WO NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Ramon Gomez,

Plaintiff,

v.

Celebrity Home Health & Hospice Incorporated, *et al*.,

Defendants.

No. CV-16-02754-PHX-JJT

ORDER

At issue are four purported Motions filed by *pro se* Plaintiff Ramon Gomez: a Motion to Amend Complaint (Doc. 50 (sealed)), to which Defendants filed a Response (Doc. 62) and Plaintiff filed a Reply (Doc. 64); a Motion to Compel (Doc. 63), to which Defendants filed a Response (Doc. 70) and Plaintiff filed a Reply (Doc. 72); a second Motion to Amend Complaint (Doc. 67), to which Defendants filed a Response (Doc. 71) and Plaintiff filed a Reply (Doc. 75); and "Amended Motion: Breach of Contract, and Privacy" (Doc. 80), to which Defendants filed a Response (Doc. 82) and Plaintiff filed a Reply (Doc. 83). The Court finds these matters appropriate for resolution without oral argument. *See* LRCiv 7.2(f).

I. MOTIONS TO AMEND

A. Background

Plaintiff, who proceeds *pro se*, filed this action on August 16, 2016, alleging that his civil rights were violated when Defendants, an entity and several of its employees who provided home health care to him, used his personal and health information to run

background checks on him and refused to let him view his medical records. (Doc. 1, Compl.) He alleges, "I am being persecuted because I am gay" and "discriminated against because of my HIV+ status which they released to a large number of people who did not previously know my HIV status," causing him "extreme medical, emotional and mental distress." (Compl. at 5.) He seeks $400 million in damages as well as a "gag order" on Defendants, an Order sealing all of his medical and personally identifiable information under the Health Insurance Portability and Accountability Act (HIPAA), and an Order requiring the individual Defendants to surrender their passports to prevent them from "fleeing the country." (Compl. at 4-5.)

On August 29, 2016, Defendants, who originally appeared *pro se*, filed an Answer. (Doc. 10 (sealed); Doc. 57 (redacted).) Two days later, the Court struck the Answer with regard to Defendant Celebrity Home Health & Hospice a/k/a Celebrity HomeCare, Inc. ("Celebrity"), because an entity may not appear *pro se*. (Doc. 11.) On September 13, 2016, counsel appeared on behalf of all Defendants. (Doc. 21.)

On September 6, 2016, Plaintiff filed a "Motion to Amend: Breach of Contract, Negligence, Discrimination, Request Medical Records be Sealed." (Doc. 13.) The next day, the Court denied the Motion because (1) Plaintiff filed it within the 21-day period in which a plaintiff may amend a complaint as a matter of course under Federal Rule of Civil Procedure 15, so a motion was not required; (2) Plaintiff did not file a proposed Amended Complaint, but rather only a statement of revisions and additions to the original Complaint, in violation of Local Rule 15.1; and (3) Plaintiff did not provide any facts or legal authority to support his request to file certain parts of the Amended Complaint under seal, in violation of Local Rule 5.6. (Doc. 14.)

On September 30, 2016, Defendants filed a Motion for a More Definite Statement under Federal Rule of Civil Procedure 12(e). (Doc. 42.) The same day, Plaintiff lodged under seal what he styled as a "Motion to Amend Complaint"—although it is actually a proposed Amended Complaint itself—along with a request to seal the filing. (Doc. 45 (sealed).) In an Order dated October 7, 2016 (Doc. 49), the Court denied as moot

Defendants' Motion for a More Definite Statement on account of Plaintiff's proposal to amend the Complaint, noted the legal standard for the filing of pleadings under seal, and filed Plaintiff's Motion to Amend on the docket under seal (Doc. 50 (sealed)). This "Motion" is now pending.

Plaintiff then filed another document titled "Motion to Amend" on October 27, 2016. (Doc. 67.) Again, the Motion is, in fact, not a motion but rather another proposed Amended Complaint—this time a redacted version of the previously-filed proposed Amended Complaint (Doc. 50). This "Motion" is also now pending.

B. Analysis

1. The Motions' Procedural Deficiencies

To date, Plaintiff's original Complaint (Doc. 1) remains the operative pleading in this matter. Under Rule 15, Plaintiff is now well past the 21-day period to amend the Complaint as a matter of course, and, because he does not have Defendants' written consent to file an Amended Complaint, he must obtain leave of Court to file an Amended Complaint. Fed. R. Civ. P. 15(a)(2). Plaintiff's two pending "Motions to Amend" (Docs. 50, 67) are not motions that seek the Court's leave to amend the Complaint, but rather proposed Amended Complaints.

