

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-50905



ROBERT W. JOHNSON,

Plaintiff - Appellant

A True Copy
Certified order issued Dec 04, 2019

Lyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

v.

KEVIN S. PORTNOY, Doctor of Chiropractic, Auburndale Chiropractic;
JAIMIE COE, Victoria Fire and Casualty; NATIONWIDE INSURANCE;
TEXAS DEPARTMENT OF INSURANCE,

Defendants - Appellees

Appeal from the United States District Court for the
Western District of Texas

CLERK'S OFFICE:

Under 5TH CIR. R. 42.3, the appeal is dismissed as of December 4, 2019,
for want of prosecution. The appellant failed to timely file record excerpts.

LYLE W. CAYCE
Clerk of the United States Court
of Appeals for the Fifth Circuit

A handwritten signature in black ink, appearing to read "Shawn D. Henderson", is written over a horizontal line.

By: _____
Shawn D. Henderson, Deputy Clerk

ENTERED AT THE DIRECTION OF THE COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

ROBERT W. JOHNSON,

Plaintiff,

v.

DR. KEVIN S. PORTNOY, JAIME COE,
NATIONWIDE INSURANCE, and TEXAS
DEPARTMENT OF INSURANCE,

Defendants.

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1:19-CV-786-RP

ORDER

Before the Court is the report and recommendation of United States Magistrate Judge Mark Lane concerning Plaintiff Robert W. Johnson's ("Johnson") complaint pursuant to 28 U.S.C. § 1915(e), 28 U.S.C. § 636(b) and Rule 1(d) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas. (R. & R., Dkt. 4). In his report and recommendation, Judge Lane recommends that the Court dismiss this action pursuant to 28 U.S.C. § 1915(e)(2)(B). (*Id.* at 2). Johnson timely filed objections to the report and recommendation. (Objs., Dkt. 6).

A party may serve and file specific, written objections to a magistrate judge's findings and recommendations within fourteen days after being served with a copy of the report and recommendation and, in doing so, secure *de novo* review by the district court. 28 U.S.C. § 636(b). Because Johnson timely objected to each portion of the report and recommendation, the Court reviews the report and recommendation *de novo*. Having done so, the Court overrules Johnson's objections and adopts the report and recommendation as its own order.

Accordingly, the Court **ORDERS** that the report and recommendation of United States Magistrate Judge Mark Lane, (Dkt. 4), is **ADOPTED**. Johnson's complaint, (Dkt. 1), is

DISMISSED WITHOUT PREJUDICE. The Clerk of the Court is directed to **CLOSE** this action.

SIGNED on September 24, 2019.

A handwritten signature in black ink, appearing to read "Robert Pitman", written over a horizontal line.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

ROBERT W. JOHNSON,

Plaintiffs,

V.

DR. KEVIN S. PORTNOY, JAIMIE COE,
NATIONWIDE INSURANCE, AND
TEXAS DEPARTMENT OF
INSURANCE,

Defendants.

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CAUSE NO. 1:19-CV-0786-RP-ML

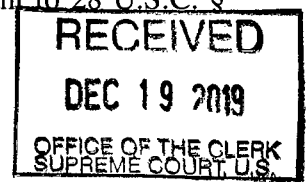
**ORDER ON *IN FORMA PAUPERIS* STATUS AND
REPORT AND RECOMMENDATION ON THE MERITS OF THE CLAIMS**

TO THE HONORABLE ROBERT PITMAN
UNITED STATES DISTRICT JUDGE:

The Magistrate Court submits this Report and Recommendation to the United States District Court pursuant to 28 U.S.C. § 636(b) and Rule 1 of Appendix C of the Local Court Rules of the United States District Court for the Western District of Texas, Local Rules for the Assignment of Duties to United States Magistrate Judges. Before the court is Plaintiff's Application to Proceed *In Forma Pauperis* (Dkt. #2). Because Plaintiff is requesting permission to proceed *in forma pauperis*, this court must review and make a recommendation on the merits of Plaintiffs' claims pursuant to 28 U.S.C. § 1915(e).

