APPENDIX A

NOT RECOMMENDED FOR PUBLICATION

No. 22-3321

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jan 23, 2023
DEBORAH S. HUNT, Clerk

SUSAN LLOYD,

Plaintiff-Appellant,

v.

THOMAS POKORNY, Retired Visiting Judge, Portage County; STATE OF OHIO; SUPREME COURT OF OHIO; PORTAGE COUNTY, OH; PORTAGE COUNTY, OH COURTHOUSE; OFFICE OF DISCIPLINARY COUNSEL, For the Supreme Court of the State of Ohio; JASON WHITACRE; SCOTT JOSEPH FLYNN; MAUREEN O'CONNOR, Chief Justice Supreme Court of Ohio; AMY C. STONE, Disciplinary Counsel; CHRISTOPHER J. MEDURI, Portage County Prosecutor Division Chief; JILL FANKHAUSER, Portage County Clerk of Courts; FLYNN, KEITH AND FLYNN, LLC, Law Offices; LINDSAY MOLNAR; MICHAEL SZABO; DAVID PERDUK; PERDUK AND ASSOCIATES; TONI DINARDO, Portage County Court Reporter, in their individual and official capacities; PORTAGE COUNTY, OH CLERK OF COURTS, Portage County Courthouse; TROY REEVES; JOSHUA THORNSBERY,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

ORDER

Before: McKEAGUE, GRIFFIN, and NALBANDIAN, Circuit Judges.

Susan Lloyd, a Pennsylvania citizen proceeding pro se, appeals the district court's dismissal of her civil action and various other orders. This case has been referred to a panel of the

court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

This action relates to a civil case that Lloyd filed in 2016 in Portage County, Ohio, raising over 100 claims stemming from a conflict with her neighbor, Joshua Thornsbery. *See Lloyd v. Thornsbery*, No. 2019-P-0080, 2021 WL 307496, at *1 (Ohio Ct. App. Jan. 29, 2021), *cert. denied*, 142 S. Ct. 608 (2021) ("the *Thornsbery* case"). In that case, Lloyd sued Thornsbery, his friend Michael Szabo, and 24 others who allegedly engaged in wrongdoing. *Id.* at *1, *7. Many claims were dismissed before trial, the trial court granted a directed verdict on others, and a jury found in favor of the defendants on the rest. *See id.* at *1. After trial, the trial court granted the defendants' motion for sanctions against Lloyd, and the state appellate court affirmed in all respects. *See id.*; *see also Lloyd v. Thornsbery*, No. 2019-P-0108, 2021 WL 307451, at *6 (Ohio Ct. App. Jan. 29, 2021), *cert. denied*, 142 S. Ct. 608 (2021).

In September 2019, Lloyd filed this action in the Eastern District of Pennsylvania, asserting over 40 claims against over 20 defendants associated with the *Thornsbery* case. In her complaint, as amended, Lloyd generally asserted that she was denied a fair trial and has been the victim of various forms of harassment and retaliation, citing 42 U.S.C. §§ 1983 and 1985 and a range of other federal and state statutes and rules. She sought a new trial and new judge, money damages, and various other forms of injunctive relief. Defendants include Thornsbery, Szabo, and their attorneys from the *Thornsbery* case; Judge Thomas Pokorny, who presided over the *Thornsbery* case, as well Portage County and the county courthouse, clerk of courts, court reporter, and prosecutor ("the Portage County defendants"); and the State of Ohio, the Ohio Supreme Court, Ohio Supreme Court Chief Justice Maureen O'Connor, and the Office of Disciplinary Counsel and two of its attorneys, who Lloyd asserted violated the law by failing to discipline Judge Pokorny and the attorneys from the *Thornsbery* case ("the State defendants").

The case was transferred to the Southern District of Ohio, and the district court disposed of all claims in a series of orders. It first determined that the claims seeking relief from the state

trial court's decision were barred by the *Rooker-Feldman* doctrine.[1] The district court dismissed most remaining claims against the State and County defendants on immunity grounds, except for the official-capacity claims for injunctive relief based on ongoing violations of federal law and certain individual-capacity claims for money damages. The district court later dismissed those claims based on qualified immunity, for lack of cognizability or standing, or as conclusory, not forward-looking, or overbroad. The district court dismissed the claims against Szabo and his attorneys as vague and conclusory or lacking any statutory basis. Lastly, the district court dismissed the claims against Thornsbery based on Lloyd's failure to respond to his motion for a more definite statement after being directed to do so and dismissed the claims against Thornsbery's attorneys for failure to effect service.

Lloyd raises 17 issues on appeal, asserting that the district court committed procedural errors and that the defendants violated her rights under the First, Fifth, Seventh, and Fourteenth Amendments and other federal laws.

We review de novo the dismissal of a complaint for failure to state a claim. *Bridge v. Ocwen Fed. Bank, FSB*, 681 F.3d 355, 358 (6th Cir. 2012). To avoid dismissal, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

I. Preliminary Matters

Lloyd first argues that the case should not have been transferred from Pennsylvania to Ohio and that the motions that had been filed in the Pennsylvania district court should not have been "reactivated" when the case was transferred. But Lloyd did not raise either of these arguments in the district court, and "the failure to present an issue to the district court forfeits the right to have the argument addressed on appeal." *Sheet Metal Workers' Health & Welfare Fund of N.C. v. Law Off. of Michael A. DeMayo, LLP*, 21 F.4th 350, 357 (6th Cir. 2021) (alteration omitted) (quoting

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

Armstrong v. City of Melvindale, 432 F.3d 695, 700 (6th Cir. 2006)). Our role is to "correct errors raised and addressed below, not to entertain new claims raised for the first time on appeal." *Greco v. Livingston County*, 774 F.3d 1061, 1064 (6th Cir. 2014) (citation omitted). Although we may overlook such a forfeiture in rare circumstances, *see id.*, we see no basis for doing so here.

