

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

OCT 30 2017

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

RICHARD HERBERT,

Plaintiff-Appellant,

v.

CVS PHARMACY, doing business as
Garfield Beach CVS LLC; et al.,

Defendants-Appellees.

No. 16-56063

D.C. No. 2:15-cv-04680-SVW-JEM

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Stephen V. Wilson, District Judge, Presiding

Submitted October 23, 2017**

Before: LEAVY, WATFORD, and FRIEDLAND, Circuit Judges.

Richard Herbert appeals pro se from the district court's summary judgment in his action alleging discrimination under 42 U.S.C. § 1981 and state law. We have jurisdiction under 28 U.S.C. § 1291. We review de novo the district court's summary judgment on the basis of res judicata. *City of Martinez v. Texaco*

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Trading & Transp., Inc., 353 F.3d 758, 761 (9th Cir. 2003). We affirm.

The district court properly granted summary judgment because Herbert's prior small claims action was based on the same primary right, there was a final judgment on the merits, and the parties are in privity. *See id.* at 762 (elements of res judicata under California law); *see also Allstate Ins. Co. v. Mel Rapton, Inc.*, 92 Cal. Rptr. 2d 151, 155 (Ct. App. 2000) (under California law, a small claims court judgment precludes further litigation on the same claim).

We do not consider matters not specifically and distinctly raised and argued in the opening brief, or arguments and allegations raised for the first time on appeal. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

AFFIRMED.