

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
WILLIAM G. POE, SR., and)	CASE NO. 12-30526 HCD
CATHERINE L. POE,)	CHAPTER 7
)	
DEBTORS.)	
)	
)	
INDIANA DEPARTMENT OF WORKFORCE)	
DEVELOPMENT,)	
PLAINTIFF,)	
vs.)	PROC. NO. 12-3033
)	
WILLIAM G. POE, SR.,)	
)	
DEFENDANT.)	

Appearances:

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

MEMORANDUM OF DECISION

At South Bend, Indiana, on December 12, 2012.

Before the court is the Motion for Entry of Default filed by the Indiana Department of Workforce Development (“plaintiff” or “IDWD”) against chapter 7 debtor William G. Poe, Sr. (“defendant” or “debtor”) on November 27, 2012. The plaintiff seeks an entry of default on the ground that the defendant failed to answer or otherwise plead to the Complaint to Determine Dischargeability of Debt. For the reasons that follow, the court grants 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).

The plaintiff filed its Complaint on May 23, 2012. The Certificates of Service filed with this court indicate that the plaintiff made three attempts to serve the defendant. *See* R. 4 (May 31, 2012); R. 7 (August 17, 2012); and R. 12 (October 2, 2012). The last Certificate of Service affirmed that service of the summons and a copy of the Complaint was made on September 20, 2012, by certified mail. *See* R. 12. It properly listed the recipients (the defendant and his bankruptcy attorney Jeffrey Arnold, Esq.), their addresses, and the certified mail receipt numbers. The “Track and Confirm” receipt of the United States Postal Service, appended to the Certificate of Service, stated that the mailing was processed on September 21, 2012, at 4:47 p.m., and delivered to the attorney on September 24, 2012, at 10:59 a.m. The certified mail receipt of delivery to the attorney was not signed, however. The date of delivery to the defendant was not available; the defendant’s wife signed the certified mail receipt but did not date it.

The plaintiff filed a Motion for Entry of Default on November 27, 2012.² In its four brief paragraphs, the IDWD stated that it filed its Complaint with the court and served the Complaint upon the defendant and his attorney by certified mail; that the defendant failed to answer the Complaint; and that, to the best of its knowledge, the defendant was not an infant, incompetent person, or person in military service. R. 13, ¶¶ 1-4. The court now considers whether the Motion for Entry of Default can or should be granted.

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).

² The plaintiff had filed an earlier Motion for Entry of Default on August 21, 2012, but withdrew the document on September 18, 2012.

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 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. *See In re Redmond*, 399 B.R. 628, 632 (Bankr. N.D. 2008) (stating that affidavit is mandated under Rule 55(a)). 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. Only after the default has been entered, however, may the plaintiff request a default judgment under Rule 55(b).

In this case, the plaintiff filed a Motion comprised of cursory statements, including the assertion that, to the best of the plaintiff’s knowledge the defendant was not an infant, incompetent person, or military serviceman. *See* R. 5, ¶ 3. The plaintiff, making that pronouncement in paragraph 3 as an affiant under penalty of perjury, did not claim to have personal knowledge of the relevant facts and did not supplement the statement with documentation. Courts generally hold that such unsubstantiated affirmations are insufficient. *See America’s Best Inns, Inc. v. Best Inns of Abilene, L.P.*, 980 F.2d 1072, 1074 (7th Cir. 1992) (per curiam) (“[O]nly the affidavit made on personal knowledge has any value (‘to the best of my knowledge and belief’ is insufficient).”); *cf. Medical Assurance Co., Inc. v. Hellman*, 610 F.3d 371, 376 (7th Cir. 2010) (stating that “affidavits alleging citizenship based on ‘the best of my knowledge and belief’ are, by themselves, insufficient to show citizenship in a diversity case,” citing *America’s Best Inns*). The court finds that the plaintiff’s unsubstantiated statement in the Motion concerning the defendant’s non-military status is insufficient as an averment based upon personal knowledge.

