UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

In re:	)	Case No. 04-17164
	)	
SARAH MORROW,	)	Chapter 13
Debtor.	)	
	)	Adversary Proceeding No. 04-1351
BUCKEYE UNION INSURANCE	)	
COMPANY,	)	Judge Arthur I. Harris
Plaintiff,	)	
	)	
v.	)	
	)	
SARAH MORROW, *et al.*,	)	
Defendants.	)	

MEMORANDUM OF OPINION

On June 24, 2004, Buckeye Union Insurance Company (Buckeye), filed the above-captioned adversary proceeding against defendants Sarah Morrow, Dennis Morrow, Johnnie Morrow, and David Morrow. In its complaint, Buckeye seeks *in rem* relief from the automatic stay as it pertains to real property owned by the defendants, which is allegedly the subject of a judgment lien in favor of Buckeye. Buckeye also seeks a one-year bar against each of the defendants from filing new bankruptcy petitions based upon the defendants' history of filing numerous bankruptcy petitions in the Northern District of Ohio. Buckeye asserts that the defendants' multiple filings have been done with the sole purpose of frustrating Buckeye's legitimate efforts to recover its collateral and that the filing bar provided under 11 U.S.C. § 109(g) is inadequate in the face of serial filings by

multiple codebtors. The case is currently before the Court on Buckeye's motion for a default judgment (Docket #5) and defendants' objection to plaintiff's motion for default judgment (Docket #11), which the Court has also construed as a motion to set aside the entry of default under Fed. R. Civ. P. 55(c). For the reasons that follow, Buckeye's motion for a default judgment is granted in part and denied in part, and defendants' objection is overruled.

PROCEDURAL BACKGROUND

On June 7, 2004, Sarah Morrow filed a petition under Chapter 13 of the Bankruptcy Code. After one extension, an order to show cause, and a motion for leave to file, the debtor filed her plan, schedules, and statements on July 22, 2004. A confirmation hearing on Sarah Morrow's Chapter 13 plan is scheduled for September 23, 2004.

On June 24, 2004, Buckeye Union Insurance Company (Buckeye), filed the above-captioned adversary proceeding against defendants Sarah Morrow, Dennis Morrow, Johnnie Morrow, and David Morrow. In its complaint, Buckeye seeks *in rem* relief from the automatic stay as it pertains to real property owned by the defendants, which is allegedly the subject of a judgment lien in favor of Buckeye. Buckeye also seeks a one-year bar against each of the defendants from filing new bankruptcy petitions based upon the defendants' history of filing numerous

bankruptcy petitions in the Northern District of Ohio. Buckeye asserts that the defendants' multiple filings have been done with the sole purpose of frustrating Buckeye's legitimate efforts to recover its collateral and that the filing bar provided under 11 U.S.C. § 109(g) is inadequate in the face of serial filings by multiple codebtors.

According to a declaration filed under penalty of perjury, all four defendants were timely served with the summons and complaint by regular mail, pursuant to Bankruptcy Rule 7004, on June 30, 2004 (Docket #7). Under Bankruptcy Rule 7012, the defendants were required to serve their answer or response by July 26, 2004. The summons also indicated that an initial pretrial conference would be held at 1:30 P.M. on August 17, 2004. No defendant filed an answer or otherwise timely responded to the complaint. On July 28, 2004, Buckeye filed a motion for a default judgment as well as a notice of filing the motion using Official Form 20A (as adapted by this Court pursuant to Administrative Order 03-5 in accordance with the Advisory Committee Note to the official form). The motion and notice of motion were served on all defendants as well as counsel for the debtor, Sarah Morrow. The notice indicated that a hearing on the motion for default judgment would be held on August 19, 2004, provided that a written response to the motion was filed no later than August 12, 2004.

On August 17, 2004, Alexander Jurczenko filed a motion to dismiss the adversary proceeding on behalf of the three non-debtor defendants and an answer on behalf of Sarah Morrow. The motion to dismiss was filed at 1:08 P.M., and the answer was filed at 1:13 P.M., just minutes before the pretrial conference that had been scheduled for 1:30 P.M. Neither filing was accompanied by a motion for leave to file pursuant to Bankruptcy Rule 9006(b). Nor have any of the defendants or their counsel ever asserted that the failure to act within the prescribed time was the result of excusable neglect. When attorney Jurczenko appeared in the courtroom at 1:30 P.M., he was advised – as was counsel for Buckeye several minutes earlier – that the pretrial would not be held because no party had filed a timely response, and that the pretrial would be adjourned to 1:30 P.M. on August 19, 2004, the time of the hearing on the motion for a default judgment.

