IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ROCK HILL DIVISION

KATHRYN B. GODLEY and ROCK HILL CITY PLAZA, LLC, a North Carolina limited liability company, Plaintiffs, v. THE WELFONT GROUP, LLC, JOSPEH JOHNSON, SEAN MARCEL, TAX APPRAISAL GROUP, LLC, LYNDA SCULL, BRYANT ASSET ADVISORS, LLC, ANDREW J. BRYANT, CHRISTOPHER D. BRYANT, AND ACTS COMMUNITY DEVELOPMENT CORPORATION, Defendants.	Case No. 0:24-cv-07705-MGL **The Welfont Defendants' Reply in Support of their Partial Motion to Dismiss Amended Complaint**

Plaintiffs' response brief (ECF No. 89) (the "Response") confirms what the Welfont Defendants[1] have maintained from the outset: this case is an attempt to convert an unsuccessful tax strategy into a multi-million-dollar lawsuit against the Welfont Defendants. Despite belatedly adding rhetoric and exhibits via their response brief, Plaintiffs still fail to allege facts that state a plausible claim under *Twombly* and *Iqbal*. The Amended Complaint (ECF No. 62) relies on conclusory assertions, speculative damages, and extrinsic materials that cannot cure its fundamental defects. Each cause of action fails as a matter of law. Accordingly, the Court should reject the arguments raised in the Response and instead grant the Partial Motion to Dismiss filed by the Welfont Defendants.

[1] The Welfont Group, LLC ("Welfont"), Joseph Johnson ("Johnson"), Shawn Marcell ("Marcell"), Tax Appraisal Group, LLC ("TAG"), and Lynda Scull ("Scull").

Argument[2]

I. Plaintiffs Fail to State Any Claims Against the Individual Defendants.

As an initial matter, Plaintiffs' Response does not cure the Amended Complaint's insufficiently vague allegations against all "Defendants" by identifying how each defendant personally interacted with Plaintiffs or was responsible for the various allegations asserted by Plaintiffs. This is precisely the type of collective pleading that the Fourth Circuit has rejected, reasoning that complaints require "specific factual allegations for each defendant" to give "fair notice to *that* defendant of the plaintiff's claim and the underlying factual support." *Langford v. Joyner*, 62 F.4th 122, 125 (4th Cir. 2023). The Amended Complaint is devoid of specific factual allegations against Johnson, Marcell, and Scull (collectively, the "Individual Defendants"). Absent such specific factual pleading, it is impossible for the Individual Defendants to know which particular acts they are alleged to have committed. *See Joyner*, 62 F.4th at 125. Further, the failure of the Plaintiffs to appropriately attribute specific actions or inactions to the Individual Defendants subjects the deficient causes of action to dismissal. *See Govan v. Coastal Walls & Ceiling*, No. 4:23-CV-6244-JD-KDW, 2024 WL 4507677, at *4 (D.S.C. Aug. 30, 2024), *report and recommendation adopted*, No. 4:23-CV-6244-JD-KDW, 2024 WL 4504520 (D.S.C. Oct. 16, 2024).

Plaintiffs' breach of contract claim makes no mention of the Individual Defendants. (*See* Am. Compl. ¶¶ 39-46). Similarly, Plaintiffs' negligent misrepresentation claim makes no factual allegations against Johnson or Marcell and suggests only that "TAG through Scull would obtain a Qualified Appraisal of the Property" but does not allege that Scull individually made any negligent

[2] Plaintiffs' note in their Response that they intend to voluntarily dismiss their veil piercing claim. Accordingly, the Welfont Defendants will treat the veil piercing claim as abandoned and will reserve any additional argument on that claim.

misrepresentation to Plaintiffs. (*See* Am. Compl. ¶¶ 47-62). Plaintiffs' fraud claim does not name Scull at all and only suggests that Johnson and Marcell made "representations" on behalf of Welfont, but not in their individual capacities. (*See* Am. Compl. ¶¶ 64-77). Likewise, Plaintiffs' negligence claim makes no factual allegations against the Individual Defendants incorporating them only via a passing reference to "all Defendants." (*See* Am. Compl. ¶¶ 78-86). In their unfair trade practices act claim, Plaintiffs again fail to plead facts establishing how any of the Individual Defendants, acting in their individual capacity, engaged in an unfair trade practice. (*See* Am. Compl. ¶¶ 87-96). Lastly, Plaintiffs make no mention of the Individual Defendants in the context of their civil conspiracy claim. (*See* Am. Compl. ¶¶ 106-111).

Plaintiffs' Amended Complaint is wholly deficient against the Individual Defendants because, for each cause of action, it either omits any reference to the Individual Defendants entirely or fails to plead with any specificity what action, or inaction, the Individual Defendants allegedly engaged in that would entitle Plaintiffs to relief against them. Moreover, there is considerable South Carolina law acknowledging that individual corporate officers are not generally liable for the actions of the corporation. *See, e.g.*, *Steinke v. Beach Bungee, Inc*., 105 F.3d 192, 195 (4th Cir. 1997) ("In South Carolina, there is a strong presumption that an officer or a director of a corporation is not, merely as a result of his standing as such, personally liable for torts of the corporation."); *Rowe v. Hyatt*, 321 S.C. 366, 369, 468 S.E.2d 649, 650 (1996) ("An officer, director, or controlling person in a corporation is not, merely as a result of his or her status as such, personally liable for the torts of the corporation."); *Olin Mathieson Chem. Corp. v. Planters Corp.*, 236 S.C. 318, 330, 114 S.E.2d 321, 327 (1960) ("[T]he mere fact that a person is a corporate officer is not sufficient to hold him liable for corporate debts or contracts."). Absent some specific factual allegations against the Individual Defendants in their individual capacity, each of Plaintiffs' claims

against them fails. Plaintiffs' abandonment of their veil piercing claim is further evidence that the Individual Defendants are not appropriate or necessary targets of this litigation.

Accordingly, the Court should, at a minimum, dismiss each of the claims against the Individual Defendants Joe Johnson, Shawn Marcell, and Lynda Scull and they should be dismissed from this case.

II. The Breach of Contract Claim Still Fails as a Matter of Law.

Plaintiffs' assert that the Welfont Defendants breached a legally enforceable and binding contract, and the validity of their breach of contract claim is predicated on the existence and language of the contract. (Am. Compl. ¶¶ 40-41). Yet, in their Response, Plaintiffs argue that the contract is "outside the pleadings" given that it is "neither attached to nor incorporated in the complaint." (Resp. in Opp. at 2). Contrary to Plaintiffs' assertions, the Court "may consider a document submitted by the movant that was not attached to or expressly incorporated in a complaint, so long as the document was integral to the complaint and there is no dispute about the document's authenticity." *Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159, 166 (4th Cir. 2016). The Welfont Defendants acknowledge both the existence of the contract and that it is integral to the Amended Complaint. *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002) (explaining that a document is "integral to the complaint" "where the complaint relies heavily upon its terms and effect" (internal quotation marks omitted). Based on Plaintiffs' framing in the Amended Complaint, the question of the alleged breach necessarily turns on an examination of the relevant contractual terms. Plaintiffs must not be allowed to plead their way around the actual terms of the contract by omitting it from their Amended Complaint and lodging a baseless dispute as to "both its completeness and the characterization urged by Defendants." (Resp. in Opp. at 2). Plaintiffs attempt to avoid the language of the contract because, when considered, it becomes apparent that

Plaintiffs have not, and cannot, allege a provision of the contract that the Welfont Defendants supposedly breached.

a. Plaintiffs' Response does not overcome the REP's express terms.

The question posed by Plaintiffs in their Amended Complaint is not whether a contract existed, but whether the Welfont Defendants violated the terms of the Real Estate Purchase Agreement ("REP"). In this way, Plaintiffs have placed the language of the REP directly at issue and it is appropriate for the Court to consider it at this stage. Both Plaintiffs' Amended Complaint and Response fail to identify any provision of the REP obligating Welfont to *obtain* a "Qualified Appraisal." The cited language from §4(a) and §16(n) of the REP merely acknowledges that Welfont was selected to "coordinate and facilitate" an appraisal process on behalf of Plaintiffs and Welfont's nonprofit client. This was merely a facilitative function and Welfont did not thereby assume legal responsibility for appraisal validity. Coordination is not equivalent to assuming liability for an independent appraiser's compliance with IRS standards. By contrast, the REP explicitly places tax-compliance obligations on *Plaintiffs*. Plaintiffs' attempt to argue that the contract imposed obligations on Welfont misconstrues the clear language of the merger and disclaimer clauses. *See Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 649 S.E.2d 494, 501 (Ct. App. 2007) (noting that South Carolina law enforces plain contract language). Moreover, in the absence of express contractual language imposing obligations on Welfont, the Plaintiffs should not be permitted to allege that Welfont "undertook" duties to secure an appraisal that met the tax law requirements for a qualified appraisal. Dismissal of a breach of contract claim is appropriate when the language of the contract at issue does not create enforceable contractual duties. *See AlphaVets, Inc. v. JPMorgan Chase Bank, N.A.*, 651 F. Supp. 3d 810, 818 (D.S.C. 2023) (dismissing contract claim where no provision imposed the alleged obligation).

III. The Claims for Negligence and Negligent Misrepresentation Each Fail.

a. Plaintiffs cannot recast a contract dispute as a tort.

Plaintiffs' negligence and negligent misrepresentation claims arise from alleged failure of the Welfont Defendants to perform certain contractual duties. Indeed, each of the alleged misrepresentations (*See* Am. Compl. ¶ 48) is essentially a provision of either §4(a) or §16(n) of the REP. "If the action is not maintainable without pleading and proving the contract, where the gist of the action is the breach of the contract, either by malfeasance or non-feasance, it is, in substance, an action on the contract, whatever may be the form of the pleading." *Dan Ryan Builders, Inc. v. Crystal Ridge Dev., Inc.*, 783 F.3d 976, 981 (4th Cir. 2015) (internal quotation marks and citation omitted).

In this way, Plaintiffs attempt to recast their breach of contract claim as negligence causes of actions. It is well established that "the mere failure to perform a contract, without more, cannot support a tort action. Instead, there must be some "active negligence or misfeasance" that occurs outside the terms of the contract." *Carroll v. Isle of Palms Pest Control, Inc.*, 446 S.C. 177, 187, 918 S.E.2d 532, 537 (2025), *reh'g denied* (Aug. 11, 2025). The Amended Complaint alleges only that Welfont failed to provide a qualified appraisal within the meaning of the applicable federal tax regulations. (*See generally* Am. Compl. ¶¶ 47-62, 78-86). Likewise, Plaintiffs' Response argues that "[b]y agreeing" to coordinate an appraisal, Defendants "voluntarily undertook" performance of such services. Where is this "agreement" and "voluntary undertaking" found? It is in the REP contract between the parties, of course.

While the Welfont Defendants deny any breach of the contract, any alleged failure, if actionable at all, arises solely from the REP, not from some independent duty of care between

commercially separate business entities. (*See* REP §4(a) & §16(n)). ("The cause of action for failing to perform or negligently performing a contract is breach of contract." *Carroll*, 446 S.C. at 187. Accordingly, Plaintiffs' recourse for this alleged nonfeasance, if any, sounds only in contract, not tort.

b. The "voluntary undertaking" theory fails.

The Restatement (Second) of Torts § 323 ("Restatement 323") applies to physical injury or property damage, not to purely economic losses like those alleged here. This section provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other ***for physical harm*** resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.

Restatement (Second) of Torts § 323 (emphasis added); *see Goode v. St. Stephens United Methodist Church*, 329 S.C. 433, 445, 494 S.E.2d 827, 833 (Ct. App. 1997) (analyzing Restatement 323 in the context of alleged physical harm). Accordingly, South Carolina courts have limited voluntary-assumption liability to cases "to situations in which a party has voluntarily undertaken to prevent physical harm, not economic injury." *Hendricks v. Clemson Univ.*, 353 S.C. 449, 458, 578 S.E.2d 711, 715 (2003).

On this point, Plaintiffs mischaracterizes the body of South Carolina law addressing Restatement 323 and voluntary-assumption liability. Plaintiffs cite *Johnson v. Robert E. Lee Acad., Inc.* for the proposition that a "duty arises if the failure to exercise such care either increases the risk of harm to the plaintiff or if the plaintiff suffers harm due to reliance on the undertaking." (Resp. in Opp. at 5). While *Johnson* directly addressed an argument that voluntary-assumption liability should be expanded to economic damages, the *Johnson* Court expressly declined "to expand that doctrine under the facts presented." *Johnson*, 401 S.C. at 506, 737 S.E.2d at 515. In

so doing, the *Johnson* Court noted that in *Hendricks v. Clemson University*, "the South Carolina Supreme Court signaled a reluctance to expand the voluntary assumption of duty doctrine beyond the circumstances set forth in the Restatement 323 and recognized in our jurisprudence." *Id.* In view of the South Carolina caselaw addressing this issue, Plaintiffs' voluntary-assumption liability theory fails where, as here, the only alleged damages are economic. Plaintiffs do not assert, and cannot assert, that they suffered any physical harm as a result of the alleged actions of the Welfont Defendants. Accordingly, Plaintiffs' voluntary-assumption liability theory fails and their negligence claims should be dismissed.

IV. Plaintiffs Still Fail to Plead Fraud with the Particularity Required by Rule 9(b).

a. Plaintiffs' allegations remain conclusory and rely on hindsight.

