IT IS ORDERED as set forth below:

Date: February 3, 2016

Mary Grace Diehl

Mary Grace Diehl
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

IN RE:	:	CASE NO.
MITCHELL D HOLLIS,	:	**15-40141-MGD**
Debtor.	:	CHAPTER 7
RREF RB SBL-GA, LLC,	:	
Plaintiff,	:	
v.	:	ADVERSARY PROCEEDING NO.
MITCHELL D HOLLIS,	:	**15-4030**
Defendant.	:	

ORDER (1) DENYING DEFENDANT'S MOTION TO DISMISS, (2) DENYING MOTION OF NONPARTIES TO QUASH SUBPOENA, (3) GRANTING PLAINTIFF'S MOTIONS TO COMPEL, AND (4) NOTICE OF STATUS CONFERENCE

This adversary proceeding is before the Court on the following motions:

- Holly Hollis and Run for God, LLC's Motion to Quash Subpoenas and Notice for Deposition of November 5, 2015 (Doc. 11) ("Motion to Quash") and Plaintiff's Response to that Motion (Doc. 14),

- Plaintiff's unopposed Motions to Compel Hollis Holdings, LLC (Doc. 19) and Defendant Mitchell Hollis (Doc. 20) (collectively "Motions to Compel"), and
- Defendant's Motion to Quash Service and Dismiss Complaint (Doc. 21) ("Motion to Dismiss") and Plaintiff's Response to that Motion (Doc. 22).

Plaintiff's objection to discharge made under 11 U.S.C. § 727 is a core proceeding arising under Title 11, and the Court has authority to enter a final order. 28 U.S.C. § 157(b)(2)(J). The Court has jurisdiction under 28 U.S.C. §§ 157(a) and 1334(b) by general reference, LR 83.7A, NDGa, and venue is proper under 28 U.S.C. § 1409(a).

I. Background

Plaintiff RREF RB SBL-GA, LLC ("RREF") is a creditor of Defendant Mitchell D. Hollis by virtue of a 2013 judgment for over $583,000. (Compl. ¶ 6, Adv. Doc. 1; Answer ¶ 6, Adv. Doc. 5).

Mr. Hollis filed a voluntary Chapter 7 petition on January 22, 2015. (Pet., Bankr. Doc. 1). The petition was filed and signed by Michael D. Hurtt of the Hurtt Law Firm, LLC, and accordingly constituted an appearance by Mr. Hurtt as attorney of record for Mr. Hollis "in all matters in the case, including contested matters and adversary proceedings." BLR 9010-4(a), NDGa.

RREF filed several Rule 2004 examination motions in Mr. Hollis's bankruptcy case. The motions sought, among other relief, oral examinations of several parties in interest including Holly Hollis and Run for God, LLC. (Bankr. Docs. 32, 33). The examinations took place on July 18, 2015 (Br. Supp't Mot. to Quash at 1, Adv. Doc. 12).

RREF filed its Complaint Objecting to Discharge of Debtor on October 3, 2015. (Adv. Doc. 1). The Clerk issued a Summons that day which, along with the Complaint, was served on Mr. Hollis personally on October 7, 2015. (Adv. Doc. 4). Mr. Hurtt was not served with a copy of

the Summons or Complaint, but filed an Answer on behalf of Mr. Hollis on September 2, 2015. (Adv. Doc. 5). The Answer asserted the affirmative defenses of insufficient service of process and lack of personal jurisdiction. (Answer, Adv. Doc. 5 at ECF 7–8).

RREF noticed a number of depositions in this adversary proceeding, including for Mr. Hollis, Hollis Holdings, LLC, Holly Hollis, and Run for God LLC. (Adv. Docs. 6–9). Neither Mr. Hollis nor Hollis Holdings, LLC filed responses or objections. David J. Blevins entered an appearance on December 3, 2015 and filed the Motion to Quash as to Holly Hollis and Run for God LLC on December 11, 2015. (Adv. Doc. 11). RREF filed a response to the Motion to Quash on December 21, 2015. (Adv. Doc. 14). In the meantime, RREF and Mr. Hollis agreed on a scheduling order on entered on December 22, 2015 which set a discovery deadline of February 29, 2016. (Adv. Docs. 15, 16). RREF filed its Motions to Compel on December 31, 2015. (Adv. Doc. 20, 21). No response was filed to either Motion to Compel. Mr. Hollis filed his Motion to Dismiss on January 6, 2016 and RREF filed its response on January 20, 2015 (Adv. Doc. 21, 22).

II. Discussion

The Court must consider the Motion to Dismiss first because it would render the other motions moot if granted. For the reasons that follow, however, the Court concludes that dismissal is not appropriate under the circumstances. The Court subsequently considers the Motion to Quash and the Motions to Compel.

a. Motion to Dismiss

Defendant's Motion to Dismiss asserts that this adversary proceeding must be dismissed based on Plaintiff's failure properly serve him within the time provided by the Federal Rules. Federal Rule of Bankruptcy Procedure ("Bankruptcy Rule") 7004 governs service of the summons

and complaint in adversary proceedings. It provides methods of service by first class mail in addition to the methods of personal service under Federal Rule of Civil Procedure ("Civil Rule") 4. Regardless of which method of service is used, Bankruptcy Rule 7004(g) requires service on the debtor's attorney under Civil Rule 5(b) when serving a summons and complaint on a represented debtor.

