Chase v. State, No. 211-4-06 Wncv (Toor, J., Mar. 6, 2009)

STATE OF VERMONT
WASHINGTON COUNTY

DAVID S. CHASE, M.D., Plaintiff, v. THE STATE OF VERMONT, et al., Defendants.	SUPERIOR COURT Docket No. 211-4-06 Wncv

RULING ON MOTION TO DISMISS

Plaintiff David Chase filed this action in 2006 against the State, the Secretary of the Vermont Agency of Human Services, the Commissioner of the Department of Health, the executive director of the Vermont Board of Medical Practice, a former director of the Board, and an investigator employed by the Board. The case arises out of the investigation and prosecution by the Board of professional misconduct charges against Dr. Chase, an ophthalmologist. It has now been to the Vermont Supreme Court and has returned with only the claims against two defendants remaining: John Howland, the past director of the Board, and Philip Ciotti, the Board investigator. Chase v. State, 2008 VT 107, ¶ 1, __ Vt. __ ("we remand for consideration of Dr. Chase's claims for money damages in counts three and five of his complaint").

Those claims are as follows: (1) that Ciotti violated Chase's due process rights by falsifying evidence, and (2) that Howland violated Chase's due process rights by "inviting the media to attend the summary suspension" hearing held by the Board. Amended Complaint

Counts 3, 5 (filed May 23, 2006). Currently before the court is the Defendants' motion to dismiss.

1. The Claim Against Howland: Notice To The Media

The due process claim against Howland is that he harmed Chase's reputation and ability to work by "inviting the media to attend the summary suspension hearing with the intention of widely disseminating news of the State's sensational allegations and the Board's improper summary suspension order." Amended Complaint ¶ 74. The complaint alleges that as a result, "the summary suspension of Dr. Chase's license was immediately and widely reported by the Vermont press," and that the "resulting press coverage effectively ended Dr. Chase's 35-year career as an ophthalmologist and destroyed his reputation." Id. ¶ 20.

Howland argues that the complaint fails to state any due process violation. The court agrees. While Chase discusses at length the alleged harm he claims to have suffered as a result of the publicity surrounding the hearing, he fails to allege any improper act by Howland. No defamatory statements are alleged. In the DiBlasio case cited by Chase, there were specific allegations that press releases issued by the defendant contained false and defamatory statements. DiBlasio v. Novello, 344 F.3d 292, 295 (2d Cir. 2003). Here, the only act alleged is notifying the news media of a hearing. Chase makes no allegation that the hearing was not properly open to the public. It is not a due process violation to invite the public to a public hearing. There is just no violation of law alleged. The motion to dismiss the claim against Howland is granted.

2. The Claim Against Ciotti: Alleged Falsification Of Evidence

Ciotti argues that the claim against him is barred by principles of res judicata. He notes that Chase raised due process challenges during the board proceedings, based upon the same

allegations at issue here. He states that the Board "explicitly rejected those claims on several occasions," finding that there were no due process violations. Motion, p. 5. He also cites authority for the propositions that administrative agency decisions are entitled to the same preclusive effect as court decisions, and that an individual employee of the State acting in his official capacity is essentially the same "party" as the State for res judicata purposes. Id., pp. 5-7.

Chase responds that the issue of whether Ciotti is liable for damages for due process violations was beyond the scope of the Board proceedings. He further argues that res judicata does not apply because the due process argument was a "collateral issue" in the Board proceedings, because Ciotti was not himself a party to the Board proceedings, and because it would be unfair.

