IT IS SO ORDERED.

Dated: 03:53 PM May 29 2009

MARILYN SHEA-STONUM
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	CASE NO. 08-52981
	)	
MARK POOLOS,	)	CHAPTER 7
	)	
DEBTOR(S)	)	JUDGE MARILYN SHEA-STONUM
	)	
	)	
STACY NAYPAUER-POOLOS,	)	ADVERSARY NO. 08-5177
	)	
PLAINTIFF,	)	
	)	
v.	)	
	)	
MARK POOLOS,	)	**ORDER GRANTING MOTION FOR LEAVE TO FILE ANSWER INSTANTER AND DENYING MOTION FOR DEFAULT JUDGMENT**
	)	
DEFENDANT.	)	
	)	
	)	

On December 8, 2008, Stacy Naypauer-Poolos ("Plaintiff") filed a complaint alleging that certain debts listed by Mark Poolos ("Debtor"), in Debtor's bankruptcy case are non-dischargeable pursuant to 11 U.S.C. § 523(a)(15). Plaintiff executed service of the complaint

on Debtor on December 16, 2008, and the Debtor's answer was due on January 15, 2009. Debtor failed to file a timely answer. Plaintiff filed a Motion for Default Judgment on March 22, 2009. The Court held three pre-trials in this proceeding; Debtor and his adversary proceeding counsel appeared at the last pre-trial, on April 15, 2009. Debtor filed a Motion for Leave to File an Answer on April 15, 2009 [docket #18]. Pursuant to 28 U.S.C. § 1334(b) and the general order of reference entered in this district, the Court has jurisdiction over this proceeding. Dischargeability determination proceedings are core proceedings pursuant to 28 U.S.C. § 157(b)(2)(I).

I. Background

The Court held a pre-trial conference in this adversary proceeding on February 4, 2009. During the February 4 pre-trial, the Court contacted Blake Brewer, Debtor's counsel in the main bankruptcy case. Mr. Brewer indicated that he did not represent Debtor in the adversary proceeding. Mr. Jones, Plaintiff's counsel, filed a motion for default judgment on March 22, 2009. The Court had set a further pre-trial conference for April 1, 2009, if necessary. Debtor failed to appear at the April 1, 2009 pre-trial conference and the Court set a final pre-trial conference for April 15, 2009. The Court indicated that if Debtor did not respond to the Motion for Default Judgment before rule time ran, the Court would grant Plaintiff's Motion for Default Judgment.

On April 15, 2009, Debtor and his counsel, Mr. Michael Butts, appeared for the pre-trial conference and filed a Motion for Leave to file an Answer Instanter [docket #18]. The Court conducted the pre-trial on the record. Debtor's counsel proffered testimony that Debtor's bankruptcy counsel told Debtor that it was not necessary for Debtor to file an answer

to this adversary proceeding. The Court then contacted Mr. Brewer, Debtor's main case counsel, who contested Debtor's proffered testimony. Debtor also spoke on his own behalf and acknowledged that he received notice of the adversary proceeding but did not respond because Mr. Brewer apparently told him that he did not need to respond. Mr. Brewer indicated that he informed Debtor that he did not represent him in the adversary proceeding. Mr. Brewer also stated that he did not tell Debtor that it was not necessary for Debtor to respond to Plaintiff's complaint.

II. Law and Analysis

Plaintiff's Motion for Default Judgment and Debtor's Motion for Leave to File an Answer include related issues and the Court will address the two at the same time. Typically, a request to file an answer after it is due is evaluated under the excusable neglect standard in Fed. R. Bankr. Pro. 9006(b)(1). However, in an exercise of judicial economy the Court will address both the Motion for Leave to File an Answer and the Motion for Default Judgment under the good cause standard used to determine whether or not a default entry should be vacated. *See Justen v. Ohio (In re Justen)*, 2007 Bankr. LEXIS 4097(Bankr. N.D. Ohio 2007).

There is a two step process for obtaining a default judgment. The movant must first request an entry of default pursuant to Fed. R. Bankr. Pro. 7055(a) and then may move the Court for the entry of a default judgment. Plaintiff has not requested an entry of default in this case, but the Court will treat the Plaintiff's Motion for Default Judgment as a request for both an entry of default and a request for default judgment. A party that would be entitled to set aside an entry of default should, typically, be permitted to file an answer. *Id*. at *7-*8

(citing *United Coin Meter Co. v. Seaboard Coastline R.R.*, 705 F.2d 839, 846 (6th Cir. 1983)). A party may set aside an entry of default for good cause. Fed. R. Bankr. Pro. 7055(c). The Court must consider the following three factors to determine if good cause exists: (1) whether or not the plaintiff would be prejudiced by setting aside the default; (2) whether or not the Debtor's defense has merit; and (3) whether or not the default was due to culpable conduct on the part of the Debtor. *Shepherd Claims Serv. Inc. v. William Darrah & Assoc.*, 796 F.2d 190, 193-94 (6th Cir. 1986). The Sixth Circuit has long noted a preference for a "trial on the merits" and against determining matters via default judgment. *Shepherd Claims Serv. Inc. v. William Darrah & Assoc.*, 796 F.2d 190, 193-94 (6th Cir. 1986).

