

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-7108

September Term, 2017

1:14-cv-00405-RJL

Filed On: May 23, 2018

Lena Terrell Hardaway,

Appellant

v.

Cross State Moving and Shlomo Dostekam,

Appellees

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

BEFORE: Henderson, Griffith, and Srinivasan, Circuit Judges

JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs filed by the parties. See Fed. R. App. P. 34(a)(2); D.C. Cir. Rule 34(j). Upon consideration of the foregoing, and the motion to appoint counsel, the motion to proceed without an appellee brief, and appellee's motion for leave to late file his brief, it is

ORDERED that the motion to appoint counsel be denied. In civil cases, appellants are not entitled to appointment of counsel when they have not demonstrated sufficient likelihood of success on the merits. It is

FURTHER ORDERED that appellee's motion to late file his brief be granted, and appellant's motion to proceed without that brief be denied. The Clerk is directed to file the lodged brief. It is

FURTHER ORDERED AND ADJUDGED that the district court's May 31, 2017 order dismissing appellant's complaint for lack of jurisdiction be affirmed. Because appellant's complaint raised no cognizable claims under federal law, federal question jurisdiction pursuant to 28 U.S.C. § 1331 was not proper. Appellant also failed to

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demonstrate that the amount in controversy in this case exceeded \$75,000; therefore, diversity jurisdiction pursuant to 28 U.S.C. § 1332(a) was also not proper. Although appellant's request for punitive damages raised her total damages claim above \$75,000, the district court correctly concluded that the punitive damages claim – which exceeded appellant's actual damages by a factor of approximately 490 – was unconstitutionally excessive. See Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23-24 (1991) (noting that there is a "line" beyond which excessive punitive damages become unconstitutional); see also Kahal v. J.W. Wilson & Associates, Inc., 673 F.2d 547, 549 (D.C. Cir. 1982) (noting that plaintiffs may not "shoehorn essentially local actions into federal court through extravagant or invalid punitive damage claims"). Like the district court, this court makes no findings about whether the parties are geographically diverse as required by 28 U.S.C. § 1332(a)(1).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

MAY 31 2017

LENA HARDAWAY,

Clerk, U.S. District & Bankruptcy
Courts for the District of Columbia

Plaintiff,

Civil Case No.

1:14-cv-0405 (RJL-DAR)

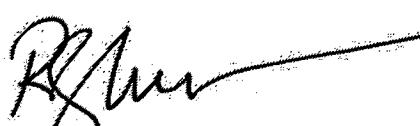
CROSS-STATE MOVING, *et al.*,

Defendants.

MEMORANDUM OPINION
(May 26, 2017) [Dkts. #57, #61]

On March 20, 2017, Magistrate Judge Deborah A. Robinson's [61] Report and Recommendation was entered. The parties then had 14 days to file objections to the recommendations made by the Magistrate Judge. Fed. R. Civ. P. 72(b)(2). To date, no objections have been filed. Upon careful consideration of the record in this case and of Magistrate Judge Robinson's Report and Recommendation, the Court ADOPTS and ACCEPTS the Report and Recommendation in full.

Accordingly, the Court shall GRANT defendant's [57] Motion to Dismiss. An appropriate Order accompanies this Memorandum Opinion.


RICHARD J. LEON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LENA HARDAWAY,

Plaintiff,

v.

CROSS STATE MOVING, et al.,

Defendants.

Civil Action No. 14-405
RJL/DAR

REPORT AND RECOMMENDATION

Plaintiff, proceeding *pro se*, commenced this action against Defendants Cross State Moving and Schlomo Dostekam arising out of a dispute over a discount voucher for moving services. Plaintiff, in her Complaint, alleges: false advertising (Count I); a violation of the District of Columbia Consumer Protection Act (Count II); fraud (Count III); negligent misrepresentation (Count IV); and unjust enrichment (Count V). *See generally* Complaint (ECF No. 1). As the basis for this court's subject matter jurisdiction, Plaintiff cites the federal statute granting jurisdiction based on diversity of citizenship. *Id.* ¶ 5. In support, Plaintiff asserts that (1) she is a "legal" resident of Hartford County, Connecticut, (2) Defendant Dostekam is the registered agent and the owner of Cross State Moving; (3) Cross State Moving's corporate headquarters and registered agent are located in Maryland; and (4) the amount in controversy exceeds \$75,000. *Id.* at 2.¹

Plaintiff alleges that after purchasing a "Cross State Moving \$250 deal for \$500 worth of moving service[s][,]" Defendants declined to provide moving services at the advertised discounted

