IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	Bk. Nos. 99-2959 (PJW)
SUBMICRON SYSTEMS CORPORATION, et al.,	)	through 99-2962 (PJW)
	)	
Debtors.	)	
	)	
	)	
	)	
HOWARD COHEN, as Plan Administrator for the Estates of Submicron Systems Corporation, Submicron Systems, Inc., Submicron Wet Process Stations, Inc. and Submicron Systems Holding I, Inc.	)	Adv. No. 01-4044
	)	
Plaintiff,	)	
	)	Civ. No. 03-230-SLR
v.	)	
	)	
STOKES ELECTRICAL SUPPLY,	)	
	)	
Defendant.	)	

MEMORANDUM ORDER

At Wilmington this 21st day of September, 2004, having reviewed defendant's renewed motion to dismiss and plaintiff's cross motion for an order extending time to serve the complaint;

IT IS ORDERED that defendant's motion (D.I. 26) is denied and plaintiff's motion (D.I. 29) is granted for the reasons that follow:

1. On May 25, 2001, plaintiff initiated an adversary proceeding against defendant in bankruptcy court by filing a

summons and complaint for avoidance of preferences under 11 U.S.C. § 547 to recover money or property to benefit the debtors' bankruptcy estate.[1] (D.I. 2) On June 26, 2001, plaintiff attempted to serve the summons and complaint on defendant by postage-paid, first-class mail at 17th and Washington Streets, Easton, Pennsylvania (the "Former Address") to the attention of Vincent J. Presto, Chief Executive Officer. Defendant had registered the Former Address with the Commonwealth of Pennsylvania Department of State, Corporation Bureau (the "Bureau") under "Basic Entity Information," and plaintiff obtained the address from this source.[2] (See D.I. 16, ex. A)

2. On October 3, 2001, plaintiff sought entry of default judgment pursuant to Fed. R. Civ. P. 55 and Fed. R. Bankr. P. 7055, since defendant failed to enter any appearance, pleadings, or otherwise present a defense. On October 22, 2001,

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[1] On September 1, 1999, debtors filed a voluntary petition for relief with the bankruptcy court under chapter 11 of the Bankruptcy Code. (D.I. 16 at 1) The bankruptcy court confirmed the first amended plan of liquidation on May 8, 2000. (Id. at 2) Plaintiff was appointed as plan administrator on behalf of debtors pursuant to the plan and the order approving the plan administrator agreement was entered May 24, 2000. (Id. at 3) On June 15, 2000, debtors served their notice of plan effective date, cancellation of shares, appointment of plan administrator and designation of plan administrator counsel.

[2] Defendant discontinued operations at the Former Address in 1981. Defendant relocated to 3401 Northwood Avenue, Easton, Pennsylvania at that time (the "Current Address"). (D.I. 15) Under the information for "Corporate Officers," defendant registered its Current Address. (See D.I. 16, ex. B)

the bankruptcy court ordered default judgment against defendant in the amount of $120,139.25 plus post-judgment interest. (D.I. 16 at 4)

3. On July 9, 2002, plaintiff sent defendant a demand letter via certified mail, return receipt requested, to the Former Address, informing defendant that the court entered default judgment. (Id.) Plaintiff also demanded payment on the judgment. The U.S. Postal Service forwarded the letter to defendant at a post office box maintained by defendant in Easton, Pennsylvania. (Id.)

4. On July 31, 2002, defendant filed a motion to vacate default judgment for failure of service pursuant to Fed. R. Civ. P. 55(c) and 60(b) or, alternatively, to reopen the proceeding. This court granted the motion to vacate on December 10, 2003.[3] (D.I. 4)

5. On January 27, 2004 defendant moved to dismiss the adversary proceedings pursuant to Fed. R. Civ. P. 12(b)(5), alleging insufficient service. (D.I. 15) Plaintiff filed a cross-motion for an order extending time to serve the summons and complaint. (D.I. 16) In a memorandum order dated April 5, 2004, this court denied defendant's motion and granted plaintiff's motion, giving the plaintiff thirty days to properly serve

[3] An order withdrawing the reference from the bankruptcy court to this court was entered on February 12, 2003. (D.I. 1)

defendant. (D.I. 20) However, the court indicated that "[i]f plaintiff fails to perfect service within this period, then the court shall grant any renewed application to dismiss pursuant to [Federal Rules of Civil Procedure] Rule 4(m)." (Id. at 10)

6. In compliance with this court's April 5th memorandum order, plaintiff sent a summons and complaint to his process server, John A. Amici ("Amici"). (D.I. 29, ex. A at ¶ 6) On April 20, 2004 Amici delivered a copy of the summons to Vincent J. Presto, Chief Executive Officer of defendant. (Id., ex. C)

7. Defendant renews its motion to dismiss for insufficient service, and further moves to dismiss for failure to state a claim. (D.I. 26) Defendant acknowledges receipt of a copy of the summons on April 20, 2004, but claims it never received a copy of the complaint. (Id. at 3) As a result, defendant argues that service was not perfected within thirty days as required by this court's April 5th memorandum order. Defendant also argues that plaintiff's complaint fails to state a claim. (Id. at 4-5) According to defendant, plaintiff's challenged transfers were checks honored after the debtors filed their chapter 11 petitions. Consequently, defendant argues that none of the transfers identified in the complaint are avoidable.

