IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 93-1362
Summary Calendar

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BOB E. BAILES,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

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Appeal from the United States District Court for the
Northern District of Texas
(3:92 CV 2544 X)

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(October 20, 1993)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

The instant appeal has its roots in an earlier pro se complaint (Appeal No. 92-1760) filed by the appellant, Bob E. Bailes, a federal prisoner, under the Federal Tort Claims Act (FTCA), after certain items of personal property, initially mailed from one federal correction institution to another, were allegedly damaged or lost. The district court, dismissing the complaint and

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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 Pursuant to that Rule, the court has determined that this opinion should not be published.

granting the government's motion for summary judgment, held that Bailes failed to overcome the government's summary judgment evidence, which demonstrated that Bailes had never mailed his administrative claim and thus had not exhausted administrative procedures. This court affirmed. See Bailes v. U.S., No. 92-1760 (5th Cir. March 11, 1993) (unpublished).

Before appeal No. 92-1760 was decided, Bailes filed the instant complaint under the FTCA, alleging that mailroom staff at the Bureau of Prisons (BOP) committed "acts of omission and . . . negligence" when they failed to "mail out" the previous FTCA claim, resulting in the dismissal of his complaint for failure to exhaust administrative remedies. Alternatively, Bailes alleged that, if the BOP staff did mail out the claim, then the Regional Office falsified affidavits in order to get claim No. 92-1760 dismissed. Bailes made requests for admissions and production of documents.

The government filed a motion to dismiss or, alternatively, for summary judgment and a motion to stay responses to discovery. The government contended that Bailes had raised the same issue in case No. 92-1760 and that he was collaterally estopped from raising it again. The government attached copies of the district court's order dismissing the complaint in case No. 92-1760, an order denying Bailes's motion for reconsideration, and Bailes's appellate brief in case No. 92-1760.

After this court affirmed in appeal No. 92-1760, the district court granted the government's motion to dismiss, holding that

Bailes was collaterally estopped from relitigating the same issue.

Bailes has filed a timely notice of appeal, noting that he had not seen, nor been served with, a copy of the government's motion to dismiss and/or summary judgment.

I

Bailes argues that collateral estoppel does not apply, in part, because the instant FTCA claim is completely unrelated to his previous one, which was filed to recover damages for personal property. He restates the argument in his reply brief. This argument has no arguable merit and is thus frivolous. See Howard v. King, 707 F.2d 215, 219-20 (5th Cir. 1983). That the first claim was filed to recover damages for Bailes's personal property is not determinative of whether collateral estoppel applies in this case.

Dismissal on grounds of collateral estoppel, or "issue preclusion," see, e.g., Terrell v. DeConna, 877 F.2d 1267, 1270 (5th Cir. 1989), requires the following three elements: (1) the issue at stake must be identical to the one involved in the prior litigation; (2) the determination of the issue in the prior litigation must have been a critical, necessary part of the judgment in that earlier action; and (3) special circumstances must not exist which would render preclusion inappropriate or unfair. Texas Pig Stands, Inc. v. Hard Rock Cafe Int'l, Inc., 951 F.2d 684, 691 (5th Cir. 1992). For reasons set forth below, there are no

special circumstances that would render inappropriate or unfair the government's invocation of collateral estoppel.

Whether Bailes mailed or properly presented the claim to the Bureau of Prisons was an issue critical to the relief sought in both claims. The district court previously ruled that Bailes failed to offer evidence to rebut affidavits filed by the government that his first FTCA claim was never mailed. The issues raised in Bailes's second FTCA claim, i.e., whether the government's affidavits were false and conspiratorial or, alternatively, whether mailroom staff were negligent for failure to mail his first claim, is directly precluded by the district court's previous ruling. Bailes is doing no more than using a new FTCA suit to challenge a dismissed one.

Bailes argues further that, because his previous FTCA claim was dismissed "without prejudice," collateral estoppel does not apply. This argument, which he repeats in his reply brief, is patently frivolous.

The first claim was dismissed "without prejudice to [Bailes's] right to *refile and exhaust* the proper administrative procedures, *subject to any applicable statute of limitations.*" (Emphasis added). The dismissal was not "without prejudice" to the issue decided on the merits, i.e., that the filing in that case was not valid because the claim was not properly presented to the administrative agency. It is precisely that issue, together with the factual determinations required to determine it, that is

subject to collateral estoppel in subsequent filings. See Texas Pig Stands, 951 F.2d at 691. To hold otherwise would render meaningless the order and affirmance in appeal No. 92-1760.

II

Bailes further argues that he was never notified by the government or the clerk that a motion to dismiss or for summary judgment had been filed.

Rule 56(c) requires that the motion "shall be served at least 10 days before the time fixed for the hearing." See Isquith v. Middle South Utilities, Inc., 847 F.2d 186, 195-96 (5th Cir.), cert. denied, 488 U.S. 926 (1988). "Service . . . shall be made by delivering a copy to the attorney or party or by mailing it to the party's last known address or, if no address is known, by leaving it with the clerk of the court . . . Service by mail is complete upon mailing." Fed. R. Civ. P. 5(b). The government indicated in its certificate of service that the motion was served by first-class mail on February 25, 1993, the day it was filed in district court. The hearing was conducted on March 18, 1993, about three weeks later. Bailes thus had timely notice by mail service, the only "notice" to which he was entitled. Further, because Bailes's address was known, that the clerk did not notify him is of no moment.

Bailes elaborates for the first time in his reply brief that the government knowingly withheld the motion from him in order to defraud the court and prevail on grounds of collateral estoppel.

