

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

PHILIP EMIABATA, )  
)  
Plaintiff, )  
)  
v. ) 1:17CV529  
)  
BB&T (BRANCH BANKING AND TRUST )  
CO.) AND JACQUE DOLOTINA, )  
)  
Defendants. )

**MEMORANDUM ORDER**

Plaintiff Philip Emiabata, proceeding pro se, claims that Defendant Branch Banking and Trust Company ("BB&T") and Defendant Jacque Dolotina, a BB&T bank teller, slandered, libeled, and put Emiabata in a false light by claiming to police that he threatened to shoot the employees of the bank. Before the court is BB&T's motion to dismiss the complaint (Doc. 9) and Emiabata's "Motion for Supplemental Pleading Due To Event That Happened After The Date Of The Pleading," which the court will construe as a motion for leave to file an amended complaint. (Doc. 14). The motions have been briefed (Docs. 10, 15, 16, 18) and are ready for decision. For the reasons set forth below, Emiabata's motion for leave to amend will be treated as moot insofar as he filed it within the time permitted to file an amended complaint as of right and, because Emiabata has yet to file his amended complaint, BB&T's motion to dismiss will be denied as moot.

## I. BACKGROUND

The allegations of Emiabata's complaint, which are difficult to decipher but accepted as true for the present motion, lay out the following:

At a BB&T bank branch in Round Rock, Texas, on June 6, 2016, a bank employee precluded Emiabata's wife, Sylvia, from withdrawing funds from her account because it had been flagged for fraud. (Doc. 2 at 7-8.)<sup>1</sup> Sylvia called Emiabata to explain the situation. (Id.) When the phone was on "loudspeaker," Emiabata told Dolotina he "might have a legal action and that [he] might sue the bank for damages." (Id. at 8.) Dolotina called the police, claiming that she heard Emiabata say he would "come to the bank and shoot the bank." (Id. at 7.)<sup>2</sup> As a result, BB&T wrote Emiabata a letter that banned him from the bank, and Emiabata was subjected to a criminal investigation. (Id. at 7-8.)

On June 9, 2017, Emiabata filed this action against Dolotina and BB&T, alleging slander, libel, and invasion of the right to privacy as "some" of his causes of action.<sup>3</sup> (Id.) The complaint

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<sup>1</sup> Dolotina allegedly gave various "different stories" for why his wife was not able to withdraw money from their account, including: (1) there was fraudulent activity, (2) the account was closed, and (3) there was a hold on the account that had not yet expired. (Doc. 2 at 8.)

<sup>2</sup> Emiabata notes that he has an accent but contends it could not have accounted for a misunderstanding of what he said. (Doc. 2 at 8.)

<sup>3</sup> The court considers only these three causes of action actually listed in the complaint.

claims both federal question and diversity jurisdiction. (Id. at 3-4.)

On September 15, 2017, BB&T moved to dismiss on the grounds that the court lacks subject matter jurisdiction, because there is neither a federal question nor complete diversity, due to the common Texas residency alleged as to Emiabata and Dolotina. (Doc. 9.) Alternatively, BB&T contends that the complaint fails to state a claim upon which relief can be granted. (Id.) BB&T acknowledges, however, that "Dolotina is no longer employed by BB&T and upon information and belief, her last known address was in Arizona." (Doc. 10 at 2.)

On September 20, 2017, the court gave Emiabata notice that Dolotina had not been served. (Doc. 13.) The notice informed Emiabata that he had 14 days to respond, after which the court could dismiss the action against Dolotina without prejudice. (Id.) On September 25, 2017, Emiabata moved for leave to file an amended complaint. (Doc. 14.) While the motion does not include an amended complaint, it makes clear that the only change Emiabata requests is to plead that Dolotina is a citizen of Arizona, not Texas. (Id. at 2.) BB&T contends that the amendment would be futile, relying on its motion to dismiss. (Doc. 16)

## **II. ANALYSIS**

### **A. Subject Matter Jurisdiction**

BB&T argues that Emiabata has demonstrated neither federal

question nor diversity jurisdiction. (Doc. 10 at 2-5.) Because subject matter jurisdiction serves as a limitation on the court's power, the court must address these arguments first. Owens-Illinois, Inc. v. Meade, 186 F.3d 435, 442 n.4 (4th Cir. 1999) ("questions of subject matter jurisdiction must be decided 'first, because they concern the court's very power to hear the case'") (citation omitted). The party seeking to invoke the court's power bears the burden of establishing subject matter jurisdiction. McNutt v. Gen. Motors Acceptance Corp., 298 U.S. 178, 189 (1936).

