IN THE CIRCUIT COURT OF WOOD COUNTY, WET VIRGINIA

KIMBERLY A. BAKER,
Plaintiff,

v. // **Civil Action No.: 19-C-177**

THE CHEMOURS COMPANY FC, LLC,
a Delaware Limited Liability Company,
SHAWN BUSCH and KEVIN CRISLIP,
Defendants.

ORDER

On August 26, 2019, came the Plaintiff, Kimberly Baker, in person ("Baker") and by her attorneys and counsel, Walt Auvil and Kirk Auvil, the entity Defendant, The Chemours Company, ("Chemours") and Defendant, Kevin Crislip,("Crislip")by their attorneys and counsel, Eric Iskra, Samuel Brock and Ellen Vance and Defendant, and Shawn Busch, in person ("Busch") and by his attorneys and counsel, Eric Iskra, Samuel Brock and Ellen Vance, for hearing on Defendants' Motion To Dismiss Complaint.

Respective counsel presented argument on the motion and upon consideration of same, the entire record, including, by judicial notice, the record in case 17-C-99, styled Kimberly Baker v. The Chemours Company, et al, ("Baker I") the disposition of which is the basis of Defendants' motion to dismiss on grounds of *res judicata* and the prohibition against claim splitting, the Court hereby **ORDERS** that the motion be GRANTED.

The issue presented is a question of law: Are the claims alleged by Baker in this action ("Baker II") barred by the doctrine of res judicata and the prohibition against claim splitting?

Defendants contend that all facts upon which Plaintiff bases Baker II occurred prior to the Court's granting summary judgment to the Defendants in Baker I on December 6, 2018, and its dismissal of all claims set out in Plaintiff's Amended Complaint. The plaintiff acknowledges that the allegations presented in her Complaint in Baker II occurred late in 2017 and through the summer of 2018.

The parties' are in conflict respecting the import and consequences of this fact. Defendants' position is that all claims asserted by Plaintiff in Baker II could have been resolved in Baker I had they been properly and timely presented in that civil action. Plaintiff's position is that she was effectively denied the opportunity to litigate her claims and allegations of adverse employment action, gender discrimination and retaliation occurring late in 2017 and through the summer of 2018 and, therefore, such claims as pled in Baker II are not barred by *res judicata* or the prohibition against claim splitting.

The Court notes several matters of record in Baker I:

1. The Complaint in Baker I named The Chemours Company as defendant but Plaintiff filed and served an Amended Complaint two days later, without need of leave from the Court, which added Shawn Busch and Jay Starcher as defendants and several new allegations. The amended complaint further added a claim against individual defendants that they aided and abetted Chemours in discriminating against plaintiff based on her gender and in retaliating against her for reporting gender discrimination.
2. The last date when the Baker I amended complaint alleged misconduct by any defendant was May 25, 2016.

3. The Baker I court entered a scheduling conference order on August 29, 2017, which established a deadline of September 15, 2017, to join any party and to amend any pleading.

4. The scheduling order did not cut off discovery until March 18, 2018, and initially set a trial date of May 15, 2018.

5. The Baker I parties entered into an Agreed Order Amending Scheduling Conference Order in November 2017; Plaintiff did not request and the Court did not permit additional time for her to amend her pleadings as part of the agreed amended order but discovery was extended through October 4, 2018, and trial was set for December 4, 2018.

6. Depositions and written discovery including numerous supplements proceeded through October 15, 2018.

7. Plaintiff's Exhibit and Witness Disclosure was filed on October 3, 2018, and included documents about conduct and events occurring after she filed her amended complaint.

8. On October 5, 2018, Defendants' filed in Baker I their Motion For Summary Judgment and Memorandum.

9. On October 22, 2018, Baker I defendants filed several motions in limine including one to exclude evidence not included in plaintiff's amended complaint.

10. On October 29, 2018, plaintiff filed in Baker I her Response and Memorandum In Opposition To Defendants' Motion For Summary Judgment.

11. On November 2, 2018, Baker I plaintiff filed her Consolidated Response To Defendants' Motions In Limine.

12. On December 6, 2018, a separate division of the Circuit Court of Wood County granted defendants' motion for summary judgment based on its Findings and Conclusions, several of which are relevant to defendants' motion to dismiss Baker II:

i. Plaintiff failed to state a *prima facie* case for gender discrimination or retaliation under the West Virginia Human Rights Act because she failed to establish that she was subjected to any adverse employment action during her employment ar Chemours;

ii. Because Plaintiff was not subjected to any discrimination and/or retaliation by Chemours, individual Defendants Shawn Busch and/or Jay Starcher could not have aided and abetted (and did not aid and/or abet) Chemours in regard to such conduct;

iii. Plaintiff's claims are limited to those stated by her in her Amended Complaint and the court would not consider additional allegations and/or claims which are outside the scope of those raised in Plaintiff's Amended Complaint for purposes of ruling on Defendants' Motion for Summary Judgment.

