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Shamee v. Warren

8-29-84

letter re:
- Twp Warren brief for SJ

pgs. 11
pi # 3208

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August 29, 1984

John M. Mayson, Clerk
Superior Court of New Jersey
CN 971
Trenton, NJ 08625

Re: Shainee Corporation vs. Warren Township, et als.
Docket No. L-034351-84
Our File No. W-126

Dear Sir:

Enclosed herewith please find an original and two copies of Defendant Township of Warren's Concurring Brief for Summary Judgment with respect to the above-mentioned matter. Would you kindly file the same returning a copy marked "filed" to this office in the envelope which has been enclosed for your convenience.

Very truly yours,

KUNZMAN, COLEY, YOSPIN & BERNSTEIN

Steven A. Kunzman

SAK:eg
encs.
cc: Honorable Eugene D. Serpentelli
All Counsel
w/enclosure

SHAINEE CORPORATION, Plaintiff, vs. WARREN TOWNSHIP, a municipal corporation of the State of New Jersey, located in Somerset County, New Jersey, THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF WARREN, THE PLANNING BOARD OF THE TOWNSHIP OF WARREN and the SEWERAGE AUTHORITY OF THE TOWNSHIP OF WARREN, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION SOMERSET COUNTY/OCEAN COUNTY Docket No. L-034351-84 Civil Action

DEFENDANT, TOWNSHIP OF WARREN'S CONCURRING
BRIEF FOR SUMMARY JUDGMENT

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On the Brief

8-31-84

STATEMENT OF FACTS

The present matter is a challenge by plaintiff, Shainee Corporation, of Warren Township's zoning ordinance under the law of Mt. Laurel II. At the time plaintiff filed the within action, the consolidated cases of A.M.G. Realty Company, Skytop Land Corp., Timber Properties v. Township of Warren had been tried and all parties were awaiting the Court's decision. Plaintiff's case was filed on or before May 25, 1984. On June 29, 1984, the Court denied plaintiff's motion to consolidate, denied defendant's motion for summary judgment, without prejudice, and reserved on the issue of builder's remedy. The matter is now before the Court on the summary judgment motion of the Warren Township Sewerage Authority. Defendant Warren Township, by this memorandum, joins in that motion.

LEGAL ARGUMENT

POINT I

DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON THE GROUND OF RES JUDICATA AND UNDER THE DECISION OF MT. LAUREL II

The doctrine of res judicata is considered to be one of reason, justice, fairness and practical necessity. It is grounded in the public policy of judicial orderliness, economy, and peace and order in society. 46 Am Jur 2d 395. Essentially, the doctrine precludes relitigation of issues between parties or their privies. Eatough v. Bd. of Medical Examiners, 191 N.J. Super. 166, 173 (App. Div. 1983). Thus, under the doctrine, where two parties, or parties in privity with the prior litigants, have litigated an issue to conclusion, the two parties, or their privies, cannot return to court to have the issue tried in another action.

If the parties are not identical, the issue may still be precluded from being relitigated under the related doctrine of collateral estoppel. Collateral estoppel is similar to the doctrine of res judicata except that the parties in the subsequent litigation need not be identical so long as the relitigating party or its privy must have had full and fair opportunity to have litigated the issue in the first action. Id. at 175. Thus, in approaching a matter challenged under either doctrine, the first question to ask is whether the issues are the same. If so, it must be determined whether the parties are the same or if they are in privity with the first litigants. If the answer to both questions is yes, than the subsequent action is barred by the doctrine of res judicata. If the first question can be answered yes, and the second question is no, than a third question must be asked: Has the unrelated party had a full

and fair opportunity to litigate this issue in the first action? If the answer is yes, the matter is barred under the collateral estoppel doctrine.

It is the position of defendant, Warren Township, that the present action barred under the doctrine of res judicata. The issues are identical and the parties are either the same as those in the first matter or their privies.

The primary issue of A.M.G., et al. v. The Township of Warren, Dock No.L-23277-80 P.W.; L-67820-80 P.W. (Somerset County, Mt. Laurel II) was whether the zoning ordinance of Warren Township was in accord with the constitutional requirements of South Burlington County N.A.A.C.P. v. Mt. Laurel, 92 N.J. 158 (1983), [hereinafter Mt. Laurel II]. A sub-issue of that matter was whether the plaintiff developers would be entitled to a "builder's remedy" in the event the zoning ordinance was struck down. The case was fully tried and the Court found in favor of the plaintiffs as to both issues.

