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18-P-1089

Appeals Court

STANLEY D. HOWARD vs. BOSTON WATER AND SEWER COMMISSION  
& others.<sup>1,2</sup>

No. 18-P-1089.

Suffolk. May 7, 2019. - September 19, 2019.

Present: Vuono, Massing, & Ditkoff, JJ.

Appeals Court, Appeal from order of single justice. Practice, Civil, Appeal, Dismissal of appeal, Enlargement of time. Res Judicata.

Civil action commenced in the Central Division of the Boston Municipal Court Department on June 24, 2016.

A motion to dismiss was heard by Robert J. McKenna, Jr., J.

A motion to reinstate an appeal was heard by Wendlandt, J., in the Appeals Court.

Stanley D. Howard, pro se.

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<sup>1</sup> John Walsh, "in his official [capacity as collections administrator] or individual capacity," and Warren K. Howard, as trustee of the Warren K. Howard Revocable Living Trust.

<sup>2</sup> Although the Boston Water and Sewer Commission participated in proceedings in the Boston Municipal Court and was the only defendant that participated before the single justices, it did not file a brief in this appeal.

DITKOFF, J. The plaintiff, Stanley D. Howard, appeals from an order of a single justice of this court denying his motion to reinstate his appeal from a decision of the Appellate Division of the Boston Municipal Court. We articulate the standard for deciding a motion to vacate a dismissal or to reinstate an appeal in a civil case and conclude that the single justice acted within her discretion in determining that the plaintiff failed to make the necessary showing. Accordingly, we affirm the order denying the plaintiff's motion.

1. Background. The plaintiff resides in a single-family home in the city of Boston, which is owned by a trust of which the plaintiff is one of the beneficiaries. In March 2015, the Boston Water and Sewer Commission (commission) sent a notice to the trust that it owed \$1,890.64 for water usage and that water service would be shut off if the bill was not paid. The trust did not pay, and the commission shut off the water on May 13, 2015.

On May 28, 2015, the plaintiff sought an injunction against the commission in the Housing Court. At a hearing on June 2, 2015, the trustee of the trust was added as a party defendant, and all parties entered into a settlement agreement under which

water service was restored pursuant to a payment schedule that would eventually satisfy the unpaid balance.<sup>3</sup>

Although he had signed the agreement, the plaintiff wanted to be compensated for the temporary deprivation of water service. He therefore amended his complaint (five times), alleged various claims under 42 U.S.C. § 1983, requested a declaratory judgment, and sought damages and other relief. On January 11, 2016, a judge of the Housing Court dismissed the plaintiff's claim for declaratory judgment as moot and dismissed the remaining counts for failure to state a claim upon which relief may be granted. The plaintiff did not appeal.<sup>4</sup>

On June 24, 2016, the plaintiff filed a lawsuit in Boston Municipal Court against the commission, again seeking relief for the temporary deprivation of water service. On August 22, 2016, a Boston Municipal Court judge dismissed the complaint. The plaintiff appealed to the Appellate Division of the Boston Municipal Court pursuant to G. L. c. 261, § 27D. On January 29, 2018, a panel of the Appellate Division concluded that the complaint was properly dismissed on the basis of claim preclusion and affirmed the order of dismissal.

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<sup>3</sup> The plaintiff confirmed at oral argument that he currently has water service.

<sup>4</sup> The plaintiff did file a motion for relief from judgment and for leave to file a sixth amended complaint. As far as we can discern, this motion was never ruled upon.

The proceedings in our court were complicated by a dispute -- never finally resolved -- about the timeliness of the plaintiff's claim of appeal from the Appellate Division.<sup>5</sup> Perhaps because of that dispute, the plaintiff failed to file a brief by the due date of June 4, 2018.<sup>6</sup> On June 15, 2018, the clerk issued a notice preceding dismissal pursuant to our Standing Order Concerning Dismissal of Appeals and Reports in All Cases for Lack of Prosecution (standing order). The plaintiff promptly filed a motion to extend the time to file a brief, but without stating a proposed new due date, citing his difficulties in obtaining a transcript of the proceedings in the civil session of the Boston Municipal Court.<sup>7</sup> On June 20, 2018, a single justice denied this motion "without prejudice to renewal with a date certain for the requested enlargement."<sup>8</sup>

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<sup>5</sup> For our purposes, we assume without deciding that it was timely.

<sup>6</sup> The appeal was entered on April 23, 2018. Because the fortieth day was a Saturday, June 2, 2018, the plaintiff's brief was due Monday, June 4, 2018. See Mass. R. A. P. 14 (a), 365 Mass. 859 (1974); Mass. R. A. P. 19 (a), as amended, 441 Mass. 1601 (2004).

