

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
WESTERN DIVISION  
No. 5:23-cv-00253-M-RN

**Ephraim Demons,**

Plaintiff,

v.

**Department of Veteran Affairs, et al.,**

Defendant.

**Memorandum & Recommendation**

Pro se Plaintiff Ephraim Demons claims Defendants Ocwen Federal Bank; its successor PHH Mortgage Corporation; Glen Messina, a corporate executive; and the Department of Veterans Affairs “committed fraud in connection with the mortgage on his Fayetteville, North Carolina home. The court previously dismissed the VA because Demons failed to serve it in a timely manner.

Several motions related to Demons’s claims are before the court. Messina and PHH<sup>1</sup> have asked the court to dismiss the claims against them for several reasons, including that the Complaint fails to state a claim against them. For his part, Demons wants the court to reinstate the VA and allow him to add defendants to the case.

Having reviewed the parties’ filings, this opinion recommends that the district court grant PHH’s and Messina’s motions to dismiss because the complaint fails to state a claim against them. It also recommends denying the motion to add a defendant as moot because the court has already granted that relief. And the district court should deny the motion to reinstate the VA, because Demons has not shown that the court should revisit its earlier decision on that point.

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<sup>1</sup> PHH brings its motion on behalf of both itself and Ocwen Federal Bank, which no longer exists. According to PHH it “succeeded to the rights and obligations of Ocwen Federal Bank, FSB.” Mem. in Supp. at 1 n.1, D.E. 22.

## I. Background

In January 2005, Demons bought a home in Fayetteville, North Carolina. Compl. at 6 ¶ 1, D.E. 1. In connection with that purchase, he took out a mortgage through the Secretary of the VA. Deed of Trust at 1, D.E. 1–2. After entering into the mortgage, Demons was told to make his mortgage payments to Countrywide Home Loans. Compl. at 6 ¶ 1.

Three years later, Demons filed for bankruptcy. *Id.* ¶ 3. As part of that process, he learned that Bank of America had purchased the loan from Countrywide. *Id.* ¶ 4. Bank of America eventually sold his mortgage to Residential Credit Solutions, who then sold it to BSI Financial Solutions. *Id.*

Demons alleges that he “discover[ed] the fraud surrounding the mortgage contract” in November 2022. *Id.* ¶ 9. This claim of fraud is based on his belief that when he signed his mortgage documents, he “created actual ‘money’” which the Defendants use “to pay off any fees associated with” his home. Compl. at 7. So he argues that instead of the VA Secretary giving him a loan, he was the one who loaned money to the VA. *Id.* at 7–8. By failing to disclose this fact to him, Demons alleges that the VA committed fraud against him. *Id.*

He also claims that, under federal law, once his debt was sold, it was considered paid in full, so he no longer has an obligation to repay it. *Id.* at 9 ¶ 4. What’s more, Demons says that under the Fair Debt Collections Practices Act, anyone who purchased his mortgage does not qualify as a creditor and cannot “collect on any claim made against” his home. *Id.* ¶ 5.

In April 2023, a law firm began nonjudicial foreclosure proceedings against Demons’s home. *Id.* § 4 ¶ 3. The next month, Demons filed a “Superior Deed of Trust” in the Cumberland County Registry of Deeds, which he claims terminated the existing deed of trust on his property. *Id.* at 6–7.

Demons sued Ocwen Federal Bank and the VA in May 2023 for this alleged fraud. D.E. 1. He seeks monetary damages and attorney's fees.

A month later, PHH—although not a party to the case—asked the court to dismiss Demons's complaint. Mot. to Dismiss, D.E. 6. It claimed that it was the successor in interest to Defendant Ocwen Federal Bank, which voluntarily dissolved several years ago. Mem. in Supp. of Mot. to Dismiss at 1, n.1, D.E. 7.

The court denied that motion without prejudice based on its conclusion that PHH “has not properly moved to enter this action.” Sept. 18, 2023 Order at 1, D.E. 15. It also ordered Demons “to amend his Complaint and name PHH as a Defendant.” *Id.* After Demons failed to do so, the court again ordered him to add PHH as a party or face dismissal of his action. Oct. 10, 2023 Order, D.E. 17.

Soon after, rather than filing an amended complaint, Demons moved to add PHH and Messina to the case and sought other relief. D.E. 18. The court granted the request to add parties but denied the rest of his request. Nov. 2, 2023 Order, D.E. 20.

But at the same time the court added PHH and Messina to the action, the court dismissed the VA from the case. Nov. 3, 2023 Order, D.E. 21. The dismissal occurred because Demons failed to properly serve the VA within the time provided by the Federal Rules. *Id.*

PHH and Messina then asked the court to dismiss them from this case. D.E. 21, 25. Both argue that Demons's complaint fails to state a claim against them. D.E. 21, 25. Messina also made several arguments related to service of process and the court's personal jurisdiction over him. Messina Mot. to Dismiss, D.E. 25.

