APPENDIX

[I deeply apologize in advance to this Supreme Court for the unusual formatting which resulted as these court documents were retrieved and moved from PDF to MS Word platforms.]

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Lucero v. Koncilja

Decided Aug 6, 2019

No. 18-1404, 08-06-2019

ANTHONY J. LUCERO, Plaintiff - Appellant,
v.

JAMES R. KONCILJA; KONCILJA & KONCILJA, P.C., Defendants - Appellees.

Scott M. Matheson, Jr. Circuit Judge

(D.C. No. 1:17-CV-01374-WJM-KMT)
(D. Colo.) ORDER AND JUDGMENT
Before MATHESON, BALDOCK, and MORITZ, Circuit Judges.

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not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

Anthony J. Lucero appeals the dismissal of his pro se complaint alleging Fourteenth Amendment violations by his former counsel, James R. Koncilja, and the law firm of Koncilja & Koncilja, P.C. (collectively, the Koncilja firm). We affirm.

I. BACKGROUND

After he was injured at work, Mr. Lucero hired the Koncilja firm to represent him on worker's compensation and related state tort claims. Dissatisfied with his legal representation, Mr. Lucero sued the Koncilja firm twice in state court. Both cases then initiated this federal suit pro se, asserting three claims for relief:

1) The Koncilja firm "committed gross legal malpractice in every conceivable [re]spect and negligently violated [his] [Fourteenth] Amendment rights" and "failed to even do the minimal amount of legal work, . . . filed in the wrong county, did absolutely no investigation[,] . . . failed to do any interrogatories, no depositions, no questioning or photographs of [his] injuries, no medical discovery, and ultimately [his] legal case was dismissed for . . . failure to prosecute." R. at 18 (emphasis and internal quotation marks

omitted).

(2) By "filing one day before the deadline and filing [his] civil case against the wrong parties, Defendants precluded [him] or any conscientious attorney from filing [his] case." Id. at 20.

(3) His "[Fourteenth] Amendment rights were severely violated in Colorado state courts," and "[i]t apparently does not really matter what laws or professional conduct rules the Koncilja[] [firm] violate[s], the courts still rule in their favor." Id.

A magistrate judge recommended dismissal of the Fourteenth Amendment claims because Mr. Lucero's allegations against these private parties failed to allege state action under 42 U.S.C. § 1983. Although Mr. Lucero argued the Koncilja firm colluded with the state court judge who presided over his case (apparently in his second state suit against the Koncilja firm), the magistrate judge declined to consider that state-action theory, ruling that Mr. Lucero could not effectively amend his complaint with these new collusion allegations.

(3) The magistrate judge recommended that the remaining claims be liberally construed to allege state-law malpractice and fraud. Absent a viable federal claim, however, the magistrate judge recommended that the district court decline to exercise supplemental jurisdiction over the state-law claims and dismiss them.

Mr. Lucero objected to the dismissal of his Fourteenth Amendment claims but did not object to the dismissal of the state-law claims.

The district court adopted the magistrate judge's report and recommendation but modified its analysis of the Fourteenth Amendment claims. Given Mr. Lucero's pro se status, the court considered his state-action theory. The court determined he failed to state a claim because Mr. Lucero did not allege a sufficient conspiratorial nexus between the firm and the judge. Rather, he simply averred that the state court judge ruled in favor of the Koncilja firm, granted its motions for extensions, and allowed late filings. The court therefore dismissed the Fourteenth Amendment claims, and without any objection to the dismissal of the state-law claims, dismissed them as well. Mr. Lucero appealed.

II. DISCUSSION

We review de novo the district court's dismissal of a complaint under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. Wasatch Equal. v. Alta Ski Lifts Co., 820 F.3d 381, 386 (10th Cir. 2016). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). "Dismissal of a pro se complaint for failure to state a claim is proper only where it is obvious that the plaintiff cannot prevail on the facts he has alleged and it would be futile to give him an opportunity to amend." Kay v. Bemis,

500 F.3d 1214, 1217 (10th Cir. 2007) (internal quotation marks omitted).

Although we afford a pro se litigant's materials a solicitous construction, Van Deelen v. Johnson, 497 F.3d 1151, 1153 n.1 (10th Cir. 2007), we have "repeatedly insisted that pro se parties follow the same rules of procedure that govern other litigants," Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 840 (10th Cir. 2005) (internal quotation marks omitted). Indeed, we "cannot take on the responsibility of serving as the litigant's attorney in constructing arguments and searching the record." Id. "Accordingly, we will not supply additional facts, nor will we construct a legal theory for plaintiff that assumes facts that have not been pleaded." Peterson v. Shanks, 149 F.3d 1140, 1143 (10th Cir. 1998) (internal quotation marks omitted).

