

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
DEAN A. HOLDERMAN and)	CASE NO. 06-31879 HCD
CHRISTINA M. HOLDERMAN,)	CHAPTER 13
)	
DEBTORS.)	
)	
)	
DEAN A. HOLDERMAN and)	
CHRISTINA M. HOLDERMAN,)	
PLAINTIFFS,)	
vs.)	PROC. NO. 11-3012
)	
BENEFICIAL FINANCIAL I, INC.,)	
)	
DEFENDANT.)	

Appearances:

Frederick W. Wehrwein, Esq., counsel for plaintiffs, 1910 St. Joe Center Road, #52, Fort Wayne, Indiana 46825; and

Beneficial Financial I, Inc., pro se, 251 East Ohio Street, Suite 1100, Indianapolis, Indiana 46204.

ORDER

At South Bend, Indiana, on December 20, 2011.

Before the court is the second Motion for Default Judgment filed by the plaintiffs Dean A. Holderman and Christina M. Holderman, chapter 13 debtors (“debtors” or “plaintiffs”), against the defendant Beneficial Financial I, Inc. (“Beneficial” or “defendant”), the holder of the debtors’ second mortgage. The court had denied the first Motion for Default Judgment but had given the debtor another opportunity to effect proper service of the summons and Complaint on the defendant. Beneficial has not appeared in this adversary proceeding or answered the Complaint. For the reasons that follow, the court denies the second Motion for Default Judgment, as well.

The plaintiffs commenced this adversary proceeding by filing a “Complaint for an Order Canceling the Second Mortgage” (“Complaint”). When the defendant did not file a response to the

Complaint, they filed a Motion for Default Judgment. This court denied the plaintiffs' original Motion on the ground that service of process on the defendant, which had been attempted four times, still was ineffective.¹ In its Decision and Order of September 1, 2011, the court also commented that the plaintiffs' first Motion did not comply with the requirements of the default rules set out in Federal Rule of Civil Procedure 55 and Federal Rule of Bankruptcy Procedure 7055.

The plaintiffs then amended the Complaint to list the proper defendant as Beneficial Financial I, Inc. *See* R. 22. In every other respect, the First Amended Complaint was identical to the original Complaint. It set out the legal description of the Plymouth, Indiana property involved and the liens on the property. It alleged that the first mortgage holder, Nationstar Mortgage, held a mortgage for \$82,225.00, and that the value of that real estate at the time of the bankruptcy filing was \$75,000.00. It then asserted that the second mortgage holder, Beneficial, held a lien with no value, and that the lien was scheduled to be cancelled under the debtors' confirmed chapter 13 plan. *See id.*

The plaintiffs served Beneficial by certified mail, in care of the resident agent for service of process, C.P. Corp. System, in Indianapolis, Indiana. According to the affidavit of plaintiffs' counsel, the certified mail return was signed and returned to the sender.² *See* R. 28, "Verified Server's Affidavit." The court finds that service was effective on C.P. Corp. System, as the defendant's resident agent, and that the plaintiffs' service of process complied with the procedural requirements of Federal Rule of Bankruptcy Procedure 7004(b)(3).

The plaintiffs then filed their second Motion for Default Judgment; the only change from the first Motion was the corrected name of the defendant. *See* R. 29 ("Second Motion"). In support of the Second

¹ The court notes that the Claim No. 8 on the debtors' Claims Register lists Beneficial Indiana, Inc., dba Beneficial Mortgage Co, 961 Weigel Dr., P.O. Box 8603, Elmhurst, IL 60126, and the claim remarks state: "Send payments to Payment Processing, 1301 E Tower Road, Schaumburg, IL 60173."

² In the "Verified Server's Affidavit," plaintiffs' counsel stated that a copy of the certified mail receipt and return were attached to the affidavit. *See* R. 28, ¶¶ 3, 4. However, no attachments were included with the Affidavit.

Motion, they stated that the First Amended Complaint had been filed, that service of process was made, and that the defendant had not responded. Based on the defendant's default, the Second Motion sought a cancellation of the second mortgage lien held by Beneficial "for reason that said lien has no value." R. 29 at 2. The court finds that the Second Motion, like the original one, seeks a default judgment without complying with any of the requirements of the rules of default.

As the court stated in its Decision and Order of September 1, 2011, Rule 7055 of the Federal Rules of Bankruptcy Procedure, which governs defaults, 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.

In this case, the plaintiffs did not request an entry of default and file an affidavit in support of that request, as required by Rule 55(a). *See Target Nat'l Bank v. Redmond (In re Redmond)*, 399 B.R. 628, 632 (Bankr. N.D. Ind. 2008). They also failed to demonstrate that the underlying allegations of their complaint entitled them to the relief they sought, as required by Rule 55(b).³ The plaintiffs requested cancellation of

³ Rule 55(b) also requires an affidavit if the defendant is a natural person. Because the defendant is a
(continued...)

the second mortgage without showing evidence of such factors as the valuation of the encumbered property and the remaining balance on the first and second mortgage liens on the date of the petition filing. *See In re Stewart*, 408 B.R. 215, 219-21 (Bankr. N.D. Ind. 2009) (requiring a showing of the wholly unsecured status of the junior mortgage claim under § 506). Even when the court accepts as true that, when the debtors filed bankruptcy, they owned a residence in Plymouth, Indiana which had a value of \$75,000.00 and was encumbered by a first mortgage of \$82,225.00 and a second mortgage of unknown amount, the debtors have not shown that they may avoid the junior lien under the Bankruptcy Code. Chapter 13 of the Code arguably provides statutory authority to strip off an unsecured lien. Nevertheless, without proving a *prima facie* case for avoiding, cancelling, or “stripping off” an unsecured second mortgage, the plaintiffs cannot succeed on a motion for default judgment. *See id.* at 220; *see also In re Forrest*, 424 B.R. 831, 835-36 (Bankr. N.D. Ill. 2009); *In re Redmond*, 399 B.R. at 633. The court determines, therefore, that the plaintiff has not fulfilled the procedural requirements of Rule 55(a) or (b).

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. In this case, the plaintiffs failed to meet the default requirements of Rule 55 (a) and (b); a junior mortgage lien cannot be stripped without the necessary demonstration of all the criteria under that Rule. *See In re Forrest*, 424 B.R. at 835.

Accordingly, the court denies the plaintiffs’ Second Motion for Default Judgment. Nevertheless, it grants the plaintiffs a final opportunity to fulfill the requirements of Rule 55. Plaintiffs are given twenty-one (21) days to do so. Failure to do so may result in the dismissal of the adversary proceeding.

SO ORDERED.

/s/ HARRY C. DEES, JR.

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

³(...continued)
corporation, however, the plaintiffs were not expected to file that affidavit.