IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	1:12CV1349
	)	
TERRY S. JOHNSON, in his official capacity as Alamance County Sheriff,	)	
	)	
Defendant.	)	

MEMORANDUM ORDER

This is an action by the United States against Terry S. Johnson, in his official capacity as Sheriff of Alamance County, North Carolina ("Johnson"), alleging a pattern or practice of discriminatory law enforcement activities directed against Latinos in violation of the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141. Before the court is Johnson's motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c) on the grounds that the action is barred by the doctrine of *res judicata* and, alternatively, that its pattern and practice claims are otherwise moot. (Doc. 10.) The motion has been fully briefed (Docs. 11, 13 & 15), and for the reasons set forth below will be denied.

I. BACKGROUND

On June 23, 2011, the United States filed a declaratory judgment

action against Johnson, the Alamance County Sheriff's Office ("ACSO"), and Alamance County "to clarify the obligations imposed by Rule 4.2 of the North Carolina Rules of Professional Conduct"[1] and to seek a declaration that Rule 4.2 permits Government attorneys to interview certain ACSO non-command staff and all former ACSO employees outside the presence of the defendants' counsel. United States v. Alamance Cty., Case No. 11cv507 (M.D.N.C.) (Doc. 1). The complaint alleged that the United States Department of Justice was investigating ACSO's police practices as to Latinos in Alamance County pursuant to the Government's authorization provided by Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d, the pattern or practice provisions of the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3789d, and the pattern or practice provisions of the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141 ("section 14141"). The Government alleged that the

[1] North Carolina Rule 4.2 addresses communications with persons represented by counsel. Comment [8] to Rule 4.2 specifically states:

> [8] This Rule applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by counsel concerning the matter to which the communication relates. The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

N.C.R. Prof. Conduct 4.2, cmt [8].

defendants repeatedly asserted that Rule 4.2 prohibited the Government's attorneys from interviewing the personnel identified without the presence of defendants' counsel, and defendants had allegedly threatened to sue the Government and its attorneys for violating Rule 4.2. The Government sought a declaration that Rule 4.2 does not prohibit it from interviewing current and former ACSO personnel outside the presence of defendants' counsel, and for "such other relief as the interests of justice may require." (Id. at 14.)

Alamance County moved to dismiss the complaint, and the Government moved for summary judgment, relying on affidavits and other materials. (Docs. 8, 22 & 18 in case 11cv507.) On the day after the court ordered a hearing on the motions, the Government filed an unopposed motion to dismiss its amended complaint as moot on the grounds that the Government had completed its 27-month investigation, issued formal findings of its investigation (which were contained in an eleven-page attachment), and no longer sought to interview the ACSO personnel for investigative purposes. (Doc. 51 in case 11cv507.) The court entered an Order dismissing the action with prejudice. (Doc. 53 in case 11cv507.)

Three months later, on December 20, 2012, the United States filed the instant action against Johnson. The complaint alleges that he and his deputies have engaged in a pattern or practice of

discriminatory law enforcement directed against Latinos in violation of section 14141. (Doc. 1.) More specifically, the complaint alleges that Johnson has urged his deputies to target Latinos; ACSO personnel make and tolerate statements evidencing bias against Latinos; ACSO deputies target Latinos for traffic stops; ACSO deputies stop Latinos without reasonable suspicion; ACSO deputies treat Latino drivers less favorably than non-Latinos, including stopping them unreasonably at checkpoints; and ACSO deputies discriminatorily refer Latinos to immigration officials. These allegations mirror those set forth in the investigative report attached to the Government's motion to dismiss its prior action. The complaint seeks declaratory relief that determines that Johnson and his deputies have discriminated against Latinos, orders them to stop their alleged unlawful acts, and requires that they adopt and implement policies, procedures, and systems to remedy the alleged pattern or practice. (Id. at 22-23.) The complaint also seeks "such other relief as the interests of justice may require." (Id. at 23.)

