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Mortg. Corp. of the South v. Bozeman (In re Bozeman)

United States Court of Appeals for the Eleventh Circuit

January 10, 2023, Filed

No. 21-10987

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For JUDITH LACY BOZEMAN, Defendant - Appellee: Charles E. Grainger, Jr., Grainger Legal Services, LLC, MONTGOMERY, AL.

For SABRINA L. MCKINNEY, Interested Party - Appellee: Sabrina L. McKinney, Jessica Pitts Trotman, Office of Chapter 13 Trustee, Middle District of Alabama, MONTGOMERY, AL.

Judges: Before ROSENBAUM and TJOFLAT, Circuit Judges, and MOODY,* District Judge.

Opinion by: ROSENBAUM

Opinion

ROSENBAUM, Circuit Judge:

Section 1322(b)(2) of Title 11 is known as the Bankruptcy Code's "antimodification" provision. *Tanner v. FirstPlus Fin., Inc.*, (*In re Tanner*), 217 F.3d 1357, 1359 (11th Cir. 2000). Under it, without the lender's express approval or an applicable statutory exception, bankruptcy plans cannot modify the rights of

* The Honorable James S. Moody, Jr., United States District Judge for the Middle District of Florida, sitting by designation.

homemortgage lenders as they relate to mortgages on a debtor's principal residence secured by that residence.

Despite the antimodification provision, Debtor-Appellee Judith Lacy Bozeman's confirmed bankruptcy plan purported to modify the rights of Plaintiff-Appellant Creditor Mortgage Corporation of the South's ("MCS") mortgage on Bozeman's residence. In fact, her plan purported to eradicate all remaining outstanding payments on her mortgage, beyond MCS's claims for past-due arrearages. Then, after Bozeman paid off the debts identified under her bankruptcy plan, Bozeman sought to have MCS's lien on her home (which had guaranteed her payments on the outstanding loan balance) dissolved. Noting that the bankruptcy court had confirmed Bozeman's Plan without objection and that 11 U.S.C. § 1327 (the "finality" provision) renders confirmed plans final, the bankruptcy court granted Bozeman's motion, and the district court affirmed.

This case requires us to determine which provision wins—antimodification or finality—when the two clash in the scenario this case presents. We declare the antimodification provision the victor.

Under Supreme Court and Eleventh Circuit precedent, we read the antimodification provision as an ironclad "do not touch" instruction for the rights of holders of homestead mortgages. So a bankruptcy plan cannot modify the rights of a mortgage lender whose claim is secured by the debtor's principal residence by

providing for release[1] of the homestead-mortgagee's lien before the mortgagee has recovered the full amount it is owed. For this reason, we reverse the bankruptcy court's order discharging MCS's lien on Bozeman's home and the district court's order affirming it.

I.

In 2015, Judith Bozeman mortgaged her home to MCS for a $14,000 loan. In exchange for the mortgage loan, Bozeman agreed to pay MCS back, plus 19.7% annual interest, over nine years. And as collateral, Bozeman agreed to give MCS a security interest in her home. That allowed MCS to foreclose on Bozeman's home and recoup the balance of Bozeman's debt to MCS if Bozeman failed to pay back the money she borrowed.

Unfortunately, in 2016, Bozeman's financial situation took a turn for the worse. On September 7, she filed for Chapter 13 bankruptcy—a legal action that allows an income-earning debtor to hold onto her property while she pays her creditors back over a three-to-five-year period. *Harris v. Viegelahn*, 575 U.S. 510, 514, 135 S. Ct. 1829, 191 L. Ed. 2d 783 (2015) (citing 11 U.S.C. §§ 1306(b), 1322, 1327(b)).

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[1] A "release" of a lien "discharge[s] a [lien] upon full payment by the borrower" and "show[s] that the borrower has full equity in the property." *Release of Mortgage*, Black's Law Dictionary (11th ed. 2019).

A week after Bozeman filed for bankruptcy, on September 16, MCS filed a proof of claim.[2] *See* 11 U.S.C. § 501. In that proof of claim, MCS asserted Bozeman owed $6,817.42 in arrears on the 2015 mortgage loan.[3] The proof of claim listed the value of MCS's claim several times, each time with "Arrearage only" handwritten beside it. In other words, the proof of claim did not include the amount outstanding on Bozeman's loan after payment of the arrearages.

A few days after MCS filed its claim, Bozeman filed a proposed payment plan. And two months later, Bozeman filed an amended plan (for convenience, our further reference in this opinion to the amended plan uses the term "Plan").[4] In the Plan, Bozeman acknowledged a debt to MCS, secured by her home, in the

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[2] A proof of claim is a legal form a creditor fills out to make a claim for payment out of bankruptcy funds in a bankruptcy case. *See* Bankruptcy Form 410.

[3] "Arrears" refer to "unpaid or overdue debt[s]." *Arrear*, Black's Law Dictionary (11th ed. 2019)

[4] When someone files a Chapter 13 bankruptcy petition, a disinterested trustee is appointed to administer the case. 11 U.S.C. § 1302. Among other things, the trustee evaluates the case, collects payments from the debtor, and distributes those payments to the creditors. *Id.* § 1302(b). On November 17, the trustee here ("Trustee") filed an objection to confirmation of the initial plan. Among other reasons, the Trustee objected because the proposed plan did not satisfy the required commitment period (the period for which the plan provides for a debtor to make payments). To justify a shorter commitment period, the Trustee requested that Bozeman include full payments to all unsecured creditors through the plan. *Id. See* 11 U.S.C. § 1325(b)(4). Bozeman then filed her amended Plan, which included 100% payments to her unsecured creditors.

amount of $17,393.04, plus 7.568% in interest. She also listed a secured car loan and unspecified unsecured debt, each owed to unrelated creditors. Bozeman's Plan proposed 58 monthly payments of $503.00 to the bankruptcy Trustee, $454.00 of which would go to MCS (seemingly adding up to a total of $26,332.00 (58 months x $454.00 per monthly payment) for MCS).

Bozeman's Plan included a lien-retention provision that guaranteed secured creditors' retention of their liens until "completion of all payments under [the] [P]lan." Still, though, Bozeman's Plan advised that "[c]reditors must file a proof of claim to be paid." And it expressly proposed that once her Plan was confirmed, "the creditor's claim shall be paid its specified monthly [P]lan payments on the terms and conditions" provided for by the [P]lan "as required under § 1325(a)(5)."[5]

The form on which Bozeman submitted her Plan identified several possible ways she could pay her creditors. Among others, one provision was titled, "curing defaults" under § 1322(b)(5). This avenue would have allowed Bozeman to remedy debts for which she had fallen behind. A plan that uses this mechanism, known as a cure-and-maintain plan, allows a homeowner "to stave off foreclosure and catch up [her] mortgage within a reasonable amount of time." *In re Muhammad*, 536 B.R. 469, 471 n.1 (Bankr. M.D. Ala. 2015) (citing 11 U.S.C. § 1322(b)(5)). It is designed to remedy

[5] Section 1325(a)(5) outlines requirements for Chapter 13 plans that provide for the payment of secured claims.

arrearages when the full balance of the debt will become due *after* the Chapter 13 plan ends. Though MCS's loan to Bozeman—with its $6,817.42 in arrearages and its balance due after the Plan ended—would have fit the bill for the "curing defaults" provision, Bozeman did not list any debts under that section.

Rather, she provided for her debt to MCS under the section titled, "secured claims paid through the [P]lan." This provision advised that creditors' claims were to be paid under "the terms and conditions listed below as required under § 1325(a)(5)."

The bankruptcy court later described Bozeman's Plan as a full-payment plan, meaning that (unlike a cure-and-maintain plan) it provided for payment of the full balance of the identified debts within the life of the Chapter 13 plan.[6] Put simply, under a full-payment plan, Bozeman's entire debt to MCS (including both the arrearages and any remaining balance) would be considered fully paid when Bozeman completed payments on her Plan.

MCS did not object to Bozeman's Plan. Nor did it initially file an amended claim.[7]

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[6] The district court referred to this type of plan as a full-balance plan. These terms are interchangeable, so for the sake of simplicity, we use the term "full-payment plan."

[7] In May 2019, two-and-a-half years after MCS filed its initial claim, MCS filed two amended proofs of claim. The bankruptcy court rejected those claims as untimely filed. MCS has not appealed that decision.

On January 9, 2017, the bankruptcy court held a confirmation hearing. The Trustee filed a summary of the confirmed Plan. That summary reiterated that Bozeman would make 58 monthly payments of $503.00 to the Trustee. And it listed MCS as the only secured creditor. In addition, the summary identified the value of the collateral supporting MCS's claim as $17,180.00, with an interest rate of 7.57%, and monthly payments of $454.00. The Trustee transmitted a copy of the Plan to MCS, and on January 14, 2017, the bankruptcy court confirmed the Plan.

Just over a year later, in March 2018, MCS moved to dismiss the bankruptcy proceeding because Bozeman fell behind on her Plan payments. MCS and Bozeman negotiated a resolution, and MCS withdrew its motion to dismiss.

With the Plan back on track, a little more than a year later, on May 13, 2019, the Trustee filed notice that Bozeman had completed her payments under her Plan. The "Notice of Final Cure Payment" said that Bozeman had successfully paid $6,817.42 to the Trustee under the Plan. According to the Trustee, this figure constituted the "[e]ntire mortgage debt" owed MCS. So the Notice of Final Cure Payment declared that Bozeman had paid her "prepetition arrearage" balance of $6,817.42 in full and that she had no remaining payments under the Plan.

The next day, MCS objected. Although Bozeman had paid the full amount "required to cure the default on the arrearage claim," MCS explained, she had paid

nothing towards the remaining $15,032.73 balance due on her mortgage. So on June 12, MCS moved to lift the automatic stay on enforcement proceedings so it could seek to foreclose on Bozeman's home.[8]

Three months later, on September 12, 2019, Bozeman moved to release the lien MCS held on her property. She argued that at the outset of the bankruptcy proceeding, she proposed to pay her entire debt to MCS. And, she continued, she had paid MCS everything it had asked for in its original proof of claim. Having paid MCS's original claim, Bozeman asserted, she satisfied the lien MCS held against her property, so the court should treat the lien as satisfied and released.

MCS objected to Bozeman's motion to discharge the bankruptcy and release the lien. It raised a series of arguments.

First, MCS contended that Bozeman had not complied with the straightforward terms of the Plan. The Plan acknowledged a $17,180.00 debt and required 58 consecutive payments. That debt had not been paid, and not all 58 payments had been made.

Second, MCS asserted that the Plan was illegal at the outset. Under the antimodification provision, MCS argued, a plan cannot modify the rights of a holder of "a claim secured only by a security interest in real property that is the debtor's principal residence." That,

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[8] When a bankruptcy case is filed, other litigation against the debtor is automatically stayed. *See* 11 U.S.C. § 362.

MCS asserted, described its lien here. So, MCS reasoned, the bankruptcy court was not free to modify the terms of its mortgage claim by approving Bozeman's Plan to the extent that it purported to extinguish the mortgage five years short of its maturity date and "cram[] down the interest rate."

Relatedly, MCS noted that 11 U.S.C. § 1322(c)(2) excuses compliance with the antimodification provision when "the last payment on the original payment schedule for a claim [that is secured only by a security interest in real property that is the debtor's principal residence but that] is due *before* the date on which the final payment under the plan is due." (emphasis added). But, MCS argued, that provision did not except MCS's claim from the antimodification provision because, under the original payment schedule for Bozeman's mortgage, the last payment was due three years *after* the Plan was scheduled to be completed.

Third, MCS contended that longstanding principles of bankruptcy law prohibit invalidation of a secured lien through bankruptcy. As MCS saw things, a lien, particularly a mortgage lien, "survives" a confirmed Chapter 13 plan, and the general rule is that liens "pass through" bankruptcy unaffected. According to MCS, bankruptcy can extinguish an *in personam* claim against a debtor, but it does not eliminate an *in rem* claim against the debtor's property.

Finally, MCS argued that our decision in *In re Bateman* squarely controlled the case. There, we held that "a secured creditor's claim for mortgage arrearage

survives the confirmed plan to the extent it is not satisfied in full by payments under the plan, or otherwise satisfied." *Universal Am. Mortg. Co. v. Bateman* (*In re Bateman*), 331 F.3d 821, 822 (11th Cir. 2003). Were that not the case, we explained, we "would deny the effect of 11 U.S.C. § 1322(b)(2), which, in effect, prohibits modifications of secured claims for mortgages on a debtor's principal residence." *Id.*

In response, Bozeman made four primary points.

First, she said that MCS got what it had bargained for. As Bozeman saw things, MCS had asked for $6,817.42 plus interest, and that's exactly what it received. Bozeman pointed out that MCS could have amended its claim before the claim submission deadline, but it failed to do so. Nor did it offer any "excuse either for its initial failure or for sleeping on its rights until the Plan had concluded," Bozeman asserted.

Second, Bozeman argued she would be unfairly prejudiced if the bankruptcy court did not discharge her debt to MCS. This was so, Bozeman explained, because Bozeman had to pay her unsecured creditors in full with what was left after she paid the arrearages claim, since MCS had failed "to amend its proof of claim to accurately represent what was owed. . . ."

Third, Bozeman acknowledged the discrepancy between the debt she outlined in her plan (the $17,180.00, with an interest rate of 7.57%) and the debt MCS claimed in its proof of claim ($6,817.42). But in her view, MCS's smaller claim superseded the Plan's estimation of the amount of her debt to MCS.

And fourth, Bozeman argued that the Supreme Court's decision in *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 130 S. Ct. 1367, 176 L. Ed. 2d 158 (2010), foreclosed MCS's challenge to the Plan based on the alleged improper confirmation of the Plan. To the extent this Court's decision in *Bateman* conflicted with *Espinosa*, Bozeman suggested that *Espinosa* controlled.

Following an evidentiary hearing, the bankruptcy court granted Bozeman's motions to discharge her from bankruptcy and to deem MCS's lien satisfied. MCS filed a notice of appeal with the district court. In that notice (and later in its briefing before us), MCS limited its appeal to the bankruptcy court's decision to deem the lien satisfied. The district court affirmed.

We now consider MCS's appeal.

II.

We "sit[] as a second court of review." *Yerian v. Webber* (*In re Yerian*), 927 F.3d 1223, 1227 (11th Cir. 2019) (quotation omitted). In that role, we "examine[] independently the factual and legal determinations of the bankruptcy court and employ[] the same standards of review as the district court." *Id.* When, as here, the district court affirms the bankruptcy court's order, we review the bankruptcy court's decision. *Brown v. Gore* (*In re Brown*), 742 F.3d 1309, 1315 (11th Cir. 2014). In so doing, we review the bankruptcy court's legal conclusions de novo and its factual findings for clear error. *Id.*

III.

The only question we address in this appeal is whether Bozeman's payoff of her Plan entitled her to satisfaction of MCS's lien on her home. Our prior precedent requires us to conclude it did not. We divide our analysis into two parts. In Section A, we explain why the Plan modified MCS's rights in violation of the Bankruptcy Code's antimodification provision, so our precedent requires us to conclude the Plan was not a legal one. Section B shows why, despite the preclusive effect of the confirmed plan, the bankruptcy court should not have released MCS's lien.

A. The antimodification provision prohibited the Plan from modifying MCS's rights as a homestead mortgagee.

We divide our discussion into three parts. In Section 1, we show why the antimodification provision's text and our precedent require us to conclude that the Plan unlawfully purported to modify MCS's rights as a homestead mortgagee. Section 2 explains how Bozeman improperly used a full-payment plan and why that improper use cannot modify MCS's rights as a homestead mortgagee. And in Section 3, we reject Bozeman's argument that the Supreme Court abrogated our precedent that requires us to conclude that Bozeman's Plan did not modify MCS's rights as a homestead mortgagee.

1. The statutory text and our prior precedent require us to conclude that, to the extent the Plan purported to modify MCS's rights as a homestead mortgagee, the Plan was not legal under the Bankruptcy Code.

Because this case requires us to consider what the Bankruptcy Code requires, we begin with the statutory text. *See Heyman v. Cooper*, 31 F.4th 1315, 1318 (11th Cir. 2022) ("As in every statutory-interpretation case, we start with the text—and, if we find it clear, we end there as well.") (citation and quotation marks omitted). In construing the terms of the statute, we give them their "ordinary public meaning." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738, 207 L. Ed. 2d 218 (2020). Our task requires us to look not only to the statutory language at issue but also to the "language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291, 108 S. Ct. 1811, 100 L. Ed. 2d 313 (1988); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law* 167 (2012) (noting that the "whole-text canon . . . calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts").

The antimodification provision states, as relevant here, that a bankruptcy "plan may—(2) modify the rights of holders of secured claims, *other than a claim secured only by a security interest in real property that is the debtor's principal residence.*" 11 U.S.C. § 1322(b)(2) (emphasis added). In other words, a plan may *not* "modify the rights of holders of . . . a claim secured only by a security interest in real property that is the debtor's principal residence." By its plain

language, then, this provision prohibits bankruptcy plans from modifying the rights of the holder of a claim secured by only a security interest in real property that is the debtor's principal residence—rights like MCS's at issue here.

Still, other parts of § 1322 limit this prohibition on modification of homestead mortgage loans. "[N]otwithstanding" § 1322(b)(2), § 1322(b)(5) authorizes bankruptcy plans to "provide for the curing of any default within a reasonable time and *maintenance of payments* while the case is pending on any unsecured claim or secured claim on *which the last payment is due after the date on which the final payment under the plan is due.*" 11 U.S.C. § 1322(b)(5) (emphasis added). So for situations when a debtor's outstanding mortgage secured by her principal home is not due to be paid off until after the plan expires, and her payments on that mortgage are in arrears—like Bozeman's situation—a plan may allow the debtor to catch up on her arrearages, while maintaining her monthly payments, and avoid foreclosure. By design, under a plan like that—a cure-and-maintain plan—after the debtor is discharged from bankruptcy, the debtor must continue to make the payments remaining on the original payment schedule for the mortgage. We refer to § 1322(b)(5) as the "cure-and-maintain exception."

By its terms, then, the cure-and-maintain exception authorizes only two things with respect to a principal-residence-backed mortgage when the last payment is due after the plan ends: (1) modification of the rights of the mortgage-holder only as those rights

relate to collection of arrears on the debt and (2) maintenance of current payments on the mortgage loan. *Id.* It does not contemplate modification of the mortgage holder's rights to receive payments remaining on the mortgage after the completion of the plan. *See id.*

In contrast—and again "[n]otwithstanding subsection (b)(2) and applicable nonbankruptcy law," § 1322(c)(2)'s text reflects that it deals solely with cases when "the last payment on the original payment schedule for a claim secured only by a security interest in real property that is the debtor's principal residence is due *before the date on which the final payment under the plan is due.*" 11 U.S.C. § 1322(c)(2) (emphasis added). We refer to this exception as the "short-term exception." Under the short-term exception, "the plan may provide for the payment of the claim as modified pursuant to section 1325(a)(5) of this title." *Id.*

Because Bozeman's case does not involve a mortgage where the last payment on the original payment schedule was due before the date on which the final payment under the plan is due, we do not discuss the requirements of the short-term exception further. It is enough to observe that the short-term exception does not authorize an exception to the antimodification provision's prohibition on modifications of a homestead-backed mortgage loan when the original payment schedule contemplates the final payment after the plan period expires.

In sum, then, in § 1322, Congress three times expressly or implicitly protected from modification the rights of homestead-mortgage lenders as they concern those lenders' secured interests in the debtor's principal residence, when the final original payment schedule does not expire before the plan period ends. We have explained that the Code makes these protections because "favorable treatment of residential mortgagees was intended to encourage the flow of capital into the home lending market." *Universal Am. Mortg. Co. v. Bateman* (*In re Bateman*), 331 F.3d 821, 826 (11th Cir. 2003) (quoting *Nobelman v. Am. Savs. Bank*, 508 U.S. 324, 332, 113 S. Ct. 2106, 124 L. Ed. 2d 228 (1993) (Stevens, J., concurring) (quotation marks omitted)).

On the other side of the equation, to protect debtors in a relationship with a homestead-mortgagee, the Bankruptcy Code checks "[t]he lender's power to enforce its rights—and, in particular, its right to foreclose on the property in the event of default"—through the Code's automatic-stay provision. *Id.* (quoting *Nobelman*, 508 U.S. at 330 (quotation marks omitted)).

Consistent with the concern for encouraging homestead mortgages, the Supreme Court has emphasized that, by its terms, § 1322(b)(2) protects "the rights" of homestead-mortgagees, as opposed to "claims." *Nobelman*, 508 U.S. at 328. Towards that end, the Court has explained, § 1322(b)(2) "does not state that a plan may modify 'claims' or that the plan may not modify 'a claim secured only by' a home mortgage. Rather, it focuses on the modification of the '*rights of holders*' of such claims." *Id.*

The Bankruptcy Code does not define the term "rights." *Id.* at 329. But the Supreme Court has instructed courts to look to state law to determine the rights a homestead mortgagee possesses under § 1322(b)(2). *Id.* (citations omitted). Here, MCS's rights are "reflected in the relevant mortgage instruments, which are enforceable under [Alabama] law." *Id.*

MCS and Bozeman signed a promissory note and mortgage that granted MCS a security interest in Bozeman's property. Those instruments gave MCS the right to foreclose on Bozeman's property if Bozeman defaulted on her obligation to make payments to MCS in the agreed-upon amounts. Under the promissory note, Bozeman needed to pay MCS the $14,000 she borrowed plus 19.70% in interest annually. The note proposed 108 monthly payments of $277.67 unless Bozeman exercised her right to pay off her balance early. And under Alabama law, Bozeman's debt could not be satisfied "until there [was] no outstanding indebtedness or other obligations secured by the mortgage[.]" Ala. Code § 35-10-26. "These are the rights that were 'bargained for by the mortgagor and the mortgagee,' and are rights protected from modification by § 1322(b)(2)." *Nobelman*, 508 U.S. at 329-30 (quoting *Dewsnup v. Timm*, 502 U.S. 410, 417, 112 S. Ct. 773, 116 L. Ed. 2d 903 (1992)).

We have also recognized as much. In *In re Dukes*, we said that "[a] creditor's rights 'protected from modification by § 1322(b)(2)' are the rights under the original loan instruments as defined by state law." *Dukes v. Suncoast Credit Union* (*In re Dukes*), 909 F.3d 1306,

1331 (11th Cir. 2018) (quoting *Nobelman*, 508 U.S. at 329-30).

Despite these rights that the parties bargained for and Alabama law protected, the bankruptcy court deemed MCS's lien in Bozeman's residence to be satisfied and released. It did so even though Bozeman paid MCS only the $6,817.42 in arrearages and has yet to pay the remaining balance. But both Supreme Court and our precedent require us to conclude that declaring a homestead-mortgagee's lien satisfied before the debt the lien secures is paid in full constitutes an impermissible modification of the homestead-mortgagee's rights under the antimodification provision.

We begin with *Nobelman*. There, the Supreme Court considered the debtors' attempt to void the portion of their creditor's lien that exceeded the value of the partially underwater home the lien secured. *Nobelman*, 508 U.S. at 325-26. The debtors relied on 11 U.S.C. § 506(a) to argue that the homestead mortgagee's claim was secured up to only the current value of the home, and the remainder of the claim was unsecured. *Id.* at 328. They asserted that the antimodification provision protects only "holders of secured claims," and the creditor held a secured claim only to the extent of the home's value. *Id.*

The Supreme Court disagreed. The Court concluded that the debtors' argument "fail[ed] to take adequate account of § 1322(b)(2)'s focus on 'rights.'" *Id.* at 328. The antimodification provision did not prohibit the modification of "claims"; rather, it prohibited the

modification of "'*the rights of holders*' of such claims," the Court explained. *Id.* And state law and the underlying mortgage instruments revealed that the creditor possessed the right to, among other things, retain its lien until its debt was paid off. *Id.* at 329. So, the Court held, bifurcating the creditor's claim, and thus partially stripping its lien, would constitute a modification of its rights in violation of the antimodification provision. *Id.* at 331.

Here, the problem is worse than that. The bankruptcy court's order did not just release MCS's lien in part; it released it in full. Even though MCS had a secured interest in Bozeman's home, MCS has received payment for only the arrearages that were included in its claim. So release of MCS's lien would cause the remainder of its interest to simply evaporate, regardless of its substantive rights under the terms of the mortgage and Alabama law. Because Bozeman obtained the release before she repaid MCS under the terms of the contract, we must conclude that the order granting the release unlawfully modified MCS's rights as a secured homestead-mortgagee.[9]

Our decisions in *Bateman* and *Dukes* further compel this result. In *Bateman*, the debtor's plan provided for only partial payment in arrears to her

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[9] *Bateman* and *Dukes*, which we will discuss further, foreclose the Trustee's suggestion that the term "modification" refers to only the bifurcation of a secured claim into a secured and unsecured portion. In both cases, we concluded that discharging liability for unpaid debts constituted a modification of rights under § 1322(b)(2). And neither case involved bifurcating claims.

primary-residence mortgage creditor (a plan that the bankruptcy court confirmed without objection). 331 F.3d at 822-23. We held that the bankruptcy court could not discharge the debtor from the full amount of the arrears she in fact owed. *Id.* at 834. We rooted our decision "within the context of the special treatment afforded mortgage lenders" under the antimodification provision. *Id.* at 825 n.4. As we explained, the debtor's "plan is prohibited from reducing the mortgagee's secured claim." *Id.* at 826. In other words, we reasoned that even though the debtor's plan had been confirmed, the antimodification provision prohibited modifications to the mortgagee's rights that the debtor's primary residence secured. As a result, we concluded that the creditor's "secured claim for arrearage survive[d] the [p]lan and [the creditor] retain[ed] its rights under the mortgage until [its] claim [was] satisfied in full." *Id.* at 834. Allowing the confirmed plan to extinguish the mortgagee's rights "would deny the effect of" the antimodification provision, we said. *Id.* at 822.

Also in *Bateman*, we cited with approval the Fifth Circuit's decision in *Simmons v. Savell* (*In re Simmons*), 765 F.2d 547 (5th Cir. 1985). There, the debtor's plan had inaccurately characterized the creditor's claim. 765 F.2d at 549. The Fifth Circuit rejected the debtor's argument that the inaccurate characterization effectively "lift[ed] the construction lien from the homestead and vest[ed] the interest of the property in the debtor 'free and clear of any claim or interest of any creditor.'" *Bateman*, 331 F.3d at 831 (quoting *Simmons*, 765 F.2d at 555). Instead, the Fifth Circuit held

the creditor's lien on the debtor's homestead "remained unimpaired by the order of confirmation." *Id.* (quoting *Simmons*, 765 F.2d at 559). So we explained in *Bateman* that, under *Simmons*, "a lien on a mortgage survives the § 1327 *res judicata* effect of a confirmed plan." *Id.*

We reached a similar conclusion in *Dukes*. There, we held that even if the debtor's plan "provided for" her mortgage, we could not discharge the debt she owed because doing so would violate the antimodification provision. *Dukes*, 909 F.3d at 1320. As we explained, "a discharge of a debtor's obligations under his residential mortgage would dramatically modify the rights of the holder of that mortgage." *Id.* The debtor argued that discharge was not a modification because the creditor could still foreclose on the property, even if it could not seek a deficiency judgment against the debtor. *Id.* at 1320-21. We rejected that argument. In so doing, we reasoned that "[r]emoval of the [creditor's] right to pursue *in personam* liability against [d]ebtor" would "strip[ ] the [creditor] of a right provided by the original loan instrument." *Id.* at 1321. The proposed discharge therefore "would necessarily modify the [creditor's] rights" in violation of the antimodification provision. *Id.*

The reasoning in *Dukes* applies with additional force here. Releasing a mortgagee's lien would modify its rights even more dramatically than discharging the debtor's obligations under the mortgage. After all, regardless of whether a mortgagee can seek *in personam* relief against a debtor, a mortgagee that retains its lien

can use that lien "to collect future obligations" through an *in rem* proceeding against the property. *Dukes*, 909 F.3d at 1322. But if MCS's lien is released here, MCS would have no mechanism to collect the remaining balance.

The Code's protections for the rights of primary-residential mortgage holders forbid that result. So they prohibit releasing a lien before the terms of the primary-residential mortgage are satisfied. Indeed, the Supreme Court has long recognized the protection bankruptcy law offers against the invalidation of a creditor's lien. *See Dewsnup*, 502 U.S. at 418-19 ("[N]o provision of the preCode statute permitted involuntary reduction of the amount of a creditor's lien for any reason other than payment on the debt.") (citing *Long v. Bullard*, 117 U.S. 617, 620-621, 6 S. Ct. 917, 29 L. Ed. 2d 1004 (1886)).[10]

Bozeman resists the conclusion that releasing MCS's lien violates the antimodification provision. She asserts that her Plan contemplated paying MCS's entire claim, so her payments through the Plan amounted to early payment of the full balance owed to MCS, and they satisfy the full scope of her obligations. But Bozeman's position does not square with

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[10] This is not to say that the modern Bankruptcy Code completely lacks the authority to strip or void liens or that liens always survive bankruptcy. *See*, *e.g.*, *Wells Fargo Bank, N.A. v. Scantling* (*In re Scantling*), 754 F.3d 1323, 1325 (11th Cir. 2014) (holding that the Bankruptcy Code authorizes "a debtor [to] 'strip off' a wholly unsecured junior mortgage in a Chapter 20 case."). In fact,

controlling legal authority. Both the text of the statute and *Nobelman* instruct that the critical inquiry for the antimodification provision involves the "*rights* of holders." *Nobelman*, 508 U.S. at 328 (quoting 11 U.S.C. § 1322(b)(2)).

So while it's true that the sole timely proof of claim that MCS filed during the bankruptcy proceeding sought only $6,817.42 in arrears, nothing about that claim (or the absence of any additional claim) changed the fact that MCS was entitled under the terms of the mortgage and Alabama law to receive full payment on the balance of its loan. In fact, our precedent is clear that a secured creditor is not required to file a claim at all, as "it will always be able to look to the underlying collateral to satisfy its lien." *Bateman*, 331 F.3d at 827. So we are not persuaded that MCS's arrearages-only claim changed the nature of its rights. Even though Bozeman paid MCS's full arrearages claim through the Plan, MCS retains the *right* to receive the entire balance. The Code precludes in *Dewsnup*, the Supreme Court recognized historical precedent for modifying a creditor's lien in "reorganization proceedings." *Dewsnup*, 502 U.S. at 418-19. But we are talking here about a primary-residential mortgage holder's lien, which, as we've noted, is a right subject to the antimodification provision. the Plan from modifying the amount that MCS was entitled to under the primary residential mortgage.

2. Bozeman's full-payment Plan cannot modify MCS's rights.

Bozeman insists that *Bateman* and *Dukes* have no bearing on the outcome here because they both concerned cure-and-maintain plans whereas Bozeman proceeded under a full-payment plan. We disagree. In fact, Bozeman's use of a full-payment plan further confirms that a release of MCS's lien is improper. To explain why, we begin with the text and then discuss *Bateman* and *Dukes* specifically.

Chapter 13 permits debtors to structure their plans as a cure-and-maintain plan or a full-payment plan. As we've noted, a cure-and-maintain plan allows a debtor to pay off her arrearages and make separate monthly payments on her mortgage so she can avoid foreclosure. *Green Tree Acceptance, Inc. v. Hoggle* (*In re Hoggle*), 12 F.3d 1008, 1010 (11th Cir. 1994). In a full-payment plan, by contrast, a debtor can combine the arrearages she owes with the full outstanding balance of the loan to create a single monthly payment. *See* 11 U.S.C. § 1325(a)(5)(B). That way, after the debtor has made all her payments under the plan, she will have paid off the entire loan and satisfied the full amount of her obligation.

Here, Bozeman unambiguously elected to structure her Plan as a full-payment plan. And the Code supports her right to do so, as cure-and-maintain plans are a permissible, but not mandatory, mechanism to structure long-term debt. *In re Chappell*, 984 F.2d 775,

780 (7th Cir. 1993).[11] But whatever the structure of her plan, the antimodification provision forbids modification of MCS's substantive rights. 11 U.S.C. § 1322(b)(2). Therefore, absent an exception to the antimodification provision, Bozeman's Plan could not modify MCS's right to receive the full loan balance before MCS's lien is released.

And here, no exception authorized Bozeman's Plan's attempt to modify MCS's right to receive the remaining balance on the primary-residential mortgage before MCS's lien could be released. Bozeman has identified no permissible exception, and the text of the Bankruptcy Code and precedent preclude our finding any.

That is so because *Nobelman* suggests that we must find any exception to the antimodification provision in the Code's text. In *Nobelman*, for example, the Supreme Court "recognize[d] two instances in which the antimodification provision of § 1322(b)(2) does not apply." *Dukes*, 909 F.3d at 1321. One includes § 1322(b)(5)'s authorization of cure-and-maintain plans, which are "expressly exempted from the antimodification provision." *Id.* (citing *Nobelman*, 508 U.S. at 330). Another is § 362's automatic-stay provision, which "does not alter future rights or obligations." *Id.* (citing *Nobelman*, 508 U.S. at 330). In other words, Congress has seen fit to create certain exceptions to

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[11] "[T]he most common use by far" of cure-and-maintain plans "is to cure defaults on residential mortgages." 8 Collier on Bankruptcy ¶ 1322.09[2].

the antimodification provision. But absent such a directive in the Code, the antimodification provision applies with full force.[12]

Turning to the situation in Bozeman's case, we must conclude that no statutory exception spares a full-payment plan from the antimodification provision. Without an exception that the text authorizes, the antimodification provision controls. And it dictates that full-payment plans may not modify homestead-mortgage holders' rights. So while Bozeman did have the option to structure her Plan as a full-payment plan instead of a cure-and-maintain plan, she could not use that full-payment plan to release MCS's lien before MCS had received the entire benefit of its bargain.

