

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
ROGER LEE SELLECK and)	CASE NO. 12-31867 HCD
STACY ANNETTE SELLECK,)	CHAPTER 7
)	
DEBTORS.)	
)	
)	
STATE OF INDIANA on the relation of the)	
INDIANA DEPARTMENT OF WORKFORCE)	
DEVELOPMENT,)	
)	
PLAINTIFF,)	
vs.)	PROC. NO. 12-3058
)	
ROGER LEE SELLECK,)	
)	
DEFENDANT.)	

Appearances:

LeGrand L. Clark, Esq., and Maricel Elaine Villacampa Skiles, Esq., counsel for plaintiff, Office of Attorney General, Indiana Government Center South, Fifth Floor, 302 West Washington Street, Indianapolis, Indiana 46204-2770; and

Roger Lee Selleck, pro se, 312 North Water Street, Peru, Indiana 46970.

MEMORANDUM OF DECISION

At South Bend, Indiana, on December 9, 2013.

Before the court is the Motion for Default Judgment filed by the plaintiff, State of Indiana on the relation of the Indiana Department of Workforce Development (“plaintiff” or “IDWD”), against the defendant Roger Lee Selleck, chapter 7 debtor (“defendant” or “Selleck”). The plaintiff commenced this adversary proceeding by filing a Complaint To Determine Dischargeability of Debt pursuant to 11 U.S.C. § 523(a)(2)(A) and § 523(a)(7). The defendant did not respond to the Complaint or to the Motion

for Default Judgment. For the reasons stated below, the court grants the Motion for Default Judgment in part and denies it in part.¹

BACKGROUND

Roger Lee Selleck and Stacy Annette Selleck filed a voluntary chapter 7 petition. After conducting the § 341 meeting, the Trustee filed his Report stating that there was no property available for distribution from the debtors' estate. The debtors were granted a discharge under 11 U.S.C. § 727; however, the court's Order stated that debts still pending before the bankruptcy court were not discharged. The case then was closed.

IDWD timely filed a proof of claim, in the amount of \$10,391.90, and timely filed an adversary proceeding against the individual debtor Roger Lee Selleck. The Complaint alleged that the defendant received unemployment compensation benefits of \$6,727.00, to which he was not entitled, and sought to have that debt declared nondischargeable as a debt for money obtained by false pretenses, false representation, or actual fraud. It also sought a civil penalty, calculated at 25% of the overpayment, of \$1,586.50. After allowances for adjustments, set-offs, and repayment, the Complaint asked for entry of a judgment in the amount of \$7,855.00 and requested that the debt be declared nondischargeable under §§ 523(a)(2)(A) and (a)(7).

The plaintiff duly served the summons and Complaint. *See* Fed. R. Bankr. P. 7004(b)(9), (g). The debtor did not answer the Complaint. *See* Fed. R. Bankr. P. 7012(a). Default was entered against the defendant pursuant to Federal Rule of Bankruptcy Procedure 7055 and Federal Rule of Civil Procedure 55(a). *See* R. 10. The plaintiff now requests that the court enter a judgment by default, in accordance with Rule 55(b). *See* R. 13.

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. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).

DISCUSSION

In its Motion for Default Judgment, the plaintiff has asked the court to enter a default judgment against the defendant because he neither appeared nor responded in this adversary proceeding. Attached to its Motion were two affidavits. The Affidavit of Indebtedness was the declaration of the plaintiff's Collection Specialist, essentially reiterating the language in the Complaint and confirming that the defendant owed the plaintiff \$7,855.00. The Affidavit for Default Judgment was the declaration of plaintiff's counsel, verifying that the defendant was not an infant, an incompetent person, or one on active military duty, as confirmed by the Department of Defense Manpower Data Center. That affidavit satisfied the requirements of Rule 55(b) and the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. App., § 501 *et seq.*, amended by the Servicemembers Civil Relief Act. *See United States v. Herzberg*, 2012 WL 523651, at *3 (E.D. Tenn. Jan. 25, 2012); *Target Nat'l Bank v. Redmond (In re Redmond)*, 399 B.R. 628, 632 (Bankr. N.D. Ind. 2008). Also attached to the Motion were documentary exhibits: "Weekly Claims" voucher forms stating that the defendant did not work and sought benefits for each of the weeks the vouchers were filed (Ex. A); the plaintiff's Investigation Case History (Ex. B); the plaintiff's Verification of Weekly Earnings (Ex. C); and the plaintiff's Determination of Eligibility (Ex. D).

