IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

IN RE:	)	
	)	
TRACY LYNN HARROD,	)	**Case No. 01-15550**
a/k/a TRACY HARROD STEWART,	)	**Chapter 7**
	)	
Debtor.	)	
	)	
ROBERT R. STEWART,	)	
	)	
Plaintiff,	)	
v.	)	**Adversary No. 02-5058**
	)	
TRACY LYNN HARROD,	)	
a/k/a TRACY HARROD STEWART,	)	
and STEVEN L. SPETH	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Defendant Tracy Lynn Harrod seeks an order dismissing plaintiff Robert R. Stewart's adversary complaint for lack of jurisdiction due to plaintiff's failure to serve both defendant *and* defendant's counsel, as provided in Fed. R. Bankr. P. 7004(b)(9). Defendant also complains that plaintiff failed to date his proof of service, rendering the proof of service invalid. Plaintiff responds that because defendant has fully answered the complaint, and because her counsel received a copy of the complaint, albeit outside the Fed. R. Bankr. P. 7004 process, "the intent of the notice statute [sic] has been satisfied and defendant cannot claim prejudice." *See* Dkt. 21, p. 2. Because plaintiff has not shown good cause for an extension of the 120-day time limit found in Fed. R. Civ. P. 4(m), defendant's

motion is granted and the adversary complaint is dismissed.[1]

This is a core proceeding over which the Court has jurisdiction pursuant to 28 U.S.C. §157(b)(2)(I) and Fed. R. Bankr. P. 7001(6).

Debtor filed her bankruptcy case on November 19, 2001. The deadline for filing dischargeability complaints under 11 U.S.C. §523(c)[2] and Fed. R. Bankr. P. 4007(c) was February 15, 2002. Plaintiff, who is defendant's former husband, filed this adversary proceeding on the last day, seeking a determination that certain of defendant's matrimonial property settlement obligations should be excepted from discharge under §523(a)(15). On February 15, the Clerk issued a summons (Dkt. 2) and on February 19, plaintiff filed his proof of service stating that service had been made upon defendant and the trustee in bankruptcy by first-class mail (Dkt. 3). Plaintiff did not serve Douglas Depew, debtor's counsel of record. Nor did plaintiff date the proof of service to indicate the date the summons and complaint were placed in the mail.

On March 14, 2002, defendant filed an answer which met the allegations of plaintiff's adversary complaint, but also sought dismissal of the case on the grounds that service was incomplete:

> 5. Process and service of process was insufficient in this case. The Certificate of Service for the Summons in this case has no date as to when the service was made. Further there was no service upon the debtor's attorney of record in the bankruptcy, Douglas D. Depew.

Dkt. 4.

Defendant filed a motion to dismiss on this basis on July 22, 2002 (Dkt. 15). By the Court's calculation, the 120th day after filing of the adversary proceeding was June 16, 2002. Inexplicably,

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[1] Fed. R. Civ. P. 4(m) is made applicable to bankruptcy by Fed. R. Bankr. P. 7004(a).

[2] All statutory references are to the Bankruptcy Code, 11 U.S.C. § 101, et seq. unless otherwise specified.

plaintiff made no further attempt at service between the filing of the answer and the filing of the motion. While a dismissal is ordinarily without prejudice, granting this motion would have the effect of denying plaintiff's cause of action in its entirety because the time in which to commence a §523(c) discharge exception expired on February 15, 2002 and further refiling would be barred by Fed. R. Bankr. P. 4007(c).

Fed. R. Bankr. P. 7004(b)(9) provides that service by first-class mail *on a debtor* is accomplished by mailing a summons and a complaint to not only the debtor, but also debtor's counsel of record. Fed. R. Bankr. P. 7004(a) incorporates by reference and makes Fed. R. Civ. P. 4(l) and 4(m) applicable in adversary proceedings. Rule 4(l) requires that proof of service be filed with the clerk. It also provides that "[f]ailure to make proof of service does not affect the validity of the service."[3] Thus, Rule 4(l) disposes of defendant's assertion that the undated return of service filed on February 19, 2002 invalidates service.

More critical in this Court's view is the failure of plaintiff to serve defendant's counsel. Plaintiff argues that this failure is at best a technical breach, that defendant's counsel ultimately received the necessary notice, and that having filed an answer, defendant is estopped from challenging service.

Plaintiff has the burden to prove that service was sufficient when that service is challenged.[4] Service on both debtor and debtor's counsel is explicitly required by Fed. R. Bankr. P. 7004.[5] The fact that debtor's counsel ultimately learned of the complaint is not enough to require a court to extend

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[3] Fed. R. Civ. P. 4(l) (West 2002).

