

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

IN RE:	§	
	§	
KATHRYN KILPATRICK	§	Case No. 22-40955
	§	
	§	
	§	
Debtor	§	Chapter 7

KATHRYN KILPATRICK	§	
	§	
Plaintiff	§	
v.	§	Adversary No. 22-04047
	§	
INTERNAL REVENUE SERVICE,	§	
U.S.A., AND	§	
U.S. DEPT. OF THE TREASURY	§	
	§	
Defendants	§	

**INTERIM ORDER SETTING DEADLINE FOR SUBMISSION OF
PROOF OF SERVICE FOR POSSIBLE ENTRY OF DEFAULT**

ON THIS DATE the Court conducted a *sua sponte* review of the file in the above-referenced adversary proceeding. The Court finds that the Complaint in this proceeding was filed on August 26, 2022. In the Complaint, Plaintiff, Kathryn Kilpatrick, seeks a determination of the dischargeability of a debt allegedly owed by Plaintiff to the Internal Revenue Service (the “Defendant”). Plaintiff requested issuance of three summons on August 26, 2022, and the Court on August 29, 2022 issued summons on the Internal Revenue Service, the U.S. Attorney for the Eastern District of Texas, and the Attorney

General of the United States of America.¹ Plaintiff did not thereafter file evidence of perfection of service of these first summons.² As a result, on September 30, 2022, the Court entered an “Order Regarding Service of Adversary Complaint” (the “Service Order”).³ The Service Order advised Plaintiff of the 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 new summons on October 4, 2022, and new summons were issued that same day. Evidence of perfection of service of these new summons was filed on Oct. 6 and October 14, 2022.

No request for entry of default has been filed, but in the absence of such a request and upon proper proof of service, it is customary in this Court for entry of default to be made *sua sponte*. However, if service of process is defective, a court does not have personal jurisdiction over the party to be served. *In re McMillan*, [614 Fed. Appx. 206](#),

¹ When serving an agency of the United States, such as the Internal Revenue Service, service may be perfected by mailing a copy of the summons and complaint to the civil process clerk at the office of the U.S. Attorney for the district in which the action is brought, to the office of the U.S. Attorney in Washington, D.C., and to the officer or agency. *See Fed. R. Bankr. P. 7004(b)(4), (5)*; *See also In re Pope*, [2013 WL 5488517](#) (Bankr. D. R.I. 2013) (“Read together, [Fed. R. Bankr.P. 7004\(b\)\(4\)](#) and [\(5\)](#) required Plaintiff to mail a copy of the summons and complaint to three entities: (1) the United States Attorney for the District of Rhode Island; (2) the Attorney General of the United States in Washington, D.C.; and (3) the Department of Education.”); *In re Griffin Oil Co., Inc.*, [149 B.R. 419, 424](#) (Bankr. E.D. Tex., 1992)(“As an adversary proceeding, Griffin would be required under [Fed. R. Bankr. R. 7004\(b\)\(4\), \(5\)](#), 11 U.S.C.A. (West 1979 and Supp. 1992) to effect service of summons on the IRS, the Attorney General of the United States as well as the United States Attorney for the Eastern District of Texas.”).

² [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\(a\)](#).

³ ECF No. 7.

210-11 (5th Cir. 2015). Any judgment obtained where the service was defective is void. *In re Van Meter*, [175 B.R. 64, 67](#) (B.A.P. 9th Cir. 1994); *In re Sheppard*, [173 B.R. 799, 805](#) (Bankr. N.D. Ga. 1994).

An entry of default cannot be made based upon the proof of service provided because it is unclear if Plaintiff's method of service was effective. Rule 7004(b) allows service to be executed via first class mail postage prepaid. [Fed. R. Bankr. P. 7004\(b\)](#). Plaintiff utilized certified mail instead of first class mail to serve Defendant.⁴ However, certified mail by itself is not a proper replacement for first class mail because it places an additional burden on defendants and, without actual proof of receipt of service, can create ambiguity as to whether a defendant was ever served.⁵ *In re Eleva, Inc.*, [2000 WL 33710904](#) at 4*(D. Utah Apr. 17, 2000) (district court ruled that certified mail was insufficient); *In re Frazier*, [394 B.R. 399, 400](#) (Bankr. E.D. Va. 2008) (bank's attempt to serve debtor via certified mail was not effective under Rule 7004); *In re Fulton*, [2022 WL 17085004](#) at *3 (Bankr. D. S.C. Nov. 18, 2022) (service by certified mail was not "super service" and did not satisfy rule 7004 because there was no return receipt or proof of

⁴ See ECF No. 13, 14, and 15.

