

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
CYNTHIA ANN HOLCOMB.)	CASE NO. 08-34272 HCD
)	CHAPTER 7
)	
DEBTOR.)	
)	
)	
CYNTHIA ANN HOLCOMB,)	
)	
PLAINTIFF,)	
vs.)	PROC. NO. 12-3043
)	
SLM CORPORATION, <i>aka</i> SALLIE MAE;)	
EDUCATIONAL CREDIT MANAGEMENT)	
CORPORATION; USA FUNDS, UNITED)	
STATES DEPARTMENT OF EDUCATION;)	
DIRECT LOAN SERVICING CENTER; and)	
UNIVERSITY ACCOUNTING SERVICE/)	
INDIANA UNIVERSITY,)	
DEFENDANTS.)	

Appearances:

Cynthia Ann Holcomb, pro se plaintiff, 1702 Longwood Court, Goshen, Indiana 46526;

Stacia Yoon, Esq., counsel for defendant Educational Credit Management Corporation, Genetos Retson Yoon & Molina LLP, 8585 Broadway, Suite 480, Merrillville, Indiana 46410; and

Robin W. Morlock, Esq., Assistant United States Attorney, counsel for USA Funds, United States Department of Education, 5400 Federal Plaza, Suite 1500, Hammond, Indiana 46320.

MEMORANDUM OF DECISION

At South Bend, Indiana, on October 30, 2012.

Before the court is the Motion to Dismiss filed by the United States of America, on behalf of its agency the Department of Education (“defendant”), one of the defendants named in this adversary

proceeding. A response was filed by the plaintiff Cynthia Ann Holcomb, chapter 7 debtor (“plaintiff” or “debtor”). For the reasons presented below, the court grants the defendant’s Motion to Dismiss.¹

BACKGROUND

Cynthia Ann Holcomb filed a chapter 13 bankruptcy petition on December 2, 2008. She converted her case to a chapter 7 case on August 20, 2010. The Order discharging the debtor was entered on November 29, 2010, and the case was closed thereafter. However, on June 22, 2012, the court granted the reopening of her bankruptcy case, and the debtor commenced this adversary proceeding pursuant to § 523(a)(8) of the Bankruptcy Code.² *See* R. 1, Motion [Complaint] to Determine Dischargeability of Debt.³ She asserted that she qualified under the undue hardship rule for a discharge of her educational loan debts. On July 3, 2012, the debtor filed a certificate of service stating that service of the summons and a copy of the Motion, now construed as a Complaint, had been made upon this defendant by first class mail. Service was made to the “U.S. Department of Education, Direct Loan Servicing Center, P.O. Box 5202, Greenville, Texas 75403-5202.”

On August 10, 2012, the United States of America, on behalf of its agency the Department of Education, filed a Motion to Dismiss this adversary for insufficiency of service of process, pursuant to Bankruptcy Rule 7012(b)(5), and lack of personal jurisdiction, pursuant to Bankruptcy Rule 7012(b)(2).⁴

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).

² The debtor attempted to commence an earlier adversary proceeding under § 523(a)(8), but it was dismissed because no motion to reopen her closed bankruptcy case had been filed.

³ An adversary proceeding is commenced by the filing of a complaint, not a motion. *See* Fed. R. Bankr. P. 7003; *see also Matter of Zale Corp.*, 62 F.3d 746, 763 (7th Cir. 1995). The court has construed the *pro se* plaintiff’s motion to be a complaint.

⁴ Federal Rule of Bankruptcy Procedure 7012(b) provides that Federal Rule of Civil Procedure 12(b)-(i) applies in adversary proceedings. Civil Rule 12(b) lists the defenses that a party may assert by
(continued...)

The defendant contended that the plaintiff failed to provide proper service of process pursuant to Bankruptcy Rule 7004(b)(4) and (b)(5), and therefore that the court could not exercise personal jurisdiction over the United States. The plaintiff responded that she had served the United States Department of Education at its billing address and that service was proper pursuant to Bankruptcy Rule 7004(b)(6).

Rule 7004 of the Federal Rules of Bankruptcy Procedure provides the authorized methods of service of process to different entities. The subdivisions of Rule 7004 relevant to this case state that service may be made within the United States by first class mail postage prepaid as follows:

(4) Upon the United States, by mailing a copy of the summons and complaint addressed to the civil process clerk at the office of the United States attorney for the district in which the action is brought and by mailing a copy of the summons and complaint to the Attorney General of the United States at Washington, District of Columbia, and in any action attacking the validity of an order of an officer or an agency of the United States not made a party, by also mailing a copy of the summons and complaint to that officer or agency. . . .

