

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

July 12, 2023

FOR THE TENTH CIRCUIT

Christopher M. Wolpert
Clerk of Court

JULIE CARPER, for herself and as parent,

Plaintiff - Appellant,

v.

DOUGLAS PETERSON, in his official
capacity as Nebraska Attorney General and
his individual capacity; SHAWN
EATHERTON, in his official and
individual capacities; SHARON K.
MAULER,

Defendants - Appellees.

No. 23-1005
(D.C. No. 1:22-CV-00363-CNS-MEH)
(D. Colo.)

ORDER AND JUDGMENT*

Before **MATHESON**, **BRISCOE**, and **EID**, Circuit Judges.

Plaintiff Julie Carper, appearing pro se, appeals the district court's dismissal of her 42 U.S.C. § 1983 complaint. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm the district court's ruling in all regards except for its dismissal with prejudice. We vacate

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, *res judicata*, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

the district court's judgment, but only to the extent that it dismisses Carper's claims with prejudice. We remand with instructions to enter judgment dismissing her claims without prejudice.

I. BACKGROUND

This suit stems from Carper's 2009 divorce in Buffalo County, Nebraska. After the divorce, Carper allegedly failed to pay child support, and, in 2018, a warrant was issued for her arrest. She lived in Colorado at that time and unsuccessfully fought extradition to Nebraska. Over the last decade, Carper has filed a wide range of legal actions against various court clerks, judges, attorneys, and her ex-husband.

In the present iteration of Carper's legal actions, she sues Sharon Mauler (the Court Clerk for Buffalo County), Shawn Eatherton (the County Attorney for Buffalo County), and Douglas Peterson (the Nebraska Attorney General) for malicious prosecution. Carper challenges the legality of her 2018 arrest warrant and seeks to hold accountable the public officials whom she believes are responsible for allowing her constitutional rights to be violated.

After Carper filed her suit, Defendants moved to dismiss. Relevant to this appeal, Defendants moved to dismiss under Federal Rule of Civil Procedure 12(b)(2), citing lack of personal jurisdiction. In addition, Peterson moved to dismiss under Rule 12(b)(1), citing lack of subject-matter jurisdiction. Carper filed a motion for jurisdictional discovery. Carper did not specify what discovery she wished to obtain. The magistrate judge denied the motion, and Carper did not object to the denial.

The magistrate judge agreed with Defendants’ jurisdictional arguments and recommended that the district court dismiss Carper’s suit. Specifically, in his report and recommendation (the R&R), the magistrate judge concluded that “Peterson, as the Nebraska Attorney General, enjoys Eleventh Amendment immunity,” and recommended that “[t]he claims against him in his official capacity [] be dismissed . . . for lack of subject matter jurisdiction.” ROA Vol. II at 610–11. As to all three Defendants, the magistrate judge concluded that Defendants do not have any ties to Colorado and that the court could not exercise personal jurisdiction over them. The R&R recommended that the suit be dismissed without prejudice. It also warned Carper that she had fourteen days to file an objection and that she needed to “specifically identify those findings or recommendations to which the objections are being made.” *Id.* at 613 n.1.

In response to the R&R, Carper filed two objections. In the first, she made substantive arguments about her malicious-prosecution claim and its factual underpinnings. In the second, she challenged the R&R’s alleged reliance on documents submitted by Eatherton and Mauler in their motion to dismiss, which were later rescinded by their Notice of Errata. These documents—some 300 plus pages—consisted of complaints previously filed by Carper in other courts and the various orders of dismissal issued in those cases. *See* ROA Vol. I at 67–397. Carper also filed a “Reconsideration Motion to Leave Amend Complaint,” ROA Vol. II at 625–29 (capitalization omitted), a “Motion to Amend Complaint,” *id.* at 640–46, and a premature “Relief from

Judgment/Recommendation Order Fed.R.Civ.P[.] Rule 60,” *id.* at 650–60 (capitalization omitted).¹

The district court adopted the R&R. In its order, the district court noted that Carper “did not specifically object to the Magistrate Judge’s Recommendation that the claims should be dismissed due to lack of personal jurisdiction or that the claims against Defendant Peterson in his official capacity are barred by sovereign immunity.” ROA Vol. III at 39. The district court also denied Carper’s motion to amend her complaint, citing Carper’s “failure to explain what, if any, contacts Defendants had with Colorado that would permit this Court to have jurisdiction over them.” *Id.* at 40. The district court entered a final judgment in which it dismissed Carper’s claims with prejudice.

