IT IS ORDERED as set forth below:

Date: April 30, 2013

Wendy L. Hagenau

Wendy L. Hagenau
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	:	CASE NO. 12-68074-WLH
MELVIN RANDALL WARNER,	:	CHAPTER 7
Debtor.	:	
SPRINGLEAF FINANCIAL SERVICES, INC.,	:	
Plaintiff,	:	ADVERSARY PROCEEDING NO: 12-5654
v.	:	
MELVIN RANDALL WARNER,	:	
Defendant.	:	

ORDER DENYING PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT

This matter came before the Court on the Plaintiff's Motion for Entry of Default Judgment (the "Motion") pursuant to Fed. R. Civ. P. 55(b), made applicable by Fed. R. Bankr. P.

7055. [Docket No. 5]. Debtor filed his Chapter 7 bankruptcy case on July 20, 2012. Thereafter, on December 17, 2012, Plaintiff initiated the current Adversary Proceeding by filing its Complaint to Determine Dischargeability of Debt pursuant to 11 U.S.C. § 523(a)(6). [Doc. No. 1]. On January 16, 2013, Plaintiff served a summons and copy of the Complaint on Debtor, Debtor's bankruptcy counsel, and the United States Trustee. (Doc. No. 4). Under Fed. R. Bankr. P. 7012, the Defendant had 30 days to answer. Defendant failed to respond. Plaintiff did not seek entry of default under Fed. R. Bankr. P. 7055(a), nor provide an affidavit as required. Instead, Plaintiff requests this Court enter a default judgment against Defendant that its claim in the amount of $10,420.00 plus $1,042.00 in attorneys' fees and $293.00 in costs is non-dischargeable. Defendant has not filed a response to the Motion, which is therefore deemed unopposed pursuant to Bankruptcy Local Rule 7007-1(c) for the Northern District of Georgia. As this matter arises in connection with a complaint to determine dischargeability, it constitutes a core proceeding over which this Court has subject matter jurisdiction. See 28 U.S.C. § 157(b)(2)(I); § 1334.

I. Procedural Deficiency.

Obtaining a default judgment is a two-step process. First, the moving party must show that entry of default is appropriate under Fed. R. Bankr. P. 7055(a), and secondly that entry of the default judgment is appropriate under Rule 7055(b)(1)(B). In this case, the Plaintiff did not seek the entry of default first. While both steps can be undertaken simultaneously, the requirements for entry of default remain the same, including that failure to plead or otherwise defend is shown by affidavit or otherwise. Moreover, under Fed. R. Bankr. P. 7055(b)(2), which incorporates Fed. R. Civ. P. 55, a default judgment may be entered by the court against a minor or incompetent person only if represented by a guardian, conservator or other similar fiduciary.

Further, the Servicemembers Civil Relief Act, 50 App. U.S.C. § 521 requires a plaintiff seeking a default judgment to file an affidavit indicating whether the defendant is in the military service or that the plaintiff is unable to determine the defendant's military status. Plaintiff in this case did not file an affidavit setting forth whether this Defendant falls within either of the above categories or establishing Defendant's default. Consequently, entry of default judgment is not appropriate. See In re Hampson, 429 B.R. 360 (Bankr. N.D. Ga. 2009).

II. Standard for Motion for Default Judgment.

Even though the Motion cannot be granted due to procedural errors, the Court will review the Motion substantively. Entry of default judgment under Fed. R. Bankr. P. 7055 is discretionary. In re Alam, 314 B.R. 834, 837 (Bankr. N.D. Ga. 2004)."[A] defendant's default does not in itself warrant the court in entering a default judgment. There must be a sufficient basis in the pleadings for the judgment entered." Nishimatsu Constr. Co., Ltd. v. Houston Nat'l Bank, 515 F.2d 1200, 1206 (5th Cir. 1975). A default only admits well-pled allegations of fact and does not admit conclusions of law. Id. "[F]acts which are not established by the pleadings …, or claims which are not well-pleaded, are not binding and cannot support the [default] judgment." Alan Neuman Prods., Inc. v. Albright, 862 F.2d 1388, 1392 (9th Cir. 1988).

In determining whether the allegations in a complaint are sufficient, the Supreme Court has recently provided guidance in both Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) and Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). In these cases, the Supreme Court explained that, while "detailed factual allegations" are not required, the pleading must offer more than "labels and conclusions" or "a formulaic recitation of the elements of a cause of action …". Twombly, 550 U.S. at 555. Instead, the complaint must contain "enough facts to state a claim to relief that is plausible on its face.

…" Twombly, 550 U.S. at 570. Lastly, the Court notes the denial of the Debtor's discharge is a severe remedy and not one to be granted lightly. With this background, the Court will now turn to the specific allegations in the Complaint.

