UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 93-3554

(Summary Calendar)

MARY DUGAN,

Plaintiff-Appellant,

versus

CAVENHAM FOREST
INDUSTRIES, INC., ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA-92-0311 "G" (3))

(July 27, 1994)

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

PER CURIAM:[*]

Appellant, Mary Dugan, brought suit in the district court against her former employers))Cavenham Forest Industries, Inc. ("CFI") and Crown Zellerbach Corporation ("CZ")))for declaratory, monetary, and injunctive relief. Dugan alleged that CFI and CZ violated provisions of the Employment Retirement Income Security Act of 1974 ("ERISA") by failing to pay her certain benefits due

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[*] Local Rule 47.5.1 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

upon her involuntary separation from employment. The district court dismissed Dugan's claims with prejudice because this Court's decision in *Harms v. Cavenham Forest Industries, Inc.*, 984 F.2d 686 (5th Cir.), *cert. denied*, __ U.S. __, 114 S. Ct. 382, 126 L. Ed. 2d. 331 (1993), demonstrated that Dugan had already received all the relief to which she was entitled. Dugan appeals, alleging that the district court erred in dismissing her claims for injunctive relief and 90-day notice and retention benefits since the judgment in *Harms* is not *res judicata* as to those claims. We affirm the district court.

I

CZ enacted Supplement C of its Retirement Plan))providing for enhanced benefits to employees))to dissuade a possible hostile takeover. According to CZ's Retirement and Severance Plans, a significant change in control of CZ stock would trigger enhanced retirement and severance benefits for CZ employees. These enhanced benefits served as a potential liability that reduced the net value of CZ's assets to hostile bidders. Despite this tactic, CZ was taken over, its operations were split up and sold off, and CFI acquired CZ's timber and wood products division. One day after CFI's acquisition, CZ amended its Retirement Plan to eliminate Supplement C's enhanced retirement benefits. Some of CZ's employees, including Mary Dugan, were transferred to CFI and were involuntarily separated from their employment approximately one year later.

Dugan then filed suit against CZ and CFI to obtain:

(a) injunctive relief))enjoining CZ to transfer funds to CFI to pay for employee benefits; and

(b) 90-day notice and retention benefits under Part III of CZ's Severance Plan))wages, severance benefits, and retirement benefits that would have accrued if CFI had extended Dugan's employment by giving her 90-days notice of involuntary separation.[1]

Dugan alleged that CFI owed her the above described benefits pursuant to ERISA, 29 U.S.C. §§ 1001 *et seq.*, because CFI had involuntarily separated her from employment and had assumed liability for paying employee benefits.

In the related case of *Harms v. Cavenham Forest Industries, Inc.*, six former employees of CZ brought suit against CFI for injunctive relief, enhanced retirement benefits, and enhanced severance benefits. Prior to the final judgment in *Harms*, Dugan and CFI agreed to consolidate their suit with *Harms* because both suits essentially involved the same claims. The parties stipulated that "the only remaining issue in *Dugan* [was] whether or not *Dugan* satisfie[d] certain conditions of the plan in order to be entitled to the claimed additional benefits and whether or not her claim was presented on a timely basis or [was] barred by a statute of limitations." Record Excerpt 10 at 2. Later, the parties agreed to unconsolidate their case from *Harms* and administratively closed

[1] At trial, Dugan claimed that she was also entitled to enhanced retirement and severance benefits under Supplement C of CZ's Retirement Plan and Part III of CZ's Severance Plan. These benefits are not at issue on appeal.

their suit pending an appeal in *Harms* since "the resolution of *Dugan* was dependent, in part, upon facts, separate and distinct from *Harms* . . . [although] the resolution of the legal issues in *Harms* equally appl[ied] to *Dugan*." Record at 232. Because Dugan's suit was administratively closed before CFI was served, CFI never had the opportunity to answer Dugan's complaint.