The matter presently before the Court, Shainee Corp. v. Warren Township, Docket No. L-034351-84 (Somerset County/Ocean County, Mt. Laurel II) presents the identical issues to the Court, namely, the constitutionality of the Township's ordinance followed by the sub-issue of builder's remedy. But, in order to fully deal with this question it is necessary to take a closer look at the Mt. Laurel doctrine.

The decisions of the New Jersey Supreme Court in South Burlington County N.A.A.C.P. v. Mt. Laurel, 67 N.J. 151 (1975) [hereinafter Mt. Laurel I] and Mt. Laurel II are based upon the "general welfare" clause of the Constitution of the State of New Jersey. Based upon this clause, the Court held that municipality must zone to allow for its regional fair share of low and moderate income dwellings. In doing so the Court was addressing the needs of persons "outside the municipality but within the region that contributes to the housing demand

within the municipality." Mt. Laurel II, at 208. A private plaintiff who pursues a Mt. Laurel action against a municipality does so, of course, on his own behalf, for his own benefit, but is able to do so, and can succeed in doing so, only under the guise of only vindicating the rights of third parties who are not plaintiffs to the action. Mt. Laurel was not developed to be a boon to the developers, it is a case designed to uphold the rights of the "third party nonbeneficiary."[1] This is borne out by the history of the Mt. Laurel doctrine and the development of the "builder's remedy."

The doctrine created under Mt. Laurel I was to protect persons who were not residents and had no holdings or other financial interest in the municipality under attack. The party plaintiff, South Burlington N.A.A.C.P. who sued on behalf of the "third party nonbeneficiaries," was allowed standing, and ultimately suceeded. Subsequent suits brought against other municipalities have been instituted by developers. Despite the developer/party plaintiff's inherent profit motivation, the Court have had no problem in allowing them to proceed on the "public spirited" path. Further, there can be no doubt that the Courts have never struck down a zoning ordinance as being unconstitutional because the plaintiff/developer could not maximize profits from the parcel. The decisions under Mt. Laurel were solely to uphold the rights of the general public to equal access to decent housing.

The development of the "builder's remedy" supports the above position. The "builder's remedy" was initially discussed in Oakwood at Madison v. Township of Madison, 72 N.J. 481, 549 (1977). The Court, in Oakwood, created the "builder's remedy" because the "corporate plaintiffs have borne the stress and

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1. See, Williams and Doughty, Studies in Legal Realism: Mount Laurel, Belle Terre and Berman, 29 Rut. L. Rev. 73, 75 (1975).

expense of this public interest litigation, albeit for private purposes ..." Id. Therefore, the Court deemed it necessary, in appropriate but rare circumstances, to mandate that the builder's parcel be rezoned to allow multi-family development. This "remedy" was proposed as an "incentive for the institution of socially beneficial but costly litigation ..." Id. at 550-551. The Mt. Laurel II Court expanded the "builder's remedy" by making it more readily available to the litigating private parties. 92 N.J. at 279. The basic reasoning, however, remained the same: there must be a reward for the diligent efforts to uphold the constitution -- even if that is not why the developer sued.

The point of this review is to show that the primary issue in Mt. Laurel cases is the constitutionality of the zoning scheme. The "builder's remedy" is, at best secondary. It is the brass ring. It is held out so that the builders will hop on the constitutional litigation merry-go-round. The doctrine was not created for the builder, but for the benefit of the people in New Jersey. The corporate or private plaintiffs are merely asserting the rights of the public at large. They are not suing on their own behalf, but on behalf of all those persons, residents and potential residents, who have been excluded from living in an area because the overall scheme of land use controls does not permit housing within their means. It is, therefore, respectfully submitted that the plaintiffs in all Mt. Laurel cases are effectively the same: the "third party nonbeneficiaries." The developer is merely a representative of the populous with the financial ability and interest to invest the money and time to vindicate the rights of those he represents in the hopes of being given the prize: the right to construct high density development in the subject town. Thus, A.M.G. Relaty Company, Skytop Land Corporation, Timber Properties, and Shainee Corporation are one and the same in respect to Warren Township save for

the right to the builder's remedy. It would not have made a difference which organization brought the suit against Warren Township; the Court, it is submitted, would have arrived at the same conclusion.[2]

Thus, there is, in fact, an identity of parties in the present matter. Shainee is merely another developer with property interests in Warren who wishes to develop high density dwellings. The fact that they own another parcel is irrelevant to the primary issue. The rights of "the people" have purportedly been vindicated by A.M.G., Skytop and Timber. They have had the ordinance overturned. Adding the presence of Shainee at this time (or even at the time of its filing -- after the trial but before the decision) can add nothing to the substance and purpose of the case.

