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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

GREGG A.BERGE et al,

Plaintiffs and Appellants,

v.

CAMBRIA COMMUNITY SERVICES
DISTRICT et al,

Defendants and Respondents.

2d Civil No. B212474
(Super. Ct. No. CV080497A)
(San Luis Obispo County)

Appellants Gregg A. Berge (Berge) and Eagle Nest Capital, LLC (Eagle Nest) appeal the trial court's ruling sustaining demurrers without leave to amend and dismissing their action against respondents Cambria Community Services District (CCSD), the County of San Luis Obispo (County) and the California Coastal Commission (Coastal Commission).

Berge has been declared a vexatious litigant. (Code Civ. Proc., § 391, subd. (b)(2).) The instant action is the fifth in eight years that Berge has brought against CCSD, the County and the Coastal Commission for inverse condemnation. In this matter, Berge included Eagle Nest as a plaintiff and added a cause of action for breach of contract. Respondents filed demurrers, which the trial court sustained without leave to

amend and dismissed the action. We affirm on the grounds that appellants' action is barred by the doctrines of res judicata and collateral estoppel.

FACTS

Appellants own separate parcels of unimproved real property in the City of Cambria, in San Luis Obispo County. The properties are zoned residential. The lots are within the service district of CCSD, which provides water and sewer services. In order to develop their property, owners of unimproved lots are required to apply to CCSD for an "intent to serve" letter, which indicates that CCSD will provide water and sewer services to the parcel. The owner must then obtain a minor use permit (MUP) from the County to comply with the Coastal Act.

Berge is an individual who has previously litigated this issue, concerning the same property. Eagle Nest is a limited liability company. It acquired its parcels in 2007, which are located in the same subdivision as Berge's property.

In 1981, CCSD created a waiting list for owners applying for water and sewer services. Berge was not placed on the waiting list. In 2000, CCSD adopted an ordinance establishing that it would no longer accept applications to the waiting list. In 2001, due to a water shortage, CCSD deemed that no new water connections would be allowed for the applicants on the waiting list.

In June 2006, Berge applied for an MUP. The County planning commission denied his application because he had not obtained an intent to serve letter from CCSD. In 2007, CCSD informed Berge that he was ineligible to receive water or sewer services because he was not on the waiting list. In September 2007, the board of supervisors upheld the planning commission's denial. In 2008, the Coastal Commission "confirmed" that Berge could not appeal the planning commission's denial to the Coastal Commission because only approved applications may be appealed. In October 2007, Eagle Nest twice requested an application for an intent to serve letter from CCSD, but has not received a response.

In May 2008, Berge and Eagle Nest filed a complaint on behalf of themselves and Does 1-10,000. Appellants alleged causes of action for inverse

condemnation and breach of contract against CCSD, the County, and the Coastal Commission. In their cause of action for inverse condemnation, appellants alleged that the County's growth restrictions have prevented them from ever being able to develop their properties for residential or any other purpose. They contended that respondents' actions have deprived them of economically viable use of the properties, constituting a compensable taking in the amount of \$350,000 per parcel.

In their cause of action for breach of contract, appellants alleged that, in 1970 and 1976, Cambria imposed a special property tax to finance the construction of a sewage treatment plant. The tax was imposed on lots that were to be improved as residential properties, including appellants' lots. In 1977, underground piping was installed to the front of appellants' properties for connection to a sewer system.

Appellants alleged that imposition of the special property tax created a "valid and enforceable written agreement" between the County and CCSD as obligors, and the owners of residential lots as obligees. Appellants argue that they are "successor[s]-in-interest" to the properties and "assignees of any rights running with the land." As such, they are entitled to compensation in the amount of the special property tax paid by the former owners of their properties.

Appellants alleged that respondents have breached this agreement because the County and CCSD have received payment of the special property tax but have refused to allow them access to the sewer treatment plant. Appellants assert that, due to their inability to develop their lots, they have suffered damages in excess of \$350,000 per parcel.

