

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO**

Civil Action N^o 05-cv-01858-EWN–MJW

SEAN HARRINGTON

Plaintiff,

v.

MADELINE WILSON and the “LAW OFFICE OF MADELINE WILSON”;
CHRISTY RYAN;
BILL J. FYFE and COLUMBINE COUNSELING CENTER, P.C.;
LAURA ARCILISE, in her personal capacity;
LOUISE CULBERSON-SMITH, in her personal capacity;
JOHN GLEASON in both his personal and official capacity;
WENDELL PRYOR in his official capacity;
ROBERT EVANS, in his official capacity; and
the JEFFERSON COUNTY COMBINED COURT (a/k/a “THE FIRST JUDICIAL DISTRICT”),
by and through the COLORADO ATTORNEY GENERAL, JOHN SUTHERS, in his official Capacity.

Defendants

PLAINTIFF’S MOTION FOR STAY OF JUDGMENT

COMES NOW, Plaintiff, Sean Harrington, for the purpose of requesting a stay of the Judgment entered in favor of defendants to the extent that dismissal of the above-captioned matter was **with prejudice**. As grounds therefor, Plaintiff states as follows:

1. Pursuant to D.C.Colo.LcivR. 7.1, the undersigned has contacted opposing counsel to confer regarding the within Motion. By the date and time of the within filing, defendants Ryan and Wilson, have registered their opposition with the undersigned.
2. Fed.R.App.P. 8(a)(1) requires that a Motion for Stay must ordinarily be filed first in district court.
3. On September 26th, 2006, Judgment was entered (docket # 85) on this Court’s order dated September 25th 2006 (docket # 80). The order disposed of the case in its entirety, **with**

prejudice, striking Plaintiff's objections to the magistrate's recommendations, denying Plaintiff's Amended Objections and, thereby, refusing to conduct the requisite *de novo* review of the magistrate's recommendations, the objections and any responses thereto pursuant to Fed.R.Civ.P. 72(b).

4. The dismissal was based upon the acceptance of the magistrate's recommendations (docket # 73), which disposed of the case under *Rooker-Feldman* and *Younger* abstention, *inter alia*.

5. Plaintiff moved this Court to reconsider the dismissal with prejudice, noting, "The law has not been properly applied to the facts of this case. In addition to providing no conclusions of law or findings of fact to evidence any de novo review, the Court failed even to apply the correct law to dismissal: Dismissal for lack of jurisdiction cannot be 'with prejudice.'" Docket # 81 at 3. The Court denied the Motion without comment.

6. Dismissals for lack of jurisdiction must be without prejudice. *See Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1216 (10th Cir.2006) ("A longstanding line of cases from this circuit holds that where the district court dismisses an action for lack of jurisdiction, as it did here, the dismissal must be without prejudice").

7. This Order of dismissal **with prejudice** contradicts this Court's adoption of the magistrate's findings: The magistrate (albeit erroneously) concluded that, "Plaintiff has adequate remedies in state court." Docket # 73 at 39. But of course, Plaintiff cannot pursue any of these allegedly "adequate remedies" if the dismissal is with prejudice.

8. Plaintiff intends to file his tort claims against Ryan and Wilson in Texas and/or Colorado state courts (as separate collateral actions) but cannot do so if the causes of action against them have been erroneously dismissed with prejudice. *See Lawlor v. Nation Screen Serv. Corp.*, 349 U.S. 322, 327 (1955) (judgment dismissing "the previous suit 'with prejudice' bars a later suit on the same cause of action"); *see also Frederiksen v. City of Lockport*, 384 F.3d 437, 438 (7th Cir. 2004) ("A suit dismissed for lack of jurisdiction cannot also be dismissed

‘with prejudice’; that's a disposition on the merits, which only a court with jurisdiction may render. ‘No jurisdiction’ and ‘with prejudice’ are mutually exclusive. . . .A jurisdictional disposition is conclusive on the jurisdictional question: the plaintiff cannot re-file in federal court. But it is without prejudice on the merits, which are open to review in state court to the extent the state's law of preclusion permits”).

WHEREFORE, for the reasons more fully set forth hereinabove, Plaintiff requests an Order staying the judgment in defendants’ favor this 26th day of September, 2006.

Respectfully submitted this 26th day of September, 2006:

/s/ Sean Harrington
197m Boston Post Rd., West #151
Marlborough, MA 01752
facsimile: (508) 630-9004
esoxlucios@msn.com

CERTIFICATE OF SERVICE

I hereby certify that on September 26th 2006, I served the foregoing Motion for Stay via electronic mail to the following ECF participants.

David H. Yun
JAUDON & AVERY LLP
dyun@jalegal.com

Christine K. Wilkinson
Ass’t Attorney General
ck.wilkinson@state.co.us

Randolph S. Dement
rdement@dementlaw.com

Brett N. Huff
WHITE & STEELE, P.C.
bhuff@wsteele.com

/s/ Sean Harrington