

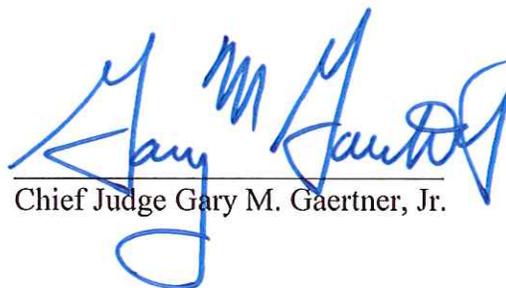


In the Missouri Court of Appeals
Eastern District

REGIONS BANK,) ED97903
)
Respondent,) Appeal from the Circuit Court
) of St. Charles County
)
v.) Honorable Ted House
) 0711-CV08525
CITY OF O'FALLON,)
)
Appellant.)

ORDER

On the Court's own Motion, the opinion filed in this case on January 15, 2013 is hereby withdrawn and a new opinion is to issue. Appellant's motion for rehearing/application for transfer is denied as moot.


Chief Judge Gary M. Gaertner, Jr.



In the Missouri Court of Appeals Eastern District

DIVISION FIVE

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| REGIONS BANK, |) | ED97903 |
| |) | |
| Respondent, |) | Appeal from the Circuit Court |
| |) | of St. Charles County |
| v. |) | |
| |) | Honorable Ted House |
| CITY OF O'FALLON, |) | 0711-CV08525 |
| |) | |
| Appellant. |) | Filed: March 5, 2013 |

Introduction

The City of O'Fallon, Missouri (City), appeals the trial court's summary judgment in favor of Regions Bank (Regions). The judgment upheld the validity of an agreement that the City would pay for the cost of installing sewer taps on property owned by Regions and ordered the City to pay damages for breaching such agreement. The City argues the agreement was void under Section 432.070, RSMo. (2000), because the agreement failed to delineate the cost of the sewer taps. Because we find that the City's sole argument on appeal is precluded under the doctrine of collateral estoppel, we affirm.¹

¹ Regions' motion to dismiss is denied as moot.

Background

In 2001, a number of landowners agreed to annex certain properties to the City pursuant to separate agreements between each landowner and the City. A common element to each agreement was that the City would pay or assume the cost of sewer taps for certain residences and in certain future developments on the properties. The number of sewer taps to be provided was different under each annexation agreement. As it relates to the property now owned by Regions, the annexation agreement said that the City would “waiv[e]/assume[e] the cost of all sewer taps in any future development of the [p]roperty, but not to exceed 700 sewer taps for the [p]roperty.”

Regions was not the original owner of this property. The annexation agreement quoted above was executed between the City and the trustees of the William C. Dierberg Trust and the Irrevocable Dierbergs Children’s Trust. Summit Pointe, LC, became the successor in interest to the Dierberg trusts and subsequently incurred costs of installing 573 sewer taps while developing the property. In 2007, Summit Pointe joined three other landowners who had annexation agreements with the City (“Individual Plaintiffs”) in suing the City in part for declaratory judgment, asking the trial court to uphold the sewer tap provisions in each annexation agreement. During the course of the lawsuit, Regions became the successor in interest to Summit Pointe. Regions continued the lawsuit but retained counsel separate from that of the Individual Plaintiffs.

In 2011, the City moved for summary judgment, arguing that because the annexation agreements did not specify the future cost to the City for the sewer taps, they were void under Section 432.070. The Individual Plaintiffs filed a cross-motion for partial summary judgment on their declaratory judgment counts pertaining to the

enforceability of the annexation agreements. The trial court granted the Individual Plaintiffs' motion, finding that pursuant to each annexation agreement, the City was obligated to provide the cost of the sewer taps designated therein.

The City did not appeal the summary judgment in favor of the Individual Plaintiffs. After the trial court granted the Individual Plaintiffs' motion, the City entered into a settlement agreement with the Individual Plaintiffs determining the amount of future compensation under the annexation agreements for each plaintiff. The Individual Plaintiffs subsequently dismissed all counts except for their declaratory judgment counts, which the court had granted through its summary judgment. The settlement agreement also stated its purpose was to allow the summary judgment on those counts to become final.

At the same time the Individual Plaintiffs had moved for partial summary judgment, Regions also moved for summary judgment. The trial court granted Regions' motion in part, finding that under the annexation agreement with Regions, the City must provide the cost of up to 700 sewer taps. The trial court concluded a genuine issue of material fact existed as to the damages for the 573 sewer taps that had already been installed. After a trial on the issue of damages, the trial court awarded Regions \$1,224,300.00 in damages and attorney's fees.

The City now appeals the trial court's partial summary judgment entered in favor of Regions along with the judgment awarding damages to Regions after trial.