Conclusion:

iv. A plaintiff's claims are limited to those asserted in the complaint and it is improper for a plaintiff to attempt to raise new theories and/or new claims in response to summary judgment.

The order cited Wilson v. Brown, 1998 WL 965981 (N.D. W.Va. 1998) though this Court agrees with Plaintiff that the case is not pertinent to the issue raised in Baker I. The order granting summary judgment also cited decisions from other jurisdictions which were pertinent

to the issue though such decisions do not constitute West Virginia precedent. Nevertheless, the holdings and analyses in these decisions offer insight and guidance to the Court. Thus, in *Golodner v. City of New London*, 2010 WL 3522489 (D. Conn. 2010), the plaintiff brought a civil action in August2008, arising from an ongoing series of disputes between himself and his neighbors and the police response to those disputes which encompassed numerous separate incidents over several years. In addressing certain of plaintiff's claims in his affidavit submitted with his memorandum opposing summary judgment the Connecticut court noted in dismissing these claims that plaintiff had not even alluded in his complaint to the conduct described in the affidavit and that he cannot amend his complaint through a response to summary judgment.

In addition, Mr. Golodner made claims regarding his complaint after 2009, during the pendency of his civil action and as to these the court declared that such allegations were beyond the scope of the complaint.

In *Seenyur v. Coolidge*, 2016 WL 7971295, a federal district court in Minnesota held in part that a claim and allegation were not properly before it because it was not presented in the underlying complaint.

Consequently, the basis for granting summary judgment was plaintiff's failure to allege in her amended complaint that any adverse employment actions were taken against her after May 25, 2016 – the last day of conduct alleged by plaintiff in her amended complaint.

The Plaintiff argues that *res judicata* does not bar Baker II because the additional misconduct took place after the last date to amend her complaint as set out in the Scheduling Order and the Agreed Amended Scheduling Order. This argument is unpersuasive for several reasons: (1) The scheduling order does not preclude plaintiff from seeking amendment of her

complaint under Rule 15 of the Rules of Civil Procedure which provides that a party may amend its pleading even after a response to it has been made "only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." (2) On November 17, 2017, less than three months after entry of the initial scheduling order, an agreed order amending it was entered which set a trial for December 4, 2018 and extended discovery to October 4, 2018; consequently, the plaintiff had more than ample time to seek further amendment of her amended complaint without prejudice to defendants, indeed, plaintiff continued to make supplemental responses to discovery requests as late as October 10, 2018. (3) Had the plaintiff filed a motion to amend at any time during 2018, one of three outcomes would have resulted: i. the court's denial of the motion to amend in its entirety, ii. the court's granting leave to file an amended complaint, iii. the court's granting leave to file an amended complaint to add new allegations only up to a date certain but denying leave as to events or conduct after such date.

It is critical to note that every one of the three possible outcomes would have resolved the *res judicata* issue now before this Court or made the issue moot. If the Baker I court had denied the motion to amend, its summary judgment in favor of defendants could not serve as a bar to Baker II; if the court had permitted further amendment of the complaint the issue would be moot and could not have arisen; if the court permitted amendment only as to events or conduct occurring before a certain date, the doctrine of *res judicata* would only bar a subsequent civil action as to matters arising before the "cut-off" date.

Consequently, it was plaintiff's failure to seek leave to amend in Baker I which generated the issue now before this Court and which prevented the Baker I court from

resolving the matter. In addition, the decision not to seek leave to amend was the plaintiff's alone and she must accept its consequences.

Plaintiff is correct in pointing out that a claim entailing allegations of discrimination, retaliation and adverse employment action when the claimant remains in her job raises distinct issues as additional adverse employment actions or misconduct may occur during pendency of the litigation. It is the Court's determination that when the plaintiff in such civil action fails to seek leave to amend her complaint she does not thereby shield herself from operation of *res judicata* principles or the principle prohibiting a plaintiff from obtaining relief on the basis of claims or allegations not set forth in her complaint.

The Court finds *Blake v. Charleston Area Medical Center, Inc.*, 201 W.Va. 469 (1997) (*"Blake"*) helpful to its determination on Defendants' motion as it addressed the nature and elements of *res judicata*. *Blake* explained that in general terms *res judicata* precludes re-litigation of the same cause of action. In addition, for a final decision in a civil action to bar or to preclude a subsequent civil action the two actions must have substantially the same parties who sue and defend in each case in the same respective character, the same cause of action or claim for relief and the same object.

