IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-9535
(Summary Calendar)

JOHN F. CHAMBERS,

Plaintiff-Appellant,

versus

RICHARD STALDER, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
For the Eastern District of Louisiana

(92-CV-2551-M1)

(June 9, 1993)

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:[*]

Plaintiff-Appellant John F. Chambers, a prisoner of the State of Louisiana, proceeding pro se and in forma pauperis, instituted this civil rights suit against numerous state actors. He appeals the district court's decision to dismiss his action without

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[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

prejudice as frivolous because his complaint here states the same claims urged in a complaint filed in an earlier suit still pending before the court. Chambers also appeals the district court's refusal to grant him a default judgment. Finding no error in the refusal to grant the default judgment, we affirm. And, although we disagree with the collateral estoppel theory on which the district court based its dismissal of Chambers' action, and with the court's blanket characterization of the dismissal as being without prejudice, we modify the court's order of dismissal and, as modified, affirm.

I

FACTS AND PROCEEDINGS

Chambers filed a complaint pursuant to 42 U.S.C. § 1983 against Richard Stalder, Secretary of the Department of Corrections; Paul Fontenot, Deputy Secretary of Public Safety Services; Larry D. Smith, Deputy Secretary of Corrections; Linda Mouille Dawkins, Undersecretary of Public Safety Services; James Myles Leblanc, Undersecretary of the Department of Corrections; WCI Warden Ed Day; Deputy Warden Robert Tanner; Assistant Warden Thomas Joseph; Lieutenant Colonel J. W. Herron; R. W. Seal; Gary Crow; Lieutenant H. Owens; and Lynn Pigott. The magistrate judge reported that Chambers now raises the same legal arguments that had been raised in an earlier case pending before the district court, and recommended dismissing the case without prejudice as frivolous on grounds of collateral estoppel. The magistrate judge did not address the merits of Chambers' complaints. Over Chambers'

objections, the district court adopted the magistrate judge's report and recommendation, and dismissed Chambers' action without prejudice as frivolous.

II

ANALYSIS

Chambers argues that he raised claims cognizable for relief under § 1983 when he alleged that the defendants took "reprisals" against him for filing emergency administrative remedy procedures. Chambers does not challenge the propriety of the district court's dismissal of his action as frivolous due to collateral estoppel. Consequently, he does not address the proper issue on appeal. See Brinkmann v. Dallas County Deputy Sheriff Abner, 813 F.2d 744, 748 (5th Cir. 1987).

A complaint filed in forma pauperis may be dismissed by the court sua sponte if the complaint is frivolous. 28 U.S.C. § 1915(d). A complaint is "`frivolous where it lacks an arguable basis either in law or in fact.'" Denton v. Hernandez, ____ U.S. ___, 112 S.Ct. 1728, 1733, 118 L.Ed.2d 340 (1992) (citing Neitzke v. Williams, 490 U.S. 319, 325, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989)). We review a § 1915(d) dismissal for abuse of discretion. Denton, 112 S.Ct. at 1734.

Collateral estoppel bars a party's attempt to relitigate an issue that has been determined by a valid and final judgment. Hunt Oil Co. v. F.E.R.C., 853 F.2d 1226, 1233 (5th Cir. 1988). The district court determined that Chambers is collaterally estopped here because his complaint duplicates claims urged in an earlier-

filed suit pending before the court. As the pending case had not yet reached a final judgment, however, the district court's bar of collateral estoppel was at best premature and therefore erroneous. See Dillard v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 961 F.2d 1148, 1161 (5th Cir. 1992), cert. denied, 113 S.Ct. 1046 (1993).

Nevertheless, actions by state prisoners under 42 U.S.C. § 1983 that duplicate issues in pending federal suits may properly be dismissed as frivolous in favor of the earlier-filed case. Pittman v. Moore, 980 F.2d 994, 994-95 (5th Cir. 1993). Further, such dismissal should be without prejudice to the prosecution of the earlier suit, but with prejudice as to the successive suit. Id. at 995. Consequently, despite the district court's improper reason for ruling that Chambers' action is barred under collateral estoppel, the court properly determined that Chambers' action should be dismissed as frivolous for raising the same issues as those raised in an earlier-filed case then pending before the district court. We therefore affirm the district court's dismissal of Chambers' action, but modify that dismissal to reflect that it is without prejudice as to the prosecution of Chambers' earlier suit, but otherwise is with prejudice.

Chambers also appears to challenge the district court's denial of his motion for default judgment against the defendants. Fed. R. Civ. P. 12(a) allows a defendant twenty days following service of summons and complaint within which to answer. Chambers filed his complaint on July 31, 1992, and defendants received

notice of the complaint on or about August 4, 1992. When Chambers filed his motion for default judgment on August 11, 1992, the defendants' twenty days within which to file a responsive pleading had not expired. Consequently, the district court properly denied Chambers' motion for default judgment. See Rauscher Pierce Refsnes, Inc. v. F.D.I.C., 789 F.2d 313 (5th Cir. 1986) (default judgment improper when FDIC answered within the sixty-day time period provided under Rule 12(a)). Chambers' claim for a default judgment is without merit.

AFFIRMED.