

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

January 25, 2024

Christopher M. Wolpert
Clerk of Court

In re: KATE BUFFY DRAKEWYCK,

Debtor.

KATE BUFFY DRAKEWYCK,

Plaintiff - Appellant,

v.

U.S. DEPARTMENT OF EDUCATION,

Defendant - Appellee.

No. 23-1236
(BAP No. 23-004-CO)
(Bankruptcy Appellate Panel)

ORDER AND JUDGMENT*

Before **MATHESON, BALDOCK**, and **EID**, Circuit Judges.

Kate Buffy Drakewyck, proceeding pro se, filed an adversary proceeding in her Chapter 7 bankruptcy action to discharge student loan debt. The bankruptcy court dismissed the adversary proceeding under Federal Rule of Civil Procedure 4(m) for failure to properly effect timely service. The Bankruptcy Appellate Panel for the

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Tenth Circuit (BAP) affirmed, and Drakewyck now appeals. Exercising jurisdiction under 28 U.S.C. § 158(d)(1), we affirm.

I

Drakewyck filed her adversary complaint against the Department of Education on October 17, 2022. That same day, the bankruptcy court issued a summons. Drakewyck then filed an affidavit of service, indicating she served the summons and complaint on a Department clerk on October 24. When the Department failed to answer, however, Drakewyck filed a “Motion to Rule in Favor of the [Debtor]: Dismissal of the Student Loan Balance,” R. at 191, which effectively sought a default judgment. The bankruptcy court denied the motion for lack of proper service, explaining that Drakewyck named an agency of the United States and was therefore also obliged to serve the U.S. Attorney’s Office in the district where the action was brought (in this case, Colorado), and the Attorney General’s Office in Washington, D.C. The bankruptcy court directed her to request a reissued summons (or what the court called an “alias summons,” R. at 190), and to effect proper service by December 13, 2022. The bankruptcy court cautioned Drakewyck that failure to comply with these directives could result in dismissal of the adversary proceeding.

On December 12, without seeking a reissued summons, Drakewyck filed two certificates of service indicating she mailed the original summons and complaint to the Attorney General and the District Attorney in Washington, D.C. The bankruptcy court determined these measures failed to comply with its directives, however, and it

again ordered Drakewyck to request a reissued summons and to effect proper service by December 28, 2022, or face the possibility of dismissal.

On January 16, 2023, Drakewyck filed a second motion for default judgment. The bankruptcy court denied that motion as well, ruling once again that she failed to properly serve the Department and did not request a reissued summons. And, in a separate order, the bankruptcy court dismissed the adversary proceeding, ruling that Drakewyck failed to (1) comply with the court's directive to request a reissued summons and (2) effect proper service within 90 days of filing the adversary proceedings, as required by Federal Rule of Civil Procedure 4(m).

The BAP affirmed on the latter ground. It observed that Drakewyck failed to properly serve the original summons and complaint on either the U.S. Attorney's Office for the District of Colorado or the Attorney General in Washington, D.C., within seven days of issuance. And because more than 90 days had passed since she commenced the adversary proceeding, the BAP agreed dismissal was warranted under Rule 4(m). The BAP recognized that Rule 4(m) required extending the service deadline for good cause, but the BAP observed that Drakewyck did not argue good cause and even if she had, the argument was unavailing because she failed to comply with the bankruptcy court's directives.

II

On appeal from the BAP's decision, we independently review the bankruptcy court's underlying decision. *See Mark J. Lazzo, P.A. v. Rose Hill Bank (In re Schupach Invs.)*, 808 F.3d 1215, 1219 (10th Cir. 2015). We review the bankruptcy

court's legal conclusions de novo, its factual findings for clear error, and its dismissal for failure to comply with Rule 4(m)'s 90-day service deadline for abuse of discretion. *See Broitman v. Kirkland (In re Kirkland)*, 86 F.3d 172, 174 (10th Cir. 1996) (evaluating predecessor rule). Like all parties, pro se litigants must comply with the applicable rules of federal procedure. *See Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005).

Federal Rule of Civil Procedure 4(m) applies in adversary proceedings, *see* Fed. R. Bankr. P. 7004(a)(1), and requires a court to dismiss a case if a party fails to effect proper service within 90 days of commencing the action, absent good cause, Fed. R. Civ. P. 4(m). Service on an agency of the United States may be made “by mailing a copy of the summons and complaint to the United States . . . and also to the . . . agency.” Fed. R. Bankr. P. 7004(b)(5). To serve the United States, a copy of the summons and complaint may be mailed “to the civil process clerk at the office of the United States attorney for the district in which the action is brought and by mailing a copy of the summons and complaint to the Attorney General of the United States at Washington, [D.C].” Fed. R. Bankr. P. 7004(b)(4). “If service is by any authorized form of mail, the summons and complaint shall be deposited in the mail within 7 days after the summons is issued” or a new summons must be issued. Fed. R. Bankr. P. 7004(e).

Drakewyck failed to satisfy these requirements. She filed an affidavit of service indicating she served the original summons and complaint on a Department clerk, but she did not serve the United States as required by Fed. R. Bankr. P.

7004(b)(4). Although she contends she mailed the original summons to the District Attorney and the Attorney General in Washington, D.C., there is no requirement to serve the District Attorney. Instead, she was required to serve the U.S. Attorney in the District of Colorado, where she initiated the adversary proceeding. She failed to do so. She also failed to properly serve the Attorney General in Washington, D.C., because she failed to mail the original summons within seven days after it issued and she never obtained a reissued summons as set forth in Fed. R. Bankr. P. 7004(e). And because she failed to effect proper service within 90 days of initiating the adversary proceeding, dismissal was warranted absent a showing of good cause. Drakewyck makes no attempt to argue in favor of good cause, and thus the bankruptcy court acted within its discretion in dismissing the adversary proceeding.

III

The bankruptcy court's judgment is affirmed. Drakewyck's motion to proceed on appeal without prepayment of costs and fees is granted.¹

Entered for the Court

Allison H. Eid
Circuit Judge

¹ Drakewyck makes a poorly developed argument related to an earlier BAP appeal, in which she contends the bankruptcy court denied her motion to waive the BAP's filing fee and assessed an unauthorized fee. That argument exceeds the scope of this appeal, however, which is taken from the BAP's order affirming the dismissal of her adversary proceeding.