FILED
United States Court of Appeals
Tenth Circuit

August 16, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

EARL L. CLINE, II; JANET CLINE,

Plaintiffs - Appellants,

v.

STATE OF UTAH; JULIE McPHIE, a/k/a Julie P. Cline, a/k/a Julie M. Packer, a/k/a Julie Camp; SHARON B. PACKER; SANDY CITY POLICE DEPARTMENT; OFFICER EVAN KELLER; DEPARTMENT OF HUMAN SERVICES, DIVISION OF CHILD AND FAMILY SERVICES, Doe Number One, a/k/a Child Protective Services, a/k/a DCFS, a/k/a CPS; DIANE MOORE, Doe Number Two, as an individual and employee of the State of Utah; CYDNEY VAIL, Doe Number Three, as an individual and employee of the State of Utah; DEPARTMENT OF HUMAN SERVICES, OFFICE OF RECOVERY SERVICES, Doe Number Four, a division of the State of Utah; WORKER # ORJR1, Doe Number Five, as an individual and employee of the State of Utah; SEAN D. REYES, Doe Number Six, Attorney General,

Defendants - Appellees.

No. 20-4086
(D.C. No. 2:19-CV-00602-TS)
(D. Utah)

ORDER AND JUDGMENT*

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* 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral

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Before **HOLMES**, **MATHESON**, and **CARSON**, Circuit Judges.

In this lawsuit, Earl and Janet Cline brought several claims under Utah and federal law. We need not detail their allegations. It is enough to say that the allegations arise from state and local affairs dating back to 2002—a divorce case, protection orders, child-abuse investigations, child-support payments, and a recent criminal charge alleging that Mr. Cline violated a protection order. The defendants fit into three groups: state defendants (the State of Utah, Department of Human Services, Diane Moore, and Cydney Vail[1]); city defendants (Sandy City Police Department and Officer Evan Keller); and private defendants (Julie McPhie, Mr. Cline's ex-wife; and Sharon Packer, McPhie's mother). After similarly grouping the defendants, the district court dismissed the case without prejudice. We affirm.

I. Jurisdiction

We first address the state defendants' argument that we lack jurisdiction over this appeal because the Clines did not timely file their notice of appeal. A timely

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estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

[1] Sean D. Reyes, the Attorney General of Utah, is also a defendant. The district court dismissed the claims against him, concluding that the Clines' amended complaint failed to allege wrongdoing by him. Because the Clines present no argument against the district court's dismissal of the claims against Reyes, they have waived any challenge to that dismissal. *See Anderson v. U.S. Dep't of Lab.*, 422 F.3d 1155, 1174 (10th Cir. 2005) ("The failure to raise an issue in an opening brief waives that issue."). And because the claims against Reyes are not at issue in this appeal, we exclude him from the group of state defendants.

notice of appeal is jurisdictional. *Yost v. Stout*, 607 F.3d 1239, 1242 (10th Cir. 2010). In a civil case where the United States is not a party, the notice of appeal must be filed "within 30 days after entry of the judgment or order appealed from." Fed. R. App. P. 4(a)(1)(A). This period is tolled, however, if a party timely moves to alter or amend the judgment under Federal Rule of Civil Procedure 59. Fed. R. App. P. 4(a)(4)(A)(iv). A motion to alter or amend a judgment is timely if it is "filed no later than 28 days after the entry of the judgment." Fed. R. Civ. P. 59(e).

The Clines filed two motions to amend the judgment under Rule 59. The first of these two motions came after the district court entered its order granting the state defendants' motion to dismiss but before the court entered a separate judgment under Federal Rule of Civil Procedure 58.[2] This motion raised "purported errors of law normally raised in a Rule 59(e) motion." *Warren v. Am. Bankers Ins. of Fla.*, 507 F.3d 1239, 1244 (10th Cir. 2007). In these circumstances, the Clines' first "Rule 59(e) motion was timely even though it was made before the separate judgment was entered." *Hilst v. Bowen*, 874 F.2d 725, 726 (10th Cir. 1989) (per curiam). Measured from the denial of that Rule 59(e) motion, their notice of appeal was timely.

