Case No. 23-3479

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

JEREMY LYNN KERR

Plaintiff - Appellant

v.

KEITH LENZ; EDWARD LEE SCHIMMEL; HIZER & SCHIMMEL; JOHN DOE HIZER; SCOTT BISHOP; ALAN J. LEHENBAUER; KATHY BISHOP; MCQUADES CO., LPA; COLIN J. MCQUADE; DANIEL P. MCQUADE; RICHARD MCQUADE; CHRISTOPHER FRASOR; CARL IRELAND; FRASOR IRELAND, LLP; SPITLER HUFFMAN, LLP; ROBERT SPITLER; REX HUFFMAN; DIANE HUFFMAN; DANIEL T. SPITLER; STEVEN L. SPITLER; NATHANIEL SPITLER; MIMI S. YOON; JAMES GRANDOWICZ, JR.; DAVE YOST; JAMES J. VANEERTEN

Defendants - Appellees

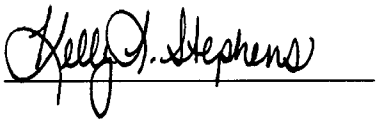
Appellant having previously been advised that failure to satisfy certain specified obligations would result in dismissal of the case for want of prosecution and it appearing that the appellant has failed to satisfy the following obligation(s):

The proper fee was not paid by January 11, 2024.

It is therefore **ORDERED** that this cause be, and it hereby is, dismissed for want of prosecution.

ENTERED PURSUANT TO RULE 45(a),
RULES OF THE SIXTH CIRCUIT
Kelly L. Stephens, Clerk

Issued: January 18, 2024



No. 23-3479

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JEREMY LYNN KERR,

Plaintiff-Appellant,

v.

KEITH LENZ, et al.,

Defendants-Appellees.

ORDER

Before: READLER, Circuit Judge.

Jeremy Lynn Kerr, a pro se Ohio prisoner, appeals a district court's judgment dismissing his civil rights action filed under 42 U.S.C. § 1983 and state law. He moves to proceed in forma pauperis on appeal.

Kerr is the owner of Kerr Buildings, Inc. ("KBI"), Beaver Creek Development Co., LLC ("BCD"), and Beaver Creek Properties, LLC ("BCP"). His federal complaint arises from two breach-of-contract actions in state court. He seeks relief from the parties to the contracts, various attorneys and law firms, the Ohio Attorney General, and a county prosecutor.

KBI filed the first breach-of-contract action in the Henry County (Ohio) Court of Common Pleas (Case No. 2011-CV-0001) against Scott Bishop, who had contracted with KBI for construction of a building; Bishop in turn filed a counterclaim. In 2012, the court entered a monetary judgment in Bishop's favor against KBI and Kerr. Bishop thereafter filed a judgment lien against Kerr in the Wood County (Ohio) Court of Common Pleas and obtained a charging order from the Henry County Court that permitted Bishop to proceed with the sale of Kerr's interests in BCD and BCP. In 2013, the Henry County Court granted Bishop's motion for appointment of a receiver, Christopher Frasor. In 2018, that court also granted Bishop's motions

for a "nunc pro tunc charging order" and an "amended order to receiver." Kerr alleged that the amended order deleted language giving Frasor the right to maintain control of BCD and BCP.

The second breach-of-contract action was filed by Keith Lenz against Kerr Building, Inc. ("Kerr Building") (a distinct entity from KBI) in 2011 in the Wood County Court (Case No. 2011-CV-0852). Like Bishop, Lenz had entered into a contract for construction of a building. After the court issued a default judgment against Kerr Building, Lenz amended the complaint to add Kerr as a defendant. Around the same time, Ottawa County was prosecuting Kerr for committing theft-related crimes against Lenz. Following Kerr's conviction, the Wood County Court granted summary judgment against him, and Lenz filed a certificate of judgment. Lenz next filed an ancillary complaint against Kerr Building (Case No. 2013-CV-0643), asserting that Kerr had fraudulently transferred four parcels of real property to BCD. In 2014, the court issued an injunction barring BCD from selling or transferring the properties, and Lenz obtained a certificate of judgment against BCD. In 2018, the court granted Frasor's motion to intervene and vacated the judgment against BCD. Frasor subsequently sold three of the four parcels of real estate, allowed the fourth to be sold at a sheriff's auction for unpaid taxes, and distributed the proceeds in 2020 to Bishop, Lenz, and others. In 2021, the court revived Lenz's 2013 judgment, after determining that it had become dormant in 2018. Kerr contended that Lenz had no right to enforce the judgment in the interim.

