FILED
United States Court of Appeal
Tenth Circuit

September 10, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

HOLLY MACINTYRE,

Plaintiff - Appellant,

v.

JP MORGAN CHASE BANK, N.A.,

Defendant - Appellee.

Nos. 19-1290 & 20-1016
(D.C. No. 1:19-CV-00172-DDD-NYW)
(D. Colo.)

ORDER AND JUDGMENT*

Before **BRISCOE**, **MATHESON**, and **CARSON**, Circuit Judges.

Holly MacIntyre, proceeding pro se,[1] appeals in No. 19-1290 from the district court's dismissal of her action against JP Morgan Chase Bank, N.A. (Chase), in which she claimed Chase committed fraud during a foreclosure proceeding in state court. She further appeals in No. 20-1016 from the district court's award of attorney

---

* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

[1] We liberally construe Ms. MacIntyre's pro se filings but "will not act as [her] advocate." *James v. Wadas*, 724 F.3d 1312, 1315 (10th Cir. 2013).

fees to Chase under Colo. Rev. Stat. § 13-17-201. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.[2]

I. BACKGROUND

Ms. MacIntyre owned real property in Jefferson County, Colorado. In 2003, she executed a $100,000 promissory note secured by a deed of trust on the property. In 2014, Chase, asserting it was the note holder, sought a foreclosure judgment in state court authorizing a sale of the property. During that proceeding, the court rejected Ms. MacIntyre's assertion that Chase's note was forged, concluded Chase was the note holder, and issued a judgment of judicial foreclosure. Ms. MacIntyre appealed to the Colorado Court of Appeals (CCA) and filed three motions to stay execution of the judgment—one in the trial court and two in the CCA. All three were denied, which Ms. MacIntyre attributed to Chase's "fraudulent misrepresentations of fact and law." R. Vol. 1 at 10 (internal quotation marks omitted). In January 2016, while the appeal was pending, the property was sold at a sheriff's sale. In April 2016, the CCA affirmed the foreclosure judgment. Ms. MacIntyre sought certiorari review in the Colorado Supreme Court but later requested dismissal of her petition on mootness grounds, and the court dismissed the petition in January 2017.

In January 2019, Ms. MacIntyre initiated this action, alleging that "Chase's fraud in the foreclosure proceeding has caused [her] extraordinary financial damage

[2] These appeals are consolidated for procedural purposes only.

by the irreversible loss of her primary residence" and that "Chase's foreclosure fraud was solidified by the fraudulent tactics it used in thwarting the indispensable stay she needed to have any possibility of reversing the foreclosure judgment on appeal." *Id.* at 11. She further alleged that "the mootness of her appeals . . . entitled [her] to have her foreclosure judgment vacated" and that she intended to seek such vacatur in Colorado's appellate courts. *Id.*

Ms. MacIntyre did not immediately serve the complaint on Chase because she believed "the viability of this lawsuit" largely hinged on the outcome of the motion she intended to file in the CCA and that an order granting her motion "might obviate the need for this lawsuit and entitle [her] to relief in the state courts of Colorado." *Id.* at 45. In February, however, before she served the complaint, counsel for Chase entered an appearance, waived service, and moved to dismiss based on (1) lack of subject-matter jurisdiction under the *Rooker-Feldman* doctrine, *see D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983); *Rooker v. Fid. Tr. Co.*, 263 U.S. 413 (1923); (2) lack of subject-matter jurisdiction under the *Younger* doctrine, *see Younger v. Harris*, 401 U.S. 37 (1971); (3) collateral estoppel; (4) judicial estoppel; (5) statute of limitations; and (6) failure to adequately plead her claim for fraud.

At a status conference a month later, Ms. MacIntyre stated she believed Chase's motion was premature and did not require a response. Chase countered that it had made a general appearance and that it was not required to wait until service before filing a dispositive motion. The court allowed Ms. MacIntyre until April 9 to

file a response to the motion to dismiss and to raise any challenge to the propriety of Chase's appearance and motion to dismiss. Ms. MacIntyre also informed the court she intended to file a motion to vacate the foreclosure judgment with the CCA by March 22.

Ms. MacIntyre ultimately filed that motion on March 29. The CCA denied it two weeks later, explaining that the mandate in her appeal had issued in January 2017 and that "[n]o further motion to vacate will be considered." R. Vol. 1 at 90. Meanwhile, after serving the complaint, Ms. MacIntyre filed (1) a motion to strike Chase's motion to dismiss as premature; and (2) a response to the motion to dismiss, in which she provided only "a discreet response" to the issue of collateral estoppel due to "her very delicate legal situation," *id.* at 81-82.

In June 2019, the district court dismissed the action under the *Rooker-Feldman* doctrine. The court did not address Chase's other defenses, and it denied as moot "[a]ll other pending motions," *id.* at 141. Ms. MacIntyre moved for reconsideration under Fed. R. Civ. P. 59(e), which the court denied, although it modified the dismissal to be without prejudice. Chase then moved for clarification, as to whether the dismissal was *sua sponte* or based on Chase's motion to dismiss. The court granted the motion and clarified it had granted Chase's Rule 12(b)(1) motion to dismiss. Ms. MacIntyre gave timely notice of appeal from the dismissal and the post-judgment orders.

Meanwhile, Chase moved for attorney fees under Colo. Rev. Stat. § 13-17-201, which requires an award of attorney fees to the defendant when a tort action brought for injury to person or property is dismissed on the defendant's Rule 12(b) motion. The court granted the motion but imposed "a general reduction of 25% of the requested hours." R. Vol. 2 (20-1016) at 62. Ms. MacIntyre moved to reconsider under Fed. R. Civ. P. 59(e), claiming that because the court dismissed the action for lack of subject-matter jurisdiction under *Rooker-Feldman*, it also lacked jurisdiction to award attorney fees. The court denied the motion, and Ms. MacIntyre timely appealed from the attorney fees orders.

II. **DISCUSSION**

In No. 19-1290, Ms. MacIntyre contends the district court erred in (1) denying as moot her motion to strike Chase's motion to dismiss; (2) dismissing her fraud claim for lack of subject-matter jurisdiction under *Rooker-Feldman*; (3) denying her motion for reconsideration; and (4) clarifying it had granted Chase's motion to dismiss. In No. 20-1016, Ms. MacIntyre contends the district court erred in (1) awarding attorney fees to Chase under Colo. Rev. Stat. § 13-17-201; and (2) denying her motion for reconsideration based upon lack of jurisdiction.

A. *Appeal No. 19-1290*

1. **Denial of Ms. MacIntyre's Motion to Strike as Moot**

Ms. MacIntyre argues the district court erred in denying her motion to strike Chase's motion to dismiss as moot. We review this issue for an abuse of discretion. *See In re Gold Res. Corp. Sec. Litig.*, 776 F.3d 1103, 1119 (10th Cir. 2015).

In her motion, Ms. MacIntyre argued Chase's motion to dismiss should have been stricken because Chase filed it before she had served the complaint. The district court did not reach this argument and instead explained: "[I]f Chase is correct that the Court does not have jurisdiction, whether its motion to dismiss should be stricken is immaterial considering the Court's ongoing obligation to evaluate its own jurisdiction." R. Vol. 1 at 136. After concluding that *Rooker-Feldman* barred the action, the court denied all pending motions, which included the motion to strike, as moot. Ms. MacIntyre asserts that when the court later clarified the dismissal was the result of granting Chase's motion to dismiss and was not *sua sponte*, "the Motion to Strike automatically became not immaterial, but very material," because the motion to dismiss "could not be [evaluated] until the Motion to Strike it had been decided." Aplt. Opening Br. (19-1290) at 19.

