

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF KENTUCKY

LEXINGTON DIVISION

IN RE:

DAVID KEITH EVANS

DEBTOR CASE NO. 99-50752

JOHN M. HENDERSON

PATRICIA A. HENDERSON PLAINTIFFS

VS. ADV. NO. 99-5089

DAVID KEITH EVANS DEFENDANT

MEMORANDUM OPINION

This matter is before the Court on the plaintiffs' Motion for Default Judgment. The plaintiffs filed their Complaint herein on June 28, 1999, and the defendant/debtor, who is not represented by counsel, has not filed an Answer or other responsive pleading. Judgment by default is provided for in FRCP 55, made applicable in bankruptcy by FRBP 7055. That rule provides in pertinent part as follows:

(a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default.

(b) Judgment. Judgment by default may be entered as follows:

(1) By the Clerk. When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due enter judgment for that amount and costs against the defendant, if the defendant has been defaulted for failure to appear and is not an infant or incompetent person.

(2) By the Court. In all other cases the party entitled to a judgment by default shall apply to the court therefor; If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper

As set out in the Rule, entry of default (upon the failure of the defendant to appear) does not automatically entitle the moving party to default judgment. See *In re Beltran*, 182 B.R. 820 (9th Cir.BAP 1995)

The decision to grant a default judgment is within the discretion of the trial court. The elements which may be considered in deciding whether to enter a default judgment are set out in *Eitel v. McCool*, 782 F.2d 1470 (9th Cir. 1986):

(1) the possibility of prejudice to the plaintiff, (2) the merits of plaintiff's substantive claim, (3) the sufficiency of the complaint, (4) the sum of money at stake in the action; (5) the possibility of a dispute concerning material facts; (6) whether the default was due to excusable neglect; and (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits.

At 1471-1472. In addition, the nature of the court's independent duty in this regard has been set out in *Matter of Hunt's Health Care, Inc.*, 161 B.R. 971 (Bkrcty.N.D.Ind. 1993):

When a defendant fails to respond to a complaint against it, the plaintiff is entitled to the entry of default. A default is not, however, an absolute confession by the defendant of his liability and of the plaintiff's right to recover. *Nishimatsu Constr. Co. Ltd. v. Houston Nat'l Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975). Instead, the failure to respond operates only as an admission of the well-pleaded factual allegations contained in the complaint. *Id.* Those allegations must still provide a legitimate basis for the entry of judgment. Consequently, even after default, a defendant is still entitled to challenge the legal sufficiency of the complaint and whether its allegations state a claim upon which judgment may be entered. *Id.* at 1206-07. See also *Danning v. Lavine*, 572 F.2d 1386, 1388 (9th Cir. 1978). If the well-pleaded allegations, which are deemed to have been admitted by the defaulting defendant, do not support the entry of judgment, judgment cannot be entered.

At 979. For the reasons set out below, this Court has concluded that it must perform such an analysis in this matter.

The plaintiffs' Complaint alleges that the defendant secured title to a vehicle from them by fraud by falsely represent[ing] to [them] that he had the legal ability to assign his workman's compensation award as security, when he knew he could not legally do so. They maintain that the debt should therefore be declared nondischargeable pursuant to 11 U.S.C. 523(a)(2), and that the debtor should be denied a discharge pursuant to 11 U.S.C. 727 because he failed to include the workers' compensation award in his Chapter 7 petition and schedules.

Pursuant to FRCP 8(a), made applicable in bankruptcy by FRBP 7008, a "well-pleaded factual allegation" is a short and plain statement of the claim showing that the pleader is entitled to relief. Under this standard, the plaintiffs' Complaint contains well-pleaded factual allegations. As stated above, the defendant's failure to appear acts as an admission of these allegations. The Court believes, however, that there are questions

concerning the merits of the plaintiffs' substantive claims, and whether they will support a judgment.

In reviewing the Complaint, the Court notes that the Contract which purports to assign the defendant's workers' compensation award was prepared by an attorney. The parties should have been advised that KRS 342.180 prohibits the assignment of compensation awards and it also makes them exempt from the claims of all creditors. In *Newberg v. Scarcione*, 865 S.W.2d 317, Ky. (1993), the court stated:

The purpose of KRS 342.180 and similar statutes which prohibit the assignment of compensation claims is to protect the injured worker and to promote the purpose of the Workers' Compensation Act by insuring that benefits are available to meet the present and future requirements for food, clothing, and shelter of the worker and his dependents, rather than being available to his creditors to satisfy antecedent debts.

At 319. Further, in *Matthews v. Lewis*, 617 S.W.2d 43, Ky. (1981), the court explained more fully as follows:

The intent of the Kentucky Workers' Compensation Act is to provide a means of support to those who have been injured in the market place. The compensation payments are in lieu of wages that, were it not for the job-related injury, would be received regularly. This money must be available to the beneficiary upon receipt and thereafter if he is to provide for himself life's necessities of food, clothing, and shelter. A judgment debtor's interest in bare survival must invariably predominate over the interest of creditors in mere economy of debt collection.

At 44. It is clear, therefore, that a workers' compensation award is not reachable by creditors of a debtor.

As concerns the plaintiffs' contention that the defendant's debt to them should be declared to be nondischargeable pursuant to 523(a)(2)(A), the record in this matter would not support a holding that the defendant should be held responsible for the legal conclusion that his workers' compensation award was assignable. The record further does not support the plaintiff's contention that the defendant should be denied a discharge pursuant to 727(a)(4). While the all-encompassing definition of interests of the debtor in property contained in 11 U.S.C. 541 would require the listing of the workers' compensation award on the debtor's schedules, the award is clearly exempt. In addition, since the purported "assignment" was entered into in 1997, and the debtor filed his petition in 1999, he may have believed that at the time of filing he had no property interest in the award. It appears that the plaintiffs would be hard-pressed to demonstrate that the defendant knowingly and fraudulently made a false oath or account so as to deny him a discharge.

In consideration of the foregoing, it is the opinion of this Court that while the plaintiffs are entitled to an entry of default against the defendant, their Motion for Default

Judgment should be overruled. An order in conformity with this opinion will be entered separately.

Dated:

By the Court -

Judge

Copies to:

Debtor

Dean A. Langdon, Esq.