On August 18, 2004, Jurczenko filed an objection to the motion for default judgment (Docket #11), in contravention of the time limit contained in Administrative Order 03-5 and without seeking leave to file pursuant to Bankruptcy Rule 9006(b). None of the defendants or their counsel has ever asserted that the failure to act within the prescribed time was the result of excusable neglect. The sole basis raised in the written objection is that the motion for default judgment fails to comply with Bankruptcy Rule 7055 and

Fed. R. Civ. P. 55.

On August 19, 2004, the Court heard argument on Buckeye's motion for default judgment and the defendants' objection. The Court indicated that it found defendants' written objection to be untimely and without merit, and that neither the untimely answer nor the untimely motion to dismiss raised any legitimate defenses to Buckeye's complaint. Accordingly, the Court indicated that it would grant the motion for default judgment to the extent that Buckeye sought to limit the automatic stay from applying to the real property that is the subject of Buckeye's judgment lien in any bankruptcy case. As the Court explained, the injunctive relief to be imposed would be very narrow. The defendants would all be free to file any new bankruptcy cases; however, the automatic stay would not extend to the real property that remains subject to Buckeye's judgment lien. In addition, any party in interest would be free to move for the automatic stay to apply to this real property provided that the movant can demonstrate that Buckeye's interest would be adequately protected under Section 361 of the Bankruptcy Code.

On August 24, 2004, the Court entered default against all four defendants (Docket #13) pursuant to Rule 7055 and Fed. R. Civ. P. 55(a). The Court construed the plaintiff's motion for default judgment (Docket #5) as both an

application for entry of default under Fed. R. Civ. P. 55(a) and a motion for default judgment under Fed. R. Civ. P. 55(b)(2). *See generally O.J. Distributing, Inc. v. Hornell Brewing Co.*, 340 F.3d 345, 352-53 (6th Cir. 2003) (describing process by which default may be entered by the clerk and a default judgment entered thereafter by the court). Similarly, the Court construed the defendants' objection to the motion for default judgment (Docket #11) as both a motion to set aside an entry of default under Fed. R. Civ. P. 55(c) and an objection to the plaintiff's motion for default judgment under Fed. R. Civ. P. 55(b)(2).

DISCUSSION

The Court has jurisdiction in this adversary proceeding pursuant to 28 U.S.C. § 1334(b) and Local General Order No. 84, entered on July 16, 1984, by the United States District Court for the Northern District of Ohio. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (G), and (O).

Standard for Setting Aside Entry of Default Under Fed. R. Civ. P. 55(c)

Bankruptcy Rule 7055 incorporates Rule 55 of the Federal Rules of Civil Procedure to adversary proceedings. In *O.J. Distributing, Inc. v. Hornell Brewing Co.*, 340 F.3d 345, 352-53 (6th Cir. 2003), the Sixth Circuit recently summarized the case law in this circuit governing Rule 55.

> The process by which a default may be entered by the clerk of court, and a default judgment entered thereafter by the district court, has been succinctly stated as follows:
>
> > The Federal Rules of Civil Procedure require a defendant to serve an answer within twenty days of being served with a summons and complaint. Fed. R. Civ. P. 12(a)(1)(A). Rule 55 permits the clerk to enter a default when a party fails to defend an action as required. The court may then enter a default judgment. Fed. R. Civ. P. 55(b)(1). A party against whom a default judgment has been entered may petition the court to set aside the default judgment under Rules 55(c) and 60(b) for good cause, and upon a showing of mistake, or any other just reason.
>
> *Weiss v. St. Paul Fire & Marine Ins. Co*, 283 F.3d 790, 794 (6th Cir. 2002).
>
> It is important to distinguish between an entry of default and a default judgment. That is, a stricter standard of review applies for setting aside a default once it has ripened into a judgment. Specifically, once the court has determined damages and a judgment has been entered, the district court's discretion to vacate the judgment is circumscribed by public policy favoring finality of judgments and termination of litigation as reflected in Rule 60(b). However, under Federal Rule of Civil Procedure 55(c), for good cause shown, the court may set aside an entry of default.
>
> The district court enjoys considerable latitude under the good cause shown standard of Rule 55(c) to grant a defendant relief from a default entry. The criteria used to determine whether good cause has been shown for purposes of granting a motion under Rule 55(c) are whether (1) the default was willful, (2) set-aside would prejudice plaintiff, and (3) the alleged defense was meritorious. It has been found that a district court abuses its discretion in denying a motion to set aside an entry of default when two of the three factors have been demonstrated by the defendant: the defendant had a meritorious defense and no prejudice would result to the plaintiff if the matter were to go forward.

