UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
SUN HEALTHCARE GROUP, INC., *et al.*,	)	Case No. 99-03657 (MFW)
	)	
Debtors.	)	
	)	
SUN HEALTHCARE GROUP, INC., and any and all debtor subsidiaries and affiliates	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adv. Proc. No. 01-7671 and 01-7480 (MFW)
	)	
MEAD JOHNSON NUTRITIONAL	)	
	)	
Defendant.	)	

MEMORANDUM OPINION[1]

Before the Court is the Motion of defendant Mead Johnson Nutritional ("Mead") for an Order (1) reopening two adversary proceedings filed by Sun Healthcare Group, Inc., on behalf of itself and its subsidiaries and affiliates (collectively "the Debtors"), (2) vacating the default judgments entered therein, and (3) dismissing the underlying complaints for failure to effect proper service within 120 days. The Debtors oppose the motion. After considering the arguments of both parties, and for

[1] This Opinion constitutes the findings of fact and conclusions of law of the Court pursuant to Federal Rule of Bankruptcy Procedure 7052.

the reasons set forth below, the motion to reopen is granted and the motion to dismiss is denied.

I. BACKGROUND

On October 12, 1999, the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code. On October 10, 2001, the Debtors filed an adversary proceeding against Mead (Adv. No. 01-7671) to avoid certain preferential transfers totaling $91,629.54 pursuant to sections 105, 542, 547(b), 548, 550 and 551 of the Bankruptcy Code, New Mexico's Uniform Fraudulent Transfer Act, Texas's Business & Commercial Code, and any other applicable state laws. On October 12, 2001, the Debtors commenced a second avoidance action against Mead (Adv. No. 01-7480) seeking to recover $77,532.

The parties stipulate that the Debtors sent all pleadings to Mead at a post office box in Charlotte, North Carolina. The parties stipulate further that none of the mailings designated a particular individual or agent for the purpose of service of process. Mead failed to respond timely to any of the Debtors' mailings. Consequently, two default judgments were entered in favor of the Debtors on March 4, 2002. The adversary proceedings were closed on March 28 and 31, 2003.

The Debtors commenced collection on the judgments. As a

result, on June 12, 2003, Mead filed the instant Motion to reopen the default judgments and to dismiss the underlying adversary complaints. The Debtors objected to the Motion on June 19, 2003. Mead filed its Reply on June 26, 2003. A Notice of Completion of Briefing was filed on March 10, 2004, and the matter is ripe for decision.

II. JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §§ 1334 & 157(b)(2)(A), (F) & (O).

III. DISCUSSION

A. Reopen Adversaries

Mead asks this Court to reopen the adversary proceedings to afford it relief. Its motion cites section 350 of the Bankruptcy Code in support. The Debtors assert that section 350 is applicable only to bankruptcy cases, not to adversaries filed in them. Consequently, the Debtors contend that we must deny the motion.

We agree with the Debtors that section 350 applies only to reopening bankruptcy cases and not to reopening adversary proceedings. 11 U.S.C. § 350(b) (1978) ("a case may be reopened . . . to administer assets, . . . accord relief to the debtor, or

for other cause"); In re Woods, 173 F.3d 770, 772 (10th Cir. 1999) (bankruptcy court has authority under section 350(b) to reopen a case).

Nevertheless, we disagree with the Debtors' assertion that this mandates we deny Mead's motion in toto. Adversary proceedings in bankruptcy cases are procedurally analogous to civil actions filed in district courts.[2] A district court does not need an independent basis to reopen a civil proceeding before considering a motion for relief from a judgment pursuant to Rule 60(b) of the Federal Rules of Civil Procedure.[3] Rather, such a motion is deemed a continuation of the original proceeding. 12 Moore's Federal Practice §60.61 (Matthew Bender 3d ed. 1999). Therefore, we will consider the merits of Mead's motion to vacate the Debtors' default judgments.

