

2009 WL 2194522

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United States District Court,  
M.D. Pennsylvania.

Florence R. PARKER, Plaintiff,

v.

PENNSTAR BANK, NBT, et al., Defendants.

No. 3:09-CV-0490. | July 22, 2009.

**Attorneys and Law Firms**

Florence R. Parker, East Orange, NJ, pro se.

Joseph L. Denaples, Nogi Appleton Weiberger & Wren PC,  
Scranton, PA, for Defendants.**Opinion****MEMORANDUM**

A. RICHARD CAPUTO, District Judge.

\*1 Presently before the Court is Report and Recommendation (“R & R”) of Magistrate Judge J. Andrew Smyser in the above-captioned matter (Doc. 38) as well as the Brief in Objection to the R & R by Defendants Pennstar Bank, NBT, David M. Gregory, Esq., Kathy Black, and LynDa Starnes (sued as “Lyda Sterns”) (Doc. 40). For the reasons stated below, the Court will overrule Defendants’ objections and adopt the Magistrate Judge’s recommendations.

**BACKGROUND****I. Factual & Procedural History**

*Pro se* Plaintiff Florence Parker initiated the present civil suit with a complaint filed on October 9, 2008 in the U.S. District Court for the District of New Jersey. (Doc. 1.) Parker’s original complaint alleges a number of civil rights claims pursuant to 42 U.S.C. § 1983 and § 1985 as well as several state law claims. Parker filed an amended complaint on October 27, 2008, prior to the filing of any responsive pleadings or motions. (Doc. 5.) The amended complaint includes none of the claims from Parker’s original complaint, but instead raises several civil claims pursuant to the Racketeer Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. §§ 1961 *et seq.*<sup>1</sup>

Defendant Pennstar Bank, NBT (“Pennstar”), its attorney, David Gregory, and certain of its employees, Kathy Black and LynDa Starnes,<sup>2</sup> are among a number of Defendants that Parker alleges engaged in an enterprise to deprive her of certain rights and property, including a 24.7 acre parcel of real estate in Wayne County, Pennsylvania. Parker had earlier received a seventy-five thousand dollar (\$75,000) home equity loan from Pennstar, secured by this property. (Ex. A, Doc. 16.) On October 9, 2007, Pennstar filed a mortgage foreclosure proceeding against Parker in the Court of Common Pleas of Wayne County, Pennsylvania, alleging default on repayment of the loan. (*Id.*) This action resulted in entry of a judgment in mortgage foreclosure against Parker and in favor of Pennstar for eighty-one thousand, two hundred twenty-nine dollars and fifty-nine cents (\$81, 229.59). (Ex. M, Doc. 16.)

On December 18, 2008, Defendants Pennstar, Gregory, Black, and Starnes filed a motion to dismiss Parker’s federal court action. (Doc. 16.) The motion argues for dismissal based on a lack of personal jurisdiction, or, in the alternative, for a change of venue to the U.S. District Court for the Middle District of Pennsylvania. It also argues for dismissal based on principles of *res judicata*. Judge Hochberg of the District of New Jersey granted the motion to transfer the action to this Court by Order of March 12, 2009. (Doc. 24.) She did not address the motion to dismiss on *res judicata* principles.

On January 6, 2009, prior to the action’s transfer, Parker filed a motion for sanctions under Federal Rule of Civil Procedure 11. (Doc. 19.) Parker requests sanctions on the grounds that the Wayne County mortgage foreclosure action was frivolous and initiated in bad faith. That motion was not addressed by the District of New Jersey and is pending here.

\*2 On March 26, 2009, Magistrate Judge Smyser issued an Order directing Parker to show cause why certain as yet unserved Defendants should not be dismissed from the action pursuant to Federal Rule of Civil Procedure 4(m). (Doc. 28.) Parker failed to respond to the Order.

On April 28, 2009, Defendants Pennstar, Gregory, Black, and Starnes filed a motion for involuntary dismissal of Parker’s action for failure to prosecute, pursuant to Federal Rule of Civil Procedure 41(b). (Doc. 36.) Defendants move for dismissal on the grounds that they have been prejudiced by Parker’s failure to respond to their correspondence,

communication, or court filings, or to meaningfully pursue her action.