(5) Upon any officer or agency of the United States, by mailing the copy of the summons and complaint to the United States as prescribed in paragraph (4) of this subdivision and also to the officer or agency. . . .

(6) Upon a state or municipal corporation or other governmental organization thereof subject to suit, by mailing a copy of the summons and complaint to the person or office upon whom process is prescribed to be served by the law of the state in which service is made when the action is brought against such a defendant in the courts of general jurisdiction of that state. . . .

Fed. R. Bankr. P. 7004(b)(4)-(6) (emphasis added). The court finds that the United States Department of Education does not qualify as a “state or municipal corporation or other governmental organization thereof.” For that reason, Bankruptcy Rule 7004(b)(6) does not govern service of process upon the agency of the federal government. Proper service upon an agency of the United States is accomplished under Rule 7004(b)(5), which in turn incorporates the provisions of Rule 7004(b)(4).

⁴(...continued)

motion. The defendant cited the following defenses to the plaintiff’s pleading:

- . . .
- (2) lack of personal jurisdiction;
- . . .
- (5) insufficient service of process

Fed. R. Bankr. P. 7012(b); Fed. R. Civ. P. 12(b)(2), (5).

However, the plaintiff failed to comply with the requirements of service of process upon an agency of the federal government. She did not serve the summons and complaint upon the United States Attorney General or the United States Attorney for the Northern District of Indiana. As a result, she did not effect proper service of process upon the United States Department of Education.⁵ *See In re Scott*, 437 B.R. 376, 379 (9th Cir. B.A.P. 2010) (concluding that service under Rule 7004(b)(5) was improper); *In re Brown*, 351 B.R. 806, 807 (Bankr. N.D.W.Va. 2006) (finding that service of process upon only the U.S. Department of Education, without service on the U.S. Attorney or Attorney General, was ineffective). Moreover, actual notice to the defendant agency is insufficient; compliance with the service rule is mandatory. *See McMasters v. United States*, 260 F.3d 814, 817 (7th Cir. 2001), *cert. denied*, 535 U.S. 1112 (2002); *In re Bouyea*, 429 B.R. 846, 848 n.1 (Bankr. D. Md. 2010). The plaintiff's status as a *pro se* plaintiff does not excuse her failure to comply with those rules. *See McMasters*, 260 F.3d at 818. Consequently, dismissal of the adversary proceeding for failure to effect proper service on the United States, pursuant to Bankruptcy Rule 7012(b)(5), is appropriate.

Because the record demonstrates that the plaintiff debtor failed to serve the United States correctly pursuant to Rule 7004, this bankruptcy court does not have jurisdiction over that defendant. *See In re Scott*, 437 B.R. at 379. As a result, the court lacks jurisdiction to decide the motion, construed as a complaint, now before it. *See id.* The court therefore concludes that dismissal of the adversary proceeding for lack of personal jurisdiction over the defendant, pursuant to Bankruptcy Rule 7012(b)(2), is appropriate, as well.

Nevertheless, Rule 7004(b)(5) directs a court to give a plaintiff reasonable time to cure a defect in service, and the defendant requests that the court provide this plaintiff an opportunity to re-serve the government agency by naming the Secretary of Education as the party defendant herein and by serving the

⁵ Although the defendant United States Department of Education did not assert that the agency itself was not served, it did advise the plaintiff that the proper party to be named, when bringing suit against the agency, is "Arne Duncan, Secretary of the Department of Education," pursuant to 20 U.S.C. § 1082(a)(2). *See R. 12* at 6.

other parties upon whom service of process is mandatory. *See In re Whelan*, 213 B.R. 310, 314 (Bankr. W.D. La. 1997) (noting that Rule 7004(b)(5) “creates a vehicle for providing a reasonable time to cure the defect of service if certain minimum service requirements were originally satisfied”).

The court therefore grants to the plaintiff fourteen (14) days from the date of this Memorandum of Decision in which to cure the defects of service on the defendant United States, on behalf of the Department of Education. Failure to do so within that time period may result in dismissal of the plaintiff’s Complaint.

SO ORDERED.

/s/ HARRY C. DEES, JR.
Harry C. Dees, Jr., Judge
United States Bankruptcy Court