UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

| | |
|---|---|
| IN RE: | CASE NO. 04-78987 |
| Anthony Lamont Detamore, | CHAPTER 7 |
| Debtor. | JUDGE MASSEY |
| Pioneer Credit Co., | |
| Plaintiff, | |
| v. | ADVERSARY NO. 05-6079 |
| Anthony Lamont Detamore, | |
| Defendant. | |

ORDER DENYING PLAINTIFF'S MOTION FOR A DEFAULT JUDGMENT

In this adversary proceeding, Plaintiff, Pioneer Credit Co., objects to the discharge of Defendant and Debtor, Anthony Lamont Detamore, pursuant to 11 U.S.C. § 727(a)(2)(A) and (a)(4)(A). Defendant has not filed an answer or other response to the complaint, and Plaintiff moves for entry of a default judgment. In the brief attached to its motion, Plaintiff asserts that Defendant "has taken no action to set aside the default or otherwise respond to the complaint." The Clerk has made an entry of default.

> Rule 7012(a) of the Federal Rules of Bankruptcy Procedure provides that "[i]f a complaint is duly served, the defendant shall serve an answer within 30 days after the issuance of the summons." Rule 5(d) of the Federal Rules of Civil Procedure, made applicable by Fed. R. Bank. P. 7005, requires a litigant to file any pleading subsequent to the complaint "within a reasonable time after service." Rule 55(a) of the Federal Rules of Civil Procedure, made applicable by Bankruptcy Rule 7055, provides that "[w]hen a party

> against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default." Rule 55(b) describes the circumstances in which "judgment by default may be entered" by the Clerk or the Court.
>
> "Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading." Fed.R.Civ.P. 8(d), made applicable by Fed. R. Bankr.P. 7008. Hence, a defendant that willfully fails to respond to a complaint is deemed to admit the well-pleaded allegations concerning liability. *Greyhound Exhibitgroup, Inc. v. E.L.U.L. Realty Corp.*, 973 F.2d 155 (2nd Cir.1992). "The [defaulting] defendant is not held to admit facts that are not well-pleaded or to admit conclusions of law." *Nishimatsu Const. Co., Ltd. v. Houston Nat. Bank*, 515 F.2d 1200, 1206 (5th Cir.1975).
>
> "The decision to enter judgment by default rests in the court's sound discretion. *Dennis Garberg & Assocs., Inc. v. Pack-Tech Int'l Corp.*, 115 F.3d 767, 771 (10th Cir.1997) (*citing Ruplinger v. Rains*, 946 F.2d 731, 732 (10th Cir.1991))." *Busey v. Board of County Com'rs of County of Shawnee, Kansas* 163 F.Supp.2d 1291, 1297 (D.Kan.2001). "Default judgments are not generally favored and any doubt in entering or setting aside a default judgment must be resolved in favor of the defaulting party." *Finch v. Big Chief Drilling Co.*, 56 F.R.D. 456, 458 (E.D.Tex.1972).

*In re Khalif*, 308 B.R. 614, 617-18 (Bankr. N.D.Ga. 2004).

The road to a default judgment begins with the complaint and ends with a showing that the defendant has not responded to the complaint. In considering whether to grant a motion for a default judgment, a court asks five questions and finds the answers to the first three in the complaint and to the last two in the certificate of service, the clerk's entry of default and the motion papers. The questions are: (1) Does the court have subject matter jurisdiction? (2) Does the complaint state a claim for relief? (3) Do the factual allegations made in the complaint, which the defendant admits by defaulting, satisfy all of the elements of the claim for relief so as to entitle the plaintiff to the relief demanded? (4) Does the court have personal jurisdiction over the defendant based on the facts stated in the certificate of service of the summons and complaint? (5) Has the defendant answered or otherwise responded to the complaint, as established by the Clerk's certificate of default and a statement by the movant that it has not received a response? Because

damage is not admitted by reason of a default, Fed. R. Civ. P. 8(d) made applicable by Fed. R. Bank. P. 7008, the plaintiff must prove at any evidentiary hearing, damages that are "neither susceptible of mathematical computation nor liquidated as of the default." *Greyhound Exhibitgroup, Inc. v. E.L.U.L. Realty Corp.*, 973 F.2d 155, 158 (2nd Cir. 1992).

