

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
SOUTH BEND DIVISION

IN THE MATTER OF	)	
	)	
JOHN MICHAEL DALY and	)	CASE NO. 09-30734 HCD
TOMEKA LORRAINE FAGER-DALY,	)	CHAPTER 7
	)	
DEBTORS.	)	
	)	
	)	
INDIANA DEPARTMENT OF WORKFORCE	)	
DEVELOPMENT,	)	
PLAINTIFF,	)	
vs.	)	PROC. NO. 09-3068
	)	
JOHN MICHAEL DALY and	)	
TOMEKA LORRAINE FAGER-DALY,	)	
DEFENDANTS.	)	

Appearances:

Magdalena Josipovic, Esq., attorney for plaintiff, Office of Attorney General, 302 West Washington Street, Indianapolis, Indiana 46204-2770; and

John Michael Daley and Tomeka Lorraine Fager-Daley, pro se defendants, 1462 Cobblestone Circle South, Mishawaka, Indiana 46544-5867.

MEMORANDUM OF DECISION

At South Bend, Indiana, on July 6, 2010.

Before the court is the Motion for Default Judgment filed by the Indiana Department of Workforce Development (“plaintiff”), against chapter 7 debtors John Michael Daly and Tomeka Lorraine Fager-Daly (“defendants” or “debtors”). The plaintiff requests a judgment by default on the underlying Amended Complaint to Determine Dischargeability of Debt. The defendants failed to respond to the Complaint or Motion for Default Judgment. For the reasons that follow, the court denies the plaintiffs’ Motion for Default Judgment.<sup>1</sup>

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<sup>1</sup> The court has jurisdiction to decide the matter before it pursuant to 28 U.S.C. § 1334 and § 157 and the Northern District of Indiana Local Rule 200.1. The court has determined that this matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).

## BACKGROUND

The debtors filed a voluntary chapter 7 petition on March 1, 2009. The chapter 7 Trustee declared that there was no property of the estate available for distribution, and the debtors received their discharge on June 22, 2009. Their case was closed on December 30, 2009.

The plaintiff timely commenced an adversary proceeding against the debtors on May 21, 2009, by filing a Complaint pursuant to 11 U.S.C. § 523(a)(2)(A). It alleged that defendant Tomeka Fager-Daly filed one or more claims with the plaintiff for unemployment insurance benefits and received \$2,698 in benefits for the weeks ending January 21, 2006, to July 1, 2006.<sup>2</sup> It further alleged that the defendant was employed and received wages from two cleaning services during 21 of those weeks and therefore that she was ineligible to receive the unemployment benefits for those weeks. On January 26, 2009, the plaintiff received a default judgment in the amount of \$2,698 against the defendant in St. Joseph Circuit Court. The Amended Complaint, filed on August 18, 2009, seeks to have the \$2,698 debt declared nondischargeable pursuant to § 523(a)(2)(A) as a debt for money obtained by false pretenses, false representation, or actual fraud.<sup>3</sup>

The debtors did not respond to the Complaint or Amended Complaint. The plaintiff thereafter filed a Motion for Default Judgment on that debt. Again the debtors failed to file any response.

## DISCUSSION

The plaintiff asks the court to enter default judgment against the defendants because they neither appeared nor responded in this adversary proceeding. Rule 7055 of the Federal Rules of Bankruptcy Procedure governs defaults. That bankruptcy rule applies Rule 55 of the Federal Rules of Civil Procedure

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<sup>2</sup> The court notes that there are no allegations of wrongdoing against the defendant John Daly. The term “defendant” refers only to Tomeka Lorraine Fager-Daly.

<sup>3</sup> The Amended Complaint was filed to correct the amount of the debt, increasing it from \$2,017, the amount requested in the original Complaint, to \$2,698, the amount sought in the Amended Complaint. *See* R. 4, ¶¶ 13-19.

in adversary proceedings. Rule 55 clearly distinguishes between an “entry of default” and “judgment by default.” *See Lowe v. McGraw-Hill Cos., Inc.*, 361 F.3d 335, 339 (7th Cir. 2004). An entry of default is made by the clerk when two acts occur: (1) the defendants fail to plead or defend, and (2) that failure is shown “by affidavit or otherwise.” *See Fed. R. Civ. P. 55(a)*.

In this case, the first prong was met: The defendants failed to file a timely answer or other defense to the plaintiff’s Complaint.<sup>4</sup> However, the plaintiff did not request that the Clerk of the Court enter a default. Nor did it file an affidavit or other sworn document, in support of that request, verifying that the defendants were properly served; that they failed to respond; and that the time for response had passed. No default determination was sought, and thus none was entered by the Clerk of the Court under Rule 55(a).

