

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
SOUTH BEND DIVISION

IN THE MATTER OF	)	
	)	
MICHAEL RAY SMITH and	)	CASE NO. 06-31671 HCD
JADE MARIE SMITH,	)	CHAPTER 7
	)	
DEBTORS.	)	
	)	
	)	
JACQUELINE SELLS HOMANN,	)	
TRUSTEE,	)	
PLAINTIFF,	)	
vs.	)	PROC. NO. 08-3017
	)	
MICHAEL RAY SMITH and	)	
JADE MARIE SMITH,	)	
DEFENDANTS.	)	

Appearances:

Jacqueline Sells Homann, Esq., Chapter 7 Trustee, Jones Obenchain, LLP, 202 South Michigan Street, 600 KeyBank Building, P.O. Box 4577, South Bend, Indiana 46634-4577; and

Michael Ray Smith and Jade Marie Smith, pro se, address unknown, listed at 57879 9th Street, Elkhart, Indiana 46517-1756.

MEMORANDUM OF DECISION

At South Bend, Indiana, on July 21, 2008.

Before the court is the Motion for Default Judgment filed on May 20, 2008, by Jacqueline Sells Homann, Chapter 7 Trustee (“Trustee”) in this bankruptcy case. The Motion was filed against Michael Ray Smith and Jade Marie Smith, chapter 7 debtors and defendants in this adversary proceeding (“defendants” or “debtors”). The defendants did not respond to the Motion. Nor did they answer the underlying “Complaint to Revoke Discharge for Failure to Cooperate with the Trustee” (“Complaint”). For the reasons that follow, the court denies the Motion for Default Judgment.

### Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and determination. After reviewing the record, the court determines that the matter before it is a core proceeding within the meaning of § 157(b)(2)(J) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rules of Bankruptcy Procedure 7052 and 9014. Any conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

### Background

The debtors filed their voluntary chapter 7 petition on November 3, 2006. On the petition, they listed their address as 1528 Edwardsburg Avenue in Elkhart, Indiana. The court granted the debtors a discharge of their debts on February 12, 2007. However, because the Trustee anticipated a possible distribution to creditors if the debtors would receive an income tax refund, the case remained open. On October 16, 2007, the Trustee filed a Motion to Compel Turnover, seeking the turnover of copies of the debtors' 2006 tax returns. The Motion and notice of the Motion, offering the debtors an opportunity to object to it by November 6, 2007, were served on the debtors by the Trustee at the Edwardsburg Avenue address. The debtors did not respond. On November 14, 2007, the court granted the Trustee's unopposed Motion and required the debtors to turn over the 2006 tax returns by November 26, 2007. However, the debtors took no action.<sup>1</sup>

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<sup>1</sup> The Court's Order on Motion to Compel, issued November 14, 2007, was sent by the Bankruptcy Noticing Center ("BNC"), by first class mail, to the debtors at the Edwardsburg Avenue address. It was returned to the court undelivered. (Other orders of the court that were returned undelivered were those of October 24, 2007; December 14, 2007; and March 7, 2008.) The court's record in this case does not reflect whether the Motion to Compel or other documents served by the Trustee were returned to the Trustee undelivered.

The Trustee then initiated this adversary proceeding against the debtors on March 7, 2008, with the filing of a Complaint and summons upon the debtors. When filing the adversary, the Trustee listed the debtors' address as 57879 9th Street in Elkhart, Indiana. In the Complaint, the Trustee asserted that the debtors had failed to respond to the Trustee's written requests and to the court's Order for turnover of their 2006 income tax returns. She contended that the debtors' noncompliance constituted appropriate grounds for revocation of the debtors' discharge of their debts in this case. The summons and a copy of the Complaint were served by the Trustee, by first class mail, on the defendants at the 9th Street address.

The debtors did not file a responsive pleading to the Trustee's Complaint. On April 21, 2008, the Clerk of the Bankruptcy Court issued an Entry of Default; again the debtors failed to respond. The Bankruptcy Noticing Center ("BNC") sent the Entry of Default to the debtors by first class mail at both the Edwardsburg Avenue and 9th Street addresses. The mailings were returned to the court from both locations by the United States Postal Service as undeliverable mail.

On May 20, 2008, the Trustee filed the Motion for Default Judgment now before the court. It sought a default judgment and revocation of the debtors' discharge on the ground that the debtors failed first to comply with the court's Order to Compel and then to respond to the Trustee's Complaint. *See* R. 14. Once again, the debtors did not file a response. For the reasons that follow, the court denies the Motion for Default Judgment.

