

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

HARRIET NICHOLSON, Plaintiff,

vs.

THE BANK OF NEW YORK MELLON
fka THE BANK OF NEW YORK
TRUSTEE FOR THE
CERTIFICATEHOLDERS OF CWMBS,
INC., CWMBS REFORMING LOAN
REMIC TRUST CERTIFICATES SERIES
005-R2, Defendant.

Civil Action No. 1:22-cv-03177-PGG-KHP

**PLAINTIFF'S RULE 60(b)(4)
MOTION FOR RELIEF FROM VOID
ORDER FOR LACK OF
JURISDICTION**

**PLAINTIFF'S MOTION FOR RELIEF FROM A VOID ORDER FOR
LACK OF SUBJECT MATTER JURISDICTION**

TO THE COURT:

Now comes Plaintiff Harriet Nicholson and files Plaintiff's timely Rule 60(b)(4) Motion for Relief from a Void Order for a lack of subject matter jurisdiction and would show unto the court the following:

Nicholson seeks relief from August 28, 2023 Order pursuant to FRCP 60(b)(4):

Rule 60. Relief from a Judgment or Order

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: (4) the judgment is void..

The district court has no discretion [in ruling on a 60(b)(4) motion], the judgment is either void or it is not. *Central Vermont Public Service Corp. v. Herbert*, 341 F.3d 186, 189 (C.A.2 (Vt.),2003) quoting *Recreational Properties, Inc. v. Southwest Mortgage Serv. Corp.*, 804 F.2d 311, 314 (5th Cir.1986).

On August 28, 2023, this court signed an Order (Dkt. 105) granting Defendant's Motion to Dismiss/Lack of Jurisdiction (Dkt. 53) with prejudice filed by The Bank of York Mellon.

08/28/2023	105	ORDER for 102 Motion to Adjourn Conference filed by Harriet Nicholson, 42 Motion for Partial Summary Judgment filed by Harriet Nicholson, 59 Motion for Leave to File Document, filed by Harriet Nicholson, 53 Motion to Dismiss/Lack of Jurisdiction filed by The Bank of New York Mellon , 83 Report and Recommendations. The R&R is adopted in part as set forth above. Defendant's motion to dismiss is granted , and Plaintiffs motion for leave to amend is denied. Plaintiffs motion for partial summary judgment (Dkt. No. 42) and motion to set a status conference (Dkt. No. 102) are denied as moot. The Clerk of Court is directed to terminate the motions (Dkt. Nos. 42, 53, 59, 102), and to close this case. Case Stay Lifted. (Signed by Judge Paul G. Gardephe on 8/28/2023) (ate) (Entered: 08/28/2023)
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This court held in *Nicholson v. Bank of New York Mellon Trustee for Certificate Holders of CWMBS, Inc., CWMBS Reforming Loan Remic Trust Certificates Series 2005-R2*, 2023 WL 5526715, at *8 (S.D.N.Y., 2023):

Judge Parker also finds that the SAC should be dismissed under Fed. R. Civ. P. 12(b)(1), **because this Court lacks subject matter jurisdiction** to hear Plaintiff's claims under the Rooker-Feldman doctrine.

If Rooker–Feldman applies, a res judicata claim must not be reached. *Harris v. New York State Dept. of Health*, 202 F.Supp.2d 143, 160 (S.D.N.Y.,2002)

“Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.” *Ex parte McCardle*, 7 Wall. 506, 514, 19 L.Ed. 264 (1868). *Steel Co. v. Citizens for a Better Environment*, 118 S.Ct. 1003, 1012, 523 U.S. 83, 94 (U.S.Ill., 1998)

It is black letter law and well-established law in this Court¹, a federal court generally may not rule on the merits of a case without first determining that it has jurisdiction over the category of claim in suit (subject-matter jurisdiction) and the parties (personal jurisdiction). *Monterey Bay Military Housing, LLC v. Ambac Assurance Corporation*, 531 F.Supp.3d 673, 699 (S.D.N.Y., 2021) quoting *Sinochem Int'l. Co. Ltd. v. Malay. Int'l. Shipping Corp.*, 549 U.S. 422, 430-31, 127 S.Ct. 1184, 167 L.Ed.2d 15 (2007).

WHEREFORE, the court should vacate the void August 28, 2023, Order for lack of subject matter jurisdiction pursuant to FRCP 60(b)(4).

