

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
ROBERT L. UNDERWOOD and)	CASE NO. 05-39712 HCD
DAWN UNDERWOOD,)	CHAPTER 7
)	
DEBTORS.)	
)	
)	
JACQUELINE SELLS HOMANN,)	
TRUSTEE,)	
PLAINTIFF,)	
vs.)	PROC. NO. 07-3120
)	
ROBERT L. UNDERWOOD and)	
DAWN UNDERWOOD,)	
DEFENDANTS.)	

Appearances:

Jacqueline Sells Homann, Trustee, Jones Obenchain, LLP. 600 KeyBank Building, 202 South Michigan Street, Post Office Box 4577, South Bend, Indiana 46634-4577; and

Robert L. Underwood and Dawn Underwood, pro se defendants, 30478 County Road 20, Elkhart, Indiana 46517.

MEMORANDUM OF DECISION

At South Bend, Indiana, on May 23, 2008.

Before the court are two documents filed on April 19, 2008, by Jacqueline Sells Homann, Chapter 7 Trustee (“Trustee”) in this bankruptcy case: “Response to Order to Show Cause for Dismissal of Case” and “Motion for Default Judgment.” The Motion was filed against Robert L. Underwood and Dawn Underwood, chapter 7 debtors and defendants in this adversary proceeding (“defendants” or “debtors”). The defendants have not responded to the Motion. Nor did they answer the underlying “Complaint to Revoke Discharge for Failure to Cooperate with the Trustee” (“Complaint”). For the reasons that follow, the court denies the Motion for Default Judgment and directs that a hearing to show cause be set by separate order.

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)(J) 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

The debtors filed their voluntary chapter 7 petition on October 15, 2005. The court granted the debtors a discharge of their debts on April 3, 2006. However, the Trustee anticipated a possible distribution to creditors whenever she would receive a 2005 income tax refund from the debtors, and therefore the case remained open. After sending informal letters to the debtors, requesting turnover of the tax refund, the Trustee filed a Motion to Compel. The debtor Robert Underwood filed a handwritten Objection to the Motion.¹ However, the court ordered that the Objection be refiled and served properly by the debtors' attorney, as required by the court's local rules. Because it was not refiled, the court struck the Objection and granted the Motion to Compel.

The Trustee then initiated this adversary proceeding against the debtors on October 11, 2007, with the filing of a Complaint and summons upon the debtors. In the Complaint, the Trustee asserted that the debtors had failed to respond to the Trustee's written requests and the court's Order for turnover of their 2005 income tax refund, which she claimed was property of the bankruptcy estate. She contended that the debtors' noncompliance constituted appropriate grounds for revocation of the debtors' discharge of their debts in this case.

¹ In the Objection, the debtor gave reasons for stopping his tax refund payments to the Trustee and requested an extension of time for paying back the refund or a reduction in the amount of payments he had been paying.

The debtors did not respond to the Trustee’s Complaint. On November 27, 2007, the Clerk of the Bankruptcy Court issued an Entry of Default; again the debtors failed to respond. Because the Trustee had taken no further action in the adversary proceeding, on March 25, 2008, the court issued an Order to Show Cause, requiring the Trustee to explain why the action should not be dismissed for want of prosecution. In her Response of April 19, 2008 (filed four days late), the Trustee apologized for the delay and explained that she was training a new assistant and that some matters had been missed. *See* R. 18, Response to Order to Show Cause. On the same date, the Trustee filed a Motion for Default Judgment. The Motion sought the entry of a default judgment and revocation of the debtors’ discharge on the ground that the debtors failed to comply with the court’s Order to Compel and failed to respond to the Trustee’s Complaint. *See* R. 19.

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 Rule 55(a) entry of default was issued by the Clerk of the Bankruptcy Court on November 27, 2007. *See* Fed. R. Civ. P. 55(a).² The Trustee’s request for a default judgment is covered by Rule 55(b)(2).³

² Rule 55 provides for the entry of default:

(a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party’s default.

Fed. R. Civ. P. 55(a).