In effect, Ms. MacIntyre argues the district court abused its discretion by not ruling on her motion to strike before ruling on Chase's motion to dismiss. She offers no authority for this position. *See United States v. Garcia*, 946 F.3d 1191, 1210 n.11 (10th Cir. 2020) (noting a "party who fails to develop or provide any authority in

support of [an] argument [has] waived it" (internal quotation marks omitted)). Ms. MacIntyre thus has failed to show the court abused its discretion in denying her motion to strike as moot.

2. **Dismissal of the Fraud Claim Under *Rooker-Feldman***

Ms. MacIntyre next contends the court erred in dismissing her action for lack of subject-matter jurisdiction under the *Rooker-Feldman* doctrine. We review this issue de novo. *See Mann v. Boatright*, 477 F.3d 1140, 1145 (10th Cir. 2007). Under "the *Rooker–Feldman* doctrine, lower federal courts are precluded from exercising appellate jurisdiction over final state-court judgments." *Lance v. Dennis*, 546 U.S. 459, 463 (2006) (per curiam). The doctrine applies to federal cases "brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005).

a. *Finality of state court action*

Ms. MacIntyre argues the state-court foreclosure proceeding was not final under *Rooker-Feldman* when she filed her federal complaint. She further argues her state-court proceeding does not satisfy any of the conditions for finality that we noted in *Guttman v. Khalsa*, including:

> (1) when the highest state court in which review is available has affirmed the judgment below and nothing is left to be resolved; (2) if the state action has reached a

> point where neither party seeks further action; or (3) if the state court proceedings have finally resolved all the federal questions in the litigation, but state law or purely factual questions (whether great or small) remain to be litigated.

446 F.3d 1027, 1032 n.2 (10th Cir. 2006) (internal quotation marks omitted).

In *Guttman*, we held the plaintiff's state-court proceeding was not final because his certiorari petition with the New Mexico Supreme Court was pending when he filed his federal action. *See id.* at 1032. Ms. MacIntyre characterizes her situation as only "a slight variation on . . . *Guttman*." Aplt. Opening Br. (19-1290) at 27. But the difference is dispositive. Two years before she filed her federal action, the Colorado Supreme Court dismissed, at her request, her petition for a writ of certiorari from the CCA's decision affirming the foreclosure judgment. Thus, unlike in *Guttman*, Ms. MacIntyre had no pending petition before the state's highest court when she filed her federal action.

Ms. MacIntyre also asserts her state-court proceeding was not final "because the Colorado Supreme Court did not *affirm* the judgment of foreclosure" but, instead, "*dismissed* the petition for certiorari on mootness grounds." *Id.* at 25 (emphasis added) (citation omitted). But we have cited *Guttman* for the broader principle that *Rooker-Feldman* applies when the "state court appeals process has run its full course." *Erlandson v. Northglenn Mun. Court*, 528 F.3d 785, 788 n.3 (10th Cir. 2008). In *Erlandson*, we found the state-court proceeding final for purposes of *Rooker-Feldman* when the Colorado Supreme Court did not affirm the trial-court

judgment but, instead, denied the federal plaintiff's certiorari petition. *See id.* Similarly, when the Colorado Supreme Court dismissed Ms. MacIntyre's certiorari petition, the "state court appeals process ha[d] run its full course." *Id.* The CCA's order denying her March 2019 motion to vacate, confirmed her appeal was final in January 2017—two years before she commenced her federal action.

Finally, Ms. MacIntyre argues the state court action is not final because she will "seek further action" by "filing a Petition for a Rule to Show Cause in the Colorado Supreme Court to vacate the state-court-judgment." Aplt. Opening Br. (19-1290) at 25-26 (internal quotation marks omitted).[3] But she concedes such a petition would be subject to the appellate rule "govern[ing] supreme court original proceedings" without "any time limit on filing," and would not be "a continuation of the concluded appellate process." *Id.* at 26 (internal quotation marks omitted). She offers no authority—and we know of none—for her claim that a party can avoid finality under *Rooker-Feldman* by initiating, let alone expressing an intention to initiate, an original proceeding in a state appellate court after an appeal has concluded. *See Garcia*, 946 F.3d at 1210 n.11 (noting an argument unsupported by authority is waived).

[3] According to Chase, Ms. MacIntyre still "ha[d] not filed such petition" as of January 2020. Aplee. Br. (19-1290) at 18 n.10.

b. *Rooker-Feldman precludes review of state-court judgment*

Ms. MacIntyre next argues her complaint does not implicate *Rooker-Feldman* because she is not "complaining of injuries caused by [the] state-court judgment[]" and is not "inviting district court review and rejection of [that] judgment[]." *Exxon Mobil Corp.*, 544 U.S. at 284. We disagree.

Her sole claim is that Chase fraudulently procured both the foreclosure judgment and the orders denying her motions to stay execution of the judgment. For a federal court to grant relief on her claim, it necessarily would have to find that the judgment and post-judgment orders were fraudulently procured. Her claim therefore depends on a federal court finding that the state courts erred in entering judgment for Chase. *Rooker-Feldman* prohibits such review. *See Exxon Mobil Corp.*, 544 U.S. at 284.

Ms. MacIntyre's attempts to distance her claim from *Rooker-Feldman* are unavailing. She contends she is seeking redress for injuries caused by the alleged fraud and not by the state-court judgment itself. But her injuries are based entirely on the court-ordered sale of her house. She has identified no injury independent of the state-court orders, and she admitted that vacatur of the foreclosure judgment by the state appellate courts "might obviate the need for this lawsuit," R. Vol. 1 at 45. Because "an element of [her] claim" is "that the state court wrongfully entered its judgment," *Rooker-Feldman* squarely applies. *Campbell v. City of Spencer*, 682 F.3d 1278, 1283 (10th Cir. 2012); *cf. Mayotte v. U.S. Bank Nat'l Ass'n*, 880 F.3d 1169,

1176 (10th Cir. 2018) (holding *Rooker-Feldman* did not apply because the plaintiff could "prove her claims without any reference to the state-court proceedings"); *P.J. ex rel. Jensen v. Wagner*, 603 F.3d 1182, 1193-94 (10th Cir. 2010) (holding *Rooker-Feldman* did not apply because the claims did "not rest on any allegation concerning the state-court proceedings or judgment" and "would be identical even if there were no state-court orders" (internal quotation marks omitted)).[4]

Ms. MacIntyre also argues *Rooker-Feldman* does not apply because she is seeking only monetary damages, not vacatur of the foreclosure judgment. But seeking monetary damages without explicitly seeking to overturn or modify the state-court judgment does not mean a claim can escape *Rooker-Feldman*'s reach. To the contrary, claims for monetary damages can implicate *Rooker-Feldman*. *See Wagner*, 603 F.3d at 1193 (distinguishing claims for monetary damages from claims for prospective injunctive and declaratory relief for purposes of *Rooker-Feldman*). In seeking monetary damages based on "the irreversible loss of her primary residence, combined with her subsequent displacement due to eviction," R. Vol. 1 at 11, Ms. MacIntyre's "requested relief would necessarily undo the [Colorado] state

[4] Ms. MacIntyre contends the district court improperly conflated *Rooker-Feldman* with preclusion. *See Mayotte*, 880 F.3d at 1175 ("[A]ttempts merely to relitigate an issue determined in a state case are properly analyzed under issue or claim preclusion principles rather than *Rooker-Feldman*." (internal quotation marks omitted)). We perceive no such doctrinal confusion in the district court's order. And in any event, our review of the dismissal is de novo.

court's judgment because it would place [her] back in the position [she] occupied prior to the [foreclosure]," *Mo's Express, LLC v. Sopkin*, 441 F.3d 1229, 1237 (10th Cir. 2006) (internal quotation marks omitted).

