U.S. Department of Justice

United States Attorney
Southern District of New York

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April 1, 2011

BY HAND
Hon. Henry B. Pitman
United States Magistrate Judge
United States District Court
500 Pearl Street, Suite 750
New York, New York 10007

Re: *Den Hollander v. Members of the Board of Regents*, 10 Civ. 9277 (LTS) (HBP)

Dear Judge Pitman:

I write on behalf of the United States Department of Education and the Secretary of Education (collectively, "the Federal Defendants") in further support of their motion to dismiss the complaint in the above-referenced action, and to respond to Plaintiff Roy Den Hollander's opposition ("Opp.") thereto. As with the Federal Defendants' moving papers, I ask that the Court accept this letter brief in lieu of a formal reply brief, and enter this letter on the docket.[1]

For the reasons explained in the Federal Defendants' motion papers, this complaint must be dismissed because Plaintiff is collaterally estopped from relitigating the issue of standing in light of this Court's and the Second Circuit's prior decisions, *see Hollander v. Inst. for Research on Women & Gender.*, No. 08 Civ. 7286 (LAK) (KNF), 2009 WL 1025960 (S.D.N.Y. Apr. 15, 2009), *aff'd*, 372 F. App'x 140, 142 (2d Cir. 2010), concluding he had no standing to bring the very same claim. *See Coll. Sports Council v. Dep't of Educ.*, 465 F.3d 20, 22-23 (D.C. Cir. 2006); *Perry v. Sheahan*, 222 F.3d 309, 318 (7th Cir. 2000); *Mrazek v. Suffolk County Bd. of Elections*, 630 F.2d 890, 898 n.10 (2d Cir. 1980); *Newdow v. Bush*, 391 F. Supp. 2d 96, 99-101 (D.D.C. 2005). Plaintiff cites three cases in an attempt to lead this Court to the opposite conclusion, but to no avail. *See* Opp. at 5-7. Indeed, all three cases support the Government's argument that collateral estoppel — *i.e.*, issue preclusion — bars Plaintiff's action.

[1]As this Court's Individual Practices require, I hereby enclose a copy of the Federal Defendants' informal (letter) motion to dismiss, previously provided to counsel on February 11, 2011, and Plaintiff's opposition papers, which I received from Plaintiff on March 10, 2011.

Taking Plaintiff's cited cases in the order in which he cites them, the Second Circuit in *Ripperger v. A.C. Allyn & Co.*, 133 F.2d 332 (2d Cir. 1940), was concerned with the proper venue in an action against two out-of-state corporations. An earlier action had been dismissed for improper venue; but in a second action, the plaintiff alleged for the first time that the corporations had designated agents for service of process within New York State. *See id.* at 333. When faced with a motion to dismiss the second action on grounds of res judicata, plaintiff argued that there should be no preclusion based on the earlier judgment, because it was on jurisdictional grounds. *See id.* The court of appeals found his "argument ingenious but unsound" as "[t]he principles of res judicata apply to questions of jurisdiction as well as to other issues." *Id.* (internal quotation marks omitted). The court explained that the alleged appointment of the agents "antedated the first suit" — noting that "[t]here has been no change in the facts" since the first action — and thus the plaintiff "could have . . . shown [it] by affidavit" in response to the motion to dismiss the first action. *Id.* at 334. The court concluded that "[n]o appeal having been taken" by plaintiff in the first case, "the former decision stands as a conclusive determination of [the venue] issue between the parties." *Id.*

The second case cited by Plaintiff concerned the jurisdictional amount in a diversity action by an investor against a trustee. *See York v. Guaranty Trust Co.*, 143 F.2d 503 (2d Cir. 1944), *rev'd on other grounds*, 326 U.S. 99 (1945). There, the plaintiff had tried to intervene in an earlier suit against the trustee claiming a particular breach of the trustee's fiduciary duty to her. *See id.* at 518-19. The case was dismissed because her intervention claim, like those of the plaintiffs in that action, fell below the $3,000 jurisdictional amount then in place for diversity actions. *See id.* In the second action, however, the same plaintiff sued the trustee "based on a different theory" — one which, if successful, could yield above $3,000 in damages. *Id.* at 517-19. This, the court held, was not barred by the decision in the earlier action, and the case was permitted to proceed. *See id.*

