UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In Re:

Rufus Jones, **CASE NO. 94-22408**

Debtor(s).

Rufus Jones,

Plaintiff(s), **A.P. NO. 96-2061**

vs.

Monroe County Child Support Enforcement Unit,

DECISION & ORDER

Defendant(s).

BACKGROUND

The Court's records indicate that: (1) on November 9, 1994, Rufus Jones (the "Debtor") filed a petition initiating a Chapter 7 case; (2) on November 17, 1994, upon the application of the Debtor, the case was converted to a Chapter 13 case; (3) on February 16, 1995, an Order was entered confirming the Debtor's Chapter 13 plan; (4) on February 9, 1996, the Chapter 13 Trustee filed a Motion to Convert or Dismiss the Chapter 13 case, which was granted on March 4, 1996, the return date of the Motion; (5) on March 21, 1996, an Order was entered reconverting the case to a Chapter 7 case; (6) on March 29, 1996, the Debtor commenced an Adversary Proceeding (the "Adversary

Proceeding") against the Monroe County Child Support Enforcement Unit ("Child Support Enforcement").

The Court's records in the Adversary Proceeding indicate that: (1) the Adversary Proceeding was commenced by the Debtor, pro se, on March 29, 1996; (2) the Adversary Proceeding was filed in response to Child Support Enforcement, on or about March 24, 1996, off-setting and applying against the unpaid child support obligations of the Debtor certain winnings the Debtor was entitled to because of his purchase of a March 23, 1996 New York State Lottery ticket; (3) among the papers filed by the Debtor to commence the Adversary Proceeding was a document which bore the heading "Brief" (hereinafter referred to as the "Brief"), in which the Debtor asserted that: (a) this offset and application by Child Support Enforcement violated the Automatic Stay provided by Section 362; (b) the Debtor's lottery winnings should be returned to him; and (c) Child Support Enforcement should be held in contempt for violating the Automatic Stay; (4) a Summons was issued in the Adversary Proceeding on April 3, 1996; (5) among the papers filed by the Debtor to commence the Adversary Proceeding was a document which bore the heading "Certificate of Service", dated March 29, 1996, which stated that the Debtor had served the Defendant with a copy of the Brief in care of the United States Post Office within New York State to Margaret Lansin at Child Support Enforcement; (6) on April 11, 1996, the Debtor filed the Affidavit of Robert Washington which indicated that he had personally served the Summons and Complaint in the Adversary Proceeding upon Child Support Enforcement at 65 Broad Street, Rochester, New York, by personal service on April 10, 1996 (the Affidavit did not set forth the name of a specific

individual served); (7) on June 17, 1996, the Debtor's May 14, 1996 Application for Default was filed and a default was certified by the Clerk of the Bankruptcy Court (the "Clerk"); and (8) on June 17, 1996 a Judgment by Default (the "Default Judgment") in the amount of $2,262.00 was entered by the Clerk.

At a May 1, 1996 hearing on a Motion filed by the Debtor to dismiss his Chapter 7 case, the Court had advised the Debtor that after a preliminary review of the Adversary Proceeding file, in anticipation of the hearing because the Motion also made reference to the relief requested in the Adversary Proceeding, it appeared that Child Support Enforcement may not have been in violation of the Automatic Stay when it offset and applied the Debtor's lottery winnings, because: (1) the Debtor's lottery winnings appeared to be post-petition assets, since they came into existence after the case was converted to a Chapter 7 on March 21, 1996, and thus not property of the Chapter 7 estate; and (2) Section 362(b)(2)(B) excepted from the operation of the Automatic Stay actions to collect alimony, maintenance or support from property that is not property of the estate.