The Court will consider these five questions in order, beginning with whether it has subject matter jurisdiction. Federal courts "are obligated to inquire into subject-matter jurisdiction sua sponte whenever it may be lacking." *Galindo-Del Valle v. Attorney General*, 213 F.3d 594, 598 n.2 (11th Cir. 2000) (citation omitted). The complaint has two counts. In Count I, Plaintiff seeks denial of Defendant's discharge, and the Court plainly has subject matter jurisdiction to determine this issue. 28 U.S.C. § 157(b)(2)(J). Plaintiff seeks a money judgment against Defendant in Count II, but the Court lacks subject matter jurisdiction to consider that claim.

Congress empowered U.S. district courts to hear bankruptcy matters in 28 U.S.C. § 1334. Bankruptcy judges derive their jurisdiction from referrals from district courts; 28 U.S.C. § 157(a) provides that "[e]ach district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district." Under subsection (a) of section 1334, a district court has "original and exclusive jurisdiction of all cases under title 11." Plaintiff's claim against Defendant in Count II does not arise under title 11; it is a claim based on state law. Section 1334(b) gives a district court "original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." An objection to discharge is a civil proceeding arising under title 11. The claim in Count II did not arise under title 11 or in the bankruptcy case; it existed prior to the filing of the bankruptcy case.

It follows that subject matter jurisdiction over Count II exists only if the claim for a money judgment is "related to" Defendant's bankruptcy case. The seminal case in the Eleventh Circuit for determining the scope of "related to" jurisdiction under section 1334(b) is *Miller v. Kemira, Inc. (In re Lemco Gypsum, Inc.*), 910 F.2d 784 (11th Cir. 1990). There, the Court of Appeals adopted the test used in *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir. 1984):

> "The usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether the outcome of the proceeding could conceivably have an effect on the estate being administered in bankruptcy. The proceeding need not necessarily be against the debtor or the debtor's property. An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate."

*Lemco Gypsum*, 910 F.2d at 788 (quoting *Pacor*, 743 F.2d at 994).

The second test adopted by the Eleventh Circuit is not met by Count II of the complaint because neither granting nor refusing to grant a money judgment to Plaintiff could have any effect whatsoever on the administration of Defendant's bankruptcy case. No claims have been filed in the case, and the Trustee has filed a report of no distribution.

Even if there were to be a distribution, there is no jurisdiction to enter money judgments merely because creditors file claims. To see that this is so, imagine that a trustee successfully objects to a debtor's discharge and that the victory prompts creditors to file adversary proceedings in which each seeks a money judgment for the undisputed amount of debt owed. Such judgments and subsequent collection efforts by each judgment creditor would plainly alter the debtor's rights and options but would in no way affect the administration of the estate. Hence, a bankruptcy court and a district court lack subject matter jurisdiction pursuant to 28 U.S.C. § 1334(b) to enter a money judgment under such circumstances, convenient to a creditor though it might be.

Bankruptcy courts often enter money judgments in adversary proceedings in which the issue is whether a specific debt is or is not dischargeable pursuant to section 523(a) of the Bankruptcy Code. Hence, it is reasonable to ask how a court could have subject matter jurisdiction in such a proceeding but lack it in a proceeding to deny a discharge. It is because in a dischargeability action, one of the elements of the claim is the existence of a debt. "'[D]ebt' means liability on a claim." 11 U.S.C. § 101(12). The court must determine the extent of a debtor's liability on a claim, though not necessarily the amount of the claim, in order to determine what debt is and is not dischargeable. The power to enter a money judgment in those circumstances derives from the necessity of determining that a debt exists and from a bankruptcy court's general equity jurisdiction. *See In re Porges*, 44 F.3d 159, 164 (2nd Cir. 1995) (holding that the bankruptcy court had jurisdiction to take the "short and logical step . . . to enter a money judgment," following a trial, even though the debtor voluntarily dismissed his Chapter 13 case before a judgment could be entered). "Circuit courts that have looked at the issue have concluded that bankruptcy courts have jurisdiction to enter money judgments in § 523 cases." *In re Lang*, 414 F.3d 1191, 1202 n.32 (10th Cir. 2005) (collecting cases).

