

**Dated: August 31, 2012**  
**The following is ORDERED:**



*Jennie D. Latta*

**Jennie D. Latta**  
**UNITED STATES BANKRUPTCY JUDGE**

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UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION

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In re  
DAVID L. KINSEY and  
ELEANOR PETERS KINSEY,  
Debtors.

Case No. 11-24774-L  
Chapter 13

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AHMAD HADI, Trustee for  
RIVER REAL ESTATE IRREVOCABLE TRUST,  
Plaintiff,

v.

Adv. Proc. No. 11-00394

DAVID L. KINSEY and  
ELEANOR PETERS KINSEY,  
Defendants.

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**ORDER GRANTING MOTION TO DISMISS COMPLAINT**

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BEFORE THE COURT is the Motion to Dismiss the Complaint filed by the Defendants/Debtors David Kinsey and Eleanor Kinsey. The motion states that the complaint should be dismissed pursuant to Rule 12(b) of the Federal Rules of Civil Procedure made applicable in

Bankruptcy by Federal Rule of Bankruptcy Procedure 7012(b). The Defendants/Debtors state that the complaint should be dismissed for three reasons:

1. Insufficient process (Rule 12(b)(4));
2. Insufficient service of process Rule 12(b)(5);
3. Failure to state a claim upon which relief can be granted (Rule 12(b)(6).

The Defendants/Debtors further state that in filing his complaint, the Plaintiff, Ahmad Hadi, is engaged in the “improper” (i.e., unauthorized) practice of law because he seeks to represent other named individuals and a business entity, but he is not a licensed attorney. The Defendants/Debtors state that “any claim or cause of action stated by the Complaint may be properly adjudicated in this Court.”

### **FACTS**

The Defendants/Debtors note that more than 120 days have passed since the filing of the Complaint but that service on the Debtors/Defendants had not been accomplished. They provide no other factual support for their motion.

The court may take judicial notice of items entered on the docket of this case. The docket reflects that the complaint was filed September 12, 2011. Summonses were issued to the Defendants/Debtors on October 11, 2011. A certificate of service was filed November 11, 2011, showing that the complaint was served upon “Harold Archibald attorney for David + Eleanor Kinsey at his last known business address on Front St, 38103.” The Certificate of Service is signed by “Beth Brooks for Ahmad Hadi” and dated November 10, 2011.

There was no activity in the case for some six months resulting in the issuance of a show cause order by the court directing the Plaintiff to show cause why the complaint should not be

dismissed for lack of prosecution. On June 6, 2012, that order was conditionally withdrawn allowing the Plaintiff thirty days to respond to the show cause order. The order further provided that if the Plaintiff failed to respond to the show cause order on or before July 2, 2012, this adversary proceeding would be dismissed and closed without further notice. Also on June 6, the Defendants/Debtors filed the pending Motion to Dismiss the Complaint. The court issued its Order and Notice of Motion to Dismiss Complaint on July 13, 2012, which directed the Plaintiff to respond on or before August 3, 2012. The Plaintiff filed a late "Answer" to the Motion to Dismiss on August 14, 2012. The "Answer" is signed by Beth Brooks as "Attorney for the Creditor." It asks that the complaint not be dismissed for the following reasons:

1. The Debtors received proper service after the filing of the Complaint and Certificate of Service Summons and Notice of Adversarial Proceeding that was issued on November 10, 2011, having previously been filed on August 8, 2011; (see attached Exhibit A) **[no exhibit is attached]**.
2. A Motion to Lift Automatic Stay and Objections to Debtors' Discharge and Dischargeability of Debt was filed (as well as a Proof of Claim) and mailed to Counsel for the Debtors on August 8, 2011 and it was faxed on August 9; (see attached Exhibit B) **[no exhibit is attached]**.
3. Although the Debtors were already aware that Ahmad Hadi and River Real Estate Irrevocable Trust were being represented by counsel, Beth Brooks, in the Shelby County Circuit Court, docket number: CT-000648-09, since on or about the filing date, February 10, 2009; a Notice of Appearance to Counsel for the Debtors in the Bankruptcy matter was faxed to counsel for the Debtors on December 14, 2011; (see attached Exhibit C and Affidavit of Attorney Exhibit D) **[no exhibits are attached]**.
4. River Real Estate Irrevocable Trust, through Trustee, Ahmad Hadi, timely filed this action in the proper Court for necessary adjudication of the matters complained of therein;

