STATE OF MICHIGAN

COURT OF APPEALS

SOAVE LAND DEVELOPMENT, LLC,

Plaintiff-Appellant,

v

SALEM TOWNSHIP,

Defendant-Appellee.

UNPUBLISHED
November 24, 2009

No. 287687
Washtenaw Circuit Court
LC No. 08-000323-CC

Before: Servitto, P.J., and Bandstra and Markey, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order granting defendant's motion for summary disposition in this action alleging inverse condemnation or a regulatory taking. Plaintiff contends that under defendant's sewer ordinance it is entitled to more sewer connections (taps) than defendant allocated to plaintiff's property. Plaintiff asserts defendant's decision denying the additional sewer taps denied it any economically viable use of the property and interfered with its investment-backed expectations. Defendant argues that this action is barred under the doctrine of collateral estoppel or the doctrine of res judicata. In a prior action based on the same facts, the trial court upheld defendant's decision limiting the number of sewer taps available to defendant's property. In that prior action, the trial court affirmed defendant's decision that because only a portion of plaintiff's property was located within the boundaries of the Hamlet Area Sewer District, plaintiff was entitled to only 10 sewer taps for that portion of the property within the district rather than the 28 taps that plaintiff sought for the entire parcel. In the present case, the trial court determined that plaintiff's underlying claim in each action was the same, and therefore, granted defendant summary disposition. We affirm.

I. Factual Background

In April 2004, defendant bought 20.4 acres parcel of property near the Hamlet of Salem, located in the Township of Salem. Only 2.65 acres of the parcel falls within the boundaries of the Hamlet Area Sewer District, which is itself within Salem Township. The remaining 17.75 acres lie outside the district. Plaintiff sought to develop the property with as many residential site-condominiums as could lawfully be fit within the entire parcel, i.e., meeting lot size and setback regulations. Plaintiff submitted various plans to the township's zoning administrator, one of which was a 24-unit development. In a letter dated August 3, 2004, the zoning administrator informed plaintiff that based on the square footage of that part of plaintiff's property within the sewer district, "10 taps would be the maximum connections allowed to the

Hamlet Sewer System." Subsequently, plaintiff submitted a 28-unit development plan to the Salem Township Board, requesting preliminary site plan approval and the allocation of 27 sewer taps in addition to the one sewer connection already servicing the property. Because the planning commission was the proper body from which to seek approval of a site plan, the township board considered plaintiff's request as one to expand the boundaries of the Salem Hamlet Sewer District to include the entirety of plaintiff's parcel. On June 14, 2005, the township board approved a motion to affirm the boundaries of the Hamlet Area Sewer District and the allocation of sewer taps.

On July 27, 2005, plaintiff filed an appeal in the circuit court regarding the June 14, 2005 decision of the township board invoking MCR 7.101 and Const 1963, Art. 6, §§ 13 and 28. Plaintiff contended that it was lawfully entitled to the number of sewer taps it had requested pursuant to Section 3.3 of the Salem Township Usage and Administration Ordinance, which governs connections to the public sewer system and reads as follows:

> The owner of all houses, buildings or properties used for human occupancy, employment, recreation or other purposes, situated within the Township within the district defined for sewerage service by the Township is hereby required at his expense to install suitable sewage facilities therein, and to connect such facilities to the available public sewer in accordance with the provisions of this Ordinance, within ninety (90) days after date of official notice to do so. For purposes of this section, a sanitary sewer shall be considered to be available when it is located not more than three hundred (300) feet at the nearest point from an existing structure. All new structures built on properties abutting a public sanitary sewer shall connect regardless of distance from sewer to structure.

The gist of plaintiff's argument relied on the last sentence to assert that because part of its parcel is situated within the boundaries of the sewer district, the entire parcel "abuts" a public sanitary sewer. Therefore, plaintiff argued, the ordinance required plaintiff to connect all new structures on its property to the Hamlet sewer system, and required defendant to allow it to tap into the Hamlet Area Sewer District sewage system to service its proposed 28-unit development. Defendant moved for summary disposition arguing that not only had plaintiff failed to exhaust its administrative remedies, but also that defendant had correctly interpreted the ordinance to limit available sewer connections to structures built on property situated within the sewer district. Otherwise, defendant argued, plaintiff's interpretation of the ordinance would permit the infinite expansion of the sewer district's boundaries, far beyond the capacity of the sewage system.