³ In pertinent part, Rule 55(b)(2) provides that a court may enter a judgment by default as follows:

Rule 55(b) (2) . . . [T]he party entitled to a judgment by default shall apply to the court therefor;
. . . If the party against whom judgment by default is sought has appeared in the action, the party
(continued...)

For the Trustee to be entitled to a default judgment against the debtors, however, the court must verify that she followed the proper procedural requirements necessary to claim that relief. The record in this case indicates that the Trustee filed the Complaint, served the Complaint and summons upon the debtors, and sought a default judgment when the debtors did not answer the Complaint. However, 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.” *Id.* (citing Fed. R. Bankr. P. 7001(6)). She must effect proper service of the complaint and summons upon the defendant. *See id.* (citing Fed. R. Bankr. P. 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.”). Service of process on a debtor is governed by Bankruptcy Rule 7004(b)(9). *See Wallace v. Shapiro (In re Shapiro)*, 265 B.R. 373, 378 (Bankr. E.D.N.Y. 2001). “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). The court has determined that the Trustee, the plaintiff in this case, has not served the summons and Complaint on the defendants duly or timely.

A. Due Service of Process

The court finds first that the Trustee failed to serve the summons and Complaint upon the defendants. It finds that the documents in this adversary proceeding were served to the wrong address. The Trustee had

³(...continued)

(or, if appearing by representative, the party’s representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper. . . .

Fed. R. Civ. P. 55(b)(2).

recorded the debtors' address as 30478 County Road 20 in Elkhart, Indiana. All documents in this adversary proceeding were sent to the defendants at that address. It is, however, an outdated address. Although the debtors' chapter 7 petition listed that address on County Road 20 as their mailing address when they filed bankruptcy, the debtors, through their attorney, filed a "Notice of Change of Address" on December 30, 2005, stating that their address had changed to 56875 Meadow Glen Drive in Elkhart, Indiana. The Certificate of Service states that the Notice was sent electronically to the Trustee. The court revised its docket, and the Bankruptcy Noticing Center, which serves the court's documents, changed the debtors' address to reflect the new Meadow Glen Drive address. Furthermore, by the court's Order of December 22, 2005, the County Road 20 property was abandoned and the creditor Wells Fargo was granted relief from the automatic stay on the property. Nevertheless, the record in this case indicates that, both in the main case and in the adversary proceeding, the Trustee continued to attempt to serve the debtors by mail using the old County Road 20 address.⁴

Under Rule 7004 of the Federal Rules of Bankruptcy Procedure, service may be made upon a debtor by first class mail "by mailing a copy of the summons and complaint to the debtor at the address shown in the petition or to such other address as the debtor may designate in a filed writing." Fed. R. Bankr. P. 7004(b)(9). The Seventh Circuit has concluded that "service is effective on a debtor even if mailed to the wrong address, if the address to which it is mailed is the last listed by the debtor in a filed writing." *Bak v. Vincze (In re Vincze)*, 230 F.3d 297, 300 (7th Cir. 2000) (per curiam) (quoting *In re Coggin*, 30 F.3d 1443, 1450 n.8 (11th Cir. 1994)); see also *Cossio v. Cate (In re Cossio)*, 163 B.R. 150, 155 (9th Cir. B.A.P. 1994) (stating that "Rule 7004(b)(9) allows service on the debtor at the listed address until he files a change of address"); *Attorneys' Title Ins. Fund, Inc. v. Zecevic (In re Zecevic)*, 344 B.R. 572, 575-76 (Bankr. N.D. Ill. 2006) (finding that plaintiff's mailing of a complaint to the address on debtor's schedules, when debtor provided no notice of a change of address, was effective service). The record reflects that the last address listed by the debtors in their bankruptcy case was the

⁴ The court finds that the Trustee's earlier documents to the debtors, such as the demand letters and Motion to Compel Turnover filed in the main bankruptcy case, also were sent to the debtors at the County Road 20 address.

