

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

In re:

Case No. 8:02-bk-15645-PMG
Chapter 7

LINDA M. BOCZAR,
a/k/a Linda Morrison,
a/k/a Linda Morrison Boczar,

Debtor.

ALICE BERGER AND DAVID
BERGER,

Plaintiffs,

vs.

Adv. No. 8:05-ap-168-PMG

LINDA M. BOCZAR,

Defendant.

**ORDER DENYING MOTION TO SET
ASIDE ORDER DISMISSING ADVERSARY
PROCEEDING**

THIS CASE came before the Court for hearing to consider the Motion to Set Aside Order Dismissing Adversary Proceeding filed by the Plaintiffs, Alice Berger and David Berger.

The proceeding was dismissed pursuant to a Motion to Dismiss Adversary Proceeding and Objection to Adversary Proceeding filed by the Debtor, Linda M. Boczar. The Court finds that the Order of dismissal should not be set aside or reconsidered, and that the proceeding should stand as dismissed.

Background

The Debtor filed a petition under Chapter 7 of the Bankruptcy Code on August 12, 2002. The Plaintiffs were listed as creditors on the Debtor's Schedule of Creditors Holding General Unsecured Claims.

On August 17, 2002, the "Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines"

was served on all creditors scheduled by the Debtor. (Doc. 2).

The deadline for filing a Complaint objecting to the discharge of the Debtor or to determine the dischargeability of certain debts was November 12, 2002.

On April 6, 2004, after the bankruptcy case had been pending for more than one and one-half years, the Debtor converted her Chapter 7 case to a case under Chapter 13. (Doc. 99).

On December 29, 2004, the Chapter 13 case was reconverted to a case under Chapter 7. (Doc. 187).

On January 3, 2005, the Clerk of the Court issued a Notice of Conversion of Case to Chapter 7. (Doc. 190). The Notice stated that "March 28, 2005, is fixed as the last day for filing a complaint objecting to the discharge of the Debtor(s) and for filing a complaint to determine the dischargeability of any debt." On March 22, 2005, the Plaintiffs filed a Motion to Extend Time to File Complaint to Obtain a Determination of the Dischargeability of a Debt. (Doc. 210). On March 29, 2005, the Court entered an Order granting the Plaintiffs' Motion, and extended the deadline for the Plaintiffs to file a Complaint until April 27, 2005. (Doc. 211).

On March 29, 2005, the Plaintiffs commenced the above-captioned adversary proceeding by filing a Complaint to Obtain a Determination of the Dischargeability of a Debt. (Adv. Doc. 1).

The Summons in the adversary proceeding was issued by the Clerk of Court on March 29, 2005, and forwarded to the Plaintiffs' attorney for service on the Debtor.

No proof of service appears in the record.

On January 18, 2006, the Court entered an Order to Show Cause and Order of Conditional Dismissal of Adversary Proceeding. (Adv. Doc. 3). The Order was issued for the reason that no action had been taken in the proceeding for more than 180 days.

On February 13, 2006, the Plaintiffs filed a Response to the Order to Show Cause. (Doc. 5). Based on the Plaintiffs' Response, a Status Conference was conducted in the case on April 11, 2006. The Plaintiffs, through counsel, and the Debtor both appeared at the Status Conference.

On May 8, 2006, the Debtor filed an "Objection to Adversary Proceeding and Motion to Dismiss." (Doc. 10). In the Motion, the Debtor alleged that she had no knowledge of the proceeding until she attended the Status Conference on April 11, that she was never served with notice of the proceeding, and that the "time allowed for filing adversary proceedings in this case is long passed."

A hearing was conducted on the Debtor's Motion on July 11, 2006. The Debtor appeared at the hearing. No appearance was entered on behalf of the Plaintiffs. At the conclusion of the hearing, the Court presented the reasons for its decision in open court, and dismissed the adversary proceeding.

On July 12, 2006, the Court entered an Order Dismissing the Adversary Proceeding in accordance with its oral ruling at the hearing. (Doc. 13).

On August 8, 2006, the Plaintiffs filed the Motion to Set Aside Order Dismissing Adversary Proceeding that is currently under consideration. (Doc. 18). In the Motion, the Plaintiffs primarily assert that they had not attended the hearing on July 11, 2006, because of their mistaken belief that the hearing had been continued, and request the opportunity to present evidence in this matter.

Discussion

The Court finds that the Plaintiffs' Motion to Set Aside Order Dismissing Adversary Proceeding should be denied. The proceeding should stand as dismissed because the Complaint was not timely filed, and because the Plaintiffs have not provided proof that the Summons and Complaint were served on the Debtor.

