APPENDIX

APPENDIX A

CASE NO.: 19-1466

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ELET VALENTINE
Plaintiff-Appellant

v.

PNC FINANCIAL SERVICES GROUP, INC.; PNC BANK, NATIONAL ASSOCIATION (AKA PNC BANK, N.A.); AND PNC MORTGAGE
Defendants-Appellees

On Appeal From The United States District Court
For The District Of Colorado
The Honorable Christine M. Arguello
Case No. 18-cv-01934-CMA-SKC

August 4, 2020

Order Denying Rehearing

BEFORE: Brisco, Matheson, and Eid, Circuit Judges

Appendix A

Volume
1 of 5

FILED
United States Court of Appeals
Tenth Circuit

August 4, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ELET VALENTINE,

Plaintiff - Appellant,

v.

THE PNC FINANCIAL SERVICES GROUP, INC., et al.,

Defendants - Appellees.

Nos. 19-1007 & 19-1466
(D.C. No. 1:18-CV-01934-CMA-SKC)
(D. Colo.)

ORDER

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

Appellant's motion for reconsideration has been construed as a petition for rehearing and filed as such as of the date of receipt. So construed, the petition for rehearing is denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

APPENDIX B

CASE NO.: 19-1466 & 19-1007

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ELET VALENTINE
Plaintiff-Appellant

v.

PNC FINANCIAL SERVICES GROUP, INC.; PNC BANK, NATIONAL ASSOCIATION (AKA PNC BANK, N.A.); AND PNC MORTGAGE
Defendants-Appellees

On Appeal From The United States District Court
For The District Of Colorado
The Honorable Christine M. Arguello
Case No. 18-cv-01934-CMA-SKC

July 14, 2020

Order and Judgment

BEFORE: Brisco, Matheson, and Eid, Circuit Judges

FILED
United States Court of Appeals
Tenth Circuit

July 14, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ELET VALENTINE,

Plaintiff - Appellant,

v.

THE PNC FINANCIAL SERVICES GROUP, INC.; PNC BANK, NATIONAL ASSOCIATION, a/k/a PNC Bank, NA; PNC MORTGAGE,

Defendants - Appellees.

Nos. 19-1007 & 19-1466
(D.C. No. 1:18-CV-01934-CMA-SKC)
(D. Colo.)

ORDER AND JUDGMENT*

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

Elet Valentine, appearing pro se, appeals from the district court's orders denying her motion for a preliminary injunction (No. 19-1007) and dismissing her action with prejudice as a sanction (No. 19-1466). Exercising jurisdiction under 28 U.S.C. § 1291, we affirm the order in No. 19-1466 and dismiss No. 19-1007 as moot.

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of these appeals. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The cases are 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.

BACKGROUND

This case arises from a dispute between Ms. Valentine and PNC Financial Services Group, Inc., PNC Bank, N.A., and PNC Mortgage (collectively "PNC") concerning her default on a residential mortgage loan and subsequent foreclosure proceedings. In 2018, a Colorado state court issued an order authorizing the sale of Ms. Valentine's home. While the foreclosure proceedings were pending, Ms. Valentine filed suit in the United States District Court for the District of Colorado alleging eleven claims for relief. She also asked the court to issue a preliminary injunction to prevent the sale of her home and require PNC to preserve documents pending determination of the merits. The court denied the motion, and Ms. Valentine appealed, which is No. 19-1007 (the "Injunction Appeal").

Following the denial of preliminary injunctive relief, PNC sold the property and moved to dismiss the Injunction Appeal as moot. Immediately thereafter, Ms. Valentine filed an amended notice of appeal in which she attempted to appeal from several procedural orders. PNC moved to dismiss the amended notice arguing that none of the orders were final and therefore could not be appealed.

While the Injunction Appeal was pending, PNC filed a motion to dismiss Ms. Valentine's amended complaint. The magistrate judge issued a recommendation to dismiss all claims except Ms. Valentine's breach of contract claim. The magistrate judge further rejected Ms. Valentine's argument that the pending Injunction Appeal divested the court of jurisdiction. The district court adopted the recommendation, noting Ms. Valentine did not challenge the magistrate judge's substantive analysis;

instead, she continued to maintain the pending Injunction Appeal divested the court of jurisdiction.

Shortly thereafter, the magistrate judge set a status conference and asked PNC to take the lead in preparing a draft proposed scheduling order. Days later, Ms. Valentine filed yet another amended notice of appeal in the Injunction Appeal in which she tried to expand the scope of the appeal to include the district court's order to dismiss all but one of Ms. Valentine's claims. This court deemed the amended notice was a new appeal and assigned it No. 19-1350 (the "Second Appeal").

In the meantime, Ms. Valentine refused to follow the magistrate judge's order to work with PNC to develop a scheduling order. Despite Ms. Valentine's failure to participate, PNC timely filed a proposed order and further asked the court to find the Second Appeal was frivolous.

On the day set for the status conference, the magistrate judge waited fifteen minutes after the scheduled start time, but Ms. Valentine failed to appear. He set a further conference in three weeks and warned Ms. Valentine she must appear or risk dismissal of her suit.

A few days later, the district court entered an order certifying the Second Appeal as frivolous: "Because it is obvious [that an order dismissing some but not all of Ms. Valentine's claims] is not appealable, the Court hereby certifies the [Second Appeal] as frivolous. As a result, this Court retains jurisdiction to consider the merits of this case." No. 19-1466, R., Vol. 5 at 114 (footnote omitted).

Undeterred, Ms. Valentine filed motions to reconsider the magistrate judge's order setting a further status conference and the court's order certifying the Second Appeal as frivolous. The court denied both motions, explaining once again that it had jurisdiction, and issuing another warning to Ms. Valentine to comply with the court's orders or face dismissal.

When Ms. Valentine failed to appear at the second status conference, the magistrate judge entered a written recommendation to dismiss the case with prejudice. The district court overruled Ms. Valentine's objections and adopted and affirmed the recommendation. As backdrop, the court outlined Ms. Valentine's failure to comply with the court's orders and "meaningfully engage in the litigation process," along with her refusal to "accept any interpretation of the law other than her own." *Id.* at 196. "The Court has had enough." *Id.* at 197.

Using the five factors announced in *Ehrenhaus v. Reynolds*, 965 F.2d 916, 921 (10th Cir. 1992)—namely "(1) the degree of actual prejudice to the defendant; (2) the amount of interference with the judicial process; (3) the culpability of the litigant; (4) whether the court warned the party in advance that dismissal of the action would be a likely sanction for noncompliance; and (5) the efficacy of lesser sanctions" (internal quotation marks, ellipsis, and citations omitted)—the district court determined dismissal as a sanction was appropriate.

As to the first factor, the court noted Ms. Valentine's "conduct has resulted in substantial prejudice to [PNC]," No. 19-1466, R., Vol. 5 at 199. "[PNC] ha[s] been diligent in [its] attempt[] to bring this litigation to a close, but these efforts have been

stymied by Ms. Valentine's disregard for hearings and Court Orders." *Id.* (internal quotation marks omitted). "In addition to being deprived of any finality in this matter, [PNC] ha[s] also expended considerable resources in what has become a futile effort to move this case forward." *Id.* at 199-200.

Regarding the second factor, the court found Ms. Valentine's "conduct has stalled the judicial process." *Id.* at 200. "[Ms. Valentine's] refusal to comply with court orders has inhibited the Court's ability to perform straightforward tasks." *Id.* "Moreover, [her] refusal to recognize this Court's authority to interpret the law has forced the Court to expend valuable time in an unnecessary and repetitive exercise of explaining to [her] why her frivolous arguments regarding this Court's jurisdiction are incorrect." *Id.* "This Court has limited resources and an extensive docket. Accordingly, the consequences that result from [Ms. Valentine's] ongoing interference with the judicial system cannot be understated." *Id.*

Considering the third factor, the court found Ms. Valentine "is culpable for her conduct," noting "[e]ven after [she] filed her second Notice of Appeal and stopped appearing at proceedings . . . [the] Magistrate Judge . . . and this Court provided [her] with multiple detailed explanations of the legal principles that refute her position regarding . . . jurisdiction." *Id.* "Nevertheless, [Ms. Valentine] has remained obstinate, and her choice to maintain her strategy under the circumstances shows that her conduct is intentional." *Id.*

As to the fourth factor, the court found Ms. Valentine "had ample notice of the possibility of dismissal due to her conduct." *Id.* at 201. And regarding the final

factor, the court found "[s]anctions less than dismissal with prejudice would not be effective," noting an award of attorney fees against Ms. Valentine "based on her frivolous attempt to remove a [separate] case to federal court" was an ineffective deterrent against her "insistence on pursuing arguments even after they have been demonstrated to be frivolous." *Id.* The Court also found "that sanctions other than dismissal with prejudice are unlikely to change what [the] Magistrate Judge . . . correctly described as [Ms. Valentine's] willful bad faith in repeatedly disregarding the Court's rules and orders." *Id.* (internal quotation marks omitted).

Ms. Valentine filed a notice of appeal from the district court's entry of a final judgment dismissing the case as a sanction, which is No. 19-1466 (the "Sanction Appeal"). Shortly thereafter, this Court dismissed the Second Appeal for lack of jurisdiction.

SANCTION APPEAL

"The Federal Rules of Civil Procedure authorize sanctions, including dismissal, for failing to appear at a pretrial or scheduling conference . . . and for failing to comply with court rules or any order of the court." *Gripe v. City of Enid*, 312 F.3d 1184, 1188 (10th Cir. 2002). "We review for an abuse of discretion the district court's decision to impose the sanction of dismissal for failure to follow court orders and rules." *Id.* "It is within a court's discretion to dismiss a case if, after considering all the relevant factors, it concludes that dismissal alone would satisfy the interests of justice." *Ehrenhaus*, 965 F.2d at 918. The district court considered

the relevant factors in deciding to dismiss Ms. Valentine's case, and its decision was not an abuse of discretion.

But Ms. Valentine does not challenge the merits of the district court's sanction order; instead, she maintains the court lacked jurisdiction to enter any orders upon the filing of her Injunction Appeal and Second Appeal, including the sanction order. Ms. Valentine is mistaken.

An appeal from an interlocutory order denying a preliminary injunction does not divest the district court of jurisdiction to proceed with the underlying action on the merits. *See Colorado v. Idarado Mining Co.*, 916 F.2d 1486, 1490 & n.2 (10th Cir. 1990). Likewise, "so long as the district court takes the affirmative step of certifying an appeal as frivolous or forfeited, it retains jurisdiction." *McCauley v. Halliburton Energy Servs., Inc.*, 413 F.3d 1158, 1162 (10th Cir. 2005). Because the court certified Ms. Valentine's Second Appeal as frivolous, it retained jurisdiction.

Last, Ms. Valentine incorporates by reference her arguments in a proposed supplement to her opening brief in the Injunction Appeal concerning eight alleged procedural errors committed by the district court. Whether to accept the proposed supplement was referred to this panel. We grant Ms. Valentine's motion to file the proposed supplement but deny the arguments in view of our ruling on the dispositive issue—the district court did not abuse its discretion in dismissing Ms. Valentine's case as a sanction for her failure to comply with the court's orders. The issues in the supplement, which include whether PNC's motion to dismiss was timely filed and whether the court properly denied Ms. Valentine's motion to file a second amended

complaint, do not "affect the outcome[,]" and therefore, "[w]e will not undertake to decide [them]." *Griffin v. Davies*, 929 F.2d 550, 554 (10th Cir. 1991).

INJUNCTION APPEAL

Ms. Valentine's appeal from the denial of the preliminary injunction is mooted by the fact that the district court proceeded to adjudicate the underlying action on the merits. When a court proceeds to adjudicate the merits of the underlying action and enters a final judgment, an appeal from the denial of a preliminary injunction is moot because a preliminary injunction is by its nature a temporary measure intended to furnish provisional protection while awaiting a final judgment on the merits. *See United States ex rel. Bergen v. Lawrence*, 848 F.2d 1502, 1512 (10th Cir. 1988).

CONCLUSION

We affirm the district's court's order in No. 19-1466. We deny Ms. Valentine's motion to reconsider this court's order denying her motion to consolidate.

