FILED
United States Court of Appeals
Tenth Circuit

October 19, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

KELLY MCGOFFNEY, Heir of the Estate of Boyd Neville Higginbotham,

Plaintiff - Appellant,

v.

VINCENT N. RAHAMAN, El Paso District Court Magistrate, in his official capacity; SHERI KING, El Paso County Clerk; CATHERINE A SEAL, El Paso County Public Teller,

Defendants - Appellees.

No. 23-1060
(D.C. No. 1:22-CV-02114-LTB-GPG)
(D. Colo.)

ORDER AND JUDGMENT[*]

Before **HARTZ**, **BALDOCK**, and **ROSSMAN**, Circuit Judges.

Plaintiff Kelly McGoffney appeals from the dismissal of her lawsuit by the United States District Court for the District of Colorado. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

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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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

I. BACKGROUND

Because Plaintiff is a pro se litigant, "we construe [her] filings liberally, but we do not act as [her] advocate." *Ford v. Pryor*, 552 F.3d 1174, 1178 (10th Cir. 2008). And because we are reviewing a dismissal of a complaint, "we accept the well-pleaded factual allegations of the complaint and construe them in the light most favorable to the plaintiff." *Ind. Pub. Ret. Sys. v. Pluralsight, Inc.*, 45 F.4th 1236, 1247 (10th Cir. 2022) (internal quotation marks omitted).

Plaintiff's father, Boyd Nevelle Higginbotham (Decedent), died in Colorado Springs, Colorado, on February 13, 2017. On March 15, 2017, Diane Evans initiated the informal probate of Decedent's estate. Ms. Evans included with the probate application a copy of a will attributed to Decedent. The probate application did not include Plaintiff as an heir. On March 23, Ms. Evans was appointed personal representative of the estate.

Plaintiff did not learn about her father's death until April 20, 2017. Upon finding out, Plaintiff filed an objection to the informal probate. Then, on June 19, Plaintiff filed a motion to intervene in the probate proceedings, asserting her status as Decedent's biological daughter. A week later, Plaintiff filed another motion seeking to revoke probate, restrict Ms. Evans's authority to convey Decedent's home, require an inventory and an accounting, and hold an evidentiary hearing.

In an order entered February 28, 2018, the probate court found that Decedent had at least five children, including Plaintiff and Ms. Evans; that "the signature on the purported will did not appear to match any of the known, notarized exemplars of

[Decedent's] signature"; and that the "signatures supplied by Ms. Evans, though not notarized, were found to appear similar to the notarized signatures and dissimilar to the purported will signature." Aplt. App. at 63 (Plaintiff's amended complaint). In light of this evidence the probate court concluded that it "could not find by a preponderance of the evidence that the will was duly executed by [Decedent]." *Id.* Accordingly, it "granted [Plaintiff's] request to revoke the informal probate of the will and adjudicated [Decedent] as intestate," although Ms. Evans remained in the role of personal representative. *Id.*

It is not entirely clear what exactly has happened since the February 2018 order,[1] but it appears that probate proceedings remain ongoing. Ms. Evans has retained her role as personal representative of the estate and, according to Plaintiff, she has reduced the value of the estate substantially.

Plaintiff filed her initial complaint in this case on August 18, 2022. In her amended complaint, submitted two months later, Plaintiff (proceeding under 42 U.S.C. § 1983) accused Defendants of providing her with insufficient notice that the probate case would be handled by a Colorado state magistrate judge, in alleged contravention of several Colorado state rules of procedure.[2] Plaintiff claimed that this failure of notice meant that the parties to the probate failed to consent to the magistrate judge's

[1] Plaintiff's original complaint goes into somewhat further detail about the chronology of later events, but "an amended complaint supersedes an original complaint and renders the original complaint without legal effect." *Predator Int'l, Inc. v. Gamo Outdoor USA, Inc.*, 793 F.3d 1177, 1181 (10th Cir. 2015) (brackets and internal quotation marks omitted).

