

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF RHODE ISLAND**

In re: KIMBERLY POPE
Debtor

BK No: 12-12778
Chapter 7

KIMBERLY POPE,
Plaintiff

A.P. No. 13-01008

v.

Not For Publication

U.S. DEPARTMENT OF EDUCATION,
R.I. STUDENT LOAN AUTHORITY,
SALLIE MAE, INC. and AMERICAN
EDUCATION SERVICES,
Defendants.

**MEMORANDUM AND ORDER DISMISSING COMPLAINT
AS TO UNITED STATES DEPARTMENT OF EDUCATION**
(this relates to Doc. #10)

Plaintiff Kimberly Pope (“Plaintiff”) filed a complaint on April 13, 2013 seeking to discharge debts owed to the United States Department of Education (“Department of Education”) and three other defendants. *See* Doc. #1. The Court has jurisdiction over this matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a), and this is a core proceeding in accordance with 28 U.S.C. § 157(b)(2)(I). The Department of Education has moved to dismiss Plaintiff’s complaint, and the Court grants the motion for the following reasons.

PROCEDURAL HISTORY

On June 4, 2013, the Department of Education moved to dismiss the complaint pursuant to Federal Rule of Civil Procedure (“Fed. R. Civ. P.”) 12(b)(5) (as incorporated in Federal Rule of Bankruptcy Procedure (“Fed. R. Bankr. P.”) 7012(b)), on the grounds that Plaintiff had failed to effectuate service of process on the Department of Education in accordance with Fed. R. Bankr. P.

7004(b)(4) and (5) by mailing a copy of the summons and complaint to the United States Attorney for the District of Rhode Island and to the Attorney General of the United States in Washington, D.C. *See* Doc. #10.

On June 28, 2013, Plaintiff objected to the Department of Education's motion to dismiss, arguing that the time allowed for service under Fed. R. Civ. P. 4(m) had not expired and, therefore, that the motion should be denied as premature.¹ *See* Doc. #14. The Court did not rule on the Department of Education's motion at that time. After the expiration of the time allowed for service under Fed. R. Civ. P. 4(m), Plaintiff still had not filed proof that the summons and complaint had been served on the Department of Education. Accordingly, on August 19, 2013, the Court ordered Plaintiff to "show cause in writing by September 9, 2013 why this Adversary Proceeding should not be dismissed as to [the Department of Education] for failure of Plaintiff to properly effect service of process on Defendant." *See* Doc. #15.

Plaintiff filed a response to the Court's order on September 9, 2013, stating that she had "mailed a copy of the Summons and Complaint to the US Department of Education as evidenced by the attached photocopy of the envelope in which said Summons and Complaint was enclosed." *See* Doc. #17. The attached photocopy was of an envelope postmarked August 14, 2013 and addressed to "US Department of Education, c/o US Attorney's Office" to the attention of an individual attorney at that office's address.

Cognizant of the cure provisions of Fed. R. Bankr. P. 7004(b)(4) and (5),² the Court, on September 17, 2013, again ordered Plaintiff to "show cause in writing by September 23, 2013 why

¹ Fed. R. Civ. P. 4(m), which applies to bankruptcy court adversary proceedings pursuant to Fed. R. Bankr. P. 7004(a)(1), states that if a defendant is not served within 120 days of the filing of the complaint 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.

² Both of those paragraphs include this identical sentence: "The court shall allow a reasonable time for service

this Adversary Proceeding should not be dismissed as to Defendant U.S. Department of Education for failure of Plaintiff to serve Defendant in accordance with Federal Bankruptcy Rule 7004(b)(4) and (5).” *See* Doc. #18. The Court also stated, “Failure to comply with this Order may result in dismissal of this action as to Defendant without further notice or hearing.” *Id.*

In response to the Court’s second order to show cause, Plaintiff filed a response on September 23, 2013 that was identical to her September 9, 2013 response, repeating that she had “mailed a copy of the Summons and Complaint to the US Department of Education as evidenced by the attached photocopy of the envelope in which said Summons and Complaint was enclosed.” *See* Doc. #20. The same photocopy of the August 14, 2013-postmarked envelope was attached.

Plaintiff has filed no proof that she has mailed a copy of the summons and complaint (a) to the Attorney General of the United States in accordance with Fed. R. Bankr. P. 7004(b)(4), or (b) to the Department of Education in accordance with Fed. R. Bankr. P. 7004(b)(5).

DISCUSSION

The Department of Education is an agency of the United States. Service may be made on an officer or agency of the United States “by mailing a copy of the summons and complaint to the United States as prescribed in paragraph (4) of this subdivision and also to the officer or agency.” Fed. R. Bankr. P. 7004(b)(5). As prescribed in paragraph (4), service may be made on the United States “by mailing a copy of the summons and complaint addressed 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,

pursuant to this subdivision for the purpose of curing the failure to mail a copy of the summons and complaint to multiple officers, agencies, or corporations of the United States if the plaintiff has mailed a copy of the summons and complaint either to the civil process clerk at the office of the United States attorney or to the Attorney General of the United States.” Fed. R. Bankr. P. 7004(b)(4) and (5).

District of Columbia.” Fed. R. Bankr. P. 7004(b)(4). 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.

After being given multiple opportunities to comply with Fed. R. Bankr. P. 7004 and the Court’s orders, Plaintiff to date has filed proof of service for only one of those three entities, the United States Attorney for the District of Rhode Island. Therefore, pursuant to Fed. R. Civ. P. 4(m) and 12(b)(5), the Court dismisses Plaintiff’s complaint as to the Department of Education, without prejudice.

CONCLUSION

For the foregoing reasons, the Department of Education’s motion to dismiss is GRANTED.

Dated: this 25th day of September, 2013.

By the Court,



Diane Finkle
U.S. Bankruptcy Judge