¹ Plaintiff, in the caption of her Complaint, provides an address in the District of Columbia; additionally, she provides a "mailing address" located in the District of Columbia. *See* Complaint (ECF No. 1) at 1, 12.

price. *Id.* at 2–3. Plaintiff alleges that Defendants overcharged her with “extra hour, extra credit card charges and extra parking charges.” *Id.* at 4. Plaintiff alleges that Defendants billed her a total of \$689 for moving services. *See id.* at 7 (Combined Uniform Household Goods Bill of Lading and Freight Bill). As relief, Plaintiff demands compensation for all damages suffered as a result of Defendants’ conduct, an award of reasonable attorneys’ fees and costs, and actual and punitive damages of not less than \$108,000. *Id.* at 12.

In his Answer to the complaint, Defendant Dostekam, *inter alia*, denied that Plaintiff’s residence is Connecticut, asserted that Plaintiff “held herself out to be a resident of Maryland who was moving to her present address in the District of Columbia[,]” and demanded “strict proof of residency,” or dismissal for lack of diversity. *See* Answer (ECF No. 12) at 1.

On July 21, 2014, the Clerk of the Court entered a default as to Defendant Cross State Moving. *See* Entry of Default (ECF No. 8). That same day, Plaintiff filed a Motion for Default Judgment against Cross State Moving, in which she requested an award of damages in the amount of \$108,000. *See* Motion for Default Judgment and Supporting Affidavit (ECF No. 9) at 1–2.² On December 1, 2014, the Court (Leon, J.) denied without prejudice Plaintiff’s motion for default judgment because “Plaintiff’s demand for \$108,000, without proper documentation or other evidence to support it, does not demonstrate her entitlement for such relief.” *See* Memorandum Order (ECF No. 16) at 4.

This action was referred to the undersigned United States Magistrate Judge for full case management. *See* Order (ECF No. 26).³ Defendant Dostekam filed a motion to dismiss in

² Plaintiff filed a duplicate Motion for Default Judgment. *See* (ECF No. 13).

³ The undersigned advised *pro se* Plaintiff of her obligations under the Federal Rules of Civil Procedure and the rules of this Court, in accordance with the dictates of this Circuit. *See* Order (ECF No. 38).

accordance with the undersigned's scheduling order, on the ground of subject matter jurisdiction, and because the moving contract "waive[d] the Court's jurisdiction in favor of arbitration." Motion to Dismiss (ECF No. 41) at 1.

On January 8, 2016, Plaintiff moved for both the assigned District Judge and the undersigned Magistrate Judge to recuse themselves from this case. *See* Motion to Recuse (ECF No. 43). Both the undersigned and the assigned District Judge entered orders denying Plaintiff's Motion to Recuse. *See* Order (ECF No. 48); 05/09/2016 Minute Order. Plaintiff sought an interlocutory appeal of the undersigned's order denying her Motion to Recuse. *See* Notice of Interlocutory Appeal (ECF No. 50). During the pendency of the appeal, the undersigned denied Defendant's motion to dismiss without prejudice. *See* Order (ECF No. 52). On January 4, 2017, the Court of Appeals for the District of Columbia Circuit denied Plaintiff's request. *See* Order (ECF No. 53). Following the resolution of Plaintiff's appeal, Defendant Dostekam re-filed his motion to dismiss. *See* Motion to Dismiss (ECF No. 57). Plaintiff then filed an opposition to the motion. *See* Plaintiff's Opposition to Defendant's Motion to Dismiss ("Plaintiff's Opp'n") (ECF No. 60).

Upon consideration of Defendant Dostekam's motion, the memoranda in support thereof and in opposition thereto, and the entire record herein, the undersigned will recommend that the Court grant the motion and dismiss this action for lack of subject matter jurisdiction.

CONTENTIONS OF THE PARTIES

Defendant Dostekam moves to dismiss Plaintiff's complaint on two grounds. First, Dostekam contends that this court lacks subject matter jurisdiction over this action because there is a lack of diversity between the parties. Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss ("Dostekam's Mem.") (ECF No. 57) at 2. Dostekam asserts that

Plaintiff held herself out as a resident of the District of Columbia when she filed her complaint on February 18, 2014, and also in September 2014. *Id.* at 2. Dostekam also argues that Plaintiff is attempting to “boot strap” herself into diversity jurisdiction by relocating to Connecticut after filing this action. *See id.*

With respect to the amount in controversy, Defendant Dostekam contends that even if Plaintiff meets the requirement for diversity, Plaintiff’s “[c]omplaint . . . does not meet the 28 U.S.C. § 1332(a) amount in controversy of a bona fide claim for \$75,000.” *Id.* Dostekam contends that Plaintiff’s actual injuries total “\$220.00, the difference between the coupon value [she] purchased and the one [she was] erroneously credited with, and possibly whatever nominal expenses [she] may have incurred in traveling to and from the Court location in Washington, D.C.” *Id.* at 3 (footnote omitted).