"Fraud is not presumed, but must be shown by clear, cogent, and convincing evidence." *Ardis v. Cox*, 314 S.C. 512, 515, 431 S.E.2d 267, 269 (Ct. App. 1993). Far from presenting clear and convincing evidence of fraud, Plaintiffs' Response re-labels the same conclusory assertions as "who, what, when, where, and how," but the allegations still lack the particular circumstances constituting fraud. Specifically, Plaintiffs do not plead facts establishing that ***any*** of the Welfont Defendants knew ***at the time*** that the appraisal was false and/or was not a "Qualified Appraisal." (*See* Am. Compl. ¶¶ 64-77). Though Plaintiff makes conclusory allegations about Welfont's knowledge, these allegations amount to nothing more than "fraud by hindsight," as they are predicated on knowledge that no party could have even had at the time the transaction was facilitated. *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir. 1999) ("Mere allegations of 'fraud by hindsight' will not satisfy the requirements of Rule 9(b)). Here, the Amended Complaint offers no evidence that any of the Welfont Defendants knew the appraisal would be disallowed by the IRS beyond idle speculation that the Welfont Defendants "must have

known" the IRS would later disagree. *See In re Ducane Gas Grills, Inc.*, 320 B.R. 341, 355 (Bankr. D.S.C. 2004) ("[U]nder South Carolina law, unfulfilled promises or statements as to future events do not amount to fraud"); *see also Schie v. Gay & Taylor, Inc.*, 290 S.C. 31, 34, 347 S.E.2d 910, 912 (Ct. App. 1986) (Acknowledging that, in an action for fraud, the alleged representation must be one of an existing fact, not merely promises or statements as to future events which later were unfulfilled); *Emerson v. Powell*, 283 S.C. 293, 296, 321 S.E.2d 629, 631 (S.C.Ct.App.1984) ("As a general rule ... the fraudulent misrepresentation must relate to a present or preexisting fact and it cannot ordinarily be based on unfulfilled promises or statements as to future events.").

Here, Plaintiffs make the conclusory and speculative claim that, because the IRS ultimately disallowed the tax deductions years after the purported fraudulent representations, the Welfont Defendants must have known at the time of the appraisal that the disallowance would eventually occur in the future. This is impossible under the facts as pled in the Amended Complaint. The Welfont Defendants made no statement or promise as to the quality of the appraisal in the first place and they cannot be charged with predicting the IRS' future actions. In the absence of any actual factual support and allegations, Plaintiffs rely on faulty "*post hoc, ergo propter hoc*" reasoning to support their fraud claim. Such flawed reasoning is insufficient, and Plaintiffs' fraud claim should fail.

V. The South Carolina Unfair Trade Practices Act Claim Fails.

Plaintiffs' fourth cause of action fails to state a prima facie claim for a violation of the South Carolina Unfair Trade Practices Act ("SCUTPA").

a. The statute targets conduct affecting the public at large.

"To be actionable under the UTPA . . . the unfair or deceptive act or practice in the conduct of trade or commerce must have an impact upon the public interest. The act is not available to

redress a private wrong where the public interest is unaffected." *Noack Enter., Inc. v. Country Corner Interiors of Hilton Head Island, Inc.*, 290 S.C. 475, 479, 351 S.E.2d 347, 350 (Ct. App. 1986). This limitation serves a valuable function. "While every private dispute doubtless has remote public ramifications, these cannot be held to satisfy the element of injury to the public interest … otherwise, every ordinary commercial dispute would become a candidate for the extraordinary remedies provided by the Act." *Omni Outdoor Adver., Inc. v. Columbia Outdoor Adver., Inc.*, 974 F.2d 502, 507–08 (4th Cir.1992). "Conduct can have an impact upon the public interest if it has the potential for repetition." *Noack*, 290 S.C. at 480, 351 S.E.2d at 350-51. However, "[t]he mere proof that the actor is still . . . engaged in the same business is not sufficient to establish this element." *Jefferies v. Phillips*, 316 S.C. 523, 529, 451 S.E.2d 21, 24 (Ct. App. 1994). Potential for repetition is typically shown in two ways: "(1) by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence or (2) by showing the company's procedures create a potential for repetition of the unfair and deceptive acts." *Daisy Outdoor Advert. Co. v. Abbott*, 322 S.C. 489, 496, 473 S.E.2d 47, 51 (1996).

In this case, Plaintiffs failed to plead a potential for the repetition of the allegedly unfair conduct and therefore do not assert the public impact required to elevate their dispute into the realm of SCUPTA. Plaintiffs make a blanket assertion that "[t]he acts of Defendants were made in and affecting trade and commerce and were acts that affect the public interest." (Am. Compl. ¶ 93). The Amended Complaint provides no further detail. Plaintiffs cannot now amend their Amended Complaint by providing additional factual allegations in their Response to the Welfont Defendants' Motion to Dismiss. "'[I]t is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss. To hold otherwise would mean that a party could unilaterally amend a complaint at will, even without filing an amendment, and simply by raising a

point in a brief.'" *Banks v. Sec'y of the Dep't of Homeland Sec.*, No. CV 6:19-2654-TMC-KFM, 2020 WL 10457662, at *5 (D.S.C. Oct. 28, 2020), *report and recommendation adopted as modified sub nom. Banks v. Sec'y of Dep't of Homeland Sec.*, No. 6:19-CV-02654-JD, 2021 WL 694795 (D.S.C. Feb. 23, 2021) (quoting *Weakley v. Homeland Sec. Sols., Inc.*, C.A. No. 14-CV-785, 2015 WL 11112158, at *5 (E.D. Va. May 19, 2015)). In ruling on the pending Motion to Dismiss, the Court should rely solely on the factual allegations contained in the Amended Complaint.

In an effort to save their deficient SCUTPA claim, Plaintiffs identify other complaints filed against Welfont in their Response. (Resp. in Opp. at 14). Although the Court should disregard this belated attempt to stuff new facts into the Amended Complaint, should the Court consider these filings, Plaintiffs' SCUTPA claim still fails. Under Rule 201 of the Federal Rules of Evidence, a trial court may take judicial notice of facts on its own accord and must take judicial notice of facts "if a party requests it and the court is supplied with the necessary information." Fed.R.Evid. 201(c). A fact is appropriate for judicial notice if it is:

> not subject to reasonable dispute because it (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

Fed.R.Evid. 201(b). Rule 201 applies only to adjudicative facts, which "are simply the facts of the particular case." Fed.R.Evid. 201(a) advisory committee note. None of the cases identified by Plaintiffs were resolved on the merits and thus, none of the claims asserted by the various plaintiffs were ***actually litigated*** or determined via a valid and final judgment. The mere existence of outside litigation is not proof of the repetition of the allegedly unfair conduct sufficient to establish an impact on the public interest. *See Beattie v. Nations Credit Fin. Servs. Corp.*, 69 F. App'x 585, 589–90 (4th Cir. 2003) (Holding that production of pleadings in a similar case involving the same defendant did not establish an adverse impact on the public interest necessary to sustain plaintiff's

SCUTPA claim). Thus, regardless of whether the Court chooses to consider the existence of these cases, and it should not, Plaintiffs' SCUTPA claim remains fatally deficient.

b. The alleged conduct is already governed by other areas of law.

SCUTPA does not extend to claims "for which other legal remedies are available." *Key Co. v. Fameco Distribs., Inc.*, 292 S.C. 524, 357 S.E.2d 476, 479 (Ct. App. 1987). Plaintiffs' allegations, breach of contract, and misrepresentation, are precisely the type of private disputes excluded from SCUTPA's scope. While SCUTPA does not expressly define "unfair or deceptive act," it is well-settled South Carolina law that a deliberate or intentional breach of a valid contract "*without more*" does not constitute a violation. *See Columbia E. Assocs. v. Bi-Lo, Inc.*, 386 S.E.2d 259, 263 (Ct. App. 1989) (citing *Key Co., Inc. v. Fameco Distribs.*, 292 S.C. 524, 357 S.E.2d 476 (Ct.App.1987); *see also*, S.C. Code Ann. § 39-5-20; *Clarkson v. Orkin Exterminating Co., Inc.*, 761 F.2d 189, 191 (4th Cir. 1985) (stating "[t]he plaintiff need not show intentional deception, but a plaintiff cannot prevail without showing at least a potential of deception" and finding the plaintiff had shown only that the defendant's representative was negligent or inept).

In this case, Plaintiffs' allegations are reducible to the claim that the Welfont Defendants failed to comply with the terms of the REP. They assert that the Welfont Defendants' conduct equates to a breach of contract. The Amended Complaint does not include factual allegations that, if taken as true, would support a conclusion that the Welfont Defendants performed a deceptive act in addition to breaching the supposed contract. Therefore, the Court should dismiss Plaintiffs' SCUTPA claim because they have failed to assert facts establishing anything "more" than a breach of contract.

VI. Plaintiffs' Civil Conspiracy Claim Fails as a Matter of Law and Should be Dismissed.

Here, Plaintiffs have merely summarized the allegations underlying their other causes of action and rebranded them as a civil conspiracy claim. (*See* Am. Compl. ¶¶ 106-111). To state a civil-conspiracy claim, a plaintiff must allege four elements: "(1) the combination or agreement of two or more persons, (2) to commit an unlawful act or a lawful act by unlawful means, (3) together with the commission of an overt act in furtherance of the agreement, and (4) damages proximately resulting to the plaintiff." *Paradis v. Charleston Cty. Sch. Dist.*, 433 S.C. 562, 861 S.E.2d 774, 780 (2021). Because "civil conspiracy is an intentional tort, an intent to harm ... [is] an inherent part of th[is] analysis." *Id*. at 780 n.9. A plaintiff asserting a civil-conspiracy claim must also allege acts "in furtherance of the conspiracy in a manner separate and independent from [their] other causes of action." *Jinks v. Sea Pines Resort, LLC*, No. 9:21-cv-00138-DCN, 2021 WL 4711408, at *3 (D.S.C. Oct. 8, 2021) (unpublished). Stated differently, if "the particular acts charged as a conspiracy are the same as those relied on as the tortious act or actionable wrong, plaintiff cannot recover damages for such act or wrong, and recover likewise on the conspiracy to do the act or wrong." *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 276 S.C. 284, 278 S.E.2d 607, 611 (1981), *overruled on other grounds by Paradis*, 861 S.E.2d at 780.

Plaintiffs' civil conspiracy claim is the seventh of eight causes of action in their Amended Complaint. (*See* Am. Compl. ¶¶ 106-111). Paragraph 106 "repeat[s] and reallege[s] each and every allegation contained in the paragraphs above as if fully restated herein." *Id*. ¶ 106. In so doing, Plaintiffs generally allege that all defendants "committed many predicate torts against [Plaintiffs], including at least the following: Breach of Contract; Negligent Misrepresentation; Fraud; Constructive Fraud; Negligence; and/or SCUTPA violations." *Id*. ¶ 107. Plaintiffs' civil conspiracy does not identify any overt act committed by any defendant, nor does it identify any additional acts

beyond those already alleged in the Amended Complaint. In so doing, Plaintiffs fail to state a valid claim for civil conspiracy and the Court should dismiss the claim.[3] *Doe 9 v. Varsity Brands, LLC,* 679 F. Supp. 3d 464, 494 (D.S.C. 2023) (Dismissing civil conspiracy claim at 12(b)(6) stage where plaintiff failed to identify additional acts in furtherance of the conspiracy separate and independent from other wrongful acts alleged in the complaint).

Conclusion

Plaintiffs' Amended Complaint remains speculative, conclusory, and legally insufficient. The alleged injuries flow from an unsuccessful tax strategy based on the IRS's later examination and disallowance of tax benefits claimed by the Plaintiffs, not from actionable conduct by the Welfont Defendants. Accordingly, the Welfont Defendants respectfully request that this Court enter an Order granting their Motion to Dismiss with prejudice, and granting such other relief as the Court may deem just and proper.

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[3] Plaintiffs' request leave to amend the already Amended Complaint in lieu of dismissal. The Welfont Defendants oppose additional amendments to the Amended Complaint and urge the Court to dismiss the civil conspiracy claim. Although leave to amend should be freely given "when justice so requires," Fed.R.Civ.P. 15(a)(2), the district court may deny leave to amend for reasons "such as . . . repeated failure to cure deficiencies by amendments previously allowed, . . . futility of amendment, etc." *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962).

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Report and Recommendation Adopted as Modified by Banks v. Secretary of Department of Homeland Security, D.S.C., February 23, 2021

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United States District Court, D. South Carolina, Greenville Division.

Rosalind Nate BANKS, Plaintiff,
v.
SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY, Defendant.

Civil Action No. 6:19-2654-TMC-KFM
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Signed 10/28/2020

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REPORT OF MAGISTRATE JUDGE

Kevin F. McDonald, United States Magistrate Judge

***1** This matter is before the court on the defendant's motion to dismiss the plaintiff's amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) (doc. 34). The plaintiff, who is proceeding *pro se*, alleges her former employer discriminated against her based on her ethnicity (Hispanic) by terminating her employment in violation of Title VII of the Civil Rights Act of 1964, as amended (doc. 11 at 5). Pursuant to the provisions of 28 U.S.C. § 636(b)(1)(A) and Local Civil Rule 73.02(B)(2)(g) (D.S.C.), all pretrial matters in employment discrimination cases are referred to a United States Magistrate Judge for consideration.

PROCEDURAL BACKGROUND

On September 19, 2019, the plaintiff filed her complaint (doc. 1). On October 8, 2019, the undersigned issued an order finding that the plaintiff's complaint was subject to summary dismissal because it failed to state a claim upon which relief can be granted (doc. 9). The plaintiff was given an attempt to correct the defects in her complaint as identified in the order (*id.*). The plaintiff filed an amended complaint on October 24, 2019 (doc. 11), and service of process was authorized on October 28, 2019 (doc. 16). The defendant was served on March 11, 2020, the United States Attorney for the District of South Carolina was served on May 28, 2020, and the Attorney General of the United States was served on May 29, 2020 (docs. 27, 32).

On July 24, 2020, the defendant filed a motion to dismiss the plaintiff's amended complaint (doc. 34). On July 27, 2020, pursuant to *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975), the plaintiff was advised of the summary judgment and motion to dismiss procedures and the possible consequences if she failed to respond adequately to the motion (doc. 37). On August 31, 2020, the plaintiff filed a response in opposition to the motion to dismiss (doc. 39). The defendant filed a reply on September 4, 2020 (doc. 41).

ALLEGATIONS IN AMENDED COMPLAINT

On October 28, 2018, the plaintiff began working for the Transportation Security Administration ("TSA") as a Transportation Security Officer ("TSO") at the Greenville-Spartanburg International Airport ("GSA") (doc. 11-1 at 1). During her first week on the job, the plaintiff became interested in an internal job announcement within the Department of Homeland Security ("DHS") and filled out the application for the position (*id.*). The plaintiff alleges that the job announcement indicated that the position required a security clearance, and when she filled out the candidate portion of the application, she indicated that the position required a security clearance (*id.* at 1-2).

