

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS.

SUPERIOR COURT

Docket No. 08-C-844

Gary Dolan

v.

Wendy St. Louis and Valerie Thorgerson

ORDER

The plaintiff, Gary Dolan ("Dolan"), proceeding pro se, brought this action against the defendants, Wendy St. Louis ("St. Louis") and Valerie¹ Thorgerson, ("Thorgerson") seeking damages for tortious interference with advantageous relations and defamation. The defendants have moved for judgment on the pleadings, arguing that res judicata and collateral estoppel bar the plaintiff's claims. They assert that Dolan "seeks to re-litigate a controversy that has been fully and finally adjudicated in federal court after more than three years of litigation, . . . [that he] seeks to bring claims in the instant case that either have been or could have been heard by the federal court in the [underlying] action . . . [and that he] seeks to circumvent the ruling of the United States District Court for the District of New Hampshire, denying . . . [his] untimely motion to amend his complaint to add additional claims and parties, including . . . St. Louis" Defs.' Mot. at 1-2. Dolan opposes the defendants' motion, contending that the claims he here seeks to advance are not barred.

Since the parties have filed affidavits and other submissions going beyond the pleadings, the Court treats the defendants' motion as one for summary judgment.

¹ Ms. Thorgerson's first name is spelled "Valarie," not "Valerie," as noted in the docket.

FACTUAL BACKGROUND

Dolan was employed at Sungard Securities Finance, LLC ("Sungard") as a client services representative from November 5, 1998 to April 15, 2005. During part of this time frame, Dolan received supervision from St. Louis, and had Thorgerson as a co-worker.

Dolan came to have substantial difficulties and issues involving St. Louis and also, to some degree, Thorgerson. Beginning in 2004, he made a number of internal complaints against St. Louis, which Sungard addressed, though not to Dolan's satisfaction. In the early 2005 time frame, Dolan continued to have employment-related difficulties associated with St. Louis and/or Thorgerson, among others, that involved his claimed bad temper, and alleged persisting negative and hostile behavior.

On April 15, 2005, Sungard terminated Dolan's employment. Dolan has indicated that he was told this occurred due to his failure to improve his claimed negative attitude after his 2004 performance evaluation.

On July 25, 2005, the plaintiff filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC") against Sungard alleging gender discrimination, harassment, and retaliation. In the Charge, the plaintiff claimed, among other things, that St. Louis treated him differently than his female co-workers and berated and humiliated him in the workplace. Id., Ex. A. Sungard responded, among other things, that the company had terminated Dolan based on concerns for the safety of his co-workers. Id., Ex. B. The EEOC afforded Dolan no relief. Id.

On or about December 19, 2005, Dolan instituted an action against Sungard in this Court alleging gender discrimination and retaliation, under both federal and state

law, wrongful discharge, breach of covenant of good faith and fair dealing, violation of RSA 275:56, intentional infliction of emotional distress, negligent infliction of emotional distress, intentional misrepresentation, negligent misrepresentation, violation of the Equal Pay Act, and promissory estoppel. Id., Ex. C. On or about February 6, 2006, Sungard removed the case to the United States District Court for the District of New Hampshire (“District Court”). Id., Ex. D.

On July 17, 2006, the District Court granted Dolan’s Motions to Amend Complaint to add Global Compliance Services, Inc. (“Global”), the operator of Sungard’s corporate Alertine Allegation Reporting Service, as a defendant, and to add four additional counts against Sungard— fraud, conspiracy to commit fraud, violation of the Equal Pay Act, and breach of contract. Id., Ex. D, Endorsed Orders of July 17, 2006. The amended complaint against Sungard included many allegations referencing St. Louis and Thorgerson. Id., Ex. E.

On August 1, 2006, Dolan filed another Motion to Amend Complaint, and, in this motion, requested permission to add seven employees of Sungard, including St. Louis, as defendants for his claims of intentional and negligent infliction of emotional distress. Id., Ex. D, No. 14. Dolan filed this motion about two months after the deadline for joinder of parties had passed. The District Court denied the motion for failure to comply with Federal Local Rule 15.1(a), and allowed Dolan to August 14, 2006 to “cure” his motion. Id., Ex. D, No. 15. On August 14, Dolan filed a Motion to Extend Discovery Track Deadline for Joinder of Additional Defendants in which he sought to have the District Court extend the deadline for joinder of additional parties and allow the addition of eleven new defendants, including St. Louis—that is, nine other Sungard employees,

and an unnamed “John Doe” defendant—as well as claims of intentional infliction of emotional distress, negligent infliction of emotional distress, and civil conspiracy against these eleven new parties. Id., Ex. D, No. 20. On September 8, 2006, Dolan’s late attempts to amend his complaint were denied, it being observed, among other things, that such attempts were “untimely.” Id., Ex. D, Endorsed Orders of September 8, 2006.

During the course of discovery, Dolan took the depositions of a number of Sungard employees, including St. Louis and Thorgerson. He also propounded and received answers to written discovery requests.

