IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

HARRIET NICHOLSON,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**C.A. NO. 3:21-cv-1779-G-BK**
	§	
BANK OF AMERICA and COUNTRYWIDE HOME LOANS, INC.	§	
	§	
	§	
Defendants.	§	

DEFENDANTS' BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

Defendants Bank of America N.A. ("BANA"), improperly named as "Bank of America," and Countrywide Home Loans, Inc. ("CHLI") respectfully submit this Brief in support of their Motion to Dismiss the First Amended Complaint (the "Amended Complaint" or "Am. Compl.," Doc. 15) filed by Plaintiff Harriet Nicholson pursuant to Fed. R Civ. P. 12(b)(1).

I. SUMMARY OF THE ARGUMENT

The Court should dismiss the Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(1) because the *Rooker-Feldman* doctrine bars the relief Plaintiff seeks as a matter of law. In the Amended Complaint, Plaintiff asserts a single claim for declaratory relief and asks this Court to vacate a December 31, 2019 Judgment rendered by the Court of Appeals, Second Appellate District of Texas at Fort Worth, in Case No. 02-19-00085-CV—which affirmed the State district court's final judgment against Plaintiff—and declare the appellate Judgment "null and void for lack of jurisdiction" and "not binding on the parties." However, the Texas Supreme Court—the appropriate court to review the Court of Appeals' decision—has already denied Plaintiff's petition for review. Thus, Plaintiff has already exhausted all avenues for appellate review in the

State court system. Because federal courts lack jurisdiction to sit in appellate review of State court decisions, this Court should dismiss the Amended Complaint for lack of subject matter jurisdiction. Additionally, or alternatively, the Court should decline to exercise the discretionary jurisdiction conferred by the Declaratory Judgment Act and dismiss the Amended Complaint.

II. PROCEDURAL HISTORY

Plaintiff filed suit on July 30, 2021. (Doc. 3.) On September 13, 2021, BANA and CHLI filed their Rule 12(b)(1) motion to dismiss in response Plaintiff's original Complaint for lack of subject matter jurisdiction, based on the applicability of the *Rooker-Feldman* doctrine. (Doc. 10-12.) Less than two hours later, Plaintiff filed the Amended Complaint, in which she alleges conclusorily that the *Rooker-Feldman* doctrine does not apply to her request for a declaratory judgment because, according to Plaintiff, the Court of Appeals did not have jurisdiction over her appeal. (Doc. 15.) Defendants now respond to the Amended Complaint.

III. INTRODUCTION AND BACKGROUND FACTS

A. The Prior State Court Litigation

The following key facts are set forth in *Nicholson v. Bank of Am., N.A.*, No. 02-19-00085-CV, 2019 WL 7407739, at *1–2 (Tex. App.—Fort Worth, Dec. 31, 2019), *reh'g denied* (Jan. 9, 2020), *review denied* (July 10, 2020), a copy of which is attached hereto as **Exhibit A** (App. 3),[1] and are a matter of public record:

> On July 3, 2012, the substitute trustee under a deed of trust foreclosed on Nicholson's Tarrant County property. However, the notice of foreclosure sale listed the Dallas County courthouse as the location of the sale rather than the Tarrant County courthouse.
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> After the purchaser at the foreclosure sale brought a forcible detainer action to evict her, Nicholson filed suit in the 342nd district court of Tarrant County against the purchaser, the substitute trustee, BoA, and others for claims arising from the

[1] Plaintiff filed copies of the Court of Appeals' Memorandum Opinion and Judgment as Exhibits F and G, respectively, to the original Complaint. *See* Doc. 3 at 110 & 121.