[2] *See* Colo. R. Mag. 5(g); Colo. R. Mag. 6(e)(2)(A); Colo. R. Mag. 6(f).

presiding, thus depriving the magistrate judge of jurisdiction. Plaintiff asserted that she was thereby deprived of her rights under the Due Process Clauses of the Fifth and Fourteenth Amendments of the United States Constitution and Article II, Section 25 of the Colorado Constitution.[3] She requested injunctive relief, declaratory relief, and damages.[4]

The magistrate judge recommended dismissal under 28 U.S.C. § 1915(e)(2)(B). *See McGoffney v. Rahaman*, No. 22-cv-02114-LTB-GPG, 2022 WL 18938327, at *1 (D. Colo. Nov. 4, 2022) (*McGoffney I*). He first stated that to the extent that Plaintiff's claim under the Declaratory Judgment Act was "presented as a stand-alone claim," it "should be dismissed" because the Declaratory Judgment Act "does not create substantive rights; it merely creates a procedure by which parties may obtain relief under some other substantive theory." *Id.* at *3. Next, the magistrate judge, relying on *Weitzel v. Dep't of Commerce of State of Utah*, 240 F.3d 871, 875 (10th Cir. 2001),

[3] Although a heading for a section of the amended complaint references the First Amendment, Plaintiff never mentions the First Amendment in that section (or, for that matter, elsewhere in the amended complaint). Plaintiff also did not discuss the First Amendment claim in her objection to the magistrate judge's report and recommendation, thus failing "to preserve [the] issue for de novo review by the district court or for appellate review." *United States v. 2121 East 30th St.*, 73 F.3d 1057, 1060 (10th Cir. 1996). And even if she had timely objected in district court, her failure to mention the First Amendment in her appellate brief waived the issue in our court. *See Addo v. Barr*, 982 F.3d 1263, 1266 n.2 (10th Cir. 2020) ("Issues not raised in the opening brief are deemed abandoned or waived." (internal quotation marks omitted)).

[4] Plaintiff also requested that the district court "[a]ccept[] jurisdiction of this case [apparently referring to the probate case] keeping in view the lack of jurisdiction of all the defendants and set it for hearing at the earliest opportunity." Aplt. App. at 69. To the extent that Plaintiff asks a federal court to probate Decedent's estate, her request is barred by the probate exception to federal jurisdiction. *See Marshall v. Marshall*, 547 U.S. 293, 311–12 (2006).

recommended that the district court abstain from exercising jurisdiction over Plaintiff's claims for declaratory and injunctive relief under *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny. *See id.* at *4. And the magistrate judge recommended dismissal of Plaintiff's claims for damages because the claims against Defendants in their official capacities were barred by the Eleventh Amendment, *see id.* at *4–5, and the claims against Ms. King (the Clerk of Court for El Paso County) and Ms. Seal (the Clerk of Court for Teller County)[5] in their individual capacities were "legally frivolous" given Plaintiff's "fail[ure] to allege specific facts in the Amended Complaint that identif[ied] what each Defendant did or failed to do that allegedly violated her rights," *id.* at *5. Finally, the magistrate judge—after noting that Plaintiff "alleges [that] the state court probate proceedings are not final"—suggested that if the state-court probate proceedings *were* final, Plaintiff's claims would be barred by the *Rooker-Feldman* doctrine. *Id.*; *see D.C. Ct. of Appeals v. Feldman*, 460 U.S. 462 (1983); *Rooker v. Fidelity Tr. Co.*, 263 U.S. 413 (1923).

The district court accepted the magistrate judge's recommendations. *See McGoffney v. Rahaman*, No. 22-cv-02114-LTB-GPG, 2023 WL 2374206, at *1 (D. Colo. Jan. 4, 2023) (*McGoffney II*). Plaintiff later filed a motion to alter or amend the judgment under Fed. R. Civ. P. 59(e) or, in the alternative, for relief from the judgment under Fed. R. Civ. P. 60. The district court—construing it as a motion under

[5] Contrary to the caption of Plaintiff's complaint, Ms. King's official position is Clerk of Court for El Paso County. We presume that Ms. Seal was Clerk of Court for Teller County at the time of these events.

Rule 59(e) because it had been filed within 28 days after judgment—denied the motion on February 6, 2023. Plaintiff timely appealed.

II. DISCUSSION

We review de novo a district court's dismissal of a complaint for failure to state a claim under 28 U.S.C. § 1915(e)(2). *See Vasquez Arroyo v. Starks*, 589 F.3d 1091, 1094 (10th Cir. 2009). Plaintiff expressly sues Magistrate Judge Rahaman in his official capacity, but Plaintiff does not specify whether she is suing Ms. King and Ms. Seal in their individual capacities, official capacities, or both. We presume (in accordance with the liberal construction afforded to pro se pleadings) that Plaintiff sues Ms. King and Ms. Seal in both capacities. Also, as we understand Plaintiff's complaint, the underlying error by Defendants was the failure to comply with the requirements of the Colorado rules of court procedure that all parties to a proceeding in which a magistrate is to perform certain functions must be notified that they must consent to the magistrate's performing those functions. This failure, according to Plaintiff, violated not only state law but also the federal Constitution and caused damages to Plaintiff. She sought redress for those damages and declaratory and injunctive relief.

