

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
MICHAEL LEE MILLER,)	CASE NO. 13-32185 HCD
)	CHAPTER 7
)	
DEBTOR.)	
)	
)	
4MHC ASSOCIATES, LIMITED)	
PARTNERSHIP,)	
)	
PLAINTIFF,)	
vs.)	PROC. NO. 13-3069
)	
MICHAEL LEE MILLER,)	
)	
DEFENDANT.)	

Appearances:

Jon Lieberman, Esq., counsel for plaintiff, Weltman, Weinberg & Reis, Co. L.P.A., 525 Vine Street, Suite 800, Cincinnati, Ohio, 45202; and

Michael Lee Miller, pro se, 51 Greenway Drive, Goshen Indiana 46526.

MEMORANDUM OF DECISION

At South Bend, Indiana, on April 22, 2014.

Before the court is the Motion for Default Judgment filed by the plaintiff, creditor 4MHC Associates, Limited Partnership (“plaintiff” or “creditor”), against Michael Lee Miller, chapter 7 debtor (“defendant” or “debtor”). The defendant did not respond or appear in this adversary proceeding. For the reasons that follow, 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

Michael Lee Miller filed a voluntary chapter 7 petition on July 26, 2013. He listed the plaintiff as a judgment creditor on Schedule F and included him on the Matrix. After the § 341 meeting of creditors was held, the chapter 7 Trustee filed his Report of No Distribution. The Order of Discharge of the debtor was issued on November 12, 2013, and the bankruptcy case was closed on March 31, 2014.

The plaintiff timely filed its Complaint to Determine Dischargeability of a Debt against the defendant on November 4, 2013. It alleged that the defendant, doing business as MLM Enterprises LLC (“MLM”), sold the plaintiff a 1995 Redman mobile home on August 17, 2010, for \$12,000.00. Attached to the Complaint was the invoice of MLM for the sale of the mobile home to “Rob Pryber,” with shipment to “Whispering Willows MHP.”² On the invoice was a notation that a payment of \$6,000.00 was made on August 23, 2010, and that the home was to be delivered on Wednesday, September 8th. Also attached to the Complaint was a copy of both sides of the down payment check of \$6,000.00. The check, written on August 23, 2010, was paid from the account of 4 MCH Associates, L.P., to the order of MLM Enterprises, LLC. On the back side of the check was an illegible endorsement. The Complaint alleged that the defendant had endorsed the plaintiff’s check, deposited it into his personal account, and spent it.

The Complaint further stated that the parties had agreed that the remaining \$6,000.00 would be paid upon delivery of the mobile home, but that the mobile home was never delivered to the plaintiff. On October 22, 2010, and again thereafter, the Complaint alleged, the defendant agreed to refund the plaintiff’s \$6,000.00 payment, and on November 18, 2010, the defendant advised the plaintiff that he had sent the check to the plaintiff. The Complaint stated that the plaintiff never received the check. According to the Complaint, on January 24, 2011, the defendant acknowledged to the plaintiff that he still owed the \$6,000.00 payment to the plaintiff. The Complaint alleged that the plaintiff never was paid and believes that MLM Enterprises LLC was an assumed business name rather than a business on record with the Indiana Secretary

² The court notes that no explanation of the relationship between the parties on the invoice, Rob Pryber and Whispering Willows MHP, and this plaintiff, 4MHC Associates, L. P., has been given.

of State. After filing a complaint in the Elkhart Superior Court against Michael L. Miller, personally and doing business as MLM, the plaintiff obtained a default judgment against him in that court, in the amount of \$6,000.00 plus interest and costs. Attached to the Complaint were the state court complaint and the Judgment of the Elkhart Superior Court, dated July 10, 2011. The Complaint asked the court to declare the debt owed to the plaintiff by the defendant nondischargeable under 11 U.S.C. § 523(a)(2)(A).

The Complaint was filed in the bankruptcy court on November 4, 2013, and was served upon the defendant and his attorney, along with the summons, on November 26, 2013. *See* R. 6. The defendant did not answer or respond to it. On February 7, 2014, the plaintiff filed a Motion for Default Judgment, requesting a judgment by default in its favor. Attached was a Memorandum in Support. Again there was no response from the defendant. The court therefore reviews the plaintiff's Motion for Default Judgment.

