

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
RICKY A. SHEPHERD,)	CASE NO. 07-30763 HCD
)	CHAPTER 7
)	
DEBTOR.)	
)	
)	
JACQUELINE SELLS HOMANN, TRUSTEE,)	
)	
PLAINTIFF,)	
vs.)	PROC. NO. 09-3027
)	
DAVID SHEPHERD and)	
MRS. DAVID SHEPHERD,)	
DEFENDANTS.)	

Appearances:

Jacqueline S. Homann, Trustee, 202 South Michigan Street, 600 Key Bank Building, Post Office Box 4577, South Bend, Indiana 46634-4577; and

Mr. and Mrs. David Shepherd, appearing pro se, Post Office Box 54, North Webster, Indiana 46555.

MEMORANDUM OF DECISION

At South Bend, Indiana, on July 7, 2009.

Before the court is the Motion for Default Judgment filed by plaintiff Jacqueline Sells Homann, Trustee (“Trustee”) in the chapter 7 bankruptcy case of Ricky A. Shepherd (“debtor”). The Motion seeks a default judgment against defendants David Shepherd and Mrs. David Shepherd (“defendants”), the parents of the debtor. For the reasons that follow, the court grants the default judgment motion.

On March 27, 2009, the Trustee filed a Complaint to Avoid and Recover an Avoidable Transfer pursuant to 11 U.S.C. § 547 and § 550. She sought to recover the sum of \$3,000 transferred by the debtor to the defendants, his parents, on February 26, 2007, to repay a loan. The debtor filed his chapter 7 voluntary petition 38 days later, on April 5, 2007. The Trustee argued that the debtor’s payment to the defendants was an avoidable preferential transfer under § 547 recoverable by the Trustee under § 550.

The defendants did not file an answer or otherwise respond to the Complaint. Once the time for response had passed, the Trustee filed a Motion for Entry of Default. *See* R. 8. The Clerk entered the default sought. *See* R. 9. The Motion for Default Judgment, with Affidavit, is now before the court.

Defaults are governed by Rule 55 of the Federal Rules of Civil Procedure, which is incorporated into bankruptcy adversary proceedings by Rule 7055 of the Federal Rules of Bankruptcy Procedure.¹ The rule 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). The entry of default under Rule 55(a) must precede the grant of a default judgment under Rule 55(b). *See Iowa Oil Co. v. T Mart, Inc. (In re Iowa Oil Co.)*, 299 B.R. 555, 561 (Bankr. N.D. Iowa 2003). As Judge Posner explained,

[t]here are two stages in a default proceeding: the establishment of the default, and the actual entry of a default judgment. Once the default is established, and thus the liability, the plaintiff still must establish his entitlement to the relief he seeks.

¹ Federal Rule of Civil Procedure 55 provides:

(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.

(b) Entering a Default Judgment.

(1) By the Clerk. If the plaintiff's claim is for a sum certain or a sum that can be made certain by computation, the clerk – on the plaintiff's request, with an affidavit showing the amount due – must enter judgment for that amount and costs against a defendant who has been defaulted for not appearing and who is neither a minor nor an incompetent person.

(2) By the Court. In all other cases, the 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.

In re Catt, 368 F.3d 789, 793 (7th Cir. 2004).

In this case, the Trustee filed a request for an entry of default and the clerk of the court, accepting the request, entered the default.² The Trustee then sought a default judgment. When a motion for default judgment is filed, a plaintiff also must submit an affidavit of non-military status, stating facts demonstrating that the defendant is not in military service, in compliance with the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C.App. § 501 et seq. *See In re Redmond*, 399 B.R. at 632 (setting forth affidavit requirements). The court finds that the Trustee's Affidavit explained her attempts to determine whether the defendants are in military service and her conclusion that there was "no reason to believe they are in active military service." R. 11, Ex. 1, ¶ 12. The court determines that the Trustee reasonably complied with the affidavit requirement.

Finally, the motion for default judgment must demonstrate that the plaintiff's underlying allegations in the Complaint entitle the plaintiff to the relief sought. *See In re Redmond*, 399 B.R. at 633. Because a court's entry of a judgment by default is discretionary, the court examines the plaintiff's Complaint to determine whether its allegations were well pled and were sufficient to state a legitimate claim for relief. *See id.*; *see also 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 In re Redmond*, 399 B.R. at 633 (citing cases). The court's entry of a judgment by default 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*

² The Trustee did not, however, file an affidavit establishing the default. Rule 55(a) requires the Clerk of the Court to enter the default of a defendant who "has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise." Fed. R. Civ. P. 55(a) (emphasis added); *see Target Nat'l Bank v. Redmond (In re Redmond)*, 399 B.R. 628, 632 (Bankr. N.D. Ind. 2008) (setting forth mandates of Rule 55(a)). Simply stating in the application for entry of default that the defendants failed to appear or respond is insufficient. The Trustee should have filed, in support of the application, an affidavit verifying that the defendants were properly served; that they did not respond; and that the time for response had passed. Henceforth, the clerk of the court will not enter the default without such verification.

(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).

The court finds that the Complaint adequately stated a legitimate claim for relief. *See In re Redmond*, 399 B.R. at 633. The allegations of the Complaint set forth facts that justify the Trustee's avoidance of a preferential transfer from the debtor to his parents, the defendants, pursuant to §§ 547 and 550. The defendants, by failing to respond, have admitted those facts, and the court deems them to be true. In her Motion for Default Judgment, the Trustee presented a more expansive justification for the claims in the Complaint, and her Affidavit described her attempts to collect the transferred funds prior to and after the filing of the Complaint. The court thus determines that the Trustee has presented a well-pled Complaint that serves as a sufficient basis for the entry of a judgment pursuant to § 547 and § 550, and that she has complied with the procedural requirements of Rule 55(a) and (b). Finally, the court determines that the amount claimed by the Trustee in the Complaint is a sum certain, \$3,000. It therefore enters judgment in that specific amount.

In conclusion, therefore, the court grants the Motion for Default Judgment filed by the Trustee. Judgment on the Complaint is entered in favor of the Trustee and against the defendants David Shepherd and Mrs. David Shepherd, pursuant to § 547, in the total amount of \$3,000.

SO ORDERED.

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