IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jackson J. Teed and	:	
Marilyn A. Teed, h/w	:	
Appellants	:	
	:	
v.	:	No. 75 C.D. 2008
	:	Submitted: August 8, 2008
Hilltown Township, Gregory J.	:	
Lippincott and David Taylor	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE McCLOSKEY FILED: September 9, 2008

Jackson and Marilyn Teed (Landowners) appeal, pro se, an order of the Court of Common Pleas of Bucks County (trial court) that granted summary judgment in favor of Hilltown Township (the Township) and dismissed Landowners' complaint in mandamus. We now affirm.

Landowners are the owners of a parcel of land situated at 237 Mill Road, Hatfield, Hilltown Township, Bucks County, Pennsylvania. The property consists of slightly more than three acres of land and is located in the Rural Residential (RR) district of the Township. The property is Landowners' principal residence. Since 1994, Landowners have owned and operated a landscape business incorporated under the name JMT Services, Inc.

Landowners had operated this landscape business from their property, storing heavy equipment and materials at the site. However, Landowners had never

acquired the proper permits authorizing such business on their property. In January of 1996, Landowners were issued a zoning violation enforcement notice by Gregory Lippincott, the Township's zoning officer, advising them that their business use of the property was not a permitted use in the RR district. Landowners filed an appeal with the Township's Zoning Hearing Board (the Board). The Board ultimately agreed with the zoning officer that Landowners had violated the Township's zoning ordinance by operating their landscape business on the property.[1]

The Township later brought a civil action against Landowners with respect to their violation of the zoning ordinance. The matter proceeded before a local district justice. Nevertheless, in December of 1996, the Township and Landowners executed an agreement and release settling all charges and/or claims brought under this civil action. Pursuant to this agreement, the Township agreed to forego all charges and/or claims in exchange for Landowners' promise to remove all equipment, goods, raw materials and other items from the property that relate to the landscaping business.[2]

On November 21, 2001, Landowners filed a zoning permit application requesting approval to use certain open areas of their property as a nursery, i.e., for plantings and storage of nursery products. About the same time, Landowners filed another zoning permit application seeking to modify their residence to include a home business office, as well as an application for a sign permit seeking to erect a sign on their property. For various reasons, including non-compliance with the 1996 agreement

[1] The Board further rejected a request from the Teeds for a use variance with respect to this business.

[2] There was an exception in this agreement providing that the Teeds may continue to possess a front-end loader on the property indefinitely.

and release, the Township's zoning officer denied each of Landowners' applications. Landowners thereafter filed an appeal with the Board.

The case proceeded with hearings before the Board.[3] At these hearings, Landowners sought to once again utilize their property to conduct their landscaping business as a use secondary and incidental to the nursery use. Following the conclusion of testimony and the receipt of evidence, the Board issued a decision and order granting Landowners' request for a permit to operate a nursery on their property, denying their request to operate a landscape business as a secondary and incidental use, granting their request to operate a home office and granting their request to erect a sign on their property.

With respect to the home office and sign requests, the Board placed numerous conditions on the same. These conditions related to the floor area of the home office, the appearance of the residence, the size of and writings on the sign, the use of one commercial vehicle at the site, parking limitations and restrictions, restrictions against noise and restrictions against the retail sales of goods. As the Board noted in its opinion, these conditions mirrored exactly the provisions contained in Section 406(I1)(1.1) – (1.10) of the Township's zoning ordinance.

Landowners thereafter filed a land use appeal with the trial court alleging that the Board erred and/or committed an abuse of discretion in refusing to permit them to operate their landscaping business from the property as a secondary and incidental use to the nursery use. Landowners also alleged that the Board erred and/or committed an abuse of discretion in imposing various conditions on the grant of its home office

[3] At these hearings, the Board heard testimony from various neighboring property owners.

use. However, the trial court rejected both of these arguments. Landowners thereafter filed an appeal with this Court, but we affirmed the trial court's order.[4]

As the appeal before this Court was pending, Landowners had filed the present mandamus complaint with the trial court asserting that, despite repeated requests, the Township has failed and/or refused to issue them the proper permits.[5] Landowners asserted that they have a clear, legal right to the building permits and a clear right to the use permits as approved by the Board. Landowners specifically sought a permit for the nursery business use, the home occupation use and the home occupation sign use. Landowners also sought the aforementioned building permits.[6]

The Township thereafter filed an answer to the complaint indicating that it did indeed issue a permit to Landowners for the nursery use on or about February 18, 2003. The Township's answer to the complaint also indicates that it issued home occupation permits and a sign permit, in accordance with the Board's previous order and affirmed by the trial court and this Court, at the time it filed its answer to the complaint, i.e., on or about February 10, 2004.[7] Additionally, the Township asserts that

---

[4] Teed v. Hilltown Township Zoning Hearing Board (Pa. Cmwlth., No. 2119 C.D. 2003, filed January 27, 2004).

[5] In their complaint, Landowners indicate that they had filed three applications with the Township in January of 2002 for building permits to construct a barn and two, small outbuildings on their property, but that the Township had never acted on these applications.

[6] Landowners persist in their earlier position that, because they are entitled as a matter of right to operate a nursery business, they are entitled to a permit that specifically authorizes their landscape business as a use incidental or secondary to the nursery business. Again, this use was specifically rejected by the Board, the trial court and this Court as neither incidental nor secondary.

[7] This matter was delayed at the trial court level for a number of years due to Landowners' filing of an action in federal court alleging a deprivation of their rights to due process and equal protection, as well a claim of inverse condemnation. The matter appears to have been stayed pending resolution of the federal claims, with the matter resuming before the trial court in late 2006.

the applications regarding the building permits were denied as incomplete and that Landowners never filed complete applications. Hence, the Township avers that Landowners are not entitled to the issuance of these permits.

Subsequent to filing its answer to Landowners' mandamus complaint, the Township filed a motion for summary judgment. The trial court, in considering the summary judgment motion, concluded that the doctrine of collateral estoppel, also known as issue preclusion, barred Landowners from obtaining the relief they sought. The trial court opined that Landowners presented the same issue in their appeal following the Board's denial of their request to use the property for their landscaping business as a use secondary and incidental to their nursery business. The trial court also rejected Landowners' claim that they were entitled to the various building permits they had requested, concluding that mandamus was not the appropriate method by which to challenge the Township's alleged failure to issue building permits. Landowners then filed an appeal with this Court.

On appeal,[8] Landowners raise the following issues for our review: (1) whether the Board erred by not issuing a permit that would allow the Landowners to operate a landscaping business as a secondary or incidental use to the nursery use; and (2) whether the Board erred in relying upon an agreement between the Landowners and

[8] This Court's scope of review of a decision of a trial court granting summary judgment is limited to considering whether the court erred as a matter of law or abused its discretion. Pakett v. The Phillies, L.P., 871 A.2d 304 (Pa. Cmwlth. 2005). A motion for summary judgment may be granted only when there is no genuine issue of material fact as to a necessary element of a cause of action and the moving party has established entitlement to judgment as a matter of law. Id. Additionally, summary judgment may be entered only in cases that are clear and free from doubt. Id. Further, we must view the record in the light most favorable to the non-moving party and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Id.

the Township to conclude that they are precluded from obtaining the subject building permits.[9] We disagree with each of these arguments.

With regard to their argument that the trial court erred in dismissing their mandamus complaint, the Landowners, with sparse discussion and without referring to legal authority, contend that collateral estoppel, or issue preclusion, as the doctrine is also known, does not apply in this case.[10] This Court has described the doctrine as follows:

> The doctrine of collateral estoppel, or issue preclusion, applies where the following four factors are met: (1) an issue of law or fact decided in a prior action is identical to one presented in a later action; (2) the prior action resulted in a final judgment on the merits; (3) the party against whom collateral estoppel is asserted was a party to the prior action or is in privity with a party to the prior action; and (4) the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior action.

City of Philadelphia v. Steen Outdoor Advertising, 927 A.2d 679, 685 (Pa. Cmwlth. 2007) (citation omitted).

In their limited argument on the issue, the Landowners appear to assert that issue preclusion does not apply here because "this is not a 'Conditional Use' or separate permit as previously argued and the Supreme court most often considers Zoning Cases

[9] Landowners also raise an issue in their brief to this Court concerning the failure of the Board to issue a permit for a "general sign," as opposed to the permit approved by the Board relating to a home occupation sign. However, upon review of the zoning ordinance, we fail to see any reference to a "general sign." Rather, the ordinance simply references "general" provisions relating to signs.

[10] Although Landowners' argument on this issue is so inadequate as to raise the question of whether the argument should be considered waived as not in compliance with Pa. R.A.P. 2119, we will address the question of whether the trial court correctly concluded that collateral estoppel bars review of Landowners' first issue.

unique." (Landowners' Brief at 17). We fail to understand this argument by Landowners.

Nevertheless, Landowners do correctly note that the appellate courts have recognized the fact that courts apply the doctrines of claim preclusion (or res judicata) and issue preclusion sparingly in zoning matters based on the reasoning that "the need for flexibility outweighs the risk of repetitive litigation." Price v. Bensalem Township Zoning Hearing Board, 569 A.2d 1030, 1032 (Pa. Cmwlth. 1990). Thus, even when an applicant has unsuccessfully sought zoning relief, he or she may be permitted a second opportunity to obtain relief. However, such opportunities usually arise only where factual elements have changed that support a second or subsequent review of an applicant's request for relief. In Price, for example, the Court concluded that, although an earlier variance denial barred a second consideration of a variance, the applicants could pursue their claim under a theory of nonconformance, even though the relief sought was the same.

However, the simple fact that the legal claim or course by which an applicant seeks relief has changed does not mean that issue preclusion will not apply to bar re-litigation. In Three Rivers Aluminum Company, Inc. v. Zoning Hearing Board of Marshall Township, 618 A.2d 1165 (Pa. Cmwlth. 1992), this Court concluded that issue preclusion barred an applicant's zoning action where the same issue raised in the zoning matter had been resolved in an earlier equity proceeding. Similarly, this Court has rejected an issue in a zoning matter on the grounds of issue preclusion that had already been addressed in an earlier mandamus action. Fincher v. Township of Middlesex, 439 A.2d 1353 (Pa. Cmwlth. 1982).

In this case, Landowners have failed to establish any grounds for distinguishing the issue raised in this mandamus action and the issue this Court

addressed in our 2004 decision. Although Landowners argue that the trial court "refused to investigate how [their] circumstances had changed," they have pointed to no new factual details or changes regarding their land and their use thereof support a claim of changed conditions. (Landowners' Brief at 17). Rather, they suggest that "the fact remains that since the nursery permit is inclusive of the Landscape use there is no legitimate denial to date." (Landowners' Brief at 17-8). The thrust of Landowners' argument is simply that, based upon their obtaining the nursery permit, they are automatically entitled to a permit that specifically authorizes them to use the property for their landscaping business. However, Landowners have not pointed to any real changes in circumstances and, consequently, have established no error by the trial court in its conclusion that issue preclusion bars this mandamus action as a means to obtain the right to use the property for their landscaping business.[11] Thus, we cannot say that the trial court erred in applying the doctrine of collateral estoppel.

We next consider Landowners' argument that the trial court erred in relying upon the agreement between them and the Township in the earlier civil action to conclude that they are not entitled to mandamus relief with regard to their request for the building permits. In its opinion, the trial court opined that the settlement reflects the Landowners' agreement "to remove from their property all equipment, goods, raw

[11] Further, we believe that Landowners would not succeed on the merits of their claim. We agree with the trial court and with this Court's earlier conclusion that, although the Landowners may be entitled to use their property for a nursery, they are not entitled to use the property for a landscaping-business purpose unless their nursery business is predominant. Although the following statement is mere dicta and, thus, not binding, we note that, if the Landowners do establish a nursery business, they might at some later point be able to establish the right to conduct their landscaping business as a secondary use. However, they have not asserted that their nursery business has changed to such a degree as to presently constitute a primary use of the property. Hence, they cannot prevail at this time arguing that they are entitled to use the property for their landscaping business simply because they are entitled to use the property as a nursery.

materials, and other items that are used by or related to the [landscaping business.]" (Agreement and Release, Consideration, Paragraph A, p. 2) (Exhibit B of the Township's Preliminary Objections). In referring to the agreement, the trial court opined that mandamus is not an appropriate remedy by which to establish the Landowners' rights under the agreement and the zoning ordinance.

We need not address the impact of the agreement on the right of the Landowners to obtain a permit for their landscaping business, because we have concluded above that they cannot prevail on that issue based upon the doctrine of issue preclusion. With regard to the question of whether or not the trial court properly granted summary judgment in favor of the Township as to Landowners' request for building permits, we begin by noting the legal grounds upon which a party may obtain relief in mandamus.

Mandamus is appropriate only where a party has established a clear legal right to the performance of a ministerial act or a non-discretionary duty on the part of the defendant, and only then when the party seeking such relief has no other appropriate or adequate remedy. Chanceford Aviation Properties, L.L.P. v. Chanceford Township Board of Supervisors, 592 Pa. 100, 114, 923 A.2d 1099, 1107-8 (2007). A party is not entitled to relief in mandamus as a means to establish his or her legal rights, but only when his or her rights have already been demonstrated. Dodgson v. Pennsylvania Department of Corrections, 922 A.2d 1023 (Pa. Cmwlth. 2007), citing Evans v. Pennsylvania Board of Probation and Parole, 820 A.2d 904 (Pa. Cmwlth. 2003), petition for allowance of appeal denied, 580 Pa. 550, 862 A.2d 583 (2004).

Landowners assert that they re-applied for the building permits in May of 2003 and suggest that the Township was required, but failed, to act upon these new applications. The factual history above indicates that the Landowners submitted

zoning/building permit applications in January 2002, that Mr. Lippincott, the Township's zoning officer, specifically denied the zoning permit applications and that he further indicated that he would not issue any permits at all until Landowners were in compliance with the 1996 agreement. Regardless of the reasons for denying the permits, Landowners could have sought to appeal that action. While Landowners appealed the denial of the use permits, they did not raise any issue concerning the denial of the building permits prior to filing the present mandamus action. Although we recognize the distinction between applications for zoning and building permits, and acknowledge that Mr. Lippincott's letter might be considered ambiguous as to Landowners' building permit applications, Landowners have not established that they have a clear legal right to the issuance of these permits.

Courts generally agree that litigants may not obtain a writ of mandamus as an alternative to the procedures established in zoning matters; however, the courts have established certain exceptions to that rule. See Robert S. Ryan, Pennsylvania Zoning Law and Practice, (Ryan), §9.1.11. The exceptions have typically been limited to situations in which a litigant claims that a deemed approval or decision has occurred under operation of the provisions of the Pennsylvania Municipalities Planning Code, Act of July 31, 1968, P.L. 805, as amended, 53 P.S. §§ 10101 – 11202. Additionally, as explained by Ryan, there is a "more generalized mandamus exception" whereby a litigant may seek a writ of mandamus to force a municipality to issue a permit when the litigant demonstrates that the official who denied the permit "(1) [has] sought to frustrate the normal zoning processes, or (2) [has] acted in a manner clearly unauthorized by the zoning ordinance." Ryan, §9.1.11. Landowners have cited no authority for the proposition that the appeal procedures would not adequately serve the

purpose of resolving the dispute concerning their building permit applications.[12] They have not pleaded any facts that suggest that the officials have acted in a manner designed to frustrate the zoning process or in a manner that the ordinance does not authorize.[13]

As stated above, mandamus is an extraordinary writ that, especially in zoning matters, is only appropriate when a party demonstrates a clear right to relief and a mandatory duty in the defendants. Landowners have not provided sufficient argument with regard to the procedures applicable for the submission and approval of building permit applications. We cannot conclude that Landowners have established a clear legal right to the relief they seek. Thus, we see no error on the part of the trial court in concluding that Landowners are not entitled to mandamus relief with regard to their request for the building permits.

Accordingly, we affirm the decision of the trial court.

JOSEPH F. McCLOSKEY, Senior Judge

[12] In fact, the Landowners have cited no authority at all regarding the question of whether mandamus is appropriate in this case. Nor have they provided adequate legal argument in support of a claim that they have a clear legal right to relief.

[13] See, e.g., Baldwin Borough v. Matthews, 393 Pa. 53, 145 A.2d 698 (1958) (mandamus appropriate where zoning officer denied building permit on grounds related to injury of public interest; officer exceeded his authority in using this as a basis for permit denial.)

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jackson J. Teed and Marilyn A. Teed, h/w Appellants	: : : :	
v.	:	No. 75 C.D. 2008
Hilltown Township, Gregory J. Lippincott and David Taylor	: :	

O R D E R

AND NOW, this 9th day of September, 2008, the order of the Court of Common Pleas of Bucks County is hereby affirmed.

_____

JOSEPH F. McCLOSKEY, Senior Judge