

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2134

September Term, 2018

MICHAEL C. WORSHAM

v.

FRIENDS OF MARILYN MOSBY, ET AL.

Nazarian,
Leahy,
Beachley,

JJ.

Opinion by Leahy, J.

Filed: July 15, 2020

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Michael Worsham, appellant, appeals from an order of the Circuit Court for Harford County, dismissing his action, which alleged violations of the Federal Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227, and its Maryland counterpart (“Maryland TCPA”), Maryland Code (1975, 2013 Repl. Vol.), Commercial Law Article, §§ 14-3201 and 14-3202, by appellees, Friends of Marilyn Mosby (“FOMM”), Arzine Ifekauche, Kweisi Mfume, and NGP VAN, Inc. (“NGP”) (collectively, “Appellees”).¹ In this appeal, he presents three questions for our review,² from which we derive a single dispositive question and recast as follows: whether the circuit court was legally correct in dismissing Worsham’s lawsuit with prejudice because his claim was barred by the doctrine of res judicata.

¹ In the order that is the subject of this appeal, the circuit court granted Worsham’s motion to dismiss NGP as a defendant. NGP asserts in its brief that it was validly dismissed from the case and is not a proper party to this appeal. Given our resolution of this appeal, we need not resolve NGP’s status.

² Worsham phrased his questions presented as follows:

- I. Whether the Harford County Circuit Court erred in dismissing the lawsuit with prejudice.
- II. Whether the Harford County Circuit Court erred in failing to rule on and thereby denying Worsham’s Motion for Partial Summary Judgment.
- III. Whether the Harford County Circuit Court erred in failing to rule on and thereby denying, Worsham’s Motion for Spoliation of Evidence and to Compel, and Worsham’s Motion to Determine Sufficiency of Kweisi Mfume’s Responses to Requests for Admissions.”

We hold that the circuit court did not err in dismissing Worsham’s complaint as barred by res judicata and, consequently, affirm the judgment of the circuit court.³

BACKGROUND

According to Worsham, two pre-recorded telephone calls were placed to his cell phone, on June 12, 2014, and June 24, 2014, “to solicit votes and money” for Mosby’s political campaign. In response, Worsham filed two lawsuits: first, a lawsuit in the district court against Mosby individually; and, second, after judgment was entered in favor of Mosby in the first lawsuit, an additional lawsuit in the circuit court against Appellees.

First Lawsuit

On August 23, 2014, Worsham filed a complaint, in the District Court sitting in Harford County, Maryland, against Mosby personally, alleging that, on June 12th and 24th, she “initiated pre-recorded voice messages in her own voice for her personal campaign with an automated telephone dialing system to [his] wireless number without prior consent.” Worsham alleged those phone calls “failed to include a phone number as required by the TCPA and FCC [Federal Communications Commission] regulations.” Those acts and omissions, Worsham alleged, violated both the federal and Maryland TCPA. Accordingly, Worsham sought statutory damages under federal and Maryland law.

³ In light of our holding that the circuit court correctly dismissed Worsham’s complaint, we do not address the other questions raised. *See, e.g., Lizzi v. Wash. Metro. Area Trans. Auth.*, 384 Md. 199, 203 (2004) (declining to address additional issues raised on appeal because the petitioner’s claim was barred by res judicata).

On July 10, 2015, the district court entered judgment in favor of Mosby. Two weeks later, the district court denied Worsham’s motions for new trial, to alter or amend the judgment, and to exercise revisory power over the judgment.

Worsham noted a de novo appeal to the Circuit Court for Harford County, in Case Number 12-C-15-002452 (“Case No. 2452”). The case proceeded to trial on March 17, 2017. At the conclusion of Worsham’s case and after oral argument, the circuit court decided that the calls did not violate the TCPA and on May 19, 2017, entered judgment in favor of Mosby. On June 26, 2017, the court denied Worsham’s post-judgment motions. The Court of Appeals denied Worsham’s ensuing petition for writ of certiorari. *Worsham v. Mosby*, 456 Md. 74 (2017).