During her second week of work, on November 5, 2018, the plaintiff gave the application to two Transportation Security Managers on duty at GSA, and she "expressed interest in learning more about the job opportunity" (*id.* at 2). Two days later, Assistant Federal Security Director Danise Daville [1] called the plaintiff and another TSO into her office and stated that she wanted them to focus on their new positions as TSOs and that, while other opportunities would be available "several years down the line," the job opportunity sought by the plaintiff was not currently appropriate for the plaintiff or her co-worker (*id.*). The plaintiff described Daville as "extremely agitated" that the plaintiff and the other TSO "expressed interest in learning more about internal

opportunities" (*id.*). The plaintiff told Daville that she and her co-worker "were simply exploring the [DHS] website as instructed during ... training week" and that she had "never applied for the opportunity" (*id.*).

***2** On November 16, 2018, the plaintiff participated in a simulation at the Columbia Metropolitan Airport, which sought to test the skills of another TSO. After the TSO failed the simulation exercise, the plaintiff participated in a debriefing session with several other TSA employees, including Transportation Security Inspector Michael Williams (doc. 11-1 at 2-3). An employee from the training department, Reuben Dedtmondt, and Assistant Federal Security Director Bob Baker also participated by phone (*id.* at 3). Both Dedtmondt and Baker provided feedback to the TSO on his performance. The plaintiff alleges that Dedtmondt's criticism was "constructive" while Baker's was "verbally aggressive" (*id.*). The plaintiff alleges that at the end of the debriefing, Williams asked for her opinion of the simulation and debriefing (*id.*). The plaintiff initially stated that she did not want to provide feedback because she was a new hire and believed her comments could be used against her and possibly lead to her termination from employment (*id.*). However, Williams assured the plaintiff that she was in a learning environment and that her comments were important (*id.*). The plaintiff then stated that Baker was "verbally aggressive" toward the TSO and that, in her opinion, Baker's comments "could be seen as a form of lateral violence" (*id.*). The plaintiff alleges that a Transportation Security Manager from Columbia stated that she believed Baker was harsh towards the TSO because of the TSO's language barrier, as he could not speak English very well (*id.*). The plaintiff told the Transportation Security Manager that the TSO should not be treated differently because he is a foreigner, and she considered such harsher treatment toward a foreigner because of a language barrier to be discrimination (*id.*).

On December 6, 2018, the TSA terminated the plaintiff's employment (doc. 11-1 at 3). The plaintiff alleges that Assistant Federal Security Director Daville told her that the TSA human resources department "had some concerns about some previous actions" of the plaintiff (*id.*). Daville told the plaintiff that she was being terminated from employment "because [she] indicated on the internal opportunity application from November 5th, 2018 that [she] had a secret security clearance when [she] did not have one," which was a clear example of lack of "candor and falsifying an application" (*id.* at 3-4). The plaintiff also alleges that Daville stated that she was being terminated because of inappropriate comments she made about Assistant Federal Security Director Baker at the debriefing on November 16, 2018 (*id.* at 4).

The plaintiff alleges that she told Daville that she should not be terminated because: Daville misread the application as the box the plaintiff checked "yes" on referred to the position about which she was inquiring; she did not believe she had formally applied for the position as she had only expressed interest by handing the application to a Transportation Security Manager; and she had been asked for her opinion during the debriefing (doc. 11-1 at 4). The plaintiff refused to sign her termination letter because she believed the reasons given for terminating her employment were fabricated (*id.*). The plaintiff alleges that the defendant "discriminated against [her] due to [her] ethnicity (Hispanic)" in violation of Title VII (*id.* at 1, 4-5).

APPLICABLE LAW AND ANALYSIS

Rule 12(b)(6) Standard

"The purpose of a Rule 12(b)(6) motion is to test the sufficiency of a complaint." *Williams v. Preiss-Wal Pat III, LLC*, 17 F. Supp. 3d 528, 531 (D.S.C. 2014) (quoting *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir. 1999)). Rule 8(a) sets forth a liberal pleading standard, which requires only a " 'short and plain statement of the claim showing the pleader is entitled to relief,' in order to 'give the defendant fair notice of what ... the claim is and the grounds upon which it rests.' " *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). "In assessing the sufficiency of a complaint, [the court] assume[s] as true all its well-pleaded facts and draw[s] all reasonable inferences in favor of the plaintiff." *Nanni v. Aberdeen Marketplace, Inc.*, 878 F.3d 447, 452 (4th Cir. 2017) (citing *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 253 (4th Cir. 2009)). "[T]he facts alleged 'must be enough to raise a right to relief above the speculative level' and must provide 'enough facts to state a claim to relief that is plausible on its face.' " *Robinson v. American Honda Motor Co., Inc.*, 551 F.3d 218, 222 (4th Cir. 2009) (quoting *Twombly*, 550 U.S. at 555, 570). "The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted).

***3** The court must liberally construe *pro se* complaints to allow the development of a potentially meritorious case, *Hughes v. Rowe*, 449 U.S. 5, 9 (1980), and such *pro se* complaints are held to a less stringent standard than those drafted by attorneys. *Gordon v. Leeke*, 574 F.2d 1147, 1151 (4th Cir. 1978). Although courts afford "special judicial solicitude" to *pro se* complaints, this solicitude "does not transform the court into an advocate" or relieve a plaintiff of her duty to plead sufficient facts to support her claim. *Weller v. Dep't of Soc. Servs. for City of Baltimore*, 901 F.2d 387, 390–91 (4th Cir. 1990). "[L]egal conclusions, elements of a cause of action, and bare assertions devoid of further factual enhancement fail to constitute well-pled facts for Rule 12(b)(6) purposes." *Nemet Chevrolet, Ltd.*, 591 F.3d at 255.

> In the context of a Title VII case, "an employment discrimination plaintiff need not plead a prima facie case of discrimination" to survive a motion to dismiss, *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002). Instead, a Title VII plaintiff is "required to allege facts to satisfy the elements of a cause of action created by that statute." *McCleary-Evans v. Maryland Dep't of Transp., State Highway Admin.*, 780 F.3d 582, 585 (4th Cir. 2015). The pertinent statute, Title VII, prohibits an employer from "discharg[ing] any individual, or [ ] otherwise discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race [or national origin]." 42 U.S.C. § 2000e-2(a)(1). Accordingly, our inquiry is whether [the plaintiff] alleges facts that plausibly state a violation of Title VII "above a speculative level." *Coleman v. Maryland Court of Appeals*, 626 F.3d 187, 190 (4th Cir. 2010) (quoting *Twombly*, 550 U.S. at 555); *see also McCleary-Evans*, 780 F.3d at 585-86.

Bing v. Brivo Sys., LLC, 959 F.3d 605, 616–17 (4th Cir. 2020) (parallel citations and footnote omitted).

Sufficiency of the Allegations in the Amended Complaint

Here, the plaintiff asserts that the defendant terminated her employment because of her "ethnicity (Hispanic)" (doc. 11-1 at 1), which the undersigned has construed as a claim of racial or national origin discrimination. Regarding her termination, the plaintiff alleges that she was told by Daville that she was being terminated because she indicated on the internal opportunity application that she had a secret security clearance when she did not have one and she made inappropriate comments about Baker at the debriefing (doc. 11-1 at 3-4). The plaintiff alleges that the reasons were fabricated, noting that Daville misread the application, as the box on which the plaintiff checked "yes" referred to the position about which she was inquiring; she did not believe she had formally applied for the position as she had only expressed interest through the proper chain of command; and, with regard to the debriefing, she had been asked for her opinion and originally demurred but was encouraged to express her opinion in a "learning environment" (*id.* at 4).

These facts cannot be construed to plausibly state a claim that the plaintiff was terminated from employment because of her race or national origin. While the plaintiff alleges that she was discriminated against because of her ethnicity, missing from her amended complaint are factual allegations that support such an inference. "Naked" allegations that a decisionmaker was biased or that a decision was made as the result of impermissible bias fail to meet the applicable standard. *McCleary-Evans*, 780 F.3d at 585. Further, "[b]eing aware of no alternative explanation and guessing that conduct is racially motivated does not amount to pleading actual facts to support a claim of racial discrimination. To the contrary, they constitute only speculation as to [the decisionmaker's] motivation." *Bing*, 959 F.3d at 618.

***4** The plaintiff's pleading failures are similar to those confronted by the Court of Appeals for the Fourth Circuit in *McCleary-Evans* and *Bing*. In *McCleary-Evans*, the plaintiff, an African-American female, alleged that two members of the hiring panel "predetermined to select for both positions a White male or female candidate" and in fact hired two "non-Black candidates," "[b]ut she alleged no factual basis for what happened 'during the course of her interview' to support the alleged conclusion." 780 F.3d at 583, 586. The Fourth Circuit determined that such allegations were speculative and "simply too conclusory" to support a claim of race or gender bias, as "[o]nly speculation can fill the gaps in her complaint.... While the allegation that non-Black decisionmakers hired non-Black applicants instead of the plaintiff is *consistent* with discrimination, it does not alone support a *reasonable inference* that the decisionmakers were motivated by bias." *Id.* at 586 (emphasis in original). Such claims were speculative, the court reasoned, because the plaintiff had not alleged that "the persons hired were not better qualified, or did not perform better during their interviews, or were not better suited based on experience and personality for the positions." *Id.* In *Bing*, the plaintiff, an African-American male, reported for his first day of work, only to be pulled aside by a manager and confronted with a newspaper article about a criminal investigation of a shooting involving a gun owned by

the plaintiff. 959 F.3d at 609. The manager then decided the plaintiff was unfit for the job and terminated his employment. *Id.* In dismissing his claim of racial discrimination, the Fourth Circuit held that the plaintiff's complaint failed to state a claim for relief "because he pled a non-discriminatory basis for his termination [the criminal investigation and plaintiff's tangential involvement] and no facts to support his conclusory allegations [of racial discrimination]." *Id.* at 617.

Similarly here, the plaintiff admits that during her second week of work, she submitted an application to two TSA managers for an internal job opportunity, and she admits that she checked the "yes" box next to a question about security clearance (doc. 11-1 at 2, 4). The plaintiff contends, however, that Daville misread the application, and the checkmark referred "to the position [she] was inquiring about" (*id.* at 4). The plaintiff also confirms that she made disparaging remarks during the debriefing about the feedback delivered by a supervisor (*id.* at 3). Thus, accepting as true the plaintiff's allegations, the amended complaint sets forth non-discriminatory reasons for the plaintiff's termination from employment, and to reasonably infer that the decisionmaker was motivated by bias requires speculation to fill the gaps in the amended complaint. In short, the amended complaint contains merely the "unadorned, the-defendant-unlawfully-harmed-me accusation," which is insufficient to state a claim upon which relief can be granted. *Iqbal*, 556 U.S. at 678 (citation omitted).

New Allegations and Matters Outside the Pleadings

"In deciding whether a complaint will survive a motion to dismiss, a court evaluates the complaint in its entirety, as well as documents attached or incorporated into the complaint." *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 448 (4th Cir. 2011). The court may consider such a document, even if it is not attached to the complaint, if the document "was integral to and explicitly relied on in the complaint," and there is no authenticity challenge. *Id.* (quoting *Phillips v. LCI Int'l, Inc.*, 190 F.3d 609, 618 (4th Cir. 1999)). *See also Int'l Ass'n of Machinists & Aerospace Workers v. Haley*, 832 F. Supp. 2d 612, 622 (D.S.C. 2011) ("In evaluating a motion to dismiss under Rule 12(b)(6), the Court ... may also 'consider documents attached to ... the motion to dismiss, so long as they are integral to the complaint and authentic.' ") (quoting *Sec'y of State for Def. v. Trimble Navigation Ltd.*, 484 F.3d 700, 705 (4th Cir. 2007)). Rule 12(d) states: "If on a motion under Rule 12(b)(6) ..., matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56 ...." Fed. R. Civ. P. 12(d).

In response to the defendant's motion to dismiss, the plaintiff argues that she "gained the verbal consent from former co-worker Hopey Martin, ... who has agreed to testify in court on [her] behalf should this case move forward to a trial" (doc. 39 at 4). The plaintiff states that a formal affidavit from Ms. Martin could not be obtained because Ms. Martin was deployed with the United States Army; however, the plaintiff included copies of her correspondence with Ms. Martin with her response to the motion to dismiss (*id.* at 5-6).

The correspondence included by the plaintiff is inappropriate for consideration on this motion to dismiss as it was not attached to the amended complaint nor was it integral to and explicitly relied on in the amended complaint. Therefore, the undersigned has not considered the material in issuing this report and recommendation. Accordingly, the court is not required to convert the motion to dismiss to a motion for summary judgment. [2]

***5** Also in her response to the motion to dismiss, the plaintiff alleges new facts that were not included in her amended complaint (*see* doc. 39). First, the plaintiff clarifies that she is alleging national origin discrimination and that she is "of Puerto Rican ethnicity" (doc. 39 at 1). Next, the plaintiff alleges that she was treated more harshly than a 'comparator' white employee: "I was treated differently than a nonminority (white) [TSO] who performed the same directive [3] and inquiry. This non-minority (white) [TSO] was allowed to apply for a number of detail opportunities. The details of the discrimination are stated in the original claim" (*id.* at 2). She also alleges that, "At that time, I was aware of non-minority (white) [TSOs] who admitted to going through the same simulation during that time period who did not receive discrimination or any type of mistreatment while attending the simulation" (*id.* at 3).

