SO ORDERED,

Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: November 9, 2016

The Order of the Court is set forth below. The docket reflects the date entered.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:

HERITAGE REAL ESTATE INVESTMENT, INC.,	**CASE NO. 14-03603-NPO**
DEBTOR.	**CHAPTER 7**
STEPHEN SMITH, AS TRUSTEE FOR HERITAGE REAL ESTATE INVESTMENT, INC.	**PLAINTIFF**
V.	**ADV. PROC. 16-00035-NPO**
BRUCE JOHNSON, MICHAEL L. KING, WILLIAM HARRISON, APOSTOLIC ASSOCIATION ASSEMBLIES, INC., AND GREATER CHRIST TEMPLE APOSTOLIC CHURCH	**DEFENDANTS**

ORDER DENYING: (1) MOTION TO SET ASIDE ENTRY OF DEFAULT AND TO QUASH SERVICE ON GREATER CHRIST TEMPLE APOSTOLIC CHURCH AND (2) MOTION TO SET ASIDE ENTRY OF DEFAULT AND TO QUASH SERVICE ON APOSTOLIC ASSOCIATION ASSEMBLIES, INC.

This matter came before the Court for hearing on October 3, 2016 (the "Hearing"), on the Motion to Set Aside Entry of Default and to Quash Service on Greater Christ Temple Apostolic Church (the "Church Motion") (Adv. Dkt. 18),[1] filed by Greater Christ Temple Apostolic Church

[1] Citations to docket entries in the above-referenced adversary proceeding (the "Adversary") are cited as "(Adv. Dkt. ____)" and citations to docket entries in the above-styled bankruptcy case (the "Bankruptcy Case") are cited as "(Bankr. Dkt. ____)".

(the "Church") and J. Stephen Smith, Trustee for the Bankruptcy Estate of Heritage Real Estate Investment, Inc.'s Response to Emergency [*sic*] Motion to Set Aside Entry of Default and Quash Service on Greater Christ Temple Apostolic Church (Dkt. # 18) (Adv. Dkt. 28), filed by J. Stephen Smith ("Smith"), chapter 7 trustee ("Trustee") in the Adversary. Also before the Court is the Motion to Set Aside Entry of Default and to Quash Service on Apostolic Association Assemblies, Inc. (the "AAA Motion") (Adv. Dkt. 19), filed by the Apostolic Association Assemblies, Inc. ("AAA") and J. Stephen Smith, Trustee for the Bankruptcy Estate of Heritage Real Estate Investment, Inc.'s Response to Motion to Set Aside Entry of Default and Quash Service on Apostolic Association Assemblies, Inc. (Dkt. #19) (Adv. Dkt. 29), filed by the Trustee. None of the other defendants in the Adversary, Bruce Johnson ("Johnson"), Michael King, or William Harrison (together, the "Johnson Parties"), filed a response.

At the Hearing, Jim F. Spencer Jr. represented the Trustee, and Henry L. Penick represented the Church and the AAA. No other counsel appeared at the Hearing. Two (2) witnesses testified at the Hearing. One exhibit was introduced into evidence by the Trustee. After considering the pleadings, testimony, and arguments of counsel, the Court finds as follows:[2]

Jurisdiction

This Court has jurisdiction over the parties to and the subject matter of the Bankruptcy Case pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O). Notice of the Church Motion and AAA Motion was proper under the circumstances.

[2] Pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure, the following constitutes the findings of fact and conclusions of law of the Court.

Facts

1. The Church is an unincorporated religious organization located at 312 Hyde Park in Eutaw, Alabama. (Adv. Dkt. 29-2).

2. AAA and the debtor, Heritage Real Estate Investment, Inc. (the "Debtor"), are related entities under the organizational umbrella of the Church. (Adv. Dkt. 1, ¶ 3). AAA is a Mississippi corporation with its principal place of business at 401 8th Street, Meridian, Mississippi. (Id.). The business corporation records maintained by the Mississippi Secretary of State do not identify an agent to receive process on behalf of AAA, but do list the names and addresses of AAA's incorporators. (Adv. Dkt. 29-3).

3. On August 25, 2011, the Johnson Parties obtained a default judgment of $6,599.648.00 against the Debtor, Luke Edwards, Alabama Mississippi Farm, Inc., and Apostolic Advancement Association, Inc.[3] in the Circuit Court of Greene County, Alabama in *Bruce L. Johnson et al. v. Luke Edwards et al.*, CV-2010-32 (the "Alabama Default Judgment") (Adv. Dkt. 1-1). Thereafter, the Johnson Parties began to execute the Alabama Default Judgment against property owned by the Debtor. One such property is the subject of the Adversary, a forty-three (43)-acre tract of land located in Greene County, Alabama (the "Greene County Property"). (Adv. Dkt. 1, ¶ 7).