With respect to the Henry County case, Kerr sought declaratory judgments stating that (1) the Henry County judgment was void because it was procured by fraud, (2) the charging order was void because it was procured in violation of his procedural due process rights, (3) the order appointing a receiver was void because it was issued against BCD and BCP, who were not parties, (4) the nunc pro tunc charging order nullified the original charging order permitting the sale of his interests in BCD and BCP, (5) the amended order to receiver removed BCP, BCD, and its properties from the receivership, (6) BCP's property at 1714 Marne Avenue, Toledo, Ohio, which was not explicitly listed in the original order appointing a receiver, should not have been included

as a receivership asset, and (7) a judgment rendered against his mother, Jeanett Payne, and his son, Nicholas Kerr, was void ab initio for lack of subject-matter jurisdiction.

With respect to the Wood County cases, Kerr sought declaratory judgments that the default judgment against Kerr Building was void ab initio for lack of subject matter jurisdiction because it (8) was not properly commenced under Ohio Civil Rule of Procedure 3(A) and (9) was procured by fraud, and (10) the judgment against Kerr was void ab initio for lack of subject-matter jurisdiction because no Ohio Civil Rule of Procedure 59 or 60 motion had been filed.

Kerr further asserted that (11) Bishop, Lenz, and other defendants engaged in racketeering through their actions during the litigation, (12) he (Kerr) had a property interest in the monies in the receivership estate prior to the 2020 distribution, (13) Frasor acted ultra vires by continuing his control of BCP and BCD after they allegedly were removed from the receivership estate by the amended order to receiver, and (14) Ohio Revised Code § 2913.02—Ohio's criminal theft statute—was unconstitutionally vague as applied in the context of a contract dispute.

Next, Kerr asserted that the defendants committed the state law torts of (15) slander of title by filing a judgment lien in Wood County after Lenz's 2013 judgment became dormant, (16) abuse of process by bringing suit against Payne and Nicholas Kerr with the ulterior motive of hindering their ability to assist Kerr in fighting the legality of the receivership, (17) unjust enrichment through the distribution of funds from the receivership estate, (18) fraud by filing false court documents, (19) conversion by exercising dominion over property that rightfully belongs to Kerr but was wrongly considered a receivership asset, (20) intentional infliction of emotional distress by engaging in outrageous and extreme conduct, (21) reckless, wanton, and willful misconduct by intentionally deviating from the Ohio Rules of Conduct, failing to try to avoid harm or injury to Kerr as a result of their actions, or both, (22) abuse of process by instigating the Ottawa County criminal action against Kerr, and (23) negligence when Frasor breached his duty as receiver to release control of BCP and BCD and return the companies' properties to Kerr. Finally, Kerr sought a declaration that (24) BCD was the rightful owner of the real estate parcels sold by Frasor and the sheriff.

The district court dismissed the action, reasoning that Kerr's claims were barred by the *Rooker-Feldman*[1] doctrine to the extent that they challenged state court judgments and that the remainder were barred by the doctrine of res judicata. The court concluded that an appeal could not be taken in good faith. Kerr then unsuccessfully moved to alter or amend the judgment. *See* Fed. R. Civ. P. 59(e).

Kerr's appeal lacks an arguable basis in law. His direct and indirect challenges to state-court orders and judgments in Claims 1 to 6, 8 to 13, 15, 17 to 19, 23 and 24 are primarily barred by the *Rooker-Feldman* doctrine. The doctrine "prevents the lower federal courts from exercising jurisdiction over cases brought by 'state-court losers' challenging 'state-court judgments rendered before the district court proceedings commenced.'" *Lance v. Dennis*, 546 U.S. 459, 460 (2006) (per curiam) (quoting *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005)). To the extent that Kerr asserts that the judgments were obtained by fraud, misrepresentation, or other improper means, his claims are barred by the doctrine of res judicata because the claims were or could have been raised in prior litigation. *See Grava v. Parkman Township*, 653 N.E.2d 226, 228 (Ohio 1995); *Thompson v. Wing*, 637 N.E.2d 917, 923 (Ohio 1994)

Kerr lacks standing to litigate Claims 7 and 16, which pertain to a civil suit against his mother and son. A litigant generally "cannot rest his claim to relief on the legal rights or interests of third parties." *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). And Kerr has failed to allege that any exceptions to this general rule are applicable here. *See, e.g.*, *Whitmore v. Arkansas*, 495 U.S. 149, 165 (1990).

