

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 15-15628
Non-Argument Calendar

D.C. Docket No. 0:15-cv-61386-WPD

DON KOZICH,

Plaintiff-Appellant,

versus

ANN DEIBERT,
MICHAEL S. LONG, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(January 11, 2018)

Before MARTIN, PRYOR, and ANDERSON, Circuit Judges.

PER CURIAM:

A
1

Don Kozich appeals the district court's dismissal of his pro se civil action based on a lack of subject matter jurisdiction under the Rooker-Feldman¹ doctrine and Kozich's failure to state a claim. As discussed below, we need not address these issues because Kozich's claim is moot.

Plaintiff-Appellant Kozich formerly leased an apartment from Defendant-Appellee Reliance Progresso Associates, LTD. On December 22, 2014, Kozich received a notice of nonrenewal, informing him that Reliance would not renew his lease due to his failure to maintain his apartment in a sanitary condition and his failure to permit management to enter his unit. Kozich refused to vacate his apartment when his lease expired, and Reliance filed a state court action to evict Kozich. On April 20, 2015, the state court issued a final judgment and writ of possession in favor of Reliance. The parties dispute whether Kozich timely appealed this judgment in state court.

On July 2, 2015, Kozich brought this action against Reliance and ten other Defendants in federal court pursuant to the Low Income Housing Tax Credit ("LIHTC") Act, 26 U.S.C. § 42, et seq. and 42 U.S.C. § 1983. He claims that the notice of nonrenewal and state court eviction violate his rights under 26 U.S.C. § 42 and the First and Fourteenth Amendments. He seeks injunctive and declaratory relief. Following the district court's denial of Kozich's motion for a

¹ See Rooker v. Fid. Tr. Co., 263 U.S. 413 (1923); D.C. Ct. App. v. Feldman, 460 U.S. 462 (1983).

temporary restraining order, Kozich was evicted from his apartment on July 23, 2015. On appeal, Appellees argue in part that this case is moot because Kozich has already vacated his apartment.

We may affirm a judgment based on any grounds supported by the record. Akanthos Capital Mgmt., LLC v. Atlanticus Holdings Corp., 734 F.3d 1269, 1271 (11th Cir. 2013) (per curiam). We address the question of mootness de novo. CAMP Legal Defense Fund, Inc. v. City of Atlanta, 451 F.3d 1257, 1268 (11th Cir. 2006). A case becomes moot “when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.” Florida Ass’n of Rehab. Facilities, Inc. v. State of Fla. Dep’t of Health & Rehab. Servs., 225 F.3d 1208, 1216-17 (11th Cir. 2000). In considering whether a case is moot, we “look at the events at the present time, not at the time the complaint was filed or when the federal order on review was issued.” Dow Jones & Co. v. Kaye, 256 F.3d 1251, 1254 (11th Cir. 2001). “When events subsequent to the commencement of a lawsuit create a situation in which the court can no longer give the plaintiff meaningful relief, the case is moot and must be dismissed.” Fla. Ass’n of Rehab. Facilities, 225 F.3d at 1217.

An exception to the mootness doctrine arises when a claim is “capable of repetition yet, evading review.” Arcia v. Sec’y of Fla., 772 F.3d 1335, 1343 (11th Cir. 2014). The exception applies where (1) the challenged action is too short in

duration to be fully litigated prior to its end, and (2) there is a reasonable expectation that the same party will be subject to the same action again. Id.

Kozich's claims for injunctive and declaratory relief from the eviction order are moot. The Court cannot grant Kozich meaningful relief from the judgment because it has already been enforced. See In re Ware, 562 F. App'x 850, 852–53 (11th Cir. 2014) (per curiam) (holding that the debtor's appeal of the bankruptcy court's order allowing a foreclosure sale was moot because the debtor did not obtain a stay of the order pending the appeal and therefore the foreclosure sale had already occurred). And there is nothing in the record to suggest that there is a reasonable expectation that Kozich will rent an apartment from Reliance and be subjected to a similar eviction proceeding in the future. Accordingly, we affirm the district court's dismissal of Kozich's claims. Because we determine that Kozich's claims are moot, we need not consider the district court's determinations that the Rooker-Feldman doctrine bars Kozich's claims and, alternatively, that Kozich fails to state a claim.²

AFFIRMED.

