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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

RUSSELL L. DEMAN,)	Case No. 10-4109 SC
)	
Plaintiff,)	ORDER GRANTING
)	<u>MOTION TO DISMISS</u>
v.)	
)	
ALLIED ADMINISTRATORS, INC.;)	
NORTHERN CALIFORNIA TILE INDUSTRY)	
TRUST FUNDS; SHARON TURNER; LINDA)	
MARTINEZ; and DOES 1 through 100,)	
inclusive,)	
)	
Defendants.)	
)	
)	

I. INTRODUCTION

Before the Court is a Motion to Dismiss brought by Defendants Sharon Turner ("Turner") and Linda Martinez ("Martinez"). ECF No. 5 ("Mot."). Turner and Martinez claim the Complaint, filed by Plaintiff Russell L. Deman ("Deman"), fails to state a claim for which relief may be granted. Id. at 1. Deman did not file an opposition to the Motion. For the following reasons, the Court GRANTS the Motion to Dismiss WITH LEAVE TO AMEND.

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1 **II. BACKGROUND**

2 Deman initially filed this action in the Superior Court of the
3 State of California for the City and County of San Francisco,
4 alleging breach of contract and breach of the implied covenant of
5 good faith and fair dealing in the administration of Deman's
6 employee benefit plan, B.A.C. Local 19 Defined Benefit Plan ("the
7 Plan"). See ECF No. 1 Ex. A ("Compl."). Named as Defendants in
8 the Complaint are Allied Administrators, Inc. ("Allied"), Northern
9 California Tile Industry Trust Funds ("NCTITF"), Turner, and
10 Martinez (collectively, "Defendants"). Id. The Complaint
11 identifies Allied and NCTITF as both "qualified employees' pension
12 plan administrators" and "the plan administrators and fiduciary for
13 B.A.C. Local 19 Trust Funds and the B.A.C. Local 19 Defined Benefit
14 Plan." Id. ¶ 6. The Complaint identifies Turner and Martinez as
15 "the agents and/or employees of Defendant Allied." Id. ¶ 7.

16 On September 13, 2010, Turner and Martinez removed this action
17 on the basis of federal question subject matter jurisdiction,
18 claiming that Deman's causes of action arise under the Employment
19 Retirement Income Security Act of 1974 ("ERISA"). ECF No. 1
20 ("Notice of Removal"). Allied and NCTITF did not join in the
21 removal. Id. Four days later, Turner and Martinez filed their
22 Motion to Dismiss. See Mot. Turner and Martinez argue that
23 Deman's state-law causes of action against all Defendants are
24 preempted by ERISA, and that because Turner and Martinez are not
25 alleged to be part of the Plan or fiduciaries of the Plan, they
26 cannot be parties to an ERISA action. Id. Deman has not filed an
27 opposition or statement of non-opposition to the motion; per Civil
28 Local Rule 7-3, his response was due October 15, 2010.

1 **III. LEGAL STANDARD**

2 A motion to dismiss under Federal Rule of Civil Procedure
3 12(b)(6) "tests the legal sufficiency of a claim." Navarro v.
4 Block, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal can be based
5 on the lack of a cognizable legal theory or the absence of
6 sufficient facts alleged under a cognizable legal theory.
7 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.
8 1990). Allegations of material fact are taken as true and
9 construed in the light most favorable to the nonmoving party.
10 Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir.
11 1996). "[T]he tenet that a court must accept as true all of the
12 allegations contained in a complaint is inapplicable to legal
13 conclusions. Threadbare recitals of the elements of a cause of
14 action, supported by mere conclusory statements, do not suffice."
15 Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (citing Bell Atl.
16 Corp. v. Twombly, 550 U.S. 544, 555 (2007)). "When there are well-
17 pleaded factual allegations, a court should assume their veracity
18 and then determine whether they plausibly give rise to an
19 entitlement to relief." Iqbal, 129 S. Ct. at 1950. A motion to
20 dismiss should be granted if the plaintiff fails to proffer "enough
21 facts to . . . nudge[] their claims across the line from
22 conceivable to plausible." Twombly, 550 U.S. at 570.

