IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-60094

Summary Calendar

BOARD OF TRUSTEES OF THE
GALVESTON WHARVES,

Plaintiff-Appellant,

v.

STARKEISER DASILVA MATOS PIRES,
ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
(93-CV-604)

(April 7, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[*]

Plaintiff-Appellant the Board of Trustees of the Galveston Wharves ("Galveston Wharves") seeks a stay of an action currently pending in the Supreme Court for the State of New York, County of New York, styled S.M. Pires and Virginia Pires v. Frota Oceanica Brasileira SA, et al., Galveston Wharves d/b/a/ Port of

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Galveston, and City of Galveston, et al., No. 22829/76 (the "New York litigation"), pending the outcome of its appeal to this court from the district court's denial of a preliminary injunction and dismissal of its suit. Because we are unable to conclude that Galveston Wharves has the requisite probability of success on the merits under the record presented, we deny its request for the stay.

I. Background

The accident giving rise to this litigation took place in Texas in late 1975. Defendant in the instant case, Starkeiser Pires, a resident of Buenos Aires ("Pires"), was injured in a railyard operated by Galveston Wharves. Pires was a merchant seaman on a ship owned by Frota Oceanica, which was docked at the wharves. At the time of his injury, Pires was traversing the wharf on his way to town when a yard train controlled by Galveston Wharves allegedly backed up without warning into an unlighted area and injured him.

Pires was treated for his injuries in a Texas hospital and originally filed suit in the United States District Court for the Southern District of Texas against several defendants, including Galveston Wharves, on December 17, 1975 (Pires I).[1] He subsequently moved to New York and attempted to discontinue the Texas action. Pires then filed a new suit against other

[1] Both Pires and his wife, Virginia Pires, filed suit seeking compensatory damages stemming from the accident. For purposes of simplicity, we will refer to both plaintiffs as "Pires."

defendants based upon the same accident in a state court in New York in June of 1976. This suit was removed to federal court in New York, transferred to the federal court in Galveston, and consolidated with Pires I. The Galveston court then transferred the consolidated Pires I to the United States District Court for the Southern District of New York, which dismissed the case against Galveston Wharves without prejudice for Pires' failure to appear in July of 1979.

Pires' next suit was filed in New York state court in November of 1976 against defendants other than Galveston Wharves (Pires II). On July 30, 1979, Pires obtained leave from that court to add Galveston Wharves as an additional defendant.

Instead of joining Galveston Wharves in Pires II, however, Pires filed yet another action in a New York state court in May of 1980 (Pires III), which was quickly removed to federal court. Pires unsuccessfully moved to remand the action, and eventually added Galveston Wharves as a defendant in Pires II. The federal district court transferred Pires III back to the Southern District of Texas in December of 1980, and, after the case had been filed on the Galveston court's docket, Pires filed a notice of appeal from the transfer order to the United States Court of Appeals for the Second Circuit. The case proceeded in the Texas transferee court and was dismissed with prejudice pursuant to Federal Rule of Civil Procedure 41(b) by final judgment entered March 13, 1981 (the Pires III dismissal).

Back in New York, Galveston Wharves filed a motion for summary judgment in Pires II on the basis that the Pires III dismissal was res judicata as to the claims raised in Pires II. On June 3, 1993, the New York state court denied the motion for summary judgment because it considered the federal court in Texas to have been without jurisdiction to enter the dismissal order since Pires had filed a post-transfer notice of appeal, which, in the New York court's opinion, divested the Texas federal court of jurisdiction (the Pires II Order).

Galveston Wharves then petitioned the District Court for the Southern District of Texas -- which had entered the dismissal order in Pires III -- for an injunction prohibiting the continued prosecution of the New York litigation pursuant to the "relitigation exception" to the Anti-Injunction Act, 28 U.S.C. § 2283, permitting a federal court to restrain state litigation of an issue previously presented to and decided by the federal court. By order entered January 5, 1994, the district court denied the request and dismissed Galveston Wharves' complaint (the "January 5 Order"), and Galveston Wharves filed the instant appeal.

II. Analysis

The action at bar was brought under the Anti-Injunction Act, providing that:

> A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by act of Congress or where necessary in aid of its jurisdiction, **or to protect or effectuate its judgments**.

28 U.S.C. § 2283 (emphasis added). The emphasized phrase, which has become known as the "relitigation exception," permits a federal court to grant injunctive relief against a proceeding in a parallel state action where the federal court has finally adjudicated a claim on the merits which should be entitled to preclusive effect in the state court action. See Amalgamated Sugar Co. v. N.L. Indus., Inc., 825 F.2d 634, 639 (2d Cir.), cert. denied, 484 U.S. 992 (1987). The Supreme Court has made clear, however, that the Full Faith and Credit Act, 28 U.S.C. § 1738 -- requiring federal courts (as well as state courts) to give state judicial proceedings "the same full faith and credit . . . as they have by law or usage in the courts of such State . . . from which they are taken" -- trumps the relitigation exception where a state court has finally determined the res judicata effect of a federal court's order. See Parsons Steel, Inc. v. First Alabama Bank, 474 U.S. 518, 524-25 (1986) ("[T]he Full Faith and Credit Act requires that federal courts give the state-court judgment, and particularly the state court's resolution of the res judicata issue, the same preclusive effect it would have had in another court of the same State.").

