**FILED**
**United States Court of Appeals**
**Tenth Circuit**

**June 5, 2018**

**Elisabeth A. Shumaker**
**Clerk of Court**

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

---

JOHN DAVIS,

Plaintiff - Appellant,

v.

DEUTSCHE BANK NATIONAL TRUST COMPANY, as trustee for GSAA Home Equity Trust 2007-5, Asset-Back Certificates, Series 2007-5; CYNTHIA D. MARES, Arapahoe County Public Trustee (Nominal Defendant); JUDGE ELIZABETH WEISHAUPL, (Nominal Defendant); LAWRENCE E. CASTLE, in his corporate and individual capacity; ROBERT J. HOPP, in his corporate and individual capacity; CHRISTINA WHITMER, Public Trustee of Grand County (Nominal Defendant); DOES 1-10,

Defendants - Appellees.

No. 17-1362
(D.C. No. 1:16-CV-02245-PAB-KLM)
(D. Colo.)

---

**ORDER AND JUDGMENT**[*]

---

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

---

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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

Pro se appellant John Davis appeals the dismissal of his amended complaint based on the foreclosure of the mortgage on real property in which he claimed an interest. He asserted claims under 42 U.S.C. § 1983 for violation of his Fourteenth Amendment rights to procedural due process and equal protection, as well as several state-law claims. He also argued that the foreclosure procedure under Colo. R. Civ. P. 120 is unconstitutional. The district court adopted the report and recommendation of a magistrate judge and dismissed the amended complaint under Fed. R. Civ. P. 12(b)(6). We have jurisdiction under 28 U.S.C. § 1291 and affirm.

## I. BACKGROUND

In January 2007 non-party Valorie Briggs obtained a mortgage loan in the amount of $214,000 from Freedom Mortgage Corp. on residential property in Arapahoe County, Colorado. Freedom Mortgage later assigned the mortgage note to defendant Deutsche Bank National Trust Co. (Deutsche Bank). After Ms. Briggs stopped making payments on the mortgage, in 2016 Deutsche Bank initiated state-court foreclosure proceedings under Rule 120.

Pursuant to Rule 120, foreclosure of a deed of trust by public trustee's sale is available where the deed of trust "names the county's public trustee as trustee." *Mayotte v. U.S. Bank Nat'l Ass'n*, 880 F.3d 1169, 1172 (10th Cir. 2018). "The creditor, or owner of the evidence of debt secured by the deed of trust, must obtain an order authorizing the public trustee to conduct the sale. Rule 120 governs the very specialized civil proceeding [for obtaining an] order authorizing sale . . . ." *Plymouth Capital Co. v. Dist. Ct.*, 955 P.2d 1014, 1015 (Colo. 1998) (citation omitted). After

the sale is conducted, the title to the property vests in the purchaser, but is subject to rights of redemption. *See* Colo. Rev. Stat. § 38-38-501(1) (2012).

Mr. Davis claimed an interest in the property as Ms. Briggs's husband and adoptive father, as well as under a power of attorney Ms. Briggs executed in his favor. The state court permitted Mr. Davis to intervene in the foreclosure proceedings. Ms. Briggs and Mr. Davis contested the foreclosure, asserting, among other grounds, that Deutsche Bank was not the real party in interest because it was not the holder in due course of the note. Following a hearing, defendant Judge Weishaupl, a Colorado district court judge, determined that Deutsche Bank had presented the original note indorsed to Deutsche Bank, so it was the real party in interest entitled to foreclose the mortgage. Therefore, the court issued an order authorizing the sale.

While the state foreclosure proceedings were pending, Mr. Davis filed the underlying lawsuit in federal court. He named as defendants Deutsche Bank; Judge Weishaupl; Ms. Mares and Ms. Whitmer, the Public Trustees for Arapahoe and Grand Counties, respectively; and Mr. Castle and Mr. Hopp, two private attorneys who had lobbied the Colorado Legislature to modify the foreclosure procedure, which was accomplished in 2006. The amendments allow, "in lieu of the original evidence of debt," a copy of the evidence of debt with "a certification signed and properly acknowledged by a holder of an evidence of debt . . . or a statement signed by the attorney for such holder" under specified conditions. Colo. Rev. Stat. § 38-38-101(1)(b)(II) (2006); *see also id.* § 38-38-101(c) (allowing a copy of the

deed of trust under specified conditions). Mr. Davis challenged the constitutionality of the Colorado foreclosure procedure and sought injunctive relief. He also asserted that the defendants violated his constitutional rights and the federal Fair Debt Collection Practices Act (FDCPA). He further alleged various state-law claims.

