

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

STATE OF OHIO, EX REL. LORA
ELIAS D.D.S., INC.,

:

:

Relator-Appellant,

:

No. 112085

v.

:

NORTHEAST OHIO REGIONAL
SEWER DISTRICT,

:

Respondent-Appellee.

:

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED

RELEASED AND JOURNALIZED: June 29, 2023

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-20-937279

Appearances:

Logan Trombley and Warner Mendenhall, *for appellant.*

McDonald Hopkins LLC, Michael J. Matasich, and
Tanjeet Dhillon; and Tamar Gontovnik, *for appellee.*

MICHELLE J. SHEEHAN, J.:

{¶ 1} Relator-appellant Lora Elias, D.D.S., Inc. (“Elias”) alleged that
respondent-appellee Northeast Ohio Regional Sewer District (“the sewer district”)

severed certain stormwater pipes connected to its building during the construction of a sewer project and caused flooding in the building. Elias first filed a tort action claiming the sewer district's subcontractor acted negligently. The trial court found the sewer district immune and dismissed the case. Seven months later, Elias filed a complaint claiming inverse condemnation and seeking a writ of mandamus to compel the sewer district to institute appropriation proceedings in the probate court. The trial court found the inverse condemnation claim was barred by res judicata. Our review indicates that existing precedent required Elias to plead mandamus as an alternative relief in the first lawsuit. Accordingly, we affirm the judgment of the trial court.

Background

a. The Negligence Case

{¶ 2} In August 2019, Elias filed a complaint in the Cuyahoga County Court of Common Pleas against the sewer district and the city of Cleveland. The complaint concerned a building it owned located on Fleet Avenue in Cleveland. According to the complaint, the building, constructed in 1870 and acquired by Elias in 2003, utilized two stormwater pipes (referred to by Elias as the laterals) emanating from the east and west sides of the building to connect to the Southerly Sewershed. The complaint alleged that in November 2016, during the sewer project called the “Fleet

Avenue Green Infrastructure Project,”¹ a subcontractor for the sewer project dug a trench in the street in front of the building and negligently “severed and/or blocked” the laterals, which caused flooding and water damage to the building, and, even though Elias complained to the city about the water damage since November 2016, nothing was done to repair the pipes.

{¶ 3} Exhibit No. 4 attached to the complaint is a report prepared in December 2016 by an engineering company upon the request of Elias’s insurance company. The report stated that Karvo Paving Company and DRS Drilling performed the sewer construction. It concluded that “cosmetic damage likely occurred as a result of the reported nearby construction activities”; several areas of damages within the first floor drywall appeared to be related to the finishing techniques utilized for the drywall rather than the vibrations from the construction; two cracks in the east room and the first floor kitchen were likely not caused by the construction; the cracks within the tiled floors in the first floor were likely due to the sagging of the floor joists; the cabinets and mirrors fastened to the walls likely

¹ Regarding the sewer project, paragraph four of the complaint alleged the following:

From 2014 to 2017, The City and NEORSD planned, financed, contracted out, and constructed the Fleet Avenue Green Infrastructure Project (the “Project”). Exhibit 1. The Project sought to create a storm water control measure whereby storm water would be [sent through] underground pipes [after being] collected along Fleet Avenue from East 53rd Street to East 65th Street to be stored in a basin underlying a vacant parcel located on the same block as the Building. The Project is a secondary system separate from and not integrated into the Southerly Sewershed.

became dislodged from the vibrations from the construction; and the damage to the foundation walls of the basement appeared “historic and was consistent with long-term ground and/or surface water intrusion.”

{¶ 4} Exhibit No. 5 attached to the complaint was a report prepared in January 2017 from an engineering company hired by Elias. The company performed an underground video scoping to inspect the storm drains but reported that it could not be seen if “the path was blocked or not hooked up.” The report stated that one side of the building “is seeing more settlement and [it] could be because storm drains were not properly tied into the new storm sewer system during road construction.”

{¶ 5} Exhibit No. 2 attached to the complaint was a report prepared in March 2017 by another engineering company hired by Elias to “scope” the laterals. The company found that “both sewers appeared not to be connected to any sewer.”

{¶ 6} The complaint alleged that, in March 2019, Elias had the laterals excavated to determine if they were connected to the Southerly Sewershed and found that they were disconnected from the pipe system leading to the city’s sewer system.

