VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 325-4-20 Cncv

Watson vs. Marmelstein et al

DECISION ON DEFENDANT HOLTON'S MOTION FOR SUMMARY JUDGMENT

In this action alleging a panoply of violations by a homeowners' association and over a dozen of its former board members, Plaintiff Roy Watson also asserts a single claim against Defendant David Holton, the association's insurance agent. Mr. Watson alleges that Mr. Holton assisted the association in violating its fiduciary duty by authoring an untruthful affidavit, on which the association then relied in defending one of Mr. Watson's prior suits. Mr. Holton moves for summary judgment, arguing that Mr. Watson had a full and fair opportunity to litigate the accuracy of the affidavit in that suit, and so is precluded from relitigating that question here.[1] The court grants the motion.

BACKGROUND

Under Rule 56, the initial burden falls on the moving party to show an absence of dispute of material fact. *E.g.*, *Couture v. Trainer*, 2017 VT 73, ¶ 9, 205 Vt. 319 (citing V.R.C.P. 56(a)). When the moving party has made that showing, the burden shifts to the non-moving party; that party may not rest on mere allegations, but must come forward with evidence that raises a dispute as to the facts in issue. *E.g.*, *Clayton v. Unsworth*, 2010 VT 84, ¶ 16, 188 Vt. 432 (citing *Alpstetten Ass'n, Inc. v. Kelly*, 137 Vt. 508, 514 (1979)). Where that party bears the burden of proof on an issue, if fairly challenged by the motion papers, it must come forward with evidence sufficient to meet its burden of proof on that issue. *E.g.*, *Burgess v. Lamoille Housing P'Ship*, 2016 VT 31, ¶ 17, 201 Vt. 450 (citing *Poplaski v. Lamphere*, 152 Vt. 251, 254–55 (1989)). The evidence, on either side, must be admissible. *See* V.R.C.P. 56(c)(2), (4); *Gross v. Turner*, 2018 VT 80, ¶ 8, 208 Vt. 112 ("Once a claim is challenged by a properly supported motion for summary judgment, the nonmoving party may not rest upon the allegations in the pleadings, but must come forward with admissible evidence to raise a dispute regarding the facts."). The court must view all evidence in the light most favorable to the non-moving

[1] Mr. Holton also asserts the statute of limitations as a defense. Because the court concludes that issue preclusion clearly forecloses Mr. Watson's claim against Mr. Holton, it does not address that defense.

party and give that party the benefit of all reasonable doubts and inferences. *Carr v. Peerless Ins. Co.*, 168 Vt. 465, 476 (1998).

Here, Mr. Holton has met his initial burden. Pursuant to V.R.C.P. 56(c)(1), he filed a statement of undisputed material facts, properly supported by references to competent evidence in the record. In response, Mr. Watson conceded that all of Mr. Holton's stated facts were undisputed; he also submitted his own statement of undisputed facts. Virtually none of those facts, to the extent material, are properly supported. Thus, the undisputed facts, for purposes of this motion, are those set forth in Mr. Holton's statement. *See* V.R.C.P. 56(e).

The following undisputed facts therefore emerge. In 2005, the Village at Northshore I Association ("Association") "first adopted a bylaw requiring temperature monitoring devices in 2005, after a burst pipe caused flooding that resulted in $80,144 damage and the Association's insurance carrier warned that it would not renew the Association's coverage." *Watson v. Village at Northshore I Ass'n*, 2018 VT 8, ¶ 61, 207 Vt. 154. In 2013, Mr. Watson commenced litigation against the Village at Northshore I Association ("Association"). In relevant part, he claimed that this bylaw was unlawful, as it allegedly imposed a condition not allowed by the Association's governing declaration. The Association responded that the bylaw was justified under 27 V.S.A. § 1319(a)(10), as a measure to prevent unreasonable interference with units and common spaces. It also argued that the requirement was reasonable because the temperature monitors prevented insurance fees from rising for members of the Association. In support of this position, the Association submitted an affidavit from Mr. Holton. In the affidavit, Mr. Holton stated that after burst pipes caused considerable physical damage, his agency was only able to secure insurance for the Association by making express assurances that the Association would mandate temperature monitoring equipment; he stated also that the Association would otherwise have been unable to secure insurance except at exorbitant cost. This court ruled in the Association's favor, in part because the "undisputed facts indicate that . . . the rule also aims to curtail behavior that would violate the terms of the declaration by causing increased insurance costs." On appeal, the Vermont Supreme Court affirmed this ruling. In so doing, the Court noted, in part, "the interference to unit owners from burst pipes takes more than one form; apart from the obvious physical intrusion of water, burst pipes caused the Association's insurance rates to increase, resulting in higher common fees to all unit owners." *Watson v. Village at Northshore I Ass'n*, 2018 VT 8, ¶ 65.