By contrast, in a proceeding to deny the debtor's discharge, whether a plaintiff holds a claim against the debtor is not an element of proof required to deny the debtor's discharge. Count II does not flow from Count I; it is an entirely separate claim that has nothing to do with whether or not the objections to discharge are valid or not. To be sure, a plaintiff must have standing to sue under section 727, which implies at least some liability if the plaintiff is a creditor, but the existence and amount of the claim are not factual elements required to be proved in order to obtain a judgment denying a debtor's discharge.

Even if the Court had jurisdiction to enter a money judgment, it would not do so, because it would give Plaintiff an advantage over other creditors. A creditor that successfully pursues an objection to discharge is not entitled by undertaking the objection to treatment not afforded to other creditors.

The second and third questions to be answered in the process of considering a motion for a default judgment are whether the complaint states a claim upon which relief can be granted and if so, whether it alleges sufficient facts to support the motion. Stating a claim for relief and alleging all of the facts necessary to support a motion for default judgment are not entirely congruent exercises, because while a complaint consisting of a short, plain statement of the basis of a claim could blur or even obfuscate specific factual elements of the claim and still state a claim for relief, only facts actually alleged are deemed admitted on a motion for a default judgment. *E.g., In re Alam*, 314 B.R. 834, 842 -843 (Bankr. N.D. Ga. 2004) (Bonapfel, J.) (refusing to enter a default judgment "based on a conclusory allegation of actual fraud.")

Plaintiff's complaint states a claim for relief under section 727(a)(2)(A) but not under section 727(a)(4)(A). Those sections provide:

> (a) The court shall grant the debtor a discharge, unless—
>
> . . .
>
> (2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed—
>
> (A) property of the debtor, within one year before the date of the filing of the petition; . . .
>
> (4) the debtor knowingly and fraudulently, in or in connection with the case—
>
> (A) made a false oath or account[.]

Consider the claim under subsection (a)(2)(A) first. The complaint alleges that in 2002, Debtor granted a purchase money security interest to Plaintiff, paid on the debt for a time, and then defaulted on the payments. Plaintiff asserts that Defendant has "failed and refused" to return the mower to Plaintiff and has not reaffirmed the obligation. The Court infers from the quoted phrase that Plaintiff made a demand on Defendant to return the mower, and he did not do so. The complaint then contains these allegations in paragraph 10,

> Prior to filing his petition, Defendant sold Plaintiff's collateral to a third party, his mother. Defendant was aware that the equipment was pledged as collateral to secure Plaintiff's loan at all times pertinent to this complaint, including the time when he sold them.

Paragraph 12 of the complaint states:

> Given the close relationship between the parties, Plaintiff reasonably apprehends that the transfer of the lawnmower was fraudulent and without consideration and was intended to defraud Plaintiff and to avoid the consequences of Defendant's filing in this Court.

Paragraph 15 of the complaint states:

> Defendant has thus, with an intent to hinder, delay, or defraud Plaintiff and/or the Trustee, transferred his property within one year before the date of filing of the petition, thus denying him the right to a discharge pursuant to 11 U.S.C. § 727(A)(2)(a) (sic: § 727(a)(2)(A)).

These allegations state a claim for relief but do not contain enough facts to permit the Court to grant the motion for a default judgment. The most obvious omission is the date of the transfer. The complaint alleges that the transfer took place prior to the filing of the petition. That is sufficient to state a claim, because the transfer might have been within the year prior to filing, but not sufficient to constitute an admission by Defendant that the transfer took place within that year. The fact that "Plaintiff reasonably apprehends that the transfer was fraudulent and without consideration" is not the equivalent of alleging that the transfer was without consideration. The word "apprehends" in this context presumably means to perceive. What a plaintiff or its agents

perceive or think is not an element of section 727(a)(2)(A). If a transfer is made for less than adequate consideration, that fact would support a conclusion that it was made for the purpose of defrauding creditors, but Plaintiff did not allege that the transfer was for less than adequate consideration. Instead, it alleges that it thinks that it might have been because Defendant sold it to his mother. In paragraph 16, Plaintiff alleged that the transfer was fraudulent, but that is a legal conclusion based on other facts not alleged. *In re Alam, supra*.

The second claim in Count I is based on Debtor's failure to list the mower in Schedule B and the alleged misclassification of Plaintiff's claim as unsecured. The operative paragraphs state:

Paragraph 13:

> In his petition and schedules filed with this Court, Defendant did not disclose the existence of the equipment or the secured nature of the obligation to Plaintiff, but instead simply listed the obligation to Plaintiff as unsecured debt and thus materially mislead (sic) the Trustee and the Court by omitting an asset valued at several thousand dollars.

