

File Copy

~~Original~~  
~~Set for paper~~

COUNTER COPY - DO NOT REMOVE -

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

Central Division

17

In re	:	
	:	
TUNEX, INC., a Utah	:	Bankruptcy No. B-79-00272
corporation	:	
	:	
Debtor	:	
	:	
TUNEX, INC.	:	
	:	
Plaintiff	:	MEMORANDUM DECISION AND ORDER
	:	
vs	:	
	:	
JOHN HARRINGTON and	:	
MADELEINE HARRINGTON	:	
	:	
Defendants	:	
	:	

Appearances: Howard S. Landa and Ellen Maycock for the plaintiff. Wendell Ables and Joffre M. Johnson for the defendants.

The debtor, Tunex, Inc., filed a complaint on July 30, 1979, requesting a judgment for damages and an injunction against the defendants, John and Madeleine Harrington, based on the termination of a license agreement between the parties. One complaint and two summonses were served by mail, return receipt requested. The envelope was addressed to Mr. and Mrs. John Harrington. The receipt was returned signed by Madeline Harrington. No answer was filed, and, at the scheduled pre-trial conference on September 12, 1979, where the defendants did not appear, the debtor moved for default judgment. Judgment by Default was entered on October 22, 1979 in the amount of \$40,699.20 with a limited permanent injunction preventing defendants from using the tradename or trademarks of the debtor. Defendants filed a motion to vacate judgment on November 5, 1979 based solely on jurisdictional grounds. A hearing was held on such motion on November 20, 1979.

Arguments for relief from the judgment were made solely on jurisdictional grounds, defendants reserving the right to raise further grounds for relief at a later date in the event jurisdiction was determined to be present. Defendants argued first that the Court did not have personal jurisdiction over the parties by reason of a defective service of process, and second, that no subject matter jurisdiction existed and that even if such did exist, the Court should abstain, leaving all issues to be resolved in a more appropriate forum.

The real force of defendants' arguments center around their contention that the Court lacks personal jurisdiction over them due to a defective service of process. Although they initially argue that service by mail is improper under these circumstances, such argument is without substance. Rule 704(c), Fed.R. Bankr.P., establishes service by mail as sufficient to invoke personal jurisdiction over a defendant. Although under Rule 4, Fed.R. Civ.P., service by mail is an alternative or substituted service allowed only "when federal or state law . . . authorizes [such] service," such a limitation is not found in Rule 704(c), Fed.R. Bankr.P. Since the Federal Rules of Civil Procedure are only applicable to bankruptcy proceedings insofar as they are incorporated in Rules 701 et seq. of the Federal Rules of Bankruptcy Procedure, this omission in Rule 704, Fed.R. Bankr.P., of the corresponding limitation on service by mail found in Rule 4, Fed.R. Civ.P., means that compliance with that requirement is not necessary to establish proper service of process and hence, personal jurisdiction over the party in a bankruptcy case.

Defendants next argue that service of process was defective and thus, failed to establish personal jurisdiction over the parties. One copy of the complaint and two copies of the summonses were mailed to the defendants in a single

envelope addressed to Mr. and Mrs. John Harrington. Defendant Madeleine Harrington signed for the envelope as shown on the receipt filed with the Court.

Rule 704(c)(1), Fed.R. Bankr.P., requires that service by mail be made "upon an individual . . . by mailing a copy of the summons, complaint, and notice to his dwelling house or usual place of abode or to the place where he regularly conducts his business or profession." By terms of this rule, written in the singular, each individual must be served separately with his own summons and complaint. The defendants, though married, are two separate persons and must be served as such. The case of Morton Buildings of Nebraska, Inc. v. Morton Buildings, Inc., 333 F. Supp. 187 (D. Neb. 1971) implies as much in holding service of process valid where two complaints and summonses were served on a defendant as an individual and in his business capacity. This interpretation may appear to be picayune, but this Court is of the opinion that substantial compliance with the rules and procedure governing service of process are the substance of that right. As stated in Zuckerman v. McCulley, 7 F.R.D. 739, 741 (E.D. Mo. 1947):

As we read the cases substantial compliance with the Rule providing manner of service is required, and courts are without authority to nullify the plain requirements of the Rule providing how jurisdiction may be acquired over the person of the defendant. (Citations omitted.)