<sup>7</sup> No satisfactory explanation has been provided as to why the plaintiff did not obtain a transcript for presentation to the Appellate Division. See Dist./Mun. Cts. R. A. D. A. 8C (c) (appellant's duty to obtain any necessary transcription of proceedings).

<sup>8</sup> Our standing order, and the notice issued pursuant to it, instructs an appellant that the case will be dismissed unless "the clerk shall receive (a) a motion by such appellant to

On June 22, 2018, the plaintiff filed a new motion for an enlargement, again failing to request a date certain. Instead, the plaintiff "request[ed] that this Court allow[] reasonable time." On July 5, 2018, the same single justice denied the plaintiff's new motion. Pursuant to our standing order, we simultaneously dismissed the appeal for lack of prosecution.

The plaintiff moved to reinstate the appeal four days later. He asserted that his brief was late because of delays in obtaining a transcript and because he was confused about the brief due date. He also discussed the timeliness of his claim of appeal. A different single justice (second single justice) denied the motion, concluding that reinstatement would be futile. The plaintiff now appeals this order.<sup>9</sup>

2. Reinstating a civil appeal. "[A] motion to reinstate an appeal is an extraordinary request and should not be granted lightly." Commonwealth v. Hurley, 391 Mass. 76, 79 (1984). In

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enlarge to a date certain set forth therein the time for serving and filing such brief and appendix and (b) an affidavit of such appellant (or . . . attorney) which shall set forth all the facts which such appellant wishes to have considered by the single justice" (emphasis added).

<sup>9</sup> The Supreme Judicial Court has held that an appellant may seek relief from the dismissal of a civil case either by applying for further appellate review of the order dismissing the case or, as here, by moving that a single justice reinstate the appeal. See Watson v. Appeals Ct., 450 Mass. 1034, 1035 (2008). Accord Mass. R. A. P. 15 (c), 365 Mass. 859 (1974).

civil cases,<sup>10</sup> our standing order provides that a single justice may allow or deny a motion to vacate a dismissal within fourteen days of the docketing of the dismissal.<sup>11</sup>

In determining the standard to be applied by a single justice in addressing a motion to vacate the dismissal of a civil appeal (or to reinstate an appeal), we are guided by the standard applied when an appellant fails to docket a civil appeal in a timely manner pursuant to Mass. R. A. P. 10 (a), as appearing in 481 Mass. 1618 (2019). In such cases, an appellant must demonstrate that the delay was caused by excusable neglect. See Robinson v. Planning Bd. of Wayland, 23 Mass. App. Ct. 920, 921 (1986); Westinghouse Elec. Supply Co. v. Healy Corp., 5

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<sup>10</sup> Our standing order sets forth a different, and more lenient, standard for criminal cases as "due process requires that a defendant who actually or constructively has been denied his right to counsel on appeal must be placed in the same position that he would have occupied were he presenting his direct appellate claims in the ordinary course." Commonwealth v. Alvarez, 69 Mass. App. Ct. 438, 443 (2007). But see White v. Commonwealth, 479 Mass. 1023, 1025-1026 (2018) (reinstatement of appeal inappropriate where approximately forty-five years had passed).

<sup>11</sup> Our practice is that, after fourteen days have passed, a single justice may deny a motion to reinstate an appeal, but may not grant such relief by himself or herself. See John Donnelly & Sons, Inc. v. Outdoor Advertising Bd., 4 Mass. App. Ct. 847, 847 (1976). We have never decided whether it is possible for a panel to reinstate a civil appeal after the passage of fourteen days. See *id.* (assuming such power without deciding). We need not decide this question here, because the plaintiff moved to reinstate the appeal four days after the docketing of the dismissal, thus well within the time to move to vacate the dismissal set forth in the standing order.

Mass. App. Ct. 43, 60-61 (1977). Furthermore, "except where it appears that the failure to . . . pay the docket fee entitling one to have his appeal docketed by the clerk was due to a failure to receive notice,<sup>[12]</sup> a showing of a meritorious case is required." Tisei v. Building Inspector of Marlborough, 3 Mass. App. Ct. 377, 379 (1975). Even if an appellant makes these showings, the court may consider any showing by the appellee of prejudice from the delay. See Robinson, supra at 922; Westinghouse Elec. Supply Co., supra at 53-54. Accord Russell v. McOwen-Hanelt, 413 Mass. 106, 111 (1992) ("as the defendant has been prejudiced by [the delay], as the plaintiffs did not cure their mistakes . . . , and as the plaintiffs have provided far too little information for us to determine whether there is any merit to their claim, we shall not invoke our equitable powers"). As a motion to vacate the dismissal of a civil appeal or to reinstate a civil appeal, no less than a motion to docket a civil appeal late, involves the equitable consideration whether to terminate an appeal because of procedural missteps, we conclude that the same standard should apply.

