UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

RAISSA DJUISSI KENGNE, Plaintiff, v. ID.ME, INC., Defendant.	CIVIL ACTION NO. 1:22-CV-2237-SEG

ORDER

This case is before the Court on the Magistrate Judge's Final Report & Recommendation ("R&R") that it be dismissed without prejudice. (Doc. 7). Plaintiff Raissa Djuissi Kengne has filed an objection to the R&R. (Doc. 9.) She has also filed a document entitled "Application for Appellate Review." (Doc. 5.)

I. Background

Ms. Kengne filed a complaint on June 6, 2022, against ID.me, Inc. ("ID.me"), a company that provides identification verification services to the Georgia Department of Labor.[1] (Doc. 1-1, Doc. 6.) She contemporaneously

[1] The docket of the case includes a second defendant, Cogency Global, Inc. This entity is not listed in the "Parties" section of the complaint as a defendant, nor does Ms. Kengne direct any claims against it. In the "Parties" section of her complaint, Plaintiff identifies Cogency Global, Inc. as the registered agent of ID.me, Inc. (Doc. 6 at 2.) The Clerk is therefore

filed an affidavit and application in support of her request to proceed with the case *in forma pauperis*. (Doc. 1.) On that application, she states that her average monthly income for the past twelve months is $7,500, and that she owns real estate (a condominium, lot of land, and an abandoned house) valued at $755,000. (*Id*. at 2, 3.) The Magistrate Judge determined that "Plaintiff's allegations of poverty are not fully supported by the record. With an annual income of approximately $90,000, Plaintiff is well above the poverty level." (Doc. 2 at 2.) On June 8, 2022, the Magistrate Judge denied Ms. Kengne's request to proceed *in forma pauperis*, and informed her that, if she wished to proceed with the case, she should pay the $402 case initiation fee by June 29, 2022.

Ms. Kengne did not pay the case initiation fee by this deadline. Instead, she filed an "Application for Appellate Review" on July 5, 2022. (Doc. 5.) In this document, she seeks "an order granting [her] an appeal" of the Magistrate Judge's June 8, 2022, order. (*Id*. at 6.) Plaintiff attached approximately 650 pages of exhibits in support of her request. (Doc. 5-1, 5-2,

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DIRECTED to correct the docket to remove Cogency Global, Inc. as a defendant.

5-3.) The Court construes this document as an appeal of the Magistrate Judge's June 8, 2022, order.[2]

On August 5, 2022, the Magistrate Judge issued a Final R&R recommending this case be closed because Ms. Kengne has not paid the $402 case initiation fee. (Doc. 7.) The Magistrate Judge states that, in addition to not paying the required fee, Ms. Kengne "has also failed to establish that this Court has subject matter jurisdiction over her claims." (*Id*. at 5.) Ms. Kengne filed an objection to the R&R. (Doc. 9.) She states that her claims are based on federal question jurisdiction, falling under the Unemployment Trust Fund (42 U.S.C.§ 1104), the Federal Unemployment Tax Act (26 U.S.C. § 3301), and the Fourteenth Amendment of the U.S. Constitution. (*Id*. at 17.)

As for her request for leave to proceed *in forma pauperis*, Ms. Kegne states that the Magistrate Judge "chose to highlight elements that would support a dismissal and ignore the full picture to represent the fair financial situation of Plaintiff." (*Id*. at 10.) She refers the Court to her "Application for Appellate Review" (Doc. 5) in which she attempts to clarify her financial situation. She also asserts that she has not failed to comply with the

[2] Ms. Kengne is proceeding *pro se*. The Court liberally construes *pro se* pleadings, *Tannenbaum v. United States*, 148 F.3d 1262, 1263 (11th Cir. 1998).

Magistrate Judge's order because she filed timely motions for reconsideration[3] and to appeal. (Doc. 9 at 17.)

