

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

In re:

RORY MICHAEL KOTYUK,

Debtor.

Case No. DK 09-06741

Hon. Scott W. Dales

Chapter 7

SCOTT A. CHERNICH, Chapter 7 Trustee,

Plaintiff,

Adv. Pro. No. 10-80591

v.

RHONDA CAYO,

Defendant.

REPORT AND RECOMMENDATION

PRESENT: HONORABLE SCOTT W. DALES
United States Bankruptcy Judge

BACKGROUND

This Report and Recommendation is based upon the Trustee's Motion for Default Judgment against Defendant, Rhonda Cayo (the "Motion"). In making this Report and Recommendation, I have reviewed the Complaint (annexed hereto as Exhibit A) filed by Chapter 7 Trustee Scott A. Chernich ("Trustee") against Defendant Rhonda Cayo ("Defendant"), and have carefully considered the limits on the Bankruptcy Court's jurisdiction, as I am required to do under 28 U.S.C. § 157(b)(2). I make this Report and Recommendation on my own initiative because I have determined, given the nature of the Trustee's claim, that this adversary proceeding is not a core proceeding. In addition, the Defendant has not appeared or otherwise participated in the bankruptcy case, and

therefore has not consented to my entering a final judgment resolving the Trustee's claims. As a result, I do not have the authority under 28 U.S.C. § 157(c) to enter final judgment in response to the Trustee's Motion. This Report and Recommendation constitutes my findings of fact and conclusions of law as contemplated in Fed. R. Bankr. P. 9033.

REPORT

On September 17, 2010, the Trustee filed a Complaint styled as one for turnover or to recover property of the estate, alleging that the Defendant owed the Debtor Rory Kotyuk \$8,000.00 on account of a "receivable" that the Defendant allegedly owed to the Debtor on the petition date. *See* Complaint ¶7. After the Defendant failed to answer or otherwise respond to the Complaint, the Clerk of the United States Bankruptcy Court entered and gave notice of default to the Defendant. *See* Entry and Notice of Default (annexed hereto as Exhibit B). The Trustee filed a Motion for Default Judgment on December 22, 2010, which I reviewed along with the Complaint and docket in this matter. After my review, I determined that the Complaint, although styled effectively as one for turnover under 11 U.S.C. § 542, actually seeks to liquidate a contract claim based on State-created rights formerly held by the Debtor but now included within the property of the estate under 11 U.S.C. § 541. The Supreme Court in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 485 U.S. 50, 102 S. Ct. 2858 (1982), held that the adjudication of such claims, in the absence of consent of the parties, falls within "the judicial power" that may be exercised only by a court with the "essential attributes" of federal judicial power prescribed in Article III of the United States Constitution. *See also* *Thomas v. Union Carbide Agricultural Prods. Co.*, 473 U.S. 568, 584, 105 S. Ct. 3325,

3334-35 (1985) (*Marathon Pipe Line* “establishes only that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants . . .”). The Bankruptcy Court lacks such attributes.

In similar matters, I have determined that the Bankruptcy Court lacked jurisdiction to enter final judgment in such a situation, and that it must proceed by recommending that the District Court grant the motion for default judgment, rather than by granting the motion and entering judgment itself. Chief Judge Paul L. Maloney concurred in this analysis, and adopted my recommendations. *See Hagan v. Sirbaugh*, slip copy, 2009 WL 331534 (W.D. Mich. Feb. 29, 2009); *Hagan v. Okony*, slip copy, 2008 WL 4722747 (W.D. Mich. Oct. 22, 2008). I follow this same procedure today.

I find that the Complaint in the present adversary proceeding is well-pleaded and satisfies Fed. R. Civ. P. 8(a), made applicable to this adversary proceeding by Fed. R. Bankr. P. 7008. The Defendant’s failure to deny the well-pleaded factual allegations constitutes an admission under Fed. R. Civ. P. 8(b)(6). The allegations, which have been admitted, establish that the Trustee, as representative of the successor to the Debtor’s rights against the Defendant, has a valid claim against the Defendant in the amount of \$8,000.00, and that the Defendant’s debt is due and payable, and not subject to defense or reduction by way of setoff, counterclaim, recoupment or otherwise.

The Trustee’s counsel represented on the record that the Defendant is neither a minor, nor an incompetent, as contemplated under Fed. R. Civ. P. 55. *See* Affidavit of Chapter 7 Trustee Scott A. Chernich, at ¶7 (annexed hereto as Exhibit C). Similarly, it appears from this affidavit that the Defendant is not in active military service. *See*

Exhibit C; *see also* 50 U.S.C. App. § 521 (2008). I have reviewed the certificate of service and have no reason to doubt that the Trustee effected proper service of the Summons and Complaint upon the Defendant.