Next, Lloyd argues that the magistrate judge improperly addressed dispositive motions even though she did not consent to a magistrate judge presiding over the case. But consent is not required for a magistrate judge to rule on certain pretrial matters or to make findings of fact and recommendations to which a party can object, and that is all that occurred here. *See* 28 U.S.C. § 636(b), (c). Finally, although Lloyd argues that the filing fee from her earlier unsuccessful appeal should be refunded because the appeal was interlocutory, she provides no grounds for doing so. She has thus failed to show that the district court erred by denying her request for a refund.

II. Portage County and State Defendants

a. *Rooker-Feldman*

To the extent that Lloyd argues that the defendants violated her First, Fifth, and Seventh Amendment rights by denying her a fair trial in the *Thornsbery* case, her claims are barred by the *Rooker-Feldman* doctrine. *See Hall v. Callahan*, 727 F.3d 450, 453–54 (6th Cir. 2013). Under this doctrine, a federal court cannot exercise "jurisdiction over a claim alleging error in a state court decision." *Id.* (quoting *Luber v. Sprague*, 90 F. App'x 908, 910 (6th Cir. 2004)). Although Lloyd summarily asserts that this doctrine does not apply, both her complaint and her appellate brief challenge specific aspects of the state court proceeding, such as the assessment of sanctions and attorney fees, the jury instructions, and the grant of a directed verdict, and ask for a new trial in front of a different judge. This makes it clear that it would be "impossible to void the state court judgment without disturbing it" and that Lloyd is "directly attacking the state court judgment." *Id.* at 454 (quotation marks omitted). To the extent that Lloyd seeks to undo the specific outcome of the *Thornsbery* case, her claims are barred by *Rooker-Feldman* and were properly dismissed by the district court.

b. Eleventh Amendment Immunity

Next, Lloyd argues that the district court incorrectly dismissed claims against state actors and entities on immunity grounds. She argues that "[o]nly states are protected by the 11th Amendment" and that "[s]tates can and have been sued." However, the Eleventh Amendment "bars all suits, whether for injunctive, declaratory or monetary relief, against the state and its departments," except for certain official-capacity suits against state officials "for prospective injunctive or declaratory relief." *Thiokol Corp. v. Dep't of Treasury*, 987 F.2d 376, 381 (6th Cir. 1993); *see also Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100–02 (1984). And a state municipal court is an arm of the state for purposes of Eleventh Amendment immunity. *See Foster v. Walsh*, 864 F.2d 416, 418–19 (6th Cir. 1988) (per curiam).

Lloyd's argument is conclusory, and she does not point to any error by the district court or any applicable exceptions to the Eleventh Amendment. Therefore, we affirm the district court's dismissal of her claims against the State of Ohio, the county courthouse, the Supreme Court of Ohio, and the Office of Disciplinary Counsel on Eleventh Amendment grounds. Further, her claims against the individual State and County defendants acting in their official capacities for monetary relief and injunctive relief based on violations of state law were properly dismissed on Eleventh Amendment grounds as well. *See Pennhurst*, 465 U.S. at 106.

c. Judicial and quasi-judicial immunity

Next, Lloyd claims that no defendant is entitled to judicial immunity. However, judges are completely immune from suit except when their actions are "nonjudicial" or are "taken in the complete absence of all jurisdiction." *Mireles v. Waco*, 502 U.S. 9, 11–12 (1991) (per curiam). "A similar immunity attaches to the activities of other public officials who perform quasi-judicial duties." *Johnson v. Granholm*, 662 F.2d 449, 450 (6th Cir. 1981) (citation omitted).

Lloyd claims that Judge Pokorny is not entitled to judicial immunity because he did not take an oath of office and thus acted without jurisdiction over the *Thornsbery* case. But even if Pokorny were acting only as a de facto judge, he would still be entitled to judicial immunity. *See White by Swafford v. Gerbitz*, 892 F.2d 457, 462 (6th Cir. 1989) (determining that "procedural errors" in a judge's appointment "do not . . . deprive him of absolute judicial immunity"). Lloyd

otherwise offers nothing more than conclusory legal statements that the relevant actors were not entitled to judicial immunity. Such statements, devoid of any factual support, are insufficient to state a claim even at the motion-to-dismiss stage. *See Lutz v. Chesapeake Appalachia, L.L.C.*, 717 F.3d 459, 464 (6th Cir. 2013); *Meeks v. Larsen*, 611 F. App'x 277, 283 (6th Cir. 2015) (explaining that "vague and conclusory assertions" are not sufficient to avoid dismissal and that legal conclusions, unlike factual allegations, need not be accepted as true (citing *Iqbal*, 556 U.S. at 678)).

Thus, all individual-capacity claims for damages against Judge Pokorny, the court reporter, Justice O'Connor, and disciplinary counsel were properly dismissed.

d. Remaining claims against State and County defendants

The district court dismissed the remaining claims against the individual State and County defendants for lack of standing, statutory immunity, qualified immunity, failure to state a claim, or failure to seek prospective relief. Although we liberally construe the briefs of pro se litigants, *see Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam), an appellant forfeits "any possible challenge to the dismissal" of certain claims by failing to advance "any sort of argument for the reversal of the district court's rulings on [those] matters," *Geboy v. Brigano*, 489 F.3d 752, 767 (6th Cir. 2007). As Lloyd does not specifically address these reasons for dismissal, she forfeited any challenge to the dismissal of the remaining claims on these grounds. *Id.*

In any event, we find no error in the district court's reasoning. As the district court correctly noted, Lloyd lacks standing to bring claims against the county prosecutor for failure to prosecute and for alleged violations of a non-party's constitutional rights. *See Futernick v. Sumpter Twp.*, 78 F.3d 1051, 1060 (6th Cir. 1996) (holding that the choice of who to prosecute only raises a constitutional issue when there is evidence of intent to harm a protected class), *abrogated on other grounds by Vill. of Willowbrook v. Olech*, 528 U.S 562 (2000); *see also Barber v. Overton*, 496 F.3d 449, 458 (6th Cir. 2007) (noting that a party lacks standing to sue for a violation of another person's constitutional rights "no matter how interrelated the harms suffered").

