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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-978

Filed 06 June 2023

Caldwell County, No. 20 CVS 1241

RALEIGH G. ROGERS, Plaintiff,

v.

WELLS FARGO BANK, N.A., Defendant.

Appeal by plaintiff from order entered 19 September 2022 by Judge Mark E. Powell in Caldwell County Superior Court. Heard in the Court of Appeals 9 May 2023.

Raleigh Rogers pro se.

McGuire Woods LLP, by Bradley R. Kutrow and Abigail A. Golden, for the defendant-appellee.

TYSON, Judge.

Raleigh Rogers (“Plaintiff”) appeals from the trial court’s granting Wells Fargo Bank, N.A.’s (“Defendant”) motion to dismiss. We affirm.

I. Background

Plaintiff alleges Defendant opened a fraudulent bank account in his name in December 2013. Plaintiff filed a complaint in the superior court of Caldwell County,

which was removed by Defendant to the United States District Court for the Western District of North Carolina (“Western District”). Defendant petitioned for dismissal in federal court for *res judicata*, citing the judgment in *Jabbari v. Wells Fargo & Co.*, No.15-CV-02159-VC, 2017 U.S. Dist. LEXIS 106294, 2017 WL 5157608, at *3, (N.D. Cal. July 8, 2017), *aff’d sub nom.*, *Jabbari v. Farmer*, 813 F. App’x 259 (9th Cir. 2020) (unpublished). *Jabbari* was a nationwide class action settlement of all customer claims based on Defendant opening unauthorized or “fraudulent” accounts and related misconduct from 1 May 2002 until 20 April 2017. *Id.*

The trial judge in the Western District dismissed Plaintiff’s claim on 5 May 2021, holding the judgment and settlement in *Jabbari* is binding on Plaintiff, has a preclusive effect on his claims, and any claims he might assert are subject to the exclusive jurisdiction of the United States District Court for the Northern District of California. *Rogers v. Wells Fargo*, No. 5:19-cv-00006-RJC, 2021 U.S. Dist. LEXIS 83968, 2021 WL 1737592, at *2 (W.D.N.C. May 5, 2021).

While Defendant’s motion to dismiss was pending in the Western District, Plaintiff filed this new action in Caldwell County Superior Court in October 2020. Plaintiff had a summons issued on 19 April 2021. Defendant moved to dismiss or alternatively to stay the action while the appeal proceeded in the federal action. The superior court stayed the action following a hearing on 4 October 2021.

The United States Court of Appeals for the Fourth Circuit affirmed the dismissal of Plaintiff’s complaint. The Supreme Court of the United States denied

Plaintiff's petition for writ of certiorari. *See Rogers v. Wells Fargo*, No. 21-1646, 2021 U.S. App. LEXIS 34479, 2021 WL 5412251 (4th Cir. November 19, 2021) (per curiam) (unpublished), *cert denied*, ___ U.S. ___, 213 L. Ed. 2d 1006 (2022).

Defendant noticed the hearing on the pending motion to dismiss and its intention to seek the court to lift the stay on 27 June 2022. Prior to the hearing Defendant drafted a letter to the presiding judge, which provided background on the case's procedural history and materials supporting their motion. The letter and materials were sent through the trial court coordinator and Plaintiff was copied.

At the hearing on 23 August 2022, a different judge, from whom the letter and materials were provided, presided. The trial court informed the parties he was taking the arguments under advisement. The parties were told, if the court lifted the motion to stay and dismissed the action, Defendant's counsel would be asked to prepare a proposed order. The trial court stated the parties would be informed of his decision within two weeks.

The next day, the trial court coordinator advised Defendant's counsel the trial court was going to lift the stay and asked Defendant's counsel to draft a proposed order. Defendant's counsel drafted the proposed order and provided it to Plaintiff for review. Plaintiff responded to the court "[a]s it has never been filed with the Court, I can not [sic] confirm it is true." Plaintiff submitted a draft order to lift the stay and deny Defendant's motion to dismiss. Defendant's counsel submitted the proposed draft order to the court to lift the stay and allow the motion to dismiss.

The trial court filed Defendant’s proposed order lifting the stay and allowing the motion to dismiss on 19 September 2022. Plaintiff emailed the trial court coordinator requesting a formal investigation and court conference into any *ex parte* communications with Defendant and the trial court regarding how Defendant’s counsel received “advance notice” of what the trial court was going to rule prior to the expiration of two weeks. Plaintiff noticed his appeal to this Court.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2021).