History of Prior Litigation

Berge first filed an action in 2000 against the County and CCSD, seeking to obtain "adequate water services" and a permit for the development of his property. (*Berge v. County of San Luis Obispo*, No. CV000325.) He filed his second and third actions in 2002 and 2003, both against the County and CCSD seeking an intent to serve letter for water and sewer services. (*Berge v. County of San Luis Obispo*, No. CV021164; *Berge v. County of San Luis Obispo*, No. CV030214.) In 2004, Berge filed a

fourth action against the County and the Coastal Commission, again seeking an intent to serve letter for water and sewer services. (*Berge v. County of San Luis Obispo*, No. CV040138.) None survived the demurrer stage. In 2006, Berge filed a claim against the County for failure to issue various permits.

Demurrers in Present Action

The County demurred to appellants' complaint on the ground that it was barred by res judicata, collateral estoppel and the statute of limitations. It alleged that it was immune from suit, that appellants had failed to exhaust their administrative remedies or to state a cause of action for inverse condemnation or breach of contract.

The Coastal Commission and CCSD separately demurred on the grounds of res judicata and collateral estoppel. CCSD also alleged that appellants had failed to successfully state claims for inverse condemnation or breach of contract. The Coastal Commission joined in CCSD's demurrer and asserted that appellants had failed exhaust certain administrative remedies mandated by the Coastal Act.

The trial court heard the matter and issued a written ruling noting Berge's history as a vexatious litigant. (Code Civ. Proc., § 391, subd. (b)(2).) It concluded that the action had not been pleaded as a class action, thus the doe plaintiffs had no standing to sue. The inverse condemnation claim was based upon the allegation that respondents had taken appellants' properties by inverse condemnation by CCSD's refusal to issue an intent to serve letter. The court observed that, on three prior occasions, the court had sustained a demurrer without leave to amend to Berge's claim for inverse condemnation that was pleaded on the identical facts.¹

The trial court sustained the demurrers of CCSD, the County and the Coastal Commission without leave to amend on the grounds of res judicata and collateral estoppel. It also ruled that the inverse condemnation cause of action was barred by the statute of limitations, failure to exhaust administrative remedies, and because the County

¹ The trial court took judicial notice of four previous lawsuits filed by Berge. Three were disposed of by demurrer and one was dismissed.

was immune from suit. Several weeks later, the court issued a formal order. Judgment was entered against appellants and the action dismissed.

DISCUSSION

On appeal from a judgment of dismissal following the sustaining of a demurrer without leave to amend, we review the trial court's ruling de novo, exercising our independent judgment to determine whether the complaint states a cause of action under any legal theory. (*Ochs v. PacifiCare of California* (2004) 115 Cal.App.4th 782, 788.) Dismissal on res judicata grounds presents a question of law that we review de novo. (*Noble v. Draper* (2008) 160 Cal.App.4th 1, 10; *Johnson v. GlaxoSmithKline, Inc.* (2008) 166 Cal.App.4th 1497, 1507 [court's application of collateral estoppel subject to de novo review].)

Res Judicata and Collateral Estoppel

The doctrine of res judicata has two aspects. Res judicata, or claim preclusion, refers to a previously litigated cause of action. Collateral estoppel, or issue preclusion, relates to an issue necessarily decided in a prior action. (*Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 828; *Teitelbaum Furs, Inc. v. Dominion Ins. Co.* (1962) 58 Cal.2d 601, 604; *Johnson v. GlaxoSmithKline, Inc., supra*, 166 Cal.App.4th at p. 1507, fn. 5.) "'Res judicata' describes the preclusive effect of a final judgment on the merits. [It] . . . prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them. Collateral estoppel . . . 'precludes relitigation of issues argued and decided in prior proceedings.' [Citation.]" (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896.)

"Under the doctrine of res judicata, if a plaintiff prevails in an action, the cause is merged into the judgment and may not be asserted in a subsequent lawsuit; a judgment for the defendant serves as a bar to further litigation of the same cause of action." (*Mycogen Corp. v. Monsanto Co., supra*, 28 Cal.4th at pp. 896-897.) Res judicata bars claims that *could have been raised* in the first proceeding; collateral estoppel bars only issues that were actually and necessarily decided in the earlier litigation. (*Noble v. Draper, supra*, 160 Cal.App.4th at p. 11.)

