



IT IS ORDERED as set forth below:

Date: March 03, 2009

**Paul W. Bonapfel
U.S. Bankruptcy Court Judge**

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

IN THE MATTER OF:	:	CASE NUMBER: R02-50780-PWB
	:	
JOE FRANK FORD, SR.,	:	
	:	IN PROCEEDINGS UNDER
	:	CHAPTER 13 OF THE
Debtor.	:	BANKRUPTCY CODE
	:	
MARY IDA TOWNSON, Chapter 13	:	
Trustee,	:	
	:	
Plaintiff	:	
	:	
v.	:	ADVERSARY PROCEEDING
	:	NO. 08-4069
A.C. LOFTIN,	:	
	:	
Defendant.	:	

ORDER AND NOTICE OF HEARING

The Plaintiff, in her capacity as trustee of a debtor's bankruptcy estate, seeks entry of default judgment on her complaint to recover funds from the Defendant based upon an overpayment of his claim. On February 6, 2009, the Court entered an Order directing the Plaintiff

to submit an affidavit as to whether the Defendant is an infant or incompetent, and his military status. In response to the Court's Order, counsel for the Plaintiff filed an affidavit stating the following (Affidavit of Brandi L. Kirkland, ¶¶ 4-6, Doc. 8):

4.

Although I have no personal knowledge of the Defendant's competency, on January 20, 2009, I spoke over the telephone with Ted Corwin, Esq.

5.

Mr. Corwin is an attorney in Rome, Georgia whose mailing address is the same post office box reflected on the Defendant's proof of claim (Claim 2-1 on the Court's Claims Register).

6.

Although it appeared from the conversation with Mr. Corwin that he no longer represents the Defendant, Mr. Corwin did state that he has been informed the Defendant may have Alzheimer's Disease, though I have no personal knowledge of this or its effect, if any, on the Defendant's competency.

A defendant's competency is relevant because Rule 55(b) of the Federal Rules of Civil Procedure (applicable under FED. R. BANKR. P. 7055) provides that the clerk may not enter default against a minor or incompetent person and the court may enter a default judgment against a minor or incompetent person only if represented by a general guardian, conservator, or other like fiduciary who has appeared. Rule 55(b) does not identify the degree of inquiry a plaintiff must take in order to determine a defendant's competency.

An affidavit is a sworn, voluntary statement of facts. An individual cannot swear to facts not within her personal knowledge. Plaintiff's counsel's statement regarding the Defendant's competency in her affidavit is not fact; indeed, the statement regarding the Defendant's possible Alzheimer's Disease is double hearsay in that someone told someone else who then told counsel for the Plaintiff.

The Court does not read Rule 55(b)(2) to impose upon a moving party an independent duty to investigate a defendant's competency. But because the Plaintiff has set forth information in an affidavit that puts the Defendant's competency into question, the Court is unwilling to enter default judgment at this time.

The Federal Rules of Civil Procedure do not define the term "incompetent." In common understanding, the term "incompetent" refers to a person who lacks the mental competence or capacity to make decisions or conduct her own legal or business affairs. Such a determination has traditionally been left to state law. *See In re Moss*, 239 B.R. 537, 539 (Bankr. W.D. Mo. 1999) (incompetency as set forth in Bankruptcy Rules 1016 and 7017 requires reference to the laws of the state of the Debtor's domicile).

In Georgia, a probate court has exclusive jurisdiction regarding the appointment of a guardian or conservator for adult persons. The probate court may appoint a guardian for an adult "only if the court finds the adult lacks sufficient capacity to make or communicate significant responsible decisions concerning his or her health or safety." O.C.G.A. § 29-4-1(a). The probate court may appoint a conservator for an adult "only if it finds the adult lacks sufficient capacity to make or communicate significant responsible decisions concerning the management of his or her property." O.C.G.A. § 29-5-1(a). Georgia law further provides that an adult shall not be presumed to be in need of a guardian or conservator unless adjudicated to be in need of one by a probate court as provided by the Georgia Code. O.C.G.A. §§ 29-4-1(e)(1); 29-5-1(e)(1). Thus, under Georgia law it appears that unless and until a probate court makes an adjudication that an adult lacks sufficient capacity to make or communicate the significant responsible decisions concerning either his or her health or safety or the management of his or her property an individual is presumed to be competent with respect to such dealings under Georgia law.

The issue here is whether the Defendant is competent for purposes of entry of default judgment in a civil proceeding in which the Plaintiff is seeking to recover property, namely the overpayment of funds to the Defendant on his proof of claim. Because this involves a decision regarding property, it would appear that whether a conservator, as opposed to a guardian, has been appointed is the only relevant inquiry. However, if a person is unable to make sound decisions regarding her health or safety (which is within the purview of a guardianship), such an adjudication would be relevant to the inquiry as well.

Although the statement in the affidavit of counsel that the Defendant “may have Alzheimer’s Disease” raises the possibility that the Defendant may be incompetent, this possibility alone does not preclude a finding of competency for purposes of Rule 55(b)(2). Instead, in the absence of evidence of competence, the proper inquiry is whether a conservator or guardian has been appointed for the Defendant by a probate court because the absence of such an appointment raises a presumption of competency under Georgia law. To demonstrate the existence of the presumption in this proceeding in which the Plaintiff has raised the issue of the Defendant’s mental status, the Plaintiff may establish that, in the appropriate probate court, no record of guardianship or conservatorship proceedings with respect to the Defendant exists.

The Defendant was represented by counsel, J. Bryant Durham, in a related adversary proceeding in the early stages of this bankruptcy case. After resolution of that matter, Mr. Durham did not represent the Defendant in the main bankruptcy case. Mr. Durham is now a Superior Court judge and is unavailable to participate further in this matter, but an attorney at Judge Durham’s former firm may be able to assist the parties and the Court in this inquiry. The Plaintiff’s counsel states in her affidavit that Ted Corwin, an attorney at Judge Durham’s former firm, reported the Defendant’s condition to her. The Court requests that Mr. Corwin contact the Defendant and

inform him of this current proceeding, the pending motion for default judgment, and the hearing set forth below. In addition, to the extent Mr. Corwin is or becomes aware of any facts that should be brought to the Court's attention, the Court requests that he report such information to the Court at the hearing set forth below. The Court does not deem any such conduct to be an entry of appearance or representation of the Defendant in this proceeding. It is

ORDERED AND NOTICE IS HEREBY GIVEN that the Court shall hold a hearing on the Plaintiff's motion for default judgment on April 1, 2009, at 11:00 a.m., in Courtroom 342, U.S. Courthouse, 600 East First Street, Rome, Georgia. It is

FURTHER ORDERED that the Defendant shall appear and show cause why default should not be entered; it is

FURTHER ORDERED that the Plaintiff's counsel at said hearing may make a presentation with regard to whether, in the appropriate probate court, any record of guardianship or conservatorship proceedings with respect to the Defendant exists. The Court **requests** that Mr. Corwin contact the Defendant and inform him of this current proceeding, the pending motion for default judgment, and the hearing set forth above. In addition, to the extent Mr. Corwin is or becomes aware of any facts that should be brought to the Court's attention, the Court requests that he report such information to the Court at the hearing set forth above.

End of Order

Distribution List

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