IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

NICKOLA CUNHA,	:	3:23-cv-00037-VAB
Plaintiff,	:	
v.	:	
THOMAS MOUKAWSHER,	:	
Defendant.	:	JUNE 14, 2023

Defendant's Reply Memorandum in Support of His Motion to Dismiss

Plaintiff's Objection[1] does nothing to undermine Defendant's arguments in favor of dismissal. To the contrary, both its lateness and its content support Defendant's argument that this Court should dismiss this action in its entirety.

I. Plaintiff's Objection is Late and this Court Should Not Consider it

Plaintiff is an experienced attorney suing the Judge who ordered her disbarment. *See Ambrose v. Ambrose*, 2022 Conn. Super. LEXIS 131, at *16 (Jan. 25, 2022) (the disbarment decision); *see also Compl.*, ¶ 1 (alleging that Plaintiff was admitted to the Connecticut bar in 1999). Plaintiff does not dispute that although she is proceeding *pro se*, "she is a disbarred attorney and should 'receive no solicitude at all.'" *Defendant's Memorandum in Support of His Motion to Dismiss*, p. 6 (ECF No. 12-1) ("*MIS MTD*") (quoting *Tracy v. Freshwater*, 623 F.3d 90, 102 (2d Cir. 2010)).

Plaintiff either knew or should have known that any Opposition she planned to file was due within twenty-one days (on or before May 15, 2023)—that deadline was reflected in the Notice Defendant filed, the relevant Federal and Local Rules attached to that Notice (*see* ECF No. 14), and explicitly on this Court's docket (*see* ECF No. 13). Despite that, Plaintiff did not file her Objection until May 31, 2023,

[1] *Plaintiff's Objection and Memorandum of Law in Opposition to Defendant's Motion to Dismiss* (ECF No. 18) ("*PO*").

sixteen days late (ECF No. 18). As a result, it is "not entitled to consideration." *Brown v. Arnold Foods Co.*, 2009 U.S. Dist. LEXIS 76580, at *5 (D. Conn. Aug. 27, 2009) (Haight, J.). Indeed, this Court has indicated that late oppositions were not entitled to consideration even when they were filed by non-attorney *pro se* litigants and not as late as Plaintiff's was here. *See, e.g.*, *id*. (finding that a *pro se* plaintiff's opposition was "not entitled to consideration when plaintiff allegedly mailed it" eight days late).

Plaintiff admits that her Objection was late. She says she "was unable to timely file this reply in opposition or a motion for extension of time due to multiple reasons which included the inability of the undersigned to access electronic filing ordered by this court. The undersigned's authorization to access to electronic filing was finalized yesterday afternoon." *PO*, p. 1.

That is not enough to establish excusable neglect. It is incumbent on a party arguing that a problem with the ECF system precluded them from filing to provide evidence to support that conclusion. *See, e.g.*, *In re Sands*, 328 B.R. 614, 619 (Bankr. N.D.N.Y. 2005). That could include evidence that "problems at the clerk's office prevented the filing" at issue. *Id*. It could include evidence regarding the party's efforts to contact the clerk's office and the clerk's office's response. *Id*. It is not enough to simply state that there was an issue without any detail. *See id*. Plaintiff's generic explanation is fully consistent with a conclusion that the problem was purely with her office and therefore insufficient to excuse her non-compliance; "[p]roblems occurring in counsel's office, such as a poor Internet connection or a hardware problem, will not excuse a[n] . . . untimely filing." *Id*.; *see also Merrihew v. Ulster*

County, 529 F. Supp. 2d 374, 376 (N.D.N.Y. 2008) (declining to find excusable neglect for a failure to timely respond to a summary judgment motion where counsel represented *inter alia* that he "never received a notification at all from ECF, due to computer problems internal to" counsel's "office").

Even if this Court were inclined to excuse Plaintiff's failure to provide sufficient evidence to support her excuse for non-compliance (it should not be), it is difficult to reconcile Plaintiff's representation to this Court with her other filings. Plaintiff voluntarily moved to participate in electronic filing on January 9, 2023 (*see* ECF No. 4). In so doing, she certified that she understood that if this Court granted her Motion, she would have to "complete the Court's required training class on electronic filing for self-represented litigants and register for a PACER account before" she could "actually begin filing documents electronically" and that she could comply with the necessary technical requirements. *Id*. Plaintiff offers no details on her efforts to obtain the required training and register for a PACER account on or before the May 15, 2023 response deadline. Nor does she indicate that she made any effort to contact the Court or otherwise obtain assistance before the deadline.