> foreclosure sale and to stop her eviction. While that suit (*Nicholson I*) was pending, the substitute trustee executed a rescission of the 2012 foreclosure sale and of the substitute trustee's deed, and he recorded this instrument in the Tarrant County real property records. On October 26, 2017, the trial court signed a final judgment ordering that the substitute trustee's deed and rescission were invalid and void and dismissing Nicholson's remaining claims with prejudice.
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> In 2016, before rendition of a final judgment in *Nicholson I*, Nicholson filed this suit against the substitute trustee in the 48th district court of Tarrant County. By amended pleadings, she added Countrywide[1] and BoA as defendants. In Nicholson's eighth amended petition, she asserted (as she had in *Nicholson I*) claims for violations of Section 12.002 of the Texas Civil Practice and Remedies Code, negligence per se, gross negligence, and fraud, and she sought declaratory relief.[2] She also alleged civil conspiracy to commit fraud.
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> Countrywide and BoA each filed a motion for summary judgment. In BoA's motion, it asserted that it was entitled to judgment as a matter of law because Nicholson's claims were barred by res judicata and collateral estoppel. It challenged Nicholson's tort claims on the ground that they were barred by the economic loss doctrine. It further moved for summary judgment on each of Nicholson's claims on the grounds that it was entitled to judgment "as a matter of law and undisputed fact" and that "Plaintiff cannot prove with competent summary judgment evidence each element of her claim."[3] Countrywide moved for summary judgment on identical grounds.
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> The trial court granted Countrywide's and BoA's summary judgment motions without specifying the grounds and subsequently granted their motions to sever. Nicholson filed a motion for new trial, which the trial court denied.

B. The Prior State Court Appellate Decision

After full briefing in the appeal, the Court of Appeals issued its Memorandum Opinion, *see* Ex. A, and Judgment (attached as **Exhibit B**) (App. 10) on December 31, 2019. In its Memorandum Opinion, the Court of Appeals concluded that the trial court did not err in granting BANA's and CHLI's motions for summary judgment, and did not abuse its discretion by severing Plaintiff's claims against BANA and CHLI from her claims against the other remaining

defendants so that a final, appealable judgment could be achieved as to BANA and CHLI. *Nicholson*, 2019 WL 7407739, at *3–4. In the Judgment, the Court of Appeals held:

> This court has considered the record on appeal in this case and holds that there was no error in the trial court's summary judgment and severance orders. It is ordered that the judgment and orders of the trial court are affirmed.

Ex. B. On January 9, 2020, the Court of Appeals denied Plaintiff's motion for rehearing (**Exhibit C**) (App. 12), and on January 23, 2020, the Court of Appeals denied Plaintiff's motion for en banc reconsideration (**Exhibit D**) (App. 15). On January 29, 2020, the Court of Appeals denied Plaintiff's motion to vacate its prior order denying her motion for reconsideration (**Exhibit E**) (App. 18). On July 10, 2020, the Texas Supreme Court denied Plaintiff's petition for review (**Exhibit F**) (App. 21). On August 11, 2020, the Texas Supreme Court Clerk notified the Court of Appeals that Plaintiff's petition for review had been denied (**Exhibit G**) (App. 23). On September 1, 2020, the Court of Appeals issued the Mandate to the lower court, with a bill of costs (**Exhibit H**) (App. 25).

C. The Instant Lawsuit

Plaintiff has fully litigated her claims against BANA and CHLI in the Texas state courts, including the Texas Supreme Court, and she has lost at every turn. As a state court loser, Plaintiff now asserts a single cause of action for declaratory relief and asks this Court to "declare" that the Court of Appeals' Judgment is "void for lack of jurisdiction and not binding on the parties." Am. Compl. (Doc. 15) at ¶ 56; *see also* Am. Compl. at Prayer. A discussed below, the Court should dismiss the Amended Complaint for lack of jurisdiction.

IV. ARGUMENT AND AUTHORITIES

A. The legal standard for dismissal pursuant to Rule 12(b)(1)

Rule 12(b)(1) mandates dismissal of an action where a federal court lacks subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). The existence of subject matter jurisdiction is a threshold

issue. "The subject matter jurisdiction of federal courts is limited and the federal courts may exercise only that jurisdiction which Congress has prescribed." *Kokkonen v. Guardian Life Ins. Co. of Am.,* 511 U.S. 375, 377 (1994). Absent a proper basis for subject matter jurisdiction, a case must be dismissed. *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 96 (1998).

