

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
DONNA GENALEA HOOKS,)	CASE NO. 13-32791 HCD
)	CHAPTER 7
)	
DEBTOR.)	
)	
)	
INDIANA DEPARTMENT OF WORKFORCE)	
DEVELOPMENT,)	
PLAINTIFF,)	
vs.)	PROC. NO. 13-3076
)	
DONNA GENALEA HOOKS,)	
DEFENDANT.)	

Appearances:

Maricel Elaine Villacampa Skiles, Esq., counsel for the plaintiff, Office of the Attorney General, 302 West Washington Street, IGCS 5th Floor, Indianapolis, Indiana 46204; and

Donna Genalea Hooks, *pro se*, 403 North Jefferson Street, Silver Lake, Indiana 46982.

MEMORANDUM OF DECISION

At South Bend, Indiana, on September 17, 2014.

Before the court is the Motion for Default Judgment filed in this adversary proceeding by the plaintiff, State of Indiana on the relation of the Indiana Department of Workforce Development (“plaintiff” or “IDWD”), against the chapter 7 debtor Donna Genalea Hooks (“defendant” or “Hooks”). 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). The defendant did not respond to the Complaint or to the Motion for Default Judgment. For the reasons stated below, the court denies the Motion for Default Judgment.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. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).

Donna Genalea Hooks, by counsel, filed a voluntary chapter 7 petition on September 26, 2013.

On her Statement of Financial Affairs she listed, as “income other than from employment or operation of business,” \$4,243.00 received from “debtor unemployment” in 2012 and \$13,526.00 received in 2011. The IDWD timely filed a proof of claim in the amount of \$7,650.57. After the § 341 meeting of creditors was held, the chapter 7 Trustee filed his Report of No Distribution, certifying that there was no estate property available for distribution and that the debtor’s estate had been fully administered. On January 6, 2014, the Order granting the debtor her discharge under 11 U.S.C. § 727 was issued, but the Order explained that “debts that the bankruptcy court specifically has decided or will decide in this bankruptcy case are not discharged.” R. 11, Order, p. 2, Case No. 13-32791. The IDWD had timely filed its adversary proceeding against the defendant-debtor on December 30, 2013, and thus the debt under consideration therein was not discharged. The main bankruptcy case was closed on January 10, 2014, but the adversary case remained pending.

The IDWD’s Complaint generally alleged that the defendant received unemployment compensation benefits, in the total amount of \$4,436.00, to which she was not entitled, and sought to have that debt declared nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A) as a debt for money obtained by false pretenses, false representation, or actual fraud. Count I alleged that the defendant applied for emergency unemployment compensation benefits but failed to disclose that she was employed by and received wages from Gulf Stream Coach, Inc. (“Gulf Stream”) during the compensable weeks of July 16 to July 23, 2011. It further alleged that the defendant worked sporadically and reported her earnings in some weeks but failed to report her earnings in other weeks. The plaintiff requested repayment of \$780.00 paid to the defendant in benefits for that period. It also claimed entitlement to a 25% civil penalty of \$195.00, and sought that the total amount of \$975.00 be declared excepted from the defendant’s discharge.

Count II alleged that the defendant applied for extended unemployment compensation benefits without disclosing that she was employed by Gulf Stream during the compensable weeks of October 29,

2011 and December 3 to 17, 2011. This Count again alleged that she worked sporadically and reported earnings in some weeks but not in other weeks. It requested repayment of benefits in the amount of \$1,560.00 and claimed a 50% penalty payment of \$780.00. However, after set-off, adjustment, and repayment allowances, the IDWD asserted that the amount still owing was \$2,296.00.

Finally, Count III alleged that the defendant applied for regular unemployment compensation benefits without disclosing her employment at Gulf Stream during the compensable weeks of January 14 to 21, 2012. Because she failed to report her earnings to IDWD, it paid her unemployment benefits. The Count also alleged that the defendant worked sporadically and reported her earnings in some but not all weeks. It requested repayment of those benefits in the amount of \$678.00 plus a 100% penalty payment of \$678.00. However, after allowances were made for adjustments, set-offs, and repayment, the plaintiff claimed that the sum of \$1,165.00 was outstanding and due from the defendant to the plaintiff under Count III. In all, the plaintiff asked that \$4,436.00 be excepted from the defendant's chapter 7 discharge.

