



ENTERED

TAWANA C. MARSHALL, CLERK
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The following constitutes the ruling of the court and has the force and effect therein described.

Signed November 26, 2008

United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

IN RE

MARTIN CRUZ LOPEZ,

DEBTOR.

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CASE No.: 08-41563-DML

CHAPTER 7

TEX-LINK COMMUNICATIONS, INC.,

PLAINTIFF,

v.

MARTIN CRUZ LOPEZ,

DEFENDANT.

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ADVERSARY No.: 08-04120

MEMORANDUM ORDER

[Relates to Docket No. 13]

CAME ON FOR CONSIDERATION defendant Martin Cruz Lopez's ("Defendant" or "Debtor") *Motion to set aside Default Judgment Due to Improper Service of Process* (the "Motion"). A hearing on the Motion was held on October 30, 2008 at 9:00 a.m. (the "Hearing"). At the Hearing the court heard argument from counsel for Defendant and counsel for Tex-Link Communications, Inc. ("Plaintiff"). By the Motion, Defendant seeks to set aside a default judgment (the "Judgment") taken against him by Plaintiff.

The court exercises jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334(b) and 157(b)(2). This memorandum order contains the court's findings of fact and conclusions of law. Fed. R. Bankr. P. 7052.

I. BACKGROUND

Debtor filed his voluntary petition (the "Petition") initiating his underlying bankruptcy case on April 2, 2008 as case number 08-41563 (the "Bankruptcy Case"). On the Petition Eric A. Liepins ("Debtor's Attorney") signed as counsel for Debtor and continues to be counsel of record for Debtor.

On June 3, 2008, Plaintiff filed its Original Complaint (together with the Amended Complaint, the "Complaint") in the Bankruptcy Case which initiated this adversary proceeding (the "Adversary Proceeding"). The Original Complaint appeared at docket no. 14 in the Bankruptcy Case.¹ The court's ECF system indicates that Debtor's Attorney received notice of the Original Complaint in the Bankruptcy Case.

Summons was issued by the clerk of the court for Defendant on June 4, 2008. According to the return of service (the "Return of Service")², Defendant was served on June 13, 2008 by

¹ Debtor's Attorney filed at least two documents after June, 3, 2008 including amended schedules on June 5, 2008.

² The Return of Service was filed by Defendant as an exhibit to the Motion.

“mail via United States Postal Service, in a first class postage prepaid envelope”. The Return of Service indicates that the Summons was sent to “1300 Keller Parkway #523 Keller, TX 76248.” The court notes that this is the same address listed on Debtor’s Petition.³ The record does not reflect any response by Defendant to the Complaint or Summons.

Following entry of default by the clerk of the court, Plaintiff filed *Plaintiff’s Motion for Default Judgment Against Martin Cruz Lopez* (the “Default Motion”) on July 29, 2008. The certificate of service on the Default Motion indicates that Debtor’s Attorney received notice of the Default Motion *via* facsimile in addition to Defendant receiving notice of the Default Motion *via* certified mail, return receipt requested. Also on July 29, 2008, Plaintiff filed its notice of hearing for the Default Motion with a certificate of service identical to that of the Default Motion.⁴

On August 28, 2008, the court held a hearing (the “Default Hearing”) on the Default Motion and granted the same. The Judgment was subsequently entered on September 10, 2008. Defendant filed his Motion on September 18, 2008 and the Hearing followed.

II. DISCUSSION

While Defendant does not give a statutory basis to set aside the Judgment, the gist of the Motion is that service was improper. Defendant states in the Motion: “Plaintiff [sic] proof of service expressly shows that Plaintiff did not properly accomplish service under Bankruptcy Rule 7009(b)(9).” See Motion at ¶ 5.⁵ Defendant does not cite to it, but the rule which provides

³ Debtor has not filed a notice of change of address. See Fed. R. Bankr. P. 4002(5)

⁴ The record also reflects correspondence between Debtor’s Attorney and counsel for Plaintiff after the Complaint was initially filed.

⁵ The court notes that the FEDERAL RULES OF BANKRUPTCY PROCEDURE contain no Rule 7009(b)(9). The court assumes that Defendant is attempting to cite FEDERAL RULE OF BANKRUPTCY PROCEDURE 7004(b)(9). This

the basis for setting aside a default judgment is FEDERAL RULE OF BANKRUPTCY PROCEDURE 7055(c).