B. The Court should dismiss the Amended Complaint for lack of subject matter jurisdiction because the *Rooker-Feldman* Doctrine applies.

Federal courts lack subject matter jurisdiction to sit in appellate review of judicial determinations made in state courts. *See Dist. of Columbia Court of Appeals v. Feldman,* 460 U.S. 462 (1983); *Rooker v. Fidelity Trust Co.,* 263 U.S. 413 (1923). In other words, "federal district courts, as courts of original jurisdiction, lack appellate jurisdiction to review, modify, or nullify final orders of state courts." *See Weekly v. Morrow*, 204 F.3d 613, 615 (5th Cir. 2000) (quoting *Liedtke v. State Bar of Tex.*, 18 F.3d 315, 317 (5th Cir. 1994)). The *Rooker–Feldman* doctrine generally applies where a plaintiff seeks relief that directly attacks the validity of an existing state court judgment. *See*, *e.g.*, *In re Bayhi*, 528 F.3d 393, 402 (5th Cir. 2008) (state judgment on a student loan obligation could not be entirely vacated); *In re Reitnauer*, 152 F.3d 341, 343-44 (5th Cir. 1998) (finding a violation of *Rooker–Feldman* doctrine where a district court decision invalidated a state judgment revoking homestead rights); *United States v. Shepherd*, 23 F.3d 923, 924-25 (5th Cir. 1994) (finding violation of *Rooker–Feldman* doctrine where district court invalidated state judgment confirming validity of foreclosure sale).

Plaintiff's Complaint falls squarely within the scope of the *Rooker-Feldman* doctrine because Plaintiff is a state court loser, and she is asking this Court to (i) sit in appellate review of the Court of Appeals' Judgment, (ii) declare the Judgment null and void, and (iii) vacate the Judgment—**something the Texas Supreme Court has already declined to do**. *See* Ex. F. Specifically, in her sole "claim" for declaratory relief, Plaintiff asks this Court to:

> declare the Second Court of Appeals' Judgment in Case No. 02-19-00085 CV styled Harriet Nicholson v. Bank of America, N.A. and Countrywide Home Loans, Inc. is void for lack of jurisdiction and not binding on the parties ….

Am. Compl. (Doc. 15) at ¶ 56; *see also* Am. Compl. at Prayer. In direct response to BANA and CHLI's motion to dismiss her original Complaint pursuant to Rule 12(b)(1) based on the *Rooker-Feldman* doctrine (Doc. 10-12), Plaintiff alleges in the Amended Complaint that the *Rooker-Feldman* doctrine does not apply because the Fifth Circuit has held that "the Rooker-Feldman does not preclude review of void state court judgments." Am. Compl. (Doc. 15) at 2. Thus, the Amended Complaint is based solely on Plaintiff's conclusory allegation that "[t]he Second Court of Appeals' Judgment in case 02-19-00085-CV is void because it had no jurisdiction of the subject matter, no jurisdiction to enter the particular judgment, and no capacity to act." Am. Compl. ¶ 57. But Plaintiff's conclusory allegation does not support a finding that the Court of Appeals' Judgment is "void."

First, the Court of Appeals confirmed in its Memorandum Opinion that it had appellate jurisdiction over the State district court's judgment—a fact Plaintiff concedes in ¶ 43 of the Amended Complaint. Second, the Court of Appeals concluded that the district court (i) did not err in granting BANA's and CHLI's motions for summary judgment, and (ii) did not abuse its discretion by severing Plaintiff's claims against BANA and CHLI from her claims against the other defendants. *Nicholson*, 2019 WL 7407739, at *3–4. (Ex. A). Third, the Texas Supreme Court denied Plaintiff's petition for review of the Court of Appeals' Judgment. Ex. F.