The defendant did not appear or respond to the Complaint. Following the plaintiff's timely request for entry of the defendant's default, the Clerk of the Court issued the Entry of Default. Now before the court is the plaintiff's Motion for Default Judgment.

DISCUSSION

The plaintiff asks the court to enter default judgment against the defendant, who neither appeared nor responded in this adversary proceeding. Rule 7055 of the Federal Rules of Bankruptcy Procedure governs defaults. That bankruptcy rule applies Rule 55 of the Federal Rules of Civil Procedure in adversary proceedings. 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). An entry of default is made by the clerk when two acts occur: (1) the defendant fails to plead or defend, and (2) that failure is shown "by affidavit or otherwise." *See Fed. R. Civ. P. 55(a).*

The court finds that the plaintiff followed the criteria set forth in the rule governing entry of defaults. It complied with Rule 55(a) by establishing the defendant's default and by requesting the Clerk's Entry of Default. *See* R. 6, Motion, Affidavit in Support; *see also Target Nat'l Bank v. Redmond (In re Redmond)*, 399 B.R. 628, 632 (Bankr. N.D. Ind. 2008). By affidavit the plaintiff declared that service of process of the summons and Complaint was timely and proper on the defendant and her bankruptcy attorney. The plaintiff's Certificate of Service also affirmed service by regular and certified mail upon the debtor-defendant and her bankruptcy attorney of record, Christopher D. Schimke. *See* R. 5; *see also* Fed. R. Bankr. P. 7004(b)(9); 7004(g).² The plaintiff also declared that the defendant failed to appear or to file a timely response. *See* Fed. R. Bankr. P. 7012(a). Having "establish[ed] the fact of default by evidence," the plaintiff fulfilled the criteria of Rule 55(a), and the Clerk of the Court entered default against the defendant. 10 *Collier on Bankruptcy* ¶ 7055.02 at 7055-3 (A.N. Resnick & H.J. Sommer, eds., 16th ed. 2013); *see* R. 7.

The plaintiff then requested that the court enter a judgment by default, in accordance with Rule 55(b). *See* R. 9. Attached to the Motion for Default Judgment were two supporting Affidavits. The first was the Affidavit of plaintiff's counsel, verifying the defendant's status as not an infant, an incompetent person, or one on active military duty, as confirmed by the Department of Defense Manpower Data Center. It presented the appropriate information that complied with the Servicemembers Civil Relief Act and satisfied the affidavit requirement of Rule 55(b). *See* 50 U.S.C.S. Appx. § 521(b)(1) (1996 & Supp. 2013); 10 *Collier on Bankruptcy* ¶ 7055.03[1] at 7055-4 to -5 (A.N. Resnick & H.J. Sommer eds., 16th ed. 2013); *In re Redmond*, 399 B.R. at 632 (citing cases). The second was an Affidavit of the plaintiff's Collection

² Attached to the plaintiff's Certificate of Service were the USPS Tracking Information print-out and the certified mail return receipt verifying proper proof of service on the defendant's counsel. *See, e.g., Relational, LLC v. Hodges*, 627 F.3d 668, 672 (7th Cir. 2010) ("To make a prima facie showing (of valid service), the movant must simply produce a return of service identifying the recipient and noting when and where service occurred."); *IDWD v. Coapstick*, Adv. Proc. 12-3048, Case No. 12-31404, Mem. Dec. of Dec. 12, 2012, at 4 (finding electronic receipts of mail tracking services to be sufficient method of corroborating proof of service). However, neither type of verification was provided to demonstrate completion of service to the defendant herself. Nevertheless, the court confirmed that its mailings, sent to the defendant at the same address used by the plaintiff, were not returned as undeliverable. Therefore there is a rebuttable presumption that service of process upon the defendant was valid and successful.

Specialist, declaring that the defendant filed unemployment benefit claims and received benefits but was ineligible to receive those benefits, and that she owed the plaintiff the total amount of \$4,436.00.

