



SO ORDERED.

SIGNED this 01 day of May, 2006.

Dale L. Somers

Dale L. Somers
UNITED STATES BANKRUPTCY JUDGE

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

In Re:

III, Inc.,

DEBTOR.

STEVEN R. REBEIN,

PLAINTIFF,

v.

**KENNETH KOST,
MICHAEL S. ADKINS, and
ROBERT J. PETERSON,**

DEFENDANTS.

**CASE NO. 03-22200-7
CHAPTER 7**

ADV. NO. 05-6077

**ORDER ON MOTION TO MODIFY RECOMMENDATION
TO THE DISTRICT COURT**

This proceeding is before the Court for consideration of the defendants' motion to modify the "Recommendation to the District Court to Grant the Defendants' Motion to Withdraw the Reference of this Adversary Proceeding," entered on March 6, 2006. The motion to modify concerns that portion of the Recommendation describing the facts surrounding the service of process in this proceeding. Defendants Kenneth Kost, Michael S. Adkins, and Robert J. Peterson (collectively "Defendants") all appear by counsel Paul D. Sinclair. Steven R. Rebein ("Trustee"), the Chapter 7 trustee of III's bankruptcy estate and the plaintiff in the adversary proceeding, has filed a response to the motion. He appears by counsel Thomas M. Franklin. The Court has reviewed the relevant materials and is now ready to rule.

The Defendants complain about the facts stated in the following paragraph in the Court's Recommendation:

D. Procedural matters

The summons which the Trustee timely served on each of the three Defendants was issued on May 31, 2005. The Trustee filed his amended complaint on June 1, and mailed a summons and complaint to each man on June 2. The Defendants therefore had until June 30 to file an answer or responsive motion.⁵ Although they did not ask for an extension of time, the Defendants did not respond to the amended complaint until July 18, when they served and filed their joint answer, in which they demanded a jury trial "on all issues so triable."⁶ Fourteen days later, on August 2, they filed their motion asking the District Court to withdraw the reference of the adversary proceeding from this Court. Despite the Defendants' delay in filing their joint answer and their motion to withdraw reference, the Trustee has not complained that either pleading was not timely filed.⁷

⁵See Fed. R. Bankr. P. 7012(a) (if complaint is duly served, answer is due 30 days after issuance of summons, unless court prescribes different time); Fed. R. Bankr. P. 7004(e) (if service is by mail, summons and complaint must be deposited in mail within 10 days after summons is issued).

⁶The joint answer stated it was filed in response to the amended complaint and only one summons was ever issued for each Defendant, so it is clear the Trustee never served the original complaint but only the amended one.

⁷The Court assumes the attorneys might have informally agreed to extend the answer time, leading the Trustee to ignore the delays.

The Defendants allege that the Trustee contacted their attorney shortly after commencing this proceeding and asked whether he would accept service of process on their behalf, and the attorney agreed to do so in exchange for making the Defendants' answer due on July 18. The Trustee concedes this is true. The Defendants complied with this agreement, then, when they filed their answer on that day. This indicates the assumption the Court stated in footnote 7 was correct.

The Defendants also assert that technically, no summonses were issued with respect to the Trustee's amended complaint. While it is true that the three identical summonses the Trustee served on the Defendants by mail and certified mail were issued before he filed his amended complaint, they refer only to "the complaint which is attached to this summons." The Trustee alleges he attached a copy of his amended complaint to each summons when he served the summonses the day after he filed the amended complaint, and the Defendants have not contested this assertion. Furthermore, Federal Rule of Civil Procedure 4(a), made applicable here by Bankruptcy Rule 7004(a)(1), specifies the information that a summons must contain, but does not require the summons to identify the particular complaint it concerns. Of course, since Rule 7004(b) authorizes using simple first class mail to serve a summons and complaint, a plaintiff will typically serve them before amending the complaint, and will need to obtain a new summons after

filing an amended complaint. The Court sees nothing in the rules, however, to preclude a plaintiff from serving an amended complaint with a summons issued before the amended complaint was filed, as the Trustee apparently did here.

The Defendants assert nothing in the record shows any of them actually received a summons and the amended complaint. The Court does not believe anything in the procedural rules applicable to adversary proceedings requires any proof that a defendant actually received the summons and complaint. Instead, Bankruptcy Rule 7004(b) explicitly authorizes service of process to be accomplished by ordinary “first class mail postage prepaid,” and says nothing about proof of receipt. Of course, the fact the Defendants filed a joint answer to the Trustee’s amended complaint establishes that they all at least became aware it had been filed, even if they did not receive a copy of it in the mail.

Although the Court indicated in its Recommendation that the Defendants’ answer appeared to have been filed late, nothing in the legal analysis relied on that appearance. The conclusion the Defendants failed to make a complete jury trial demand in the ten-day time period allowed by Civil Rule 38(b) was based on the fact they filed their motion to withdraw reference fourteen days after they filed their answer, not on the fact their answer was apparently due eighteen days before they filed it. Even though their answer was filed within the time the parties agreed to, the Defendants’ motion to withdraw reference was not filed within the time set by Rule 38 for demanding a jury trial.

The Recommendation is hereby modified to reflect the parties' agreement that the Defendants' answer would not be due until July 18, 2005. To the extent the Defendants ask the Court to conclude their motion to withdraw reference was timely under Civil Rule 38, their request is denied.

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