[2] The motion appears after the separate judgment on the district court's docket. But the Clines filed the motion by mail, so, under local rules, they filed it on the date of its postmark, two days before the court entered the judgment. *See* D. Utah Civ. R. 5-1(d)(2).

II. Standards of Review

Because the Clines represent themselves, we construe their filings liberally. *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005). At the same time, though, we cannot take on the role of their advocate by constructing arguments and searching the record. *Id.*

The district court dismissed some of the Clines' claims under Federal Rule of Civil Procedure 12(b)(1) for lack of subject-matter jurisdiction; it dismissed others under Rule 12(b)(6) for failure to state a claim. We review these dismissals de novo. *Smith v. Plati*, 258 F.3d 1167, 1174 (10th Cir. 2001).

"To survive a Rule 12(b)(6) motion to dismiss, a plaintiff's complaint must allege sufficient facts 'to state a claim to relief that is plausible on its face.'" *Strauss v. Angie's List, Inc.*, 951 F.3d 1263, 1266 (10th Cir. 2020) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible if the complaint pleads facts that allow a "court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* We accept as true all well-pleaded factual allegations and view them in the light most favorable to the plaintiff. *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009).

III. Private Defendants

The district court concluded the Clines failed to state a federal claim against the private defendants, and it declined to exercise supplemental jurisdiction over the state-law claims against them.

The Clines argue they sufficiently pleaded claims against the private defendants under 42 U.S.C. §§ 1983 and 1985(3).[3] A § 1983 claim requires a showing that the defendant acted under color of state law. *Schaffer v. Salt Lake City Corp.*, 814 F.3d 1151, 1155 (10th Cir. 2016). A § 1985(3) claim requires a showing of a conspiracy. *Tilton v. Richardson*, 6 F.3d 683, 686 (10th Cir. 1993). The district court concluded the Clines offered only conclusory allegations of a conspiracy and of the private defendants' acting under color of state law. Although the Clines label these conclusions "somewhat outrageous," Aplts. Opening Br. at 20, they do not point to any specific facts undermining the court's analysis. They instead claim to have included "a list of facts" as an appendix to their opening brief. *Id.* Yet the attachments to their brief do not include any document identified as an appendix. In any event, what matters is their amended complaint. *See Gee v. Pacheco*, 627 F.3d 1178, 1186 (10th Cir. 2010) ("Generally, the sufficiency of a complaint must rest on its contents alone."). After reviewing it, we agree with the district court's conclusion

[3] The Clines' amended complaint did not say under which of § 1985's three subsections they proceeded. Their opening brief, however, quotes § 1985(3). *See* Aplts. Opening Br. at 22.

that the Clines failed to plead facts that could show a conspiracy or that could show the private defendants acted under color of state law.

IV. City Defendants[4]

The district court dismissed the state-law claims against the city defendants because it concluded the Clines failed to comply with the notice requirement of the Governmental Immunity Act of Utah (the Act). Compliance with the Act "is a prerequisite to vesting a district court with subject matter jurisdiction over claims against governmental entities." *Wheeler v. McPherson*, 40 P.3d 632, 635 (Utah 2002). The Supreme Court of Utah has "consistently and uniformly" demanded strict compliance with the Act. *Id*. (internal quotation marks omitted). Under the Act, before filing suit, a "person having a claim against a governmental entity, or against the governmental entity's employee for an act or omission occurring during the performance of the employee's duties, within the scope of employment, or under color of authority shall file a written notice of claim with the

[4] The city defendants suggest that, as to the claims against them, the Clines challenge the district court's order denying Rule 59(e) relief and do not challenge the court's initial dismissal order. We think the opposite is true. The Clines' appellate arguments address the city defendants' motion to dismiss, Aplts. Opening Br. at 19, and the district court's "dismissal order," *id.* at 20; *see also* Aplts. Reply Br. at 10 (arguing "the court's decision to dismiss the Sandy defendants based upon the Utah Governmental Immunity Act is an error of law and should be reversed"). Although the Clines' opening brief mentions the order denying the Rule 59(e) motions, it does so in a single sentence in the statement of the case. Aplts. Opening Br. at 5. That is not enough to raise a challenge to the district court's Rule 59(e) rulings, and the Clines have therefore waived any challenge to them. *See United States v. Martinez*, 518 F.3d 763, 768 (10th Cir. 2008).

entity." Utah Code Ann. § 63G-7-401(2). A person with a claim against a city must send the notice to the city clerk. § 63G-7-401(3)(b)(ii)(A).

