

16-3381

Everson v. Armstrong et al.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007 IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 8th day of September, two thousand seventeen.

PRESENT:

BARRINGTON D. PARKER,

SUSAN L. CARNEY,

Circuit Judges.

TIMOTHY C. STANCEU,

*Chief Judge, U.S. Court of Int'l Trade.**

CHRISTOPHER EVERSON,

Plaintiff-Appellant,

v.

No. 16-3381

JOHN ARMSTRONG, OFFICIAL AND INDIVIDUAL CAPACITY,

SCOTT SEMPLE, COMMISSIONER OF CORRECTION,

OFFICIAL AND INDIVIDUAL CAPACITY,

Defendants-Appellees.

FOR APPELLANT:

Christopher Everson, *pro se*, Hamden, CT.

* Chief Judge Timothy C. Stanceu, of the United States Court of International Trade, sitting by designation.

1 AMICUS CURIAE:

Carletha S.P. Texidor, Assistant Attorney
General, Office of the Connecticut
Attorney General, Hartford, CT.

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5 Appeal from a judgment of the United States District Court for the District of
6 Connecticut (Chatigny, J.).

7 **UPON DUE CONSIDERATION WHEREOF, IT IS HEREBY ORDERED,**
8 **ADJUDGED, AND DECREED** that the judgment of the district court entered on
9 September 7, 2016, is **AFFIRMED**.

10 Appellant Christopher Everson appeals from a judgment entered after the district
11 court *sua sponte* dismissed his suit pursuant to 28 U.S.C. § 1915(e)(2). We assume the parties'
12 familiarity with the underlying facts, the procedural history of the case, and the issues on
13 appeal, to which we refer only as necessary to explain our decision to affirm.¹

14 We review *de novo* a district court's *sua sponte* dismissal under § 1915(e)(2). *Giano v.*
15 *Goord*, 250 F.3d 146, 149-50 (2d Cir. 2001). We conclude that the district court properly
16 dismissed Everson's complaint on claim-preclusion grounds. *Monahan v. N.Y.C. Dept. of Corr.*,
17 214 F.3d 275, 285 (2d Cir. 2000) (A claim is precluded when "(1) the previous action
18 involved an adjudication on the merits; (2) the previous action involved the plaintiffs or
19 those in privity with them; [and] (3) the claims asserted in the subsequent action were, or
20 could have been, raised in the prior action."). First, Everson's 2004 action for damages under
21 42 U.S.C. § 1983 was resolved on the merits when the district court entered summary
22 judgment for defendants in 2009. *Everson v. Comm'r of Corr.*, No. 04-cv-387 (Dkt. Nos. 48,
23 131); *see also Beck v. Levering*, 947 F.2d 639, 642 (2d Cir. 1991). Second, with the exception of
24 Commissioner Scott Semple, now sued in his individual capacity, the 2004 action and the

¹ The named defendants were never served and, therefore, are not parties to this appeal. We directed the Connecticut Attorney General's Office to file a brief as amicus curiae in support of defendants' position.

1 current action involve the same named parties or those in privity with them. Third, in both
2 the 2004 action and the current action, Everson asserts claims under § 1983 based on his
3 allegedly discriminatory firing in 2001. Therefore, the district court properly determined that
4 the earlier dismissal of the 2004 action precludes Everson from pursuing the present claims
5 against the same parties.

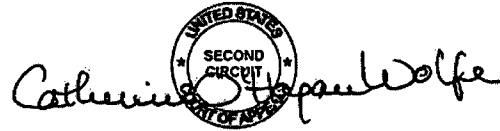
6 Dismissal of Everson's claim against Semple also was proper. The district court
7 dismissed this claim on claim-preclusion grounds even though it could have been argued that
8 Semple was not in privity with the plaintiffs in the 2004 action. We need not consider that
9 issue because the claim, even were it not so precluded, would be time-barred. *See Lounsbury v.*
10 *Jeffries*, 25 F.3d 131, 133-34 (2d Cir. 1994). Moreover, to the extent Everson seeks in the
11 current action to hold Semple liable in his individual capacity as well as in his official
12 capacity, he fails to allege any facts to support an inference that Semple was personally
13 involved in the 2001 events giving rise to his claim. *See, e.g., K & A Radiologic Tech. Servs., Inc.*
14 *v. Comm'r of Dep't of Health of State of N.Y.*, 189 F.3d 273, 278-79 (2d Cir. 1999) (stating that
15 "[p]ersonal involvement of the defendant in the alleged deprivation is a prerequisite to
16 recovery of damages under § 1983").

