

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
KENNETH SHAY KLEIN and)	CASE NO. 12-31617 HCD
CYNTHIA RUTH KLEIN)	CHAPTER 7
DEBTORS)	
)	
)	
JOSEPH D. BRADLEY, TRUSTEE)	
PLAINTIFF)	
vs.)	PROC. NO. 14-3063
)	
KENNETH SHAY KLEIN, CYNTHIA RUTH KLEIN,)	
ARUBA BANK N.V., MARGARET DEJONGE,)	
MONARCH COMMUNITY BANK, 1 ST SERVICE)	
SOLUTIONS, INC., CREATIVE FINANCIAL)	
GROUP, INC., TONY KOLOMAYETS, OMEGA)	
FINANCIAL GROUP, LTD., and RICHARD A.)	
KRANITZ)	
DEFENDANTS)	

Appearances:

J. Richard Ransel, Esq. and Lisa Gilkey Schoetzow, Esq., Throne, Grodnik, LP, 228 West High Street, Elkhart, Indiana 46516 for plaintiff Joseph D. Bradley, Trustee.

Aruba Bank N.V., pro se.

ORDER

At South Bend, Indiana, on February 9, 2015.

Before the court is the Motion for Default Judgment Against Defendant Aruba Bank (“Motion”) filed by the plaintiff, Joseph D. Bradley, Trustee (“plaintiff”).¹ For the reasons set forth below, the court denies the Motion without prejudice.

Adversary Proceeding Background

The plaintiff filed this adversary proceeding on September 10, 2014 seeking the recovery of money or property from many defendants. With respect to defendant Aruba Bank N.V., the amount

¹ The court has jurisdiction to decide the matter before it pursuant to 28 U.S.C. §§ 1334 and 157, and Northern District of Indiana Local Rule 200.1. The court has determined this matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A).

the plaintiff seeks to recover is \$26,392.88. (Complaint, ECF No. 1, at ¶¶ 16 and 27.) The court issued a summons on September 11, 2014, that set the date to file a motion or answer to the complaint at October 14, 2014.² On September 16, 2014, the attorney for the plaintiff filed an unsworn Certificate of Service (ECF No. 4) stating that he sent a copy of the complaint and summons “via regular U.S. mail and Certified mail, return receipt requested, postage pre-paid” on that date to Aruba Bank N.V., c/o Highest Ranking Officer, Camacuri 12, P.O. Box 192, Oranjestad, Aruba.

On October 14, 2014, Aruba Bank N.V. filed a Motion of Exeptive Defense of Non Jurisdiction and Competence (ECF No. 8). Both the managing director and executive director of Aruba Bank N.V. signed the motion. This motion asserts that this court has no jurisdiction over Aruba Bank N.V. Aruba Bank maintains the decisions of this court have no effect in other countries, and that this court is not competent to decide legal questions regarding transactions made in Aruba. The Bank asserts that “transactions in Aruba fall out of the jurisdiction/competence of the Court and the claim of the plaintiff should be declared nonsuited/inadmissible.” Aruba Bank also states that its Motion of Exeptive Defense should not be considered as an answer or acceptance of the jurisdiction of this court.

The plaintiff, by counsel, responded to the motion of Aruba Bank on October 20, 2014 (ECF No. 11), and filed a brief in support of this response on October 27, 2014 (ECF No. 19). This response asks the court to strike the motion of Aruba Bank because it was filed by its officers rather than an attorney representing the Bank. The plaintiff’s response also points to Aruba Bank’s business contacts and activities within the United States and with U.S. citizens as providing a proper basis for the jurisdiction of this court. The court set a hearing on Aruba Bank’s Motion of Exeptive Defense of Non

²Federal Rule of Bankruptcy Procedure 7012(a) requires a defendant to serve an answer to a complaint “within 30 days after the issuance of the summons.” In this adversary proceeding, the 30th day after the issuance of the summons was October 11, 2014, a Saturday. In computing time periods, Federal Rule of Bankruptcy Procedure 9006(a)(1)(C) states “if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.” Monday, October 13, 2014, was Columbus Day, a legal holiday. Taken together, these Rules made the proper date for a response to the summons Tuesday, October 14, 2014.