## II. Report and Recommendation & Objections

Magistrate Judge Smyser's R & R addresses three issues. First, he addresses Pennstar, Gregory, Black, and Starnes' motion to dismiss based on *res judicata* principles. (Doc. 16.) He concludes that Parker's claims are not precluded by the earlier Wayne County mortgage foreclosure action and therefore recommends denying Defendants' motion to dismiss on those grounds. Second, he addresses Parker's failure to comply with his order to show cause why the complaint should not be dismissed as to unserved defendants and recommends dismissal of these parties pursuant to Federal Rule of Civil Procedure 4(m). The Magistrate Judge notes that the issue of Parker's failure to serve a number of defendants was raised in Defendants Pennstar, Gregory, Black, and Starnes' motion for involuntary dismissal, but makes no recommendation for disposition of this motion. Finally, he addresses Parker's motion for sanctions. (Doc. 19.) He concludes that the motion lacks merit and recommends it be denied.

Parker filed no objections to the R & R.

Defendants Pennstar, Gregory, Black, and Starnes filed a Brief in Objection to the R & R, raising two objections. (Doc. 40.) First, they object to the recommended denial of their motion to dismiss based on *res judicata* principles. Defendants concede that the Magistrate Judge accurately set forth the applicable law, but argue that he erred in its application. Second, Defendants object to "the recommended disposition of defendants' motion for involuntary dismissal pursuant to Federal Rule of Civil Procedure 41(b)." (Defs.' Br. in Objection 7, Doc. 40.) Defendants apparently believe that, because he made reference to the motion but did not discuss Rule 41(b), the Magistrate Judge implicitly recommends denial. Parker did not file a response to Defendants' objections.

## LEGAL STANDARD

Where objections to a magistrate judge's report are filed, the Court must conduct a *de novo* review of the contested portions of the report, 28 U.S.C. § 636(b)(1)(C), *Sample v. Diecks*, 885 F.2d 1099, 1106 n. 3 (3d Cir.1989), provided the objections are both timely and specific, *Goney v. Clark*, 749

F.2d 5, 6-7 (3d Cir.1984). In its *de novo* review, the Court may accept, reject, or modify, in whole or in part, the factual findings or legal conclusions of the magistrate judge. 28 U.S.C. § 636(b)(1)(C); *Owens v. Beard*, 829 F.Supp. 736, 738 (M.D.Pa.1993) (McClure, J.). Although the review is *de novo*, the statute permits the Court to rely on the recommendations of the Magistrate Judge to the extent it deems proper. See *United States v. Raddatz*, 447 U.S. 667, 675-76, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980) ("Congress intended to permit whatever reliance a district judge, in the exercise of sound judicial discretion, chose to place on a magistrate's proposed findings and recommendations"); *Goney*, 749 F.2d at 6-7; *Ball v. U.S. Parole Comm'n*, 849 F.Supp. 328, 330 (M.D.Pa.1994) (Kosik, J.). Uncontested portions of the report may be reviewed at a standard determined by the district court. See *Thomas v. Arn*, 474 U.S. 140, 154, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985) (the statute neither prevents nor requires a particular standard if no objections are filed); *Goney*, 749 F.2d at 7. At the very least, the Court should review uncontested portions for clear error. See, e.g., *Cruz v. Chater*, 990 F.Supp. 375, 376-77 (M.D.Pa.1998) (Venaskie, J.) (citing Advisory Committee notes on Federal Rule of Civil Procedure 72(b), implementing 28 U.S.C. § 636(b)(1)(C)).

## DISCUSSION

### I. Recommendations with Objection

#### A. Motion to Dismiss on Res Judicata Principles

\*3 Defendants Pennstar, Gregory, Black, and Starnes object to the recommended denial of their motion to dismiss on *res judicata* principles. Defendants argue that Parker's claims against Pennstar are barred under the doctrine of *res judicata* and her claims against Gregory, Black, and Starnes are precluded under the doctrine of collateral estoppel.

As an initial matter, the Court must define the scope of Parker's claims, as the record reflects some confusion on this point. Parker filed her original complaint on October 9, 2009. (Doc. 1.) Prior to any response by a defendant, Parker filed an amended complaint on October 27, 2008. (Doc. 5.) Pursuant to Federal Rule of Civil Procedure 15(a) (A), Parker had the right to file an amended complaint once as of course before being served with a responsive pleading. However, Parker included a paragraph in her amended complaint asserting that: "All counts are incorporated within this amended complaint and with the original civil complaint filed October 9, 2008." (Am.Compl.4.)

Parker may not incorporate by reference the claims of her original pleading into her amended complaint. “An amended complaint supercedes the original version in providing the blueprint for the future course of a lawsuit.” *Snyder v. Pascack Valley Hosp.*, 303 F.3d 271, 276 (3d Cir.2002). Thus, the amended pleading must include both the claims previously asserted and the new claims a plaintiff seeks to add. *Hummel v. Care*, No. 08-cv-1567, 2009 U.S. Dist. LEXIS 26047, at \*2, 2009 WL 813976 (M.D.Pa. Mar. 27, 2009) (Conner, J.). Parker's claims are thus limited to those raised in her amended complaint, namely, to her several civil RICO claims.