340 F.3d at 352-53 (most citations and internal quotations omitted).

As noted previously, the Court will construe the defendants' opposition to plaintiff's motion for default judgment (Docket #11) as both a motion to set aside

an entry of default under Fed. R. Civ. P. 55(c) and an objection to the plaintiff's motion for default judgment under Fed. R. Civ. P. 55(b)(2). Accordingly, the Court will consider defendants' motion to set aside the entry of default under the "good cause shown" standard of Rule 55(c) rather than the standard applicable to motions under Rule 60(b).

In reviewing the three factors identified by the Sixth Circuit in the seminal case of *United Coin Meter Co. v. Seaboard Coastline R.R.*, 705 F.2d 839, 844 (6th Cir. 1983), this Court finds that none of the factors supports setting aside the entry of default in this case.

1. Whether the Default Was Willful

In their objection and in oral argument before the Court, the defendants and their counsel never once suggested that their failure to respond or otherwise plead within the time required under Rule 7012 was the result of an honest mistake rather than willful misconduct, carelessness, or negligence. In fact, defendants and their counsel offered no reason at all. This disregard of deadlines required under the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure is reflected not only in this adversary proceeding, but in debtor Sarah Morrow's current Chapter 13 case and in the other five bankruptcy cases filed by the same counsel representing all four defendants. In the absence of any assertion that

defendants' failure to respond within the prescribed period was the result of excusable neglect, the Court believes that the pattern exhibited by the defendants and their counsel in these six bankruptcy cases is relevant and supports a finding that the default was the result of culpable conduct.

2. Whether Setting Aside Entry of Default Would Prejudice Plaintiff

Plaintiff's complaint does not seek money damages against any of the defendants. Rather, plaintiff seeks only an opportunity to proceed in state court with foreclosure actions involving property that is subject to Buckeye's judgment lien, without being stayed by defendants' serial bankruptcy filings. According to the complaint's well-pleaded allegations, defendants have no equity in the property that is subject to Buckeye's judgment lien, and the defendants' serial bankruptcy filings have seriously hindered Buckeye's attempts to protect its security interest in the defendants' property. Were the Court to set aside the default, it would probably delay by a minimum of several months Buckeye's ability to proceed with foreclosure, assuming Buckeye were entitled to relief on the merits. For example, defendants Daniel Morrow and Johnnie Morrow would be free to stay any foreclosure proceedings by filing successive bankruptcy petitions, even though defendant David Morrow is currently barred from filing a new case by virtue of Section 109(g), and even though Buckeye might obtain

relief from stay in Sarah Morrow's current Chapter 13 case. Based upon Buckeye's complaint, it is also unlikely that the additional interest and costs associated with such delay will ever be recovered through foreclosure or the collection of any deficiency judgment.

Moreover, the narrow injunctive relief that the Court contemplates awarding Buckeye would not unfairly prejudice the defendants from legitimate attempts to prosecute any bankruptcy cases. Each of the defendants would be free to file new bankruptcy cases; however, the automatic stay would not extend to the real property that is subject to Buckeye's judgment lien. Rather, anyone, including any of the defendants, would be free to move for the automatic stay to apply to the property in question, provided that the movant can demonstrate that Buckeye's interest will be adequately protected under Section 361 of the Bankruptcy Code. Under these circumstances, the Court finds that setting aside the entry of default would result in significant prejudice to the plaintiff.

3. Whether the Defendants Have a Meritorious Defense

The Court finds none of the defenses raised by the defendants to be meritorious. The sole defense in defendants' objection to plaintiff's motion for default judgment (Docket #11) is that the motion fails to comply with Bankruptcy Rule 7055 and Fed. R. Civ. P. 55. As the Court explained in the courtroom on

August 19, 2004, the Court does not believe that this defense is meritorious, particularly when the Court construes plaintiff's motion for default judgment (Docket #5) as both an application for entry of default under Fed. R. Civ. P. 55(a) and a motion for default judgment under Fed. R. Civ. P. 55(b)(2) and similarly construes the defendants' objection to the motion for default judgment (Docket #11) as both a motion to set aside an entry of default under Fed. R. Civ. P. 55(c) and an objection to the plaintiff's motion for default judgment under Fed. R. Civ. P. 55(b)(2).

