2019 WL 452747
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United States District Court,
E.D. Texas, Sherman Division.

Marlon GREEN
v.
COVENANT TRANSPORTATION GROUP, INC., et al.

Civil Action No. 4:17-CV-568
|
Signed 02/05/2019

Attorneys and Law Firms

Marlon Green, Denton, TX, pro se.

MEMORANDUM ADOPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

AMOS L. MAZZANT, UNITED STATES DISTRICT JUDGE

***1** Came on for consideration the report of the United States Magistrate Judge in this action, this matter having been heretofore referred to the Magistrate Judge pursuant to 28 U.S.C. § 636. On December 28, 2018, the report of the Magistrate Judge (Dkt. #17) was entered containing proposed findings of fact and recommendations that Plaintiff Marlon Green's claims against Defendants Covenant Transportation Group, Inc., Travelers Insurance, and Farmers Insurance be dismissed.

Having received the report of the United States Magistrate Judge, and no objections thereto having been timely filed, the Court is of the opinion that the findings and conclusions of the Magistrate Judge are correct and adopts the Magistrate Judge's report as the findings and conclusions of the Court.

It is, therefore, **ORDERED** that Plaintiff Marlon Green's claims against Defendants Covenant Transportation Group, Inc., Travelers Insurance, and Farmers Insurance are **DISMISSED**.

All relief not previously granted is **DENIED**.

The Clerk is directed to **CLOSE** this civil action.

IT IS SO ORDERED.

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2018 WL 7204232
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United States District Court,
E.D. Texas, Sherman Division.

MARLON GREEN, Plaintiff,
v.
COVENANT TRANSPORTATION GROUP, INC., ET AL., Defendants.

CIVIL ACTION NO. 4:17-CV-00568-ALM-CAN
|
Filed 12/28/2018

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Christine A. Nowak UNITED STATES MAGISTRATE JUDGE

***1** Pending before the Court is Plaintiff Marlon Green's Complaint [Dkt. 1]. The Court recommends that Plaintiff's Complaint be **DISMISSED**, as specified herein.

BACKGROUND

Plaintiff filed the instant suit on August 15, 2017, against Defendants Covenant Transportation Group, Inc., Travelers Insurance, and Farmers Insurance [Dkt. 1]. On the same day, the case was assigned to U.S. Magistrate Judge Priest-Johnson [Dkt. 2]. On August 21, 2017, Plaintiff filed a Motion to Proceed *In Forma Pauperis* [Dkt. 7]. On August 23, 2017, Judge Johnson ordered that Plaintiff pay his filing fee or file a motion to proceed *in forma pauperis* [Dkt. 3]. On September 14, 2017, the case was reassigned to the undersigned. On September 19, 2017, the Court granted Plaintiff's Motion to Proceed *In Forma Pauperis*, and directed that before it took up formal review of Plaintiff's complaint, Plaintiff should be given an opportunity to amend, and that service of process would not issue, if at all, until the Court completes its screening of Plaintiff's Amended Complaint pursuant to 28 U.S.C. § 1915(e)(2)(B) and 28 U.S.C. § 1915A [Dkt. 8]. On October 4, 2017, Plaintiff filed an Objection to the Court's September 19 Order [Dkts. 10; 12]; on November 20, 2017, the Court overruled Plaintiff's Objection and extended his deadline to file an amended pleading to December 4, 2017 [Dkt. 11]. On November 27, 2017, Plaintiff filed an Amended Complaint [Dkt. 12]. On December 19, 2017, the Court ordered served to issue and directed Plaintiff to provide the name and physical address for service of process for each Defendant named in the Amended Complaint on or before January 19, 2018 [Dkt. 13]. The Court further advised Plaintiff that his failure to provide the name or correct address for service of process may result in a dismissal of Plaintiff's claims against Defendants without prejudice [Dkt. 13 at 2]. On March 5, 2018, instead of providing any such addresses to the Clerk of the Court, Plaintiff filed a further Amended Complaint ("First Amended Complaint"), the live pleading in this action [Dkt. 15]. On March 8, 2018, Plaintiff additionally filed a "Citation: Failure to Prosecute," wherein he reiterates certain allegations from his First Amended Complaint [Dkt. 16]. To date, Plaintiff has failed to provide Defendants' current addresses to the Clerk of the Court or take any other action in this matter.

