No. 17-17144 [Dist Ct. No.: 5:15-cv-03698-EJD]

IN THE
UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

LORI RODRIGUEZ; et al.,
Plaintiffs - Appellants,

vs.

CITY OF SAN JOSE; et al.,
Defendants - Appellees.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

APPELLANTS' SUPPLEMENTAL BRIEF
(By Order of the Court | DktEntry 53)

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CORPORATE DISCLOSURE STATEMENT

SECOND AMENDMENT FOUNDATION, INC., (SAF) is a non-profit membership organization incorporated under the laws of Washington with its principal place of business in Bellevue, Washington. SAF has over 650,000 members and supporters nationwide, including California. The purposes of SAF include education, research, publishing and legal action focusing on the Constitutional right to privately own and possess firearms, and the consequences of gun control. SAF is not a publicly traded corporation.

THE CALGUNS FOUNDATION, INC., (CGF) is a non-profit organization incorporated under the laws of California with its principal place of business in Sacramento, California. CGF supports the California firearms community by promoting education for all stakeholders about California and federal firearms laws, rights and privileges, and by defending and protecting the civil rights of California gun owners. CGF is not a publicly traded corporation.

These institutional plaintiffs have provided funding for this suit.

Dated: January 7, 2019

/s/ Donald Kilmer
Donald Kilmer, Attorney for Appellants

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I. INTRODUCTION

On December 20, 2018 (DktEntry: 53), this Court ordered the parties to file simultaneous briefs, discussing the state court rulings' effect on this Court's adjudication of the specific claims made by Lori Rodriguez in light of the *Rooker-Feldman* doctrine and the doctrines of preclusion. The parties were also directed to address what effect, if any, the organizational Plaintiffs-Appellants' presence in the case has on the *Rooker-Feldman* and preclusion analyses.

Both doctrines are inapplicable to Lori Rodriguez's specific claims. Furthermore, the organizational plaintiffs were not parties to the state court actions and therefore cannot be prejudiced by either doctrine.

II. STATEMENT OF FACTS

The Superior Court order [ER Tab 6, Page 080-081] that was appealed, contemplated further action by the parties with respect to the Rodriguez firearm collection, which at that time (with the exception of one firearm that belonged exclusively to Lori) was the community property of both Lori Rodriguez and her husband. [ER 11:153-157]

The judgment of the trial court included a provision that: "The City agrees to hold the weapons pending final disposition or resolution of this matter in accordance with its general practices." [ER 6:081] In

other words, the trial court made an order that the weapons, were to be held by the City of San Jose, pending further developments, which included the possibility of a transmutation of the firearm collection from mixed community and separate property to something else.

This is confirmed by the transcripts from the trial court. [ER 6:075]

> THE COURT: With that said, I think there are viable alternatives that need to be explored. This is the community possession of the respondent[1] and whether it's by sale or release to a separate place. I'm going to let you folks work that out. So with respect to the request to release the guns back to Ms. Rodriguez, I'm going to deny that request, all right? I'm going to ask that the City prepare the order. (Emphasis added. {TX 24:13-19})

Based on correspondence between counsel, a side agreement was reached with the City of San Jose to hold the firearms without storage charge until final disposition. The matter was then appealed to the Sixth District Court of Appeal. Although the Sixth District affirmed the trial court order on the specific petition filed by the City (in an unpublished opinion), the disposition included this finding and order:

> "**[W]e believe that the record on appeal shows that the procedure provided by section 33850 et seq. for return of firearms in the possession of law enforcement remains available to Lori.**" *City of San Jose v. Rodriguez*, 2015 Cal.App.Unpub. LEXIS 2315, 2326. (Emphasis added.)

[1] Lori's husband was the respondent in the state court.[ER 6:080]

Thus the Court of Appeal sanctioned Lori's continued efforts to recover the firearms, albeit via California's administrative procedures rather than court processes. This passed the decision back to the City of San Jose, provided that Lori could successfully complete the regulatory and administrative procedures to transfer and register of all the firearms (excluding the one she already owned) from her husband to herself. This transmutation of the entire firearm collection from mixed community/separate property, made the entire collection Lori's sole and separate property. This is a critical change of facts.

