STATE OF MICHIGAN

COURT OF APPEALS

VINCENT P. SHIEDA,

Plaintiff-Appellant,

v

CITY OF ROMULUS,

Defendant-Appellee.

UNPUBLISHED
November 16, 2010

No. 293053
Wayne Circuit Court
LC No. 09-005524-CC

Before: BECKERING, P.J., and JANSEN and TALBOT, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition on the basis of res judicata. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

I

Plaintiff was the owner of property with a two-story, 2,000-square-foot commercial building in Romulus, Michigan. According to the documents provided by the parties, as early as July 2005, defendant sent notices to plaintiff advising him that his building was unsafe and an attractive nuisance, and warning that it would be demolished unless plaintiff resolved the problem. In December 2005, defendant agreed to table the proposed demolition in light of plaintiff's representations that he would clean up and repair or sell the building. In November 2006, problems with the building persisted, and defendant advised plaintiff to board up the structure immediately and remove the "debris and trash i.e. automobile parts, etc." within ten days. In January 2007, defendant again advised plaintiff that the structure had been declared sub-standard and condemned. Defendant gave plaintiff 30 days to demolish the building himself and remove all debris or face a Show Cause Hearing, wherein the building would either be ordered demolished or otherwise made safe. In February 2007, the construction board of appeals voted to recommend to the city council that the building be demolished. In April 2007, the city council ordered that the building be demolished, but also asked the building department to give plaintiff reasonable time to complete repairs and to bring the building up to code. In August 2007, while conducting a pre-demolition asbestos inspection, defendant discovered that the building was being illegally occupied as living quarters for residential use and ordered that the building be vacated immediately. By February 2008, with the condition of the building as yet unresolved, defendant awarded the demolition bid to a contractor to tear down plaintiff's

building. Plaintiff was sent a letter on February 19, 2008, indicating: "**This is the final notice prior to the demolition taking place.**"

Plaintiff filed an action against defendant by way of a complaint dated March 12, 2008. In *Schieda v City of Romulus*, Wayne Circuit Court No. 08-106460-CH, plaintiff sought to enjoin the demolition of his building and requested damages for tortious interference of contract based on his allegation that he was willing to fix up the building and he had a potential buyer for the property. According to plaintiff, following an evidentiary hearing on March 26, 2008, the trial court denied plaintiff's request for a preliminary injunction in an order dated May 28, 2008. Following an oral argument held on June 17, 2008, the trial court granted defendant's motion for summary disposition in an order dated August 8, 2008. The reason for the ruling is not indicated in the order, and neither party has supplied a transcript of the evidentiary proceedings or the motion that resulted in the order of dismissal. On August 8, 2008, the trial court also heard defendant's motion for attorney fees and costs, which it granted in an order dated August 26, 2008. Defendant contends the attorney fees and costs were awarded because the trial court deemed plaintiff's complaint to be frivolous. Plaintiff did not appeal either order.

In October 2008, defendant had the building demolished as planned.

On March 10, 2009, plaintiff filed this action "for inverse condemnation and violations of 42 USC 1983." Plaintiff alleged that due to his age and poor health, wherein he was often in the hospital with chronic ailments, he did not receive several notices until after the hearing date had already passed, and that defendant had continued to cancel demolition dates to allow him time to repair his building, which he contends he continued to do. By the time the building was destroyed, he had completed all repairs and negotiated a favorable lease for the building.[1] As such, plaintiff alleged that defendant's actions were "arbitrary and discriminatory" and constituted a "taking" without just compensation.

Defendant moved for summary disposition, citing MCR 2.116(C)(6), (7), and (8), and argued that the present action was barred by res judicata and collateral estoppel. Plaintiff opposed defendant's motion on the ground that the conditions of the property at the time of the first action were "dramatically different" than they were at the time the building was demolished, and thus, res judicata was inapplicable. Plaintiff attached to his opposition brief an affidavit of a construction worker who indicated that he began cleaning up the building and yard in the winter and spring of 2008, and he began repairing the building in June, July, and August 2008. As of late August 2008, the building was fully repaired inside and out and fully tenantable for commercial occupancy. Plaintiff also argued that because defendant's destruction of a "fully repaired and tenantable building" had never been addressed in the first action, collateral estoppel was also inapplicable.

