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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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July 13, 2022

Clerk - Middle District of Florida
U.S. District Court
801 N FLORIDA AVE
TAMPA, FL 33602-3849

Appeal Number: 21-14292-GG
Case Style: Helen Ferguson v. Gettel Management Group
District Court Docket No: 8:21-cv-01244-CEH-AAS

The enclosed copy of the Clerk's Order of Dismissal for failure to prosecute in the above-referenced appeal is issued as the mandate of this court. *See* 11th Cir. R. 41-4. Pursuant to 11th Cir. R. 42-2(c) and 42-3(c), when an appellant fails to timely file or correct a brief or appendix, the appeal shall be treated as dismissed on the first business day following the due date. This appeal was treated as dismissed on 07/05/2022.

Eleventh Circuit Rules 42-2(e) and 42-3(e) govern motions to set aside dismissal and remedy the default. Such motions must be filed within 14 days of the date the clerk issues the Order of Dismissal. Except as otherwise provided by FRAP 25(a) for inmate filings, a motion to set aside dismissal and remedy the default is not timely unless the clerk receives the motion within the time fixed for filing. *See* FRAP 25(a)(2)(A)(i).

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Joseph Caruso, GG
Phone #: (404) 335-6177

Enclosure(s)

APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 21-14292-GG

HELEN FERGUSON,

Plaintiff - Appellant,

versus

GETTEL MANAGEMENT GROUP,
agent of Gettel Acura,

Defendant - Appellee.

Appeal from the United States District Court
for the Middle District of Florida

ORDER: Pursuant to the 11th Cir. R. 42-2(c), this appeal is DISMISSED for want of prosecution because the appellant Helen Ferguson failed to file a CORRECTED brief within the time fixed by the rules, effective July 13, 2022.

DAVID J. SMITH
Clerk of Court of the United States Court
of Appeals for the Eleventh Circuit

FOR THE COURT - BY DIRECTION

APPENDIX A.

Doc 20
FILED 11/2/2021

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

HELEN FERGUSON,

Petitioner,

v.

Case No: 8:21-cv-1244-CEH-AAS

GETTEL MANAGEMENT GROUP,

Defendant.

ORDER

This matter comes before the Court on the Report and Recommendation of Magistrate Judge Amanda Sansone (Doc. 8). In the Report and Recommendation, the Magistrate Judge recommends that *pro se* Plaintiff Helen Ferguson's motion to proceed *in forma pauperis* be denied and Plaintiff's Amended Complaint be dismissed. Plaintiff filed Objections to the Report and Recommendation (Doc. 12). On August 3, 2021, Plaintiff paid the \$402 filing fee. Upon consideration of the Report and Recommendation, the Objections, and upon this Court's independent examination of the file, it is determined that the Objections should be overruled, the Report and Recommendation adopted, and this action dismissed with prejudice.

I. BACKGROUND

On June 3, 2021, Plaintiff Helen Ferguson, proceeding *pro se*, filed a "Complaint for a Civil Case Alleging that the Defendant Owes Plaintiff a Sum of Money (28 U.S.C. § 1332; Diversity of Citizenship)" against Defendant Gettel Management

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Group (Gettel Acura). Doc. 1. Although the Complaint indicates the Court's jurisdiction is based on diversity of citizenship, both Plaintiff and Defendant are alleged to be Florida citizens. *Id.* at 3. The Complaint summarily alleges that Defendant Gettel Management Group violated Plaintiff's civil rights on December 28, 2015. *Id.* at 4. On June 14, 2021, Plaintiff filed a long form application to proceed in District Court without prepaying fees or costs (Doc. 5), which the Court construes as a motion to proceed *in forma pauperis*. The motion was referred to the Magistrate Judge, who entered an Order on June 22, 2021, noting that while Plaintiff's financial application supports her claim of indigency, Plaintiff fails to properly invoke the jurisdiction of this Court as complete diversity does not exist between Plaintiff and Defendant, who are both citizens of Florida. Doc. 6. The Magistrate Judge further observed that despite Plaintiff's claim that Defendant owes her \$350,000 from a civil rights lawsuit, she fails to provide documents showing any judgment in her favor. The Magistrate Judge permitted the Plaintiff an opportunity to file an Amended Complaint.