The Court has reviewed and considered each of Plaintiff's filings. Broadly construing Plaintiff's Amended Complaint, the Court surmises the underlying facts and Plaintiff's claims to be as follows: Plaintiff was involved in a car accident in July 2016 while traveling in Shreveport, Louisiana [Dkt. 15-1 at 4, 9]. Plaintiff asserts that the accident was the fault of the "CTG driver" [Dkt. 15 at 1], and that he sustained physical injuries to his person and damage to his vehicle. Plaintiff thereafter sought medical treatment at the VA Medical Center, and his vehicle was repaired at Maaco Collison Center [Dkt. 15 at 1]. Plaintiff contends that Defendants are liable for his expenses incurred as a result of this car accident [Dkt. 15 at 1].

***2** Plaintiff does not enumerate any specific causes of action or claims, but rather broadly states that "[a]dministrative abuses are covered by The Civil Rights Act, and American with Disability Act Rights" [Dkt. 15 at 2]. In the most recent Amended Complaint, Plaintiff alleges that the Court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 1332, but avers that "[t]he claim is less than $75,000.00" [Dkt. 15 at 2]. Plaintiff also states "[f]ederal law violations include." *Id.* The Court finds, upon review, that Plaintiff's claim(s) should be dismissed for lack of subject matter jurisdiction, and for failing to provide addresses for the preparation of service of process on Defendants, as ordered by the Court.

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SUBJECT MATTER JURISDICTION

Federal courts are courts of limited jurisdiction and must have statutory or constitutional power to adjudicate a claim. *Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998). A federal court has an independent duty, at any level of the proceedings, to determine whether it properly has subject matter jurisdiction over a case. *Ruhgras AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999); *McDonal v. Abbott Labs.*, 408 F.3d 177, 182 n.5 (5th Cir. 2005) ("any federal court may raise subject matter jurisdiction *sua sponte*"). "Federal courts have subject matter jurisdiction and are authorized to entertain a cause of action only where a question of federal law is involved or where there is diversity of citizenship between the parties and the amount in controversy exceeds $75,000.00." *Hereford v. Carlton*, 9:15-CV-26, 2016 WL 7042231, at *3 (E.D. Tex. May 26, 2016) (citing 28 U.S.C. §§ 1331, 1332).

Diversity Jurisdiction

For jurisdiction to exist under § 1332, complete diversity must exist such that no plaintiff and no defendant may be citizens of the same state. *Wis. Dep't of Corr. v. Schacht*, 524 U.S. 381, 388 (1998). "Complete diversity means that a federal court may not exercise diversity jurisdiction if the plaintiff is a domiciliary of the same state as any one of the defendants." *Garcia v. Beaumont Crime Stoppers*, 1:14CV589, 2018 WL 1100406, at *1–2 (E.D. Tex. Jan. 8, 2018), *report and recommendation adopted*, 1:14CV589, 2018 WL 1072432 (E.D. Tex. Feb. 27, 2018) (citing *Menendez v. Wal-Mart Stores, Inc.*, 364 F. App'x 62, 65 (5th Cir. 2010)). In the instant case, Plaintiff fails to allege both his citizenship and the citizenship of each Defendant. "A party asserting diversity jurisdiction must "distinctly and affirmatively" allege the citizenship of the parties." *Copeland v. Minton*, 3:16-CV-726-L, 2016 WL 7971584, at *3 (N.D. Tex. Dec. 29, 2016), *report and recommendation adopted*, 3:16-CV-726-L, 2017 WL 303025 (N.D. Tex. Jan. 23, 2017) (quoting *Getty Oil Corp. v. Ins. Co. of N. Am.*, 841 F.2d 1254, 1259 (5th Cir. 1988) (citing *McGovern v. Am. Airlines, Inc.*, 511 F.2d 803, 805 (5th Cir. 1991))). Because Plaintiff has failed to meet his obligation to distinctly and affirmatively allege the citizenship of the parties in the instant case, he has failed to establish that the Court may exercise subject matter jurisdiction pursuant to § 1332 over this matter. *See id.* ("Because Plaintiff has failed to distinctly and affirmatively allege the citizenship of the parties, he has failed to show that diversity jurisdiction exists over this action."); *see also Davis v. Wells Fargo Bank, N.A.*, 4:13-CV-910-A, 2013 WL 6768058, at *2 (N.D. Tex. Dec. 18, 2013) (same).

