



IT IS ORDERED as set forth below:

Date: February 3, 2015

W. Homer Drake
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

IN THE MATTER OF:	:	CASE NUMBERS
	:	
RONDALD WAYNE HOUCHINS,	:	BANKRUPTCY CASE
	:	NO. 14-11928-WHD
	:	
Debtor.	:	
	:	
RONALD WAYNE HOUCHINS,	:	ADVERSARY PROCEEDING
	:	NO. 14-1053
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
WELLS FARGO BANK, N.A.,	:	IN PROCEEDINGS UNDER
	:	CHAPTER 13 OF THE
	:	BANKRUPTCY CODE
Defendant.	:	

ORDER

Before the Court is the Motion to Dismiss Complaint, filed by Wells Fargo Bank, N.A. (hereinafter the "Defendant"). The Motion arises in connection with a complaint

(hereinafter the “Complaint”) filed by Ronald Wayne Houchins (hereinafter the “Plaintiff”) to determine the validity, extent, or priority of liens against real property and for other declaratory and injunctive relief.

PROCEDURAL HISTORY

1. The Plaintiff filed the Complaint on November 5, 2014. The Court issued a summons for Wells Fargo Bank, N.A. (hereinafter the “Summons”).
2. According to the Plaintiff’s certificates of service, the Plaintiff served the Complaint and Summons by: (1) mailing a copy of the Complaint and Summons *via* United States first class mail addressed to Wells Fargo Bank, N.A., Corporation Service Company, 40 Technology Parkway South, Suite 300, Norcross, GA 30092; and (2) by hand delivering a copy of the Complaint and Summons addressed to Wells Fargo Bank, N.A., Corporation Service Company at 40 Technology Parkway South, Suite 300, Norcross, GA 30092; and (3) by “leaving the process with the defendant or an officer or agent of the defendant at 40 Technology Parkway South, Norcross, GA 30092, “Corporation Service Company, Registered Agent” attention Alicia Smith. *See* Dkt. Nos. 3 & 4.
3. On December 5, 2014, the Defendant filed the instant motion to dismiss, asserting that the Complaint and Summons have not been served properly and, accordingly, the Court lacks personal jurisdiction over the Defendant. The Defendant

apparently seeks dismissal of the Complaint pursuant to Rule 7012(b)(2) and (b)(5).

4. The Plaintiff has filed no response to the Motion. Accordingly, the Motion is deemed unopposed. *See* BLR 7007-1(c).

CONCLUSIONS OF LAW

Under Rule 12(b) of the Federal Rules of Civil Procedure, made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7012(b), a defendant may raise by motion certain defenses, including: (1) lack of personal jurisdiction; and (2) insufficient service of process. FED. R. CIV. P. 12(b)(2); (b)(5); FED. R. BANKR. P. 7012(b). “Lack of personal jurisdiction under Rule 12(b)(2) and insufficient service of process under Rule 12(b)(5) are ‘closely interrelated’ questions.” *In re Everette*, 2014 WL 4385741 (Bankr. S.D. Ga. Sept. 4, 2014). “‘Service of process is a jurisdictional requirement: a court lacks jurisdiction over the person of a defendant when that defendant has not been served.’” *Id.* (quoting *Pardazi v. Cullman Med. Ctr.*, 896 F.2d 1313, 1317 (11th Cir. 1990)); *see also* FED. R. BANKR. P. 7004(f) (“If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service in accordance with this rule or the subdivisions of Rule 4 F.R.Civ.P. made applicable by these rules is effective to establish personal jurisdiction over the person of any defendant with respect to a case under the Code or a civil proceeding arising under

the Code, or arising in or related to a case under the Code.”); *In re Brackett*, 243 B.R. 910, 913 (Bankr. N.D. Ga. 2000) (Drake, J.). Such is the case even where the defendant has actual knowledge of the filing of the complaint. *See In re DuFour*, 153 B.R. 853, 856 (Bankr. D. Minn. 1993).