{¶ 7} The complaint raised a single claim of negligence and sought over \$600,000 in property damage. Elias alleged that “the severed and/or blocked Laterals have caused extensive flooding and water damage” to the building’s foundation, which resulted in “extensive settling, wall cracks, ceiling collapses, and door/window misalignments” in the building.

{¶ 8} The sewer district moved to dismiss on several grounds. First, it argued that it was not liable for acts performed by an independent contractor. Second, it argued that, as a political subdivision, it was immune from the negligence claim raised by Elias pursuant to Revised Code Chapter 2744. Third, the sewer district argued that the claim was time barred by the two-year statute of limitations set forth in R.C. 2744.04 because Elias complained about the water damage beginning in November 2016 and the video inspection of the pipes in March 2017 showed the pipes were unconnected. Yet, Elias did not file the complaint until August 2019.

{¶ 9} Elias filed a brief opposing the motion to dismiss, claiming that the sewer district was not immune. Elias also argued that the statute of limitations for negligence claims against a political subdivision for damage to real property is four years, not two years, and it had not expired.

{¶ 10} On January 27, 2020, the trial court granted the motion, finding that Elias's claim was time barred pursuant to R.C. 2744.04 and, further, that the sewer district was immune from Elias's claim. The court dismissed the case with prejudice. In the same judgment entry, it also granted the city of Cleveland's motion for judgment on the pleadings. Elias did not appeal from the trial court's decision.

b. Subsequent Complaint for a Writ of Mandamus

{¶ 11} Subsequently, on September 15, 2020, Elias filed a complaint for a writ of mandamus in the trial court, naming only the sewer district as the respondent. Elias raised a claim of inverse condemnation. It claimed that the

flooding and water damage to its building constituted a taking and sought a writ of mandamus to compel the sewer district to institute appropriation proceedings in the probate court pursuant to Revised Code Chapter 163.

{¶ 12} The factual allegations in the complaint for a writ of mandamus were substantially similar to the first complaint with one difference: while the first complaint alleged the sewer district's subcontractor negligently severed the pipes, the second complaint alleged that the sewer district "intended the Laterals to not connect to the Southerly Sewershed."

{¶ 13} The sewer district filed a combined motion to dismiss and motion for summary judgment. It attached to the motion the record of the prior case and argued that the inverse condemnation claim was barred by res judicata because the two cases were based on the allegation of flooding and water damage to its building caused by the sewer construction. Elias filed a brief in opposition to the combined motion.

{¶ 14} The trial court agreed with the sewer district and granted its motion to dismiss with prejudice. The court noted that it had previously dismissed Elias's prior action based on the statute of limitations and political subdivision immunity and, therefore, the instant case was barred by res judicata.

Law and Analysis

{¶ 15} On appeal, Elias raises the following assignments of error for our review:

I. Under Ohio Constitution Article I, Section 19, res judicata cannot apply to an inverse condemnation action against a political subdivision when the prior case precludes an adequate remedy at law.

II. Res judicata is not applicable because the prior case does not concern the same occurrence as the subsequent case.

For ease of discussion, we address these two assignments of error jointly.

{¶ 16} As an initial matter, we note that the court may only look to the complaint when ruling on a Civ.R. 12(B)(6) motion yet a res judicata analysis necessarily require an examination of materials beyond the complaint; therefore, the court has held that a Civ.R. 12(B)(6) motion is not the proper method for resolving a defense on the basis of res judicata. *Hutchinson v. Beazer E., Inc.*, 8th Dist. Cuyahoga Nos. 86635 and 87897, 2006-Ohio-6761, ¶ 15, citing *State ex rel. Freeman v. Morris*, 62 Ohio St.3d 107, 109, 579 N.E.2d 702 (1991), and *Shaper v. Tracy*, 73 Ohio St.3d 1211, 1212, 654 N.E.2d 1268 (1995). Rather, “[s]ummary judgment is the preferred method by which to address res judicata.” *Id.*

{¶ 17} In this case, the prior tort action was not referenced on the face of the complaint. However, the sewer district filed a combined motion to dismiss and motion for summary judgment and attached the record of the prior proceeding to the motion. While the trial court looked beyond the face of the mandamus complaint and considered the prior case in applying res judicata to the instant case, it granted the motion to dismiss, even though it should have ruled on the motion for summary judgment instead. The error, however, is innocuous under the circumstances of this case, where Elias had an opportunity to respond to the sewer

district's motion for summary judgment and present appropriate evidence under Civ.R. 56, and it filed a brief opposing the combined motion to dismiss and motion for summary judgment.

