IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

In re:

BRUCE R. SUNDE AND
SANDI L. SUNDE, (Chapter 13)

Debtors. Case No. 07-10151

MEMORANDUM DECISION

Bruce and Sandi Sunde, as joint debtors, filed a voluntary Chapter 13 petition on January 17, 2007. Glen E. Johnson Construction, Inc., a Minnesota corporation, ("Creditor") timely filed an unsecured claim for $22,500, to which the Sundes objected. The Creditor did not file an answer to the summons and complaint. On July 2, a default order granting the objection to the claim was issued.

On July 19, the Creditor filed a motion to vacate the order denying the claim on the grounds that the Creditor did not receive proper service of process. The Sundes objected to the motion. A preliminary hearing was held on August 7 on the matter and the issue was taken under advisement.

The Creditor entered the following address in the section titled "Name and Address where notices should be sent" on their Proof of Claim:

> Glen E. Johnson Construction
> 634 Commerce Drive
> Hudson, WI 54016-9178

The Sundes served the objection by mailing it to this address. The Creditor did not respond to the service, and on July 2, the Court granted the objection to the claim. The Creditor has moved

to vacate the order denying the claim on the grounds the Creditor was not properly served with process.

"The objection to a claim initiates a contested matter . . . ." In re Simmons, 765 F.2d 547, 552 (5th Cir. 1985); In re Hofmeister, 1994 Bankr. LEXIS 1590, FN1 (Bankr. D. Wis. 1994) (Martin, J.). Contested matters must be served "in the matter provided for service of a summons and complaint by Rule 7004." Fed. R. Bankr. P. 9014(b).

Federal Rule of Bankruptcy Procedure 7004(b) states the procedure by which service may be made upon a party by First Class Mail. Because the Creditor here is a corporation, 7004(b)(3) applies in this case:

> (b) . . . [S]ervice may be made within the United States by first class mail postage prepaid as follows:
> . . . .
> (3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association, by mailing a copy of the summons and complaint to the attention of an officer, a managing or general agent or to any other agent authorized by statute to receive service and the statute . . . .

Here, service of process was mailed to "Glen E. Johnson Construction" and not to an officer or agent. Thus, service did not comply with the statute.

The Sundes argue that strict compliance with Rule 7004(b)(3) is not appropriate in this case. They argue that a permissible address for service of process is the "address creditor provided on its Proof of Claim" which was filed with the court and signed by Glen Johnson, agent of the Creditor. The Proof of Claim form itself requires that the claimant provide "Name and Address where notices should be sent." The Sundes point out that the Creditor had responded to prior notices mailed to this address. In addition, there is no indication of the Creditor's corporate identity on the proof of claim form, although it is apparent from the accompanying documents that the Creditor is a corporation.

There is some authority which supports the Sundes' position. In In re Village Craftsman, 160 B.R. 740 (Bankr. D.N.J. 1993) the debtor mailed the service to the address provided on the proof of claim. The court found this service was sufficient. "[A party] cannot submit an address to the court [on a proof of claim] as that to which all notices should be sent and then argue that it was not properly served when notices are sent to that address." Id. at 745. In Re Village adopts an estoppel argument; other courts have reasoned that the address listed on the Proof of Claim is a lawfully appointed "agent" for receipt of process. E.g., Ms. Interpret v. Rawe Druck-und-Veredlungs-GmbH (In re Ms. Interpret), 222 B.R. 409 (Bankr. D.N.Y. 1998) (attorney-addressee designated on the proof of claim was impliedly appointed as agent; service was effective); and In re Chess, 268 B.R. 150, 157 (Bankr. D. Tenn. 2001) ("the address designated by a creditor on its proof of claim evidences 'appointment' and satisfies the requirements of Rule 7004, effectuating service of process.").

There are cases which reach the opposite conclusion. These cases stress the distinction between "notice" and "service," and emphasize the important role that service plays in bankruptcy proceedings. "Notice in bankruptcy proceedings is different from service of process." Boykin v. Marriott Int'l, Inc. (In re Boykin), 246 B.R. 825, 828 (Bankr. D. Va. 2000).

