UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF	)	
	)	
NATHAN DANIEL MAST and	)	CASE NO. 07-32667 HCD
CONSUELA NIOME MAST,	)	CHAPTER 7
	)	
DEBTORS.	)	
	)	
	)	
REBECCA HOYT FISCHER,	)	
	)	
PLAINTIFF,	)	
vs.	)	PROC. NO. 08-3042
	)	
NATHAN DANIEL MAST and	)	
CONSUELA NIOME MAST,	)	
	)	
DEFENDANTS.	)	

Appearances:

Rebecca H. Fischer, Esq., Trustee, Laderer & Fischer, P.C., 112 West Jefferson Boulevard, Suite 310, South Bend, Indiana 46601; and

Nathan Daniel Mast and Consuela Niome Mast, pro se, 320 West Wilden Avenue, Goshen, Indiana 46528.

MEMORANDUM OF DECISION

At South Bend, Indiana, on September 23, 2008.

Before the court is the Motion for Default Judgment filed on July 11, 2008, by Rebecca Hoyt Fischer, Chapter 7 Trustee and Plaintiff in this adversary proceeding. The Motion was filed against chapter 7 debtors Nathan Daniel Mast and Consuela Niome Mast, defendants herein. Neither the defendants nor their attorney of record in the underlying bankruptcy case responded to the Motion. Nor did they appear in the proceeding or answer the Trustee's underlying Complaint. For the following reasons, the court grants the Trustee's Motion and revokes the discharge of the defendant debtors.

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 a chapter 7 voluntary petition on October 11, 2007. On their petition, they listed their address as 320 West Wilden Avenue in Goshen, Indiana. After the first meeting of creditors was held, the Trustee filed an initial report and then a Notice of Assets. The debtors' discharge was entered on January 14, 2008, but the case was not closed. On April 22, 2008, the Trustee filed a Motion to Compel, seeking the turnover of non-exempt federal and state income tax refunds in the amount of $2,925.59. No objections were filed. The court granted the Trustee's Motion on May 15, 2008, and ordered the debtors to turn over the tax refunds to the Trustee within 10 days. The Order was served on each debtor, at the Wilden Avenue address, and on the debtors' attorney of record, Janice L. Shei, Esq., of the Law Offices of Peter Francis Geraci. There was no response. According to the docket, the envelopes sent to the defendants containing the court's Order for Turnover were returned to the court with the stamped message "unable to forward."

The Trustee commenced this adversary proceeding on May 28, 2008, by filing a "Complaint to Revoke Discharge for Failure to Cooperate with the Trustee." According to the Trustee's Certificate of Service, the summons and Complaint were served by first-class mail on the two debtors (at the Wilden Avenue address)

and on their attorney. The Complaint sought revocation of the debtors' discharge pursuant to 11 U.S.C. § 727(d)(2) because of their failure to comply with the court's Order of May 15, 2008, to turn over their 2007 income tax refunds.[1]

The debtors' failure to plead or defend in this case triggered the issuance of the Clerk's Entry of Default on July 10, 2008. The Clerk of the Bankruptcy Court served the Entry on each defendant by first class mail sent to the Wilden Avenue address. The debtors again failed to file any response. The docket indicates that the envelopes were returned to the court as undeliverable mail.

The Trustee then filed a Motion seeking a default judgment on the ground that the defendants had failed to answer the Complaint against them and that the Clerk had entered a default on July 10, 2008. She also filed the required affidavit of non-military status. To demonstrate that the defendants, to her knowledge, were not in military service, the Trustee stated that "said Defendants are physically domiciled or [have] their place of business at 127 West 12th Street, Mishawaka, Indiana 46544, and [are] not under or subject to the jurisdiction of any military or naval authorities whatsoever." R. 9, Affidavit. The Motion was served on the defendants at the Wilden Avenue address, and once again the debtors did not respond. The court now examines the Trustee's Motion for Default Judgment.