Respectfully submitted,
/s/ Harriet Nicholson

CERTIFICATE OS SERVICE

I certify counsel of record was served when e-filing via pacer on November 8, 2023.

/s/ Harriet Nicholson

¹ See Ex. A

EX. A

MONTEREY BAY MILITARY HOUSING, LLC v. AMBAC

531 F. Supp. 3d 673 - Dist. Court, SD New York, 2021 - Google Scholar

... PAUL G. **GARDEPHE**, United States District Judge ... 2d 15 (2007)

"[A] **federal court generally may not rule on the merits of a case without first determining that it has jurisdiction** over the ...

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Hylton v. JP Morgan Chase Bank, NA

338 F. Supp. 3d 263 - Dist. Court, SD New York, 2018 - Google Scholar

... ORDER. Paul G. **Gardephe**, United States District Judge ...

"[A] **federal court generally may not rule on the merits of a case without first determining that it has jurisdiction** over the category ...

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AYEKABA v. MBA

Dist. Court, SD New York, 2020 - Google Scholar

... ORDER. PAUL G. **GARDEPHE**, District Judge ...

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KOTLYARSKY v. United States Department of Justice

Dist. Court, SD New York, 2022 - Google Scholar

... ORDER. PAUL G. **GARDEPHE**, District Judge ...

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Walpert v. Jaffrey

127 F. Supp. 3d 105 - Dist. Court, SD New York, 2015 - Google Scholar

... PAUL G. **GARDEPHE**, District Judge ... No. 69)). LEGAL STANDARD.

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Brown v. KERRY INC.

Dist. Court, SD New York, 2022 - Google Scholar

... March 7, 2022. ORDER. PAUL G. **GARDEPHE**, District Judge ...

"[A] **federal court generally may not rule on the merits of a case without first determining that it has jurisdiction** over the ...

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Hoffman v. CITY COLLEGE OF NEW YORK

Dist. Court, SD New York, 2021 - Google Scholar

... PAUL G. **GARDEPHE**, District Judge ... A. Rule 12(b)(1) Motion.

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[Cruz v. New York City Department of Education](#)

Dist. Court, SD New York, 2020 - Google Scholar

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[NEXT GENERATION TECHNOLOGY, INC. v. JADDOU](#)

Dist. Court, SD New York, 2023 - Google Scholar

... March 18, 2023. ORDER. PAUL G. **GARDEPHE**, District Judge ...

"[A] **federal court generally may not rule on the merits of a case without first determining that it has jurisdiction** over the ...

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[Thompson v. Elev8 CENTER NEW YORK, LLC](#)

Dist. Court, SD New York, 2023 - Google Scholar

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[YING YU LIU v. Wolf](#)

Dist. Court, SD New York, 2020 - Google Scholar

... May 30, 2020. ORDER. PAUL G. **GARDEPHE**, District Judge ...

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[Hylton v. JP Morgan Chase Bank, NA](#)

Dist. Court, SD New York, 2018 - Google Scholar

... ORDER. PAUL G. **GARDEPHE**, District Judge ...

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[GOTTESFELD v. Anderson](#)

Dist. Court, SD New York, 2020 - Google Scholar

... ORDER. PAUL G. **GARDEPHE**, District Judge ...

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[NEW CANAAN CAPITAL MANAGEMENT, LLC v. OZADO PARTNERS LLC](#)

Dist. Court, SD New York, 2017 - Google Scholar

... PAUL G. **GARDEPHE**, District Judge ... I. LEGAL STANDARD.

"[A] **federal court generally may not rule on the merits of a case without first determining that it has jurisdiction** over the ...

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[YS GM MARFIN II LLC v. FOUR WOOD CAPITAL ADVISORS, LLC](#)

Dist. Court, SD New York, 2023 - Google Scholar

... PAUL G. **GARDEPHE**, District Judge ... A. Fed. R. Civ. P. 12(b)(1).

"[A] **federal court generally may not rule on the merits of a case without first determining that it has jurisdiction** over the ...

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[Reed v. Luxury Vacation Home LLC](#)

632 F. Supp. 3d 489 - Dist. Court, SD New York, 2022 - Google Scholar

... ORDER. PAUL G. **GARDEPHE**, United States District Judge ...

