

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
EARL EUGENE MILLER and)	CASE NO. 11-31434 HCD
DAWN MARIE MILLER,)	CHAPTER 13
)	
DEBTORS.)	
)	
)	
INDIANA DEPARTMENT OF WORKFORCE)	
DEVELOPMENT,)	
PLAINTIFF,)	
vs.)	PROC. NO. 11-3042
)	
EARL EUGENE MILLER,)	
)	
DEFENDANT.)	

Appearances:

LeGrand L. Clark, counsel for the plaintiff, Office of the Attorney General, 302 West Washington Street, Fifth Floor, Indianapolis, Indiana 46204; and

Earl Eugene Miller, pro se, 18561 County Road 46, New Paris, Indiana 46553.

MEMORANDUM OF DECISION

At South Bend, Indiana, on November 17, 2011.

Before the court is the Indiana Department of Workforce Development’s Amended Motion for Default Judgment, filed by the Attorney General and Deputy Attorney General of Indiana (“plaintiff” or “IDWD”), against chapter 13 debtor Earl Eugene Miller (“defendant” or “debtor”). The plaintiff again requests a judgment by default on the underlying Complaint to Determine Dischargeability of Debt. For the reasons that follow, the court again must deny the plaintiff’s Motion for Default Judgment.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).

The court summarized the background facts in its Memorandum of Decision of October 26, 2011, and need not repeat them here. *See* R. 6 at 2. In that opinion, the court set forth the criteria established in the default rules, Rule 55 of the Federal Rules of Civil Procedure and Rule 7055 of the Federal Rules of Bankruptcy Procedure. It pointed out which requirements the plaintiff had failed to meet under those rules. The plaintiff thereafter satisfied certain requisite elements of Rule 55(a) by moving for an entry of default. *See* R. 7. However, IDWD did not verify that information by filing an affidavit to show the defendant's nonresponse and the plaintiff's proper service of process. *See* Fed. R. Civ. P. 55(a) ("and that failure is shown by affidavit or otherwise"); *see also* R. 6 at 2-3; *In re Redmond*, 399 B.R. 628, 632-33 (Bankr. N.D. Ind. 2008). Nevertheless, the court issued the Clerk's Entry of Default.

The plaintiff then filed the Amended Motion for Default Judgment now before the court. It stated that the plaintiff served the summons and complaint and that the defendant did not respond.² In the remaining paragraphs of the Amended Motion and in the prayer for relief, the plaintiff repeated verbatim the Complaint. Attached to the Amended Motion were two exhibits: (1) an "Affidavit for Default Judgment," filed by plaintiff's counsel, and (2) the "Plaintiff's Designation of Materials Relied Upon in Support of the Amended Motion for Default Judgment." Appended to the second exhibit were these documents: (A) the plaintiff's "Determination of Eligibility," dated November 25, 2008; (B) the plaintiff's "Notice of Potential Overpayment," dated November 25, 2008; (C) the plaintiff's "Investigation Case History," dated November 21, 2008, and "Report of Interview," dated November 18, 2008; and (D) an "Affidavit of Indebtedness," filed by a Collection Specialist of the plaintiff, dated November 2, 2011.

The Affidavit of plaintiff's counsel verified the defendant's status as not a minor, an incompetent person, or a member of the armed forces. The court finds that it contained facts sufficient to satisfy the affidavit requirement of Rule 55(b). *See* R. 6 at 3; *In re Redmond*, 399 B.R. at 632.

² The Amended Motion also stated that an Amended Complaint was served. *See* R. 11, ¶¶ 1, 2. Nothing in the court's record, however, reflects that the Complaint was amended, and no certificate of service of an Amended Complaint was submitted to the court.

However, the Amended Motion did not satisfy Rule 55(b)'s requirement that it demonstrate entitlement to the relief sought in the Complaint. In its recent Memorandum of Decision in this adversary proceeding, the court described in detail the duty of a plaintiff to set forth a *prima facie* case in order to succeed on a motion for default judgment. *See* R. 6 at 4-6. The plaintiff filed its Complaint pursuant to 11 U.S.C. § 523(a)(2)(A) and (a)(7), but it never referred to the elements of either exception to discharge. It briefly mentioned the defendant's failure to disclose but failed to allege and demonstrate the defendant's knowing and willful misrepresentation, his intent to deceive, and the other required factors of § 523(a)(2)(A). *See, e.g., In re Carey*, 2010 WL 936117 (D.N.J. March 11, 2010) (finding insufficient proof of debtor's intent to defraud under § 523(a)(2)(A)); *In re Gaither*, 2006 WL 5217792 at *2 (Bankr. D. Md. Feb. 27, 2006) (concluding that plaintiff "does not even come close to satisfying its burden" under § 523(a)(2)(A)). Moreover, the plaintiff gave no indication that a fine, penalty, or forfeiture was involved in any transaction between the plaintiff and defendant. Indeed, the court finds no justification in the plaintiff's Complaint or Amended Motion for a claim under § 523(a)(7).

