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E-Filed 04/04/11

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

SHEILA BLAXILL

Plaintiff,

v.

ARROW FINANCIAL SERVICES, LLC. and
NELSON & KENNARD

Defendants.

Case Number 5:10-CV-04520 JF (PSG)

**ORDER¹ GRANTING MOTION TO
DISMISS WITH LEAVE TO
AMEND**

Re: Docket No. 14

Plaintiff Sheila Blaxill brings this action against Defendants Arrow Financial Services, LLC (“Arrow”) and Nelson & Kennard (“Nelson”) alleging violations of the Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. §§ 1692-1692p, and California’s Rosenthal Fair Debt Collection Practices Act (“RFDCPA”), CAL. CIV. CODE §§ 1788-1788.33. Defendants move to dismiss Blaxill’s First Amended Complaint for failure to state a claim upon which relief may be granted. For the reasons set forth below, the motion will be granted, with leave to amend.

I. BACKGROUND

Blaxill, a resident of San Jose, California, alleges that she is a “consumer” under the

¹ This disposition is not designated for publication in the official reports.

1 FDCPA.² Am. Compl. ¶ 4. Arrow is a collection agency incorporated in Delaware whose
2 principal place of business is in Niles, Illinois. *Id.* ¶ 5. Nelson is a collection agency
3 incorporated in California whose principal place of business is in Sacramento, California. *Id.* ¶
4 6. Blaxill alleges that both Arrow and Nelson are “debt collectors” under the FDCPA. *Id.* ¶¶ 5,
5 6.

6 Blaxill obtained a \$5,000 loan (“the Loan”), which she claims meets the FDCPA’s
7 definition of “debt,” from Direct Merchant Bank. *Id.* ¶¶ 9, 10. She alleges that Direct Merchant
8 Bank transferred the Loan to Arrow for collection, and that Arrow engaged in “communications”
9 as defined by the FDCPA when it attempted to collect the Loan. *Id.* ¶¶ 11, 12. Arrow hired
10 Nelson to assist it in collecting the Loan. *Id.* ¶ 12. Nelson filed a lawsuit against Blaxill in the
11 Santa Clara Superior Court on August 13, 2010. *Id.*; Def.’s Mot. at 2-3. On October 22, 2010,
12 sixteen days after Blaxill filed the instant action, the Superior Court entered a default judgment
13 against her.

14 Blaxill claims that Arrow and Nelson engaged in abusive tactics in attempting to collect
15 the Loan and that she continues to suffer from humiliation, anger, anxiety, emotional distress,
16 and fear as a result of Defendants’ alleged conduct. Am. Compl. ¶¶ 13-15, 17, 18.

17 II. STANDARD OF REVIEW

18
19 Fed. R. Civ. P. Rule 8(a) requires a plaintiff to plead her claim with sufficient specificity
20 to give the defendant fair notice of what the claim is and the grounds upon which it rests. *Bell*
21 *Atl. Corp. v. Twombly*, 550 U.S. 545, 555 (2007). “To survive a motion to dismiss, a complaint
22 must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible
23 on its face.’ A claim has facial plausibility when the plaintiff pleads factual content that allows
24 the court to draw the reasonable inference that the defendant is liable for the misconduct
25 alleged.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550

26
27 ² The facts in this section are taken from the Plaintiff’s operative pleading and documents
28 that are judicially noticeable. The Court assumes these facts to be true and construes them in the
light most favorable to the Plaintiff for purposes of the instant motion. *Jenkins v. McKeithen*,
395 U.S. 411, 421 (1969).

1 U.S. 544, 556, 570 (2007)). A court is not required to accept as true conclusory allegations,
2 unreasonable inferences, or unwarranted deductions of fact. *Manzarek v. St. Paul Fire & Marine*
3 *Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). If a complaint lacks facial plausibility, a court
4 must grant leave to amend unless it is clear that the complaint’s deficiencies cannot be cured by
5 amendment. *Gompper v. VISX, Inc.*, 298 F.3d 893, 898 (9th Cir. 2002).

6 III. DISCUSSION

7 8 **A. Blaxill Fails to State a Claim for Violations of the FDCPA, 15 U.S.C. §§ 1692-1692p** 9 1. 15 U.S.C. §§ 1692b(1) and 1692b(3)

10 Blaxill claims that Arrow violated 15 U.S.C. § 1692b(1) by contacting third parties about
11 the Loan without identifying itself and for purposes other than verifying her location. Am.
12 Compl. ¶ 20. She also claims that Defendants violated 15 U.S.C. § 1692b(3) by contacting third
13 parties repeatedly without being asked to do so. *Id.* ¶ 23.

