[Cite as *Green v. Clair*, 2015-Ohio-662.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

CITY OF GREEN	C.A. No. 27467
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
GARY CLAIR	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellee	CASE No. CV 2013-07-3397

DECISION AND JOURNAL ENTRY

Dated: February 25, 2015

WHITMORE, Judge.

{¶1} Appellant, City of Green ("the City"), appeals from the judgment of the Summit County Court of Common Pleas, dismissing its complaint against Appellee, Gary Clair ("Clair"). This Court reverses.

I

{¶2} In 1992, Clair bought adjoining properties at 280 Stoner Road and 252 East Comet Road within the City. 252 East Comet Road is a corner lot at the intersection of Comet and Stoner Roads. At the time Clair purchased the property, 280 Stoner Road was an L-shaped lot bordering 252 East Comet Road on two sides and having frontage on both Comet and Stoner Roads.

{¶3} In 1998, Clair entered into an agreement to sell a portion of the 280 Stoner Road property. Following a lot split of that property, 280 Stoner Road no longer had any frontage on Comet Road; 252 East Comet Road remained unchanged; and a new parcel was created with

frontage on Comet Road.[1] According to the City, the new parcel with frontage on Comet Road was supposed to be joined to 252 East Comet Road. If the two properties fronting Comet Road were not joined, neither would contain the minimum half-acre lot size required for building a residential structure in the City at that time. The split of the 280 Stoner Road property was recorded, and Clair completed the sale of that property. But, a joinder of the parcels fronting Comet Road was not recorded. At some point, the portion of the property that had been split from 280 Stoner Road with frontage on Comet Road was assigned the address of 244 East Comet Road.[2]

{¶4} In 1999, the City filed a complaint against Clair alleging he had constructed a structure on 252 East Comet Road that violated its zoning ordinances. More particularly, the City alleged that Clair: 1) "constructed a structure at 252 E[ast] Comet Road which exceeds the maximum height of buildings as allowed"; 2) "constructed a structure at 252 E[ast] Comet Road in contradiction to the plans submitted by [Clair] when obtaining his zoning permit from the City"; and 3) impermissibly "built a structure at 252 E[ast] Comet Road * * * [to] be used for [] living quarters or a place of business." The City and Clair reached a settlement that the court journalized on April 21, 2000.

{¶5} The April 21, 2000 settlement entry provided:

> 1. These parties acknowledge that the said Settlement Agreement and Settlement Contract is intended to cover and does cover all the disputed issues, claims and controversies between them. Further, this Settlement Agreement and Contract includes all the essential terms of the parties' agreement. The parties also acknowledge a good and valuable consideration has been exchanged between them. The [c]ourt

[1] A small sliver of property, not pertinent to this appeal, was also created between 252 East Comet Road and 280 Stoner Road.

[2] Clair contends that this address was assigned as a temporary address in 1998 and later became a permanent address. The City, on the other hand, contends that this address was assigned as a temporary address in May 2000 and is still a temporary address.

> will keep continuing jurisdiction over this matter to ensure the terms are complied with.
>
> 2. It is agreed between the parties that the landowner, Gary Clair, who owns the property in dispute at 252 East Comet Road, within the City of Green, Summit County, Ohio, and who has built a garage structure on said property, agrees that he will not reside in the garage structure nor permit others to do so. Further, Gary Clair agrees that he will not conduct a business in the garage structure located on this property nor allow others to do so.
>
> 3. Further, Gary Clair agrees to abide by all existing City of Green zoning ordinances. The City of Green agrees to pay the cost of this matter.

The journal entry containing this settlement was signed by the trial judge, the magistrate, the City's law director, and Clair.

{¶6} Shortly thereafter, a post-settlement dispute regarding costs arose and Clair filed an appeal with this Court. *Green v. Clair*, 9th Dist. Summit No. 20271, 2001 WL 123469 (Feb. 14, 2001) ("*Clair I*"). Clair alleged that he was entitled to "costs in the amount of $5,892.00." *Id.* at *1. We upheld the trial court's determination that the City was only required to pay $237.30 in court costs. *Id.* at *1-2. Following our disposition of *Clair I*, there does not appear to have been any further litigation between the parties for almost ten years.

{¶7} Then, in 2010, Clair sold 252 East Comet Road and began residing in a structure located on 244 East Comet Road. In January 2011, the City filed a motion for contempt alleging that the structure on 244 East Comet Road was the same "garage structure" that had been specified in the April 21, 2000 settlement entry. Clair opposed the City's motion because "the settlement agreement journalized by the [c]ourt regarding the dispute concern[s] 252 East Comet Road, only" and had "no application to him residing in a structure located at 244 East Comet Road." In a judgment entry dated April 20, 2011, the trial court agreed with Clair finding:

> The April 21, 2000 Judgment Entry specifically identifies the property in dispute as being 252 East Comet Road, not 244 East Comet Road. Moreover, this Judgment Entry memorialized the parties' settlement agreement that [Clair] would not reside in 'a garage structure on said property,' that being 252 East Comet Road. The language of the Judgment Entry is clear and unambiguous. The [c]ourt cannot now, 11 years later, expand the scope of the April 21, 2000 Judgment Entry and the settlement agreement of the parties to include structures located at 244 East Comet Road.

