



Honorable Mike K. Nakagawa  
United States Bankruptcy Judge



Entered on Docket  
October 10, 2019

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEVADA

\* \* \* \* \*

In re:	)	Case No. 18-16622-mkn
	)	
RICHARD L. WATT aka RICHARD LEE	)	Chapter 13
WATT,	)	
	)	
Debtor.	)	
	)	
RAM INTERNATIONAL	)	Adv. Proc. No. 19-01010-mkn
MANAGEMENT, LLC, a Nevada	)	
corporation, <sup>1</sup>	)	
	)	
Plaintiff,	)	Date: October 2, 2019
v.	)	Time: 9:30 a.m.
	)	
RICHARD L. WATT, an individual	)	
	)	
Defendant.	)	

**ORDER REGARDING EX-PARTE MOTION FOR ISSUANCE OF ALIAS SUMMONS  
AND ENLARGMENT OF TIME TO SERVE<sup>2</sup>**

<sup>1</sup> Although Plaintiff appears to be a limited liability company, the complaint identifies it as a corporation.

<sup>2</sup> In this Order, all references to “ECF No.” are to the numbers assigned to the documents filed in the underlying bankruptcy case as they appear on the bankruptcy docket maintained by the clerk of court. All references to “AECF No.” are to the numbers assigned to the documents filed in this adversary proceeding. All references to “Section” are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All references to “Bankruptcy Rule” are to the Federal Rules of Bankruptcy Procedure. All references to “Civil Rule” are to the Federal Rules of Civil Procedure. All references to “FRE” are to the Federal Rules of Evidence. All references

On October 2, 2019, the court heard arguments on the Ex-Parte Motion for Issuance of Alias Summons and Enlargement of Time to Serve (“Motion”), filed by Ram International Management, LLC (“Plaintiff”). The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under submission.

### **BACKGROUND<sup>3</sup>**

On November 6, 2018, Richard L. Watt (“Debtor”), through his bankruptcy counsel, Dorothy G. Bunce (“Attorney Bunce”), filed a voluntary Chapter 13 bankruptcy petition. (ECF No. 1). On his petition, Debtor listed his address at 9424 Yucca Blossom Drive, Las Vegas, Nevada. On that same day, the Clerk of Court (“Clerk”) issued a Notice of Chapter 13 Bankruptcy Case reflecting a deadline of February 19, 2019, for creditors and parties-in-interest to file any adversary complaints objecting to the Debtor’s discharge or to determine dischargeability of debt.

On January 28, 2019, Plaintiff timely filed an adversary complaint (“Initial Complaint”). (AECF No. 1). A copy of the Initial Complaint was also filed in the main bankruptcy case, and Attorney Bunce was sent electronic notice of the Initial Complaint via the CM/ECF system. (ECF No. 22).

On February 4, 2019, Plaintiff filed its first amended complaint (“FAC”) objecting to Debtor’s discharge under Section 727(a)(2) and to determine dischargeability of debt under Sections 523(a)(2) and 523(a)(19). (AECF No. 5). A copy of the FAC was also filed in the main bankruptcy case, and Attorney Bunce was sent electronic notice of the FAC via the CM/ECF system. (ECF No. 23).

On March 13, 2019, Plaintiff requested a summons from the Clerk. (AECF No. 6).

On March 14, 2019, the Clerk issued a summons. (AECF No. 7).

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to “LR” are to the Local Rules of Bankruptcy Practice for the United States Bankruptcy Court for the District of Nevada.

<sup>3</sup> Pursuant to FRE 201(b), the court takes judicial notice of all materials appearing on the dockets in the above-captioned bankruptcy case and adversary proceeding. See U.S. v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980); see also Bank of Am., N.A. v. CD-04, Inc. (In re Owner Mgmt. Serv., LLC Trustee Corps.), 530 B.R. 711, 717 (Bankr. C.D. Cal. 2015) (“The Court may consider the records in this case, the underlying bankruptcy case and public records.”).

