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NO. 65369-5

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

KIRK ALAN THOMPSON,
Appellant,

V.

KING COUNTY,
Respondent.

2010 SEP -1 AM 10:19

APPELLANT'S BRIEF

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ASSIGNMENT OF ERROR

The trial court erred in granting its order of April 12, 2010, dismissing Plaintiff's negligence case against King County based upon a stipulation in federal court that a parallel case of Plaintiff, acting pro se, against two named corrections officers sued in their individual capacities could be withdrawn

STATEMENT OF THE CASE

Kirk Thompson, a prison inmate, has attempted, pro se, to sue his jailers claiming that he was a victim of a jail rape at the King County Jail. The history of this case, or cases, bears witness to some of the pitfalls of pro se representation. What should be clear from that history is that the issues raised by Plaintiff in both federal and state court have not been addressed on their merits by any trier of fact.

On October 16, 2008, Mr. Thompson filed a federal lawsuit claiming violations of the Federal Civil Rights Act 42 U.S.C. § 1983 and negligence. (RP 29-34). He named as Defendants, Brian McMillen and "Sgt. Weirich (sic)", in their "individual capacities", claiming failure to protect him from a jail rape which occurred while he was in the King County Jail in Seattle, Washington. (RP 29).

Following the federal filing, Mr. Thompson filed on November 13, 2008, a separate lawsuit in state court, in King County Superior Court

Cause Number 08-2-38989SEA (RP 84-91). The Defendants named in that case were Mr. Thompson's inmate assailants and "Reed Holgeerts Director of King County Correctional Facility". (RP 84). The defendants were sued in their "individual capacity." (RP 84).

King County moved to dismiss this case based upon the defense of res judicata was what was offered in the federal case as a "STIPULATION FOR VOLUNTARY DISMISSAL FRCP (a) (1) (A)." (RP 81). This was signed by Mr. Thompson on March 5, 2009, and thereafter on March 9, 2009 by Daniel Kinerk, Attorney for Defendants. (RP 82). That stipulation stated:

(1) "The present action shall be withdrawn with prejudice; (2) each party shall bear their respective costs incurred as a result of this action."

(RP 82). In this present case, King County presented no record of the filing of the stipulation in Federal District Court Cause Number C08-1206 TSZ/BAT, nor is there any evidence of acknowledgment of the stipulation in any form by the federal trial judge.

With regard to the parallel state case of November 13, 2008, the stipulation said nothing; and in this case the Defendant King County presented no court records indicating that that later-filed state cause was dismissed. That action continued without reference to the terminal implications of the federal court case. The last presented document

prepared by defense counsel was a dismissal of Brian McMillan, “without prejudice”. (RP 128-129).

Mr. Thompson sought counsel and then filed the present negligence lawsuit, against King County and its employees, which included the employees of the King County Jail. (RP 130-132). King County then moved to dismiss the action pursuant to CR 12 (b) (6), prior to filing any answer to the complaint. On April 12, 2010, the Honorable Jim Rogers, Judge of the Superior Court, granted King County’s motion and dismissed the case. (RP 167-169). This appeal followed.

It is Mr. Thompson’s submission that his pro se case was intended to be withdrawn from the jurisdiction of the federal court leaving his state claims as they existed in the ongoing state case. (RP 155-156). The federal court never entered a judgment on the state claims relating to supplemental jurisdiction of those claims. Mr. Thompson submits that federal principles of res judicata applicable to his pro se federal case should not apply in this case to the benefit of Defendant King County, which was not a party in the federal case.

ARGUMENT

A. A. Did the trial court err in failing to apply fully summary judgment requirements in King County’s CR 12 (b) (6) motion

hearing which was converted by King County into a summary judgment hearing?

King County's motion to dismiss in this case was crafted as a CR 12 (b) (6) motion to dismiss. (RP 4-132). The motion was filed before an answer had been filed. The order of dismissal was entered before an answer had been filed. The defense of res judicata is an affirmative defense which must be pled and proved. Farmers Insurance Company of Washington v. Miller, 87 Wn. 2d 70, 549 P.2d 9 (1976), CR 8 (c). That affirmative defense was not pled.

On a CR 12 (b) (6) motion, a defense of failure to state a claim upon which relief can be granted, the court must accept as true all of the allegations in the complaint. Danzig v. Danzig, 79 Wn. App 612, 904 P.2d 312 (1995). For that kind of motion, it is the burden of the movant to establish from the face of the pleadings that no claim may be successfully prosecuted. Ibid. There is nothing on the face of the complaint that suggests that res judicata principles should apply to the complaint.

