FILED
United States Court of Appeals
Tenth Circuit

January 20, 2022

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

THOMAS JAMES DORN,

Plaintiff - Appellant,

v.

VERNA CARPENTER, Judge; JEFFERSON COUNTY COURT; CITY AND COUNTY OF DENVER,

Defendants - Appellees.

No. 21-1298
(D.C. No. 1:20-CV-02103-RM-KLM)
(D. Colo.)

ORDER AND JUDGMENT*

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

Proceeding pro se, Appellant Thomas Dorn filed a series of suits against the City and County of Denver, Jefferson County Court, and Jefferson County District Court Judge Verna Carpenter.[1] The suits were consolidated in the District of Colorado before a magistrate judge. The magistrate judge issued a report and

---

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

[1] As a pro se litigant, we liberally construe Dorn's filings, Erickson v. Pardus, 551 U.S. 89, 94 (2007), without acting as his advocate, Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991).

recommendation ("Recommendation") finding that Dorn's consolidated suit failed for a variety of reasons, with two threshold reasons being the Colorado Governmental Immunity Act ("CGIA") and Eleventh Amendment immunity.

Specifically, the Recommendation found that the suit against all defendants failed under the CGIA because the CGIA bars "all claims for injury which lie in tort or could lie in tort[.]" See Colo. Rev. Stat. § 24-10-106(1). Dorn sought to recover for such injuries. The Recommendation also found that the claims against Jefferson County Court and Judge Carpenter failed under the Eleventh Amendment because the Amendment precludes federal jurisdiction over state officials acting in their official capacities. See, e.g., Bishop v. John Doe 1, 902 F.2d 809, 810 (10th Cir. 1990) ("The eleventh amendment generally bars lawsuits in federal court seeking damages against states as well as against state agencies, departments, and employees acting in their official capacity.").

The Recommendation was thorough, and the district judge adopted it in full despite Dorn's objections. Dorn's brief identifies no legal errors in the decision below and we see none either. Therefore, reviewing his arguments de novo and

exercising jurisdiction under 28 U.S.C. § 1291, we affirm the judgment.[2]

Entered for the Court

Gregory A. Phillips
Circuit Judge

[2] Dorn sent the court an untitled document on January 12, 2022 that we have construed as a reply brief. But the deadline to file a reply was December 13, 2021, so we decline to consider it.

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257
(303) 844-3157
Clerk@ca10.uscourts.gov

Christopher M. Wolpert
Clerk of Court

Jane K. Castro
Chief Deputy Clerk

January 20, 2022

Thomas James Dorn
21 Pine Street
Natrona Heights, PA 15065

RE: 21-1298, Dorn v. Carpenter, et al
Dist/Ag docket: 1:20-CV-02103-RM-KLM, 1:20-CV-02501-RM-KLM

Dear Appellant:

Enclosed is a copy of the order and judgment issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of Court

cc: Geoffrey Klingsporn
Andrew David Ringel

CMW/lg

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Raymond P. Moore

Civil Action No. 20-cv-02103-RM-KLM
(Consolidated with Civil Action No. 20-cv-02501-RM-KLM)

THOMAS JAMES DORN,

Plaintiff,

v.

VERNA CARPENTER, Judge,
JEFFERSON COUNTY COURT, and
CITY AND COUNTY OF DENVER,

Defendants.

ORDER

This matter is before the Court on the Recommendation of United States Magistrate Judge (the "Recommendation") (ECF No. 47) on the following three Motions to Dismiss: (1) Motion to Dismiss from Defendants Judge Verna Carpenter ("Judge Carpenter") and Jefferson County Court ("JeffCo") (the "Carpenter/JeffCo Motion") (ECF No. 19); (2) Motion to Dismiss Complaint from Defendant Jefferson County Court (the "JeffCo Motion") (ECF No. 29); and (3) City and County of Denver's Renewed Motion to Dismiss (the "Denver Motion") (ECF No. 30). The Magistrate Judge recommends granting all of the Motions to Dismiss and terminating this case. Plaintiff has filed an objection (ECF No. 48), to which Judge Carpenter and JeffCo have filed a response. Plaintiff then filed an "Objection and Summary" (ECF No. 50), which the Court

construes as a reply.[1] The matter is fully briefed. After reviewing the record, and being otherwise fully advised, the Court finds and orders as follows.

I. LEGAL STANDARD

A. Magistrate Judge's Recommendation

Pursuant to Fed. R. Civ. P. 72(b)(3), this Court reviews de novo any part of the magistrate judge's recommendation that is properly objected to. An objection is proper only if it is sufficiently specific "to focus the district court's attention on the factual and legal issues that are truly in dispute." United States v. One Parcel of Real Prop., 73 F.3d 1057, 1060 (10th Cir. 1996). "In the absence of a timely objection, the district may review a magistrate's report under any standard it deems appropriate." Summers v. Utah, 927 F.2d 1165, 1167 (10th Cir. 1991). In addition, it is well established that "'[i]ssues raised for the first time in objections to the magistrate judge's recommendation are deemed waived.'" ClearOne Commc'ns, Inc. v. Biamp Sys., 653 F.3d 1163, 1185 (10th Cir. 2011) (quoting Marshall v. Chater, 75 F.3d 1421, 1426-27 (10th Cir. 1996)).

B. Motions to Dismiss

The Recommendation correctly set forth the standard of review for motions filed under Fed. R. Civ. P. 12(b)(1) and 12(b)(6) and the Court hereby incorporates by reference the standard set forth therein. (ECF No. 47, pp. 5-8.)

C. Pro Se Party

The Court construes Plaintiff's filings liberally because he proceeds pro se. See Erickson v. Pardus, 551 U.S. 89, 94 (2007) (per curiam). Nonetheless, the Court does not serve as

[1] Although Plaintiff did not seek leave to file a reply, the Court will consider it in this instance in order to have a complete record of Plaintiff's position.