[1] Plaintiff alleged that defendant had denied him a building permit three times; thus, it is unclear whether any of plaintiff's improvements were performed with the proper permits.

At the June 23, 2009, motion hearing, when evaluating the applicability of res judicata and whether the matter contested was or could have been resolved in the first action, the trial court inquired why plaintiff essentially sat on his rights and did not bring to the court's attention any improvements he had made, or those he planned in the future to ascertain whether it would make a difference, prior to the court's dismissal of the first case on August 8, 2008. Plaintiff's counsel responded:

> . . .[I]t seems to me very logical that a Court is going to support a plaintiff whose Constitutional rights are taken from him simply because he didn't come in and say to the City, look, I know you won my preliminary injunction case, but now I have completed my building, so don't destroy it. You have to come to Court for another order to do that? Does it not seem to you that the thing speaks for itself, don't destroy a perfectly good building?

The trial court granted defendant's motion for summary disposition on the basis of res judicata.

II

This Court reviews de novo both a trial court's decision regarding a motion for summary disposition pursuant to MCR 2.116(C)(7) and questions of law, including the application of a legal doctrine such as res judicata. *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 417; 733 NW2d 755 (2007). In making its determination, this Court reviews the entire record to determine whether the defendant was entitled to summary disposition. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

Summary disposition may be granted under MCR 2.116(C)(7) where a claim is barred because of a prior judgment. "A party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence." *Maiden*, 461 Mich at 119. Such material submitted, if admissible in evidence, must be considered. *Id*. "Unlike a motion under subsection (C)(10), a movant under MCR 2.116(C)(7) is not required to file supportive material, and the opposing party need not reply with supportive material. The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant. *Id*.

"The doctrine of res judicata is employed to prevent multiple suits litigating the same cause of action." *Adair v Mich*, 470 Mich 105, 124-125; 680 NW2d 386 (2004). Res judicata "'bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first.'" *Id.* at 418 (citation omitted); *Estes v Titus*, 481 Mich at 573, 585; 751 NW2d 493 (2008).

With regard to the first element of res judicata, we must determine whether plaintiff's 2008 action was decided on the merits. Our Supreme Court in *Washington v Sinai Hosp of*

Greater Detroit, 478 Mich 412, 419; 733 NW2d 755 (2007), interpreted MCR 2.504(B)(3) to provide that, unless an involuntary dismissal is for lack of jurisdiction or for failure to join a party, and unless the order otherwise specifies, a trial court's involuntary dismissal order "operates as an adjudication of the entire merits of a plaintiff's claim." [2] Here, plaintiff's prior action was involuntarily dismissed, and although the order did not state the basis of the trial court's ruling, it contained no limiting language and none of the other exceptions apply. Thus, the dismissal order is deemed to be an adjudication on the merits.

The parties do not dispute the existence of the second element of res judicata, given that both the 2008 and 2009 actions involve the same parties.

With respect to the third element of res judicata, this Court uses a transactional test to determine if a matter could have been resolved in a prior case. *Washington*, 478 Mich at 420. In *Washington*, the Court relied on *Adair*, 470 Mich at 124-125, for its description of the transactional test. "The transactional test provides that the assertion of different kinds or theories of relief still constitutes a single cause of action if a single group of operative facts give rise to the assertion of relief." *Id*. at 124 (citation and internal quotation marks omitted). "Whether a factual grouping constitutes a transaction for purposes of res judicata is to be determined pragmatically, by considering whether the facts are related in *time, space, origin or motivation*, [and] whether they form a convenient trial unit . . . ." *Id*. at 125 (citation and internal quotation marks omitted, emphasis in original). As explained in *Adair*, 470 Mich at 125, although the fact that "the evidence needed to prove [the second case] is different than was needed in [the first case]" may have some relevance, "the determinative question is whether the claims in the instant case arose as part of the same transaction as did the claims in [the first case]."