B. Vacate Default Judgments

Mead claims that the default judgments are void under Rule 60(b)(4) because the Debtors failed to effect proper service of process. Bankruptcy Rule 7004(b)(3) requires that service by

---

[2] Both are commenced by filing a complaint with the court. In fact, Bankruptcy Rule 9002(1) includes adversary proceedings within the definition of "civil action[s]." Bankruptcy Rule 7003 provides that Rule 3 of the Federal Rules of Civil Procedure - which governs the commencement of civil actions - also applies in adversary proceedings.

[3] Bankruptcy Rule 9024 incorporates by reference Rule 60(b) of the Federal Rules of Civil Procedure.

first class mail on a domestic corporation be addressed "to the attention of an officer, managing or general agent, or . . . any other agent authorized by appointment or by law" to receive service of process. Fed. R. Bankr. P. 7004(b)(3). Here, the Debtors have admitted serving Mead only at P.O. Box 751735, Charlotte, NC 28275, without addressing the documents to the attention of any officer, managing or general agent of Mead. Mead asserts that this address is a lockbox to receive payments, which is maintained and administered by a bank.[4] (Aff. of Mary Stewart, ¶¶ 3-4.)

Failure to address the service of process to the attention of an officer or agent of Mead violates the statutory requirements of Bankruptcy Rule 7004(b)(3). See, e.g., In re Golden Books Family Entertainment, Inc., 269 B.R. 300, 305 (Bankr. D. Del. 2001) (notice documents deficient because "among other things, debtors failed to address any of the copies . . . to a person of authority or to a person authorized to accept service"). Notice must comply with the literal requirements of Bankruptcy Rule 7004(b)(3). Id. at 305. Consequently, we conclude that the Debtors' service of process did not meet the

[4] Mead explains that the bank processes payments, deposits them into Mead's account, and forwards the documentation to Mead to allow it to apply the payments to the appropriate customer accounts.

requirements of Bankruptcy Rule 7004(b)(3).

The Third Circuit has held that "a default judgment entered when there has been no proper service of the complaint is, a fortiori, void, and should be set aside." Gold Kist, Inc. v. Laurinburg Oil Co., 756 F.2d 14, 19 (3d Cir. 1985). Thus, the default judgments the Debtors have obtained against Mead are void and should be set aside because service was defective.

The Debtors assert, nonetheless, that we should not vacate the default judgments because Mead's culpable conduct led to the entry of such judgments and that setting aside the judgment would be prejudicial to the Debtors. The Third Circuit has stated three factors lower courts should consider when deciding a motion to vacate a default judgment - whether (1) plaintiff will be prejudiced if the judgment is set aside, (2) defendant has a meritorious defense to the underlying action, and (3) default resulted from defendant's culpable conduct. Feliciano v. Reliant Tooling Co., Ltd., 691 F.2d 653, 656 (3d Cir. 1982). See also Hritz v. Woma Corp., 732 F.2d 1178, 1181 (3d Cir. 1984); U.S. v. $55,518.05 in U.S. Currency, 728 F.2d 192, 195 (3d Cir. 1984).

However, the Feliciano factors are inapplicable to the instant case because they are relevant "only when [a judgment to be vacated] was authorized." Gold Kist, 756 F.2d at 19. Since we already have determined that proper service of process was not

effected in these adversary proceedings, this Court never acquired the personal jurisdiction over Mead necessary to bind it to the default judgments. As such, these judgments were not authorized. See Lampe v. Xouth, Inc., 952 F.2d 697, 700-01 (3d Cir. 1992) (personal jurisdiction must be established in every case before a court has power to render any judgment; a court obtains personal jurisdiction over the parties when the complaint and summons are properly served upon defendant).

