

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
PAUL EDWARD NORTH and)	CASE NO. 08-30114 HCD
STEPHANIE MARIE NORTH,)	CHAPTER 7
)	
DEBTORS.)	
)	
)	
REBECCA HOYT FISCHER, TRUSTEE,)	
)	
PLAINTIFF,)	
vs.)	PROC. NO. 08-3092
)	
PAUL EDWARD NORTH and)	
STEPHANIE MARIE NORTH,)	
DEFENDANTS.)	

Appearances:

Rebecca Hoyt Fischer, Trustee, 112 West Jefferson Boulevard, Suite 310, South Bend, Indiana 46601-1438.

MEMORANDUM OF DECISION

At South Bend, Indiana, on January 30, 2009.

Before the court is the Motion for Default Judgment filed by Rebecca Hoyt Fischer, Chapter 7 Trustee herein (“Trustee”). She seeks a default judgment against the defendants Paul Edward North and Stephanie Marie North, chapter 7 debtors (“debtors” or “defendants”), on the ground that the defendants have failed to answer or otherwise plead to the Complaint to Deny Discharge filed by the Trustee. For the reasons that follow, the court grants the Motion for Default Judgment and denies the discharge of the 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 January 22, 2008. After the first meeting of creditors, the Trustee filed a Notice of Assets. She then offered the debtors a stipulated agreement that they could repay those non-exempt assets, in monthly payments of \$202, but that they must also turn over their 2008 economic stimulus rebate check. The Trustee thrice sent the stipulation to the debtors and their counsel, but it was never executed. Consequently, she filed a Motion to Compel the turnover of the economic stimulus check. No objection was filed,¹ and the court granted the motion by Order of July 24, 2008. Despite proper service of process on the debtors and on their bankruptcy attorney of record, there was no response to the court's Order and no turnover of the funds. Thereafter, the Trustee filed a second Motion to Compel, requiring turnover of \$3,298, which represented the non-exempt assets. Again the debtors raised no objection; the court granted the Motion to Compel by Order of September 25, 2008. Neither the debtors nor their counsel reacted to the Order, by challenging it, turning over a payment, signing the original agreement, or responding in some other way. As a result, the Trustee commenced this adversary proceeding on November 20, 2008. The debtors' failure to respond to the Complaint has led to the Motion for Default Judgment now before the court.

¹ The debtors sent the Trustee a handwritten note addressed "To Whom It May Concern," on July 11, 2008, stating that they had spent the economic stimulus funds but that they would continue to make the monthly obligation of \$202. Nevertheless, they did not offer a signed agreement and made no payments in July and August 2008. The only payment of \$202 tendered by the debtors was made on September 12, 2008. The court declines to find that this letter, sent to the Trustee and not to the court, should be deemed a formal objection to the Trustee's Motion to Compel.

Discussion

The plaintiff Trustee asks the court to enter default judgment against the defendants because they failed to plead or to defend their position. Rule 7055 of the Federal Rules of Bankruptcy Procedure governs defaults. That bankruptcy rule applies Rule 55 of the Federal Rules of Civil Procedure in adversary proceedings. *See Lowe v. McGraw-Hill Cos., Inc.*, 361 F.3d 335, 339 (7th Cir. 2004) (noting distinction between “entry of default” under Rule 55(a) and “judgment by default” under Rule 55(b)). In this case, after the Trustee filed an Affidavit of No Answer, Defense or Response on December 30, 2008, the Clerk of the Bankruptcy Court entered the defendants’ default on January 7, 2009. *See Fed. R. Civ. P. 55(a)*.² The plaintiff’s present request for a default judgment is covered by Rule 55(b)(2).³

The court finds that the plaintiff has fulfilled the procedural requirements to be entitled to a default judgment. First, she duly served the summons and Complaint on November 20, 2008. *See Educ. Credit Mgmt. Corp. v. Mersmann (In re Mersmann)*, 505 F.3d 1033, 1043 (10th Cir. 2007). The debtors and their attorney were

² Rule 55 provides for the entry of default:

(a) Entering a Default. When 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, the clerk must enter the party’s default.

Fed. R. Civ. P. 55(a).

³ 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. The court may conduct hearings or make referrals – preserving any federal statutory right to a jury trial – when, to enter or effectuate judgment, it needs to:

- (A) conduct an accounting;
- (B) determine the amount of damages;
- (C) establish the truth of any allegation by evidence; or
- (D) investigate any other matter.

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

properly served pursuant to the requirements of Bankruptcy Rule 7004(b)(9), 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). The court finds that service of process was effective and timely.

