

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
CHARLES R. McMAHON AND)	CASE NO. 08-30129 HCD
MARY A. McMAHON,)	CHAPTER 13
)	
DEBTORS.)	
)	
)	
DEBRA L. MILLER, TRUSTEE,)	
)	
PLAINTIFF,)	
vs.)	PROC. NO. 08-3043
)	
HOMEcomings FINANCIAL NETWORK, INC.,)	
)	
DEFENDANT.)	

Appearances:

Rebecca Hoyt Fischer, Esq., attorney for plaintiff, 112 West Jefferson Boulevard, Suite 310, South Bend, Indiana 46601-1438.

MEMORANDUM OF DECISION

At South Bend, Indiana, on November 18, 2008.

Before the court is the Motion for Default Judgment filed by the plaintiff Debra L. Miller, Trustee (“Trustee” or “plaintiff”) in the chapter 13 case of the debtors Charles R. and Mary A. McMahon (“debtors”). The Trustee sought a default judgment after the defendant Homecomings Financial Network, Inc. (“Homecomings” or “defendant”) failed to answer or otherwise to respond to the Trustee’s Complaint to Avoid Lien. For the reasons that follow, the court denies the Trustee’s Motion for Default Judgment.

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

The facts are uncontested. This adversary proceeding was commenced on May 29, 2008, with the Trustee's filing of a Complaint to Avoid Lien pursuant to 11 U.S.C. § 544. The lien the Trustee seeks to avoid is the debtors' residential real estate mortgage lien held by Homecomings. The debtors had executed the mortgage and promissory note on May 13, 2003, and Homecomings recorded it two days later in the office of the Recorder of Starke County, Indiana.

On January 24, 2008, however, the debtors filed for chapter 13 bankruptcy relief. They listed Homecomings as a creditor on Schedule D holding a secured claim in the amount of \$28,993.84. Two months later, the court approved the parties' "Joint Stipulation and Proposed Order to Commence Adequate Protection Mortgage Payments without Notice." In that Stipulation, the Mortgagee was listed as "Homecomings Financial" and its address was "attn. Bankruptcy, PO Box 939072, San Diego, California 92193-9072." The same address was used on the debtors' matrix and on Schedule D. On May 10, 2008, attorney Timothy Black filed a proof of claim, asserting a secured claim in the amount of \$29,096.68, on behalf of the "Bank of New York Trust Co., N.A., c/o Homecomings Financial, LLC, Homecomings Financial Network" ("Bank"), at the same address.

Nineteen days later, on May 29, 2008, the Trustee filed a Complaint to avoid that mortgage lien on the ground that the improperly acknowledged mortgage was not entitled to recordation and should be avoided under 11 U.S.C. § 544. The Trustee served the summons and Complaint by first class mail to "Homecomings

Financial Network, Inc., P.O. Box 939072, San Diego, California 92193-9072,” the same address used by Homecomings throughout this bankruptcy case. When Homecomings failed to respond to the Complaint, the Clerk of the Bankruptcy Court issued the Clerk’s Entry of Default.¹ The Bankruptcy Noticing Center served the Entry of Default on Homecomings by first class mail to the same address on July 20, 2008. Homecomings again did not respond to that notice of default. On August 1, 2008, the notice was returned to the court marked “undeliverable.” On October 6, 2008, the Trustee filed a Motion for Default Judgment.

Discussion

The Trustee seeks a default judgment pursuant to Rule 55(b) of the Federal Rules of Civil Procedure, made applicable in these proceedings by Federal Rule of Bankruptcy Procedure 7055.² A party requesting a judgment by default first must fulfill all the procedural requirements for proper service of a summons and complaint upon the defendant. *See Educational Credit Mgmt. Corp. v. Mersmann (In re Mersmann)*, 505 F.3d 1033, 1043 (10th Cir. 2007) (citing Fed. R. Bankr. P. 7001(6), 7003, 7004). “Without proper service, the defendant cannot be said to have ‘failed to plead or otherwise defend as provided by these rules.’” *Id.* at 1043-44

¹ The court notes that Federal Rule of Civil Procedure 55(b)(1) requires that a party’s failure to plead or otherwise defend be shown “by affidavit or otherwise” before the clerk enters the party’s default. The Clerk of the Court requires strict compliance with that Rule.

