

nent injunction. However, Rule 65 requires hearings for preliminary injunctions, not permanent injunctions. Moreover, we have held that "even in suits for injunctive relief, the district courts should not hesitate to grant a plaintiff's request for summary judgment when the defendant has failed to meet the requirements prescribed by Rule 56(e)." *SEC v. Research Automation Corp.*, 585 F.2d 31, 33-34 (2d Cir. 1978). Had a material fact been in dispute, then a hearing should have been granted. However, plaintiffs' suit is based on the record that was established in *Lowen*, and there are no material facts at issue.

[6, 7] Appellants next contend that the court erred in applying the offensive collateral estoppel doctrine. This claim is also without merit. The doctrine of collateral estoppel prevents previously litigated issues from being relitigated, thereby producing finality in judgments. See *Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 44 (2d Cir. 1986). In *Gelb*, this court established a four-part test to determine if the doctrine of collateral estoppel applies:

(1) the issues in both proceedings must be identical, (2) the issue in the prior proceedings must have been actually litigated and actually decided, (3) there must have been full and fair opportunity for the litigation in the prior proceeding, and (4) the issue previously litigated must have been necessary to support a valid and final judgment on the merits.

Id. The district court correctly concluded that the plaintiffs had met each of the legs of the test. This suit involves the same transactions at issue in *Lowen*. The violation of Section 406 of ERISA for self-dealing transactions was the subject of the summary judgment in the prior case. Appellants in this case had a full and fair opportunity to litigate the issue both at the trial level and on review by this court in *Lowen*. Finally, the violation of 29 U.S.C. § 1106 was litigated, and the prior determination supports the present judgment on the merits.

[8] Finally, appellants contend that the doctrine of *res judicata* prohibits the Secretary of Labor and the private plaintiffs

from recovering monetary relief that duplicates the relief granted in the prior action. Again the argument is frivolous. Application of *res judicata* in these circumstances is designed to prevent double recoveries. However, the judgment here is concurrent, and appellants are not subject to double recovery because the judgment merely decreases the amounts recouped by the Plans by the sums recovered by the private plaintiffs. This ensures some recovery for the Plans in the event that the trustees are incapable or unwilling to secure recovery for them. In some instances, the trustees may be faced with potential liability and their interest in absolving themselves may conflict with the private litigants' interest in fair adjudication of the issues and full recovery. Because of the possibility that the trustees will not act, 29 U.S.C. § 1132(a) (1988) authorizes the Secretary of Labor to bring suit concurrently with private plaintiffs to recover appropriate damages. The judgment in the instant case fulfills that statutory purpose.

For the reasons stated above, the judgment of the district court is affirmed.



Arleamon SADLER, Jr.,
Plaintiff-Appellant,

v.

CITIBANK, N.A., Defendant-Appellee.

No. 232, Docket 91-7521.

United States Court of Appeals,
Second Circuit.

Submitted Oct. 21, 1991.

Decided Oct. 22, 1991.

Depositor sued bank seeking damages for alleged breach of security. Complaint was dismissed for lack of subject matter jurisdiction by the United States District Court for the Southern District of New

York, Mary Johnson Lowe, J., and depositor appealed. The Court of Appeals held that depositor did not have private right of action under the Bank Protection Act, or regulation thereunder, for alleged failure of bank to credit transfer of money from depositor's checking account to "ready credit" account after depositor attempted to make the transfer at an automatic teller machine.

Affirmed.

1. Banks and Banking ⇐188½

Depositor did not have right of action under the Bank Protection Act, or security regulation promulgated thereunder, for alleged failure of bank to credit transfer of money from depositor's checking account to his "ready credit" account after depositor attempted to make the transfer at an automatic teller machine. Bank Protection Act of 1968, §§ 2-5, 12 U.S.C.A. §§ 1881-1884.

2. Banks and Banking ⇐503

Bank Protection Act, and regulation promulgated thereunder dealing with security methods and devices for federally insured banks, did not expressly or implicitly create a private right of action in favor of individual depositors. Bank Protection Act of 1968, §§ 2-5, 12 U.S.C.A. §§ 1881-1884.

Arleamon Sadler, Jr., pro se.

Roy B. Oser, New York City (Joseph L. Buckley, Sills Cummis Zuckerman Radin Tischman Epstein & Gross, P.C., of counsel), for defendant-appellee.

Before TIMBERS, WINTER and WALKER, Circuit Judges.

PER CURIAM:

Arleamon Sadler, Jr., *pro se*, appeals from Judge Lowe's dismissal of his complaint for lack of subject-matter jurisdiction. Sadler's complaint alleged that there had been a "breach of security" at Citibank, N.A., in violation of 12 C.F.R. § 327 (1991). Although he alleged in conclusory

fashion that he had been financially harmed by this breach, the fact of any actual loss is anything but clear from the face of the complaint. Nevertheless, the complaint unambiguously sought damages of one billion dollars. (Exhibit B to plaintiff's brief).

