DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

JOSEPH BELSON, Plaintiff/Appellant, v. CITY OF PHOENIX, a government entity, Defendant/Appellee.	)	1 CA-CV 10-0078 DEPARTMENT C **MEMORANDUM DECISION** Not for Publication – (Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2009-024717

The Honorable Eileen S. Willett, Judge

AFFIRMED IN PART; REVERSED IN PART, REMANDED

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B A R K E R, Judge

¶1 Plaintiff Joseph Belson appeals from the superior court's order dismissing his complaint against the City of Phoenix for breach of contract, promissory estoppel, and breach of the duty of good faith and fair dealing. The superior court dismissed Belson's complaint, agreeing with the City that it was barred under the doctrine of res judicata. For the reasons set forth below, we affirm in part, reverse in part, and remand.

Facts and Procedural History

¶2 The facts[1] underlying this case commenced over sixteen years ago. In August of 1994, Plaintiff Belson applied to enter the City of Phoenix's Scattered Sites Program, designed by the City to increase accessibility to home ownership for City residents. Under this program, the City leases City-owned homes to tenants and retains a portion of the payments to be used as a down payment on the future purchase of the home. Lessees who rent a home for five years are eligible to purchase the home from the City. The lessee is required to satisfy educational and community service requirements, permit regular inspection of the property by City officials, and provide information to the City to ensure compliance with annual certification requirements.

[1] In reviewing a trial court's grant of a motion to dismiss, we accept as true the well-pleaded factual allegations of the plaintiff's complaint. *Jeter v. Mayo Clinic Ariz.,* 211 Ariz. 386, 389, ¶ 4, 121 P.3d 1256, 1259 (App. 2005).

¶3 After a six-month interview and qualifying process, the City accepted Belson into the Program. He signed a lease agreement with the City in February of 1995. At the time Belson entered the program – nearly sixteen years ago – it was the City's policy (and, Belson argues, the terms of his agreement) to rent the homes for five years and then to offer them to the lessees using the "acquisition-plus-cost" pricing model. According to Belson, the acquisition cost of his home was under $50,000.

¶4 The City never offered Belson an opportunity to purchase his home. In November of 2004, the City changed its pricing methodology to a "fair market" value-based model, and it charged program participants a purchase price of 80% of the fair market value of the homes it acquired. In 2006, the City again changed its model, and it now charges program participants 95% of the fair market value of the homes. The tax-assessed value of Belson's home is currently $160,500.

¶5 In 2006, the City sued Belson and attempted to evict him due to an alleged failure to complete recertification work related to his household composition and income monitoring. Belson countersued, stating that he had a right to purchase the property by participation in the program and that the doctrine of promissory estoppel required the City to offer the property to him for sale. The trial court found that Belson did not

materially breach the lease, and it found for Belson and against the City on the detainer action.

¶6 The court also found in favor of Belson on his promissory estoppel claim. It stated that the City must provide Belson "the opportunity to purchase the house he was led to believe he would be able to purchase over **11** years ago." Rather than order the transfer of the property, however, the court provided in its judgment:

> [T]he Court finds that Mr. Belson's claim of Promissory Estoppel is granted, and that the City of Phoenix must provide Mr. Belson an opportunity to complete the Community Housing Resources of Arizona ("CHR") requirements of the Scattered Sites Program and to provide him the opportunity to purchase the home located at [] in Phoenix, Maricopa County, Arizona.

In response to the City's motion for post-judgment relief, Belson requested that the court order an appraisal and compel the City to transfer the home to Belson. The court declined to compel the sale, stating:

> In regard to Defendant's requests for a court-ordered appraisal of the property, and an order requiring Plaintiff to sell the property to him, the Court finds and determines that it would be inappropriate for the Court to enter any such orders. The Court declined in its prior ruling to order Plaintiff to sell the property to Defendant, and instead ordered Plaintiff to provide Defendant an opportunity to complete the CHR requirement of the Scattered Sites Program, and to provide him an opportunity to purchase the home.

Thus, rather than compel a sale, the trial court in 2006 confirmed that Belson have the "opportunity" to (1) complete recertification and (2) purchase the home. Finally, Belson filed a "Petition for Issuance of Writ of Mandamus" to again ask the trial court to compel the City to sell the subject property. The trial court refused to modify the existing judgment to grant Belson additional relief.

¶7 In the matter before us, Belson asserts he has now satisfied the certification requirements of the program, but the City has not offered the home for purchase at the price that the City allegedly promised when Belson entered the program.

¶8 After Belson completed the certification requirements, he filed the current four-count lawsuit to compel the City to convey the home to him at the price he asserts was promised as well as monetary damages for the City's alleged breach. The City moved to dismiss, claiming that Belson's claim was barred on res judicata grounds. The court granted the motion, and Belson appealed. We have jurisdiction pursuant to Arizona Revised Statute ("A.R.S.") section 12-2101(B) (2003).