The court determines, as well, that the Amended Motion made no reference to the exhibits appended to it. If those exhibits were meant to demonstrate the allegations in the Complaint and to support the relief sought, they failed to do so. *See In re Gaither*, 2006 WL 5217792 at *2 (noting that exhibits were not identified or discussed, questioning their relevance).³ However, "[q]uestions of dischargeability and the

³ The court points, as an example, to Exhibit A, the "Determination of Eligibility," which was one of the designated materials supporting the plaintiff's Amended Motion. In it the investigator, Steven Stump, presented the "Circumstances of Case" and the "Conclusion of Case":

You [defendant Earl E. Miller] were employed at Swift Transportation Co. and had earnings during [specified] week(s). . . . You were in truck driving school full time (dates given). . . . An interview was scheduled in the Elkhart Local Office for 11-25-08. On 11-19-08 you called and stated that you did not receive any of the monies earned from Swift Transportation when claiming benefits, that it all went to pay off your truck driving school bill.

CONCLUSION OF CASE

Based on available evidence, it must be concluded that you knowingly failed to disclose, or falsified material facts. Therefore, the penalties prescribed by Chapter 13, Section 1.1 of the Laws of Indiana (continued...)

interpretation of the bankruptcy code are to be determined under the federal bankruptcy laws, not state law.” *Wisconsin Dept. of Workforce Dev. v. Ratcliff*, 390 B.R. 607, 613 (E.D. Wis. 2008). The plaintiff did not show that any of the appended documents supports a *prima facie* case for exception to discharge under § 523(a)(2)(A) or § 523(a)(7) of the Bankruptcy Code.

A judgment by default is a drastic remedy, one rendered against disobedient parties. *See Matter of Maurice*, 21 F.3d 767, 773 (7th Cir. 1994). Even when a defendant is technically in default, a plaintiff is not entitled, as a right, to a default judgment. The plaintiff must provide factual allegations that establish the liability of the defendant. *See In re Liebl*, 434 B.R. 529, 536 (Bankr. N.D. Ill. 2010) (requiring a showing of “at least *prima facie* facts meeting the legal requirements to except a debt from discharge”); *In re Stewart*, 408 B.R. 215, 220 (Bankr. N.D. Ind. 2009) (“[I]n order to be entitled to a judgment by default, the plaintiff must establish a *prima facie* case which evidences the plaintiff’s entitlement to the relief requested.”); *In re Zecevic*, 344 B.R. 572, 576 (Bankr. N.D. Ill. 2006) (stating that a debtor in bankruptcy “has a presumptive right to a discharge” and that “default judgment motions should not be granted unless the movant shows that its debt is nondischargeable as a matter of law”). Because the plaintiff has not demonstrated a *prima facie* basis for relief under § 523(a)(2)(A) or (a)(7), he is not entitled to a judgment by default.

The court has determined that the allegations in the plaintiff’s Complaint do not even include the elements of § 523(a)(2)(A) or (a)(7), that the assertions in the Amended Motion are identical to those in the Complaint, and that there are no facts presented by the plaintiff to support a finding that the debt claimed by IDWD was nondischargeable. The circumstances of fraud have not been alleged with particularity, as

³(...continued)

relating to the Department of Workforce Development apply.

R. 11, Ex. A. The court finds that the evidence reported in that document simply did not lead to the report’s conclusions (a) of the debtor’s knowing failure to disclose or falsification of material facts, or (b) that provisions under Indiana law relating to the Department of Workforce Development applied to this case. Moreover, the plaintiff made no attempt to show the relevance of this report and the other exhibits to the adversary proceeding in this bankruptcy.

is required under Federal Rule of Civil Procedure 9(b) and Federal Rule of Bankruptcy Procedure 7009. There is no averment of an intent to deceive. In its earlier Memorandum of Decision, the court itemized the requirements of Rule 55 that were not met. The plaintiff was aware of the court's reasons for denying the previous motion for default judgment and was given 21 days to cure the deficiencies. It failed to do so. *See In re Zecevic*, 344 B.R. at 579 ("The Adversary proceeding will be dismissed with prejudice since Plaintiff was aware of the Court's questions about this case and apparently lacks any more evidence that would meet its need.").

CONCLUSION

For the reasons stated above, the court denies the Amended Motion for Default Judgment filed by the plaintiff Indiana Department of Workforce Development against the defendant Earl Eugene Miller, chapter 13 debtor, and dismisses the adversary proceeding with prejudice.

SO ORDERED.

/s/ HARRY C. DEES, JR.

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