

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
SOUTH BEND DIVISION

IN THE MATTER OF	)	
	)	
JAMES H. SHALLENBARGER,	)	CASE NO. 10-35240 HCD
	)	CHAPTER 7
DEBTOR.	)	
	)	
	)	
NANCY J. GARGULA,	)	
UNITED STATES TRUSTEE,	)	
PLAINTIFF,	)	
vs.	)	PROC. NO. 11-3002
	)	
JAMES H. SHALLENBARGER,	)	
DEFENDANT.	)	

Appearances:

Ellen L. Triebold, Esq., Office of the United States Trustee, 100 East Wayne Street, Suite 555, South Bend, Indiana 46601;

Anthony T. Adolf, Esq., attorney for debtor in Case No. 10-35240, 239 West Baker Street, Fort Wayne, Indiana 46802; and

James H. Shallenbarger, *pro se*, 1805 Berkey Avenue, Goshen, Indiana 46526.

MEMORANDUM OF DECISION

At South Bend, Indiana, on April 18, 2011.

Before the court is the Motion for Default Judgment filed by the plaintiff Nancy J. Gargula, United States Trustee, against the defendant James H. Shallenbarger, chapter 7 debtor. The defendant failed to respond to the plaintiff's Complaint to Deny Discharge under 11 U.S.C. § 727 or Motions for Clerk's Entry of Default and for Default Judgment. The plaintiff also has filed a Motion for Status Conference and Affidavit. For the reasons that follow, the court grants the plaintiff's Motion for Default Judgment and denies the Motion for Status Conference as moot.<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)(J).

The United States Trustee asks the court to enter default judgment against the defendant because he failed to plead or to defend after being served the plaintiff's summons and Complaint. Rule 7055 of the Federal Rules of Bankruptcy Procedure governs defaults. It applies Rule 55 of the Federal Rules of Civil Procedure in adversary proceedings. Rule 55 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). It sets forth a two-step process for a movant: proof of a default and then justification for a judgment by default. *See In re Catt*, 368 F.3d 789, 793 (7th Cir. 2004).

An entry of default is made by the Clerk of the Court when two acts occur: (1) the defendant "has failed to plead or otherwise defend," and (2) "that failure is shown by affidavit or otherwise." Fed. R. Civ. P. 55(a). To satisfy Rule 55(a), the plaintiff first must submit a sworn statement that verifies (a) that the defendant was served properly (pursuant to Bankruptcy Rule 7004) with the summons and complaint; (b) that the defendant did not answer, defend, or respond to the complaint; and (c) that the time for a response had expired. When the request is filed with an affidavit, the clerk enters the party's default. The entry of default under Rule 55(a) must precede the grant of a default judgment under Rule 55(b). "Once the default is established, and thus liability, the plaintiff still must establish his entitlement to the relief he seeks." *In re Catt*, 368 F.3d at 793.

Once the default has been entered, the plaintiff then applies to the court for a default judgment under Rule 55(b)(2).<sup>2</sup> When the defendant is a natural person, the motion requires a supporting affidavit that verifies the defendant's status as not an infant, an incompetent person, or one holding military status. The affidavit must present facts that comply with the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C.App., § 501 *et seq.* *See United States v. Kaufman*, 453 F.2d 306, 308-09 (2nd Cir.1971); *Target Nat'l Bank v. Redmond (In re Redmond)*, 399 B.R. 628, 632 (Bankr. N.D. Ind. 2008). The motion for default judgment

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<sup>2</sup> Rule 55(b)(1) allows the Clerk of the Court, upon the plaintiff's request and with an accompanying affidavit, to enter default judgment when the plaintiff's claim is for an exact sum, one that was detailed in declarations and/or documentary exhibits. *See e360 Insight v. The Spamhaus Project*, 500 F.3d 594, 602 (7th Cir. 2007). The plaintiff in this proceeding is not seeking a monetary judgment.

must demonstrate that the allegations of the underlying complaint prove a *prima facie* case for a valid cause of action and establish the defendant's liability as a matter of law. See *In re Redmond*, 399 B.R. at 633; see also *Capital One Bank v. Bungert (In re Bungert)*, 315 B.R. 735, 736-37 (Bankr. E.D. Wis. 2004); *In re Taylor*, 289 B.R. 379, 382 (Bankr. N.D. Ind. 2003).