A. Fourteenth Amendment Claims & State Action

We first consider Mr. Lucero's Fourteenth Amendment claims. "To state a cause of action under 42 U.S.C. § 1983 for an alleged violation of the Fourteenth Amendment . . . , the challenged conduct must constitute state action." Scott v. Hern, 216 F.3d 897, 906 (10th Cir. 2000) (citing Lugar v. Edmondson Oil Co., 457 U.S. 922, 930-32 (1982)). "When a plaintiff in a § 1983 action attempts to assert the necessary 'state action' by implicating state officials or judges in a conspiracy with private defendants, mere conclusory allegations with no supporting factual averments are insufficient; the pleadings must specifically present facts tending to show agreement and concerted

action." Id. at 907 (internal quotation marks omitted). In particular, a plaintiff must plausibly allege "a significant nexus or entanglement between the absolutely immune State official and the private party in relation to the steps taken by each to fulfill the objects of their conspiracy." Norton v. Liddel, 620 F.2d 1375, 1380 (10th Cir. 1980).

Mr. Lucero offers no specific allegations suggesting a conspiracy between the Koncilja firm and the state court judge who presided over his case. He merely alleges the state court judge repeatedly abused his discretion by ruling in favor of the Koncilja firm, accepting the firm's untimely filings, and granting its motions for extensions of time, while denying or ignoring his similar requests. But these allegations do not suggest a nexus or shared conspiratorial objective between the firm and the state court judge. Nor is there any inference that they agreed or even acted in concert to violate Mr. Lucero's Fourteenth Amendment rights. We therefore agree with the district court that Mr. Lucero failed to plausibly allege state action.

B. State-Law Claims & Firm Waiver Rule

We next consider Mr. Lucero's state-law claims. As indicated above, although he objected to the dismissal of his Fourteenth Amendment claims, he did not object to the magistrate judge's recommendation to dismiss the state-law claims. "Under this court's firm waiver rule, the failure to timely object to a magistrate judge's finding and recommendations waives appellate review of both factual and legal questions." Klein v. Harper, 777 F.3d 1144, 1147 (10th Cir. 2015).

"This rule does not apply, however, when (1) a pro se litigant has not been informed of the time period for objecting and the consequences of failing to object, or when (2) the interests of justice require review." Morales-Fernandez v. INS, 418 F.3d 1116, 1119 (10th Cir. 2005) (italics and internal quotation marks omitted).

The first exception to the firm waiver rule is inapplicable because the magistrate judge informed Mr. Lucero he had 14 days to file timely, specific objections to the report and recommendation and that failure to do so would waive appellate review. R. at 27. Neither do we have occasion to consider the interests-of-justice exception because Mr. Lucero advances no argument invoking that exception. See Bronson v. Swensen, 500 F.3d 1099, 1104 (10th Cir. 2007) ("[W]e routinely have declined to consider arguments that are not raised, or are inadequately presented, in an appellant's opening brief."). Consequently, the firm waiver rule bars review of the claims.

III. CONCLUSION

The judgment of the district court is affirmed.
Entered for the Court

Scott M. Matheson,
Circuit Judge

THIS IS A FINAL ORDER FOR PURPOSES OF THIS APPEAL TO THE U.S. SUPREME COURT

B. *ANTHONY J. LUCERO, Plaintiff, v. JAMES R. KONCILJA, and KONCILJA & KONCILJA, P.C., Defendants.*

United States District Court, D. Colorado.

September 6, 2018.

Editors Note
Applicable Law: 28 U.S.C. § 1983
Cause: 28 U.S.C. § 1983 Civil Rights
Nature of Suit: 440 Civil Rights: Other
Source: PACER

Attorney(s) appearing for the Case

Anthony J. Lucero, Plaintiff, pro se.

James R. Koncilja & Koncilja & Koncilja, P.C., Defendants, represented by Glendon L. Laird , McElroy Deutsch Mulvaney & Carpenter, LLP.

ORDER ADOPTING JULY 20, 2018 RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

WILLIAM J. MARTÍNEZ, *District Judge.*

Plaintiff Anthony Lucero ("Plaintiff" or "Lucero"), proceeding *pro se*, brings Fourteenth Amendment claims against Defendants

James R. Koncilja ("Koncilja") and Koncilja & Koncilja, P.C. (jointly, "Defendants"). (ECF No. 5.) Defendants move to dismiss for lack of subject matter jurisdiction pursuant to Federal Rule of

Civil Procedure 12(b)(1). (ECF No. 14 ("Motion").) Plaintiff filed a Response to Defendants' Motion (ECF No. 37) ("Response") and Defendants filed a Reply in support of their Motion (ECF No. 40).

United States Magistrate Judge Kathleen M. Tafoya filed a Report and Recommendation recommending that Defendants' Motion to Dismiss be granted. (ECF No. 50 ("Recommendation").) Plaintiff filed an Objection to Judge Tafoya's Recommendation. (ECF No. 51-1 ("Objection").) Upon review, the Court adopts Judge Tafoya's recommended disposition, although for reasons somewhat different than those relied upon by Judge Tafoya. As a consequence, Defendants' Motion to Dismiss is granted.

I. BACKGROUND

On November 18, 2006, Plaintiff was working as a maintenance engineer at Wyndham Hotels and Resorts in Colorado Springs when he fell down an empty elevator shaft, injuring his ear, kidney, spleen, arm, wrist, and knee. (ECF No. 5 at 2-3.) Plaintiff hired James R. Koncilja and his law firm, Koncilja & Koncilja, P.C. to represent him in his workers' compensation settlement ("Settlement") and in his lawsuit against Kone, Inc., Strobel Construction Unlimited, Inc., Sedlak Electric Company, Heating and Plumbing Engineers, Inc., and John Doe Construction 1 through 5 ("Lawsuit"). (*Id.* at 3.)

