

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
WILLIAM JOSEPH DePALMA,)	CASE NO. 11-33640 HCD
)	CHAPTER 7
)	
DEBTOR.)	
)	
)	
ALEKSANDR BLYAKHEROV,)	
)	
PLAINTIFF,)	
vs.)	PROC. NO. 11-3060
)	
WILLIAM JOSEPH DePALMA,)	
)	
DEFENDANT.)	

Appearances:

Amy D. Griner, Esq., counsel for plaintiff, Griner & Company, Attorneys at Law, 2827 Lincolnway East, Mishawaka, Indiana 46544; and

William Joseph DePalma, pro se defendant, 59716 Thornberry Court, South Bend, Indiana 46614.

MEMORANDUM OF DECISION

At South Bend, Indiana, on November 29, 2012.

Before the court is the Motion for Default Judgment filed by plaintiff Aleksandr Blyakherov against defendant William Joseph DePalma, chapter 7 debtor. The defendant did not appear or respond to the plaintiff's Complaint, which requested that the court find the defendant's debt to the plaintiff nondischargeable pursuant to 11 U.S.C. § 523(a)(2) and (a)(4). 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 debtor, represented by Anita K. Gloyeski, Esquire, filed a voluntary chapter 7 petition in bankruptcy. After the chapter 7 Trustee held the § 341 meeting of creditors, she filed her Report stating that there was no property available for distribution from the debtor's bankruptcy estate to creditors. The debtor received his Order of Discharge; the Order stated, however, that not all types of debts are discharged in a chapter 7 case.

The plaintiff herein filed this adversary proceeding, alleging that he, a creditor of the defendant debtor, held a judgment against the defendant which was entered on July 22, 2008, in the St. Joseph Superior Court. *See* R. 1, ¶¶ 1, 2. According to the plaintiff's Complaint, the state court found that the defendant obtained money from the plaintiff by making false material representations with the intent to deceive the plaintiff. It ordered compensatory damages of \$24,000.00, punitive damages of \$72,000.00, and attorney fees of \$2,000.00. *See id.* ¶ 3. In the Complaint before this court, the plaintiff argued that the state court judgment, based upon the defendant's false representations, actual fraud, deceit and larceny, should be held to be nondischargeable in the defendant's bankruptcy under 11 U.S.C. § 523(a)(2) and (4). *See id.* ¶ 4.

The Certificate of Service filed by the plaintiff verified that service of the summons and a copy of the Complaint was timely made on the defendant by regular first class mail at the address listed on his bankruptcy petition. His bankruptcy attorney was not served. When the defendant failed to respond to the Complaint within the time period established by the summons, the plaintiff filed a Motion for Entry of Default Judgment. *See* R. 5. The Clerk of the Court then entered default against the defendant. Many months later, the plaintiff filed a Motion for Default Judgment. It set forth the Complaint's central allegations, reported the defendant's failure to answer the Complaint, noted the issuance of the Clerk's Entry of Default, and requested a judgment by default. The court now reviews the plaintiff's Motion requesting a judgment by default to determine whether it comports with the procedural mandates for default judgments.

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 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 United States v. Kaufman*, 453 F.2d 306, 308-09 (2nd Cir.1971); *Target Nat’l Bank v. Redmond (In re Redmond)*, 399 B.R. 628, 632 (Bankr. N.D. Ind. 2008). 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.

The court finds that the plaintiff's initial Motion, requesting both an entry of default and default judgment, attempted to subsume into one motion both Rule 55(a) and Rule 55(b), and failed to satisfy the requirements of either prong. The plaintiff 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). He failed to serve the summons and Complaint on the defendant-debtor's attorney, *see* Fed. R. Bankr. P. 7004(g), and failed to file the Rule 55(a) affidavit or other sworn statement that verified that the defendant had received proper notice and that due process was accorded. *See* Fed. R. Bankr. P. 7055; Fed. R. Civ. P. 55(a); *see also Target Nat'l Bank v. Redmond (In re Redmond)*, 399 B.R. 628, 632 (Bankr. N.D. Ind. 2008) (setting forth mandates of Rule 55(a)). For these reasons, the Clerk's Entry of Default should not have issued. The court now sets aside the entry of default as improvidently entered.

In addition, the plaintiff did not file the Rule 55(b) affidavit and failed to present a *prima facie* case under § 523(a)(2) and (a)(4). For example, under § 523(a)(2)(A), such factors as misrepresentation, fraud, and intent to deceive are criteria that must be shown by direct or indirect evidence. Cursory

allegations are insufficient; there must be factual allegations that demonstrate those essential 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”). In this case, the plaintiff alleged a state court judgment, but failed to append it to the Complaint or to demonstrate its *res judicata* or collateral estoppel effect on this court. The court determines that the plaintiff has failed to provide a sufficient basis for entitlement to a default judgment for nondischargeability under Rule 55(a) and (b). Consequently, the Motion for Default Judgment must be denied.

However, this adversary proceeding failed more fundamentally in its initial phase, well before the Motion for Default Judgment. As was noted above, the plaintiff properly served the summons and Complaint on the defendant-debtor, in compliance with Federal Rule of Bankruptcy Procedure 7004(b)(9), but did not serve the defendant-debtor’s attorney. *See Thompson v. U.S.*, 445 Fed. Appx. 878, 880 (7th Cir. 2011) (stating that “proof of valid service is always a prerequisite to judicial relief”) (citing *Omni Capital Int’l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104, 108 S. Ct. 404, 98 L.Ed.2d 415 (1987)). Rule 7004(g) requires that, when a defendant is a debtor and is represented by counsel, the debtor’s attorney also must be served. *See In re Flaherty*, 432 B.R. 742, 749 (Bankr. N.D. Ill. 2010). The court finds that the plaintiff failed to comply with that Rule. Consequently, service of process on the debtor defendant was insufficient and invalid. *See In re Yashaya*, 402 B.R. 278, 283 (Bankr. E.D.N.Y. 2009) (“The Bankruptcy Rules provide that service of process on a Debtor is insufficient unless both the debtor and his attorney are served with the summons and complaint.”).

“Valid service of process is necessary in order to assert personal jurisdiction.” *In re Smith*, 111 F.3d 133 at *1 (7th Cir. 1997) (citing *Omni Capital Int’l*, 484 U.S. at 104); *see also In re Haughee*, 428 B.R. 828, 832 (Bankr. N.D. Ind. 2010) (finding that court lacked personal jurisdiction over defendant who was never effectively served). In this case, service of process was ineffective and, as a result, the court does not have personal jurisdiction over the defendant charged in the plaintiff’s Complaint. Without the establishment

of personal jurisdiction over the defendant in this adversary proceeding, the court cannot consider either an entry of default or a default judgment. Accordingly, the Clerk's Entry of Default, improvidently entered, is now set aside and the Motion for Default Judgment is denied. *See, e.g., In re Smith*, 2011 WL 4002251 at *2 (Bankr. M.D.N.C. Feb. 7, 2011).

When the defendant has not been served within 120 days after the complaint is filed, the court is required to "dismiss the action without prejudice against that defendant or order that service be made within a specified time." Fed. R. Civ. P. 4(m); *see Cardenas v. City of Chicago*, 646 F.3d 1001, 1007-08 (7th Cir. 2011). The court, in its discretion, allows the plaintiff fourteen (14) days from the date of this Memorandum of Decision to obtain an alias summons and attempt proper service on the defendant and his bankruptcy counsel.

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. This adversary proceeding will be dismissed if the plaintiff fails to effect proper service on the defendant and his attorney within 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