On March 1, 2007, Sungard and Global each filed Motions for Summary Judgment (id., Ex. D, Nos. 48-49); and on December 5, 2007 the District Court granted Global’s motion for summary judgment on all counts. Id., Ex. D, No. 77. On January 8, 2008, the District Court, in a 46 page decision, denied summary judgment in regard to Dolan’s claims against Sungard of gender discrimination, violation of RSA 275:56, and part of his retaliation claims, but granted summary judgment with respect to his claims of wrongful discharge, breach of the covenant of good faith and fair dealing, intentional infliction of emotional distress, negligent infliction of emotional distress, negligent misrepresentation, promissory estoppel, fraud, conspiracy to commit fraud, equal pay, and much of his retaliation claims. Id., Ex. H. The District Court’s decision expressly referenced both St. Louis and Thorgerson in dealing with pertinent material facts and legal conclusions. Id. It also instructed Dolan to file, on or before January 30, 2008, a supplemental brief addressing the basis of his claim under RSA 275:56, and allowed Sungard, if appropriate, to file, on or before February 11, 2008, a supplemental motion for summary judgment addressing the claims not yet resolved. Id.

Dolan filed a Motion for Reconsideration on January 23, 2008. Id., Ex. D, No. 81. Sungard not merely opposed this motion but filed its supplemental motion for summary judgment. Id., Ex. D, Nos. 88-89. Dolan filed opposition papers to Sungard's supplemental summary judgment motion. Id. Ex. D, Nos. 96-97. On March 6, 2008, the District Court denied Dolan's Motion for Reconsideration (id. Ex. D, No.95); and, on April 23, 2008, in a 19 page decision, granted summary judgment for Sungard on all of Dolan's remaining claims. Id., Ex. I. Again, St. Louis and Thorgerson were extensively referenced. Id.

In late May, 2008, Dolan appealed the District Court's judgment to the United States Court of Appeals for the First Circuit (id. Ex. D, No. 103); and then, in September 2008, filed the instant action against St. Louis and Thorgerson.

Dolan's present complaint advances allegations that solely relate to his employment circumstances at Sungard, including his loss of employment. Dolan seeks relief in regard to claimed statements and conduct of St. Louis and/or Thorgeson that occurred in the employment context.

On January 29, 2009, the First Circuit entered a judgment affirming the District Court's judgment. Id., Ex. J. Dolan filed an untimely petition for a panel rehearing, which the First Circuit denied. Id., Ex. K. On September 22, 2009, the United States Supreme Court closed review proceedings that Dolan had there instituted. See Defs.' Notification of United States Supreme Court's Closure of Case, filed September 25, 2009.

DISCUSSION

The defendants argue, among other things,² that res judicata bars Dolan's action here as he had a full and fair opportunity to litigate any claims he had arising from his employment circumstances and loss of employment in the earlier case against Sungard, a case in which he implicated them to a substantial degree as material Sungard employees. Dolan contends that res judicata does not bar his present claims against St. Louis and Thorgerson because these persons are not in privity with Sungard, the cause of action in the instant case is not the same as the cause of action litigated in federal court, no final judgment had been rendered in the first case, and he did not sufficiently learn the basis of his current claims against St. Louis and Thorgerson until it was too late to join them in the earlier action.

"Res judicata 'precludes the litigation in a later case of matters actually litigated, and matters that could have been litigated, in an earlier action between the same parties for the same cause of action.'" Brzica v. Trustees of Dartmouth College, 147 N.H. 443, 454 (2002) (quoting In re Alfred P., 126 N.H. 628, 629 (1985)). Res judicata prevents "repetitive litigation so that at some point litigation over a particular controversy must come to an end." Eastern Marine Const. Corp. v. First Southern Leasing, 129 N.H. 270, 273 (1987). For res judicata to apply, three elements must be met: (1) the same cause of action must be before the court in both instances; (2) the parties must be the same or in privity with one another; and (3) a final judgment on the merits must have been rendered on the first action. Brzica, 147 N.H. at 454.

² The Court does not address the defendants' collateral estoppel argument.

Here, it is established that a final judgment on the merits has been rendered in the earlier case. The appellate steps are over. The third prong referenced above has been satisfied.

As to the first prong, the New Hampshire Supreme Court defines a cause of action for res judicata purposes “collectively to refer to all theories on which relief could be claimed on the basis of the factual transaction in question.” Sleeper v. Hoban Family P’ship, 157 N.H. 530, 534 (2008) (quoting Eastern Marine Const., 129 N.H. at 275). “Generally, in determining whether two actions are the same cause of action for the purpose of applying res judicata, [the Court] consider[s] whether the alleged cause of action arises out of the same transaction or occurrence.” Id. (quotation and citation omitted). “Res judicata will bar a second action even though the plaintiff is prepared in the second action to present evidence or grounds or theories of the case not presented in the first action.” Brzica, 147 N.H. at 455-56.

The Court finds that Dolan’s claims in the instant case against St. Louis and Thorgeron arise out of the same transactions and occurrences that were involved in the first action— that this current suit is essentially based on the same common nucleus of facts and circumstances.

