



**IT IS ORDERED as set forth below:**

**Date: June 29, 2016**

**Lisa Ritchey Craig  
U.S. Bankruptcy Court Judge**

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION**

<b>IN THE MATTER OF:</b>	:	<b>CASE NUMBERS</b>
	:	
GREGORY DANIELS,	:	BANKRUPTCY CASE
	:	09-65367-LRC
Debtor.	:	
_____	:	
	:	
GREGORY DANIELS,	:	ADVERSARY PROCEEDING
	:	NO. 15-5296
Plaintiff,	:	
	:	
v.	:	
	:	
HOWE LAW FIRM, P.C.,	:	IN PROCEEDINGS UNDER
	:	CHAPTER 7 OF THE
Defendant.	:	BANKRUPTCY CODE

**ORDER**

Before the Court is the Motion to Quash Service and Dismiss (the "Motion"), filed

in the above-captioned adversary proceeding by Howe Law Firm, P.C. (“Defendant”). Gregory Daniels (“Plaintiff”) opposes dismissal of his complaint and has filed a Motion for Default Judgment or, In the Alternative, Motion for Extension of Time. In this case, Plaintiff attempted to serve Defendant in accordance with Georgia law, rather than by simply mailing a copy of the summons and complaint to Defendant’s officer or registered agent, as provided for by Rule 7004(b) of the Federal Rules of Bankruptcy Procedure. In the process of doing so, Plaintiff neglected to serve the summons in the time required by Rule 7004(e). For the reasons stated below, Defendant’s Motion to Quash Service shall be granted, Defendant’s Motion to Dismiss shall be denied, Plaintiff’s Motion for Default Judgment shall be denied, and Plaintiff shall be granted additional time to serve the complaint in accordance with the requirements of the Federal Rules of Bankruptcy Procedure.

Further, it appearing to the Court that Plaintiff has pending litigation in the United States District Court for the Northern District of Georgia, Case No. 1:2015-cv-00827 SCJ (the “District Court Case”), and that the District Court Case involves the same transactions and occurrences complained of in the instant case, the Court will stay these proceedings until Plaintiff notifies the Court that the District Court Case has been concluded.

#### **PROCEDURAL HISTORY**

Plaintiff filed a voluntary petition under Chapter 7 of the Bankruptcy Code on

March 2, 2009, and received his discharge on June 17, 2009. *See* Case No. 09-65367-LRC, Docs. 1, 16). After the Court closed Plaintiff's bankruptcy case, Plaintiff filed a motion to reopen the case for the purpose of filing a declaratory action to determine whether a debt owed to Network Commercial Services, Inc. ("Network") was discharged. *See id.* Doc. 32. The Court granted Plaintiff's motion to reopen the bankruptcy case on July 15, 2015. *See id.* Doc. 41. On July 23, 2015, Plaintiff filed a complaint against Network (the "Complaint") seeking: (1) a determination that a prepetition debt owed to Network had been discharged, (2) enforcement of the discharge injunction, and (3) sanctions and damages against Network for its violations of the discharge injunction. *See* Doc. 1. Network answered the complaint on August 21, 2015. *See* Doc. 3.

On September 22, 2015, Plaintiff sought leave to amend the Complaint, which the Court granted, and Plaintiff filed the amended complaint on September 22, 2015 ("Amended Complaint"), adding claims against Network for violations of the Fair Debt Collections Practices Act (the "FDCPA"). *See* Docs. 6, 7, 12. Network answered the Amended Complaint on October 6, 2015.<sup>1</sup> *See* Doc. 9. Subsequently, Plaintiff sought leave to file a second amended complaint (the "Second Amended Complaint") to add Defendant as a party defendant under the theory that the FDCPA allows a plaintiff to recover damages from a law firm engaged in the filing and prosecution of an invalid legal

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<sup>1</sup> Plaintiff and Network stipulated to a dismissal with prejudice as to Network only on December 16, 2015.

action. *See* Doc. 15. The Court granted Plaintiff leave to file the Second Amended Complaint on December 8, 2015, and a summons issued for Defendant on December 16, 2015. *See* Docs. 15, 17, 19.

On February 22, 2016, Plaintiff filed an affidavit of service, indicating that a process server, known as Roberto Benito with RB&C Services, Inc. (“Benito), served Defendant by delivering the summons and a copy of the Second Amended Complaint to the Georgia Secretary of State’s office on February 2, 2016. *See* Doc. 22. Additionally, Plaintiff filed an affidavit of “non-service” in which Benito details his prior, unsuccessful attempts to serve Defendant at its business address from December 17, 2015, through January 15, 2016. *See* Doc. 23. On April 4, 2016, the Georgia Secretary of State filed a certificate of acknowledgement, indicating receipt of service of process on behalf of Defendant, pursuant to O.C.G.A. § 9-11-4(e)(1)(A).

On April 15, 2016, Defendant filed a special appearance and answer to the Amended Complaint and the Second Amended Complaint, along with the instant motion to quash service and dismiss. *See* Docs. 30, 31. Plaintiff filed a response opposing the motion to quash service and dismiss and seeking the entry of default judgment, or, in the alternative, an extension of time to perfect service of process. Defendant opposes Plaintiff’s requests for entry of default judgment and additional time to perfect service. *See* Doc. 33.

