

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
ROBERT SCOTT RORIE and)	
TERI MARIE RORIE,)	CASE NO. 09-35935 HCD
)	CHAPTER 7
DEBTORS.)	
)	
)	
ARTHUR J. NICHOLAS,)	
)	
PLAINTIFF,)	
vs.)	PROC. NO. 10-3031
)	
ROBERT SCOTT RORIE and)	
TERI MARIE RORIE,)	
DEFENDANTS.)	

Appearances:

R. Wyatt Mick, Jr., attorney for plaintiff, Bingham & Loughlin, P.C., 400 Lincoln Way East, P.O. Box 583, Mishawaka, Indiana 46546-0583; and

Robert Scott Rorie and Teri Marie Rorie, pro se, 1318 East Century Avenue, Gilbert, Arizona 85296.

DECISION and ORDER

At South Bend, Indiana, on August 10, 2010.

Before the court is the Renewed Motion for Default Judgment filed by plaintiff Arthur J. Nicholas (“plaintiff”) against the chapter 7 debtors Robert Scott Rorie and Teri Marie Rorie (“defendants” or “debtors”).¹ For the reasons that follow, the court denies the Motion without prejudice.

¹ The court has jurisdiction to decide the matter before it pursuant to 28 U.S.C. § 1334 and § 157 and the Northern District of Indiana Local Rule 200.1. The court has determined that this matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).

BACKGROUND

The debtors filed their voluntary chapter 7 petition on December 19, 2009. The plaintiff was listed on Schedule F as a creditor holding an unsecured business debt in the amount of \$80,000. After the chapter 7 Trustee filed her report certifying that the estate was fully administered and that there was no property available for distribution from the estate, the Order granting the debtors a discharge was issued on April 5, 2010, and the case was closed on May 12, 2010.

The plaintiff timely commenced this adversary proceeding on March 25, 2010, with a Complaint to Determine Dischargeability of Debt. *See* R. 1. The next day, the summons was issued on each defendant. On May 27, 2010, the plaintiff filed certificates of service which verified that the plaintiff served the defendants at their address in Gilbert, Arizona, by certified mail on March 27, 2010. *See* R. 5, 6. The defendants' bankruptcy attorney was served on July 1, 2010. *See* R. 11.

The debtors did not respond within the 30-day period required by the summons. Thereafter, the plaintiff filed three motions: (1) on June 14, 2010, a Motion for Default Judgment, with three affidavits: an Affidavit in Support of Default Judgment, an Affidavit of Non-Military Status, and an Affidavit of Service on the debtors; (2) on July 1, 2010, a Motion for Clerk's Entry of Default as to the defendant Robert Scott Rorie;² and (3) on July 13, 2010, after the Clerk's Entry of Default was issued, a Renewed Motion for Default Judgment against the defendant Robert Scott Rorie. That motion is now before the court.

DISCUSSION

The plaintiff asks the court to enter default judgment against the defendant Robert Scott Rorie ("defendant") because he neither appeared nor responded in this adversary proceeding. Rule 7055 of the Federal Rules of Bankruptcy Procedure governs defaults. That bankruptcy rule applies Rule 55 of the

² The court notes that the Complaint was filed against the two debtors as defendants; however, the Complaint's allegations name only the defendant Robert Scott Rorie. All other documents – affidavits and motions – refer only to Robert Scott Rorie, and not to his co-debtor Teri Marie Rorie.

Federal Rules of Civil Procedure in adversary proceedings. Rule 55 clearly 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) (noting distinction between “entry of default” under Rule 55(a) and “judgment by default” under Rule 55(b)).

The record indicates that the plaintiff first filed a Motion for Default Judgment with supporting affidavits. *See* R. 7, 8, 9, 10. Then, probably realizing that he had requested the judgment of default prior to the entry of default, the plaintiff attempted to remedy the error by requesting the entry of default and then by renewing his request for default judgment. *See In re Catt*, 368 F.3d 789, 793 (7th Cir. 2004) (“There are two stages in a default proceeding: the establishment of the default, and the actual entry of a default judgment. Once the default is established, and thus the liability, the plaintiff still must establish his entitlement to the relief he seeks.”).

However, a prerequisite to an entry of default is proper service of process. *See Target Nat’l Bank v. Redmond (In re Redmond)*, 399 B.R. 628, 631 (Bankr. N.D. Ind. 2008). To be entitled to an entry of default and then to a default judgment, the summons and complaint first must be duly served. When serving a debtor, service may be made 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). Nevertheless, whenever a debtor is represented by an attorney and that debtor is served, “service shall also be made upon the debtor’s attorney by any means authorized under Rule 5(b) [of the Federal Rules of Civil Procedure].” Fed. R. Bankr. P. 7004(g). Service upon both the debtor and attorney thus is required. *See Yesh Diamonds, Inc. v. Yashaya (In re Yashaya)*, 403 B.R. 278, 283 (Bankr. E.D.N.Y. 2009) (“The Bankruptcy Rules provide that service of process on a Debtor is insufficient unless both the debtor and his attorney are served with the summons and complaint.”) (citing cases).