Also attached to the Motion were two documentary exhibits: the on-line “Uplink Help” dialog box linked to the weekly claims form (Exhibit B)³, and the defendant’s Sworn Statement, executed September 28, 2012, after appearing at an interview scheduled by an IDWD Investigator (Exhibit A). In that Statement, the defendant declared that she had entered her information into a computer and filled out the claims voucher “wrong.”

Q: Why did you fail to report your work and earnings from Gulf Stream Coach Inc. when claiming and receiving unemployment benefits in 2011 and 2012?

A: I was unsure on how to fill out my voucher and exactly on when and how to put my income in. I was unaware of having to report income the week I worked, I thought it was the week I was paid. Once again I did fill out the voucher wrong.

R. 9, Ex. A, p. 4.

In the Motion itself, the plaintiff began its argument for a judgment of nondischargeability under § 523(a)(2)(A) by setting forth its undisputed facts. According to the IDWD, Hooks received emergency, extended, and regular unemployment benefits from time to time by certifying when she submitted each weekly claim voucher that she had reported all her work and earnings, had answered truthfully and accurately, and had reported anything that interfered with her ability to work.⁴ IDWD found, however, that

³ The plaintiff’s Exhibit B is illegible.

⁴ The plaintiff’s evidence of this certification was the on-line information in the section “How Do I Get My Benefit Payment?” The instructions stated:

Every time you submit a claim voucher, you are certifying that you:

- Registered for work on IndianaCAREERconnect.com and that you completed your work search requirements.
- Are not receiving subsistence allowance (payment) for training or education that would make you ineligible for unemployment benefits.
- Have reported any and all work, earnings and self-employment activity for this week, even if you haven’t received payment for it yet.
- Have reported anything that interfered with your ability to work full-time this week.

(continued...)

Hooks claimed benefits for eight of the compensable weeks between July 16, 2011 and January 21, 2012, in which she failed to report her earnings from Gulf Stream, earnings which constituted deductible income when determining eligibility for unemployment compensation benefits. *See* R. 9, ¶ 10.

When an IDWD Investigator interviewed the defendant on September 27, 2012, Hooks “appeared and stated that she failed to properly report her employment and earnings from Gulf Stream Coach, Inc. because she was unsure of when and how to report her earnings.”⁵ *Id.*, ¶ 12, citing Ex. A (Hook’s Sworn Statement); Compl. Exs. C, H, M (Determinations of Eligibility). The Motion then stated the Investigator’s conclusion, which became the IDWD’s final decision:

Based on the available information, the Department made a determination of ineligibility, pursuant to Ind. Code § 22-4-17-2, and sent notice to the Defendant on November 9, 2012.

Id. The record does not contain a determination by an administrative law judge or further review by the IDWD. Although the IDWD did not so state in its Motion or Complaint, it appears that the defendant did

⁴(...continued)

- Have given only true and accurate answers and information in the application for benefits.
- Are aware that if you knowingly or purposely fail to disclose information or make false statements to receive unemployment benefits, you may:
 - Lose your unemployment benefits.
 - Be required to repay benefits received improperly with interest and penalty. That may include referral of your account to a collection agency.
 - Eliminate your chance to use the wages for future benefits.
 - Be subject to civil and criminal prosecution.

R. 1, Ex. A. A claimant is required to read a voucher certification screen and then to click the button “Yes I agree, file my claim” in order to submit a claim voucher. *See Telligman v. Review Bd. of IDWD*, 996 N.E.2d 858, 860-61 (Ind. App. 2013).

⁵ The Investigator’s Report, in full, described the interview in these terms:

Hooks did appear and stated that she was constantly being laid off and called back to work so she was unsure how to report her earnings while claiming benefits. Hooks also stated that she was confused because she believed she was to report her earnings when she received her paycheck and not when she actually worked.

