FILED
United States Court of Appeals
Tenth Circuit

June 6, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JAMES CONLON DAY, a resident of Florida,

Plaintiff - Appellant,

v.

F. COULTER DEVRIES; B. JANEEN DEVRIES; DANIEL JONES; DEVRIES AND ASSOCIATES, P.C.,

Defendants - Appellees.

No. 22-3107
(D.C. No. 2:21-CV-02146-KHV-TJJ)
(D. Kan.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, **BALDOCK**, and **PHILLIPS**, Circuit Judges.

Plaintiff James Conlon Day sued Defendants F. Coulter Devries, B. Janeen Devries, Daniel Jones, and Devries and Associates, P.C., alleging breach of fiduciary duty and fraud on the court based on the Defendants' alleged actions in Kansas state court. The district court dismissed Mr. Day's claims on the merits. He now appeals only the dismissal of his fraud-on-the-court claim. Because that claim is barred by

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* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

the *Rooker-Feldman* doctrine,[1] we remand with instructions to the district court to vacate that portion of its prior dismissal order addressing the merits of the fraud-on-the-court claim, and to dismiss that claim without prejudice for lack of subject matter jurisdiction.

I. Background

In 1998, Mr. Day hired Defendants to provide legal services to him and his advertising company in a dispute with a former employee. His allegations concerning Defendants' conduct are as follows.[2]

Defendants filed an unsuccessful antitrust action on Mr. Day's behalf against the former employee in Kansas state court, the purpose of which was to waste attorney fees. Defendants then suggested a replevin action to repossess a car Mr. Day had loaned to the employee. Someone had stolen the promissory note evidencing the loan, so Defendants instructed Mr. Day to recreate it from memory. Defendants then misrepresented the recreated note to the Kansas state court as an exact electronic copy of the original, and the court authorized repossession of the car.

The former employee then demonstrated to the court that the replevin action was fraudulent and obtained an ex parte order to search Mr. Day's office and computer files. Defendants then asked Mr. Day to sign a statement accepting

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[1] *See 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).

[2] We liberally construe Mr. Day's pleadings because he appears pro se. *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005).

responsibility, and he did so. But Defendants added a paragraph that was not in the document when Mr. Day signed it. Defendants then withdrew from representing Mr. Day. Despite his withdrawal, Defendant Coulter Devries agreed to negotiate a settlement on Mr. Day's behalf. Coulter Devries placed undue pressure on Mr. Day to accept the settlement, including threats that he would be prosecuted criminally if the matter went to a hearing. Mr. Day accepted the settlement, which ultimately ruined his advertising business.

In 2000, Mr. Day filed a malpractice action against Devries and Associates, Coulter Devries, and Daniel Jones in Missouri state court. He alleged that as a result of their legal malpractice, he suffered $900,000 in damages and was unable to enforce the non-compete agreement. The case proceeded to an eight-day jury trial in 2005, during which Defendants committed perjury and induced the trial judge to call Mr. Day a liar in the presence of the jury. The trial court also erroneously admitted evidence and testimony and allowed an inconsistent jury verdict to stand.

Based on the foregoing allegations, Mr. Day filed an action in federal district court in 2021. His amended complaint appears to assert two claims: that Defendants breached their fiduciary duty to Mr. Day, and that their fraudulent actions during the 2005 trial produced a corrupt judgment that must be set aside. Defendants moved to dismiss the claims, arguing they were barred by the *Rooker-Feldman* doctrine. They also argued in the alternative that the claims were barred by the Kansas statute of limitations, and that the fraud-on-the-court claim had not been pleaded with particularity. The district court granted the motion to dismiss on the latter two

grounds and declined to address the *Rooker-Feldman* argument. This appeal followed.

II. Discussion

A. The Nature of Mr. Day's Claim

Rule 60(d)(1) of the Federal Rules of Civil Procedure preserves the remedy of "an independent action to relieve a party from a judgment, order, or proceeding." Liberally construed, we interpret Mr. Day's claim as such an action. *See Zurich N. Am. v. Matrix Serv., Inc.*, 426 F.3d 1281, 1290-91 (10th Cir. 2005) ("[T]he savings clause to Rule 60(b) [i.e., Rule 60(d)] recognizes the power of a court to entertain an independent action to relieve a party from a judgment." (internal quotation marks omitted)).