On July 2, 2021, Plaintiff filed an Amended Complaint, naming as Defendants, Gettel Management Group, Gettel Acura's supervisor Diane Bieman ("Bieman"), and her co-worker Debbie Mellace ("Mellace"). Doc. 7. Plaintiff asserts jurisdiction is proper based on a federal question. *Id.* at 4. Plaintiff alleges that during the time between 2014 and 2015, she was "verbally abused by the supervisor of Gettel Acura and terminated because she wouldn't leave and go home." *Id.* Plaintiff further alleges her co-worker was searching her purse every time she left the office. *Id.* Plaintiff seeks

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\$400,000 in compensatory and punitive damages for violation of her civil rights. *Id.* She attaches to her Amended Complaint an Equal Employment Opportunity Commission (EEOC) Charge of Discrimination dated February 2, 2016, in which she asserted claims of discrimination based on race and retaliation by her employer, Gettel Acura. *Id.* at 8. Additionally, she attaches a "Notice of Suit Rights" dated September 22, 2016. *Id.* at 9.

On July 21, 2021, the Magistrate Judge issued a Report and Recommendation recommending Plaintiff's Amended Complaint be dismissed, in which she noted that Plaintiff originally filed a discrimination action against these Defendants on December 21, 2016. Doc. 8 at 3 (citing Case No. 8:16-cv-3460-SDM-TBM (M.D. Fla.)) ("the original action"). In the original action, Plaintiff sued Gettel Acura, Bieman, Mellace, and another Gettel Acura employee for alleged race discrimination, sex discrimination, verbal abuse by her supervisor, retaliatory conduct, and termination. See Doc. 8 in the original action. Plaintiff attached to her complaint in that case the same Charge of Discrimination and Notice of right to sue. See *id.* at 7-8.

In the Report and Recommendation here, the Magistrate Judge reviewed the procedural background of the original action, which ultimately was dismissed with prejudice in 2018. See Doc. 86 in the original action. After dismissal of that case, Plaintiff continued to litigate that action, filing two more motions seeking default judgment against Defendants and a "pay out of settlement," which the district court denied in 2019. See Docs. 88-91 in the original action.

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In the present suit brought two years later, Plaintiff asserts the same claims of discrimination and retaliation against her former employer and two of its employees. Doc. 7. In considering the Amended Complaint, the Magistrate Judge concluded that the current action is barred by the doctrine of *res judicata* because there was an adjudication on the merits of the original action and both actions involved the same parties and same causes of action. Doc. 8. The Magistrate Judge further noted that even if Plaintiff's claims were not barred by *res judicata*, her claims would be time-barred as she would have had ninety days from her rights to sue notice in which to bring her claims. Her rights to sue notice is dated September 2016. Thus, any lawsuit filed arising out of the claims that form the basis of the Charge of Discrimination are time-barred.

On July 30, 2021, Plaintiff filed "Objections to the Report and Recommendation." Doc. 12. Plaintiff indicates that her complaint and amended complaint were for settlement purposes. She objects to her complaint being dismissed as frivolous or malicious. She then proceeds to outline the procedural history of the original action, in which she notes several times that certain procedural happenings were not "part of the process of Plaintiff's case." By way of example, in reviewing documents filed in the original action, Plaintiff explains the case was supposed to end in a default judgment,¹ and that discovery requested by Defendants, motions to compel

¹ According to Plaintiff, Defendants did not timely answer the complaint or amended complaint in her original action. She moved for default judgment, but her motions were denied.

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filed by Defendants, and hearings set by the court were not part of the process of her case. Doc. 12 at 2-4.