Plaintiff claims that "Koncilja committed gross legal malpractice in every conceivable [res]pect and negligently violated [Plaintiff's] Fourteenth Amendment rights that would have insured a fair legal process." (*Id.*) According to Plaintiff, Defendants failed to even do the minimal amount of legal work. (*Id.*) Specifically, Plaintiff alleges that "Koncilja filed in the wrong county, did absolutely no investigation of the scene, nor of the hotel and their staff, no interviewing of culpable contractors.

Koncilja failed to do any interrogatories, no depositions, no questioning or photographs of [Plaintiff's] injuries, no medical discovery, and ultimately [Plaintiff's] legal case was dismissed for [Plaintiff's] *`failure to prosecute'*—even though James Koncilja said that [Plaintiff] would make `big money' on that civil suit against Wyndham Hotel[s]. He did nothing, and [Plaintiff] was awarded nothing."[1] (*Id.* (emphasis in original).)

Plaintiff then retained Attorney Paul Gordon to sue Defendants for professional negligence and breach of contract stemming from the dismissal of Plaintiff's Lawsuit ("Malpractice Lawsuit"). (ECF No. 14 at 2.) Plaintiff's Malpractice Lawsuit was dismissed by the Pueblo County District Court on August 6, 2012 "for failing to file a certificate of review because expert testimony would be required." (ECF No. 14-2 at 9.) This order of dismissal was subsequently upheld by the Colorado Court of Appeals, which "conclude[d that] the district court correctly ruled that plaintiff's negligence and breach of contract claims require expert analysis of the work performed by defendants and the facts underlying plaintiff's accident-related claims." (ECF No. 14-3 at 7.) The Colorado Court of Appeals "perceive[d] no abuse of discretion in this ruling and in the court's conclusion that plaintiff was, thus, required to file a certificate of review as to his professional negligence claim." (*Id.*) The Colorado Supreme Court denied Plaintiff's petition for writ of *certiorari*. (ECF No. 14-4 at 1.)

On October 17, 2013, Plaintiff, proceeding *pro se* filed a second malpractice lawsuit against Defendants ("*Pro se* Malpractice Lawsuit") in the Pueblo County District Court based on their actions, or lack thereof, in Plaintiff's Settlement and Lawsuit. (ECF No. 14-5 at 1.) This time, the Pueblo County District Court found that "the issues raised in the instant case are the same issues that were or should have been raised in [the Malpractice Lawsuit]. Therefore, they may not be raised again in the instant case." (*Id.* at 2.) The Pueblo County District Court also noted that "the Court file does not show a certificate of review filed by the Plaintiff. The Plaintiff must have been aware from his prior cases that a certificate of review would be required. Therefore,

the Court finds that there is no good cause shown to excuse the Plaintiff and this case must be dismissed for failure to comply with C.R.S. 13-2-602." (*Id.* at 3.)

Instead of appealing the court's dismissal of his *Pro se* Malpractice Lawsuit, Plaintiff filed a 24 page Motion for Relief from Order Granting Defendants' Motion to Dismiss on November 4, 2014. (ECF No. 14-6.) The Pueblo County District Court denied this motion because "[t]he Plaintiff's remedy from Judge Crockenberg's Order was to file a Notice of Appeal." (ECF No. 14-7.) Plaintiff appealed the denial of his Motion for Relief and the Colorado Court of Appeals affirmed the trial court's order. (ECF No. 14-8 at 14.) Plaintiff subsequently appealed to the Colorado Supreme Court, which again denied Plaintiff's petition for writ of *certiorari.* (ECF No. 14-9.)

II. STANDARD OF REVIEW

When a magistrate judge issues a recommendation on a dispositive matter, Federal Rule of Civil Procedure 72(b)(3) requires that the district court judge "determine *de novo* any part of the magistrate judge's [recommendation] that has been properly objected to." Fed. R. Civ. P. 72(b)(3). In conducting its review, "[t]he district court judge may accept, reject, or modify the recommendation; receive further evidence; or return the matter to the magistrate judge with instructions." *Id.* An objection is proper if it is filed within fourteen days of the magistrate judge's recommendations and is specific enough to enable the "district judge to focus attention on those issues—factual and legal—that are at the heart of the parties' dispute." *United States v. 2121 East 30th Street,* 73 F.3d 1057, 1059 (10th Cir. 1996) (quoting *Thomas v. Arn,* 474 U.S. 140, 147 (1985)). "When no timely objection is filed, the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." Fed. R. Civ. P. 72(b) advisory committee's note; *see also Summers v. Utah,* 927 F.2d 1165, 1167 (10th Cir. 1991) ("In the absence of timely objection, the district

court may review a magistrate's report under any standard it deems appropriate.").