The Debtors also contend that we should not vacate the default judgments because they have "diligently pursued [their] claim[s]" while Mead failed to prosecute its motion within a "reasonable time." (Debtors' Obj., pp. 12-13.) While Rule 60(b) states that motions should be initiated within a "reasonable time," this limitation does not apply to actions brought under subsection (4), the basis for Mead's current motion. See, e.g., U.S. v. One Toshiba Color T.V., 213 F.3d 147, 157 (3d Cir. 2000) (en banc) ("nearly overwhelming authority exists for the proposition that there are no time limits with regards to a challenge to a void judgment because of its status as a nullity"); Shenouda v. Mehanna, 203 F.R.D. 166, 169 (D.N.J. 2001) (defendant's motion to vacate default judgment not untimely although made 5 years after judgment entered; void judgment may be attacked at any time). See also 12 Moore's Federal Practice,

§60.44(5)(c) (Matthew Bender, 3d ed. 1999) (Rule 60(b)(4) motion challenging judgment as void is not subject to "reasonable time" requirement and may be made at any time).

Consequently, we conclude that the default judgments entered against Mead are void because the complaints were never properly served. Mead's motion to vacate will be granted.

C. Motion to Dismiss Underlying Complaints

Mead also seeks to dismiss the Debtors' underlying complaints because of the failure to properly serve process within the 120 days prescribed in Bankruptcy Rule 7004, which incorporates Rule 4(m). Rule 4(m) provides:

> if service of the summons and complaint is not made upon defendant within 120 days after the filing of the complaint, the court . . . shall dismiss the action without prejudice as to the defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period.

Fed. R. Civ. P. 4(m).

In a Rule 4(m) analysis, the court must first ascertain whether the plaintiff has "good cause" to excuse the failure to perfect service within 120 days. See Petrucelli v. Bohringer, 46 F.3d 1298, 1305 (3d Cir. 1995). If the plaintiff demonstrates "good cause," then the court is duty-bound to extend the time for service. However, where the plaintiff cannot show "good cause," the court still has discretion to grant the plaintiff additional

time to serve the defendant properly or to dismiss the action without prejudice.

The Third Circuit has equated "good cause" with "excusable neglect" under Rule 60(b)(2). See Petrucelli, 46 F.3d at 1312, citing Dominic v. Hess Oil, 841 F.2d 513, 517 (3d Cir. 1988). Excusable neglect requires "a demonstration of good faith on the part of the party seeking an enlargement [of time for service] and some reasonable basis for noncompliance with the time specified in the rules." Petrucelli, 46 F.3d at 1312.

Here, the Debtors have submitted no evidence of the requisite "excusable neglect" and reasonable basis for noncompliance with Rule 4(m)'s 120-day deadline that would warrant a finding by this Court that there is "good cause" to mandate extending the time for service. In fact, the Debtors did not even address this issue in the papers submitted to the Court.

However, even though the record does not show "good cause" for the Debtors' failure to properly serve Mead within 120 days, we can, in our discretion, grant the Debtors additional time to perfect service. Again, the Petrucelli case is instructive. The Third Circuit stated that the Advisory Committee notes on Rule 4(m) provide some factors for lower courts to consider when deciding to exercise their discretion, including whether the applicable statute of limitations would bar refiling of the

plaintiff's action. See Petrucelli, 46 F.3d at 1305-06. Other factors a court may consider include frivolousness of the plaintiff's complaint, the plaintiff's objective unreasonableness (factually and legally), and the plaintiff's motivation in pursing the claim. See Ritter v. Cooper, 2003 WL 23112306, at *3 (D. Del. Dec. 30, 2003). The greater the number of these factors that appear true, the weaker the rationale for the court to exercise its discretion in favor of extending the time for service.