Jurisdiction and Competence for November 24, 2014 (Notice of Hearing, ECF No. 14). No one appeared for Aruba Bank at the November 24 hearing. As a result, the plaintiff was directed to prepare a proposed order denying the Bank's motion. (See Court Minutes, ECF No. 40.) By order dated December 2, 2014, (ECF No. 44) the court overruled the motion of Aruba Bank and sustained the plaintiff's response. Based on the business transacted with the United States, the court found it had "necessary and competent jurisdiction over Aruba Bank to determine its rights in this adversary proceeding." The court ordered qualified counsel³ for Aruba Bank to file an appearance within twenty days of the date of the court's order (i.e., by December 22, 2014). The order of December 2 also stated "[i]n the event no appearance and answer are timely filed, the Trustee is authorized to file such pleadings as he deems appropriate to receive a default judgment against Aruba Bank, which pleadings shall be executed and entered by this Court, all without further hearing."

The plaintiff moved for entry of default by the clerk of court on December 29, 2014 (ECF No. 48). The clerk entered default as to Aruba Bank on December 30, 2014. (ECF No. 49) On January 21, 2015, the plaintiff filed his Motion for Default Judgment Against Defendant Aruba Bank (ECF No. 55) that is the subject of this order.

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 such as this one. 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). This Rule sets forth a two-step procedure 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

³28 U.S.C. § 1654 states the following: "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein." As relevant to the matter before the court, N.D. Ind. L.B.R. B-9010-1(c) states as follows: "In all matters and proceedings before this court, only natural persons may appear and represent themselves. All other entities shall be represented by an attorney." See *In re IFC Credit Corp.*, 663 F.3d 315, 319 (7th Cir. 2011) ("Corporations unlike human beings are not permitted to litigate pro se.").

Cir. 2004). With respect to defendant Aruba Bank in this adversary proceeding, the plaintiff has not fulfilled his procedural obligations under Rule 55. The plaintiff has sought and obtained the clerk's entry of default against Aruba Bank, ECF No. 49, in satisfaction of Rule 55(b)(1). The plaintiff has filed the Trustee's Motion for Default Judgment Against Defendant Aruba Bank, ECF No. 55, for relief under Rule 55(b)(2). Ultimately the plaintiff requests the court to enter a default judgment against the Bank for \$26,392.88, the amount requested in the complaint. The court notes that the plaintiff has not submitted an affidavit or any other supporting documents along with his Motion. Nor has the plaintiff filed a brief in support of his Motion as required by the local rules of this court. N.D. Ind. L.B.R. B-7007-1(a).

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. 2007), *cert. denied*, 551 U.S. 1114 (2007). Guiding the court's review of a motion for default judgment is the policy set by the Seventh Circuit to favor trial on the merits over default judgments. *Lundeen v. Rhoad*, 2014 WL 6977279 (S.D. Ind. Dec. 9, 2014) and *Daniel v. Power*, 2007 WL 611242 (S.D. Ill. Feb. 26, 2007) citing *Sun*. Therefore, before entering a default judgment the court requires that a plaintiff 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) (“[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.”) Default judgment may be denied when the facts are insufficient to support the claim in the complaint. Here the only ‘facts’ before the court are the unsworn assertions of the attorney for plaintiff in his Motion and the allegations in the underlying Complaint. The court finds these unsworn and unsupported assertions alone are insufficient to establish that the plaintiff is entitled to the relief sought.

While not raised in the minimal response of Aruba Bank, the court has concerns about the sufficiency of service. The court is mindful that proper service under the rules is a prerequisite to the authority of the court to act. “Improper service of process destroys a court's personal jurisdiction, making any judgment entered against the improperly served party void.” *In re Outboard Marine Corp.*, 358 B.R.

893, 897 (Bankr. N.D. Ill. 2007) (citing cases); *The Knit With v. Knitting Fever, Inc.*, 2010 WL 2788203, at *3 (E.D. Pa. July 13, 2010) (“[E]ven if a defendant has notice of a lawsuit against it, such notice neither validates an otherwise defective service nor waives the defendant's right to object to that service.”)

