

**IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT**

ELBERT WALTON, JR.)	
)	
Appellee,)	
)	
vs.)	Appeal No. ED 87078
)	
CITY OF BERKELEY, MISSOURI)	
)	
Appellant.)	

Appeal from the Circuit Court of Saint Louis County
The Honorable Steven H. Goldman
Circuit Court Cause No. 01CC-000336

APPELLANT'S BRIEF

Submitted by:

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STATEMENT OF JURISDICTION

Plaintiff/Appellee Elbert Walton brought an action for breach of contract and wrongful removal for his dismissal from the position of City Attorney for Berkeley, Missouri. The Circuit Court of St. Louis County dismissed the breach of contract cause and entered judgment in favor of plaintiff on the equitable claim of wrongful removal on March 8, 2002. Both the City of Berkeley and Elbert Walton appealed the trial court's decision to the Missouri Court of Appeals. The Appeals court reversed in part as to Count I (Wrongful Removal) and the cause remanded to the trial court for further proceedings as to Count I, and affirmed in all other respects in accordance with the Appeals Court opinion delivered August 26, 2003. Thereafter, plaintiff, requested leave of the trial court to amend his pleading, which the trial court denied. The Court entered judgment in favor of Defendant City of Berkeley, and Plaintiff appealed.

On the second appeal the Missouri Court of Appeals reversed the trial court and remanded the cause with directions to grant Walton leave to amend his pleadings and for further proceedings in accordance with the Appeals court opinion delivered March 22, 2005. Walton amended his

petition and the trial court thereafter entered judgment in his favor. The City appealed.

The Mo. Rev. Stat. 512.020 provides, among other things, that any party to a suit aggrieved by any judgment of any trial court in any civil from which an appeal is not prohibited by the constitution, nor clearly limited in special statutory proceedings, may take his appeal to a court having Appellant jurisdiction from any final judgment.

This appeal does not involve any issue within the exclusive jurisdiction of the Missouri Supreme Court. Therefore, Article V, Section III of the Missouri Constitution vests this Court with Appellant jurisdiction. Territorial jurisdiction exists by reason of Mo. Rev. Stat. 477.050.

STATEMENT OF FACTS

Plaintiff/Appellant Elbert Walton (“Walton”) brought an action for breach of contract and wrongful removal for his dismissal from the position of City Attorney for Berkeley, Missouri (“Berkeley”). In September, 1998, February, 1999 and May, 1999, the City Council received recommendations for termination of Walton as City Attorney from the City Manager. (L.F. Transcript 411-416, 467) On each occasion, the Council voted to terminate Walton. (L.F. Transcript 411-416, 467) However, due to the political turmoil and multiple lawsuits filed, Walton acted as City Attorney until his removal in May, 1999. (L.F. Transcript 138, 173-180)

On January 29, 2001, approximately twenty months, after his last removal, Walton filed a two count petition for wrongful removal of City Attorney and breach of contract against Berkeley. (L.F. 009) On February 27, 2001, Berkeley answered plaintiffs’ petition and stated in their answer that “plaintiff fails to state a claim for which relief may be granted.” (L.F. 026-028)

In his wrongful removal claim, Plaintiff/Appellant maintained, among other things, that Berkeley did not follow its Charter when they removed him from office. (L.F. 009-011) Article V, Section 13 of the Berkeley City Charter provides that the City Attorney may be removed from office by the

City Manager, upon approval of the City Council. (L.F. 009-011) Walton asserts that the City Council never approved his termination; therefore, he remained the City Attorney up to the time of the Circuit Court's judgment. (L.F. 009-011) Further, as a direct and proximate cause of his wrongful removal, Walton claimed damages in a sum in excess of One Hundred and Fifty Thousand Dollars (\$150,000). (L.F. 011)

In the second count of his petition, Walton claimed a breach of contract. (L.F. 011) It was alleged that on March 1, 1997, Defendant and Plaintiff entered into a contract by which plaintiff agreed to render legal services to the Defendant and Defendant agreed to pay Plaintiff fees for such services rendered plus expenses in consideration thereof. (L.F. 011) Walton maintained that this agreement was modified by a second agreement dated April 1, 1998. (L.F. 011-012). According to Walton, Berkeley breached its agreement, when the City Manager removed him without the approval of the City Council. (L.F. 012) Walton claimed damages in a sum in excess of Sixty Seven Thousand, Five Hundred Dollars (\$67,500).