Rule 12(b)(1) empowers a court to dismiss a complaint for "lack of jurisdiction over the subject matter." Fed. R. Civ. P. 12(b)(1). Dismissal under Rule 12(b)(1) is not a judgment on the merits of a plaintiff's case. Rather, it calls for a determination that the court lacks authority to adjudicate the matter, attacking the existence of jurisdiction rather than the allegations of the complaint. *See Castaneda v. INS*, 23 F.3d 1576, 1580 (10th Cir. 1994) (recognizing federal courts are courts of limited jurisdiction and may only exercise jurisdiction when specifically authorized to do so). The burden of establishing subject matter jurisdiction is on the party asserting jurisdiction. *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974). A court lacking jurisdiction "must dismiss the cause at any stage of the proceeding in which it becomes apparent that jurisdiction is lacking." *See id.*

A Rule 12(b)(1) motion to dismiss "must be determined from the allegations of fact in the complaint, without regard to mere conclusory allegations of jurisdiction." *Groundhog v. Keeler*, 442 F.2d 674, 677 (10th Cir. 1971). When considering a Rule 12(b)(1) motion, however, the court may consider matters outside the pleadings without transforming the motion into one for summary judgment. *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995). Where a party challenges the facts upon which subject matter jurisdiction depends, a district court may not presume the truthfulness of the complaint's "factual allegations . . . [and] has wide discretion to allow affidavits, other documents, and [may even hold] a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1)." *Id.*

In reviewing a Motion to Dismiss under Rule 12(b)(6) the Court will "assume the truth of the plaintiff's well-pleaded factual allegations and view them in the light most favorable to the plaintiff." *Ridge at Red Hawk, LLC v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007). Thus the Court "must accept all allegations as true and may not dismiss on the ground that it

appears unlikely the allegations can be proven." *Robbins v. Oklahoma,* 519 F.3d 1242, 1247 (10th Cir. 2008). "[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Id.* (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 556 (2007) ("*Twombly*")).

"[T]o withstand a motion to dismiss, a complaint must contain enough allegations of fact `to state a claim to relief that is plausible on its face.'" *Robbins,* 519 F.3d at 1247 (quoting *Twombly,* 550 U.S. at 570). This means that "[t]he burden is on the plaintiff to frame a `complaint with enough factual matter (taken as true) to suggest' that he or she is entitled to relief. `Factual allegations must be enough to raise a right to relief above the speculative level.'" *Robbins,* 519 F.3d at 1247 (quoting *Twombly,* 550 U.S. at 545 & 556). Plaintiff "does not need detailed factual allegations" but must plead more than merely "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Id.*

III. ANALYSIS

In his Amended Complaint, Plaintiff raises three claims for relief. First, Plaintiff argues that Defendants violated his Fourteenth Amendment Due Process rights by "not investigating any aspect of [Plaintiff's] life-threatening injuries at the Wyndham Hotel & Resort." (ECF No. 5 at 4.) Second, Plaintiff argues that by "filing one day before the deadline and filing [Plaintiff's] civil case against the wrong parties, Defendants precluded [Plaintiff] or any conscientious attorney from filing a case." (*Id.* at 5.) Plaintiff further alleges that he "has submitted substantial evidence that Defendants [] actually *protected* the real culprits from ever[] being sued for damages that harmed [him]." (*Id.* (Emphasis in original).) Finally, Plaintiff's third claim for relief is that his "Fourteenth Amendment rights were severely violated in Colorado state courts against [Defendants]. It apparently does not matter what laws or professional conduct

rules the Defendants violate, the Courts still rule in their favor." (*Id.*) Plaintiff requests "the Federal District Court to recognize the extreme judicial bias against [Plaintiff], and in favor of Defendants] that persists throughout the Colorado judicial system." (*Id.* at 7.) Additionally, Plaintiff requests financial relief based on the amount Defendants thought Plaintiff could win in his Lawsuit, the amount Defendants believed Plaintiff would have been awarded in his Settlement, and jury verdicts that have actually been awarded for similar injuries. (*Id.*)

In their Motion to Dismiss, Defendants argue that Plaintiff's Fourteenth Amendment claims "are essentially the same as the claims made in [Plaintiff's Malpractice Lawsuit] and [Plaintiff's *Pro se* Malpractice Lawsuit]." (ECF No. 14 at 4.) Defendants raise three main arguments in favor of dismissing Plaintiff's claims pursuant to Rule 12(b)(1).

First, they argue that the state courts' dismissal of Plaintiff's Malpractice Lawsuit and Plaintiff's *Pro se* Malpractice Lawsuit divests this Court of jurisdiction. (*Id.* at 5.) Defendants argue claim preclusion applies here because Plaintiff's prior lawsuits were final judgments and were resolved on the merits by the state court (*id.*), Plaintiff's prior lawsuits were based upon claims for relief identical to the present action (*id.* at 7), and the parties to all three lawsuits are identical (*id.* at 10).

Second, Defendants argue that all of Plaintiff's claims are time barred because the statute of limitations bars legal malpractice actions alleging negligence brought more than two years after the action accrues. (*Id.*)

Third, Defendants argue that even if the Court were to reach the merits of Plaintiff's Fourteenth Amendment claims, Plaintiff's claims fail because his Fourteenth Amendment due process claims fail to allege state action. (*Id.* at 12.)