After she transferred title of the entire collection to her name, she was cleared by California Department of Justice, Bureau of Firearms to recover her firearms. She tendered the certified releases to the City of San Jose in compliance with state law, and the City still refused to release the firearms to her. [ER 11:153-217]

Furthermore, as noted in the principle briefs, shortly after the Superior Court refused to release the firearms directly to Lori at the hearing in August of 2013, the California Legislature enacted statutes to expressly provide a way for gun owners to safely and legally keep firearms in a home when they live with a prohibited person. Assembly Bill 500 and a companion Senate Bill 363, were signed by the Governor

on October 11, 2013. [ER 14:349-379] The relevant change in law was the requirement that firearms be secured in a gun safe when the owner lives with another person who is prohibited from possessing firearms. Penal Code § 25135.

While the time and expense of litigating this matter in two state court proceedings has been frustrating, Lori Rodriguez can not be seen as taking issue in federal court with either of the state courts' rulings. Even if she believes they were wrong to be so cautious, and wrong on the law, she never-the-less, dutifully accepted the judgments and attempted in good faith to comply with the conditions imposed on her to obtain her property. Her nemesis is the City of San Jose, who assumed that role through out-of-court conduct by defying the Court of Appeal.

Nor would it be reasonable to expect Lori to file a Petition for Review with the California Supreme Court. The Court of Appeal made a very specific finding that she suffered no prejudice as long as the administrative procedures of Penal Code § 33850 et seq., remained available to her. Appellants must affirmatively demonstrate prejudicial error on appeal. *Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 232 Cal.Rptr. 528. *See also: Citizens for Open Government v. City of Lodi* (2012) 205 Cal.App.4th 296, 140 Cal.Rptr.3d 459.

One of the chief purposes of the *Rooker-Feldman* Doctrine is to ensure that state court decisions are only reviewed by the U.S. Supreme Court. Without being able to show prejudice, it is speculative that Lori could have obtained review by California's highest court before seeking a writ of certiorari under 28 USCA § 1257, as that Court would likely have compelled Lori to do what the Sixth District had already commanded, and she already done – exhaust administrative remedies through Penal Code § 33850 et seq., first.

In 2013 (prior to the change in California's safe storage law) the trial judge was apparently concerned with (among other things) the community property characterization of the firearms and he wanted "viable alternatives [...] explored" and he implored the parties to "work that out." [ER 6:075] Lori did. The City of San Jose didn't.

After the Court of Appeals wrote: "[W]e believe that the record on appeal shows that the procedure provided by section 33850 et seq. for return of firearms in the possession of law enforcement remains available to Lori." *City of San Jose v. Rodriguez*, 2015 Cal.App.Unpub. LEXIS 2315, 2326, Lori tried once more to explore viable alternatives and work things out with the City of San Jose. But, neither the intervening change in the gun storage law, nor the Court of Appeal's

instructions that Lori's firearms be returned to her after she complied with California Penal Code § 33850 et seq., were persuasive to the City of San Jose. Six (6) years after they were (wrongfully) seized, Lori still does not have possession of these firearms, and the only government entity frustrating that is the City of San Jose. This became a wholly different case in August of 2015 when the complaint was finally filed in the District Court [ER 4:015-024].

Defendant-Appellees have not cross-appealed any issue, including the District Court's findings and order that the Second Amendment Foundation (SAF) and The Calguns Foundation (CGF) have standing to litigate this case. [ER 3:008-013]

