[DO NOT PUBLISH]

In the United States Court of Appeals

For the Eleventh Circuit

No. 22-13864

Non-Argument Calendar

DAVID W. FOLEY, JR.,
JENNIFER T. FOLEY,

Plaintiffs-Appellants,

versus

ORANGE COUNTY,
a political subdivision of Florida,
ASIMA M. AZAM,
individually and together, in their
personal capacities,
TIM BOLDIG,
individually and together, in their
personal capacities,
FRED BRUMMER,

RICHARD CROTTY,
individually and together, in their
personal capacities, et.al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 6:22-cv-00456-RBD-EJK

Before ROSENBAUM, GRANT, and BRASHER, Circuit Judges.

PER CURIAM:

David Foley, Jr., and Jennifer Foley, proceeding *pro se*, sued Orange County, Florida, Orange County officials, and Orange County employees for ordering the Foleys to destroy an aviary they used to maintain and sell a small flock of toucans on their property. The district court dismissed their complaint on res judicata grounds, denied their request for judicial notice, and denied their motion for leave to amend their complaint. The Foleys appealed. On appeal, the employee defendants moved for Rule 38 sanctions. For the reasons stated below, we affirm the district court and deny the defendants' motion for sanctions.

I.

Since the early 2000s, the Foleys owned and maintained a small flock of toucans on their property to breed and sell. David Foley held licenses from the Florida Fish and Wildlife Conservation Commission to sell the toucans on his property from 2002 to 2008; but after a private citizen initiated an investigation of the sale of the toucans in 2007, the Orange County Enforcement Board ordered the Foleys to get a permit for their aviary structure, destroy it, or pay a daily fine. David Foley applied for a permit, but a county employee denied the application because using an aviary for commercial purposes violated the Orange County Code. The Foleys were ultimately forced to destroy their aviary and make other accommodations for their toucans. The Orange County Board of Zoning Adjustment, the Board of County Commissioners, and Florida state courts upheld the decision to deny the permit.

The Foleys sued Orange County and 19 individual county employees in their official and individual capacities in federal court, seeking a declaratory judgment that the Orange County land use ordinance is void and alleging violations of the Fourteenth Amendment's Due Process Clause and Equal Protection Clause, First Amendment, and Fourth Amendment. The district court held that Orange County's land use regulations were unlawful and granted summary judgment to the Foleys on that claim but granted summary judgment to Orange County on the other claims. *See Foley v. Orange County*, No. 6:12-cv-269, 2013 WL 4110414, at *14 (M.D. Fla. Aug. 13, 2013). The Foleys appealed, and we held that all the

Foleys' federal claims had no plausible foundation or were clearly foreclosed by Supreme Court decisions. *See Foley v. Orange County*, 638 F. App'x 941, 945–46 (11th Cir. 2016). Thus, under *Bell v. Hood*, 327 U.S. 678, 682 (1946), we held that the district court lacked federal-question jurisdiction to decide the state law claim, vacated the district court's judgment, and ordered the district court to dismiss the case without prejudice. *See Foley*, 638 F. App'x at 946.

The Foleys again sued those defendants in Florida state court. They alleged state and federal takings and due process claims but later amended their complaint to drop the federal takings claim. The state court dismissed the Foleys' amended complaint with prejudice.

The Foleys then brought this suit against the same defendants in federal court, alleging federal takings and due process claims. The defendants moved to dismiss the complaint on res judicata grounds. The district court agreed and dismissed the federal due process claim because the Foleys had brought the same claim against the same defendants in state court and because the state court dismissed it on the merits. The district court also dismissed the federal takings claim on res judicata grounds because, even though the Foleys dropped that claim in state court, res judicata applies to all claims arising out of the same nucleus of operative facts, and the state takings claim the Foleys pursued was based on the same facts as their federal takings claim. The district court further held that even though the Foleys claimed they "reserved" their takings claim in state court, they made no affirmative

representation in their state court pleadings to avoid the application of res judicata as required by our precedent. *See Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299, 1309 (11th Cir. 1992). The district court also denied in part the Foleys' motion for judicial notice to the extent the Foleys sought notice of the defendant's motive of any previous filings and denied the Foleys motion for leave to amend their complaint.