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[1] Section 727(d) of the Bankruptcy Code states, in pertinent part:

> (d) On request of the trustee . . ., and after notice and a hearing, the court shall revoke a discharge granted under subsection (a) of this section if –
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> . . .
>
> (2) the debtor acquired property that is property of the estate . . . and knowingly and fraudulently failed to report the acquisition of or entitlement to such property, or to deliver or surrender such property to the trustee.

11 U.S.C. § 727(d)(2).

Discussion

Rule 7055 of the Federal Rules of Bankruptcy Procedure governs defaults. The bankruptcy rule 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). In this case, the Clerk of the Bankruptcy Court entered the defendants' default on July 10, 2008. The Trustee's request for a default judgment is covered by Rule 55(b)(2).[2]

For the Trustee to be entitled to a default judgment against the debtors, the court first must verify that she followed the proper procedures needed to claim that relief. The first requirement is that the summons and complaint be duly served. *See Educ. Credit Mgmt. 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 documents 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. *See Wallace v. Shapiro (In re Shapiro)*, 265 B.R. 373, 378 (Bankr. E.D.N.Y. 2001). Rule 7004(b)(9) provides that service may be made "by mailing a copy of the summons and complaint to the debtor at the address shown in the petition or statement of affairs or to such other address as the debtor may designate in a filed writing." Both the debtor and the attorney must be served, and service by first class mail is considered "constitutionally adequate notice of suit" under the rule. *Bak v. Vincze (In re Vincze)*, 230 F.3d 297, 299 (7th Cir. 2000) (per curiam) (citing cases).

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[2] 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).

According to the record, the Trustee served the debtors at the address shown in the petition. The record also indicates that the only address provided by the debtors or their attorney was the address on the petition. The court finds, therefore, that there was effective service of process on the defendants.[3]

Even though it appears, from the undelivered mailings returned to the court, that the debtors no longer receive mail at the Wilden Avenue address, service of process was not invalidated. Debtors are required to "file a statement of any change of the debtor's address" under Bankruptcy Rule 4002(a)(5). When debtors do not notify the court or the Trustee of a change of address, as these debtors failed to do, then service at the address listed on the petition is proper. *See id.* at 300 (concluding that "'service is effective on a debtor even if mailed to the wrong address, if the address to which it is mailed is the last listed by the debtor in a filed writing'") (quoting *In re Coggin*, 30 F.3d 1443, 1450 n.8 (11th Cir. 1994)); s*ee also Hammer v. Drago (In re Hammer)*, 940 F.2d 524, 526 (9th Cir. 1991) (concluding that culpable conduct of debtors led to default). The court thus finds that the Trustee's service of the summons and Complaint was valid in spite of the returned mailings. The court also determines that the Clerk's Entry of Default was duly served. *See* Fed. R. Civ. Proc. 55(a).

The court notes that the Trustee did not submit an affidavit seeking an Entry of Default which asserted that (a) the defendants were served properly with the Complaint, summons, and notice of service; (b) the defendants did not answer, defend, or respond to the Complaint; and (c) the time for a response had expired. Such an affidavit is mandated under Federal Rule of Civil Procedure 55(a) and Federal Rule of Bankruptcy Procedure 7055. *See, e.g., Neuman v. U.S.*, 2008 WL 2959876 at *1 (S.D. Ill. July 31, 2008); *O'Callaghan v. Sifre*, 242 F.R.D. 69, 74 (S.D.N.Y. 2007); *In re Coleman*, 37 B.R. 120, 123 (Bankr. W.D. Wisc. 1984). It will be required henceforth before the Clerk's Entry of Default will issue. Nevertheless, because these facts, found to be true from the docket, justified the entry of default in this case, the court will not disturb the issuance of the Clerk's Entry of Default.

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[3] The court also finds that service was timely. *See* Fed. R. Civ. P. 7004(e), (g).