In denying Galveston Wharves an injunction in this case, the district court reasoned that the New York state court had finally determined the res judicata effect of the Pires III dismissal order and that the federal court was thus bound by the state court's resolution of the issue. See Parsons Steel, 474 U.S. at 524 (limiting the relitigation exception of the Anti-Injunction

Act "to those situations in which the state court has not yet ruled on the merits of the res judicata issue"). As the court below noted:

> Once the state court has rejected a claim of res judicata, then the Full Faith and Credit Act, 28 U.S.C. § 1738, becomes applicable and the federal courts must turn to state law to determine the preclusive effect of the state court's decision.

January 5 Order (citing Parsons Steel, 474 U.S. at 524). The district court then concluded that "the correctness of a state court's determination as to the conclusive effect of a federal judgment must be pursued by way of appeal through the state court system and certiorari from the U.S. Supreme Court." Id. (citing Parsons Steel, 474 U.S. at 525-26).

Galveston Wharves asserts that the district court abused its discretion in denying the injunction primarily because it erroneously concluded that the New York state court's Pires II Order, refusing to give res judicata effect to the federal court's judgment, was sufficiently final to warrant preclusive effect in the court below. Proceeding upon this premise, Galveston Wharves argues that it meets each of the well established criteria for granting injunctive relief pending appeal, as follows:

> (1) Whether the movant has made a showing of likelihood of success on the merits,
>
> (2) Whether the movant has made a showing of irreparable harm if the stay is not granted,
>
> (3) Whether the granting of the stay would substantially harm the other parties, and

(4) Whether the granting of the stay would serve the public interest.

Ruiz v. Estelle, 650 F.2d 555, 565 (5th Cir. 1981), cert. denied, 460 U.S. 1042 (1983); Texas v. United States Forest Serv., 805 F.2d 524, 525 (5th Cir. 1986).

As Galveston Wharves candidly admits, it bears the burden on appeal of demonstrating that the district court abused its discretion in denying injunctive relief. See Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 151 (1988); Quintero v. Klaveness Ship Lines, 914 F.2d 717, 720 (5th Cir. 1990), cert. denied, 111 S. Ct. 1322 (1991). Nonetheless, Galveston Wharves contends that the district court declined to exercise its discretion to enter the injunction based upon an erroneous conclusion of law which we review de novo. See Securities Exch. Comm'n v. AMX Int'l, Inc., 7 F.3d 71, 73-74 (5th Cir. 1993) (holding that a district court's legal conclusion that it does not have discretion under the circumstances presented may be reviewed de novo).

We agree with the district court that the Pires II Order denying summary judgment on the res judicata issue would be entitled to absolute deference in the federal courts by reason of the Full Faith and Credit Act if final -- regardless of whether the state court's conclusion was in error. See Parsons Steel, 474 U.S. at 525. However, the Pires II Order may not have been sufficiently final to warrant such preclusive effect. Galveston Wharves has not yet briefed the point, and the court below did not analyze the issue in terms of New York law.

We read Parsons Steel to require a federal court to apply a two-part test in determining whether the state court's ruling on res judicata is itself entitled to full faith and credit by our courts. See id. at 524. First, the federal court is to determine whether the state court has "finally rejected" the claim of res judicata. The Supreme Court appears to define "finally rejected" for this purpose as when the state court has ruled definitively on the merits of the res judicata claim. Id.; see also Amalgamated Sugar, 825 F.2d at 642 (Because the New Jersey court "had not yet ruled upon the merits of the res judicata defense . . ., but [instead] had indicated that it would consider the merits of the res judicata defense only in the context of a full trial on the merits . . ., the district court was not required to abstain from issuing the injunction.").

If the federal court concludes that the state court has finally disposed of the claim, then the federal court must "turn to state law to determine the preclusive effect of the state court's decision." Id. Thus, in the instant case, the court below was required to look to the laws of the State of New York to determine whether the denial of summary judgment on the basis of res judicata would have been entitled to res judicata effect in another New York court. Only if the summary denial warranted preclusion in the New York courts would it require full faith and credit by this court. See First Alabama Bank, N.A. v. Parsons Steel, Inc., 825 F.2d 1475, 1479-80 (11th Cir. 1987) (on remand from the Supreme Court) (Parsons Steel II), cert. denied, 484

U.S. 1060 (1988). In fact, on remand from the Supreme Court, the district court in Parsons Steel II held that the res judicata issue -- which had been raised in the Alabama state court action through motions to dismiss, for summary judgment, and for directed verdict, all of which had been denied -- had not been finally determined by the state court as a matter of Alabama law and concluded that an injunction was proper. Parsons Steel II, 825 F.2d at 1480.

