

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

NUE CHEER FRANKLIN)
)
Plaintiff,)
)
v.)
)
ARBOR STATION, LLC,)
JUSTIN MATTHEW PARNELL, esq.,)
PARNELL AND CRUM, P.A.,)
)
)
Defendants.)

CASE NO. 2:11-cv-294-MEF

REPORT AND RECOMMENDATION OF THE MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636(b)(1) this case was referred to the undersigned United States Magistrate Judge for review and submission of a report with recommended findings of fact and conclusions of law (Doc. 6, filed April 18, 2011). For good cause, the Magistrate Judge recommends that this case be dismissed prior to service of process pursuant to 28 U.S.C. § 1915(e)(2)(B).¹

I. INTRODUCTION

The Plaintiff, Nue Cheer Franklin, (“Franklin”) who is proceeding *pro se*, filed this action pursuant to 42 U.S.C. § 1983 on April 18, 2011. In her Complaint, Franklin alleges that Arbor Station, an apartment complex located in Montgomery, Alabama where she

¹ The statute provides, in pertinent part: “[T]he court shall dismiss the case at any time if the court determines that . . . the action or appeal – (i) is frivolous or malicious, (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief.” 28 U.S.C. § 1915(e)(2)(B).

currently resides, filed, through its counsel, Justin Matthew Parnell,, an unlawful detainer complaint against her in the District Court for Montgomery County. She further alleges that Arbor Station prevailed in that complaint. Franklin paid a supersedeas bond and appealed to the Circuit Court of Montgomery County, Alabama. While her appeal was pending, Arbor Station is alleged to have obtained a Writ of Possession in violation of Ala. Rule Civ. Pro. 62 (d) and Franklin's Fifth Amendment right to due process. (Doc. 1, Complaint and Doc. 15, June 22, 2011 Memorandum Opinion and Order and *See Arbor Station Apartments v. Nue Franklin* DV- 2011-52.

Franklin filed a Motion to Amend the Complaint on April 28, 2011. (Doc. 11). The Magistrate Judge recommended dismissal of the Complaint and denial of the Motion to Amend. (Doc. 12). Prior to the Court entering an Order on the Recommendation, Franklin filed a Second Motion to Amend and a Second Amended Complaint. (Doc. 14). On June 22, 2011, the Court entered an Order adopting the Recommendation to the extent that it recommends dismissal of the claims in the Complaint (Doc. 1) and denial of the Motion to Amend filed April 28, 2011. (Doc. 11). The Court further Ordered that the Motion to Amend filed on May 23, 2011 (Doc. 14) be Granted in Part and Denied in Part. Finally, the Court Ordered Franklin to file an Amended Complaint which does "not include any claims against Arbor Station pursuant to 42 U.S.C. § 1983" and does not "contain claims against either Judge Pool or Judge Reese." (Doc. 15). On June 28, 2011, Franklin filed a Third Amended Complaint (Doc. 16). Following a return from appeal on the Court's June 22,

2011 Memorandum Opinion and Order, Franklin filed a Fourth Amended Complaint (Doc. 30).

The allegations in her Fourth Amended Complaint arise from same set of facts plead in the initial Complaint filed in this court. In the Fourth Amended Complaint, Franklin states that there was an underlying action initiated by Arbor Station in Montgomery County District Court alleging unlawful detainer and seeking possession of property. Plaintiff states she filed an appeal from this ruling. While her appeal was pending, Arbor Station is alleged to have obtained a Writ of Possession in violation of Ala. Rule Civ. Pro. 62 (d) and Franklin's Fifth Amendment right to due process. (Doc. 1, Complaint; Doc. 30, Fourth Amended Complaint and Doc 15, June 22, 2011 Memorandum Opinion and Order).

