IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-60391
Summary Calendar

BOBBY G. JONES and BRENDA M. JONES,

Plaintiffs-Appellants,

versus

UNITED STATES OF AMERICA, on behalf of Farmers Home Administration,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Mississippi
(3:92-CV-680WS)

(January 20, 1995)

Before REAVLEY, HIGGINBOTHAM and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Appellants Bobby and Brenda Jones complain that the district court erred in granting the government's motion to dismiss or in the alternative for summary judgment, and in denying them leave to amend their complaint. We agree with the government that the claims asserted in the complaint are barred by res judicata, and

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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 Pursuant to that Rule, the Court has determined that this opinion should not be published.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 the district court did not abuse its discretion in denying leave to amend. Accordingly we affirm.

The Jones's brought their original complaint against the United States as sole defendant. The complaint alleged that the Federal Land Bank foreclosed on part of the Jones's farm, and that this foreclosure resulted from the Department of Agriculture's failure to provide loan restructuring as required by the Agricultural Credit Act of 1987, 7 U.S.C. § 1921 *et seq*. (the Act). The Jones sought a declaratory judgment and injunctive relief allowing them to exercise buyback or leaseback rights under the Act, as well as damages.

A prior suit also involved the foreclosure on the farm tract. After the foreclosure on the property, the Jones continued to farm it. The government brought an eviction suit in federal court, and obtained a default judgment. The district court in the prior suit entered a lengthy order denying a motion to set aside the default judgment in August of 1992, concluding among other things that the Jones had failed to raise a meritorious defense. The complaint in the pending cause was filed in October of 1992.

The district court correctly decided that the judgment in the prior suit operated as res judicata on the claims in the second suit. Four conditions must be met for res judicata to apply:

> First, the parties in a later action must be identical to (or at least be in privity with) the parties in a prior action. Second, the judgment in the prior action must have been rendered by a court of competent

> jurisdiction. Third, the prior action must have concluded with a final judgment on the merits. Fourth, the same claim or cause of action must be involved in both suits.

United States v. Shanbaum, 10 F.3d 305, 310 (5th Cir. 1994). "If these conditions are satisfied, claim preclusion prohibits either party from raising any claim or defense in the later action that was or *could have been* raised in support of or opposition to the cause of action asserted in the prior action." *Id*. (emphasis in original).

Considering these four elements, the Jones cannot dispute that the parties are identical, and do not challenge the jurisdiction of the federal court in the first action. We conclude that the third element is met as well here, since a default judgment is a judgment "on the merits" for purposes of res judicata. *See, e.g., Moyer v. Mathas*, 458 F.2d 431, 434 (5th Cir. 1972) (noting that a prior "judgment is no less res judicata because it was obtained by default, absent any proof of fraud, collusion, or lack of jurisdiction.").

We conclude that the fourth element -- the requirement that the two suits involve the same claim or cause of action -- is met as well. In our circuit:

> We have adopted a transactional test for determining whether two complaints involve the same cause of action. "Under this approach, the critical issue is not the relief requested or the theory asserted but whether the plaintiff bases the two actions on the same nucleus of operative facts." If the factual scenario of the two action parallel, the same cause of action is involved in both. The substantive theories advanced, forms of relief requested, types of rights asserted, and variations in evidence needed do not inform this inquiry.

Agrilectric Power Partners, Ltd. v. General Electric Co., 20 F.3d 663, 665 (5th Cir. 1994) (footnotes omitted). Here the two suits involved the same nucleus of operative facts. Both suits involved the use and ownership of the identical farm property, and whether the government had properly foreclosed on the land in light of certain provisions of the Act.

The farm consisted of two tracts, a 432 acre tract and a 517 acre tract. In the first suit, the court in its default judgment granted exclusive possession of both tracts to the United States. The judgment was amended to cover only the 517 acre tract, after the parties pointed out that the foreclosure only transferred title to the 517 acre tract. In moving to set aside the default judgment, the Jones submitted a proposed answer and counterclaim, alleging that they had filed an application with the Farmers Home Administration of the Department of Agriculture (the Agency) "for restructuring of their indebtedness under the Agricultural Credit Act of 1987." The pleading asserted as a defense that the Agency, "through misrepresentation and delay, refused to act on the application and thereby effectively denied Defendants the right of appeal . . . ." It prayed for a judgment ordering the Agency "to allow net recovery buyback under the 1987 Act" and "to allow Jones' leaseback-buyback rights for the 517 Acre Tract under the 1987 Act."

In the second suit, the complaint alleged that the Agency, "through delay and misrepresentations, intentionally refused to act on the application and thus intentionally denied Jones his

right to net recovery buyback and right of appeal under the 1987 Act." It sought damages as well as injunctive relief ordering the Agency to allow a "net recovery buyback" of the entire farm, or in the alternative a "net recovery buyback" of the 432 acre tract and a "leaseback/buyback" of the 517 acre tract.

The Jones also complain on appeal that the district court erred in denying them leave to amend their complaint. The motion for leave to amend was filed 13 months after the filing of the original complaint. The proposed amended complaint added three individual officials with the Farmers Home Administration. It sought compensatory and punitive damages from these individuals for their allegedly intentional, unlawful and unreasonable actions "in gross and wanton disregard of Jones' rights . . . ." The amended complaint identifies no statutory private right of action that would entitle them to money damages from these individuals; the claims can therefore be characterized as *Bivens*-type claims.

"Whether leave to amend should be granted is entrusted to the sound discretion of the district court, and that court's ruling is reversible only for an abuse of discretion." *Wimm v. Jack Eckerd Corp.*, 3 F.3d 137, 139 (5th Cir. 1993). We find no abuse of discretion. Leave to amend need not be given if the complaint as amended would be subject to dismissal. *Pan-Islamic Trade Corp. v. Exxon Corp.*, 632 F.2d 539, 546 (5th Cir. 1980), *cert. denied*, 454 U.S. 927 (1981). A claim against federal officials for violation of constitutional rights brought directly

under the Constitution, i.e. a *Bivens* claim, is subject to the defense of qualified immunity unless the officials' conduct was not objectively reasonable and violated clearly established constitutional rights. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Burns-Toole v. Byrne*, 11 F.3d 1270, 1274 (5th Cir. 1994). The complaint here does not show how these requirements are met. Indeed, it does not even clearly identify the constitutional right which was violated. Whether the right is in the nature of procedural due process, e.g. a right to notice and hearing, or substantive due process, is unclear from the complaint. If the complaint was intended to assert a substantive due process claim, it failed to explain how a particular type of loan for restructuring farm debt under the Act is such a well recognized "right" that it rises to the level of a constitutional property right, the denial of which would give rise to a *Bivens* claim.

AFFIRMED.