

**UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION**

In re:

CELINA C. GORUT

Case No. 6:09-bk-10634-ABB  
Chapter 7

Debtors.

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FLORIDA POWER CORP. d/b/a,  
PROGRESS ENERGY FLORIDA

Plaintiff,

Adv. Pro. No. 6:11-ap-00323-ABB

vs.

CELINA C. GORUT,

Defendant.

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**ORDER**

This matter came before the Court on the Amended Motion for Entry of Default (Doc. No. 7) filed by the Plaintiff Florida Power Corporation d/b/a Progress Energy Florida (“Plaintiff”) against the Debtor/Defendant Celina Gorut (“Debtor”). An evidentiary hearing was held on April 4, 2012 at which counsel for the Plaintiff was present. The Debtor failed to appear. Plaintiff’s Motion is due to be denied for the reasons set forth herein.

***Event Chronology***

The Debtor filed the above-captioned Chapter 7 case on July 23, 2009. Plaintiff was not listed as a creditor in the Debtor’s Schedules. Plaintiff filed a Complaint (Doc. No. 1) on December 15, 2011 requesting that a debt resulting from Debtor’s unauthorized

and unlawful use of the electric utility service be deemed nondischargeable pursuant to 11 U.S.C. Sections 523(a)(4), and 523(a)(6). The Court issued a Summons on December 15, 2011 (Doc. No. 2). Debtor is represented by counsel in the main case.

Plaintiff filed a Motion for Entry of Default against the Debtor on January 19, 2012. The Motion was denied for insufficient service of process pursuant to Federal Rule of Civil Procedure 7004 and an Order was entered on February 1, 2012 (Doc. No. 4). The Clerk's default was not entered. Plaintiff filed an Affidavit of Service (Doc. No. 6) and a Motion for Entry of Final Default Judgment (Doc. No. 7).

The Affidavit of Service shows Plaintiff engaged a private process server to effect personal service on the Debtor. The private process server hand-delivered a copy of the Complaint and Summons to the Debtor's daughter at 15451 SW 302<sup>nd</sup> St., Homestead, FL 33033, on December 21, 2011. The Affidavit of Service states Debtor's daughter is a co-resident at this address and she is thirty years old. The statements in the Affidavit fail to provide information sufficient to substantiate that this location is the Debtor's usual place of abode. The Debtor's address as shown in the bankruptcy petition is 864 Goldenbough Rd, Lake Wales, FL 33898. This is the address where she has received every notice concerning her bankruptcy case. The Debtor has not filed a change of address with this Court. Plaintiff did not present any evidence to establish the address in Homestead is the Debtor's residence or usual place of abode.

There is no evidence in the record that a copy of the Complaint and Summons were delivered to the Debtor personally or to a person of suitable age at Debtor's usual place of abode.

Plaintiff has not served the Debtor and her counsel with the Complaint and a valid summons within the fourteen-day service period of Federal Rule of Bankruptcy Procedure 7004(e) and the 120-day service period of Federal Rule of Civil Procedure 4(m).

The Clerk of Court has not entered a default pursuant to Federal Rule of Bankruptcy Procedure 7055(a), which is required before Plaintiff can request entry of a default judgment.

Plaintiff's Motion for Entry of Final Default Judgment is due to be denied.

### ***Conclusions of Law***

Plaintiff has made several errors regarding the filing and service of the Complaint which impede the entry of a default judgment at this time. The Court issued a Summons on December 15, 2011 and Plaintiff was required to serve the Complaint and Summons on Debtor and her counsel within fourteen days of December 15, 2011 by one of the delivery methods delineated in Federal Rule of Bankruptcy Procedure 7004. FED. R. BANKR. P. 7004(a), (b), (e), (g). Personal service to an individual can be accomplished pursuant to Federal Rule of Civil Procedure 4(e)(2) (applicable to bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 7004(a)) by "delivering a copy of the summons and of the complaint to the individual personally," "leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there," or "delivering a copy of each to an agent authorized by appointment or by law to receive service of process."<sup>1</sup> FED. R. CIV. P. 4(e). Federal Rule

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<sup>1</sup> Federal Rule of Civil Procedure 4(e)(1) gives plaintiff the option of serving the summons and complaint in the manner prescribed by the law of the forum state as an alternative to the 'federal'

of Bankruptcy Procedure 7004(b) allows an additional method of personal service by first class mail. FED. R. BANKR. P. 7004(b). A summons not served within fourteen days of its issuance becomes invalid and an alias summons must be obtained. FED. R. BANKR. P. 7004(e).

