United States District Court, N.D. California.

SIMMONS v. AMERICAN AIRLINES, (N.D.Cal. 2002)

No. C-01-1074 JCS (N.D. Cal. Jan. 23, 2002)

RAYMOND B. SIMMONS, Plaintiff, v. AMERICAN AIRLINES, Defendants

No. C-01-1074 JCS

United States District Court, N.D. California.

January 23, 2002

ORDER GRANTING MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)[Docket No. 4]

JOSEPH C. SPERO, United States Magistrate Judge

Defendant's Motion to Dismiss for Failure to State a Claim Pursuant to Federal Rule of Civil Procedure 12(b)(6) came on for hearing on Friday, October 12, 2001, at 9:30 a.m. Plaintiff filed a supplemental brief on October 17, 2001. Plaintiff filed an opposition to Defendant's supplemental brief on October 23, 2001. For the reasons stated below, Defendant's motion is GRANTED.

I. INTRODUCTION

In this diversity action, Plaintiff brings a claim for slander under Cal. Civ. Code § 43. Plaintiffs slander claim is based on two theories. First, Plaintiff alleges that he was slandered when an American Airlines flight attendant, Mary Bowman, stated in an incident report that Plaintiff used the work "hijack" while on an American Airlines flight. Second, Plaintiff alleges that he was slandered when counsel for American Airlines repeated Bowman's statement in this Court in a prior case brought by Plaintiff based on the same incident. Defendant brings a Motion to Dismiss pursuant to Fed.R.Civ.P. 12(b)(6), asserting that under California law, the statement made by its counsel is a privileged communication and therefore, Plaintiffs slander claim should be dismissed to the extent that it is based on that statement. Defendant further asserts that, to the extent Plaintiffs slander claim is based on Mary Bowman's statement alone, that claim is barred by res judicata.

II. BACKGROUND

This case is based on an incident that occurred on August 19, 1999, when Plaintiff was "thrown off an airplane by defendant for being black." Complaint at 1. Specifically, Plaintiff alleges that "Mary Bowman filed a false report that she heard me say `hijack' on the plane." Plaintiff further alleges that Defendant's attorney, Christopher Dort, "made it public" in a December 15, 2000 hearing in this Court in Related Case No. C-00-0620 when he stated that "as [Plaintiff] was being removed from the airplane . . . he made a comment about a hijacking." Id. at 2. Plaintiff attached as an exhibit to his Complaint the American Airlines incident report at issue. The incident report states, in part, as follows:

[Recorded by Kathie Yacio on 08/19/1999 at 18:24:11]:

> F/A #1 BOWMAN CONTACTED CALL CTR VIA TELE, SAID THAT BEFORE DPTR A FEMALE PSGR TOLD F/A #5 THAT THE MALE PSGR IN 29F WAS FACING WINDOW AND MUMBLING OBSCENITIES INCLUDING "D--- WHITE B----"
>
> MALE PASSENGER LATER SAID, "I AM NOT GOING TO HIJACK." GATE AGT AND F/A BOWMAN ALLEGEDLY HEARD THIS COMMENT AND THE PSGR WAS REMOVED FROM ACFT.

Exh. A to Complaint.

Plaintiff filed Related Case No. C-00-0620 ("the Related Case") in San Francisco Superior Court on January 21, 2000.[1] In that action, Plaintiff sued American Airlines, alleging that he was discriminated against on the basis of race, in violation of the Unruh Act, Cal. Civ. Code § 51. Complaint, Case No. C-00-0620 ("Related Complaint"). Plaintiff attached to the Related Complaint a letter describing the incident upon which his claim was based. Exh. A to Complaint in Related Case ("August 29 Letter"). According to Plaintiff, on August 19, 1999, Plaintiff was removed prior to take-off from an American Airlines flight bound for Tampa, Florida. August 29 Letter. Plaintiff stated in his letter that he was sitting reading a book when two flight attendants asked him to retrieve his carry-on bag and get off the plane. Id. The flight attendants did not inform Plaintiff of the reason he was being asked to get off the plane at that time. Id. As he stepped off the plane, he asked the flight attendants, "Do you believe that I am a hijacker?" Id. When one of the flight attendants questioned him about this statement, Plaintiff said that the comment was "just an unfunny joke." Id. According to Plaintiff, after he was in the airport, the two flight attendants who had escorted him from the plane told Plaintiff that he had been asked to get off the plane because another passenger had accused him of yelling "honky bitches" on the plane. Id. Plaintiff denied that he had made such a statement. Id.