Furthermore, Plaintiff's allegations in his Amended Complaint establish that the relief sought does not meet the requisite amount in controversy [Dkt. 15 at 2]. Although, there is no requirement in the Fifth Circuit that an actual dollar amount must appear on a paper in the suit, the amount in controversy includes all damages available under the law governing the suit, but the party seeking to invoke the court's jurisdiction must rely on more than conclusory allegations to establish jurisdiction. *Hereford v. Carlton*, 9:15-CV-26, 2016 WL 7042231, at *3 (E.D. Tex. May 26, 2016). Plaintiff avers in his Amended Complaint that his "claim is less than $75,000.00," and that he "would accept $69,999.00" from Defendants [Dkt. 15 at 2]. Furthermore, Plaintiff's Amended Complaint notes that the costs associated with his vehicle's service at Maaco Collision Center total $3,000, and his medical bills incurred as a result of the collision total $60,000 [Dkt. 15 at 1-2]. Plaintiff fails to set forth facts in his pleadings that the amount in controversy exceeds the jurisdictional minimum, and therefore, the Court is unable to exercise diversity jurisdiction over this matter. *See Walker v. Red River Employees Fed. Credit Union*, 5:05CV112, 2006 WL 1005006, at *2 (E.D. Tex. Apr. 18, 2006) (dismissing complaint for failing to demonstrate requisite amount in controversy met); *Ahmmad v. Wells Fargo Bank, NA*, 3:13-CV-5019-N-BH, 2014 WL 4468207, at *4 (N.D. Tex. Sept. 9, 2014) (citing *Washington v. Orchard Bank*, No. 3:10–cv–1137, 2010 WL 4923524, at *2 (N.D. Tex. Oct. 18, 2010), *report and recommendation adopted*, 2010 WL 4923923 (N.D. Tex. Nov. 29, 2010) (dismissing complaint for lack of diversity jurisdiction where plaintiff failed to provide facts to support his amount in controversy claim).

No Federal Question Asserted

***3** "[F]ederal question jurisdiction under 28 U.S.C. § 1331 'exists when "a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." ' " *Johnson v. City of Denton*, 417CV00453RASCAN, 2018 WL 3487585, at *2 (E.D. Tex. June 8, 2018), *report and*

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recommendation adopted, 4:17-CV-453, 2018 WL 3478898 (E.D. Tex. July 19, 2018) (Mazzant, J.) (quoting *Borden v. Allstate Ins. Co.*, 589 F.3d 168, 172 (5th Cir. 2009) (quoting *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 27-28 (1983))). "A federal question exists 'if there appears on the face of the complaint some substantial, disputed question of federal law.' " *Id.* (quoting *In re Hot-Hed Inc.*, 477 F.3d 320, 323 (5th Cir. 2007) (quoting *Carpenter v. Wichita Falls Indep. Sch. Dist.*, 44 F.3d 362, 366 (5th Cir. 1995)).

Plaintiff alleges "[f]ederal law violations include" and elsewhere in his pleadings states "[a]dministrative abuses are covered by The Civil Rights Act, and American with Disability Act Rights." These are the only statements the Court is able to find potentially related to or intended to assert federal question jurisdiction [Dkt. 15 at 2]. Aside from this bare allegation, Plaintiff offers no further facts or allegations that he is entitled to relief under these or any other federal statute. Mere mention of federal statutes does not rise to the level of invoking federal question jurisdiction. *Kahclamat v. Nash*, 3:18-CV-464-G-BN, 2018 WL 1515126, at *2 (N.D. Tex. Mar. 6, 2018), *report and recommendation adopted*, 3:18-CV-0464-G (BN), 2018 WL 1513655 (N.D. Tex. Mar. 27, 2018), *appeal dismissed*, 18-10709, 2018 WL 6579318 (5th Cir. Oct. 3, 2018) ("And the mere mention of federal law or bare assertion of a federal claim is not sufficient to obtain federal question jurisdiction, because 'federal courts are without power to entertain claims otherwise within their jurisdiction if they are so attenuated and unsubstantial as to be absolutely devoid of merit; wholly insubstantial; obviously frivolous; plainly unsubstantial; or no longer open to discussion.' ") (quoting *Hagans v. Levine*, 415 U.S. 528, 536-37 (1974); citing *Murphy v. Inexco Oil Co.*, 611 F.2d 570, 573 (5th Cir. 1980) ("[T]he assertion that the claim involves [a federal] question must be more than incantation.")).