After Carper filed her appeal, we abated her appeal pending resolution of her motion to reconsider before the district court. The district court denied that motion.

II. DISCUSSION

We conclude that Carper’s bases for appeal are unavailing. In addition to Carper having waived her appeal by not adequately objecting to the R&R, the R&R’s substantive conclusions on personal and subject-matter jurisdiction, as adopted by the district court, are correct. We do conclude, however, that the district court erred in dismissing Carper’s claims with prejudice.

¹ The magistrate judge denied the latter two motions as premature and moot, respectively. *See* ROA Vol. II at 9 (minute order).

A. Firm Waiver

As an initial matter, we need not reach the merits of this suit, as Carper has waived her arguments by failing to properly object to the R&R. “[T]he failure to make timely objection to the magistrate’s findings or recommendations waives appellate review of both factual and legal questions.” *Johnson v. Reyna*, 57 F.4th 769, 778 (10th Cir. 2023) (alteration in original) (citation omitted). “[W]e apply the firm-waiver rule to pro se litigants, provided they were informed of the time period for objecting and the consequences of failing to object.” *Id.* (internal quotation marks and citation omitted). A party must provide “*specific* written objections” to the magistrate judge’s recommendations. Fed. R. Civ. P. 72(b)(2) (emphasis added). An objection must be “sufficiently specific to focus the district court’s attention on the factual and legal issues that are truly in dispute.” *United States v. One Parcel of Real Prop.*, 73 F.3d 1057, 1060 (10th Cir. 1996).

Here, Carper did not specifically object to the R&R’s recommendation that her claims should be dismissed due to lack of personal jurisdiction, or that the claims against Peterson in his official capacity are barred by sovereign immunity. Instead, she focused her objections on the substance of her malicious-prosecution claims and the Notice of Errata. Because Carper did not specifically object to the recommendations in the R&R despite being told she needed to do so, any challenges to the jurisdictional conclusions therein are waived on appeal. Still, we proceed to review the district court’s conclusions on personal and subject-matter jurisdiction.

B. Personal Jurisdiction

To the extent Carper sues Defendants in their personal capacities, the district court did not have personal jurisdiction over Defendants.

1. Standard of Review

“The plaintiff has the burden of establishing personal jurisdiction.” *Eighteen Seventy, LP v. Jayson*, 32 F.4th 956, 964 (10th Cir. 2022) (citation omitted). “When, as here, the district court finds personal jurisdiction lacking based on the complaint and affidavits, we review the court’s dismissal de novo, taking as true all well-pleaded facts alleged in the complaint.” *Id.* (citing *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1070 (10th Cir. 2008) (“[A]ny factual disputes in the parties’ affidavits must be resolved in plaintiffs’ favor.”)). “[A]t this early stage in the litigation, in the absence of an evidentiary hearing, the [plaintiff] need only make a prima facie showing of personal jurisdiction.” *Id.* “In other words, the plaintiff may defeat a motion to dismiss by presenting evidence—either uncontested allegations in its complaint or evidence in the form of an affidavit or declaration—that if true would support jurisdiction over the defendant.” *Id.* at 965 (internal quotation marks and citation omitted).

2. Analysis

“Personal jurisdiction over nonresident defendants is proper if an applicable statute authorizes service of process and if the exercise of jurisdiction comports with constitutional due process.” *Hood v. Am. Auto Care, LLC*, 21 F.4th 1216, 1220 (10th Cir. 2021). “[T]he Federal Rules of Civil Procedure incorporate the Colorado long-arm

statute, which confers personal jurisdiction to the extent permitted by the United States Constitution.” *Id.* (internal citations omitted); *see* Fed. R. Civ. P. 4; Colo. Rev. Stat. § 13-1-124 (2023). “Thus, the statutory and constitutional requirements merge and we must assess only whether Colorado jurisdiction over this claim would be consistent with due process.” *Hood*, 21 F.4th at 1220–21.