It then concluded: “Claimant knowingly failed to disclose employment and earnings or other material facts.” R. 1, Ex. D, p. 3.

not appeal the Investigator's Determinations of Eligibility, mailed to the defendant on November 9, 2012, and it became final on November 19, 2012.⁶

The plaintiff argued in its Motion that, because the internet help link instructed claimants to enter gross earnings, Hooks "knew how to properly report her wages." *Id.*, ¶ 15. However, she failed to report her earnings. The plaintiff then summarized its argument for nondischargeability of the debt thus:

In summary, the Defendant, Donna Hooks, obtained unemployment benefits from the Department by certifying that she had (1) reported *any and all* work, *earnings*, and self-employment activity for the week, (2) given only true and accurate answers and information in the application for benefits, and (3) reported anything that interfered with her ability to work full-time during the week. During the compensable weeks, the Defendant failed to report her earnings reported by her employer – Gulf Stream Coach, Inc. – on her weekly claims vouchers. The Defendant knew that her representations were false because the claims submitted without wages [were] not an unintentional mistake and [were] not a listing of net wages rather than gross wages, which further shows that the Defendant made the false representations with an intent to deceive. As a result of Defendant's certifications and reported earnings to the Department, the Department justifiably relied on the Defendant's deceptions to its detriment, i.e., it erroneously paid unemployment benefits to the Defendant – benefits in which the Defendant was not entitled.

Id., ¶ 21. It asked the court to declare judgment in its favor and to declare the debt of \$4,436.00 plus costs of \$293.00 nondischargeable by default.

Before entering a default judgment, however, the court also requires that a plaintiff establish a *prima facie* showing on the merits of its claim. *See In re Liebl*, 434 B.R. 529, 536 (Bankr. N.D. Ill. 2010) (requiring plaintiff to show "at least *prima facie* facts meeting the legal requirements to except a debt from discharge"); *In re Taylor*, 289 B.R. 379, 382 (Bankr. N.D. Ind. 2003) ("[B]efore a litigant is awarded the relief it seeks when the opposing party fails to respond, the court needs to satisfy itself that the facts before it demonstrate a *prima facie* entitlement to that relief."); *cf. Ojeda v. Goldberg*, 599 F.3d 712, 718 (7th Cir.

⁶ The notification of the right to appeal, found at the bottom of Exhibit C, is written in a font much smaller than the one used in the body of the Determination of Eligibility. It states: "This determination will become final on 11-19-12 if not appealed. Either party may appeal this determination and request a hearing before an administrative law judge within ten days of the date this determination was mailed or otherwise delivered. Please see reverse side for appeal procedure." R. 1, Exs. C, H, M. In an even smaller font, the final admonition is presented: "Important notice to claimant: If you appeal this determination, you must continue to submit vouchers each week while unemployed." *Id.* The record does not reflect that the Investigator apprised the claimant of her right to appeal and gave her some guidance concerning appeals.

2010) (stating that “exceptions to discharge are to be construed strictly against a creditor and liberally in favor of the debtor”) (quoting cases). Even when a defendant affirmatively has conceded or admitted by default the allegations in the complaint, a court “has an independent responsibility to verify that the debts in question are indeed nondischargeable.” *In re Sanderson*, 509 B.R. 206, 209 (Bankr. W.D. Wis. 2014). Courts have found that a plaintiff’s *prima facie* showing was successful when, from the evidence presented, “a factfinder could reasonably find every element that the plaintiff must ultimately prove to prevail in the action.” *In re Thanh V. Truong*, 271 B.R. 738, 742 (Bankr. D. Conn. 2002).

Moreover, bankruptcy courts have discretion whether to enter a judgment by default. *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). 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. at 536; *In re Hostetter*, 320 B.R. 674, 678 (Bankr. N.D. Ind. 2005). Thus the plaintiff herein must show a *prima facie* case for each element of § 523(a)(2)(A) to obtain a default judgment on its fraud-based nondischargeability complaint. *See In re Zecevic*, 344 B.R. 572, 576 (Bankr. N.D. Ill. 2006).

The plaintiff’s Complaint asked the court to declare nondischargeable the defendant’s debt to IDWD under § 523(a)(2)(A) as a debt for money obtained by false pretenses, false representation, or actual fraud. Under that subsection of § 523(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*, 599 F.3d at 716-17; *In re Maurice*, 21 F.3d 767, 774 (7th Cir. 1994).