⁵ "First class mail is simply delivered to the address" and the postal service "leaves the mail in the mailbox." *In re Frazier*, [394 B.R. 399, 400-01](#) (Bankr. E.D. Va. 2008). Certified mail on the other hand requires that defendant "sign for the mail in order to receive it." *Id.* If no one capable of receiving service for defendant is not present to sign however, "the summons and complaint may never be delivered." *Id.* This is because if the postal service fails to deliver the package to the defendant three times, they will instead leave a notice that the mail is available for pick up. *Id.* If the mail is never picked up by a defendant, the package is returned to the sender as unclaimed. *Id.* Thus, lacking any certificate of service or other proof, courts cannot be certain that certified mail was ever served on a defendant.

actual receipt in the record). In cases where the party actually received the summons and complaint, service by certified mail has been held to be sufficient. *See, e.g., In re Hardy*, [187 B.R. 604, 607](#) (Bankr. E.D. [Tenn. 1995](#)); *In re Ted A. Petras Furs, Inc.*, [172 B.R. 170, 176–77](#) (Bankr. E.D. N.Y. 1994), subsequently dismissed, [100 F.3d 943](#) (2d Cir. [1996](#)).

In the present case, the proof of service submitted by Plaintiff does not include either a return receipt or clear proof of delivery at the required addresses. For the Court to enter a default in Plaintiff's favor against Defendant, she must provide acceptable proof of service. Such proof may be the certified mail return receipt reflecting delivery within the seven day window of [Fed. R. Bankr. P. 7004\(e\)](#), or other proof of actual receipt of summons by Defendant.

An additional consideration in this case is the application of [Fed. R. Civ. P. 4\(m\)](#).⁶ This rule operates to require service of a complaint not more than 90 days after its filing. If this time limitation is not met, the Court has discretion to dismiss the action without prejudice, order service within a specified time, or extend the time for service for an

⁶ [Fed. R. Civ. P. 4\(m\)](#) is applicable to this proceeding pursuant to Fed. R. 7004(a) and states:

“Time Limit for Service. If a defendant is not served within 90 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f), 4(h)(2), or 4(j)(1), or to service of a notice under Rule 71.1(d)(3)(A).”

[Fed. R. Civ. P. 4\(m\)](#).

appropriate period upon a showing of good cause. However, even in the absence of good cause the Fifth Circuit has held that courts have discretionary power to extend the time for service. *Thompson v. Brown*, 91 F.3d 20, 21 (5th Cir. 1996); *see also Louviere v. Thompson*, 572 B.R. 638, 657-658 (Bankr. S.D. Tex. 2017). The Court will, based upon a review of the docket and Plaintiff's efforts to serve Defendant, exercise its discretion and extend the time under Fed. R. Civ. P. 4(m) for service from November 24, 2022 until March 7, 2023.

Finally, the entry of this interim order is only relevant to service on Defendant, Internal Revenue Service. No entry of default can be made in regard to the Department of the Treasury nor the United States of America because no summons have been requested or issued addressed to these separate defendants. It is unclear from the Complaint if Plaintiff intends there to be any defendants other than the Internal Revenue Service, but under no circumstances will default be entered against such defendants in the absence of issuance and service of summons in accordance with applicable rules. Accordingly, the Court finds that just cause exists for the entry of the following order.

IT IS THEREFORE ORDERED that Plaintiff shall, within twenty-one (21) days after entry of this order, either:

- (1) submit acceptable proof of service on Defendant, Internal Revenue Service, as outlined above sufficient to permit the Court to make an entry of default in Plaintiff's favor against Defendant, Internal

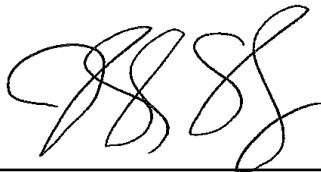
Revenue Service; or

- (2) request issuance of new summons directed to Defendant, Internal Revenue Service, which new summons if requested shall be caused by Plaintiff to be served by first class mail postage prepaid on Defendant within seven (7) days of issuance in accordance with Fed. R. Bankr. P. 7004(b)(4), (5), and proof of perfection of service submitted thereafter as required pursuant to Fed. R. Civ P. 4(l).

IT IS FURTHER ORDERED that the time period for serving a summons and complaint under Fed. R. Civ. P. 4(m), Rule 7004, and any other rule or procedure is extended to, and includes, March 7, 2023.

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

Signed on 01/06/2023

A handwritten signature in black ink, appearing to read 'J. Searcy', is written over a horizontal line.

THE HONORABLE JOSHUA P. SEARCY
UNITED STATES BANKRUPTCY JUDGE