CR 12 (b) (6) does allow for circumstances in which a CR (12) (b) is filed and, as in this case, material extrinsic to the pleadings is provided. CR (12) (b). When those extrinsic materials are presented, the motion to dismiss may be converted into a motion for summary judgment under CR

56. CR 12 (b). If the motion becomes a motion for summary judgment, evidentiary rules applicable to that kind of motion would apply.

Appellate review of a summary judgment proceeding is review de novo. Folsom v. Burger King, 135 Wn. 2d 658, 663, 958 P.2d 301 (1998). In assessing a motion for summary judgment, a reviewing court, or a trial court, must view the facts in a light most favorable to the non-moving party, in this instance, the Plaintiff. Homeowners Association v. Tydings, 72 Wn. App. 139, 864 P.2d 392 (1993). All reasonable inferences from the evidence must be drawn in favor of the non-moving party. Tabak v. State, 73 Wn. App. 691, 870 P.2d 1014 (1994). A summary judgment of dismissal of this lawsuit is sustainable only if there are no genuine issues of material fact. Homeowners, *supra* at 154. The party resisting summary judgment must present some evidence, even inconsistent evidence, which will support the existence of a material issue of fact. Yuan v. Chow, 92 Wn. App. 137, 960 P.2d 1003 (1998); Barnes v. McLennod, 128 Wn.2d 563, 810 P.2d 469 (1996). Essentially, the nonmovant's evidence must be treated as verity for purposes of the motion.

The burden lies with the moving party to show the absence of material facts as to the various claims. Safeco Insurance v. Butler, 118 Wn.2d 383, 823 P.2d 499 (1992); Nicholson v. Deal, 52 Wn.App 814, 764 P.2d 1007 (1988). Where issues of fact are presented, a court may not

decide a factual issue unless reasonable minds can reach only one conclusion from the evidence presented. Hooper v. Yakima County, 79 Wn. App. 770, 904 P.2d 1183 (1995).

It should be noted that a movant for summary judgment may not raise new issues in rebuttal. White v. Kent Medical Center, Inc. P.S., 61 Wn.App 163, 810 P.2d (1991).

A movant for summary judgment must show by admissible evidence that no issue of material fact exists; in the absence of the meeting of that burden, the non-movant has no duty of response. Jacobsen v. State, 89 Wn. 2d 104, 108, 569 P.2d 152 (1977). Evidence provided at summary judgment must be sworn and based on personal knowledge. State v. Evans Campaign Committee, 86 Wn. 2d 503, 546 P.2d 75 (1976).

The defense of res judicata is an affirmative defense which is non-jurisdictional and must be pled and proved. Farmers Insurance Company of Washington v. Miller, 87 Wn. 2d 70, 549 P.2d 9 (1976); CR 8 (c).

To the extent that King County's motion was a converted summary judgment, its submitted materials, and there was much material, must be presented in the form of affidavits or declarations under oath. CR 56 (e). At the trial level, Mr. Thompson objected to the use of unsworn and extraneous material and moved to strike those materials from the trial court's consideration. (RP 137-138). Because the relevant material

related only to the order dismissing Brian McMillan from the ongoing state case, Plaintiff's federal and state complaints, and the federal stipulation, the residue of Defendant's materials were extraneous to King County's motion to dismiss, and they should have been stricken from the Court's consideration.

As his evidence, Mr. Thompson presented a declaration indicating that the stipulation in the federal case was not intended or expected by him to put an end permanently to all of his claims that he was sexually assaulted and that his jailors' negligence was a proximate cause of the rape of him. He submits that this declaration raised a material issue of fact relating to the purpose and effect of the stipulation. On this basis, the granting of summary judgment was unwarranted. He stated that he thought that the stipulation was an agreement to "withdraw" his claims from consideration by the Federal Court. (RP 155-156). That assertion is un rebutted by King County. That assertion was corroborated by the fact that at the time of the stipulation, Mr. Thompson was continuing to prosecute his state claims in the ongoing state court case. The stipulation's use of the more ambiguous word "withdrawn" instead of the more unequivocal word "dismiss" supports his position. As perhaps an imperfect analogy, a judicial opinion that is withdrawn does not constitute a dismissal of a controversy. US v. Cope, 527 F.3d 944 (9th Cir. 2008).

B. Were principles of res judicata, applicable to the effect of a stipulation in a federal court case involving a federal question, applied according to federal principles in light of the existence of a parallel ongoing case in state court? Federal courts hold that in federal question cases such as Mr. Thompson’s Federal Civil Rights claims, federal principles of res judicata would apply to the consequences of rulings in the case. Taylor v. Sturgill, 553 US 880, 128 S. Ct. 2161 (2008); Semtek International, Inc., v. Lockheed Martin Corp., 531 US 497, 507, 508, 121 S. Ct. 1021, 149 L. Ed 2d 32 (2001).