A. *False Representations*

This court first considers whether the plaintiff's Complaint, together with the attachments, contains *prima facie* facts to establish that the defendant obtained unemployment benefits through knowingly false representations or willful misrepresentations. The Complaint alleged that the defendant worked sporadically for Gulf Stream and reported her earnings sporadically, as well. It asserted, in each Count, that the defendant "did report earnings in some weeks but failed to report any earnings in other weeks," and "[t]hus, Defendant knew how to properly report her wages." R. 1, ¶¶ 12-13; 24-25; 36-37. The exhibits showed that the defendant answered "no" to the question "Did you work?" on the vouchers for the weeks of July 16 and 23, 2011; October 29, 2011; December 3-17, 2011; and January 14-21, 2012. *See id.*, Exs. B, G, and L. The Investigation Case Histories reflected that Hooks worked for Gulf Stream and earned wages for each of those weeks. *See id.*, Exs. D, E, and I. The record thus demonstrated that Hooks did work each of the weeks she stated on her vouchers that she did not work.

According to the Complaint's exhibits, on October 31, 2012, the IDWD sent Hooks three Notices of Potential Overpayment, advising her of the reasons found for the overpayments, the amounts involved, and the penalties applied. *See id.*, Exs. F, K, and P. On November 9, 2012, IDWD's Investigator sent Hooks three Determinations of Eligibility, each confirming the conclusion that the defendant was ineligible for benefits during the specified weeks:

Based on available evidence, it must be concluded that you knowingly failed to disclose, or falsified material facts. Therefore, the penalties prescribed by Chapter 13, Section 1.1 of the Laws of Indiana relating to the Department of Workforce Development apply.

Id. However, the Determinations also reported that Hooks appeared on September 27, 2012, at a scheduled interview and "stated that you were unsure of when and how to report your earnings." *Id.*

The day after the interview, September 28, 2012, the defendant gave the IDWD a Sworn Statement, in which she admitted her mistake and explained her confusion:

I was unsure on how to fill out my voucher and exactly on when and how to put my income in. I was unaware of having to report income the week I worked, I thought it was the week I was paid. Once again I did fill out the voucher wrong.

R. 9, Ex. A. The court notes that the plaintiff did not include the Statement in its Complaint's exhibits, but did append it to its Motion for Default Judgment.⁷

IDWD argued, in its Motion, that the help link showed the defendant how to report her wages; for that reason, it contended, she knew she falsely represented on the vouchers that she was unemployed when she was working, thereby receiving benefits to which she was not entitled. *See id.*, ¶¶ 14-16. The court evaluated the IDWD evidence throughout this record to determine whether it had presented *prima facie* facts to support this fraud-based requirement, since factual allegations concerning fraud must be presented with particularity.⁸ *See* Fed. R. Bankr. P. 7009; Fed. R. Civ. P. 9(b). *See In re Casali*, 2014 WL 4296664 at *4 (Bankr. N.D. Ill. Aug. 29, 2014) (“The particularity requirement of Rule 9(b) applies equally to all claims based upon an underlying fraud, including fraud claims under § 523(a)(2)(A).”).

The court finds that Complaint alleged and the exhibits confirmed that the defendant filed incorrect vouchers numerous times and was paid benefits based upon those claims. However, they did not present *prima facie* facts showing that the defendant knew she was falsifying her vouchers when she filed them. There was no allegation of actual fraud or false representation in the Complaint and no evidence of deceptive conduct or knowing misrepresentation. *See, e.g., McClellan v. Cantrell*, 217 F.3d 890, 893 (7th Cir. 2000) (explaining that “actual fraud [under § 523(a)(2)(A)] is broader than misrepresentation” and includes “any deceit, artifice, trick, or design involving direct and active operation of the mind, used to

⁷ Statements made by claimants-defendants in IDWD's proceedings must be provided as material evidence in any causes of action raised by IDWD in this court.

⁸ Federal Rule of Civil Procedure 9(b) requires: “In alleging fraud . . . , a party must state with particularity the circumstances constituting fraud.” Federal Rule of Bankruptcy Procedure 7009 applies Rule 9 in bankruptcy adversary proceedings.

circumvent and cheat another’’) (quoting 4 *Collier on Bankruptcy* ¶ 523.08[1][e], p. 523-45 (15th ed., Lawrence P. King ed., 2000)); *see also In re Chen*, 227 B.R. 614, 619 (D.N.J. 1998) (affirming bankruptcy court distinction between knowing misrepresentation and mistaken belief).