III. ARGUMENT

A. The *Rooker-Feldman* Doctrine Does Not Apply to the Facts of this Case.

Federal court jurisdiction to review state court judgments is vested exclusively in the U.S. Supreme Court. 28 USCA § 1257. Thus district courts lack subject matter jurisdiction to do so. Which is why a district court may not adjudicate an action seeking to reverse or nullify a final state court judgment. Nor may federal courts adjudicate issues 'inextricably intertwined' with those adjudicated by the state court. In

short, the loser in state court cannot avoid its fate by trying to persuade a federal district court that the state court judgment violates the loser's federal rights. *Exxon Mobil Corp. v. Saudi Basic Industries Corp*. (2005) 544 U.S. 280. *See also: Johnson v. De Grandy* (1994) 512 U.S. 997. This *Rooker-Feldman* Doctrine is based on the cases giving rise to the rule. *Rooker v. Fidelity Trust Co.* (1923) 263 U.S. 413, and *District of Columbia Court of Appeals v. Feldman* (1983) 460 U.S. 462.

The doctrine does not apply where plaintiffs do not allege state court legal error. *Bell v. City of Boise* (9th Cir. 2013) 709 F.3d 890, 897. "If, on the other hand, a federal plaintiff asserts as a legal wrong an allegedly illegal act or omission by an adverse party, *Rooker-Feldman* does not bar jurisdiction." *Noel v. Hall*, (9th Cir. 2003) 341 F.3d 1148, 1164.

As noted above, the Sixth District Court of Appeal made a very specific finding that Lori still had available to her the remedies of California Penal Code § 33850 for the recovery of her property; even as that court of appeal affirmed the trial court's Welfare and Institutions Code § 8102 *in rem* petition initiated against Lori's husband.

The gravamen of this lawsuit is San Jose's (irrational) refusal to return Lori's property to her **after** the Court of Appeal issued its opinion with the Penal Code § 33850 et seq., instructions. Lori's claim

for relief under the Second Amendment arises **both** before and **after** the appellate court's opinion. The facts arising under the Second Claim (Fourth Amendment), Third Claim (Fifth Amendment), Fourth Claim (Fourteenth Amendment), and Fifth Claim (Pendant State Claim: Penal Code § 33850) all arose independent of the WIC § 8102 matter or **after** the City of San Jose refused to comply with the instructions issued by the Court of Appeal. [ER 4:015-024]

Rooker-Feldman does not limit federal jurisdiction where the federal suit seeks to enforce a state court judgment – even where the federal court is required to interpret the judgment, as long as the court is not being asked to exercise appellate review over the state court decision. "Merely requiring a federal court to understand what it is that a state court decided does not implicate *Rooker-Feldman*, but rather normal preclusion principles and rules of construction." *Coles v. Granville* (6th Cir. 2006) 448 F.3d 853, 858-859; *Banks v. Slay* (8th Cir. 2015) 789 F.3d 919, 923 – doctrine applies only to 'state-court losers,' not to those seeking to enforce state court judgment.

Nor can San Jose complain that enforcement of the Sixth District's order should have been had in state court. "[P]laintiffs are free to litigate in any court with jurisdiction, and their choice to forgo further,

optional state review hardly converted the state constitutional judgment into a decision following 'full and fair opportunity to litigate,' *Allen v. McCurry*, (1980) 449 U.S. 90, [...] as res judicata would require. For that matter, a federal court gives no greater preclusive effect to a state-court judgment than the state court itself would do, *Marrese v. American Academy of Orthopaedic Surgeons*, (1985) 470 U.S. 373, 384-386, [...]"(internal citations omitted) *as cited in: Johnson v. De Grandy* (1994) 512 U.S. 997, 1005-1006.

The requirements for application of *Rooker-Feldman* are set forth in *Exxon Mobil Corp. v. Saudi Basic Industries Corp*. (2005) 544 U.S. 280.

First, the federal plaintiff must have lost in state court. Arguably, Lori did not "lose" on the claims she brought in this case. The state trial court refused to release the guns to Lori under Welfare and Institutions Code (WIC) § 8102 because (at least in part) the firearms were still mostly the community property of both Lori and her husband. Furthermore, both state courts contemplated some future process (Penal Code § 33850 et seq.?) to avoid the forfeiture of the collection.

