

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION

In re:

Case No. 6:05-bk-00358-ABB  
Chapter 7

CHARACTER CORNER, INC.,

Debtor.

CARLA MUSSELMAN, TRUSTEE,

Plaintiff,

vs.

Adv. Pro. No. 6:07-ap-00005-ABB

CHRISTOPHER WEISING,

Defendant.

CARLA MUSSELMAN, TRUSTEE,

Plaintiff,

vs.

Adv. Pro. No. 6:07-ap-00006-ABB

KATHY WEISING,

Defendant.

**ORDER**

This matter came before the Court on the Motions to Dismiss Complaints (collectively, "Motions to Dismiss")<sup>1</sup> filed by Christopher Weising and Kathy Weising, the Defendants herein (collectively, the "Defendants"), seeking dismissal of the Complaints<sup>2</sup> filed against them by Carla Musselman, the Chapter 7 Trustee and the Plaintiff herein ("Trustee"). A hearing was held on June 4, 2007 at which counsel for the Plaintiff and counsel for the Defendants appeared. The parties were granted leave to submit closing briefs.<sup>3</sup> The Court

<sup>1</sup> Doc. Nos. 8; 8. Defendants subsequently filed Memoranda of Law in support of their Motions to Dismiss (Doc. Nos. 16; 16).

<sup>2</sup> Doc. Nos. 1; 1.

<sup>3</sup> All parties filed closing briefs (Doc. Nos. 18, 19, 22; 18, 19) and the Plaintiff filed an Affidavit (Doc. Nos. 23; 20) setting forth the service actions taken by counsel.

makes the following findings and rulings after reviewing the pleadings and evidence, and being otherwise fully advised in the premises.

Character Corner, Inc, the Debtor herein, filed the above-captioned Chapter 7 bankruptcy case on January 14, 2005. The Trustee filed the Complaints on January 12, 2007, shortly before the expiration of the statutes of limitations for certain trustee strong-arm recovery actions. Summonses were issued by the Court on January 12, 2007.

The Trustee seeks various relief against the Defendants in the Complaints. She seeks to avoid and recover from Kathy Weising certain transfers on the basis the transfers are allegedly preferential or fraudulent. She cites Sections 544 and 547 of the Bankruptcy Code in the Complaint. The three-count Complaint filed against Christopher Weising seeks to, among other things, set aside and recover various transfers made to Christopher Weising, "Company Outlet of LBV, Inc.," and a number of other persons and entities.

The Defendants contend the Trustee failed to timely serve the Complaints and summonses and the Complaints must be dismissed for lack of personal jurisdiction. Counsel for the Trustee served the Complaints and summonses on the Defendants via first-class mail within 120 days of the filing of the Complaints in accordance with Federal Rule of Civil Procedure 4(m). Federal Rule of Bankruptcy Procedure 7004(e), requires a summons and complaint "be deposited in the mail within 10 days after the summons is issued." The Trustee's counsel acknowledges service was not made within the ten-day period of Rule 7004(e). Counsel did not request the issuance of new summonses after the ten-day period expired. The time for making service pursuant to Federal Rule of Civil Procedure 4(m) has expired.

A summons expires after ten days and is without validity. Fed. R. Bankr. P. 7004(e) ("If a summons is not timely delivered or mailed, another summons shall be issued and served."); *In re Goforth*, 183 B.R. 560, 561 (Bankr. W.D. Ark. 1995). The Trustee's attempted service of the summonses after the Rule 7004(e) deadline had passed was a nullity. *In re Greater Se. Cmty. Hosp. Corp. I*, Case No. 02-2250, Adv. No. 05-10040, 2006 WL 3289279, at \*1 (Bankr. D.D.C. Nov. 8, 2006). The summonses were "stale and ineffective" when the Trustee attempted service. *Id.* The Trustee has not shown good cause

for failing to meet the ten-day service requirement of Rule 7004(e).<sup>4</sup>

Dated this 22<sup>nd</sup> day of June, 2007.

A court, in the absence of good cause, may exercise its discretion and enlarge the 120-day service period of Federal Rule of Civil Procedure 4(m). In re Cowles, 343 B.R. 18, 20 (Bankr. D. Conn. 2006). The reasons for the service delay and the effects of granting or denying an extension are relevant to an enlargement determination. Id.

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

The statutes of limitations for certain avoidance actions may bar new adversary proceedings, to the prejudice of the Trustee, if the adversary proceedings were to be dismissed. The prejudice to the Trustee in dismissing the adversary proceedings outweighs the prejudice to the Defendants in enlarging the time period for service. The equities involved support an exercise of discretion to enlarge the 120-day service period of Federal Rule of Civil Procedure 4(m).

Accordingly, it is

**ORDERED, ADJUDGED and DECREED** that the Defendants' Motions to Dismiss are hereby **DENIED**; and it is further

**ORDERED, ADJUDGED and DECREED** that the Clerk shall issue new summonses in the above-captioned adversary proceeding, and further summonses upon request of the Trustee if she fails to make service within the ten-day period of Federal Rule of Bankruptcy Procedure 7004(e); and it is further

**ORDERED, ADJUDGED and DECREED** that the time pursuant to Federal Rule of Civil Procedure 4(m) to serve the summonses and Complaints is enlarged to July 25, 2007; and it is further

**ORDERED, ADJUDGED and DECREED** that status conferences will be held in the above-captioned adversary proceedings on July 30, 2007 at 10:30 a.m.

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<sup>4</sup> A summons is issued by the Court immediately after a complaint is filed and is sent to the plaintiff electronically via the Court's CM/ECF system. If a plaintiff cannot serve the summonses within the ten-day period the plaintiff must obtain a new summons from the Court.