{¶ 18} Accordingly, we review this appeal under the summary judgment standard. Summary judgment is appropriate where it appears that (1) “there is no genuine issue as to any material fact;” (2) “the moving party is entitled to judgment as a matter of law;” and (3) “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, who is entitled to have the evidence construed most strongly in his favor.” *Harless v. Willis Day Warehousing Co., Inc.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978). Pursuant to Civ.R. 56(C), summary judgment shall be rendered 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.” We review a trial court's grant of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996- Ohio 336, 671 N.E.2d 241 (1996).

a. Taking Claim and Inverse Condemnation Claim for a Writ of Mandamus

{¶ 19} Here, Elias’s mandamus complaint similarly alleged that its building sustained water damage due to the stormwater pipes being disconnected during the sewer project. The mandamus complaint raised a different cause of action however. While the previous lawsuit raised a cause of action of negligence, the instant complaint raised a claim of inverse condemnation. It claimed the damage sustained by the building due to the sewer project constituted a taking without just compensation and sought a writ of mandamus to direct the sewer district to institute appropriation proceeding so that Elias could be compensated for the damage.

{¶ 20} Article I, Section 19, Ohio Constitution prohibits the taking of private property without just compensation. *State ex rel. Shemo v. Mayfield Hts.*, 95 Ohio St.3d 59, 63, 765 N.E.2d 345 (2002). Inverse condemnation is “a cause of action against the government to recover the value of property taken by the government without formal exercise of the power of eminent domain.” *State ex rel. Doner v. Zody*, 130 Ohio St.3d 446, 2011-Ohio-6117, 958 N.E.2d 1235, ¶ 62, quoting *Moden v. United States*, 404 F.3d 1335, 1342 (Fed.Cir.2005).

{¶ 21} Inverse condemnation has been described as a “shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted.” *Cincinnati v. Chavez Props.*, 117 Ohio App.3d 269, 274, 690 N.E.2d 561 (1st.Dist 1996), quoting *United States v. Clarke*, 445 U.S. 253, 257, 100 S. Ct. 1127, 63 L.Ed.2d

373 (1980). Inverse condemnation can be pursued where “certain government activities, such as operating an airport or pursuing an urban renewal project, substantially interfere with the use and enjoyment of property.” *Chavez* at 274.

{¶ 22} “To be entitled to a writ of mandamus for inverse condemnation, an owner ‘must establish a clear legal right to compel the city to commence appropriation, a corresponding legal duty on the part of the city to institute that action, and the lack of an adequate remedy * * * in the ordinary course of law.’” *State ex rel. Lillis v. Summit*, 2017-Ohio-1539, 88 N.E.3d 1267, ¶ 15 (9th Dist.), quoting *State ex rel. Gilbert v. Cincinnati*, 125 Ohio St.3d 385, 2010-Ohio-1473, 928 N.E.2d 706, ¶ 15. As the Supreme Court of Ohio held, “Mandamus is the appropriate action to compel public authorities to institute appropriation proceedings where an involuntary taking of private property is alleged.” *Shemo* at 63. *See also State ex rel. Shelly Materials v. Clark Cty. Bd. of Commrs.*, 115 Ohio St.3d 337, 2007-Ohio-5022, 875 N.E.2d 59, ¶ 15 (“Mandamus is the appropriate action to compel public authorities to commence appropriation cases when an involuntary taking of private property is alleged.”).

b. Res Judicata

{¶ 23} In this case, however, we do not reach the issue of whether Elias demonstrated its entitlement to a writ of mandamus. Pursuant to existing precedent, Elias’s claim for a writ of mandamus is barred by res judicata.

{¶ 24} The issue of whether res judicata applies in a particular situation is a question of law reviewed under a de novo standard. *Nationwide Ins. Co. v. Davey*

Tree Expert Co., 166 Ohio App.3d 268, 2006-Ohio-2018, 850 N.E.2d 127, ¶ 15 (11th Dist.). The question here is whether res judicata barred Elias from filing the complaint for inverse condemnation seeking relief for a writ of mandamus after plaintiff's tort complaint was dismissed by the trial court with prejudice.