Ms. MacIntyre further contends a claim for money damages based on a fraudulent state-court foreclosure judgment is exempt from *Rooker-Feldman*. But in *Tal v. Hogan*, 453 F.3d 1244 (10th Cir. 2006), we rejected the plaintiff's similar attempt to circumvent *Rooker-Feldman* by claiming the defendant "committed fraud on appeal" in state court. *Id.* at 1255. We noted "new allegations of fraud might create grounds for appeal, but that appeal should be brought in the state courts." *Id.* at 1256.

Ms. MacIntyre attempts to distinguish *Tal* by describing her claim as involving "not *new* fraud" but rather the "same fraud that she argued before the state court." Aplt. Reply Br. (19-1290) at 10 (internal quotation marks omitted). But *Tal* not only recognized that "new allegations of fraud" could come within the *Rooker-Feldman* prohibition, but also allegations that the federal defendant "*continue[d]* to make false claims." *Tal*, 453 F.3d at 1256 (emphasis added). In particular, we observed that the state appellate court "was confronted with and reviewed the same 'fraud' as the trial court" and that "[i]ts holding is equally applicable to the 'fraud' alleged at the trial court level . . . as it was to the 'fraud' allegedly perpetrated before its very eyes." *Id.* at 1257. The same is true with Ms. MacIntyre's claim that Chase fraudulently procured the foreclosure judgment and the denial of her motions for a stay. Her

attempt to distinguish *Tal* fails, and her "loss in state court precludes a second round in federal court." *Id.*

* * * *

For Ms. MacIntyre to prevail on her fraud claim, the district court would have had to review and reject the state-court judgment that she alleges Chase fraudulently procured. Because *Rooker-Feldman* prohibits such review, the district court properly dismissed her claim for lack of subject-matter jurisdiction.

3. **Denial of Ms. MacIntyre's Rule 59(e) Motion to Reconsider**

Ms. MacIntyre contends the district court erred in denying her Rule 59(e) motion to reconsider except to the extent the court modified the dismissal to be without prejudice. We review this issue for an abuse of discretion. *See Nelson v. City of Albuquerque*, 921 F.3d 925, 929 (10th Cir. 2019).

"Grounds warranting a motion to reconsider include (1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice," including "where the court has misapprehended the facts, a party's position, or the controlling law." *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000). In her brief, Ms. MacIntyre lists sixteen issues she included in her Rule 59(e) motion.[5] In denying the motion,

[5] Except for the *Rooker-Feldman* issues we have addressed, Ms. MacIntyre has not raised on appeal the other arguments in her motion to reconsider. *See Platt v. Winnebago Indus., Inc.*, 960 F.3d 1264, 1271 (10th Cir. 2020) ("[F]ailure to raise an issue in an opening brief waives that issue." (internal quotation marks omitted)).

the district court stated it "remain[ed] certain that the *Rooker-Feldman* doctrine prohibit[ed] it from considering this matter." R. Vol. 1 at 167. Although Ms. MacIntyre faults the court for not providing "any analysis whatsoever" and for incorrectly stating it had "previously considered" arguments that she had not raised until her motion. Aplt. Opening Br. (19-1290) at 33-34 (internal quotation marks omitted), she focuses on the *Rooker-Feldman* determination. As discussed above, we have considered the issue de novo and agree with the court's assessment. Because the court properly concluded it lacked jurisdiction, Ms. MacIntyre cannot show that the court erred in denying her motion to reconsider.

4. Clarification regarding the dismissal

Finally, Ms. MacIntyre contends the district court erred in granting Chase's motion and clarifying that it had "granted Defendant's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1)," R. Vol. 1 at 173. We review this issue for an abuse of discretion. *See Jones, Waldo, Holbrook & McDonough v. Cade*, 510 F.3d 1277, 1278 (10th Cir. 2007).

As Ms. MacIntyre notes, the court's clarification that the dismissal was based on Chase's Rule 12(b)(1) motion meant Chase was eligible for an award of attorney fees under Colo. Rev. Stat. § 13-17-201. She alleges no particular error with the clarification but claims she "will be fatally prejudiced by [the clarification] if this Court is inclined to uphold the dismissal" on one of the alternative grounds raised by Chase that she strategically chose not to address in district court. Aplt. Opening Br.

(19-1290) at 36. Because we agree with the district court's Rooker-Feldman ruling and do not address Chase's alternative grounds for dismissal, Ms. MacIntyre's prejudice argument fails. The district court did not abuse its discretion in granting Chase's motion to clarify the basis for dismissal.

B. ***Appeal No. 20-1016***

1. **Order awarding attorney fees under Colo. Rev. Stat. § 13-17-201**

In No. 20-1016, Ms. MacIntyre contends the district court erred in awarding attorney fees under Colo. Rev. Stat. § 13-17-201. This statute applies when a federal court, exercising diversity jurisdiction over a tort action under Colorado state law, grants a defendant's motion to dismiss under Rule 12(b) of the Federal Rules of Civil Procedure. *See Jones v. Denver Post Corp.*, 203 F.3d 748, 757 (10th Cir. 2000), *abrogated on other grounds by Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002). We review the district court's factual findings for clear error and legal conclusions de novo. *See id.* at 756.

Ms. MacIntyre initially opposed Chase's motion for attorney fees on the ground that, in a diversity action dismissed for lack of jurisdiction, 28 U.S.C. § 1919 preempted Colo. Rev. Stat. § 13-17-201. The federal statute provides: "Whenever any action or suit is dismissed in any district court . . . for want of jurisdiction, such court may order the payment of just costs." 28 U.S.C. § 1919. The district court concluded that although 28 U.S.C. § 1919 does not authorize an award of attorney

fees, it also does not prohibit a court from otherwise awarding fees. The court found no conflict between the statutes and, thus, no preemption.

On appeal, Ms. MacIntyre reiterates her argument regarding preemption. But her analysis is relegated entirely to a cursory footnote in her opening brief. We therefore decline to consider the issue. *See United States v. Hardman*, 297 F.3d 1116, 1131 (10th Cir. 2002) (en banc) ("Arguments raised in a perfunctory manner, *such as in a footnote*, are waived." (emphasis added)).[6]

2. **Denial of Ms. MacIntyre's Rule 59(e) Motion to Reconsider**

Ms. MacIntyre contests the denial of her Rule 59(e) motion to reconsider the order awarding attorney fees. We review this issue for an abuse of discretion. *See Nelson*, 921 F.3d at 929. And we review "jurisdictional arguments de novo in order to ensure that the district court did not abuse its discretion by making a clear error of judgment or exceeding the bounds of permissible choice in the circumstances." *Devon Energy Prod. Co. v. Mosaic Potash Carlsbad, Inc.*, 693 F.3d 1195, 1201-02 (10th Cir. 2012) (alteration and internal quotation marks omitted).

In her motion to reconsider, Ms. MacIntyre argued the dismissal for lack of subject-matter jurisdiction under *Rooker-Feldman* also meant that "diversity . . .

---

[6] Ms. MacIntyre has cited no authority showing 28 U.S.C. § 1919 preempts a state statute mandating attorney fees. She cites *State v. Golden's Concrete Co.*, 962 P.2d 919, 926 (Colo. 1998), in which the Colorado Supreme Court held that 42 U.S.C. § 1988, which permits attorney fees for a prevailing party in a 42 U.S.C. § 1983 action, preempts Colo. Rev. Stat. § 13-17-201.

jurisdiction never attached" and that the court lacked subject-matter jurisdiction to award attorney fees under state law. R. Vol. 2 (20-1016) at 73. The court found the argument was untimely raised and without merit. Ms. MacIntyre contends it was not untimely because subject-matter jurisdiction can be raised at any time. In any event, we agree with the court's conclusion that it had jurisdiction to award fees.