Meadow Glen Drive address. The court determines, therefore, that the Trustee's attempted service of process to the defendants at the now defunct County Road 20 address was defective.⁵ See *Saucier v. Capitol One (In re Saucier)*, 366 B.R. 780, 785 (Bankr. N.D. Ohio 2007) (stating that, "as a minimum threshold, service of the complaint must be made at a proper address"); *Smith v. Khalif (In re Khalif)*, 308 B.R. 614, 618-19 (Bankr. N.D. Ga. 2004) (concluding that service on defendant to incorrect address could not satisfy Rule 7004(b)(9)).

The Trustee did serve the Complaint electronically upon the defendants' attorneys (who did not represent them in the adversary case).⁶ However, service upon the attorneys, without proper service upon the defendants, was insufficient. See *In re Teknek, LLC*, 512 F.3d 342, 346 (7th Cir. 2007) (concluding that serving the party's attorney "does not satisfy the requirement of personal service on a putative litigant"). The defendants themselves must be served so that they can answer and defend the allegations against them. See *Parson v. Cole (In re Cole)*, 142 B.R. 140, 143 (Bankr. N.D. Tex. 1992) (concluding that service on only the attorney is not sufficient). It is clear, therefore, that the Trustee, by not serving the Complaint and summons (and all subsequent documents in this proceeding) upon the defendants at their changed address, did not meet the requirements of Bankruptcy Rule 7004(b)(9). The court finds that the Complaint and summons were not duly served.

B. Time Limit for Service of Process

The court also finds that the Complaint and summons were not timely served. It appears that the Trustee failed to investigate whether she had the correct address of the defendants after she received no response from them. As a consequence, more than 120 days have passed since the filing of the Complaint on October 11, 2007, and the defendants still have not been properly served 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.

⁵ The court became aware of the improper service after BNC mailings from the court to the debtors in this adversary proceeding, including the Clerk's Entry of Default, were returned to the court undelivered.

⁶ However, the Trustee did not serve the summons upon the defendants' attorneys. See *In re Vincze*, 230 F.3d at 299 (requiring debtor and attorney to be served both the summons and complaint).

C. Consequences of Defective Service

1. Dismissal under Rule 4(m)

The repercussions of this failed service of process are numerous. First, because the time limit for service has long passed, this action is subject to dismissal pursuant to Federal Rule of Civil Procedure 4(m).⁷ Rule 4(m) requires the court to dismiss the action without prejudice unless the plaintiff gives “good cause” for her ineffective service of process. “[I]f 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. The court will allow the Trustee the opportunity to demonstrate good cause for her failure to accomplish proper and timely service at a hearing to be set by separate order.

2. Lack of Jurisdiction

A second result of the deficient service is the court’s loss of jurisdiction over the defendants. “[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.” *Cruisephone, Inc. v. Cruise Ships Catering and Services, N.V. (In re Cruisephone, 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 defendants when they have 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)); *In re Khalif*, 308 B.R. at 618;

⁷ 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).

Kadlecek v. Ferguson (In re Ferguson), 204 B.R. 202, 207 (Bankr. N.D. Ill. 1997). A court considering whether a default judgment is appropriate against a defendant who has failed to plead or otherwise defend may raise the question of *in personam* jurisdiction *sua sponte*. See *Tuli v. Republic of Iraq (In re Tuli)*, 172 F.3d 707, 712 (9th Cir. 1999) (citing cases); *Rivas v. RJM Acquisition (In re Rivas)*, 377 B.R. 423, 426 (Bankr. S.D. Fla. 2007) (stating that examination of jurisdiction over the parties is court's duty). According to the Seventh Circuit Court of Appeals, when defendants were not served and did not appear in the proceeding, the judge lacked authority over them. See *In re Teknek, LLC.*, 512 F.3d at 346. Accordingly, this court determines that it has no personal jurisdiction over the defendants herein until proper service of the Complaint and summons is made.

