IT IS ORDERED as set forth below:

Date: August 27, 2010

Paul W. Bonapfel
U.S. Bankruptcy Court Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	:	
	:	
BRIAN K. LEGGETT,	:	**Case No. 07-76630-pwb**
Debtor.	:	
	:	
CSX TRANSPORTATION, INC.,	:	
	:	
Plaintiff,	:	
vs.	:	**Adversary No. 08-6009-pwb**
	:	
BRIAN K. LEGGETT,	:	
	:	
Defendant.	:	
	:	

ORDER ON MOTIONS TO DISMISS [14] AND
TO EXTEND TIME FOR SERVICE [12]

If a creditor contends that a debt is excepted from discharge under paragraphs (a)(2), (a)(4), or (a)(6) of § 523(a) of the Bankruptcy Code, 11 U.S.C. §§ 523(a)(2), (4), (6), the creditor must timely seek

a determination of the exception in the bankruptcy court. 11 U.S.C.A. § 523(c).[1] The plaintiff, CSX Transportation Inc. ("CSX"), timely filed, but failed to properly serve, a complaint against Brian Leggett (the "Debtor") asserting that its debt is excepted from discharge under each of these, but no other, paragraphs. The debt is based on a consent judgment in which the Debtor expressly acknowledged the debt's exception from discharge under all of them.

The Debtor has moved to dismiss the adversary proceeding for CSX's failure to timely serve the complaint within the 120 days required by Rule 4(m) of the Federal Rules of Civil Procedure, *applicable under* Fed. R. Bankr. P. 7004(a). [Docket No. 14]. CSX has moved for an extension of time to effect service under Rule 4(m). [Docket 12]. For the reasons set forth below, the Court will grant CSX's motion for extension of time to effectuate service and deny the Debtor's motion to dismiss.

FACTS

The material facts are undisputed.

The Debtor filed a voluntary chapter 7 bankruptcy petition on October 9, 2007. About five years earlier, in 2002, CSX filed suit against the Debtor in the United States District Court for the Northern District of Georgia for the recovery of CSX's money that the Debtor had collected from CSX's customers but had wrongfully and knowingly converted and misappropriated for his own use. In October 2005, the District Court entered a consent judgment in favor of CSX for $1,930,058.93. The consent judgment incorporated the Debtor's acknowledgment that his debt to CSX was not excepted from a discharge in a bankruptcy case and that his liability was based on actions within the meaning of paragraphs (a)(2), (a)(4), and (a)(6) of § 523(a).

After entry of the consent judgment, CSX filed another suit in the District Court, alleging that the Debtor had made fraudulent transfers to family members, including his wife and brother. On

[1] A creditor must file a complaint to determine the dischargeability of the debt within 60 days after the date first set for the meeting of creditors under 11 U.S.C. § 341(a). Fed. R. Bankr. P. 4007(c).

the day before the Debtor, his wife, and his brother were scheduled to appear for depositions in the fraudulent transfer action, the Debtor's litigation counsel notified counsel for CSX that the defendants would not appear for the deposition because the Debtor intended to file bankruptcy.

After the Debtor filed his voluntary Chapter 7 petition, CSX timely filed its complaint to determine the dischargeability of its debt on January 8, 2008, but did not serve it within the time that Rule 4(m) requires.

At the same time it filed its complaint, CSX sought relief from the automatic stay of 11 U.S.C. § 362(a) so that it could proceed in its fraudulent transfer action. On January 30, 2008, the Court granted limited, conditional relief from the automatic stay, permitting CSX to resume the fraudulent transfer action on condition that the Trustee be added as a party plaintiff and that CSX and the Trustee not seek *in personam* relief against the Debtor.

After settling some of the estate's claims in the fraudulent transfer action, the Trustee in March 2010 abandoned the estate's interest in any remaining claims. At that time, counsel for CSX reviewed the docket of this adversary proceeding, realized that service of the complaint had never been effected on the Debtor during the two years it had been pending, and attempted to serve the Debtor but did not properly do so.

