

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

| | | |
|-----------------------------------|---|-----------------------|
| IN THE MATTER OF |) | |
| |) | |
| RONALD WILLARD BOWYER and |) | CASE NO. 05-34460 HCD |
| JO ANN BOWYER, |) | CHAPTER 7 |
| |) | |
| DEBTORS. |) | |
| |) | |
| JACQUELINE SELLS HOMANN, TRUSTEE, |) | |
| |) | |
| PLAINTIFF, |) | |
| vs. |) | PROC. NO. 08-3067 |
| |) | |
| RONALD WILLARD BOWYER and |) | |
| JO ANN BOWYER, |) | |
| |) | |
| DEFENDANTS. |) | |

ORDER

At South Bend, Indiana, on January 12, 2009.

Before the court is the Motion for Default Judgment filed by plaintiff Jacqueline Sells Homann, Chapter 7 Trustee, against the defendants Ronald Willard Bowyer and Jo Ann Bowyer, chapter 7 debtors. The plaintiff stated, in the Motion and attached Affidavit, that the defendants failed to respond to her three requests for turnover of inherited assets and to the court's Order compelling turnover. She asks that the court enter default judgment against the defendants and revoke their discharge.

The court finds that the plaintiff has not complied with the requirements of Rule 55 of the Federal Rules of Civil Procedure, as incorporated into bankruptcy adversary proceedings by Rule 7055 of the Federal Rules of Bankruptcy Procedure. Rule 55 clearly distinguishes between the entry of default (Rule 55(a)) and the entry of a default judgment (Rule 55(b)). *See Lowe v. McGraw-Hill Cos., Inc.*, 361 F.3d 335, 339 (7th Cir. 2004). Although the plaintiff did not apply for an entry of default from the Clerk of the Court or file an affidavit or other sworn statement, the court itself determined that the defendants were properly served with the summons and

complaint, that they did not respond, and that the time for response had passed. It therefore entered default against the defendants on September 9, 2008.¹

The plaintiff now requests that the court enter a judgment by default, in accordance with Rule 55(b). To succeed on the default judgment, however, she is required to file an affidavit supporting the motion that states facts demonstrating the defendants' non-military status, in compliance with the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C.App. § 501 et seq. See *Toyota Motor Credit Corp. v. Montano (In re Montano)*, 192 B.R. 843, 845 (Bankr. D. Md. 1996). In addition, the well-pleaded allegations in the complaint must be sufficient to state a legitimate claim for relief. See *In re Taylor*, 289 B.R. 379, 382 (Bankr. N.D. Ind. 2003). Bankruptcy courts in this circuit require the plaintiff to prove a *prima facie* case under the pertinent section of the Bankruptcy Code before a default judgment is granted. See *Capital One Bank v. Bungert (In re Bungert)*, 315 B.R. 735, 736-37 (Bankr. E.D. Wis. 2004) (citing *Mega Marts, Inc. v. Trevisan (In re Trevisan)*, 300 B.R. 708, 713 (Bankr. E.D. Wis. 2003)). The court's entry of a judgment by default is discretionary. It is appropriate only after the court determines that service was properly made, that the party has defaulted, and that the complaint's allegations support the relief sought. See *Levin v. Greco (In re Greco)*, 397 B.R. 102, 105 (Bankr. N.D. Ill. 2008); *El-Yacoubi v. Hetrick (In re Hetrick)*, 379 B.R. 612, 618-19 (Bankr. E.D. Va. 2007).

In this case, the affidavit does not demonstrate the defendants' non-military status. In addition, the Complaint's allegations describe the defendants' non-responses but do not demonstrate a *prima facie* case brought under the Bankruptcy Code. The defendants' failure to respond "does not automatically entitle a plaintiff to entry of a default judgment." *In re Bungert*, 300 B.R. at 736. In light of the deficiencies found in the plaintiff's motion,

¹ Federal Rule of Civil Procedure 55(a) requires the clerk to enter the party's default "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise." Fed. R. Civ. P. 55(a) (emphasis added). This court requires a plaintiff to apply for the Clerk's Entry of Default by filing an application and an affidavit or other sworn statement that verifies (a) that the defendants were served properly with the complaint, summons, and notice of service pursuant to the appropriate subsection of Bankruptcy Rule 7004; (b) that the defendants did not answer, defend, or respond to the complaint; and (c) that the time for a response had expired. See Fed. R. Bankr. P. 7004, 7012, 7055; Fed. R. Civ. P. 4, 12, 55; see also *O'Callaghan v. Sifre*, 242 F.R.D. 69, 74 (S.D.N.Y. 2007) (referring to local rule). The court no longer enters a default without the party's application and affidavit.

the court determines that the plaintiff's request for a default judgment is not warranted. The plaintiff is granted thirty (30) days to cure the deficiencies. Motion for Default Judgment is denied.

SO ORDERED.

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