

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

In re:

William L. Corl,

Debtor.

Bankruptcy Case No. 07-06817
Honorable Scott W. Dales
Chapter 7

_____/

Kelly M. Hagan, Trustee,

Plaintiff,

Adversary Proceeding
No. 08-80120

v.

Nancy Okony,

Defendant.

_____/

REPORT AND RECOMMENDATION
REGARDING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

BACKGROUND

This Report and Recommendation is based upon the Trustee's Application for Entry of Default Judgment Against Defendant, Nancy Okony (the "Motion") and a hearing on the Motion that took place in Lansing, Michigan, on June 4, 2008. In making this Report and Recommendation, I have reviewed the Complaint (annexed hereto as Exhibit A) filed by Kelly M. Hagan ("Trustee") against Nancy Okony ("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 March 20, 2008, the Trustee filed a Complaint styled as one for turnover of property, alleging that the Defendant owed the Debtor, William L. Corl, \$15,000.00 on account of a prepetition loan. See Complaint ¶10 (annexed hereto as Exhibit A). On April 29, 2008, 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). At a hearing on June 4, 2008, after posing a few questions to the Trustee's attorney, I determined that the Complaint, although styled as one for turnover under 11 U.S.C. § 542, actually sought 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 . . . ”).

Although the Sixth Circuit recognizes that a party may impliedly consent to the bankruptcy court’s exercise of jurisdiction under 28 U.S.C. § 157(c)(2), the Defendant in the adversary proceeding before me has taken no action in the bankruptcy court from which I might imply her consent. Cf. In re Southern Indus. Banking Corp., 809 F.2d 329, 331 (6th Cir. 1987).¹ Under the circumstances, I am concerned that if I were to enter judgment on the Trustee’s Complaint, the judgment could be vulnerable to collateral attack as a “void judgment” under Fed. R. Civ. P. 60(b)(4) when the Trustee attempts to enforce it. A healthy respect for the limits on my authority, and my desire to ensure that any judgment on the Complaint may be enforced without fear of collateral attack, lead me to refrain from granting the Motion, and instead recommending that the United States District Court grant the Motion.

I find that the Complaint 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 bankruptcy estate, as successor to the Debtor’s rights against the Defendant, has a valid claim against the Defendant in the amount of \$15,000.00, 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

¹ The Sixth Circuit observed that “[e]ven if express consent has not been proven, we agree with recent cases in the bankruptcy courts that have supported the notion that the absence of a timely objection to the bankruptcy court’s jurisdiction constitutes implied consent to the resolution of the controversy.” Southern Indus. Banking Corp., 809 F.2d at 331. That case is distinguishable from this one because the appellant’s counsel in Southern Indus. Banking Corp. previously consented to an order of the bankruptcy court and did not contest jurisdiction until the trial court issued an unfavorable ruling. As noted above, Ms. Okony has taken no action in this matter.

counsel has sworn that the Defendant is not a minor, nor is she incompetent, as contemplated under Fed. R. Civ. P. 55. See Affidavit In Support of Request for Default Judgment (annexed hereto as Exhibit C). Similarly, it appears from Exhibit C 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 \$15,000.00.

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 Kelly M. Hagan, Chapter 7 Trustee; Kevin M. Smith, Esq., attorney for Chapter 7 Trustee; and Nancy Okony, defendant, each at their respective addresses of record, or by ECF transmission where applicable.

Dated this 18th day of June, 2008

Honorable Scott W. Dales
United States Bankruptcy Judge

Service made: June 18, 2008 (kw)