

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
TY ALLEN SENDERS,)	CASE NO. 11-30720 HCD
)	CHAPTER 13
DEBTOR.)	
)	
INDIANA DEPARTMENT OF WORKFORCE)	
DEVELOPMENT,)	
)	
PLAINTIFF,)	
vs.)	PROC. NO. 11-3031
)	
TY ALLEN SENDERS,)	
)	
DEFENDANT.)	

Appearances:

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

Ty Allen Senders, pro se, 68264 County Road 23, New Paris, Indiana 46553.

MEMORANDUM OF DECISION

At South Bend, Indiana, on November 21, 2011.

Before the court is the Amended Motion for Default Judgment of the plaintiff Indiana Department of Workforce Development (“plaintiff” or “IDWD”), against chapter 13 debtor Ty Allen Senders (“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 25, 2011, and need not repeat them here. *See* R. 9 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. 10. 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.² *See* Fed. R. Civ. P. 55(a) ("and that failure is shown by affidavit or otherwise"); *see also* R. 9 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 next 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.³ It then argued that the defendant's debt to the plaintiff should be held nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A) and (a)(7). 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) and (C), the plaintiff's two "Determinations of Eligibility," dated March 22, 2011; (B) and (D), the plaintiff's three "Notices of Potential Overpayment," dated March 14, 2011; and (E) 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. 9 at 3; *In re Redmond*, 399 B.R. at 632.

² The court notes that the plaintiff had filed a cursory Affidavit with its original Motion for Default Judgment; both were filed prematurely, before a Clerk's Entry of Default was requested. *See* R. 8.

³ 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.

The Amended Motion attempted to satisfy Rule 55(b)'s requirement that it demonstrate entitlement to the relief sought in the Complaint. The Complaint was filed pursuant to 11 U.S.C. § 523(a)(2)(A) and (a)(7), but the pleading did not refer to the elements of those exceptions to discharge to justify its claims of nondischargeability of the debtor's debt. One allegation in each of the two counts brought the Complaint within the ambit of § 523(a)(2)(A):

A subsequent investigation by the Department disclosed that Senders failed to disclose material facts which would have made Senders ineligible to receive the money paid to and accepted by him.

R. 1, ¶¶ 8, 18. The Complaint asserted nondischargeability under § 523(a)(7) by alleging that, under Indiana Code § 22-4-13-1.1(b), the plaintiff was entitled to receive civil penalties of 25% of the overpayment amount for the first ineligibility and of 50% of the overpayment amount for the second. *See id.*, ¶¶ 12, 21.

In the Amended Motion, the plaintiff sought to rectify the brevity of the Complaint by showing that it was entitled to its claims of nondischargeability. It set forth the criteria for each provision and the undisputed facts which, it argued, demonstrated the required factors of § 523(a)(2)(A) and § 523(a)(7). It stated that the defendant was employed at Hoosier Horse Trailers LLC during the weeks of August 22-29, 2009; January 16-February 6, 2010; and July 10-August 28, 2010. However, he had applied for and had received unemployment benefits for those weeks. The defendant did not appear at the interview scheduled by the IDWD, and did not appeal its determination of the defendant's ineligibility. The decision became final on April 1, 2011. The plaintiff asserted entitlement to the repayment of unemployment benefits for those weeks, plus civil penalties of 25% and 50% pursuant to Indiana Code § 22-4-13-1.1(b), for a total debt of \$5,649.25. The plaintiff then incorporated the terms of § 523(a)(2)(A) in presenting a summary argument in its Amended Motion:

In summary, the Defendant, Ty A. Senders, obtained unemployment benefits from the Department by certifying that she [*sic*] was unemployed and eligible to receive benefits. The Defendant knew that her [*sic*] representations were false because he was employed at Hoosier Horse Trailers LLC at the same time he was receiving unemployment benefits. The Defendant deceived the Department, and the Department relied on the Defendant's deceptions to its

detriment, i.e., it erroneously paid unemployment benefits to the Defendant – benefits in which the Defendant was not entitled.

R. 14, ¶ 16.

The court finds that the Complaint demonstrated that the plaintiff found the defendant ineligible, under Indiana’s labor laws, to receive unemployment benefits payments for specified weeks when he was employed. State law requires repayment of improper benefit payments and imposes civil penalties. *See* Ind. Code § 22-4-13-2; § 22-4-13-1.1. However, under § 523(a)(2)(A) of the Bankruptcy Code, a plaintiff must prove, by a preponderance of the evidence, that the debtor made false representations, knowing them to be false when he made them, and making them with the intention of deceiving the creditor. In addition, the plaintiff must show that it, as creditor, justifiably relied on those representations to its detriment. *See* R. 9 at 5 (citing *In re Sheridan*, 57 F.3d 627, 635 (7th Cir. 1995), and other cases). The Complaint alleged the defendant’s failure to disclose material facts 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 at *2-*3 (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)).

The plaintiff’s attempt, in the Amended Motion, to re-describe the underlying facts in order to satisfy the elements of § 523(a)(2)(A) was insufficient. The Indiana statutes, which provide a means of recouping overpayments obtained by false statement or by the failure to disclose a material fact, *see* Ind. Code § 22-4-13-1(c), do not require a showing of the defendant’s intent to deceive or the creditor’s reliance and injury, and the IDWD did not make such a proof. The plaintiff’s depiction, in its Amended Motion’s “summary” description, resembled an attempt to push a square peg through a round hole. That description does not support a claim under § 523(a)(2)(A). Moreover, since the claim of the nondischargeability of the state law penalties depends upon the nondischargeability of the underlying debt, the court finds that the claim under § 523(a)(7) also fails.

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”). The plaintiff has not demonstrated a *prima facie* basis for relief under § 523(a)(2)(A) or (a)(7) and is not entitled to a judgment by default.

One last point must be made. In its Memorandum of Decision of October 25, 2011, 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.”). The court concludes that the plaintiff’s Complaint must be dismissed.

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 Ty Allen Senders, 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