Johnson now moves to dismiss the complaint on the grounds that the claims alleged in it could have been brought in the Government's previous action and thus are barred by the doctrine of *res judicata*. Johnson argues in the alternative that the Government's pattern or

practice claims are moot because the United States Department of Homeland Security ("DHS") terminated Johnson's authority to investigate immigration offenses at the Alamance County jail. Each contention will be addressed in turn.

II. ANALYSIS

A motion for judgment on the pleadings is analyzed under the same standard as a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). See Burbach Broad. Co. of Del. v. Elkins Radio Corp., 278 F.3d 401, 405-06 (4th Cir. 2002). The court assumes the truth of the factual allegations in the complaint and draws all reasonable factual inferences in the plaintiff's favor as the nonmoving party. See id. at 406. Unlike on a Rule 12(b)(6) motion, however, on a Rule 12(c) motion the court may consider the answer and any affirmative defenses, and factual allegations contained therein "are taken as true only where and to the extent they have not been denied or do not conflict with the complaint." Jadoff v. Gleason, 140 F.R.D. 330, 331-32 (M.D.N.C. 1991). "The test applicable for judgment on the pleadings is whether or not, when viewed in the light most favorable to the party against whom the motion is made, genuine issues of material fact remain or whether the case can be decided as a matter of law." Smith v. McDonald, 562 F. Supp. 829, 842 (M.D.N.C. 1983), aff'd, 737 F.2d 427

(4th Cir. 1984), aff'd, 472 U.S. 479 (1985).

A. *Res Judicata*

Johnson argues first that the present case is barred by *res judicata* because he says the Government's previous declaratory judgment action arose out of the same transactions as the present case – the alleged discriminatory policing practices of the ACSO. He also points out that the previous action was dismissed with prejudice but acknowledges that the relief sought was different. (Doc. 11 at 3-7.)

Res judicata, also known as "claim preclusion," bars a party from "suing on a claim that has already been 'litigated to final judgment by that party . . . and precludes the assertion of any legal theory, cause of action, or defense which could have been asserted in that action.'" Ohio Valley Envtl. Coal. v. Aracoma Coal Co., 556 F.3d 177, 210 (4th Cir. 2009) (quoting 18 James Wm. Moore et al., Moore's Federal Practice § 131.10-(1)(a) (3d ed. 2008)). In order for *res judicata* to apply, three elements must be present: "(1) a judgment on the merits in a prior suit resolving (2) claims by the same parties or their privies, and (3) a subsequent suit based on the same cause of action." Id. (quoting Aliff v. Joy Mfg. Co., 914 F.2d 39, 42 (4th Cir. 1990)). To find that the subsequent suit is based on the same cause of action, the court need not determine that

it is based on the same legal theory as long as it "arises out of the same transaction or series of transactions as the claim resolved by the prior judgment." Id.

The parties agree that the prior action ended in a final judgment between the same parties. They dispute whether the two actions arise out of the same transaction or series of transactions. Johnson defines the transactions as the alleged discriminatory police practices, pointing to the Department of Justice's eleven-page investigative report the Government attached to its dismissal notice in the prior action which details the same basic conduct complained of in the present lawsuit. The Government characterizes the transactions as entirely different, contending that the first lawsuit simply sought a declaration of its right under the State's ethics rules for lawyers to interview ACSO personnel in an effort to carry out its investigative obligations to determine whether the ACSO's conduct warranted the filing of an action on the merits.

Neither party acknowledges that the doctrine of *res judicata* is limited by a declaratory judgment exception. Laurel Sand & Gravel, Inc. v. Wilson, 519 F.3d 156, 163–64 (4th Cir. 2008). The preclusive effect of a declaratory judgment action applies "only to the 'matters declared' and to any issues actually litigated . . . and determined in the action." Duane Reade, Inc. v. St. Paul Fire

& Marine Ins. Co., 600 F.3d 190, 196 (2d Cir. 2010) (quoting Restatement (Second) of Judgments § 33 (1982)). The exception applies as long as "the prior action solely sought declaratory relief" and not damages or injunctive relief. Laurel Sand, 519 F.3d at 164.