II. STANDARD OF REVIEW

When a party makes a timely and specific objection to a Magistrate Judge's Report and Recommendation, the district judge "shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made. 28 U.S.C. § 636(b)(1)(C); U.S. v. Raddatz, 447 U.S. 667, 673 (1980). The district judge may accept, reject, or modify in whole or in part, the Report and Recommendation of the Magistrate Judge. Fed. R. Civ. P. 72. The district judge may also receive further evidence or recommit the matter to the Magistrate Judge with further instructions. *Id.*

III. DISCUSSION

As a preliminary matter, Plaintiff's objection fails to raise any factual or legal basis to refute the Magistrate Judge's recommendations. Thus, the objections are due to be overruled. Rather, Plaintiff repeats her dissatisfaction with how the original action was handled and the outcome of that case. As explained in detail by the Magistrate Judge in the Report and Recommendation, Plaintiff's claims are barred by the doctrine of *res judicata*. The doctrine of *res judicata* "bars the filing of claims which were raised or could have been raised in an earlier proceeding." *Maldonado v. U.S. Atty. Gen.*, 664 F.3d 1369, 1375 (11th Cir. 2011) (quoting *Ragsdale v. Rubbermaid, Inc.*, 193 F.3d 1235, 1238 (11th Cir. 1999)). For *res judicata* to bar a subsequent case, four

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elements must be present: "(1) there is a final judgment on the merits; (2) the decision was rendered by a court of competent jurisdiction; (3) the parties, or those in privity with them, are identical in both suits; and (4) the same cause of action is involved in both cases." *Id.*

Here, as discussed by the Magistrate Judge, each of the four elements are satisfied. The Plaintiff's claims in this action are barred because there was a final adjudication on the merits of her claims by the district court in the original action, the parties are the same, and the causes of action are the same. Accordingly, the Amended Complaint is due to be dismissed with prejudice. The Court further agrees with the Magistrate Judge that notwithstanding the applicability of the *res judicata* doctrine to the present action, Plaintiff's claims still fail because any cause of action for discrimination or retaliation arising out of her employment with Gettel Acura would have had to be filed within ninety days of the Rights to Sue Notice, which Plaintiff has not done here.

The Court observes that Plaintiff paid the filing fee in August 2021 after the Magistrate Judge issued her Report and Recommendation. However, this does not save Plaintiff's cause. In relevant part, Section 1915 states, "[n]otwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that . . . the action . . . fails to state a claim upon which relief may be granted. 28 U.S.C. § 1915(e)(2)(B)(ii). See *Harmon v. Webster*, 263 F. App'x 844, 846 (11th Cir. 2008) (finding complaint failed to state a claim upon which relief may be granted because it was barred by *res judicata*). Thus, the motion for

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in forma pauperis is due to be denied as moot. And although Plaintiff paid the filing fee, her claims are due to be dismissed as barred as set forth herein.

Accordingly, it is hereby

ORDERED:

1. Plaintiff's Objections (Doc. 12) to the Magistrate Judge's Report and Recommendation are **OVERRULED**.
2. The Report and Recommendation of the Magistrate Judge (Doc. 8) is adopted, confirmed, and approved in all respects and is made a part of this Order for all purposes, including appellate review.
3. Plaintiff's Motion to Proceed *in Forma Pauperis* (Doc. 5) is **DENIED** as moot.
4. Plaintiff's Amended Complaint (Doc. 7) is **DISMISSED** with prejudice.
5. The Clerk is directed to terminate any pending motions and deadlines and close this case.

DONE AND ORDERED in Tampa, Florida on November 2, 2021.

Charlene Edwards Honeywell

Charlene Edwards Honeywell
United States District Judge

Copies to:
Counsel of Record
Unrepresented Parties

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

HELEN FERGUSON,

Plaintiff,

v.

Case No. 8:21-cv-1244-CEH-AAS

GETTEL MANAGEMENT GROUP,

Defendant.

REPORT AND RECOMMENDATION

Helen Ferguson requests to proceed *in forma pauperis*. (Doc. 5). It is RECOMMENDED that Ms. Ferguson's motion be DENIED, and this action be dismissed.