14 As applicable here, 15 U.S.C. § 1692b(1) requires that a debt collector “identify himself,
15 state that he is confirming or correcting location information concerning the consumer, and, only
16 if expressly requested, identify his employer.” 15 U.S.C. § 1692b(3) prohibits a debt collector
17 from communicating with a third party “more than once” for the purpose of acquiring location
18 information about the consumer “unless requested to do so by such person or unless the debt
19 collector reasonably believes that the earlier response of such person is erroneous or incomplete.”

20 Because the instant complaint lacks any factual particularity, such as the dates and
21 contents of the alleged communications, it fails to state a claim for relief under §§ 1692b(1) and
22 1692b(3). *See Iqbal*, 129 S.Ct. at 1949.

23 2. 15 U.S.C. § 1692b(2)

24 Blaxill claims that Defendants violated 15 U.S.C. § 1692b(2) by informing third parties
25 of the existence and nature of the Loan. Am. Compl. ¶ 22. Specifically, Blaxill alleges that
26 Nelson made substituted service of the state court summons and complaint on her neighbor. *Id.* ¶
27 27. Defendants argue that because they obtained a default judgment against Blaxill in the state
28 court action, any determination by the Court as to whether the state court complaint was served

1 properly would “undercut” the *Rooker-Feldman* doctrine. Def.’s Mot. at 9-10; *see also Rooker v.*
2 *Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460
3 U.S. 462 (1983).

4 However, the *Rooker-Feldman* doctrine applies only when “the losing party in state court
5 filed suit in federal court after the state proceedings ended, complaining of an injury caused by
6 the state-court judgment and seeking review and rejection of that judgment.” *Exxon Mobil Corp.*
7 *v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 291 (2005) (holding as inappropriate the application
8 of the *Rooker-Feldman* doctrine to a case in which plaintiff did not ask the district court to
9 overturn a state court judgment entered against it). “When there is parallel state and federal
10 litigation, *Rooker-Feldman* is not triggered simply by the entry of judgment in state court.” *Id.* at
11 292. “Disposition of the federal action, once the state-court adjudication is complete, would be
12 governed by preclusion law.” *Id.* at 293. “[S]tate law determines whether the defendant prevails
13 under principles of preclusion.” *Id.* (citations omitted). The doctrine does not apply here, as
14 Blaxill is neither complaining of an injury caused by the Superior Court’s entry of a default
15 judgment nor seeking review and rejection of that judgment. Instead, she is complaining of an
16 injury caused by Defendants’ alleged violations of the FDCPA.

17 California’s *res judicata* doctrine precludes parties from “relitigating the same cause of
18 action that has been finally determined by a court of competent jurisdiction.” *Tensor Group v.*
19 *City of Glendale*, 17 Cal. Rptr. 2d 639, 642 (Cal. Ct. App. 1993) (citations omitted). “California
20 law defines a cause of action by focusing on the ‘primary right’ at stake.” *Id.* Here, there is no
21 relation between the injury to Defendants from Blaxill’s failure to pay the Loan and the claimed
22 injury to Blaxill from Defendants’ alleged disclosures to third parties, as they do not implicate
23 the same primary right. Because the instant action does not seek to relitigate the same claims
24 presented to the Superior Court, it is not barred by *res judicata*.

1 California's collateral estoppel doctrine precludes parties from relitigating an issue
2 decided at a previous proceeding if (1) the issue decided in the prior determination is identical to
3 that presented in the second action, (2) there was a final judgment on the merits in the earlier
4 action, and (3) the party against whom estoppel is asserted was a party to the earlier action or in
5 privity with a party to the earlier action. *Riley v. Giguere*, 631 F. Supp. 2d 1295, 1306-07 (E.D.
6 Cal. 2009) (citing *Clemmer v. Hartford Ins. Co.*, 587 P.2d 1098 (Cal. 1978)).