Dostekam further contends that Plaintiff’s prayer for punitive damages cannot bring the value of her claims to \$75,000 because “Plaintiff’s breach of contract and statutory claims – even if otherwise viable – do not give rise to a claim for punitive damages.” *Id.* Defendant Dostekam maintains that even if Plaintiff could recover punitive damages, it would require an award “of nearly 350 times greater than Plaintiff’s alleged compensatory damages” to meet the statutory requirement for diversity jurisdiction. *Id.* at 4. Dostekam also argues that in keeping with the precedents in this District, an award of such a ratio of punitive damages to compensatory damages is inappropriate here because Plaintiff has “alleged a purely economic injury, and had not alleged that Defendant Dostekam showed a reckless disregard for the health or safety of others.” *Id.* (citing *McQueen v. Woodstream Corp.*, 672 F. Supp. 2d 84, 92 (D.D.C. 2009)).

In the alternative, Dostekam contends that Plaintiff remains bound by the terms of the moving contract, specifically section 10, which requires that all disputes arising out of the contract be submitted to arbitration. *Id.* at 5–6.

Plaintiff, in her opposition, asserts that her complaint is sufficient under Rule 8(a) of the Federal Rules of Civil Procedure, and that to survive a “Rule 12 Motion to Dismiss[,] Plaintiff’s Complaint only has to be ‘plausible.’” *See* Plaintiff’s Opp’n at 2–3. Plaintiff further contends that Defendant Dostekam is subject to this court’s jurisdiction because Defendant Dostekam owns Cross State Moving and the events giving rise to this action occurred in the District. *Id.* at 4.

Plaintiff does not offer any arguments in opposition to Defendant Dostekam’s challenge to the lack of diversity and the statutory amount in controversy. Rather, Plaintiff contends that this court has subject matter jurisdiction over Defendant Dostekam because he previously admitted to violating federal fraud laws, and that Defendant Dostekam willfully and intentionally devised a scheme to defraud Plaintiff. *Id.* at 4–5. Plaintiff alleges that Defendant Dostekam has a history of violating federal interstate commerce laws and committing fraud. *Id.* at 5. Plaintiff maintains that she is only required to “give [D]efendant fair notice of what [her] claim is and the grounds upon which it rests.” *Id.* Plaintiff further contends that Dostekam wants this court to deny her Fourteenth Amendment rights, constitutional guarantees, and her rights under binding precedent. *Id.* at 7. Plaintiff argues that the assigned District Judge and the undersigned Magistrate Judge are required to liberally construe her pleadings because Plaintiff is a *pro se* litigant, and maintains that the Court has a legal duty to ensure that *pro se* litigants do not have additional barriers in accessing the courts, and to prevent “inadvertent forfeiture of their rights because of their lack of legal training.” *Id.* at 8 (citation omitted). Citing case law from the Second, Ninth, and Tenth Circuits,

Plaintiff contends that *pro se* litigants “must be freely afforded an opportunity to amend a complaint” *Id.* at 10.

Plaintiff also argues that the court has created the appearance of bias in favor of Defendant Dostekam and his attorney, by giving Dostekam legal advice, ruling on Defendant’s motion before Defendant mailed the motion to the Plaintiff, refusing to sanction or force Defendant to pay Plaintiff’s travel costs, and refusing to schedule another conference. *See id.* at 12–13. Finally, Plaintiff requests that the court grant her leave to amend her complaint “as a right.” *Id.* at 14.

Defendant Dostekam, in reply, contends that Plaintiff’s argument is not responsive to his motion to dismiss because the motion is not based upon Rules 12(b)(6) or 12(c). *See* Response to Plaintiff’s Opposition (“Defendant’s Reply”) (ECF No. 44) at 1. Dostekam reiterates that this Court cannot hear this case because the underlying contract between the parties provides for arbitration of any disputes; diversity of citizenship is lacking because Plaintiff was a resident of the District of Columbia when she commenced this action; and Plaintiff cannot meet the jurisdictional \$75,000 amount in controversy requirement. *Id.* Defendant Dostekam denies Plaintiff’s allegations that he admittedly violated federal fraud or theft statutes, or that he intentionally defrauded Plaintiff. *Id.* at 1–2. Defendant Dostekam asserts that Plaintiff confuses the basis of his motion to dismiss with a motion to dismiss based upon a lack of factual predicate. *Id.* at 2. Finally, Dostekam maintains that the court should dismiss this action since Plaintiff’s Opposition “does not rebut any of [the defenses raised in the motion to dismiss].” *Id.* at 3.