On October 26, 2005, the trial court heard oral arguments regarding plaintiff's appeal and defendant's motion for summary disposition. The court denied the motion for summary disposition, took the plaintiff's appeal under advisement, and allotted the parties additional time to submit supplemental briefing. The trial court issued its opinion and order denying plaintiff's appeal on February 24, 2006. The trial court found that plaintiff sought to expand the boundaries of the Hamlet Area Sewer District as properly allocated by township authorities, which in turn would lead to taxing sewer system beyond its capacity. The court ruled that the critical third sentence of Section 3.3 of the sewer ordinance must be read in context:

> . . . In the third sentence the ordinance clarifies the preceding sentence by providing that notwithstanding the 300 foot limitation, any new structures must

> connect. Unfortunately this sentence of the ordinance is inartfully drafted and used the phrase "abutting a sanitary sewer" instead of "within the sewer district."
>
> . . . It is clear from the context that the language of the last sentence of Section 3.3 of the ordinance did not intend to require or allow any new structure built on property adjacent to a sewer district to connect to that sewer. The word "abutting" in that sentence clearly refers to property already within the district.

Based on this reading of Section 3.3, the trial court ruled that the township "is not, under the terms of [the sewer] ordinance, required to provide sewer service to new structures built outside the district." This Court denied plaintiff's application for leave to appeal, finding "lack of merit on the grounds presented." *Soave Land Development, LLC v Salem Township*, unpublished order of the Court of Appeals, entered June 29, 2006 (Docket No. 269066).

On September 26, 2007, plaintiff filed an action under 42 USC 1983 in the United States District Court for the Eastern District of Michigan, seeking damages from defendant for allegedly violating its rights under the Fifth and Fourteenth Amendments to the United States Constitution. Defendant moved for summary judgment. On May 6, 2008, plaintiff voluntarily dismissed its federal lawsuit.

On April 1, 2008, plaintiff filed the instant action in the circuit court; it was assigned to the same trial judge who had ruled on plaintiff's claims in the earlier action. Plaintiff's complaint is titled as one for inverse condemnation. After reciting the factual background of defendant's denial of plaintiff's request for 28 sewer connections and the earlier circuit court ruling regarding plaintiff's appeal, the complaint alleges:

> 11. Salem is required to apply the sewer ordinance but has failed to do so.
>
> 12. Salem's action of denying Soave the use of twenty-eight (28) sewer taps has denied Soave an economically viable use of his land.
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> 13. Salem's denial is illegitimate because it is in direct contradiction to the plain language of its ordinance.
>
> 14. The effect of the regulation is to deny Soave any economically viable use of his property.
>
> 15. Salem's denial has interfered with a distinct, investment-backed expectation.
>
> 16. Salem's actions have resulted in a taking of the property.
>
> 17. As a direct and proximate result of Salem's taking of the property, Salem owes Soave just compensation for the highest and best use of the property.

On May 22, 2008, defendant moved for summary disposition under MCR 2.116(C)(8) and (C)(10). Defendant argued that plaintiff lacked a vested property right to sewer connections, citing *In re Certified Question (Fun 'N Sun RV, Inc v Michigan)*, 447 Mich 765, 787-788; 527 NW2d 468 (1994) ("One who asserts an uncompensated taking claim must first establish that a

vested property right is affected."). Plaintiff's right to sewer connections, defendant asserted, rested on its interpretation of defendant's sewer ordinance, which the trial court had already ruled did not support defendant's claim. Thus, defendant argued that plaintiff's inverse condemnation action was barred by the doctrines of collateral estoppel and res judicata.

At oral arguments on defendant's motion, plaintiff argued that the doctrines of collateral estoppel and res judicata did not apply because the prior action addressed a question of law, and there was no discovery and litigation of the facts. When the trial court asked for the basis of its takings claim, plaintiff's counsel conceded that plaintiff was relying on its interpretation of the sewer ordinance to support its claim to 28 sewer taps for its property. The trial court observed that while plaintiff's claim might have merit if it had prevailed in the earlier case, plaintiff "lost that appeal," and, "as a matter of law there was no unlawful taking." The court's order granting summary disposition was entered August 21, 2008. Plaintiff brings this appeal by right.

II. Standard of Review

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Whether the doctrines of collateral estoppel or res judicata bar a subsequent action also present questions of law this Court reviews de novo. *Ditmore v Michalik*, 244 Mich App 569, 574; 625 NW2d 462 (2001); *Minicuci v Scientific Data Mgt, Inc*, 243 Mich App 28, 34; 620 NW2d 657 (2000).

A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the basis of the pleadings alone. *Corley v Detroit Bd of Ed*, 470 Mich 274, 277; 681 NW2d 342 (2004). All properly pleaded factual allegations must be accepted as true and construed in a light most favorable to the nonmoving party. *Maiden*, *supra* at 119. A motion for summary disposition under MCR 2.116(C)(8) may be granted only if no factual development could possibly justify recovery. *Corley*, *supra* at 277.