I. REQUEST TO PROCEED *IN FORMA PAUPERIS*

The court has reviewed Plaintiff's financial affidavit and determined Plaintiff is indigent and should be granted leave to proceed *in forma pauperis*. Accordingly, the court hereby **GRANTS** Plaintiff's request for *in forma pauperis* status. The Clerk of the Court shall file the complaint without payment of fees or costs or giving security therefor pursuant to 28 U.S.C. §



1915(a). This indigent status is granted subject to a later determination the action should be dismissed if the allegation of poverty is untrue or the action is found frivolous or malicious pursuant to 28 U.S.C. § 1915(e). Plaintiff is further advised, although Plaintiff has been granted leave to proceed *in forma pauperis*, a court may, in its discretion, impose costs of court at the conclusion of this lawsuit, as in other cases. *Moore v. McDonald*, 30 F.3d 616, 621 (5th Cir. 1994).

As stated below, this court has made a § 1915(e) review of the claims made in this complaint and is recommending Plaintiff's claims be dismissed under 28 U.S.C. § 1915(e). Therefore, service upon Defendants should be withheld pending the District Court's review of the recommendations made in this Report. If the District Court declines to adopt the recommendations, then service should be issued at that time upon Defendants.

II. REVIEW OF THE MERITS OF THE CLAIM

A. Factual Background

Plaintiff brings claims against Dr. Kevin S. Portnoy, DC, Auburndale Chiropractic; Jaimie Coe, Victoria Fire & Casualty Company; Nationwide Insurance; and Texas Department of Insurance ("TDI"). He argues that this court has federal question jurisdiction pursuant to 28 U.S.C. § 1331 and asserts claims for "lieing [sic], fraud, falsifying documents, insurance fraud, false testimony, due process violations, civil rights violations, and denial of claimant's insurance rights." Dkt. #1 at 1. He asserts that "Dr. Kevin S. Portnoy lied committing insurance fraud by stating Plaintiff has no spinal disability" in connection with a June 24, 2019 physical examination. As a result, he alleges that his insurance benefits "stemming from [his] January 28, 2019 accident" were found to be no longer warranted and were denied by Jaimie Coe on July 23, 2019. Based on these allegations he seeks "\$100 Trillion Dollars in Punitive Damages; \$500

Billion for Insurance Fraud, \$200 million for Lying [sic] and False Testimony; Judicial Sanctions; Plaintiff 100% ownership of All Defendants Assets, Properties, Stocks, Bonds, Securities, Liquidations (Domestic & Foreign) & Businesses.” *Id.* at 2–3. According to the Complaint and its attachments, Plaintiff resides in Bronx, New York, and Defendant Jaimie Coe of Victoria Fire & Casualty Company works in Daphne, Alabama in association with Nationwide Insurance. The Complaint does not contain any allegations relating to TDI.

B. Standard of Review

Because Plaintiff has been granted leave to proceed *in forma pauperis*, the court is required by statute to review the Complaint. Section 1915(e)(2) provides in relevant part that “the court shall dismiss the case at any time if the court determines that . . . the action or appeal (i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief.” 28 U.S.C. § 1915(e)(2). A complaint is frivolous, if it “lacks an arguable basis either in law or in fact.” *Neitzke v. Williams*, 490 U.S. 319, 325, (1989); *Siglar v. Hightower*, 112 F.3d 191, 193 (5th Cir. 1997). A claim lacks an arguable basis in law when it is “based on an indisputably meritless legal theory.” *Neitzke*, 490 U.S. at 327. A claim lacks an arguable basis in fact when it describes “fantastic or delusional scenarios.” *Id.* at 327–28.

Pro se complaints are liberally construed in favor of the plaintiff. *Haines v. Kerner*, 404 U.S. 519, 20–21 (1972). However, *pro se* status does not offer a plaintiff an “impenetrable shield, for one acting *pro se* has no license to harass others, clog the judicial machinery with meritless litigation, and abuse already overloaded court dockets.” *Ferguson v. MBank Houston N.A.*, 808 F.2d 358, 359 (5th Cir. 1986).

C. Discussion

Generally, a federal court has subject matter jurisdiction over a case in two circumstances. The first, known as federal question jurisdiction, exists if a case “arises under the Constitution, treaties or laws of the United States.” 28 U.S.C. § 1331. The second circumstance in which a federal court has jurisdiction is frequently termed diversity jurisdiction. *See generally* 28 U.S.C. § 1332 (setting out the elements required for jurisdiction based on “diversity of citizenship”). “Diversity jurisdiction under 28 U.S.C. § 1332 only exists where the parties are citizens of different states and the amount in controversy exceeds \$ 75,000.” *White v. FCI USA, Inc.*, 319 F.3d 672, 674-675 (5th Cir. 2003). If the asserted basis of federal jurisdiction is the diversity of the parties, 28 U.S.C. § 1332, the party seeking to invoke federal diversity jurisdiction bears the burden of establishing both that the parties are diverse and that the amount in controversy exceeds \$75,000. *Manguno v. Prudential Prop. & Cas. Ins. Co.*, 276 F.3d 720, 723 (5th Cir. 2002).