² Rule 55(b)(2) states, in pertinent part:

(2) By the Court. In all other cases, the party must apply to the court for a default judgment. . . . If the party against whom a default judgment is sought has appeared personally or by a representative, that party or its representative must be served with written notice of the application at least 3 days before the hearing. The court may conduct hearings . . . when, to enter or effectuate judgment, it needs to:

- (A) conduct an accounting;
- (B) determine the amount of damages;
- (C) establish the truth of any allegation by evidence; or
- (D) investigate any other matter.

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

(citing Fed. R. Civ. P. 55(a), Fed. R. Bankr. P. 7055); *see also Miller v. Keybank National Association (In re Schwartz)*, Case No. 07-32786, Adv. Proc. 08-3013, Mem. Dec. Aug. 15, 2008 (finding that service on bank was improper). In this case, the court became concerned about service of process when the Clerk’s Entry of Default was returned as “undeliverable mail.” The record in this adversary proceeding indicates that the Trustee, by counsel, filed a Certificate of Service stating that service of the summons and a copy of the Complaint was made by first class mail to (and only to) Homecomings at the address used throughout this bankruptcy case: “P.O. Box 939072, San Diego, California 92193-9072.” It also demonstrates that the Complaint (and only the Complaint) initiating the adversary case was electronically mailed to attorneys Timothy Black (counsel for Bank of New York Trust Company, c/o Homecomings) and June E. Bules (counsel for the debtors) and to the United States Trustee and the chapter 13 Trustee. The court record does not reflect whether the Trustee received returned mail, and no affidavit of effective service was filed. The record does show that the mortgage lien at issue was held by Homecomings and that a proof of claim was filed by attorney Timothy Black, on behalf of the “Bank of New York Trust Company, N.A., c/o Homecomings.”

To determine whether the service of process was proper, the court first considered whether either Homecomings or the Bank is a federally insured depository institution. Bankruptcy Rule 7004(h) governs service of a summons and complaint on such institutions (as they are defined in the Federal Deposit Insurance Act).³ When establishing that rule, Congress recognized the need to grant safeguards to federally insured banks that are named as defendants. It therefore added the more rigorous requirements that service be made by certified mail and be addressed to an officer of the institution. *See Hamlett v. Amsouth Bank (In re Hamlett)*, 322 F.3d 342, 346 (4th Cir. 2003) (describing legislative history of Rule 7004(h)); *see also Miller v. Keybank Nat’l Ass’n (In re Schwartz)* (Adv. Proc. 08-3013), Mem. Dec. Aug. 15, 2008 at 3-5 (citing cases). Confirmation of that status can

³ Rule 7004(h) states: “Service on an insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act) . . . shall be made by certified mail addressed to an officer of the institution.” There are three exceptions to those requirements: 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. *See Fed. R. Bankr. P. 7004(h)(1)-(3)*.

be made by a review of the Federal Deposit Insurance Corporation website: www3.fdic.gov/idasp/ (Nov. 6, 2008). Those entities listed on the online directory of insured financial institutions must be served following the mandates of Rule 7004(h). *See In re Hamlett*, 322 F.3d at 346. It is noteworthy, however, that one court has held that Rule 7004(h) does not govern service on a wholly owned subsidiary of an insured depository institution which itself is not an insured bank or savings association. *See Fleet Credit Card Servs., L.P. v. Tudor (In re Tudor)*, 282 B.R. 546, 550-52 (Bankr. S.D. Ga. 2002). In this case, the record does not indicate the relationship between Homecomings and the Bank. Nevertheless, the court found that Homecomings was not listed on the online directory as an FDIC insured institution and also that the Bank of New York Trust Company was categorized as an inactive (closed) financial institution. Therefore neither entity required service by certified mail service to an officer pursuant to Rule 7004(h).

Because Homecomings appears to be a corporation or a limited liability corporation, the court next considered whether the proper method of service should be the one set forth by Rule 7004(b)(3) for corporations.⁴ In this case, the Trustee's service of process was mailed by first class mail to the defendant Homecomings, but not to the attention of an officer or agent who was authorized to receive service of process. The rule does not require service to be addressed to a named individual. *See Moglia v. Lowitz & Sons (In re Outboard Marine Corp.)*, 359 B.R. 893, 899-900 (Bankr. N.D. Ill. 2007). However, it does require "that the mailing be directed to the attention of the officer or agent by reference to his position or title." *Id.* at 900. The court finds that service did not comply with Rule 7004(b)(3). Consequently, the court determines that Homecomings was not properly served with the summons and Complaint.