{¶8} The City filed a motion for reconsideration with the trial court. On June 15, 2011, the trial court vacated its earlier entry and granted the City's motion for contempt. Clair appealed, and we held that the June 15, 2011 entry was void. *Green v. Clair*, 9th Dist. Summit No. 26032 (Dec. 21, 2011) ("*Clair II*"), relying on *Pitts v. Ohio Dept. of Transp.*, 67 Ohio St.2d 378, 381 (1981) (a motion for reconsideration of a final judgment is a nullity as are all judgments or orders based on that motion).

{¶9} Thereafter, the City filed a motion in the trial court for relief under Civ.R. 60(B), which the court denied. The City appealed, and we affirmed the trial court finding the City could not "use a Civ.R. 60(B) motion as a substitute for [a] direct appeal" of the April 20, 2011 judgment entry. *Green v. Clair*, 9th Dist. Summit No. 26918, 2014-Ohio-1605, ¶ 12 ("*Clair III").*

{¶10} In July 2013, the City filed a second action against Clair seeking declaratory and injunctive relief. In the 2013 case, the City alleged that Clair had not obtained necessary zoning, building, occupancy, and septic permits "for a single-family residence at 244 E[ast] Comet Road." The City sought a declaration that "the [s]tructure at 244 E[ast] Comet Road is an illegal residential structure that was originally built as a garage [because] Clair [] never obtained the appropriate permits for the [s]tructure to serve as a single-family residence." The City further sought to enjoin Clair and any other individual "from residing in the [s]tructure at 244 E[ast] Comet Road." The 2013 case is the subject of the current appeal.

{¶11} Clair moved to dismiss the 2013 case arguing it was barred by the 1999 case. More specifically, Clair alleged, "[t]his case was litigated in the 1999 case * * * by the same parties over the same issues that control the outcome of the instant case, that is zoning violations on the same garage complained about in the 1999 case." Clair continued, "[t]he [City] consented to a settlement agreement involving use of the said garage property and its remedies if any for a violation of the agreement, if any, are to be heard in the 1999 case." Clair attached copies of the following items from the 1999 case to his motion: 1) a list of the docket entries, 2) the complaint, 3) the City's motion for contempt, 4) the April 21, 2000 settlement entry, 5) the April 20, 2011 judgment entry, 6) the June 15, 2011 judgment entry, and 7) a January 5, 2012 order noting the June 15, 2011 judgment entry was vacated by this Court in *Clair II*.

{¶12} The trial court converted the motion to dismiss to one for summary judgment pursuant to Civ.R. 12(B). Subsequently, the City also moved for summary judgment. The court denied the City's motion for summary judgment, granted Clair's motion for summary judgment, and dismissed the complaint.

{¶13} In granting Clair's motion for summary judgment and dismissing the 2013 case, the court noted, "[t]his case involves a structure located at the temporary address of 244 East Comet R[oa]d, Green, Ohio. This building was formerly included in the parcel of property at 252 East Comet R[oa]d, Green, Ohio and was the subject of much litigation in the matter of *Green v. Clair*, CV 1999-07-2610." The court continued, "[w]hether or not an individual may reside in the building and whether or not the building is in compliance with the [C]ity of Green zoning ordinances are issues precisely addressed by the settlement agreement in the 1999 case and again litigated on April 20, 2011 and then again on June 15, 2011." Consequently, the court determined that the 2013 case was barred by res judicata.

{¶14} The City now appeals raising two assignments of error for our review.

II

Assignment of Error Number One

> THE TRIAL COURT ERRED IN DETERMINING APPELLANT'S COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTION WERE BARRED BY RES JUDICATA AND COLLATERAL ESTOPPEL BECAUSE THE FACTS THAT GAVE RISE TO THE COMPLAINT OCCURRED 10 YEARS AFTER THE JUDGMENT ENTRY ALLEGEDLY BARRING APPELLANT'S CLAIMS.

{¶15} In its first assignment of error, the City argues that the trial court erred in finding the 2013 case barred by res judicata. More specifically, the City alleges that the issues in the 1999 case and the 2013 case are "markedly different." We agree.