If Aruba Bank were a domestic bank, that is, a bank that is an insured depository institution as defined by section 3 of the Federal Deposit Insurance Act,⁴ Bankruptcy Rule 7004(h) would require service by certified mail addressed to an officer of the institution.⁵ However, since Aruba Bank is not an insured depository institution within the scope of Rule 7004(h), service by certified mail under that Rule is not required. Rather, as provided by Bankruptcy 7004(a)(1), Civil Rule 4(h)(2) applies because Aruba Bank was served at “a place not within any judicial district of the United States.” With respect to corporations, partnerships, or associations not within any judicial district of the United States, Civil Rule 4(h)(2) calls for service in the manner prescribed by Rule 4(f) for an individual.

Rule 4(f) specifies three methods of service in a foreign country. The plaintiff may serve a foreign defendant

(1) by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;⁶

⁴As pertinent to the matter before the court, section 3 of the FDIC Act states as follows: “(2) Insured depository institution. The term ‘insured depository institution’ means any bank or savings association the deposits of which are insured by the Corporation pursuant to this Act.” 12 U.S.C. § 1813(c)(2). Aruba Bank has not been shown to be within this definition.

⁵The court notes that two banks were named as defendants in this adversary proceeding, Monarch Community Bank and Aruba Bank N.V. Upon a review of the certificates of service filed by the plaintiff concerning both banks, the court notes the checkbox for “Mail service: Regular, first class United States mail, postage fully prepaid, address to:” was checked for each bank and a mailing address was listed. The court also notes that the checkbox for “Certified Mail Service on an Insured Depository Institution: By sending the process by certified mail addressed to the following officer of the defendant at:” were never checked, nor were any mailing addresses listed for either bank. On motion of the plaintiff, the court dismissed Monarch Community Bank as a party in this adversary proceeding with prejudice, ECF No. 67.

⁶The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163, is more commonly called the Hague Service Convention. Through September 2014, 68 countries, including Aruba and the United States, are contracting states to this Convention. A listing of contracting states is available at

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(2) if there is no internationally agreed means, or if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice:

(A) as prescribed by the foreign country's law for service in that country in an action in its courts of general jurisdiction;

(B) as the foreign authority directs in response to a letter rogatory or letter of request; or

(C) unless prohibited by the foreign country's law, by:

(i) delivering a copy of the summons and of the complaint to the individual personally; or

(ii) using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt; or

(3) by other means not prohibited by international agreement, as the court orders.

Fed. R. Civ. P. 4(f).

The record in this adversary proceeding does not show compliance with the Hague Service Convention or other internationally agreed means of service under Rule 4(f)(1). The plaintiff also does not claim service as prescribed by Rule 4(f)(2) or (f)(3). Although the plaintiff states that process was sent by certified mail to Aruba Bank, this statement was not made under the penalty of perjury. Compare ECF No. 4, with ECF No. 4-1, page 38 of 38. In the former, the attorney for plaintiff “certified” sending process via regular and certified mail. This document was not signed under penalty of perjury. In the later, the individual who actually did the mailing declared under penalty of perjury to only using regular, first class mail. The plaintiff did not include a copy of delivery confirmation by the postal service.⁷ The fact that the plaintiff has not included a copy of a signed delivery receipt suggests to the

⁶(...continued)

http://www.hcch.net/index_en.php?act=conventions.status&cid=17 (last visited Feb. 5, 2015) or https://en.wikipedia.org/wiki/Hague_Service_Convention (last visited Feb. 5, 2015).

⁷Historically in the United States, proof of delivery of certified mail was provided by means of a signature on the ‘green card’ return receipt. The United States Postal Service (“USPS”) now provides mailing and delivery confirmation by means of ERR — Electronic Return Receipt. The Electronic Return Receipt links to a signature

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court that no receipt showing service exists and the plaintiff did not follow the technical requirements for service in Rule 4(f). *See generally In re Cyphermint, Inc.*, 445 B.R. 11, 14 (Bankr. D. Mass. 2011), *aff'd*, 459 B.R. 488 (D. Mass 2011) (discussing service of process in foreign countries).

Conclusion

For the reasons discussed above, the court denies without prejudice the plaintiff's Motion for Default Judgement Against Defendant Aruba Bank.

SO ORDERED.

/s/ HARRY C. DEES, JR.

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

⁷(...continued)
image stored at the USPS when the letter is delivered by the carrier. Information about certified mail is available from the USPS at <http://www.certified-mail-envelopes.com/faqs/> (last visited Feb. 9, 2015).