Plaintiff's "Motions" are defective for a number of reasons. To begin with, Local Rule 15.1(a) requires a party moving for leave to amend a pleading to attach a copy of the proposed amended pleading as an exhibit to the motion, "which must indicate in what respect it differs from the pleading it amends, by bracketing or striking through the text to be deleted and underlining the text to be added." Plaintiffs' "Motions" (Docs. 50, 67) do not comply with this Local Rule.

Next, although "Rule 15(a) declares that leave to amend shall be freely given when justice so requires," *Foman v. Davis*, 371 U.S. 178, 182 (1962), the policy in favor of allowing amendments is subject to limitations. After a defendant files a responsive pleading, leave to amend is not appropriate if the "amendment would cause prejudice to the opposing party, is sought in bad faith, is futile, or creates undue delay." *Madeja v.*

Olympic Packers, 310 F.3d 628, 636 (9th Cir. 2002) (internal quotations omitted). "Futility alone can justify the denial of a motion for leave to amend." *Nunes v. Ashcroft*, 375 F.3d 805, 808 (9th Cir. 2003). Because Plaintiff's "Motions" (Docs. 50, 67) are simply proposed Amended Complaints, they do not begin to demonstrate, with legal support, why the Court should allow Plaintiff to amend the Complaint in the manner he proposes. Nonetheless, in their Responses, Defendants attempt to demonstrate, with legal support, why the Court should deny Plaintiff's attempts at filing an Amended Complaint as futile. (Docs. 62, 71.)

Finally, Plaintiff filed a second "Motion to Amend" (Doc. 67) after the first (Doc. 50) was briefed but before the Court ruled on it. That is not the way this works. And the result of Plaintiff's practice of filing multiple "Motions" is that Defendant was required to incur the expense of preparing and filing a Response twice (Docs. 62, 71).

In a prior Order (Doc. 51), the Court warned Plaintiff that he would be held to the requirements and knowledge of the applicable rules—including the Federal Rules of Civil Procedure, the Local Rules, and the Federal Rules of Evidence—and to adherence to those rules, the applicable law, and all Orders of this Court. *See Am. Ass'n of Naturopathic Physicians v. Hayhurst*, 227 F.3d 1104, 1107-08 (9th Cir. 2000) (noting that *pro se* litigants are not excused from following court rules); *Carter v. Comm'r of Internal Revenue*, 784 F.2d 1006, 1008 (9th Cir. 1986) (same). The Court also warned that any future failure to follow the applicable rules and law would be met with sanctions. Here, although Plaintiff improperly styled two of his filings as "Motions to Amend," requiring two Responses from Defendants, it appears to the Court that Plaintiff was attempting to adhere to the Court's Order (Doc. 49) requiring Plaintiff to file a redacted version of the sealed proposed Amended Complaint. Accordingly, the Court will not enter an Order sanctioning Plaintiff for this error.

2. Futility

In the proposed Amended Complaints (Docs. 50, 67), Plaintiff adds a number of new legal theories under federal statutory and constitutional law for his claims against

Defendants. In their Responses (Docs. 62, 71), beyond identifying the procedural deficiencies in those filings, Defendants argue that Plaintiff's proposed Amended Complaints would be futile. The Court agrees.

First, because the Court cannot plausibly infer from the allegations in the proposed Amended Complaints that Defendants are state actors, Plaintiff may not bring a claim against Defendants under 42 U.S.C. § 1983. Even if Defendants have contracts covered by Medicaid and Medicare—which they deny—they are not state actors for the purposes of § 1983. *See Florer v. Congregation Pidyon Shevuyim, N.A.*, 639 F.3d 916, 926-27 (9th Cir. 2011).

Second, and similarly, Plaintiff cannot bring Fifth or Fourteenth Amendment claims against Defendants, because Defendants did not plausibly take a governmental action (or an action under color of federal or state law), which such claims require. *See Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 924 (1982) (Fourteenth Amendment); *Fid. Fin. Corp. v. Fed. Home Loan Bank of S.F.*, 792 F.2d 1432, 1435 (9th Cir. 1986) (Fifth Amendment).