STANDARD OF REVIEW

Subject Matter Jurisdiction Pursuant to Federal Rule of Civil Procedure 12(b)(1)

Federal Rule of Civil Procedure 12(b)(1) provides for the dismissal of an action for lack of jurisdiction over the subject matter of the complaint. *See* Fed. R. Civ. P. 12(b)(1). Federal courts

are courts of limited jurisdiction, and governing law “presumes that ‘a cause lies outside this limited jurisdiction.’” *Tsigie v. Faculty Practice Plan*, No. 12-1876, 2013 WL 4505938, at *4 (D.D.C. Aug. 22, 2013) (quoting *Edwards v. Freeman*, No. 13-0043, 2013 WL 3243556, at *3 (D.D.C. June 28, 2013)); *see also Kokkenen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). A court, in its determination of whether it has subject matter jurisdiction, “may ‘consider the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court’s resolution of disputed facts.’” *Tsigie*, 2013 WL 4505938, at * 4 (quoting *Lempert v. Rice*, No. 12-01518, 2013 WL 3776261, at *3 (D.D.C. July 19, 2013)) (citation omitted). “[Counseled]” complaints, as well as complaints filed by plaintiffs proceeding *pro se*, “are to be construed with sufficient liberality to afford all possible inferences favorable to the pleader on allegations of fact.” *Id.* (citation and internal quotation marks omitted). These favorable inferences notwithstanding, it remains the burden of the plaintiff to prove subject matter jurisdiction by a preponderance of the evidence. *Id.* (citations omitted); *cf. White v. Hillcrest Davidson and Associates*, No. 12-1346, 2013 WL 3358045, at *1 (D.D.C. July 5, 2013) (citation and internal quotation marks omitted) (“The plaintiff’s *pro se* status does not relieve her of her obligation to ‘plead an adequate jurisdictional basis for her claims.’”).

“As a general matter, courts should consider Rule 12(b)(1) challenges to its subject matter jurisdiction before assessing the legal sufficiency of a claim under Rule 12(b)(6).” *Lempert*, 2013 WL 3776261, at *7 (citation omitted).

DISCUSSION

The undersigned finds that Plaintiff has failed to carry her burden to prove, by a preponderance of the evidence, that this Court has subject matter jurisdiction over this action.

Subject Matter Jurisdiction – Diversity of Citizenship

In order for a district court to exercise diversity jurisdiction over an action, the parties must be citizens of different states and the amount in controversy must exceed the sum or value of \$75,000, exclusive of interests and costs. 28 U.S.C. § 1332(a)(1).

With respect to the citizenship of the parties, Defendant Dostekam makes several arguments that the parties are not diverse. The undersigned, however, has no occasion to make findings with respect to those arguments because it is clear that even if the parties are diverse, the Complaint does not meet the statutory requirement of the amount in controversy. Plaintiff appears to allege that Defendant Dostekam engaged in fraudulent misrepresentation in violation of District of Columbia law. *See* Complaint ¶¶ 9–30. “The District of Columbia Court of Appeals has ‘explicitly recognized [the ‘out-of-pocket’ damages measure] as the norm’ in fraudulent misrepresentation cases.” *McQueen*, 672 F. Supp. 2d at 89 (quoting *Dresser v. Sunderland Apartments Tenants Ass’n*, 465 A.2d 835, 840 n.18 (D.C. 1983)) (additional citations omitted). The “out-of-pocket” measure is subject to exception only “in rare cases where necessary to effect justice.” *McQueen*, 672 F. Supp. 2d at 89 (citation omitted). Under District of Columbia law, a plaintiff can recover punitive damages if “it is shown by clear and convincing evidence that the tort committed by the defendant was aggravated by egregious conduct and a state of mind that justifies punitive damages.” *Id.* at 90 (citation omitted).