Discussion

The City's sole point on appeal is that the annexation agreement at issue was void under Section 432.070² because it did not specify the cost to the City for the sewer taps. Regions argues that the City's argument is barred by the doctrine of collateral estoppel. We agree with Regions.

Collateral estoppel, or issue preclusion, works to "protect [courts] against the expense and vexation attending multiple lawsuits, conserve judicial resources, and foster reliance on judicial action by minimizing the possibility of inconsistent decisions." Kinsky v. 154 Land Co., LLC, 371 S.W.3d 108, 112 (Mo. App. E.D. 2012) (internal alterations and quotations omitted) (quoting Taylor v. Sturgell, 533 U.S. 880, 892 (2008)). In cases where litigants claim an issue is precluded due to its adjudication in a prior case, four elements must be met in order for collateral estoppel to apply:

- (1) the issue decided in the first action must be identical to the issue in the second;
- (2) the prior litigation must have resulted in a judgment on the merits;
- (3) the party to be estopped must have been a party or in privity with a party to the prior litigation; and
- (4) the party to the prior adjudication must have had a full and fair opportunity to litigate the issue in the prior suit.

Kinsky, 371 S.W.3d at 112. When these elements are shown, the party attempting to raise the previously adjudicated issue in another case will be precluded from doing so.

Similarly, collateral estoppel can preclude a party from raising an issue on appeal. Specifically, when a party to a multi-claim lawsuit allows one of those claims to become

² Section 432.070 states, "No . . . city . . . shall make any contract, unless the same shall be within the scope of its powers or be expressly authorized by law, nor unless such contract be made upon a consideration wholly to be performed or executed subsequent to the making of the contract; and such contract, including the consideration, shall be in writing and dated when made, and shall be subscribed by the parties thereto, or their agents authorized by law and duly appointed and authorized in writing."

final, that party may be precluded from disputing the findings of that final judgment in his or her appeal on the other claims. Arnold v. Fletcher, 761 S.W.2d 261, 262 (Mo. App. E.D. 1988). Failure to appeal the judgment that became final may cause a party to forfeit his or her ability to dispute underlying facts and conclusions that are common to both that final judgment and a related judgment pending appeal. See Franksen v. George, 725 S.W.2d 878, 880 (Mo. App. W.D. 1987). Whether collateral estoppel applies requires consideration of the specific facts at issue, and “[f]airness is the overriding concern.” Wilkes v. St. Paul Fire & Marine Ins. Co., 92 S.W.3d 166, 120 (Mo. App. E.D. 2002).

Here, disputing the underlying legal conclusion common to both cases is precisely what the City seeks to do. The legal conclusion underlying the summary judgments for the Individual Plaintiffs and for Regions is that the City’s agreement to provide sewer taps at an unspecified cost is enforceable. The City chose not to dispute this conclusion with regard to the Individual Plaintiffs, but rather to enter a settlement agreement with the Individual Plaintiffs limiting the financial impact of the court’s judgment on the City.³ However, this does not undo the trial court’s conclusion that the agreements are enforceable, nor does it change the fact that that conclusion is now part of a final judgment.⁴ The City cannot take a benefit (albeit through the settlement agreement’s

³ Therefore, the City’s reliance on the fact that the settlement agreement explicitly stated that the City admitted no truth or falsity of any claim or defense is misplaced; it has no bearing on the issue of enforceability of the annexation agreements.

⁴ On the issue of whether the Individual Plaintiffs’ voluntary dismissal of its other counts allowed the partial summary judgment to become a final judgment, we acknowledge the Western District’s holding in Shelter Mut. Ins. Co. v. Vulgamott, which found that such action is an impermissible attempt at piecemeal litigation. 96 S.W.3d 96, 104-06 (Mo. App. W.D. 2003). However, we note that holding has since been called into question by a more recent case’s application of Missouri Supreme Court precedent. See Stewart v. Liberty Mut. Fire Ins. Co., 349 S.W.3d 381, 384 n. 4 (Mo. App. W.D. 2011) (applying holding in Magee v. Blue Ridge Prof’l Bldg. Co., 821 S.W.2d 839, 842 (Mo. banc 1991)). In any event, the present case is distinguishable from Vulgamott in that, rather than attempting to carve out a portion of a single claim to

limit of financial obligation) from acceding the final judgment as it relates to the Individual Plaintiffs and then choose to dispute that judgment's underlying conclusion because the City suffers detriment, in the form of money damages, from that same conclusion as it relates to Regions. See Franksen, 725 S.W.2d at 880. Thus, the City cannot raise on appeal the argument that the annexation agreement is void under Section 432.070.