Third, Plaintiff cannot bring an action against Defendants under the Privacy Act of 1974, 5 U.S.C. § 522a, because that statute only creates a right of action by and against governmental agencies, which the parties here are not. *See* 5 U.S.C. § 551(1).

Fourth, there is no private (non-governmental) right of action under HIPAA or the Occupational Safety and Health Administration (OSHA) regulations themselves. *See, e.g.*, *Garmon v. Cnty. of Los Angeles*, 828 F.3d 837, 847 (9th Cir. 2016) ("HIPAA itself provides no private right of action."); *Webb v. Smart Document Solutions, LLC*, 499 F.3d 1078, 1080-81 (9th Cir. 2007) (noting that, because HIPAA provides no federal private right of action, plaintiffs were required to bring their claim under state law to challenge health document processor's policy of charging law firm higher rate to obtain copies of hospital records than individual rate under HIPAA); *Woolbright v. Prince*, No. 1 CA-CV 14-0544, 2016 WL 1211720, at *3 (Ariz. Ct. App. Mar. 29, 2016) (HIPAA provides no private right of action against doctor for allegedly releasing medical information about

plaintiff and his children to the public); *Sullins v. Third & Catalina Constr. P'ship*, 602 P.2d 495, 498-99 (Ariz. Ct. App. 1979) (noting OSHA regulations "could not be used to establish a cause of action"). In certain instances, these federal laws may provide evidence or support for a state law claim; for example, provisions of HIPAA may be relevant to a determination of the standard of care in a private negligence claim brought under state law. *See, e.g.*, *Acosta v. Byrum*, 638 S.E.2d 246, 253 (N.C. Ct. App. 2006) (noting plaintiff cited HIPAA as evidence of the appropriate standard of care); *but see Sullins*, 602 P.2d at 498-99 (noting that the OSHA regulations under scrutiny "would not even qualify as evidence of the standard of care because Arizona does not recognize non-delegable duties"). But Plaintiff brings no such claim, and even if he did, it would properly be a claim under state, not federal, law.

Fifth, the Supreme Court has held that, to bring a claim against private (non-governmental) parties under the Equal Privileges Clause of what is known as the Ku Klux Klan Act, 42 U.S.C. § 1985(3), as Plaintiff attempts to do, a plaintiff must show, among other things, "that some racial, or perhaps otherwise class-based, invidiously discriminatory animus [lay] behind the conspirators' action." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 267-68 (1993). In the Ninth Circuit, sexual orientation does not give rise to a protected class under § 1985(3). *DeSantis v. Pac. Tel. & Tel. Co., Inc.*, 608 F.2d 327, 332-33 (9th Cir. 1971), *abrogated on other grounds by Nichols v. Azteca Restaurant Enters., Inc.*, 256 F.3d 864 (9th Cir. 2001); *see also Darden v. Alameda Cnty. Network of Mental Health Clients*, No. C-95-0783 MHP, 1995 WL 616633, at *4 (N.D. Cal. Oct. 4, 1995). Because Plaintiff alleges discrimination on account of his sexual orientation and HIV status, his claim against private parties under § 1985(3) fails. And because a § 1986 action is predicated on a successful § 1985 conspiracy action, Plaintiff's § 1986 claim fails likewise.

In sum, from the allegations in Plaintiff's proposed Amended Complaints, it is not plausible that Plaintiff can bring claims against Defendants under §§ 1983, 1985 or 1986, the Fifth or Fourteenth Amendments, the Privacy Act of 1974, HIPAA, or the OSHA

regulations, and the Court will thus dismiss these claims with prejudice—that is, without leave to amend. *See Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000).

3. Jurisdiction

The only remaining claim in the proposed Amended Complaints (Docs. 50, 67) is Plaintiff's breach of contract claim—a state law claim. This raises the question whether the Court has subject matter jurisdiction over this case.

Unlike state courts, federal courts only have jurisdiction over a limited number of cases, and those cases typically involve either a controversy between citizens of different states ("diversity jurisdiction") or a question of federal law ("federal question jurisdiction"). *See* 28 U.S.C. §§ 1331, 1332. The Supreme Court has stated that a federal court must not disregard or evade the limits on its subject matter jurisdiction. *Owen Equip. & Erections Co. v. Kroger*, 437 U.S. 365, 374 (1978). Thus, a federal court is obligated to inquire into its subject matter jurisdiction in each case and to dismiss a case when subject matter jurisdiction is lacking. *See Valdez v. Allstate Ins. Co.*, 372 F.3d 1115, 1116 (9th Cir. 2004); Fed. R. Civ. P. 12(h)(3).

