

FEB - 3 2004

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
DIVISION

IN RE: : CASE NO. 03-66109
LEONARD SANDS, : CHAPTER 7
Debtor. : JUDGE MASSEY

JOHN W. RAGSDALE, JR. as Trustee
for the Estate of Leonard Sands,
Plaintiff,

v.

ADVERSARY NO. 03-9331

THOMAS GIAMBOI,
Defendant.

ORDER ON MOTION FOR DEFAULT JUDGMENT

On October 24, 2003, Plaintiff filed a complaint containing three counts seeking a judgment against Defendant (1) authorizing Plaintiff pursuant to 11 U.S.C. § 363 to sell real property located at 1028 Exeter - Building B, Boca Raton, Florida 33434 (the "Property") in which Plaintiff alleges that Defendant and Debtor each own a 50% interest, (2) directing Defendant to provide Plaintiff with an accounting with respect to the Property from January 1, 2000 to the date of trial and (3) awarding Plaintiff attorney's fees pursuant to O.C.G.A. § 13-6-11.

On January 14, 2004, Plaintiff moved for a default judgment based on an affidavit of William Russell Patterson, Jr., Plaintiff's counsel, in which Mr. Patterson states that he properly served the summons and complaint on October 27, 2003, that Defendant had thirty days to answer

or otherwise respond to the complaint and that Defendant had "failed to file an answer or motion within the time limit fixed by the Court or by Fed. R. Bank. P. 7012."

Bankruptcy Rule 7012(a) prescribes the time within which an answer must be served - not filed. Rule 5(d) of the Federal Rules of Civil Procedure, made applicable by Bankruptcy Rule 7005, provides in relevant part that "[a]ll papers after the complaint required to be served upon a party, together with a certificate of service, must be filed with the court within a reasonable time after service." Thus, a plaintiff seeking a default judgment should state that the plaintiff has not been served with an answer or other response and that, based on a review of the docket, none has been filed. The Court presumes that counsel is saying that not only has Defendant not filed an answer or other response, he also has not served one on Plaintiff.

The Clerk has made an entry of default indicating that Defendant filed no response to the complaint. Nor did he file a response to the motion for default judgment.

Plaintiff is entitled to a default judgment on the first two counts of the complaint seeking authority to sell the Property and an accounting. He is not entitled to a default judgment for attorney's fees sought in Count Three.

The statute O.C.G.A. § 13-6-11, on which Plaintiff relies as the basis for an award of attorney's fees, provides:

The expenses of litigation generally shall not be allowed as a part of the damages; but where the plaintiff has specially pleaded and has made prayer therefor and where the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, the jury may allow them.

Plaintiff mouths the legal conclusions that Defendant acted in bad faith, has been stubbornly litigious and has caused Plaintiff unnecessary trouble and expense in paragraph 16 of the

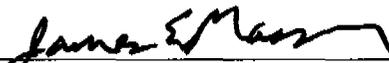
Complaint, after incorporating the earlier paragraphs in paragraph 15. The only allegations about Defendant's conduct earlier in the complaint are that he has "excluded Debtor from possession of the property" (paragraph 12) and that Defendant "has or *may have* received monies from the rental of the Property" to which Plaintiff asserts an interest (paragraph 13). Emphasis added.

Lay aside such issues as whether that statute has any application to Counts One and Two filed in the bankruptcy court. The complaint fails to show that Defendant has engaged in any of the conduct described in the Georgia statute. The complaint does not state when Debtor was excluded from the property. The term "Debtor" is not defined and presumably merely refers to Leonard Sands but not necessarily to Mr. Sands' role as a debtor in this case. That would not matter because Mr. Sands ceased to have authority to deal with the Property when it became property of the estate, so conceivably, excluding him from the Property might have benefitted the estate. There is no allegation describing the agreement of Mr. Sands and Mr. Giamboi with respect to the Property or to show that Mr. Sands had any right to use the Property or that Mr. Sands is due anything from the rental of the Property, if it was rented, which Plaintiff admits it may not have been. Thus, assuming that the factual allegations in the complaint are true, they do not show a violation of O.C.G.A. § 13-6-11.

Accordingly, it is

ORDERED that Plaintiff's motion for a default judgment against the Defendant is GRANTED as to Counts One and Two and DENIED as to Count Three.

This 3rd day of February, 2003.



JAMES E. MASSEY
U.S. BANKRUPTCY JUDGE