

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF SOUTH CAROLINA**

In re,

Kenneth Edward Hutto, Jr.,

Debtor(s).

Kenneth Edward Hutto, Jr.,

Plaintiff(s),

v.

Discover Bank, DB Servicing Corporation,

Defendant(s).

C/A No. 22-02601-EG

Adv. Pro. No. 22-80040-EG

Chapter 7

**ORDER DENYING MOTION FOR  
DEFAULT JUDGMENT**

**THIS MATTER** is before the Court on the *Motion for Default Judgment* filed by Kenneth Edward Hutto, Jr. (“Plaintiff”) on November 22, 2022.<sup>1</sup> Discover Bank, the named defendant in the above-captioned adversary proceeding (“Defendant”), failed to file an answer or other responsive pleading to the Plaintiff’s complaint. As a result, the Plaintiff filed an Affidavit of Default,<sup>2</sup> and, on November 29, 2022, the Clerk’s Office issued an Entry of Default against the Defendant.<sup>3</sup> The Court scheduled a hearing for December 14, 2022 to determine whether the Plaintiff properly served the Defendant and, more specifically, to consider whether (a) the Defendant falls within the definition of “insured depository institution” for purposes of Fed. R. Bankr. P. 7004(h), (b) the requirements of Rule 7004(h) or any other applicable requirements of Rule 7004 have been met, and/or (c) service on an attorney who has not appeared in the adversary

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<sup>1</sup> ECF No. 10.

<sup>2</sup> ECF No. 9. A prior Affidavit of Default was filed on November 16, 2022, but subsequently withdrawn as a result of a Notice of Insufficient Affidavit being filed by the Clerk’s Office.

<sup>3</sup> ECF No. 11.

proceeding or related bankruptcy case is proper. Plaintiff's counsel appeared at the hearing, but no appearance was made on behalf of the Defendant.

### **FACTUAL BACKGROUND**

Plaintiff is also the debtor in the main Chapter 7 bankruptcy case referenced above. His schedules list Discover Bank on Schedule E/F of unsecured creditors as having a judgment against Plaintiff. Discover Bank was listed on the schedules as having the following address: Discover Bank, Attorney or Manager, PO Box 30943, Salt Lake City, UT 84130-0943. On Part 3 of Schedule E/F, which requires a debtor to list any other party to be notified about the bankruptcy filing, the Plaintiff also listed the following:

Zwicker & Associates  
For: Discover  
PO Box 481918  
Charlotte, NC 28269

The Chapter 7 trustee filed a notice of no distribution; accordingly, creditors were not required to file proofs of claims.

The mailing matrix lists three separate addresses for Discover Bank. Two are the same as what was listed in the schedules (as reflected above), and the third address is listed as follows:

(p) Discover Financial Services LLC  
PO Box 3025  
New Albany OH 43054-3025

At the bottom of the mailing matrix, the following explanation is provided for the designation of (p) included before some of the listed entities' addresses: "The preferred mailing address (p) above has been substituted for the following entity/entities as so specified by said entity/entities in a Notice of Address filed pursuant to 11 U.S.C. 342(f) and Fed. R. Bankr. P. 2002(g)(4)."

Plaintiff filed the complaint in this adversary proceeding on October 11, 2022, and the Clerk of Court issued the summons the following day. The complaint seeks an order of the Court

declaring that no judicial lien exists from a judgment that Defendant obtained against Plaintiff in state court. Plaintiff filed a Certificate of Mailing indicating that the summons and complaint were served on the Defendant on October 14, 2022 by U.S. Mail at the following addresses:

Discover Bank,  
DB Servicing Corporation  
PO Box 3025  
New Albany, OH 43054-3025

Zwicker & Associates  
For: Discover Bank  
PO Box 481918  
Charlotte NC 28269-0000

### **CONCLUSIONS OF LAW**

The Court has a duty to ensure that relief is afforded to a plaintiff only after due process and proper notice—even in the absence of opposition to the complaint. *In re Kennedy*, 403 B.R. 363, 365 (Bankr. D.S.C. 2009). Proper service of process is necessary to provide a defendant with notice that complies with constitutional requirements of due process and to establish that the Court has personal jurisdiction over the defendant. *See Koehler v. Dodwell*, 152 F.3d 304, 306 (4th Cir. 1998) (“Absent waiver or consent, a failure to obtain proper service on the defendant deprives the court of personal jurisdiction over the defendant.”) (citation omitted). The plaintiff bears the burden of demonstrating that personal jurisdiction exists. *See Negron-Torres v. Verizon Commc’ns., Inc.*, 478 F.3d 19, 23 (1st Cir. 2007).

Service of a summons and complaint in an adversary proceeding is governed by Fed. R. Bankr. P. 7004. A plaintiff conducting service pursuant to Rule 7004 must strictly comply with the Rule’s requirements. *Kennedy*, 403 B.R. at 365 (“Because the method of service [under Rule 7004] is not burdensome, it is all the more important to strictly comply with service requirements.”); *see also In re Pittman Mech. Contractors*, 180 B.R. 453, 457 (Bankr. E.D. Va.