Next, Lloyd failed to state a claim against Portage County. To the extent she seeks to raise § 1983 claims against the county, she has failed to allege that the county engaged in a policy or

custom that violated her constitutional rights. *See Monell v. Dep't of Soc. Servs. of N.Y.*, 436 U.S. 658, 694 (1978) ("[I]t is when execution of a government's policy or custom . . . inflicts the injury that the government as an entity is responsible under § 1983.").

Next, the district court determined that, even if Lloyd could properly state a constitutional violation against any individual County defendants, she failed to provide any clearly established law that would prevent the application of qualified immunity. *See Plumhoff v. Rickard*, 572 U.S. 765, 779–81 (2014). Lloyd has not corrected this deficiency on appeal, nor has she addressed the district court's conclusion that these defendants are statutorily immune from any remaining claims of statutory violations. *See* Ohio Rev. Code § 2744.03 (establishing that political subdivisions and employees of political subdivisions are immune from actions to recover damages for injuries allegedly caused by any act or omission in connection with a government or propriety function).

Lastly, as to the claims against the individual County and State defendants for prospective relief from ongoing violations of federal law, the district court did not err in determining that Lloyd either did not properly seek prospective relief or failed to state a claim for which relief could be granted. In particular, Lloyd's allegations of conspiracy, discrimination, malicious prosecution, and First Amendment violations are too conclusory to state a claim. *See Lutz*, 717 F.3d at 464; *Meeks*, 611 F. App'x at 283.

III. Private actor defendants

a. Thornsbery's state-court attorneys

First, Thornsbery's state-court attorneys were properly dismissed for failure to serve. Lloyd argues that, because the attorneys waived service of process and did not object to receiving service by email, they should not have been dismissed under Federal Rule of Civil Procedure 4(m). But the waivers that Lloyd points to on appeal only waived service of the original complaint, not the amended complaint. And those written waivers did not explicitly consent to service by email, so any attempt to serve those defendants with the amended complaint by email was not effective. *See* Fed. R. Civ. P. 5(b)(2)(E) (requiring written consent to electronic service).

b. Thornsbery

Next, Thornsbery was properly dismissed based on Lloyd's failure to respond to the district court's show-cause order, which directed her to file a second amended complaint in response to Thornsbery's motion for a more definite statement. *See* Fed. R. Civ. P. 41(b) (permitting dismissal based on a plaintiff's failure to "to comply with . . . a court order").

c. Szabo and his attorneys

Finally, the district court correctly dismissed the claims against Szabo and his state-case attorneys for failure to state a claim. Lloyd's constitutional claims against these defendants were properly dismissed because they did not act "under color of state law[.]" *Day v. Wayne Cnty. Bd. of Auditors*, 749 F.2d 1199, 1202 (6th Cir. 1984) (citation omitted). As to her conspiracy, discrimination, malicious prosecution, racketeering, aiding and abetting, Fair Debt Collection Practices Act, and bribery claims, Lloyd merely provided conclusory statements and failed to allege facts that could support a claim against these defendants. *See Lutz*, 717 F.3d at 464; *Meeks*, 611 F. App'x at 283.

To the extent that Lloyd argues that Szabo and his attorneys responded late and thus she was entitled to a default judgment, the district court correctly applied Federal Rule of Civil Procedure 15. Generally, "any required response to an amended pleading must be made . . . within 14 days after service of the amended pleading," Fed. R. Civ. P. 15(a)(3), and these defendants claimed that they did not receive the email service and did not know about the amended complaint until they received copies from other defendants in the mail. The defendants' response was not late as they were never served; alternatively, their response was only eight days past the timeframe from the alleged service, which the district court found reasonable in the circumstances.

Lastly, Lloyd claims that Szabo's attorneys from the *Thornsbery* case are not allowed to represent him in the instant case because they are also representing themselves pro se. But this argument fails because Szabo is proceeding pro se before this court and did so before the district court as well. There is nothing in the Federal Rules of Appellate Procedure that prohibits pro se appellees from filing joint briefs on their own behalf. Thus, her request to strike Szabo's and the attorneys' brief on these grounds is **DENIED**. And for the reasons stated above, the district court's orders dismissing Lloyd's claims are **AFFIRMED.**

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX B

Case No. 22-3321

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

SUSAN LLOYD

Plaintiff - Appellant

v.

THOMAS POKORNY, Retired Visiting Judge, Portage County; STATE OF OHIO; SUPREME COURT OF OHIO; PORTAGE COUNTY, OH; PORTAGE COUNTY, OH COURTHOUSE; OFFICE OF DISCIPLINARY COUNSEL, For the Supreme Court of the State of Ohio; JASON WHITACRE; SCOTT JOSEPH FLYNN; MAUREEN O'CONNOR, Chief Justice Supreme Court of Ohio; AMY C. STONE, Disciplinary Counsel; CHRISTOPHER J. MEDURI, Portage County Prosecutor Division Chief; JILL FANKHAUSER, Portage County Clerk of Courts; FLYNN, KEITH AND FLYNN, LLC, Law Offices; LINDSAY MOLNAR; MICHAEL SZABO; DAVID PERDUK; PERDUK AND ASSOCIATES; TONI DINARDO, Portage County Court Reporter, in their individual and official capacities; PORTAGE COUNTY, OH CLERK OF COURTS, Portage County Courthouse; TROY REEVES; JOSHUA THORNSBERY

Defendants - Appellees

BEFORE: MCKEAGUE, GRIFFIN and NALBANDIAN, Circuit Judges.