Demons opposed the Defendants' motions. He also renewed his request to add PHH and Messina as parties. D.E. 29 And he asked the court to reinstate the VA as a party and enter a default judgment against it. D.E. 30.

## **II. Discussion**

### **A. PHH and Messina Motions to Dismiss**

PHH and Messina argue that Demons's complaint should be dismissed under Federal Rule 12(b)(6) because it fails to state a claim upon which relief may be granted.<sup>2</sup> The Supreme Court has explained that to withstand a motion to dismiss under Rule 12(b)(6), "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) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The Court explained that "[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." *Id.* Thus, while a court must accept all the factual allegations in a complaint as true, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*

After *Iqbal*, a court considering a motion under Rule 12(b)(6) must subject a complaint to a two-part test. First, the court must identify the allegations in the complaint that are not entitled to the assumption of truth because they are conclusory or mere formulaic recitations of the elements of a claim. *Id.* at 679. Then, taking the remaining factual allegations as true, the court must determine whether the complaint "plausibly give[s] rise to an entitlement to relief." *Id.* If, after conducting this two-part analysis, "the well-pleaded facts do not permit the court to infer

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<sup>2</sup> Because the court is recommending the district court grant the 12(b)(6) motion, the court need not address the other arguments in Messina's motion.

more than the mere possibility of misconduct, the complaint has alleged—but it has not show[n]—that the pleader is entitled to relief.” *Id.* (internal citation and quotations omitted). If a party fails to show that they are entitled to relief, the court must dismiss the deficient claims.

Demons’s status as a pro se party relaxes, but does not eliminate, the requirement that a complaint contain facially plausible claims. Although a court must liberally construe a pro se plaintiff’s allegations, it “cannot ignore a clear failure to allege facts” that set forth a cognizable claim. *Johnson v. BAC Home Loans Servicing, LP*, 867 F. Supp. 2d 766, 776 (E.D.N.C. 2011); *see Giarratano*, 521 F.3d at 304 n. 5. “The special judicial solicitude with which a district court should view . . . pro se complaints does not transform the court into an advocate. Only those questions which are squarely presented to a court may properly be addressed.” *Weller v. Dep’t of Soc. Servs.*, 901 F.2d 387, 391 (4th Cir. 1990) (quotation omitted). Every party, pro se or otherwise, must comply with the Federal Rules of Civil Procedure. *See Iqbal*, 556 U.S. at 678; *Baldwin Cnty. Welcome Ctr. v. Brown*, 466 U.S. 147, 152 (1984) (per curiam).

Demons claims that PHH and Messina engaged in fraud in connection with his mortgage. To establish a claim of fraud, a plaintiff must allege five things. First that the defendant made a false representation or concealed a material fact. *Early v. Eley*, 243 N.C. 695, 91 S.E.2d 919 (1956). Second, that the misrepresentation or concealment was reasonably calculated to deceive the plaintiff. *Id.* Third that the defendant acted with the intent to deceive. *Id.* Fourth, that the plaintiff was actually deceived. *Id.* And fifth that the plaintiff suffered damage because of the defendant’s actions. *Id.*

The Federal Rules require that a party alleging fraud, “must state with particularity the circumstances constituting fraud[.]” Fed. R. Civ. P. 9(b). The Fourth Circuit has stated that circumstances include “the time, place, contents of the false representations, as well as the

identity of the person making the misrepresentations and what he obtained thereby.” *McCauley v. Home Loan Inv. Bank, F.S.B.*, 710 F.3d 551, 559 (4th Cir. 2013).

Demons’s Complaint does not plausibly allege that PHH or Messina engaged in fraud against him. In fact, it contains no allegations about them at all. The complete failure to allege any wrongdoing by these Defendants entitles them to dismissal.

This failure is even more glaring considering that the District Court gave Demons several opportunities to amend his complaint to add PHH as a party. Yet he failed to do so, choosing, instead, to move to add parties to the case. In doing so, he passed up the opportunity to allege wrongdoing by these Defendants in his complaint. It is that document which controls the court’s analysis of a Rule 12(b)(6) motion. *See E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 448 (4th Cir. 2011) (discussing the documents a court can consider when resolving a Rule 12(b)(6) motion). And he cannot add allegations to this case through briefs or filings. *See Bratcher v. Pharm. Prod. Dev., Inc.*, 545 F. Supp. 2d 533, 542 (E.D.N.C. 2008). So the District Court should dismiss PHH and Messina from this action.

Similarly, there are no allegations against Ocwen in the Complaint. Thus Demons has failed to plausibly allege a claim against the defunct company. It too should be dismissed from this case.

