

FEB 14 2005

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF ARIZONA**

U.S. BANKRUPTCY COURT  
FOR THE DISTRICT OF ARIZONA

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4	In re:	)	Chapter 7
5	THOMAS DEVINE and LOREN DEVINE,	)	No. 4-04-bk-03379-JMM
6	<u>Debtors.</u>	)	Adversary No. 4-04-ap-00122
7	CITIBANK, SOUTH DAKOTA, N.A.,	)	<b>MEMORANDUM DECISION RE: VARIOUS MOTIONS</b>
8	Plaintiff,	)	
9	vs.	)	
10	THOMAS DEVINE and LOREN DEVINE,	)	
11	<u>Defendants.</u>	)	

This case is procedurally flawed. The plaintiff, Citibank, South Dakota, N.A., filed a § 523 non-dischargeability complaint and served the same on the Debtors.

Upon not receiving a timely answer, Citibank sought entry of a default from the Clerk. For reasons not relevant here, the Clerk's office never formally entered the actual default.

Thereafter, on December 21, 2004, in the face of the pending default motion, the Debtors filed a motion to dismiss.

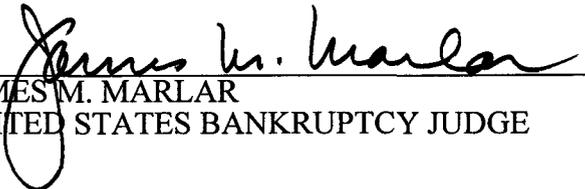
Based on the record before the court, the court finds that the motion to dismiss is timely, as no default had been entered by the Clerk when the motion to dismiss was filed. Had it been entered, the Debtors would have had to have sought to set aside the default (Fed.R.Civ.P. 55(c)), and then succeeded thereon, prior to filing the Rule 12 motion to dismiss. But since a default was never formally entered, the Debtors' motion to dismiss was timely.

Addressing the merits of the motion to dismiss, the court finds that it should be denied, at this time, and that the parties should proceed to flesh out the facts, and sort out which law applies, in the course of an answer, routine discovery, motion practice (if practical), and trial (if necessary).

1                   Accordingly, the court enters the following rulings, which should bring this case back on  
2 track procedurally:

3                   IT IS ORDERED that Citibank's motion for entry of default is DENIED;  
4                   IT IS FURTHER ORDERED that Debtors' motion to dismiss is DENIED;  
5                   IT IS FURTHER ORDERED that Citibank's motion to strike is DENIED; and  
6                   IT IS FURTHER ORDERED that Debtor shall file an answer to Citibank's complaint no  
7 later than ten (10) days after entry of the court's order herein. FED.R.BANKR.P. 7012(a).

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9                   DATED: February 14, 2005.

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12                   JAMES M. MARLAR  
13                   UNITED STATES BANKRUPTCY JUDGE

13 COPIES served as indicated below this 14  
14 day of February, 2005, upon:

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