IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

Case No. 03-36490

NANCY LEE WADDLE

Debtor

MBNA AMERICA BANK, N.A.

Plaintiff

v. Adv. Proc. No. 04-3044

NANCY L. WADDLE

Defendant

MEMORANDUM ON MOTION TO DISMISS AND TO SET ASIDE JUDGMENT BY DEFAULT

APPEARANCES: ELIZABETH H. PARROTT, ESQ.
Post Office Box 23408
Nashville, Tennessee 37202
Attorney for Plaintiff

MOSTOLLER, STULBERG & WHITFIELD
Ann Mostoller, Esq.
136 S. Illinois Avenue
Suite 104
Oak Ridge, Tennessee 37830
Attorneys for Debtor/Defendant by Special Appearance

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

On March 2, 2004, the Plaintiff, MBNA America Bank, N.A., filed the Complaint Objecting to Dischargeability of Indebtedness (Complaint) initiating this adversary proceeding. On June 22, 2004, a nondischargeable Judgment (Default Judgment) in the amount of $16,150.00 was entered against the Debtor/Defendant.[1] Now before the court is the Motion to Dismiss and to Set Aside Judgment by Default by Special Appearance (Motion to Set Aside Default Judgment) filed by the Debtor on June 24, 2004, seeking to set aside the Default Judgment entered against her and to dismiss the Complaint on the basis that she was not properly served with process in accordance with the Federal Rules of Bankruptcy Procedure and the Federal Rules of Civil Procedure.

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(A), (I), and (O) (West 1993).

I

The Debtor filed the Voluntary Petition commencing her bankruptcy case under Chapter 7 of the Bankruptcy Code on November 25, 2003. As of that date, the Plaintiff was a creditor of the Debtor, holding an unsecured claim in the amount of $16,858.99, pursuant to a credit card account. On March 2, 2004, the Plaintiff timely filed its Complaint, seeking a determination that $16,000.00 of its claim, incurred by the Debtor through cash advances or convenience checks in August 2003, was nondischargeable under 11 U.S.C.A. § 523(a)(2) (West 1993 & Supp. 2004).

[1] Of this amount, $150.00 represents the filing fee associated with the filing of the Complaint.

Upon the filing of the Complaint, the clerk issued the Plaintiff a Summons in an Adversary Proceeding (Summons) on March 2, 2004. The Summons was returned to the clerk by Plaintiff's counsel on March 8, 2004, evidencing service of the Summons and a copy of the Complaint on March 5, 2004, by first class mail, postage prepaid, upon the Debtor and Maurice Guinn, the Chapter 7 Trustee in the Debtor's bankruptcy case. Although the Adversary Proceeding Cover Sheet filed by the Plaintiff with the Complaint correctly identifies Ann Mostoller as the Debtor's attorney, Ms. Mostoller was not served with the Complaint or the Summons issued on March 2, 2004.

On May 13, 2004, the Plaintiff's attorney filed a document entitled "Certificate of Service for Resending of Summons to Defendant's Attorney," certifying that she had mailed a copy of the Summons and Complaint to the Debtor's attorney, Ms. Mostoller, on May 12, 2004. A copy of the original Summons issued on March 2, 2004, and filed with the court on March 8, 2004, was attached to this document. Subsequently, on June 14, 2004, Ms. Mostoller filed a Notice of Appearance, requesting that her name be entered as attorney of record for the Debtor in this adversary proceeding.

On June 16, 2004, the Plaintiff filed a Motion for Entry of Default Judgment, which was granted by entry of the Order of Default; Finding of Core Proceeding; and For Entry of Default Judgment, on June 22, 2004. Pursuant thereto, the court also entered the nondischargeable Default Judgment against the Defendant in the amount of $16,150.00 on June 22, 2004. The Plaintiff's attorney filed a Certificate of Service certifying that these documents were served upon both the Debtor and Ms. Mostoller.

The Debtor, without making a formal appearance, filed her Motion to Set Aside Default Judgment on June 24, 2004, averring that the Plaintiff did not effectuate proper service of process pursuant to Federal Rule of Bankruptcy Procedure 7004 and Federal Rule of Civil Procedure 4. Accordingly, the Debtor requests that the court set aside the June 22, 2004 Default Judgment and that the court dismiss the Complaint unless it is properly served in accordance with these Rules. On July 14, 2004, the Plaintiff filed its Response to Motion to Dismiss and Set Aside Default Judgment, arguing that the Debtor was served on March 5, 2004, but has failed to answer the Complaint, and opposing the Debtor's Motion to Set Aside Default Judgment.

