

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
SOUTH BEND DIVISION

IN THE MATTER OF	)	
	)	
CHARLES ERIC HOCH and	)	CASE NO. 11-32757 HCD
CATHERINE MARIE HOCH,	)	CHAPTER 7
	)	
DEBTORS.	)	
	)	
	)	
REBECCA HOYT FISCHER,	)	
	)	
PLAINTIFF,	)	
vs.	)	PROC. NO. 12-3053
	)	
CHARLES ERIC HOCH,	)	
	)	
DEFENDANT.	)	

Appearance:

Rebecca Hoyt Fischer, Chapter 7 Trustee, 401 East Colfax, Suite 305, South Bend, Indiana 46617; and Charles Eric Hoch, pro se defendant, 4006 St. Andrews Circle, Apt. 2C, Mishawaka, Indiana 46545.

MEMORANDUM OF DECISION

At South Bend, Indiana, on December 19, 2012.

Before the court is the Motion for Default Judgment filed by Rebecca Hoyt Fischer, chapter 7 Trustee (“plaintiff” or “Trustee”) of the bankruptcy case of Charles Eric Hoch and Catherine Marie Hoch, against the debtor Charles Eric Hoch (“defendant” or “debtor”). The plaintiff seeks a default judgment on the ground that the defendant did not answer or otherwise plead to the Complaint to Revoke Discharge. The record reflects that the defendant has not pled or otherwise defended in this adversary proceeding; he has not responded to the Complaint or other documents filed by the plaintiff in this matter. Nevertheless, for the reasons stated below, the court denies the Motion for Default Judgment.<sup>1</sup>

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<sup>1</sup> 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)(J).

## BACKGROUND

The debtors filed a voluntary chapter 7 bankruptcy petition on July 13, 2011, and they were granted a discharge by the court's Order of October 17, 2011. The Order stated, however, that not all types of debts are discharged in a chapter 7 case. After the first meeting of creditors, the Trustee filed a Preliminary Inventory Report, in which she stated that she anticipated receiving funds from non-exempt 2011 federal and state tax refunds. *See* R. 13 (Case No. 11-32757). Following the Trustee's Motion to Compel Turnover of the debtor Charles Eric Hoch's 2011 tax returns, and after the time for filing objections had passed, the court ordered the defendant to turn over those tax returns within ten days of its Order. *See* R. 30, 32 (Order, July 18, 2012 (Case No. 11-32757)).

On August 6, 2012, the Trustee commenced this adversary proceeding against the debtor Charles Eric Hoch by filing a Complaint To Revoke Discharge for Failure to Cooperate with the Trustee pursuant to 11 U.S.C. § 727(d)(2). *See* R. 1. She argued in the Complaint that the defendant failed to respond to the court's Order of July 18, 2012, and failed to cooperate with the Trustee. She asserted that the defendant's failure "constitutes appropriate grounds for revocation of the discharge of Charles Eric Hoch's debts only." *Id.*, ¶ 2. The Trustee's Certificate of Service verified that the debtor and his counsel had been properly served. *See* R. 5; Fed. R. Bankr. P. 7004(b)(9), (g). The Trustee then filed an Affidavit of No Answer, Defense or Response and requested a finding of default. *See* R. 8. On October 31, 2012, the Clerk entered the default of Charles Eric Hoch. *See* R. 9.

Two weeks later, the Trustee filed a Motion for Default Judgment. In it she stated briefly that the defendant failed to answer or otherwise plead to the Complaint, that the Complaint was mailed to the defendant and his bankruptcy counsel, and that an Affidavit of Non-Military Status was attached. *See* R. 11. That Affidavit, equally cursory in its content, stated that, "to the best of the Trustee's knowledge and belief," the defendant was not in military or naval service. Attached to the Affidavit was the Department of Defense Manpower Data Center's Status Report, which stated that the defendant was not and had not been

on active status. *See id.*, Att. 1. The record shows that the defendant did not file an answer to the Motion for Default Judgment, just as he had failed to respond throughout this adversary proceeding.

