United States Bankruptcy Court
District of New Mexico

Document Verification

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:
ROGER W. COOPER and
MARY E. COOPER,
Debtors. No. 7-03-10307 SS

UNITED STATES TRUSTEE,
Plaintiff,
vs.
Adv. No. 03-1234 S

ROGER W. COOPER, JR., et al.,
Defendants.

MEMORANDUM OPINION ON MOTION TO SET ASIDE ENTRY OF DEFAULT

This matter is before the Court on Defendants' Motion to Set Aside Entry of Default. Defendants appear through their attorney Daniel J. Behles. The Plaintiff United States Trustee appears through its attorney Ron E. Andazola. This is a core proceeding. 28 U.S.C. § 157(b)(2).

Most pertinent facts are undisputed. Plaintiff timely filed this adversary on May 9, 2003. The summons was issued on May 14, 2003. Plaintiff served the summons on May 15, 2003 as shown in the Certificate of Service filed on May 15, 2003. A copy of the complaint and the summons were mailed to each Debtor individually at their address of record, to the case trustee at her address of record, and, as required by Fed. R. Bankr. P. 7004(b)(9), to Debtors' attorney Daniel Behles at

"Box 849" in Albuquerque. Mr. Behles' address is actually "Box 415."

No answer was timely filed[1], and the Plaintiff filed a motion for default judgment on June 20, 2003. The Clerk's Entry of Default was filed June 24, 2003 and a Default Judgment was filed on June 30, 2003.

Also on June 30, 2003, Debtors filed a Motion to Set Aside Entry of Default (the "Motion") and an Answer to the complaint. The Motion does not specify the rule(s) on which it relies. The Motion does not challenge service. Nor does the Answer contain a Fed.R.Civ.P. 12(b) motion to dismiss.

The Court conducted a hearing on August 19, 2003 on the Motion to Set Aside Default and at that time Mr. Behles made an oral motion to amend the answer to include a Fed.R.Civ.P. 12(b)(5) motion to dismiss for improper service. On September 3, 2003, Plaintiff filed a Memorandum in Opposition to Motion to Set-Aside Entry of Default, which argues that Defendants waived their improper service defense by not filing it as a

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[1] Debtors' brief alleges that Mr. Behles was out of the state from May 29 to June 17, 2003 and that Debtors were unable to consult with him until his return. Plaintiff's brief, on the other hand, alleges that Mr. Behles received a copy of the complaint by e-mail on May 12, 2003 and instructed his legal assistant to prepare an entry of appearance and a request for extension of time to file an answer. Clearly there are some factual issues that need further evidentiary development.

motion or including it in the Answer. Debtors filed a response brief on September 15, 2003, which argues that the oral motion to amend should be construed as a 12(b) motion to dismiss and should be granted.

DISCUSSION

Fed.R.Civ.P. 12(b)(5) provides in part:

> Every defense, in law or fact, to a claim for relief in any pleading ... shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: ... (5) insufficiency of service of process ... A motion making any of these defenses shall be made before pleading if a further pleading is permitted.

Fed.R.Civ.P. 12(h) provides in part:

> (1) A defense of ... insufficiency of service of process is waived ... (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

Fed.R.Civ.P. 15(a) describes when a pleading can be amended as a matter of course:

> A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served.

The Court finds that Defendants waived their Fed.R.Civ.P. 12(b)(5) defense by not raising it in either a motion to

dismiss or their answer, see Rules 12(b)(5) and 12(h), or in an amended answer filed within 20 days of service of the original answer, see Rules 12(h) and 15(a). See Seward & Kissel v. Smith Wilson Co., Inc., 814 F.Supp. 370, 374 (S.D.N.Y. 1993)(Defendant not allowed to raise 12(b)(5) defense after omitting it from its untimely answer after default is entered.) See also Sec. and Exch. Comm'n v. Cherif, 933 F.2d 403, 416 (7th Cir. 1991)(Defendant who filed responsive pleading after default that did not contain 12(b)(5) defense waived it.) Indeed, Mr. Behles' admirably candid brief admits as much:

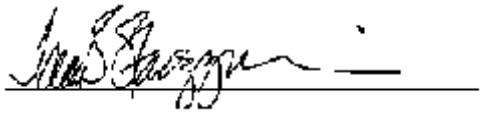
> Trustee correctly argues that the defense of insufficiency of service can be waived if not raised in a motion or in the answer. That is precisely why Defendants made the oral motion at the hearing. Specifically, defendants moved to amend their answer to include a defense of insufficient service.

Debtors' Response to U.S. Trustee's Memorandum in Oppostion to Motion to Set Aside Entry of Default at 2 (doc 19 and 21).

CONCLUSION

Therefore, if the judgment is to be set aside, Debtors must proceed through the usual rules that require, for example, excusable neglect and a meritorious defense. The Court will enter an order denying the Rule 12(b)(5) defense and set a preliminary hearing at which the Court will schedule

an evidentiary hearing on whether the judgment should be set aside under the usual rules.



Honorable James S. Starzynski
United States Bankruptcy Judge

I hereby certify that on January 23, 2004, a true and correct copy of the foregoing was either electronically transmitted, faxed, delivered, or mailed to the listed counsel and parties.

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