UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

In Re:
John J. Longchamp and Linda E. Longchamp,
Debtors.

Chapter 7
Case No: 00-10077

Bank of America, NA (USA),
Plaintiff,
v.

Linda E. Longchamp, et al., Defendants

Adversary Proceeding
No. 00-01021 cab

ORDER DENYING MOTION FOR RECONSIDERATION AND/OR ENLARGEMENT OF TIME AND GRANTING *SUA SPONTE* MOTION TO DISMISS

This matter is before this Court pursuant to its *Sua Sponte* Notice of Hearing and Order to Show Cause why this case should not be dismissed based upon (1) the Plaintiff's filing of this adversary proceeding without being admitted to practice in this Court and (2) the Plaintiff's failure to prosecute, to wit, its failure to serve the summons herein [Dkt.# 3-1 in the adversary proceeding] (hereafter referred to as "the Order to Show Cause"). At the Show Cause Hearing held September 5, 2000, this Court withdrew the Order to Show Cause as to counsel's lack of admission to practice before this Court upon counsel's representation that he had previously been permitted to practice in this Court without admission and that he had taken steps to be admitted immediately upon receipt of the Order to Show Cause; the Court reserved decision as to the latter grounds in order to allow Plaintiff's counsel an opportunity to submit an affidavit explaining the failure to serve the summons. Subsequent to the hearing, counsel for Plaintiff submitted his Motion and Memorandum for Reconsideration and/or Enlargement of Time, with supporting affidavit. For the reasons set forth below, the Complaint Objecting to Dischargeability of Indebtedness is dismissed without prejudice and the Motion for Reconsideration and/or Enlargement of Time is denied.

JURISDICTION

This Court has jurisdiction over this matter pursuant to sections 157, 1334 and 1441 of Title 28, U.S.C.

PROCEDURAL HISTORY

On January 28, 2000, the Debtors, John J. and Linda E. Longchamp, filed their voluntary Petition for Chapter 7 relief. Bank of America, NA (USA), a creditor listed on Schedule F of the Debtors' schedules, filed its Complaint Objecting to Dischargeability of Indebtedness against the Debtors ("the Complaint") timely on April 17, 2000, and a Summons was issued by this Court on April 28, 2000. On the date the adversary proceeding was filed, Plaintiff's counsel was not admitted to practice before this Court pursuant to Rule 83.2, Local Rules of United States District Court for the District of Vermont. Neither the Summons nor Complaint was ever served upon the Defendant/ Debtors. On May 11, 2000, an Order was entered discharging the Debtors pursuant to §727 of Title 11, U.S.C., and on May 13, 2000 that Order was served upon all duly listed creditors, including the Plaintiff [Dkt. # 5-1 in the chapter 7 case].

On August 25, 2000, this Court, *sua sponte*, issued its Notice of Hearing for September 5, 2000 and Order To Show Cause why this case should not be dismissed for failure to act upon the following matters:

> FILING IS DEFECTIVE AS IT IS FILED BY AN ATTORNEY NOT ADMITTED TO PRACTICE IN THE UNITED STATES BANKRUPTCY COURT, DISTRICT OF VERMONT, and FAILURE TO PROSECUTE BASED UPON FAILURE TO SERVE SUMMONS."

No response or other papers were filed by the Plaintiff in response to the Court's Order to Show Cause. On September 5, 2000, counsel for Plaintiff appeared at the duly scheduled hearing, telephonically, and stated that he opposed dismissal of the adversary proceeding and argued that dismissal would be inappropriate because he was in the process of submitting an Application for Admission and because he had experienced a disruption in his clerical staff during the requisite 120 day period for service of the Summons and Complaint upon the Defendant/ Debtors. This Court withdrew the Order to Show Cause to the extent it relied upon counsel's lack

of admission to practice before this Court based upon assurances that counsel was actively seeking admission to practice before this Court. However, this Court reserved decision on the Order to Show Cause based upon the failure to comply timely with the applicable service of process requirements pending an affidavit to be submitted by Plaintiff's counsel.