II

The Debtor requests that the court set aside the Default Judgment entered against her on June 22, 2004, averring that the Plaintiff's service of process upon her was defective. The court may set aside a default judgment "[f]or good cause shown . . . in accordance with Rule 60(b)." FED. R. CIV. P. 55(c) (applicable in adversary proceedings through FED. R. BANKR. P. 7055). Rule 60(b) provides, in material part, that "[o]n motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding . . . [if] (4) the judgment is void[.]" FED. R. CIV. P. 60(b) (made applicable in bankruptcy proceedings by virtue of FED. R. BANKR. P. 9024). The party requesting Rule 60(b) relief bears the burden of establishing all prerequisites associated therewith. *McCurry v. Adventist Health Sys./Sunbelt, Inc.*, 298 F.3d 586, 592 (6th Cir. 2002).

"A judgment is not void merely because it is erroneous. It is void only if the court that rendered judgment lacked jurisdiction of the subject matter, or of the parties, or if the court acted in a manner inconsistent with due process of law." *Thomas, Head & Greisen Employees Trust v. Buster*, 95 F.3d 1449, 1460 n.17 (9th Cir. 1996). "A void judgment remains void until such time jurisdiction is finally determined to exist[.]" *Page v. Schweiker,* 786 F.2d 150, 154 (3d Cir. 1986).

Improper service of process renders a judgment obtained thereby void. *See Ruehle v. Educ. Credit Mgmt. Corp. (In re Ruehle)*, 307 B.R. 28, 33 (B.A.P. 6th Cir. 2003) (holding that "[a] judgment is void if the court lacked jurisdiction over the affected party because of a lack of notice resulting in a violation of due process.").

> Under Rule 60(b)(4), if a judgment is void, it must be vacated. Lack of notice and sufficient service of process leading ultimately to lack of due process properly renders a judgment void. The constitutional standard regarding notice requires that it "be such as is reasonably calculated to reach interested parties."

In re Chess, 268 B.R. 150, 155-56 (Bankr. W.D. Tenn. 2001) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 70 S. Ct. 652, 659 (1950)).

The Debtor argues that the Plaintiff did not serve her attorney with the Summons and Complaint as required by Federal Rule of Bankruptcy Procedure 7004 and/or Federal Rule of Civil Procedure 4, thus rendering its service of process upon her invalid, and the Default Judgment void. Federal Rule of Bankruptcy Procedure 7004 provides, in material part:

(a) Summons; service; proof of service

Rule 4(a), (b), (c)(1), (d)(1), (e) . . . , and (m) F.R.Civ.P. applies in adversary proceedings. . . .

(b) Service by first class mail

[S]ervice may be made within the United States by first class mail postage prepaid as follows:

. . . .

> (9) Upon the debtor, after a petition has been filed by or served upon the debtor and until the case is dismissed or closed, by mailing a copy of the summons and complaint to the debtor at the address shown in the petition or statement of affairs or to such other address as the debtor may designate in a filed writing and, if the debtor is represented by an attorney, to the attorney at the attorney's post-office address.

. . . .

(e) Summons: time limit for service within the United States

Service made under Rule 4(e) . . . F.R.Civ.P shall be 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.

FED. R. BANKR. P. 7004.[2] "Rule 7004(b)(9) unambiguously provides that service of process upon a debtor is not sufficient unless both the debtor and his attorney are served with the summons and a copy of the complaint." *Dreier v. Love (In re Love)*, 232 B.R. 373, 377 (Bankr. E.D. Tenn. 1999). "Anything short of strict compliance with Rule 7004(b)(9) is insufficient." *Love*, 232 B.R. at 377.

[2] As it applies to the portions of Rule 7004 above, Rule 4 of the Federal Rules of Civil Procedure, entitled "Summons," requires that an issued summons be served with all complaints within 120 days of filing. *See* FED. R. CIV. P. 4.

