In the United States Bankruptcy Court

for the Southern District of Iowa

KELLY J. CONSTANT *Debtor(s).*	Bankruptcy No. 05-08226 Chapter 7
UNITED STATES TRUSTEE *Plaintiff(s)* vs. KELLY J. CONSTANT *Defendant(s)*	Adversary No. 06-30177

ORDER RE: MOTION TO TAKE DEFAULT

This matter came before the undersigned on February 9, 2007 for a telephonic hearing on United States Trustee's Motion to Take Default Regarding Complaint to Revoke Discharge. Plaintiff U.S. Trustee was represented by Attorney Robert Gainer. Debtor/Defendant did not appear. This is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A) and (J).

STATEMENT OF THE CASE

U.S. Trustee's complaint seeks to revoke Debtor's discharge based on her failure to turn over tax returns and wage statements. As Debtor has not appeared or answered, U.S. Trustee requested default judgment. The Court set this for hearing to determine sufficiency of service before default judgment is entered.

Debtor filed her Chapter 7 case on October 5, 2005. Discharge entered on January 10, 2006. On Trustee's motion, the Court ordered Debtor to attend a 2004 Examination. Debtor failed to appear. U.S. Trustee filed its complaint herein on September 18, 2006 to revoke Debtor's discharge for failure to obey the order and failure to turn over the tax returns and wage statements.

U.S. Trustee filed a Certificate of Service stating that the Summons and Complaint were mailed to Debtor at 431 South 3rd Ave. West, Newton, Iowa 50208, and to her attorney, Dennis McKelvie, PO Box 213, Grinnell, Iowa 50112. These addresses for the parties conform with the addresses listed in Debtor's bankruptcy case, No. 05-8226. The docket in this action shows several pieces of mail sent to Debtor at the same address were returned undeliverable, including copies of the summons (Doc. 11), the notice and bar date for the Motion for default judgment (Doc. 15), and the notice of the February 9, 2007 hearing (Doc. 18). Neither Debtor not her attorney have filed an answer or appearance in this action. Attorney McKelvie has informed the U.S. Trustee that he does not know Debtor's current address and is unable to contact her.

CONCLUSIONS OF LAW

An essential element of justice is notice of suit and opportunity to be heard. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 318 (1950). Notice must be "reasonably calculated to reach interested parties." Id.

The Federal Rules of Civil Procedure generally require personal service upon defendants. See Fed. R. Civ. Proc. 4. Service may be effected by U.S. Mail only with the acknowledgment of the defendant. If the defendant fails to

acknowledge receipt of the summons and complaint, personal service must be effected. See generally Fed. R. Civ. Proc. 4(c)(2)(C)(ii), (d)(1), (d)(3).

In Bankruptcy Court, Rule 7004 governing service of process in adversary proceedings significantly abbreviates the procedures by permitting service of a summons and complaint by first class mail. Unlike the Federal Rules of Civil Procedure, no acknowledgement of receipt of service is required under the Federal Rules of Bankruptcy Procedure. In re Braden, 142 B.R. 317, 319 (Bankr. E.D. Ark. 1992).

Under Rule 7004(b)(1), service of the summons and complaint may be made upon an individual defendant by "mailing a copy of the summons and complaint to the individual's dwelling house or usual place of abode." The use of the abbreviated procedure of service by mail in bankruptcy proceedings requires a higher standard of care when serving a party defendant. In re Barry, 330 B.R. 28, 33 (Bankr. D. Mass. 2005). "Mailing to a respondent's 'last known address' is not sufficient to effect service under this rule if the respondent is not living at that address at the time service is attempted." Id.

Where the defendant is a debtor, Rule 7004(b)(9) is applicable. This provides that service may be made by first class mail:

> Upon the debtor, after a petition has been filed by or served upon the debtor and until the case is dismissed or closed, by mailing a copy of the summons and complaint to the debtor at the address shown in the petition or to such other address as the debtor may designate in a filed writing.

Fed. R. Bankr. P. 7004(b)(9). Service shall also be made on the debtor's attorney, if the debtor is represented by an attorney, whenever service is made on the debtor under this rule. Fed. R. Bankr. P. 7004(g).

Rule 4002(a)(5) states that one of debtor's duties is to file a statement of any change of the debtor's address. Debtor was reminded of this requirement in the Order Regarding Duties of Debtor filed in her bankruptcy case on November 1, 2004 (Doc. 2).

In this case, although the discharge entered on January 10, 2006, the case remained open when the U.S. Trustee filed its complaint to revoke discharge on September 18, 2006. Service of the summons and complaint were made on Debtor and her attorney at the addresses listed in Debtor's Chapter 7 bankruptcy case. U.S. Trustee argues that service of the summons was effective under Rule 7004(b) and, in the absence of an answer by Debtor, default judgment is appropriate.

