UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOHN EAKIN,

Plaintiff,

v.

AMERICAN BATTLE MONUMENTS COMMISSION, et al.,

Defendants.

No. SA-12-CV-01002-FB

DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION TO VACATE JUDGMENT AND RESUME DISCOVERY

THE AMERICAN BATTLE MONUMENTS COMMISSION ("ABMC"), *et. al.* ("Defendants") respond to Plaintiff's Motion to Vacate Judgment and Resume Discovery as follows:

BACKGROUND

This lengthy litigation involves claims seeking the identification and return of the remains of Private Arthur H. "Bud" Kelder, a fallen United States servicemember who died in 1942 while a prisoner of the Imperial Japanese Army at Camp Cabanatuan in the Philippines during World War II, and was buried, among others, in a common grave[1]. ECF # 39, ¶¶ 1-2, 15-34, 137-151. Plaintiff John Eakin is proceeding under a power of attorney granted by his cousin Douglas Kelder[2]. Plaintiff also asserted various claims purporting to seek declaratory and injunctive relief on behalf of all families of deceased servicemembers. *Id.* ¶¶ 118-136. During the pendency of the case, graves were disinterred, remains were identified as Pvt. Kelder, and his PNOK was notified. ECF # 98, ¶ 1-2. With the identification of Pvt. Kelder's remains, the Court dismissed the case as moot, entered judgment and closed the case on March 25, 2015. ECF #s 120, 121. Now, over nine (9) years later, Plaintiff (proceeding under an updated power of

[1] The grave is referred to as Common Grave 717, or "CG 717."
[2] Douglas Kelder is alleged to be the designated Primary Next of Kin ("PNOK") and is also the Person Authorized to Direct Disposition ("PADD") of Pvt. Kelder's remains. [ECF # 39, ¶¶ 2, 37], s*ee also, Patterson v Defense POW/MIA Accounting Agency, et. al.* 398 F. Supp 3d. 102, 109 (W.D. Tex., 2019), Ex. 4.

attorney from Douglas Kelder) filed the instant motion on August 28, 2024, seeking injunctive relief to order the return of further remains of Pvt. Kelder (some of which have admittedly already been returned[3]), or alternatively, to vacate the judgment and re-open the case. ECF # 127, Ex. 1. Plaintiff asserts standing based on the updated power of attorney and an alleged "quasi-property right in a dead body." ECF # 127, pp. 4, 10. The Court must deny the motion because Plaintiff litigated these same issues and the same request for relief in a subsequent case and lost, his claims are now barred and he lacks standing, and there are no unforeseen or extraordinary circumstances that require the judgment in this case (entered almost a decade ago) to be vacated.

EVIDENCE

Defendants attach the following exhibits that are incorporated herein:

Ex. 1: April 18, 2019 Declaration of Gregory Berg, Ph.D. in *Patterson et. al. v. Defense POW/MIA Accounting Agency, et al.,* No. 5:17-CV-00467, United States District Court, Western District of Texas, San Antonio Division ("the *Patterson* case").

Ex. 2: June 5, 2019 Second Declaration of Gregory Berg, Ph.D. in the *Patterson* case.[4]

Ex. 3: Excerpts from the November 29, 2018 deposition of Plaintiff John Eakin in the *Patterson* case.

Ex. 4: November 6, 2024 Declaration of Gregory Berg, Ph.D.

RESPONSE

Judge Rodriguez Entered Summary Judgement Against Plaintiff on the Same Issues and the Same Request for Relief

Plaintiff references, in passing, the *Patterson* case as "other related litigation," that was "closed July 29, 2019". [ECF # 127, pg. 4]. The case is identified as a "petition for Writ of

[3] Plaintiff points to Ex. 2 in his motion as being representative of the remains that have been returned.[ECF # 127, pg. 5]. This is factually incorrect, there were additional remains identified, and all identified portions of Pvt. Kelder have been returned. Ex. 4.

[4] To the extent necessary, pursuant to Fed. R. Evid. 201(b) Defendant requests the Court to take judicial notice of Exs. 1 and 2.

Mandamus action to obtain the remains of … Private Arthur H. "Bud" Kelder." [*Id.*]. While this passing reference is true, there is much more to the *Patterson* case that, for reasons unknown, is not disclosed to the court in the instant motion.