The R&R and Defendants on appeal proceed on a theory of specific (rather than general) personal jurisdiction.² A court may exercise specific jurisdiction over a nonresident defendant if “(1) [] the defendant has ‘purposefully directed [its] activities at residents of the forum,’ and (2) that the suit ‘arise out of or relate to those activities.’” *Hood*, 21 F.4th at 1221 (second alteration in original) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)). Consistent with due process, the non-resident defendant must have the “requisite minimum contacts with the forum state, such that having to defend the lawsuit there would not offend traditional notions of fair play and substantial justice.” *Eighteen Seventy, LP*, 32 F.4th at 965 (internal quotation marks and

² The R&R noted that it was “unclear whether [Carper] intends to argue general jurisdiction over the Defendants.” ROA Vol. II at 612–13. To succeed on a theory of general jurisdiction, Carper would need to establish that Defendants were “essentially at home” in Colorado. *Eighteen Seventy, LP*, 32 F.4th at 965 n.8 (quoting *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1024 (2021)). Carper’s allegations and arguments do not come close to meeting this more exacting standard. *See Ford Motor Co.*, 141 S. Ct. at 1024 (discussing that specific jurisdiction “covers defendants less intimately connected with a State”).

citations omitted). “This analysis is fact specific.” *ClearOne Commc’ns, Inc. v. Bowers*, 643 F.3d 735, 763 (10th Cir. 2011) (citation omitted).

Nothing alleged in Carper’s complaint suggests that any Defendant would have the requisite minimum contacts to establish personal jurisdiction. Further, as to Peterson, in support of his motion to dismiss, he submitted a declaration attesting that he has few, if any, contacts with Colorado: he works and resides in the State of Nebraska; he does not own, use, or possess any real property in Colorado; he has never lived in Colorado; he does not conduct business in Colorado; and he has not committed any tortious acts in Colorado. Eatherton and Mauler also submitted affidavits, which similarly represent that neither had contacts with Colorado.

Relying on this evidence, and in light of Carper’s failure to show otherwise, the magistrate judge correctly determined that Peterson, Mauler, and Eatherton did not have any ties to Colorado. The district court agreed, and so do we. Carper’s claims must be dismissed for lack of personal jurisdiction.

C. Subject-Matter Jurisdiction

To the extent Carper sues Peterson in his official capacity, such suit is barred by the Eleventh Amendment.

1. Standard of Review

“We review a district court’s grant of a motion to dismiss de novo.” *Hennessey v. Univ. of Kan. Hosp. Auth.*, 53 F.4th 516, 527 (10th Cir. 2022). “Specific to a dismissal for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure

12(b)(1), we review the dismissal de novo but review any factual findings underlying the dismissal for clear error.” *Id.* “We also review de novo the district court’s dismissal based on sovereign immunity.” *Id.* (internal quotation marks and citation omitted).

2. Analysis

“The Eleventh Amendment renders the States [and their agencies] immune from ‘any suit in law or equity, commenced or prosecuted . . . by Citizens of another State, or by Citizens or Subjects of any Foreign State.’” *Tennessee v. Lane*, 541 U.S. 509, 517 (2004) (second alteration in original) (quoting U.S. Const. amend. XI); *see Collins v. Daniels*, 916 F.3d 1302, 1315 (10th Cir. 2019). The rule applies with equal force to suits brought against state officials in their official capacities “because ‘a suit against a state official in his or her official capacity . . . is no different than a suit against the State itself.’” *Muscogee (Creek) Nation v. Okla. Tax Comm’n*, 611 F.3d 1222, 1227 (10th Cir. 2010) (alteration in original) (quoting *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 71 (1989)). “Once effectively asserted, Eleventh Amendment immunity constitutes a bar to the exercise of federal subject matter jurisdiction.” *Williams v. Utah Dep’t of Corr.*, 928 F.3d 1209, 1212 (10th Cir. 2019) (internal brackets removed; citations omitted).

Sovereign immunity is not absolute. For example, “[a] State may waive its sovereign immunity at its pleasure, and in some circumstances Congress may abrogate it by appropriate legislation.” *Va. Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 253–54 (2011) (internal citation omitted). For Congress to limit sovereign immunity, its intent to do so must be “obvious from a clear legislative statement.” *Seminole Tribe of Fla. v.*

Florida, 517 U.S. 44, 55 (1996) (internal quotation marks and citation omitted).

“[Section] 1983 does not abrogate a state’s sovereign immunity.” *Muscogee (Creek) Nation*, 611 F.3d at 1227 (citing *Quern v. Jordan*, 440 U.S. 332, 338–40 (1979)).

