

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
STEPHEN FRANK ZBACNIK and)	CASE NO. 07-31262 HCD
CYNTHIA LYNN ZBACNIK,)	CHAPTER 7
)	
DEBTORS.)	
)	
)	
FACTORY TILE INC.,)	
)	
PLAINTIFF,)	
vs.)	PROC. NO. 10-3041
)	
CYNTHIA LYNN ZBACNIK,)	
)	
DEFENDANT.)	

MEMORANDUM OF DECISION and ORDER

At South Bend, Indiana, on August 3, 2010.

Before the court is the Motion for Entry of Default and Default Judgment filed by the plaintiff Factory Tile Inc. (“plaintiff”) against the defendant Cynthia Lynn Zbacnik, a chapter 7 debtor (“defendant” or “debtor”). The plaintiff seeks the entry of default and of default judgment on the underlying Complaint Seeking Exception to Discharge, brought pursuant to 11 U.S.C. § 523(a)(2)(A) and (a)(6). The defendant did not file a response to the plaintiff’s Complaint or to this Motion. For the reasons that follow, the court denies the plaintiff’s Motion for Entry of Default and Default Judgment.¹

BACKGROUND

The debtors, Stephen Frank Zbacnik and Cynthia Lynn Zbacnik, filed a voluntary chapter 13 petition on May 23, 2007, but converted the case to a chapter 7 on February 3, 2010. The chapter 7 Trustee

¹ 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).

declared that there was no property of the estate available for distribution, and the debtors received their discharge on May 17, 2010. On May 24, 2010, the case was closed.

The plaintiff timely commenced an adversary proceeding against one of the debtors, Cynthia Lynn Zbacnik, on May 10, 2010, by filing a Complaint pursuant to 11 U.S.C. § 523(a)(2)(A) and (a)(6). It alleged that, on August 12, 2009, while in chapter 13, the defendant entered into a written contract with the plaintiff for the purchase and installation of carpeting and ceramic tile. The plaintiff completed the work, but the defendant made only minimal payments. After numerous demands, the plaintiff sued the defendant in St. Joseph Superior Court. On December 7, 2009, the state court entered judgment against the defendant in the amount of \$11,713.67 plus costs; on April 5, 2010, that court issued a civil body attachment for the defendant. It was not until April 9, 2010, that notice was sent to the plaintiff of the defendant's bankruptcy. The plaintiff alleged that the defendant's conduct – her failure to pay for the tile and carpet work, her silence about her pending bankruptcy, and her misrepresentation of her ability to pay – are fraudulent acts done in bad faith and with willful and malicious intent to injure the plaintiff.

The defendant did not respond to the plaintiff's Complaint or to the Motion for Entry of Default and Default Judgment.

DISCUSSION

The plaintiff's Motion asks for both an entry of default and a default judgment against the defendant. 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. 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 defendant fails 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 defendant failed to file a timely answer or other defense to the plaintiff's Complaint.² However, the plaintiff did not request, in a separate document, 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 defendant was properly served; that she failed to respond; and that the time for response had passed.

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 plaintiff's motion, combining its request for entry of default and for default judgment, does not recognize the separate stages and distinct purposes of each request. 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)).

Once a plaintiff successfully demonstrates the first stage in a default proceeding under Rule 55(a) by establishing the default, it next is required to prove the second stage under Rule 55(b) by establishing its entitlement to the relief it seeks. *See In re Redmond*, 399 B.R. at 633. The Rule 55(b) motion first requires an affidavit supporting it that states facts demonstrating the defendant's 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 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. A cursory statement, based solely on the plaintiff's "information and belief," that the defendant is not an active member of the military service, is insufficient. *See Rey Rey Produce SFO, Inc., v. M & M Produce and Food Serv.*

² The court notes that the defendant and her attorney were duly served the summons and Complaint. *See* R. 3; Fed. R. Bankr. P. 7004(b)(9), 7004(g).

Supplies, 2006 WL 1867633 at *1 (N.D. Cal. July 5, 2006) (stating that “compliance with the Soldiers’ and Sailors’ Civil Relief Act of 1940 may not be satisfied on information and belief”). The plaintiff must file an affidavit which provides a factual basis for the affiant’s claim or a showing of the effort to ascertain the defendant’s status and to confirm that the defendant is not in American military service. *See, e.g., Adobe Systems, Inc. v. Taveira*, 2009 WL 506861 at *5 (N.D. Cal. Feb. 27, 2009) (finding declaration was insufficient, but plaintiff’s sworn representation in court that the defendant said he was not in the military was sufficient); *In re Templehoff*, 339 B.R. 49, 53-55 (Bankr. S.D.N.Y. 2005) (requiring factual support for movant’s conclusion concerning the debtor’s military status by searching the Department of Defense Manpower Data Center and by reviewing the debtor’s petition and other documents to determine his occupation).

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, 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 Complaint’s § 523(a)(2)(A) and (a)(6) allegations of fraud, bad faith, and willful and malicious intent to injure the plaintiff were sufficient for a complaint. To succeed on a default judgment motion, however, those allegations must be grounded in facts that establish the required elements to demonstrate a *prima facie* case for nondischargeability.³ *See In re Stewart*, 408 B.R. 215, 220 (Bankr. N.D. Ind. 2009).

In summary, the court finds, first, that the plaintiff should have sought an entry of default before a default judgment. *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*

³ To show that the defendant’s debt was nondischargeable under § 523(a)(2)(A), which excepts from discharge any debt “for money, property, [or] services, . . .to the extent obtained by false pretenses, a false representation, or actual fraud,” the plaintiff must establish that (1) the defendant obtained the plaintiff’s services through representations that the defendant either knew to be false or made with such reckless disregard for the truth as to constitute willful misrepresentation; (2) the defendant acted with an intent to deceive the plaintiff; and (3) the plaintiff justifiably relied on the defendant’s false representations to its 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). To show that the defendant’s debt to the plaintiff was nondischargeable under § 523(a)(6), the plaintiff must prove by a preponderance of the evidence that the debtor willfully (*i.e.*, deliberately or intentionally) and maliciously (*i.e.*, without just cause or excuse, in conscious disregard of one’s duties) injured the plaintiff or its property. To be successful, the plaintiff must demonstrate that the debtor intended the injury, not merely the act that caused the injury. *See Garoutte v. Damax, Inc.*, 400 B.R. 208, 212-13 (S.D. Ind. 2009).

(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 the plaintiff has not established a *prima facie* case of the allegations in its Complaint in order to succeed on its Motion for Default Judgment. It therefore is not entitled to default judgment pursuant to this Motion.

Having found that the requirements of Rule 55(a) and (b) were not met, the court denies the plaintiff's Motion for Entry of Default and Default Judgment.

CONCLUSION

For the reasons stated above, the court denies the Motion for Entry of Default and Default Judgment filed by the plaintiff Factory Tile Inc. against the defendant Cynthia Lynn Zbacnik. 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.

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