[1,2] Soon after filing his complaint, Sadler wrote a letter to Judge Lowe, requesting a meeting "to eliminate irregularities in the handling of papers pertaining to this case." A hearing was held on April 10, 1991. At this hearing, Judge Lowe learned that the basis for Sadler's complaint was the alleged failure of Citibank to credit a transfer of money from Sadler's checking account to his "ready credit" account after Sadler attempted to make this transfer at an automatic teller machine. Judge Lowe also determined that Sadler sought enforcement of 12 C.F.R. § 326, a regulation that deals with a host of security methods and devices for federally insured banks, such as alarms, locks, bait money, specifications for night depositories, and so forth. Judge Lowe dismissed the complaint for lack of subject-matter jurisdiction on the ground that the regulation in question did not create a private cause of action. Sadler appeals.

Title 12 C.F.R. § 326 was promulgated pursuant to the Bank Protection Act of 1968, 12 U.S.C. §§ 1881-84 (1988). It contains no express private right of action. We must, therefore, determine whether the Act creates an implicit private right of action. In *Cort v. Ash*, 422 U.S. 66, 78, 95 S.Ct. 2080, 2088, 45 L.Ed.2d 26 (1975), the Supreme Court identified four questions relevant to such an inquiry: (i) "[D]oes the statute create a federal right in favor of the plaintiff?"; (ii) "[I]s there any indication of legislative intent, explicit or implicit, either to create such a remedy or deny one?"; (iii) "[I]s it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?"; and (iv) "is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?" *Id.*

The pertinent answers to these questions preclude the implying of a private remedy for a violation of either the statute or regulation. *Accord Krupnick v. Union Nat'l Bank*, 470 F.Supp. 1037 (W.D.Pa.1979). The Bank Protection Act's purpose was "reducing the rising number of robberies which have plagued banks and savings and loan associations." S.Rep. No. 1263, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S.C.C.A.N. 2530, 2530. There is no indication of any intent on Congress's part to create such a private remedy. Indeed, the Act contains an enforcement mechanism, namely the collection of civil penalties from banks that violate the rules promulgated pursuant to the Act. 12 U.S.C. § 1884 (1988). Nor would it be consistent with the purposes of the Act to imply a private remedy. The Act is not intended to protect individual depositors. Rather, it is designed to prevent theft that would deplete federal insurance funds and to aid law enforcement officials in apprehending perpetrators. S.Rep. No. 1263, *reprinted in* 1968 U.S.C.C.A.N. at 2530. Finally, if Sadler has been harmed by Citibank's mismanagement of his accounts, an appropriate state action would redress any harm. We affirm.



UNITED STATES of America, Appellee,
v.

Gustavo ROSADO-UBIERA; Cespedes-Nunez; Beltre-Mora, Defendants,

Gustavo Rosado-Ubiera, Defendant-Appellant.

No. 192, Docket 91-1148.

United States Court of Appeals,
Second Circuit.

Submitted Oct. 1, 1991.

Decided Oct. 23, 1991.

Defendant who pleaded guilty to conspiracy to distribute cocaine was sentenced

to 70 months' imprisonment, in the United States District Court for the District of Connecticut, Dorsey, J., and defendant appealed. The Court of Appeals held that District Court, by failing to resolve defendant's precise role in offense, incorrectly applied Sentencing Guidelines when it calculated applicable range from which to depart, where defendant had challenged factual allegations in presentence report.

Vacated and remanded.

1. Criminal Law ⇨986.4(1)

District court, by failing to resolve defendant's precise role in cocaine distribution conspiracy, incorrectly applied Sentencing Guidelines when it calculated applicable range from which to depart for the trace amount of cocaine involved, where defendant had challenged factual allegations in presentence report that defendant and another were "partners in cocaine dealing." U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.App.

2. Criminal Law ⇨1181.5(8)

Remand for resentencing was required, where district court failed to resolve defendant's precise role in cocaine distribution conspiracy, and district court's downward departure from Sentencing Guidelines resulted in longer sentence than bottom of range that would have applied had sentencing court found in defendant's favor on disputed issues concerning defendant's role. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.App.

James T. Cowdery, Hartford, Conn. (Chastigny & Cowdery, of counsel), submitted a brief for defendant-appellant.

Peter D. Markle, Asst. U.S. Atty., D. Connecticut, New Haven, Conn. (Richard N. Palmer, U.S. Atty., of counsel), submitted a letter for appellee.

Before CARDAMONE, WALKER and McLAUGHLIN, Circuit Judges.