

UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT

IN RE:

ELEANOR B. BAIRD,

DEBTOR.

BONNIE C. MANGAN, TRUSTEE,

PLAINTIFF

vs.

ELEANOR B. BAIRD,

DEFENDANT.

)
) CASE NO. 03-33323 (LMW)

)
) CHAPTER 7

)
) ADV. PRO. NO. 04-3043

)
) DOC. I.D. NO. 17

APPEARANCES

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Plaintiff Chapter 7 Trustee

Eleanor B. Baird
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Defendant *Pro Se* Debtor

**MEMORANDUM OF DECISION RE:
MOTION FOR JUDGMENT BY DEFAULT**

Lorraine Murphy Weil, United States Bankruptcy Judge

The matter before the court is the chapter 7 trustee's (the "Trustee") Motion For Default Judgment (Doc. I.D. No. 17, the "Motion")¹ pursuant to which the Trustee seeks entry of judgment against the above-captioned debtor (the "Debtor") revoking her chapter 7 discharge pursuant to Bankruptcy Code §§ 727(d)(2) and 727(d)(3). This court has jurisdiction over this matter as a core proceeding pursuant to 28 U.S.C. §§ 157(b) and 1334(b). The memorandum constitutes the findings of fact and conclusions of law mandated by Rule 7052 of the Federal Rules of Bankruptcy Procedure.

I. BACKGROUND

A. The Chapter 7 Case

The Debtor commenced this chapter 7 case by petition (Case Doc. I.D. No. 1, the "Petition") filed on June 27, 2003 (the "Petition Date"). On June 30, 2003, the first meeting of creditors (the "Section 341 Meeting") was scheduled and a bar date of October 6, 2003 was set for filing complaints objecting to discharge or to determine the dischargeability of certain debts. (*See* Case Doc. I.D. No. 2.)

On July 14, 2003, the Debtor filed Bankruptcy Schedules A-J. (Case Doc. I.D. No. 9, the "Schedules.") On Schedule B (Personal Property), at item 17, the Debtor disclosed that she had submitted a deposit of \$68,551.13 (the "Deposit") to the Internal Revenue Service (the "IRS") "in connection with [a] rejected offer in compromise." On Schedule C (Property Claimed as Exempt) the Debtor claimed \$1,000.00 of the Deposit as exempt under Bankruptcy Code § 522(b)(2) and

¹ Citations herein to the docket of this adversary proceeding appear in the following form: "Doc. I.D. No. ____." Citations herein to the docket of the above-captioned chapter 7 case appear in the following form: "Case Doc. I.D. No. ____."

Conn. Gen. Stat. § 52-532b(r) [sic].² On Schedule D (Creditors Holding Secured Claims) the Debtor listed the IRS as a creditor and specified that the aggregate amount owed (for federal income taxes) was \$261,779.95 for 1998 and \$2,825.55 for 1999 and that both amounts were secured by a lien on her residence. On Schedule I (Current Income of Individual Debtor(s)) the Debtor stated that she is retired and has no employment, but does receive income from Social Security (\$1,901.00 per month) and a pension (\$1,414.20 per month). Along with the Schedules, the Debtor filed a Statement of Financial Affairs³ and Chapter 7 Individual Debtor's Statement of Intention.⁴

At the Section 341 Meeting, the Debtor stated under oath that the IRS had not yet returned the Deposit to her or her counsel. (Trustee's Supplemental Affidavit (as defined below) ¶ 6.) On September 19, 2003, the Trustee filed a Motion for Turnover of Property of the Estate (Case Doc. I.D. No. 14, the "Turnover Motion"), seeking an order that the Debtor or her counsel turn over the Deposit to the Trustee when the IRS returned it. A hearing on the Turnover Motion on notice to the Debtor was held and the turnover order (Case Doc. I.D. No. 19, the "Turnover Order") was entered on October 23, 2003. The Debtor was granted her chapter 7 discharge (Case Doc. I.D. No. 17) on October 14, 2003.

B. The Adversary Proceeding

The Trustee filed the complaint (Doc. I.D. No. 1, the "Complaint") that initiated this adversary proceeding on February 23, 2004, alleging that the IRS informed her that the Debtor had

² The Debtor apparently meant to refer to Conn. Gen. Stat § 52-352b(r) which provides for an exemption for "[a]ny interest of the exemptioner in any property not to exceed in value one thousand dollars," Conn. Gen. Stat. Ann. § 52-352b(r) (West 2005).

³ The Statement of Financial Affairs did not make any mention of the Deposit.