1.

The Court takes judicial notice of the documents filed in the related action, "not for the truth of the matters asserted in the other litigation but rather to establish the fact of such litigation." See Liberty v. Mutual Ins. Co. v. Rotches Pork Packers, 969 F.2d 1384, 1388 2d Cir. 1992) (applying Fed.R. 28 Evid. 201).

Defendant American Airlines removed the Related Case to federal district court on February 23, 2000. On November 9, 2000, Defendant filed a motion for summary judgment. A hearing was held on Defendant's summary judgment motion on December 15, 2000. The Court granted Defendant's motion on December 20, 2000, on the basis that Plaintiff had failed to present specific and probative evidence of racial animus in the face of a legitimate, non-discriminatory reason articulated by Defendant justifying its conduct, namely, an established safety policy which mandates the removal from the plane of passengers engaged in misconduct. Plaintiff appealed the Court's final judgment in the Related Case to the Ninth Circuit Court of Appeals. That appeal currently is pending.

Defendant now brings a Motion to Dismiss in this action. In its original motion, Defendant raised one argument, namely, that Plaintiffs slander claim should be dismissed because the statement of its attorney at a judicial hearing is privileged pursuant to Cal. Civ. Code § 47. At oral argument, the Court noted that Plaintiffs Complaint could be construed to allege not only that Plaintiff was slandered by the statement of Defendant's attorney, but also that he was slandered by the underlying statement of American Airlines employee Mary Bowman in the incident report. In response, Defendant argued that any claim based on the statement of Mary Bowman was barred under the doctrine of res judicata. Defendant filed a supplemental brief in support of this argument following the hearing.

III. ANALYSIS

A. Legal Standard

A complaint should not be dismissed pursuant to Fed.R.Civ.P. 12 (b)(6) unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Parks Sch. of Business, Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995). Dismissal can be based on the lack of cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990). On a motion to dismiss, the court accepts the facts alleged in the complaint as true. Id.

B. Claim Based on Statement of Defendant's Counsel

Defendant asserts that Plaintiff fails to state a claim for slander based on the statement of Defendant's counsel, Christopher Dort, because, under California law, the statement of its attorney made at the December 15, 2000 hearing is privileged. See Cal. Civ. Code 47(a)(2). The Court agrees.

In determining whether a plaintiff in a diversity action has sufficiently stated a claim to survive a 12(b)(6) motion, the court must refer to state substantive law to determine the elements that must be pleaded, while applying federal pleading standards. Clark v. Allstate Insurance Co., 106 F. Supp.2d 1016, 1018 (S.D. Cal. 2000) (holding in diversity action that federal pleading standard governing malice should be applied to state law claim seeking punitive damages rather than heightened pleading standard that would have been applied to same claim in state court and noting that "it is well established that federal courts sitting in diversity must apply state substantive law and federal procedural rules") (citing to Erie v. Tomkins, 304 U. 5. 64 (1938)). To state a claim for slander under California law, the Plaintiff must allege that the statement is: 1) false; 2) unprivileged; and 3) resulted in one or more of the five types of injury listed under Cal. Civ. Code § 46.[2]

2.

Cal. Civ. Code § 46 provides as follows:

> Slander is a false and unprivileged publication, orally uttered, and also communications by radio or any mechanical or other means which:
>
> 1. Charges any person with crime, or with having been indicted, convicted, or punished for crime;
>
> 2. Imputes in him the present existence of an infectious, contagious, or loathsome disease;
>
> 3. Tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits;
>
> 4. Imputes to him impotence or a want of chastity; or
>
> 5. Which, by natural consequence, causes actual damage.

Here, Plaintiff fails to state a claim for slander as to the statement by Christopher Dort because he has not only failed to allege that the statement is unprivileged, but has also alleged facts showing that the statement is indeed privileged. In particular, Cal. Civ. Code § 47(a)(2) provides that "[a] privileged publication or broadcast is one made . . . [i]n any judicial proceeding." The privilege conferred by Cal. Civ. Code § 47(a)(2) is an absolute privilege and exists even where the statement at issue was made with malice. Ascherman v. Natanson, 23 Cal.App.3d 861, 864 (972) (citing to Albertson v. Raboff, 46 Cal.2d 375, 379 (1956). Because Christopher Dort's statement was made in the course of a judicial proceeding, Plaintiff fails to state a claim for slander based on that statement. See Harnish

v. Smith, 138 Cal.App.2d 307, 309 (1956) (holding that plaintiffs failed to state a claim for slander where plaintiffs did not allege that statements were unprivileged and where facts alleged showed that statements were, in fact, privileged).