[4] *In re Med-Atlantic Petroleum Corp.*, 233 B.R. 644, 654 (Bankr. S.D.N.Y. 1999).

[5] *In re Johannsen*, 82 B.R. 547, 548 (Bankr. D. Mont. 1988).

the service period without a showing of good cause.[6]

Although plaintiff does not address this point in his response, Fed. R. Civ. P. 4(m) provides for some extension of time in which to accomplish service. That rule states that if service is not made within 120 days after the filing of the complaint, the court shall, on motion of the defendant or on its own motion, dismiss the action without prejudice *or* "direct that service be effected within a specified period of time; provided that *if the plaintiff shows good cause for the failure*, the court shall extend the time for service for an appropriate period."[7] Here, the only "good cause" apparent is the fact that should this proceeding be dismissed, plaintiff will be barred by Fed. R. Bankr. P. 4007(c) from bringing it again.

Tenth Circuit authority makes it clear that such an extension may be granted, even beyond the 120 day period, where an action may be time-barred.[8] The Court of Appeals held that a district court has a separate duty to consider whether cause exists to grant a permissive extension of time contemplated by Fed. R. Civ. P. 4(m). Good cause can include the action being time-barred, the complexity of service requirements on certain parties (such as the United States), and the need to protect pro se litigants.[9]

However, inadvertence or negligence by itself is not "good cause." In *In re Kirkland*[10], the Tenth Circuit applied what is now Rule 4(m),[11] to a bankruptcy adversary proceeding in which the pro

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[6] *In re Hall*, 222 B.R. 275 (Bankr. E.D. Va. 1998).

[7] Fed. R. Civ. P. 4(m) (West 2002) (Emphasis added).

[8] *Espinoza v. U.S.*, 52 F.3d 838 (10th Cir. 1995).

[9] *Id.* at 842.

[10] 86 F.3d 172 (10th Cir. 1996).

[11] The provisions of what are now Fed. R. Civ. P. 4(m) were previously found in Rule 4(j).

se plaintiffs, withholding service for strategic or economic reasons, failed to make service within the 120 day period. Affirming the bankruptcy court, the Court of Appeals concluded that "inadvertence or negligence alone do not constitute "good cause" for failure of timely service. Mistake of counsel or ignorance of the rules also usually do not suffice."[12] The Court further asserted that "[T]he plaintiff who seeks to rely on the good cause provision must show meticulous efforts to comply with the rule."[13] Other courts have adopted a similar standard. Where the court is asked to make an equitable determination of excuse, the party seeking the extension bears the burden of demonstrating some good faith effort to comply with the service rules, either by making further efforts at service or by making an immediate request for an extension under Rule 4(m).[14]

Plaintiff relies on *In re Anderson*[15] where the court granted an extension of the 120 day period. There, the plaintiff served the summons 11 days after its issuance[16] but defendant waited until after the 120 day period had expired to seek dismissal of the case on the grounds of failed service. Finding that the passivity of defendant effectively misled the plaintiff into believing his service was valid, the court granted an extension of the 120 day period. The *Anderson* court also stated that:

> Where a defendant's affirmative conduct reasonably alerts a plaintiff as to an alleged insufficiency of service of process within the reasonable period of time prior to the expiration of the 120-day window of Rule 4(j) [now Rule 4(m)], good cause does not exist to justify a failure to effect proper service.

179 B.R. at 406 (*citing McGregor v. United States*, 933 F.2d 156 (2d Cir. 1991)).

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[12] 86 F.3d at 176 (citations omitted).

[13] *Id.*

[14] *See In re Casey*, 198 B.R. 918, 925 (Bankr. S. D. Calif. 1996).

[15] 179 B.R. 401 (Bankr. D. Conn. 1995).

[16] It should be noted that Fed. R. Bankr. P. 7004(e) requires a summons to be served no later than 10 days after its issuance.

In this case, defendant's timely answer, quoted above, made plaintiff aware of his failure to serve debtor's counsel. Plaintiff was alerted to the alleged defective service as early as March 14, 2002 and well within the 120 day service period under Rule 4(m). To this day, plaintiff has made no effort to cure the defect in service. Nor has plaintiff requested an extension of the 120 day period. Defendant affirmatively placed plaintiff on notice of the defective service and yet plaintiff took no corrective action. This is a far cry from the "meticulous efforts" at compliance that courts look for when determining whether to grant an extension. Accordingly, this Court will not extend the 120-day period as permitted by Fed. R. Civ. P. 4(m).

Defendant's motion to dismiss plaintiff's complaint for lack of jurisdiction due to lack of service is GRANTED and plaintiff's complaint is DISMISSED.

Dated this 17th day of December, 2002.

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ROBERT E. NUGENT, CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT
DISTRICT OF KANSAS