



IT IS ORDERED as set forth below:

Date: July 6, 2016

A handwritten signature in black ink, appearing to read "Barbara Ellis-Monro", is written above a horizontal line.

**Barbara Ellis-Monro
U.S. Bankruptcy Court Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

IN RE:

ERICA CHERIE GILLIS,

Debtor.

MARY IDA TOWNSON,

Plaintiff,

v.

PATRICIA GLENN-SHAHEED, M.D.,

Defendant.

CASE NO. 12-53067-BEM

CHAPTER 13

ADVERSARY PROCEEDING NO.
16-5029-BEM

ORDER

This proceeding comes before the Court on Plaintiff's request for entry of default. [Doc. 5]. The Court held a hearing on the request on June 1, 2016. Albert Clark Guthrie appeared on behalf of Plaintiff; Defendant did not appear.

Plaintiff filed her complaint and the clerk's office issued a summons on February 4, 2016. [Doc. 1, 2]. She filed a certificate of service showing service of the complaint and summons on Defendant on February 4, 2016. [Doc. 3]. On March 10, 2015, Defendant filed a letter in the main bankruptcy case. A copy of the letter was entered on the docket in this adversary proceeding on March 31, 2016. [Doc. 4]. On April 19, 2016, Plaintiff filed a Request for Entry of Default. [Doc. 5].

Pursuant to Fed. R. Civ. P. 55(a), made applicable to adversary proceedings by Fed. R. Bankr. P. 7055, "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default." The question here is whether Defendant's letter constitutes a pleading or other defense such that the Clerk must enter default.

The documents recognized as pleadings under the Civil Rules and Bankruptcy Rules are set forth in Fed. R. Civ. P. 7 as: a complaint; an answer to a complaint, a counterclaim, or a crossclaim; a third-party complaint; an answer to a third-party complaint, and a reply to an answer. Based on the procedural posture of the proceeding, Defendant's letter cannot be any pleading other than an answer. Under Fed. R. Civ. P. 8(b), "In responding to a pleading, a party must: (A) state in short and plain terms its defenses to each claim asserted against it; and (B) admit or deny the allegations asserted against it by an opposing party." In the case of a *pro se* litigant like Defendant, pleadings are liberally construed and held to a less stringent standard than pleadings filed by an attorney, although the pleading "still must comply with the procedural rules governing the proper form of pleadings." *Heard v. Nix*, 170 Fed. Appx. 618, 619 (11th Cir. 2006).

The phrase “otherwise defend” is not a defined term. However, courts have construed it to include “various challenges to such matters as service, venue, and the sufficiency of the prior pleading” 10A Fed. Prac. & Proc. Civ. § 2682 (3d ed.); *see also Beepot v. JP Morgan Chase Nat. Corporate Servs., Inc.*, 626 Fed. Appx. 935, 937 (11th Cir. 2015) (no default when defendant timely filed a motion to dismiss). Furthermore, the Advisory Committee Notes to Rule 55 state that the language was changed in 2007 from “plead or otherwise defend as provided by these rules” to merely “plead or otherwise defend” to clarify that any action “showing an intent to defend” would prevent a default “even though not connected to any particular rule.” Fed. R. Civ. P. 55, Advisory Committee Notes (2007). Here, Defendant has not filed any motions and her letter cannot fairly be construed as demonstrating an intent to defend since it does not expressly or implicitly contest liability. Therefore, the question is whether it meets the standard of an answer.

The complaint alleges Defendant is Debtor’s employer [Doc. 1 ¶ 6], and Defendant is subject to an Employment Deduction Order (“EDO”). *Id.* ¶ 7. After a default in payments by Defendant, Plaintiff required Defendant to submit certified funds, and Defendant failed to remit certified funds but instead tendered business checks that were refused by Plaintiff. *Id.* ¶¶ 14-16. Although the letter does not respond point-by-point to the allegations, it does admit key allegations, including that Debtor is a “hard working employee” of Defendant, that Defendant “will satisfy payments as soon as possible,” and that it is difficult for Defendant “to get out biweekly to send the certified payments,” so she allowed Debtor to cash the checks and pay Plaintiff directly. Defendant also stated she was “hoping that over time the trustee would have modern technology and would be able to automatically deduct the amount from my

account, to avoid balances.” [Doc. 4]. Based on the foregoing and the fact that Defendant is acting *pro se*, the Court finds the letter is sufficient to constitute an answer.

Plaintiff argued that even if the letter is a responsive pleading, it was filed late, such that Defendant is in default. The answer in this proceeding was due March 7, 2016. Defendant’s letter was filed on March 10, 2016. The untimeliness of an answer does not necessarily justify entry of default. *Davila v. Marshall*, No. 15-10749, 2016 WL 2941929, at *2 (11th Cir. May 20, 2016) (late-filed motion to dismiss did not warrant default judgment); *Gayle v. Thompson (In re Thompson)*, No. 11-51640, AP No. 11-5202, 2011 WL 2836594, at *1 (Bankr. N.D. Ga. June 30, 2011) (Bonapfel, J.) (“[E]ven if a party answers late, if the party files an answer prior to the request for entry of default, the clerk may not enter default.”). Plaintiff will not be prejudiced by a finding that Defendant is not in default. The letter was filed by a *pro se* party prior to the request for entry of default, and nothing prevents Plaintiff from seeking preliminary relief in a form other than default judgment, such as judgment on the pleadings. Furthermore, judgment by default is disfavored, with preference for deciding cases on the merits. *Davila*, 2016 WL 2941929, at *2 (citing *Mitchell v. Brown & Williamson Tobacco Corp.*, 294 F.3d 1309, 1316-17 (11th Cir. 2002)). Accordingly, it is

ORDERED that Defendant is not in default, and Plaintiff is not entitled to entry of default by the Clerk.

END OF ORDER

Distribution List

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