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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Nadia Drake, an unmarried woman,

Plaintiff,

v.

Salt River Pima-Maricopa Indian Community, a federally recognized Indian Tribe, d/b/a Talking Stick Resort and Casino,

Defendant.

No. CV-19-2957-PHX-MTL

REPLY IN SUPPORT OF DEFENDANT'S MOTION TO SET ASIDE CLERK'S ENTRY OF DEFAULT

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The Court should grant Defendant Salt River Pima-Maricopa Indian Community's ("SRPMIC") Motion and set aside the Clerk's entry of default (Doc. 15) because Plaintiff never served SRPMIC with the summons and complaint in a manner that constitutes valid service, as required by the Federal Rules of Civil Procedure.

In her Response, Plaintiff first argues that she "served" the summons and complaint on SRPMIC through undersigned counsel. She also contends that she served the summons and complaint on SRPMIC via certified mail pursuant to Federal Rules of Civil Procedure 4(e) and 4(f)(2)(ii). Plaintiff's arguments fail because SRPMIC never

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authorized undersigned counsel to accept service of process in this action (as counsel clearly communicated to Plaintiff's counsel), nor do the Rules of Civil Procedure permit Plaintiff to serve SRPMIC via mail. Thus, this Court never established personal jurisdiction over SRPMIC, SRPMIC had no obligation to respond to the complaint, and good cause exists to set aside the entry of default.

I. SRPMIC never authorized undersigned counsel to accept service of process in this action.

Plaintiff first argues that she served SRPMIC by serving undersigned counsel because undersigned counsel "informed Plaintiff's counsel that they represented Defendant prior to suit being filed." Doc. 22 at p. 1. Plaintiff's argument improperly conflates the fact of representation with the scope of representation. "[O]nly where an attorney is expressly or impliedly authorized to accept service of process can his doing so bind his absent client and subject him to the personal jurisdiction of the local court." *Christensson v. Hogdal*, 199 F.2d 402, 406 (D.C. Cir. 1952) (citing *Stone v. Bank of Commerce*, 174 U.S. 412, 421 (1899); 5 Am.Jur. 313; Fed. R. Civ. P. 4(d)(1)).

Plaintiff does not argue that SRPMIC ever explicitly or implicitly authorized its counsel to accept service of process on its behalf. To the contrary, Plaintiff expressly acknowledges that undersigned counsel "refused to 'accept' service of process on behalf of Defendant." *Id.* Indeed, because SRPMIC never authorized its counsel to accept service of process in this (or any other) action and undersigned counsel expressly advised Plaintiff's process server that she could not accept service on behalf of SRPMIC, Plaintiff's service of process on undersigned counsel was neither proper nor valid.

II. Service by mail was not authorized by Fed. R. Civ. P. 4(e).

Two and a half months after attempting to serve SRPMIC through undersigned counsel and just days before the date on which the Court advised that it would dismiss the action for failure to complete service, Plaintiff attempted to serve SRPMIC twice via certified mail. Plaintiff contends this was valid service under Fed. R. Civ. P. 4(e)(1), which states that "[u]nless federal law provides otherwise, an individual . . . may be

served in a judicial district of the United States by following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made." Plaintiff argues that Arizona Rule of Civil Procedure 4.2 permits service by mail in certain circumstances, and on that basis, claims that service by mail on SRPMIC was valid in this case.

Plaintiff's argument is misplaced and ignores the language of both rules. By its own terms, Fed. R. Civ. P. 4(e) only applies to *individuals* within a judicial district of the United States. SRPMIC is a federally-recognized sovereign Indian tribe, not an individual. Furthermore, Plaintiff does not clarify which provision of Arizona Rule 4.2 purportedly permits service outside of Arizona via mail. For example, Arizona Rule 4.2(c) only applies to *persons* to be served at an address outside Arizona, not a tribal entity. *See* Ariz. R. Civ. P. 4.2(c) ("If a serving party knows the address of the *person* to be served and the address is outside Arizona but within the United States, the party made serve the person by mailing the summons . . .) (emphasis added). Thus, Plaintiff's attempt to serve SRPMIC via certified mail was not authorized by Federal Rule of Civil Procedure 4(e).

III. Service by mail was also not authorized by Rule 4(f)(2)(ii).

Plaintiff's final argument is that her attempts to serve SRPMIC via certified mail were proper under Fed. R. Civ. P. 4(f)(2)(ii), which states that "[u]nless federal law provides otherwise, an *individual* . . . may be served at a place not within any judicial district of the United States . . . unless prohibited by the foreign country's law, by using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt." (emphasis added) But Plaintiff's attempt to serve SRPMIC via certified mail was not authorized by Rule 4(f)(2)(ii) because that rule, like Rule 4(e), only applies to individuals.

Simply put, because Plaintiff filed this lawsuit against SRPMIC, a sovereign territory, she was required to comply with the SRPMIC's Rules of Civil Procedure, which require that a private process server obtain permission from the tribe to effect

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service of process upon tribal land. *See* SRPMIC Rule of Civil Procedure 5-13. Plaintiff does not argue that she ever petitioned SRPMIC for permission to complete service on the Community. One purpose of the rules governing the service of process is to notify a defendant that it is being sued, an even more important purpose of those rules is to establish the Court's jurisdiction over a defendant because "[u]ntil service is properly accomplished (or waived), the Court does not have personal jurisdiction over the defendant." *Lagod v. Valley Metro Rail, Inc.*, No. CV-07-2027-PHX-JAT, 2009 WL 440216, at *3 (D. Ariz. Feb. 23, 2009) (citing 5B Wright & Miller, Federal Practice and Procedure § 1353 (3d ed. 2004) at 338). In sum, Plaintiff's attempts to serve SRPMIC via certified mail instead of undertaking the necessary effort to complete service in accordance with the Federal Rules of Civil Procedure and SRPMIC's Rules of Civil Procedure were improper and ineffective.

IV. Plaintiff should not be given additional time to properly complete service.

Plaintiff finally asks that if the Court finds that her attempts to serve SRPMIC were ineffective, she should be given additional time to "service [sic] Defendant personally." Doc. 22 at p. 3. However, Plaintiff had ample time to properly complete service. Moreover, any additional attempts to serve SRPMIC would be futile for the reasons set forth in SRPMIC's Motion to Dismiss (Doc. 14); namely, because the Court lacks subject matter jurisdiction over Plaintiff's personal tort claims and her claim arising under Title VII of the Americans with Disabilities Act. *See Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998) (explaining that a tribe is only subject to suit if it has waived its immunity or Congress has authorized suit); *Fla. Paraplegic Ass'n, Inc. v. Miccosukee Tribe of Indians of Fla.*, 166 F.3d 1126, 1131-34 (11th Cir. 1999) (holding that Congress "did not contemplate that Indian tribes would be subject to private lawsuits for violating . . . the ADA").

V. Conclusion

For all the foregoing reasons and the additional reasons stated in its Motion to Dismiss (Doc. 14), SRPMIC respectfully requests that the Court set aside the entry of default for good cause shown, pursuant to Federal Rule of Civil Procedure 55(c).

DATED this 9th day of October 2019.

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By s/Caroline Larsen

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