III. Facts.

Plaintiff's Complaint is brief, but asserts the following facts. Prior to filing Chapter 7 bankruptcy, on August 31, 2011, Defendant obtained a loan from Plaintiff in the amount of $10,420.00 secured by a 2001 Ford Focus, various unidentified items of personal property, and a 1999 Bayliner 2452 Classic Express boat (the "Collateral"). (Complaint, ¶3). Plaintiff requested reaffirmation but Defendant has neither reaffirmed nor surrendered the collateral. Plaintiff asserts that "on information and belief", Defendant has conceded to his counsel that he transferred possession of the boat to a third party as a down payment for the financing of another vehicle in contravention of the contract signed by and between Defendant and Plaintiff. (Complaint, ¶4). The complaint makes no allegations regarding the remaining items of collateral. Plaintiff further asserts the Defendant's actions show he had no intention to repay this debt and that Defendant willfully and maliciously injured Plaintiff. (Complaint, ¶5).

IV. 11 U.S.C. § 523(a)(6).

11 U.S.C. § 523(a)(6) states "[a] discharge under section 727 ... of this title does not discharge an individual debtor from any debt ... (6) for willful and malicious injury by the debtor to another entity or to the property of another entity." To be deemed non-dischargeable under Section 523(a)(6), a debt must result from a deliberate and intentional injury and not merely a deliberate or intentional act that leads to injury. Kawaauhau v. Geiger, 523 U.S. 57, 118 S.Ct. 974, 140 L.Ed.2d 90 (1998). The conversion of another's property without his knowledge or consent, done intentionally and without justification and excuse, to the other's injury, is a willful

and malicious injury within the meaning of the Section 523(a)(6) exception. Matter of McLaughlin, 14 B.R. 773, 775 (Bankr.N.D.Ga.1981).

The Court cannot grant Plaintiff's Motion for default judgment based upon the facts asserted in the Complaint. The allegations regarding the transfer of the boat are only based upon "information and belief" and that is based on hearsay. In a similar case, the court found a creditor's pleadings that a debtor "may" have transferred collateral were insufficient to warrant granting default judgment. In re Hart, 2007 WL 7143073 *2-3 (Bankr. N.D. Ga. 2007). Likewise, the facts in Plaintiff's complaint are alleged in a manner that makes them "pure speculation". Hart, 2007 WL 7143073 *2. Moreover, conversion under Section 523(a)(6) requires a showing of willful and malicious injury such that both the act and the injury are deemed "deliberate" and "intentional". In re LaGrone, 230 B.R. at 904. The Complaint asserts the Defendant's *actions show* he had no intention to repay this debt and that Defendant willfully and maliciously injured Plaintiff. These allegations, though, are mere legal conclusions. There are no details from which the Court may determine the source or content of Plaintiff's information, if or when the collateral was transferred, to whom it was transferred, why it was transferred, or whether or not Defendant intended to repay Plaintiff. In short, the complaint says nothing to illuminate Debtor's conscious intent to violate the property rights of Plaintiff. Without more, the Court cannot determine whether Defendant intended to willfully and maliciously injure Plaintiff.

Even assuming *arguendo* the Complaint contained facts which establish both the willfulness and maliciousness of Defendant's actions, it fails to assert how the transfer of the collateral caused the $10,420.00 in damages alleged therein. Plaintiff indicates that apart from the boat, the loan was secured by other items of collateral which were not transferred. However,

Plaintiff has not clarified the value of the specific collateral transferred in relation to the other items of collateral, or the value of the boat. Only the amount of a claim caused by the willful or malicious action is non-dischargeable, not the entire debt. As such, the Court cannot grant Plaintiff's Motion.

V. Attorneys fees and costs.

Lastly, the Court notes the Plaintiff seeks attorneys' fees of $1,042.00 and costs of $293.00. The Motion asserts that provisions in the contractual agreement between Plaintiff and Defendant call for payment of reasonable attorneys' fees, costs, and expenses. (Motion, ¶ 7). In the Eleventh Circuit, attorneys' fees and costs may be included as part of a judgment of non-dischargeability where the parties previously agreed to a grant of costs and attorneys fees in collection of the account. TranSouth Fin. Corp. of Florida v. Johnson, 931 F.2d 1505, 1509 (11th Cir. 1991); Matter of Rusu, 188 B.R. 325, 330 (Bankr. N.D. Ga. 1995). However, a contractual provision for attorneys' fees is enforceable only if the creditor gives ten days written notice of the principal and interest due and its intent to enforce the contractual attorneys' fee provision, and the debtor subsequently fails to pay. O.C.G.A. § 13–1–11(a)(3). Although the contract between the parties may provide for payment of Plaintiff's attorneys' fees and costs, there is no evidence that Plaintiff complied with the requirements of O.C.G.A. § 13–1–11(a)(3) prior to the filing of this bankruptcy case. As ordered below, Plaintiff may address the deficiency regarding its entitlement to attorneys' fees and costs at the trial of the matter.

VI. Conclusion.

Accordingly, it is hereby ORDERED that Plaintiff's Motion is **DENIED**. Plaintiff is directed to contact chambers to schedule a trial of this matter.

The Clerk is directed to serve a copy of this Order on the Defendant, counsel for Defendant, Plaintiff, counsel for Plaintiff, the United States Trustee, and all other parties in interest.

END OF DOCUMENT

DISTRIBUTION LIST

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