IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION
7:18-CV-74-D

ANDREW U.D. STRAW,	)	
Plaintiff,	)	
v.	)	**ORDER**
STATE OF NORTH CAROLINA,	)	
Defendant.	)	

This pro se case is before the court on the motion to proceed *in forma pauperis* under 28 U.S.C. § 1915(a)(1) (D.E. 1) by plaintiff Andrew U.D. Straw ("plaintiff") and for a frivolity review pursuant to 28 U.S.C. § 1915(e)(2)(B). These matters were referred to the undersigned magistrate judge pursuant to 28 U.S.C. § 636(b)(1)(A) and (B), respectively. As set out below, the motion to proceed *in forma pauperis* will be allowed, and the case will be allowed to proceed.

IN FORMA PAUPERIS MOTION

The court finds that plaintiff has adequately demonstrated his inability to prepay the required court costs. His motion to proceed *in forma pauperis* is therefore ALLOWED.

FRIVOLITY REVIEW

I. BACKGROUND

In his proposed complaint (D.E. 1-1) and the incorporated documents,[1] he alleges as follows:

Plaintiff was born on 19 March 1969 at Camp Lejeune military base in Onslow County, North Carolina. *Id.* ¶ 1. He was poisoned by contaminated water on the base and suffers

[1] These documents are a declaration by plaintiff entitled as an affidavit ("Pl.'s Decl.") (D.E. 1-2) and copies of two letters (D.E. 1-3 and 1-4) relating to his mental health. They are incorporated by reference into the complaint in paragraph 2 thereof.

neurobehavioral effects resulting from the contamination. *Id.* ¶¶ 1-2. Previously, plaintiff and others sued the United States pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.*, for injuries arising from exposure to the contaminated water at Camp Lejeune. Pl.'s Decl. ¶ 5. Plaintiffs' claims against the United States were rejected in multi-district litigation ("MDL") on the grounds that they were untimely under North Carolina's statute of repose and/or statute of limitations. *Id.* ¶ 11. Plaintiff now contends that application of the North Carolina statute of repose and statute of limitations to his claims of injury from the contaminated water violates Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12131-12165; the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.*; and the United States Constitution. Compl., e.g., ¶¶ 15-16. He seeks $10 million in compensatory and punitive damages from the State of North Carolina ("defendant"), the sole defendant, along with declaratory relief. *Id.* ¶¶ 17-19; Pl.'s Decl. ¶ 17.

II. APPLICABLE LEGAL STANDARDS FOR FRIVOLITY REVIEW

After allowing a party to proceed *in forma pauperis*, as here, the court must conduct a frivolity review of the case pursuant to 28 U.S.C. § 1915(e)(2)(B). The court must dismiss the complaint if it determines that the action is frivolous or malicious, 28 U.S.C. § 1915(e)(2)(B)(i); fails to state a claim upon which relief can be granted, *id.* § 1915(e)(2)(B)(ii); or seeks monetary relief from an immune defendant, *id.* § 1915(e)(2)(B)(ii). 28 U.S.C. § 1915(e)(2)(B); *see Denton v. Hernandez*, 504 U.S. 25, 27 (1992) (standard for frivolousness).

Under Rule 8 of the Federal Rules of Civil Procedure, a pleading that states a claim for relief must contain "a short and plain statement of the grounds for the court's jurisdiction . . . [and] a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(1), (2). Case law explains that the complaint must "'state[ ] a plausible claim for relief' that 'permit[s] the court to infer more than the mere possibility of misconduct' based upon 'its

judicial experience and common sense.'" *Coleman v. Md. Court of Appeals*, 626 F.3d 187, 190 (4th Cir. 2010) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)). Likewise, a complaint is insufficient if it offers merely "labels and conclusions," "a formulaic recitation of the elements of a cause of action," or "naked assertion[s]" devoid of "further factual enhancement." *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotation marks omitted)).

In evaluating frivolity specifically, a pro se plaintiff's pleadings are held to "less stringent standards" than those drafted by attorneys. *White v. White*, 886 F.2d 721, 722-23 (4th Cir. 1989). Nonetheless, the court is not required to accept a pro se plaintiff's contentions as true. *Denton*, 504 U.S. at 32. Instead, the court is permitted to "pierce the veil of the complaint's factual allegations and dismiss those claims whose factual contentions are clearly baseless." *Neitzke v. Williams*, 490 U.S. 319, 327 (1989). Provided that a plaintiff's claims are not clearly baseless, the court must weigh the factual allegations in plaintiff's favor in its frivolity analysis. *Denton*, 504 U.S. at 32. The court must read the complaint carefully to determine if a plaintiff has alleged specific facts sufficient to support the claims asserted. *White*, 886 F.2d at 724.