"It is well established that a federal court may consider collateral issues after an action is no longer pending." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395 (1990); *see also Willy v. Coastal Corp.*, 503 U.S. 131, 137 (1992) (upholding Rule 11 sanctions after "[a] final determination of lack of subject-matter jurisdiction" because "such a determination does not automatically wipe out all proceedings had in the district court at a time when the district court operated under the misapprehension that it had jurisdiction"). We therefore have held that "a district court may still award attorney's fees after dismissing the underlying action for lack of subject-matter jurisdiction . . . because a claim for attorney's fees gives rise to issues separate and distinct from the merits of the original cause of action." *D.A. Osguthorpe Family P'ship v. ASC Utah, Inc.*, 705 F.3d 1223, 1236 (10th Cir. 2013) (internal citation omitted). This is equally true when a state statute forms the basis for an award of attorney fees. *See Lorillard Tobacco Co. v. Engida*, 611 F.3d 1209, 1217 (10th Cir. 2010) ("[A] district court need not have subject matter jurisdiction to award attorney's fees pursuant to [Colo. Rev. Stat. §] 13-17-102.").

Ms. MacIntyre contends that her action was only a "would-be diversity case" and that the dismissal under *Rooker-Feldman* meant the district court "was never for a minute 'sitting in diversity'" such that it had "access to a state fee-shifting statute." Aplt. Reply. Br. (20-1016) at 5. But she offers no applicable authority for this novel argument. The fact that the court lacked jurisdiction over her sole claim for relief does not mean it lacked jurisdiction to award attorney fees after the dismissal. The district court did not abuse its discretion in denying the Rule 59(e) motion.

III. CONCLUSION

We (1) affirm the district court's judgment, (2) deny Ms. MacIntyre's motion to strike Chase's brief in No. 19-1290, and (3) grant Chase's motion for leave to file a response to Ms. MacIntyre's motion to strike and her motion for leave to file a reply to Chase's response.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge

FILED
United States Court of Appeals
Tenth Circuit

October 19, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

HOLLY MACINTYRE,

Plaintiff - Appellant,

v.

JP MORGAN CHASE BANK, N.A.,

Defendant - Appellee.

Nos. 19-1290 & 20-1016
(D.C. No. 1:19-CV-00172-DDD-NYW)
(D. Colo.)

ORDER

Before **BRISCOE**, **MATHESON**, and **CARSON**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Daniel D. Domenico

Civil Action No. 1:19-cv-00172-DDD-NYW

HOLLY MACINTYRE,

Plaintiff,

v.

JP MORGAN CHASE BANK, N.A.

Defendant.

ORDER OF DISMISSAL

This case alleges that Defendant JP Morgan Chase Bank, N.A. (Chase) falsified signatures and indorsements on a promissory note, thereby permitting it to fraudulently obtain a judgment in Colorado state court authorizing a foreclosure sale of Ms. MacIntyre's property. Chase moves to dismiss for lack of subject-matter jurisdiction and for failure to state a claim. (Doc. 12.) In addition to responding, Ms. MacIntyre moves to strike Chase's motion because it was filed before service of the Complaint. (Doc. 20.) Because this case seeks to reopen a matter that was decided by a final decision of a Colorado state court, the Court has no jurisdiction to resolve it. Therefore, the case is **DISMISSED WITH PREJUDICE**.

B

I. BACKGROUND

Unless specifically noted, the following allegations are drawn from the Complaint (Doc. #1) and are taken as true. *See Wilson v. Montano*, 715 F.3d 847, 850 n.1 (10th Cir. 2013).

Holly MacIntyre was the owner of real residential property in Jefferson County, Colorado. On January 10, 2003, she executed a $100,000 promissory note made payable to Broker One Lending and secured by a deed of trust on the property. On December 16, 2014, Chase—claiming to be the holder of the note—sought a judgment permitting it to conduct a foreclosure sale of the property. During the trial in state court, Chase knowingly produced a different, "forged and falsified" note bearing a "simulated handwritten indorsement apparently made by Broker One Lending to Flagstar Bank" and "simulated ink-stamped indorsement in blank, apparently made by Flagstar Bank, but not actually made by Flagstar Bank." At the state trial, "Chase disputed every allegation that MacIntyre made there about the falsification of the false notes and the signatures." After weighing the evidence, the "state court concluded that Chase is the 'holder' of the purported 'note' and issued a judgment of judicial foreclosure against MacIntyre."

Ms. MacIntyre appealed to the Colorado Court of Appeals and filed three motions to stay execution of the foreclosure judgment. Chase's attorneys obtained denials of all three motions to stay by "using fraudulent misrepresentations of fact and law." On January 21, 2016, the property was sold at a sheriff's sale. On April 28, 2016, the Colorado Court of Appeals affirmed the foreclosure judgment. Ms.

MacIntyre sought certiorari review in the Colorado Supreme Court, but she later filed a "suggestion of mootness and motion to dismiss as moot," and the high court dismissed on mootness grounds on January 3, 2017.

On January 18, 2019, proceeding pro se, Ms. MacIntyre filed this case alleging that "Chase's fraud in the foreclosure proceeding has caused [her] extraordinary financial damage by the irreversible loss of her primary residence. . . . Chase's foreclosure fraud was solidified by the fraudulent tactics it used in thwarting the indispensable stay she needed to have any possibility of reversing the foreclosure judgment on appeal." In the Complaint, she argued that the "mootness of her appeals" entitles her to have her foreclosure judgment vacated—a theory she alleged she would test with forthcoming appellate filings.

Counsel for Chase appeared on February 7 and waived service on behalf of Chase. On February 28, Chase filed a motion to dismiss for lack of subject-matter jurisdiction under either the *Rooker-Feldman* or *Younger* doctrines. Chase further submits that the Complaint fails to state a claim because Ms. MacIntyre is estopped from relitigating certain issues, she filed more than a year beyond the applicable statute of limitations period, and she is unable to plead the necessary fraud element of reliance.

On March 28, Ms. MacIntyre filed a "motion to vacate judgment as moot" in the Colorado Court of Appeals. (Doc. 19-1.) On April 11, the Court of Appeals ordered: "Appellant's motion to vacate the judgment as moot is denied. Case was

mandated on January 4, 2017. No further motion to vacate will be considered." (Doc. 22-1, at 2.)

On April 5, Ms. MacIntyre served Chase with the Complaint. On April 9, she moved to strike the motion to dismiss as premature solely because it was filed before service of the Complaint. She further responded to the motion to dismiss by singularly addressing Chase's invocation of collateral estoppel. The Court considers the parties' motions together.

II. ANALYSIS

Courts must hold pro se litigants' pleadings "to less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 519, 520 (1972). Because Ms. MacIntyre is pro se, the Court reads the Complaint broadly for facts that could be sufficient to state a valid claim, *Hall v. Bellmon*, 935 F.2d 1106, 1110 & n.3 (10th Cir. 1991), or which might "evince[] a basis for the court's subject-matter jurisdiction." *Kucera v. Cent. Intelligence Agency*, 754 F. App'x 735, 736 (10th Cir. 2018). At the same time, where the Court's subject-matter jurisdiction is in question, the Court is not constrained to accept a complaint's allegations as true. *Holt v. United States*, 46 F.3d 1000, 1002–03 (10th Cir. 1995). And here, Ms. MacIntyre supplied the Court with her unsuccessful post-Complaint appellate filings, which may bear on the jurisdictional question.