We dismiss No. 19-1007 as moot. We grant Ms. Valentine's motions to file a supplement to her opening brief and to extend the time for filing that supplement, and we direct the Clerk to file the supplement as of the date it was received. We deny Ms. Valentine's motions to: (1) reconsider this court's order to supplement the record; (2) preserve the record; (3) oppose PNC's entry of appearance; and

(4) reconsider this court's order denying her motion to consolidate. We deny PNC's motions to dismiss the appeal and amended notice of appeal as moot.

Entered for the Court

Allison H. Eid
Circuit Judge

APPENDIX C

CASE NO.: 19-1350

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ELET VALENTINE
Plaintiff-Appellant

v.

PNC FINANCIAL SERVICES GROUP, INC.; PNC BANK, NATIONAL ASSOCIATION (AKA PNC BANK, N.A.); AND PNC MORTGAGE
Defendants-Appellees

On Appeal From The United States District Court
For The District Of Colorado
The Honorable Christine M. Arguello
Case No. 18-cv-01934-CMA-SKC

ORDER [Dismissing Appeal For Lack Of Jurisdiction]

DECEMBER 13, 2019

BEFORE: LUCERO, HARTZ, AND HOLMES

FILED
United States Court of Appeals
Tenth Circuit

December 13, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ELET VALENTINE,

Plaintiff - Appellant,

v.

PNC FINANCIAL SERVICES GROUP, INC.; PNC BANK, NATIONAL ASSOCIATION, a/k/a PNC Bank, NA; PNC MORTGAGE,

Defendants - Appellees.

No. 19-1350
(D.C. No. 1:18-CV-01934-CMA-SKC)
(D. Colo.)

ORDER

Before **LUCERO**, **HARTZ**, and **HOLMES**, Circuit Judges.

This matter is before us on Appellant Elet Valentine's response to the court's order to show cause why this appeal should not be dismissed for lack of jurisdiction. In this appeal, Ms. Valentine seeks to challenge the district court's order of August 30, 2019 adopting a magistrate judge's recommendation to dismiss all but one of Ms. Valentine's claims.

Generally, this court's jurisdiction is limited to review of final decisions of the district courts. 28 U.S.C. § 1291. A final decision is one that reflects the disposition of all claims and the rights and liabilities of all parties. Fed. R. Civ. P. 54(b). The district court's order dismissing all but one of Ms. Valentine's claims is not a final order. Nor is

it immediately appealable under the collateral order doctrine, as Ms. Valentine contends, because it did not resolve a question "collateral to" the merits, and it is reviewable upon entry of final judgment. *See United States v. Copar Pumice Co., Inc.*, 714 F.3d 1197, 1204 (10th Cir. 2013) (setting forth the requirements of the collateral order doctrine). Indeed, we note that the district court has since entered final judgment in the underlying case, and Ms. Valentine has appealed that judgment. Ms. Valentine's remaining arguments in response to the order to show cause are unavailing.

This appeal is dismissed for lack of jurisdiction. Ms. Valentine's motion to consolidate this appeal with Appeal No. 19-1007 is denied as moot.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk

by: Jane K. Castro
Counsel to the Clerk

APPENDIX D

CASE NO.: 19-1350

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

ELET VALENTINE
Plaintiff-Appellant

v.

PNC FINANCIAL SERVICES GROUP, INC.; PNC BANK, NATIONAL ASSOCIATION (AKA PNC BANK, N.A.); AND PNC MORTGAGE
Defendants-Appellees

ORDER CERTIFIYING APPEAL AS FRIVOLOUS AND DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION

Case No. 18-cv-01934-CMA-SKC

OCTOBER 9, 2019

BEFORE: JUDGE CHRISTINE M. ARGUELLO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Christine M. Arguello

Civil Action No. 18-cv-01934-CMA-SKC

ELET VALENTINE,

Plaintiff,

v.

THE PNC FINANCIAL SERVICES GROUP, INC.,
PNC BANK, NATIONAL ASSOCIATION, *a/k/a* PNC Bank, NA, and
PNC MORTGAGE,

Defendants.

ORDER CERTIFYING APPEAL AS FRIVOLOUS AND DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION

This matter is before the Court on Plaintiff Elet Valentine's Second Amended Notice of Appeal (Doc. # 97) and Motion for Reconsideration (Doc. # 96) of this Court's Order Adopting and Affirming August 1, 2019 Recommendation of United States Magistrate Judge (Doc. # 94). Based on the reasons that follow, the Court certifies Plaintiff's latest appeal as frivolous and denies Plaintiff's Motion for Reconsideration.

I. BACKGROUND

The Court recently recounted the facts of this case in its Order adopting Magistrate Judge Crews' Recommendation. *See* (*Id.*). Accordingly, the Court will reiterate the factual background only to the extent necessary to address Plaintiff's Motion.

On August 2, 2018, Plaintiff, acting *pro se*, filed a Motion for an *Ex Parte* Temporary Restraining Order or Preliminary Injunction which sought to enjoin Defendants' foreclosure on her home and to preserve evidence. *See generally* (Doc. # 6). This Court denied Plaintiff's Motion, and Plaintiff appealed that decision. (Doc. ## 71, 73.)

Subsequently, Magistrate Judge Crews issued a Recommendation in which he concluded, *inter alia*, that this Court should grant in part and deny in part Defendants PNC Financial Services Group, Inc., PNC Bank, N.A., and PNC Mortgage's ("Defendants") Motion to Dismiss Plaintiff's Amended Complaint. (Doc. # 92 at 28–29.) On August 30, 2019, this Court affirmed the Recommendation after conducting a *de novo* review of Plaintiff's objections. (Doc. # 94.) Thus, the Court denied the Motion to Dismiss as to Plaintiff's breach of contract claim which is based on the theory that Defendants failed to properly apply and credit her loan payments. However, the Court granted the Motion to Dismiss as to as to the remaining claims in Plaintiff's Amended Complaint. (*Id.* at 6.)

On September 10, 2019, Plaintiff filed a document titled Second Amended Notice of Appeal (Doc. # 97) regarding this Court's August 30 Order. Additionally, on September 12, 2019, Plaintiff filed a Motion for Reconsideration of the same Order. (Doc. # 96.)

II. DISCUSSION

Before proceeding to the merits of Plaintiff's Motion for Reconsideration, the Court must consider its jurisdiction because Plaintiff has filed multiple notices of appeal

in this case. *See Amazon, Inc. v. Dirt Camp, Inc.*, 273 F.3d 1271, 1276 (10th Cir. 2001) ("A federal court has an independent obligation to examine its own jurisdiction.").

A. THIS COURT RETAINS JURISDICTION

1. Applicable Law

"The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982). However, the Tenth Circuit has held that:

> Because this divestiture of jurisdiction is subject to abuse and can unreasonably delay trial, we recognized in *Stewart v. Donges*, 915 F.2d 572 (10th Cir. 1991) a procedure by which a district court may maintain jurisdiction [in] a [case] if the court certifies that [an] appeal is frivolous.

Langley v. Adams Cnty., Colo., 987 F.2d 1473, 1477 (10th Cir. 1993). Specifically, "to regain jurisdiction, [a district court] must take the affirmative step of certifying the appeal as frivolous or forfeited . . . ." *Stewart*, 915 F.2d at 577. An appeal is frivolous if "the result is obvious or . . . the appellant's arguments are wholly without merit." *Barnes v. Sec. Life of Denver Ins. Co.*, No. 18-cv-718-WJM-SKC, 2019 WL 142113, at *2 (D. Colo. Jan. 9, 2019) (citation omitted).

2. Analysis

Plaintiff's Second Amended Notice of Appeal is frivolous. It is well established that "federal circuit courts have jurisdiction to review only 'final decisions' of district courts." *Spring Creek Expl. & Prod. Co., LLC v. Hess Bakken Inv., II, LLC*, 887 F.3d 1003, 1015 (10th Cir. 2018) (citation omitted); 28 U.S.C. § 1291. A "final decision must dispose of all claims by all parties, except a decision may otherwise be considered final

if it is properly certified as a final judgment under Federal Rule of Civil Procedure 54(b)." *New Mexico v. Trujillo*, 813 F.3d 1308, 1316 (10th Cir. 2016).

In the instant case, this Court's Order Adopting and Affirming August 1, 2019 Recommendation of Untied States Magistrate Judge did not dispose of all of Plaintiff's claims. *See* (Doc. # 94 at 6). Therefore, the Order is not a final decision for purposes of 28 U.S.C. § 1291. Moreover, the Court has not certified the Order as a final judgment pursuant to Federal Rule of Civil Procedure 54. Accordingly, the Order is not appealable.

Because it is obvious from a review of the docket that this Court's Order is not appealable, the Court hereby certifies Plaintiff's Second Amended Notice of Appeal (Doc. # 97) as frivolous.[1] As a result, this Court retains jurisdiction to consider the merits of this case. *Stewart*, 915 F.2d at 577.

B. PLAINTIFF'S MOTION FOR RECONSIDERATION

Plaintiff's Motion for Reconsideration is lacking in merit. The Motion asserts the same arguments that Plaintiff raised in her Objection (Doc. # 93) to Magistrate Judge Crews' Recommendation. The Court addressed those arguments in its Order adopting the Recommendation. *See* (Doc. # 94 at 4–5). Moreover, "[a] motion for reconsideration is not appropriate to revisit issues already addressed or advance arguments that could

[1] To the extent that Plaintiff asserts that her initial appeal of this Court's denial of her motion for preliminary injunctive relief divested this Court of jurisdiction, the Court reiterates that "[a]lthough the filing of a notice of appeal ordinarily divests the district court of jurisdiction, in an appeal from an order granting or denying a preliminary injunction, a district court may nevertheless proceed to determine the action on the merits." (Doc. # 94 at 5) (quoting (Doc. # 92 at 3 n.1) (Magistrate Judge Crews' Recommendation) (quoting *Free Speech v. Fed. Election Comm'n*, 720 F.3d 788, 791 (10th Cir. 2013))).

have been raised in prior briefing." *Gebremedhin v. Am. Family Mut. Ins. Co.*, No. 13-cv-02813-CMA-BNB, 2016 WL 7868815, at *1 (D. Colo. Feb. 5, 2016).

III. CONCLUSION

Based on the foregoing, the Court FINDS that Plaintiff's Second Amended Notice of Appeal (Doc. # 97) is frivolous. Consequently, this Court retains jurisdiction in this case. Additionally, the Court ORDERS that Plaintiff's Motion for Reconsideration (Doc. # 96) is DENIED.

DATED: October 9, 2019

BY THE COURT:

Christine M. Arguello

CHRISTINE M. ARGUELLO
United States District Judge

APPENDIX E

CASE NO.: 19-1350

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ELET VALENTINE
Plaintiff-Appellant

v.

PNC FINANCIAL SERVICES GROUP, INC.; PNC BANK, NATIONAL ASSOCIATION (AKA PNC BANK, N.A.); AND PNC MORTGAGE
Defendants-Appellees

On Appeal From The United States District Court
For The District Of Colorado
The Honorable Christine M. Arguello
Case No. 18-cv-01934-CMA-SKC

Minute Order: Determined New Case not Second Notice of Appeal for Case No. 19-1007

SEPTEMBER 10, 2019

BEFORE: Clerk: U.S. Court of Appeals

Appendix E

LMTN,JD1,MJ CIV PP,TERMED

U.S. District Court - District of Colorado
District of Colorado (Denver)
CIVIL DOCKET FOR CASE #: 1:18-cv-01934-CMA-SKC

Valentine v. PNC Financial Services Group, Inc., The et al
Assigned to: Judge Christine M. Arguello
Referred to: Magistrate Judge S. Kato Crews
Case in other court: USCA, 19-01007
USCA, 19-01350
USCA, 19-01466
Cause: 42:1981 Civil Rights

Date Filed: 07/30/2018
Date Terminated: 11/13/2019
Jury Demand: Plaintiff
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: Federal Question

Plaintiff

Elet Valentine

represented by **Elet Valentine**
3273 South Truckee Way
Aurora, CO 80013
720-750-2234
PRO SE

V.

