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

CHARLES EDWARD BROWN, Plaintiff, v. FIRST ADVANTAGE BACKGROUND SERVICES CORP., Defendant.	)	1:23CV195

ORDER

This matter is before the court on Plaintiff Charles Edward Brown's Motion for Leave to File Plaintiff's First Amended Complaint. (Doc. 20.) Defendant First Advantage Background Services Corporation ("First Advantage") opposes Brown's motion. (Doc. 23.) Brown has filed a reply. (Doc. 24.)

Federal Rule of Civil Procedure 15 provides that a plaintiff may amend a complaint once as a matter of course within 21 days after the earlier of (1) service of a responsive pleading or (2) service of a motion under Federal Rule of Civil Procedure 12(b), (e), or (f). After that period, a party may amend only with either the opposing party's written consent or leave of court. Fed. R. Civ. P. 15(a)(2); Foman v. Davis, 371 U.S. 178, 182 (1962) (noting that "the grant or denial of an opportunity to amend is within the discretion of the District Court"). While district courts have discretion to grant or deny a motion to amend, the Fourth Circuit

has interpreted Rule 15(a) to provide that "leave to amend a pleading should be denied only when the amendment would be prejudicial to the opposing party, there has been bad faith on the part of the moving party, or the amendment would have been futile." Laber v. Harvey, 438 F.3d 404, 426 (4th Cir. 2006) (citation omitted); Foman, 371 U.S. at 182 (same).

A claim may be futile "if the proposed change . . . advances a claim or defense that is legally insufficient on its face," in which case "the court may deny leave to amend." Williams v. Little Rock Mun. Water Works, 21 F.3d 218, 225 (8th Cir. 1994) (citing Charles A. Wright & Arthur Miller, Fed. Prac. & Proc.: Civil, § 1487, at 637 (1991)); see Joyner v. Abbott Laboratories, 674 F. Supp. 185, 190 (E.D.N.C. 1987) (same). "To determine whether a proposed amended complaint would be futile, the Court reviews the revised complaint under the standard used to evaluate a motion to dismiss for failure to state a claim." Amaya v. DGS Constr., LLC, 326 F.R.D. 439, 451 (D. Md. 2018) (citing Katyle v. Penn Nat'l Gaming, Inc., 637 F.3d 462, 471 (4th Cir. 2011)). Thus, "[a] motion to amend a complaint is futile 'if the proposed claim would not survive a motion to dismiss.'" Pugh v. McDonald, 266 F. Supp. 3d 864, 866 (M.D.N.C. 2017) (quoting James Madison Ltd. v. Ludwig, 82 F.3d 1085, 1099 (D.C. Cir. 1996)).

A Rule 12(b)(6) motion to dismiss is meant to "test[] the

sufficiency of a complaint" and not to "resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." Republican Party of N.C. v. Martin, 980 F.2d 943, 952 (4th Cir. 1992). To survive such a motion, "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)). In considering a Rule 12(b)(6) motion, a court "must accept as true all of the factual allegations contained in the complaint," Erickson v. Pardus, 551 U.S. 89, 94 (2007) (per curiam), and all reasonable inferences must be drawn in the non-moving party's favor, Ibarra v. United States, 120 F.3d 472, 474 (4th Cir. 1997).

Rule 12(b)(6) and Rule 15 should be balanced against Federal Rule of Civil Procedure 8(a)(2), which provides that a complaint need only contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Rule 12(b)(6), and thus Rule 15, protect against meritless litigation by requiring sufficient factual allegations "to raise a right to relief above the speculative level" so as to "nudge[] the[] claims across the line from conceivable to plausible." Twombly, 550 U.S. at 545, 570 (2007); see Iqbal, 556 U.S. at 678 (2009). When considering whether a Rule 15 motion to amend is futile, the court "need not

accept as true unwarranted inferences, unreasonable conclusions, or arguments." Giarratano v. Johnson, 521 F.3d 298, 302 (4th Cir. 2008).