23
24 **IV. DISCUSSION**

25 **A. Preliminary Matters**

26 Before the Court discusses the Motion, it addresses two other
27 disputed issues that, although not properly before the Court, the
28 parties suggest should bear on the Court's decision on the Motion.

1 First, the parties dispute whether this action was properly
2 removed to federal court. The Notice of Removal was filed by
3 Turner and Martinez, and was not joined by Allied or NCTITF. See
4 Notice of Removal. On November 2, 2010, the Court sua sponte
5 ordered Turner and Martinez to file a declaration explaining why
6 Allied and NCTITF had not joined in the removal of this action.
7 ECF No. 8. In response, Reuben B. Jacobson ("Jacobson"), counsel
8 for Turner and Martinez, filed a declaration stating that, to his
9 knowledge, neither Allied nor NCTITF were served with the
10 Complaint. See Jacobson Decl. ¶ 3.¹ David L. Mitchell
11 ("Mitchell"), counsel for Deman, then filed a declaration,
12 attaching proof of service on both Allied and NCTITF. Mitchell
13 Decl. Exs. A, B.² In a responsive supplemental declaration,
14 Jacobson wrote that Allied and NCTITF were presently determining
15 whether the service of process was valid. Supp. Jacobson Decl. ¶¶
16 3-4.³ On November 11, 2010, Allied and NCTITF specially appeared,
17 represented by the same counsel as Turner and Martinez, filing a
18 memorandum "to advise the Court that neither has been served with
19 the summons and complaint in this action." ECF No. 13 ("Allied &
20 NCTITF Supp. Mem."). Allied and NCTITF claim in this memorandum
21 that the individual served on their behalf, David S. Walker
22 ("Walker"), is not the agent of service of process for Allied and
23 NCTITF, and that substituted service on Walker is procedurally
24 invalid because the proof of service lacks a declaration showing
25 that the summons and complaint could not be personally served on

26 ¹ ECF No. 9.

27 ² ECF No. 11.

28 ³ ECF No. 12.

1 the agent of service without reasonable diligence. Id.

2 The Court finds that this debate is moot, because Deman has
3 not filed a motion to remand this action to state court. Section
4 1447(c) of Title 28 of the U.S. Code provides: "A motion to remand
5 the case on the basis of any defect other than lack of subject
6 matter jurisdiction must be made within 30 days after the filing of
7 the notice of removal under section 1446(a)." Because a federal
8 question provided the basis of this Court's jurisdiction, the
9 joinder of Allied and NCTITF is a purely procedural issue that does
10 not affect this Court's subject matter jurisdiction. More than
11 thirty days have passed since the Notice of Removal was filed, and
12 so under § 1447(c), Deman has waived any non-jurisdictional
13 challenge to the removal of this action by failing to seek remand.

14 A second and related issue is whether NCTITF and Allied were
15 properly served with the complaint and summons. NCTITF and Allied
16 claim that service of the complaint on them was procedurally
17 improper. See Sept. 13, 2010 Supp. Mem. at 1. However, NCTITF and
18 Allied have not filed a motion to be dismissed as Defendants under
19 Rule 12(b)(5). Under Rule 12(h)(1)(b), a party waives a Rule
20 12(b)(5) defense if it fails to make it by motion. Fed. R. Civ. P.
21 12(h)(1)(b); see Cowen v. Aurora Loan Servs., No. 10-452, 2010 WL
22 3342196, *7 (D. Ariz. Aug. 25, 2010) (finding defendant waived Rule
23 12(b)(5) challenge to service of the complaint by failing to file a
24 Rule 12 motion when twenty-seven days had passed since removal of
25 the action to federal court). Therefore, the Court finds that
26 Defendants Allied and NCTITF have WAIVED any Rule 12(b)(5)
27 challenge to the service of Deman's complaint and summons. Counsel
28 for NCTITF and Allied must immediately register as ECF users. See

1 Clerk's Notice to Defs.' Att'ys, ECF No. 6.

2 **B. Motion to Dismiss**

3 Turner and Martinez argue that Deman's state-law causes of
4 action against all Defendants are preempted by ERISA, and that
5 because Turner and Martinez are not alleged to be part of the Plan
6 or fiduciaries, they cannot be parties to an ERISA action. Id.