² Kozich also filed several motions asking this Court to take judicial notice of certain documents. Given that this case is moot, we deny all pending motions.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 15-15628-EE

DON KOZICH,

Plaintiff - Appellant,

versus

ANN DEIBERT,
MICHAEL S. LONG,
BERNARD E. SMITH,
Chairman of the Board of the Florida Housing
Finance Corporation,
U.S. DEPARTMENT OF HOUSING AND URBAN
DEVELOPMENT,
US DEPARTMENT OF VETERANS AFFAIRS, et al.,

Defendants - Appellees.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: MARTIN, PRYOR, and ANDERSON, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:


UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-61386-CIV-DIMITROULEAS

DON KOZICH,
Individually,

Plaintiff,

vs.

ANN DEIBERT, *et al.*,

Defendants.

**ORDER GRANTING MOTIONS TO DISMISS;
DISMISSING CASE FOR LACK OF SUBJECT MATTER JURISDICTION**

THIS CAUSE is before the Court upon Defendants Florida Housing Finance Corporation ("FHFC") and Bernard E. Smith ("Smith")'s Motion to Dismiss [DE 42] and Defendants Ann Deibert ("Deibert"), Michael S. Long ("Long"), Broward County Housing Authority ("BCHA"), Building Better Communities, Inc. ("BBC"), Broward Workforce Communities, Inc. ("BWC") and Reliance-Progresso Associates, Limited ("RPA")'s Motion to Dismiss [DE 43], both filed herein on September 8, 2015. The Court has considered the Motions [DE's 42, 43], notes that Plaintiff Don Kozich ("Plaintiff" or "Kozich") has failed to file a Response on or before the October 19, 2015 extended deadline¹, and is otherwise fully advised in the premises.

¹ The Court entered an Order on September 28, 2015, extending the deadline for Plaintiff to respond to Defendants' Motions to Dismiss [DE's 42, 43] to October 5, 2015. See [DE 64]. The Court entered an Order on October 6, 2015, extending the deadline for Plaintiff to respond to Defendants' Motions to Dismiss to October 13, 2015. See [DE 67]. The Court stated therein that "[t]he Court is highly unlikely to grant any additional extensions before ruling on the pending motions." See [DE 67]. The Court entered an Order on October 14, 2015, extending the deadline for Plaintiff to respond to Defendants' Motions to Dismiss to October 19, 2015. See [DE 70]. The Court stated therein that "Plaintiff is on notice that the Court is highly unlikely to grant any additional extensions before ruling on the pending motions." See [DE 70].

Plaintiff's October 19, 2015 Motion for an additional extension of time [DE 71] on the grounds that Plaintiff has been spending time preparing for an October 20, 2015 hearing is **DENIED**.

I. BACKGROUND

The Complaint alleges that Plaintiff Kozich previously had a lease with Defendant RPA to occupy a residence at the Progresso Point Apartment Community. *See* [DE 1] at ¶¶ 5, 8. The lease was not renewed and, on March 6, 2015, Defendant RPA brought a tenant eviction action against Kozich in the Broward County Court, case no. 15-4735 COCE 50. *See* [DE 1] at p. 12; [DE 43-4]. On March 19, 2015, Kozich filed in state court his Answer, Affirmative Defenses, Request for Jury Trial, and Request for Attorney Fees and Costs. *See* [DE's 43-3, 43-4]. On April 20, 2015, a Final Judgment for Removal of Tenant was entered by the state court judge. *See* [DE 1] at p. 13; *see also* [DE 43-1]. Kozich moved to vacate the state court judgment, which was denied. *See* [DE 1] at p. 13; *see also* [DE's 43-2, 43-3].

Kozich did not appeal the attached final judgment and instead, on July 2, 2015, commenced this action for declaratory and injunctive relief. *See* [DE 1]. In relevant part, the Complaint alleges that the property manager for the Progresso Point Apartment Community, Defendant Professional Management, Inc. (PMI) did not renew Kozich's lease because of his alleged activities in promoting and organizing the Progresso Point Tenants Organization and that PMI lacked good cause to terminate his tenancy. The Complaint requests that the Court declare that the non-renewal of the lease was wrongful and seeks injunctive relief to prevent the eviction. *See* [DE 1]. The Complaint essentially requests that this Court review the state court final judgement of eviction.

Pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure (the "Rules"), Defendants now move the Court to dismiss this case for lack of subject-matter jurisdiction pursuant to the *Rooker-Feldman* doctrine and for failure to state a claim.

