

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Philip A. Brimmer

Civil Action No. 17-cv-02184-PAB-SKC

PAUL J. GERSTENBERGER and
CELERINA B. GERSTENBERGER,

Plaintiffs,

v.

INTERNAL REVENUE SERVICE (IRS),

Defendant.

ORDER

This matter comes before the Court *sua sponte* on review of the order, Docket No. 42, entered on March 18, 2019, wherein the Court dismissed this action with prejudice. See Docket No. 42 at 6.

The Court finds that it erroneously dismissed this case *with prejudice* upon its finding that granting plaintiffs leave to amend their complaint would be futile. In an earlier order, the Court accepted the magistrate judge's recommendation and dismissed plaintiffs' claims without prejudice for lack of subject matter jurisdiction. See Docket No. 26 at 2; Docket No. 23 at 14. Futility of amendment does not convert a dismissal for lack of subject matter jurisdiction into a dismissal with prejudice. See *Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1219 (10th Cir. 2006) (holding that district court erred by applying "the futility concept to convert a dismissal that should have been without prejudice into one with prejudice"). As the Tenth Circuit has explained, "denial of leave to amend and dismissal with prejudice are two separate

concepts.” *Id.* Dismissal with prejudice is only appropriate “where a complaint fails to state a claim under Rule 12(b)(6) *and* granting leave to amend would be futile.” *Id.* (emphasis added).

Wherefore, it is

ORDERED that the Court’s March 18, 2019 order, Docket No. 42, is amended as follows:

1. Plaintiffs’ Request for Reconsideration and Reinstatement of Case Citing New Evidence and Legal Representation [Docket No. 41], which the Court construes as an objection to the Recommendation of the United States Magistrate Judge [Docket No. 38], is **OVERRULED**.

2. The Recommendation of United States Magistrate Judge [Docket No. 38] is **ACCEPTED** in part and **REJECTED** in part as reflected in this order and the order, Docket No. 42, entered on March 18, 2019.

3. Plaintiffs’ Motion for Leave to File Amended Complaint [Docket No. 24] is **DENIED**.

4. This case is dismissed without prejudice.

5. Plaintiffs Motion Requesting Partial Summary Judgment for Immediate Removal of Unsupported and Undocumented Lien on Plaintiffs Primary Residence [Docket No. 31] is **DENIED** as moot.

6. Within 14 days of the entry of this order, defendant may have its costs by filing a Bill of Costs with the Clerk of the Court.

7. This case is closed.

DATED March 21, 2019.

BY THE COURT:

s/Philip A. Brimmer
PHILIP A. BRIMMER
Chief United States District Judge