UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF	)	
	)	
ERNEST BOWYER, JR.	)	CASE NO. 11-31568 HCD
	)	CHAPTER 7
DEBTOR.	)	
	)	
	)	
UNITED STATES TRUSTEE,	)	
PLAINTIFF,	)	
vs.	)	PROC. NO. 11-3043
	)	
DENNIS MILLER, RICHARD KUHNS, and	)	
VANGUARD PROPERTIES LLC,	)	
DEFENDANTS.	)	

D E C I S I O N and O R D E R

At South Bend, Indiana, on January 20, 2012.

Before the court are the "Motion to Dismiss and Notice of Lack of Jurisdiction" and "Motion for Extension of Time in Response to Summons" filed by the defendants Dennis Miller ("Miller") and Richard Kuhns ("Kuhns") (jointly, "defendants"). *See* R. 34, 35, 36, 37. The plaintiff United States Trustee, by Ellen L. Triebold, Esq. ("Trustee" or "plaintiff"), filed an Objection to the defendants' Motions to extend time. The court has considered each motion and the objections thereto and, for the reasons set forth below, denies the defendants' motions.

BACKGROUND

The court entered a default judgment against the defendants Miller and Kuhns on October 6, 2011.[1] *See* R. 27, 28 (Judgment and Mem. Decision). Five days later, the defendants each filed an identical

[1] The court denied the plaintiff's default judgment motion against the third defendant, the corporation Vanguard Properties LLC, but allowed the plaintiff to effect proper service on that defendant pursuant to Federal Rule of Bankruptcy Procedure 7004(b)(3). *See* R. 27 at 3. Service on Vanguard, through its registered agent Dennis Miller, was effected on October 11, 2011. *See* R. 33.

motion captioned "Motion to Dismiss and Notice of Lack of Jurisdiction."[2] A month thereafter, each defendant filed a document entitled "Motion for Extension of Time in Response to Summons," identical in

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[2] The Motions were almost identical, except that the names of the defendants changed. The court replicates verbatim the Motion of defendant Richard Kuhns, which contained a jurisdiction argument omitted from Dennis Miller's Motion:

> MOTION TO DISMISS AND NOTICE OF LACK OF JURISDICTION
>
> Now comes Richard-O:Kuhns a sovereign man on dry land, with motion to dismiss based on the following:
>
> 1. Attorney for Plaintiff alleges that a valid response was not filed, A response was filed on August 9 2011 by way of a IRS Form 56 that appointed ELLEN TREIBOLD as Trustee for Case No. 11-03043. It appears that a response to IRS Form 56 was not acknowledged as required by law.
>
> 2. Plaintiff lacks jurisdiction over the living man Richard-O:Kuhns, see enclosed "Act of State"
>
> 2A An "Act of State" was registered in International Common Law of The Hague as file number A2011-0.810121107 with the Secretary of State-Indiana and I don't believe there is any evidence to the contrary.
>
> 2B RICHARD KUHNS – STRAW MAN – DEBTOR severed and I don't believe there is any evidence to the contrary.
>
> 2C I, Richard-O:Kuhns, the man, domicile at 9659 N State Rd 19, Nappanee, Indiana (without the US) and I don't believe there is any evidence to the contrary.
>
> 2D I, Richard-O:Kuhns, occupy the Office of "Executrix" to administer the "RICHARD KUHNS ESTATE" as evidenced by the IRS Form 56 and have exercised my inherent right as "Power of Attorney and Declaration as Representative" to handle all Commercial affairs Forthwith and I don't believe there is any evidence to the contrary.
>
> YOU HAVE BEEN NOTICED. Done this 11th day of October, 2011. [3-cent stamp affixed]
> by Richard-O:Kuhns (signature), authorized representative.
> Signed reserving all my rights at UCC 1-207 & 1-308
>
> I AM HERE IN MY PROPER CAPACITY TO DISMISS THE PRESUMPTION OF JURISDICTION, AS I AM AMONG THE LIVING AND WILL BE HANDLING MY COMMERCIAL AFFAIRS ACCORDINGLY.
>
> THIS IS AN OFFICIAL NOTICE "I AM NOT DEAD IN THE WATER."