Plaintiff's advocate, see Gallagher v. Shelton, 587 F.3d 1063, 1067 (10th Cir. 2009), and he is required to follow the same procedural rules as counseled parties. See Yang v. Archuleta, 525 F.3d 925, 927 n.1 (10th Cir. 2008) ("Pro se status 'does not excuse the obligation of any litigant to comply with the fundamental requirements of the Federal Rules of Civil and Appellate Procedure.'" (citation omitted)).

II. BACKGROUND

The Recommendation accurately summarized the background on which these consolidated actions are based. At bottom, these actions arise from Judge Carpenter's issuance of a civil protective order (restraining order) in favor of two individuals whom Plaintiff has sued in a third lawsuit pending before this Court. Plaintiff refers to these two individuals as the "girl" ("Meredith") and her daughter with whom Plaintiff allegedly resided at some point in time. Plaintiff complains of the issuance of this protective order and cobbles together various allegedly wrongful actions which may or may not loosely be related to or arise from this order. For example, Plaintiff contends that his employment and quite enjoyment were somehow interfered with by one or more of the Defendants.

The Magistrate Judge considered Plaintiff's allegations and arguments and recommended the following:

- That, based on Eleventh Amendment Immunity, Carpenter/JeffCo's and JeffCo's Motions to Dismiss be granted as to official capacity claims for monetary damages and injunctive relief and that these claims be dismissed without prejudice;

- That, based on absolute immunity, Carpenter/JeffCo's Motion to Dismiss be granted as to individual capacity claims against Judge Carpenter and that these claims be dismissed with prejudice;

- That, based on the Colorado Governmental Immunity Act, all Defendants' Motions to Dismiss be granted as to state law claims and that such claims be dismissed without prejudice; and

- That, pursuant to Fed. R. Civ. P. 12(b)(6), Denver's Motion to Dismiss be granted to the extent Plaintiff is attempting to assert any claims pursuant to 42 U.S.C. § 1983 and, because Plaintiff appears pro se, that these claims be dismissed without prejudice.

And, because no claims would remain if the Recommendation was accepted, the Magistrate Judge recommended the case be terminated. Plaintiff's objection followed.

III. DISCUSSION

Even liberally construed, Plaintiff fails to articulate any error or other basis as to why the Recommendation should be not be accepted.

Plaintiff states he objects and then proceeds to make a number of arguments, none of which addresses the Magistrate Judge's construction of his claims, analysis of the allegations under applicable law, or legal determinations which support the Recommendation. For example, Plaintiff contends he has evidence he wishes to present. But Plaintiff's contention fails to recognize the application of Rule 12 and how Plaintiff is required to show the Court has subject matter jurisdiction and that he plausibly alleged claims for relief. Similarly, Plaintiff asserts he needs an order from this Court to order "them" (presumably Judge Carpenter and others) to vacate the restraining order but fails to show how this supports any error in the Recommendation.[2] Likewise, Plaintiff asserts he wishes to add new claims for breach of contract but fails to show he should be allowed to do so much less that the addition of such conclusory claims would salvage any existing claim or these actions.

[2] Or that this Court has the power to do so.

Plaintiff's reply fares no better. He argues he is seeking damages relating to the restraining order and there is some "conspiracy." He concludes that his lawsuit is justified. The Court finds neither the allegations nor the applicable law supports this conclusion. As Judge Carpenter and JeffCo argue in their response to Plaintiff's objection, Plaintiff wholly fails to address the bases given in the Recommendation for granting their Motion to Dismiss. The same can be said as to the other Motions to Dismiss – Plaintiff fails to address the bases which support granting them as well.

IV. CONCLUSION

Based on the foregoing, it is **ORDERED**

(1) That Plaintiff's objection (ECF No. 48) is OVERRULED;

(2) That the Recommendation (ECF No. 47) is ACCEPTED and ADOPTED as an order of the Court;

(3) That the Motion to Dismiss from Defendants Judge Verna Carpenter and Jefferson County Court (ECF No. 19) is GRANTED and

  (a) That all official capacity claims for monetary damages and injunctive relief are dismissed without prejudice;

  (b) That all individual capacity claims against Judge Carpenter are dismissed with prejudice; and

  (c) That all state law claims are dismissed without prejudice;

(4) That the Motion to Dismiss Complaint from Defendant Jefferson County Court (ECF No. 29) is GRANTED and

(a) That all official capacity claims for monetary damages and injunctive relief are dismissed without prejudice; and

(b) That all state law claims are dismissed without prejudice;

(5) That the City and County of Denver's Renewed Motion to Dismiss (ECF No. 30) is GRANTED and

(a) That all state law claims are dismissed without prejudice; and

(b) That, to the extent Plaintiff is attempting to assert any claims pursuant to 42 U.S.C. § 1983, these claims are dismissed without prejudice;

(6) That the Clerk shall enter JUDGMENT in favor of Defendants and against Plaintiff as stated herein; and

(7) That the Clerk shall close this case and Civil Action No. 20-cv-02501-RM-KLM.

DATED this 5th day of August, 2021.

BY THE COURT:

RAYMOND P. MOORE
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 20-cv-02103-RM-KLM
(Consolidated with Civil Action No. 20-cv-02501-RM-KLM)

THOMAS JAMES DORN,

Plaintiff,

v.

VERNA CARPENTER, Judge,
JEFFERSON COUNTY COURT, and
CITY AND COUNTY OF DENVER,

Defendants.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

ENTERED BY MAGISTRATE JUDGE KRISTEN L. MIX

This matter is before the Court on three motions to dismiss: (1) the **Motion to Dismiss** from Defendants Judge Verna Carpenter ("Judge Carpenter") and Jefferson County Court ("JeffCo") [#19][1] ("Carpenter/JeffCo Motion"); (2) Defendant JeffCo's **Motion to Dismiss** [#29] ("JeffCo Motion"); and (3) Defendant City and County of Denver's ("Denver") **Renewed Motion to Dismiss** [#30] ("Denver Motion") (collectively "Motions to Dismiss"). Pursuant to 28 U.S.C § 636(b) and D.C.COLO.L.CivR 72.1(c), the

[1] "[#19]" is an example of the convention the Court uses to identify the docket number assigned to a specific paper by the Court's case management and electronic case filing system (CM/ECF). This convention is used throughout this Recommendation, and the page numbers cited are to CM/ECF.

