

857 F.2d 1478 (Table), 1988 WL 91126 (C.A.9 (Alaska))

Unpublished Disposition

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA9 Rule 36-3 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Ninth Circuit.

Roy HENDRICKS, Plaintiff-Appellant,
v.
Jerry WOODS, Walter Saroka, Defendants-Appellees.

No. 87-4020.

Argued and Submitted Aug. 3, 1988.

Decided Aug. 25, 1988.

D. Alaska

AFFIRMED.

Appeal from the United States District Court of the State of Alaska, Russel Holland,
District Judge, Presiding.

**Before KOZINSKI, NOONAN and DAVID R. THOMPSON, Circuit
Judges.**

MEMORANDUM [FN*](#)

*1 Roy Hendricks brought a *Bivens* [FN1](#) action against Walter Saroka and Jerry Woods, Special Agents for the United States Fish and Wildlife Service, alleging violation of rights secured under the Fourth Amendment. The district court granted summary judgment in favor of Saroka and Woods, and Hendricks appeals. We have jurisdiction under [28 U.S.C. § 1291](#) and we affirm.

BACKGROUND

Over a period of five months in late 1980, Walter Saroka, working in an undercover capacity for the United States Fish and Wildlife Service and posing as an east coast ivory buyer, made several purchases of illegal ivory from Roy Hendricks. All of the sales took place in the basement of Hendricks' residence in Anchorage, Alaska. On each visit, Saroka observed various piles of untagged and illegal ivory walrus tusks lying in plain view in Hendricks' basement. Based on the information gathered during his several visits to Hendricks' residence, Saroka obtained a search warrant for the premises.

On February 4, 1981, Woods and three other officers executed the search warrant without incident. Hendricks was tried and, based upon the evidence gathered during the search of his residence, assessed a civil penalty for three violations of the Marine Mammal Protection Act, [16 U.S.C. § 1361](#), et seq. In a separate action, Hendricks was ordered to forfeit items seized during the search. Both the forfeiture and civil penalty have been upheld on appeal.

During the pendency of the forfeiture and civil penalty actions, Hendricks filed suit in district court against the United States, three Doe defendants and appellees Woods and Saroka in their individual capacities. The complaint alleged one cause of action sounding in tort and one for violation of Hendricks' "civil rights." In a motion to dismiss under [Fed.R.Civ.P. 12](#), the government asserted that Hendricks failed to state a claim under any civil rights statute. Hendricks, in his Opposition to Defendants' Motion to Dismiss, acknowledged that no claim was stated under a civil rights statute but characterized his claim as one sounding in a *Bivens*-type action:

It is true that the Civil Rights Statute does not apply here, but under [Bivens v. 6 Unknown, Named Agents of the \[sic\] Federal Bureau of Narcotics, 403 U.S. 388, 1971](#), the facts alleged in Count I, when combined with those alleged in Count II all sufficiently make out a case for violation of Civil Rights against the Federal Government.

* * *

In addition, the *Bivens* case runs parallel [sic] with the Federal Tort Claims Act, and the Federal Tort Claims act, as well as the *Bivens* case in situations such as the one before this Court gives rise to two (2) causes of action....

The district court dismissed Hendricks' complaint, but permitted him to amend the complaint to include any claim of deprivation of a constitutional right under *Bivens*. Hendricks failed to amend his complaint within the time allowed. Accordingly, his lawsuit was dismissed in its entirety and final judgment was entered against him. Hendricks did not appeal from this judgment.

*2 Eight months later, on February 3, 1984, Hendricks filed the present action in district court against Woods and Saroka, relying solely on a *Bivens* theory of liability. The district court granted summary judgment in favor of Woods and Saroka.

ANALYSIS

In this *Bivens* action, Hendricks seeks monetary damages against agents Woods and Saroka, claiming they violated his fourth amendment right against unreasonable search and seizure. Specifically, Hendricks alleges that Saroka fraudulently obtained the search warrant through the use of false information and affidavits and that Woods seized items beyond the scope of the warrant and acted outside the scope of his authority by restraining Hendricks and his wife in the living room while the search was being conducted in the basement. Woods and Saroka moved for summary judgment claiming that they were immune from suit as a matter of law. In granting summary judgment for Woods and Saroka, the district court held that Hendricks failed to present evidence sufficient to defeat their motion for summary judgment. We may affirm the district court based on any ground supported by the record. [Islamic Republic of Iran v. Boeing Co., 771 F.2d 1279, 1288 \(9th Cir.1985\)](#), cert. dismissed, [107 S.Ct. 450 \(1986\)](#). We conclude that the present action is barred by the doctrine of *res judicata*.

