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IT IS SO ORDERED.

Dated: June 12, 2014



Beth A. Buchanan

Beth A. Buchanan
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re)	
JOSEPH A. PERSONS)	Case No. 13-11619
Debtor)	Chapter 7
)	Judge Buchanan
MARK ALAN GREENBERGER,)	
CHAPTER 7 TRUSTEE)	
Plaintiff)	Adv. No. 14-1019
v.)	
JOSEPH A. PERSONS,)	
Defendant)	

ORDER DENYING MOTION FOR DEFAULT JUDGMENT

This matter is before this Court on the Chapter 7 Trustee's *Complaint to Deny Discharge* [Docket Number 1] and *Motion for Default Judgment* [Docket Number 5].

For the following reasons, the Motion for Default Judgment is DENIED, without prejudice.

I. The Trustee Has Failed To Properly Serve The Debtor.

The Complaint and the Summons [Docket Number 2] were served on the Debtor, but were not served on the Debtor's attorney. Service on a debtor's attorney is an additional service requirement. See Fed. R. Bankr. P. 7004(g); see e.g., *Jahn v. Clayton (In re Clayton)*, 2012 Bankr.

LEXIS 152, at *7, 2012 WL 112940, at *3 (Bankr. E.D. Tenn. Jan. 12, 2012). Accordingly, service is insufficient. *See* Fed. R. Civ. P. 12 (b)(5).¹

II. The Trustee Has Failed To State A Claim Under 11 U.S.C. § 727(a).

The record reflects that no answer or responsive pleading to the Complaint has been filed. The failure of a defendant to respond to a complaint, however, does not automatically entitle a plaintiff to entry of a default judgment. Rather, a default judgment must be grounded in fact and in law. *Webster v. Key Bank (In re Webster)*, 287 B.R. 703, 709 (Bankr. N.D. Ohio 2002)(citations omitted). A motion for default judgment may be denied when the facts alleged in the complaint are insufficient to support the claim in the complaint. *Target Nat'l Bank v. Redmond (In re Redmond)*, 399 B.R. 628, 632 (Bankr. N.D. Ind. 2008).

The Trustee seeks to have the Debtor's discharge denied because the Debtor has failed to provide the Trustee with information regarding an account receivable from Falcon Towing and Recovery, a business owned by the Debtor. The Complaint references only 11 U.S.C § 727(a) in general. It is unclear to this Court under which subsection the Trustee seeks to proceed. It seems most likely that the Trustee seeks to proceed under subsection (4)(D)("[T]he debtor knowingly and fraudulently, in or in connection with the case— . . . withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs."). Where a complaint includes allegations of fraud, the court must "evaluate the evidence presented to assure that the plaintiff has presented a prima facie case." *Fleet Credit Card Services, L.P. v. Macias (In re Macias)*, 324 B.R. 181, 186 (Bankr. E.D. N.Y. 2004)(citation omitted). If this Court has assumed correctly, then the Trustee has not presented a prima facie case in that the Complaint fails to allege that the Debtor "knowingly and fraudulently" withheld the information requested.²

III. The Motion For Default Judgment Is Not Accompanied By Appropriate Affidavits.

Federal Rule of Civil Procedure 55(b)(2)³ states that "[a] default judgment may be entered against a minor or incompetent person only if represented by a general guardian, conservator, or other like fiduciary who has appeared." In order for this Court to make such determination, it is incumbent upon a plaintiff to attest that a defendant against whom a default judgment is sought is not a minor or incompetent person. While it may seem reasonable to simply presume that an individual who has filed a bankruptcy petition is not a minor or an incompetent person, it is this Court's position that the better practice is for a plaintiff to so attest, such that the record clearly reflects the requisite elements necessary for entry of a default judgment. Further, there are many

¹ Made applicable in adversary proceedings by Federal Rule of Bankruptcy Procedure 7012(b).

