IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

CALVIN DEE AYCOCK,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	**No. 14-cv-2890-SHL-tmp**
SETERUS, INC., FEDERAL NATIONAL MORTGAGE ASSOCIATION, and WILSON AND ASSOCIATES, P.L.L.C.,	)	
	)	
Defendants.	)	

REPORT AND RECOMMENDATION

Before the court is the Motion to Dismiss filed by defendant Wilson & Associates, PLLC ("Wilson") on December 15, 2014 (ECF No. 13), and the Motion to Dismiss filed by defendants Seterus, Inc. ("Seterus") and Federal National Mortgage Association ("Fannie Mae") on December 29, 2014 (ECF No. 15). Plaintiff Calvin Dee Aycock filed a response in opposition on January 22, 2015. (ECF No. 18.) Seterus and Fannie Mae filed a reply on February 6, 2015. (ECF No. 21.) Also before the court is Aycock's motion titled "Motion for Expansion of Time to File Second Amended Complaint." (ECF No. 32.) Wilson and Seterus filed responses in opposition on April 30, 2015, and May 1, 2015. (ECF Nos. 33, 34.)

For the reasons below, it is recommended that the defendants' motions be granted, and Aycock's motion to amend be denied.

I. PROPOSED FINDINGS OF FACT

Aycock filed a forty-four page amended complaint on November 18, 2014. (ECF No. 8.) Although it is difficult to decipher, it appears that Aycock's complaint arises out of the foreclosure of a residence located at 6427 Ashton Road, Memphis, Tennessee 38134. Among his various allegations, Aycock alleges that defendants do not have the legal right to foreclose upon the property because "no sum is owed by Aycock to [any defendant] and further, Aycock further believes no valid assignment exists." (Am. Compl. ¶ 25.) Aycock further alleges that defendants have made "fraudulent and deliberate misrepresentations of material facts to Aycock" (Am. Compl. ¶ 32) and that "there is no factually supported evidence the purported unverified assignment on the subject property which appears on the public land record is bona fide" (Am. Compl. ¶ 36). According to Aycock, sometime in late May or early June 2014, he sent a debt validation letter to Seterus, and that he received a "non-response response letter" from Wilson. (Am. Compl. ¶¶ 39, 40.) Aycock alleges that Seterus and Wilson lack standing to foreclose on the property (Am. Compl. ¶ 42) and that defendants have "used the U.S. Postal Service in a fraudulent

attempt to collect a debt from Aycock" (Am. Compl. ¶ 45). Aycock purports to bring claims under the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692, et seq.; the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681, et seq.; the Tennessee Consumer Protection Act ("TCPA"), Tenn. Code Ann. § 47-18-104, et seq.; and the Tennessee Collection Service Act ("TCSA"), Tenn. Code Ann. § 62-20-127, et seq.[1]

II. PROPOSED CONCLUSIONS OF LAW

A. Standard of Review

In assessing whether the complaint in this case states a claim on which relief may be granted, the standards under Rule 12(b)(6) of the Federal Rules of Civil Procedure, as stated in Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009), and Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-57 (2007), are applied. Hill v. Lappin, 630 F.3d 468, 470B71 (6th Cir. 2010). "Accepting all well-pleaded allegations in the complaint as true, the Court 'consider[s] the factual allegations in [the]

[1] Aycock appears to also assert a cause of action titled "Accounting." (Am. Compl. ¶¶ 52-55.) An "accounting," however, is a remedy, not an independent cause of action. See Stockler v. Reassure Am. Life Ins. Co., No. 11-CV-15415, 2013 WL 866486, at *11 (E.D. Mich. Mar. 7, 2013) (citing Roy v. Mich. Child Care Ctrs., Inc., No. 08-10217, 2009 WL 648496, at *1 (E.D. Mich. Mar. 11, 2009) ("[A]n accounting is a remedy, rather than a separate cause of action."); Johnson v. Pullman, Inc., 845 F.2d 911, 913, (11th Cir. 1998) ("Although plaintiffs' complaint contained a count in which an accounting was sought, that relief would not be available here absent some independent cause of action.")).

complaint to determine if they plausibly suggest an entitlement to relief.'" Williams v. Curtin, 631 F.3d 380, 383 (6th Cir. 2011) (quoting Iqbal, 556 U.S. at 681) (alteration in original). "[P]leadings that . . . are no more than conclusions[] are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." Iqbal, 556 U.S. at 679; see also Twombly, 550 U.S. at 555 n.3 ("Rule 8(a)(2) still requires a 'showing,' rather than a blanket assertion, of entitlement to relief. Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only 'fair notice' of the nature of the claim, but also 'grounds' on which the claim rests.").

