

DLD-098

January 23, 2020

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **19-3143**

DR. BEVERLEY M. HARRIS, Appellant

VS.

THE BOZZUTO GROUP; ET AL.
(D.N.J. Civ. 2-18-cv-10277)

Present: RESTREPO, PORTER, and NYGAARD, Circuit Judges

Submitted are:

- (1) By the Clerk for possible dismissal due to jurisdictional defect;
- (2) Appellant's October 7, 2019 response to possible dismissal;
- (3) Appellant's November 4, 2019 "information on continuous torturing"; and
- (4) Appellant's November 8, 2019 response to possible dismissal in the above-captioned case.

Respectfully,

Clerk

ORDER

The appeal is dismissed for lack of appellate jurisdiction. "Ordinarily the proceedings in a district court must be final as to [] all causes of action and parties for a court of appeals to have jurisdiction over an appeal under 28 U.S.C. § 1291." Morton Int'l, Inc. v. A.E. Staley Mfg. Co., 460 F.3d 470, 476 (3d Cir. 2006). Here, Harris's third amended complaint remains pending, and the case is therefore not final. Our dismissal is without prejudice to Harris's ability to file a new notice of appeal when the District Court issues a final judgment in her case. To the extent that Harris presents requests for relief in her filings in this Court, those requests are denied.

By the Court,

s/ Richard L. Nygaard
Circuit Judge

A True Copy



Patricia S. Dodszuweit

Patricia S. Dodszuweit, Clerk
Certified Order Issued in Lieu of Mandate

Dated: January 28, 2020
SLC/cc: Beverly M. Harris
Daniel L. Russell, Jr., Esq.

APPENDIX H

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAMBERS OF
MADELINE COX ARLEO
UNITED STATES DISTRICT JUDGE

MARTIN LUTHER KING
COURTHOUSE
50 WALNUT ST. ROOM 4066
NEWARK, NJ 07101
973-297-4903

December 5, 2019

VIA CERTIFIED MAIL

Beverley M. Harris
230 Hamilton Avenue
New Rochelle, NY 10801

VIA ECF

Counsel for Defendants

LETTER ORDER

Re: **Dr. Beverley M. Harris v. The Bozzuto Group, et al.,**
Civil Action No. 18-10277

Dear Litigants:

Before the Court are two motions filed by Plaintiff: “To order defendant to provide a rental resume for Plaintiff’s prospective landlord,” ECF No. 130, and “For an order against the Defendant FBI to cease and desist defamation and continued torture,” ECF No. 131.

By letter order dated April 24, 2019, this Court dismissed the complaint without prejudice, specifically finding no subject matter jurisdiction against the FBI. See Letter Order at 4, ECF No. 103. Plaintiff thereafter filed a third amended complaint, ECF No. 107, and Defendants filed renewed motions to dismiss, ECF Nos. 110, 127, 128 or for summary judgment, ECF No. 129. Those motions are pending.

Plaintiff has filed similar motions for inappropriate relief during the course of this litigation and all have been denied. Plaintiff is therefore ordered not to file any additional motions without permission from the Court, and no additional motions while the motions to dismiss are pending. Plaintiff’s motions at ECF Nos. 130 and 131 are both **DENIED** as without merit and frivolous. All discovery is stayed. If and when this case proceeds to discovery, these issues can be raised with the Magistrate Judge at the initial conference.

So ordered.

/s Madeline Cox Arleo
Hon. Madeline Cox Arleo
United States District Judge

*After this order, the FBI
TORTURING INCREASED dramatically*

CLOSING

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

**CHAMBERS OF
MADELINE COX ARLEO
UNITED STATES DISTRICT
JUDGE**

**MARTIN LUTHER KING
COURTHOUSE
50 WALNUT ST. ROOM 4066
NEWARK, NJ 07101
973-297-4903**

April 24, 2019

VIA CERTIFIED MAIL

Beverley M. Harris
230 Hamilton Avenue
New Rochelle, NY 10801

VIA ECF

Counsel for Defendants

LETTER ORDER

**Re: Dr. Beverley M. Harris v. The Bozzuto Group, et al.,
Civil Action No. 18-10277**

Dear Litigants:

Before the Court is Defendants The Bozzuto Group, Thomas S. Bozzuto, Toby Bozzuto, David Curcio and Michelle Demetriou's (collectively, the "Bozzuto Defendants") Motion to Dismiss, ECF No. 26, and former United States Attorney General Jefferson Sessions and Federal Bureau of Investigation Director Christopher A. Wray's (collectively, the "Federal Defendants"), Motion to Dismiss, ECF No. 92. For the reasons set forth herein, both motions are GRANTED.

