

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

In re LOUIS J. PEARLMAN, <i>et al.</i> ,)	
)	
Debtor.)	Case No. 6:07-bk-00761-KSJ
)	Chapter 11
)	Jointly Administered
_____)	
SONEET R. KAPILA, as CHAPTER 11)	
TRUSTEE for TRANS CONTINENTAL)	
AIRLINES, INC., TRANS)	Adversary No. 6:09-ap-00743-KSJ
CONTINENTAL RECORDS, INC., and)	
LOUIS J. PEARLMAN ENTERPRISES,)	
INC.,)	
)	
Plaintiff,)	
vs.)	
)	
DE BEAUBIEN, KNIGHT, SIMMONS,)	
MANTZARIS & NEAL, LLP,)	
)	
Defendant.)	
_____)	

ORDER DENYING DEFENDANT’S MOTION TO DISMISS

The Chapter 11 trustee, Soneet R. Kapila, filed this adversary proceeding on May 3, 2009 (Document No. 1). Pursuant to the Federal Rule of Civil Procedure 4(m), made applicable to this adversary proceeding by Bankruptcy Rule 7004, the trustee was required to serve the complaint and related summons on defendant, De Beaubien, Knight, Simmons, Mantzaris & Neal, LLP, within 120 days of filing the complaint (on or before August 31, 2009). The trustee failed to timely serve the complaint until September 1, 2009, missing the deadline by one day. Defendant now moves (Doc. No. 5) for dismissal of the complaint pursuant to Federal Rules of Civil Procedure 4(m) and 12(b).

The trustee does not dispute that service was untimely by one day. He urges the Court to not dismiss the adversary proceeding arguing that Rule 4(m) contemplates dismissal without

prejudice, which is not possible here because the applicable statutes of limitations have run (Doc. No. 14). He argues that his (or his attorney's) error was made in good faith and that a one day extension of the service deadline would not unduly prejudice the defendant.

First, the trustee argues cause exists to extend the service deadline. Here, the trustee filed several hundred adversary proceedings around the same time. In this particular adversary proceeding, however, he consented to a tolling agreement that caused his attorneys to treat this action differently than the others. Unfortunately, by placing this adversary on a different track, the attorneys overlooked the service deadline and failed to serve the complaint timely.

The Court does not find an attorney's oversight good cause for the trustee's failure to timely serve the complaint. Attorney error or inadvertence does not constitute good cause, regardless of how many adversary proceedings a trustee or his attorney is handling. "Good cause exists only when some outside factor, such as reliance on faulty advice rather than inadvertence or negligence, prevented service." *Prisco v. Frank*, 929 F.2d 603, 604 (11th Cir. 1991) (discussing "good cause" under former Rule 4(j)), *superseded in part*, as stated in *Horenkamp v. Van Winkle and Co., Inc.*, 402 F.3d 1129, 1132 n. 2 (11th Cir. 2005).

Second, the trustee argues that, regardless of cause, the Court should exercise her discretion to extend the service deadline by one day. "Rule 4(m) grants discretion to the district court to extend the time for service of process even in the absence of a showing of good cause." *Horenkamp*, 402 F.3d at 1132. As in *Horenkamp*, a dismissal of this complaint would foreclose plaintiff's claim because the statute of limitations has run. *See id.* at 1133. Dismissal with prejudice for failing by one day to timely serve a complaint is a harsh consequence. Moreover, the Court finds no undue prejudice to defendant; defendant knew of this lawsuit well in advance of being served and a one day delay in service constitutes virtually no prejudice. In *Horenkamp*, which approved a 29 day extension of the service deadline, the Eleventh Circuit Court of

Appeals quoted the Advisory Committee Note to Rule 4(m) and recognized that circumstances like these may favor the exercise of a court's discretion to extend the time for service of process under Rule 4(m). *Id.* at 1132-33 (“Relief may be justified, for example, if the applicable statute of limitations would bar the refiled action . . .”).

For these reasons, the Court denies defendant's motion to dismiss the complaint. The time for plaintiff to serve the complaint is extended by one day, to include September 1, 2009, the day upon which service properly was effected. The defendant is directed to file an answer in this adversary proceeding no later than **May 13, 2011**. The parties are directed otherwise to comply with the Adversary Proceeding Case Management Order (Doc. No. 3414 in Main Case 6:07-bk-761-ksj).

DONE AND ORDERED in Orlando, Florida, on April 7, 2011.



KAREN S. JENNEMANN
United States Bankruptcy Judge

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