NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-2043

AMRO A. ELANSARI,
Appellant

v.

UNIVERSITY OF PENNSYLVANIA

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 2-19-cv-00786)
District Judge: Honorable Paul S. Diamond

Submitted Pursuant to Third Circuit LAR 34.1(a)
July 16, 2019
Before: CHAGARES, KRAUSE, and NYGAARD, Circuit Judges

(Opinion filed: July 17, 2019)

OPINION*

PER CURIAM

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* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

Amro Elansari appeals the District Court's sua sponte dismissal of his amended complaint for failure to state a claim pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii). For the following reasons, we will affirm.

Elansari filed his action and a motion to proceed in forma pauperis (IFP) with the District Court on February 25, 2019, alleging that the University of Pennsylvania, John Doe professor, and "ChargeItSpot" violated 45 C.F.R. § 46.116, which imposes informed consent requirements on human research studies. Elansari's cause of action stems from his use of a phone charging station, which allows those in need of a charge to "put [their] phone in a locker, unlock it with a code, and retrieve [their] phone once it has charged." Am. Compl. ¶ 2. Elansari alleged he used one of these charging stations; however, when he went to retrieve his phone, he had to complete a University of Pennsylvania survey on consumer psychology, which he did not consent to. According to Elansari, "the button to skip the survey was 'broken'" and he was therefore forced to provide information that he did not want to divulge in order to get his phone back. Am. Compl. ¶ 12.

The District Court granted Elansari's IFP motion, but dismissed the action, with leave to amend, for failure to state a claim under § 1915(e)(2)(B)(ii). Specifically, the District Court held that Elansari failed to allege facts indicating that any of the defendants were subject to the federal regulation.[1] Elansari filed his amended complaint against the

[1] The District Court also directed Elansari to identify all defendants in the caption of any amended complaint, because he had named John Doe professor and "ChargeItSpot" only in the body of the complaint.

University of Pennsylvania[2] arguing that the university was subject to § 46.116 because it "receives substantial amounts of federal funding each year." Am. Compl. ¶ 24. The District Court disagreed, noting that simply receiving federal funding does not indicate that the university is subject to the regulation, and further noted that § 46.116 does not provide a private cause of action.[3] To the extent Elansari was attempting to bring a 42 U.S.C. § 1983 action, the District Court determined that he failed to show that any of the defendants were state actors. The District Court dismissed the amended complaint with prejudice.[4] Elansari timely appealed.

We have jurisdiction pursuant to 28 U.S.C. § 1291. Our review of the District Court's sua sponte dismissal pursuant to § 1915(e)(2)(B)(ii) is de novo. See Allah v. Seiverling, 229 F.3d 220, 223 (3d Cir. 2000). When considering whether to dismiss a complaint for failure to state a claim pursuant § 1915(e)(2)(B)(ii), the District Court uses the same standard it employs under Fed. R. Civ. P. 12(b)(6). See id. "[A] complaint must contain sufficient factual allegations, taken as true, to 'state a claim to relief that is plausible on its face.'" Fleisher v. Standard Ins. Co., 679 F.3d 116, 120 (3d Cir. 2012) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). We accept all factual allegations in the complaint as true and construe those facts in the light most favorable to

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[2] Elansari again failed to name John Doe professor and "ChargeItSpot" in the caption.

[3] The District Court also noted that Elansari failed to allege any facts indicating that John Doe professor or "ChargeItSpot" was subject to the federal regulations.

[4] The District Court, in the alternative, dismissed the possible state law tort claims due to a lack of subject matter jurisdiction. See Fed. R. Civ. P. 12(h)(3).

the plaintiff. Id. "We may affirm a district court for any reason supported by the record." Brightwell v. Lehman, 637 F.3d 187, 191 (3d Cir. 2011).

Elansari's brief on appeal is a single page consisting of two sentences. Even liberally construing this filing, we are unable to surmise his challenges to the District Court's determinations. Consequently, we are inclined to view Elansari's one-page brief—which sets forth none of the issues addressed by the District Court and contains no citation to authority or the record—as effectively waiving any challenge to the District Court's rulings on these matters.[5] See Kost v. Kozakiewicz, 1 F.3d 176, 182 (3d Cir. 1993) (noting that if an appellant fails "to set forth the issues raised on appeal and to present an argument in support of those issues in their opening brief," those issues are normally deemed "abandoned and waived . . . on appeal and [they] need not be addressed by the court of appeals"); see also Doeblers' Pa. Hybrids, Inc. v. Doebler, 442 F.3d 812, 821 n.10 (3d Cir. 2006) (noting that "passing and conclusory statements do not preserve an issue for appeal").