Res judicata, or claim preclusion, bars "the litigation of a claim or defense if there exists a final judgment in former litigation in which the 'parties, subject matter and causes of action are identical or substantially identical.'" Berlin Convalescent Center, Inc., v. Stoneman, 159 Vt. 53, 56 (1992)(citation omitted).[1] This "does not require that the claims were actually litigated in the prior proceeding; rather, it applies to claims that were or should have been litigated in the prior proceeding." In re Central Vermont Public Service Corp., 172 Vt. 14, 20 (2001).[2] The rationale of claim preclusion is to "protect the courts and the parties against the burden of relitigation,

[1] Administrative proceedings can meet the requirement of a "prior judgment." Lamb v. Geovjian, 165 Vt. 375, 381 (1996) (applying res judicata to ruling of State Veterinary Board).

[2] There appears to be some debate within our Supreme Court over whether the correct test is "should have been" or "could have been." *See* Carlson v. Clark, 2009 VT 17, ¶¶ 13 n. 4, 28, 32-34. There is also a lack of clarity as to whether the "transactional" or "same evidence" test applies in Vermont. *Compare* Faulkner v. Caledonia County Fair Ass'n, 2004 VT 123, ¶¶ 11-15, 178 Vt. 51 (adopting transactional test) *with* Carlson, 2009 VT 17,¶ 15 (referring to "same evidence" analysis). On the facts of this case, the court concludes that these differences are not material.

encourage reliance on judicial decision, prevent vexatious litigation and decrease the chances of inconsistent adjudication." Berlin at 57.

The issue asserted here – that Ciotti falsified evidence – was raised by Chase during Board proceedings. It was raised in that context not as a cause of action, but as a basis for motions to dismiss the charges. The substance of the underlying due process claim in this case is the same as that previously asserted. *See, e.g*., Austin v. Hanover Insurance Co., 14 Fed. Appx. 109, 110 (2d Cir. 2001)(unpublished opinion)(finding subsequent lawsuit asserting that fraudulent evidence was submitted in first lawsuit was barred by res judicata).

However, as Ciotti concedes, Chase could not have sought damages against Ciotti in the context of the former action brought against him by the Board. He could not have asserted a counterclaim against Ciotti for damages in the context of those misconduct proceedings. Presumably, this is what the Supreme Court meant when it noted that "[t]he Board was in no position to (and did not) decide the potential liability of these individual defendants to Dr. Chase." Chase, ¶ 18.

An exception to res judicata exists when "[t]he plaintiff was unable to … seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction" of the forum, "and the plaintiff desires in the second action to rely on that theory or to seek that remedy or form of relief…" Restatement (Second) Judgments § 26(1)(c). Under such circumstances, "it is unfair to preclude him from a second action in which he can present those phases of the claim which he was disabled from presenting in the first." Id., comment (c). Therefore, "res judicata does not bar subsequent litigation when the court in the prior action could not have awarded the relief requested in the new action." Marvel Characters, Inc. v. Simon, 310 F. 3d 280, 287 (2d Cir. 2002). *See also*, Davidson v. Capuano, 792 F.2d 275, 278 (2d

Cir. 1986)(res judicata "will not be applied if the initial forum did not have the power to award the full measure of relief sought in the later litigation"); Gargiul v. Tompkins, 790 F.2d 265, 272-73 (2d Cir. 1986) (allowing teacher's suit against member of Board of Education because she "could not have recovered damages" in the prior proceeding before the Board); Grimes v. Miller, 448 F. Supp. 2d 664, 669 (D. Md. 2006)(due process claims seeking damages not barred by prior proceeding seeking reinstatement to city council, because damages were not available in prior action).

The principle appears to apply even more strongly here because Chase was a *defendant* in the prior proceeding. "[A] second action ordinarily should be permitted whenever the defendant sought simply to defeat recovery by the plaintiff in the first action without demanding any effort by the court to measure the extent of the injury done to the defendant or to award affirmative relief." 18 Wright & Miller, Federal Practice & Procedure, Jurisdiction 2d § 4414 (West, Westlaw through 2008). Thus, "the traditional conclusion has been that purely defensive use of a theory does not preclude a later action for affirmative recovery on the same theory." Id. *See also*, Carlson v. Clark, 2009 VT 17, ¶ 25, __ Vt. __ (Dooley, J., dissenting) ("Where the defendant from the first proceeding seeks to bring a subsequent action, the preclusion rules are narrower than for a plaintiff bringing a subsequent action").

