

Not Intended for Publication or Citation

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

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|--------------------------|---|-------------------|
| IN RE: CASE NO. 09-15342 |) | |
| |) | |
| ANNMARIE MILLER |) | |
| |) | |
| Debtor |) | |
| |) | |
| |) | |
| TIMOTHY E. DEXTER |) | |
| |) | |
| Plaintiff |) | |
| |) | |
| vs. |) | PROC. NO. 10-1029 |
| |) | |
| ANNMARIE MILLER |) | |
| |) | |
| Defendant |) | |

DECISION

At Fort Wayne, Indiana, on November 8, 2010.

The plaintiff failed to properly serve the summons and complaint upon the debtor during the 120 days after bringing this action. As a result, the court has been asked to consider whether it should be dismissed pursuant to Rule 4(m) of the Federal Rules of Civil Procedure, which is made applicable to this proceeding by Rule 7004(a) of the Federal Rules of Bankruptcy Procedure.

Plaintiff's counsel served the summons and complaint upon debtor's attorney, see, Fed R. Bankr. P. Rule 7004(g), but not upon the debtor/defendant. Despite the lack of proper service, the defendant answered and, in doing so, raised the insufficiency of service as an affirmative defense. Nothing further happened regarding service until the parties filed the required pretrial order. In her contentions, the defendant again raised the issue of improper service as an affirmative defense. The court then scheduled the matter for a hearing to discuss, among other things, the issue of service.

At that hearing the defendant asked the court to dismiss the case because service still had not been properly effected and the 120-day deadline for doing so had passed. See, Fed. R. Bankr. P. Rule 7004(a); Fed. R. Civ. P. Rule (4)(m). The court gave the parties the opportunity to submit briefs directed to the issue of dismissal; while the question was being briefed, the plaintiff requested an alias summons which was then served, along with the complaint, upon the defendant by first class mail. Accordingly, service has now been made upon both the debtor and her attorney,¹ although not within the time required by the rules of procedure.

Pursuant to Rule 4(m) of the Federal Rules of Civil Procedure, service must be accomplished within 120 days of the date the action begins. If it is not the court may dismiss the action, without prejudice, unless the plaintiff has good cause for the failure to accomplish service. In that event, the court must give the plaintiff additional time to complete service. Even in the absence of good cause for the failure to accomplish service, the court has the discretion not to dismiss and, instead, to require that service be made by a specified time. See, Panaras v. Liquid Carbonic Industries Corp., 94 F.3d 338, 340 (7th Cir. 1996). See also, U.S. v. Ligas, 549 F.3d 497, 501 (7th Cir. 2008); U.S. McLaughlin, 470 F.3d 698, 700 (7th Cir. 2006).

There is no good cause for plaintiff's failure to effectuate service within the time required. See, Coleman v. Milwaukee Board of School Directors, 290 F.3d 932, 934 (7th Cir. 2002) (“good cause means a valid reason for delay”). The only reason it was not done was because counsel did not know how it was supposed to be done. Similarly, since service has now been properly made, there is no reason to consider establishing a deadline by which it must be done. As a result, the only

¹Despite the recent service by first class mail, defendant's counsel still contends that the debtor has not been properly served, arguing that service had to be made either personally or by certified mail. The Federal Rules of Bankruptcy Procedure specifically authorize service upon a debtor (and most other parties) by first class mail, see, Fed. R. Bankr. P. Rule 7004(b)(9), and so service by that means was proper.

question before the court is whether it should dismiss the action, without prejudice, because of the failure to effectuate service in a timely manner or allow it to go forward.

One of the factors the court must consider in deciding whether to dismiss an action due to the failure to timely serve the summons and complaint is whether the relevant statute of limitations has expired; if so a dismissal would effectively be with prejudice. Nonetheless, the expiration of the statute of limitations does not prevent the court from dismissing the action, it is simply a factor the court must “fully consider.” Panaras, 94 F.3d at 341. Here, the statute of limitations for this action has expired. The court has been asked to determine the dischargeability of the debtor’s obligation to the plaintiff and the deadline for bringing the action expired on March 12, 2010. Consequently, to dismiss it now would prevent a successful refiling. Furthermore, it does not appear that any harm has come from the delay in service and, although the original insufficiency of service has never been waived, see, Ligas, 549 F.3d at 503 (“a defendant does not waive a jurisdictional argument when it properly raises the defense but participates in litigation at the district court’s direction”), the defendant has been aware of this litigation since shortly after it began and, in accordance with the court’s scheduling order, has participated in pretrial proceedings. Given these circumstances – the lack of any harm from the delay, the fact that service has now been properly made, defendant’s actual knowledge of and participation in the litigation, and the expiration of the statute of limitations – dismissing the action due to the failure to effectuate service within the time required is not appropriate. McLaughlin, 470 F.3d at 701. See also, Coleman, 290 F.2d at 934.

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