Ultimately, the sixteen day delay here is considerable and the excuse Plaintiff offers lacks the detail to establish excusable neglect. This Court need not—and should not—consider Plaintiff's Objection. Plaintiff should not be treated more favorably than a non-attorney *pro se* litigant, *see Brown*, 2009 U.S. Dist. LEXIS 76580, at *5, or an attorney whose failure to comply would harm their client. *See, e.g.*, *Merrihew*, 529 F. Supp. 2d at 376 (noting that "[t]he Court is sympathetic to the negative effect

of these circumstances on Plaintiff's case" but finding that "[n]onetheless, the omission in this case is not excusable and cannot be so lightly overlooked").

II. Supreme Court Precedent Forecloses Plaintiff's Eleventh Amendment Argument and Requires Dismissal of Plaintiff's Official Capacity Damages Claims in their Entirety

Defendant argued that this Court has recognized—based on Supreme Court and Second Circuit precedent—that "'[i]t is well settled that the Eleventh Amendment bars suits for money damages against state officials acting in their official capacities.'" *MIS MTD*, p. 10 (quoting *Amato v. Elicker*, 534 F. Sup. 3d 196, 206 (D. Conn. 2021) (Shea, J.), which—in turn—cited cases, including *Ford v. Reynolds*, 316 F.3d 351, 354 (2d Cir. 2003), and citing *Kentucky v. Graham*, 473 U.S. 159, 169 (1985)). Plaintiff responds that Defendant's argument is "flawed and wrongfully applied" because "Congress passed 42 U.S.C. § 1983 pursuant to the power vested in it by § 5 of the Fourteen [sic] Amendment to allow enforcement of the guaranteed protections provided in that amendment." *PO*, pp. 2-3 (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976)).

Supreme Court precedent establishes that Plaintiff is incorrect. *Fitzpatrick* involved Title VII, not § 1983. *See Fitzpatrick*, 427 U.S. at 447. Title VII abrogates Eleventh Amendment immunity. The Supreme Court has consistently held that § 1983 does **not**. *See, e.g.*, *Edelman v. Jordan*, 415 U.S. 651, 677 (1974); *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 66 (1989). As this Court recently recognized, "it is beyond dispute that Congress's enactment of § 1983 did not abrogate Eleventh Amendment immunity from federal court lawsuits." *Campbell v. City of*

Waterbury, 585 F. Sup. 3d 194, 202 (D. Conn. 2022) (Meyer, J.) (citing *Salu v. Miranda*, 830 Fed. App'x 341, 347 (2d Cir. 2020), which—in turn—was citing *Quern v. Jordan*, 440 U.S. 332, 338-45 (1979)).

That should not come as a surprise to Plaintiff, an experienced attorney. *Fitzpatrick* itself—the sole case on which Plaintiff relies in her effort to rebut Defendant's Eleventh Amendment argument—makes clear that § 1983 does not "abrogate the immunity conferred by the Eleventh Amendment." *Fitzpatrick*, 427 U.S. at 451-53. So does *Will*, which Plaintiff cites elsewhere in her Objection. *See PO*, 5 (citing *Will*); *see Will*, 491 U.S. at 66 (noting that *Quern* made "clear" that "Congress, in passing § 1983, had no intention to disturb the States' Eleventh Amendment immunity and so to alter the federal-state balance in that respect"). And so does *Graham*, which Defendant cited in both his Memorandum and his Safe Harbor materials advising Plaintiff that Supreme Court precedent foreclosed her claims. *See MIS*, p. 10; *see also Contingent Motion*, p. 2 (A-7). Plaintiff's failure to acknowledge and address that known controlling authority is consistent with the conduct that led to her disbarment. That controlling authority also requires dismissal of Plaintiff's official capacity damages claims in their entirety.

