

STATE OF MICHIGAN
COURT OF APPEALS

CASTLE INVESTMENT COMPANY,

Plaintiff-Appellant/Cross-Appellee,

v

CITY OF DETROIT,

Defendant-Appellee/Cross-
Appellant.

UNPUBLISHED

March 19, 2002

No. 224411

Wayne Circuit Court

LC No. 98-836330-CZ

Before: Cavanagh, P.J., and Doctoroff and Jansen, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's decision to grant defendant's motion for summary disposition and dismiss plaintiff's complaint with prejudice. We affirm.

I

The historical facts of this case are, for the most part, uncontested by the parties. On October 21, 1974, the Detroit city council declared an "emergency" and enacted an emergency ordinance, 9-H, that required a certificate of approval from the city's Buildings and Safety Engineering Department (BSED) for the sale of one- and two-family homes. The ordinance was effective in November 1974 and was set to expire in February 1975. Ordinance 9-H also directed the BSED to promulgate rules and regulations for the home inspections, which the department provided and which were placed on file and made available to the public. Ordinance 9-H did not require the city council to take action to approve the rules and regulations.

In response to a January 1975 letter from the mayor and a February 1975 public hearing, the city council established a task force to work on a new ordinance for building inspections. In the interim, the council passed Ordinance 104-H that directed the BSED to make available the applicable rules and regulations for a certificate of approval. Again, the newly enacted ordinance did not require city council approval of the inspection rules and regulations.

On June 8, 1976, the task force submitted proposed regulations to the city council. Immediately thereafter, the city council passed Ordinance 124-H, which is the ordinance at issue in this case. Unlike its predecessors, this new ordinance specifically required the BSED to prepare a list of inspection guidelines and stated that the guidelines would not be effective until

approved by the city council. The guidelines were made part of the public record, however, there is no evidence that council ever approved them.

Plaintiff filed the instant complaint as a class action in November 1998. In its complaint, plaintiff alleged that Ordinance 124-H, as amended by Ordinance 213-H,¹ was invalid because the ordinance required the city council to approve the guidelines for home inspection and the council failed to do so. Plaintiff also alleged that because the council never approved the guidelines, they are not effective and cannot be enforced, and the BSED was “usurping the legislative law-making function in violation of the constitutional doctrine of separation of powers.” Plaintiff sought damages for funds paid for inspections made under the invalid ordinance and asked the court to enjoin defendant from present and future enforcement of the ordinance and order an accounting of fees paid under the ordinance.

Defendant responded to plaintiff’s complaint with a motion for summary disposition pursuant to MCR 2.116(C)(8). Defendant argued that the provision in the ordinance requiring the city council to approve the guidelines was invalid because it conflicted with the separation of powers provisions of the city charter by infringing on the rule-making power of the executive branch of the city government and on the mayor’s veto power. Defendant further argued that this invalid portion of the ordinance was severable and the remaining portions of the ordinance would remain valid. Defendant also asserted that plaintiff failed to state a claim regarding the constitutionality of the ordinance because it did not violate any provision of the Michigan or United States Constitutions. Finally, defendant argued that invalidating the ordinance would violate the intent of the city council in enacting the ordinance. The trial court denied defendant’s motion in a written opinion and order that addressed only the first issue of defendant’s motion, whether the guidelines approval requirement violated the separation of powers doctrine.

In June 1999, plaintiff moved for summary disposition pursuant to MCR 2.116(C)(10). Plaintiff argued that because there was no genuine issue of fact that the city council did not approve the guidelines, the guidelines were invalid and unenforceable. Plaintiff also argued that the ordinance’s requirement that the council approve the guidelines did not conflict with the executive branch’s rule-making power and that the invalid portion of the ordinance was not severable. Defendant responded to plaintiff’s motion and filed a cross-motion for summary disposition. Defendant argued that plaintiff’s challenge to the ordinance should be dismissed because it was barred by laches and collateral estoppel. Defendant asserted that plaintiff failed to challenge the ordinance within a reasonable time after it was enacted, and the procedural flaw was an insufficient basis for overturning an ordinance that has been in effect for 23 years. Defendant also claimed that public policy considerations for an ordinance that has been relied on by the city and public for such an extended period of time should prevent a successful challenge. Defendant further argued that, even if the guidelines were invalid, the Detroit City Code provides for complete severability of all invalid provisions of an ordinance without affecting the validity of the remaining portions of the ordinance. In addition, defendant argued that plaintiff was

¹ The provisions of Ordinance 124-H have been codified in the Detroit City Code, Chapter 26. Apparently, certain applicable sections of the code were amended in October 1997 by Ordinance 213-H. Those amendments are not at issue in this case.

collaterally estopped from challenging the ordinance because plaintiff had unsuccessfully challenged the same ordinance in an earlier case.