Motions to Dismiss have been referred to the undersigned for a recommendation regarding disposition. [#34].

The Court has reviewed the Motions to Dismiss [#19, #29, #30], the Plaintiff's Responses [#31, #35, #42], the Replies [#32, #33], the case file, and the applicable law, and is sufficiently advised in the premises. For the reasons set forth below, the Court respectfully **recommends** that the Motions to Dismiss [#19, #29, #30] be **granted.**

I. Background[2]

Plaintiff, who is proceeding pro se,[3] commenced the earlier of the two consolidated cases by filing his Complaint [#1] against Defendants Judge Carpenter, JeffCo, and Denver in Case No. 20-cv-02103-RM-KLM ("20-cv-02103") on July 17, 2020. Plaintiff's second case, Case No. 20-cv-02501-RM-KLM ("20-cv-02501") was commenced against Defendants JeffCo and Denver in the United States District Court for the District of Delaware in August 2019. The second case was transferred to this Court on August 20, 2020 (*see* [#49]), and the two cases were consolidated on October 7, 2020. *See* Orders [#27] in 20-cv-02103, [#71] in 20-cv-02501.

---

[2] For the purposes of resolving the Motions to Dismiss [#19, #29, #30], the Court accepts as true all well-pled, as opposed to conclusory, allegations made in Plaintiff's Amended Complaint [#12]. *See Shero v. City of Grove, Okla.*, 510 F.3d 1196, 1200 (10th Cir. 2007) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

[3] The Court must construe liberally the filings of a pro se litigant. *See Haines v. Kerner*, 404 U.S. 519, 520-521 (1972). In doing so, the Court should not be the pro se litigant's advocate, nor should the Court "supply additional factual allegations to round out a plaintiff's complaint or construct a legal theory on a plaintiff's behalf." *Whitney v. New Mexico*, 113 F.3d 1170, 1175 (10th Cir. 1997) (citing *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991)). In addition, a pro se litigant must follow the same procedural rules that govern other litigants. *Nielsen v. Price*, 17 F.3d 1276, 1277 (10th Cir. 1994).

The operative Complaints in the two cases are difficult to decipher in regard to the claims that Plaintiff is asserting and the acts that he attributes to each Defendant. Thus, in 20-cv-02103, Plaintiff alleges in his Statement of Claim that Defendants:

> Interfere[ed] with my job and manipulat[ed] where I can live, leading me into trouble. Us[ed] people who work in the court system to create a false report and false restraining order. Sabotag[ed] my employment. State involvement in a civil restraining order, which created damages. Not understanding the law of quiet enjoyment, with[eld] my Identity[.] Create[ed] a slanderous report. [Wantonness.] [B]attery with a dangerous substance[.] Inside a bar they drug[ged] me and battered me outside creating hand damage[.] [D]id not investigate the crime [which is] discrimination.

Am. Compl. [#12] at 4. The relief Plaintiff seeks is an "injunction against the restraining order, full restoration of my rights, and money damages totaling $150,000,000." *Id.*

The Complaint [#2] in 20-cv-02501 alleges "constitutional violations, cruel and unusual punishment, [and] personal injury." *Id.* at 3. Plaintiff's described injuries are "job loss, personal injury to my hand, interven[ing] with my work, [and] harassment while working." *Id.* at 7. Plaintiff seeks $70 million for the injury[ies] to his hand and $10 million for the restraining order. *Id.*

Plaintiff's initial Opposition to Motion to Dismiss [#31] ("Response"), filed as to all three Motions to Dismiss [#19, #29, #30], asserts generally that Judge Carpenter "did not follow the state statute" by issuing a restraining order against him, although the statute Plaintiff is referring to is not identified. *Id.* at 3. Plaintiff asserts that JeffCo "is liable for the tortious acts [it] assist[ed] in, including the theft of a copy of the restraining order . . . and publishing false information in an attempt to support the issuing of the restraining order." *Id.*

Additionally, Plaintiff alleges that Judge Carpenter and JeffCo were in a conspiracy with Defendant Denver to "cover up [a] terrorist attack" against Plaintiff. *Response* [#31] at 2. More specifically, Plaintiff contends that on August 12, the exact year is not given, he was at a bar in Denver on Colfax Avenue where he was drugged and, upon exiting the bar, he was "battered in a hand to hand style (sic) combat move" that left damage to his hand. *Id.* at 4. Plaintiff asserts that "it was some agent or undercover officer associated with Denver who facilitated the attack, and therefor[e] the city allowed the attack to happen." *Id.* Plaintiff claims to have reported the attack to 911 the next day, and alleges "the police and city were negligent in investigating [the attack] and allowed it to happen." *Id.* Finally, Plaintiff contends that Denver, JeffCo, or the State of Colorado, who is not a party to this action, "either discriminated against my employment or did not protect it." *Id.* Plaintiff alleges one or all of them used "some type of foreign forces or some other form of espionage or sabotage" to have Plaintiff terminated from two separate jobs in Denver. *Id.* at 4-5.

Judge Carpenter and JeffCo contend that the Eleventh Amendment, the Colorado Governmental Immunity Act ("CGIA"), and absolute judicial immunity bar all of Plaintiff's claims against them, and that the claims should be dismissed pursuant to Rules 12(b)(1) and (6). *Carpenter/JeffCo Motion* [#19] at 1-6; *JeffCo Motion* [#29] at 1-5. Defendant Denver alleges that the CGIA bars Plaintiff's state law claims, and in the event Plaintiff has constitutional claims against Denver, argues that Plaintiff fails to state a claim for relief. *Denver Motion* [#30] at 1-5.