In the Motion for Default Judgment itself, the plaintiff presented its § 523(a)(2)(A) claim by setting forth its undisputed facts:

- (1) Selleck received weekly unemployment benefits by stating that he was unemployed;
- (2) Selleck certified that he was unemployed, available for work, and eligible to receive benefits;
- (3) Selleck answered the question "Worked this week?" as "NO" on his Weekly Claims vouchers;
- (4) IDWD determined that Selleck was employed by Bellar Construction Management Inc. ("Bellar") for the weeks of January 3, 2009 through May 9, 2009; and
- (5) IDWD paid Selleck \$6,727.00 in benefits for the compensable weeks he claimed to be unemployed.

See R. 13, ¶¶ 7-10. When an investigator questioned him at an interview, however, the defendant said that "he did not properly report his earnings because he was having a rough time financially." *Id.*, ¶ 12 (citing

Ex. A).² IDWD thereafter made a determination of ineligibility and sent Selleck notice of the overpayment of benefits to him. *See id.*, Ex. D. Because Selleck did not file a timely appeal, the determination became final.

The Motion for Default Judgment summarized its argument for nondischargeability of the debt Selleck owed to IDWD:

In summary, the Defendant, Roger L. Selleck, obtained unemployment benefits from the Department by certifying that he was unemployed and eligible to receive benefits. Selleck knew that his representations were false because he was employed at the same time he was receiving unemployment benefits. Selleck deceived the Department, and the Department relied on Selleck's deceptions to its detriment, i.e., it erroneously paid unemployment benefits to Selleck – benefits in [*sic*] which Selleck was not entitled.

R. 13, ¶ 14. It asked the court for a judgment of nondischargeability in its favor by default. The defendant did not file a response to the Motion.

A bankruptcy 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 In re Mergen*, 473 B.R. 743, 744 (Bankr. W.D. Wis. 2012). The Seventh Circuit Court of Appeals has called a default judgment a "severe sanction." *Wellness Int'l Network, Ltd. v. Sharif*, 727 F.3d 751, 781 (7th Cir. 2013). Particularly in a bankruptcy setting, in which "a debtor has a presumptive right to a discharge, default motions should not be granted unless the movant demonstrates that its debt is nondischargeable as a matter of law." *In re Dade*, 2012 WL 1556510 at *4 (Bankr. C.D. Ill. May 1, 2012) (citations omitted); *see also In re Liebl*, 434 B.R. 529, 536 (Bankr. N.D. Ill. 2010); *In re Hostetter*, 320 B.R. 674, 678 (Bankr. N.D. Ind. 2005).

A plaintiff requesting a default judgment therefore must establish a *prima facie* showing on the merits of its claim. *See In re Taylor*, 289 B.R. 379, 382 (Bankr. N.D. Ind. 2003). The plaintiff's Complaint asked the court to declare nondischargeable the defendant's debt to IDWD under § 523(a)(2)(A) as a debt

² The court notes that there are two paragraphs numbered 12.

for money obtained by false pretenses, false representation, or actual fraud, and under § 523(a)(7) as a penalty. Under § 523(a)(2)(A), a plaintiff must establish that (1) this defendant obtained the plaintiff's money through representations that the defendant either knew to be false or made with such reckless disregard for the truth as to constitute willful misrepresentation; (2) the defendant acted with an intent to deceive the plaintiff; and (3) the plaintiff justifiably relied on the defendant's false representations to its detriment. *See, e.g., In re Davis*, 638 F.3d 549, 553 (7th Cir. 2011); *Ojeda v. Goldberg*, 599 F.3d 712, 716-17 (7th Cir. 2010); *In re Maurice*, 21 F.3d 767, 774 (7th Cir. 1994).