The Court's principle concern is whether it has the power to hear this case. Federal courts "have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party," and

thus a court may *sua sponte* raise the question of whether there is subject matter jurisdiction "at any stage in the litigation." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 501 (2006). Therefore, if Chase is correct that the Court does not have jurisdiction, whether its motion to dismiss should be stricken is immaterial considering the Court's ongoing obligation to evaluate its own jurisdiction. The *Rooker-Feldman* and *Younger* doctrines raised by Chase both implicate the Court's subject-matter jurisdiction. *See Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 281 (2005); *Chapman v. Oklahoma*, 472 F.3d 747, 748 (10th Cir. 2006).

Rooker-Feldman takes its name from the Supreme Court's decisions in *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). In *Rooker*, plaintiffs previously defeated in state court filed suit in a federal district court alleging that the adverse state court judgment was unconstitutional and asking that it be declared "null and void." 263 U.S. at 414–15. The Supreme Court stated that even if the state court was wrong, "that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding," and such was not the province of the federal district courts. *Id.* at 415–16. In *Feldman*, the Supreme Court similarly concluded that a federal district court lacked subject-matter jurisdiction over what would have been essentially a review of allegations "inextricably intertwined" with judicial determinations made by the District of Columbia's highest court. 460 U.S. at 485–86.

Citing the habit of district courts to expand the scope of the *Rooker* and *Feldman* decisions, the Supreme Court in *Exxon* considered whether the doctrine precluded a federal court from hearing a case brought only weeks after a parallel case was filed in state court and well before any judgment in the state court. 544 U.S. at 281. There, the Court held that the "*Rooker-Feldman* doctrine is confined to cases of the kind from which it acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the federal district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp.*, 544 U.S. at 281. Thus, *Exxon* clarified that "*Rooker-Feldman* is not triggered simply by the entry of judgment in state court" but only "after state proceedings have ended." *Id.* at 292. The Tenth Circuit has read *Exxon* to mean that a state court action is not final for *Rooker-Feldman* purposes until a party's final chance to appeal has passed. *Guttman v. Khalsa*, 446 F.3d 1027, 1031 (10th Cir. 2006) ("In this case, Guttman filed his federal suit while his petition for certiorari to the New Mexico Supreme Court was pending. His state suit was not final. As such, the *Rooker-Feldman* doctrine does not bar his federal suit and the district court does have subject matter jurisdiction to hear the case."); *Chapman v. Oklahoma*, 472 F.3d 747, 749 (10th Cir. 2006) ("Mr. Chapman's state court proceedings have not reached the end of the state courts' appeal process, and the district court therefore erred by dismissing his complaint under *Rooker-Feldman*.").

Even when appeals remain in a state case, however, "[c]omity or abstention doctrines may, in various circumstances, permit or require the federal court to stay or dismiss the federal action in favor of the state-court litigation." *Exxon Mobil Corp.*, 544 U.S. at 292. One such abstention doctrine is the product of *Younger v. Harris*, 401 U.S. 37 (1971), which provides principles for determining when it is appropriate for a federal court to abstain for interfering with a state judicial proceeding. *Seneca-Cayuga Tribe of Okla. v. State of Okl. ex rel. Thompson*, 874 F.2d 709, 711 (10th Cir. 1989). Abstention is appropriate when (1) there is an ongoing state criminal, civil, or administrative proceeding; (2) the state court provides an adequate forum to hear the claims raised in the federal complaint; and (3) the state proceedings involve important state interests, matters which traditionally look to state law for their resolution, or implicate separately articulated state policies. *Chapman*, 472 F.3d at 749.

Finally, when parallel cases are waged in state and federal court, "disposition of the federal action, once the state-court adjudication is complete, would be governed by preclusion law." *Exxon Mobil Corp.*, 544 U.S. at 293. Most relevant here, the principle of collateral estoppel prevents re-litigation of issues that have been previously decided on the merits against a party that had a full and fair opportunity to litigate them in the prior proceeding. *See Harrison v. Eddy Potash, Inc.*, 248 F.3d 1014, 1022 (10th Cir. 2001). However, "[p]reclusion, of course, is not a jurisdictional matter. . . . In parallel litigation, a federal court may be bound to recognize the claim- and issue-preclusive effects of a state-court judgment, but

federal jurisdiction over an action does not terminate automatically on the entry of judgment in the state court." *Id.* Therefore, to dismiss under the doctrine of collateral estoppel, the Court must be confident of its subject-matter jurisdiction.

Here, the face of the Complaint makes clear that Ms. MacIntyre's case cannot continue in federal court. She argued the very same fraud she complains of here before the state court, which considered it, rejected it, and entered judgment affirming the validity of the note and permitting Chase to execute upon it. Ms. MacIntyre appealed, and the Court of Appeals ultimately affirmed and issued a mandate on January 4, 2017. The Colorado Supreme Court, at Ms. MacIntyre's request, dismissed her petition for review and the lower state court decision became final. Even so, in the January 2019 Complaint, Ms. MacIntyre pleaded her then-future intent to advance another state appeal, and the documents subsequently filed in this case show that she did, in fact, do so (though she was ultimately unsuccessful). Her principle opposition to Chase's motion to dismiss rests on the grounds that this second appeal might result in vacatur of the state court judgment. So, the question becomes whether this case is best viewed as inviting appellate review of a final state court decision, requiring abstention from an ongoing civil proceeding, or being sufficiently parallel (at least upon filing) to the state court matter such that any decision that became final in state court could only have preclusive effect through estoppel.

The Court has a responsibility to read the Complaint broadly and has made every effort to reconcile Ms. MacIntyre's purported insistence on a continued right

to appeal with the deadlines governing such processes. But the most recent decision of the Colorado Court of Appeals—entered April 11, 2019 and which disposed of this second appeal—is unequivocal that her "[c]ase was mandated on January 4, 2017. No further motion to vacate will be considered." Even though the Court must afford pro se parties the benefits of certain doubts, it cannot go so far as to imply a right to further appeal more than two years after a final mandate has been issued and certainly cannot comment on the propriety of decisions that were finally litigated in state court. Whatever Ms. MacIntyre's most recent filings in state court might be called, they are not "an appropriate and timely appellate proceeding" — that is something she had already undertaken, though without success. *See Rooker*, 263 U.S. at 415–16. Had some legitimate ongoing appeal been pending at the time she filed the Complaint, the Court might have had occasion to address abstention under *Younger*. But under these circumstances, where the Complaint asks the Court to effectively review state court proceedings after the timely and appropriate appellate process in state court has been completed, *Rooker-Feldman* holds that the Court has no jurisdiction over the matter. And because it lacks subject-matter jurisdiction, the Court cannot address the merits of any part of this case.

III. CONCLUSION

Based on the foregoing, it is **ORDERED** and **ADJUDGED** that this case is **DISMISSED WITH PREJUDICE** for lack of subject-matter jurisdiction. All other pending motions are **DENIED AS MOOT**. The Clerk is instructed to close this case.

Dated: June 28, 2019

BY THE COURT:

/s/*Daniel D. Domenico*
Hon. Daniel D. Domenico
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Daniel D. Domenico

Civil Action No. 1:19-cv-00172-DDD-NYW

HOLLY MACINTYRE,

Plaintiff,

v.

JP MORGAN CHASE BANK, N.A.,

Defendant.

ORDER GRANTING IN PART
MOTION FOR ATTORNEYS' FEES

This matter is before the Court on Defendant's Motion for Attorney Fees (Doc. 41), filed August 8, 2019. On September 5, 2019, Plaintiff filed a response in opposition to the motion, and on September 26, 2019, Defendant filed its reply. (Docs. 50, 56.)[1] For the reasons stated below, the motion is **GRANTED IN PART**.