When considering a motion for summary disposition under MCR 2.116(C)(10), this Court must view the evidence submitted to the trial court in the light most favorable to the party opposing the motion. *Maiden*, *supra* at 120. The trial court properly grants the motion when the submitted evidence fails to establish any genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). A genuine issue of material fact exists when the evidence, viewed in the light most favorable to the party opposing the motion, leaves open an issue upon which reasonable minds might differ. *Id*.; *Maiden*, *supra* at 120.

A motion for summary disposition may also be granted under MCR 2.116(C)(7) when a claim is barred by a prior judgment. The motion may, but need not, be supported or opposed by affidavits, depositions, admissions, or other documentary evidence. *Maiden*, *supra* at 119. The allegations of the complaint are accepted as true unless contradicted by submitted evidence. *Id*. The motion is properly granted when the undisputed facts establish the moving party is entitled to judgment as a matter of law. *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537, 541; 688 NW2d 550 (2004).

III. Analysis

Plaintiff first argues that the trial court erred by applying the doctrine of collateral estoppel to grant defendant summary disposition. Plaintiff asserts that the doctrine does not apply because the prior case decided a question of law—the proper construction of defendant's ordinance—and the doctrine only applies to fully and fairly litigated *facts*. Further, plaintiff contends that it did not have a full and fair opportunity to litigate facts in the prior case, relying on exceptions noted in *Monat v State Farm Ins Co*, 469 Mich 679, 683 n 2; 677 NW2d 843 (2004). Specifically, plaintiff contends the issue decided in the first case was one of law, the action was one akin to an administrative appeal, and plaintiff was required to sustain a higher burden of proof than the preponderance of evidence standard in the present action. We disagree.

Collateral estoppel is a rule of issue preclusion. It bars the "relitigation of an issue in a subsequent, different cause of action between the same parties or their privies when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding." *Ditmore*, *supra* at 577. Generally, the application of collateral estoppel requires that (1) a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment, (2) the same parties had a full and fair opportunity to litigate the issue, and (3) mutuality. *Monat*, *supra* at 682-684. Mutuality exists if the party asserting collateral estoppel would have been bound by the prior decision had it been an adverse one. *Lichon v American Universal Ins Co*, 435 Mich 408, 427; 459 NW2d 288 (1990). Contrary to plaintiff's argument, however, "collateral estoppel applies '[when] an issue of *fact or law* is actually litigated and determined by a valid and final judgment . . . .'" *Id*. at 428, quoting 1 Restatement Judgments, 2d, § 27, p 250 (emphasis altered); see also *Ditmore*, *supra* at 577. Here, the issue actually litigated and decided in the prior case was a mixed question of fact and law: whether defendant's ordinance required defendant to grant plaintiff additional sewer connections when part of plaintiff's parcel of property was situated within and part of plaintiff's parcel was situated outside the boundaries of the Hamlet Area Sewer District.

Moreover, collateral estoppel may apply even if the first action is viewed, as plaintiff argues, "akin to administrative review." The doctrine applies to administrative determinations if the proceedings were adjudicatory, a method to appeal the decision was provided, and the Legislature intended that the administrative determination be final in the absence of an appeal. *Minicuci*, *supra* at 33-34, citing *Nummer v Dep't of Treas*, 448 Mich 534, 541-542; 533 NW2d 250 (1995). Here, the proceedings resulting in the prior decision, although initiated as an appeal of an administrative decision, were adjudicatory. An appeal of the prior judgment was available. After this Court denied plaintiff's application for leave to appeal, the prior judgment became final. Because the prior action was an appeal of an administrative decision does not render the doctrine of collateral estoppel inapplicable to preclude litigation again of the same issue that was previously decided, i.e., that plaintiff was not entitled under the terms of defendant's sewer ordinance to additional sewer connections for that part of its property situated outside the Hamlet Area Sewer District.

Plaintiff's argument regarding the exceptions to collateral estoppel discussed in *Monat*, *supra* at 683 n 2, is unavailing. The claims of plaintiff in the prior case and the instant action are substantially similar, if not identical. Further, the facts on which plaintiff bases its claim to additional sewer connections under the terms of sewer ordinance are undisputed and are the same as it asserted in the earlier action. Also, the burden of proof did not affect the trial court's prior legal ruling construing defendant's sewer ordinance contrary to plaintiff's position. Rather, the

legal issue in the first action, entitlement to additional sewer connections, was fully and fairly litigated to a final decision. We conclude the trial court properly ruled that based on the prior decision, plaintiff could not as a matter of law prove its inverse condemnation or regulatory taking claim in this case. *In re Certified Question*, *supra* at 787-788; *Ditmore*, *supra* at 577.

In light of this determination, we need not decide whether the trial court's ruling was also proper under the res judicata doctrine.

We affirm. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Deborah A. Servitto
/s/ Richard A. Bandstra
/s/ Jane E. Markey