To determine whether Parker's RICO claims against Defendants are barred by preclusion principles, this Court must look to state preclusion law. *See Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 380, 105 S.Ct. 1327, 84 L.Ed.2d 274 (1985) (“The preclusive effect of a state court judgment in a subsequent federal lawsuit generally is determined by the full faith and credit statute [28 U.S.C. § 1738] ... Section 1738 embodies concerns of comity and federalism that allow the States to determine ... the preclusive effect of judgments in their own courts.”)

Under Pennsylvania law, the concept of *res judicata* “encompasses two related, yet distinct principles: technical *res judicata* and collateral estoppel.” *Stilp v. Pennsylvania*, 910 A.2d 775, 783 (Pa.Comm. Ct.2006).

Technical *res judicata* provides that where a final judgment on the merits exists, a future lawsuit on the same cause of action is precluded. Collateral estoppel acts to foreclose litigation in a subsequent action where issues of law or fact were actually litigated and necessary to a previous final judgment.

*Id.* (citations omitted).

For technical *res judicata* to apply, the following four (4) factors must be present: (1) identity of the thing sued upon or for; (2) identity of the causes of action; (3) identity of the persons or parties to the action; and (4) identity of the quality or capacity of the parties suing or being sued. *Id.* (citations omitted).

\*4 Technical *res judicata* does not bar Parker's RICO claims against Pennstar because there is no identity of causes

of action between this and the Wayne County mortgage foreclosure action. “Generally, causes of action are identical when the subject matter and the ultimate issues are the same in both the old and new proceedings.” *Id.* The state mortgage foreclosure action presented a breach of contract issue. The elements of a RICO claim do not raise the same issue.<sup>3</sup> Moreover, the subject matter of the two suits is not the same. Both actions involve the 24.7 acre parcel of real estate in Wayne County deeded to Parker, but it features differently in the two cases. In the state court action, Pennstar alleged a right to foreclose on the property because it secured the defaulted debt. At the heart of Parker's RICO allegations is the contention that the moving defendants conspired with other defendants to deprive her of her property, including the parcel, through illegal means. While there is some overlap between Parker's factual allegations here and allegations she raised as a defendant in the state action, they form only part of Parker's much broader allegations in the present action.<sup>4</sup>

Defendants additionally argue that Parker should be barred by technical *res judicata* because she did not raise her present claims among her counterclaims to the state action. Defendants correctly note, “[*res judicata* applies to claims that were actually litigated as well as those matters that should have been litigated.” *Id.* “A party must raise all matters related to an issue at the first opportunity or be forever barred from raising them again.” *Winpenny v. Winpenny*, 434 Pa.Super. 348, 643 A.2d 677, 679 (Pa.Super.Ct.1994). However, Parker alleges a plan by multiple defendants to obtain her property covering a time period prior to, including, and *after* the state court litigation. Indeed, she alleges that the state court action itself was instituted in order to coerce her. With these allegations in mind, it cannot be said that Parker's first opportunity to raise her RICO claims arose in the course of the state action. Because the state court and present actions do not present identical causes of action, the Court will deny Defendants' motion as to their technical *res judicata* argument.

Defendants next argue that Parker's claims against Gregory, Black, and Starnes are precluded under the doctrine of collateral estoppel. Collateral estoppel, also known as issue preclusion, “forecloses re-litigation in a later action, of an issue of fact or law which was actually litigated and which was necessary to the original judgment.” *Hebden v. Workmen's Comp. Appeal Bd.*, 534 Pa. 327, 632 A.2d 1302, 1304 (Pa.1993) (quoting *City of Pittsburgh v. Zoning Bd. of Adjustment of Pittsburgh*, 522 Pa. 44, 559 A.2d 896, 901 (Pa.1989)) (internal quotation marks omitted). Defendants

argue that several issues raised by Parker as a defendant to the state action must be precluded from relitigation here, including the following allegations: (1) improper service of court filings in the Wayne County action on Parker; (2) failure to provide her adequate notice under state law of Pennstar's intent to foreclose; and (3) fraudulent modification of the loan contract by Pennstar.<sup>5</sup>

\*5 Relitigation of an issue of fact or law determined in a prior proceeding is precluded under the doctrine of collateral estoppel if five requirements are met:

- (1) the issue decided in the prior case is identical to the one presented in the later action;
- (2) there was a final adjudication on the merits;
- (3) the party against whom the plea is asserted was a party or in privity with a party in the prior case;
- (4) the party or person privy to the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding; and
- (5) the determination in the prior proceeding was essential to the judgment.