Here, Plaintiff asserts that this court has federal question jurisdiction, possibly based on his “civil rights” claims. But Plaintiff has not pleaded any facts that plausibly give rise to a claim under 42 U.S.C. § 1983 because he has not alleged any violation of his rights by a person acting under color of state law. Thus, the court lacks federal question jurisdiction over Plaintiff’s claims as they are currently pleaded. It is unclear whether this court has diversity jurisdiction: Plaintiff identifies himself as a resident of New York and attaches information that suggests Defendant Jaimie Coe, of Victoria Fire and Casualty and Nationwide Insurance, is located in Alabama. He includes no other allegations or documents that suggest the citizenship for diversity purposes of the remaining defendants.¹

¹ Plaintiff names TDI as a defendant, but has not included any allegations, jurisdictional or otherwise, that involve TDI. Nevertheless “[i]t is well established that a state is not a ‘citizen’ for purposes of diversity

But even if the court could exercise diversity jurisdiction over this matter, this is not the proper venue for this case. Under 28 U.S.C. § 1391(b), a civil action may be brought in “(1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located; (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or (3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court’s personal jurisdiction with respect to such action.” This dispute appears to concern a New Yorker’s private insurance claims. Plaintiff has not pleaded any facts that connect the events underlying this lawsuit with the Western District of Texas.² Moreover, although Plaintiff names TDI as a defendant in this case he has not pleaded any facts that connect Defendant TDI with the events underlying this lawsuit. Thus, Plaintiff has not articulated any reason this venue is proper.

For the foregoing reasons, the undersigned recommends that this suit be dismissed without prejudice.

III. ORDER AND RECOMMENDATIONS

The Magistrate Court hereby **GRANTS** Plaintiff’s Application to Proceed *In Forma Pauperis* (Dkt. #2). The Magistrate Court **RECOMMENDS** the District Court **DISMISS WITHOUT PREJUDICE** Plaintiffs’ Complaint.

The referral of this matter to the Magistrate Judge should now be **CANCELED**.

jurisdiction.” *Tradigrain, Inc. v. Miss. State Port Auth.*, 701 F.2d 1131, 1132 (5th Cir. 1983). “The effects of this rule extend to any state agency ‘which is merely an alter ego of the state,’ but not to independent agencies whose existence is ‘separate and distinct from the state.’ *Tex. Cnty. and Dist. Ret. Sys. v. Wexford Spectrum Fund, L.P.*, 953 F. Supp. 2d 726, 729–730 (W.D. Tex. 2013)(quoting *Tradigrain*, 701 F.2d at 1132). Additionally, Plaintiff did not include any information that allows the court to analyze the citizenship of either Dr. Kevin S. Portnoy or Nationwide Insurance for diversity purposes.

² Plaintiff recently filed a case regarding a New York State Thruway Authority debt in this court’s San Antonio Division. That case, like this one, lacks any apparent connection to this judicial district. *See* Cause No. 5:19-CV-00878-FB-HJB.

IV. WARNING

The parties may file objections to this Report and Recommendation. A party filing objections must specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive, or general objections. *See Battles v. United States Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987).

A party's failure to file written objections to the proposed findings and recommendations contained in this Report within fourteen (14) days after the party is served with a copy of the Report shall bar that party from de novo review by the District Court of the proposed findings and recommendations in the Report and, except upon grounds of plain error, shall bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the District Court. *See* 28 U.S.C. § 636(b)(1)(C); *Thomas v. Arn*, 474 U.S. 140, 150-53 (1985); *Douglass v. United Services Automobile Ass'n*, 79 F.3d 1415 (5th Cir. 1996)(en banc).

SIGNED August 14, 2019



MARK LANE
UNITED STATES MAGISTRATE JUDGE

**Additional material
from this filing is
available in the
Clerk's Office.**