---

[1] On October 8, 2019, Plaintiff filed a "Surreply" styled as a "Motion to file a Surresponse to [Defendant's] Reply." (Doc. 57.) In it, she opposes Defendant's reply, which, because of the reply's case citations and argument against the position she took in her response, she sees as "a veritable new motion" by Defendant. (*Id.* at 7.) The Court does not view Chase's reply as a new motion. True, parties should not raise "entirely new but foreseeable points relevant to a motion [ ] in a reply," *Tetra Techs., Inc. v. Harter*, 823 F. Supp. 1116, 1120 (S.D.N.Y. 1993) (cited by Plaintiff), but Defendant was obligated to address certain legal principles, including two entirely new theories, raised by Plaintiff. Insofar as Document 57 is itself a motion, it is **GRANTED** to the extent that the Court has considered the arguments therein. No further briefing on the motion for attorneys' fees is necessary.

C

BACKGROUND

Plaintiff Holly MacIntyre was the owner of real residential property in Jefferson County, Colorado. Defendant JP Morgan Chase Bank, N.A. ("Chase")—claiming to be the holder of a promissory note secured by the property—sought a judgment permitting it to conduct a foreclosure sale of the property. In this case, Ms. MacIntyre alleged that during the trial in state court, Chase produced a forged note bearing signatures not made by the parties to which they were attributed—so as to fraudulently cause the sale. Chase disputed the allegations, and, after weighing the evidence, the state court concluded that Chase was the holder of the note and issued a judgment of judicial foreclosure against Ms. MacIntyre. The Colorado Court of Appeals affirmed. Eventually, the Colorado Supreme Court dismissed her appeal as moot on Ms. MacIntyre's own motion after the property was sold.

On January 18, 2019, proceeding pro se, Ms. MacIntyre filed this case alleging that "Chase's fraud in the foreclosure proceeding has caused [her] extraordinary financial damage." Chase filed a motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim. Ms. MacIntyre filed a motion to vacate the state court judgment in the Court of Appeals, which ordered: "Appellant's motion to vacate the judgment as moot is denied. Case was mandated on January 4, 2017. No further motion to vacate will be considered." (Doc. 22-1, at 2.) On June 28, this Court granted Chase's motion to dismiss this case for lack of subject matter jurisdiction under the *Rooker-Feldman* doctrine, which prevents federal court review of state court proceedings. (Docs. 30, 35.). On August 8, Chase filed this motion for attorneys' fees under Colo. Rev. Stat. § 13-17-201 ("Section 201").

ATTORNEYS' FEES

Plaintiff denies that Section 201 is applicable to this action. She argues that 28 U.S.C. § 1919 ("Section 1919"), which permits courts to order payment of just costs (but not attorneys' fees) after a jurisdictional dismissal, instead governs. She also argues that Colo. Rev. Stat. § 13-17-102(6) ("Section 102"), limiting when fees can be collected from a pro se party, prohibits Chase from collecting attorneys' fees from her. She has not contested the reasonableness of the fees Chase requests.

The Court is somewhat sympathetic to Ms. MacIntyre, though her current predicament is of her own making. In a prior proceeding in state court, Chase foreclosed upon her house. Since then, Ms. MacIntyre has traversed through different cases and courts seeking to undo that outcome. Such was her purpose here. But despite Chase's warnings to her, through conferral and motion practice, of the inefficacy of her claims in this Court, she continued. As Chase maintained, the Court had no authority, under these circumstances, to undo the state proceeding or its outcome. And because, as explained below, Ms. MacIntyre's legal contentions in response to the present motion are meritless, this case, rather than help her cause, will cause her additional financial hardship.

A. Inapplicability of Section 1919

Ms. MacIntyre calls Chase's invocation of Section 201 a "distraction." She believes Section 1919 controls and preempts Section 201. She even cites Colorado ethical rules she finds implicated by Chase's failure to disclose Section 1919. *See* Colo. R. Prof. C. 3.3(a)(2) ("A lawyer shall not knowingly . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel."). She notes to the Court that there "is not a single reported case in the history of

American jurisprudence in which attorney's fees have been awarded under § 1919." *Castillo Grand, LLC v. Sheraton Operating Corp.*, 719 F.3d 120, 124 (2d Cir. 2013). She believes, therefore, that she cannot be liable for attorneys' fees here.

Ms. MacIntyre is mistaken. Section 1919 has nothing to do with the instant motion and does not preempt Section 201. Section 1919 states: "Whenever any action or suit is dismissed in any district court . . . for want of jurisdiction, such court may order the payment of just costs." A plain reading of the statute, as Chase notes, reveals it gives the Court authority to order payment of *costs*. It does not prohibit the Court from ordering payment of reasonable *attorneys' fees*. Attorneys' fees are not mentioned in Section 1919, so the Court is not surprised that no other court has used it to award them. Attorneys' fees and costs are discrete forms of litigation expense, separately awardable under certain circumstances. *See U.S. ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038, 1056–57 (10th Cir. 2004) (discussing separate applicability of fee- and cost-shifting statutes permitting awards of litigation expenses in suits where, like here, federal courts are not authorized to decide the merits). Section 1919 is about costs; the motion in question here is about attorneys' fees.

B. Applicability of Section 201

In this case, Ms. MacIntyre brought a single tort claim under Colorado law. She alleged that "Chase's fraud in the foreclosure proceeding has caused [her] extraordinary financial damage by the irreversible loss of her primary residence, combined with her subsequent displacement due to eviction." (Doc. 1 ¶ 36.) Chase moves for mandatory attorneys' fees under Section 201, which states in relevant part:

> In all actions brought as a result of a death or an injury to person or property occasioned by the tort of any other person, where any such action is dismissed on motion of the defendant prior to trial under rule 12(b) of the Colorado rules of civil procedure, such defendant shall have judgment for his reasonable attorney fees in defending the action.

The Court dismissed this action under Fed. R. Civ. P. 12(b), upon which Colorado Rule 12(b) is modeled. *See Warne v. Hall*, 373 P.3d 588, 593 (Colo. 2016) ("It cannot seriously be disputed that the Colorado Rules of Civil Procedure were modeled almost entirely after the corresponding federal rules."). Ms. MacIntyre argues that Section 201 doesn't apply to this case, calling significant Chase's lack of citation to "a single (1) published case from the Tenth Circuit that treats that particular statute as substantive law in a (2) diversity case that was dismissed for (3) lack of subject matter jurisdiction." (Doc. 50, at 7.)

But there *are* cases, published and unpublished, in the Tenth Circuit and this Court, satisfying each of those categories. *See Jones v. Denver Post Corp.*, 203 F.3d 748, 757 (10th Cir. 2000) ("In the Tenth Circuit, attorney fee statutes [including Section 201] are considered substantive for purposes of a diversity action."); *Infant Swimming Research, Inc. v. Faegre & Benson, LLP*, 335 F. App'x 707, 715 (10th Cir. 2009) (holding Section 201 applicable to a dismissal for lack of subject matter jurisdiction under federal rules); *Checkley v. Allied Prop. & Cas. Ins. Co.*, 635 F. App'x 553, 559 (10th Cir. 2016) (same); *Shrader v. Beann*, 503 F. App'x 650, 654–55 (10th Cir. 2012) ("Under Colorado law, a Colorado court must award a defendant in a tort action who prevails on a Rule 12(b) motion reasonable attorney fees in defending that action. The statute also applies to a dismissal under Fed. R. Civ. P. 12(b) of a tort claim brought under Colorado law." (citations omitted)); *Dorsey on behalf of J.D. v. Pueblo Sch. Dist. 60*, 215 F. Supp. 3d 1092, 1093 (D. Colo. 2016)

("This provision also applies to Colorado tort claims pending in federal court that are dismissed pursuant to Federal Rule of Civil Procedure 12(b)."). It is beyond legitimate dispute that binding precedent holds that Section 201 is substantive law in diversity cases and is applicable to a dismissal for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1).

