2003 WL 21437057
Only the Westlaw citation is currently available.
United States District Court,
S.D. New York.

LATINO OFFICERS ASSOCIATION, INC., et al.,
Plaintiffs,
v.
THE CITY OF NEW YORK, et al. Defendants.

No. 99 Civ.9568 LAK. | June 16, 2003.

Suit was brought against city by Latino and African-American police officers claiming retaliation and discrimination in discipline. On city's motion for summary judgment, the District Court, Kaplan, J., held that: (1) res judicata precluded claims of officers up to date of complaint in prior action; (2) claim of minority police officer, that he was forced to retire in retaliation for his pre-retirement activities, was barred by res judicata; and (3) city could not be in better position with respect to individual officers than it enjoyed with respect to minority police officer association.

Motion granted in part and denied in part.

Opinion

ORDER

KAPLAN, J.

(Corrected)

***1** Defendants move for summary judgment dismissing the claims of plaintiffs Latino Officers Association, Inc. ("LOA"), Miranda, Alvarez and Maldonado solely on the ground that they are barred by *res judicata,* or claim preclusion, in light of judgments entered in prior actions brought by LOA, Miranda and Alvarez.[1]

[1] Although defendants moved also for summary judgment dismissing as to plaintiff Monserrate, that aspect of the motion is moot by virtue of a stipulation of dismissal as to Monserrate dated June 12, 2003.

As the general nature of this action is abundantly clear from prior reported decisions,[2] familiarity with which is assumed, the Court turns directly to the issues regarding these plaintiffs and the prior actions. It will deal first with the actions brought, in whole or in part, by two of the individual plaintiffs and turn then to previous actions by the LOA.

[2] *E.g., Latino Officers Ass'n, Inc. v. City of New York,* No. 99 Civ. 9568(LAK), 253 F.Supp.2d 771 (S.D.N.Y.2003); *id.,* 209 F.R.D. 79 (S.D.N.Y.2002).

I. Individual Actions

A. Miranda

Miranda has been a plaintiff in three prior actions against the City: (1) *Miranda v. City of New York,* 94 Civ. 8501(JSR) (S.D.N.Y. filed Nov. 22, 1994) (the *Miranda Case*), (2) *Latino Officers Ass'n, Inc. v. City of New York,* 97 Civ. 1384(LBS) (S.D.N.Y. filed Feb. 28, 1997) (the *Recognition Action*), and (3) *Latino Officers Ass'n, Inc. v. Safir,* 97 Civ. 3143(SHS) (S.D.N.Y. filed May 1, 1997) (the *Public Speaking Action*).

The parties agree that defendants, to prevail, must establish that (1) the prior action upon which they rely was adjudicated on the merits, (2) it involved the same parties or their privies, and (3) the claims asserted in the present case were or could have been raised in the prior action. *E.g., Monahan v. New York City Dep't of Corr.,* 214 F.3d 275, 284-85 (2d Cir.), *cert. denied,* 531 U.S. 1035, 121 S.Ct. 623, 148 L.Ed.2d 533 (2000). "Whether or not the first judgment will have preclusive effect depends in part on whether the same transaction or connected series of transactions is at issue, whether the same evidence is needed to support both claims, and whether the facts essential to the second were present in the first." *Id.* at 285 (quoting *NLRB v. United Technologies Corp.,* 706 F.2d 1254, 1260 (2d Cir.1983) (internal quotation marks omitted)). *See also* RESTATEMENT (SECOND) OF JUDGMENTS § 24(2) (1982).