Upon consideration of the petition for reconsideration/rehearing filed by the Appellant,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

ENTERED BY ORDER OF THE COURT
Deborah S. Hunt, Clerk

Issued: February 28, 2023

APPENDIX I

Case: 22-3321 Document: 13 Filed: 05/12/2022 Page: 121

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

SUSAN LLOYD,

Plaintiff,

v.

Civil Action 2:20-cv-2928
Judge Edmund A. Sargus, Jr.
Magistrate Judge Chelsey M. Vascura

THOMAS POKORNY, *et al.*,

Defendants.

REPORT AND RECOMMENDATION

On January 11, 2021, the Court granted Plaintiff a final extension of time to properly serve Defendants Jason Whitacre, Scott Flynn, Flynn, Keith, and Flynn, LLC, and Troy Reeves, and ordered that Plaintiff file proof of such service on the docket by February 11, 2021. (Order, ECF No. 94.) In the Order, the Court also cautioned Plaintiff that failure to properly effect service on these four Defendants would result in the dismissal of Defendants Jason Whitacre, Scott Flynn, Flynn, Keith, and Flynn, LLC, and Troy Reeves from this action with prejudice pursuant to Federal Rule of Civil Procedure 41(b). (*Id.* at 2.) To date, Plaintiff has not filed the required proof of service on the docket.

Under the circumstances, the undersigned finds dismissal of Plaintiff's action appropriate pursuant to Rules 4(m) and 41(b). The Court's inherent authority to dismiss a plaintiff's action with prejudice because of her failure to prosecute is expressly recognized in Rule 41(b), which provides in pertinent part: "If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) . . . operates as an

Case: 22-3321 Document: 13 Filed: 05/12/2022 Page: 122

adjudication on the merits." Fed. R. Civ. P. 41(b); *Link v. Wabash R.R. Co.*, 370 U.S. 626, 629–31 (1962). "This measure is available to the district court as a tool to effect 'management of its docket and avoidance of unnecessary burdens on the tax-supported courts [and] opposing parties.'" *Knoll v. AT & T*, 176 F.3d 359, 363 (6th Cir. 1999) (internal citations omitted).

The Sixth Circuit directs the district courts to consider the following four factors in deciding whether to dismiss an action for failure to prosecute under Rule 41(b):

> (1) whether the party's failure is due to willfulness, bad faith, or fault; (2) whether the adversary was prejudiced by the dismissed party's conduct; (3) whether the dismissed party was warned that failure to cooperate could lead to dismissal; and (4) whether less drastic sanctions were imposed or considered before dismissal was ordered.

Schafer v. City of Defiance Police Dep't, 529 F.3d 731, 737 (6th Cir. 2008) (citing *Knoll*, 176 F.3d at 363). "'Although typically none of the factors is outcome dispositive, . . . a case is properly dismissed by the district court where there is a clear record of delay or contumacious conduct.'" *Schafer*, 529 F.3d at 737 (quoting *Knoll*, 176 F.3d at 363).

Here, Plaintiff (1) failed to effect service of process on the Defendant during the time permitted by Federal Rule of Civil Procedure 4(m); and (2) failed to comply with the Court's show cause order. Plaintiff's failure to timely comply with the clear orders of the Court, which established reasonable deadlines for compliance, constitutes bad faith or contumacious conduct. *See Steward v. Cty. of Jackson, Tenn.*, 8 F. App'x 294, 296 (6th Cir. 2001) (concluding that a plaintiff's failure to comply with a court's order "constitute[d] bad faith or contumacious conduct and justifie[d] dismissal"). Because Plaintiff has missed these deadlines and disregarded the Court's order, the undersigned concludes that no alternative sanction would protect the integrity of the pretrial process.

It is therefore **RECOMMENDED** that this action be **DISMISSED WITHOUT PREJUDICE** pursuant to Rule 4(m) for failure to timely effect service of process and pursuant

to Rule 41(b) for failure to prosecute. It is further **RECOMMENDED** that Plaintiff be ordered to list 2:20-cv-2928 as a related case if she re-files this action.

PROCEDURE ON OBJECTIONS

If any party objects to this Report and Recommendation, that party may, within fourteen (14) days of the date of this Report, file and serve on all parties written objections to those specific proposed findings or recommendations to which objection is made, together with supporting authority for the objection(s). A Judge of this Court shall make a *de novo* determination of those portions of the Report or specified proposed findings or recommendations to which objection is made. Upon proper objections, a Judge of this Court may accept, reject, or modify, in whole or in part, the findings or recommendations made herein, may receive further evidence or may recommit this matter to the Magistrate Judge with instructions. 28 U.S.C. § 636(b)(1).

The parties are specifically advised that failure to object to the Report and Recommendation will result in a waiver of the right to have the District Judge review the Report and Recommendation *de novo*, and also operates as a waiver of the right to appeal the decision of the District Court adopting the Report and Recommendation. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

/s/ Chelsey M. Vascura
CHELSEY M. VASCURA
UNITED STATES MAGISTRATE JUDGE

Case: 22-3321 Document: 13 Filed: 05/12/2022 Page: 123

APPENDIX J

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

SUSAN LLOYD,

Plaintiff,

v.

THOMAS POKORNY, *et al.*,

Defendants.