Claim 14, which challenges the constitutionality of Ohio's theft statute, necessarily challenges the fact of Kerr's incarceration and may not be brought in a § 1983 action. *See Preiser v. Rodriguez*, 411 U.S. 475, 488-90 (1973). Claim 22, which challenges the instigation of the criminal action against Kerr and seeks money damages, cannot be brought in a § 1983 action until his convictions are reversed. *See Heck v. Humphrey*, 512 U.S. 477, 487 (1994).

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[1] *Rooker v. Fid. Tr. Co.*, 263 U.S. 413, 415-16 (1923); *D.C. Ct. of Appeals v. Feldman*, 460 U.S. 462, 476 (1983).

Claims 20 and 21, which raise the state law torts of intentional infliction of emotional distress and reckless, wanton, and willful misconduct, are too conclusory to state a claim. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

For these reasons, the court **DENIES** Kerr's IFP motion. Unless Kerr pays the $505 appellate filing fee to the district court within thirty days of the entry of this order, this appeal will be dismissed for want of prosecution.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Jeremy Kerr,

Plaintiff

v.

Keith Lenz, et al.,

Defendants

Case No. 3:22-cv-1054

MEMORANDUM OPINION
AND ORDER

I. INTRODUCTION

Pro se plaintiff Jeremy Kerr filed this *in forma pauperis* civil rights action against the following defendants: Keith Lenz; Edward L. Schimmel; Hizer & Schimmel; John Doe Hizer; Scott Bishop; Kathy Bishop ("Kathy"); Alan J. Lehenbauer; The McQuade Co., LLP; Colin McQuade; Daniel McQuade; Richard McQuade; Christopher Frasor; Carl Ireland; Frasor Ireland, LLP; Spitler Huffman, LLP; Robert Spitler; Rex Huffman; Diane Huffman; Daniel Spitler; Steven Spitler; Nathaniel Spitler; Mimi Yoon; James Grandowicz, Jr.; Dave Yost; and James Van Eerten. (Doc. No. 1).

Plaintiff's complaint concerns civil state court judgments entered against him in the Wood County Court of Common Pleas (*Lenz v. Kerr Building, Inc., et al.*, Case No. 2011CV0852 and *Lenz v. Kerr Building, Inc., et al.*, Case No. 2013CV0643) and the Henry County Court of Common Pleas (*Kerr Building, Inc. v. Bishop*, Case No. 2011CV0001). Plaintiff seeks declaratory judgment stating that the state court judgments are void. Plaintiff also seeks compensatory damages.

On June 17, 2022, Plaintiff filed an application to proceed *in forma pauperis* (Doc. No. 2), which I grant by separate order.

On July 7, 2022, I ordered Plaintiff to provide the Court a copy of the complaint for each defendant, two completed summonses for each defendant, one USM 285 process receipt and return for each defendant, and a notice of compliance (*See* Doc. No. 3). The Court cautioned Plaintiff that the failure to comply with the Court's order may result in dismissal of the complaint. (*Id.*). Thereafter, Plaintiff filed the required summonses, USM 285 forms, 15 copies of the complaint, and two notices of partial compliance (Doc. Nos. 4 and 6). Although the number of copies falls short of the Court's Order, I will construe Plaintiff's responses as substantial compliance and will therefore review Plaintiff's complaint.

II. BACKGROUND

Plaintiff states that in 2010, Kerr Buildings, Inc. ("Kerr Buildings") contracted with Scott Bishop to construct a steel building. It appears that a contract dispute arose between the parties, and Kerr Buildings filed a lawsuit against Bishop in the Henry County Court of Common Pleas (Case No. 2011CV0001). Bishop then filed a counterclaim against Kerr Buildings. Plaintiff "closed down the operations of" Kerr Buildings prior to trial and Kerr Buildings did not prosecute its case against Bishop. Bishop proceeded with his counterclaim, and in October 2012, he obtained a judgment against Kerr Buildings and Plaintiff individually in the amount of $79,648.00. Plaintiff alleges that this judgment is void because it was obtained fraudulently. He contends that Bishop, his wife, Kathy, and/or his attorney, Alan J. Lehenbauer, removed his official title as "President" of Kerr Buildings from various documents, and this change altered the contract with Bishop.