As set out above, "[t]he purpose of a Rule 12(b)(6) motion is to test the sufficiency of a complaint." *Williams*, 17 F. Supp. 3d at 531. To that end, even a *pro se* "[p]laintiff may not raise or assert allegations in [her] response brief that are not otherwise properly before the Court in the actual pleadings under consideration." *Nix v. McCabe Trotter & Beverly P.C.*, C.A. No. 18-CV-1360-DCN-BM, 2018 WL 6112991, at *4 n.8 (D.S.C. Sept. 10, 2018) (citations omitted), *R&R adopted by* 2018 WL 5263276 (D.S.C. Oct. 23, 2018). *See also Weakley v. Homeland Sec. Sols., Inc.*, C.A. No. 14-

CV-785, 2015 WL 11112158, at *5 (E.D. Va. May 19, 2015) ("Plaintiff cannot assert new claims by raising them in h[is] brief in opposition to the Defendant's motion to dismiss. [I]t is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss. To hold otherwise would mean that a party could unilaterally amend a complaint at will, even without filing an amendment, and simply by raising a point in a brief." (internal quotation marks and citation omitted)), *R&R adopted by* 2015 WL 11112159 (E.D. Va. June 16, 2015).

Even considering the plaintiff's new allegations [4], the plaintiff still fails to state a claim under Title VII for discrimination on the basis of national origin or race. The plaintiff's clarification that she is of Puerto Rican ethnicity does not change the analysis, because the plaintiff has failed to allege facts connecting her ethnicity to her termination from employment. Further, the plaintiff's vague allegations that unspecified white TSOs were allowed to apply for detail positions and engaged in training simulations without "discrimination or any type of mistreatment" (doc. 39 at 3), do not raise a plausible basis to infer that the plaintiff's termination from employment was the result of discrimination on the basis of the plaintiff's ethnicity. The Fourth Circuit has held that allegations that the plaintiff "was treated differently as a result of his race than whites" and that a specified white co-worker was not disciplined for similar conduct, failed to raise a plausible complaint of racial discrimination. *Coleman v. Md. Court of Appeals*, 626 F.3d 187, 191 (4th Cir. 2010). As argued by the defendant, the complaint in *Coleman* was more specific than plaintiff's new allegations here, because it identified a specific white employee who had engaged in similar conduct. Nevertheless, the Fourth Circuit held that the allegations failed "to establish a plausible basis for believing [the white co-worker and the plaintiff] were actually similarly situated or that race was the true basis for [the plaintiff's] termination. *Id.* Here, the plaintiff's new allegations do not give rise to a plausible claim for relief. She does not identify the names of these employees, the names of their supervisors, the circumstances under which they applied for details or attended training simulations, or any facts suggesting that her supervisors were biased against people Puerto Rican ethnicity. *See also Ali v. BC Architects Eng'rs, PLC*, No. 19-1582, 2020 WL 6075663, at *2 (4th Cir. Oct. 15, 2020) (finding that allegations that a non-Arab person was hired to replace the plaintiff and that the employer treated non-Arab employees more considerately when terminating them were insufficient to support a reasonable inference of intentional race discrimination (citations omitted)); *Kelly v. QVC*, C.A. No. 17-CV-2858-RBH-KDW, 2018 WL 4560571, at *9 (D.S.C. May 7, 2018) (concluding complaint failed to state a claim where "[p]laintiff has not provided *any* names, characteristics, or other details concerning who the 'other employees (white/black with light complexion)' were or what their claimed 'same or similar' infractions were"), *R&R adopted by* 2018 WL 3322970 (D.S.C. July 6, 2018).

***6** Based upon the foregoing, the plaintiff's allegations in the amended complaint – even considered along with the new allegations made in response to the motion to dismiss – do not "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570).

CONCLUSION AND RECOMMENDATION

Wherefore, based upon the foregoing, the undersigned recommends that the defendant's motion to dismiss (doc. 34) be granted. Further, as the plaintiff has previously been given an opportunity to file an amended complaint, the undersigned recommends that the action be dismissed with prejudice and without leave for further amendment. *See Workman v. Morrison Healthcare*, 724 F. App'x 280, 281 (4th Cir. 2018) (indicating that because "the district court already ... afforded Workman the opportunity to amend," it could "dismiss the complaint with prejudice").

IT IS SO RECOMMENDED.

The attention of the parties is directed to the important notice on the following page.

Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. "[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must 'only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.' " *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee's note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); see Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

Robin L. Blume, Clerk
United States District Court
300 East Washington Street
Greenville, South Carolina 29601

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140 (1985); Wright v. Collins, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).

All Citations

Not Reported in Fed. Supp., 2020 WL 10457662

Footnotes

1 The plaintiff refers to Daville as “Denise Duville” in her amended complaint (doc. 11-1 at 2). However, it is the defendant's understanding that the plaintiff is referring to Assistant Federal Security Director Danise Daville (doc. 34-1 at 2 n.3).

2 As noted, the *pro se* plaintiff was provided with an explanation of the motion to dismiss and motion for summary judgment procedures in the *Roseboro* order (*see* doc. 37).

3 The plaintiff defines the “directives given by management” as “exploring detail opportunities and completing internal assignments” (doc. 39 at 2).

4 Pursuant to Rule 15, a complaint may be amended once as a matter of law within 21 days after serving it, or within 21 days after the service of a responsive pleading or a motion under Rule 12(b), (e), or (f), whichever is earlier. Fed. R. Civ. P. 15(a)(1). The plaintiff here has already amended her complaint once (*see* doc. 11). Accordingly, the plaintiff may only file a second amended complaint with the defendant's consent or the court's leave. *See id.* 15(a)(2). However, even if the plaintiff moved to amend to add the allegations included in her response to the motion to dismiss, such amendment would be futile as the plaintiff's new allegations fail to state a claim, as discussed herein.

2024 WL 4507677
Only the Westlaw citation is currently available.
United States District Court, D. South Carolina, Florence Division.

Duane GOVAN, Plaintiff,
v.
COASTAL WALLS AND CEILING; William Arnold; and Deborah Arnold, Defendants.

C/A No. 4:23-cv-6244-JD-KDW
|
Signed August 30, 2024

Attorneys and Law Firms

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Arden Youngblood Lowndes, Laura P. Paton, Gordon Rees Scully Mansukhani, Charleston, SC, for Defendants.

REPORT AND RECOMMENDATION

Kaymani D. West, United States Magistrate Judge

***1** This employment-related matter is before the court for issuance of a Report and Recommendation ("Report") pursuant to 28 U.S.C. § 636(b) and Local Civil Rule 73.02(B)(2) (D.S.C.). Plaintiff began this action by filing a Complaint on December 4, 2023. Compl., ECF No. 1. Because Plaintiff is proceeding without representation (pro se) the undersigned reviewed Plaintiff's pleading and determined additional information was required to bring his case into proper form. Proper Form Orders, ECF No. 9 (granting Plaintiff's request to proceed in forma pauperis and instructing Plaintiff to provide service documents and a summons); ECF No. 22 (requiring Plaintiff to provide a summons). In responding to the Proper Form Orders Plaintiff indicated he was pursuing his case against Coastal Walls and Ceiling; William Arnold; and Deborah Arnold. He indicated he was not pursuing the matter against certain other defendants he previously had listed. *See* Notice of Voluntary Dismissal, ECF No. 26 (dismissing claims against Brad May, Charlotte Walls and Ceiling, Inc., John Does 1-10, and Dolorita Degraffenreid). The court authorized service of the Complaint on Coastal Walls and Ceiling; [1] William Arnold; and Deborah Arnold ("Defendants"). ECF No. 28. All Defendants have now been served. *See* ECF Nos. 33, 34, 48. On April 18, 2024, Defendants filed a joint Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), seeking dismissal of the entire Complaint for failure to state a claim. Defs. Mem., ECF No. 35. [2] Plaintiff opposes the Motion. ECF No. 44. Defendants filed a Reply. ECF No. 45. Having considered the parties' filings and applicable law, the undersigned recommends Defendants' Motion to Dismiss, ECF No. 35, be *granted*, and Plaintiff's Complaint be dismissed. It is further recommended that Plaintiff be given a reasonable opportunity to amend his Complaint.

I. Legal standard

"A motion filed under Rule 12(b)(6) challenges the legal sufficiency of a complaint." *Francis v. Giacomelli*, 588 F.3d 186, 192 (4th Cir. 2009). Typically, the court measures the legal sufficiency by determining whether the complaint meets the Rule 8 standards for a pleading. [3] *Id.* The Supreme Court considered the issue of well-pleaded allegations, explaining the interplay between Rule 8(a) and Rule 12(b)(6) in *Bell Atlantic Corp. v. Twombly*:

> Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the ... claim is and the grounds upon which it rests." While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level ...

***2** 550 U.S. 544, 555 (2007) (internal citations omitted); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." (citing *Twombly*, 550 U.S. at 556)). "When considering a motion to dismiss, the court must accept as true all of the factual allegations contained in the complaint." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). The court is also to " 'draw all reasonable inferences in favor of the plaintiff.' " *Kolon Indus.*, 637 F.3d at 440 (quoting *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 253 (4th Cir. 2009)). Although a court must accept all *facts* alleged in the complaint as true, this is inapplicable to legal conclusions, and "[t]hreadbare recitals of the elements of a cause of

action, supported by mere conclusory statements, do not suffice." *Iqbal,* 556 U.S. at 678 (citation omitted). While legal conclusions can provide the framework of a complaint, factual allegations must support the complaint for it to survive a motion to dismiss. *Id.* at 679. Therefore, a pleading that provides only "labels and conclusions" or "naked assertion[s]" lacking "some further factual enhancement" will not satisfy the requisite pleading standard. *Twombly,* 550 U.S. at 555, 557. Further, the court "need not accept as true unwarranted inferences, unreasonable conclusions, or arguments." *E. Shore Mkts., Inc. v. J.D. Assocs., Ltd. P'ship*, 213 F.3d 175, 180 (4th Cir. 2000). At bottom, the court is mindful that a complaint "need only give the defendant fair notice of what the claim is and the grounds upon which it rests." *Coleman v. Md. Ct. of Apps.,* 626 F.3d 187, 190 (4th Cir. 2010) (internal quotation marks omitted).

Here, Defendants look to Federal Rule of Civil Procedure Rule 9(b) to challenge the pleading sufficiency of Plaintiff's fraudulent representation claim. Rule 9(b) provides that "[i]n all averments of fraud, duress or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." Rule 9(g) states that "when items of special damages are claimed, each shall be averred." As recently explained in this court,

> As with Rule 8, failure to comply with the special pleading requirements set forth in Rule 9 is treated as a failure to state a claim under Rule 12(b)(6). *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 783 (4th Cir. 1999). Federal courts sitting in diversity apply federal procedural law and state substantive law. *Hartford Fire Ins. Co. v. Harleysville Mut. Ins. Co.*, 736 F.3d 255, 261 n.3 (4th Cir. 2013). Pleading standards are procedural and, thus, federal law applies. *Fuller v. Aliff*, 990 F. Supp. 2d 576, 580 (E.D. Va. 2013).

Johnson v. Pennymac Loan Servs., LLC, No. 4:23-CV-3426-JD-TER, 2024 WL 3656493, at *4 (D.S.C. July 24, 2024).

Pro se complaints are held to a less stringent standard than those drafted by attorneys, *Gordon v. Leeke*, 574 F.2d 1147, 1151 (4th Cir. 1978), and a federal district court is charged with liberally construing a complaint filed by a pro se litigant to allow the development of a potentially meritorious case. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007); *Kerr v. Marshall Univ. Bd. of Governors*, 824 F.3d 62, 72 (4th Cir. 2016). When a federal court is evaluating a pro se complaint, the plaintiff's allegations are assumed to be true. *De'Lonta v. Angelone*, 330 F.3d 630, 630 n.1 (4th Cir. 2003). Nevertheless, the requirement of liberal construction does not mean that this court can ignore a clear failure in the pleading to allege facts that set forth a claim currently cognizable in a federal district court. *Weller v. Dep't of Soc. Servs.*, 901 F.2d 387, 391 (4th Cir. 1990). Further, "a court may not act as [a pro se] litigant's advocate and construct legal arguments that the plaintiff has not made[.]" *Warren v. Tri Tech Labs., Inc.*, 993 F. Supp. 2d 609, 613 (W.D. Va.), *aff'd,* 580 F. App'x 182 (4th Cir. 2014) (citing *Brock v. Carroll,* 107 F.3d 241, 242–43 (4th Cir. 1997) (Luttig, J., concurring); *Beaudett v. City of Hampton*, 775 F.2d 1274, 1278 (4th Cir. 1985)).

II. Allegations in Plaintiff's Complaint

***3** Considered in the light most favorable to Plaintiff, the nonmoving party, the "Statement of Facts" in the Complaint includes the following allegations:

- Plaintiff "has been employed by the Defendant[4] for over 7 years and qualifies as an employee under the definitions provided by the Fair Labor Standards [Act,] 29 U.S.C. § 203." Compl. ¶ 11.

- Throughout his employment Plaintiff "has been subjected to numerous tortious acts including but not limited to coercion and infringements on their federal statutory rights to compensation with regard to equitable pay in various regards, particularly with the working extra hours during the week and then misrepresenting that work took place on Saturday hours without compensation for the same as prescribed by federal law." *Id.* ¶ 12.

- For over seven years Defendant has been "misrepresenting information to the IRS regarding the Plaintiff's working hours throughout the week and misrepresenting that work took place on Saturdays when it did not in order for them to be able to embezzle the excess amounts for themselves in the instant matter." *Id.* ¶ 13. Plaintiff was "threatened with termination if they opposed any of this unlawful conduct. Now, the IRS is garnishing Plaintiff's wages as a result of

the misrepresentations engaged in by the Defendants in this instant matter." *Id.*

- After working over seven years without a raise, Plaintiff "informed the Defendant of their grievances only to be retaliated against through the garnishment of their wages by the IRS which caused financial hardship to the Plaintiff." Compl. ¶ 15.

- Defendant "also forged the amount of Dependents of the Plaintiff on their W-4 forms in furtherance of their misrepresentation and embezzlement attempts" to Plaintiff's detriment. Compl. ¶ 15; *see also* ex. A to Compl., ECF No. 1-1 at 1 (W-4 form signed by Plaintiff on November 19, 2020; claiming $2000 in the "Dependents" portion of the form).