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).

There 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.

*In re Catt*, 368 F.3d 789, 793 (7th Cir. 2004). The court finds that the requirements of Rule 55(a) were not met. *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)).

Instead, the plaintiff filed a motion for default judgment, requesting that the court grant a judgment by default concerning the nondischargeability of the debt. The rule governing the entry of a default judgment by the court is Rule 55(b)(2). As the rule makes clear, if liability of the defendant is established by default, the plaintiff still must establish his entitlement to the relief he seeks. *See In re Redmond*, 399 B.R. at 633. The motion first requires an affidavit supporting it 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.* Default judgments must not be entered against members of the armed

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<sup>4</sup> The court notes that the defendants and their attorney were duly served the summons and Amended Complaint. *See Fed. R. Bankr. P. 7004(b)(9), 7004(g); see also R. 5, Amended Certificate of Service.*

services who may be unable to appear and defend themselves. *See United States v. Kaufman*, 453 F.2d 306, 308-09 (2d Cir. 1971); *In re Redmond*, 399 B.R. at 632.

Second, the motion for default judgment must demonstrate that the plaintiff's underlying allegations in the Complaint entitle the plaintiff to the relief sought. 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 entry of default itself is discretionary; 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) (citations omitted). 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 Rule 7055 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 the bankruptcy context, where a debtor has a presumptive right to a discharge, default judgment motions should not be granted unless the movant shows that its debt is nondischargeable as a matter of law." *In re Zecevic*, 344 B.R. 572, 576 (Bankr. N.D. Ill. 2006) (citing *Merrill Lynch Mtg. Corp. v. Narayan*, 908 F.2d 246, 252 (7th Cir. 1990)). Thus, a creditor seeking a default judgment in an adversary proceeding to except a debt from discharge . . . must show at least *prima facie* facts establishing that the debt is nondischargeable. *Id.*

*In re Tsakhniv*, 2009 WL 3738094 at \*2 (Bankr. N.D. Ill. Nov. 5, 2009). Particularly when the complaint is brought under § 523 and raises allegations of fraud, the court should require some proof of fraudulent intent, such as documentation or transcripts of § 341 meetings, attached to the complaint, as evidence which provides a *prima facie* case for fraud. *See In re Trevisan*, 300 B.R. at 714-15. Mere conclusory allegations do not justify a grant of a motion for default judgment.

In this case, the court finds, first, that the plaintiff should have sought an entry of default before a default judgment. Judgments by default are prematurely requested if they are sought before the default is declared. *See Lowe*, 361 F.3d at 339 (commenting that the grant of a default judgment “obviously would have been premature” before the entry of default); *see also MBNA America Bank, N.A. v. Hostetter (In re Hostetter)*, 320 B.R. 674, 678 (Bankr. N.D. Ind. 2005); *New Austin Roosevelt Currency Exchange, Inc. v. Sanchez (In re Sanchez)*, 277 B.R. 904, 907 (Bankr. N.D. Ill. 2002). Second, it finds that no affidavits were filed to support a Rule 55(a) application or a Rule 55(b) motion. Third, it determines that there is no allegation – in the Complaint, Amended Complaint, or Motion for Default Judgment – that the defendant Tomeka Fager-Daly intended to defraud the plaintiff.

The plaintiff asked the court to find that the defendants’ debt to it was nondischargeable as a matter of law pursuant to § 523(a)(2)(A), which excepts from discharge any debt “for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by false pretenses, a false representation, or actual fraud. . . .” To succeed under § 523(a)(2)(A), the plaintiff has the burden of proving by a preponderance of the evidence that the debt owed to it by the defendants was obtained by actual fraud, false pretenses, or misrepresentation. *See McClellan v. Cantrell*, 217 F.3d 890, 893-94 (7th Cir. 2000) (stating that fraud is not limited to misrepresentations and misleading omissions); *In re Bero*, 110 F.3d 462, 465 (7th Cir.1997) (setting forth burden of proof). The plaintiff must establish that (1) the defendants obtained the plaintiff’s monies through representations that the defendants either knew to be false or made with such reckless disregard for the truth as to constitute willful misrepresentation; (2) the defendants acted with an intent to deceive the plaintiffs; and (3) the plaintiff justifiably relied on the defendants’ false representations to their detriment. *See In re Sheridan*, 57 F.3d 627, 635 (7th Cir. 1995); *Mayer v. Spanel Int’l, Ltd.*, 51 F.3d 670, 673 (7th Cir.), *cert. denied*, 516 U.S. 1008 (1995); *In re Maurice*, 21 F.3d 767, 774 (7th Cir. 1994); *see also Field v. Mans*, 516 U.S. 59, 74-75, 116 S. Ct. 437, 446, 133 L.Ed.2d 351 (1995)

(holding that a creditor's reliance need only be justifiable, not reasonable). No intent to deceive was alleged and no *prima facie* proof was proffered.