The service of process requirements having been fulfilled, the court turns now to the Trustee's Motion for Default Judgment. It finds first that the Motion was properly supported by the submission of an affidavit indicating her investigation of the defendants' non-military status. The affidavit complied with the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C.App. § 501 et seq. (2003), which requires an affidavit in order to obtain a judgment by default against an individual. The purpose of the Act is "to prevent default judgments from being entered against members of the armed services in circumstances where they might be unable to appear and defend themselves." *United States v. Kaufman*, 453 F.2d 306, 308-09 (2nd Cir. 1971). The Act applies in bankruptcy cases. *See Toyota Motor Credit Corp v. Montano (In re Montano)*, 192 B.R. 843, 845 (Bankr. D. Md. 1996). The Trustee's affidavit, by setting forth the reasons for her belief that the debtors were not in military service, fulfilled the requirement that facts and documents support her conclusion.

The Motion itself sought a judgment by default on the ground that the defendants had failed to respond to the Complaint. The Complaint, in turn, alleged that the defendants' failure to comply with the court's Order of May 15, 2008 (requiring turnover of the defendants' 2007 tax refunds) and their failure to cooperate with the Trustee, in violation of § 727(d)(2), required revocation of the defendants' discharge.

The court's entry of a judgment by default is discretionary. *See Sun v. Board of Trustees of Univ. Ill.*, 473 F.3d 799, 809 (7th Cir.), *cert. denied*, 127 S. Ct. 2941 (2007); *Stafford v. Mesnik*, 63 F.3d 1445, 1450 (7th Cir. 1995). The court should consider such factors as the sufficiency of the complaint, the merits of the plaintiff's claims, the prejudice to the plaintiff, the dollar amount involved, the possibility of a factual dispute, the nature of the default, and the possibility that excusable neglect caused the default. *See Rual Trade Ltd. v. Viva Trade LLC*, 549 F.Supp.2d 1067, 1071 (E.D. Wisc. 2008); *see also Comerica Bank v. Esposito*, 215 Fed. Appx. 506, 508, 2007 WL 186244 (7th Cir. 2007) (unpub'd) (adding other factors).

The court finds that the allegations of this Complaint are well pled, have merit, and serve as a sufficient basis for the entry of judgment under § 727(d)(2). The Trustee may obtain revocation of the debtors' discharge under subsection (d)(2) by demonstrating that the debtor acquired a tax refund that is property of the

estate and failed to report it or to turn it over to the Trustee. *See Fokkena v. Klages (In re Klages)*, 381 B.R. 550, 553 (8th Cir. B.A.P. 2008); *Seaver v. Markey (In re Markey)*, 378 B.R. 594, 620 (Bankr. D. Minn. 2007). In this case, the debtors, by failing to respond to the Complaint, have admitted that they received $2,925.59 in non-exempt federal and state tax refunds and failed to turn the funds over to the Trustee. The Complaint's allegations upon default, deemed to be true, are sufficient grounds for revocation of the debtors' discharge under § 727(d)(2). *See Mangan v. Baird (In re Baird)*, 2005 WL 2203247 at *3-*4 (Bankr. D. Conn. 2005) (unpub'd). Moreover, since there is no evidence to the contrary, the court finds that there is no possibility of a factual dispute. Finally, the court recognizes that the default was caused by the defendants' failure to inform the Trustee and the court of a new address; it determines that such conduct is not considered excusable neglect. *See, e.g., In re Plunkett*, 82 F.3d 738, 742 (7th Cir. 1996) (concluding that a creditor's failure to notify of new address was not excusable neglect).

The record shows that the defendants received and knowingly and fraudulently failed to deliver to the Trustee property of the estate. They also refused to obey the court's Order of May 15, 2008, of which they had valid notice. The court determines, therefore, that the Trustee has established, through the Complaint and the record in the underlying Chapter 7 case, that she is entitled to a judgment by default under § 727(d)(2). The defendants' discharge in the underlying main case shall be revoked.

Conclusion

For the foregoing reasons, the Trustee's Motion for Default Judgment is hereby granted. The discharge of the defendant debtors Nathan Daniel Mast and Consuela Niome Mast is revoked pursuant to 11 U.S.C. § 727(d)(2).

SO ORDERED.

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