Defendant

PNC Financial Services Group, Inc., The

represented by **Matthew A. Morr**
Ballard Spahr LLP-Denver
1225 Seventeenth Street
Suite 2300
Denver, CO 80202-5596
303-292-2400
Fax: 303-296-3956
Email: morrm@ballardspahr.com
ATTORNEY TO BE NOTICED

Patrick H. Pugh
Ballard Spahr, LLP-Denver
1225 Seventeenth Street
Suite 2300
Denver, CO 80202-5596
303-292-2400
Fax: 303-296-3956
Email: pughp@ballardspahr.com
TERMINATED: 07/01/2019

Defendant

PNC Bank, National Association
also known as
PNC Bank, N.A.

represented by **Matthew A. Morr**
(See above for address)
ATTORNEY TO BE NOTICED

Patrick H. Pugh

(See e for address)
TERMINATED: 07/01/2019

Defendant

PNC Mortgage

represented by **Matthew A. Morr**
(See above for address)
ATTORNEY TO BE NOTICED

Patrick H. Pugh
(See above for address)
TERMINATED: 07/01/2019

Date Filed	#	Docket Text
09/10/2019	97	NOTICE OF APPEAL by Plaintiff Elet Valentine. (USCA Case No. 19-1007) (evana,) (Modified on 9/17/2019 after review by the circuit, it was determined that this is a new Notice of Appeal as opposed to Second Amended Notice of Appeal)(evana,). (Entered: 09/16/2019)

PACER Service Center

Transaction Receipt

11/01/2020 04:46:00

PACER Login:	etvalentine:5661717:0	**Client Code:**	
Description:	Docket Report	**Search Criteria:**	1:18-cv-01934-CMA-SKC Starting with document: 97 Ending with document: 97
Billable Pages:	2	**Cost:**	0.20

APPENDIX F

CASE NO.: 19-1007

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ELET VALENTINE
Plaintiff-Appellant

v.

PNC FINANCIAL SERVICES GROUP, INC.; PNC BANK, NATIONAL ASSOCIATION (AKA PNC BANK, N.A.); AND PNC MORTGAGE
Defendants-Appellees

On Appeal From The United States District Court
For The District Of Colorado
The Honorable Christine M. Arguello
Case No. 18-cv-01934-CMA-SKC

SECOND AMENDED NOTICE OF APPEAL

SEPTEMBER 10, 2019

BEFORE: CLERK: U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No.: 18-cv-01934-CMA-SKC

ELET VALENTINE,
Plaintiff

v.

PNC FINANCIAL SERVICES GROUP, INC., PNC BANK, NATIONAL ASSOCIATION and PNC MORTGAGE

Defendants(s)

SECOND AMENDED NOTICE OF APPEAL

Notice is hereby given that, Elet Valentine, Appellant/Petitioner in the above named case, hereby submits Second Amended Notice of Appeal to the United States Court of Appeals for the Tenth Circuit from the **late filing** of the Order Adopting and Affirming August 1, 2019, Recommendation of United States Magistrate Judge **[Doc #94]** entered on August 30. 2019, and the Recommendation of U.S. Magistrate Judge RE: Motion To Dismiss [ECF #40] & Motion To Amend [#67] **[Doc #92]** entered on August 1, 2019.

It is further requested that this Second Amended Notice of Appeal be consolidated with the previous Notice of Appeal filed on January 8, 2019, and the Amended Notice of Appeal filed on January 18, 2019. All notices including this

Second Amended Notice of Appeal are all timely filed pursuant to Fed. R. App. P. Rule 4(a)(1)(A) and Fed. R. App. P. Rule 4(a)(3). Subjects discussed (i.e. Defendant's Motion to Dismiss [Doc#40] and Second Amended Complaint [#67] are the subjects of [Doc # 92] and [Doc #94] which is currently under appeal and Appellate briefs have been submitted on both these subjects.

Respectfully Submitted,

Dated this **10** day of September 2019

Signature:

Elet Valentine, Pro Se
P.O. Box 390281
Denver, CO 80239
etvalentine@live.com
876-865-3048

Certificate of Service

I certify that on (date) **September 10, 2019,** I filed this **Second Amended Notice of Appeal** with The United States District Court for The District of Colorado. I sent a copy, along with any attachments, to the people listed below in accordance with (Rule 5(d)(1):

Sent by (Check One): ☒ U.S. Mail; OR ☐ In-Person Hand Delivery ☐ Fax ☐ Email

Name of Party Served: Matthew A. Morr,
Registration Number: 35913
Firm: Ballard Spahr, LLP
Address: 1225 17th Street, Ste 2300
Denver, CO 80202
Phone Number: 303-292-2400
Fax Number: 303-296-3956
E-Mail Address: morrm@ballardspahr.com
PNC FINANCIAL SERVICES GROUP, INC

Original Filed:

Jeffery P. Colwell, Clerk
Alfred A. Arraj United States Court
901 19th Street, Room A105
Denver, CO 80294-3589
303-844-3433

Signature: _____

Elet Valentine, Pro Se
P.O. Box 390281
Denver, CO 80239
etvalentine@live.com
876-865-3048

Certificate of Service

I certify that on (date) **September 10, 2019,** I filed this **Second Amended Notice of Appeal** with The United States District Court for The District of Colorado. I sent a copy, along with any attachments, to the people listed below in accordance with (Rule 5(d)(1):

Sent by (Check One): ☒ U.S. Mail; OR ☐ In-Person Hand Delivery ☐ Fax ☐ Email

Name of Party Served: Matthew A. Morr,
Registration Number: 35913
Firm: Ballard Spahr, LLP
Address: 1225 17th Street, Ste 2300
Denver, CO 80202
Phone Number: 303-292-2400
Fax Number: 303-296-3956
E-Mail Address: morrm@ballardspahr.com
PNC BANK, NATIONAL ASSOCIATION (AKA PNC BANK, N.A.)

Original Filed:

Jeffery P. Colwell, Clerk
Alfred A. Arraj United States Court
901 19th Street, Room A105
Denver, CO 80294-3589
303-844-3433

Signature: 

Elet Valentine, Pro Se
P.O. Box 390281
Denver, CO 80239
etvalentine@live.com
876-865-3048

Certificate of Service

I certify that on (date)**September 10, 2019,** I filed this **Second Amended Notice of Appeal** with The United States District Court for The District of Colorado. I sent a copy, along with any attachments, to the people listed below in accordance with (Rule 5(d)(1):

Sent by (Check One): ☒ U.S. Mail; OR ☐ In-Person Hand Delivery ☐ Fax; ☐ Email

Name of Party Served: Matthew A. Morr,
Registration Number: 35913
Firm: Ballard Spahr, LLP
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PNC MORTGAGE

Original Filed:

Jeffery P. Colwell, Clerk
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Denver, CO 80294-3589,
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Signature:

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APPENDIX G

CASE NO.: 19-1007

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ELET VALENTINE
Plaintiff-Appellant

v.

PNC FINANCIAL SERVICES GROUP, INC.; PNC BANK, NATIONAL ASSOCIATION (AKA PNC BANK, N.A.); AND PNC MORTGAGE
Defendants-Appellees

On Appeal From The United States District Court
For The District Of Colorado
The Honorable Christine M. Arguello
Case No. 18-cv-01934-CMA-SKC

SEPTEMBER 12, 2019

ORDER: GRANTING "REQUEST TO FILE SUPPLEMENTAL OPENING BRIEF"

BEFORE: CLERK: U.S. COURT OF APPEALS

FILED
United States Court of Appeals
Tenth Circuit

September 12, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ELET VALENTINE,

Plaintiff - Appellant,

v.

THE PNC FINANCIAL SERVICES GROUP, INC.; PNC BANK, NATIONAL ASSOCIATION, a/k/a PNC Bank, NA; PNC MORTGAGE,

Defendants - Appellees.

No. 19-1007
(D.C. No. 1:18-CV-01934-CMA-SKC)
(D. Colo.)

ORDER

On September 10, 2019, appellant filed a "Request to File a Supplement to Opening Brief." Appellant is instructed to re-file the "request" with the proposed supplement attached no later than October 9, 2019.

Entered for the Court

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk

APPENDIX H

CASE NO.: 19-1466

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ELET VALENTINE
Plaintiff-Appellant

v.

PNC FINANCIAL SERVICES GROUP, INC.; PNC BANK, NATIONAL ASSOCIATION (AKA PNC BANK, N.A.); AND PNC MORTGAGE
Defendants-Appellees

On Appeal From The United States District Court
For The District Of Colorado
The Honorable Christine M. Arguello
Case No. 18-cv-01934-CMA-SKC

JULY 29, 2020

RECONSIDERATION - COURT GROSS MATERIAL
(REQUEST FOR REHEARING)

BEFORE: CLERK: U.S. CLERK OF APPEALS

Appendix H

Appeal No. 19-1466

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ELET VALENTINE, Appellant/Petitioner v. PNC FINANCIAL SERVICES GROUP, INC., PNC BANK, NATIONAL ASSOCIATION and PNC MORTGAGE Appellee/Respondent	**RESONCIDERATION – COURT GROSS MATERIAL ERROR**

On Appeal from the United States District Court for the District of Colorado
The Honorable Christine M. Arguello
Case No. 18-cv-01934-CMA-SKC

HERE COMES NOW, Elet Valentine, Pro Se, Appellant/Petitioner submits, Reconsideration – Court Material Error as Court made a determination concerning The District Court Order of October 9, 2019, *"Order Certifying Appeal as Frivolous and Denying Plaintiff Motion for Reconsideration"* [ref no. 1068611] (EXHIBIT 1). The Court's "Order and Judegement" of July 14, 2020, is soley based on a (EXHIBIT 1). The District Court's October 9, 2019, Order is not contained in Case No. 1466 or Case No. 19-1007. This document is only contained in Case No. 19-1350. Case No. 19-1350, was closed in a December 10, 2019 and is not under appeal.

Secondly, the Court states Plaintiff did not respond to the *"Order Certifying Appeal as Frivolous and Denying Plaintiff Motion for Reconsideration"*. However, Appellant did respond. The response is located in Case No. 19-1350.

Wherefore, it is the Appellant plea that the court reconsider its position as the an order was based on an non-existent document that is not a part of Case No. 19-1466 or 19-1007 and not under appeal.

Respectfully Submitted,

Dated this __29___ day of July 2020

Signature /s/Elet Valentine

Elet Valentine, Pro Se
3273 S. Truckee Way
Bldg 18 Apt 102
Aurora, CO 80013
elet.valentine@outlook.com
720-750-2234

Certificate of Service

I certify that on **July 29, 2020**, I filed Reconsideration – Court Material Error with The United States Court of Appeals For The Tenth Circuit. I sent a copy, along with any attachments, to the people listed below in accordance with Rule 5(d)(l):

Sent by (Check One):_X_ U.S. Mail; __In-Person Hand Delivery __ Fax __ Email

Name of Party Served: Matthew A. Morr,
Registration Number: 35913
Firm: Ballard Spahr, LLP
Address: 1225 17th Street, Ste 2300
Denver, CO 80202
Phone Number: 303-292-2400
Fax Number: 303-296-3956
E-Mail Address: **morrm@ballardspahr.com**
PNC FINANCIAL SERVICES GROUP, INC.

Original Filed:
Bryon White United States Courthouse
United States Court of Appeals
1823 Stout Street
Denver, CO 80257
303-844-3157

Signature /s/Elet Valentine
Elet Valentine, Pro Se
3273 S. Truckee Way
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Aurora, CO 80013
elet.valentine@outlook.com
720-750-2234

Certificate of Service

I certify that **July 29, 2020**, I filed Reconsideration – Court Material Error with The United States Court of Appeals For The Tenth Circuit. I sent a copy, along with any attachments, to the people listed below in accordance with Rule 5(d)(l):

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Denver, CO 80202
Phone Number: 303-292-2400
Fax Number: 303-296-3956
E-Mail Address: **morrm@ballardspahr.com**
PNC BANK, National Association (PNC Bank, N.A.)

Original Filed:
Bryon White United States Courthouse
United States Court of Appeals
1823 Stout Street
Denver, CO 80257
303-844-3157

Signature /s/Elet Valentine
Elet Valentine, Pro Se
3273 S. Truckee Way
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720-750-2234

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E-Mail Address: **morrm@ballardspahr.com**
PNC MORTGAGE

Original Filed:
Bryon White United States Courthouse
United States Court of Appeals
1823 Stout Street
Denver, CO 80257
303-844-3157

Signature /s/Elet Valentine

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EXHIBIT 1

U.S. COURT OF APPEALS

10TH CIRCUIT

"ORDER AND JUDGEMENT"

CASE NO. 19-1466

AND

CASE NO. 18-1007

OCTOBER 10, 2019

FILED
United States Court of Appeals
Tenth Circuit

July 14, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ELET VALENTINE,

Plaintiff - Appellant,

v.