A. Timeliness

The Debtor initially filed a petition under Chapter 7 of the Bankruptcy Code on August 12, 2002. The case was converted to a case under Chapter 13 on April 6, 2004, and subsequently reconverted to a case under Chapter 7 on December 29, 2004.

Rule 1019(2) of the Federal Rules of Bankruptcy Procedure provides:

Rule 1019. Conversion of a Chapter 11 Reorganization Case, Chapter 12 Family Farmer's Debt Adjustment Case, or Chapter 13 Individual's Debt Adjustment Case to a Chapter 7 Liquidation Case

(2) New Filing Periods. A new time period for filing claims, a complaint objecting to discharge, or a complaint to obtain a determination of dischargeability of any debt shall commence pursuant to Rules 3002, 4004, or 4007, provided that a new time period shall not commence if a chapter 7 case had been converted to a chapter 11, 12, or 13 case and thereafter reconverted to a chapter 7 case and the time for filing claims, a complaint objecting to discharge, or a complaint to obtain a determination of the dischargeability of any debt, or any extension thereof, expired in the original chapter 7 case.

F.R.Bankr.P. 1019(2)(Emphasis supplied).¹ "This prevents creditors from having two chapter 7 opportunities to assert the same complaints." 9 Collier on Bankruptcy ¶1019.04[2] (Alan N. Resnick & Henry J. Sommer eds., 15th ed. Rev.).

In this case, the deadline to file dischargeability complaints in the original Chapter 7 was November 12, 2002. The Plaintiffs were served with the Notice of Chapter 7 and notice of the deadline, but did not file a complaint within the time permitted.

The case was converted to a Chapter 13 on April 6, 2004, more than sixteen months after the bar date had passed, and later reconverted to a case under Chapter 7 on December 29, 2004. Consequently, pursuant to the clear language of Rule 1019(2), no new time period for filing dischargeability complaints commenced upon the reversion to a Chapter 7 case. "The prohibition against the filing of any new claims and complaints in a reconverted chapter 7 case is intended to apply to those who had a full opportunity to file their claims and complaints in the first case, but failed to do so." In re Hahn, 167 B.R. 693, 696 (Bankr. N.D. Ga. 1994)(Citations omitted).

The Court acknowledges, of course, that the Notice of Conversion of Case to Chapter 7 dated January 3, 2005, erroneously included a statement that March 28, 2005, was fixed as the last day to file a dischargeability complaint. The erroneous statement, however, did not create a new bar date under the circumstances of this case.

¹ Interim Bankruptcy Rule 1019(2), as approved by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States and adopted by this Court on October 3, 2005, contains the same provision as it relates to this issue.

The Court's decision in In re Dipalma, 94 B.R. 546 (Bankr. N.D. Ill. 1988) is directly on point. In Dipalma, the debtor initially filed a Chapter 7 case. After the bar date for filing dischargeability complaints had passed, the case was converted to a case under Chapter 13. A subsequent order reconverting the case to Chapter 7 erroneously reset the deadline for filing complaints. In re Dipalma, 94 B.R. at 547. The Court found that the bar date for filing dischargeability complaints was not extended.

The language of Rule 1019(3) [now Rule 1019(2)] is unambiguous. If a chapter 7 case has been converted to a chapter 13 case then reconverted to a chapter 7 liquidation, no new time period will be allowed where the original bar date has expired during the pendency of the original chapter 7 proceeding and the creditors have had a full opportunity to file their claims and complaints. (Citations omitted).

Id. at 548. With specific reference to the new bar date erroneously set forth in the order, the Court stated:

Therefore, since the original bar date was before the date of the order that converted the case, Rule 1019(3) [now Rule 1019(2)] prohibited the setting of a new time period for filing objections to discharge or complaints to determine dischargeability. The December 31, 1988 bar date set by the September 27, 1988 order is thus unavailable to [the creditor].

Id. at 549. See also In re Kirkpatrick, 120 B.R. 309, 312 (Bankr. S.D.N.Y. 1990)(The failure to file a dischargeability complaint during the original Chapter 7 was due solely to the creditor's inaction, and the subsequent conversions of the case will not substitute for the creditor's initial untimeliness.)

Pursuant to Rule 1019(2) of the Federal Rules of Bankruptcy Procedure, the Plaintiffs' Complaint was not timely filed, and was therefore properly dismissed. The Plaintiffs' Motion to Set Aside Order Dismissing Adversary Proceeding should be denied.