ANALYSIS

Collateral estoppel, or issue preclusion, "bars the subsequent relitigation of an issue which was actually litigated and decided in a prior case . . . resulting in a final judgment on the merits, where that

issue was necessary to the resolution of the action." *Daiello v. Town of Vernon*, 2018 VT 17, ¶ 12, 207 Vt. 139 (citation and quotation marks omitted). "In deciding whether issue preclusion is appropriate, we balance our desire not to deprive a litigant of an adequate day in court against a desire to prevent repetitious litigation of what is essentially the same dispute." *Stevens v. Stearns*, 2003 VT 74, ¶ 13, 175 Vt. 428 (internal quotations and citations omitted). Only the issue need be the same; the contexts or forms in which it is raised do not need to be identical. *Scott v. City of Newport*, 2004 VT 64, ¶ 13, 177 Vt. 491 ("For issue preclusion, identity of subject matter or causes of action is not required. . . . The requirement is that the issue be the same in the two actions.").

A court should apply preclusion only when the following elements are met:

> (1) preclusion is asserted against one who was a party or in privity with a party in the earlier action; (2) the issue was resolved by a final judgment on the merits; (3) the issue is the same as the one raised in the later action; (4) there was a full and fair opportunity to litigate the issue in the earlier action; and (5) applying preclusion in the later action is fair.

Trepanier v. Getting Organized, Inc., 155 Vt. 259, 265 (1990).

> No one simple test is decisive in determining whether either of the final two criteria are present; courts must look to the circumstances of each case. Among the appropriate factors for courts to consider are the type of issue preclusion, the choice of forum, the incentive to litigate, the foreseeability of future litigation, the legal standards and burdens employed in each action, the procedural opportunities available in each forum, and the existence of inconsistent determinations of the same issue in separate prior cases.

Id. Examination of the background here makes clear that all criteria are present.

The first two criteria are clearly met. Mr. Holton was a party to the earlier action, which resulted not only in a final judgment on the merits, but an affirmance on the issue at hand by the Supreme Court. That Mr. Holton was not a party is of no moment; the Vermont Supreme Court has abandoned the doctrine of mutuality, which permitted issue preclusion only when both parties are bound by the prior judgment. *See Daiello*, 2018 VT 17, ¶ 14.

The remaining criteria are also easily met. Mr. Watson's protestations to the contrary notwithstanding, the accuracy of Mr. Holton's affidavit was clearly at issue in the prior action, and equally clearly resolved there. One need only compare Mr. Watson's assertions in opposing summary judgment in that case with his assertions here to conclude that he makes the same arguments today that he made then. This court concluded then, over Mr. Watson's vigorous objection, that the facts set forth in Mr. Holton's affidavit were undisputed. *Watson v. Village at Northshore I Ass'n*, 2016 WL 6661785, 3, n.3. Indeed, the Supreme Court's decision affirming this court, as quoted above, makes

clear that those facts were integral to the determination of the reasonableness of the 2005 bylaw change. While the context of Mr. Waton's present attack differs from the earlier context—here he asserts a breach of fiduciary duty while there he asserted that the bylaw was unlawful—the same factual issue lies at the heart of each dispute. That issue was conclusively resolved by this court and affirmed by the Supreme Court.

Nor can it be said that Mr. Watson did not have a full and fair opportunity to litigate this question in the prior case, such that it would be unfair to apply collateral estoppel against him. To the contrary, the record reflects that Mr. Watson litigated the question vigorously. That he failed then, as he has now, properly to meet his burden in coming forth with competent evidence to create a genuine dispute of material fact does not mean that he was denied fair process; it means instead that he failed properly to take advantage of the process he was afforded. That failure, however, falls then and now on his shoulders alone. While the court is understandably indulgent of litigants who choose to represent themselves, that indulgence does not excuse their failure to apprehend and follow the rules.

In a last-ditch effort to save this claim from issue preclusion, Mr. Watson argues that he was denied a full and fair opportunity to litigate the issue by the Association's dishonestly hiding the fact that the temperature monitoring was mandated for insurance purposes until after the close of discovery in the 2013 proceeding. This argument, however, lacks factual support. The only support for these allegations comes from Mr. Watson's own affidavit, which is plainly incompetent. Rather than stating facts based on personal knowledge, the affidavit consists of conjecture and speculation about the motives and moral character of both the Association's directors and Mr. Holton. Such evidence is insufficient for a finding in Plaintiff's favor. See *Progressive Ins. Co. v. Wasoka*, 2005 VT 76, ¶ 25, 178 Vt. 337 ("It is a basic principle of summary judgment that mere allegations of counsel unsupported by documented evidence are not enough to create a genuine issue of material fact."). Furthermore, Mr. Watson explicitly raised the issue of insurance carriers threatening the Association's coverage in absence of the temperature monitoring rule as part of a discovery request. Exhibit K. As the issue of the insurance contingency was clearly on Mr. Watson's radar prior to the close of discovery, the court cannot credit the suggestion that he lacked opportunity to dispute Mr. Holton's affidavit. Rather, consideration of the entirety of the record makes clear that Mr. Watson had ample opportunity, and therefore that all criteria for application of collateral estoppel are met.

ORDER

The Court grants Mr. Holton's motion. All claims against him in this action are dismissed with prejudice.

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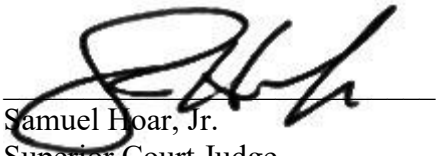

Samuel Hoar, Jr.
Superior Court Judge