IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge William J. Martínez

Civil Action No. 16-cv-2491-WJM-KMT

FRANK BROWN,

Plaintiff,

v.

DISH NETWORK, L.L.C.,

Defendant.

ORDER ADOPTING APRIL 21, 2017 RECOMMENDATION OF MAGISTRATE JUDGE GRANTING DEFENDANT'S MOTION TO DISMISS

This matter is before the Court on the April 21, 2017 Recommendation of United States Magistrate Judge Kathleen M. Tafoya ("Recommendation," ECF No. 41) that Defendant's Motion to Dismiss (the "Motion," ECF No. 27) be granted. The Recommendation is incorporated herein by reference. *See* 28 U.S.C. § 636(b)(1)(B); Fed. R. Civ. P. 72(b). Plaintiff filed an objection to the Recommendation. ("Objection," ECF No. 47.) For the reasons set forth below, Plaintiff's Objection is overruled, the Magistrate Judge's Recommendation is adopted, Defendant's Motion is granted, and judgment is entered in favor of Defendant on all claims in this matter.

I. STANDARD OF REVIEW

When a magistrate judge issues a recommendation on a dispositive matter, Federal Rule of Civil Procedure 72(b)(3) requires that the district judge "determine *de novo* any part of the magistrate judge's [recommendation] that has been properly objected to." An objection to a recommendation is properly made if it is both timely and

specific. *United States v. One Parcel of Real Property Known as 2121 East 30th St.*, 73 F.3d 1057, 1059 (10th Cir. 1996). An objection is sufficiently specific if it "enables the district judge to focus attention on those issues—factual and legal—that are at the heart of the parties' dispute." *Id.* In conducting its review, "[t]he district court judge may accept, reject, or modify the recommendation; receive further evidence; or return the matter to the magistrate judge with instructions." *Id.* Here, Plaintiff filed a timely objection to Judge Tafoya's Recommendation. Therefore, this Court reviews the issues before it *de novo*.

Under Federal Rule of Civil Procedure 12(b)(6), a defendant may move to dismiss for "failure to state a claim upon which relief can be granted." In evaluating such a motion, a court must "assume the truth of the plaintiff's well-pleaded factual allegations and view them in the light most favorable to the plaintiff." *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007). The dispositive inquiry is "whether the complaint contains 'enough facts to state a claim to relief that is plausible on its face.'" *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Granting a motion to dismiss "is a harsh remedy which must be cautiously studied, not only to effectuate the spirit of the liberal rules of pleading but also to protect the interests of justice." *Dias v. City & Cnty. of Denver*, 567 F.3d 1169, 1178 (10th Cir. 2009) (internal quotation marks omitted). "Thus, 'a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely.'" *Id.* (quoting *Twombly*, 550 U.S. at 556).

Further, in considering Judge Tafoya's Recommendation, the Court is mindful of Plaintiff's *pro se* status, and accordingly reads his pleadings and filings liberally. *Haines v. Kerner*, 404 U.S. 519, 520–21 (1972); *Trackwell v. United States Gov't*, 472 F.3d 1242, 1243 (10th Cir. 2007). The Court, however, cannot act as advocate for Plaintiff, who must still comply with the fundamental requirements of the Federal Rules of Civil Procedure. *See Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991); *see also Ledbetter v. City of Topeka, Kan.*, 318 F.3d 1183, 1188 (10th Cir. 2003).[1]

II. BACKGROUND

No parties object to the recitation of facts set forth by Judge Tafoya in the April 21, 2017 Recommendation. (*See* ECF Nos. 41, 47, 49.) Accordingly, the Court adopts and incorporates the "Statement of the Case" section of the Recommendation as if set forth herein. (ECF No. 41 at 1–3.)

Briefly, Plaintiff worked for Defendant DISH Network between December 3, 2007 and January 22, 2008. (ECF No. 1 ¶ 5.) Plaintiff was employed as an Associate Tester and was required to report to the Defendant's location in Spartanburg, South Carolina.

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[1] Plaintiff objects to Judge Tafoya's reliance on *Hall*, in which Judge Tafoya states that "a *pro se* litigant's 'conclusory allegations without supporting factual averments are insufficient to state a claim upon which relief can be based.'" (ECF No. 47 at 8 (citing ECF No. 41 at 3 (quoting *Hall*, 935 F.2d at 1110)).) Plaintiff argues that this "claim made by the Magistrate is without merit . . . [and t]his is an outdated precedent for which new precedent exist[s]." (ECF No. 47 at 8 (citing *Trackwell*, 472 F.3d at 1243).)

First, even with application of the less stringent standard articulated in *Trackwell*, the Tenth Circuit still requires all litigants, *pro se* or not, to plead factual averments that are sufficient to state a claim. *See Smith-Johnson*, 207 F. App'x 911, 912 (10th Cir. 2016) ("Although we construe *pro se* filings liberally, 'this court has repeatedly insisted that *pro se* parties follow the same rules of procedure that govern other litigants.'" (quoting *Nielsen v. Price*, 17 F. 3d 1276, 1277 (10th Cir. 1994)). Second, and contrary to Plaintiff's argument, the Court finds that Judge Tafoya gave appropriate deference to Plaintiff's pleadings considering his *pro se* status. Accordingly, Plaintiff's objection to this portion of the Recommendation is overruled.

(*Id*. ¶¶ 5–6.) Following his separation from employment with Defendant, on April 21, 2008, Plaintiff was arrested and charged in a Pennsylvania state court with criminal offenses related to a robbery that occurred in Philadelphia on December 18, 2007. (*Id*. ¶ 7.)

At trial, Plaintiff asserted that on the day of the robbery he was on assignment for Defendant in South Carolina. (*Id*. at ¶ 8.) The prosecution subpoenaed Defendant to produce employment records demonstrating Plaintiff's presence in South Carolina on December 18, 2007. (*Id*.) The employment records produced did not verify Plaintiff's alibi. (*Id*. ¶ 9 ("Despite the fact that Plaintiff was, in fact, on assignment and physically present at Defendant's South Carolina location on December 18, 2007, said employment records as disclosed by Defendant failed to reflect as much.").) According to Plaintiff, "[a]s a consequence, and because Plaintiff was unable to establish that he was on assignment . . . Plaintiff was found guilty of the charges against him." (*Id*. ¶10.) On March 18, 2010, Plaintiff was sentenced to an indefinite term of seven to fourteen years in prison, followed by fifteen years of probation. (*Id*.)

Plaintiff asserts that on June 15, 2015, he obtained employment records from Defendant, which "revealed an error in Defendant's record-keeping." (*Id*. ¶¶ 11–12.) Plaintiff contends that had these employment records been disclosed before his criminal trial, he would have been able to demonstrate that Defendant's record-keeping was inaccurate and that, contrary to the prosecutor's contention, Plaintiff was on assignment in South Carolina on the date of the robbery. (*Id*. ¶ 16.)

Based on this course of events, Plaintiff filed the instant action asserting the following claims: (1) "negligent creation and maintenance of employment records" (*i.e.*, negligent recordkeeping) and (2) "negligent search, retrieval, production and disclosure of employment records" (*i.e.*, negligent misrepresentation). (ECF No. 1 at 6–13.) After Plaintiff filed his complaint, United States District Judge Lewis T. Babcock *sua sponte* dismissed Plaintiff's negligent misrepresentation claim, finding that such a claim was not actionable under the circumstances. (ECF No. 7 at 4–5.) Plaintiff moved for reconsideration of the dismissal of his negligent misrepresentation claim (*see* ECF No. 17), however this Court agreed with Judge Babcock in that Plaintiff could not state such a claim, and accordingly denied Plaintiff's motion (ECF No. 39).[2]

III. ANALYSIS

Judge Tafoya recommended that Defendant's Motion be granted "and that Plaintiff's claims be dismissed with prejudice for failure to state a claim upon which relief can be granted." (ECF No. 41 at 7.) Judge Tafoya made several findings to reach that recommendation.

First, Judge Tafoya found that "Colorado does not recognize a claim for negligent recordkeeping." (*Id*. at 5 (citing *Cash v. Minnequa Bank of Pueblo*, 426 P.2d

[2] In Plaintiff's Objection, he again "objects to the dismissal of Plaintiff's negligent misrepresentation claim." (ECF No. 47 at 9.) Plaintiff asserts that "within the Magistrate's recommendation, the magistrate confirms the dismissal of my negligent misrepresentation claim." (*Id*.) In the Court's view, this is an improper second attempt to object to the dismissal of his claim. Rule 72 permits a party to "file specific written objections to the proposed *findings* and *recommendations*." Fed. R. Civ. P. 72(b)(2) (emphasis added). Here, Judge Tafoya, in a footnote, merely recognized that this Court had previously dismissed his claim for negligent misrepresentation—indeed no analysis was provided regarding the negligent misrepresentation claim. (*See* ECF No. 41 at 3 n.1.) Thus, this footnote does not constitute a "finding" or "recommendation" that Plaintiff could properly object to. Accordingly, Plaintiff's objection to this portion of the Recommendation is overruled.

767, 770 (Colo. 1967) (analyzing claim for negligent recordkeeping under theory of negligence)).) Second, Judge Tafoya found that a two-year statute of limitations applies to negligence claims, and that Plaintiff's claims are therefore barred by the statute of limitations. (*Id*. at 5–7 (citing Colo. Rev. Stat. § 13-80-102(1)(a)).)

Plaintiff contends that Judge Tafoya's conclusion that Colorado does not recognize a negligent recordkeeping claim "is false and contrary to Colorado law." (ECF No. 47 at 6 (citing *Click v. Lupori*, 2014 WL 7228747, at *1 (D. Colo. Dec. 16, 2014)).) Plaintiff maintains that the plaintiff in *Click* asserted a negligent recordkeeping claim and that "this recordkeeping claim made it all the way to trial and was heard and decided on by a jury." (*Id*. at 6–7.)

However, Plaintiff's misunderstands the holding in *Click*. There the plaintiff sued her dentist for professional negligence based on the negligent extraction of her wisdom teeth. *See Click*, 2014 WL 7228747, at *1. While the plaintiff did call attention to her dentist's recordkeeping problems, the court noted that a medical providers negligence in keeping inaccurate medical records may only be analyzed under a professional negligence claim as "part of his overall 'treatment' of the patient." *Id*. at *6–7. Thus, in the Court's view, the plaintiff in *Click* clearly did not bring a claim for negligent recordkeeping that "made it all the way to trial."

Further, as cited in Judge Tafoya's Recommendation, in *Minnequa Bank of Pueblo* the Colorado Supreme Court found the defendant bank careless and negligent in the recordkeeping of its safety deposit box receipts, but went on to analyze defendant's conduct under a civil negligence claim, not a negligent recordkeeping

claim. *Minnequa Bank of Pueblo*, 426 P.2 at 770. Thus, the Court finds that Judge Tafoya properly concluded that Colorado does not recognize a claim for negligent recordkeeping. Accordingly, Plaintiff's objection to this portion of the Recommendation is overruled.[3]

Plaintiff also objects to Judge Tafoya's finding that "Plaintiff's claims are barred." (ECF No. 41 at 6.) Judge Tafoya correctly noted that "Colorado's general discovery rule provides that claims accrue when a plaintiff knows or should know through reasonable diligence of both the injury and its cause." (*Id*. at 6 (citing *Micale v. Bank One N.A.*, 382 F. Supp. 2d 1207, 1225 (D. Colo. 2005)).) Based on her finding that Plaintiff's claim should be properly construed as one for negligence, Judge Tafoya applied a two-year limitations period. (*Id*. at 5.) Judge Tafoya then found that by "February 1, 2010, Plaintiff knew or should have known of his injury—his conviction—and its cause—his inability to provide an alibi due to the Defendant's alleged failure to provide records to back up his alibi." (*Id*. at 7.) Judge Tafoya concluded that "[b]ecause Plaintiff's claims accrued, at the latest, on February 1, 2010, he had until February 1, 2012, at the latest to file his Complaint . . . but he did not file his case in this Court until October 4, 2016." (*Id*.)[4]

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[3] There is also a serious question whether Colorado would recognize *any* cause of action that presumes the innocence of a person still subject to a conviction. But the Court need not address that question in these circumstances.

[4] Plaintiff's criminal trial began on February 1, 2010, he was convicted on February 2, 2010, and was sentenced on March 18, 2010. (ECF No. 1 ¶ 10.) Picking among these dates is immaterial to the outcome of Plaintiff's case. The Court therefore need not decide precisely when Plaintiff's claim accrued.

In his Objection, Plaintiff asserts that he did not discover the basis of his claims until June 2015, when he received the employment records from Defendant. (ECF No. 47 at 5.) Plaintiff further asserts that he "had absolutely no employment records from the Defendant that may have indicated [his] attendance for the entire week of December 15, 2007 through December 22, 2007." (*Id*. at 2.) Given this position, Plaintiff appears to object to the following statement by Judge Tafoya:

> The fact that Plaintiff received what he believes is proof of the Defendant's failure to provide proper documentation in June 2015 is irrelevant, because he has known or should have known that the Defendant's records did not match his own records, which Plaintiff alleges is the reason for his conviction, no later than the date he was found guilty of the charges.

(ECF No. 41 at 7.)

Plaintiff argues that "[t]his is an absolute misinterpretation of the Magistrate[']s part as I had absolutely no employment records that contradicted the records produced by the Defendant." (ECF No. 47 at 3.) And, "[c]ontrary to Magistrate's interpretation, I never made any statements within my Complaint which would make a person believe that I had employment records for which to contradict Defendant's employment records [provided at trial]." (*Id*.)

Plaintiff misinterprets Judge Tafoya's findings in her Recommendation. When Judge Tafoya stated that Plaintiff "has known or should have know that the Defendant's records did not match his own records," she was not referring to actual physical records in Plaintiff's possession. Rather, Judge Tafoya was referring to Plaintiff's belief or recollection that formed that basis of his assertion at trial that he was on assignment in South Carolina on the date of the crime. In fact, in Plaintiff's own Complaint he

references this belief (without mentioning any physical records in his possession), when he alleged "that Plaintiff was, in fact, on assignment and physically present at Defendant's South Carolina location on December 18, 2007, [albeit] said employment records as disclosed by Defendant failed to reflect as much." (ECF No. 1 ¶ 9.)

Thus, the Court finds disingenuous Plaintiff's contention that he could not have known of his injury—the conviction—until June 2015 when he received the employment records from Defendant. In the Court's view, the allegations in Plaintiff's Complaint clearly reveal that he should have known of his potential claim against Defendant at the latest date of March 18, 2010, when he was sentenced for his criminal conviction. (*See id*. ¶ 10.) Accordingly, Judge Tafoya correctly found that Plaintiff's claims are barred by the applicable statute of limitations. *See* Colo. Rev. Stat. § 13-80-102(1)(a). Plaintiff's objection to this portion of the Recommendation is overruled.

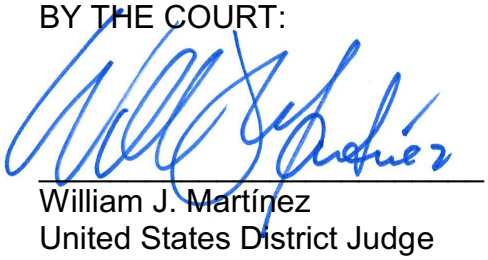
IV.CONCLUSION

For the reasons set forth above, the Court ORDERS as follows:

1. Plaintiff's Objection (ECF No. 47) to the Magistrate Judge's Recommendation is OVERRULED;
2. The Magistrate Judge's Recommendation (ECF No. 41) is ADOPTED in its entirety;
3. Defendant's Motion to Dismiss (ECF No. 27) is GRANTED;
4. The Clerk shall enter judgment in favor of Defendant on all claims and shall terminate this case.
5. The parties shall bear their own costs and fees.

Dated this 18th of July, 2017.

BY THE COURT:



William J. Martínez
United States District Judge