IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

CHARLES ROBERT GARNER,	)	No. 65624-4-I
Appellant,	)	
	)	UNPUBLISHED OPINION
v.	)	
	)	
CITY OF FEDERAL WAY,	)	
	)	
Respondent.	)	FILED: July 25, 2011
	)	

Schindler, J. — Charles Garner filed a lawsuit against the City of Federal Way challenging the City's order to demolish as an unconstitutional taking of his property and a violation of his rights under the state building code. The court granted the City's motion for summary judgment dismissal on the grounds that Garner's lawsuit was barred by the doctrine of res judicata. We affirm.

FACTS

Charles Garner purchased a house in 1976 in the vicinity of the Seattle-Tacoma Airport. Garner partially disassembled the house and moved it to another parcel of property he owns located in what is now the City of Federal Way (the City). Garner did not obtain a building permit and never completed the reassembly of the house at the

new location. In the decades that followed, the condition of the structure deteriorated.

On July 1, 2008, the City issued a "Complaint of Unfit Building" in violation of Federal Way City Code § 1-30.[1] The complaint alleged that the structure on Garner's property was uninhabitable and unsafe due to lack of "essential water, gas, sewage disposal, mechanical, plumbing, electrical systems, and services." The complaint pointed to the absence of exits from the upper floors, lack of power to operate smoke detection systems, damaged and missing exterior siding, missing doors and windows, and interior open stud walls with exposed wiring. The City building official stated that because the required repairs would cost more than 50 percent of the assessed value of the structure, under the Federal Way Revised Code (FWRC) the building should be demolished. See FWRC §1.15.180(2).

The complaint notified Garner of the hearing on the matter scheduled for July 16, 2008.

The City building official R. Lee Bailey and Garner testified at the hearing. The hearing examiner ordered Garner to demolish the structure. The hearing examiner's findings state, in pertinent part:

> The subject building remains unfinished, unable to be occupied, and left in a prolonged deteriorating state.
>
> . . . The building has no electricity, gas or sewer service.
>
> . . . The roof is covered with moss. The building lacks sheet rock and insulation. The windows on the building are either missing or broken. The siding and gutters are loose and appear to be failing. The building is not sheltered from the elements.
>
> . . . The building lacks ingress and egress to and from the front door on the upper story.
>
> . . . Repairs for the building would cost more than half the

[1] This provision is currently codified at Federal Way Revised Code § 1.15.170 ("Dangerous or Unfit Buildings or Structures Defined").

> assessed value of the property.
>
> . . . The building is dangerous not only to human habitation, but also to the public.

The hearing examiner found that the building was unfit for habitation, unsafe, and concluded that the code provisions of the City required the structure to be demolished. The order required Garner to apply for necessary permits to demolish within 45 days.

Garner appealed the hearing examiner's decision to the Appeals Commission. See FWRC § 1.15.230. Garner participated in the appeal hearing. The Appeals Commission upheld the hearing examiner's findings, the conclusion that the building was unfit for human habitation or other use in violation of the City's code provisions, and the order to demolish.

Garner filed a lawsuit in the King County Superior Court appealing the City's order to demolish. The trial court conducted a trial de novo. The trial court adopted the findings and conclusions of the Appeals Commission that the building was "unfit and more than fifty percent damaged or deteriorated," and there were "no errors of fact or law." The court ruled that the "building in question is appropriate for demolition and that the order to demolish . . . was proper." The court entered an "Order Affirming Appeal" and denied Garner's motion for reconsideration. Garner appealed the superior court's order. The appeal was dismissed for lack of prosecution.

On March 31, 2009, Garner filed "Plaintiff's Complaint For Damages" against the City. Garner alleged that the City's order to demolish amounted to a "de facto taking" and a violation of his rights under the state building code, RCW 19.27.180.

The City filed a motion for summary judgment. The City asserted that Garner's claims were barred by the doctrine of res judicata. The City submitted evidence showing that Garner previously challenged the City's actions concerning his property in the proceedings before the hearing examiner, the Appeals Commission, and a trial de novo in superior court.