[1] The *Public Speaking Action* patently has no *res judicata* effect on Miranda in this case. The complaint in that case challenged as unconstitutional a New York City Police Department ("NYPD") policy that required police officers to seek and obtain permission before testifying or speaking publicly on NYPD matters. Levy Decl. Ex. 5. The claims of discrimination and retaliation asserted here were not asserted in the *Public Speaking Action.* Despite the fact that some of the events at issue in this case antedated the filing of that suit, and thus might have been included in that complaint, the evidence "needed" to support the *Public Speaking Action* did not include the

sort of discrimination and retaliation claimed here. Nor can it be said that the facts "essential" to proof of this case "were present in" that one. Accordingly, this Court holds that the events at issue here are not the same transaction or part of the same series of transactions at issue in the *Public Speaking Action.* The judgment in that case has no preclusive effect on Miranda here.

***2** The same is true of the *Recognition Action.* That action challenged the NYPD's refusal to recognize the LOA and alleged that this practice interfered with the LOA's associational and other rights. Again, there is no commonality between the claims asserted in that complaint and the claims asserted here on behalf of Miranda. The latter were not asserted in the *Recognition Action.* The facts essential to this case were not needed to support relief there. Although there is some dispute as to whether Miranda sued in the *Recognition Action* solely and explicitly in his capacity as president of the LOA or also individually,[3] it is unnecessary to resolve this point because, in any event, the same transactions are not at issue in the two actions.

3 *Compare* Levy Decl. Ex. 2, caption, prayer for relief & ¶ 5 (describing Miranda as a plaintiff "in his capacity as President of the Latino Officers Association, New York, Inc. on behalf of its members"), *with* Levy Decl. Ex. 4 (waiver and release in connection with *Recognition Action* executed by Miranda as "a plaintiff herein, and as president of the Latino Officers Association, Inc.").

[2] The *Miranda Case* is another matter. The complaint in that action asserted claims under the First and Fourteenth Amendments, 42 U.S.C. § 1983, Title VII of the Civil Rights Act of 1964, and the New York State Human Rights Law ("NYSHRL"). Miranda there complained that he was retaliated against, improperly disciplined, and subjected to a hostile work environment in consequence of, *inter alia,* his 1992 filing of an internal NYPD complaint regarding alleged discrimination against African American and Latino police officers. Levy Decl. Ex. 7. The complaint in this action makes many of the same claims, although it complains also of events that allegedly occurred after November 22, 1994.

Plaintiffs concede that the *Miranda Case* was adjudicated on the merits. They tacitly acknowledge that the events complained of in this action that occurred before November 22, 1994 were or could have been asserted in *Miranda* and that "no serious privity issues" exist. Pl. Mem. 29. On the other hand, plaintiffs correctly note that the critical date for *res judicata* purposes is the date of the complaint in the prior action. *E.g., Curtis v. Citibank, N.A.,* 226 F.3d 133, 139 (2d Cir.2000). In consequence, defendants are entitled to summary judgment dismissing Miranda's claims, to the extent they are based on events prior to November 22, 1994, by virtue of the preclusive effect of the judgment in the *Miranda Case.*[4]

4 The question whether they are entitled to broader relief on the basis of the dismissal of the LOA's claims in the prior actions is dealt with below.

B. Alvarez

[3] On November 12, 1997, Alvarez sued the City, the NYPD, and, in both their individual and official capacities, Rudolph Giuliani, and a number of employees of the NYPD, under Title VII, 42 U.S.C. § 1983 and the First and Fourteenth Amendments. *Alvarez v. City of New York,* 97 Civ. 8391(SAS) (S.D.N.Y. filed Nov. 12, 1997) (the *"Alvarez Case"*). The complaint in that case noted that he had retired on disability, that he objected to alleged racial, gender and ethnic discrimination in the NYPD, that he was retaliated against for doing so, and that he was subjected to a hostile work environment. Lev Decl. Ex. 12. Among other things, he claimed that he was wrongfully subjected to internal discipline. *Id.* ¶ 44.