8. Plaintiff argues in his opposition to defendant's motion to dismiss that his service was sufficient. (D.I. 29 at

4) According to plaintiff, a complaint was previously served on defendant. Plaintiff claims that "failure to serve an additional copy of the [c]omplaint with the second [s]ummons does not require dismissal of the suit." (Id. at 5) Furthermore, plaintiff claims that to the best of his knowledge, the summons and complaint were served on defendant. Plaintiff provided his process server with the summons and the complaint and instructed the server to deliver both to the defendant. Plaintiff also argues that even if service was insufficient, his subsequent efforts to ensure that defendant received the complaint demonstrated good cause and excusable neglect, permitting an extension of the April 5th memorandum order deadline.[4] Finally, plaintiff contends that the transfers he challenged occurred before the debtors filed their chapter 11 petitions, meaning those transfers are avoidable and that plaintiff's complaint states a claim.

9. Fed. R. Bankr. P. 7004 governs service of a summons and complaint in bankruptcy proceedings. Fed. R. Bankr. P. 7004. Subsection (a) of Fed. R. Bankr. P. 7004 incorporates

[4] Upon learning of defendant's renewed motion to dismiss for insufficient service, plaintiff investigated defendant's allegation that defendant never received a complaint. (D.I. 29 at 7) Based on this inquiry plaintiff once again sent the complaint to its process server and, to the best of plaintiff's knowledge, the complaint was delivered. (Id.) Furthermore, plaintiff obtained an alias summons from this court, which was delivered on May 10, 2004. (Id. at 7-8).

by reference Fed. R. Civ. P. 4(m). Rule 4(m) grants courts the power to dismiss an action if "service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint . . . ." Rule 4(m) also states that "if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period."

10. The Third Circuit has identified a two-step process for application of Rule 4(m). Petrucelli v. Bohringer & Ratzinger, 46 F.3d 1298, 1305 (3d Cir. 1995). First, a district court must determine whether good cause exists for an extension of time. Id. Second, if good cause exists, the district court must extend time for service of the summons and complaint. "If, however, good cause does not exist, the court may in its discretion decide whether to dismiss the case without prejudice or extend time for service." Id.

11. The presence or absence of good cause for an extension of time to effect service is a matter of discretion for a district court. See United States v. Nuttall, 122 F.R.D. 163, 166 (D. Del. 1988)(citing Dominic v. Hess Oil V.I. Corp., 841 F.2d 513, 514, 516-17 (3d Cir. 1988); Braxton v. United States, 817 F.2d 238, 242 (3d Cir. 1987)). Courts have considered several factors for determining whether good cause exists: (1) the reasonableness of a plaintiff's efforts to serve; (2) prejudice to the defendant by lack of timely service; and (3)

whether plaintiff moved for an extension of time to serve. Id. at 167. The Third Circuit has defined "good cause" as being tantamount to "excusable neglect" under Fed. R. Civ. P. 6(b). Petrucelli, 46 F.3d at 1307, n.11; Braxton, 817 F.2d at 241. Thus, in weighing these factors, the court's primary focus should be on the plaintiff's reasons for not complying with the time limit in the first place and whether the plaintiff acted in good faith in attempting service. Boley v. Kaymark, 123 F.3d 756, 758 (3d Cir. 1997)(quoting MCI Telecomms. Corp. v. Teleconcepts, 71 F.3d 1086, 1098 (3d Cir. 1995)). However, the Third Circuit has cautioned that inadvertence and "half-hearted efforts at service which fail to meet the standard" do not constitute "good cause." Braxton, 817 F.2d at 241.

12. The Federal Rules of Civil Procedure do not specifically explain what factors a court should consider when deciding to exercise its discretion to extend time for service in the absence of a finding of good cause. In Petrucelli, the Third Circuit identified the Advisory Committee note to Rule 4(m) as instructive, noting that "relief may be justified, for example, if the applicable statute of limitations would bar the refiled action, or if the defendant is evading service or conceals a defect in attempted service." 46 F.3d at 1305-06 (quoting Fed. R. Civ. P. 4(m), Advisory Committee Note, 1993 Amendments). Besides guidance from the Advisory Committee, this court has set

forth other factors for determining whether to exercise discretion, including: (1) the frivolousness of the plaintiff's complaint; (2) the plaintiff's motivation in pursuing its claims; (3) the objective unreasonableness of the plaintiff's case (both its factual and legal components); and (4) the need in particular circumstances to advance considerations of compensation and deterrence. Ritter v. Cooper, 2003 WL 23112306, *3 (D. Del. 2003)(citing E.I. du Pont de Nemours & Co. v. New Press, Inc., 1998 WL 355522, *4 (E.D. Pa. June 29, 1998)).