Bailes also moves to supplement the record with a purported copy of a request for return receipt, containing the handwritten "not delivered or received" and "no records." The request contains a signature, allegedly that of the Assistant U.S. Attorney.

Issues raised for the first time in an appellate reply brief need not be considered. U.S. v. Prince, 868 F.2d 1379, 1386 (5th Cir.), cert. denied, 493 U.S. 932 (1989). Bailes's motion, appended to his reply brief, is therefore improper. Further, this court "will not ordinarily enlarge the record on appeal to include material not before the district court." U.S. v. Flores, 887 F.2d 543, 546 (5th Cir. 1989) (citation omitted). Bailes's request to supplement the record is denied.[1]

III

Bailes argues that the district court's order of summary judgment without considering the government's admissions on material issues of fact was reversible error. This argument is frivolous.

Bailes requested in the instant claim, inter alia, that the government admit that the first claim was received by the Bureau of Prisons staff but that it was later destroyed. He also requested, inter alia, that the government produce a copy of the mail room records and other documents related to the investigation following

[1] A similar motion to supplement, in connection with a reply brief, was denied in appeal No. 92-1760. See Bailes, No. 92-1760 (5th Cir. March 11, 1993) (unpublished)

the filing of his initial claim. Because the government failed to respond to Bailes's requests, he considers the requests "admitted." See Fed. R. Civ. P. 36. However, the government moved to stay any responses to discovery until 30 days after the district court ruled on its motion. The district court did not rule on the motion before granting the government's motion to dismiss.

Summary judgment must generally follow "adequate time for discovery." See Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The district court, however, has discretion to decide whether discovery will benefit a non-movant's attempt to defend a motion for summary judgment and may rule on the motion without it. See International Shortstop, Inc. v. Rally's, Inc., 939 F.2d 1257, 1266 (5th Cir. 1991), cert. denied, 112 S.Ct. 936 (1992) (ruling on a Fed. R. Civ. P. 56(f) motion). Bailes's request for discovery pertained to facts already determined in the first FTCA claim as a consequence of his failure to rebut the evidence set forth in the government's affidavits. Bailes's argument that he should have obtained by "admissions" what was decided against him in previous litigation is frivolous indeed. Contrary to his argument, no material facts remained to defeat a motion for summary judgment. See Bache v. American Tel. & Tel, 840 F.2d 283, 287 (5th Cir. 1987), cert. denied, 488 U.S. 888 (1988). As indicated by the district court's ruling on the merits, because Bailes was collaterally estopped to raise the issue whether his

claim was mailed and received, discovery lodged to resurrect the issue was moot.

IV

Bailes also contends that the district court lacked venue to consider his claim. This argument is frivolous. It seems thoroughly contradictory for Bailes to be arguing on appeal that the district court in which he chose to file suit was the wrong venue. Unsurprisingly, his assertion is false. Bailes states that he resides in Tarrant County. Tarrant County is in the Northern District of Texas. 28 U.S.C. § 124(a)(2). The suit was filed "in the judicial district where the plaintiff resides." 28 U.S.C. § 1402(b).

V

Bailes argues that the magistrate judge lacked authority to enter judgment on matters under the FTCA, pointing to the magistrate judge's order granting him IFP status in the district court. Bailes argues further that, in the light of this asserted argument, the district court had no jurisdiction to rule on the government's motion to dismiss and/or summary judgment and that, consequently, this court has no jurisdiction over this appeal. This argument is frivolous.

A magistrate judge may be designated by the district court to hear and determine any pretrial matter pending before the court, provided that the matter does not involve certain final dispositions, including motions for summary judgment. See 18

U.S.C. § 636(b)(1)(A). Before the magistrate judge may enter judgment in such cases, there must be express written "consent of the parties." See 18 U.S.C. § 636(c)(1). Consent was not required in Bailes's case, however, because the magistrate judge did not make a final disposition. The magistrate judge merely issued an order to proceed IFP, a pretrial matter. Bailes' reliance on Tripati v Rison, 847 F.2d 548 (9th Cir. 1988), even if it were binding on this court, is misplaced. Tripati holds that *denial* of IFP by a magistrate judge is a final judgment which requires express consent of the parties in order to be valid. Bailes, however, was not denied IFP.

VI

For reasons set forth above, this appeal should be dismissed as frivolous. See Howard, 707 F.2d at 219-20; 5th Cir. R. 42.2. "An appeal is frivolous if the result is obvious or the arguments of error are wholly without merit." Coghlan v. Starkey, 852 F.2d 806, 811 (5th Cir. 1988). Stated differently, an appeal is frivolous if the claim advanced is unreasonable or is not brought with a reasonably good faith belief that it is justified. Clark v. Green, 814 F.2d 221, 223 (5th Cir. 1987).

A federal appellate court can impose sanctions against litigants filing frivolous appeals, including damages and single or double costs to the appellee. See Fed. R. App. P. 38; Clark, 814 F.2d at 223. Although pro se litigants are not held to the standard of professionals, they are not allowed to raise totally

frivolous appeals. Clark, 814 F.2d at 223. See Brinkmann v. Johnston, 793 F.2d 111, 113 (5th Cir. 1986). Instead of imposing sanctions, we warn Bailes that the filing of frivolous appeals in the future will result in sanctions, such as financial penalties and limited access to the judicial system. See, e.g., Smith v. McCleod, 946 F.2d 417, 418 (5th Cir. 1991).

VII

For the reasons stated herein, this appeal is dismissed as frivolous. See Fed. R. App. P. 34(a)(1) and 5th Cir. R. 42.2.

D I S M I S S E D.