*Erisco Indus. v. Workers' Comp. Appeal Bd.*, 955 A.2d 1065, 1069 (Pa.Commw.Ct.2008) (citing *Office of Disciplinary Counsel v. Kiesewetter*, 585 Pa. 477, 889 A.2d 47 (Pa.2005)).

After reviewing the record of the state action, as presented on this record by the parties, the Court cannot conclude whether the issues identified by Defendants were considered by the state court and thus were actually litigated and essential to the judgment. Defendants are correct that Parker raised the these issues in the course of the Wayne County action. Parker effectively acknowledges this point in her amended complaint. (*See* Am. Compl. ¶¶ 12-25.) However, the state court record does not indicate whether these issues were before the court when it ruled on Pennstar's mortgage foreclosure claim. This is largely due to the confusing posture in which Parker raised them. She first raised the issues of improper foreclosure notice and modification of the loan contract, styled as counterclaims, with her answer to Pennstar's complaint in mortgage foreclosure. (Gregory Aff., Ex. D, Doc. 16.) When Pennstar later moved for summary judgment on its claim and requested oral argument, the state court issued notice of the argument and required parties to submit briefs. (*Id.* at Exs. H, I, J.) Parker filed a brief titled "Argument for Summary Judgment and Dismissal with

Prejudice for Plaintiff's Egregious Acts," in which she raises the three identified issues and purports to move for summary judgment. (Ex. E, Doc. 40.) It is not clear whether this filing is intended as a brief in opposition to Pennstar's motion, a cross-motion for summary judgment on Pennstar's claim, or a motion for summary judgment on her counterclaims. After Parker's failure to appear at oral argument, the state court entered an order granting Pennstar's motion for summary judgment without opinion, but did not dispose of or otherwise discuss the purported counterclaims. (Gregory Aff., Ex. L.) It is impossible to discern from the order whether the court considered the issues raised by Parker in her counterclaims or brief in coming to its decision.

Defendants argue that summary judgment on the mortgage foreclosure action would have been precluded if the state court credited Parker's arguments that she was improperly served, that she received inadequate notice of intent to foreclose, or that the loan contract was improperly modified. However, it is also possible that the state court did not view Parker's arguments as pled, argued, or otherwise raised *as defenses to Pennstar's claim*-given the confused posture in which she raised these issues-and did not consider them in its disposition of Pennstar's motion for summary judgment. The record simply does not shed light on how the state court understood Parker's counterclaims and brief to relate to Pennstar's claim, on which it entered judgment. Because the Court cannot determine whether the identified issues were finally decided by the state court and essential to its judgment, Defendants motion will be denied as to the collateral estoppel argument.

\*6 For the foregoing reasons, the Court will adopt Magistrate Judge Smyer's recommendation to deny Defendants Pennstar, Gregory, Black, and Starnes' motion to dismiss on preclusion principles. (Doc. 16.)

#### ***B. Motion for Involuntary Dismissal Pursuant to Federal Rule of Civil Procedure 41(b)***

Defendants Pennstar, Gregory, Black, and Starnes object to "the recommended disposition of defendants' motion for involuntary dismissal pursuant to Federal Rule of Civil Procedure 41(b)." (Defs.' Br. in Objection 7.) Defendants Brief in Objection argues in favor of dismissal of Parker's action on Rule 41(b) grounds.<sup>6</sup> Though the R & R does not discuss Rule 41(b) or explicitly recommend any disposition of the relevant motion, Defendants apparently believe that

Magistrate Judge reaches and implicitly recommends its denial.

The Court disagrees with Defendants that the R & R recommends any disposition of their motion for involuntary dismissal. Though mentioned in the R & R, the motion was not directly addressed and appears to remain open. Magistrate Judge Smyser notes that the existence of yet unserved defendants was raised in Defendants' motion, but also notes that the issue was ripe prior to its filing based on Parker's failure to comply with his order to show cause. (R & R at 4, Doc. 38.) He then specifically recommends dismissal of the unserved defendants based on Parker's failure to comply with his March 26 Order, pursuant to Federal Rule of Civil Procedure 4(m).<sup>7</sup> (*Id.* at 13, 14-15 & n. 1, 889 A.2d 47.) He does not address Rule 41(b) or recommend disposition of Defendants' motion for involuntary dismissal.

Because the issue was not before the Magistrate Judge, this Court will not address the question of dismissal on grounds of Rule 41(b) in this review. Defendants' motion for involuntary dismissal (Doc. 36) remains open.

