

FEB - 2 2005

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

| | | |
|---|---|----------------------------|
| IN THE MATTER OF: | : | CASE NUMBER: A04-67973-PWB |
| | : | |
| ANDREW KASUKU MUOK, | : | |
| | : | IN PROCEEDINGS UNDER |
| | : | CHAPTER 7 OF THE |
| Debtor. | : | BANKRUPTCY CODE |
| <hr style="width: 50%; margin-left: 0;"/> | | |
| CHASE MANHATTAN BANK | : | |
| USA, NA, | : | |
| | : | ADVERSARY PROCEEDING |
| Plaintiff | : | NO. 04-9144 |
| | : | |
| v. | : | |
| | : | |
| ANDREW KASUKU MUOK, | : | JUDGE BONAPFEL |
| | : | |
| Defendant. | : | |

**ORDER FOR PLAINTIFF TO SHOW CAUSE WHY COMPLAINT SHOULD NOT BE
DISMISSED**

On August 19, 2004, Chase Manhattan Bank USA, NA ("Plaintiff") filed a complaint seeking a determination that the debt owed by Debtor arising from a charge made on his credit card charge account is nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A).¹ Debtor has filed a motion to dismiss the complaint on the grounds that Plaintiff has failed to timely perfect service of the summons and complaint on Debtor.

Bankruptcy Rule 7004(b)(9) requires service of the summons and complaint upon the debtor "at the address shown in the petition or statement of affairs or to such other address as the

¹Plaintiff alleges that at the time Debtor made the charge on his account, he represented an ability and intent to repay the loan when in fact he lacked the ability and intent to repay the loan. Plaintiff is advised to review this Court's ruling in *In re Alam*, 314 B.R. 834 (Bankr. N.D. Ga. 2004), regarding the viability of such arguments in a § 523(a)(2)(A) proceeding involving the use of a credit card.

debtor may designate in a filed writing” and the debtor’s attorney. Plaintiff’s certificate of service (Doc. No. 4) states that Plaintiff served the summons and copy of the complaint by first class United States mail, postage fully pre-paid, addressed to:

E.L. CLARK, ESQ.

ANDREW KASUKU MUOK

ANGELYN M. WRIGHT, ESQ.

No addresses are listed for any of the individuals on the certificate of service. *See* Instructions for Form B250A, Summons in an Adversary Proceeding (“The appropriate box should be checked to show how service was made. If mail service, state the mailing address, city, state and zip code of the place to which the summons and complaint were mailed.”). In addition, attached to the Complaint (Doc. No. 1) is a “Certificate of Mailing” in which counsel certifies he mailed the complaint on August 19, 2004, to the following, but not the Debtor:

E.L. Clark
Clark & Washington P.C.
3300 Northeast Expwy Bldg. 3 #A
Atlanta, GA 30341
ATTORNEY FOR DEBTOR/DEFENDANT

Angelyn M. Wright
116 East Howard Ave.
P.O. Box 2890
Decatur, GA 30031-2890
CHAPTER 7 TRUSTEE

Rule 7004 of the Federal Rules of Bankruptcy Procedure governs the requirements for service of a summons and complaint in a bankruptcy proceeding. Rule 7004(e) requires that service of the summons and complaint shall be made within ten days after the summons is issued. If a summons is not timely delivered or mailed, another summons shall be issued and served. Pursuant to Rule 4(m) of the Federal Rules of Civil Procedure, made applicable by Bankruptcy

Rule 7004(a), if service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court shall dismiss the action or direct that service be effected on the defendant within a specified time “provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period.”

Debtor contends that because Plaintiff has failed to effect service of the summons and complaint upon him as required by Rule 7004, the complaint should be dismissed. Debtor contends that Plaintiff has not taken steps to perfect service of the summons and complaint upon him in this adversary proceeding since the filing of his answer in which he raised the defective service as an affirmative defense. In addition, Plaintiff has not filed a response to the Debtor’s motion to dismiss. Moreover, the Court notes that the deadline for submission of a pretrial order in this proceeding has passed. Based upon Plaintiff’s apparent failure to effect service or submit a pretrial order, it appears that Plaintiff has failed to prosecute this case and dismissal may be warranted on that ground as well. *See* BLR 7055-1(a), NDGa.

There are three exceptions to the 120 day service requirement of Rule 4(m): “(1) good cause under Rule 4(m); discretion under Rule 4(m); and (3) excusable neglect under Bankruptcy Rule 9006(b).” *Tony Divino Enterprises v. Langston (In re Langston)*, 2005 WL 88911 at *2 (D. Utah Jan. 13, 2005). Because Plaintiff has not responded to Debtor’s motion, the Court will direct Plaintiff to file, within twenty days of the entry date of this Order, appropriate pleadings to show good cause or some other basis why this Court should not dismiss this action for failure to properly perfect service of the summons and complaint upon Debtor or for want of prosecution. Accordingly, it is

ORDERED that, within **twenty days** of the entry date of this Order, Plaintiff must file appropriate pleadings to show good cause or some other basis why this Court should not dismiss

this action for failure to properly perfect service of the summons and complaint upon Debtor or for want of prosecution. Failure to file a written response shall result in dismissal of this complaint.

The Clerk is directed to serve copies of this Order on the persons on the attached Distribution List.

At Atlanta, Georgia, this 31 day of January, 2005.

A handwritten signature in black ink, appearing to read "Paul W. Bonapfel", is written over a horizontal line.

PAUL W. BONAPFEL
UNITED STATES BANKRUPTCY JUDGE

DISTRIBUTION LIST

Richard H. Thomson
Clark & Washington, P.C.
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Building 3, Suite A
Atlanta, GA 30341

Heath W. Williams
Heath W. Williams, LLC
170 Mitchell Street, SW
Atlanta, GA 30303