(Cite as: 1991 WL 133413 (Bankr.D.Vt.))

In re Sandra J. LATUCH and John A. Latuch, Debtor.

NORM'S FURNITURE SALES, INC., Plaintiff,

v.

Sandra J. LATUCH and John A. Latuch, Defendants.

Bankruptcy No. 90-00197.

Adv. No. 90-00035.

United States Bankruptcy Court. D. Vermont.

Feb. 8, 1991.

W. Carroll, Hyde Park, Vermont, for plaintiff/respondent Norm's Furniture Sales, Inc. (Sales).

J. Sensenich, Woodbury College Legal Clinic, Montpelier, Vermont, for defendants/movants Sandra and John Latuch (Latuch).

MEMORANDUM OF DECISION ON MOTION TO DISMISS

FRANCIS G. CONRAD, Bankruptcy Judge.

***1** This matter is before us on Latuch's motion to dismiss for failure to serve a summons and complaint. [FN1]

The parties have not stipulated to the facts, but they may be ascertained with uncontradicted certainty from the pleadings and affidavits filed by the parties.

Sales filed its complaint, pro se, [FN2] with the Bankruptcy Clerk's Office on May 30, 1990. The Bankruptcy Clerk's Office issued a summons and notice of pre-trial conference and preliminary pre-trial Order on June 1, 1990. The original pre-trial conference set for August 15, 1990 was changed, on July 12, 1990, to August 21, 1990 due to a Court conflict. Attorney Carroll filed a notice of appearance on behalf of Norm's Furniture Sales, Inc. on July 24, 1990. Attorney Carroll also filed, on July 24, 1990, a Certificate of Service on the original

summons and complaint and preliminary pre-trial Order. Latuch filed, on August 1, 1990, a motion to dismiss or, alternatively, to cancel the pre-trial conference set for August 21, 1990 because Sales had failed to serve the summons and complaint.

With the agreement of the parties, the August 21, 1990 pre-trial conference was continued to October 10, 1990. Sales claims there was some confusion between counsel over the continuance, and the issuance of a new summons. Latuch claims there was no confusion.

On August 15, 1990, Sales filed its response to Latuch's motion to dismiss. The motion to dismiss was scheduled by the Court to be heard on October 10, 1990, immediately preceding the pre-trial conference.

On September 19, 1990, Attorney Carroll sent a hand-written memo-letter to the Bankruptcy Clerk requesting the Clerk's Office issue a new summons and complaint. This request was made 111 days after the original filing. It was not docketed until October 19, 1990. No new summons and complaint was issued by the Clerk's Office. No explanation is provided by counsel about the Clerk's failure to issue a new summons and complaint.

After hearing oral argument, on October 10, 1990, on the motion to dismiss, we requested memoranda of law on the issues raised by the parties, and a supporting affidavit from Attorney Carroll about the service problems. The requested memoranda and affidavit were timely received. With the matter being fully submitted, it was taken under advisement.

Sales argues that its adversary proceeding should not be dismissed. For cause, it assets several grounds.

First, Sales claims Rules of Practice and Procedure in Bankruptcy Rule 7004(f) does not provide for dismissal and does not necessarily require the issuance of a new summons and complaint.

Second, Sales argues, Bankruptcy Rule 7004(a) provides that F.R.Civ.P. 4(c)(2)(C)(i) applies to this adversary proceeding because F.R.Civ.P. 4(c)(2)(C)(i) allows State service rules to apply. V.R.Civ.P. does not have the ten (10) day time limitation contained in Bankruptcy Rule 7004(f).

Third, Sales asserts that Latuch had actual notice of the pendente (sic) proceeding and that this should be sufficient because Bankruptcy Rule 7004(b) appears to be designed so that a pre-trial conference can be scheduled by the Clerk along with the summons.