Here, Carper sues Peterson, Nebraska’s attorney general, in his official capacity. The relief she seeks is monetary damages. Neither exception to sovereign immunity applies: § 1983 does not abrogate the Eleventh Amendment, *id.*, and “Nebraska has not waived its sovereign immunity with regard to § 1983 suits brought against it,” *Anthony K. v. State*, 855 N.W.2d 802, 812 (2014). Accordingly, the R&R correctly determined that Carper’s claim against Peterson in his official capacity is barred by the Eleventh Amendment and sovereign immunity. The district court appropriately adopted the R&R’s conclusion on this issue.

D. Dismissal with Prejudice and Denial of Motion to Amend

Carper argues that the district court judge was “bias[ed],” lacked familiarity with the case, and had little judicial experience compared to the magistrate judge. Aplt. Br. at 4. None of these allegations are meritorious. The district court is permitted, indeed, required, to review a magistrate judge’s dispositional recommendation. *See* 28 U.S.C. § 636(b)(1)(B). Here, the district court did so and adopted the well-reasoned analysis therein.

Carper also challenges the district court’s decision to dismiss her claims with prejudice, despite the R&R recommending that they be dismissed without prejudice. “We review the [trial] judge’s dismissal with prejudice for an abuse of discretion.” *Seale v.*

Peacock, 32 F.4th 1011, 1027 (10th Cir. 2022) (citation omitted). A district court should not dismiss claims with prejudice for lack of personal jurisdiction. *Hollander v. Sandoz Pharms. Corp.*, 289 F.3d 1193, 1216 (10th Cir. 2002). “Personal jurisdiction . . . is an essential element of the jurisdiction of a district . . . court, without which the court is powerless to proceed to an adjudication.” *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999) (second alteration in original) (internal quotation marks and citation omitted); *see also Hollander*, 289 F.3d at 1216 (“[A] jurisdictional ruling did not address the merits of the [] allegations . . . , and, as a result, the claim . . . should [be] dismissed without prejudice to filing in an appropriate forum.”).

The district court discussed that “granting [Carper] leave to amend is a futile act as she cannot and has not established that the Court has personal jurisdiction over Defendants or that the claims against Defendant Peterson in his official capacity are not barred by sovereign immunity.” ROA Vol. III at 40. In denying Carper’s post-judgment motion, the district court concluded that a with-prejudice dismissal was appropriate in order to sanction Carper’s abusive litigation tactics. On appeal, Defendants suggest that we adopt the district court’s reasoning and allow Carper to be sanctioned. We decline to do so. Defendants and the district court cite only out-of-circuit case law to support their sanctions analysis. We do not agree that Carper’s actions warrant sanctions.³

³ We need not determine here whether a dismissal with prejudice for lack of personal jurisdiction is always inappropriate.

Relatedly, Carper challenges the district court's denial of her motion to amend her complaint. Before the district court and on appeal, Carper does not explain how an amendment to her complaint would help her clear the personal-jurisdiction hurdle. Accordingly, the district court properly denied it.

E. Miscellaneous Issues

We also dispose of Carper's miscellaneous challenges to the district court's dismissal. First, Carper argues that Defendants' Notice of Errata altered the nature of Defendants' motion to dismiss and that the district court failed to address this issue. *See* Aplt. Br. at 7 ("By pulling the supporting document six months after the Defendants['] Motion to Dismiss the ERRATA converted the motion to dismiss a facial attack."). However, the documents removed by the Notice of Errata did not affect the R&R's discussion of personal jurisdiction. Any errors that may have occurred because of the Notice of Errata are harmless.

Second, Carper contends that "Defendants' failure to confer also created an error of law." *Id.* at 13. But Carper fails to identify a specific ruling by the district court on this issue.

Third, Carper challenges the district court's denial of her request for jurisdictional discovery. Carper, however, did not preserve this issue for appeal because she did not object to the magistrate judge's order denying her motion for discovery. "[F]ailure to make timely objections to the magistrate's findings or recommendations waives appellate review of both factual and legal questions." *One Parcel of Real Prop.*, 73 F.3d at 1059.

III. CONCLUSION

We **AFFIRM** the district court's ruling in all regards except for its dismissal with prejudice. We **VACATE** the district court's judgment, only to the extent that it dismisses Carper's claims with prejudice. We remand with instructions to enter judgment dismissing her claims without prejudice.

Entered for the Court

Mary Beck Briscoe
Circuit Judge