17 Finally, Everson invokes this Court's mandamus jurisdiction, seeking an order
18 directing the district court to revisit its 2009 summary judgment ruling. We deny the
19 requested relief. Everson has already had the opportunity to appeal the 2009 ruling, and
20 mandamus "[may] not be used as a substitute for the regular appeals process." *See, e.g., Cheney*
21 *v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380-81 (2004) (citation omitted).

1 We have considered Everson's remaining arguments and find them to be without
2 merit. Accordingly, we **AFFIRM** the district court's judgment.

3 FOR THE COURT:

4 Catherine O'Hagan Wolfe, Clerk of Court

The image shows a handwritten signature, "Catherine O'Hagan Wolfe", written in cursive. The signature is written over a circular official seal. The seal contains the text "UNITED STATES" at the top, "SECOND CIRCUIT" in the center, and "CLERK OF COURT" at the bottom. There are small stars on either side of the "SECOND CIRCUIT" text.

**UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT**

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 25th day of October, two thousand seventeen.

Christopher Everson,

Plaintiff - Appellant,

v.

John Armstrong, Official and Individual Capacity, Scott
Semple, Commissioner of Correction, Official and
Individual Capacity,

Defendants - Appellees.

ORDER

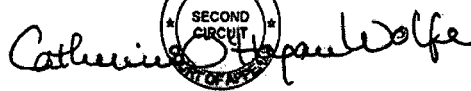
Docket No: 16-3381

Appellant, Christopher Everson, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

A circular seal of the United States Court of Appeals for the Second Circuit is positioned over the signature. The seal contains the text "UNITED STATES", "SECOND CIRCUIT", and "COURT OF APPEALS".

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

CHRISTOPHER EVERSON,

Plaintiff,

V.

SCOTT SEMPLE, *Commissioner of
Correction, Official and Individual
Capacity*, and JOHN ARMSTRONG, *Official
and Individual Capacity*,

Defendants.

CASE NO. 3:16CV77 (RNC)

JUDGMENT

This action having come on for consideration of the plaintiff's motion for leave to proceed in forma pauperis dkt. # [2], and the plaintiff's motion for appointment of counsel dkt. # [3] before the Honorable Robert N. Chatigny, United States District Judge, and, District Judge Robert N. Chatigny referred the matter to the Honorable Judge Donna F. Martinez, United States Magistrate Judge and,

The Honorable Donna F. Martinez, US Magistrate Judge having considered the full record of the case including applicable principles of law, and having filed a recommended ruling dkt. # [10] granting the plaintiff's motion to proceed in forma pauperis, denying his motion for appointment of counsel and recommending that his complaint be dismissed without prejudice pursuant to 28 U.S.C. § 1915 (e) (2)(B). The Court having approved and adopted over objection; it is hereby

ORDERED, ADJUDGED AND DECREED that this case be dismissed.

Dated at Hartford, Connecticut, this 7th day of September, 2016.

ROBIN D. TABORA, Clerk

By /s/ TG
Terri Glynn
Deputy Clerk

EOD: 9/7/16

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CHRISTOPHER EVERSON,	:	
	:	
Plaintiff,	:	
	:	
v.	:	CASE NO. 3:16cv77(RNC)
	:	
SCOTT SEMPLE, ET AL.	:	
	:	
Defendants.	:	

RECOMMENDED RULING

Plaintiff, Christopher Everson, brings this employment discrimination action against defendants Scott Semple and John Armstrong--the Commissioner and former Commissioner of the Department of Correction ("DOC"), respectively. Pending before the court is plaintiff's motion for leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915 (doc. #2) as well as his motion for appointment of counsel.¹ (Doc. #3.) Based on plaintiff's financial affidavit, the motion to proceed in forma pauperis is GRANTED. However, I recommend that his complaint be dismissed without prejudice pursuant to 28 U.S.C. § 1915(e)(2)(B). His motion for appointment of counsel is DENIED.

