

ENTERED ON
MAR 23 2005

DOCKET

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:)	CHAPTER 7
)	
MICHAEL J. DAVIS)	CASE NO. 04-97253-MHM
)	
Debtor)	
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EDWARD HOWSE)	
SHARI HOWSE TAYLOR)	
)	ADVERSARY PROCEEDING
Plaintiffs)	NO. 04-9218
v.)	
)	
MICHAEL J. DAVIS, JR.)	
)	ORDER DENYING MOTION
Defendant)	FOR DEFAULT JUDGMENT

This adversary proceeding commenced December 30, 2004, with the filing of Plaintiffs' complaint. Plaintiffs' complaint alleges Debtor was employed by Plaintiffs to appeal a criminal conviction of Plaintiff Howse. In accordance with the written contract between Plaintiffs and Debtor, Plaintiffs paid Debtor \$4,000 as a retainer. Debtor failed to file the appeal and Plaintiff Howse's Motion for Out of Time Appeal was denied. In the fee arbitration proceeding Plaintiffs filed against Debtor, the arbitration panel entered an award March 19, 2004, which directed Debtor to refund the \$4,000. Debtor failed to do so.¹ In the prayer of the complaint, Plaintiffs seek a determination that their claim against Debtor is nondischargeable under §523(a)(4) as defalcation in a fiduciary capacity. Plaintiffs also seek relief from the automatic stay to collect their claim from Debtor.

¹ Debtor's Chapter 7 case was filed October 5, 2004.

Debtor failed to file a response to Plaintiffs' complaint. On February 5, 2005, Plaintiffs filed Plaintiffs' Request for Entry of Default Judgment, in which Plaintiffs request that the Clerk enter a default judgment against Debtor in the amount of \$4,000. The Clerk, U.S. Bankruptcy Court, issued an Entry of Default February 22, 2005.

Bankruptcy Rule 7055, which incorporates Fed. R. Civ. Proc. 55, provides that obtaining a default judgment is a two-step procedure: plaintiffs must follow the procedure set forth in both FRCP 55(a) and (b). MOORE'S FEDERAL PRACTICE, ¶55.03. Plaintiffs attempted to collapse this two-step procedure into one, which, procedurally, is a minor defect; however, Plaintiffs also seek entry of default judgment by the Clerk, rather than by the court.

Bankruptcy Rule 7055 provides that a default judgment may be entered by the Clerk when the plaintiff's claim against a defendant is for a sum certain; however, Plaintiffs' complaint seeks a determination of nondischargeability and relief from the automatic stay.² Although one of Plaintiffs' claims for relief is for a sum certain, the remainder of the claims for relief sought by Plaintiffs is equitable relief and is available only from the court, not the Clerk. Therefore, Plaintiffs' request is misdirected.

Even if Plaintiffs' request for default judgment were properly directed to the bankruptcy court, however, Plaintiffs would not be entitled to the relief sought in their request for default judgment. First, and most obviously, Plaintiffs' request for default judgment seeks only a money judgment for \$4,000, which is relief *not sought* in the complaint. Plaintiffs' request for default judgment does not seek relief for the remainder of the non-monetary claims of the complaint.

² Relief from the stay of 11 U.S.C. §§362 is normally sought by motion in the main case, but may be pursued in an adversary proceeding. The estate is represented by the Chapter 7 Trustee, who would be a necessary party to a §362 motion.

Therefore, pursuant to Fed. R. Civ. Proc. 54(c), incorporated in Bankruptcy Rule 7054, their request for default judgment must be denied.

Additionally, the facts set forth in Plaintiffs' complaint fail to set forth a *prima facie* case under §523(a)(4). Plaintiffs' complaint alleges that they entered into a contract with Debtor, paid Debtor a fee for legal services and then Debtor failed to perform the promised services. Debtor breached the contract. That breach, however, does not constitute defalcation while acting in a fiduciary capacity.

"Defalcation," within the meaning in §523(a)(4), mandates, at least, an entrustment of the creditor's money or property to debtor. Mere breach of fiduciary obligation does not in itself constitute a "defalcation," within the meaning of statutory exception to discharge. *SunTrust Bank v. Roberson*, 231 B.R. 136 (Bankr. S.D. Ga. 1999) (J. Walker). Plaintiffs did not entrust their money to Debtor. They paid him a fee. A breach of contract does not constitute defalcation.³ Accordingly, it is hereby

ORDERED that Plaintiffs' motion for default judgment is denied.

The Clerk, U.S. Bankruptcy Court, is directed to serve a copy of this order upon Plaintiffs' attorney, Defendant, and the Chapter 7 Trustee.

IT IS SO ORDERED, this the 22nd day of March, 2005.



MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE

³ Without more, Plaintiffs' complaint fails to achieve the legal result which would form the necessary predicate to seeking relief from the stay; however, if the debt were found nondischargeable, relief from the stay would be unnecessary.