Rule 8(a)(2) requires "[a] pleading that states a claim for relief" to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." A complaint violates these provisions when it "is so verbose that the Court cannot identify with clarity the claim(s) of the pleader and adjudicate such claim(s) understandingly on the merits." Harrell v. Dirs. of Bur. of Narcotics & Dangerous Drugs, 70 F.R.D. 444, 446 (E.D. Tenn. 1975); see also Dillard v. Rubin Lublin Suarez Serrano, No. 12-2182-STA-dkv, 2013 WL 1314399, at *2 (W.D. Tenn. Mar. 28, 2013) (citing Flayter v. Wis. Dep't of Corr., 16 F. App'x 507, 509 (7th Cir. 2001) (dismissing 116-page

complaint pursuant to Rule 8(a)(2)); Plymale v. Freeman, No. 90-2202, 1991 WL 54882, at *1 (6th Cir. Apr. 12, 1991) (district court did not abuse its discretion in dismissing with prejudice "rambling" 119-page complaint containing nonsensical claims); Jennings v. Emry, 910 F.2d 1434, 1436 (7th Cir. 1990) ("A . . . complaint must be presented with intelligibility sufficient for a court or opposing party to understand whether a valid claim is presented and if so what it is. And it must be presented with clarity sufficient to avoid requiring a district court or opposing party to forever sift through its pages in search of that understanding.") (citations omitted)); Michaelis v. Neb. State Bar Ass'n, 717 F.2d 437, 438-39 (8th Cir. 1983) (per curiam) (affirming dismissal of 98-page complaint where "[t]he style and prolixity of these pleadings would have made an orderly trial impossible"); Gordon v. Green, 602 F.2d 743, 744-45 (5th Cir. 1979) (concluding that a 4000-page pleading, comprised of "various complaints, amendments, amended amendments, amendments to amended amendments, and other related papers," did not comply with Rule 8(a) "as a matter of law"); Windsor v. A Fed. Exec. Agency, 614 F. Supp. 1255, 1258 (M.D. Tenn. 1983) (noting that a 47-page complaint was excessive, in light of the purpose of a pleading to state a simple claim, as well as "confusing and distracting" and ordering plaintiff to amend his complaint to comply with Rule 8), aff'd mem., 767 F.2d

923 (table), 1985 WL 13427 (6th Cir. June 27, 1985) (per curiam).

"*Pro se* complaints are to be held to less stringent standards than formal pleadings drafted by lawyers, and should therefore be liberally construed." Williams, 631 F.3d at 383 (internal quotation marks omitted). *Pro se* litigants, however, are not exempt from the requirements of the Federal Rules of Civil Procedure. Wells v. Brown, 891 F.2d 591, 594 (6th Cir. 1989); see also Brown v. Matauszak, 415 F. App'x 608, 613 (6th Cir. 2011) ("[A] court cannot create a claim which [a plaintiff] has not spelled out in his pleading") (internal quotation marks omitted); Payne v. Sec'y of Treasury, 73 F. App'x 836, 837 (6th Cir. 2003) (affirming *sua sponte* dismissal of complaint pursuant to Fed. R. Civ. P. 8(a)(2) and stating, "[n]either this court nor the district court is required to create Payne's claim for her"); cf. Pliler v. Ford, 542 U.S. 225, 231 (2004) ("District judges have no obligation to act as counsel or paralegal to *pro se* litigants."); Young Bok Song v. Gipson, 423 F. App'x 506, 510 (6th Cir. 2011) ("[W]e decline to affirmatively require courts to ferret out the strongest cause of action on behalf of *pro se* litigants. Not only would that duty be overly burdensome, it would transform the courts from neutral arbiters of disputes into advocates for a particular party. While courts are properly charged with protecting the rights of all who come

before it, that responsibility does not encompass advising litigants as to what legal theories they should pursue.")

