

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

LUCIEN P. LEJA,)	
)	
Plaintiff)	
)	
v.)	Civil No. 98-201-P-C
)	
CAROLYN HELWIG, et al.,)	
)	
Defendants)	

**RECOMMENDED DECISION ON
DEFENDANTS' MOTIONS TO DISMISS AND PLAINTIFF'S MOTIONS TO INVOKE
RES IPSA LOQUITUR AND FOR RELIEF FROM FINAL JUDGMENT**

The plaintiff, again appearing *pro se*, has filed a second complaint in this court seeking relief under federal and state law¹ in connection with his arrest in October 1994 by the Cumberland County Sheriff's Department. In the previous action, *Lucien P. Leja v. William R. Holmes, et al.*, Civil No. 96-370-P-C, the court entered a final judgment on January 23, 1998 in favor of all defendants on all claims. Accordingly, the defendants in this action — Carolyn Helwig, Penny Whitney, William R. Holmes, Donald Foss, the State of Maine and the County of Cumberland — have moved here for dismissal on the ground of res judicata. Pending are two separate dismissal motions — one filed on behalf of Helwig, Whitney and the State of Maine (the "State defendants") (Docket No. 3), and the second filed on behalf of Holmes, Foss and Cumberland County (the "County defendants") (Docket

¹ Counts I through XVI of the complaint assert claims for "unlawful entry," "assault," "unreasonable search and seizure," "false arrest," "false imprisonment," "making false written statement," "denial of bail," "malicious arrest," "malicious prosecution," "conspiracy," "deceit by perjury," "deceit by abuse of process," "deceit by misconduct in office," "vicarious liability," "harassment" and "double jeopardy." Count XVII alleges the violation of the plaintiff's constitutional rights, a claim that obviously arises under 42 U.S.C. § 1983 although the complaint does not explicitly reference this provision.

No. 8). The State defendants seek sanctions against the plaintiff and the County defendants report they have placed the plaintiff on notice that a sanctions motion is forthcoming pursuant to Fed. R. Civ. P. 11(c)(1)(A).

The plaintiff opposes these motions and counters with two of his own. The first (Docket No. 5) seeks a judicial determination that the doctrine of *res ipsa loquitur* is applicable to the case and, thus, that the defendants should essentially be required to assume the burden of proving they are blameless for the wrongs asserted by the plaintiff. The plaintiff's second motion (Docket No. 8) directly confronts the defendants' position on res judicata by seeking relief pursuant to Fed. R. Civ. P. 60(b) from the final judgment entered in the previous case.

I recommend that the plaintiff's motion for relief from the judgment in Civil No. 96-370-P-C be denied, that the defendants' motions for dismissal be granted, that the request for sanctions be denied and that the motion relating to *res ipsa loquitur* be denied as moot. It is my further recommendation that the court enter an order warning the plaintiff that any further attempt to relitigate in this court the claims asserted in this complaint will result in the imposition of sanctions upon him.

The plaintiff's motion for relief from the previous judgment asserts as grounds therefor "fraud, misrepresentation and misconduct by an adverse party." Motion for Relief from Final Judgment (Docket No. 8). The allegations are entirely conclusory and the plaintiff has not complied with the requirement that every motion "incorporate a memorandum of law, including citations and supporting authorities." Loc. R. 7(a). The plaintiff has not requested a hearing on his Rule 60(b) motion, nor did he pursue a direct appeal of the judgment in question. In these circumstances, the court can and should deny the motion for relief from judgment without further delay. *See Madonna*

v. United States, 878 F.2d 62, 66 (2d Cir. 1989) (“conclusory averments” of fraud insufficient to trigger Rule 60(b) relief); *see also Teamsters, Chauffers, Warehousemen & Helpers Union Local No. 59*, 953 F.2d 17, 21 (1st Cir. 1992) (similar, as to claim of existence of meritorious defense in underlying action where defendant seeks Rule 60(b) relief); *Mitchell v. Hobbs*, 951 F.2d 417, 420 (1st Cir. 1991) (Rule 60(b) “may not be used to escape the consequences of the movant’s dilatory failure to take a timely appeal.”); 11 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2865 (2d ed. 1995) at 381 (noting that court need not hold hearing “if the motion clearly is without substance and merely an attempt to burden the court with frivolous contentions”) (citations omitted).

