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United States District Court,
W.D. Texas,
San Antonio Division.

Alicia MANSEL, Plaintiff-Intervenor,
v.
BUILDERS GYPSUM SUPPLY, Defendant.

No. 05-CV-0965-RF. | Oct. 16, 2006.

Opinion

ORDER DENYING DEFENDANT'S AMENDED MOTION TO DISMISS

ROYAL FURGESON, J.

***1** BEFORE THE COURT is Defendant's Amended Motion to Dismiss (Docket No.54), filed August 7, 2006; Plaintiff-Intervenor's Response (Docket No. 60), filed September 11, 2006; and Defendant's Reply (Docket No. 61), filed September 20, 2006. After due consideration, the Court is of the opinion that Defendant's Amended Motion to Dismiss should be DENIED.

FACTUAL AND PROCEDURAL BACKGROUND

On September 29, 2005, the Equal Employment Opportunity Commission ("E.E.O.C.") filed suit against Defendant for violations of Title VII of the Civil Rights Act of 1964.[1] Based on various allegations of unlawful employment practices on the basis of sex and retaliation, the suit was brought on behalf of Plaintiff-Intervenor and a class of similarly situated females.[2] Plaintiff-Intervenor intervened in the lawsuit on January 13, 2006, alleging violation of Title VII of the Civil Rights Act of 1964 and state law claims of assault and battery.[3]

1 E.E.O.C.'s Complaint (Docket No. 1).

2 *Id.*

3 Pl.-Intervenor's First Am. Compl. (Docket No. 29).

On May 11, 2006, Defendant and the E.E.O.C. entered into a consent decree resolving all issues raised in the E.E.O.C.'s complaint.[4] The consent decree enjoined Defendant's from discrimination on the basis of gender, maintaining a work environment conducive to such discrimination, and retaliating against employees filing E.E.O.C. complaints.[5] The decree also required Defendant to create a sexual harassment policy, provide equal employment opportunity training, and pay Plaintiff-Intervenor $200,000.[6] In compliance with the consent decree, Defendant issued a check to Plaintiff-Intervenor, but also requested that Plaintiff-Intervenor sign a release of her Title VII claims in exchange for the settlement funds.[7]

4 Consent Decree (Docket No. 25).

5 *Id.*

6 *Id.*

7 Def.'s Am. Mot. to Dismiss (Docket No. 54).

Several weeks later, on June 6, 2006, Plaintiff-Intervenor filed her First Amended Complaint and Jury Demand reasserting her Title VII and assault and battery claims.[8] At that time, she had not cashed the settlement check, but on June 14, 2006, Plaintiff-Intervenor endorsed the check. Defendant now files this Motion to Dismiss, asserting preclusion of Plaintiff-Intervenor's claims based on a theory of res judicata.[9] Defendant maintains that the consent decree resolved the Title VII claims. Further, although she was not a signatory to the consent decree, Defendant argues that Plaintiff-Intervenor was in privity with the E.E.O.C. and her subsequent endorsement of the settlement check prevents her from now bringing her own claims.[10] Plaintiff-Intervenor responds that the consent decree is not a final judgment on the merits because by its very terms it excludes any of Plaintiff-Intervenor's claims.[11] Plaintiff-Intervenor also contends that no privity exists between herself and the E.E.O.C. because she neither participated in nor controlled any part of the E .E.O.C.'s case.[12]

8 Pl.-Intervenor's First Am. Compl. (Docket No. 29).

[9] The affirmative defense of res judicata contains two principal categories: (1) claim preclusion (also known as res judicata); and (2) issue preclusion (also known as collateral estoppel). *See Barr v. Resolution Trust Corp.,* 837 S.W.2d 627, 628 (Tex.1992). The case at bar concerns claim preclusion.

[10] Def.'s Am. Mot. to Dismiss (Docket No. 54).