On June 24, 1996, after it had been served with a copy of the Default Judgment, Child Support Enforcement filed a Motion (the "Child Support Motion") to set aside the Default Judgment, which was made returnable on July 10, 1996. The Motion alleged that: (1) the Summons and Complaint had not been properly served in the Adversary Proceeding in accordance with Rule 7004[1]

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[1] Rule 7004 provides in pertinent part:

(a) Summons; Service; Proof of Service. Rule 4(a), (b), (c)(2)(C)(i), (d), (e) and (g) - (j) F.R. Civ. P. applies in adversary proceedings. Personal service pursuant to Rule 4(d) F.R. Civ. P. may be made by any person not less than 18 years of age who is not a party and the summons

the Rules of Bankruptcy Procedure and Rule 4 of the Federal Rules of Civil Procedure, since a copy of the Summons and Complaint had not been mailed or delivered either to the Chief Executive Officer of the County of Monroe (the "County Executive") or by service in the manner prescribed by applicable state law, which in this case would be pursuant to New York Civil Practice Law and Rules (the "CPLR") Section 311(4)[2], which required service to be effected upon the chairman or clerk of the board of supervisors, the clerk, the attorney or the treasurer of the County of Monroe; (2) service upon an employee of Child Support Enforcement, by either mailing the papers to an employee of that department of the County of Monroe or personally delivering them to a secretary of that department, was insufficient service under Rule 7004 and CPLR Section 311(4); and (3) Child Support Enforcement had a meritorious defense to the allegations set forth in the Adversary

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may be delivered by the clerk to any such person.

(b) Service by First Class Mail. Except as provided in subdivision (h), in addition to the methods of service authorized by Rule 4(c)(2)(C)(i) and (d) F.R. Civ. P., service may be made within the United States by first class mail postage prepaid as follows:

(6) Upon a state or municipal corporation or other governmental organization thereof subject to suit, by mailing a copy of the summons and complaint to the person or office upon whom process is prescribed to be served by the law of the state in which service is made when an action is brought against such a defendant in the courts of general jurisdiction of that state, or in the absence of the designation of any such person or office by state law, then to the chief executive officer thereof.

[2] CPLR Section 311 provides in pertinent part:

Personal service upon a corporation or governmental subdivision
4. upon a county, to the chairman or clerk of the board of supervisors, clerk, attorney or treasurer.

Proceeding, since the collection of child support from property of the Debtor which is not property of the estate does not violate the Automatic Stay, and the Debtor's lottery winnings were not property of the estate.

On July 8, 1996, the Debtor filed a response (the "Response") to the Child Support Motion which asserted that: (1) the Debtor was not going to appear for oral argument on July 10, 1996 because on June 19, 1996, when he and his spouse appeared at the Federal Building, he was harassed by a certain security guard; (2) the Summons in the Adversary Proceeding was served personally by an eligible process server; (3) Rule 4 does not state that the chief executive officer must be served, and Robert Washington served the Defendant by delivering the papers to the secretary who works for the Child Support Enforcement and "[i]f the person that works at the front desk can not receive important doccuments why is the person Setting at the front desk making appointments and excepting other important papers."; (4) a Default Judgment cannot go forward unless proper service is made and proof of service is provided to the Court; (5) there is an automatic stay even in Chapter 7 and creditors must file a motion asking to lift the stay remedies; and (6) Child Support Enforcement did not defend itself at the June 19, 1996 Section 341 meeting, did not respond to the Complaint in the Adversary Proceeding or appeal the Default Judgment to the District Court, so the Child Support Motion should be dismissed with prejudice.

At the July 10, 1996 return date of the Child Support Motion, a Deputy County Attorney for the County of Monroe appeared, however, the Debtor did not appear. The Court granted the Child

Support Motion and advised that it would issue a written decision so that the Debtor, who had not appeared, would have a full and complete explanation of the Court's decision.

DISCUSSION

Rule 55(c) of the Federal Rules of Civil Procedure, adopted by Rule 7055 of the Rules of Bankruptcy Procedure, provides that: " DEFAULT (c) Setting Aside Default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)."

Rule 60(b) of the Federal Rules of Civil Procedure provides that:

> Relief From Judgment or Order
> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Since the Debtor's claim against Child Support Enforcement was for a sum certain, the Default Judgment was entered by the Clerk, pursuant to Rule 55(b)(1) of the Federal Rules of Civil Procedure, adopted by Rule 7055 of the Rules of Bankruptcy Procedure. The Judgment was entered based upon the Debtor's Application for Default, which asserted that the Complaint was served

upon the Defendant, and upon a Certificate of Service of the Summons and Complaint which was filed in the Court on April 11, 1996.