Second Lawsuit

On June 9, 2017, while Worsham’s post-judgment motions in Case No. 2452 still were pending, he filed a complaint in the Circuit Court for Harford County, Case Number 12-C-17-001456 (“Case No. 1456” and the subject of the instant appeal), against FOMM, NGP, Kweisi Mfume, Arinze Ifekauche, and P&S Systems & Solutions dba Robocalls Network.⁴ The complaint alleged that the defendants had conspired “to make pre-recorded voice calls” to his “wireless cell phone telephone number that is on the National Do Not Call list registry, to solicit votes and money for the campaign to elect Marilyn Mosby.” According to Worsham’s complaint, the defendants placed two pre-recorded calls on June 12, 2014 and June 24, 2014. Worsham averred that the placement of the pre-recorded calls

⁴ P&S Systems & Solutions was never served with process.

violated the FTCA because they were placed without his prior express consent, and failed to include a clear statement of the telephone number of the originating party. Worsham asserted that the purported FTCA violations also separately constituted violations of the Maryland FTCA. He sought statutory damages of \$8,000, an injunction prohibiting the defendants “from calling or assisting with calling any persons in Maryland in violation of the TCPA or FCC regulations,” attorney’s fees “as may apply,” and costs.

On October 2, 2017, NGP filed a motion to dismiss and/or for summary judgment. In its memorandum in support of its motion, NGP averred, among other things, that Worsham’s claims were barred by this Court’s prior decision in *Worsham v. Ehrlich*, 181 Md. App. 711, 728-31, *cert. denied*, 406 Md. 747 (2008).⁵ The following month, FOMM, Mfume, and Ifekauche filed a motion to dismiss and/or for summary judgment, incorporating the arguments raised in NGP’s motion.

Worsham filed responses opposing both motions and requested hearings. In his opposition to NGP’s motion to dismiss and/or for summary judgment, Worsham included, as an exhibit, answers to interrogatories by Mosby in the prior Case No. 2452. In February of 2018, Worsham moved to dismiss NGP as a defendant.

In March 2018, Worsham filed a motion for sanctions for spoliation of evidence and to compel against FOMM and Ifekauche, which included as an exhibit the Affidavit of Arinze Ifekauche from the prior Case No. 2452. FOMM and Ifekauche filed an opposition to Worsham’s motion, once again alerting the court that Worsham “had previously filed

⁵ In *Worsham v. Ehrlich*, we found that there is no private right of action for unsolicited political solicitations under the TCPA. 181 Md. App. 711, 728-31 (2008).

suit against Ms. Mosby based upon the exact same facts and alleged calls noted in the instant matter.” The following month, Worsham filed a motion to determine the sufficiency of Mfume’s responses to requests for admissions. Several weeks later, Mfume filed an opposition to Worsham’s motion.

On April 16, 2018, Worsham filed an amended complaint, which was substantially similar to the previous complaint, except that it no longer included NGP as a defendant and added a claim for damages against Mfume. Then, on May 3, 2018, Worsham filed a motion for partial summary judgment as to the issue of the defendants’ liability and requested a hearing.

On May 3, 2018, the circuit court issued a memorandum opinion and order granting, among other pending motions, NGP’s motion to dismiss and for summary judgment, and dismissing Case No. 1456 “in its entirety as barred by res judicata.” The court explained that “[i]n this case, each of the elements for res judicata are met where the parties are in privity with Marilyn Mosby, [Worsham] previously litigated this issue in a court of competent jurisdiction, and the court entered a final judgment on the merits of [Worsham’s] claims.” The court concluded that all claims presented were barred by res judicata because “the claims against the defendants arise out of the same cause of action in that [Worsham] alleges that the defendants violated the TCPA when they made two particular phone calls in June 2014 and these issues were resolved on summary judgment[.]”⁶

⁶ The record in Case No. 2452 reflects that judgment was granted on Mosby’s motion for judgment at the conclusion of Worsham’s case.