[11] Pl.-Intervenor's Resp. to Def.'s Am. Mot. to Dismiss (Docket No.60).

[12] *Id.*

STANDARD OF REVIEW

A motion to dismiss under Rule 12(b)(6) challenges a complaint on the basis that it fails to state a claim upon which relief can be granted.[13] A 12(b)(6) dismissal "is viewed with disfavor and is rarely granted."[14] The defendant has the burden of showing that plaintiff can prove no set of facts consistent with the allegations in the complaint which would entitle it to relief.[15] The purpose of a Rule 12(b)(6) motion is to test the sufficiency of the complaint, not to decide the merits of the case, even if it "appear[s] on the face of the pleadings that a recovery is very remote and unlikely."[16] As such, the Court must accept all well-pleaded factual allegations in the complaint as true and view the allegations in the light most favorable to the non-moving party.[17]

[13] FED. R. CIV. P. 12(b)(6).

[14] *Shipp v. McMahon,* 234 F.3d 907, 911 (5th Cir.2000) (quoting *Kaiser Aluminum & Chem. Sales v. Avondale Shipyards,* 677 F.2d 1045, 1050 (5th Cir.1982)).

[15] *Baton Rouge Bldg. & Constr. Trades Council AFL-CIO v. Jacobs Constructors, Inc.,* 804 F.2d 879, 881 (5th Cir.1986) (citing *Hishon v. King & Spalding,* 467 U.S. 69 (1984)).

[16] *Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S.Ct. 1683, 1686 40 L.Ed.2d 90 (1974)

[17] *Am. Waste & Pollution Control Co. v. Browning-Ferris, Inc.,* 949 F.2d 1384, 1386 (5th Cir.1991).

***2** Generally, the doctrine of res judicata must be pled as an affirmative defense. A dismissal under Rule 12(b)(6) on grounds of res judicata may be appropriate, however, where the elements of res judicata are apparent on the face of the pleadings.[18] If the elements of res judicata are not apparent on the face of the pleadings, the Court must treat the motion to dismiss as one for summary judgment.[19] In the present case, the res judicata elements are apparent from the face of the pleadings, and therefore permits the Court to determine this action as a motion to dismiss rather than a summary judgment.[20]

[18] *See Kan. Reinsurance Co. v. Cong. Mktg. Corp. of Tex.,* 20 F.3d 1362, 1366 (5th Cir.1994).

[19] *See Moch v. E. Baton Rouge Parish Sch. Bd.,* 548 F.2d 594, 596 n. 1 (5th Cir.1997).

[20] While the Court references the Consent Decree it issued, the pertinent aspects of the decree are also stated in the pleadings, motions, and responses of the parties.

ANALYSIS

Defendant's Motion to Dismiss poses to the Court the question of whether the consent decree between the E.E.O.C. and Defendant precludes Plaintiff-Intervenor's suit on grounds of res judicata. Upon consideration of both parties' arguments, the Court finds that res judicata does not apply.

In a federal-question case, federal courts apply the federal rules of res judicata.[21] Under federal law, the test for res judicata has four elements: (1) the prior action was concluded by a final judgment on the merits; (2) the parties are identical or in privity; (3) the judgment in the prior action was rendered by a court of competent jurisdiction; and (4) the same claim or cause of action was involved in both cases.[22] In the case at bar, the parties agree that the earlier judgment was rendered by a court of competent jurisdiction. All other elements, however, are disputed.

[21] *Heiser v. Woodruff,* 327 U.S. 726, 733 (1946).

[22] *Test Masters Educ. Serv., Inc. v. Singh,* 428 F.3d 559, 571 (5th Cir.2005) (citing *Petro-Hunt, L.L.C. v. United States,* 365 F.3d 385, 395 (5th Cir.2004)); *see also Blonder-Tounge Lab. v. Univ. of Ill. Found.,* 402 U.S. 313, 323-24 (1972).

