NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

BAP NO. MW 10-078

Bankruptcy Case No. 10-43912-MSH

FREDERICK HUTCHINGS,
Debtor.

EDWARD ST. PETER,
Appellant,

v.

FREDERICK HUTCHINGS,
Appellee.

Appeal from the United States Bankruptcy Court
for the District of Massachusetts
(Hon. Melvin S. Hoffman, U.S. Bankruptcy Judge)

Before
Haines, Votolato, and Deasy,
United States Bankruptcy Appellate Panel Judges.

Edward St. Peter, pro se, on brief for Appellant.
Frederick Hutchings, pro se, on brief for Appellee.

May 25, 2011

Deasy, U.S. Bankruptcy Appellate Panel Judge.

Edward St. Peter ("St. Peter") appeals from the bankruptcy court's orders dismissing the involuntary petition he filed against Frederick Hutchings ("Hutchings") and denying his motion for reconsideration. For the reasons set forth below, the Panel **REVERSES** and **REMANDS** this matter to the bankruptcy court for further proceedings consistent with this opinion.

BACKGROUND

On August 4, 2010, St. Peter filed an involuntary chapter 7 petition against Hutchings in which he claimed to be a judgment creditor. After initially sending the summons to St. Peter at an incorrect address, the bankruptcy court issued the summons on August 16, 2010. Thereafter, on October 28, 2010, the bankruptcy court ordered St. Peter to show cause why the case should not be dismissed for his failure to verify that he had served Hutchings with the involuntary petition (the "Show Cause Order").

Instead of filing a response, on November 4, 2010, St. Peter filed a motion to extend the deadline to serve Hutchings (the "Extension Motion"). St. Peter explained that after receiving the summons, he promptly gave it to a process server who then returned it to him in late October because the server was unable to locate Hutchings and he was experiencing personal problems. St. Peter argued that because the lack of service was beyond his control, additional time to hire a process server and serve Hutchings was warranted.

On November 9, 2010, the bankruptcy court issued an endorsed order denying the Extension Motion and dismissing the case because St. Peter had failed to serve Hutchings in a timely fashion (the "Dismissal Order"). On November 22, 2010, St. Peter filed a motion to alter or amend (the "Reconsideration Motion") the Dismissal Order in which he reiterated the facts

and added that he had located a process server and needed "just a little more time to perfect service." Two days later, the bankruptcy court issued an endorsed order denying the Reconsideration Motion (the "Reconsideration Order") on the grounds that it was "nothing more than a re-argument of the prior motion."

St. Peter timely filed a Notice of Appeal in which he listed only the Reconsideration Order. In both his Statement of Issues to Be Presented on Appeal and his brief, St. Peter principally addressed the Dismissal Order. In his two-sentence brief, Hutchings simply stated that he rested his argument on the decision of the bankruptcy court.

JURISDICTION

Before addressing the merits of an appeal, we must determine that the Panel has jurisdiction, even if the issue is not raised by the litigants. See Boylan v. George E. Bumpus, Jr. Constr. Co. (In re George E. Bumpus, Jr. Constr. Co.), 226 B.R. 724 (B.A.P. 1st Cir. 1998). We have jurisdiction to hear appeals (1) from final judgments, orders, and decrees and (2) with leave of court, from certain interlocutory orders. 28 U.S.C. § 158(a); Fleet Data Processing Corp. v. Branch (In re Bank of New England Corp.), 218 B.R. 643, 645 (B.A.P. 1st Cir. 1998).

To determine our jurisdiction, we must first decide if both orders are properly before the Panel. In the Notice of Appeal, St. Peter listed only the Reconsideration Order. In both his Statement of Issues to Be Presented on Appeal and his brief, St. Peter addressed almost exclusively the Dismissal Order. In his brief, Hutchings did not specify on which decision of the bankruptcy court he was resting his argument. In this case, both parties appear *pro se*, the issues in both orders appear inextricably intertwined, and given his vague brief, Hutchings would not likely be prejudiced if both orders were examined by the Panel. Therefore, the wording of the

Notice of Appeal does not present a bar to our consideration of both orders. See Alstom Caribe, Inc. v. George P. Reintjes Co., Inc., 484 F.3d 106, 112 (1st Cir. 2007) (ruling appeal of reconsideration order can include underlying order based upon similar considerations).

An order dismissing an involuntary petition is a final order. Metz v. Dilley (In re Dilley), 339 B.R. 1, 5 (B.A.P. 1st Cir. 2006). "An order denying reconsideration is a final appealable order if the underlying order was a final appealable order and together the order denying reconsideration and the underlying order end the litigation on the merits." Nesbit v. Rowbotham (In re Rowbotham), 359 B.R. 356 (B.A.P. 1st Cir. 2007). Because the Dismissal Order and Reconsideration Order each meet the test for a final order, we have jurisdiction over the appeal of both orders.