A court may consider subject matter jurisdiction as part of the frivolity review. *See Lovern v. Edwards*, 190 F.3d 648, 654 (4th Cir. 1999) (holding that "[d]etermining the question of subject matter jurisdiction at the outset of the litigation is often the most efficient procedure"); *Cornelius v. Howell*, No. 3:06-3387-MBS-BM, 2007 WL 397449, at *2-4 (D.S.C. 8 Jan. 2007) (discussing the lack of diversity jurisdiction during frivolity review as a basis for dismissal). "Federal courts are courts of limited jurisdiction and are empowered to act only in those specific situations authorized by Congress." *Bowman v. White*, 388 F.2d 756, 760 (4th Cir. 1968). The presumption is that a federal court lacks jurisdiction in a particular case unless it is demonstrated that jurisdiction

exists. *Lehigh Min. & Mfg. Co. v. Kelly*, 160 U.S. 327, 336 (1895). The burden of establishing subject matter jurisdiction rests on the party invoking jurisdiction, here plaintiff. *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982) ("The burden of proving subject matter jurisdiction . . . is on the plaintiff, the party asserting jurisdiction."). The complaint must affirmatively allege the grounds for jurisdiction. *Bowman*, 388 F.2d at 760. If in a frivolity review the court determines that it lacks subject matter jurisdiction, it must dismiss the action pursuant to 28 U.S.C. § 1915(e)(2)(B)(i). More generally, "[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." Fed. R. Civ. P. 12(h)(3).

III. DISCUSSION

As noted, plaintiff's claims relate to MDL, which was conducted in the Northern District of Georgia. *See generally In re Camp Lejeune N. Carolina Water Contamination Litig.*, 263 F. Supp. 3d 1318 (N.D. Ga. 2016). In that litigation, plaintiff and others asserted tort claims against the United States arising from their exposure to toxic substances contained in the water supply at Camp Lejeune. *Id.* at 1325. Plaintiffs alleged that the United States "failed to monitor the quality of the water supply at Camp Lejeune and failed to provide notice to the Plaintiffs concerning the presence of toxic substances in the water supply." *Id.*

In an 11 May 2012 decision in the case, *see* MDL No. 1:11-md-02218-JOF, 2012 WL 12869566, at *7 (11 May 2012), the district court held that North Carolina's ten-year statute of repose, N.C. Gen. Stat. § 1-52(16), served to bar plaintiffs' claims in the litigation, concluding that the statute did not contain an exception for latent diseases to otherwise save plaintiffs' claims. *Id.* Although the North Carolina legislature thereafter amended the statute of repose to expressly indicate that it should not be construed to bar injuries or damages arising from exposure to contaminated ground water, on 14 October 2014, the Eleventh Circuit ruled that the statute's

amendment by the legislature could not be applied retroactively to plaintiffs' claims. *Bryant v. United States,* 768 F.3d 1378, 1380 (11th Cir. 2014). The Eleventh Circuit in *Bryant* concluded that the statute of repose in place at the time plaintiffs commenced the action was not ambiguous, and there was no exception for latent disease applicable to the plaintiffs. *Id.* The Eleventh Circuit remanded the case for further proceedings in accordance with that determination. *Id.* at 1386.

The government then filed a motion to dismiss before the MDL court. 263 F. Supp. 3d at 1327. Plaintiffs opposed the motion to dismiss and urged the court to reconsider the Eleventh Circuit's holding in light of a recent Fourth Circuit ruling in *Stahle v. CTS Corp.*, 817 F.3d 96 (4th Cir. 2016). In *Stahle*, the Fourth Circuit disagreed with the Eleventh Circuit's *Bryant* decision and held that North Carolina's statute of repose did not encompass injuries arising from latent disease. *Id.* at 100, 104. The MDL court rejected plaintiffs' argument concerning *Stahle,* held that the Eleventh Circuit's ruling was binding on it, and allowed the government's motion to dismiss. 263 F. Supp. 3d at 1330, 1336. This decision was recently affirmed by the Eleventh Circuit. *See In re Camp Lejeune N. Carolina Water Contamination Litig.*, No. 16-17573, 2019 WL 2206237, at *2 (11th Cir. 22 May 2019) ("As we held five years ago, Plaintiffs' claims are subject to the ten-year statute of repose under N.C. Gen. Stat. § 1-52(16). The wells at issue in this case were taken out of use in 1987, and the earliest claim by a Plaintiff was made in 1999—two years after the statute of repose had cut off Defendants' liability.").

Here, as indicated, plaintiff does not seek to reassert his claims of injury from the purportedly contaminated water. Rather, in an admitted attempt to avoid the preclusive effect of the earlier litigation (*see* Compl. ¶ 4), he challenges the North Carolina statute of repose and statute of limitations themselves under the Constitution, as well as the ADA and Rehabilitation Act of 1973.