C. Inapplicability of Section 102

Ms. MacIntyre further suggests that, because she is pro se, attorneys' fees may not be assessed against her unless the Court finds that she knew or reasonably should have known that her action or defense, or any part thereof, was substantially frivolous, substantially groundless, or substantially vexatious. *See* Colo. Rev. Stat. § 13-17-102(6). Unlike Section 201, which is substantive, this district uniformly considers Section 102 to be "merely a procedural statute regarding sanctions based on conduct in the litigation and not substantive law under *Erie*." *Dowling v. Gen. Motors LLC*, No. 15-CV-00445-KLM, 2019 WL 4415650, at *3 (D. Colo. Sept. 16, 2019) (collecting cases); *Hach Co. v. In-Situ, Inc.*, No. 13-CV-02201-CBS, 2016 WL 9725765, at *11 (D. Colo. Nov. 22, 2016) ("Colorado courts provide clarity, characterizing § 13-17-102 as a sanction, rather than a substantive right[,]" and preempted by Fed. R. Civ. P. 11) (citation omitted); *see also Scottsdale Ins. Co. v. Tolliver*, 636 F.3d 1273, 1279 (10th Cir. 2011) ("Substantive fees are those which are 'tied to the outcome of the litigation,' whereas procedural fees are generally based on a litigant's 'bad faith conduct in litigation.'" (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 52–53 (1991)).

Section 102 is therefore inapplicable in federal court, and there is no suggestion that it limits Section 201's operation against pro se parties. Indeed, even if Section 102 were applicable, Colorado courts have

held that the more specific, later-enacted requirements of Section 201 supersede the earlier, more general provisions of Section 102. *See, e.g., Houdek v. Mobil Oil Corp.*, 879 P.2d 417 (Colo. App. 1994), *Hewitt v. Rice*, 119 P.3d 541, 546 (Colo. App. 2004), *aff'd*, 154 P.3d 408 (Colo. 2007) (both "that § 13–17–201 applies and controls over § 13–17–102(7)"). *See also Bath v. Am. Express Co.*, No. 19-CV-00606-RM-NYW, 2019 WL 2607020, at *9 (D. Colo. May 31, 2019) (discussing propriety of attorneys' fees under Section 201 against a pro se plaintiff but not yet addressing issue because no affidavit supporting fee request had been filed), *report and recommendation adopted sub nom. Bath v. Am. Express Nat'l Bank*, No. 1:19-CV-00606-RM-NYW, 2019 WL 2602505 (D. Colo. June 25, 2019).

This reasoning comports with the purposes behind these statutes, only one of which addresses circumstances raised by the present motion. Section 201 "was enacted to discourage unnecessary litigation of tort claims," *Smith v. Town of Snowmass Vill.*, 919 P.2d 868 (Colo. App. 1996), but Section 102 is in place to punish "conduct that is arbitrary, abusive, stubbornly litigious, or disrespectful of the truth." *City of Black Hawk v. Ficke*, 215 P.3d 1129, 1132 (Colo. App. 2008). Chase does not seek fees to punish such conduct; it seeks fees for obtaining dismissal of an unnecessary tort claim, which is governed by Section 201.

D. Reasonable Attorneys' Fees

The only remaining task is to determine the reasonable attorneys' fees to which Chase is entitled. Chase submitted an affidavit by Jeffrey M. Lippa who, together with Ronald J. Tomassi, Jr. and Lindsay Aherne, billed fees on this case. (Doc. 41-3.) Attached to the affidavit is a billing report containing detailed descriptions of the work these attorneys performed. Chase seeks $34,596.10, reflecting 130.2 hours at rates ranging

from $174 to $341 per hour. Ms. MacIntyre, who only argued the issues set forth above, does not rebut the amount requested. The Court would normally interpret a litigant's silence on this issue as a tacit admission of the reasonableness of the fees sought. *See, e.g., Torres v. Am. Family Mut. Ins. Co.*, 606 F. Supp. 2d 1286, 1292 (D. Colo. 2009). But because Ms. MacIntyre is unrepresented, a closer look is warranted.

"The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); *see also Shrader*, 503 F. App'x at 654 (approving of the district court's use of this methodology in a Section 201 case). In other words, "[t]o determine the reasonableness of a fee request, a court must begin by calculating the so-called lodestar amount of a fee, and a claimant is entitled to the presumption that this lodestar amount reflects a reasonable fee." *Robinson v. City of Edmond*, 160 F.3d 1275, 1281 (10th Cir. 1998) (internal quotations and citations omitted). "The lodestar calculation is the product of the number of attorney hours reasonably expended and a reasonable hourly rate." *Id.* (internal quotation omitted).

1. Reasonable Hourly Rate

A court must look to what the evidence shows the market commands for analogous litigation. *Case v. Unified School District No. 233*, 157 F.3d 1243, 1255 (10th Cir. 1998). The local market rate is usually the state or city in which counsel practices. *Ellis v. Univ. of Kan. Med. Ctr.*, 163 F.3d 1186, 1203 (10th Cir. 1999) (looking at "the prevailing market rate in the relevant community"); *Case*, 157 F.3d at 1256 (looking at fees charged by lawyers in the area in which the litigation occurs). A "district judge may turn to her own knowledge of prevailing market

rates as well as other indicia of a reasonable market rate." *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482, 1493 (10th Cir. 1994). The court is also entitled to consider the quality of counsel's performance in setting the fee. *Ellis*, 163 F.3d at 1203.

Work was performed on this case by three attorneys at Greenberg Traurig, LLP. Mr. Lippa has been licensed to practice law since 2005, is a shareholder at the firm, and billed at $366 per hour. Mr. Tomassi, Jr. has been licensed since 2006, is also a shareholder, and billed at $341 per hour. Ms. Aherne has been licensed since 2015, is an associate, and billed from $174 to $260 per hour. Based on the Court's experience in private and public practice in the Denver area, these rates are reasonable, considering these lawyers' experience, the subject matter of the case, and quality of work they performed.

2. Reasonable Number of Hours

In determining the reasonableness of the hours expended, a court considers several factors, including: (1) whether the amount of time spent on a particular task appears reasonable in light of the complexity of the case, the strategies pursued, and the responses necessitated by an opponent's maneuvering; (2) whether the amount of time spent is reasonable in relation to counsel's experience; and (3) whether the billing entries are sufficiently detailed, showing how much time was allotted to specific tasks. *See Ramos v. Lamm*, 713 F.2d 546, 553–54 (10th Cir. 1983). If the court has adequate time records before it, "it must then ensure that the winning attorneys have exercised 'billing judgment.'" *Case*, 157 F.3d at 1250. In other words, the district court should exclude from this initial fee calculation hours that were not "reasonably expended." *Hensley*, 461 U.S. at 434 (internal quotation omitted).

Chase seeks attorneys' fees for 130.2 hours of work from January 18 to June 30, 2019. During this time, the events of this case were limited. On January 18, Ms. MacIntyre filed the Complaint. On February 28, Chase moved to dismiss and, subsequently, replied. (Docs. 12, 24.) On March 19, the parties had a ten-minute status conference with Magistrate Judge Wang. (Doc. 18.) On April 30, Chase filed a response to Ms. MacIntyre's motion to strike its motion to dismiss. (Doc. 25.) Chase was thus responsible for three substantive filings and one short conference. By the Court's rough calculation, upon review of the billing records, Chase's attorneys' time was generally divided between research and drafting substantive filings (over ninety-five hours), internal strategy and preparation sessions (about fifteen hours), conferring with Ms. MacIntyre and Chase (under ten hours), and other tasks.