Nor are Lori's claims "inextricably intertwined" with the issues raised in the WIC § 8102 action. Most of them arose after San Jose ignored the Court of Appeal's order. Furthermore, there was no

opportunity to litigate wide-open constitutional claims within the context of the limited statutory and evidentiary rules of the *in rem* action that arises under WIC § 8102[2] hearings. *Rooker-Feldman* does not bar federal claims that a state court does not address. "[F]ederal plaintiffs cannot be said to have had a reasonable opportunity to raise their federal claims in state court where the state court declines to address those claims and rests its holding solely on state law." *Simes v. Huckabee* (8th Cir. 2004) 354 F.3d 823, 829.

Additionally, according to the Seventh Circuit, the proper inquiry under *Rooker-Feldman* is not whether the injury plaintiff(s) seeks to redress in federal court is 'intertwined' with the state court judgment but, instead, whether the injury sought to be redressed results from the state court judgment itself or out-of-court conduct. In the latter case (out-of-court conduct), *Rooker-Feldman* does not bar federal court litigation. *Iqbal v. Patel* (7th Cir. 2015) 780 F.3d 728. The City's refusal to comply with Penal Code § 33850 et seq., is out-of-court conduct and

[2] To find otherwise, would be to alter or amend California law in these hearings. Local governments would be at risk to pay attorney fees and costs to prevailing respondents and/or intervenors on counter-claims under 42 U.S.C. § 1983. Furthermore, California's rather informal evidentiary rules in these hearings would raise serious due process issues under any constitutional litigation theories.

makes up the gravamen of Lori's claims in this case.

The second test under *Exxon*, is that the federal plaintiff must complain of injuries caused by the state court judgment. Lori brought this action to federal court – in part – because the City of San Jose is injuring her by refusing to comply with the Sixth District's instruction to resolve the controversy. The fact that Lori believes that the state courts were wrong is beside the point. She accepted the injustice of the state court judgment, followed their instructions, complied with the regulatory process for the transfer and return of the firearms. Lori is seeking to reap the benefit of the state (appellate) court judgment.

The third requirement is that the federal court plaintiff must be asking the district court to review and reject the state court judgment. On the contrary, Lori came to federal court to compel the City's compliance (along with her constitutional claims) with the appellate court's directive to use Penal Code § 33850 et seq., to end the dispute.

Finally, both the state trial court and the state court of appeal filed judgments that contemplated further action by the parties to fully and finally resolve the matter. Lori Rodriguez took all the steps required of her by both courts. The City? Not so much. Its conduct after the state appellate court issued its opinion is both new conduct and a continuing

wrong. Thus the *Rooker-Feldman* Doctrine is not applicable to the specific claims raised by Lori Rodriguez.

B. The *Rooker-Feldman* Doctrine Does Not Apply to the Organizational Plaintiff-Appellants.

Rooker-Feldman is not applicable to the organizational litigants. They were not parties to the state court action. The doctrine applies only when the federal plaintiff was a party to the state action and is challenging the adverse decision by the state court. *Johnson v. De Grandy* (1994) 512 U.S. 997, 1005-1006. *See also: Bennett v. Yoshina* (9th Cir. 1998) 140 F.3d 1218, 1224.

C. The Affirmative Defense of Preclusion has been Waived.

Claim preclusion is an affirmative defense. It is waived if not raised. *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, (2005) 544 U.S. 280, 293. *See also: Clements v. Airport Auth. of Washoe County*, 69 F.3d 321, 328. The order below [ER 3:008-013] mentions no affirmative defenses raised by Defendants. No cross-appeal has been filed to preserve the issue. Defendant-Appellees cannot be rescued by boot-strapping the preclusion issue during supplemental briefing. "[G]enerally, an appellee waives any argument it fails to raise in its answering brief." *United States v. Dreyer*, 804 F.3d 1266, 1277 (9th Cir. 2015) (en banc).