As we've explained, our decisions in *Bateman* and *Dukes* confirm the protections that the antimodification provision requires be afforded to mortgage-holders' rights.

As an initial matter, neither *Bateman* nor *Dukes* purports to cabin its reasoning to cases involving cure-and-maintain plans. And both cases held that the underlying bankruptcy plans would improperly modify the secured creditors' rights if the liens were released before the entire balances were paid. *Bateman*, 331 F.3d at 832; *Dukes*, 909 F.3d at 1320. If that is true in

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[12] We have also recognized an additional express exception to the antimodification provision in § 1322(c)'s short-term exception. *Am. Gen. Fin., Inc. v. Paschen* (*In re Paschen*), 296 F.3d 1203, 1207 (11th Cir. 2002). But as we explained earlier, *see supra* at 15-16, § 1322(c) does not apply here.

the context of cure-and-maintain plans, it must also be true in the context of full-payment plans. After all, no statutory basis authorizes full-payment plans to provide fewer protections to homestead mortgage holders' rights than cure-and-maintain plans offer.[13] Nor are we aware of any statutory basis upon which full-payment plans can impose any modification on mortgage holder's rights without their express agreement.

The Trustee argues that the factual distinction between cure-and-maintain plans and full-payment plans is "critical" because mortgage liens will always survive a cure-and-maintain plan, but a full-payment plan is designed to discharge all debts provided for in the plan. This misses the point. That a full-payment plan is designed to discharge all debts provided for in the plan does not change the fact that the antimodification provision precludes the modification of the homestead mortgage holder's rights. Nor does our decision prevent a debtor from using a full-payment plan to pay off her full mortgage balance, discharge her debt, and satisfy the corresponding lien. But to do so, the debtor must, in fact, use her full-payment plan to pay the full balance she owes.

Bozeman seemingly knew this—her Plan proposed paying MCS $17,393.04 plus interest. But because of MCS's arrearages-only claim, Bozeman

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[13] If anything, full-payment plans provide more protections to homestead mortgagees' rights than cure-and-maintain plans since cure-and-maintain plans arise under § 1322(b)(5), which is "expressly exempted from the antimodification provision." *Dukes*, 909 F.3d at 1321.

sought to satisfy the full scope of her obligation by paying only those arrearages and ignoring the remaining balance owed to MCS. But this maneuver purports to modify MCS's right to receive full payment before its lien is released, so the antimodification provision forbids it. If Bozeman had, in fact, used her full-payment plan to pay off the full balance she owed, releasing MCS's lien at this stage would be entirely appropriate.

In sum, Bozeman's use of a full-payment plan instead of a cure-and-maintain plan does not alter our conclusion that her Plan purports to improperly modify MCS's rights in violation of § 1322(b)(2).

3. *Espinosa* did not abrogate *Bateman*.

Bozeman also argues that *Bateman* should not control here because, in her view, the Supreme Court's decision in *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 130 S. Ct. 1367, 176 L. Ed. 2d 158 (2010), "displaced the rationale in *Bateman*, to the extent that when a creditor has notice that a plan proposes to modify the rights of a creditor and the creditor fails to object to confirmation or timely appeal, the confirmed plan remains enforceable and binding on the creditor." Appellee's Br. at 10 (citing *Espinosa*, 559 U.S. at 275). We disagree.

In *Espinosa*, a debtor sought to discharge the interest that had accrued on his student-loan debt. He did so even though he did not show "undue hardship" in an adversary proceeding—a showing required to discharge certain student-loan debts. 559 U.S. at

263-64 (citing 11 U.S.C. §§ 523(a)(8), 1328; Fed. R. Bankr. P. 7001(6)). The student-loan creditor received notice of the plan but did not object based on the debtor's failure to show undue hardship or initiate an adversary proceeding. *Id.* at 265. And the bankruptcy court confirmed the debtor's plan. *Id.* After the debtor completed payments on the principal he owed, the court discharged the accrued interest due the creditor. *Id.* at 265-66. Six years after the debt had been discharged (and ten years after the initial confirmation), the student-loan creditor filed a motion under Federal Rule of Civil Procedure 60(b)(4) seeking to set aside as void the bankruptcy court's order confirming the plan. *Id.* at 266.

The Supreme Court held the bankruptcy court's confirmation order was not "void" under Rule 60(b)(4). It explained that "[a] judgment is not void . . . simply because it is or may have been erroneous," and a Rule 60(b)(4) motion "is not a substitute for a timely appeal." *Id.* at 270 (citations omitted). Instead, *Espinosa* held that Rule 60(b)(4) applies only when an error that affects jurisdiction or that affects due process by depriving parties of notice occurs. *Id.* at 271.

As we explain below, *Espinosa* has no bearing on the release of a lien after a confirmed plan erroneously modifies a homestead-mortgagee's rights. And we do not read *Espinosa* as having abrogated *Bateman* for five reasons.

First, the Supreme Court expressly limited *Espinosa*'s holding to collateral challenges to confirmed

Chapter 13 plans under Federal Rule of Civil Procedure 60(b)(4). *Espinosa*, 559 U.S. at 269 n.8 ("We express no view on the terms upon which other provisions of the Bankruptcy Rules may entitle a debtor or creditor to postjudgment relief.").[14] Bozeman's case does not arise in the context of a Rule 60(b)(4) motion, and that is an important difference for two reasons: (1) as we've noted, *Espinosa* expressly does not apply outside the Rule 60(b)(4) context; and (2) the practical difference between the procedural posture of a Rule 60(b)(4) motion and the situation in *Bateman* renders *Espinosa*'s reasoning inapplicable to the *Bateman* situation.

We explain what we mean by this second reason in our second point: *Bateman* emerged in a significantly different procedural posture than *Espinosa.* In *Espinosa*, the creditor brought its Rule 60(b)(4) motion challenging the discharge order ten years after the debtor's plan had been confirmed and six years after his debt had been discharged. *Espinosa*, 559 U.S. at 265-66. In *Bateman*, by contrast, the creditor brought its challenge after plan confirmation but *before* the underlying debt had been discharged. *See Bateman*, 331 F.3d at 823. So though the challenge was collateral

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[14] In *In re Le Centre on Fourth, LLC*, we applied *Espinosa* to a bankruptcy dispute emerging outside the Rule 60(b) context. *See Jackson v. LeCentre on Fourth, LLC* (*In re Le Centre on Fourth, LLC*), 17 F.4th 1326, 1334 (11th Cir. 2021). But in *Le Centre*, we relied on *Espinosa* for its holding concerning the notice due a creditor to satisfy due process. *Id.* (discussing *Espinosa*, 559 U.S. at 272). We did not consider or address *Espinosa*'s impact, if any, on the antimodification provision.

in one sense (as it related to the lawfulness of the plan), it was not in another (as it related to the amount of the debt to be discharged upon completion of the plan). The same is true here: though MCS did not object to Bozeman's plan before confirmation, it timely objected to and appealed the bankruptcy court's decision to release its lien. And unlike the creditor in *Espinosa*, MCS did not bring its challenge years after the fact under Rule 60(b)(4).

Third, a fair reading of *Espinosa* confirms that the Court was primarily concerned with the meaning of a "void" judgment under Rule 60(b)(4). The Court held that a judgment is "void" under that provision "only in the rare instance where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard." 559 U.S. at 271. *Espinosa* went on to explain that neither such circumstance applied in that case, and it rejected the creditor's arguments urging the Court to "expand the universe of judgment defects that support Rule 60(b)(4) relief." *Id.* at 273. Even though the Court agreed with the creditor that the bankruptcy court made a legal error, the Court held that the error did not "render [the bankruptcy court's] subsequent confirmation order void for purposes of Rule 60(b)(4)." *Id.* at 274. So at every opportunity, *Espinosa* discussed its holding in the context of Rule 60(b)(4) and the meaning of "void." In short, the opinion did not purport to decide more than the

appropriate scope of Rule 60(b)(4) and the meaning of "void" when it discussed the effect of a confirmed plan.[15]

Fourth, our decision in *Bateman* did not rest on the premise that the plan there was unlawfully confirmed, and therefore, ripe for collateral attack. In fact, we specifically rejected that suggestion. *See Bateman*, 331 F.3d at 825 n.4 ("[W]hether the [p]lan was confirmed in violation of § 1322 or § 1325 is irrelevant to the disposition of this case, because the ***res judicata*** effect of § 1327 prohibits the collateral attack of a confirmed plan.") (citation omitted). We went as far as to address and reject the creditor's argument "that because the [p]lan did not meet the requisites of § 1325 . . . the [p]lan cannot be afforded ***res judicata*** effect under § 1327." *Id.* at 829. We even acknowledged that the "[p]lan was improperly confirmed because it conflicted with § 1322's mandatory provisions," and noted that "[h]ad [the creditor] objected to or appealed from the [p]lan's confirmation, it would have prevailed without question, given the facts presented to us." *Id.* at 830. Still, we held that because the creditor "did not do so," it remained bound by § 1327. *Id.* In this sense, *Bateman* and *Espinosa* are at peace with each other (and with our decision here) in their recognition that

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[15] Following its discussion of Rule 60(b)(4), *Espinosa* also considered the statutory requirements for confirming a plan that discharges student-loan debt. 559 U.S. at 276-78 (discussing 11 U.S.C. §§ 523(a)(8), 1328(a)(2)). Neither this case nor *Bateman* involves § 523(a)(8) or § 1328(a)(2), so we do not address *Espinosa*'s impact on the interpretation of those provisions.

confirmed bankruptcy plans are immune from collateral attack, even if they were erroneously confirmed.

Fifth, our decision in *Dukes* reaffirmed our holding in *Bateman* to prohibit discharge of homestead-mortgage debt if doing so would modify a creditor's rights in violation of the antimodification provision—even though the plan erroneously provided for the discharge. *Dukes*, 909 F.3d at 1321 (citing *Bateman*, 331 F.3d at 822); *see also Hope v. Acorn Fin., Inc.*, 731 F.3d 1189, 1194 (11th Cir. 2013) (relying on *Bateman* after *Espinosa*). Because we decided *Dukes* after the Supreme Court issued *Espinosa*, even if we thought *Espinosa* compelled a different outcome, we would still be bound by *Dukes*. *See Keohane v. Fla. Dep't of Corr. Sec'y*, 981 F.3d 994, 1005 (11th Cir. 2020) (Rosenbaum, J., dissenting from the denial of rehearing en banc) ("[W]e have held that the prior-precedent rule binds later panels even when the prior panel's decision failed to mention controlling Supreme Court precedent and reached a holding in conflict with that precedent.") (citing *Smith v. GTE Corp.*, 236 F.3d 1292, 1302-03 (11th Cir. 2001)).

At bottom, we are convinced that our decision in *Bateman* remains intact after the Supreme Court's decision in *Espinosa*. And as we explained earlier, *Bateman* requires us to conclude that releasing MCS's lien would improperly modify its rights and therefore violate § 1322(b)(2).

B. The finality provision does not override the antimodification provision to allow for the release of MCS's lien after the bankruptcy court's confirmation of Bozeman's unlawful Plan.

MCS's challenge also raises the question of whether the ***res judicata*** effect of the confirmation order requires release of MCS's lien. We hold it does not.

The Bankruptcy Code makes clear that confirmation of a plan carries real weight. Specifically, the Code mandates that "[t]he provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan." 11 U.S.C. § 1327(a). The upshot of this provision is "[c]onfirmation has preclusive effect, foreclosing relitigation of any issue actually litigated by the parties and any issue necessarily determined by the confirmation order." *Bullard v. Blue Hills Bank*, 575 U.S. 496, 502, 135 S. Ct. 1686, 191 L. Ed. 2d 621 (2015) (citation omitted).

We have also explained that "[p]reclusion under § 1327 is somewhat harsher than common law preclusion" and that a confirmed plan "is given the same effect as any district court's final judgment on the merits." *Bateman*, 331 F.3d at 830; *Wallis v. Justice Oaks II, Ltd.* (*In re Justice Oaks II, Ltd.*), 898 F.2d 1544, 1550 (11th Cir. 1990). A confirmed plan has this effect "even if the plan does not, by its terms, comply with the Bankruptcy Code." *Hope*, 731 F.3d at 1194.

As we have explained, the Plan at issue here violated the antimodification provision. So it should not have been confirmed. As a reminder, the Plan impermissibly allowed Bozeman to pay only MCS's arrearages claim and ignore the remaining balance Bozeman owed on her mortgage. But despite this error, because of the Code's finality provision, Bozeman's Plan retains preclusive effect and is therefore valid and enforceable.

We explored the importance of finality of confirmed plans in *Bateman.* There, although the creditor failed to object to a legally erroneous plan, it later filed a motion to dismiss the bankruptcy proceeding because the plan never should have been confirmed. 331 F.3d at 833. Though we agreed the plan should not have been confirmed, we rejected the argument that the bankruptcy proceeding should be dismissed for that reason. *Id.* We noted that the creditor had several opportunities to raise its objections to the plan before the plan was confirmed and obtained preclusive effect. *Id.* And we expressed concern that the prejudice associated with unwinding the plan "would far exceed the possible benefit." *Id.*

For largely the same reasons, MCS cannot now complain about infirmities with the Plan. MCS had ample opportunity to participate in the underlying proceeding and file a timely amended claim with the full balance it was owed. MCS also could have objected to the Plan's confirmation and argued that the Plan impermissibly modified its rights. And MCS should have noticed, far earlier than it did, that Bozeman's Plan was structured as a full-payment plan rather

than a cure-and-maintain plan. Not only did the Plan, by its own terms, indicate that it was a full-payment plan, but also MCS received only one monthly payment from Bozeman (as it would under a full-payment plan) rather than two monthly payments (as it would under a cure-and-maintain plan). Plus, the amount of that monthly payment did not equal the $454.00 monthly payment that the Plan seemingly noted MCS was due.

But MCS's errors do not change the fact that the Code still affords special protections to homestead-mortgage holders' rights. So even though our cases have recognized the importance of finality, they have also said time and again that secured liens survive bankruptcy proceedings. *Holloway v. John Hancock Mut. Life Ins. Co.* (*In re Holloway*), 81 F.3d 1062, 1063 n.1 (11th Cir. 1996) ("[D]ischarges in bankruptcy do not affect liability in rem. Thus, liens on property remain enforceable after discharge unless avoidable under the Bankruptcy Code."). In *Bateman*, for example, we held that the creditor's secured lien "is unaffected by the Plan and survives the bankruptcy unimpaired." 331 F.3d at 832. This conclusion flowed naturally from the overarching principle that "a secured creditor need not do anything during the course of the bankruptcy proceeding because it will always be able to look to the underlying collateral to satisfy its lien."[16] *Id.* at 827.

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[16] We relied on the lien's survival to demonstrate that the creditor will not face significant prejudice from the erroneously confirmed plan, nor will the debtor receive an unwarranted windfall. *Bateman*, 331 F.3d at 833.

We also reached a similar conclusion in *In re Thomas*, in which we held the creditor retained its lien on a mobile home even though the debtor's interest was discharged through bankruptcy. *Southtrust Bank of Ala., N.A. v. Thomas* (*In re Thomas*), 883 F.2d 991, 997 (11th Cir. 1990). And in *Dukes*, we suggested in dicta that, because of the antimodification provision, a creditor's mortgage would "pass[] through the bankruptcy unaffected even though no proof of claim was filed." 909 F.3d at 1322; *see also SEC v. Wells Fargo Bank, N.A.*, 848 F.3d 1339, 1344 (11th Cir. 2017) ("In the bankruptcy context, a secured creditor's lien remains intact through the bankruptcy, regardless of whether the creditor files a proof of claim.").

Under our case law, then, we must hold that MCS's lien survived Bozeman's bankruptcy. Based on the terms of the mortgage and Alabama law, MCS had the substantive right to collect the full balance it lent to Bozeman as well as the right to hold its lien on the property as collateral until the debt had been paid. And under the antimodification provision, Bozeman's Plan could not legally modify those rights.

Although MCS did not timely object to the Plan's confirmation or appeal the discharge of Bozeman's debt, MCS did oppose Bozeman's motion to release its lien, and it timely appealed the bankruptcy court's order granting her motion. And because releasing MCS's lien before MCS receives full payment would impermissibly modify MCS's rights, MCS's lien must survive the bankruptcy proceeding. While the finality provision confirms that it is too late to alter the Plan, it is

not too late for MCS to invoke the Code's special protection for homestead mortgagees.

Our decision here follows directly from *Bateman*. In that case, we acknowledged that the creditor should have raised its challenges earlier and that, if it had, the erroneous plan would not have been confirmed. 331 F.3d at 833. And the creditor's failure carried consequences, as we rejected the creditor's motion to dismiss the debtor's plan, holding that the plan remained valid and enforceable. *Id.* Still, though, we held that the creditor's secured claim could not be satisfied until the debtor paid the entire claim amount because "to permit otherwise would deny the effect of 11 U.S.C. § 1322(b)(2), which, in effect, prohibits modifications of secured claims for mortgages on a debtor's principal residence." *Id.* at 822.

The same is true here. MCS should have raised its challenges earlier, and it could have prevented confirmation of Bozeman's Plan. But we cannot hold that MCS's lien on the property can be deemed satisfied because the antimodification provision protects MCS's right to receive full recovery, regardless, and MCS has raised a timely challenge to the order releasing its lien.[17]

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[17] Our opinion expressly does not consider a case in which a creditor belatedly seeks relief from an order releasing its lien.

IV.

We hold that release of MCS's lien before its loan had been repaid in full violates § 1322(b)(2)'s antimodification clause. Until MCS is paid in full, its lien remains intact, and the Bankruptcy Code's finality provision does not change that fact.[18]

REVERSED AND REMANDED.

[18] Because MCS did not appeal the bankruptcy court's decision to discharge Bozeman from bankruptcy, we do not consider or disturb that decision.

Mohon v. Agentra LLC

United States District Court for the District of New Mexico

January 17, 2023, Filed

No. 1:18-cv-00915-MIS-SCY

Counsel: For Barbara Mohon, Plaintiff: Sidney Childress, LEAD ATTORNEY, Sid Childress, Lawyer, Santa Fe, NM USA.

For TracyAnn Nicole Hamilton, Defendant: David J. Kaminski, LEAD ATTORNEY, Carlson & Messer, LLP, Los Angeles, CA USA; Stephen A. Watkins, LEAD ATTORNEY, Carlson & Messer, Los Angeles, CA USA.

Judges: MARGARET STRICKLAND, UNITED STATES DISTRICT JUDGE.

Opinion by: MARGARET STRICKLAND

Opinion

MEMORANDUM OPINION AND ORDER GRANTING MOTION TO SET ASIDE DEFAULT JUDGMENT

THIS MATTER is before the Court on "Motion and Memorandum of Law in Support of Defendant Tracy-ann Nicole Hamilton's Motion to Set Aside Default Judgment" [ECF No. 113], filed August 11, 2022, by Defendant TracyAnn Nicole Hamilton ("Defendant Hamilton"). Plaintiff Barbara Mohon ("Plaintiff") responded, and Defendant Hamilton replied. ECF Nos. 115, 116. The Court, having considered the parties'

submissions, the record, and the relevant law,[1] finds that the Motion is well-taken and should be **GRANTED**.

BACKGROUND

On August 1, 2018, Plaintiff filed this action in New Mexico state court against Agentra LLC, Tracyann Nicole Hamilton, and Jane Does 1-10 alleging violations of (i) the Telephone Consumer Protection Act of 1991 ("TCPA"), 47 U.S.C. § 227 *et seq.*; (ii) nuisance, trespass to chattels, and a civil conspiracy under New Mexico common law; and (iii) Section 22 of the New Mexico Unfair Practices Act, N.M. Stat. Ann. § 57-12-22 (1978). ECF No. 1-1 at 20-36. Specifically, Plaintiff alleges Defendants operated and profited from "a massive, nationwide robo-calling conspiracy designed to sell a type of discounted medical benefit plan" in violation of the law. *Id.* at 23. According to Plaintiff, Defendant Hamilton acted as an insurance broker and telemarketer on behalf of Defendant Agentra LLC, an insurance brokerage agency. *See id.* at 25, 29.

On August 2, 2018, a state court summons was issued for Defendant Hamilton at 7971 Riviera Blvd., Apt. #101, Miramar, FL 33023 ("Riviera Blvd. address"), a business address allegedly associated with Defendant Hamilton. *Id.* at 40-41, 45. However,

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[1] The Court determines that this matter is suitable for disposition without oral argument or an evidentiary hearing, contrary to Defendant Hamilton's request. ECF 116 at 9-10; D.N.M.LR-Civ. 7.6(a).

Plaintiff filed a motion on September 9, 2018, for alternative service of process on Defendant Hamilton, arguing that she was evading service of process at the aforementioned location. *Id.* at 44. In support, Plaintiff attached the invoice and affidavit of the professional process server hired to serve process on Defendant Hamilton. *Id.* The affidavit by the process server states:

> Received by Aallen Bryant & Associates, Inc. on the 13th day of August, 2018 at 4:00 pm to be served on Tracyann Nicole Hamilton, 7971 Riviera Blvd #101, Miramar, FL 33023.
>
> I, Hector Castro, being duly sworn, depose and say that on the 24th day of August, 2018 at 1:23 pm, I:
>
> Posted by attaching a true copy of this Summons; Request for Jury; Complaint for Violations of The Telephone Consumer Protection Act, The Unfair Practices Act and Torts with the date and hour of service endorsed thereon by me, to a conspicuous place on the property described.
>
> Additional Information pertaining to this Service:
>
> Posted per client instruction
> 8/14 @ 11:12 am Dean Hamilton Insurance company at this location Tracy not in maybe in after 2 pm but not sure she has no set time. 8/14 @ 2:15 pm Not in. 8/15 @ 10:58 am - Locked. Ring doorbell by front door, spoke to female through the ringdoor bell device stated Tracy is on vacation won't be back until after Monday. 8/21 @ 10:17 am - Spoke to another employee who state Tracy was terminated months ago, when ask why did someone else

> claim she's on vacation he basically stated that was a new employee. 8/21 @ 10:53 am — Per sales person claims that they are all 1099's employees and Tracy never comes in. 8/24 @ 1:23pm - Posted.

Id. at 50 (reference to [sic] omitted). Plaintiff elaborated that the process server "must speak to the occupants of the business location . . . through an intercom system at the door" because "they will allow no other access." *Id.* at 44-45.

Additionally, Plaintiff maintained that public records from the State of Florida confirmed that Defendant Hamilton was a licensed insurance broker with a business location of "Miramar, Florida." *Id.* at 45, 51. Further, Plaintiff attached additional public records from the State of Florida that indicated Defendant Hamilton was the "owner" of "Dean-Hamilton Insurance, LLC." *Id.* at 52. The document listed Dean-Hamilton Insurance, LLC's current principal place of business as the Riviera Blvd. address and was electronically signed by Defendant Hamilton on January 10, 2018. *Id.*

As such, Plaintiff requested the following alternate method of service of process be permitted:

> 1. The process server shall make another attempt at personal service or hand-delivery of the Summons and Complaint in this matter on Defendant Tracyann Nicole Hamilton at 7971 Riviera Blvd #101 in Miramar, Florida. If personal service is unsuccessful the process server shall leave the process with or hand the process to any person who appears to be in charge at 7971

> Riviera Blvd #101 in Miramar, Florida, along with a copy of Plaintiff's Motion for Alternative Service and the Court's Order Authorizing Alternative Service of Process. If the process server is unable to leave the process with or hand the process to any person who appears to be in charge at 7971 Rivera Blvd #101 in Miramar, Florida, the process server shall post the Summons and Complaint in this matter on a conspicuous place at the property, along with a copy of Plaintiff's Motion for Alternate Service and the Court's Order Authorizing Alternate Service of Process.
>
> 2. Plaintiff's attorney shall also email the Summons, Plaintiff's Complaint, Plaintiff's Motion for Alternate Service of Process and the Court's Order Authorizing Alternate Service of Process, on two (2) separate occasions on two (2) separate days, to: Tracyann@deanhamiltoninsurance.com[.] Plaintiff's attorney shall thereafter file a Certificate of Service.

Id. at 46. Plaintiff argued that Defendant Hamilton would receive actual notice of emails directed to "tracyann@deanhamiltoninsurance.com" since Plaintiff received an email on July 23, 2018, on which this email address was carbon copied. *Id.* at 35, 45.

On September 14, 2018, the state court granted the motion and found that "[b]ased on the exhibits and attachments to the motion . . . substantial evidence [demonstrates] that Defendant's place of business is 7971 Riviera Blvd #101 in Miramar, Florida but she has evaded personal service of process there." *Id.* at 60. The state court held "the alternate method of service

of process authorized by this Order is reasonably calculated under all the circumstances to apprise Defendant Tracyann Nicole Hamilton of the existence and pendency of this action and to afford her a reasonable opportunity to appear and defend." *Id.*

This action was then removed to federal court on September 28, 2018. ECF No. 1 at 1. The Court notes that Plaintiff did not request issuance of a federal court summons after removal. Subsequently, on October 25, 2018, an affidavit of service was entered stating:

> I, Hector Castro, being duly sworn, depose and say that on the 15th day of October, 2018 at 4:06 pm, I:
>
> Posted by attaching a true copy of this Summons; Request for Jury; Complaint for Violations of The Telephone Consumer Protection Act; Exhibits; The Unfair Practices Act and Torts; Motion for Alternative Service of Process on Defendant Tracy Ann Nicole Hamilton; Order Authorizing Alternate Service of Process with the date and hour of service endorsed thereon by me, to a conspicuous place on the property described.
>
> Additional Information pertaining to this Service:
>
> This was served in accordance with the Order for Alternate Service. attempted 10/4 @ 11:50 AM, no answer; attempted 10/10 @ 2:30 PM, no answer[.]

ECF No. 13 at 1. Additionally, a certificate of service was entered on December 2, 2018, to establish that Plaintiff sent two emails on two separate days to

"tracyann@deanhamiltoninsurance.com" in accordance with the state court's order. ECF No. 20 at 1-3.

On January 7, 2019, Plaintiff requested the Clerk of the Court enter default against Defendant Hamilton, which the Clerk of the Court entered on January 9, 2019. ECF Nos. 24 at 1-3; 26 at 1. Plaintiff then moved for a default judgment against Defendant Hamilton only on her claims for statutory damages under the TCPA and waived the rest of her claims against Defendant Hamilton. ECF No. 25 at 2. On June 5, 2019, the Court granted Plaintiff's motion for default judgment, based on the Court's conclusion that the record established that Defendant Hamilton "defaulted for her failure to appear, answer or respond to Plaintiff's Complaint despite receiving service of process." ECF No. 39 at 1. Consequently, the Court entered default judgment in favor of Plaintiff and against Defendant Hamilton in the amount of $90,000.00, with interest. *Id.* at 2.

On August 11, 2022, Defendant Hamilton, claiming that she had no prior knowledge of the lawsuit, filed the underlying Motion to set aside the default judgment according to Rules 55(c) and 60(b) of the Federal Rules of Civil Procedure. ECF No. 113. Plaintiff responded, and Defendant Hamilton replied. ECF Nos. 115, 116.

PARTIES' ARGUMENTS

Defendant Hamilton argues Plaintiff's default judgment is void and offends due process as she was

not properly served. ECF No. 113 at 3. Specifically, Defendant Hamilton contends she did not receive actual notice of the lawsuit and default judgment until on or about July 11, 2022, when she learned her TD Ameritrade account had been garnished by Plaintiff to satisfy the default judgment. ECF No. 113-1 at 1-2. Further, Defendant Hamilton states that she has not worked at the Riviera Blvd. address since 2017 and has never resided at the Riviera Blvd. address. *Id.* at 1. As such, Defendant Hamilton argues there was no proper service under either federal or New Mexico law. ECF No. 113 at 3-4.

Plaintiff, however, argues Defendant Hamilton was adequately served, both via email and at her business address, and she had actual knowledge of the summons and complaint prior to entry of judgment. ECF No. 115 at 3. Additionally, Plaintiff rebuts Defendant Hamilton's contention that she has not worked at the Riviera Blvd. address since 2017. *Id.* at 7. Plaintiff references from the record and attaches as exhibits multiple documents, including public records from the State of Florida, that indicate from 2017 to 2022 the Riviera Blvd. address was Defendant Hamilton's business address. ECF Nos. 11 at 22; 115-1 at 5; 115-2 at 1; 115-3 at 2, 4; 115-4 at 2-3, 5; 115-5 at 1; 115-6 at 1; 115-7 at 1; 115-8 at 1-2; 115-9 at 1; 115-10 at 3; 115-11 at 2; 115-12 at 1; 115-13 at 1; 115-14 at 1; 115-15 at 1; 115-16 at 8. Many of these documents list Defendant Hamilton as the "owner" and registered agent of "Dean-Hamilton Insurance, LLC" and "Dean-Hamilton Socioeconomic Development, Corp." with a

principal place of business at the Riviera Blvd. address and are signed by Defendant Hamilton. Further, Plaintiff furnishes documents to suggest "tracyann@deanhamiltoninsurance.com" was Defendant Hamilton's email address. ECF Nos. 1 at 35; 11 at 22.

In rebuttal, Defendant Hamilton provides affidavits that state the placement of the Riviera Blvd. address on public filings was a clerical error and that her business no longer operated at that location by early 2018. ECF Nos. 116 at 6-7; 116-1 at 2-4; 116-4 at 1-2. Further, Defendant Hamilton argues Plaintiff fails to demonstrate receipt of any emails sent to "tracyann@deanhamiltoninsurance.com" and that this email address was inactive on November 30, 2018 and December 2, 2018, when Plaintiff emailed the state court summons and complaint. ECF Nos. 116 at 6, 8-9; 116-1 at 3.

LEGAL STANDARD

Default judgments are generally disfavored in light of the objective that "every effort should be made to try cases on their merits." *Greenwood Explorations, Ltd. v. Merit Gas & Oil Corp.,* 837 F.2d 423, 426 (10th Cir. 1998). Under Federal Rule of Civil Procedure 55(c), a district court "may set aside a final default judgment under Rule 60(b)." Federal Rule of Civil Procedure 60(b)(4) provides that "[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding [if] . . . the judgment is void. . . ."

A final judgment is void under Federal Rule of Civil Procedure 60(b)(4) only "where [the] judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard." *United States Aid Funds, Inc. v. Espinosa,* 559 U.S. 260, 271, 130 S. Ct. 1367, 176 L. Ed. 2d 158 (2010). The right to relief from a void judgment is mandatory. *V. T. A., Inc. v. Airco, Inc.,* 597 F.2d 220, 224 n.8 (10th Cir. 1979). And, unlike its counterparts, Federal Rule of Civil Procedure 60(b)(4) is not subject to time limitations, nor does the moving party need to establish a meritorious defense. *Id.* at 224; *Covington Indus., Inc. v. Resintex A. G.,* 629 F.2d 730, 733 n.3 (2d Cir. 1980).

For example, a judgment is void and must be set aside if there is no personal jurisdiction over the defendant. *Myzer v. Bush,* 750 F. App'x 644, 648 (10th Cir. 2018). A court lacks personal jurisdiction over a defendant if there is insufficient service of process. *Emps. Reinsurance Corp. v. Bryant,* 299 U.S. 374, 376, 57 S. Ct. 273, 81 L. Ed. 2d 289 (1937). Federal Rule of Civil Procedure 4 governs service of process and "provides the mechanism by which a court . . . asserts jurisdiction over the person of the party served." *Okla. Radio Assocs. v. F.D.I.C.,* 969 F.2d 940, 943 (10th Cir. 1992). Unless service is waived, proof of service must be made to the court. Fed. R. Civ. P. 4(l). Thus, "a judgment entered without notice or service is constitutionally infirm." *Peralta v. Heights Medical Center, Inc.,* 485 U.S. 80, 84, 108 S. Ct. 896, 99 L. Ed. 2d 75 (1988).

DISCUSSION

The Court addresses Defendant Hamilton's argument that the final judgment is void pursuant to Federal Rule of Civil Procedure 60(b)(4). For the Court to have proper personal jurisdiction over Defendant Hamilton, Plaintiff must have followed the edicts of Federal Rule of Civil Procedure 4 and due process.

As an initial matter, Federal Rule of Civil Procedure 4(a) requires the summons to have the Court's name, the Clerk of the Court's signature, the Court's seal, and the time within which the defendant must appear and defend. Fed. R. Civ. P. 4(a)(1)(A), (D), (F)-(G). The summons that Plaintiff attempted to serve on Defendant Hamilton after removal does not satisfy those requirements. ECF Nos. 13 at 2; 20 at 2-3. Rather, Plaintiff used the state court summons instead of requesting and serving a federal one. The state court summons has the state court's name and seal, the state Clerk of Court's signature, and indicates the time under New Mexico law within which a defendant must appear and defend. *Compare* N.M. Dist. Ct. R. Civ. P. 1-012(A) ("A defendant shall serve his answer within thirty (30) days after the service of the summons and complaint upon him.") *with* Fed. R. Civ. P. 12(a)(1)(A)(i) ("A defendant must serve an answer . . . within 21 days after being served with the summons and complaint. . . ."). Additionally, a state court summons becomes null and void once a case is removed to federal court. *Beecher v. Wallace,* 381 F.2d 372, 373 (9th Cir. 1967); *Ibarra v. City of Clovis,* No. 4-cv-1253, 2005 U.S. Dist. LEXIS 62669, 2005 WL 8163456, at *2

(D.N.M. Dec. 14, 2005). Thus, the use of the state court summons by Plaintiff after removal was ineffective per Federal Rule of Civil Procedure 4(a).

