IT IS ORDERED as set forth below:

Date: January 9, 2014

Mary Grace Diehl

Mary Grace Diehl
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	:	**CASE NO.**
LOUISE SWAIN McCOWAN,	:	**09-85560-MGD**
Debtor,	:	**CHAPTER 7**
PAUL H. ANDERSON, JR., AS TRUSTEE,	:	**ADVERSARY PROCEEDING NO. 12-5416**
Plaintiff,	:	
v.	:	
LOUISE SWAIN McCOWAN, ERVIN J. SWAIN, JR., and ANDREW D. WALCOTT,	:	
Defendants.	:	

ORDER DENYING TRUSTEE'S MOTION FOR DEFAULT JUDGMENT

This case is before the Court on the Chapter 7 Trustee's Motion for Default Judgment ("Motion"). (Docket No. 60). This Motion is limited to Defendant Andrew D. Walcott. The other

Defendants previously entered into a consent judgment with the Chapter 7 Trustee ("Trustee"). (Docket No. 61).

Trustee seeks a default judgment against Mr. Walcott under 11 U.S.C. 362(k)(1) for a willful violation of the automatic stay. Defendant did not file a timely answer to the Trustee's Complaint, and an entry of default was made. Since the entry of default, Defendant filed an answer and an amended answer that includes a crossclaim against Defendants Louise Swain McCowan and Ervin J. Swain, Jr. Because the complaint fails to allege facts sufficient for the Court to award a default judgment, the Trustee's Motion is **DENIED**.

Rule 55(c) of the Federal Rules of Civil Procedure, made applicable to this proceeding by Rule 7055 of the Federal Rules of Bankruptcy Procedure, governs the procedures related to entry of default and default judgment. FED. R. BANKR. P. 7055; *Oldfield v. Pueblo De Bahia Lora, S.A.*, 558 F.3d 1210, 1216 n.14 (11th Cir. 2009). In default, the complaint's factual allegations – except those relating to the amount of damages – are deemed admitted. FED. R. BANKR. P. 7008 (applying FED. R. CIV. P. 8(b)(6)). The Court has discretion as to the entry of a default judgment. Federal Rule of Civil Procedure 55(b), made applicable to bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 7055, provides that the court *may* enter judgment by default (emphasis added). "[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., Ltd. v. Houston Nat. Bank,* 515 F.2d 1200, 1206 (5th Cir. 1975); *see also Alan Neuman Prods., Inc. v. Albright*, 862 F.2d 1388, 1392 (9th Cir. 1988), *cert. denied*, 493 U.S. 858 (1989); *Wahl v. McIver*, 773 F.2d 1169, 1174 (11th Cir. 1985).

Rule 55(c) provides the standard by which relief from default can be given. "The court may

set aside an entry of default for good cause . . . ." FED. R. CIV. P. 55(c). "A defendant, even though in default, is still entitled to contest the sufficiency of the complaint and its allegations to support the judgment being sought." *Tyco Fire & Sec., LLC v. Hernandez Alcocer*, 218 Fed. Appx. 860, 863 (11th Cir. 2007) (citations omitted). Yet, Defendant's failure to file and serve an answer as commanded in the complaint results in an admission of all of the complaint's factual allegations. FED. R. CIV. P. 8(b)(6). Although Defendant Walcott later filed an answer and an amended answer, without successfully obtaining leave to file the answer and without moving to set aside the default, the amended answer does not result in consideration of its asserted denials. Under Rule 8, the Trustee's factual allegations remain admitted. Trustee's complaint, however, fails to allege the sufficient facts to make out a viable claim against Defendant Walcott for a willful violation of the automatic stay.

Rule 8 of the Federal Rules of Civil Procedure, made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7008, provides that "each allegation must be simple, concise, and direct." FED. R. CIV. P. 8(d)(1). The Supreme Court has explained that while this does not require "detailed factual allegations," a pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929. "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. at 557). Instead, the complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. at 570.

