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The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

THE FEDERAL DEPOSIT INSURANCE
CORPORATION, AS RECEIVER OF
WASHINGTON MUTUAL BANK,

Plaintiff,

v.

KERRY K. KILLINGER, STEPHEN J.
ROTELLA, DAVID C. SCHNEIDER,
LINDA C. KILLINGER, and ESTHER T.
ROTELLA,

Defendants.

Case No. 2:11-cv-00459 MJP

STATEMENT IN FURTHER SUPPORT
OF ESTHER T. ROTELLA'S
UNOPPOSED MOTION TO DISMISS

NOTE ON MOTION CALENDAR:
September 15, 2011

1 In its quest to make a media splash, the FDIC named Stephen Rotella’s wife, Esther
2 Rotella, as a defendant in this action. The FDIC did so even though she did nothing wrong, and
3 the FDIC had no claim against her. In its Complaint, the FDIC did not plead a single fact that
4 would potentially implicate this Court’s jurisdiction—a point the FDIC now virtually concedes.
5 Mrs. Rotella timely moved to dismiss on July 1, 2011 based on the FDIC’s failure to plead a
6 factual basis for personal jurisdiction. (*See* Dkt. No. 54.) Mrs. Rotella also joined in her co-
7 Defendants’ motions to dismiss for failure to state a claim (Dkt. Nos. 53 & 55) and included a
8 short section in her motion entitled “The FDIC Fails to State a Claim Against Mrs. Rotella.”
9 (Dkt. No. 54 at 4.)

10 The FDIC did not file opposition papers in response to Mrs. Rotella’s motion to dismiss.
11 Instead, on the afternoon the FDIC’s opposition was due—*nearly two months* after Mrs. Rotella
12 filed her five-page motion to dismiss—the FDIC filed a motion to compel “jurisdictional”
13 discovery and for an extension of time to oppose the motion to dismiss. (Dkt. No. 65.) As Mrs.
14 Rotella explained in her opposition to that motion, the FDIC did not even attempt to argue that it
15 met the “good cause” standard for granting extensions of time (*see* Dkt. No. 72 at 4–5),
16 especially with respect to the non-jurisdictional arguments at Section II of Mrs. Rotella’s motion,
17 titled “The FDIC Fails to State a Claim Against Mrs. Rotella.” (Dkt. No. 54 at 4.)

18 **I. Because the FDIC Lacked Good Cause for Seeking an Extension of Time to File an**
19 **Opposition, the Court Should Grant Mrs. Rotella’s Motion to Dismiss**

20 Mrs. Rotella’s motion to dismiss, among other things, challenged the legal sufficiency of
21 the FDIC’s conclusory jurisdictional allegation. (Dkt. No. 54 at 1–4.) Mrs. Rotella did not
22 challenge any jurisdictional *facts* because the FDIC did not allege any facts to challenge. By
23 virtue of its unilateral decision to defer opposing Mrs. Rotella’s motion pending jurisdictional
24 discovery, the FDIC has conceded that it failed to allege such facts. But “[a]s a rule, a plaintiff is
25 not entitled to jurisdictional discovery to enable her to bolster an inadequate pleading if the
26 defendant merely challenges the legal sufficiency of the jurisdictional allegations in the
27 complaint, and does not place the factual basis for personal jurisdiction in issue.” *In re Teligent*,

1 *Inc.*, Nos. 01-12974 SMB, 03-3577, 2004 WL 724945, at *6 (Bankr. S.D.N.Y. Mar. 30, 2004)
2 (denying jurisdictional discovery until the plaintiff pleads “legally sufficient, *non-conclusory*
3 allegations” (emphasis added)). *See, e.g., Jarvis v. Regan*, 833 F.2d 149, 155 (9th Cir. 1987)
4 (affirming order denying discovery where “appellants’ *complaint* did not raise factual issues that
5 required discovery for their resolution”) (emphasis added); *Robinson v. DaimlerChrysler AG*,
6 No. 07-3258 SC, 2008 WL 728877, at *6 (N.D. Cal. Mar. 17, 2008) (refusing to allow discovery
7 where plaintiff’s failure to establish jurisdiction was based on the failure to allege the necessary
8 facts). Accordingly, a motion to compel discovery in an attempt to cure a pleading failure does
9 not provide “good cause” for extending time to oppose a motion to dismiss.

