

IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF
IOWA

IN RE:)

) Chapter 7

VERNON WAYNE COOPER)

aka Vern Cooper,) Bankruptcy No. 02-03566

) (Involuntary)

Debtor.)

ORDER RE DEBTOR'S MOTION TO DISMISS AND MOTION TO TRANSFER VENUE

On December 19, 2002, the above-captioned matter came on for hearing on Debtor's Motion to Dismiss and Motion to Transfer Venue to the District of Minnesota. Debtor appeared by Attorney Joseph Peiffer. The creditors who filed the involuntary petition ("Creditors") appeared by Attorney Jon McCright. Creditor Pioneer Mutual Life Insurance Company appeared by Attorney Eric Lam. These matters were argued after which they were taken under advisement subject to briefs. All briefs are now on file and this matter is ready for resolution. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A).

STATEMENT OF THE CASE

An Involuntary Chapter 7 petition was filed on October 11, 2002. A summons was issued and subsequently served. However, it was not served within ten days of its issuance. Debtor filed the pending Motion asserting that, under Rule 7004(e) of the Federal Rules of Bankruptcy Procedure, the summons was not timely served and the underlying petition must be dismissed.

Alternatively, Debtor's Motion asserts that venue should be changed to the District of Minnesota. Debtor states he now resides in the State of Minnesota. He alleges that his wife has already filed a Chapter 7 petition in Minnesota and venue in his case should be transferred to Minnesota for administration.

At the time of hearing, Debtor stated that the Court could find grounds for retaining venue in the Northern District of Iowa. As such, Debtor withdrew his Motion for Change of Venue.

In the briefs filed after the hearing on December 19, 2002, the parties state that a new summons from the Clerk of Bankruptcy Court was issued and served on Debtor with the involuntary petition on December 19, 2002. On December 23, 2002, while this matter was under advisement, Debtor apparently filed a voluntary Chapter 7 petition in the United States Bankruptcy Court for the District of Minnesota denominated as In re Vernon Wayne Cooper, No. 2-33527.

CONCLUSIONS OF LAW

A summons was issued on October 11, 2002 when the Involuntary Chapter 7 petition was filed. Creditors admit that, through confusion over Debtor's address and the fact that the summons was sent to a County Sheriff in Minnesota, it was not effectively served within the ten days provided in Rule 7004(e) of the Federal Rules of Bankruptcy Procedure which provides:

(e) Service made under Rule 4(e), (g), (h)(1), (i), or (j)(2) F.R.C.P. shall be made by delivery of the summons and complaint within 10 days after the summons is issued. If service is by any authorized form of mail, the summons and complaint shall be deposited in the mail within 10 days after the summons is issued. If a summons is not timely delivered or mailed, another summons shall be issued and served.

This Rule has no counterpart in the Federal Rules of Civil Procedure. It was added to the Bankruptcy Rules because of the specialized procedures utilized by Bankruptcy Court.

There is no counterpart to F.R.B.P. 7004(f) in the Federal Rules of Civil Procedure. This absence further confirms the purpose of F.R.B.P. 7004(f). An initial 10-day opportunity for the service is unnecessary under the Federal Rules of Civil Procedure because the responsive pleading window thereunder (20 days) begins to run only from the date a defendant is actually served.

F.R.C.P. 12(a)(1)(A). By contrast, because the Bankruptcy Rule responsive pleading window runs from the date of summons issuance, F.R.B.P. 7012(a), a 10-day rule such as F.R.B.P. 7004(f) is necessary to relieve a defendant from an unduly shortened responsive pleading window.

In re Anderson, 179 B.R. 401, 404 n.4 (Bankr. D. Conn. 1995).

Debtor asserts that the failure to serve the summons within ten days of its issuance is fatal to the petition, mandating dismissal of the involuntary petition. However, as is apparent on the face of the Rule, the remedy available for failure to serve a summons within the ten day period is issuance of a new summons and not dismissal.

Lack of diligence in serving a party, thereby warranting dismissal, is controlled by Rule 7004(m) which states:

(m) Time Limit for Service. If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period.

Here, Creditors obtained issuance of a summons upon the filing of the petition. They made a good faith attempt to serve Debtor but were unable to do so during the term of the summons through no lack of diligence on their part. They remain well within the window of service envisioned by Rule 7004(m). The expiration of the original summons has no jurisdictional import in and of itself. It merely envisions that a new summons must be issued. In re Krikava, 236 B.R. 701, 705-706 (Bankr. D. Neb. 1999).

The Court is advised, through the parties' briefs, that a new summons has been issued and served upon Debtor. The Court need not determine whether this service is good at this time. Suffice it to state that Creditors have made serious and good faith attempts to serve Debtor. No cause, either legally or factually, is shown to support a dismissal of the petition on these grounds.

WHEREFORE, the Involuntary Debtor, at the time of hearing, withdrew his Motion for Change of Venue of this petition to the District of Minnesota. As this motion has been withdrawn, and as this Court determines that venue is appropriate in the Northern District of Iowa, the pending petition shall remain venued in this District.

FURTHER, the Motion to Dismiss filed by Debtor is OVERRULED and DENIED for the reasons set forth herein.

FURTHER, after the filing of an answer or other responsive pleading by Debtor, this matter shall proceed pursuant to the Federal Rules of Bankruptcy Procedure.

FURTHER, Creditor Pioneer Mutual Life Insurance Company has filed an

additional Motion relating to Debtor's filing of a voluntary Chapter 7 petition in the District of Minnesota. This matter shall be set for hearing by separate order.

SO ORDERED this 6th day of January, 2003.

CHIEF BANKRUPTCY JUDGE PAUL J. KILBURG