Next, the Court determines whether service of process itself was proper. Federal Rule of Civil Procedure 4(e)(2) states that service on an individual may be accomplished by:

> (A) delivering a copy of the summons and of the complaint to the individual personally;
>
> (B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or
>
> (C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

Alternatively, Federal Rule of Civil Procedure 4(e)(1) provides that an individual may be served by "following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made. . . ." As Plaintiff does not assert that service of process was effectuated according to Federal Rule of Civil Procedure 4(e)(2), the Court determines whether process was made according to New Mexico law.

New Mexico law lays out a hierarchy of methods for service of process on an individual. N.M. Dist. Ct. R. Civ. P. 1-004(F) comm. commentary ("A hierarchy of methods of service has been established. In some cases, a listed method of service cannot be used until other

methods of service are attempted unsuccessfully."). First, New Mexico Rule of Civil Procedure 1-004(F)(1)(a) requires service to be attempted on the individual personally. N.M. Dist. Ct. R. Civ. P. 1-004(F)(1)(a)("Personal service of process shall be made . . . to the individual personally; or if the individual refuses to accept service, by leaving the process at the location where the individual has been found; and if the individual refuses to receive such copies or permit them to be left, such action shall constitute valid service. . . ."). Additionally, New Mexico Rule of Civil Procedure 1-004(F)(1)(b) allows service of process "by mail or commercial courier service as provided in" New Mexico Rule of Civil Procedure 1-004(E)(3).[1]

Next, New Mexico Rule of Civil Procedure 1-004(F)(2) requires service to be made on "some person residing at the usual place of abode of the defendant who is over the age of fifteen" and for service to be sent by first class mail to "the defendant's last known mailing address." Only after service of process is attempted by New Mexico Rule of Civil Procedure 1-004(F)(1) and (F)(2), may (F)(3) be invoked. New Mexico Rule of Civil Procedure 1-004(F)(3) permits a copy of the process to be delivered to the defendant's "actual place of business or employment . . . to the person apparently in charge" and for service to be mailed "to the defendant

[1] New Mexico Rule of Civil Procedure 1-004(E)(3) permits for service by mail "provided that the envelope is addressed to the named defendant" and "the defendant or a person authorized by appointment . . . to accept service of process upon the defendant signs a receipt for the envelope or package containing the summons and complaint. . . ."

at the defendant's last known mailing address and at the defendant's actual place of business or employment."

Plaintiffs' process server did not attempt to personally serve Defendant Hamilton or to serve some person at Defendant Hamilton's home address. *See* N.M. Dist. Ct. R. Civ. P. 1-004(F)(1)-(2). Nor does the record reflect that the summons and complaint were mailed to Defendant Hamilton at her home address, the Riviera Blvd. address, or any other address. Pursuant to New Mexico Rule of Civil Procedure 1-004(F)(3), only if a plaintiff attempts service personally or at the defendant's residence may the plaintiff serve the defendant at their actual place of business. *See, e.g., Diaz v. United States AG*, No. 14-cv-1086, 2015 U.S. Dist. LEXIS 196597, 2015 WL 13307288, at *3 (D.N.M. Aug. 4, 2015); *Bodenner v. Martin*, No. 12-cv-601, 2012 U.S. Dist. LEXIS 208585, 2012 WL 12845649, at *7 (D.N.M. Nov. 30, 2012); *Bagley v. Costa*, No. 6-cv-1101, 2007 U.S. Dist. LEXIS 112698, 2007 WL 9734851, at *1 (D.N.M. Feb. 8, 2007); *Edmonds v. Martinez*, 2009-NMCA 072, 146 N.M. 753, 215 P.3d 62, 66 (N.M. Ct. App. 2009); *Ortiz v. Shaw*, 2008-NMCA 136, 145 N.M. 58, 193 P.3d 605, 610-11 (N.M. Ct. App. 2008). Irrespective of whether the Riviera Blvd. address was Defendant Hamilton's actual place of business, Plaintiff failed to comply with the prescribed hierarchy set forth in New Mexico Rule of Civil Procedure 1-004(F).

Nevertheless, the state court granted Plaintiff leave to effectuate alternative service of process on Defendant Hamilton. ECF No. 1-1 at 60. New Mexico Rule

of Civil Procedure 1-004(J) provides that, where it has been shown by affidavit that service cannot otherwise be reasonably made under New Mexico Rule of Civil Procedure 1-004, a moving party may seek leave of the court to effect service "by any method or combination of methods . . . that is reasonably calculated under all of the circumstances to apprise the defendant of the existence and pendency of the action and afford a reasonable opportunity to appear and defend." Accordingly, a party requesting service on an individual by unconventional methods must demonstrate that the hierarchy outlined in New Mexico Rule of Civil Procedure 1-004(F) was followed diligently, although their attempts were unsuccessful. *Soto v. Vill. of Milan Police Dep't*, No. 10-cv-43, 2010 U.S. Dist. LEXIS 147648, 2010 WL 11619168, at *2 (D.N.M. Sept. 17, 2010); *Martinez v. Segovia*, 2003-NMCA 023, 133 N.M. 240, 62 P.3d 331, 338 (N.M. Ct. App. 2002).

Plaintiff's motion in state court and accompanying affidavit by the process server for alternative service of process failed to establish that process could not otherwise be reasonably made under Rule 1-004(F). First, Plaintiff did not allege any attempt to serve Defendant Hamilton personally or by mail as required by New Mexico Rule of Civil Procedure 1-004(F)(1). Nor did Plaintiff allege that any such attempts would be unsuccessful. Second, Plaintiff did not allege any attempt to serve Defendant Hamilton at her home address or mail the summons and complaint to Defendant Hamilton's last known mailing address as required by New Mexico Rule of Civil Procedure 1-004(F)(2).

Nor did Plaintiff allege that Defendant Hamilton's home address was unascertainable. *See, e.g., Ellis v. United States,* No. 20-cv-971, 2021 WL 1999492, at *2 (D.N.M. May 19, 2021). Finally, Plaintiff did not allege any attempt for service to be mailed to Defendant Hamilton at her last known mailing address and actual place of business as required by New Mexico Rule of Civil Procedure 1-004(F)(3). Nor did Plaintiff allege that doing so would be unfeasible. Accordingly, Plaintiff's motion in state court and accompanying affidavit did not make the requisite showing to authorize alternative methods of service under New Mexico Rule of Civil Procedure 1-004(J).

After removal of an action from state court, the federal court may redetermine the propriety of state-court orders concerning the sufficiency of process. 14C Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 3738 (4th ed.). A federal court is free to reconsider a state court order and treat the order as it would any interlocutory order it might itself have entered. *Nissho-Iwai American Corp. v. Kline,* 845 F.2d 1300, 1303-04 (5th Cir. 1988). In light of this and the Court's determination that Plaintiff's motion in the state court did not establish the requisite showing under New Mexico Rule of Civil Procedure 1-004(J), the Court finds that the alternate service of process on Defendant Hamilton failed to comport with New Mexico law and due process. *See Mullane v. Cent. Hanover Bank & Tr. Co.,* 339 U.S. 306, 314-15 (1950); *Edmonds,* 215 P.3d at 67.

Lastly, in New Mexico, actual notice of service is not a substitute for service of process on an individual in accordance with New Mexico Rule of Civil Procedure 1-004(F). *Exec. Consulting, Inc. v. Kilmer,* 931 F. Supp. 2d 1139, 1141 (D.N.M. 2013); *Trujillo v. Goodwin,* 116 P.3d 839, 841 (N.M. Ct. App. 2005).

In sum, the Court determines the summons and service of process on Defendant Hamilton was ineffective, and thus there was no personal jurisdiction over her. Accordingly, the final judgment is void under Federal Rule of Civil Procedure 60(b)(4).

CONCLUSION

For the foregoing reasons, it is **HEREBY ORDERED** that "Motion and Memorandum of Law in Support of Defendant Tracyann Nicole Hamilton's Motion to Set Aside Default Judgment" [ECF No. 113] is **GRANTED**.

It is **FURTHER ORDERED** that "Clerk's Entry of Default" [ECF No. 26] and "Default Judgment Against Defendant Tracyann Nicole Hamilton" [ECF No. 39] **SHALL** be set aside. Defendant Hamilton **SHALL** be permitted to participate in this case free of default judgment against her.

/s/ Margaret Strickland

MARGARET STRICKLAND

UNITED STATES DISTRICT JUDGE

Gupte v. Davis

United States District Court for the District of Connecticut

January 23, 2023, Decided; January 23, 2023, Filed

Civil No. 3:21-cv-880 (AWT)

Counsel: Pradeep B. Gupte, Plaintiff, Pro se, Columbia, CT.

For Kimberly Davis, HR-Director, Newington public schools, Newington Board of Education, Clare Salerno, Defendants: David S. Monastersky, LEAD ATTORNEY, Howd & Ludorf, LLC, Hartford, CT.

Judges: Alvin W. Thompson, United States District Judge.

Opinion by: Alvin W. Thompson

Opinion

RULING ON MOTION FOR SUMMARY JUDGMNENT

The pro se plaintiff, Pradeep Gupte, brings suit against defendants Kimberly Davis, Director of Talent Management for Newington Public Schools; Clare Salerno, Assistant Director of Student Services for Newington Public Schools; and the Newington Board of Education. In his Amended Complaint, the plaintiff claims that the defendants demoted him from his previous position as a paraeducator and subsequently terminated his employment because of his national origin in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended 42 U.S.C. § 2000e, et seq.; because of his age in violation of the Age Discrimination

in Employment Act ("ADEA"), 29 U.S.C. § 621, et seq.; and because of his disability in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, et seq. The plaintiff also claims that the defendants discriminated against him in violation 42 U.S.C. §§ 1981 and 1983, and that their conduct violated 18 U.S.C. § 1519.

For the reasons set forth below, the defendants' motion for summary judgment is being granted.

I. FACTUAL BACKGROUND

The plaintiff claims that defendant Kimberly Davis demoted him from a full-time position as a paraeducator with the Newington Public Schools to a part-time position as a daily substitute teacher. He also claims that Davis subsequently wrongfully terminated him from the substitute teacher position. The plaintiff claims that defendant Clare Salerno improperly deleted his name from the online management system for substitute teacher assignments and that defendant Davis engaged in conduct that constituted a "cover up." The plaintiff claims that both of these defendants took these actions against him because of his national origin, age, and disability.

On December 8, 2020, the plaintiff wrote an email to Cindy Campbell, Davis' administrative assistant, with the subject line "substitute teacher." The email stated: "Good morning, I am working as a paraeducator in NPS. Is it possible for you to make me a substitute teacher part[-]time/full[-]time in our school

system? Thank you for your consideration." Campbell forwarded that email to Davis, who contacted the plaintiff to arrange to meet with him. Subsequently, the plaintiff received a December 9, 2020 letter from the Assistant Superintendent of Schools stating: "This letter will confirm your transfer from your current Paraeducator position at Newington High School to a daily substitute effective Monday, December 14, 2020. If you have any questions, please contact my office at (860)665-8630." Defs.' Local Rule 56(a)1 Statement (ECF No. 67-1) Exh. A2 at 10. Thus, the plaintiff has failed to create a genuine issue of material fact as to whether the defendants demoted him from his position as a paraeducator.

On March 22, 2021, the plaintiff initiated a lawsuit against defendant Davis in Connecticut Superior Court. See Pradeep Gupte v. Kimberly Davis, UWY-CV21-5027858-S (Conn. Super. Ct. 2021). The plaintiff stated that he was suing Davis for the following reasons:

> I was unjust[ifiably] terminated by Newington Public Schools. Kim Davis (HR-Director) falsified the documents (copy attached). All other information is enclosed[.] I worked in that school system since about Nov 4, 2020. Kim Davis falsified the documents (for coverup) which is in violation of US fed code 18 U.S. Code § 1519.

Defs.' Local Rule 56(a)1 Statement (ECF No. 67-3) Exh. C1 at 3. With respect to the attached copy of "falsified" documents, the plaintiff wrote: "Falsified document by Kim Davis. I did[ ]not work on Dec 17, 2020. I am a

'per-diem' employee. I don't get vacation-pay either. Clare Salerno deleted my name 3 times from 'Aesop document' [and] that is why Kim Davis falsified the document [and] paid me for [one] day." Id. at 5.

A trial was held in Superior Court on June 4, 2021, after which the court entered judgment in favor of Davis. In the Order rendering judgment in favor of Davis, the court stated:

> The plaintiff asserts that the defendant, Kimberly Davis, wrongfully terminated his employment as a "per diem" employee for the Newington school system, and that the defendant falsified certain documents in violation of 18 U.S.C.[ ] § 1519. . . . The plaintiff also claims that in terminating his employment, the defendant discriminated against the plaintiff based on his national origin and/or heritage.

Defs.' Local Rule 56(a)1 Statement (ECF No. 67-3) Exh. C2 at 11-12.

The court found that "[a]t the hearing that took place . . . on June 4, 2021, Ms. Davis appeared and testified credibly that she terminated the plaintiff for the reasons set forth in her letter to the plaintiff dated January 12, 2021." Id. at 11. The court quoted extensively from that letter, as follows:

> This letter is a follow up to the phone conversation that we had on Monday, January 11, 2021. [I] explained to you that after you had accepted substitute assignments in three different buildings I was contacted by administration who shared the following:

1. Tuesday, January 5, 2021 — Mr. Gupt[e] accepted a half day assignment (3.5 hours) at John Wallace Middle School. The principal Mr. Dias informed me that upon arrival Mr. Gupte looked disheveled and asked where he could put his lunch. The office tried to explain that there was no lunch time during this short assignment but "he didn't seem to listen." He was assigned to the STEM Teacher Mrs. Brinker's room. Mrs. Brinker told Mr. Dias that Mr. Gupte was a distraction during class as he constantly interrupted her and brought up things that just did not pertain to the lesson or the students' level of understanding. At one point, he took a 30 minute lunch in one o[f] the conference rooms. Principal Dias explained he did not feel comfortable nor confident about having Mr. Gupt[e] as a building substitute and asked that he be taken off the substitute list for his building.

2. Thursday, January 7, 2021 — Mr. Gupte accepted a full day assignment at Newington High School. Throughout the day there seemed to be a lot of confusion around his assignment that caused frustration among building staff. It was also communicated that Mr. Gupte was not wearing his mask appropriately or completely and had to be reminded throughout the day to adjust it. At the end of the day, the secretary called and asked to remove him from their building substitute list.

3. Friday, January 8, 2021 — Mr. Gupte accepted a full day assignment at Anna Reynolds Elementary School. The principal Mr. Smith informed me that he told Mr. Gupte to go home early because he seemed to be having a hard time understanding the assignment which was to provide coverage for

> scheduled PPT meetings. Additionally, staff had complained that Mr. Gupte was not wearing his mask appropriately and seemed disheveled. Mr. Smith also informed me that he did not think Mr. Gupte was a good fit at the elementary level and wanted him taken off the substitute list for his building.

Id. at 11-12.

The court found that "Ms. Davis also explained how and why the computer screen shots the plaintiff claims reflect false information are accurate." Id. at 12. The Order concludes:

> Based on the testimony and evidence submitted by the parties, the court concludes that the plaintiff failed to sustain his burden of proving that the defendant unlawfully terminated the plaintiff's employment or discriminated against him. The court also concludes that the defendant did not falsify any information in violation of 18 U.S.C.[] § 1519.

Id.

II. LEGAL STANDARD

A motion for summary judgment may not be granted unless the court determines that there is no genuine issue of material fact to be tried and that the facts as to which there is no such issue warrant judgment for the moving party as a matter of law. Fed. R. Civ. P. 56(a). See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *Gallo v. Prudential Residential Servs.*, 22 F.3d 1219, 1223 (2d

Cir. 1994). Rule 56(c) "mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.*, 477 U.S. at 322.

When ruling on a motion for summary judgment, the court must respect the province of the jury. The court, therefore, may not try issues of fact. See, e.g., *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *Donahue v. Windsor Locks Bd. of Fire Comm'rs*, 834 F.2d 54, 58 (2d Cir. 1987); *Heyman v. Commerce of Indus. Ins. Co.*, 524 F.2d 1317, 1319-20 (2d Cir. 1975). It is well-established that "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of the judge." *Anderson*, 477 U.S. at 255. Thus, the trial court's task is "carefully limited to discerning whether there are any genuine issues of material fact to be tried, not deciding them. Its duty, in short, is confined . . . to issue-finding; it does not extend to issue-resolution." *Gallo*, 22 F.3d at 1224.

Summary judgment is inappropriate only if the issue to be resolved is both genuine and related to a material fact. Therefore, the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. An issue is "genuine . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248

(internal quotation marks omitted). A material fact is one that would "affect the outcome of the suit under the governing law." Id.

When reviewing the evidence on a motion for summary judgment, the court must "assess the record in the light most favorable to the non-movant . . . and draw all reasonable inferences in its favor." Weinstock v. Columbia Univ., 224 F.3d 33, 41 (2d Cir. 2000) (quoting Delaware & Hudson Ry. Co. v. Consolidated Rail Corp., 902 F.2d 174, 177 (2d Cir. 1990)).

Because the plaintiff in this case is proceeding pro se, the court must read the plaintiff's pleadings and other documents liberally and construe them in a manner most favorable to the plaintiff. See *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir. 1994). Moreover, because the process of summary judgment is "not obvious to a layman," *Vital v. Interfaith Medical Ctr.*, 168 F.3d 615, 620 (2d Cir. 1999), the district court must ensure that a pro se plaintiff understands the nature, consequences, and obligations of summary judgment. See id. at 620-621. Thus, the district court may itself notify the pro se plaintiff as to the nature of summary judgment; the court may find that the opposing party's memoranda in support of summary judgment provide adequate notice; or the court may determine, based on thorough review of the record, that the pro se plaintiff understands the nature, consequences, and obligations of summary judgment. See id.

The court finds that the plaintiff understands the nature, consequences, and obligations of summary

judgement. First, the defendants served the plaintiff with the notice to pro se litigants required by Local Rule 56(b). Second, the defendants' memorandum states the nature and consequences of summary judgment. Third, the plaintiff submitted a response to the defendants' motion that included documents that he viewed as proving his claim. Finally, the court held oral argument on the motion for summary judgment on October 21, 2022. During that hearing, the plaintiff specifically addressed the argument in the motion for summary judgment with respect to exhaustion of administrative remedies. He also raised a new argument, i.e. that he did not receive a Loudermill hearing, which was unavailing because he did not have a protected property interest in his position. Most significantly, however, the court specifically highlighted the issue of res judicata and asked the pro se plaintiff for his position with respect to the defendants' contention that the instant lawsuit is the same one he had brought in Connecticut Superior Court, except for the addition of two defendants. The plaintiff's response, in substance, was that he could not remember whether it was or not.

III. DISCUSSION

As discussed above, the Amended Complaint contains five claims against the defendants. The defendants move for summary judgment on the grounds that (1) the plaintiff failed to exhaust his administrative remedies with respect to the Title VII, ADEA, and ADA claims; (2) the plaintiff's claims are barred under the doctrines of res judicata and collateral estoppel; (3) the

plaintiff cannot establish a prima facie case with respect to his claims pursuant to 42 U.S.C. §§ 1981 and 1983; (4) 18 U.S.C. § 1519 does not give rise to a private cause of action; and (5) defendants Kimberly Davis and Clare Salerno cannot be individually liable under Title VII, the ADEA and the ADA.

The court agrees that the plaintiff's discrimination claims are barred under the doctrine of res judicata. The court also agrees that 18 U.S.C. § 1519 does not provide for private cause of action. Consequently, the court does not reach the defendants' other arguments.

"Res judicata bars re-litigation if '(1) the previous action involved an adjudication on the merits; (2) the previous action involved the plaintiffs or those in privity with them; [and] (3) the claims asserted in the subsequent action were, or could have been, raised in the prior action.'" S*oules v. Connecticut Dep't of Emergency Servs. & Pub. Prot.*, 882 F.3d 52, 55 (2d Cir. 2018) (quoting *Monahan v. N.Y.C. Dep't of Corr.*, 214 F.3d 275, 285 (2d Cir. 2000)).

As to the first element, the Connecticut Superior Court judgment was an adjudication on the merits for the purposes of res judicata. "Adjudication on the merits has a well settled meaning: a decision finally resolving the parties' claims . . . that is based on the substance of the claim advanced, rather than on a procedural, or other, ground." *Sellan v. Kuhlman*, 261 F.3d 303, 311 (2d Cir. 2001) (internal quotation marks and citations omitted). Here, the Connecticut Superior

Court entered judgment in favor of Davis after a trial on the merits.

The second element is satisfied because the plaintiff himself filed the prior action in Connecticut Superior Court.

The third element requires that the claims asserted in the present action were, or could have been, raised in the plaintiff's prior action in Connecticut Superior Court.

> As to third element, we consider whether the second lawsuit concerns "the same claim — or nucleus of operative facts — as the first suit;" applying three considerations: "(1) whether the underlying facts are related in time, space, origin, or motivation; (2) whether the underlying facts form a convenient trial unit; and (3) whether their treatment as a unit conforms to the parties' expectations."

Soules, 882 F.3d at 55 (quoting *Channer v. Dep't of Homeland Sec.*, 527 F.3d 275, 280 (2d Cir. 2008)). "Res judicata 'is based on the requirement that the plaintiff must bring all claims at once against the same defendant relating to the same transaction or event.'" *Soules*, 882 F.3d at 55 (quoting *N. Assur. Co. of Am. v. Square D Co.*, 201 F.3d 84, 88 (2d Cir. 2000) (internal citation omitted)).

The underlying facts in the present action and in the Connecticut Superior Court action are related in time, space, origin, and motivation. Both cases arise out of the termination of the plaintiff's employment on

January 11, 2021 and the key question in each case is whether the reasons given by Davis in her January 12, 2021 letter were a pretext for discrimination. In the prior action, the plaintiff claimed that those reasons were a pretext for discrimination on the basis of his national origin and/or heritage. In the instant action, the plaintiff contends that those reasons were a pretext for discrimination on the basis of not only his national origin and/or heritage, but also on the basis of age, disability, and race. Thus, the question of the decisionmakers' motivation in terminating the plaintiff's employment is at the heart of both cases. Although the plaintiff adds Salerno and the Newington Board of Education as defendants in this case, the assessment of Salerno's conduct was a significant part of the litigation in Connecticut Superior Court. In his complaint there, the plaintiff specifically referenced conduct by Salerno, and the Superior Court specifically found, that the plaintiff's contention that the computer screen shots reflect false information lacks merit. The Newington Board of Education also has been added as a defendant in this case; while it was not a defendant in the prior action, Davis was at all times acting as a duly authorized agent of the Newington Board of Education, namely the Director of Talent Management for the Newington Public Schools.

Because the prior action and the present action arise from the same alleged conduct, and the same witnesses and evidence would be involved, the underlying facts would have formed a convenient trial unit. See *Waldman v. Village Of Kiryas Joel*, 207 F.3d 105 112

(citing *Interoceanica Corp. v. Sound Pilots, Inc.*, 107 F.3d 86, 90 (2d Cir. 1997)). Also, treating this single set of facts as a unit would conform to the parties' expectations. Consequently, the employment discrimination claims in the present action involve the same nucleus of operative facts as those in the plaintiff's prior action in Connecticut Superior Court, and the plaintiff could have raised all of his claims here in that prior action.

The plaintiff asserted claims pursuant to 18 U.S.C. § 1519 in the prior action and also does so in this case. "[I]f state preclusion law includes [the] requirement of prior jurisdictional competency, which is generally true, a state judgment will not have claim preclusive effect on a cause of action within the exclusive jurisdiction of the federal courts." *Valley Disposal, Inc. v. Cent. Vt. Solid Waste Mgmt. Dist.*, 31 F.3d 89, 98 (2d Cir. 1994) (quoting *Maresse v. Am. Acad. Of Orthopaedic Surgeons*, 470 U.S. 373, 382 (1985)) (internal quotation marks omitted).

Here, 18 U.S.C. § 1519 is a federal criminal statute and therefore does not fall within the subject matter jurisdiction of state courts. See *United States v. Balde*, 943 F.3d 73, 88 (2d Cir. 2019) ("Congress has granted the district courts jurisdiction over federal criminal prosecutions in 18 U.S.C. § 3231. That statute provides that the district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.") (internal quotation marks and citations omitted).

Therefore, the plaintiff's claim based on 18 U.S.C. § 1519 is not barred by res judicata. However, the defendants' motion must nonetheless be granted because 18 U.S.C. § 1519 does not provide for a private cause of action. See *Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 511 (2d Cir. 1994) ("To the extent that Appellants assert claims based on the violation of criminal statutes, . . . these claims are not cognizable, as federal criminal statutes do not provide private causes of action.").

Therefore, all of the plaintiff's claims, except the claim based on 18 U.S.C. § 1519, are barred by res judicata. The defendants are entitled to judgment as a matter of law with respect to the claim based on 18 U.S.C. § 1519 because that statute does not provide for a private cause of action.

IV. CONCLUSION

For the reasons set forth above, the Motion for Summary Judgment (ECF no. 65) is hereby GRANTED.

The Clerk shall enter judgment in favor of the defendants on all of the plaintiff's claims and close this case.

It is so ordered.

Dated this 23rd day of January 2023, at Hartford, Connecticut.

/s/ AWT

Alvin W. Thompson

United States District Judge

Ogden v. Granite Sch. Dist.

United States District Court for the
District of Utah, Central Division

February 6, 2023, Decided; February 6, 2023, Filed

Case No. 2:22-cv-00331

Counsel: For Kristin Ogden, on behalf of Lucas Ogden, Plaintiff: William N. Pohl, LEAD ATTORNEY, THE LAW OFFICE OF WILLIAM POHL PLLC, PROVO, UT.

For Granite School District, Defendant: Joan M. Andrews, LEAD ATTORNEY, Joseph Mason Kjar, FABIAN VANCOTT, SALT LAKE CITY, UT.

Judges: Daphne A. Oberg, United States Magistrate Judge.

Opinion by: Daphne A. Oberg

Opinion

MEMORANDUM DECISION AND ORDER:

(1) DENYING MOTION TO DISMISS PURSUANT TO RULE 12(b)(1); AND

(2) CONVERTING MOTION TO DISMISS PURSUANT TO RULE 12(b)(6) TO A MOTION FOR SUMMARY JUDGMENT

Plaintiff Kristen Ogden brought this action on behalf of her son, Logan Ogden, under the Individuals

with Disabilities Education Act[1] (IDEA).[2] Ms. Ogden claims Defendant Granite School District denied Mr. Ogden a free appropriate public education under the IDEA by, among other things, improperly removing him from his Individualized Education Program (IEP).[3] After a Utah State Board of Education hearing officer determined Granite did not violate the IDEA with respect to Mr. Ogden, Ms. Ogden filed this action in state court appealing that determination,[4] and Granite removed the case to federal court.[5]

Granite has filed a motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.[6] Granite argues this court lacks subject-matter jurisdiction under Rule 12(b)(1) and the complaint fails to state a plausible claim for relief under Rule 12(b)(6) for the same reason: because Ms. Ogden's appeal of the hearing officer's decision is time-barred.[7] The court held a hearing on the motion on December 5, 2022.[8] As ordered at the hearing, Granite filed a

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[1] 20 U.S.C § 1400 *et seq.*

[2] (*See* Appeal of Utah State Bd. of Educ. Special Educ. Servs. Div. Admin. Hr'g ("Compl."), Doc. No. 2 at 9-23.) Ms. Ogden originally filed this action using only her and her son's initials. A corrected version of the complaint with their full names was filed on January 4, 2023. (*See* Errata to Compl., Doc. No. 33.)

[3] (*See* Compl. ¶¶ 4-8 & p. 14, Doc. No. 2 at 11, 22.)

[4] (*See id.*)

[5] (*See* Notice of Removal, Doc. No. 2 at 1-5.)

[6] (Granite Sch. Dist.'s Mot. to Dismiss Pursuant to Rule 12(b)(1) and 12(b)(6) ("Mot. to Dismiss"), Doc. No. 10.)

[7] (*See id.* at 1-2.)

[8] (*See* Minute Entry, Doc. No. 30.)

notice of supplemental authority to which Ms. Ogden responded.[9]

Having considered all the briefing and arguments, the court[10] orders as follows:

1. Granite's motion is denied insofar as it seeks dismissal pursuant to Rule 12(b)(1) for lack of subject-matter jurisdiction. As explained below, because the IDEA's deadline for filing a civil action is not jurisdictional, Granite's argument that this action is time-barred does not implicate subject-matter jurisdiction under Rule 12(b)(1).

2. Because both parties present matters outside the pleadings, the motion to dismiss under Rule 12(b)(6) must be treated as a motion for summary judgment.[11] Accordingly, the court converts Granite's motion to dismiss under Rule 12(b)(6) to a motion for summary judgment and sets deadlines for the parties to submit all pertinent material, as set forth below.

BACKGROUND

Ms. Ogden's complaint alleges as follows. Mr. Ogden was a student in Granite School District until

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[9] (*See* Doc. Nos. 31, 32.)

[10] The parties consented to proceed before a magistrate judge in accordance with 28 U.S.C. § 636(c) and Rule 73 of the Federal Rules of Civil Procedure. (*See* Doc. No. 15.)

[11] *See* Fed. R. Civ. P. 12(d).

he graduated from high school in June 2021.[12] During this time period, Mr. Ogden was a child with a disability who was eligible for services under the IDEA.[13] On March 11, 2019, Granite removed Mr. Ogden from his IEP over Ms. Ogden's objection.[14] Granite never justified this removal, and it misrepresented to Ms. Ogden that an IEP and 504 plan were "the same thing."[15] Granite reinstated an IEP for Mr. Ogden on February 21, 2021, the last quarter of twelfth grade.[16] Granite then permitted Mr. Ogden to graduate over Ms. Ogden's objection.[17]

Ms. Ogden requested a due process hearing pursuant to the IDEA, and the Utah State Board of Education held an administrative hearing.[18] The hearing officer issued a decision on December 7, 2021, finding Granite did not deny Mr. Ogden a free appropriate public education under the IDEA.[19]

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[12] (Compl. ¶ 1, Doc. No. 2 at 10; Mot. to Dismiss ¶ 13, Doc No. 10 (providing the month and year of graduation).)

[13] (Compl. p. 2, Doc. No. 2 at 10.)

[14] (*Id.* ¶ 5, Doc. No. 2 at 11.)

[15] (*Id.* ¶ 7-8, Doc. No. 2 at 11.)

[16] (*Id.* ¶¶ 6, 11, Doc. No. 2 at 11-12.)

[17] (*Id.* ¶ 1, Doc. No. 2 at 10.)

[18] (*See* Mot. 1, Doc. No. 10; *see also* Compl. pp. 4-14, Doc. No. 2 at 12-22 (discussing the hearing officer's decision).) Although the complaint does not expressly allege Ms. Ogden requested a due process hearing, this fact appears to be undisputed.

[19] (*See* Compl. pp. 4-6, Doc. No. 2 at 12-14.)

Ms. Ogden filed this action appealing the hearing officer's decision in state court on April 7, 2022[20]—121 days after the decision was issued. Ms. Ogden alleges she was "pro se throughout the hearing" and "had no notice of the right to appeal or statute of limitations on this appeal until after this period had lapsed."[21] The complaint contains a "request for additional filing time" pursuant to Rule 60(b)(1) of the Utah Rules of Civil Procedure due to the alleged failure to provide Ms. Ogden with notice of the statute of limitations.[22]

LEGAL STANDARDS

Rule 12(b)(1) permits a party to move to dismiss for "lack of subject-matter jurisdiction."[23] A motion to dismiss under Rule 12(b)(1) may take one of two forms.[24] "A facial attack looks only to the factual allegations of the complaint in challenging the court's jurisdiction."[25] "A factual attack, on the other hand, goes beyond the factual allegations of the complaint and presents evidence in the form of affidavits or otherwise to challenge the court's jurisdiction."[26]

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[20] (*See id.* at p. 14, Doc. No. 2 at 22; Notice of Electr. Filing, Doc. No. 2 at 27.)

[21] (Compl. p. 4, Doc. No. 2 at 12.)

[22] (*Id.*)

[23] Fed. R. Civ. P. 12(b)(1).

[24] *Rural Water Dist. No. 2 v. City of Glenpool,* 698 F.3d 1270, 1272 n.1 (10th Cir. 2012).

[25] *Id.* (internal quotation marks omitted).

[26] *Id.* (internal quotation marks omitted).

Rule 12(b)(6) permits dismissal for "failure to state a claim upon which relief can be granted."[27] To avoid dismissal under Rule 12(b)(6), a complaint must allege "enough facts to state a claim to relief that is plausible on its face."[28] The court accepts as true all well-pleaded factual allegations and draws all reasonable inferences in the plaintiff's favor.[29] However, the court need not accept a plaintiff's conclusory allegations as true.[30] Rule 12(d) governs the consideration of materials outside the pleadings, providing: "If, on a motion under Rule 12(b)(6) . . . , matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56."[31] Further, "[a]ll parties must be given a reasonable opportunity to present all the material that is pertinent to the motion."[32]

ANALYSIS

Granite contends this action was untimely filed and, therefore, must be dismissed both for lack of subject-matter jurisdiction under Rule 12(b)(1) and for failure to state a claim under Rule 12(b)(6).[33] Granite

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[27] Fed. R. Civ. P. 12(b)(6).

