Missouri Court of Appeals

Southern District

Division Two

CITY OF SULLIVAN, a Missouri Municipal Corporation in Franklin and Crawford Counties, Plaintiff-Respondent, vs. JUDITH ANN SITES, as Trustee of the Judith Ann Sites Trust, Defendant-Appellant.	)	No. SD29596 Filed March 31, 2010

IN THE CIRCUIT COURT OF CRAWFORD COUNTY

Honorable William Camm Seay, Circuit Judge

AFFIRMED IN PART AS MODIFIED; REVERSED IN PART

Judith Ann Sites, Trustee of the Judith Ann Sites Trust[1] ("Trustee"), appeals that part of the trial court's judgment awarding the City of Sullivan ("City") $3,750.00 for a

[1] The petition filed by City in this case lists the "Judith Ann Sites Trust" as the defendant in its caption and alleges in its body that the "Judith Ann Sites Trust" is the owner of the real property in the city requiring the payment of the tap fee. Although appellant raises no issue on appeal in this regard, a trust is not a legal entity that is capable of suing or being sued. *Sunbelt Envtl. Servs., Inc. v. Rieder's Jiffy Market, Inc.*, 138 S.W.3d 130, 134 (Mo.App. 2004). Judith Ann Sites, Trustee of the Judith Ann Sites Trust, however, filed an answer to the petition on her behalf identifying herself in that capacity as the defendant and thereafter participated fully in this case, including this appeal, referring to herself and being referred to by the trial court and City as either the Judith Ann Sites Trust or as Trustee of the Judith Ann Sites Trust. Nevertheless, the trial court's judgment references the defendant as the Judith Ann Sites Trust. Pursuant to our authority to "give such judgment as the court ought to give" as provided in Rule 84.14, the judgment is hereby modified so that any reference to the defendant is to Judith Ann Sites, Trustee of the Judith Ann Sites Trust, and that the judgment is entered against her as defendant in that capacity. *See McBee v.*

sewer tap fee. Trustee contends that City's ordinance authorizing the collection of the fee constitutes a "special law" in violation of article III, section 40(30) of the Missouri Constitution. We agree and reverse that part of the trial court's judgment.

Factual and Procedural Background

Viewed in the light most favorable to the trial court's judgment and disregarding all contrary evidence and inferences, ***BBCB, LLC v. City of Independence***, 201 S.W.3d 520, 531 (Mo.App. 2006), the facts are as follows.

Before December of 1996, residents of Sullivan whose property was not situated near existing city sewer main lines were permitted to maintain private sewer systems on their properties, which generally took the form of septic tanks. In 1996, City developed a plan to lay new sewer lines in areas that previously could not have connected to City's sewer system—the "unsewered areas." The Board of Aldermen proposed a bond issue to fund the construction of the new sewer main lines. A proposal to issue $3,305,000.00 in revenue bonds to be used to improve and expand City's existing sewer system and waterworks was submitted to and approved by Sullivan residents.

In May of 1999, once the actual plan for the construction of the new sewer lines was completed, the Board of Aldermen passed Ordinance No. 2574, which issued the $3,305,000.00 in bonds. This ordinance provides that the bonds are special, limited obligations of City, payable solely from, and secured by, a pledge of the net revenues gained from the operation of City's combined sewer system and waterworks.

Gustaaf Vandecnocke Revocable Trust, 986 S.W.2d 170, 173 (Mo. banc 1999). This opinion and its caption, consistent with the law that a trust is not a legal entity, and our modification of the judgment accordingly, will only refer to Judith Ann Sites, Trustee of the Judith Ann Sites Trust as the defendant and appellant.

As part of implementing the new sewer project and setting the revenue stream to fund the revenue bonds, the Board of Aldermen passed Ordinance No. 2581 in July of 1999. City claims this ordinance mandates that after its passage, a new gravity-type connector to the sewer system for land located in a pre-1996 sewered area would be required to pay a sewer tap fee of $60.00,[2] whereas the same type new connector for land located in a pre-1996 unsewered area would be required to pay $3,750.00; the fees would be $75.00 and $4,250.00, respectively, to connect via a grinder pump connection.

Trustee owns twelve-and-one-half acres located in a pre-1996 unsewered area of the city. She maintains a private septic tank on the property.