Application of collateral estoppel requires that (1) the issue must be identical to that decided in a former proceeding; (2) it must have been actually litigated and necessarily decided in the former proceeding; (3) the decision must be final and on the merits; and (4) the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding. (*Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal.4th 921, 943-944.)

All of Berge's lawsuits sought the same relief--receipt of an intent to serve letter to obtain access to sewer and water services. Berge has previously litigated the identical issues against the same parties named in the present matter. He filed the first three lawsuits against the County and CCSD, and the fourth against the County and the Coastal Commission.

In its written ruling, the trial court stated that appellants had characterized their cause of action for inverse condemnation as a land-use dispute, while the earlier causes of action (in the prior lawsuits) were couched in terms of water use. The court noted, however, that this was "a distinction without a substantive difference." In its formal order, the court repeated that appellants could not avoid the bar of res judicata and collateral estoppel by recharacterizing their inverse condemnation claim. It stated that "[w]hether termed 'land-use' or 'water-law,' [appellants'] claim is fundamentally premised upon an alleged taking of [appellants'] property through CCSD's refusal to provide an 'Intent to Serve' Letter for water and sewer service." Citing *Gilbert v. State of California* (1990) 218 Cal.App.3d 234, 250, the trial court concluded that "[a] potential water user has no absolute right to water service, so CCSD's actions have not resulted in any taking."

Appellants make two assertions: 1) the trial court erred by concluding that it was immaterial whether their action was characterized as a land-use or water law issue; and 2) they cannot be considered potential water users, thus *Gilbert* does not apply. In *Gilbert*, a county public utility district imposed a moratorium on new water service following drought conditions. Owners of unimproved property brought an action seeking, among other things, to compel the district to remove the moratorium and develop additional water resources. They also alleged a cause of action for inverse

condemnation. The *Gilbert* court concluded that there was no regulatory taking because appellants did not have a protected property interest. (*Gilbert v. State of California, supra*, 218 Cal.App.3d at pp. 252, 256, 258.) It observed that appellants purchased property lacking any service connection, and the property remained in the same condition as when it was acquired--unimproved real property with no access to water. (*Id.* at p. 256.)

Appellants rely on a federal case cited in *Gilbert* to support their propositions: *Bank of Am. Nat. T. & S. v. Summerland Cty. Water D.* (9th Cir. 1985) 767 F.2d 544. There, plaintiff Bank of America filed an action against a water district concerning water allocation. It raised several constitutional challenges, and included a cause of action for inverse condemnation.

In its published decision, the federal court commented upon Bank of America's pending state law claim regarding the system of water allocation, stating that it would make a significant difference "whether the state court categorizes the underlying issues as involving land use principles or water law principles." (*Bank of Am. Nat. T. & S. v. Summerland Cty. Water D., supra*, 767 F.2d at p. 548.) The court indicated that, if land use principles were to apply, then Bank of America might be able to recover for inverse condemnation. It noted that Bank of America was not yet a water user and that, under California law, potential water use is not a property right. (*Ibid.*)

Appellants emphasize the quoted language in an attempt to salvage their lawsuit, without success. A federal court's statement concerning a theory of recovery on a pending state law claim has no bearing on the matter before us. Appellants also assert that they cannot be considered potential water users because they have never been issued intent to serve letters or received approval of their land use permit applications.

While the instant complaint contains an extensive history of the land-use regulations for Cambria and its permitting requirements, it clearly concerns the same matter--Berge's alleged entitlement to an intent to serve letter to obtain water and sewer access. Under the principles of *res judicata*, Berge is barred from relitigating this claim.

His breach of contract cause of action is likewise barred because he could have raised it in a prior proceeding, but did not.

Privity

We now consider whether collateral estoppel bars the causes of action alleged by Eagle Nest. Of the four requirements previously set out, we are concerned here only with the element of privity.

