

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
RICHARD CARL HAHN,)	CASE NO. 12-30583 HCD
)	CHAPTER 7
)	
DEBTOR.)	
)	
)	
JERE HAHN,)	
)	
PLAINTIFF,)	
vs.)	PROC. NO. 12-3010
)	
RICHARD CARL HAHN,)	
)	
DEFENDANT.)	

Appearances:

Kristina L. Lynn, Esq., counsel for plaintiff, Lynn and Stein, P.C., 105 South Wabash Street, Wabash, Indiana 46992; and

Richard Carl Hahn, pro se, 3517 Edinburgh Drive, Kalamazoo, Michigan 49006.

MEMORANDUM OF DECISION

At South Bend, Indiana, on January 22, 2013.

Before the court is the Motion to Reopen Adversary Proceeding filed by the plaintiff Jere Hahn, by counsel. The court has considered the Motion pursuant to 11 U.S.C. § 350(b) and, in its discretion, denies said Motion.¹

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 defendant Richard Carl Hahn is a chapter 7 debtor. He filed his voluntary chapter 7 petition on February 29, 2012. He listed the plaintiff, his former spouse, as an unsecured creditor on Schedule F. On April 4, 2012, the chapter 7 Trustee issued his Report of No Distribution, and by the court's Order of June 11, 2012, the debtor was granted a discharge from all prepetition debts except those that were declared nondischargeable. The case was closed on June 14, 2012.

On March 14, 2012, however, the plaintiff had filed a Complaint against the debtor, asking the court to find that the property settlement debt owed to her by the defendant under the terms of their divorce decree was excepted from the defendant's discharge under 11 U.S.C. § 523(a)(15). The adversary proceeding remained open after the debtor's case terminated to allow the plaintiff to prove her claim of nondischargeability.

The court first determined that it lacked personal jurisdiction over the defendant because the plaintiff's service of process was defective. *See* R. 8, Mem. Dec., July 19, 2012. It gave the plaintiff 14 days (until August 2, 2012) to effect proper service upon the defendant and his bankruptcy attorney. After the two-week period passed without any evidence of effective service, the court dismissed the adversary proceeding and later closed it. *See* R. 11, Mem. Dec., Aug. 15, 2012.

On August 10, 2012, the defendant debtor, pro se, filed a document entitled "Reply to General Allegations," which was deemed to be an untimely Answer to the Complaint. *See* R. 10. In the Reply he reported that he had "not received correspondence in a timely manner," due to an incorrect address, and stated his correct address as 3517 Edinburgh Drive in Kalamazoo, Michigan. The court did not consider the document when it reviewed whether the plaintiff had served process successfully according to the terms of its order of July 19, 2012. In its Memorandum of Decision of August 15, 2012, the court determined that dismissal was appropriate because of the plaintiff's failure to effect proper and timely service on the defendant and his attorney. *See* R. 11 at 2.

On January 7, 2013, the plaintiff filed three documents with the court: the Certificate of Service that was required on or before August 2, 2012; a Notice of Change of the Address of the defendant debtor; and a Motion to Reopen Adversary Proceeding. The Notice simply presented to the court the address reported by the defendant in his Reply five months earlier. *See* R. 14. The Certificate of Service, signed by counsel for the plaintiff on January 7, 2013, declared under penalty of perjury that service of the summons and a copy of the complaint was made on August 10, 2012, by regular first class United States Mail addressed to Richard Hahn, the defendant. *See* R. 13. The Motion to Reopen stated the plaintiff's reasons for her service of process difficulties and for deciding not to file a certificate of service before the date of January 7, 2013. *See* R. 15 at 2-3. It specifically reported:

Counsel for the Plaintiff did not file a certificate of service after mailing the Alias Summons and Complaint upon Defendant/Debtor on July 25, 2012, because Plaintiff was unable to perfect service upon the Defendant/Debtor. However, once Plaintiff was made aware of Defendant/Debtor's current address, Plaintiff attempted to perfect service of the Alias Summons and Complaint upon the Defendant/Debtor. Unfortunately, the Court dismissed the adversary proceeding before Plaintiff filed her certificate of service proving proper service was effected upon the Defendant/Debtor.

Id., ¶ 13. She pointed out that service was perfected, because the defendant filed an answer, and argued that the case should now be heard on the merits. *See id.*, ¶¶ 15-16. The court now considers the Motion.

DISCUSSION

Section 350(b) of the Bankruptcy Code allows a court to reopen a case "to administer assets, to accord relief to the debtor, or for other cause." The plaintiff, as the moving party, has the burden of proving one of those grounds. *See In re Redmond*, 380 B.R. 179, 186 (Bankr. N.D. Ill. 2007); *Horizon Aviation of Va., Inc. v. Alexander*, 296 B.R. 380, 382 (E.D. Va. 2003).

A bankruptcy court has broad discretion when determining whether to reopen a bankruptcy case and specifically whether there is "cause" for a reopening. *See Redmond v. Fifth Third Bank*, 624 F.3d 793, 798 (7th Cir. 2010); *In re OORC Leasing, LLC*, 359 B.R. 227, 228 (Bankr. N.D. Ind. 2007). Cases may be

reopened, for example, to administer assets, to amend schedules, or to avoid liens. *See In re OORC Leasing*, 359 B.R. at 231. In this case, the reopening is requested to file a certificate of service, as proof of proper service, and to determine the complaint on its merits. When considering a request to reopen, a court may consider such factors as “(1) the length of time that the case has been closed; (2) whether the debtor would be entitled to relief if the case were reopened; and (3) the availability of nonbankruptcy courts, such as state courts, to entertain the claims.” *Redmond*, 624 F.3d at 798.