Plaintiff engaged a process server to execute personal service of the Complaint and Summons pursuant to Federal Rule of Civil Procedure 4(e). Plaintiff's service of process on the Debtor failed to comply with the requirements of Rule 4(e). The process server did not hand-deliver the summons and complaint to the Debtor personally. There is no evidence on the record to establish that the address in Homestead is the Debtor's dwelling or usual place of abode or that the Debtor's daughter is an agent authorized by appointment or by law to receive service of process on Debtor's behalf. Substitute service on the Debtor's daughter at this address was improper.

Plaintiff has not served the Complaint and Summons on the Debtor or her counsel. The Summons became invalid fourteen days after its issuance.

The time periods for effecting service of process have expired. The fourteen-day service period of Rule 7004(e) expired and the original summons is invalid. No alias summons has been issued.

Plaintiff was required to serve the Complaint and a valid summons upon the Debtor and her counsel within 120 days of December 15, 2011 pursuant to Federal Rule

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means of service set out in subsection 4(e)(2). The applicable Florida Statute provides: "(1)(a) Service of original process is made by delivering a copy of it to the person to be served with a copy of the complaint, petition, or other initial pleading or paper or by leaving the copies at his or her usual place of abode with any person residing therein who is 15 years of age or older and informing the person of their contents ...". Fla. Stat. §48.031(1)(a). Service of process requirements in Florida are parallel to the service procedures outlined in Federal Rule of Civil Procedure 4(e)(2).

of Civil Procedure 4(m) (applicable to bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 7004(a)). Plaintiff has not served the Debtor and her counsel with the Complaint and a valid summons. The 120-day service period has expired. Delineate

The entry of a default judgment is a two-step process governed by Federal Rule of Civil Procedure 55 (applicable to bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 7055): the Clerk of Court must enter a default pursuant to subsection (a), followed by the entry of a final default judgment pursuant to subsection (b). FED. R. CIV. P. 55. Plaintiff's Motion for Entry of Final Default Judgment is premature given the Clerk of Court has not entered a default as required by subsection (a).

The Motion for Entry of Final Default Judgment is due to be denied because the Plaintiff has failed to effect proper service of the Summons and Complaint on the Debtor and Plaintiff did not obtain an entry of default by the Clerk of Court prior to moving for default judgment.

The Court has discretion "to extend the time for service for an appropriate period" upon the showing of "good cause." FED. R. CIV. P. 4(m). Given the serious allegations made in the Complaint good cause exists to allow Plaintiff an opportunity to conduct service.

Debtor is required to file a notice of new address if she has moved from the address shown on the bankruptcy petition. Debtor must file and serve on Plaintiff the notice of her current address within fourteen (14) days of the date of entry of this Order.

Plaintiff shall request the Clerk of Court to issue an alias summons. Plaintiff shall conduct service and file proofs of service pursuant to the governing rules within thirty-

five (35) days of the date of entry of this Order. Plaintiff's failure to timely and fully comply with this Order shall result in the dismissal of this adversary proceeding.

Accordingly, it is

**ORDERED, ADJUDGED and DECREED** that the Debtor's Motion for Entry of Final Default Judgment (Doc. No. 7) is hereby **DENIED**; and it is further

**ORDERED, ADJUDGED and DECREED** that the Debtor, within fourteen (14) days of the date of entry of this Order, shall file and serve on Plaintiff a notice setting forth her current address; and it is further

**ORDERED, ADJUDGED and DECREED** that upon Plaintiff's request the Clerk of Court shall issue an alias summons; and it is further

**ORDERED, ADJUDGED and DECREED** that Plaintiff, within thirty-five (35) days of the date of entry of this Order, shall conduct service of the Complaint and alias summons upon the Debtor and her counsel and file proofs of service pursuant to the provisions of Federal Rule of Bankruptcy Procedure 7004 and Federal Rule of Civil Procedure 4. Plaintiff's failure to timely and fully comply with this Order shall result in the dismissal of this adversary proceeding.

Dated this 14th day of June, 2012.

/s/ Arthur B. Briskman  
ARTHUR B. BRISKMAN  
United States Bankruptcy Judge