[28] *Hogan v. Winder,* 762 F.3d 1096, 1104 (10th Cir. 2014) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 547, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).

[29] *Wilson v. Montano,* 715 F.3d 847, 852 (10th Cir. 2013).

[30] *Hall v. Bellmon,* 935 F.2d 1106, 1110 (10th Cir. 1991).

[31] Fed. R. Civ. P. 12(d).

[32] *Id.*

[33] (*See* Mot. to Dismiss, Doc. No. 10.)

also argues that, contrary to the allegations in the complaint, Ms. Ogden was repeatedly provided with a "procedural safeguards" notice which included the deadline to file a civil action.[34] In support of its motion, Granite filed the hearing officer's decision,[35] a letter from the Utah State Board of Education to Ms. Ogden's representatives (notifying her of the decision),[36] portions of the hearing transcript,[37] signed IEP documents acknowledging Ms. Ogden's receipt of "procedural safeguards" notices,[38] three versions of the notice,[39] the state court docket from this action before it was removed to federal court,[40] and email correspondence between Ms. Ogden's former counsel, the Utah State Board of Education, and Granite's counsel.[41]

Ms. Ogden does not dispute this action was filed beyond the statutory deadline for bringing a civil action to challenge the hearing officer's decision. However, she argues "excusable neglect" under Rule 60(b)(1) of the Federal Rules of Civil Procedure

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[34] (*See id.* at 10-11.)

[35] (Ex. 2 to Mot. to Dismiss, Doc. No. 10-2.)

[36] (Ex. 19 to Granite Sch. Dist.'s Reply in Support of Mot. to Dismiss ("Reply"), Doc. No. 20-7.)

[37] (Ex. 3 to Mot. to Dismiss, Doc. No. 10-3; Exs. 13-15 to Reply, Doc. Nos. 20-1-20-3.)

[38] (Exs. 4-8 to Mot. to Dismiss, Doc. Nos. 10-4-10-8.)

[39] (Exs. 10-12 to Mot. to Dismiss, Doc. Nos. 10-10-10-12.)

[40] (Ex. 9 to Mot. to Dismiss, Doc. No. 10-9.)

[41] (Exs. 16-17 to Reply, Doc. Nos. 20-4-20-5.)

justifies the untimely filing.[42] She also argues the statutory filing deadline should be equitably tolled for several reasons: (1) the hearing officer failed to inform her of the appeal deadline in his decision; (2) the "procedural safeguards" notices were vague as to the appeal deadline; and (3) she is legally blind and suffers from a traumatic brain injury.[43] Ms. Ogden also submitted documents outside the pleadings in support of her opposition, including a corrective action plan issued by the Utah State Board of Education to Granite after the due process hearing,[44] a "letter of limited guardianship" for Mr. Ogden by a Utah state court,[45] and a record from the Utah Department of Workforce Services.[46]

A. Statutory Deadline to File a Civil Action Under the IDEA

The IDEA provides that a party aggrieved by a hearing officer's decision on an IDEA complaint "shall have the right to bring a civil action with respect to the complaint presented" and may bring the action "in any State court of competent jurisdiction or in a district court of the United States, without regard to the

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[42] (Opp'n to Granite Sch. Dist.'s Mot. to Dismiss ("Opp'n") 2, 10-12, 16-17, Doc. No. 16.)

[43] (*Id.* at 5-9, 13, 15-16.)

[44] (Ex. 1 to Opp'n, Doc. No. 16-1.)

[45] (Ex. 2 to Opp'n, Doc. No. 16-2.)

[46] (Ex. 3 to Opp'n, Doc. No. 16-3.)

amount in controversy."[47] The statute provides "90 days from the date of the decision of the hearing officer to bring such an action, or, if the State has an explicit time limitation for bringing such action . . . , in such time as the State law allows."[48] Utah has adopted a shorter, thirty-day time limit for filing a civil action to appeal the hearing officer's decision.[49]

It is undisputed, and apparent from the face of the complaint, that Ms. Ogden filed this action in Utah state court 121 days after the hearing officer's decision. This was well beyond Utah's thirty-day limitation period, and untimely even under the longer, ninety-day deadline for filing an action in federal court. Thus, absent tolling of the deadline or some other basis for relief, this action is time-barred.

B. The IDEA Filing Deadline is Nonjurisdictional

The court first addresses Granite's argument that the case should be dismissed under Rule 12(b)(1) because the untimely filing deprives the court of subject-matter jurisdiction.

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[47] 20 U.S.C. § 1415(i)(2)(A).

[48] 20 U.S.C. § 1415(i)(2)(B).

[49] *See* Utah Code Ann. § 53E-7-208(4)(a) ("A party to a due process hearing may appeal the decision resulting from the due process hearing by filing a civil action with a court described in 20 U.S.C. Sec. 1415(i), if the party files the action within 30 days after the day on which the due process hearing decision was issued.").

"If a statute of limitations is jurisdictional, a failure to comply deprives courts of authority to hear the case."[50] "[C]ourts can't toll statutes of limitations that deprive them of jurisdiction."[51] However, "statutes of limitations are not always—and, indeed, presumptively are not—jurisdictional."[52] "The test is whether Congress has 'clearly stated' that a statutory limitation is jurisdictional."[53] "'Congress must do something special, beyond setting an exception-free deadline, to tag a statute of limitations as jurisdictional and so prohibit a court from tolling it.'"[54]

The Tenth Circuit has not addressed whether the IDEA's filing deadline is jurisdictional, and courts in other jurisdictions which have considered this issue take conflicting positions.[55] However, the decision from

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[50] *Farhat v. United States,* No. 21-7061, 2022 U.S. App. LEXIS 20095, at *11 (10th Cir. July 21, 2022) (unpublished) (citing *United States v. Kwai Fun Wong,* 575 U.S. 402, 408-09, 135 S. Ct. 1625, 191 L. Ed. 2d 533 (2015).

[51] *Id.* (quoting *Chance v. Zinke,* 898 F.3d 1025, 1030 (10th Cir. 2018)).

[52] *Big Horn Coal Co. v. Sadler,* 924 F.3d 1317, 1323 (10th Cir. 2019) (internal quotation marks omitted).

[53] *Id.* (quoting *Barnes v. United States,* 776 F.3d 1134, 1146 (10th Cir. 2015)).

[54] *Farhat,* 2022 U.S. App. LEXIS 20095, at *12 (quoting *Kwai Fun Wong,* 575 U.S. at 410).

[55] *Compare Farzana K. v. Ind. Dep't of Educ.,* 473 F.3d 703, 705 (7th Cir. 2007) (finding a state-prescribed thirty-day time limitation for filing civil actions under the IDEA nonjurisdictional), *and Jenkins v. Butts Cnty. Sch. Dist.,* 984 F. Supp. 2d 1368, 1374-75 (M.D. Ga. 2013) (finding the IDEA's ninety-day filing deadline nonjurisdictional and subject to tolling), *and B.R. v. Prosser Sch. Dist. No. 116,* No. CV-08-5025-RHW, 2010 U.S. Dist.

the District of New Jersey in *Wall Township Board of Education v. C.M.*[56] is the most persuasive. In *Wall Township,* the court found the IDEA deadline nonjurisdictional.[57] Specifically, the court concluded "[t]ime prescriptions created by state laws cannot be jurisdictional because '[o]nly Congress may determine a lower federal court's subject-matter jurisdiction.'"[58] Therefore, "by permitting the individual states to set forth the time limitation for an aggrieved party to appeal a decision made following an IDEA due process hearing, Congress intended for Section 1415(i)(2)(B) to be treated as a statute of limitations subject to waiver, estoppel, and equitable tolling."[59] Several other courts have adopted this rationale in also finding the IDEA

LEXIS 17210, at *4 (E.D. Wash. Feb. 26, 2010) (unpublished) (finding the IDEA's ninety-day filing deadline nonjurisdictional and subject to equitable tolling), *with C.B. v. Argyle Indep. Sch. Dist.,* No. 4:11cv619, 2012 U.S. Dist. LEXIS 26985, at *12-13 (E.D. Tex. Feb. 7, 2012) (unpublished) (finding the IDEA's ninety-day filing deadline "mandatory and jurisdictional"), *and Maynard v. Dist. of Columbia,* 579 F. Supp. 2d 137, 141-42 (D.D.C. 2008) (noting "Courts in this District have generally treated the IDEA's limitations period as a jurisdictional bar" but declining to reach the issue).

[56] 534 F. Supp. 2d 487 (D.N.J. 2008).

[57] *Id.* at 492-93.

[58] *Id.* at 493 (second alteration in original) (quoting *Bowles v. Russell,* 551 U.S. 205, 217, 127 S. Ct. 2360, 168 L. Ed. 2d 96 (2007)).

[59] *Id.* The *Wall Township* court also found it significant that the IDEA's limitation provision does not use the word "jurisdiction" and is separate from the provision giving any aggrieved party the right to bring a civil action. *Id.*

filing deadline nonjurisdictional.[60] This court is likewise persuaded by the reasoning in *Wall Township* and concludes the IDEA's deadline for filing a civil action is nonjurisdictional—particularly where, as here, the applicable deadline was created by state law.

Granite relies on the Supreme Court's decision in *Hamer v. Neighborhood Housing Services*[61] in support of its argument that the filing deadline in this case is jurisdictional.[62] Specifically, Granite points to *Hamer*'s statement, describing a prior holding from *Bowles v. Russell,*[63] that "an appeal filing deadline prescribed by statute will be regarded as 'jurisdictional,' meaning that late filing of the appeal notice necessitates dismissal of the appeal."[64] But both *Bowles* and *Hamer* addressed deadlines to appeal a district court judgment[65]—not the deadline to file a civil action appealing an administrative decision. Indeed, *Hamer* explained the "rule of decision" from *Bowles* and other precedent as follows: "If a time prescription governing the transfer of adjudicatory authority *from one Article III court to another* appears in a statute, the limitation is

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[60] *See, e.g., Jenkins,* 984 F. Supp. 2d at 1374 (discussing the split of authority and finding the reasoning in *Wall Township* "most persuasive"); *B.R.,* 2010 U.S. Dist. LEXIS 17210, at *4 (adopting the reasoning in *Wall Township*).

[61] 138 S. Ct. 13, 199 L. Ed. 2d 249, ___ U.S. ___ (2017).

[62] (*See* Granite's Notice of Suppl. Auth. 2, Doc. No. 31 (citing *Hamer,* 138 S. Ct. at 16).)

[63] 551 U.S. 205, 127 S. Ct. 2360, 168 L. Ed. 2d 96 (2007).

[64] *Hamer,* 138 S. Ct. at 16 (citing *Bowles,* 551 U.S. at 210-13).

[65] *See id.* at 18; *Bowles,* 551 U.S. at 207.

jurisdictional."[66] Here, the statutory filing deadline at issue is a deadline to file a civil action for judicial review of an administrative decision. Because *Hamer* and *Bowles* do not address this issue, they do not mandate a different result.[67]

Because the IDEA deadline for filing a civil action is nonjurisdictional, Granite's motion is denied insofar as it seeks dismissal for lack of subject-matter jurisdiction.

C. The Parties' Presentation of Materials Outside the Pleadings Requires Conversion of the Rule 12(b)(6) Motion to a Motion for Summary Judgment

The court next addresses whether Granite's argument that the action is time-barred may be resolved under Rule 12(b)(6).

"Typically, facts must be developed to support dismissing a case based on the statute of limitations."[68] "But [a] statute of limitations defense may be appropriately resolved on a Rule 12(b) motion when the

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[66] *Hamer,* 138 S. Ct. at 20 (emphasis added).

[67] Indeed, *Wall Township* relies on *Bowles* in support of its analysis finding the IDEA's filing deadline nonjurisdictional. *See Wall Township,* 534 F. Supp. 2d at 493 ("Time prescriptions created by state laws cannot be jurisdictional because '[o]nly Congress may determine a lower federal court's subject-matter jurisdiction.'" (quoting *Bowles,* 551 U.S. at 217)).

[68] *Herrera v. City of Espanola,* 32 F.4th 980, 991 (10th Cir. 2022).

dates given in the complaint make clear that the right sued upon has been extinguished."[69]

Although the dates in the complaint show Ms. Ogden filed this action after the statutory deadline, Ms. Ogden contends the deadline should be equitably tolled because she was not provided adequate notice of it.[70] This argument, if borne out by the evidence, is colorable; a court in this district has found failure to provide notice constituted grounds to equitably toll the IDEA filing deadline.[71] But both parties rely on evidence outside the pleadings in support of their positions regarding whether Ms. Ogden received adequate notice. While some of these documents, such as state court records, are subject to judicial notice, others may not be considered on a Rule 12(b)(6) motion without converting it to a motion for summary judgment.[72] For example, Granite relies on hearing transcripts, IEP documents signed by Ms. Ogden, "procedural safeguards" notices, and emails in asserting Ms. Ogden was notified of the filing deadline.[73] Where the issue of

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[69] *Id.* (alteration in original) (internal quotation marks omitted).

[70] (Opp'n 5-9, 13, 15-16, Doc. No. 16.)

[71] *See L.C. v. Utah State Bd. of Educ.,* 57 F. Supp. 2d 1214, 1218-19 (D. Utah 1999).

[72] *See* Fed. R. Civ. P. 12(d).

[73] Granite argues documents from the administrative proceedings should be considered in assessing the motion to dismiss because the proceedings are referenced in the complaint. (*See* Mot. 2 n.2, 6 n.3, 7-8 n.4 Doc. No. 10); *see also Prager v. LaFaver,* 180 F.3d 1185, 1189 (10th Cir. 1999) ("[I]f a plaintiff does not incorporate by reference or attach a document to its complaint, but

whether Ms. Odgen is entitled to equitable tolling turns on evidence outside the pleadings, the Rule 12(b)(6) motion must be converted to a motion for summary judgment. Because Granite's Rule 12(b)(6) motion to dismiss is being converted to a motion for summary judgment, the parties are permitted to present any additional material pertinent to this issue as set forth below.

D. Rule 60(b) Is Inapplicable

In addition to relying on the doctrine of equitable tolling, Ms. Ogden argues Rule 60(b) of the Federal Rules of Civil Procedure provides grounds to set aside the hearing officer's order even after the statutory time limit has expired.[74] However, Rule 60(b) is wholly inapplicable here.

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the document is referred to in the complaint and is central to the plaintiff's claim, a defendant may submit an indisputably authentic copy to the court to be considered on a motion to dismiss." (internal quotation marks omitted)). But the "procedural safeguards" notices and emails submitted by Granite are neither part of the administrative record nor specifically referenced in the complaint.

[74] (Opp'n 2, 10-12, Doc. No. 16.) In her complaint, Ms. Ogden seeks relief under Rule 60(b) of the Utah Rules of Civil Procedure. (*See* Compl. p. 4, Doc. No. 2 at 12.) However, she relies primarily on the federal rule in her opposition to the motion to dismiss. In any event, Utah's version of Rule 60(b) would not provide relief because the Utah Supreme Court has found it inapplicable to administrative proceedings. *See Frito-Lay v. Utah Labor Comm'n,* 2009 UT 71, ¶¶ 17-18, 20, 222 P.3d 55, 59.

Rule 60(b) provides that "[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding" for enumerated reasons including "(1) mistake, inadvertence, surprise, or excusable neglect."[75] A motion under this rule "must be made within a reasonable time—and for reasons (1), (2), and (3), no more than a year after the entry of the judgment or order."[76] Ms. Ogden argues "excusable neglect" under this rule justifies her failure to meet the IDEA filing deadline.[77]

Ms. Ogden has failed to identify any authority supporting the notion that the hearing officer's order qualifies as a "final judgment [or] order" for purposes of Rule 60(b), where it is an administrative decision and not a federal court order. Further, a Rule 60(b) motion ordinarily must be made in the same court that rendered the judgment.[78] Here, Ms. Ogden is not seeking Rule 60(b) relief from the agency which entered the order but, instead, has filed a civil action for judicial review of that order. Rule 60(b) cannot be used to circumvent the statute of limitations for filing such an action under the IDEA.

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[75] Fed. R. Civ. P. 60(b)(1).

[76] Fed. R. Civ. P. 60(c)(1).

[77] (Opp'n 2, 10-12, 16-17, Doc. No. 16.)

[78] *See, e.g., Budget Blinds, Inc. v. White,* 536 F.3d 244, 268 (3d Cir. 2008); *Harper Macleod Solicitors v. Keaty & Keaty,* 260 F.3d 389, 394 (5th Cir. 2001); *Lundahl v. Compton,* No. 2:99-cv-0015, 2000 U.S. Dist. LEXIS 22703, at *11 n.18 (D. Utah Apr. 29, 2000) (unpublished); *see also* 11 Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. Civ. § 2865 (3d. ed.).

CONCLUSION

The court ORDERS as follows:

1. Granite's motion is denied insofar as it seeks dismissal pursuant to Rule 12(b)(1) for lack of subject-matter jurisdiction. Because the IDEA's deadline for filing a civil action is not jurisdictional, Granite's argument that this action is time-barred does not implicate subject-matter jurisdiction under Rule 12(b)(1).

2. Because both parties present matters outside the pleadings, the motion to dismiss under Rule 12(b)(6) must be treated as a motion for summary judgment. Accordingly, the court converts Granite's motion to dismiss under Rule 12(b)(6) to a motion for summary judgment and sets deadlines for the parties to submit all pertinent material, as follows:

   a. Within fourteen days of this order, each party may file any additional material pertinent to the motion and a memorandum explaining how this material supports their respective positions.

   b. Within twenty-eight days of this order, each party may file a response to the other party's submission.

DATED this 6th day of February, 2023.

BY THE COURT:

/s/ Daphne A. Oberg

Daphne A. Oberg

United States Magistrate Judge

Badger v. Novins

Superior Court of New Jersey, Appellate Division

February 16, 2023, Argued; March 1, 2023, Decided

DOCKET NO. A-1000-21

Counsel: James Young argued the cause for appellant.

Amber J. Monroe argued the cause for respondent (Gary C. Zeitz, LLC, attorneys; Amber J. Monroe, on the brief).

Judges: Before Judges Whipple and Marczyk.

Opinion

PER CURIAM

Defendant Jorge Alarcon appeals from the trial court's November 12, 2021 order denying his motion to vacate a default judgment entered against him in a foreclosure action. Following our review of the record and applicable legal principles, we reverse and remand.

I.

Charles Novins was the owner of 25 Manchester Place, Newark (the property) prior to the Internal Revenue Service (IRS) foreclosing on the property in 2014 pursuant to a delinquent federal tax lien. There is no deed granting title to the IRS. In April 2015, defendant purchased the property from the IRS via quitclaim deed. This deed was recorded in Essex County in May 2015.

In November 2018, defendant discovered various creditors, including plaintiff SBMUNI%LB-Honey Badger, held outstanding tax liens on the property.[1] At that time, defendant obtained an "Outside Lien Redemption Statement" from the City of Newark (Newark) informing him $11,359.04 was owed to plaintiff. Defendant attempted to pay plaintiff the full amount on November 30, 2018.[2]

Defendant alleges in March 2019, someone appeared at the property claiming to be the owner and asked him to leave. Upon contacting Newark, defendant learned plaintiff had refused to accept his November 2018 payment. Unbeknownst to defendant, plaintiff had filed a complaint for foreclosure of the tax lien on the property in April 2018. Defendant was not included as a party because, according to plaintiff, his deed was not in the chain of title and thus did not appear in a title search. Following an October 2018 writ of execution, a sheriff's sale was held in March 2019, and the property was sold to the third party who later approached defendant.

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[1] Plaintiff asserts defendant's recorded deed lacked a valid legal description of the property and was outside the chain of title because there was no conveyance from Novins. Furthermore, there was no recorded deed for the United States from the IRS foreclosure.

[2] The other creditors were successfully paid off at that time. Plaintiff was the only creditor who refused the tender to redeem because it asserted defendant did not have a recorded interest in the property.

Plaintiff voluntarily filed a motion to set aside the March 2019 sheriff's sale, which the court granted in August 2019. According to plaintiff, the third party backed out after discovering defendant's interest in the property. According to plaintiff, defendant—in addition to paying the original amount—had to pay interest as well as reimburse plaintiff for two real estate tax payments made in March and September of 2019. In February 2020, when defendant attempted to pay only the original amount plus interest through December 3, 2018, his redemption was not accepted.

Plaintiff contends on February 27, 2020, it informed defendant it would file a foreclosure action if defendant did not redeem the tax lien within a week. Plaintiff subsequently filed an amended complaint on March 3, 2020, this time including defendant as a party. Three days later, plaintiff attempted to serve the complaint at the property upon someone purporting to be defendant's wife. Defendant maintains he was never served and, therefore, was not aware the amended complaint was filed. Defendant also claims he is not married and has never lived at the property. Defendant further asserts the deed to the property clearly indicated he resided at 1172 Madison Avenue in Teaneck and that all records in the Newark Tax Assessor's office also reflect his Teaneck address. Following the sheriff s sale, plaintiff notes defendant's email to plaintiff indicated someone "showed up at my door claiming to be the owner . . . and giving me notice to

leave," which plaintiff argues demonstrates defendant was living at the property.[3]

On July 30, 2020, plaintiff filed a motion for entry of an order setting a time, place, and amount of redemption. Plaintiff sent this motion via certified mail to the property's address. The court granted the motion and entered an order dated August 21, 2020. The court also gave defendant until October 20, 2020 to redeem the lien. Defendant did not redeem the lien.

Plaintiff filed a motion for entry of final judgment on November 20, 2020, and the court entered final judgment on February 19, 2021. In September 2021, defendant moved to vacate the default judgment. The trial court found defendant did not establish mistake, inadvertence, surprise, or excusable neglect under *Rule* 4:50-1. It reasoned:

> [Defendant] is asking [t]he [c]ourt to find that his error in not responding to the proper procedure for the redemption of the tax sale certificate should be deemed excusable neglect, but human error is not excusable neglect. And in this case, particularly, the defendant had significant opportunities to redeem the tax sale certificate, and rather than pay the full amount that was due on the taxes[,] he chose not to.

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[3] However, plaintiffs own certification of inquiry indicates, "[w]e requested that Guaranteed Subpoena attempt to serve defendant, Mrs. Jorge A. [Alarcon], wife of Jorge . . . with the Summons and Complaint. . . . As a result of our inquiry, we have concluded the given name of Mrs. Jorge [Alarcon] . . . could not be determined."

. . . .

> [Defendant] was placed on notice directly by the plaintiff of the tax sale certificate and his right to redeem, and was given at least a three-month period, from December 12[,] 20[19] to March 3[,] 2020, when plaintiff put on hold its motion for final judgment to give to [defendant] the opportunity to redeem the tax sales certificate for the full amount, which he chose not to do.

The court denied the motion to vacate judgment on November 12, 2021. This appeal followed.

Defendant raises the following points on appeal:

> *POINT 1*
>
> THE TRIAL COURT [ABUSED] ITS DISCRETION IN FAILING TO EXERCISE ITS BROAD EQUITABLE POWER UNDER *RULE* 4:50-1.
>
> > A. RELIEF PURSUANT TO *R.* 4:50-1(a) - Excusable Neglect.
> >
> > B. RELIEF PURSUANT TO *R.* 4:50-1(D) - THE JUDGMENT OR ORDER IS VOID DUE TO INSUFFICIENT SERVICE OF PROCESS.
> >
> > C. RELIEF PURSUANT TO *R.* 4:50-1(f) - ANY OTHER REASON JUSTIFYING RELIEF FROM THE OPERATION OF THE JUDGMENT OR ORDER.
>
> *POINT 2*
>
> RESPONDENT IS BARRED FROM FEES AND COST PURSUANT N.J.S.A. 54:5-97.1 . . . BECAUSE THEY FAILED TO SERVE [DEFENDANT]

WITH THIRTY (30) DAY NOTICE AS REQUIRED BY STATUTE. (Not Raised Below).

II.

"The trial court's determination under [*Rule* 4:50-1] warrants substantial deference, and should not be reversed unless it results in a clear abuse of discretion." *U.S. Bank Nat'l Ass'n v. Guillaume*, 209 N.J. 449, 467, 38 A.3d 570 (2012). An abuse of discretion "arises when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" *Flagg v. Essex Cty. Prosecutor*, 171 N.J. 561, 571, 796 A.2d 182 (2002) (quoting *Achacoso-Sanchez v. Immigr. & Naturalization Serv.*, 779 F.2d 1260, 1265 (7th Cir. 1985)).

The motion judge is obligated to review a motion to vacate a default judgment "'with great liberality,' and should tolerate 'every reasonable ground for indulgence . . . to the end that a just result is reached.'" *Mancini v. EDS ex rel. N.J. Auto. Full Ins. Underwriting Ass'n*, 132 N.J. 330, 334 (1993), 625 A.2d 484 (quoting *Marder v. Realty Constr. Co.*, 84 N.J. Super. 313, 319, 202 A.2d 175 (App. Div. 1964)). "All doubts . . . should be resolved in favor of the parties seeking relief." *Ibid.*[4]

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[4] A motion to vacate default judgment implicates two often competing goals: The desire to resolve disputes on the merits, and the need to efficiently resolve cases and provide finality and stability to judgments. "The rule is designed to reconcile the strong interests in finality of judgments and judicial efficiency with the

Rule 4:50-1 offers litigants a broad opportunity for relief from a final judgment or order:

> On motion, with briefs, and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment or order for the following reasons: (a) [M]istake, inadvertence, surprise, or excusable neglect; (b) newly discovered evidence which would probably alter the judgment or order and which by due diligence could not have been discovered in time to move for a new trial under *R.* 4:49; (c) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (d) the judgment or order is void; (e) the judgment or order has been satisfied, released or

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equitable notion that courts should have authority to avoid an unjust result in any given case." *Manning Eng'g Inc. v. Hudson Cnty. Park Comm'n*, 74 N.J. 113, 120, 376 A.2d 1194 (1977); *see also Hodgson v. Applegate*, 31 N.J. 29, 43, 155 A.2d 97 (1959) (interest in finality must be balanced with the goal of doing justice in the *case); Nowosleska v. Steele*, 400 N.J. Super. 297, 303, 946 A.2d 1097 (App. Div. 2008) (stating courts have liberally exercised power to vacate default judgments "in order that cases may be decided on the merits"). In balancing these two goals, our system is sympathetic to the party seeking relief, because of the high value we place on deciding cases on the merits. Although the movant bears the burden of demonstrating its failure to answer should be excused and default judgment vacated, *Jameson v. Great Ad & Pac. Tea Co.*, 363 N.J. Super. 419, 425-26, 833 A.2d 626 (App. Div. 2003), close issues should be resolved in the movant's favor. *Mancini*, 132 N.J. at 334. The decision whether to grant or deny a motion to vacate a default judgment must be guided by equitable considerations. *Prof'l Stone, Stucco & Siding Applicators, Inc. v. Carter,* 409 N.J. Super. 64, 68, 975 A.2d 1039 (App. Div. 2009) (holding "*Rule* 4:50 is instinct with equitable considerations.").

> discharged, or a prior judgment or order upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or order should have prospective application; or (f) any other reason justifying relief from the operation of the judgment or order.

If the relief is sought on contested facts, an evidentiary hearing must be held. *Nolan ex rel Nolan v. Lee Ho*, 120 N.J. 465, 474, 577 A.2d 143 (1990).

A.

A tax sale foreclosure judgment is void where there was defective service of process on the property owner. *M & D Assocs. v. Mandara*, 366 N.J. Super. 341, 352-53 (App. Div. 2004). The interplay between *Rule* 4:50-1(d) (void judgments) and *Rule* 4:50-2 triggers constitutional due process concerns. "[A] judgment entered without notice or service is constitutionally infirm." *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 84, 108 S. Ct. 896, 99 L. Ed. 2d 75 (1988) (holding a requirement that a meritorious defense be presented in order to vacate a void judgment violated due process). "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950). The absence of notice violates "the most rudimentary demands of due process of law."

Armstrong v. Manzo, 380 U.S. 545, 550, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965).

We have recognized, however, equitable doctrines might preclude relief from the void judgment. For example, in *Sobel v. Long Island Entertainment Productions, Inc.*, 329 N.J. Super. 285, 293-94, 747 A.2d 796 (App. Div. 2000), we indicated where the defendant had actual notice of the suit prior to entry of judgment because service of process was effectuated at his home, although not on a family member, the defendant might be estopped by his failure to act within a reasonable time. *See also Wohlgemuth v. 560 Ocean Club*, 302 N.J. Super. 306, 314-17 (App. Div. 1997).

Defendant contends he was never properly served with the amended foreclosure complaint. The court did not squarely address that issue. Instead, the court focused on the fact defendant was on notice of the tax sale certificate and his right to redeem. The fact that defendant was aware of the tax sale certificate does not obviate the need for him to be properly served with the complaint. That is, there is no indication defendant was aware of the suit prior to the entry of the default judgment. The judge appears to have applied *Rule* 4:50-1(a) to deny the motion to vacate the default judgment finding there was no mistake, surprise, or excusable neglect. However, defendant also moved to vacate pursuant to *Rule* 4:50-1(d), claiming the judgment was void for lack of personal jurisdiction due to defective service. A motion pursuant to *Rule* 4:50-1(d) does not require proof of excusable neglect and a meritorious defense. *See Jameson*, 363 N.J. Super. at 425. Rather,

such a motion requires proof the judgment is void, such as where there is a lack of personal jurisdiction due to defective service.

Although plaintiff maintains there is evidence defendant was properly served, a return of service is not conclusive evidence of effective service. Rather, it "raises a presumption that the facts as therein recited are true." *Goldfarb v. Roeger*, 54 N.J. Super. 85, 90, 148 A.2d 189 (App. Div. 1959); *see also Jameson*, 363 N.J. Super. at 426. "If some evidence is presented tending to disprove the return, but is not sufficient to establish that the return is false, the presumption is nevertheless eliminated from the case." *See Jameson*, 363 N.J. Super. at 426-27. "Once the presumption is removed from [the] case, it remains plaintiff's overall burden of persuasion to demonstrate that service upon [defendant] was achieved[.]" *Id.* at 428-29.[5]

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[5] Plaintiff mistakenly relies on *Garley v. Waddington*, 177 N.J. Super. 173. 425 A.2d 1084 (App. Div. 1981), and ignores we remanded that matter for a plenary hearing where there was a fact issue regarding the sufficiency of service. *Id.* at 182. Moreover, plaintiff's reliance on *Rosa v. Araujo*, 260 N.J. Super. 458, 616 A.2d 1328 (App. Div. 1992), is also misplaced. We determined due process considerations were satisfied there, even though the individual served in that matter was not the appropriate person, because the record revealed defendant "concededly received the summons and complaint prior to the entry of default judgment, was aware of the nature of the lawsuit, and turned the matter over to an attorney for representation." *Id.* at 463. There is no indication in this matter defendant acknowledged he received the complaint, let alone provided it to his attorney.

Here defendant maintains he never lived at the property where plaintiff purportedly served defendant's wife. Moreover, defendant claims he was not married. Additionally, plaintiff asserts his correct address is in Teaneck—not Newark—as evidenced by the deed in this case, which reflects his Teaneck address, along with the records from the Newark Tax Assessor's office. We recognize plaintiff alleges defendant's prior statements suggest he may have been residing at the property. However, defendant has established there is a clear question of fact as to whether he was properly served with the summons and complaint. We conclude the trial judge should have conducted a plenary hearing to resolve this issue as it goes to the fundamental issue of whether defendant had notice of the lawsuit. For this reason, we would ordinarily remand for a plenary hearing. However, because we determine below defendant is entitled to vacate the default judgment pursuant to *Rule* 4:50-1(f), the trial court will not have to conduct a plenary hearing to address the defective service issue.

B.

To obtain relief from a default judgment under *Rule* 4:50-1(a), a defendant must demonstrate both excusable neglect and a meritorious defense. *Dynasty Bldg. Corp. v. Ackerman*, 376 N.J. Super. 280, 285, 870 A.2d 629 (App. Div. 2005). "'Excusable neglect' may be found when the default was 'attributable to an honest mistake that is compatible with due diligence or reasonable prudence.'" *Guillaume*, 209 N.J. at 468

(quoting *Mancini*, 132 N.J. at 335). To determine if a defense is meritorious, courts "[m]ust examine defendant's proposed defense. . . ." *Bank of N.J. v. Pulini*, 194 N.J. Super. 163, 166, 476, A.2d 797 (App. Div. 1984). "New Jersey courts have always had the inherent equitable power to vacate judgments and, with respect to default judgments, have exercised great liberality in doing so in order that cases may be decided on the merits." *Nowosleska*, 400 N.J. Super. at 303 (citing *Loranger v. Alban*, 22 N.J. Super. 336, 342, 92 A.2d 77 (App. Div. 1952)).