- Plaintiff has suffered financial damages "in addition to special damages from personal injury and harm in the form of permanent damage to their hands caused by the excessive hours worked during the week in the instant matter without compensation which includes special damages for pain and suffering as well as ongoing medical expenses and treatment in addition to any and all other necessary and applicable damages resulting from the tortious conduct of the Defendant in the instant matter." Compl. ¶ 17.

The Complaint then sets out the following causes of action: I) Breach of contract; II) Fraudulent misrepresentation; III) Personal injury ("Against John Doe Manager in Individual Capacity" [5]); IV) Violation of Fair Labor Standards Act 29 U.S.C. § 203, *et seq.*

III. Analysis

***4** Defendants seek dismissal for failure to state a claim as to each of Plaintiff's causes of action. Before detailing their arguments as to each claim, Defendants first argue Plaintiff impermissibly has bound all claims together as to all Defendants. Unsurprisingly, Plaintiff takes issue with Defendants arguments. The court considers each in turn.

A. Facts added in Plaintiff's opposition memorandum cannot be considered

In opposing the Motion to Dismiss Plaintiff included a "Counter-Statement of Facts" in his memorandum. Pl. Mem. 4-6, ECF No. 44. As an initial matter, the court agrees with Defendants' argument that any additional facts provided by Plaintiff in his response to the pending Motion to Dismiss are not properly before the court and cannot be considered. *See* Reply 1-2, ECF No. 45. The pending Motion challenges the sufficiency of Plaintiff's Complaint. Plaintiff cannot amend his Complaint by providing additional factual allegations in opposing the motion. *See, e.g., Huddleston v. Wells Fargo Bank, N.A.*, C/A No. 0:23-2112-SAL-PJG, 2023 WL 8474515, at *4 (D.S.C. Oct. 11, 2023); *Celester v. Baker Buick & GMC*, C/A No. 2:22-cv-01748-BHH-KDW, 2023 WL 4422533, at *3 (D.S.C. June 21, 2023) (citing *Mylan Labs., Inc. v. Akzo, N.V.*, 770 F. Supp. 1053, 1068 (D. Md. 1991) (citations omitted)). This is true even when, as here, the pleader is a pro se litigant. *Banks v. Sec'y of the Dep't of Homeland Security*, C/A No. 6:19-2654-TMC-KFM, 2020 WL 10457662, at *5 (D.S.C. Oct. 28, 2020) (quoting *Nix v. McCabe Trotter & Beverly, P.C.*, C/A No. 18-cv-1360-DCN-BM, 2018 WL 6112991, at *4 n.8 (D.S.C. Sept. 10, 2018), *R&R adopted by* 2018 WL 5263276 (D.S.C. Oct. 23, 2018)). " 'To hold otherwise would mean that a party could unilaterally amend a complaint at will, even without filing an amendment, and simply by raising a point in a brief.' " *Banks*, 2020 WL 10457662, at *5 (quoting *Weakley v. Homeland Sec. Sols., Inc.*, C.A. No. 14-CV-785, 2015 WL 11112158, at *5 (E.D. Va. May 19, 2015)). For purposes of ruling on the pending Motion to Dismiss, only factual allegations found in the Complaint will be considered in analyzing Defendants' Motion.

B. Causes of action

As an initial matter, the court generally agrees with Defendants' argument that Plaintiff's pleading cannot pass muster when he does not plead with specificity to which Defendant he is referring when making claims against a singular "Defendant" while suing multiple "Defendants." Defs. Mem. 7. [6] In reviewing the specific causes of action the court will construe the pleading in the light most favorable to Plaintiff. Plaintiff is reminded, though, that he must do more than allege generic liability; he is to explain what action or inaction is attributable to which Defendant or Defendants. Similarly, if he does not attribute any specific actions or inactions to any of the three served Defendants, those Defendants would be subject to dismissal. Where "there are no allegations of any wrongdoing" by a specific defendant, the complaint "fails to state a claim on which relief can be granted as to [that d]efendant." *Greene v. Stirling*, No. 5:16-cv-00587-JMC-KDW, 2016 WL 11201007, at *2 (D.S.C. June 17, 2016), *Report and Recommendation adopted by* 2017 WL 1420238 (D.S.C. Apr. 21, 2017). Plaintiff's

generic response that his Complaint describes a "coordinated scheme of misconduct involving all named defendants" and "a systematic pattern of behavior," Pl. Mem. 7-8, does nothing to diminish this pleading requirement.

1. Breach of contract

***5** Plaintiff's first cause of action is for breach of contract. Compl. ¶¶ 19-24. Plaintiff avers that the "parties had a contractual agreement as it pertains to the employment of the Plaintiff by the Defendant," that Defendant "engaged in the unjustified breach of said contract through the garnishing of the Plaintiff's wages without case or justification," and that Defendant caused Plaintiff damages "in the form of financial hardship for which the Plaintiff has not been compensated[.]" Compl. ¶¶ 21-24.

Both parties agree that South Carolina substantive law applies to the state-law-based claims. As Plaintiff indicates in the body of his Complaint and Defendants note in their memorandum, the elements of a breach of contract action in South Carolina are as follow: 1) a binding contract between the parties; 2) an unjustifiable failure to perform the contract; and 3) damage suffered by Plaintiff as a direct and proximate result of the breach. Compl. ¶ 20; Defs. Mem. 8 (both citing *Fuller v. E. Fire & Cas. Ins. Co.*, 124 S.E.2d 602, 610 (S.C. 1962)).

Defendant seeks Rule 12(b)(6) dismissal of the breach of contract claim, arguing the Complaint does not include details sufficient to identify the contract he alleges he has or with which Defendant(s) he has a contract, nor does the pleading explain the terms of the contract that allegedly were breached. Further, although Plaintiff characterizes the wage-garnishment as the contractual breach, he seems to allege the IRS (presumably the United States Internal Revenue Service) is the entity that garnished the wages. Accordingly, Defendants argue, Plaintiff has not set out a plausible breach-of-contract cause of action. Defs. Mem. 8-9.

In response to the Motion, although citing a case from New York, Plaintiff correctly notes that, in some instances, an employment relationship creates an implied contract. Pl. Mem. 10. Plaintiff then submits that his Complaint "details Defendants' failure to pay Plaintiff for overtime work as agreed upon, which is a direct violation of the agreed terms and a clear breach of contract." *Id.* at 11. Plaintiff submits that this provides enough at the pleadings stage. *Id.*

On Reply, Defendants correctly assert that, while there are situations in which an employment relationship may create an implied contract, Plaintiff still must plead sufficient factual allegations to set out the existence of such. Defs. Mem. 4 (citing, *inter alia, Oroujian v. Delfin Group USA LLC*, 57 F. Supp. 3d 544, 536 (D.S.C. 2014)). Defendants further note that Plaintiff has provided "no clarification or new factual allegations setting out with whom Plaintiff entered into an employment or otherwise contractual relationship." Defs. Mem. 4-5. Further, Defendants note Plaintiff has not explained with which Defendant(s) Plaintiff claims to have entered into a contractual relationship. *Id.* at 5.

Plaintiff's breach-of-contract cause of action has not been sufficiently pleaded. He has not set forth with any particularity the terms of the alleged contract, the specific parties, or the specific manner in which any contract allegedly was breached. "[I]n South Carolina, at-will employment is the default employment status." *Weaver v. John Lucas Tree Expert Co.*, No. 2:13-CV-01698-PMD, 2013 WL 5587854, at *6 (D.S.C. Oct. 10, 2013). A promise of at-will employment "creates no enforceable rights in favor of the employee other than the right to collect wages accrued for work performed." *Anthony v. Atl. Grp., Inc.*, 909 F. Supp. 2d 455, 482 (D.S.C. 2012), *aff'd* No. 12-2538 (4th Cir. July 12, 2013). The court does note that, while Plaintiff's opposition memorandum characterizes the breach of contract as the "non-payment of wages for overtime work," Pl. Mem. 11, nothing in the Complaint under consideration includes that sort of information, nor does it provide details of the alleged contract.

***6** At bottom, despite his statement to the contrary, Pl. Mem. 11, Plaintiff's Complaint does not "detail Defendants' failure to pay Plaintiff for overtime work as agreed upon." The Complaint does not plainly explain Plaintiff's allegations as to how he believes Defendants improperly compensated him. Plaintiff obliquely refers to being required to work "extra hours during the week and then misrepresenting that work took place on Saturday hours without compensation for the same as prescribed by federal law." Compl. ¶ 12. He then avers Defendant has been misrepresenting information to the IRS so that Defendant could "embezzle the excess amounts" and that the IRS is garnishing Plaintiff's wages as a result of Defendants' misrepresentations. *Id.* ¶ 13. These convoluted averments do not set out with any factual clarity an allegation that Defendants failed to pay Plaintiff for overtime work, much less that these actions constituted a breach of contract

(or the terms of and parties to any such contract). The breach of contract claim is subject to dismissal.

2. Fraudulent misrepresentation

Next, Defendants seek Rule 12(b)(6) dismissal of Plaintiff's fraudulent misrepresentation claim, arguing the Complaint does not satisfy the heightened pleading standards applicable to fraud claims. Defs. Mem. 9-10; Reply 5-6. Plaintiff submits his pleading is adequate in this regard. Pl. Mem. 12-14.

As explained by another court in this District, the pleading-sufficiency of this fraud claim is considered under Federal Rule of Civil Procedure 9; failure to satisfy Rule 9's requirements is considered failure to state a claim pursuant to Rule 12(b)(6): [7]

> Rule 9(b) imposes a heightened pleading standard on fraud claims, requiring a plaintiff to "state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). "To meet this standard, a plaintiff must, at a minimum, describe 'the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby.' " *U.S. ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 379 (4th Cir. 2008) (quoting *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir. 1999)). *See also U.S. ex rel. Kasowitz Benson Torres LLP v. BASF Corp.*, 285 F. Supp. 3d 44, 47 (D.D.C. 2017) ("To allege fraud, a plaintiff must state the time, place, and content of the false misrepresentations, the fact misrepresented, and what was obtained or given up as a consequence of the fraud." (citing *U.S. ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1385 (D.C. Cir. 1981))). These facts are often "referred to as the 'who, what, when, where, and how' of the alleged fraud." *U.S. ex rel. Wilson*, 525 F.3d at 379 (citation omitted). Failure to comply "with Rule 9(b)'s particularity requirement for allegations of fraud is treated as a failure to state a claim under Rule 12(b)(6)." *Harrison*, 176 F.3d at 783 n.5 (citing *U.S. ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 901 (5th Cir. 1997)).

Sanders v. Domingo, No. 3:21-CV-02415-JMC, 2022 WL 173891, at *2 (D.S.C. Jan. 18, 2022).

In his fraudulent misrepresentation claim Plaintiff references the "entirely separate action of receiving unjustified benefits from Plaintiff's paychecks in the instant matter by misrepresenting their working hours. In addition, the Defendant also forged the Plaintiff's amount of dependents on their W-4 which also constituted fraudulent misrepresentation and forgery to the detriment of the Plaintiff (Exhibit A and Exhibit B)." Compl. ¶ 27; Exhibit A appears to be Plaintiff's 2020 W-4 form; Exhibit B is his list of "Defendants". In setting out allegations concerning this claim, Plaintiff avers the following:

> ***7** 29. Here, the Defendant was fully aware of the falsity of their actions and misrepresentations as it pertained to the Saturday work of the Plaintiff which did not take place and their intention to defraud the company and the government through the receipt of kickbacks illegally by coercing the Plaintiff not to receive the payment for the misrepresented hours that they were legally entitled to as well as consequences if they were to assert their rights in the instant matter in unlawful retaliation against the Plaintiff for asserting a legal right.
>
> 30. The Defendant engaged in this conduct for their own benefit and with the intent to deceive and defraud others including the Plaintiff of the additional payments based on the misrepresentations described herein.
>
> 31. For over 7 years, the Defendant has been collecting kickbacks by misrepresenting the Plaintiff's working hours on Saturdays in order for them to be able to embezzle the excess amounts for themselves in the instant matter. Also, the Plaintiff was threatened with termination if they opposed any of this unlawful conduct.
>
> 32. The misrepresentations engaged in by the Defendant through their manager resulted in the direct and proximate causation of damages to the Plaintiff for which the Plaintiff has not been compensated for through the instant moment thereby giving rise to the instant claim for fraudulent representation with the intent to deceive, entirely separate from the original breach of contract as it pertains to the garnishment of wages by the IRS.
>
> 33. As a result, the Plaintiff is seeking compensatory and punitive damages for any and all damages resulting directly and proximately from the Defendant's conduct in an amount to be determined at trial in addition to any and all other relief that is deemed fair and equitable by this Honorable Court.

Compl. ¶¶ 29-32.

Fundamentally, Plaintiff's pleading is deficient in that it does not state with particularity the "the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby." *U.S. ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d at 379. Plaintiff suggests the fraudulent misrepresentation claim relates to one or more unspecified Defendants misrepresenting the hours Plaintiff worked. The only reference to a particular individual associated with Defendant is "their manager," Compl. ¶ 32, an individual not called by name. Further, the "Defendant" initially listed as the "Myrtle Beach Branch Manager," was not named in the operative Complaint and is not a Defendant herein. To whom Defendant or Defendants made any fraudulent misrepresentation is far from clear. The interplay with Plaintiff's W-4 form and the IRS is similarly unclear.

Plaintiff simply has not set out his fraudulent misrepresentation claim with sufficient particularity. The undersigned recommends dismissal. This is so even in light of the "charge that '[a] court should hesitate to dismiss a complaint under Rule 9(b) if the court is satisfied (1) that the defendant has been made aware of the particular circumstances for which she will have to prepare a defense at trial, and (2) that plaintiff has substantial prediscovery evidence of those facts.' " *Scott v. Scott*, No. 3:22-CV-02800-SAL, 2023 WL 11886699, at *4 (D.S.C. Mar. 3, 2023) (quoting *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir. 1999)). Here, however, the court is not satisfied that Defendants have been made aware of the particular circumstances for which they will have to prepare a defense. *See Scott*, 2023 WL 11886699, at *4 (granting dismissal for failure to satisfy Rule 9(b)'s heightened pleading requirement). The Complaint consists of confusing allegations related to misrepresentations, kickbacks, falsification of IRS forms, and the IRS' garnishment of Plaintiff's wages. As currently pleaded the identity of those making such representations, to whom, when, and to what end are far from clear. Defendants' Motion should be granted as to Plaintiff's fraudulent misrepresentation claim. [8]

3. Personal injury

***8** Defendants also seek dismissal of Plaintiff's Third Cause of Action for "Personal Injury," brought "against John Doe manager in individual capacity." Compl. ¶¶ 34-45. Defendants submit that the claim is a negligence-based claim for workplace injury and is precluded by the South Carolina Workers' Compensation Act ("SCWCA"). *See* Defs. Mem. 15-17; Reply 8-9.