4. On February 24, 2014, the Sheriff of Greene County, Alabama (the "Sheriff") conducted a forced sale on the Greene County Property. (Adv. Dkt. 1-2). The Johnson Parties bid $90,000.00 of their Alabama Default Judgment and received a Sheriff's Deed. (*Id.*). Pursuant to the right of redemption granted certain persons by Alabama Code § 6-5-248, the

[3] Apostolic Advancement Association, Inc. should not to be confused with AAA.

Debtor had one (1) year from the date of the Sheriff's sale to tender the amount of their bid at the sale, plus any accrued interest, to the Johnson Parties. (Adv. Dkt. 1, ¶ 9).

5. On November 6, 2014, the Debtor filed a petition for relief under chapter 11 of the Bankruptcy Code. (Bankr. Dkt. 1).

6. On January 21, 2015, the Court converted the Bankruptcy Case to a chapter 7 case, "thereby allowing for a prompt and orderly liquidation of the Debtor's assets" (Bankr. Dkt. 75). Smith was appointed the Trustee.

7. Without the Trustee's consent or knowledge, the Debtor purportedly transferred its interest in the Greene County Property to the Church on February 20, 2015, through the execution of the Corporation Quit Claim Deed (the "Quitclaim Deed") (Adv. Dkt. 1-3). At this juncture, the Debtor's interest in the Greene County Property apparently consisted solely of its right of redemption under Alabama law.

8. On February 23, 2015, the Church and AAA tendered to Drayton Pruitt ("Pruitt"), counsel for the Johnson Parties, a check in the amount of $96,750.00, purportedly redeeming the Greene County Property from the Sheriff's sale (the "Redemption Check") (Adv. Dkt. 1-4). Pruitt allegedly maintains possession of the Redemption Check pending the outcome of the Adversary. (Adv. Dkt. 1, ¶ 12).

9. On May 21, 2015, Johnson filed a proof of claim (Cl. 11-1 at 7) in the Bankruptcy Case in the amount of $9,094,862.00, consisting of the principal amount of the Alabama Default Judgment of $6,599,648.00 plus interest and other fees, "less sales."

10. On June 15, 2016, the Trustee commenced the Adversary, seeking declaratory relief against the Church, AAA, and the Johnson Parties regarding the proper owner(s) of the Greene County Property and the Redemption Check. (Adv. Dkt. 1). Count I of the Complaint

for Declaratory Judgment to Determine the Estate's Interest in Property and Other Relief (the "Complaint") (Adv. Dkt. 1) asked the Court to declare the Trustee the owner of the Greene County Property by virtue of the attempted redemption by the Church. (Compl. ¶ 17). In the alternative, Count I asked the Court to declare the Johnson Parties the owners of the Greene County Property by virtue of the Sheriff's Deed and the Trustee the owner of the Redemption Check as consideration for the Quitclaim Deed. (Compl. ¶ 18). Depending on the ruling of the Court, the Trustee asked the Court to require the Johnson Parties to reduce their proof of claim by $96,750.00. (Compl. ¶ 20). Count II of the Complaint asked the Court to set aside the post-petition transfer to the Church of the Debtor's right of redemption in the Greene County Property under 11 U.S.C. § 549.[4] (Compl. ¶¶ 24-25).

11. On June 16, 2016, the Clerk of the Bankruptcy Court (the "Clerk") issued the Summons in an Adversary Proceeding (the "Summonses") (Adv. Dkt. 4) to all defendants.

12. To obtain service of process on the Church and AAA, the Trustee retained Bobby McGuffie ("McGuffie"), a part-time private process server. (Adv. Dkt. 29-2). The gist of McGuffie's testimony at the Hearing was that he handed copies of the Summonses and Complaints to Clifton Dawson ("Dawson") at the Church at 312 Hyde Park, Eutaw, Alabama, on Wednesday, June 22, 2016.[5] Because the Church and AAA challenged the sufficiency of service of process, it is necessary to include additional details from McGuffie's testimony at the Hearing about the steps he took to effectuate service of process on the Church and AAA.

[4] From this point forward, all code sections refer to the Bankruptcy Code found at title 11 of the U.S. Code unless otherwise noted.

[5] Test. of McGuffie at 1:55:00-2:00:00 (Oct. 3, 2016). The Trial was not transcribed. The references to testimony are cited by the time stamp of the audio recording.

McGuffie testified that he drove to the Church at 312 Hyde Park in Eutaw, Alabama. On the front of the building to the right of the entranceway was a sign that read, "Greater Christ Temple Apostolic Church." McGuffie entered the Church and met an unidentified middle-aged man. McGuffie greeted him and told him why he was there. He pulled the Summonses and Complaints from a large, grey envelope and showed them to the unidentified man, who told McGuffie that the person he needed to talk to was in a Church meeting. He then disappeared into an office for a few minutes and returned with a younger man, who introduced himself to McGuffie as "Bishop Dawson."

