IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-60094

BOARD OF TRUSTEES OF THE GALVESTON WHARVES,

Plaintiff-Appellant,

VERSUS

STARKEISER DaSILVA MATOS PIRES and
VIRGINIA PIRES,

Defendants-Appellees.

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

(November 4, 1994)

Before SMITH and EMILIO M. GARZA, Circuit Judges, and STAGG, District Judge.*

JERRY E. SMITH, Circuit Judge:**

This appeal represents another proceeding in a line of litigation that has lasted for almost twenty years. Plaintiff, the Board of Trustees of the Galveston Wharves ("Galveston Wharves"), appeals the dismissal of this suit and the denial of a preliminary

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* District Judge of the Western District of Louisiana, sitting by designation.

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 Pursuant to that rule, the court has determined that this opinion should not be published.

injunction entered pursuant to the "relitigation exception" to the Anti-Injunction Act, 28 U.S.C. § 2283. For the reasons that follow, we AFFIRM.

I.

The accident that gave rise to this litigation occurred in Texas in December 1975. Defendant in the present action, Starkhiser Pires,[1] a merchant seaman aboard a ship docked at the wharves, was injured when a yard train controlled by Galveston Wharves backed up and allegedly hit him without warning.

Pires filed suit against several defendants, including Galveston Wharves, in federal court in Galveston in December 1975 ("Pires I"). Pires was being treated for his injuries in Texas at the time, but later moved to New York for additional treatment. Pires attempted to discontinue his Texas action and filed a new suit against other defendants in New York state court in June 1976. This suit was removed to federal court in New York, transferred to federal court in Galveston, and consolidated with Pires I. The suit was then transferred to the federal court in New York, which dismissed the case against Galveston Wharves without prejudice for Pires's failure to appear in July 1979.

Pires's second suit was filed in New York state court in November 1976 against defendants other than Galveston Wharves ("Pires II"). In July 1979, Pires obtained leave from the court to add Galveston Wharves as a defendant but chose, instead, to file

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

another action in New York state court in May 1980 against Galveston Wharves ("Pires III"). This case was removed to federal court; Pires unsuccessfully moved to remand it to state court. Subsequently, Pires added Galveston Wharves as a defendant in Pires II.

Pires III was transferred back to Texas federal court in December 1980. After the case had been filed on the Galveston 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 court and was dismissed with prejudice pursuant to FED. R. CIV. P. 41(b) by final judgment entered in March 1981.

In New York, Galveston Wharves filed a motion for dismissal in Pires II based upon the claim that the dismissal in Pires III was res judicata as to the claims at issue in Pires II. In June 1993, the New York state court denied the motion for dismissal ("Pires II order") because it considered the federal court in Texas to have been without jurisdiction, given the post-transfer notice of appeal, and because it did not consider the Texas court's dismissal to have been on the merits.

Galveston Wharves then petitioned the Texas federal court for an injunction pursuant to the "relitigation exception" to the Anti-Injunction Act, to stop the proceeding in New York. In January 1994, the Texas federal court denied the request and dismissed Galveston Wharves's complaint, whereupon Galveston Wharves filed

this appeal.[2]

II.

According to the Anti-Injunction Act,

> 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. The last phase, "to protect or effectuate its judgments," is commonly known as the "relitigation exception" to the Anti-Injunction Act. Federal courts may grant injunctions "to prevent state litigation of an issue that previously was presented to and decided by the federal court. It is founded in the well-recognized concepts of res judicata and collateral estoppel." SantoPadre v. Pelican Homestead & Sav. Ass'n, 937 F.2d 268, 273 (5th Cir. 1991) (quoting Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 147 (1988)).

The Full Faith and Credit Act, 28 U.S.C. § 1738, requires that federal courts give the same full faith and credit to state proceedings that courts in the state from which they have been taken give to those state proceedings. The Full Faith and Credit Act trumps the relitigation exception where a state court has finally determined the res judicata effect of a federal court's order. Parsons Steel, Inc. v. First Alabama Bank, 474 U.S. 518, 524, 525 (1986). A federal court, pursuant to the Full Faith and

[2] Galveston Wharves applied to this court for a stay of the New York action pending this appeal. This court, however, denied the request in April 1994.

Credit Act, must "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." Id. at 525.

The district court a quo determined that the New York state court's denial of Galveston Wharves's motion for summary judgment on res judicata grounds constituted a final determination of the res judicata issue and, therefore, barred an injunction. The district court, quoting Parsons Steel, 474 U.S. at 524, noted that

> [o]nce the state court has finally rejected a claim of res judicata, then the Full Faith and Credit Act becomes applicable and federal courts must turn to state law to determine the preclusive effect of the state court's decision.

The district court concluded that plaintiffs could challenge the state court's determination only by direct appeal through the state court system and, ultimately, by writ of certiorari to the United States Supreme Court.