Much of Plaintiff's "Personal Injury" cause of action is comprised of several paragraphs of a hornbook-like explanation about how South Carolina's workers' compensation system operates and is "usually the only way you can take legal action against your employer with regard to a workplace injury or illness." Compl. ¶ 35. Plaintiff then notes there are exceptions that may permit an employee to "bring suit against third parties such as product manufacturers, contractors, or other vendors after a workplace injury or illness." Compl. ¶ 36. Plaintiff then includes a general recitation of the elements of a negligence claim: duty of care, negligence (breach of duty), causation, and damages. Compl. ¶ 40.

The arguably substantive portion of Plaintiff's "Personal Injury" cause of action avers that "the instant personal injury claim goes against the manager that was directly responsible for the Saturday kickback abuse and misrepresentations complained of in the instant matter (unbeknownst to the actual employer)." Compl. ¶ 37. This manager is unnamed. Plaintiff submits he has "established that there is a duty of care in the instant matter stemming from the manager's responsibilities of the workplace in the instant matter (separate from the company all together)." Compl. ¶ 41. Plaintiff continues, averring the "breaches of this duty of care" are "self evident as they include the coerced over-working of the Plaintiff in the instant matter without fair compensation and with the use of coercive tactics for failure to comply with the Defendant's demands to comply with the Saturday kickback conspiracy to embezzle funds." Compl. ¶ 42. Plaintiff submits this "coerced overworking" resulted in "permanent damages to the hands of the Plaintiff which are used consistently in the type of work normally provided by the Plaintiff for the Defendant in the industry of Walls and Cleaning work." Compl. ¶ 43. Plaintiff submits "Defendant's breach of protocols" have caused him to suffer damages such as "medical bills, lost wages, rehabilitation costs, pain, and suffering." Compl. ¶ 44.

The SCWCA contains an exclusivity provision, which states as follows:

> The rights and remedies granted by this title to an employee when he and his employer have accepted the

> provisions of this title, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin as against his employer, at common law or otherwise, on account of such injury, loss of service or death ....

S.C. Code Ann. § 42-1-540. Based on this provision, South Carolina courts hold that the SCWCA provides the exclusive remedy against an employer for an employee who sustains injuries arising out of his or her employment. *Sabb v. S.C. State Univ.*, 567 S.E.2d 231, 234 (S.C. 2002). The only exceptions to the exclusivity provision are: (1) when the injury results from the act of a subcontractor who is not the injured person's direct employer; (2) when the injury is not accidental but rather results from the intentional act of the employer or its alter ego; (3) when the tort is slander and the injury is to reputation; or (4) when involving certain occupations expressly excluded by the SCWCA. *Cason v. Duke Energy Corp.*, 560 S.E.2d 891, 893 n.2 (S.C. 2002).

***9** Defendants submit the SCWCA's exclusivity provision applies to Plaintiff's claims and no exception applies. Defs. Mem. 15-17. As noted by Defendants, the "intentional injury exception is construed narrowly and does not include allegedly injuries that fall short of "conscious and deliberate intent directed to the purpose of inflicting an injury." *Sibert v. Raycom Media, Inc.*, No. 3:17-cv-1544-CMC, 2017 WL 3721238 at *3 (D.S.C. Aug 29, 2017). *See* Defs. Mem. 15-16. Further, Plaintiff has admitted he is an employee, and he is attempting to make a personal-injury-type claim against an unnamed "John Doe" manager who allegedly was "responsible for the Saturday kickback abuse and misrepresentations ... unbeknownst to the actual employer." Compl. ¶ 37.

While Plaintiff's allegations in the pleading sound in negligence, in his opposition to Defendants' Motion he seems to attempt to recast them as claims for actions that "were not merely negligent but involved intentional misrepresentations and policies that led directly to Plaintiff's injuries—specifically, the permanent damage to his hands due to coerced overworking." Pl. Mem. 17.

As noted above, Plaintiff cannot inject additional averments into the Complaint by making new arguments or allegations in his opposition memorandum. Further, even if the court were to consider Plaintiff's Complaint as including a claim for intentional injury, he has not set out a claim sufficient to show "conscious and deliberate intent directed to the purpose of inflicting an injury." *Sibert*, 2017 WL 3721238, at *3. Plaintiff's Third Cause of Action is subject to dismissal as it is precluded by the SCWCA. [9]

4. FLSA

Defendants also seek dismissal of Plaintiff's fourth and final cause of action for "Violation of Fair Labor Standards Act 29 U.S.C. § 203, et seq.," Compl. ¶¶ 46-54, arguing it is unclear under which section or sections of the FLSA Plaintiff is pursuing his claim and he has not set out a plausible claim. Defs. Mem. 12-15.

As properly noted by Defendants, minimum-wage-related FLSA claims are brought pursuant to 29 U.S.C. § 206; overtime-pay-related FLSA claims are brought pursuant to 29 U.S.C. § 207. To establish a prima facie minimum-wage-based claim under § 206 "a plaintiff's complaint must show that '(1) the plaintiff was employed by the defendant; (2) the plaintiff was engaged in commerce ...; (3) the plaintiff was not compensated for all hours worked during each work week at a rate equal to or greater than the then applicable minimum wage; and (4) none of the exemptions in 29 U.S.C. § 213 applied to the plaintiff's position.' " *Aspinall v. Keller*, No.: 8:22-cv-04706-TMC-JDA, 2023 WL 8367706 at *5 (D.S.C. Apr. 7, 2023) (quoting *Seagram v. David's Towing & Recovery, Inc.*, 62 F. Supp. 3d 467, 473 (E.D. Va. 2014)) (citation omitted); 29 U.S.C. § 206.

For an overtime-pay related claim under 29 U.S.C. § 207, a plaintiff must "provide sufficient factual allegations to support a reasonable inference that he or she worked more than forty hours in at least one workweek and that his ... employer failed to pay the requisite overtime premium for those overtime hours." *Hall v. DIRECTV, LLC*, 846 F.3d 757, 777 (4th Cir. 2017). As another court in this District has noted, this "requires 'more than merely alleg[ing] that they regularly worked in excess of forty hours per week without receiving overtime pay' but cautioned plaintiffs are not required 'to identify a *particular* week in which they worked uncompensated overtime hours.' " *Lucas v. United Parcel Serv., Inc.*, No. 3:21-CV-02328-SAL, 2022 WL 4533787, at

*6 (D.S.C. Sept. 2, 2022) (quoting *Hall*, 846 F.3d at 777) (internal citations omitted).

***10** Plaintiff's Complaint entitles the Fourth Cause of Action as one brought for violation of the FLSA, but does not specify which type of claim he is bringing. Curiously, Plaintiff also references South Carolina's Payment of Wages Act. [10] Compl. ¶ 47. The remainder of Plaintiff's Fourth Cause of Action provides as follows:

> 48. Under federal law, employers who fail to pay proper wages may be liable for up to double the amount of unpaid back wages plus costs and attorney's fees incurred by employees. These cases can be brought by pay lawyers on a class or collective basis on behalf of all workers who were subjected to the same illegal pay practices.
>
> 49. An employer shall not withhold or divert any portion of an employee's wages unless the employer is required or permitted to do so by state or federal law or the employer has given written notification to the employee of the amount and terms of the deductions as required by S.C. Labor law.
>
> 50. Each of these provisions of Fair Labor Standards Act were violated both with regards to the federal law and the state law, thereby giving rise to the instant claim.
>
> 51. Throughout the course of employment, the Plaintiff has been subjected to numerous tortious acts including but not limited to coercion and infringements on their federal statutory rights to compensation with regards to equitable pay in various regards, particularly with the excessive overworking of the Plaintiff during the week and the misrepresentation of working of the Saturday hours.
>
> 52. For over 7 years, the Defendant has been collecting kickbacks by misrepresenting the Plaintiff's working hours on Saturdays in order for them to be able to embezzle the excess amounts for themselves in the instant matter. Also, the Plaintiff was threatened with termination if they opposed any of this unlawful conduct.
>
> 53. Also, the Plaintiff was threatened with termination if they opposed any of this unlawful conduct.
>
> 54. As a result, the Plaintiff is seeking compensatory and punitive damages for any and all damages resulting directly and proximately from the Defendant's conduct in an amount to be determined at trial in addition to any and all other relief that is deemed fair and equitable by this Honorable Court.

Compl. ¶¶ 48-51. Plaintiff's general statements concerning what federal law and "S.C. Labor law" require do nothing to provide Defendants with an understanding of Plaintiff's precise claims or how he alleges the FLSA was violated.

In responding to Defendants' Motion Plaintiff arguably explains that he is pursuing a claim of unpaid overtime in violation of the FLSA. Pl. Mem. 6 ("By falsifying work hours and failing to pay overtime, Defendants systemically violated the FLSA, which protects employees from wage theft and mandates compensation for overtime at a rate not less than one and one-half times the regular rate of pay."). Again, though, Plaintiff's arguments in response to a motion are not considered to amend his current Complaint in any manner.

Further, Plaintiff submits he has provided information in the Complaint that the pleading does not include. For example, Plaintiff argues his Complaint "specifies that Plaintiff was required to work overtime without receiving proper compensation, in direct violation" of the FLSA. Pl. Mem. 15. He submits the Complaint includes "specific references to periods where Plaintiff worked beyond the standard workweek without adequate pay." *Id.* It does not, however. Plaintiff's several references to Saturday work, *e.g.*, Compl. ¶ 51, alone do not set out a plausible claim. While Plaintiff is correct that, at this stage, he would not necessarily "need to detail each individual paycheck or the exact hours worked to survive a motion to dismiss," Pl. Mem. 15, he must provide more detail than he has provided. As written, this portion of Plaintiff's Complaint is a hodge-podge of references to general law requiring employees to be paid equitable wages and general allegations relating to purported kickbacks and embezzlement that Plaintiff discussed elsewhere. Missing are details concerning circumstances surrounding the alleged FLSA violation(s).

***11** Plaintiff has not set forth facts sufficient to allege a plausible FLSA violation. That claim is subject to dismissal.

C. Individual Defendants

As discussed above, Plaintiff's Complaint is deficient in that he makes various references to "Defendant" and "Defendants" without explaining which Defendant or Defendant he contends is responsible for the various causes of action. Further, the court notes the Complaint itself does not list individuals William Arnold or Deborah Arnold by

name, let alone attribute specific allegations as to either of them. The only mention of the Arnolds is to list them as "Owner and President" and "Owner" respectively in the list of "Defendants." ECF No. 1-1 at 2. This failure alone is sufficient to require dismissal of William Arnold and Deborah Arnold as parties to this litigation.

The court further notes that, in responding to the Motion to Dismiss, Plaintiff generally submits that all Defendants —Coastal, William Arnold, and Deborah Arnold—may be jointly responsible for all acts "if [ ] individuals direct those corporate acts." Pl. Mem. 8. However, to the extent this argument is even considered, it oversimplifies legal doctrine concerning circumstances under which corporate officers may be found responsible for corporate acts. *See generally* Reply 9-11. Nothing in the Complaint sets out a plausible claim against William Arnold or Deborah Arnold. They should be dismissed as Defendants.

D. Rule 11 request

Defendants conclude their motion by requesting "fees and costs incurred for having to defend this claim," citing Federal Rule of Civil Procedure 11. Defs. Mem. 17. While such a request is within the discretion of the District Judge to consider, the undersigned is of the opinion that pro se Plaintiff's pleading is not one that should entitle Defendants to fees and costs under the auspices of Rule 11.

IV. Conclusion and recommendation

For the reasons set forth above, it is recommended that Defendants' Motion to Dismiss, ECF No. 35, be *granted* and Plaintiff's Complaint be dismissed as to all Defendants. It is not recommended, however, that Defendants be awarded fees and costs. Further, it is recommended that Plaintiff be given a reasonable opportunity to present an amended complaint. [11]

IT IS SO RECOMMENDED.

Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. [I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation. *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee's note).

***12** Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *see* Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

Robin L. Blume, Clerk
United States District Court
Post Office Box 2317
Florence, South Carolina 29503

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).

All Citations

Not Reported in Fed. Supp., 2024 WL 4507677

Footnotes

1 Defendant Coastal Walls and Ceiling indicated it is properly identified as "Coastal Walls and Ceilings, LLC." Defs. Mem. 1, ECF No. 35.

2 Defendants briefly also submit they alternatively move for a more definite and certain statement pursuant to Rule 12(e) because "the allegations are so vague that Defendants cannot properly respond to the Complaint." Defs. Mem. 3.

3 As noted within, for fraud-related allegations, Federal Rule of Civil Procedure 9 imposes a more stringent pleading standard.

4 As discussed more fully within, Plaintiff often references "Defendant" or "Defendants" without specifying which Defendant or Defendants is intended. In "Exhibit B" to Plaintiff's Complaint he identifies William Arnold as "Owner and President" and Deborah Arnold as "Owner" (presumably of Coastal Walls and Ceiling). ECF No. 1-1 at 2.

5 Plaintiff's Complaint listed "Coastal Walls and Ceiling, John Does 1-10" as Defendants in the initial caption. Compl. at 1. Plaintiff also attached an "Exhibit B" to the Complaint that listed the Defendants as William Armond, Deborah Arnold, Coastal Walls and Ceiling (local branch), Charlotte Walls & Ceiling, Inc. (Headquarters), Dolorita Degraffenreid (Human Resources) and Brad May (Myrtle Beach Branch Manager). ECF No. 1-1 at 2. As noted above, however, in providing service documents Plaintiff advised the court it was suing only Coastal Walls and Ceiling, William Arnold, and Deborah Arnold.