Garner filed a response brief six days before the hearing. The brief was not received by opposing counsel until the day before the hearing. See CR 56(c) (adverse party may file affidavits, memoranda, or other documents no later than 11 calendar days before the hearing). At the hearing on the motion for summary judgment, the trial court struck Garner's brief as untimely. The trial court granted the City's motion for summary judgment and dismissed the lawsuit.

ANALYSIS

In this appeal, Garner primarily attempts to challenge the order requiring him to demolish the building. Garner's foremost substantive claim appears to be that the City improperly preempted state legislation by failing to incorporate a provision enacted in 1989, RCW 19.27.180. RCW 19.27.180(1) provides:

> Residential buildings or structures moved into or within a county or city are not required to comply with all of the requirements of the codes enumerated in chapters 19.27 and 19.27A RCW, as amended and maintained by the state building code council and chapter 19.28 RCW, if the original occupancy classification of the building or structure is not changed as a result of the move.

The Appeals Commission and the superior court in the previous proceeding considered and rejected Garner's argument because RCW 19.27.180 was inapplicable to the Unfit

Buildings Act, RCW 35.80, as incorporated by the FWRC. The superior court expressly ruled that "RCW 19.27.180 does not prevent the application of RCW 35.80 nor invalidates the proceedings and orders below."

Garner also appears to make two arguments challenging the basis of the trial court's order on summary judgment. Garner asserts: (1) the trial court failed to construe the facts in the light most favorable to him as the nonmoving party, and (2) the court erred in concluding that the doctrine of res judicata applies because the prior proceeding and his current complaint do not involve the same subject matter. Specifically, Garner points to his claim of de facto taking of property in his complaint and asserts this claim was not addressed in the prior proceedings.[2]

We review the decision to grant summary judgment de novo. Degel v. Majestic Mobile Manor, Inc., 129 Wn.2d 43, 48, 914 P.2d 728 (1996). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c); Degel, 129 Wn.2d at 48. The facts and all reasonable inferences from those facts must be considered in the light most favorable to the nonmoving party. Degel, 129 Wn.2d at 48.

As the moving party, the defendant bears the burden of showing the absence of an issue of material fact. Young v. Key Pharm., Inc., 112 Wn.2d 216, 225, 770 P.2d

[2] The City argues that we should decline to consider Garner's arguments on appeal because he fails to comply with RAP 10.3(a)(4), (5), and (6). While the cited rules are mandatory, RAP 1.2 favors deciding cases on their merits and in this case, despite Garner's lack of compliance with the rules of appellate procedure and imprecise arguments, we are able to do so. Accordingly, we deny the City's motion to strike.

182 (1989). If the defendant meets this burden, then the burden shifts to the party with the burden of proof at trial, the plaintiff. Young, 112 Wn.2d at 225. The nonmoving party must set forth specific facts showing a genuine issue and cannot rely on mere allegations, speculation, or argumentative assertions. Little v. Countrywood Homes, Inc., 132 Wn. App. 777, 780, 133 P.3d 944 (2006); Baldwin v. Sisters of Providence in Wash., Inc., 112 Wn.2d 127, 132, 769 P.2d 298 (1989). If the plaintiff fails to meet the burden of setting forth admissible facts to establish an essential element of the claim, dismissal is appropriate because there can be no genuine issue of material fact. A complete failure of proof concerning an essential element of the plaintiff's case renders all other facts immaterial. Young, 112 Wn.2d at 225.

Here, Garner did not file his brief in opposition to summary judgment in compliance with the civil rules, and Garner does not assign error to the trial court's decision to strike the untimely filed response. See CR 56(c); Davies v. Holy Family Hosp., 144 Wn. App. 483, 499, 183 P.3d 283 (2008) (trial court's ruling on whether to accept an untimely response or to strike it as untimely is reviewed for an abuse of discretion). Further, Garner appeared at the hearing and presented argument. But he did not address whether the doctrine of res judicata barred the lawsuit. When the court asked Garner how the subject matter of his lawsuit was different from the previously litigated subject matter, he insisted that the trial court in the previous case merely found the state building code provision he relied on, RCW 19.27.180, was inapplicable.

Accordingly, Garner did not meet his burden of presenting any admissible evidence in opposition to the City's motion for summary judgment. Nor does Garner

point to any relevant disputed facts that the trial court improperly construed against him. Under CR 56(c), "[t]he judgment sought shall be rendered forthwith" if the showing required by the rule has been made.