### DISCUSSION

To be entitled to a judgment by default, the plaintiff must comply with the requirements of Rule 55 of the Federal Rules of Civil Procedure, which has been incorporated into bankruptcy adversary proceedings by Rule 7055 of the Federal Rules of Bankruptcy Procedure. Rule 55 clearly distinguishes between the entry of default (Rule 55(a)) and the entry of a default judgment (Rule 55(b)). *See Lowe v. McGraw-Hill Cos., Inc.*, 361 F.3d 335, 339 (7th Cir. 2004). The Trustee recognized this distinction and sought an entry of default under Rule 55(a), by filing an Affidavit that served as a motion and affidavit, before requesting a default judgment under Rule 55(b).<sup>2</sup> The Clerk of the Court entered the default.

The plaintiff then filed the Motion for Default Judgment and attached an affidavit supporting the Motion that stated that, to the best of her knowledge and belief, the defendant was not in military or naval service. Because the defendant was a natural person, the default judgment required a supporting affidavit that verified the defendant's status as not an infant, an incompetent person, or one holding military status. The affidavit needed to present facts that complied with the Servicemembers' Civil Relief Act, 50 U.S.C. App., § 501 *et seq.* *See United States v. Kaufman*, 453 F.2d 306, 308-09 (2d Cir. 1971); *Target Nat'l Bank v. Redmond (In re Redmond)*, 399 B.R. 628, 632 (Bankr. N.D. Ind. 2008). In this case, the plaintiff affirmed

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<sup>2</sup> In the Affidavit, the Trustee affirmed that, to the best of her knowledge, the defendant did not answer, defend or respond. *See* R. 8, ¶ 2. Her declaration was not made under penalty of perjury, and she did not claim to have personal knowledge of the defendant's non-response or of the effectiveness of service of process on the defendant and on his attorney. Nor did she supplement the Affidavit 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 Affidavit is insufficient as an averment based upon personal knowledge. Future affidavits and motions based on the “best of the plaintiff's knowledge and belief” will not be accepted by the court.

that, to the best of her knowledge and belief, the defendant was not in military service. Such a statement, unsupported by facts demonstrating the defendant's military status, fails to fulfill the requirements of the Act and of Rule 55(b). *See U.S. v. Simmons*, 508 F.Supp. 552, 552 (D.C. Tenn. 1980) (holding that "affiant's best information and belief," which sets forth no facts showing that the defendant is not in the military service, as is required by statute, is insufficient; denying motion for default judgment); *see also Bay Area Painters & Tapers Pension Trust Fund v. O P & Sons Constr.*, 2012 WL 2159372 at \*3 (N.D. Cal. Apr. 3, 2012) (describing supplemental declaration providing additional details requested by court); *In re Redmond*, 399 B.R. at 632 (setting forth affidavit requirements under Rule 55(b)(2)). In this case, the Trustee appended to the Affidavit the Status Report Pursuant to Servicemembers Civil Relief Act, issued by the Department of Defense Manpower Data Center, which stated that the defendant did not have active duty status. The court is therefore satisfied that the affiant Trustee has knowledge, rather than mere belief, of the defendant's military status. The court accepts the plaintiff's Affidavit, supported by the Status Report, as substantially complying with the affidavit requirement of Rule 55(b) in this case.

A second requisite of a motion for default judgment is that it demonstrate that the plaintiff's underlying allegations in the complaint entitle the plaintiff to the relief sought. *See In re Redmond*, 399 B.R. at 633. Because a court's entry of a judgment by default is discretionary, the court examines the plaintiff's Complaint to determine whether its allegations were well pled and were sufficient to state a legitimate claim for relief. *See id.*; *see also In re Taylor*, 289 B.R. 379, 382 (Bankr. N.D. Ind. 2003). Bankruptcy courts in this circuit require a plaintiff to prove a *prima facie* case under the pertinent section of the Bankruptcy Code before a default judgment is granted. *See id.* at 633 (citing cases); *DuBois v. Faber (In re Faber)*, 330 B.R. 235, 239 (Bankr. N.D. Ind. 2005).

