

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)
)
 KENNETH W. ELLIS and)
 CAROLYN I. ELLIS,) CASE NO. BK86-1136
)
 DEBTORS) A86-189
)
 DALE E. ELLIS,)
)
 Plaintiff)
)
 vs.)
)
 KENNETH W. ELLIS and)
 CAROLYN I. ELLIS,)
)
 Defendant)

MEMORANDUM OPINION AND ORDER

Evidentiary hearing was held on March 25, 1987, in Lincoln, Nebraska. Rodney Rehm of Lincoln, Nebraska, appeared for Plaintiff. D.L. Pelton of Bellevue, Nebraska, appeared for Defendant.

Question Presented

Whether the court must dismiss an adversarial complaint which was not served upon the debtor until the 120 days required by Fed. R. Civ. P. 4(j) had lapsed.

Facts

On July 21, plaintiff filed a petition with the Bankruptcy Court, and on July 22 a summons was issued to plaintiff's attorney. Plaintiff's attorney certified that the summons and petition were mailed to Carolyn Ellis, debtor. No attorney certification is in the court file indicating that a summons and petition were mailed to Kenneth Ellis, co-debtor.

On August 7, 1986, debtors moved for this Court to dismiss the adversary complaint claiming insufficient service. Debtors allege that they had received a summons but no copy of the petition.

On September 29, 1986, the Court, in considering the debtors' motion to dismiss, ordered "plaintiff to obtain service within statutory time period or case will be dismissed. . . . Plaintiff granted 15 days to file amended complaint." (Doc. No. 16)

The amended complaint was filed on October 14, 1986, and a new summons was issued on November 20, 1986. No certification of service by plaintiff's attorney for this second summons is included in the Court file. The 120 days required under Fed. Civ. P. 4(j) expired on November 19. Consequently, the mailing of the summons issued November 20 is beyond that limitation.

Discussion

Bankruptcy Rule 7004, process; service of summons, complaint, incorporates Rule 4(a), (b), (d), (e) and (g)-(i) of the Federal Rules of Civil Procedure for adversary proceedings. Rule 7004 does not include F.R.C.P. 4(j). Rule 4(j) establishes a time limit of 120 days within which the service of a summons and complaint must be made. However, because Rule 7004 does not incorporate this particular portion of Rule 4, it is not applicable in bankruptcy cases.

Rule 7004(f) sets forth the time limit for service in adversarial cases as follows: "If service is made pursuant to, Rule 4(d)(1)-(7) it shall be made by delivery of the summons and complaint within 10 days following issuance of a summons. If service is made by any authorized form of mail, the summons and complaint shall be deposited in the mail within 10 days following issuance of the summons. If a summons is not timely delivered or mailed, another summons shall be issued and served." Bankruptcy Rule 7004(f) (emphasis added).

ⁱ Norton Bankruptcy Law and Practice in its editorial comment to Rule 7004(f) reads:

The time limits for service in Rule 7004(f) are different than those in Federal Rule 4(j). The Federal Rule provides for dismissal if service is not effected within 120 days after the filing of the complaint. The Bankruptcy Rule, . . . is concerned with the time within which the person served must act. . . . Untimely service is a basis for a motion to quash service due to an insufficiency of process or provides a defense based on the insufficiency of process.

. . .

Where there has been substantial delay in the service of the summons and complaint, the proper procedure under the Bankruptcy Rules is

to file a motion to dismiss under Federal Rule of Civil Procedure 41(b). Thus, if the plaintiff delayed more than 120 days, even though the Bankruptcy Rules do not pick up Federal Rule 4(j) which mandates a dismissal, the court has discretion to do so under Rule 41(b).

6 Norton Bankruptcy Law and Practice, Rule 7004(f) at 354 (1985).

Two bankruptcy courts have adopted this suggestion from Norton's within their jurisdictions, In re Riposo, 59 Bankr. 563, 567 (Bankr. N.D. N.Y. 1986); In re Dahowski, 48 Bankr. 877, 884 (Bankr. S.D. N.Y. 1985).

The court in the Dahowski commented that the purpose of the Bankruptcy Rule is to secure prompt administration of the bankruptcy estate. Thus the extended time period allowed in Federal Rule Civil Procedure 4(j) is not appropriate. Dahowski at 879.

Summary

Technically, Defendants still have not been timely served, but do have actual notice.

This issue appears to be one of first impression for this Court. Because public policy requires speedy administration of the bankruptcy administration and because the Court at its hearing to consider debtor's motion to dismiss ordered the plaintiff to obtain service within the statutory time period, the Court may incorporate the 120 day limit established by Fed. R. Civ. P. 4(j). Extension beyond the 120 days then would be permitted only upon a showing of good cause by the party who initiated the service.

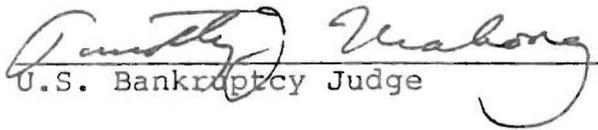
However, to adopt such a view of the Rules, after the fact, would not be appropriate. Since defendants have received the summons and complaint and had actual notice timely, this Court will not dismiss this case. The Rules are not extremely clear and to dismiss would deny Plaintiff a day in Court, through no fault of Plaintiff. On the other hand, counsel for plaintiff failed to timely follow the Court's order of September 29, 1986. Failure to properly serve the Defendants shortly after September 29, 1986, caused the need for the evidentiary hearing. Plaintiff's counsel should be required to compensate Defendants for reasonable legal fees incurred in preparation for trial and for the actual trial, including travel expenses. Expenses incurred by Defendants, other than legal fees, are not to be compensated.

Defendant to provide Plaintiff's counsel with itemization of fees and expenses within 30 days. If Plaintiff's counsel disputes the reasonableness of the fees, a hearing will be scheduled at the request of either party.

Defendants to move or plead to amended complaint within 20 days.

DATED: April 13, 1987.

BY THE COURT:


U.S. Bankruptcy Judge

Copies to:

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