Plaintiff filed an initial Response [#31], as discussed previously, and then filed two additional Responses: (1) a Response to Order [#35], where Plaintiff reiterated his

allegations and request for injunctive relief regarding the restraining order; and (2) a Response to Defendants [sic] Response [#42]. The "Response to Order" [#35], which was construed as a motion, was denied by District Judge Raymond P. Moore by Order [#41] of May 17, 2021. The Response to Defendants' Response [#42] attempts to explain in more detail why Plaintiff contends his claims should not be dismissed. That response [#42] is construed as a surreply that Plaintiff did not seek leave to file, nor did he show show how the surreply was necessary, i.e., that Defendants relied on new material in their Replies [#32, #33]. *See Green v. New Mexico*, 420 F.2d 1189, 1196 (10th Cir. 2005). Nonetheless, in the interest of completeness and because Plaintiff is proceeding pro se, the Court will consider the surreply.

II. Standard of Review

The Motions to Dismiss [#19, #29, #30] are brought pursuant to Fed. R. Civ. P. 12(b)(1), (3), and (6). As the Court recommends dismissal under Rule 12(b)(1) and (6), the Court addresses the standard of review only under those provisions.[4]

A. Rule 12(b)(1)

The purpose of a motion to dismiss pursuant to Rule 12(b)(1) is to test whether the Court has jurisdiction to properly hear the case before it. Because "federal courts are courts of limited jurisdiction," the Court must have a statutory basis to exercise its jurisdiction. *Montoya v. Chao*, 296 F.3d 952, 955 (10th Cir. 2002); Fed. R. Civ.

---

[4] The introduction to Denver's Motion [#30] cited Rule 12(b)(3), but Denver made no arguments regarding improper venue. Thus, the Court has not considered Rule 12(b)(3) in this Recommendation.

P. 12(b)(1). Statutes conferring subject matter jurisdiction on federal courts are to be strictly construed. *F & S Const. Co. v. Jensen*, 337 F.2d 160, 161 (10th Cir. 1964). "The burden of establishing subject-matter jurisdiction is on the party asserting jurisdiction." *Id.* (citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)).

A motion to dismiss pursuant to Rule 12(b)(1) may take two forms: a facial attack or a factual attack. *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995). When reviewing a facial attack on a complaint, the Court accepts the allegations of the complaint as true. *Id.* By contrast, with a factual attack, the moving party challenges the facts upon which subject-matter jurisdiction depends. *Id.* at 1003. When reviewing a factual attack on a complaint, the Court "may not presume the truthfulness of the complaint's factual allegations." *Id.* The Court therefore must make its own findings of fact. *Id.* In order to make its findings regarding disputed jurisdictional facts, the Court "has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing." *Id.* (citing *Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990); *Wheeler v. Hurdman*, 825 F.2d 257, 259 n.5 (10th Cir. 1987)).

B. Rule 12(b)(6)

The purpose of a motion to dismiss pursuant to Rule 12(b)(6) is to test "the sufficiency of the allegations within the four corners of the complaint after taking those allegations as true." *Mobley v. McCormick*, 40 F.3d 337, 340 (10th Cir. 1994); Fed. R. Civ. P. 12(b)(6) (stating that a complaint may be dismissed for "failure to state a claim upon which relief can be granted"). "The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be

granted." *Sutton v. Utah State Sch. For the Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999) (citation omitted). To withstand a motion to dismiss pursuant to Rule 12(b)(6), "a complaint must contain enough allegations of fact to state a claim for relief that is plausible on its face." *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see also Shero v. City of Grove, Okla.*, 510 F.3d 1196, 1200 (10th Cir. 2007) ("The complaint must plead sufficient facts, taken as true, to provide 'plausible grounds' that discovery will reveal evidence to support the plaintiff's allegations" (quoting *Twombly*, 550 U.S. at 570)).

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertion[s] devoid of further factual enhancement." *Id.* (brackets in original; internal quotation marks omitted). That said, "[s]peculative facts are not necessary; the statement need only give the defendant fair notice of what the. . . claim is and the grounds upon which it rests[;]" the 12(b)(6) standard does not "require that the complaint include all facts necessary to carry the plaintiff's burden." *Khalik v. United Airlines*, 671 F.3d 1188, 1190 (10th Cir. 2012). To survive a motion to dismiss pursuant to Rule 12(b)(6), the factual allegations in the complaint "must be enough to raise a right to relief above the speculative level." *Christy Sports, LLC v. Deer Valley Resort Co.*, 555 F.3d 1188, 1191 (10th Cir. 2009). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct," a factual allegation has been stated, "but it has not show[n] [ ] that the pleader is entitled to

relief," as required by Fed. R. Civ. P. 8(a). *Iqbal*, 556 U.S. at 679 (second brackets added; citation and internal quotation marks omitted).

III. Analysis

A. Eleventh Amendment Immunity

Tenth Circuit jurisprudence recognizes that, as a preliminary matter, a federal court may not consider the merits of any case without first verifying the existence of subject matter jurisdiction. *Herrera v. Alliant Specialty Ins. Servs., Inc.*, No. 11-cv-00050-REB-CBS, 2012 WL 959405, at *3 (D. Colo. Mar. 21, 2012); *see also Kline v. Biles*, 861 F.3d 1177, 1180 (10th Cir. 2017) ("Federal courts are courts of limited jurisdiction. . . . They possess only that power authorized by Constitution and statute"). Absent subject matter jurisdiction, "the court must dismiss the action." Fed. R. Civ. P. 12(h)(3). The party asserting subject matter jurisdiction bears the burden of establishing its existence. *See Kokkonen*, 511 U.S. at 377.

