

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALLAN K. MARSHALL : CIVIL ACTION
 :
v. :
 :
 :
PARK PLAZA CONDOMINIUM ASS'N, :
CYNTHIA MORRISEY, SCULLY CO., :
JOSHUA BERNSTEIN, and :
ABRAHAM, LOEWENSTEIN, BUSHMAN :
& KAUFFMAN, P.C. : NO. 98-2912

MEMORANDUM and ORDER

Norma L. Shapiro, S.J.

September 3, 1999

Plaintiff Allan K. Marshall ("Marshall"), alleging violation of the Fair Housing Act ("FHA"), 42 U.S.C. § 3601, et seq., filed this action against defendants Park Plaza Condo Ass'n ("Park Plaza"), Cynthia Morrisey ("Morrisey"), Scully Co., Joshua Bernstein ("Bernstein"), and Abraham, Lowenstein, Bushman, & Kauffman, P.C. ("ALBK"). Defendant Scully Co. has filed a motion to dismiss the Complaint under Federal Rules of Civil Procedure 12(b)(4). All defendants have joined in a motion for summary judgment based on res judicata. For the reasons stated below, defendant Scully Co.'s motion to dismiss will be denied; defendants' motion for summary judgment will be granted.

BACKGROUND

Marshall leased a Park Plaza condominium owned by Ismail

Kazem ("Kazem"). On June 7, 1996, Park Plaza, by its attorney Bernstein and ALBK, sent a letter directing Kazem not to renew Marshall's lease when it expired because his operation of a law practice from the residential condominium resulted in a "constant stream of undesirable visitors" to his condominium. Marshall, an attorney and native of the Republic of India, alleges the letter was discriminatory because it was a covert way of accusing him of having too many African-American and other minority friends, acquaintances, and visitors. Ten days later, Kazem terminated Marshall's month-to-month lease as of July 31, 1996, and subsequently evicted him. Before Marshall was evicted, defendants allegedly failed to make repairs to the apartment. Marshall alleges defendants also delayed his move by lying about the availability of the elevator and failed to refund part of his security deposit.

After his eviction, Marshall brought a state court action against Park Plaza, Morrisey, Scully Co., Bernstein, and ALBK for: 1) libel; 2) fraud; 3) tortious interference with contract; 4) intentional or negligent misrepresentation; 5) breach of contract; and 6) Pennsylvania Unfair Trade Practices and Consumer Protection Law. This complaint alleged defendants committed these state torts in sending the letter of June 7, 1996, and evicting him.

After the state action was terminated in favor of defendants

on appeal from the grant of preliminary objections, Marshall brought this federal action for violation of the FHA. Marshall attempted service of Scully Co. by serving Park Plaza as its agent. Scully Co. is the managing company for Park Plaza, but the entities are separate.

Scully Co. moved to dismiss for improper service. Asserting res judicata bars this subsequent federal action, all defendants have moved for summary judgment.

DISCUSSION

I. Motion to Dismiss

A. Standard of Review

In considering a motion to dismiss under Rule 12(b)(6), the court "must take all the well pleaded allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the pleadings, the plaintiff may be entitled to relief." Colburn v. Upper Darby Township, 838 F.2d 663, 665 (3d Cir. 1988), cert. denied, 489 U.S. 1065 (1989); see Rocks v. City of Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989). The court must decide whether "relief could be granted on any set of facts which could be proved." Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988). A motion to dismiss may be granted only if the court finds the plaintiffs can prove no set of facts in support of their claim

which would entitle them to relief. See Conley v. Gibson, 355 U.S. 41, 45 (1957).

B. Improper Service

Fed. R. Civ. Pro. Rule 4(h) states:

Unless otherwise provided by federal law, service upon a domestic or foreign corporation ... shall be effected:

(1) in a judicial district of the United States in the manner prescribed for individuals by subdivision (e)(1), or by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

Rule (e)(1) provides for service "pursuant to the law of the state in which the district court is located, or in which service is effected." Marshall had two options in serving Scully Co.: 1) under Rule 4(h) by serving the summons and copy of complaint on an officer or agent; and 2) under Pennsylvania law, by serving "at any office or usual place of business of the defendant to his agent or to the person for the time being in charge thereof." Pa. R. Civ. Pro. Rule 402(a)(iii).

Marshall attempted service of Scully Co. by serving process on Morrisey, not an agent of Scully Co., at Park Plaza, not Scully Co.'s place of business. Morrisey did not notify the process server that she was not an agent of Scully Co., but that is irrelevant; it was Marshall's burden to effect proper service on an agent of Scully Co. Scully Co.'s address was no secret;

its agents, Bill Hollin and Bill Elsing, were listed in the directory published by Park Plaza.

Service of Scully Co. was improper, but Scully Co. waived any objection to improper service by moving for summary judgment. When Scully Co. joined the other defendants in requesting this court to address the merits, it was calling upon the court to exercise jurisdiction over this action and itself. By requesting the court to bind Marshall on the merits, it agreed to be bound also. Although Scully Co. joined in the motion of another party, the effect of requesting a meritorious decision is the same. By invoking the jurisdiction of this court, Scully Co. waived any objection it had to improper service. See In re Texas Eastern Transmission Corp. PCB Contamination Insurance Coverage Litigation, 15 F.3d 1230, 1236 (3d Cir. 1994)("[W]e note preliminarily that a party is deemed to have consented to personal jurisdiction [based on insufficiency of service of process] if the party actually litigates the underlying merits or demonstrates a willingness to engage in extensive litigation in the forum.").