As is reflected in the decisions dealing with Sungard’s motions for summary judgment in the earlier case, the District Court squarely considered, among other things, the following that would figure prominently here if Dolan were allowed to pursue his present claims: that Dolan had filed a number of internal complaints against St. Louis; that he had received performance appraisals that passed muster but reflected attitude issues; that in March, 2005, he had had a loud and difficult argument with St. Louis and

Thorgerson at a department meeting regarding vacation time; that Thorgerson had thereafter expressed concern to supervisors that Dolan might harm her or one of their co-workers and that Dolan had talked of having a gun; that Sungard came to terminate Dolan's employment after hearing of said concerns; and that Dolan felt he had been unfairly treated, and spoken of. Defs.' Mot., Exs. H. and I.

Further, the District Court observed, in assessing Dolan's case:

[T]he record provides ample evidence of Dolan's negativity and hostility in the workplace. The record also supports Sungard's view that instead of improving, Dolan's attitude was becoming more negative and hostile. St. Louis and Thorgerson were concerned that he might harm them or someone else at work.

Id., Ex. H at 29.

Finally, and in dealing with, and dismissing as lacking in necessary evidentiary support, Dolan's conspiracy to commit fraud claim, the District Court characterized the claim as asserting that a number of Sungard employees, including St. Louis and Thorgerson, had "conspired to have him wrongfully discharged . . . [;] that they tried to cause him sufficient distress to make him resign and, when that did not work, they created a non-discriminatory reason to terminate him." Id. Ex. H. at 43. This bears marked similarity at least to the tortious interference with advantageous relations claim that Dolan here asserts.

Thus, it is not the case, as Dolan asserts, that he seeks here to raise matters that are not covered by the preclusive "same cause of action" res judicata standard.

Dolan asserts, nonetheless, that he did not become really aware of his claims against St. Louis and Thorgerson until it was too late to assert them in the earlier action. The record reflects, however, that Dolan was very much aware, even while still employed by Sungard, that his employment-based concerns and complaints strongly

implicated St. Louis and, to some degree, Thorgerson. Moreover, the record also reflects that Dolan had full and fair opportunity in the earlier case to come to know timely and completely his possible claims (including any claims specifically against the defendants presently at bar), and he had the obligation there to proceed with diligence. That he did not do so caused the District Court to deny his naming of additional defendants, including St. Louis, a circumstance that does not operate as a form of saving excuse. See Fiumara v. Fireman's Fund Ins. Cos., 746 F.2d 87, 92 (1st Cir. 1984).

As to the first prong—the privity requirement—employees are in privity with their employers for purposes of res judicata if they pertinently act within the scope of their employment. Thirty Pines, Inc. v. Bersaw, 92 N.H. 69 (1942). “[A] judgment excusing the master or principal from liability on the ground that the servant or agent was not at fault forecloses a subsequent suit against the later on the same claim.” Lober v. Moore, 417 F.2d 714, 718 (D.C. Cir. 1969). A plaintiff “having seen fit to elect bringing its suit against the employer instead of against the employee, or both, as it might well have, is bound by its election.” Thirty Pines, 92 N.H. at 69; see also Fiumara, 746 F.2d at 92 (holding that the plaintiff was foreclosed from making claims against certain non-parties to earlier actions where he “had full and fair opportunity for judicial resolution of the same issue,” and where the non-named parties were “all acting as agents of the . . . [the defendants in the earlier actions] when they committed the putative misdeeds for which they have now been sued.”); Lubrizol Corp. v. Exxon Corp., 871 F.2d 1279, 1288 (5th Cir. 1989) (“Where a plaintiff has sued parties in serial litigation over the same transaction; where plaintiff chose the original forum and had the opportunity to raise all

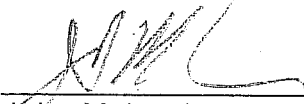
its claims relating to the disputed transaction in the first action; where there was a 'special relationship' between the defendants in each action, if not complete identity of the parties; and where although the prior action was concluded, the plaintiff's later suit continued to seek essentially similar relief—the courts have denied plaintiff a second bite at the apple.”).

The Court finds that St. Louis and Thorgerson are in privity with Sungard for purposes of res judicata. The first prong is met. As previously discussed, St. Louis and Thorgerson, were material, active employees of Sungard, the defendant-company, in regard to the issues and contentions involved in Dolan's earlier action, and conducted themselves within the scope of their employment, at least in part to serve Sungard's interests, in carrying out their pertinent activities that concerned Dolan. See, e.g., Taboas v. Mlynczak, 149 F.3d 576, 582 (7th Cir. 1998) (holding that employees acted within the scope of their employment by reporting concerns about retaliation by a supervisor).

For the reasons expressed above, the Court **GRANTS** summary judgment in favor of St. Louis and Thorgerson on the basis of res judicata.

SO ORDERED.

12/2/09
Date



John M. Lewis
Presiding Justice