The district court denied injunctive relief. All defendants moved to dismiss. The magistrate judge recommended that the amended complaint be dismissed and, after considering Mr. Davis's objections, the district court adopted the recommendation. The court dismissed the claims against Judge Weishaupl based on judicial immunity, and dismissed the remaining federal claims for failure to state a plausible claim for relief. The court declined to exercise jurisdiction over the state-law claims and dismissed them without prejudice. Mr. Davis does not appeal the dismissal of the state-law and FDCPA claims, the denial of injunctive relief, or the dismissal of the Doe defendants.

## II. STANDARDS OF REVIEW

"We review a Rule 12(b)(6) dismissal de novo." *Nixon v. City & Cty. of Denver*, 784 F.3d 1364, 1368 (10th Cir. 2015) (internal quotation marks omitted). In doing so, "[w]e accept all the well-pleaded allegations of the complaint as true and construe them in the light most favorable to [Mr. Davis]." *Id.* (ellipsis and internal quotation marks omitted). To withstand dismissal, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the

misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation and internal quotation marks omitted). Moreover, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," are not sufficient to state a claim for relief. *Id.*

We liberally construe Mr. Davis's pro se filings. *See Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005). We do not, however, "take on the responsibility of serving as the litigant's attorney in constructing arguments and searching the record." *Id.* Moreover, "pro se parties [must] follow the same rules of procedure that govern other litigants." *Id.* (internal quotation marks omitted).

## III. JUDGE WEISHAUPL

The district court determined that Judge Weishaupl was entitled to judicial immunity. On appeal, Mr. Davis argues that in enacting Rule 120, the State of Colorado impliedly waived sovereign immunity and therefore Judge Weishaupl was not entitled to judicial immunity. Even if a state's waiver of its sovereign immunity also waives judicial immunity of the state's judicial officers, "[a] State's consent to suit must be unequivocally expressed in the text of the relevant statute. . . . Waiver may not be implied." *Sossamon v. Texas*, 563 U.S. 277, 284 (2011) (citations and internal quotation marks omitted). Therefore, Mr. Davis's implied-waiver argument fails. We affirm the dismissal of the claims against Judge Weishaupl.

## IV. PUBLIC TRUSTEES

The district court dismissed the public trustees, Ms. Mares and Ms. Whitmer, because the amended complaint provided only a formulaic recitation of elements of a cause of action that were insufficient to state a plausible claim for relief. We do not review this ruling because Mr. Davis does not challenge it in his opening brief. An appellant's opening brief must identify "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies." Fed. R. App. P. 28(a)(8)(A). "Consistent with this requirement, we routinely have declined to consider arguments that are not raised, or are inadequately presented, in an appellant's opening brief." *Bronson v. Swensen*, 500 F.3d 1099, 1104 (10th Cir. 2007).

## V. DEUTSCHE BANK, MR. CASTLE, AND MR. HOPP

### A. Color of State Law

A person acting under color of state law who "subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured." 42 U.S.C. § 1983. Mr. Davis argues that Deutsche Bank was a state actor subjecting it to liability under § 1983 because it utilized state law to foreclose on his property and received significant aid from Judge Weishaupl and Public Trustee Mares, both of whom are public officials.

