

UNITED STATES COURT OF APPEALS March 19, 2009

TENTH CIRCUIT

Elisabeth A. Shumaker
Clerk of Court

CHARLIE JAMES GRIFFIN, JR.,

Plaintiff-Appellant,

v.

OFFICER GASH,

Defendant-Appellee.

No. 08-1301

(D.C. No. 07-cv-00177-MSK-MJW)

(D. Colo.)

ORDER AND JUDGMENT*

Before **O'BRIEN, McKAY, and GORSUCH**, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2). The case is therefore ordered submitted without oral argument.

In 2007, Plaintiff filed the instant complaint in the District of Colorado alleging that Defendant assaulted him in January 2003. The district court concluded that Plaintiff was barred from asserting this claim, which had previously been dismissed with prejudice by the same court. Specifically,

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Plaintiff filed a complaint against Defendant in 2004 in the District of Colorado alleging the same operative facts and making the same claim, and that complaint was dismissed with prejudice fourteen months later based on Plaintiff's failure to comply with the court's order regarding monthly filing fee payments.

As the district court noted, a dismissal with prejudice bars the refiling of the same claim in the same court by the same plaintiff. *See Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 505-06 (2001). We thus see no error in the court's decision to dismiss the instant complaint.

Plaintiff argues that the district court erred by failing to appoint him an attorney, and he requests that this court appoint counsel to represent him on appeal. We hold that the district court did not abuse its discretion in denying the request for appointment of counsel. We likewise decline to appoint counsel to represent Plaintiff on appeal.

Plaintiff contends that the court erred by failing to inform him that he should respond to Defendant's summary judgment motion. However, the record reflects that Plaintiff in fact filed a timely response to the motion and that the district court considered this response in its order dismissing the case. Thus, whether notice came from the district court or not, Plaintiff clearly received both notice and an opportunity to respond to the summary judgment motion.

Plaintiff contends that the district court erred by failing to consider a number of factors, such as his long-term mental illness. Plaintiff failed to raise

these issues at any time during the proceedings in the district court, and we therefore do not consider them on appeal. *See Treff v. Galetka*, 74 F.3d 191, 193 (10th Cir. 1996).

We **GRANT** Plaintiff's motion to proceed *in forma pauperis* on appeal and remind him of his continuing obligation to make partial payments until his filing fee has been paid in full. We **AFFIRM** the district court, and all other pending motions are **DENIED**.

Entered for the Court

Monroe G. McKay
Circuit Judge