It follows inexorably that all defendants are entitled to dismissal of the plaintiff’s claims based on the doctrine of res judicata to the extent those claims arise out of the plaintiff’s 1994 arrest and the events surrounding it. Because both the previous suit and the present litigation have arisen in federal court, the federal law of res judicata applies. *Massachusetts School of Law at Andover, Inc. v. American Bar Assn.*, 142 F.3d 26, 37 (1st Cir. 1998).

The elements of federal res judicata are (1) a final judgment on the merits in an earlier suit, (2) sufficient identity between the causes of action asserted in the earlier and later suits, and (3) sufficient identity between the parties in the two suits.

Id. (citation and internal quotation marks omitted).

The plaintiff vigorously asserts that the judgment in the underlying action is not a final judgment on the merits, given that it is based at least to some extent on certain procedural defaults committed by the plaintiff in connection with the summary judgment proceedings in the earlier litigation. I am unable to agree with the plaintiff. In general, “[s]ummary judgment constitutes a

final judgment on the merits for purposes of applying res judicata.” *Dowd v. Society of St. Columbans*, 861 F.2d 761, 764 (1st Cir. 1988) (citations omitted). It is also well-established that the court may dismiss an action based on the plaintiff’s failure to comply with the Federal Rules of Civil Procedure or “any order of court,” with such a dismissal operating “as an adjudication upon the merits.” Fed. R. Civ. P. 41(b); *see also Ortiz-Cameron v. Drug Enforcement Admin.*, 139 F.3d 4, 6 (1st Cir. 1998) (prior judgment based on missed deadline “on the merits” for res judicata purposes). It would be incongruous, indeed, if the same principle did not apply to summary judgment proceedings, in which the court may enter judgment in favor of a moving party only if the record developed by that party supports judgment as a matter of law, regardless of whether the non-moving party has presented factual matter in opposition to the motion. *See McDermott v. Lehman*, 594 F.Supp. 1315, 1321 (D. Me. 1984). The record developed by the defendants in the previous proceeding supported judgment as a matter of law and the plaintiff may not use a second lawsuit to mitigate his failure to present evidence in the first proceeding that genuine issues of material fact existed.

Nor is there any question that the issues presented in the two lawsuits have sufficient identity to justify the invocation of res judicata. The court applies a “transactional approach” to this question, which “boils down to whether the causes of action arise out of a common nucleus of operative facts.” *Massachusetts School of Law*, 142 F.3d at 38 (citations omitted). Although the legal theories in the plaintiff’s two complaints are not identical, it is abundantly clear that the events at issue are the same. The only exceptions are the allegations appearing in various places in the instant complaint to the effect that defendants Holmes, Foss, Helwig and Whitney committed perjury in connection with sworn statements submitted in the previous litigation. I take up those allegations

separately, *infra*.

Finally, there is sufficient identity of parties in the two suits to bar a second round of litigation as to four of the defendants. Helwig, Whitney, Holmes and Foss were all parties to the previous action and thus there is no question about identity as to them. Each is entitled to dismissal of all federal claims against him or her on res judicata grounds.

New to this proceeding are the State of Maine and the County of Cumberland. These parties are entitled to dismissal of the plaintiff's section 1983 claim. A state is not a "person" within the meaning of section 1983 and is therefore not subject to liability for the constitutional tort described therein. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989).

Cumberland County is entitled to dismissal of the section 1983 claim based on the branch of the doctrine of res judicata known as collateral estoppel or issue preclusion. The general rule is that "[c]ollateral estoppel, or issue preclusion, bars relitigation of any issue *actually* decided in previous litigation between the parties, whether on the same or a different claim." *Gilday v. Dubois*, 124 F.3d 277, 283 (1st Cir. 1997), *cert. den.* 1998 WL 174854 (Jun. 8, 1998) (citations and internal quotation marks omitted) (noting that an issue may be "actually" decided even if not "explicitly" decided in previous lawsuit) (emphasis in original). Further, a party collaterally estopped from relitigating an issue with a previous opponent "is also precluded from doing so with another [party] unless the fact that he lacked full and fair opportunity to litigate the issue in the first action or other circumstances justify affording him an opportunity to relitigate the issue." *Restatement (Second) of Judgments* § 29 (1982).