The failure to establish excusable neglect under *Rule* 4:50-1(a) does not automatically act as a barrier to vacating a default judgment pursuant to *Rule* 4:50-1(f) where the equities indicate otherwise. *See Morales v. Santiago*, 217 N.J. Super. 496, 504-05, 526 A.2d 266 (App. Div. 1987) (vacating judgment under *Rule* 4:50-1(f) after a proof hearing due to "misgivings" about the merits of plaintiff s claim even though defendant's attorney had not adequately presented defendant's case on the motion to vacate); *see also Siwiec v. Fin. Res., Inc.*, 375 N.J. Super. 212, 218-20, 867 A.2d 485 (App. Div. 2005) (vacating judgment because even though defendant did not establish excusable neglect, under subsection (f), plaintiff's right to judgment presented a novel question of law, and defendant was extended neither a notice of proof hearing nor a right to participate).

Subsection (f) of *Rule* 4:50-1, the "catchall" category, allows the court to vacate a final judgment for "any other reason justifying relief from the operation

of the judgment or order." *Ibid.* "No categorization can be made of the situations which would warrant redress under subsection (f) . . . [t]he very essence of [subsection] (f) is its capacity for relief in exceptional situations. And in such exceptional cases its boundaries are as expansive as the need to achieve equity and justice." *Court Inv. Co. v. Perillo*, 48 N.J. 334, 341, 225 A.2d 352 (1966); *see also DEG, LLC v. Twp. of Fairfield*, 198 N.J. 242, 269-71, 966 A.2d 1036 (2009). In order to obtain relief under subsection (f), the movant must demonstrate the circumstances are exceptional, and that enforcement of the order or judgment would be unjust, oppressive, or inequitable. *Nowosleska*, 400 N.J. Super. at 304-05; *City of E. Orange v. Kvnor*, 383 N.J. Super. 639, 646, 893 A.2d 46 (App. Div. 2006). For relief under subsection (f), "strict bounds should never confine its scope." *Hodgson*, 31 N.J. at 41.

This case has a complicated procedural history as set forth above. In short, defendant acquired the property from the IRS through a quitclaim deed. We find it compelling that when defendant first learned of the outstanding tax liens in November 2018, he attempted to pay off the liens. In fact, liens from other creditors were successfully paid off at that time. It was not until March 2019 defendant learned plaintiff had refused to accept the November 2018 payment because defendant's deed was apparently not in the chain of title. Despite not accepting the payment, plaintiff later voluntarily moved to set aside the sheriff's sale recognizing defendant's interest in the property. To be sure, defendant's efforts thereafter were not a model of

efficiency in paying off the liens owed to plaintiff. However, the situation was further complicated when plaintiff thereafter filed an amended complaint in March 2020, this time naming defendant, but allegedly not properly serving him as discussed more fully above.

Viewing this matter indulgently, as required by *Rule* 4:50-1, we are satisfied the circumstances are sufficiently exceptional to entitle defendant to relief under *Rule* 4:50-1(a), and the matter should be adjudicated on the merits. Again, enforcement of the judgment would be unjust, given the unusual procedural history and defendant's good faith attempts to pay off liens, coupled with the chain of title issues.

We are therefore constrained to reverse the trial court's denial of defendant's motion to vacate the default judgment and remand for defendant to have an opportunity to file an answer to the complaint.[6] To the extent we have not otherwise addressed the arguments of either party, we have determined they lack sufficient merit to warrant discussion. *R.* 2:11-3(e)(1)(E).

Reversed and remanded.

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[6] Defendant shall file an answer within thirty-five days from the date of this opinion. Given the procedural history of this case, on remand the trial court may implement an expedited management order to move this case toward a timely resolution. Additionally, because we are vacating the default judgment, we need not address defendant's arguments pursuant to *N.J.S.A.* 54:5-97.1, which can be addressed by the trial court if defendant files a contesting answer.

Watson v. Lampkin

Supreme Court of New York, Appellate Division,
First Department

March 2, 2023, Decided; March 2, 2023, Entered

Index No. 114873/08, Appeal No. 17441,
Case No. 2022-03255

Counsel: Ginsburg & Misk LLP, Queens Village (Christopher Ryan Clarke of counsel), for appellant Geovanny Fernandez Attorney at Law, Bronx (Geovanny Fernandez of counsel), for Vincent Sollazo Lampkin, respondent.

John S. James, New York, for Estate of Lillian Lampkin, respondent.

Judges: Before: Singh, J.P., Moulton, Gonzalez, Shulman, JJ.

Opinion

The trial court correctly concluded that a corporate acknowledgement did not show the requisite proof of corporate authority to convey the property by deed in 1996 (*see Galetta v Galetta*, 21 NY3d 186, 193-194, 991 N.E.2d 684, 969 N.Y.S.2d 826 [2013]). A deed based on forgery or obtained by false pretenses is void ab initio, as it is "legally impossible for anyone to become a bona fide purchaser of real estate, or a purchaser at all, from one who never had any title" (*Marden v Dorthy*, 160 NY 39, 56, 54 N.E. 726 [1899]; *Cruz v Cruz*, 37 AD3d 754, 754, 832 N.Y.S.2d 217 [2d Dept 2007]). As there is no evidence, on the face of the deed or otherwise, that the transferor had authority to transfer title to the property, we concur that the trial court properly

concluded that the deed was void ab initio. Accordingly, appellant's statute of limitations argument likewise fails, as a deed that is void ab initio is not subject to the statute of limitations (*Faison v Lewis*, 25 NY3d 220, 10 N.Y.S.3d 185, 32 N.E.3d 400 [2015]).

Because the record reflects that appellant was well aware, at the time it purchased an interest in the property, that there was ongoing litigation regarding the legitimacy of the 1996 transfer, any argument that laches should preclude respondents' claims is unavailing (*see generally Olowofela v Olowofela*, 204 AD3d 821, 164 N.Y.S.3d 482 [2d Dept 2022]).

We have considered appellant's remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: March 2, 2023

State v. Levy

Court of Appeals of Ohio, Eighth Appellate District, Cuyahoga County

March 16, 2023, Released; March 16, 2023, Journalized

Counsel: Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Anthony T. Miranda, Assistant Prosecuting Attorney, for appellee.

Law Offices of William B. Norman and William B. Norman, for appellant.

Judges: KATHLEEN ANN KEOUGH, JUDGE. FRANK DANIEL CELEBREZZE, III, P.J., and MARY J. BOYLE, J., CONCUR.

Opinion by: KATHLEEN ANN KEOUGH

Opinion

JOURNAL ENTRY AND OPINION

KATHLEEN ANN KEOUGH, J.:

Defendant-appellant, Jermaine Levy, appeals the trial court's judgment entry denying his emergency motion to vacate void judgment. For the reasons that follow, we affirm.

I. Procedural Background

In 2002, a jury found Levy, who acted as his own trial counsel, guilty of escape, a second-degree felony, and forgery, a fifth-degree felony. The trial court sentenced him to three years in prison, to be served consecutively to other previously imposed prison

sentences.[1] Levy, through a delayed appeal, challenged his convictions, raising six assignments of error, none of which challenged his waiver of counsel at trial. *State v. Levy*, 8th Dist. Cuyahoga No. 83114, 2004-Ohio-4489, ¶ 1-8.[2] This court overruled his assignments of error and affirmed his convictions. *Id.*[3]

Subsequently in 2005, Levy, pro se, filed a delayed application to reopen his appeal pursuant to App.R. 26(B), and in 2006 filed an amended application. This court denied the applications without opinion. The Ohio Supreme Court declined jurisdiction and dismissed the appeal. *State v. Levy*, 109 Ohio St.3d 1458, 2006-Ohio-2226, 847 N.E.2d 7.

In 2008, the United States District Court for the Northern District of Ohio dismissed Levy's petition for

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[1] At the time, Levy was serving a 20-year sentence imposed in Cuyahoga C.P. No. CR-00-387402 and an aggregate sentence of 240 months in federal prison.

[2] While his motion for a delayed appeal was pending, Levy, pro se, filed a petition for postconviction relief contending that he received ineffective assistance of appellate counsel because counsel failed to timely file a direct appeal. The trial court found that the issues relating to appellate counsel were not cognizable in postconviction proceedings but ultimately found the petition moot because Levy's appeal was accepted and he had new appellate counsel.

[3] After the Ohio Supreme Court allowed Levy to file a delayed appeal of this court's decision, the court dismissed the case for want of prosecution. ***State v. Levy, 105 Ohio St.3d 1468, 2005-Ohio-1254, 824 N.E.2d 538.*** His subsequent attempt to appeal this court's decision was unsuccessful. *See* ***State v. Levy, 108 Ohio St 3d 1485, 2006-Ohio-962, 843 N.E.2d 792*** (motion for leave to file delayed appeal denied).

writ of habeas corpus, finding that he failed to make a substantial showing of a denial of a constitutional right directly related to his conviction or custody. *See Levy v. Ohio*, N.D.Ohio No. 1:06-CV-237, 2008 U.S. Dist. LEXIS 8726 (Feb. 6, 2008). The content of Levy's petition and the federal court's decision will be discussed later in this opinion.

In June 2022, Levy filed an emergency motion to vacate void judgment contending that his convictions were void because he was deprived of his constitutional right to counsel, predicated on an invalid waiver of counsel. The state opposed the motion, contending that the Ohio Supreme Court's recent holdings in *State v. Harper*, 160 Ohio St.3d 480, 2020-Ohio-2913, 159 N.E.3d 248, and *State v. Henderson*, 161 Ohio St.3d 285, 2020-Ohio-4784, 162 N.E.3d 776, did not afford Levy relief from his conviction because (1) a denial of counsel renders a conviction voidable, and (2) res judicata prevented Levy from this challenge because he could have raised this issue in his direct appeal. The trial court summarily denied Levy's motion.

Levy now appeals, raising the following two assignments of error, which will be addressed together:

> I. The trial court's failure to inform appellant Levy of, and ensure he understood: the nature of the charged offenses, the statutory offenses included, the range of allowable punishments, the possible defenses to each change, any other facts essential to a broad understanding of the matter as a whole, and the dangers and disadvantages of

self-representation resulted in an invalid waiver of counsel.

II. Denial of counsel, effected through an invalid waiver of counsel, results in a loss of jurisdiction and a conviction which is void.

At the heart of Levy's appeal is his reliance on the Ohio Supreme Court's decision in *State ex rel. Ogle v. Hocking Cty. Common Pleas Court*, 167 Ohio St.3d 181, 2021-Ohio-4453, 190 N.E.3d 594, and this court's subsequent decisions in *Euclid v. Hedge*, 8th Dist. Cuyahoga No. 110473, 2022-Ohio-464, and *State v. Majid*, 8th Dist. Cuyahoga No. 110560, 2022-Ohio-189, that both recognized the effect of *Ogle*. He contends that based on this authority, *Harper* and *Henderson* do not apply, his conviction is void, and the trial court erred in denying his request to vacate his conviction.

We find that even if Levy were permitted to assert this challenge twenty years after his conviction, and even if he demonstrated that his constitutional right to counsel was violated, he has not established that this violation rose to the level of a plain error that this court must correct.

II. Postconviction and Void Judgment

In this appeal, Levy contends that his waiver of trial counsel was invalid; and thus, his judgment of conviction is void. We construe Levy's motion to vacate a void judgment as an untimely petition for postconviction relief under R.C. 2953.21(A)(1). *See State v. Reynolds*, 79 Ohio St.3d 158, 1997-Ohio-304, 679

N.E.2d 1131, at syllabus (holding that a post direct appeal seeking to vacate a conviction on constitutional grounds is treated as a petition for postconviction relief); *see also State v. Ali*, 8th Dist. Cuyahoga No. 110624, 2021-Ohio-4303, ¶ 10. Under R.C. 2953.21(A), a person convicted of a criminal offense may petition the court to vacate the judgment if the defendant alleges that the judgment is void or voidable. Postconviction relief is available for errors of constitutional dimension, i.e., errors that effectively deprived the trial court of jurisdiction to conviction the defendant. *State v. Perry*, 10 Ohio St.2d 175, 178-179, 226 N.E.2d 104 (1967).

Because Levy was convicted in 2002, and this court affirmed his convictions in his direct appeal in 2004, Levy's 2021 motion is untimely. *See* R.C. 2953.21(A)(2) (petition for postconviction relief must be filed no later than 365 days after the date on which the trial transcript is filed in the court of appeals in a direct appeal). Moreover, Levy previously filed a petition for postconviction relief, making his current petition successive.

If a petition is successive or untimely, a defendant may still seek relief pursuant to R.C. 2953.23(A) by (1) demonstrating that he was unavoidably prevented from discovering facts upon which his petition relies, or that his petition relies on the recognition of a new federal or state right recognized by the United States Supreme Court that retroactively applies to his situation; and (2) showing by clear and convincing evidence that, but for the constitutional error, no reasonable

trier of fact would have found him guilty of the offense for which he was convicted.

Typically, a petitioner's failure to satisfy R.C. 2953.23(A) deprives a trial court of jurisdiction to adjudicate the merits of an untimely or successive postconviction relief petition. *State v. Apanovitch*, 155 Ohio St.3d 358, 2018-Ohio-4744, 121 N.E.3d 351, ¶ 36. Moreover, a successive petition for postconviction relief is typically subject to the doctrine of res judicata.

Levy does not allege or establish any of the requirements necessary to bring an untimely or successive petition for postconviction. Rather, he contends that his conviction is void because his waiver of counsel was deficient, thus depriving him of his constitutional right of counsel. The state contends that Levy's constitutional challenge would merely render his conviction voidable and thus, res judicata prevents him from this collateral attack because he could have raised the issue in a direct appeal. The state maintains that the Ohio Supreme Court's recent holdings in *Harper*, 160 Ohio St.3d 480, 2020-Ohio-2913, 159 N.E.3d 248, and *Henderson*, 161 Ohio St.3d 285, 2020-Ohio-4784, 162 N.E.3d 776, prevent Levy from obtaining the relief he seeks. Levy contends that *Harper* and *Henderson* do not apply because deprivation of the right to counsel as guaranteed by the Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution, divests a court of jurisdiction and renders a conviction void.

When the petitioner contends that the trial court lacked jurisdiction over his conviction, res judicata will not apply. A jurisdictional defect cannot be waived and may be raised at any time. *State ex rel Tubbs Jones v. Suster*, 84 Ohio St.3d 70, 75, 1998-Ohio-275, 701 N.E.2d 1002; *see also NDHMD, Inc. v. Cuyahoga Cty. Bd. of Revision*, 8th Dist. Cuyahoga No. 98004, 2012-Ohio-5508, ¶ 8. This is because "[i]f a court acts without jurisdiction, then any proclamation by that court is void." *Id.,* citing *Patton v. Diemer*, 35 Ohio St.3d 68, 518 N.E.2d 941 (1988) (courts have inherent authority to vacate their own void judgments). Accordingly, because a void judgment is a nullity, it is open to collateral attack at any time. *Lingo v. State*, 138 Ohio St.3d 427, 2014-Ohio-1052, 7 N.E.3d 1188, ¶ 46. Moreover, such attacks cannot be defeated by res judicata. *Id. See also State v. Wilson*, 73 Ohio St.3d 40, 45, 1995-Ohio-217, 652 N.E.2d 196, fn. 6*,* (holding that res judicata does not bar a criminal defendant from challenging a trial court's subject matter jurisdiction in a petition for postconviction relief).

In *Harper* and *Henderson,* the Supreme Court of Ohio realigned its precedent with the traditional understanding of what constitutes a void judgment. *Harper* at ¶ 4; *Henderson* at ¶ 34. The court did so to "restore predictability and finality to trial-court judgments and criminal sentences." *Henderson* at ¶ 33. As explained in *Henderson,* "[a] void judgment is rendered by a court without jurisdiction. * * * A voidable judgment is one pronounced by a court with jurisdiction." *Id.* at ¶ 17. If a judgment is void, "[i]t is a mere nullity

and can be disregarded" and "[i]t can be attacked in collateral proceedings." *Id.,* citing *Tani v. State*, 117 Ohio St. 481, 494, 5 Ohio Law Abs. 830, 159 N.E. 594 (1927).

In *Harper,* the Supreme Court of Ohio returned to the traditional view and held that "[w]hen a case is within a court's subject-matter jurisdiction and the accused is properly before the court, any error in the exercise of that jurisdiction in imposing postrelease control renders the court's judgment voidable, permitting the sentence to be set aside if the error has been successfully challenged on direct appeal." *Id.* at ¶ 4. In *Henderson,* the court recognized that *Harper* involved the imposition of postrelease control and was not a case in which a trial court deviated from a statutory mandate. *Henderson* at ¶ 27. The court made clear "that sentences based on an error are voidable, if the court imposing the sentence has jurisdiction over the case and the defendant, including sentences in which a trial court fails to impose a statutorily mandated term" and that "[a] sentence is void only if the sentencing court lacks jurisdiction over the subject matter of the case or personal jurisdiction over the accused." *Henderson* at *id.* Accordingly, it would appear that *Harper* and *Henderson* could deny Levy relief from his conviction because the trial court had subject matter jurisdiction over his felony charges and personal jurisdiction over him.

However, in *Ogle*, 167 Ohio St.3d 181, 2021-Ohio-4453, 190 N.E.3d 594, the Ohio Supreme Court applied *Henderson* and addressed what constitutes a void

sentence in the context of the Sixth Amendment right to counsel. After an unsuccessful direct appeal, Ogle filed a complaint for writs of prohibition and mandamus as a means to void her conviction, contending that the trial judge had no jurisdiction to conduct a sentencing hearing because she did not waive her right to trial counsel. The appellate court dismissed her writ of prohibition, deciding that the trial judge had general jurisdiction over Ogle's felony case; the court also dismissed her writ of mandamus, finding that she had an adequate remedy by way of a direct appeal to assert her right-to-counsel claim.

The Ohio Supreme Court reversed the appellate court decision, finding that Ogle pleaded "a colorable claim that [the trial judge] violated her *Sixth Amendment* [right to counsel] when [the judge] ordered her to not communicate with any lawyer and then sentenced her and that this error rendered the sentencing entry void." *Id.* at ¶ 19. In holding that a violation of the *Sixth Amendment* right to counsel renders a conviction void, the *Ogle* Court adhered to the decision of the Supreme Court of the United States decision in *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938), which declared a Sixth Amendment right-to-counsel violation results in a court's loss of jurisdiction and renders an associated conviction void. *Ogle* at ¶ 1213; *see also Custis v. United States*, 511 U.S. 485, 496, 114 S.Ct. 1732, 128 L.Ed.2d 517 (1994) (holding a violation of the Sixth Amendment right to counsel is the sole exception to the general rule against collateral attacks upon state convictions).

According to the *Ogle* Court, a Sixth Amendment violation renders an associated conviction void—meaning the trial court lacked jurisdiction over the subject matter of the case or personal jurisdiction over the accused. *Ogle* at ¶ 1214; *see also State v. Hudson*, 161 Ohio St.3d 166, 2020-Ohio-3849, 161 N.E.3d 608, ¶ 17 (stating the same). And when a court lacks subject matter jurisdiction, the issue of jurisdiction cannot be waived or forfeited and may be asserted at any time. *See State v. Mbodji*, 129 Ohio St.3d 325, 2011-Ohio-2880, 951 N.E.2d 1025, ¶ 10. Accordingly, *Harper* and *Henderson* would not bar Levy relief.

We recognize that the Ohio Supreme Court decided *Ogle* when reviewing a writ proceeding where the issue was whether the petitioner made a "colorable claim" for relief. And although it would seem that Ogle would not be precluded under *Harper* and *Henderson* from raising deprivation of trial counsel in a postconviction collateral attack, the Supreme Court did not address what effect *Harper* and *Henderson* would have on the merits of Ogle's complaint for writs of prohibition and mandamus. Interestingly, the court even stated that res judicata may be a defense that the trial judge could raise. *See Ogle* at ¶ 15. This statement appears to be contradictory to the court's holding that when a defendant is deprived of the right to counsel, the trial court loses jurisdiction, rendering a conviction void res judicata does not apply to void judgments.

The dissent in *Ogle* focused on the majority's characterization of "jurisdiction" in the *Zerbst* context, finding that the evolution of case law demonstrates that

Zerbst's use of the term "jurisdiction" was not based on subject-matter jurisdiction, but rather the generic term of "jurisdiction." The dissent concluded that denying an accused the assistance of counsel is not a jurisdictional error but a structural error. *Id.* at ¶ 34 (Kennedy, [C.]J., dissenting). "The trial court, then, was the proper forum to sentence Ogle for committing a felony, and consideration of whether the court denied her the assistance of counsel addressed the rights of the parties, not the adjudicatory power of the court." *Id.* at ¶ 38 (Kennedy, [C].J., dissenting.) According to the dissent, *Harper* and *Henderson* would bar Ogle from relief because her argument challenging a right to counsel would render her conviction voidable, not void, and thus, subject to res judicata.

From the outside looking in, the majority in *Ogle* appears to have only decided the issue presented—whether Ogle presented a colorable claim that would defeat a Civ.R. 12(B)(6) motion to dismiss on a writ of prohibition or met the criteria for mandamus. However, it cannot be overlooked that the *Ogle* Court appears to have concluded that a trial court depriving a defendant of trial counsel causes the trial court to lose jurisdiction and thus, renders any subsequent conviction void. Accordingly, in light of the *Ogle* decision, we conclude that neither *Harper* nor *Henderson* would preclude Levy relief if his waiver of counsel is deemed to be invalid.

III. Denial of Counsel is Structural Error

A criminal defendant's right to counsel is guaranteed under the Sixth Amendment to the United States Constitution and Article I, Section 10, of the Ohio Constitution. Correlative to this right is the criminal defendant's right to represent himself. *State v. Martin*, 103 Ohio St.3d 385, 2004-Ohio-5471, 816 N.E.2d 227, ¶ 23; *State v. Hackett*, 164 Ohio St.3d 74, 2020-Ohio-6699, 172 NE.3d 75, ¶ 9 (a defendant has a constitutional right to self-representation). Denial of either of these rights may result in structural error, warranting per se reversal. *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, 802 N.E.2d 643, ¶ 18; *Weaver v. Massachusetts*, ___ U.S. ___, 137 S.Ct. 1899, 1907-1908, 198 L.Ed.2d 420 (2017); *United States v. Davila*, 569 U.S. 597, 611, 133 S.Ct. 2139, 186 L.Ed.2d 139 (2013) (Structural error has been recognized only in limited circumstances involving fundamental constitutional rights, including the denial of counsel to an indigent defendant, the denial of counsel of choice, and the denial of self-representation at trial.).

In this case, Levy maintains that he never properly waived his right to counsel. Accordingly, he contends that that he was deprived of his constitutional right to counsel.

A criminal defendant may waive his or her Sixth Amendment right to counsel so long as the waiver occurs knowingly, intelligently, and voluntarily. *State v. Gibson*, 45 Ohio St. 2d 366, 345 N.E.2d 399 (1976), *paragraph one of the syllabus* citing *Faretta v. California*,

422 U.S. 806, 835, 95 S. Ct. 2525, 45 L.Ed.2d 562 (1975) (the choice to relinquish counsel should be made with "eyes open"); *Martin* at ¶ 24 (noting that criminal defendants have a constitutional right to self-representation and may do so when done voluntarily, knowingly, and intelligently).

Crim.R. 44 sets forth the procedure for waiver of counsel in cases of "serious offenses," which includes felonies. *See* Crim.R. 2(C)). Crim.R. 44(A) explains that a defendant is entitled to counsel in serious-offense cases, unless after being advised of the right, the defendant knowingly, intelligently, and voluntarily waives it. Additionally, Crim.R. 44(C) requires that the waiver "shall be in open court * * * . In addition, in serious offense cases the waiver shall be in writing."

The writing requirement of Crim.R. 44(C) is not constitutionally required, however, and thus reviewing courts will uphold waivers so long as the trial court "substantially complies" with the requirements of Crim.R. 44(A), ensuring an appropriate waiver of the right to counsel. *Martin*, 103 Ohio St.3d 385, 2004-Ohio-5471, 816 N.E.2d 227, at ¶ 39 ("[T]he trial court must demonstrate substantial compliance with Crim.R. 44(A) by making a sufficient inquiry to determine whether the defendant fully understood and intelligently relinquished his or her right to counsel.").

Substantial compliance with Crim.R. 44(A) has been found where the trial court undertakes a sufficient inquiry into whether the defendant fully understood and intelligently relinquished the right to

counsel. *Martin* at ¶ 39. This requires that the trial court "adequately explain the nature of the charges, the statutory offenses included within them, the range of allowable punishments, possible defenses, mitigation, or other facts essential to a broad understanding of the whole matter." *Id.* at ¶ 43, citing *Von Moltke v. Gillies*, 332 U.S. 708, 724, 68 S.Ct. 316, 92 L.Ed. 309 (1948); *State v. Gibson*, 45 Ohio St.2d 366, 377, 345 N.E.2d 399 (1976); *see also Hedge*, 8th Dist. Cuyahoga No. 110473, 2022-Ohio-464, ¶ 8.

In this case, Levy repeatedly asserted that he wished to proceed pro se, did not want trial counsel, and never objected to not having counsel. (Tr. 5-23.) He did not, however, execute a written waiver of counsel in accordance with Crim.R. 44. But the record demonstrates that the trial court advised Levy that if he wished to proceed without counsel, he would not receive any special consideration during trial, including with respect to his understanding of trial procedures and the Rules of Evidence. (Tr. 19-20.) The court explained to Levy certain Crim.R. 11 rights before he executed his waiver of speedy trial: that he had a presumption of innocence, the state bore the burden of proof, right to have a jury trial, question witnesses, compulsory process, and right not to testify. The court also cautioned Levy that by acting as his own attorney, the jury could form impressions about him during this activity. Nevertheless, although the trial court gave Levy these advisements, we find that it did not engage in a complete colloquy, as set forth in *Martin,* by explaining the nature of the charges, the statutory

offenses included within them, or the range of allowable punishments. Accordingly, this court could find that the trial court committed structural error by failing to ensure that Levy made a knowing, intelligent, and voluntary waiver of counsel.

In 2006, the Northern District of Ohio considered whether Levy made a knowing, intelligent, and voluntary wavier of counsel when it considered his petition for writ of habeas corpus. *See Levy*, N.D.Ohio No. 1:06-CV-237, 2008 U.S. Dist. LEXIS 8726 (Feb. 6, 2008). Among his five grounds for relief, Levy contended in his second ground that he "was denied the right to counsel in violation of the Fifth, Sixth, and Fourteenth Amendments where [he] was not informed of the nature and consequences of the crimes charged so as to enable him to make an informed decision" regarding his waiver of trial counsel. In his first ground for relief, Levy asserted that his appellate counsel was ineffective for failing to raise whether Levy's waiver of counsel was knowing, intelligent, and voluntary.

The federal court determined that Levy's arguments challenging his waiver of counsel lacked merit because Levy "was fully aware of the charges against him; his waiver of his right to counsel was made freely, unequivocally, and voluntarily." *Id.* at *13. The court reasoned:

> Levy had been represented by counsel in previous matters, therefore his familiarity with the criminal justice system belie any claim that he did not know the disadvantages of proceeding without counsel when he opted to do so. His utilization of

> pretrial procedures and preparation also illustrate that he had extensive knowledge of the criminal justice system. * * * [T]he record demonstrated that Levy clearly and unequivocally opted to represent himself.

Id. at *14.

Although we are not bound by rulings on federal constitutional law made by a federal court other than the United States Supreme Court, this court is permitted to review this decision with some persuasive weight. *State v. Burnett*, 93 Ohio St.3d 419, 424, 2001-Ohio-1581, 755 N.E.2d 857; *State ex rel. Heller v. Miller*, 61 Ohio St. 2d 6, 8, 399 N.E.2d 66 (1980).

We find the district court's decision cogent, and further find that based on the transcript of the proceedings, Levy waived his right to counsel. Prior to trial, Levy insisted that he proceed pro se for trial. In fact, despite having appointed counsel, he told the trial court that he had "been representing myself from the beginning pro se." (Tr. 7.) When the court inquired whether he needed his appointed counsel, Levy unequivocally said, "No. * * * Yeah, I'm sure, because I already got a pretty solid defense ready. I just need to get to a law library so I could put it together." (Tr. 8.) The court asked Levy's appointed counsel about the decision and counsel responded, "Other than that in speaking with Jermaine, he's indicated that he wants to represent himself. * * * I went over his opening statement and the voir dire of the jury." (Tr. 11.) The court found that no reason existed to believe that Levy was not competent to represent himself and then explained

to Levy that no special privileges would be afforded to him merely because he was acting pro se. (Tr. 1921.) Levy stated that he understood and wished to proceed pro se. Moreover, during the middle of trial and while discussing issuing subpoenas and the compulsory process, Levy told the court, "I am a pro se defendant. I did waive my counsel, right to counsel, but I didn't waive my right to compulsory [process]." (Tr. at 639.) Based on the record before this court, the totality of the circumstances and statements reveal that Levy made a knowing, intelligent, and voluntary waiver of trial counsel.

Even if this court were to find that Levy did not knowingly waive counsel, thus constituting structural error, he has failed to demonstrate that the error rises to the level of plain error that this court must correct. In *State v. West*, Slip Opinion No. 2022-Ohio-1556, 168 Ohio St. 3d 605, the Ohio Supreme Court reiterated that "a structural error is a violation of the basic constitutional guarantees that define the framework of a criminal trial; it is not susceptible to harmless-error review but rather, when an objection has been raised in the trial court, is grounds for automatic reversal." *Id.* at ¶ 2, citing *State v. Jones*, 160 Ohio St.3d 314, 2020-Ohio-3051, 156 N.E.3d 872, ¶ 2, 20; *see also State v. Gray*, 8th Dist. Cuyahoga No. 106589, 2018-Ohio-3678, ¶ 30. "But when the accused fails to object to the error in the trial court, appellate courts apply the plain-error standard of review, shifting the burden to the accused to demonstrate that the error affected the trial's outcome." *West* at *id,* citing *Jones* at ¶ 17. In fact,

the Ohio Supreme Court has consistently "'rejected the notion that there is any category of forfeited error that is not subject to the plain error rule's requirement of prejudicial effect on the outcome.'" *West* at *id.,* quoting *Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 24, citing *Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, 802 N.E.2d 643, at ¶ 23.

Crim.R. 52(B) provides that "plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Notice of plain error and "intervention by a reviewing court is warranted only under exceptional circumstances to prevent injustice." *State v. Bailey*, Slip Opinion No. 2022-Ohio-4407, ¶ 8; *see also West* at ¶ 22, quoting *Rogers* at ¶ 23 (even if the error satisfies the three criteria to constitute plain error, courts retain discretion to correct the error). In *State v. Bond*, Slip Opinion No. 2022-Ohio-4150, the Ohio Supreme Court reminded reviewing courts that they have discretion to recognize plain error, even when a structural error occurs. "The fmal consideration in the plain-error analysis is whether correcting the error is required to prevent a manifest miscarriage of justice or whether the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *See [United States v.] Olano*, 507 U.S. [725], at 736, 113 S.Ct. 1770, 123 L.Ed.2d 508 [(1993)]; *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804, *paragraph three of the syllabus." Id.* at ¶ 35.

In his emergency motion to vacate void judgment, Levy did not argue plain error. But in an argument raised for the first time on appeal, Levy asserts that he was prejudiced by the invalid waiver because he was unfamiliar with the potential penalty associated with the offenses. Despite this new argument, Levy has not demonstrated that he would not have proceeded without counsel had a valid waiver been executed or he had been thoroughly advised of the perils of self-representation. Accordingly, even reviewing for plain error, this is not the exceptional case where intervention by this court is required to prevent a manifest miscarriage of justice.

IV. Conclusion

Based on the foregoing, we find that the trial court did not err in denying Levy's emergency motion to vacate void judgment. His assignments of error are overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KATHLEEN ANN KEOUGH, JUDGE

FRANK DANIEL CELEBREZZE, III, P.J., and MARY J. BOYLE, J., CONCUR

Blackwood v. Berry Dunn, LLC

United States District Court for the
Southern District of West Virginia

March 27, 2023, Decided; March 27, 2023, Filed

Civil Action No. 2:18-cv-1216

Counsel: For Julia E. Blackwood, Plaintiff: Michael David Weikle, LEAD ATTORNEY, MICHAEL D. WEIKLE & ASSOCIATES, Ann Arbor, MI.

For Berry Dunn, LLC, Defendant: Brian J. Moore, Kelsey Haught Parsons, LEAD ATTORNEYS, DINSMORE & SHOHL, Charleston, WV.

Judges: John T. Copenhaver, Jr., Senior United States District Judge.

Opinion by: John T. Copenhaver, Jr.

Opinion

MEMORANDUM OPINION AND ORDER

Pending before the court is the Plaintiff's Rule 60(b)(4) & (6) Motion for Relief, filed on May 31, 2022. ECF No. 79.

I. Background

Julia E. Blackwood initiated this action in the Kanawha County Circuit Court on March 16, 2018. Compl., ECF No. 1-1. On August 8, 2018, Berry Dunn, LLC, and Nicole Y. Becnel, removed to this court on the basis of diversity of citizenship. Notice of Removal ¶¶ 5-8, ECF No. 1.

In their notice of removal, the defendants represented that "Berry Dunn is a Maine corporation with its principal place of business in Portland, Maine. (Documentation from West Virginia Secretary of State's office, attached as Exhibit D)." Id. ¶ 7. Exhibit D to the notice of removal consists of a "Business Organization Detail" webpage provided by the West Virginia Secretary of State respecting Berry, Dunn, McNeil & Parker, LLC, in which Berry Dunn, LLC, is described as an "LLC | Limited Liability Company" and lists Maine as Berry Dunn, LLC's, charter state.[1] Id. Ex. D.