C. Claim Based on Statement of Mary Bowman Alone

Defendant further argues that Plaintiffs slander claim must be dismissed to the extent that it is based on the statement of Mary Bowman alone because it is barred by res judicata. The Court agrees.[3]

3. Because the Court finds that Plaintiffs claim is barred by res judicata, the Court does not reach the question of whether Plaintiff states a claim for slander based on the statement of Mary Bowman.

A federal court sitting in diversity apply the res judicata law of the state in which it sits. Costantini v. Trans World Airlines, 681 F.2d 1199, 1201 (9th Cir. 1982). California courts, in turn, apply federal standards in determining the res judicata effect of a prior federal court judgment. Younger v. Jensen, 26 Cal.3d 397, 410 (1980). It is established in the Ninth Circuit that "[r]es judicata, also known as claim preclusion, bars litigation in a subsequent action of any claims that were raised or could have been raised in the prior action." See Owens v. Kaiser Foundation Health Plan, Inc., 244 F.3d 708, 713 (9th Cir. 200 1) (citing Western Radio Servs. Co. v. Glickman, 123 F.3d 1189, 1192 (9th Cir. 1997)). The doctrine of res judicata is applicable whenever there is: 1) an identity of claims; 2) a final judgment on the merits; and 3) identity or privity between the parties. Id.

Here, Plaintiff is suing the same defendant that he sued in the Related Case and, therefore, there is identity of parties. In addition, although Plaintiffs appeal of the district court's order granting summary judgment in the Related Case is pending, the district court's order is nonetheless considered a final judgment for the purposes of res judicata. See Costantini, 681 F.2d at 1201 (holding that under California law, res judicata effect of prior federal judgment is determined by federal standards); Turner v. Turner, 204 B.R. 988, 992 (9th Cir. 1997) (noting that "[g]enerally, federal court judgments are considered final for collateral estoppel purposes, even when the appeal is pending"); Calhoun v. Franchise Tax Board, 20 Cal.3d 881, 884 (1978) (holding that federal district court judgment was a "final judgment" for purposes of res judicata even though appeal of that judgment was pending before the Ninth Circuit).

The Court also finds that there is identity of claims between the slander claim in this action based on Mary Bowman's statement and the discrimination claim asserted in the related case. The Ninth Circuit looks to the following criteria in determining whether or not successive lawsuits the same cause of action:

> (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action;
>
> (2) whether substantially the same evidence is presented in the two actions;
>
> (3) whether the two suits involve infringement of the same right; and
>
> (4) whether the two suits arise out of the same transactional nucleus of facts.

Costantini v. Trans World Airlines, 681 F.2d 1199, 1201 (9th Cir. 1982) (applying California law). "The last of these criteria is the most important." Id. Further, a plaintiff cannot avoid the bar of res judicata merely by pleading a new legal theory based on the same cause of action. McClain v. Apodaca, 793 F.2d 1031, 1034 (9th Cir. 1986).

Here, the slander claim against Mary Bowman clearly arises from the same transactional nucleus of facts as does the discrimination claim in the Related Case. See Owens, 244 F.3d at 714 (holding that claims were

barred by res judicata where they arose from same transactional set of facts as earlier claims). In particular, the claim against Mary Bowman is based on the same incident as was Plaintiffs discrimination claim in the Related Case, and these claims could have been conveniently tried together. See id. Moreover, although Plaintiff alleges a slander claim in this action rather than a racial discrimination claim, as in the Related Case, the right at issue in both cases is essentially the same. In particular, both cases are based on the allegation that Plaintiff was wrongfully removed from the flight because of his race. See Complaint at 1 (alleging that Plaintiff "was thrown off an airplane for being black"). Finally, because both the discrimination claim and the slander claim are based on the motivations of the American Airlines employees involved in the incident, and particularly Mary Bowman, substantially the same evidence would be presented in both actions. Therefore, to the extent that Plaintiff alleges a claim of slander based on the statement of Mary Bowman alone, that claim is barred by res judicata.

IV. CONCLUSION

Defendants Motion to Dismiss Pursuant To Federal Rule of Civil Procedure 12(b)(6) is GRANTED. Plaintiffs claims for slander are dismissed with prejudice, thus disposing of all of Plaintiffs claims in this action. The Clerk is directed to close the file in this case.

IT IS SO ORDERED.