Plaintiff responded to each of these arguments in his Response. (ECF No. 37.) First, Plaintiff contends that claim preclusion does not apply here because these Fourteenth Amendment claims

ere not brought forward or argued at the state court and there was no trial, no resolution on the merits, and no final judgment. (ECF No. 37 at 6.) Plaintiff argues that the state court dismissals were without prejudice and were not based on the merits of his arguments and are therefore not entitled to preclusive effect. (*Id.*)

Second, Plaintiff maintains that his claims are not time barred because his initial filings were within the statute of limitations, it takes several years to go through the state court's appeals procedures, and there was only a short lapse between his filings. (*Id.* at 7.)

Third, in response to Defendants' state actors argument, Plaintiff argues that Defendants, although private parties, were acting as state actors for purposes of 42 U.S.C. § 1983. (*Id.*) Plaintiff's argument relies on a Fifth Circuit opinion which held that a private party can be deemed a state actor if he or she is a joint participant with a state official in the offending enterprise. *Ballard v. Wall,* 413 F.3d 510, 519 (5th Cir. 2005). The Fifth Circuit held that to establish that the attorneys were joint participants in the judge's alleged offending enterprise, the plaintiff is required to demonstrate that the attorneys and judge knowingly participated in the alleged conspiracy. *Id.* Plaintiff argues that "the now retired Judge Crockenberg, an employee of the State of Colorado, did not even try to hide his rulings on whatever [Defendants] wanted. Defendants and the court were one and the same. They were a `team.' You could even say that Defendants were actually *their own judge.* Whatever Defendant[s] [] put to the court, the Defendants received the ruling they wanted." (ECF No. 37 at 8 (emphasis in original).)

Judge Tafoya's Recommendation focuses on the state action argument. First, she found that in his Amended Complaint, Plaintiff fails to allege any facts that show that the defendants are state actors. (ECF No. 50 at 5.) She acknowledges that Plaintiff attempted to correct this deficiency in his Response to Defendants' Motion to Dismiss "by implying that the defendants colluded with the state court judge who presided over Plaintiff's

legal malpractice case in order to receive the ruling they wanted." (*Id.* (internal quotation marks omitted.)) First, Judge Tafoya stated that Plaintiff may not effectively amend his omplaint by alleging new facts in his response to a motion to dismiss. She explained that even if Plaintiff had properly raised this argument, "relief under § 1983 cannot be premised solely on an argument that private actors misused available state procedures or rules, particularly in the absence of overt and significant assistance from state officials." (*Id.*) Her Recommendation further stated, "because the court recommends dismissal of Plaintiff's federal claims, the court also recommends that the district court decline to exercise jurisdiction over Plaintiff's state law claims." (*Id.* at 7.)

Plaintiff raises two main objections to Judge Tafoya's Recommendation.[2] First, Plaintiff argues that his § 1983 collusion claim was not an attempt to effectively amend his Amended Complaint. (ECF No. 51-1 at 5.) He acknowledges that he did not use the term "state actor" in his Amended Complaint, but explains that was because "there is not any reference to that term within his Federal Rules Handbook." (*Id.* (emphasis omitted).) Additionally, he claims, "Lucero, having found the name [s]tate [a]ctor has subsequently and consistently described all the attributions to [Defendants] to being the manifestations of State Actor throughout his documents." (*Id.* (emphasis omitted).)

Second, Plaintiff argues that his § 1983 claims are not conclusory allegations. (ECF No. 51-1 at 3.) Specifically, he claims that he "has upwards of 48 exhibits that will show during discovery and that irrefutably prove every assertion of [Defendants'] violations of Lucero's 5th and 14th Amendments, U.S. Constitutional & Bill of Rights guarantees to due process of law." (*Id.*) According to Plaintiff, the Court "cannot determine some of the factual truths of [Defendants'] violations of Lucero's constitutional rights without discover [*sic*]." (*Id.* at 4.)

Given Plaintiff's *pro se* status, the Court will consider Plaintiff's § 1983 collusion claim, even though Plaintiff should have specifically presented his Fourteenth Amendment claims as a

1983 collusion claim in his Amended Complaint. The Court concludes that amending the Complaint would be futile, because even if this § 1983 theory was included in the Amended Complaint, the allegations in Plaintiff's response brief still fail to state a claim upon which relief can be granted. The Court expresses no opinion on Judge Tafoya's reasoning which relies on the Tenth Circuit rule that relief under § 1983 cannot be premised solely on an argument that private actors misused available state procedures or rules.

The Tenth Circuit articulated the test to determine whether a private individual has actively conspired with an immune state official in *Norton v. Liddel,* 620 F.2d 1375, 1380 (10th Cir. 1980).[3]

It is our view that the critical inquiry in making this determination is: Has the plaintiff demonstrated the existence of a significant nexus or entanglement between the absolutely immune State official and the private party in relation to the steps taken by each to fulfill the objects of their conspiracy? The resolution of such issues must, of necessity, be made on a case-to-case basis.

Here, Plaintiff's only allegation supporting his conspiracy theory is that the state court judges ruled in Defendants' favor, granting their motions for extensions and permitting late filings. (ECF No. 37 at 8-9.) "Nothing in the Amended Complaint [or Plaintiff's Response or Objection] indicates that the court or the attorneys were acting outside the confines of the neutral function of a judicial forum." *Shaffer v. Cook,* 634 F.2d 1259, 1260 (10th Cir. 1980). Plaintiff's briefs fail to allege the kind of conspiratorial nexus between the state court and Defendants contemplated in *Norton* that would support a cognizable § 1983 claim.