It is well-established that there is no *respondeat superior* liability in connection with claims arising under section 1983 against an entity of local government such as Cumberland County, and

such a claim is therefore not cognizable unless some “action” pursuant to “official [government] policy” or “custom” “caused a constitutional tort.” *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 690-91 (1978). The previous litigation established the lack of any constitutional tort, a determination that is binding against the plaintiff here vis-a-vis his section 1983 claim against Cumberland County for issue-preclusion purposes. It therefore follows that no possible basis under *Monell* exists for imposing section 1983 liability on the county.

As already noted, the plaintiff’s allegations that defendants Holmes, Foss, Helwig and Whitney perjured themselves in the previous litigation do not arise out of the same nucleus of operative facts as the events at issue in the underlying litigation. However, as Helwig and Whitney point out, witnesses are absolutely immune from liability under section 1983 for testimony given in the course of judicial proceedings. *See Watterson v. Page*, 987 F.2d 1, 7 (1st Cir. 1993). Even the most generous reading of the plaintiff’s complaint, which does not invoke section 1983, suggests that such a claim is the only perjury claim asserted that does not arise under state law. To the extent the plaintiff seeks to pursue state-law claims based on perjured testimony, the court should decline to exercise its supplemental jurisdiction and dismiss any such claims without prejudice. The same is true to the extent that any of the plaintiff’s state-law claims may survive against the State and Cumberland County. *See* 28 U.S.C. § 1367(c)(3); *Roche v. John Hancock Mut. Life Ins. Co.*, 81 F.3d 249, 257 (1st Cir. 1996) (in deciding whether to retain jurisdiction over state-law claims when foundational federal-law claim terminates, court must take into account concerns of comity, judicial economy, convenience, fairness and the like; dismissal may be appropriate if federal-question claim eliminated early in the proceedings).

To summarize: In light of the judgment in *Leja v. Holmes et al.*, Civil No. 96-370-P-C, the

doctrine of res judicata entitles all defendants in this case to dismissal of the complaint to the extent that it seeks relief under 42 U.S.C. § 1983. Defendants Helwig, Whitney, Holmes and Foss are entitled to dismissal on res judicata grounds on all state-law claims to the extent they relate to the plaintiff's 1994 arrest and the events surrounding it, but not to the extent the plaintiff alleges the making of false sworn statements in affidavits and other matter submitted to the court in connection with the previous litigation. To the extent that any state-law claims survive, I recommend that the court decline to exercise its supplemental jurisdiction and, therefore, dismiss the claims without prejudice.

On balance, consideration of the factors listed by the Advisory Committee in connection with the 1993 amendment of Rule 11² leads me to recommend that the request for sanctions be denied. However, it is prudent to advise the plaintiff that this court is no more likely to permit a pro se litigant to abuse the litigation process than to allow a party represented by counsel to do so. A phrase like res judicata may seem like legal jargon, but its underlying rationale is anything but a legal technicality. Rather, it is based on the notion that a party who loses a case or an argument cannot simply return to court and try again. In most cases, a plaintiff who puts defendants to the effort and

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Whether the improper conduct was willful, or negligent; whether it was part of a pattern of activity, or an isolated event; whether it infected the entire pleading, or only one particular count or defense; whether the person has engaged in similar conduct in other litigation; whether it was intended to injure; what effect it had on the litigation process in time or expense; whether the responsible person is trained in the law; what amount, given the financial resources of the responsible person, is needed to deter that person from repetition in the same case; what amount is needed to deter similar activity by other litigants

Fed. R. Civ. P. 11, Advisory Committee Notes, 1993 Amendments.

expense of responding a second or further time to claims upon which they have already been successful must be prepared to pay the costs incurred by those defendants in that needless exercise.

For the foregoing reasons, I recommend that the plaintiff's motion for relief from judgment in Docket No. 96-370 be **DENIED**, that the request for sanctions be **DENIED**, that the defendants' motions for dismissal be **GRANTED** as to all claims other than those which may reasonably be construed to assert violations of state law concerning perjury and that the court decline to exercise supplemental jurisdiction over any such state-law claims, and that the plaintiff's motion relating to the doctrine of *res ipsa loquitur* be denied as moot. I further recommend that the court warn the plaintiff that any further attempt by him to relitigate in this court the issues arising from his October 1994 arrest will expose him to the imposition of sanctions that could include the assessment of defense costs.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 16th day of July, 1998.

*David M. Cohen
United States Magistrate Judge*