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JAN 04 2017

CLERK U.S. BANKRUPTCY COURT
Central District of California
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NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION**

In re:

DAE YUB HYUN and UN YONG
HYUN,

Debtors.

Case No. 2:15-bk-21338-RK

Chapter 7

Adv. No. 2:15-ap-01553-RK

FINANCIAL SERVICES VEHICLE
TRUST,

Plaintiff.

vs.

DAE YUB HYUN,

Defendant.

**ORDER DENYING PLAINTIFF'S
MOTION FOR DEFAULT JUDGMENT**

Pending before the court in the above-captioned adversary proceeding is the motion of Plaintiff Financial Services Vehicle Trust ("Plaintiff") for default judgment on its claims under 11 U.S.C. §§ 523(a)(2)(A) and (a)(2)(B) against Defendant Dae Yub Hyun ("Defendant"). Electronic Case Filing Number ("ECF") 24. Defendant, whose default has been entered by the court, ECF 20, did not file any opposition or response to the motion for default judgment.

1 On October 19, 2015, Plaintiff commenced this adversary proceeding by filing a
2 complaint to determine dischargeability of debt pursuant to 11 U.S.C. §§ 523(a)(2)(A) and
3 (a)(2)(B), and 523(a)(6). ECF 1. On November 16, 2015, Defendant filed an answer to
4 Plaintiff's complaint. ECF 8. On August 1, 2016, the court entered its Order Striking
5 Defendant's Answer and Entering Default Against Defendant, ECF 20, which struck
6 Defendant's answer and entered default against Defendant because Defendant failed to
7 appear at the June 14, 2016 pretrial conference, failed to appear at the July 26, 2016
8 hearing on an order to show cause, ECF 16, and failed to file the required declaration as
9 required by the order to show cause. On December 13, 2016, Plaintiff filed its motion for
10 default judgment and did not notice the motion for hearing, nor provide any notice to
11 Defendant regarding whether Defendant had an opportunity to request a hearing or an
12 opportunity to respond to the motion for default judgment. ECF 24.

13 Having considered the motion for default judgment and the record otherwise
14 before the court, the court denies the motion for the following reasons.

15 Under Federal Rule of Civil Procedure 55(b)(2), applicable to this adversary
16 proceeding by Federal Rule of Bankruptcy Procedure 7055, "If the party against whom a
17 default judgment is sought has appeared personally or by a representative, that party or
18 its representative must be served written notice of the application at least 7 days before
19 the hearing." "An appearance ordinarily is an overt act by which the party comes into
20 court and submits to the jurisdiction of the court. This is an affirmative act involving
21 knowledge of the suit and an intention to appear." *Benny v. Pipes*, 799 F.2d 489, 492
22 (9th Cir. 1986), *quoting*, 28 Fed.Proc. (L.Ed.) § 65.137 at 526 (1984); *see also*, 1
23 Wagstaffe, *California Practice Guide: Federal Civil Procedure Before Trial*, ¶ 6:89 at 6-20
24 (2016) ("A Rule 55(b)(2) notice is required only where the defendant has made an
25 'appearance' in the action. It clearly is required where defendant has filed an answer
26 . . ."). "Failure to give such notice where required is a 'serious procedural error' violating
27 due process: 'Absent special circumstances, the failure to give necessary notice will
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1 require that the default judgment be set aside where attacked on direct appeal or by a
2 motion to vacate the judgment.” *Id.*, citing and quoting, *In re Roxford Foods, Inc.*, 12
3 F.3d 875, 881 (9th Cir. 1993). Further, Local Bankruptcy Rule 7055-1(b)(1)(E) also
4 requires that notice of a motion for default judgment has been served on the defaulting
5 party if required by Federal Rule of Civil Procedure 55(b)(2).

6 Here, the court determines that Defendant’s answer filed on November 16, 2015,
7 notwithstanding that it was later stricken by the court, is an affirmative act involving
8 knowledge of the suit and an intention to appear, and constitutes an appearance for
9 purposes of Federal Rule of Civil Procedure 55(b)(2). Accordingly, Federal Rule of Civil
10 Procedure 55(b)(2) expressly requires that Plaintiff must serve written notice of the
11 motion for default judgment upon Defendant and implicitly requires that the motion for
12 default judgment be noticed for hearing, neither of which has occurred. *See also*, 1
13 Wagstaffe, *California Practice Guide: Federal Civil Procedure Before Trial*, ¶ 6:84 at 6-19.
14 Therefore, pursuant to Federal Rule of Civil Procedure 55(b)(2) and Local Bankruptcy
15 Rule 7055-1(b)(1)(E), the court must deny Plaintiff’s motion for default judgment.

16 Based on the foregoing, IT IS HEREBY ORDERED that Plaintiff’s motion for
17 default judgment is denied without prejudice.

18 IT IS SO ORDERED.

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23 Date: January 4, 2017



24 Robert Kwan
25 United States Bankruptcy Judge
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