IT IS ORDERED as set forth below:

Date: October 14, 2015

W. Homer Drake
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

IN THE MATTER OF:	:	**CASE NUMBER**
JEFFREY ALAN MARTIN,	:	14-11743-WHD
GRIFFIN E. HOWELL, III, Trustee for the Estate of Jeffrey Alan Martin,	:	ADVERSARY PROCEEDING NO. 14-1061-WHD
Plaintiff.	:	
v.	:	
MARTIN FINANCIAL, LLC, MARTIN FINANCIAL, INC., TMAR LTD, LLC, Q-TAN, LLC, MARADA, INC., AND CONNI L. MARTIN (a/k/a Conni L. Shaw),	:	IN PROCEEDINGS UNDER CHAPTER 7 OF THE BANKRUPTCY CODE
Defendants.	:	

ORDER

This matter arises between the Plaintiff, Griffin Howell, III (the "Trustee"), Chapter 7 trustee for the estate of Jeffrey Alan Martin (the "Debtor"), and Martin Financial, Inc. ("MFI"), Martin Financial, LLC ("MFL"), Marada, Inc. ("Marada"), TMAR Ltd, LLC ("TMAR"), Q-Tan, LLC ("Q-Tan") (collectively, the "Defendants"), and Conni Martin.[1] Currently before the Court is MFL's Motion to Set Aside. This Court has subject matter jurisdiction over the matter pursuant to 28 U.S.C. §§ 157(b)(1) and 28 U.S.C. § 1334, as a core proceeding under 28 U.S.C. §§ 157(b)(2)(A), (E) & (H).

Background

The Debtor filed a voluntary petition on August 8, 2014, under Chapter 7 of the Bankruptcy Code. On November 24, 2014, the Trustee initiated this adversary proceeding by filing a complaint against the Defendants. That same day, the Clerk issued summonses on the Defendants, and the Trustee, through his attorney Lisa Wolgast, submitted a certificate of service declaring that each of the Defendants,

[1] Defendant Conni Martin is listed separately because she was added to this case as a defendant after the events leading to this particular motion. *See* Amend. Compl., Doc. No. 38.

including MFL, had been served with a summons and a copy of the complaint by regular first-class mail. On December 23, 2014, the Defendants, apart from Marada and MFL, filed their answers to the Trustee's complaint.

On January 6, 2015, the Trustee filed a Motion for Default Judgment against MFL and Marada, citing the fact that those two defendants had failed to respond to the complaint. On January 8, 2015, the Clerk entered a notation of default against MFL and Marada, and on January 27, 2015, the Court granted default judgment against them. From the time the Trustee filed his complaint to the entry of default judgment, the record indicates that MFL received service of at least four documents, including the Trustee's Motion for Default Judgment and the Court's Order granting that motion.

On September 3, 2015, nearly eight months after the Court granted default judgment, MFL filed its Motion to Set Aside. In its Motion, MFL asserts that the summons issued by the Clerk does not list MFL as a defendant and that MFL "has never been served with a summons directed to it." MFL contends that the

defective service was insufficient to furnish the Court with personal jurisdiction to enter default judgment, and therefore the judgment should be set aside.

Discussion

Federal Rule of Civil Procedure 55, applicable to bankruptcy through Federal Rule of Bankruptcy Procedure 7055, empowers a court to enter default judgment when a party has "failed to plead or otherwise defend." FED. R. CIV. P. 55(a). Rule 55 also allows a court to "set aside an entry of default for good cause" or a final judgment in accordance with Rule 60(b). FED. R. CIV. P. 55(c). Rule 60, in turn, authorizes a court to set aside a final judgment for a number of reasons, such as mistake or fraud, and contains a catch-all provision allowing a court to set aside a judgment for "any other reason that justifies relief." FED. R. CIV. P. 60(b). Here, MFL only cites generally to Rule 60 in support of its motion, but if the Court was without personal jurisdiction to enter the default judgment, that would render the judgment void, which is one of the enumerated grounds for relief found in Rule 60(b). *See Oldfield v. Pueblo De Bahia Lora, S.A.*, 558 F.3d 1210, 1218 (11th Cir.

2009) ("[A]n in personam judgment entered without personal jurisdiction over a defendant is void as to that defendant."); *see also* FED. R. CIV. P. 60(b)(4).

As an initial matter, it is important to determine what MFL means when it alleges that it was never served with a summons "directed to it," as MFL's motion is unclear in its assertion. At first glance, there are two alternative scenarios: (1) MFL was not served with any summons, or (2) MFL was served, but with a defective summons that did not list it as a defendant. On closer examination, however, MFL appears to actually allege only the latter.

