

The below described is **SIGNED**.

Dated: May 09, 2006

*Glen E Clark*

GLEN E. CLARK  
U.S. Bankruptcy Judge



IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF UTAH

In re	)	
	)	
Belinda Marek	)	Bankruptcy Case No. 05C-3181
	)	
Debtor,	)	Chapter 7
	)	
_____	)	
	)	
GE Money Bank	)	Adversary Proceeding No. 05-02766
	)	
Plaintiff,	)	
	)	
vs.	)	ORDER DENYING MOTION
	)	FOR DEFAULT JUDGMENT
	)	
Belinda Marek	)	
	)	
Defendant,	)	
	)	

This matter came before the court on the 27<sup>th</sup> day of April, 2006. Gregory M. Constantino appeared in behalf of the plaintiff, GE Money Bank (“GE”), Jody L. Howe appeared, by special appearance only, in behalf of the Belinda Ann Marek (the “Debtor”).

### Facts

1. On August 26, 2005, the Debtor filed a Chapter 7 bankruptcy petition.
2. Debtor's first meeting of creditors was held in September 20, 2005.
3. The deadline by which all objections to Debtor's discharge must be filed was established as November 21, 2005.
4. The Chapter 7 trustee assigned to Debtor's case filed a "No Asset" report with the Court on October 17, 2005.
5. On November 28, 2005, with no objections to Debtor's discharge having been filed, the Debtor was issued a Chapter 7 discharge, and Debtor's case was ordered closed.
6. On December 12, 2005, GE filed adversary proceeding 05-02766 seeking an exception to Debtor's discharge pursuant to 11 U.S.C. § 523(a)(2).
7. On December 28, 2005, GE served Debtor with a summons and complaint by mailing the summons and complaint to the Debtor at her home address and mailing the summons and complaint to Debtor's counsel at her office address.
8. Debtor has not filed an answer to the complaint.
9. On March 17, 2006, GE filed a Motion for Default Judgment together with a Memorandum of Costs, Military Service Affidavit, Proposed Default Certificate and a proposed Order of Default.

10. On March 23, 2006, the propose Order of Default was filed as unsigned. The docket entry with the unsigned order stated: Reason Order was Unsigned: Plaintiff must notice for hearing or deal with Rule 7004(b)(9).
11. GE noticed its Motion for Default Judgment for hearing on April 27, 2005.

### Discussion

By filing an adversary proceeding seeking exception to Debtor's discharge after the established deadline to file such an adversary proceeding, and by serving the summons and complaint on the Debtor after closure of Debtor's case, GE has created two separate problems for itself: 1) Federal Rule of Bankruptcy Procedure ("Rule") 4004(a) requires that a complaint objecting to discharge must be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a); and 2) Rule 7004(b)(9) provides that service of a summons and complaint upon the Debtor may be made after the petition has been filed by the Debtor and until the case is dismissed or closed.

The United States Supreme Court's opinion in Kontrick v. Ryan, 540 U.S. 443, 124 S.Ct. 906 (2004) provides some comfort to GE by holding that the filing deadlines prescribed by Rules 4004 and 9006(b)(3) are not jurisdictional, but instead are claim-processing rules that do not delineate what cases bankruptcy courts are competent to adjudicate. Kontrick v. Ryan, goes on to state that the affirmative defense afforded a debtor under Rule 4004(a) generally must be raised by the debtor in an answer or responsive pleading, and may be raised, at the latest, at the trial on the

merits. For this reason, GE's adversary proceeding cannot be dismissed under Rule 4004(a) based solely upon the late filing of its adversary proceeding.

In this adversary proceeding, no answer has been filed and there has been no trial on the merits. Instead, Debtor has apparently elected not to answer GE's complaint relying upon Rule 7004(b)(9) which requires a plaintiff to serve a debtor with a summons and complaint prior to closure of the Debtor's case. GE argues that Rule 7004(b)(1) should apply because the Debtor is an individual, and Rule 7004(b)(1) governs service upon individuals. To interpret Rule 7004(b)(1) in such a way would render Rule 7004(b)(9), which governs service upon debtors, meaningless. It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant. It is our duty to give effect, if possible, to every clause and word of a statute. TRW Inc. v. Andrews, 534 U.S. 19, 122 S. Ct. 441 (2001).

There is further reason to require GE to comply with the Rule 7004(b)(9) requirements. Rule 7004(b)(9) is the more specific rule of the two rules. Its effect is limited to debtors. As a rule, when a general provision conflicts with a more specific provision, the more specific provision should prevail. A fundamental tenet of statutory construction is that a court should not construe a general statute to eviscerate a statute of specific effect. Where there is inescapable conflict between general and specific terms or provisions of a statute, the specific will prevail. In re Gledhill, 76 F.3d 1070 (10th Cir. 1996)<sup>1</sup>. To give meaning to Rule 7004(b)(9), the rule must be read to apply to all

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<sup>1</sup>Both cited cases discuss rules of statutory construction. The Court will apply the rules of statutory construction to interpret the Federal Rules of Bankruptcy Procedure.

debtors, including individuals. Once a debtor's bankruptcy case is closed, a creditor must first reopen the case before service on the debtor can be effected. This was not done by GE, and the summons and complaint served on December 28, 2005 is ineffective. See, e.g. In re Martinez, 232 B.R. 458 (Bankr.C.D. Cal. 1999).

Based upon the above, it is hereby

ORDERED that GE's motion for default judgement is hereby DENIED.

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ORDER SIGNED