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**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF KANSAS**

**In Re:**

**MICHAEL BARTON MYERS,  
  
DEBTOR.**

**CASE NO. 01-41991-11  
CHAPTER 11**

**MICHAEL BARTON MYERS,  
  
PLAINTIFF,**

**v.**

**ADV. NO. 02-7026**

**TODD NIELSON MYERS,  
  
DEFENDANT.**

**ORDER DENYING MOTION TO DISMISS AND MOTION FOR CONTINUANCE,  
AND DIRECTING DEFENDANT TO FILE AN ANSWER TO THE COMPLAINT**

This proceeding was before the Court on June 18, 2002, on the defendant's motion to dismiss and his "Consolidated Notice of Non-Waiver of Service Requirements and Motion for Continuance of Hearing." The defendant has filed pleadings *pro se* but did not appear for the hearing. The plaintiff-debtor appeared *pro se* by telephone at the hearing.

On April 3, 2002, the debtor commenced this proceeding by filing a complaint seeking, under 11 U.S.C.A. §542, turnover of property allegedly held by his son, the defendant, in Switzerland. He also alleged that the defendant is a citizen of the United States. The debtor claimed that he had left unspecified personal property at the defendant's residence in 1999 along with money to ship it to the

debtor, but that the defendant had failed to return the property to him. He also alleged that his estranged wife had given the defendant other personal property, including a family Bible and several guns. Finally, the debtor claimed that he could use some of the property to produce income.

On April 22, the defendant filed a motion to dismiss on the ground that the Court lacked jurisdiction over subject matter, apparently because: (1) the Court had granted stay relief for a state court to divide the marital property of the debtor and his estranged wife in their divorce proceeding; and (2) the personal property allegedly held in Switzerland was outside the Court's jurisdiction. He cited Fed. R. Bankr. P. 7012 and Fed. R. Civ. P. 12(b)(1) and (3) as authority for this part of his motion. The defendant also alleged that the complaint failed to state a claim for which relief may be granted because it was ambiguous about the identity, location, and disposition of the property, and whether *in personam* or *in rem* relief was sought. Here, he relied on Bankruptcy Rule 7012(b) and Civil Rule 12(b)(6). Finally, he alleged that the debtor's wife was a necessary party to this proceeding, but that joining her as a party would deprive the Court of subject matter jurisdiction because of the stay relief order. He cited Civil Rule 19 to support this argument.

The debtor filed a response to the motion, noting among other things that the defendant had not denied that the Court had personal jurisdiction over him. The debtor identified some more property in this response: a "substantial" coin collection and his grandfather's Masonic sword. In light of the dispute about the motion to dismiss, the Clerk's Office set the matter for a hearing on June 18; notice of the motion was mailed on May 20.

On June 10, the defendant filed a pleading titled "Consolidated Notice of Non-Waiver of Service Requirements and Motion for Continuance of Hearing." He stated that he refused to waive

service requirements under the laws of the United States, Switzerland, and the Hague Convention, and that he exercised “his right, under the Hague Convention, to refuse direct service by mail.” Finally, he asked for a continuance of the hearing on his motion to dismiss “until such time as he may be lawfully served with reasonable advance notice of such hearing.” About a week later, he submitted a copy of a letter that appears to be from his employer that asked for hearings to be scheduled sixty to ninety days in advance in order not to jeopardize its business or the defendant’s job.

At the hearing on June 18, the debtor appeared by phone and the defendant did not appear. Believing the defendant’s appearance was not necessary for the hearing, the Court denied his request for a continuance. The Court then ruled that the defendant’s notice of non-waiver of service requirements was filed too late because he had already entered his appearance in the proceeding by filing his motion to dismiss. Civil Rule 12(h)(1), made applicable here by Bankruptcy Rule 7012(b), provides that defenses of lack of jurisdiction over the person, insufficiency of process, and insufficiency of service of process are waived if omitted from a motion to dismiss (like the one the defendant filed in this case). The Court also determined that it does have jurisdiction over this proceeding and that the complaint does state a claim for relief, and denied the motion to dismiss. The Court directed the debtor to submit a proposed written order incorporating the Court’s rulings, but he has not yet done so.

On July 29, the Court received a copy of a letter that appears to be written under the authority of the Swiss Ambassador in Washington, D.C. The letter explains the Swiss Government’s view about the proper manner of serving judicial documents on persons or corporations located in Switzerland. A careful reading of the letter indicates its author understands that the defendant was served with the summons and complaint in this proceeding by mail in Switzerland.

The letter lead the Court to review this matter again, and this time, to notice that Swiss Ambassador's understanding is mistaken. The return of service in the court file contains a declaration under penalty of perjury that the summons and complaint were personally served on the defendant at the Shawnee County Courthouse here in Topeka, Kansas, on April 4. Like the Swiss Ambassador, the Court had assumed that the initial notice of this proceeding was served on the defendant by mail in Switzerland. The discovery that he was actually personally served here in Kansas simply strengthens the Court's belief that his efforts to invoke the Hague Convention are misguided. While Civil Rule 4(f) requires service in a foreign country to be made in accordance with the Hague Convention or some similar internationally agreed means, that Rule applies only to service of the summons and complaint. The Rule's primary function is to give the defendant notice of the commencement of an action and to mark the Court's assertion of jurisdiction over the lawsuit.<sup>1</sup> Personal service of the summons and complaint, made on the defendant while he was in Kansas, certainly gave the Court jurisdiction over his person, so concerns about interfering with Swiss sovereignty by initiating a suit against one of its residents by mail are not implicated here. Civil Rule 5 governs service of pleadings after the summons and complaint and it does not refer to the Hague Convention or other international agreements.

The Court recognizes, of course, how difficult it would be for the defendant travel from Switzerland to Kansas to appear for hearings, and is willing to allow him to appear by telephone for most hearings, except such evidentiary hearings as may become necessary. Indeed, the debtor lives in California and has appeared before this Court by phone for many hearings in connection with his

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<sup>1</sup>4 Charles Alan Wright & Arthur R. Miller, *Fed. Prac. & Pro. Civil 3d*, §1063 at 328 (2002).

bankruptcy case. If the defendant provides an appropriate phone number (certain notes in the court file indicate he may have done so already), the Court is also willing to direct the Clerk's Office to send copies of hearing notices to the defendant by facsimile transmission to help insure that he receives timely information about them.

The defendant's motion for continuance is hereby denied. His motion to dismiss is also denied. He is directed to file an answer to the debtor's complaint on or before September 16, 2002.

In light of the Court's issuance of this order, the debtor is excused from his obligation to prepare an order about the June 18 hearing. The show cause hearing scheduled for August 27 regarding his failure to fulfill that obligation is hereby canceled.

IT IS SO ORDERED.

Dated at Topeka, Kansas, this 1st day of August, 2002.

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JAMES A. PUSATERI  
CHIEF BANKRUPTCY JUDGE