We review the denial of the injunction for abuse of discretion. Blue Bell Bio-Medical v. Cin-Bad, 864 F.2d 1253, 1256 (5th Cir. 1989). Within an abuse of discretion test, underlying facts are reviewed for clear error, and underlying conclusions of law are reviewed de novo. Spawn v. Western Bank))Westheimer, 989 F.2d 830, 839 (5th Cir. 1993), cert. denied, 114 S. Ct. 1048 (1994). As Judge Friendly has stated, "[i]t is not inconsistent with the discretion standard for an appellate court to decline to honor a purported exercise of discretion which was infected by an error of law." Abrams v. Interco, Inc., 719 F.2d 23, 28 (2d Cir. 1983).

We must now decide, pursuant to Parsons Steel, whether the New York state court's denial of Galveston Wharves's motion for summary judgment constituted a final rejection of the res judicata claim. Importantly, even if the order from the New York court was in error, it must be given deference under the Full Faith and Credit Act if it was final. Parsons Steel, 474 U.S. at 525. In this court's earlier denial of a stay pending the present appeal, we determined that whether the New York order was final was a sufficiently close question to deny the stay but did not purport to resolve the issue.[3]

Parsons Steel requires a federal court to apply what is basically a two-part inquiry to determine whether the state court's ruling on the res judicata issue is entitled to full faith and credit in federal court. We must first determine whether the state court has "finally rejected" the res judicata claim. Parsons Steel indicated that the question is whether the state court has ruled definitively on the merits of the res judicata claim. Parsons Steel, 474 U.S. at 524. We must review state law to determine how "final" state courts would consider the state court's ruling.

If we conclude that the state court has rendered a final judgment on the res judicata claim, our second inquiry is to decide to what preclusive effect the state court ruling is entitled. Id.

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[3] To grant injunctive relief pending an appeal, we must decide, among other things, that the moving party has made a showing of likelihood of success on the merits. See Ruiz v. Estelle, 650 F.2d 555, 565 (5th Cir. Unit A June 1981) (per curiam), cert. denied, 450 U.S. 1042 (1983). In the instant case, we determined that the question of whether Galveston Wharves could obtain injunctive relief was close, as New York law on the finality of the order was uncertain. Therefore, we held that Galveston Wharves could not show a likelihood of success.

Again, we must turn to state law to make the determination. Id.

For purposes of preclusion, a state may closely relate the idea of finality with appealability. See, e.g., First Ala. Bank v. Parsons Steel, Inc., 825 F.2d 1475, 1480 (11th Cir. 1987), cert. denied, 484 U.S. 1060 (1988). In other instances, a state court may indicate explicitly that it has made only a temporary judgment on the res judicata issue but reserves a full decision on the merits for the context of a full trial. See, e.g., Amalgamated Sugar Co. v. NL Indus., Inc., 825 F.2d 634, 642 (2d Cir. 1987), cert. denied, 484 U.S. 992 (1988).

We now address the question of how final New York courts would regard the Pires II order and how much preclusiveness they would accord to it. In New York, a final, as opposed to an interlocutory, judgment in an action is one that determines the rights of the parties with respect to, and disposes of, a certain cause or part of a cause. Morris v. Morange, 38 N.Y. 172 (1868). Final judgment is entered only after all the issues with respect to a certain claim or claims have been decided and disposed of. Fales v. Lawson, 4 N.Y.S. 284 (Sup. Ct. 1889). Only final judgments are appealable.

"Final judgments" will support the application of res judicata in New York. The scope of "final judgment," however, in a res judicata context, is "not confined to a final judgment in an action." Bannon v. Bannon, 1 N.E.2d 975, 977 (N.Y. 1936). Instead, a final judgment in this context "may include any judicial decision upon a question of fact or law which is not provisional

and subject to change and modification in the future by the same tribunal." Id. As the Bannon court explained:

> The essential element of a conclusive adjudication is finality of the proceedings. A judicial decision can constitute a conclusive adjudication of question of fact or law only when rendered in a proceeding in which a court had jurisdiction to render an irrevocable and final decision upon such question.

Id. at 978. Thus, an interlocutory judgment may have a res judicata effect if it is a final determination of an issue or issues raised in the action. In re Levine, 32 N.Y.S.2d 218 (Sup. Ct. 1941), aff'd, 34 N.Y.S.2d 414, app. den., 35 N.Y.S.2d 167 (1942).

In New York, the doctrine of res judicata is technically applicable when a final judgment has been made on the merits in one proceeding and an attempt at relitigation is made in a second proceeding. DAVID D. SIEGEL, NEW YORK PRACTICE 2D § 448, at 679 (1991). The relitigation of a point within the same action is prevented under the doctrine of "law of the case." See, e.g., id.; McGrath v. Gold, 330 N.E.2d 35 (N.Y. 1975). The law of the case binds not only the parties in the action, but also any courts of coordinate jurisdiction. See Telaro v. Telaro, 255 N.E.2d 158, 159 (N.Y. 1969).