Even if we declined to enforce this waiver, we would—for the reasons mentioned above and thoroughly discussed in the District Court's order—agree with the District Court's dismissal pursuant to § 1915(e)(2)(B)(ii). Additionally, the District Court did not err in declining to invite additional amendment of the complaint. See Grayson v. Mayview State Hosp., 293 F.3d 103, 111 (3d Cir. 2002).

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[5] Elansari, who states in his District Court filings that he is a law student, is proceeding pro se. Although we construe pro se filings liberally, this policy has not prevented us from applying the waiver doctrine to pro se appeals. See, e.g., Emerson v. Thiel Coll., 296 F.3d 184, 190 n.5 (3d Cir. 2002) (per curiam).

For all of the forgoing reasons, we will affirm the District Court's judgment.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-2043

AMRO A. ELANSARI,
Appellant

v.

UNIVERSITY OF PENNSYLVANIA

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 2-19-cv-00786)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, PORTER, MATEY and NYGAARD*, Circuit Judges

The petition for rehearing filed by Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the

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* Honorable Richard L. Nygaard's vote is limited to panel rehearing.

circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/Michael A. Chagares
Circuit Judge

Dated: August 7, 2019
JK/cc: Amro A. Elansari

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AMRO ELANSARI,	:	
Plaintiff,	:	
	:	
v.	:	**Civ. No. 19-786**
	:	
UNIVERSITY OF PENNSYLVANIA,	:	
Defendant.	:	

ORDER

On February 25, 2019, Plaintiff Amro Elansari moved to proceed *in forma pauperis* and filed a *pro se* Complaint against the University of Pennsylvania. (Doc. Nos. 1, 2.) Although not listed in the caption, Plaintiff also named a John Doe professor and "ChargeItSpot" as Defendants in his Complaint. (Doc. No. 2.) On March 5, 2019, I granted Plaintiff leave to proceed *in forma pauperis* and dismissed his Complaint with leave to amend. (Doc. Nos. 4, 5.)

On April 2, 2019, Plaintiff filed an Amended Complaint against the University of Pennsylvania. (Doc. No. 6.) He again names a John Doe professor and "ChargeItSpot" as Defendants only in the body of the Amended Complaint, despite my instructions to identify all Defendants in the caption of his complaint. (Id.; Doc. No. 5.)

I will now dismiss Plaintiff's Amended Complaint. 28 U.S.C. § 1915(e)(2)(B)(ii); Fed. R. Civ. P. 12(h)(3).

I. FACTS AS ALLEGED

Once again, Plaintiff alleges that in November 2018, he "was on his way home . . . when he found that his phone was out of battery near the Exton Mall where there are various phone charging stations labelled 'Free Charging.'" (Am. Compl. 1.) These phone stations allow users to "put [their] phone in a locker, unlock it with a code, and retrieve [their] phone once it has charged." (Id.) Plaintiff used one of these stations. (Id.) To retrieve his phone, however, Plaintiff

was "force[d]" to complete a University of Pennsylvania survey on consumer psychology, leading to "the forceful taking" of his "personal and sensitive information." (Id.) According to Plaintiff, "the button to skip the survey was 'broken.'" (Id. at 3.) Plaintiff "never consented to providing information to the University of Pennsylvania and instead was made to by taking an extensive 20 question psychological survey probing for very deeply intrinsic subconscious consumer thoughts and preferences in a very provocative manner." (Id. at 4.)

Plaintiff now alleges a violation of 45 C.F.R. § 46.116, which imposes informed consent requirements in human research studies. (Id. at 6–9.) He seeks declaratory relief and damages. (Id. at 9.)

II. LEGAL STANDARD

Because Plaintiff is proceeding *in forma pauperis*, I must dismiss Plaintiff's Complaint if it fails to state a claim. 28 U.S.C. § 1915(e)(2)(B)(ii); see Tourscher v. McCullough, 184 F.3d 236, 240 (3d Cir. 1999) (failure to state a claim under § 1915(e)(2)(B)(ii) is the same standard applicable to motions to dismiss under Federal Rule of Civil Procedure 12(b)(6)); see also Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (the court must determine whether the complaint contains "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face"). Conclusory statements do not suffice. Iqbal, 556 U.S. at 678. Because Plaintiff is proceeding *pro se*, I will construe his allegations liberally. Higgs v. Att'y Gen., 655 F.3d 333, 339 (3d Cir. 2011).