The Trustee brought her Complaint to Revoke Discharge pursuant to § 727(d)(2). The court is mindful that revocation of discharge is a harsh measure, one contrary to the Bankruptcy Code's general policy of allowing the honest debtor a fresh start, and it therefore construes the statute strictly against the party

seeking revocation of discharge. *See Disch v. Rasmussen*, 417 F.3d 769, 777 (7th Cir. 2005) (pointing out strict limitations on a court's authority to revoke a discharge); *Grochocinski v. Eckert (In re Eckert)*, 375 B.R. 474, 478 (Bankr. N.D. Ill. 2007) (placing on plaintiff the burden of proving elements of § 727(d) by a preponderance of the evidence). Moreover, because a motion for default judgment is by its nature unopposed, the plaintiff (particularly a trustee experienced in bankruptcy practice) must establish a *prima facie* case by providing competent evidence showing that the grounds for revocation of discharge exist. *See In re Tsakhniv*, 2009 WL 3738094 at \*2 (Bankr. N.D. Ill. Nov. 5, 2009) (“In the bankruptcy context, where 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.”) (citing *Merrill Lynch Mortgage Corp. v. Narayan*, 908 F.2d 246, 252 (7th Cir. 1990)). A trustee must demonstrate, in a default judgment motion, that the unchallenged facts presented in the complaint create a legitimate legal and factual basis for the entry of a judgment by default.

Section 727(d)(2) requires the court to revoke a debtor's discharge if –

the debtor acquired property that is property of the estate, or became entitled to acquire property that would be property of the estate, and knowingly and fraudulently failed to report the acquisition of or entitlement to such property, or to deliver or surrender such property to the trustee.

11 U.S.C. § 727(d)(2). In this case, the Trustee's Complaint alleged that the debtor failed to cooperate with the Trustee by failing to turn over his 2011 tax returns. The Motion for Default Judgment alleged merely that the defendant failed to answer or otherwise plead to the Complaint. The plaintiff had the burden of setting out competent evidence demonstrating the property at issue, the defendant's knowing and fraudulent failure to turn over his tax records, to report the tax refund, or to deliver it to the Trustee. *See In re Yonikus*, 974 F.2d 901, 905 (7th Cir. 1992); *Richardson v. Schoemperlen (In re Schoemperlen)*, 332 B.R. 179, 181 (Bankr. C.D. Ill. 2005). The court has gleaned some of the factual background from the record, but the onus is on the plaintiff to establish a *prima facie* case. It is noteworthy that, in the Complaint, there is no allegation of fraud and no evidence that the debtor knowingly intended to defraud the Trustee. *See In re Yonikus*, 974 F.2d

at 905; *In re Self*, 325 B.R. 224, 248 (Bankr. N.D. Ill. 2005). Nor is there any explanation for bringing this adversary proceeding against only one of the two debtors in this bankruptcy case. The court determines that the plaintiff failed to demonstrate a *prima facie* case under Rule 55(b) or to state a legitimate claim for denial of the debtor's discharge under § 727(d)(2).

The court concludes that the Trustee has not met her burden of proving a *prima facie* case for revocation of the debtor's discharge following his default. The court therefore denies the Trustee's Motion for Default Judgment. Nevertheless, in light of the clear record shown on the court's docket, demonstrating the court's Order requiring turnover and the lack of response by the debtor, the court allows the plaintiff the opportunity to file, within twenty-one (21) days, an amended Motion for Default Judgment that presents a *prima facie* case pursuant to § 727(d)(2) and Federal Rule of Civil Procedure 55(b).

#### CONCLUSION

For the reasons presented above, the Trustee's Motion for Default Judgment against the chapter 7 debtor Charles Eric Hoch is denied. However, the plaintiff is given twenty-one (21) days to file an amended Motion that fulfills the requirements of Rule 55(b).

SO ORDERED.

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