McGuffie had never met Dawson and was unfamiliar with the designation of "Bishop" at that particular Church. Nothing in Dawson's outward appearance indicated to McGuffie whether he was indeed a "Bishop;" Dawson was casually dressed in long pants and a collared shirt. They engaged in small talk. McGuffie told him he was a pastor in Mississippi and served process as a part-time job. He showed Dawson the Summonses and Complaints, which were separated by binder clips, and told him they were "court documents." He then asked Dawson if he was authorized to accept service of process on behalf of the Church and AAA. Dawson answered him in the affirmative as to both questions. McGuffie asked him if he would sign a statement to that effect "to be sure," which Dawson agreed to do. McGuffie wrote on the back of the empty, grey envelope, "Clifton Dawson authorized [to] accept on behalf of Apostolic Association [and] Church [at] 312 Hyde Park." (H'rg Ex. 1). Dawson signed his name underneath this statement,

and McGuffie signed his own name underneath Dawson's signature and dated it June 22, 2016.[6] (Id.).

McGuffie signed the returns of service, checking the box on each one indicating "Personal Service: By leaving the process with the defendant or with an officer or agent of defendant." (Adv. Dkt. 9-10). In the empty space next to the box showing execution of service on the Church (Adv. Dkt. 10 at 2), McGuffie wrote, "Bishop Clifton Dawson at 312 Hyde Park Eutaw, Alabama 35462 on behalf of Greater Christ Temple Apostolic Church." (*Id*.). Similarly, on the return showing execution of service on AAA (Adv. Dkt. 9 at 2), McGuffie wrote, "Bishop Clifton Dawson at 312 Hyde Park Eutaw, Alabama 35462 on behalf of Apostolic Association Assemblies Inc." (*Id.*).

13. Fannie Grantham ("Grantham"), a forty (40)-year member of the Church testified at the Hearing that Dawson was a minister of the Church, but that he held no other title or position at the Church, including the designation of "Bishop."[7]

14. Assuming the sufficiency of service of process on June 22, 2016, the Church and AAA were required by Rule 7012(a) of the Federal Rules of Bankruptcy Procedure ("Rule

[6] The Church and the AAA claimed in paragraph two (2) of the Church Motion and AAA Motion that they were allegedly served process on July 22, 2016, but in paragraph six (6), on June 22, 2016. (Church Mot. ¶ 2; AAA Mot. ¶ 2). The returns on the Summonses clearly reflect that process was served on June 22, 2016 (Adv. Dkt. 9-10), and this date was not disputed by the Church or AAA at the Hearing. The reference in paragraph two (2) of the Church Motion and AAA Motion to July 22, 2016, appears to be a typographical error.

[7] Test. of Grantham at 2:10:00-2:20:00 (Oct. 3, 2016).

7012(a)") to serve an answer to the Complaint by July 18, 2016,[8] which is thirty (30) days after issuance of the Summonses, but they failed to do so. On July 20, 2016, the Trustee simultaneously filed the Request to Clerk to Enter Default (Adv. Dkt. 12) against the Church and the Request to Clerk to Enter Default (Adv. Dkt. 11) against AAA (together, the "Default Requests") pursuant to Rule 55(a) of the Federal Rules of Civil Procedure, as made applicable to adversary proceedings by Rule 7055 of the Federal Rules of Bankruptcy Procedure.

15. On July 29, 2016, the Clerk issued the Entry of Default (Adv. Dkt. 13) against AAA and the Entry of Default (Adv. Dkt. 14) against the Church (together, the "Entries of Default"). As of the date of this Order, the Trustee has not moved the Court for a default judgment against the Church or AAA under Rule 55(b)(2) of the Federal Rules of Civil Procedure, as made applicable to adversary proceedings by Rule 7055 of the Federal Rules of Bankruptcy Procedure.

16. On August 29, 2016, more than sixty (60) days after McGuffie handed the Summonses and Complaints to Dawson and more than thirty (30) days after the Entries of Default were entered, the Church and AAA filed the Church Motion and the AAA Motion, in which they asked the Court to quash service of process as being ineffective or, in the alternative, to set aside the Entries of Default for "good cause."

Discussion

The Church and AAA claimed that service of process was invalid because: (1) Dawson was not an authorized agent to accept service of process and (2) the place where service was

[8] Thirty (30) days from issuance of the Summonses is July 16, 2016, but because that day falls on a Saturday, the last day to serve an answer was Monday, July 18, 2016, pursuant to Rule 9006(a)(1)(C) of the Federal Rules of Bankruptcy Procedure. FED. R. BANKR. P. 9006(a)(1)(C) ("[I]f [the] last day is a Saturday, Sunday, or legal holiday, the period continues to run until the next day that is not a Saturday, Sunday, or legal holiday.").

attempted is more than 100 miles from the Federal Courthouse in Jackson, Mississippi. In the alternative, they alleged that the Trustee filed the Default Requests prematurely on July 20, 2016—less than thirty (30) days after the attempted service of process. Even if the Default Requests were timely filed, the Church and AAA maintained at the Hearing that Rule 7012(a) is inherently unfair and unconstitutional as a violation of equal protection of the laws. Finally, they alleged that they had "good cause" for their failure to answer the Complaint in a timely manner and valid defenses to the claims asserted in the Adversary.