I. Legal Standard

The same statute that authorizes the court to grant in forma pauperis status to a plaintiff also contains a provision

¹U.S. District Judge Robert N. Chatigny referred the pending motions to me on June 15, 2016. (Doc. #8.)

that protects against abuses of this privilege. Subsection (e) provides that the court "shall dismiss the case at any time if the court determines that . . . the action . . . (i) is frivolous or malicious; (ii) fails to state a claim upon which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(B); Neitzke v. Williams, 490 U.S. 319, 325 (1989).

II. Discussion

Plaintiff's complaint appears to challenge the court's February 4, 2009 judgment against him in an earlier lawsuit he filed in 2004. See Everson v. Comm'r of Correction, Docket No. 04-cv-387(RNC) (D. Conn. Feb. 4, 2009). Plaintiff pleads the same underlying facts as he did in the 2004 case. He was arrested in October and November 2000, but the charges later were dismissed. Immediately following both arrests, plaintiff alleges that his employer, the Department of Correction ("DOC"), "began its employee arrest procedure," with which plaintiff maintains he cooperated fully. Nonetheless, in March 2001, the DOC terminated plaintiff's employment. In April 2004, he filed a complaint with this court pursuant to 42 U.S.C. § 1983, alleging employment discrimination on the basis of his race. In February 2009, Judge Chatigny granted summary judgment in favor of defendants. Plaintiff appealed to the Second Circuit, which dismissed his appeal for failure to pay the filing fee. He

filed a motion to reopen the case, which was denied. Plaintiff filed a petition for a writ of certiorari, which the United States Supreme Court denied in November 2010.

"Under the doctrine of res judicata, or claim preclusion, [a] final adjudication on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." St. Pierre v. Dyer, 208 F.3d 394, 399 (2d Cir. 2000) (internal quotation marks omitted).

"Once a final judgment has been entered on the merits of the case, that judgment will bar any subsequent litigation by the same parties or those in privity with them concerning the transactions out of which the first action arose The doctrine of res judicata mandates the sua sponte dismissal of the instant action." Wasser v. Battista, No. 12-CV-2455

(RRM) (LB), 2012 WL 1901957, at *2 (E.D.N.Y. May 23, 2012). Plaintiff's attempt to relitigate claims that already were decided by this court is barred by the doctrine of res judicata and thus, his complaint should be dismissed. Eze v. Scott, No. 10-CV-1017, 2011 WL 4383140, at *4 (W.D.N.Y. Sept. 14, 2011) ("[R]epetitious litigation of virtually identical causes of action is subject to dismissal under 28 U.S.C. § 1915[e].") (internal quotation marks omitted).

Turning to plaintiff's request for appointment of counsel, a plaintiff in a civil case is not entitled to appointment of a

free lawyer on request and the Second Circuit repeatedly has cautioned district courts against the routine appointment of counsel. See, e.g., Hendricks v. Coughlin, 114 F.3d 390, 393 (2d Cir. 1997); Cooper v. A. Sargenti Co., 877 F.2d 170, 172 (2d Cir. 1989). Because volunteer-lawyer time is in short supply, a plaintiff seeking appointment of a free lawyer must show first that he "sought counsel and has been unable to obtain it." McDonald v. Head Criminal Court Supervisor Officer, 850 F.2d 121, 123 (2d Cir. 1988). If the plaintiff has been unable to obtain counsel, he must then demonstrate that his complaint passes the test of "likely merit." Cooper at 173. This standard requires a plaintiff to show that the claims in the complaint have a sufficient basis to justify appointing a volunteer lawyer to pursue them. In light of my recommendation to dismiss plaintiff's complaint on res judicata grounds, plaintiff's motion for appointment of counsel is DENIED.

III. Conclusion

For these reasons, plaintiff's motion to proceed in forma pauperis (doc. #2) is GRANTED, but I recommend that his complaint be dismissed without prejudice. Plaintiff's motion for appointment of counsel (doc. #3) is DENIED.

Any party may seek the district court's review of this recommendation. See 28 U.S.C. § 636(b) (written objections to proposed findings and recommendations must be filed within

fourteen days after service of same); Fed. R. Civ. P. 6(a), 6(d) & 72; Thomas v. Arn, 474 U.S. 140, 155 (1985); Frank v. Johnson, 968 F.2d 298, 300 (2d Cir. 1992) (failure to file timely objections to Magistrate Judge's recommended ruling waives further review of the ruling).

Dated this 3rd day of August, 2016 at Hartford,
Connecticut.

_____/s/_____
Donna F. Martinez
United States Magistrate Judge

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