On May 25, 2017, a little more than two (2) years after judgment was entered and the instant case was closed, Douglas Kelder (represented by counsel and proceeding in his own name), along with six other plaintiffs[5], filed suit against the Defense POW/MIA Accounting Agency ("DPAA")[6], the ABMC and other Defendants in the *Patterson* case seeking the same relief sought in the instant motion; namely, injunctive and declaratory relief relating to the identification and return of the entirety of Pvt. Kelder's remains. *Patterson,* 398 F. Supp.3d. at 109, 111-12; [No. 5:17-CV-00467, ECF 1, pp. 6, 10-11]. "Plaintiffs' central grievance is Defendants' refusal to return the remains of the fallen servicemembers in issue." *Id.* at 109. As to Pvt. Kelder, although testing of the remains from the common grave was ongoing, "[p]laintiffs take issue with the time this process has taken." *Id.* at 112. Judge Rodriguez also correctly stated that "[p]laintiffs' case turns largely on whether they have a protected property interest in their deceased relatives' remains." *Id.* at 117.

Defendants sought summary judgment on the Plaintiffs' claims and provided extensive evidence to the Court, including the Declarations of Gregory Berg, Ph.D. Exs. 1,2. Dr. Berg was, and still is, the Laboratory Manager of the Scientific Analysis Directorate for the DPAA. *Id., see also* Ex. 4. As shown by Dr. Berg's declarations, the majority of the larger elements of Pvt. Kelder's skeleton had been identified, including the left fibula that came from previously mis-identified remains disinterred in the United States. Ex. 3., ¶¶ 5-6. Dr. Berg also provided a diagram illustrating what remains had been identified. *Id.,* ¶ 6, Ex. 2, pg. 29. The diagram stands

[5] Plaintiff John Eakin was disclosed as a testifying expert in the *Patterson* case and organized the various plaintiffs for their lawsuit. Ex. 3, pp. 4, 6, 20-21. The court never reached Defendant's motion to exclude Mr. Eakin on *Daubert* grounds. *See Patterson,* 398 F. Supp.3d at 108, 126. (No. 5:17-CV-00467, ECF #s 55, 59).

[6] DPAA is the agency currently responsible for unaccounted DoD personnel and providing information to family members. *Patterson,* 398 F. Supp. 3d. at 111, *see also* Ex. 4.

in sharp contrast to that submitted by Plaintiff in the instant motion. *See* ECF # 127, pg. 5, Ex. 2. Importantly, and central to the relief requested by Plaintiff in the instant motion, Dr. Berg declared "[t]he DPAA Laboratory has in its possession no additional remains for which it can be said that they are likely those of PVT Kelder, rather than another servicemember." Ex. 2, ¶ 8.

After examining the history of the case, the development of the various agencies tasked with these issues over time, the legal theories asserted by Plaintiffs (all of which essentially sought the same thing) and the extensive evidentiary record; Judge Rodriguez granted summary judgment in favor of the Defendants on all counts, including Douglas Kelder's claims for the return of any further unidentified remains of Pvt. Kelder. *Patterson,* 398 F. Supp. 3d. at 108, 111-12, 115, 126-27. The court also held that "Plaintiffs' proposed property interest, which is already stated at the highest level of generality, must thus be recast as an interest in unidentified remains … and assuming for argument that the remains *were* identified, Plaintiffs still do not state a cognizable property interest. This is because a property interest, for due process purposes, cannot be stated at so high a level of abstraction." *Id.* at 118 (emphasis original).

Simply put, in the *Patterson* case, the exact same relief was requested as in the instant motion, by the exact same party in interest, against the exact same Defendants in interest, for the exact same remains, of the exact same servicemember; and all relief requested was denied after extensive briefing and evidence on the merits of the case. Douglas Kelder, either in his own name or through a power of attorney granted to Plaintiff, has no legally recognizable interest in, or right to the return of any further remains of Pvt. Kelder, if any exist at all.

Plaintiff's Claims for the Return of Further Remains of Pvt. Kelder Are Barred by Res Judicata

"The rule of res judicata encompasses two separate but linked preclusive doctrines: (1) true res judicata or claim preclusion and (2) collateral estoppel or issue preclusion. *Test Masters Ed. Services, Inc. v. Singh,* 428 F.3d 559, 571 (5th Cir. 2005) (internal citations omitted). The res

judicata effect of a prior judgment is a question of law. *Id., see also Oreck Direct, L.L.C., v. Dyson, Inc.,* 560 F.3d 398, 401 (5th Cir. 2009).

