

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

CALVIN HAMMOND : CIVIL ACTION
 :
 v. :
 :
 J.C. PENNEY COMPANY, INC. :
 JOSEPH HASKINS :
 JOHN BETHEA, and :
 ERIC HASSEL : NO. 97-1240

MEMORANDUM AND ORDER

HUTTON, J.

January 7, 1998

Presently before the Court is the Defendants' unopposed Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 41(a). For the foregoing reasons, the defendants' motion is granted.

I. BACKGROUND

In his various complaints, plaintiff, Calvin Hammond ("Hammond"), claims that he was wrongly accused of shoplifting. According to the complaints, while he was shopping at the J.C. Penney department store located at 1035 Market Street on August 12, 1996, the three security guard defendants seized and handcuffed him without provocation, brutally attacked him, and kept him in custody for several hours until the police took him to the hospital.

Hammond filed his first Complaint in the Pennsylvania Court of Common Pleas, Philadelphia County, on October 9, 1996. In it he charged defendant J.C. Penney Company, Inc. ("J.C. Penney") with negligence, gross negligence, and assault and battery, seeking compensatory damages in excess of \$50,000. J.C. Penney removed the action to this Court on November 14, 1996. But before the action

could go any further, Hammond voluntarily dismissed his claims, first in the state court on November 18, 1996, and then in this Court on December 4, 1996.

On January 23, 1997, Hammond filed a complaint in the Court of Common Pleas of Philadelphia County, raising the same claims, but adding individual defendants Joseph Haskins, John Bethea, and Eric Hassel. Once again, the defendants removed the action to this Court on February 19, 1997. And once again, Hammond voluntarily dismissed his claims, first in the Court of Common Pleas of Philadelphia County on February 25, 1997, and then in this Court on March 6, 1997.

Finally, on July 2, 1997, this Court granted Hammond's Motion for Leave to File an Amended Complaint against the same parties. Hammond filed his Amended Complaint with the Court on July 9, 1997.

II. DISCUSSION

In their motion, the defendants argue that this action should be dismissed with prejudice because Hammond has voluntarily dismissed the same claims at least twice before.

Federal Rule of Civil Procedure 41(a)(1) states:

[A]n action may be dismissed by the plaintiff without order of court (I) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once

dismissed in any court of the United States or of any state an action based on or including the same claim.

The so-called "two dismissal" rule does not require that the plaintiff twice dismiss his own claims in federal court, but only that he previously dismiss the action at least once in any state or federal court, and then do so an additional time in federal court Rule under 41(a)(1). See Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 394 (1990); Lake at Las Vegas Investors Group, Inc. v. Pacific Malibu Develop. Corp., 933 F.2d 724, 726 (9th Cir. 1991); Shapiro v. Shapiro, 1995 WL 550636, *1 (E.D.Pa. September 13, 1995). See generally 9 Charles A. Wright, Arthur R. Miller, et al., Federal Practice and Procedure § 2368 (2d ed. 1995) Once the Rule is triggered, the claims asserted in the complaint at issue are res judicata. See Manning v. South Carolina Dep't of Highway and Public Transp., 914 F.2d 44, 47 (4th Cir. 1990); Smith, Kline & French Lab. v. A.H. Robins Co., 61 F.R.D. 24, 30 (E.D.Pa. 1973); Shapiro, 1995 WL 550636, at *2.

In this case, Hammond twice brought and twice dismissed the same basic action against J.C. Penney and the individual defendants.¹ He twice invoked Rule 41(a)(1): first on December 4, 1996, and again on March 6, 1997. Accordingly, under Rule

¹ Although the Defendants argue that he should be deemed to have dismissed it four times, it would seem unfair to count the two possibly unnecessary notices Hammond filed in the state court after the action had been removed.

41(a)(1), the March 6, 1997 voluntary dismissal operated as an adjudication on the merits. See Shapiro, 1995 WL 550636, at *2. This claim is therefore dismissed as res judicata.

An appropriate Order follows.

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O R D E R

AND NOW, this 7th day of January, 1998, upon consideration of the Defendants' unopposed Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 41(a), IT IS HEREBY ORDERED that Defendants' Motion is **GRANTED**.

IT IS FURTHER ORDERED that the Plaintiff's Complaint is DISMISSED with PREJUDICE.

BY THE COURT:

HERBERT J. HUTTON, J.