The federal common law identifies generally principles of res judicata, or claim preclusion, as follows:

For claim preclusion to apply, there must be (1) an identity of claims in the two actions; (2) a final judgment on the merits in the first action; and (3) identity or privity between the parties in the two actions.

Frank v. United Airlines, 216 F.3d 845 (9th Cir. 2000).

Fundamental to a claim of res judicata is the preexistence of a valid and

final judgment: “The threshold requirement of res judicata is a final judgment on

the merit in the prior suit.” Hisles v. Todd Pacific Shipyards Corp., 151 Wn. 2d

853, 865, 93, P.3d 108 (2004).

As noted previously, the stipulation upon which King County relied in its motion to dismiss, was not a court record, much less the imprimatur of a final judgment. A judgment is defined under Federal Rules:

“Judgment” as used in these rules includes a decree and any order from which an appeal lies. A judgment should not include recitals of pleadings, a master report, or a record of prior proceedings.

Fed. R.Civ.P. 54 (a).

Mr. Thompson claimed that without the introduction of a document, admissible as evidence and constituting a final judicial record relating to the federal case, principles of res judicata requiring a final prior judgment could not be applied.

C. Did the absence of the federal trial court’s ruling relating to supplemental jurisdiction in the federal case involving both a federal question and the state tort of negligence warrant dismissal, based on res judicata principles, of the negligence claims against King County in state court?

The federal case filed by Mr. Thompson claimed violation of his federal civil rights and a claim of negligence against two named individuals sued in their individual capacities. When a case is filed in federal court which includes both federal questions and state claims, the

federal trial judge, after dismissing federal claims such that only the state claims remained, may determine to exercise supplemental jurisdiction or decline to exercise supplemental jurisdiction with regard to the state claims. 28 U.S.C. § 1367; Simmons v. Navajo County, 609 F.3d 1011, 1023 (9th Cir. 2010).

In this case there is no evidence that the federal court exercised any judicial act with regard to the state claims or made any ruling at all with regard to its supplemental jurisdiction of the state claims. For this reason, particularly in the summary judgment context, it is submitted that King County was not entitled to the inference that the federal court made a discretionary determination of any description regarding those claims. If this is the case, then the state claims were not considered or dismissed or remanded by the federal court and, therefore, the state claims were not extinguished.

D. Did the claim of privity of the parties in the prior federal and subsequent state case support dismissal of the state action based on res judicata principles?

One of the requirements of res judicata in either the federal or state context is the existence of a relationship of privity between the parties in the second case and the parties of the first case. In the federal case, Mr. McMillen and “Sgt.. Weirich” were sued in their personal capacities only.

That limitation has specific consequences. In a federal civil rights under 42 U.S.C. Section 1983, King County could not be held to be vicariously liable for the acts or omissions of its corrections officers because principles of respondeat superior do not apply to a governmental entity under that Act. Mortimer v. Baca, 594 F. 3d 714, 721 (9th Cir. 2010); Monell v. Dept. of Social Services, 436 US 638, 691, 98 S. Ct. 2018, 56 L.Ed 611 (1978). In a case under 42 USC § 1983, King County could not be held liable to Mr. Thompson on a theory of negligence. Daniels v. Williams, 474 U.S. 327, 106 S. Ct. 677, 88 L.Ed 2d. 662 (1986).

A distinction exists also with regard to the status of a defendant who may be a governmental employee: the employee may be sued in his or her individual capacity or in his or her official capacity. Babcock v. State, 116 Wn. 2d 596, 620, 621, 809 P.2d 143 (1991). For federal civil rights purposes, a county employee can be sued in his individual capacity, thereby putting him outside the scope of his employment, or in his official capacity, which would make him an agent of a governmental entity. Mortimer, supra. Suit against a county employee in his official capacity would be treated as a suit against the county, and personal defenses which he might have if sued in his individual capacity would not apply. Kentucky v. Graham, 473 U.S. 159, 105 S. Ct. 3099, 87 L. Ed.2d 114 (1985). With regard to King County as an entity in a federal civil rights

case, that entity must be sued in a manner claiming its independent responsibility as an entity for any wrongdoing of its employees. Owen v. Independence, 445 U.S. 622, 100 S. Ct. 1398, 63 L. Ed. 2d673 (1980). Because of the difference in legal status between the county and its employees, there is a divergence in the quality and identity of those parties with regard to the claims made in Mr. Thompson's cases. Proof of the unitary status of the parties sued in the original and in the subsequent case is an element of the res judicata defense which must be established by King County.

E. Should pro se Plaintiff Thompson have been accorded the lenity which federal courts counsel for pro se parties such that he could obtain a hearing on the actual merits of his claims?