THE PNC FINANCIAL SERVICES GROUP, INC.; PNC BANK, NATIONAL ASSOCIATION, a/k/a PNC Bank, NA; PNC MORTGAGE,

Defendants - Appellees.

Nos. 19-1007 & 19-1466
(D.C. No. 1:18-CV-01934-CMA-SKC)
(D. Colo.)

ORDER AND JUDGMENT*

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

Elet Valentine, appearing pro se, appeals from the district court's orders denying her motion for a preliminary injunction (No. 19-1007) and dismissing her action with prejudice as a sanction (No. 19-1466). Exercising jurisdiction under 28 U.S.C. § 1291, we affirm the order in No. 19-1466 and dismiss No. 19-1007 as moot.

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of these appeals. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The cases are 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.

BACKGROUND

This case arises from a dispute between Ms. Valentine and PNC Financial Services Group, Inc., PNC Bank, N.A., and PNC Mortgage (collectively "PNC") concerning her default on a residential mortgage loan and subsequent foreclosure proceedings. In 2018, a Colorado state court issued an order authorizing the sale of Ms. Valentine's home. While the foreclosure proceedings were pending, Ms. Valentine filed suit in the United States District Court for the District of Colorado alleging eleven claims for relief. She also asked the court to issue a preliminary injunction to prevent the sale of her home and require PNC to preserve documents pending determination of the merits. The court denied the motion, and Ms. Valentine appealed, which is No. 19-1007 (the "Injunction Appeal").

Following the denial of preliminary injunctive relief, PNC sold the property and moved to dismiss the Injunction Appeal as moot. Immediately thereafter, Ms. Valentine filed an amended notice of appeal in which she attempted to appeal from several procedural orders. PNC moved to dismiss the amended notice arguing that none of the orders were final and therefore could not be appealed.

While the Injunction Appeal was pending, PNC filed a motion to dismiss Ms. Valentine's amended complaint. The magistrate judge issued a recommendation to dismiss all claims except Ms. Valentine's breach of contract claim. The magistrate judge further rejected Ms. Valentine's argument that the pending Injunction Appeal divested the court of jurisdiction. The district court adopted the recommendation, noting Ms. Valentine did not challenge the magistrate judge's substantive analysis;

instead, she continued to maintain the pending Injunction Appeal divested the court of jurisdiction.

Shortly thereafter, the magistrate judge set a status conference and asked PNC to take the lead in preparing a draft proposed scheduling order. Days later, Ms. Valentine filed yet another amended notice of appeal in the Injunction Appeal in which she tried to expand the scope of the appeal to include the district court's order to dismiss all but one of Ms. Valentine's claims. This court deemed the amended notice was a new appeal and assigned it No. 19-1350 (the "Second Appeal").

In the meantime, Ms. Valentine refused to follow the magistrate judge's order to work with PNC to develop a scheduling order. Despite Ms. Valentine's failure to participate, PNC timely filed a proposed order and further asked the court to find the Second Appeal was frivolous.

On the day set for the status conference, the magistrate judge waited fifteen minutes after the scheduled start time, but Ms. Valentine failed to appear. He set a further conference in three weeks and warned Ms. Valentine she must appear or risk dismissal of her suit.

A few days later, the district court entered an order certifying the Second Appeal as frivolous: "Because it is obvious [that an order dismissing some but not all of Ms. Valentine's claims] is not appealable, the Court hereby certifies the [Second Appeal] as frivolous. As a result, this Court retains jurisdiction to consider the merits of this case." No. 19-1466, R., Vol. 5 at 114 (footnote omitted).

Undeterred, Ms. Valentine filed motions to reconsider the magistrate judge's order setting a further status conference and the court's order certifying the Second Appeal as frivolous. The court denied both motions, explaining once again that it had jurisdiction, and issuing another warning to Ms. Valentine to comply with the court's orders or face dismissal.

When Ms. Valentine failed to appear at the second status conference, the magistrate judge entered a written recommendation to dismiss the case with prejudice. The district court overruled Ms. Valentine's objections and adopted and affirmed the recommendation. As backdrop, the court outlined Ms. Valentine's failure to comply with the court's orders and "meaningfully engage in the litigation process," along with her refusal to "accept any interpretation of the law other than her own." *Id.* at 196. "The Court has had enough." *Id.* at 197.

Using the five factors announced in *Ehrenhaus v. Reynolds*, 965 F.2d 916, 921 (10th Cir. 1992)—namely "(1) the degree of actual prejudice to the defendant; (2) the amount of interference with the judicial process; (3) the culpability of the litigant; (4) whether the court warned the party in advance that dismissal of the action would be a likely sanction for noncompliance; and (5) the efficacy of lesser sanctions" (internal quotation marks, ellipsis, and citations omitted)—the district court determined dismissal as a sanction was appropriate.

As to the first factor, the court noted Ms. Valentine's "conduct has resulted in substantial prejudice to [PNC]," No. 19-1466, R., Vol. 5 at 199. "[PNC] ha[s] been diligent in [its] attempt[] to bring this litigation to a close, but these efforts have been

stymied by Ms. Valentine's disregard for hearings and Court Orders." *Id.* (internal quotation marks omitted). "In addition to being deprived of any finality in this matter, [PNC] ha[s] also expended considerable resources in what has become a futile effort to move this case forward." *Id.* at 199-200.

Regarding the second factor, the court found Ms. Valentine's "conduct has stalled the judicial process." *Id.* at 200. "[Ms. Valentine's] refusal to comply with court orders has inhibited the Court's ability to perform straightforward tasks." *Id.* "Moreover, [her] refusal to recognize this Court's authority to interpret the law has forced the Court to expend valuable time in an unnecessary and repetitive exercise of explaining to [her] why her frivolous arguments regarding this Court's jurisdiction are incorrect." *Id.* "This Court has limited resources and an extensive docket. Accordingly, the consequences that result from [Ms. Valentine's] ongoing interference with the judicial system cannot be understated." *Id.*

Considering the third factor, the court found Ms. Valentine "is culpable for her conduct," noting "[e]ven after [she] filed her second Notice of Appeal and stopped appearing at proceedings . . . [the] Magistrate Judge . . . and this Court provided [her] with multiple detailed explanations of the legal principles that refute her position regarding . . . jurisdiction." *Id.* "Nevertheless, [Ms. Valentine] has remained obstinate, and her choice to maintain her strategy under the circumstances shows that her conduct is intentional." *Id.*

As to the fourth factor, the court found Ms. Valentine "had ample notice of the possibility of dismissal due to her conduct." *Id.* at 201. And regarding the final

factor, the court found "[s]anctions less than dismissal with prejudice would not be effective," noting an award of attorney fees against Ms. Valentine "based on her frivolous attempt to remove a [separate] case to federal court" was an ineffective deterrent against her "insistence on pursuing arguments even after they have been demonstrated to be frivolous." *Id.* The Court also found "that sanctions other than dismissal with prejudice are unlikely to change what [the] Magistrate Judge . . . correctly described as [Ms. Valentine's] willful bad faith in repeatedly disregarding the Court's rules and orders." *Id.* (internal quotation marks omitted).

Ms. Valentine filed a notice of appeal from the district court's entry of a final judgment dismissing the case as a sanction, which is No. 19-1466 (the "Sanction Appeal"). Shortly thereafter, this Court dismissed the Second Appeal for lack of jurisdiction.

SANCTION APPEAL

"The Federal Rules of Civil Procedure authorize sanctions, including dismissal, for failing to appear at a pretrial or scheduling conference . . . and for failing to comply with court rules or any order of the court." *Gripe v. City of Enid*, 312 F.3d 1184, 1188 (10th Cir. 2002). "We review for an abuse of discretion the district court's decision to impose the sanction of dismissal for failure to follow court orders and rules." *Id.* "It is within a court's discretion to dismiss a case if, after considering all the relevant factors, it concludes that dismissal alone would satisfy the interests of justice." *Ehrenhaus*, 965 F.2d at 918. The district court considered

the relevant factors in deciding to dismiss Ms. Valentine's case, and its decision was not an abuse of discretion.

But Ms. Valentine does not challenge the merits of the district court's sanction order; instead, she maintains the court lacked jurisdiction to enter any orders upon the filing of her Injunction Appeal and Second Appeal, including the sanction order. Ms. Valentine is mistaken.

An appeal from an interlocutory order denying a preliminary injunction does not divest the district court of jurisdiction to proceed with the underlying action on the merits. *See Colorado v. Idarado Mining Co.*, 916 F.2d 1486, 1490 & n.2 (10th Cir. 1990). Likewise, "so long as the district court takes the affirmative step of certifying an appeal as frivolous or forfeited, it retains jurisdiction." *McCauley v. Halliburton Energy Servs., Inc.*, 413 F.3d 1158, 1162 (10th Cir. 2005). Because the court certified Ms. Valentine's Second Appeal as frivolous, it retained jurisdiction.

Last, Ms. Valentine incorporates by reference her arguments in a proposed supplement to her opening brief in the Injunction Appeal concerning eight alleged procedural errors committed by the district court. Whether to accept the proposed supplement was referred to this panel. We grant Ms. Valentine's motion to file the proposed supplement but deny the arguments in view of our ruling on the dispositive issue—the district court did not abuse its discretion in dismissing Ms. Valentine's case as a sanction for her failure to comply with the court's orders. The issues in the supplement, which include whether PNC's motion to dismiss was timely filed and whether the court properly denied Ms. Valentine's motion to file a second amended

complaint, do not "affect the outcome[,]" and therefore, "[w]e will not undertake to decide [them]." *Griffin v. Davies*, 929 F.2d 550, 554 (10th Cir. 1991).

INJUNCTION APPEAL

Ms. Valentine's appeal from the denial of the preliminary injunction is mooted by the fact that the district court proceeded to adjudicate the underlying action on the merits. When a court proceeds to adjudicate the merits of the underlying action and enters a final judgment, an appeal from the denial of a preliminary injunction is moot because a preliminary injunction is by its nature a temporary measure intended to furnish provisional protection while awaiting a final judgment on the merits. *See United States ex rel. Bergen v. Lawrence*, 848 F.2d 1502, 1512 (10th Cir. 1988).

CONCLUSION

We affirm the district's court's order in No. 19-1466. We deny Ms. Valentine's motion to reconsider this court's order denying her motion to consolidate.

We dismiss No. 19-1007 as moot. We grant Ms. Valentine's motions to file a supplement to her opening brief and to extend the time for filing that supplement, and we direct the Clerk to file the supplement as of the date it was received. We deny Ms. Valentine's motions to: (1) reconsider this court's order to supplement the record; (2) preserve the record; (3) oppose PNC's entry of appearance; and

(4) reconsider this court's order denying her motion to consolidate. We deny PNC's motions to dismiss the appeal and amended notice of appeal as moot.

Entered for the Court

Allison H. Eid
Circuit Judge

EXHIBIT 2

U.S. DISTRICT COURT ORDER

"ORDER CERTIFYING APPEAL AS FRIVOLOUS AND DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION"

CASE NO. 19-1350

OCTOBER 10, 2019

[REF#10688611]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Christine M. Arguello

Civil Action No. 18-cv-01934-CMA-SKC

ELET VALENTINE,

Plaintiff,

v.

THE PNC FINANCIAL SERVICES GROUP, INC.,
PNC BANK, NATIONAL ASSOCIATION, *a/k/a* PNC Bank, NA, and
PNC MORTGAGE,

Defendants.

ORDER CERTIFYING APPEAL AS FRIVOLOUS AND DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION

This matter is before the Court on Plaintiff Elet Valentine's Second Amended Notice of Appeal (Doc. # 97) and Motion for Reconsideration (Doc. # 96) of this Court's Order Adopting and Affirming August 1, 2019 Recommendation of United States Magistrate Judge (Doc. # 94). Based on the reasons that follow, the Court certifies Plaintiff's latest appeal as frivolous and denies Plaintiff's Motion for Reconsideration.

I. BACKGROUND

The Court recently recounted the facts of this case in its Order adopting Magistrate Judge Crews' Recommendation. *See* (*Id.*). Accordingly, the Court will reiterate the factual background only to the extent necessary to address Plaintiff's Motion.

On August 2, 2018, Plaintiff, acting *pro se*, filed a Motion for an *Ex Parte* Temporary Restraining Order or Preliminary Injunction which sought to enjoin Defendants' foreclosure on her home and to preserve evidence. *See generally* (Doc. # 6). This Court denied Plaintiff's Motion, and Plaintiff appealed that decision. (Doc. ## 71, 73.)