Here, the complaint's factual allegations taken as true do not make out a claim for a willful

violation of the stay by Defendant Walcott. To assert a claim for willful violation of the stay there must first be a violation of the stay. Trustee asserts that the unauthorized sale of the debtor's interest in the property violated the automatic stay under section 362(a)(3), yet the complaint fails to specify how acts attributable to Defendant Walcott resulted in any prohibited act to "obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." In this jurisdiction, the intent element, of the claim is analyzed under a two-step test: "(1) knew that the automatic stay was invoked and (2) intended the actions which violated the stay." *Jove Eng'g, Inc. v. IRS*, 92 F.3d 1539, 1555 (11th Cir. 1996). Acts without knowledge of bankruptcy are not willful. *Mitchell Constr. Co. v. Smith (In re Smith)*, 180 B.R. 311, 319 (Bankr. N.D. Ga. 1995).

This action involves the unauthorized post-petition sale of real property in which the estate holds a one-half interest. The complaint alleges facts regarding the other Defendants and their actions in the sale of the property. Yet, with respect to Trustee's motion for default judgment against Defendant Walcott, the Court only considers that facts pled as to Defendant Walcott. The complaint includes two allegations regarding Defendant Walcott's actions and involvement of the sale. First, Trustee states that Defendant Walcott entered into a conspiracy to sell the real property with the other Defendants and without the knowledge of Trustee. (Complaint, ¶ 17). Second, Trustee states that pursuant to the conspiracy, Defendant Walcott improperly notarized the power of attorney signed by Debtor that was brought to him by Defendant Swain because Debtor was not present and he did not attest as to Debtor's identity or signature. (Complaint, ¶ 19). The complaint includes two additional statements regarding the collective actions of all the named Defendants in paragraphs 31 and 32, which allege bad faith and intentional and fraudulent transfers of estate's interest in the property.

Trustee is not entitled to a default judgment as to Defendant Walcott because the factual allegations are not sufficient to make out a plausible claim for willful violation of the stay. There are no factual statements regarding Defendant Walcott's knowledge of Debtor's bankruptcy. *Mitchell Constr. Co. v. Smith (In re Smith)*, 180 B.R. 311, 319 (Bankr. N.D. Ga. 1995) ("Acts without knowledge of bankruptcy are not willful."). Beyond the statement of conspiracy, which is a legal conclusion and not a plain factual statement, there are no facts that allow the Court to find or infer Defendant Walcott's intent to further the Defendants' alleged plan for an unauthorized sale of the property when he improperly notarized the power of attorney. There are no circumstantial facts included in the complaint that would allow the Court to infer knowledge or intent regarding the sale of the estate's interest in property. *See Ashcroft v. Iqbal*, 129 S. Ct. at 1949 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. at 557 (a complaint is not sufficient if it tenders 'naked assertion[s]' devoid of 'further factual enhancement'). Further, the complaint's characterization of the transaction when limited to its statements regarding Defendant Walcott, are limited to an improper notarization of Debtor's power of attorney. There are no factual allegations to support that Defendant Walcott had any knowledge, let alone intent or participation, of the other Defendants' actions or plan to effectuate an improper sale of real property. Neither element under the *Jove* standard is established by the factual statements in the complaint. For these reasons, there is not a basis to award default judgment.

As noted above, Defendant Walcott filed an untimely answer after Trustee's motion for default judgment was filed. The answer is late, and there is no pending motion before the Court regarding leave to file an answer and to set aside the entry of default. Therefore, Defendant Walcott's asserted crossclaim also has no effect given the status of the late-filed answer. Under

Federal Rule of Civil Procedure 13(g), Defendant Walcott is limited to asserting the crossclaim in a pleading, as defined by Rule 7(a). *Bernstein v. IDT Corp.*, 582 F. Supp. 1079, 1089 (D. Del. 1984). The crossclaim cannot be asserted or considered on its own without the requisite pleading. *Id.*

It is well established that the district courts enjoy an inherent power to manage and control their own dockets. *See, e.g., Landis v. N. Am. Co.*, 299 U.S. 248, 254, 57 S.Ct. 163, 81 L.Ed. 153 (1936) (affirming "the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants"). Given the improper procedure of Defendant Walcott's answer, the Court will take no further action regarding Defendant Walcott's answer, including the crossclaim. Accordingly, it is

ORDERED that the Trustee's Motion for Default Judgment is hereby **DENIED**.

It is **FURTHER ORDERED** and **NOTICE IS HEREBY GIVEN** that a status conference will be held in Courtroom 1201, United States Courthouse, Richard B. Russell Federal Building, 75 Spring Street, Atlanta, Georgia, on **February 13, 2014** at **11:30 a.m.**

The Clerk is directed to serve a copy of this Order upon Trustee, Defendants, and their respective counsel.

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