² Alternatively, this Court observes that if the Debtor had failed to comply with an order granting a motion for turnover of the required information, the Trustee would then be in a position to challenge the Debtor's discharge under 11 U.S.C. § 727(a)(6)(A)("[T]he debtor has refused, in the case— . . . to obey a lawful order of the court . . ."). This Court has observed this practice by other chapter 7 trustees in this District.

³ Made applicable in adversary proceedings by Federal Rule of Bankruptcy Procedure 7055.

adversary proceedings where the individual defendant is not a debtor. In the present case, the Trustee has not filed an affidavit or declaration pursuant to 28 U.S.C. § 1746 indicating that the Debtor is not a minor or incompetent person.

As a further requirement for entry of a default judgment, this Court must determine whether a defendant is in the military service in accordance with the Servicemembers Civil Relief Act. 50 U.S.C. app. § 521(b). This statute requires a plaintiff to file an affidavit “(A) stating whether or not the defendant is in military service and showing necessary facts to support the affidavit; or (B) if the plaintiff is unable to determine whether or not the defendant is in military service, stating that the plaintiff is unable to determine whether or not the defendant is in military service.”⁴ 50 U.S.C. app. § 521(b)(1). In the present case, the Trustee has not filed the affidavit required by 50 U.S.C. app. § 521(b).

IV. Additional Procedural Deficiencies.

This Court notes the following additional procedural deficiencies:

(1) Attached to the Complaint is a twenty-one (21) day notice of parties’ right to object. In general, a motion or an application shall be accompanied by a twenty-one (21) day notice. *See* LBR 9013-1. However, a complaint is not a motion or an application contemplated by LBR 9013-1. Rather, the time period within which to file an answer to a complaint is governed by Federal Rule of Bankruptcy Procedure 7012(a). Furthermore, it is misleading to accompany a complaint with a twenty-one (21) day notice since the time within which to file an answer to a complaint is thirty (30) days.⁵

(2) Attached to the Complaint is a certificate of service. While attaching a certificate of service to a complaint is not a fatal procedural defect, it is generally not necessary. Proof of service of a complaint—and summons—is more properly evidenced by the filing of a certificate of service, indicating service of *both* the summons and complaint. *See* Director’s Procedural Form 250A.

(3) The certificate of service attached to the Complaint states that the Complaint was served electronically through the Court’s ECF System on Stefanie Brunemann, the Debtor’s attorney in the main case. A complaint may not be served electronically. *See* ECF Procedure 9(a)(1).

(4) The certificate of service attached to the Motion for Default Judgment incorrectly states that the Motion for Default Judgment was served electronically through the Court’s ECF System on Brian Flick, as “Attorney for the Debtor.” This presents two issues. First, when the action is an

⁴ In completing an affidavit, this Court notes that the military status of a defendant may be determined by conducting an on-line search through the Department of Defense Manpower Data Center (“DMDC”) search engine, located at <https://www.dmdc.osd.mil/appj/scra/scraHome.do>. A plaintiff using the DMDC search engine should attach a printed copy of the certificate generated by the search.

⁵ Indeed, the Trustee filed the instant Motion for Default Judgment on April 22, 2014, *before* the expiration of the thirty (30) day period within which to file an answer.

adversary proceeding, an attorney only receives notice through the Court's ECF System after the attorney has filed a pleading or otherwise appeared in the adversary proceeding. Mr. Flick has not entered an appearance in this adversary proceeding. Second, Mr. Flick is no longer the Debtor's attorney. *See* Notice of Substitution of Counsel, Case No. 13-11619, Docket Number 64.

(5) The certificate of service attached to the Complaint states that the Complaint was served on all creditors in the main case by ordinary U.S. Mail. While this is not a fatal procedural defect, it is not necessary to serve a complaint on all creditors in the main case. The creditors in the main case are not defendants in the adversary proceeding.⁶

IT IS SO ORDERED.

copy to:

Mark A. Greenberger, Chapter 7 Trustee

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⁶ Similarly, it was not necessary to serve the Motion for Default Judgment on all creditors, as evidenced by the certificate of service attached to the Motion for Default Judgment.