Subsequently, Magistrate Judge Crews issued a Recommendation in which he concluded, *inter alia*, that this Court should grant in part and deny in part Defendants PNC Financial Services Group, Inc., PNC Bank, N.A., and PNC Mortgage's ("Defendants") Motion to Dismiss Plaintiff's Amended Complaint. (Doc. # 92 at 28–29.) On August 30, 2019, this Court affirmed the Recommendation after conducting a *de novo* review of Plaintiff's objections. (Doc. # 94.) Thus, the Court denied the Motion to Dismiss as to Plaintiff's breach of contract claim which is based on the theory that Defendants failed to properly apply and credit her loan payments. However, the Court granted the Motion to Dismiss as to as to the remaining claims in Plaintiff's Amended Complaint. (*Id.* at 6.)

On September 10, 2019, Plaintiff filed a document titled Second Amended Notice of Appeal (Doc. # 97) regarding this Court's August 30 Order. Additionally, on September 12, 2019, Plaintiff filed a Motion for Reconsideration of the same Order. (Doc. # 96.)

II. DISCUSSION

Before proceeding to the merits of Plaintiff's Motion for Reconsideration, the Court must consider its jurisdiction because Plaintiff has filed multiple notices of appeal

in this case. *See Amazon, Inc. v. Dirt Camp, Inc.*, 273 F.3d 1271, 1276 (10th Cir. 2001) ("A federal court has an independent obligation to examine its own jurisdiction.").

A. THIS COURT RETAINS JURISDICTION

1. Applicable Law

"The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982). However, the Tenth Circuit has held that:

> Because this divestiture of jurisdiction is subject to abuse and can unreasonably delay trial, we recognized in *Stewart v. Donges*, 915 F.2d 572 (10th Cir. 1991) a procedure by which a district court may maintain jurisdiction [in] a [case] if the court certifies that [an] appeal is frivolous.

Langley v. Adams Cnty., Colo., 987 F.2d 1473, 1477 (10th Cir. 1993). Specifically, "to regain jurisdiction, [a district court] must take the affirmative step of certifying the appeal as frivolous or forfeited . . . ." *Stewart*, 915 F.2d at 577. An appeal is frivolous if "the result is obvious or . . . the appellant's arguments are wholly without merit." *Barnes v. Sec. Life of Denver Ins. Co.*, No. 18-cv-718-WJM-SKC, 2019 WL 142113, at *2 (D. Colo. Jan. 9, 2019) (citation omitted).

2. Analysis

Plaintiff's Second Amended Notice of Appeal is frivolous. It is well established that "federal circuit courts have jurisdiction to review only 'final decisions' of district courts." *Spring Creek Expl. & Prod. Co., LLC v. Hess Bakken Inv., II, LLC*, 887 F.3d 1003, 1015 (10th Cir. 2018) (citation omitted); 28 U.S.C. § 1291. A "final decision must dispose of all claims by all parties, except a decision may otherwise be considered final

if it is properly certified as a final judgment under Federal Rule of Civil Procedure 54(b)." *New Mexico v. Trujillo*, 813 F.3d 1308, 1316 (10th Cir. 2016).

In the instant case, this Court's Order Adopting and Affirming August 1, 2019 Recommendation of Untied States Magistrate Judge did not dispose of all of Plaintiff's claims. *See* (Doc. # 94 at 6). Therefore, the Order is not a final decision for purposes of 28 U.S.C. § 1291. Moreover, the Court has not certified the Order as a final judgment pursuant to Federal Rule of Civil Procedure 54. Accordingly, the Order is not appealable.

Because it is obvious from a review of the docket that this Court's Order is not appealable, the Court hereby certifies Plaintiff's Second Amended Notice of Appeal (Doc. # 97) as frivolous.[1] As a result, this Court retains jurisdiction to consider the merits of this case. *Stewart*, 915 F.2d at 577.

B. PLAINTIFF'S MOTION FOR RECONSIDERATION

Plaintiff's Motion for Reconsideration is lacking in merit. The Motion asserts the same arguments that Plaintiff raised in her Objection (Doc. # 93) to Magistrate Judge Crews' Recommendation. The Court addressed those arguments in its Order adopting the Recommendation. *See* (Doc. # 94 at 4–5). Moreover, "[a] motion for reconsideration is not appropriate to revisit issues already addressed or advance arguments that could

[1] To the extent that Plaintiff asserts that her initial appeal of this Court's denial of her motion for preliminary injunctive relief divested this Court of jurisdiction, the Court reiterates that "[a]lthough the filing of a notice of appeal ordinarily divests the district court of jurisdiction, in an appeal from an order granting or denying a preliminary injunction, a district court may nevertheless proceed to determine the action on the merits." (Doc. # 94 at 5) (quoting (Doc. # 92 at 3 n.1) (Magistrate Judge Crews' Recommendation) (quoting *Free Speech v. Fed. Election Comm'n*, 720 F.3d 788, 791 (10th Cir. 2013))).

have been raised in prior briefing." *Gebremedhin v. Am. Family Mut. Ins. Co.*, No. 13-cv-02813-CMA-BNB, 2016 WL 7868815, at *1 (D. Colo. Feb. 5, 2016).

III. CONCLUSION

Based on the foregoing, the Court FINDS that Plaintiff's Second Amended Notice of Appeal (Doc. # 97) is frivolous. Consequently, this Court retains jurisdiction in this case. Additionally, the Court ORDERS that Plaintiff's Motion for Reconsideration (Doc. # 96) is DENIED.

DATED: October 9, 2019

BY THE COURT:

Christine M. Arguello
CHRISTINE M. ARGUELLO
United States District Judge

APPENDIX I

CASE NO.: 18-cv-01934-CMA-SKC

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ELET VALENTINE
Plaintiff-Appellant

v.

PNC FINANCIAL SERVICES GROUP, INC.; PNC BANK, NATIONAL ASSOCIATION (AKA PNC BANK, N.A.); AND PNC MORTGAGE
Defendants-Appellees

JANUARY 7, 2019

ORDER AFFIRMING MAGISTRATE JUDGE KATO CREWS' ORDER DENYING PLAINTIFF'S MOTION TO CORRECT RECORD, MOTION TO FILE A SECOND AMENDED COMPLAINT, MOTION FOR EXTENTION OF TIME TO FILE AN AMENDED COMPLAINT, AND MOTION OF TIME TO FILE RESPONSE TO MOTION TO DISMIS

BEFORE: JUDGE CHRISTINE M. ARGUELLO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Christine M. Arguello

Civil Action No. 18-cv-01934-CMA-SKC

ELET VALENTINE,

Plaintiff,

v.

THE PNC FINANCIAL SERVICES GROUP, INC.,
PNC BANK, NATIONAL ASSOCIATION, *a/k/a* PNC Bank, NA, and
PNC MORTGAGE,

Defendants.

ORDER AFFIRMING MAGISTRATE JUDGE S. KATO CREWS' ORDER DENYING PLAINTIFF'S MOTION TO CORRECT RECORD, MOTION TO FILE A SECOND AMENDED COMPLAINT, MOTION FOR EXTENSION OF TIME TO FILE AN AMENDED COMPLAINT, AND MOTION FOR EXTENSION OF TIME TO FILE RESPONSE TO MOTION TO DISMISS

This matter is before the Court on Plaintiff Elet Valentine's Objections (Doc. ## 56, 57) to an Order issued by Magistrate Judge S. Kato Crews (Doc. # 53), wherein he denied Plaintiff's (1) motion to correct the Court's records; (2) motion to file a second amended complaint (3) motion for an extension of time to file a second amended complaint; and (4) motion for an extension of time to respond to the pending motion to dismiss (Doc. ## 47–50). For the reasons that follow, this Court overrules Plaintiff's Objections and affirms Magistrate Judge Crews' Order. The Order is incorporated herein by reference. *See* 28 U.S.C. § 636(b)(1)(A); Federal Rule of Civil Procedure 72(a).

I. BACKGROUND

On October 11, 2018, Plaintiff filed four motions—seeking various extensions of time, seeking to correct the Court record, and seeking to amend her complaint—which are presently at issue. On October 15, 2018, this Court referred the motions to Magistrate Judge Crews. (Doc. # 51.) Magistrate Judge Crews entered an Order on the same day denying Plaintiff's motions. Subsequently, on October 29, 2018, Plaintiff filed two documents respectively titled Objectionto [sic] Minuite [sic] Order Doc 55 – Denial Request to Amend and Denial Extention [sic] of Time (Doc. # 56) and Objectionto [sic] Minuite [sic] Order Doc 53 – Correct Court Record (Doc. # 57). Although (Doc. # 56) indicates that it is objecting to Doc. # 55, the Court assumes Plaintiff intended to object to Doc. # 53 based on the substance of that document.

II. STANDARD OF REVIEW

When a magistrate judge issues a non-dispositive pretrial order, "[a] party may serve and file objections to the order to the district court within 14 days after being served with a copy." Fed. R. Civ. Pro. 72(a). The district court must modify or set aside any part of the order that "is clearly erroneous or is contrary to law." Fed. R. Civ. Pro. 72(a); 28 U.S.C. § 636(b)(a)(A); *First Union Mortg. Corp. v. Smith*, 229 F.3d 992, 995 (10th Cir. 2000).

With regard to legal matters, the district court conducts an independent, plenary review of the magistrate judge's order. *In re Motor Fuel Temperature Sales Practice Litig.*, 707 F. Supp. 2d 1145, 1148 (D. Kan. 2010); *see also* 12 Charles Alan Wright, et al., Federal Practice & Procedure § 3069 (2d ed. 2017). Under the 'contrary to law'

standard, the reviewing court "set[s] aside the magistrate order only if it applied an incorrect standard," *Dias v. City & Cty. of Denver*, No. 07-cv-00722-WDM-MJW, 2007 WL 4373229, *2 (D. Colo. Dec. 7, 2007) (internal quotations omitted), or applied the appropriate legal standard incorrectly, *Kissing Camels Surgery Ctr., LLC v. Centura Health Corp.*, No. 12-cv-3012-WJM-BNB, 2014 WL 5599127, *1 (D. Colo. Nov. 4, 2014).

As to factual findings by the magistrate judge, the 'clearly erroneous' standard "requires that the reviewing court affirm unless it 'on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Ocelot Oil Corp. v. Sparrow Indus.*, 847 F.2d 1458, 1464 (10th Cir. 1988) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)). This is a deferential standard. *In re Motor Fuel Temperature Sales Practice Litig.*, 707 F. Supp. 2d at 1147.

III. ANALYSIS

Magistrate Judge Crews' Order is neither clearly erroneous nor contrary to law. Plaintiff appears to argue that Magistrate Judge Crews erred in denying Plaintiff's motion to amend her complaint on the basis of Plaintiff's failure to comply with Colorado Local Rule of Civil Procedure 15.1. Under Rule 15.1(b) a "party who files an opposed motion for leave to amend or supplement a pleading shall attach as an exhibit a copy of the proposed amended or supplemental pleading. . . ." Magistrate Judge Crews denied Plaintiff's motion to amend her complaint (Doc. # 49) and her motion for an extension of time to file a second amended complaint (Doc. # 48) because "Plaintiff has not attached the proposed second amended complaint." (Doc. # 53 at 1.)

In her Objection, Plaintiff asserts that the "2nd Amended Complaint would not be attached until it was composed, which it has not." (Doc. # 56 at 1.) However, the fact that Plaintiff had not yet composed her amended complaint when she filed her corresponding motion is not a justification for her failure to comply with Local Rule 15.1(b). Therefore, Magistrate Judge Crews did not err in denying Plaintiff's motion to amend her complaint (Doc. # 49) and denying as moot her motion seeking an extension of time to file a second amended complaint (Doc. # 48).[1]

Plaintiff's contention that the Magistrate Judge erred in his application of Federal Rule of Civil Procedure 15 because the Magistrate Judge did not cite Rule 15 in its entirety is lacking in merit. There is no evidence that the Magistrate Judge failed to correctly apply Rule 15. Moreover, Magistrate Judge Crews denied Plaintiff's motion to amend her complaint without prejudice, which means that Plaintiff could have refiled her motion and made the corrections necessary to comply with the Federal and Local rules of civil procedure.

