

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

IN RE:	§	
	§	
ROBERT EDWIN JACOBSEN,	§	Case No. 07-41092
	§	(Chapter 7)
Debtor.	§	
_____	§	
	§	
CHRISTOPHER MOSER, CHAPTER 7	§	
TRUSTEE,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Adv. No. 08-4128
	§	
COAST CAPITAL, LTD.,	§	
	§	
Defendant.	§	

MEMORANDUM OPINION AND ORDER

This adversary proceeding came on for trial on December 5, 2008. Gabrielle Hamm appeared for Plaintiff Christopher Moser. Defendant Coast Capital, Ltd. did not make an appearance. Accordingly, the Plaintiff requested a default judgment against the Defendant. The Court, having considered the Plaintiff’s request and the evidence introduced by the Plaintiff, makes the following findings and conclusions.¹

I. Relevant Procedural History

1. Robert Edwin Jacobsen (the “Debtor”) filed a petition for relief under Chapter 13 of Title 11 of the United States Code (the “Bankruptcy Code”) on May 25, 2007 (the “Petition Date”). The case was converted to a case under Chapter 7 pursuant to

¹ To the extent that any finding of fact is construed to be a conclusion of law, it is hereby adopted as such. Likewise, to the extent any conclusion of law is construed to be a finding of fact, it is hereby adopted as such.

a Memorandum Opinion and Order entered on December 5, 2007. The Plaintiff was thereafter appointed as the Chapter 7 trustee.

2. The Plaintiff initiated this adversary proceeding against Robert Edwin Jacobsen and his wife, Alise Malikyar, on July 27, 2007.

3. The Plaintiff filed a First Amended Complaint on March 31, 2008. The First Amended Complaint added Coast Capital Ltd. as a defendant, among other changes. The First Amended Complaint asserted the following claims against the Defendant: (1) Avoidance of Lien of Coast Capital pursuant to §§ 548(a) or 544(b); Avoidance of Lien pursuant to §547(b); (3) Accounting from Coast Capital; (4) Avoidance and Recovery of All Fraudulent, Preferential and Unauthorized Post-Petition Transfers to Coast Capital; (5) Violation of Automatic Stay by Coast Capital; and (6) Permanent Injunction.

4. The Plaintiff filed a Second Amended Complaint on August 15, 2008. The Second Amended Complaint did not alter the claims against the Defendant. The Plaintiff's claims against the Defendant were severed and assigned a separate adversary proceeding number pursuant to an Order entered on August 19, 2008.

II. Relevant Facts

5. The Defendant purports to be a limited liability company organized under the laws of Belize. Prior to the Petition Date, on or about August 3, 2006, the Defendant filed in the deed records of Contra Costa County, California, a Deed of Trust (the "Deed of Trust"). The Deed of Trust asserts a lien on realty located at 2324 Tice Valley Boulevard in Walnut Creek, California (the "Tice Valley Property"). The Deed of Trust allegedly secured a Note executed and delivered by the Debtor's wife, Alise Malikyar, on August 2, 2007.

6. On December 14, 2007, subsequent to the Petition Date and subsequent to the conversion of this case to Chapter 7, the Defendant filed a Notice of Default and Election to Sell Under Deed of Trust (the “Notice of Default”) in the deed records of Contra Costa County, California. The Plaintiff sent a letter to the Defendant regarding the Notice of Default. The letter was addressed to Carlos A. Olmo, as vice president of the Defendant, at 2A South Park Street, Belize City, Belize, Central America.

7. The Defendant sent account statements to Alise Malikyar dated January 31, 2008, February 29, 2008, March 31, 2008, April 30, 2008, and May 31, 2008. The account statements are printed on the Defendant’s letterhead. Each of the account statements provides the following address for the Defendant: Coast Capital Ltd., 2A South Park Street, P.O. Box 1131, Belize City, Belize, Central America.

8. On March 27, 2008, the Defendant filed a Substitution of Trustee in the deed records of Contra Costa County, California. The Defendant provided the following address in the Substitution of Trustee: Coast Capital Ltd., 2A Park Street, Belize City, Belize, Central America. The Substitution of Trustee was purportedly executed by Gregorio Alvizuri Ramirez as Beneficiary and Successor Trustee.

9. On May 23, 2008, the Defendant filed a Notice of Trustee’s Sale in the deed records of Contra Costa County, California. The document was purportedly signed by Gregorio Alvizuri Ramirez as the trustee or party conducting the sale. The Defendant listed the following address on the Notice of Trustee’s Sale: “Coast Capital Ltd. 1/c Michael Mitchel” [sic], 18111 N. Preston Road, Suite 810, Dallas, TX 75252-5481.

10. On April 2, 2008, Michael Mitchell forwarded a letter from Coast Capital to the Plaintiff. Mr. Mitchell, who was previously retained by the Defendant in

connection with the main bankruptcy case, stated in his correspondence that he had not been retained by the Defendant with respect to this adversary proceeding but was forwarding the letter as a courtesy. In its letter, which is dated April 1, 2008, the Defendant states “[w]e also heard about your lawsuit against us.” The letter is printed on the Defendant’s letterhead, signed by Gregoria Alvizuri Ramizez as president of the Defendant, and contains the following address for the Defendant: Coast Capital Ltd., 2A South Park Street, P.O. Box 1131, Belize City, Belize, Central America.