Accordingly, an appellant seeking to vacate the dismissal of a civil appeal or to reinstate a civil appeal must show

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<sup>12</sup> Such a failure of notice may or may not establish excusable neglect, depending on whether the party or attorney acted with diligence. See Troy Indus., Inc. v. Samson Mfg. Corp., 76 Mass. App. Ct. 575, 582-583 (2010).

(1) that the delay was caused by excusable neglect and (2) a meritorious case on appeal (except where the delay was caused by a lack of notice). Even if the appellant makes these showings, the single justice may weigh any prejudice shown by the appellee and conclude that such prejudice makes the exercise of the single justice's equitable powers unwarranted.

In applying this test, a single justice should be guided by the principle that excusable neglect refers to "circumstances that are unique or extraordinary, not to any 'garden-variety oversight.'" Sheav v. Alvord, 66 Mass. App. Ct. 910, 911 (2006), quoting Feltch v. General Rental Co., 383 Mass. 603, 613-614 (1981). Accord Pierce v. Hansen Eng'g & Mach. Co., 95 Mass. App. Ct. 713, 713 (2019) ("garden variety miscommunication" not excusable neglect). With regard to the second prong, a showing of a meritorious issue requires an appellant to show not that that he would necessarily prevail but, rather, that the issue "present[s] a question of law deserving judicial investigation and discussion." Tisei, 3 Mass. App. Ct. at 379, quoting St. Nicholas Russian Benefit Soc., Inc. v. Yaselko, 279 Mass. 81, 85 (1932). Accord L.B. v. Chief Justice of the Probate and Family Ct., 474 Mass. 231, 241 n.17 (2016).

3. Meritorious case. "It is well settled that this court will not reverse an order of a single justice in the absence of



an abuse of discretion or clear error of law." Commonwealth v. Springfield Terminal Ry. Co., 77 Mass. App. Ct. 225, 229 (2010), quoting Commonwealth v. Senior, 429 Mass. 1021, 1021 (1999). We asked the plaintiff, by written order, to provide briefing on "how would the appellant support his claim that the Boston Municipal Court judge erred in dismissing his complaint, and that the Appellate Division erred in affirming the dismissal of the complaint." The plaintiff has provided considerable argument in support of his contention that the commission improperly shut off his water service, but no explanation how he can overcome the claim preclusion bar arising from the Housing Court's dismissal of his lawsuit.

"The term 'res judicata' includes both claim preclusion, also known as true res judicata, and issue preclusion, traditionally known as collateral estoppel." G.B. v. C.A., 94 Mass. App. Ct. 389, 397 n.14 (2018), quoting Mancuso v. Kinchla, 60 Mass App. Ct. 558, 564 (2004). "The invocation of claim preclusion requires three elements: (1) the identity or privity of the parties to the present and prior actions, (2) identity of the cause of action, and (3) prior final judgment on the merits." Santos v. U.S. Bank Nat'l Ass'n, 89 Mass. App. Ct. 687, 692 (2016). There is no question that the plaintiff and the commission were parties in the Housing Court. Under ordinary circumstances, a cause of action is identical where

"the claims are based on the same series of transactions." Baby Furniture Warehouse Store, Inc. v. Meubles D&F Ltée, 75 Mass. App. Ct. 27, 34 (2009). Here, the complaint in the Municipal Court is based on the same series of transactions as the complaint dismissed in the Housing Court. The minor differences between the complaint in the Municipal Court and the complaint in the Housing Court are inadequate to defeat the defense, as "[c]laim preclusion does not require a decision on the merits of a claim that could have been brought but was not." Korn v. Paul Revere Life Ins. Co., 83 Mass. App. Ct. 432, 438 (2013). Finally, "[a]t least for res judicata purposes, . . . a dismissal under Mass. R. Civ. P. 12 (b) (6) is considered an adjudication on the merits." Buffalo-Water 1, LLC v. Fidelity Real Estate Co., 481 Mass. 13, 19 n.9 (2018). The plaintiff's assertion that he can rectify (and should be allowed to rectify) the deficiencies in his fifth amended complaint in the Housing Court is a matter to be determined by the Housing Court judge, not by bringing substantially the same action in a different court.

In short, the plaintiff has not demonstrated (either to the single justice or to us) how he can overcome the application of claim preclusion here.<sup>13</sup> As the plaintiff has failed to show a

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<sup>13</sup> As the plaintiff failed to show a meritorious case on appeal, we need not discuss whether he showed excusable neglect.

meritorious case, the second single justice acted within her discretion in denying the motion to reinstate the appeal.<sup>14</sup>

Order affirmed.

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<sup>14</sup> The plaintiff also appeals from the denial of his motion to order the Boston Municipal Court to produce audio recordings. As we do not reinstate his appeal, that issue is moot.