#### Discussion

Rule 7055 of the Federal Rules of Bankruptcy Procedure, which governs default, applies Rule 55 of the Federal Rules of Civil Procedure in adversary proceedings. Rule 55 distinguishes between an "entry of default" and "judgment by default." *See Lowe v. McGraw-Hill Cos., Inc.*, 361 F.3d 335, 339 (7th Cir. 2004). The Trustee's request for a default judgment, filed after the Clerk's Entry of Default was issued, is covered by

Rule 55(b)(2).<sup>2</sup> For the Trustee to be entitled to a default judgment against the debtors, however, the court must verify that she followed the proper procedural requirements necessary to claim that relief. The issue herein is the sufficiency of service.

The record in this adversary proceeding indicates that the Trustee sought a default judgment when the debtors did not answer the Complaint. However, the “obligation to answer the adversary proceeding complaint is not triggered until the complaint is ‘duly served.’” *Educational Credit Management Corp. v. Mersmann (In re Mersmann)*, 505 F.3d 1033, 1043 (10th Cir. 2007) (citing Fed. R. Bankr. P. 7012(a)). The party initiating an adversary proceeding “must fulfill the highly specific service of process requirements” when serving the complaint and summons upon a defendant. *Id.* (citing Fed. R. Bankr. P. 7001(6), 7003, 7004); *see also Ingala v. Sciarretto (In re Sciarretto)*, 170 B.R. 33, 34 (Bankr. D. Conn. 1994) (“The federal rules place responsibility for service of process on the plaintiff.”). Service of a summons and complaint is governed by Bankruptcy Rule 7004.<sup>3</sup> *See Wallace v. Shapiro (In re Shapiro)*, 265 B.R. 373, 378 (Bankr. E.D.N.Y. 2001). “Without proper service, the defendant cannot be said to have ‘failed to plead or otherwise defend as provided by these rules.’” *In re Mersmann*, 505 F.3d at 1043-44 (citing Fed. R. Civ. P. 55(a), Fed. R. Bankr. P. 7055).

According to the Certificate of Service, the Trustee served the summons and Complaint on each defendant on March 7, 2008, by first class mail at the 9th Street address in Elkhart, Indiana. *See* R. 3. When the time period for filing a responsive pleading had passed without any response, the court served the Entry of Default

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<sup>2</sup> In pertinent part, Rule 55(b)(2) provides that a court may enter a judgment by default as follows:

Rule 55(b) (2) . . . [T]he party must apply to the court for a default judgment. . . . If the party against whom a default judgment is sought has appeared personally or by a representative, that party or its representative must be served with written notice of the application at least 3 days before the hearing. . . .

Fed. R. Civ. P. 55(b)(2).

<sup>3</sup> Under Rule 7004 of the Federal Rules of Bankruptcy Procedure, service may be made upon a debtor by first class mail “by mailing a copy of the summons and complaint to the debtor at the address shown in the petition or to such other address as the debtor may designate in a filed writing.” Fed. R. Bankr. P. 7004(b)(9).

upon the debtors at two addresses: the 9th Street address in Elkhart (the defendants' putative address in this adversary proceeding) and at the Edwardsburg Avenue address in Elkhart (the defendants' listed address on their bankruptcy petition). *See* R. 9, 10. All the mailed documents were returned to the court by the United States Postal Service marked "not deliverable."

The undelivered, returned Entry of Default is clear evidence that service of process of that document failed and thus that the defendants had no notice of the Entry of Default. An entry of default under Rule 55(a) is a prerequisite to a default judgment under Rule 55(b). *See Riehm v. Park (In re Park)*, 272 B.R. 323, 328 (Bankr. D.N.J. 2001); *see also Webster Indus., Inc. v. Northwood Doors, Inc.*, 244 F.Supp.2d 998, 1003 (N.D. Iowa 2003); *Rose v. Elias*, 2008 WL 341993 at \*1 (S.D. Ohio 2008) (citing cases). The court therefore determines that it is proper to vacate and set aside the Clerk's Entry of Default, *sua sponte*, and to deny the Trustee's Motion for Default Judgment. *See* Fed. R. Civ. P. 55(c); Fed. R. Bankr. P. 7055; *see also Judson Atkinson Candies, Inc. v. Latini-Hohberger Dhimantec*, 529 F.3d 371, 385-86 (7th Cir. 2008) (affirming that the court had authority to set aside *sua sponte* an entry of default for good cause).

The evidence of the undelivered Entry of Default demonstrates that documents mailed at that time to the defendants at the 9th Street address or at the Edwardsburg Avenue address in Elkhart were insufficiently served on the defendants; it requires the setting aside of the Entry of Default and denial of the Motion for Default Judgment. However, it still is unclear whether the Trustee's Complaint, filed March 7, 2008, was served upon the defendants. "[A]s a minimum threshold, service of the complaint must be made at a proper address." *Saucier v. Capitol One (In re Saucier)*, 366 B.R. 780, 785 (Bankr. N.D. Ohio 2007).

