

16-2404  
Boyd et al. v. NYCTL 1996-1 Trust et al.

**UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

**SUMMARY ORDER**

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 15<sup>th</sup> day of June, two thousand seventeen.

PRESENT: DENNIS JACOBS,  
DEBRA ANN LIVINGSTON,  
RAYMOND J. LOHIER, JR.,  
Circuit Judges.

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JOAN GRANT BOYD, SYBIL TAYLOR and  
TONYA WARTERS, on behalf of  
themselves and all others similarly  
situated,  
Plaintiffs-Appellants,

-v.-

16-2404

NYCTL 1996-1 TRUST, NYCTL 1998-1  
TRUST, and NYCTL 1999-1 TRUST,  
Defendants-Appellees,

J.E. ROBERT CO., INC., and JER  
REVENUE SERVICES, LLC,  
Defendants.

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2 **FOR APPELLANTS:** PAUL STUART GROBMAN, New York,  
3 New York.

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5 **FOR APPELLEES:** JULIE STEINER for Zachary W.  
6 Carter, Corporation Counsel of  
7 the City of New York (Jane L.  
8 Gordon, on the brief).  
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10 Appeal from judgment of the United States District  
11 Court for the Eastern District of New York (Cogan, J.).

12 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED**  
13 **AND DECREED** that the judgment of the district court be  
14 **AFFIRMED.**

15 Three representatives of a putative class appeal from  
16 the judgment of the United States District Court for the  
17 Eastern District of New York (Cogan, J.) dismissing their  
18 claims as barred by res judicata. We assume the parties'  
19 familiarity with the underlying facts, the procedural  
20 history, and the issues presented for review. We affirm the  
21 district court's judgment for the reasons that follow.

22 Plaintiffs are three members of a proposed class of  
23 individuals who claim harm from the way New York City  
24 collects debts arising from unpaid water bills. In 2005,  
25 they brought a class action ("Boyd I") against the  
26 defendants in this case asserting Fair Debt Collection  
27 Practices Act ("FDCPA") and state law claims. The district  
28 court in Boyd I dismissed the FDCPA claim on summary

1 judgment and--because the FDCPA claim was the only asserted  
2 basis for federal jurisdiction--declined to exercise  
3 supplemental jurisdiction over the state law claims. Boyd  
4 v. J.E. Robert Co., No. 05-CV-2455, 2013 WL 5436969  
5 (E.D.N.Y. Sept. 27, 2013), aff'd Boyd v. J.E. Robert Co.,  
6 765 F.3d 123 (2d Cir. 2014) (per curiam).

7 In 2015, the same three plaintiffs sued a nearly  
8 identical group of defendants ("Boyd II") asserting RICO and  
9 state law claims based on the same facts as the prior suit.  
10 This time, the plaintiffs asserted jurisdiction both on the  
11 basis of the federal RICO claim and the Class Action  
12 Fairness Act ("CAFA"). The district court dismissed all  
13 their claims pursuant to Rule 12(b)(6) on res judicata  
14 grounds, and the plaintiffs appeal only from the dismissal  
15 of their state law claims.

16 When there has been a "final judgment on the merits,"  
17 res judicata prevents a plaintiff in the initial case from  
18 bringing a second lawsuit against the same defendants  
19 arising from the same "transaction, or series of connected  
20 transactions" in order to "relitigat[e] issues that were or  
21 could have been raised" in the first case. Duane Reade,  
22 Inc. v. St. Paul Fire & Marine Ins. Co., 600 F.3d 190, 195-  
23 96 (2d Cir. 2010). Plaintiffs do not dispute that the  
24 parties in both Boyd cases are the same, or that the claims

1 in both arise from the same set of transactions. Instead,  
2 they argue that the decision in Boyd I was not a final  
3 judgment because dismissal was without prejudice, that the  
4 defendants waived their right to argue res judicata, and  
5 that the issue of federal jurisdiction under CAFA could not  
6 have been raised in Boyd I.

7 The plaintiffs attempt to use the dismissal of Boyd I  
8 "without prejudice" to evade the bar of res judicata. We  
9 reject the "without prejudice" argument. See Epperson v.  
10 Entertainment Express, Inc., 242 F.3d 100 (2d Cir. 2001);  
11 Kale v. Combined Ins. Co. Of Am., 924 F.2d 1161, 1165 n.3,  
12 1167 (1st Cir. 1991).

13 The plaintiffs argue that the defendants waived their  
14 res judicata defense by asking the Boyd I court to dismiss  
15 the state law claims for lack of jurisdiction. It may be  
16 that res judicata generally does not apply when defendants  
17 acquiesce to the splitting of claims, but the defendants'  
18 motion to dismiss in Boyd I does not constitute acquiescence  
19 or waiver. Defendants took the position that the plaintiffs  
20 could try to bring their claims in state court, not that  
21 they could try again in federal court.

22 Finally, the plaintiffs argue that they could not have  
23 raised CAFA jurisdiction in Boyd I because there was no  
24 "reasonable probability" that they could claim at least \$5

1 million in damages, as federal jurisdiction under CAFA  
2 requires. 28 U.S.C. § 1332(d)(2); see Cutrone v. MERS, 749  
3 F.3d 137, 142 (2d Cir. 2014). Arithmetic disproves their  
4 argument. The plaintiffs' initial complaint in Boyd I  
5 alleged that the named class members were overcharged by  
6 thousands of dollars, that there were thousands of other  
7 class members, and that the claims of the named plaintiffs  
8 were typical of the claims of the other class members.<sup>1</sup>  
9 There was a "reasonable probability" that plaintiffs'  
10 damages totaled at least \$5 million, and plaintiffs thus  
11 indeed could have invoked CAFA jurisdiction in Boyd I.

12 For the foregoing reasons, and finding no merit in the  
13 plaintiffs' other arguments, we hereby **AFFIRM** the judgment  
14 of the district court.  
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18 FOR THE COURT:  
19 CATHERINE O'HAGAN WOLFE, CLERK  
20

A circular official seal of the United States Second Circuit Court of Appeals is stamped over the signature. The seal contains the text "UNITED STATES", "SECOND CIRCUIT", and "COURT OF APPEALS".

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<sup>1</sup> The Boyd I complaint is a public record of which we may take judicial notice. Blue Tree Hotels Inv. (Canada), Ltd. v. Starwood Hotels & Resorts Worldwide, Inc., 369 F.3d 212, 217 (2d Cir. 2004).