STATE OF MICHIGAN

COURT OF APPEALS

HARRY PRICE, KENNETH PLANK, PEGGY PLANK, MICHAEL STUBAN, and SUSAN STUBAN, Plaintiffs-Appellants,	UNPUBLISHED February 19, 2009
v	No. 282352 Cass Circuit Court
CASS COUNTY and PORTER TOWNSHIP, Defendants-Appellees.	LC No. 07-000578-CE

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

MARKEY, J. (*concurring*).

I am in complete agreement with the majority that the trial court's order granting summary disposition in favor of defendants must be reversed. Res judicata does not bar plaintiffs' action. I write separately because I believe the trial court had jurisdiction to enter the prior declaratory judgments even if defendants did not utilize the most apropos legal theory.

I. Standard of Review

This Court reviews de novo a trial court's determination to grant or deny summary disposition to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion for summary disposition under MCR 2.116(C)(7) asserts that a claim is barred by immunity granted by law and need not be supported or opposed by affidavits, depositions, admissions, or other documentary evidence. *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 25-26; 703 NW2d 822 (2005). The allegations of the complaint are accepted as true unless contradicted by documentary evidence. *Maiden*, *supra* at 119. The motion is properly granted when the undisputed facts establish the moving party is entitled to immunity granted by law. *By Lo Oil Co*, *supra* at 26.

Whether the doctrine of res judicata bars a subsequent action presents a question of law this Court reviews de novo. *Adair v State*, 470 Mich 105, 119; 680 NW2d 386 (2004). This Court also reviews de novo constitutional issues. *By Lo Oil Co*, *supra* at 25.

II. Analysis

Both the Michigan Constitution and the United States Constitution prohibit the taking of private property for public use without just compensation. *Tolksdorf v Griffith*, 464 Mich 1, 2; 626 NW2d 163 (2001).[1] Michigan's Constitution provides: "Private property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law. Compensation shall be determined in proceedings in a court of record." Const 1963, art 10, § 2. Government agencies are not constitutionally prohibited from taking private property for public use; the state and its political subdivisions may take private property through the power of eminent domain and formal condemnation proceedings but the government is required to pay property owners just compensation. *Merkur Steel Supply, Inc v Detroit*, 261 Mich App 116, 129; 680 NW2d 485 (2004). The government is liable in an action for inverse condemnation if it takes private property for a public purpose without providing the property owner just compensation. *Id*. A property owner is automatically entitled to just compensation in two situations: (1) when the owner is deprived of all economically beneficial or productive use of the property or (2) "when the government physically and permanently invades any portion of the property." *Dorman v Clinton Township*, 269 Mich App 638, 646; 714 NW2d 350 (2006), citing *K & K Constr, Inc v Dep't of Natural Resources*, 456 Mich 570, 576, 575 NW2d 531 (1998). In addition, both the Michigan and federal constitutions prohibit the government from depriving a person of life, liberty, or property without due process of law. US Const, Am XIV; Const 1963, art 1, sec 17; *Tolksdorf, supra* at 7; *By Lo Oil Co, supra* at 28-29.

"Res judicata bars a subsequent action between the same parties when the evidence or essential facts are identical." *Sewell v Clean Cut Mgt, Inc*, 463 Mich 569, 575; 621 NW2d 222 (2001). "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." *Adair, supra* at 121. For the res judicata to apply, the prior action must also have resulted in a final decision. *Richards v Tibaldi*, 272 Mich App 522, 531; 726 NW2d 770 (2006). The doctrine applies to both default and consent judgments as were obtained by Cass County in its declaratory judgment actions. *Id*.; *Schwartz v City of Flint*, 187 Mich App 191, 194; 466 NW2d 357 (1991).

In the present case, there is no dispute that the prior actions were decided on the merits, were final judgments, and involved the same parties or their privies. The only issue is whether the trial court correctly determined that plaintiffs' claims in the instant case could have been resolved in the prior actions. "The test for determining whether two claims arise out of the same transaction and are identical for res judicata purposes is whether the same facts or evidence are essential to the maintenance of the two actions." *Schwartz, supra* at 194-195. This is the "same evidence," but because Michigan broadly applies the doctrine of res judicata it also recognizes the "same transaction" as an alternative method to determine whether res judicata applies. *Adair,*

---

[1] The Taking Clause found in the Fifth Amendment applies to the states through the Fourteenth Amendment. *Tolksdorf, supra* at 2 n 1, citing *Penn Central Transportation Co v New York City*, 438 US 104, 122; 98 S Ct 2646; 57 L Ed 2d 631 (1978).

supra at 124. "'Whether a factual grouping constitutes a transaction for purposes of res judicata is to be determined pragmatically, by considering whether the facts are related in *time, space, origin or motivation,* [and] whether they form a convenient trial unit . . . .'" *Id*. at 125, quoting 46 Am Jur 2d, Judgments 533, p. 801 (emphasis in *Adair*).

