

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
ANN MARIE ROBERTS,)	CASE NO. 08-32568 HCD
)	CHAPTER 7
)	
DEBTOR.)	
)	
)	
JACQUELINE SELLS HOMANN, TRUSTEE,)	
)	
PLAINTIFF,)	
vs.)	PROC. NO. 10-3027
)	
WAYNE HENSELL and MARY FRANKLIN,)	
)	
DEFENDANTS.)	

MEMORANDUM OF DECISION

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

Before the court is the Motion for Default Judgment filed by plaintiff Jacqueline Sells Homann (“plaintiff” or “Trustee”), chapter 7 Trustee of the bankruptcy estate of Ann Marie Roberts, against defendants Wayne Hensell and Mary Franklin, creditors of the debtor (“defendants”). The Trustee requests a default judgment on the underlying Complaint, which demanded payment of unpaid rents and damages owed to the debtor’s bankruptcy estate by the defendants. The defendants did not respond to the Complaint or to this Motion. Because the plaintiff has complied with the requirements of Rule 55 of the Federal Rules of Civil Procedure, as incorporated into bankruptcy adversary proceedings by Rule 7055 of the Federal Rules of Bankruptcy Procedure, the Motion is granted.¹

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).

The debtor filed a voluntary chapter 7 petition on August 6, 2008, and was granted a discharge on November 17, 2008. However, because the Trustee anticipated receiving certain non-exempt assets – a judgment and the proceeds from the sale of real estate – the case remained open.

On March 17, 2010, the Trustee commenced this adversary proceeding by filing a Complaint to Collect Rent. The certificate of service declared that the service of the summons and a copy of the complaint was made by first class mail addressed to the defendants on the same day the Complaint was filed. *See* Fed. R. Bankr. P. 7004(b)(9). The Complaint alleged that the defendants had entered into a lease agreement with the debtor but had stopped rent payments; moreover, they had caused significant damage before vacating the property. It further alleged that the defendants had failed to pay a trash bill and had left trash on the premises which had to be removed at the debtor's expense. It requested judgment against the defendants in the amount of the unpaid rent and damages.

When the defendants did not timely answer the Complaint, the Trustee filed a Request for Clerk's Entry of Default. On May 3, 2010, the court issued the Clerk's Entry of Default.²

The plaintiff now requests that the court enter a judgment by default, in accordance with Rule 55(b). She has attached an Affidavit stating facts demonstrating that neither defendant is in military service, in compliance with the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C.App. § 501 *et seq.* *See* R. 11, Ex. B; *Toyota Motor Credit Corp. v. Montano (In re Montano)*, 192 B.R. 843, 845 (Bankr. D. Md. 1996). The plaintiff's affidavit provides a factual basis for the affiant's claim; it demonstrates her effort to ascertain the defendant's status and to confirm that the defendant is not in American military service. *See, e.g., In re Templehoff*, 339 B.R. 49, 53-55 (Bankr. S.D.N.Y. 2005) (requiring factual support for movant's conclusion

² When requesting a Clerk's Entry of Default, a plaintiff is required to "submit a sworn statement requesting a clerk's entry of default that verifies (a) that the defendant was served properly with the Complaint, summons, and notice of service; (b) that the defendant 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." *Target Nat'l Bank v. Redmond (In re Redmond)*, 399 B.R. 628, 632 (Bankr. N.D. Ind. 2008). The Trustee did not file a Rule 55(a) affidavit. Nevertheless, the Request for Clerk's Entry of Default was granted and the default was entered against the defendants without the affidavit. The court requires an affidavit to accompany future Rule 55(a) requests.

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). The court finds that the affidavit is sufficient.

Having found that the Motion and Affidavit complied with the procedural requirements of Rule 55(b), the court examined the Trustee's Complaint to determine whether its allegations were well pled and were sufficient to state a legitimate claim for relief. *See 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 DuBois v. Faber (In re Faber)*, 330 B.R. 235, 239 (Bankr. N.D. Ind. 2005); *Capital One Bank v. Bungert (In re Bungert)*, 315 B.R. 735, 736-37 (Bankr. E.D. Wis. 2004); *New Austin Roosevelt Currency Exchange, Inc. v. Sanchez (In re Sanchez)*, 277 B.R. 904, 907 (Bankr. N.D. Ill. 2002). The court's entry of a judgment by default is discretionary. It 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.

In this case, neither the Complaint nor the Motion for Default Judgment sought relief pursuant to a section of the Bankruptcy Code. However, in the Complaint the Trustee asserted her right to collect assets of the bankruptcy estate and demanded the payment of rent proceeds and damages. The Complaint set forth the months for which no rent was paid, the damage done to the property, the costs of trash removal, and the unpaid trash bill. In addition, attached to the Trustee's Motion for Default Judgment was the Affidavit of the debtor, who owned the property and leased it to the defendants. *See R. 11, Ex. A*. The debtor affirmed the Complaint's allegations and demonstrated in detail that the allegations were well pled and were sufficient to support the relief sought. The Affidavit also itemized the amounts of unpaid rent and the damages the debtor incurred. The court finds, therefore, that the Complaint's allegations demonstrated a *prima facie* case stating a legitimate claim for relief. *See In re Redmond*, 399 B.R. at 633 (citing cases).

Having demonstrated to the court that service of process was properly made, that the defendants had defaulted, and that they were not in military service, the Trustee has complied with the procedural requirements of Rule 55(b). Moreover, because the Complaint's allegations supported the relief sought and the defendants have not offered any response to them, the court finds that a judgment by default is proper.

Accordingly, the court grants the Trustee's Motion for Default Judgment against the defendants and enters judgment by default against the defendants in the amount of \$6,713.30, plus costs and post-judgment interest.

SO ORDERED.

/s/ HARRY C. DEES, JR.
Harry C. Dees, Jr., Judge
United States Bankruptcy Court