UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20640
Summary Calendar

DILIP KUMAR PAUL, ET AL.,

Plaintiffs,

DILIP KUMAR PAUL,

Plaintiff-Appellant,

versus

PARSONS, BRINKERHOFF, QUADE, and DOUGLAS, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas (CA-H-92-2429 c/w 92-2792)

(April 28, 1995)

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:[1]

Dilip Kumar Paul appeals, *pro se*, the dismissal of his *qui tam* action under the False Claims Act, 31 U.S.C. §§ 3730, *et seq*. We **AFFIRM**.

I.

Paul was employed by PB-KBB, an engineering firm, in May 1981. In June 1982, PB-KBB and Parsons, Brinkerhoff, Quade & Douglas,

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[1] 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 Pursuant to that rule, the court has determined that this opinion should not be published.

Inc. (PBQ&D), formed a joint venture (PB/PB-KBB) and entered into a contract with Battelle Memorial Institute (BMI) to provide architectural and engineering design services for the construction of exploratory shafts to investigate geological features of potential nuclear waste disposal sites in salt formations. BMI assigned the contract to the United States Department of Energy (DOE), and PB/PB-KBB submitted claims for payment to DOE.

Paul was assigned to work as a mining engineer on the joint venture project in June 1982; was transferred to another division of PB-KBB that July; and was discharged that August. *See* ***Paul v. P.B.-K.B.B., Inc.***, 801 S.W.2d 229, 229 (Tex. Ct. App. 1990). He filed suit against PB-KBB in Texas state court, claiming that he was wrongfully discharged for his unwillingness to commit an illegal act, alleging that the preliminary study regarding the shaft design "could've killed people", and that he was fired for his objections to that project. ***Id***. The jury's verdict in favor of PB-KBB was affirmed on appeal in 1990. ***Id***. at 230.

In August 1992, Paul filed a *qui tam* complaint, pursuant to the False Claims Act (FCA), against PB-KBB and PBQ&D, claiming that they knowingly presented, or caused to be presented, false or fraudulent claims to the United States Government. After he filed a similar complaint against BMI, the two actions were consolidated. The Government declined to intervene. The defendants moved to dismiss, asserting, *inter alia*, that the action was barred by *res judicata*; and the district court agreed. ***United States ex rel.***

Paul v. Parsons, Brinkerhoff, Quade & Douglas, Inc., 860 F. Supp. 370 (S.D. Tex. 1994).

II.

Paul contends that *res judicata* does not bar his action because (1) the state court judgment was void; (2) the parties to the federal and state actions are not the same; and (3) the two actions do not constitute the same cause of action.

The application of *res judicata* is an issue of law which we review *de novo*. *E.g.*, ***Schmueser v. Burkburnett Bank***, 937 F.2d 1025, 1031 (5th Cir. 1991). "When applying the doctrine of res judicata we look to the effect that a Texas state court would give to a prior Texas state court judgment." ***Id***. at 1031. Under Texas law,

> an existing final judgment rendered upon the merits by a court of competent jurisdiction upon a matter within its jurisdiction is conclusive of the rights of the parties in all other actions on the points at issue and adjudicated in the first suit. Further, the rule of res judicata in Texas bars litigation of all issues connected with a cause of action or defense which, with the use of diligence, might have been tried in a former action as well as those which were actually tried.

Id. (quoting ***Abbott Laboratories v. Gravis***, 470 S.W.2d 639, 642 (Tex. 1971)).

A.

Paul contends that the state judgment was not a final judgment on the merits, but instead was void, because the state court lacked subject matter and *in personam* jurisdiction over indispensable parties; and that PB-KBB fraudulently obtained the judgment. Because he did not raise these issues in the district court, we

decline to exercise our discretion to consider them. *See* ***Highlands Ins. Co. v. National Union Fire Ins. Co.***, 27 F.3d 1027, 1031-32 (5th Cir. 1994) (applying, in civil case, plain error analysis of ***United States v. Olano***, ___ U.S. ___, 113 S. Ct. 1770 (1993)), *cert. denied*, ___ U.S. ___, 115 S. Ct. 903 (1995).

B.

Next, Paul contends that there is no identity of parties because PBQ&D and BMI were not parties to the state action.[2] The identity-of-parties test is satisfied, not only as to parties to the earlier litigation, but also as to those in privity with them. *See* ***Soto v. Phillips***, 836 S.W.2d 266, 269 (Tex. Ct. App. 1992).

Paul asserts that PBQ&D and PB-KBB are jointly and severally liable as joint venturers, and that BMI, as general contractor, is vicariously liable for the actions of its subcontractor, PB/PB-KBB. As the district court noted, the allegations against the defendants are "virtually identical". 860 F. Supp. at 373. We agree with the district court that there is privity among the defendants. *See* ***Soto***, 836 S.W.2d at 270 ("When the allegation is that the parties were in a vicarious relationship, ... a judgment for the principal bars a later suit against the agent").

C.

Finally, Paul contends that "the claims in the instant case are different than those tried in the Texas state court". He

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[2] For the first time on appeal, Paul asserts that the Government is a party to the suit and was not in privity with the parties to the state action. Even if we were to exercise our discretion to consider this assertion, we would find it frivolous, because the Government declined to intervene in this action.

maintains that he could not have asserted his FCA claims in the state action because federal courts have exclusive jurisdiction over such claims.

> [U]nder Texas law a different cause of action is one that proceeds not only on a sufficiently different legal theory but also on a sufficiently different factual footing as not to require the trial of facts material to the former suit; that is, an action that can be maintained even if all the disputed factual issues raised in the plaintiff's original complaint are conceded in the defendant's favor .... A different cause of action is not merely a different theory of recovery; it should differ in the theories of recovery, the operative facts, and the measure of recovery.

Hogue v. Royse City, TX, 939 F.2d 1249, 1253 (5th Cir. 1991) (internal quotation marks and citations omitted).

Paul's FCA action arises from the same operative facts which gave rise to the prior state action -- activities connected to the contract between BMI and the joint venture regarding preliminary designs for nuclear waste disposal shafts. In his state action, Paul alleged that he was discharged because he refused to commit the illegal act of certifying the plans and specifications for the preliminary design. ***Paul***, 801 S.W.2d at 229-30. In the instant action, Paul alleges that PBQ&D and BMI participated with PB-KBB in committing the illegal acts of certifying the plans for the preliminary design. Accordingly, the operative facts underlying the two actions are the same. Paul's assertion that he could not have asserted his FCA claims in the state court action is erroneous; state courts have concurrent jurisdiction over FCA

claims. *See* ***United States ex rel. Hartigan v. Palumbo Bros., Inc.***, 797 F. Supp. 624, 631-32 (N.D. Ill. 1992).[3]

III.

For the foregoing reasons, the judgment is

AFFIRMED.

[3] The parties have filed numerous motions and cross-motions, all of which are denied.