In applying the "same evidence" test, I first note that Cass County failed to cite any statutory or case law authority, either in the prior actions for declaratory relief, or in its brief on appeal, for the proposition that the government may take a private easement for a public purpose without providing just compensation to the affected private property owners. Determining the nature of defendants' claim in the prior actions is essential to applying the "same evidence" test for res judicata purposes. I assume for purposes of analysis that defendants' claim in the prior actions were based by analogy on case law allowing the installation of sanitary sewers in either dedicated public highways or statutory public highways by user, MCL 221.20. See *Village of Grosse Point Shores v Ayres*, 254 Mich 58, 64; 235 NW 829 (1931) ("The dedication of property for the purpose of a highway carries the right to public travel and also the use for all present and future agencies commonly adopted by public authority for the benefit of the people, such as sewer, water, gas, lighting, and telephone systems."), and *Eyde Bros Dev Co v Eaton County Drain Comm'r*, 427 Mich 271, 295; 398 NW2d 297 (1986) (holding an abutting landowner is not entitled to just compensation for a new public use of an existing public easement in a highway established by user). Specifically, the Court in *Eyde* held, "when a new use of an existing public easement in a highway dedicated by user adds to the public benefit *and does not constitute an additional servitude on the* abutting *fee owner*, the fee owner is not entitled to compensation through condemnation proceedings." *Id*. (emphasis added). Thus, "the construction of a sewer within an existing public easement does not entitle the fee owner to compensation through condemnation proceedings when it is shown there will be no additional servitude or permanent damage to the fee owner's property." *Id*. at 300.

In *City of Kentwood v Sommerdyke Estate*, 458 Mich 642, 646; 581 NW2d 670 (1998), the Court held "the highway-by-user statute is constitutional and does not create a 'taking' of property without just compensation." This is so because after the property has become dedicated to public use pursuant to operation of the statute and the owner's failure to act for the statutory period, "'the former owner retains no interest for which he may claim compensation.'" *Id*. at 663, quoting *Texaco v Short*, 454 US 516, 530; 102 S Ct 781; 70 L Ed 2d 738 (1982). More recently, our Supreme Court has observed that the rule in *Eyde* and *Grosse Pointe Shores* is consistent with the grant in MCL 247.183(1) to the lay utilities "'upon, over, across, or under' public roads." *Blackhawk Dev Corp v Dexter Village*, 473 Mich 33, 49-50; 700 NW2d 364 (2005). Further, "improvements made pursuant to a public easement are limited to those uses that fall within the right-of-way of the roadway itself." *Id*., n 10.

For the purpose of analyzing the application of res judicata only, I assume without deciding that the principles with respect to using public highway easements for public utilities extends to private road easements that have not been formally dedicated to the public or become public highways by user under MCL 221.20. I make this assumption because even though I doubt the efficacy of defendants' claims in the prior litigation, those issues could have been litigated and, indeed, *were* the subject matter of the prior litigation. The evidence to support defendants' claim in the prior actions would include showing the proposed sanitary sewer project would not create an "additional servitude or permanent damage to the fee owner's property."

Eyde Bros Dev Co, *supra* at 300. This conclusion is consistent with the allegations set forth in Cass County's complaint for declaratory relief: the sanitary sewer "project will be below ground and will in no way interfere with the use of said roads . . . once the system is built," and that the proposed project "is consistent with the use of said right of ways as roads or streets." The prayer for relief in the prior action was also consistent in that it asked that the trial court determine Cass County "has the right to construct and maintain said waste water system *within* the private roads of Porter Township without the necessity of easements from the defendants and without payment of compensation to the defendants." On the other hand, evidence to support plaintiffs' claim in the instant action is the complete opposite of the evidence supporting the prior actions: the sanitary sewer project with respect to plaintiffs' property imposes an additional servitude or "permanent damage to the fee owner's property." That defendants erected an aboveground structure on plaintiffs' property is evidence that defendants' sanitary sewer project patently increased the burden of a private easement even if plaintiffs' entire parcel was already burdened for use as a private access road; further, defendants' permanent occupation of the property would constitute a per se taking requiring just compensation. *Dorman*, *supra* at 646. Thus, under the same evidence test, because the evidence and facts necessary to support plaintiffs' claims are different from those supporting defendants' claims in the prior actions, res judicata would not bar plaintiffs' claims. *PT Today, Inc v Comm'r of Financial & Ins Services*, 270 Mich App 110, 147; 715 NW2d 398 (2006); *VanDeventer v Michigan Nat'l Bank*, 172 Mich App 456, 464; 432 NW2d 338 (1988).

