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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MOSTAFA ARAM AZADPOUR,

Plaintiff - Appellant,

v.

SUN MICROSYSTEMS, INC.; et al.,

Defendants - Appellees.

Nos. 06-16960

07-16556

D.C. No. CV-05-04087-MJJ

D.C. No. CV-06-03272-MJJ

MEMORANDUM\*

Appeal from the United States District Court  
for the Northern District of California  
Martin J. Jenkins, District Judge, Presiding

Submitted July 1, 2008\*\*

Before: WALLACE, HAWKINS, and THOMAS, Circuit Judges.

In these consolidated appeals, Mostafa Aram Azadpour appeals pro se from the district court's summary judgment in favor of defendants and final judgment

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\* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

\*\* The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

dismissing Azadpour's actions alleging that he was wrongfully denied long-term disability benefits. We have jurisdiction under 28 U.S.C. § 1291. After de novo review, *Universal Health Servs. v. Thompson*, 363 F.3d 1013, 1019 (9th Cir. 2004) (grant of summary judgment); *Stewart v. U.S. Bancorp*, 297 F.3d 953, 956 (9th Cir. 2002) (dismissal based on res judicata); *Knieval v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005) (dismissal for failure to state a claim); *Sparta Surgical Corp. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 159 F.3d 1209, 1211 (9th Cir. 1998) (denial of remand), we affirm.

In appeal No. 06-16960, we affirm for the reasons stated in the district court's order granting summary judgment in favor of defendants, entered on September 26, 2006. Azadpour advances no argument challenging the district court's conclusions of law, and we therefore deem any such arguments abandoned. *See Indep. Towers of Wash. v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003) (explaining that issues not argued on appeal are deemed abandoned). Contrary to his contention, Azadpour may not present for the first time on appeal purportedly new facts in opposition to summary judgment. *See Ramirez v. Galaza*, 334 F.3d 850, 859 n.6 (9th Cir. 2003) ("We have consistently held that a party may not raise new issues of fact on appeal after declining to present those facts before the trial court.").

In appeal No. 07-16556, we affirm the district court's dismissal based on the doctrine of res judicata. *See Tripati v. G.L. Henman*, 857 F.2d 1366, 1367 (9th Cir. 1988) (per curiam) ("The established rule in federal courts is that a final judgment retains all of its res judicata consequences pending decision of the appeal.") (citation and internal quotation marks omitted). The district court also properly dismissed Azadpour's fraud claim, the only claim in the second action not subject to res judicata, for failure to state a claim. *See* Fed. R. Civ. P. 9(b) (requiring fraud to be pled with particularity); *see also* Cal. Civ. Code § 1573 (establishing elements of constructive fraud under California law).

In both actions, the district court properly denied Azadpour's motions to remand because the Employee Retirement Income Security Act ("ERISA") preempts his claims. *See* 29 U.S.C. § 1144(a) (ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan"); *DeVoll v. Burdick Painting, Inc.*, 35 F.3d 408, 412 (9th Cir. 1994) ("The Ninth Circuit has held that ERISA preempts common law theories of breach of contract implied in fact, promissory estoppel, estoppel by conduct, fraud and deceit, and breach of contract.").

Azadpour's remaining contentions are unpersuasive.

Azadpour's motion for leave to file a motion under Rule 60 of the Federal Rules of Civil Procedure in the district court is denied.

Azadpour's motion to file an oversized reply brief in appeal No. 07-16556 is granted.

**AFFIRMED.**