If a plaintiff fails to properly serve a defendant under Bankruptcy Rule 7004, the defendant may move to quash service and to dismiss the adversary proceeding. Two rules govern how and when such a motion is made. The first is another provision of Civil Rule 4 incorporated by of Bankruptcy Rule 7004, Rule 4(m). As of the filing of this case,[1] that rule required the Court to dismiss the action without prejudice or to order service to be made in a specified time if service was not made within 120 days. However, the rule requires the Court to extend the time for service if the plaintiff shows good cause for the failure to make service.

The second rule governing when a motion to dismiss for insufficient service of process may be presented is Civil Rule 12, incorporated by Bankruptcy Rule 7012. Civil Rule 12(b) states that a party may raise the defense of insufficient service of process either by answer or by motion made before the answer. If a party fails to raise the defense by either of those means, Civil Rule 12(h)(1) provides that it is waived. Even if the defense is preserved in the Answer, courts have held Rule 12(h)(1) defenses to be waived if a party participates in litigation without actively pursuing

1 Civil Rule 4(m) was amended, effective December 1, 2015, to reduce the time to serve a defendant from 120 days to 90 days. To the extent that certain Civil Rules, including Civil Rule 4(m), are applicable in bankruptcy proceedings, those rules are to be applied as amended. See Fed. R. Bankr. P. 9032. Here, the Court assumes that the pre-amendment 120-day time limit applies to service of RREF's complaint and summons because that last day for service under a 120-day time limit was December 1, 2015, the same day new Civil Rule 4(m) became effective. Thus, whether using a 120-day or 90-day timeframe, the time for service of the complaint and summons has passed.

the defenses. *See Matthews v. Brookstone Stores, Inc.*, 431 F. Supp. 2d 1219, 1223 (S.D. Ala. 2006) (discussing cases).

It is undisputed that RREF failed to serve Mr. Hollis' attorney under Bankruptcy Rule 7004(g). In this case, Mr. Hollis chose not to move to quash service and dismiss the action under Civil Rule 12(b), but instead pled insufficient service of process and lack of personal jurisdiction as affirmative defenses in his Answer. (Adv. Doc. 5 at ECF 7–8). He now, 156 days after the filing of the Complaint, seeks dismissal based on RREF's failure to serve his attorney. Such a dismissal is "without prejudice" in name only, as the deadline to file a complaint objecting to Mr. Hollis's discharge has since run. (Bankr. Doc. 29). Under these circumstances, RREF contends, the Court should find Mr. Hollis waived the defense of insufficient service of process.

In support of its contention, RREF relies on *Datskow v. Teledyne, Inc., Cont'l Products Div.*, 899 F.2d 1298, 1303 (2d Cir. 1990). In *Datskow*, the Second Circuit barred a defendant from raising the defense of insufficient service of process by motion after only a few months of litigation notwithstanding the defendant's preservation of the defense in its answer. *Id.* The court explained that it would have been simple for the plaintiffs to correct the process error had the matter been brought to the court's attention sooner, but that the statute of limitations on the plaintiff's claim had since run. *Id.* Waiver was particularly appropriate in that case, the court noted, because the defendant's objection was solely about a defect in the form of service and there was no doubt as to the constitutionality of the court's exercise of personal jurisdiction. *Id.*

In this case, Mr. Hollis could have easily brought the matter to the court's attention prior to the expiration of the 120-day window for service of the complaint. By waiting until now to deploy this hole card, Mr. Hollis seeks to render determinative what would have been a curable deficiency

while in the meantime permitting RREF to conduct potentially wasted discovery. Mr. Hollis at one point even consented to extending discovery. (Docs. 15, 16). Furthermore, exercise of personal jurisdiction over Mr. Hollis in this case hardly implicates constitutional due process where Mr. Hollis availed himself of this Court by filing a voluntary bankruptcy petition and received notice of this action by personal service—"the classic form of notice always adequate in any type of proceeding." Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). The Court agrees with RREF that Mr. Hollis has waived the defense of insufficient service of process.

To permit otherwise would contravene Bankruptcy Rule 1001's command to "secure the just, speedy, and inexpensive determination of every case and proceeding" by elevating technicalities over merits. Such an outcome runs "entirely contrary to the spirit of the Federal Rules" which "'reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.'" Foman v. Davis, 371 U.S. 178, 181–82 (1962) (quoting Conley v. Gibson, 355 U.S. 41, 48 (1957)). The policy of preferring a resolution on the merits over a technicality is bolstered in a Section 727 case because "[o]bjections to discharge pursuant to Code § 727(a) are directed toward protecting the integrity of the bankruptcy system by denying discharge to debtors who engaged in objectionable conduct that is of a magnitude and effect broader and more pervasive than fraud on, or injury to, a single creditor." *In re Applegate*, 498 B.R. 383, 388 (Bankr. S.D. Ga. 2013) (quoting *In re Joseph*, 121 B.R. 679, 682 (Bankr. N.D.N.Y. 1990) (internal quotations omitted). Because the Court is not dismissing this adversary proceeding, it next turns to the discovery motions.