II. Motion for Summary Judgment

A. Standard of Review

Summary judgment may be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file,

together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A defendant moving for summary judgment bears the initial burden of demonstrating there are no facts supporting the plaintiff's claim; then the plaintiff must introduce specific, affirmative evidence there is a genuine issue for trial. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-324 (1986). "When a motion for summary judgment is made and supported as provided in [Rule 56], an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in [Rule 56], must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

The court must draw all justifiable inferences in the non-movant's favor. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). A genuine issue of material fact exists only when "the evidence is such that a reasonable jury could return a verdict for the non-moving party." Id. at 248. The non-movant must present sufficient evidence to establish each element of its case for which it will bear the burden at trial. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986).

B. Res Judicata

Pennsylvania law determines whether res judicata bars this action. Davis v. United States Steel Supply, Division of U.S. Steel Corp., 688 F.2d 166, 170 (3d Cir. 1993); See also Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373 (1985). Res judicata bars subsequent litigation of all or part of a claim that was the subject of a previous action. See Balent v. City of Wilkes-Barre, 669 A.2d 309, 313 (Pa. 1995). "Res judicata applies not only to claims actually litigated, but also to claims which could have been litigated during the first proceeding if they were part of the same cause of action." Id. Res judicata avoids excessive and duplicative costs and efforts of litigation, averts potential inconsistency in decisions, and conserves judicial resources. See id. at 315. Its purpose "is to avoid piecemeal litigation." Churchill v. Star Enterprises, ___ F.3d ___, 1999 WL 430182, *8 (3d Cir. June 28, 1999). Pennsylvania liberally construes the doctrine. See 10 Standard Pa. Practice 2d §65:63.

The elements for res judicata are identity of: 1) the things sued for; 2) the cause of action; 3) persons and parties to the action; and 4) the quality or capacity of the persons. See Duquesne Slag Prod. Co. v. Lench, 415 A.2d 53, 55 (Pa. 1980). The court considers the similarity of the cause of action by analyzing: a) similarity of acts giving rise to the complaints; b) demand for recovery; and c) identity of witnesses, documents,

& facts alleged. See 10 Standard Pa. Practice 2d §65:84. The main question is "whether the evidence to support both is the same." Nernst Lamp Co. v. Hill, 90 A. 137, 138 (Pa. 1914). If the causes of action arise from the same acts, res judicata may apply, but if the actions are distinct or the matters necessary for resolution of the actions differ then it does not. See 10 Standard Pa. Practice 2d §§ 65:87-88.

The legal theories Marshall asserted in the state court action differ from those he asserts in this action under the FHA, but the acts giving rise to these actions are identical.¹ Marshall has sued the same private parties for monetary damages in state court and here.²

Both causes of action complain of plaintiff's eviction and the events surrounding it, including the allegedly discriminatory letter sent by the condominium's lawyer to plaintiff's landlord; the action seeks damages and involves the same witnesses (i.e., plaintiff, the management of the condominium association, and its managing corporation and the author of the allegedly

¹ The FHA claim could have been brought in state court. See 42 U.S.C. § 3613.

² Defendants also assert res judicata based on the original eviction procedure. The parties were not identical in that proceeding' Kazem was the plaintiff and Marshall was the defendant. The defendant attorney and defendant law firm in this action may not have been in privity with the plaintiff in that proceeding. This court declines to address the preclusive effect of the eviction proceeding because Marshall's state court action bars the present federal court action.

discriminatory letter), the same documents (i.e., the lease and the allegedly discriminatory letter), and the same facts (i.e., transmission of the letter and alleged violation of the lease). In both actions, Marshall sued defendants for injuries resulting from his eviction and the allegedly discriminatory letter, and for failure to refund a \$200 security deposit, and failure to repair his apartment on at least one occasion.

The only claim that may differ from those alleged in state court is the FHA claim for discriminatory delays in his use of the elevator and/or keys when moving. The evidence necessary to prove this claim would include statements by Morrisey and the cost to Marshall to store his furniture, allegedly the measure of damages. These de minimis claims are connected and arise from the same cause of action. The evidence, such as defendants' discriminatory motive and the witnesses to be called, overlap. They clearly could have been asserted in the state court action and cannot be independently asserted as "piecemeal litigation" now. Churchhill, ___ F.3d ___, 1999 WL 430182, *8.

CONCLUSION

Service of process upon Scully Co. was insufficient to provide this court with jurisdiction over it initially, but Scully Co. subsequently waived its objection to service when it joined in the motion for summary judgment of the other

defendants. The motion for summary judgment will be granted, because the final decision in the prior state court action filed by Marshall against these same defendants bars this federal action.

An appropriate Order follows.

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ORDER

AND NOW, this 3rd day of September, 1999, upon consideration of the motion to dismiss of defendant Scully Co. and defendants' motion for summary judgment, all responses , and after a hearing during which counsel for all parties were heard, and in accordance with the attached Memorandum, it is hereby **ORDERED** that:

1. The motion to dismiss for improper service of process of Scully Co. is **DENIED**.

2. Defendants' motion for summary is **GRANTED**.

3. Judgment is entered against plaintiff and in favor of all defendants as follows: Park Plaza Condominium Ass'n, Cynthia Morrisey, Scully Co., Joshua Bernstein, and Abraham, Loewenstein, Bushman & Kauffman, P.C.

4. The Clerk of Court is directed to mark this action **CLOSED**.

Shapiro, S.J.