Because the Court's docket in this proceeding reflected nothing more than the filing of the complaint and issuance of summons for over two years, the Court in April 2010 scheduled a show cause hearing for counsel to appear and show cause why the case should not be dismissed. [Docket No. 4].[2] At that hearing, the Debtor's counsel appeared and requested dismissal based on failure to effect service of process within the 120-day period that Rule 4(m) permits, and CSX requested additional time to effect service of the complaint, also under Fed. R. Civ. P. 4(m). The Court

[2]After issuance of the show cause order, counsel for CSX filed a request for entry of default on May 12, 2010. [Docket No. 6]. The Clerk advised counsel that default judgment could not be entered in the absence of, among other things, an affidavit establishing the date of service of the complaint. [Docket No. 8].

directed the parties to file written motions, which are now before the Court.

DISCUSSION

Fed. R. Civ. P. 4(m), *applicable under* Fed. R. Bankr. P. 7004(a), provides:

> If a defendant is not served within 120 days after the complaint is filed, the court — on motion or on its own after notice to the plaintiff — must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.

Because CSX has clearly failed to comply with the 120-day requirement of Rule 4(m), the Court must decide whether to dismiss this action. Rule 4(m) requires the court to extend the time for service if the plaintiff shows good cause, *see, e.g., Panaras v. Liquid Carbonic Indus. Corp.*, 94 F.3d 338, 340 (7th Cir. 1996),[3] but permits the court to exercise its discretion to extend the time for service of process, even in the absence of good cause. *Horenkamp v. Van Winkle & Co.*, 402 F.3d 1129, 1132 (11th Cir. 2005).

If CSX fails under both standards, the Court must dismiss the complaint. The Court considers each issue in turn.

Good Cause

Rule 4(m) does not define "good cause." Courts addressing the existence of "good cause" under Rule 4(m) have considered whether the plaintiff made a reasonable and diligent effort to effect service. *See, e.g.*, *Habib v. General Motors Corp.*, 15 F.3d 72, 74 (6th Cir. 1994). The Court finds

[3] The court cited *Petrucelli v. Bohringer and Ratzinger*, 46 F.3d 1298, 1305 (3d Cir. 1995).

that CSX has not established good cause for its failure to effect service within the 120-day period of Rule 4(m). The only justification that CSX advances as "cause" for its failure to effect service within 120 days is that counsel mistakenly believed that he had. The Court finds no reasonable and diligent effort to serve the Debtor and, consequently, no good cause for the failure.

Discretionary Extension of Time to Effect Service

Because CSX has not established good cause, the Court must determine whether it should, in its discretion, grant CSX additional time to serve the Debtor.

The Eleventh Circuit in *Horenkamp v. Van Winkle & Co.*, 402 F.3d 1129, 1132 (11th Cir. 2005), looked to the Advisory Committee Note to Rule 4(m) for guidance as to what factors may justify the grant of an extension of time for service of process in the absence of good cause. The Note references two possible justifications for relief: a bar to a refiled action under an applicable statute of limitations or the defendant's evasion of service or concealment of a defect in attempted service. Fed. R. Civ. P. 4(m), Advisory Committee Note, 1993 Amendments.

Other courts have listed a number of factors that a court in a bankruptcy context properly considers in determining whether to exercise its discretion to extend the time for service. *See, e.g.*, *Donaldson v. Lopez* (*In re Lopez*), 292 B.R. 570 (E.D. Mich. 2003); *Evans v. Dibartolo* (*In re Dibartolo*), 2006 WL 3097394 (Bankr. N.D. Ohio 2006); *Russell v. Goins* (*In re Goins*), 2006 WL 2089922 (Bankr. E.D. Tenn. 2006).

For example, in *Donaldson v. Lopez* (*In re Lopez*), 292 B.R. 570, 576 (E.D. Mich. 2003) (*quoting Slenzka v. Landstar Ranger, Inc.,* 204 F.R.D. 322 (E.D. Mich. 2001)), the court identified factors to be considered as including whether:

> (1) a significant extension of time was required; (2) an extension of time would prejudice the defendant other than the inherent "prejudice" in having to defend the suit; (3) the defendant had actual notice of the lawsuit; (4) a dismissal without prejudice would substantially prejudice the plaintiff; i.e. would his lawsuit be time-barred; and (5) the plaintiff had made any good faith efforts at effecting proper service of process.

