

United States District Court
For the Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ZHIXUN SAMUEL SUN,)	Case No.: 5:10-CV-01055-EJD
)	
Plaintif,)	ORDER DENYING PLAINTIFF’S
)	MOTION FOR DEFAULT
v.)	JUDGMENT
)	
RICKENBACKER COLLECTION dba)	
RICKENBACKER GROUP,)	
)	[Re: Docket No. 61, 62, 64]
Defendant.)	

Presently before the court is pro se Plaintiff Zhixun Samuel Sun’s motion for entry of default judgment for \$27,189.54 in monetary damages and injunctive relief against Defendant Rickenbacker Collection. Plaintiff seeks relief for injuries arising out of Defendant’s alleged violation of the Fair Credit Reporting Act, 15 U.S.C. § 1681s-2. The Court took the Plaintiff’s motion under submission without oral argument pursuant to Civil L.R. 7-1(b). Having considered the moving papers, the briefs, and the evidence presented, the motion is DENIED for the reasons discussed below.

I. Background

On October 20, 2009, Plaintiff filed an action in Santa Clara County Superior Court alleging negligence and an intentional tort on October 20, 2009 in Santa Clara County Superior Court. See Dkt. No. 1, Ex. A. Defendant filed an Answer to this initial complaint, and subsequently removed the action to this court.

The court recites the factual background of this case from the allegations contained in Plaintiff’s First Amended Complaint (“FAC”). Dkt. No. 23. On April 29, 2009, Plaintiff applied

1 for a primary home loan at Wells Fargo Bank. FAC 2:16-17. In the process of applying for this
2 loan, Plaintiff learned that his credit report indicated that he owed a debt of \$8,810. Id. at 2:18-19.
3 According to Plaintiff, Defendant placed this debt on Plaintiff's credit report without verifying the
4 debt, communicating with Plaintiff, or providing the address of the original creditor to Plaintiff. Id.
5 at 2:20-22. Plaintiff disputed the debt, and Defendant responded with a letter purporting to verify
6 the debt and suggesting Plaintiff pay the account immediately. Id. at 2:23-27. Defendant later
7 increased this debt to \$8,861.21, and later again to \$8,992. Id. at 3:2, 3:16.

8 Plaintiff hired attorney Edwin Chau to dispute the debt for him. Id. at 3:6. Mr. Chau sent a
9 dispute letter to Defendant regarding the debt on July 9, 2009. Id. at 3:8-10. Plaintiff paid Mr.
10 Chau \$885.54 in fees. FAC, Ex. 5. On September 15, 2009, Plaintiff hired attorney Vivian Lu to
11 represent him in a civil lawsuit against Defendant. FAC, at 3:12-14. Ms. Lu filed the lawsuit in
12 Santa Clara Superior Court October 20, 2009. Plaintiff incurred \$3282.00 in Ms. Lu's attorney
13 fees. FAC, Ex. 10.

14 On December 3, 2009, Defendant sent Plaintiff a letter notifying him of closure of the
15 collection account against him. FAC, Ex. 7. Several days later, Defendant sent another
16 notification of the account closure, stating that it had initiated a removal of the debt from Plaintiff's
17 credit reporting. FAC, Ex. 8. A month later, Plaintiff's credit report still did not reflect the
18 correction. FAC 4:1-2.

19 Plaintiff continued to pursue this case after receiving these letters from Defendant. On
20 November 15, 2010, Plaintiff filed her FAC, alleging violation of the federal Fair Debt Collection
21 Practices Act ("FDCPA") and violation of the Fair Credit Reporting Act ("FCRA"). Defendant
22 filed a motion to dismiss the FDCPA claim, which Judge Lucy Koh granted on February 18, 2011.
23 Defendant did not address the FCRA claim, and thus that claim has survived.

24 Under Fed. R. Civ. P. 12(a)(4)(A), Defendant was required to file an answer to the
25 remaining FCRA claim by March 4, 2011. Defendant failed to file an answer. Instead, on March
26 3, 2011, Defendant's counsel filed a motion to withdraw as attorney, which stated that Defendant,
27 which is no longer in business, could not pay its defense costs and had breached its legal services
28 agreement by failing to pay the agreed-upon fees. Judge Koh granted this motion on April 8, 2011,

1 and ordered Defendant to retain new counsel within 30 days or risk entry of default judgment. Dkt.
2 No. 40. New counsel for Defendant has still not appeared.