On April 2, 2019, Plaintiff filed a certificate of service pursuant to which an individual named Richard Etienne attested, under penalty of perjury, that he effectuated personal service of a summons and complaint<sup>4</sup> on March 26, 2019, “[b]y leaving the process with the defendant or with an officer or agent of defendant at ... 9424 Yucca Blossom Las Vegas Nevada 89134[.]” (AECF No. 8). The certificate of service did not reflect service of a summons and complaint on Attorney Bunce.<sup>5</sup>

On May 30, 2019, Plaintiff filed a document titled “Entry of Default,” which stated that “default is entered against the defendant” under FRBP 7055 due to Debtor’s failure to file an answer to the FAC.<sup>6</sup> (AECF No. 11).

On June 6, 2019, Plaintiff’s counsel, James W. Kwon (“Attorney Kwon”), filed an affidavit in support of default, which he subsequently amended (“Kwon Affidavit”). (AECF Nos. 12, 14, and 17). In pertinent part, Attorney Kwon attested that “Debtor was timely served a copy of the Summons and Amended Adversary Complaint on March 26, 2019, at [A]ECF No. 8.” Kwon Affidavit at ¶ 5.

On September 3, 2019, Plaintiff filed the current Motion. (AECF No. 19). The certificate of service attached to the Motion<sup>7</sup> does not reflect service of the Motion on the

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<sup>4</sup> The certificate of service did not clarify whether the “FAC” was the complaint that was served.

<sup>5</sup> Bankruptcy Rule 7004(g) states:

(g) SERVICE ON DEBTOR’S ATTORNEY. If the debtor is represented by an attorney, whenever service is made upon the debtor under this Rule, service shall also be made upon the debtor’s attorney by any means authorized under Rule 5(b) F.R.Civ.P.

FED. R. BANKR. P. 7004(g).

<sup>6</sup> Under Civil Rule 55, made applicable herein pursuant to Bankruptcy Rule 7055, a default must be entered by the Clerk. Plaintiff’s “Entry of Default” was not entered by the Clerk and therefore did not constitute the entry of default under the applicable rules.

<sup>7</sup> LR 7005(a) requires litigants to utilize “the court’s certificate of service form” and contemplates that this form will be filed separately on the docket.

Debtor<sup>8</sup> and further represents that service was effectuated on Attorney Bunce via the CM/ECF system.<sup>9</sup>

On September 12, 2019, Plaintiff noticed the Motion to be heard on October 16, 2019. (AECF No. 20). The certificate of service attached to the notice of hearing did not reflect service of the same on the Debtor and further represented that service was effectuated on Attorney Bunce via the CM/ECF system.<sup>10</sup>

On September 23, 2019, Plaintiff filed an *ex parte* motion requesting a hearing on shortened time on the Motion (“OST Request”). (AECF No. 22). A declaration from Attorney Kwon (“Kwon Declaration”) accompanied the OST Request. *Id.* In pertinent part, Attorney Kwon attested as follows:

4. We filed the Ex-Parte Motion (Dkt. No. 19) on September 3, 2019 and were given a hearing date of October 16, 2019, which is *after* the scheduled September 26, 2019 status conference.

5. We believe that the motion should be heard before the September 26, 2019 status hearing as it will resolve a number of issues which are subject of the status hearing. So a hearing date before that time is imperative.

Kwon Declaration at ¶¶ 4-5 (emphasis in original).

On September 24, 2019, the court entered an order granting the OST Request and scheduled a hearing on the Motion for October 2, 2019. (AECF No. 23).

On September 26, 2019, the court held a status hearing in this adversary proceeding. Attorney Kwon appeared on Plaintiff’s behalf, Attorney Bunce appeared as Debtor’s bankruptcy counsel, and Jeffrey A. Cogan (“Attorney Cogan”) specially appeared as Debtor’s counsel in this adversary proceeding.

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<sup>8</sup> An adversary plaintiff is required to serve an unrepresented debtor-defendant with every pleading filed in an adversary case. At the time Plaintiff filed the Motion, Debtor was not represented by counsel. Plaintiff has not explained why Debtor was not served with the Motion.

<sup>9</sup> Attorney Bunce has not entered an appearance in this adversary proceeding. Therefore, electronic notice was not sent to Attorney Bunce via the CM/ECF system.

<sup>10</sup> See notes 7 through 9, *supra*.