III. Plaintiff Effectively Concedes that Absolute Judicial Immunity Bars Her Individual Capacity Damages Claims in their Entirety, and Supreme Court Precedent would Foreclose those Claims Even if Plaintiff Had Not Conceded

Defendant argued that absolute judicial immunity bars Plaintiff's individual capacity damages claims in their entirety, citing and discussing Supreme Court and Second Circuit precedent. *See MIS MTD*, pp. 7-9. Plaintiff offers a single paragraph

in response, which neither cites any judicial immunity decisions nor seeks to distinguish any of the decisions Defendants cited. *See PO*, p. 4. That is effective abandonment of Plaintiff's argument. *See, e.g.*, *Cabello-Setlle v. Sullivan*, 2022 U.S. Dist. LEXIS 171695, at *12 n.2 (S.D.N.Y. Sep. 22, 2022) ("declin[ing] to address [an] issue as . . . inadequately briefed" where the discussion was "limit[ed] . . . to a single paragraph with scant legal argument and citations to binding authorities"); *cf. Thurmand v. Univ. of Conn.*, 2019 U.S. Dist. LEXIS 14622, at *7 (D. Conn. Jan. 30, 2019) (Hall, J.) ("Courts in this Circuit have presumed that plaintiffs have abandoned their claims when they do not oppose a motion to dismiss them," citing cases).

Even if Plaintiff did not technically concede the issue, she presumably cited no supporting authority because there is none for her to cite. Defendant had jurisdiction to address Plaintiff's violations of the Rules of Professional Conduct. *See, e.g.*, *Burton v. Mottolese*, 267 Conn. 1, 59 (2003) (affirming a trial court's disbarment of an attorney). None of the authority Plaintiff cites indicates otherwise. Indeed, Plaintiff acknowledges in her Complaint that Connecticut law allows for summary disbarment. *See Compl.*, ¶ 9 (citing Conn. Practice Book § 2-45); *id.* at ¶ 10 (citing Conn. Gen. Stat. § 51-14). Plaintiff makes (meritless) arguments that the relevant state Rules and laws are unconstitutional, but that comes nowhere near showing that Defendant acted "'in the complete absence of jurisdiction.'" *Haynes v. Foschio*, 2022 U.S. App. LEXIS 3921, at *2-3 (2d Cir. Feb. 14, 2022) (Summary Order) (quoting *Huminski v. Corsones*, 396 F.3d 53, 75 (2d Cir. 2005)) (affirming a district court's dismissal of claims on absolute immunity grounds despite the plaintiff's assertion

that "the defendants acted without jurisdiction" because "the defendants acted while presiding over the [plaintiff's] case" and were protected by immunity even if their actions were erroneous). Absolute judicial immunity plainly bars Plaintiff's individual capacity damages claims in their entirety.

IV. Plaintiff Cannot Use Her Objection to Re-Write Her Complaint to Assert Claims for Injunctive Relief and Even if She Could Those Claims Would be Barred

As Defendant pointed out, "Plaintiff's Complaint cannot properly be construed to demand non-monetary relief"—the only relief Plaintiff expressly seeks is monetary (compensatory damages, punitive damages, and fees) and her generic prayer for relief does not change the analysis. *MIS MTD*, p. 7 n.1. Plaintiff offers no argument in response. Instead, she simply states in her Objection that she "is entitled to prospective injunctive relief for all actions taken by the defendant post-judgment." *PO*, p. 5. That cannot avoid dismissal.

As an initial mater, there is no reference to those alleged post-judgment actions in Plaintiff's Complaint; her allegations relate to her disbarment. *See Compl.*, ¶¶ 2-3, 9-10, 12, 14, 22. Plaintiff cannot properly use her Objection to re-write her Complaint; "'it is well established that [p]laintiffs cannot amend their complaint by asserting new facts or theories for the first time in opposition to Defendants' motion to dismiss.'" *Mallison v. Connecticut Office of Early Childhood*, 2022 U.S. Dist. LEXIS 185286, at *10-11 (D. Conn. Oct. 11, 2022) (Nagala, J.) (quoting *Miley v. Hous. Auth. of City of Bridgeport*, 926 F. Supp. 2d 420, 432 (D. Conn. 2013) (Bryant, J.)).

In any event, § 1983 expressly provides that "in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." 42 U.S.C. § 1983. Plaintiff does not allege or even assert that declaratory relief was unavailable. Nor could she credibly; "[d]eclaratory relief against a judge for actions taken within his or her judicial capacity is ordinarily available by appealing the judge's order." *Errato v. Seder*, 2023 U.S. Dist. LEXIS 56145, at *25 (D. Conn. Mar. 31, 2023) (Nagala, J.) (quotation marks omitted). To the extent Plaintiff believes that Defendant's post-disbarment rulings violated Plaintiff's rights, she can seek review of Defendant's decisions through the appellate process.