6 Defendants' concern about Plaintiff's binding the "alleged John Doe defendants" with the other named defendants, Defs. Mem. 7, is unfounded as there remain no "John Doe" defendants in this matter.

7 " 'Federal courts sitting in diversity apply federal procedural law and state substantive law.' " *Johnson v. PennyMac Loan Servs., LLC*, No. 4:23-CV-3426-JD-TER, 2024 WL 3656493, at *4 n.2 (D.S.C. July 24, 2024) (quoting *Hartford Fire Ins. Co. v. Harleysville Mut. Ins. Co.*, 736 F.3d 255, 261 n. 3 (4th Cir. 2013)). Pleading standards are procedural; therefore, thus, federal law applies. *Id.*

8 Furthermore, to the extent Defendants' challenge is considered one to the substance of Plaintiff's fraudulent misrepresentation claim dismissal is also appropriate. To prevail on such a claim under South Carolina law, Plaintiff "must allege and prove: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury." *Karoue v. Blue Cross Blue Shield of S.C.*, 3:13-cv-01844, 2014 WL 792140, at *5 (D.S.C. Feb. 25, 2014) (internal citation omitted).

9 Further, Plaintiff has not made clear against which Defendant or Defendants he seeks to bring this claim. The "John Doe" manager is not a Defendant (nor would naming such a Defendant salvage this claim).

10 Plaintiff provides no detailed discussion of the South Carolina Unpaid Wages Act, nor has his pleading plausibly set forth a claim under that statute.

11 Of course both parties will have an opportunity to file any objections to this Report and Recommendation as explained in the attached "Notice of Right to File Objections to Report and Recommendation." Plaintiff should wait for the District Judge to issue its Order regarding this Report and Recommendation on the pending Motion to Dismiss before attempting to submit any amended complaint.

End of Document

2021 WL 4711408
Only the Westlaw citation is currently available.
United States District Court, D.
South Carolina, Beaufort Division.

Jill K. JINKS, individually and as trustee of the Jinks Heritage Trust, Plaintiff,
v.
SEA PINES RESORT, LLC; Community Services Associates, Inc.; Association of Sea Pines Plantation, Property Owners, Inc. and the Advisory Board, Defendants.

No. 9:21-cv-00138-DCN
|
Signed 10/08/2021

Attorneys and Law Firms

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ORDER

DAVID C. NORTON, UNITED STATES DISTRICT JUDGE

***1** The following matter is before the court on defendant Association of Sea Pines Plantation Property Owners Inc. and the Advisory Board's ("ASPPPO") motion to dismiss, ECF No. 44. For the reasons set forth below, the court grants in part and denies in part the motion.

I. BACKGROUND

This case concerns a referendum to amend certain Declaration of Covenants and Restrictions dated September 7, 1974, recorded in the Beaufort County, South Carolina Register of Deeds (the "1974 Covenants"). The 1974 Covenants, along with various other recorded covenants and declarations, govern the rights and responsibilities of property owners of Sea Pines Plantation located on Hilton Head Island, South Carolina. The 1974 Covenants were executed by the then-owner and developer of the Sea Pines Plantation community, Sea Pines Plantation Company, Inc. (the "Company."). The Sea Pines Plantation community is comprised of residential properties, commercial properties, and the Sea Pines Resort, as well as golf courses, tennis courts, biking and leisure trails, and beach access. Defendant Sea Pines Resort, LLC (the "Resort") currently owns and operates the Sea Pines Resort.

On November 17, 2020, defendant Community Services Associates Inc. ("CSA") called the referendum at issue to amend the 1974 Covenants. CSA is a South Carolina nonprofit corporation that is the record owner of the roads, gates, open spaces, and common properties in the Sea Pines Plantation community and performs repairs necessary to maintain the attractiveness and value of the community and its properties. Before calling the referendum, CSA sought approval from a Resort representative, and the requested approval was given.

The proposed amendment, if enacted, would create an "Infrastructure Improvement Fund" and impose an additional annual assessment of $600.00 upon residential property owners in Sea Pines Plantation, including plaintiff Jill K. Jinks ("Jinks"). The Infrastructure Improvement Fund would be "used only for the repair, replacement, addition and improvement of the roads, bridges, bulkheads, leisure trails, storm water facilities and systems located in or servicing Sea Pines...." ECF No. 38, Amend. Compl. ¶ 54. Under the 1974 Covenants, "Participating Property Owners" are entitled to vote on the referendum. A "Participating Property Owner" is defined under the 1974 Covenants as

> all those owners of Residential lots, and Family Dwelling Units, except the

> Company, who execute that certain Agreement, known as the 'Advisory Group Agreement', and all owners of Residential lots and Family Dwelling Units who purchase property in Sea Pines Plantation which is subject to the payment of the same or greater dollar amount of the assessments provided for herein.

ECF No. 38-1 at 3. For the amendment to be approved, seventy-five percent of the Participating Property Owners who return a ballot must vote in favor of the amendment.

The proposed amendment states that it is made by the Resort "with the acknowledgement of [CSA] and [ASPPPO]." Amend. Compl. ¶ 75. ASPPPO is a nonprofit corporation formed in 1973, whose stated mission is to provide a forum for and to promote the common good and general welfare of residential property owners on Sea Pines Plantation and to represent residential property owners in all matters in pursuit of these objectives. On November 30, 2020, the ASPPPO board of directors held a special meeting adopting a resolution approving the proposed amendment to the 1974 Covenants. Following the passage of the resolution, ASPPPO encouraged its members to vote in favor of the referendum.

***2** Jinks, as a residential property owner in Sea Pines Plantation, objected to the referendum on the basis that none of the named defendants, including CSA, the Resort, or ASPPPO (collectively, "defendants"), had the authority to call for or pursue any referendum to amend the 1974 Covenants. Despite Jinks' objection, defendants moved forward with the referendum. At a CSA board of directors meeting held on January 28, 2021, the chair of the board advised that the referendum had passed.

On January 13, 2021, one week before referendum ballots were due, Jinks filed the instant action, asserting (1) declaratory judgment claims against the Resort and CSA; (2) breach of contract claims against CSA and ASPPPO; and (3) civil conspiracy, nuisance, and permanent injunction claims against all defendants for their actions taken in connection with the referendum. In particular, Jinks seeks a declaration that defendants lacked the legal authority to call for the subject referendum or to implement the referendum and that the proposed amendment is invalid. On March 29, 2021, ASPPPO filed a motion to dismiss. ECF No. 44. On April 12, 2021, Jinks responded in opposition, ECF No. 51, and on April 19, 2021, ASPPPO replied, ECF No. 53. On June 30, 2021, Jinks filed a supplement to her response to the motion to dismiss, notifying the court of new authority on issues discussed in the parties' briefings. ECF No. 70. On July 7, 2021, ASPPPO responded to Jinks' supplemental filing. ECF No. 71. The court held a hearing on the motion to dismiss on September 28, 2021. ECF No. 73. As such, this motion has been fully briefed and is now ripe for review.

II. STANDARD

A Federal Rule of Civil Procedure 12(b)(6) motion for failure to state a claim upon which relief can be granted "challenges the legal sufficiency of a complaint." Francis v. Giacomelli, 588 F.3d 186, 192 (4th Cir. 2009) (citations omitted); see also Republican Party of N.C. v. Martin, 980 F.2d 943, 952 (4th Cir. 1992) ("A motion to dismiss under Rule 12(b)(6) ... does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses."). To be legally sufficient, a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A Rule 12(b)(6) motion should not be granted unless it appears certain that the plaintiff can prove no set of facts that would support his claim and would entitle him to relief. Mylan Labs., Inc. v. Matkari, 7 F.3d 1130, 1134 (4th Cir. 1993). When considering a Rule 12(b)(6) motion, the court should accept all well-pled allegations as true and should view the complaint in a light most favorable to the plaintiff. Ostrzenski v. Seigel, 177 F.3d 245, 251 (4th Cir. 1999); Mylan Labs., Inc., 7 F.3d at 1134. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id.

III. DISCUSSION

ASPPPO requests that the court dismiss Jinks' civil conspiracy, nuisance, and injunctive relief claims against it. The court addresses each claim in turn.

A. Civil Conspiracy

In their initial briefings, both parties argued ASPPPO's motion to dismiss under the established elements for civil conspiracy in South Carolina at the time. Under that approach, to establish a claim for civil conspiracy, a plaintiff was required to plead and prove: (1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, (3) causing plaintiff special damages. See Hackworth v. Greywood at Hammett, LLC, 682 S.E.2d 871, 874 (S.C. Ct. App. 2009), overruled by Paradis v. Charleston Cty. Sch. Dist., 861 S.E.2d 774, 780 (S.C. 2021); McMillan v. Oconee Mem'l Hosp., Inc., 626 S.E.2d 884, 886 (S.C. 2006), overruled by Paradis, 861 S.E.2d at 780. ASPPPO initially challenged Jinks' civil conspiracy claim under each of these three elements, and Jinks framed her arguments in her response accordingly. See ECF No. 44-1 at 5 (citing Hackworth, 682 S.E.2d at 874); ECF No. 51 at 4 (citing McMillan, 626 S.E.2d at 886).

***3** As the parties acknowledged in their supplemental briefings, the Supreme Court of South Carolina recently changed the calculus for establishing a civil conspiracy claim. Specifically, the South Carolina Supreme Court in Paradis, 861 S.E.2d at 780, explicitly abolished the third element, which required the plaintiff to plead special damages. Following, Paradis, under South Carolina law, "a plaintiff asserting a civil conspiracy claim must establish (1) the combination or agreement of two or more persons, (2) to commit an unlawful act or a lawful act by unlawful means, (3) together with the commission of an overt act in furtherance of the agreement, and (4) damages proximately resulting to the plaintiff." 861 S.E.2d at 780. Moreover, the court in Paradis confirmed that "[s]ince civil conspiracy is an intentional tort, an intent to harm, which has also been discussed in our conspiracy law, remains an inherent part of the analysis." Id. at 780. As such, the court will construe ASPPPO's arguments that Jinks failed to plead that the "primary purpose" of the conspiracy was to harm her as, instead, an argument that Jinks simply failed to plead intent to harm. The court will also disregard ASPPPO's arguments regarding special damages. Therefore, the court discusses only Jinks' arguments regarding intent to harm and acts in furtherance of the conspiracy in turn below.

1. Intent to Harm

The court finds that Jinks fails to allege that ASPPPO acted with intent to harm. According to ASPPPO, the amended complaint can only fairly be read as alleging that defendants intended to amend the 1974 Covenants to create a fund to repair Sea Pines Plantation's infrastructure. According to Jinks, her complaint should be read as alleging that defendants conspired with the intent to permanently alter Jinks' property rights by passing an unlawful referendum and imposing a new, additional annual assessment. Under either interpretation of the amended complaint, Jinks has not sufficiently alleged that defendants acted with intent to harm her.

"Civil conspiracy requires a specific intent to injure the plaintiff." Sizemore v. Georgia-Pac. Corp., 1996 WL 498410, at *13 (D.S.C. Mar. 8, 1996) (citing Bivens v. Watkins, 437 S.E.2d 132, 134 (S.C. Ct. App. 1993)), aff'd sub nom. Sizemore v. Hardwood Plywood & Veneer Ass'n, 114 F.3d 1177 (4th Cir. 1997). Some evidence that the alleged conspirators "acted with malice towards" the plaintiff is required. Waldrep Bros. Beauty Supply, Inc. v. Wynn Beauty Supply Co., Inc., 992 F.2d 59, 63 (4th Cir. 1993) (applying South Carolina law). Where, for example, alleged conspirators acted out of a general desire to make a profit rather than to harm the plaintiff, a claim for civil conspiracy cannot lie. Bivens, 437 S.E.2d at 136. Thus, a claim for civil conspiracy requires at least some degree of relationship between the plaintiff and the alleged conspirators.

Here, even if ASPPPO intended to impose an annual assessment on homeowners, including Jinks, these allegations fall short of pleading that defendants intended to injure Jinks by doing so. Indeed, it is undisputed that the assessment was intended to create the Infrastructure Improvement Fund to repair, replace, and improve roads, bridges, leisure trails, and storm water facilities and systems within Sea Pines Plantation. By Jinks' own account, then, defendants' efforts were directed at benefiting the Sea Pines community, rather than at harming Jinks. The amended complaint cannot be reasonably construed as alleging malice towards Jinks. Because she does not allege that defendants conspired with the intent to injure her, Jinks' claim for civil conspiracy fails. The court therefore grants ASPPPO's motion to dismiss this claim and also sua sponte dismisses this claim as to the Resort and CSA.

2. Acts in Furtherance of the Conspiracy

Even if Jinks properly alleged that ASPPPO acted with intent to harm, Jinks' civil conspiracy claim also fails because she does not allege that ASPPPO acted in furtherance of the conspiracy in a manner separate and independent from her other causes of action. "In a civil conspiracy claim, one must plead additional facts in furtherance of the conspiracy separate and independent from other wrongful acts alleged in the complaint, and the failure to properly plead such acts will merit the dismissal of the claim." Hackworth, 682 S.E.2d at 875. Stated another way, " '[w]here the particular acts charged as a conspiracy are the same as those relied on as the tortious act or actionable wrong, plaintiff cannot recover damages for such act or wrong, and recover likewise on the conspiracy to do the act or wrong.' " Todd v. S.C. Farm Bureau Mut. Ins. Co., 278 S.E.2d 607, 612 (S.C. 1981) (quoting 15A C.J.S. Conspiracy § 33, at 718), overruled on other grounds by Paradis, 861 S.E.2d at 780; see also Kuznik v. Bees Ferry Assocs., 538 S.E.2d 15, 21 (S.C. Ct. App. 2001) ("Because [the third party plaintiff] ... merely realleged the prior acts complained of in his other causes of action as a conspiracy action but failed to plead additional facts in furtherance of the conspiracy, he was not entitled to maintain his conspiracy cause of action."); Doe v. Erskine Coll., 2006 WL 1473853, at *17 (D.S.C. May 25, 2006) (granting defendant's motion for summary judgment on plaintiff's civil conspiracy claim because "the Complaint does not plead specific facts in furtherance of the conspiracy; instead the Complaint simply restates the alleged wrongful acts in relation to the plaintiff's other claims for damages."). The parties do not argue in their supplemental briefings that Paradis abolished this pleading requirement, and the court is satisfied that it did not. See Paradis, 861 S.E.2d at 779–80 (explaining that the court in Todd, 278 S.E.2d at 607, "correctly concluded the civil conspiracy claim failed as a matter of law" where the "only wrongful acts alleged were those for which damages had already been sought" and "the plaintiff's repetition of the same acts as the prior claims was insufficient to salvage the claim").