I. BACKGROUND

In her original complaint, Ms. Ferguson sued Gettel Management Group for \$350,000 that she claimed should have been (but was not) awarded to her as a default judgment in her 2016 employment discrimination action against Gettel Management Group. (Doc. 1). Although unclear, Ms. Ferguson appeared to allege diversity jurisdiction as the basis for the court's jurisdiction. (*Id.* at pp. 3-4). This court deferred Ms. Ferguson's motion to proceed *in forma pauperis*, addressed whether this court had jurisdiction to hear Ms. Ferguson's case, and ordered Ms. Ferguson to submit an amended complaint. (Doc. 6).

In her amended complaint, Ms. Ferguson alleges federal question jurisdiction as the basis for the court's jurisdiction. (Doc. 7). Ms. Ferguson alleges claims under Title VII for sex discrimination, race discrimination, and possible retaliatory conduct. (Doc. 7, Ex. 1). Ms. Ferguson also requests punitive and compensatory damages under the Civil Rights Act of 1991. (*Id.*). Ms. Ferguson alleges her supervisor verbally abused her and she was terminated because she would not leave and go home. (Doc. 7, p. 4). Ms. Ferguson attaches her charge of discrimination from February 2016 and the Equal Employment Opportunity Commission (EEOC) Dismissal and Notice of Rights dated September 22, 2016. (Doc. 7, Exs. 2, 3).

II. LEGAL STANDARD

After determining the economic status of the litigant, the court must review the case and dismiss it *sua sponte* if it is frivolous, malicious, fails to state a claim, or "seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(B); *see Martinez v. Kristi Cleaners, Inc.*, 364 F.3d 1305, 1307 (11th Cir. 2004) (citation omitted).

Dismissal for failure to state a claim in this context is governed by the same standard as dismissal under Rule 12(b)(6), Federal Rules of Civil Procedure. *Mitchell v. Farcass*, 112 F.3d 1483, 1490 (11th Cir. 1997). Dismissal for failure to state a claim is appropriate if the facts, as pleaded, fail to state a

claim for relief that is “plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted).

If a district court determines from the face of the complaint that the factual allegations are clearly baseless or the legal theories lack merit, the court may conclude a case has little or no chance of success and dismiss before service of process. *Carroll v. Gross*, 984 F.2d 392, 393 (11th Cir. 1993) (per curiam). While the court holds complaints in *pro se* actions to less stringent pleading standards, a *pro se* plaintiff remains subject to the same law and rules of court as a litigant represented by counsel. *See Moon v. Newsome*, 863 F.2d 835, 837 (11th Cir. 1989).

III. DISCUSSION

In the original case (case number 16cv3460) filed on December 21, 2016, Ms. Ferguson alleged claims under Title VII for race discrimination, sex discrimination, verbal abuse from her supervisor, retaliatory conduct, and termination based on her employment with Gettel Acura. (Doc. 8; 16cv3460).¹ Ms. Ferguson also named Ms. Diana Bieman, her supervisor, Debbie Mellace, the office assistant, and Fred Bartholomew of Gettel Management Group Corporate office as defendants. (*Id.* at p. 2). Throughout this previous case, the

¹ At the court’s direction, Ms. Ferguson amended her complaint, which was the operative complaint for her original case. (Doc. 8, 16cv3460).

court denied Ms. Ferguson's many requests for default judgment. (See Doc. 85, p. 1; 16cv3460 (listing all the docket numbers)). Gettel Acura tried to move forward with the litigation by seeking discovery and noticing Ms. Ferguson's deposition, but Ms. Ferguson refused to engage because she argued that she had a right to default against Gettel Acura, despite her six requests for default being denied. (*Id.* at pp. 2-4). Gettel Acura moved for sanctions against Ms. Ferguson, specifically for the court to dismiss her case with prejudice for failure to comply with a court order. (Doc. 81; 16cv3460). After Judge McCoun recommended granting Gettel Acura's request for dismissal, Judge Merryday dismissed the case with prejudice in February 2018. (Doc. 86, 16cv3460). Despite her case being dismissed, Ms. Ferguson moved two more times for default judgment and for a "pay out of settlement." (Docs. 88, 90, 16cv3460). Judge Merryday denied both requests in 2019. Now two years later in a new case, Ms. Ferguson alleges claims under Title VII for sex discrimination and race discrimination, and possible retaliatory conduct against Gettel Management Group. (Doc. 7, Ex. 1, 21cv1344).

