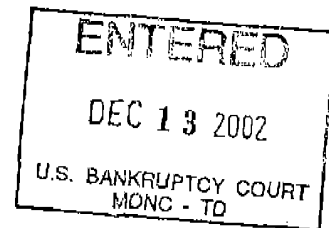


UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF NORTH CAROLINA  
WINSTON-SALEM DIVISION

In re: )  
Pamela T. Johnson )  
Debtor. )  
Edwin H. Ferguson, Jr. Trustee in )  
Bankruptcy for Pamela T. Johnson )  
Plaintiff, )  
v. )  
Pamela T. Johnson )  
Defendant. )

Case No. 02-59011

Ad. Proc. Case No. 02-6055 ✓



ORDER

THIS MATTER came on for hearing, after due and proper notice, before the undersigned bankruptcy judge in Winston-Salem, North Carolina upon Motion by the Defendant to set aside Clerk's Entry of Default. Appearing before the court was A. Carl Penney, attorney for Pamela T. Johnson (the "Debtor"), and Edwin H. Ferguson, Jr., Chapter 7 Trustee. For the reasons stated herein, the court will grant the Debtor's motion to set aside the entry of default.

FACTS

On December 28, 1999, the Debtor filed a joint petition with her spouse under Chapter 13 of the Bankruptcy Code. In her Chapter 13 Schedules, the Debtor listed jointly owned jewelry in the amount of \$4,500. Thereafter, the Debtor separated from her spouse and filed a de-consolidation conversion to Chapter 7 on June 28, 2002. At the time of the conversion, the Debtor filed a claim for property exemptions listing \$200.00 in jewelry. At the § 341 creditors' meeting held on July 26, 2002, the Trustee requested an explanation as to the discrepancy

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between the value of the jewelry listed on the Chapter 13 Schedules and her claim for property exemptions in the Chapter 7 proceeding. The § 341 meeting was continued until August 9, 2002, at which time the Debtor presented a receipt dated February 27, 2002 for the sale of jewelry for the sum of \$600.00. The Debtor sold the jewelry without authorization from the Chapter 13 office or the court. The Trustee requested from the attorney for the Debtor, as well as the Debtor, further explanation and received no response. A week later, on August 16, 2002, the Trustee filed a complaint objecting to the discharge of the Debtor. On August 23, 2002, the Trustee mailed the complaint and summons to the Debtor and the Debtor's attorney, Mr. Penney. These documents were received by Mr. Penney on August 26, 2002. On September 30, 2002, the Trustee filed a motion for entry of default. The motion was granted and default was entered against the Debtor on October 7, 2002.

The Debtor filed a motion to set aside the entry of default on October 30, 2002. The Debtor contends that her estranged husband has possession of some of the jewelry and that she was forced to sell some of the jewelry to provide for living expenses following the separation from her husband, who was shot in a robbery attempt shortly following their separation. The Debtor used \$325.00 of the \$600.00 in jewelry proceeds to make her Chapter 13 plan payment. The Debtor's counsel indicated that difficulty in reaching the Debtor and his failure to note the filing deadline caused the delayed response to the Trustee's Complaint. On October 2, 2002, less than a week after the time period to answer had expired, Mr. Penney contacted the Trustee to request an extension of time to answer. The Trustee responded that he had already filed for an entry of default.

## DISCUSSION

Rule 55(c) of the Federal Rules of Civil Procedure, made applicable to these proceedings by Federal Rule of Bankruptcy Procedure 7055, states that “[f]or good cause shown the court may set aside an entry of default.” Fed.R.Civ.P. 55(c). In determining whether there is “good cause” to set aside an entry of default, the court should consider several factors including whether the defaulting party has acted with reasonable diligence in seeking to set aside the default, whether the defaulting party presents meritorious defenses, and whether the party will be substantially prejudiced if the default is not set aside. See Lolatchy v. Arthur Murray, Inc., 816 F.2d 951, 954 (4<sup>th</sup> Cir. 1987); United States v. Eastern Metal Prods. & Fabricators, Inc., 112 F.R.D. 685, 690 (M.D.N.C. 1986); St. Jude Scheepvaart USA, Inc. v. EMED Shipping, Ltd., 2001 WL 604183, \*3 (M.D.N.C. 2001). The court should also consider the personal responsibility of the party, the willfulness of the default and the availability of less drastic sanctions. Lolatchy, 816 F.2d at 953; see also United States v. \$10,000.00 in U.S. Currency, 2002 WL 1009734, \*3 (M.D.N.C. 2002). Finally, Rule 55(c) must be “liberally construed in order to provide relief from the onerous consequences of defaults and default judgments.” Lolatchy, 816 F.2d at 954 (citing United States v. Moradi, 673 F.2d 725, 727 (4<sup>th</sup> Cir. 1982). “Any doubts about whether relief should be granted should be resolved in favor of setting aside the default so that the case may be heard on the merits.” Tolson v. Hodge, 411 F.2d 123, 130 (4<sup>th</sup> Cir. 1969).

