

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
HAMMOND DIVISION

IN RE: )  
)  
JESUS MIGUEL DELTORO and ) CASE NO. 05-64915 JPK  
MARIA ELIZABETH DELTORO, ) Chapter 7  
)  
Debtors. )  
\*\*\*\*\* )  
GREAT AMERICAN INSURANCE )  
COMPANIES, )  
)  
Plaintiff, )  
)  
v. ) ADVERSARY NO. 05-6263  
)  
JESUS MIGUEL DELTORO, )  
)  
Defendant. )

ORDER REGARDING SUPPLEMENTATION OF RECORD  
WITH RESPECT TO MOTION FOR DEFAULT JUDGMENT

This adversary proceeding was commenced by a complaint filed by the plaintiff on December 7, 2005. The record establishes that service of process was made upon the defendant, and that the defendant neither appeared in the action nor filed a response to the plaintiff's complaint. Entry of default was made pursuant to Fed.R.Bankr.P. 7055/Fed.R.Civ.P. 55(a) on April 20, 2006. On May 3, 2006, the plaintiff filed a Motion for Entry of Default Judgment.

The plaintiff's action is premised upon 11 U.S.C. § 523(a)(4), specifically upon the alleged commission of "larceny" by the defendant. The materials of record establish the plaintiff's entitlement to a determination that the amount of \$56,477.36 owed by the defendant to the plaintiff is excepted from discharge by operation of 11 U.S.C. § 523(a)(4). However, paragraph 12 of the Affidavit of Rachel Weimer submitted by the plaintiff in support of its motion refers to the plaintiff's receipt of \$15,000.00 in restitution payments, apparently made by the defendant in performance of a criminal monetary sentence entered against him by the Cook

County, Illinois Criminal Division Court under case number 05-CR-904301. The Court is unable to determine whether or not the \$15,000.00 is the extent of the criminal monetary sentence imposed for the benefit of, or which will inure to the benefit of, the plaintiff by that criminal case. The Court assumes – but does not decide – that the restitution ordered in that criminal case is excepted from discharge in the defendant's Chapter 7 case [case number 05-64915 in the United States Bankruptcy Court for the Northern District of Indiana, Hammond Division] by operation of 11 U.S.C. § 523(a)(7); *Kelly v. Robinson*, 107 S.Ct. 353 (1986). If the amount of the criminal restitution sentence imposed for the benefit of, or inuring to the benefit of, the plaintiff exceeds \$15,000.00, the issue arises as to the propriety of entering a separate judgment in this adversary proceeding which credits only the amount of restitution paid, but not the amount of further restitution payable, under the criminal sentence. Even if the entry of such a "double" recovery judgment would be appropriate, the Court deems it necessary to incorporate a mechanism into the judgment to be entered in this case by which credit is given to the defendant against that judgment for additional amounts paid to or for the benefit of the plaintiff under the criminal sentence. The record simply does not contain sufficient information for the Court to determine the manner in which the judgment to be entered in this case should take account of the criminal restitution sentence, or if that should be done at all.

Additionally, the materials submitted by the plaintiff in support of its motion for default judgment seek an award of attorney's fees. There is no provision of federal law which authorizes the recovery of attorney's fees by a plaintiff successful in an action under 11 U.S.C. § 523(a)(4). However, recovery of attorney's fees can be premised upon a contractual agreement between the plaintiff and the defendant which authorizes the recovery of those fees in the circumstances of this case; *In re Sheridan*, 105 F.3d 1164 (7<sup>th</sup> Cir. 1997) – or by applicable state law which allows the recovery of attorney's fees as an adjunct to recovery of monetary damages for the nature of the conduct giving rise to the § 523(a)(4) action; *Cohen v.*

*De La Cruz*, 118 S.Ct. 1212 (1998). In the instant case, the record does not disclose any basis upon which an award of attorney's fees to the plaintiff can be based.

The Court deems it necessary to consider additional matters with respect to the plaintiff's motion for entry of default judgment, pursuant to Fed.R.Bankr.P. 7055/Fed.R.Civ.P. 55(a)(2).

IT IS ORDERED that a telephonic conference between the Court and the plaintiff's counsel shall be held on **July 19, 2006, at 11:30 A.M.** to address the foregoing issues. Not later than ten days in advance of the date of that hearing, plaintiff's counsel shall file with the Court a copy of the state criminal judgment entered against the defendant, including all provisions of that document or of any other document entered in relation to the defendant's sentence which relates to the defendant's obligation of restitution to or for the benefit of the plaintiff; and a statement of the contractual or other basis which would sustain the plaintiff's request for an award of attorney's fees as part of the judgment to be entered in this case.

IT IS FURTHER ORDERED that if not later than ten days in advance of the date of the scheduled telephonic conference, the defendant files a motion with the Court for participation in that conference, the telephonic conference will be converted to a hearing in open court at the scheduled date and time.

Dated at Hammond, Indiana on May 25, 2006.

/s/ J. Philip Klingeberger  
J. Philip Klingeberger, Judge  
United States Bankruptcy Court

Distribution:

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