Nonetheless, Plaintiff continues to challenge the Court of Appeals' Judgment, and specifically, its conclusion that the district court did not abuse its discretion vis-à-vis the November 28, 2018 order severing Plaintiff's claims against BANA and CHLI from her claims against the other defendants (the "Severance Order") following the grant of BANA's and CHLI's respective motions for summary judgment. Am. Compl. ¶¶ 28-30. Plaintiff alleges that the

Severance Order was not a final and appealable order "because it did not dispose of all parties and claims pending in the lawsuit," *id.* ¶ 46, and therefore, the Court of Appeals Judgment is "void for lack of jurisdiction," *id.* at 50-51. But the Texas Supreme Court and Texas courts of appeals have consistently held that where summary judgment in favor of a single defendant is proper in a case with multiple defendants, severance of that claim is proper so that it may be appealed. *Cherokee Water Co. v. Forderhause,* 641 S.W.2d 522, 526 (Tex. 1982); *Arredondo v. City of Dallas*, 79 S.W.3d 657, 665 (Tex. App.—Dallas 2002, pet. denied); *Smith v. Texas Farmers Ins. Co.*, 82 S.W.3d 580, 588 (Tex. App. 2002—San Antonio, pet. denied); *Guidry v. National Freight, Inc.*, 944 S.W.2d 807, 812 (Tex. App.—Austin 1997, no writ). Thus, Plaintiff's allegation that the Severance Order was not a final and appealable order is wrong.

Moreover, Plaintiff has already challenged the Severance Order through various avenues available to her in the Court of Appeals and the Texas Supreme Court, and Plaintiff has lost over and over again. As discussed in the Amended Complaint, Plaintiff filed a Petition for Writ of Mandamus on January 24, 2019, "complaining of the improper interlocutory severance order," in case 02-19-0022-CV, and the Court of Appeals denied the Petition. Am. Compl. ¶¶ 31-32. This was Plaintiff's first bite at the proverbial apple. Next, Plaintiff appealed the Severance Order and summary judgment orders to the Court of Appeals. This was Plaintiff's second bite at the apple. In its Memorandum Opinion, the Court of Appeals concluded that it had jurisdiction over the appeal, *Nicholson*, 2019 WL 7407739, at *2,[2] and also concluded that the lower court did not abuse its discretion in entering the Severance Order, *id.* at *4, stating:

> In her second issue, Nicholson complains of the trial court's severance order. A trial court does not abuse its discretion in severing a claim if "(1) the controversy involves more than one cause of action, (2) the severed claim is one that would be the proper subject of a lawsuit if independently asserted, and (3) the

[2] The Fifth Circuit has made clear that under these circumstances, a state court judgment is "absolutely immune from collateral attack." *See Steph v. Scott*, 840 F.2d 267, 270 (5th Cir. 1988).

> severed claim is not so interwoven with the remaining action that they involve the same facts and issues." *Aviation Composite Techs., Inc. v. CLB Corp.*, 131 S.W.3d 181, 188 (Tex. App.—Fort Worth 2004, no pet.) (citing *Guar. Fed. Sav. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 658 (Tex. 1990) (op. on reh'g)). The controlling reasons for granting a severance "are to do justice, avoid prejudice, and further convenience." *Id.*
>
> Nicholson's argument in her brief is simply that her claims against Countrywide and BoA "were the same cause of actions against" other defendants and that "[because] the cause[s] of actions were identical, involving the same facts and issues, the trial court effectively severed parties and split[ ] cause[s] of actions into another lawsuit." She further asserted that "[Countrywide's and BoA's] supporting affidavit[s] relied on evidence involving the same facts and issues from" the other defendants.
>
> Nicholson does not, however, address whether the severed claims, if asserted independently, were the proper subject of a lawsuit and does not explain how the severed claims are so interwoven with the remaining action that they involve the same facts and issues. *See* Tex. R. App. P. 38.1(i); *City of Keller*, 433 S.W.3d at 729. Further, "a trial court may sever dismissed claims from remaining claims in order to render an otherwise interlocutory judgment final and appealable," *Aviation Composite*, 131 S.W.3d at 187 n.5, and Nicholson does not explain why the trial court abused its discretion by severing her claims in order to render its interlocutory summary judgment orders final and appealable. *See id.*; *see also Watson v. City of Southlake*, No. 02-18-00143- CV, 2019 WL 4509047, at *10 (Tex. App.—Fort Worth Sept. 19, 2019, pet. filed) (citing *Aviation Composite* for the proposition that "*[r]egardless* of whether the claims could be maintained separately, 'a trial court may sever dismissed claims from remaining claims in order to render an otherwise interlocutory judgment final and appealable.' " (emphasis added)). Nicholson also failed to explain how severing her claims against Countrywide and BoA harmed her in any way. *See* Tex. R. App. P. 38.1(i), 44.1(a); *Thomas v. Logic Underwriters, Inc.*, No. 02-16-00376-CV, 2017 WL 5494386, at *5 (Tex. App.—Fort Worth Nov. 16, 2017, pet. denied) (mem. op.). For these reasons, we overrule her second issue.