Here, Brown seeks to amend his complaint to add allegations that First Advantage incorrectly reported information about the status of his medical examiner's certificate to his prospective employer. Brown alleges that during discovery it became apparent that First Advantage reported to his prospective employer that his medical examiner's certificate had expired in January 2021 and was inactive at the time of First Advantage's report on January 9, 2023. (Doc. 20-1 ¶¶ 96-97.) Brown's proposed amended complaint alleges that the certificate had in fact been renewed on December 30, 2022, and First Advantage's reporting was "wholly inaccurate." (Id. ¶ 99.) First Advantage opposes the motion on the grounds of lack of a good faith basis and futility. (Doc. 23 at 3.) As to the former, First Advantage argues that Brown lacks a good faith basis to assert that it should have known of and included the new certificate in Brown's report. In support, First Advantage attaches what it maintains are copies of the North Carolina Department of Motor Vehicle ("DMV") website reflecting the procedures that Brown should have followed to file his medical examiner's certificate with the North Carolina DMV. (Docs. 23-1, -2, and -3.) As to the latter, First Advantage argues that Brown's amendments are insufficient to allege a claim under the Fair Credit

Reporting Act and that he could not allege a proper factual basis because any such allegation would be "knowingly false." (Doc. 23 at 8.) Brown responds that the DMV website information is not authenticated, that the proposed amendments would survive a motion to dismiss, and, in any event, he should be permitted to proceed on the liberal standard for amendments and conduct discovery to continue to investigate this claim. (Doc. 24.)

First Advantage is correct that the proposed amendments to the complaint fail to allege sufficient facts that would make plausible Brown's claim that First Advantage failed to follow reasonable procedures to assure maximum possible accuracy of the information concerning its report of Brown's medical eligibility. See 15 U.S.C. 1681e(b) ("Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates."). Brown must allege more than just that First Advantage's report was false with respect to Brown's medical examiner's certificate. Here, Brown alleges:

> Upon information and belief, the only reason that First Advantage failed to properly identify that Plaintiff's medical examiner's certificate was active at the time First Advantage prepared its report concerning Plaintiff was because First Advantage fails to maintain reasonable procedures to assure maximum possible accuracy of the consumer information it reports in the consumer reports it prepares.

(Doc. 20-1 ¶ 101.) Brown alleges that his doctor signed his medical

form on December 30, 2022, only days before First Advantage derived its information for the report it sold to his prospective employer's third-party vendor on January 9, 2023. (Id. ¶¶ 49, 98.) Unlike Brown's claim that First Advantage failed to follow reasonable procedures to ensure that the felony convictions attributed to him were false based on public record information, nowhere does Brown allege any factual information to make plausible his claim that First Advantage failed to follow reasonable procedures to determine that its report concerning his medical examiner's certificate was accurate.

First Advantage argues that its reliance on the public records of the North Carolina DMV provides in effect a per se defense. (Doc. 23 at 2-3 (citing Houston v. TRW Info. Servs., Inc., No. 88-CIV-0186 (MEL), 1989 WL 59850 (S.D.N.Y. May 2, 1989), aff'd sub nom. Houston v. TRW Info., 896 F.2d 543, at *1–2 (2d Cir. 1990), for the proposition that the defendant did not violate the Fair Credit Reporting Act when it reported a judgment listed in a court docket, even though the judgment had been vacated, because the vacatur did not also appear in the public record). While the court need not reach this issue as this contention would require information outside the record, and whether there is a failure to follow reasonable procedures will ordinarily be a jury question "in the overwhelming majority of cases," Dalton v. Capital Associated Indus., Inc., 257 F.3d 409, 416 (4th Cir. 2001)

(citations omitted), it does highlight that a plaintiff must allege some factual basis to render plausible a claim under section 1681e(b). Cf. Henson v. CSC Credit Servs., 29 F.3d 280, 285 (7th Cir. 1994) (finding reliance on public records presumptively reasonable).

For these reasons, Brown's motion will be denied without prejudice should he determine a factual basis for his claim as to First Advantages reporting of the medical examiner's certificate.

IT IS ORDERED that Plaintiff's Motion for Leave to File Plaintiff's First Amended Complaint (Doc. 20) is DENIED without prejudice.

/s/ Thomas D. Schroeder
United States District Judge

October 26, 2023