The Court's decision in *Adair*, 470 Mich at 125-131, indicates that res judicata does not apply when the actions that form the basis of the complaint in the second action did not "exist[] during the pendency" of the first action. Thus, in that case, res judicata did not bar challenges to statutory and regulatory requirements that were imposed on local school districts after the Court decided the prior action, *Durant v Mich*, 456 Mich 175; 566 NW2d 272 (1997).

Applying the transactional test here, we conclude that plaintiff's claims in the instant case arose out of the same transaction as his claims in the 2008 case. A single group of operative facts gives rise to plaintiff's assertion of relief in both cases. See *Adair*, 470 Mich at 124. In the first case, plaintiff was seeking to prevent the demolition of his building at a time when defendant had already given up on three years of efforts to work with plaintiff, issued a final declaration that the building would be demolished, and, according to plaintiff, refused to grant him building permits. By plaintiff's own representations, most of the material improvements to his building were performed in June, July, and August 2008, while the court still had jurisdiction

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[2] MCR 2.504(B)(3), pertaining to involuntary dismissals, states that "[u]nless the court otherwise specifies in its order for dismissal, a dismissal under this subrule or a dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for failure to join a party under MCR 2.205, operates as an adjudication on the merits.

over the prior case. The fact that plaintiff's final improvements to the property were not complete until a few weeks after the first action was dismissed does not create a separate transaction. The timing of the improvements clearly overlapped with the prior action. At any time before the court entered its final dismissal order on August 8, 2008, which effectively allowed the demolition to proceed, and during the 21 days thereafter in a motion for reconsideration under MCR 2.119(F)(1),[3] plaintiff could have brought the ongoing improvements to the attention of the court. Plaintiff also had an opportunity to appeal the order, but he did not do so.

Both of plaintiff's actions originated from defendant's planned, and ultimately achieved, demolition of plaintiff's building, and plaintiff's motivation to avoid such demolition never changed because even in the first action he pledged to make improvements and alleged that he had a potential buyer interested in the property. In order to obtain relief in the instant action, plaintiff would be required to show that his property did not constitute a nuisance warranting demolition. See *Ypsilanti Twp v Kircher*, 281 Mich App 251, 272; 761 NW2d 761 (2008) (stating that "the nuisance exception to the prohibition of unconstitutional takings provides that because no individual has the right to use his or her property so as to create a nuisance, the State has not taken anything when it asserts its power to enjoin nuisance-like activity"). Thus, from a pragmatic perspective, plaintiff's claims in the instant case are merely the tail end of a continuum in a dispute over the planned condemnation of plaintiff's building, which was clearly at issue in the first action. Were we to accept plaintiff's argument that the 11th hour final improvements he made to his building—which he failed to bring to defendant's or the court's attention—constitute a material change of circumstances, the condemnation process could be turned on its head by homeowners claiming to have made or undertaking to make last minute improvements to their property immediately before demolition. Because plaintiff's improvements were well underway during the pendency of the first action, and thus, could have been raised by plaintiff and considered by the trial court in determining whether the demolition was proper, which is the issue in the instant case, "they form a convenient trial unit," see *Adair*, 470 Mich at 125, and constitute the same transaction. Thus, all three elements of res judicata are satisfied.

In light of our decision that res judicata applies, it is unnecessary to address defendant's alternative theory of collateral estoppel.

Affirmed.

/s/ Jane M. Beckering
/s/ Kathleen Jansen
/s/ Michael J. Talbot

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[3] Plaintiff had until August 29, 2008 to file a motion for reconsideration.