## **B. Motion to Add Defendant**

Demons once again asks the court to add PHH and Messina to this action. D.E. 29. The court has already ruled on this motion, Nov. 2, 2023 Order, so this request is moot.<sup>3</sup> The District Court should deny it.

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<sup>3</sup> To the extent Demons is asking the court to reconsider its ruling on that motion, the motion should still be denied because he has not shown that any of the circumstances justifying reconsideration apply here.

### C. Motion to Reinstate the Department of Veterans Affairs

Finally, Demons asks this court to reinstate the VA as a defendant. The court previously dismissed the VA based on Demons's failure to prove he served it in a timely manner. D.E. 23. The Federal Rules allow a district court to revisit an interlocutory decision at any time before entering a final judgment. Fed. R. Civ. P. 54(b). But a court should only do so if it would be appropriate under the law-of-the-case doctrine. *Carlson v. Boston Sci. Corp.*, 856 F.3d 320, 325 (4th Cir. 2017).

And that means there are only three circumstances when a court should reconsider an earlier interlocutory decision. The first circumstance arises if further litigation has yielded "substantially different evidence" from what was available to the parties at the time of the original decision. *Id.* A change in the applicable law also provides a reason to depart from an earlier decision. *Id.* And a court may also modify its prior order if doing so is necessary to correct a "clear error causing manifest injustice." *Id.* (quotations omitted).

Demons does not argue that either of the first two circumstances are present here. And a review of the record shows that any argument that they are would fail. He has not presented the court with substantially different evidence than what was available when the court ruled, and there has been no change in the applicable law. Thus, to obtain relief, Demons must show that the court's prior order contained a clear error that will cause a manifest injustice.

In an attempt to meet this standard, he argues that the court erred by not recognizing that he properly served the VA in a timely manner. The docket reflects Demons sent a copy of the Summons and Complaint to the VA through a process server and the United States Postal Service. D.E. 19. He also sent a copy to the Attorney General in California. *Id.*

But this evidence does not demonstrate any error by the court, let alone clear error resulting in manifest injustice. Instead, it shows that the court correctly concluded that Demons failed to properly serve the VA within the time allotted by the Federal Rules.

Rule 4(i)(2) of the Federal Rules of Civil Procedure governs service of process for the VA. That Rule explains that to properly serve a United States agency, a plaintiff must ensure that several individuals and entities receive a copy of the summons and complaint. First, the plaintiff must deliver a copy of the summons and complaint to the United States Attorney for the district in which the action is pending. Fed. R. Civ. P. 4(i)(1)(A)(i) & (i)(2). Alternatively, the summons and complaint may be delivered to a person the United States Attorney has designated with the court to receive service of process or it can be mailed by registered or certified mail to that office's civil process clerk. Fed. R. Civ. P. 4(i)(1)(A)(ii) & (i)(2). Second, the plaintiff must send a copy of the summons and complaint registered or certified mail to the Attorney General of the United States in Washington, D.C. Fed. R. Civ. P. 4(i)(1)(B) & (i)(2). And third, the plaintiff must send a copy of the summons and complaint by registered or certified mail to the agency named as a defendant. Fed. R. Civ. P. 4 (i)(2).

Demons did not comply with Rule 4(i)(2). He did not send a copy of the summons and complaint to the United States Attorney for the Eastern District of North Carolina. And he directed service to the Attorney General in California instead of Washington. Plus, there is no indication he served the VA by mail. So Demons failed to properly serve the VA, and the District Court properly dismissed it from this case. Thus, the District Court should deny his motion to reinstate the VA.<sup>4</sup>

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<sup>4</sup> Given this recommendation, there is no need to address the other relief sought in Demons's motion.



### III. Conclusion

Since Demons does not plausibly allege a claim against PHH, Ocwen, or Messina, the District Court should grant their motions to dismiss. The court has also already granted in part Demons previous motion to add PHH as a defendant, so his current motion should be denied as moot. Finally, the district court should deny Demons's motion to reinstate the VA. As the court noted, Demons failed to provide proof that he properly served the VA.

The Clerk of Court must serve a copy of this Memorandum and Recommendation ("M&R") on each party who has appeared in this action. Any party may file a written objection to the M&R within 14 days from the date the Clerk serves it on them. The objection must specifically note the portion of the M&R that the party objects to and the reasons for their objection. Any other party may respond to the objection within 14 days from the date the objecting party serves it on them. The district judge will review the objection and make their own determination about the matter that is the subject of the objection. If a party does not file a timely written objection, the party will have forfeited their ability to have the M&R (or a later decision based on the M&R) reviewed by the Court of Appeals.

Dated: April 17, 2024



Robert T. Numbers, II  
United States Magistrate Judge