The court has considered whether collateral estoppel, or issue preclusion, bars the instant lawsuit. *Eriline Co. S.A. v. Johnson*, 440 F.3d 648, 655 (4th Cir. 2006) (indicating that "certain affirmative defenses implicate important institutional interests of the court," such as collateral estoppel, "and may sometimes be properly raised and considered *sua sponte*"); *Greathouse v. U.S. Attorney*, No. 2:16-CV-06205, 2019 WL 2079465, at *3 (S.D.W. Va. 19 Apr. 2019) (noting that while issues of preclusion are an affirmative defense, a court may address such matters *sua sponte* in some circumstances), *rep. and recomm. adopted*, 2019 WL 2079766 (10 May 2019). Issue preclusion "'precludes relitigation of issues of fact or law that are identical to issues which have been actually determined and necessarily decided in prior litigation in which the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate.'" *Weinberger v. Tucker*, 510 F.3d 486, 491 (4th Cir. 2007) (quoting *Virginia Hosp. Ass'n v. Baliles*, 830 F.2d 1308, 1311 (4th Cir. 1987)); *Muhammad v. Lappin*, No. CIV.A. 2:07CV18, 2009 WL 3063310, at *4 (N.D.W. Va. 23 Sept. 2009) ("Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." (citing *Allen v. McCurry*, 449 U.S. 90, 94 (1980)), *aff'd*, 379 F. App'x 308 (4th Cir. 2010). The elements necessary for collateral estoppel to apply include: (1) the issue subject to preclusion is identical to one litigated in another forum; (2) the relevant issue was actually decided in the prior litigation; (3) the determination was a "critical and necessary part" of the court's decision in the prior litigation; (4) the prior judgment was final and valid; and (5) the party had a "full and fair opportunity to litigate the issue" in the prior proceeding. *Ramsay v. U.S. Immigration & Naturalization Serv.*, 14 F.3d 206, 210 (4th Cir. 1994).

Here, the record is not clear as to whether the necessary elements for the application of collateral estoppel are met. Certainly, plaintiff is seeking again to litigate matters related to North Carolina's statute of repose, the application of which was actively and heavily litigated in the earlier litigation. *See, e.g. In re Camp Lejeune, N. Carolina Water Contamination Litig.*, 2012 WL 12869566, at *2 ("[T]here is no doubt that both § 9658 [of the Comprehensive Environmental Response Compensation and Liability Act or CERCLA] and an interpretation of North Carolina's statute of repose are significant, dispositive issues in the litigation."). It is not clear from the present record, however, whether questions of the statute's constitutionality or violation of federal statutes were considered in that litigation and whether the instant lawsuit is merely an attempt to recast the prior claims and circumvent the prior courts' determinations. *See Clarke v. Richmond Behavioral Health Auth.*, 402 F. App'x 764, 766 (4th Cir. 2010) (vacating denial of *in forma pauperis* where "based on the record before the court, it is unclear to us that [plaintiff'] complaint was 'fundamentally the same' as the claim he filed in his previous action against Defendant"). Allowing the record to be more fully developed to flesh out those matters, particularly in a case where questions of constitutionality are presented, would seemingly be the wisest use of judicial resources, both at the trial court level and in any future potential appeals.

Moreover, it is not readily apparent that plaintiff's claims are frivolous or lack any potential merit, providing an additional reason for the claims to proceed. *See, e.g., Jones v. United States,* 751 F. Supp. 2d 835, 842 (E.D.N.C. 2010) (noting that North Carolina's statute of repose is "likely unconstitutional" if construed to exclude latent disease). Defendant should have a full opportunity to defend any attacks on the constitutionality of its statutes.

CONCLUSION

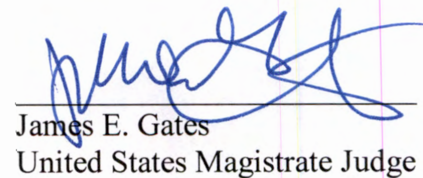
For the foregoing reasons, the court concludes that at this early stage of this proceeding and based on the record before it, plaintiff's claims are not frivolous and do not suffer from the other deficiencies specified in 28 U.S.C. § 1915(e)(2)(B). This case should accordingly proceed.

IT IS THEREFORE ORDERED as follows:

1. The Clerk shall file plaintiff's proposed complaint (D.E. 1-1) with the incorporated documents (D.E. 1-2, 1-3, 1-4) and issue the summons prepared by plaintiff (D.E. 1-6); and

2. The U.S. Marshals Service shall serve defendant by delivering the summons to the addressee listed along with a copy of the complaint, pursuant to Fed. R. Civ. P. 4(i)(2).

SO ORDERED, this 8th day of July 2019.



James E. Gates
United States Magistrate Judge