the Clerk issued an entry of default. The Bank now moves that the entry of default be set aside. "A court may set aside an entry of default for good cause." Fed. R. Civ. P. 55(c); Fed. R. Bankr. P. 7055. "Rule 55(c) requires 'good cause' for the judicial action, not 'good cause' for the defendant's error; as used in this Rule, the phrase is not a synonym for 'excusable neglect.'" *Sims v. EGA Products, Inc.*, 475 F.3d 865, 868 (7th Cir. 2007). The court finds that defective service constitutes good cause to set aside its entry of default upon the Bank. *See Ultrasonics, Inc. v. Eisberg (In re Ultrasonics, Inc.)*, 269 B.R. 856, 861-62 (Bankr. D. Idaho 2001); *Whitaker v. American Partitions, Inc. (In re Olympia Holding Corp.)*, 230 B.R. 623, 627-28 (Bankr. M.D. Fla. 1999); *Bessette v. JDR Recovery Corp. (In re Bessette)*, 226 B.R. 103, 105 (Bankr. D. Idaho 1998). The court therefore sets aside and vacates the Clerk's Entry of Default as void. As a further result of its lack of personal jurisdiction over the Bank because it was not duly served, the court cannot adjudge that the defendant is in default. Therefore, the Motion for Default Judgment must be denied.

Before concluding, however, the court adds a further comment concerning the plaintiff's default motion. In addition to the defective service of process, the Trustee's Motion for Default Judgment is deficient in another respect. Under Federal Rule of Bankruptcy Procedure 7055, a motion reciting only that the defendants had failed to respond and that an entry of default had been entered is insufficient. A defendant's failure to

respond “does not automatically entitle a plaintiff to entry of a default judgment.” *Capital One Bank v. Bungert (In re Bungert)*, 315 B.R. 735, 736 (Bankr. E.D. Wis. 2004) (citation omitted). The entry of default itself is discretionary; it may be denied when the facts are insufficient to support the claim in the complaint.

In [bankruptcy, as in] traditional civil litigation, the defendant’s failure to respond to a complaint against it does not mean that the plaintiff is entitled to the relief it seeks. Instead, the default is nothing more than an admission of the well pleaded factual allegations contained in the complaint. Before the plaintiff is entitled to the entry of judgment in its favor, those allegations must still state a legitimate claim for relief. Consequently, in passing upon a request for a default judgment, the court has a duty to examine those allegations and satisfy itself that the entry of judgment based upon them would be appropriate.

In re Taylor, 289 B.R. 379, 382 (Bankr. N.D. Ind. 2003). The court has “broad discretion to conduct such hearings and receive evidence that it deems proper before entering a default judgment.” *Mega Marts, Inc. v. Trevisan (In re Trevisan)*, 300 B.R. 708, 713 (Bankr. E.D. Wis. 2003) (citing Bankruptcy Rule 7055(b)(2) and cases). A plaintiff must prove a *prima facie* case of the allegations in a complaint in order to succeed on a motion for default judgment. *See Attorneys’ Title Ins. Fund, Inc., v. Zecevic (In re Zecevic)*, 344 B.R. 572, 574 (Bankr. N.D. Ill. 2006); *In re Bungert*, 315 B.R. at 737. The law in the Seventh Circuit clearly favors “a trial on the merits over a default judgment.” *Sun v. Board of Trustees of University of Illinois*, 473 F.3d 799, 811 (7th Cir.), *cert. denied*, ___ U.S. ___, 127 S. Ct. 2941, 168 L.Ed.2d 262 (2007) (insisting that default judgments be used “only in extreme situations, or when other less drastic sanctions have proven unavailing”).

In this case, the Trustee’s motion for default judgment required some proof that the Trustee was entitled to the relief she sought on the merits of her case, which sought to avoid the Bank’s mortgage lien. The court finds that the Trustee’s cursory motion, which reported only the defendant’s failure to respond, was not sufficient. *See In re Zecevic*, 344 B.R. at 578-79 (concluding that plaintiff did not meet burden of demonstrating a *prima facie* basis for relief; denying motion for default judgment).

Conclusion

For the reasons stated above, the Bank’s Motion to Set Aside Entry of Default is granted and the Clerk’s Entry of Default is hereby set aside and vacated. The Bank’s Request for Hearing is denied as moot.