While courts may consider punitive damages in computing the amount in controversy, “courts in this circuit have adhered to the Supreme Court’s observation regarding the permissible ratio between compensatory and punitive damages.” *McQueen*, 672 F. Supp. 2d at 91; *see also Hunter v. District of Columbia*, 384 F. Supp. 2d 257, 260 (D.D.C. 2005) (holding that a plaintiff who suffered damages of \$5,500 could not meet the amount in controversy requirement, which

would require a ratio of punitive to compensatory damages of approximately 13 to 1); *Thomas v. Nat'l Legal Prof'l Assoc.*, 594 F. Supp. 2d 31, 34 (D.D.C. 2009) (holding that a plaintiff met the amount-in-controversy requirement with a 6.5 to 1 ratio of punitive to compensatory damages). In this Circuit, subject matter jurisdiction is lacking if it is “highly improbable that the amount in controversy could exceed the jurisdictional threshold, and when plaintiff submits no evidence to the contrary.” *McQueen*, 672 F. Supp. 2d at 91; *Hunter*, 384 F. Supp. 2d at 260; *see also* *Rosenboro v. Kim*, 994 F.2d 13, 18 (D.C. Cir. 1993).

In the instant action, Plaintiff requests actual and punitive damages of not less than \$108,000. *See* Complaint at 12. Plaintiff does not dispute that her out-of-pocket loss is \$220, thus, Plaintiff is requesting punitive damages in the amount of \$107,780.⁴ Such an award would result in a punitive damages to compensatory damages ratio of approximately 490 to 1, which the undersigned finds to be unconstitutionally excessive and not recoverable as a matter of law.⁵ The undersigned therefore finds that diversity jurisdiction is lacking because the damages Plaintiff has alleged, as well as any allowable punitive damages, does not satisfy the amount in controversy requirement.

Subject Matter Jurisdiction – Federal Question

While Plaintiff, in her Complaint, primarily alleges subject matter jurisdiction on diversity grounds, Plaintiff’s opposition to the instant motion to dismiss includes the argument that subject

⁴ Defendant Dostekam concedes that in addition to the out-of-pocket amount of \$220.00, Plaintiff’s loss could include reasonable expenses of “possibly whatever nominal expenses [she] may have incurred in traveling to and from the Court location in Washington, D.C.” Dostekam’s Mem. at 5 (footnote omitted).

⁵ The undersigned notes that the assigned District Judge (Leon, J.) previously declined to enter a default judgment against Defendant Cross State Moving and found that “Plaintiff’s demand for \$108,000, without proper documentation or other evidence to support it, does not demonstrate her entitlement for such relief.” *See* Memorandum Order (ECF No. 16) at 4.

matter jurisdiction is proper based on allegations arising under various federal fraud statutes. *See* Plaintiff's Opp'n at 4–5. Plaintiff argues that Defendants have “admitted to violating Federal Fraud laws” and alleges violations of Wire Fraud, Internet Fraud, Bank Fraud, Simple Fraud, and Theft by Interstate Commerce. *Id.* at 4.

While a court must liberally construe a *pro se* plaintiff's pleadings, *Erickson v. Pardus*, 551 U.S. 89, 94 (2007), Plaintiff has made no showing that she is entitled to bring a civil action to enforce federal criminal provisions. *See Morris v. Carter Global Lee, Inc.*, 997 F. Supp. 2d 27, 40–41 (D.D.C. 2013) (“[E]ven if Plaintiff did provide sufficient allegations, he is still not entitled to sue to enforce these federal criminal provisions.”); *Potter v. Toei Animation Inc.*, 839 F. Supp. 2d 49, 54 (D.D.C. 2012) (“[T]o the extent Plaintiff is seeking to bring a cause of action under the criminal statute . . . it provides no private civil right of action.”); *Wiggins v. Hitchens*, 853 F. Supp. 505, 511 (D.D.C. 1994) (“Federal wire fraud is a criminal offense that has no corresponding private right of action.”).

The undersigned thus finds that Plaintiff has failed to show any cognizable civil action pursuant to the cited federal statutes, and therefore finds that subject matter jurisdiction on the basis of a federal question is lacking.

CONCLUSION

As Plaintiff's Complaint fails to meet the requirements for either federal question or diversity jurisdiction, the undersigned finds that this court is without subject matter jurisdiction to address the merits of Plaintiff's Complaint.

For all the foregoing reasons, it is, this 20th day of March, 2017,

RECOMMENDED that Defendant's Motion to Dismiss (ECF No. 57) be **GRANTED**.

/s/
DEBORAH A. ROBINSON
United States Magistrate Judge

Within fourteen days, either party may file written objections to this report and recommendation. The objections shall specifically identify the portions of the findings and recommendations to which objection is made, and the basis of each such objection. In the absence of timely objections, further review of issues addressed herein may be deemed waived.