STANDARD OF REVIEW

Given that the bankruptcy judge dismissed the case due to St. Peter's failure to serve the summons timely, the standard on review is *de novo*. See Saxena v. Nabilsi (In re Nabilsi), No. 09-1207, 2010 WL 6259980 (B.A.P. 9th Cir. Nov. 16, 2010) ("Construction of rules of procedure and the Bankruptcy Code presents questions of law that we review *de novo*. . . . Issues regarding the sufficiency of service of process also are reviewed *de novo*."). The standard of review for a request for reconsideration is abuse of discretion. Roman v. Carrion (In re Rodriguez Gonzalez), 396 B.R. 790, 797 (B.A.P. 1st Cir. 2008) ("We review the denial of a motion for relief from judgment for abuse of discretion."). Abuse of discretion occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed, but the court makes a serious mistake in

weighing them. Indep. Oil & Chem. Workers of Quincy, Inc. v. Procter & Gamble Mfg. Co., 864 F.2d 927, 929 (1st Cir. 1988).

DISCUSSION

In his Statement of Issues to Be Presented on Appeal and brief, St. Peter claims that the bankruptcy court committed several errors related to the service of the summons, including having failed to give him the opportunity to re-serve the summons where the deadline for service had not yet expired under Fed. R. Civ. P. 4(m).

After an entity commences an involuntary petition under 11 U.S.C. § 303(b)(2), the clerk shall issue a summons and the entity shall cause the summons and petition to be served "in the manner provided for service of a summons and complaint by Rule 7004(a) or (b)." Fed. R. Bankr. P. 1010(a). "Rule 7004(e) and Rule 4(l) F.R.Civ.P. apply when service is made or attempted under [Rule 1010(a)]." Id.

Fed. R. Bankr. P. 7004, in part, provides,

> (a) **SUMMONS; SERVICE; PROOF OF SERVICE.**
> (1) Except as provided in Rule 7004(a)(2), Rule 4(a), (b), (c)(1), (d)(1), (e)-(j), (l), and (m) F.R.Civ.P. applies in adversary proceedings.
> . . .
>
> (e) **SUMMONS: TIME LIMIT FOR SERVICE WITHIN THE UNITED STATES.**
> Service made under Rule 4(e), (g), (h)(1), (i), or (j)(2) F. R. Civ. P. shall be by delivery of the summons and complaint within 14 days after the summons is issued. If service is by any authorized form of mail, the summons and complaint shall be deposited in the mail within 14 days after the summons is issued. If a summons is not timely delivered or mailed, another summons shall be issued and served. This subdivision does not apply to service in a foreign country.

Fed. R. Bankr. P. 7004 (emphasis added).

Fed. R. Civ. P. 4(m), as incorporated by Fed. R. Bankr. P. 7004(a)(1), provides that unless a defendant is served within 120 days after the complaint is filed, the court must dismiss the action or "order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period." Fed. R. Civ. P. 4(m).

Although Fed. R. Bankr. P. 7004(e) requires delivery of the summons within 14 days after issuance, failure to serve it in that time period only renders the summons invalid and the service ineffective. See Premier Capital, Inc. v. DeCarolis, No. 01-126-M, 2002 WL 47134, *5 (D.N.H. Jan. 2, 2002) (ruling summons served after deadline in Fed. R. Bankr. P. 7004(e) ineffective); Sheehan v. Gay (In re Gay), 415 B.R. 872, 873 (Bankr. M.D. Fla. 2009) ("A summons not served within [14] days of its issuance becomes invalid . . . ."). Typically, the remedy for failing to serve a summons within the 14 days provided in Fed. R. Bankr. P. 7004(e), but before the 120 days provided in Fed. R. Civ. P. 4(m), is not dismissal but the issuance of a new summons. See, e.g., Premier Capital, 2002 WL 47134, at *7 n.4 ("[B]oth Fed. R. Bankr. P. 7004(e) and relevant precedent make clear that the exclusive cure for defective service, when recognized within the 120-day service period, is re-service."); Campbell v. Castelo (In re Campbell), 105 B.R. 19, 21 (B.A.P. 9th Cir. 1989) ("Bankruptcy Rule 7004(f) [now Rule 7004(e)] does not limit the number of summonses a plaintiff may receive for the purposes of curing defective service.") (citing Sanghui v. Alpha Omega Travel, Ltd. (In re Terzian), 75 B.R. 923, 926 (Bankr. S.D.N.Y. 1987)); Dale v. Vadnais (In re Vadnais), 15 B.R. 575, 576 (Bankr. D.R.I. 1981) (denying motion to dismiss under Fed. R. Bankr. P. 7004(e) predecessor and ordering new summons to issue).

In this case, the bankruptcy court denied the request for an extension of the deadline to serve the summons and dismissed the case because St. Peter had failed to serve the summons timely. However, the only consequence of St. Peter not having served a summons on Hutchings 14 days after it was issued was that the summons he held was no longer valid. The deadline for him to serve a summons had not expired; it was six weeks hence. The relief St. Peter sought by the Extension Motion was unnecessary and it could have been denied as moot. Regardless of the reasons for the denial of the extension request, St. Peter still had time and opportunity to request and serve a valid summons on Hutchings. Based on the slim record before us, and in the absence of any rationale for the bankruptcy court's ruling(s), the Panel concludes that the bankruptcy court erred in entering the Dismissal Order and abused its discretion in denying the Reconsideration Motion.

CONCLUSION

For the reasons set forth above, we **REVERSE** the Dismissal Order and the Reconsideration Order and **REMAND** this matter to the bankruptcy court for further proceedings consistent with this opinion.