11. Belize has not formally adopted or ratified the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Criminal Matters (the “Hague Service Convention”).² A list of the current members of the Hague Service Convention is published by the Hague Conference on Private International law and is available at http://www.hcch.net/index_en.php?act=conventions.status&cid=17 (last visited January 22, 2009).

12. The Plaintiff has attempted to serve Coast Capital with the First Amended Complaint and with its Second Amended Complaint as follows:

- On April 2, 2008, the Plaintiff sent a Summons and the First Amended Complaint to Coast Capital via registered mail and regular, first class mail a copy at the following address: Coast Capital Ltd., Attn: Carlos A. Olmo, Vice President, 2A South Park Street, Belize City, Belize, Central America.
- On June 23, 2008, the Plaintiff attempted to serve Coast Capital by delivering a Summons and the First Amended Complaint to Ruben Abalos, Contra Costa County Court, 725 Court St., Martinez, CA.

² The Court notes, however, that according to materials published by the U.S. Department of State, “Government of Belize authorities have advised the U.S. Embassy that the convention does apply and that requests for service should be sent to the following central authority: The General Registry, Supreme Court Building, P.O. Box 87, Belize City, Belize.” See http://travel.state.gov/law/info/judicial/judicial_686.html (last visited January 12, 2009).

- On August 15, 2008, the Plaintiff mailed a Summons and the Second Amended Complaint to the Defendant at the following address: Coast Capital Ltd., 2A South Park Street, P.O. Box 1131, Belize City, Belize, Central America.

III. Legal Discussion

A. Introduction

1. The Plaintiff has requested that the Court enter a default judgment in his favor. Default judgments based on a failure to respond are governed by Federal Rule of Civil Procedure 55, as adopted and applied to this adversary proceeding by Federal Rule of Bankruptcy Procedure 7055.

2. Default is a two-step process. Prior to obtaining a default judgment under Rule 55(b), there must be an entry of default as provided in Rule 55(a). *See* Wright, Miller & Kane, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3D §2682 (collecting authority). Before a default can be entered, the Court must have jurisdiction over the party against whom the judgment is sought, which means that the party must have been effectively served with process. *Id.* (collecting authority).

B. Jurisdiction Over *In Rem* Claims

3. The Second Amended Complaint sets forth both *in rem* claims regarding the Tice Valley Property as well as *in personam* claims against the Defendant.

4. With respect to the Plaintiff's *in rem* claims, the administration of the bankruptcy estate is a core proceeding over which this Court has exclusive jurisdiction pursuant to 28 U.S.C. §§1334(e) and 157(a) and the United States District Court for the Eastern District of Texas' Order of Reference of Bankruptcy Cases and Proceedings *Nunc Pro Tunc*. The Court's jurisdiction permits it to "determin[e] all claims that anyone, whether named in the action or not, has to the property or thing in question. The

proceeding is ‘one against the world.’” *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 448 (2004) (citations omitted).

C. Jurisdiction Over *In Personam* Claims

5. With respect to the Plaintiff’s *in personam* claims against the Defendant, the Court turns to Federal Rule 4(f) and (h), as adopted and applied to adversary proceedings by Bankruptcy Rule 7004(a). Federal Rule 4(h)(2) provides that service on a foreign corporation is made in the same way as service on an individual in a foreign country. Federal Rule 4(f) provides for several alternative methods of service on an individual in a foreign country, which the Court will address in turn.

6. First, Federal Rule 4(f)(1) provides for service by any internationally agreed means, such as those authorized by the Hague Service Convention.³ Because Belize is not a member or a participating state, service through the Hague Service Convention is not necessary in this case for the court to acquire jurisdiction over the Defendant. The Court concludes that Federal Rule 4(f)(1) does not apply to this case. *See Mayoral-Amy v. BHI Corp.*, 180 F.R.D. 456 (S.D. Fla. 1998) (discussing service on a corporation incorporated under the laws of Belize).

7. With respect to countries that have not adopted the Hague Service Convention, Federal Rule 4(f)(2) provides that service of a complaint may be made in a manner consistent with that country’s law. In this case, however, the Court is unable to

³ The Hague Service Convention regularizes service of process in international civil suits. The primary means by which service is accomplished is through a receiving country’s “Central Authority.” The Hague Service Convention affirmatively requires each member country to designate a Central Authority to receive documents from another member country. *See* Hague Service Convention, art. 2. The receiving country can impose certain requirements with respect to those documents. *See id.*, art. 5. If the documents comply with applicable requirements, the Hague Service Convention affirmatively requires the Central Authority to effect service in its country. *See id.*, arts. 4 & 5.

determine whether the Plaintiff's attempts to serve the Defendant are consistent with the laws of Belize. Belize generally demands that a complaint be served personally on each defendant. *See* Belize Supreme Court (Civil Procedure) Rules, 2005, at §5.1(1) (available at http://www.belize law.org/document/supreme_court_rules2005.pdf) (last visited January 22, 2009). A complaint is served personally on an individual by handing it to, or leaving it with, the person to be served. *Id.* at §5.3. Service on a limited company or a limited liability company may be accomplished by faxing or mailing the complaint to the registered office of the company, by leaving the claim form at the registered office of the company, or by serving the claim form personally on any director, manager or officer of the company or the registered agent of the company. *See id.* at §5.7.

