

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

JUDGE PETER J. WALSH

824 MARKET STREET
WILMINGTON, DE 19801
(302) 252-2925

July 28, 2004

Michael D. DeBaecke
Elio Battista, Jr.
Blank Rome LLP
1201 Market Street
Suite 800
Wilmington, DE 19801

Alan E. Gamza
Moses & Singer LLP
1301 Avenue of the Americas
New York, New York 10019

Counsel for Wellspring
Associates, LLC

Michael B. Schaedle
John E. Lucian
Blank Rome LLP
One Logan Square
Philadelphia, PA 19103

Counsel for Montague S.
Claybrook, Chapter 7
Trustee

**Re: Montague S. Claybrook, Chapter 7 Trustee of Discovery Zone,
Inc. et al. v. Wellspring Associates, LLC
Adv. Proc. No. 01-1590**

Dear Counsel:

This ruling is with respect to the motion for summary judgment (Doc. # 15) filed by Montague S. Claybrook ("Trustee"), Chapter 7 Trustee of Discovery Zone, Inc., DZ Party, Inc., Discovery Zone (Puerto Rico), Inc. and Discovery Zone Licensing, Inc. (collectively, "Debtor") and the motion to dismiss (Doc. # 17) filed by Wellspring Associates, LLC ("Wellspring"). By his complaint, the Trustee seeks to recover alleged preferential transfers made to Wellspring. For the reasons set forth below, I

will deny the Trustee's summary judgment motion and deny Wellspring's motion to dismiss.

On September 21, 2001, the Trustee served Wellspring with interrogatories, request for admissions and request for the production of documents. On November 1, 2001, Wellspring filed an answer to the complaint. The Trustee sent two letters, one in December 2001 and the other in November 2003, regarding Wellspring's failure to respond to the discovery requests. On December 22, 2003, Wellspring responded to the Trustee and asked for additional copies of the discovery requests. The discovery requests were re-served on January 5, 2004. As of January 15, 2004, when the Trustee's motion was filed, there had been no response to the request.

The Trustee alleges that summary judgment should be granted in his favor because Wellspring failed to file a timely response to his request for admissions under Fed. R. Civ. P. 36(a) and the requests are now deemed admitted, therefore leaving no genuine issue of material fact.

Courts, however, can deny a summary judgment even where the requests are deemed admitted.

[S]ummary judgment is not automatically granted on the basis of admissions. Because summary judgment is a drastic measure, a motion for summary judgment based on an admission established by default may receive special scrutiny from the court. The party against whom a motion for summary judgment is directed on the basis . . . of a matter deemed admitted may be allowed extra time to respond to a request

7 James Wm. Moore et al., Moore's Federal Practice § 36.03[4] (3d ed. 1999).

The situation here is similar to that in Skoczylas v. Atlantic Credit & Finance, Inc., No. 00-5412, 2002 WL 55298, at *4 (E.D. Pa. Jan. 15, 2002), where the court denied the motion for summary judgment regarding the four-count complaint even after the requests for admissions were not answered. The court found that, although failure to respond results in an admission, the court has discretion, pursuant to Fed. R. Civ. P. 36(b), to allow a party to withdraw or amend an admission. Id. at *3. The court, relying on Universal Bank v. Hoffman (In re Hoffman), No. 99-0459, 2000 WL 192986, at *2 (Bankr. E.D. Pa. Feb. 14, 2000), did not undergo an analysis of excusable neglect, but rather stated that Rule 36(b) establishes a two-part inquiry where the court must (1) determine whether the requested amendment will promote a determination on the merits of the case and (2) evaluate whether the party who obtained the admission would suffer prejudice by a delayed response. Id. (citations omitted). The defendant was unable to prove the prejudicial effect of permitting the delayed responses so the summary judgment with respect to the complaint was denied. Id. at *4.

In Skoczylas the plaintiff filed its delinquent answers to the requests for admissions with the response to the summary judgment motion. Likewise here, Wellspring served its answer shortly following the Trustee's summary judgment motion. The

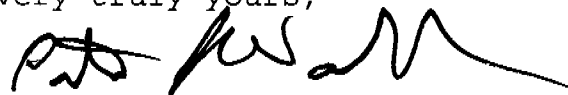
Trustee has not presented any evidence of prejudice and this case should be decided on the merits.

Wellspring's motion to dismiss is based on defective service of process because the summons and complaint were not addressed to the attention of an officer or agent as required by Rule 7004(b)(3).

Failure to comply with the requirements of Fed. R. Bankr. P. 7004 will not automatically result in a dismissal of the case. Hasbrouck v. Valeu (In re Valeu), 53 B.R. 549 (Bankr. D.N.D. 1985). In Valeu the court agreed that service was not proper, but found that improper service may be cured under Fed. R. Civ. P. 4(h) by subsequent proper service. Id. at 554. The court equated Rule 4(h) to an analysis under Rule 15 (permitting the amendment of pleadings). Id. "The primary consideration in allowing a cure of the improper service is the harm to the defendants." Id. The court found that further efforts to properly serve the defendant would not affect the defendants' rights, so the plaintiff was ordered to serve the defendant in accordance with Rule 7004(b)(9). Id.; see also Smith v. Boyer, 442 F. Supp. 62, 64 (W.D.N.Y. 1977) (finding that the plaintiff could "serve the defendant anew" even after it failed to serve the summons along with the complaint, since the plaintiff, who had actual notice of the suit and had "notice of the facts upon which the complaint [was] based," would not be prejudiced).

Based on Valeu and Smith, however, I will permit the Trustee to amend its service by addressing the documents in accordance with Rule 7004(b)(3). Wellspring has not presented any evidence of prejudice if the Trustee serves the complaint a second time. On the contrary, Wellspring filed an answer to the original complaint, evidencing the fact that it received actual notice of the facts upon which the complaint is based. For these reasons, Wellspring's motion to dismiss is denied.

Very truly yours,

A handwritten signature in black ink, appearing to read "Peter J. Walsh", with a long horizontal flourish extending to the right.

Peter J. Walsh

PJW:ipm

P.S. Wellspring counsel's attention is directed to Local Rule 9010-1(a) regarding the need for local counsel.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re:) Chapter 7
)
DISCOVERY ZONE, INC., et al.,) Case No. 99-0941 (PJW)
) (Jointly Administered)
Debtors.)
_____)
)
MONTAGUE S. CLAYBROOK,)
Chapter 7 Trustee of Discovery)
Zone, Inc., DZ Party, Inc.,)
Discovery Zone (Puerto Rico),)
Inc. and Discovery Zone)
Licensing, Inc.,)
)
Plaintiff,)
)
v.) Adv. Proc. No. 01-1590 (PJW)
)
WELLSPRING ASSOCIATES, LLC,)
)
Defendant.)

ORDER

For the reasons set forth in the Court's letter ruling of this date:

(1) The motion for summary judgment (Doc. # 15) filed by Montague S. Claybrook, Chapter 7 Trustee of Discovery Zone, Inc., DZ Party, Inc., Discovery Zone (Puerto Rico), Inc. and Discovery Zone Licensing, Inc., is **DENIED**.

(2) The motion to dismiss (Doc. # 17) filed by Wellspring Associates, LLC is **DENIED** and the Trustee has thirty (30) days to effect proper service upon Wellspring.



Peter J. Walsh
United States Bankruptcy Judge

Dated: July 28, 2004