According to the record herein, the plaintiff served the defendants on March 27, 2010, and the court finds that service of process on them was properly effected. However, the plaintiff did not serve the defendants' attorney until July 1, 2010. *See* R. 11. The court determines that service on the attorney was insufficient since, under the Bankruptcy Rules, delivery of the summons and complaint must be made "within 14 days after the summons is issued." Fed. R. Bankr. P. 7004(e); *see Menges v. Menges (In re Menges)*, 337 B.R. 191, 193-94 (Bankr. N.D. Ill. 2006) ("Service of a stale summons is no service at all.").

The plaintiff has attempted to excuse his lack of timely service on defendants' counsel by suggesting that the attorney knew of the lawsuit (as was demonstrated by his letter to notify the debtors of the adversary proceeding) and that he received electronic notice of the Complaint as an attorney who used the court's Electronic Case Filing System ("ECF").³

Bankruptcy Rule 7004(g) requires service "upon the debtor's attorney by any means authorized under Rule 5(b) F. R. Civ. P." Rule 5(b) of the Federal Rules of Civil Procedure, in turn, authorizes service by electronic means "if the person consented in writing – in which event service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served." Fed. R. Civ. P. 5(b)(2)(E). In this case, the court recognizes that the debtor's lawyer, Mr. Seese, is an authorized and frequent user of the court's ECF System and that the commencement of this adversary case was listed on the docket of the debtors' main bankruptcy case on March 26, 2010. The letter Mr. Seese sent

³ In his Affidavit of Service, the plaintiff pointed out:

- ...
- 2. Patrick M. Seese [the debtors' bankruptcy attorney] sent a letter to the Debtors on March 26, 2010, enclosing a copy of the Complaint. A copy of the letter with the enclosure is attached as Exhibit "C."
- 3. Debtors had actual knowledge of the pendency of this proceeding.

R. 10, Affidavit ¶¶ 2, 3.

to the debtors on that same date reflects that notice of the Complaint reached him, even though he was not included in the plaintiff's service of process of the summons and Complaint.

Nevertheless, the plaintiff cannot rely on the possibility that the defendants' attorney was electronically served. Rule 5(b) permits a court's local rules of procedure to govern the authorized use of the court's electronic transmission. In this court, the Fifth Amended Order Authorizing Electronic Case Filing states that, when an attorney admitted to the bar of this court registers as a User of the court's ECF System, he waives the right to receive personal service and consents to electronic service. *See* "Fifth Amended Order Authorizing Electronic Case Filing," p. 2, ¶ 3(b)(ii). There is an important exception to the rule, however: Service of a summons and complaint and service of subpoenas must be made by personal service or service by first class mail.⁴ *See Tex-Link Communications, Inc. v. Lopez (In re Lopez)*, 2008 WL 6287457 at *3 (Bankr. N.D. Tex. Nov. 26, 2008) (stating that "the consent to receive notice by ECF contemplated by L.R. 5.1 is limited by (the court's) General Order"). The court finds, therefore, that the bankruptcy attorney's receipt of the notice of the Complaint (as reflected in his transmittal of it to the defendants by letter on March 26, 2010) was not proper service of process as required pursuant to Bankruptcy Rule 7004. *See Buffalo Constr., Inc. v. McMillan (In re McMillan)*, 2010 WL 234241 at *3 (Bankr. E.D. Tenn. Jan. 14, 2010) (concluding that, even though a debtor's attorney may have received electronic notice of a filing, "actual notice of the adversary proceeding is not a substitution for service of process, nor does it cure the 'technically defective service of process' effectuated by the Plaintiff").

Having determined that neither electronic notice of the Complaint on March 26, 2010, nor the untimely service of process on July 1, 2010, was effective service upon the debtors' attorney, the court finds

⁴ The pertinent text of the Fifth Amended Order provides:

Registration as an ECF User constitutes . . . The Registered User's waiver of the right to personal service or service by first class mail and consent to electronic service, *except with regard to service of a summons and complaint under Fed. R. Bankr. P. 7004 and subpoenas.*

Fifth Amended Order, p. 2, ¶ 3(b)(ii).

that service of process pursuant to Rule 7004 was not accomplished in this adversary proceeding. *See In re McMillan*, at *3 (“It is clear that these Rules ‘unambiguously provide [] that service of process upon a debtor is not sufficient unless both the debtor and his attorney are served with the summons and a copy of the complaint . . . [and a]nything short of strict compliance . . . is insufficient’”) (*quoting Dreier v. Love (In re Love)*, 232 B.R. 373, 377 (Bankr. E.D. Tenn. 1999)). In sum, service of process of the summons and Complaint has not been effected on the defendants or on their attorney.

