

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 17-5340 FMO (FFMx) **Date** January 5, 2018

Title Marilyn Coulon v. Richard Fairbank

Present: The Honorable Fernando M. Olguin, United States District Judge

Vanessa Figueroa

None Present

Deputy Clerk

Court Reporter / Recorder

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

None Present

None Present

Proceedings: **(In Chambers) Order to Show Cause Re: Service of Summons and Complaint**

Plaintiff Marilyn Coulon (“plaintiff” or “Coulon”) commenced this action by filing her original Complaint on July 19, 2017, against Richard Fairbank of Capital One (“defendant” or “Fairbank”). (See Dkt. 1, Complaint). On October 3, 2017, the court issued an Order to Show Cause Re: Dismissal Re: Lack of Prosecution, as plaintiff failed to serve the summons and Complaint within 90 days. (See Court’s Order of October 3, 2017, at 1). On October 10, 2017, plaintiff filed her First Amended Complaint (“FAC”), (Dkt. 10), and a Proof of Service, asserting that defendant was served with the summons and FAC by priority mail. (See Dkt. 11). The court dismissed plaintiff’s FAC on November 6, 2017, with leave to amend. (See Dkt. 13, Court’s Order of November 6, 2017, at 4). Plaintiff then filed the Second Amended Complaint (“SAC”) on December 5, 2017. (See Dkt. 16).

“A federal court does not have jurisdiction over a defendant unless the defendant has been served properly under Fed.R.Civ.P.4. . . . [W]ithout substantial compliance with Rule 4, neither actual notice nor simply naming the defendant in the complaint will provide personal jurisdiction.” Direct Mail Specialists, Inc. v. Eclat Computerized Techs., Inc., 840 F.2d 685, 688 (9th Cir. 1988) (internal quotation marks and citations omitted); see S.E.C. v. Ross, 504 F.3d 1130, 1140 (9th Cir. 2007) (“[N]either actual notice nor simply naming the defendant in the complaint will provide personal jurisdiction without substantial compliance with Rule 4.”) (internal quotation marks omitted). However, “[s]o long as a party receives sufficient notice of the complaint, Rule 4 is to be liberally construed to uphold service.” Travelers Cas. & Sur. Co. of Am. v. Brenneke, 551 F.3d 1132, 1135 (9th Cir. 2009) (internal quotation marks omitted).

Rule 4(e)¹ of the Federal Rules of Civil Procedure provides, in relevant part:

Unless federal law provides otherwise, an individual . . . may be served in a judicial district of the United States by:

(1) following state law for serving a summons in an action brought in courts

¹ Unless otherwise indicated, all “Rule” references are to the Federal Rules of Civil Procedure.

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of general jurisdiction in the state where the district court is located or where service is made; or

(2) doing any of the following: [¶] (A) delivering a copy of the summons and of the complaint to the individual personally; [¶] (B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or [¶] (C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

Rule 4(m) provides that "[i]f a defendant is not served within 90 days after the complaint is filed, the court – on motion or on its own after notice to the plaintiff – must dismiss the action without prejudice against that defendant[.]" See Torre v. Brickey, 278 F.3d 917, 919 (9th Cir. 2002) (per curiam) (stating, under prior 120 day deadline, that Rule 4(m) "provides a 120-day period from the filing of the complaint within which to serve summons and complaint upon the defendant."). This deadline applies irrespective of whether plaintiff serves the original complaint or an amended complaint. "The filing of an amended complaint does not vitiate the failure to serve the original complaint within [90] days of filing it under Fed. R. Civ. P. 4(m); a party must make a diligent effort to serve the original complaint, or some amended version thereof, within [90] days of filing the original complaint." U.S. ex rel. Adams v. Wells Fargo Bank Nat. Ass'n, 2013 WL 6506732, *4 (D. Nev. 2013).

Having reviewed the Proof of Service filed by plaintiff, (see Dkt. 11), it appears that plaintiff has not substantially complied with Rule 4. For example, the Proof of Service indicates that plaintiff served the summons and Complaint herself, (see Dkt. 11), but Rule 4(c)(2) requires that service be effected by a person who is "not a party" to the action. Further, the Proof of Service indicates that service was attempted by mail, which is insufficient to comply with the methods of service set forth in Rule 4(e)(2)(A)-(C), i.e., personal service, leaving a copy at defendant's "dwelling or usual place of abode with someone of suitable age and discretion who resides there[.]" or delivering a copy of the summons and Complaint to an "authorized" agent.

In addition, the Proof of Service does not comply with California state law for serving a summons. See Fed. R. Civ. P. Rule 4(e)(1) ("Unless federal law provides otherwise, an individual . . . may be served in a judicial district of the United States by . . . following state law for serving a summons[.]"). The Proof of Service does not demonstrate compliance with California law governing service by mail. For example, the Proof of Service, which simply asserts that the "summons, federal minutes, complaint & copies of emails" were sent by "priority 2 day Air" to defendant, (see Dkt. 11), does not indicate whether defendant acknowledged receipt of the mailing or provide any other evidence of actual receipt. See Cal. Civ. Proc. Code § 415.30(c) (written acknowledgment of summons served by mail sufficient for effective service); see also Taylor-Rush v. Multitech Corp., 217 Cal.App.3d 103, 110-11 (1990), reh'g denied and opinion modified on other grounds (Feb. 8, 1990) ("Other evidence of actual receipt may also validate the otherwise defective service, such as, where a defendant's attorney acknowledges the defendant's receipt of the summons. Here, however, no such evidence has been presented.") (internal citation omitted). Nor does plaintiff's attempted service comply with California law governing service by