In the event that the Court does not agree that the parties are identical, then the third question must be addressed. In that event, it is submitted that Shainee or its privies, the contract sellers, had full and fair opportunity to join into the original litigation. The issue, however, was fully litigated on behalf of the "developers" inasmuch as the constitutional issue was fully thrashed and laid bare for the Court's decision. There was no more for this plaintiff to add to the case. They did, in fact, have full and fair opportunity to litigate this motion before the Court, themselves or through their privies; be they "brother developers" or the public at large.

In sum, the parties to this case are, for all intents and purposes, the same as those in the first matter although the vehicle for the presence of the

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2. It should be further noted that Warren by no means admits by this or by any other statements made herein that its ordinance was unconstitutional or that the determination of the Court in so holding was correct. It is merely being stated that all the named developers are capable of presenting complete and effective cases-as are many developers in this State-and that it is of little or no importance for the decision upon the primary issue which developer pursues the action.

parties (the developers) are different. The issue, too, was identical: whether the defendant's ordinance is constitutional. There being identical parties and identical issues, the doctrine of res judicata should apply. It is therefore respectfully submitted that the defendants are entitled to summary judgment on the within matter.

The position of Warren is further supported by the substance and policy of Mt. Laurel II. As was stated above, the purported purpose of the Mt. Laurel doctrine is to remedy constitutional infractions by a municipality in the terms of its zoning ordinance. Mt. Laurel II, of course, takes the further step of promoting compliance. This, however, should not give every developer or potential developer the right to the fruits of the victory: the right to have its parcel rezoned. At this point, the only issue which remains is how to effectuate the Court's decision: compliance. The master is entitled to rezone the parcels belonging to A.M.G., Skytop and Timber because they presented and litigated the constitutionality of Warren's ordinance. Now that the trial of the primary issue has concluded, can all developers and potential developers join in the battle and assert the right to the "builder's remedy"? If they answer is yes, the result would lead to the ultimate absurdity: all open tracts would have to be rezoned to allow high density development in accordance with the fair share determination. The job of the master would be impossible and any hope of a municipality being able to have some control over its fate and future would be dashed.

Further, one of the fundamental aspects of Mt. Laurel II was to streamline the Mt. Laurel process. Very early in the decision the Court expressed its dismay at the confusion and waste that had arisen in the process to that time. The Court stated:

> The deficiencies in its application range from uncertainty and inconsistency at the trial level to inflexible review criteria at the appellate level. The waste of judicial energy involved at every level is substantial and is matched only by the often needless expenditure of talent on the part of lawyers and experts. The length and complexity of trial is often outrageous, and the expense of litigation is so high that a real question develops whether the municipality can afford to defend or the plaintiffs can afford to sue.

92 N.J. at 200. The Court therefore devised the three trial judge system, the master's assistance, tried to streamline the determination of region and fair share, and set forth allowable remedies to allow plaintiffs. To allow Shainee to enter into this matter or continue to pursue an action essentially identical to the A.M.G. action could be a waste of judicial economy and energy, would greatly complicate the resolution of the A.M.G. matter, and would result in substantial and unnecessary costs to Warren Township in relitigating the matter. Therefore, it is respectfully submitted that there is substantial basis in the Mt. Laurel II decision to dismiss plaintiffs suit.

Finally, the fact that the Court in Mt. Laurel II discussed res judicata in terms of the order of compliance, does not mean that that is the only time when such an order can issue. The Court was addressing the doctrine in order to protect municipalities from continuing litigation after the matter had been previously decided. Thus, it is submitted that the Court can grant summary judgment to the defendants at this time for the previously stated reasons. If not, the Court must grant a stay pending the final determination of the entire A.M.G., Skytop, Timber controversy so that that matter can be dealt with in a concise and efficient manner without undue pressure by non-party developers and litigants.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the defendant is entitled to an order of summary judgment in the within matter.

Respectfully submitted,

KUNZMAN, COLEY, YOSPIN & BERNSTEIN
Attorneys for Defendant
Township of Warren

By: _____
Steven A. Kunzman