{¶ 25} Pursuant to the doctrine of res judicata, “[a] valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transactions or occurrence that was the subject matter of the previous action.” *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 653 N.E.2d 226 (1995), syllabus. Res judicata serves to bar claims that were brought and those that “were or might have been litigated in a first lawsuit.” *Rogers v. Whitehall*, 25 Ohio St.3d 67, 69, 494 N.E.2d 1387 (1986). Res judicata bars a subsequent action when (1) there is a valid final judgment on the merits in an earlier action, (2) the second action involves the same parties, (3) the second action raises claims that were or could have been litigated in the first action, and (4) the second action arises out of the same transaction or occurrence that was the subject of the first action. *State ex rel. Armatas v. Plain Twp. Bd. of Zoning Appeals*, 160 Ohio St.3d 161, 2020-Ohio-2973, 154 N.E.3d 74, ¶ 9. The doctrine of res judicata applies to a writ of mandamus. *State ex rel. Mora v. Wilkinson*, 105 Ohio St.3d 272, 2005-Ohio-1509, 824 N.E.2d 1000, ¶ 15.

{¶ 26} In the instant case, Elias first filed a negligence action against the sewer district and the trial court dismissed the case with prejudice. A dismissal with prejudice upon a Civ.R. 12(B) motion is a judgment on the merits that operated

under the doctrine of res judicata to bar a subsequent action. *Briggs v. Cincinnati Rec. Comm.*, 132 Ohio App.3d 610, 611, 725 N.E.2d 1161 (1st Dist.1998). As such, the prior tort case was decided on the merits. The same parties — Elias and the sewer district — were involved in the second action. Therefore, the first and second elements of res judicata are met.

{¶ 27} Regarding the third element, Elias’s mandamus action would be barred if it could have been brought in the first lawsuit. Under Ohio law, when a property owner raises a taking claim pursuant to Ohio Constitution, Article I, Section 19, “[m]andamus is the appropriate action to compel public authorities to institute appropriation proceedings” for just compensation of the alleged taking. *Shemo*, 95 Ohio St.3d at 63, 765 N.E.2d 345. In a case factually similar to this case, *State ex rel. Hensley v. Columbus*, 10th Dist. Franklin No. 10AP-840, 2011-Ohio-3311, ¶ 24, *discretionary appeal not allowed*, 130 Ohio St.3d 1475, 2011-Ohio-5605, 957 N.E.2d 1168, the Tenth District held that the property owner could have brought a claim for mandamus as part of the initial lawsuit and the failure to do so meant that the subsequent claim for mandamus was barred by res judicata.

{¶ 28} In *Hensley*, several property owners whose wells were dried up as a result of the city of Columbus’s construction of a sewer line filed a lawsuit in the trial court asserting they were damaged by the construction. The trial court granted summary judgment in favor of the city on grounds of immunity. Subsequently, the property owners filed a mandamus action for a writ compelling the city to institute

appropriation proceedings, claiming the city's conduct constituted a taking without compensation in violation of Article I, Section 19, Ohio Constitution.

{¶ 29} In finding res judicata barred the subsequent mandamus claim, the Tenth District applied the Supreme Court of Ohio's decision in *State ex rel. Arcadia Acres v. Ohio Dept. of Job & Family Servs.*, 123 Ohio St.3d 54, 2009-Ohio-4176, 914 N.E.2d 170. In *Arcadia*, plaintiff nursing homes initially filed a complaint for declaratory relief seeking a change in reimbursement rates. The trial court dismissed the declaratory judgment action on the ground that mandamus was the sole vehicle for the relief sought. Plaintiffs then filed a mandamus action. The Supreme Court of Ohio held that res judicata barred the mandamus action because plaintiffs "had a full and fair opportunity to plead mandamus when they brought the declaratory-judgment case" and that "nothing prevented the nursing homes from adopting the cautious approach of pleading two alternative causes of action." *Arcadia* at ¶ 17.