A. Was service of process proper?

The manner in which the Trustee chose to serve process on the Church and AAA requires a brief review of the Federal Rules of Bankruptcy Procedure, the Federal Rules of Civil Procedure, and the Mississippi Rules of Civil Procedure. Rule 7004(b) of the Federal Rules of Bankruptcy Procedure provides that process in an adversary proceeding may be served pursuant to Rule 4(h) of the Federal Rules of Civil Procedure, which allows service of process on a corporation or unincorporated association in the manner prescribed by Rule 4(e)(1) of the Federal Rules of Civil Procedure. Rule 4(e)(1) of the Federal Rule of Civil Procedure, in turn, allows for service of process "by following state law for serving a summons. . . in the state where the district court is located." Rule 4 of the Mississippi Rule of Civil Procedure provides that service of process may be made upon a corporation or unincorporated association "by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process." MISS. R. CIV. P. 4.

The Church and AAA argued that the Trustee did not satisfy the technical requirements for valid service of process under Rule 4 of the Mississippi Rules of Civil Procedure. Notably,

they did not allege that they actually failed to receive notice of the commencement of the Adversary. In response, the Trustee contended that service of process was effective on June 22, 2016, when McGuffie handed the Summonses and Complaints to Dawson because Dawson was an agent who had either express or apparent authority to accept service of process.

In Mississippi, an executed summons creates a presumption that service was properly executed. *Pointer v. Huffman*, 509 So. 2d 870, 872 (Miss. 1987). This presumption is rebuttable through the use of extrinsic evidence, including the testimony of the person contesting service. *McCain v. Dauzat*, 791 So. 2d 839, 842 (Miss. 2001). Here, the Church and AAA contested Dawson's agency status. In that regard, the Mississippi Supreme Court has stated that it "must examine each case to determine whether the person was authorized as an agent for purposes of accepting service of process." *Johnson v. Rao*, 952 So. 2d 151, 156 (Miss. 2007) (citation omitted). "Only employees with some authority are classified as agents authorized to accept service of process on behalf of an employer." *Id*. at 154 (citation omitted).

1. Church—Service of Process

Dawson identified himself as a Bishop of the Church and advised McGuffie that he was authorized to accept service of process on behalf of the Church. At the Hearing, Grantham denied that Dawson was a Bishop of the Church and testified that he was only a minister who sometimes preached from the pulpit.[9] In her opinion, McGuffie should have served process on a deacon of the Church, instead of a minister. Grantham's testimony was the only evidence offered on behalf of the Church to rebut the presumption that service was sufficient.

[9] Test. of Grantham at 2:10:00-2:20:00 (Oct. 3, 2016). When asked, Grantham denied having any knowledge of a YouTube video of "Bishop Dawson" preaching at the Church. (*Id*.).

The Trustee asserted that regardless of whether Dawson had actual authority to accept service of process on behalf of the Church, he had apparent authority to do so. *Marion Cty. Econ. Dev. Dist. v. Wellstone Apparel, LLC*, Civil Action No. 2:13-CV-44-KTP-MTP, 2013 WL 3328690, at *5 (S.D. Miss. July 2, 2013). In Mississippi, there are three (3) elements of apparent authority: "(1) acts or conduct of the principal; (2) reliance thereon by a third person; and (3) a change of position by the third person to his detriment." *Id*. (citing *Nelson v Baptist Memorial Hosp*., 70 So. 3d 190, 195 (Miss. 2011)).

The Court finds that Dawson had apparent authority to accept service of process on behalf of the Church. It is undisputed that notwithstanding Dawson's title, he was an employee of the Church who identified himself to McGuffie as being authorized to accept service of process. It is also undisputed that Dawson voluntarily accepted the Summonses and Complaints after McGuffie showed them to him and explained what they were. It is unfair for the Church to complain that McGuffie delivered the Summons and Complaint to the wrong person when McGuffie went to the Church, approached the first person he saw inside the Church, and delivered the papers according to the directions of an employee there.

Counsel for the Church and AAA argued at the Hearing that an agent may not designate himself as being authorized to accept service of process; only the principal of the agent may do so.[10] Counsel's argument ignores the doctrine of apparent authority. "The power of an agent to bind his principal is not limited to the authority actually conferred upon the agent, but the principal is bound if the conduct of the principal is such that persons of reasonable prudence, ordinarily familiar with business practices, dealing with the agent might rightfully believe the

[10] Tr. at 1:40:00-1:45:00 (Oct. 3, 2016).

agent to have the power he assumes to have." *Johnson*, 952 So. 2d at 154-55 (quotation omitted).

