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

In re:

LENEE D. COLE, (Chapter 7)

Debtor. Case No. 05-17753

LENEE D. COLE

Plaintiff,

v. Adv. No. 06-00196

AMERICAN EDUCATION SERVICES

Defendant.

MEMORANDUM DECISION

Lenee Cole filed a voluntary chapter 7 petition on September 20, 2005, and was granted a discharge on September 29, 2006. She then brought this adversary proceeding to determine the dischargeability of a student loan debt. On December 19, 2006 a default judgment was entered against American Education Services (AES) for failure to respond to the summons and complaint. AES now moves to have the case reopened and the default judgment vacated for lack of personal jurisdiction due to ineffective service of process.

Ms. Cole owed Sallie Mae, Inc. $11,832 at the time of the chapter 7 filing. The guarantor of the debt, AES, assumed the debt after the petition was filed. AES notified Ms. Cole by letter dated August 17, 2006 that the debt was an educational loan and therefore generally nondischargeable, and stated, "If you plan to file a complaint on the basis that repayment of the student loan debt would impose undue hardship, AES must be notified in writing with a copy of the Summons and Complaint." At the foot of the letter is the address of AES. The letter was carbon copied to "Loan Servicing Center/PA." No officer or agent's name is included in the letter.

The proceeding sought to have the debt discharged as an undue hardship pursuant to 11 U.S.C. § 523(a)(8). Ms. Cole has not been represented by an attorney. After filing an amended complaint, she filed with the court a sworn certificate of service showing that the amended summons and complaint were addressed to

> American Educational Services
> 1200 North Seventh Street
> Harrisburg, PA 17102-1444

The address is identical to the address at the foot of the August 17th letter.

AES did not answer the complaint or appear in the proceedings. After receiving notice of the default judgment, AES sought to have the judgment vacated and the case reopened. AES has filed an affidavit stating that it has no record of receiving service of the adversary proceeding and was unaware of its existence prior to receiving notice of the entry of judgment.

Federal Rule of Bankruptcy Procedure 7004(b) states the procedure by which service may be made upon a party by mail:

> (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 simply to AES, and not to an officer or agent. Thus, service did not comply with the statute.

Ms. Cole argues that strict compliance with Rule 7004(b)(3) is not required in this case. She observes that AES failed to supply the name of an officer or agent to whom notice should be sent. Moreover, by communicating with her by letter, AES held out to Ms. Cole the return address as the proper address for mailing service of process.

This circuit has not confronted whether strict compliance with Rule 7004(b)(3) is always required. Almost all courts to address the issue have found that 7004(b)(3) must be followed strictly.[1] However, in one case that holds otherwise, service was deemed effective when the party to be served had filed with the court—pursuant to a local rule—an address for service which omitted an officer or agent's name. Green Tree Financing Servicing Corp. v. Karbel, (In re Karbel), 220 B.R. 108, 112 (Bankr. Fed. App. 1998). What little dispute exists surrounding Rule 7004(b)(3) arises when the service is addressed to an office or a generic recipient such as "Officer" or "President" rather than a specifically named officer or agent.[2]

Even if this court were prepared to hold that the requirements of 7004(b)(3) need not be strictly observed, the facts here fall outside the range of argument. Ms. Cole failed to address

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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] Compare Schwab v. Associates Commercial Corp. (In re C.V.H. Transport Inc.), 254 B.R. 331 (Bankr. M.D. Pa. 2000) (service to "officer, manager, or general agent" was sufficient) with Beneficial California, Inc. v. Villar (In re Villar), 317 B.R. 88, 93 (B.A.P. 9th Cir. 2004) (service ineffective unless addressed to a "*specifically named* officer").

service to a particular officer or agent, an office, or even to a generic "Officer" or "Agent." AES lacked actual notice of the adversary proceeding. So, both legally and practically, service here was ineffective.

AES moves pursuant to Federal Rule of Civil Procedure 60(b) to have the default judgment vacated and the case reopened. 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 . . . .
>
> 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 AES was defective. This court never had jurisdiction over AES. The default judgment must be vacated and the case reopened.

AES also moves the court to dismiss the case. Federal Rule of Civil Procedure 4(m), as incorporated by Federal Rule of Bankruptcy Procedure 7004(a), states,

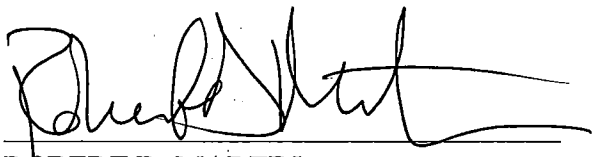
> If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time;

provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period.

A Rule 60(b) order for relief shall be made "upon such terms as are just." Fed. R. Civ. P. 60(b). Dismissal would not meet this standard.

The 120-day period in Federal Rule of Civil Procedure 4(m) has long passed, so the question for the court is whether the time period for service should be equitably tolled. The facts as alleged disclose that the Ms. Cole attempted to properly serve AES, and that she believed that she had served AES. AES does not allege that it has been prejudiced by the delay. The 120-day period shall be tolled and Ms. Cole allowed to serve AES properly.

Dated: September 4, 2007



ROBERT D. MARTIN
UNITED STATES BANKRUPCY JUDGE