

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
TIMOTHY RAY WALLACE)	CASE NO. 14-31213 HCD
RACHEL DIANE WALLACE)	CHAPTER 7
)	
DEBTOR(S))	
)	
)	
BEARCAT CORP.)	
PLAINTIFF)	
vs.)	PROC. NO. 14-3034
)	
RACHEL DIANE WALLACE)	
DEFENDANT)	

Appearances:

Nathanel M. Jordan, Esq. and Steven Turner, Esq., counsel for plaintiff, 130 North Main Street, P.O. Box 575, Goshen, IN 46527-0575.

Rachel Diane Wallace, pro se, 1415 West Avenue, Goshen, IN 46526.

MEMORANDUM OF DECISION

At South Bend, Indiana, on November 6, 2014.

Before the court is the Motion for Default Judgment filed by the plaintiff, creditor Bearcat Corp. (“plaintiff” or “creditor”), against Rachel Diane Wallace, chapter 7 debtor (“defendant” or “debtor”). The defendant did not respond or appear in this adversary proceeding. For the reasons that follow, the court grants the plaintiff’s Motion.¹

¹The 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

Timothy Ray Wallace and Rachel Diane Wallace filed a voluntary chapter 7 petition on May 8, 2014. They listed the plaintiff as a creditor on Schedule F and included the plaintiff on the Matrix. After concluding the § 341 meeting of creditors, the chapter 7 Trustee filed her Report of No Distribution. The court issued an Order of Discharge of the debtors on August 18, 2014, and the bankruptcy case was closed on August 20, 2014.

The plaintiff timely filed its Complaint to Object to A Discharge and to Determine Dischargeability of a Debt against the defendant Rachel Diane Wallace on July 3, 2014. The clerk issued a summons on July 3, 2014. The plaintiff served the debtor and her bankruptcy attorney a copy of the complaint and summons by first class mail, postage fully prepaid, on July 7, 2014. The summons required a response from the debtor within 30 days of issuance, August 4, 2014.² On August 8, 2014, the plaintiff requested the entry of default against the debtor. This request included the affidavit of the plaintiff's attorney attesting to proper service of the complaint and summons on the debtor and her attorney, the failure of the debtor to file an answer, and that the debtor is not an infant or incompetent person or a member of the military. The plaintiff served the affidavit in support of entry of default on the debtor and her bankruptcy attorney on August 11, 2014. The clerk of court entered the default of the debtor on August 12, 2014. The clerk sent a copy of entry of default by first class mail to the debtor on August 14, 2014. The plaintiff filed a motion for default judgment on August 21, 2014.

The complaint alleged that the defendant, while employed by the plaintiff in a clerical position with authority to initiate payroll checks, "she fraudulently caused [the plaintiff] to pay her significantly more than she was entitled to be paid for her work." (R. 1, ¶ 5). The complaint states this action of the debtor was the basis for her guilty plea in Elkhart Superior Court IV, in cause 20D04-0006-

²Thirty days from the issuance of the summons was August 2, 2014. Because this day was a Saturday, the response period was extended to August 4, 2014, the next day that is not a Saturday, Sunday, or legal holiday. See Federal Rules of Bankruptcy Procedure 7012 (a) and 9006(a)(1)(C).

DF-0309, to the offense of Theft, a Class D felony. The Elkhart Superior Court accepted the debtor's guilty plea on October 23, 2000, and ordered the debtor to pay restitution to the plaintiff. Under the terms of the Sentencing Order Per Plea Agreement, the Elkhart County Victim Offender Reconciliation Program would make a determination and assess the total amount of restitution. Through June 14, 2002, the Elkhart Superior Court ordered restitution in the amount of \$57,565.56. On motion of the plaintiff, on August 14, 2003, the Elkhart Superior Court IV entered a civil judgment against the debtor, under cause 20D04-0308-CC-0099, for \$54,027.56. The plaintiff filed a complaint in the Elkhart Superior Court IV on June 27, 2013, in cause 20D04-1306-CC-0668, to renew the civil judgment in cause 20D04-0303-CC-0099.