That would not be the only impediment to Plaintiff's putative demands for injunctive relief if she had actually pled them (she did not). As Defendant pointed out, "both the Eleventh Amendment and the *Younger* abstention doctrine would bar any such relief." *MIS MTD*, p. 7 n.1. Plaintiff offers no direct response to those arguments—her Eleventh Amendment discussion does not meaningfully address the issue, and she does not mention *Younger* at all. In addition, the gravamen of Plaintiff's argument appears to be that the "orders are ex post facto orders." PO, 5. Any such argument would "fail[ ] because the Ex Post Facto Clause applies only to criminal, and not civil cases." *Varricchio v. Chalecki*, 2016 U.S. Dist. LEXIS 133621, at *23 (D. Conn. Sep. 28, 2016) (quotation marks omitted, referencing cases including

DeMartino v. Comm. of Internal Rev., 862 F.2d 400, 409 (2d Cir. 1988)).[2] Ultimately, Plaintiff cannot create claims for injunctive relief in an effort to avoid dismissal.

V. Plaintiff's Objection Does Nothing to Undermine Defendant's *Rooker-Feldman* Argument

Defendant argued that even if any of Plaintiff's claims could survive dismissal under the Eleventh Amendment and absolute judicial immunity (they cannot), the *Rooker-Feldman* doctrine independently bars them. *See MIS MTD*, 9-13. Defendant pointed out that "[t]he Second Circuit and District Courts within this Circuit have consistently held that the *Rooker-Feldman* doctrine barred comparable federal challenges brought by attorneys challenging their disbarments or other professional discipline" and cited five cases to support that assertion. *MIS MTD*, 11 & n.4.

Plaintiff does not cite a single one of those cases, let alone persuasively distinguish them. Instead, she apparently argues that *Rooker-Feldman* does not bar her claims because the second factor is not met because her claims "speak not to the propriety of the state court judgments, but to the fraudulent course of conduct that defendants pursued in obtaining such judgments." *PO*, p. 3 (quotation marks omitted, discussing *Sung Cho v. City of New York*, 910 F.3d 639, 645-46 (2d Cir. 2018)).

Plaintiff is incorrect.[3] *Sung Cho* involved a challenge by plaintiffs "charged with violating New York City's Nuisance Abatement Law" and—in their view—forced

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[2] To be clear, there likely are myriad other reasons why such an argument would fail. In the event that any aspect of Plaintiff's action survives this Motion to Dismiss, Defendant will fully address any of Plaintiff's surviving claims as necessary.

[3] Plaintiff also represents that Defendant "acknowledges that all four requirements are not met." *PO*, p. 4. That is false. *See MIS MTD*, p. 11 (explicitly arguing that the second factor is met).

by the law to enter into "settlement agreements . . . with the City [that] required them to waive various constitutional rights." *Sung Cho*, 910 F.3d at 642, 643. The City moved to dismiss on various grounds not including the *Rooker-Feldman* doctrine. *See id*. at 644. The district court raised the *Rooker-Feldman* doctrine *sua sponte* and subsequently dismissed the case on that ground. *See id*.

The Second Circuit reversed. In so holding, the Court noted that it has "**applied the *Rooker-Feldman* doctrine with some frequency** to cases"—like this one—"**involving suits directly against state court judges.**" *Id.* at 645 & n.5 (emphasis added) (citing cases). Plaintiff ignores that dispositive aspect of *Sung Cho*.

As Defendant pointed out, the *Rooker-Feldman* establishes that "'it is basic hornbook law that this Court has no power and no jurisdiction to act as a super appellate court over state court judgments.'" *MIS MTD*, p. 9 (quoting *Burnham v. Chabot*, 2022 U.S. Dist. LEXIS 128859, at *9 (W.D.N.Y. July 20, 2022)). Plaintiff cannot avoid that by asserting—without any legal or factual basis—that her injury did not result from the state court judgment ordering her disbarment. Unlike *Sung Cho*, this is not a situation where the state court "merely ratified" conduct by third parties. *Sung Cho*, 910 F.3d at 646. Rather, Plaintiff explicitly claims that Defendant—and only Defendant—caused her claimed injury. *See Compl.*, ¶ 14 (referring to Defendant as "accuser, trier, judge, jury, and executioner, . . . and "one tyrant in a black robe").

Respectfully submitted,

DEFENDANT

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Certificate of Service

I hereby certify that on June 14, 2023 a copy of the foregoing was electronically filed. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Robert J. Deichert
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