IDWD also argued that the internet help link (which was an illegible exhibit) told claimants to enter total gross wages when answering the question “How much did you earn?” According to the plaintiff, that instruction proved that Hooks “knew how to properly report her wages.” R. 9, ¶ 15. However, the defendant left that question blank; she claimed that she had not worked at all during each of the weeks at issue. The court finds that the IDWD’s “help link argument” is completely ineffective to demonstrate that the defendant *knowingly* made a misrepresentation of her earnings. The issue is whether the defendant made a knowing false representation by affirming that she did not work on specific weeks when she in fact was working.

In addition, Hooks’ Sworn Statement raises a genuine material question concerning the Investigator’s Conclusion that the defendant “knowingly failed to disclose, or falsified material facts.” *See, e.g., In re Carey*, 2010 WL 936117 at *2 (D.N.J. March 11, 2010) (noting that “a ‘knowing’ misrepresentation . . . could result from a ‘mistaken belief’”); *In re Olsen*, 2014 WL 4327886 at *27 (Bankr. D.Mont. Aug. 28, 2014) (finding, after a trial, that no evidence in the record showed that defendant knew his representations were false); *In re Ortiz*, 2014 WL 4187474 at *4 (Bankr. D.N.J. Aug. 21, 2014) (finding, after a trial, that plaintiff submitted insufficient evidence of defendant’s knowledge of a misrepresentation in filing unemployment claims).

In light of (a) the Complaint’s failure to allege fraud or false representation; and (b) the conflicting evidence in the record – on one hand, the Investigator’s conclusion (based on “available evidence” not in the record) that the defendant knowingly falsified facts, and on the other hand the defendant’s Sworn Statement contradicting that charge, the court determines that a factfinder could not reasonably find that the defendant’s statement on each of the vouchers was a knowing misrepresentation.

Accordingly, it concludes that the plaintiff failed to make a *prima facie* showing of the first prong of § 523(a)(2)(A).

B. *Intent to Deceive*

The court also found insufficient the plaintiff's showing concerning the second essential element, the defendant's intent to deceive the plaintiff. This essential element also must be pleaded with particularity under Rule 9(b) of the Federal Rules of Civil Procedure. *See In re Weichman*, 422 B.R. 143, 154 (Bankr. N.D. Ind. 2010) (concluding plaintiff failed to plead actual fraud with particularity because complaint alleged no facts to establish the debtor obtained money by actual fraud).

Intent to deceive is measured by the debtor's subjective intention at the time the representation was made. Because proof of fraudulent intent may be unavailable, the scienter requirement may be inferred from the surrounding circumstances.

In re Aguilar, 511 B.R. 507, 512-13 (Bankr. N.D. Ill. 2014) (citations omitted); *accord In re Slaton*, 469 B.R. 814, 819 (Bankr. W.D. Wis. 2012) (stating same test, noting that debtors "had to be lying from the start"); *In re Weichman*, 422 B.R. at 150 (stating same test, finding complaint failed to state facts showing actual fraud).

In its Complaint the plaintiff made no allegation at all of the defendant's fraudulent intent. In each of the three Counts of the Complaint it alleged that Hooks "worked sporadically for Gulf Stream" and "did report earnings in some weeks but failed to report any earnings in other weeks." R. 1, ¶ 12. It further alleged that she "knew how to properly report her wages" but failed to do so. *Id.*, ¶¶ 12-14 (Count I); ¶¶ 24-26 (Count II); ¶¶ 36-38 (Count III). Each Count then sought to have the debt excepted from discharge "as a debt for money to the extent obtained by false pretenses, false representation or actual fraud pursuant to 11 U.S.C. § 523(a)(2)(A)." *Id.*, ¶¶ 17, 29, 41. There were no facts to show that the defendant obtained her benefits with fraudulent intent. It was clear that the Complaint's allegations failed to present a scintilla of a *prima facie* showing that the defendant intended to deceive the plaintiff.