D. The Plaintiff-Appellants' Claims are Not Precluded.

There is six criteria for analyzing the issue of claim preclusion, derived from *Lucido v. Superior Court*, (1990) 272 Cal. Rptr. 767 [cited in *White v. City of Pasadena*, 671 F.3d 918 (9th Cir. 2012)] They are:

(1) "[T]he issue sought to be precluded from relitigation must be identical to that decided in a former proceeding." Here – the issues are not identical. There was a change in the safe storage law while the state case was pending and there was a change in the characterization of the property after Lori transmuted title to the guns.

(2) [T]he issue to be precluded "must have been actually litigated in the former proceeding." Here – the only plausible issue that was actually litigated in both the state and federal action was the Second Amendment claim made prior to the administrative relief ordered by the court of appeal. That claim was rejuvenated, though not litigated in state court, after the decision by the Court of Appeals.

(3) [T]he issue to be precluded "must have been necessarily decided in the former proceeding." Here – due to the change of characterization of the property from mixed community, to Lori's sole and separate property, and due to the change in safe storage laws, the issues were not "necessarily decided" – nor have Lori's constitutional

torts and state law pendant claims (Penal Code § 33850 et seq.,) been adjudicated in state court.

(4) "[T]he decision in the former proceeding must be final and on the merits." Given that both the trial court and the court of appeal contemplated further legal actions by both Lori and the City of San Jose, the state action was not final, nor was it on the merits given the changes to the law and the change in ownership status of the guns. Nor was Lori able to raise constitutional counter-claims in a WIC § 8102 hearing as an intervenor.

(5) "[T]he party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding." Here – again, WIC § 8102 actions are *in rem*, and while Lori (but not SAF or CGF) was an intervenor in the state court action, the property itself was transmuted from mixed community to Lori's separate property after the Court of Appeal's decision. Furthermore, SAF and CGF were not parties to the state court action.

(6) Application of issue preclusion must be consistent with the public policies of "preservation of the integrity of the judicial system, promotion of judicial economy, and protection of litigants from harassment by vexatious litigation." Here – the public policy for a

simple, administrative procedure for returning firearms to law-abiding citizens is the public policy flaunted by the City of San Jose. It is the City of San Jose (with its deep pockets and platoon of lawyers) that is acting out the role of the vexatious litigant. During the WIC § 8102 hearing in August of 2013, the City's attorney admitted that it (and the court) was powerless to stop Lori from acquiring other firearms and storing them in her home in her California approved gun safe. [ER 6:071] She has been proposing this solution since April of 2013. [ER 11:158-162] All of the firearms now belong to Lori. She has jumped though all the hoops required by California law, through the procedure directed by the Court of Appeal. That should have ended the matter. It did not. The City of San Jose is still irrationally refusing to return Lori's property to her. [ER 11:153-217]

Neither Lori's, nor the organizational/institutional plaintiffs' claims are precluded by the state court matter.

IV. CONCLUSION

This matter should be decided on the merits, and not on a *Rooker-Feldman* or claim preclusion Hail Mary pass. Respectfully Submitted. January 7, 2019.

/s/ Donald Kilmer
Attorney for Appellant-Plaintiffs

CERTIFICATE OF COMPLIANCE

This brief complies with the Court's Order (DktEntry 53) as it does not exceed 15 pages. This brief has been prepared in proportionally spaced typeface using WordPerfect Version X8 in Century Schoolbook 14 point font.

Dated: January 7, 2019

/s/ Donald Kilmer
Donald Kilmer, Attorney for Appellants

NOTICE OF RELATED CASES

Plaintiff/Appellants are not aware of any pending cases in Northern District of California or the Ninth Circuit that could be related to this action.

Dated: January 7, 2019

/s/ Donald Kilmer
Donald Kilmer, Attorney for Appellants

CERTIFICATE OF SERVICE

On January 7, 2019, I served the foregoing **APPELLANTS' SUPPLEMENTAL BRIEF (By Order of the Court | DktEntry 53)** by electronically filing it with the Court's ECF/CM system, which generated a Notice of Filing and effects service upon counsel for all parties in the case. I declare under penalty of perjury that the foregoing is true and correct.

Executed January 7, 2019,

/s/ Donald Kilmer
Attorney for Appellants