

ENTERED ON

SEP 29 2009

DOCKET

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:)	CHAPTER 13
)	
FREDERICK MIKE BALLEW,)	CASE NO. 08-60130 - MHM
)	
Debtor.)	
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FREDERICK MIKE BALLEW,)	
)	
Plaintiff,)	
v.)	ADVERSARY PROCEEDING
)	NO. 08-6663
BRENDA SMITH,)	
)	
Defendant.)	

**ORDER GRANTING DEFENDANT'S MOTION
TO SET ASIDE DEFAULT**

This adversary proceeding commenced December 10, 2008, when Plaintiff filed a pleading entitled *Objection to Proof of Claim Filed by Brenda Smith (Proof of Claim No. 1) and Counterclaim* (the "Objection"). Summons was issued December 11, 2008, and the summons and complaint were served on Defendant by first class mail December 15, 2008. Defendant failed to file an answer and Plaintiff filed a request for entry of default February 5, 2009. Default was entered February 6, 2009.

On March 4, 2009, Defendant filed a *Motion to Set Aside Default* (the "Motion") and an answer. Defendant, by different counsel, amended the Motion March 9, 2009. Plaintiff filed a response opposing the Motion, as amended. Defendant filed a reply March 20, 2009.

Plaintiff's Objection shows that Defendant filed a proof of claim for unpaid child support as a priority claim in the amount of \$73,507.84. Plaintiff asserts that the current amount of child support he owes is \$11,375.84. Plaintiff asserts that Defendant has obtained no state court order supporting her claim of unpaid child support in excess of \$73,000.

In the Motion, as amended, Defendant shows that the attorney representing her at the time the Objection was filed failed to file an answer because he believed a hearing would be scheduled. Defendant's counsel's belief was not unreasonable because usually an objection to claim is filed as a contested matter in the main case. Under Bankruptcy Rule 9014, no written response to a contested matter is required unless specifically ordered. Apparently, Plaintiff filed the Objection as an adversary proceeding because he was also seeking to avoid a lien on his real property in excess of the amount he claims to owe. Arguably, Plaintiff could have accomplished this in the contested matter procedure but chose not to do so.

Defendant also alleged specific facts in the Motion, as amended, to show that she has a meritorious defense. She alleged specific facts that would support a finding that, although she has no specific court order for the amount of the child support arrearage she sets forth in

her proof of claim, Plaintiff failed to pay child support during the years from 1999 to 2004, when the minor child reached age 18.

Bankruptcy Rule 7055, based on F.R.C.P. 55(c), provides:

(c) Setting Aside Default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).¹

The provisions of Rule 60(b) are inapplicable to the instant proceeding because no default judgment has been entered. Therefore, Defendant need only show good cause to set aside the default. Under the circumstances of this case, Defendant has shown good cause to set aside the default. Defendant's attorney's failure to file a timely answer was negligent but understandable given the title of the pleading and the usual procedure for prosecuting an objection to a proof of claim. Defendant moved promptly to set aside the entry of default. Plaintiff has not shown prejudice: Being required to try the action is not prejudice.

¹ F.R.C.P. 60(b) provides:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Plaintiff failed to show any loss of evidence or difficulty in prosecuting the action caused by Defendant's default. Accordingly, it is hereby

ORDERED that Defendant's motion to open default is *granted*. It is further


ORDERED that, as confirmation of Plaintiff's Chapter 13 cases is dependent upon the resolution of Plaintiff's objection to Defendant's claim, expedited consideration of Plaintiff's Objection is appropriate. The parties' counsel shall confer and submit to the court the following scheduling information within 14 days of the date of entry of this order:

- (a) A description of any amendments to the pleadings anticipated and a timetable for the filing of amendments;
- (b) A description of any motions that are anticipated and a timetable for filing such motions;
- (c) Information regarding the time needed for discovery; and
- (d) A Joint Settlement Conference Statement certifying that a settlement conference has been held, whether the conference was in person or by telephone, the date of the meeting, the names of all participants, and that any offers of settlement were communicated to the clients. The **Settlement Conference Certificate** shall also set forth opinions of counsel as to the prospects of settlement of this adversary proceeding; specific problems, if any, which are hindering settlement; whether counsel intend to schedule additional settlement conferences; and whether counsel desire a conference with the Court regarding settlement problems. **The substance of the settlement discussions should not be disclosed unless, in the opinion of both counsel, such disclosure would not be prejudicial to the trial of the case.**

Upon receipt of the above information, the court will schedule a status conference.

The Clerk, U.S. Bankruptcy Court, is directed to serve a copy of this order upon Plaintiff's attorney, Defendant's attorney, and the Chapter 13 Trustee.

IT IS SO ORDERED, this the 28th day of September, 2009.



MARGARET H. MORPHY
UNITED STATES BANKRUPTCY JUDGE