



SO ORDERED.

SIGNED this 17 day of April, 2006.

Dale L. Somers

Dale L. Somers
UNITED STATES BANKRUPTCY JUDGE

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

In Re:

**MAX R. WAGERS,
GEORGIA A. WAGERS,**

DEBTORS.

CHRISTOPHER J. REDMOND,

PLAINTIFF,

v.

**CHRIS E. WAGERS,
CHRISTINA E. WAGERS,**

DEFENDANT(S).

**CASE NO. 03-24484-7
CHAPTER 7**

ADV. NO. 05-6190

**ORDER DENYING MOTION TO DISMISS PARTY, AND GRANTING MOTION
TO AMEND COMPLAINT, BUT REQUIRING NEW SERVICE OF PROCESS**

This proceeding is before the Court on a motion filed by Kristin H. Wagers to dismiss or to quash service of process, and a motion filed by the plaintiff-trustee for leave to amend his complaint. Ms. Wagers appears by counsel Richard C. Wallace and Timothy J. Muir of Evans & Mullinix, P.A. Plaintiff-trustee Christopher J. Redmond appears as his own counsel and by co-counsel Jacob W. Stauffer, both of Husch & Eppenberger, LLC. The Court has reviewed the relevant materials and is now ready to rule.

This dispute arises because defendant Chris E. Wagers, the Debtors' son, used to be married to Christine E. Wagers, and is now married to Kristin H. Wagers. The Trustee's complaint seeks to avoid various prepetition transfers the Debtors allegedly made to their son or to both him and their daughter-in-law. It was filed on the last day of the two-year period fixed by 11 U.S.C.A. § 546(a)(1)¹ for bringing certain avoidance actions. The complaint named Christina E. Wagers as one of the defendants, instead of Kristin H. Wagers. The Trustee alleges this was a mistake. The complaint was served by mailing it to the address where Kristin and the Debtors' son live. Kristin now asks the Court to dismiss her as a party or to quash the service of process on her, and the Trustee asks for leave to amend his complaint to name her as the correct defendant. The Court concludes Kristin's motion to dismiss must be denied, and the Trustee's motion to amend his complaint must be granted. However, the Trustee will be required to file the amended

¹The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat 23, was enacted after the Debtors filed their bankruptcy case, but did not amend § 546(a), or otherwise make any changes that might affect this decision.

complaint and formally serve it on Kristin in accordance with Federal Rule of Bankruptcy Procedure 7004, and will be given 30 days to do so.

FACTS

The Debtors filed their joint Chapter 7 bankruptcy petition on October 23, 2003. The Trustee was appointed to serve as the trustee of their bankruptcy estate. On October 23, 2005, the Trustee filed the complaint that commenced this adversary proceeding, alleging the Debtors had made a number of transfers to one or both of the defendants that he sought to avoid under §§ 544, 547, and 548 of the Bankruptcy Code.² The Trustee also asked for turnover of the transferred property under § 542, and for an accounting. He named the Debtors' son and Christine E. Wagers³ as defendants. The complaint said they both lived at 5221 Kent Place in Topeka, Kansas, and further identified them as the son and daughter-in-law of the Debtors.

Summonses were issued on November 1 for Chris E. Wagers and Christine E. Wagers. On December 1, Chris E. Wagers filed an answer. That same day, his current

²Under § 301, the commencement of a voluntary case constitutes an order for relief. Under § 546(a)(1)(A), the Trustee had two years after entry of the order for relief to commence a proceeding under § 544, 545, 547, 548, or 553. Federal Rule of Bankruptcy Procedure 9006(a) provides that when computing any time period prescribed by statute, the day of the act from which the time period begins to run is not included. This means the § 546(a)(1)(A) two-year period ran from October 24, 2003, to October 23, 2005, and to the extent he sought relief under §§ 544, 547, and 548, the Trustee filed his complaint on the last possible day.

³“Christina E. Wagers” was named as one of the defendants in the caption and the body of the complaint, but “Christine E. Wagers” was named as the person to be served. The summons was directed to “Christine E. Wagers.” Kristin Wager’s motion says Christine A. Wagers is her husband’s ex-wife. Thus, it appears the ex-wife’s first name is Christine and her middle initial is either “A” or “E.” Because her correct name has no impact on this decision and to avoid adding to the confusion, the Court will use “Christine E. Wagers” in the text, and will not mention the other possibilities again.

wife, Kristin H. Wagers, represented by the same attorneys as he is, filed a motion to have the action against her dismissed or the attempted service on her quashed because she was not named as a defendant. On December 13, the Trustee responded to Kristin's motion, contending he had named the wrong woman to be a defendant along with the Debtors' son. At the same time, the Trustee filed a motion for leave to amend his complaint to remove Christine E. Wagers and include Kristin H. Wagers as a defendant. He attached to the motion a proposed amended complaint that appears to be identical to the original complaint except Kristin is substituted for Christine E. Wagers. The motion to amend the complaint was transmitted to the Court's Electronic Filing System, and was served on Kristin's attorney through a Notice of Electronic Filing generated by that system.

