

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.)	

DECISION and ORDER

At South Bend, Indiana, on February 8, 2011.

Before the court is the Motion for Default Judgment filed by the plaintiff Factory Tile, Inc., against the defendant Cynthia Lynn Zbacnik, chapter 7 debtor. The defendant failed to respond to the plaintiff's Complaint or Motions for Clerk's Entry of Default and for Default Judgment. For the reasons that follow, the court grants the plaintiff's Motion for Default Judgment.¹

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).

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).

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, 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). However, if the request for relief is not precisely valued, the plaintiff must apply to the court for a default judgment under Rule 55(b)(2). 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 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 its favor, it still must determine whether the complaint's allegations "state a legitimate claim for relief." *In re Taylor*, 289 B.R. at 382. "A default judgment establishes, as a matter of law, that defendants are liable to plaintiff on each cause of action alleged in the complaint." *e360 Insight*, 500 F.3d at 602 (adding that a hearing must be held on damages unless the claim is liquidated or clearly calculable).

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. The plaintiff's application to the court for a judgment of default also satisfied the criteria of Rule 55(b)(2). Particularly because the defendant was a debtor, the 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 debt to the plaintiff was nondischargeable as a matter of law.

The plaintiff, in its Complaint, alleged facts to support its claim that the defendant "acted fraudulently, in bad faith, and with willful and malicious intent to injure Plaintiff." R. 1, ¶ 19. It asked that the debt owed to the plaintiff by the debtor be found nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A)²

² Section 523(a)(2)(A) provides that an individual debtor is not discharged from any debt "for money, property, [or] services" to the extent obtained by "false pretenses, a false representation, or actual fraud." To prevail under § 523(a)(2)(A) when claiming false pretenses or a false representation, a creditor must establish that: (1) the debtor obtained the property through a representation that was false or was made with such reckless regard for the truth as to constitute willful misrepresentation; (2) the debtor acted with an intent to defraud; and (3) the creditor actually and justifiably relied on the false representations. *See Ojeda v. Goldberg*, 599 F.3d 712, 716-17 (7th Cir. 2010).

and § 523(a)(6).³ The court determined that the plaintiff's allegations, uncontested by this chapter 7 debtor, satisfied the elements of the nondischargeability sections as they have been interpreted in this circuit.⁴ Although the Motion for Default Judgment did not elaborate on the causes of action at issue or on the debtor's misrepresentations, fraudulent actions, and willful and malicious intent presented in the Complaint, the Complaint itself presented sufficient information for the court to find that the plaintiff succeeded in demonstrating a *prima facie* case under § 523(a)(2)(A) and (a)(6).

Accordingly, having found that the debt owed by the defendant Cynthia Lynn Zbacnik to the plaintiff Factory Tile, Inc., is excepted from the defendant's discharge, the court now grants the plaintiff's Motion for Default Judgment against the defendant.

SO ORDERED.

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

³ Section 523(a)(6) provides: "A discharge under Section 727 . . . does not discharge an individual from any debt . . . (6) for willful and malicious injury by the debtor to another entity or to the property of another entity." To succeed under § 523(a)(6), a plaintiff must allege and prove three elements by a preponderance of the evidence: (1) that the defendant caused an injury; (2) that the defendant's actions were willful (intending to cause injury); and (3) that the defendant's actions were malicious (in conscious disregard of one's duties or without just cause or excuse). *See Garoutte v. Damax, Inc.*, 400 B.R. 208, 212-13 (S.D. Ind. 2009); *In re Odeh*, 431 B.R. 807, 817 (Bankr. N.D. Ill. 2010).

⁴ However, the court declines to find that the Judgment of the St. Joseph Superior Court has collateral estoppel effect and that the amount of that judgment is nondischargeable. The plaintiff did not attach the state court judgment to the Complaint and did not apply the elements of collateral estoppel.