B. Proof of service

As a second basis for denying the Motion to Set Aside Order Dismissing Adversary Proceeding, the Court finds that the Plaintiffs have not provided proof that the

Summons and Complaint were properly served on the Debtor.

No documents appear in the record of this adversary proceeding as proof that the Plaintiffs served the Debtor with a copy of the Summons and Complaint.

Rule 7004(e) of the Federal Rules of Bankruptcy Procedure provides that the complaint may be served by depositing the summons and complaint in the mail within ten days after the summons is issued. The plaintiff is responsible for service of the summons and complaint. F.R.Civ.P. 4(c).

Rule 4(l) of the Federal Rules of Civil Procedure, as made applicable to this proceeding by Rule 7004(a) of the Federal Rules of Bankruptcy Procedure, provides in part:

Rule 4. Summons

...

(l) Proof of Service. If service is not waived, the person effecting service shall make proof thereof to the court. If service is made by a person other than a United States marshal or deputy United States marshal, the person shall make affidavit thereof.

F.R.Civ.P. 4(l). Additionally, Rule 4(m) of the Federal Rules of Civil Procedure provides:

Rule 4. Summons

...

(m) Time Limit for Service. If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time.

F.R.Civ.P. 4(m). "Service of process is the physical means by which personal jurisdiction is obtained over a party." In re Chase & Sanborn Corp., 835 F.2d 1341, 1344 (11th Cir. 1988). Absent evidence that service was effected, therefore, the Court cannot determine whether personal jurisdiction over the defendant was properly acquired. In re Soto, 221 B.R. 343, 350 (Bankr. E.D. Pa. 1998).

In this case, the Plaintiffs have not filed proof that service was effected on the Debtor pursuant to Rule 4(l) of the Federal Rules of Civil Procedure.

The Complaint was filed in March of 2005, and a Summons was issued by the Clerk of Court at that time. The Summons was forwarded to Plaintiffs' counsel for service on the same date that the Complaint was filed. The Debtor did not respond to the Complaint, and no further activity occurred in the case until January 18, 2006, when the Court issued an Order to Show Cause to the Plaintiffs for lack of prosecution.

Plaintiffs' counsel thereafter appeared at a Status Conference in the case on April 11, 2006, at which time the Debtor advised the Court that she had learned of the proceeding for the first time that day.

Approximately one month later, on May 8, 2006, the Debtor filed a Motion to Dismiss the Adversary Proceeding. (Adv. Doc. 10). In the Motion, the Debtor specifically alleged:

1. Debtor had no knowledge of these adversary proceedings until she arrived for the Hearing on April 11, 2006, for the granting of her discharge.
2. Debtor was never served with notice of these adversary proceedings.

(Adv. Doc. 10, p. 1). The Court conducted a hearing on the Motion to Dismiss on July 11, 2006. The Plaintiffs did not appear at the hearing.

The Court entered an Order granting the Debtor's Motion, and dismissed the proceeding on July 12, 2006. (Adv. Doc. 13).

In summary, the Debtor has asserted since April 11, 2006, that service of process was defective in this case. Plaintiffs' counsel was present at the April 11, 2006, hearing when the Debtor first claimed that she had never been served. Further, Plaintiffs' counsel subsequently received a copy of the Motion to Dismiss in which the Debtor expressly alleged that she had never been served.

Despite Plaintiffs' notice of the Debtor's assertions for at least five months, however, no corrective measures have been taken to establish that service was properly effected. No proof of service was filed with the Court as of the hearing on the Motion to Dismiss or the hearing on the Plaintiffs' Motion to Set Aside the Order of Dismissal, for example, and no proof of service has been filed as of the date of this Order.

Absent evidence of the fact of service in compliance with Rule 4(m), the Court cannot conclude that personal jurisdiction was acquired over the Debtor. The Court finds that the proceeding was properly dismissed, and that the Plaintiffs' Motion to Set Aside Order Dismissing Adversary Proceeding should be denied.

Conclusion

The Plaintiffs' Motion to Set Aside Order Dismissing Adversary Proceeding should be denied. The proceeding should stand as dismissed because the Complaint was not timely filed, and because the Plaintiffs have not provided proof that the Summons and Complaint were properly served on the Debtor.

Accordingly:

IT IS ORDERED that the Motion to Set Aside Order Dismissing Adversary Proceeding filed by the Plaintiffs, Alice Berger and David Berger, is denied.

DATED this 21st day of February, 2007.

BY THE COURT

/s/ Paul M. Glenn
PAUL M. GLENN
Chief Bankruptcy Judge