Defendants JeffCo and Judge Carpenter first argue that the Eleventh Amendment of the United States Constitution bars claims against them for damages. *Carpenter/JeffCo Motion* [#19] at 2; *JeffCo Motion* [#29] at 2. Supreme Court precedent supports this argument, as the Court has repeatedly held that the Eleventh Amendment precludes federal jurisdiction over state officials acting in their official capacities as to retroactive monetary relief. *Pennhurst State School & Hosp. v Halderman*, 56 U.S. 89, 102-06 (1984). The Eleventh Amendment protections extend "to state agencies functioning as an arm of the state." *Id.* (citation omitted). Eleventh Amendment immunity, however, may be waived by an Act of Congress, or by a state, "through a clear expression of its intent to waive." *Id.* at 780-781.

JeffCo argues it is protected under the Eleventh Amendment as "an arm of the State of Colorado." *JeffCo Motion* [#29] at 3. Similarly, Defendant Judge Carpenter argues that the claims for damages against her as a state official are barred by the Eleventh Amendment. *Carpenter/JeffCo Motion* [#19]. The Court agrees. Article VI, section 1 of the Colorado Constitution vests "[t]he judicial power of the state in . . . county courts, and such other . . . judicial officers." CO Const. Art. 6, § 1. Further, Article VI, sections 16 and 17 establish the existence and jurisdiction of county courts and judges, thereby making them an extension of the state protected by the Eleventh Amendment. CO Const. Article VI, §§ 16 and 17; *see Hunt v. Colo. Dep't of Corr.*, 271 F. App'x 778, 780 (10th Cir. 2008). Plaintiff has not shown that there has been an express waiver of Eleventh Amendment immunity. Although the CGIA partially waives Eleventh Amendment immunity for some tort claims, it does not waive claims made under federal law. *See* Colo. Rev. Stat. § 24-10-106(1). Therefore, Plaintiff's claim of violations of his civil rights under federal law are barred by JeffCo's and Judge Carpenter's Eleventh Amendment immunity. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 66 (1989); *Patillo v. Larned State Hosp.*, No. 11-3184, 2012 WL 256023, at *2 (10th Cir. 2012).

In his Response [#31], however, Plaintiff argues that JeffCo is not protected by the Eleventh Amendment as "an arm of the state" because it was performing an autonomous function. *Id.* at 3. Although performing autonomously can lead to the conclusion that an entity is not "an arm of the state," there are other factors to consider. *See Sturdevant v. Paulsen*, 218 F.3d 1160. 1164 (10th Cir. 2000) (providing an overview to determine whether an entity is an arm of the state). Beyond looking at the degree of autonomy, the court also "examines the extent of financing the agency receives independent of the state

treasury and its ability to provide for its own financing. The governmental entity is immune from suit if the money judgment sought is to be satisfied out of the state treasury." *Id.* (quoting *Watson v. University of Utah Medical Center*, 75 F.3d 569, 574-75 (10th Cir. 1996) (internal quotations and citations omitted). As previously stated, "[t]he judicial power of the state" is vested in county courts and other judicial officers. CO Const. Art. 6, § 1. The Colorado Constitution does not confer county courts the ability to generate their own funding, therefore, it follows that a money judgment sought against a county court would be satisfied from the state treasury. JeffCo is therefore immune from Plaintiff's claims, even if it was performing an autonomous function. *See Sturdevant*, 218 F.3d at 1164 (quoting *Watson*, 75 F.3d at 574-75).

As to Judge Carpenter, Plaintiff alleges that she "did not follow the state statute, or law" with regards to the restraining order and has therefore "assumed liability," although he does not allege what statute or law he is referring to. *Response* [#31] at 4. In the event Plaintiff is claiming the restraining order issued by Judge Carpenter acting in her official capacity violated his civil rights and entitles him to damages, the Court finds Defendant Judge Carpenter is immune from those claims. As previously discussed, Article VI, section 16 establishes the position of county judges, making them a state official. CO Const. Article VI, § 16. "Suits against state officials in their official capacity[ies] should be treated as suits against the state." *Hafer v. Melo*, 502 U.S. 21, 25 (1991) (citing *Kentucky v. Graham*, 473 U.S. 159, 166 (1985)); *see also Duncan v. Gunter*, 15 F.3d 989, 991 (10th Cir. 1994) (stating that state officers sued in their official capacity are not "person subject to suit under 42 U.S.C. § 1983"). Here, any claim against Judge Carpenter is essentially a claim against the state, and is barred by the Eleventh

Amendment. *Doe v. Douglas Cty. Sch. Dist. RE-1*, 775 F. Supp. 1414, 1416 (D. Colo. 1991).

The Court also notes that while not raised by Defendants, Plaintiff sues Defendants for injunctive relief "against the restraining order." *Am. Compl.* [#12] at 4. The Supreme Court has held that "the Eleventh Amendment does not prevent federal courts from granting prospective injunctive relief to prevent a continuing violation of federal law." *Green v. Mansour*, 474 U.S. 64, 68 (1985). Here, Plaintiff does not allege that he seeks injunctive relief to prevent a continuing violation of federal law; instead, he seeks an injunction regarding a state court's issuance of a restraining order. Therefore, the injunctive relief claim against the Defendants in their official capacities is also barred by the Eleventh Amendment.

Based on the foregoing, it is recommended that the Carpenter/JeffCo Motion [#19] and JeffCo Motion [#29] be **granted** as to the official capacity claims for monetary and injunctive relief, and these claims be **dismissed without prejudice**. *See Schrader v. Richardson,* No. 11–2191, 2012 WL 266933, at *2 (10th Cir. 2012) (citation omitted) (dismissal based on Eleventh Amendment immunity is without prejudice).