I. BACKGROUND

This lawsuit arises from Plaintiff's alleged discovery of a video camera surreptitiously installed in her apartment. Second Amended Complaint ("SAC"), ECF No. 15 ¶ 37-39. Plaintiff alleges that on September 11, 2017, she moved into an apartment in The Park, an apartment complex in Roselle, New Jersey owned and operated by The Bozzuto Group.¹ *Id.* ¶¶ 4, 16, 26. On the day she moved in to her new apartment, the leasing agent performed only a cursory inspection of the premises, and had Plaintiff sign a "move in document" stating that she and a lessor's representative had inspected the apartment, when in fact they had not. *Id.* ¶¶ 22-25. Plaintiff further alleges that a construction cone consistently reappeared in front of her car, and that another employee had walked around her car, and placed the cone in front of the vehicle. *Id.*

¹ The Bozzuto Defendants point out in their memorandum that there is no corporate entity with this name, the term is used colloquially to refer to a group of companies affiliated with the Bozzuto Defendants. Def. Mem. at 13, ECF. No. 26.3.

¶ 29-32. She also claims that employees of The Park performed a “background check” without her knowledge or permission, as she only gave Defendants permission to perform a “credit check.” Id. ¶¶ 33-34.

In December of 2017, Plaintiff alleges that she heard an “unusual and unrecognized low sound,” which caused her to “abandon[] her bed for the couch in the living room.” Id. ¶ 36. On March 8, 2018, she heard the same sound coming from an air conditioning vent above the door to her bedroom. Id. ¶ 37. Plaintiff discovered a video camera in that vent. Id. ¶ 38. She alleges that she “strongly believes that the FBI encouraged the Park Apartment Management” to install the camera, by telling management that Plaintiff “is a ‘sex offender’” and that “the FBI has done this before with landlords here in the United States and abroad.” Id. ¶ 36. Plaintiff claims that the FBI “has motive and means to want to deprive Plaintiff of her Constitutional Rights” because it is “trying to cover up its illegal action of implanting 2 devices into Plaintiff[’s] body.” Id. ¶ 57.

Plaintiff asserts five cause of action against the Bozzuto Defendants, and four causes of action against the Federal Defendants.²

As against the Bozzuto Defendants, Plaintiff asserts three causes of action for negligence, claiming that the Bozzuto Defendants negligently hired and supervised their staff, id. ¶¶ 64-69, acted negligently and caused harm to Plaintiff in an otherwise unspecified manner, id. ¶¶ 70-74, and also acted negligently by failing to either obtain appropriate state real estate licenses, or hire appropriately licensed individuals, id. ¶¶ 75-85. Plaintiff also asserts a cause of action for “violation of 28 U.S.C. § 2511” and a New Jersey common law claim for invasion of privacy arising from the alleged installation of the camera in her apartment.³ Id. ¶¶ 86-94.

As against the Federal Defendants, Plaintiff asserts three causes of action:⁴ one claim for defamation for falsely telling the managers of her apartment building that she was “sex offender”,

² Plaintiff’s SAC does not clearly articulate the basis for each of her causes of action. Because Courts “are required to liberally construe pleadings drafted by pro se parties” this description of Plaintiff’s causes of action reads her pleadings to raise the strongest claims they suggest. Manning v. Hudson County, No. 17-3450, 2019 WL 1423262, at *4 (D.N.J. Mar. 29, 2019).

³ None of Plaintiff’s claims bear any conceivable relation to 28 U.S.C. § 2511, which reads, in its entirety: “Notice of suit under section 1494 of this title shall be given to the Attorney General, to the Comptroller General, and to the head of the department requested to settle the account in question. The judgment of the United States Court of Federal Claims in such suit shall be conclusive upon the parties, and payment of the amount found due shall discharge the obligation. The transcript of such judgment, filed in the clerk’s office of any district court, shall be entered upon the records, and shall be enforceable as other judgments.” 28 U.S.C. § 1494 grants the Court of Federal Claims jurisdiction to determine “the amount, if any, due to or from the United States by reason of any unsettled account of any officer or agent of, or contractor with, the United States,” subject to certain conditions not relevant here. The Court cannot determine why plaintiff included 28 U.S.C. § 2511 alongside her state common law claims for invasion of privacy, as it creates no cause of action. Thus, to the extent that Plaintiff asserts any cause of action based on 28 U.S.C. § 2511, the Court dismisses those claims for failure to state a claim upon which relief could be granted pursuant to Federal Rule of Civil Procedure 12(b)(6).