10 In any event, beyond the title of the motion and its request for relief, the FDIC failed to
11 address, much less demonstrate, good cause for an extension of time to respond to Mrs. Rotella’s
12 motion. The FDIC’s reply brief made a belated attempt to demonstrate good cause. (Dkt. No.
13 75 at 6–7.) However, the FDIC addressed only why it waited until August 22 to file a motion to
14 *compel*—not why it failed to request an extension of time at any point during the *seven-and-a-*
15 *half weeks* the FDIC had to respond to Mrs. Rotella’s motion to dismiss. The FDIC presented
16 *no* explanation for why it did not, for example, move for an *extension* once the FDIC concluded
17 it could not respond to the motion without discovery back in July, or even when the FDIC
18 received Mrs. Rotella’s objections on August 15. Instead, the FDIC glosses over the fact that it
19 waited two weeks after receiving the motion to dismiss before it served jurisdictional discovery
20 and criticizes Mrs. Rotella for: (i) using the time prescribed by the Federal Rules to respond to
21 the discovery; and (ii) meeting and conferring within 3 hours of the FDIC’s request to do so
22 (which, the FDIC fails to mention, Mrs. Rotella’s counsel agreed to do while on vacation to
23 accommodate the FDIC’s timing demands). And the FDIC has never explained why it needed an
24 extension to oppose Mrs. Rotella’s non-jurisdictional arguments. (*See* Dkt. No. 75.)

25 Because the FDIC lacked good cause for seeking an extension and failed to file a timely
26 opposition, the Court should grant Mrs. Rotella’s motion to dismiss. W.D. Wash. L.R. 7(b)(2)
27 (“If a party fails to file papers in opposition to a motion, such failure may be considered by the

1 court as an admission that the motion has merit.”); *Wegzyn v. Griffie*, No. C08-1361 MJP MAT,
2 2009 WL 3400928, at *1 (W.D. Wash. Oct. 20, 2009) (Pechman, J.) (“The Court deems
3 plaintiff’s failure to oppose the dispositive motion to be an admission that defendants’ motion has
4 merit.”).

5 **II. Mrs. Rotella’s Opening Memorandum Showed That the Court Should Dismiss the**
6 **FDIC’s Complaint against Her**

7 Even ignoring the deficiencies described above, the Court should dismiss the FDIC’s
8 claims because its Complaint fails to set forth any facts sufficient to establish personal
9 jurisdiction over Mrs. Rotella under Washington’s long arm statute, RCW 4.28.185. While the
10 FDIC submitted evidence with its motion to compel in an attempt to assert jurisdiction, the FDIC
11 may not add facts to the complaint. *See, e.g., Broam v. Bogan*, 320 F.3d 1023, 1026 n.2 (9th Cir.
12 2003). “In determining the propriety of a Rule 12(b)(6) dismissal, a court may not look beyond
13 the complaint to a plaintiff’s moving papers, such as a memorandum in opposition to a
14 defendant’s motion to dismiss.” *Id.* (citation omitted); *see also Amazon.com, Inc. v.*
15 *Underwriters at Lloyd’s London*, No. 2:04-cv-1777P, 2005 WL 1312046, at *2 (W.D. Wash.
16 June 1, 2005) (Pechman, J.) (dismissing action, denying leave to amend, and explaining the
17 “Court will not look beyond a Plaintiff’s pleading papers and the exhibits submitted there []
18 when conducting the 12(b)(6) inquiry”). In any event, the FDIC’s supposed new-found
19 “evidence” provides no support for the FDIC’s conclusory allegation that this Court has long-
20 arm jurisdiction. At most it would show that Mrs. Rotella held title to real property or was
21 registered to vote in Washington, which does not speak to whether Mrs. Rotella committed a
22 tortious act in the state, RCW 4.28.185(1)(b), or demonstrate that Mrs. Rotella’s activities fall
23 within the Ninth Circuit’s jurisdictional due process test, *Schwarzenegger v. Fred Martin Motor*
24 *Co.*, 374 F.3d 797, 802 (9th Cir. 2004).

25 Moreover, the Court should dismiss the FDIC’s claims because the FDIC’s fraudulent
26 transfer allegations fail to satisfy the pleading requirements of Rules 8 and 9(b). (Dkt. No. 54 at
27 2–4; Dkt. No. 72 at 8–9; Dkt. No. 78 at 10–12.) Indeed, the FDIC’s “defective” allegations of

1 tortious conduct cannot form the basis for long-arm jurisdiction, and the FDIC has failed to
2 respond to Mrs. Rotella’s challenge of those allegations. *In re Wash. Mut., Inc. Sec., Derivative*
3 *& ERISA Litig.*, No. 08-1919 MJP, 2010 WL 2803033, at *4 (W.D. Wash. July 15, 2010) (where
4 a plaintiff’s “defective allegations are the only ones that could possibly satisfy personal
5 jurisdiction,” a plaintiff has “failed to provide any support for specific jurisdiction”).

6 **III. Conclusion**

7 For the above reasons, and the reasons set forth in Mrs. Rotella’s motion to dismiss and
8 opposition to the FDIC’s motion to compel and extend time, Mrs. Rotella respectfully requests
9 the Court enter an Order dismissing the FDIC’s claims against her.

10 Dated this 15th day of September, 2011.

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26 *Attorneys for Esther T. Rotella*

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on September 15, 2011, the foregoing was electronically filed with
3 the Clerk of the Court using the CM/ECF system which will send notification of such filing to all
4 counsel of record who receive CM/ECF notification and that the remaining parties shall be
5 served in accordance with the Federal Rules of Civil Procedure.

6 DATED this 15th day of September, 2011.

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