Id.

Next, the Court of Appeals denied Plaintiff's motion for rehearing (Ex. C) (App. 12), denied Plaintiff's motion for en banc reconsideration (Ex. D) (App. 15), and denied Plaintiff's motion to vacate its prior order denying her motion for reconsideration (Ex. E) (App. 18), which

represented Plaintiff's third, fourth and fifth bites at the apple. Lastly, the Supreme Court denied Plaintiff's petition for review (Ex. F) (App. 21), representing Plaintiff's sixth bite at the apple.

Plaintiff now comes to this Court for what amounts to a seventh bite at the apple. But there is no authority for the proposition that this Court or any federal court has jurisdiction to review and reject (i) the Court of Appeals' own determination that it had appellate jurisdiction over Plaintiff's appeal or (ii) the Supreme Court's decision declining to review the Court of Appeals' Judgment. Accordingly, the Court should conclude as a matter of law that the *Rooker-Feldman* doctrine bars Plaintiff's request for declaratory relief finding the Court of Appeals' Judgment "void for lack of jurisdiction and not binding on the parties," and it should dismiss the Amended Complaint for lack of subject matter jurisdiction.

C. The Court should dismiss the Amended Complaint for lack of subject matter jurisdiction because there is no actual controversy between Plaintiff and Defendants.

Additionally, or alternatively, the Court should dismiss the Amended Complaint because there is no actual controversy warranting the exercise of jurisdiction pursuant to the Declaratory Judgment Act ("DJA"). Codified at 28 U.S.C. § 2201, the DJA implicates discretionary, rather than compulsory, jurisdiction. *See Brillhart v. Excess Ins. Co. of Am.,* 316 U.S. 491, 494 (1942); *see also* 28 U.S.C. § 2201(a) (courts "may declare the rights and other legal relations of any interested party seeking such declaration…"). To be entitled to declaratory relief under the DJA, a plaintiff must allege facts demonstrating that there exists "a substantial and continuing controversy between the two adverse parties." *Bauer v. Texas*, 341 F.3d 352, 358 (5th Cir. 2003). Here, there is no existing "substantial and continuing controversy" between Plaintiff and BANA and CHLI because, as discussed above, the State courts—including the district court, the Court of Appeals, and the Texas Supreme Court—have fully adjudicated Plaintiff's claims against BANA and CHLI to finality. Thus, the Court should decline to exercise the discretionary

jurisdiction conferred by the DJA, and it should dismiss the Amended Complaint pursuant to Rule 12(b)(1).

V. CONCLUSION

For the reasons stated herein, BANA and CHLI respectfully request that the Court grant their motion and dismiss the Amended Complaint, in its entirety, pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction.

Dated: September 27, 2021

Respectfully submitted,

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ATTORNEYS FOR DEFENDANTS BANK OF AMERICA, N.A. AND COUNTRYWIDE HOME LOANS, INC.

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of September 2021, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system and caused a copy of same to be delivered to pro se Plaintiff Harriet Nicholson via regular U.S. mail and email at the following:

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