Thereafter, Ms. Blackwood moved to remand, contending that complete diversity of citizenship was lacking inasmuch as Ms. Becnel and Ms. Blackwood were both citizens of West Virginia. ECF No. 6. Apart from the issue of Ms. Becnel and Ms. Blackwood's common citizenship, the plaintiff's motion did not address the citizenship of Berry Dunn, LLC. The court denied the motion, finding that Ms. Becnel had been fraudulently joined to defeat diversity jurisdiction. Mem. Op. and Ord. at 14, ECF No. 26.

A little more than a month before trial, the plaintiff filed a motion for reconsideration of the court's order denying the motion to remand. Mot. for Reconsideration, ECF No. 50. The plaintiff again argued that Ms. Becnel's citizenship should not be disregarded

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[1] "Berry Dunn, LLC" is shortened by the parties from Berry, Dunn, McNeil & Parker, LLC. See Rule 7.1 Disclosure Statement, ECF No. 2. Throughout the litigation, the parties in this court have referred to the defendant as "Berry Dunn, LLC," as the court does herein.

under the doctrine of fraudulent joinder. The plaintiff referred to Berry Dunn, LLC, as a "Limited Liability Corporation," rather than as a limited liability company, but did not otherwise address Berry Dunn, LLC's, citizenship. The court denied the plaintiff's motion. Mem. Op. and Ord. 6, ECF No. 60.

On September 12, 2019, the parties filed a Stipulation of Partial Dismissal with Prejudice. ECF No. 70. On the same date, the court entered a judgment order, closing the case. ECF No. 71.

Ms. Blackwood then appealed the court's order denying her motion to remand, which the Fourth Circuit affirmed. Blackwood v. Berry, Dunn, McNeil & Parker, LLC, No. 19-2153, 828 Fed. Appx. 174.

II. Discussion

The plaintiff now moves the court to set aside the court's final judgment order pursuant to Federal Rules of Civil Procedure 60(b)(4) and (6). Under Rule 60(b)(4), a court "may relieve a party . . . from a final judgment" because "the judgment is void," while under Rule 60(b)(6) the court may do so for "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(4), (6).

The plaintiff's Rule 60(b)(4) motion is made on the basis of purported newly discovered information, namely, information from the Secretary of State for the State of Maine, dated May 27, 2022, which provides that Berry Dunn, LLC, is an unincorporated limited liability company. Pl.'s Mot. ¶ 3, ECF No. 79. On the

basis of this information, the plaintiff argues that the court lacks subject matter jurisdiction, inasmuch as the defendants' notice of removal "misrepresented" the fact that Berry Dunn, LLC, is, as its name suggests, a limited liability company rather than a corporate entity. Id. ¶ 2. The plaintiff posits that this apparent disconnect between Berry Dunn, LLC's, actual legal status and the grounds for jurisdiction provided in the notice of removal is the result of the defendants "knowing, or being grossly negligent, in not knowing [Berry Dunn, LLC] was not a Maine corporation." Id. As the plaintiff now argues,

> "Neither the Court nor Plaintiff had any reason to suspect Defendants[ ] would misrepresent Berry Dunn as a Maine Corporation. As such, this issue could not have been notice[d] by the Court or Plaintiff. 'At best, [Defendants] did not engage in the necessary due diligence [regarding Berry Dunn's legal status before removing this civil action from state court] to determine whether there was appropriate jurisdiction; at worst, [Defendants actively concealed Berry Dunn's legal status as a] limited liability company [ ] to manufacture diversity jurisdiction.' "

Pl.'s Reply 3 n.9, ECF No. 81. The plaintiff also preemptively argues that any attempt to amend the notice of removal to include an accurate statement of jurisdictional facts is untimely. Pl.'s Mot. ¶ 5; Pl.'s Resp. ¶ 6. Consequently, according to the plaintiff, the court's judgment order in favor of the defendants is void "for complete want of subject matter jurisdiction solely claimed by Defendants in their Notice of

Removal based on complete diversity," and this case must be remanded to state court. Pl.'s Mot. ¶ 6.

The defendants respond by denying that they misrepresented the status of Berry Dunn, LLC.[2] Defs.' Resp. in Opposition to Pl.'s Mot. 1-2, ECF No. 80. The defendants concede that Berry Dunn, LLC, is in fact a limited liability company, but aver that none of its members, at the time of removal in August 2018, were citizens of West Virginia. Id. at 2. Berry Dunn, LLC, submits the affidavit of Jodi Coffee, the Controller for Berry, Dunn, McNeil & Parker, LLC, and Berry, Dunn, McNeil & Parker, Inc. Id., Affidavit of Jodi Coffee, Ex. B ("Coffee Aff."). Ms. Coffee attests to the citizenship of Berry Dunn, LLC's, 17 members in August 2018, all of whom were citizens of either Maine or New Hampshire. Id. ¶¶ 7-9.

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[2] Berry Dunn, LLC, argues, apparently for the first time, that Berry, Dunn, McNeil & Parker, Inc. ("Berry Dunn, Inc."), employed Ms. Blackwood, not Berry Dunn, LLC, and that Berry Dunn, Inc., is a Maine Corporation with a principal place of business in Maine. Considering Berry Dunn, Inc.'s, citizenship, subject matter jurisdiction exists, or so the argument goes. In response, the plaintiff has filed an unexecuted severance agreement between the plaintiff and Berry, Dunn, McNeil & Parker, LLC. ECF No. 81-7. This argument is belated and beside the point. The defendants did not at any time heretofore raise the issue of whether Berry Dunn, Inc., is the proper defendant. Berry Dunn, Inc., is not the entity named in this action nor is it the entity which litigated this case to final judgment. The court therefore disregards the argument that the citizenship of Berry Dunn, Inc., cures any jurisdictional defects, and will consider only that which concerns Berry Dunn, LLC.

Based on the foregoing, the defendants further argue that the court need not set aside its judgment order because (1) the court did in fact possess subject matter jurisdiction, as evidenced by the Coffee Affidavit, and (2) that the court had an arguable basis for jurisdiction. Id. at 4. Finally, the defendants argue res judicator should apply inasmuch as the plaintiff, having already appealed the court's order denying remand, had the opportunity to challenge this court's subject matter jurisdiction, and failed to do so. Id. at 5-6.

The plaintiff counters that the notice of removal was "clear and unambiguous" that Berry Dunn, LLC, was a corporation, and adds that the defendants' civil cover sheet states the same.[3] Pl.'s Resp. ¶ 1. The plaintiff dismisses the Coffee Affidavit as being "wholly unverified and undocumented," although the affidavit is quite plainly verified. Id. ¶ 3. Moreover, the plaintiff argues that the Coffee Affidavit is "suspect," because of "unsupported statements supporting Defendants'

[3] The plaintiff's response begins by pointing out that the defendants' reply "is presented without numbered paragraphs in violation" of Rule 10, and informing the court that plaintiff has chosen to forego moving the court to strike the defendants' reply. Such a motion would have been futile. Rule 10(b) applies to pleadings and requires that "claims or defenses" be stated in numbered paragraphs. The court having already entered final judgment in this matter, we are well beyond the pleading stage. As such, the defendants' reply in opposition to a Rule 60(b) motion is not subject to the requirement that claims or defenses in pleadings be numbered. See Fed. R. Civ. P. 7(a) (listing seven types of pleadings permitted in federal court); id. 10(b) (requirement to number paragraphs in pleadings).

verifiably false claims," regarding who the plaintiff's former employer was. Id. ¶¶ 11-13; see supra n.2.

The court turns first to the defendants' argument that the plaintiff's Rule 60(b) motion is subject to res judicata inasmuch as the plaintiff could have raised the same argument on appeal, but failed to do so.

The doctrine of res judicata applies when a final judgment on the merits in one action is attacked in a later action involving issues that were or could have been litigated in the first action. See Pueschel v. United States, 369 F.3d 345, 354-55 (4th Cir. 2004).

While it is true that the plaintiff has long possessed the necessary information to appeal the issue which she now raises for the first time, the plaintiff is attacking the final judgment order through Rule 60(b) in a single action rather than as a collateral attack in a separate action. Thus, the guiding principles the court must consider are those which concern finality of judgments under Rule 60(b) rather than under the doctrine of res judicata.

In considering a Rule 60(b) motion, the court's analysis proceeds in two steps. Wells Fargo Bank, N.A. v. AMH Roman Two NC, LLC, 859 F.3d 295, 298-99 (4th Cir. 2017) "To bring [herself] within Rule 60(b), the movant must make a showing of timeliness, a meritorious defense, a lack of unfair prejudice to the opposing party, and exceptional circumstances." Werner v. Carbo, 731 F.2d 204, 207 (4th Cir. 1984). These threshold requirements derive from "a well settled principle of law that a Rule 60(b) motion seeking relief from

judgment is not a substitute for a timely and proper appeal." Dowell v. State Farm Fire and Cas. Auto. Ins. Co., 993 F.2d 46, 48 (4th Cir. 1993). Next, "[a]fter a party has crossed this initial threshold, [it] then must satisfy one of the six specific sections of Rule 60(b)." Id.

Notwithstanding the broad rule announced in Werner respecting Rule 60(b) motions, the weight of authority indicates that some or all of the threshold requirements do not apply to Rule 60(b)(4) motions, inasmuch as the court's jurisdiction is being challenged. See Vinten v. Jeantot Marine Alliances, S.A., 191 F.Supp.2d 642, 649-651 (D.S.C. 2002) (Norton, J.) (concluding that the threshold requirements "which necessitate the use of discretion by the district court," are inconsistent with a district court's total lack of discretion to deny a Rule 60(b)(4) motion where jurisdiction is lacking); see also In re Heckert, 272 F.3d 253, 256-57 (4th Cir. 2001) (a Rule 60(b)(4) motion "is not subject to the reasonable time limitations imposed in the other provisions of Rule 60(b)"); Mary Kay Kane, Federal Practice & Procedure Civil § 2866 (3d ed.) (there is neither a time limit to attack a void judgment nor a requirement to show a meritorious defense). In short, a broad rule that all 60(b) motions must clear the threshold requirements is apparently at odds with authorities which expressly or impliedly state the opposite with respect to Rule 60(b)(4) motions in particular. Owners Ins. Co. v. Foxfield Commons, C.A., No. 6:20-031187-DMH, 2021 WL 5086262, *3 n.3 (D.S.C. Nov. 2, 2021) (concluding that an intra-circuit split exists on the applicability of the timeliness requirement on Rule

60(b)(4) motions and applying rule from In re Heckert because it preceded Wells Fargo) (Herlong, J.); Sherman v. Litton Loan Servicing, LP, Civ. A. No. 2:10cv567, 2011 WL 6203256, *1 n.2 (E.D. Va. Dec. 13, 2011) (explaining that all Rule 60(b) motions are subject to the threshold requirements, but the threshold requirements have been "relaxed" for Rule 60(b)(4) motions).

The question of whether all, some, or none of the threshold requirements apply to Rule 60(b)(4) motions is, in this case, not one the court needs to address further inasmuch as the court will consider her Rule 60(b)(4) motion on its merits. Notwithstanding the relaxed requirements on Rule 60(b)(4) motions, the threshold requirements apply with full effect to Rule 60(b)(6) motions, and so the court will turn to the plaintiff's Rule 60(b)(6) motion first. Werner, 731 F.2d at 207; Wells Fargo, 859 F.3d at 298-99.

1. Rule 60(b)(6)

In support of her Rule 60(b)(6) motion "for any other reason that justifies relief," the plaintiff argues only as follows:

> "[I]n view of the fact Berry Dunn is expected to know its status as a limited liability company, there is no reasonable basis for it to request relief from remand pursuant to Rule 60(b)(6) to amend jurisdictional allegations to include factual allegations regarding its status as a limited liability company (including the citizenship of each of its members) it was fully aware when it removed this

> case but chose to represent itself as Maine corporation."

Pl.'s Mot. ¶ 8. The plaintiff develops her Rule 60(b)(6) motion no further, regarding either the substance of the motion or the threshold requirements.

"Because the [threshold] requirements are described in the conjunctive, [plaintiff] must meet them all." Wells Fargo, 859 F.3d at 299. Inasmuch as the plaintiff has wholly failed to demonstrate that she satisfies any of the threshold requirements for bringing a Rule 60(b)(6) motion, the court DENIES the plaintiff's Rule 60(b)(6) motion.

Even if the court were to consider the plaintiff's Rule 60(b)(6) motion on the merits, the court would not grant the plaintiff relief under that section of Rule 60. Rule 60(b)(6) is intended to provide relief from judgment in "only extraordinary circumstances." Aikens v. Ingram, 652 F.3d 496, 500 (4th Cir. 2011). The reason for granting relief under Rule 60(b)(6) must be one that "does not fall within the list of enumerated reasons given in Rule 60(b)(6)." Id. The plaintiff identifies no extraordinary circumstances that the court can discern from her briefing. Even if plaintiff had done so, plaintiff would still have failed to provide adequate grounds for granting relief under Rule 60(b)(6). Id. Having denied the plaintiff's Rule 60(b)(6) motion, the court turns now to the plaintiff's Rule 60(b)(4) grounds.

2. Rule 60(b)(4)

A final judgment order is "void" under Rule 60(b)(4) if the court rendering judgment lacked subject matter jurisdiction. Wendt v. Leonard, 431 F.3d 410, 412 (4th Cir. 2005). The Fourth Circuit has recognized that this broadly stated rule is, in practice, "narrowly construe[d] . . . precisely because of the threat to finality of judgments and the risk that litigants . . . will use Rule 60(b)(4) to circumvent an appeal process they elected not to follow." Id.

In light of such considerations, a judgment is void "[o]nly when the jurisdictional error is 'egregious.'" Id. at 413 (quoting United States v. Tittjung, 235 F.3d 330, 335 (7th Cir. 2000)). "[C]ourts must look for the rare instance of a clear usurpation of power." Id. (citation and quotations omitted). "A court plainly usurps jurisdiction only when there is a total want of jurisdiction and no arguable basis on which it could have rested a finding that it had jurisdiction." Id. (citation and quotations omitted); Hawkins v. i-TV Digitalis Tavkozlesi zrt, 935 F.3d 211, 222 (4th Cir. 2019) ("So long as there was an 'arguable basis' for jurisdiction, we will uphold the judgment.") (quoting Wendt, 431 F.3d at 413). The plaintiff must show, then, that "there was no arguable basis for subject matter jurisdiction," in order for the court to set aside the final judgment as void. Hawkins, 935 F.3d at 221.

The defendants' notice of removal provided an arguable basis for the exercise of jurisdiction. The notice of removal unambiguously states on its face that Berry

Dunn, LLC, is a Maine corporation with a principal place of business in Maine. This statement, along with the fraudulently joined Becnel and the citizenship of Blackwood, supported the court's exercise of jurisdiction. Indeed, even now the plaintiff describes the statement in the notice of removal with respect to Berry Dunn, LLC, as being "clear and unambiguous." ECF No. 81 at 2.

Moreover, the conduct of the parties, in particular, the plaintiff, who failed to challenge subject matter jurisdiction with respect to Berry Dunn, LLC, provided an arguable basis for the exercise of jurisdiction when considered alongside that which the notice of removal stated in plain terms. While it is true that a void judgment may not obtain validity through the passage of time, Jackson v. FIE Corp., 302 F.3d 515, 523 (5th Cir. 2002) ("[A]t least absent extraordinary circumstances [] the mere passage of time cannot convert an absolutely void judgment into a valid one."), the defendants' long-unchallenged statement of grounds for jurisdiction is nonetheless relevant to the court's conclusion that it possessed an arguable basis for its exercise of jurisdiction. In contrast to the plaintiff's repeated insistence that subject matter was lacking due to the presence of Ms. Becnel in the litigation, the parties and the court proceeded through the litigation under the uncontested assumption that subject matter jurisdiction existed vis-à-vis the plaintiff and Berry Dunn, LLC. The court cannot conclude now that it lacked an arguable basis for exercising jurisdiction, especially where, as here, the plaintiff has relied on the very same

clear and unambiguous basis for jurisdiction for more than four years.

Finally, there is a more fundamental reason for denying the plaintiff's motion: the court does not in fact lack subject matter jurisdiction. The plaintiff largely takes issue with the notice of removal inasmuch as it was defective procedurally, and does not directly contend that Berry Dunn, LLC's, members are citizens of West Virginia such that diversity jurisdiction is actually lacking. Rather, the plaintiff's argument boils down to the fact that what was stated in the notice of removal was inaccurate. The removal statute provides a cure for such procedural defects. See 28 U.S.C. § 1447(c). Pursuant to 28 U.S.C. § 1447(c), a motion to remand may be made "on the basis of any defect in removal procedure." Although such a motion must be made within 30 days of the filing of the notice of removal, § 1447(c) further provides that "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." Id. (emphasis added). This case is now well past the point of final judgment and even further beyond the 30-day time period for making such a motion on the basis of a procedural defect.

To the extent that the plaintiff has contested the factual underpinning for the court's exercise of jurisdiction, the defendants have responded by demonstrating the existence of subject matter jurisdiction. Although the plaintiff asserts several times that the defendants seek to amend their notice of removal to rectify a defective basis for jurisdiction, the defendants

have sought no such thing; they have merely responded to the plaintiff's motion with an affidavit which demonstrates that jurisdiction existed at the time of removal. The plaintiff argues that this affidavit is suspect and unsupported. ECF No. 81 at ¶ 11. The court credits the sworn affidavit of Ms. Coffee and concludes otherwise. No further information is needed to support the court's conclusion that subject matter jurisdiction exists in this action.

Accordingly, the court DENIES the plaintiff's Rule 60(b)(4) motion, for failure to demonstrate that the judgement is void, inasmuch there is not a total want of jurisdiction, and an arguable basis existed for finding that the court possessed jurisdiction. Wendt, 431 F.3d at 413.

III. Conclusion

For the foregoing reasons, the plaintiff's motion under Rules 60(b)(4) and (6) is denied.

The Clerk is requested to transmit this Order to all counsel of record and to any unrepresented parties.

ENTER: March 27, 2023

/s/ John T. Copenhaver, Jr.

John T. Copenhaver, Jr.

Senior United States District Judge

Innerline Eng'g v. Operating Eng'rs Health & Welfare Trust Fund for N. Cal.

United States District Court for the Northern District of California

March 28, 2023, Decided; March 28, 2023, Filed

Case No. 22-cv-03663-JSC

Counsel: For Innerline Engineering, Inc., Plaintiff: Michael R Weinstein, Ferris and Britton, APC, San Diego, CA United Sta.

For OPERATING ENGINEERS HEALTH AND WELFARE TRUST FUND FOR NORTHERN CALIFORNIA; DAN REDING and JAMES E. MURRAY, Trustees, PENSION TRUST FUND FOR OPERATING ENGINEERS; DAN REDING and JAMES E. MURRAY, Trustees, PENSIONED OPERATING ENGINEERS HEALTH AND WELFARE TRUST FUND; DAN E. REDING and JAMES E. MURRAY, Trustees, Operating Engineers and Participating Employers Pre-Apprentice, Appentice and Journeyman Affirmative Action Training Fund, Dan E. Reding and James E. Murray, Trustees, OPERATING ENGINEERS LOCAL UNION NO. 3 VACATION, HOLIDAY AND SICK PAY TRUST FUND; DAN REDING and JAMES E. MURRAY, Trustees, Heavy and Highway Committee, also known as, Heavy and Highway Trust Fund, Defendants: Luz Elena Mendoza, Saltzman & Johnson Law Corporation, Alameda, CA; Matthew Parsa Minser, Saltzman & Johnson Law Corporation, Concord, CA.

For OPERATING ENGINEERS LOCAL 3 OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, Defendant: Kenneth Charles Absalom, LEAD ATTORNEY, Law Offices of Kenneth

C. Absalom, San Francisco, CA; Luz Elena Mendoza, Saltzman & Johnson Law Corporation, Alameda, CA; Matthew Parsa Minser, Saltzman & Johnson Law Corporation, Concord, CA.

For Operating Engineers Local 3 Heavy And Highway Trust Fund, Defendant: Dante' Rennell Taylor, Andrews Lagasse Branch + Bell, San Francisco, CA; Luz Elena Mendoza, Saltzman & Johnson Law Corporation, Alameda, CA; Matthew Parsa Minser, Saltzman & Johnson Law Corporation, Concord, CA.

Judges: JACQUELINE SCOTT CORLEY, United States District Judge.

Opinion by: JACQUELINE SCOTT CORLEY

Opinion

ORDER ON MOTION TO DISMISS

Re: Dkt. No. 35

Innerline Engineering, Inc, ("Innerline") brings this lawsuit against Defendants—a series of trust funds and their trustees (collectively, the "Trust Funds")—for relief from a prior judgment in equity, unjust enrichment, and conversion. The Trust Funds move to dismiss Innerline's claims. (Dkt. No. 35.)[1] After carefully considered the parties' briefing and having had the benefit of oral argument on March 23, 2023, the Court DENIES the Trust Funds' motion to dismiss. Innerline has standing to challenge the underlying

[1] Record citations are to material in the Electronic Case File ("ECF"); pinpoint citations are to the ECF-generated page numbers at the top of the documents.

judgment via an independent action in equity and this Court has jurisdiction to review that action. Defendants' argument that Innerline fails to state a claim is unpersuasive.

BACKGROUND

I. The Underlying Lawsuit

This dispute arises from an earlier lawsuit—*Operating Engineers' Health and Welfare Trust Fund for Northern California, et al., v. Caribou Energy Corporation, et al.*, in the United States District Court, Northern District of California, Case No. 4:18-cv-02086-YGR. In that case, the Trust Funds (who are the defendants in this matter) sued Rafael Padilla ("Padilla") and the Caribou Energy Corporation ("Caribou") for outstanding fringe benefit contributions, liquidated damages, interest, attorneys' fees, and costs owed to the Trust Funds under the Employee Retirement Income Security Act of 1974 ("ERISA") § 3(3), 29 U.S.C. § 1002(3) and the parties' contract. (*See* Case No. 3:18-cv-02086-YGR, Dkt. No. 1.) Padilla, Caribou, and the Trust Funds settled the underlying suit in July 2018. (Dkt. No. 34 ¶ 12.)

The settlement agreement established a total judgment of $345,849.44. (Dkt. No. 34-1 at 4.) The agreement defined Padilla as a "Guarantor" and confirmed Padilla was "personally guaranteeing the amounts due herein." (*Id.* at 3.) Padilla and Caribou further confirmed:

> [T]hat all successors in interest, assignees, and affiliated entities (including, but not limited to, parent or other controlling companies), and any companies with which either Defendant joins or merges, if any, shall also be bound by the terms of this Stipulation as Guarantors. This shall include any additional entities in which Guarantor is an officer, owner or possesses any controlling ownership interest. All such entities shall specifically consent to the Court's jurisdiction, the use of a Magistrate Judge for all proceedings, and all other terms herein, in writing, at the time of any assignment, affiliation or purchase.

(*Id.*) The contract also created procedures in the event of default. (*Id.* at 7 ¶ 10.) If Padilla or Caribou defaulted, the Trust Funds were required to make a written demand for payment. (*Id.*) If Padilla and Caribou failed to cure the default within seven days, all amounts remaining due would become payable to the Trust Funds. (*Id.*) In the event of an uncured default, the contract provided that "unpaid or late-paid contributions, together with 20% liquidated damages and 10% per annum interest shall become part of [the] Judgment." (*Id.* ¶ 11.) To enforce this provision, the stipulated judgment states: "A Writ of Execution may be obtained without further notice, in the amount of the unpaid balance plus any additional amounts due under the terms herein. Such Writ of Execution may be obtained solely upon declaration by a duly authorized representative of Plaintiffs setting forth the balance due as of the date of default." (*Id.* at 8 ¶ 12.)

The Court entered this stipulation as a judgment on July 3, 2018 (the "Judgment"). (*Id.* at 10.) Roughly three months later, the Trust Funds filed a notice of default with the Court. (*Id.* at 16.) Because Padilla and Caribou failed to comply with the agreement, the Trust Funds requested a new Writ of Execution for $535,144.35 (the principle amount due plus $189,294.91 in ongoing contribution amounts during the default period, liquidated damages, and interest). (*Id.* at 21 ¶ 8(f).)

The Trust Funds requested the Court enter the Writ of Execution against Caribou, Padilla, and Innerline Engineering (the plaintiff in this matter). (*Id.* at 21 ¶ 10.) Although Innerline was not a party in the case, the Trust Funds wished to execute the Writ against Innerline under the guarantor provision in the Judgment. (*Id.*) The Trust Funds provided evidence Padilla served as a corporate officer for Innerline when he signed the Judgment. (*Id.*)

The Court entered the Writ of Execution against Innerline in the amount of $535,144.35 and the Trust Funds served the Writ on Innerline in October 2018. (Dkt. No. 34 ¶ 20.) Since that date, the Trust Funds have levied "in excess of $438,000.00" against Innerline's assets based on the Writ executed from the Judgment. (*Id.* ¶ 23.)

II. Procedural Background

Innerline sued the Trust Funds in Alameda County Superior Court in July 2020.[2] (Dkt. No. 36-1 at 8.) Innnerline sought declaratory relief the Writ was invalid and restitution for unjust enrichment. (*Id.* at 15.) In February 2021, the state court stayed Innerline's suit to avoid conflicting rulings because Innerline could challenge the writ in federal court. (*Id.* at 46-47.)

Innerline filed this action in June 2022. Initially, Innerline sought declaratory relief the Writ was invalid and restitution for unjust enrichment. (Dkt. No. 1.) The Trust Funds moved to dismiss. (Dkt. No. 12.) The

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[2] Defendants request the Court take judicial notice of previous suits involving the parties in this case and the underlying litigation. Generally, a district court cannot "consider material outside the pleadings when assessing the sufficiency of a complaint under Rule 12(b)(6);" however, Federal Rule of Evidence 201 allows a district court to do so through judicial notice. *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 998 (9th Cir. 2018). A court can take judicial notice of facts "not subject to reasonable dispute" because they are "generally known within the court's territorial jurisdiction" or can be "accurately determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). This includes "undisputed matter of public record, including documents on file in federal and state courts." *Harris v. Cty. of Orange*, 682 F.3d 1126, 1132 (9th Cir. 2012).

The Court GRANTS Defendants' request as to the parallel state court proceedings (Dkt No. 36, Exs. F, G, and H), and the bankruptcy court filings (Exs. I through O). The Court DENIES Defendants' motion as to Exhibit E. Contrary to Defendants' argument, the email from Caribou to Defendants confirming payment does not form the basis for the complaint nor is it referenced in that document.

Court dismissed Innerline's declaratory relief claim and declined supplemental jurisdiction over the unjust enrichment action. Specifically, the Court determined ancillary subject matter jurisdiction exists in this Court to review earlier judgments (and writs based on those judgments). But declaratory relief was unavailable as to the Writ because the Writ had already expired. So, Plaintiff's sole federal claim was moot. Plaintiff then filed a First Amended Complaint ("FAC"), seeking to void the Judgment as to Innerline, restitution for unjust enrichment, and damages for conversion of the levied funds.

DISCUSSION

The Trust Funds move to dismiss under Federal Rules 12(b)(1) and 12(b)(6). Under Rule 12(b)(1), the Trust Funds argue Innerline lacks standing to challenge the Judgment. Under Rule 12(b)(6), the Trust Funds argue Innerline fails to state a claim upon which relief can be granted. (Dkt. No. 35 at 3.) The Court disagrees and DENIES the Trust Funds' motions to dismiss.

I. The Trust Funds' Motion to Dismiss under Rule 12(b)(1)

A. Justiciability and Jurisdiction

The Trust Funds' standing argument actually encompasses three different doctrines. To clarify matters, the Court will parse these arguments into their respective doctrinal categories. First, the Trust Funds claim

Innerline lacks standing to challenge the Judgment itself (rather than the Writ of Execution based on the Judgment). Second, the Trust Funds imply this Court's prior motion to dismiss order only addressed ancillary jurisdiction to review the writ, rather than jurisdiction to review the Judgment. Third, the Trust Funds argue the challenge to the Judgment may only be lodged via a Rule 60(b)(4) motion in the underlying case, rather than through an independent action in equity. Each argument is unpersuasive.

1. Standing

Standing consists of three elements. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016). The plaintiff must have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.* The Trust Funds challenge whether Innerline "suffered a cognizable injury as a result of the Stipulation in the Underlying Action." In particular, they contend given Innerline pleads it was not a party to the Judgment, but that it was (improperly) made a party to the underlying writ, Innerline pleads only that it was injured by the writ, not the Judgment. So, Innerline does not have standing to challenge the Judgment.

The Trust Funds' argument contradicts Ninth Circuit authority. Although the parties neglected to cite any caselaw on this point, the Ninth Circuit has held "[a] nonparty may seek relief from a judgment

procured by fraud if the nonparty's interests are *directly affected.*" *Eyak Native Village v. Exxon Corp.*, 25 F.3d 773, 777 (9th Cir. 1994); *see also Herring v. F.D.I.C.*, 82 F.3d 282, 285 (9th Cir. 1995) (reaffirming the "directly affected" standard as to parties challenging an underlying judgment). While the challenge here is not one of fraud on the court, there is no reason why that "directly affected interests" standard should not also apply here. The Complaint alleges the Trust Funds used the Judgment to obtain a writ to levy Innerline's bank account. (Dkt. No. 34 ¶ 18.) The Trust Funds do not contest this. For example, in the Trust Funds' motion to dismiss they state: "Defendants note that they relied on the clear terms of the Stipulation to bind Innerline as a Guarantor/Judgment Debtor and not CCP Section 187." (Dkt. No. 35 at 31.) In other words, the Trust Funds argue the Judgment authorized the Writ. Thus, even if Innerline is not a party to the Judgment, Innerline has standing to challenge the Judgment as void because the Judgment "directly affected" its interests.

2. Ancillary Subject Matter Jurisdiction

The Trust Funds also argue this Court's earlier Order "only addresses and finds ancillary jurisdiction over the Writ in the Underlying Action and not the stipulated judgment." (Dkt. No. 40 at 8.) To clarify matters, this Court has ancillary subject matter jurisdiction to review Innerline's motion for relief from the Judgment rendered in the Northern District of California. *United States v. Beggerly*, 524 U.S. 38, 46, 118

S. Ct. 1862, 141 L. Ed. 2d 32 (1998). Indeed, this Court only had jurisdiction to review the Writ in the first motion to dismiss Order *because* the Court has jurisdiction to review its earlier judgments. Thus, ancillary subject matter jurisdiction exists here.

3. Equitable Jurisdiction

The Trust Funds' final "standing" argument—that Innerline should have brought a motion under Rule 60(b)(4) rather than an independent action in equity—is better categorized as a challenge to this Court's equitable jurisdiction. *See Guzman v. Polaris Indus. Inc.*, 49 F.4th 1308, 1314 (9th Cir. 2022) ("Equitable jurisdiction is distinct from subject matter jurisdiction, although both are required for a federal court to hear the merits of an equitable claim.") At bottom, the Court disagrees with the Trust Funds. The availability of a Rule 60(b)(4) motion does not preclude Innerline from bringing an independent action in equity here.

a. The Rule 60 Scheme

To understand how the Trust Funds' 60(b)(4) argument touches on equitable jurisdiction, it is necessary to explain how the independent action in equity fits within the larger context of Federal Rule of Civil Procedure 60.

Rule 60 enumerates certain procedures to obtain relief from a judgment or order. Fed. R. Civ. P. 60. Rule 60(a) covers corrections to judgments to remedy

clerical mistakes, oversights, and omissions in judgments. Rule 60(b), by contrast, allows the court to relieve "a party or its legal representative from a final judgment, order, or proceeding for the following reasons":

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b). Under Rule 60(c), motions under 60(b)(1), (2), and (3) must be brought within one year. All other provisions must be utilized "within a reasonable time" after the entry of judgment or the date of the proceeding. Fed. R. Civ. P. 60(c).

But Rule 60 is not the exclusive means to obtain relief from a prior judgment. Rule 60(d) provides: "This rule does not limit a court's power to: (1) entertain an independent action to relieve a party from a judgment, order, or proceeding . . . " So, Rule 60 "does not limit" any equitable power that already exists. *Lapin v. Shulton, Inc.*, 333 F.2d 169, 171 (9th Cir. 1964) ("[Rule 60(d) preserves to courts the powers which theretofore they had been free to exercise . . . ") And such equitable

power does exist. A party seeking equitable relief through an independent action must satisfy the traditional equitable requirements for such suits. Those elements are traditionally stated as:

> (1) a judgment which ought not, in equity and good conscience, to be enforced; (2) a good defense to the alleged cause of action on which the judgment is founded; (3) fraud, accident, or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense; (4) the absence of fault or negligence on the part of the defendant; and (5) the absence of any adequate remedy at law.