B. Absolute Immunity

Defendants also argue that the individual capacity claims against Judge Carpenter are barred by the doctrine of absolute judicial immunity. *Carpenter/JeffCo Motion* [#19] at 5. Judge Carpenter argues that she may only be subject to liability when she has acted in "clear absence of all jurisdiction." *Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978) (quoting *Bradley v. Fisher*, 13 Wall. 335, 351 (1872)). Further, Judge Carpenter argues she has jurisdiction to issue a civil protection order under Colorado Law pursuant to Colo.

Rev. Stat. § 13-14-104.5(1)(a), and therefore has judicial immunity. *See Stump*, 435 U.S. at 356-57. The Court agrees.

The principles of judicial and quasi-judicial immunity apply to individual-capacity claims. *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1156 (10th Cir. 2011) (citation omitted). "[A]bsolute immunity is necessary so that judges can perform their functions without harassment or intimidation." *Van Sickle v. Holloway*, 791 F.2d 1431, 1435 (10th Cir. 1986). However, there are two exceptions to the doctrine of judicial immunity: "(1) when the act is not taken in the judge's judicial capacity, and (2) when the act, though judicial in nature, is taken in the complete absence of all jurisdiction." *Stein v. Disciplinary Bd. Of the Supreme Court of N.M.*, 520 F.3d 1183, 1195 (10th Cir. 2008) (internal quotation marks omitted).

Regarding the first exception, Plaintiff has not plausibly alleged any actions performed by Judge Carpenter that were not judicial in nature. The challenged conduct is indisputably judicial in nature because it relates to the issuance of a restraining order against Plaintiff, and act which Judge Carpenter has jurisdiction and authority to perform. *See Martinez v. Winner*, 771 F.2d 424, 434 (10th Cir. 1985) ("An act is judicial if it is a function normally performed by a judge and the parties dealt with the judge in [her] judicial capacity."); *see also Stump*, 435 U.S. at 363 ("Disagreement with the action taken by the judge . . . does not justify depriving that judge of [her] immunity."). Plaintiff argues, however, that Judge Carpenter lost her immunity because she was acting "in a purely administrative capacity." *Response to Defendants' Response* [#42] at 1. Plaintiff cites no authority or facts supporting this assertion. Further, Plaintiff's conclusory allegation that the order was "wantonly" issued, Response [#35] at 6, is insufficient to defeat judicial

immunity. *See Martinez*, 771 F.2d at 434 ("A judge is entitled to immunity even if he acted with partiality, maliciously, or corruptly."). Therefore, the first exception does not apply because Judge Carpenter's challenged conduct was a valid exercise of her judicial duty.

Plaintiff also argues that Judge Carpenter did not follow the state statute regarding restraining orders; thus, the second exception to judicial immunity would apply. *Response* [#31] at 3. This assertion is incorrect. "[A]n act in clear absence of jurisdiction can be found when a court of limited jurisdiction attempts to adjudicate a case outside of its jurisdiction." *Flanders v. Synder Bromley*, No. 09-cv-01623-CMA-KMT, 2010 WL 2650028, at *6 (D. Colo. June 30, 2010). Colo. Rev. Stat. § 13-14-104.5(1)(a) clearly establishes county court jurisdiction over restraining orders, thus the alleged wrongful conduct relates to a duty performed in Defendant Judge Carpenter's role as a county judge in a matter within her jurisdiction. Therefore, the second exception to judicial immunity does not apply. *See Winslow v. Romer*, 759 F. Supp. 670, 673 (D. Colo. 1991) (finding that the judicial defendant was entitled to absolute judicial immunity).

Further, Plaintiff argues in Response [#42] that Judge Carpenter is not immune when a constitutional right is involved. [#42] at 5. The Court disagrees. First, Plaintiff has cited no authority supporting this argument. Second, the argument does not fall within either of the two exceptions to judicial immunity previously discussed. "The fact that the issue before the judge is a controversial one is all the more reason that [she] should be able to act without fear of suit." *Stump*, 435 U.S. 364.

Plaintiff additionally asserts that Defendant Judge Carpenter was not aware of the covenant of quiet enjoyment. *Response* [#31] at 1. Plaintiff cites no facts to support his

assertion, and does not address how the covenant of quiet enjoyment relates to the restraining order. Thus, this argument is rejected.

Finally, Plaintiff asserts that Judge Carpenter did not give him a reasonable time to appear for the hearing. *Response* [#31] at 3. Plaintiff does not explain how this exempts Judge Carpenter from absolute judicial immunity, and the Court also notes that this was not alleged in the Amended Complaint [#12]. A complaint cannot be amended through a brief opposing a motion to dismiss. *Hayes v. Whitman*, 264 F.3d 1017, 1025 (10th Cir. 2001).

Based on the foregoing, the Court **recommends** that the Carpenter/JeffCo Motion [#19] be **granted** on this issue, and that Plaintiff's claims against Judge Carpenter in her individual capacity be **dismissed with prejudice** on the basis of absolute judicial immunity. *See Mehdipour v. Matthews*, 386 F. App'x 775, 778 (10th Cir. 2010) (affirming trial court's dismissal of claims with prejudice on the basis of judicial immunity).

C. Colorado Government Immunity Act

All three Defendants also argue that the CGIA offers them immunity from Plaintiff's state law claims. *Carpenter/JeffCo Motion* [#19] at 5; *JeffCo Motion* [#29] at 5; *Denver Motion* [#30] at 2. The Court agrees.

Defendants Denver and JeffCo are public entities as defined in the CGIA. *See* Colo. Rev. Stat. § 24-10-103(4)(a) and (5). Colo. Rev. Stat. § 24-10-106(1) establishes that a public entity "shall be immune from liability in all claims for injury in tort or could lie in tort...except provided otherwise in this section." A public entity's sovereign immunity is waived for injuries resulting from certain specified actions or conditions, Colo. Rev. Stat. § 24-10-106(1)(a)-(i), but Plaintiff has not plead any injury resulting from the listed

exceptions as to JeffCo. *See Am. Compl.* [#12] at 4. Nor has Plaintiff made any arguments that the exceptions apply to waive Defendants JeffCo's immunity under the CGIA. *See Responses* [#31, #35, #42]. Therefore, the Court finds that JeffCo has immunity under the CGIA as to the state law claims.