Nonetheless, even if the court had considered Garner's untimely filed response to the motion for summary judgment, dismissal was appropriate because Garner failed to refute the City's showing that his claims were barred by the doctrine of res judicata. In the response in opposition to summary judgment, Garner ignores the prior proceedings in which he challenged issuance of the unfit building complaint and the order to demolish. Instead, Garner relies on the assertion that his 2009 complaint did not involve the same subject matter as another complaint he filed in 2006, which alleged a due process violation in connection with the City's appeal process following a violation notice issued to Garner in 2003.[3]

Res judicata prevents relitigation of the same claim where a subsequent claim involves the same (1) subject matter, (2) cause of action, (3) persons and parties, and (4) quality of persons for or against the claim made. In re Estate of Black, 153 Wn.2d 152, 170, 102 P.3d 796 (2004). Under the doctrine of res judicata, no party may re-litigate "claims and issues that were litigated, or might have been litigated, in a prior action." Pederson v. Potter, 103 Wn. App. 62, 69, 11 P.3d 833 (2000). The res judicata doctrine is designed to discourage piecemeal litigation. Spokane County v. Miotke, 158 Wn. App. 62, 69, 240 P.3d 811 (2010). The doctrine "'puts an end to strife, produces certainty as to individual rights, and gives dignity and respect to judicial

[3] This claim was removed to federal court and in a 2007 order, the Federal District Court for the Western District of Washington rejected Garner's claim that the City violated his due process rights.

proceedings.'" Marino Prop. Co. v. Port Comm'rs of the Port of Seattle, 97 Wn.2d 307, 312, 644 P.2d 1181 (1982) (quoting Walsh v. Wolff, 32 Wn.2d 285, 287, 201 P.2d 215 (1949)). "[T]he res judicata test is a conjunctive one requiring satisfaction of all four elements." Hisle v. Todd Pac. Shipyards Corp., 151 Wn.2d 853, 866, 93 P.3d 108 (2004).

Garner's argument that his current claim of de facto taking is not the same claim litigated in the proceedings following the City's 2008 complaint and subsequent order to demolish is not persuasive.[4] For purposes of res judicata, causes of action are identical if (1) prosecution of the later action would impair the rights established in the earlier action, (2) the evidence in both actions is substantially the same, (3) infringement of the same right is alleged in both actions, and (4) the actions arise out of the same nucleus of facts. Yakima County v. Yakima County Law Enforcement Officers Guild, 157 Wn. App. 304, 328, 237 P.3d 316 (2010).

The record does not support Garner's argument that his claim of unconstitutional taking was not litigated. In his current lawsuit against the City, Garner alleges a de facto taking of his property.[5] In the prior proceedings, Garner alleged that a taking of property occurred and the trial court expressly rejected his claim. The court specifically ruled that Garner had "not made any showing that a taking of property has occurred or

[4] Garner vaguely refers to the fact that the 2009 trial court judgment arose in the context of an administrative appeal. To the extent that he suggests that res judicata does not apply because of the administrative context of the prior proceedings, we do not agree. Quasi-judicial determination of an administrative agency is final, binding, and subject to res judicata to the same extent as the judgment of a court. See Hilltop Terrace Homeowner's Ass'n v. Island County, 126 Wn.2d 22, 30-31, 891 P.2d 29 (1995); Lejeune v. Clallam County, 64 Wn. App. 257, 264-65, 823 P.2d.1144 (1992); Shoemaker v. City of Bremerton, 109 Wn.2d 504, 507-13, 745 P.2d 858 (1987).

[5] The record indicates that the structure was torn down in accordance with the court's order on or about December 14, 2009.

will occur through the actions of the City of Federal Way."[6]

[6] While Garner does not explain how the taking claim in his current lawsuit is any different from the taking claim the court ruled on in the prior proceeding, we are cognizant of the fact that res judicata is not intended to deny any litigant his day in court. We are confident this has not occurred here. Hisle, 151 Wn.2d at 865.

We affirm summary judgment dismissal of Garner's lawsuit against the City.[7]

WE CONCUR:

[7] We decline to award the City attorney fees.