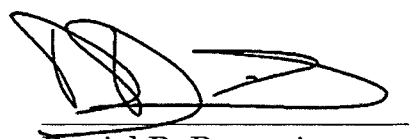
The Court finds some of this time unreasonably spent. The ninety-five hours of substantive work is somewhat excessive, given the general lack of complexity and brevity of the case. The attorneys also spent at least one hour unnecessarily checking the docket for the absence of entries, two-and-a-half hours on three simple notices of appearance, and two hours on post-judgment review unneeded to secure the same. They also spent nearly five hours on an unconsummated settlement. All things considered, instead of serving as a "green-eyeshade accountant," *Fox v. Vice*, 563 U.S. 826, 838 (2011), further scouring the individual billing entries for evidence of waste or fat, the Court finds that a general reduction of 25% of the requested hours is appropriate. Because Chase has not supplied separate totals reflecting the number of hours worked by each attorney, the Court applies this reduction to the final dollar amount requested.

CONCLUSION

Based on the foregoing, it is **ORDERED** that Ms. MacIntyre's motion to file a surresponse (Doc. 57) is **GRANTED**, and Chase's Motion for Attorney Fees (Doc. 41) is **GRANTED IN PART**. Chase is awarded attorneys' fees in the reduced amount of **$25,947.08**. It is further **ORDERED** that the Amended Judgment (Doc. 36) shall be again amended to reflect the award of attorneys' fees.

DATED: October 10, 2019.

BY THE COURT:



Daniel D. Domenico
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Daniel D. Domenico

Civil Action No. 1:19-cv-00172-DDD-NYW

HOLLY MACINTYRE,

Plaintiff,

v.

JP MORGAN CHASE BANK, N.A.,

Defendant.

ORDER DENYING RECONSIDERATION

This matter is before the Court on Ms. MacIntyre's motion, brought pursuant to Federal Rule of Civil Procedure 59(e), for reconsideration of its order granting Chase attorneys' fees under Colo. Rev. Stat. § 13-17-201, which she filed October 24, 2019. (Doc. 60.) On November 14, 2019, Chase filed a response in opposition to the motion, and on November 29, 2019, Ms. MacIntyre replied. (Docs. 61, 62.) The motion is without merit and is **DENIED**.

The Court will briefly outline the relevant background. Plaintiff Holly MacIntyre was the owner of real residential property in Jefferson County, Colorado. Defendant JP Morgan Chase Bank, N.A. ("Chase")—claiming to be the holder of a promissory note secured by the property—sought a judgment permitting it to conduct a foreclosure sale of the property. In this case, Ms. MacIntyre alleged that during the trial in state court, Chase produced a forged note bearing signatures not made by the parties to which they were attributed—so as to fraudulently cause the sale. Chase disputed the allegations, and, after weighing the evidence,

D

the state court concluded that Chase was the holder of the note and issued a judgment of judicial foreclosure against Ms. MacIntyre. On January 18, 2019, proceeding pro se, Ms. MacIntyre filed this case alleging that "Chase's fraud in the foreclosure proceeding has caused [her] extraordinary financial damage."

On June 28, this Court granted Chase's motion to dismiss for lack of subject matter jurisdiction under the *Rooker-Feldman* doctrine, which prevents federal court review of state court proceedings. (Docs. 30, 35.) On August 8, Chase filed this motion for attorneys' fees under Colo. Rev. Stat. § 13-17-201 ("Section 201"). Section 201 states:

> In all actions brought as a result of a death or an injury to person or property occasioned by the tort of any other person, where any such action is dismissed on motion of the defendant prior to trial under rule 12(b) of the Colorado rules of civil procedure, such defendant shall have judgment for his reasonable attorney fees in defending the action.

Relying on a plain reading of the statute, as well as Tenth Circuit and district court precedent, the Court determined that awarding reasonable attorneys' fees under Section 201 is mandatory where, as here, the Court dismisses a Colorado tort claim upon a motion brought pursuant to Federal Rule of Civil Procedure 12(b). On October 10, 2019, the Clerk entered a second amended final judgment, which reflects the Court's fee award of $25,947.08.

Fourteen days later, on October 24, 2019, Ms. MacIntyre filed this motion to reconsider pursuant to Federal Rule of Civil Procedure 59(e).[1]

---

[1] Citing outdated law requiring Rule 59(e) motions to be filed within ten days of the entry of judgment, Chase incorrectly argues that the motion should have been filed pursuant to Rule 60(b). *See, e.g., Handy v. City of Sheridan*, No. 12-CV-01015-WYD-KMT, 2015 WL 428380, at *1 (D. Colo. Jan. 30, 2015), *aff'd*, 636 F. App'x 728 (10th Cir.

"Rule 59(e) motions may be granted when 'the court has misapprehended the facts, a party's position, or the controlling law.'" *Nelson v. City of Albuquerque*, 921 F.3d 925, 929 (10th Cir. 2019) (quoting *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000)). But "Rule 59(e) motions are 'not appropriate to revisit issues already addressed or advance arguments that could have been raised in prior briefing.'" *Id.* at 929 (quoting *Servants of the Paraclete*, 204 F.3d at 1012).

Ms. MacIntyre's motion advances two arguments. First, she reargues that 28 U.S.C. § 1919 is the only state or federal cost-shifting statute applicable to a federal court's dismissal for lack of subject matter jurisdiction, and it preempts Section 201. (Doc. 60, at 2–4.) The Court has already addressed this incorrect position, and it cannot do so again here. *See Nelson v. City of Albuquerque*, 921 F.3d 925, 930 (10th Cir. 2019) (reversing for abuse of discretion where district court granted Rule 59(e) motion that rehashed old arguments (citing *Servants of the Paraclete*, 204 F.3d at 1012)).

Second, she claims that because the Court dismissed her claim for lack of subject matter jurisdiction under the *Rooker-Feldman* doctrine, it didn't have the jurisdictional authority to then award attorneys' fees. Apparently, Ms. MacIntyre "recently realized" she wanted to make this argument "after additional research." (Doc. 61-1.) She thus admits that she could have raised this issue in prior briefing but neglected to do so. It is therefore not appropriate for the Court to entertain the argument. But even if it were, it is incorrect. As the Court noted in its previous

---

2016) ("Rule 59(e) motions must be filed within 28 days of final judgment. Fed. R. Civ. P. 59(e). Motions filed after 28 days of final judgment should be considered under Rule 60(b)."); *see also Van Skiver v. United States*, 952 F.2d 1241, 1243 (10th Cir. 1991) (analyzing a prior version of Rule 59(e) and noting that a motion not served within 10 days of judgment must be construed as a Rule 60(b) motion).

order, the Tenth Circuit has already affirmed an award of fees under Section 201 after dismissing a case for lack of subject matter jurisdiction. *Infant Swimming Research, Inc. v. Faegre & Benson, LLP*, 335 F. App'x 707, 715 (10th Cir. 2009). That decision is unpublished, but it is still "highly persuasive." *See, e.g.*, *United States v. Cleveland*, 356 F. Supp. 3d 1215, 1283 (D.N.M. 2018), *appeal dismissed* (Feb. 8, 2019). And it certainly does not amount to a misapprehension of the law by this Court.

CONCLUSION

Based on the foregoing, Ms. MacIntyre's motion for reconsideration (Doc. 60) is **DENIED**.

DATED: December 11, 2019. BY THE COURT:

Daniel D. Domenico
United States District Judge