The third and final case contained a discussion of the differences between claim preclusion (res judicata) and issue preclusion (collateral estoppel) in the context of a discharged soldier's suit for disability severance pay. *See Lowe v. United States*, 79 Fed. Cl. 218, 227-31 (2007), *appeal dismissed*, 333 F. App'x 523 (Fed. Cir. 2009). The statute under which the plaintiff sued provided in relevant part that severance payments are to be paid "[u]pon separation from [the] armed force[s] under [particular statutes]." *Id.* at 230 (internal quotation marks omitted). In his first action, the Court of Federal Claims ruled that soldiers, such as the plaintiff, who had been dishonorably discharged from the military, were not discharged under the appropriate statutes to quality for such payments. *See id.* The plaintiff, however, apparently "misconstrued the holding" of first decision as having held that he could only file such a suit *after* he had been discharged, and thus filed a second action alleging just that — that he had been separated from military service prior to filing his (second) complaint. *Id.* Thus, plaintiff's "attempt to 'cure' the jurisdictional defects" in his first lawsuit was unsuccessful. *Id.*

Plaintiff unsuccessfully seizes on dicta and statements taken out of context in these cases to argue that his suit may go forward. Importantly, none of these cases concern (or even mention) standing, and none of them contradict the recent and authoritative cases cited by the Federal Defendants holding that a determination of a party's standing to bring a particular claim is preclusive in subsequent actions where the same plaintiff tries to bring the same claim again,

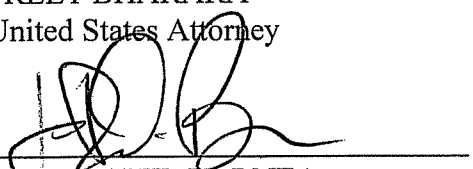
supplementing his standing claims only with facts that were available to him at the time of the first complaint. At most, Plaintiff's papers demonstrate that such defects in standing may not be cured in a subsequent action, though other types of jurisdictional defects can be cured in certain circumstances. It is true that in a footnote in the *York* case, the court of appeals cited the *Ripperger* case and an 1883 Supreme Court case for the broad proposition that "a prior decision dismissing a suit on the mere pleadings for lack of jurisdiction is not a bar to a second suit alleging jurisdictional facts which existed when the first suit was pending but which were not therein alleged." 143 F.2d at 519 n.21 (citing *Smith v. McNeal*, 109 U.S. 426 (1883) (earlier complaint had been dismissed for lack of subject-matter jurisdiction for failure to plead fact necessary to show federal question on the face of the well-pleaded complaint; second complaint, properly alleging jurisdictional fact in the complaint, was allowed to proceed)). This pronouncement not only mischaracterizes the holding in *Ripperger*, but also is far broader than the actual holding in *York* — that a jurisdictional dismissal on one cause of action does not preclude a plaintiff from suing the same defendant on another theory — and it thus utter dicta.

The same can be said for the statements made by the Court of Federal Claims in *Lowe* cited by Plaintiff summarizing the application of the preclusion doctrines to jurisdictional dismissals, which are not only dicta but also misconstrue the cases cited. In support of the vaguely worded proposition that issue preclusion never applies to prevent relitigation of an issue "if after the initial dismissal plaintiff has 'cured' the jurisdictional deficiency identified in the first suit," 79 Fed. Cl. at 229, the court cited only two cases: a case recognizing that "'[a] dismissal for lack of subject matter jurisdiction [in one court] . . . permits a litigant to refile [his action] in an appropriate forum, *i.e.*, one that has jurisdiction over the claim,'" *id.* (quoting *Vink v. Hendrickus Johannes Schiff Rolkan N.V.*, 839 F.2d 676, 677 (Fed. Cir. 1988)), and another that explains that, in the D.C. Circuit at least, this "curable defect" doctrine "is limited to events that occur after the original dismissal for lack of jurisdiction," *Citizen Elecs. Co. v. OSRAM GmBH*, 225 F. App'x 890, 893 (Fed. Cir. 2007) (collecting cases).

In sum, Plaintiff's opposition papers contain no authority that permit him to replead his standing in this action after it was conclusively determined in the previous case. Once again, should the Court deem that this issue ought to be presented in a formal motion or that the parties should also address the underlying merits of Plaintiff's constitutional claim against the Federal Defendants, the Federal Defendants respectfully request the opportunity to do so. I thank the Court for its consideration of this matter.

Respectfully,

PREET BHARARA
United States Attorney

By: 

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Encls.

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