After we affirmed the judgment in *Harms*, the district court reopened this case and ordered the parties to submit briefs on any unresolved legal issues. Dugan alleged that the issues of injunctive relief and 90-day notice and retention benefits remained unresolved. In light of the *Harms* decision, the district court held that Dugan's claim for injunctive relief was barred by *res judicata* because it had already been unsuccessfully litigated by the *Harms* plaintiffs. Moreover, the court held that Dugan was not entitled to 90-day notice and retention benefits because *Harms* determined that "only one benefit is available under Section III of the Involuntary Separation Plan: Paid Terminal Leave."[2] Because Dugan had already received paid terminal leave, the district court ordered no additional relief and dismissed Dugan's claims with prejudice. We affirm.

II

Dugan argues that the district court erred by holding that her claims for injunctive relief and 90-day notice and retention

[2] Paid terminal leave is a "leave of absence during which time the employee receives compensation but is not an active employee and does not have an assigned position and is not expected to return to work." Record at 55.

benefits are barred by *res judicata*. Specifically, Dugan argues that this case and *Harms* do not involve the same parties and causes of action.[3] The elements of *res judicata* are: (1) the parties must be identical in both suits; (2) the prior judgment must be rendered by a court of competent jurisdiction; (3) there must be a final judgment on the merits; and (4) the same cause of action must be involved in both cases. *Meza v. General Battery Corp.*, 908 F.2d 1262, 1265 (5th Cir. 1990) (citing *Howell Hydrocarbons, Inc. v. Adams*, 897 F.2d 183, 188 (5th Cir. 1990)). We review the issue of *res judicata de novo*. *Medina v. I.N.S.*, 993 F.2d 499, 502 (5th Cir. 1993); *Schmueser v. Burkburnett Bank*, 937 F.2d 1025, 1031 (5th Cir. 1991).

A

Dugan contends that the issues raised in this case and *Harms* do not satisfy the "same cause of action" element of *res judicata*. The district court explicitly held that the same issues were raised in *Harms* and in this case:

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[3] Dugan also argues that the district court erred in precluding her claims for relief because CFI never pleaded *res judicata* as required by Federal Rule of Civil Procedure 8(c). Rule 8(c) states: "In a pleading to a preceding pleading, a party shall set forth affirmatively . . . res judicata . . . and any other matter constituting an avoidance or affirmative defense." FED. R. CIV. P. 8(c). However, a district court may raise the issue of *res judicata sua sponte* when it serves the interests of judicial economy and "the previous action had been brought before a court of the same district, even though the record contained neither the complaint nor the order of dismissal in the earlier action." *Nagle v. Lee*, 807 F.2d 435, 438 (5th Cir. 1987); *see Burrell v. Newsome*, 883 F.2d 416, 418 (5th Cir. 1989) (holding that we are not prevented from considering affirmative defenses invoked *sua sponte* by district courts). The same district court heard *Harms* and this case. Thus, under the rule announced in *Nagle*, we find Dugan's argument unpersuasive.

> [Dugan] alleges issues of fact and law nearly identical to those involved in *Harms* . . . [and] the complaints in this case and in *Harms* are essentially the same. In both cases, the plaintiffs claim that they were denied the same benefits under the same severance and retirement plans by the same defendants, all in violation of ERISA.

Record at 4, 5. Dugan has the burden of showing that the record does not support the district court's conclusion and she must do this by including in the record all evidence relevant to conclusions unsupported by the evidence. *See* FED. R. APP. P. 10(b)(2) (requiring appellant to include evidence in record that shows why district court's holding is unsupported by evidence); *cf. McDonough v. M/V Royal Street*, 614 F.2d 1300, 1304 (5th Cir. 1979) (affirming district court where appellant failed to provide transcript of testimony). Dugan alleges that her claims arise from facts "separate and distinct" from *Harms*, but she has failed to identify what specific facts in the record distinguish her claims from *Harms*. Dugan's argument is without merit.