On September 27, 2019, Debtor, by and through Attorney Cogan, entered a special appearance and filed an opposition (“Opposition”) to the Motion. (AECF No. 26).

On September 30, 2019, Plaintiff filed a reply in support of the Motion. (AECF No. 27).

### DISCUSSION

By the instant Motion, Plaintiff asks for an order extending the time to serve a summons and complaint on the Debtor. Pursuant to Bankruptcy Rule 7004(e), “[s]ervice ... shall be made by delivery of the summons and complaint within 7 days after the summons is issued.” FED. R. BANKR. P. 7004(e). In this case, Plaintiff served the summons and FAC twelve days after the summons was issued—5 days later than allowed under Bankruptcy Rule 7004(e). Because more than 90 days<sup>11</sup> have elapsed since the filing of the Initial Complaint, Plaintiff requests a court order extending its deadline to serve a summons and complaint under Civil Rule 4(m), which states:

(m) TIME LIMIT FOR SERVICE. If a defendant is not served within 90 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.

....

FED. R. CIV. P. 4(m) (made applicable herein pursuant to Bankruptcy Rule 7004(a)).

Plaintiff admits that the summons and FAC were served late, but explains, without a supporting declaration or affidavit, that service was late “[d]ue to an internal office miscommunication ....” Motion at 2:7-8. Plaintiff further argues that Attorney Kwon’s “mistakes concerning service of process under Rule 7004 do not rise to the level of good cause under Rule 4(m),” though Plaintiff argues that “there is no indication that [Attorney Kwon] did not proceed in good faith, and, in fact, has attempted to rectify the situation as quickly and as expeditiously as possible.” *Id.* at 3:26-4:2. Whether or not good cause has been shown under Civil Rule 4(m) to mandate an extension of time for service, a court has discretion to extend the

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<sup>11</sup> The October 2, 2019, hearing on the Motion was 247 days after Plaintiff’s filing of the Initial Complaint.

1 period for service.

2 As one court has observed, “[E]ven where no good cause is shown, district courts have  
3 broad discretion to extend the time for service.” Zero Motorcycles, Inc. v. Nikola Motor Co.,  
4 2018 WL 1696867, at \*3 (N.D. Cal. Apr. 6, 2018) *citing* Oyama v. Sheehan (In re Sheehan), 253  
5 F.3d 507, 513 (9th Cir. 2001). *See also* Efaw v. Williams, 473 F.3d 1038, 1040 (9th Cir. 2007).  
6 “In determining whether to exercise its discretion to extend the time for service, the Court  
7 considers factors such as the statute of limitations bar, prejudice to the defendant, actual notice of  
8 the lawsuit, and eventual service.” Zero Motorcycles, 2018 WL 1696867, at \*3 *citing* Efaw, 473  
9 F.3d at 1041.

10 Under the circumstances of this case, the court concludes that it should exercise its  
11 discretion to extend the time for service, with conditions. Attorney Bunce was sent electronic  
12 notice of the Initial Complaint and the FAC via the CM/ECF system, and Debtor has not argued  
13 that Attorney Bunce never received this notice. Further, although Debtor was served with a stale  
14 summons and the Initial Complaint, such service was effectuated at the same address as  
15 identified by Debtor in his Chapter 13 petition, and Debtor has not suggested that he did not  
16 otherwise receive notice of the summons and Initial Complaint. If the court dismissed Plaintiff’s  
17 claim under Section 523(a)(19), Plaintiff could simply re-file it because “there is no deadline to  
18 file a complaint to determine dischargeability under § 523(a)(19).” Robert E. Ginsberg & Robert  
19 D. Martin, Ginsberg & Martin on Bankruptcy § 11.06[S] (5th ed. 2019). Elevating form over  
20 substance to foster this type of inefficiency is unwarranted under the facts of this case. Denying  
21 this Motion on procedural grounds will also result in a final disposition on procedural grounds of  
22 Plaintiff’s claim under Section 523(a)(2),<sup>12</sup> as the time to file such a complaint expired on  
23 February 19, 2019. However, decisions on the merits are favored over dispositions based on  
24 procedural grounds. *See, e.g.* Wisdom v. Gugino (In re Wisdom), 770 Fed. Appx. 881, 882 (9th  
25 Cir. May 28, 2019) (unpublished) (discussing “the strong policy favoring decisions on the