As Emiabata is proceeding pro se, the court construes his pleadings liberally and holds them to a less stringent standard than for those drafted by attorneys. Haines v. Kerner, 404 U.S. 519, 520-21 (1972). However, he is held to compliance with the Federal Rules of Civil Procedure and this court's local rules (available on the court's website: [www.ncmd.uscourts.gov](http://www.ncmd.uscourts.gov)).

#### **1. Federal Question Jurisdiction**

Federal question jurisdiction exists when a case "arises under" federal law. 28 U.S.C. § 1331. Under the well-pleaded complaint rule, "federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987). It is not "enough that there may be a defense grounded in federal law or that the complaint anticipates and rebuts such

a defense." Pressl v. Appalachian Power Co., 842 F.3d 299, 302 (4th Cir. 2016) (citing Caterpillar, 482 U.S. at 392-93).

Here, the complaint claims federal question jurisdiction, but the causes of action alleged are slander, libel, and invasion of the right to privacy. (Doc. 2 at 3, 7.) Both slander and libel are causes of action under state tort law, so neither supports federal question jurisdiction. Further, the invasion of the right to privacy does not give rise to a federal cause of action. Defendant suggests, and the court agrees, that this is best interpreted as a false light claim. (Doc. 10 at 3-4.)<sup>4</sup> Given that false light is also a state tort law cause of action, Mourad v. Fleming, No. CIV.A.4:02CV738-Y, 2004 WL 2866975, at \*3 (N.D. Tex. Aug. 12, 2004), aff'd, 180 F. App'x 523 (5th Cir. 2006) (interpreting a claim for the "tort of invasion of privacy" as false light claim and noting that false light is a state law claim); Lewis v. Marzulli, No. 16-CV-4021 (KAM)(JO), 2016 WL 5874994, at \*2 (E.D.N.Y. Oct. 7, 2016) ("false light/invasion of privacy does not present an issue of federal statutory or constitutional law"), Emiabata has failed to demonstrate federal question jurisdiction.

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<sup>4</sup> This conclusion is bolstered by the fact that Emiabata later describes this cause of action as "Invasion of my Right to Privacy by Publication of information that place me in False Light supra." (Doc. 2 at 7.)

## 2. Diversity Jurisdiction

Diversity jurisdiction requires that the parties have complete diversity - meaning that the citizenship of every plaintiff must be different from the citizenship of every defendant. 28 U.S.C. § 1332; Caterpillar, Inc. v. Lewis, 519 U.S. 61, 68 (1996); Cent. W. Virginia Energy Co. v. Mountain State Carbon, LLC, 636 F.3d 101, 103 (4th Cir. 2011). If there is a defect in the allegation of diversity jurisdiction, a plaintiff may amend the complaint to cure that defect so long as diversity jurisdiction existed in fact at the time the suit was filed. 28 U.S.C. § 1653; Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 831 (1989). A plaintiff seeking to amend his complaint may do so without requesting the leave of court within "21 days after serving it, or . . . 21 days after service of a motion under Rule 12(b), (e), or (f)." Fed. R. Civ. P. 15(a).

Here, the complaint alleges that BB&T is a North Carolina corporation but that both Emiabata and Dolotina are citizens of Texas. (Doc. 2 at 3-4.) Thus, the complaint does not demonstrate diversity jurisdiction. However, BB&T "acknowledges that if the Court allows Plaintiff leave to amend his complaint, [alleging that Dolotina is a citizen of Arizona] may give rise to diversity jurisdiction under 28 U.S.C. § 1332." (Doc. 16 at 2.)

Emiabata filed his motion for leave to file an amended complaint - to correct the allegation that Dolotina is a citizen

of Arizona - less than 21 days after service of BB&T's motion to dismiss. He did not need leave of court to file an amended complaint and should have done so as of right under Rule 15(a). Consequently, acknowledging Emiabata's status as a pro se litigant, the court will treat his motion to amend as an effort to file an amended complaint and will provide him 14 days from the date of this order to file his amended complaint to correct the allegation as to Dolotina's residency.<sup>5</sup> No other amendment has been requested, nor will it be permitted absent proper motion.