b. Motion to Quash

Nonparties Holly Hollis and Run for God, LLC seek an order quashing the subpoena issued November 5, 2015 by counsel for RREF and the associated notice of deposition. (*See* Adv. Doc. 14 at ECF 6, 13). As the Court noted in the Background section of this Order, RREF previously deposed Holly Hollis and Run for God, LLC by means of a Rule 2004 examination in Mr. Hollis's Chapter 7 case. (Bankr. Docs. 32, 33). RREF now seeks to depose Holly Hollis and Run for God, LLC under Bankruptcy Rule 7030. (Adv. Docs. 7–9). The nonparties assert that under Civil Rule 30(a)(2)(A)(ii), made applicable to this proceeding by Bankruptcy Rule 7030, RREF must first obtain leave of court for a second deposition. That rule provides that "[a] party must obtain leave of court [to depose any person] . . . if the parties have not stipulated to the deposition and . . . the deponent has already been deposed in the case." Fed. R. Civ. P. 30(a)(2)(A)(ii). The nonparties' contention is that the word "case" as used in the rule, should apply to Mr. Hollis' entire Title 11 case and note that the plain language of the rule does not restrict the limitation to depositions taken under that rule. Neither the nonparties nor RREF could find any case law on this point. The Court admits it too could find no cases on point and concludes the matter is one of first impression.

Bankruptcy Rule 9002(1) provides that "action" or "civil action" when used in a Civil Rule applicable to a bankruptcy case "means an adversary proceeding or, when appropriate, a contested petition, or proceedings to vacate an order for relief or to determine any other contested matter." The rule does not, however, mention the word "case." The word used in the bankruptcy context frequently refers to the entire Title 11 umbrella. *See, e.g.* 11 U.S.C. § 301, 28 U.S.C. § 1334(a). Considering, however, that Civil Rule 30 was written in the context of "civil actions and

proceedings in the United States district courts," (Civil Rule 1), and not necessarily bankruptcy proceedings (Civil Rule 81(a)(2)), it is unlikely that this was the drafter's intent.

Adopting the nonparties' interpretation would produce absurd results. For example, if a debtor sought to depose an individual in a nondischargeability action the debtor brought against one creditor, and a trustee later sought to depose that same individual in an avoidance action the trustee brought against a different creditor, leave of court would be required by the trustee but not by the debtor. Moreover, such a rule makes little sense in light of the completely different scope of a Rule 2004 examination and a Rule 7030 deposition. In re Valley Forge Plaza Associates, 109 B.R. 669, 674 (Bankr. E.D. Penn. 1990) ("R2004 permits a party invoking it to undertake a broad inquiry of the examiner, in the nature of a "fishing expedition." . . . The scope of a R2004 examination is even broader than that of discovery permitted under the F.R.Civ.P., which themselves contemplate broad, easy access to discovery." (citations omitted)).

Accordingly, the Court concludes that in this specific context, "case" should be read to mean "adversary proceeding or, when appropriate, a contested petition, or proceedings to vacate an order for relief or to determine any other contested matter." Cf. Fed. R. Bankr. P. 9002(1). As RREF has not yet deposed nonparties Holly Hollis and Run for God, LLC in this adversary proceeding, it may do so without leave of court.

c. Motion to Compel

RREF filed its Motions to Compel Mr. Hollis and Hollis Holdings, LLC on December 31, 2015. (Adv. Doc. 20, 21). No response was filed to either motion, accordingly the Motions to Compel are deemed unopposed. BLR 7001-1(c), 7031-1(c), NDGa. Neither party has sought a protective order on any ground relating to service of process, and in any case the Court has already

held that Mr. Hollis waived his objection to service by not raising it earlier. Consequentially, the Court will grant the Motions to Compel.

III. Conclusion

For the foregoing reasons, it is

ORDERED that the Motion to Dismiss (Doc. 21) is **DENIED**.

It is **FURTHER ORDERED** that the Motion to Quash (Doc. 11) is **DENIED** and Motions to Compel (Doc. 19) are **GRANTED**. Mr. Hollis, Hollis Holdings, LLC, Holly Hollis, and Run for God, LLC are each **DIRECTED** to comply with their respective discovery obligations on or before **February 15, 2015**. The Court will reserve the matter of awarding RREF's fees and costs for bringing the Motions to Compel until the close of discovery.

It is **FURTHER ORDERED and NOTICE IS HEREBY GIVEN** that the Court will hold a status conference in this matter on **March 9, 2016** at **9:25 a.m.** in Room 342, United States Courthouse, 600 East First Street, Rome, Georgia 30161.

The Clerk is directed to serve a copy of this Order on Plaintiff and Plaintiff's counsel, Defendant and Defendant's counsel, and the parties on the attached distribution list.

END OF DOCUMENT

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