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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,)	Case No. 2:09-CV-02012-JAM-DAD
)	
Plaintiff,)	<u>ORDER DENYING DEFENDANT'S</u>
)	<u>MOTION TO DISMISS</u>
v.)	
)	
ROBBIN M. COKER,)	
)	
Defendant.)	
)	

This matter is before the Court on Defendant Robbin M. Coker's ("Defendant's") Motion to Dismiss (Doc. 12) Plaintiff the United States of America's ("Plaintiff's") First Amended Complaint ("FAC") (Doc. 5). The FAC brings a claim for relief against Defendant under the Federal Debt Collection Procedures Act ("FDCPA"), 28 U.S.C. §§ 3001 et seq. Defendant seeks dismissal of the FAC based on Federal Rule of Civil Procedure 12(b)(2), 12(b)(3), 12(b)(4) and 12(b)(5). Plaintiff opposes the motion.¹ Defendant did not submit a reply brief addressing any of the points raised in Plaintiff's

¹ This motion was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 230(g).

1 opposition brief. For the reasons set forth below, Defendant's
2 motion is denied.

3
4 I. Factual and Procedural Background

5 The FAC alleges that on May 1, 1996, Defendant signed an
6 "Application/Promissory Note" consolidating various college and law
7 school loans through the Student Marketing Loan Association's
8 ("Sallie Mae") Smart Loan Account. The loan amounted to \$60,466.00
9 at 9% interest per annum. Sallie Mae disbursed the loan proceeds
10 on December 17, 1996. In June 1998, Defendant defaulted on the
11 loan.

12 Plaintiff alleges that pursuant to Title IV of the Higher
13 Education Act of 1965, as amended 20 U.S.C. §§ 1071-1087ii, the
14 loans were guaranteed loans for which the United States Department
15 of Education provides reinsurance to the guarantor in the event of
16 a debtor's default. When Defendant defaulted, the loan guarantor
17 paid Sallie Mae its claim for the unpaid debt, and then Plaintiff
18 reimbursed the guarantor under the reinsurance agreement. The
19 guarantor assigned Plaintiff its right and title to the loan on
20 August 18, 2003. Plaintiff alleges that it has demanded payment,
21 but Defendant has failed to repay the defaulted loan. As of August
22 28, 2009, Defendant owes Plaintiff \$138,867.73, and interest
23 continues to accrue on the principal sum at a daily rate of \$17.25.
24 Plaintiff also seeks to recover a surcharge of 10% of the amount
25 due and owing to compensate it for its attorneys' fees and
26 collection costs pursuant to 28 U.S.C. § 3011.

27 Plaintiff filed the original complaint (Doc. 1) in this Court
28 on July 21, 2009. Plaintiff filed the FAC on August 28, 2009.

1 Shortly thereafter, Defendant filed for bankruptcy under Chapter 13
2 of the Bankruptcy Code. Accordingly, this case was stayed pursuant
3 to an automatic stay. (Doc. 6). The stay was lifted on January
4 21, 2010 when Defendant's bankruptcy petition was dismissed. (Doc.
5 7). Plaintiff served Defendant in North Carolina via substituted
6 service on January 28, 2010. Defendant allegedly no longer resides
7 in California, and now moves to dismiss the FAC for lack of
8 personal jurisdiction, improper venue, insufficient process and
9 insufficient service of process.

10 11 II. Opinion

12 A. Legal Standard

13 Federal Rule of Civil Procedure 12(b) sets forth defenses that
14 may be raised in response to claims for relief, including lack of
15 subject matter jurisdiction, lack of personal jurisdiction,
16 improper venue, insufficient process, insufficient service of
17 process, failure to state a claim, and failure to join a party
18 under Rule 19. Fed. R. Civ. Proc. 12(b). A motion asserting any
19 of these defenses must be made before pleading if a responsive
20 pleading is allowed. If a pleading sets out a claim for relief
21 that does not require a responsive pleading, an opposing party may
22 assert at trial any defense to that claim. No defense or objection
23 is waived by joining it with one or more other defenses or
24 objections in a responsive pleading or in a motion. Id. A party
25 waives any defense listed in Rule 12(b)(2)-(5) by (A) omitting it
26 from a motion in the circumstances described in Rule 12(g)(2); or
27 (B) failing to either make it by motion under this rule or include
28 it in a responsive pleading or in an amendment allowed by Rule

1 15(a) (1) as a matter of course. Fed. R. Civ. Proc. 12(h).

