

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

IN RE:	§	
	§	
SCOTT EDWIN SOUTH	§	Case No. 22-40365
	§	
Debtor	§	Chapter 7
<hr/>		
KSMI PROPERTIES LLC	§	
	§	
Plaintiff	§	
	§	
v.	§	Adversary No. 22-4035
	§	
SCOTT EDWIN SOUTH	§	
	§	
Defendant	§	

ORDER GRANTING MOTION FOR ALTERNATIVE SERVICE

Before the Court is a “Motion for Alternative Service” (the “Motion”) filed by Plaintiff, KSMI Properties LLC (the “Plaintiff” or “KSMI”). The Court has considered the docket and pleadings in this case, as well as the Motion and the exhibits attached thereto. No objection to the Motion has been filed.

KSMI filed its “Complaint Objecting to Dischargeability of Certain Debts Pursuant to 11 U.S.C. § 523” (the “Complaint”) on June 29, 2022. KSMI requested issuance of summons on July 5, 2022, and the Court issued summons on Defendant, Scott Edwin South (the “Defendant” or “Debtor”) that same day. Plaintiff did not file evidence of perfected service of this first summons.¹ As a result, on July 27, 2022, the Court

¹ Fed. R. Civ. P. 4(l) requires proof of service to be made to the Court, a requirement incorporated into adversary proceedings by Fed. R. Bankr. P. 7004(a).

entered an “Order Regarding Service in Adversary Complaint” (the “Service Order”).²

The Service Order advised Plaintiff of its failure to perfect service, and directed Plaintiff either to file proof of timely service, request issuance of a new summons to Defendant, or otherwise show cause why this adversary proceeding should not be dismissed for want of prosecution. In response, Plaintiff requested issuance of a new summons on August 3, 2022, and new summons was issued on August 4, 2022. Plaintiff did not timely file any evidence of perfection of service of this second summons.

On September 7, 2022, KSMI filed its Motion seeking authorization to serve Defendant by alternative means. Plaintiff’s process server made four (4) unsuccessful attempts to personally serve Defendant at his home address listed in the underlying bankruptcy case.³ As a result, Plaintiff is requesting to serve Defendant “by leaving a true copy of the same with anyone over sixteen (16) years of age...” or “by leaving or attaching a true copy of same to the front entrance of the residence...”⁴

Fed. R. Bankr. P. 7004 governs service of summons in adversary proceedings, and incorporates portions of Fed. R. Civ. P. 4.⁵ Importantly for this case, Fed. R. Bankr. P.

² ECF No. 4.

³ Mot., 2, ¶ 1, ECF No. 10.

⁴ Mot., 2, ¶ 2, ECF No. 10.

⁵ Fed. R. Bankr. P. 7004(a)(1) states in part:

“(1) Except as provided in Rule 7004(a)(2), Rule 4(a), (b), (c)(1), (d)(5), (e)–(j), (l), and (m) Fed. R. Civ. P. applies in adversary proceedings. Personal service under Rule 4(e)–(j) Fed. R. Civ. P. may be made by any person at least 18 years of age who is not a

7004 permits service within the United States by first class mail with prepaid postage.⁶

Personal service, as attempted by Plaintiff, is of course also permitted. Fed. R. Civ. P. 4(e)(2)(A). In this Court’s experience, service by first class mail is an efficient and effective way to serve summons. Comparatively, personal service is more commonly utilized under the Texas Rules of Civil Procedure. Tex. R. Civ. P. 106(a). Federal practice recognizes service methods authorized under the Texas Rules of Civil Procedure and permits use of those methods for serving summons in an adversary proceeding.⁷

The Court understands the Motion as one seeking authorization for substituted service by alternative means under Tex. R. Civ. P. 106(b). Such a request is contemplated by Fed. R. Civ. P. 4(e)(1). “Service under Texas state law is governed by

party, and the summons may be delivered by the clerk to any such person.”

⁶ Fed. R. Bankr. P. 7004(b)(1) states in part:

“(b) **Service by first class mail.** Except as provided in subdivision (h), in addition to the methods of service authorized by Rule 4(e)–(j) Fed. R. Civ. P., service may be made within the United States by first class mail postage prepaid as follows:

(1) 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.”