On appeal, the Foleys challenge the district court's dismissal of their claims on res judicata grounds, the district court's partial denial of their request for judicial notice, and the district court's denial of their motion to amend their complaint. Additionally, the employee defendants ask us to sanction the Foleys under Federal Rule of Appellate Procedure 38 for submitting arguments on appeal that are devoid of merit.

II.

We review *de novo* the district court's dismissal of the complaint based on res judicata. *See Kizzire v. Baptist Health Sys., Inc.*, 441 F.3d 1306, 1308 (11th Cir. 2006). We review the district court's ruling on a request for judicial notice for an abuse of discretion. *See Lodge v. Kondaur Cap. Corp.*, 750 F.3d 1263, 1273 (11th Cir. 2014). We also review the district court's denial of a motion to amend for an abuse of discretion, "but whether the motion is futile is a question of law that we review *de novo*." *Brooks v. Warden*, 800 F.3d 1295, 1300 (11th Cir. 2015).

III.

The Foleys first argue that the district court erred in applying the federal res judicata standard instead of the state standard and that under the state standard the state court judgment creates no bar to this case on res judicata grounds.

The Foleys are correct that, "[i]n considering whether to give preclusive effect to state-court judgments under res judicata or collateral estoppel, the federal court applies the rendering state's law of preclusion." *Cmty. State Bank v. Strong*, 651 F.3d 1241, 1263 (11th Cir. 2011). Thus, the district court erred in applying the federal standard instead of the Florida standard. But because the Foleys' claims are still barred by res judicata under Florida law, that error does not require reversal.

A claim is barred by res judicata under Florida law where there is: "(1) identity of the thing sued for; (2) identity of the cause of action; (3) identity of the persons and parties to the action; (4) identity of the quality [or capacity] of the persons for or against whom the claim is made; and (5) the original claim was disposed on the merits." *Lozman v. City of Riviera Beach*, 713 F.3d 1066, 1074 (11th Cir. 2013). And "res judicata bars relitigation in a subsequent cause of action not only of claims raised[] but also claims that could have been raised." *Fla. Dept. of Transp. v. Juliano*, 801 So.2d 101, 107 (Fla. 2001).

The Foleys argue that the state court claims were not disposed of on the merits and that there is no identity of the cause of action. The Foleys say the state court did not dispose of their claims

on the merits because the state court dismissed their claims (1) for lack of standing and thus for lack of jurisdiction and (2) based on absolute immunity, which is not an adjudication on the merits. We disagree. While the state court discussed the lack of an existing case or controversy, mootness, and ripeness, it made clear that it dismissed each of the Foleys' claims for failure to state a cause of action and dismissed the complaint with prejudice. And while the state court dismissed the claims against the individual defendants based on absolute immunity, it did so with prejudice because none of the Foleys' allegations sufficiently stated a claim against the individual defendants. Our precedent establishes that "dismissal of a complaint with prejudice satisfies the requirement that there be a final judgment on the merits." *Citibank, N.A. v. Data Lease Fin. Corp.*, 904 F.2d 1498, 1501 (11th Cir. 1990). Even more, under Florida law, "[a]n order finally dismissing a complaint for failure to state a cause of action is an adjudication on the merits." *Smith v. St. Vil*, 714 So. 2d 603, 605 (Fla. Dist. Ct. App. 1998). Thus, the district court disposed of the Foleys' claims on the merits.