Plaintiff states that he had interests in two limited liability companies: BCD and BCP. Attempting to satisfy a portion of the Henry County judgment, Bishop filed a motion for a charging order, which would allow him to attach distribution of profits from those companies to which Plaintiff was entitled. Plaintiff alleges that Bishop, Kathy, and/or Lehenbauer engaged in ex parte

communications with the presiding judge with the intent to procure the charging order without Plaintiff's knowledge and in violation of his procedural due process rights. He contends this conduct rendered the charging order void.

Bishop also filed a motion for the appointment of a receiver. Plaintiff claims that he never received a copy of the motion. Plaintiff alleges that the order appointing receiver is void for being issued against non-party entities, BCD and BCP, and the order granted the receiver (Christopher Frasor) numerous powers never requested by Bishop, with the malicious intent to harm Plaintiff. According to the complaint, Bishop filed a motion for amended order to receiver, which the court granted, along with a "nunc pro tunc charging order." Plaintiff alleges that the nunc pro tunc charging order "nullified the order in the original charging order to proceed with execution sale of Plaintiff's interests in BCD and BCP." Plaintiff contends that his property on Marne Avenue was improperly included as a receivership asset.

Plaintiff further states that in 2010, Kerr Buildings contracted with Keith Lenz to construct a steel building. A contract dispute arose between the parties, and Lenz filed a lawsuit against Plaintiff and Kerr Buildings in the Wood County Court of Common Pleas (Case No. 2011CV0852). In July 2013, Lenz obtained a judgment against "Kerr Building, Inc." and Plaintiff jointly and severally in the amount of $234,670.00. The court denied Plaintiff's motion for relief from judgment. In November 2013, Lenz filed a certificate of judgment against "Kerr Building, Inc." Plaintiff alleges that the judgment against "Kerr Building, Inc." is void because that entity does not exist and Lenz failed to correct the name to the company's legal name of "Kerr Buildings, Inc." (Emphasis added.) Plaintiff also alleges that "Kerr Building, Inc." was not properly served, rendering the default judgment void. Plaintiff claims that Lenz's attorney, "Defendant Schimmel," procured the judgment against "Kerr Building, Inc." fraudulently by filing the action against the wrong party. Plaintiff also claims that the court lacked jurisdiction to allow Lenz to amend his complaint, and therefore, the judgment is void.

enrichment, fraud, conversion, intentional infliction of emotional distress, negligence, and willful misconduct.

III. STANDARD OF REVIEW

Pro se pleadings are liberally construed. *Boag v. MacDougall*, 454 U.S. 364, 365, 102 S. Ct. 700, 70 L. Ed. 2d 551 (1982) (per curiam); *Haines v. Kerner*, 404 U.S. 519, 520, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972). The district court, however, is required to dismiss an *in forma pauperis* action under 28 U.S.C. § 1915(e) if it fails to state a claim upon which relief can be granted, or if it lacks an arguable basis in law or fact. *Neitzke v. Williams*, 490 U.S. 319, 328, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989); *Lawler v. Marshall*, 898 F.2d 1196 (6th Cir. 1990); *Sistrunk v. City of Strongsville*, 99 F.3d 194, 197 (6th Cir. 1996). A claim lacks an arguable basis in law or fact when it is premised on an indisputably meritless legal theory or when the factual contentions are clearly baseless. *Neitzke*, 490 U.S. at 327. A cause of action fails to state a claim upon which relief may be granted when it lacks "plausibility in the complaint." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 564, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

A pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). The factual allegations in the pleading must be sufficient to raise the right to relief above the speculative level on the assumption that all the allegations in the complaint are true. *Twombly*, 550 U.S. at 555. The plaintiff is not required to include detailed factual allegations, but he or she must provide more than "an unadorned, the defendant unlawfully harmed me accusation." *Iqbal*, 556 U.S. at 678. A pleading that offers legal conclusions or a simple recitation of the elements of a cause of action will not meet this pleading standard. *Id.* The Court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986).