II. Legal Standards

A. Review of the Magistrate Judge's R&R

To challenge the findings and recommendations of the Magistrate Judge, a party must file with the Clerk of Court written objections which "shall specifically identify the portions of the proposed findings and recommendation to which objection is made and the specific basis of the objection." *Heath v. Jones*, 863 F.2d 815, 822 (11th Cir. 1989). If timely and proper objections are filed, the district court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(C). The district judge must "give fresh consideration to those issues to which specific objection has been made by a party." *Jeffrey S. v. State Bd. of Educ. of Ga.*, 896 F.2d 507, 512 (11th Cir. 1990). The district judge reviews legal conclusions de novo, even in the absence of an objection. *See Cooper-Houston*

[3] No motion for reconsideration has been filed in this case. Ms. Kengne filed a motion for reconsideration in another case she has before this Court, Civil Action No. 1:22-cv-2297-SEG-CMS, *Kengne v. Georgia Power Company*, which she attached as Exhibit 9A to her "Application for Appellate Review." (Doc. 5.)

v. S. Ry. Co., 37 F.3d 603, 604 (11th Cir. 1994). "[T]he district court will review those portions of the R&R that are not objected [to] under a clearly erroneous standard." *Liberty Am. Ins. Group, Inc. v. WestPoint Underwriters, L.L.C.,* 199 F.Supp.2d 1271, 1276 (M.D. Fla. 2001). After conducting a careful review of the findings and recommendations, a district judge may accept, reject, or modify the Magistrate Judge's R&R. 28 U.S.C. § 636(b)(1); *United States v. Powell*, 628 F.3d 1254, 1256 (11th Cir. 2010).

B. Appeal of the Magistrate Judge's Order

Federal Rule of Civil Procedure 72(a) states that a party may file objections to a Magistrate Judge's non-dispositive order,[4] and "[t]he district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law." Clear error is a "highly deferential standard of review," and a finding is clearly erroneous "when although there is evidence to support it, the reviewing court on the entire evidence is left with definite and firm conviction that a mistake has been committed." *Holton v. City of Thomasville Sch Dist.*, 425 F.3d 1325, 1350 (11th Cir. 2005).

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[4] The Magistrate Judge's June 8, 2022, order was not dispositive of Ms. Kengne's claims. (Doc. 2 at 3.)

C. Screening Pursuant to 28 U.S.C. § 1915

In cases brought *in forma pauperis* (meaning, without prepayment of the filing fee), the Court must conduct an initial screening known as a frivolity review. The Court must dismiss a case during this initial screening if it "determines that . . . the action or appeal (i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(B).

A claim is "frivolous" under 28 U.S.C. § 1915(e)(2)(B) when "it lacks an arguable basis either in law or in fact," *Neitzke v. Williams*, 490 U.S. 319, 325 (1989), or when it "has little or no chance of success" — for example, when it appears "from the face of the complaint that the factual allegations are clearly baseless[,] the legal theories are indisputably meritless," or "the defendant's absolute immunity justifies dismissal before service of process." *Carroll v. Gross*, 984 F.2d 392, 393 (11th Cir. 1993) (internal quotations omitted). To have some chance of success, a complaint must "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

During the frivolity review, the Court's authority to "'pierce the veil of the complaint's factual allegations' means that a court is not bound, as it usually is when making a determination based solely on the pleadings, to accept without question the truth of the plaintiff's allegations." *Denton v. Hernandez*, 504 U.S. 25, 32 (1992). If the alleged facts are "fanciful," "fantastic," and "delusional," the court may dismiss the complaint. *Id.* at 32-33 (citations omitted). And "a finding of factual frivolousness is appropriate when the facts alleged rise to the level of the irrational or the wholly incredible." *Id.* at 33. Further, a complaint fails to state a claim upon which relief can be granted when it does not include "enough factual matter (taken as true)" to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007). A claim is also deemed "frivolous" under 28 U.S.C. § 1915 where there is no subject matter jurisdiction. *Davis v. Ryan Oaks Apartment*, 357 F. App'x 237, 238-39 (11th Cir. 2009); *see also Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006) ("[W]hen a federal court concludes that it lacks subject-matter jurisdiction, the court must dismiss the complaint in its entirety.")

III. Discussion

A. Appeal of the Magistrate Judge's June 8, 2022, order denying Ms. Kengne's request to proceed *in forma pauperis*

When considering an affidavit in support of a request to proceed *in forma pauperis*, "[t]he only determination to be made by the court . . . is whether the statements in the affidavit satisfy the requirement of poverty." *Martinez v. Kristi Kleaners, Inc.,* 364 F.3d 1305, 1307 (11th Cir. 2004). A litigant need not be "absolutely destitute" to qualify for *in forma pauperis* status, *Adkins v. E.I. DuPont de Nemours & Co.,* 335 U.S. 331, 338–40 (1948). However, an applicant must show that he is unable "to pay for the court fees and costs, and to support and provide necessities for himself and his dependents." *Martinez at* 1307 (11th Cir. 2004).