Plaintiff's pleadings revolve around a car accident, his subsequent dealings with various insurance companies, and resulting medical issues. Plaintiff does not raise any federal causes of action or cite any federal statutes—aside from a single conclusory sentence—or case law in support of his allegations. *Bell v. State Farm County Mut. Ins. Co.*, 6:04CV408, 2005 WL 8160839, at *2 (E.D. Tex. Nov. 4, 2005) ("even considered under the lenient standard applicable to pro se litigants, the Court can conceive of no set of facts under which the plaintiff would be entitled to relief from a federal district court based on federal question jurisdiction. Plaintiff describes a car accident involving parties domiciled in Texas, the subsequent wrangling with State Farm over the value of the resulting claim, and his ongoing medical issues, none of which satisfies the requirements for federal jurisdiction."). District courts have original jurisdiction over all civil actions "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. The claims present in the instant lawsuit do not present a federal question as none of these claims arise under the Constitution, laws, or treaties of the United States. *See Bell*, 2005 WL 8160839, at *2. As none of the claims at issue arise under the Constitution, laws, or treaties of the United States, the Court lacks federal question jurisdiction over this matter.

FAILURE TO PROVIDE ADDRESSES

***4** It is undisputed that "[b]efore a[ ] federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied." *Murphy Bros. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350 (1999). Service of process in a federal action is governed generally by Rule 4 of the Federal Rules of Civil Procedure. Pursuant to Rule 4(m) of the Federal Rules of Civil Procedure, "If a defendant is not served within 90 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. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period." Accordingly, Plaintiff has ninety (90) days to accomplish effective service of process. Notably, "[t]hat plaintiff has been granted leave to proceed IFP does not excuse plaintiff from the requirement to ensure timely service of process." *Sandoval v. Am. Laser Skin Care, LLC*, 5:14-CV-338-DAE, 2015 WL 518801, at *4–7 (W.D. Tex. Feb. 2, 2015).

In the instant case, the 90–day time period within which plaintiff was required to accomplish service of process began to run on December 19, 2017, the date on which the Court directed Plaintiff to provide addresses for service of process. The December 19, 2017 Order specifically stated that service should issue and advised Plaintiff that it was his responsibility to find and provide the Court with the correct address for each Defendant. The Order

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further stated that Plaintiff's failure to provide the name or correct addresses for service of process may result in a dismissal of Plaintiff's claims against Defendants without prejudice [Dkt. 13]. To date, no address information has been received from Plaintiff. Plaintiff has not diligently pursued service, nor has he timely complied with the Court's directives in the December 19, 2017 Order, which instructed Plaintiff to provide the name and current address of each Defendant [Dkt. 13]. Furthermore, Plaintiff has not provided any reason why the 90–day time period to accomplish service should be extended under these circumstances. As a result, Plaintiff's claims and complaint should also be dismissed under Rule 4. *See Sandoval*, 2015 WL 518801, at *7 (court dismissed complaint under Rules 4 and 41 for the failure of the *pro se* plaintiff, proceeding *in forma pauperis*, to prepare summons to be served by the U.S. Marshal Service). Plaintiff's claims are also properly dismissed without prejudice under Rule 41(b) for his failure to provide the address information as ordered by the Court. *Sandoval*, 2015 WL 518801, at *7 (court dismissed complaint under Rules 4 and 41 for the failure of the *pro se* plaintiff, proceeding *in forma pauperis*, to prepare summons to be served by the U.S. Marshal Service).

CONCLUSION AND RECOMMENDATION

Accordingly, as discussed *supra*, the Court recommends that Plaintiff's suit be dismissed without prejudice.

Within fourteen (14) days after service of the magistrate judge's report, any party may serve and file written objections to the findings and recommendations of the magistrate judge. 28 U.S.C. § 636(b)(1)(C). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's report and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific.

Failure to file specific, written objections will bar the party from appealing the unobjected-to factual findings and legal conclusions of the magistrate judge that are accepted by the district court, except upon grounds of plain error, provided that the party has been served with notice that such consequences will result from a failure to object. *See Douglass v. United Services Automobile Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996) (en banc), *superseded by statute on other grounds*, 28 U.S.C. § 636(b)(1) (extending the time to file objections from ten to fourteen days).

***5 SIGNED this 28th day of December, 2018.**

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