UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JOHN WALKER, JR., ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, Plaintiff, v. REALHOME SERVICES AND SOLUTIONS, INC., D/B/A OWNERS.COM, Defendant.	CIVIL ACTION NO. 1:18-CV-03044-JPB

ORDER ADOPTING FINAL REPORT AND RECOMMENDATION

This matter came before the Court on the Magistrate Judge's Final Report and Recommendation [Doc. 26] recommending that Realhome Services and Solutions, Inc.'s ("Defendant") Motion to Dismiss [Doc. 8] be granted. This Court finds as follows:

John Walker, Jr. ("Plaintiff") filed this action against Defendant alleging violations of the Fair Credit Report Act ("FCRA"). In Count One, Plaintiff asserts that Defendant violated 15 U.S.C. § 1681b(b)(2)(A), which provides that a person may not procure a consumer report for employment purposes unless "a clear and conspicuous disclosure has been made in writing to the consumer at any time before the report is procured or caused to be procured, in a document that consists

solely of the disclosure." The Magistrate Judge determined that Count One should be dismissed because Plaintiff failed to allege a concrete injury. In Count Two, Plaintiff alleges that Defendant violated 15 U.S.C. § 1681b(b)(3)(A), which provides that in using a consumer report for employment purposes, before taking any adverse action, "the person intending to take such adverse action shall provide to the consumer to whom the report relates" a copy of the report and a description of the rights of the consumer. The Magistrate Judge then determined that both Count One and Count Two should be dismissed because the report was not used for employment purposes. Importantly, for recovery under either 15 U.S.C. §§ 1681b(b)(2)(A) or (b)(3)(A), the plain and unambiguous language of the statute dictates that the consumer report must be used for employment purposes.

Plaintiff timely filed his objections to the Magistrate Judge's Final Report and Recommendation on February 11, 2019. Plaintiff argues that this Court should reject the Report and Recommendation and deny Defendant's Motion to Dismiss in its entirety. Specifically, Plaintiff argues that the Magistrate Judge erred in determining that Plaintiff did not have standing because the Magistrate Judge failed to consider other types of injury unrelated to confusion. Plaintiff also argues that the Magistrate Judge erred in determining that FCRA does not apply to independent contractors.

A district judge has broad discretion to accept, reject or modify a magistrate judge's proposed findings and recommendations. United States v. Raddatz, 447 U.S. 667, 680 (1980). Pursuant to 28 U.S.C. § 636(b)(1), the Court reviews any portion of the Report and Recommendation that is the subject of a proper objection on a *de novo* basis and any non-objected-to portion under a "clearly erroneous" standard. Because Plaintiff timely filed objections, this Court will review the entire recommendation *de novo*.

As already stated above, for Plaintiff to prevail on either of his claims, this Court must find that the consumer report was used for employment purposes. In this case, it is undisputed that Plaintiff applied for an independent contractor position with Defendant. Thus, this Court must determine whether a person seeking to work as an independent contractor—not as an employee—is covered by FCRA. Because determining whether FCRA covers independent contractors is relevant, and potentially dispositive, to both Count One and Count Two, this will be the Court's first inquiry.

Under FCRA, employment purposes is defined as "a report used for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee." 15 U.S.C. § 1681a(h). This Court is not aware of any binding authority from this circuit concerning whether independent contractors are

protected by FCRA, and neither party has cited any.[1] However, it is well established that

> [w]here Congress uses terms that have accumulated settled meaning under ... the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.... In the past, when Congress has used the term 'employee' without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.

Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322–23 (1992) (internal citations omitted). Furthermore, this Court "must presume that Congress said what it meant and meant what it said." Collins v. Experian Information Sols., Inc., 775 F.3d 1330, 1335 (11th Cir. 2015). Plaintiff argues that this Court should construe FCRA broadly to include independent contractors because FCRA is a remedial statute. Importantly,

[1] Other district courts have held that the FCRA does not apply to independent contractors. See Lamson v. EMS Energy Mktg. Serv., Inc., 868 F. Supp. 2d 804 (E.D. Wis. 2012) (holding that an independent contractor was not covered by the protections of FCRA); Johnson v. Sherwin-Williams Co., 152 F. Supp. 3d 1021 (N.D. Ohio 2015) (finding that the unambiguous language of FCRA makes clear that the "for employment purposes" provision does not apply where an individual is being evaluated for retention as an independent contractor); and Smith v. Mut. of Omaha Ins. Co., No. 4:17-CV-00443-JAJ-CFB, 2018 WL 6921119, at *4 (S.D. Iowa Oct. 4, 2018) (holding that if the plaintiff is an independent contractor, then his FCRA claim will necessarily fail and noting that Hoke is no longer good law because the Supreme Court ruled in favor of a "presumption that Congress means an agency law definition for 'employee' unless it clearly indicates otherwise").

however, in addressing whether a court should broadly construe statutes based on what mischief the federal statute was designed to remedy, the Supreme Court warned that the cases which have done so result in "feeble precedents for unmooring the term from the common law." Id. at 324. Ultimately, because employee or employment is not otherwise defined in FCRA, pursuant to Darden, this Court is required to apply the common law meaning of employment, which does not include independent contractors. As such, the Magistrate Judge was correct when he determined that FCRA does not apply in this case, and his decision is therefore adopted.

Plaintiff argues that Hoke v. Retail Credit Corporation—a decision pre-dating Darden by seventeen years and decided by another circuit—demands a different result. 521 F.2d 1079 (4th Cir. 1975). In that case, the Fourth Circuit Court of Appeals broadly defined employment. Id. at 1082 (holding, in the context of medical licensing, that "we have no hesitancy in concluding the information was furnished for 'employment purposes' in the broad generic sense of the words"). With the mandates of Darden, which was decided after Hoke, this Court finds that it would

be inappropriate to construe the term employment beyond its ordinary common-law meaning. As such, Defendant's objection is OVERRULED.

Plaintiff argues, in his other objection, that Count One should not be dismissed because he suffered a concrete injury. Because this Court agrees with the Magistrate Judge that Count One and Count Two should be dismissed because the consumer report was not used for employment purposes, this objection need not be addressed. In other words, even if Plaintiff sufficiently alleged a concrete injury, which this Court, in agreement with the Magistrate Judge, does not believe that he has, Plaintiff's claims would still fail because Plaintiff was not covered by FCRA.

For the reasons stated above, with the exception of the Section IV.B. of the Report and Recommendation, which this Court finds is not necessary to adopt as the issue need not be addressed, the Report and Recommendation is ADOPTED as the order of this Court and Defendant's Motion to Dismiss [Doc. 8] is GRANTED. The CLERK is DIRECTED to close this case.

SO ORDERED this 9th day of August, 2019.

J. P. BOULEE
United States District Judge