Ms. Kengne acknowledges that the financial affidavit she submitted on June 6, 2022, is accurate, but she has since provided further information to clarify her financial situation. In her appeal of the Magistrate Judge's order, she states that she has separated from her job. She attaches a notice from the Georgia Department of Labor dated November 18, 2021, showing that her "period of last employment" was September 3, 2019, to November 18, 2021. (Doc. 5-3 at 11-12.) She also provides the Court with two foreclosure notices, one concerning the vacant land lot and the other concerning the abandoned house. (*Id*. at 13-22.) Additionally, a letter she has attached from her bank indicates that, as of March 3, 2022, her "Delta Community Credit Union Checking and/or Savings Account remains in negative status." (*Id*. at 31.)

The foregoing information was not presented to the Magistrate Judge before she issued her June 8, 2022, order. Certainly, that order was not clearly erroneous or contrary to law. However, the supplemental financial information provided by Ms. Kengne after the June 22 order sufficiently supports her claim of indigency. Ms. Kengne's "Application for Appellate Review" is therefore GRANTED IN PART AND DENIED IN PART.[5] (Doc. 5.) The Court grants her leave to proceed in this case *in forma pauperis*.

B. The Magistrate Judge's R&R and Ms. Kengne's objection

Because the Court has granted Ms. Kengne leave to proceed *in forma pauperis*, her objection to the R&R on that issue is deemed moot. The Court therefore focuses on Ms. Kegne's objection to the Magistrate Judge's recommendation that the case be dismissed without prejudice for lack of subject matter jurisdiction.

[5] As part of her requested relief, Ms. Kegnes asks the Court to "hold that the [Magistrate] Court erred in denying the Motion to Proceed in Forma Pauperis." (Doc. 5 at 33.) As explained above, the Magistrate Judge did not err, based on the information that was before her. The Court therefore DENIES this part of Ms. Kegne's "Application for Appellate Review."

The Magistrate Judge conducted a preliminary screening of the complaint and determined that subject matter jurisdiction was lacking. Specifically, the Magistrate Judge determined that there are no allegations in the complaint that assert federal question jurisdiction, and "it is also doubtful that diversity jurisdiction exists" because the amount in controversy requirement may not be satisfied and the complaint indicates that Ms. Kengne and the defendant are both citizens of Georgia. (Doc. 7 at 4-5.)

1. Federal Question Jurisdiction

A federal question exists when a civil action arises "under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Generally, "a case 'arises under' federal law if federal law creates the cause of action." *Pacheco de Perez v. AT & T Co.*, 139 F.3d 1368, 1373 (11th Cir. 1998). To determine whether a complaint raises a federal question, the Court examines the allegations in the complaint to discern whether the cause of action is created by federal law. *See Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Fla.*, 999 F.2d 503, 507 (11th Cir. 1993); *see also Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987).

In her objection to the R&R, Ms. Kengne asserts that there are three federal question causes of action: the Unemployment Trust Fund (42 U.S.C.§ 1104), the Federal Unemployment Tax Act (26 U.S.C. § 3301), and the

Fourteenth Amendment of the U.S. Constitution. (Doc. 9 at 17.)[6] The Court examines each of these alleged bases for federal question jurisdiction in turn.

a. Unemployment Trust Fund (42 U.S.C. § 1104)

The Unemployment Trust Fund was established as part of the Social Security Act, 42 U.S.C. § 1104. The Fund "receives and holds" moneys deposited by state agencies from state unemployment funds. § 1104(a). "The Fund [is] invested as a single fund, but the Secretary of the Treasury . . . maintain[s] a separate book account for each State agency." § 1104(e). The Secretary is further "authorized and directed to pay out of the Fund to any State agency such amount as it may duly requisition, not exceeding the amount standing to the account of such State agency at the time of such payment." § 1104(f). The Unemployment Trust Fund does not provide for a private right of action. Because Ms. Kengne cannot bring a claim as a private litigant pursuant to the Fund, her reliance on this statute to establish federal question jurisdiction is improper.