II. DISCUSSION

A. Standard of Review

1. Lack of Subject-Matter Jurisdiction Under Rule 12(b)(1)

As a threshold matter, the Court must determine if jurisdiction exists before proceeding to the merits of the case. *Sinochem Int'l Co. v. Malay Int'l Shipping Corp.*, 127 S. Ct. 1184, 1191 (2007) (“Without jurisdiction the court cannot proceed at all in any cause; it may not assume jurisdiction for the purposes of deciding the merits of the case.” (internal quotations omitted)). “The burden for establishing federal subject matter jurisdiction rests with the party bringing the claim.” *Sweet Pea Marine, Ltd. v. APJ Marine, Inc.*, 411 F.3d 1242, 1247 (11th Cir. 2005). Where the *Rooker-Feldman* Doctrine is at issue, a party may challenge a court’s subject-matter jurisdiction through a Rule 12(b)(1) motion to dismiss. *See Chipman v. U.S. Bank N.A.*, 2012 WL 1093144, at *2-4 (M.D. Fla. Apr. 2, 2012).

2. Failure to State a Claim Under Rule 12(b)(6)

To adequately plead a claim for relief, Federal Rule of Civil Procedure 8(a)(2) requires “a short and plain statement of the claim showing that the pleader is entitled to relief,” in order to “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” *Conley v. Gibson*, 355 U.S. 41, 47 (1957). Under Rule 12(b)(6), a motion to dismiss should be granted only if the plaintiff is unable to articulate “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (abrogating *Conley*, 355 U.S. at 41). “A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Twombly*, 550 U.S. at 556). The

allegations of the claim must be taken as true and must be read to include any theory on which the plaintiff may recover. *See Linder v. Portocarrero*, 963 F. 2d 332, 334-36 (11th Cir. 1992) (citing *Robertson v. Johnston*, 376 F. 2d 43 (5th Cir. 1967)).

However, the court need not take allegations as true if they are merely “threadbare recitals of a cause of action’s elements, supported by mere conclusory statements” *Iqbal*, 129 S. Ct. at 1949. In sum, “a district court weighing a motion to dismiss asks not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.” *Twombly*, 550 U.S. at 568 n.8 (internal quotations omitted).

B. Analysis

1. Lack of Subject-Matter Jurisdiction

Federal review of state-court judgments may only occur in the United States Supreme Court. 28 U.S.C. § 1257(a); *see also Figueroa v. Merscorp, Inc.*, 766 F.Supp.2d 1305 (S.D. Fla. 2011). “The *Rooker-Feldman* [D]octrine places limits on the subject matter jurisdiction of federal district courts and courts of appeal over certain matters related to previous state court litigation.” *Goodman v. Sipos*, 259 F.3d 1327, 1332 (11th Cir. 2001) (citing *Rooker v. Fid. Trust Co.*, 263 U.S. 413, 415-16 (1923); *D.C. Ct. of Appeals v. Feldman*, 460 U.S. 462, 476-82 (1983)). Under the Doctrine, federal district courts “have no authority to review the final judgments of state courts.” *Siegel v. LePore*, 234 F.3d 1163, 1172 (11th Cir. 2000) (en banc). Significantly, even if the state court judgment was unconstitutional, *Rooker-Feldman* prevents a federal district court from correcting the error. *Feldman*, 460 U.S. at 486.

In addition to blocking federal claims that the state court actually heard, the Doctrine also bars claims that are “inextricably intertwined” with a state court judgment. *Siegel*, 234 F.3d at

1172. Accordingly, the Eleventh Circuit has set forth four criteria that must be satisfied for the *Rooker-Feldman* Doctrine to apply: (1) the plaintiff in federal court is the same as the loser in state court; (2) the prior state court ruling was a final or conclusive judgment on the merits; (3) the plaintiff had a reasonable opportunity to raise its federal claims in the state court; (4) the state court either adjudicated the issue the federal court is considering or the issue was inextricably intertwined with the state court's judgment. *Amos v. Glynn Cnty. Bd. of Tax Assessors*, 347 F.3d 1249, 1265 n.11 (11th Cir. 2003).