The court's entry of a judgment by default is discretionary. See *Sun v. Board of Trustees of Univ. of IL.*, 473 F.3d 799, 810 (7th Cir.), *cert. denied*, 551 U.S. 1114, 127 S. Ct. 2941, 168 L.Ed.2d 262 (2007). It may be denied when the facts are insufficient to support the claim in the complaint. Particularly in a bankruptcy setting, in which "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) (citations omitted). After the court accepts all the factual allegations of the complaint as true and admitted by the defendant, and after it draws all reasonable inferences in [the plaintiff's] favor, it still must determine whether the complaint's allegations "state a legitimate claim for relief." *In re Taylor*, 289 B.R. at 382.

In this case, the court finds that the plaintiff complied with the requirements of Rule 55(a); for that reason, the Clerk's Entry of Default was issued.<sup>3</sup> The plaintiff's application to the court for a judgment of default also satisfied the criteria of Rule 55(b)(2).<sup>4</sup> Particularly because the defendant was a debtor, the

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<sup>3</sup> The Affidavit attached to the Motion for Entry of Default verified the information required to support the Motion for Default Judgment, and should have been attached to the latter Motion. The affidavit required with a request for entry of default must verify that service on both the debtor and her counsel was proper, that no response to the Complaint was made, and that the time for filing a response had passed. See p. 2, *supra*. The court was able to satisfy itself, by examination of the Certificate of Service, that service was proper. The second Affidavit provided by plaintiff's counsel provided additional verification: the receipt of service of the summons and Complaint by the debtor and her counsel, the defendant's failure to answer or respond, and additional history of the adversary proceeding. Consequently, the court was able to proceed to the Motion for Default Judgment.

<sup>4</sup> Although the motions for entry of default and for judgment by default were filed together on the same day, with only one Affidavit, the court first considered the request for the entry of default, based upon those procedural requirements. It now considers the motion for default judgment and accompanying affidavit. The discussion of the default rule's two subsections, Rule 55(a) and (b), in this Memorandum of Decision should clarify the reason that both motions were not ruled upon simultaneously.

court scrutinized the allegations of the plaintiff's Complaint and the arguments of the Motion for Default Judgment to determine whether the plaintiff set forth a *prima facie* case, one that established that the debtor defendant's discharge should be denied as a matter of law.

The plaintiff, in her Complaint, alleged detailed facts to support its claim that the defendant's discharge should be denied pursuant to 11 U.S.C. § 727(a)(4)(A), (a)(3), or (a)(5).<sup>5</sup> The court determined that the plaintiff's allegations, uncontested by this chapter 7 debtor, satisfied the elements of the denial of discharge subsections as they have been interpreted in this circuit. Although the Motion for Default Judgment did not elaborate on the causes of action at issue, the Complaint itself presented sufficient information for the court to find that the plaintiff succeeded in demonstrating a *prima facie* case under § 727(a)(3), (a)(4) and (a)(5).

Accordingly, having found that the debtor has failed to respond or otherwise answer the allegations in the plaintiff's Complaint, and having found that the plaintiff has satisfied all the criteria of Federal Rule of Bankruptcy Procedure 7055 and Federal Rule of Civil Procedure 55(a) and (b), the court now grants the plaintiff's Motion for Default Judgment against the defendant and denies the discharge of the defendant James H. Shallenbarger pursuant to 11 U.S.C. § 727(a)(3), (a)(4)(A), and (a)(5).

SO ORDERED.

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

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<sup>5</sup> Section 727(a) provides that "[t]he court shall grant the debtor a discharge, unless –

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(3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information . . . from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case;

(4) the debtor knowingly and fraudulently, in or in connection with the case –  
(A) made a false oath or account;

...

(5) the debtor has failed to explain satisfactorily . . . any loss of assets or deficiency of assets to meet the debtor's liabilities.

11 U.S.C. § 727(a)(3), (a)(4)(A), (a)(5); *see also Stamat v. Neary*, \_\_\_ F.3d \_\_\_, 2011 WL 1045839 at \*3-\*7 (7th Cir. Mar. 24, 2011) (setting forth § 727(a)(4)(A) test); *In re Kitson*, 341 Fed. Appx. 234, 237-38 (stating tests for § 727(a)(3), (a)(4)); *In re Hudgens*, 149 Fed. Appx. 480, 487-89 (7th Cir. 2005) (setting forth tests for § 727(a)(4), (a)(5)).