On September 6, 2000, counsel for Plaintiff filed a Motion and Memorandum for Reconsideration and/or Enlargement of Time seeking "an enlargement of time in which to object to the Debtor's (sic) discharge pursuant to Bankruptcy Rule 9006(b)", with accompanying affidavit of counsel. In pertinent part, Plaintiff's counsel avers "that his paralegal/ secretary was out on medical leave during the period of April 28, 2000 up to and including June 26, 2000, and during this period, notwithstanding that this Court did issue the Summons, the Summons was not served along with the Complaint upon Defendants by anyone from [counsel's] office." No further explanation is provided as to why Plaintiff failed to serve the Defendants during the requisite 120 day period pursuant to Bankruptcy Rule 7004, failed to seek an enlargement of time for service during the 120 day period and failed to take any steps to prosecute the action through the date of the hearing.

ISSUE

The issue before the Court is whether the Plaintiff has demonstrated good cause sufficient to preclude dismissal for its failure to serve the Defendants during the 120 day period as set forth in Rule 4(m), F.R.C.P. as incorporated by Bankruptcy Rule 7004(a), and, if not, whether Plaintiff is entitled to a discretionary enlargement of time notwithstanding the absence of good cause.

DISCUSSION

Rule 4(m), Federal Rules of Civil Procedure, provides in pertinent part:

> If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period.

Rule 4(m) is applicable to these proceedings pursuant to Bankruptcy Rule 7004(a). Thus, a Bankruptcy Court must grant an extension of time when the plaintiff can show good cause for the failure to serve within 120 days. If, however, good cause is not shown, the court may dismiss the case without prejudice or extend the time for service. See Petrucelli v. Bohringer & Ratzinger, 46 F.3d 1298, 1305 (3d Cir. 1995); Goodstein v. Bombardier Capital, Inc., 167 F.R.D. 662, 666 (D.Vt. 1996).

One of the principal purposes of the 120 day service requirement of Rule 4 is to ensure diligent prosecution of civil cases by the plaintiff. See Tillman v. New York Department of Mental Health, 776 F. Supp. 841, 843 (S.D.N.Y. 1991). Similarly, one of the underlying purposes of bankruptcy is to grant a debtor a fresh start as expeditiously as possible. See Pioneer Investment Services Company v. Brunswick Associates Limited, 507 U.S. 380, 389, 113 S.Ct. 1489, 1495 (1993); In re Love, 232 B.R. 373, 379 (E.D.Tenn. 1999).

Determining whether an extension of time for service is appropriate invokes a two part analysis. Goodstein v. Bombardier Capital, Inc., 167 F.R.D. at 666. First, the court must decide whether good cause exists. Id. If good cause exists, then the court grants plaintiff an extension of time to serve, and the inquiry is ended. However, if good cause is not shown, the court proceeds to the second part of the analysis to decide whether to dismiss the case without prejudice or to extend the time for service. Id.

The determination of good cause depends upon an analysis of two principal factors: whether the plaintiff has made a reasonable effort to effect service, and whether the defendant has been prejudiced by the failure to serve. Id. Some courts have also considered whether the plaintiff has moved under Rule 6(b), FRCP, for an enlargement of time in which to effect service. See, e.g., Gowan v. Teamsters Union (237) 170 F.R.D. 356, 360 (S.D.N.Y. 1997).

Because Plaintiff has not made any reasonable effort to effect service upon these Defendants, this Court finds that good cause is lacking. Plaintiff filed the Complaint on April 17, 2000 and, notwithstanding that the summonses were issued on April 28, 2000, did nothing to effect service of process upon the Defendants. While Plaintiff's counsel asserts that his paralegal/ secretary was on medical leave for a portion of the 120 day period between April 28, 2000 and June 26, 2000, there is no explanation whatsoever for his lack of diligence in

seeking another summons or a motion for enlargement of time to perfect service between June 26, 2000 and the issuance of the Order to Show Cause.