After the circuit court denied Worsham’s post-judgment motions, he noted this timely appeal.⁷

DISCUSSION

The central question in this appeal concerns whether the circuit court correctly dismissed Case No. 1456 on the grounds of res judicata. We generally review a grant of a motion to dismiss de novo. *Greater Towson Council of Cmty. Ass’ns. v. DMS Dev., LLC*, 234 Md. App. 388, 408 (2017). In this case, the circuit court considered, among other things, the record of the earlier Case No. 2452, including the complaint and Mosby’s answers to Worsham’s interrogatories. Under this circumstance, we treat the motion to dismiss as a motion for summary judgment. *See* Md. Rule 2–322(c) (“If, on a motion to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 2-501[.]”); *N. Am. Specialty Ins. Co. v. Boston Med. Group*, 170 Md. App. 128, 136 (2006) (defendant’s motion to dismiss based on res judicata converted into a motion for summary judgment when defendant attached, and the court considered, “exhibits from the first case”).

In reviewing a grant of summary judgment, we first “determine whether there is a

⁷ NGP and FOMM moved for attorney’s fees, and its motion is still pending in the circuit court. The court ordered the parties to appear again for a hearing on attorney’s fees after finding that Worsham pursued the litigation in bad faith by continuing to “litigate[] the same set of facts after his claims under the TCPA had been conclusively denied at several levels by the courts in this State.”

dispute as to a material fact sufficient to require an issue to be tried.” *Boland v. Boland*, 423 Md. 296, 365 (2011). If not, we determine “whether the moving party is entitled to judgment as a matter of law.” *Id.* at 366 (citation and quotation omitted). *See also* Md. Rule 2-501(f) (“The court shall enter judgment in favor of or against the moving party if . . . there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law[.]”). We review whether the court’s decision was correct as a matter of law regardless of whether the court’s order operated as a grant of a motion to dismiss or for summary judgment. *Greater Towson Council*, 234 Md. App. at 408.

Worsham contends that the circuit court erred in dismissing his amended complaint with prejudice on the ground of res judicata primarily on two bases. First, Worsham avers that the circuit court erred in dismissing the action “*sua sponte*.” Second, according to Worsham, he was “prejudiced because he was not given a reasonable notice and opportunity to present materials.” Appellees counter that a court on notice that it had previously decided an issue may notice that issue on its own initiative and, because Worsham’s claims had already been fully litigated before the district and circuit courts, the circuit court “properly invoked res judicata to dismiss the second suit.”

The Court of Appeals has clarified the scope and requirements for res judicata:

Res judicata is an affirmative defense that precludes the same parties from relitigating any suit based upon the same cause of action because the second suit involves a judgment that “is conclusive, not only as to all matters that have been decided in the original suit, but as to all matters which with propriety could have been litigated in the first suit.”

Powell v. Breslin, 430 Md. 52, 63 (2013) (quoting *Alvey v. Alvey*, 225 Md. 386, 390 (1961)). Specifically,

the doctrine of res judicata precludes the relitigation of a suit if (1) the parties in the present litigation are the same or in privity with the parties to the earlier action; (2) the claim in the current action is identical to the one determined in the prior adjudication; and (3) there was a final judgment on the merits in the previous action.

Id. at 63-64 (citations omitted).

A comparison of the complaints in Cases Nos. 2452 and 1456 makes plain that the three elements of res judicata are satisfied. First, Case No. 1456 features the same plaintiff and, for purposes of res judicata, the privies of Mosby, the defendant to the earlier action. Importantly, the party against whom res judicata is invoked, Worsham, is the *same* in both actions. It is only the roster of defendants that differs in the two cases. “For purposes of res judicata, privity ‘generally involves a person so identified in interest with another that [the person] represents the same legal right.’” *Bank of N.Y. Mellon v. Georg*, 456 Md. 616, 659 (2017) (citation omitted). Mosby, personally, and the Appellees—which includes her campaign committee, FOMM, and campaign manager, Ifekauche—are sufficiently “identified in interest” with each other “that they could be said to share ‘the same legal right.’” *Id.* at 662 (citation omitted). Given the relationship between Mosby and Appellees, the Appellees’ interests were “fully represented, with the same incentives, by” Mosby in Case No. 2452. *Id.* at 663 (citation omitted). The circuit court observed correctly that “[t]he interests of the [Appellees] in this case are so intertwined with the liability of Marilyn Mosby that the parties are properly considered in privity for the purpose of determining res judicata where they are alleged to have violated the TCPA by placing the

