IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF ARKANSAS
LITTLE ROCK DIVISION

IN RE: AMBER JEAN BRYANT **1:10-bk-10477 E**
CHAPTER 7

WHITE RIVER HEALTH SYSTEM, INC.
d/b/a WHITE RIVER MEDICAL CENTER **PLAINTIFF**

v. **AP NO.: 1:10-ap-1068**

AMBER JEAN BRYANT **DEFENDANT**

ORDER DENYING APPLICATION FOR DEFAULT JUDGMENT AND MOTION TO STRIKE ANSWER AND FOR DEFAULT JUDGMENT

Now before the Court is the *Application for Default Judgment* and *Motion to Strike Answer and For Default Judgment* filed by the Plaintiff, White River Health System, d/b/a White River Medical Center, on June 28, 2010. The Court's docket reflects that the Complaint in this matter was filed and the summons issued on May 4, 2010, and served upon the Defendant on May 7, 2010. Pursuant to Federal Rule of Bankruptcy Procedure 7012(a), the defendant shall serve an answer within 30 days after the issuance of the summons unless a different time is prescribed by the court. Accordingly, the Answer is this case was due June 3, 2010. Because the Answer was filed five days late, on June 8, 2010, Plaintiff moves for default judgment and to strike the Defendant's Answer. As explained herein, default judgment is not appropriate in this case, and the Court will not strike the Defendant's Answer.

In addressing Plaintiffs' Application and Motion, it is important to distinguish between the entry of a "default" and the entry of a "default judgment." Federal Rule of Civil

EOD 7/20/2010
by L Schacherbauer

Procedure 55 concerning default applies to adversary proceedings. Fed. R. Bankr. P. 7055. "The entry of the default by the Clerk under Federal Rule 55(a) is a docket entry." *Editor's Comment*, Bankruptcy Rule 7055. If a party fails to plead or otherwise defend against a complaint and a default has been entered, the next step is the entry of a default judgment. *See Johnson v. Dayton Elec. Mfg. Co.*, 140 F.3d 781, 783 (8th Cir. 1998) (citation and internal quotes omitted) ("When a party has failed to plead or otherwise defend against a pleading listed in [Federal Rule] 7(a), entry of default under [Federal Rule] 55(a) must precede grant of a default judgment under [Federal Rule] 55(b).")

In this case, there has been no entry of default by the Clerk. It appears to the Court that a default was not entered because Debtor did, in fact, file an Answer to the Complaint.[1] The Court will not grant Plaintiff's Motion, in part, because the entry of a default must precede a default judgment. *See Brooks v. United States*, 29 F. Supp. 2d 613, 618 (N.D. Cal. 1998) ("As default has not been entered against [the defendant], the entry of default judgment would be inappropriate. The entry of default judgment is a two-part process; default judgment may be entered only upon the entry of default by the Clerk of the Court.")

Moreover, the Court accepts Debtor's Counsel's explanation that she failured to answer the complaint in a timely manner due to an incorrect calculation of days. In *U.S. ex rel. Shaver v. Lucas Western Corp*, 237 F.3d 932 (8th Cir. 2001), the Court of Appeals for the Eighth Circuit addressed a failure to respond to a complaint in a timely fashion. That

[1] The Court notes that even if a default had been entered prior to the filing of Plaintiff's Motion, the set-aside of the entry of a default is governed by a more lenient "good cause" standard than is the set-aside of a default judgment. *See Johnson*, 140 F.3d at 783-84.

court found the set-aside of an entry of default proper where the defendant-corporation did not respond to a complaint because it mistakenly forwarded that complaint to an incorrect individual, but only discovered its error after learning of the entry of default. *Shaver*, 237 F.3d at 933. In this case, Debtor's counsel states that she was in communication with Plaintiff's counsel about whether or not she would be filing an Answer on behalf of Debtor, and that she missed the deadline due solely to an incorrect calculation of days. The Answer was only five days late, and it would be an abuse of the Court's discretion to enter a default judgment in such circumstances. *See Jones Truck Lines*, 63 F.3d at 688 (citation and internal quotes omitted) ("A court abuses its discretion if it enters a default judgment for a marginal failure to comply with time requirements.").

Finally, the Court notes that default judgment is not favored by the law and "should be a rare judicial act." *See Jones Truck Lines, Inc. v. Foster's Truck & Equipment Sales, Inc. (In re Jones Truck Lines, Inc.)*, 63 F.3d 685, 688 (8th Cir. 1995) (citations and internal quotes omitted). *See also Johnson v. Dayton Elec. Mfg. Co.*, 140 F.3d 781, 785 (8th Cir. 1998), citing *Shepard Claim Serv., Inc. v. William Darrah & Assocs.*, 796 F.2d 190, 193 (6th Cir, 1986) ("[W]hen a grant of default judgement precludes consideration of the merits of a case, even a slight abuse of discretion may justify reversal."); *Oberstar v. Fed. Deposit Ins. Corp.*, 978 F.2d 494, 504 (8th cir. 1993) (There is a "judicial preference for adjudication on the merits [that] goes to the fundamental fairness of the adjudicatory process.").[2]

[2] The law governing default and disfavoring default judgments is well-settled. Moving for default judgment and to strike an answer filed just five days late, particularly where Plaintiff's counsel was informed of Defendant's intention to file an Answer, and where no

CONCLUSION

The Court will not enter a default judgment in this case because a default was not entered, an Answer has been filed, Debtor provided an acceptable reason for the delay in filing the Answer, and there was only a marginal failure to comply with the time requirements. For these reasons, it is hereby

ORDERED that Plaintiff's *Application for Default Judgment* is **DENIED;** and it is further

ORDERED that Plaintiff's *Motion to Strike Answer and for Default Judgment* is **DENIED**.

IT IS SO ORDERED.

Audrey R. Evans
United States Bankruptcy Judge
Dated: 07/20/2010

cc: Ronald Burnett, attorney for Plaintiff
Lyndsey Dilks, attorney for Debtor/Defendant
U.S. Trustee

default had been entered, borders on the frivolous.