If a defendant is not properly served within 120 days after the complaint is filed, the court must either dismiss the complaint, without prejudice, or direct that service be made within a specified time. *See* Fed. R. Civ. P. 4(m); Fed. R. Bankr. P. 7004. In this case, the Complaint was served on March 25, 2010; service of process on the defendants and their attorney was required within 120 days, or by July 23, 2010. It is clear that the plaintiff did not accomplish service within the Rule 4(m) time period. Nevertheless, the rule sets forth another mandate: “But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.” *Id.* Courts have defined “good cause” to mean “a valid reason for delay, such as the defendant’s evading service.” *Coleman v. Milwaukee Bd. of Sch. Dirs.*, 290 F.3d 932, 934 (7th Cir. 2002). Whether good cause exists is left to the discretion of the court. *See In re Flaherty*, _B.R._, 2010 WL 2696788 at *5-6 (Bankr. N.D. Ill. July 8, 2010) (listing what does not constitute good cause for lack of timely service: inadvertence, ignorance or lack of familiarity with the rules of bankruptcy procedure, for example). Even without a showing of good cause, however, the court has the discretion to grant an extension of time beyond the 120-day period. *See id.*; *Fadayiro v. Ameriquest Mortgage Co.*, 2007 WL 141912 at *2 n.4 (N.D. Ill. Jan 17, 2007) (citing 1993 amendments to Rule 4(m)). The court is permitted to enlarge the time period if “the circumstances in this case establish that the Plaintiff’s failure to achieve service was the result of ‘excusable neglect.’” *In re Flaherty*, 2010 WL 2696788 at *6 (citing to factors listed in *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Pship*, 507 U.S. 380, 395 (1993)).

The court has examined the circumstances of this case and has found no good cause for the plaintiff's failure to serve the defendants' counsel timely. *See In re McMillan*, 2010 WL 234241 at *4 (counsel's ignorance of the federal bankruptcy rules and the court's Administrative Procedures do not constitute good cause for a failure to properly serve defendants' attorney). Nevertheless, it also has found no indication that the plaintiff acted in bad faith or in disregard of the Rules; indeed, he attempted to correct the deficiency in service of process. In the view of the court, there is no danger of prejudice to the defendants and no negative impact on these judicial proceedings in allowing the plaintiff the opportunity to serve the defendants and their counsel properly. The court is persuaded that, because (a) the debtors' counsel had notice of the Complaint and notified his clients, (b) the plaintiff made a good faith effort to effect proper service of process on the attorney, and (c) the court prefers to decide a case on its merits, it will permit the plaintiff one last opportunity to accomplish service on the defendants and their counsel. It cautions the plaintiff, however, that the failure to obtain effective service of process upon the defendants and their counsel will deprive this court of jurisdiction over the defendants and will cause dismissal of the Complaint. *See U.S. v. Ligas*, 549 F.3d 497, 500 (7th Cir. 2008) (stating that a court "may not exercise personal jurisdiction over a defendant unless the defendant has been properly served with process"); *In re Louis Jones Enters., Inc.*, 2010 WL 1726820 at *2 (Bankr. N.D. Ill. Apr. 27, 2010) (stating that the failure properly to serve the defendant under Rule 7004 deprives the court of jurisdiction over the defendant).

The court thus grants the plaintiff leave to issue an Alias Summons for service of process upon the defendants and counsel.⁵ In its discretion under Rule 4(m), the court allows the plaintiff 45 days from the date of this Order in which to validate the service associated with the issuance of the Alias Summons. *See, e.g., In re Flaherty*, 2010 WL 2696788 at *12 (granting plaintiff 45 days to properly serve process).

⁵ "If a summons is not timely delivered or mailed, another summons shall be issued and served." Fed. R. Bankr. P. 7004(e). In this case, the summon that was served upon the defendants expired and no summons was served on the defendants' attorney. The plaintiff is directed to request that the Clerk of the Court issue a replacement, called an Alias Summons; the plaintiff then is required to serve the defendants and their attorney with the Alias Summons and Complaint by mail within the time limits prescribed in Bankruptcy Rule 7004.

CONCLUSION

For the reasons set forth in this Decision and Order, the court denies, without prejudice, the Renewed Motion for Default Judgment in favor of the plaintiff Arthur J. Nicholas and against the defendants Robert Scott Rorie and Teri Marie Rorie, chapter 7 debtors. The court directs the plaintiff to effect proper service of process upon the defendants and their counsel on or before September 24, 2010. Failure to do so will lead to the dismissal of this proceeding.

SO ORDERED.

/s/ HARRY C. DEES, JR.

HARRY C. DEES, JR., JUDGE
UNITED STATES BANKRUPTCY COURT