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In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

NANCY ANN HANIKA

Bankruptcy No. 98-02209S

Debtor(s).

Chapter 7

DONALD H. MOLSTAD Trustee

Adversary No. 99-9037S

Plaintiff(s)

vs.

NANCY ANN HANIKA DONNIE MEEVES

KEN TYLER and DUSTY McDOUGLE

d/b/a D & M Construction

Defendant(s)

ORDER RE: MOTION FOR DEFAULT JUDGMENT

On March 29, 1999, the trustee filed a complaint to revoke the debtor's discharge under 11 U.S.C. § 727(d)(1) and to recover preferential transfers under 11 U.S.C. § 547(b). The trustee certified that, on April 8, 1999, copies of the summons and complaint were served by mail on all defendants. No one answered or otherwise responded to the complaint.

On June 14, 1999, the trustee filed a motion for default judgment against defendants Nancy Hanika, Ken Tyler and Donnie Meeves. The clerk's default of record was entered June 16, 1999. Hearing on the motion was held July 13, 1999 in Sioux City. The trustee appeared for himself. Hanika, Tyler and Meeves each appeared *pro se*.

The court ruled orally that the motion would be denied as to defendant Hanika. She was granted 14 days to file an answer to the complaint. The matter was taken under advisement as to defendants Tyler and Meeves.

Findings of Fact

On July 22, 1998, Nancy Hanika filed her Chapter 7 bankruptcy petition *pro se*. She received a discharge October 29, 1998. The trustee seeks an order revoking Hanika's discharge. The trustee alleges that, after Hanika's discharge was granted, he first learned she had received the proceeds of a personal injury settlement approximately two weeks before her filing. He claims Hanika used the money for various purchases and to pay debts, including debts to Tyler and Meeves. The trustee

alleges that Hanika made false oaths both in her schedules and at her meeting of creditors by her failure to disclose the settlement or the transfers to Tyler and Meeves.

The trustee alleges that Meeves and Tyler received preferential transfers of money from Hanika on account of antecedent debt within the 90-day period prior to her filing. He seeks judgment against Meeves for \$1,500 and against Tyler for \$2,708.13.

Defendant Dusty McDougale, d/b/a D & M Construction, was served at 107 - 16th Street, Sioux City, Iowa 51103. Defendant Donnie Meeves is Hanika's 21-year-old son. Defendant Ken Tyler was identified as Hanika's boyfriend. Hanika, Tyler and Meeves all reside at 1012 - 13th Street, Sioux City, Iowa 51105. That is also the address shown on Hanika's petition. The trustee certified that he served them at that address.

The trustee has received copies of documents from defendant McDougale, and is satisfied that the amount of money he received from Hanika during the preference period was very small. See 11 U.S.C. § 547(c)(8) (trustee may not avoid transfers aggregating less than \$600).

Hanika was in jail for nine days at the end of March 1999 and again from June 13 to June 28, 1999.

Discussion

At the hearing on the trustee's motion, defendants Hanika, Tyler and Meeves made various oral statements that they had not received copies of papers filed in this proceeding. The Bankruptcy Rules provide that service of a summons and complaint may be made by mail. Fed.R.Bankr.P. 7004(b). Unless the debtor has filed a notice of change of address, a *pro se* debtor may be served by mail at the address shown in the petition. Fed.R.Bankr.P. 7004(b)(9). Other individual defendants may be served at their "dwelling house or usual place of abode." Fed.R.Bankr.P. 7004(b)(1). The trustee certified that copies of the summons and complaint were served as required by Rule 7004 on April 8, 1999.

"Mail that is properly addressed, stamped and deposited into the mails is presumed to be received by the addressee." Moody v. Bucknum (In re Bucknum), 951 F.2d 204, 207 (9th Cir. 1991) (quoting Osborn v. Ricketts (In re Ricketts), 80 B.R. 495, 498 (B.A.P. 9th Cir. 1987)). In the Eighth Circuit, this is a "very strong presumption." Arkansas Motor Coaches v. Comm'r of Internal Revenue, 198 F.2d 189, 191 (8th Cir. 1952); Iowa Lamb Corp. v. Kalene Industries, Inc., 871 F.Supp. 1149, 1153 (N.D. Iowa 1994). The trustee's certificate of service creates a presumption that the summons and complaint were properly mailed and, therefore, received by the defendants. In re Bucknum, 951 F.2d at 207. The presumption is so strong that it cannot be overcome by mere denial of receipt. Id. ("clear and convincing evidence" is required to overcome presumption); Brandt v. Parke (In re Foos), 204 B.R. 545, 548 n.4 (Bankr. N.D. Ill. 1997) (affidavit denying receipt insufficient to rebut presumption); In re Cox, No. X90-01377S, slip op. at 4-5 (Bankr. N.D. Iowa Jan. 9, 1992) (mere assertion of non-receipt insufficient).

Defendant Meeves at first claimed he had not received the summons and complaint. Upon being shown the court's file, however, he acknowledged having received copies of the papers filed there. He simply failed to take any action in response to receiving them. The trustee is entitled to default judgment against Meeves.

Defendant Tyler stated that the first document he received in this proceeding was the notice setting the trustee's motion for hearing. He does not deny, however, that the trustee mailed the summons and complaint to his residence, and does not deny that the documents were delivered there. He merely

states that he did not personally receive them. He suggests that Hanika's daughters took his mail while Hanika was in jail. This explanation does not overcome the evidence that Tyler was served with the summons and complaint in conformance with Rule 7004. Moreover, the explanation does not account for his claimed failure to receive the documents. Tyler admitted receiving other mail during the dates at issue. Hanika did not claim to be in jail on the date the summons and complaint were served. The notice of hearing, which Tyler did receive, was served when Hanika was in jail. Default judgment should enter against Tyler.

The court ruled orally that defendant Hanika would be permitted to answer and defend the trustee's action. Although Hanika was properly served with the summons and complaint, the court believes it appropriate to apply a more liberal standard for relief from default in the case of a *pro se* debtor defending a claim to revoke discharge. Hanika has been in jail during some of the time this proceeding has been pending. The trustee's claim against her, to revoke her discharge for obtaining the discharge through fraud, is a serious one. The court takes judicial notice that priority and general unsecured claims scheduled in her bankruptcy case total \$45,896.05. She has made attempts to secure legal counsel.

The trustee's claims against McDougle and Hanika remain to be resolved, whether by dismissal, trial or otherwise. Final judgment against Tyler and Meeves will enter when the court is able to adjudicate the claims against all defendants. See Fed.R.Civ.P. 54(b), incorporated by Fed.R.Bankr.P. 7054 (final judgment requires express determination of no just reason for delay and upon express direction for entry of judgment).

IT IS ORDERED that the trustee's motion for default judgment is granted in part and denied in part.

IT IS FURTHER ORDERED that the clerk's default is vacated as to Nancy Hanika. She shall file an answer to the trustee's complaint on or before July 27, 1999.

SO ORDERED THIS 20TH DAY OF JULY 1999.

William L. Edmonds
Chief Bankruptcy Judge