STATE OF MICHIGAN

COURT OF APPEALS

HARRY PRICE, KENNETH PLANK, PEGGY PLANK, MICHAEL STUBAN, and SUSAN STUBAN,

Plaintiffs-Appellants,

v

CASS COUNTY and PORTER TOWNSHIP,

Defendants-Appellees.

UNPUBLISHED
February 19, 2009

No. 282352
Cass Circuit Court
LC No. 07-000578-CE

Before: Markey, P.J., and Murphy and Borrello, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting summary disposition in favor of defendants in this action involving the taking of plaintiffs' private property, which we shall refer to as lot 1, to facilitate the construction of a sanitary sewer system by Cass County within Porter Township. As part of the sewer project, a pump station was built on the surface of lot 1 that included a large drip tank and generator, surrounded by an eight-foot tall chain-link fence topped with barb wire. On the basis of two earlier declaratory judgment actions filed by Cass County that resulted in a consent and a default judgment, the trial court granted summary disposition under MCR 2.116(C)(7) grounded on the doctrine of res judicata. We reverse and remand for further proceedings.

Summary disposition may be granted under MCR 2.116(C)(7) when a claim is barred by "prior judgment," or in other words, res judicata. We review de novo a trial court's ruling on a motion for summary disposition as well as the issue regarding the applicability of res judicata. *RDM Holdings, LTD v Continental Plastics Co*, __ Mich App __; __ NW2d __, issued December 16, 2008 (Docket No. 278912), slip op at 4. In *Adair v Michigan*, 470 Mich 105, 121; 680 NW2d 386 (2004), our Supreme Court stated:

> The doctrine of res judicata is employed to prevent multiple suits litigating the same cause of action. The doctrine 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. This Court has taken a broad approach to the doctrine of res judicata, holding that it bars not only claims already litigated, but also every

> claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not. [Citations omitted.]

In determining whether a factual grouping constitutes a singular "transaction" for purposes of res judicata, a pragmatic approach is used, with a court considering whether the facts are related in time, space, origin or motivation, and whether the facts form a convenient trial unit. *Id.* at 125. Res judicata applies to consent and default judgments as well as litigated judgments. *Schwartz v Flint*, 187 Mich App 191, 194; 466 NW2d 357 (1991).

Narrowing our focus, plaintiffs' action concerned an L-shaped parcel at the end of Dolan Road, i.e., lot 1, upon which defendants constructed the above-ground pump station. Defendants contend that lot 1, in its entirety, is a private road, while plaintiffs counter that they jointly own lot 1, which is subject only to a driveway easement for one local resident, entailing only a small section of the fairly large parcel. Plaintiffs alleged causes of action for trespass, the taking of private property without the payment of just compensation, and violation of due process. Counsel for defendants stated at oral argument that lot 1 is private property and that there is no relevant difference between a private road and a private lot in general for purposes of the litigation. The underlying complaints spoke simply of "private roads" and indicated that "[t]he project will be below ground and will [in] no way interfere with the use of said roads by the defendants once the system is built." There was no legal description, nor any other descriptive reference, expressly identifying lot 1 in the underlying complaints. These complaints also maintained that there was no necessity to obtain easements for the project, that the various lot owners should be precluded from interfering with the project, and that there was no entitlement to compensation by anyone. The trial court, in the consent and default judgments, granted permission to Cass County to construct and maintain the sanitary sewer system along the private roads.

Even presuming that the underlying pleadings and judgments encompassed lot 1 through the general and vague references to "private roads," we fail to see how the doctrine of res judicata is implicated, where the construction of an above-ground pump station was clearly not suggested, expressly or implicitly, in the plain language of the pleadings, and where construction of the pump station was not commenced until after the earlier judgments were entered. The construction of a *surface* pump station on lot 1 was not the subject matter of the previous litigation as envisioned by the unambiguous language contained in the pleadings; therefore, it cannot be said that the issues of a taking, the payment of just compensation, due process, and trespass relative to lot 1 were *already litigated* for purposes of res judicata. *Adair*, *supra* at 121 (res judicata bars claims already litigated). Moreover, it cannot be concluded, with any sense of fairness,[1] that plaintiffs, by the exercise of reasonable diligence, could or should have raised those matters, considering the nature of the pleadings in the underlying actions and the circumstances surrounding the construction of the pump station at a much later date. *Id.* (res judicata bars every claim arising from the same transaction that a party could have raised by the

[1] At its core, "[d]ue process requires fundamental fairness." *In re Brock*, 442 Mich 101, 111; 499 NW2d 752 (1993).

exercise of reasonable diligence but did not). While conceptually the building of a pump station could be considered part of the overall "transaction" of constructing the sewer system, we are not prepared to find that plaintiffs' claims arose out of the same transaction when Cass County gave no indication whatsoever that the "transaction" would entail the building of a pump station on lot 1 and where the construction took place after the litigation was closed. Had Cass County provided some type of minimal notice in the pleadings to alert plaintiffs of the possibility that a surface pump station would be constructed somewhere in the vicinity of lot 1, defendants' position here would be more credible. But instead the underlying pleadings expressly denied the possibility of such a station by affirmatively indicating that the project would be built below ground and would not permanently interfere with the use of any property. It would require an impermissible amount of speculation to find that, had plaintiffs engaged in the previous litigation, they would have been timely informed of defendants' plan to construct a pump station on lot 1, assuming such a plan even existed at the time, such that they could have demanded just compensation within the context of the suits.