I reach the same conclusion by applying the broader same transaction test for res judicata. Although the prior declaratory actions and the instant action are related because they involve the installation of a sanitary sewer system in Porter Township, the two actions are not related in time, space, origin or motivation, and would not have formed a convenient trial unit. *Adair*, *supra* at 125. The prior actions were brought *before* the sewer project was commenced to avoid defendants' having to obtain releases or bring condemnation actions. Plaintiffs' action for just compensation and deprivation of property without due process of law could not have been brought until *after* defendants actually took plaintiffs' property by the erecting the pump station at issue. "The mere threat of condemnation and its attendant publicity, without more, is insufficient" to warrant an action for inverse condemnation. *Merkur*, *supra* at 130. Clearly, defendants' motivation in the prior actions differed significantly from plaintiffs' motivation in the instant action. Also, contrary to the trial court's reasoning, plaintiffs had no ability to litigate "where the sewer could or could not have been placed." Moreover, I do not read the plaintiffs' complaint as seeking to do so. Instead, plaintiffs are merely asserting their constitutional right not to be deprived of property without due process of law, Const 1963, art 1, § 17, but if their property is taken for public purposes, that they be justly compensated, Const 1963, art 10, § 2. Even were plaintiffs prescient regarding defendants' intent to take plaintiffs' property for an aboveground pump station, the declaratory judgment actions would not constitute the appropriate legal proceedings for litigating just compensation for condemnation.

Cass County filed its prior action against hundreds of Porter Township property owners. It sought only a declaration it had the right to construct and maintain its proposed sanitary sewer system without the necessity of obtaining easements from those property owners or having to pay just compensation. Even if plaintiffs, a small subset of the defendants in the declaratory actions, had prevailed in those actions, all they could have obtained from the trial court was a ruling that defendants must either obtain releases or condemn plaintiffs' property. Procedures in

condemnation actions are governed exclusively by the Uniform Condemnation Procedures Act (UCPA), MCL 213.51 *et seq*. See MCL 213.75 ("All 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."); *Luna Pier v Lake Erie Landowners*, 175 Mich App 430, 433; 438 NW2d 636 (1989); *City of Kalamazoo v KTS Industries, Inc*, 263 Mich App 23, 38; 687 NW2d 319 (2004) (The UCPA "sets forth the exclusive procedures to be followed by an agency seeking to condemn property under the power of eminent domain."). The UCPA unequivocally provides that an umbrella declaratory judgment action is not the appropriate process for litigating individual property owner's claims for just compensation. For example, MCL 213.52(2) states:

> If property is to be acquired by an agency through the exercise of its power of eminent domain, the agency shall commence a condemnation action for that purpose. An agency shall not intentionally make it necessary for an owner of property to commence an action, including an action for constructive taking or de facto taking, to prove the fact of the taking of the property.

In addition to requiring that the agency initiate a condemnation action, § 12 of the UCPA provides that absent "good cause shown to the contrary, there shall be a separate trial as to just compensation with respect to each parcel." MCL 213.62(2).

Consequently, I conclude that under either the "same evidence" test, or the "same transaction" test, the doctrine of res judicata does not bar plaintiffs' claim for just compensation. It should also be noted that the doctrine of res judicata is subject to the constitutional restraint of due process of law. *Dart v Dart*, 460 Mich 573, 584-586; 597 NW2d 82 (1999); *Beyer v Verizon North, Inc*, 270 Mich App 424, 435; 715 NW2d 328 (2006). Constitutional due process requires that a party receive both notice of the nature of the proceedings and an opportunity for a meaningful hearing by an impartial decisionmaker. *By Lo Oil*, *supra* at 29. Here, plaintiffs had no notice defendants intended to occupy their land by installing a permanent pump station on it until after the prior suits had been concluded and defendants started construction on plaintiffs' property.

Consequently, although I concur in the majority's decision to reverse and remand for further proceedings, I do so for the reasons set forth in this separate opinion. We do not retain jurisdiction. As the prevailing parties, plaintiffs may tax costs pursuant to MCR 7.219.

/s/ Jane E. Markey