We hold that the district court did not err in denying relief. We need not rely on the same reasoning as the district court. "We may affirm the district court on any ground supported by the record, even one not addressed by the district court or presented on appeal," *Frey v. Town of Jackson*, 41 F.4th 1223, 1240 (10th Cir. 2022), although we must take care that doing so is fair to the appellant, *see Elkins v. Comfort*,

392 F.3d 1159, 1162 (10th Cir. 2004) (discussing appropriate considerations). We believe that doing so is appropriate here.

To begin with, Plaintiff has no valid claims under the Fifth Amendment because "[t]he Due Process Clause of the Fifth Amendment applies only to action by the federal government"—yet Plaintiff's allegations solely concern actions by state authorities. *Koessel v. Sublette Cnty. Sheriff's Dep't*, 717 F.3d 736, 748 n.2 (10th Cir. 2013).

We now turn to the remaining causes of action.

A. Damages

Plaintiff's claims for damages brought against Defendants in their official capacities are barred by the Eleventh Amendment. "[A]bsent waiver by the State or valid congressional override, the Eleventh Amendment bars a damages action against a State in federal court. This bar remains in effect when State officials are sued for damages in their official capacity." *Kentucky v. Graham*, 473 U.S. 159, 169 (1985) (citation omitted). Plaintiff has not pointed to an applicable "waiver by the State or valid congressional override" of state sovereign immunity here, nor do we perceive any. *Id.*; *see id.* at 169 n.17 (Section 1983 does not abrogate a State's Eleventh Amendment immunity). Thus, we affirm the dismissal of her damages claims against Defendants in their official capacities.

We also affirm the dismissal of Plaintiff's damages claims against Ms. King and Ms. Seal in their personal capacities. "Individual liability under § 1983 must be based on the defendant's personal involvement in the alleged constitutional violation." *Schneider v. City of Grand Junction Police Dep't*, 717 F.3d 760, 768 (10th Cir. 2013)

(brackets and internal quotation marks omitted). Nowhere in her amended complaint does Plaintiff allege facts indicating Ms. King's or Ms. Seal's "personal involvement in the alleged constitutional violation[s]." *Id.* The amended complaint simply asserts that Plaintiff failed to receive notice. But it does not allege why the court clerk's office would make the decision to send notice (does the magistrate judge direct the clerk to send notice, or does a statute or rule impose on the clerk's office a duty to send notice?), and it does not allege any personal involvement by Ms. King or Ms. Seal in the failure to provide notice to Plaintiff. Hence, Plaintiff has failed to state a claim against them.

B. Declaratory Judgment

Plaintiff seeks an order declaring that "Defendants violated the captioned Colorado Rules for Magistrates," Aplt. App. at 69, that "Defendants denied Plaintiff's rights to due process under the U.S. Constitution . . . and the Colorado Constitution," *id.* at 70, and that Defendants "are liable to Plaintiff for damages caused by their actions and/or inactions," *id.* at 67. To the extent that Plaintiff seeks declaratory judgment against the clerks in their individual capacities, those claims fail for the same reason that the damages claims failed—namely, the complaint fails to adequately allege any personal misconduct by the clerks.

As for the declaratory-judgment claims against Defendants in their official capacities, they are barred by sovereign immunity under the Eleventh Amendment. Plaintiff is barred from requesting a declaration that "Defendants denied Plaintiff's rights to due process under the U.S. Constitution," Aplt. App. at 70, because state sovereign immunity generally encompasses suits against state officials for actions "in

carrying out their official duties." *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 103 (1984). Although *Ex parte Young*, 209 U.S. 123 (1908), provides an exception to state sovereign immunity when a plaintiff alleges "an ongoing violation of federal law" and only "seek[s] relief properly characterized as prospective," *Chilcoat v. San Juan County*, 41 F.4th 1196, 1213–14 (10th Cir. 2022) (internal quotation marks omitted), "*Ex parte Young* may not be used to obtain a declaration that a state officer has violated a plaintiff's federal rights in the past," *id.* at 1215 (internal quotation marks omitted). And as for the requested declaration that "Defendants violated the captioned Colorado Rules for Magistrates," Aplt. App. at 69, claims against state officials for violations of state law do not come within the *Ex parte Young* exception, whether they seek prospective or retroactive relief. *See Pennhurst*, 465 U.S. at 106.

