



IT IS ORDERED as set forth below:

Date: August 10, 2016

**Lisa Ritchey Craig
U.S. Bankruptcy Court Judge**

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

IN RE:)	CHAPTER 7
)	
KRISTEN L. MEHR,)	CASE NO. 15-51991 – LRC
)	
Debtor.)	
<hr/>		
KRISTEN L. MEHR,)	
)	
Plaintiff,)	ADVERSARY PROCEEDING
v.)	NO. 15-5200
)	
UNITED STATES OF AMERICA)	
DEPARTMENT OF THE TREASURY)	
INTERNAL REVENUE SERVICE and)	
THE STATE OF CALIFORNIA FRANCHISE)	
TAX BOARD,)	
)	
Defendants.)	

ORDER ON MOTION FOR DEFAULT JUDGMENT

This adversary proceeding is before the court on Plaintiff’s *Restated Motion for Default Judgment* filed May 23, 2016 (Doc. No. 24) (the “Restated Motion”). On

February 2, 2015 (the “Petition Date”), Plaintiff filed a petition for relief under chapter 7 of title 11, initiating the case underlying this proceeding, Case No. 15-51991, which was assigned to the Honorable Margaret H. Murphy.

Plaintiff filed a complaint April 22, 2015, initiating this adversary proceeding (the “Original Complaint”). Summons was issued April 22, 2015. The Original Complaint sought, *inter alia*, an order stating that taxes assessed by the State of California Franchise Tax Board (“California”) for income earned during the 2010 tax year should not be excluded from Debtor’s discharge under 11 U.S.C. § 523(a)(1).

California never responded to or appeared in opposition to the relief sought in the Original Complaint. On July 8, 2015, Plaintiff requested entry of default (Doc. No. 7), and the Clerk’s Entry of Default was entered July 15, 2015. Plaintiff then filed a *Motion for Default Judgment* on July 17, 2015 (Doc. No. 10) (the “Original Motion”). The affidavit of Plaintiff’s counsel filed with the Original Motion represented that the Original Complaint and Summons were served upon the Governor of California and the State of California Franchise Tax Board on April 22, 2015, by first class mail. Judge Murphy entered an order on July 28, 2015 (Doc. No. 11) (the “Original Order”), granting the Original Motion in part and denying the Original Motion in part.

On March 1, 2016, Plaintiff filed an amended complaint (Doc. No. 16) (the “Amended Complaint”) which includes additional factual allegations that were not in the Original Complaint. The Amended Complaint again seeks, *inter alia*, an order stating that taxes assessed by California for income earned during the 2010 tax year should not be excluded from Debtor’s discharge under 11 U.S.C. § 523(a)(1).

The affidavit of Plaintiff's counsel filed with the Restated Motion represents that the Amended Complaint and Summons were served upon the Governor of California and the State of California Franchise Tax Board March 1, 2016, by first class mail. California has not appeared in opposition to the relief sought in the Amended Complaint. Following Plaintiff's renewed request for entry of default (Doc. No. 23), the Clerk entered the default on May 18, 2016. Plaintiff now seeks default judgment.

DISCUSSION

Federal Rule of Bankruptcy Procedure 7055 states that Federal Rule of Civil Procedure 55 is to be applied in adversary proceedings. FED. R. BANKR. P. 7055. Federal Rule of Civil Procedure 55 provides that a plaintiff may obtain a default judgment against a defendant who "has failed to plead or otherwise defend[.]" FED. R. CIV. P. 55(a). However, a plaintiff is not automatically entitled to a default judgment just because a defendant failed to respond. *Cf. In re Trevisan*, 300 B.R. 708, 713 (E.D. Wis. 2003). To be entitled to a default judgment, a plaintiff must provide sufficient facts to support a cause of action. *Id.* While well-pleaded allegations of fact are deemed admitted by Defendant's default, legal conclusions are not entitled to similar deference. *Cotton v. Massachusetts Mutual Life Insurance Co.*, 402 F.3d 1267, 1278 (11th Cir. 2005) ("allegations" that defendant falls under the statutory definition of a fiduciary, without facts explaining in what way defendant meets the definition, are not "well-pleaded factual allegations" sufficient to establish the defendant's status as a fiduciary).