The Seventh Circuit has made clear that “[t]he longer a party waits to file a motion to reopen a closed bankruptcy case, the more compelling the reason to reopen must be.” *Id.* at 799. In this case, the plaintiff filed the Motion to Reopen almost five months after the adversary proceeding was dismissed and closed. She did not file a Rule 59 or Rule 60 motion or an appeal of the court’s ruling. She provided no reason, in the Motion, for the delay between her allegedly proper service of process on August 10, 2012, and the filing of the certificate of service and of this motion on January 7, 2013. The court finds that the belated filing of this request to reopen the adversary proceeding is untimely.

The court also determines that the plaintiff has not met her burden of providing sufficient cause for reactivating the adversary proceeding. She argues that the certificate of service filed on January 7, 2013, proved that service on the defendant debtor and his attorney was properly made. The court has reviewed the plaintiff’s second Certificate of Service and has found that service was not accomplished.

Federal Rule of Bankruptcy Procedure 7004, which governs service of process in bankruptcy adversary proceedings, requires service of both the summons and the complaint upon a defendant. Fed. R. Bankr. P. 7004(a)(1); Fed. R. Civ. P. 4(c)(1); *Dreier v. Love (In re Love)*, 232 B.R. 373, 377 (Bankr. E.D. Tenn. 1999). It allows service of process upon a debtor through the United States mail “by mailing a copy of the summons and complaint to the debtor at the address shown on the petition or to such other address as the debtor may designate in a filed writing.” Fed. R. Bankr. P. 7004(b)(9). If the debtor is represented by an attorney, service is required upon that attorney as well. Fed. R. Bankr. P. 7004(g). The rule makes clear

that service of process upon a debtor is not effective unless both the debtor and his attorney are served with the summons and a copy of the complaint. *See In re Flaherty*, 432 B.R. 742, 750-51 (Bankr. N.D. Ill. 2010); *In re Yashaya*, 403 B.R. 278, 283 (Bankr. E.D.N.Y. 2009).

In the first Certificate of Service filed in this adversary proceeding, counsel for the plaintiff declared that service of process was made upon the defendant debtor, but not upon the debtor's attorney. *See* R. 3. In its Memorandum of Decision, the court reviewed the numerous deficiencies in the plaintiff's service of process, one of which was the lack of service on the debtor's attorney, as mandated under Rule 7004(g). *See* R. 8. Despite the court's guidance on proper service of process and its granting of an extension of time to the plaintiff to accomplish it, the plaintiff was unsuccessful in serving the defendant and his attorney within the time limit set by the court. Because the plaintiff failed to respond within the allotted time period, the court concluded that it remained without jurisdiction over the defendant and dismissed the adversary proceeding. *See* R. 11.

The plaintiff's second Certificate of Service certified that her attorney served the defendant debtor eight days after the court's extended deadline. *See* R. 13. Again the Certificate made no mention of service upon the debtor's counsel. *See In re Menges*, 337 B.R. 191, 194 (Bankr. N.D. Ill. 2006). Nor did the plaintiff offer evidence of such service of process. For that reason, the court again finds that service of process of the alias summons upon the defendant was ineffective and void.

This court "may not exercise personal jurisdiction over a defendant unless the defendant has been properly served with process." *United States v. Ligas*, 549 F.3d 497, 500 (7th Cir. 2008); *see also In re Haughee*, 428 B.R. 828, 832 (Bankr. N.D. Ind. 2010) (finding that court lacked personal jurisdiction over defendant who was never effectively served). Personal jurisdiction over a defendant is established when the service requirements of Rule 7004 of the Federal Rules of Bankruptcy Procedure are followed. In this case the defendant was untimely served with the alias summons and the defendant's attorney was not served. The court concludes that it remains without personal jurisdiction over the defendant.

The plaintiff nevertheless insisted, in the Motion, that service had been perfected because the defendant filed an answer. *See* R. 15, ¶ 15. However, “actual knowledge of a suit is not a substitute for proper service of process and does not cure a technically defective service of process.” *In re Wedell*, 329 B.R. 59, 62 (W.D. Wash. 2005); *see also In re Cook*, 421 B.R. 446, 455 (Bankr. W.D. Tenn. 2009). Moreover, “the service requirement is not satisfied merely because the defendant is aware that he has been named in a lawsuit or has received a copy of the summons and the complaint.” *Ligas*, 549 F.3d at 500. It is clear that the plaintiff failed to effect proper or timely service on the defendant, and the defendant’s actual knowledge that the adversary proceeding was pending does not relieve the plaintiff of her responsibility for the required service of process upon the defendant. The court still lacks jurisdiction over the defendant.

In summary, the court determines that, despite the time extension, the plaintiff failed to serve the alias summons and complaint upon the defendant within 14 days, in violation of Bankruptcy Rule 7004(e). Service was further defective because the plaintiff failed to effect service upon the defendant debtor’s attorney, in violation of Bankruptcy Rule 7004(g). Moreover, service on the defendant, required to be completed within 120 days after the complaint was filed, was not accomplished, in violation of Federal Rule of Civil Procedure 4(m). The court finds that the plaintiff has not shown good cause for the failure to effect proper service despite its previous grant of a time extension.

For the abovementioned reasons, the court concludes that the plaintiff, with the burden of demonstrating a valid cause to reopen this adversary proceeding, failed in her burden. A closed case should not be reopened if “it appears that to do so would be futile and a waste of judicial resources.” *Redmond*, 624 F.3d at 803 (quoted case omitted)). That is the case herein. The Motion to Reopen is denied.

SO ORDERED.

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