3. *Vacatur* of Clerk's Entry of Default

As a result of its lack of authority over the defendants, the court was unable to issue orders concerning the defendants. However, unaware that the defendants had not been served the Trustee's Complaint, it issued an entry of default on November 27, 2007. It now considers, *sua sponte*, whether to vacate the entry. See *O'Connell v. Three Park Avenue Bldg. Co., L.P. (In re Blutrich Herman & Miller)*, 227 B.R. 53, 59 (Bankr. S.D.N.Y. 1998) (citing cases finding that courts have power to vacate orders and judgments *sua sponte*).

"A court may set aside an entry of default for good cause." Fed. R. Civ. P. 55(c); Fed. R. Bankr. P. 7055; see *Southwest Georgia Farm Credit v. Justice (In re Justice)*, 330 B.R. 872, 874 (Bankr. M.D. Ga. 2005). When an entry was made, after deficient service of process, which resulted in the defendants' lack of notice of the pending proceeding and the court's lack of *in personam* jurisdiction over them, courts have vacated the entry *sua sponte*. See *In re Blutrich Herman & Miller*, 227 B.R. at 59 (citing cases). "Generally, a judgment is void if the court lacked subject matter jurisdiction or personal jurisdiction." *In re Outboard Marine Corp.*, 369 B.R. at 358. More specifically, "a default judgment obtained after improper service is void." *Id.*; see also *In re Rivas*, 377 B.R. at 426-27; *Ultrasonics, Inc. v. Eisberg (In re Ultrasonics, Inc.)*, 269 B.R. 856, 863 (Bankr. D. Idaho 2001) (citing cases); *In re Safon Ochart*, 74 B.R. 131, 133 (Bankr. D. P.R. 1986).

In this case, the court lacked personal jurisdiction over the defendants, due to defective service of process, at the time it issued the entry of default. It therefore sets aside the Clerk's Entry of Default as void. *See Miller v. Cappuccilli (In re Cappuccilli)*, 193 B.R. 483, 489 (Bankr. N.D. Ill. 1996) (vacating default judgment).

4. Denial of Motion for Default Judgment

When a court is without *in personam* jurisdiction over the defendants because they have not been duly or timely served the Complaint and summons that initiated this adversary proceeding, it cannot adjudicate that those defendants are in default. Therefore, the Motion for Default Judgment must be denied. In addition to the defective service of process, however, 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 In re Zecevic*, 344 B.R. at 574; *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”); *see also Davis v. Hutchins*, 321 F.3d 641, 646 (7th Cir. 2003) (stating that a default is warranted when a “party has exhibited a willful refusal to litigate the case properly”).

In this case, the plaintiff’s motion for default judgment required some proof that the plaintiff was entitled to the relief she sought on the merits of her case, the turnover of the tax refund. The court finds that the Trustee’s cursory motion, which reported only the defendants’ failure to respond, was not sufficient. *See In re Zecevic*, 344 B.R. at 578-79 (concluding that plaintiff did not meet burden (by averments in complaint, supporting prove-up affidavit, and statement of findings of fact and conclusions of law) of demonstrating a *prima facie* basis for relief; denying motion for default judgment; dismissing adversary proceeding with prejudice). In addition, the court finds no evidence, in the Motion or in the record before it, warranting revocation of the defendants’ discharge. For these several reasons, therefore, the court determines that a judgment by default is inappropriate and that the Trustee’s Motion for Default Judgment is denied.

5. Possible Dismissal of Adversary Proceeding

Some courts, finding that defective service of process under Bankruptcy Rule 7004(b)(9) has resulted in the court’s loss of personal jurisdiction over the defendants, have concluded that dismissal of the adversary proceeding should result. *See, e.g., Williams v. Life Savings and Loan*, 802 F.2d 1200, 1202 (10th Cir. 1986) (*per curiam*) (holding that a “court may not dismiss an action *sua sponte* for lack of personal jurisdiction except when a default judgment is to be entered”); *Robinson v. Lefler (In re Lefler)*, 319 B.R. 538,541 (Bankr. E.D. Tenn. 2004) (“Insufficient service of process is a basis for dismissal of an adversary proceeding pursuant to Federal Rule of Civil Procedure 12(b)(5).”). Other courts have chosen “to give the Plaintiff an opportunity to present any facts not apparent in the record which would support the Court’s exercise of personal