After the new sewer line was installed, City sent Trustee a letter advising that installation was complete and she had 210 days within which to connect her property to the new system. The letter also stated that she would be charged $3,750.00 for the gravity feed connection. Trustee did not comply with the terms of the letter, and instead continued to maintain her private septic tank.

On December 8, 2005, City filed a Petition for Injunctive Relief against Trustee in the Circuit Court of Crawford County, which sought to enjoin Trustee from using the private septic system and require Trustee to connect to the new sewer line. City contended that Trustee continued to maintain her private septic tank while her property was within 100 feet of a sewer line, which was in violation of its ordinance requiring connection to its sewer system if property was located within that distance of a sewer main line.

[2] At the time of trial, a new ordinance had increased the $60.00 fee for previously sewered areas to $500.00.

Trustee responded in her answer that the sewer tap fees are unlawful because they amount to a "special law" in violation of the Missouri Constitution, article III, section 40(30). Trustee alleged that she—along with other property owners residing in pre-1996 unsewered areas—was placed in a special classification of persons required to pay a much higher rate than those in the pre-1996 sewered areas, for access to the same public sewer system. Trustee further alleged that imposition of the varying fees constituted a violation of the Equal Protection Clause found in article I, section 2, of the Missouri Constitution. Finally, Trustee contended that the financing method did not comport with section 250.080.[3]

Following trial, the trial court entered judgment in favor of City. Specifically, the trial court held that the sewer tap fees imposed by City do not violate the Missouri Constitution, and it enjoined Trustee from operating its private septic system. The trial court further ordered that City could enter Trustee's property in order to connect the property with the main sewer line, if necessary. Finally, the trial court awarded City $3,750.00 in damages—the amount of the sewer tap fee—and found Trustee liable for the costs of connecting the property to the main sewer line.

Trustee timely appealed to the Supreme Court of Missouri, which thereafter transferred the appeal to this Court.[4]

Standard of Review

Whether a municipal ordinance is constitutionally valid is a question of law that this Court reviews *de novo*. ***State ex rel. Sunshine Enters. of Mo., Inc. v. Bd. of Adjustment of the City of St. Ann***, 64 S.W.3d 310, 314 (Mo. banc 2002).

[3] All statutory references are to RSMo 2000, unless otherwise noted.
[4] Trustee does not challenge any relief afforded City against her by the trial court in its judgment other than the payment of the $3,750 sewer tap fee.

Discussion

Trustee, in her sole point relied on, contends that Ordinance No. 2581

> is a special law in violation of Article III, § 40(30), of the Constitution of Missouri, and therefore is invalid *in that* that ordinance arbitrarily requires property owners near new sewer lines to pay a 750% higher fee to connect to those sewer lines than it does for owners of new properties near sewer lines existing at the time of the ordinance's enactment to receive the same services using the same materials, and thus enacts a classification based on the immutable characteristics of historical and geographic facts.

We agree.

Before reaching the merits of the claim, however, we address City's contention that Trustee's claim is precluded by the decision of the Eastern District of this Court in ***Larson et al. v. City of Sullivan***, 92 S.W.3d 128 (Mo.App. 2002).[5] The ***Larson*** plaintiffs challenged the constitutionality of the ordinance on different grounds than those raised in the instant case; City argues in its brief, however, that, through virtual representation,[6] the doctrine of claim preclusion bars Trustee's claim here because, quoting ***Heintz Elec. Co. v. Tri Lakes Interiors, Inc.***, 185 S.W.3d 787, 792 (Mo.App. 2006), "'[t]he doctrine precludes not only those issues on which the court in the former case was required to pronounce judgment, but to every point properly belonging to the subject matter of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.'"

[5] An astute reader may pause to ponder how issues involving City's ordinance No. 2581 eventually became the subject of two cases in different geographical districts of this Court. Sullivan is bisected by the county line between Franklin County, in the Eastern District of this Court, and Crawford County, in this district of the Court. *Compare* section 477.050; section 477.060. Venue of the suit against City in *Larson* had to be brought in Franklin County, where its seat of government is apparently situated, *see* section 508.050, whereas venue of City's suit against Trustee in this case was dictated by Trustee's residence in the Crawford County part of the city, *see* section 508.010.2(1).