2
3 B. Defenses under Federal Rule of Civil Procedure 12(b)

4 1. Federal Rule of Civil Procedure 12(b) (2)

5 Defendant moves the Court to dismiss the FAC for lack of
6 personal jurisdiction. Plaintiff contends that the Court has
7 personal jurisdiction over the FAC. Federal Rule of Civil
8 Procedure 12(b) (2) allows a party to assert lack of personal
9 jurisdiction as a defense. When a defendant challenges personal
10 jurisdiction, the plaintiff bears the burden of establishing the
11 court's personal jurisdiction over the defendant. Cubbage v.
12 Merchant, 744 F.2d 665,667 (9th Cir. 1984). If the district court
13 does not conduct an evidentiary hearing on the jurisdictional
14 challenge, a plaintiff need only make a prima facie showing of
15 personal jurisdiction. Action Embroidery Corp. v. Atlantic
16 Embroidery, Inc., 368 F.3d 1174, 1177 (9th Cir. 2004). In
17 determining if a prima facie showing has been made, the court must
18 take the uncontroverted allegations of the complaint as true, and
19 conflicts between the parties' affidavits must be resolved in
20 plaintiff's favor. Id.

21 Defendant's Motion to Dismiss alleges that Defendant resides
22 in North Carolina, and is therefore not subject to personal
23 jurisdiction in California. However, as Plaintiff points out, the
24 FDCPA authorizes nationwide service of process over defendants
25 indebted to the United States. 28 U.S.C. § 3004. The Ninth
26 Circuit has found that federal statutes that authorize the service
27 of process beyond the boundaries of the forum state likewise expand
28 the personal jurisdiction of the courts within that forum. See Go

1 Video, Inc. v. Akai Elec. Co., Ltd., 885 F.2d 1406, 1414 (9th Cir.
2 1989) (upholding personal jurisdiction over a foreign corporation
3 under Section 12 of the Clayton Act, 15 U.S.C. § 22). The FDCPA's
4 nationwide service of process provision similarly confers national
5 jurisdiction. Reese Bros. V United States Postal Service, 477 F.
6 Supp. 2d 31 (D.D.C. 2007), citing Go-Video, 885 F.2d at 1414.
7 Furthermore, "when a statute authorizes nationwide service of
8 process, national contacts analysis is appropriate. In such cases,
9 due process demands a showing of minimum contacts with the United
10 States with respect to foreign defendants before a court can assert
11 personal jurisdiction. Action Embroidery, 368 F.3d at 1180
12 (holding that a Virginia corporation operating in the United States
13 clearly had such minimum contacts).

14 Thus, Plaintiff need only show that Defendant has sufficient
15 minimum contacts with the United States so as not to violate the
16 'traditional notions of fair play and substantial justice.' Reese,
17 477 F. Supp. 2d at 39, quoting Int'l Shoe Co., v. Washington, 326
18 U.S. 310, 316 (1945). The evidence submitted by Plaintiff shows
19 that Defendant is an attorney licensed by the State Bar of
20 California, maintains an active law practice in Sacramento,
21 California and filed two bankruptcy petitions on behalf of a client
22 in the Eastern District shortly after filing the present motion.
23 Defendant's motion alleged that Defendant is a resident of North
24 Carolina, but did not address Defendant's California law practice.
25 Nor did Defendant submit any evidence challenging or denying these
26 California contacts. Accordingly, Plaintiff has established the
27 Defendant has minimum contacts with the state of California, thus
28 satisfying the national contacts test. Defendant's motion to

1 dismiss for lack of personal jurisdiction is denied, as the Court
2 finds that it has personal jurisdiction over Defendant.

3 2. Federal Rule of Civil Procedure 12(b)(3)

4 Federal Rule of Civil Procedure 12(b)(3) allows a defendant to
5 assert improper venue as a defense. Here, Defendant argues that
6 North Carolina is the proper venue for this suit, because Defendant
7 resides in North Carolina. However, Plaintiff argues that the
8 Eastern District of California is the proper venue, because
9 Defendant applied for the loan and signed the promissory note in
10 this district.