III. Issues

Plaintiff argues the trial court: (1) lacked neutrality; (2) the trial court engaged in *ex parte* communications; (3) erred by ruling his claims were barred by *res judicata* in *Jabbari*; (4) the trial court erred by allowing his motion to dismiss; (5) violated the Americans with Disabilities Act (“ADA”) and North Carolina’s Racketeering Influenced and Corrupt Organizations Act (“RICO”) by dismissing his claim without a jury trial; and, (6) erred that by dismissing his claims violated his due process rights in violation of the Law of the Land Clause in Article I, Section 19 of the North Carolina Constitution.

Plaintiff failed to raise the trial court’s purported lack of neutrality, alleged engagement in *ex parte* communications, alleged violations of the ADA and our State’s RICO statutes, or his claim under the Law of the Land Clause in argument or motion before the trial court or in a post-hearing motion. Plaintiff has waived appellate

review on these issues. *See* N.C. R. App. P. 10(a)(1) (“In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party’s request, objection, or motion.”).

Plaintiff’s remaining issues asserting the trial court erred by allowing Defendant’s motion to dismiss for *res judicata* are combined for review.

IV. Standard of Review

“A Rule 12(b)(6) motion tests the legal sufficiency of the pleading.” *Kemp v. Spivey*, 166 N.C. App. 456, 461, 602 S.E.2d 686, 690 (2004) (citation and quotation marks omitted). “When considering a [Rule] 12(b)(6) motion to dismiss, the trial court need only look to the face of the complaint to determine whether it reveals an insurmountable bar to plaintiff’s recovery.” *Carlisle v. Keith*, 169 N.C. App. 674, 681, 614 S.E.2d 542, 547 (2005) (citation and quotation marks omitted).

This Court reviews *de novo* “whether, as a matter of law, the allegations of the complaint . . . are sufficient to state a claim upon which relief may be granted”, on appeal from an order allowing a motion to dismiss under Rule 12(b)(6). *Christmas v. Cabarrus Cty.*, 192 N.C. App. 227, 231, 664 S.E.2d 649, 652 (2008) (ellipses original) (citation and quotation marks omitted). This Court also “consider[s] the allegations in the complaint [as] true, construe[s] the complaint liberally, and only reverse[s] the

trial court's denial of a motion to dismiss if plaintiff is entitled to no relief under any set of facts which could be proven in support of the claim." *Id.* (citation omitted).

V. Motion to Dismiss

Plaintiff asserts the trial court erred in dismissing his complaint for "*res judicata*." Dismissal of a complaint under Rule 12(b)(6) for failure to state a claim is proper when one of the following conditions is met: "(1) when the complaint on its face reveals that no law supports plaintiff's claim; (2) when the complaint reveals on its face the absence of fact sufficient to make a good claim; [or] (3) when some fact disclosed in the complaint necessarily defeats the plaintiff's claim." *Oates v. JAG, Inc.*, 314 N.C. 276, 278, 333 S.E.2d 222, 224 (1985) (citations omitted).

"The doctrine of *res judicata* provides that a final judgment on the merits in a prior action precludes a second suit based on the same cause of action between the same parties or those in privity with them." *Holly Farm Foods v. Kuykendall*, 114 N.C. App. 412, 416, 442 S.E.2d 94, 97 (1994) (citations omitted). *Res judicata* not only bars "the relitigation of matters determined in the prior proceeding but also all material and relevant matters within the scope of the pleadings, which the parties, in the exercise of reasonable diligence could and should have brought forward." *Id.* (citation and internal quotation marks omitted). "The defense of *res judicata* (sic) may not be avoided by shifting legal theories or asserting a new or different ground for relief[.]" *Rodgers Builders v. McQueen*, 76 N.C. App. 16, 30, 331 S.E.2d 726, 735 (1985) (citation omitted).

Plaintiff's claims all arise from the same factual basis: Defendant's admitted opening of an unauthorized or "fraudulent" account in Plaintiff's name. As the Western District, the United States Court of Appeals for the Fourth Circuit, and the United States Supreme Court all held, Plaintiff met the class member description is *Jabbari*, had actual notice of the settlement, and had failed to affirmatively "opt out" to avoid the preclusive effect of the settlement. The trial court properly dismissed Plaintiff's claim for failure to state a claim upon which relief could be granted for *res judicata*.

VI. Conclusion

Plaintiff litigated the same factual basis in federal court prior to this action. *Res judicata* precludes Plaintiff from relitigating the same claims in this action. We affirm the trial court's conclusion to dismiss Plaintiff's claim pursuant to Rule 12(b)(6) based upon *res judicata*. *It is so ordered.*

AFFIRMED.

Judges ARROWOOD and RIGGS concur.

Report per Rule 30(e).