In 2013, Lenz filed a second lawsuit in the Wood County Court of Common Pleas alleging that Plaintiff and "Kerr Building" had fraudulently transferred real property to another of Plaintiff's business entities to avoid attachment of the judgment lien in the first lawsuit (Case No. 2013CV0643). The state court entered judgment in Lenz's favor, enjoining Plaintiff and his entities from transferring the property. It appears that in January 2014, Lenz filed a certificate of judgment against BCD, and in June 2019, Lenz filed another lien against Plaintiff and "Kerr Building." Plaintiff alleges that attorney Schimmel had knowledge that the first lien was dormant, and the second lien could not revive a dormant judgment.

Plaintiff contends that Schimmel knowingly misrepresented the 2019 judgment lien as valid with malicious purpose to harm Plaintiff "and to facilitate the goal of the enterprise/conspiracy." In December 2020, Frasor distributed the receivership estate to Lenz, Bishop, Kathy, Ireland, Frasor, and Schimmel (attorney fees). Plaintiff alleges that these defendants knew the funds were "stolen and/or wrongfully obtained" by Frasor. Plaintiff contends that he, as sole shareholder of BCD and BCP, was the rightful owner of the funds in the receivership.

In January 2021, Schimmel filed a motion to revive "Lenz's dormant judgment." The Wood County Court of Common Pleas found the judgment became dormant on November 18, 2018, and it ordered the judgment shall stand revived effective March 11, 2021. Plaintiff alleges, therefore, that Lenz had no right to enforce his judgment against Plaintiff and "Kerr Building, Inc."

Plaintiff additionally alleges that the Ohio Rev. Code § 2913.02 ("Theft") is unconstitutionally vague; the defendants engaged in a pattern of corrupt activity, in violation of Ohio Rev. Code § 2923.32 ("RICO"); and Frasor acted outside the scope of his authority as receiver when he continued his possession and control of BCP and BCD after the Henry County Court of Common Pleas removed the entities from the receivership estate in its amended order of April 2018. Finally, Plaintiff alleges the following state law claims: slander of title, abuse of process, unjust

In reviewing a complaint, the Court must construe the pleading in the light most favorable to the plaintiff. *Bibbo v. Dean Witter Reynolds, Inc.*, 151 F.3d 559, 561 (6th Cir. 1998).

IV. ANALYSIS

Plaintiff challenges several state court judgments obtained against him and asks this Court to revisit the judgments obtained in Wood County and Henry County.

To the extent Plaintiff is attacking the state court judgments and is seeking to be relieved of the consequences of the state court proceedings, the *Rooker-Feldman* doctrine bars my review. *See Dist. of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 483, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16, 44 S. Ct. 149, 68 L. Ed. 362 (1923). United States District Courts do not have jurisdiction to overturn state court decisions even if the request to reverse the state court judgment is based on an allegation that the state court's action was a violation of federal law. *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 292, 125 S. Ct. 1517, 161 L. Ed. 2d 454 (2005). "Where federal relief can only be predicated upon a conviction that the state court was wrong, it is difficult to conceive [of] the federal proceeding as, in substance, anything other than a prohibited appeal of the state-court judgment." *Catz v. Chalker*, 142 F.3d 279, 295 (6th Cir. 1998) (quoting *Keene Corp. v. Cass*, 908 F.2d 293, 296-97 (8th Cir. 1990) (quoting *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 25, 107 S. Ct. 1519, 95 L. Ed. 2d 1 (1987)), amended on other grounds 243 F.3d 234 (6th Cir. 2001). Federal appellate review of state court judgments can only occur in the United States Supreme Court. *See Feldman*, 460 U.S. at 483; *Rooker*, 263 U.S. at 415-16.

Rooker-Feldman does not, however, bar federal jurisdiction "simply because a party attempts to litigate in federal court a matter previously litigated in state court." *Exxon Mobil Corp.*, 544 U.S. at 293; *Berry v. Schmitt*, 688 F.3d 290, 298-99 (6th Cir. 2012). It also does not address potential conflicts between federal and state court orders, which fall within the parameters of the doctrines of comity, abstention, and preclusion. *Berry*, 688 F.3d at 299. Rather, the *Rooker-Feldman* doctrine applies only where a party losing his or her case in state court initiates an action in federal district court

complaining of injury caused by a state court judgment itself and seeks review and rejection of that judgment. *Berry*, 688 F.3d at 298-99; *In re Cook*, 551 F.3d 542, 548 (6th Cir. 2009).