## II. Recommendations without Objection

Recommendations to which no objections are made are reviewed for clear error. *Cruz*, 990 F.Supp. at 376-77. The Court finds no clear error with regard to the recommended disposition of Parker's motion for sanctions (Doc. 19) or the recommendation to dismiss the amended complaint as against a number of unserved defendants pursuant to Rule 4(m). The Court will therefore adopt Magistrate Judge Smyser's recommendations for the reasons set forth in the R & R. The Court will deny Parker's motion and dismiss the amended complaint as to Defendants CitiMortgage, Inc., John Doe burglar-agent, Cadoza Lumber Valley Co., Inc., Carmen Vitale, Ray Jenson, Lynda Starnes (sued as "Lyda Sterns"), John Doe-affiant, Jane Doe-affiant, John Nolan, Credit Counseling Center, John Doe-Supervisor/Director Dreher Township, C. Daniel Higgins, Esq., Joan Carol Langston, Milford Valley Abstract, First Penn Abstract, Kathy M. Young, National Penn Bank, John Doe, Jane Doe, Arrow Head Electric, and Bobby Lee.

## CONCLUSION

For the foregoing reasons, the Court will overrule the objections of Defendants Pennstar, Gregory, Black, and

Starnes to the R & R and adopt Magistrate Judge Smyser's recommendations. The Court will therefore deny Defendants' motion to dismiss on principles of *res judicata* (Doc. 16); deny Plaintiff Parker's motion for sanctions (Doc. 19); and dismiss the amended complaint as against certain unserved defendants.

\*7 An appropriate Order follows.

## ORDER

**NOW**, this 22<sup>nd</sup> day of July, 2009, **IT IS HEREBY ORDERED** that:

- (1) The objections to Magistrate Judge Smyser's Report & Recommendation by Defendants Pennstar Bank, NBT, David M. Gregory, Esq., Kathy Black, and LynDa Starnes are **OVERRULED**.
- (2) The recommendations of Magistrate Judge Smyser's Report & Recommendation (Doc. 38) are **ADOPTED**.
- (3) Defendants Pennstar Bank, NBT, David M. Gregory, Esq., Kathy Black, and LynDa Starnes' Motion to Dismiss based on Res Judicata (Doc. 16) is **DENIED**.
- (4) Plaintiff Florence Parker's Application for Sanctions (Doc. 19) is **DENIED**.
- (5) The following Defendants are **DISMISSED** from this action: CitiMortgage, Inc., John Doe burglar-agent, Cadoza Lumber Valley Co., Inc., Carmen Vitale, Ray Jenson, Lynda Starnes (sued as "Lyda Sterns"), John Doe-affiant, Jane Doe-affiant, John Nolan, Credit Counseling Center, John Doe-Supervisor/Director Dreher Township, C. Daniel Higgins, Esq., Joan Carol Langston, Milford Valley Abstract, First Penn Abstract, Kathy M. Young, National Penn Bank, John Doe, Jane Doe, Arrow Head Electric, and Bobby Lee.
- (6) The case is **RECOMMITTED** to Magistrate Judge Smyser for further proceedings.

## REPORT AND RECOMMENDATION

J. ANDREW SMYSER, United States Magistrate Judge.

This civil action was initiated with a complaint filed in the United States District Court for the District of New Jersey on October 9, 2008. An amended complaint was filed on October 27, 2008.

The case was transferred to this District by Order of March 12, 2009, D.N.J. Civil No. 08-5009 (Hochberg, J.).

The plaintiff's claims in the amended complaint are related to a 24.7 acre parcel of real estate in Wayne County, Pennsylvania that had been acquired by and deeded to the plaintiff. She had borrowed money from defendant Pennstar-NBT using a \$75,000 home equity line of credit secured by the Wayne County parcel owned by the plaintiff. On October 9, 2007, Pennstar filed a claim in the Court of Common Pleas of Wayne County to collect a debt due to Pennstar from plaintiff Ms. Parker in the amount of \$78,719.26, based upon the use by the plaintiff of the home equity loan line of credit and her alleged failure to repay the loan. The Wayne County civil action resulted in a judgment in the amount of \$81,229.59 in favor of Pennstar and against the plaintiff. Many of the plaintiff's claims in the amended complaint concern alleged procedural errors and incorrect decisions made in the course of the state court litigation of the civil action by the bank against the plaintiff. She asserts that filed documents were not served on her. She asserts that her due process rights were not protected in that process, resulting in a summary judgment against her.

Several of the plaintiff's claims in this civil action relate to her Wayne County parcel, but involve matters and occurrences other than the Pennstar action against her based upon the home equity loan. Some of her claims involve contracts that she had with persons to do work at her property. She alleges a breach of a contract to cut timber from her acres and to compensate her for the wood on the part of defendant Cadoza Valley Lumber. She alleges a failure to complete electrical repairs by defendant Arrow Head Electric and its owner, Bobby Lee.