Nor did the administrative record attached as exhibits to the Complaint provide any proof of the defendant's fraudulent intent. The record reflected the IDWD's demonstration under Indiana Code § 22-4-13-1.1(a) that the defendant knowingly failed to disclose the amounts she earned, failed to disclose other facts, or falsified facts. *See, e.g., Telligman v. Review Bd. of IDWD*, 996 N.E.2d 858, 867 (Ind. App. 2013) (affirming administrative decision that claimant knowingly failed to disclose or falsified facts). Under the Bankruptcy Code, however, the plaintiff must show that the debtor made a knowingly false representation and, as a separate requirement, that the debtor made it with the intent to deceive the plaintiff, before the court can find that the debtor's debt to the plaintiff is nondischargeable under § 523(a)(2)(A).⁹ In this case, the plaintiff's Complaint is based on *prima facie* facts from the plaintiff's administrative record, and it fails to contain any allegation or evidence of fraudulent intent, an essential element under § 523(a)(2)(A).

In its Motion for Default Judgment, however, the IDWD did at least acknowledge the element of intent. It argued:

Defendant knew that her representations were false because the claims submitted without wages [were] not an unintentional mistake and [were] not a listing of net wages rather than gross wages, which further shows that the Defendant made the false representations with an intent to deceive.

R. 9, ¶ 21. This opaque contention attempted to prove the defendant's knowingly false representations and her intent to deceive by describing the claims she submitted as (1) listing no wages, (2) listing neither her net wages nor her gross wages, and (3) listing claims that were "not an unintentional mistake," which must mean an intended mistake. In making this argument, the IDWD adopted boilerplate language it has used in many of its Motions for Default Judgment, but it does not fit these circumstances. The defendant in fact did not list her wages and did not list either net or gross earnings, not because she intended to deceive the

⁹ Courts have recognized that other states' unemployment compensation laws do not have an "intent to deceive" requirement equivalent to the Bankruptcy Code's requirement under § 523(a)(2)(A). *See, e.g., In re Chen*, 227 B.R. 614, 626 (D.N.J. 1998) (concluding that element of intent required under New Jersey unemployment law is not identical to the level of intent required by § 523(a)(2)(A)); *In re Neff*, 2013 WL 6713071 at *8 (Bankr. D. Mont. Dec. 19, 2013) (finding that administrative decision under Montana's unemployment insurance statute did not satisfy heavy burden of showing fraud under § 523(a)(2)(A)).

plaintiff, but rather because she claimed she was not working at all. So assertions (1) and (2) are without any merit. The third argument is actually a legal conclusion, not a factual allegation or legal argument. It presents no factual showing that the defendant made intentional mistakes, and the court will not infer an intent to deceive solely from the representations on the face of the vouchers or the IDWD's cursory contention that the defendant's "claims submitted without wages" were "not an unintentional mistake." *See, e.g., In re Carey*, 2010 WL 936117 at *2 (D. N.J. Mar. 11, 2010) (stating "the Bankruptcy Code required specific intent to deceive that could not be inferred from the circumstances presented"); *In re Sanderson*, 509 B.R. 206, 210 (Bankr. W.D. Wis. 2014) (finding that debtor's admissions of his circumstances concerning his weekly certification permitted inference of intent). This court declines to infer intent on such sparse allegations and arguments. *See In re Sheridan*, 57 F.3d 627, 634 (7th Cir. 1995) (stating that "[w]hether to infer the requisite intent is left to the bankruptcy court" because it "is in the best position to observe the witnesses and presentment of the evidence").

In addition, the defendant's Sworn Statement contradicted the plaintiff's charge that Hooks knew her representations were false. In that Statement, the defendant described an unintended mistake. In it she declared that she filled out the voucher "wrong" for the following reason:

I was unsure on how to fill out my voucher and exactly on when and how to put my income in.
I was unaware of having to report income the week I worked, I thought it was the week I was paid.

R. 9, Ex. A, p. 4. Although the Investigator, in her Report, acknowledged Hooks' explanation, without taking her reasons into account the Investigator simply concluded: "Claimant knowingly failed to disclose employment and earnings or other material facts." *Id.*

The court thus is presented with conflicting material assertions by the defendant, in her Sworn Statement, and the Investigator, in her Conclusion. Based on the record before it, therefore, a factfinder could reasonably find that there were genuine issues of material fact but could not reasonably find that the

defendant made false representations with an intent to deceive. The court determines that the plaintiff has not successfully made a *prima facie* showing of the second element of § 523(a)(2)(A).

