



Ponder v. Wersant et al

2018 | Cited 0 times | S.D. Texas | February 2, 2018

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION BRIAN LAMAR PONDER, §

§ § § § § § Plaintiff, VS. CIVIL ACTION NO. 4:17-CV-00537 PAUL GERARD WERSANT, et al, Defendants.

OPINION AND ORDER Pending in the above- Coury Matthews Jacocks; James E. Albertelli, P.A. d/b/a Albertelli Law; Albertelli &

Whitworth, P.A. d/b/a Albertelli Law; James Edward Albertelli d/b/a Albertelli Law and Albertelli & Whitworth, P.A.; Gregory David Whitworth d/b/a Albertelli Law; and Albertelli &

smmiss, Doc. 34. Having considered

and denies the remaining part as moot because the Court is of the opinion that the Court lacks subject-matter jurisdiction over the remaining claims.

This history of this case is detailed in a prior opinion and order dated September 5, 2017, 3, 13. Subsequently, the parties filed the above-referenced, Motion to Dismiss, Motion to Strike, and Response.

United States District Court Southern District of Texas

ENTERED February 02, 2018 David J. Bradley, Clerk

Ponder also filed a Motion for Default asserting that the Motion to Dismiss was late-filed, which the Court denied on November 29, 2011. Doc. 37. In denying the Motion for Default, the Court weighed t - based dispositions, and found that the scale tipped toward a merit-based disposition of the present Motion to Dismiss. Id. at 4 5. Because Wersant had not joined the Motion to Dismiss, the Court permitted Wersant fourteen days to file a responsive document. Id. at 5. Wersant timely filed a Notice of Appearance, Joinder to the Motion to Dismiss, and his own briefing in support. Docs. 38 40.

ms from one incident: trespass to land, conversion, Default, Doc -4; 19-1 (image of documents on the door); 19-3 (image of alleged door



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23, 138. Ponder also

knowingly and willfully obtaining the information from a consumer reporting agency under false

Ponder asserts that the Court has jurisdiction over the trespass to land and conversion claims under diversity jurisdiction and over the FRCA claim under federal question jurisdiction. See 28 U.S.C. §§ 1331 2(a)(1).

Wersant concedes that he served the Motion

process server at his residences in Georgia and New York, as Ponder could not be served at his documents . . . by posting the documents in a conspicuous location on the

- . . the AUNT -3.

these three claims under Rule 12(b)(6) for failure to state a claim upon which relief may be granted. Docs. 31 at 4; 40 at 1. Defendants also move for unreasonably and vexatious Id. at 8.

I.

as untimely and precluded. Doc. 32 34. In both his Motion to Strike and Response, Ponder

and precluded under Fed. R. Civ. P. 12(g)(2) on the grounds that it was not filed within 14 days after notice of denial Id. Ponder also asserts that motion is pre

The Court will consider the Motion to Dismiss, for although it is untimely, it is not precluded. The Court has already held in a prior opinion that it will consider the late-filed 5. The Motion to Dismiss is not precluded because the prior Motion to Dismiss was granted as to

7. The Court also declines to strike and concludes that it

DENIES of the Motions to Dismiss. II. under 12(b)(6)

claims, Docs. 31 at 4, 38 as Ponder makes only a Wersant also asserts that the FCRA violation must be dismissed because both addresses are

publically available. Doc. 40 at 8 9.

When a district court reviews a motion to dismiss under FED. R. CIV. P. 12(b)(6), it must construe the complaint in favor of the plaintiff and take all well-pleaded facts as true. *Wolcott v. Sebelius*, 635 F.3d 757, 763 (5th Cir. 2011) (citing *Gonzalez v. Kay*, 577 F.3d 600, 603 (5th Cir. 2011); *Leal v. McHugh*, 731 F.3d



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405, 410 (5th Cir. 2013)

(quoting Bell Atl. Corp. v. Twombly face] when the pleaded factual content allows the court to draw the reasonable inference that the

Montoya v. FedEx Ground Package Sys., Inc., 614 F.3d 145, 148 (5th Cir. 2010) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)) (internal but it asks for more than a sheer possibility that a defendant Iqbal, 556

U.S. at 678 (quoting Twombly

Twombly, 550 U.S. at 544

(citations omitted). A court may also review the documents attached to a motion to dismiss if the complaint refers to the documents and they are central to the claim. Kane Enters v. MacGregor (USA), Inc., 322 F.3d 371, 374 (5th Cir. 2003).