To determine whether *Rooker- Feldman* bars a claim, the Court must look to the "source of the injury the Plaintiff alleges in the federal complaint." *McCormick v. Braverman*, 451 F.3d 382, 393 (6th Cir. 2006); *see Berry*, 688 F.3d at 299; *Kovacic v. Cuyahoga County Dep't of Children and Family Services*, 606 F.3d 301, 310 (6th Cir. 2010). If the source of the plaintiff's injury is the state-court judgment itself, then the *Rooker-Feldman* doctrine bars the federal claim. *McCormick*, 451 F.3d at 393. "If there is some other source of injury, such as a third party's actions, then the plaintiff asserts an independent claim." *Id.*; *see Lawrence v. Welch*, 531 F.3d 364, 368-69 (6th Cir. 2008). In conducting this inquiry, the court should also consider the plaintiff's requested relief. *Evans v. Cordray*, 424 Fed. Appx. 537, 2011 WL 2149547, at *1 (6th Cir. 2011).

Here, the source of the injury for many of Plaintiff's claims are the state court judgments themselves. Plaintiff asks this Court to declare the judgments void. Pursuant to *Rooker-Feldman*, I lack jurisdiction to grant that relief.[1]

Additionally, Plaintiff appears to allege throughout his complaint independent claims that the state court judgments were procured by certain defendants through fraud, misrepresentation, or other improper means. He also alleges a state statute is unconstitutionally vague and he asserts several state law claims, including RICO, slander, fraud, conversion, negligence, and intentional infliction of emotional distress. To the extent Plaintiff presents such independent claims that his injuries were caused by the defendants' alleged wrongdoing before the state court, res judicata bars these claims.

A Plaintiff cannot file an action in federal court to relitigate matters that were already decided in state court proceedings. Federal Courts must give the same preclusive effect to a state-

[1] This Court previously dismissed Plaintiff's complaint alleging that the charging order entered in the Henry County case was void on the grounds that review of the state court order was barred by the *Rooker-Feldman* doctrine. *See Kerr v. Collier*, No. 3:20-cv-01110, 2020 U.S. Dist. LEXIS 215162 (N.D. Ohio Nov. 16, 2020) (J. Helmick).

court judgment as that judgment receives in the rendering state. 28 U.S.C. § 1738; *Abbott v. Michigan*, 474 F.3d 324, 330 (6th Cir. 2007); *Young v. Twp. of Green Oak*, 471 F.3d 674, 680 (6th Cir. 2006). To determine the preclusive effect a prior state court judgment would have on the present federal action, the Court must apply the law of preclusion of the state in which the prior judgment was rendered. *Migra v. Warren City School District Board of Educ.*, 465 U.S. 75, 81, 104 S. Ct. 892, 79 L. Ed. 2d 56 (1984).

In Ohio, the doctrine of res judicata encompasses two related concepts: (1) claim preclusion and (2) issue preclusion. *State ex rel. Davis v. Pub. Emp. Ret. Bd.*, 120 Ohio St. 3d. 386, 392, 2008-Ohio 6254, 899 N.E.2d 975 (2008). "Claim preclusion prevents subsequent actions, by the same parties or their privies, based on any claim arising out of a transaction that was the subject matter of a previous action." *Grava v. Parkman Twp.*, 73 Ohio St. 3d 379, 382, 1995- Ohio 331, 653 N.E.2d 226 (1995). Claim preclusion also bars subsequent actions whose claims "could have been litigated in the previous suit." *Id.*

By contrast, issue preclusion, or collateral estoppel, prevents the "relitigation of any fact or point that was determined by a court of competent jurisdiction in a previous action between the same parties or their privies," even if the causes of action differ. *Id.* Issue preclusion applies when a fact or issue "(1) was actually and directly litigated in the prior action; (2) was passed upon and determined by a court of competent jurisdiction; and (3) when the party against whom [issue preclusion] is asserted was a party in privity with a party to the prior action." *Thompson v. Wing*, 70 Ohio St.3d 176, 183, 1994 Ohio 358, 637 N.E.2d 917 (1994).