Finally, Plaintiff objects to the Magistrate Judge's denial of her motion to correct the record. However, Magistrate Judge Crews did not err in finding that the designation of Plaintiff's case as a Civil Rights matter has "no bearing on the outcome of the case." (Doc. # 53 at 1.) Therefore, there is a substantial justification for denying Plaintiff's motion.

[1] The Court notes that the instant order has no bearing on Plaintiff's pending motion seeking to file a Second Amended Complaint (Doc. # 67), which this Court referred to Magistrate Judge Crews on December 14, 2018 (Doc. # 69).

Thus, having reviewed the relevant pleadings and applicable law, the Court finds that Magistrate Judge Crews did not err in denying Plaintiff's motions for the reasons set forth in (Doc. # 53). His Order denying those motions is not, therefore, clearly erroneous or contrary to law.

IV. CONCLUSION

For the foregoing reasons, the Court AFFIRMS Magistrate Judge Crews' Order (Doc. # 53) and OVERRULES Plaintiff's Objections (Doc. ## 56, 57).

DATED: January 7, 2019

BY THE COURT:

Christine M. Arguello

CHRISTINE M. ARGUELLO
United States District Judge

APPENDIX J

CASE NO.: 19-1466

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ELET VALENTINE
Plaintiff-Appellant

v.

PNC FINANCIAL SERVICES GROUP, INC.; PNC BANK, NATIONAL ASSOCIATION (AKA PNC BANK, N.A.); AND PNC MORTGAGE
Defendants-Appellees

JANUARY 7, 2019

ORDER ADOPTING AND AFFIRMING SEPTEMBER 28, 2018 RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

BEFORE: CHRISTINE M. ARGUELLO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Christine M. Arguello

Civil Action No. 18-cv-01934-CMA-SKC

ELET VALENTINE,

Plaintiff,

v.

THE PNC FINANCIAL SERVICES GROUP, INC.,
PNC BANK, NATIONAL ASSOCIATION, *a/k/a* PNC Bank, NA, and
PNC MORTGAGE,

Defendants.

ORDER ADOPTING AND AFFIRMING SEPTEMBER 28, 2018
RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This matter is before the Court on the September 28, 2018 Recommendation (Doc. # 42) by United States Magistrate Judge S. Kato Crews that Plaintiff's Motion for an *Ex Parte* Temporary Restraining Order and Preliminary Injunction (Doc. # 6) be denied. Plaintiff timely filed an Objection to the Recommendation. (Doc. # 46.) Subsequently, Defendants PNC Financial Services Group, Inc., PNC Bank, N.A., and PNC Mortgage, a division of PNC Bank, N.A. ("Defendants") filed a Response (Doc. # 54) and Plaintiff filed a Surreply (Doc. # 61). For the reasons that follow, the Court affirms and adopts the Recommendation.

I. BACKGROUND

The Magistrate Judge's Recommendation provides an extensive recitation of the factual and procedural background of this case. The Recommendation is incorporated herein by reference. *See* 28 U.S.C. § 636(b)(1)(B); Fed. R. Civ. P. 72(b). Accordingly, the Court will reiterate the factual background only to the extent necessary to address Plaintiff's objections.

This case arises out of a dispute between Plaintiff Elet Valentine and Defendants regarding a loan transaction secured by real property located in Denver, Colorado, and the subsequent foreclosure on the property.

On August 2, 2018, Plaintiff, acting *pro se*, filed a Motion for an *Ex Parte* Temporary Restraining Order or Preliminary injunction which sought to enjoin Defendants' foreclosure on her home despite the fact that a Colorado state court determined that Defendants were justified in proceeding with a foreclosure sale of the property. *See* (Doc. # 6 at 3; Doc. # 26 at 1). Plaintiff supplemented the Motion on August 16, 2018, by filing a document titled Plaintiff's Brief in Support of a Motion for *Ex Parte* Temporary Restraining Order or Preliminary Injunction. (Doc. # 25.) Defendants filed a Response to Plaintiff's Motion on August 17, 2018. (Doc. # 29.)

On September 28, 2018, Magistrate Judge Crews issued a Recommendation that Plaintiff's Motion should be denied. (Doc. # 42.) Specifically, the Recommendation determined that Plaintiff has very little, if any, likelihood of prevailing on the merits of her claims. (*Id.* at 7.) Additionally, the Recommendation concluded that Plaintiff failed to

show that she will suffer irreparable harm without an injunction to prevent the foreclosure sale.[1] (*Id.* at 11.)

On October 11, 2018, Plaintiff filed an Objection to the Recommendation. (Doc. # 46.) Plaintiff effectively objects to the Recommendation in its entirety. With respect to the Recommendation's conclusion that Plaintiff will not suffer irreparable harm in the absence of an injunction, Plaintiff asserts that her Motion and related filings actually establish that she met her burden with regard to irreparable harm. *See* (*id.* at 28).

Subsequently, Defendants proceeded with the foreclosure sale based on the state court's determination that Defendants are the real party in interest, that there is a reasonable probability of a default under the Note and Deed of Trust sufficient for Defendants to proceed with the foreclosure, and that Plaintiff did not raise any valid defenses that would prevent the foreclosure. (Doc. # 54 at 2; Doc. # 70 at 2.) The sale took place on November 29, 2018. (Doc. # 70 at 2.) The state court entered an Order Approving Sale on December 21, 2018. (Doc. # 70-1 at 1–2.)

II. STANDARD OF REVIEW

After a magistrate judge issues a recommendation on a motion seeking injunctive relief, 28 U.S.C. § 636(b)(1) requires that the district judge conduct a *de novo* review of any part of the Recommendation to which a proper objection has been made. An

[1] The Court notes that the Recommendation focuses primarily on why Plaintiff is unlikely to prevail on the merits of her claims. However, because the Court agrees with Magistrate Judge Crews' conclusion that Plaintiff has failed to show irreparable harm, the Court need not reach the issue of whether Plaintiff is likely to prevail on the merits of her claims. *N.M. Dep't of Game and Fish v. U.S. Dep't of the Interior*, 854 F.3d 1236, 1249 (10th Cir. 2017) (noting that if a movant fails to "meet its burden of showing a significant risk of irreparable injury, [courts] need not address the remaining preliminary injunction factors.").

objection is properly made if it is both timely and specific. *U.S. v. One Parcel of Real Property Known As 2121 East 30th Street*, 73 F.3d 1057, 1059 (10th Cir.1996). In conducting the review, a "district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions." Fed. R. Civ. P. 72(b)(3). Any arguments raised for the first time in objections are deemed waived and need not be considered by the district court. *Marshall v. Chater*, 75 F.3d 1421, 1426 (10th Cir. 1996).

When a party proceeds *pro se*, as Plaintiff does here, the Court "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). However, it is not "the proper function of the district court to assume the role of advocate for the *pro se* litigant." *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). Additionally, a *pro se* litigant is still bound by the rules of federal and appellate procedure. *Abdelsamed v. United States*, 13 F. App' x. 883, 884 (10th Cir. 2001).

III. ANALYSIS

Injunctive relief is an extraordinary remedy that should be granted only when the moving party clearly and unequivocally demonstrates its necessity. *See Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1258 (10th Cir. 2005). A party seeking a preliminary injunction or temporary restraining order must show (1) the movant is substantially likely to succeed on the merits; (2) the movant will suffer irreparable injury if the injunction is denied; (3) the movant's threatened injury outweighs the injury the opposing party will

suffer under the injunction; and (4) the injunction would not be adverse to the public interest. *Fish v. Kobach*, 840 F.3d 710, 723 (10th Cir. 2016); *Kaplan v. Bank of N.Y. Mellon Trust Co.*, No. 10-cv-02802-PAB, 2010 WL 4775725, at *1 (D. Colo. 2010) (citing *Lundgrin v. Claytor*, 619 F.2d 61, 63 (10th Cir. 1980)) (noting that the four elements apply to both preliminary injunctions and temporary restraining orders and that "the same considerations apply" to both forms of injunctive relief).

It is well established that "a showing of probable irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction." *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1260 (10th Cir. 2004). Therefore, "the moving party must first demonstrate that such injury is likely before the other requirements for the issuance of an injunction will be considered" *Id.* (quoting *Reuters Ltd. v. United Press Int'l, Inc.*, 903 F.2d 904, 907 (2d Cir. 1990)). Accordingly, if the movant fails to meet its burden of establishing irreparable injury, courts "need not address the remaining preliminary injunction factors." *N.M. Dep't of Game and Fish v. U.S. Dep't of the Interior*, 854 F.3d 1236, 1249 (10th Cir. 2017) (citing *People for the Ethical Treatment of Prop. Owners v. U.S. Fish and Wildlife Serv.*, 852 F.3d 990, 1008 (10th Cir. 2017) ("If it is not necessary to decide more, it is necessary not to decide more.")); *see also Conry v. Estate of Barker*, No. 14-cv-02672-CMA-KLM, 2017 WL 5952709, at *1 (D. Colo. 2017) (same).

In the instant case, Plaintiff has failed to establish a likelihood of irreparable harm, i.e., a significant risk that she will experience harm that cannot be compensated after the fact by money damages. *N.M. Dep't of Game and Fish*, 854 F.3d at 1250

(quoting *Fish*, 840 F.3d at 751–52). Purely economic loss "is usually insufficient to constitute irreparable harm" because economic losses can readily be compensated with monetary damages. *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1158 (10th Cir. 2011). Additionally, the party seeking injunctive relief must show that the harm is certain as opposed to theoretical, great, and "of such *imminence* that there is clear and present need for equitable relief." *Schrier v. Univ. of Colo.*, 427 F.3d at 1267 (emphasis added); *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1190 (10th Cir. 2003).

Plaintiff's alleged harm is compensable by money damages. Courts have held that the "foreclosure of a property translates to economic loss. . . ." *Tatten v. City and Cty. of Denver*, No. 16-cv-01603-GPG, 2016 WL 10518586, at *2 (D. Colo. 2016); *see, e.g.*, *May v. U.S. Bank, N.A.*, No. 13-cv-01621-PAB-MJW, 2013 WL 4462033, at *9 (D. Colo. 2013) (noting that any claimed injury due to foreclosure sale "is not irreparable and may be compensated in money damages, even after a foreclosure sale"); *Moore v. One W./Indy Mac Bank*, No. 10-cv-01455-REB-CBS, 2010 WL 3398855, at *7 (D. Colo. 2010) (noting plaintiff did not demonstrate irreparable injury because plaintiff "retains a right to redeem following a foreclosure sale and any subsequent harm in losing her property may be compensated by money damages"). Additionally, emotional damages related to the foreclosure of a home are also compensable with monetary damages. *See Strand v. Am.'s Servicing Co.*, No. 2:11-cv-2 TS, 2011 WL 108902, at *1 (D. Utah 2011).

The harm Plaintiff alleges she will face absent injunctive relief is as follows: "irreparable harm, substantial further emotional injury, embarrassment, inconvenience,

and unjustly displaced [sic], lose remaining home equity, further financial hardship, and cause an unjust enrichment." (Doc. # 6 at 4; Doc. # 35 at 35–36.) Such injuries are readily compensable with monetary damages. *See Tatten*, 2016 WL 10518586, at *2; *Strand*, 2011 WL 108902, at *1. In fact, Plaintiff's Amended Complaint explicitly seeks compensatory damages for "future pecuniary and non-pecuniary losses, stress, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, financial hardship, and other nonpecuniary losses." (Doc. # 36 at 68.) Notably, the injuries which Plaintiff argues are irreparable are effectively the same injuries for which Plaintiff is seeking compensatory damages. As the Supreme Court has recognized, "the possibility that adequate compensatory or other corrective relief will be available at a later date . . . weighs heavily against a claim of irreparable harm." *Sampson v. Murray*, 415 U.S. 61, 90 (1970).

Moreover, Plaintiff's alleged harm is not imminent. The "purpose of a preliminary injunction is not to remedy past harm but to protect plaintiffs from irreparable injury that will surely result without their issuance." *Schrier*, 427 F.3d at 1267 (citing *Heideman*, 348 F.3d at 1189 (noting that a preliminary injunction will not issue without a showing of "a clear and present need for equitable relief to *prevent* irreparable harm") (emphasis added)). In the instant case, the foreclosure sale took place on November 29, 2018. (Doc. # 70 at 2.) The sale was subsequently approved by a Colorado state court on December 21, 2018. (Doc. # 70-1 at 1–2.) Therefore, because the sale has already taken place, Plaintiff's alleged harm is not imminent.