R. 35. Defendant Miller's Motion, R. 34, includes his name and address and omits paragraphs 2 and 2A.

all respects except for the name of the defendant.[3] *See* R. 36, 37. Neither document presented an actual motion under the title of the Motion. There was no substance to the filing: no allegations, no relief sought or grounds therefor, no factual or legal authority for the Motion. In fact, neither Motion by Miller or Kuhn gave any information whatsoever.

On December 9, 2011, the plaintiff filed her Objection to the Motions for Extension of Time filed by each defendant. *See* R. 38, 39. She asserted that the Motion did not comport with Federal Rule of Bankruptcy Procedure 9013, which requires a motion to set forth the relief sought and to state with particularity the grounds for relief. She also argued that the Motion did not comport with local rule B-9006-1, which requires a party seeking an extension of time to contact the opposing party prior to filing the motion and further requires the motion to state the agreed-to or requested enlargement date. She requested that the Motions be stricken. The court has considered the defendants' Motions and the objections thereto.

DISCUSSION

The defendants filed their Motions to Dismiss after the court entered its Judgment by default in favor of the Trustee and against the defendants. A motion to dismiss generally must allege and demonstrate that the complaint must be dismissed because it failed to state a claim upon which relief can be granted, *see* Federal Rule of Civil Procedure 12(b)(6), or that it failed to state a claim to relief that was "plausible on its face," *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009), or that it merely presented a "formulaic recitation of the elements of a cause of action," *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1964, 167 L.Ed.2d 929 (2007). Nowhere in their Motions to Dismiss do the defendants so allege. Nowhere do they respond to or address the allegations in the Trustee's Complaint.

The defendants assert that they filed a valid response, and that it was IRS Form 56. However, IRS Form 56 is a Notice Concerning Fiduciary Relationship. It is executed to designate a fiduciary for tax

[3] Each Motion was comprised of the bankruptcy case caption, the title of the Motion, the signature of each defendant with the statement "all rights reserved," and a 4-cent stamp attached in the corner. The defendants did not move for anything. There was no body to the Motion.

purposes. *See U.S. v. Hill*, 2005 WL 3536118 at *2 (D. Ariz. Dec. 22, 2005) ("Form 56 merely gives notice of a pre-existing fiduciary relationship and cannot, by itself, create a relationship."). In this case, the defendants used the form to name, falsely, the attorney for the Trustee as the defendants' fiduciary. *See, e,g, United States v. Able*, 2010 WL 2431013 at *2 (D.S.C. March 26, 2010) (recognizing the defendant's filing of false Form 56 and other IRS documents as elements of a tax fraud scheme).

The defendant Kuhn also asserts that the plaintiff lacks jurisdiction over him because an "Act of State" was registered in the International Common Law of the Hague. A court may dismiss an action for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) and for lack of personal jurisdiction over a party under Rule 12(b)(2). However, Kuhn does not append the alleged document or explain its relevance to this case. He does not set forth in what manner any international agreement, act, or common law prohibits this court's jurisdiction over him personally or over this bankruptcy case and the related adversary proceeding filed in this court. He has not satisfied his burden of proving that the exercise of jurisdiction over him in this bankruptcy proceeding is in any way unreasonable. *See Simon v. Phillip Morris, Inc.*, 86 F. Supp. 2d 95, 137 (E.D.N.Y. 2000) (reviewing international conventions on jurisdiction, concluding that personal jurisdiction over the defendant was proper). Nor has he suggested that this court lacks subject matter jurisdiction to render a valid judgment herein. Indeed, the court finds such allegations to be delay tactics and impediments to justice, even "nonsensical rants that in no way relate to this case." *United States v. Mackey*, 2009 WL 424396 at *2 (E.D.La. Feb. 19, 2009) (upholding a default judgment against the defendant). Dismissal of this adversary proceeding will not be based on IRS Form 56 or on an "Act of State" registered in the International Common Law of the Hague.

