

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Western Division

In re:)	Bankr. No. 99-50465
THOMAS W. STANTON)	Chapter 7
Soc. Sec. No. 504-52-5315)	
and)	
MARY STANTON)	
Soc. Sec. No. 504-68-8954)	
Debtors.)	
CONNIE DREW)	Adv. No. 99-5022
Plaintiff,)	
-vs-)	MEMORANDUM OF DECISION
)	RE: DEFENDANTS-DEBTORS'
THOMAS W. STANTON)	MOTION TO DISMISS
MARY STANTON)	
Defendants.)	

The matter before the Court is the Motion to Dismiss filed by Defendants-Debtors. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Memorandum of Decision and accompanying order shall constitute the Court's findings and conclusions under F.R.Bankr.P 7052. As set forth below, the Court concludes that Defendants-Debtors' Motion must be denied.

I.

Thomas W. and Mary Stanton (Debtors) filed a Chapter 7 petition on September 20, 1999. The Clerk served a Notice of Commencement of case in which she advised creditors that December 20, 1999 was the last date to file a complaint objecting to the entry of Debtors' discharge or to the dischargeability of a particular debt under certain subsections of § 523(a).

On December 20, 1999, Connie Drew ("Plaintiff") filed a dischargeability complaint under 11 U.S.C. § 523(a). Under F.R.Bankr.P. 7004(e), Plaintiff had through December 30, 1999 to serve the summons and complaint. She served the complaint and

subpoena on January 3, 2000. On January 20, 2000, Debtors moved to dismiss the complaint on the grounds that it was filed untimely and served untimely.

II.

Under F.R.Bankr.P. 4007(c), the deadline for filing a complaint objecting to the dischargeability of a particular debt under §§ 523(a)(2), (4), (6), or (15) is sixty days after the first date set for the meeting of creditors. The deadline in Rule 4007(c) must be strictly construed unless a timely extension of time to file is obtained under Rule 4007(c). *KBHS Broadcasting Co. v. Sanders (In re Bozeman)*, 226 B.R. 627, 630 (B.A.P. 8th Cir. 1998); *In re Walgamuth*, 144 B.R. 465, 467-68 (Bankr. D.S.D. 1992) (citing several cases therein).

Our resolution of this case turns on the construction of the word "filed" in Bankruptcy Rule 4007(c). That rule provides: "A complaint to determine the dischargeability of any debt pursuant to § 523(c) of the Code shall be filed not later than 60 days following the first date set for the meeting of creditors held pursuant to § 341(a)."

Prior to December 1, 1991, exactly what steps were required to "file" a document with the court was a matter of much controversy and ambiguity. See FEDERAL PRACTICE AND PROCEDURE § 1153 (Charles Wright & Arthur Miller, eds., 2d ed. 1987). Effective December 1, 1991, however, Rule 5 of the Federal Rules of Civil Procedure has been amended to provide, in pertinent part: "The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices." Therefore, as of December 1, 1991, filing of a complaint under the Federal Rules of Civil Procedure, which are incorporated into the Bankruptcy Rules under Bankruptcy Rule 7005, is accomplished when the complaint is delivered to the clerk of the appropriate court.

New Boston Development Co. v. Toler (In re Toler), 999 F.2d 140, 141-142. After reviewing several other conforming and contrary decisions, the court in *Toler* concluded that a complaint is filed when it is presented to the clerk, notwithstanding any non-compliance with a local rule or failure to file it with a summons. *Id.* at 142. Accord *American Express Travel Related Services Co. v. Farley*, 146 B.R. 82 (S.D.N.Y. 1992).

Likewise, this Court concludes that Rule 4007(c) requires only that the complaint be filed on or before the deadline date. That happened here. That Plaintiff did not serve the complaint and summons until several days later does not eviscerate the timely filing of the complaint. Accordingly, Defendants-Debtors' Motion to Dismiss will be denied to the extent that dismissal was sought because the complaint was not timely filed.

III.

Defendants-Debtors have also moved to dismiss Plaintiff's complaint because it was not timely served. Federal Rule of Bankruptcy Procedure 7004(e) (as amended December 1, 1999) provides that the complaint and summons must be served within ten days after the summons is issued. In this adversary proceeding, the Clerk issued the summons on December 20, 1999. Plaintiff had until December 30, 1999 to have the summons and complaint delivered or mailed. That did not happen.

This failure, however, is not fatal. Rule 7004(e) states that another summons shall be issued if the first is not timely

delivered or mailed. Further, F.R.Bankr.P. 7004, which incorporates F.R.Civ.P. 4(m), gives Plaintiff 120 days after the complaint is filed to serve the summons and complaint. In this adversary proceeding, Plaintiff's 120 days have not expired. Therefore, she may request another summons and perfect service of this alias summons and complaint on Defendants-Debtors. See *Krikava v. Butler (In re Krikava)*, 236 B.R. 701, 705-06 (Bankr. D. Neb. 1999); *Kadlecek v. Ferguson (In re Ferguson)*, 204 B.R. 202, 206-07 (Bankr. N.D. Ill. 1997). Accordingly, Defendants-Debtors' Motion to Dismiss on the grounds that the complaint was not timely served will be denied.

Defendants-Debtors have already answered and filed a motion for summary judgment. Upon notice from Defendants-Debtors' counsel that they are waiving Plaintiff's service of the complaint and an alias summons, the Court will proceed to issue a scheduling order on Defendants-Debtors' Motion for Summary Judgment. If not, a scheduling order will be withheld until proper service is made.

Dated this 30 day of February, 2000.

BY THE COURT:


Irvin N. Hoyt
Bankruptcy Judge



Charles L. Nail, Jr., Clerk

Deputy Clerk

(SEAL)

I hereby certify that a copy of this document was mailed, hand delivered, or faxed this date to the parties on the attached service list.

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FEB 03 2000

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court, District of South Dakota

NOTICE OF ENTRY
Under F.R. Bankr.P. 9022(a)
Entered

FEB 03 2000

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

Case: 99-05022 Form id: 122 Ntc Date: 02/03/2000 Off: 3 Page : 1
Total notices mailed: 6

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