Alternatively, Plaintiff appears to argue that she will suffer irreparable harm if Defendants are not compelled to comply with the Federal Rules of Civil Procedure by preserving relevant evidence. Specifically, Plaintiff asserts that if "material evidence to this litigation is removed, destroyed, altered would [sic] prejudice [her] case and cause immediate and irreparable injury." (Doc. # 25 at 19.) However, there is no evidence that immediate judicial action is necessary to prevent Defendants from losing or destroying evidence. At present, it is sufficient to note that the parties are under an ongoing obligation to preserve documents that may be relevant to the instant case and that the Court has "inherent power to impose sanctions for the destruction or loss of evidence." *Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.*, 244 F.R.D. 614, 620 (D. Colo. 2007). The abstract risk that a litigant might fail to comply with the Federal Rules of Civil Procedure, without more, is insufficient to justify judicial action.

In sum, Plaintiff has not demonstrated that she will suffer irreparable harm absent injunctive relief. The alleged injuries Plaintiff cites are compensable with monetary damages. Moreover, Plaintiff's alleged injuries are not imminent because the foreclosure sale of her home has already taken place. Accordingly, because Plaintiff failed to meet her burden of establishing irreparable injury, injunctive relief is not warranted and the Court "need not address the remaining preliminary injunction factors." *N.M. Dep't of Game and Fish*, 854 F.3d at 1249.

IV. CONCLUSION

For the reasons set forth above, Plaintiff's Objection (Doc. # 46) is OVERRULED and Magistrate Judge Crews' Recommendation (Doc. # 42) is AFFIRMED and ADOPTED.

Accordingly, it is ORDERED that Plaintiff Elet Valentine's Motion for an *Ex Parte* Temporary Restraining Order and Preliminary Injunction (Doc. # 6) is DENIED.

DATED: January 7, 2019

BY THE COURT:

Christine M. Arguello

CHRISTINE M. ARGUELLO
United States District Judge

APPENDIX K

CASE NO.: 19-1466

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ELET VALENTINE
Plaintiff-Appellant

v.

PNC FINANCIAL SERVICES GROUP, INC.; PNC BANK, NATIONAL ASSOCIATION (AKA PNC BANK, N.A.); AND PNC MORTGAGE
Defendants-Appellees

SEPTEBMER 28, 2019

RECOMMENDATION OF THE UNITED STATES JUDGE RE: ECF #6

BEFORE: MAGISTRATE KATO S. CREW

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Magistrate Judge S. Kato Crews

Civil Action No. 1:18-cv-01934-CMA-SKC

ELET VALENTINE

Plaintiff,

v.

PNC FINANCIAL SERVICES GROUP, INC.;
PNC BANK, NATIONAL ASSOCIATION;
PNC MORTGAGE,

Defendants.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE RE: ECF #6

United States Magistrate Judge S. Kato Crews

This matter is before the Court on Plaintiff's Motion for an *Ex Parte* Temporary Restraining Order and Preliminary Injunction ("Motion"), filed August 2, 2018. [ECF #6.] District Court Judge Arguello referred the Motion to this Court on August 3, 2018. [ECF #10.] This Court has carefully considered the Motion and related briefing,[1] the entire case file and applicable case law, and has determined that a hearing would not materially assist

[1] The related briefing includes Defendants' Opposition to Motion for *Ex Parte* Temporary Restraining Order or Preliminary Injunction [ECF #26]; Plaintiff's Brief in Support of a Motion for *Ex Parte* Temporary Restraining Order or Preliminary Injunction [ECF #25]; Plaintiff's Amended Brief in Support of a Motion for *Ex Parte* Temporary Restraining Order or Preliminary Injunction [ECF #35]; and the exhibits attached to these filings. The Court also considered the Motion in the context of Plaintiff's Amended Verified Complaint for Damages and Jury Demand ("Amended Complaint") [ECF #36], filed after the Motion. Defendant did not oppose the filing of the Amended Complaint. [ECF #34.]

to resolve the Motion. For the following reasons, the Court RECOMMENDS the Motion be DENIED.

A. BACKGROUND

Plaintiff proceeds *pro se* in this matter. She commenced this action alleging 11 claims for relief against the lender-Defendants related to their handling of her residential mortgage loan, which resulted in Colo. R. Civ. P. 120 proceedings in state court (the "Rule 120 Proceeding"). On August 1, 2018, the state court issued an order authorizing the foreclosure sale of Plaintiff's home pursuant to C.R.S. § 38-38-101 *et seq.* Defendants have yet to proceed with a foreclosure sale of the property. They have instead voluntarily agreed to forego the sale at least until a ruling on the Motion. Thus, the Rule 120 Proceeding remains pending because the entire process provided by C.R.S. § 38-38-101 *et seq.* has yet to fully conclude.

Plaintiff's claims for relief include: (1) equitable tolling; (2) breach of promissory note; (3) breach of deed of trust; (4) unjust enrichment; (5) fraud in the inducement; (6) fraudulent concealment; (7) fraudulent misrepresentation; (8) vicarious liability; (9) abuse of process; (10) unfair and deceptive acts or practices under the Colorado Consumer Protection Act; and (11) extreme and outrageous conduct. [ECF #36.] Generally, Plaintiff's claims arise out of allegations that, for at least a ten-year period, Defendants failed to properly apply, or otherwise account for, her monthly mortgage payments; inflated her account with improper and unexplained additional fees and charges; improperly instigated state court foreclosure proceedings; and, by their handling of her account, violated certain federal and state laws and breached provisions of the promissory note and deed of trust. [*See generally* ECF #36.] Plaintiff argues that her

claims predate the underlying Rule 120 Proceeding and that none of their elements "complain about injury as a result of the Rule 120 Hearing." [ECF #25 p.11; ECF #35 p.41.]

In the Motion, Plaintiff seeks injunctive relief for the following reasons:

> ...*to prevent* PNC, PNC's Officers, agent(s), servants, employees, assigns, constable, sheriffs, Justices of the Peace, attorneys and/or others unnamed from directly or indirectly *executing or conducting the Trustee Sale scheduled for August 2, 2018, while property (sic) is subject to ongoing litigation*[,]
>
> ...from *otherwise subjecting the property to a potentially* (sic) *transfer of possession, altering of title, other documents, selling to third parties, taking possession of the property, or any other alteration from its original and current state while the property is the subject to ongoing litigation*, [and,]
>
> ...*to preserve the primary evidence in its original form* in this case, the integrity of the judicial process, and the status quo, pending the determination of the merits for litigation.

[ECF #6 p.3.] [Emphasis added.]

In her two related briefs [ECF #25 and #35] (the "Briefs"), however, Plaintiff describes the injunctive relief she seeks quite differently from what she articulates in the Motion. In her Briefs, Plaintiff argues for injunctive relief to prevent Defendants from destroying documents relevant to their handling of all aspects of her mortgage loan. [*See generally* ECF #25 and #35.] In other words, while Plaintiff's Motion seeks injunctive relief to prevent the pending foreclosure sale, her subsequent Briefs seek injunctive relief to require Defendants to preserve documents relevant to the claims and defenses in this action. As a result, the Court construes Plaintiff's Briefs as a separate request or motion to preserve evidence.

B. LEGAL STANDARDS

1. Review of a *Pro Se* Party's Filings

A federal court must construe a *pro se* plaintiff's pleadings "liberally" and hold the pleadings "to a less stringent standard than formal pleadings filed by lawyers." *Smith v. United States*, 561 F.3d 1090, 1096 (10th Cir. 2009). "[The] court, however, will not supply additional factual allegations to round out a plaintiff's complaint or construct a legal theory on plaintiff's behalf." *Id.* (citing *Whitney v. New Mexico*, 113 F.3d 1170, 1173–74 (10th Cir. 1997)). The Tenth Circuit has interpreted this rule to mean:

> [I]f the court can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, it should do so despite the plaintiff's failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements.

Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991). This interpretation is qualified in that it is not "the proper function of the district court to assume the role of advocate for the *pro se* litigant." *Id.*; *see also Dunn v. White*, 880 F.2d 1188, 1197 (10th Cir. 1989) ("[W]e will not supply additional facts, nor will we construct a legal theory for plaintiff that assumes facts that have not been pleaded.").

2. Preliminary Injunction

Federal Rule of Civil Procedure 65(a) and (b) govern preliminary injunctions and temporary restraining orders. Where, as here, "the opposing party has notice, the procedure and standards for issuance of a temporary restraining order mirror those for a preliminary injunction." *Emmis Commc'ns Corp. v. Media Strategies, Inc.*, No. 00-WY-

2507CB, 2001 WL 111229, at *2 (D. Colo. Jan. 23, 2001) (citing 11A Charles Alan Wright, et al., *Federal Practice and Procedure* § 2951 (2d ed.1995)).

Injunctive relief is an extraordinary remedy which should only be granted when the moving party clearly and unequivocally demonstrates its necessity. *See Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1258 (10th Cir. 2005). Granting such "drastic relief" is the exception rather than the rule. *United States ex rel. Citizen Band Potawatomi Indian Tribe of Okla. v. Enter. Mgmt. Consultants, Inc.*, 883 F.2d 886, 888-89 (10th Cir.1989); *GTE Corp. v. Williams*, 731 F.2d 676, 678 (10th Cir. 1984). In the Tenth Circuit, a party requesting injunctive relief must clearly establish the following: (1) the party will suffer irreparable injury unless the injunction issues; (2) the threatened injury outweighs whatever damage the proposed injunction may cause the opposing party; (3) the injunction, if issued, would not be adverse to the public interest; and, (4) there is a substantial likelihood of success on the merits. *Id.* "The purpose of a preliminary injunction is not to remedy past harm but to protect plaintiffs from irreparable injury that will surely result without their issuance." *Schrier*, 427 F.3d at 1267. Moreover,

> [b]ecause the limited purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held, we have identified the following three types of specifically disfavored preliminary injunctions... (1) preliminary injunctions that alter the status quo; (2) mandatory preliminary injunctions; and (3) preliminary injunctions that afford the movant all the relief that [she] could recover at the conclusion of a full trial on the merits.

Id. at 1258-59 (citations omitted). These disfavored injunctions are "more closely scrutinized to assure that the exigencies of the case support the granting of a remedy that is extraordinary even in the normal course." *Id.* at 1259.

3. Preservation of Evidence

The Federal Rules of Civil Procedure require parties to take steps to preserve relevant evidence, including electronic and physical evidence. Thus, a specific order from the court directing one or both parties to preserve evidence is not ordinarily required. The courts have inherent power, however, to make such an order when necessary. *See United States ex rel. Smith v. The Boeing Co.*, 05–1073–WEB, 2005 WL 2105972, *2 (D. Kan. Aug. 31, 2005) (citing *Pueblo of Laguna v. United States*, 60 Fed. Cl. 133, 135 (Fed. Cl. 2004)). In such cases, the courts are guided by principles of equity, including consideration of the following factors: (1) how much of a concern there is for the maintenance and integrity of the evidence in the absence of an order; (2) any irreparable harm likely to result absent a specific order directing preservation; and, (3) the capability of the party to maintain the evidence sought to be preserved. *Id.* (citing *Capricorn Power Co. v. Siemens Westinghouse Power Co.*, 220 F.R.D. 429, 433 (W.D. Pa. 2004)).

Federal courts are not equipped to micro-manage litigants' discovery-conduct. Therefore, parties are under the ongoing obligation to "preserve documents that may be relevant to pending or imminent litigation." *Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.,* 244 F.R.D. 614, 620 (D. Colo. 2007) (citation omitted). If a party violates this duty, "[t]he court has inherent power to impose sanctions for the destruction or loss of evidence." *Id.* (citation omitted).

C. ANALYSIS

The Court recommends denying the Motion because it seeks an injunction to prohibit the underlying and pending foreclosure sale from going forward. As a result, the relief Plaintiff seeks would alter the status quo because it would require the Court to

intervene in pending state court proceedings. For this reason, the injunctive relief sought by Plaintiff "constitutes a specifically disfavored injunction" that "must be more closely scrutinized." *See Schrier*, 427 F.3d at 1261. Accordingly, the Motion must be denied unless Plaintiff's "right to relief [is] clear and unequivocal." *Id.* at 1258.