First, MFL does not state in its motion that it did not receive a copy of the complaint, which Rule 4 requires to be served with the summons. *See* FED. R. CIV. P. 4(c)(1); FED. R. BANKR. P. 7004(a)(1) ("[Rule] 4(c)(1)…applies in adversary proceedings."). Second, the Trustee filed a certificate of service stating that the Trustee had mailed a summons and a copy of the complaint to MFL. Certificate of Service; Doc. No. 3. Once a party presents evidence that an item was properly mailed, a presumption arises that it reached its intended recipient. *Farris v. Walton*, 365 F. App'x 198, 199 (11th Cir. 2010). This presumption may be

rebutted, but it requires more than "mere denial of receipt." *Id.* at 200 ("[D]irect testimony of nonreceipt, combined with other evidence, may be sufficient to rebut the presumption."). Even if the presumption is rebutted, it is still incumbent on the movant to persuade the trier of fact that the document was not, in fact, received. *In re Hobbs*, 141 B.R. 466, 468 (Bankr. N.D. Ga. 1992) (Cotton, J.); *see also Mountain Nat'l Bank v. Brackett*, 243 B.R. 910, 914-15 (Bankr. N.D. Ga. 2000) (Drake, J.). In this case, the Trustee has presented sufficient evidence to raise the presumption that it served MFL with a summons, and MFL has not presented sufficient evidence through its motion to rebut that presumption. Therefore, the Court must conclude that MFL was served with a summons, and the focus must necessarily be on the second scenario: MFL was served with a summons, but the summons was defective.

A review of the summons issued by the Clerk shows that the summons failed to list MFL as a defendant in the caption. Summons, Doc. No. 2. Accordingly, the issue for the Court to decide is what effect the service of a defective summons has on the Court's entry of default judgment against MFL.

The Eleventh Circuit Court of Appeals has held that because a party may amend a summons, a defect in a summons does not present a jurisdictional issue. *Sanderford v. Prudential Ins. Co. of Am.*, 902 F.2d 897, 900 (11th Cir. 1990) ("The rules clearly contemplate that the court may have personal jurisdiction over a defendant served with imperfect process."); *accord Vega Matta v. Alvarez de Choudens*, 440 F. Supp. 246, 248 (D.P.R. 1977) ("[S]mall clerical defects in the summons, particularly when defendants have been duly and unambiguously notified, are curable by amendment…."); *see also* FED. R. CIV. P. 4(a)(2) ("The court may permit a summons to be amended."); FED. R. BANKR. P. 7004(a)(1) ("Rule 4(a)…applies in adversary proceedings."). However, where, as here, the plaintiff has not requested to amend his summons, the issue becomes whether the defendant has waived the defense of insufficiency of process. *See Sanderford*, 902 F.2d at 900. In that regard, the Eleventh Circuit has held,

> [I]f a summons is in substantial compliance with [Rule 4], and a defendant has not been prejudiced by the defect in the summons, the defendant must raise his or her Rule 12(b)(4) defense by motion or in a responsive pleading, or risk having waived that defense if he or she waits until final default judgment has been entered.

Id. Therefore, a defendant will have waived its defense of insufficiency of process unless it can show either that the summons was not in substantial compliance with Rule 4, that the minor defect in the summons was prejudicial to the defendant, or that the its actions were insufficient to constitute waiver of its defense. *See id.* at 900-01.

Federal Rule of Civil Procedure 4(a), applicable to bankruptcy through Federal Rule of Bankruptcy Procedure 7004(a)(1), requires that a summons, among other things, must "name the court and the parties." FED. R. CIV. P. 4(a)(1)(A). Nevertheless, failing to name all of the defendants in the caption of the summons is not a fatal defect. *See Sanderford*, 902 F.2d at 900-01 ("Even if the summons fails to name all of the defendants…dismissal is generally not justified absent a showing of prejudice."). Because the failure to list all of the defendants is the only defect alleged in the summons issued by the Clerk in this case, the summons here is in substantial compliance with Rule 4.

Having determined that, the Court must decide whether MFL was prejudiced by the minor defect in the summons. The Eleventh Circuit has identified notice of the suit as a critical factor in determining whether the defect in the summons prejudiced the defendant. For instance, in *Sanderford*, the court found no prejudice where the defendant "had complete and total knowledge of [the plaintiff's] claim against him" despite the defective summons. *Id.* at 901. In that case, the defendant had been served with the complaint, the plaintiff's response to a show cause order, and multiple notices regarding the impending entry of default judgment against him. *Id.* The court concluded that, by choosing to remain silent while the court entered default judgment, despite this glut of notice, the defendant had failed to show that he was prejudiced by the defect in the summons. *Id.*; *see also Vega Matta*, 440 F. Supp. at 248-49 (finding that service of the complaint with names of defendants listed in the caption undid any harm caused by service of defective summons).

Here, MFL has not shown that it was prejudiced in any way by the minor defect in the summons. According to the certificates of service, MFL was served

with a copy of the complaint, the Court's Order granting a temporary restraining order, the Trustee's Motion for Default Judgment, and the Court's Order granting that motion. All of these documents clearly list MFL as a defendant in the caption, giving it notice of the case, and yet MFL took no action. Consequently, like the defendant in *Sanderford*, MFL has failed to show that it was prejudiced by the defect in the summons.

Finally, the Court has no trouble concluding that MFL's actions served to waive its defense of insufficiency of process. Though the Eleventh Circuit did not speak directly to what actions are sufficient to constitute waiver in *Sanderford*, the court makes it abundantly clear in its opinion that waiting until after the entry of default judgment, when one has notice of the impending entry of that judgment, certainly serves as a waiver of the defense. *See* 902 F.2d at 901 (holding that defendant who waited three weeks after default to raise issue with process had waived defense). Here, MFL has waited until eight months after default judgment was entered before filing anything in this case, even after receiving notice of the entry of the default judgment. This undoubtedly constitutes waiver.

Conclusion

For the reasons set forth above, it is hereby **ORDERED** that MFL's Motion to Set Aside is **DENIED**.

The Clerk is **DIRECTED** to serve a copy of this Order on all parties and respective counsel.

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