8. The Belize Limited Liability Partnership Act provides for the registration of limited liability companies with the International Business Companies Registry. *See* Belize Limited Liability Partnership Act Chapter 258, Part IV (rev. ed. 2000) (available at www.belize law.org) (last visited January 22, 2009). The registration form includes information regarding a company's officers and registered office. Unfortunately, the registry appears to be proprietary or, at least, does not allow on-line access. *See* IBC Belize, available at <http://www.ibcbelize.com/services.php> (last visited January 22, 2009). The Court is, therefore, unable to determine the identity of the Defendant's managers or officers, where the registered office of the Defendant is located or, consequently, whether the Defendant has been served with a copy of the Second Amended Complaint in a manner consistent with the laws of Belize.

9. Finally, the Court turns to Federal Rule 4(f)(3), which provides that service may be made "by other means not prohibited by international agreement." In

Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 707 (1988), the Supreme Court held that in cases in which the Hague Service Convention does not apply, service of notice need only meet the requirements of state law and the Due Process Clause to be effective. Due process demands “notice reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections.” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (citing *Milliken v. Meyer*, 311 U.S. 457 (1940)). The Supreme Court continued:

The notice must be of such nature as reasonably to convey the required information ... and it must afford a reasonable time for those interested to make their appearance ... But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met the constitutional requirements are satisfied.

Mullane, 339 U.S. at 314-315. Under U.S. law, it is well settled that service of process via certain forms of mail satisfies due process requirements. *Travelers Health Ass'n. v. Virginia*, 339 U.S. 643, 650 (1950) (citing *Int'l Shoe Co. v. State of Washington*, 326 U.S. 310, 320-321, (1945)).

10. Here, the Plaintiff was unable to personally serve an officer or manager of the Defendant (whoever those individuals may be). The Plaintiff, however, mailed copies of its complaint against the Defendant via regular as well as registered mail to the address used by the Defendant in its most recent filings in Contra Costa County, California. Service on the address provided by the Defendant in the real estate records is particularly appropriate in light of the fact that this adversary proceeding relates to the Defendant’s rights in the Tice Valley Property and that the *in personam* causes of action against the Defendant arise from or are related to the purported loan underlying the Deed

of Trust. Notably, the Defendant used the same address in its billing statements and in the letter forwarded to the Plaintiff in April 2, 2008. The Court also notes that the Defendant stated in its letter dated April 2, 2008, that it was aware of the Plaintiff's claims in this adversary proceeding. Indeed, at the trial on December 5, 2008, an entity claiming to have acquired the Defendant's interest in the Tice Valley Property appeared and attempted to join the proceeding.⁴

IV. Conclusion

Under the circumstances of this case, the Court finds and concludes that the Plaintiff has satisfied Federal Rule 4(f) and (h)(2) and *Mullane*. The manner of service upon the Defendant was reasonably calculated to give notice of this adversary proceeding to the Defendant. Accordingly, the Court concludes that the Plaintiff is entitled to entry of a default against the Defendant under Federal Rule 55(a). The Court will conduct a separate evidentiary hearing on the Plaintiff's request for entry of a judgment pursuant to Rule 55(b).

IT IS THEREFORE ORDERED that default is hereby entered against the Defendant, Coast Capital, Ltd., pursuant to Federal Rule of Bankruptcy Procedure 7055(a).

IT IS FURTHER ORDERED that a hearing will be held before this Court on March 3, 2009, at 2:30 p.m., at which time the Plaintiff, Christopher J. Moser, shall appear and present affidavits or other evidence which meet the requirements for a default

⁴ South Shore Capital, Inc. ("South Shore") appeared at the trial on December 5, 2008, and claimed to be the successor in interest to the Defendant. Counsel for South Shore stated that he had been retained by South Shore several months prior to the trial date and that he was aware of the pending adversary proceeding. Nonetheless, South Shore waited until the eve of trial to file a Motion for Joinder of Persons Needed for Just Determination. At trial, South Shore was unprepared and unable to establish the authenticity of the documents attached to its motion. The Court, therefore, orally denied South Shore's motion and proceeded with the trial of the Plaintiff's adversary complaint.

judgment set forth in Federal Rule of Civil Procedure 55(b)(2), as adopted and applied to this proceeding by Federal Rule of Bankruptcy Procedure 55.

Signed on 1/23/2009

Brenda T. Rhoades SR

HONORABLE BRENDA T. RHOADES,
UNITED STATES BANKRUPTCY JUDGE