In this instance, the Debtor and her counsel have acted with reasonable promptness in seeking to set aside the entry of default. The Debtor’s motion to set aside was filed on October 30, 2002, just twenty three days after the entry of default by the Bankruptcy Clerk. Furthermore, the parties do not dispute that Mr. Penney contacted the Trustee prior to the entry of default

seeking an extension of time within which to file an answer. Thus, the Trustee was aware even earlier of the Debtor's intention to respond to the Complaint.

The Debtor has also made an adequate showing of a meritorious defense. With respect to entries of default, "a proffered defense may be considered meritorious if there is even a hint or suggestion that it will be a complete defense if proven." Eastern Metal Prods. & Fabricators, Inc., 112 F.R.D. at 691. The Debtor has provided an explanation as to the whereabouts of the jewelry and the disposition of the proceeds. The Debtor has asserted the defense that the complaint does not state a legally sufficient basis upon which denial of discharge should be granted and that failure to obtain court approval of the sale of assets may not by itself always be sufficient to deny discharge. The court finds that the Debtor has established a meritorious, albeit contested, defense sufficient for the purposes of setting aside an entry of default.

An entry of default as a result of the Debtor's counsel's actions would severely and irreparably prejudice the Debtor. In contrast, the Trustee has not demonstrated that he would be substantially prejudiced if the entry of default is set aside. "Delay alone is not a sufficient basis for prejudice. . . Prejudice may result from loss of evidence, greater difficulty in discovery or trial, or opportunity for fraud and collusion." Eastern Metal Prods. & Fabricators, Inc., 112 F.R.D. at 691. Moreover, the sequence of events that led to the present motion occurred during a relatively short period of time. The Complaint was filed less than one month following the initial § 341 hearing, and Mr. Penney contacted the Trustee within the week following the expiration of the deadline to answer. While the court recognizes that the Trustee has been considerably inconvenienced, he will not be substantially prejudiced.

The Debtor's actions do not rise to the level of willful default. While Mr. Penney

indicated that he had some difficulty in reaching the Debtor, he also contends that he failed to note the filing deadline and allowed the 30 day answer period to expire. (Motion to Set Aside Entry of Default ¶ 4.) Mr. Penney acknowledges that he should have requested an extension of time to file an answer. In view of this, the court finds that the Debtor is not personally responsible for the default being entered in this case and the responsibility lies with Debtor's counsel. Therefore, the Debtor should not be denied a discharge simply because of her counsel's failure to get an extension of time.

Finally, the Trustee was well aware that the Debtor was represented by counsel for both the adversary proceeding and the underlying bankruptcy case, and yet attempted no actions short of default to elicit an answer. Clearly, the Trustee was frustrated by the lack of prompt and complete responses to his initial inquiries, and then by the failure of the Debtor to file an answer to the Complaint in a timely manner. Nevertheless, the court must consider the availability of sanctions that are less drastic than a default. See Lolatchy, 816 F.2d at 953-954 (finding that the district court abused its discretion when it did not attempt to cure a failure to respond with sanctions other than a default). There is no more severe sanction than the entry of a judgment against a party. At this point in the case, the denial of the Debtor's discharge without allowing her the opportunity to offer a defense on the merits of the case is a disproportionately harsh consequence of her failure to file a timely answer.

After consideration of the factors and circumstances of the case, the court finds good cause to set aside the Entry of Default. It is in the best interests of all parties that the case be resolved on the merits, rather than default judgment. However, adversary proceedings are subject to the Federal Rules of Civil Procedure to ensure the orderly and prompt resolution of disputes. Continued disregard for such rules will result in sanctions by the court.

Accordingly, IT IS ORDERED that the Debtor's Motion to Set Aside the Entry of Default is GRANTED. The Debtor is hereby ORDERED to properly file an answer or motion to dismiss within twenty (20) days of the entry of this order.

This the 13 day of December 2002.

**CATHARINE R. CARRUTHERS**

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Catharine R. Carruthers  
United States Bankruptcy Judge