UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of	:	
LYLE STEPHEN KOSS and VIRGINIA RUTH KOSS,	:	Case No. 93-1707-D Chapter 7
Debtors.	:	
LYLE STEPHEN KOSS and VIRGINIA RUTH KOSS,	:	
Plaintiffs,	:	Adv. No. 93-93114
vs.	:	
SALLIE MAE LOAN SERVICING CENTER,	:	
Defendant,	:	
and	:	
IOWA COLLEGE STUDENT AID COMMISSION,	:	
Intervener.	:	

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ORDER--MOTION FOR DEFAULT

This proceeding pends upon Plaintiffs' Motion for Default. Notice of this motion was given on March 30, 1990.

On June 28, 1993, Plaintiffs filed for relief under Chapter 7 of the Bankruptcy Code.

On August 6, 1993, Plaintiffs filed their complaint alleging that Defendant, Sallie Mae Loan Servicing Center, held a claim in the approximate amount of $9,250.00, which

claim was an educational loan. Plaintiffs further allege that subject educational loan was dischargeable pursuant to 11 U.S.C. § 523(a)(8)(b) in that excepting it from discharge would impose an undue hardship on the debtors and their dependents.

On September 14, 1993, Iowa College Student Aid Commission (hereinafter ICSAC) was permitted to intervene in that subject obligation had been assigned to ICSAC and ICSAC should be permitted to protect its interest. ICSAC thereafter filed its answer and counterclaim.

The answer denies the essential allegations of the complaint. The Counterclaim alleges that the Plaintiff, Virginia Ruth Koss, obtained student loans and defaulted on her obligation to repay those loans. The Counterclaim further alleges that ICSAC has paid the notes under the terms of its guaranty and the notes have been assigned to ICSAC. ICSAC prays for judgment against Virginia Ruth Koss in the amount of $10,330.91, plus costs, including costs of collection, and interest.

The Complaint and Counterclaim were set for trial on March 2, 1994, at 1:15 p.m., in the Federal Building, Davenport, Iowa. Notice was given to ICSAC.

On March 2, 1994, Plaintiffs appeared with counsel prepared for trial. ICSAC failed to appear and defend against the complaint or prosecute its counterclaim.

The matter was continued and Plaintiffs were to submit an application for fees and expenses with bar date and proposed order. Plaintiffs submitted an application for fees and expenses which was returned by order on March 8, 1994, in that Plaintiffs failed to submit bar date and proposed order. Plaintiffs have failed to comply with the order returning documents submitted for filing. The Plaintiffs have now submitted their motion for default and pray for compensation for attorney's fees and costs.

Counsel for ICSAC originally stated that he did not believe that ICSAC had received notice. Said counsel later voluntarily and candidly advised the court that there was notice in his file and he apologized for not being present for trial.

ICSAC has agreed to compensate Plaintiffs and their counsel for their costs so that they may be made whole.

DISCUSSION

Fed.R.Bankr.P. 7055 governs defaults in adversary proceedings. This rule incorporates Fed.R.Civ.P. 55 by

reference. There are two steps for default under Fed.R.Civ.P. 55 for failure to plead or defend:

(1) The entry of the default; and

(2) The subsequent entry of a judgment by default.

Shepherd Claims Service, Inc. v. William Darral & Assoc., 796 F.2d 190, 193 (6th Cir. 1986). In this case, there has not yet been an entry of default nor entry of judgment.

The Plaintiffs are not entitled to a default as a matter of right, as the ruling is within the sound discretion of the Court. Further, default judgments are not favored by the law and should be a rare judicial act. U.S. on Behalf of Time Equip. Rental v. Harre, 983 F.2d 128, 130 (8th Cir. 1993); Comiskey v. JFTJ Corp., 989 F.2d 1007, 1009 (8th Cir. 1993).

Factors which may be considered when the Court seeks to determine if a default should be granted include:

(1) Prejudice to the plaintiff. Taylor v. City of Baldwin, 859 F.2d 1330, 1332 (8th Cir. 1988). Conditions may be imposed in the setting aside of a default entry. The imposition of conditions or sanctions in an order vacating a default is a useful device in mitigating any prejudice which the plaintiff might suffer by allowing the defendant to plead. Littlefield v. Walt Flanagan & Co., 498 F.2d 1133, 1136 (10th Cir. 1974).

(2) A strong policy favoring decision on the merits. Grandbouche v. Clancy, 825 F.2d 1463, 1468 (10th Cir. 1987).

(3) Bad faith dealings with the court or opposing party. Comiskey, 989 F.2d at 1009; Harre, 983 F.2d at 130; F.D.I.C. v. Daily, 973 F.2d 1525, 1530 (10th Cir. 1992); Taylor, 859 F.2d at 1332.

(4) The merits of plaintiff's substantive claim. Eitel v. McCool, 782 F.2d 1470, 1471 (9th Cir. 1986).

(5) Whether or not there is a dispute concerning material facts or whether issues of substantive public importance are in question. In re Howell Enterprises, 99 B.R. 413, 415 (Bankr. E.D. Ark. 1989); In re Bacon, 131 B.R. 110, 112 (Bankr. E.D. Ark. 1991).

(6) Whether the amount of money potentially involved is substantial. Id.

(7) Whether the default is largely technical. Towers Financial Corp. v. Solomon, 126 F.R.D. 531, 536 (N.D. Ill. 1989).

(8) Whether the grounds for default are clearly established or in doubt. Id.

(9) The validity of the defense on the merits. Ochoa v. Principal Mut. Ins. Co., 144 F.R.D. 418, 420 (N.D. Ga. 1992).

In this case, counsel for ISCAC voluntarily and in good faith admitted to this Court that notice was received. The failure to appear at trial was the result of inadvertence. There have been no allegations by the Plaintiffs of bad faith dealings on the part of ICSAC.

Additionally, this case involves the attempt to discharge a student loan obligation. The Bankruptcy Code evidences a public policy to make such obligations nondischargeable unless the loans first became due more than seven years before the filing of the petition or the debt imposes an undue hardship on the debtor.

The Debtors seek to discharge this obligation on the grounds of undue hardship. The law strongly favors trial on the merits and disfavors default judgments. A finding of undue hardship requires this Court to make factual findings. Proving undue hardship is not an easy burden for debtors in cases such as these.

The Court finds, after careful consideration of the circumstances of this case, that the Plaintiffs' Motion for Default Judgment should be denied. However, the Court will impose certain conditions on the Intervenor to mitigate any prejudice that might have been suffered by the Plaintiffs. Specifically, the Court finds that ICSAC shall compensate the

Plaintiffs and their counsel for attorney fees and expenses related to the failure of ICSAC to appear at the scheduled trial. Plaintiffs shall submit an application for fees and expenses to allow the Court to ascertain the proper award.

ORDER

IT IS ACCORDINGLY ORDERED that the Plaintiffs' Motion for Default is denied.

IT IS FURTHER ORDERED that the Intervenor, Iowa College Student Aid Commission is ordered to compensate Plaintiffs' for their attorney fees and expenses occasioned by the Intervenor's failure to appear at trial.

IT IS FURTHER ORDERED that the Plaintiffs resubmit their application for fees and expenses in accordance with the standards of In re Pothoven, 84 B.R. 579 (Bankr. S.D. Iowa 1988).

Dated this day of _26th_____ day of April, 1994.

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Russell J. Hill
U.S. Bankruptcy Court