This court rendered a default judgment against the defendants after the court determined that neither defendant had timely responded to the plaintiff's Complaint and that the plaintiff had complied with all the requirements of Federal Rule of Civil Procedure 55(a) and (b), made applicable in adversary proceedings under Federal Rule of Bankruptcy Procedure 7055. Once the court determined that the

defendants were in default, the Clerk of the Court entered default pursuant to Rule 55(a). At that point, the defendants were deemed to have conceded the factual allegations of the Complaint. Once default has been entered, each defaulting party "loses his standing before the court, as well as his right to present evidence on issues other than unliquidated damages," because the "well-pleaded allegations of the complaint relating to liability are taken as true." *United States v. Able*, 2010 WL 2431013 at *5; *see also In re Jarosz*, 322 B.R. 662, 670 (Bankr. E.D. Wis. 2005) ("Generally, when default is entered, the defaulting party loses standing to contest the truth of the facts alleged in the complaint."). The Trustee then fully demonstrated, in her Motion for Default Judgment, that the allegations of the Complaint were well pleaded. She fulfilled the requirements of Rule 55(b) and established her entitlement to the relief sought. Based on the record before the court, the Trustee's Motion for Default Judgment was granted. The defendants have given no explanation for their failure to file an answer and have raised no issues of material fact to challenge the Complaint. The reasons given for dismissal are without any merit. The court concludes that the default judgment was warranted in this case and that the Motions to Dismiss must be denied.

The defendants' Motions for Extension of Time in Response to Summons, filed December 9, 2011, must also be denied. The plaintiff served the Complaint on each defendant, and the Certificate of Service gave notice to each that a response was due within 30 days. An answer or response by Miller and Kuhns was due on or before August 11, 2011, and by Vanguard Properties LLC was due on or before November 10, 2011.[4] No response was ever filed, timely or untimely, and no explanation for their failure to respond has been given. Bankruptcy Rule 9006 provides that "the court for cause shown may at any time in its discretion . . . on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect." Fed. R. Bankr. P. 9006(b)(1). However, no excusable neglect has been alleged to justify an extension of time. Indeed, no cause whatsoever was given;

[4] The defendants Miller and Kuhns filed Motions for Extension of Response to Summons on August 9, 2011, but they were ordered to amend the motions by the court's Order of August 22, 2011. The parties were granted seven (7) days in which to file amended Motions. When no filing was submitted to the court, the court ordered that the Motions be stricken. *See* Order of September 7, 2011, R. 12, 13.

nothing was requested in the body of the Motions, and no argument for relief was made. The court finds, therefore, that the Motions are untimely filed and that they fail to set forth any relief sought or the grounds for such relief. *See* Fed. R. Bankr. P. 9013.

The court agrees with the Trustee that the Motions, as filed, are frivolous and must be stricken. The Motions, with no request or argument to justify them, are irrelevant and insufficient. The court finds that both the Motions to Dismiss and the Motions for Extension of Time are documents that have wasted the court's and the plaintiff's time and resources. They contained neither factual nor legal backing. If further inappropriate filings are made, and if they are found to cause unnecessary delay, or to be filed in bad faith, the court will consider whether the defendants should be sanctioned.

Accordingly, based upon the record before it, the court sustains the Plaintiff's Objection and denies the Motion for Extension of Time in Response to Summons filed by the defendants Dennis Miller and Richard Kuhns.

CONCLUSION

For the reasons set forth above, the plaintiff's Objection to Motion for Extension of Time in Response to Summons is sustained and the Motions for Extension of Time in Response to Summons filed by the defendants Dennis Miller and Richard Kuhns are denied. The Motions to Dismiss and Notice of Lack of Jurisdiction filed by defendants Dennis Miller and Richard Kuhns are also denied.

SO ORDERED.

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