The first and fifth factors are clearly in the Debtor's favor. The usual time for service expired over two years ago, which is a significant time period. CSX made no effort, much less a good faith one, to serve the Debtor timely at the time the proceeding was initiated and thereafter failed to serve the debtor properly. The mistaken belief of its counsel that service had been made when the action was filed and the later ineffective actions to serve the Debtor cannot qualify as "good faith" efforts.

The other factors favor an extension of time for service. Of primary importance here is the fact that the provisions of 11 U.S.C. § 523(c) and Fed. R. Civ. P. 4007(c) will effectively bar the relief CSX seeks because it cannot now timely commence a lawsuit to determine the dischargeablility of its debt on the only grounds that it has. The effect is equivalent to the operation of a statute of limitations to prevent the refiling of an action. Consequently, a dismissal without prejudice will effectively terminate CSX's claim; section 523(c) and Rule 4007(c) will operate to discharge the debt.

While failure to extend the time for service will, therefore, prejudice CSX because it is fatal to its claim, an extension of time will not prejudice the Debtor beyond requiring him to defend the suit. In the Rule 4(m) context, however, "prejudice" to the defendant contemplates more than having to defend on the merits; rather, to constitute prejudice, the delay must cause results that prevent the defendant from presenting her case, such as a witness becoming unavailable or other loss of evidence in the interim. *See, e.g., Russell v. Goins* (*In re Goins*), 2006 WL 2089922 (Bankr. E.D. Tenn. July 6, 2006). Here, the Debtor does not allege any loss of evidence.

Determination of the Rule 4(m) issue requires a weighing of all of these factors and not merely a toting up of how many factors each side "wins." Moreover, a court should also consider "the effect an extension would have on the administration of justice and whether an extension would undermine any policy considerations explicitly or implicitly contained in the procedural rules urging the prompt disposition of the particular type of matter." *Donaldson v. Lopez* (*In re Lopez*), 292 B.R. 570, 576 (E.D. Mich. 2003).

Balancing all of the factors here, the primary factor is the prejudice that CSX would suffer after years of pursuing litigation when the parties have contemplated since 2005 that the debt would be excepted from discharge. Despite CSX's blunder, the Court cannot conclude that it would properly exercise its discretion by failing to permit CSX an additional opportunity to serve the Debtor in view of the fact that both CSX and the Debtor contemplated that the debt would be excepted from discharge in a consent judgment entered two years before the bankruptcy filing and in view of the lack of any prejudice to the Debtor. To the contrary, it is appropriate to exercise discretion here so that the issues may be determined on the merits.

This conclusion is consistent with the other considerations the Court must take into account. *See Donaldson v. Lopez* (*In re Lopez*), 292 B.R. 570, 576 (E.D. Mich. 2003). Given the circumstances here, primarily the lengthy litigation that has been required for CSX to obtain a judgment against the Debtor (interrupted by a prior bankruptcy filing of the Debtor[4]) and the fact that the parties expressly contemplated that the debt would not be discharged in a bankruptcy case, the proper administration of justice does not require the effective termination of CSX's rights because of counsel's oversights in effecting timely and proper service. To the contrary, the interests of justice require that CSX have the opportunity to establish that its debt is excepted from discharge as the consent judgment provides.

Nor does the Court's conclusion undermine any policy considerations relating to the bankruptcy laws or the procedural requirements concerning determination of dischargeability of a debt under § 523(c) and Fed. R. Bankr. P. 4007. It is true that the expeditious determination of what debts are dischargeable is important to the fresh start that the Bankruptcy Code provides for a debtor, and that a debtor has an important interest in knowing whether a debt is subject to being determined to be nondischargeable so that she can plan her postbankruptcy economic life accordingly. *See Donaldson v. Lopez* (*In re Lopez*), 292 B.R. 570, 576-77 (E.D. Mich. 2003).

With regard to a dischargeability action that 11 U.S.C. § 523(c) requires, the important consideration is the timely initiation of the action, not necessarily its disposition. The provisions of § 523(c) and the timing requirements of Fed. R. Bankr. P. 4007(c) protect the debtor's interest in knowing that, as of a date certain, she will not face claims that debts

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[4]See *In re Leggett*, 335 B.R. 227 (Bankr. N.D. Ga. 2005).

are excepted under paragraphs (a)(2), (a)(4), or (a)(6) of § 523(a) unless an action has been timely commenced. This protection is necessary and appropriate when the debtor does not expect a challenge to the dischargeability of a debt or is aware of the possibility of a challenge but expects to be able to mount a defense to it if it is filed.

