

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT HAMMOND

IN RE:)
MELINDA LOUISE IPPOLITO)
) BANKRUPTCY NO. 08-23856
)
Debtor)

ORDER AND NOTICE OF HEARING

The Court takes judicial notice that on May 19, 2009, Melinda Louise Ippolito, Debtor filed an Objection to Claim No. 5 filed by Debra Lynch Dubovich on behalf of Levy & Dubovich (“Claimant”).

Said Objection was duly noticed to Levy and Dubovich, who was granted to and including April 18, 2009, to respond thereto and request a hearing thereon. The time to file a response pursuant to said notice has expired, and no response has been filed.

The Court has reviewed said Objection which alleges that the claim was filed as a Priority Claim, and that the Debtor believes the claim should be a general claim and requests that an order be entered by the Court that the Claim for fees to Claimant appointed as guardian ad litem in a dissolution proceeding is not a Domestic Support Obligation entitled to priority status. It is not clear to the Court as to whether as a matter of law the Objectant is entitled to a default order pursuant to Fed. R. Civ. P. 55, as made applicable by Fed. R. Bk. P. 9014 and Fed. R. Bk. P. 7055 granting the relief requested in said Objection.¹ It has been held that guardian ad litem fees arising out of a dissolution or custody

¹ The power to enter a default judgment is in the broad discretion of the trial court. In re Kubick, 171 B.R. 658, 659 (9th Cir. BAP 1994) (collecting cases). The Court prior to the entry of a default judgment has an independent duty to determine the sufficiency of a claim. Id. 171 B.R. at 662. The entry of a default judgment without a hearing is improper where the complaint is not pled sufficiently to withstand a motion to dismiss. Id. 171 B.R. at 662. A complaint that merely recites statutory language will not withstand a motion to dismiss. Id., 171 B.R. at 660.

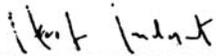
When a default judgment is entered, facts alleged in the complaint may not be contested. Black v. Lane, 22 F.3d 1395, 1399 (7th Cir. 1994) (citing Thomson v. Wooster, 111 U.S. 104, 5 S. Ct. 788, 29 L. Ed. 105 (1885)). The entry of a default order, does not, however, preclude a party from challenging the sufficiency of the complaint. Id. 22 F.3d at 1399. Thus, a default is not treated as, “[a]n absolute confession by the defendant of his liability and of the plaintiff’s right to recover.” Nishimatsu Constr. Co., Ltd. v. Houston Nat’l Bank, 515 F.2d 1200, 1206 (5th Cir. 1975). The defendant is not held to admit facts that are not well-plead or to admit conclusions of law. Id. 515 F.2d at 1206. See also, Danning v. Lavine, 572 F.2d 1386, 1388 (9th Cir. 1978) (facts which are not established by the pleadings, or claims that are not well-pleaded,

proceeding are nondischargeable under §523(a)(5) as a domestic support obligation and thus then may be entitled to priority claim status under §507(a)(1). See In re Chang, 163 F.3d 1138 (9th Cir. 1998); In re Staggs, 203 B.R. 712 (Bankr. W. D. Mo 1996); In re Coleman, 37 B.R. 120 (Bankr. W. D. Wis. 1984); In re Lockwood, 148 B.R. 45 (Bankr. E. D. Wis. 1992); Miller v. Gentry, Ph. D., et. al 169 B.R. 715 (D. Kan. 1994); In re Douglas, 202 B.R. 961 (Bankr. S. D. Ill. 1996); In re Peters, 133 B.R. 291 (S.D. N.Y. 1991); In re O'Toole, 194 B.R. 629 (Bankr. E. D. Mo. 1996); In re Constantine, 183 B.R. 335 (Bankr. D. Mass. 1995).

Accordingly, the Court shall sua sponte conduct a hearing as to said Objection prior to the entry of an Order relating thereto. It is therefore,

ORDERED, that hearing shall be held on said Objection on the 17th day of June, 2009 at 2:10 o'clock P.M.

Dated: May 21, 2009



JUDGE, U. S. BANKRUPTCY COURT

Distribution

are not binding and cannot support the judgment); Weft, Inc. v. G.C. Inv. Assocs., 630 F. Supp. 1138, 1143 (E.D.N.C. 1986), aff'd. sub nom. Weft, Inc. v. Georgaide, 822 F.2d 56 (4th Cir. 1987) (upon a default, a plaintiff is entitled to a determination of liability unless he had failed to state a claim for relief or it is clear from the face of the complaint that the allegations are not susceptible to proof). As the Court noted in McDaniel v. Nationwide, 85 B.R. 69 (Bankr. N.D. Ill. 1988):

A default judgment, even where an order of default has been entered, is not a matter of right. Finch v. Big Chief Drilling Company, 56 F.R.D. 456, 458 (E.D. Tex. 1972). Whether a default judgment should be entered is a matter resting in the sound discretion of the trial judge. Duling v. Markun, 231 F.2d 833, 836 (7th Cir. 1956), cert. denied, 352 U.S. 870, 77 S. Ct. 96, 98, 1 L. Ed.2d 76, 77 (1956). One of the factors the Court may consider in exercising its discretion is whether entry of the default judgment will result in injustice. Id. at 458. Injustice may be done where there is a valid defense to a plaintiff's claim and, were it not for the defendant's default, the proceeding probably would have had a different result. Atlantic Dredging and Construction Company v. Nashville Bridge Company, 57 F.2d 519, 521 (5th Cir. 1921). Defaults are also disfavored in actions where public issues are implicated. Wilson v. Winstead, 84 F.R.D. 218, 219 (E.D. Tenn. 1979).

Id. 85 B.R. at 71. See also, In re Beltran, 182 B.R. 820, 823-35 (9th Cir. B.A.P. 1995); In re Villegas, 132 B.R. 742, 746 (9th Cir. B.A.P. 1991); In re Wall, 127 B.R. 353, 355 (Bankr. E.D. Va. 1991).