same two phone calls which were the subject of prior litigation for the purpose of promoting Mosby’s reelection.” Clearly, the Appellees shared a common interest in avoiding the vexatious repackaging of the same claims that Worsham had raised previously and unsuccessfully.⁸

Regarding the second element, the claims in the current action are substantially the same as those determined in the prior adjudication. In *Anne Arundel County Board of Education v. Norville*, the Court of Appeals noted that “claims and defenses are the same for res judicata purposes when they arise from a ‘common nucleus of operative facts.’” 390 Md. 93, 109 (2005) (quoting *GLF Constr. Corp. v. LAN/STV*, 414 F.3d 553, 555 n.2 (5th Cir. 2005)). Here, both lawsuits arise out of the same phone calls placed to Worsham as part of Mosby’s reelection campaign, and Worsham alleged only violations of TCPA and Maryland TCPA in both lawsuits. Case No. 1456 is simply another attempt to hold a party liable for the same statutory violations which were previously litigated in Case No. 2452.

Third, the prior decision of the circuit court in Case No. 2452 constitutes a final judgment on the merits, which could be and was appealed, and satisfies the final element of res judicata. At the conclusion of Worsham’s case and after oral argument, the circuit

⁸ We need not address whether the same privity test would apply if res judicata were invoked against, rather than in favor of, the defendants in the two actions. *See, e.g., Mathews v. Cassidy Turley Md., Inc.*, 435 Md. 584, 628 (2013) (noting that the “analysis of privity for purposes of collateral estoppel focuses on whether the interests of the party *against* whom estoppel is sought were fully represented, with the same incentives, by another party in the prior matter”) (citation omitted) (emphasis added). (The same analysis applies to res judicata. *See Georg*, 456 Md. at 662-63.)

court granted Mosby’s motion for judgment. The court memorialized its judgment in a written order on May 19, 2017. Then, Worsham filed post-judgment motions, which were denied by the circuit court, and a petition for writ of certiorari with the Court of Appeals, which was dismissed. *See Worsham v. Mosby*, 456 Md. 74 (2017).

Finally, we note that Worsham’s remaining contentions are misplaced. First, the fact that the parties in the underlying case failed to move for summary judgment on the issue of res judicata is of no consequence. The Court of Appeals has “decided cases previously on res judicata grounds, even though res judicata was not raised in the petition for writ of certiorari.” *Anne Arundel Cty. Bd. of Educ. v. Norville*, 390 Md. 93, 104 (2005).

The Court resolved, in the context of raising res judicata sua sponte on appeal:

[I]f a court is on notice that it has previously decided the issue presented, the court may dismiss the action sua sponte, even though the defense has not been raised. The result is fully consistent with the policies underlying res judicata: it is not based solely on the defendant’s interest in avoiding the burdens of twice defending a suit, but is also based on the avoidance of unnecessary judicial waste.

Id. at 105 (cleaned up) (citing *Arizona v. California*, 530 U.S. 392, 412 (2000)). Second, we discern no prejudice to Worsham by the court’s dismissal. As detailed above, Worsham previously had his claim adjudicated, which subjected Case No. 1456 to dismissal. We further note that Worsham relied on answers to interrogatories by Mosby from the prior Case No. 2452, effectively notifying the circuit court that he had brought the prior action.

We hold that the circuit court correctly dismissed Case Number 1456 on the ground of res judicata. Accordingly, in light of this holding, we need not address Worsham’s remaining issues. *E.g.*, *Norville*, 390 Md. at 103.

**JUDGMENT OF THE CIRCUIT COURT
FOR HARFORD COUNTY AFFIRMED.
APPELLANT TO PAY COSTS.**