13. The court finds that good cause exists to grant plaintiff's requested extension. First, plaintiff engaged in reasonable efforts to ensure that he properly served defendant in accordance with this court's April 5th memorandum order. Plaintiff's first attempt to serve defendant was by first-class mail. (D.I. 15 at 2) According to defendant, this attempt was unsuccessful. (Id.) Plaintiff hired a professional process server for his second attempt at service, and supplied the server with both the complaint and summons. (D.I. 29 at 7, ex. B) Although hiring a professional process server undoubtedly cost more money than mailing the summons and complaint, plaintiff took this extra precaution to ensure service was perfected. Furthermore, it is reasonable to assume that if a summons and complaint are delivered to a process server, with instructions to deliver both documents, these documents will be delivered.

Second, good cause exists because extending the time to serve the summons and complaint will not prejudice defendant. Given that the present action was filed on May 25, 2001, and still exists four years after its initiation, plaintiff's request for a short extension does not prejudice defendant. Furthermore, defendant had actual notice of plaintiff's complaint by July 31, 2002. "[A]ctual notice to a defendant that an action was filed militates against a finding of prejudice." Boley v. Kaymark, 123 F.3d 756, 759 (3d Cir. 1997).

Finally, good cause exists in the present matter because plaintiff moved for an extension of time to serve. Plaintiff's opposition to defendant's renewed motion to dismiss incorporated a motion to extend time to serve defendant. (D.I. 29)

14. Even in the absence of a finding of good cause, this court finds in its discretion that the relevant factors weigh in favor of excusing plaintiff's failure to perfect service. If the court were to dismiss the instant suit, plaintiff would not be able to re-file his complaint because the action would be barred by the applicable statute of limitations.[5] See e.g., Hodges v. Greiff, 2002 WL 34368774, *2 (E.D. Pa. 2001) ("[T]he fact that most of plaintiff's claims against defendant

[5]The parties do not contest the expiration of the statute of limitations. The court, therefore, accepts this expiration as a fact, although the parties have not provided sufficient information in the record for verification.

would now be time-barred is a factor supporting an exercise of the Court's discretion."). Furthermore, plaintiff's claim against defendant is not frivolous by all accounts. As the plan administrator, plaintiff was appointed to liquidate the debtors' assets for the benefit of debtors' creditors. If the instant suit is dismissed, the potential distribution to these creditors likely will be reduced. This is especially true given that the applicable statute of limitations has expired. In light of the substantial risk of prejudice to plaintiff, the court finds that it would be unjust to deprive plaintiff of the opportunity to prove his claim by dismissing his complaint for failure to effectuate service. Accordingly, the court grants plaintiff's motion for an extension of ten days from the date of this order to permit plaintiff to verify that service of the complaint and alias summons has been properly effectuated.

16. In analyzing a motion to dismiss pursuant to Rule 12(b)(6), the court must accept as true all material allegations of the complaint and it must construe the complaint in favor of the plaintiff. See Trump Hotels & Casino Resorts, Inc. v. Mirage Resorts, Inc., 140 F.3d 478, 483 (3d Cir. 1998). "A complaint should be dismissed only if, after accepting as true all of the facts alleged in the complaint, and drawing all reasonable inferences in the plaintiff's favor, no relief could be granted under any set of facts consistent with the allegations

of the complaint." Id. Claims may be dismissed pursuant to a Rule 12(b)(6) motion only if the plaintiff cannot demonstrate any set of facts that would entitle him to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The moving party has the burden of persuasion. See Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1409 (3d Cir. 1991).

17. Plaintiff's complaint states a claim for avoidance of transfers pursuant to section 547(b) of the Bankruptcy Code. According to § 547(b), a trustee may avoid any transfer by the debtor: (1) to or for the benefit of the creditor; (2) for a debt owed by the debtors before such transfer was made; (3) that was made while the debtor was insolvent; (4) that was made on or within 90 days before the date of the filing of the petition; and (5) that enables the creditor to receive more than the creditor would receive if: (a) the case was under Chapter 7 of Title 11; (b) if the transfers were not made; or (c) the creditor received payment on its debts under Title 11. 11 U.S.C. § 547(b).

According to plaintiff's complaint, "[d]ebtors issued checks or wire transfers to [d]efendant, all of which cleared the [d]ebtors' bank during the [p]reference [p]eriod and which amounted in the aggregate to $120,139.25." (D.I. 29, ex. B at 3) Plaintiff goes on to allege that these transfers were to or for the benefit of defendant and that the transfers were for a debt owed by the debtors before the transfer was made. (Id. at 4)

Finally, plaintiff alleges that the debtors made these transfers while they were insolvent and that defendant received more than it would have received: (1) under Chapter 7 of Title 11; (2) if the transfers had not been made; or (3) if defendant received payment on its debts under Title 11. (Id.) Assuming these allegations to be true, plaintiff has stated a claim to avoid the challenged transfers. As a result, defendant's motion to dismiss for failure to state a claim is denied.

Sue L. Robinson
United States District Judge