These same principles also bar Plaintiff's request for an order declaring "Defendants' practice unlawful, and that Defendants[] are liable to Plaintiff for damages caused by their actions and/or inactions," Aplt. App. at 67.[6]

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[6] Even if this last request could be construed as seeking prospective relief, the complaint contains no allegations of a continuing controversy arising from an ongoing failure by Defendants to follow the rules. "This court has explained that a plaintiff cannot maintain a declaratory or injunctive action unless he or she can demonstrate a good chance of being likewise injured by the defendant in the future." *McAlpine v. Thompson*, 187 F.3d 1213, 1216 (10th Cir. 1999) (brackets and internal quotation marks omitted). The complaint does not suggest that the failure to give notice continues to be a problem in El Paso or Teller county, and nothing in the complaint suggests that Plaintiff, a resident of Indiana, expects to engage in future litigation in either county.

C. Injunctive Relief

Finally, we address Plaintiff's claim for injunctive relief. The district court relied on *Younger* abstention to dismiss that claim. *See McGoffney II*, 2023 WL 2374206, at *2; *McGoffney I*, 2022 WL 18938327, at *4. In doing so the court invoked a 2001 opinion of this court. In 2013, however, the Supreme Court adopted a tighter expression of *Younger* abstention than it had in the past. In *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69 (2013), it limited abstention to only three contexts: "[1] state criminal prosecutions, [2] civil enforcement proceedings, and [3] civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions." *Id.* at 73 (internal quotation marks omitted); *see id*. at 72 (requiring that civil proceedings in second category be "akin to criminal prosecutions"). A probate proceeding obviously does not fit either of the first two contexts. As for "civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions," *id*. at 73, the Court illustrated that context by pointing to a "civil contempt order," *id*. at 79, or a "requirement for posting bond pending appeal," *id*. Plainly, this third context does not encompass run-of-the-mill probate proceedings. Hence, *Younger* abstention would be improper here.[7]

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[7] Based on Plaintiff's description of the probate case as still ongoing at the time that she filed suit, we agree with the district court that applying the *Rooker-Feldman* doctrine would be inappropriate. *See Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005) ("The *Rooker-Feldman* doctrine . . . is confined to . . . cases brought by state-court losers complaining of injuries caused by state-court judgments

Nevertheless, dismissal of the claim for injunctive relief was proper. To begin with, the Eleventh Amendment bars Plaintiff's request for injunctive relief predicated on alleged violations of state law. *See Pennhurst*, 465 U.S. at 106.

As for Plaintiff's claim under § 1983 for injunctive relief for violation of federal law, § 1983 has a specific provision barring the claim. The provision states that "in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." All three defendants are judicial officers. *See Lundahl v. Zimmer*, 296 F.3d 936, 939 (10th Cir. 2002); *Landrith v. Gariglietti*, 505 F. App'x 701, 702–03 (10th Cir. 2012) (unpublished) (Gorsuch, J.) (clerks are judicial officers for purposes of § 1983). And Plaintiff has not alleged that a declaratory decree was violated or that justifiable prospective declaratory relief is unavailable. *See Knox v. Bland*, 632 F.3d 1290, 1292 (10th Cir. 2011) (denying injunctive relief against state judge where appellant did "not show[] that either" "a declaratory decree was violated or declaratory relief was unavailable"); *Justice Network Inc. v. Craighead Cnty.*, 931 F.3d 753, 762–64 (8th Cir. 2019) (rejecting plaintiff's request for injunctive relief against state judges on the ground that § 1983's conditions had not been met, while simultaneously rejecting the plaintiff's declaratory-relief claims because they sought only a declaration that past conduct was illegal (citing *Lawrence v. Kuenhold*, 271 F. App'x 763, 766 n.6 (10th Cir. 2008))).

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rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments.").

III. CONCLUSION

We **AFFIRM** the district court's judgment. We **GRANT** Plaintiff's motion to proceed *in forma pauperis* on appeal. We **DENY** Plaintiff's motions requesting rehearing or reconsideration of our decision not to require the Defendants to file response briefs.

Entered for the Court

Harris L Hartz
Circuit Judge