C. Justifiable Reliance

Following the same analysis, the court finds that the Complaint contained no allegation of the third factor, IDWD's justifiable reliance, and the Motion for Default Judgment simply concluded its summary paragraph by asserting that the "Department justifiably relied on the Defendant's deceptions to its detriment." R. 8, ¶ 22.

The court recognizes the importance of an efficient unemployment compensation system, which depends on the honesty of claimants seeking benefits, and the need for the procedures established under Indiana law to carry out its statutory purposes. When determining the eligibility of claims, the IDWD must be able to rely on the valid information recorded in those vouchers. *See, e.g., In re Yuppa*, 2013 WL 4854479 at *4 (Bankr. S.D. Ohio, June 12, 2013). However, in a bankruptcy nondischargeability setting, this court requires that the IDWD's reliance be shown to be justified when the defendant has demonstrated both a knowingly fraudulent misrepresentation of information on each filed voucher and an intention to deceive the IDWD. The plaintiff's cursory assertion of justifiable reliance, without any *prima facie* factual support, is simply inadequate. *Cf. In re Razo*, 446 B.R. 918, 920-21 (Bankr. N.D. Ind. 2011) (denying IDWD motion on ground it failed to satisfy its burden of proof in bankruptcy court).

Accordingly, the court finds that the Complaint's § 523(a)(2)(A) allegations are insufficient under the default judgment requirements of Federal Rule of Bankruptcy Procedure 7055 and Federal Rule of Civil Procedure 55. They are equally insufficient under Rule 9(b)'s requirement that fraud be alleged with particularity. Having failed to establish a *prima facie* showing on the required elements of nondischargeability under § 523(a)(2)(A), the plaintiff will not be awarded the default judgment it seeks. *See In re Forrest*, 424 B.R. 831, 835 (Bankr. N.D. Ill. 2009) (bankruptcy court has discretion to deny default judgment if insufficient facts are pleaded to support a cause of action); *see also In re Mercer*, 2013 WL

3367253 at *5-*6 (Bankr. M.D. Ala. July 5, 2013) (concluding, after hearings, that plaintiff did not carry its burden of proof, despite parties' stipulated judgment of nondischargeability and defendant's default; dismissing complaint with prejudice). This plaintiff has not made the requisite *prima facie* showing with respect to two elements in its claim of nondischargeability, and it is not entitled to its requested relief.¹⁰

In light of this Complaint's multiple insufficiencies, the court must deny the Motion for Default Judgment. Nevertheless, it may, in its discretion, allow the plaintiff an opportunity to present additional evidence and testimony to prove its entitlement to the nondischargeability of the defendant's obligation under § 523(a)(2)(A). See *In re Rowell*, 440 B.R. 117, 120 (Bankr. D.S.C. 2010); *In re Trevisan*, 300 B.R. 708, 719 (Bankr. E.D. Wis. 2003). The plaintiff is directed to advise the court whether it chooses to have a hearing. Within fourteen (14) days of the date of entry of this Memorandum of Decision, IDWD must request that an evidentiary hearing be scheduled. At that hearing, the plaintiff must present evidence sufficient to make a *prima facie* showing pursuant to § 523(a)(2)(A). However, if the plaintiff fails to request such a hearing within fourteen (14) days or fails to present adequate additional evidence and testimony at that hearing, this adversary proceeding against the defendant Donna Genalea Hooks will be dismissed in accordance with the foregoing Memorandum of Decision.

CONCLUSION

For the reasons stated in this Memorandum of Decision, the Motion for Default Judgment filed by the plaintiff Indiana Department of Workforce Development against the defendant Donna Genalea Hooks is denied. The court in its discretion grants the plaintiff fourteen (14) days from the entry of this Memorandum of Decision to request a hearing in order to present additional evidence and testimony to prove

¹⁰ The court adds that the plaintiff has made no showing to justify its claimed entitlement to the nondischargeability of the civil penalties it included in each count of the Complaint under the criteria of § 523(a)(2)(A).

its entitlement to the nondischargeability of the defendant's obligation under § 523(a)(2)(A). The failure to make such a timely request will result in dismissal of this adversary proceeding.

SO ORDERED.

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