Nor does the Court find any meritorious defenses within defendant Sarah Morrow's untimely answer or the other defendants' untimely motion to dismiss. For example, the answer contains a general denial without meeting the substance of the averments denied as required under Bankruptcy Rule 7008 and Fed. R. Civ. P. 8(b), and the defendants' reservation of additional unidentified defenses is contrary to Fed. R. Civ. P. 8(c). The Court also finds no merit in the asserted failure to join unidentified indispensable parties. With respect to the defendants' untimely motion to dismiss, the Court disagrees with assertions that it lacks subject matter jurisdiction and *in personam* jurisdiction. Given the Supreme Court's recent decision in *Tennessee Student Assistance Corp. v. Hood*, ___U.S.___, 124 S. Ct. 1905 (2004), in which the Court held that state sovereign

immunity was not infringed by the bankruptcy court's *in rem* jurisdiction to discharge state-held student loan debt, the Court finds ample authority to proceed with nonmonetary relief against the three non-debtors under 28 U.S.C. § 1334(a), (b), and (e). The Court also finds that this action constitutes a core proceeding within 28 U.S.C. § 157(b)(2)(A), (G), and (O). Moreover, even if this action were not a core proceeding within the meaning of 28 U.S.C. § 157(b), that failure would not constitute a defense on the merits for purposes of setting aside entry of default. Finally, the Court also rejects as nonmeritorious those defenses raised by counsel for the defendants during argument on August 19, 2004, such as the failure of Bankruptcy Rule 7004 to require service by certified mail.

Accordingly, the Court finds that none of the factors enunciated by the Sixth Circuit in *United Coin Meter* and its progeny supports setting aside the entry of default in this case under Rule 55(c).

DEFENDANTS' HISTORY OF SERIAL BANKRUPTCY FILINGS

Buckeye's complaint documents a history of unsuccessful serial Chapter 13 petitions by the defendants, including six separate petitions in just two and one-half years, all filed by the same attorney. Defendant David Morrow is the debtor Sarah Morrow's husband. Defendant Dennis Morrow is Sarah Morrow's brother-in-law. Defendant Johnnie Morrow is Sarah Morrow's sister-in-law.

David Morrow's first Chapter 13 case was filed on January 4, 2002 (Case # 02-10145). It was voluntarily dismissed on July 10, 2002, without a plan of reorganization ever being confirmed.

David Morrow's second Chapter 13 case was filed on December 20, 2002 (Case # 02-24515). It was dismissed for lack of funding on June 30, 2003, without a plan of reorganization ever being confirmed.

Dennis Morrow's Chapter 13 case was filed on December 23, 2002 (Case # 02-24535). It was dismissed for lack of funding on August 28, 2003, without a plan of reorganization ever being confirmed.

Johnnie Morrow's Chapter 13 case was filed on September 8, 2003 (Case # 03-21819). It was dismissed on January 26, 2004, without a plan of reorganization ever being confirmed.

David Morrow's third Chapter 13 case was filed on April 12, 2004 (Case # 04-14443). David Morrow never filed the required plan, schedules, or statements. On May 13, 2004, Buckeye filed a motion seeking relief from stay, dismissal, sanctions, and *in rem* relief. The hearing on Buckeye's motion was scheduled for June 10, 2004. On June 10, 2004, the debtor moved for voluntary dismissal, knowing that a voluntary dismissal, if granted before a ruling on Buckeye's motion, would automatically result in a filing bar of 180 days against

the debtor only and would not carry any *in rem* relief or other sanctions. On June 21, 2004, the Court dismissed David Morrow's third Chapter 13 case, but retained jurisdiction to consider Buckeye's complaint seeking *in rem* relief or other sanctions.

Sarah Morrow filed her Chapter 13 case on June 7, 2004 (Case # 04-17164). Her plan, schedules, and statements were due by June 22, 2004. After one extension, an order to show cause, and a motion for leave to file, the debtor filed her plan, schedules, and statements on July 22, 2004. A confirmation hearing on Sarah Morrow's Chapter 13 plan is scheduled for September 23, 2004. Buckeye commenced the above-captioned adversary proceeding against Sarah Morrow and the other three defendants on June 24, 2004.