### CONCLUSIONS OF LAW

Under Federal Rule of Bankruptcy Procedure 7004(b), a plaintiff in an adversary proceeding may serve a complaint and summons on a corporate defendant by first class United States mail addressed to the attention of an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process.” FED. R. BANKR. P. 7004(b)(3). Rule 7004(a)(1) also permits service in the manner provided for in Rule 4(h) of the Federal Rules of Civil Procedure. FED. R. BANKR. 7004(a)(1). Under Rule 4(h)(1), a corporation must be served in one of the following ways: “(A) in the manner prescribed by Rule 4(e)(1) for serving an individual; or (B) by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process. . . .” FED. R. CIV. P. 4(h)(1). Pursuant to Rule 4(e)(1), service may be made by “following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made.” FED. R. CIV. P. 4(e)(1)). Under Georgia law, in an action against a corporate defendant, the complaint and summons may be served by delivery to “the president or other officer of such corporation . . . , a managing agent thereof, or a registered agent thereof, provided that when for any reason service cannot be had in such manner, the Secretary of State shall be an agent of such corporation . . . upon whom any process, notice, or demand may be served.” O.C.G.A. §

9-11-4(e)(1)(A). Therefore, “under Georgia law, substituted service upon the Secretary of State is proper only after a plaintiff has attempted to serve the persons listed in the statute and for any reason that attempt is unsuccessful.” *Davis v. Frederick J. Hanna & Assocs., P.C.*, 506 F.Supp.2d 1322, 1323 (N.D. Ga. 2007).

Assuming without deciding that Plaintiff met the statutory requirements for substitute service under Georgia law, Plaintiff’s service on the Secretary of State was defective in that Plaintiff served the summons more than seven days after its issuance without obtaining an alias summons in contravention of Rule 7004(e). *See* FED. R. BANKR. P. 7004(e) (“Service under Rule 4(e) . . . shall be by delivery of the summons and complaint within 7 days after the summons is issued. . . . If a summons is not timely delivered . . . another summons will be issued for service.”); *In re Williams*, 2015 WL 6689244, at \*2 (Bankr. N.D. Ga. Sept. 14, 2015) (Diehl, J.). For this reason, such service was insufficient, must be quashed, and cannot support Plaintiff’s request for entry of a default judgment against Defendant. *Id.* (“[P]roper service is necessary for the Court to have jurisdiction . . . .”); *In re Archer*, 2012 WL 5205823, at \*1 (Bankr. N.D. Ga. Oct. 1, 2012) (Diehl, J.) (“This attempt at service was insufficient because it was outside the allowed [seven]-day period.”); *In re Dohring*, 245 B.R. 262, 263 (Bankr. N.D. Tex. 2000) (“The summons, as served, was expired and therefore service of it was a nullity and should be quashed.”).

That being the case, Plaintiff has also run afoul of Rule 7004(a)(1), which makes Rule 4(m) of the Federal Rules of Civil Procedure applicable to this adversary proceeding. Under Rule 4(m), a plaintiff has 90 days from the filing of the complaint in which to properly serve the defendant and, “[i]f a defendant is not served within 90 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.” FED. R. CIV. P. 4(m). “If the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.” *Id.*; *see also Tidwell v. Roane Family P'ship, LP*, 2015 WL 2213714, at \*4 (N.D. Ga. May 11, 2015) (adopting report and recommendation to extend the time for service where the plaintiff presented uncontroverted testimony that defendant was evading service and defendant made no attempt to show that it would be prejudiced by an extension of time to serve).

Here, more than 90 days have lapsed since the filing of the Second Amended Complaint. Accordingly, Plaintiff is unable to obtain an alias summons and perfect service of the Second Amended Complaint within the time provided for by Rule 4(m). The Court has the discretion, however, “to extend the time for service of process even in the absence of a showing of good cause.” *Horenkamp v. Van Winkle And Co.*, 402 F.3d 1129, 1132 (11th Cir. 2005). Having considered the facts of this case, including the fact that Plaintiff appears to have attempted diligently to serve Defendant and has sought an

extension of time, the Court finds that good cause exists to allow Plaintiff additional time within which to perfect service of process.

For this reason,

**IT IS ORDERED** that Defendant's Motion to Quash Service is **GRANTED**;

**IT IS FURTHER ORDERED** that Defendant's Motion to Dismiss is **DENIED**;

**IT IS FURTHER ORDERED** that Plaintiff's Motion for Default Judgment is **DENIED**;

**IT IS FURTHER ORDERED** that Plaintiff shall have thirty (30) days from the date of the entry of this Order to obtain an alias summons and serve it and the Second Amended Complaint properly upon Defendant in accordance with the requirements of Rule 7004 of the Federal Rules of Bankruptcy Procedure. Upon effectuating such service, Plaintiff shall file a certificate of service.

**IS FURTHER ORDERED** that, upon the filing of Plaintiff's certificate of service, all matters herein shall be stayed until further order of this Court. Upon resolution and conclusion of the District Court Case, Plaintiff shall immediately notify the Court of such by the filing of an affidavit detailing the manner in which the District Court Case was concluded.

**END OF DOCUMENT**