UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

ARMAND COOK,

Plaintiff,

v. **Case No: 6:22-cv-1557-PGB-EJK**

JAMES FEURERSTEIN,

Defendant.

REPORT AND RECOMMENDATION

This cause comes before the Court on pro se Plaintiff's Amended Motion for Default Judgment (the "Motion") (Doc. 33), filed June 4, 2024. Upon consideration, I respectfully recommend that the Court deny the Motion and dismiss Plaintiff's Amended Complaint (Doc. 18), for the reasons set forth herein.

I. BACKGROUND[1]

Plaintiff, proceeding pro se, filed a Complaint on August 29, 2022, naming the State of Florida, Judge Wayne Shoemaker, and Attorney James F. Feurerstein[2] as

[1] On default, a defendant admits the well-pleaded allegations of fact in the complaint. *Eagle Hosp. Physicians, LLC v. SRG Consulting, Inc.*, 561 F.3d 1298, 1307 (11th Cir. 2009).

[2] The Court refers to Mr. Feurerstein as an attorney in this R&R because it appears he was a practicing attorney at the time he represented Plaintiff. However, the Court notes that he has since been disbarred from the Florida Bar. James F. Feuerstein III "Jim", The Florida Bar, https://www.floridabar.org/directories/find-mbr/profile/?num=708909 (last visited Nov. 7, 2024). The Court also notes that there is a spelling discrepancy between the way Plaintiff spells Mr. Feurerstein's name in the Complaint and the way it is spelled on the Florida Bar's website; however, the Florida Bar number Plaintiff identifies as belonging to Mr. Feurerstein matches that of the Florida Bar profile cited above.

Defendants. (Doc. 1.) After sua sponte review of the file, the undersigned issued a Report and Recommendation ("R&R") on the Complaint. (Doc. 16.) Plaintiff did not object and filed the operative Amended Complaint. (Doc. 18.) Subsequently, the Court adopted the R&R. (Doc. 20.) Plaintiff's Amended Complaint sues Attorney James F. Feurerstein and alleges as follows.

In June 2020, Plaintiff was charged by information with one count of domestic stalking, a Florida misdemeanor. (Doc. 18 at 2); *see also Florida v. Cook*, No. 2020-MM-004424-A-O (Fla. Orange Cnty. Ct. June 12, 2020).[3] Plaintiff was represented by Defendant. (Doc. 18 at 2–3.) Plaintiff alleges that, on October 14, 2020, Defendant emailed Plaintiff and advised that the prosecutor would not be dropping the charge against Plaintiff, but the State had offered Plaintiff 12 months of supervised probation and a withhold of adjudication. (*Id.*) The following day, Plaintiff responded via email and told his attorney he wanted to take his case to trial. (*Id.*)

Plaintiff alleges that the following February, Plaintiff was prepared to go to trial. (*Id.* at 3.) Defendant asked him again if Plaintiff "want[ed] to do the Withhold of Adjudication" and Plaintiff responded that he was not guilty. (*Id.*) Defendant then told

[3] The undersigned reviewed the docket of Plaintiff's underlying county court misdemeanor case to present a fuller description of the facts. The undersigned respectfully recommends the Court take judicial notice of the facts set forth in the online county court docket for Plaintiff's misdemeanor proceedings. Fed. R. Evid. 201(b)(2) (permitting a court to "judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned"); *see also Boyd v. Georgia*, 512 F. App'x 915, 917 (11th Cir. 2013) (unpublished) (finding district court did not abuse its discretion in taking judicial notice of plaintiff's state court proceedings).

Plaintiff "No Contest is another word for Not Guilty." (*Id.*) Plaintiff alleges he did not know what pleading no contest meant, and he did not understand he was waiving his right to a trial. (*Id.*) However, Plaintiff ultimately did enter a plea of no contest. (*Id.*) Based on this plea, on February 23, 2021, Judge Shoemaker entered a disposition of a withhold of adjudication. *Cook*, No. 2020-MM-004424-A-O (Fla. Orange Cnty. Ct. Feb. 23, 2021).

Plaintiff asserts claims against Defendant for a violation of his right to speedy trial and an ineffective assistance of counsel/legal malpractice claim,[4] both pursuant to the Sixth Amendment. (Doc. 18 at 1.) Defendant has been defaulted and Plaintiff now moves for default judgment. (Docs. 30, 33.)

II. STANDARD

A district court may enter a default judgment against a properly served defendant who fails to defend or otherwise appear. Fed. R. Civ. P. 55(b)(2). The mere entry of a default by the Clerk does not, in itself, warrant the Court's entering a default judgment. *See Tyco Fire & Sec. LLC v. Alcocer*, 218 F. App'x 860, 863 (11th Cir. 2007). Rather, a defaulted defendant is deemed to admit only the plaintiff's well-pled allegations of fact. *Id.* "Thus, before entering a default *judgment* for damages, the district court must ensure that the well-pleaded allegations in the complaint, which are

[4] The undersigned does not read Plaintiff's Amended Complaint to assert a state law claim for legal malpractice, based on the nature of Plaintiff's allegations. Moreover, the Amended Complaint does not plead the parties' citizenship for the Court to determine whether the parties are diverse.

taken as true due to the default, actually state a substantive cause of action and that there is a substantive, sufficient basis in the pleadings for the particular relief sought." *Id.* (emphasis in original).