**B. Motion to Dismiss for Failure to State a Claim**

Because an amended complaint stating proper subject matter

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<sup>5</sup> Diversity jurisdiction further requires that the amount in controversy exceed \$75,000. 28 U.S.C. § 1332. BB&T does not contest this requirement. However, the court "has an independent duty to ensure that its jurisdiction is proper" and must dismiss the action if it determines that there is no subject matter jurisdiction. Mosley v. Wells Fargo Bank, N.A., 802 F. Supp. 2d 695, 698 (E.D. Va. 2011); Fed. R. Civ. P. 12(h)(3).

Courts apply the "legal certainty" test in determining whether this requirement is met. St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 289 (1938). "[T]he court should look to the face of the complaint itself to determine whether it is a legal certainty that plaintiff's claims do not reach the required amount." Shanaghan v. Cahill, 58 F.3d 106, 112 (4th Cir. 1995). "Unless the claim for an amount over the jurisdictional prerequisite is made in bad faith, or unless it is plain from the complaint that an amount less than the jurisdictional amount is all that is at issue, the district court has jurisdiction over the case." Id. Emiabata alleges \$980,000 in damages. (Doc. 2 at 8.) BB&T states that it "would dispute that Plaintiff has suffered any damages whatsoever" but "accepts Defendant's allegations as true" for the purposes of its motion to dismiss. (Doc. 10 at 3 n.1) Based on its review, even though the basis for the damages figure alleged is not apparent on the face of the complaint, the court cannot say that it is a legal certainty that the amount in controversy is below the required amount, and so the court cannot deny the right to amend as futile on this basis.

jurisdiction has not yet been filed, it is not clear that the court will have subject matter jurisdiction to address the merits. Owens-Illinois, Inc., 186 F.3d at 442 n.4. Therefore, the court denies BB&T's motion to dismiss as moot but without prejudice to its consideration if a properly amended complaint is filed. In order to avoid unnecessary duplication of effort should an amended complaint be filed, BB&T may simply file a notice that it wishes to rest on its current briefing.

**C. Service of the Complaint and Process on Dolotina**

One final matter requires attention. Emiabata has not served Dolotina, even after this court's notice under Federal Rule of Civil Procedure 4(m). (Doc. 13.) The record reflects that the U.S. Marshal returned the summons as to Dolotina as unserved because of an "insufficient address." (Doc. 12.) This is no doubt because Dolotina apparently no longer lives in Round Rock, Texas, for the reasons noted above. Therefore, because Emiabata timely moved to amend the complaint to add a proper address for Dolotina and appears to have been awaiting a ruling on that motion, the court will grant Emiabata 30 days from the date of this order within which to serve Dolotina with an amended complaint. Otherwise, absent a further sufficient showing, the action as to Dolotina will be dismissed without prejudice without further notice. Fed. R. Civ. P. 4(m). See, e.g., LHF Productions, Inc. v. Does, Civil Action No. 3:16CV284, 2016 WL 7423094, at \*6 (E.D.



Va. Dec. 22, 2016) (finding that Rule 4(m) unambiguously permits an extension of time to serve process regardless of whether a plaintiff can show good cause).

### **III. CONCLUSION**

For the reasons stated, therefore,

IT IS ORDERED that Emiabata's motion for leave to amend (Doc. 14) will be treated as MOOT insofar as Emiabata filed the motion within the time permitted to file an amended complaint as of right. Therefore, Emiabata shall have fourteen (14) days from the date of this order within which to file an amended complaint correcting the alleged residency of Defendant Dolotina. Because no other amendment was requested, none will be permitted. In the event that Emiabata does not file his amended complaint within this time period, the court will grant BB&T's motion to dismiss for lack of subject matter jurisdiction without further notice.

IT IS FURTHER ORDERED that because Emiabata has yet to file his amended complaint, BB&T's motion to dismiss will be DENIED as moot without prejudice to its consideration, upon proper notice, following the filing of an amended complaint correcting the defective jurisdictional allegation. BB&T may renew its motion simply by filing a notice to that effect and need not re-brief it.

          /s/          Thomas D. Schroeder  
United States District Judge

February 1, 2018