More specifically, *Blake* provides that:

> [f]or purposes of *res judicata*, 'a cause of action' is the fact or facts which establish or give rise to a right of action, the existence of which affords a party a right to judicial relief ... The test to determine if the...cause of action involved in the two suits is identical is to inquire whether the same evidence would support both actions or issues....If the two cases require substantially different evidence to sustain them, the second cannot be said to be the same cause of action and barred by *res judicata. Blake* at 476, quoting *White v. SWCC,* 164 W.Va. 284,290 (1980).

Blake further amplified the requirements of the doctrine of *res judicata*:

> 'an adjudication by a court having jurisdiction of the subject-matter and the parties is final and conclusive, not only as to the matters actually determined, but as to every other matter which the parties might have litigated as incident thereto and coming within the legitimate purview of the subject-matter of the action. It is not essential that the matter should have been formally put in issue in a former suit, but it is sufficient that the *status* of the suit was such that the parties might have had the matter disposed of on its merits. An erroneous ruling of the court will not prevent the matter from being *res judicata*.' Point 1, Syllabus, *Sayre's Adm'r v. Harpold,* 33 W.Va. 553 (1890), Syllabus Point 1, *In re Estate of McIntosh,* 144 W.Va. 583 (1959). Syl. Pt. 1, *Conley v. Spillers,* 171 W.Va. 584 (emphasis in original). Thus, *res judicata* may operate to bar a subsequent proceeding even if the precise cause of action involved was not actually litigated in the former proceeding so long as the claim could have been raised and determined. *Blake* @ 476-477.

The decision explicitly declared the three essential elements that must exist to preclude the litigation of a subsequent action on grounds of *res judicata*:

> First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action. *Blake* @ 477.

Each of the three essential elements exists in the present circumstances such that preclusion of Baker II on the grounds of *res judicata* is warranted. Nevertheless, the very decision which thoroughly analyzed the doctrine of preclusion declared: "Notwithstanding this

scrupulous assessment of the applicability of *res judicata* to a particular case, we reiterate our prior admonishment that, even though the requirements of *res judicata* may be satisfied, we do 'not rigidly enforce [this doctrine] where to do so would plainly defeat the ends of justice.'" *Blake, supra, @* 478, quoting *Gentry v. Farruggia,* 132 W.Va. 809, 811 (1949).

A review of *Gentry* demonstrates that the quoted language was dictum as the W. Va. Supreme Court's reversal of a circuit court's decision sustaining defendant's plea of *res judicata* was based on its conclusion that an unsuccessful action by owner of a taxicab to recover damages to the cab from collision with a truck did not preclude an action by the taxicab driver to recover injuries sustained in the accident because a privity of interest between owner and driver did not exist.

Similarly, in *Barnett v. Wolfolk*, 149 W.Va. 246 (1965) our State Supreme Court of Appeals held that the relationship of master and servant did not form a basis for application of the doctrine of *res judicata* against the servant in respect to a judgment rendered in a prior in personam action to which the master was a party but the servant was not.

In *Galanos v. National Steel Corp.,* 178 W.Va. 193 (1987) the State Supreme Court reversed a circuit court grant of summary judgment in favor of the owner of a steel facility, who obtained a favorable judgment in a prior lawsuit brought by a worker injured in an explosion, in subsequent litigation brought by two different workers injured in the same explosion. The *Galanos* court held there was no privity between plaintiffs in the two cases and emphasized that the workers in the subsequent litigation did not exercise any degree of control over the prior litigation.

In the case under review the plaintiffs in Baker I and Baker II are identical. Moreover, the plaintiff certainly had complete control of the decision not to seek further amendment of her complaint in Baker I. Indeed, she sought to introduce in evidence the very events or conduct which she could have sought to include in a second amended complaint.

There is no basis by which this Court may conclude that application of *res judicata* to Baker II would plainly defeat the ends of justice.

The Defendants' MotionTo Dismiss is GRANTED and it is **ORDERED** that Plaintiff's claims for relief be and are hereby DISMISSED with prejudice.

The parties shall near their own costs and attorney fees.

The Clerk of this Court shall mail a true copy of this order to:

Eric W. Iskra, Esq.
Samuel M. Brock, III, Esq.
Ellen J. Vance, Esq.
Spilman Thomas & Battle, PLLC
300 Kanawha Blvd., East
P.O. Box 273
Charleston, WV 25321-0273

Walt Auvil, Esq.
The Employment Law Center, PLLC
1208 Market Street
Parkersburg, WV 26101

ENTER: 9-6-19

J.D. BEANE, Judge

STATE OF WEST VIRGINIA
COUNTY OF WOOD, TO-WIT:

I, CAROLE JONES, Clerk of the Circuit Court of Wood County, West Virginia, hereby certify that the foregoing is a true and complete copy of an order entered in said Court, on the 6 day of Sept 2019, as fully as the same appears of record.

Given under my hand and seal of said Circuit Court, this the 10 day of Sept 2019

Carole Jones
Clerk of the Circuit Court of
Wood County, West Virginia

By: _____, Deputy