It is true that the alleged discriminatory practices of the ACSO were at the root of the Government's first lawsuit. However, that case merely sought a declaratory judgment that the Government had the right to interview certain ACSO personnel in its attempt to carry out its investigative obligations to determine whether it had sufficient factual grounds to bring a lawsuit under section 14141. The transactions at issue in that prior case were the interviews of ACSO personnel, and the action sought only declaratory, and not any other, relief. It therefore falls neatly within the declaratory judgment exception. To say that the Government's lawsuit over its right to interview witnesses bars later litigation on the merits of the alleged underlying civil rights violations would render the investigative powers available in such cases nugatory. It would also be inconsistent with the North Carolina Rules of Professional Conduct, which contemplate – actually invite – the filing of a declaratory judgment action to clarify counsel's responsibilities

under Rule 4.2.[2]

Accordingly, the claims of the present lawsuit are not barred by the prior action.

B. Mootness

Johnson argues next that a portion of the allegations of the present lawsuit have been mooted by subsequent actions. Specifically, he contends that the allegations of section H of the complaint, which charge that ACSO officers discriminatorily refer Latinos at the Alamance County jail to immigration officials, are now moot because Johnson's authority to make any referrals was based on a prior agreement with the Government which was terminated by DHS on September 18, 2012. (Doc. 11 at 7-8.) The Government responds that these allegations are but one of several grounds for the two separate claims it is pursuing, and the fact that Johnson's authority

[2] Rule 4.2, comment [7], provides that "[a] lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order." The United States initiated the prior action pursuant to 28 U.S.C. § 1345, which provides that district courts have original jurisdiction in all civil actions commenced by the United States, 28 U.S.C. § 1331, federal question jurisdiction, and 28 U.S.C. § 2201(a), declaratory relief. (Doc. 17 in case 11cv507 ¶¶ 1, 18-19.) The Government asserted that interviews outside the presence of counsel were essential to the collection of accurate information and sought a declaration of its ability to interview ACSO personnel, alleging that "numerous" current and former ACSO employees had refused to cooperate or had expressed fear or concerns of retaliation if they talked. (Id. ¶ 4; see id. ¶¶ 30-49 (recounting defendants' specific denials to interviews), ¶ 50 (discussing six current or former officers who had allegedly been intimidated).) "In an unsettled situation, a party has an ethical duty to seek the court's guidance as opposed to acting on its own." McCallum v. CSX Transp., Inc., 149 F.R.D. 104, 110 n.4 (M.D.N.C. 1993) (Eliason, M.J.).

to make referrals has been terminated does not render the larger claim moot.

An actual controversy must exist for the court to have jurisdiction over a claim. Arizonans for Official English v. Arizona, 520 U.S. 43, 67 (1997). However, where a claim depends on multiple grounds or theories, the non-existence of one ground or theory does not render the larger claim moot. See Simmons v. United Mtg. & Loan Inv., LLC, 634 F.3d 754, 763 (4th Cir. 2011) (noting that a case is moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome" (citations omitted).)

Here, the Government raises two claims, each under section 14141: one for an alleged pattern or practice of discriminating against Latinos in Alamance County based on their ethnicity; and one for alleged unlawful seizures of Latinos in Alamance County based on ethnicity. (Doc. 1.) Whether one of the alleged practices has become moot does not eliminate the claim where, as here, there are other grounds alleged to support it. Thus, judgment on the claim cannot be entered at this time.

III. CONCLUSION

For the reasons set forth above, Johnson's motion for judgment on the pleadings (Doc. 10) is DENIED.

/s/ Thomas D. Schroeder
United States District Judge

April 29, 2013