As indicated above Mr. Thompson filed his federal case both as a prison inmate and as a pro se plaintiff. The Ninth Circuit has adopted and encouraged the general rule that pro se parties in federal court should be treated with more leniency than parties who are represented. Garoux v. Pulley, 739 F.2d 437 (9th Cir. 1984); Abassi v. Immigration and Naturalization Service, 305 F.3d 1028, 1032 (9th Cir. 2002). That judicial tolerance should extend to Mr. Thompson's confusion over the legal implications of his uninformed actions in seeking access to a tribunal which would address the actual merits of his case.

F. By dismissing the action based on res judicata principles did the trial court fail to apply federal and state court preferences for addressing litigation on the merits of the case?

As noted, Mr. Thompson was never able to present his claims to a trier of fact. Instead his historical record includes: a stipulation for withdrawal of his claims from federal court; an ongoing pro se state case; and the present case which the trial court has dismissed based upon King County's CR 12 (b) (6) motion. Federal courts are encouraged to attempt to allow litigants their day in court rather than to close the door on their claims procedurally. Abassi, supra at 1032. The same emphasis upon addressing a case on its actual merits exists in the State of Washington: "The court rules are intended to allow the court to reach the merits of an action". Spokane County v. Specialty Auto and Truck Painting, Inc. 153 Wn.2d 238, 245, 103 P.3d 792 (2004); Phelp v. Alameida, 569 F.3d 1120, 1140, 1141 (9th Cir. 2009).

CONCLUSION

Defendant King County's motion to dismiss this action was a motion pursuant to CR 12 (b) (6), as a failure to state a claim on which relief could be granted, which was transformed into a summary judgment proceeding by the presentation of materials extrinsic to the complaint in this case. The result was a kind of hybrid proceeding wherein Mr.

Thompson became judged upon more than the pleadings. That alteration of the shape of the proceeding required that he be given all benefits of inferences which could reasonably be drawn from what admissible evidence was presented. He alone has attempted to describe the intent of the stipulation, to withdraw his case from federal court, which now prevents him from proving that he was a victim of criminal rape in the King County Jail.

The hypothetical dagger in the heart of his case was the stipulation to withdraw the case, which appears not to have been filed in federal court and a stipulation which lacks evidence of any judicial acknowledgment of that stipulation, There is no judicial record of the trial court's determination as to what that federal court intended as disposition of Mr. Thompson's state claim: either a dismissal of it or a remanding of it to the state forum. Additionally the federal case is devoid of any recognition of its effect upon Mr. Thompson's state case, which was ongoing at the time of the stipulation.

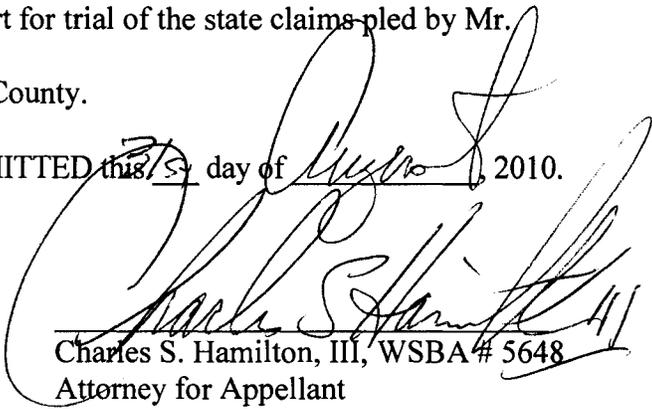
The materials provided should make clear that Mr. Thompson was acting as a pro se plaintiff; and as a pro se plaintiff Mr. Thompson should have been extended the degree of tolerance which federal courts extend to pro se plaintiffs, as well as the general judicial preference for allowing

cases to be adjudicated on their merits rather than preempting them with procedural barriers.

Mr. Thompson has indicated by declaration that he never intended to do more than withdraw his claims from federal court. This is consistent with the wording of the stipulation. His present case against King County presents no federal claims, also consistent with his declaration. A material question of fact exists as to interpretation on the stipulation. It is submitted respectfully that the materials presented by Defendant in support of an unpled affirmative defense, do not establish final or binding rulings in federal court on the issue of whether or not Mr. Thompson's state claims may go forward.

Whether this case is reviewed de novo as a hearing on a motion to dismiss on the pleadings, or as a motion for summary judgment based upon pleadings and extrinsic evidence, it is submitted that the trial court's ruling in this case should be reversed and that this matter should be remanded to the trial court for trial of the state claims pled by Mr. Thompson against King County.

RESPECTFULLY SUBMITTED this 5 day of August, 2010.


Charles S. Hamilton, III, WSBA # 5648
Attorney for Appellant