Claim preclusion, or res judicata, bars the litigation of claims that have been litigated, or should have been raised in a prior suit. *Singh,* 428 F.3d at 571. Both parties and their privies are precluded. *Oreck,* 560 F.3d at 401. The rule ensures the finality of judgments, conserves judicial resources and protects litigants from multiple lawsuits. *Id.* "The 'doctrine of res judicata is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and private peace,' which should be cordially regarded and enforced by the courts.'" *Singh,* 428 F.3d at 574.

The elements of res judicata are (1) the parties are identical or in privity; (2) the judgment in the prior action was rendered by a court of competent jurisdiction; (3) the prior action was concluded by a final judgement on the merits; and (4) the same claim or cause of action was involved in both actions. *Id.* As to the third element, a court's summary judgment which determines the merits of an action, claim or defense, is a final judgement on the merits. *Pittard v. Citimortgage, Inc.,* 2022 WL 686464 at *7, No. SA-21-CV-01114-JKP (W.D. Tex., San Antonio, March 8, 2022) (internal citations omitted). As to the fourth element, the court applies a "transactional test,' which requires that the two actions be based on the "same nucleus of operative facts." *Oreck,* 560 F.3d at 401-02 (internal citations omitted).

Here, the "prior action" is actually the subsequent *Patterson* case, that was decided prior to the relief requested by Plaintiff in the instant motion. For whatever reason, Mr. Kelder (and Mr. Eakin) chose to test the waters in a different court and litigate their claims, along with other Plaintiffs. Then, rather than appeal their adverse ruling in *Patterson*, they now attempt an end-run around Judge Rodriguez in this court based on the artifice of non-performance; which is the exact same thing they previously claimed…i.e., give us the remains, this is taking too long and we have a property (and liberty) interest in them. This, they cannot do.

All of the elements of res judicata are met. These are the same parties and privvies. Mr. Kelder, the Plaintiff PNOK in *Patterson* and real party in interest, is in privity with Plaintiff Mr. Eakin in the case at bar. They have successfully invoked the Court's jurisdiction in both cases, without challenge, and continue to do so. The summary judgment against them in the *Patterson* case thoroughly determined all issues and claims by all parties and is a decision on the merits. The exact same nucleus of operative facts and claims are asserted in both cases, to the same remains. As such, having chosen to litigate their claims in a different court, and having then lost, Plaintiff and Mr. Kelder are now barred from doing so again in this court.

Plaintiff is Barred by Collateral Estoppel From Re-Litigating The Issue of His Alleged Property Right to Further Remains of Pvt. Kelder

Although similar, collateral estoppel prevents parties from re-litigating the same issues conclusively determined between them in a previous action. *Singh,* 428 F.3d at 572. A party is precluded from re-litigating an issue already raised in an earlier action if: (1) the issue at stake is identical to the one involved in the earlier action; (2) the issue was actually litigated in the earlier action; and (3) determination of the issue was a necessary part of the judgment in the earlier action. *Id.*

Here, Plaintiff again raises the issue of having an alleged a "quasi-property right" to the remains of Pvt. Kelder. ECF # 127, pg. 10. This exact same issue, along with having an alleged liberty interest in the remains, was raised and fully litigated before Judge Rodriguez in the *Patterson* case. *Patterson,* 398 F. Supp. 3d. at 117-120. Further, the issue was a necessary part of the summary judgment since "[p]laintiffs' case turn[ed] largely on whether they have a protected property interest in their deceased relatives' remains." *Id.* at 117. As such, all the elements of collateral estoppel are met. Plaintiff is estopped from re-litigating the issue of whether he, or Mr. Kelder, have any property interest, or legally cognizable interest at all, in any further remains of Pvt. Kelder. Having litigated and lost on this exact issue, the law does not afford Plaintiff another try.