When the defendants failed to file an answer or otherwise respond by December 22, 2008, the Trustee thereafter filed an affidavit requesting an entry of default by the Clerk of the Court. The sworn statement verified (a) that the defendants and their counsel were served properly with the Complaint, summons, and notice of service; (b) that the defendants did not answer, defend, or respond to the Complaint; and (c) that 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., Blake v. Trutwein (In re Trutwein)*, 381 B.R. 417, 2007 WL 4467569 at *2 (unpub’d) (9th Cir. B.A.P. 2007); *Briarpatch Ltd., L.P. v. Geisler Roberdeau, Inc.*, 513 F.Supp.2d 1, 2 (S.D.N.Y. 2007); *O’Callaghan v. Sifre*, 242 F.R.D. 69, 74 (S.D.N.Y. 2007); *King v. Cava Inc. (In re King)*, 270 B.R. 783, 784 (Bankr. N.D. Ala. 2001). As required by Rule 55(a), after receiving the Trustee’s affidavit the Clerk of the Court entered the defendants’ default on January 7, 2009. That Entry of Default is a prerequisite to the entry of a judgment by default. *See, e.g., Johnson v. Dayton Elec. Mfg. Co.*, 140 F.3d 781, 783 (8th Cir. 1998); *Virgin Records America, Inc. v. Johnson*, 441 F.Supp.2d 963, 965 (N.D. Ind. 2006).

The Trustee filed her Motion for Default Judgment on January 12, 2009. A motion for default judgment, under Rule 55(b), requires another affidavit, one that states facts demonstrating the defendant’s non-military status. This second affidavit must comply with the Soldiers’ and Sailors’ Civil Relief Act, 50 U.S.C.App., § 501 *et seq.* 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). In this case, the plaintiff Trustee declared that, to the best of her knowledge and belief, neither defendant is in the military

service, and both defendants are physically domiciled at the address provided. The court finds that the plaintiff has sufficiently demonstrated the defendants' non-military status in her Affidavit.

In her Motion for Default Judgment, the Trustee presented the underlying facts that led to the Motion. She thoroughly described her frequent requests for turnover of non-exempt property of the estate, her attempts at an agreement to repay the funds over time, and the repeated failures by the debtors and their attorney to respond to the court's Orders. Because the plaintiff's factual allegations in the Complaint and Motion for Default Judgment have not been challenged by the defendants, the court deems them to be admitted by the defendants as true. *See* Fed. R. Civ. P. 8(b)(6); Fed. R. Bankr. P. 7008.

Nevertheless, a plaintiff has one last hurdle before obtaining a judgment by default. 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). The court's entry of a judgment by default itself is discretionary. *See Sun v. Board of Trustees of Univ. IL.*, 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). It may be denied when the facts are insufficient to support the claim in the complaint.

In [bankruptcy, as in] traditional civil litigation, the defendant's failure to respond to a complaint against it does not mean that the plaintiff is entitled to the relief it seeks. Instead, the default is nothing more than an admission of the well pleaded factual allegations contained in the complaint. Before the plaintiff is entitled to the entry of judgment in its favor, those allegations must still state a legitimate claim for relief. 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 has "broad discretion to conduct such hearings and receive evidence that it deems proper before entering a default judgment." *Mega Marts, Inc. v. Trevisan (In re Trevisan)*, 300 B.R. 708, 713 (Bankr. E.D. Wis. 2003) (citing Bankruptcy Rule 7055(b)(2) and cases). 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 In re Bungert*, 315 B.R. at 737; *In re Trevisan*, 300 B.R. at 715.

The remaining question, therefore, is whether the allegations of the Complaint are sufficiently pled to prove a *prima facie* case and to support the relief the Complaint seeks – that the debtors’ discharge be denied. The Trustee cited 11 U.S.C. § 727(d)(2), which seeks revocation of a discharge if “the debtor acquired property that is property of the estate . . . and knowingly and fraudulently failed . . . to deliver or surrender such property to the trustee.” However, because the discharge has not yet been issued in this case, the court has construed the Complaint as one seeking denial of the discharge pursuant to 11 U.S.C. § 727(a)(2)(B) and (a)(6)(A).⁴ See *Richardson v. Schoemperlen (In re Schoemperlen)*, 332 B.R. 179, 181 (Bankr. C.D. Ill. 2005).

The Trustee alleged in the Complaint that the debtors failed to comply with the Court’s Order of September 25, 2008, which required the defendants to turn over non-exempt assets in the amount of \$3,298. She further alleged that they failed to cooperate with the Trustee in this matter. The court determines that the allegations of this Complaint are well pled, have merit, and serve as a sufficient basis for the entry of a judgment denying the discharge of the debtors under § 727(a)(2)(B) and § 727(a)(6)(A). The court therefore grants the Trustee’s Motion for Default Judgment and enters judgment in favor of the plaintiff Trustee and against the defendants.

⁴ § 727(a) The court shall grant the debtor a discharge, unless –

. . .

(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, ... –

. . .

(B) property of the estate, after the date of the filing of the petition; [or]

(6) the debtor has refused, in this case —

(A) to obey any lawful order of the court

11 U.S.C. § 727(a)(2), (a)(6).

Conclusion

For the reasons presented in this Memorandum of Decision, the court grants the Motion for Default Judgment filed by the plaintiff Rebecca Hoyt Fischer, chapter 7 Trustee. Judgment by default is entered in favor of the Chapter 7 Trustee and against defendants Paul Edward North and Stephanie Marie North, chapter 7 debtors. The discharge of the defendants is denied pursuant to 11 U.S.C. § 727(a)(2)(B) and § 727(a)(6)(A).

SO ORDERED.

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