UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-20089
Summary Calendar

VICTOR C. JOSE,

Plaintiff-Appellant,

VERSUS

UNITED ENGINEERS & CONSTRUCTORS, INC., ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
For the Southern District of Texas

(CA-H-93-2864)

(November 30, 1994)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:[*]

BACKGROUND

Following his termination by United Engineers and Constructors, Inc. ("United"), Victor C. Jose filed a pro se employment discrimination action against United in the federal district court for the District of Colorado. On January 29, 1993,

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

that suit was dismissed, without prejudice, on Jose's own motion. Prior to the voluntary dismissal, Jose had filed another suit against United, based on the same claims and facts, in the federal district court for the Southern District of Texas. The Texas district court transferred this suit back to the Colorado district court where venue was proper. The Colorado district court later dismissed the action with prejudice because Jose had failed to comply with several court orders and rules and had essentially refused to participate in the action because he protested venue.

Prior to the Colorado district court's dismissal, Jose filed a suit on July 19, 1993, in Texas state court, against United and United's parent company, Raytheon Company ("Raytheon"). This suit was based on the same facts as the previous suits, but also included a claim brought under the Texas Deceptive Trade Practices Act, Tex. Bus. & Com. Code Ann. § 1741 et. seq. ("DTPA"). The defendants removed the state court action to the district court for the Southern District of Texas on the basis of diversity jurisdiction.

The defendants filed a motion for summary judgment, asserting among other things that Jose's lawsuit was barred by res judicata. The district court granted the defendants' motion for summary judgment and dismissed the suit.

OPINION

Jose presents no convincing argument that the district court erred in granting summary judgment to the defendants on res judicata grounds.

We review summary judgments de novo, under the same standards the district court applies on a motion for summary judgment. Amburgey v. Corhart Refractories Corp., 936 F.2d 805, 809 (5th Cir. 1991). Summary judgment is proper when, viewing the evidence in the light most favorable to the non-movant, "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Id.; Fed. R. Civ. P. 56(c). Rule 56(e) of the Federal Rules of Civil Procedure provides that "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of [his] pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial."

The bar of res judicata applies only if four requirements are met: "(1) the parties must be identical in both suits; (2) the prior judgment must have been 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." Howell Hydrocarbons, Inc. v. Adams, 897 F.2d 183, 188 (5th Cir. 1990) (citation omitted). Under res judicata analysis, "cause of action" is defined to include all claims that were or could have been brought in a prior action based on the same transaction. See Nilsen v. City of Moss Point, Miss., 701 F.2d 556, 560 (5th Cir. 1983).

Each of these elements is satisfied by the summary judgment evidence in this case. First, Jose does not argue that there was no identity of the parties between the Colorado district court

lawsuit and this case.[1] Second, although he attempts to challenge both the transfer of the earlier action to the district court in Colorado and that court's judgment of dismissal,[2] Jose fails to advance a nonfrivolous argument that the Colorado district court did not possess jurisdiction over his suit. Third, the Colorado district court's dismissal with prejudice for failure to comply with court rules operates as a judgment on the merits. See Fed. R. Civ. P. 41(a). Finally, both suits involve the same cause of action for res judicata purposes. At the heart of both suits is the conduct of United in allegedly forcing Jose from his employment. Although Jose's second suit added a claim under the Texas DTPA, the Colorado district court could have exercised supplemental jurisdiction over that claim pursuant to 28 U.S.C. § 1367(a) ("in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of

[1] The identity of the parties test is met in this case because Raytheon, which was not a party to the earlier litigation, is in privity with United, its wholly owned subsidiary. R. 43; see Howell Hydrocarbons, 897 F.2d at 188 ("A non-party is in privity with a party for res judicata purposes in three instances: (1) if [it] is a successor in interest to the party's interest in the property; (2) if [it] controlled the prior litigation; or (3) if the party adequately represented [its] interests in the prior proceeding.") (citation omitted).

[2] The record does not reflect that Jose appealed that dismissal at the time.

the same case or controversy under Article III of the United States Constitution.").[3]

Jose chose not to comply with the Colorado district court's rules but rather filed a second suit in Texas state court while his original case was still pending. "[W]hen one has a choice of more than one remedy for a given wrong, here the . . . discharge, he or she may not assert them serially, in successive actions, but must advance them all at once on pain of bar." Langston v. Insurance Co. of North America, 827 F.2d 1044, 1048 (5th Cir. 1987).

Because the elements of res judicata are satisfied, we AFFIRM the district court's grant of summary judgment.

[3] Moreover, recovery under the DTPA is limited to consumers. See Parkway Co. v. Woodruff, 857 S.W.2d 903, 908 (Tex. Ct. App. 1993). To establish consumer status under the DTPA, Jose must show that he sought or acquired goods or services by purchase or lease. Tex. Bus. & Com. Code. Ann. § 17.45(4). As the district court pointed out, Jose's DTPA claim arises out of his status as an employee, and "[t]herefore, as a matter of law, [Jose's] claim fails because he is not a consumer as defined by DTPA." R. 281.