***4** Jinks argues that ASPPPO took several overt actions to further the conspiracy, including but not limited to (1) adopting a resolution in favor of the referendum and amendment; (2) sending a newsletter actively encouraging its members to vote in favor of the referendum and amendment; and (3) putting its name and consent to the amendment on the face of the referendum and amendment. All of these allegations are specifically incorporated by reference into Jinks' causes of action for breach of contract and nuisance. The amended complaint fails to allege a single independent and separate act taken by ASPPPO in furtherance of the alleged conspiracy that does not also serve as the basis for Jinks' other causes of action. At most, Jinks' civil conspiracy cause of action merely summarizes the same acts that also serve as the bases for the other claims in the civil conspiracy cause of action. For example, ASPPPO's act of allegedly acknowledging and supporting the referendum is also alleged at paragraphs 100 and 101 of the amended complaint as the basis of Jinks' cause of action for breach of contract. Amend. Comp. ¶¶ 100, 101. Similarly, paragraph 114 of the amended complaint alleges ASPPPO's "approval and active[ ] encourage[ment]" of the proposed referendum as support for Jinks' nuisance cause of action. Amend. Compl. ¶ 114. Because "[t]he only alleged wrongful acts pled are those for which damages have already been sought," Todd, 278 S.E.2d at 611, Jinks' claim of civil conspiracy against ASPPPO fails and must be dismissed under this independent basis as well. See Coker v. Norwich Com. Grp., Inc., 2021 WL 4037472, at *6 (D.S.C. Sept. 3, 2021) (holding that the plaintiff's civil conspiracy failed because "he has merely reincorporated his previous claims and added conclusory allegations the Individual Defendants were engaged in a civil conspiracy").

During the hearing, Jinks argued that she should be permitted to plead civil conspiracy in the alternative, and, therefore, her claim against ASPPPO should not be dismissed for failing to plead acts in furtherance of the conspiracy separate and independent from facts alleged in her other causes of action. This argument has been considered and rejected by both South Carolina state courts and courts in this district. In Hackworth, the South Carolina Court of Appeals held that a party may plead alternative theories in cases involving civil conspiracy; however, "when a party wishes to assert multiple causes of action, including civil conspiracy, it must allege facts in furtherance of the conspiracy and special damages that are separate and independent of the other acts and damages that underlie the causes of action within the same complaint." 682 S.E.2d at 876. Jinks cannot avoid pleading separate and independent acts in furtherance of the conspiracy by simply couching her conspiracy claim as an alternative to her breach of contract and nuisance causes of action. See Howard v. Allen Univ., 2012 WL 3637754, at *8 (D.S.C. Feb. 27, 2012), report and recommendation adopted, 2012 WL 3637746 (D.S.C. Aug. 22, 2012) (rejecting the plaintiff's argument that his civil conspiracy claim should not be dismissed because he pled civil conspiracy as an alternative to his defamation claim, such that those claims were not duplicative); Watson v. Adams, 2017 WL 1001122, at *18 (D.S.C. Mar. 15, 2017) (finding dismissal of a civil conspiracy claim appropriate where the plaintiff pled that claim in the alternative but failed

to allege additional acts in furtherance of a conspiracy rather than reallege other claims within the complaint). As already noted, Jinks' civil conspiracy claim lacks any allegation of acts by ASPPPO that are separate and independent from other wrongful acts alleged in her complaint, and, accordingly, the civil conspiracy claim against ASPPPO must be dismissed. [1] Jinks' attempt to recast her conspiracy claim as an alternative claim does not save it from dismissal.

B. Nuisance

Next, ASPPPO requests that the court dismiss Jinks' real property nuisance claim against it. "A nuisance ... provides a remedy for invasions of a property owner's right to the use and enjoyment of his property." Babb v. Lee County Landfill SC, LLC, 747 S.E.2d 468, 473 (S.C. 2013) (citing Clark v. Greenville Cnty., 437 S.E.2d 117, 119 (S.C. 1993) ("Nuisance law is based on the premise that '[e]very citizen holds his property subject to the implied obligation that he will use it in such a way as not to prevent others from enjoying the use of their property.' ")). Nuisance requires "a substantial and unreasonable interference with the plaintiff's use and enjoyment of his property." Sanders v. Norfolk Southern Ry. Co., 400 F. App'x 726, 729 (4th Cir. 2010).

***5** Jinks alleges that "by conspiring to promulgate the unauthorized referendum and proposed amendment to the 1974 Covenants," defendants interfered with her "use and enjoyment of her property." Amend. Compl. ¶ 112. Specifically, Jinks alleges that defendants "have interfered with [Jinks'] vested interest in the provisions of the 1974 Covenants regarding their modification, as well as in the provisions of the 1974 Covenants pertaining to assessments." Id.

ASPPPO claims there can be no viable nuisance claim against it because ASPPPO itself did not propose the referendum. This argument lacks merit. Jinks alleges that ASPPPO participated in the referendum because its name appeared on the proposed amendment and it encouraged its members to vote in favor of the referendum. Therefore, to the extent that the referendum interfered with Jinks' use and enjoyment of her property, Jinks sufficiently states a claim for the same against ASPPPO. Nevertheless, the court does not find that the referendum interfered with Jinks' use and enjoyment of her property in any way.

ASPPPO argues that Jinks has not alleged the type of interest in property recognized by South Carolina for purposes of finding a loss of "use and enjoyment" of real property, and the court agrees. ECF No. 71 at 5 (citing Babb, 747 S.E.2d at 468). Jinks does not cite a single case where a plaintiff stated a claim for nuisance against a homeowner's association or property management group for amending governing documents or imposing an additional assessment. During the hearing, counsel for Jinks conceded that she could not locate such a case on point, and the court likewise was unable to identify any authority acknowledging a claim similar to Jinks'. Indeed, Jinks' claim is far cry from the nuisances to real property commonly recognized by South Carolina courts, such offensive odors, gas leaks, impact of commercial development, and toxic substances. To the extent Jinks maintains that the assessment imposed by the amendment interferes with her use and enjoyment of her property by reducing its value, ASPPPO argues that "[m]erely suffering a reduction in property value is not, by itself, an interest [in] property [recognized] by the nuisance doctrine." Id. (citing Strong v. Winn-Dixie Stores, Inc.,125 S.E.2d 628 (S.C. 1962)). The court agrees. In Winn-Dixie Stores, the South Carolina Supreme Court held that even if construction of a new supermarket in close proximity to plaintiffs' homes would result in depreciation of their home values, it would not necessarily amount to a nuisance. 125 S.E.2d at 634. Jinks cannot rely on the fact that the proposed assessment may reduce the value of her property to establish nuisance, and the court fails to see how modifying the 1974 Covenants otherwise interferes with Jinks' use and enjoyment of her property in a manner that South Carolina recognizes as a nuisance. As such, the court grants the motion to dismiss Jinks' nuisance cause of action against ASPPPO for failure to state a claim. Moreover, because Jinks does not allege that the Resort and CSA interfered with the use and enjoyment of her property in any way other than modifying the 1974 Covenants to impose an additional assessment, the court likewise sua sponte dismisses the nuisance cause of action against both of these defendants.

C. Injunction

Lastly, ASPPPO requests that the court dismiss Jinks' claim for injunctive relief against it. In her amended complaint, Jinks asks that the court enjoin the implementation, approval, execution, and/or recording of the proposed amendment to the 1974 Covenants by defendants. A plaintiff seeking a permanent injunction must show that (1) it has suffered irreparable injury; (2) the available legal remedies are inadequate to compensate for that injury; (3) the balance of hardships between the plaintiff and defendant warrants an equitable remedy; and (4) the public interest would

not be disserved by a permanent injunction. eBay Inc. v. MercExchange, LLC, 547 U.S. 388, 391 (2006); see also Herrera v. Finan, 176 F. Supp. 3d 549, 568 (D.S.C. 2016), aff'd, 709 F. App'x 741 (4th Cir. 2017).

***6** In its motion to dismiss, ASPPPO argues that Jinks' request for injunctive relief against it fails because she cannot show a likelihood of success on the merits. As Jinks points out, in so doing, ASPPPO confuses her claim as one for preliminary injunctive relief, rather than for permanent injunctive relief. To state a claim for permanent injunctive relief, Jinks is not required to show a likelihood of success on the merits, and the court rejects ASPPPO's contention to the contrary. Otherwise, in its reply, ASPPPO argues that the court should dismiss the claim because Jinks has not demonstrated irreparable injury or absence of an adequate remedy at law. Specifically, ASPPPO maintains that the only harm Jinks alleges is the annual assessment imposed by the amendment, which is "$600.00 per Family Dwelling Unit and $360 per residential lot." Amend. Compl. at ¶ 52. ASPPPO argues that "[t]he only possible damage which will result from a denial of plaintiff's motion is a loss of profits, which will be readily ascertainable and recoverable and hence such damages are not irreparable." ECF No. 71 at 7 (citing Columbia Broad. Sys., Inc. v. Custom Recording Co., 189 S.E.2d 305, 311 (S.C. 1972)). ASPPPO miscites Columbia Broad for this proposition. To begin, Columbia Broad involved a temporary injunction, which, as already noted, is not at issue in this motion. Moreover, in the line ASPPPO cites from Columbia Broad, the Supreme Court of South Carolina was quoting the lower court's reasoning for denying a temporary injunction. Columbia Broad, 189 S.E.2d at 311. But the Supreme Court of South Carolina specifically rejected that reasoning, explaining that when a legal remedy is "impracticab[le]" or when "successive actions at law would be necessary to protect the plaintiff's rights," "the existence of the legal remedy is not an obstacle to the exertion of the equitable power.' " Id. at 312 (citing Kirk v. Clark, 4 S.E.2d 13 (S.C. 1939)). Therefore, the caselaw ASPPPO cites does not support its argument that Jinks is not entitled to injunctive relief because her damages are readily ascertainable and recoverable. Here, if Jinks succeeds in proving the amendment is invalid, it would be impracticable to simply award Jinks the present value of the annual assessment and permit the recording and implementation of the amendment, such that Jinks and all Sea Pines Plantation property owners are indefinitely subject to an invalid annual assessment. Such an approach would likewise presumably require successive actions to provide relief to other property owners subject to the assessment. Because ASPPPO puts forth no argument that is properly grounded in South Carolina law to support its request for dismissal of Jinks' claim for permanent injunction, the court declines to dismiss that claim.

Notably, although the court grants the motion to dismiss Jinks' civil conspiracy and nuisance claims against ASPPPO, Jinks' breach of contract claim remains pending, and ASPPPO does not challenge that claim in its motion. As such, Jinks still has a substantive claim pursuant to which the court could plausibly grant injunctive relief against ASPPPO should Jinks succeed in this action. See City of Charleston v. Joint Comm'n, 473 F. Supp. 3d 596, 632 (S.D. W. Va. 2020) ("[A]n injunction is merely a remedy flowing from the underlying substantive claims rather than an independent cause of action itself."). Jinks' complaint requests that the court enjoin ASPPPO from taking any further action to record, implement, or approve the proposed amendment. Jinks' breach of contract cause of action alleges, inter alia, that ASPPPO breached the 1974 Covenants and its own bylaws by acknowledging and supporting the referendum. Construing these allegations in the light most favorable to Jinks, as it must, the court finds that Jinks' breach of contract claim plausibly provides Jinks a basis for the injunctive relief requested. [2] Therefore, Jinks's injunctive relief claim survives the instant motion to dismiss.

IV. CONCLUSION

For the reasons set forth above, the court **GRANTS** the motion to dismiss Jinks' civil conspiracy and nuisance causes of action against ASPPPO, **DENIES** the motion to dismiss Jinks' cause of action for injunctive relief against ASPPPO, and sua sponte **DISMISSES** Jinks' civil conspiracy and nuisance claims against the Resort and CSA.

***7 AND IT IS SO ORDERED.**

All Citations

Not Reported in Fed. Supp., 2021 WL 4711408

Footnotes

1 Because the briefings submitted in connection with ASPPPO's motion to dismiss only address ASPPPO's acts in furtherance of the alleged conspiracy, the court does not determine whether the civil conspiracy claim against the Resort and CSA should also alternatively be dismissed on this ground.

2 During the hearing, counsel for ASPPPO argued for the first time that ASPPPO is not a proper party against whom Jinks may seek injunctive relief, as it does not have the power to record or implement the amendment at issue. Counsel for Jinks argued that ASPPPO's signature is required before the amendment to the 1974 Covenants can be recorded, and as such, her claim for injunctive relief against ASPPPO is appropriate. Counsel for Jinks conceded that Jinks did not explicitly allege in the complaint that ASPPPO had the power to record the amendment, but explained that ASPPPO's power to do so is reflected in the parties' joint stipulation concerning her withdrawal of her motion for preliminary injunction. ECF No. 18. However, even if the court took judicial notice of the stipulation, it does not affirmatively state that ASPPPO has any power to enact or implement the amendment; it merely states that "to the extent ASPPPO has any [such] right," it will not exercise it. Id. at 2. Still, construing the allegations in the light most favorable to Jinks and drawing all inferences in her favor, Jinks plausibly alleges that injunctive relief against ASPPPO will be necessary to prevent it from further approving, supporting, or participating in the implementation and recording of the amendment. Jinks need not have explicitly pled that ASPPPO has the power to record the amendment to state a claim for injunctive relief against it.

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