5. River Real Estate Irrevocable Trust, would state that proper service of Complaint was had within the requisite time period by both the Trustee and the Attorney and the Debtors have failed to affirmatively allege with specificity the facts or upon which they rest this allegation [sic];
6. Pursuant to the Federal Rules of Civil Procedure Rule 4(m), a proper certificate of service of summons, stamped by this Court, with all the necessary information was filed and served on the Debtors with the requisite formalities adhered to; (See attached Exhibit A); **[no exhibit is attached]**.
7. The Debtors executed with all proper formalities personal and Corporate guarantees and promissory notes, between Creditor and Debtors for the advancement of the inventory, equipment, good will and stock transfer;
8. The Debtors then abandoned the store and breached the lease after depletion of the One hundred and ten thousand dollar (\$110,000) inventory and retained and converted the monies made on the sale of the secured inventory; now they want the Court's protection from the executed promissory notes and personal and Corporate guarantees that secured the advancement of said inventory;
9. Debtors have suffered no prejudice in this matter; the Law abhors a forfeiture.

Plaintiff's Answer to Motion to Dismiss, Doc. No. 20. The Plaintiff prays that the Motion to Dismiss be denied.

### **JURISDICTION AND AUTHORITY**

The Complaint attempts to seek a determination of the dischargeability of a particular debt in bankruptcy. It therefore falls within the original but not exclusive jurisdiction of the federal district courts over all civil proceedings arising under title 11, or arising in or related to cases under title 11. 28 U.S.C § 1334(b). Because the dischargeability of particular debts is a matter governed by section 523 of the Bankruptcy Code, this is a civil proceeding arising under title 11. The United States District Court for the Western District of Tennessee has exercised the authority granted under

11 U.S.C. § 157 to refer any or all proceedings arising under title 11 to the bankruptcy judges for this district. *See In re Jurisdiction and Proceedings Under the Bankruptcy Amendments Act of 1984*, Misc. No. 81-30 (W.D. Tenn. July 10, 1984). Matters related to the dischargeability of particular debts are core bankruptcy proceedings over which the bankruptcy judges may preside and make final determinations. *See* 28 U.S.C. § 157(b)(1) and (2)(I). *See Stern v. Marshall*, \_\_\_ U.S. \_\_\_, 131 S. Ct. 2594 (2011).

## **ANALYSIS**

### **A. Failure to Timely Respond to the Show Cause Order**

The Motion to Dismiss should be granted for a number of reasons. First, the Plaintiff failed to timely respond to the Order Conditionally Withdrawing Order to Show Cause. That order gave him until July 2, 2012, to file a response to the Sua Sponte Order to Show Cause. The Plaintiff did not file his response until August 14, 2012, some 43 days late. Pursuant to the conditional order, the complaint could have been dismissed on July 3 without further notice to the Plaintiff. The reason that it was not most likely has to do with the fact that the Motion to Dismiss was pending. The Clerk of the Bankruptcy Court generally will not cue an adversary proceeding for dismissal when there are motions pending.

### **B. Failure to Timely Respond to the Motion to Dismiss**

Second, the Plaintiff failed to timely respond to the Motion to Dismiss. The Court's Order and Notice of the filing of the Motion to Dismiss directed the Plaintiff to respond on or before August 3, 2012. The Plaintiff did not respond until August 14, 2012, some eleven days late. No explanation or excuse was given by the Plaintiff for this tardy response. The Order and Notice issued by the Court conformed to Official Bankruptcy Form 20A and provided,

If you or your attorney do not take these steps, the court may decide that you do not oppose the relief sought in the motion and may enter an order granting that relief.

Pursuant to that Order and Notice, the Court may grant the Defendants/Debtors' motion and dismiss the Complaint.