Two copies of the summonses having been mailed to the defendants, but only one copy of the complaint having been sent leaves the court without in personum jurisdiction over the defendant John Harrington. A copy of the complaint must be served with each summons on every defendant individually, for "service of the summons without the copy of the complaint is insufficient to gain jurisdiction over the defendant." 2 Moore's Federal Practice ¶4.09, at 4-105 (2d ed. 1979). See also 2 Moore's Federal Practice ¶4.03, n. 12, at 4-61

(2d ed. 1979), and cases cited therein. Even if John Harrington had actual notice of the suit, the service remains defective. See 2 Moore's Federal Practice ¶4.11(1), at 4-116 (2d ed. 1979). Therefore, the Court now determines that service of process was not properly made on defendant John Harrington, and thus, the Court has no in personum jurisdiction over him. Service was properly made, however, on defendant Madeleine Harrington by mailing a summons and complaint to her at her principal place of abode, which documents were actually received by her as noted on the return of service. Thus, this Court does have personal jurisdiction over her.

The Court further determines that subject matter jurisdiction is present. Section 311 of the Bankruptcy Act, 11 U.S.C. §711, gives the court "exclusive jurisdiction of the debtor and his property, wherever located." As this proceeding involves intangible property of the debtor, including its tradename and trademarks, this Court may exercise jurisdiction. In the case of Madeleine Harrington, over whom the Court has determined personal jurisdiction exists, this finding of subject matter jurisdiction is further strengthened by §2a(7), 11 U.S.C. §11a(7), which provides that

where in a controversy arising in a proceeding under this Act an adverse party does not interpose objection to the summary jurisdiction of the court of bankruptcy, by answer or motion filed before the expiration of the time prescribed by law or rule of court or fixed or extended by order of court for the filing of an answer to the petition, motion or other pleading to which he is adverse, he shall be deemed to have consented to such jurisdiction.

As she has not timely objected to the jurisdiction of this Court, she is deemed to have consented to its jurisdiction.

The defendants finally contend that the Court should abstain and leave all issues to be resolved in another forum. Sufficient grounds for abstention have not been shown. The defendants in this action were not parties to

the Tunex v. Schamberger et al. proceeding before this Court, and the issues presented are not identical with those argued in that proceeding. The defendants are not parties to the Colorado suit involving Schamberger and the others, but merely have a pending motion to join as party plaintiffs. Therefore, arguments for abstention based primarily upon the Court's ruling in Schamberger are insufficient. On the evidence and representations before this Court, abstention is not now proper.

The Court's ruling does not prejudice the defendant Madeleine Harrington's right to allege any nonjurisdictional ground for relief from the judgment that she may have.

ORDER

It having been determined that the Court has no in personam jurisdiction over the defendant John Harrington,

IT IS NOW ORDERED that the motion to vacate judgment as to defendant John Harrington be, and it is, granted.

It having been determined that the Court does have in personam jurisdiction over the defendant Madeleine Harrington and further that subject matter jurisdiction is present,

IT IS NOW ORDERED that the motion to vacate judgment as to defendant Madeleine Harrington be, and it is, denied. To expedite the proceedings in this matter, since it was made apparent to the Court that further grounds for relief would be raised in the event this motion based on jurisdictional grounds was denied, a further hearing is now set for August 12, 1980. at 3:40 p.m. to entertain further arguments for relief from the default judgment against Madeleine Harrington.

DATED this 2 day of July, 1980.

  
Ralph R. Mabey  
United States Bankruptcy Judge

RRM/bl