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. 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. When the request is filed with an affidavit, the clerk enters the party's default. 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, Rule 55(b)(1) allows the Clerk of the Court, upon the plaintiff’s request and with an accompanying affidavit, to enter default judgment when the plaintiff’s claim is for an exact sum, one that was detailed in declarations and/or documentary exhibits. *See e360 Insight v. The Spamhaus Project*, 500 F.3d 594, 602 (7th Cir. 2007). However, if the request for relief is not precisely valued, the plaintiff must apply to the court for a default judgment under Rule 55(b)(2). 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 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 IL*, 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. After the court accepts 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. “A default judgment establishes, as a matter of law, that defendants are liable to plaintiff on each cause of action alleged in the complaint.” *e360 Insight*, 500 F.3d at 602.

In this case, the plaintiff did not demonstrate the criteria required under the default rules in order to establish the default of this defendant. Indeed, even its service of process commencing the adversary proceeding was insufficient, and without proper service the court cannot consider the subsequent Motion for Default Judgment. The plaintiff's Complaint was filed on November 4, 2013, and the summons was issued on November 5, 2013. Plaintiff, by counsel, served the Complaint and summons upon the defendant and his bankruptcy attorney on November 26, 2013. *See* R. 6; R. 7 (Mem. Support), at ¶ 2. However, the summons had expired on November 19, 2013. *See* Fed. R. Bankr. P. 7004(e) (requiring delivery of summons and complaint within 14 days after issuance of summons). The plaintiff did not seek an alias summons to effect proper service on the parties. *See id.*; *see also In re Menges*, 337 B.R. 191, 193 (Bankr. N.D. Ill. 2006) ("If service is not made in that time, the summons is stale, and another summons must be issued."). It is clear that the untimely service was defective and that "[s]ervice of a stale summons is no service at all." *Id.* at 194.

Moreover, service of the summons and complaint was not made "within 120 days after the filing of the complaint," as Federal Rule of Civil Procedure 4(m) requires. *See* Fed. R. Bankr. P. 7004(a) (applying Fed. R. Civ. P. 4(m) in bankruptcy proceedings). Proper service pursuant to Bankruptcy Rule 7004(e) is a prerequisite for timely service under Civil Rule 4(m). *See Premier Capital, Inc. v. DeCarolus*, 2002 WL 47134 at *6 (D.N.H. Jan. 2, 2002) (citing *In re Love*, 232 B.R. 373, 378 (Bankr. E.D. Tenn. 1999), *aff'd* 242 B.R. 169 (E.D. Tenn. 1999) and 3 Fed. Appx. 497 (6th Cir. 2001)). The court concludes, therefore, that service was tardy and ineffective under Bankruptcy Rule 7004(e) and Civil Rule 4(m).

A court "may not exercise personal jurisdiction over a defendant unless the defendant has been properly served with process." *United States v. Ligas*, 549 F.3d 497, 500 (7th Cir. 2008).

Rule 4(m) generally requires a plaintiff to serve process within 120 days, but a plaintiff may move for additional time to serve the defendant. If the plaintiff shows good cause for his failure to accomplish service within the designated period of time, then the district court must grant an extension. If the plaintiff cannot show good cause, then the decision to grant an extension is left to the discretion of the . . . court.

Id. at 501 (citations omitted); *see also Rose v. U.S. Postal Service*, 352 Fed. Appx. 82, 84 (7th Cir. 2009).

Despite that rule's lenient option, however, this plaintiff did not move for additional time to show good cause for its failure to timely serve the defendant. Nor did it move to show excusable neglect under Bankruptcy Rule 9006(b). No meritorious reason has been given for the delayed service of process.

“When a plaintiff fails to serve process within the period of time prescribed by the federal rules, Rule 4(m) requires the . . . court to dismiss the complaint without prejudice.” *Ligas*, 549 F.3d at 501. Nevertheless, in this case dismissal without prejudice would result in a dismissal with prejudice, since the deadline for filing dischargeability complaints expired on November 4, 2013, the day this plaintiff filed its Complaint, and its re-filing therefore would be time-barred under Bankruptcy Rule 4007. *See In re Flaherty*, 432 B.R. 742, 753-54 (Bankr. N.D. Ill. 2010) (citing *In re Ryan*, 408 B.R. 143, 159-60 (Bankr. N.D. Ill. 2009)). For that reason, the court in its discretion allows the plaintiff an opportunity to show good cause for its failure to effect valid service on the defendant within 14 or 120 days..

The court concludes that, as a result of the plaintiff's ineffective service upon the defendant, the court has no jurisdiction over this defendant. Accordingly, the Motion for Default Judgment filed by the plaintiff against the defendant is denied. In its discretion, it allows the plaintiff fourteen (14) days to submit a written response showing good cause for its untimely service of process. Failure to make such proof shall result in the dismissal of the Complaint with prejudice.

SO ORDERED.

Harry C. Dees, Jr., Judge
United States Bankruptcy Court