Although Rule 60(d)(3), which reserves to the district court the power to "set aside a judgment for fraud on the court," might seem a better match given Mr. Day's allegations, that provision concerns the federal district court's inherent power to set aside its *own* judgment if procured by fraud. *See United States v. Buck*, 281 F.3d 1336, 1341 (10th Cir. 2002) (describing Rule 60(d)(3) as allowing a party "to invoke the inherent power of a court to set aside *its* judgment if procured by fraud upon the court" (emphasis added)). By contrast, theoretically a party may bring an independent action under Rule 60(d)(1) to seek relief from a judgment entered in a different court, as Mr. Day does here. *See* 11 Charles Alan Wright, et al., Federal Practice & Procedure § 2868 (3d ed. 2012) ("[I]n theory, at least, [an] action [under Rule 60(d)(1)] may be brought in any court of competent jurisdiction."). As we

observed in *Buck*, the "narrow avenue" of such an independent action is still "wide enough to allow at least some claims of fraud." 281 F.3d at 1341.

B. Subject Matter Jurisdiction

Having established the nature of the claim at issue, we must now address the district court's subject matter jurisdiction. The district court dismissed Mr. Day's claim because he had not pleaded fraud with requisite particularity as required by Fed. R. Civ. P. 9(b), and because his claim was barred by the Kansas statute of limitations.[3] The district court acknowledged that Defendants had argued the claim was barred by *Rooker-Feldman*, but declined to address the argument "[b]ecause the statute of limitations and Rule 9(b) particularity requirement . . . are dispositive." R. at 320 n.4.

The *Rooker-Feldman* doctrine, however, may not be so easily avoided. If the doctrine applies, then the district court lacks subject matter jurisdiction over Mr. Day's claim. *See Graff v. Aberdeen Enterprizes, II, Inc.*, 65 F.4th 500, 514 (10th Cir. 2023). "The *Rooker-Feldman* doctrine . . . recognizes that 28 U.S.C. § 1331 is a grant of original jurisdiction, and does not authorize district courts to exercise appellate jurisdiction over state-court judgments, which Congress has

[3] Contrary to the district court's order, claims asserted under the savings clause of Rule 60(d) are not subject to statutes of limitations. *See Buck*, 281 F.3d at 1341 ("There is no set time limit for filing an independent action."); *Crosby v. Mills*, 413 F.2d 1273, 1276 (10th Cir. 1969) ("[Rule 60] permits an independent action and prescribes no time limitations for such action."); 11 Federal Practice & Procedure § 2868 ("There is no time limit on when an independent action may be brought.").

reserved to [the Supreme] Court [under 28 U.S.C.] § 1257(a)." *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 644 n.3 (2002).

"In light of the limited subject matter jurisdiction granted to the federal courts by Congress, we have a duty to satisfy ourselves that jurisdiction is appropriate." *Adams v. Reliance Standard Life Ins. Co.*, 225 F.3d 1179, 1182 (10th Cir. 2000). We therefore must address whether the *Rooker-Feldman* doctrine precludes the district court's exercise of jurisdiction over Mr. Day's claim.

Defendants argue the doctrine applies because Mr. Day's claim effectively seeks to overturn a state court judgment. "*Rooker-Feldman*'s jurisdictional bar applies when (1) the plaintiff lost in state court, (2) the state court judgment caused the plaintiff's injuries, (3) the state court rendered judgment before the plaintiff filed the federal claim, and (4) the plaintiff is asking the district court to review and reject the state court judgment." *Graff*, 65 F.4th at 514 (internal quotation marks omitted).

Mr. Day's claim falls within these parameters. He lost his malpractice claim in Missouri state court after an eight-day jury trial, and he alleges injuries resulting from that loss. In particular, he alleges that he suffered damages in the form of the legal fees he paid Defendants and the demise of his company—the very same damages he sought in his malpractice lawsuit. The Missouri state court entered judgment against Mr. Day in 2005, many years before he filed his federal claim. Finally, his federal lawsuit seeks a review and rejection of the state court judgment. His allegations include that Defendants committed perjury and that the Missouri state court erroneously admitted certain testimony and evidence and allowed an

inconsistent jury verdict to stand. Accordingly, he asks the district court to set that judgment aside. *See id.* at 515 (for *Rooker-Feldman* to apply, "a litigant's claim must specifically seek to modify or set aside a state court judgment"). Thus, it appears that the *Rooker-Feldman* doctrine precludes federal court jurisdiction over his claim.