The Clines argue that they complied with this notice requirement. Yet they do not claim to have sent notice to Sandy's city clerk. They instead assert that they complied by sending notice to the mayor, who, they say, had an obligation either to "notify the sender of the proper place to send it" or to "forward it on." Aplts. Opening Br. at 19. The mayor's failure to fulfill this obligation, the Clines assert, forecloses the city defendants from seeking dismissal on the ground that the Clines failed to comply with the notice requirement. But they cite no authority supporting this assertion, and we found none.[5] To the contrary, "actual notice of a claim by a governmental entity does not absolve a party of its duty to strictly comply with the Act." *Wheeler*, 40 P.3d at 637. Because the Clines did not "strictly comply with the Act's requirement that they direct and deliver their notice of claim to the [city] clerk," *id.*, the district court correctly dismissed the state-law claims against the city defendants.

The Clines correctly point out that the Act does not govern its § 1983 claim against the city defendants. *See Martinez v. California*, 444 U.S. 277, 284 n.8

[5] Although the Clines do not cite it, Utah Code Ann. § 63G-7-401(8) precludes a governmental entity from challenging the timeliness of a notice of claim under certain circumstances. But that provision does not apply here, because the city defendants did not challenge the timeliness of a notice of claim; they instead argued that the Clines failed to properly file a notice with the city at all. *See* R. at 394. Nor did the district court's ruling rely on the timeliness of any notice.

(1980). But the district court dismissed the § 1983 conspiracy claim against the city defendants not because the Clines failed to comply with the Act, but instead because they presented only conclusory allegations of a conspiracy. The district court's analysis was correct.

V. State Defendants

The district court dismissed claims against the state defendants on three alternative grounds: the *Rooker-Feldman*[6] doctrine, the *Younger*[7] abstention doctrine, and Eleventh Amendment immunity. On appeal, the Clines challenge the district court's application of the *Rooker-Feldman* and *Younger* doctrines, but not its application of Eleventh Amendment immunity—immunity that the district court concluded barred all claims against the state defendants. "If the district court states multiple alternative grounds for its ruling and the appellant does not challenge all those grounds in the opening brief, then we may affirm the ruling." *Rivero v. Bd. of Regents of Univ. of N.M.*, 950 F.3d 754, 763 (10th Cir. 2020). So we affirm the district court's decision to dismiss the claims against the state defendants without deciding whether it correctly applied the *Rooker-Feldman* and *Younger* doctrines.

VI. Default

The Clines assert the state and city defendants are "in default," Aplts. Opening Br. at 19, and ask us to "find that [the city defendants] are in default," Aplts. Reply

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[6] *See D.C. Ct. of Appeals v. Feldman*, 460 U.S. 462 (1983); *Rooker v. Fid. Tr. Co.*, 263 U.S. 413 (1923).

[7] *See Younger v. Harris*, 401 U.S. 37 (1971).

Br. at 10. Insofar as the Clines ask us to enter default judgment in their favor, we must decline. District courts, not appellate courts, may enter such judgments. *See* Fed. R. Civ. P. 55(b). Indeed, the Clines unsuccessfully sought default judgments against the state and city defendants in the district court. But we cannot conclude that they have sufficiently presented a challenge to the district court's orders denying default judgment, even though we construe their briefs liberally. They do not even mention the district court's orders, let alone develop an argument that the orders were wrong. And so we deem waived any challenge to the orders denying default judgment. *See United States v. Martinez*, 518 F.3d 763, 768 (10th Cir. 2008).

VII. Conclusion

We affirm the district court's judgment.

Entered for the Court

Joel M. Carson III
Circuit Judge