⁴ Plaintiff’s SAC also includes Count VI, a claim for “violation of 28 U.S.C. § 2511 & Invasion of Privacy by the FBI[.]” SAC ¶ 102. This conclusory assertion seems to mirror allegations Plaintiff made in her first amended complaint, ECF No. 4-1, which included extensive factual allegations suggesting that the FBI had tampered with her application to proceed in forma pauperis in this Court. See id. at ¶¶ 56-63. She omitted all such allegations in her SAC. In her opposition to the Federal Defendants’ motion to dismiss, Plaintiff admitted that this allegation was included erroneously: her “amended complaint stating that the FBI had made changes to the Court’s file was obviously

prostitute, and liar,” id. ¶ 104; one claim for a violation of Plaintiff’s First Amendment rights “by trying to stop her from expressing her Rights to free speech” when she filed this lawsuit; id. ¶ 105, and one claim for “Abuse of Power and Intimidation against Plaintiff, a Violation [of] her Civil Rights.” Id. ¶ 106.

Plaintiff seeks compensatory and punitive damages against both sets of Defendants, a declaratory judgment that her constitutional and other rights have been infringed, and further seeks to permanently enjoin Defendants from “further violation of Plaintiff’s constitutional rights, the Privacy Act, and State and common laws.” Id. at 15.

II. LEGAL STANDARD

In considering a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), the Court accepts as true all of the facts in the complaint and draws all reasonable inferences in favor of the nonmoving party. Phillips v. County of Allegheny, 515 F.3d 224, 233 (3d Cir. 2008). Dismissal is inappropriate even where “it appears unlikely that the Plaintiff can prove those facts or will ultimately prevail on the merits.” Id. at 231. However, the facts alleged must be “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). Therefore, a complaint will survive a motion to dismiss if it provides a sufficient factual basis such that it states a facially plausible claim for relief. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

When presented with a motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), the district court must first assess whether the movant asserts that the face of the complaint demonstrates a lack of subject matter jurisdiction – a “facial” attack – or whether the movant disputes the facts as alleged in the complaint – a “factual” attack. See Constitution Party of Pa. v. Aichele, 757 F.3d 347, 357 (3d Cir. 2014). “An attack on subject matter jurisdiction that is based on a lack of administrative exhaustion is a factual challenge and not a facial one.” Eladawey v. Fed. R.R. Admin., No. 13-2976, 2014 WL 4610644, at *2 (D.N.J. Sept. 12, 2014) (quoting J.H. ex rel. J.H. v. Egg Harbor Twp. Bd. of Educ., No. 08-488, 2009 WL 1322514, at *2 (D.N.J. May 11, 2009)). Where a district court is presented with a factual attack, the court “may weigh and ‘consider evidence outside the pleadings.’” Constitution Party, 757 F.3d at 358 (quoting Gould Elecs. Inc. v. United States, 220 F.3d 169, 176 (3d Cir. 2000)). The Plaintiff bears the burden of proving the presence of jurisdiction in a factual challenge. Eladawey, 2014 WL 4610644, at *2.

III. ANALYSIS

Both sets of Defendants seek to dismiss the SAC. The Federal Defendants argue that this Court lacks subject matter jurisdiction over plaintiff’s claims under the Federal Tort Claims Act (“FTCA”), and that Plaintiff otherwise fails to state a claim upon which relief may be granted. Federal Def. Mem. at 6-20, ECF No. 92.1. The Court agrees.

a. THE FEDERAL DEFENDANTS

This Court lacks subject matter jurisdiction over Plaintiff’s tort claim against the Federal Defendants. Count VII of the SAC seek damages for defamation against the FBI, a claim sounding

incorrect and was quickly amended.” Pl. Opp. ECF No. 95 ¶ 3(i). The Court thus deems Count VI of the SAC withdrawn.

in tort. SAC ¶ 103. Under the FTCA, a “tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues.” 28 U.S.C. § 2401(b). Courts interpreting this provision have “held that the requirement that the appropriate federal agency act on a claim before suit can be brought is jurisdictional and cannot be waived.” Roma v. United States, 344 F.3d 352, 362 (3d Cir. 2003). As this Court has previously explained, “[t]he FTCA has mandatory administrative claims procedures with which a Plaintiff must comply prior to filing suit; if they are not followed, sovereign immunity is not waived, and the court lacks subject matter jurisdiction over Plaintiff’s claim.” Eladawey, 2014 WL 4610644, at *2 (quoting Clark v. Wells Fargo Bank, No. 13-1293, 2013 WL 1680178, at *2 (D.N.J. Apr.16, 2013)).

