

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

JOHN BARTH,)	
)	
Plaintiff)	
)	
v.)	Docket No. 01-208-P-C
)	
TOWN OF SANFORD, et al.,)	
)	
Defendants)	

**RECOMMENDED DECISION ON PLAINTIFF’S MOTION FOR CLASS
CERTIFICATION AND DEFENDANTS’ MOTION TO DISMISS**

The defendants, the town of Sanford, its inhabitants, its selectmen and two individuals, William Roberts and Richard Wilkins, move to dismiss this action pursuant to Fed. R. Civ. P. 12(b)(6). Also pending is the *pro se* plaintiff’s motion to certify a plaintiff class. I recommend that the court deny the motion to certify and grant the motion to dismiss.¹

I. Class Certification

The plaintiff seeks certification of the following class:

the residents and landowners of the village of Springvale in the town of Sanford who reside within seven hundred feet of the former railbed there . . . and are injured in the use or enjoyment of their property by acts of defendant [sic] in maintaining, promoting, extending and refusing to abate a noise nuisance there.

¹ The plaintiff contends that the motion to dismiss is untimely. Plaintiff Class Opposition to Defendant Motion to Dismiss (“Opposition”) (Docket No. 5) at 20. While ordinarily the 20 days allowed for a responsive pleading after service of the complaint on the town clerk, *see* Return of Service, Exh. A to Opposition, would have expired on September 11, 2001, the filing of the motion to dismiss on September 12, 2001 (Docket No. 4) was not untimely because the clerk of this court extended deadlines for all litigants that fell on September 11, 2001 for one day due to the tragic national events of that day.

Complaint (Docket No. 1) ¶ P1. Class actions are governed by Fed. R. Civ. P. 23. It is not necessary to address the requirements of that rule under the circumstances present here, however. The plaintiff appears *pro se* and seeks to represent the proposed class. Plaintiff Motion for Order of Determination of Class Action under Rule 23(c)(1) (Docket No. 7) at 1. In general, class representatives cannot appear *pro se*. 7A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* §1769.1 at 380 (2d ed. 1986).

A litigant may bring his own claims to federal court without counsel, but not the claims of others. This is so because the competence of a layman is “clearly too limited to allow him to risk the rights of others.”

Fymbo v. State Farm Fire & Cas. Co., 213 F.3d 1320, 1321 (10th Cir. 2000) (citations omitted), quoting *Oxendine v. Williams*, 509 F.2d 1405, 1407 (4th Cir. 1975). See also *Avery v. Powell*, 695 F. Supp. 632, 643 (D. N.H. 1988). Given the nature of the claims set forth in the complaint and the sweeping scope of the relief sought, the plaintiff cannot serve as an adequate representative of the proposed class. Accordingly, his request for class certification should be denied.

II. Motion to Dismiss

A. Applicable Legal Standard

The defendants’ motion invokes Fed. R. Civ. P. 12(b)(6). Defendants’ Motion to Dismiss, etc. (“Motion to Dismiss”) (Docket No. 4) at 1. “When evaluating a motion to dismiss under Rule 12(b)(6), [the court] take[s] the well-pleaded facts as they appear in the complaint, extending the plaintiff every reasonable inference in [his] favor.” *Pihl v. Massachusetts Dep’t of Educ.*, 9 F.3d 184, 187 (1st Cir. 1993). The defendant is entitled to dismissal for failure to state a claim only if “it appears to a certainty that the plaintiff would be unable to recover under any set of facts.” *Roma Constr. Co. v. aRusso*, 96 F.3d 566, 569 (1st Cir. 1996); see also *Tobin v. University of Maine Sys.*, 59 F.Supp.2d 87, 89 (D. Me. 1999).

B. Discussion

The defendants contend that this action is barred by operation of the legal doctrine of *res judicata*, referring the court to an action filed by the plaintiff in state court entitled *John S. Barth v. Town of Sanford*, Maine Superior Court (York County), Docket No. CV-99-265. Motion to Dismiss at 4-5. That action was dismissed with prejudice, Order [dated March 30, 2000], *Barth v. Town of Sanford*, Maine Superior Court (York County), Docket No. CV-99-265, and the dismissal was upheld on appeal, *Barth v. Town of Sanford*, Decision No. Mem 00-111, Docket No. Yor-00-188, Maine Supreme Judicial Court (Oct. 2, 2000).

[T]he federal doctrine of *res judicata*, or claim preclusion, bars a subsequent action whenever three criteria are met: (1) there is a final judgment on the merits in an earlier action; (2) “sufficient identity” exists between the parties in the earlier and later suits, and (3) “sufficient identity” exists between the causes of action in the two suits.