Paragraph 16:

> Defendant has given incomplete and/or false information in his petition and schedules in this case and is therefore not entitled to a discharge by virtue of 11 U.S.C. § 727(A)(4) (sic: § 727(a)(4)).

This portion of Count I does not state a claim for relief. Section 727(a)(4) provides for denial of a discharge to a debtor who knowingly and fraudulently makes a false oath in connection with the bankruptcy case. The elements that a plaintiff must prove under section 727(a)(4)(A) are that "(1) the debtor made a statement under oath, (2) the statement was false, (3) the debtor knew the statement was false, (4) the debtor made the statement with fraudulent intent, and (5) the statement related materially to the bankruptcy case." *In re Kressner,* 206 B.R. 303, 316 (Bankr. S.D.N.Y.1997) (quoting *In re Emery*, 170 B.R. 777, 783 (Bankr. E.D.N.Y. 1994)).

The complaint contains no allegation that Defendant made any statement under oath. Plaintiff alleges in paragraph 13 that Defendant did not "disclose the existence of the equipment," presumably meaning the mower. A debtor must disclose in schedules A, B and G property in which he or she has an interest. An omission to disclose an interest in property would make the schedules inaccurate. Plaintiff alleges in paragraph 10 that prior to the petition date, Defendant sold the mower to his mother. Paragraph 12 references the transfer of the mower to Defendant's mother. The complaint does not allege that Defendant retained an interest in the mower, and the Court infers from the use of the word "sold" that Defendant retained no interest in the mower following the alleged sale. The paragraphs relating to the section 727(a)(4) claim were not stated as alternatives to earlier paragraphs. The Court must accept the facts alleged by Plaintiff as true. Hence, if Defendant sold the mower, he did not have to disclose it because he no longer owned it.

With respect to the mower, the complaint does not allege that Defendant knew he was making a false statement when he executed his schedules or that he did so with fraudulent intent.

The complaint suggests that the transfer of the mower was not authorized under the security agreement and that this somehow adds weight to the claim. Perhaps transferring the mower violated the security agreement. Perhaps not. Exhibit B to the complaint is illegible and therefore cannot supply factual allegations, including those necessary to liquidate the alleged damages. Even if the security agreement prohibited a transfer, the fact of a breach would not make the transfer fraudulent or require Defendant to disclose property in which he no longer had an interest. Hence, with respect to the omission of mention of the mower in the schedules, Plaintiff has failed to allege sufficient facts to satisfy four out of the five elements necessary to state a claim under section 727(a)(4)(A).

The second inaccuracy in the schedules according to Plaintiff is the failure of Defendant to acknowledge its security interest by listing the claim in Schedule F (unsecured claims) rather than schedule D (secured claims). Plaintiff has assumed that it holds a secured claim in the bankruptcy proceeding but, based on Plaintiff's factual allegation that Defendant sold the mower to his mother before the petition date, its assumption is false. Section 506(a) of the Bankruptcy Code tells us how to determine whether a claim is or is not secured. It begins: "An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property . . . ." In other words, a claim in bankruptcy is a secured claim to the extent that the creditor has an interest in the estate's interest in the property. If the estate has no interest in an item of property securing the claim of a creditor, the creditor would not hold a secured claim with respect to that property so, for bankruptcy purposes, it would be appropriate to list the claim as unsecured in schedule F. Because, according to the complaint, Defendant sold the mower prior to the petition date, his bankruptcy estate has no interest in the mower, even if Plaintiff does. Hence, Plaintiff has failed to show that its claim for bankruptcy purposes is a secured claim, even though it might be proper to refer to it as a secured claim under state law.

As with the alleged false statement concerning the mower, Plaintiff has not alleged that Defendant knew his schedules were false with respect to the classification of Plaintiff's claim. Nor has he shown that Defendant acted fraudulently.

