

I.

On June 30, 1994, Diminico filed his original complaint in the district court alleging claims under the Employee Retirement Income Security Act of 1974 ("ERISA") and claims under Texas law. The district court dismissed Diminico's complaint without prejudice for failure to serve the summons within 120 days of the filing of the complaint. See FED. R. CIV. P. 4(j).

On February 14, 1995, Diminico filed in Texas state court alleging the same claims. Defendant-Appellee Lehman Brothers, Inc. ("Lehman Brothers") removed the action to federal court and moved to dismiss based on the running of the statute of limitations applicable to Diminico's claims. The district court granted the motion to dismiss, finding that the case was based upon the same set of facts as the cause of action previously dismissed. The court did not address Lehman Brothers' limitations defense.

II.

The district court's second dismissal now on appeal appears to be based on the doctrine of *res judicata* and/or collateral estoppel. We find that *res judicata* cannot be properly applied in this case. The first dismissal was without prejudice, and was not a judgment on the merits. In addition, Lehman Brothers was not properly served in the first action and, thus, was not a proper party. Therefore, because there was never a final judgment on the merits and the parties are not identical in both suits, the district court erred in dismissing Diminico's second cause of action based on the doctrine of *res judicata*. See *Nagle v. Lee*,

807 F.2d 435, 440 (5th Cir. 1987). We also find collateral estoppel inapplicable as the facts were not "fully and fairly litigated" in the first action and the parties were not cast as adversaries in the first action. *See Matter of Greenway*, 71 F.3d 1177 (5th Cir. 1996).

Lehman Brothers argues on appeal that dismissal was proper because Diminico's claim for conversion is barred by the applicable two-year statute of limitations. However, Diminico did not specify in his complaint which section under ERISA applied to his cause of action. The determination of the nature of Diminico's cause of action and the applicable statute of limitations is a mixed question of law and fact. Such a determination requires a close examination of Diminico's pleadings to evaluate their true nature and specification as to the pertinent ERISA section that he alleges Lehman Brothers violated. As a court of review, we decline to make such a factual determination in the first instance and remand to the district court for further development and evaluation.

III.

For the reasons articulated above, the district court's dismissal is VACATED, and we REMAND to the district court for further development consistent with this opinion.