Under § 523(a)(7), a plaintiff has the burden of showing that the debt is (1) a fine, penalty or forfeiture, (2) payable to and for the benefit of a governmental unit, and (3) not compensation for actual pecuniary loss. *See In re Towers*, 162 F.3d 952, 954-55 (7th Cir. 1998), *cert. den.*, 527 U.S. 1004 (1999).

This court, having evaluated the plaintiff's default judgment motion, finds that IDWD demonstrated that the defendant obtained the plaintiff's money by applying for and receiving unemployment benefits through representations on the vouchers that he was not working. However, during the compensable weeks at issue, Selleck in fact was employed and paid by Bellar. The defendant admitted that he knew he was reporting his earnings improperly, and IDWD alleged that he never reported any earnings on the claims vouchers. The plaintiff asserted that the defendant "failed to disclose material facts which would have made [him] ineligible to receive benefits." R. 13, ¶ 12. Based upon the allegations, substantiated by the claims vouchers found in Exhibit A, the court determines that the defendant knowingly falsely stated, on numerous weekly vouchers, the material fact that he was unemployed, thereby receiving benefits to which he was not entitled. *See, e.g., Telligman v. Review Bd. of IDWD*, 996 N.E.2d 858, 867 (Ind. App. 2013) (affirming Board decision that defendant falsified facts to obtain unemployment benefits while employed); *cf. In re Winston*, 114 B.R. 566, 569 (Bankr. N.D. Ill. 1990) (finding that government agency should be afforded relief under § 523(a)(2)(A) when debtor failed to inform agency of employment and fraudulently continued to receive unemployment benefits).

The court also finds that the plaintiff paid the defendant unemployment benefits in reliance on the defendant's false representations that he was unemployed. *See, e.g., In re Yuppa*, 2013 WL 4854479 at *4 (Bankr. S.D. Ohio, June 12, 2013) (finding that state agency justifiably relied on defendant's misrepresentations on benefits application forms). The court thus determines that IDWD met its burden of showing the first and third factors of the *prima facie* test of § 523(a)(2)(A), knowingly false representation and justifiable reliance.

However, the plaintiff's showing concerning the second essential element, the defendant's intent to deceive the plaintiff, was problematic. The plaintiff made no allegation of the defendant's intent to deceive in its Complaint, and in its Motion for Default Judgment it merely stated conclusorily that "Selleck deceived the Department." R. 13, ¶ 14. The investigator of Selleck's claim conducted the interview to determine whether he "failed to disclose or misrepresented material facts," but he made no inquiry into Selleck's intent. *See id.*, Ex. D. In addition, the Indiana unemployment compensation statute upon which the plaintiff relies, Indiana Code § 22-4-13-1(c), contains no requirement that an intent to deceive be found. It states:

(c) Any individual who knowingly:

(1) makes, or causes to be made by another, a false statement or representation of a material fact knowing it to be false; or

(2) fails, or causes another to fail, to disclose a material fact; and

as a result thereof has received any amount as benefits to which the individual is not entitled under this article, shall be liable to repay such amount, with interest at the rate of one-half percent (0.5%) per month, to the department

Ind. Code § 22-4-13-1(c). The statute requires a finding of a knowingly false representation or omission of a material fact, but it lacks any language requiring examination of the claimant's intent to deceive. The court concludes that the element of intent to deceive is not essential to a recovery under Indiana Code § 22-4-13-1(c) but is required under § 523(a)(2)(A) of the Bankruptcy Code. It further determines that, in this case, fraudulent intent was not determined by the plaintiff's investigator or demonstrated sufficiently by the

plaintiff. *Cf. In re Chen*, 227 B.R. 614 (D.N.J. 1998) (affirming bankruptcy court's decision that state statute required knowing misrepresentation, not intent to deceive, and that defendant did not have intent required for § 523(a)(2)(A)).

