IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

IN RE: ROBERT L. and KIMBERLY R. JACKSON, Debtors **No. 5:15-bk-72917**
Ch. 13

ROBERT L. and KIMBERLY R. JACKSON **PLAINTIFFS**

v. **5:16-ap-7055**

JP MORGAN CHASE BANK, N.A. **DEFENDANT**

MEMORANDUM OPINION AND ORDER

Before the Court are the debtors' motion for default judgment filed on September 13, 2016, and the creditor's response to the motion filed on October 11, 2016. Also before the Court are the debtor's October 26, 2016 motion to strike the answer that the creditor filed on October 13, 2016, and the creditor's response to the motion. For the reasons stated below, the Court denies the debtors' motion for default judgment and motion to strike the creditor's answer.

The debtors filed their voluntary chapter 13 petition, schedules, and plan on November 13, 2015, and their plan was confirmed on July 19, 2016. The following week, on July 25, 2016, the debtors filed their *Adversary Complaint to Determine Validity of Secured Status Under 11 U.S.C. § 506(a)(1) and Avoid Mortgage Lien*. The debtors properly served a copy of the complaint and a summons on the creditor, JP Morgan Chase Bank, N.A. [Chase Bank], pursuant to Rule 7004(h), which states that service on an insured depository institution, such as a bank, "shall be made by certified mail addressed to an officer of the institution . . . ." Fed. R. Bankr. P. 7004(h).[1] Despite proper service, Chase

[1] Counsel for Chase Bank argued that because the "Return Receipt Requested" card was not signed by an officer of the bank, service on Chase Bank was not perfected. However, the Court cannot find any requirement in the rules that the card be signed or that a signature is even required.

Bank failed to respond to the debtors' complaint. On September 19, 2016, the debtors filed their motion for default judgment and, again, served Chase Bank by certified mail addressed to an officer of the bank. Finally, on October 11, 2016, counsel for Chase Bank filed a notice of appearance and responded to the debtors' motion for default judgment. After the Court set the motion and response for hearing, Chase Bank then filed its answer to the debtors' complaint.

The requirements for the entry of default and default judgment are found in Federal Rule of Bankruptcy Procedure 7055, which incorporates Federal Rule of Civil Procedure 55. Rule 55 states, in relevant part:

> **Default; Default Judgment**
> (a) **Entering a Default**. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default.
>
> (b) **Entering a Default Judgment**.
>
> (1) By the Clerk. If the plaintiff's claim is for a sum certain or a sum that can be made certain by computation, the clerk--on the plaintiff's request, with an affidavit showing the amount due--must enter judgment for that amount and costs against a defendant who has been defaulted for not appearing and who is neither a minor nor an incompetent person.
>
> (2) By the Court. In all other cases, the party must apply to the court for a default judgment. . . .

Fed. R. Civ. P. 55. Rule 55 contemplates a two-step process:

> first, pursuant to Fed. R. Civ. P. 55(a), the party seeking a default judgment must have the clerk enter the default by submitting the required proof that the opposing party has failed to plead or otherwise defend; second, pursuant to Fed. R. Civ. P. 55(b), the moving party may seek entry of judgment on the default under either subdivision (b)(1) or (b)(2) of the rule.

Dahl v. Kanawha Inv. Holding Co., 161 F.R.D. 673, 683 (N.D. Iowa 1995). According to the Eighth Circuit, an "entry of default under Rule 55(a) must precede grant of a default judgment under Rule 55(b)." *Johnson v. Dayton Elec. Mfg. Co.*, 140 F.3d 781, 783 (8th Cir. 1998); *see also Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d 1040, 1042 (8th

Cir. 2000) (citing *Johnson* for this requirement).[2] In this case, there has been no entry of default. Thus, the Court will treat the debtors' motion for default judgment as a motion for entry of default. *See, e.g., Nextgear Capital, Inc. v. Ark. Exch., Inc.*, No. 4:14-CV-256 JMM, slip op., 2015 WL 11108980, at *1 (E.D. Ark. Jan. 1, 2015).

The debtor's motion meets the requirements of Rule 55(a). The motion is signed by counsel and attached to the motion is proof of service on Jamie Dimon, who is identified as the CEO of JP Morgan Chase. The debtors were entitled to an entry of default in this case on or about September 13, 2016, the date the motion was filed. At that time, had an entry of default been entered, the debtors could have proceeded with the second step, moving for default judgment. Instead, the motion was docketed in accord with its title, a motion for default judgment.

Chase Bank responded to the docketed motion for default judgment on October 11, 2016. Because the Court is treating the debtors' motion as a motion for entry of default rather than a motion for default judgment, the Court will treat Chase Bank's response to the motion as a motion to set aside what should have been an entry of default. Rule 55(c) states that "[t]he court may set aside an entry of default for good cause, and it may set aside a *final* default judgment under Rule 60(b)." Fed. R. Bankr. P. 7055 (incorporating Fed. R. Civ. P. 55). In its Response to Motion to Strike Answer, which is also before the Court, Chase Bank pleads affirmatively that its answer to the debtors' complaint was filed late "due to a miscommunication regarding the referral for representation." Although this does little to justify Chase Bank's dilatory response to the pleadings filed in this case, the

[2] At the hearing, counsel for the debtors cited two earlier motions for default judgment that were filed in other cases before the Court. Those exemplars were granted by the Court without the movant first showing "by affidavit or otherwise" that the defendant had failed to plead or otherwise defend. Both of the motions were set for hearing by the Court on notice to the defendants and were granted when the defendants failed to appear. Neither defendants moved to set aside the Court orders granting default judgment.

Eighth Circuit recognizes that "it is likely that a party who promptly attacks an entry of default, rather than waiting for grant of a default judgment, was guilty of an oversight and wishes to defend the case on the merits." *Johnson*, 140 F.3d at 784. While Chase Bank's reason may not suffice to prove excusable neglect as a basis to set aside a default judgment under Rule 60(b), the standard for setting aside an entry of default has a lower threshold, which the Court believes Chase Bank has met. This finding also comports with the Eighth Circuit's "'judicial preference for adjudication on the merits . . . .'" *Id.* (quoting *Oberstar v. F.D.I.C.*, 987 F.2d 494, 504 (8th Cir. 1993)).

In sum, the Court denies the debtors' motion for default judgment filed on September 13, 2016. To the extent the motion for default judgment emerged from this procedural quagmire as an entry of default on the Court's docket, the Court sets aside the entry of default. The Court also denies the debtors' motion to strike the answer filed by Chase Bank. The Court will schedule this adversary proceeding for trial by subsequent notice.

IT IS SO ORDERED.

Ben Barry
United States Bankruptcy Judge
Dated: 12/09/2016

cc: Todd F. Hertzberg
Jennifer A. Wyse
Keith Morrison