



The relief described hereinbelow is SO ORDERED.

Signed September 04, 2008.

A handwritten signature in black ink, reading "Robert D. Berger", is written over a horizontal line.

ROBERT D. BERGER  
United States Bankruptcy Judge

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

**In re:**

**WILLIAM CARLISLE HOPKINS II,  
Debtor.**

**Case No. 07-21081  
Chapter 7**

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**CORE FUNDING GROUP, L.P.,  
Plaintiff,**

**v.**

**Adv. No. 07-06275**

**WILLIAM CARLISLE HOPKINS II,  
Defendant.**

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**ORDER DENYING DEFENDANT'S MOTION TO  
DISMISS FOR INSUFFICIENT SERVICE OF PROCESS AND  
GRANTING PLAINTIFF ADDITIONAL TIME TO EFFECT SERVICE**

Defendant's Motion to Dismiss for insufficient service of process and Plaintiff's counter-Motion for Leave to Serve Defendant/Debtor Out of Time are before the Court.<sup>1</sup> Plaintiff Core Funding Group, L.P. ("Core"), filed this action seeking to except from discharge in excess of

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<sup>1</sup> Doc. Nos. 16 and 18.

\$567,000.00 arising from five promissory notes secured by Hopkins' former law firm's accounts receivable. Hopkins moves the Court to dismiss under Fed. R. Bankr. P. 7012(b)(5) for insufficiency of service of process. Plaintiff filed a response and a counter-motion for leave to serve Defendant out of time. The Court, having reviewed the relevant pleadings, denies Defendant's motion and grants Plaintiff's motion.

### **Background**

Hopkins filed for bankruptcy on May 22, 2007. On October 15, 2007, Core filed this adversary seeking to except its claims against Hopkins from discharge, citing 11 U.S.C. §523(a)(2)(A) and (B). Core alleges Hopkins entered into a series of promissory notes, each secured by a pledge of accounts receivable from Hopkins' former law firm. Core further alleges Hopkins converted its collateral for his own use and concealed the receipt of collateral proceeds from Core while negotiating subsequent loans.

At the time Core filed suit, Nancy Jochens represented it. Ms. Jochens requested and received the summons on October 30, 2007. However, Hopkins was never served with the summons or the complaint. Hopkins' counsel, apparently aware of the lawsuit through the Court's electronic filing system (ECF), filed an answer on December 18, 2007, preserving the defense of insufficiency of service of process within the answer. Ms. Jochens requested leave to withdraw on January 3, 2008. On March 5, 2008, the Court held a pre-trial scheduling conference at which counsel for Hopkins announced Ms. Jochens' withdrawal and stated he had been informed substitute counsel from Ohio would soon be entering their appearance for Core.

On May 6, 2008, Hopkins moved to dismiss for insufficiency of service of process. Hopkins argued he had never been served and substitute counsel had never entered an

appearance. On May 22, 2008, present counsel entered his appearance for Core. On May 28, he filed a motion for leave to have additional time to serve Hopkins. The 120-day deadline for Core to serve Hopkins expired on February 11, 2008.

### Discussion

Service of process of an adversary proceeding requires the service of both a summons and the complaint on the defendant.<sup>2</sup> Additionally, if the defendant is a debtor represented by counsel, service shall also be made upon the debtor's attorney by any means authorized by Fed. R. Civ. P. 5(b).<sup>3</sup> In this district, service through the electronic filing system (ECF) is not an authorized means for service of a summons and complaint unless the person consents in writing.<sup>4</sup> Merely being a registered user of ECF does not waive the right to service by personal service or first class mail.<sup>5</sup> Service of process upon a debtor is not sufficient unless both the debtor and his attorney receive the summons and complaint other than by receiving notice of the filing through ECF.<sup>6</sup> The attorney's actual knowledge of the adversary proceeding does not substitute for proper service and cannot cure the "technically defective service of process" on the debtor/defendant.<sup>7</sup>

If service is not accomplished within 120 days after the complaint was filed, the court shall dismiss the action without prejudice or direct service be effected within a specified time.<sup>8</sup> If good cause is shown for plaintiff's failure to serve the complaint in the time allowed, an

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<sup>2</sup> Fed. R. Bankr. P. 7004(a)(1); 7004 (b)(9).