B. FDCPA Claims

"Congress enacted the FDCPA in 1977 'to eliminate abusive debt collection practices by debt collectors' and to insure that debt collectors who refrain from abusive practices are not competitively disadvantaged." McCabe v. Crawford & Co., 272 F. Supp. 2d 736, 741 (N.D. Ill. 2003); 15 U.S.C. § 1692(e). The FDCPA forbids a debt collector from making a false representation of "the character, or legal status of any debt." 15 U.S.C. § 1692e(2)(A); see also Aronson v. Commercial Fin. Servs., Inc., No. Civ. A 96-2113, 1997 WL 1038818, at *4 (W.D. Pa. Dec. 22, 1997) (a debt collector's false statement made during a telephone conversation violates the § 1692e(2)(A) if it misrepresents the amount or character of a debt); Kimber v. Federal Fin. Corp., 668 F. Supp. 1480, 1488-89 (D. Ala. 1987) (debt collector violates § 1692e(2)(A) when it threatens to sue a consumer on a claim that the debt collector knows is barred by the applicable statute of limitations).

A *prima facie* FDCPA claim must allege facts showing: (1) the plaintiff is a natural person who is harmed by violations of the FDCPA, or is a "consumer" within the meaning of 15 U.S.C.A. §§ 1692a(3), 1692(d) for purposes of a cause of action, 15 U.S.C.A. § 1692c or 15 U.S.C.A. § 1692e(11); (2) the "debt"

arises out of a transaction entered primarily for personal, family, or household purposes, 15 U.S.C.A. § 1692a(5); (3) the defendant collecting the debt is a "debt collector" within the meaning of 15 U.S.C.A. § 1692a(6); and (4) the defendant has violated, by act or omission, a provision of the FDCPA, 15 U.S.C.A. § 1692a-16920; 15 U.S.C.A. § 1692a; 15 U.S.C.A. § 1692k. Langley v. Chase Home Fin. LLC, No. 1:10-cv-604, 2011 WL 1150772, at *5 (W.D. Mich. Mar. 11, 2011) (citing Whittiker v. Deutsche Bank Nat'l Trust Co., 605 F. Supp. 2d 914, 938-39 (N.D. Ohio 2009)).

Aycock has failed to provide any factual allegations that plausibly suggest a claim for relief under the FDCPA. Even assuming, *arguendo*, that Aycock has sufficiently alleged that he is a consumer with a debt and that defendants are properly classified as "debt collectors" under the statute, he has failed to provide any factual support that any defendant has violated a provision of the FDCPA. Instead, Aycock offers conclusory legal statements such as the following:

> AYCOCK is informed and believes and therefore alleges SETERUS and WILSON have violated the Fair Debt Collection Practices Act, in 15 USC § 1692e, because each defendant has intentionally made and/or employed false, deceptive and misleading representations and/or means in connection with a debt alleged to be owed by AYCOCK. (Am. Compl. ¶ 46.)

> AYCOCK is informed and believes and therefore alleges SETERUS and WILSON have knowingly and

> intentionally made misrepresentations, or misleading and/or false representations as to the legal status, character, and/or amount of the debt, in violation of 15 USC § 1692e(2) and in violation of USC 15 § 1692e(10). (Am. Compl. ¶ 48.)
>
> SETERUS, FNMA and WILSON collectively violate § 1692d of the FDCPA by engaging in conduct, the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of an alleged debt." (Am. Compl. ¶ 64a.)
>
> SETERUS, FNMA and WILSON collectively violate § 1692j of the FDCPA for making false statements of material fact by communications, wherein they are pose [sic] as creditors or that they are represent [sic] creditors. (Am. Compl. ¶ 64b.)
>
> AYCOCK is informed and believes and therefore alleges SETERUS and WILSON have used the U.S. Postal Service in a fraudulent attempt to collect a debt from AYCOCK, in violation of the aforementioned federal statutes and state codes, for an alleged debt purportedly owed to a "Lender" or "Creditor" other than SETERUS. AYCOCK believes said debt was either sold to investors, 'charged off' or satisfied by proceeds of an insurance settlement. (Am. Compl. ¶ 45.)
>
> SETERUS, FNMA, and WILSON use unfair or unconscionable means to collect or attempt to collect a debt in violation of 15 U.S.C. 1692f, as stated in the foregoing ¶ 45c. (Am. Compl. ¶ 64d.)

These mere legal conclusions couched as factual allegations are insufficient to state a claim under the FDCPA. It is therefore recommended that Aycock's claims under the FDCPA be dismissed.

