

RENDERED: OCTOBER 28, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000484-MR

DAVID G. HARRINGTON

APPELLANT

v. APPEAL FROM MADISON CIRCUIT COURT
HONORABLE WILLIAM G. CLOUSE, JR., JUDGE
ACTION NO. 14-CI-00231

KENTUCKY REAL ESTATE
APPRAISERS BOARD

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: MAZE, TAYLOR, AND VANMETER, JUDGES.

TAYLOR, JUDGE: David G. Harrington brings this appeal from a February 27, 2015, Opinion and Order of the Madison Circuit Court granting the motion of the Kentucky Real Estate Appraisers Board to dismiss Harrington's complaint pursuant to Kentucky Rule of Civil Procedure (CR) 12.02. We affirm.

Harrington is a certified residential real estate appraiser. The Kentucky Real Estate Appraisers Board (Board) filed a complaint against Harrington on January 5, 2010. In the complaint, the Board alleged that Harrington had violated several statutes and regulations governing the conduct of certified residential real property appraisers. The allegations were related to appraisal reports Harrington prepared for twelve properties during 2007 and 2008. Following a two-day hearing, the Board's Findings of Fact, Conclusions of Law and Final Order (Final Order) was rendered on February 23, 2010. Therein, the Board found that Harrington violated sundry statutes and regulations in connection with his appraisals of the twelve properties. As a result, Harrington was fined \$5,000 and his appraiser's license was revoked for a period three years.

Harrington appealed the Board's Final Order to the Franklin Circuit Court (Action No. 10-CI-00494). Kentucky Revised Statutes (KRS) 324A.052(5). By Opinion and Order entered November 13, 2013, the Franklin Circuit Court affirmed the Board's Final Order. The circuit court specifically held that the Board's determination Harrington violated myriad statutes and regulations was supported by substantial evidence. And, the circuit court addressed Harrington's argument that the Board was improperly constituted pursuant to KRS 324A.015 as follows:

Harrington's argument that the members of the Board at the hearing were not properly qualified is outside of this Court's review. Pursuant to KRS 13B.150, the instant review is confined to the record compiled at the administrative hearing. Harrington was provided with

ample opportunity to question the Board's qualifications at the hearing and failed to do so. Therefore, his argument the Board was not properly constructed is outside the scope of this administrative review.

November 13, 2013, Opinion and Order at 5-6. The circuit court essentially concluded that Harrington had not raised the Board members' qualifications at the administrative hearing, thus precluding it from reviewing same. Harrington did not pursue an appeal of the circuit court's Opinion and Order.

Instead, on December 11, 2013, Harrington filed a complaint against the Board in Bullitt Circuit Court. In the complaint, Harrington alleged that the Board "was not properly constituted . . . and actions of the [Board] have violated [his] due process rights." Harrington sought an injunction and/or a restraining order enjoining the Board from enforcing its Final Order. In response, the Board filed a motion pursuant to CR 12.02(c) for a change of venue as the Board's principal office was located in Madison County. The motion for change of venue was granted, and the matter was transferred from Bullitt Circuit Court to Madison Circuit Court. The Board also filed a motion pursuant to CR 12.02(f) to dismiss Harrington's action for failure to state a claim.

By Opinion and Order entered February 27, 2015, the Madison Circuit Court granted the Board's motion to dismiss Harrington's complaint and reasoned as follows:

On February 18, 2010, the Board issued its Findings of Fact, Conclusions of Law, and Final Order holding that [Harrington] was guilty of violating the statutes and regulations, and imposed sanctions and a fine. Pursuant

to KRS 324A.052(5) [Harrington] appealed the Board's decision to the Franklin Circuit Court claiming the Board's Final Order was an abuse of discretion and unconscionable. He also asserted in his appeal that certain members of the Board were not qualified to serve on the Board. On November 12, 2013, the Franklin Circuit Court upheld the Board's decision, concluding the decision was supported by substantial evidence, and was not arbitrary or capricious. Further, the court held the issue concerning the qualifications of the Board members was outside the Court's review.

....

Following the [precedent] of *Powell* [*v. Winchester Bank*, 551 S.W.2d 820 (Ky. App. 1977)], this Court rules the institution of the present lawsuit is tantamount to an impermissible collateral attack on the judgment rendered by the Franklin Circuit Court. The Franklin Circuit Court held in its Order, pursuant to KRS 13B.150, its judicial review of the administrative hearing was confined to the record established at the hearing. It could not entertain arguments that were not raised during the Board's hearing.