7 The first element of this test is not met here, because the Superior Court did not decide
8 whether service was proper. Because Blaxill never filed an answer to Defendants' complaint, the
9 Superior Court never considered whether service was defective. *See Riley*, 631 F. Supp. 2d at
10 306 (finding that, for collateral estoppel purposes, the state court litigated the issue of whether
11 service was proper because the party against whom default judgment was entered moved to
12 vacate it under the theory that service had been improperly rendered). Further, in California, a
13 default judgment is "not conclusive as to any defense or issue which was not raised and is not
14 necessary to uphold the judgment." *Four Star Electric, Inc. v. F & H Construction*, 10 Cal. Rptr.
15 2d 1, 3 (Cal. Ct. App. 1992) (citations omitted). Because the issue of whether service was
16 defective was neither raised by Blaxill nor necessary to uphold the state court's default judgment,
17 the instant action is not barred by collateral estoppel.

18 15 U.S.C. § 1692b(2) prohibits a debt collector from "stat[ing] that such consumer owes
19 any debt" when communicating with third parties for the purpose of acquiring location
20 information about the consumer. The FDCPA's definition of "debt collector" excludes "any
21 person while serving or attempting to serve legal process on any other person in connection with
22 the judicial enforcement of any debt." 15 U.S.C. § 1692a(6)(D). Here, the person who allegedly
23 served the state court summons and complaint on Blaxill's neighbor is not a person covered by
24 the FDCPA. Because Blaxill's complaint does not contain any other factual allegations that
25 would support a reasonable inference that Defendants are liable for making unlawful disclosures
26 to third parties, it fails to state a claim for relief under 15 U.S.C. § 1692b(2). *See Iqbal*, 129
27 S.Ct. at 1949.

1 3. 15 U.S.C. §§ 1692c(a) and 1692d(5)

2 Blaxill claims that Arrow violated 15 U.S.C. § 1692c(a) by contacting her at a time and
3 place known to be inconvenient to her, and by calling her at her place of employment despite
4 knowing that her employer prohibited such communications. Am. Compl. ¶¶ 24, 25. She also
5 claims that Arrow violated 15 U.S.C. § 1692d(5) by causing her phone to ring repeatedly and
6 engaging her in phone conversations with the intent to annoy and harass her. *Id.* ¶ 21.

7 15 U.S.C. § 1692c(a) prohibits a debt collector from communicating with a consumer at a
8 “time or place known or which should be known to be inconvenient to the consumer,” or “at the
9 consumer’s place of employment if the debt collector knows or has reason to know that the
10 consumer’s employer prohibits the consumer from receiving such communications.” 15 U.S.C. §
11 1692d(5) prohibits a debt collector from “causing a telephone to ring or engaging any person in
12 telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any
13 person at the called number.”

14 The instant complaint fails to state a claim for relief under either § 1692c(a) or 1692d(5)
15 because it contains nothing more than “threadbare recitals of the elements of a cause of action.”
16 *Gorman v. Wolpoff & Abramson, LLP*, 370 F. Supp. 2d 1005, 1014 (N.D. Cal. 2005), *rev'd in*
17 *part on other grounds*, 594 F.3d 1147 (9th Cir. 2009) (dismissing FDCPA claim because the
18 plaintiff failed to allege “the date or contents of even one call” allegedly made by the defendant).
19 Because the complaint does not state the date and contents of the several phone calls allegedly
20 made by Arrow, or specific facts to show that Arrow knew that Blaxill’s employer prohibited her
21 from receiving its phone calls, it fails to raise the reasonable inference that Arrow is liable for the
22 conduct alleged and thus fails to state a claim under §§ 1692c(a) and 1692d(5). *See Iqbal*, 129
23 S.Ct. at 1949.

24 4. 15 U.S.C. § 1692e(10)

25 Blaxill claims that Arrow violated the provisions of 15 U.S.C. § 1692e(10) by “inflating
26 the debt” and employing deceptive means to collect a debt. Am. Compl. ¶ 26. Defendants argue
27 that this claim is precluded by the *Rooker-Feldman* doctrine. However, as discussed above,
28 neither the *Rooker-Feldman* doctrine nor *res judicata* apply to the instant action, and collateral

1 estoppel does not apply to the issue of whether Defendants inflated the debt because that issue
2 was not decided by the state court.

3 15 U.S.C. § 1692e(10) prohibits debt collectors from using “any false representation or
4 deceptive means to collect or attempt to collect any debt or to obtain information concerning a
5 consumer.” However, Blaxill’s pleading is devoid of facts explaining how Defendants used
6 deceptive means to collect the loan. *See Iqbal*, 129 S.Ct. at 1949. Accordingly, it fails to state a
7 claim for relief under 15 U.S.C. § 1692e(10).