A process server cannot be expected to know the internal procedures of an unincorporated religious association, like the Church, for accepting service of process. Grantham's testimony did not reveal what the practice or custom of the Church might be, but she offered her opinion that McGuffie should have served process on a deacon of the Church. Apparently, Dawson and the unidentified man at the Church who directed McGuffie to Dawson, held a different opinion from Grantham's.

The Church should not be allowed to escape the consequences of its failure to establish internal procedural safeguards to prevent default. *Sellers v. Osyka Permian, LLC*, 263 F.R.D. 372, 378 (S.D. Miss. 2009). It is difficult to understand why the Church was not more responsible in ensuring that process reached its counsel in a timely manner, especially in light of the Alabama Default Judgment obtained by the Johnson Parties in 2011 against some of its related entities, including the Debtor. The Debtor attempted to appeal the Alabama Default Judgment, but it was denied as untimely by the Alabama Supreme Court. (Bankr. Dkt. 268). As a result, the Debtor filed a legal malpractice suit on September 4, 2014, alleging that their former counsel failed to prevent or timely challenge the Alabama Default Judgment. (*Id.*). Only a few months later, the Debtor commenced the Bankruptcy Case. Given this recent history, the Church should have implemented steps to prevent another default.

The Court finds that McGuffie reasonably relied on Dawson's representation and that he served process based on this representation. *See Garcia v. Maersk, Inc.*, No. 03CV-5697 FB RML, 2005 WL 1492380 (E.D.N.Y. June 24, 2005) ("In tendering service, a process server may rely upon a corporation's employees to identify individuals authorized to accept service.");

Kuhilk v. Atlantic Corp, 112 F.R.D. 146, 148 (S.D.N.Y. 1986) (holding that process server is entitled to rely on representation of authority made by receptionist). That the Church did in fact receive notice of the Adversary does not itself validate the service of process, but it is evidence that the goal of Rule 4 of the Mississippi Rules of Civil Procedure of bringing fair notice of the commencement of the Adversary to the attention of the Church was met when McGuffie served Dawson. 4 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & ADAM N. STEINMAN, FEDERAL PRACTICE AND PROCEDURE § 1063 (4th ed. 2015) (discussing primary function of Rule 4 of the Federal Rules of Civil Procedure). For all of these reasons, the Court finds that Dawson had the apparent authority to accept service of process on behalf of the Church.

2. AAA—Service of Process

AAA presented no evidence at the Hearing to rebut the presumption that service was sufficient. *Dauzat*, 791 So. 2d at 842. Grantham, who belonged to AAA by virtue of her membership in the Church, was deemed unqualified to testify on behalf of AAA because she held no position of authority there and lacked any personal knowledge as to its officers and agents.

According to the Mississippi Secretary of State's website, AAA had no registered agent for service of process at the time McGuffie served Dawson. (Adv. Dkt. 29-3). At an earlier hearing in the Bankruptcy Case on January 14, 2015, Grantham testified that the Church conducts business through numerous separate entities, including AAA.[11] All of these entities are connected to the Church and operated by members of the Church. Her earlier testimony as well as the pleadings filed in this Bankruptcy Case support her testimony (Bankr. Dkt. 62) and explain why the same person was in a position of authority at both the Church and AAA to

[11] Test. of Grantham at 10:00:00-10:30:00 (Jan. 16, 2015).

accept service of process. In the absence of any evidence to the contrary, the Court finds that service process on AAA was valid.

3. Rule 7004(d) of the Federal Rules of Bankruptcy Procedure provides for nationwide service of process.

The Church and AAA claimed that service was ineffective because they were served more than 100 miles from where the Summonses were issued. They cited Rule 4(k) of the Federal Rules of Civil Procedure ("Rule 4(k)") in support of their claim.

The Federal Rules of Civil Procedure "apply to bankruptcy proceedings to the extent provided by the Federal Rules of Bankruptcy Procedure." FED. R. CIV. P. 81(a)(1). Federal Rule of Bankruptcy Procedure 7004 ("Rule 7004") expressly makes Rule 4 of the Federal Rules of Civil Procedure ("Rule 4") applicable to adversary proceedings with the exception of subsections (c)(2), (d)(2)-(5), (k) and (n). Thus, Rule 7004 incorporates by reference only parts of Rule 4. The Church and AAA rely on Rule 4(k) for their argument, but that rule is not among those made applicable to bankruptcy proceedings.

More to the point, Federal Rule of Bankruptcy Procedure 7004(d) ("Rule 7004(d)") expressly provides that "[t]he summons and complaint . . . may be served anywhere in the United States." FED. R. BANKR. P. 7004(d). "The intended effect [of Rule 7004(d)] is to extend the territorial jurisdiction of the bankruptcy courts to the entirety of the United States." *Pongetti v. Laws (In re Self)*, 51 B.R. 683, 685 (Bankr. N.D. Miss. 1985); *see Teitelbaum v. Choquette & Co. (In re Outlet Dep't Stores, Inc.)*, 82 B.R. 694, 697-99 (Bankr. S.D.N.Y. 1988) (discussing bases for authority for nationwide service of process). The Court, therefore, rejects the Church's and AAA's challenge to the sufficiency of service of process based on the distance of the Church from the Federal Courthouse given that Rule 7004(d) provides for nationwide service of process.