A review of the Affidavits of Service and the Debtor's Response indicates that the Debtor failed to serve the Summons and Complaint in the Adversary Proceeding upon the proper Defendant, the County of Monroe, in accordance with the requirements of Rule 7004 of the Rules of Bankruptcy Procedure, since he failed to serve the Summons and Complaint on either the County Executive of the County of Monroe or any of the individuals set forth in CPLR Section 311(4). Therefore, jurisdiction over the Defendant was never properly obtained and the Court must set aside the Default Judgment as void as required by Rule 60(b)(4) of the Federal Rules of Civil Procedure[3].

In response to the Debtor's assertion that the Default Judgment could not have been entered if service was not proper, it should be noted that the Second Edition, December 1991, of the Bankruptcy Clerks Manual, issued by the Court Administration Division, Administrative Office of the United States Courts, states :

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[3] *See, e.g., New York State Nat. Org. for Women v. Terry,* 961 F.2d 390, 400 (2d Cir. 1992), *vacated in part on remand on other grounds,* 41 F.3d 794 (2d Cir. 1994) (holding that Federal courts have no authority to stray from service requirements of state law and lack jurisdiction over defendants who are not properly served under state law); *Recreational Properties v. Southwest Mortg. Service,* 804 F.2d 311, 314 (5th Cir. 1986) (setting aside a void default judgment under FRCP 60(b) (4) because of lack of jurisdiction due to insufficient service); *Broughton v. Chrysler Corp.*, 144 F.R.D. 23, 26 (W.D.N.Y. 1992)[FOSCHIO, J.] (holding that service accepted by mailroom employee who was not the person authorized to accept service of process on a corporation under CPLR Section 311(1) was improper and could not bring a defendant within the jurisdiction of the court, and that actual notice does not cure a service defect).

> Once the affidavit of service has been filed, the issue of whether service was properly effected is not a matter of concern for the clerk. Any question regarding sufficiency of service should be left to the parties to raise and for the judge to make a final determination. The clerk's concern is that an affidavit of service has been filed in a timely fashion. *Id*. at §18.06(d)(4).

In addition to finding the Default Judgment must be set aside as void pursuant to Rule 60(b)(4) of the Federal Rules of Civil Procedure, as set forth above, I find that sufficient grounds exist to find that the Default Judgment should be set aside pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure, in the interests of justice.

In this case the criteria established by the Court of Appeals for the Second Circuit[4] to relieve a party from a default under Rule 55(c) of the Rules of Civil Procedure have been met in that: (1) the facts and circumstances presented indicate that the default by the Defendant, which was not properly served, or served with papers which at best were confusing , was not willful; (2) the Defendant has presented a meritorious defense, that its actions were excepted from the automatic stay; and (3) setting aside the Default would not appear to prejudice the Debtor who obtained the Default Judgment, since: (1) as set forth above, on May 1, 1996, prior to filing by the Debtor of the Application Default, the Court advised him that it appeared that Child Support Enforcement had a meritorious defense to the allegations set forth in the Adversary Proceeding; and (2) it appears that

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[4] The Court of Appeals for the Second Circuit has established that defaults are generally disfavored, doubt should be resolved in favor of the defaulting party, and has set forth three criteria for determining whether entry of a default or a default judgment should be set aside for "good cause" under Rule 55(c) or under Rule 60(b): (1) whether the default was willful, (2) whether the moving party has presented a meritorious defense with respect to the underlying action, and (3) whether setting aside the default would prejudice the party who secured the entry of default. *Enron Oil Corp.* v. *Diakuhara*, 10 F.3d 90, 96 (2d Cir. 1993).

the Defendant's failure to answer was the result of improper service. Since the Court would have relieved the Defendant of its default, it must set aside the Default Judgment pursuant to Rule 60(b)(6).

CONCLUSION

The Motion of Child Support Enforcement to set aside the June 17, 1996 Default Judgment is in all respects granted, and the Default Judgement is hereby vacated. The Adversary Proceeding shall proceed in accordance with the rules, procedures and policies of the Court.

IT IS SO ORDERED.

_____/s/_____
HON. JOHN C. NINFO, II
U.S. BANKRUPTCY JUDGE

Dated: July 11, 1996