8 **B. Blaxill Fails to State a Claim for Violations of the RFDCPA, CAL. CIV. CODE §§
1788-1788.33**

9 1. CAL. CIV. CODE §§ 1788.17 and 1788.13(e)

10 Blaxill claims that Arrow’s alleged violations of 15 U.S.C. § 1692 also violated CAL.
11 CIV. CODE § 1788.17 and 1788.13(e). Am. Compl. ¶¶ 37, 33. CAL. CIV. CODE § 1788.17
12 provides that “every debt collector collecting or attempting to collect a consumer debt shall
13 comply with the provisions of Sections 1692b to 1692j” of the FDCPA. Because Blaxill has
14 failed to state a claim for violations of the FDCPA, she also fails to state a claim for violations of
15 § 1788.17. CAL. CIV. CODE § 1788.13(e) is unrelated to the FDCPA, as it prohibits debt
16 collectors from making “false representations that the consumer debt may be increased by the
17 addition of attorney’s fees, investigation fees, service fees, finance charges, or other charges if, in
18 fact, such fees or charges may not legally be added to the existing obligation.” However, the
19 operative complaint fails to state a claim under § 1788.13(e), as it is devoid of facts to plausibly
20 suggest that Defendants made false representations in violation of this provision. *See Iqbal*, 129
21 S.Ct. at 1949.

22 2. CAL. CIV. CODE § 1788.12(a)

23 Blaxill claims that Arrow violated CAL. CIV. CODE § 1788.12(a) by communicating with
24 her employer about the Loan without her permission and for purposes other than verifying her
25 location or employment information. Am. Compl. ¶ 34. CAL. CIV. CODE § 1788.12(a) prohibits
26 a debt collector from “[c]ommunicating with the debtor’s employer regarding the debtor’s
27 consumer debt unless such a communication is necessary to the collection of the debt, or unless
28 the debtor or his attorney has consented in writing to such communication.” Because Blaxill’s

1 complaint does not contain any factual content to give the defendant fair notice of what the claim
2 is and the grounds upon which it rests, such as the dates of the alleged communications, it fails to
3 state a claim under § 1788.12(a). *See Twombly*, 550 U.S. at 555 (2007).

4 3. CAL. CIV. CODE § 1788.12(b)

5 Blaxill claims that Arrow violated CAL. CIV. CODE § 1788.12(b) by communicating with
6 her extended family about the Loan without her permission and for purposes other than verifying
7 her location or employment information. Am. Compl. ¶ 35. CAL. CIV. CODE § 1788.12(b)
8 prohibits debt collectors from “[c]ommunicating information regarding a consumer debt to any
9 member of the debtor's family, other than the debtor's spouse or the parents or guardians of the
10 debtor who is either a minor or who resides in the same household with such parent or guardian,
11 prior to obtaining a judgment against the debtor, except where the purpose of the communication
12 is to locate the debtor, or where the debtor or his attorney has consented in writing to such
13 communication.” Blaxill’s complaint also fails to state a claim under this provision, as it does
14 not indicate which member of Blaxill’s family was contacted by Arrow, or when and under what
15 circumstances that person was contacted. *See Iqbal*, 129 S.Ct. at 1949; *see also Castellanos v.*
16 *JPMorgan Chase & Co.*, No. 09-CV-00969-H, 2009 WL 1833981 (S.D. Cal. 2009) (holding that
17 the plaintiff sufficiently pleaded a violation of § 1788.12 because he indicated the number of
18 times the defendant allegedly called his brother-in-law, as well as the contents of the alleged
19 phone calls).

20 4. CAL. CIV. CODE § 1788.16

21 Blaxill claims that Arrow violated CAL. CIV. CODE § 1788.16 by sending her a
22 communication simulating legal and judicial process. Am. Compl. ¶ 36. CAL. CIV. CODE §
23 1788.16 prohibits a debt collector from sending “a communication which simulates legal or
24 judicial process or which gives the appearance of being authorized, issued, or approved by a
25 governmental agency or attorney when it is not.” Because Blaxill’s pleading does not contain
26 any factual content to give the defendant fair notice of what the claim is and the grounds upon
27 which it rests, such as the dates or contents of the alleged communications, it fails to state a claim
28 under § 1788.16. *See Twombly*, 550 U.S. at 555 (2007).

ORDER

Good cause therefor appearing, Defendants' motion is GRANTED, with leave to amend.

Any amended complaint must be filed within thirty (30) days of the date of this order.

IT IS SO ORDERED.

DATED: 04/04/11



JEREMY FOGEL
United States District Judge

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