....

Additionally, in the interest of judicial expediency and efficiency, [Harrington] could have appealed the Franklin Circuit Court's decision to the Kentucky Court of Appeals rather than instituting a new lawsuit. The case at bar has been heard by one administrative agency and three circuit courts, albeit in varying degrees. While this Court does not conclude [Harrington] has engaged in forum-shopping, it certainly has such an appearance.

....

IT IS HEREBY ORDERED that the above-styled action against the Kentucky Real Estate Appraisers Board be DISMISSED with prejudice.

Madison Circuit Court Opinion and Order at 1-4. This appeal follows.

Harrington now contends the Madison Circuit Court erred by dismissing his complaint pursuant to CR 12.02(f) for failure to state a claim upon which relief could be granted. Specifically, Harrington asserts the circuit court erroneously concluded the action was barred by *res judicata*.

It is well-established that a court should not dismiss a complaint for failure to state a claim under CR 12.02(f) “unless the pleading party appears not to be entitled to relief under any state of facts which could be proved in support of his claim.” *Certain Underwriters at Lloyd’s, London v. Abundance Coal, Inc.*, 352 S.W.3d 594, 596. (Ky. App. 2011) (citation omitted). In ruling upon a CR 12.02(f) motion, the circuit court does not make any factual determinations; instead, the matter is merely a question of law. *Id.* Thus, our review of a circuit court’s order dismissing a complaint pursuant to CR 12.02(f) is *de novo*. *Id.* Our review proceeds accordingly.

The doctrine of *res judicata* provides that a final judgment upon the merits, if rendered by a court of competent jurisdiction, “is conclusive of causes of action and of facts or issues thereby litigated, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction.” *Yeoman v. Com., Health Policy Bd.*, 983 S.W.2d 459, 464 (Ky. 1998) citing 46 Am. Jur. 2d § 514; *see also Coomer v. CSX Transportation, Inc.*, 319 S.W.3d 366 (Ky. 2010). *Res judicata* generally operates to bar repetitive suits and, more specifically, is composed of two subparts – claim preclusion and issue preclusion. *Yeoman*, 983 S.W.2d 459; *Coomer*, 319 S.W.3d 366.

Claim preclusion essentially bars a party from relitigating a cause of action that was previously adjudicated and bars any new lawsuit on the same cause of action. *Yeoman*, 983 S.W.2d 459. For claim preclusion to operate as a bar against further litigation, the following elements must be satisfied:

(1) there must be an identity of the parties between the two actions; (2) there must be an identity of the two causes of action; and (3) the prior action must have been decided on the merits.

Miller v. Administrative Office of the Courts, 361 S.W.3d 867, 872 (Ky. 2011).

Applying the three elements of claim preclusion to the case *sub judice*, it is clear that the first element – identity of the parties – is satisfied.

Harrington and the Board were both parties to the administrative action that was appealed to the Franklin Circuit Court, and both are parties to the second action before the Madison Circuit Court.

As to the second element, we believe that the two causes of action are identical. In the first action, the Board determined that Harrington violated sundry statutes and regulations, thus resulting in a fine and suspension of his appraiser's license. Harrington appealed the Board's Final Order to the Franklin Circuit Court, and the circuit court affirmed the Final Order. Essential to the circuit court's affirmance, the court concluded that Harrington had failed to preserve the issue of the Board members' qualifications. In the second action, Harrington filed a complaint seeking to enjoin enforcement of the Board's Final Order. Therein, Harrington alleged that members of the Board were not properly qualified; the

same issue raised by Harrington in the first action. In both the first and second actions, Harrington is attempting to impugn the Board's Final Order due to the Board allegedly being improperly constituted. We, thus, believe the causes of action alleged in the first and second actions are identical.

Turning to the third element, we conclude that the first action was resolved on the merits. In the first action, there was an adjudication on the merits both by the Board in its Final Order and by the Franklin Circuit Court in its Opinion and Order. Most importantly, in its Opinion and Order, the Franklin Circuit Court adjudicated that Harrington had not raised the Board members' qualifications at the administrative hearing, thus precluding it from reviewing same. Therefore, the third element is satisfied.

Accordingly, we are of the opinion that the Madison Circuit Court properly granted the Board's motion to dismiss Harrington's complaint pursuant to CR 12.02(f).

For the foregoing reasons, the Opinion and Order of the Madison Circuit Court is affirmed.

ALL CONCUR.

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BRIEF AND ORAL ARGUMENT
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