That does not necessarily end our *Rooker-Feldman* inquiry, however. As discussed above, Mr. Day seeks to invoke the district court's power to "entertain an independent action to relieve a party from a judgment, order, or proceeding," Fed. R. Civ. P. 60(d)(1), on the ground that the Missouri state judgment was procured by fraud. Some circuits have held that *Rooker-Feldman* does not apply where a plaintiff asserts "'a collateral attack on a state court judgment which is alleged to have been procured through fraud, deception, accident, or mistake.'" *Sun Valley Foods Co. v. Detroit Marine Terminals, Inc.* (*In re Sun Valley Foods Co.*), 801 F.2d 186, 189 (6th Cir. 1986) (quoting *Resolute Ins. Co. v. North Carolina*, 397 F.2d 586, 589 (4th Cir. 1968)); *see also Pondexter v. Allegheny Cnty. Hous. Auth.*, 329 F. App'x 347, 350 (3d Cir. 2009) (holding *Rooker-Feldman* did not apply because the plaintiff's claim did not allege harm caused by a state court judgment, "but instead challenges the manner in which the state court judgment was procured"); *Kougasian v. TMSL, Inc.*, 359 F.3d 1136, 1141 (9th Cir. 2004) (same). Other circuits, however, have rejected this exception to *Rooker-Feldman*. *E.g., Taylor v. Fed. Nat'l Mortg. Ass'n*, 374 F.3d 529, 533 (7th Cir. 2004) (holding *Rooker-Feldman* barred fraud-on-the-court claim because relief for such a claim required setting aside the state court's judgment,

which "is tantamount to a request to vacate the state court's judgment"); *Fielder v. Credit Acceptance Corp.*, 188 F.3d 1031, 1035-36 (8th Cir. 1999) ("In general, we have been unwilling to create piecemeal exceptions to *Rooker-Feldman*.").

We have not explicitly rejected a fraud exception to *Rooker-Feldman*, but an unpublished decision cast considerable doubt on it. *See West v. Evergreen Highlands Ass'n*, 213 F. App'x 670, 674 n.3 (10th Cir. 2007). As the court explained in *West*, "[t]here is good reason to balk at" adopting such a fraud exception because "[s]tate rules of procedure provide various means to attack a wrongfully obtained judgment." *Id.* "Construing *Rooker-Feldman* to permit federal reconsideration and nullification of state judgments on grounds that could have been pursued in state court arguably allows under the rubric of collateral attack just another mechanism for lower federal court review unauthorized under § 1257."[4] *Id.*

Notably, and consistent with the concern expressed in *West*, Mr. Day has not claimed that he is precluded from challenging the state court's judgment under the Missouri Rules of Civil Procedure, which "leave[] open the possibility for an

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[4] In addition, we note that the decision that first adopted the fraud exception, *In re Sun Valley Foods Co.*, quoted from a decision of the Fourth Circuit that involved an exception to res judicata—not *Rooker-Feldman*. *See In re Sun Valley Foods Co.*, 801 F.2d at 189 (quoting *Resolute Ins. Co.*, 397 F.2d at 589); *see also* Steven N. Baker, *The Fraud Exception to the Rooker-Feldman Doctrine: How It Almost Wasn't (and Probably Shouldn't Be)*, 5 Fed. Cts. L. Rev. 139, 150 (2011) ("The Sixth Circuit's solitary citation for this exception to the general rule is *Resolute Insurance Co.* Nowhere did the Sixth Circuit explain why it borrowed from what the Fourth Circuit explicitly designated a res judicata exception and incorporated that exception into the *Rooker-Feldman* doctrine." (footnote and internal quotation marks omitted)).

independent cause of action in equity wherein the trial court may set aside a final judgment more than one year after it was entered." *Mathers v. Allstate Inc. Co.*, 265 S.W.3d 387, 390 (Mo. Ct. App. 2008).[5] We decline to adopt a fraud exception to the *Rooker-Feldman* doctrine under these circumstances.

III. Conclusion

Mr. Day's fraud-on-the-court claim is barred by the *Rooker-Feldman* doctrine. We therefore dismiss this appeal and remand to the district court with instructions to dismiss Mr. Day's fraud-on-the-court claim without prejudice for lack of subject matter jurisdiction.

Entered for the Court

Timothy M. Tymkovich
Circuit Judge

[5] Even if his claim were not barred by *Rooker-Feldman*, Mr. Day would be required to plead, among other things, "that there is no other available or adequate remedy." *Winfield Assocs., Inc. v. Stonecipher*, 429 F.2d 1087, 1090 (10th Cir. 1970).