\*8 One of her claims involves the entry of her residence by unknown person(s) (John Doe-burglar) after the Court of Common Pleas of Wayne County had granted summary judgment in favor of the bank and against her in the bank's foreclosure action brought on the basis of the home equity nonpayment claim. She alleges a concerted set of actions by the Bank and Cadoza to deprive her of the value of her property and the lumber on it without compensation to her. She asserts that defendant Gregory, the Bank's attorney, was

a part of this concerted plan. She values the 24.7 acres at \$1,200,000 and the trees on the land at \$300,000. She claims that \$10,450 in personal property items were stolen from or broken or damaged in her residence.

There are three motions pending. One is the motion to dismiss the complaint for failure to state a claim upon which relief can be granted, filed in the United States District Court for the District of New Jersey on December 18, 2008 (Doc. 16), as a part of the motion to dismiss filed there and left for resolution in this court by the Order of March 12, 2009, Hochberg, J. (Doc. 24). The other is the motion to dismiss the complaint as to unserved defendants (Doc. 36), filed on April 28, 2009, an issue that was ripe before that motion, however, by the Order of March 26, 2009 (Doc. 28) and the absence of any response from the plaintiff to that Order. The third is the plaintiff's motion for sanctions. (Doc. 19).

The defendants have argued *res judicata* and claim preclusion. The plaintiff argues that her civil rights cause(s) of action are not precluded by the earlier mortgage foreclosure litigation, particularly because her civil rights claims are brought against persons and entities who were not parties to the mortgage foreclosure action. Her argument is in part also that the judgment in the mortgage foreclosure action is not a valid judgment. She asserts that it was not entered in compliance with due process requirements, was not entered pursuant to an exercise of power granted to the court, and was the result of extrinsic fraud, misrepresentation and duress.

The April 22, 2008 Judgment in Mortgage Foreclosure entered by the Court of Common Pleas of Wayne County, was entered in Civil No. 696 of 2007, an action initiated upon a Complaint in Mortgage Foreclosure brought by Pennstar Bank, a division of NBT Bank, NA, against Florence R. Parker. The complaint alleged that the defendant there, Ms. Parker, had defaulted in payments under a \$75,000 home equity loan. The mortgaged property is described in the complaint. The complaint sought recovery of \$78,719.26.

A motion to dismiss pursuant to Rule 12(b)(6) challenges the legal sufficiency of the plaintiff's complaint; the court must decide whether, even if the plaintiff were able to prove all of his allegations, he would be unable to prevail. *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir.1977). When deciding a motion to dismiss, the court must accept all material allegations of the complaint as true and draw all inferences in the light most favorable to the plaintiff. *Pennsylvania House, Inc. v. Barrett*, 760 F.Supp.

439, 449 (M.D.Pa.1991). However, “conclusory allegations of law, unsupported conclusions and unwarranted inferences need not be accepted as true.” *Id.* at 449-50.

\*9 “Federal Rule of Civil Procedure 8(a)(2) requires only ‘a short and plain statement of the claim showing that the pleader is entitled to relief.’” *Erickson v. Pardus*, 551 U.S. 89, 127 S.Ct. 2197, 2200, 167 L.Ed.2d 1081 (2007). Detailed factual allegations are not required. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1964, 167 L.Ed.2d 929 (2007). However, more is required than labels, conclusions and a formulaic recitation of the elements of a cause of action. *Id.* at 1965. “Factual allegations must be enough to raise a right to relief above the speculative level.” *Id.* Stating a claim requires a complaint with enough factual matter to suggest the required elements of a claim. *Phillips v. County of Allegheny*, 515 F.3d 224, 234 (3d Cir.2008). However, “this ‘does not impose a probability requirement at the pleading stage,’ but instead ‘simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of’ the necessary element.” *Id.* (quoting *Twombly*, *supra*, 127 S.Ct. at 1965). The statement required by Rule 8(a)(2) need only give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests. *Erickson*, *supra.*, 127 S.Ct. at 2200. The “notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims.” *Swierkiewicz v. Sorema*, 534 U.S. 506, 512, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002).

A complaint filed by a *pro se* litigant is to be liberally construed and “ ‘however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.’” *Erickson*, *supra*, 127 S.Ct. at 2200 (2007) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976)).