***2** Fourth, according to Sales, when a summons is not served within the ten (10) days required by Bankruptcy Rule 7004(f), the proper course is not to dismiss the action, but to quash service and allow alias process to be issued and served. Moreover, Sales claims, citing

Grammenos v. Lemos, 457 F.2d 1067 (2d Cir.1972), in the Second Circuit a case remains inchoate during the time of ineffective service so long as effective service can still be obtained. This is important, says Sales, because when it requested an alias summons on September 18, 1990 service would still have been effected.

Fifth, Sales argues F.R.Civ.P. 4(j) does not require dismissal if good cause is shown. Sales further asserts that Courts have broad discretion to retain or dismiss a case, but only after careful consideration of the facts. According to Sales, the facts show that although the matter has not been handled artfully, the misunderstanding between counsel about the August continuance and the fact the Sales requested an alias summons within the time when service could be made as a right points to quashing service, but not dismissal.

Sixth, Sales claims that when a plaintiff is proceeding pro se, or when the other party contributed to the error, a certain leniency should be given under F.R.Civ.P. 4.

Finally, in a recitation that we don't understand, Sales argues something about the Bankruptcy Clerk's Office not issuing the summons.

Latuch points out that it is undisputed Sales failed to serve Latuch within the ten (10) days allowed by Bankruptcy Rule 7004(f). Additionally, Latuch says that it is also undisputed a new summons and complaint was not served within the requirements of Bankruptcy Rule 7004(f) or within the 120 day period prescribed by F.R.Civ.P. 4(j).

Moreover, Latuch says, Sales was on notice that service was defective via its motion to dismiss. Latuch also counters with the argument that Sales has not shown cause within F.R. Civ.P. 4(j), and, from its earlier papers, Sales disputed that it was necessary to obtain and serve a new summons.

Finally, Latuch advances Sales' papers are conspicuously silent as to why additional time under F.R.Civ.P. 6(b) was not requested extending the time to obtain a new summons and to make service upon the defendant.

Rules of Practice and Procedure in Bankruptcy Rule 7004(b), in addition to the methods of service authorized by F.R.Civ.P. 4(c)(2)(C)(i) and (d), provide for service within the United States by first class mail. F.R.Civ.P. 4(c)(2)(C)(i) allows for service under the law of the State in which the District Court is held.

V.R.Civ.P. 4(1) provides for service by first class mail, but unlike F.R.Civ.P. 4, it contains no ten (10) day service rule, Bankruptcy Rule 7004(f), or 120 day termination rule, F.R.Civ.P. 4 (j). It does provide for a notice and acknowledgement of the service by mail, V.R.Civ.P. 4(1) (2), and an Official Form, Form 1B.

If service is made by any authorized form of mail, the summons and complaint shall be deposited in the mail within ten (10) days following issuance of the summons. If a summons is not timely delivered or mailed, another summons shall be issued and served. Bankruptcy Rule 4(f). If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the Court's own initiative with notice to such party, or upon motion, F.R.Civ.P. 4(j).

***3** The language of Bankruptcy Rule 7004(f) is mandatory, not precatory. Rule 7004(f) requires that the summons and complaint shall be deposited in the mail within ten (10) days following issuance of the summons. Rule 7004(f). If a summons is not timely mailed, another summons shall be issued and served. Id. (Emphasis supplied). F.R.Civ.P. 4(j)'s language is also mandatory, i.e., unless good cause is shown, the action shall be dismissed. F.R.Civ.P. 4 (j). (Emphasis supplied). See, Santos v. State Farm Fire & Casualty Company, 902 F.2d 1092, 1096 (2d Cir.1990) (Leval, D.J. concurring) (Use of the word "shall" makes clear that the rule is mandatory).

Applying the law to the facts of this motion to dismiss we will grant Latuch's motion to dismiss.

There is no doubt service in this adversary proceeding did not occur within ten (10) days of the complaint filing. No new summons and complaint were reissued within the 120 day period, nor was any request for an extension to serve the summons and complaint ever made. The issue that remains under F.R.Civ.P. 4(j) is whether Sales has shown good cause. It has not.