the plaintiff at least one chance to amend the complaint under rule 15(a) before dismissing the

Champlin v. Manpower Inc., No. 4:16-CV-421, 2016 WL 3017161, at *2 (S.D. Tex. May 26, 2016) (citing Great Plains Trust Co. v. Morgan Stanely Dean Witter & Co., 313 F.3d 305, 329 (5th Cir. 2002)). proposed change clearly is frivolous or advances a claim or defense that is legally insufficient on

its face. 6 Charles A. Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1487 (2d. ed. 1990); Motten v. Chase Home Fin., 831 F. Supp. 2d 988, 994 (S.D. Tex. 2011).

reporting agency under false pretenses and falser certification given by Defendant PAUL

19 ¶ 144 Case 4:17-cv-00537 Document 42 Filed in TXSD on 02/02/18 Page 5 of 8 r Id. ¶ 140 43.

Ponder does not, however, allege facts or attach evidence of the consumer reporting agency utilized and under what false pretenses. Thus, the Court holds that Ponder has failed to state a claim upon which relief may be granted. See Iqbal, 556 U.S. at 678; Twombly, 550 U.S. at 544. The Court also holds that Ponder should not be given leave to amend his FAC. See Motten, 831 F. Supp. 2d at 994.

The Court had previously admonished Ponder not to squander his credibility as an advocate. Doc. 27 at 11. He has done so. Ponder seeks damages for what he does not dispute is Motion. Accordingly, the Court hereby

GRANTS FCRA claim. III. Jurisdiction



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trespass and conversion under Rule 12(b)(1).

A court may sua sponte raise a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction at any time. *Westland Oil Dev. Corp. v. Summit Transp. Co.*, 481 F. Supp. 15, 19 (S.D. Tex. 1979), , 614 F.2d 768 (Temp. Emer. Ct. App. 1980). See also *Kidd v. Sw. Airlines Co.* questions sua sponte The Court may find lack of subject matter jurisdiction on any of the following three bases: (1)

the complaint; (2) the complaint along with undisputed facts evidenced in the record; and (3) the *Barrera-Montenegro v. United States*

a case for lack of subject matter jurisdiction is not a judgment on the merits and does not preclude the plaintiff from pursuing his claim in a court that properly has jurisdiction. *Hitt v. City of Pasadena*, 561 F.2d 606, 608 (5th Cir. 1977) (per curiam). And the Court may decline to

Under 28 U.S.C. §1332, the district courts shall have original jurisdiction if there is (1) complete diversity of citizenship and (2) the amount in controversy is greater than \$75,000, to a legal certainty, that the plaintiff cannot recover the amount claimed or if, from the proofs, the court is satisfied to a like certainty that the plaintiff never was entitled to recover that amount . . . the suit will be *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289 (1938).

In his FAC, Ponder alleges that the Court has jurisdiction over his trespass to land and

amount for the two claims, but instead attaches images of the papers taped to the door and the

tape residue left behind on the door. Docs. 19, 19-1, 19-3.

Ponder has not cited and the Court cannot find any cases wherein tape residue damage from service of motions, even alleged unnecessary service, fulfilled the amount of controversy prong under § 1332(a)(1). Thus, the Court holds that this tape residue alone is legally insufficient to allege a damage amount greater than \$75,000. See generally *St. Paul Mercury Indem. Co.*, 303 U.S. at 289; *Barrera-Montenegro v. United States*, 74 F.3d at 659. And the Court has already dismissed the FCRA claim, over which it has original jurisdiction. Thus, the Court holds that it

lacks jurisdiction over these remaining claims. See 28 U.S.C. §§ 1332(a)(1), 1367(c)(3). Accordingly, the Court hereby

ORDERS Pond prejudice. Accordingly, the Court holds the remaining portions of the Motion to Dismiss are

MOOT and declines to award sanctions. III. Conclusion



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For the foregoing reasons, it is hereby ORDERED DENIED.

IT IS FURTHER ORDERED 40, is GRANTED as to the FCRA claim. The FCRA claim is DISMISED WITH PREJUDICE.

IT IS FURTHER ORDERED that DISMISSED without prejudice because the Court lacks subject matter jurisdiction. Accordingly,

it is hereby

ORDERED are MOOT and the request for sanctions, Docs. 31 & 40, are denied. SIGNED at Houston, Texas, this 2nd day of February, 2018.

_____ MELINDA HARMON UNITED STATES DISTRICT JUDGE

