

STATE OF MICHIGAN  
COURT OF APPEALS

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DAVID E. ALLEN, INC.,

Plaintiff-Appellant,

v

CHARTER TOWNSHIP OF LANSING,

Defendant-Appellee.

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UNPUBLISHED

December 15, 2005

No. 263076

Ingham Circuit Court

LC No. 04-001728-CZ

Before: Donofrio, P.J. and Zahra and Kelly, JJ.

PER CURIAM.

In this declaratory action, plaintiff appeals as of right the trial court's order granting summary disposition in defendant's favor pursuant to MCR 2.116(C)(4).<sup>1</sup> We affirm.

I. Procedural History

On December 28, 2004, plaintiff filed a complaint for declaratory judgment alleging that it was attempting to change the nature of its current business, operating under the assumed name of Sparty's Night Club. However, it was unable to determine what changes it could legally make under defendant's ordinances.<sup>2</sup> Specifically, plaintiff sought a ruling on whether defendant would allow it to operate a bikini bar, a totally nude establishment that does not serve alcoholic beverages, or an adult bookstore. Plaintiff also sought a ruling on whether it could divide its property so that the portion more than 500 feet from a residentially zoned area could be converted to these uses. Plaintiff also alleged that the ordinance was unconstitutional on its face and as applied, defendant violated equal protection guarantees, and the ordinance was an unconstitutional prior restraint on free speech.

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<sup>1</sup> Although the trial court cited both MCR 2.116(C)(4) and (C)(8) on the record, the order appealed only cites MCR 2.116(C)(4). On the record, the trial court explained, "I wanted to put them both on the record. I wanted to put them—the reasons for why the court would review a (C)(8) request and a (C)(4). In my opinion they met the burden on granting on a (C)(4)."

<sup>2</sup> Since this complaint was filed, defendant has amended the relevant provisions of its ordinances.

Defendant filed a motion for summary disposition, pursuant to MCR 2.116(C)(4) and (C)(8), arguing that plaintiff failed to exhaust its administrative remedies because it did not give defendant the opportunity to reach a decision on plaintiff's bikini bar, "nude establishment," or adult bookstore proposals. Plaintiff responded stating that it was not required to exhaust administrative remedies because it pleaded a facial challenge to the zoning ordinance.

While this case was pending in the trial court, also pending before the same trial court was plaintiff's appeal of defendant's denial of plaintiff's application for a topless activity permit (hereinafter "the zoning appeal"). In the zoning appeal, plaintiff argued that the same zoning ordinance at issue in this case was unconstitutional on its face and as applied, defendant violated equal protection guarantees, and the ordinance was an unconstitutional prior restraint on free speech.

After hearing argument on defendant's motion for summary disposition in this case and a motion for summary disposition in the zoning appeal, the trial court entered an order granting summary disposition in this case in defendant's favor pursuant to MCR 2.116(C)(4). The trial court put its reasons for its ruling in this case on the record at the hearing in the zoning appeal; it stated,

With respect to docket number 04-1728-CZ, in this case Plaintiff David E. Allen, Incorporated, operates a nightclub named Sparty's s [sic] nightclub on the east side of Lansing Township near East Lansing and Michigan State University. Plaintiff filed this action against Lansing Township to obtain declaratory judgment requesting that this Court issue an order declaring that Sparty's can operate as a bikini bar, which is different than the prior topless bar activity requested. And that the bikini bar should be operated—or may be operated under Lansing Township ordinances. In this case the Court will grant Defendant Charter Township of Lansing['s] motion for summary disposition pursuant to 2.116(C)(4) and (C)(8).

The sole issue before the Lansing Township board in October 2004 was Plaintiff's request to undertake topless entertainment at its bar or nightclub. There was no consideration of whether or not a bikini bar would be granted, at least preliminarily, a permit. In this Court's reading of the information submitted in the briefs, the first time the Lansing Township officials became aware of Plaintiff's desire to operate a bikini bar at the Sparty location was within the complaint for declaratory judgment in the instant action on December 28, 2004, before this Court. Before that time, they had not had an opportunity to discuss the issue of a bikini bar or the proposal with the Lansing Township officials. Therefore, the Plaintiff has failed to exhaust its administrative remedies before seeking further review. In this Court's opinion, Plaintiff's claim with respect to the bikini bar<sup>[3]</sup> is not ripe for review at this time.<sup>4</sup>

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<sup>3</sup> From the lower court record and the briefs on appeal, it appears that the trial court referred to (continued...)