B. Should the Entries of Default be set aside as untimely?

The Church and AAA argued that the Entries of Default were premature because they were entered less than thirty (30) days after service of process, albeit more than thirty (30) days after issuance of the Summonses. Even if the Entries of Default were timely filed, they contended that Rule 7012(a) is inherently unfair and/or unconstitutional.

1. Were the Default Requests filed too early?

Under Rule 7012(a), an answer to a complaint is due thirty (30) days after issuance of a summons unless the Court prescribes a different time. The Summonses themselves reflect this same procedural requirement: "You are . . . required to file a motion or answer to the complaint . . . within 30 days after the date of issuance of this summons." (Adv. Dkt. 4). The Church and AAA maintained that the Trustee filed the Default Requests prematurely on July 20, 2016. They alleged that the earliest date for filing the Default Requests was July 22, 2016, which is thirty (30) days after the date of service on June 22, 2016. Given that the Summonses were both issued on June 16, 2016, however, the default occurred on July 18, 2016,[12] pursuant to Rule 7012(a). Accordingly, the Court finds that the Trustee's filing of the Default Requests was procedurally proper.

Even if the Court's application of Rule 7012(a) is improper as suggested by the Church and AAA, the Entries of Default were not entered by the Clerk until July 29, 2016, more than thirty (30) days after the date of service on June 22, 2016. The Court thus finds that any premature filing of the Default Requests was harmless.

In the pleadings, the Church and AAA cited *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc*., 526 U.S. 344 (1999), for the proposition that a "motion for default filed before

[12] *See supra* note 8.

the instance of default is due to be denied." (Church Mot. ¶ 6; AAA Mot. ¶ 6). That case, however, involved the time within which a defendant may remove a state-court action to federal court under 28 U.S.C. § 1446(b), and rested on an interpretation of the removal statute. *Murphy Bros*., 526 U.S. at 347. It did not involve Rule 7012(a). The Court next considers the argument of the Church and AAA that Rule 7012(a) should not be applied because it is either inherently unfair or unconstitutional.

2. Is Rule 7012(a) inherently unfair and/or unconstitutional?

The Church and AAA contended that Rule 7012(a) is inherently unfair because a plaintiff controls the timing of service and could intentionally delay service of a summons in order to gain an advantage. They did not assert that the Trustee intentionally delayed service of process in the Adversary but argued hypothetically that Rule 7012(a) presented him with that option.

Their argument lacks merit in that it ignores the seven (7)-day time limit imposed by Rule 7004(e) of the Federal Rules of Bankruptcy Procedure on the service of a summons. Because Rule 7004(e) of the Federal Rules of Bankruptcy Procedure requires that a summons be served within seven (7) days after its issuance, a defendant named in an adversary proceeding has a minimum of twenty-three (23) days from the date of service to answer an adversary complaint.[13] Also, in order to preclude any gamesmanship as suggested by the Church and AAA, a defendant who needs more time to answer a complaint may simply seek an extension

[13] A summons expires if it is not served within the seven (7)-day period provided in Rule 7004(d). In that event, the remedy is to seek reissuance of a summons if less than ninety (90) days have passed since the date the complaint was filed. Otherwise, the adversary is subject to dismissal because Rule 7004(a)(1) of the Federal Rules of Bankruptcy Procedure, which incorporates by reference Rule 4(m) of the Federal Rules of Civil Procedure, limits the time for service of a summons to ninety (90) days from the date of the filing of the complaint.

under Rule 9006(b)(1) of the Federal Rules of Bankruptcy Procedure. Such extensions are often granted.

The Church and AAA also contended at the Hearing that Rule 7012(a) violates the Equal Protection Clause of the U.S. Constitution.[14] They supposed that two (2) similarly-situated defendants could be served with process on different days, resulting in one defendant having less time to serve an answer to a complaint than the other. They did not cite any authority for the proposition that the U.S. Constitution guarantees every defendant the same number of days to answer a complaint and failed to take into account Rule 7004(e) of the Federal Rules of Bankruptcy Procedure.