jurisdiction over the Defendant.” *In re Rivas*, 377 B.R. at 427; *see also Dreier v. Love (In re Love)*, 3 Fed. Appx. 497, 498 (6th Cir. 2001) (affirming *Dreier v. Love (In re Love)*, 242 B.R. 169 (E.D. Tenn. 1999)). Because dismissal is a harsh sanction, and because an opportunity to correct defects may lead to a salutary result for all parties involved, this court agrees that the latter approach is the “more prudent course,” and now follows it.⁸ *In re Rivas*, 377 B.R. at 427. The court orders that a hearing be set by separate order to determine whether this adversary proceeding should be dismissed for lack of *in personam* jurisdiction.

D. Order to Show Cause

One other matter must be considered. On March 25, 2008, the court ordered the Trustee to show cause why no action had been taken during the previous 60 days in this adversary proceeding. Without a demonstration of good cause for her inactivity, the court could dismiss the proceeding pursuant to the court’s local rule B-7041-1, which arises from Federal Rule of Civil Procedure 41, made applicable in adversary proceedings by Federal Rule of Bankruptcy Procedure 7041.⁹

The Trustee, in her belated Response to the court’s Order to Show Cause, presented her “cause” for failing to prosecute the case: She explained that, because she was training a new assistant, some matters had been missed. The case law finds that, when an attorney or her staff errs or is negligent, courts measure whether “good cause” is established by considering such factors as the magnitude and frequency of the failures to comply with deadlines, the effect of those failures on the court, and the prejudice if any to the defendant. *See Ball v. City of*

⁸ The Court notes that the defendants’ last interaction with the Trustee was their unsuccessful attempt to respond to the Trustee’s Motion to Compel on April 30, 2007, by filing a handwritten objection requesting an alternative resolution concerning the payment of their 2005 income tax refund. *See* R. 25, Case No. 05-39712.

⁹ Local Bankruptcy Rule B-7041-1 provides:

Any contested matter or adversary proceeding in which no action has been taken for a period of sixty (60) days may be dismissed due to the lack of prosecution, with judgment for costs, if any, following twenty-one (21) days notice given by the court to counsel of record or, in the case of a *pro se* party, to the party unless, for good cause shown, the court orders otherwise.

N.D. Ind. L.B.R. B-7041-1.

Chicago, 2 F.3d 752, 759-60 (7th Cir. 1999). The court finds that, in this case, the Trustee’s conduct has not been contumacious and the lack of prosecution has not prejudiced the defendants, who have been unaware of the adversary proceeding. The Trustee’s inattentiveness to the adversary proceeding could be characterized as simple neglect – which would be excused under the “excusable neglect” standard of *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 394-95, 113 S. Ct. 1489, 123 L.Ed.2d 74 (1993), and under the lower Rule 4(m) threshold by which to measure “good cause,” as explained in *U.S. v. McLaughlin*, 470 F.3d 698, 700 (7th Cir. 2006).¹⁰ By comparison, therefore, the Trustee’s inattention is not an appropriate reason for dismissing this case under Rule 41 and Local Rule B-7041-1.

Conclusion

For the reasons stated above, the Trustee’s Motion for Default Judgment is denied and the Clerk’s Entry of Default is vacated and set aside. The court directs the Trustee to appear and show cause at a hearing before the court why this adversary proceeding should not be dismissed for defective service of process and lack of *in personam* jurisdiction. Hearing will be set by separate order.

SO ORDERED.

/s/ Harry C. Dees, Jr.
HARRY C. DEES, JR., CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT

¹⁰ The Seventh Circuit made clear, in *McLaughlin*, that Rule 4(m) “specifies no criteria for the exercise of mercy,” and does not demand a showing of “excusable neglect.” *McLaughlin*, 470 F.3d at 700. Therefore, in weighing whether the Trustee has established “good cause,” the court recognizes that, in this circuit, the Rule 4(m) “good cause” showing is easier to satisfy than the “excusable neglect” standard.