Case No. 2:20-cv-2928

JUDGE EDMUND A. SARGUS, JR.
Magistrate Judge Chelsea M. Vascura

OPINION AND ORDER DENYING DEFENDANT JOSHUA THORNSBERY'S MOTION TO DISMISS (ECF NO. 66) & GRANTING INDIVIDUAL PORTGAGE COUNTY DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS (ECF NO. 69)

Plaintiff Susan Lloyd filed a complaint alleging far-ranging state and federal law violations against the State of Ohio, Portage County, and private individuals and entities involved in her state civil suit against Defendant Joshua Thornsbery. Defendant Thornsbery, well as Defendants Judge Thomas Pokorny, Portage County Assistant Prosecutor Chris Meduri, Portage County Clerk of Courts Jill Fankhauser, and Portage County Court Reporter Toni DeNardo, filed motions under Federal Rule of Civil Procedure 12 seeking the dismissal Lloyd's claims. For the reasons that follow, Thornsbery's motion is denied and the individual Portage County Defendants' motion is granted.

I. Background

Lloyd brings this case based on the events surrounding her civil lawsuit in state court in Portage County, Ohio for harassment against Defendant Joshua Thornsbery and other individuals. The case went to trial, and the defendants there ultimately prevailed. On January 29, 2021, the

Case: 22-3321 Document: 13 Filed: 05/12/2022 Page: 124

Case: 22-3321 Document: 13 Filed: 05/12/2022 Page: 125

Ohio court of appeals affirmed the trial court.[1] Lloyd has since filed an appeal to the Ohio Supreme Court.[2] For further background, interested readers should refer to this Court's previous opinion and order granting in part and denying in part the motion to dismiss filed by Defendants Portage County Ohio, Portage County Courthouse, Pokorny, Meduri, Fankhauser, and DiNardo (collectively "Portage County Defendants"). (ECF No. 64.)

This opinion led to the dismissal of the majority of Lloyd's claims against the Portage County Defendants. Defendants Portage County and Portage County Courthouse were dismissed from the case. (*Id.* at PageID #944, 949.) The Court determined that it lacked subject matter jurisdiction under the *Rooker-Feldman* doctrine to adjudicate Lloyd's claims challenging state-court determinations and pursuant to the Eleventh Amendment to adjudicate her claims against the individual Portage County Defendants in their official capacities for damages. (*Id.* at PageID #942–46.) The rest of Lloyd's claims against the individual Portage County Defendants in their individual capacities for damages were also dismissed for a variety of reasons, such as judicial and quasi-judicial immunity, standing, and qualified immunity. (*Id.* at PageID #949–56.) The only remaining claims for the Portage County Defendants are those against the individual Portage County Defendants (Judge Pokorny, Meduri, Fankhauser, and DiNardo) in their official capacities seeking nonmonetary relief from ongoing violations of federal law. (*Id.* at PageID #957.) The Portage County Defendants' motion to dismiss those claims was denied without prejudice because neither side had specifically addressed them. (*Id.*)

Now, the Court considers two motions brought under Federal Rule of Civil Procedure 12. Defendant Thornsbery filed a motion to dismiss the claims against him for lack of personal

[1] https://services.portageco.com/eservices/home.page.7 (click "Click Here to Search Public Records"; search by case number for "2016CV00230"; scroll and select the matter with "Party/Company" as "LLOYD, SUSAN"; choose the "Docket" tab; then scroll to the bottom of the page to click on page "2").

[2] *Id.*

Case: 22-3321 Document: 13 Filed: 05/12/2022 Page: 126

jurisdiction under Rule 12(b)(2). (ECF No. 66.) The remaining individual Portage County Defendants filed a motion for judgment on the pleadings under Rule 12(c), arguing that the claims seeking nonmonetary claims them should be dismissed. (ECF No. 69.)

II. Analysis

A. Defendant Thornsbery's Rule 12(b)(2) Motion

Federal Rule of Civil Procedure 12(b)(2) permits a defendant to raise via motion a lack of personal jurisdiction as a defense to the claims against him. Fed. R. Civ. Pro. 12(b)(2). When a defendant files a motion to dismiss under Rule 12(b)(2), a plaintiff must "make a prima facie case" of personal jurisdiction, which can be accomplished by pointing to allegations in the complaint. *Malone v. Stanley Black & Decker, Inc.*, 965 F.3d 499, 504 (6th Cir. 2020). "The burden then shifts to the defendant, whose motion to dismiss must be properly supported with evidence," and ultimately shifts again to the plaintiff to provide evidence that the federal court has jurisdiction. *Id.* Even assuming the burden ever shifted to Lloyd despite Thornsbery's sparse motion, Lloyd has made a prima facie case that Thornsbery does not respond to, meaning he has not met his burden.

Thornsbery's motion is deficient. The Rule 12(b)(2) motion states in its entirety: "Pro-se defendant Joshua Thornsbery moves to this honorable Court to dismiss the Amended Complaint of Plaintiff Susan Lloyd for lack of personal jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2)." (ECF No. 66 at PageID #973.) Local Rule 7.2(a)(1) requires that litigants provide a memorandum with legal authorities and argumentation to support their motions. S.D. Ohio Civ. R. 7.2(a)(1). Moreover, "'[i]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed [forfeited]' and 'it is not sufficient for a party to mention a possible argument in the most skeletal way, leaving the court to flesh on its bones.'" *United States*

Case: 22-3321 Document: 13 Filed: 05/12/2022 Page: 127

v. Brown, 819 F.3d 800, 829 (6th Cir. 2016) (quoting *United States v. Robinson*, 390 F.3d 853, 886 (6th Cir. 2004)).

But if Thornsbery's motion were sufficient to trigger the Rule 12(b)(2) burden shifting, Lloyd satisfies her burden. She alleges in her amended complaint that at the time of the events underlying this case, Thornsbery resided in Ohio,[3] the seat of the relationship between Thornsbery and Lloyd occurred in Ohio, and the underlying state-court action took place in Ohio. This is sufficient to establish a prima facie case of personal jurisdiction because Thornsbery caused a consequence in Ohio via his interactions with Lloyd, satisfying purposeful available of the forum state, and he has a "substantial enough connection to the forum state to make the exercise of jurisdiction over the defendant reasonable." *Gerber v. Riordan*, 649 F.3d 514, 518 (6th Cir. 2011) (quoting *Calphalon Corp. v. Rowlette*, 228 F.3d 718, 721 (6th Cir. 2000)). And because Thornsbery offers no evidentiary support, he fails to satisfy his burden. Accordingly, his motion is denied.[4]

B. Remaining Individual Portage County Defendants' Rule 12(c) Motion

The same standard for a motion to dismiss a complaint under Federal Rule of Civil Procedure 12(b)(6) applies to a motion for judgment on the pleadings under Rule 12(c). *Bates v. Green Farms Condo. Ass'n*, 958 F.3d 470, 480 (6th Cir. 2020). A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Rule 8 "does not require 'detailed factual allegations,'" but pleadings cannot consist only of "labels and conclusions," "formulaic recitation[s] of the elements of a cause of action," or

[3] Lloyd alleges that Thornsbery lived in Ohio (ECF No. 23 at ¶ 23), but Thornsbery now appears to live in Kentucky (ECF No. 66-1).

[4] Lloyd also argues that Thornsbery failed to file a certificate of service, serve his motion, or sign it in contravention of the Local Rules and Federal Rules of Civil Procedure. (ECF No. 80 at PageID #1281–82.) Though she is correct, these issues are mooted by the denial of Thornsbery's motion.

Case: 22-3321 Document: 13 Filed: 05/12/2022 Page: 128

"'naked assertion[s] devoid of "further factual enhancement."'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 557 (2007)). The "plaintiff must 'allege[ ] facts that "state a claim to relief that is plausible on its face" and that, if accepted as true, are sufficient to "raise a right to relief above the speculative level."'" *Mills v. Barnard*, 869 F.3d 473, 479 (6th Cir. 2017) (citation omitted). A claim is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. Courts must "construe the complaint in the light most favorable to the plaintiff and accept all [well-pleaded factual] allegations as true." *Donovan v. FirstCredit, Inc.*, 983 F.3d 246, 252 (6th Cir. 2020) (quoting *Keys v. Humana, Inc.*, 684 F.3d 605, 608 (6th Cir. 2012)).

The remaining individual Portage County Defendants argue that the outstanding claims against them in their official capacities seeking nonmonetary relief of ongoing violations of federal law must be dismissed. (ECF No. 69-1.) Defendants offer a variety of arguments based on the type of federal law Lloyd alleges they have violated. But the most appropriate analysis is also the simplest, which is to focus on the type of relief sought. This is so because the survival of these claims depends on the pursuit of prospective, nonmonetary relief under the *Ex Parte Young* doctrine, 209 U.S. 123 (1908). *In re Flint Water Cases*, 960 F.3d 303, 333–34 (6th Cir. 2020). The possible prospective injunctive relief Lloyd asks for is limited to the following: a public apology to Lloyd, for DiNardo to lose her court reporter license and the disbarment of Judge Pokorny, "her freedom of speech restored on any Portage County or State of Ohio official website or social media page," and an injunction prohibiting Defendants from "violating any other individual civil rights." (ECF No. 23 at ¶¶ 698, 701, 702, 705, 706.) For this reason, it unnecessary to address substantively many of Defendants' arguments, such as that claims premised on the

Case: 22-3321 Document: 13 Filed: 05/12/2022 Page: 129

Federal Rules of Civil Procedure are incognizable, because no permissible type of relief under *Ex Parte Young* is attached to those claims. (*See* ECF No. 69-1 at PageID #1102.) Each type of relief sought and the attendant claims are addressed below.

First, an apology for past wrongs committed by the Defendants. Although this is nonmonetary relief, it is not prospective, or forward-looking, relief. *Kesterson v. Kent State Univ.*, 345 F. Supp. 3d 855, 886 (N.D. Ohio 2018), *reversed in part on other grounds*, 967 F.3d 519 (6th Cir. 2020). Nor is an apology cognizable relief. *Id.* (collecting cases holding that courts do not have the authority to order apologies).

Second, the loss of a professional license for DiNardo and Judge Pokorny based on their prior conduct. Again, this is not forward-looking relief; Lloyd is seeking vindication for past wrongs. Moreover, 42 U.S.C. § 1983 is not "a viable legal vehicle to seek an order by a state agency to revoke a" professional license. *Whitaker v. Hiland*, No. 5:09CV–P128–R, 2009 WL 3398719, at *2 (W.D. Ky. Oct. 21, 2009).

Next, restoration of her freedom of speech on municipal websites and social media. Defendants fail to address this type of relief in their motion. The Court construes this is as a request that Judge Pokorny stop "blocking her from talking about the case on social media or even referencing the case to anybody else without Pokorny['s] permission." (ECF No. 23 at ¶¶ 45, 701.) This is forward-looking injunctive relief. However, Lloyd's pleadings are conclusory and do not provide any facts that permit this Court to determine if she plausibly pleads a violation of the First Amendment. It is particularly unclear what Lloyd means by "blocking." Though one inference could be that Lloyd is referring to a gag order, that is a difficult inference to draw because she also includes Defendants "Whiteacre, Flynn Keith Flynn, and Flynn" in this claim. (ECF No. 23 at ¶ 45.) These former defendants are private attorneys and the law firm that employs them, and

Case: 22-3321 Document: 13 Filed: 05/12/2022 Page: 130

counsel cannot issue gag orders. This indicates that "blocking," an activity Judge Pokorny and the private defendants engage in, does not refer to issuing a gag order.