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ELGHOSSAIN v. BANK AUDI SAL

Dist. Court, SD New York, 2023 - Google Scholar

... ORDER. PAUL G. **GARDEPHE**, District Judge ...

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LAWYERS COMMITTEE FOR 9/11 INQUIRY, INC. v. Barr

Dist. Court, SD New York, 2021 - Google Scholar

... March 24, 2021. ORDER. PAUL G. **GARDEPHE**, District Judge ...

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BALKANLI v. PUBLIC STORAGE

Dist. Court, ED New York, 2018 - Google Scholar

... Paul G. **Gardephe**, United States District Judge ...

"[A] **federal court generally may not rule on the merits of a case without first determining that it has jurisdiction** over the category of claim ...

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Reed v. LUXURY VACATION HOME LLC

Dist. Court, SD New York, 2022 - Google Scholar

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Wiggins v. UNILEVER UNITED STATES, INC.

Dist. Court, SD New York, 2023 - Google Scholar

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Wiggins v. UNILVER UNITED STATES, INC.

Dist. Court, SD New York, 2023 - Google Scholar

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Leckie v. City of New York

Dist. Court, SD New York, 2023 - Google Scholar

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SALAMENO v. BRITTANY RAWLINGS

Dist. Court, SD New York, 2021 - Google Scholar

... March 22, 2021. ORDER. PAUL G. **GARDEPHE**, District Judge ...

"[A] **federal court generally may not rule on the merits of a case without first determining that it has jurisdiction** over the ...

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Seaman v. NATIONAL COLLEGIATE STUDENT LOAN TRUST
2007-2

Dist. Court, SD New York, 2023 - Google Scholar

... PAUL G. GARDEPHE, District Judge ...

"[A] federal court generally may not rule on the merits of a case without first determining that it has jurisdiction over the category of claim in suit ([i]e ...

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MONTEREY BAY MILITARY HOUSING, LLC v. AMBAC
ASSURANCE CORPORATION

Dist. Court, SD New York, 2021 - Google Scholar

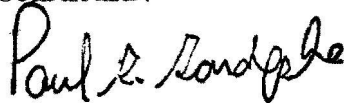
... PAUL G. GARDEPHE, District Judge ... 549 US 422, 430-31 (2007)

("[A] federal court generally may not rule on the merits of a case without first determining that it has jurisdiction over the ...

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MEMO ENDORSED: While this Court did not reach a holding on the Rooker-Feldman doctrine in its August 28, 2023 Order granting Defendant's motion to dismiss, as this Court explained in that Order: (1) the Second Circuit held in Hunter v. McMahon, 75 F.4th 62 (2d Cir. 2023) that "[w]hen an appeal remains pending in state court, the state proceedings have not ended and Rooker-Feldman does not apply," *id.* at 65; and (2) Plaintiff filed the instant action on April 18, 2022, the same day as the Texas Court of Appeals' order denying Plaintiff's "motion to set aside" its March 31, 2022 decision affirming the Texas trial court's order granting Defendant summary judgment in her previous action, and more than two months before the Texas Court of Appeals' mandate was issued on June 30, 2022. See Nicholson v. Bank of New York Mellon Tr. for Certificate Holders of CWMBS, Inc., CWMBS Reforming Loan Remic Tr. Certificates Series 2005-R2, No. 22CIV3177PGGKHP, 2023 WL 5526715, at *8 n.6 (S.D.N.Y. Aug. 28, 2023) (citing Texas Court of Appeals Docket Sheet (Dkt. No. 84) at 5-6). Given the Second Circuit's decision in McMahon and the timing of the instant case as compared to Plaintiff's appeal in Texas, there was no basis in the record to conclude that the Rooker-Feldman doctrine applied, and therefore no basis to doubt this Court's subject-matter jurisdiction. Accordingly, this Court did in fact properly exercise its jurisdiction in reaching the res judicata issue raised by Defendant's Rule 12(b)(6) motion to dismiss. Pro se Plaintiff's contention that this Court's August 28, 2023 Order was "void . . . for lack of subject matter jurisdiction" (Nov. 8, 2023 Pltf. Ltr. (Dkt. No. 110) at 3) is therefore incorrect, and her motion for relief from that Order is denied. The Clerk of Court is directed to terminate the motions at Dkt. Nos. 110 and 111.

SO ORDERED.



Paul G. Gardephe
United States District Judge

Dated: November 10, 2023