RECOMMENDATION

I recommend that the United States District Court grant the Motion and enter judgment in favor of the Plaintiff Trustee in the amount of \$8,000.00, plus costs in the amount of \$250, representing the filing fee in this matter.

The Clerk of the United States Bankruptcy Court for the Western District of Michigan shall enter this Report and Recommendation in the docket of the above-captioned adversary proceeding, and shall transmit a copy of the Report and Recommendation to the United States District Court for the Western District of Michigan. In addition, the Clerk of the United States Bankruptcy Court shall transmit a copy of this Report and Recommendation, including all attachments, to Scott A. Chernich, Esq. and W. Joseph Mills, Esq., and Rhonda Cayo, each at their respective addresses of record, or by ECF transmission where applicable.



UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

IN RE:

RORY MICHAEL KOTYUK,
Debtor.

HON. SCOTT W. DALES

Case No. 09-06741

Chapter 7

SCOTT A. CHERNICH, Chapter 7 Trustee,

Plaintiff,

v

Adv. Proc. No. _____

RHONDA CAYO,

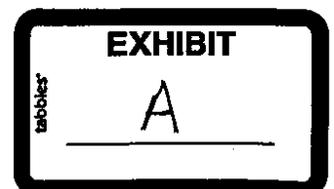
Defendant.

W. Joseph Mills (P24625)
Mills & Shaw, P.C.
Attorneys for Debtor
445 West Michigan Ave.
Suite 110
Kalamazoo, MI 49007
(269) 383-2100

Scott A. Chernich (P48893)
Chapter 7 Trustee
Foster, Swift, Collins & Smith, P.C.
313 S. Washington Square
Lansing, MI 48933
(517) 371-8100

TRUSTEE'S COMPLAINT TO RECOVER PROPERTY OF THE ESTATE

Chapter 7 Trustee Scott A. Chernich (the "Trustee") through his attorneys Foster Swift Collins & Smith, P.C. files this Complaint against Defendant Rhonda Cayo ("Defendant") pursuant to Federal Rules of Bankruptcy Procedure 7001 and 11 U.S.C. § 542(a), and in support thereof states as follows:



1. Debtor Rory Kotyuk (the "Debtor") filed for relief under Chapter 7 of the Bankruptcy Code on July 10, 2009.

2. The Trustee was appointed the Chapter 7 Trustee at the first meeting of creditors held on July 10, 2009.

3. The Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 157(b) and 1334(a) and (b).

4. Venue is proper before the Court pursuant to 28 U.S.C. § 1409(a).

5. This adversary proceeding is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(e).

6. Upon information and belief, Defendant resides at 2753 Eamon Road, Benton Harbor, Michigan.

7. At his first meeting of creditors, the Debtor testified that he loaned Defendant \$8,000 ("Receivable"). A copy of a check written to the Debtor in the amount of \$3,000 with a notation that the Debtor paid the Defendant \$5,000 in cash on July 11, 2007 is attached as Exhibit A.

8. The Trustee is claiming the Receivable as an asset of the bankruptcy estate pursuant to 11 U.S.C. § 541.

9. Despite repeated requests to turn over the Receivable to the bankruptcy estate, Defendant has refrained and refused from doing so.

10. The Trustee may recover and preserve for the benefit of the estate the property transferred or the value of such property from Defendant pursuant to 11 U.S.C. § 542.

WHEREFORE, Chapter 7 Trustee, Scott A. Chernich respectfully requests that the Court:

- A. Order a judgement in favor of the Trustee and against Defendant Rhonda Kayo in the amount of \$8,000 pursuant to 11 U.S.C. §§ 541 and 542;
- B. Preserve the payment to Defendant as an asset of the bankruptcy estate pursuant to 11 U.S.C. § 551; and
- C. For such other and further relief that the Court deems just and equitable.