In this action, Alvarez and the plaintiff class sue a slightly different cast of defendants, including the Police Relief Fund (the "Fund"). Levy Decl. Ex. 1, Sec. Am. Cpt. caption. Specifically, Alvarez claims that he was forced to retire on disability in circumstances in which similarly situated white officers would not have been treated in that manner. *Id.* ¶ 100. In addition, he complains that the NYPD has withheld financial assistance and failed to cooperate with other agencies that could provide him support. *Id.* ¶¶ 103-104. Furthermore, he alleges that the NYPD and the Fund have conspired to discriminate against him in retaliation for his prior protests and for bringing the *Alvarez Case. Id.* ¶ 101.

***3** Insofar as Alvarez claims here that he was forced to retire in retaliation for his pre-retirement activities, his action is barred by the judgment in the *Alvarez Case.* That action complained of retaliation for his pre-retirement activities, and its commencement post-dated his retirement. The complaint even noted the retirement. *Id.* ¶ 88. In consequence, the claim that his retirement was forced as a retaliatory measure involves the same transactions and occurrences and could have been raised in the previous action.

Similarly, to whatever extent Alvarez complains here of alleged discrimination and retaliation prior to the filing of the *Alvarez Case,* his claims are barred. On the other hand, for reasons discussed above, his claims based on events after November 12, 1997, including his conspiracy claim against the NYPD and the Fund[5] concerning the denial of benefits, are not barred by the adjudication on the merits

of his claims in that case.

[5] This conclusion is supported further by the fact that the Fund was not a defendant in the *Alvarez Case,* and there has been no showing that it was in privity with any of the defendants in the prior litigation. The most promising theory under which privity might be established is if the Fund's interests were adequately represented in the prior action, such as if the Fund controlled a prior defendant's representation in the *Alvarez Case. See Chase Manhattan Bank, N.A.,* 56 F.3d at 346. This has not been demonstrated. Another hook on which privity might be established is through the theory of "virtual representation," under which nonparties may be barred from litigating claims where there is "substantial identity of the incentives of the earlier party with those of the party against whom *res judicata* is asserted." *Chase Manhattan Bank, N.A.,* 56 F.3d at 346. *But see Doctor's Assocs., Inc. v. Reinert & Dureee, P.C.,* 191 F.3d 297, 304 (2d Cir.1999) (criticizing virtual representation doctrine). The complaint alleges that the Fund is a not-for-profit entity and that its Board is comprised of members of the NYPD Pension Board. Levy Decl. Ex. 1, Sec. Am. Cpt. ¶ 56. Assuming this to be true, there has been no showing that the interests of the Fund with respect to Alvarez's application were aligned with those of any of the *Alvarez Case* defendants. *Res judicata* therefore does not apply on this theory.

II. The LOA's Prior Claims

[4] As noted above, the *Recognition Action* challenged the NYPD's refusal to recognize the LOA in alleged violation of its associational and other constitutional rights. The *Public Speaking Action* challenged as unconstitutional an NYPD policy that required police officers to seek and obtain permission before testifying or speaking on NYPD matters. The crux of this action is the contention that African American and Latino police officers were discriminated against in the operation of the NYPD's internal disciplinary system and otherwise subjected to racial and ethnic discrimination. The claims in the former actions have virtually nothing in common with those in this action. In consequence, the judgments in those actions have no claim preclusive effect here vis-a-vis the LOA. This conclusion makes it unnecessary to address the City's contention that the individual plaintiffs referred to in this order are barred in whole or in part because they were in privity with the LOA.[6] The City cannot be in a better position with respect to those plaintiffs than it enjoys with respect to the LOA.

[6] As Maldonado has not filed any individual actions against the defendants in the instant case, the only basis on which defendants claim they are entitled to summary judgment against him is by virtue of his status as an LOA member represented in the *Recognition* and *Public Speaking Actions.*

III. Conclusion

Defendants' motion for summary judgment dismissing the claims of the LOA, Miranda, Alvarez and Maldonado [docket item 92] is granted to the extent that the claims of

1. Miranda based on events prior to November 22, 1994, and

2. Alvarez based on events prior to November 12, 1997

are dismissed. The motion is denied in all other respects.

SO ORDERED.