As to Defendant Denver, Plaintiff argues that it is liable for the injures he incurred because of the "chemical weapons attack" on him and the "hand to hand (sic) style combat moves" used against him by an alleged agent or undercover officer of Denver outside a bar on Colfax Avenue. *See Am. Compl.* [#12] at 4 20-cv-02103; *Response* [#31] at 4. Denver asserts that Plaintiff may be attempting to invoke the "roadway" exception to the CGIA, subsection (d)(I) of Colo. Rev. Stat. § 24-10-106(1).[5] *Denver Motion* [#30] at 2-3. The exception waives immunity if a "dangerous condition of a public . . . road, or street . . . physically interferes with the movement of traffic." Colo. Rev. Stat. § 24-10-106(1)(d)(I). Here, Plaintiff is alleging that an "agent or undercover officer" was the assailant who caused his injuries; he is not arguing that a "dangerous condition" of the road caused the harm. *See Response* [#31] at 4. Nor does he make any allegations regarding interference with the movement of traffic. Accordingly, the Court finds that

[5] It is not clear why Denver believes that Plaintiff may be relying on this exception, as he does not address it in his complaints in the two actions or in his Responses to the Motions to Dismiss. Nonetheless, the Court addresses the issue in the interest of completeness.

subsection (d)(I) of the CGIA does not apply to waive Defendant Denver's immunity from tort liability under the CGIA. The Court further finds that no other CGIA exceptions apply.[6]

Finally, as to Judge Carpenter, Defendants state, and Plaintiff does not disagree, that Judge Carpenter is a public employee within the meaning of Colo. Rev. Stat. § 24-10-103(4)(a) and (5) (stating that a "public employee" means an officer, employee, servant, or authorized volunteer of the public entity, whether or not compensated, elected, or appointed[,]" and that a public entity includes the judicial department of the state). A public employee is immune from all claims that lie in tort, "unless the act or omission causing such injury was willful and wanton." Colo. Rev. Stat. § 24-10-118(2)(a). While the term "willful and wanton" is not defined in the CGIA, "the majority of courts have applied to definition set forth in Colorado's exemplary damages statute, Colo. Rev. Stat. § 13-21-102[,]" which requires that the public employee "act not only unlawfully, but with the intent to injure, or in conscious disregard of the probability that his acts would result in injury to the plaintiff." *Pittman v. City of Aurora*, No. 19-cv-02209-PAB-NRN, 2020 WL 508946, at *7 (D. Colo. Jan. 31, 2020) (quotation and internal quotation marks omitted). Here, while Plaintiff has alleged that Judge Carpenter's conduct was wanton, see *Amended Complaint* [#12] in 20-cv-02103, this allegation is conclusory and unsupported by any facts from which the Court could infer that Judge Carpenter acted unlawfully or with an intent to injure Plaintiff. While Plaintiff has alleged additional facts as to Judge

[6] Denver also argues Plaintiff's claim would fail for lack of notice under the CGIA, Colo. Rev. Stat. § 24-10-109. *See Denver Motion* [#30] at 3. Because the Court finds that Denver has immunity under the CGIA, it need not discuss the notice argument.

Carpenter in his responses, these are not properly raised as Plaintiff did not allege them in the complaint, and they do not in any event show that Judge Carpenter's actions rise to the level of willful and wanton conduct required under Colorado law.

Therefore, the Court **recommends** that the Motions to Dismiss [#19, #29, #30] be **granted** as to the argument that the CGIA bars Plaintiff's state law claims, and that the state law claims against Defendants be **dismissed without prejudice.** *Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1218 (10th Cir. 2006) (a dismissal for lack of subject matter jurisdiction must be without prejudice); *Moaz v. City & Cty. Of Denver*, No. 17-cv-00030-MSK-NYW, 2017 WL 6381688, at *4 (D. Colo. Dec. 14, 2017) (holding that CGIA grants "sovereign immunity" as to tort claims and such claims are therefore "dismissed for lack of subject matter jurisdiction").

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

Defendant Denver also asserts that the claims against it fail to state a claim for relief. *Denver Motion* [#30] at 2. To the extent Plaintiff asserts constitutional claims based on the restraining order (*See Compl.* [#2] at 1 in 20-cv-02501), there are no allegations that Denver was involved in, or responsible in any way, for the restraining order. To the extent the complaints in the two actions can be liberally construed as asserting claims against Denver pursuant to 42 U.S.C § 1983, the Court agrees with Denver that Plaintiff has failed to adequately plead them. As Denver notes, a § 1983 claim against it could only rest on two theories: failure to protect or failure to enforce the law. *See Denver Motion* [#30] at 4. There is, however, no general constitutional right to police protection. *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 196 (1989); *Gray v. University of Colo. Hosp. Auth.*, 672 F.3d 909, 916-17 (10th Cir. 2012). Moreover, the

Fourteenth Amendment does not "require the State to protect the life, liberty, and property of its citizens against invasion by private actions." *DeShaney*, 489 U.S. at 195. Thus, "[a]s a general matter, . . . a State's failure to protect the individual against private violence . . . does not constitute a violation of the Due Process Clause." *Id.* at 197. Therefore, Plaintiff's allegation that Denver "allowed the attack to happen" (*Response* [#31] at 4) does not constitute a violation of his due process rights.