⁴ In the Statement of Intention, the Debtor stated that the mortgage debt against her residence would be reaffirmed pursuant to Bankruptcy Code § 524(c).

received the promised refund of the Deposit in the form of a check (the “Check”) in the amount of the Deposit and negotiated the Check on or about July 25, 2003 (prior to the Section 341 Meeting). (Complaint at 11.) The Trustee further alleged that the Debtor failed to deliver or surrender the Check or its proceeds to the Trustee, as was required by the Turnover Order. (Complaint at 14-15.)

The Complaint seeks a revocation of the Debtor’s discharge pursuant to: (1) Bankruptcy Code § 727(d)(2) on the stated grounds that the Debtor acquired property of the bankruptcy estate and knowingly and fraudulently failed to deliver or surrender such property to the Trustee; and (2) Bankruptcy Code § 727(d)(3) on the stated grounds that the Debtor refused to obey a lawful order of the Court (i.e., the Turnover Order).

The Debtor is *pro se* in this adversary proceeding⁵ and has failed to plead or otherwise defend. The Trustee filed a Motion for Default (Doc. I.D. No. 13) on October 7, 2004 and the Clerk entered a default (Doc. I.D. No. 14) on the same date. The Motion was filed on October 22, 2004 and a hearing on the Motion on notice to the Debtor was held on November 24, 2004. The Debtor did not appear at that hearing. The Court took the matter under advisement at the conclusion of the hearing. The Court issued that certain Order Permitting Supplementation of Proof on Motion for Default Judgment (Doc. I.D. No. 21, the “Proof Order”) on January 3, 2005 permitting the Trustee further to support the Motion with admissible evidence.⁶ Pursuant to the Proof Order, the Trustee filed the following: Supplemental Affidavit [of the Trustee] in Support of Motion for Default Judgment (Doc. I.D. No. 23, the “Trustee’s Supplemental Affidavit”); and Supplemental Affidavit

⁵ The Debtor was represented by counsel in the chapter 7 case.

⁶ The deadline for filing such additional proof was extended by further orders of the court.

[of the IRS] in Support of Motion for Default Judgment (Doc. I.D. No. 30, the “IRS Affidavit”).⁷ Mr. Mele avers in the IRS Affidavit that (a) on July 16, 2003, the Check was mailed to the Debtor at the address stated in the Petition; (b) the Check was “cashed” on July 28, 2003; and (c) the Check was presented to the IRS for payment on August 1, 2003. (IRS Affidavit ¶¶ 4-7.)⁸

II. ANALYSIS

A. The Default Judgment Standard

A court may enter default judgment against a party when that party has failed to plead or otherwise defend their side of the case.⁹ That principle is governed by Rule 55 of the Federal Rules of Civil Procedure, made applicable herein by Rule 7055 of the Federal Rules of Bankruptcy Procedure. A debtor who is named as a defendant in an adversary proceeding with respect to matters relating to discharge is always deemed to have appeared in the adversary proceeding for purposes of Rule 55(b)(2).¹⁰ *See Katz v. Araujo (In re Araujo)*, 292 B.R. 19 (Bankr. D.Conn. 2003) (revocation of discharge by default judgment).

⁷ The IRS Affidavit is the sworn statement of Ronald Mele, the IRS Insolvency Group Manager and was made on his personal knowledge. (IRS Affidavit ¶¶ 2,3.)

⁸ The Check was endorsed by the Debtor over to one Robert D. Baird and then endorsed by him. (*See* IRS Affidavit, Exhibit A (copy of cashed Check).)

⁹ Default judgment may be entered by the clerk only if the movant is seeking to be awarded a sum that is certain or calculable, if the default is for want of appearance, and the defendant is neither an infant or incompetent person. Fed. R. Civ. P. 55(b)(1). In all other circumstances, determination of whether default judgment should be entered is made by the court. Fed. R. Civ. P. 55(b)(2).

¹⁰ Fed. R. Civ. P. 55(b)(2) requires that parties against whom default judgment is sought who have appeared in the action be served written notice of the application for default judgment at least three days prior to the hearing on the application.

Entry of default does not automatically lead to entry of default judgment by the court. *Valley Oak Credit Union v. Villegas (In re Villegas)*, 132 B.R. 742, 746 (B.A.P. 9th Cir. 1991) (“[E]ntry of default does not automatically entitle the nondefaulting party to entry of a default judgment regardless of the fact that the effect of entry of a default is to deem allegations admitted.”). Rather, the court has the discretion in each case to determine whether entry of default judgment is proper, and “may conduct a hearing requiring some proof [from the Plaintiff] of the facts that must be established in order to determine [the Debtor’s] liability.” *Citibank USA, N.A. v. Spring (In re Spring)*, No. 04-3007, 2005 WL 588776, at *2 (Bankr. D. Conn. March 7, 2005) (internal quotation marks omitted).