The burden to establish that a claim is foreclosed as a matter of *res judicata* or claim preclusion is on the party asserting that the claim is foreclosed. The plaintiff states a claim that there was not a breach by her of her loan agreement. Even in the absence of a stated set of factual findings or a stated rationale for the Wayne County Court’s Judgment, it can probably be inferred from the fact of the Judgment that the Court found there to have been a breach of the loan agreement. But the plaintiff also claims procedural violations by the plaintiff Bank and its attorney in the Wayne County litigation. There is not any basis to infer that these claims were addressed in the Wayne County case.

The fact that the state court’s Judgment was entered pursuant to a grant of summary judgment must be considered here in the context of an issue of claim preclusion. There was not a hearing. The opportunity that the defendant borrower had to present her factual contentions in that litigation is not shown. The Court acted upon a motion for summary judgment. The plaintiff asserted in opposing the summary judgment motion that the loan agreement presented with the Bank’s summary judgment motion was not the loan agreement that she had signed. That assertion would appear to have given rise to a material issue of factual dispute. How that claim was resolved by the Court is not shown. That it was rejected can be inferred. Why it was rejected can not be inferred, and whether its rejection was pursuant to a procedure and a standard justifying claim preclusion can not be addressed at this time.

\*10 We do not mean to state that the issue of whether there was a breach of the loan agreement can be relitigated in federal court. However, we are not prepared in this *pro se* plaintiff case to conclude with certainty that the only claim presented by the pleadings is the issue whether there was a breach of the loan agreement.

Defendant David Gregory in a Declaration (Doc. 16-2) states that he brought the Wayne County foreclosure action on October 3, 2007. On October 31, 2007, defendant Ms. Parker applied for Pennsylvania Homeowners’ Emergency Mortgage Assistance. That was denied on January 28, 2008, because she was not a Pennsylvania resident.

After defendant Ms. Parker had on April 17, 2007 filed a notification in the mortgage foreclosure litigation that all correspondence should be sent to 290 Nevin Road, P.O. Box A, Newfoundland, PA 18445, all pleadings in the litigation were sent to Ms. Parker at that address, Gregory states.

On February 25, 2008, Gregory filed a summary judgment motion in the Wayne County case. After briefing, the Judgment of April 22, 2008 was entered. An appeal to the Pennsylvania Superior Court was taken by Ms. Parker. The appeal was dismissed on procedural grounds, on the basis that Ms. Parker as the appellant did not file a brief when required.

The subject matter jurisdiction of the Wayne County Court of Common Pleas over the mortgage foreclosure action involving a Wayne County piece of real property is not reasonably in dispute. Proper notice to Ms. Parker, defendant

there, plaintiff here, and the opportunity to defend against the Wayne County mortgage foreclosure action is in dispute. She filed a response to that complaint in mortgage foreclosure, however there was not a hearing and issues raised here are not shown to have been addressed.

The plaintiff argues in her brief (Doc. 21) that the Judgment of the Wayne County Court of Common Pleas was not based upon a hearing on the merits of the mortgage foreclosure claim of Pennstar Bank. She asserts that her mortgage loan was not in default. She alleges that there was a modification of her loan agreement of which she did not have notice.

*Res judicata* or claim preclusion relieves the parties of the cost and vexation of multiple lawsuits, conserves judicial resources, and by preventing inconsistent decisions, encourages reliance on adjudication. *Drum v. Nasuti*, 648 F.Supp. 888, 898 (E.D.Pa.1986), *aff'd*, 831 F.2d 286 (1987). Claim preclusion requires a defendant to demonstrate that there has been (1) a final judgment on the merits in a prior suit involving (2) the same parties or their privies and (3) a subsequent suit based on the same cause of action. *Lubrizol Corp. v. Exxon Corp.*, 929 F.2d 960, 963 (3d Cir.1991).

The Wayne County Court of Common Pleas entered a Judgment in Mortgage Foreclosure in *Pennstar Bank v. Florence A. Parker*, in the amount of \$81,229.59, on April 22, 2008. (Doc. 16-2, Exh. M). The court had granted the plaintiff's motion for summary judgment, without an opinion. (*Id.*, Exh. L). The motion had been based upon the contention that Ms. Parker had not made all payments due and owing under the terms of the loan documents. The motion was supported by a general statement in an affidavit that the borrower had failed to make all monthly payments. Ms. Parker's Answer to the complaint denying that she had failed to make payments due under the loan agreement and asserting that the loan document pleaded in that action by the bank was not the loan document that she had signed in September of 2004. (*Id.*, Exh. D).

\*11 There is no indication in the record of this case of an actual resolution of claim(s) or counterclaims and defenses in the determination of the Wayne County Court to enter a judgment, and accordingly there is not a basis presented here for the application of claim preclusion or *res judicata* principles.