Plaintiff also alleges discrimination against him by Denver through its decision not to investigate the "chemical weapons attack" and "battery" against him. *Am. Compl.* [#12] at 4 in the first action. Liberally construed, this could be either a due process or an equal protection claim. The Court has already found that Plaintiff failed to state a due process claim. Moreover, Plaintiff has not alleged any of the requirements for an equal protection claim. *See Am. Compl.* [#12]. To plausibly allege an equal protection claim for a class of one, a plaintiff must show: (1) that he was "intentionally treated differently from others similarly situated" in all material respects, and (2) "that there is no rational basis for the difference in treatment[,]" i.e., that the government action is abusive and not related to any legitimate objective. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). Plaintiff has not alleged facts that support any of these elements.

In addition, to the extent Plaintiff is alleging that Denver is liable under the Eighth Amendment or otherwise for the acts of the "agent or undercover officer associated with Denver" that allegedly "facilitated the attack[,]" (Response [#31] at 4), Plaintiff has failed to state a municipal liability claim. "A municipality cannot be held liable under section 1983 on a *respondeat superior* theory." *Monell v. Dep't of Soc. Services of City of New York*, 436 U.S. 658, 691 (1978). Instead, "[t]o establish municipal liability, a plaintiff must

first demonstrate a 'municipal policy or custom,' which may take one of the following forms:

> (1) a formal regulation or policy statement; (2) an informal custom amounting to a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law; (3) the decisions of employees with final policymaking authority; (4) the ratification by such final policymakers of the decisions—and the basis for them—of subordinates to whom authority was delegated subject to these policymakers' review and approval; or (5) the failure to adequately train or supervise employees, so long as that failure results from deliberate indifference to the injuries that may be caused."

Waller v. City and Cty. of Denver, 932 F.3d 1277, 1283 (10th Cir. 2019) (quoting *Bryson v. City of Okla. City*, 627 F.3d 784, 788 (10th Cir. 2010) (international quotation marks and brackets omitted). Further, "after establishing a municipal policy or custom, a plaintiff must demonstrate 'a direct causal link between the policy or custom and the injury alleged.'" *Waller*, 932 F.3d at 1284 (quoting *Bryson*, 627 F.3d at 788). Here, Plaintiff has not alleged any policy or custom of Denver that is related to the alleged attack on him, let alone a direct causal link between the policy and the injury suffered.

Finally, Denver notes in its Reply [#33] that Plaintiff made new allegations against it in his Response [#31]. Thus, Plaintiff alleges that Defendants conspired against him by orchestrating the "chemical weapons attack" and then the restraining order "in an attempt to cover up the terrorist attack." *Response* [#31] at 2. Further, Plaintiff alleges for the first time that Denver "negligently investigated" the "chemical weapons attack" against him. *Id.* at 4. As previously discussed, a complaint cannot be amended through a brief opposing a motion to dismiss. *Hayes*, 264 F.3d at 1025. Therefore, the Court declines to consider Plaintiff's new allegations.

Based on the foregoing, the Court **recommends** that any § 1983 claims against Defendant Denver be **dismissed without prejudice** for failure to state a claim. *Gee v. Pacheco*, 627 F.3d 1178, 1186 (10th Cir. 2010) ("ordinarily the dismissal of a *pro se* claim under Rule 12(b)(6) should be without prejudice, and a careful judge will explain the pleading's deficiencies so that a prisoner with a meritorious claim can then submit an adequate complaint.") (citations omitted); *Gabriel v. Emergency Medical Specialists, P.C.*, No. 16-cv-00051-RBJ-CBS, 2016 WL 8310097, at *8 n. 13 (D. Colo. Nov. 1, 2016) ("Given the heightened concerns that govern *pro se* litigation, 'ordinarily the dismissal of a pro se claim should be without prejudice'") (citation omitted).

IV. Conclusion

For the reasons stated above,

IT IS **RECOMMENDED** that the Carpenter/JeffCo Motion and JeffCo's Motion [#19, #29] be **GRANTED** as to the official capacity claims for monetary damages and injunctive relief under the Eleventh Amendment, and that these claims be **DISMISSED WITHOUT PREJUDICE.**

IT IS FURTHER **RECOMMENDED** that the Carpenter/JeffCo Motion [#19] be **GRANTED** as to the claims against Judge Carpenter in her individual capacity based on absolute judicial immunity, and that these claims be **DISMISSED WITH PREJUDICE**.

IT IS FUTHER **RECOMMENDED** that the Motions [#19, #29, #30] be **GRANTED** based on the CGIA bar, and that Plaintiff's state law claims against Defendants be **DIMISSED WITHOUT PREJUDICE** for lack of subject matter jurisdiction.

IT IS FURTHER **RECOMMENDED** that Denver's Motion [#30] be **GRANTED** as to any claims asserted under federal law pursuant to 42 U.S.C. § 1983 for failure to state a claim, and that the claims be **DISMISSED WITHOUT PREJUDICE**.

IT IS FURTHER **RECOMMENDED** that as the Court has recommended dismissal of all claims, this case be **TERMINATED.**

IT IS HEREBY **ORDERED** that pursuant to Fed. R. Civ. P. 72, the parties shall have fourteen (14) days after service of this Recommendation to serve and file any written objections in order to obtain reconsideration by the District Judge to whom this case is assigned. A party's failure to serve and file specific, written objections waives de novo review of the Recommendation by the District Judge, Fed. R. Civ. P. 72(b); *Thomas v. Arn*, 474 U.S. 140, 147-48 (1985), and also waives appellate review of both factual and legal questions. *Makin v. Colo. Dep't of Corr.*, 183 F.3d 1205, 1210 (10th Cir. 1999); *Talley v. Hesse*, 91 F.3d 1411, 1412-13 (10th Cir. 1996). A party's objections to this Recommendation must be both timely and specific to preserve an issue for de novo review by the District Court or for appellate review. *United States v. One Parcel of Real Prop.*, 73 F.3d 1057, 1060 (10th Cir. 1996).

Dated: June 24, 2021

BY THE COURT:

Kristen L. Mix
United States Magistrate Judge