11 Federal law does not limit venue to a defendant's residence.
12 28 U.S.C. § 1391(b). Pursuant to 28 U.S.C. § 1391(b), venue for a
13 civil action is also proper in the "judicial district in which a
14 substantial part of the events or omissions giving rise to the
15 claim occurred, . . ." 28 U.S.C. § 1391(b)(2). As Plaintiff
16 argues, the dispute in this case arises from the loan, which was
17 applied for and signed in the Eastern District. Defendant listed
18 her Sacramento law practice as the presumed source to repay the
19 loans, and has maintained that law practice after defaulting on the
20 loan. Hence, the Court finds that the Eastern District of
21 California is an appropriate venue for this suit, as a substantial
22 part of the events and omissions giving rise to the FDCPA claim
23 occurred in this district.

24 3. Federal Rules of Civil Procedure 12(b)(4) and (5)

25 Federal Rules of Civil Procedure 12(b)(4) and 12(b)(5) allow
26 Defendant to assert insufficient process and insufficient service
27 of process as defenses. Here, Defendant asserts both defenses,
28 arguing that service of process was insufficient because Defendant

1 was not served in the Eastern District of California, but rather in
2 North Carolina. Additionally, service of the FAC and the amended
3 summons was in the form of substitute service on a person described
4 as Defendant's "live in friend." Defendant's motion to dismiss
5 alleges that Defendant has no such friend, and only received the
6 amended summons in the mail. Defendant alleges she never received
7 a copy of the FAC.

8 Plaintiff argues that it properly executed substitute service
9 at Plaintiff's home in North Carolina. Plaintiff submitted an
10 affidavit of its process server, attesting to service of process on
11 an adult female residing at Plaintiff's home, who accepted service
12 on Plaintiff's behalf.

13 Service of process is governed by Federal Rule of Civil
14 Procedure 4. Once service is challenged, the plaintiff bears the
15 burden of establishing that service was valid under Rule 4. Callans
16 v. U.S. Postal Service, 2006 WL 3491141, *2 (N.D. Cal. Dec. 1,
17 2006), citing Brockmeyer v. May, 383 F. 3d 798, 801 (9th Cir.
18 2004). Factual questions concerning a 12(b)(5) motion, regarding
19 the manner in which service was executed, may be determined by the
20 court through affidavits, depositions, or oral testimony.
21 Covington v. U.S., 1991 WL 11010699, *1 (N.D. Cal. Dec. 20, 1991).

22 Rule 4(e)(2)(B) authorizes serving an individual within a
23 judicial district of the United States by leaving a copy of the
24 summons and complaint at the individual's dwelling or usual place
25 of abode with someone of suitable age and discretion who resides
26 there. As previously discussed, the FDCPA authorizes nationwide
27 service of a summons and complaint. Here, Plaintiff submitted an
28 affidavit of service from its process server, attesting to service

1 of process at Defendant's home in North Carolina. Defendant did
2 not submit any affidavit regarding service or lack thereof, and did
3 not submit a reply brief responding to the evidence of service
4 presented by Plaintiff. Plaintiff has shown that service was
5 properly executed at Defendant's North Carolina home, meeting its
6 burden of proof to overcome Defendant's 12(b)(5) challenge. With
7 respect to 12(b)(4), Defendant has not articulated any specific
8 objection to process under 12(b)(4). Accordingly this defense is
9 also denied.

10 4. Federal Rule of Civil Procedure 15

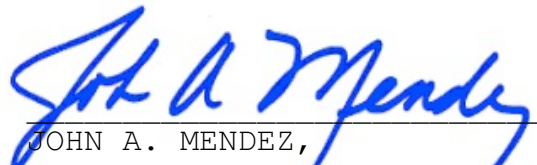
11 Lastly, Defendant argues that the amended complaint was not
12 timely under Federal Rule of Civil Procedure 15 and should
13 therefore be dismissed. Plaintiff is correct that Defendant cites
14 the version of Rule 15 that went into effect on December 1, 2009.
15 Plaintiff's complaint was amended prior to that date, and therefore
16 not subject to the timing requirement imposed after December 1,
17 2009. The FAC was served after December 1, 2009, due to the
18 automatic bankruptcy stay that was in place. Accordingly, the FAC
19 is timely.

20
21 III. Order

22 For the reasons set forth above, Defendant's Motion to Dismiss
23 is hereby DENIED.

24 IT IS SO ORDERED.

25
26 Dated: October 21, 2010

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JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE