STATE OF MICHIGAN

COURT OF APPEALS

WAAD F. SEBA,

Plaintiff-Appellant,

v

DEPARTMENT OF ENVIRONMENTAL QUALITY and ANDREW HARTZ,

Defendants-Appellees.

UNPUBLISHED
September 29, 2009

No. 286759
Court of Claims
LC No. 07-000112-MM

Before: Murphy, P.J., and Meter and Beckering, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition based on res judicata, MCR 2.116(C)(7). We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

This case has its origins in plaintiff's 1997 purchase of a 12-acre parcel of vacant land in Lyon Township in Oakland County. Although plaintiff made efforts to ascertain whether he would have trouble building several homes on the property due to the presence of wetlands, he was ultimately served with a cease and desist order issued by defendant Department of Environmental Quality (MDEQ) after plaintiff placed some soil on the southern portion of the property. Plaintiff argued that he placed the soil on previously existing fill material, not a wetland. Attempts to negotiate a compromise failed, and plaintiff's wetlands permit application, which he had filed in 1999 after the dispute with the MDEQ arose, languished without action by the MDEQ. Unable to build on his property, in 2000, plaintiff brought suit against the MDEQ and defendant Andrew Hartz, who is an MDEQ employee. Plaintiff's complaint alleged the following five counts: (I) declaratory judgment deeming his application approved as a matter of law under MCL 324.30307; (II) unconstitutionality of Michigan's wetland protection act (WPA), MCL 324.30301 *et seq.*, as causing an equal protection violation when applied to his property; (III) unconstitutionality of the WPA in general as violating due process of law; (IV) inverse condemnation resulting from the diminution in value of his property and from a complete taking of his property while the MDEQ refused to let him build; and (V) a federal civil rights violation by Hartz under 42 USC 1983 resulting from Hartz's refusal to act on plaintiff's wetlands permit application. The MDEQ filed a counterclaim, alleging violations of the WPA and seeking to impose a significant monetary penalty. In 2001, the trial court dismissed count V on Hartz's motion for summary disposition. In 2002, the MDEQ filed a motion for summary disposition with respect to count IV of plaintiff's complaint, and plaintiff filed a motion for summary

disposition relative to counts I, II, and III of his complaint. Plaintiff also sought to amend his complaint to add a claim against the MDEQ for a federal civil rights violation under 42 USC 1983. The trial court granted the MDEQ's motion in regard to count IV of plaintiff's complaint. The court also denied plaintiff's request for summary disposition on counts I, II, and III of his complaint, and instead, pursuant to MCR 2.116(I)(2), granted summary disposition in favor of the MDEQ on those counts. The trial court denied plaintiff's motion to amend the complaint, finding that the requested amendment to add a § 1983 against the MDEQ would be futile. The proceedings that followed, including the current litigation, resulted in orders that were entered by a different trial judge than the judge who ruled as indicated above.

The action on the MDEQ's counterclaim proceeded through discovery and to a bench trial beginning in January 2003. On the second day of trial, the MDEQ produced for the first time a handwritten note and drawing of plaintiff's property, allegedly created back in 1989. Later that day, the MDEQ agreed to dismiss with prejudice its counterclaim that plaintiff violated the WPA. In March 2003, plaintiff's counsel wrote the MDEQ, demanding that it produce all documents it had that related to wetlands on plaintiff's property. On April 11, 2003, and pursuant to the earlier stipulation at the bench trial, the trial court issued a final order in that suit, in relevant part dismissing the MDEQ's counterclaims with prejudice, stating "there has been no finding of fact that any of Waad Seba's actions or activities on the subject property, through the date of January 28, 2003, constituted a violation of [WPA]," and holding as a matter of law that the south portion of the property is not regulated wetland. The order expressly made no findings regarding regulation of the north portion of the property and also stated that any surviving claims against Hartz personally were dismissed with prejudice.

One week later, the MDEQ produced the "Parks Installation file," which contained records concerning the actions of an earlier owner of the property, Parks Installation Company. The file included over 40 documents which showed that significant filling activity had occurred on the property almost ten years before plaintiff purchased it. The MDEQ had failed to produce the file during the litigation despite discovery requests by plaintiff that would have encompassed the file. Plaintiff moved for reconsideration and relief from judgment, requesting that the trial court reconsider the 2002 opinion and order on the cross-motions for summary disposition, allow plaintiff to prosecute his claims against the MDEQ, allow plaintiff to conduct discovery relative to the withheld evidence, sanction the MDEQ for intentional misconduct, and grant plaintiff any other appropriate relief. The trial court denied the motion, and plaintiff then filed a motion for reconsideration of that order, limiting the reconsideration request to the previous motion's prayer for relief from judgment under MCR 2.612(C)(1). The trial court granted plaintiff's motion for reconsideration, setting the matter for an evidentiary hearing.

Before the evidentiary hearing took place, the MDEQ was generally non-compliant with discovery requests served by plaintiff, and the trial court granted plaintiff's motion compelling discovery. In a brief relative to the scheduled evidentiary hearing, plaintiff requested reversal of the 2002 opinion and order on the cross-motions for summary disposition, an order granting plaintiff a default judgment under MCR 2.302(E) (discovery rule allowing sanctions), an order awarding plaintiff all of his costs and attorney fees incurred in the litigation, and a request for any other appropriate relief. Following the hearing, the trial court, on the record, granted plaintiff relief from judgment as to count I of his complaint only (declaratory judgment approving wetlands application), but not on the remaining counts because the grounds on which

those counts were based "would be unaffected by the newly discovered evidence." The trial court further found that, as a penalty or sanction for discovery violations committed by the MDEQ, the MDEQ was in default with respect to count I of plaintiff's complaint. As a further sanction, the court awarded plaintiff all of his reasonable costs and attorney fees that were incurred in the litigation. Plaintiff then filed a motion to settle the order arising out of the court's ruling from the bench, and plaintiff also sought reconsideration and clarification of the court's ruling, challenging some of the court's rulings. In relevant part, plaintiff sought money damages with respect to count I, and he requested a new evidentiary hearing in order to determine the amount of damages incurred by plaintiff due to the MDEQ's fraudulent and wrongful actions, which deprived plaintiff of use of the property. After a subsequent hearing to settle the order, in which plaintiff reiterated his request for money damages, an order was entered consistent with the court's original ruling from the bench. Pursuant to the order, a default judgment on count I was entered against the MDEQ, which judgment granted plaintiff's application for a permit and precluded the MDEQ from declaring the permit area a wetland subject to regulation. The court found that the MDEQ had intentionally withheld evidence and that the MDEQ made no attempt to provide the evidence in a timely manner. While plaintiff was awarded costs and attorney fees, the order did not award him any money damages. We note that, at the hearing to settle the order, the trial court had stated that plaintiff's claim for money damages "sounds like a separate cause of action, not that I'm suggesting that."

In 2007, plaintiff brought the present suit, alleging that defendants' intentional withholding of evidence resulted in further damage to him, and asserting counts for inverse condemnation, malicious prosecution, abuse of process, and federal civil rights violations (which plaintiff no longer pursues). The only claim involving Hartz was that the MDEQ acted through him in violating plaintiff's federal civil rights. Defendants moved for summary disposition, arguing that the claims were barred by res judicata or collateral estoppel. At the hearing, the trial court noted that the first trial judge had initially denied plaintiff's request for damages for either diminution in value or a complete taking (count IV) and that she (judge now presiding) had not reinstated that count and the other counts thereafter, having found that the first trial judge properly dismissed plaintiff's original counts II-IV. The court then held that plaintiff's claims for inverse condemnation, abuse of process, and malicious prosecution were barred by res judicata because the 2007 action involved identical parties, the earlier suit was resolved on the merits in a final judgment, and the claim regarding the wrongful withholding of evidence was exactly the same as in the earlier suit. The court noted "that the Plaintiff seeks damages for the period from 1999 to 2005 in the present case . . . , whereas in the prior case, plaintiff sought damages only through 2000." The court concluded, "[H]ad Plaintiff prevailed on the merits of this claim in [the] prior case, the Court would have awarded damages through the end of the pendency of the case, which would be through 2005." The trial court additionally found that the abuse of process and malicious prosecution claims were barred by res judicata because "Plaintiff essentially litigated these issues over the course of the litigation thoroughly, repeatedly, and exhaustively and argued claims alleging fraud and related misconduct." The court cited numerous places in the record of the earlier case where plaintiff's pleadings described "malicious prosecution," "willful" actions by defendant, "deliberate and fraudulent concealment," and similar references. The court finally appeared to rule that the claims were also barred by collateral estoppel but, when pressed by defense counsel, stated the suit was "dismissed under the theory of res judicata."

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Application of the doctrines of res judicata and collateral estoppel present questions of law, which we also review de novo on appeal. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

In *Adair v Michigan*, 470 Mich 105, 121; 680 NW2d 386 (2004), our Supreme Court summarized:

> 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. *Sewell v Clean Cut Mgmt, Inc*, 463 Mich 569, 575; 621 NW2d 222 (2001). 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. *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999).

The *Adair* Court continued:

> [T]he determinative question is whether the claims in the instant case arose as part of the same transaction as did the claims in [the earlier case]. 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 (internal edits, citations, and quotation marks omitted).]

With respect to the inverse condemnation claim alleged in the 2007 complaint, the same claim was pursued and litigated in the previous suit, resulting in a decision on the merits when an order granting summary disposition was entered in favor of defendants on the count and then left in place despite arguments concerning the withheld file. After the first suit was reopened, plaintiff specifically sought to have the previously dismissed inverse condemnation claim revisited and reexamined, but the trial court rejected the request, finding that the withheld evidence did not affect the initial grant of summary disposition.[1] In other words, there was a

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[1] In a brief, filed in the first action, challenging the court's failure to allow the inverse condemnation claim (count IV) to go forward, plaintiff unsuccessfully maintained:

> Similarly, Count IV pertains to Mr. Seba's claim that [he was]wrongfully deprived . . . of the use of his property beginning in August 1998, that fact has been established by the MDEQ's fraudulent concealment of the Parks Installation file. Had that file been produced when originally requested by Mr. Seba, there is no question that the MDEQ could not have prevented him from developing his

(continued…)

ruling that the MDEQ was entitled to summary disposition on the inverse condemnation claim, even assuming fraudulent action on the part of the MDEQ in withholding the Parks Installation file. Accordingly, we must reject plaintiff's argument that the factual basis of each inverse condemnation claim was different, where the 2000 action was based on defendants' failure to approve his wetlands permit application and the 2007 action was based on the withholding of evidence by defendants. Contrary to plaintiff's argument, the 2000 lawsuit did eventually come to encompass a claim of inverse condemnation predicated in part on withheld evidence, and the trial court, wrongfully or rightfully, rejected it. Plaintiff's success in reopening the 2000 suit was itself based entirely on the withheld file, and, as indicated above, he frequently and repeatedly filed motions and briefs berating defendants for causing his land to lay unused for years. The inverse condemnation claim eventually argued in the 2000 suit and that alleged in 2007 were one in the same. Both claims arose from the delay in plaintiff's ability to develop his land, with underlying factual support of an improper taking coming from the evidence showing that the MDEQ withheld the Parks Installation file. The claim here simply extended the relevant time period as to damages, but this has no bearing whatsoever on whether res judicata is applicable, otherwise the doctrine would essentially be rendered meaningless.

Although plaintiff did not expressly raise claims of abuse of process and malicious prosecution in the 2000 action, they are also barred by res judicata. Plaintiff asserts that he could not have brought a claim for malicious prosecution because his claim would not have accrued until the 2000 proceedings were terminated in his favor in 2005. However, the MDEQ's prosecution against plaintiff terminated in his favor in January 2003, when it agreed to dismiss its counterclaim against him. After that point, the MDEQ made no claims or counterclaims against plaintiff, although the litigation, in general, was reopened. Thus, there was a period of time in which the MDEQ's claims against plaintiff had been terminated in plaintiff's favor, plaintiff had acquired knowledge of the withheld file, and the litigation remained open and pending. Yet, plaintiff made no attempt to seek amendment of his complaint to add a claim for malicious prosecution, something that reasonable diligence would have demanded; the facts were all in place and the suit was still open. In *Schwartz v Flint*, 187 Mich App 191, 194-195; 466 NW2d 357 (1991), this Court found that res judicata barred the plaintiff's claim for money damages arising out of a zoning action, despite the plaintiff's argument that he could not have brought such a claim in the first suit because a money-damage remedy had not been expressly recognized by the courts at the time that suit was *initially filed*. The *Schwartz* panel reasoned:

