SDNY Bankruptcy Court Enters Final Default Judgments Against Properly Served Foreign Defendants

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Recently, in the *Advance Watch* bankruptcy, the Bankruptcy Court for the Southern District of New York ruled that a bankruptcy judge is authorized to enter a final default judgment in an adversary proceeding against a foreign defendant who failed to respond to a validly-served summons and complaint, in spite of being an Article I judge.[1] Notably, the court found that the recent Supreme Court decision, *Wellness International Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015), a further iteration of the *Stern v. Marshall*[2] line of cases, made clear that Article I judges can enter final orders with respect to claims that they would otherwise not have constitutional authority to issue final rulings on based on waiver by or consent of the parties. The court then found that failing to respond to a served summons and complaint constituted such a waiver.

Background

In *Advance Watch*, the Plaintiff, the trustee for a creditor trust organized under the Debtor's confirmed chapter 11 plan, initiated adversary proceedings against three foreign defendants (the "Defendants"), all located in Hong Kong, to avoid and recover allegedly preferential transfers between the Debtor and the Defendants.[3] In each of the adversary proceedings, the Plaintiff: (1) filed a complaint in the bankruptcy court; (2) served the summons and complaint on the Defendants by having the bailiff's assistant of the High Court of Hong Kong to personally serve each Defendant at its Hong Kong address; (3) filed a proof of service with the bankruptcy court; (4) requested that the clerk issue a certificate of default in the bankruptcy court; (5) served the certificate of default on the Defendants by U.S. mail; (6) moved for entry of default judgment and filed a notice of presentment of order for default judgment in the bankruptcy court; and (7) served the motion for entry of a default judgment and notice of presentment on each Defendant in Hong Kong via U.S. Mail.[4] Throughout this entire process—which began on September 28, 2017 and concluded on April 30, 2018—the Defendants failed to appear and made no other responsive filings.[5]

[1] *Kravitz v. Deacons* (*In re Advance Watch Co., Ltd.)*, No. 15-12690, 2018 WL 3203386 (Bankr. S.D.N.Y. June 29, 2018).

[2] 564 U.S. 462 (2011).

[3] *In re Advance Watch Co., Ltd.*, at *1.

[4] *Id*. at *1-2.

[5] *Id*. at *2.

Issue Presented and Applicable Law

The question before the court was whether it had the authority to enter a final default judgment against each of the Defendants where each was properly served, but failed to respond.[6] In answering this question, the court looked to Rule 55 of the Federal Rules of Civil Procedure, which governs default judgments and is incorporated in the Bankruptcy Rules through Rule 7055, and the bankruptcy court's constitutional authority to enter final judgments.[7] Rule 55(a) provides that the clerk "must" enter a default judgment, "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and the failure is shown by affidavit or otherwise."[8] Rule 55(b) further provides that if a plaintiff's claim is "for a sum certain or a sum that can be made certain by computation, the Clerk must enter judgment against the defaulting party in the amount of the claim."[9]

As to the bankruptcy court's constitutional authority, the court first noted that *Stern v. Marshall*, a seminal case regarding the bankruptcy court's constitutional authority to issue final judgments, left open an important issue: "whether an Article I bankruptcy judge may enter a final order or judgment with respect to non-core and so-called *Stern* claims (*i.e.,* statutorily core, but requiring an Article III judge to enter final orders or judgment) based on waiver by or consent of the parties."[10] The court then explained its view that the Supreme Court's recent decision in *Wellness Int'l Network, Ltd. v. Sharif* resolved this issue by holding that "allowing bankruptcy litigants to waive the right to Article III adjudication of *Stern* claims does not usurp the constitutional prerogatives of Article III courts."[11] A party can, thus, consent to final adjudication of such claims in the bankruptcy court and, importantly, "consent need not be express."[12] The court then ruled that bankruptcy courts may, therefore, enter default judgment in an adversary proceeding based on implied consent resulting from a defendant's failure to respond to a summons and complaint.

The court also concluded that its authority for entering such a default was consistent with its own prior precedent in *Oldco M Corp.*, which predated *Wellness*,[13] and which several other

[6] *Id*. at *1.

[7] *Id*. at *2.

[8] *In re Advance Watch Co., Ltd.*, at *2 (citing Fed. R. Civ. P. 55(a)).

[9] *Id*. (citing Fed. R. Civ. P. 55(b)).

[10] *Id*. at *3.

[11] *Id*. (citing *Wellness* at 1945-46).

[12] *Id*. (citing *Wellness* at 1948 n.13).

[13] In *Oldco*, the court had concluded that implied consent was a proper basis for upholding the bankruptcy court's authority to enter a final order or judgment in an adversary proceeding against a validly-served defendant. *In re Oldco M Corp.*, 484 B.R. 598 (Bankr. S.D.N.Y. 2012).

bankruptcy courts had applied following the *Wellness* decision.[14]

The Court's Analysis

Applying the standard to the case at hand, the court reasoned that it could grant the motion for default judgment against the Defendants so long as: (1) the appropriate documents were properly served on all Defendants; and (2) the motion for default judgment was for a sum certain or a sum that could be made certain by computation as required under Rule 55.[15]

First, in regards to service, the court, applying Rule 4(f) and (h), which together govern service on foreign corporations, concluded that the Plaintiff properly served the Defendants with the summons and complaint.[16] Walking through one example, the court explained that the Plaintiff, in compliance with the Hague Convention and Hong Kong's High Court rules of service of process, caused the bailiff's assistant to personally serve a summons and complaint on the Defendant at its Hong Kong address, that the Defendant's secretary voluntarily accepted the service, and that the Plaintiff then obtained and filed a certificate confirming the date and place that the summons and complaint were served on the Defendant, and supplemented the certificate with an affidavit from the bailiff's assistant identifying the method and recipient of service.[17] The court found that taken together, these facts satisfied Rule 4's service requirements on a foreign corporation. The court also concluded that service of the remaining documents—including the certificate of default, and motion for default judgment—were properly served via mailings to the Defendant's last known address in compliance with the more flexible requirements of Rule 5, which applies to service of documents other than complaints.[18]

Second, in regards to the sum certain requirement, the court concluded that the Plaintiff's motion for a specified amount ($15,006.99), which included interest and costs, and which was supported by a declaration and bank statements evidencing the transfers and the amount the Plaintiff sought to avoid and recover, satisfied Rule 55's sum certain requirement.[19]

The court stated in summary: "The fact that the three Defendants are located in Hong Kong does not save them: The Plaintiff complied with the applicable provisions of the Hague

[14] *In re Advance Watch Co., Ltd.*, at *3 (citing *Campbell v. Carruthers (In re Campbell)*, 553 B.R. 448, 452-53 (Bankr. M.D. Ala. 2016); *Hopkins v. M & A Ventures, dba Hiwide Transp. Ltd., (In re Hoku Corp.)*, AP No. 15-08043, 2015 WL 8488949, at *1-2 (Bankr. D. Idaho 2015)).

[15] *Id*. at *4.

[16] *Id*. at *5.

[17] *Id*.

[18] *Id*. at *6.

[19] *Id*.

Convention, Hong Kong law and U.S. Bankruptcy law."[20] The court thus granted the motion for entry of default judgments against all Defendants.[21]

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[20] *In re Advance Watch Co., Ltd.*, at *6.

[21] *Id*.