But those are not the circumstances in this matter. The Debtor has known since entry of the consent judgment in October 2005 that CSX intended to pursue the collection of its judgment notwithstanding a bankruptcy filing on the very grounds that it is asserting here, and it contains his acknowledgment that the debt will be excepted from discharge. The consent judgment does not necessarily determine the outcome of this proceeding as to whether the debt is excepted from discharge,[5] but the fact that he agreed that the debt would

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[5]A prior judgment may have preclusive effect in later litigation under two doctrines, traditionally referred to as the doctrines of res judicata and collateral estoppel. Modern terminology, following the approach of the *Restatement (Second) of Judgments* § 27 (1982), replaces the term "res judicata" with "claim preclusion" and the term "collateral estoppel" with "issue preclusion." The modern terms are more analytically helpful and contribute to greater clarity of thought. *See* Christopher Klein, Lawrence Ponoroff, and Sarah Borrey, *Principles of Preclusion and Estoppel in Bankruptcy Cases,* 79 AMER. BANKR. L.J. 839, 847 (2005) (citing 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, FEDERAL PRACTICE AND PROCEDURE § 4402 (2d ed.2003)). The Supreme Court has adopted this approach. *E.g., New Hampshire v. Maine,* 532 U.S. 742, 748-49, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001).

The doctrine of claim preclusion prevents the relitigation of a claim that the prior judgment adjudicated. This principle prevents relitigation of a claim, broadly defined under a transactional test that includes matters that have been litigated and matters arising out of the same transaction that could have been raised in the original litigation. The doctrine of issue preclusion prevents the relitigation of any issue that was necessarily adjudicated in rendering the prior judgment. *See generally* Christopher Klein, Lawrence Ponoroff, and Sarah Borrey, *Principles of Preclusion and Estoppel in Bankruptcy Cases,* 79 AMER. BANKR. L.J. 839, 847 (2005).

In dischargeability litigation in a bankruptcy court, the Supreme Court has held that claim preclusion does not apply, *Brown v. Felsen*, 442 U.S. 127, 99 S.Ct. 2205, 60 L.Ed.2d 767 (1979), and that issue preclusion does. Grogan v. Garner, 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991). *See generally Colorado West Transportation Co., Inc. v. McMahon (In re McMahon),* 356 B.R. 286, 290-91 (Bankr. N.D. Ga. 2006), *rev'd* 380 B.R. 911 (N.D. Ga. 2007).

not be discharged shows clearly that CSX's effort to except the debt from discharge after he filed his bankruptcy case was not a surprise to the Debtor.

Indeed, in the circumstances the surprise would be the absence of any activity within the required time, at which point he or his counsel could be expected to glance at the court's docket to confirm whether CSX had timely commenced an action, which would, of course, have revealed it. If the Debtor had been concerned about a prompt determination of the issues rather than hoping for the occurrence of a procedural deficiency that would permit him to avoid potential nondischargeability without having to defend, he could have joined issue by filing an answer and insisting on prompt disposition of the matter. Although the Debtor had no duty to check the docket that would give rise to a conclusion that he should be charged with inquiry or constructive notice, the circumstances are such that he cannot fairly claim that the existence of a timely-filed dischargeability action was a surprise.

Further, the fact that the Debtor acknowledged in the consent judgment that the debt would be excepted from discharge leads the Court to the conclusion that, in the particular circumstances of this proceeding, the Debtor's legitimate interest in the prompt ascertainment of the extent of his fresh start does not justify permitting him to avoid a result he and CSX expressly contemplated without defending on the merits.

CONCLUSION

Based on the foregoing, it is hereby **ORDERED** as follows:

1. The Defendant's motion to dismiss for failure to effect timely service is **DENIED.**

The Court does not express an opinion as to whether issue preclusion applies in this proceeding.

2. The Plaintiff's motion to extend the time to effect service is **GRANTED** as set forth herein. The Plaintiff shall have ten days from the date of entry of this order to obtain summons and to effect proper service on the Defendant.

[End of Order]