> Plaintiff's prior suit was *still pending* at the time each of these cases [recognizing a money-damage remedy] was decided. Thus, at the very least, plaintiff was clearly apprised of the possibility of claiming damages *before termination of his prior suit*. Amending his complaint to include a claim for money damages would have been a viable means for plaintiff to establish his claim for damages in that suit. [*Id.* at 195 (emphasis added).]

(…continued)

property by either requiring a Wetland Permit Application in the first place or denying approval of a Wetland Permit Application in the event one was needed.

As for plaintiff's abuse of process claim, plaintiff provides no reason why he could not have sought an amendment of his complaint after the suit was reopened in order to add such a claim, something that, again, reasonable diligence would have demanded. Plaintiff merely argues that 'the facts and evidence necessary" to support this claim "differ materially from the facts and evidence necessary" to support the claims of the 2000 action. Again, plaintiff argued repeatedly during the 2000 action that defendants acted fraudulently and maliciously in withholding evidence. Thus, even if the specific elements of an abuse of process claim were not actually litigated, all of the relevant evidence was already before the court and nothing prevented plaintiff from bringing the claim to the court's attention at that time.

Furthermore, it is clear and evident from plaintiff's pleadings and arguments that, regardless of the label placed on any particular count in the current lawsuit, the gravamen of the claims is that he is entitled to damages for the lost use of his property based on, in part, the withheld evidence. "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). And the trial court did indeed specifically address and reject plaintiff's attempt to recover lost-use damages, which damage claim was predicated on the argument that the MDEQ improperly withheld evidence. Therefore, res judicata bars the present suit.[2] Plaintiff's reliance on the court's suggestion in the first litigation that a separate cause of action might be proper relative to lost-use damages does not serve as a basis to deny summary disposition here. First, the trial court immediately followed up its statement by indicating that it was not suggesting that plaintiff actually file a separate cause of action. Further, a "separate cause of action" does not mean a separate lawsuit; indeed, the court's statement could have been read as a suggestion to seek amendment of the complaint to add a different cause of action, which plaintiff failed to do. Finally, the court's statement simply does not provide a basis to ignore the doctrine of res judicata, even if it could be interpreted as telling plaintiff to file a separate suit.

Plaintiff also argues that a court can choose to disregard application of the doctrine of res judicata under circumstances in which, as here, application of the doctrine would contravene substantial public policy. In *Storey v Meijer, Inc*, 431 Mich 368, 377 n 9; 429 NW2d 169 (1988), our Supreme Court stated, "'Res judicata is applied if it does not offend public policy or result in manifest injustice.'" (Citation omitted.) Here, plaintiff obtained some level of relief in the first suit, where the application for a permit was deemed granted and the MDEQ was precluded from declaring the permit area a wetland subject to regulation. Plus, plaintiff was awarded substantial costs and attorney fees arising from the lengthy litigation. While we do not condone the MDEQ's actions, and we do question the soundness of the trial court's decision in the first suit to deny lost-use damages, we cannot conclude that manifest injustice would occur by application of res judicata under the circumstances presented. Furthermore, we are not prepared to find that public policy grounds demand a different result.

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[2] There is no indication that plaintiff appealed the trial court's ruling to challenge the rejection of the damages claim.

Finally, because the trial court did not err in applying res judicata to dismiss the action, we need not address defendants' alternative argument that plaintiff is collaterally estopped from raising the 2007 issues.

Affirmed.

/s/ William B. Murphy
/s/ Patrick M. Meter
/s/ Jane M. Beckering