The trial court held a hearing on both motions in August 1999. After brief arguments, the court stated on the record that it was denying plaintiff's motion and granting defendant's motion based on laches and collateral estoppel. No further explanation of the court's decision was provided. In a written order, the court denied plaintiff's motion and granted defendant's motion for the reasons stated on the record, and dismissed plaintiff's complaint with prejudice.

II

Plaintiff first argues that the trial court erred when it dismissed plaintiff's complaint because the claim was not barred by laches. We disagree.

Laches is an equitable affirmative defense that remedies the general inconvenience that results from a delay in the assertion of a legal right. *Dep't of Public Health v Rivergate Manor*, 452 Mich 495, 507; 550 NW2d 515 (1996). Application of the doctrine of laches requires the passage of time combined with a change in condition that would make it inequitable to enforce a claim. *Gallagher v Keefe*, 232 Mich App 363, 369; 591 NW2d 297 (1998); *In re Contempt of United Stationers Supply Co*, 239 Mich App 496, 504; 608 NW2d 105 (2000). The defendant has the burden of proving that the plaintiff's lack of due diligence resulted in some prejudice to the defendant. *Gallagher, supra*. Each case should be determined on its own particular facts. *City of Troy v Papadelis (On Remand)*, 226 Mich App 90, 97; 572 NW2d 246 (1997).

In this case, plaintiff was challenging an ordinance that had been in effect and relied upon by defendant for 22 years. Plaintiff insists that it raised the issue of the validity of the guidelines shortly after it first discovered this procedural defect. However, it is apparent from the cases cited by defendant that plaintiff's counsel represented plaintiff or persons and entities similarly situated to the instant plaintiff in court challenges of this same ordinance before 1998.² Clearly, plaintiff and its counsel had ample opportunity to investigate the validity of this ordinance in the previous court challenges, and the failure to discover this technical error and challenge the ordinance on this ground at an earlier date suggests that plaintiff has been less than diligent.

However, lack of due diligence or a long delay alone does not constitute laches, and defendant must show that it was prejudiced by the delay or that allowing plaintiff to pursue its claim would be inequitable. *City of Troy, supra* at 97. In this case, the prejudice to defendant is clear. Defendant relied on the validity of this ordinance for more than 20 years, especially given the fact that the ordinance has been unsuccessfully challenged in court on several occasions.³

² Plaintiff's counsel was involved in at least three cases that were appealed to this Court and which challenged the validity of the ordinance at issue or the authority of the City of Detroit to enforce the ordinance, including one in which the instant plaintiff was a party. *Joy Management Co v City of Detroit*, 183 Mich App 334; 455 NW2d 55 (1990); *Castle Investment Co, et al. v City of Detroit*, unpublished opinion per curiam of the Court of Appeals, issued May 24, 1996 (Docket No. 175553); *City of Detroit v Sledge*, 223 Mich App 43; 565 NW2d 690 (1997).

³ In addition to the cases listed in note 3, *supra*, the validity of this ordinance has also been challenged in the following cases: *Brand v Hartman*, 122 Mich App 326; 332 NW2d 479 (1983);
(continued...)

During that time, defendant collected innumerable fees and fines in reliance on the validity of the ordinance and its accompanying guidelines. Were this Court or the trial court to declare the ordinance invalid, defendant could face untold damages through reimbursement of fees to thousands of potential plaintiffs, including all of the home buyers or sellers who have sold or purchased property in the City of Detroit since 1976. It is apparent that allowing plaintiff to pursue its claim would be inequitable and severely prejudicial to defendant.