The Plaintiff would not be prejudiced if the Court denies her Motion for Default Judgment and allows the Debtor to answer. The Plaintiff is certainly inconvenienced by the Debtor's delay in responding to the adversary proceeding. Mere delay in adjudicating a plaintiff's claim, however, is not sufficient prejudice to warrant entering default judgment for the Plaintiff. *United Coin Meter Co. v. Seaboard Coastline R.R.*, 705 F.2d 839, 845 (6th Cir. 1983). The Plaintiff has not demonstrated that she would suffer any tangible harm from allowing the Debtor to answer, other than the costs she incurred as a result of filing the Motion for Default Judgment.

The Court must also consider whether or not the Debtor has a meritorious defense. The Debtor stated in his brief to his Motion for Leave to File an Answer that he agreed that the majority of the debts that Plaintiff listed were not dischargeable. There is a dispute over one of the debts, a lease and the wear and tear balance on a Dodge Durango. The parties' divorce decree states that the "Dodge Durango lease /wear tear balance shall be paid by the

parties named upon said lease agreements as their interests may appear, or as the named parties should agree otherwise." [Docket #11-2]. In her affidavit Plaintiff stated that there are three individuals named on the Dodge/Durango lease, Debtor, Plaintiff, and Eileen Reese, who is Plaintiff's mother. [Docket #11-3]. Plaintiff also states in the affidavit that she has a separate agreement with Eileen Reese that Plaintiff would take over the payments on the lease if the Debtor did not pay. Neither party filed a copy of the lease in question. Debtor contends that the divorce decree does not create a non-dischargeable obligation for Debtor to assume this debt.

In order for a defense to be meritorious it must be one that is good at law. Likelihood of success is not a valid measure. *Invst Fin. Group v. Chem-Nuclear Sys.*, 815 F.2d 391, 398-99 (6th Cir. 1987). The Court should "determine whether there is some possibility that the outcome of the suit after a full trial will be contrary to the result achieved by the default."*Id.* (quoting 10 C. Wright, A. Miller and M. Kane, Federal Practice and Procedure, § 2699 at 531 (1983)). Debtor has asserted that the divorce decree did not create an obligation for Debtor to assume the Durango lease. If Debtor were able to prove his assertion it would provide a defense to at least one of the debts that Plaintiff claims are not dischargeable.

Finally, the Court must examine whether or not the Debtor's delay in responding was due to culpable conduct. Culpable conduct displays "either an intent to thwart judicial proceedings or a reckless disregard, ... for those proceedings." *Shepherd Claims Serv. Inc.*, 796 F.2d at 194. Delays caused by mistake or misunderstanding are not culpable, "even if the conduct of the party was careless and inexcusable." *In re Meyer*, 84 B.R. 498, 501

(Bankr. S.D. Ohio 1988). In this case Debtor received notice of the adversary proceeding. Debtor claims that his main bankruptcy counsel, Blake Brewer, informed him that it was not necessary to respond. Mr. Brewer claimed during the April 15, 2009 pre-trial conference that he informed Debtor that he did not represent him in the adversary proceeding. The Court will not make a determination as to the veracity of the statements Debtor and Mr. Brewer made at the last pre-trial. The Court notes, however, that if counsel informed Debtor that he need not respond to Plaintiff's complaint, that would certainly qualify, at the very least, as a reckless disregard of judicial proceedings on the part of Mr. Brewer.

The fact that Debtor finally retained counsel for the adversary proceeding and filed a response, before the entry of default judgment, demonstrates that Debtor likely did not intend to thwart this proceeding. It appears that the Debtor was ignorant of Court procedure or was ill-advised, but there is no evidence to suggest that he intentionally thwarted this proceeding. Debtor's ignorance does not excuse the Debtor's delay in responding to the adversary proceeding, but given the Sixth Circuit's strong preference against default judgments the Court will err on the side of caution and allow Debtor leave to file an answer and deny Plaintiff's Motion for Default Judgment.

III. Conclusion

Based upon the foregoing, the Plaintiff's Motion for Default Judgment is **DENIED** and the Debtor's Motion for Leave to File an Answer is **GRANTED.**

Debtor must file his answer no later than **June 11, 2009**.[1] The Court urges the parties to seriously consider settlement of this proceeding, particularly because the Debtor agrees with Plaintiff that most of the debts at issue are not dischargeable, pursuant to 11 U.S.C. § 523(a)(15). The Court will hold a further pre-trial conference in this matter, if necessary, on **June 17, 2009 at 3:45 p.m.**

[1] The Court allowed Debtor's counsel, Mr. Butts, to file the Motion for Leave to File an Answer and the accompanying brief on paper. The Court will **not** allow Mr. Butts to file any further paper filings while he is representing Debtor. Debtor's answer and any subsequent filings must be filed via the Court's electronic filing system and must also be fully compliant with Fed. R. Bankr. Pro. 9011.

# # #

cc: (*via* electronic mail)
L. Ray Jones, Counsel for Plaintiff
Michael Butts, Counsel for Debtor
Blake Brewer, Main Case Counsel for Debtor

(*via* U.S. Mail)
Stacy Naypauer-Poolos, Plaintiff
Mark Poolos, Debtor