[6] Ms. Kengne also references "O.C.G.A. § 34-8-45 Supplemental unemployment benefits." This is a state statue which does not confer federal question jurisdiction.

b. Federal Unemployment Tax Act (26 U.S.C. § 3301)

In the Federal Unemployment Tax Act, 26 U.S.C. § 3301, *et seq*., "Congress has authorized a cooperative federal-state scheme to provide benefits to unemployed workers. The Act requires employers to pay an excise tax on wages paid to employees in 'covered' employment, but entitles them to a credit of up to 90% of the federal tax for contributions they have paid into federally approved state unemployment compensation programs." *California v. Grace Brethren Church*, 457 U.S. 393, 396-97 (1982). Some courts "have allowed plaintiffs to sue a state in federal court for recovery of past unemployment claims, principally on the grounds that the state's unemployment compensation fund is a special, segregated fund as distinguished from a general revenue fund." *Esparza v. Valdez*, 862 F.2d 788, 794 (10th Cir. 1988). Here, however, Ms. Kengne is not making any claims against the State of Georgia. Instead, she is suing ID.me, a private company, because she "was unable to create an ID.Me account" and alleges that her inability to create an account was preventing her from receiving her unemployment benefits. [7] (Doc. 6 at 4.) Furthermore, the relief that Ms.

[7] The Georgia Department of Labor has partnered with ID.me to verify the identities of claimants for unemployment benefits. https://dol.georgia.gov/blog-post/idme (last visited Oct. 21, 2022).

Kengne seeks in her complaint is not the recovery of any unemployment benefits, but rather an order directing ID.me to give her "access to her account in order for [her] to claim her unemployment benefits." (Doc. 6 at 5.) The Court is not aware of any authority, nor has Ms. Kengne provided any, that allows an individual to sue a private business for injunctive relief utilizing the Federal Unemployment Tax Act. Thus, reliance on this statute to establish federal question jurisdiction is also improper.

c. The Fourteenth Amendment

The complaint does not list the Fourteenth Amendment as a basis for federal question jurisdiction. (Doc. 1-1 at 3.) In her objection to the R&R, Ms. Kengne states, however, that her claims under the Fourteenth Amendment "are implied in analyzing the impact that the lack of income can have on an individual and the deprivation by ID.Me, Inc. of the way for Plaintiff to access legally obtained income." (Doc. 9 at 5.)

As a private company, ID.me's actions in this case are not "fairly attributable to the State" under the Fourteenth Amendment. *Lugar v. Edmondson Oil Co.,* 457 U.S. 922, 929 (1982). Ms. Kengne makes the argument that ID.me is a state actor because it has partnered with the Georgia Department of Labor "to verify claimant identification in order to receive any types of unemployment benefits." (Doc. 9 at 9.) But as the court in *Harris v. McDonald's Corp*., 901 F.Supp. 1552, 1557 (M.D. Fla. 1995) explained:

> Private actors may become state actors only under three theories: "conspiracy," "public function," and "nexus." The conspiracy theory requires that the private actor conspire with the State to deprive the plaintiff of a civil right. The public function theory requires that the private actor exercise powers exclusively exclusive to the State. The nexus theory requires the existence of a sufficiently close relationship or "nexus" between the State and the private actor so that the action of the private actor "may be fairly treated as that of the State itself." *Jackson v. Metropolitan Edison Co.,* 419 U.S. 345, 351, 95 S.Ct. 449, 453, 42 L.Ed.2d 477 (1974).

The complaint itself is devoid of any allegations that implicate any of these theories. And the only information provided in Ms. Kengne's objection to the R&R regarding the relationship between ID.me and the State of Georgia is that the state has "partnered with" ID.me. The Court understands this to mean that the State of Georgia has hired ID.me to perform identification verification services for it. Ms. Kengne makes no allegations that the State of Georgia has joined with ID.me in an enterprise or conspiracy to deprive her or others of their unemployment benefits, nor does she provide any facts supporting a finding that "[t]he State has so far insinuated itself into a position of interdependence with [the private party] that it must be recognized as a joint participant in the challenged activity[.]" *Burton v. Wilmington Parking Auth.,* 365 U.S. 715, 725 (1961). There are also no allegations or information that suggest ID.me is exercising a power reserved exclusively to the State of Georgia. Thus, the allegations and information provided by Ms. Kengne are not sufficient to support a finding that ID.me is a state actor subject to the prohibitions of the Fourteenth Amendment.

For the foregoing reasons, Ms. Kengne's complaint fails to establish federal question jurisdiction.

2. Diversity Jurisdiction

In her objection to the R&R, Ms. Kengne clarifies that her "claims are not based on diversity jurisdiction." (Doc. 9 at 6.) However, because she asserted diversity of citizenship as a basis for jurisdiction in her complaint (Doc. 6 at 3), the Court has reviewed the Magistrate Judge's analysis on this issue and finds no clear error.