[6] "Virtual representation," in which a judgment concerning a public body is presumed binding on all residents, citizens and taxpayers pertinent to that body, is "based upon considerations of necessity and paramount convenience and may be invoked to prevent a failure of justice." *Drainage Dist. No. 1 v. Matthews*, 234 S.W.2d 567, 574 (Mo. 1950). It is applicable if "the interest of the represented and the representative are so identical that the inducement and desire to protect the common interest may be assumed to be the same in each and if there can be no adversity of interest between them." *Id.*

We cannot reach the merits of this argument because City failed to raise the issue of claim preclusion in any pleading to the trial court. Rather, in its Amended Answer to Defendant Sites' Counterclaim, City argues only that Trustee is "collaterally estopped from bringing forth these issues in this matter as they have already been judicially settled."[7] Likewise, City used similar language to assert collateral estoppel in its Motion to Dismiss Defendant's Answer.

Claim preclusion differs from issue preclusion; the former—also known as *res judicata*—"precludes the same parties from relitigating the same claim[,]" while the latter—commonly known as collateral estoppel—"precludes the same parties from relitigating an issue which has been previously adjudicated." ***Stine v. Warford***, 18 S.W.3d 601, 605 (Mo.App. 2000). While these defenses may be closely related, ***Sexton v. Jenkins & Assocs., Inc.***, 152 S.W.3d 270, 273 n.3 (Mo. banc 2004), they are, nevertheless, distinct defenses and as such, the pleading of one cannot satisfy a requirement to plead the other.

Rule 55.01 states, "A defense consisting of an affirmative avoidance to any matter alleged in a preceding pleading must be pleaded." The failure to so plead waives that defense unless either (1) the trial court permitted the pleadings to be amended to include the defense, or (2) the issue was tried by implied or actual consent of the parties. ***Billings Mut. Ins. Co. v. Cameron Mut. Ins. Co.***, 229 S.W.3d 138, 143 (Mo.App. 2007). Neither exception is supported by the record in this case. Thus, City has waived any claim

[7] City uses both "claim preclusion" and "*res judicata*" intermittently throughout its argument on appeal; although commonly tied to claim preclusion, *res judicata* is occasionally used in place of both "claim preclusion" and "issue preclusion." *See Sexton v. Jenkins & Assocs., Inc*., 152 S.W.3d 270, 273 n.3 (Mo. banc 2004). Nevertheless, in its pleadings, City only specifically referenced collateral estoppel.

preclusion defense by failing to raise that defense in any pleading responsive to Trustee's claim.

Our resolution of the merits of Trustee's point rests on a two-step analysis: first, we must determine if Ordinance No. 2581 constitutes a "special law" as defined by article III, section 40(30) of the Missouri Constitution, and second, if so, we must decide if the City has provided substantial justification "for utilization of a special rather than a general law." ***City of Springfield v. Sprint Spectrum, L.P.***, 203 S.W.3d 177, 182 (Mo. banc 2006) (citing ***Harris v. Missouri Gaming Comm'n***, 869 S.W.2d 58, 65 (Mo. banc 1994)).

The Missouri Constitution provides:

> The general assembly shall not pass any local or special law:
>
> . . . .
>
> (30) where a general law can be made applicable, and whether a general law could have been made applicable is a judicial question to be judicially determined without regard to any legislative assertion on that subject.

Mo. Const. Art. III, § 40(30). Missouri courts have long recognized that "a general law is a 'statute which relates to persons or things as a class.'" ***City of Springfield***, 203 S.W.3d at 184 (quoting ***Reals v. Courson***, 164 S.W.2d 306, 307 (Mo. 1942)). By contrast, "a statute which relates to *particular persons or things* of a class is special." ***Reals***, 164 S.W.2d at 307-08 (emphasis added). Such special laws "do not embrace all of the class to which they are naturally related." ***Id.*** at 308.

Whether a law is general or special "can most easily be determined by looking to whether the categories created under the law are open-ended or fixed, based on some immutable characteristic." ***City of Springfield***, 203 S.W.3d at 184 (citing ***Harris***, 869

S.W.2d at 65). Laws that are not open-ended usually single out one or more groupings by certain permanent characteristics. ***O'Reilly v. City of Hazelwood***, 850 S.W.2d 96, 99 (Mo. banc 1993). "Classifications based on *historical facts*, *geography*, or constitutional status focus on immutable characteristics and are therefore facially special laws." ***Harris***, 869 S.W.2d at 65 (emphasis added).