1995 (“Strict compliance with [Rule 7004’s] notice provision in turn serves to protect due process rights as well as assure that bankruptcy matters proceed expeditiously.”) Service of process in adversary proceedings on insured depository institutions, as such term is defined in section 3 of the Federal Deposit Insurance Act, is governed by Rule 7004(h), which provides that service shall be made by certified mail addressed to an officer of the institution unless “(1) the institution has appeared by its attorney, in which case the attorney shall be served by first class mail; (2) the court orders otherwise after service upon the institution by first class mail sent to an officer of the institution designated by the institution; or (3) the institution has waived in writing its entitlement to service by certified mail by designating an officer to receive service.” Fed. R. Bankr. P. 7004(h); *see also In re Hamlett*, 322 F.3d 342, 346 (4th Cir. 2003) (finding that service on an insured depository institution must comply with the express language of Rule 7004(h) and that service by certified mail on the registered agent did not meet the requirements of the Rule which requires service addressed to an officer of the institution.)

At the hearing, Plaintiff did not dispute that Discover Bank, the named Defendant, is an insured depository institution; rather, Plaintiff noted that according to the mailing matrix, Discover Bank had provided the Bankruptcy Noticing Center, the agency that provides noticing services to the Bankruptcy Court in this District, notice of its preferred address as set forth above, and that Discover Financial Services LLC, the entity listed for the preferred mailing address, is not an insured depository institution. Plaintiff indicated that to the extent necessary, it would request the reissuance of the summons to serve the Defendant again; however, Plaintiff requested further direction from the Court as to how service should be properly effected.

As set forth above, the preferred mailing address was specified in a Notice of Address filed pursuant to section 342(f) and Federal Rule of Bankruptcy Procedure 2002(g)(4). Section 342(f)(1) provides:

An entity may file with any bankruptcy court a notice of address *to be used by all the bankruptcy courts or by particular bankruptcy courts*, as so specified by such entity at the time such notice is filed, to *provide notice* to such entity in all cases under chapters 7 and 13 pending in the courts with respect to which such notice is filed, in which such entity is a creditor.

11 U.S.C. § 342(f)(1) (emphasis added). Beginning no later than 30 days after the notice of address is filed, all notices to the creditor required to be provided by the designated courts in such cases must be provided at the address in the notice filed under section 342(f), unless a notice has been filed under section 342(e) requesting a different address be used in a particular case. *See* 11 U.S.C. § 342(f)(2).

Fed. R. Bankr. P. 2002(g)(4) further provides, in pertinent part:

[A]n entity and a notice provider may agree that when the notice provider is directed by the court to give a *notice*, the notice provider shall give the *notice* to the entity in the manner agreed to and at the address or addresses the entity supplies to the notice provider. That address is conclusively presumed to be a proper address for the notice.

Notably, this provision applies to notices required to be mailed pursuant to Rule 2002—not service of summons and complaints pursuant to Rule 7004. SC LBR 2002-1(b) also addresses a party in interest’s designation of preferred address pursuant to 11 U.S.C. § 342(f) and specifies that the notice of preferred address shall be filed with the Bankruptcy Noticing Center and “[p]arties may rely on the address and the method of notice specified by the party in interest to the Court’s noticing agency.” SC LBR 2002-1(b). Rule 2002 generally governs “notice” of matters that typically concern all parties, such as the deadline for filing proofs of claim or hearings on the proposed use,

sale, or lease of property. Rule 7004, on the other hand, governs service of process in adversary proceedings and contested matters. *See In re Synthesis Indus. Holdings 1 LLC*, Case No.: 18-15993-MKN, 2019 WL 5783254, at \*6 (Bankr. D. Nev. Aug. 7, 2019) (finding service on a financial institution failed to comply with Rule 7004(h) and drawing a distinction between notice requirements of Rule 2002 and service requirements of Rule 7004); *see also In re Gordon*, No. BK-S-11-22221-LBR, 2013 WL 1163773, \*6 (Bankr. D. Nev. Mar. 20, 2013).

