

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
ROBERT HARRISON BOLES,)	CASE NO. 12-30329 HCD
)	CHAPTER 7
)	
DEBTOR.)	
)	
)	
KEMBA CREDIT UNION,)	
)	
PLAINTIFF,)	
vs.)	PROC. NO. 12-3027
)	
ROBERT HARRISON BOLES,)	
)	
DEFENDANT.)	

Appearances:

David Patrick Durbin, Esq., attorney for plaintiff, Bleecher, Brodey & Andrews, 9247 North Meridian Street, Suite 101, Indianapolis, Indiana 46260; and

Robert Harrison Boles, pro se defendant, 51642 Tall Pines Drive, Elkhart, Indiana 46514.

MEMORANDUM OF DECISION

At South Bend, Indiana, on November 28, 2012.

Before the court is the Motion for Default Judgment of Nondischargeability of Debt filed by the plaintiff Kemba Credit Union (“plaintiff” or “Kemba”) against the defendant Robert Harrison Boles, chapter 7 debtor (“defendant” or “debtor”). The plaintiff requests that the court grant a judgment by default against the defendant on the ground that the debt he owes to the plaintiff is nondischargeable under 11 U.S.C. § 523(a)(2). For the reasons that follow, the court denies the plaintiff’s Motion.¹

BACKGROUND

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).

Robert Harrison Boles filed a voluntary chapter 7 bankruptcy petition on February 14, 2012. Kemba was listed on Schedule F as a creditor holding an unsecured claim. On the Statement of Financial Affairs, the state court civil judgment “*State of Indiana v. Boles*, Case No. 20DO21012FC00118,” was listed, with the additional statement “restitution ordered.” After the first meeting of creditors, the chapter 7 Trustee filed his Report stating that no property of the debtor’s estate was available for distribution to creditors. The Order of Discharge was issued on May 29, 2012, and the case was closed on August 8, 2012.

On April 24, 2012, Kemba timely filed its Complaint Objecting to Dischargeability of Debt. *See* R. 1. The plaintiff alleged that the debt owed to it by the defendant arose out of a series of checks written in July 2010 by the defendant. According to the Complaint, the defendant deposited the checks into his Kemba bank account, knowing that he did not have sufficient funds, with the intent to deceive and defraud the plaintiff by withdrawing sums of money from his account before the deposited checks had cleared. Attached to the Complaint as exhibits were copies of those checks and the July 2010 monthly statement reflecting the transactions and the resulting fees for insufficient funds. *See id.*, Exs. A, B.

The Complaint also stated that the defendant was convicted of a Class C felony for those actions under Indiana Code § 35-43-5-8. By its Order of August 29, 2011, the Elkhart Superior Court sentenced the defendant to home detention and probation and required payment of a fine, court costs, and restitution to the victim, Kemba. *See id.*, Ex. C, “*State of Indiana v. Boles*, Case No. 20DO21012FC00118.” The Complaint further described and attached the Victim Offender Reconciliation Program Contract signed by the defendant and a representative of Kemba, in which the defendant promised to pay Kemba \$8,894.67 in restitution. *See id.*, Exs. D, E. The Contract stated that the defendant would make his first payment on February 13, 2012. However, he filed bankruptcy on February 12, 2012.

The Complaint alleged that the defendant’s unpaid debt was excepted from discharge pursuant to 11 U.S.C. § 523(a)(2)(B) as “a debt for money which was obtained by use of a false written statement

respecting the Defendant's financial condition upon which the Plaintiff reasonably relied and which statement the Defendant made with the intent to deceive the Plaintiff in order to obtain money." R. 1, ¶ 9.

The plaintiff's Certificate of Service declared that the defendant and his bankruptcy attorney Rachel A. Kidd, Esq., were served the summons and a copy of the Complaint by first class mail on the same day the Complaint was filed with the court. *See* R. 5. Six weeks, later, the plaintiff filed its "Motion for Default Judgment of Nondischargeability of Debt" ("Motion"). It reported, in four brief paragraphs, that the Complaint was filed, that service was obtained on the defendant, that the defendant did not respond, and that the plaintiff was entitled to a default judgment. *See* R. 6. The court now reviews the plaintiff's request that a judgment by default be entered against the defendant.

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 defendant and his 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).

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 § 523(a)(2)(B). For example, the Complaint alleged an intent to deceive; the Motion now must demonstrate that element of § 523(a)(2)(B) by direct or indirect evidence. There must be factual allegations to support that essential element. *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). There must be a sufficient basis for entitlement to a default judgment for nondischargeability before the court will 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 denies the plaintiff’s Motion for Default Judgment. Nevertheless, it grants the plaintiff another opportunity to demonstrate its right to an entry of default. Within fourteen (14) days of the date of this Memorandum of Decision, the plaintiff may request a Clerk’s Entry of Default, with supporting sworn statement, as described above. If the default is entered against the defendant, the plaintiff then may seek a judgment by default pursuant to Rule 55(b).

CONCLUSION

For the reasons set forth in this Memorandum of Decision, the court denies the Motion for Default Judgment of Nondischargeability of Debt filed by the plaintiff Kemba Credit Union against the defendant Robert Harrison Boles, chapter 7 debtor, without prejudice.

SO ORDERED.

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