Here, Plaintiff has failed to demonstrate that she is substantially likely to succeed on the merits of any of her 11 claims in a manner to achieve this Court's intervention in the pending Rule 120 Proceeding. *See Schrier*, 427 F.3d at 1258. As already mentioned, Plaintiff seeks injunctive relief: "to prevent [Defendants] from directly or indirectly executing or conducting the Trustee Sale;" to prevent Defendants "from otherwise subjecting the property to a potentially (sic) transfer of possession, altering of title, ...selling to third parties, taking possession of the property, or any other alteration from its original and current state;" and, "to preserve the primary evidence [presumably the home] in its original form in this case..." [ECF #6 p.3.] For the reasons discussed below, the Court recommends holding that there is little or no likelihood of success on the merits of any of Plaintiff's claims pursuant to which she seeks injunctive relief because the injunction she seeks is barred under the *Younger* abstention doctrine.

Because the underlying foreclosure sale is pending, the Court concludes the *Younger* abstention doctrine applies. "*Younger* abstention dictates that federal courts not interfere with state court proceedings by granting equitable relief—such as injunctions of important state proceedings or declaratory judgments regarding constitutional issues in those proceedings—when such relief could adequately be sought before the state court." *Rienhardt v. Kelly*, 164 F.3d 1296, 1302 (10th Cir. 1999). *Younger* abstention applies 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 v. Oklahoma, 472 F.3d 747, 749 (10th Cir. 2006) (quoting *Crown Point I, LLC v. Intermountain Rural Elec. Ass'n*, 319 F.3d 1211, 1215 (10th Cir. 2003)). If those three conditions exist, "*Younger* abstention is non-discretionary and, absent extraordinary circumstances, a district court is required to abstain." *Id.* (quoting *Crown Point I, LLC*, 319 F.3d at 1215).

The Court concludes that all three *Younger* conditions exist regarding the injunction Plaintiff seeks. First, the Rule 120 Proceeding is ongoing. All that has so far occurred in the Rule 120 Proceeding is issuance of the order authorizing sale. Once a state court authorizes a sale, the public trustee advertises and conducts the sale and the property is then sold to the highest bidder who then receives a certificate of purchase. C.R.S. §§ 38-38-102, -103, -106; *see also Beeler Props., LLC v. Lowe Enter. Residential Inv'rs, LLC*, No. 07-cv-00149-MSK-MJW, 2007 WL 1346591, at *2 (D. Colo. May 7, 2007) (discussing the foreclosure process prior to the amendments to C.R.S. § 38-38-101 *et seq.* that were effective January 1, 2008). The borrower may cure the default prior to the sale date; the sale typically occurs 110 to 125 days after the public trustee records the Notice of Election and Demand. C.R.S. §§ 38-38-104 (re: cure), -108 (re: sale date). Cure thus annuls the sale. C.R.S. § 38-38-104(d)(I). If the owner fails to cure, and upon expiration of the redemption period (reserved for junior lienors only), then title to the property vests in the holder of the certificate of purchase eight days after the sale, and a confirmation deed issues. C.R.S. § 38-38-501. As a result, there are several remaining

steps to occur in the pending Rule 120 Proceeding. Plaintiff's rights in the property are not ultimately extinguished until *after* the cure period or title to the property vests in the holder of the certificate of purchase.[2] *See* C.R.S. § 38-38-501; *see also Haney v. Fed. Nat'l Mortg. Ass'n*, No. 16-cv-01296-PAB-STV, 2017 WL 1404103, at *4 (D. Colo. Mar. 9, 2017) (homeowner's rights in the property were not extinguished until after title vested in the holder of the certificate of purchase); *Commonwealth Prop. Advocates, LLC v. U.S. Bank Nat. Ass'n*, No. 10-cv-00657-WYD-KMT, 2011 WL 386783, at *2 (D. Colo. Feb. 2, 2011) ("Given the nature of the Colorado foreclosure process...I find that final adjudication has not yet occurred, and I must abstain from reaching Plaintiff's request for declaratory relief under the rule of *Younger*...").

Second, due to the nature of the injunctive relief Plaintiff seeks—i.e., stopping the foreclosure sale—the Court concludes that state court provides an adequate forum for any claims Plaintiff has which may allow for such relief. The Court notes that this particular *Younger* factor is a difficult call when considering the complex and numerous issues raised by Plaintiff in her Amended Complaint [ECF #36], and when considering the limited scope of proceedings under Colo. R. Civ. P. 120(d). But the specific injunction Plaintiff

[2] The Court is mindful that whether a Rule 120 proceeding remains "pending" after the mere issuance of an order authorizing sale appears an amorphous issue when reviewing decisions from this District. *Compare Kramer v. Vigil*, No. 13-cv-00142-PAB-KLM, 2013 WL 2285076, at *3 (D. Colo. May 22, 2013) (federal suit challenging Rule 120 determinations by state court not subject to *Younger* abstention because order authorizing sale issued) *with Beeler Props., LLC*, 2007 WL 1346591, at *3 (federal suit challenging Rule 120 determinations by state court subject to *Younger* abstention depending on the stage in the foreclosure process.). However, due to the statutory steps that have yet to occur in this case, as described above, this Court concludes that Plaintiff's Rule 120 Proceeding is still pending, particularly considering Defendants' current voluntary stay of the foreclosure sale and Plaintiff's pending opportunity to cure the default.

seeks is one to prevent the foreclosure sale from going forward. [ECF #6 p.3.] Colorado Rule of Civil Procedure 120 provides the specific state-court avenue for obtaining court orders authorizing a foreclosure sale. It further provides a mechanism for interested parties, like Plaintiff, to oppose an order authorizing sale by filing a response with the state court describing "the facts the respondent relies on in objecting to the issuance of an order authorizing sale, and may include copies of documents which support the respondent's position," and by presenting evidence at a hearing. Colo. R. Civ. P. 120(c) and (d). A homeowner who unsuccessfully opposes an order authorizing sale has an opportunity to cure default and retain ownership of the property prior to a sale. C.R.S. § 38-38-104. Thus, state court appears an adequate forum for Plaintiff's claims seeking relief related to the pending foreclosure sale. *See Gordon v. Wells Fargo Bank, N.A.*, No. 11-cv-00123-BNB, 2011 WL 1557866, at *3 (D. Colo. April 25, 2011); *Dean v. JP Morgan Chase Bank Nat. Ass'n*, No. 10-cv-00539-PAB-MJW, 2011 WL 782727, at *2 (D. Colo. Feb. 28, 2011); *Edward v. Dubrish*, No. 07-cv-02116-REB-KMT, 2009 WL 1683989, at *11 (D. Colo. June 15, 2009).

Third, actions "that challenge the Rule 120 order and process are proceedings involving important state interests concerning title to real property located and determined by operation of state law." *Beeler Props., LLC*, 2007 WL 1346591, at *3. Further, matters concerning foreclosures have traditionally been resolved in the state courts. *Gordon*, 2011 WL 1557866, at *3 (citing C.R.C.P. 120(f)). For these reasons, the third Younger factor is also satisfied.

To be sure, the Court further concludes that Plaintiff has not shown she will suffer irreparable harm without an injunction to prevent the foreclosure sale. *Weitzel v. Div. of*

Occupational & Prof'l Licensing, 240 F.3d 871, 876 (10th Cir. 2001) (the *Younger* abstention doctrine is inapplicable in extraordinary circumstances where irreparable injury can be shown). The foreclosure of property translates to economic loss which usually does not, in and of itself, constitute irreparable harm; such losses are compensable by monetary damages. *Tatten v. City & Cty. of Denver*, No. 16-cv-01603-GPG, 2016 WL 10518586, at *2 (D. Colo. July 19, 2016) (internal quotations and citation omitted). And, Colorado law provides Plaintiff an opportunity to cure the default prior to the foreclosure sale. C.R.S. § 38-38-104.

For these reasons, the Court recommends finding that the *Younger* abstention doctrine precludes this Court from issuing the injunction Plaintiff seeks to halt the underlying foreclosure sale, and therefore, Plaintiff has not shown a probability of success on the merits of any of her claims which may be relevant to the injunctive relief she seeks; nor has she shown irreparable harm.[3] Thus, the Court recommends denial of the Motion [ECF #6] based on *Younger* abstention. *See Beeler Props., LLC*, 2007 WL 1346591, at *3 ("[I]f there has been no final determination of the rights of the parties because the foreclosure process was not concluded, then the Court should abstain under the *Younger* doctrine.")

[3] Defendants argue application of the *Rooker-Feldman* doctrine to deny the Motion. That doctrine bars federal district courts from conducting appellate-type review of state court judgments, including judgments authorizing the sale of property. *See Campbell v. City of Spencer*, 682 F.3d 1278, 1279-80 (10th Cir. 2012) (citing *Rooker v. Fid. Trust Co.*, 263 U.S. 413 (1923) and *D.C. Ct. App. v. Feldman*, 460 U.S. 462 (1983)); *Fick v. US Bank Nat'l Ass'n*, No. 11-cv-03184-WYD-KLM, 2011 WL 6941751, at *3 (D. Colo. Dec. 15, 2011). The Court finds, however, that this doctrine does not apply here due to the absence of a state court judgment in the Rule 120 Proceeding. *See Dillard v. Bank of New York,* 476 F. App'x 690, 692 n.3 (10th Cir. 2012); *Silva v. US Bank Nat'l Assoc.*, 294 F. Supp.3d 1117, 1128-29 (D. Colo. 2018).

Insofar as the Motion (by way of Plaintiff's Briefs) seeks an order to require Defendants to preserve evidence, the Court recommends denying the Motion as premature. This case remains at its early stages, including Plaintiff's filing of her Amended Complaint on September 17, 2018. [ECF #36.] Discovery has yet to commence.

No showing has been made of a significant threat that documents will be lost or destroyed absent an immediate order. For example, the Court understands Plaintiff to allege that the 2010 and 2013 loan modification documents have never been recorded or produced, and that these documents "will become destroyed or altered" without an emergency order from the Court. [ECF #25 pp.12, 17; ECF #35 pp.28; 34.] Defendants, however, attached the 2010 loan modification as Exhibit G to their Response, and the 2013 loan modification as Exhibit I to their Response. [ECF #26-7 and #26-9.] Defendants' Response attaches 12 exhibits consisting of the 2003 Note; 2003 Note Allonge; 2003 Deed of Trust; affidavits of merger; loan modifications; 2017 payment history; correspondence between the parties; and other documents relevant to the parties' claims and defenses. [*See generally* the exhibits to ECF #26.] Also, the transcript of the Rule 120 Proceeding (attached as Exhibit 6 to the Motion) shows that the state court reviewed "yearly ledgers" produced by Defendants "that reflect all of the activity on [Plaintiff's] account...for each year and I believe they start with 2003 and go through ...there's one for 2017, maybe even 2018." [ECF #6 p.19.]

For these reasons, it appears Defendants have in fact preserved documents relevant to the claims and defenses in this case consistent with their obligations under the Federal Rules of Civil Procedure. The Court is not persuaded that a Preservation Order is appropriate now or that it would serve any useful purpose considering the lack

of any showing that Defendants will lose or destroy evidence absent an immediate order. Accordingly, the Court finds that the Plaintiff has failed to show any irreparable harm likely to result in the absence of a preservation order.

D. RECOMMENDATION

For the above-reasons, the Court RECOMMENDS the Motion be DENIED. Further, to the extent Plaintiff's Briefs are read together with the Motion as seeking a preservation order, the Court RECOMMNEDS that this relief also be DENIED.[4]

NOTICE: Pursuant to 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b)(2), the parties have fourteen (14) days after service of this recommendation to serve and file specific written objections to the above recommendation with the District Judge assigned to the case. A party may respond to another party's objections within fourteen (14) days after being served with a copy. The District Judge need not consider frivolous, conclusive, or general objections. A party's failure to file and serve such written, specific objections waives *de novo* review of the recommendation by the District Judge, and waives appellate review of both factual and legal questions. *Thomas v. Arn*, 474 U.S. 140, 148–53 (1985); *Makin v. Colorado Dep't of Corrs.*, 183 F.3d 1205, 1210 (10th Cir. 1999); *Talley v. Hesse*, 91 F.3d 1411, 1412–13 (10th Cir. 1996).

[4] In making this recommendation, the court is not making any findings or conclusions regarding the pending motion to dismiss [ECF. #40] or any arguments made therein.

DATED: September 28, 2018

BY THE COURT:

S. Kato Crews
United States Magistrate Judge
District of Colorado