Nothing in the section 342(f) or Rule 2002(g), or the Local Bankruptcy Rules for that matter, allows a plaintiff to avoid the strict service requirements set forth in Rule 7004—especially Rule 7004(h). *See In re Scott*, C/A No. 05-45332-JW, slip. op. at 5 (Bankr. D.S.C. May 23, 2006) (“The Fourth Circuit requires strict compliance with Rule 7004(h) in order for service to be valid.”) (citation omitted). A review of Rule 9036, titled “Notice and Service Generally” leads to that conclusion. Rule 9036(a) specifies that the rule applies whenever the Federal Rules of Bankruptcy Procedure “require or permit sending a notice or serving a paper by mail or other means.” The rule goes on to provide that entities other than the clerk of court may send a notice or serve a paper in the same manner as the clerk does, with the exception that the “high-volume users” provisions of Rule 9036(b)(2)(A) and (B) do not apply. Fed. R. Bankr. P. 9036(c); 10 Collier on Bankruptcy ¶ 9036.04 (2022). Rule 9036(e), however, restricts the applicability of the rule itself by providing that it “does not apply to any paper required to be served in accordance with Rule 7004.” Fed. R. Bankr. P. 9036(e); *see also* 10 Collier on Bankruptcy ¶ 9036.06 (2022) (“Rule 9036(e) states that the rule does not apply to any paper required to be served in accordance with Rule 7004, which applies to service of a summons and complaint in adversary proceedings and to any paper in a contested matter that is required to be served according to that rule. Papers served subsequently in such proceedings, however, may be served electronically as permitted by Rule 9036.”).

The Court finds that the proper entity that should have been served with the summons and complaint is Discover Bank—the named Defendant. Because Discover Bank is an insured depository institution, service should have been by certified mail to an officer of the institution, as provided by Rule 7004(h).<sup>4</sup> The Court further finds that the exceptions provided by Rule 7004(h) do not apply to the facts before it. In fact, there is no order of the Court altering the requirements of Rule 7004(h) and there is no evidence indicating that the Defendant has waived in writing its entitlement to service by certified mail. *See* Fed. R. Bankr. P. 7004(h)(2)-(3). Moreover, while Rule 7004(h)(1) provides if “the institution has appeared by its attorney, in which case the attorney shall be served by first class mail,” here the Defendant has not filed a proof of claim and no appearance has been made in the main bankruptcy case or this adversary proceeding by an attorney on behalf of Discover Bank.

It appears that Plaintiff attempted to serve counsel for the Defendant by serving Zwicker & Associates, which Plaintiff’s counsel stated at the hearing was the Defendant’s counsel in obtaining the judgment. However, no attorney from that firm has appeared in either the main bankruptcy case or this adversary proceeding. Under similar circumstances, Judge Duncan concluded that service of process on an attorney for a party who had not appeared in the bankruptcy case or adversary proceeding was not sufficient. *Kennedy*, 403 B.R. at 363; *see also In re Lancaster*, No. 02–21540, 2003 WL 109205 (Bankr. D. Idaho Jan. 3, 2003) (finding service by mail on attorney who appeared for creditor in the state court litigation inadequate to meet the requirements of Rule 7004). While the Court has determined the proper manner of service on the

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<sup>4</sup> Even if the Plaintiff was correct that the proper entity to serve was Discover Financial Services LLC, which is not an insured depository institution, service of the summons and complaint would have been governed by Fed. R. Bankr. P. 7004(b)(3) which requires service on a domestic corporation to be made within the United States by *first class mail* postage prepaid “by mailing a copy of the summons and complaint *to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process*.” (emphasis added). Here, service was made by mailing the summons and complaint to a general address without specifying to whose attention the documents should be directed; accordingly, it would nevertheless be deficient.

Defendant, the Court is not in a position to determine the proper address for Discover Bank and whether service should be made on an officer by certified mail to the Post Office Box in Utah versus the one in Ohio, or another address. To the extent that, after some due diligence, Plaintiff is uncertain of the actual address, out of an abundance of caution, it would be prudent for the Plaintiff to serve an officer of Discover Bank at both addresses by certified mail.<sup>5</sup>

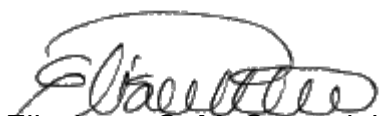
### **CONCLUSION**

Based on the foregoing, the Court finds that Plaintiff failed to effect service in compliance with Fed. R. Bankr. P. 7004 and therefore vacates the Clerk's entry of default. Plaintiff may request a reissued summons within 7 days of the entry of this order. Upon Plaintiff's failure to timely request a reissued summons, this adversary proceeding will be promptly dismissed without prejudice.

**AND IT IS SO ORDERED.**

**FILED BY THE COURT  
12/19/2022**



  
Elisabetta G. M. Gasparini  
US Bankruptcy Judge  
District of South Carolina

Entered: 12/19/2022

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<sup>5</sup> The Court notes that Discover Bank's public website provides a list of registered agents "available for service of legal process upon certain affiliates and/or subsidiaries of Discover." For South Carolina, the list indicates that the registered agent for "Discover Bank" is "CT Corporation System, 2 Office Park Court, Suite 103, Columbia, SC 29223." <https://www.discover.com/company/our-company/assets/registered-agents.html>. While the link has a disclaimer that "[b]y providing this list Discover and its subsidiaries and affiliates do not waive any rights to include, without limitation, the right to object to service of process on any basis including but not limited to any and all objections arising out of defective or improper service," it may also be prudent, if the Plaintiff is uncertain as to the proper address to use for service purposes, to also send the summons and complaint to this address, to the attention of an officer of Discover Bank, in addition to the other addresses noted above.