Galveston Wharves has not briefed the applicable New York law. Our preliminary review of New York decisions on the finality of summary denials leaves us uncertain about how a New York court would view the res judicata decision in Pires II. Several courts have indicated that a denial of summary judgment does not warrant any res judicata consequence. See Armetta v. General Motors Corp., 158 A.D.2d 284, 285, 550 N.Y.S.2d 686, 687 (N.Y. App. Div. 1990) (holding that a denial of summary judgment under New York law is generally not entitled to res judicata effect); DiCocco v. Capital Area Community Health Plan, 159 A.D.2d 119, 123, 559 N.Y.S.2d 395 (N.Y. App. Div. 1990) ("[T]he denial of summary judgment, determining nothing more than the existence of factual issues requiring a trial, is given no preclusive effect."); cf. Puro v. Puro, 79 A.D.2d 925, 926, 434 N.Y.S.2d 424, 426 (N.Y. App. Div. 1981) (Denial of summary judgment which inferentially involved an affirmative defense was not res judicata and would not preclude an amendment to the defendant's answer to assert that defense.).

Conversely, however, there are decisions which tend to characterize a definitive denial of summary judgment, such as in the instant case, as sufficiently final for preclusionary effect. See Pigott Constr. Int'l, Ltd. v. Contractors Ornamental Steel Co., Inc., 75 A.D.2d 988, 492 N.Y.S.2d 319 (N.Y. App. Div. 1980) (holding that the denial of summary judgment in one action may preclude consideration of the same issue in a related action for indemnification).[2] A policy against successive motions for summary judgment also tends to show finality. See Schripteck Marketing, Inc. v. Columbus McKinnon Corp., 187 A.D.2d 800, 801, 589 N.Y.S.2d 656 (N.Y. App. Div. 1992) ("[T]he [New York] courts have adopted a policy which discourages multiple summary judgment motions in the same action in the absence of newly discovered evidence or other sufficient cause."); Curry v. Nocket, 104 A.D.2d 435, 436, 478 N.Y.S.2d 953 (N.Y. App. Div. 1984).[3]

Further, New York law may permit appeals from denials of summary judgment. Grimmer v. Gallery, 171 N.E.2d 298, 301 (N.Y. 1960) ("[H]ad the plaintiff appealed from the order denying his motion for summary judgment . . ., we would have reversed and

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[2] As the dissent in that case points out, there is substantial authority that the denial of summary judgment would not be final for purposes of collateral estoppel. Pigott Constr. Int'l, Ltd. v. Contractors Ornamental Steel Co., Inc., 75 A.D.2d 988, 492 N.Y.S.2d 319, 321-22 (N.Y. App. Div. 1980) (Hancock, J., dissenting).

[3] The New York courts also appear to require that renewed or successive motions for summary judgment must be heard by the same judge who decided the original motion, even if the motion must be transferred to that judge. See La Freniere v. Capital Dist. Transp. Auth., 105 A.D.2d 517, 518, 481 N.Y.S.2d 467 (N.Y. App. Div. 1984) (La Freniere II).

granted such motion."); La Freniere v. Capital Dist. Transp. Auth., 96 A.D.2d 664, 665, 466 N.Y.S.2d 501 (N.Y. App. Div. 1983) (La Freniere I) (affirming denial of summary judgment). Based upon this preliminary research, this court is uncertain whether a New York court would be required to give res judicata effect to the Pires II denial of summary judgment, and without greater assurance that the order does not require full faith and credit by our courts, we are not persuaded that Galveston Wharves will prevail on the merits of its appeal.

III. Conclusion

In sum, we are not sufficiently convinced that Galveston Wharves can prevail on the merits of its claim for injunctive relief based upon the circumstances now presented to award a stay. The state of New York law is sufficiently unclear to us that restraint is the best course at this point.

We are also somewhat concerned about issuing such extraordinary relief when Pires has never been served in this action. In this regard, we note that Galveston Wharves has moved this court to permit substituted service upon Pires' attorney, a request which we must deny since personal jurisdiction must be obtained by perfection of service in the district, rather than the appellate, court. We do not mean to imply that a court of appeals may never issue a stay ex parte, but only that, under the circumstances of this case, the lack of service adds to our conclusion to abstain from interfering with the New York court at this time.

We are not unmindful of the fact that Galveston Wharves clearly satisfies the other requisites for obtaining a stay -- irreparable injury, lack of substantial harm to the non-movant, and public interest. We are also aware that this litigation over what appears to be a relatively straightforward negligence case has been ongoing for over eighteen years. Thus, the denial of this temporary relief is by no means a final adjudication upon the merits. Rather, we direct Galveston Wharves to brief thoroughly the issues involving New York law discussed above in its appellate brief for our further consideration. The appeal is hereby expedited, and the Clerk is directed to establish an expedited briefing schedule.

STAY DENIED.

MOTION FOR SUBSTITUTED SERVICE DENIED WITHOUT PREJUDICE.