> When so much of the daily diet of bankruptcy practice is handled by "notice and hearing" under § 102(1), and on the nonappearance or nonobjection of a party who has been provided an opportunity to appear or object, it is appropriate that both the Court and counsel for the proponent pay heed to the requirements of proper service.
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> In re Lancaster 2003 WL 109205 at *3 (Bankr. D. Idaho 2003).

The distinction between "notice" and "service" can be blurred in bankruptcy proceedings because of the relatively lenient service requirements in Rule 7004(b).

> Nationwide service of process by first class mail is a rare privilege which can drastically reduce the costs and delay of litigation. As a privilege, it is not to be abused or taken lightly. Where the alternative to service by mail is hiring a process server to serve the papers in person, it seems like a small burden to require literal compliance with the rule. . . . Where the procedure outlined in a rule is less formal than the procedure it replaces, it should be strictly construed.
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> In re Schoon, 153 B.R. 48, 49 (Bankr. D. Cal. 1993).

These cases, and others,[1] hold that failure to address the summons to an officer or agent renders the service ineffective.

The latter line of cases provides the better view. Rule 7004(b)(3) expressly requires that service be addressed to the attention of "an officer, [or] agent" of the business. The court is not persuaded that the plain language of Rule 7004(b)(3) should be overridden simply[2] because the Creditor failed to provide a proper address for service on its proof of claim form.

The Creditor moves to have the default order denying the Creditor's claim vacated. The Creditor does not cite the grounds for vacating the order. Presumably, the Creditor seeks relief under Federal Rule of Civil Procedure 60(b). That rule states,

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (4) the judgment is void . . . .

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[1] See, e.g., Beneficial California, Inc. v. Villar (In re Villar), 317 B.R. 88, 93 (B.A.P. 9th Cir. 2004) (service ineffective under Rule 7004(b)(3) for failure to name a "*specifically named* officer"); York v. Bank of America, N.A. (In re York), 291 B.R. 806, 811 (Bankr. D. Tenn. 2003) (service ineffective for failure to name an officer "by name or by title"); Braden v. General Motors Acceptance Corp., 142 B.R. 317 (Bankr. D. Ark. 1992) (service ineffective for failure to name an office, officer or agent).

[2] There is a second troubling issue. Who has the responsibility to identify the creditor as a corporation for purposes of service when the corporate status is not apparent, or it is hidden? Neither the code nor case law appears to provide the answer. It seems grossly unfair for a creditor to disguise its corporate identity by providing an address with no corporate identification and later ambush the proceedings by claiming that it was not properly served as a corporation. In this case, there is no evidence that the claimant had such a devious motive. Although, it does appear that the creditor now seeks to exploit the code to gain a tactical advantage. Were malice suspected this case might be decided differently.

Fed. R. Civ. P. 60(b)

"Before a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied." Omni Capital Int'l v. Rudolf Wolff & Co., 484 U.S. 97, 104 (U.S. 1987).

"[W]hen the rule 60(b)(4) motion alleges that the underlying judgment is void because the court lacked personal or subject matter jurisdiction, once the court decides that the allegations are correct the trial judge has no discretion and must grant appropriate Rule 60(b) relief." Bally Export Corp. v. Balicar, Ltd., 804 F.2d 398, 400 (7th Cir. 1986) (internal quotations omitted). Thus, if service of process is defective, the court lacks personal jurisdiction over the party and the judgment must be vacated.

Here, service of process on the Creditor was defective. The Court never had jurisdiction over the Creditor in the adversary proceeding. Therefore the default order must be vacated.

A Rule 60(b) order for relief shall be made "upon such terms as are just." Fed. R. Civ. P. 60(b). The Sundes attempted to serve the Creditor properly, and they believed that they had served the Creditor. The Creditor does not allege that it has been prejudiced by any delay. Thus, the time for service for objecting to a claim shall be extended for 45 days from this date to allow the Sundes to serve the Creditor properly.

Dated: October 2, 2007

ROBERT D. MARTIN
UNITED STATES BANKRUPCY JUDGE