

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
SOUTH BEND DIVISION

IN THE MATTER OF	)	
	)	
STEVEN SHAFFER,	)	CASE NO. 09-30011 HCD
	)	CHAPTER 7
	)	
DEBTOR.	)	
	)	
	)	
SUPERIOR DISTRIBUTION OF	)	
INDIANA, INC.,	)	
	)	
PLAINTIFF,	)	
vs.	)	PROC. NO. 09-3064
	)	
STEVEN SHAFFER,	)	
	)	
DEFENDANT.	)	

Appearances:

Christopher M. Trapp, Esq., and James E. Rossow, Esq., counsel for plaintiff, 342 Massachusetts Avenue, Suite 500, Indianapolis, Indiana 46204; and

Steven Shaffer, pro se, 29937 CR 18, Elkhart, Indiana 46517.

MEMORANDUM OF DECISION

At South Bend, Indiana, on January 21, 2010.

Before the court is the Motion for Default Judgment filed by the plaintiff Superior Distribution of Indiana, Inc., against the defendant Steven Shaffer, chapter 7 debtor herein. The plaintiff sought judgment pursuant to Federal Rule of Civil Procedure 55(a)(2), made applicable by Federal Rule of Bankruptcy Procedure 7055.<sup>1</sup> For the reasons that follow, the court grants the Motion.

---

<sup>1</sup> There is no subsection (a)(2) in Federal Rule of Civil Procedure 55. The Rule, in its entirety, 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.

(continued...)

The court first finds that the plaintiff properly requested the Clerk’s Entry of Default. In the attached Affidavit, plaintiff’s counsel James E. Rossow, Jr., Esq., verified that the Complaint was properly filed and served on the defendant. *See* R. 8, Rossow Aff.; *see also* Fed. R. Bankr. P. 7004(b)(9). He affirmed that the defendant failed to appear, file an answer, or otherwise respond to the Complaint; that the defendant was not an infant or an incompetent person; and that he was not a person in active military service. *See* R. 8, Rossow Aff. In the Plaintiff’s Response to Order to Show Cause, the plaintiff provided additional information to assist the court in its consideration: (a) that the defendant, in e-mails to the plaintiff, stated that he had “no intention or desire” to have his debt to the plaintiff included in his discharge; (b) that the defendant wanted to enter into pay arrangements for his debt; and ©) that the defendant failed to respond to a proposed agreed judgment entry and never appeared in this adversary proceeding. *See* R. 13 at 1. Finally, the Response pointed out that the debtor had filed his bankruptcy case without an attorney and never sought the representation of an attorney in this adversary proceeding. *See id.* at 2. The court determines that the requirements for entitlement to entry of default under Federal Rule of Civil Procedure 55(a) have been met. *See Redmond v. Target Nat’l Bank (In re Redmond)*, 399 B.R. 628, 631-32 (Bankr. N.D. Ind. 2008) (setting forth Rule 55(a) procedural requirements). The court further finds that the plaintiff proffered

---

<sup>1</sup>(...continued)

(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;
- ©) establish the truth of any allegation by evidence; or
- (D) investigate any other matter.

Fed. R. Civ. P. 55.

sufficient cause to excuse its delay in pleading and to demonstrate proper service of process. Because the requirements of Rule 55(a) were fulfilled, the Clerk's entry of default now is entered against the defendant Steven Shaffer.

Presently before the court is the plaintiff's motion for default judgment, which requested entry of judgment on the ground of the defendant's failure to respond in this adversary proceeding. *See* R. 9. Along with the motion were two affidavits. Kristy Whitsit, the plaintiff's credit manager, stated in her Affidavit that the defendant, when employed by the plaintiff, "knowingly, fraudulently and wrongfully took and carried away from Plaintiff's warehouse certain goods, wares and other materials . . . that [were] owned by Plaintiff and had a value of not less than \$10,630.28." R.9, Ex. 1 at 1. She further affirmed that the defendant installed the equipment, received payment for it from a third party, and kept the payment. In taking those actions, the affiant urged, the defendant "willfully and maliciously injured Plaintiff and Plaintiff's property." *Id.* at 2. Attached to the Affidavit was an invoice itemizing the plaintiff's equipment taken by the defendant. The credit manager concluded the Affidavit by arguing that, as a result of the defendant's conversion of that property, the plaintiff was entitled to actual damages, treble damages, prejudgment interest, reasonable costs of collection, costs, and attorney's fees. *See id.*

The second affidavit was filed by the plaintiff's attorney. He verified the proper service of the Complaint on the defendant and reiterated the information provided in his Affidavit for Clerk's Entry of Default. *See In re Redwood*, 399 B.R. at 632 (describing the required affidavits under Rule 55(a) and (b)). He sought attorney's fees in the amount of \$3,037.75 and litigation costs in the amount of \$287.26.

The court finds that the plaintiff's default motion satisfies the dictates of Rule 55(b). First, the affidavit of the plaintiff's attorney affirmed that the defendant is not an infant or an incompetent person; it further verified, in compliance with the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. App., § 501 *et seq.*, that the defendant is not in active military service. *See id.* The court then examined the plaintiff's Complaint to determine whether its allegations were well pled and were sufficient to state a legitimate claim for relief.

*See id.* at 633 (citing *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 id.* (citing cases). They recognize that an entry of a judgment by default is discretionary and 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 El-Yacoubi v. Hetrick (In re Hetrick)*, 379 B.R. 612, 618-19 (Bankr. E.D. Va. 2007).

In this case, the plaintiff asks that the defendant’s debt to it be excepted from discharge pursuant to 11 U.S.C. § 523(a)(4) and (a)(6). Those subsections do not discharge an individual debtor from any debt

- (4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny; or
- (6) for willful and malicious injury by the debtor to another entity or to the property of another entity.

In the Complaint, the plaintiff alleged the debtor’s knowing and intentional taking of the plaintiff’s equipment, its sale to a third party, and its installation in a third party’s location. R. 1 at 2. It labeled that conduct “larceny” and “embezzlement” pursuant to § 523(a)(4). It further stated that the debtor’s willful and malicious injury to the plaintiff should be excepted from the debtor’s discharge under § 523(a)(6). Applying the definitions of larceny and embezzlement, as found in federal common law for nondischargeability purposes, the court finds that the plaintiff’s Complaint sufficiently stated a claim under § 523(a)(4).<sup>2</sup> Moreover, the Affidavit of the plaintiff’s credit manager validated the underlying facts and gave substance to the allegations of the Complaint. The court concludes that the allegations of the Complaint are well pled, have merit, and serve as a sufficient basis for the entry of a judgment of nondischargeability under 11 U.S.C. § 523(a)(4). Having found that the debt owed by the defendant to the plaintiff is nondischargeable

---

<sup>2</sup> Larceny is proven when the creditor demonstrates that the defendant wrongfully, willfully and with fraudulent intent took property from its owner. *Digital Sys. Engineering, Inc., v. Moreno (In re Moreno)*, 414 B.R. 485, 491 (Bankr. W.D. Wis. 2009) (citing cases); *Martello v. Fowers (In re Fowers)*, 360 B.R. 888, 898 (Bankr. N.D. Ind. 2007) (citing cases). Embezzlement is defined as “the fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come.” *In re Moreno*, 414 B.R. at 491 (citing cases). It is proven when the creditor shows that the debtor appropriated the property for his own benefit and that he did so with fraudulent intent or deceit. *See id.*