"Once liability is established, the court turns to the issue of relief." *Enpat, Inc. v. Budnic,* 773 F. Supp. 2d 1311, 1313 (M.D. Fla. 2011). "Pursuant to Federal Rule of Civil Procedure 54(c), '[a] default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings,' and a court may conduct hearings when it needs to determine the amount of damages, establish the truth of any allegation by evidence, or investigate any other matter." *Id.* (citing Fed. R. Civ. P. 55(b)(2).) Where all the essential evidence is of record, an evidentiary hearing on damages is not required. *SEC v. Smyth,* 420 F.3d 1225, 1232 n.13 (11th Cir. 2005).

III. DISCUSSION

A. Service of Process

The Court previously determined that service was proper on Defendant by personal service. (Doc. 30.)

B. Jurisdiction and Venue

Federal question jurisdiction exists in civil actions arising under the Constitution, laws, or treaties of the United States. 28 U.S.C. § 1331. Here, Plaintiff has asserted claims pursuant to the Sixth Amendment to the United States Constitution. Venue is appropriate because a substantial amount of the activities forming the basis of the Amended Complaint occurred here. 28 U.S.C. § 1391(b)(2).

C. Liability

Plaintiff asserts claims against his former defense attorney for violations of his right to speedy trial and ineffective assistance of counsel, pursuant to the Sixth Amendment. (Doc. 18 at 1.) Constitutional violations are asserted through 42 U.S.C. § 1983. "To state a claim under § 1983, a plaintiff must allege the conduct complained of was committed by a person acting under color of state law, and the conduct deprived the plaintiff of rights, privileges, or immunities secured by the Constitution or laws of the United States." *Downey v. Duval Cnty. Jail*, No. 3:24-CV-508-MMH-LLL, 2024 WL 4433445, at *2 (M.D. Fla. Oct. 7, 2024). Plaintiff's claims therefore fail because Plaintiff's lawyer was not acting under color of state law while representing Plaintiff. *See Polk Cnty. v. Dodson,* 454 U.S. 312, 325 (1981). Even if Plaintiff's lawyer was court-appointed, that is still not enough to satisfy the statute. *Id.* ("[A] public defender does not act under color of state law when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding."). Since Plaintiff's Amended Complaint fails to demonstrate that his attorney acted under color of state law, I respectfully recommend that Plaintiff's claims be dismissed for failure to state a claim upon which relief may be granted.

D. Request for Relief

Plaintiff requests that this Court set aside his no contest plea and reverse his criminal case such that this case can be tried. (Doc. 18 at 5.) Plaintiff also requests damages for an unspecified amount. (*Id.*) To the extent that Plaintiff seeks to have this Court amend a criminal sentence issued by a state court, that relief is unavailable. This

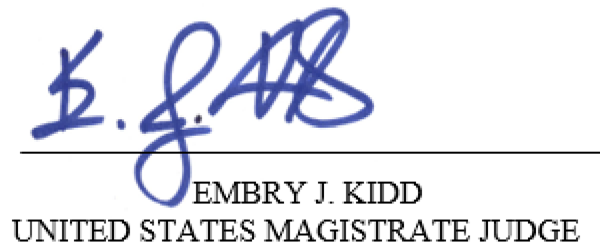
is because federal courts cannot act as appellate courts to issues decided by state courts. "The *Rooker-Feldman* doctrine is a jurisdictional rule that precludes federal district courts from reviewing 'cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments.'" *Macleod v. Bexley*, 730 Fed. App'x 845, 847 (11th Cir. 2018) (unpublished) (quoting *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005)). Plaintiff is not entitled to damages as he has failed to state a claim upon which relief may be granted.

IV. RECOMMENDATION

Upon consideration of the foregoing, I **RESPECTFULLY RECOMMEND** that the Court:

1. **DENY** Plaintiff's Amended Motion for Default Judgment (Doc. 33);
2. **DISMISS** Plaintiff's Amended Complaint for failure to state a claim upon which relief may be granted (Doc. 18); and
3. **DIRECT** the Clerk of Court to close the case.

Recommended in Orlando, Florida on November 8, 2024.



EMBRY J. KIDD
UNITED STATES MAGISTRATE JUDGE

NOTICE TO PARTIES

The party has **fourteen days** from the date the party is served a copy of this report to file written objections to this report's proposed findings and recommendations or to seek an extension of the fourteen-day deadline to file written objections. 28 U.S.C. § 636(b)(1)(C). A party's failure to file written objections waives that party's right to challenge on appeal any unobjected-to factual finding or legal conclusion the district judge adopts from the Report and Recommendation. *See* 11th Cir. R. 3-1; 28 U.S.C. § 636(b)(1).