In this case, if the adversary proceedings are dismissed, the Debtors could not refile because the statute of limitations has expired. See 11 U.S.C. § 546(a)(1)(A). Therefore, the Debtors are unable to cure the defective service absent our grant of additional time. Further, consideration of the Ritter factors seem to support an extension. First, the Debtors' complaints do not appear frivolous or objectively unreasonable. Both the Debtors and Mead have acknowledged Mead's receipt of more than $45,000 in payments within 90 days prior to the filing of the Debtors' chapter 11 petitions. (Stip. of Facts, ¶4.) Whether such transfers represent avoidable preferences under section 547 of the Bankruptcy Code or fraudulent conveyances under New Mexico's Uniform Fraudulent Transfer Act and/or Texas' Business & Commercial Code and other applicable state laws are genuine

issues of material fact about which the parties disagree. There remain additional important contested factual issues: (1) the actual amount of check 14948, (2) whether the Debtors' payments to Mead via checks 20123 and 20215 comprised improper post-petition transfers, and (3) whether checks 1459 and 14406 cleared within 90 days of the Debtors' chapter 11 filings. Consequently, the Debtors' complaints appear neither frivolous nor objectively unreasonable. See, e.g., Penguin Books U.S.A., Inc. v. New Christian Church of Full Endeavor, Ltd., 2004 WL 728878, at *3 (S.D.N.Y. Apr. 6, 2004) ("only those claims that are clearly without merit or otherwise patently devoid of legal or factual basis ought to be deemed objectively unreasonable").

Next, we find no improper motive in the Debtors' prosecution of the instant adversary proceedings against Mead. The Debtors have pursued similar avoidance actions to recover funds from other creditors. (Obj. & Supp. Brief of Sun Healthcare, ¶ 4.) To the extent that the transfers can be avoided, the monies recovered belong to the estate. Consequently, the Debtors' maintenance of their claims against Mead appears appropriate.

Courts prefer to avoid default judgments and dispose of cases on the merits. See, e.g., Tozer v. Krause Milling Co., 189 F.2d 242, 245 (3d Cir. 1951); In re USN Communications, Inc., 288 B.R. 391, 398 (Bankr. D. Del. 2003). As a result, we will

exercise our discretion under Rule 4(m) and grant the Debtors a short extension of time to serve the complaints.

IV. CONCLUSION

For the foregoing reasons, we grant Mead's motion to vacate the default judgments and deny its motion to dismiss the Debtors' underlying complaints for failure to perfect service within 120 days of filing.

An appropriate Order is attached.

BY THE COURT:

Mary F. Walrath
United States Bankruptcy Judge

Dated: April 30, 2004

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
SUN HEALTHCARE GROUP, INC., *et al.*,	)	Case No. 99-03657(MFW)
	)	
Debtor.	)	
	)	
SUN HEALTHCARE GROUP, INC. and any and all debtor subsidiaries and affiliates	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Adv. Proc. Nos. 01-7671 and 01-7480(MFW)
MEAD JOHNSON NUTRITIONAL	)	
	)	
Defendant.	)	

ORDER

AND NOW, this **30th** day of **April, 2004**, upon consideration of defendant Mead's Motion to vacate the default judgments and dismiss the underlying complaints and the Debtors' response, for the reasons set forth in the accompanying Opinion, it is hereby

ORDERED that the Motion to vacate the default judgments is **GRANTED**; and it is further

ORDERED that the Motion to dismiss the underlying complaints is **DENIED.**

BY THE COURT:

Mary F. Walrath
United States Bankruptcy Judge

cc: See Attached

SERVICE LIST

Denise L. Savage, Esquire
SAVAGE & ASSOCIATES, P.C.
56 Lafayette Avenue
White Plains, NY 10603

Marla R. Eskin, Esquire
CAMPBELL & LEVINE, LLC
800 N. King Street
Suite 300
Wilmington, DE 19081

Gary R. Case, Esquire
Nick J. Cirignano, Esquire
ZIEMER STAYMAN WEITZEL SHOULDERS, LLP
20 N.W. First Stret
P.O. Box 916
Evansville, IN 47706-0916

Richard A. Keuler, Jr., Esquire
REED SMITH, LLP
1201 Market Street
Suite 1500
Wilmington, DE 19801