



IT IS ORDERED as set forth below:

Date: November 3, 2014

Mary Grace Diehl

Mary Grace Diehl
U.S. Bankruptcy Court Judge

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

In re:	:	BANKRUPTCY CASE NO:
	:	
KENNETH L. TERRY,	:	09-42669-MGD
	:	
Debtor.	:	CHAPTER 7
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PATRICIA O'MEARA TERRY	:	
	:	
Plaintiff,	:	
	:	
v.	:	ADVERSARY PROCEEDING NO:
	:	
KENNETH L. TERRY,	:	14-4017-MGD
	:	
Defendant.	:	
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**ORDER GRANTING DEFENDANT'S MOTION
TO SET ASIDE ENTRY OF DEFAULT**

Before the Court is Debtor-Defendant Kenneth L. Terry's Motion to Set Aside Default Judgment. (Doc. 8) (the "Motion"). The Clerk entered Defendant's default on September 5, 2014. The Court has not entered default judgment against Defendant. The Court construes

Defendant's Motion as one to set aside the Clerk's Entry of Default, and on those grounds will grant the Motion.

I. PROCEDURAL BACKGROUND

Defendant's Chapter 7 bankruptcy case was closed with a discharge on January 6, 2014. (Bankr. Doc. 119). Plaintiff Patricia O'Meara Terry filed a motion to reopen that case on May 14, 2014, which the Court granted May 28, 2014. (Bankr. Docs. 121, 123). Plaintiff filed her Complaint to Determine Dischargeability Pursuant to 11 U.S.C. Sec. 523 on July 9, 2014. (*See* Doc. 4).¹ Attached to Plaintiff's Complaint was a Certificate of Service styled for this adversary proceeding and dated as of July 9, 2014, but referencing an "Objection to Confirmation." (Doc. 4 at 19). This Certificate of Service does not reference or acknowledge service of the summons, which was issued the same day. (Doc. 2).

Plaintiff filed a Motion for Default Judgment on September 4, 2014, prior to the Clerk's Entry of Default. (Doc. 5).² Plaintiff filed a Certificate of Service for Complaint and Summons on September 5, 2014, and the Clerk entered Defendant's default the same day. (Doc. 6) That Certificate of Service recites that that "the Complaint to Determine Dischargeability Pursuant to 11 U.S.C. Sec. 523, and the summons [were served] on the Defendant and the Trustee." It does not identify either party by name and does not include their addresses.

Defendant filed the instant Motion on September 7, 2014. (Doc. 8). In sworn affidavits, Defendant and Counsel for Defendant both assert they were not served with the Complaint. (Motion ¶¶ 4, 6; Aff. Terry, Doc 8-1; Aff. Salter, Doc. 8-2). Plaintiff filed a response September 22, 2014. (Doc. 9). In an attached affidavit, Keith J. Williams, Counsel for Plaintiff, asserts the

¹ Plaintiff amended her Complaint on July 10, 2014 to redact personal identifiers. (Doc. 4)

² Plaintiff's motion is not properly before the Court, and is not addressed by this Order. *See Dahl v. Kanawha Inv. Holding Co.*, 161 F.R.D. 673, 686, 1995 U.S. Dist. LEXIS 8284 (N.D. Iowa 1995) (clerk's entry of default a prerequisite to court's entry of default judgment).

pleadings in the case were served as shown in the filed certificates of service. (Aff. Williams, Doc. 9-1).

II. LEGAL STANDARD

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. CIV. P. 55; *Oldfield v. Pueblo De Bahia Lora, S.A.*, 558 F.3d 1210, 1216 n.14 (11th Cir. 2009). 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, and it may set aside a default judgment under Rule 60(b).” FED. R. CIV. P. 55(c). A determination on the merits is favored by courts, creating a liberal standard for “good cause shown” in Rule 55(c). *Compania Interamericana Export-Import, S.A. v. Compania Dominicana de Aviacion*, 88 F.3d 948, 951 (11th Cir. 1996).

Good cause is determined from the facts of each case and guided by several factors. *Id.* (explaining that the standard is “not a precise formula”). The court is charged with “identifying circumstances that warrant a finding of good cause.” *Id.* Factors considered by the courts include whether the default was culpable or willful, whether setting it aside would prejudice the adversary, whether the defaulting party presents a meritorious defense, whether there was significant financial loss to the defaulting party, and whether the defaulting party acted promptly to correct the default. *Id.* An intentional or reckless disregard for the judicial system allows the court to make no other findings in denying the relief. *Id.* at 951-52 .

III. DISCUSSION

Good cause exists in this case to set aside the Clerk's Entry of Default. Each of the certificates of service presented by Plaintiff was procedurally deficient, and therefore neither provides sufficient proof for the Court to conclude that Defendant was actually served.

Bankruptcy Local Rule 7005-1 governs proof of service in adversary proceedings. That rule provides as follows:

The person serving process in an adversary proceeding or serving a motion initiating a contested matter with regard to which service on an opposing party is required shall make proof of service thereof promptly to the Bankruptcy Court in accordance with the Bankruptcy Rules. The Certificate of Service must include the name and address of all persons and parties served.

BLR 7005-1, NDGa.

Plaintiff filed two certificates of service. The first was attached to the filed Complaint and therefore could not prove service of the summons, issued after the filing of the Complaint. (Doc. 4 at 19). Further, the certificate refers to an "Objection to Confirmation," not to the Complaint. (*Id.*).

The second, filed nearly two months after the Complaint, was not filed "promptly," as required by BLR 7005-1. More importantly, it lacked the "name and address of all persons and parties served." As a result of these procedural deficiencies, neither certificate creates a presumption of service. *Cf. In re Brackett*, 243 B.R. 910, 914 (Bankr. N.D. Ga. 2000)

The affidavit by Keith J. Williams, Counsel for Plaintiff, also does not establish proof of service. That affidavit states that "[t]he pleadings in this adversary proceeding were served as shown in the filed certificates of service." (Aff. Williams, Doc 9-1). This

statement essentially incorporates the aforementioned deficient certificates. As the certificates do not show proper service, this statement does not serve as proof of service.

Absent proof of service, there is no basis to conclude that Defendant's "default was culpable or willful." Defendant has appeared in this action and has promptly acted to cure default, including by attaching an Answer to his Motion. Good cause exists to grant relief from the Clerk's Entry of Default. Accordingly, it is

ORDERED that Defendant's Motion, construed as a motion to set aside the Clerk's Entry of Default is **GRANTED**.

It is **FURTHER ORDERED** that Defendant file an Answer to Plaintiff's Complaint to Determine Dischargeability Pursuant to 11 U.S.C. Sec. 523 within 15 days of the entry of this Order.

The Clerk is directed to serve a copy of this Order upon Plaintiff, Defendant, and their respective Counsel.

END OF DOCUMENT