

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Feb 20, 2019

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

RUSSELL D. ROSCO and BONNIE
R. ROSCO,

NO: 2:15-CV-325-RMP

Plaintiffs,

ORDER GRANTING DEFAULT
JUDGMENT

v.

ADVANTAGE GROUP,

Defendant.

BEFORE THE COURT is *pro se* Plaintiffs' Motion for Default Judgment, ECF No. 296. Plaintiffs Russel D. Rosco and Bonnie R. Rosco move for default judgment against Defendant Advantage Group, LLC. When first considering this motion, the Court ordered Plaintiffs to produce evidence that they properly served Advantage Group. ECF No. 297. Thereafter, Plaintiffs filed proof of service. ECF No. 298. The Court has considered the briefing and the record, and is fully informed.

1 **BACKGROUND**

2 Plaintiffs filed their complaint in this case on November 25, 2015. ECF No.

3 1. In their complaint, Plaintiffs alleged that Advantage Group violated the Fair
4 Credit Reporting Act (“FCRA”) by providing false or misleading credit reports to
5 third parties seeking Plaintiffs’ credit information. *Id.* at 9–10. Having never
6 received a response from Advantage Group, Plaintiffs moved for an entry of
7 default against Advantage Group on January 16, 2016, and the District Court Clerk
8 entered the default that same day. ECF No. 94.

9 Plaintiffs moved for default judgment against Advantage Group on
10 December 12, 2018. ECF No. 296. They alleged that Advantage Group violated
11 the FCRA on nine separate occasions by unlawfully reporting Plaintiffs’ credit
12 accounts to third parties. *Id.* at 2. Based on these nine violations and the
13 provisions of the FCRA, Plaintiffs ask for judgment against Advantage Group in
14 the amount of \$9,000 in actual damages and \$9,000 in punitive damages. *Id.*

15 The Court issued an order regarding Plaintiffs’ motion for default judgment
16 on January 31, 2019. ECF No. 297. Having reviewed Plaintiffs’ motion and the
17 record, the Court was not satisfied that Plaintiffs had completed service of process
18 on Advantage Group. *Id.* at 3; *see also Direct Mail Specialists, Inc. v. Eclat*
19 *Computerized Techs., Inc.*, 840 F.2d 685 (9th Cir. 1988) (“A federal court does not
20 have jurisdiction over a defendant unless the defendant has been served
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1 properly.”). The Court ordered Plaintiffs to file proof of proper service of process
2 on Advantage Group within 21 days of the Court’s order. ECF No. 297 at 4.

3 On February 15, 2019, Plaintiffs filed proof of their service of process on
4 Advantage Group. ECF No. 298. Having failed to contact or locate Advantage
5 Group, Plaintiffs mailed the summons and complaint to the New Mexico Secretary
6 of State, in accordance with New Mexico law. *Id.* at 5–6; *see also* N.M. Stat. § 38-
7 1-5.1.

8 **LEGAL STANDARD**

9 A court may exercise its discretion to order default judgment following the
10 entry of default by the Clerk of the Court. Fed. R. Civ. P. 55(b). Once the Clerk of
11 Court enters default, the well-pleaded allegations of the complaint, except those
12 concerning damages, are deemed true. Fed. R. Civ. P. 8(b)(6); *see TeleVideo Sys.,*
13 *Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987). In conjunction with
14 moving for default judgment, Plaintiff must provide evidence of all damages
15 sought in the complaint, and the damages sought must not be different in kind or
16 exceed the amount demanded in the pleadings. Fed. R. Civ. P. 54(c).

17 The Ninth Circuit has prescribed the following factors to guide the district
18 court’s decision regarding the entry of a default judgment: “(1) the possibility of
19 prejudice to the plaintiff, (2) the merits of plaintiff's substantive claim, (3) the
20 sufficiency of the complaint, (4) the sum of money at stake in the action; (5) the
21 possibility of a dispute concerning material facts; (6) whether the default was due

1 to excusable neglect, and (7) the strong policy underlying the Federal Rules of
2 Civil Procedure favoring decisions on the merits.” *Eitel v. McCool*, 782 F.2d
3 1470, 1471–72 (9th Cir. 1986).¹

4 DISCUSSION

5 *Service of Process*

6 Before granting default judgment, a district court should ensure the
7 adequacy of the service of process on the party against whom default judgment is
8 requested. *Calista Enters. Ltd. v. Tenza Trading Ltd.*, No. 3:13-cv-01045-SI, 2014
9 WL 3670856, at *2 (D. Or. July 23, 2014). Service of process may be completed
10 by following state rules for service in the state in which service is to be made. Fed.
11 R. Civ. P. 4(e)(1). In New Mexico, if a designated agent of a state-registered LLC
12 cannot be found, a plaintiff may serve process on the Secretary of State of New
13 Mexico to effectuate service against the LLC. N.M. Stat. § 38-1-5.1.