As part of the debtor's plea agreement, the Elkhart Superior Court sentenced the debtor to make restitution payments. The chronological case summary (CCS) from the state court criminal case reflects that the debtor and counsel were participants at hearings where the state court set the restitution amount owed by the debtor.³ As of September 7, 2003, the Elkhart Superior Court criminal records show the restitution amount owed by the debtor was \$54,027.56. The Elkhart Superior Court entered this amount as a judgment against the debtor on August 14, 2003, under civil case 20D04-0308-CC-0099. The principal amount of that judgment, and interest through September 5, 2013, of \$32,104.59, remained unsatisfied. On June 27, 2013, the plaintiff filed civil action 20D04-1306-CC-0668 in Elkhart Superior Court to renew the judgment in case 20D04-0308-CC-0099. The Elkhart Superior Court entered a default judgment against the debtor on September 1, 2013, in the principal amount of \$54,027.56, and interest through September 5, 2013, in the amount of \$32,104.59, plus costs. As of May 8, 2014, the principal amount of \$54,027.56 remained unpaid along with accrued interest of \$35,005.80, plus costs of \$102.06.

³See Elkhart Superior Court No. 4 criminal case 20D04-0006-DF-0309 CCS entries dated 10/23/2000, 5/31/2002, and 6/14/2002. The CCS shows the restitution was transferred to civil docket 20D04-0308-CC-0099 on 8/14/2003.

The plaintiff asserts the actions of the debtor meet the essential elements for fraud, actual fraud, false representation, embezzlement, larceny, defalcation of property while in a fiduciary capacity, and willful and malicious injury to another or the property of another within the meaning of 11 U.S.C. § 523(a)(2), (4), and (6). The plaintiff requests a determination by this court that the civil judgments are nondischargeable.

DISCUSSION

The record here shows the plaintiff filed a timely complaint requesting that the court find the debt of the defendant nondischargeable under § 523(a)(2), (4), and (6) for fraud, actual fraud, false representation, embezzlement, larceny, defalcation of property while in a fiduciary capacity, and willful and malicious injury to property. R. 1, at ¶ 6. The plaintiff properly served the defendant and her bankruptcy attorney. The defendant is not an incompetent person or in the military service. The defendant has not made any answer or other response to the plaintiff's complaint or to the entry of default.⁴

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).

The clerk of the court makes an entry of default 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)

⁴While the debtor was afforded an opportunity to respond to both the complaint and entry of default she has declined to do so. The silence of the debtor in the face of the serious consequences of a determination of nondischargeability leads to court to proceed with caution in ruling on this request for default judgment. Exceptions to discharge are to be strictly construed against a creditor and liberally in favor of the debtor. *See In re Scarlata*, 979 F.2d 521, 524 (7th Cir. 1992), rehearing denied 1993 U.S. App LEXIS 6376 (7th Cir. March 26, 1993) (citing cases).

that they served the defendant 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 plaintiff files the request 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.

The substance of the plaintiff's complaint in this court is the debtor's guilty plea in state court to the crime of theft is sufficient to except the debt from discharge under § 523(a)(2), (4), and (6). Concerning theft, the relevant provisions of the Indiana Code in effect at the time of the plea read:

Theft – Receiving stolen property.

(a) A person who knowingly or intentionally exerts unauthorized control over property of another person, with intent to deprive the other person of any part of its value or use, commits theft, a Class D felony.

I.C. § 35-43-4-2.

11 U.S.C. § 523(a)(4)

Section 523(a)(4) excepts from discharge debts for "fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." 11 U.S.C. § 523(a)(4). By pleading guilty, the debtor has admitted her activities while initiating payroll checks were knowing and intentional acts that deprived the plaintiff of property without authorization. This confession is sufficient to establish that the debtor took funds with fraudulent intent for her own benefit. *Target Distrib. v. Weslowski (In re Weslowski)*, 2014 Bankr. LEXIS 1080, *9-10 (Bankr. N.D. Ind. March 18, 2014). As an employee of the plaintiff, the debtor was in a position of trust to accurately initiate payroll checks. Her guilty plea was an admission that her activities while initiating payroll checks were knowing and intentional acts that deprived the plaintiff of property without authorization. This confession is sufficient to establish that the debtor took

funds with fraudulent intent for her own benefit. The court finds it should except debt owed by the debtor to the plaintiff from her discharge.⁵

CONCLUSION

For the reasons set forth in this Memorandum of Decision, the court grants the Motion for Default Judgment of plaintiff Bearcat Corp. against the defendant Rachel Diane Wallace. The court finds the debtor is in default. The plaintiff has made a prima facia showing that the court should except its debt from discharge. The court grants the relief sought in the Complaint to Object to Discharge and to Determine Dischargeability of a Debt in the principal amount of \$54,027.56, plus court costs of \$102.06, and accrued interest of \$35,005.80.

SO ORDERED.

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

⁵Because the court finds § 523(a)(4) excepts the debt to plaintiff from discharge, the court does not need to address other grounds raised by the plaintiff.