IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JARRELL D. CURNE,

Plaintiff,

vs.

LIBERTY MUTUAL INSURANCE COMPANY,

Defendants.

Case No. 2:21-CV-02192

MEMORANDUM AND ORDER

Proceeding pro se, Plaintiff Jarrell D. Curne filed suit against Defendant Liberty Mutual Insurance Company in Johnson County District Court on March 25, 2021. On April 27, 2021, Defendant Liberty Mutual filed its Notice of Removal with this Court. Now before the Court is Defendant Liberty Mutual's Motion to Dismiss (Doc. 12) and numerous motions filed by Plaintiff Curne (Docs. 16, 17, 25, 27, 37, 52, 68, 69, 70, 71, 74, 75, 78, 79).

I. Factual and Procedural Background

This case stems from an automobile insurance policy dispute. Curne alleges that he was rear-ended by another driver on July 26, 2020. Curne alleges that his insurer, Liberty Mutual, breached its insurance contract with him by failing to pay his medical expenses and for repairs to his vehicle stemming from the accident. Plaintiff Curne asserts $20,000,000 in damages.

On April 24, 2021, while this case was still pending in Johnson County District Court, Curne requested that the Johnson County District Court enter a default judgment against Liberty Mutual if Liberty Mutual failed to appear by April 27. After Liberty Mutual removed this action to this Court on April 27, Curne's Motion for Default Judgment brought under K.S.A. 60-255 was converted to a Motion for Default Judgment under Rule 55 of the Federal Rules of Civil Procedure. The Court denied Curne's motion as premature on April 30, noting that Liberty Mutual's time to file a responsive pleading had not yet expired. Immediately thereafter, Curne filed a flurry of motions and exhibits arguing that his motion had been improperly denied.

While those motions were pending before the Court, Liberty Mutual filed its Motion to Dismiss on May 4. Curne has since filed an additional motion for a clerk's entry of default, a motion for the undersigned to recuse himself from the case, and other miscellaneous motions. The Court will address each motion in turn.

II. Legal Standard

Because Plaintiff appears pro se in this case, the Court must liberally construe his pleadings.[1] If a court can reasonably read a pro se complaint in such a way that it could state a claim on which the plaintiff could prevail, it should do so despite "failure to cite proper legal authority . . . confusion of various legal theories . . . or [Plaintiff's] unfamiliarity with pleading requirements."[2] The Court, however, is not an advocate for the pro se litigant.[3] "Despite the liberal

[1] *See Trackwell v. U.S. Gov't*, 472 F.3d 1242, 1243 (10th Cir. 2007) ("Because [the plaintiff] appears pro se, we review his pleadings and other papers liberally and hold them to a less stringent standard than those drafted by attorneys.").

[2] *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

[3] *Id.*

construction afforded pro se pleadings, the court will not construct arguments or theories for the plaintiff in the absence of any discussion of those issues."[4]

III. Analysis

A. Plaintiff Curne's Motion for Recusal (Doc. 52)

28 U.S.C. § 455(a) provides that a judge must "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." A judge also most disqualify himself "[w]here he has a personal bias or prejudice concerning a party."[5] These rules are designed to "eliminate 'even the appearance of impropriety' "[6] and thus require a judge to "recuse himself when there is the appearance of bias, regardless of whether there is actual bias."[7] The Tenth Circuit has therefore held that the appropriate test for the Court is "whether a reasonable person, knowing all the relevant facts, would harbor doubts about the judge's impartiality."[8]

In his Motion for Recusal, Curne argues that the undersigned has "outright bias" against Curne and that the undersigned has refused to follow the Federal Rules of Civil Procedure. Curne, however, makes no argument of *how* the undersigned has displayed bias against him or failed to follow the Federal Rules. It appears that Curne is frustrated that the Court denied Curne's Motion for Default Judgment, but "adverse rulings are not in themselves grounds for recusal."[9] Further,

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[4] *Drake v. City of Fort Collins*, 927 F.2d 1156, 1159 (10th Cir. 1991) (citation omitted).

[5] 28 U.S.C. § 455(b)(1).

[6] *Harris v. Champion*, 15 F.3d 1538, 1571 (10th Cir. 1994) (quoting *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 865 (1988)).

[7] *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 659 (10th Cir. 2002) (citation omitted).

[8] *Id.* (quoting *Hinman v. Rogers*, 831 F.2d 937, 939 (10th Cir. 1987)).

[9] *Glass v. Pfeffer*, 849 F.2d 1261, 1268 (10th Cir. 1988) (citing *United States v. Bray*, 546 F.2d 851, 857 (10th Cir. 1976)).

the Court has no personal bias or prejudice against Curne. Because judges have a duty to sit when there is no legitimate reason for recusal[10] and because Curne has presented no facts which would lead a reasonable person to harbor doubts about the undersigned's impartiality, the Court denies Curne's motion for recusal.

B. Plaintiff Curne's Motions for Default Judgment and Reconsideration (Docs. 16, 17, 25, 27, 37)

As noted above, Curne filed suit against Liberty Mutual on March 25 in Johnson County District Court. Pursuant to K.S.A. 40-218, the Kansas Commissioner of Insurance acknowledged service on behalf of Liberty Mutual on April 9. On April 24, Curne requested that the Johnson County District Court enter a default judgment against Liberty Mutual if Liberty Mutual failed to appear by April 27. Prior to filing a responsive pleading, Liberty Mutual removed this action on April 27.

Upon removal, the Court converted Curne's Motion for Default Judgment brought under K.S.A. 60-255 to a Motion for Default Judgment under Rule 55 of the Federal Rules of Civil Procedure. The Court denied Curne's motion as premature on April 30, noting that Liberty Mutual's time to file a responsive pleading had not yet expired. Since the Court's denial of Curne's Motion for Default Judgment, Curne has filed five separate motions all aimed at a second shot at default judgment. Although stylized as separate motions for default judgment and motions for reconsideration, the core of Curne's argument remains the same—Curne asserts that he served Liberty Mutual on April 5 and on April 9, and that Liberty Mutual was therefore in default for its failure to respond by April 30. The Court will therefore address the motions as a collective.

[10] *Bryce*, 289 F.3d at 659 (citation omitted).

First, the Court concludes that proper service was not completed on April 5 as asserted by Curne. Liberty Mutual is a Massachusetts corporation, and K.S.A. 60-308(a)(2) provides that service of process may be made outside the state in the same manner as service within the state. Although Kansas law permits service of process by certified mail,[11] it provides that service of process of foreign corporations must be made by "[s]erving an officer, manager, partner or a resident, managing or general agent."[12] Curne's certified mail receipt did not indicate that the certified mail was addressed to an officer or agent of Liberty Mutual. Instead, Curne merely addressed the mail to "Liberty Mutual." This is insufficient as a matter of Kansas law, and service was therefore not completed on April 5.

Service was properly completed by April 9, however. Kansas law provides that service may be made on an insurance company by service on the commissioner of insurance,[13] and as noted above, the Kansas Commissioner of Insurance accepted service on behalf of Liberty Mutual on April 9. The Court will therefore calculate Liberty Mutual's response deadline based on the April 9 date of service and will not address Curne's calculations based on the April 5 date of service. Relevant here, Federal Rule 81 governs removed actions and provides that:

> A defendant who did not answer before removal must answer or present other defenses or objections under these rules within the longest of these periods:
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> > (A) 21 days after receiving—through service or otherwise—a copy of the initial pleading stating the claim for relief;
> > (B) 21 days after being served with the summons for an initial pleading on file at the time of service; or

[11] K.S.A. 60-303(c)(1).

[12] K.S.A. 60-304(e)(1).

[13] K.S.A. 60-304(g).

(C) 7 days after the notice of removal is filed.[14]

Curne served Liberty Mutual on April 9. Therefore, under subsections (A) and (B), Liberty Mutual's deadline for filing of a responsive pleading would have been April 30. But, subsections (A) and (B) cannot be viewed in isolation. Liberty Mutual's deadline under subsection (C) would be seven days after it filed its notice of removal—May 4. Because Rule 81 provides that defendants must file a responsive pleading *within the longest of* the three periods listed, Liberty Mutual's response deadline was May 4, not April 30.

All of Curne's pending motions for reconsideration and default hinge on Curne's belief that Liberty Mutual should have filed its responsive pleading by April 30. As addressed above, this is not the correct deadline under the Federal Rules. Further, Liberty Mutual filed its Motion to Dismiss on May 4—the deadline set by Rule 81. Liberty Mutual therefore did not fail to respond to Curne's lawsuit and default judgment against Liberty Mutual is not warranted. Thus, the Court denies Curne's pending motions for reconsideration and default found in Docs. 16, 17, 25, 27, and 37.

C. Defendant Liberty Mutual's Motion to Dismiss for Failure to State a Claim (Doc. 12)

Federal Rule of Civil Procedure 12(b)(6) provides that a defendant may move for dismissal of any claim for which the plaintiff has failed to state a claim upon which relief can be granted.[15] Upon such motion, the court must decide "whether the complaint contains 'enough facts to state a claim to relief that is plausible on its face.' "[16] A claim is facially plausible if the plaintiff pleads

[14] Fed. R. Civ. P. 81(c)(2).

[15] Fed. R. Civ. P. 12(b)(6).

[16] *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

facts sufficient for the court to reasonably infer that the defendant is liable for the alleged misconduct.[17] The plausibility standard reflects the requirement in Rule 8 that pleadings provide defendants with fair notice of the nature of claims as well the grounds on which each claim rests.[18] Under Rule 12(b)(6), the court must accept as true all factual allegations in the complaint, but need not afford such a presumption to legal conclusions.[19]

Here, Curne asserts breach of contract by Liberty Mutual. To state a claim for breach of contract in Kansas, the plaintiff must allege: "(1) the existence of a contract between the parties; (2) sufficient consideration to support the contract; (3) the plaintiff's performance or willingness to perform in compliance with the contract; (4) the defendant's breach of the contract; and (5) damages to the plaintiff caused by the breach."[20] In its Motion to Dismiss, Liberty Mutual does not dispute that Curne has alleged the existence of a contract with Liberty Mutual, consideration in support of that contract, and damages caused by its alleged breach. Liberty Mutual argues only that Curne failed to allege that he complied with the contract or how Liberty Mutual breached a duty within the contract. The Court agrees that Curne has failed to allege that Liberty Mutual breached a duty within the contract.

Curne's amended state court petition alleges that Liberty Mutual failed to fix his vehicle and pay for his medical bills after he was rear-ended by a third party during the term of his policy with Liberty Mutual. But, Curne fails to allege what provisions of the contract required Liberty to

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[17] *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556).

[18] *See Robbins v. Okla.*, 519 F.3d 1242, 1248 (10th Cir. 2008) (citations omitted); *see also* Fed. R. Civ. P. 8(a)(2).

[19] *Iqbal*, 556 U.S. at 678–79.

[20] *Stechschulte v. Jennings*, 297 Kan. 2, 298 P.3d 1083, 1098 (2013) (citation omitted).

pay for his medical bills or damage to his vehicle. Although Curne asserts that he was willing to pay his deductible under the policy, Curne does not allege the type of coverage for which he had contracted with Liberty Mutual. Because the terms of automobile policies may vary widely, allegations regarding the specific duties owed by Liberty Mutual to Curne under the policy are necessary in order to state a claim for relief. Bare assertions of a duty to pay are not sufficient under Rule 8.[21] Curne's claim against Liberty Mutual is therefore dismissed.

IT IS THEREFORE ORDERED that Plaintiff's Motion for Recusal of Eric F. Melgren (Doc. 52) is **DENIED.**

IT IS FURTHER ORDERED that Plaintiff's Motion for Reconsideration (Doc. 16) is **DENIED.**

IT IS FURTHER ORDERED that Plaintiff's Motion for Rule 81(c) Removed Actions (Doc. 17) is **DENIED.**

IT IS FURTHER ORDERED that Plaintiff's Motion for Reconsideration (Doc. 25) is **DENIED.**

IT IS FURTHER ORDERED that Plaintiff's Second Motion for Default Judgment (Doc. 27) is **DENIED.**

IT IS FURTHER ORDERED that Plaintiff's Motion for Rule 77(c) (Doc. 37) is **DENIED.**

IT IS FURTHER ORDERED that Defendant's Motion to Dismiss for Failure to State a Claim (Doc. 12) is **GRANTED.**

[21] *Iqbal*, 556 U.S. at 678 ("Nor does a complaint suffice if it tenders 'naked assertions' devoid of 'further factual enhancement.' ") (quoting *Twombly*, 550 U.S. at 557) (alteration omitted).

IT IS FURTHER ORDERED that Plaintiff's Motion (Doc. 68) is **DENIED AS MOOT.** To the extent Plaintiff requests that the Court rule on pending motions filed by Plaintiff, it has done so. To the extent Plaintiff intended to request any other relief, the Court cannot identify it.

IT IS FURTHER ORDERED that Plaintiff's Motion (Doc. 69) is **DENIED AS MOOT.** Plaintiff asserts insufficient service of process under Fed. R. Civ. P. 12(b)(4). Defendant has not filed any pleadings to which Rule 12(b)(4) is applicable. To the extent Plaintiff seeks relief from Magistrate Judge O'Hara's order (Doc. 63) directing Defendant to re-serve its improperly served response (Doc. 59) and extending Plaintiff's response deadline, the Court finds no error.

IT IS FURTHER ORDERED that Plaintiff's Motion (Doc. 70) is **DENIED AS MOOT.** To the extent Plaintiff requests that the Court rule on pending motions filed by Plaintiff, it has done so. To the extent Plaintiff argues that he did not receive Defendant's Motion to Dismiss, the Court finds the argument without merit as Plaintiff has responded to arguments addressed by Defendant in its Motion to Dismiss. To the extent Plaintiff seeks relief from Magistrate Judge O'Hara's order (Doc. 63) noting the proper process for filing of an amended complaint, the Court finds no error.

IT IS FURTHER ORDERED that Plaintiff's Motion (Doc. 71) is **DENIED AS MOOT.** To the extent Plaintiff requests the same relief requested in Doc. 70, it is denied as moot. To the extent Plaintiff requests any further relief, the Court cannot identify it.

IT IS FURTHER ORDERED that Plaintiff's Motion (Doc. 74) is **DENIED AS MOOT.** To the extent Plaintiff requests that the Court review his attached exhibits in ruling on his already addressed motions for reconsideration, the Court denies the motion as moot.

IT IS FURTHER ORDERED that Plaintiff's Motion for Summary Judgment (Doc. 75) is **DENIED.** The motion is denied for failure to comply with Fed. R. Civ. P. 56(c).

IT IS FURTHER ORDERED that Plaintiff's Motion (Doc. 78) is **DENIED AS MOOT.** The Court is unable to identify the relief that Plaintiff seeks in his motion.

IT IS FURTHER ORDERED that Plaintiff's Motion (Doc. 79) is **DENIED AS MOOT.** The Court is unable to identify the relief that Plaintiff seeks in his motion.

IT IS SO ORDERED.

This case is closed.

Dated this 8th day of September, 2021.

Eric F Melgren

ERIC F. MELGREN
UNITED STATES DISTRICT JUDGE