Here, Plaintiff claims that Defendants procured the state court judgments through fraud or other improper means, engaged in a pattern of corrupt activity in violation of Ohio's RICO statute, and engaged in conduct that constituted slander of title, abuse of process, unjust enrichment, fraud, conversion, intentional infliction of emotional distress, negligence, and willful misconduct. Plaintiff also claims that Frasor acted outside the scope of his authority as receiver and Ohio's theft statute is

unconstitutionally vague. All of these claims were either litigated previously in the Henry County action or the Wood County actions or could have been litigated in those state court proceedings. These claims are therefore barred by the doctrine of res judicata.

V. CONCLUSION

Having considered and examined the *pro se* plaintiff's pleadings to determine their legal viability, I conclude that Plaintiff has failed to state a claim upon which relief may be granted. I am therefore dismissing this action pursuant to 28 U.S.C. § 1915(e). I certify, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith.

So Ordered.

s/ Jeffrey J. Helmick
United States District Judge

No. 23-3479

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Nov 27, 2023
KELLY L. STEPHENS, Clerk

JEREMY LYNN KERR,

Plaintiff-Appellant,

v.

KEITH LENZ, ET AL.,

Defendants-Appellees.

ORDER

Before: CLAY, GIBBONS, and LARSEN, Circuit Judges.

Jeremy Lynn Kerr, a Michigan prisoner, petitions the court to rehear en banc its order denying his in forma pauperis motion. The petition has been referred to this panel, on which the original deciding judge does not sit, for an initial determination on the merits of the petition for rehearing. Upon careful consideration, the panel concludes that the original deciding judge did not misapprehend or overlook any point of law or fact in issuing the order and, accordingly, declines to rehear the matter. Fed. R. App. P. 40(a).

The Clerk shall now refer the matter to all of the active members of the court for further proceedings on the suggestion for en banc rehearing.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens

Kelly L. Stephens, Clerk

APPENDIX C

No. 23-3479

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Dec 12, 2023
KELLY L. STEPHENS, Clerk

JEREMY LYNN KERR,

Plaintiff-Appellant,

v.

KEITH LENZ, ET AL.,

Defendants-Appellees.

ORDER

Before: CLAY, GIBBONS, and LARSEN, Circuit Judges.

Jeremy Lynn Kerr petitions for rehearing en banc of this court's order entered on September 19, 2023, denying leave to proceed in forma pauperis on appeal. The petition was initially referred to this panel, on which the original deciding judge does not sit. After review of the petition, this panel issued an order announcing its conclusion that the original application was properly denied. The petition was then circulated to all active members of the court, none of whom requested a vote on the suggestion for an en banc rehearing. Pursuant to established court procedures, the panel now denies the petition for rehearing en banc. Unless Kerr pays the $505 filing fee to the district court within 30 days of the entry of this order, this appeal will be dismissed for want of prosecution.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens, Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Jeremy Kerr,

Plaintiff,

v.

Keith Lenz, *et al.*,

Defendants.

Case No. 3:22-cv-1054

MEMORANDUM OPINION
AND ORDER

I. INTRODUCTION AND BACKGROUND

Pro se plaintiff Jeremy Kerr filed this *in forma pauperis* civil rights action against the following defendants: Keith Lenz; Edward L. Schimmel; Hizer & Schimmel; John Doe Hizer; Scott Bishop; Kathy Bishop ("Kathy"); Alan J. Lehenbauer; The McQuade Co., LLP; Colin McQuade; Daniel McQuade; Richard McQuade; Christopher Frasor; Carl Ireland; Frasor Ireland, LLP; Spitler Huffman, LLP; Robert Spitler; Rex Huffman; Diane Huffman; Daniel Spitler; Steven Spitler; Nathaniel Spitler; Mimi Yoon; James Grandowicz, Jr.; Dave Yost; and James Van Eerten. (Doc. No. 1).

Kerr's complaint concerns civil state court judgments entered against him in the Wood County Court of Common Pleas (*Lenz v. Kerr Building, Inc., et al.*, Case No. 2011CV0852 and *Lenz v. Kerr Building, Inc., et al.*, Case No. 2013CV0643) and the Henry County Court of Common Pleas (*Kerr Building, Inc. v. Bishop*, Case No. 2011CV0001). Kerr seeks a declaratory judgment stating that the state court judgments are void ab initio for a variety of reasons, including because they allegedly

were procured by fraud. (*See, e.g.,* Doc. No. 1 at 4, 40-54). He also asserts a variety of state law claims, including alleged violations of Ohio's Corrupt Activities Act and Ohio tort law.