With No Legally Cognizable Interest In The Return Of Any Further Remains, Plaintiff Lacks Standing To Force Further Agency Action

Plaintiff alleges "[t]his Court previously addressed Defendant's objection to Plaintiff's standing." [ECF # 127, ¶ II, pg. 4]. More accurately, Magistrate Judge Bemporad recommended the case be dismissed in its entirety because Plaintiff had no standing since no duty was owed directly to him, but Plaintiff was allowed to amend his complaint and proceed under the power of attorney from Mr. Kelder, as the designated PNOK pursuant to 10 U.S.C. § 1501(d). [ECF # 34, pg. 16]. The issue of whether *Mr. Kelder* had standing was not reached until the *Patterson* case, in which it was decided in the context of the alleged property and liberty interests claimed by Mr. Kelder. As set forth *supra*, Judge Rodriguez held that Mr. Kelder, the PNOK, had no legally cognizable property interest in any further remains of Pvt. Kelder, even if the remains were identified. *Patterson,* 398 F. Supp.3d. at 118-120. Further, he had no liberty interest in the remains, since "no court has accepted Plaintiffs' 'vague statements of societal recognition of family rights and duties regarding the burial of a recently deceased relative.'" *Id.* at 120.

"The standing doctrine defines and limits the role of the judiciary and is a threshold inquiry to adjudication." *McClure v. Ashcroft,* 335 F.3d 404, 408 (5th Cir. 2003) (citing *Warth v. Seldin,* 422 U.S. 490, 517-18 (1975)). "The inquiry has two components: constitutional limits, based on the case-and-controversy clause in Article III of the Constitution; and prudential limits, crafted by the courts." *Warth,* 422 U.S. at 498 (citing *Raines v. Byrd,* 521 U.S. 811, 820 (1997)). Because Article III standing is a threshold issue, it must be addressed before questions of prudential standing. *Ford v. NYLCare Health Plans of Gulf Coast, Inc.,* 301 F.3d 329, 332 (5th Cir. 2002). To meet the constitutional standing requirement, a plaintiff must show 1) an injury in fact 2) that is fairly traceable to the actions of the defendant and 3) that likely will be redressed by a favorable decision. *E.g., McClure,* 335 F.3d at 409 (citing *Lujan,* 504 U.S. at 560-61). The

injury must be concrete and particularized, actual or imminent and not conjectural or hypothetical. *Id.* Likewise, the Court's ability to redress the injury must not be speculative. *Id.*

Here, since it was adjudicated that Mr. Kelder has no legally cognizable interest in the remains he seeks to recover, Plaintiff no longer has standing. He has no injury in fact. The Court cannot redress his alleged injury by ordering DPAA to go find more bones of Pvt. Kelder, that he has no right to in the first place, most of which do not even lend themselves to further testing and none of which can be said to be that of Pvt. Kelder. Further, without standing, the Court cannot adjudicate Plaintiff's request for injunctive relief as to any further remains of Pvt. Kelder.

No Unforeseen, Extraordinary Circumstances Exist to Vacate the Judgment

Plaintiff seeks to vacate the judgment in this case (and indirectly vacate the *Patterson* judgment) pursuant to Fed. R. Civ. P. 60(b)(6), which provides that a party can be relieved from a final judgment for "any other reason that justifies relief." ECF # 127, pg. 8. Plaintiff is correct that Rule 60(b)(6) is a residual clause used to cover *unforeseen* circumstances, to accomplish justice in *exceptional* circumstances, and relief will only be granted if *extraordinary* circumstances are present. *Id.* pg. 9 (citations omitted) (emphasis added). An example would be a truncated proceeding with no evidence, where the merits were not examined and did not allow for the presentation of a defense, when neither the Defendant nor its counsel appeared due to a number of unusual circumstances. *See Seven Elves, Inc. v. Eskenazi,* 635 F.2d 396, 398-401 (5th Cir. 1981). That certainly would not describe this years-long heavily litigated case, especially considering the even more heavily litigated *Patterson* case involving the exact same issues. Further, motions for relief from judgement under the catch-all provision are not substitutes for timely appeals. *Hess v. Cockrell,* 281 F.3d 212, 216 (5th Cir. 2002). Although Plaintiff strenuously argues that the case was not moot and judgment never should have been entered over his objection, he never appealed the judgment, nor did Mr. Kelder appeal the adverse summary judgment ruling in the *Patterson* case.

Instead, Plaintiff argues, essentially, that Defendants tricked everyone because they didn't identify a "complete set" of Pvt. Kelder's remains and then concealed the rest. ECF #127, pp. 3, 5-7. This is again factually incorrect, just like (mis)representing to the Court that only a few bones of Pvt. Kelder had been returned, when Plaintiff knew as far back as 2019 that more had been identified and returned than what is alleged in the instant motion. Exs. 2, 4.

