

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

IN RE:)
)
TRACEY MACIEJKO,) CASE NO. 08-21809 JPK
) Chapter 7
Debtor.)

FIFTH THIRD BANK,)
Plaintiff,)
v.) ADVERSARY NO. 08-2135
TRACEY MACIEJKO,)
Defendant.)

ORDER

This adversary proceeding was commenced by a complaint filed by Fifth Third Bank on November 17, 2008. The complaint seeks a determination that an indebtedness owed to the plaintiff by the defendant is excepted from discharge pursuant to 11 U.S.C. § 523(a)(2).

No attorney has entered an appearance on behalf of the defendant in this case, and the defendant has not filed an answer or other response to the complaint. However – in a circumstance unique to the court – as evidenced by record entry #5 filed on January 20, 2009, the defendant signed and filed the certificate of service which was affixed to a summons previously served upon her. This defendant is proceeding *pro se*, and the court therefore – with all due latitude to a *pro se* defendant – deems this document to constitute the defendant’s appearance in this case.

Fed.R.Civ.P. 55(a), as applicable to this adversary proceeding by operation of Fed.R.Bankr.P. 7055, as effective December 1, 2007, alters the former schematics of Rule 55(a) by doing away with the concept of “a party’s failure to plead or otherwise defend” as provided by [the Federal Rules of Civil Procedure] 11, as a basis for entry of default. The “deemed” appearance by a *pro se* litigant is taken as an attempt to “otherwise defend”, and thus entry of default may not be made at this time. The court may enter a default judgment if “the plaintiff’s claim is for a sum certain or a sum that can be made certain by computations”; Fed.R.Civ.P. 55(b)(1). However, the court does not deem this provision to allow the entry of the default

judgment in a circumstance in which the complaint does not establish a *prima facie* claim for the relief requested, regardless of whether or not the amount of damages requested under the theory of relief is capable of easy mathematical calculation. Rather, despite the amendment of Fed.R.Civ.P. 55 effective on December 1, 2007, in order for a default judgment to be entered it is still incumbent upon the plaintiff to establish a *prima facie* case for the relief requested by the complaint. This complaint does not do so; *See, In re Hostetter*, 320 B.R. 674 (Bankr. N.D.Ind. 2005).

Because the court deems the defendant to have appeared in the action, Fed.R.Civ.P. 55(b)(2) is operative, and thus the following applies:

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 three days before the hearing (on the plaintiff's motion for entry of a default judgment).

The court deems it necessary to conduct a hearing with respect to any request for entry of a default judgment to both "establish the truth of any allegations by evidence" of the complaint's assertions that the indebtedness is excepted from discharge under 11 U.S.C. § 523(a)(2), and to "investigate any further matter", i.e., whether or not the indebtedness is in fact excepted from discharge under the legal standards applicable to that determination; Fed.R.Civ.P. 55(b)(2)(C) and (D). In order to invoke the default judgment provisions of Fed.R.Civ.P. 55(b)(2), "the party [the plaintiff] must apply to the court for a default judgment".

IT IS ORDERED that within 30 days of the date of entry of this order the plaintiff shall file application for a default judgment pursuant to Fed.R.Civ.P. 55(b)(2). The court will then set a hearing on that application, with notice to both the plaintiff and the defendant.

Dated at Hammond, Indiana on February 19, 2009.

/s/ J. Philip Klingeberger
J. Philip Klingeberger, Judge
United States Bankruptcy Court

Distribution:
Attorney for Plaintiff, Defendant