

ENTERED

MAY 03 '00

U.S. Bankruptcy Court
Greensboro, NC
KWC

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

IN RE:)	
)	
George W. Watlington,)	Case No. 99-12096C-7G
)	
Debtor.)	
_____)	
)	
William G. Talley and)	
Jennifer L. Talley,)	
)	
Plaintiffs,)	
)	
v.)	Adversary No. 99-2076
)	
George W. Watlington,)	
)	
Defendant.)	
)	

ORDER

This adversary proceeding came before the court on May 2, 2000, for a hearing upon defendant's motion to dismiss. Appearing for the hearing were Jennifer L. Talley, one of the plaintiffs, and Phillip E. Bolton, attorney for the defendant. Having considered the motion, the matters of record in this adversary proceeding and the arguments presented at the hearing, the court finds and concludes as follows:

1. In this adversary proceeding, the plaintiffs allege that indebtedness owed to the plaintiffs is nondischargeable pursuant to § 523(a)(2) of the Bankruptcy Code.

2. Pursuant to § 523(c) of the Bankruptcy Code and Bankruptcy Rule 4007(c), an order was entered in Defendant's Chapter 7 case fixing December 11, 1999, as the last day for filing a complaint to determine the dischargeability of a debt pursuant to § 523(a)(2) and the other subparagraphs of §523(a) referred to in § 523(c) of the Bankruptcy Code.

3. December 11, 1999, fell on a Saturday and, therefore, pursuant to Bankruptcy Rule 9006(a), the last day for filing complaints to determine dischargeability was carried over to the next business day which was Monday, December 13, 1999.

4. On December 13, 1999, the clerk of Bankruptcy Court received from the plaintiffs their complaint to determine dischargeability of a debt. The complaint was stamped by the clerk as "Received". However, the clerk did not stamp the complaint as "Filed" because the complaint was not accompanied by the \$150.00 filing fee.

5. On or about December 17, 1999, the clerk received the \$150.00 filing fee from the plaintiffs and thereupon stamped the complaint as being "Filed" on December 17, 1999.

6. Even though the complaint was not accompanied by the filing fee, plaintiffs' delivery of the complaint to the clerk on December 13, 1999, constituted at least constructive filing of the

complaint on that date, which means that plaintiffs' complaint was filed prior to the expiration of the bar date for the filing of complaints. See In re Emory, 219 B.R. 7003 (Bankr. D.S.C. 1998).

7. Since plaintiffs' complaint was filed before the expiration of the bar date, the defendant is not entitled to have this adversary proceeding dismissed as being late filed.

8. Even though the complaint was filed before the expiration of the bar date, and summons thereafter was issued, the plaintiffs have not served the defendant or his attorney with a copy of the summons and complaint as required by Bankruptcy Rule 7004.

9. More than 120 days have passed since the filing of the complaint without the defendant and his attorney being served with process. Consequently, pursuant to Rule 4(m) of the Federal Rules of Civil Procedure which is made applicable in this adversary proceeding by Bankruptcy Rule 7004(a), if service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court "shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time"

10. Under the circumstances of this adversary proceeding, it is more appropriate for the court to order that service upon the defendant be effected within a specified time, rather than

dismissing this action without prejudice.

Now, therefore, it is ORDERED, ADJUDGED AND DECREED as follows:

1. The defendant's motion to dismiss is denied to the extent that it is based upon the assertion that the plaintiffs' complaint was not filed before the expiration of the last day for filing complaints to determine dischargeability of indebtedness;

2. The plaintiffs shall, within 20 days from the date of this order, serve the defendant and his attorney with a copy of a valid summons and a copy of the complaint; and

3. In the event the plaintiffs fail to serve the defendant and his attorney with a copy of a valid summons and complaint within 20 days, this adversary proceeding shall be dismissed.

This 3rd day of May, 2000.

William L. Stocks
WILLIAM L. STOCKS
United States Bankruptcy Judge