United States v. Cunan, 156 F.3d 110, 114 (1st Cir. 1998). “Maine, whose earlier judgment is invoked here as *res judicata*, employs [a functional “same transaction” test in determining whether the cause of action in the two cases is the same], which is therefore binding” in this court. *Diversified Foods, Inc. v. First Nat’l Bank of Boston*, 985 F.2d 27, 30 (1st Cir. 1993).

Under Maine law,

[c]laim preclusion bars the relitigation of a claim if: (1) the same parties or their privies are involved in both actions; (2) a valid final judgment was entered in the prior action; and (3) the matters presented for decision in the second action were, or might have been litigated in the first action. To determine whether the matters presented for decision in the instant action were or might have been litigated in the prior action, we examine whether the same cause of action was before the court in the prior case. We apply a transactional test to define a cause of action, pursuant to which the measure of a cause of action is the aggregate of connected operative facts that can be handled together conveniently for purposes of trial. A prior judgment bars a later suit arising out of the same aggregate of operative facts event though the second suit relies on a legal theory not advanced in the first case, seeks different relief than that sought in the first case, and involves evidence different from that evidence relevant to the first case.

Johnson v. Samson Constr. Corp., 704 A.2d 866, 868 (Me. 1997) (citations and internal punctuation omitted).

The plaintiff contends that this action is not barred by *res judicata* because he has named parties in addition to the town as defendants in this action, unlike the state-court action; the dismissal of the state action did not constitute judgment on the merits; and the current action includes claims not raised in the state action. Opposition at 6-13.

The defendants named by the plaintiff in this action and not named in the state-court action are the inhabitants of the town of Sanford, the Sanford selectmen and William Roberts and Richard Wilkins in their individual capacities. Complaint at 1. Roberts is identified in the complaint as the chairman of the town selectmen and Wilkins as “an official of defendant town responsible for road maintenance within said town.” *Id.* ¶¶ P5-P6. While Wilkins and the selectmen are not the same party as the town of Sanford,² the only defendant in the prior action, the law considers them to be the town’s privies for purposes of *res judicata* analysis. In the context of governmental entities, the Maine Law Court has discerned privity between town officials and a town. *Camps Newfound/Owatonna Corp. v. Town of Harrison*, 705 A.2d 1109, 1114 (Me. 1998). While Roberts and Wilkins are named in their individual capacities and might therefore at first glance appear to be unprotected by *res judicata*, *id.* (finding privity only where individual defendants sued in their official capacity), a review of the allegations in the complaint and the nature of the relief sought demonstrates that Roberts and Wilkins also come within the ambit of the doctrine. The complaint alleges no acts by the individual defendants that are separate and distinct from the acts alleged to have been undertaken by the other defendants, and certainly no acts by these individuals that were beyond the scope of their positions with or

² The plaintiff argues that the town of Sanford and the inhabitants of the town of Sanford are separate parties. Plaintiff’s Opposition at 7. Maine law is to the contrary. *See, e.g., Bureau of Taxation v. Town of Washburn*, 490 A.2d 1182, 1185 (Me. 1985).

employment by the town. Indeed, the complaint alleges in each of its five counts that the actions at issue have been undertaken pursuant to municipal policy, Complaint at 5-9, providing no basis whatsoever for individual liability. The relief sought, as set forth in the complaint at page 61 and in the draft order submitted with the complaint, runs solely against the town; the complaint seeks no payment from the individual defendants in that capacity. Thus, the individuals are in sufficient privity with the town to warrant a finding of identity of parties. *Id.*

Contrary to the plaintiff's next argument, dismissal with prejudice of the state-court action does constitute a judgment on the merits. *Johnson*, 704 A.2d at 869.

With respect to the plaintiff's third and final argument, the complaint in the present action presents five counts, alleging federal constitutional violations, violation of 41 U.S.C. § 1985, violation of the Maine Civil Rights Act, violation of 17 M.R.S.A. § 2701 *et seq.* and violation of 36 M.R.S.A. § 652, Complaint at 5-9, all arising out of "the increasing use of extremely noisy hobby vehicles . . . upon an abandoned railbed," refusal of municipal authorities to abate the nuisance and "harassment, threatening, vandalism, and assault against" the plaintiff resulting from attempts to seek redress, *id.* at 2. The complaint in the state-court action, while not stated in counts, seeks relief almost identical to that sought in the present action. *Compare* Complaint, *John S. Barth v. Town of Sanford*, Maine Superior Court (York County), Docket No. CV-99-265, at 29-31 *with* [Proposed] Order granting relief in this case. The plaintiff characterizes only Counts II and III of the instant complaint as "present[ing] entirely new kinds of causes of action," and argues that *res judicata* may not apply to the other three counts because they present continuing torts, since "every instance of a nuisance is a new cause of action." Opposition at 8. Count II of the complaint alleges violation of the plaintiff's right to equal protection under the federal constitution and state law, and Count III alleges denial of his rights to equal protection and due process on the same legal basis. While it is true that the state-court

complaint does not specifically allege violations of these rights, the *res judicata* inquiry does not stop there.