Even if we were to grant Sales the greatest benefit of the doubt because it was initially a pro se plaintiff, the facts show that: (1) after counsel was retained, no new summons and complaint was ever issued; (2) even after notice about the defective service via the motion to dismiss, no new summons and complaint was filed; and, (3) no extension of time to make service was ever obtained.

The facts also reveal that Sales' counsel was not confused over the continuance of the August 21, 1990 pre-trial conference. Sales' counsel stated, in what we call the "first" memo, only a "no objection" to the continuance of the pre-trial conference. The letter is silent about any additional process to issue. Latuch's counsel disagrees with Sales' contention that additional process was to issue from the Bankruptcy Clerk's Office, although this is what Sales' counsel says in an affidavit attached to the memorandum of law in opposition to the motion to dismiss. We have to let the first memo speak for itself. Some forty (40) days later, on September 18, 1990, the Bankruptcy Clerk's Office received a memo-letter asking for execution of a new summons. The Clerk's Office did not issue a new summons. The second

memo-letter was not docketed until October 19, 1990. [FN3] The difference between a Clerk's function and an attorney's function is quite dramatic. A Clerk's function is ministerial and an attorney's is discretionary. The former has little discretion and the latter has great responsibility. Attorney negligence cannot be vicariously transferred to the Clerk's Office. While we are sympathetic to Sales' position, Sales offered no evidence by testimony or affidavit about the Clerk's failure to issue the summons. If Sales had offered evidence about the Clerk's failure, we may have been able to find cause not to dismiss the action. But unfortunately we are bound by the evidence to find no cause has been shown. Moreover, if no action is taken by a Clerk's Office, it is an attorney's obligation to follow-up on any required action requested. The argument about the Clerk's failure to serve looses much of its luster because up to the time of this dismissal motion Sales argued that it didn't need to reissue the summons and complaint.

***4** Finally, filing a request to obtain a new summons within the 120 day period of F.R.Civ.P. 4 (j) is not good cause because there is always the possiblity the summons and complaint will not be served within the 120 day period. The statute requires service, not requests.

There is no doubt Latuch was aware of the complaint. Awareness that a complaint has been filed against you is not the same as receiving actual service. Notice about a lawsuit is not a substitute for service of a summons and complaint. If we were to follow Sales' argument about service being necessary only to schedule a pre-trial conference to its logical conclusion the service of summons and complaints would never be necessary. We wonder how a plaintiff would ever obtain jurisdiction over a defendant if no summons and complaint were served.

Sales also claims that service is allowed under V.R.Civ.P. 4(1) and that this State rule does not have a ten (10) day requirement. Mercifully, we don't have to decide the irreconcilable conflict created by F.R.Civ.P. 4(c)(2)(C)(i) because V.R.Civ.P. 4(1) requires proof of service by mail, and in this matter the requisite proof of service was not provided by Sales. Thus, this defense fails.

Having failed to serve the initial summons and complaint within the ten (10) day period required under Bankruptcy Rule 4(f), and having failed to obtain a new summons within 120 days as provided by F.R.Civ.P. 4(j), and no good cause shown, Latuch's motion to dismiss will be granted.

An appropriate Order will be issued.

> FN1. We have jurisdiction to hear this matter under 28 USC § 1334(b). This is a core proceeding under 28 USC § 157(b)(2)(I), (e), and (o). This Memorandum of Decision constitutes findings of fact and conclusions of law under F.R.Civ.P. 52, as made applicable by Rules of Practice and Procedure in Bankruptcy Rule 7052.

FN2. A corporation is required to be represented by counsel. The initial complaint was filed by the corporation, pro se. This in itself may have made the summons and complaint defective ab initio because there was no personal legal representative for the corporation. We decide the issue in spite of this defect.

FN3. A letter from an attorney is not a pleading and is not required to be docketed.

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