A. Rule 7055(c) and Rule 60(b)

According to Rule 7055(c) “[t]he court may set aside an entry of default for good cause, and it may set aside a default judgment under Rule 60(b).” See Fed. R. Bankr. P. 7055(c). In this case, default judgment has already been entered, so the court will review Defendant’s request under FEDERAL RULE OF CIVIL PROCEDURE 60(b).

FEDERAL RULE OF CIVIL PROCEDURE 60(b) permits a court to set aside a judgment upon a finding of, *inter alia*, “(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud...; (4) the judgment is void; (5) judgment has been satisfied...; (6) any other reason justifying relief from the operation of the judgment.” See Fed. R. Civ. P. 60(b).

If, in fact, service was not proper, then this would provide a basis for the court to set aside the Judgment. On the other hand, if service was proper Defendant has provided no other basis to set aside the Judgment under FEDERAL RULE OF CIVIL PROCEDURE 60(b) and the Motion would have to be denied.

B. Service on Defendant Under Rule 7004(b)(9)

Rule 7004 sets forth the various methods that service may be effected upon an adverse party in an adversary proceeding. In this case, it appears that Plaintiff relied upon Rule 7004(b)(9) for service upon Defendant. Rule 7004(b)(9) states:

apparent error occurs numerous times in the Motion and the court will use this assumption in reading Defendant’s references to 7009(b)(9).

Service by First Class Mail. Except as provided in subsection (h), in addition to the methods of service authorized by Rule 4(e)-(j) F.R.Civ.P., service may be made within the United States by first class mail postage prepaid as follows: . . . (9) Upon the debtor, after a petition has been filed by or served upon the debtor and until the case is dismissed or closed, by mailing a copy of the summons and complaint to the debtor at the address shown in the petition or to such other address as the debtor may designate in a filed writing.

Fed. R. Bankr. P. 7004(b)(9).

Based on the record the court finds that Plaintiff complied with the requirements of Rule 7004(b)(9).⁶ As discussed above, the Return of Service makes clear that the Summons and Original Complaint were served on Defendant by first class mail postage pre-paid. Defendant has offered no evidence to the contrary and does not appear dispute this fact.

C. Service on Defendant's Counsel Under Rule 7004(g) and L.R. 5.1

Plaintiff points the court to Rule 7004(g) and Local Rule 5.1 in support of its position that service also was proper upon Debtor's Attorney. Pursuant to Rule 7004(g) service on a debtor must be accompanied by service upon the debtor's counsel. Rule 7004(g) states: "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." See Fed. R. Bankr. P. 7004(g).⁷ According to Northern District of Texas L.R. 5.1(d) "[d]elivery of the notice of electronic filing that is automatically generated by ECF constitutes service under Fed. R. Civ. P. 5(b)(2)(E) on each party who is a registered user of

⁶ Inexplicably, Defendant states: "Rule 7009(b)(9) [sic] unambiguously provides service of process upon a debtor is not sufficient unless both the debtor and his attorney are served with the summons and a copy of the Complaint." See Motion at ¶ 6. A cursory review of Rule 7004(b)(9) reveals no such requirement. This discrepancy appears to be the result of Defendant relying on the prior version of Rule 7004(b)(9). Rule 7004(b)(9) was amended in 2006, and the provisions in Rule 7004(b)(9) regarding requiring service on a debtor's attorney was moved to Rule 7004(g), discussed below. See 2006 Advisory Committee Note to Rule 7004. All of the cases which Defendant cites in support of his position antedate 2006 rule amendments.

⁷ FEDERAL RULE OF CIVIL PROCEDURE 5 is made applicable in bankruptcy by FEDERAL RULE OF BANKRUPTCY PROCEDURE 7005.

ECF.” See N. D. Tex. L.R. 5.1(d). Moreover, FEDERAL RULE OF CIVIL PROCEDURE 5 expressly states that such service may be proper if allowed by local rules, which it is in the Northern District of Texas. See Fed. R. Civ. P. 5(b)(3).⁸ Debtor’s Attorney has been at all relevant times a registered ECF user and filed documents in the Bankruptcy Case both before and after the Original Complaint was filed.

Notwithstanding the foregoing, the bankruptcy courts in this district have specifically addressed service of a complaint and summons in an adversary proceeding by General Order 2004-06. As discussed below, the consent to receive notice by ECF contemplated by L.R. 5.1 is limited by General Order 2004-06 and for this reason electronic service upon Debtor’s Attorney did not comply with FEDERAL RULE OF CIVIL PROCEDURE 5 as contemplated by Rule 7004(g).