We also disagree with the Foleys' argument that there was no identity of the causes of action in state court and federal court. In their complaint, the Foleys acknowledged that the defendants and the incidents here are the same as those in the state court case. Indeed, the Foleys raised the same federal due process claim in state court that they now raise in federal court. And while the Foleys dropped their federal takings claim in state court to pursue their state takings claim, res judicata bars relitigation of any claims that could have been raised in the previous action. *See Fla. Dept. of*

Transp., 801 So.2d at 107. There is no serious dispute that the Foleys could not have raised their federal takings claim in state court—they did, even if they later decided to abandon it. And even though the Foleys now argue they "reserved" their federal takings claim in state court, we agree with the district court that they made no affirmative representation in their state court pleadings as required by our precedent to avoid the application of res judicata. *See Fields*, 953 F.2d at 1309. Thus, under res judicata, the Foleys are barred from now raising a claim they declined to pursue in state court.

The Foleys separately argue, citing *Laskar v. Peterson*, 771 F.3d 1291, 1300 (11th Cir. 2014), that the state court decision created a new intervening fact on which their federal due process claim now relies. In *Laskar* the state court's denial of a means available to remedy an alleged constitutional violation was the basis of the later due process claim in federal court. It was unclear whether the state court dismissed a mandamus request without considering the merits and thus whether there was a means available to Laskar to remedy the alleged constitutional violation. *See id.* at 1301. Here, however, the state court provided a means for the Foleys to remedy their alleged violations and dismissed their complaint on the merits, so this argument fails.

The Foleys next argue that the district court erred in denying their request for judicial notice of the defendants' inconsistent positions in state and federal court. It is appropriate for a court to take judicial notice of a fact that is both not subject to reasonable

dispute and is either (1) "generally known within the trial court's territorial jurisdiction" or (2) "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). "Indisputability is a prerequisite" for a court to take judicial notice. *United States v. Jones*, 29 F.3d 1549, 1553 (11th Cir. 1994). The district court did not abuse its discretion in declining to take judicial notice of the defendants' intent in state court because the parties' intentions were subject to reasonable debate, as illustrated by the parties' briefs, and because the accuracy of the defendants' motive cannot be determined without being reasonably questioned. Thus, the district court did not abuse its discretion in denying in part the Foleys' request for judicial notice.

Finally, the Foleys argue that the district court erred in denying as futile their motion for leave to amend their complaint to add a new count for declaratory relief as to whether the Fourteenth Amendment recognizes a legitimate claim of entitlement to a state-issued license to sell birds. The Foleys argue that the district court incorrectly concluded that the state court already rejected the argument. A district court is justified in denying leave to amend due to futility "when the complaint as amended is still subject to dismissal." *Hall v. United Ins. Co. of Am.*, 367 F.3d 1255, 1262–63 (11th Cir. 2004). We agree with the defendants that the district court did not err in denying the Foleys' motion for leave to amend because the Foleys could have raised that claim in their state court complaint. Thus, that claim would be barred by res judicata if the Foleys were allowed to add it to their complaint, so the district court's denial of their motion for leave to amend was justified by futility.

IV.

The employee defendants ask us to impose sanctions under Federal Rule of Appellate Procedure 38, arguing that the Foleys raised frivolous claims in the face of clearly established law demonstrating that their claims were barred by res judicata. "Rule 38 sanctions are appropriately imposed against appellants who raise clearly frivolous claims in the face of established law and clear facts." *Parker v. Am. Traffic Sols., Inc.*, 835 F.3d 1363, 1371 (11th Cir. 2016). Under Rule 38, "a claim is clearly frivolous if it is utterly devoid of merit." *Id.* As explained above, the Foleys are correct that the district court erroneously applied the federal res judicata test instead of the Florida test. Thus, even though this error does not require us to reverse, it shows that the Foleys' arguments were not utterly devoid of merit. Therefore, we deny the employee defendants' motion for sanctions.

V.

For the reasons stated above, we **AFFIRM** the district court's grant of the defendants' motions to dismiss, denial of the Foleys' request for judicial notice, and denial of the Foleys' motion for leave to amend. We **DENY** the employee defendants' motion for Rule 38 sanctions.