

**UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa**

In the Matter of	:	Case No. 96 - 02645 - CH
	:	
JACK E. PENMAN, JR.,	:	Chapter 7
	:	
Debtor.	:	
-----	:	
DEBBIE S. BENSLEY,	:	Adv. No. 96 - 96201
	:	
Plaintiff,	:	
	:	
vs.	:	
	:	
JACK E. PENMAN, JR.,	:	
	:	
	:	
Defendant.	:	

ORDER -- ENTRY OF DEFAULT

On January 16, 1997, a telephonic hearing was held on the Plaintiff's Motion for Default Judgment and Debtor-Defendant's Objection thereto. Debtor, Jack E. Penman, Jr., was represented by attorney Eric Borseth; Creditor, Debbie S. Bensley, was represented by attorney Erik A. Luthens. At the conclusion of the hearing, the Court took the matter under advisement. The Court now considers the matter fully submitted.

The Court has jurisdiction of this matter pursuant to 28 U.S.C. § 157 (b)(1) and § 1334. This is a core proceeding. 28 U.S.C. § 157(b)(2)(I). The Court, upon review of the briefs, pleadings, evidence, and arguments of counsel, now enters its findings and conclusions pursuant to Fed.R.Bankr.P. 7052.

FINDINGS OF FACT

1. Jack E. Penman, Jr., filed an individual chapter 7 bankruptcy petition on July 3, 1996.

2. Notice of the § 341 Meeting of Creditors was served by the Clerk's Office on July 8, 1997. Debtor failed to appear for the Meeting on August 9, 1996, which was then continued. Notice of the continued Meeting was served on August 12, 1996. Debtor appeared at the § 341 Meeting held on September 13, 1996.

3. On October 8, 1996, Debbie S. Bensley, Debtor's former spouse, timely filed a Complaint to Determine Dischargeability of Debt pursuant to 11 U.S.C. § 523 (a)(5) and/or § 523 (a)(15). Bensley is a creditor by virtue of an award of attorney's fees in dissolution of marriage proceedings in the Iowa District Court in an for Polk County, file number C.D. No. 065-38553. Bensley was awarded attorney's fees because of contempt matters involving child support and for Penman's failure to appear at a pretrial conference. Bensley also alleges that debts owed to medical creditors scheduled in Penman's bankruptcy are for medical services provided to Debtor's daughters.

4. A Summons and Notice of Pretrial Conference in an Adversary Proceeding was issued by the Clerk of the Bankruptcy Court on October 9, 1996. The first paragraph of the Summons states:

YOU ARE SUMMONED and required to submit a motion or answer to the complaint which is attached to this summons to the clerk of the bankruptcy court within 30 days after the date of issuance of this summons . . .

In bold print at the bottom of the Summons is the admonition:

IF YOU FAIL TO RESPOND TO THIS SUMMONS, YOUR FAILURE

WILL BE DEEMED TO BE YOUR CONSENT TO ENTRY OF A JUDGMENT BY THE BANKRUPTCY COURT AND JUDGMENT BY DEFAULT MAY BE TAKEN AGAINST YOU FOR THE RELIEF DEMANDED IN THE COMPLAINT.

The Summons contained notification that a pretrial conference would be held on November 18, 1996 at 9:30 a.m. in the U.S. Courthouse Annex, 110 E. Court Avenue, Des Moines, IA 50309, in the 4th Floor Courtroom #1.

5. Service of process was made by mailing the Summons and a copy of the complaint on October 12, 1996, to Eric Borseth at 5191 Maple Dr. Suite J, Pleasant Hill, IA 50317 and on Jack E. Penman, Jr. at 4411 S.E. 112th, Runnells, IA 50237.

6. At the pretrial conference held on November 18, 1996, Eric Luthens, counsel for Plaintiff, appeared. Neither Defendant, Borseth, or any other attorney appeared on behalf of the Debtor-Defendant. Neither Borseth or Defendant had any contact with the Court regarding this Adversary Proceeding prior to the pretrial conference. Luthens was directed to file a motion for default because there was neither a motion nor an answer on file in this Adversary Proceeding.

