United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

COLBI TROESTER-MILLER,

Plaintiff,

v.

TD BANK USA, NATIONAL ASSOCIATION,

Defendant.

Case No. 15-cv-04621-BLF

ORDER (1) SUBMITTING DEFENDANT TD BANK USA, N.A.'S MOTION TO DISMISS FOR INSUFFICIENT SERVICE OF PROCESS WITHOUT ORAL ARGUMENT AND VACATING HEARING; (2) GRANTING MOTION TO DISMISS; AND (3) DIRECTING CLERK TO CLOSE FILE

[Re: ECF 35]

On July 28, 2016, Defendant TD Bank USA, N.A. filed a Motion to Dismiss for Insufficient Service of Process pursuant to Federal Rule of Civil Procedure 12(b)(5). *See* Motion to Dismiss, ECF 35. The motion is supported by declarations and correspondence establishing that Plaintiff failed to respond to an offer extended by TD Bank USA N.A.'s counsel to return a waiver of service under Federal Rule of Civil Procedure 4(d), and failed to effect service of process on TD Bank USA, N.A. within the time provided under Federal Rule of Civil Procedure 4(m).

Plaintiff's response to the motion to dismiss was due on August 11, 2016. *See* Civ. L.R. 7-3(a) (opposition due within fourteen days). Plaintiff did not file a response. On August 12, 2016, TD Bank USA, N.A. filed a Notice of No Opposition to Motion for Dismissal for Insufficient Service of Process. *See* Notice of No Opposition, ECF 36. Plaintiff did not file a response to the Notice of No Opposition. The Court hereby SUBMITS the Motion to Dismiss for disposition without oral argument and VACATES the hearing date noticed for December 1, 2016. *See* Civ. L.R. 7-1(b).

At the time Plaintiff's complaint was filed on October 6, 2015, Federal Rule of Civil Procedure 4(m) provided that "[i]f a defendant is not served within 120 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 or order that service be made within a specified time." Fed. R. Civ. P. 4(m); *see also Malibu Media, LLC v. Doe,* No. C 15-04443 WHA, 2016 WL 3383759, at *1 (N.D. Cal. June 20, 2016) (discussing prior version of Rule 4(m)).[1] TD Bank USA, N.A. has shown by its motion that Plaintiff did not serve it within 120 days after filing the complaint and still has not served it with the summons and complaint. Plaintiff has not rebutted that showing or responded in any way to TD Bank USA, N.A.'s Motion to Dismiss or Notice of No Opposition. Under these circumstances, the Court concludes that dismissal, rather than an extension of time to effect service, is appropriate. The Motion to Dismiss is GRANTED and the action is DISMISSED WITHOUT PREJUDICE as to TD Bank USA, N.A.

All other defendants previously having been dismissed from the case, the Clerk is HEREBY DIRECTED to close the file.

IT IS SO ORDERED.

Dated: November 4, 2016

BETH LABSON FREEMAN
United States District Judge

[1] Rule 4(m) was amended, effective December 1, 2015, to shorten the time for service from 120 days to 90 days. This Court applies the 120-day rule that was in effect when Plaintiff filed the complaint. *See Malibu Media*, 2016 WL 3383759, at *1 n.*.