Even if Judge Pokorny had issued a gag order, however, Lloyd still fails to state a claim. The Sixth Circuit has suggested that a gag order extending beyond trial and into an appeal "would trammel First Amendment values, and thus fail to pass Constitutional muster." *In re Memphis Pub. Co.*, 887 F.2d 646, 649 (6th Cir. 1989). Nevertheless, this Court lacks jurisdiction to hear such a claim because it is barred by the *Rooker-Feldman* doctrine in this procedural posture. *Marshall v. Bowles*, 92 F. App'x 283, 284 (6th Cir. 2004) ("A fair reading of the complaint reveals that Marshall's federal case is an impermissible appeal of state court judgments as it raises specific grievances regarding decisions of a Kentucky domestic relations court. Thus, the district court lacked jurisdiction over any challenge Marshall is making to the legal proceedings held in Judge Bowles's court."). Lloyd again challenges a state-court decision, which this Court lacks the jurisdiction to consider.

Finally, a broad injunction prohibiting violations of civil rights. Defendants urge this Court to conclude that an "obey-the-law" injunction is per se impermissible. (ECF No. 69-1 at PageID #1100.) Overbroad requests for injunctive relief are generally inappropriate. *Perez v. Ohio Bell Tele. Co.*, 655 F. App'x 404, 412 (6th Cir. 2016) (discussing *EEOC v. Wooster Brush Co. Emps. Relief Ass'n*, 727 F.2d 566 (6th Cir. 1984)). But typically, this is an issue that is not raised at the pleadings stage—though in this case, the nature of the injunctive relief sought implicates this Court's subject matter jurisdiction, considering the *Ex Parte Young* doctrine. When a federal court could craft a narrow injunction based on federal-law violations alleged, at least one court has done so despite a request for an obey-the-law injunction. *See Bazzy Invs. v. City of Dearborn*, No. 16-10879, 2018 WL 10962765, at *8 (E.D. Mich. Aug. 2, 2018) (discussing *Perez*). Therefore, the

Case: 22-3321 Document: 13 Filed: 05/12/2022 Page: 131

Court proceeds to the merits of the ongoing constitutional violations that Lloyd alleges in her amended complaint.

In only three instances does Lloyd's complaint possibly allege ongoing violations of her constitutional rights. First, she alleges that all defendants "continue to violate . . . multiple Federal . . . laws." (ECF No. 23 at ¶ 27.) This allegation is too cursory to state a claim. Second, she alleges that Judge Pokorny continues to violate her First Amendment rights by "blocking" her communications about her trial. (*Id.* at ¶ 45.) But as discussed above, she fails to provide any additional factual allegations that would allow the Court to determine what actions Judge Pokorny is specifically taking, such as a gag order or a warning. This is a mere assertion. And finally, Lloyd alleges that Pokorny violates her right of access to the courts by sealing documents in her case. (*Id.* at ¶ 266.) But again, this is a cursory statement with no additional factual allegations, such as why the state court purported to seal the documents. Accordingly, Lloyd fails to state a claim based on her request for prospective injunctive relief.

Lloyd offers one responsive counterpoint in her response brief. She contends that the remaining individual Portage County Defendants already had their chance via their Rule 12(b)(6) motion to raise these issues, but they did not. (ECF No. 83 at PageID #1303.) Lloyd ignores, however, that the Court denied the motion to dismiss *without prejudice* as to the claims examined here. And a Rule 12(c) motion raising a failure to state a claim is permissible. Fed. R. Civ. P. 12(h)(2)(B); *see* 1 Steven S. Gensler & Lumen N. Mulligan, Federal Rules of Civil Procedure, Rules and Commentary Rule 12 (Westlaw February 2021 Update) (explaining that some courts permit successful Rule 12(b)(6) motions, despite Rule 12(g), because a defendant can simply file a Rule 12(c) motion). There is no procedural bar to Defendants' Rule 12(c) motion.

III. Conclusion

For these reasons, Thornsbery's motion to dismiss under Rule 12(b)(2) (ECF No. 66) is **DISMISSED** and the individual Portage County Defendants' motion for judgment on the pleadings under Rule 12(c) (ECF No. 69) is **GRANTED.**

IT IS SO ORDERED.

3/11/2021
DATE

s/Edmund A. Sargus, Jr.
EDMUND A. SARGUS, JR.
UNITED STATES DISTRICT JUDGE

Case: 22-3321 Document: 13 Filed: 05/12/2022 Page: 132

Case: 22-3321 Document: 13 Filed: 05/12/2022 Page: 133

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

SUSAN LLOYD,

Plaintiff,

v.

Case No. 2:20-cv-2928
Judge Edmund A. Sargus, Jr.
Magistrate Judge Chelsey M. Vascura

THOMAS POKORNY, *et al.*,

Defendants.

OPINION AND ORDER

This matter is before the Court for consideration of a Report and Recommendation issued by the Magistrate Judge on February 24, 2021. (ECF No. 103.) The Magistrate Judge reports that Plaintiff failed to properly effect service on Defendants Jason Whitacre, Scott Flynn, Troy Reeves, and Flynn, Keith, and Flynn, LLC. The Magistrate Judge further reports that the failure to properly effect service comes despite the Court previously ordering Plaintiff to file proof of service and cautioning that failure to properly effect service would result in a dismissal of the action against these four Defendants.

The Magistrate Judge recommends dismissal of this action against these four Defendants pursuant to Rules 4(m) and 41(b) of the Federal Rules of Civil Procedure. Plaintiff timely objected to the Report and Recommendation, stating that "[t]he Defendants all waived service[.]" (ECF No. 104.) The Court has reviewed *de novo* Plaintiff's objection and **OVERRULES** the objection. Plaintiff's assertion is unsupported by any proof of these alleged waivers.