Generally, private parties are not state actors subject to liability under § 1983. *See Brokers' Choice of Am., Inc. v. NBC Universal, Inc.*, 757 F.3d 1125, 1143 (10th Cir. 2014) (observing that "§ 1983 excludes from its reach merely private conduct, no matter how discriminatory or wrongful" (internal quotation marks omitted)). Nevertheless, Mr. Davis alleges that Deutsche Bank acted jointly with a state judge and a public trustee. "State action is . . . present if a private party is a willful participant in joint action with the State or its agents." *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1453 (10th Cir. 1995) (internal quotation marks omitted). But Deutsche Bank's "mere invocation" of the Rule 120 procedure did not constitute joint action by the bank and the state officials. *See Johnson v. Rodrigues*, 293 F.3d 1196, 1205 (10th Cir. 2002) ("[A] private party's mere invocation of state legal procedures does not constitute joint participation or conspiracy with state officials satisfying the § 1983 requirement of action under color of law." (brackets and internal quotation marks omitted)). Therefore, Mr. Davis did not allege a plausible claim of state action against Deutsche Bank under the joint action test.

Mr. Davis asserted that Mr. Castle and Mr. Hopp were state actors because they were involved with the state legislature to modify the foreclosure statute and drafted proposed legislation. "[L]obbying activities [that are] actions of a private individual or corporation [seeking] to tell lawmakers what it wants or needs from government, . . . whether an aid or a hindrance to good governance, are not 'state action' implicating individual constitutional rights." *Single Moms, Inc. v. Mont.*

*Power Co.*, 331 F.3d 743, 749 (9th Cir. 2003); *cf. Sable v. Myers*, 563 F.3d 1120, 1123 (10th Cir. 2009) ("Absolute legislative immunity attaches to all actions taken in the sphere of legitimate legislative activity." (internal quotation marks omitted)). The amended complaint thus failed to state a plausible claim of state action by Mr. Castle and Mr. Hopp.

**B. Conspiracy**

Mr. Davis asserted that Deutsche Bank, Mr. Castle, and Mr. Hopp conspired together and with state officials to pass the legislation modifying the Rule 120 procedure. The amended complaint alleged that Mr. Castle and Mr. Hopp drafted the legislative bill and "engag[ed] with" a state elected representative who sponsored the bill. R. Vol. 1 at 213; *see also id.* at 206 (amended complaint alleging "defendant attorneys committed the **first overt act** in the conspiracy . . . when they drafted HB06-1387"). The only other allegations of a conspiracy were that the attorneys violated their oaths to support the Constitution and used the law for their own financial enrichment. *Id.* at 214.

Mr. Davis did not "allege specific facts showing an agreement and concerted action amongst the defendants," *Tonkovich v. Kan. Bd. of Regents*, 159 F.3d 504, 533 (10th Cir. 1998). "Conclusory allegations of conspiracy are insufficient to state a valid § 1983 claim." *Id.* (internal quotation marks omitted).[1]

[1] We need not address Mr. Davis's argument that the continuing violation doctrine applies to his claims against Mr. Castle and Mr. Hopp because we determine that Mr. Davis failed to state a claim against those defendants.

## VI. CONSITUTIONALITY OF RULE 120 PROCEDURE[2]

Mr. Davis contends that the Rule 120 procedure is unconstitutional because it does not provide for a full and fair hearing or a right to appellate review, and because it permits the lender to provide only a copy of the evidence of debt, rather than the original, to the state court. He further asserts that a lender must prove it paid value for the note; otherwise a thief could be a holder in due course based solely on possession of an indorsed-in-blank promissory note.[3]

The Due Process Clause provides for procedural due process, which "ensures the state will not deprive a party of property without engaging fair procedures to

---

[2] To the extent Mr. Davis seeks relief that would require setting aside the foreclosure sale, those claims are barred by the *Rooker-Feldman* doctrine. *See Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005) (holding barred claims are those "complaining of injuries caused by state-court judgments"). But he seeks title to the real property and damages, which are not barred by *Rooker-Feldman*. *See Mayotte*, 880 F.3d at 1175-76 (stating a challenge to the Rule 120 procedure that included the relief of damages and obtaining title to the plaintiff's home, while "inconsistent with the Rule 120 order approving sale," was not barred by *Rooker-Feldman*).