In the proposed Amended Complaints, Plaintiff alleges federal question jurisdiction, which arises under 28 U.S.C. § 1331. However, as the Court noted above, Plaintiff fails to raise a plausible claim against Defendants under federal law. As a result, the Court lacks federal question jurisdiction over this matter. *See Webb*, 499 F.3d at 1080-81.

Furthermore, the allegations contained in the proposed Amended Complaints fail to demonstrate diversity jurisdiction because the parties are not citizens of different states. *See* 28 U.S.C. § 1332. Instead, Plaintiff alleges that both he and Defendant Denise Kiss are citizens of Arizona, which defeats the possibility of diversity jurisdiction. *See Strawbridge v. Curtiss*, 7 U.S. 267 (1806). Accordingly, the Court lacks subject matter jurisdiction over this case and must therefore dismiss it.

II. DISCOVERY MOTIONS

Plaintiff has also filed two discovery-related motions: a Motion to Compel, in order to try to obtain a copy of his medical records from Defendants (Doc. 63), and an

"Amended Motion," in which he claims Defendants improperly sent his medical records to their attorneys and improperly tried to charge him for the copies of his medical records that he requested (Doc. 80). Because Plaintiff fails to state a federal claim and the Court therefore lacks jurisdiction in this matter, as discussed above, these Motions are moot. However, the Court briefly addresses Defendants' request for sanctions in an amount equal to their attorneys' fees for responding to Plaintiff's discovery-related Motions.

In their Response (Doc. 70), Defendants argue that, in a prior Order (Doc. 51), the Court already warned Plaintiff not to try to engage in discovery until after the parties held the discovery planning conference pursuant to Federal Rule of Civil Procedure 26(f), and Plaintiff's latest two Motions (Docs. 63, 80) violate that Order. In his Reply (Doc. 72), Plaintiff explains that he did not seek his medical records as a matter of discovery in this lawsuit, but rather asked Defendants for a copy of his medical records under his HIPAA rights as a former patient of Defendant Celebrity—rights that he now asks the Court to enforce. However, the Court's role does not include acting as law enforcement in the sense Plaintiff suggests. The Court's role is to resolve disputes between parties by way of claims brought before the Court and by applying the Federal Rules of Civil Procedure, Local Rules and relevant law. As a result, in this Court, Plaintiff's claim that he is entitled to his medical records under HIPAA is wrapped up in his claims against Defendants in this lawsuit, and the Federal Rules of Civil Procedure—including the discovery rules—govern how the parties seek and exchange information related to Plaintiff's claims. Thus, Plaintiff's present Motions are in fact attempts to obtain information through discovery in this matter, which the Court warned Plaintiff against in its prior Order (Doc. 51).

However, it appears that Plaintiff simply misapprehended the Court's role in his effort to obtain his medical records outside the context of this lawsuit and the rules that govern it. As a result, the Court again declines to enter an Order sanctioning Plaintiff in this instance.

III. CONCLUSIONS

For the reasons stated above, Plaintiff has failed to plausibly state a federal law claim against Defendants, and the Court finds that his inability to state a federal claim in this matter cannot be cured by allowing him to amend the Complaint or the proposed Amended Complaints. *See Lopez,* 203 F.3d at 1130. Because the Court has neither federal question nor diversity jurisdiction over this case, the Court must dismiss it. Plaintiff may be able to bring his state law claims against Defendants in state court.

IT IS THEREFORE ORDERED denying Plaintiff's Motion to Amend Complaint (Doc. 50).

IT IS FURTHER ORDERED denying Plaintiff's Motion to Compel (Doc. 63).

IT IS FURTHER ORDERED denying Plaintiff's second Motion to Amend Complaint (Doc. 67).

IT IS FURTHER ORDERED denying Plaintiff's Amended Motion: Breach of Contract, and Privacy (Doc. 80).

IT IS FURTHER ORDERED dismissing this case for lack of subject matter jurisdiction.

IT IS FURTHER ORDERED directing the Clerk of Court to enter judgment accordingly and close this case.

Dated this 6th day of April, 2017.

Honorable John J. Tuchi
United States District Judge