Beggerly, 524 U.S. at 41; *see also National Sur. Co. v. State Bank of Humboldt, Neb.*, 120 F. 593, 599 (8th Cir. 1903) (stating the traditional equitable factors prior to the Federal Rules of Civil Procedure). The Trust Funds' final standing argument seems to seize on this fifth element: the absence of any adequate remedy at law.

b. Alternative Remedies at Law

The crux of the jurisdictional dispute here is whether some alternative remedy at law exists to redress Innerline's alleged injury. This matters from a jurisdictional perspective (rather than just a merits perspective) because equitable jurisdiction in federal courts is limited. In diversity actions, for example, federal courts lack equitable jurisdiction where an adequate remedy at law remains available. *See Sonner v. Premier Nutrition Corp.*, 971 F.3d 834, 842 (9th Cir. 2020); *Guzman v. Polaris Indus. Inc.*, 49 F.4th 1308,

1313 (9th Cir. 2022) (concluding the district court lacked equitable jurisdiction to hear a claim where the plaintiff had an adequate remedy at law under federal equitable jurisdiction principles). The same principal applies for independent actions in equity absent diversity jurisdiction. If an adequate remedy at law exists, an independent action in equity fails. *United States v. Beggerly*, 524 U.S. 38, 41, 118 S. Ct. 1862, 141 L. Ed. 2d 32 (1998) (discussing the elements of an independent action in equity as jurisdictional).

The Trust Funds suggest Rule 60(b)(4) is a "remedy at law" precluding equitable relief for Innerline's independent action and state law unjust enrichment claims. (Dkt. No. 34 at 3, 33; Dkt. No. 40 at 7, 19-20.) Thus, the Court must consider whether it may exercise equitable jurisdiction via an independent action in equity when a party could raise a motion via Rule 60(b)(4) in the underlying action. In other words, does Rule 60(b)(4) provide a "remedy at law" that precludes equitable jurisdiction over Innerline's independent action?

The answer is no. Rule 60(b)(4) is not a "remedy at law;" it is a procedure to obtain a remedy. Independent actions in equity simply provide a different path to the same remedy. The Ninth Circuit's reasoning in *Nevada VTN v. Gen. Ins. Co. of Am.*, 834 F.2d 770, 775 (9th Cir. 1987) supports this functional approach. There, the court observed: "An independent action resembles a separate suit, yet it seeks in essence to duplicate the relief afforded by a motion in the original proceedings." *Id.* Thus, "motions and independent actions for relief

commonly have been treated as interchangeable." *Id.* Most out-of-circuit authority takes the same approach. C. Wright & A. Miller, 11 *Federal Practice & Procedure* § 2868 (3d ed. 2022) (collecting cases for the proposition that "[a] party is not bound by the label used in the party's papers. A motion may be treated as an independent action *or vice versa as is appropriate.*") (emphasis added); *see also Bankers Mortg. Co. v. United States*, 423 F.2d 73, 77 n.7 (5th Cir. 1970) ("Where the adverse party is not prejudiced an independent action for relief may be treated as a 60(b) motion, and conversely, a 60(b) motion may be treated as the institution of an independent action.") So, if a motion in the underlying action and an independent action in equity are "interchangeable" because independent actions "in essence [seek] to duplicate the relief" of a motion in the underlying case, *see Nevada VTN*, 834 F.2d at 775, it would make no sense to *preclude* equitable jurisdiction over independent actions for failure to pursue a motion in the underlying case. Put differently, because 60(b)(4) motions and independent actions in equity are interchangeable, the availability of the former does not divest this Court of jurisdiction to hear the latter. To put it yet another way, a Rule 60(b)(4) motion is not a *legal* remedy; it is an alternative means to obtain an equitable remedy in this context.

Although the Trust Funds fail to cite any case to support the proposition that Rule 60(b)(4) relief is a remedy at law, their position is not entirely without authority. At least one federal court has held an independent action in equity is unavailable when relief

could be obtained via a Rule 60(b)(4) motion in a different jurisdiction. *See Taft v. Donellan Jerome, Inc.*, 407 F.2d 807, 808 (7th Cir. 1969) ("Plaintiff has an adequate remedy at law and since he failed to exhaust his legal remedies under Rule 60(b)(4), he should not be allowed to bring an equitable action in another jurisdiction.") But the Seventh Circuit in *Taft* did not explain how Rule 60(b) provides a remedy "at law." Rather, that case is better read as a presumption against the exercise of equitable jurisdiction when a party pursues an independent action in a jurisdiction that did not issue the underlying judgment. In a cross-jurisdictional situation, the failure to bring a 60(b)(4) motion in the underlying action raises comity concerns between different federal jurisdictions. *See Lapin v. Shulton, Inc.*, 333 F.2d 169, 172 (9th Cir. 1964) (affirming dismissal of independent action where district court refused to exercise equitable jurisdiction on comity grounds); *Treadaway v. Acad. of Motion Picture Arts & Scis.*, 783 F.2d 1418, 1421 (9th Cir. 1986) (discussing comity concerns as discretionary, not jurisdictional). The same comity concerns are not present here because Innerline brought its independent action in the same district court that issued the underlying judgment.

Thus, given the Ninth Circuit's reasoning in *Nevada VTN*, the Court has equitable jurisdiction to review Innerline's independent action in equity even though Innerline could have brought a Rule 60(b) motion in the underlying action. 834 F.2d at 775; *see also U.S. Care, Inc. v. Pioneer Life Ins. Co. of Illinois*, 244

F. Supp. 2d 1057, 1061 (C.D. Cal. 2002) (treating independent action in equity as a Rule 60(b) motion for relief); *Mitchell v. Bd. of Cnty. Comm'rs of Cnty. of Santa Fe*, No. CIV 05-1155 JB LAM, 2011 U.S. Dist. LEXIS 37486, 2011 WL 1330775, at *6 (D.N.M. Mar. 31, 2011) (describing the procedural benefits of independent actions in equity as a distinct suit where disputed facts may require additional discovery).

* * *

In sum, the Court is satisfied Innerline has standing to challenge the Judgment, ancillary subject matter jurisdiction exists in this Court to hear that challenge, and the limits of equitable jurisdiction do not preclude Innerline's independent action. Thus, the Trust Funds' challenge under Federal Rule of Civil Procedure 12(b)(1) fails.

II. The Trust Funds' Motion to Dismiss under Rule 12(b)(6)

The Trust Funds' 12(b)(6) motion is also unpersuasive. The Trust Funds argue for dismissal on grounds that (1) Innerline's independent cause of action fails to state a claim; (2) laches bar Innerline's claims; (3) ERISA requires dismissal; (4) no due process violation occurred because the stipulation binds Innerline; and (5) Innerline's unjust enrichment claim fails because Innerline has an adequate remedy at law under Rule 60(b)(4). The Court disagrees.

A. Independent Action in Equity

To obtain relief from a judgment via an independent action in equity, a plaintiff must prove the following elements exist:

> (1) a judgment which ought not, in equity and good conscience, to be enforced; (2) a good defense to the alleged cause of action on which the judgment is founded; (3) fraud, accident, or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense; (4) the absence of fault or negligence on the part of the defendant; and (5) the absence of any adequate remedy at law.

See United States v. Beggerly, 524 U.S. 38, 41, 118 S. Ct. 1862, 141 L. Ed. 2d 32 (1998). This is a demanding standard. Relief is only available "to prevent a grave miscarriage of justice." *Beggerly*, 524 U.S. at 47. Taking all inferences in favor of the non-moving party, Innerline met its burden to plead an independent action in equity.

1. A Judgment Which Ought Not Be Enforced

Innerline alleges the Court entered a judgment which ought not to be enforced. Specifically, Innerline requests relief from the Judgment because it is "void" as to Innerline. (Dkt. No. 34 at 8.) A judgment can be "void" when premised on "a violation of due process that deprives a party of notice or the opportunity to be heard." *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 271, 130 S. Ct. 1367, 176 L. Ed. 2d 158 (2010). According to Innerline, the Judgment binds

Innerline to guarantee Caribou and Padilla's debt. Innerline complains the Court entered this judgment without notice to Innerline. So, Innerline seeks an order that the Judgment is void as to Innerline. At this initial pleading stage, those allegations are sufficient to raise a claim.

The Trust Funds' contrary argument is unpersuasive. The Trust Funds contend that even if the Writ was void—for lack of notice to Innerline—that does not mean the Judgment is void. (Dkt. No. 40 at 14.) Specifically, the Trust Funds argue the Judgment was not premised on a due process violation, even if the Court found the Writ was premised on a violation. The Judgment here allowed the Trust Funds to bind non-signatories to the contract as guarantors and authorized the Trust Funds to obtain a writ of execution against those guarantors without notice. (Dkt. No. 34-1 ¶¶ 3, 12.) The Trust Funds have not persuaded the Court that a non-party bound under this scheme cannot as a matter of law obtain relief from a judgment that purports to bind that non-party as a guarantor.

The Trust Funds cited authority is inapposite. In *Garcia v. United States*, No. 20-55670, 2021 U.S. App. LEXIS 22369, 2021 WL 3202164, at *1 (9th Cir. July 28, 2021), for example, the Ninth Circuit affirmed that a party cannot raise a due process challenge to a judgment when the alleged due process violation occurred at a stage completely unrelated to the judgment. There, the plaintiff's counsel failed to appear at an Order to Show Cause hearing when the district court required the defendant to appear. (*See* C.D. Cal. No.

17-6380-DSF-AFM; Dkt. No. 63 at 2-3.) The district court found "any purported due process violation or misrepresentations made at the OSC Hearing did not result in the MTD Order and Judgment; instead they were based on Plaintiff's failure to oppose the motion to dismiss." (*Id.* at 5.) That is not what happened here. Indeed, just the opposite is true. The purported due process violations here are inherent in the judgment and directly caused Innerline's injury.

The Trust Funds' citation to *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 130 S. Ct. 1367, 176 L. Ed. 2d 158 (2010) is similarly unpersuasive at this stage of the litigation. There, the Court found no due process violation occurred even though the bankruptcy court failed to conduct an adversarial proceeding pursuant to the Federal Rules of Bankruptcy Procedure. *Id.* at 261. The Court emphasized that the creditor received "actual notice" of a bankruptcy plan "more than satisfied its due process rights." *Id.* Here, according to the Complaint's allegations, Innerline was not a party to the Judgment and received no notice before the Court entered the Judgment and executed the Writ under the Judgment. Drawing all inferences in Innerline's favor, the Trust Funds have not shown as a matter of law that Innerline received actual notice merely because Padilla signed the Judgment in his individual capacity.

2. Innerline's Defense

As to Innerline's defense and the mistake that prevented Innerline from raising that defense—the second and third factors necessary to state a claim—Innerline complains it was not a party to the settlement negotiation and the Judgment was issued without notice or an opportunity for Innerline to be heard in opposition. In other words, Innerline complains it was bound as a judgment debtor under the judgment despite never appearing in the underlying case. The Trust Funds argue Padilla represented Innerline in the underlying case so no due process violation occurred. But whether Padilla did, in fact, do so is a question beyond a 12(b)(6) motion to dismiss.

3. The Absence of Fault and Negligence

The cases vary when describing this prong's requirements. Most cases describe this pleading requirement in negative terms—an "essential element" required to bring an independent action is the "absence of fault or negligence." *Beggerly*, 524 U.S. at 41; *State Bank*, 120 F. at 599; *Pickford v. Talbott*, 225 U.S. 651, 658, 32 S. Ct. 687, 56 L. Ed. 1240 (1912). Some later cases have restyled this element as a requirement that plaintiffs plead "diligence." *S. Care, Inc. v. Pioneer Life Ins. Co. of Illinois*, 244 F. Supp. 2d 1057, 1062 (C.D. Cal. 2002) (citing 12 James Wm. Moore et al., Moore's Federal Practice § 60.82 (3d Ed. 2002)). But the treatise underlying that formulation cites cases requiring "absence of fault or negligence." *See id.*

(citing *Carteret Savings and Loan Association v. Dr. Neil Jackson*, 812 F.2d 36, 39 (1st Cir. 1987); *Indian Head National Bank of Nashua v. Brunelle*, 689 F.2d 245, 250 (1st Cir. 1982)). Thus, to the extent those requirements differ, "the absence of fault or negligence" is the correct standard.

But that standard begs a question: a party must plead the absence of fault or negligence *as to what*? Or, alternatively, diligence *as to what*? The Trust Funds argue "Innerline cannot and has not shown that it is free of fault or negligence in its delay *in seeking relief* and in its failure to file a 60(b) motion at any time since 2018." (Dkt. No. 35 at 20) (emphasis added). In other words, the Trust Funds argue Innerline must be free from fault or negligence as to their efforts to seek relief from judgment. This argument misunderstands the nature of the "fault or negligence" prong.

Rather, this element requires a party prove the reason it failed to present a defense in the underlying action was not its own negligence. In *Pickford v. Talbott*, for example, equitable relief was unavailable because the party seeking relief based on newly discovered evidence could have found the evidence prior to the entry of judgment. 225 U.S. at 658. There, the party seeking relief satisfied the first three elements for an independent action: (1) an unjust judgment existed; (2) the party had a defense; and (3) a mistake or fraud barred the party from raising that defense earlier. But because the party seeking relief was the party who made the underlying mistake (i.e. the

failure to investigate all available evidence), equitable relief was barred. *Id.* As another case stated:

> The power of a court of equity to relieve against a judgment, upon the ground of fraud in a proceeding had directly for that purpose, is well settled. The power extends also to cases of accident and mistake. But such relief is never given upon any ground of which the complainant, with proper care and diligence, could have availed himself *in the proceeding at law.* In all such cases he must be without fault or negligence. If he be not within this category, the power invoked will refuse to interfere, and will leave the parties where it finds them.

Brown v. Buena Vista Cnty., 95 U.S. 157, 159, 24 L. Ed. 422 (1877) (emphasis added). Put differently, delay in raising a defense *after* judgment was entered is not coextensive with "fault or negligence" in raising the defense *before* judgment was entered. Laches governs the former, the "absence of fault or negligence" governs the latter. *Id.* (discussing laches as a separate defense barring relief).

Applying that standard here, Innerline adequately pleads the absence of fault or negligence in raising its defense to the judgment. According to the complaint, the reason Innerline failed to defend itself in the underlying action is that Innerline was not a party to the underlying action. (Dkt. No. 34 ¶ 28.) That raises a plausible inference that Innerline's current defense is not barred by its negligence in the underlying action. The Trust Funds' contrary argument—that Innerline was "dilatory" in protecting its rights—

speaks to laches, not negligence. (Dkt. No. 35 at 21.) So, in short, Innerline adequately pleads that the failure to object to the judgment prior to its entry was not the result of its own negligence.

4. Alternative Remedies at Law.

As to the last element, no alternative legal remedy exists to relieve Innerline from the allegedly void judgment. *See* Part I.3.b, *supra*, at 7-9. The availability of Rule 60(b)(4) does not preclude an independent action in equity.

* * *

The Trust Funds' reliance on *Ayres v. MetLife, Inc.*, No. 21-CV-08523-JSC, 2022 U.S. Dist. LEXIS 101092, 2022 WL 1801494 (N.D. Cal. June 2, 2022) is also inapposite. (Dkt. No. 35 at 18-19.) In *Ayres*, this Court dismissed an independent action in equity because the plaintiffs were parties in the underlying lawsuit, lacked a meritorious defense to that suit, and provided no explanation for why they waited over 20 years to bring their challenge to the underlying suit. Critically here, unlike the *Ayres* plaintiffs, Innerline was not a party to the underlying suit and raises a defense that—if proved on the merits—could prove the Judgment was void for lack of notice to Innerline. And the judicially noticeable facts here show that, unlike the *Ayres* plaintiffs, Innerline took at least some action to protect its rights prior to filing this lawsuit. (*See* Dkt. No. 36-1 at 8.) So, at bottom, *Ayres* is not persuasive here. Because Innerline meets the pleading

requirements for an independent action in equity, the Trust Funds' arguments for dismissal are unpersuasive

B. Laches

The Trust Funds next attempt to argue laches bars Innerline's equitable action and unjust enrichment claim. The Court disagrees at this early stage in the proceedings. As an initial matter, it is not clear that laches can bar Innerline's independent action in equity. Laches traditionally applies to independent actions in equity. *See* Fed. R. Civ. P. 60 advisory committee's note ("Where the independent action is resorted to, the limitations of time are those of laches or statutes of limitations.") But the Ninth Circuit has held "[a] void judgment cannot acquire validity because of laches on the part of the judgment debtor." *In re Ctr. Wholesale, Inc.*, 759 F.2d 1440, 1448 (9th Cir. 1985) (calling delay in bringing a Rule 60(b)(4) motion "irrelevant" even in light of Rule 60(c)'s command that such motions must be brought within a reasonable time). Innerline argues this independent action is a motion for relief from a void judgment. Thus, if the principles underlying Rule 60(b)(4) apply to independent actions seeking relief from a void judgment, *see Nevada VTN*, 834 F.2d at 775, laches may not apply to the independent action.

Even if laches applies, however, dismissal of either equitable claim based on laches is premature on this 12(b)(6) motion. It matters *why* Innerline waited to

bring its claims. *Evergreen Safety Council v. RSA Network Inc.*, 697 F.3d 1221, 1227 (9th Cir. 2012) ("In determining the reasonableness of the delay, courts look to the cause of the delay.") Drawing all inferences in Innerline's favor, it is possible Innerline's delay was reasonable given it was not a party to the underlying suit and it tried to contest the matter in state court within two years. The Trust Funds argue such delay was unreasonable based on *Garcia v. United States*, No. 20-55670, 2021 U.S. App. LEXIS 22369, 2021 WL 3202164, at *1 (9th Cir. July 28, 2021) (affirming district court's denial of Rule 60(b)(4) motion brought 20 months after the offending order). (Dkt. No. 40 at 14.) But that case merely exemplifies why dismissal for unreasonable delay would be premature here. As the Ninth Circuit noted in *Garcia*, "[w]hat constitutes 'reasonable time' depends upon the facts of each case, taking into consideration the interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to the other parties." *Id.* (quoting *Lemoge v. United States*, 587 F.3d 1188, 1196 (9th Cir. 2009)). For example, the district court in that case relied on declarations and evidence beyond the Rule 60 motion to determine the delay was unreasonable. (*See* C.D. Cal. No. 17-6380-DSF-AFM; Dkt. Nos. 61-1, 63.) Here, in contrast, the Court cannot rely on such evidence to determine laches here because the litigation has not proceeded beyond the pleadings. Thus, the Trust Funds' laches argument fails, at this stage at least, because the Court cannot find unreasonable delay based on the pleadings and judicially noticeable record alone.

C. ERISA

The Trust Funds next argue "All Causes of Action must be dismissed as ERISA Provides Absolute Protection for Plan Benefits." (Dkt. No. 35 at 24.) The basis for Defendants' theory is 29 U.S.C. § 1103(c). That statute provides "the assets of a plan shall never inure to the benefit of any employer[.]" *Id.* The Trust Funds "contend that both Caribou and Innerline are employers under ERISA." (Dkt. No. 35 at 25.) Thus, the Trust Funds argue Innerline's claims must be dismissed because 29 U.S.C. § 1103(c)(2)(A)(ii) provides the exclusive means for "employers" to recover contributions employers make to ERISA plans by "mistake of fact or law."

This argument far exceeds the bounds of a motion to dismiss for failure to state a claim under Rule 12(b)(6). Neither the complaint nor any judicially noticeable documents establish as a matter of law Innerline is an ERISA employer, so it would be error for the Court to consider the ERISA theory at this stage. Thus, the Trust Funds' motion to dismiss on ERISA grounds fails.

D. The Stipulation and Cal. Code Civ. P. § 187

Innerline pleads the underlying judgment is void in part because Innerline never received notice of the judgment under California Code of Civil Procedure § 187. (Dkt. No. 34 ¶ 17.) The Trust Funds argue the Court should find the procedures under that statute unnecessary because the Judgment clearly and

unambiguously bound Innerline. In the alternative, the Trust Funds argue adding Innerline as a judgment debtor did not violate due process because Innerline was Padilla's alter-ego. Neither argument warrants dismissal at this stage.

Even if the Court assumes compliance with California Code of Civil Procedure § 187 is unnecessary when a stipulation purports to bind a non-party in the case,[4] Defendants' arguments both boil down to the same merits question: could Padilla bind Innerline to the judgment?

The relevant provision in the stipulation states:

> [A]ll successors in interest, assignees, and affiliated entities (including, but not limited to, parent or other controlling companies), and any companies with which either Defendant joins or merges, if any, shall also be bound by the terms of this Stipulation as Guarantors. **This shall include any additional entities in which Guarantor is an officer**, owner or possesses any controlling ownership interest. All such entities shall specifically consent to the Court's jurisdiction, the use of a

[4] The Trust Funds argue compliance with Section 187 is unnecessary where a stipulation binds a party. Innerline disagree, citing *Tokio Marine & Fire Ins. Corp. v. Western Pacific Roofing Corp.*, 75 Cal.App.4th 110, 89 Cal. Rptr. 2d 1 (1999) for the proposition that such stipulations do not supplant notice under Section 187. The Trust Funds counter that Section 187 is merely one way to bind a third party, not the *only* way to bind a third party. The Court need not reach this dispute because, as discussed below, the Court cannot find the stipulation is clearly and unequivocally binding on Innerline at this stage.

> Magistrate Judge for all proceedings, and all other terms herein, in writing, at the time of any assignment, affiliation or purchase.

(Dkt. No. 34-1 at 3 (emphasis added).) Innerline pleads Padilla was Innerline's CEO when he signed this agreement. (Dkt. No. 34 ¶ 16.) Based on this allegation, the Trust Funds argue Innerline is clearly and unequivocally bound under the agreement as a matter of law.

The Trust Funds have not persuaded the Court Innerline is so bound and thus cannot state a claim to set aside the Judgment. Padilla signed the bottom of the stipulation twice: once as "President of Defendant Caribou Energy Corporation" and once as "individual Defendant and Guarantor." (Dkt. No. 34-1 at 10.) Taking all inferences in the non-moving party's favor, those specific signature-block titles raise a reasonable inference Padilla was *not* signing the document as Innerline's CEO. Thus, the Court cannot determine Innerline is bound by the stipulation as a matter of law based on the pleadings. Nor can the Court conclude Innerline was Padilla's alter-ego based on the complaint alone.

The Trust Funds' contrary arguments are unpersuasive. They point to Cal. Corp. Code § 7214 for the proposition that Padilla, as CEO of Innerline, bound Innerline when he signed the agreement. But that law only governs "contracts between any corporation and another person." Corp. Code § 7214. The very debate here is whether this was, in fact, a contract between

Innerline and the Trust Funds. Taken to its extreme, Defendants' position could lead to absurd results. For example, were Padilla an officer of a local chapter of the Boys and Girls Club, would the Boys and Girls Club be on the hook for this judgment too?

The Trust Funds cited authority is likewise inapposite to the factual circumstances here. *See Bay Area Painters & Tapers Pension Tr. Fund v. De Martinez Painting, Inc.*, No. C-09-3098 MMC, 2010 U.S. Dist. LEXIS 65639, 2010 WL 2382418 (N.D. Cal. June 10, 2010). In *Bay Area Painters*, the district court enforced a stipulation against the CEO of the underlying defendant even though the CEO was not a party to the lawsuit and was never personally served in the case. But, although he was not a party to the lawsuit, the CEO seeking relief there *signed the stipulated judgment in his individual capacity* and the stipulation specifically recited that he was guaranteeing the judgment in his individual capacity. *Id.* at *1-2. So even though he was not a defendant in the lawsuit, he was a party to the judgment. Drawing all reasonable inferences in Innerline's favor, that is not what happened here. The dispute here is whether a party allegedly not represented in a stipulation can be bound via its CEO who signs the stipulation in his individual capacity. *Bay Area Painters* would be on point if Padilla sought relief from judgment. But Padilla is not the Plaintiff here. Innerline is. So *Bay Area Painters* is irrelevant to this dispute.

E. Unjust Enrichment & Adequate Remedies at Law.

The Trust Funds also move to dismiss Innerline's claim for unjust enrichment because Innerline has a remedy at law under Federal Rule of Civil Procedure 60(b)(4).[5] This argument fails because, as explained above, the Trust Funds cite no support for the proposition that Rule 60(b)(4) provides a remedy "at law." Nor do the Trust Funds cite any case explaining how relief from judgment under Rule 60(b)(4) would result, in and of itself, in the return of the levied money. Innerline seeks restitution, not just a finding the underlying judgment is void. Thus, the Trust Funds motion to dismiss the unjust enrichment claim fails.

F. Conversion

While the Trust Funds ask the Court to dismiss Innerline's conversion claim, the motion does not make any argument specific to that claim other than denying the Court's subject matter jurisdiction over it. (Dkt. No. 35 at 20.) Because the Court determines subject matter jurisdiction exists here, the Trust Funds' motion to dismiss the conversion claim fails.

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[5] The Trust Funds initially argued there is no claim for unjust enrichment under California law. (Dkt. No. 35 at 33 citing *Walker v. USAA Cas. Ins. Co.*, 474 F. Supp. 2d 1168, 1174 (E.D. Cal. 2007)). But, the Trust Funds later acknowledged the Ninth Circuit has recognized claims for unjust enrichment under California law. *See Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1070 (9th Cir. 2014); *Astiana v. Hain Celestial Gp., Inc.*, 783 F.3d 753, 762 (9th Cir. 2015).

CONCLUSION

The Trust Funds' motion to dismiss is DENIED. Innerline has standing to challenge the judgment, the Court has jurisdiction to hear that challenge, and Innerline states a claim. A Case Management Conference is set for April 27, 2023 at 1:30 P.M. via Zoom video. A joint case management conference statement is due one week in advance.

IT IS SO ORDERED.

This Order disposes of Dkt. No. 35.

Dated: March 28, 2023

/s/ Jacqueline Scott Corley

JACQUELINE SCOTT CORLEY

United States District Judge

Wilkins v. United States

Supreme Court of the United States

November 30, 2022, Argued; March 28, 2023, Decided

No. 21-1164.

Counsel: **Jeffrey W. McCoy** argued the cause for petitioner.

Benjamin W. Snyder argued the cause for respondent.

Judges: Sotomayor, J., delivered the opinion of the Court, in which Kagan, Gorsuch, Kavanaugh, Barrett, and Jackson, JJ., joined. Thomas, J., filed a dissenting opinion, in which Roberts, C. J., and Alito, J., joined.

Opinion by: SOTOMAYOR

Opinion

JUSTICE SOTOMAYOR delivered the opinion of the Court.

Larry Steven Wilkins and Jane Stanton wanted quiet titles and a quiet road. Wilkins and Stanton, the petitioners here, both live alongside Robbins Gulch Road in rural Montana. The United States has permission, called an easement, for use of the road, which the Government interprets to include making the road available for public use. Petitioners allege that the road's public use has intruded upon their private lives, with strangers trespassing, stealing, and even shooting Wilkins' cat.

Petitioners sued over the scope of the easement under the Quiet Title Act, which allows challenges to the United States' rights in real property. Invoking the Act's 12-year time limit, 28 U. S. C. § 2409a(g), the Government maintains that the suit is jurisdictionally barred. Petitioners counter, and the Court holds, that § 2409a(g) is a nonjurisdictional claims-processing rule.

I

Robbins Gulch Road runs through about a mile of private property. Petitioners acquired their properties along the road in 1991 and 2004. Back in 1962, petitioners' predecessors in interest had granted the United States an easement for the road. The Government contends that the easement includes public access, which petitioners dispute. On petitioners' telling, the easement does not allow access to the general public and requires the Government to maintain and patrol the road.

In 2018, petitioners brought suit under the Quiet Title Act. The Government moved to dismiss the action on the ground that the Act's 12-year time limit had expired. Under the Act, "[a]ny civil action . . . , except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued." § 2409a(g). Accrual occurs "on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States." *Ibid.* The parties disagreed as to whether the Act's time limit is jurisdictional, which is relevant to

the procedures for litigating whether § 2409a(g) bars petitioners' claim.[1]

The District Court agreed with the Government and dismissed the case for lack of subject-matter jurisdiction. The Ninth Circuit affirmed the dismissal for lack of jurisdiction. 13 F. 4th 791 (2021). Applying Circuit precedent, the Court of Appeals held that this Court had already interpreted § 2409a(g) as jurisdictional in *Block v. North Dakota ex rel. Board of Univ. and School Lands*, 461 U. S. 273, 273, 103 S. Ct. 1811, 75 L. Ed. 2d 840 (1983). This further entrenched a divide among the Courts of Appeals.[2] This Court granted certiorari to resolve the split, 596 U. S. ___ (2022), and now reverses the Ninth Circuit's judgment.

II

A

"Jurisdiction, this Court has observed, is a word of many, too many, meanings." *Arbaugh v. Y & H Corp.*, 546 U. S. 500, 510, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006) (internal quotation marks omitted). In particular,

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[1] The parties dispute the precise implications on remand of a ruling that § 2409a(g) is nonjurisdictional. This Court takes no position on that dispute.

[2] Compare *Wisconsin Valley Improvement Co. v. United States*, 569 F. 3d 331, 333-335 (CA7 2009), with, *e.g.*, *Bank One Texas v. United States*, 157 F. 3d 397, 402-403 (CA5 1998); *Spirit Lake Tribe v. North Dakota*, 262 F. 3d 732, 737-738 (CA8 2001); *Kane County v. United States*, 772 F. 3d 1205, 1214-1215 (CA10 2014); and *F.E.B. Corp. v. United States*, 818 F. 3d 681, 685-686 (CA11 2016).

this Court has emphasized the distinction between limits on "the classes of cases a court may entertain (subject-matter jurisdiction)" and "nonjurisdictional claim-processing rules, which seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Fort Bend County v. Davis*, 587 U. S. ___, ___-___, 139 S. Ct. 1843, 204 L. Ed. 2d 116, 125 (2019) (internal quotation marks omitted). The latter category generally includes a range of "threshold requirements that claimants must complete, or exhaust, before filing a lawsuit." *Reed Elsevier, Inc. v. Muchnick*, 559 U. S. 154, 166, 130 S. Ct. 1237, 176 L. Ed. 2d 18 (2010).

To police this jurisdictional line, this Court will "treat a procedural requirement as jurisdictional only if Congress 'clearly states' that it is." *Boechler v. Commissioner,* 596 U. S. ___, ___, 142 S. Ct. 1493, 212 L. Ed. 2d 524, 530 (2022) (quoting *Arbaugh*, 546 U. S., at 515, 126 S. Ct. 1235, 163 L. Ed. 2d 1097). This principle of construction is not a burden courts impose on Congress. To the contrary, this principle seeks to avoid judicial interpretations that undermine Congress' judgment. Loosely treating procedural requirements as jurisdictional risks undermining the very reason Congress enacted them.

Procedural rules often "seek to promote the orderly progress of litigation" within our adversarial system. *Henderson v. Shinseki*, 562 U. S. 428, 435, 131 S. Ct. 1197, 179 L. Ed. 2d 159 (2011). Limits on subject-matter jurisdiction, in contrast, have a unique potential to disrupt the orderly course of litigation.

"Branding a rule as going to a court's subject-matter jurisdiction alters the normal operation of our adversarial system." *Id.*, at 434, 131 S. Ct. 1197, 179 L. Ed. 2d 159. "For purposes of efficiency and fairness, our legal system is replete with rules" like forfeiture, which require parties to raise arguments themselves and to do so at certain times. *Ibid.* Jurisdictional bars, however, "may be raised at any time" and courts have a duty to consider them *sua sponte*. *Ibid.* When such eleventh-hour jurisdictional objections prevail post-trial or on appeal, "many months of work on the part of the attorneys and the court may be wasted." *Id*., at 435, 131 S. Ct. 1197, 179 L. Ed. 2d 159. Similarly, doctrines like waiver and estoppel ensure efficiency and fairness by precluding parties from raising arguments they had previously disavowed. Because these doctrines do not apply to jurisdictional objections, parties can disclaim such an objection, only to resurrect it when things go poorly for them on the merits. *Ibid.*

Given this risk of disruption and waste that accompanies the jurisdictional label, courts will not lightly apply it to procedures Congress enacted to keep things running smoothly and efficiently. Courts will also not assume that in creating a mundane claims-processing rule, Congress made it "unique in our adversarial system" by allowing parties to raise it at any time and requiring courts to consider it *sua sponte*. *Sebelius v. Auburn Regional Medical Center*, 568 U. S. 145, 153, 133 S. Ct. 817, 184 L. Ed. 2d 627 (2013). Instead, "traditional tools of statutory construction must plainly show that Congress imbued a procedural bar

with jurisdictional consequences." *United States v. Kwai Fun Wong*, 575 U. S. 402, 410, 135 S. Ct. 1625, 191 L. Ed. 2d 533 (2015).