The repercussions of a failed service of process are numerous. First, if the Trustee's service of the Complaint was defective, then the court has no jurisdiction over the defendants. *See In re Teknek, LLC*, 512 F.3d 342, 346 (7th Cir. 2007) (stating that the judge lacked authority over a defendant who was not served and did not appear). "[S]ervice of process is the vehicle through which a court can properly exercise its adjudicatory power over an individual or entity in a particular case." *Cruisehone, Inc. v. Cruise Ships Catering & Servs., N.V. (In*

*re CruisePhone, Inc.*), 278 B.R. 325, 332 (Bankr. E.D.N.Y. 2002). A court is deprived of its right to exercise judicial power over a defendant, however, when he has not been properly served the complaint and summons that initiated the adversary proceeding. *See id.*; *see also Moglia v. King Marine, Inc. (In re Outboard Marine Corp.)*, 369 B.R. 353, 358 (Bankr. N.D. Ill. 2007) (citing *Trustees of Local Union No. 727 Pension Fund v. Perfect Parking, Inc.*, 126 F.R.D. 48, 51 (N.D. Ill. 1989)); *Kadlecek v. Ferguson (In re Ferguson)*, 204 B.R. 202, 207 (Bankr. N.D. Ill. 1997). A court considering the imposition of a default judgment on a nonresponsive defendant may raise the question of personal or *in personam* jurisdiction *sua sponte*. *See Tuli v. Republic of Iraq (In re Tuli)*, 172 F.3d 707, 712 (9th Cir. 1999) (citing cases); *Rivas v. RJM Acquisition (In re Rivas)*, 377 B.R. 423, 426 (Bankr. S.D. Fla. 2007) (stating that examination of jurisdiction over the parties is court's duty).

By extension, if this court lacked personal jurisdiction over the defendants herein because they were not duly served the Complaint and summons, it has no authority to adjudicate that those defendants were in default. *See Educational Credit Mgmt. Corp. v. Repp (In re Repp)*, 307 B.R. 144, 151 (9th Cir. B.A.P. 2004) (stating that "proper service is a prerequisite to entry of default and default judgment"). Finally, the court notes that defective service of a complaint may result in dismissal of the adversary proceeding.<sup>4</sup> *See Robinson v. Lefler (In re Lefler)*, 319 B.R. 538, 541 (Bankr. E.D. Tenn. 2004) ("Insufficient service of process is a basis for dismissal of an adversary proceeding pursuant to Federal Rule of Civil Procedure 12(b)(5).").

Because it is unclear whether service of the summons and Complaint upon the defendants was successful, the court will give the plaintiff Trustee an opportunity to present any facts not apparent in the record

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<sup>4</sup> The court also notes that the Trustee's Motion for Default Judgment is deficient in another respect: It has failed to state a legitimate claim for relief. Under Federal Rule of Bankruptcy Procedure 7055, a motion reciting only that the defendants failed to respond and that an entry of default was entered is insufficient. A defendant's failure to respond "does not automatically entitle a plaintiff to entry of a default judgment." *Capital One Bank v. Bungert (In re Bungert)*, 315 B.R. 735, 736 (Bankr. E.D. Wis. 2004) (citation omitted). A plaintiff must prove a *prima facie* case of the allegations in a complaint in order to succeed on a motion for default judgment. *See Attorneys' Title Ins. Fund, Inc. v. Zecevic (In re Zecevic)*, 344 B.R. 572, 574 (Bankr. N.D. Ill. 2006); *In re Bungert*, 315 B.R. at 737. "Consequently, in passing upon a request for a default judgment, the court has a duty to examine those allegations and satisfy itself that the entry of judgment based upon them would be appropriate." *In re Taylor*, 289 B.R. 379, 382 (Bankr. N.D. Ind. 2003). The court finds that the Trustee's cursory motion, which reported only the defendants' failure to respond, was not sufficient. *See In re Zecevic*, 344 B.R. at 578-79.

which would support the court's exercise of personal jurisdiction over the defendants. *See In re Rivas*, 377 B.R. at 427. The court therefore allows the Trustee 30 days in which either to demonstrate that service of process to the 9th Street address was effective or to perfect service on the defendants. The failure to do so may result in dismissal of this adversary proceeding.

Conclusion

For the reasons stated above, the Trustee's Motion for Default Judgment is denied, without prejudice, and the Clerk's Entry of Default is vacated and set aside. The Trustee is afforded thirty (30) days, commencing from the entry of this Order, either to offer proof of proper service of the summons and Complaint upon the defendants or to perfect service upon the defendants. Failure to do so may result in dismissal of this adversary proceeding.

SO ORDERED.

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/s/ Harry C. Dees, Jr.  
HARRY C. DEES, JR., CHIEF JUDGE  
UNITED STATES BANKRUPTCY COURT