As a threshold determination, the Court finds that no final judgment on the merits has been reached between the parties. "[I]f reasonable doubt exists as to what was decided in the first action, the doctrine of res judicata should not be applied,"[23] but res judicata's finality requirement is broadly defined.[24] The consent decree to which Defendant's res judicata argument clings, however, does not fully satisfy the final judgment requirement. While the Fifth Circuit has referred to a consent decree as a final judgment, the Circuit has been clear that consent decrees are contracts that are not subject to the same jurisdiction and collateral attack rules as common final judgments.[25] Parties in a consent decree may, therefore, contractually agree to preclusion.[26] Accordingly, the preclusive effect of a consent decree should be measured by the intent of the parties.

[23] *Memphis-Shelby County Airport Auth. v. Braniff Airways, Inc.,* 783 F.2d 1283, 1288 (5th Cir.1986) (citing *Kauffman v. Moss,* 420 F.2d 1270, 1274 (3d Cir.), *cert. denied,* 400 U.S. 846 (1970); *McNellis v. First Fed. Sav. & Loan Ass'n of Rochester, N.Y.,* 364 F.2d 251, 257 (2d Cir.1966), *cert. denied,* 385 U.S. 970 (1966)).

[24] *See* CHARLES ALLEN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4432 (comparing res judicata final judgments and appellate review final judgments).

[25] *Ho v. Martin Marietta Corp.,* 845 F.2d 545, 547 (5th Cir.1988) ("[W]hen we test the validity of consent decrees that affect only the rights of the parties before the court, we are mindful of the principles not only regarding the validity of judgments but also regarding the validity of contracts."); *See* WRIGHT ET AL., *supra* note 24, at § 4443 ("The judgment [in a consent decree] result not from adjudication but from a basically contractual agreement of the parties."); *Dennis v. County of Fairfax,* 55 F.3d 151, 154 (4th Cir.1995) (finding that an employer's signing of a consent decree in a Title VII case was not a confession of liability and did not bind the parties in future litigation as an admission of wrongdoing).

[26] *U.S. v. ITT Cont'l Banking Co.,* 420 U.S. 223, 236-37 (1975) (finding that consent decrees should be construed as contracts).

In the present case, the consent decree makes clear the intent of the parties by stating that "the terms of the settlement as agreed upon by the E.E.O.C. and Builders Gypsum do not include the claims made by Plaintiff-Intervenor, Alicia Mansel."[27] This statement in the consent decree makes clear to the Court that not only was there no determination on the merits, but also that preclusion of Plaintiff-Intervenor's claims was not intended by the parties. Had Defendant wished to preclude further claims by Plaintiff-Intervenor, it should have made this intention clear in the consent decree.[28] To the contrary, Defendant knowingly signed the very document which it now wishes to circumvent. Accordingly, the Court finds that because no final judgment exists as to Plaintiff-Intervenor's claims, her claims are not precluded in the current suit. Further, the Court's determination on this threshold issue obviates discussion of the remaining res judicata factors.[29]

[27] Consent Decree (Docket No. 25 at 1).

[28] *See Ho,* 845 F.2d at 548 (commenting that the parties were free to negotiate the terms of the settlement and the defendant should have insisted on the relinquishment of claims).

[29] *See, e.g., Clark v. Amoco Prod. Co.,* 794 F.2d 967, 9774 (5th Cir.1986) (finding that Rule 12(b)(6) dismissal on res judicata grounds was not appropriate where defendants failed to establish one of the four elements of res judicata).

CONCLUSION

***3** Defendant has failed to prove that the consent decree signed by the E.E.O.C. and Defendant consisted of a final judgment on the merits as to Plaintiff-Intervenor's individual claims. Without satisfying their burden as to this threshold determination, the Court will not grant preclusive effect to the consent decree. Accordingly, it is hereby ORDERED that Defendant's Amended Motion to Dismiss (Docket No.54) be DENIED.