The mere fact that a debtor provides information on schedules that is not true does not prove that he did so knowingly and fraudulently. The complaint alleges that the trustee and the Court were misled by the alleged misclassification of the claim. Complaint, ¶13. Neither the

Court nor the trustee could have been misled, however, if the Debtor did not own the mower. Even if the Debtor owned the mower, the Court would not consider the listing of a secured claim as an unsecured claim to be, by that fact alone, proof that the error was deliberate and made with the intent to defraud the Court or the trustee. Many debtors make classification or other errors on schedules that are completely benign. Plaintiff appears to rely completely on inferences of devious conduct it draws from the fact that Defendant's transferee was his mother. Although a close personal relationship between a debtor and a transferee can be a badge of fraud, the fact of such a relationship alone is not sufficient to permit speculation that consideration was inadequate, which itself is a separate badge of fraud. *Cf. Max Sugarman Funeral Home, Inc. v. A.D.B. Investors*, 926 F.2d 1248, 1254-1255 (1st Cir. 1991) ("The presence of a single badge of fraud may spur mere suspicion; the confluence of several can constitute conclusive evidence of an actual intent to defraud, absent "significantly clear" evidence of a legitimate supervening purpose. (citations omitted)). Here, the single badge raises a slight suspicion but hardly enough to conclude the transfer was fraudulent as to Plaintiff or that Defendant had the motive to attempt to conceal the transfer by classifying Plaintiff's claim on his schedules as unsecured. For these reasons, the portion of Count I referencing section 727(a)(4) does not state a claim for relief.

The fourth question a court must examine on a motion for a default judgment is whether it has personal jurisdiction over the defendant. A court will assume that a summons and complaint were properly served if the facts concerning service described in a certificate of service meet the requirements of the applicable procedural rule. Plaintiff here served the complaint by mail, and so the applicable rule is Bankruptcy Rule 7004(b)(9), which provides:

(b) Service by First Class Mail

Except as provided in subdivision (h), in addition to the methods of service authorized by Rule 4(e)-(j) F.R.Civ.P., service may be made within the United States by first class mail postage prepaid as follows:
. . .

(9) Upon the debtor, after a petition has been filed by or served upon the debtor and until the case is dismissed or closed, by mailing a copy of the summons and complaint to the debtor at the address shown in the petition or statement of affairs or to such other address as the debtor may designate in a filed writing and, if the debtor is represented by an attorney, to the attorney at the attorney's post-office address.

According to the certificate of service, Plaintiff served the complaint on Mr. Detamore and his attorney by mail at their respective addresses that, the Court judicially notices, are the ones of record in this case. The certificate of service states only that service was made by "U.S. Mail." It does not state that service was made by first class mail, postage prepaid, which is what Rule 7004(b) requires. Because it is possible to send a summons and complaint by U.S. Mail in a class other than first class and to put the onus of paying the postage on the recipient, Plaintiff's certificate of service fails to provide sufficient facts from which the Court can determine that service was proper. It probably was. In its brief, Plaintiff's counsel asserts but does not certify that he used certified mail, which is not required under Rule 7004, except with respect to an insured financial institution as specified in Rule 7004(h). If this were the only problem, the Court would have afforded Plaintiff time to file an amended certificate of service.

The last inquiry on a motion for a default judgment is whether the record shows that the defendant has failed to respond to the complaint. A defendant meets the deadline for responding to a complaint by *serving* an answer or other response. Fed. R. Bank. P. 7012(a). The *filing* of papers, including an answer and motion, is to be made within a reasonable time after service, Fed. R. Civ. P. 5(d), made applicable by Fed. R. Bank. P. 7005, and hence could be made after the time

for serving a response has expired. For this reason, a motion for a default judgment should show that the plaintiff has not been served with an answer or other response, not just that the defendant has not filed one. Here, there is no question that Defendant has not responded to the complaint.

In summary, Plaintiff's motion for a default judgment is without merit. This discussion does not mean, however, that it would be impossible for Plaintiff to prove at trial facts sufficient to satisfy the elements of a claim under section 727(a)(2)(A). The conclusions are simply that the facts alleged in the complaint, as opposed to conclusions of law and perceptions of the Plaintiff about what may have occurred, are insufficient to entitle Plaintiff to a default judgment with respect to section 727(a)(2)(A), that the portion of Count I referencing section 727(a)(4) does not state a claim for relief and that the Court lacks subject matter jurisdiction with respect to Count II. For these reasons, it is

ORDERED that Plaintiff's motion for a default judgment is DENIED.

Dated: September 27, 2005.

JAMES E. MASSEY
U.S. BANKRUPTCY JUDGE