

3/16/04

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE: : CASE NO. 03-94486
:
ROBERT L. MACK, : CHAPTER 7
:
Debtor. : JUDGE MASSEY

TOMPKINS & ASSOCIATES,
Plaintiff,

v. : ADVERSARY NO. 03-9208

ROBERT L. MACK,
Defendant.

ORDER DENYING PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT
AND DENYING DEFENDANT'S MOTION TO SET ASIDE A DEFAULT AS MOOT

Plaintiff moves for a default judgment but tripped up by waiting more than ten days after issuance of the summons to serve it. The docket in this adversary proceeding reflects that the complaint was filed and the summons was issued on July 2, 2003. Plaintiff filed a certificate of service showing personal service of the summons and complaint on Defendant on July 17, 2003. Personal service is provided for in Fed. R. Civ. P. Rule 4(e), made applicable by Fed.R. Bankr. P. 7004(a). Unlike Rule 4, however, Bankruptcy Rule 7004(e) requires that "[s]ervice made under Rule 4(e) . . . shall be by delivery of the summons and complaint within 10 days after the

summons is issued." Plaintiff served the summons and complaint 15 days after the issuance of the summons. For this reason, the Clerk refused to make an entry of default.

Defendant filed an answer subsequent to the filing of the motion for a default judgment and a motion to set aside what he perceived to be a default. Because the service of the summons and complaint did not comply with Bankruptcy Rule 7004(e), Defendant was never in default.

Accordingly, it is

ORDERED that Plaintiff's motion for a default judgment is DENIED and Defendant's motion to set aside default is DENIED as moot.

This 12th day of March 2004.


JAMES E. MASSEY
U.S. BANKRUPTCY JUDGE