{¶16} We review a trial court's decision applying res judicata de novo. *Galvin v. Adkins*, 9th Dist. Lorain No. 08CA009322, 2008-Ohio-3202, ¶ 16. The doctrine includes the related concepts of claim preclusion and issue preclusion. *Fort Frye Teachers Assn., OEA/NEA v. State Employment Relations Bd.*, 81 Ohio St.3d 392, 395 (1998). Claim preclusion 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." *Id.* Issue preclusion, or collateral estoppel, provides that "a fact or a point that was actually and directly in issue in a previous action, and was passed upon and determined by a court of competent jurisdiction, may not be drawn into question in a subsequent action between the same parties." *Id.*

{¶17} "[A]n absolute due process prerequisite to the application of collateral estoppel is that the party asserting the preclusion must prove that the identical issue was actually litigated, directly determined, and essential to the judgment in the prior action." *Price v. Carter Lumber Co.*, 9th Dist. Summit No. 26243, 2012-Ohio-6109, ¶ 10. "It is not enough that a similar issue *

* * was litigated and decided in [the prior] action. For collateral estoppel to bar the relitigation of an issue, precisely the *same* issue must have previously been litigated and decided." (Emphasis sic.) *Thompson v. Wing*, 70 Ohio St.3d 176, 185 (1994). The party asserting the applicability of collateral estoppel bears the burden of "pleading and proving the identity of issues." *Goodson v. McDonough Power Equipment, Inc*., 2 Ohio St.3d 193, 198 (1983).

{¶18} In the present matter, the trial court found the 2013 case barred reasoning that the issues raised by the City were "precisely addressed" by: 1) the April 21, 2000 settlement entry, 2) the April 20, 2011 judgment entry, and 3) the June 15, 2011 judgment entry in the 1999 case. Initially, we note that we previously declared the June 15, 2011 judgment entry void. *See Clair II*. Therefore, the June 15, 2011 judgment entry is of no effect and cannot serve as the basis for barring the current action. We will examine whether the 2013 case raises identical issues to those determined by the other two entries relied upon by the court in finding this action barred by res judicata.

{¶19} Clair argues that the issues raised in the 2013 case were addressed in the April 21, 2000 settlement entry because it "cover[ed] all the disputed issues, claims and controversies between the parties" and "the facts that gave rise to this [2013] lawsuit existed in 1999 when the City first filed suit against Clair." According to Clair, the existence of "the parcel known as 244 East Comet [Road] is a matter of public record since 1998."

{¶20} Res judicata generally does not apply when the subject matter of the subsequent case involves a different property than the earlier case. *See Bonnieville Towers Condominium Owners Assn., Inc. v. Andrews*, 8th Dist. Cuyahoga No. 89838, 2008-Ohio-1833, ¶ 19 (res judicata did not bar second foreclosure action against a different parcel of real property than in the first action); *see also Snavely Development Co. v. City of Willoughby Hills*, 11th Dist. Lake

No. 99-L-169, 2000 WL 1686963, *3 (Nov. 9, 2000) (res judicata did not apply where issues in second case concerned a different parcel).

{¶21} The April 21, 2000 settlement entry identifies "the property in dispute [as] 252 East Comet Road." The complaint in the 1999 case, likewise, alleged violations at 252 East Comet Road. The 2013 case, on the other hand, identifies the property it concerns as 244 East Comet Road. While 244 and 252 East Comet Road adjoin each other and at one time were both owned by Clair, they are separate parcels and have been since before the filing of the 1999 case. Neither the complaint in the 1999 case nor the April 21, 2000 settlement entry mentions 244 East Comet Road. Moreover, Clair's assertion that "[t]he City presents no evidence of violations against 244 East Comet [Road] prior to the settlement agreement" belies his contention that "the facts that gave rise to this [2013] lawsuit existed in 1999 when the City first filed suit against Clair."

{¶22} In addition to involving a separate parcel, the 2013 case alleges different zoning violations than the 1999 case. In the 1999 case, the City alleged that Clair had built a structure in excess of the maximum allowable height, in contradiction of plans submitted for his zoning permit, and to be impermissibly used as a residence or business. By contrast, in the 2013 case, the City alleged that Clair was residing in an "illegal residential structure" because he failed to obtain necessary permits for it. Whether Clair obtained required permits is not the same issue as whether he constructed a building of excessive height or in contradiction to a zoning permit. Because the 2013 case involves different zoning issues on a different parcel of real property than the 1999 case, the trial court erred in finding that the April 21, 2000 settlement entry operated to bar the current action.

{¶23} The issue brought before the court in the 1999 case by the City's motion for contempt was whether Clair had violated the April 21, 2000 settlement entry by residing in a structure located at 244 East Comet Road. The court determined that he had not, reasoning that the settlement entry related exclusively to 252 East Comet Road. In rendering its April 20, 2011 decision, the court determined that the scope of the settlement entry did not extend to "structures located at 244 East Comet Road." The issue in the 2013 case, on the other hand, is whether 244 East Comet Road is in compliance with zoning ordinances regarding permitting requirements. It is axiomatic that the court in the 1999 case did not determine whether 244 East Comet Road was in compliance with any of the City's zoning ordinances when it ruled that 244 East Comet Road was not covered by the settlement entry.