The fact is, there has never been a "complete set" of remains from any one individual from CG 717. Ex. 4. The photo of the skeletons proffered by Plaintiff in his motion to suggest this is misleading, at best. They are not complete skeletons of any one person, and instead each table is an assemblage of between three (3) and nine (9) different people. Ex. 4. After years of analysis, the DPAA Laboratory has made twelve (12) different identifications from the disinterred remains from CG 717, all of which have been returned to their families, including Pvt. Kelder. There are still at least six (6) unidentified persons. Nothing has been "concealed as CIL Portions[7]" and the DPAA laboratory still has all the unidentified CG 717 remains, specifically tracked by accession number, for each disinterred casket. Ex. 4.

Bottom line, this case is still moot. Pvt. Kelder has been accounted for and identified. Ex. 4. Just like in 2019, the DPAA Laboratory still has no additional remains in its possession for which it can be said are likely those of Pvt. Kelder. Exs. 2, 4. There is nothing else to return. There is no mandate for DPAA to continue testing every bone fragment in its possession for Plaintiff, to the exclusion of the families of all other fallen servicemembers. Perhaps more remains of Pvt. Kelder will be identified with DPAA's ongoing efforts to make additional identifications of the remaining six servicemembers associate with CG 717, or with a group identification, and if that happens Mr. Kelder will be notified.

[7] "CIL" stands for Central Identification Laboratory. "CIL Portions" are essentially portions of untestable, unidentified human remains classified by the DPAA Laboratory as medical waste. That has not happened in the case of CG 717 and may never happen. *See* Ex. 4.

This case does not represent an injustice, nor are there any unforeseeable or extraordinary circumstances that would justify vacating the judgment. While acknowledging the national priority of DPAA's work, and in no way impugning a family's interest in the return of their fallen servicemember, even in this context there can be a point of diminishing returns. The continued responses required of Plaintiff's litigation diverts scarce and valuable agency resources. At tremendous effort, terabytes of data of deceased servicemembers from World War II have been located and produced in response to his Plaintiff's FOIA lawsuits so he can compile the database for his website/MIA project. *See Eakin v. United States Dep't. of Def.,* Cause No. 5:10–cv–784–FB (W.D. Tex. Jan. 23, 2012); *Eakin v United States Dep't. of Def.,* 2022 WL 2657250 at *1, No. 5:16-cv-972-RCL (W.D. Tex., San Antonio, July 8, 2022), *see also* Ex. 3, pp. 6-8, 19. Graves that had been the resting site of fallen servicemembers and not disturbed for almost a century have been disinterred, remains have been examined and tested, Pvt. Kelder has been accounted for and identified, his family notified and identified remains returned. *See* Exs. 1-2, 4. With that, Plaintiff's legal journey, and that of Pvt. Kelder, must now come to an end. "Public policy dictates that there should be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." *Singh,* 428.F. 3d. at 574 (quoting *Federated Dept. Stores, Inc. v. Moitie,* 452 U.S. 394, 401 (1981)). Plaintiff and Mr. Kelder have had their day(s) in Court and full due process to advance all of their arguments, on all of their issues. There is no reason to vacate the judgement in this case, much less any extraordinary reason.

WHEREFORE Defendants request that the Court deny Plaintiff's motion in all respects, decline to vacate judgment and re-open this long-closed case, decline to re-litigate the *Patterson* case, and grant such other and further relief to which Defendants may be entitled.

Dated: November 26, 2024.

Respectfully submitted,

Jaime Esparza
United States Attorney

By: */s/ Darryl S. Vereen*
Darryl S. Vereen
Assistant United States Attorney
Texas Bar No. 00785148
darryl.vereen@usdoj.gov
601 NW Loop 410, Suite 600
San Antonio, Texas 78216-5597
Tel. (210) 384-7170
Fax. (210) 384-7358

Attorneys for Defendant

CERTIFICATE OF SERVICE

I certify that on November 26, 2024, I electronically filed this document with the Clerk of Court using the CM/ECF system. The CM/ECF system will send notification to the following CM/ECF participant(s):

Mr. John Eakin
9865 Tower View
Helotes, TX 78023
jeakin@airsafety.com
johnjeakin@gmail.com
Pro Se

/s/ Darryl S. Vereen
Darryl S. Vereen
Assistant United States Attorney