Discussion

¶9 The only question presented on appeal is whether res judicata bars Belson's action against the City. Whether a claim is barred by res judicata is a question of law that we review de

novo. *Phoenix Newspapers, Inc. v. Dep't of Corr.*, 188 Ariz. 237, 240, 934 P.2d 801, 804 (App. 1997).

¶10 Under the doctrine of res judicata, or claim preclusion, an existing and final judgment on the merits by a court of competent jurisdiction is conclusive as to every point decided and every point raised by the record that could have been decided as to the parties and their privies in all other actions. *Hoff v. City of Mesa*, 86 Ariz. 259, 261, 344 P.2d 1013, 1014 (1959). Under Arizona law, a claim is barred by res judicata if a court previously issued a final judgment on the merits involving the same cause of action with the same parties. *Chaney Bldg. Co. v. City of Tucson*, 148 Ariz. 571, 573, 716 P.2d 28, 30 (1986).[2] In deciding whether an action is the same cause of action for res judicata purposes, Arizona uses the "same evidence" test. *Pettit v. Pettit*, 218 Ariz. 529, 532, ¶ 8, 189 P.3d 1102, 1105 (App. 2008). Under this test, "the plaintiff is precluded from subsequently maintaining a second action based upon the same transaction, if the evidence needed to sustain the second action would have sustained the first action." *Id*.

[2] Both parties cite federal law for the applicable res judicata standard, but because the allegedly preclusive judgment was issued by an Arizona state court, we apply Arizona state law instead. *Cf. In re Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source*, 212 Ariz. 64, 69, ¶ 13, 127 P.3d 882, 887 (2006) ("Federal law dictates the preclusive effect of a federal judgment.").

(quoting Restatement of Judgments § 61 (1942)). Further, "[u]nlike issue preclusion, which applies only to issues that were actually litigated, a second claim is precluded 'not only upon facts actually litigated but also upon those points which might have been litigated.'" *Id*. at 533, ¶ 10, 189 P.3d at 1106 (citing *Gilbert v. Bd. of Med. Exam'rs*, 155 Ariz. 169, 174, 745 P.2d 617, 622 (App. 1987) (internal citations omitted)). We apply this standard to each of the four counts in Belson's current complaint to determine whether res judicata applies.

¶11 As to count one of Belson's complaint, Belson claims that the City breached its contract with him when it refused to transfer the property to him at the acquisition-plus-cost price under the lease agreement entered in 1995. The 2006 court rejected Belson's breach of contract claims by finding in favor of Belson only on promissory estoppel grounds. Belson did not appeal this ruling. Therefore, Belson's breach of contract claim is barred by res judicata.

¶12 Count three of Belson's complaint states that the City promised Belson that he would be provided job training and job placement by the City and that the City failed to offer these opportunities to him. This claim is not addressed in Belson's opening brief. Because the opening brief must "contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the

authorities, statutes and parts of the record relied on," Ariz. R. Civ. App. P. 13(a)(6), this issue is insufficiently supported for appellate review and is waived. *See State v. Lopez*, 223 Ariz. 238, 240, ¶ 6, 221 P.3d 1052, 1054 (App. 2009). We therefore affirm as to count three.

¶13 Count two alleges a promissory estoppel claim premised on the allegation that the City promised Belson that he would be able to purchase the subject property for the acquisition-plus-cost price. Belson prevailed on the promissory estoppel claim, in part, in the 2006 litigation. The court in 2006, however, declined to order transfer of the property to Belson on specific terms. Rather, that litigation mandated that the City need only provide Belson an opportunity to purchase the home. In the 2006 action, the trial court did not, however, decide what offer price would be appropriate; and from our perspective, it expressly reserved the issue of price. Therefore, as to use of promissory estoppel principles to determine what a fair offer price is, count two is not barred. We caution that we are not holding that promissory estoppel principles must be applied to determine price. We hold only that the court may consider whether it is appropriate to apply promissory estoppel to the issue of price in determining whether the City has given Belson an appropriate "opportunity" to purchase the property as the 2006 judgment requires.

¶14 Belson's fourth count alleges that the City's offer to sell the property at 95% of fair market value was in bad faith. He asserts the City therefore breached the duty of good faith and fair dealing as well as the 2006 judgment requiring the City to give Belson an opportunity to purchase the property. This claim, similar to the portion of count two that we have just discussed, has its roots in the 2006 judgment. This claim could not have been raised in the 2006 litigation. It is therefore not barred by res judicata.

Conclusion

¶15 For the reasons set forth above, the trial court's ruling is affirmed as to counts one and three. The ruling in count two is affirmed except insofar as it is construed to bar the court from considering promissory estoppel principles to determine any appropriate purchase price for the home. The ruling is reversed as to count four. We remand this case for proceedings consistent with this decision.

/s/
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DANIEL A. BARKER, Presiding Judge

CONCURRING:

/s/
_____
MARGARET H. DOWNIE, Judge

/s/
_____
MICHAEL J. BROWN, Judge