14 Plaintiffs filed an Acceptance of Service Certificate from New Mexico’s
15 then-Secretary of State, Brad Winter, stating that he received the summons and
16 complaint on behalf of Advantage Group after Advantage Group could not be

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18 ¹ Parties moving for default judgment in this district must state, by declaration or
19 affidavit, whether the party against whom judgment is sought is an infant or
20 otherwise incompetent and attest that the Servicemembers Civil Relief Act
21 (“SCRA”) does not apply. *See* LCivR 55(b)(1). However, given Plaintiffs’ *pro se*
status, and no evidence to support the conclusion that the Advantage Group is
incompetent or that the SCRA applies, the Court deems Plaintiffs’ failure to follow
the Local Rules as harmless.

1 located. ECF No. 298 at 6. He received the service of process on January 13,
2 2016, within the ninety-day limit imposed by Rule 4(m). *Id.*; *see also* Fed. R. Civ.
3 P. 4(m). Therefore, the Court finds that service of process on Advantage Group
4 was proper.

5 ***Default Judgment***

6 Plaintiffs move for default judgment against Advantage Group for nine
7 violations of the FCRA. ECF No. 296.

8 The Court turns to the seven *Eitel* factors. *Eitel*, 782 F.2d at 1471–72. The
9 first factor, the possibility of prejudice to Plaintiffs, favors granting default
10 judgment. Plaintiffs have been unable to locate Advantage Group throughout the
11 course of this litigation, and Advantage Group has not pleaded or otherwise
12 appeared to defend against Plaintiffs’ claims. Plaintiffs appear to lack an
13 alternative to default judgment for recovery against Advantage Group and would
14 be prejudiced if the Court did not grant default judgment.

15 The second and third *Eitel* factors are assessed by analyzing whether the
16 allegations in the complaint are sufficient to state a claim on which Plaintiffs may
17 recover. *See Danning v. Lavine*, 572 F.2d 1386, 1388 (9th Cir. 1978). Plaintiffs
18 claim that Advantage Group violated the FCRA by providing false or misleading
19 information to third parties on credit reports held by Advantage Group. ECF No. 1
20 at 9–10. While Plaintiffs do not allege a violation of a specific subsection of the
21 FCRA, Plaintiffs appear to allege a violation of 15 U.S.C. § 1681e(b), which states

1 that consumer reporting agencies “shall follow reasonable procedures to assure
2 maximum possible accuracy of the information concerning the individual about
3 whom the report relates.” 15 U.S.C. § 1681e(b); *accord Hebbe v. Pliler*, 627 F.3d
4 338, 342 (9th Cir. 2010) (holding that the Court has an obligation to liberally
5 construe *pro se* complaints).

6 “Liability under § 1681e(b) is predicated on the reasonableness of the credit
7 reporting agency’s procedures in obtaining credit information.” *Guimond v. Trans*
8 *Union Credit Info. Co.*, 45 F.3d 1329, 1333 (9th Cir. 1995). A plaintiff establishes
9 a prima facie violation of section 1681e(b) by showing that a credit reporting
10 agency prepared a report containing inaccurate information. *Id.* A credit reporting
11 agency can rebut the prima facie violation by proving that the report was generated
12 using reasonable procedures. *Id.*

13 Taking the allegations in the complaint as true, Advantage Group provided
14 false and misleading reports to third parties by reporting Plaintiffs’ closed credit
15 accounts as open or active, establishing a prima facie violation of section 1681e(b).
16 ECF No. 1 at 9–10. Without Advantage Group available to rebut the prima facie
17 case by showing the reasonable procedures it used to prevent reporting inaccurate
18 statements, Plaintiffs’ FCRA claim is legally sufficient. *Danning*, 572 F.2d at
19 1388. Therefore, the second and third *Eitel* factors favor granting the default
20 judgment.