City of Sullivan Ordinance No. 2581 provides:

> 2. There shall be two (2) classifications for user fees on connection of sewer permits:
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> a. Class One:
>
> 1) Type A. A four inch (4") sewer tap, and
>
> 2) Type B. A sewer tap in excess of four inches (4").
>
> A permit and inspection fee of $60.00 for a Type A Sewer Connection or $75.00 for a Type B Sewer Connection shall be paid to the City Collector at the time the application is filed to cover the material and equipment cost required to make said tap.
>
> b. Class Two (1996 Revenue Bond Projects):
>
> 1) Type A. A gravity connection, and
>
> 2) Type B. A pressure connection (grinder pump).
>
> A permit and inspection fee of $3,750.00 for a Type A Sewer Connection or $4,250.00 for a Type B Sewer Connection shall be paid to the City Collector at the time the application is filed to cover the material and equipment cost required to make said tap. Sewer connections made after the completion of the unsewered areas identified in the 1996 Revenue Bond are subject to a permit and inspection fee inflation adjustment (consumer price index) calculated from the date of completion of the unsewered areas identified in the 1996 Revenue Bond to the date of permit for the connection.

In its brief, City admits that the ordinance categorizes new connectors to its sewer system into two distinct groups: those seeking to connect property in the pre-1996

sewered areas of the city and those seeking to connect property in the pre-1996 unsewered areas of the city. On its face, such categorization is both historically and geographically based and is, thus, fixed. Nevertheless, City asserts that the classification "is open-ended in that the separate connection fee is tied to the existence of revenue bonds, which is not a permanent characteristic." City cites us to no relevant legal authority supporting this assertion. We find it has no merit.

While it is true that the revenue bonds will someday be paid and in that sense are not permanent, that characteristic bears no relationship to the characteristic that serves to divide new sewer connections into two distinct categories for purposes of charging a sewer tap fee. The only characteristic that divides the class of new connections between the two categories is whether the new connector is seeking to connect property that was in the sewered area or the unsewered area of the city in 1996. As noted, this characteristic is both historically and geographically based and thus, makes the ordinance establishing such classification, on its face, a special law requiring substantial justification. ***Harris***, 869 S.W.2d at 65.

In order to provide substantial justification supporting the enactment of Ordinance No. 2581, City must demonstrate that "the vice that is sought to be corrected, the duty imposed, or the permission granted by the statute [is] so unique to the persons, places, or things classified by the law that a law of general applicability could not achieve the same result[.]" ***School Dist. of Riverview Gardens v. St. Louis County***, 816 S.W.2d 219, 221 (Mo. banc 1991); *see also* ***Hunter Ave. Prop., L.P. v. Union Elec. Co.***, 895 S.W.2d 146, 153-54 (Mo.App. 1995). This, City has not done.

The only justification proffered by City for imposing different fees is because such fees "ensure those that derive a special benefit or service from the new sewer system bear some of the cost of the public improvement." However, the benefit provided by Ordinance No. 2581 for which City is imposing a sewer tap fee—access to the city sewer system—is the same for all city residents: the same materials are used to tap into the sewer line and the same manner of waste disposal is utilized regardless of location, it is only the fee charged by City that differs according to one's address. In other words, a new connector in the pre-1996 unsewered area is getting nothing more than a new connector in the pre-1996 sewered area of the city—access to the sewer system. Therefore, City has failed to demonstrate any benefit to the new connectors in the pre-1996 unsewered areas of the city "so unique to the persons, places, or things classified by the law that a law of general applicability could not achieve the same result." ***Id.*** Trustee's point is granted.

Decision

That part of the trial court's judgment awarding City $3,750.00 against Trustee for the sewer tap fee is reversed. Otherwise, the judgment is affirmed in all respects as modified[8] by this opinion.

Gary W. Lynch, Presiding Judge

Scott, C.J., and Rahmeyer, J., concur.
Division I
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[8] *See* footnote 1.

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