Franklin alleges state law claims against Arbor Station pursuant to *Ala. Code* §§ 35-9A-461(a)(c)(e), 35-9A-407, 35-9A-201, 35-9A-163(a)(3), 35-9A-421, 6-6-332; and for Fraud and Unjust Enrichment. She also alleges state law claims against attorney Justin Matthew Parnell pursuant to *Ala. Code* § 35-9A-461(a) and (e) and for negligence or legal malpractice. She also alleges state law claims against Parnell & Crum, P.A. for negligent hiring, negligent training, and negligent supervision. In addition, Franklin alleges claims pursuant to the Fair Debt Collection Practices Act §§ 15 U.S.C. 1692e(2)(5)(10) against Arbor Station, a debt collector, for using "false and misleading information" during various proceedings in the prior state court action involving unlawful detainer and seeking possession of her property. Franklin also alleges a claim pursuant to the FDCPA § 1692f(1) against

Arbor Station for an attempt to collect legal fees from her which is prohibited by the Alabama Uniform Residential Landlord Tenant Act. Because the action before this court now is premised on a prior state court action, the court will consider whether the current action is barred by res judicata.

II. DISCUSSION AND ANALYSIS

“Our res judicata analysis has always required a consideration of the facts and legal theories of two causes of action as well as the rights and duties involved in each case.” *Draper v. Atlanta Indep. Sch. Sys.*, 377 Fed. Appx. 937, 940 (11th Cir. 2010) *certiorari denied*, 131 S.Ct. 342, 178 L.Ed. 2d 223, 79 USLW 3205 (Oct. 4, 2010) *citing Manning v. City of Auburn*, 953 F.2d 1355, 1359 (11th Cir. 1992). “We have consistently concluded that when the substance and facts of each action are the same, res judicata bars the second suit.” *Id.* In *I.A. Durbin, Inc. v. Jefferson National Bank*, 793 F.2d 1541 (11th Cir. 1986), the Court summarized the doctrine of res judicata as follows:

Res judicata or claim preclusion refers to the preclusive effect of a judgment in foreclosing relitigation of matters that were litigated or could have been litigated in an earlier suit. . . . In order for the doctrine of res judicata to bar a subsequent suit, four elements must be present: (1) there must be a final judgment on the merits; (2) the decision must be rendered by a court of competent jurisdiction; (3) the parties, or those in privity with them, must be identical in both suits; and (4) the same cause of action must be involved in both cases.

I.A. Durbin, 793 F.2d at 1549 (citations omitted). *See also Manning*, 953 F.2d at 1358 (recognizing Alabama case law also sets forth these four requirements in order for res judicata to attach).

Indeed, the general rule is that a federal court will apply the law of the state in which it sits on the doctrine of res judicata. *Wesch v. Folsom*, 6 F. 3d 1465 (11th Cir. 1993); *but see*, *Diaz v. Moore*, 861 F.Supp. 1041, 1046, fn 16 (N.D. Fla.1994) (recognizing that some courts have called this rule into question, where, as in the instant case, a federal court is “considering the preclusive effect of a prior *federal court judgment*.”)(emphasis in original.) Federal common law and Alabama common law are consistent as to the law of res judicata and the court will rely on both state and federal cases in this recommendation. The court now turns its attention to how the elements of res judicata apply in the instant action.

(1) A Final Judgment.

On January 6, 2011, Arbor Station filed an unlawful detainer action against Franklin in Montgomery County District Court. *See Arbor Station Apartments v. Nue Franklin DV-2011-52*. Justin Matthew Parnell represented Arbor Station in this action. On February 11, 2011, Montgomery County District Court Judge Jimmy Pool entered judgment for possession in favor of Arbor Station. Franklin appealed the judgment to the Montgomery County Circuit Court and the case was remanded to District Court on April 11, 2012. On remand, the District Court issued a writ of possession. Thereafter, Franklin filed a Motion to Quash the Writ of Possession which was denied on April 18, 2011. On September 2, 2011, Franklin filed a Motion to Vacate Order and Return Supersedeas Bond. The District Court denied the Motion on November 30, 2011. On December 13, 2011, Franklin filed a Motion to Amend Judgment. By Order of December 29, 2011, the District Court set a hearing on that Motion

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