7. On November 19, Luthens filed an Affidavit in Support of Entry of Default Judgment. Mail notice of said affidavit was given to Jack E. Penman Jr., 4411 S.E. 112th, Runnells, Iowa 50237, and Eric Borseth, Attorney at Law, 5191 Maple Drive, Suite J, Pleasant Hill, Iowa 50317. Bar date notice of ten days for filing objections to the entry of the default judgment was mailed to both Defendant and Borseth.

8. On November 27, 1996, an Answer, signed by Eric Borseth, Borseth & Genest Law Office, Attorney for Defendant, was filed.

9. Defendant's Objection to the affidavit in support of default judgment was filed on that same date. Defendant admits that he did not serve a responsive pleading and gives no reason why a responsive pleading was not filed within the prescribed time.

DISCUSSION

Debbie S. Bensley, Debtor-Defendant's ex-spouse, filed a Complaint to Determine Dischargeability of Debts arising from dissolution of marriage proceedings. Defendant, Jack E. Penman, Jr., failed to file, within the prescribed time frame, a responsive pleading to the Summons and Complaint served on both he and his counsel. Neither Defendant nor his counsel appeared for the scheduled pretrial conference. Plaintiff seeks entry of a default judgment, which Defendant opposes.

Entry of a default judgment under Fed.R.Civ.P. 55 is made applicable to Adversary Proceedings by Fed.R.Bankr.P. 7055. Granting of a default judgment for failure to defend may be appropriate where there is more than a marginal failure to comply with the time requirements and where the conduct includes "willful violations of court rules, contumacious conduct, or intentional delay." See Ackra Direct Marketing Corp. v. Fingerhut Corp., 86 F.3d 852, 856 (8th Cir. 1996) (citing U.S. v. Harre, 983 F.2d 128, 130 (8th Cir. 1993)).

In his Objection, Defendant states that he appeared at the Bankruptcy Court on November 18, 1996, but that he did not arrive on time. He states that he attempted to locate the "appropriate venue" but was unfamiliar with the Federal Court system and arrived late. Plaintiff, in her response to the Objection, asserts that this is absurd as Defendant had more than 30 days notice within which he could have acquainted himself with the hearing location.

At the January 16, 1997, hearing, Borseth gave an excuse of ignorance for failing to respond to the Summons and Complaint within the prescribed time frame. This Court finds Borseth's defense to be without merit. In the Objection to entry of a default judgment, "Defendant admits the existence of Bankruptcy rule 701.2(a)." Assuming Defendant's reference is to Fed.R.Bankr.P. 7012 (a), which requires a responsive pleading be filed within 30 days after the issuance of the summons, this Court is left to theorize as to who's ignorance led to the current procedural posture. Borseth is presumed to be an attorney admitted to practice in this district. While admitting the existence of Rule 7012, counsel cannot logically deny knowledge of the substance of that Rule, or of the correlating rule, Fed.R.Civ.P. 12 (a), which requires a responsive pleading in a shorter time frame. Defendant, himself, has spent a lot of time in the District Court of Iowa and when he failed to show for a pretrial conference there, he found out that sanctions could be imposed for such failure. Plaintiff and this Court were unable to get Defendant's attention until he was presented with the possibility of having a default judgment entered against him. A summons means what it says.

This Court finds that default should be entered against Defendant as he has failed to plead or otherwise defend within the statutory time and has failed to give any good reason why he failed to do so. In order to enter judgment, this Court finds it necessary to establish the truth of the allegations in Plaintiff's complaint by evidence.

ORDER

IT IS THEREFORE ORDERED that Plaintiff's motion for default is SUSTAINED and a default is entered against Defendant.

IT IS FURTHER ORDERED that Plaintiff shall contact the courtroom deputy, Linda Burnett, 515-284-6479, to establish a date and time for establishing the truth of the allegations of the complaint by evidence.

Dated this _____ day of July, 1997.

RUSSELL J. HILL, CHIEF JUDGE
U.S. BANKRUPTCY COURT