Rule 7004(b)(3) provides that service on a corporation may be made “by mailing [first class, postage prepaid] a copy of the summons and complaint to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process.” FED. R. BANKR. P. 7004(b)(3). Service upon a corporate defendant’s registered agent is ordinarily sufficient. *See In re Spejcher*, 2006 WL 6592065 (Bankr. N.D. Ga. 2006) (Massey, J.) (“The Trustee effectuated service by first class mail, postage prepaid, addressed to the registered agent for each of the three defendants.”). Service on an “insured depository institution,” however, must be made by “certified mail addressed to an officer of the institution” unless certain exceptions apply. FED. R. BANKR. P. 7004(h).

Here, the Defendant asserts that, as a “domestic corporation,” it was entitled to be served properly, which it appears to believe required the Plaintiff to send or deliver the Complaint and Summons to the attention of an officer of the Defendant. The Defendant has not alleged that Corporation Service Company, the entity to whom the Plaintiff mailed and hand-delivered the Complaint and Summons, is not the Defendant’s

registered agent. The Defendant has not, therefore, explained why service upon what appears to be the Defendant's registered agent—an “agent authorized by appointment . . . to receive service of process”—would not satisfy the terms of Rule 7004(b)(3). The Defendant has also not relied upon Rule 7004(h), which generally requires service upon an insured depository institution be made by certified mail to the attention of an officer. Nor does the Defendant provide the Court with any factual basis to conclude that it is an “insured depository institution.” While the Court is inclined to agree with the Defendant that the Complaint and Summons have not been properly served, the Court cannot so find without a demonstration that either Corporation Service Company has not been appointed by the Defendant to receive service of process on its behalf, or that the Defendant is an “insured depository institution.”

Further, the Court would ordinarily exercise its discretion to deny a motion to dismiss for lack of proper service and permit a plaintiff the opportunity to effectuate proper service, especially when the 120-day period provided by Rule 4(m) for service of a complaint and summons has not yet expired. See *In re Valeu*, 53 B.R. 549, 554 (Bankr. D.N.D. 1985); see also *Umbenhauer v. Woog*, 969 F.2d 25, 30 (3d Cir. 1992) (“[D]ismissal of a complaint is inappropriate when there exists a reasonable prospect that service may yet be obtained. In such instances, the district court should, at most, quash service, leaving the plaintiffs free to effect proper service.”) (citations omitted); *Chase*

Manhattan Bank USA, Nat'l Ass'n v. Muok, Adv. Pro. No. 04-9144, at 3 (Bankr. N.D. Ga. Feb. 2, 2005) (Bonapfel, J.) (allowing the plaintiff an opportunity to show cause why the complaint, which likely could have been dismissed for want of prosecution, should not be dismissed for insufficient service of process).

That being said, the Plaintiff has not responded to the Motion, suggesting that the Plaintiff has no interest in further prosecuting the Complaint. The Court also notes that the bankruptcy case to which this adversary proceeding related has been dismissed, and the time for appealing the dismissal of the bankruptcy case has expired without action by the Plaintiff. *See* Case No. 14-11928-WHD, Dkt. No. 33 (Oct. 20, 2014), Dkt. No. 49 (Jan. 6, 2015) (denying motion to reconsider dismissal order). Although the Court cannot determine with certainty that service of the Complaint and Summons was in fact defective, it appears that the Plaintiff failed to serve the Complaint in accordance with Rule 7004(h) and that the Plaintiff has no further interest in pursuing this litigation. Out of an abundance of caution and given the Court's uncertainty as to the status of the service, however, the Court will exercise its discretion to permit the Plaintiff to either effectuate proper service or to file a response asserting that service was in fact proper. Accordingly,

It is **ORDERED** that, the Plaintiff shall have fourteen (14) days after the entry of this Order within which to effectuate proper service and to file proof thereof or to file a

response to the Motion. If the Plaintiff fails to do either, the Motion shall stand **GRANTED**, and the Complaint shall stand **DISMISSED** as of the date of the entry of this Order.

END OF DOCUMENT