DISCUSSION

1. Motion to dismiss and Motion for leave to amend complaint

Federal Rule of Civil Procedure 15 is made applicable here by Bankruptcy Rule 7015,⁴ and subsection (a) of Rule 15 provides that leave to amend a pleading "shall be freely given when justice so requires." The parties' arguments make clear that their dispute is not so much about whether the Trustee should be allowed to amend his complaint, but whether the amended complaint will relate back to his original complaint,

⁴Interim Federal Rules of Bankruptcy Procedure implementing the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 have been promulgated by the Advisory Committee on Bankruptcy Rules and adopted in this District by Standing Order 05-5, but none of them have changed any of the Federal Rules of Civil Procedure or the rules governing adversary proceedings, Bankruptcy Rule 7001 through 7087. Interim Bankruptcy Rule 9006 did not change subparagraph (a) of Rule 9006. Other than the reference in footnote 2 to Rule 9006(a), only certain civil rules and adversary rules are involved in this decision.

so his claims against Kristin will be considered timely under § 546(a) of the Bankruptcy Code. In other words, the only reason to deny the motion to amend the complaint would be if the amendment would not save the claims against Kristin. The Court will therefore turn to the relation-back question.

The facts presented here appear to be legally indistinguishable from those before the United States Supreme Court in *Schiavone v. Fortune*.⁵ In that case, the Court ruled a complaint could not be amended and relate back under Rule 15(c) to change the party against whom a claim is asserted if that party did not receive notice of the institution of the action until after the applicable limitations period had run.⁶ In this case, since the Trustee filed his complaint on the last day of the applicable limitations period and he has not suggested that he gave anyone notice of the complaint other than through the normal service of process, Kristin could not have received notice of the commencement of the case until after the period ran. If *Schiavone* were still the law, the Trustee's claims against Kristin would probably have to be dismissed and be barred by the time limits set by § 546(a). However, five years after *Schiavone*, Civil Rule 15(c)(3) was amended to change the result reached there.⁷ The Court must therefore apply the present version of Rule 15(c) in order to resolve the parties' dispute.

As relevant here, Rule 15(c) now reads:

⁵477 U.S. 21, 22-25 (1986).

⁶477 U.S. at 25-32.

⁷See Advisory Committee Notes, 1991 Amendment to Civil Rule 15(c).

An amendment of a pleading relates back to the date of the original pleading when

...

(2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or

(3) the amendment changed the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period allowed by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

Since the Trustee's amended complaint changes nothing about the Trustee's claims except the identity of one of the defendants, the claims all clearly arise out of the conduct, transaction, or occurrence set forth in his original complaint. Civil Rule 4(m), made applicable here by Bankruptcy Rule 7004(a), gives a plaintiff 120 days after filing a complaint to serve it, together with a summons, on each defendant.

Under subsection (c)(3) of Rule 15, the question becomes whether within 120 days of the filing of the Trustee's complaint, Kristin (1) received such notice of the filing of the complaint that she will not be prejudiced in maintaining her defense on the merits, and (2) knew or should have known the action would have been brought against her but for a mistake. The Trustee's reply to Kristin's motion to dismiss, in which he admitted he intended to name Kristin as one of the defendants, and his motion to amend the complaint to name her were both filed less than 60 days after his original complaint, and served

electronically on her attorney.⁸ Within the Rule 4(m) time period, then, Kristin not only had notice of the Trustee's original complaint and the mistake made in it, but also had notice the Trustee was trying to obtain permission to correct the mistake and assert claims against her. The question of prejudice to her defense could arise only if the notice she received during the 120-day period fixed by Rule 4(m) either had not informed her that the Trustee had commenced an action, or had not alerted her that the Trustee had made a mistake and intended to name her as a defendant. The notice here definitely informed her within the 120-day period that she was an intended target of the complaint, and so should take any steps that might be necessary to preserve her defense. Consequently, the claims asserted in the Trustee's amended complaint will relate back to his original complaint. Since Kristin has offered no other reason why the amendment should not be allowed, the Trustee's motion for leave to amend his complaint will be granted and Kristin's motion to dismiss the claims against her will be denied.

2. Motion to quash service of process

Kristin asks in the alternative that the Court quash the service of process made on her. Because the original complaint failed to name her as a party, the service was not effective to make her a defendant. The Court has discretion to dismiss the claims against her or merely to quash the service and require the Trustee to try again.⁹ Because the

⁸See Bankruptcy Court for the District of Kansas Standing Order No. 05-3(b), adopting *Administrative Procedures for Filing, Signing, and Verifying Pleadings and Documents by Electronic Means* (eff. Mar. 17, 2005) and §§ I.A., II.A. & D., III.A. of those Administrative Procedures.

⁹See 5B Wright & Miller, *Fed. Prac. & Pro. Civil 3d*, § 1354 (2004).

Trustee has already submitted an amended complaint that does name Kristin as a defendant and the original service he mailed to her home apparently reached her, it seems likely the Trustee will be able to make valid service this time, so the Court will give him a chance to do so. Since the 120-day period that Rule 4(m) allows for service expired while this matter was under advisement, the Trustee will be given 30 days to properly serve the amended complaint on Kristin.

CONCLUSION

For these reasons, Kristin H. Wagers's motion to dismiss is hereby denied, and the Trustee's motion to amend his complaint is granted. So that the docket for the case will properly reflect the filing of the amended complaint, the Trustee is hereby directed to re-submit it as a separate pleading within 10 days of the date of this order. Kristin's alternative motion to quash the service of process attempted to be made on her is hereby granted. The Trustee is given 30 days to serve a summons and the amended complaint on Kristin as required by Federal Rule of Bankruptcy Procedure 7004.

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