{¶24} Moreover, although the trial judge in the 2013 case purported to apply the doctrine of res judicata, she appears to have re-examined the underlying facts regarding whether the "structure" was covered by the settlement entry.[3] In the 1999 case, the trial judge determined the April 21, 2000 settlement entry did not "include structures located at 244 East Comet Road." By contrast, the trial judge in the 2013 case found the same structure was involved in both cases albeit at different addresses. After noting that the 2013 case "involves a structure located at the temporary address of 244 East Comet R[oa]d," the judge in the second case determined "[t]his building was formerly included in the parcel of property at 252 East Comet R[oa]d" and, therefore, was the subject matter of the earlier case including the April 21, 2000 settlement entry.

[3] We express no opinion regarding whether the parties intended the structure on the parcel now identified as 244 East Comet Road to be covered by their settlement agreement. Rather, we base our decision on whether Clair met his burden of proving an identity of issues given the entries in the 1999 case.

{¶25} Even Clair contends in his brief to this Court that "corrections" are needed to "put the trial courts [sic] most recent decision in accord with the previous decisions of the previous court." The inconsistent decisions rendered by different judges in the 1999 case and the 2013 case run counter to one of the primary policies underlying the doctrine of res judicata, namely "foster[ing] reliance on judicial action by minimizing the possibility of inconsistent decisions." (Internal quotations omitted.) *See Haley v. Haggard*, 9th Dist. Lorain No. 96CA006541, 1997 WL 625478, *3 (Oct. 1, 1997). The trial court's misapplication of res judicata in the current case has turned the doctrine on its head by creating, rather than preventing, an inconsistent result.

{¶26} Finally, it is evident from the transcripts that Clair's position in the 1999 case was that the City must file a separate lawsuit if it was alleging zoning violations existed at 244 East Comet Road. In the 1999 case, Clair's attorney argued, "the issue before this [c]ourt only concerns 252 [East Comet Road]" and the City cannot "back-door" or "bootstrap" issues about 244 East Comet Road to 252 East Comet Road. He continued, "[n]ow, the City [] ha[s] concerns about 244 East Comet [Road] * * * they have to file the appropriate action to bring that matter before a court who has jurisdiction over that matter." In addition, Clair himself testified in the 1999 case that he "agreed not to reside in the structure at 252 [East Comet Road]" and that the structure that the City was seeking to hold him in contempt for residing in "is not the structure at 252 [East Comet Road]." We are mindful of "the ever-present goal of substantial justice." *Galvin*, 2008-Ohio-3202, at ¶ 19. Given the contrary positions advanced by Clair in the two cases, he will not be heard to argue that res judicata prevents the current suit from proceeding. *See Davis v. Wal-Mart Stores, Inc.*, 93 Ohio St.3d 488, 491 (2001) ("res judicata is not a shield to protect the blameworthy").

{¶27} The City's first assignment of error is sustained.

Assignment of Error Number Two

THE TRIAL COURT ERRED WHEN IT REFUSED TO RENDER A DECLARATORY JUDGMENT BECAUSE A REAL CONTROVERSY EXISTED BETWEEN THE PARTIES WHICH WOULD TERMINATE BY THE ISSUANCE OF A DECLARATORY JUDGMENT.

{¶28} In its second assignment of error, the City argues that a justiciable controversy exists regarding whether Clair illegally constructed a single-family residence at 244 East Comet Road, thereby, entitling it to a declaratory judgment. Based on our disposition of the City's first assignment of error, this assignment of error is moot and we decline to address it. *See* App.R. 12(A)(1)(c).

III

{¶29} As a final matter, we address Clair's motion for sanctions against the City for bringing an allegedly frivolous appeal. App.R. 23 provides: "If a court of appeals shall determine that an appeal is frivolous, it may require the appellant to pay the reasonable expenses of the appellee including attorney fees and costs." We have sustained the City's first assignment of error; therefore, this appeal had merit and was not frivolous. Accordingly, we deny Clair's motion for sanctions.

IV

{¶30} The City's first assignment of error is sustained. Its second assignment of error is moot. The judgment of the Summit County Court of Common Pleas is reversed and this matter is remanded for further proceedings consistent with this opinion.

Judgment reversed
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

BETH WHITMORE
FOR THE COURT

CARR, P. J.
MOORE, J.
CONCUR.

APPEARANCES:

STEPHEN J. PRUNESKI, Attorney at Law, for Appellant.

GARY CLAIR, pro se, Appellee.