It will be recommended that this complaint not be dismissed as to defendants Pennstar Bank, NBT, Black, Starns and Gregory on the basis of claim preclusion.

By Order of March 26, 2009 (Doc. 28) it was ordered that the plaintiff show cause why defendants CitiMortgage, Inc., John Doe burglar-agent, Cadoza Lumber Valley Co., Inc., Carmen Vitale, Ray Jenson, LynDa Starns, John Doe-affiant, Jane Doe-affiant, John F. Nolan, Credit Counseling Center, John Doe-Supervisor/Director, Dreher Township, C. Daniel Higgins, Esq., Joan Carol Langston, Milford Valley Abstract, First Penn Abstract, Kathy M. Young, National Penn Bank, John Doe, Jane Doe, Arrow Head Electric and Bobby Lee should not be dismissed pursuant to Fed.R.Civ.P. 4(m).

The plaintiff did not respond to that Order directing her to show cause why the complaint should not be dismissed as to those named, unserved defendants.

The plaintiff's motion for sanctions (Doc. 19) is a motion in which the plaintiff asked the federal court, while the case was in the District of New Jersey, to impose sanctions against defendant Gregory pursuant to Rule 11 of the Federal Rules of Civil Procedure for instituting the Wayne County litigation and for conduct relating to the discovery process on the part of defendant Gregory in his earlier capacity as counsel for the plaintiff Pennstar Bank in the Wayne County mortgage foreclosure litigation. The plaintiff asserts that the claim in the Wayne County case that a debt was due was frivolous because there was not a debt due. The application of Rule 11 of the Federal Rules of Civil Procedure to a lawyer's conduct in litigation in another court would not be an authorized application of Rule 11.

For the foregoing reasons, it is recommended that the court deny the motion of defendants Pennstar Bank, David M. Gregory, Esquire, Kathy Black and LynDa Starnes (Doc. 16) to dismiss the complaint for failure to state a claim upon which relief can be granted; that the complaint be dismissed as to defendants CitiMortgage, Inc., John Doe burglar-agent, Cadoza Lumber Valley Co., Inc., Carmen Vitale, Ray Jenson, LynDa Starns, John Doe-affiant, Jane Doe-affiant, John F. Nolan, Credit Counseling Center, John Doe-Supervisor/Director, Dreher Township, C. Daniel Higgins, Esq., Joan Carol Langston, Milford Valley Abstract, First Penn Abstract, Kathy M. Young, National Penn Bank, John Doe, Jane Doe, Arrow Head Electric and Bobby Lee pursuant to Rule 4(m)<sup>1</sup>, that the plaintiff's motion for sanctions (Doc. 19) be denied and that the case be remanded to this magistrate judge.



Footnotes

- 1 Parker raises a number of RICO claims, heading each Count with a different alleged predicate offense, including extortion, mail fraud, obstruction of justice, and violation of the Pennsylvania Hate Crimes Act. (*See* Am. Compl., Doc. 5.)
- 2 Parker alleges that these individual defendants acted as agents of Pennstar. (*See* Am. Compl. at 2.)
- 3 The elements that must be pled to state a civil RICO claim are: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495 (1985). The statutory definition of “racketeering activity” incorporates the elements of a large number of federal and state crimes. *See* 18 U.S.C. § 1961(1).
- 4 As Magistrate Judge Smyser noted, Parker is not at liberty to relitigate the state judgment in mortgage foreclosure in this forum. A valid state court judgment is afforded full faith and credit by federal courts. 28 U.S.C. § 1738. The Court merely concludes that Parker does not raise an identical claim here to the claim decided in the Wayne County action.
- 5 By arguing that Parker's claims against Gregory, Black, and Starnes are precluded in their entirety by the doctrine of collateral estoppel, Defendants apparently argue that the identified issues are dispositive of the RICO claims. Because I find collateral estoppel inapplicable on other grounds, *see infra*, I need not reach this argument.
- 6 Federal Rule of Civil Procedure 41(b) provides, in relevant part: “If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it.”
- 7 Federal Rule of Civil Procedure 4(m) provide, in relevant part:  
If a defendant is not served within 120 days after the complaint is filed, the court-on motion or on its own after notice to the plaintiff-must dismiss the action without prejudice against that defendant or order that service be made within a specified time.  
But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.
- 1 The motion of April 28, 2009 (Doc. 36) raises the failure to serve these defendants. The Order of March 26, 2009 (Doc. 28) had directed the plaintiff to show cause why the complaint should not be dismissed as to these defendants. The plaintiff did not respond to that Order. Without further briefing, the court should dismiss the complaint as to these unserved defendants pursuant to Rule 4(m).