IN THE UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of

IDEAL MECHANICAL CONTRACTORS CO.,

Debtor, Case No. 88-380-D

IDEAL MECHANICAL CONTRACTORS CO.,

Plaintiff, Adv. No. 88—0058
Chapter 11

V.

THE UNITED STATES OF AMERICA
DEPARTMENT OF TREASURY AND
INTERNAL REVENUE SERVICE,

Defendants.

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ORDER - MOTION TO SET ASIDE DEFAULT JUDGMENT

On June 30, 1988, a telephonic hearing was held on Defendant's motion to set aside default judgment. Jerry A. Soper appeared on behalf of Plaintiff, and Kevin R. Query appeared on behalf of the Internal Revenue Service (hereinafter "Defendant").

This is a core proceeding pursuant to 28 U.S.C. §157(b)(2). The Court, upon review of the pleadings and arguments of counsel, now enters its findings and conclusions pursuant to F.R. Bankr. P. 7052.

FINDINGS OF FACT

1. On March 17, 1988, Plaintiff filed an adversary complaint against Defendants.

2. On March 25, 1988, Plaintiff served by first class mail a copy of the Summons and Complaint upon the Assistant

U.S. Attorney for the Southern District of Iowa and the U.S. Trustee. However, plaintiff failed to serve a copy of the Summons and Complaint upon the Attorney General of the United States.

3. On May 3, 1988, Plaintiff filed a motion, pursuant to Bankruptcy Rule 7055, for a default order. In said motion, plaintiff noted that more than thirty-five days had passed since the date of service and that neither Defendant had answered.

4. On May 5, 1988, the Court entered an Order granting judgment by default for plaintiff.

5. On June 6, 1988, Defendant filed a motion to set aside the Court's Order. In said motion, Defendant argued Plaintiff had failed to serve the Attorney General of the United States pursuant to Bankruptcy Rule 7004(b)(4). As a result, Defendant further argued the Court lacked jurisdiction over Defendant because of improper service.

6. On June 23, 1988, Plaintiff filed a response to Defendant's motion to set aside judgment. In said response, Plaintiff argued Defendant had not shown any good cause entitling it to get the default judgment set aside.

DISCUSSION

Bankruptcy Rule 7055 adopts Fed. R. Civ. P. 55(c) which addresses the setting aside of default judgments and provides:

> 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).

This provision vests the Court with broad discretion to set aside an entry of default in order to accomplish justice. Hamilton v. Edell, 67 F.R.D. 18, 20 (E.D. Pa. 1975). Courts look upon default with disfavor because the interests of justice are best served by a trial on the merits. Id.; see also In re Utsick, 37 B.R. 704, 705 (Bankr. D. Me. 1983) (default judgments are not favored in the law).

In determining whether "good cause" exists to set aside the default judgment in the case at bar, the Court initially must determine the proper application of Bankruptcy Rule 7004(b)(4) and Fed. R. Civ. P. 4(d)(4) (hereinafter "Rule 4(d)(4)"). Bankruptcy Rule 7004 provides in relevant part:

> (a) Summons; Service; Proof of Service. Rule 4(a),(b), (c)(2)(C)(i), (d), (e) and (g)—(i)(j) FR Civ P applies in adversary proceedings....
>
> (b) Service by First Class Mail. In addition to the methods of service authorized by Rule 4(c)(2)(C)(i) and (d) FR Civ P, service may be made within the United States by first class mail postage prepaid as follows:
>
> (4) Upon the United States, by mailing a copy of the summons and complaint to the United States attorney for the district in which the action is brought and also the Attorney General of the United States at Washington. District of Columbia.... [emphasis added)

Rule 4(d)(4) provides:

> (d) Summons and Complaint: Person to be Served. The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:
>
> (4) Upon the United States. by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney.., and by sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia.... [emphasis added]

Bankruptcy Rule 7004 sets out the method of personal service in an adversary proceeding within the bankruptcy court and is very similar to Rule 4(d)(4). Compare Bankruptcy Rule 7004 and Fed. R. Civ. P. 4(d)(4) (the main difference between the two is that Bankruptcy Rule 7004 provides for service upon the United States by first class mail while Rule 4(d)(4) provides for service upon the United States by registered or certified mail). Rule 4(d)(4) applies in adversary proceedings according to the plain language of Bankruptcy Rule 7004(a).

A valid judgment cannot be entered against the United States without proper service. Jordan v. United States, 694 F.2d 833, 835 (D.C. Cir. 1982). The language of Rule 4(d)(4) is clear and unambiguous, and it is well—settled that service upon the Attorney General as prescribed in said Rule is mandatory. Lemmon v. Social Security Adminis-

tration, 20 F.R.D. 215, 217 (E.D. S.C. 1987); see Messenger v. United States, 231 F.2d 328, 330 (2nd Cir. 1956). However, a more liberal construction and application of Rule 4(d) (4) is the prevailing standard. C&L Farms. Inc. v. Federal Crop Ins. Corp., 771 F.2d 407 (8th Cir. 1985); Williams v. General Services Admin., 582 F.Supp. 442 (E.D. Pa. 1984); Jordan, 694 F.2d 833 (D.C. Cir. 1982); Fugle v. United States., 157 F. Supp. 81 (D. Mont. 1957).

In Jordan, supra, the Court stated:

> Where the necessary parties in the government have actual notice of a suit, suffer no prejudice from a technical defect in service, and there is a justifiable excuse for the failure to serve properly, courts should not and have not construed Rule 4(d) (4) so rigidly....

694 F.2d at 836. In C&L Farms, supra, the Eighth Circuit noted that "dismissal is not invariably required where service of process is ineffective" and that "in many appellate cases which mention the 'mandatory' nature of Rule 4(d)(4)..., the district courts had dismissed on somewhat more substantive grounds." 771 F.2d at 408 (citations omitted).

Defendant would have this Court rely on the case of In re Morrell, 69 B.R. 147 (N.D. Cal. 1986), and the "mandatory" requirements of service to vacate the default judgment. However, Morrell is distinguishable from the case at bar. In Morrell, a default order entered against the United States was set aside. Objections to the IRS tax

claims were filed but neither the United States Attorney nor the Attorney General were mailed copies of said objections. As a result, the necessary parties to the suit did not have actual notice and no one appeared on behalf of the United States at the hearing. In the case at bar, however, the Assistant United States Attorney was promptly served and he did have actual notice of the suit. He offers no explanation why he did not appear on behalf of Defendant. Thus, Morrell is clearly distinguishable from the case at bar.

Despite the fact that Morrell, supra, is distinguishable and that strict compliance with rules of service is no longer the prevailing standard where necessary parties have actual notice, the Court will vacate the default judgment in the interest of justice. This result is necessary because a grave inequity would result if Defendant's claim is not heard on the merits. Since default judgments are not favored, justice will be better served if both parties are allowed to present their case. However, the Court wishes to make clear that in the future, the practice of receiving service and then failing to answer or provide a satisfactory explanation for the failure to answer will not be looked upon favorably.

CONCLUSION AND ORDER

WHEREFORE, based on the foregoing analysis, the Court concludes that since default judgments are not favored in

the law, vacating the default judgment is in the interests of justice.

IT IS ACCORDINGLY ORDERED that Defendant's motion to set aside default judgment is hereby granted.

Dated this 22nd day of July, 1988.

RUSSELL J. HILL
U.S. BANKRUPTCY JUDGE