⁷ Fed. R. Civ. P. 4(e)(1) states in part:

“(e) **Serving an Individual Within a Judicial District of the United States.** Unless federal law provides otherwise, an individual—other than a minor, an incompetent person, or a person whose waiver has been filed—may be served in a judicial district of the United States by:

(1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; or . . .”

Rule 106 of the Texas Rules of Civil Procedure. When personal service or certified mail are unsuccessful under Texas Rule 106(a), plaintiffs may move for a substituted method of service under Texas Rule 106(b) . . .” *Pharmerica, Inc. v. DSJ Healthcare, Inc.*, No. 4:99-CV-242, 2010 WL 4962974, at *4 (E.D. Tex. Oct. 22, 2010).

A plaintiff must meet two requirements to use a substituted method of service under Tex. R. Civ. P. 106(b). First, a plaintiff must provide “a statement—sworn to before a notary or made under penalty of perjury—listing any location where the defendant can probably be found . . .” Tex. R. Civ. P. 106(b). Second, the plaintiff must specifically state facts “showing that service has been attempted under (a)(1) [by personal service] or (a)(2) [by registered certified mail] at the location named in the statement but has not been successful.” Tex. R. Civ. P. 106(b); *see also Pharmerica, Inc.*, 2010 WL 4962974 at *4. Once these requirements are met, Tex. R. Civ. P. 106(b) gives the Court flexibility to fashion an appropriate method to accomplish service.⁸

The Court finds Plaintiff has met the requirements under Texas Rule 106(b) by providing a statement sworn before a notary listing a location where Defendant can

⁸ Tex. R. Civ. P. 106(b) states in part:

“(b) . . . the court may authorize service:

(1) by leaving a copy of the citation and of the petition with anyone older than sixteen at the location specified in the statement; or

(2) in any other manner, including electronically by social media, email, or other technology, that the statement or other evidence shows will be reasonably effective to give the defendant notice of the suit.”

probably be found, his home address as reflected in his bankruptcy petition. This sworn statement further describes an interaction with a child at the residence who “stated that the [D]efendant [was not] home at the moment” on the second attempt to complete service of process.⁹ The process server also included the dates and times of four (4) failed attempts to serve Defendant at his residence.¹⁰ The Court thus finds sufficient grounds to allow substitute service by alternative means under Tex. R. Civ. P. 106(b).

KSMI gives no explanation in the Motion, however, for its failure to attempt service on Defendant by first class mail pursuant to Fed. R. Bankr. P. 7004(b)(1). The Court finds this an efficient method of service, and further finds it appropriate to require Plaintiff to also serve Defendant by this method. Accordingly, the Court finds that just cause exists for entry of the following order.

IT IS THEREFORE ORDERED that the Plaintiff, shall, within seven (7) days of entry of this order request issuance of new summons directed to Defendant, Scott Edwin South.

IT IS FURTHER ORDERED that the Plaintiff, shall, within seven (7) days of issuance of new summons as contemplated by this order, cause such summons to be served on Defendant, Scott Edwin South by **both** of the following methods:

- 1) by leaving a true copy of this summons, complaint, *and a copy of*

⁹ Mot., ECF No. 10, Ex. A.

¹⁰ *Id.*

this order, with anyone over sixteen (16) years of age at 402 Saint Andrews Dr., Allen, Texas 75002, and

- 2) by mailing a true copy of this summons, complaint, *and a copy of this order*, to Defendant, Scott Edwin South, by first class mail postage prepaid to Defendant's home at 402 St Andrews Dr., Allen, TX 75002.

IT IS FURTHER ORDERED that the Plaintiff, shall, within seven (7) days of effecting service of new summons by both methods as directed by this order, file proof of such service on Defendant, Scott Edwin South, pursuant to Fed. R. Civ P. 4(l).

IT IS FURTHER ORDERED that failure to comply with this order may result in dismissal of this case without further notice or order.

IT IS FURTHER ORDERED that except as granted herein, the Motion is **DENIED**.

Signed on 10/18/2022



BD

THE HONORABLE JOSHUA P. SEARCY
UNITED STATES BANKRUPTCY JUDGE