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27 <sup>12</sup> Plaintiff also asserts a claim under Section 727(a)(2), which does not apply in Chapter  
28 13 cases. *See* 11 U.S.C. § 103(b) (“Subchapters I and II of chapter 7 of this title apply only in a  
case under such chapter.”).

merits” in denying a motion for default judgment); Ledesma Ventures, LLC v. Garlock (In re Garlock), 2017 WL 1089487, at \*6 (B.A.P. 9th Cir. March 22, 2017) (same, in the context of reviewing an order dismissing an adversary proceeding for lack of prosecution, but further advising that this federal policy is not, standing alone, outcome determinative).

Debtor’s plea of prejudice to himself and the judicial system due to Plaintiff’s failure to follow applicable rules is not unimportant, but the court does not believe it rises to the level of prejudice that has been found in other cases in which courts have declined to exercise their broad discretion to extend the deadline under Civil Rule 4(m). See, e.g. Efaw v. Williams, 473 F.3d at 1041 (plaintiff waited seven years to serve the complaint and the only eyewitness died in the interim). Debtor presumably has, however, been prejudiced by incurring the attorneys’ fees required to respond to Plaintiff’s failures. For these reasons, the court will exercise its broad discretion under Civil Rule 4(m) conditioned on Plaintiff’s payment of Debtor’s attorneys’ fees and costs incurred in responding to the Motion and attending the hearings on September 26, 2019, and October 2, 2019.<sup>13</sup> See Perfekt Marketing, LLC v. Recania (In re Recania), Adv. No. 17-01228-MKN at Dkt. No. 26 (Bankr. D. Nev. May 24, 2018) (granting a motion under Civil Rule 4(m) with similar conditions).

**IT IS THEREFORE ORDERED** that the Ex-Parte Motion for Issuance of Alias Summons and Enlargement of Time to Serve, Docket No. 19, be, and the same hereby, is **GRANTED** subject to the following conditions:

(1) Defendant shall file a declaration of counsel accompanied with time entries reflecting the fees and costs incurred for responding to the subject Motion and attending the above-referenced hearings no later than October 23, 2019. If Plaintiff disputes any of the requested fees and/or costs, it shall file an objection no later than October 30, 2019, at which time the court will deem the matter submitted and enter its ruling

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<sup>13</sup> The court observes that the Disclosure of Compensation of Attorney for Debtor(s) filed by Attorney Bunce on November 6, 2018, reflects that her fee for basic services does not include her representation in this adversary proceeding. See ECF No. 1. Attorney Bunce nevertheless attended the September 26, 2019, status hearing in this adversary proceeding and presumably incurred fees. Fees will be allowed to either Attorney Bunce or Attorney Cogan, but not both for attending the hearings.

1 without further hearing unless otherwise ordered by the court. If no objection is filed,  
2 then Plaintiff shall pay all requested fees and costs to Defendant and file a statement  
3 of compliance with the court no later than November 6, 2019.

4 (2) Upon Plaintiff's timely filing of a statement of compliance with the court, Plaintiff  
5 shall have ten business days to obtain a summons from the Clerk of Court, serve the  
6 summons and the First Amended Complaint (or any further amended complaint) on  
7 Debtor in the manner required under the Federal Rules of Bankruptcy Procedure, and  
8 file a certificate of service with the court.

9 **IT IS FURTHER ORDERED** that Plaintiff's failure to timely pay the allowed attorney  
10 fees and costs ordered hereby, or to timely serve the summons and First Amended Complaint (or  
11 any further amended complaint), may result in dismissal of Plaintiff's causes of action under 11  
12 U.S.C. §§ 523(a)(2) and 523(a)(19), and 11 U.S.C. § 727(a)(2) without further court order or  
13 hearing.

14  
15 Copies sent via CM/ECF ELECTRONIC FILING

16 Copies sent via BNC to:

17 RICHARD L. WATT  
18 9424 YUCCA BLOSSOM DR  
19 LAS VEGAS, NV 89134-8936

20 DOROTHY G. BUNCE  
21 2037 FRANKLIN AVE  
22 LAS VEGAS, NV 89104

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