The record reflects that although it mailed the Complaint, together with the Summons issued on March 2, 2004, to the Debtor on March 8, 2004, the Plaintiff did not, in fact, serve the Debtor's attorney, Ms. Mostoller, but instead, erroneously served the Summons and Complaint upon the Chapter 7 Trustee. The Plaintiff discovered this mistake, and in an attempt to cure the defective service of process, it mailed a copy of the Complaint, together with a copy of the March 2, 2004 Summons that was filed on March 8, 2004, to Ms. Mostoller, as evidenced by the Certificate of Service for Resending of Summons to Defendant's Attorney filed with the court on May 13, 2004. In this Certificate of Service, the Plaintiff used the same certification language as provided on the Summons, certifying that she mailed these documents to Ms. Mostoller on May 12, 2004.[3] The Plaintiff argues that this action satisfies the requirements of Rule 7004(b)(9) and cured any defect in service of process of the Summons and the Complaint.

However, adoption of the Plaintiff's position would require the court to ignore the express language of Rule 7004(e), which requires service of a summons within 10 days of its issuance. Only one Summons has been issued in this case, the Summons issued on March 2, 2004, when the Complaint was filed. That Summons, which expired on March 12, 2004, was served on the Debtor and Mr. Guinn, erroneously, on March 5, 2004. The Plaintiff's mailing of a copy of that Summons and the Complaint to Ms. Mostoller on May 12, 2004, did not

[3] The Plaintiff argues that it properly served the Debtor and that it erroneously sent the "courtesy copy" to Mr. Guinn rather than Ms. Mostoller. It then argues that it provided Ms. Mostoller with a "courtesy copy" of the adversary proceeding documents. The court finds no language within Rule 7004 to indicate that service of a summons and complaint upon a debtor's attorney are simply a "courtesy" rather than a requirement.

constitute service of process in compliance with the Federal Rules of Bankruptcy Procedure or the Federal Rules of Civil Procedure. *See, e.g., Premier Capital, Inc. v. DeCarolis*, No. 01-126-M, 2002 U.S. Dist. LEXIS 1879, at *18 (D.N.H. Jan. 4, 2002) ("[U]ntimely delivery, even when made to all persons who must be served, is insufficient to constitute valid service."); *Ruthe v. Dohring (In re Dohring)*, 245 B.R. 262 (Bankr. N.D. Tex. 2000) (holding that "service" of an expired summons does not suffice and allowing additional time to obtain an alias summons for proper service). Moreover, actual knowledge of a lawsuit does not substitute for or cure a "technically defective service of process." *Friedman v. Estate of Presser*, 929 F.2d 1151, 1156 (6th Cir. 1991).

Finally, the Plaintiff argues that even though the Debtor was represented by Ms. Mostoller in her underlying Chapter 7 bankruptcy case, the Debtor was unrepresented in this adversary proceeding until a notice of appearance was entered by Ms. Mostoller. The court finds this argument to be in total contradiction to the precise language of Rule 7004(b)(9) requiring service of process upon a debtor's attorney of record in the bankruptcy case.

III

The court finds that the Plaintiff has not effectuated service of process upon the Debtor and her attorney, Ms. Mostoller, as required by Federal Rule of Bankruptcy Procedure 7004(b)(9) and (e). Accordingly, the Default Judgment entered on June 22, 2004, is void

for lack of personal jurisdiction over the Debtor and shall be set aside. The court will not, however, dismiss the Complaint, but will expect the Plaintiff to promptly prosecute its claim.

An order consistent with this Memorandum will be entered.

FILED: July 27, 2004

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

Case No. 03-36490

NANCY LEE WADDLE

Debtor

MBNA AMERICA BANK, N.A.

Plaintiff

v. Adv. Proc. No. 04-3044

NANCY L. WADDLE

Defendant

O R D E R

For the reasons set forth in the Memorandum on Motion to Dismiss and to Set Aside Judgment by Default filed this date, the court directs the following:

1. The Motion to Dismiss and to Set Aside Judgment by Default by Special Appearance filed by the Defendant on June 24, 2004, is **GRANTED** to the extent the Defendant seeks to vacate the Judgment and the Order of Default; Finding of Core Proceeding; and For Entry of Default Judgment entered on June 22, 2004. The Judgment and Order of Default; Finding of Core Proceeding; and For Entry of Default Judgment are accordingly **VACATED**.

2. The Motion to Dismiss and to Set Aside Judgment by Default by Special Appearance filed by the Defendant on June 24, 2004, is, except as granted above, in all other respects, **DENIED**.

SO ORDERED.

ENTER: July 27, 2004

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE