

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
DONALD F. GARWICK,)	CASE NO. 12-32761 HCD
)	CHAPTER 7
)	
DEBTOR.)	
)	
)	
INDIANA DEPARTMENT OF WORKFORCE)	
DEVELOPMENT,)	
PLAINTIFF,)	
vs.)	PROC. NO. 12-3071
)	
DONALD F. GARWICK,)	
)	
DEFENDANT.)	

Appearances:

Heather M. Crockett, Esq., Office of the Attorney General, 302 West Washington Street, IGCS 5th Floor, Indianapolis, Indiana 46204; and

Donald F. Garwick, pro se, 204 Westwind Drive, Apartment E, Michigan City, Indiana 46360.

MEMORANDUM OF DECISION

At South Bend, Indiana, on November 20, 2013.

Before the court is the Amended Motion for Entry of Default filed by the plaintiff, State of Indiana on the relation of the Indiana Department of Workforce Development (“plaintiff” or “IDWD”), against the defendant Donald F. Garwick, chapter 7 debtor (“defendant” or “Garwick”). The defendant failed to respond to the plaintiff’s underlying Complaint To Determine Dischargeability of Debt, which charged that the defendant received unemployment compensation benefits to which he was not entitled, pursuant to Indiana Code § 22-4-13-1.1, and that his debt to the state of Indiana should be declared nondischargeable

pursuant to 11 U.S.C. § 523(a)(2)(A) and § 523(a)(7). For the reasons presented in this Memorandum of Decision, the court denies the Motion for Entry of Default.¹

BACKGROUND

Donald F. Garwick filed a voluntary chapter 7 petition on July 31, 2012. After the § 341 meeting of creditors was held, the chapter 7 Trustee filed his Report of No Distribution. The Order discharging the debtor was entered on November 13, 2012, and the case was closed on December 7, 2012.

The plaintiff timely filed its four-count Complaint seeking to have the defendant's debt to IDWD declared nondischargeable under § 523(a)(2)(A), as a debt for money obtained by false pretenses, false representation, or actual fraud, and under § 523(a)(7), as a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit. The Complaint's Count I sought the repayment of emergency unemployment compensation benefits in the amount of \$4,980.00 and a 25% civil penalty of \$1,245.00, for a total (after allowance for adjustments, set-offs and repayment) of \$4,240.00 in improper payments. Count II of the Complaint sought the repayment of regular unemployment compensation benefits in the amount of \$8,673.00 plus a 50% penalty of \$4,336.00, for a total of \$13,009.00 in improper payments. Count III sought the repayment of emergency unemployment compensation benefits in the amount of \$7,085.00 and a 100% civil penalty of \$7,085.00, for a total of \$14,170.00 in improper payments. Count IV sought the repayment of regular benefits in the amount of \$1,171.00 plus a 100% civil penalty of \$1,171.00, for a total of \$2,342.00 in improper payments.

The plaintiff duly served the summons and Complaint upon the debtor-defendant and his bankruptcy attorney of record by regular first class U.S. mail and by certified mail. *See* Fed. R. Bankr. P. 7004(b)(9), (g). The defendant's counsel signed the return receipt, indicating effective service of process, but the defendant's certified mail envelope was returned to the plaintiff unclaimed. *See* R. 8, ¶4. It appears

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).

that the delivery was attempted at the defendant's most recent address on record in this court. When the plaintiff mailed the summons and Complaint to the defendant's last known address, it completed proper service. *See* Fed. R. Bankr. P. 7005; Fed. R. Civ. P. 5(b)(2)(C). Nevertheless, the defendant did not receive the summons or Complaint. He did not file a response to the Complaint within thirty days of issuance of the summons, as the summons directed. *See* Fed. R. Bank. P. 7012(a). Now before the court is IDWD's Amended Motion for Entry of Default By Clerk.

DISCUSSION

Default rulings are governed by 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). 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). The plaintiff sought an entry of default under Rule 55(a), by filing a Motion and Affidavit. The court reviewed the Motion, Affidavit, and underlying Complaint.

A judgment by default is considered an extreme sanction. *See, e.g., Wellness Int'l Network, Ltd. v. Sharif*, 727 F.3d 751, 781 (7th Cir. 2013); *Sun v. Board of Trustees of Univ. of IL*, 473 F.3d 799, 811 (7th Cir.) (calling it a "weapon of last resort, appropriate only when a party willfully disregards pending litigation"), *cert. denied*, 551 U.S. 1114 (2007) (citation omitted).

[I]n the context of bankruptcy, where 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) (citing cases). The movant in this case, IDWD, commenced its claim that the debt was nondischargeable with a Complaint. The Complaint sought to have the debt declared nondischargeable pursuant to § 523(a)(2)(A) and § 523(a)(7). However, the court finds that the Complaint's § 523(a)(2)(A) claims against the defendant Garwick cannot succeed.

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). The court finds that the plaintiff did not establish that this defendant, Garwick, fraudulently obtained the plaintiff's unemployment benefits.

The plaintiff's Complaint alleged that Garwick filed claims for both emergency and regular unemployment compensation benefits but failed to disclose material facts which would have made him ineligible to receive those benefits. *See* R. 1, ¶¶ 8-9, 16-17, 24-25, 32-33. It then alleged that IDWD paid Hughes, not Garwick, \$4,980.00 in benefits. Nevertheless, it demanded repayment of those benefits, and an added penalty, from Garwick, not Hughes.

The court is left to conjecture who the actual defendant is. Should the Complaint have named Hughes rather than Garwick as the defendant? Was Hughes mistakenly paid benefits that were intended to be paid to Garwick? Was Garwick paid benefits intended for Hughes? The court also questions whether IDWD paid either Hughes or Garwick the amount of \$4,980.00 in benefits. R. 1, ¶ 14. According to the Complaint, the plaintiff asserted its entitlement to an additional penalty of 25% of the overpayment amount – and \$1,245.00 is 25% of \$4,980.00. However, the plaintiff then claimed that the outstanding debt was \$4,240.00. If the entire overpayment and penalty were due and owing, the debt amount would be \$6,225.00. The Complaint alleged that there may be “allowances for adjustments, set-offs and repayment,” but did not clarify that \$1,985.00 was repaid or adjusted or set off for some reason. The court therefore questions the amount of the benefits payment and the recipient of it. Indeed, it now questions the allegations in general.

The court surmises that “Hughes” was the defendant named in an earlier complaint filed by IDWD. It further assumes that the plaintiff regularly uses a standard form or template for its nondischargeability complaints, impersonally filling in the blanks as it accuses each defendant of fraud and demands a repayment and fine or penalty from the defendant. In this case, the court suspects, it carelessly failed to insert the correct name of this defendant throughout the template form.

The plaintiff’s sloppy identification of the defendant in the Complaint, however, has left unclear who actually received the benefits which the IDWD seeks to have declared nondischargeable under § 523(a)(2)(A) and to penalize further under § 523(a)(7). The court further questions whether (if its assumption of the thoughtless, mechanical use of a template is correct) IDWD’s fill-in-the-blank complaints contained the correct dates and payment amounts for whichever defendant’s name was inserted. Nevertheless, it is clear that a complaint that accuses “alternative defendants” of obtaining the plaintiff’s money (*i.e.*, unemployment benefits payments) through false representations cannot succeed.

In every case, the court reviews the documents attached to the Complaint for verification or elucidation of the underlying facts of the case. In this case, the plaintiff alleged the following in each count:

A subsequent investigation by the IDWD disclosed that Garwick failed to disclose material facts which would have made Garwick disqualified or ineligible to receive benefits or eligible to receive benefits in a reduced amount. Garwick either had not reported or under reported earnings on his weekly claims vouchers.

R. 1, ¶¶ 9, 17, 25, 33. However, the plaintiff did not include any administrative determination by an IDWD investigator or decision by an Administrative Law Judge that would confirm Garwick as the proper defendant or confirm the benefits payment amounts. In fact, no additional evidence was attached to the Complaint. Even though “courts are not required to scour the record for evidence to support a party’s arguments,” *Murray v. AT&T Mobility LLC*, 374 Fed. Appx. 667, 671 (7th Cir. 2010), the court searched the record in the defendant-debtor’s main bankruptcy case and this adversary proceeding to clarify the Complaint’s allegations. The court noted that the plaintiff did not discover the “alternative defendant” error itself (by proof-reading its pleading or by reviewing it before submitting later documents, for example); it did not proffer an amended

complaint. On this record, therefore, it appears that IDWD paid Hughes benefits but demanded repayment of those benefits from Garwick. After searching for some confirmation that the defendant herein was intended to be Garwick, the court is left with material allegations in the Complaint concerning both Garwick and Hughes.

There is no question that the misidentification of the defendant in the Complaint is not a “de minimis” or minor clerical error. If Hughes, rather than Garwick, was paid some or all of the benefits at issue herein, then Garwick could not be accused of obtaining the benefits by false pretenses, false representation, or actual fraud. This Complaint, like others submitted by this plaintiff, is simply and clearly unacceptable. (See also *IDWD v. Quaglio*, Case No. 13-30136, Adv. Proc. 13-3014, Mem. Dec. Nov. 20, 2013.) It is not the job of a court to rewrite a pleading or to excuse the careless deficiencies of a plaintiff. See *Smart v. Local 702 Int’l Bhd. of Elec. Workers*, 562 F.3d 798, 811 (7th Cir. 2009) (“[T]he court is not required to rewrite a deficient pleading.”). The court’s loss of confidence in the integrity of the plaintiff’s submissions to this court further causes the court to deny the Motion for Entry of Default and to dismiss the Complaint.

There is another reason, a substantive one, that the Complaint cannot succeed. In the four counts, the plaintiff alleged that improper unemployment compensation payments were made to the defendant, but it referred to only one state statute, Indiana Code § 22-4-13-1.1(b). However, subsection (b) concerns penalties, and it must follow from subsection (a), which was not cited. The statute provides, in pertinent part:

22-4-13-1.1. Failure to disclose or falsification of facts results in forfeiture – Civil penalties – Hearing and review – Interest and civil penalties deposited in special employment and training services fund.

(a) . . . [I]f an individual knowingly:

(1) fails to disclose amounts earned during any week in the individual’s waiting period, benefit period, or extended benefit period; or

(2) fails to disclose or has falsified any fact;

that would disqualify the individual for benefits, reduce the individual’s benefits, or render the individual ineligible for benefits or extended benefits, the individual forfeits any wage credits

earned or any benefits or extended benefits that might otherwise be payable to the individual for the period in which the failure to disclose or falsification occurs.

(b) In addition to amounts forfeited under subsection (a), an individual is subject to the following civil penalties for each instance in which the individual knowingly fails to disclose or falsifies any fact that if accurately reported to the department would disqualify the individual for benefits, reduce the individual's benefits, or render the individual ineligible for benefits or extended benefits

Ind. Code § 22-4-13-1.1(a), (b). The court finds that the Complaint does not allege that the defendant *knowingly* failed to disclose any information. The *scienter* criterion is essential to the plaintiff's entitlement to receive both repayments and civil penalties under the state law, and to prove the debt nondischargeable under § 523(a)(2)(A). The court finds that the plaintiff failed to sustain its burden of alleging or demonstrating with sufficient evidence that the defendant knowingly failed to disclose material facts. *See Telligman v. Review Board of IDWD*, _ N.E.2d _, 2013 WL 5799438 at *7 (Ind. App. Oct. 29, 2013) (affirming Board's finding of claimant's knowing failure to disclose or falsify facts).

As was stated above, § 523(a)(2)(A) requires a plaintiff to establish that the defendant obtained the plaintiff's money through knowingly false representations or willful misrepresentations. This Complaint merely alleges that the defendant failed to disclose material facts. Section 523(a)(2)(A) also mandates that the plaintiff show that the defendant acted with the intent to deceive the plaintiff. However, this Complaint contains no allegation of the defendant's intent to deceive the plaintiff. Finally, § 523(a)(2)(A) demands that the plaintiff demonstrate its justifiable reliance on the defendant's false representations. Again, no reliance, justifiable or otherwise, by the plaintiff was alleged. In other words, the plaintiff did not give even the most cursory attention to the requirements of the state statute and the federal bankruptcy statute when it drafted this inadequate, substantively empty Complaint. It did not even include documentary substantiation from the administrative record of the IDWD.

Based on the record before this court, therefore, the court concludes that the plaintiff has not established, as a matter of law, any of the essential requirements of § 523(a)(2)(A). It has failed to present a *prima facie* case that would demonstrate the nondischargeability of the debt claimed by the IDWD under

§ 523(a)(2)(A). Moreover, without proof that the debt itself is nondischargeable, no fine or penalty based upon that debt can be held nondischargeable under § 523(a)(7). Consequently, the court denies the plaintiff's Motion for Entry of Default and dismisses this unacceptable Complaint.

CONCLUSION

For the reasons set forth in this Memorandum of Decision, the court denies the Motion for Entry of Default filed by the plaintiff, the State of Indiana on the relation of the Indiana Department of Workforce Development, against the defendant Donald F. Garwick. The plaintiff's Complaint is dismissed with prejudice.

SO ORDERED.

/s/ HARRY C. DEES, JR.

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