However, it is Rule 55(b), not 55(a), which must be supported by an affidavit demonstrating the defendant’s non-military status. *See Target Nat’l Bank v. Redmond (In re Redmond)*, 399 B.R. 628, 632

(Bankr. N.D. Ind. 2008). For that reason, the plaintiff still has the opportunity to file an appropriate affidavit that complies with the Soldiers' and Sailors' Civil Relief Act. *See id.* The Rule 55(a) Motion now before the court, in contrast, requires a sworn statement which affirmatively demonstrates the plaintiff's proper service, the defendant's failure to answer, and expiration of the time for response. The court finds that the Motion concluded with the phrase "sworn to under penalties for perjury," and the court therefore deems the Motion to be an affidavit with the proper language of affirmation, as if it were a "verified" Motion for Entry of Default. As such, the court concludes that the Motion meets the affidavit requirement of Rule 55(a).

Rule 55(a) also requires that the defendant be effectively and timely served with process before a default may be entered against him. Proof of service of the summons must be satisfied before a court may assert personal jurisdiction over a defendant. *See United States v. Ligas*, 549 F.3d 497, 500 (7th Cir. 2008). If service is not timely effected, the court has no personal jurisdiction over the defendant, and the case may be dismissed. *See Hurst v. Names Unknown*, 42 Fed.Appx. 895, 896 (7th Cir. 2002); *In re Flaherty*, 432 B.R. 742, 752 (Bankr. N.D. Ill. 2010). The plaintiff has the burden of demonstrating that service of process was accomplished. *See Cardenas v. City of Chicago*, 646 F.3d 1001, 1005 (7th Cir. 2011).

A plaintiff is responsible for serving the summons and complaint within the 120-day time period allowed by Federal Rule of Civil Procedure 4(m), which applies in adversary proceedings. *See Fed. R. Bankr. P. 7004(a)(1); Fed. R. Civ. P. 4(m).*³ The Rule requires a plaintiff "to serve a proper summons and a copy of the complaint on all defendants – delivered by a person authorized to serve process and received by a person authorized to accept it for the defendant – within the time restrictions of Rule 4(m)." *Mann v. Castiel*, 729 F. Supp. 2d 191, 195-96 (D.D.C. 2010). The Rule further provides that, if service on a

³ Federal Rule of Civil Procedure 4(m) provides:

(m) Time Limit for Service. If a defendant is not served within 120 days after the complaint is filed, the court – on motion or on its own after notice to the plaintiff – must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. . . .

defendant is not accomplished within 120 days after the Complaint is filed, the court has three choices. It either “must dismiss the action without prejudice against that defendant”; “order that service be made within a specified time”; or “extend the time for service for an appropriate period” if the plaintiff demonstrates good cause for the failure to serve. Fed. R. Civ. P. 4(m). The plaintiff has the burden of showing “good cause.” *Geiger v. Allen*, 850 F.2d 330, 333 (7th Cir. 1988).

In this case, the court finds that the Complaint was filed on May 23, 2012, and that the 120-day period expired on September 20, 2012. Service of process “is complete on mailing.” Fed. R. Bankr. P. 9006(e). According to the record herein, the Certificate of Service states that service was made on September 20, 2012, and the Post Office receipt states that the mailing was processed on September 21, 2012, and delivered on September 24, 2012. The court finds that service of process was complete on September 20, 2012, the final day of the 120-day period. Therefore the plaintiff did serve a timely alias summons on the defendant and his counsel within the time period of Rule 4(m).

Consequently, the court finds that the plaintiff’s brief assertion, in its Motion for Entry of Default, that “[t]he complaint was served upon the Defendant and the Defendant’s bankruptcy attorney by certified mail” is consistent with the court’s docket report in this case. R. 13, ¶ 2. It also determines, upon further review, that the plaintiff both timely and properly effected service of process on the defendant and his counsel. In addition, the record shows that the defendant did not file a timely response. The court concludes, therefore, that the Motion for Entry of Default fulfills the requirements of Rule 55(a).

For the reasons set forth above, the court grants the Motion for Entry of Default filed by the plaintiff Indiana Department of Workforce Development. The Clerk shall enter the default against the defendant William G. Poe, Sr., as authorized by Federal Rule of Bankruptcy Procedure 7055 and Federal Rule of Civil Procedure 55(a).

SO ORDERED.

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