Since this Court has determined that good cause to extend the time for service is lacking, it must determine whether it would be appropriate to exercise its discretion to enlarge the time for service under the circumstances presented. In deciding whether to grant a discretionary extension of time under Rule 4(m), courts consider a variety of factors, including: whether the defendant has evaded service, concealed a defect in attempted service, or actively participated in the case; the timeliness of a defendant's motion to dismiss, if any; whether the defendant would be prejudiced by the failure to be served timely; and whether service was eventually accomplished. See Goodstein v. Bombardier Capital, Inc., 167 F.R.D. 662, 666 (D.Vt. 1996). Courts have also considered whether a plaintiff has acted diligently in seeking to serve the defendant or to request an enlargement of time. See Gowan v. Teamsters Union (237) 170 F.R.D. 356, 360 (S.D.N.Y. 1997); In re Love, 232 B.R. 373, 379 (E.D.Tenn. 1999); see also Stebbins v. Capital Cities/ ABC, Inc., 96 F.3d 1450 (7th Cir. 1996)(unpublished opinion), No. 95-3774, 1996 WL 508578; Sewell v. Jones, No. 95 civ 6224 SAS, 1996 WL 374140 (S.D.N.Y. July 3, 1996). Moreover, while the applicable Advisory Committee note indicates that an extension of time may be justified if a statute of limitations would bar the refiled action, it is clear that a court may determine dismissal to be appropriate, notwithstanding that a statute of limitations or other bar date may preclude the refiling of an action. See Petrucelli v. Bohringer & Ratzinger, 46 F.3d 1298, 1306 (3d Cir. 1995); see also Panaras v. Liquid Carbonic Industries Corp., 94 F.3d 338, 341 (7th Cir. 1996); Adams v. Allied Signal General Aviation Avionics, 74 F.3d 882, 887-88 (8th Cir. 1996)(refusing a discretionary extension of time to serve despite the running of the statute of limitations).

This Court has carefully considered each of the foregoing factors and the circumstances of this case, including the bar to refiling a dischargeability complaint, in reaching its determination not to extend the time for service. As indicated above, no steps were taken to perfect service of process during the 120 day period. Nor did Plaintiff take any steps to seek an additional summons or request an enlargement of time to perfect service or to otherwise advance these proceedings in a diligent manner. Furthermore, on notice from this Court that

Plaintiff would face dismissal if it failed to show cause at the September 5th hearing, Plaintiff failed to file any written response and still did not file an admission application or motion to enlarge the time to serve its summons prior to the hearing date. Instead of demonstrating good cause or due diligence, Plaintiff's affidavit reflects a nonchalance and lack of adherence to the bankruptcy rules. Plaintiff's conduct and affidavit totally ignore the recognized interests of the Debtors/Defendants in obtaining expeditious relief under the liquidation provisions of Chapter 7. It appears that if this Court had not raised the issue of dilatoriness on its own initiative, Plaintiff might never have taken appropriate steps to effect service or prosecute its claim. The Debtors have not evaded service nor have they actively participated in this adversary proceeding.[1] In fact, there is no evidence in the record before this Court that the Debtors have any knowledge at all that this lawsuit has been commenced, or any reason to believe that plaintiff's debt is not discharged. The Debtors should not be subject to this adversary proceeding solely because of the Court's motion, where, as here, the Plaintiff/Creditor has failed to prosecute. Hence, to grant Plaintiff an extension of time would cause great prejudice to the Debtors.

Based upon the foregoing, this Court cannot discern any just cause for relieving Plaintiff of the consequences of its lack of due diligence or for disturbing the Debtors' fresh start. As noted persuasively in other jurisdictions:

> a contrary conclusion would undermine one of the underlying purposes of bankruptcy, which is to grant a debtor a fresh start as expeditiously as possible, and 'would extend both the 120 days and the statute of limitations of every cause of action indefinitely'

In re Barr, 217 B.R. 626, 630 (W.D.Wash. 1998)(quoting Petrucelli, supra); see also In re Love, 232 B.R. 373, 379 (E.D.Tenn. 1999).

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[1] It should be noted that the court in Goodstein v. Bombardier Capital, Inc., 167 F.R.D. 662 (D.Vt. 1996) emphasized its similar displeasure with the plaintiff's conduct and observed that it would have dismissed that action without prejudice, regardless of the statute of limitations, if the defendant had not participated in the case or had acted in a more timely manner once it had notice of the proceeding. Id., at 667 at fn. 2.

IT IS THEREFORE ORDERED that the Complaint Objecting to Dischargeability of Indebtedness is dismissed without prejudice and the Motion for Reconsideration and/or Enlargement of Time is denied.

September 21, 2000

Hon. Colleen A. Brown
U.S. Bankruptcy Court Judge

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