"[T]he word 'privity' has acquired an expanded meaning. The courts, in the interest of justice and to prevent expensive litigation, are striving to give effect to judgments by extending 'privies' beyond the classical description. [Citation.] The emphasis is not on a concept of identity of parties, but on the practical situation." (*People ex rel. State of Cal. v. Drinkhouse* (1970) 4 Cal.App.3d 931, 937.) "The question is whether, under the circumstances as a whole, the party to be estopped should reasonably have expected to be bound by the prior adjudication." (*California Physicians' Service v. Aoki Diabetes Research Institute* (2008) 163 Cal.App.4th 1506, 1524 [insurer Blue Shield was in privity with plan administrator CalPERS, thus was bound by administrative decision adverse to CalPERS]; but see *Lynch v. Glass* (1975) 44 Cal.App.3d 943, 948 [private landowners not collaterally estopped from seeking a public easement where the identical issue had been decided adversely to corporate developers who had litigated the same issue].)

Privity is (1) a mutual or successive relationship to the same rights of property, also described as an identification in interest of two individuals, such as to represent the same legal rights; and (2) a "sufficiently close" relationship between the party to be estopped and the unsuccessful party in the prior litigation. (*Consumer Advocacy Group, Inc. v. ExxonMobil Corp.* (2008) 168 Cal.App.4th 675, 689.) Consideration must be given to the "fairness of binding appellant with the result obtained in earlier proceedings in which it did not participate." (*Ibid.*)

Eagle Nest shares an interest with Berge because both have undeveloped property in the same subdivision served by CCSD. Eagle Nest, like Berge, wished to obtain an intent to serve letter and an MUP in order to develop its property. Both were

prevented from doing so by CCSD's adoption of the 2000 ordinance refusing further applications for the waiting list (for intent to serve letters). Eagle Nest purchased its property in 2007. It applied for an application, but received no response. Given Berge's extensive litigation concerning the intent to serve letter, Eagle Nest could reasonably have expected to be bound by the prior adjudications. (*California Physicians' Service v. Aoki Diabetes Research Institute, supra*, 163 Cal.App.4th at p. 1524.) Under these circumstances, no unfairness would result by precluding Eagle Nest from raising this issue. The relationship between Berge and Eagle Nest constitutes a mutual or successive relationship to the same rights of property, thus satisfying the definition of privity. (*Consumer Advocacy Group, Inc. v. ExxonMobil Corp., supra*, 168 Cal.App.4th at p. 689.)

Collateral estoppel may be applied "even though precise identity of parties and issues may be lacking. The principle may be invoked to protect against vexatious litigation . . . [or] to further the finality of litigation in which public interests are involved" (*Lynch v. Glass, supra*, 44 Cal.App.3d at p. 947.) Berge has been declared a vexatious litigant due to his repeated filing of the same lawsuit, based on the same facts, against the same parties. The issues of water and sewer access were litigated and decided against Berge in three of the four prior cases, and proceeded to a final judgment on the merits. Public policy is served by discouraging vexatious litigation, particularly where other property owners could conceivably raise the same issues that have been litigated and adjudicated since 2000. Collateral estoppel bars Eagle Nest from pursuing this claim.

Appellants have added nothing with their breach of contract cause of action. It is merely another attempt to obtain damages from the County and CCSD because they have been unable to obtain intent to serve letters. It is the same claim that Berge raised in 2000, 2002 and 2003, styled as a different cause of action. Moreover, appellants have not alleged the existence of a written contract between themselves and the County or CCSD. Even had they done so, such a claim would have been barred by

the four-year statute of limitations on a written contract. Over 30 years have passed since the special assessment was imposed in 1970 and 1976. (Code Civ. Proc., § 337.)

Collateral estoppel bars both Berge and Eagle Nest from relitigating the same issue that has been litigated and decided in previous proceedings, and which resulted in a final judgment.

DISPOSITION

The judgment (orders sustaining the demurrers of CCSD, the County and the Coastal Commission) is affirmed. Respondents are awarded their costs on appeal.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Charles S. Crandall, Judge
Superior Court County of San Luis Obispo

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