

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF NORTH CAROLINA  
DURHAM DIVISION

IN RE: )  
)  
Claudia R. Smith, ) Case No. 05-81334C-7D  
)  
Debtor. )  
\_\_\_\_\_)  
)  
John A. Northen, Chapter 7 )  
Trustee for Claudia R. Smith, )  
)  
Plaintiff, )  
)  
v. ) Adversary No. 10-9053  
)  
Claudia R. Smith, )  
Ray Jefferson Smith, )  
Joel Morgan Graves, Jennifer )  
Graves, and RBC Bank (USA), )  
)  
Defendants. )  
)

ORDER

This adversary proceeding came before the court on February 3, 2011, on the motion for default judgment by RBC Bank (USA) ("RBC") as to its crossclaims against Defendants Claudia R. Smith and Ray Jefferson Smith. James S. Livermon, III appeared on behalf of RBC, Brett Smith Yauger appeared on behalf of Claudia R. Smith ("Debtor"), and Vicki Parrott appeared on behalf of John A. Northen, chapter 7 trustee ("Trustee") and plaintiff in this proceeding. Defendant Ray Jefferson Smith ("Mr. Smith") did not appear. Having considered the motion and the record before the court, the court concludes that the motion should be denied as provided by this order.

Debtor filed the underlying bankruptcy petition on May 5, 2005 under chapter 13 of the Bankruptcy Code. Subsequently, the Debtor voluntarily converted to chapter 7 on January 29, 2010. At both the time of the petition and time of the conversion, Debtor was the sole owner of real property located at 1120 Lloyd Stewart Road, Broadway, North Carolina, as well an owner of real property at 312 T. Johnson Road, Carthage, North Carolina, together with her husband, Mr. Smith, as tenants by the entireties.

As alleged by the Trustee, on March 12, 2010 Debtor sold the Broadway Property to Joel Morgan Graves and Jennifer Graves ("the Graves"), without authorization from the court, using a portion of the net proceeds to payoff a balance owed to RBC on a note secured by the Carthage property. The Trustee filed this adversary proceeding on June 23, 2010, therein objecting to the Debtor's discharge under section 727(a)(2) as well as asserting a number of claims seeking to recover the Broadway property or the proceeds from its sale for the benefit of the estate. The record reflects that the Trustee served a summons and copy of the complaint by mail to the Debtor, Mr. Smith, each of the Graves, and the registered agent of RBC. The summons was not mailed to Brett Smith Yauger, attorney for the Debtor.

RBC answered the complaint on August 23, 2010, and then filed an amended answer on September 22, 2010, wherein RBC asserted crossclaims against the Debtor and Mr. Smith. In these

crossclaims, RBC sought (1) equitable subrogation to the rights of those parties who have benefitted from the satisfaction of the RBC note and RBC's cancellation of the deed of trust on the Carthage property, (2) voiding of the satisfaction of the note and reinstatement of the deed of trust in favor of RBC on the Carthage property, and/or (3) imposition of equitable liens on either or both properties.<sup>1</sup> As documented by the November 23, 2010 Supplemental Certificate of Service, counsel for RBC served its crossclaims on the Debtor, Mr. Smith, and Mr. Yauger by first class mail on September 22, 2010. No summons was included with the mailings of the amended answer and crossclaims.

Neither the Debtor or Mr. Smith answered RBC's crossclaims, and on December 31, 2010, RBC requested entry of default and moved for default judgment. Default on the crossclaims was entered January 4, 2011.

When serving a complaint and summons in an adversary proceeding, Bankruptcy Rule 7004(g) requires that "[i]f 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." The effect of this rule is "that service of process on a Debtor is insufficient unless both the debtor and his attorney

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<sup>1</sup> In its motion for default judgment, RBC seeks only reinstatement of the note and deed of trust. RBC has returned the payoff funds to the bankruptcy estate.


are served with the summons and complaint." E.g., In re Yashaya, 403 B.R. 278, 283 (Bankr. E.D.N.Y. 2009). Here, the Trustee failed to serve the complaint and summons on the Debtor's attorney, so accordingly service of process on the Debtor was insufficient and personal jurisdiction over the Debtor with respect to this adversary proceeding was not established.

Ordinarily, a crossclaimant may rely on the service of process by the plaintiff in order to establish jurisdiction over a defendant as a cross-defendant. See generally, 3 Moore's Federal Practice § 13.111 (3d ed. 2010). However, if service of process is deficient as to the complaint, service will also be deficient as to the crossclaim, absent independent service of process. See Nat'l. Trust for Historic Pres. v. 1750 K Inv., 100 F.R.D. 483, 487 (E.D. Va. 1984), aff'd 755 F.2d 929 (4th Cir. 1985) (table decision). Independent service of process for a crossclaim will require issuance of a crossclaim summons, informing the crossclaim defendant of how and when to respond, as well as the consequence for not doing so, properly served together with the crossclaim. See, e.g., Mt. Shasta Title & Escrow Co. v. Pennbrook Homes, No. 2:07-cv-963-GEB-EFB, 2007 WL 4210478, at \*1 n.1 (E.D. Cal. Nov. 28, 2007) (noting that "[p]arties who have not yet appeared must be personally served with a summons on a cross-complaint"). While the Debtor was served a copy of the amended answer and crossclaims, no summons was served along with it. Accordingly, no independent

service of process exists for the crossclaims, so they share in the complaint's insufficiency of service.

As personal jurisdiction has not been established over the Debtor in this adversary proceeding, the court cannot enter a default judgment against her. Accordingly, it is hereby ORDERED that RBC's motion for default judgment is denied and the entry of default shall be stricken.

This 7th day of February, 2011.



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WILLIAM L. STOCKS  
United States Bankruptcy Judge

PARTIES IN INTEREST

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