

IT IS ORDERED as set forth below:



Date: June 26, 2007

James E. Massey

James E. Massey
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:

CASE NO. 05-95299

Brenda Diane Kelly,

CHAPTER 7

Debtor.

JUDGE MASSEY

Barbara B. Stalzer, Trustee,

Plaintiff,

v.

ADVERSARY NO. 07-6132

Robert A. Payne,

Defendant.

ORDER GRANTING MOTION FOR DEFAULT JUDGMENT

Plaintiff Barbara B. Stalzer is the Chapter 7 Trustee for the bankruptcy estate of Brenda Diane Kelly, Debtor in case no. 05-95299 referenced in the above style. In this adversary proceeding against Defendant Robert A. Payne, Plaintiff seeks a turnover of property of the

estate or, alternatively, the avoidance of an alleged fraudulent transfer and a judgment for the amount of that transfer.

Plaintiff has filed a proof of service, certifying that she served the summons and complaint on Defendant by United States Mail, postage prepaid, on April 2, 2007. The Court infers from the address of Defendant stated in the certificate of service that that address was Defendant's residence address at that time. See Fed. R. Bankr. P. 7004(b)(1). That certification describes a proper manner of service under Rule 7004 of the Federal Rules of Bankruptcy Procedure. Plaintiff filed an "Amended Affidavit" of service on June 18, 2007 that, in addition to repeating the contents of the earlier filed proof of service, stated that Defendant has not responded to the complaint and to Plaintiff's knowledge is not in the military service and is not incompetent, suffering from a mental defect or an infant.

On June 6, 2007, Plaintiff filed a motion for a default judgment. The attached certificate of service shows service on Defendant at the same address at which the summons was served as well as on an attorney. Defendant has not filed an answer or other response to the complaint or to the motion for default judgment, and the Clerk has made an entry of default.

A court's entry of default judgment is discretionary under Fed. R. Civ. P. 55(b), made applicable in adversary proceedings by Fed. R. Bankr. P. 7055. "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. v. Houston Nat. Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975). Upon the Clerk's entry of default, the defaulting defendant is deemed to "admit[] the plaintiff's well-pleaded allegations of fact," *id.*, but "is not held to admit facts that are not well-pleaded or to admit conclusions of law." *Id.*

In the complaint, Plaintiff alleges that Debtor received net proceeds of the sale of a business she owed totaling \$35,000. Plaintiff further alleges that a bank records concerning Defendant's account at Wachovia Bank produced by Debtor show that Debtor transferred the sum of \$35,000 to him in July 2005 for which Defendant gave no consideration to Debtor. Plaintiff also alleges that Defendant is holding the \$35,000 for Debtor. Debtor filed this Chapter 7 case on August 17, 2005.

The complaint asserts two theories on which Plaintiff contends she is entitled to a judgment against Defendant for \$35,000. In Count I, she contends that the funds transferred by Debtor to Defendant are property of the estate and that he is in possession of property of the estate and should be ordered to turn over that property to the Trustee. Based on the facts alleged, this Count is without merit,

According to Plaintiff, the funds in question were deposited in a bank account at Wachovia Bank in Defendant's name prior to the commencement of Debtor's Chapter 7 case. If Debtor had cash in her possession when she filed bankruptcy, that cash was property of the estate. See 11 U.S.C. § 541. If Debtor had given cash to Defendant before filing bankruptcy or cash that was at the time of the transfer property of the estate, and if he still has that cash under his mattress, that cash would be property of the estate. But those are not the facts Plaintiff alleges. She says that at the time of the filing of the petition, Defendant had a bank account at Wachovia Bank in his name into which Debtor transferred the sale proceeds at an earlier date.

When a customer of a bank has a balance in an account at that bank, that customer has no interest in any specific cash or other asset of the bank. The only property interest that such a customer has is a claim against the bank to be paid the balance in the account, subject to any

rights of offset the bank may have. Defendant has no interest in any specific asset of Wachovia Bank, and Plaintiff could not possibly identify any such asset as one belonging to Debtor.

Count II of the complaint, by contrast, states a claim for relief. Plaintiff contends that the transfer of \$35,000 by to Defendant within one year of the date of the filing of the petition was a fraudulent transfer because Defendant gave nothing in return to the Debtor and Debtor was insolvent at the time of the transfer or became insolvent as a result of the transfer. Pursuant to 11 U.S.C. § 548, cited by Plaintiff in her complaint, that transfer of Debtor's assets is avoidable. Pursuant to 11 U.S.C. § 550, also referenced by Plaintiff in the complaint, Plaintiff is entitled to a judgment against Defendant in the amount of \$35,000, which is the value of the property transferred. For this reason, Plaintiff's motion for a default judgment against Defendant is GRANTED.

Plaintiff is entitled to post-judgment interest at the rate provided pursuant to 28 U.S.C. § 1961. The Court will enter a separate judgment.

END OF ORDER