

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
HAMMOND DIVISION AT LAFAYETTE

IN RE: CASE NO. 09-40832 )  
)  
MARK D. SHUMATE )  
CATHERINE ALICIA SHUMATE )  
)  
Debtors )  
)  
)  
INDUSTRIAL FEDERAL CREDIT UNION )  
)  
)  
Plaintiff )  
)  
vs. ) PROC. NO. 09-4017  
)  
CATHERINE ALICIA SHUMATE )  
)  
Defendant )

**DECISION AND ORDER**

At Fort Wayne, Indiana, on February 12, 2010.

Plaintiff's amended application for default judgment, filed on February 9, 2010, is DENIED.

Although the affidavit attached to the application demonstrates that the summons and complaint were properly served on the debtor/defendant (remedying the deficiency in Plaintiff's original motion), it fails to demonstrate that debtor's counsel was served as required by Rule 7004(g) of the Federal Rules of Bankruptcy Procedure. The debtor is represented by Alfred McClure in the underlying bankruptcy case. The affidavit states that plaintiff's counsel mailed Mr. McClure a letter, on or about December 15, 2009, inquiring if he represented the defendant regarding this proceeding, and counsel responded that he did not. From this the court implies that counsel believes he was not required to serve anyone other than the debtor. That is not so.

"If a debtor is represented by an attorney, whenever service is made upon the debtor, . . . service shall also be made upon the debtor's attorney . . ." Fed. R. Bankr. P. Rule 7004(g). Service

upon counsel is in addition to the service upon the debtor required by Rule 7004(b)(9). See e.g., In re Cappuccilli, 193 B.R. 483, 486 (Bankr. N.D. Ill. 1996). Furthermore, the obligation to serve debtor's counsel is not a conditional one; it does not depend upon counsel's intentions or whether counsel will be representing the debtor in the adversary proceeding. Such a requirement would be non-sensical, if for no other reason than until a defendant has been properly served it has no duty to respond to a plaintiff's complaint. Silva v. City of Madison, 69 F.3d 1368, 1376 (7th Cir. 1995). You cannot make serving counsel depend upon whether counsel will be representing the debtor in litigation when the debtor has no duty to participate in the litigation unless and until it has been properly served. Rule 7004(g) asks only whether the debtor has counsel, not the scope of counsel's engagement or what counsel may plan on doing in the future. That determination can readily be made simply by looking at the court's docket. If the debtor has counsel in the bankruptcy case, service must be made upon both the debtor and debtor's counsel. If the debtor is pro se, or if counsel has withdrawn, only the debtor need be served.

The Seventh Circuit has a distinct preference for strict compliance with the legal requirements concerning service of process. See, Mid-Continent Wood Products, Inc. v. Harris, 936 F.2d 297, 301 (7th Cir. 1991). Cf., Del Raine v. Carlson, 826 F.2d 698, 704 (7th Cir. 1987) (proper service of process is not "some mindless technicality"). Here those requirements require service to be made upon both debtor's counsel and the debtor. Since that has not been done, plaintiff is not entitled to judgment by default.

SO ORDERED.

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