In addition, we have denied long delayed challenges to ordinances affecting real estate transactions because of public policy considerations. In *Edel v Filer Township*, 49 Mich App 210; 211 NW2d 547 (1973), this Court found that a zoning ordinance that had been in effect for approximately 18 years should not be invalidated because the township failed to follow procedural requirements in enacting the ordinance:

In the orderly process of handling real estate transactions where they are affected by provisions of zoning ordinances and amendments, it is essential that the members of the general public and the people buying or selling real estate must be able to rely on the validity of the public record, to-wit: a zoning ordinance and the zoning map issued in accordance with such zoning ordinance, without the necessity of poring over musty files and searching newspaper morgues, going back years in order to avoid a claim by other persons that there was a failure to comply with some technical requirement of law in the adoption of the ordinance in question. To hold otherwise would bring about chaotic conditions beyond all comprehension in the transfer and usage of real estate in any community having a zoning ordinance affecting such land. [*Id.* at 216, quoting *Northville Area Non-Profit Housing Corp v Walled Lake*, 43 Mich App 424, 435-436; 204 NW2d 274 (1972).]

We believe the same considerations are applicable in this instant case. Defendant and presumably thousands of home buyers and sellers have relied on the validity of the ordinance. To now invalidate this ordinance would create “chaotic conditions beyond all comprehension,” *Edel, supra*, as all of those potential plaintiffs line up to sue defendant to recover the fees or fines they paid connected with the requirements of this ordinance. Therefore, we find no error in the trial court’s conclusion that plaintiff’s claim was barred by laches.

III

Plaintiff next argues that the trial court erred when it determined that plaintiff’s claim was barred by collateral estoppel. We agree, however we conclude that the error was harmless.

Collateral estoppel, also known as issue preclusion, bars relitigation of an issue in a subsequent cause of action between the same parties or their privies if the prior proceeding

(...continued)

Butcher v City of Detroit, 131 Mich App 698; 347 NW2d 702 (1984); *Butcher v City of Detroit*, 156 Mich App 165; 401 NW2d 260 (1986).

resulted in a valid, final judgment and the issue was actually determined in the prior action. *Ditmore v Michalik*, 244 Mich App 569, 577; 625 NW2d 462 (2001). For collateral estoppel to apply, the issue to be litigated in the second action must be identical and not merely similar to the issue in the first action. *Eaton Co Rd Comm'rs v Schultz*, 205 Mich App 371, 376; 521 NW2d 847 (1994). The doctrine only bars relitigation of an issue that was actually litigated, i.e., put into issue by the pleadings, and submitted to and determined by the trier of fact. *VanDeventer v Michigan National Bank*, 172 Mich App 456, 463; 432 NW2d 388 (1988). Further, the parties in the second action must be the same as or privy to the parties in the first action. *Husted v Auto-Owners Ins Co*, 213 Mich App 547, 556; 540 NW2d 743 (1995). A person is privy to a party if the person has an interest in the matter affected by the judgment, such as by inheritance, succession, or purchase. *Id.*

In this case, defendant argues that plaintiff's claim is precluded by collateral estoppel because plaintiff or its privies have already challenged the ordinance at issue. It appears that plaintiff or its agents have sued defendant over issues involving this ordinance. See note 3, *supra*. However, the issue whether the guidelines for home inspections are invalid because they were not approved by the city council was not litigated in any of the cases cited by defendant. Because collateral estoppel bars only the relitigation of an issue that was actually litigated in a prior proceeding, *VanDeventer, supra*, defendant's argument is without merit.

Because collateral estoppel does not apply to the instant case, the trial court erred when it concluded that plaintiff's claim was barred on that basis. However, this error is harmless because the trial court correctly concluded that plaintiff's claim was barred by laches. An error in a ruling is not a ground for disturbing a judgment or order unless refusal to take this action appears to be inconsistent with substantial justice. MCR 2.613(A). Because plaintiff's claim would have been dismissed on the basis of laches, the court's erroneous conclusion that dismissal was warranted due to collateral estoppel was not inconsistent with substantial justice.

IV

On cross-appeal, defendant argues that the trial court erred in denying its first motion for summary disposition. In that motion, defendant claimed that the requirement in the ordinance that the city council approve the guidelines is invalid because it conflicts with the separation of powers provision of the city charter and that the invalid portion of the ordinance is severable from rest of the ordinance. However, because we concluded that the trial court did not err in granting defendant summary disposition on the ground that plaintiff's claim was barred by laches, then these issues are moot and we need not address them. An issue is moot when an event occurs that renders it impossible for the reviewing court to grant relief. *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998). Here, there is no meaningful relief for the trial court's denial of defendant's first motion for summary disposition where the court properly granted defendant's second motion for summary disposition.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Martin M. Doctoroff
/s/ Kathleen Jansen