

Court of Claims of Ohio

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VERNON A. FISCHER

Plaintiff

v.

DEPARTMENT OF NATURAL RESOURCES

Defendant

Case No. 2013-00037

Judge Patrick M. McGrath
Magistrate Robert Van Schoyck

ENTRY GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

{¶1} On February 21, 2014, defendant filed a motion for summary judgment pursuant to Civ.R. 56(B). On March 10, 2014, plaintiff filed a memorandum in opposition. The motion is now before the court for a non-oral hearing pursuant to L.C.C.R. 4(D).

{¶2} Civ.R. 56(C) states, in part, as follows:

{¶3} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor." See *also*

Gilbert v. Summit Cty., 104 Ohio St.3d 660, 2004-Ohio-7108, citing *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317 (1977).

{¶4} According to plaintiff's complaint, in 2001 defendant conducted a dredging operation in a waterway bordering plaintiff's residential property. Plaintiff claims that in 2012, his seawall and the soil behind it began to sink into the waterway because the dredging was performed too close to the seawall, and at too great a depth.

{¶5} Defendant argues, among other things, that plaintiff's claim is precluded by the doctrine of res judicata based upon the outcome of an action plaintiff previously brought in this court as Case No. 2005-10438, *Fischer v. Ohio Department of Natural Resources*.

{¶6} The doctrine of res judicata provides that "[a] valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action." *Grava v. Parkman Twp.*, 73 Ohio St.3d 379 (1995), syllabus. "The party asserting res judicata must show the following four elements: (1) there was a prior valid judgment on the merits; (2) the second action involved the same parties as the first action; (3) the present action raises claims that were or could have been litigated in the prior action; and (4) both actions arise out of the same transaction or occurrence." *Reasoner v. Columbus*, 10th Dist. Franklin No. 04AP-800, 2005-Ohio-468, ¶ 5.

{¶7} In support of its motion, defendant submitted a copy of the complaint from Case No. 2005-10438 (filed October 20, 2005), as well as a February 6, 2006 judgment entry dismissing Case No. 2005-10438 on the basis that the action was time-barred under the two-year statute of limitations set forth in R.C. 2743.16(A). According to these records, plaintiff claimed in Case No. 2005-10438 that the 2001 dredging operation was performed too close to his seawall and caused sections of the seawall to slip into the waterway, that he first discovered the damage in 2002, and that he discovered further damage in 2003. In the court's entry of dismissal, it was held that

plaintiff's claim was one for permanent trespass, that the claim accrued when plaintiff first discovered the damage in 2002, and that the claim was untimely filed beyond the two-year statute of limitations, in 2005.

{¶8} The court notes that the records defendant submitted from Case No. 2005-10438 are not certified. "Ordinarily, unauthenticated documents, including uncertified court records, may not support summary judgment." *Nicely v. Kline*, 10th Dist. Franklin No. 05AP-825, 2006-Ohio-951, ¶ 21. Inasmuch as no objection has been raised as to their authenticity, however, the court may consider them. *Lytle v. Columbus*, 70 Ohio App.3d 99, 104 (10th Dist.1990) ("When ruling on a motion for summary judgment, a trial court may consider documents other than those specified in Civ.R. 56(C) in support of the motion when no objection is raised.").

{¶9} Indeed, in his memorandum, plaintiff does not contest the authenticity of the records, nor does plaintiff dispute that both cases arise from the 2001 dredging operation and allegedly resultant movement of his seawall into the waterway. Plaintiff also does not offer any argument or evidence that his claims in the present action either were not or could not have been litigated in Case No. 2005-10438. Rather, the subject matter of both actions appears to be essentially the same. Furthermore, both actions involve the same parties, and the dismissal of Case No. 2005-10438 on the basis of the statute of limitations represents a valid judgment on the merits of that case. *See Dean v. Ohio State Hwy. Patrol*, 10th Dist. Franklin No. 02AP-1438, 2003-Ohio-4505, ¶ 6, citing *LaBarbera v. Batsch*, 10 Ohio St.2d 106 (1967).

{¶10} Upon review of the memoranda and evidence submitted by the parties, reasonable minds can only conclude that there are no genuine issues of material fact, the doctrine of res judicata operates as a bar to plaintiff's claims, and defendant is entitled to judgment as a matter of law. Accordingly, defendant's motion for summary judgment is GRANTED and judgment is rendered in favor of defendant. All previously scheduled events are VACATED. Court costs are assessed against plaintiff. The

clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

PATRICK M. MCGRATH
Judge

cc:

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