Generally, where notice is sent to the address listed by the debtor in the bankruptcy petition, due process is satisfied. In re Villarreal, 304 B.R. 882, 886 (B.A.P. 8th Cir. 2004). It is the debtor's responsibility to maintain a current mailing address on file with the court at all times during the pendency of a bankruptcy case. In re Araujo, 292 B.R. 19, 23 (Bankr. D. Conn. 2003). "Thus, service is effective on a debtor even if mailed to the wrong address, if the address to which it is mailed is the last listed by the debtor in a filed writing." Id.at 24; In re Coggin, 30 F.3d 1443, 1450 (11th Cir. 1994). Rule 7004(b)(9) does not require proof of actual receipt. In re Vincze, 230 F.3d 297, 299 (7th Cir. 2000).

One court has noted, however, that a discharge in bankruptcy is not a suspended sentence or parole. In re Martinez, 232 B.R. 458, 461 (Bankr. C.D. Cal. 1999). The debtors' duty to keep the court informed of their addresses ends after discharge is entered and the case is closed. Id. After that time, debtors no longer must continue to check in with and inform the court or creditors of their whereabouts. Id.

DEFAULT JUDGMENT

A party is not entitled to default judgment as of right. In re Jones Truck Lines, Inc., 63 F.3d 685, 686 (8th Cir. 1995). Rather, the decision calls for the court's exercise of sound judicial discretion. In re McArthur, 258 B.R. 741, 746 (Bankr. W.D. Ark. 2001).

> A hearing on the merits is favored by the policies underlying the Federal Rules of Civil Procedure. Default is disfavored and should be a rare judicial act. This principle is well settled. The granting of a default is a harsh measure to be resorted to in extreme circumstances.

Id.(citations omitted); Jones Truck Lines, 63 F.3d at 688.

Bankruptcy courts have taken a conservative approach and refrain from granting default judgment motions, especially when the defendant is the debtor in a bankruptcy case. McArthur, 258 B.R. at 746. When deciding whether to grant a default judgment, the court should consider:

> the amount of money potentially involved; whether material issues of fact or issues of substantial public importance are at issue; whether the default is largely technical; whether plaintiff has been substantially prejudiced by the delay involved; and whether the grounds for default are clearly established or are in doubt. Furthermore, the court may consider how harsh an effect a default judgment might have, or whether the default was caused by a good-faith mistake or by excusable or inexcusable neglect on the part of the defendant.

Id.at 747; Chao v. Sauve, 2004 WL 503819, *2 (N.D. Iowa 2004); 10A Wright, Miller & Kane, Federal Practice & Procedure §2685.

ANALYSIS

U.S. Trustee served the summons and complaint on Debtor at the address shown in her bankruptcy petition. This is procedurally sufficient under Rule 7004(b)(9). However, U.S. Trustee is not entitled to default judgment as of right.

This action seeks to revoke Debtor's discharge. The denial of a debtor's discharge is a harsh sanction, In re Sendecky, 283 B.R. 760, 763 (B.A.P. 8th Cir. 2002), as is the grant of a default judgment. Granting the U.S. Trustee's motion would result in Debtor losing her discharge without having actual notice of this action. All indications in the file show that Debtor has not been at the address the U.S. Trustee used for mailing the summons since before this action was commenced. Also, the Court notes that the U.S. Trustee filed the adversary complaint herein more than nine months after Debtor received her discharge, and then requested default judgment three months later. Any delay caused by a denial of the default judgment will not prejudice the U.S. Trustee.

Debtor has the duty to report any change of address while her Chapter 7 case is pending. In this case, however, the case has now remained open for more than a year after the discharge was entered. The last activity in the bankruptcy case occurred almost five months prior to the filing of the U.S. Trustee's complaint. Considering the amount of time that has passed since discharge entered and the fact that mailings to Debtors have been returned undeliverable, the Court is not willing to impose the harsh consequence of a default judgment revoking Debtor's discharge.

WHEREFORE, U.S. Trustee's Motion to Take Default Regarding Complaint to Revoke Discharge is DENIED.

FURTHER, considering the time that has passed since Debtor filed her bankruptcy petition and received a discharge, the U.S. Trustee is directed to serve the summons and complaint on Debtor in accordance with Rule 7004(b)(1), in order to give Debtor adequate notice of this proceeding and opportunity to respond.

FURTHER, judgment shall enter accordingly.

DATED AND ENTERED: February 23, 2007.

Paul J. Kilburg
U.S. Bankruptcy Judge