3 The action was reassigned to the undersigned on April 25, 2011. Dkt. No. 44. On May 24,
4 2011, Plaintiff filed for entry of default and a motion for default judgment. Dkt. No. 46. The
5 motions were brought under Fed. R. Civ. P. 55(a) and Fed. R. Civ. P. 55(b)(1), and were denied.
6 Dkt. No. 52. On December 13, 2011, Plaintiff filed a second motion for entry of default, which
7 was also denied. On February 28, 2012, Plaintiff filed a third motion for entry of default (Dkt. No.
8 53), which the Court granted on July 10, 2012 (Dkt. No. 59).

9 Plaintiff now brings two motions for entry of default pursuant to Federal Rule of Civil
10 Procedure 55(a) and one motion for entry of default judgment pursuant to Federal Rule of Civil
11 Procedure 55(b)(2). Dkt. Nos. 61, 62, 64. The two motions brought pursuant to Rule 55(a) are
12 duplicative of the motions already granted by this court, and thus will be DENIED as moot. The
13 motion for default judgment pursuant to Rule 55(b)(2) is brought in accordance with this court's
14 July 10, 2012 order granting entry of default, and will now be considered.

15 II. Legal Standard

16 Pursuant to Federal Rule of Civil Procedure 55(b)(2), following an entry of default, a court
17 may enter default judgment on the merits of the case against a defendant who has failed to plead or
18 otherwise defend an action. "The district court's decision whether to enter a default judgment is a
19 discretionary one." Aldabe v. Aldabe, 616 F.2d 1089, 1092 (9th Cir. 1980). In exercising that
20 discretion, a court should consider the following factors: "(1) the possibility of prejudice to the
21 plaintiff; (2) the merits of plaintiff's substantive claim; (3) the sufficiency of the complaint; (4) the
22 sum of money at stake in the action; (5) the possibility of a dispute concerning material facts; (6)
23 whether the default was due to excusable neglect; and (7) the strong policy underlying the Federal
24 Rules of Civil Procedure favoring decisions on the merits." Eitel v. McCool, 782 F.2d 1470, 1471-
25 72 (9th Cir. 1986). When assessing these seven "Eitel factors," all well-pled allegations in the
26 complaint regarding liability are taken as true, except as to the amount of damages, for which
27 evidentiary support is required. See Fair Hous. of Marin v. Combs, 285 F.3 d 899, 906 (9th Cir.
28 2002); TeleVideo Sys., Inc. v. Heidenthal, 826 F.2d 915, 917-18 (9th Cir. 1987) (per curiam).

1 If the plaintiff is seeking money damages, the plaintiff must “prove-up” any such damages.
2 Amini Innovation Corp. v. KTY Int'l Mktg., 768 F.Supp.2d 1049, 1053–54 (C.D. Cal. 2011). That
3 is, the plaintiff must “provide evidence of its damages, and the damages sought must not be
4 different in kind or amount from those set forth in the complaint.” Id. (citing Philip Morris USA,
5 Inc. v. Castworld Prods., Inc., 219 F.R.D. 494, 498 (C.D.Cal. 2003)); see Schwarzer, Tashima, and
6 Wagstaffe, Federal Civil Procedure Before Trial § 6:80 (2010 ed.). “In order to ‘prove up’
7 damages, a plaintiff is generally required to provide admissible evidence (including witness
8 testimony) supporting damage calculations.” Cannon v. City of Petaluma, No. C 11–0651, 2011
9 WL 3267714, at *2 (N.D. Cal. July 29, 2011) (Hamilton, J.) (citing Schwarzer, et al., § 6:94, et
10 seq.).]

11 **III. Discussion**

12 **a. Jurisdiction**

13 Courts have an affirmative duty to examine their own jurisdiction—both subject matter
14 jurisdiction and personal jurisdiction—when entry of judgment is sought against a party in default.
15 In re Tuli, 172 F.3d 707, 712 (9th Cir. 1999). Here, the court has subject matter jurisdiction
16 pursuant to 28 U.S.C. § 1331 because Plaintiff’s complaint raises a federal question under the Fair
17 Credit Reporting Act, 15 U.S.C. § 1681s-2. Personal jurisdiction arises from service upon
18 Defendant in California. See Dkt. No. 1, Ex. A., Burnham v. Sup. Ct., 495 U.S. 604, 610-11
19 (1990).