I must also dismiss Plaintiff's Complaint *mea sponte* if I determine that I lack subject matter jurisdiction. Fed. R. Civ. P. 12(h)(3). Dismissal is appropriate where there is a failure to advance a *bona fide* federal cause of action, or a failure to establish diversity of citizenship (for any state law claims). 28 U.S.C. §§ 1331, 1332(a); see Coulter v. Tatananni, 737 Fed. Appx. 613, 615 (3d Cir. 2018).

III. DISCUSSION

A. Federal Law Claims

In the first iteration of his Complaint, Plaintiff purported to invoke this Court's federal question jurisdiction ""as to whether or not [Defendants'] actions constitute[] violations of federal regulations on research and the rights of people being used as research subjects without consent." (Compl. at 4.) In response, I noted that 45 C.F.R. § 46.116 sets forth the general requirements for informed consent in research studies, but that it applies only to "research involving human subjects conducted, supported, or otherwise subject to regulation by any Federal department or agency that takes appropriate administrative action to make the policy applicable to such research." 45 C.F.R. § 46.101(a). Because Plaintiff did not allege facts indicating that the University of Pennsylvania, the John Doe Professor, or "ChargeItSpot" were subject to these requirements, I dismissed his Complaint without prejudice.

Attempting to cure this defect, Plaintiff alleges that the University of Pennsylvania is subject to § 46.116 because it "receives substantial amounts of federal funding each year." (Am. Compl. 7.) This allegation does not, however, convert the University into a federal department or agency or indicate that the underlying study was supported or subject to federal regulation. Plaintiff also fails to allege any facts indicating that the unnamed Professor or "ChargeItSpot" are subject to these requirements. Finally, § 46.116 does not provide a private cause of action. See Bilinski v. Wills Eye Hosp., No. 16-02728, 2016 WL 6247569, at *2 (citing Thomas v. Catlin, 141 F. App'x 673, 674 (9th Cir. 2005) and Robinett v. United States, No. 95-5023, 1995 WL 473105, at *1 (Fed. Cir. Aug. 10, 1995)).

Plaintiff also fails to allege a viable civil-rights claim for a violation of his constitutional right to privacy. 42 U.S.C. § 1983. To state a claim under § 1983, Plaintiff must allege that his

constitutional rights were violated by "a person acting under color of state law." West v. Atkins, 487 U.S. 42, 48 (1988). Although Plaintiff alleges that the University of Pennsylvania receives federal funding, "state contributions to otherwise private entities, no matter how great those contributions may be, will not themselves transform a private actor into a state actor." Krynicky v. Univ. of Pittsburgh, 742 F.2d 94, 102 (3d Cir. 1984), cert. denied 471 U.S. 1015 (1985). Plaintiff also fails to allege that the John Doe professor or "ChargeItSpot" are state actors.

Because Plaintiff fails to make out a viable federal claim, I am again compelled to dismiss under § 1915(e)(2)(B)(ii).

B. Possible State Law Claims

Construed liberally, Plaintiff's claims could give rise to state-law negligence or intentional tort claims. Because Plaintiff has not made out a viable federal claim, I cannot exercise pendent jurisdiction over these state law claims. 28 U.S.C. § 1367; Hedges v. Musco, 204 F. 3d 109, 123 (3d Cir. 2000). Because Plaintiff has not made out diversity jurisdiction, I lack subject matter jurisdiction to hear the claims. 28 U.S.C. § 1332(a); Fed. R. Civ. P. 12(h)(3); Zambelli Fireworks Mgf. Co., Inc. v. Wood, 592 F.3d 412, 420 (3d Cir. 2010) (dismissing state law claim for lack of subject matter jurisdiction where all Parties were citizens of the same state). Accordingly, I will, in the alternative, dismiss Plaintiff's Amended Complaint on this ground as well. Fed. R. Civ. P. 12(h)(3).

IV. CONCLUSION

For the foregoing reasons, I will dismiss Plaintiff's federal claims with prejudice. Because any amendment of these claims would likely be futile, I will not allow Plaintiff to amend his Complaint a second time.

To the extent Plaintiff seeks to raise state law claims, I will dismiss those claims without prejudice. Plaintiff may refile those claims in a proper state court where federal jurisdiction will not be an issue.

An appropriate Judgment follows.

AND IT IS SO ORDERED.

/s/ Paul S. Diamond

April 11, 2019

Paul S. Diamond, J.