Although it is true that under Rule 7012(a) a defendant served on June 16, 2016, with a summons issued that same day would have thirty (30) days to serve an answer to an adversary complaint, whereas a defendant served seven (7) days later on June 23, 2016, with the same summons would have only twenty-three (23) days, seven (7) days is the maximum difference in response times because a summons expires after seven (7) days pursuant to Rule 7004(e) of the Federal Rules of Bankruptcy Procedure. Thus, as stated previously, twenty-three (23) days is the minimum amount of a time a defendant will ever have to answer an adversary complaint. Correlatively, Rule 12(a) of the Federal Rules of Civil Procedure requires that an answer be served within twenty-one (21) days following service, which is less than the twenty-three (23)

[14] Under 28 U.S.C. § 2403 and Federal Rule Bankruptcy Procedure 9005.1, which incorporates by reference Rule 5.1 of the Federal Rules of Civil Procedure, a party who questions the constitutionality of a federal statute must provide notice to the U.S. Attorney General in those cases where the United States is not a party. It does not appear that the Church or AAA provided such notice. Because the Court finds that they lack standing to raise this issue, no purpose would be served in delaying issuance of this Order in order to provide proper notice to the United States.

day minimum provided as a result of the interplay between Rules 7012(a) and 7004(e) of the Federal Rules of Bankruptcy Procedure.[15]

Here, the Church and AAA were served simultaneously, so the equal protection argument raised by the Church and AAA does not comport with what actually happened in the Adversary. To the extent there is any merit to the constitutional challenge to Rule 7012(a), the Court finds that they lack standing to raise it because they have not shown that they suffered any injury in fact. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

C. Should the Entries of Default be set aside for good cause?

Having determined that the Entries of Default were proper, the Court next considers whether they should be set aside. Rule 55(c) of the Federal Rules of Civil Procedure, made applicable to adversary proceedings pursuant to Rule 7055 of the Federal Rules of Bankruptcy Procedure, grants the court discretion to set aside an entry of default "[f]or good cause shown." FED. R. CIV. P. 55(c). "The requirement of good cause has generally been interpreted liberally." *Effjohn Int'l Cruise Holdings, Inc. v. A&L Sales, Inc*., 346 F.3d 552, 563 (5th Cir. 2003) (quotation omitted). "[E]ntries of default are serious; where there are no intervening equities, any doubt should . . . be resolved in favor of the movant to the end of securing a trial on the merits." *Id.* (quotation omitted).

There is no fixed standard that can anticipate all situations that would justify a finding of good cause for a party's failure to answer a complaint. The Fifth Circuit Court of Appeals

[15] *Compare* FED. R. BANKR. P. 7012(a) ("If a complaint is duly served, the defendant shall serve an answer within 30 days after the issuance of the summons, except when a different time is prescribed by the court.") *with* FED. R. CIV. P. 12(a)(1)(A)(i) ("Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is . . . within 21 days after being served with the summons and complaint . . . .") *and* MISS. R. CIV. P. 12(a) ("A defendant shall serve his answer within thirty days after the service of the summons and complaint. . . . ").

considers the following factors useful in identifying circumstances that would warrant a finding of good cause: (1) whether the failure to act was willful; (2) whether setting aside the default would prejudice the other side; and (3) whether a meritorious defense has been presented. *Lacy v. Sitel Corp*., 227 F.3d 290, 292 (5th Cir. 2000). These factors are not exclusive. *Id*. Other factors may be considered, such as whether a party acted expeditiously to set aside the default. At bottom, the decision whether to grant relief from a default is informed by equitable principles. *Dierschke v. O'Cheskey (In re Dierschke)*, 975 F.2d 181, 184 (5th Cir. 1982).

1. Reason for the Default

A willful failure to defend a lawsuit alone may constitute sufficient cause for refusing to set aside an entry of default. *Id*. The burden of showing by a preponderance of the evidence that its neglect was excusable, rather than willful, rests on the defendant. *Wooten v. McDonald Transit Assocs., Inc*., 788 F.3d 490, 500-01 (5th Cir. 2015).

Although Grantham's testimony did not address why the Church and AAA were unable to respond timely to the Complaint, counsel for the Church and AAA attributed their defaults to the mistaken belief of the person who received the Summonses and Complaints, presumably Dawson, that the deadline for filing an answer was thirty (30) days after service of process, not thirty (30) days after issuance of the Summonses.[16]

Excusable neglect is not limited to omissions caused by circumstances beyond a party's control, but it does require that a defending party provide a basic explanation for the inaction that led to the default. *McGrady v. D'Andrea Elec., Inc*., 434 F.2d 1000, 1001 (5th Cir. 1970). At the Hearing, however, there was no evidence presented by the Church or AAA as to what events led to the default after McGuffie served the Summonses and Complaints. Did Dawson misplace

[16] *See supra* note 15. It appears that the Church and AAA may have relied on Rule 12(a) of the Mississippi Rules of Civil Procedure instead of Rule 7012(a).

or forget about the papers until the time to respond had expired? Even if the Church and AAA failed to act because of their ignorance of Rule 7012(a), they waited more than sixty (60) days after service to file the Church Motion and AAA Motion. *See Dierschke*, 975 F.2d at 184 (promptness with which curative action is taken is a factor in determining whether to set aside a default).

The Court finds that the Church and AAA have not shown that their default was excusable and, therefore, the first factor weighs in favor of not setting aside the Entries of Default. Although the Fifth Circuit has held that a finding that a defendant intentionally failed to answer a complaint obviates the need for any other findings, *Dierschke*, 975 F.2d at 184, the Court weighs the other two (2) factors before making its determination.