The City disputes this because the annexation agreements and parties addressed in each judgment below are different. The City also argues that the causes of action were different in that the Individual Plaintiffs sought declaratory judgment and Regions was awarded damages. In terms of the elements of collateral estoppel, the City essentially disputes the first element, whether the issues in the two claims are identical; and the fourth element, whether the City had an opportunity to fully and fairly litigate the issue.

Regarding the first, the City argues that the issues in each case were different by pointing out that the annexation agreements for each plaintiff were not identical. The City also emphasizes that each of the properties are at various stages of development, thus the remedies sought by the Individual Plaintiffs differ from those sought by Regions in that Regions sought money damages. Finally, the City discusses the manner in which Regions' successor, Summit Pointe, went about installing sewer taps on the developed portions of its property, arguing that the fact Summit Pointe did this through a contract with Duckett Creek Sanitary District distinguishes this case from that of the Individual Plaintiffs.

reserve for future litigation, the Individual Plaintiffs here dismissed their alternative claims for relief after the trial court granted summary judgment on their claim for declaratory judgment. It was then as if those alternative claims had never been filed, and the partial summary judgment became a final appealable judgment. See Stewart, 349 S.W.3d at 385.

Though the City's arguments certainly highlight factual differences between each of the plaintiffs, the properties, the annexation agreements, and the remedies sought; it does not necessarily follow that the underlying legal issue decided in each case was different. Despite these differences in detail, one thing was common to all annexation agreements: the City agreed to provide certain sewer taps for each plaintiff's property at an unspecified cost. While the specific wording of each sewer tap provision varies among the four annexation agreements, the sewer tap provision in the annexation agreement of one of the Individual Plaintiffs is nearly identical to that in Regions' agreement: the City's agreement with the Rockensteins states that the City "will waive/assume the cost of residential 32 sewer taps in any future development of the property."⁵

Each plaintiff's request for relief was related to this common sewer tap element. Each plaintiff requested that the trial court declare the sewer tap provision in his or her annexation agreement was enforceable. Regions had an additional request for damages because its property had already been developed, but the damages flowed from the same provision in the annexation agreement. Therefore, the underlying issue put to the trial court in both cases was whether the City could be bound by this language.

Furthermore, the argument the City made to the trial court in disputing the applicability of the annexation agreements is the same argument the City now makes in its sole point on appeal. The trial court specifically found that Section 432.070 did not void the annexation agreements to provide sewer taps. On appeal, the City's sole argument is that Section 432.070 does in fact make the City's annexation agreement with

⁵ The other two annexation agreements added the statement that the City would provide sewer taps "regardless of what entity will be the supplier."

Regions void as it relates to sewer taps. The issue determined by the trial court in its summary judgment in favor of the Individual Plaintiffs is identical to the issue the City raises on appeal.

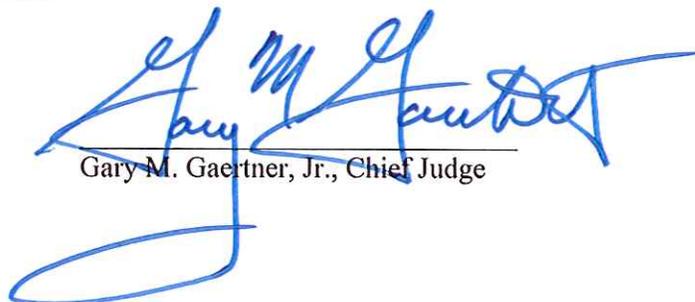
Finally, the fourth element of collateral estoppel is whether the City had a full and fair opportunity to litigate the issue. The City states that a determinative fact that was not part of the litigation below is that Summit Pointe entered into an agreement with the Duckett Creek Sanitary District for the construction of a sewage treatment plant. Yet this fact, apparently related to the way in which Summit Pointe obtained sewer taps, has no bearing on whether the City could validly contract to provide up to 700 sewer taps to Summit Pointe without specifying the cost. The City argued the agreement was void under Section 432.070, and did so by making the same arguments and citing the same authority to the trial court as the City does on appeal. The City filed a motion for summary judgment below and opposed the Individual Plaintiffs' motion for summary judgment as well as Regions' motion for summary judgment, all of which the City supported with memorandums of law. The trial court considered everything offered by both parties and entered judgment. Given these circumstances, the City had a full and fair opportunity to litigate the issue of enforceability of its obligation to provide sewer taps under these annexation agreements at unspecified cost.

Because the City did not appeal the final judgment entered in favor of the Individual Plaintiffs, and because that judgment addressed the same issue the City attempts to appeal here, the City's argument that the annexation agreement is void is barred on appeal under the doctrine of collateral estoppel. See Arnold, 761 S.W.2d at 262. Point denied.

Conclusion

The judgment of the trial court is affirmed.

Robert M. Clayton III, J., concurs.
Ellen L. Siwak, S.J., concurs.



Gary M. Gaertner, Jr., Chief Judge