Nevertheless, the plaintiff presented a document which demonstrated sufficiently to the court the defendant's intent to deceive. In the interview with the claims investigator, the defendant had stated that he "did not properly report [his] earnings because [he was] having a rough time financially." R. 13, ¶ 12; Ex. D. The defendant thus admitted that his conduct was deliberate and intentional. He admitted making false statements on the weekly vouchers. He declared that he was unemployed during the weeks that he actually was working for Bellar. *See In re Yuppa*, 2013 WL 4854479 at *4 ("Repeated misrepresentations of employment status when applying for unemployment benefits are sufficient to prove fraudulent intent.") (citing cases).

"Determining whether a debtor had the requisite intent under § 523(a)(2)(A) is a factual, subjective inquiry decided by examining all of the relevant circumstances, including those that took place when the debt occurred." *In re Hanson*, 470 B.R. 808, 821 n.3 (N.D. Ill. 2012). Courts recognize that direct evidence of an intent to deceive is seldom found, and they allow indirect proof of intent by examining the circumstantial evidence at the time the representation was made. *See, e.g., In re Haskell*, 475 B.R. 911, 921 (Bankr. C.D. Ill. 2012). The Seventh Circuit has explained, nevertheless, that a plaintiff "cannot use circumstantial evidence to demonstrate [a defendant's] intent to defraud if he cannot prove any fraudulent act by [the defendant]." *Stelmokas v. Kodzius*, 460 Fed. Appx. 600, 604 (7th Cir. 2012). In this case, the defendant confessed to his fraudulent conduct of making false statements on the weekly vouchers because he was in financial straits. In the view of the court, those admissions provide conclusive circumstantial evidence that Selleck intended to deceive IDWD in order to obtain unemployment benefits from IDWD.

Based upon the defendant's statement to the investigator and the un rebutted facts in the plaintiff's Motion for Default Judgment, the court determines that the plaintiff has succeeded in demonstrating the

second essential component to a determination of nondischargeability under § 523(a)(2)(A), the defendant's intent to deceive the plaintiff. It therefore concludes that the plaintiff has established a *prima facie* showing of each of the required elements of nondischargeability of a debt under § 523(a)(2)(A). Consequently, the plaintiff has successfully demonstrated that the defendant's debt to it is excepted from his discharge as a matter of law under § 523(a)(2)(A).

However, IDWD has not attempted to present a *prima facie* case under § 523(a)(7). It has not shown the court that the plaintiff's 25% penalty fulfills the criteria of that exception to a debtor's discharge. As the court has pointed out in earlier cases brought by this plaintiff, no allegations or arguments have demonstrated that the penalty added to the demand for repayment of unemployment compensation benefits is nondischargeable as a matter of law under § 523(a)(7).

Accordingly, the court finds that the plaintiff has complied with the procedural requirements of Federal Rule of Bankruptcy Procedure 7055 and Federal Rule of Civil Procedure 55(a) and (b). Concluding that a judgment by default is proper, the court grants the plaintiff's Motion for Default Judgment against the defendant in part and denies it in part. It grants the relief sought in the Complaint pursuant to § 523(a)(2)(A) and denies the relief sought under § 523(a)(7). Judgment of nondischargeability is entered against the defendant in the amount of \$6,268.50 in this adversary proceeding.³

³ The court has calculated, from the figures found in the plaintiff's Motion, that the plaintiff paid Selleck \$6,727.00, that the payments or offsets amounted to \$458.50, and thus that the remaining debt is \$6,268.50.

CONCLUSION

For the reasons presented in this Memorandum of Decision, the Motion for Default Judgment filed by the plaintiff, the State of Indiana on the relation of the Indiana Department of Workforce Development, against the defendant Roger Lee Selleck, is granted in part and denied in part. The relief requested in the plaintiff's Complaint pursuant to 11 U.S.C. § 523(a)(2)(A) is granted. The relief requested in the plaintiff's Complaint pursuant to 11 U.S.C. § 523(a)(7) is denied. The obligation owed by the defendant to the plaintiff, in the amount of \$6,268.50, is excepted from the defendant-debtor's discharge.

SO ORDERED.

/s/ HARRY C. DEES, JR.

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