C. FCRA Claims

"The purpose of the "FCRA is to promote 'efficiency in the Nation's banking system and to protect consumer privacy.'" Wolfe v. MBNA America Bank, 485 F. Supp. 2d 874, 882 (W.D. Tenn. 2007) (citing 15 U.S.C. § 1681(a)). Congress enacted it "to protect consumers from inaccurate information in consumer reports by establishing credit reporting procedures which 'utilize correct, relevant, and up-to-date information in a confidential and responsible manner.'" Nelski v. Trans Union, LLC, 86 F. App'x 840, 843-44 (6th Cir. 2004) (quoting Jones v. Federated Fin. Reserve Corp., 144 F.3d 961, 965 (6th Cir. 1998)). "The FCRA places obligations on three distinct types of entities involved in consumer credit: consumer reporting agencies, users of consumer reports, and furnishers of information to consumer reporting agencies." Carney v. Experian Info. Solutions, Inc., 57 F. Supp. 2d 496, 500 (W.D. Tenn. 1999) (emphasis added).

It is clear that none of the defendants qualify as either "consumer reporting agencies" or "users of consumer reports." Assuming, *arguendo*, that the FCRA applies to defendants as "furnishers of information," the furnisher has two primary duties: 1) to accurately provide credit information to the consumer reporting agencies; 2) in the event a consumer reporting agency asks the furnisher to respond to a dispute

about the information provided, conduct an appropriate investigation as required by the FCRA and report the results of the investigation appropriately, which could include modifying, deleting or permanently blocking the reporting of inaccurate information. See Boggio v. USAA Fed. Sav. Bank, 696 F.3d 611, 614-15 (6th Cir. 2012). "[C]onsumers may step in to enforce their rights only after a furnisher has received proper notice of a dispute from a [consumer reporting agency]." Id. at 615. Aycock has failed to allege that any defendant provided any information to a consumer reporting agency, or that the consumer reporting agency notified any defendant of a dispute. Aycock's conclusory allegation that his credit has been damaged and he is therefore entitled to damages under the FCRA (Am. Compl. ¶ 67), is insufficient to state a claim. It is therefore recommended that Aycock's FCRA claim be dismissed.

D. TCPA Claims

In analyzing Aycock's TCPA claim, the court finds the analysis in Pugh v. Bank of America, No. 13-2020, 2013 WL 3349649, at *5-10 (W.D. Tenn. July 2, 2013), also a case arising from a foreclosure, instructive.

> Under the TCPA, "the unfair or deceptive acts must affect trade or commerce, as defined by the Act." Davenport v. Bates, M2005-02052-COA-R3CV, 2006 Tenn. App. LEXIS 790, at *54, 2006 WL 3627875 (Tenn. Ct. App. Dec. 12, 2006). In Pursell v. First Am. Nat'l Bank, 937 S.W.2d 838, 841-42 (Tenn. 1996), the Tennessee Supreme Court held that a lender's

repossession of collateral securing a defaulted loan is not actionable under the TCPA. The plaintiff in Pursell borrowed money from First American to purchase a pickup truck, which he pledged as collateral for the loan. Id. at 839. When the plaintiff became delinquent on his payments, the bank repossessed the truck, sold it at auction for $3,000 more than what was owed, and retained the proceeds as "collection expenses." Id. at 839-40. The plaintiff brought suit against the bank and the repossession company alleging several causes of action, including one under the TCPA. Id. at 840. The trial court dismissed the TCPA claim, and the Supreme Court affirmed on the basis that collateral repossession and disposition practices are not within the definition of "trade or commerce" in the TCPA. Id. at 840-42. The Pursell court held that, "[t]hough the definitions of 'trade or commerce' contained within the [TCPA] are broad, they [do] not extend to this dispute, which arose over repossession of the collateral securing the loan." Id. at 842.

Since Pursell, courts have consistently held that a lender's actions for foreclosure and debt-collection, even when pursuing loan modification, are not covered under the TCPA. See Knowles v. Chase Home Fin., LLC, No. 1:11-cv-1051, 2012 U.S. Dist. LEXIS 166748, at *23-24 (W.D. Tenn. Aug. 2, 2012); Peoples v. Bank of Am., No. 11-2863-STA, 2012 U.S. Dist. LEXIS 22208, at *9, 2012 WL 601777 (W.D. Tenn. Feb.22, 2012) (holding that lender's negotiation of a mortgage modification while simultaneously pursuing foreclosure was not actionable under the TCPA); Vaughter v. BAC Home Loans Servicing, LP, No. 3:11-cv-00776, 2012 U.S. Dist. LEXIS 6066, at *5-6, 2012 WL 162398 (M.D. Tenn. Jan. 19, 2012) (deciding that TCPA did not apply to defendant's allegedly deceptive acts during loan modification negotiations and home foreclosure); Hunter v. Washington Mut. Bank, No. 2:08-CV-069, 2008 U.S. Dist. LEXIS 71587, at *5-6, 2008 WL 4206604 (E.D. Tenn. Sept. 10, 2008) (dismissing TCPA claim based on bank's attempts to collect from delinquent borrower).