The plaintiff is unable to rely on the Default Judgment of the St. Joseph Circuit Court, as well. Although the plaintiff did not argue it, it appears that the plaintiff based its default judgment motion on the doctrine of collateral estoppel. If it applies, that doctrine prevents a party from relitigating issues previously determined in another court. *See Jensen v. Foley*, 295 F.3d 745, 748 (7th Cir. 2002). The principles of collateral estoppel are applicable in adversary proceedings. *See Grogan v. Garner*, 498 U.S. 279, 285 n. 11, 111 S. Ct. 654, 658 n. 11, 112 L.Ed.2d 755 (1991). "The effect of a judgment in subsequent litigation is determined by the law of the jurisdiction that rendered the judgment . . . provided the judgment was rendered in a proceeding that comported with due process of law." *In re Catt*, 368 F.3d 789, 790-91 (7th Cir. 2004) (citing 28 U.S.C. § 1738 and supporting case law); *see also Kramer Consulting, Inc. v. McCarthy (In re McCarthy)*, 350 B.R. 820, 831-33 (Bankr. N.D. Ind. 2006). In this case, the St. Joseph Circuit Court rendered the Default Judgment at issue. In Indiana, "to bar relitigation of an issue, the doctrine of collateral estoppel requires: 1) a final judgment on the merits in a court of competent jurisdiction; 2) identity of the issues; and 3) the party to be estopped was a party or the privity of a party in the prior action." *Huber v. United Farm Family Mut. Ins. Co.*, 856 N.E.2d 713, 717 (Ind. App. 2006) (citation omitted). The Seventh Circuit, in *Catt*, noted that Indiana is among "a significant minority of states . . . [to] allow findings made in default proceedings to collaterally estop, provided that the defaulted party could have appeared and defended if he had wanted to." *In re Catt*, 368 F.3d at 791.

In its Default Judgment, the state court granted recovery to the plaintiff based entirely on the defendant's failure to appear and answer, without any judgment on the underlying issues alleged in the state court Complaint. *See In re Catt*, 368 F.3d at 792 (stating that the state court finding on fraud is "an essential predicate of the judgment"). Neither fraud nor any of the essential elements of § 523(a)(2)(A) was

mentioned in the state court default judgment. There was no judgment on the merits, and the issues presented in the state court action were not demonstrated to be identical to those in this proceeding.

In addition, the court finds that the third prong of the collateral estoppel requirements has not been satisfied: The party to be estopped in this bankruptcy case was not shown to be the party named as the defendant in the state court action. In fact, the plaintiff's claim that it obtained a Default Judgment against the debtor Tomeka Fager-Daly is simply incorrect. The defendant named in the state court's Default Judgment is "Daly Fager." Throughout the document, the defendant is identified as if the first name were Daly and the second name Fager. This court cannot find that the state court Default Judgment applies to this debtor.

Finally, the plaintiff did not show that the "defaulted party could have appeared and defended if [she] had wanted to." *In re Catt*, 368 F.3d at 791. The plaintiff did not demonstrate that the defendant was properly served, that she participated in the state court action, or that she chose not to appear. This court therefore cannot conclude that the defendant "had a fair chance, which [she] booted, for a full and fair hearing" in the state court action. *Id.* at 792. Without a showing of the collateral estoppel requirements, this court does not allow the state court default judgment to bar litigation of the issue in this adversary proceeding.

The court concludes that the plaintiff has not proven the elements of collateral estoppel and that the state court default judgment against the defendant "Daly Fager" is ineffective in this proceeding in any case. The court also finds that the plaintiff failed to show a *prima facie* case of the allegations in its Complaint in order to succeed on its Motion for Default Judgment.

Having found that there is no Entry of Default by the Clerk of the Court and that the requirements of Rule 55(a) were not met, and further having found that the requirements of Rule 55(b) were not met, the court denies the plaintiff's Motion for Default Judgment.

Conclusion

For the reasons stated above, the court denies the Motion for Default Judgment filed by the plaintiff Indiana Department of Workforce Development against the defendants John Daly and Tomeka Fager-Daly. The plaintiff is afforded thirty (30) days, commencing from the entry of this Order, to cure the deficiencies found by the court. Failure to do so may result in dismissal of this adversary proceeding.

SO ORDERED.

/s/ HARRY C. DEES, JR.  
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HARRY C. DEES, JR., JUDGE  
UNITED STATES BANKRUPTCY COURT