<sup>3</sup> Fed. R. Bankr. P. 7004(g).

<sup>4</sup> Fed. R. Bankr. P. 7005(b)(2)(E); D. Kan. LBR 5005.1, Appx. 1-01.II.D.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*; *Moll v. Parker (In re Parker)*, slip copy, 2007 WL 2815561 (Bankr. E.D. Tenn. Sept. 25, 2007).

<sup>7</sup> *Id.*, citing *Friedman v. Estate of Presser*, 929 F.2d 1151, 1156 (6th Cir. 1991) (quoting *Del Raine v. Carlson*, 826 F.2d 698, 704 (7th Cir. 1987)).

<sup>8</sup> Fed. R. Civ. P. 4(m).

extension of time for service is mandatory.<sup>9</sup> Even if good cause is not shown, the court has discretion to enlarge the 120-day period.<sup>10</sup> In determining whether to exercise its discretion to extend the 120-day period, the court considers (1) the length of the extension required; (2) prejudice to the defendant other than the inherent prejudice of having to defend the suit; (3) whether the defendant had actual knowledge of the suit; (4) whether dismissal without prejudice would substantially prejudice the plaintiff (for example, the suit becoming time-barred); and (5) whether plaintiff made any good faith efforts to effect proper service.<sup>11</sup> Without a showing of good cause, an extension of the 120-day period may be justified if the applicable statute of limitations would bar refiling.<sup>12</sup> The punishment should fit the crime. Where a timely suit is dismissed without prejudice but becomes dismissed with prejudice by the passing of the statute of limitations, the court should consider the severity of the penalty.<sup>13</sup> Further, when no prejudice is shown to the defendant, third parties, or the court, and the plaintiff's complaint would be otherwise time-barred, granting an extension cannot be an abuse of discretion.<sup>14</sup>

In this case, Plaintiff fails to show good cause. The record shows the file was transferred among several attorneys, and service slipped from counsel's notice through the process. However, Defendant has shown no prejudice to himself or others. He has an answer on file. Meanwhile, the Plaintiff will face dismissal of its suit after the passing of the statute of limitations with no chance to refile. Since being served with Defendant's Motion to Dismiss,

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<sup>9</sup> *Id.*; see also *In re Furr's Supermarkets, Inc.*, 2007 WL 2827459 (B.A.P. 10th Cir. Sept. 26, 2007).

<sup>10</sup> *Espinoza v. United States*, 52 F.3d 838, 841 (10th Cir. 1995) (citing Advisory Committee's notes on Fed. R. Civ. P. 4).

<sup>11</sup> *Slenzka v. Landstar Ranger, Inc.*, 204 F.R.D. 322, 326 (E.D. Mich. 2001).

<sup>12</sup> *Espinoza*, 52 F.3d at 842; *Melton v. Wiley*, 262 Fed. Appx. 921, 923 (11th Cir. 2008).

<sup>13</sup> *Id.*

<sup>14</sup> *U.S. v. McLaughlin*, 470 F.3d 698, 701 (7th Cir. 2006).

Plaintiff has acted quickly to retain substitute counsel, and counsel has shown a diligence to pursue service by requesting the extension. Accordingly, the Court will exercise its discretion and grant Plaintiff additional time to properly serve the Defendant.

**Conclusion**

IT IS ORDERED Defendant's Motion to Dismiss is DENIED.

IT IS FURTHER ORDERED Plaintiff's Motion for Leave to Serve Defendant/Debtor Out of Time is GRANTED. Plaintiff shall have 30 days from the date of this Order to obtain an Alias Summons and effectuate service of process upon Defendant in accordance with the Federal Rules of Bankruptcy Procedure and the Federal Rules of Civil Procedure.

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ROBERT D. BERGER  
U.S. BANKRUPTCY JUDGE  
DISTRICT OF KANSAS