Here, the Federal Defendants have submitted a declaration stating that the FBI has reviewed its claims database and has not found any administrative claim submitted by Plaintiff. ECF No. 92.4. Plaintiff makes no attempt to controvert this assertion, and in fact concedes that she has not filed any administrative claims. Pl. Opp., ECF No. 95 ¶ 28 (Plaintiff “did not file an ‘Tort Claim Claims’ [sic] because as she had informed Special Agent Drew Chrislip, she did not want any compensation.”) Accordingly, this Court has no jurisdiction over Plaintiff’s tort claims against the Federal Defendants, and dismisses Count VII under Federal Rule of Civil Procedure 12(b)(1).⁵

Plaintiff’s remaining claims against the Federal Defendants also fail. Count VIII states, in its entirety, that the Federal Defendants violated her “First Amendment Rights by trying to stop her from expressing her Rights to free speech when she filed” this lawsuit. SAC ¶ 103. This claim is entirely unsupported by any factual allegations. Similarly, Count IX simply states, in its entirety: “Abuse of Power and Intimidation against Plaintiff, a Violation her Civil Rights.” Id. ¶ 106. This is conclusory and unsupported by any factual allegations. The Court therefore dismisses Counts VIII and IX under Federal Rule of Civil Procedure 12(b)(6).

b. THE BOZZUTO DEFENDANTS

The Bozzuto Defendants argue that Plaintiff’s SAC should be dismissed because she fails to state a claim upon which relief may be granted; and further argues that this Court lacks subject matter jurisdiction over Plaintiff’s claims. Bozzuto Mem. at 3-11, ECF No. 26.3.

There is no basis for an exercise of federal question jurisdiction over the Bozzuto Defendants. Counts I through V of Plaintiff’s SAC assert only state law tort claims against these Defendants. While Plaintiff cites to 28 U.S.C. § 2511 in Counts IV and V of her SAC, for the reasons stated in note 3, supra, she cannot state a claim against any Defendant under that provision.

Thus, in order to have jurisdiction over Plaintiff’s state law claims, Plaintiff must meet the requirements of the diversity statute, 28 U.S.C. § 1332, which requires complete diversity between the parties. “It is well-established that diversity jurisdiction under § 1332(a) requires complete diversity, meaning that the citizenship of each Plaintiff must be different than the citizenship of

⁵ To the extent that Plaintiff’s complaint can be read as asserting tort claims against former Attorney General Sessions and FBI Director Wray individually, plaintiff has failed to plead any facts suggesting that they are liable in their individual capacities, and dismisses any claims against them in their individual capacities under Federal Rule of Civil Procedure 12(b)(6).

each defendant.” Mercedes-Benz USA, LLC v. Nippon Yusen Kabushiki Kaisha, No. 18-13764, 2018 WL 6522487, at *6 (D.N.J. Dec. 12, 2018). Here, Plaintiff alleges that she is a resident of New Jersey, and that Defendant Michelle Demetriou is also a resident of New Jersey. SAC ¶¶ 4, 13. As the face of the SAC makes clear, the parties to this action are not completely diverse, and therefore this Court cannot have subject matter jurisdiction over this dispute pursuant to § 1332.

c. LEAVE TO AMEND

Ordinarily, a district court must give a pro se Plaintiff leave to amend their pleadings, “unless such an amendment would be futile or prejudicial.” Hudson v. McKeesport Police Chief, 182 F. App’x 124, 126 (3d Cir. 2006). Plaintiff’s tort claims against the Federal Defendants are jurisdictionally defective, as she concedes that she has not complied with the appropriate notice provisions of the FTCA. The Court therefore will not permit Plaintiff to amend her tort claims against the Federal Defendants, as any amendment would be futile. For the same reasons, the Court will not permit Plaintiff to amend her complaint to assert claims under 28 U.S.C. § 2511. The Court will permit Plaintiff to amend Counts VIII and IX of the SAC, to give Plaintiff the chance to allege sufficient facts to state a claim upon which relief could be granted.

As to the Bozzuto Defendants, the Court will not permit Plaintiff to amend her complaint without remedying the defects in subject matter jurisdiction. Plaintiff is reminded that “the Court can only ‘properly determine whether complete diversity of the parties in fact exists and thus whether the Court has jurisdiction to adjudicate the matter[.]’ when the Plaintiff, even if proceeding pro se, affirmatively pleads facts regarding the citizenship of individual defendants and the dual citizenship of corporate defendants.” Phillip v. Atl. City Med. Ctr., 861 F. Supp. 2d 459, 467 (D.N.J. 2012) (quoting Poling v. K. Hovnanian Enters., 99 F. Supp. 2d 502, 515 (D.N.J.2000)). Any amendment must properly allege that all parties to the suit are in fact diverse, that is, they are citizens of different states. If Plaintiff’s third amended complaint fails to properly allege diversity of citizenship, the Court may dismiss this action with prejudice.

IV. CONCLUSION

Based on the foregoing, Defendants’ motions to dismiss are **GRANTED**. Because this is a first dismissal, it is without prejudice to the submission, within 60 days, of a properly supported motion to amend the Complaint.

IT IS on this 24th day of April, 2019,

ORDERED that Defendants’ Motions to Dismiss, ECF Nos. 26 and 92, are **GRANTED** without prejudice.

/s Madeline Cox Arleo

Hon. Madeline Cox Arleo

United States District Judge