Respectfully submitted,

Dated: September 16, 2010

/s/ Scott A. Chernich
Scott A. Chernich (P 48893)
Chapter 7 Trustee

313 South Washington Square
Lansing, MI 48933
(517) 371-8133

United States Bankruptcy Court
Western District of Michigan
One Division Ave., N.
Room 200
Grand Rapids, MI 49503

<p>IN RE: Debtor(s) (name(s) used by the debtor(s) in the last 8 years, including married, maiden, trade, and address):</p> <p>Rory Michael Kotyuk</p> <p>Scott Chernich</p> <p>Rhonda Cayo</p> <p style="text-align: right;">Debtor</p> <p style="text-align: right;">Plaintiff</p> <p style="text-align: right;">Defendant</p>	<p>Case Number 09-06741-swd</p> <p>Adv Case Number 10-80591-swd</p> <p>Chapter 7</p> <p>Honorable Scott W. Dales</p>
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ENTRY AND NOTICE OF DEFAULT

NOTICE IS HEREBY GIVEN THAT a default is entered against Defendant, Rhonda Cayo , in the above-captioned adversary proceeding for the reason that it appears from the record that the named defendant has failed to plead or otherwise defend in this adversary proceeding as required by law. Defendant, Rhonda Cayo may not either personally or through counsel defend this adversary proceeding either by appearing in court, by filing pleadings or other papers with the court, or otherwise, without first setting aside the default.

Plaintiff may now apply to the Court for entry of a default judgment. If plaintiff requests entry of default judgment pursuant to Fed.R. Bankr.P. 7055(b), the application for default judgment shall indicate whether the Plaintiff intends to rely solely upon the pleadings to support the application. Moreover, if Plaintiff does not intend to rely solely upon the pleadings, the application shall identify each element and prayer for relief Plaintiff intends to support with additional proofs (e.g. affidavit, deposition transcript, document, oral testimony). Plaintiff, at its option, may also attach to the application the supporting documents, affidavits, and deposition transcripts.

Upon receipt of the application, the Court may either enter the requested default judgment against Defendant, Rhonda Cayo , without further hearing or schedule the application for hearing.

Plaintiff is advised that the Court may at any time issue an order to show cause why this adversary proceeding against Defendant, Rhonda Cayo , should not be dismissed for lack of progress if it appears to the Court that Plaintiff is not diligently attempting to enter a default judgment against Defendant, Rhonda Cayo .

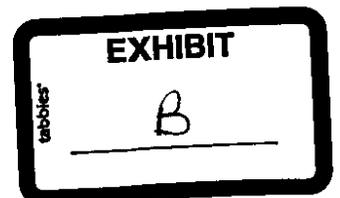


DANIEL M. LAVILLE
CLERK OF BANKRUPTCY COURT

Dated: December 2, 2010

/S/ _____
M. Cox
Deputy Clerk

Clerks Entry and Notice of Default transmitted to the Bankruptcy Noticing Center for service of same upon interested parties appearing of record herein.



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Debtor.

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Attorneys for Debtor
445 West Michigan Ave.
Suite 110
Kalamazoo, MI 49007
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Scott A. Chernich (P48893)
Patricia J. Scott (P73061)
Foster, Swift, Collins & Smith, P.C.
Attorneys for Chapter 7 Trustee
313 S. Washington Square
Lansing, MI 48933
(517) 371-8100

AFFIDAVIT OF CHAPTER 7 TRUSTEE SCOTT A. CHERNICH

STATE OF MICHIGAN)
)ss.
COUNTY OF INGHAM)

I, Chapter 7 Trustee, Scott A. Chernich, being first duly sworn, depose and say as follows:

1. I was appointed the Chapter 7 Trustee at the first meeting of creditors held on July 10, 2009.
2. At his first meeting of creditors, the Debtor testified that he loaned Defendant \$8,000



("Receivable").

3. The Trustee is claiming the Receivable as an asset of the bankruptcy estate pursuant to 11 U.S.C. § 541.

4. Despite repeated requests to turn over the Receivable to the bankruptcy estate, Defendant has refrained and refused from doing so.

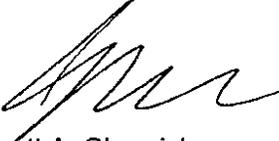
5. The Trustee may recover and preserve for the benefit of the estate the property transferred or the value of such property from Defendant pursuant to 11 U.S.C. § 542.

6. If called as a witness in this matter, I am competent to testify as to the matters stated herein.

7. Upon information known to me, the Defendant is not an infant, is not an incompetent person, and is not engaged in the military service.

FURTHER AFFIANT SAYETH NAUGHT

Dated: December 16, 2010



/s/ Scott A. Chernich
Scott A. Chernich

Subscribed and sworn to before me, a notary public, on the 16th day of December, 2010.



/s/ Jeanne M. Phillips
Jeanne M. Phillips, Notary Public
Ingham County, Michigan
My commission expires: 07/10/2014