{¶ 30} Applying *Arcadia*, the Tenth District reasoned that nothing prevented the property owners from pursuing a mandamus claim to seek compensation for the alleged damage stemming from the city's construction of the sewer line and the failure to do so precludes the subsequent mandamus action. *Hensley*, 10th Dist. Franklin No. 10AP-840, 2011-Ohio-3311, at ¶ 24. See also *State ex rel. Marcum v. Florence Twp.*, 6th Dist. Erie No. E-16-029, 2017-Ohio-6916 (a subsequent mandamus action was barred by res judicata after the first complaint claiming negligence by the municipality in constructing a drainage project was

dismissed on immunity grounds; plaintiff could have amended the first complaint to include a claim in mandamus or filed a new action in mandamus prior to the resolution of the negligence claim); *State ex rel. McNamara v. Rittman*, 9th Dist. Wayne No. 08CA0011, 2009-Ohio-911 (res judicata barred residents' mandamus action relating to a municipality's water-pumping operation because residents could have pursued a mandamus action at the same of the initial action alleging damages); and *Riveredge Dentistry Partnership v. Cleveland*, N.D. Ohio No. 1:22-cv-1007, 2022 U.S. Dist. LEXIS 229995, 20 (Dec. 21, 2022) (In Ohio, a taking claim must be brought through a mandamus action and such mandamus relief can be pleaded as an alternative remedy on a substantive state law claim; thus, the property owner was not required to obtain a ruling on its negligence claim before it could pursue a taking claim, and therefore, the third element of res judicata was met.).

{¶ 31} Similarly here, Elias had the full and fair opportunity to plead mandamus when she brought the first lawsuit and, therefore, under existing precedent, res judicata bars the mandamus claim in a subsequent action. Elias argues on appeal that it could not have pled mandamus relief until it received an unfavorable ruling in the first action and also complains that the existing law makes it “procedurally impossible” for property owners to bring an inverse condemnation claim when it is unclear if political subdivision immunity applies. Elias contends that “property owners should be allowed to pursue the negligence claim first to determine the political subdivision immunity issue, but then be allowed to pursue an inverse condemnation action afterwards if the first precludes the alternative

remedy.” Elias’s contention is without merit. Pursuant to *Arcadia* and *Hensley*, nothing prevented Elias from “adopting the cautious approach of pleading two alternative causes of action.” *Arcadia* at ¶ 17. Until the Supreme Court of Ohio instructs otherwise, we are bound by existing precedent.

{¶ 32} Regarding the fourth element of res judicata, the issue is whether the second action arose out of the same occurrence that was the subject of the first action. Our review of the complaints indicates that the two complaints concerned the same occurrence: during the construction of the Fleet Avenue Green Infrastructure Project, the stormwater pipes in the subject building were severed, which caused flooding and water damage to the building beginning in November 2016. While the first complaint alleged a subcontractor negligently severed the pipes and the sewer district failed to repair them, the second complaint alleged the sewer district “intended the Laterals to not connect to the Southerly Sewershed.” Nonetheless, the two complaints concerned the same occurrence: the flooding and water damage to the subject building caused by the severing of the pipes during the construction of the sewer project.

{¶ 33} To circumvent the fourth element, Elias claims the second complaint was based on the sewer district’s continual refusal to repair the severed laterals *after* January 27, 2020, the date the trial court dismissed the first action. Elias claimed that a claim “arises again every day the severed laterals are not fixed,” citing *State ex rel. Nickoli v. Erie Metroparks*, 124 Ohio St.3d 449, 2010-Ohio-606, 923 N.E.2d 588.

{¶ 34} In *Nickoli*, the relators filed a mandamus action to compel the commencement of appropriation proceedings. The court held that the statute of limitations barred the relators' taking claim, rejecting their claim that their case was not time barred due to the "continuous-violation doctrine." In discussing the "continuous-violation doctrine" in the context of the statute of limitations, the court distinguished continuing violations from continuing *effects* of prior violations and observed that the present effects of past violations do not trigger a continuous-violation exception to the application of the statute of limitations. *Id.* at ¶ 32. The discussion of the "continuous-violation doctrine" in *Nickoli* concerns the application of the statute of limitations and is irrelevant here.

{¶ 35} There are no genuine issues of material fact regarding the application of res judicata in this case. Under existing precedent, mandamus can be pleaded as an alternative remedy in the initial tort action against the governmental entity and Elias's failure to pursue a writ of mandamus as part of the earlier case precluded the instant mandamus complaint. The trial court properly found the instant complaint for an inverse condemnation barred by res judicata. The first and second assignments of error are without merit.

{¶ 36} Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MICHELLE J. SHEEHAN, JUDGE

ANITA LASTER MAYS, A.J., and
MARY J. BOYLE, J., CONCUR