B

Dugan also argues that the district court erred in dismissing her case because she was not a party to the *Harms* suit, nor was she in privity with the plaintiffs in *Harms*. Thus, Dugan alleges that CFI has not met the "identity of parties" element of *res judicata*, and *Harms* should not preclude her from raising claims for injunctive relief and 90-day notice and retention benefits.

Generally, only identical parties are subject to *res judicata*. *See* 18 CHARLES A. WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE, § 4449 (1981). However, a nonparty may be precluded from relitigating claims if she is in privity with a named party who litigated the

same cause of action in an earlier suit. *Russell v. Sunamerica Securities Co.*, 962 F.2d 1169, 1173 (5th Cir. 1992). A nonparty is in privity with a party in a prior suit when: (1) the nonparty has succeeded to a party's interest in property; (2) the nonparty controlled the original suit and will be bound by the judgement; or (3) the nonparty's interests were represented adequately by a party in the original suit. *Freeman v. Lester Coggins Trucking*, 771 F.2d 860, 864 (5th Cir. 1985). Adequate representation))the third type of privity identified above))sometimes "refers to the concept of virtual representation, by which a nonparty may be bound because the party to the first suit is so closely aligned with his [the nonparty's] interests as to be his virtual representative." *Id*. (quoting *Aerojet-General Corp. v. Askew*, 511 F.2d 710, 719 (5th Cir.), *cert denied*, 423 U.S. 908, 96 S. Ct. 210, 46 L. Ed. 2d 137 (1975)). Virtual representation requires more than parallel interests or the use of the same attorney in both suits. *Id*. Instead, virtual representation is to be "kept within strict confines," *Meza*, 908 F.2d at 1272, and it "demands the existence of an express or implied legal relationship in which parties to the first suit are accountable to nonparties who file a subsequent suit raising identical issues." *Pollard v. Cockrell*, 578 F.2d 1002, 1008 (5th Cir. 1978). If a nonparty plaintiff consents to be bound by the judgment of another trial, the nonparty plaintiff has developed a sufficient legal relationship with the party plaintiff to be virtually represented. *See In re Navigation Technology Corp*., 880 F.2d 1491, 1494 (1st Cir. 1989) (noting that *res*

judicata applies when nonparty expressly or impliedly consents to be bound by outcome of trial); *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 40 (1982) (stating that "[a] person who agrees to be bound by the determination of issues in an action between others is bound in accordance with the terms of his agreement"). Thus, if a nonparty plaintiff stipulates that certain claims will be resolved by a separate trial, then the nonparty plaintiff is virtually represented by the party plaintiff, and the stipulated claims are barred from relitigation in subsequent proceedings. *Cf*. 18 CHARLES A. WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE, § 4453 (1981) (stating that reliance on "actual consent to be bound, may fairly be treated as an aspect of preclusion by judgment").

Dugan and CFI made a joint motion for administrative closure of their case pending the resolution of *Harms*. In that motion, the parties stipulated that "the only remaining issue is whether or not *Dugan* satisfies certain conditions of the plan in order to be entitled to the claimed additional benefits and whether or not her claim was presented on a timely basis or is barred by a statute of limitations." Record Excerpt 10 at 2. This stipulation reflects the parties' intent to litigate only whether Dugan met the eligibility requirements of CZ's plans, and whether Dugan had avoided the prescriptive effect of the statute of limitations. CFI concedes that these two matters should be resolved in favor of Dugan. Thus, the stipulation evidences Dugan's express consent to be bound by the determinations of the *Harms* court as to the claims

of injunctive relief and notice and retention benefits. Dugan was, therefore, virtually represented by the plaintiffs in *Harms*.

All elements of *res judicata* have been established by the facts of this case, and Dugan's claims for injunctive relief and 90-day notice and retention benefits are barred from relitigation.

III

We need not address Dugan's specific ERISA arguments because we find that her relitigation of claims against CZ and CFI is barred by *res judicata*. For the forgoing reasons, the judgment of the district court is **AFFIRMED**.