

In the United States Bankruptcy Court
for the Northern District of Iowa

SARAH E. DAWSON
Debtor(s).

Bankruptcy No. 00-01534-W
Chapter 7

NORMAN DURNS
DARLENE DURNS
Plaintiff(s)

Adversary No. 00-9121-W

vs.

SARAH E. DAWSON
Defendant(s)

ORDER RE MOTION TO DISMISS ADVERSARY COMPLAINT

On May 18, 2001, the above-captioned matter came on for telephonic hearing on Debtor's Motion to Dismiss for Failure to Prosecute. Attorney Don E. Gottschalk appeared for Plaintiffs Norman and Darlene Durns. Attorney John Pieters, Jr., appeared for Defendant/Debtor Sarah E. Dawson. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).

STATEMENT OF THE CASE

Debtor seeks to dismiss with prejudice Plaintiffs' Dischargeability Complaint for failure to comply with Federal Rules of Bankruptcy Procedure Rule 7041 and Federal Rules of Civil Procedure Rule 41 (b) as well as for failure to comply with this Court's order enlarging the time in which the Plaintiffs could serve the summons.

FINDINGS OF FACT

Debtor filed her Chapter 7 Petition on June 19, 2000. July 31, 2000 was the first date set for the meeting of creditors. Plaintiffs filed their adversary complaint pro se on July 25, 2000 and filed an amended complaint on July 31, 2000. Debtor was granted a discharge on October 3, 2000.

On December 8, 2000, this court granted Plaintiffs "30 days within which to recast the adversary petition if necessary and serve the same upon Defendant." At the December 8 hearing, Attorney Don E. Gottschalk entered an appearance on behalf of the Plaintiffs. The Bankruptcy Clerk reissued the Summons and Notice on December 12, 2000. The Black Hawk County Sheriff's Office received the Summons on December 22, 2000. This motion comes before the Court because actual service was effected January 12, 2001, four days after the 30-day extension granted by the Court.

CONCLUSION OF LAW

Debtor brings this motion to dismiss for Plaintiffs' failure to comply with the Federal Bankruptcy Rules for service of a summons or to comply with an order of this Court under Federal Bankruptcy Procedure Rule 7041. Rule 7041 incorporates Federal Civil Procedure Rule 41. Rule 41(b) provides for dismissal "for failure of the plaintiff to prosecute or to comply with these rules or any order of the court."

Debtor asserts Plaintiffs failed to comply with the time limits for service promulgated in Rule 7004(a) and (e). Rule 7004(a) incorporates Federal Rule of Civil Procedure 4(m). The pertinent part of Rule 4(m) provides that "if service of the summons and complaint is not made within 120 days after filing of the complaint, the court ... shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period." Rule 7004(e) requires that the summons be served within 10 days of its issuance and if service by mail is used, the complaint must be deposited in the mail within 10 days after the summons has been issued.

Courts have authority, in their discretion, to dismiss an action with prejudice for failure to comply with court orders or the Federal Rules of Civil Procedure. Aziz v. Wright, 34 F.3d 587, 589 (8th Cir. 1994). "However, dismissal with prejudice should be used sparingly because it is a drastic sanction." Dahl v. Kanawha Inv. Holding Co., 161 F.R.D. 673, 678 (N.D. Iowa 1995). To determine whether dismissal for want of prosecution is appropriate, the Eighth Circuit Court of Appeals applies a balancing test, "balancing the policy of giving the plaintiff [a] day in court against [the] policies of preventing undue delay, avoiding court congestion, and preserving respect for court procedures." Garland v. Peebles, 1 F.3d 683, 686 (8th Cir. 1993). The main focus of the balancing test is on the conduct of the plaintiff. Dahl, 161 F.R.D. at 678.

The Court granted Plaintiffs a 30-day extension within which to recast the complaint and serve Debtor. The advisory committee notes to the 1993 amendments to Rule 4(m) state that the court shall grant an extension for good cause but also the court may extend the time for service rather than dismiss the case even if plaintiff fails to show good cause. Adams v. Allied Signal Gen. Aviation Avionics, 74 F.3d 882, 887 (8th Cir. 1996). The December 8, 2000 extension eliminates the need to determine if Plaintiffs could demonstrate good cause for failing to serve the summons in the interim between the filing of the complaint and the 30-day extension. Rule 4(m) case law discussing timely service within the 120-day period is instructive in considering whether service outside the 30-day extension period granted by the Court is acceptable.

Rule 4(m) is not a statute of limitations but rather a procedural rule dictating the procedures or time for service of process. In re Ferguson, 210 B.R. 785, 790 (Bankr. N.D. Ill. 1997). The substantive statute of limitations for the filing of this action is found in Bankruptcy Rule 4007(c). Creditors have 60 days after the first date set for the meeting of creditors to file a complaint on dischargeability of debts. 11 U.S.C. § 4007(c). Rule 4(m) acts like a statute of limitations if the court grants a dismissal for untimely service after the running of the statute of limitations for filing a cause of action. The running of the limitations statute alone could be reason to extend the period for service. Casey v. Kasal, 223 B.R. 879 (E.D. Pa. 1998).

While it is not mandatory that the court extend the deadline for effecting service of summons solely because of the running of the substantive limitations statute, the fact that the suit cannot be resolved on the merits is a factor that must be given close attention. In re Ferguson, 204 B.R. 202, 209 (Bankr.

N.D. Ill. 1997). Pursuant to Rule 4007(c), September 29, 2000 was the last day for Plaintiffs to file a complaint under § 523(c). Dismissal in this instance would be prejudicial to Plaintiffs.

It is not fatal for a plaintiff that the complaint was not served within the extended time period permitted by this Court. In re Halberstram, 219 B.R. 356, 362 (E.D.N.Y. 1998) (nondischargeability complainant's failure to comply with bankruptcy court order, in not serving amended complaint did not warrant dismissal of complaint, where debtor was not prejudiced by 18-day delay). "Where there is a good faith attempt to comply with the requirements of the bankruptcy rules and the federal rules... errors in such process should be amenable so long as there is no prejudice to the party served." In re Betts, 142 B.R. 819, 825 (Bankr. N.D. Ill. 1992). When evaluating prejudice, courts should contemplate a loss of evidence, an unavailability of witnesses or other material alteration caused by the creditor's delay that would prevent the debtor from presenting a case. In re Justin Barr, 217 B.R. 626, 631 (Bankr. W.D. Wash. 1998). Debtor does not allege that the delay of four days has caused her prejudice.

There is no bright line for determining when to exercise discretion to allow extensions. Dismissal is "only appropriate where there has been a clear record of delay or contumacious conduct." Dahl, 161 F.R.D. at 678-79. Plaintiffs' conduct was not rebellious nor intentionally disobedient.

Plaintiffs made a reasonable attempt to serve their complaint. Having placed responsibility for service with the Sheriff's Department, Plaintiffs had done everything reasonably necessary to effectuate service. The fact that the period for service in this case was over the holiday season further explains the modest delay in service. It is the conclusion of this Court that discretion must be exercised so as to ensure that this case is justly resolved on its merits rather than on the basis of procedural technicalities. The Court approves delayed service of summons made after the deadline.

WHEREFORE, Debtor's Motion to Dismiss for Failure to Prosecute is DENIED.

SO ORDERED this 20th day of June, 2001.

Paul J. Kilburg
Chief Bankruptcy Judge