Under the transactional test applied by the Maine courts to determine whether the same cause of action was before the court in the prior action, “[a] prior judgment bars a later suit arising out [of] the same aggregate of operative facts even though the second suit relies on a legal theory not advanced in the first case.” *Johnson*, 704 A.2d at 868. That is precisely the situation presented here. The plaintiff’s federal constitutional claims presented in counts II and III of the complaint arise out of the same aggregate of operative facts as did his claims in the state-court action. Comparison of the factual allegations in the two complaints makes this clear. The same is true of the plaintiff’s claims under the Maine Human Rights Act. “A plaintiff may not split a cause of action and prosecute each of its parts in separate lawsuits.” *Id.* “Res judicata prevents a litigant from splintering his or her claim and pursuing it in a piecemeal fashion by asserting in a subsequent lawsuit other grounds of recovery for the same claim that the litigant had a reasonable opportunity to argue in the prior action.” *Id.* at 868-69 (internal punctuation and citation omitted).³

The plaintiff contends that Counts I, IV and V allege a continuing nuisance and accordingly cannot be barred by *res judicata* “unless prior final judgment explicitly comprehended all future instances of such tort.” Plaintiff’s Opposition at 8. The complaint does allege that “[t]he nuisance caused by operation of ATVs, motorcycles, and snowmobiles upon the subject railbed has continued with the same effects to the date of this complaint.” Complaint ¶ 139. In the context of the application of a statute of limitations, it is a general rule of Maine law that “[a]s long as the nuisance continues

³ Each of the federal causes of action asserted in the complaint could have been brought in state court: claims under 42 U.S.C. § 1985 (Complaint at 5-9), *see, e.g., Holland v. Sebunya*, 759 A.2d 205, 209 & n.6 (Me. 2000); claims under 42 U.S.C. § 1983 for taking of property without compensation and denial of equal protection (Complaint at 5-7, 9), *see, e.g., Cottle Enters., Inc. v. Town of Farmington*, 693 A.2d 330, 334-335 (Me. 1997); claims under 42 U.S.C. § 1983 for denial of due process, *see, e.g., Munjoy Sporting & Athletic Club v. Dow*, 755 A.2d 531, 537 (Me. 2000).

unabated, a plaintiff may bring successive actions for damages throughout its continuance.” *Murray v. Bath Iron Works Corp.*, 867 F. Supp. 33, 48 (D. Me. 1994). However, when the issue involves application of the doctrine of *res judicata*, a different focus is required. The plaintiff’s argument would allow a plaintiff to bring successive claims of nuisance after repeated holdings by the courts that the activities at issue did not constitute a nuisance, merely because the activities continued unchanged after each such finding. A more obvious waste of judicial resources is difficult to imagine. Here, the state court’s dismissal of the plaintiff’s earlier complaint with prejudice operates, as a matter of law, as a judgment on the merits. The possibility that the dismissal resulted from a procedural violation rather than a determination that the claims actually lacked substantive merit, as the plaintiff suggests here, Opposition at 8-11, makes no difference, *Johnson*, 704 A.2d at 869 n. 1. Activity that has been found, per entry of a judgment, not to constitute a nuisance as a matter of law cannot become a nuisance merely by virtue of the passage of time after such a determination has been made. *See generally Department of Human Servs. v. Lowatchie*, 569 A.2d 197, 199-200 (Me. 1990) (dismissal with prejudice seven years previously of action seeking to establish paternity for want of prosecution bars second action seeking identical relief, applying *res judicata*; “*res judicata* forecloses the relitigation of the fact of paternity established in an earlier proceeding”).

Res judicata as that doctrine is interpreted and applied by the Maine Law Court bars this action.

III. Conclusion

For the foregoing reasons, I recommend that the plaintiff’s motion for certification of a class be **DENIED** and that the defendants’ motion to dismiss this action be **GRANTED**.

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 5th day of November, 2001.

David M. Cohen
United States Magistrate Judge

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