"Res judicata is a doctrine of claim preclusion which operates to prevent litigation of matters that were raised or should have been raised in an earlier suit." *See McKinnon v. Blue Cross and Blue Shield of Ala.*, 935 F.2d 1187, 1192 (11th Cir. 1991). "The purpose behind the doctrine of res judicata is that the

full and fair opportunity to litigate protects a party's adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Ragsdale v. Rubbermaid, Inc.*, 193 F.3d 1235, 1238 (11th Cir. 1999) (quotations and alteration omitted). Four elements are required for res judicata to bar a subsequent suit: "(1) there must be a final judgment on the merits; (2) the decision must be rendered by a court of competent jurisdiction; (3) the parties, or those in privity with them, must be identical in both suits; and (4) the same cause of action must be involved in both cases." *I.A. Durbin, Inc. v. Jefferson Nat'l Bank*, 793 F.2d 1541, 1549 (11th Cir. 1986). "A final decision is 'one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Pitney Bowes, Inc. v. Mestre*, 701 F.2d 1365, 1368 (11th Cir. 1983) (citation omitted). If the plaintiff fails to comply with a court order, the defendant may move to dismiss the claims against it and the dismissal "operates as an adjudication on the merits." Fed. R. Civ. P. 41(b); *see also Kiera v. Berry*, 573 F. App'x 918, 919 (11th Cir. 2014) (finding a dismissal of a complaint for failure to comply with an order of contempt "operates as an adjudication on the merits" under Rule 41(b)). As to the fourth element, whether the causes of action in both suits are identical, the inquiry is not only whether both cases advance precisely the

same legal theory, but also whether the legal theories and claims arise out of “the same nucleus of operative fact.” *NAACP v. Hunt*, 891 F.2d 1555, 1561 (11th Cir. 1990).

Here, all four elements are met for res judicata. Because Judge Merryday dismissed Ms. Ferguson’s original case with prejudice for failure to comply with a court order, that dismissal “operates as an adjudication on the merits.” Fed. R. Civ. P. 41(b). Judge Merryday’s previous decision dismissing the case with prejudice was rendered by “a court of competent jurisdiction.” Although Ms. Ferguson identifies the defendant as Gettel Management Group here, it is the same defendant as the original case but just a different name. Specifically, the amended complaint from the original case shows Ms. Ferguson identifies Gettel Acura and Gettel Management to be the same entities. (See Doc. 8, p. 9; 16cv3460). Ms. Ferguson identifies the same causes of action—race discrimination, sex discrimination, and retaliatory conduct—and the same facts are identified in both cases. Ms. Ferguson also provides the same charge of discrimination and EEOC Dismissal and Notice of Rights that she provide in the prior case. (See Doc. 7, Exs. 2, 3, 21cv1244; Doc. 8, Ex. A, 16cv3460). Thus, Ms. Ferguson’s claims are barred by res judicata.²

² Even if Ms. Ferguson’s claims were not barred by res judicata, her claims are time barred. Under Title VII, once a party receives the notice of rights, the party has ninety days to file a civil action. 42 U.S.C. § 2000e-5(f)(1); *see also Santini v. Cleveland Clinic*

IV. CONCLUSION

Thus, it is **RECOMMENDED** that Ms. Ferguson's motion for leave to proceed *in forma pauperis* (Doc. 5) be **DENIED**, and the amended complaint (Doc. 7) be **DISMISSED**.

ENTERED in Tampa, Florida on July 21, 2021.

Amanda Arnold Sansone

AMANDA ARNOLD SANSONE
United States Magistrate Judge

Fla., 232 F.3d 823, 825 (11th Cir. 2000) ("Title VII . . . may not be brought more than 90 days after a complainant has adequate notice that the EEOC has dismissed the Charge."). Ms. Ferguson received her right to sue letter on September 22, 2016. (Doc. 7, Ex. 3). However, she filed her case on June 3, 2021, over four years and eight months after she received her notice of rights. (See Doc. 1).

**Additional material
from this filing is
available in the
Clerk's Office.**