Accordingly, the Court **ADOPTS** the Report and Recommendation, (ECF No. 103), and **DISMISSES without prejudice** Plaintiff's Complaint against Defendants Jason Whitacre, Scott

Flynn, Troy Reeves, and Flynn, Keith, and Flynn, LLC. Further, upon the recommendation of the Magistrate Judge it is **ORDERED** that Plaintiff shall list 2:20-cv-2928 as a related case if she re-files this action. As other parties remain in this case, the case is to remain open.

IT IS SO ORDERED.

5/26/2021
DATE

s/Edmund A. Sargus, Jr.
EDMUND A. SARGUS, JR.
UNITED STATES DISTRICT JUDGE

Case: 22-3321 Document: 13 Filed: 05/12/2022 Page: 134

APPENDIX P

Case: 22-3321 Document: 13 Filed: 05/12/2022 Page: 149

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

SUSAN LLOYD,

Plaintiff,

v.

Case No. 2:20-cv-2928
JUDGE EDMUND A. SARGUS, JR.
Magistrate Judge Chelsey M. Vascura

THOMAS POKORNY, *et al.*,

Defendants.

ORDER

This matter arises on Defendant Thornsbery's Motion to Dismiss for Failure to Prosecute (the "Motion to Dismiss"). (ECF No. 124.) On February 17, 2022, this Court reserved judgment on Defendant's Motion to Dismiss and ordered Plaintiff to show cause as to why her complaint should not be dismissed for failure to comply with the Magistrate Judge's December 17 Order (the "Show Cause Order"). (ECF No. 127.) Plaintiff was given fourteen days to comply with the December 17 Order—specifically, by filing an amended complaint that honed her allegations against Defendant Thornsbery. (*Id.*) To date, no second amended complaint has been filed. Instead, Plaintiff has responded to the Show Cause Order by arguing that Defendant Thornsbery's Motion to Dismiss should be denied because it was improperly filed under the Federal Rules of Civil Procedure and because "his certificate of service . . . did not state on what date and how [Plaintiff] Lloyd was served" and was not formally signed. (ECF No. 128.)

The Court addressed Plaintiff's arguments in the Show Cause Order. (ECF No. 127.) There, it specifically noted that Defendant Thornsbery's motion was properly filed pursuant to Federal Rule of Civil Procedure 41(b), and that the sufficiency of his certificate of service was "of

Case: 22-3321 Document: 13 Filed: 05/12/2022 Page: 150

little practical importance, given that (1) Plaintiff is clearly aware of [Defendant's Motion to Dismiss] and (2) the basis for his motion—Plaintiff's failure to comply with the December 17 Order—is something that the Court may act on *sua sponte*." (ECF No. 127) (citing *Carpenter v. City of Flint*, 723 F.3d 700, 704 (6th Cir. 2013)).

The Court's position on the matter has not changed. In other words, whether on Defendant's motion or this Court's own volition, Plaintiff's claims against Defendant Thornsbery may be dismissed pursuant to Rule 41(b) for failure to comply with the December 17 Order.

The United States Court of Appeals for the Sixth Circuit has instructed district courts to consider the following four factors in deciding whether to dismiss an action for failure to prosecute under Rule 41(b):

> (1) whether the party's failure is due to willfulness, bad faith, or fault; (2) whether the adversary was prejudiced by the dismissed party's conduct; (3) whether the dismissed party was warned that failure to cooperate could lead to dismissal; and (4) whether less drastic sanctions were imposed or considered before dismissal was ordered.

Schafer v. City of Defiance Police Dep't, 529 F.3d 731, 737 (6th Cir. 2008) (citing *Knoll*, 176 F.3d at 363). "'Although typically none of the factors is outcome dispositive, . . . a case is properly dismissed by the district court where there is a clear record of delay or contumacious conduct.'" *Id.*

As this Court stated in the Show Cause Order:

> Plaintiff, who is proceeding *pro se*, has been repeatedly apprised of the potential consequences of failing to heed this Court's orders in prosecuting her claims. (*See* ECF No. 91) (ordering Plaintiff to "show cause" why her claims against other defendants should not be dismissed for failure to prosecute); (ECF No. 112) (adopting the Magistrate Judge's report and recommendation dismissing Plaintiff's claims against various defendants for failure to prosecute). Nevertheless, the December 17 Order itself did not specifically warn Plaintiff that noncompliance therewith would result in dismissal. And it appears that Plaintiff (erroneously) believed that her objection to the December 17 Order would stay her obligation to comply with it.

(ECF No. 127.)

At this point, Plaintiff has been given close to three months to comply with the December 17 Order. The Court attempted to confront this noncompliance with "less drastic action" (*i.e.*, action falling short of dismissal) with the Show Cause Order, which explicitly warned Plaintiff that her failure to comply therewith could result in dismissal of her complaint. Plaintiff has failed to heed this warning.

Accordingly, for the foregoing reasons, the Court **DISMISSES** Plaintiff Lloyd's remaining claims against Defendant Thornsbery pursuant to Rule 41(b), (ECF No. 23), and **DENIES AS MOOT** Defendant Thornsbery's Motion to Dismiss (ECF No. 124).

Because Defendant Thornsbery is the last defendant remaining in this action, this case is to be closed on the docket of this Court.

IT IS SO ORDERED.

3/21/2022
DATE

s/Edmund A. Sargus, Jr.
EDMUND A. SARGUS, JR.
UNITED STATES DISTRICT JUDGE

Case: 22-3321 Document: 13 Filed: 05/12/2022 Page: 151

Additional material from this filing is available in the Clerk's Office.