### **C. Failure to Timely Serve the Defendants**

Third, the complaint has never been served on the Defendants/Debtors. According to the Certificate of Service filed by the Plaintiff, the Complaint was served upon an attorney, Harold Archibald. Rule 4(e) of the Federal Rules of Civil Procedure requires that service upon an individual be made by one of three ways:

- (A) delivering a copy of the summons and of the complaint to the individual personally;
- (B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who reside there;  
or
- (C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

Fed. R. Civ. P. 4(e)(2). In addition to these methods, in an adversary proceeding in bankruptcy service may be made by United States first class mail postage prepaid:

Upon an individual other than an infant or incompetent, by mailing a copy of the summons and complaint to the individual's dwelling house or usual place of abode or to the place where the individual regularly conducts a business or profession.

Fed. R. Bankr. P. 7004(b)(1). When a debtor is represented by an attorney, a copy of the summons and complaint must also be delivered to his or her attorney by any means authorized under Rule 5(b) of the Federal Rules of Civil Procedure (Fed. R. Bankr. P. 7004(g)), but service upon a debtor's attorney does not substitute for service upon a debtor himself. The Rules of Bankruptcy Procedure

unambiguously require personal service upon the debtor and upon his attorney. Service is not sufficient unless both are accomplished. *See Dreier v. Love (In re Love)*, 232 B.R. 373, 377 (Bankr. E.D. Tenn. 1999). Moreover, “anything short of strict compliance ... is insufficient,” *Love*, 232 B.R. at 377, as “the requirement of proper service of process ‘is not some mindless technicality.’” *Friedman v. Estate of Presser*, 929 F.2d 1151, 1156 (6th Cir. 1991) (quoting *Del Raine v. Carlson*, 826 F.2d 698, 704 (7th Cir. 1987)).

There are two time limits that apply to service of process in an adversary proceeding. First, the summons and complaint must be deposited in the mail within 14 days after the summons is issued. Fed. R. Bankr. P. 7004(e). If the summons is not timely delivered or mailed, another summons must be issued and mailed. *Id.* Second, if service of the summons and complaint is not made upon the defendant within 120 days after the filing of the complaint, “the court shall dismiss the complaint without prejudice as to that defendant or direct that service be effected within a specified time.” Fed. R. Civ. P. 4(m), made applicable in adversary proceedings in bankruptcy by Fed. R. Bankr. P. 7004(a).

The summonses that were originally issued on October 11, 2011, are now stale. They were not deposited in the mail addressed to the defendants at their dwelling house or usual place of abode within fourteen days of their issuance. Moreover, more than 120 days has elapsed since the complaint was filed on September 12, 2011 – in fact, 268 days elapsed before the Motion to Dismiss was filed – and the Plaintiff has still not accomplished service upon the Defendants/Debtors. Pursuant to Federal Rule of Civil Procedure 4(m), and Federal Rule of Bankruptcy Procedure 7004(a), the Complaint must be dismissed.

#### **D. The Complaint Fails to State a Claim Upon Which Relief Can be Granted**

Having found that at least three reasons exist for dismissing the Complaint based upon timeliness, the court turns to the more serious claim made by the Debtors/Defendants: that the Complaint fails to state a claim upon which relief may be granted. The Complaint seeks a determination concerning the dischargeability of a particular debt. It does not, however, state any grounds for excepting the debt from discharge, nor does it reference a section of the Bankruptcy Code that would support the relief requested. Objections to discharge and dischargeability “should be construed strictly against the creditor and liberally in favor of the debtor.” *Stephens v. Morrison (In re Morrison)*, 450 B.R. 734, 746 (Bankr. W.D. Tenn. 2011), quoting *Wazeter v. Michigan Nat’l Bank (In re Wazeter)*, 209 B.R. 222, 226 (Bankr. W.D. Mich. 1997) (internal citations and quotations omitted).

Pursuant to Federal Rule of Civil Procedure 12(b)(6), made applicable in adversary proceedings in bankruptcy by Federal Rule of Bankruptcy Procedure 7012(b), a complaint may be dismissed if it fails to state a claim upon which relief can be granted. A motion to dismiss pursuant to Rule 12(b)(6) “should only be granted when the court, upon review of the complaint, is convinced that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief.” *Garzoni v. K-Mart Corp. (In re Garzoni)*, 35 Fed. Appx. 182 (6th Cir. 2002).