On March 4, 2002, Defendant filed a Motion to dismiss claiming (1) that the purported agreements identified in Count II of Plaintiff's action were executed in violation of RSMo. § 432.070 and are therefore void; (2) the State of Missouri does not have a cause of action for wrongful termination;

and (3) the plaintiff failed to state a claim upon which relief may be granted on both counts (L.F. 051-053) The Court did not rule on Defendant's motion and jury selection commenced. (L.F. Transcript 002)

At the close of the plaintiff's case in chief, Defendant moved for a directed verdict, which the Court sustained as to count II (breach of contract). (L.F. Transcript 395-401) As to the wrongful removal count, the Court indicated that "any inadequacies in the pleading of the first count are cured by the evidence in the case, so that the pleadings in the first count are amended, in effect, by the evidence to the extent that they aren't proper or not complete." (L.F. Transcript 399) The Court further stated that he would consider the first count as an equitable claim for reinstatement of back pay, because he did not know of any legal cause of action that would fit. (L.F. Transcript, 399) Both parties objected. (L.F. Transcript, 399-402) Defendant voiced its objection, stating, among other things:

"we believe that plaintiff in this cause of action has failed to state a cause of action for which relief can be granted. That was one of the affirmative defenses in the answer propounded by the City of Berkeley. We believe that the plaintiff failed to give the City of Berkeley proper notice of this cause of action. This matter was not filed as an equity matter. It has always been, in our opinion, a cause of action that has not been properly pled, and for that reason, we wanted to voice our objection." (L.F. Transcript, 401-102)

After argument and over Defendant's objection, the Court dismissed the jury and proceeded on the equitable claim of wrongful removal. (L.F. Transcript 395-409)

At the close of this case, the Court made findings and entered judgment in favor of plaintiff Elbert Walton and against Defendant City of Berkeley, in a total amount of One Hundred and Fifty Six Thousand, Forty-Nine and 82/100ths Dollars (\$156,049.82). (L.F. 065-067)

Both the City of Berkeley and Elbert Walton appealed the trial court's decision to the Missouri Court of Appeals. The Appeals court reversed in part as to Count I (Wrongful Removal) and the cause remanded to the trial court for further proceedings as to Count I, and affirmed in all other respects in accordance with the Appeals Court opinion delivered August 26, 2003. Thereafter, plaintiff, requested leave of the trial court to amend his pleading, which the trial court denied. The Court entered judgment in favor of Defendant City of Berkeley, and Plaintiff appealed.

On the second appeal the Missouri Court of Appeals reversed the trial court and remanded the cause with directions to grant Walton leave to amend his pleadings and for further proceedings in accordance with the Appeals court opinion delivered March 22, 2005. Walton amended his

petition and the trial court thereafter entered judgment in his favor. The City appealed.

(Some of the facts are referenced by the legal file in the first appeal

Walton v. City of Berkeley, 118 S.W. 3d 617 (Mo. App. E.D. 2003).)

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN GRANTING EQUITABLE RELIEF ON PLAINTIFF'S AMENDED COUNT I CLAIM WHEN THERE IS NO EVIDENCE IN THE RECORD THAT PLAINTIFF HAD NO ADEQUATE REMEDY AT LAW.

Blue Cross Health Services v. Sauer, 800 S.W. 2d 72, 76 (Mo. App. E.D. 1990)

Kerber v. Alt. 275 S.W. 2d 604, 606 (Mo. App. St.L.Dist., 1955)

Newmark v. Vogelgesang, 915 S.W. 2d. 337, 339 (Mo. App. E.D. 1996)

Schildknecht v. Director of Revenue, 901 S.W. 2d 348, 349 (Mo. App. E.D. 1995)

Walton v. City of Berkeley, 118 S.W. 3d 617 (Mo. App. E.D. 2003)

II. THE TRIAL COURT ERRED TO THE EXTENT THAT IT SEEKS TO GRANT PLAINTIFF RELIEF BASE ON CONTRACT OR BREACH THEREOF, RES JUDICATA BARRS ANY CONTRACT CLAIM, AS THAT HAD PREVIOUSLY BEEN ADJUDICATED AND SUSTAINED BY THE MISSOURI COURT OF APPEALS.

Chesterfield Village v. City of Chesterfield, 64 S.W. 3d. 315, 318 (Mo banc. 2002)

Elam v. City of St. Ann, 784 S.W. 2d 330, 334 (Mo. App. E.D., 1990).

In re Marriage of Caby, 825 S.W.2d 56, 59 (Mo. App. 1992).
(Mo.App. E.D. 1996)

Travis v. Contico Intern., Inc., 928 S.W.2d 367, 369 (Mo. App. 1996)

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING EQUITABLE RELIEF ON PLAINTIFF’S AMENDED COUNT I CLAIM WHEN THERE IS NO EVIDENCE IN THE RECORD THAT PLAINTIFF HAD NO ADEQUATE REMEDY AT LAW.