Here, upon careful consideration, the Court determines that the *Rooker-Feldman* Doctrine blocks Plaintiff's claims. Prior to the filing of this action, Defendant RPA obtained through state proceedings a Final Judgment for Removal of Tenant against Kozich. The claims brought by Kozich for declaratory and injunctive relief are inextricably intertwined with those state court eviction proceedings. Indeed, Kozich has specifically requested that this Court enjoin and set aside the state court eviction judgment. Plaintiff had a reasonable opportunity to – and did – raise many of the same claims and defenses in the state court eviction action that he asserts in the above-styled action. Florida statutory law clearly provides that these issues could be litigated in the Broward County Court proceedings. See Sections 83.60 (1),(2) and 83.64, Fla. Stat. Thus, each criterion for application of the *Rooker-Feldman* Doctrine has been met, and the Court does not have subject-matter jurisdiction over Kozich's claims. See *Velardo v. Fremont Inv. & Loan*, 298 F. App'x 890, 891-92 (11th Cir. 2008) (affirming district court's dismissal of claims that "were not independent of the claims involved in the circuit court foreclosure action"); *Figueroa v. Merscorp, Inc.*, 766 F. Supp. 2d 1305, 1324 (S.D. Fla. 2011) (dismissing claims pursuant to *Rooker-Feldman* Doctrine where "[the plaintiff]'s federal claims [could] only succeed to the

extent the Florida court erred, and the Court [could not] grant [plaintiff] his requested relief without disturbing the Florida foreclosure judgment). Kozich's arguments that the state court failed to properly address the issues he raised in his answer and defenses are arguments that Kozich could have raised in an appeal to a higher Florida state court; they do not provide a basis for an exception to the *Rooker-Feldman* Doctrine.

Accordingly, the Court lacks subject-matter jurisdiction and will dismiss Kozich's claims against all Defendants with prejudice.²

2. Failure to State a Claim

Defendants assert, in the alternative, that even if the *Rooker-Feldman* doctrine did not prevent Kozich from litigating this case in federal district court, the Complaint is still subject to dismissal for failure to state a claim. The Court agrees.

First, Kozich does not assert a viable federal claim for relief based on a claimed violation of 26 U.S.C. § 42. *See Mendoza vs. Frenchman Hill Apartments Limited Partnership*, 2005 WL 6581642 (E.D. Wa. 2005) (granting summary judgment for defendant on plaintiff's § 1983 claim for eviction without cause of low-income property for no enforceable private right of action for violations under Federal Low Income Housing Tax Credit Act).

Further, with respect to certain of the individual Defendants, the Court agrees with the FHFC Defendants that Kozich's filings are devoid of allegations of any direct or individual actions taken by Defendant Smith as to Kozich and, moreover, that the inclusion of Defendant

² In this context, the Court will dismiss with prejudice. Any cognizable claims are inextricably intertwined to the state court foreclosure actions and are, therefore, barred by the *Rooker-Feldman* Doctrine. Consequently, an amendment would be futile and dismissal with prejudice is warranted. *See, e.g., Mickens v. 10th Judicial Circuit Court*, 458 F. App'x 839 (11th Cir. 2012) (affirming district court's dismissal with prejudice of original complaint as barred by *Rooker-Feldman* Doctrine).

Smith in his official capacity is improper as FHFC can sue or be sued in the name of the corporation. *See* § 420.507(1), Fla. Stat. Additionally, as to Defendants Deibert and Long, the Complaint is devoid of any allegations to show that these individuals violated any of Kozich's clearly established constitutional rights in a fact specific way so as to overcome these Defendants entitlement to qualified immunity.


Finally, Florida state agencies and entities have the right to "home venue" and cannot be sued in a county other than the location of their principal home office, in the absence of waiver or one of the limited recognized exceptions. *See Bush v. State*, 945 So.2d 1207, 1212 (Fla. 2006). Accordingly, while the Court need not reach this issue, dismissal or transfer of this action would also be appropriate as to certain state governmental Defendants based upon improper venue.

III. CONCLUSION

Accordingly, it is **ORDERED AND ADJUDGED** as follows:

1. The Motions [DE's 42, 43] are hereby **GRANTED**;
2. The above-styled action is hereby **DISMISSED WITH PREJUDICE**;
3. The Clerk is directed to **CLOSE** this case and **DENY AS MOOT** all pending motions.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida,
this 20th day of October, 2015.


WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:
Counsel of record

Don T. Kozich
P.O. Box 2032
Fort Lauderdale, FL 33303

Professional Management Inc. (PMI)
Syrie Ortiz VP
9095 SW 87 Avenue Ste. 777
Miami, FL 33176