I have carefully reviewed the Complaint and the “Answer” filed in response to the Motion to Dismiss. The grounds for excepting a debt from discharge in bankruptcy are set forth at 11 U.S.C. § 523(a). Those that might have some bearing on the Complaint are the so-called fraud exceptions, subsections (a)(2), (4), and (6). The Complaint indicates that the Plaintiff proceeded by Sworn Account in an underlying state court proceeding. This tells me that fraud was not alleged in the underlying action. Fraud is also not alleged in the Adversary Proceeding Complaint. Read in a light



most favorable to the Plaintiff, the Complaint alleges a cause of action for debt. The Complaint states, “the debtors made their last payment and then defaulted; they now owe \$67,758.71.” At most, in his “Answer,” the Plaintiff states that, “The Debtors then abandoned the store and breached the lease after depletion of One hundred and ten thousand dollar (\$110,000) inventory and retained and converted the monies made on the sale of secured inventory.” Conversion may sometimes provide the basis for exception of a debt from discharge under section 523(a)(6) for willful and malicious injury by the debtor to the property of another entity. Here, however, the Complaint indicates that the Defendants/Debtors purchased a store from the Plaintiff, so that sale of inventory was presumed and intended. The value of the inventory alleged to have been “retained and converted” exceeds the amount of the debt, so there was no one-to-one correspondence between them. The Defendants/Debtors appear to have defaulted in payment of a note. Nowhere does the Plaintiff allege facts that would tend to show that their failure to pay was willful or malicious. The Complaint should be dismissed for failure to state a claim upon which relief can be granted.

#### **E. The Complaint Should be Dismissed with Prejudice**

I have now given four reasons why the Complaint should be dismissed. The question remains, should the Plaintiff be given another chance. The Plaintiff claims that the Defendants/Debtors have suffered no prejudice in this proceeding. That is simply not the case.

Discharge is perhaps the most fundamental goal of an individual debtor in bankruptcy. It permits the honest but unfortunate debtor a fresh start in life. For this reason, the Bankruptcy Code provides a very short statute of limitations for the filing of complaints to determine the dischargeability of debts based upon one or more of the fraud exceptions. Pursuant to section 523(c)(1), debts of a kind specified in subsections (2), (4), or (6) of that section are discharged

unless a creditor timely files a complaint. Complaints to determine the dischargeability of a debt must be filed no later than 60 days after the first date set for the meeting of creditors. Fed. Rule Bankr. P. 4007(c). The deadline for non-government creditors to file complaints in the Debtors' bankruptcy case was August 8, 2011. The complaint in this case was filed September 12, 2011, well outside that deadline.

In his "Answer," the Plaintiff references a motion for relief from the automatic stay filed August 8, 2011. The docket does not reflect that a motion was filed on that day, but does reflect that the Plaintiff attempted to file a proof of claim on August 9, which was rejected and finally accepted for filing on August 16. Attached to the Proof of Claim is an "Amended Affidavit of Sworn Account," which states only that the Defendants are indebted to the Plaintiffs ... for a total of \$63,758.71 as of March 30, 2011." The Debtors objected to this claim and the claim was disallowed by order entered March 30, 2012. The motion for relief from stay that the Plaintiff references was in fact filed on the same day as the adversary proceeding complaint, September 12, 2011.

The time limit provided at Rule 4007(c) is to be strictly construed. It cannot be enlarged unless a motion is filed before the original time has expired stating "cause" to extend the time. No motion to extend the time to file a complaint was timely filed by the Plaintiff.

The Plaintiff failed to timely file his complaint. To permit him to correct the numerous procedural deficiencies at this point would disturb the repose intended by the Bankruptcy Code and Rules in specifying the rather short deadline for filing complaints to determine whether the fraud exceptions to discharge will apply.

### **CONCLUSION**

For the foregoing reasons, the Complaint is **DISMISSED WITH PREJUDICE.**

cc: Debtors/Defendants  
Attorney for Debtors/Defendants  
Plaintiff  
Attorney for Plaintiff  
Chapter 13 Trustee