I dismissed Kerr's claims pursuant to 28 U.S.C. § 1915(e) after concluding they were barred by the *Rooker-Feldman* doctrine and the doctrine of *res judicata.* (Doc. No. 9). Kerr filed a motion to alter or amend those rulings pursuant to Rule 59(e). (Doc. No. 11). He also filed a document titled "request to take notice," which contains additional argument in support of his Rule 59(e) motion based upon Judge Sutton's concurrence in *VanderKodde v. Mary Jane M. Elliott, P.C.*, 951 F.3d 397 (6th Cir. 2020).

II. DISCUSSION

Rule 59(e) states that a party must file a motion to alter or amend a judgment within 28 days of the entry of the judgment. Fed. R. Civ. P. 59(e). The party filing a Rule 59(e) motion must demonstrate there was "(1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) a need to prevent manifest injustice." *Henderson v. Walled Lake Consol. Sch.,* 469 F.3d 479, 496 (6th Cir. 2006).

Kerr argues I made a clear error of law by applying the *Rooker-Feldman* doctrine and concluding this court lacks subject matter jurisdiction over his claims. According to Kerr, he has disclaimed any argument that the state-court judgments violate the Constitution or federal law and, therefore, he should be permitted to proceed. (Doc. No. 11 at 2). He further argues that I should adopt Judge Sutton's advice in his concurring opinion in *Vanderkodde* and conclude that I, like "too many [other] district courts [have] erroneously appl[ied] *Rooker-Feldman* to properly presented federal issues." (Doc. No. 12 at 1)

Kerr cites extensively to *Vanderkodde* but ignores the most relevant part:

> The *Rooker* side of things had what seemed to be a humble start in 1923. The Supreme Court dismissed a federal lawsuit seeking to "declare" a state trial court judgment "null and void" after it had already been affirmed by the state's supreme court. *Rooker v. Fid. Tr. Co.*, 263 U.S. 413, 414[1923] . . . . The brisk, unanimous

> opinion turned on a section of the Judicial Code, now located at 28 U.S.C. § 1257, that permits only the United States Supreme Court to review appeals from state supreme courts. *Id.* at 416, 44 S.Ct. 149. That was right – not because of comity concerns or any new doctrine that limited the jurisdiction of the federal courts but because only the United States Supreme Court, not federal district courts, may entertain appeals from final judgments of the state courts. 28 U.S.C. § 1257.

VanderKodde, 951 F.3d at 405 (6th Cir. 2020) (Sutton, J., concurring).

This is exactly the type of relief Kerr seeks – he argues the state courts got it wrong, and I should correct their errors by declaring their rulings to be void. Kerr already raised this argument and his disagreement with my decision does not rise to the level of a clear error of law, as "[a] motion under Rule 59(e) is not an opportunity to re-argue a case." *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998). I deny Kerr's motion on this basis.

Kerr also argues I "erred in applying res judicata [sua] sponte," because it is listed as an affirmative defense in Rule 8(c). (Doc. No. 11 at 2). But § 1915 states that when a plaintiff is authorized to proceed with a case without prepaying the civil filing fee, "the court shall dismiss the case at any time if the court determines that . . . the action . . . fails to state a claim on which relief may be granted." 28 U.S.C. § 1915(e)(2). That statute requires me to review complaints filed by plaintiffs like Kerr who are proceeding *pro se* and *in forma pauperis*, and Congress may create exceptions to individual Federal Rules of Civil Procedure like Rule 8 by enacting federal statutes like § 1915(e) "overriding it in certain instances." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 400 (2010). Kerr's argument is not persuasive, and I deny his motion on this basis as well.

III. CONCLUSION

For the reasons stated above, I deny Kerr's Rule 59 motion. (Doc. No. 11). Further, I reaffirm my earlier certification, pursuant to 28 U.S.C. §1915(a)(3), that an appeal from this decision could not be taken in good faith.

So Ordered.

s/ Jeffrey J. Helmick
United States District Judge

28 USCS § 2254

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
(b)
(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—
(A) the applicant has exhausted the remedies available in the courts of the State; or
(B)
(i) there is an absence of available State corrective process; or
(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.
(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.
(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.
(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
(e)
(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.
(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—
(A) the claim relies on—
(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.
(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.
(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.
(h) Except as provided in section 408 of the Controlled Substance Acts [21 USCS § 848], in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.
(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254 [28 USCS § 2254].