2. Prejudice

A finding of prejudice that would weigh against vacating a default generally requires more than the inconvenience of having to prove a claim. *Lacy*, 227 F.3d at 293. Moreover, the mere possibility of prejudice from delay is insufficient in itself to support a refusal to set aside a default. *Id.* Instead, a plaintiff must show that the delay "will result in the loss of evidence, increased difficulties in discovery, or greater opportunities for fraud and collusion." *Id.* (quotation omitted). The Trustee did not present any evidence of unfair prejudice. In the absence of such evidence, the Court finds that the second factor weighs in favor of setting aside the Entries of Default.

3. Meritorious Defense

An important factor in determining whether to set aside a default is if doing so would affect the outcome of the Adversary. *Beitel v. OCA, Inc. (In re OCA, Inc.)*, 551 F.3d 359, 373 (5th Cir. 2008). A meritorious defense is presented when the "factual basis is sufficient in theory

to support a conclusion that there is a possibility that the outcome after trial would not mirror the default judgment." *Id.* In assessing whether the Church and AAA have raised meritorious defenses, the Court considers the nature of the relief sought by the Trustee in the Complaint.

In the Complaint, the Trustee asked the Court to set aside the Quitclaim Deed from the Debtor to the Church under § 549 and, in general, to determine the rights of the parties to the Greene County Property and the Redemption Check. Section 549 provides, in pertinent part, that a trustee may avoid a post-petition transfer of property of the estate. 11 U.S.C. § 549. The elements of a § 549 claim are relatively straightforward: (a) a transfer occurred; (2) the transfer was property of the estate; (3) the transfer occurred after the commencement of the bankruptcy case; and (4) the transfer was not authorized by the Bankruptcy Code or the bankruptcy court. *Litzler v. Am. Elk Conservatory, Inc. (In re Kelso)*, 196 B.R. 363, 368 (Bankr. N.D. Tex. 1996). According to the Trustee, the Debtor transferred its interest in the Greene County Property to the Church on February 20, 2015, after the Debtor filed its Bankruptcy Case on November 6, 2014. Also according to the Trustee and the Court's review of the docket in the Bankruptcy Case, the transfer was unauthorized. *See* FED. R. BANKR. P. 6000 ("Any entity asserting the validity of a transfer under § 549 of the Code shall have the burden of proof.)

a. Church's Defense

In the Church Motion, the Church alleged that the Debtor donated the Greene County Property to the Church more than ten (10) years ago. (Church Mot. ¶ 7). In other words, the Church apparently contests that the transfer occurred post-petition. In support of its allegation, the Church attached to the Church Motion a "Resolution of the Board" (the "Board Resolution") (Adv. Dkt. 18-2) dated April 3, 2004, and signed by Booker Grantham, in which the board of

directors of the Debtor purportedly voted to donate the Greene County Property to the Church. The Church did not offer any explanation for the later Quitclaim Deed.

In Alabama, to effectuate a transfer of title to real property, a deed must meet certain statutory requirements. *Smith v. Smith*, 820 So. 2d 64, 70 (Ala. 2001); ALA. CODE § 35-4-20. Also, the written instrument must include the present intention of the grantor to convey real property. *State Dep't of Revenue v. Ritchey*, 541 So. 2d 514 (Ala. 1989). The Board Resolution, however, does not appear to satisfy these requirements or have been properly recorded. ALA. CODE § 35-4-62(a). Regardless of the legal effect of the Board Resolution, the Church and AAA did not dispute that the only conveyance in the land records is the Quitclaim Deed, which was executed post-petition. Whatever interest of the Debtor was transferred by virtue of the Quitclaim Deed was thus subject to the avoidance powers of the Trustee under § 549. The Court finds that the Church did not allege sufficient facts to support a defense to the Complaint.

b. AAA's Defense

In the AAA Motion, AAA alleged that it had a meritorious defense "as it is entitled to the subject land it redeemed" or "a return of its payment for said land." (AAA Mot. ¶ 7). AAA did not explain how its contribution to the Redemption Check created an interest in the Greene County Property. The Court finds that AAA's allegations are insufficient to provide a meritorious defense to the Trustee's avoidance action.

4. Summary

After assessing the factors useful in identifying circumstances that would warrant a finding of good cause, the Court finds that two (2) of the primary factors weigh against setting aside the Entries of Default. The stated reason for the defaults does not establish excusable

neglect, and the allegations of the Church and AAA fall short of establishing a meritorious defenses. For those reasons, the Court denies their request to vacate the Entries of Default.

Conclusion

The Church and AAA have failed to rebut the presumption that service of process was proper and failed to demonstrate good cause to set aside the Entries of Default. Accordingly, the Court finds that the Church Motion and AAA Motion should be denied.

IT IS, THEREFORE, ORDERED that the Church Motion and the AAA Motion are denied.

##END OF ORDER##