

APR 27 2004

UNITED STATES BANKRUPTCY COURT
 NORTHERN DISTRICT OF GEORGIA
 ATLANTA DIVISION

IN THE MATTER OF:	:	CASE NUMBER: A03-80845-PWB
	:	
PAUL DARRELL BERKE,	:	
	:	IN PROCEEDINGS UNDER
	:	CHAPTER 7 OF THE
Debtor.	:	BANKRUPTCY CODE
_____	:	
	:	
WILLIAM GRIGGS,	:	
	:	ADVERSARY PROCEEDING
Plaintiff	:	NO. 04-9003
	:	
v.	:	
	:	
PAUL DARRELL BERKE,	:	JUDGE BONAPFEL
	:	
Defendant.	:	

ORDER DENYING MOTION FOR DEFAULT JUDGMENT

William Griggs ("Plaintiff") seeks a determination that a debt owed by the Debtor, Paul Darrell Berke ("Defendant") is nondischargeable. Plaintiff contends that on March 7, 2000, Plaintiff was awarded \$14,922.34 in attorney's fees as a result of frivolous lawsuit pursued by Defendant, as counsel for Tommy Shubrick, in *Tommy Shubrick v. William Griggs*, Civ. Action No. 97A6004-3, State Court of Cobb County, Georgia. Plaintiff contends that this debt is nondischargeable pursuant to 11 U.S.C. § 523(a)(17) and § 523(a)(19). Based upon Defendant's failure to file an answer, Plaintiff now seeks entry of default judgment.

Entry of default judgment by the court is discretionary. *See* Fed. R. Civ. P. 55(b) ("Judgment by default *may* be entered" by the court) (emphasis added). The allegations in the complaint itself must serve as a sufficient basis for the entry of judgment. "[A] defendant's default does not in itself warrant the court in entering default judgment. There must be a sufficient basis

in the pleadings for the judgment entered.” *Nishimatsu Constr. Co., Ltd. v. Houston Nat. Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975); *see also Alan Neuman Productions, Inc. v. Albright*, 862 F.2d 1388, 1392 (9th Cir. 1988), *cert. denied*, 493 U.S. 858 (1989); *Wahl v. McIver*, 773 F.2d 1169, 1174 (11th Cir. 1985).

Section 523(a)(17) provides that a debt is nondischargeable if it is for a fee imposed by a court for the filing of a case, motion, complaint, or appeal, or for other costs and expenses assessed with respect to such filing, regardless of an assertion of poverty by the debtor under section 1915(b) or (f) of title 28, or the debtor’s status as a prisoner, as defined in section 1915(h) of title 28.

The wording of § 523(a)(17) is somewhat ambiguous; it is possible to read this statute to apply to fees imposed against any persons, not just prisoners seeking to proceed *in forma pauperis*. However, subsection (a)(17) was added to § 523 in 1996 as part of the Omnibus Consolidated Rescissions and Appropriations Act of 1996 in conjunction with the Prison Litigation Reform Act which amended 28 U.S.C. § 1915. *See South Bend Community School Corp. v. Eggleston*, 215 B.R. 1012, 1017 n.2 (N.D. Ind. 1997) (“this section was added specifically under the Prison Litigation Reform Act for the purported purpose of ensuring that prisoners did not continue to use *in forma pauperis* provisions as a way to avoid filing fees and to potentially reduce the number of frivolous prisoner filings”); 4 ALAN N. RESNICK & HENRY J. SOMMER, COLLIER ON BANKRUPTCY ¶ 523.23 (15TH ed. rev. 2004). The legislative history of the statutes indicates that § 523(a)(17) applies only to fees and costs imposed on prisoner litigants under 28 U.S.C. § 1915. *E.g., In re Hough*, 239 B.R. 412 (9th Cir. B.A.P. 1999); *In re Tepfer*, 280 B.R. 628 (N.D. Ill. 2002). As a result, Plaintiff has no nondischargeability claim under § 523(a)(17) for fees arising from a state court case.

As an alternative ground, Plaintiff contends its debt is nondischargeable pursuant to § 523(a)(19). Section 523(a)(19) provides that a discharge does not apply to a debt that-

(A) is for -

(i) the violation of any of the Federal securities laws (as that term is defined in section 3(a)(47) of the Securities Exchange Act of 1934), any of the State securities laws, or any regulation or order issued under such Federal or State securities laws; or

(ii) common law fraud, deceit, or manipulation in connection with the purchase or sale of any security; and

(B) results from-

(i) any judgment, order, consent order, or decree entered in any Federal or State judicial or administrative proceeding;

(ii) any settlement agreement entered into by the debtor; or

(iii) any court or administrative order for any damages, fine, penalty, citation, restitutionary payment, disgorgement payment, attorney fee, cost, or other payment owed by the debtor.

Plaintiff contends that his debt is nondischargeable under § 523(a)(19)(B)(i) and (iii). However, § 523(a)(19)(A) and (B) must be read in the conjunctive; a plaintiff must prove that the debt arises from violation of securities laws ((a)(19)(A)) *and* that the debt results from a judgment or order entered in a court or administrative proceeding ((a)(19)(B)). Plaintiff has not alleged that the debt owed by Defendant arises from the violation of any federal or state securities laws or in contravention of the common law with respect to the purchase or sale of a security. As a result, the allegations in Plaintiff's complaint do not establish a sufficient basis for entry of default judgment against Defendant.

Finally, pursuant to Rule 55(b)(2), "no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein." Prior to the entry of default

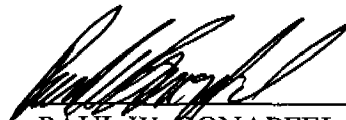
judgment, a plaintiff is required to file in the court an affidavit indicating whether the defendant is or is not in the military service or that the plaintiff is unable to determine the defendant's military status, as required by the Servicemember's Civil Relief Act, 50 App. U.S.C. § 501 *et seq.* Plaintiff has failed to file an affidavit setting forth that Defendant does not fall within any of these delineated groups.

In sum, Plaintiff's complaint does not state a claim upon which relief can be granted and, as a result, Plaintiff's motion for default judgment is denied. Because Defendant has filed no answer, Plaintiff may amend his complaint without leave of court. Accordingly, it is

ORDERED that Plaintiff's motion for default judgment is **DENIED** without prejudice.

The Clerk is directed to serve copies of this Order on counsel for Plaintiff and the Defendant.

At Atlanta, Georgia, this 27 day of April, 2004.



PAUL W. BONAPFEL
UNITED STATES BANKRUPTCY JUDGE