Galveston Wharves correctly notes, as did the prior panel in this case, that a denial of summary judgment is generally res judicata of nothing except that summary judgment was not warranted. Puro v. Puro, 434 N.Y.S.2d 424, 426 (App. Div. 1981); PRACTICE COMMENTARIES BY PROF. SIEGEL, MCKINNEY'S CONSOLIDATED LAWS, CPLR 3212, C 3212:21, Vol. 7B, at 327. A grant of summary judgment, however, is

regarded as a merits adjudication. Eidelberg v. Zellermayer, 174 N.Y.S.2d 300, 304 (App. Div. 1958). This tends to weigh against regarding a district court denial as final.

The denial, nevertheless, may be the "law of the case" "insofar as that a subsequent summary judgment motion in the same case and on the same proof will not be entertained." SIEGEL, PRACTICE COMMENTARIES, 3212:21, at 440. New York courts have indicated that a second motion for summary judgment on the same issue must be based upon new information in order for the court to rule on the merits of the motion. Schriptek v. Columbus McKinon Corp., 589 N.Y.S.2d 656, 658 (App. Div. 1992), leave to appeal denied, 611 N.E.2d 300 (N.Y. 1993); LaFreniere v. Capital Dist. Tranp. Auth., 481 N.Y.S.2d 467, 468 (App. Div. 1981).

We conclude, however, that the New York court's order at issue in this case was not, strictly speaking, a denial of a motion for summary judgment. According to the court, Galveston Wharves made a motion to dismiss on res judicata grounds, while Pires counter-claimed for summary judgment. A motion to dismiss is governed by CPLR 3211. Under CPLR 3211(a)(5), a party may move for a judgment dismissing a cause of action on the ground that the action may not be maintained because of any one of a number of objections, including res judicata. The objections that appear in CPLR 3211(a)(5) are those that have been designated as affirmative defenses under CPLR 3018(b). The defendant can raise the CPLR 3211(a) dismissal motion instead of pleading the objection as a defense in the answer. See SIEGEL, NEW YORK PRACTICE § 263, at 393.

In addition, under CPLR 3211(c), a court may treat a CPLR 3211 motion as a summary judgment motion. Such a decision is important, because if the motion is granted, it carries all of the res judicata consequences of a granting of summary judgment. SIEGEL, NEW YORK PRACTICE § 270, at 398. There is no indication from the Pires II order that Galveston Wharves's motion to dismiss was treated as a summary judgment motion.[4]

A denial of a motion to dismiss under CPLR 3211 does not give rise to a final judgment but generally does invoke the doctrine of "law of the case." SIEGEL, PRACTICE COMMENTARIES, C 3211:70 at 99. A court is not precluded, however, from indicating that it is not passing on the merits of the issue, but is deferring it to the trial. Id. The Pires II court did not indicate that it would consider the res judicata issue later. This makes sense, as it is highly unlikely that evidence produced later in the pre-trial procedure or at trial would have an impact on the res judicata decision.

Thus, we regard the Pires II order as a final adjudication on the merits of the res judicata issue, because it will be considered as the "law of the case" in New York. As a result, New York courts of coordinate jurisdiction must give preclusive effect to the order. Of course, higher courts in New York may revisit the issue, but, as the Court indicated in Parsons Steel, it is up to the party to pursue, on its own, review in state court.

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[4] In its brief, Galveston Wharves refers to its motion as one for summary judgment.

We also note, in the alternative, that even if we treat the Pires II order as a denial of a motion for summary judgment, it would carry the same preclusive effect as the "law of the case." As we have indicated, motions for summary judgment generally do not have preclusive effect in New York. We note, however, the policy against multiple motions for summary judgment on the same issue absent new evidence. A motion for summary judgment involves the assertion that no triable issues exist. Moskowitz v. Garlock, 259 N.Y.S.2d 1003 (App. Div. 1965).

In this case, there is no allegation by Galveston Wharves that Pires has failed, through his pleadings or evidence, to state a triable issue. Rather, the summary judgment motion would be based upon what is normally the affirmative defense of res judicata. Thus, the rejection of the claim of res judicata in the Pires II order is more akin to rejection of a legal argument on the merits. Further, Telaro indicates that a denial of a motion for summary judgment may be appealed and gives rise to the doctrine of the "law of the case." Telaro, 255 N.E.2d at 159; SIEGEL, PRACTICE COMMENTARIES, 3212:21, at 327.

III.

We conclude, therefore, that New York courts of coordinate jurisdiction must give preclusive effect to the Pires II order. Appellate courts in New York may review the decision, but as Parsons Steel indicated, this is Galveston Wharves's job to pursue. Accordingly, we AFFIRM the district court's denial of the injunc-

tion under the Anti-Injunction Act.