While Plaintiff insists that he has evidence to support his collusion claim, the Court is not convinced. As the First Circuit articulated, "when a complaint omits facts that, if they existed, would clearly dominate the case, it seems fair to assume that those facts do not exist." *O'Brien v. DiGrazia,* 544 F.2d 543, 546 n.3 (1st Cir. 1976). The same is true for a plaintiff that asserts

the existence of "irrefutabl[e]" evidence (ECF No, 51-1 at 3) but does not actually disclose it. Accordingly, the Court adopts Judge Tafoya's Recommendation as modified herein and grants Defendants' Motion to Dismiss with respect to Plaintiff's Fourth Amendment claims.

Neither party objected to Judge Tafoya's recommendation that the Court decline to exercise jurisdiction over Plaintiff's state law claims. As to that issue, the Court concludes that Judge Tafoya's analysis was thorough and sound, and that there is no clear error on the face of the record. Accordingly the Court adopts Judge Tafoya's Recommendation with respect to Plaintiff's state law claims and declines to exercise jurisdiction over these claims. *See* 28 U.S.C. § 1367(c)(3).

IV. CONCLUSION

For the reasons set forth above, the Court ORDERS as follows:

1. The Magistrate Judge's July 20, 2018 Recommendation (ECF NO. 50) is ADOPTED as modified herein;2. Plaintiff's Objection (ECF NO. 51-1) is OVERRULED;3. Defendants' Motion to Dismiss (ECF No. 14) is GRANTED;4. Plaintiff's Amended Complaint (ECF No. 5) is DISMISSED WITH PREJUDICE as to his § 1983 cause of action and otherwise DISMISSED WITHOUT PREJUDICE for lack of subject matter jurisdiction;5. Plaintiff's Motion to Recover Service Expenses (ECF No. 12) is DENIED AS MOOT;6. Plaintiff's Motion for Judgment on the Pleadings Pursuant to Fed. R. Civ. P. 12(c) is DENIED AS MOOT; and7. The Clerk shall enter judgment accordingly and shall terminate this case. The parties shall bear their own attorney's fees and costs.

FootNotes

1. Plaintiff's Lawsuit was filed on his behalf by Koncilja at the El

Paso County District Court. It was dismissed on June 14, 2010 because the Court found "Plaintiff ha[d] not responded to the March 19, 2010 Delay Prevention Order issued by [that] court or filed any returns of service on other named defendants." (ECF No. 14-1 at 2.) Accordingly, that court "dismissed [the action] for failure to respond to the Delay Preveention [*sic*] Order or prosecute in a diligent fashion." (*Id.*)

2. Plaintiff raises several issues in his Objection (ECF No. 51-1). However, for purposes of this Order, the Court will focus exclusively on the arguments that relate to the Magistrate Judge's Report and Recommendation (ECF No. 50).

3. "A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority, but rather he will be subject to liability only when he has acted in the `clear absence of all jurisdiction.'" *Stump v. Sparkman,* 435 U.S. 349 (1978). Here, none of Plaintiff's allegations indicate that any of the judges acted outside the scope of the jurisdiction of their court. Thus, if they were parties to this lawsuit, they would have absolute immunity for their judicial acts. Therefore, the Court considers Plaintiff's § 1983 collusion claim as a collusion claim between private parties and parties entitled to absolute immunity.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 17–cv–01374–WJM–KMT

ANTHONY LUCERO,

Plaintiff,

v.

JAMES R. KONCILJA, and
KONCILJA & KONCILJA, P.C.,

Defendants.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Magistrate Judge Kathleen M. Tafoya

This case comes before the court on "Defendants' Motion to Dismiss Plaintiff's Amended Complaint for Lack of Subject Matter Jurisdiction Pursuant to Fed. R. Civ. P. 12(b)(1)" (Doc. No. 14 [Mot.], filed November 13, 2017). Plaintiff filed his response on December 28, 2017 (Doc. No. 37 [Resp.]), and Defendants filed their reply on January 12, 2018 (Doc. No. 40 [Reply]).

STATEMENT OF CASE

Plaintiff, proceeding *pro* se, filed this case asserting claims against Defendants James R. Koncilja and Koncilja & Koncilja, P.C. for legal malpractice and violations of his Fourteenth Amendment rights to due process. (*See* Doc. No. 5 [Compl.].) Plaintiff also alleges the defendants failed to follow Colorado statutes and rules when he filed a legal malpractice case against them. (*Id.* at 5–6.)