Diversity jurisdiction is proper only when the parties are citizens of different states and the amount in controversy exceeds $75,000.00. *See* 28 U.S.C. § 1332(a). Both of these elements must be met for diversity jurisdiction to exist. The Court addresses each of these elements in turn.

a. Citizenship of the Parties

In evaluating assertions of diversity jurisdiction, federal courts apply "the well-established rule that diversity of citizenship is assessed at the time the action is filed." *Freeport–McMoRan, Inc. v. KN Energy, Inc.*, 498 U.S. 426, 428 (1991). To invoke this Court's diversity jurisdiction, the complaint must allege facts that, if true, show that no plaintiff is a citizen of the same state as any defendant. *See Travaglio v. Am. Express Co.*, 735 F.3d 1266, 1268 (11th Cir. 2013). It is the plaintiff's obligation to "affirmatively allege facts demonstrating the existence of jurisdiction." *Taylor v. Appleton*, 30 F.3d 1365, 1367 (11th Cir. 1994). "Where, as here, the plaintiff asserts diversity jurisdiction, [the plaintiff] has the burden to prove that there is diversity." *King v. Cessna Aircraft Co.*, 505 F.3d 1160, 1171 (11th Cir. 2007).

Ms. Kengne alleges that she is a citizen of Georgia. (Doc. 6 at 3.) She alleges that ID.me is a Virginia corporation with its principal place of business in Georgia. (*Id.* at 4.) "For the purposes of [diversity jurisdiction], a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business." 28 U.S.C. § 1332(c). Thus, taking the allegations of the complaint as true, ID.me is a citizen of both Virginia and Georgia for purposes of diversity jurisdiction. Because Ms. Kengne and ID.me are both citizens of Georgia, there is no diversity of citizenship. The citizenship element of diversity jurisdiction is therefore not satisfied.

b. Amount in Controversy

The second element of diversity jurisdiction is the amount in controversy, which must exceed $75,000. Ms. Kengne does not plead any damages in the complaint. "To prove damages by [a] preponderance of the evidence the party seeking federal jurisdiction must do more than conclusorily assert that the amount in controversy exceeds $75,000. Failure to quantify the amount of loss can constitute speculation, which is insufficient to satisfy the plaintiff's burden." *Smith v. McDowell*, No. 7:10-CV-134 HL, 2010 WL 4818100, at *2 (M.D. Ga. Nov. 22, 2010). Thus, where a plaintiff's complaint contains general allegations that she suffered damages but does not quantify those damages with any specific dollar figures, she has not met her burden of establishing the court's diversity jurisdiction. *Bradley v. Kelly Services, Inc.*, 224 F. App'x 893, 895 (11th Cir. 2007). *See also Salus v. One World Adoption Svcs., Inc.*, No. 1:12–CV–894–TWT, 2012 WL 3756611, at *3 (N.D. Ga. Aug. 27, 2012) (finding that the amount in controversy was not satisfied where "the Plaintiffs have not presented specific calculations showing that the jurisdictional amount is met.")

Ms. Kengne has not pleaded any damages, much less an indeterminate amount of damages. Based on the information before this Court, neither element required to establish diversity jurisdiction has been sufficiently alleged in the complaint.

IV. Conclusion

The Court GRANTS IN PART AND DENIES IN PART Ms. Kengne's "Application for Appellate Review," construed as an appeal of the Magistrate Judge's June 8, 2022, order denying her leave to proceed *in forma pauperis*. (Doc. 5.) Based on new financial information provided by Ms. Kegne after the June 8, 2022, order, the Court grants her leave to proceed in this case without prepaying the filing fee. The Court accordingly DEEMS MOOT Ms. Kegne's objection to the Magistrate Judge's R&R on the issue of Plaintiff's *in forma pauperis* status. The Court OVERRULES Ms. Kengne's objection to the R&R on the issue of subject matter jurisdiction and ADOPTS the R&R (Doc. 7) as to that issue.

The Court has also conducted a review of the complaint pursuant to 28 U.S.C. § 1915. For the reasons stated above, the Court DISMISSES the complaint WITHOUT PREJUDICE for lack of subject matter jurisdiction. As no matters remain pending before this Court, the Clerk is DIRECTED to close this case.

SO ORDERED this 24th day of October, 2022.

SARAH E. GERAGHTY
United States District Judge