

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:)	CHAPTER 7
)	
DONALD KYLE CAVIN,)	CASE NO. 12-60927 - MHM
TONIA MANN CAVIN,)	
)	
Debtors.)	
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G. SCOTT FREEMAN,)	
)	
Plaintiff,)	
v.)	ADVERSARY PROCEEDING
)	NO. 12-5668
DONALD KYLE CAVIN,)	
TONIA R. MANN CAVIN,)	
)	
Defendants.)	

ORDER ON MOTION TO DISMISS

Plaintiff initiated this proceeding by filing a Complaint December 28, 2012. Defendants filed a *Motion to Dismiss* October 9, 2014, asserting that they did not receive notice of a hearing held in this proceeding and, accordingly, this proceeding should be dismissed for lack of due process and because this Court may be biased by proffers made by Plaintiff at the hearing (Doc. No. 104) (the "Motion"). Plaintiff filed a response October 20, 2014 (Doc. No. 105). For the reasons set forth below, the Motion is *denied*.

The alleged lack of process stems from an *Order and Notice of Status Conference* entered August 11, 2014, scheduling a hearing to be held September 15, 2014 (Doc. No. 99) (the “Notice”). A Certificate of Service, executed by an employee of the Court, is attached to the Notice, and certifies that the Notice was mailed to Defendants at their address of record; however, Defendants assert in the Motion that they did not receive the Notice. Hearing was held September 15, 2014 (the “Hearing”), at which Plaintiff appeared and was heard. Defendants did not appear at the Hearing. As a result of the Hearing, an order entered September 16, 2014 set forth a schedule by which the parties should prepare their respective portions of the pre-trial order described in Bankruptcy Local Rule 7016-1 (N.D. Ga.), consolidate their portions into a single document, and propose the resulting pre-trial order to the court in accordance with the local rules (Doc. No. 100) (the “Order”).¹

Defendants assert that their due process rights were violated twice: first, because they were not properly served with the Notice, and second, because the court failed to continue the hearing when Defendants failed to appear. As a result of those due process violations, and because Plaintiff was allowed to communicate with the court without Defendants presence, Defendants argue this proceeding must be dismissed.

¹ The Order directed that Plaintiff deliver its portion of the pre-trial order to Defendants within 14 days after entry of the Order and file a certificate of service averring to such delivery. Defendants were directed to respond with their portion within 21 days of receipt of Plaintiff’s portion, and Plaintiff was directed to present the final product to the Court, whether or not Defendant complied, on or before October 28, 2014. Plaintiff certified delivery of its portion to Defendant October 2, 2014, but has not yet presented a consolidated order.

Defendants' due process rights were not violated. The Certificate of Service attached to the Notice indicates that the Notice was mailed to Defendants' address of record. A letter properly addressed and mailed is presumed to have been properly delivered. *In re Hobbs*, 141 B.R. 466, 468 (Bankr. N.D. Ga. 1992) (J. Cotton) (citing *Hagner et al. v. United States*, 285 U.S. 427, 430, 52 S.Ct. 417, 418 (1932)). While that presumption may be rebutted by evidence, mere denial of receipt is not sufficient to rebut the presumption. *Id.* (citing *In re Longardner & Associates, Inc.*, 855 F.2d 455, 459-60 (7th Cir. 1988); *Osborn v. Ricketts (In re Ricketts)*, 80 B.R. 495, 497 (9th Cir. BAP 1987); *In re Euston*, 120 B.R. 228, 230-31 (Bankr. M.D. Fla. 1990)). Without some evidence to the contrary, the presumption stands that Defendants were provided proper notice of the hearing. This Court is not required to continue a hearing when Defendants fail to appear. Defendants argue that BLR 5071-1 provides a mechanism to continue hearings; however, however, BLR 5071-1 provides that hearings will be continued "only on the basis of exceptional circumstances." A party's failure to appear is not an exceptional circumstance.


Even if Defendants were not properly served with the Notice, dismissal would be inappropriate. Defendants have not alleged that they were not served with the Complaint or Summons initiating this adversary proceeding, or with a dispositive motion resulting in a prejudicial order. Defendants complain that they did not receive notice of a status conference, the only result of which was an order outlining this Court's procedural

expectations. Defendants have not been prejudiced by their nonappearance at the Hearing. Nor could any perceived bias require the undersigned's recusal from this proceeding, because "bias" must stem from "extrajudicial sources" to require recusal. *In re Tyler*, 498 B.R. 373 (Bankr. N.D. Ga. 2013) (J. Sacca) (citing *United States v. Bailey*, 175 F.3d 966, 968 (11th Cir. 1999)). "Information 'acquired in the course of a judicial proceeding' does not come from an extrajudicial source." *Id.* Accordingly, it is hereby

ORDERED that the Motion is *denied*.

The Clerk is directed to serve this Order upon counsel for Plaintiff, Defendants, and the Chapter 7 Trustee.

IT IS SO ORDERED, this the 5th day of November, 2014.



MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE