IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JESSE J. ALMENDAREZ, Plaintiff, v. PA STATE LOTTERY and RIVERS CASINO Defendants.	)	Civil Action Nos. 17-587; 17-588; 17-589

MEMORANDUM OPINION

I. Introduction

Pending before the court are three complaints (Civil Action Nos. 17-587, 17-588, 17-589) filed by Jesse J. Almendarez ("plaintiff"). On May 5, 2017, plaintiff filed two complaints, one against the PA State Lottery at civil action number 17-587, (17-587 ECF No. 1), and the other against Rivers Casino at civil action number 17-588. (17-588 ECF No. 1.) On June 12, 2017, plaintiff filed a third complaint against the PA State Lottery at civil action number 17-589, (17-589 ECF No. 5). All three complaints involve the same kind of claim, namely that the named defendant engaged in a "false advertising" scheme to promote gambling.

On June 12, 2017, this court granted plaintiff's motion for leave to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915 in civil action number 17-589. (17-589 ECF No. 4.) On July 20, 2017, this court granted plaintiff's declarations for leave to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915 in civil action numbers 17-587 and 17-588. (17-587 ECF No. 5; 17-588 ECF No. 5.) The court is obligated under that same statute to dismiss any case in which

the complaint asserts claims that are frivolous or malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief against a defendant who is immune from such relief. 28 U.S.C. §1915(e)(2)(B). For the purpose of the court's review under § 1915(e)(2)(B), the court will address plaintiff's three complaints together. While recognizing that courts have a special obligation to construe a *pro se* litigant's pleadings liberally, *see* Erickson v. Pardus, 551 U.S. 89, 94 (2007); Higgs v. Atty. Gen. of the U.S., 655 F.3d 333, 339 (3d Cir. 2011), *as amended* (Sept. 19, 2011), this court nevertheless concludes that plaintiff's complaints are subject to dismissal, without prejudice, under § 1915(e)(2)(B).

II. Factual and Procedural Background

Plaintiff alleges in the complaints that the PA State Lottery and Rivers Casino engaged in false advertising schemes to promote gambling. Although plaintiff's complaints are sparse and difficult to interpret, the court concludes that plaintiff alleges the following facts.

With respect to the PA State Lottery, plaintiff alleges that he sent four "Pittsburgh Steeler Scratch-off tickets," each costing $5.00, to the PA State Lottery, and that he did not receive a response. (17-587 ECF No. 1 at 1.) Plaintiff does not state when he purchased these tickets, or that any of them were winning tickets. He does, however, "claim" four signed and framed NFL Pittsburgh Steelers Jerseys and four signed NFL Steelers helmets, with accompanying stands.[1] (Id. at 2.)

Plaintiff also alleges that in or around 2012, he purchased 74 tickets in the PA State Lottery's "$100 a day for life" contest, with each ticket costing one dollar, for a total of $74 dollars' worth of tickets. (17-589 ECF No. 5 at 1.) Plaintiff states that he later learned through

[1] It is unclear on the face of the complaint whether plaintiff is asserting that he won the four jerseys and helmets or if he is simply stating that these were the available prizes in the scratch-off contest.

"telephone reports" about complaints that this contest involved a scheme whereby there were "5 $1.00 winners and 8 FREE TICKETS." (Id. at 2–3.)

With respect to Rivers Casino, plaintiff claims that he won $12,500 on one slot machine at defendant's casino and $6,250 on another slot machine at defendant's casino, for a total of $18,750, and that he never received payment for these winnings. (17-588 ECF No. 1 at 1–2.)

III. Standard of Review

Pursuant to 28 U.S.C. §1915(e)(2)(B) and §1915A(a), district courts are statutorily required to review the complaint of a plaintiff proceeding *in forma pauperis* prior to service of process.[2] In doing so, the court must evaluate whether the complaint is (i) frivolous or malicious, (ii) fails to state a claim upon which relief may be granted, or (iii) seeks monetary relief from a defendant immune from such relief. 28 U.S.C. §1915(e)(2)(B). If "at any time" the court determines that the action meets any of those criteria, the court "shall dismiss the case." Id. A complaint is frivolous where it lacks an arguable basis either in law or in fact. Neitzke v. Williams, 490 U.S. 319, 325 (1989); Adams v. US States Treasury Sec'y, 655 F. App'x 890, 891 (3d Cir. 2016).

The legal standard for dismissing a complaint for failure to state a claim pursuant to §1915(e)(2)(B)(ii) and § 1915A(b)(1) is identical to the legal standard used when ruling on Rule 12(b)(6) motions. Small v. Herrera, 52 F. Supp. 3d 684, 686-87 (D. Del. 2014) (citing Tourscher

[2] The screening provisions of 28 U.S.C. §1915(e)(2)(B) apply to both prisoner and non-prisoner plaintiffs who proceed *in forma pauperis*. *See* Atamian v. Burns, 236 F. App'x 753, 755 (3d Cir. May 24, 2007) ("[T]he provisions of § 1915(e) apply to all in forma pauperis complaints, not simply those filed by prisoners."); Grayson v. Mayview State Hosp., 293 F.3d 103, 114 n. 19 (3d Cir. 2002)(concluding that non-prisoner indigent plaintiffs are "clearly within the scope of § 1915(e)(2)"); *see also* Plonka v. Borough of Susquehanna, Civ. Action No. 17-00262, 2017 WL 1250792, at *2 (M.D. Pa. Apr. 5, 2017) (applying §1915(e)(2)(B) screening provisions to non-prisoner's complaint); Cohen v. Moore, Civ. Action No. 16-661, 2016 WL 7474815, at *1 (W.D. Pa. Dec. 29, 2016) (same).

v. McCullough, 184 F.3d 236, 240 (3d Cir. 1999) (applying Fed. R. Civ. P. 12(b)(6) standard to dismissal for failure to state a claim under § 1915(e)(2)(B))). A motion to dismiss filed pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the complaint. Kost v. Kozakiewicz, 1 F.3d 176, 183 (3d Cir. 1993). In deciding a motion to dismiss, the court accepts as true all well-pled factual allegations in the complaint and views them in a light most favorable to the plaintiff. U.S. Express Lines Ltd. v. Higgins, 281 F.3d 383, 388 (3d Cir. 2002). While a complaint does not need detailed factual allegations to survive a Rule 12(b)(6) motion to dismiss, a complaint must provide more than labels and conclusions. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). A "formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555. "Factual allegations must be enough to raise a right to relief above the speculative level" and "sufficient to state a claim for relief that is plausible on its face." Id. at 555-56. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Twombly, 550 U.S. at 556).

In this case, plaintiff is proceeding without the benefit of legal counsel. Pro se plaintiffs are held to a less stringent standard than individuals who are represented by counsel. Fed. Express Corp. v. Holowecki, 552 U.S. 389, 402 (2008) ("[P]ro se litigants are held to a lesser pleading standard than other parties."). Nevertheless, for Rule 12(b)(6) purposes, "a *pro se* complaint must still 'contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" Salley v. Sec'y Pa. Dep't of Corr., 565 F. App'x 77, 81 (3d Cir. 2014) (quoting Iqbal, 556 U.S. at 678); *see* Thakar v. Tan, 372 F. App'x 325, 328 (3d Cir. 2010) ("[A] litigant is not absolved from complying with Twombly and the federal pleading requirements merely because s/he proceeds pro se.").

IV. Discussion

The complaints in this case are sparse, difficult to interpret, and replete with disjointed averments, conclusory allegations, and factual non sequiturs. Vague references are made in the complaints to past events lacking factual context or documentation. Nevertheless, the court must determine whether the allegations in plaintiff's complaints, if accepted as true, state plausible claims to relief. Salley, 565 F. App'x 77 at 81.

Here, plaintiff does not cite any specific state or federal laws, but seeks relief from a " 'false advertising' scheme to promote gambling." (17-587 ECF No. 1 at 3; 17-588 ECF No. 1 at 2; 17-589 ECF No. 5 at 4.) Each of plaintiff's claims essentially involves an assertion that plaintiff paid for entry into a gambling competition and that he did not receive the prize or payout from this competition.[3] Though plaintiff does not explicitly state that defendants advertised these competitions and their associated prizes, the court will draw this inference based on plaintiff's repeated claim of relief from "false advertising." Based on this claim and the other averments in plaintiff's complaint, the best that this court can decipher is that plaintiff is attempting to assert a violation of 1) the Lanham Act, 2) the Federal Trade Commission Act, or 3) state law claims, including breach of contract and fraud.

The Lanham Act provides a cause of action for false advertising. 15 U.S.C. § 1125(a). Plaintiff, however, lacks standing to bring a false advertising claim under the Lanham Act. In Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1390 (2014), the Supreme Court held that

> to come within the zone of interests in a suit for false advertising under § 1125(a), a plaintiff must allege an injury to a commercial interest in reputation or sales. A consumer who is hoodwinked into purchasing a disappointing product may well have an injury-in-

[3] In only one of the complaints does plaintiff assert that he won the gambling competition. (*See* 17-588 ECF No. 1.) Even in that complaint, however, plaintiff does not allege that defendant denied him payment, merely that he never receive payment. (Id.)

> fact cognizable under Article III, but he cannot invoke the protection of the Lanham Act—a conclusion reached by every Circuit to consider the question.

Because the Lanham Act is intended to protect a commercial plaintiff whose commercial interests have been harmed, "[a] customer . . . does not have standing to pursue a claim under the Lanham Act, which protects claims related to commercial interests such as a business competitor's allegation of unfair competition." Haynes v. Paree, Civ. Action No. No. 12-329, 2012 WL 1032681, at *2 (D.S.C. Feb. 27, 2012); *see* Sandoz Pharm. Corp. v. Richardson-Vicks, Inc., 902 F.2d 222, 230 (3d Cir. 1990) ("the [Lanham Act] provides a private remedy to a commercial plaintiff who meets the burden of proving that its commercial interests have been harmed by a competitor's false advertising."). Here, plaintiff did not assert that he is a commercial plaintiff or that the alleged false advertising harmed his commercial interest. Plaintiff, therefore, lacks standing to pursue a claim under the Lanham Act.

Plaintiff is similarly unable to pursue a claim under the Federal Trade Commission ("FTC") Act. "[T]he Federal Trade Commission Act may be enforced only by the Federal Trade Commission. Nowhere does the Act bestow upon either competitors or consumers standing to enforce its provisions." Alfred Dunhill Ltd. v. Interstate Cigar Co., 499 F.2d 232, 237 (2d Cir. 1974); *see* 15 U.S.C. § 45(a)(1); R.T. Vanderbilt Co. v. Occupational Safety & Health Review Comm'n, 708 F.2d 570, 574 (11th Cir. 1983) ("Under [the FTC Act], consumers and members of the public—the beneficiaries of the statute—are not provided a private right of action."); Holloway v. Bristol-Myers Corp., 485 F.2d 986, 988–89 (D.C. Cir. 1973) ("The [FTC] Act nowhere purports to confer upon private individuals, either consumers or business competitors, a right of action to enjoin the practices prohibited by the Act or to obtain damages following the commission of such acts."); Taggart v. GMAC Mortg., LLC, No. CIV.A. 12-415, 2012 WL 5929000, at *6 (E.D. Pa. Nov. 26, 2012) ("[P]rivate parties are not authorized to file enforcement

actions [under the FTC Act], only the FTC has that authority."). Plaintiff, therefore, is not entitled to relief under the FTC Act.

Finally, plaintiff seems to raise potential state law claims, including breach of contract and fraud. For a federal court to hear state law claims it must have either supplemental jurisdiction under 28 U.S.C. § 1367 or jurisdiction under the diversity statute, 28 U.S.C. § 1332. Here, plaintiff does not allege a cognizable federal question claim that would give this court supplemental jurisdiction over this action, therefore, the only means by which this court could entertain plaintiff's state claw claims would be through diversity jurisdiction. The diversity statute requires complete diversity of parties and an amount in controversy in excess of seventy-five thousand dollars. 28 U.S.C. § 1332(a). Here, plaintiff is the party invoking the jurisdiction of the federal court, therefore, the burden of demonstrating these requirements lies with him. Columbia Gas Transmission Corp. v. Tarbuck, 62 F.3d 538, 541 (3d Cir. 1995) ("[A] party who invokes the jurisdiction of the federal courts has the burden of demonstrating the court's jurisdiction.")

"A plaintiff, as the party asserting federal jurisdiction, 'must specifically allege each party's citizenship, and these allegations must show that the plaintiff and defendant are citizens of different states.' " James v. Scott, Civ. Action No. 11-1175, 2011 WL 4002200, at *3 (D.N.J. Sept. 7, 2011) (quoting American Motorists Ins. Co. v. American Employers' Ins. Co., 600 F.2d 15, 16 (5th Cir.1979)); *see* Universal Reinsurance Co., Ltd. v. St. Paul Fire & Marine Ins. Co., 224 F.3d 139, 141 (2d Cir.2000) ("The failure to allege [the party's] citizenship in a particular state is fatal to diversity jurisdiction"). Nowhere in plaintiff's complaints does he provide information with respect to his own citizenship or the citizenship of the two named defendants – the PA State Lottery and Rivers Casino. While the court recognizes that plaintiff is

a pro se litigant, and, therefore, held to less stringent standards, the court can find no basis for finding diversity between the parties and for asserting jurisdiction over plaintiff's actions. [4] James, 2011 WL 4002200, at *3.

Because plaintiff does not have standing to bring his "false advertising" claims under the Lanham Act or the FTC Act, and plaintiff did not satisfy the requirements for diversity jurisdiction, the court will dismiss the complaint without prejudice for failing to state a claim upon which relief may be granted. 28 U.S.C. §1915(e)(2)(B)(ii). The dismissal is without prejudice, and plaintiff may file amended complaints if plaintiff can show diversity of citizenship between the parties and that the amount in controversy exceeds the sum of $75,000.00, exclusive of interest and costs. *See* Id. at *4. Amended complaints must be filed on or before August 17, 2017. If plaintiff fails to file amended complaints these cases will be closed.

V. Conclusion

For the foregoing reasons, pursuant to 28 U.S.C. § 1915(e)(2)(B), this court is compelled to dismiss plaintiff's complaints without prejudice. An appropriate order will follow.

Dated: July 27, 2017

/s/ Joy Flowers Conti
Joy Flowers Conti
Chief United States District Judge

[4] At this time, the court is also unable to find that plaintiff met the amount in controversy requirement. Plaintiff does not allege a specific amount in damages and given the general lack of clarity throughout plaintiff's complaints it is difficult to determine the amount plaintiff is seeking in each case. The court, to the best of its abilities, finds that plaintiff is seeking $20 at civil action number 17-587 (the amount plaintiff paid to enter the allegedly fraudulent scheme) (17-587 ECF No. 1); $18,750 at civil action number 17-588 (the amount plaintiff allegedly won at defendant's casino, and which he never received) (17-588 ECF No. 1); and $74 at civil action number 17-589 (the amount plaintiff paid to enter the allegedly fraudulent scheme) (17-589 ECF No. 5). Because plaintiff does not appear to have claimed damages in an amount greater than $75,000 in any of his complaints, the court cannot find that plaintiff satisfied the amount in controversy requirement in any of the three suits. Columbia Gas, 62 F.3d at 541 (quoting St. Paul Mercury Indemnity Co. v. Red Cab. Co., 303 U.S. 283,590 (1938). (" '[T]he sum claimed by the plaintiff controls if the claim is apparently made in good faith.'")