The Complaint makes clear that this dispute arises from and addresses a mortgage transaction. . . . The gravamen of Plaintiffs' allegations is that foreclosing on the Property would be improper because of representations made during a series of events that

> led to the denial of Plaintiffs' request for a loan modification. Those events occurred in the context of a dispute that is effectively a "dispute over repossession of the collateral securing [a] loan." Pursell, 937 S.W.2d at 842. "[W]hen a debtor defaults on a mortgage payment, and the mortgage holder forecloses upon the collateral that secured the loan (in this case, the Property), the TCPA does not apply." Launius v. Wells Fargo Bank, N.A., No. 3:09-CV-501, 2010 U.S. Dist. LEXIS 89234, at *5-6, 2010 WL 3429666 (E.D. Tenn. Aug. 27, 2010).

2013 WL 3349649 at *7. Similarly here, Aycock's complaint relates to a dispute over repossession of the collateral securing a loan. For that reason, the court concludes that the TCPA is inapplicable, and it is recommended that Aycock's TCPA be dismissed.

E. TCSA Claims

The Tennessee Collection Service Act ("TCSA") provides that "[n]o person shall commence, conduct or operate any collection service business in this state unless the person holds a valid collection service license issued by the board under [the TCSA] or prior state law." Tenn. Code Ann. § 62-20-105(a). No private right of action exists under the TCSA, however. See Hunter, 2008 WL 4206604, at *16 ("The statute does not expressly create a private cause of action . . . and the court's research reveals no indication that a private right of action exists under the TCSA. [The TCSA claim] will accordingly be dismissed for failure to state a claim upon which relief may

be granted."). It is therefore recommended that Aycock's TCSA claim be dismissed.

F. Aycock's Motion to Amend

In his April 29 motion to amend, Aycock requests an extended amount of time to "amend the complaint to incorporate important new evidence acquired . . . ." However, Aycock provides the court with no specifics or guidance as to what this "new evidence" might be or how it will remedy the deficiencies noted above. Further, Aycock has failed to attach a proposed amended complaint to his motion. For those reasons, it is recommended that Aycock's motion to amend be denied. See Glick v. Farm Credit Servs. of Mid-America, FLCA, No. 5:09CV02273, 2010 WL 3118673, at *1 (N.D. Ohio Aug. 6, 2010) ("Glick's motion to amend fails to supply either a proposed amended complaint or a description of the proposed amendments, leaving the Court without the requisite knowledge of the substance of the proposed amendment. The motion fails to allege any additional facts or further articulate the basis for the claims asserted in the complaint, and indeed contains no substantive discussion whatsoever. As a result, the Court has no basis for finding that the interests of justice would be served by granting leave."); Williams v. Caruso, No. 2:08-CV-36, 2008 WL 3539759 (W.D. Mich. Aug. 12, 2008) ("Plaintiff's motion to amend does not allege any facts nor does it articulate the basis of his

claims. Plaintiff has not convinced the Court that justice will be served by granting leave to amend.").

III. RECOMMENDATION

For the above reasons, it is recommended that defendants' motions be granted, Aycock's motion to amend be denied, and Aycock's complaint be dismissed in its entirety.

Respectfully submitted,

s/ Tu M. Pham
TU M. PHAM
United States Magistrate Judge

May 28, 2015
Date

NOTICE

WITHIN FOURTEEN (14) DAYS AFTER BEING SERVED WITH A COPY OF THIS REPORT AND RECOMMENDED DISPOSITION, ANY PARTY MAY SERVE AND FILE SPECIFIC WRITTEN OBJECTIONS TO THE PROPOSED FINDINGS AND RECOMMENDATIONS. ANY PARTY MAY RESPOND TO ANOTHER PARTY'S OBJECTIONS WITHIN FOURTEEN (14) DAYS AFTER BEING SERVED WITH A COPY. 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b)(2); L.R. 72.1(g)(2). FAILURE TO FILE OBJECTIONS WITHIN FOURTEEN (14) DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND FURTHER APPEAL.