[3] Mr. Davis also contends that the Rule 120 procedure violates equal protection but the allegations in the amended complaint are mere conclusory statements insufficient to state a claim for relief. *See Iqbal*, 556 U.S. at 678. On appeal, he argues that Rule 120 parties, as distinguished from other litigants, are denied the rights to a jury trial, counterclaims, and appeal, but he has not attempted to make the required "threshold showing that [Rule 120 parties] were treated differently from others who were similarly situated to them," *Brown v. Montoya*, 662 F.3d 1152, 1172-73 (10th Cir. 2011) (internal quotation marks omitted). In addition, to the extent Mr. Davis challenges the constitutionality of the forcible entry and detainer action used to evict him from his property, he has not identified where he presented this claim to the district court, and our review of the amended complaint indicates it was not presented. Therefore, because this claim was raised for the first time on appeal, we do not consider it. *See Davis v. Clifford*, 825 F.3d 1131, 1137 n.3 (10th Cir. 2016).

reach a decision." *Pater v. City of Casper*, 646 F.3d 1290, 1293 (10th Cir. 2011) (internal quotation marks omitted). In a Rule 120 proceeding, an interested party, such as the mortgagor, may file a response to the motion seeking an order authorizing sale. Rule 120(c)(1). If a response is filed, the state district court must hold a hearing. "[T]he scope and purpose of a Rule 120 hearing is very narrow: the trial court must determine whether there is a reasonable probability "of a default or other circumstances authorizing exercise of a power of sale has occurred." *Plymouth Capital Co.*, 955 P.2d at 1017. In determining whether there is a reasonable probability of default, "[i]t is . . . incumbent upon the Rule 120 court to consider any evidence the Debtors present on the issue of whether a default has occurred." *Id.* In addition, if the mortgagor asserts a "real party in interest" defense whereby he or she asserts that the party seeking to sell the property "has no legitimate claim to the property at all, . . . the burden should devolve upon the party seeking the order of sale to show that he or she is indeed the real party in interest." *Goodwin v. Dist. Ct.*, 779 P.2d 837, 843 (Colo. 1989). The order granting or denying the motion is not appealable, *see* Rule 120(d), but "parties aggrieved by the Rule 120 court's decision may seek injunctive or other relief in a court of competent jurisdiction," *Plymouth Capital Co.*, 955 P.2d at 1017.

Judge Weishaupl held a hearing to address Mr. Davis's challenges to the foreclosure. She did not rely on the presumption that evidence of debt may be established based on a qualified holder's certification or an attorney's statement. *See* § 38-38-101(b)(II). Rather, Judge Weishaupl relied on Deutsche Bank's production

of the duly-indorsed original note. We conclude that procedural due process was satisfied here. *See Jones v. Flowers*, 547 U.S. 220, 223 (2006) (stating that due process requires "notice and opportunity for hearing *appropriate to the nature of the case*" (emphasis added) (internal quotation marks omitted)).

Mr. Davis further argues that the Rule 120 procedure is unconstitutional because the lender is not required to produce the original note. "A litigant has standing to challenge the constitutionality of a statute only insofar as it adversely affects his own rights." *Clements v. Fashing*, 457 U.S. 957, 966 n.3 (1982). It is undisputed that Deutsche Bank produced the original note indorsed to Deutsche Bank. Mr. Davis does not have standing to challenge this provision of the Rule 120 procedure because it was not applied to him.

Mr. Davis also contends that Deutsche Bank was required to prove that it paid value for the note. But Colorado foreclosure law provides that a "person in possession of a negotiable instrument evidencing a debt, which has been . . . indorsed in blank," is presumed to be the holder of the evidence of debt. § 38-38-100.3(10)(c) (2015). "Colorado law does not limit enforcement of an obligation to a holder who received the instrument through negotiation. A note may also be enforced by a *transferee*." *Miller v. Deutsche Bank Nat'l Trust Co. (In re Miller)*, 666 F.3d 1255, 1264 (10th Cir 2012); *id.* (explaining that "[t]ransfer of an instrument . . . vests in the transferee any right of the transferor to enforce the instrument." (internal quotation

marks omitted)). The district court correctly dismissed the constitutional challenges to the Rule 120 procedure.

## VII. CONCLUSION

We affirm the district court's judgment.

Entered for the Court

Mary Beck Briscoe
Circuit Judge