In order to obtain judgment by default, the “plaintiff must demonstrate a *prima facie* case by competent evidence in order to obtain a [d]efault [j]udgment.” *Id.* at *2 (quoting *General Electric Capital Corp. v. Bui (In re Bui)*, 188 B.R. 274, 276 (Bankr. N.D. Cal. 1995)). The plaintiff has demonstrated a *prima facie* case when “a factfinder could reasonably find every element that the plaintiff must ultimately prove to prevail in the action.” *Fisher v. Vassar College*, 114 F.3d 1332, 1336 (2d Cir. 1997) (*en banc*), *cert. denied*, 522 U.S. 1075 and *reh'g denied*, 523 U.S. 1041 (1998) (*abrogated on other grounds by Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000)). In the present case, the Trustee must demonstrate a *prima facie* case under Section 727(d)(2) and/or 727(d)(3) of the Bankruptcy Code in order to prevail on the Motion. *See Katz v. Araujo, supra*.

B. Revocation of Discharge

The Trustee is seeking revocation of the Debtor's discharge under Bankruptcy Code §§ 727(d)(2) and 727(d)(3). Because the court has determined that the Trustee is entitled to prevail under Section 727(d)(2), the court will not address Section 727(d)(3).

Section 727(d) of the Bankruptcy Code provides in relevant part:

On request of the trustee . . . and after notice and a hearing, the court shall revoke a discharge granted under subsection (a) of this section if –

. . .
(2) the debtor acquired property that is property of the estate, or became entitled to acquire property that would be property of the estate, and knowingly and fraudulently failed to report the acquisition of or entitlement to such property, or to deliver or surrender such property to the trustee . . .

11 U.S.C.A. § 727(d)(2) (West 2005).

To obtain relief under §727(d)(2), a plaintiff must prove both that a debtor acquired or became entitled to acquire property of the estate and that the debtor knowingly, with intent to defraud, failed to report or deliver the property to the trustee The court may base a finding of fraudulent intent on inferences drawn from a course of conduct, or from all of the surrounding circumstances.

Suroviak Electric, Inc. v. Sylvia (In re Sylvia), 214 B.R. 437, 440 (Bankr. D.Conn. 1997) (Krechevsky, J) (citations omitted). As previously noted, because the Motion is one for default judgment and the Debtor is not actively opposing its entry, the Trustee must establish a *prima facie* case showing that grounds for revocation of discharge exist under Section 727(d)(2). *See In re Spring, supra* at *2.

The court concludes that the Trustee has made out a *prima facie* case under Section 727(d)(2) because a reasonable finder of fact could find as follows. The Debtor's right to receive the Check arose prepetition and was property of the estate in this case. *See* 11 U.S.C. § 541(a); Schedules (Schedule B, item 17). The Debtor received the Check after the Petition Date and was obligated to

turn it over to the Trustee. *See* 11 U.S.C. § 521(4). Instead, the Debtor endorsed the Check and it subsequently was “cashed” by a third party.¹¹ The Debtor lied to the Trustee at the Section 341 Meeting about the status of the Check (by stating that neither she nor her counsel had received the Check prior to the date of the Section 341 Meeting). A finder of fact could infer from the foregoing facts the requisite fraudulent intent. All of the foregoing establishes a *prima facie* case under Section 727(d)(2).

III. CONCLUSION

“[I]t is axiomatic that the extraordinary relief of a bankruptcy discharge is reserved for the honest but unfortunate debtor.” *Hill v. Muniz (In re Muniz)*, 320 B.R. 697, 702 (Bankr. D.Colo. 2005). Although it is a harsh result that a debtor that has already been granted a discharge should have that discharge revoked, “Congress could not have expressed its will more clearly than it did in §727.” *Id.* A debtor who “does not honor her obligations to turn over estate property,” *id.*, is not one who will be allowed to keep her discharge. In this case, the Trustee has established a *prima facie*

¹¹ The Debtor’s purported signature on the Check looks sufficiently similar to the Debtor’s signature on the Petition not to raise any “red flags” in that regard. In any event, the record in this case does not contain any suggestion by the Debtor that Mr. Baird forged her signature and converted the Check.

case that the Debtor committed an act within the purview of Bankruptcy Code § 727(d)(2).
Therefore, the court grants the Motion and a judgment will enter revoking the Debtor's discharge.

BY THE COURT

Dated: August 11, 2005


Lorraine Murphy Weil
United States Bankruptcy Judge