⁴ Rule 7004(b) provides that "service may be made within the United States by first class mail postage prepaid as follows:

...

(3) Upon a domestic or foreign corporation . . . by mailing a copy of the summons and complaint to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

Fed. R. Bankr. P. 7004(b)(3).

Several consequences follow when service is ineffective. First, the defendant lacks notice of the adversary proceeding; second, the court presiding over the case has no jurisdiction over an un-served defendant; and third, whenever a complaint is not timely served upon a defendant more than 120 days after its filing, it must be dismissed without prejudice or time for its service must be extended. *See* Fed. R. Civ. P. 4(m).⁵ The court turns to the last point first. In this case, the Complaint was filed on May 29, 2008, and the defendant still has not been properly served. Since the 120-day limit has passed, the action is now subject to dismissal. Nevertheless, this court chooses to give the plaintiff more time for proper service of the summons and Complaint. *See United States v. McLaughlin*, 470 F.3d 698, 699-700 (7th Cir. 2006). “Because the issues raised in the Complaint are legal ones concerning the acknowledgment of the mortgage, the court believes that the [defendant] is not prejudiced by the lack of timely service.” *Miller v. Keybank Nat’l Ass’n (In re Schwartz)* (Adv. Proc. 08-3013), Mem. Dec. Aug. 15, 2008 at 6 (citing *McLaughlin*, 470 F.3d at 701). Therefore, the court grants the plaintiff a thirty-day extension of time in which to effect proper service.

The court’s lack of jurisdiction over the un-served defendant creates other consequences. “[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). The court determines that it has no personal jurisdiction over this defendant until proper service of the summons and Complaint is made. *See Miller v. Keybank Nat’l Ass’n (In re Schwartz)* (Adv. Proc. 08-3013), Mem. Dec. Aug. 15, 2008 at 6-7 (citing cases). It therefore had no

⁵ Federal Rule of Civil Procedure 4(m), made applicable in adversary proceedings by Federal Rule of Bankruptcy Procedure 7004, provides, in pertinent part:

(m) Time Limit for Service. If a defendant is not served within 120 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. 4(m).

jurisdiction to issue the Clerk's Entry of Default on July 20, 2008. *See In re Teknek, LLC*, 512 F.3d 342, 346 (7th Cir. 2007) (stating that person not served with process is not a party; judge lacks authority over her).

An entry of default may be set aside "for good cause." Fed. R. Civ. P. 55(c); *Price v. America's Servicing Co. (In re Price)*, 388 B.R. 901, 905 (Bankr. E.D. Ark. 2008). The court finds that defective service constitutes good cause to set aside its entry of default upon the defendant. *See Meganck v. Coutts (In re Coutts)*, 188 B.R. 949, 953 (Bankr. E.D. Mich. 1995); *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. Just as it was without jurisdiction to enter the defendant's initial default, it also is without the power to adjudicate that the defendant is in default. *See Maloni v. Fairway Wholesale Corp. (In re Maloni)*, 282 B.R. 727, 731 (1st Cir. B.A.P. 2002); *Rivas v. RJM Acquisition (In re Rivas)*, 377 B.R. 423, 426-27 (Bankr. S.D. Fla. 2007). 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 is insufficient when it recites only that the defendants had failed to respond and that an entry of default had been entered. 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) (citations omitted). 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 Univ. 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 defendant’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 Motion for Default Judgment filed by the Trustee Debra L. Miller, plaintiff in this adversary proceeding, is denied. In addition, the Clerk’s Entry of Default is hereby set aside and vacated. The Court grants to the plaintiff an extension of time, pursuant to Federal Rule of Civil Procedure 4(m), in which to effect proper service. The Trustee is afforded thirty (30) days, commencing from the entry of this Order, to perfect service of the summons and Complaint upon the defendant. Failure to do so may result in dismissal of this adversary proceeding.

SO ORDERED.

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