Another provision of the Restatement states that res judicata bars claims based upon "evidence or grounds or theories of the case not presented in the first action, or ... remedies or forms of relief not demanded in the first action." Id. § 25, quoted in Faulkner v. Caledonia County Fair Ass'n, 2004 VT 123, ¶ 14, 178 Vt. 51. However, the court reads that provision as addressing situations in which a party had at least the *possibility* of asserting the claim for damages in the earlier action. The comment to Section 25 notes as much: "Preclusion is narrower

when a procedural system in fact does not permit the plaintiff to claim all possible remedies in one action." Id. comment (f).

Ciotti points to cases in which res judicata was found to bar claims against individual government employees after prior administrative proceedings in which the same issue was raised. *See, e.g.*, Lamb v. Geovjian, 165 Vt. 375 (1996); Bagnola v. Smithkline Beecham Clinical Laboratories, 776 N.E. 2d 730, 737-41 (Ill. App. 2002). However, the principles of Section 26 of the Restatement were not addressed in those cases. Moreover, Lamb turned on interpretation of the scope of a settlement agreement.[3]

Ciotti also argues that the principles of Section 26 of the Restatement apply only if the current plaintiff was successful in the prior proceeding. However, he offers no authority for this proposition.

The court concludes that, even assuming that there is a sufficient identity of parties between the two cases[4], res judicata does not bar Chase's claims against Ciotti because he could not have asserted a claim for damages in the prior proceedings.

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[3] The court finds that the other cases cited by Ciotti on this topic either are not on point or support the contrary position. In Powell v. Snyder, 84 Fed. Appx. 650, 652 (7th Cir. 2003), the court expressly noted that "both suits seek compensation," so there was no apparent restriction on Powell's ability to seek damages in the prior action. Parker v. Blauvelt Volunteer Fire Company, 712 N.E. 2d 647, 650 (N.Y. 1999), held that "termination of the prior Article 78 proceeding on the merits was *not* res judicata as to the section 1983 damage claims" (emphasis added). The issue of res judicata was not raised at all in Sam v. Metro-North Commuter Railroad, 731 N.Y.S.2d 459 (N.Y. App. Div., First Dep't 2001). As in Parker, the court in Latino Officers Association v. New York, 253 F. Supp. 2d 771, 781-83 (S.D.N.Y. 2003), held that a damage claim was not barred by a prior proceeding terminating the plaintiffs from their employment. The language to which Ciotti points in the latter three cases relates to the different doctrine of collateral estoppel, an issue not raised in the current motion.

[4] The only parties to the Board proceeding were the Board and Chase. Ciotti was not a party. The Vermont Supreme Court has barred claims against a member of the State Veterinary Board on res judicata grounds because her actions were taken "solely in her official role" as a board member. Lamb, 165 Vt. at 380. Somewhat confusingly, the Court also stated that "a public official sued in her individual capacity is generally *not* considered to be in privity with the government for the purpose of res judicata." Id. (emphasis added). It appears that the Court found privity to exist in Lamb because the defendant "was a party to the first proceeding in her official capacity as a member of the Board," and it was apparent that the defendant's disputed acts were done "solely in her official capacity..." Id. at 380. In this case, both issues are less clear because (1) Ciotti was merely an investigator, not a Board member, and (2) the parties have not addressed whether falsification of evidence by an investigator can be considered an "official act." Given the resolution of this motion on other grounds, the court does not reach the question.

Order

Howland's motion to dismiss is granted. Ciotti's motion to dismiss is denied. The parties are directed to submit a proposed discovery schedule to the court by March 23.

Dated at Montpelier this 6th day of March, 2009.

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Helen M. Toor
Superior Court Judge