This Court in the first appeal of this cause Walton v. City of Berkeley, 118 S.W. 3d 617 (Mo. App. E.D. 2003) held that “(e)quitable relief is extraordinary and should not be applied when an adequate legal remedy exists.” (citing) Newmark v. Vogelgesang, 915 S.W. 2d. 337, 339 (Mo. App. E.D. 1996) “Furthermore, to invoke equity jurisdiction the party seeking equitable relief must plead and **prove** there is no adequate remedy at law. (emphasis added) Blue Cross Health Services v. Sauer, 800 S.W. 2d 72, 76 (Mo. App. E.D. 1990) Pleading and proving the lack of an adequate remedy at law are jurisdictional, and their absence may be taken advantage of by the adverse party at any stage of the proceeding, or even by the court itself. Kerber v. Alt. 275 S.W. 2d 604, 606 (Mo. App. St.L.Dist., 1955) A circuit court does not possess the jurisdiction to grant equitable relief where there is an adequate remedy at law. Schildknecht v. Director of Revenue, 901 S.W. 2d 348, 349 (Mo. App. E.D. 1995)

In the case at bar, the trial court pursuant to the remand directive of this court, allowed plaintiff to amend his petition. Plaintiff amended his

petition to set out one count for injunction, reinstatement, back pay, and wrongful removal, in which he pled that he had no adequate remedy at law. (L.F. 54) By stipulation, the parties submitted upon the evidentiary record of the first trial. No additional evidence was proffered by either party. As such, the record is absent of any proof that the plaintiff had no adequate remedy at law. Further, this court previously stated in its first opinion Walton v. City of Berkeley, 118 S.W. 3d 617 (Mo. App. E.D. 2003), which is predicated on the same record, that “plaintiff did not plead or **present any evidence** that there was not an adequate remedy at law for the cause of action raised in Count I of his petition.” (emphasis added)

Because there is an absence of any evidence in the record that plaintiff had no adequate remedy at law, the trial court erred in granting equitable relief on plaintiff’s amended petition.

II. THE TRIAL COURT ERRED TO THE EXTENT THAT IT SEEKS TO GRANT PLAINTIFF RELIEF BASED ON CONTRACT OR BREACH THEREOF, RES JUDICATA BARRS ANY CONTRACT CLAIM, AS THAT CLAIM HAS PREVIOUSLY BEEN ADJUDICATED AND SUSTAINED BY THE MISSOURI COURT OF APPEALS.

To the extent that the trial court is awarding plaintiff relief based on breach of contract, the court lacks jurisdiction. Any breach of contract claim or award is barred by res judicata.

The trial court in its first judgment concluded that the contract was not lawfully executed and thus unenforceable under the law. The contract action was dismissed; the plaintiff appealed and this Court affirmed the trial court's judgment on this point.

Res judicata means "a thing adjudicated" and is a common law doctrine that precludes relitigation of a claim formerly made. Chesterfield Village v. City of Chesterfield, 64 S.W. 3d. 315, 318 (Mo banc. 2002) Res judicata precludes the same parties from re-litigating the same cause of action. Elam v. City of St. Ann, 784 S.W. 2d 330, 334 (Mo. App. E.D., 1990). As a general rule the validity of a judgment may only be impeached in an action by a formal appeal, "the sole object of which is to deny and

disprove the judgment." Travis v. Contico Intern., Inc., 928 S.W.2d 367, 369 (Mo. App. 1996), quoting, In re Marriage of Caby, 825 S.W.2d 56, 59 (Mo. App. 1992).

Because the Missouri Court of Appeals has already sustained the breach of contract judgment of the trial court, res judicata bars the trial court from amending said judgment.

CONCLUSION

For all the foregoing reasons, the appellate court should reverse the trial court's judgment.

Respectfully submitted

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CERTIFICATION

The undersigned counsel certifies that the word count of the foregoing brief complies with the limitations contained in Rule 84.06(b) and includes the information required by Rule 55.03. The word count is 2609.

Furthermore, pursuant to the Missouri Rules of Appellate Procedure, Appellants hereby state that the computer diskette provided herewith is scanned and is virus free.

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CERTIFICATE OF SERVICE

The undersigned certifies that two copies of the foregoing brief were served by U.S. Mail postage pre-paid on the following attorneys:

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on the 20th day of March, 2006.

Donnell Smith