Under 11 U.S.C. § 523(a)(1), a tax debt is not dischargeable (A) if it is “of the kind and for the periods specified in section 507(a)(3) or 507(a)(8)” of the Bankruptcy Code; (B) if the required tax return was not filed or was filed late and less than two years prior to the petition date; or (C) if the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat the tax. 11 U.S.C. § 523(a)(1). 11 U.S.C. § 523(a)(1). Section 507(a)(3) debts are not implicated here. Section 507(a)(8) describes, in relevant part, income taxes for which required returns are last due within three years before the petition date, which are assessed within 240 days before the petition date, or which are assessed after commencement of the case. *Id.* § 507(a)(8).

In the Original Order, Judge Murphy found that Plaintiff “show[ed] that the 2010 tax debt owed to California is not exempt from discharge under § 523(a)(1)(B), . . . [but that Plaintiff failed] to show that the 2010 tax debt owed to California should not be exempt from discharge under § 523(a)(1)(A) or (C).” Judge Murphy noted two deficiencies in the pleadings. First, Plaintiff failed to allege when the tax return was last due, and second, there were no factual allegations in the pleadings that could support a conclusion that Plaintiff had not “made a fraudulent return or willfully attempted in any manner to evade or defeat [the] tax.” 11 U.S.C. § 523(a)(1)(C). Judge Murphy also found that the general allegation contained in the Original Complaint that “the tax liability to be discharged is not a result of any action of the Plaintiff as set forth in 11

U.S.C. § 523(a)(B) [*sic*] and (C)” was a legal conclusion and not admissible as a well-pled factual allegation.

Applying the standards of *Cotton, supra*, the undisputed facts contained in the Amended Complaint show that:

1. More than two years prior to the Petition Date, California assessed income taxes against Plaintiff based upon certain income earned in California in 2010;
2. California has demanded payment from Plaintiff of these taxes;
3. Plaintiff’s tax return for 2010 was last due April 15, 2011;
4. Plaintiff did not file for an extension of these taxes;
5. Plaintiff filed a return for the apportioned tax prior to the Petition Date; and
6. Plaintiff’s return filed with California was a true representation of all taxes due to California.

These facts are deemed admitted and show that the 2010 tax debt owed to California is not excepted from discharge under § 523(a)(1)(A), (B) or (C). Plaintiff has now established with the Amended Complaint that Plaintiff’s 2010 tax return was last due on April 15, 2011, which was more than three years prior to the Petition Date, and that the tax return was a true representation of the taxes owed, which is sufficient to

support the conclusion that Plaintiff did not make a fraudulent return or attempt to evade or defeat the tax.¹ Accordingly, it is hereby

ORDERED that the Restated Motion is *granted*.

IT IS FURTHER ORDERED that a separate judgement will be entered contemporaneously herewith.

[END OF DOCUMENT]

¹ See and compare, *United States v. Fretz (In re Fretz)*, 244 F.3d 1323 (11th Cir. 2001) (holding that a debtor's failure to file tax returns and pay taxes satisfied the statutory requirements for non-dischargeability under section 523(a)(1)(C)); *United States v. Jacobs (In re Jacobs)*, 490 F.3d 913 (11th Cir. 2007) (holding that a debtor who filed his tax returns late, titled property in his wife's name in order to avoid tax liens attaching to the property, engaged in lavish spending and had his law firm characterize his salary as officer compensation, which is not subject to tax withholding, demonstrated that the debtor willfully attempted to evade or defeat the taxes); and *Griffith v. United States (In re Griffith)*, 206 F.3d 1389 (11th Cir. 2000) (holding that mere non-payment of a tax does not constitute willfully attempting to evade or defeat a tax, but that a debtor's non-payment of the tax coupled with actions to evade payment of the tax does rise to the level of willfully attempting to evade or defeat the tax).