The Relief To Be Awarded

Although a defaulting defendant is deemed to admit every well-pleaded allegation in the complaint, the Court is required to make an independent determination of the relief to be awarded unless the amount of damages is certain. *See*, *e.g.*, *Ryan v. Homecomings Fin. Network*, 253 F.3d 778, 780-81 (4th Cir. 2001). The Court must therefore determine the appropriate relief to be awarded based upon the facts alleged in Buckeye's complaint.

Courts have grappled with the appropriate remedies for serial Chapter 13

cases for many years. *See generally* KEITH LUNDIN, CHAPTER 13 BANKRUPTCY (3D ED.) § 339.1. For example, some courts have imposed filing bars that extend beyond the 180-day sanction under Section 109(g). *See*, *e.g.*, *In re Casse*, 198 F.3d 327, 337-40 (2d Cir. 1999) (finding authority in Bankruptcy Code to sanction bad-faith serial filers for periods longer than 180-day bar under Section 109(g)); *In re Price*, 304 B.R. 769 (Bankr. N.D. Ohio 2004) (court imposed 360-day refiling bar against debtor who, with non-debtor spouse, engaged in tag-team filing of six successive petitions over period of six years). On the other hand, other courts have held that the Bankruptcy Code is properly interpreted to preclude bars on refiling other than the sanction provided under Section 109(g). *See*, *e.g.*, *In re Frieof*, 938 F.2d 1099 (10th Cir. 1991). *See also In re Barrett*, 964 F.2d 588, 591 (6th Cir. 1992) (suggesting in *dicta* that injunction against debtor from filing a bankruptcy case in the future would exceed the "powers properly invoked by a bankruptcy court").

Although the Court is inclined to agree with the Tenth Circuit's view that the Bankruptcy Code does not authorize filing bars other than the 180 days specified in Section 109(g), the Court need not determine that issue in this case. Rather, the Court finds that a more limited remedy should protect Buckeye without barring any of the defendants from filing a new bankruptcy petition. That remedy

is simply a modification of the automatic stay in any future bankruptcy filing as it relates to the property that is the subject of Buckeye's judgment lien. The Court finds authority for this limited injunctive relief pursuant to 11 U.S.C. §§ 105, 361, 362, and 349(b)(3).

As the Court explained to counsel in the courtroom on August 19, 2004, the injunctive relief to be imposed would be very narrow. The defendants would all be free to file any new bankruptcy cases; however, the automatic stay would not extend to the real property that is subject to Buckeye's judgment lien. In addition, in any bankruptcy case, including Sarah Morrow's existing Chapter 13 case, anyone would be free to move for the automatic stay to apply to the property in question, provided that the movant can demonstrate that Buckeye's interest will be adequately protected under Section 361 of the Bankruptcy Code.

Accordingly, the Court will limit its relief to an injunction modifying the automatic stay in any bankruptcy filing as it relates to the property that is the subject of Buckeye's judgment lien. Moreover, the automatic stay of Bankruptcy Code Section 362(a) will not apply to the property described above unless and until a party in interest moves to apply the stay and demonstrates that Buckeye's interest would be adequately protected under Bankruptcy Code Section 361.

CONCLUSION

For the foregoing reasons, plaintiff's motion for a default judgment (Docket #5) is granted in part and denied in part as follows:

1. The filing of a bankruptcy petition by any person will not extend the protection of the automatic stay of 11 U.S.C. § 362(a) to the following property described in paragraph 8 of plaintiff's complaint:

1256 East 125th Street, Cleveland, Ohio 44106, PP# 110-79-034;

15922 Forest Hills Blvd., East Cleveland, Ohio 44112, PP# 673-32-023;

2255 Newbury, East Cleveland, Ohio 44112, PP# 673-32-0022;

1744 Lakefront Ave., East Cleveland, Ohio 44112, PP# 672-11-060; and

13421 Cedar Rd., Cleveland Heights, Ohio 44108, PP# 687-05-047.

2. The automatic stay of Bankruptcy Code Section 362(a) will not apply to the property described above unless and until a party in interest moves to apply the stay and demonstrates that Buckeye's interest would be adequately protected under Bankruptcy Code Section 361.

3. Each party shall bear its own costs and attorneys fees.

In addition, defendants' objection to plaintiff's motion for default judgment (Docket #11), which the Court has also construed as a motion to set aside the entry of default under Fed. R. Civ. P. 55(c), is overruled.

A separate Default Judgment shall be entered in accordance with this Memorandum of Opinion.

IT IS SO ORDERED.

/s/ Arthur I. Harris 08/25/2004
Arthur I. Harris
United States Bankruptcy Judge