

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JONATHAN SOUTHALL

CIVIL ACTION

VERSUS

NO: 13-2793

CITY OF THIBODAUX, SHAWN
SNOW, UNKNOWN THIBODAUX
POLICE OFFICERS, AND SCOTT
SILVERII IN HIS CAPACITY AS
CHIEF OF POLICE FOR THE CITY
OF THIBODAUX

SECTION: "A" (5)

ORDER AND REASONS

Before the Court is a **Motion to Dismiss (Doc. 9)** filed by defendants Shawn Snow, Scott Silverii, and unknown City of Thibodaux police officers. Plaintiff Jonathan Southall opposes the motion. The motion, scheduled for submission on August 28, 2013, is before the Court on the briefs without oral argument. For the following reasons, Defendants' motion to dismiss is DENIED.

Plaintiff filed this civil rights lawsuit against Defendants alleging an unlawful search of Plaintiff's person and property. Defendants filed their answer to Plaintiff's complaint on August 9, 2013. (Doc. 7). Defendants did not raise the issue of service in the answer. On August 12, 2013, Defendants filed the instant Rule 12(b)(5) motion to dismiss claiming insufficient service of process because service on the individual defendants was effected by serving the receptionist at the police station. (Doc. 9-1 at

2). Plaintiff argues in opposition that Defendants waived their insufficient service of process defense by failing to raise the defense in their answer. (Doc. 13 at 1).

Rule 12(b)(5) of the Federal Rules of Civil Procedure allows a party to move to dismiss a case based on insufficient service of process. Fed. R. Civ. Pro. 12(b)(5); *Ross v. Bob Dean Enter., Inc.*, No.10-287, 2013 WL 393108, at *3 (E.D. La. Jan. 20, 2013) (Brown, J.). The party responsible for service bears the burden of proving its validity when the sufficiency of service is challenged. *Ross*, 2013 WL 393108, at *3. Nevertheless, the defense of insufficient service of process is waived unless made in a party's first responsive pleading. *Kersh v. Derozier*, 851 F.2d 1509, 1511 (5th Cir. 1988); Fed. R. Civ. Pro. 12(h)(1). The moving party must raise the defense in its answer if that is the first responsive pleading to the court. *Giannakos v. M/V Bravo Trader*, 762 F.2d 1295, 1298 (5th Cir. 1985).

In the present case, Defendants failed to raise the defense of insufficient service of process in their answer filed on August 8, 2013. Three days later, Defendants raised that defense by filing a motion to dismiss pursuant to Rule 12(b)(5). Defendants' answer was the first responsive pleading filed. Therefore, Defendants waived their 12(b)(5) defense by not raising it in their answer.

Accordingly, and for the foregoing reasons;

IT IS ORDERED that the **Motion to Dismiss (Doc. 9)** filed by defendants Shawn Snow, Scott Silverii, and unknown City of Thibodaux police officers is **DENIED**.

November 12, 2013



JAY C. ZAINY
UNITED STATES DISTRICT JUDGE