1 The fourth *Eitel* factor, the sum of money at stake in the action, is neutral
2 due to the relatively low amount of money at stake here. The Court turns to the
3 fifth factor, which is the possibility of a dispute concerning the material facts. As
4 stated above, if Advantage Group had answered Plaintiffs' allegations, they could
5 have refuted the claim that they reported false or misleading information or
6 provided evidence of their reasonable procedures that are meant to prevent
7 inaccurate reporting. This case, and every case before this Court involving
8 Plaintiffs, is ripe with a history of disputed facts on the credit reporting at issue.
9 Therefore, the possibility of a dispute concerning the material facts is high, and this
10 factor weighs against granting default judgment.

11 The sixth *Eitel* factor is whether the entry of default was due to excusable
12 neglect. *Eitel*, 782 F.2d at 1471–72. In *Eitel*, the Ninth Circuit found excusable
13 neglect when a party did not answer a complaint because it thought that it had
14 reached a settlement with the plaintiff. *Id.* at 1472. Plaintiffs attempted to serve
15 Advantage Group but could not contact them at their registered address. Plaintiffs
16 then served Advantage Group by mailing the documents to the New Mexico
17 Secretary of State in accordance with New Mexico law. It has been over three
18 years since Plaintiffs served the New Mexico Secretary of State, and Advantage
19 Group has still not appeared to defend against Plaintiffs' claims. It appears that
20 Advantage Group has had opportunity to defend against the claims in this action,
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1 but has failed to appear. The sixth *Eitel* factor weighs in favor of granting default
2 judgment.

3 The seventh *Eitel* factor is the strong policy favoring decisions on the merits
4 in the Federal Rules of Civil Procedure. *Eitel*, 782 F.2d at 1471–72. “Whenever it
5 is reasonably possible, cases should be decided upon their merits.” *Pena v.*
6 *Seguros La Comercial, S.A.*, 770 F.2d 811, 814 (9th Cir. 1985). But a defendant’s
7 failure to appear “makes a decision on the merits impractical, if not impossible.”
8 *PepsiCo, Inc. v. Cal. Sec. Cans*, 238 F. Supp. 2d 1172, 1177 (C.D. Cal. 2002).
9 Advantage Group’s failure to appear makes an adjudication on the merits
10 impossible. Therefore, the seventh *Eitel* factor weighs in favor of granting the
11 default judgment.

12 Ultimately, five of the seven *Eitel* factors weigh in favor of granting default
13 judgment, one weighs against granting default judgment, and one is neutral. Based
14 on these factors, the Court finds that granting default judgment is appropriate.

15 ***Damages***

16 Plaintiffs ask for \$9,000 in actual damages and \$9,000 in punitive damages.
17 ECF No. 296 at 2. Punitive damages are available for willful violations of the
18 FCRA. 15 U.S.C. § 1681n(a)(2). “To be entitled to punitive damages under 15
19 U.S.C. 1681e(b), a consumer must show that the defendant acted in ‘reckless
20 disregard of [its] statutory duty.’” *Saindon v. Equifax Info. Servs.*, 608 F. Supp. 2d
21 1212, 1216 (N.D. Cal. 2009) (quoting *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47,

1 56 (2007)) (brackets in original). Plaintiffs have made no such showing that
2 Advantage Group acted in reckless disregard of the FCRA. For that reason, the
3 Court will not impose punitive damages on Advantage Group.

4 Accordingly, **IT IS HEREBY ORDERED:**

5 1. Plaintiffs' Motion for Default Judgment, **ECF No. 296**, and
6 supplement to that motion, **ECF No. 298**, are **GRANTED**.

7 2. Judgment shall be entered in favor of Plaintiffs against Advantage
8 Group in the amount of \$9,000, plus interest, as calculated by 28 U.S.C. § 1961.

9 **IT IS SO ORDERED.** The District Court Clerk is directed to enter this
10 Order, provide copies to Plaintiffs, enter judgment as directed, and **close this case**.

11 **DATED** February 20, 2019.

12 *s/ Rosanna Malouf Peterson*
13 ROSANNA MALOUF PETERSON
14 United States District Judge
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