Under this clear statement rule, the analysis of §2409a(g) is straightforward.[3] "[I]n applying th[e] clear statement rule, we have made plain that most time bars are nonjurisdictional." *Ibid.* Nothing about §2409a(g)'s text or context gives reason to depart from this beaten path. Section 2409a(g) states that an action "shall be barred unless it is commenced within twelve years of the date upon which it accrued." This "text speaks only to a claim's timeliness," and its "mundane statute-of-limitations language say[s] only what

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[3] The dissent maintains that this Court's settled clear statement rule does not apply here because §2409a(g) is a condition on a waiver of sovereign immunity and "as such, this Court should interpret it as a jurisdictional bar to suit." *Post*, at 2 (opinion of Thomas, J.). Over three decades ago, this Court in "*Irwin* . . . foreclose[d] th[e] argument" that "time limits" are jurisdictional simply because they "function as conditions on the Government's waiver of sovereign immunity." *Wong*, 575 U. S., at 417-418, 135 S. Ct. 1625, 191 L. Ed. 2d 533 (citing *Irwin v. Department of Veterans Affairs*, 498 U. S. 89, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990)). Contrary to the dissent's suggestion, *Irwin* extends to the "many statutes that create claims for relief against the United States or its agencies [and] apply only to Government defendants." *Scarborough v. Principi*, 541 U. S. 401, 422, 124 S. Ct. 1856, 158 L. Ed. 2d 674 (2004); cf. also *Boechler v. Commissioner*, 596 U. S. ___, ___, 142 S. Ct. 1493, 212 L. Ed. 2d 524 (2022) (slip op., at 3) (applying clear statement rule to petitions for review of agency action). Notably, even the dissent in *Wong* did not engage in such an attempt to turn back the clock, instead arguing that the provision in that case was jurisdictional based on its specific text and history. See 575 U. S., at 423-428, 135 S. Ct. 1625, 191 L. Ed. 2d 533 (opinion of ALITO, J.).

every time bar, by definition, must: that after a certain time a claim is barred." *Id*., at 410, 135 S. Ct. 1625, 191 L. Ed. 2d 533. Further, "[t]his Court has often explained that Congress's separation of a filing deadline from a jurisdictional grant indicates that the time bar is not jurisdictional." *Id*., at 411, 135 S. Ct. 1625, 191 L. Ed. 2d 533. The Quiet Title Act's jurisdictional grant is in 28 U. S. C. §1346(f),[4] well afield of §2409a(g). And "[n]othing conditions the jurisdictional grant on the limitations perio[d], or otherwise links those separate provisions." *Wong*, 575 U. S., at 412, 135 S. Ct. 1625, 191 L. Ed. 2d 533. Section 2409a(g) therefore lacks a jurisdictional clear statement.

B

The Government does not focus on the text of §2409a(g), but instead points to a trilogy of decisions by this Court that purportedly establish that the provision is jurisdictional. None of these three decisions definitively interpreted §2409a(g) as jurisdictional.

This Court has made clear that it will not undo a "definitive earlier interpretation" of a statutory provision as jurisdictional without due regard for principles of *stare decisis*. *John R. Sand & Gravel Co. v. United States*, 552 U. S. 130, 138, 128 S. Ct. 750, 169 L. Ed. 2d 591 (2008). At the same time, however,

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[4] Section 1346(f) provides that "[t]he district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States."

"[c]ourts, including this Court, have more than occasionally misused the term 'jurisdictional' to refer to nonjurisdictional prescriptions." *Fort Bendi* (some internal quotation marks and alterations omitted). The mere fact that this Court previously described something "without elaboration" as jurisdictional therefore does not end the inquiry. *Henderson*, 562 U. S., at 437, 131 S. Ct. 1197, 179 L. Ed. 2d 159. To separate the wheat from the chaff, this Court has asked if the prior decision addressed whether a provision is " 'technically' "—whether it truly operates as a limit on a court's subject-matter jurisdiction—and whether anything in the decision "turn[ed] on that characterization." *Arbaugh*, 546 U. S., at 512, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (quoting *Steel Co. v. Citizens for Better Environment*, 523 U. S. 83, 91, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998)); see also *Zipes v. Trans World Airlines, Inc.*, 455 U. S. 385, 395, 102 S. Ct. 1127, 71 L. Ed. 2d 234 (1982) (looking to whether "the legal character of the requirement was . . . at issue"). If a decision simply states that "the court is dismissing 'for lack of jurisdiction' when some threshold fact has not been established," it is understood as a "drive-by jurisdictional rulin[g]" that receives "no precedential effect." *Arbaugh*, 546 U. S., at 511, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (some internal quotation marks omitted).

The Government begins with *Block*, 461 U. S. 273, 103 S. Ct. 1811, 75 L. Ed. 2d 840. The case presented "two separate issues" about the Quiet Title Act, neither of which was whether the 12-year limit was

jurisdictional. *Id.*, at 276, 103 S. Ct. 1811, 75 L. Ed. 2d 840. First, the Court held that the Act was "the exclusive procedure" for challenging "the title of the United States to real property." *Id.*, at 276-277, 286, 103 S. Ct. 1811, 75 L. Ed. 2d 840. Second, the Court held that the 12-year limit applied to States. *Id.*, at 277, 103 S. Ct. 1811, 75 L. Ed. 2d 840. It was only in the opinion's conclusion that, in remanding, the Court remarked that if the time limit applied, "the courts below had no jurisdiction to inquire into the merits." *Id.*, at 292, 103 S. Ct. 1811, 75 L. Ed. 2d 840. The opinion contains no discussion of whether the provision was "'technically jurisdictional'" or what in the case would have "turn[ed] on that characterization." *Arbaugh*, 546 U. S., at 512, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (quoting *Steel Co.*, 523 U. S., at 91, 118 S. Ct. 1003, 140 L. Ed. 2d 210). There is nothing more than an "unrefined dispositio[n]" stating that a "threshold fact" must "b[e] established" for there to be "jurisdiction." 546 U. S., at 511, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (internal quotation marks omitted). This is a textbook "drive-by jurisdictional rulin[g]" that *Arbaugh* held "should be accorded no precedential effect" as to whether a limit is jurisdictional. *Ibid.* (internal quotation marks omitted).

In an effort to endow a fleeting statement with lasting significance, the Government and the dissent invoke historical context. *Block* described the Act's time limit as "a condition on the waiver of sovereign immunity." 461 U. S., at 287, 103 S. Ct. 1811, 75 L. Ed. 2d 840. *Block* never stated, however, that the Act's time limit was therefore truly a limit on subject-matter

jurisdiction. Yet according to the Government and the dissent, this went without saying because the case law at the time was "unmistakably" clear that conditions on waivers of immunity were subject-matter jurisdictional. *Post*, at 9.

This reading is undermined by the very history on which it draws. In *Irwin v. Department of Veterans Affairs*, 498 U. S. 89, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990), the Court surveyed the case law about whether "time limits in suits against the Government" are subject to "equitable tolling, waiver, and estoppel." *Id*., at 94, 111 S. Ct. 453, 112 L. Ed. 2d 435. If associating time limits with waivers of sovereign immunity clearly made those limits jurisdictional, equitable exceptions would be just as clearly foreclosed. Instead, *Irwin* described the Court's approach to this question as "ad hoc" and "unpredictab[le]," "leaving open" whether equitable exceptions were available in any given case. *Id.*, at 94-95, 111 S. Ct. 453, 112 L. Ed. 2d 435. Accordingly, even if "a statute of limitations [was] a condition on the waiver of sovereign immunity and thus must be strictly construed," this still "d[id] not answer the question whether equitable tolling can be applied to this statute of limitations." *Bowen v. City of New York*, 476 U. S. 467, 479, 106 S. Ct. 2022, 90 L. Ed. 2d 462 (1986). The Court instead analyzed the specific statutory scheme at issue, with varying results. *Ibid.* (citing *Honda v. Clark*, 386 U. S. 484, 87 S. Ct. 1188, 18 L. Ed. 2d 244 (1967)).

Block itself reflected the ambivalent nature of time limits for suits against the Government. *Block*

recognized that "we should not construe such a time-bar provision unduly restrictively," 461 U. S., at 287, 103 S. Ct. 1811, 75 L. Ed. 2d 840, which the Court quoted just a few years later in support of the proposition that some such limits are subject to equitable tolling, *Bowen*, 476 U. S., at 479, 106 S. Ct. 2022, 90 L. Ed. 2d 462; see also *Irwin*, 498 U. S., at 94, 111 S. Ct. 453, 112 L. Ed. 2d 435. Similarly, while *Block* cautioned that exceptions to such time limits will not "be lightly implied," it did not hold they were categorically precluded. 461 U. S., at 287, 103 S. Ct. 1811, 75 L. Ed. 2d 840. *Block* thus acknowledged nothing more than a general proposition, echoed by *Irwin*, that "a condition to the waiver of sovereign immunity . . . must be strictly construed." *Irwi*n, 498 U. S., at 94, 111 S. Ct. 453, 112 L. Ed. 2d 435. In *Irwin*, as elsewhere, this did not mean that time limits accompanying such waivers are necessarily jurisdictional.

Next, the Government offers *United States v. Mottaz*, 476 U. S. 834, 106 S. Ct. 2224, 90 L. Ed. 2d 841 (1986). Once again, the question presented was not whether the Quiet Title Act's 12-year time limit was technically jurisdictional. The Court instead had to decide which of two possible statutory time bars applied. *Id.*, at 841, 106 S. Ct. 2224, 90 L. Ed. 2d 841. This analysis proceeded in two steps. First, the Court asked which of several federal statutes—"the Quiet Title Act; the Allotment Acts; [or] the Tucker Act"—was the "source of . . . jurisdiction" based on the nature of the plaintiff's claim and the relief sought. *Ibid.* (citations omitted). The Court explained that the Quiet Title Act

applied because it was "'the exclusive means by which adverse claimants could challenge the United States' title to real property,'" and the plaintiff 's claim fell "within the Act's scope." *Id*., at 841-842, 106 S. Ct. 2224, 90 L. Ed. 2d 841 (quoting *Bloc*k, 461 U. S., at 286, 103 S. Ct. 1811, 75 L. Ed. 2d 840). Second, the Court "then determine[d] whether [the] suit was brought within the relevant limitations period." *Mottaz*, 476 U. S., at 841, 106 S. Ct. 2224, 90 L. Ed. 2d 841. The Court concluded that the plaintiff had notice over 12 years before she sued, and "[h]er claim [was] therefore barred." *Id.*, at 843-844, 106 S. Ct. 2224, 90 L. Ed. 2d 841. Neither step in the Court's analysis "turn[ed] on" whether any time limits were "'technically jurisdictional.'" *Arbaugh*, 546 U. S., at 512, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (quoting *Steel Co*., 523 U. S., at 91, 118 S. Ct. 1003, 140 L. Ed. 2d 210).

General statements in the opinion about waivers of immunity cannot change this basic fact. At the outset of its analysis, the Court observed that "the terms of [the United States'] waiver of sovereign immunity define the extent of the court's jurisdiction" and that "'a statute of limitations . . . constitutes a condition on the waiver.'" *Mottaz*, 476 U. S., at 841, 106 S. Ct. 2224, 90 L. Ed. 2d 841 (quoting *Block*, 461 U. S., at 287, 103 S. Ct. 1811, 75 L. Ed. 2d 840). Neither of these statements, however, played a role in determining which statute applied or whether the plaintiff brought her claim within 12 years after it accrued. There is also no indication in the opinion that the parties raised tolling or other equitable exceptions. As such, "'the legal

character'" of the time limit was never "'at issue.'" *Reed Elsevier*, 559 U. S., at 169, n. 8, 130 S. Ct. 1237, 176 L. Ed. 2d 18 (quoting *Zipes*, 455 U. S., at 395, 102 S. Ct. 1127, 71 L. Ed. 2d 234).

The Government also points to *Mottaz*'s procedural background section. Buried in a paragraph recounting a tangled procedural history, the Court remarked that the Government raised the Quiet Title Act, "apparently for the first time," in a petition for rehearing. 476 U. S., at 840, 106 S. Ct. 2224, 90 L. Ed. 2d 841. This supposedly reveals that the Court *sua sponte* and *sub silentio* raised, considered, and rejected an argument that the Government had forfeited the Quiet Title Act's time limit, doing so all because the time limit was jurisdictional. Yet a background section is an unlikely place for such a ruling. This is particularly true where, as the word "apparently" indicates, the Court did not pause over its passing remark. Nor did the Court mention this again. Further, even if the Court had secretly considered forfeiture, there were nonjurisdictional reasons the Court could have concluded forfeiture did not apply.[5] Speculating about

[5] For example, the Court might have concluded forfeiture did not apply because of the confusing way the case had been pleaded, see Brief for United States in *United States* v. *Mottaz*, O. T. 1985, No. 85-546, p. 22, n. 11, or that any forfeiture argument had itself been forfeited. Or the Court might have, on reflection, agreed with the Government that it had sufficiently raised the *Quiet Title Act* prior to rehearing. *Ibid.* The dissent, *post*, at 8, n. 3, mistakes these observations as a suggestion that *Mottaz* actually took one of those approaches. Far from it. This Court is merely declining to read tea leaves to divine lost meanings about what the *Mottaz* Court might have thought about a forfeiture argument it never

what this Court might have thought about arguments it never addressed needlessly introduces confusion. This Court looks for definitive interpretations, not holdings in hiding. Finally, there is *United States v. Beggerly*, 524 U. S. 38, 118 S. Ct. 1862, 141 L. Ed. 2d 32 (1998). The Court in *Beggerly* addressed whether §2409a(g) could be equitably tolled. *Id*., at 48-49, 118 S. Ct. 1862, 141 L. Ed. 2d 32. Subject-matter jurisdiction, as noted, is never subject to equitable tolling. If *Block* and *Mottaz* had definitely interpreted §2409a(g) as subject-matter jurisdictional, the Court could have just cited those cases and ended the matter without further discussion.[6] Instead, the Court parsed the provision's text and context, concluding that "by providing that the statute of limitations will not begin to run until the plaintiff 'knew or should have known of the claim of the United States,'" the law "has already effectively allowed for equitable tolling." *Beggerly*, 524 U. S., at 48, 118 S. Ct. 1862, 141 L. Ed. 2d 32. Also relevant were "the unusually generous" time limit and the importance of clarity when it comes to land rights. *Id.*, at 48-49, 118 S. Ct. 1862, 141 L. Ed. 2d 32. This careful analysis of whether the text and context were consistent with equitable tolling would have been wasted words if the Court had already held that §2409a(g) was jurisdictional. Precisely because the

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raised and over which "the parties did not cross swords." *Arbaugh v. Y & H Corp.*, 546 U. S. 500, 512, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006).

[6] The Court was not unaware of *Block*, quoting it for a different point in the very same section. *Beggerly*, 524 U. S., at 48, 118 S. Ct. 1862, 141 L. Ed. 2d 32.

Court's inquiry was so focused on the particular nature of equitable tolling, *Beggerly* also did not address whether other exceptions such as "fraudulent concealment or equitable estoppel might apply," as Justice Stevens noted in his concurrence. *Id.*, at 49, 118 S. Ct. 1862, 141 L. Ed. 2d 32. If anything, *Beggerly*'s discussion of nonjurisdictional reasons why tolling specifically was unavailable indicates the Court understood §2409a(g) not to be jurisdictional. Thus, *Beggerly* undermines any notion that *Block* and *Mottaz* had put the jurisdictional question to rest.

All three cases therefore point in one direction: This Court has never definitively interpreted §2409a(g) as jurisdictional.[7] For similar reasons, the Government's argument about legislative acquiescence is unavailing. Congress amended the Act in 1986 to provide special rules for States in the wake of *Block*. See 100 Stat. 3351-3352. Then, as now, "none of our decisions establishe[d]" that the time limit was jurisdictional, so there was no definitive judicial interpretation to which Congress could acquiesce. *Alexander v. Sandoval*, 532 U. S. 275, 291, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001). The mere existence of a decision employing the term jurisdiction without elaboration does not show Congress adopted that view. Nor can the Government's

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[7] The dissent invokes a fourth case, *United States v. Dalm*, 494 U. S. 596, 110 S. Ct. 1361, 108 L. Ed. 2d 548 (1990), which offers no more support. *Dalm* involved a separate provision of a separate statute, see *id.*, at 601-602, 110 S. Ct. 1361, 108 L. Ed. 2d 548, and cannot render §2409a(g) jurisdictional when Quiet Title Act cases like *Block*, *Mottaz*, and *Beggerly* failed to do so.

handful of lower court opinions stand in for a ruling of this Court, especially where some of these decisions contain only fleeting references to jurisdiction.[8] See *Boechler*, 596 U. S., at ___, 142 S. Ct. 1493, 212 L. Ed. 2d 524 (slip op., at 7-8).

All told, neither this Court's precedents nor Congress' actions established that §2409a(g) is jurisdictional. While the Government warns that revisiting precedent results in uncertainty, no revisiting is necessary here. Far more uncertainty would follow from the Government's method of divining definitive interpretations from stray remarks.

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Section 2409a(g) is a nonjurisdictional claims-processing rule. The Court of Appeals' contrary judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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[8] See *Fulcher v. United States*, 696 F. 2d 1073, 1078 (CA4 1982).

Dissent by: THOMAS

Dissent

JUSTICE THOMAS, with whom THE CHIEF JUSTICE and JUSTICE ALITO join, dissenting.

The doctrine of sovereign immunity bars suits against the United States. But, in the Quiet Title Act of 1972, Congress waived this immunity and consented to suits against the United States in order to determine the status of disputed property. 28 U. S. C. §2409a. Congress conditioned this consent on, among other things, a 12-year statute of limitations: "Any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued." §2409a(g). This Court has long construed such conditions on waivers of sovereign immunity as jurisdictional. And, it has acknowledged the jurisdictional nature of the Quiet Title Act's statute of limitations in several precedents.

In holding that §2409a(g) is not jurisdictional, the majority commits two critical errors. First, it applies the same interpretive approach to a condition on a waiver of sovereign immunity that it would apply to any run-of-the-mill procedural rule. Second, by reading the Court's prior Quiet Title Act precedents in this way, the Court disregards their express recognition of the jurisdictional character of the Act's time bar. Accordingly, I respectfully dissent.

I

This Court's skepticism of the jurisdictional character of procedural bars does not extend to conditions on a waiver of sovereign immunity. In the context of a waiver of sovereign immunity, the Court presumes that procedural limitations are jurisdictional. The Act's time bar is one such provision, and, as such, this Court should interpret it as a jurisdictional bar to suit.

As a sovereign, the United States "is immune from suit save as it consents to be sued, . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States v. Sherwood*, 312 U. S. 584, 586, 61 S. Ct. 767, 85 L. Ed. 1058 (1941); see also *Lehman v. Nakshian*, 453 U. S. 156, 160, 101 S. Ct. 2698, 69 L. Ed. 2d 548 (1981); *United States v. Mitchell*, 463 U. S. 206, 212, 103 S. Ct. 2961, 77 L. Ed. 2d 580 (1983) (describing this principle as "axiomatic"). Consequently, "[s]overeign immunity is by nature jurisdictional." *Henderson v. United States*, 517 U. S. 654, 675, 116 S. Ct. 1638, 134 L. Ed. 2d 880 (1996) (Thomas, J., dissenting). This principle is longstanding, and the majority does not dispute it. See *ante*, at 7-8.

"A necessary corollary of this rule," however, "is that when Congress attaches conditions to legislation waiving the sovereign immunity of the United States, those conditions must be strictly observed, and exceptions thereto are not to be lightly implied." *Block v. North Dakota ex rel. Board of Univ. and School Land*s, 461 U. S. 273, 287, 103 S. Ct. 1811, 75 L. Ed. 2d 840

(1983); see also *United States v. Nordic Village, Inc.*, 503 U. S. 30, 34, 112 S. Ct. 1011, 117 L. Ed. 2d 181 (1992) (stating that a waiver of sovereign immunity "must be construed strictly in favor of the sovereign" and "not enlarge[d] . . . beyond what the language requires" (internal quotation marks omitted)). Thus, "in many cases this Court has read procedural rules embodied in statutes waiving immunity strictly, with an eye to effectuating a restrictive legislative purpose when Congress relinquishes sovereign immunity." *Honda v. Clark*, 386 U. S. 484, 501, 87 S. Ct. 1188, 18 L. Ed. 2d 244 (1967). In *United States v. Dalm*, 494 U. S. 596, 110 S. Ct. 1361, 108 L. Ed. 2d 548 (1990), the Court reaffirmed this "settled principl[e]" in the specific context of "[a] statute of limitations requiring that a suit against the Government be brought within a certain time period." *Id.*, at 608, 110 S. Ct. 1361, 108 L. Ed. 2d 548. Such a requirement, the Court explained, "is one of" the "terms of [the United States'] consent to be sued" and, therefore, "define[s] th[e] court's *jurisdiction* to entertain the suit." *Ibid.* (emphasis added; internal quotation marks omitted).

Those straightforward principles resolve this case. The Quiet Title Act partially waives the immunity of the United States by granting federal district courts "exclusive original jurisdiction of civil actions under *section 2409a* to quiet title to an estate or interest in real property in which an interest is claimed by the United States." 28 U. S. C. §1346(f). This provision's cross-reference to §2409a incorporates several conditions on this waiver. For example, the Act specifies that

the United States "shall not be disturbed in possession or control" of contested land "pending a final judgment or decree, the conclusion of any appeal therefrom, and sixty days," and "if the final determination [is] adverse," the United States shall have the right to purchase the land for just compensation. §2409a(b). Similarly, the Act provides that any "civil action against the United States under this section shall be tried by the court without a jury" and bars suits based on adverse possession. &SECT;§2409a(f), (n). It also incorporates the time bar at issue here: "Any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States." §2409a(g).

These provisions carefully delineate the scope of the Act's limited waiver of sovereign immunity, establishing conditions on which the United States has consented to be sued. The United States has not, for example, consented to a jury trial or to be sued on an adverse possession theory. Similarly, and just as critically, it has not consented to be sued (except by a State) once the 12-year statute of limitations has passed.

The majority acknowledges that these restrictions must be strictly construed. See *ante*, at 8. Yet, it concludes that the time bar should not be considered jurisdictional. In another context, the majority's conclusion is arguably plausible. But, in this

context, it is simply incorrect. As a condition on the United States' limited waiver of sovereign immunity in the Quiet Title Act, the Act's statute of limitations is jurisdictional. Moreover, in light of this Court's longstanding case law, the jurisdictional character of the time bar would have been well understood by the 1972 Congress. See *ante*, at 3 (suggesting that the Court should "avoid judicial interpretations that undermine Congress' judgment" when interpreting arguably jurisdictional provisions).

With no answer to the Court's longstanding view that conditions on waivers of sovereign immunity are jurisdictional, the majority seeks refuge in *Irwin v. Department of Veterans Affairs*, 498 U. S. 89, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990). *Ante*, at 7-8. *Irwin* considered whether equitable tolling should apply to the time to file an employment-discrimination lawsuit against the Government under Title VII of the Civil Rights Act of 1964. There, the Court reasoned that "[t]ime requirements in lawsuits between private litigants are customarily subject to 'equitable tolling,'" and that "[o]nce Congress has made . . . a waiver [of sovereign immunity], . . . making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver." *Irwin*, 498 U. S., at 95, 111 S. Ct. 453, 112 L. Ed. 2d 435. It thus concluded that "[s]uch a principle is likely to be a realistic assessment of legislative intent as well as a practically useful principle of interpretation." *Ibid.*

The majority suggests that *Irwin* stands for the proposition that a condition on a waiver of sovereign immunity must be strictly construed, but then goes on to argue that it is not necessarily jurisdictional. *Ante*, at 8. However, our decision in *United States v. Williams*, 514 U. S. 527, 115 S. Ct. 1611, 131 L. Ed. 2d 608 (1995), decided five years after *Irwin*, demonstrates that statutes of limitations in suits brought against the United States are no less jurisdictional now than they were before *Irwin*. In *Williams*, the Court cited *Dalm*'s holding that failure to file a claim against the Government for a federal tax refund within the statute-of-limitations period operates as a *jurisdictional* bar to suit, and the Court reaffirmed that a statute of limitations "narrow[s] the waiver of sovereign immunity." 514 U. S., at 534, n. 7, 115 S. Ct. 1611, 131 L. Ed. 2d 608 (citing 494 U. S., at 602, 110 S. Ct. 1361, 108 L. Ed. 2d 548).[1] *Irwin*, thus, does not disrupt this Court's long held understanding that conditions on waivers of sovereign immunity are presumptively jurisdictional.

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[1] I have previously noted that *Irwin* "does perhaps narrow the scope of the sovereign immunity canon." *Scarborough v. Principi*, 541 U. S. 401, 426, 124 S. Ct. 1856, 158 L. Ed. 2d 674 (2004) (dissenting opinion). But, it "does so only in *limited circumstances*," such as "where the Government is made subject to suit to the same extent and in the same manner as private parties are." *Ibid.* (emphasis added). This is not one of those circumstances. The Quiet Title Act's framework *exclusively* governs actions to quiet title against the United States. And, it includes a number of conditions favorable to the Federal Government that would not apply in traditional quiet title actions among private litigants.

II

Regardless of whether conditions on waivers of sovereign immunity remain jurisdictional post-*Irwin*, we have said that, where the Court has offered a "definitive earlier interpretation" of a statutory time bar as jurisdictional, we will continue to treat it as jurisdictional unless and until Congress directs otherwise. *John R. Sand & Gravel Co. v. United States*, 552 U. S. 130, 137-138, 128 S. Ct. 750, 169 L. Ed. 2d 591 (2008); see also *United States v. Kwai Fun Wong*, 575 U. S. 402, 416, 135 S. Ct. 1625, 191 L. Ed. 2d 533 (2015) (reaffirming *John R. Sand*'s rule). And, we have emphasized that *Irwin* "does not imply revisiting past precedents." *John R. Sand*, 552 U. S., at 137, 128 S. Ct. 750, 169 L. Ed. 2d 591.

The *John R. Sand* standard is amply met here. This Court concluded in *Block v. North Dakota ex rel. Board of Univ. and School Lands*, 461 U. S. 273, 103 S. Ct. 1811, 75 L. Ed. 2d 840 (1983), and again in *United States v. Mottaz*, 476 U. S. 834, 106 S. Ct. 2224, 90 L. Ed. 2d 841 (1986), that compliance with the Quiet Title Act's 12-year time bar is a jurisdictional prerequisite.

Block considered whether the Act's statute of limitations applied to state litigants.[2] There, the

[2] At the time of the Court's decision, the Act's statute of limitations read as follows: "Any civil action under this section shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States." 28

Government had argued that the plaintiffs' failure to sue within the 12-year deadline established by the statute meant that the "district court lacked jurisdiction" to consider the plaintiffs' claims. Brief for the Petitioners in *Block v. North Dakota ex rel. Board of Univ. and School Lands*, O. T. 1982, No. 81-2337, p. 5. In assessing this argument, the Court made clear that it understood the Act's statute of limitations to arise in the context of a waiver of sovereign immunity, discussing at some length the tradeoffs proposed as Congress deliberated over the scope of the Act. See 461 U. S., at 280-285, 103 S. Ct. 1811, 75 L. Ed. 2d 840. The Court also prominently invoked *Sherwood* and *Lehman*, cases discussing the jurisdictional nature of sovereign-immunity waivers, to explain why the limitations provision must be "strictly observed." *Block*, 461 U. S., at 287, 103 S. Ct. 1811, 75 L. Ed. 2d 840. After concluding that States were not exempt from the time bar, the Court stated that, "[i]f North Dakota's suit is barred by [the statute of limitations], the courts below had no jurisdiction to inquire into the merits," and it remanded for the lower courts to determine whether the suit was so barred. *Id.*, at 292-293, 103 S. Ct. 1811, 75 L. Ed. 2d 840. This statement that the time bar went to "jurisdiction" was an integral part of the Court's instructions on remand. Moreover, on remand, the Eighth Circuit understood the Court to have used the term "jurisdiction" to refer to a court's authority to hear the case. See

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U. S. C. §2409a(f) (1982 ed.). Congress subsequently amended the provision to add its current language excepting actions brought by States.

North Dakota ex rel. Board of Univ. and School Lands v. Block, 789 F. 2d 1308, 1310 (CA8 1986) (noting that neither the Eighth Circuit nor the District Court had "'jurisdiction to inquire into the merits'" because the Act's "statute of limitations is jurisdictional").

In *Mottaz*, three years after *Block*, the Court again considered the jurisdictional nature of the Act's time bar. In the lower courts, the Government initially defended against a "somewhat opaque" set of claims by relying on the general 6-year statute of limitations for actions against the United States, 28 U. S. C. §2401(a). *Mottaz*, 476 U. S., at 839, 106 S. Ct. 2224, 90 L. Ed. 2d 841. The District Court held that the suit was time barred under §2401(a), but the Eighth Circuit reversed and remanded. *Id.*, at 838-839, 106 S. Ct. 2224, 90 L. Ed. 2d 841. The Government then argued, for the first time, in its petition for rehearing in the Court of Appeals that the suit arose under the Quiet Title Act and was thus subject to the Act's 12-year statute of limitations. *Id.*, at 840-841, 106 S. Ct. 2224, 90 L. Ed. 2d 841. This Court granted certiorari "to consider whether [the] respondent's claim was barred under either [the 6-year bar] or [the 12-year bar]." *Id.*, at 841, 106 S. Ct. 2224, 90 L. Ed. 2d 841.

In addressing these, the Court cited *Sherwood* for the proposition that, "[w]hen the United States consents to be sued, the terms of its waiver of sovereign immunity define the extent of the court's jurisdiction." 476 U. S., at 841, 106 S. Ct. 2224, 90 L. Ed. 2d 841. It then quoted *Block* for the proposition that "'[w]hen waiver legislation contains a statute of limitations, the

limitations provision constitutes a condition on the waiver of sovereign immunity,'" treating *Block* as precedential on this point. 476 U. S., at 841, 106 S. Ct. 2224, 90 L. Ed. 2d 841. The Court also characterized the statute of limitations as a "central condition of the consent given by the Act." *Id*., at 843, 106 S. Ct. 2224, 90 L. Ed. 2d 841 (citing *Block*, 461 U. S., at 283-285, 103 S. Ct. 1811, 75 L. Ed. 2d 840). As in *Block*, this reasoning was a critical and substantial part of the Court's opinion. The Court ultimately concluded that the plaintiff's claim was untimely and thus barred under the Act. 476 U. S., at 844, 106 S. Ct. 2224, 90 L. Ed. 2d 841. The Court further concluded that no other statute "conferred jurisdiction" on the lower courts to adjudicate her claim. *Id*., at 841, 106 S. Ct. 2224, 90 L. Ed. 2d 841; see also *id*., 844-851, 106 S. Ct. 2224, 90 L. Ed. 2d 841. In deciding the case, the Court noticeably did not engage in a forfeiture analysis, underscoring that it understood the Government's late-raised statute-of-limitations argument to be jurisdictional and, thus, capable of being raised at any point in the proceedings. See *Arbaugh v. Y & H Corp.*, 546 U. S. 500, 514, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006) (explaining that jurisdictional arguments cannot be forfeited).[3]

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[3] The majority suggests that *United States v. Mottaz*, 476 U. S. 834, 106 S. Ct. 2224, 90 L. Ed. 2d 841, may have (*sub silentio*) concluded that forfeiture did not apply in that case. See *ante*, at 10, and n. 5. But, presumably, such a conclusion would have merited mention in the Court's opinion. To be sure, the majority notes that the Government had raised the statute of limitations "'*apparently* for the first time'" in a petition for rehearing. *Ante*,

United States v. Beggerly, 524 U. S. 38, 118 S. Ct. 1862, 141 L. Ed. 2d 32 (1998), on which the majority relies, see *ante*, at 10-11, is not to the contrary. In that case, the Court considered whether the Quiet Title Act's time bar may be equitably tolled. After noting that the Court of Appeals had considered the statute of limitations jurisdictional, see *Beggerly*, 524 U. S., at 42, 118 S. Ct. 1862, 141 L. Ed. 2d 32, the Court turned to the language of the Act. The Court emphasized that the 12-year statute of limitations began to accrue when the litigants knew or should have known of the claim of the United States, and it observed that the provision's text "has already effectively allowed for equitable tolling." *Id.*, at 48, 118 S. Ct. 1862, 141 L. Ed. 2d 32 (citing *Irwin,* 498 U. S., at 96, 111 S. Ct. 453, 112 L. Ed. 2d 435). "Given this fact, and the unusually generous nature of the [Act]'s limitations time period," the Court concluded that "extension of the statutory period by additional equitable tolling would be unwarranted." 524 U. S., at 48-49, 118 S. Ct. 1862, 141 L. Ed. 2d 32. Thus, while *Beggerly* might be read to view the Act's time bar as *potentially* susceptible to tolling (and thus, by inference, nonjurisdictional), the Court did not hold that the bar *actually* could be tolled. Rather, the Court held the opposite. *Beggerly* is therefore, at best,

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at 9 (quoting *Mottaz*, 476 U. S., at 840, 106 S. Ct. 2224, 90 L. Ed. 2d 841 (emphasis added)). However, the use of the word "apparently" does not indicate that the Court "did not pause over its passing remark," as the majority contends. See *ante*, at 9-10. To the contrary, it suggests that the Court did not need to conduct a forfeiture analysis, because the provision was jurisdictional in any event (and thus not subject to forfeiture).

ambiguous with respect to the jurisdictional nature of the time bar. As such, it does not overcome the Court's clear prior view set out in both *Block* and *Mottaz*.

For the majority, the Court's statements in *Block* and *Mottaz* are not "definitiv[e]" enough to satisfy *John R. Sand*. *Ante*, at 11. But, the import of the Court's references to "jurisdiction" in *Block* and *Mottaz* would have been clear at the time. A court in the 1980s discussing a provision of a statute as a waiver of sovereign immunity, citing *Sherwood* (and, later, *Block*), invoked a well-known set of ideas that readers at the time unmistakably associated with the concept of jurisdiction. In fact, the Court in *Dalm* cited *Block* and *Mottaz*—and no other cases—for the proposition that conditions on waivers of sovereign immunity "define th[e] court's *jurisdiction* to entertain the suit." 494 U. S., at 608, 110 S. Ct. 1361, 108 L. Ed. 2d 548 (emphasis added; internal quotation marks omitted). The Court's precedents must be understood in that context.

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The Quiet Title Act's statute of limitations functions as a condition on a waiver of sovereign immunity, and is therefore jurisdictional. This Court has repeatedly characterized the Act's time bar as jurisdictional, and that interpretation remains authoritative under *John R. Sand*. Accordingly, I respectfully dissent.