7 The Court agrees with Turner and Martinez. ERISA's preemption
8 clause provides that ERISA "shall supersede any and all State laws
9 insofar as they may now or hereafter relate to any employee benefit
10 plan." 29 U.S.C. § 1144(a). State common law contract and tort
11 claims that relate to an employee benefit plan are therefore
12 preempted. Spain v. Aetna Life Ins. Co., 11 F.3d 129, 131-32 (9th
13 Cir. 1993). Deman brings two causes of action in his Complaint:
14 breach of contract, and breach of the implied covenant of good
15 faith and fair dealing. See Compl. In stating these two causes of
16 action, Deman pleads the following facts: Defendants gave him
17 "false and misleading information" relating to his retirement and
18 pension rights and benefits, id. ¶ 9; Defendants failed to provide
19 benefits under the Plan for which he was eligible, id. ¶ 11; and
20 Defendants breached their fiduciary duties to him as Plan
21 administrators by failing to respond to his requests for
22 information and by "arbitrarily denying without consideration" his
23 requests for benefits, id. ¶ 14.

24 The Court finds Deman's two causes of action -- as well as the
25 facts pleaded in stating them -- relate to the Plan. Therefore,
26 Deman's breach of contract and breach of the implied covenant of
27 good faith and fair dealing claims are DISMISSED as preempted by
28 ERISA. Because this preemption applies to the claims against all

1 Defendants, including Allied and NCTITF, these causes of action are
2 dismissed against ALL DEFENDANTS.

3 Turner and Martinez also argue that any ERISA claim brought
4 against them should fail because they are not alleged to be part of
5 the Plan or Plan fiduciaries, but rather "agents and/or employees
6 of Defendant Allied." Compl. ¶ 7. Turner and Martinez cite an
7 out-of-circuit case, Taylor v. Peoples Natural Gas Co., 49 F.3d 982
8 (3d Cir. 1995), for the proposition that "individual employees,
9 whose activities are limited within a framework of policies,
10 interpretations, rules, practices, and procedures made by other
11 persons, fiduciaries with respect to the plan, cannot be
12 individually liable as fiduciaries under ERISA." Mot. at 6
13 (internal quotation marks omitted).

14 The Court need not rule on whether Taylor applies here,
15 because the Complaint is so vague as to Turner and Martinez's
16 involvement in the action that it fails to allege "enough facts to
17 state a claim to relief that is plausible on its face." Twombly,
18 550 U.S. at 570. Deman merely identifies the two as "agents and/or
19 employees of defendant Allied," without providing their job titles
20 or expanding on what role the two played in the alleged denial of
21 Deman's benefits. Because the Complaint includes insufficient
22 allegations of material fact for the Court to state a plausible
23 claim against Turner and Martinez, the Court GRANTS the Motion to
24 Dismiss Turner and Martinez as Defendants WITH LEAVE TO AMEND.

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V. CONCLUSION

For the foregoing reasons, the Court GRANTS Sharon Turner and Linda Martinez's Motion to Dismiss, and dismisses all claims against Turner, Martinez, Allied Administrators, Inc., and Northern California Tile Industry Trust Funds WITHOUT PREJUDICE. The Court GRANTS Plaintiff Russell L. Deman thirty (30) days' leave to file an amended complaint. Should Deman fail to file an amended complaint within this timeframe, the Court will dismiss his action WITH PREJUDICE, pursuant to Rule 41(b) of the Federal Rules of Civil Procedure.

IT IS SO ORDERED.

Dated: December 17, 2010


UNITED STATES DISTRICT JUDGE