STANDARD OF REVIEW

A. Pro Se *Plaintiff*

Plaintiff is proceeding *pro se*. The court, therefore, "review[s] his pleadings and other papers liberally and hold[s] them to a less stringent standard than those drafted by attorneys." *Trackwell v. United States*, 472 F.3d 1242, 1243 (10th Cir. 2007) (citations omitted). *See also Haines v. Kerner*, 404 U.S. 519, 520–21 (1972) (holding allegations of a *pro se* complaint "to less stringent standards than formal pleadings drafted by lawyers"). However, a *pro se* litigant's "conclusory allegations without supporting factual averments are insufficient to state a claim upon which relief can be based." *Hall v. Bellmon,* 935 F.2d 1106, 1110 (10th Cir. 1991). A court may not assume that a plaintiff can prove facts that have not been alleged, or that a defendant has violated laws in ways that a plaintiff has not alleged. *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983). *See also Whitney v. New Mexico*, 113 F.3d 1170, 1173–74 (10th Cir. 1997) (court may not "supply additional factual allegations to round out a plaintiff's complaint"); *Drake v. City of Fort Collins*, 927 F.2d 1156, 1159 (10th Cir. 1991) (the court may not "construct arguments or theories for the plaintiff in the absence of any discussion of those issues"). The plaintiff's *pro se* status does not entitle him to application of different rules. *See Montoya v. Chao*, 296 F.3d 952, 957 (10th Cir. 2002).

B. Failure to State a Claim upon Which Relief Can Be Granted[1]

[1] Defendants argue Plaintiff's claims should be dismissed pursuant to Federal Rule of Procedure 12(b)(1) for the Court's lack of subject matter jurisdiction. (*See* Mot.) However, each of the bases upon which Defendants seek dismissal—claim preclusion, statute of limitations, and failure to allege a claim—is properly analyzed under Federal Rule of Civil Procedure 12(b)(6) for the plaintiff's failure to state a claim. *See Nichols v. Danley*, 266 F. Supp. 2d 1310, 1312 (D.N.M. 2003) (res judicata); *Aldrich v. McCulloch Props., Inc.*, 627 F.2d 1036, 1041 n.4 (10th Cir. 1980) (statute of limitations).

Federal Rule of Civil Procedure 12(b)(6) provides that a defendant may move to dismiss a claim for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1201 (10th Cir. 2003) (quotation marks omitted).

"A court reviewing the sufficiency of a complaint presumes all of plaintiff's factual allegations are true and construes them in the light most favorable to the plaintiff." *Hall v. Bellmon*, 935 F.2d 1106, 1198 (10th Cir. 1991). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Plausibility, in the context of a motion to dismiss, means that the plaintiff pleaded facts which allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* The *Iqbal* evaluation requires two prongs of analysis. First, the court identifies "the allegations in the complaint that are not entitled to the assumption of truth," that is, those allegations which are legal conclusion, bare assertions, or merely conclusory. *Id.* at 679–81. Second, the Court considers the factual allegations "to determine if they plausibly suggest an entitlement to relief." *Id.* at 681. If the allegations state a plausible claim for relief, such claim survives the motion to dismiss. *Id.* at 679.

Notwithstanding, the court need not accept conclusory allegations without supporting factual averments. *S. Disposal, Inc., v. Texas Waste*, 161 F.3d 1259, 1262 (10th Cir. 1998). "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is

inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S at 678. Moreover, "[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' Nor does the complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (citation omitted). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.* (citation omitted).

In evaluating a Rule 12(b)(6) motion to dismiss, courts may consider not only the complaint itself, but also attached exhibits and documents incorporated into the complaint by reference. *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009) (citations omitted). "[T]he district court may consider documents referred to in the complaint if the documents are central to the plaintiff's claim and the parties do not dispute the documents' authenticity." *Id.* (quotations omitted).

ANALYSIS

A. Fourteenth Amendment Claim

Plaintiff alleges the defendants "committed gross legal malpractice in every conceivable aspect and negligently violated [his] 14th Amendment rights that would have insured a fair legal process" while representing him in a Workers' Compensation case against Wyndham Hotel. (Compl. at 3.)

Under 42 U.S.C. § 1983, persons acting under the color of state law can be held liable for depriving others of their constitutional rights. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150 (1970). In order to show that an action was taken under color of state law, a plaintiff must

show: (1) that the "alleged constitutional deprivation [was] 'caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the state is responsible,' " and (2) that the " 'party charged with the deprivation [was] a person who may fairly be said to be a state actor.' " *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999) (quoting *Lugar v. Edmondson Oil Co., Inc.*, 475 U.S. 922, 937 (1982)).

In his Amended Complaint, Plaintiff fails to allege any facts to show that the defendants are state actors. In his Response, Plaintiff attempts to correct this deficiency by implying that the defendants "colluded" with the state court judge who presided over Plaintiff's legal malpractice case in order to "receive[] the ruling they wanted." (Resp. at 8.) However, Plaintiff "may not effectively amend [his] Complaint by alleging new facts in [his] response to a motion to dismiss." *In re Qwest Commc'ns Int'l, Inc.*, 396 F. Supp. 2d 1178, 1203 (D. Colo. 2004). Furthermore, Plaintiff has not requested leave to amend his Amended Complaint in order to allege additional facts or pursue new claims. Finally, relief under § 1983 cannot be premised solely on an argument that private actors misused available state procedures or rules, particularly in the absence of overt and significant assistance from state officials. *Cobb v. Saturn Land Company, Inc.*, 966 F.2d 1334, 1336–37 (10th Cir. 1992). Plaintiff's allegations in his Amended Complaint that the state court judge abused his discretion by making rulings that Plaintiff disagreed with fails to bring Plaintiff's Fourteenth Amendment claim within the ambit of § 1983.