20 **b. Adequacy of Service of Process**

21 Because Defendant has appeared in this action, Federal Rule of Civil Procedure 55(b)(2)
22 requires, as a prerequisite to entry of default judgment, that Plaintiff serve Defendant or its
23 representative with written notice of the application at least seven days before the hearing on the
24 default judgment. See Fed. R. Civ. P. 55(b)(2). Here, Plaintiff timely served Defendant the motion
25 for default judgment and all associated pleadings by United States mail to the last known addresses
26 of Defendant. Proof of Service, Dkt. No. 67. Accordingly, the Court is satisfied that service of
27 process was adequate under Rule 55(b)(2).
28

1 **c. Default Judgment**

2 At the outset, the court notes that several of the Eitel factors weigh in favor of granting
3 default judgment. For instance, failure to enter default judgment in favor of Plaintiff would result
4 in prejudice to Plaintiff. Denying judgment against a defendant who does not participate in
5 litigation deprives the plaintiff of a remedy until such time as the defendant chooses to litigate. See,
6 e.g., Craigslist, Inc. v. Naturemarket, Inc., 694 F.Supp.2d 1039, 1061 (N.D.Cal. 2010).
7 Additionally, the parties have not presented any issue of material fact, because the allegations in
8 the complaint are taken as true. Moreover, Plaintiff has provided documentation to verify the
9 factual allegations regarding the underlying dispute. Finally, there is no evidence that Defendant’s
10 failure to participate in the litigation is due to the excusable neglect.

11 Despite these factors weighing in favor of default judgment, Plaintiff’s motion nonetheless
12 must be denied because his FAC fails to state a claim. Judgment by default cannot be entered if the
13 complaint fails to state a claim. See Moore v. United Kingdom, 384. F.3d 1079, 1090 (9th Cir.
14 2004). As Judge Koh previously dismissed Plaintiff’s FDCPA claim, only the FCRA claim
15 remains in this case.

16 Plaintiff alleges that he is entitled to relief under Section 1681s-2 of the FCRA. “The
17 FCRA expressly creates a private right of action for willful or negligent noncompliance with its
18 requirements...However, § 1681s-2 limits this private right of action to claims arising under
19 subsection (b), the duties triggered upon notice of a dispute from a CRA.” Gorman v. Wolpoff &
20 Abramson, LLP, 584 F.3d 1147, 1154 (9th Cir. 2009) (citing § 1681s-2(c)). Section 1681s-2(b)
21 states that, after receiving a notice of dispute from a credit reporting agency (“CRA”), the furnisher
22 of information shall:

- 23 (A) conduct an investigation with respect to the disputed information;
- 24 (B) review all relevant information provided by the [CRA] pursuant to section 1681i(a)(2)
- 25 ...;
- 26 (C) report the results of the investigation to the [CRA];
- 27 (D) if the investigation finds that the information is incomplete or inaccurate, report those
- 28 results to all other [CRAs] to which the person furnished the information ...; and

1 (E) if an item of information disputed by a consumer is found to be inaccurate or
2 incomplete or cannot be verified after any reinvestigation under paragraph (1) ... (i) modify
3 ... (ii) delete[or] (iii) permanently block the reporting of that item of information [to the
4 CRAs].

5 Gorman v. Wolpoff & Abramson, LLP, 584 F.3d 1147, 1154 (9th Cir. 2009) (citing 15
6 U.S.C. § 1681s-2(b)(1)).

7 Thus, to state a claim for a violation of 15 U.S.C. S 1681s-2, Plaintiff must show that a CRA
8 informed Defendant of a dispute. Gorman, 584 F.3d at 1154 (“These duties arise only after the
9 furnisher receives notice of dispute from a CRA; notice of a dispute received directly from the
10 consumer does not trigger furnishers’ duties under subsection (b)).

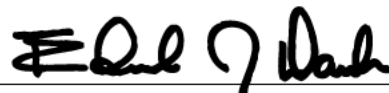
11 Plaintiff has made no such showing. Though the FAC describes in detail Plaintiff’s
12 communications with Defendant regarding the erroneous debt Defendant had placed on his credit
13 report, Plaintiff does not include any allegation that a CRA also notified Defendant of a dispute.
14 Because Plaintiff only alleges that he and his attorneys, but not a CRA, raised the dispute with
15 Defendant, he has failed to state a claim under the FCRA. Plaintiff’s Motion for Default Judgment
16 is therefore DENIED.

17 **IV. Conclusion**

18 For the foregoing reasons, the court DENIES Plaintiff’s Motion for Default Judgment.
19 Plaintiff may file an amended complaint within 30 days of this order. Plaintiff is advised that
20 failure to file an amended complaint within the time provided, or failure to amend the complaint in
21 a manner which remedies the deficiency identified in this order, may subject the complaint to
22 dismissal without further notice.

23 **IT IS SO ORDERED.**

24 Dated: January 2, 2013

25 

26 EDWARD J. DAVILA
27 United States District Judge