With respect to the zoning appeal, the trial court determined that the ordinance was constitutional, denied the appeal, and dismissed the action with prejudice. Plaintiff filed, in this Court, an application for leave to appeal the trial court's order. Plaintiff argued that defendant improperly denied its application for a topless activity permit, the ordinance was unconstitutional on its face and as applied, defendant violated equal protection guarantees, and the ordinance was an unconstitutional prior restraint on free speech. This Court denied plaintiff's application for leave to appeal for "lack of merit in the grounds presented." *David E Allen, Inc v Charter Twp of Lansing*, unpublished order of the Court of Appeals, entered August 12, 2005 (Docket No. 263054).

In this case, plaintiff appeals of right the trial court's order dismissing its declaratory action.

## II. Analysis

### A. Constitutional Claims

In its issues presented on appeal, plaintiff presents several arguments contending that the trial court erred in granting summary disposition of his constitutional claims. However, because plaintiff's constitutional claims were already decided on their merits by the trial court and this Court in the zoning appeal, the claims are barred by res judicata. Whether res judicata bars a claim is a question of law subject to de novo review. *Ditmore v Michalik*, 244 Mich App 569, 574; 625 NW2d 462 (2001).

In the zoning appeal to the circuit court, plaintiff claimed the ordinance was unconstitutional on its face and as applied, defendant violated equal protection guarantees, and the ordinance was an unconstitutional prior restraint on free speech. The trial court denied plaintiff's appeal and dismissed the action with prejudice. This Court denied plaintiff's application for leave to appeal "for lack of merit in the grounds presented." In this case, plaintiff raises the same claims.

"Res judicata bars relitigation of claims actually litigated and those claims arising out of the same transaction that could have been litigated." *Hugget v Dep't of Natural Resources*, 232 Mich App 188, 197; 590 NW2d 747 (1998). "For the doctrine to apply (1) the former suit must have been decided on the merits, (2) the issues in the second action were or could have been resolved in the former one, and (3) both actions must involve the same parties or their privies." *Energy Reserves, Inc v Consumers Power Co*, 221 Mich App 210, 215-216; 561 NW2d 854 (1997). Because plaintiff's constitutional claims against defendant were decided by the trial court on their merits in the zoning appeal, and this Court denied plaintiff's application for leave to appeal that decision "for lack of merit in the grounds presented," the claims are barred by res judicata. Accordingly, we affirm the trial court's ruling granting summary disposition of plaintiff's constitutional claims.

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(...continued)

all three of plaintiff's proposed uses collectively as the bikini bar proposal.

<sup>4</sup> The trial court also stated that it agreed with defendant that there was no actual controversy under MCR 2.605.

## B. Bikini Bar, “Nude Establishment,” and Adult Bookstore Proposals

In addition to raising several constitutional claims, plaintiff also sought the trial court’s determination on whether the ordinance permits it to operate a bikini bar, a “nude establishment,” or an adult bookstore on its property. However, both the trial court and this Court lack jurisdiction over this claim because plaintiff failed to exhaust its administrative remedies.

Summary disposition is appropriate under MCR 2.116(C)(4) if “the court lacks jurisdiction of the subject matter.” Whether the trial court has subject-matter jurisdiction is a question of law that this Court reviews de novo. *Citizens for Common Sense in Gov’t v Attorney General*, 243 Mich App 43, 49-50; 620 NW2d 546 (2000).

Michigan law clearly requires that, before challenging the application of a local zoning ordinance in court, plaintiffs must pursue their administrative remedies until they obtain a final nonjudicial determination on the permitted uses of their property. *Paragon Properties Co v Novi*, 452 Mich 568; 550 NW2d 772 (1996); *Braun v Ann Arbor Charter Twp*, 262 Mich App 154; 683 NW2d 755 (2004); *Conlin v Scio Twp*, 262 Mich App 379; 686 NW2d 16 (2004).

Plaintiff does not contend that it exhausted its administrative remedies. Rather, it contends that its facial challenge to the ordinance is not subject to the exhaustion of remedies requirement. However, as discussed above, plaintiff’s constitutional claims are precluded by res judicata. To the extent plaintiff’s declaratory action seeks a determination of whether defendant would approve plaintiff’s proposed property uses under the terms of the ordinance, plaintiff has failed to exhaust its administrative remedies by seeking a determination by defendant.<sup>5</sup>

Affirmed.

/s/ Pat M. Donofrio  
/s/ Kirsten Frank Kelly

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<sup>5</sup> Our resolution of these issues obviates the need to address plaintiff’s other issues on appeal.