

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

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|---------------------------|---|-----------------------|
| IN THE MATTER OF |) | |
| |) | |
| BRAD WISENBAUGH and |) | CASE NO. 12-30625 HCD |
| ANNA K. WISENBAUGH, |) | CHAPTER 7 |
| |) | |
| DEBTORS. |) | |
| |) | |
| |) | |
| LAPORTE COMMUNITY FEDERAL |) | |
| CREDIT UNION, |) | |
| PLAINTIFF, |) | |
| vs. |) | PROC. NO. 12-3036 |
| |) | |
| BRAD WISENBAUGH and |) | |
| ANNA K. WISENBAUGH, |) | |
| DEFENDANTS. |) | |

Appearances:

Brooks J. Grainger, Esq., counsel for plaintiff, Post Office Box 6200, South Bend, Indiana 46660-6200; and
Brad Wisenbaugh and Anna K. Wisenbaugh, pro se defendants, 6003 West Zacharie, La Porte, Indiana 46350.

MEMORANDUM OF DECISION

At South Bend, Indiana, on December 3, 2012.

Before the court is the Motion for Default Judgment filed by the plaintiff Laporte Community Federal Credit Union (“plaintiff” or “Credit Union”) against the defendants Brad and Anna K. Wisenbaugh, chapter 7 debtors (“defendants” or “debtors”). The defendants did not appear or respond to the plaintiff’s Complaint, which requested that the court find the defendants’ debt to the plaintiff nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A) or (B). For the reasons set forth below, the court denies the plaintiff’s Motion.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)(I).

BACKGROUND

The debtors Brad and Anna K. Wisenbaugh, represented by Janice Shei, Esquire, filed a voluntary chapter 7 petition on March 1, 2012. On Schedule F, they listed the creditor Laporte Community Federal Credit Union as an unsecured creditor in the amount of \$2,050.00. After the chapter 7 Trustee held the § 341 meeting of creditors, he filed his Report stating that there was no property available for distribution from the debtors' bankruptcy estate to creditors. The debtors received their Order of Discharge on June 18, 2012; the Order stated, however, that not all types of debts are discharged in a chapter 7 case. The bankruptcy case was closed by Order of June 26, 2012.

The plaintiff herein timely filed this adversary proceeding, alleging in its Complaint that the defendant Brad Wisenbaugh ("Brad") misrepresented information on the Credit Union's loan application and misrepresented his willingness and ability to repay the \$2,000.00 loan he owes to the Credit Union. *See* R. 1 and Exs A, B. It asked the court to determine that the debt, in the amount of \$2,075.00 plus interest, costs, and attorney fees, was nondischargeable pursuant to § 523(a)(2)(A) or (B). *See id.* ¶¶ 20, 21.

The plaintiff's Certificate of Service declared that the plaintiff served the defendants and Janice Shei, Esq., by certified mail on the same day the Complaint was filed with the court. *See* R. 3, 4. Almost two months later, the plaintiff filed its Motion for Default Judgment. It reported, in three brief paragraphs, that the summons and Complaint were served on the defendants and their bankruptcy attorney; that no answer was filed; that the defendant is not in military service and is not an infant or incompetent; and that the debt is nondischargeable. *See* R. 5. Based upon that Motion, the Clerk's Entry of Default was issued as to each defendant. *See* R. 6, 7. The court now reviews the plaintiff's request that a judgment by default be entered against the defendants.

DISCUSSION

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 such as this one. 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). 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. 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 may request a default judgment under Rule 55(b). 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 Target Nat’l Bank v. Redmond (In re Redmond)*, 399 B.R. 628, 632 (Bankr. N.D. Ind. 2008) (citing cases). The motion for default judgment also 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 Ill.*, 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. *See Morrison v. Mergen (In re Mergen)*, 473 B.R. 743, 744 (Bankr. W.D. Wis. 2012). 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." *Attorneys' Title Ins. Fund, Inc., v. Zecevic (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.

In this case, the plaintiff's Motion, by requesting a default judgment before requesting an entry of default, put the cart before the horse. The plaintiff's Motion did not recognize the distinction between first establishing the default and seeking an entry of default under Rule 55(a) and then, after the Clerk of the Court enters the default, establishing entitlement to the relief sought and seeking a default judgment under Rule 55(b). It also did not provide the affidavit required at each of the two stages. Even though service of process on the defendants and their bankruptcy attorney appears to be proper, without a sworn statement that verifies that the defendant received proper notice and that due process was accorded, the plaintiff failed to fulfill the "entry of default" criteria of Rule 55(a). Accordingly, the Clerk's Entry of Default, improvidently entered, must be set aside.

The court also finds that the "default judgment" requirements of Rule 55(b) were not properly established. The plaintiff provided no affidavit with verification of the defendant's competence, adult status, and non-military status, and no supporting report concerning his military service from the Department of Defense Data Center or from some other source. In addition, even though the Complaint was thorough in its allegations and was supported by exhibits, Rule 55(b) requires that a motion for default judgment present

a *prima facie* case that demonstrates that the Complaint's undisputed allegations proved the essential elements of the Bankruptcy Code section under which the Complaint was brought, in this case 11 U.S.C. § 523(a)(2)(A) and (B). There must be factual allegations to support those elements. *See In re Hostetter*, 320 B.R. 674, 679 (Bankr. N.D. Ind. 2005) (noting the court's discretion to require "some proof of the facts that are necessary to a valid cause of action or to determine liability") (citation omitted). Without a sufficient basis for entitlement to a default judgment for nondischargeability, the court will not grant a default judgment. The court concludes that the plaintiff's cursory Motion in no way met the requirements of either Rule 55(a) or Rule 55(b). *See In re Redmond*, 399 B.R. at 632-33.

Accordingly, the court sets aside and vacates the Clerk's Entry of Default and denies the plaintiff's Motion for Default Judgment. Nevertheless, it grants the plaintiff another opportunity to demonstrate its entitlement to an entry of default and a default judgment. The court, in its discretion, allows the plaintiff fourteen (14) days from the date of this Memorandum of Decision to comply with the requisites of Federal Rule of Bankruptcy Procedure 7055 and Federal Rule of Civil Procedure 55.

CONCLUSION

For the reasons set forth in this Memorandum of Decision, the Clerk's Entry of Default is stricken and the plaintiff's Motion for Default is denied. If the plaintiff chooses not to pursue its Complaint further, this adversary proceeding will be dismissed after fourteen (14) days from the date of this Memorandum of Decision.

SO ORDERED.

/s/ HARRY C. DEES, JR.

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