D. General Order 2004-06

As with all the foregoing applicable law, Debtor has not cited to General Order No. 2004-06. General Order No. 2004-06 became effective December 1, 2004 and states in part:

Consent to Electronic Notice from parties. By accepting a login and password from the Authorizing Court, an Electronic Filer consents, in lieu of any rights to service of any document by personal service or by first class mail from interested parties, to accept service from such parties by electronic means through the transmission facilities of the Authorizing Court, except the service of process of a summons and complaint in an adversary proceeding under Fed. R. Bankr. P. 7004, or the service of a subpoena under Fed. R. Bankr. P. 9016.

See General Order No. 2004-06 at p. 3.

The court concludes that the specific provisions of General Order 2004-06 effectively create a carve-out for complaints and summons from the general rule that electronic service is

⁸ The District Court's local rules are incorporated by reference as part of the local bankruptcy rules. L.B.R. 9029.3 states “The District Court Local Civil Rules which are incorporated by reference and made applicable by these rules shall be the District Court Local Civil Rules in effect on the effective date of these rules and as thereafter amended, unless otherwise provided by such amendment.” See L.B.R. 9029.3.

proper for ECF filers in this district. L.R. 5.1 simply makes FEDERAL RULE OF CIVIL PROCEDURE 5(b)(3) applicable. That rule, in turn allows use of a court's electronic filing system for service in compliance with FEDERAL RULE OF CIVIL PROCEDURE 5(b)(2)(e). The latter rule requires written consent from the person served in order for electronic service to be effective. Thus, as Plaintiff relied on Debtor's Attorney's ECF agreement, service upon Debtor's Attorney through ECF is effective only to the extent of his written consent. There is nothing in the record to indicate that Debtor's Attorney consented in writing to service of the Complaint by electronic means.

In light of General Order No. 2004-06 the court concludes that service upon Debtor's Attorney of the Original Complaint did not comply strictly with Rule 7004(g) because service on Debtor's Attorney of the Original Complaint was solely by ECF.

E. Attorney's Fees

The court is very troubled by the apparently willful inattention of Debtor's Attorney in this matter. Whether service is proper is a question that must be addressed in the context of due process and potential prejudice. The court believes that in this particular case Debtor's Attorney's actual receipt of the Complaint (at least in its original form), Default Motion, and notice of Default Hearing, especially considering Debtor was properly served, weighs in favor of finding that the requirements of due process have been met by Plaintiff and Defendant has not suffered prejudice. See, e.g., *Matter of Covington*, 2 B.R. 120 (Bankr. S.D. Fla. 1979) and *Burke v. Greaves (In re Greaves)*, 121 B.R. 234, 236 (N.D. Ill. 1990) ("An elementary requirement of due process is notice reasonably calculated, under all the circumstances, to apprise interested parties of the action and afford them an opportunity to present their objections.") (internal citation omitted). The court also concludes that service was proper upon Debtor himself.

Even in light of this, it is the court's preference that any case brought before it be disposed of on the merits. The Adversary Proceeding asks that the court deny Defendant's discharge. To grant that relief based on a flawed default judgment – however immaterial its flaws – is inconsistent with the court's overriding concern that any party have a full hearing on the merits in court. Thus, the court concludes the Motion should be granted.

On the other hand, it would be inequitable to allow Defendant to set aside the Judgment without compensation for the fees and expenses incurred in this case by Plaintiff, especially in light of the actual knowledge of the Adversary Proceeding of Debtor's Attorney. According to the papers filed by Plaintiff it has expended \$7,000 in fees and expenses in the course of obtaining the Judgment. The court concludes it is appropriate that Defendant and Debtor's Attorney bear half that cost.

Defendant and Debtor's Attorney are therefore **ORDERED** to remit to Plaintiff's attorney the sum of \$3,500.00 to cover legal costs and expenses incurred in obtaining the Judgment for which they shall be jointly and severally liable and which shall be paid no later than 30 days following the entry of this order.

III. CONCLUSION

After review of the record and the evidence presented, the court concludes that service of the Original Complaint and Summons on Defendant was proper and complied with the requirements of Rule 7004(b)(9). However, the court concludes that Debtor's Attorney did not receive proper service under Rule 7004(g). In light of this the court concludes there is a basis to set aside the Judgment under Rule 7055(c) and 9024(b). For the reasons stated herein the Judgment is hereby **VACATED**. Responsive pleadings to the Complaint are due from Defendant on or before 15 days following the entry of this order.

IT IS SO ORDERED.