Accordingly, Plaintiff's Fourteenth Amendment claim should be dismissed.

B. Supplemental Jurisdiction

Construing Plaintiff's Amended Complaint liberally because Plaintiff is not represented by an attorney, *Haines*, 404 U.S. at 520–21, it appears Plaintiff also asserts common law claims of legal malpractice and fraud.

"Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (internal citations omitted). If a court does not have jurisdiction over the subject matter of an action, the court must dismiss the action. *Full Life Hospice, LLC v. Sebelius*, 709 F.3d 1012, 1016 (10th Cir. 2013).

This court recommends herein that Plaintiff's constitutional claim be dismissed, and, thus, there is no basis for federal question jurisdiction. However, Plaintiff also contends that the Court has diversity jurisdiction pursuant to 28 U.S.C. § 1332. (*See* Compl. at 2, ¶ 4.) Under § 1332, the federal courts have jurisdiction over all civil actions where the mater in controversy exceeds the sum or value of $75,000 and the action is between citizens of different states. 28 U.S.C. § 1332(a). According to the Amended Complaint, all parties are citizens of Colorado. (*See* Compl. at 1, ¶¶ 1–3.) Because Plaintiff and Defendants are citizens of the same state, Plaintiff cannot maintain a diversity action against the defendants in this Court.

The pretrial dismissal of all federal claims–leaving only state-law claims—"generally prevents a district court from reviewing the merits of the state law claim[s]." *McWilliams v. Jefferson Cnty.*, 463 F.3d 1113, 1117 (10th Cir. 2006); *see also* 28 U.S.C. § 1367(c)(3) (stating that a district court may decline to exercise supplemental jurisdiction over state-law claims if "the district has dismissed all claims over which it has original jurisdiction"). This is not an inflexible rule, however, and a district court has discretion to adjudicate the merits of the state-

law claims when "the values of judicial economy, convenience, fairness, and comity" indicate that retaining jurisdiction over the state-law claims would be appropriate. *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 349-50 (1988). Nevertheless, "in the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine . . . will point toward declining to exercise jurisdiction over the remaining state-law claims." *Cohill*, 484 U.S. at 350 n.7; *see also Thatcher Enters. v. Cache Cnty. Corp.*, 902 F.2d 1472, 1478 (10th Cir. 1990) ("Notions of comity and federalism demand that a state court try its own lawsuits, absent compelling reasons to the contrary.").

Here, because the court recommends dismissal of Plaintiff's federal claims, the court also recommends that the District Court decline to exercise jurisdiction over Plaintiff's state law claims.

CONCLUSION

WHEREFORE, for the foregoing reasons, the court

RECOMMENDS that "Defendants' Motion to Dismiss Plaintiff's Amended Complaint for Lack of Subject Matter Jurisdiction Pursuant to Fed. R. Civ. P. 12(b)(1)" (Doc. No. 14) be **GRANTED** as follows:

1. Plaintiff's Fourteenth Amendment claim should be dismissed with prejudice for failure to state a claim upon which relief can be granted; and
2. The District Court should decline to exercise supplemental jurisdiction over Plaintiff's remaining claims. The court further

RECOMMENDS that all other pending motions be **DENIED** as moot.

ADVISEMENT TO THE PARTIES

Within fourteen days after service of a copy of the Recommendation, any party may serve and file written objections to the Magistrate Judge's proposed findings and recommendations with the Clerk of the United States District Court for the District of Colorado. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *In re Griego*, 64 F.3d 580, 583 (10th Cir. 1995). A general objection that does not put the district court on notice of the basis for the objection will not preserve the objection for *de novo* review. "[A] party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for de novo review by the district court or for appellate review." *United States v. One Parcel of Real Prop. Known As 2121 East 30th Street, Tulsa, Okla.*, 73 F.3d 1057, 1060 (10th Cir. 1996). Failure to make timely objections may bar *de novo* review by the district judge of the magistrate judge's proposed findings and recommendations and will result in a waiver of the right to appeal from a judgment of the district court based on the proposed findings and recommendations of the magistrate judge. *See Vega v. Suthers*, 195 F.3d 573, 579–80 (10th Cir. 1999) (a district court's decision to review a magistrate judge's recommendation *de novo* despite the lack of an objection does not preclude application of the "firm waiver rule"); *One Parcel of Real Prop.*, 73 F.3d at 1059–60 (a party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for *de novo* review by the district court or for appellate review); *Int'l Surplus Lines Ins. Co. v. Wyo. Coal Ref. Sys., Inc.*, 52 F.3d 901, 904 (10th Cir. 1995) (by failing to object to certain portions of the magistrate judge's order, cross-claimant had waived its right to appeal those portions of the ruling); *Ayala v. United States*, 980 F.2d 1342, 1352 (10th Cir. 1992) (by their failure to file objections, plaintiffs waived their right to appeal the magistrate

judge's ruling); *but see, Morales-Fernandez v. INS*, 418 F.3d 1116, 1122 (10th Cir. 2005) (firm waiver rule does not apply when the interests of justice require review).

Dated this 20th day of July, 2018.

BY THE COURT:

Kathleen M. Tafoya
United States Magistrate Judge