Furthermore, given defendants' concession that private property is at issue, and considering that the pump station is a permanent above-ground structure that restricts full use of lot 1, any assertion by defendants that use of plaintiffs' property in this fashion was lawfully encompassed by the earlier litigation reflects a misunderstanding of condemnation principles and the government's right of eminent domain. Defendants took private property for public use, and this cannot reasonably be disputed.

Under the Uniform Condemnation Procedures Act (UCPA), MCL 213.51 *et seq.*, and specifically MCL 213.55, a governmental agency must, amongst a number of pre-litigation steps, tender a good-faith offer to acquire private property, and this Court has ruled "that the tendering of a good-faith offer is a necessary condition precedent to invoking the jurisdiction of the circuit court in a condemnation action." *In re Acquisition of Land for the Central Industrial Park Project*, 177 Mich App 11, 17; 441 NW2d 27 (1989). This Court further observed that, absent a good-faith offer, "the trial court was obligated to dismiss th[e] action for want of subject matter jurisdiction," and that "the lack of subject matter jurisdiction cannot be waived nor can a party be estopped from raising the issue." *Id.* While the UCPA provides that "[a]ll actions for the acquisition of property by an agency under the power of eminent domain shall be commenced pursuant to and be governed by this act," MCL 213.75, we also note the existence of the County Department and Board of Public Works Act (act or public works act), MCL 123.731 *et seq.*, and Chapter 3 of the act, MCL 123.771 *et seq.*, that governs related condemnation proceedings.

In the underlying complaints, Cass County, through its Board of Public Works, alleged that the township adopted a resolution to construct the sanitary sewer system pursuant to 1957 PA 185, which is the public works act. The act addresses, in part, the acquisition, improvement, enlargement, extension, operation, and maintenance of sewage disposal systems within a county. See MCL 123.731(d); MCL 123.737(b); MCL 123.738; MCL 123.739. Chapter 3 of the public works act controls condemnation procedures, authorizing a county "to take private property necessary for any purpose within the scope of its powers under this act, for the use or benefit of the public and to institute and prosecute proceedings for that purpose." MCL 123.771; see also *Oakland Co v Schoenrock*, 33 Mich App 365, 366; 189 NW2d 870 (1971)("The County of Oakland commenced this action pursuant to MCL[] § 123.771 *et seq.*, . . . to condemn real estate owned by the defendants"). The payment of just compensation for the taking of any private

property is required. MCL 123.773; MCL 123.776; MCL 123.778; MCL 123.781. Under the public works act, there are also a litany of steps to be taken by the governmental entity prior to the commencement of litigation. See generally MCL 123.771 *et seq.*

It is unnecessary for us to reconcile the public works act and the UCPA, given that defendants here failed to comply with either act relative to the underlying actions and the subsequent taking of lot 1 to construct the pump station. This calls into question, under *Central Industrial Park Project, supra* at 17, whether the trial court even had jurisdiction to enter a judgment that would entitle defendants to take lot 1 and build a pump station thereon, assuming such a judgment was actually entered, which it was not. Res judicata generally requires, in part, a prior final decision by a court of *competent jurisdiction*. *Jones v Chambers*, 353 Mich 674, 680; 91 NW2d 889 (1958); *Harvey v Harvey*, 237 Mich App 432, 436-437; 603 NW2d 302 (1999); *Wayne Co v Detroit*; 233 Mich App 275, 277; 590 NW2d 619 (1998); *In re Cook Estate*, 155 Mich App 604, 610; 400 NW2d 695 (1986).[2]

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction. As the prevailing parties, plaintiffs may tax costs pursuant to MCR 7.219.

/s/ William B. Murphy
/s/ Stephen L. Borrello

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[2] A circuit court certainly has subject matter jurisdiction, in general, to entertain a declaratory judgment action, see MCR 2.605(A), but we must consider the gravamen of the action. "It is well settled that the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim." *Adams v Adams*, 276 Mich App 704, 710-711; 742 NW2d 399 (2007), citing *David v Sternberg*, 272 Mich App 377, 381; 726 NW2d 89 (2006). Here, the substance of the allegations and the requested relief in the underlying declaratory judgment actions focused on taking private roads (property) for a township-wide sewer project, barring interference by property owners subject to the project, and rejecting any claimed entitlement to compensation. Under these parameters, and limiting our concentration to lot 1 and the pump station, the actions were, in actuality, more in the nature of condemnation proceedings, especially given the judgments allowing construction on private lands, regardless of the nomenclature used by Cass County. It matters not that the county may have been operating under the mistaken belief that it could take lot 1 and construct a pump station thereon through a declaratory judgment action without abiding by the rules governing condemnation proceedings. We finally note that subject matter jurisdiction may be raised by a party at any time and that, in general, "lack of subject matter jurisdiction can be collaterally attacked," as opposed to errors in the exercise of jurisdiction properly established, which can only be challenged on direct appeal. *In re Hatcher*, 443 Mich 426, 438-439; 505 NW2d 834 (1993). Indeed, "a proven lack of subject matter jurisdiction renders a judgment void." *Id.* at 438.