



IT IS ORDERED as set forth below:

Date: February 21, 2012

**W. Homer Drake
U.S. Bankruptcy Court Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION**

IN THE MATTER OF:	:	CASE NUMBERS
	:	
WILLIS RICHARD SCOTT	:	BANKRUPTCY CASE
REBECCA SUE SCOTT,	:	NO. 10-12764-WHD
	:	
Debtors.	:	
_____	:	
	:	
GRIFFIN E. HOWELL, III,	:	
	:	
Plaintiff,	:	ADVERSARY PROCEEDING
	:	NO. 11-1084
v.	:	
	:	
BOBBIE HOLMES,	:	IN PROCEEDINGS UNDER
	:	CHAPTER 7 OF THE
Defendant.	:	BANKRUPTCY CODE

ORDER

Before the Court is the Motion to Dismiss Complaint, filed by Bobbie Holmes (hereinafter the "Defendant"). The matter arises in connection with a complaint to avoid and

recover a preferential transfer, filed by Griffin E. Howell, III (hereinafter the "Trustee"), in his capacity as the trustee of the bankruptcy estate of Willis and Rebecca Scott (hereinafter the "Debtors"). Accordingly, this matter constitutes a core proceeding, over which this Court has subject matter jurisdiction. *See* 28 U.S.C. § 1334; § 157(b)(2)(F).

On July 27, 2010, the Debtors filed a voluntary petition under Chapter 7 of the Bankruptcy Code. The Trustee was appointed as trustee of the Debtors' bankruptcy estate and continues to administer assets in the case. On December 29, 2011, the Trustee filed a complaint against the Defendant. On that same date, the Clerk of the Court issued a summons to be served on the Defendant. The summons advised the Defendant that an answer to the Complaint would be due within thirty days of the date of the issuance of the summons.

On January 12, 2012, the Defendant filed an answer to the Complaint. The Defendant also filed a motion to dismiss the Complaint. The Trustee opposes the motion to dismiss on the basis that it lacks any legal grounds.

As best as the Court can discern, the Defendant believes that the Trustee incorrectly stated the time for the Defendant to file her answer in a cover sheet attached to the Complaint. Without explanation, the Defendant cites BLR 5001-2 for the proposition that an "Adversary Proceeding must be filed not later than 14 days after being served." She then cites BLR 7004-1, which, she states, provides the "[f]ailure of a party to state the correct response time shall constitute grounds for dismissal of the action without prejudice."

As to the former, this Court has no Bankruptcy Local Rule 5001-2. If the Court did

have such a rule, there is no reason to find that it has been violated. The purpose of such a rule appears to be to prevent a plaintiff from serving a complaint and then not actually filing the complaint.¹ Here, the Defendant has not alleged in her motion to dismiss that the Trustee served her with the Complaint more than fourteen days before he filed the Complaint.² In fact, the copy of the summons she attached to her motion suggests that she received the Complaint on January 3, 2012, which was approximately five days after the Trustee filed the Complaint. Additionally, assuming the Trustee served the Complaint and summons together, it would have been impossible for the Trustee to have done so without first filing the Complaint. *See* FED. R. BANKR. P. 7004(a); Fed. R. Civ. P. 4(b) ("On or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal."). Thus, it does not appear that the Trustee served the Defendant with the Complaint more than two weeks before he filed it.

As to the latter, although this Court does have a rule that is similar to the Bankruptcy Local Rule 7004-1 cited by the Defendant, *see* BLR 7004-1(a), the Court cannot determine any way in which the Trustee has violated that rule. Local Rule 7004-1(a) states that the "[f]ailure of a party or attorney for a party to state the correct response time on a summons

¹ Such a local rule may be based on Rule 5(d)(1), which requires a paper, other than a complaint, to be filed within a reasonable time after service. *See* FED. R. CIV. P. 5(d)(1).

² The Court would not have to guess as to the date of service if the Trustee had filed a certificate of service as required. Nonetheless, the failure to file a certificate of service does not affect the validity of service, *see* FED. R. BANKR. P. 7004(a); FED. R. CIV. P. 4(1)(3), and the Complaint and summons were clearly served upon the Defendant in time for the Defendant to file her answer.

or notice of lawsuit and request for waiver of service of summons attached to a complaint . . . or any other pleading that requires a summons shall constitute grounds for dismissal without prejudice." BLR 7004-1(a).

The Complaint, as filed with the Court, has no attachments that state any time for filing a response to the Complaint. The summons, which was issued by the Clerk of Court, correctly states the response time of thirty days from the date of the issuance of the summons, as established by Federal Rule of Bankruptcy Procedure 7012. While the Complaint may have been served upon the Defendant with a cover sheet that incorrectly stated the time for replying to the Complaint and summons, the Court has no way to determine if that was the case.

Even if that occurred, it does not constitute a basis to dismiss the Complaint. The local rule provides for dismissal without prejudice if the attorney does not state the correct response time on the summons. Presumably, the dismissal of such a complaint ensures that a complaint does not remain pending against an individual who has failed to file an answer due to his failure to receive notice of the time for responding.

Here, the summons correctly stated the response time, and the Defendant successfully filed her answer within the time required. Even if the Trustee did serve the Defendant with a statement that conflicted with the correct response time stated in the summons, the Defendant was not harmed by that error. This is evidenced by the fact that she filed her answer on time. Further, nothing would be accomplished by dismissing the Complaint without prejudice, as the Trustee could simply re-file the complaint.

For the reasons stated above, the Defendant's Motion to Dismiss is **DENIED**.

END OF DOCUMENT