“[T]he doctrine of *res judicata* [or claim preclusion] ‘bar[s] all grounds for recovery which could have been asserted, *whether they were or not*, in a prior suit between the same parties ... on the same cause of action.’ ” [Constantini v. Trans World Airlines, 681 F.2d 1199, 1201 \(9th Cir.\)](#), cert. denied, [459 U.S. 1087 \(1982\)](#) (quoting [Ross v. IBEW, 634 F.2d 453, 457 \(9th Cir.1980\)](#)) (emphasis added). Dismissal of an action for failure to state a claim is on the merits, and *res judicata* bars the plaintiff from filing another complaint on the same cause of action. [Federated Dept. Stores v. Moitie, 452 U.S. 394, 399 n. 3 \(1981\)](#) (dismissal for failure to state a claim under [Rule 12\(b\) 6](#) is a “judgment on the merits” for purposes of *res judicata* doctrine); [Noll v. Carlson, 809 F.2d 1446, 1447 n. 2 \(9th Cir.1987\)](#). The question is whether Hendricks' *Bivens* claim in the present action arose out of the same cause of action asserted in the prior action. See [Harris v. Jacobs, 621 F.2d 341, 343 \(9th Cir.1980\)](#).

In this circuit we apply the following criteria to determine whether different lawsuits involve a single cause of action:

(1) Whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts.

[Constantini, 681 F.2d at 1201-02](#). The last of these criteria is the most important. [Id. at 1202](#).

*3 Both of Hendricks' lawsuits arose out of the same transactional nucleus of facts: the search and seizure pursuant to warrant which took place on February 4, 1981. Both lawsuits allege that agents Woods and Saroka violated Hendricks' civil rights. In the present lawsuit, Hendricks alleges a *Bivens* claim as the district court suggested when it granted him leave to amend his complaint in the prior lawsuit. The fact that Hendricks

failed to present a detailed *Bivens* claim in his first lawsuit, either in his original complaint or by an amended complaint after the district court gave him leave to amend, is irrelevant for *res judicata* purposes. See [Constantini, 681 F.2d at 1201](#).

The other three factors for finding a single cause of action are clearly met. The right of Woods and Saroka in not being subject to liability would be impaired by prosecution of the present case. It appears that the evidence in the instant action would be the same as that offered in the prior action. Finally, the two actions involve infringement of the same rights: both suits seek damages for violation of Hendricks' fourth amendment rights during a warrant search and seizure at Hendricks' residence in 1981. We therefore conclude that the cause of action involved in this lawsuit is the same as that raised in Hendricks' 1982 action and is barred by *res judicata*.

Were this the only ground for affirmance of the district court, we would not impose sanctions against Hendricks for a frivolous appeal. This is because the district court also considered the *res judicata* issue and determined that, in its view, the *res judicata* doctrine was not applicable.

However, the district court granted summary judgment for the defendants because Hendricks had not presented “sufficient evidence” of a constitutional violation. The district court was charitable in this use of language. We have reviewed the record at length, and it is absolutely clear that Hendricks presented no evidence whatsoever of any constitutional violation. The reason is obvious. There isn't any. Moreover, the record reflects that Hendricks paid little attention to this case while it was in the district court, and failed to comply with extensions of time deadlines which the district court granted. The district court found that he had been “dilatatory.” Sanctions may be imposed for a frivolous appeal. [Fed.R.App.P. 38](#). An appeal is frivolous if the result is obvious, or the arguments of error are wholly without merit. [Grimes v. Commissioner, 806 F.2d 1451, 1454 \(9th Cir.1986\)](#).

The only ground Hendricks asserts on appeal for the warrant's invalidity is his assertion that the agents, in support of their motion for summary judgment, did not present an affidavit by Saroka. In this, Hendricks seriously misrepresents the record. Saroka's affidavit in support of the warrant was presented as part of the agents' moving papers in their motion for summary judgment. Hendricks further argued in the district court that Saroka fraudulently obtained the warrant because he induced Hendricks to sell ivory by representing himself as a licensed dealer. Just how this could have had any effect on the validity of the warrant was never explained. This argument is not renewed on appeal.

*4 In support of his argument that items seized in the search of his residence exceeded the scope of the warrant, Hendricks argues that “[n]umerous items [which were] seized” in the search had been acquired by him before the Marine Mammal Protection Act was enacted. This has nothing to do with whether the scope of the warrant was exceeded.

Hendricks also makes reference in his brief on appeal to the proposition that if there are genuine issues of material fact which are in dispute, summary judgment is not an appropriate remedy. He provides nothing, however, to show that there is any genuine issue of material fact in dispute in this case. Finally, while he frames three issues as the issues on appeal, he offers only vague and meritless arguments in support of them.

The result in this case is obvious. Hendricks' arguments on appeal are wholly without merit. Sanctions are appropriate, and we award them against both Hendricks and his counsel in the aggregate sum of \$2,500, plus double costs.

AFFIRMED WITH SANCTIONS.

[FN*](#) This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

[FN1. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 \(1971\).](#)

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