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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

PAUL V. FITZGERALD,	)	
Appellant,	)	Filed September 9, 1977
vs.	)	
THE BOARD OF ADJUSTMENT OF THE CITY OF GARNER, IOWA,	)	164 2-58847
Appellee.	)	

Appeal from Hancock District Court - L. E. Plummer, Judge.

Appeal from sustaining a motion to quasha writ of certiorari based on the doctrine of issue preclusion. - Reversed and remanded with directions.

J. Ramsay McKey, of Garner, for Appellant.

Buck & Hill, of Britt, for Appellee.

Heard by Allbee, C.J., and Donielson, Snell, Oxberger & Carter, JJ.

PER CURIAM

Plaintiff, Paul V. Fitzgerald, appeals an adverse decision of the trial court sustaining a motion to quash a writ of certiorari issued against defendant, The Board of Adjustment of the City of Garner, Iowa, based upon the application of the doctrine of issue preclusion. The appeal raises the issues of: (1) whether plaintiff's motion to strike was directed to defendant's motion to quash; (2) whether the return to the writ of certiorari waived defendant's right to file the motion to quash; and (3) whether the trial court erred in sustaining the motion to quash based upon the application of the doctrine of issue preclusion.

Plaintiff initially brought suit against B. (Ed) Edwards and the City of Garner challenging the legality of the City's issuance of a building permit to Edwards allowing construction of an eight-unit multiple family dwelling which was to be connected to an existing four-unit multiple family dwelling. Plaintiff sought both temporary and permanent injunctions. A hearing was held on the request for temporary injunction and thereafter plaintiff sought leave to amend to join the Board of Adjustment of the City of Garner and to include the specific issue (certiorari) presented in the second suit. The court overruled both requests and held that there was not sufficient evidence to show an illegal act in issuance of the permit and therefore denied the temporary injunction.

Plaintiff then dismissed suit I against the City of Garner without prejudice and within the time period provided by rule 319, Rules of Civil Procedure, brought this action for certiorari against the Board of Adjustment. A writ of certiorari was issued, defendant filed its return and at the same time filed its motion to quash. In response, plaintiff filed his resistance to the motion to quash and his motion to strike paragraph six from the return to the writ as unresponsive. Paragraph six included by reference all of the proceedings in suit I. After a hearing, the trial court overruled plaintiff's motion to strike and sustained defendant's motion to quash on the basis of issue preclusion. Plaintiff appeals from those rulings. Our review is as in ordinary proceedings. Rule 318, R.C.P.

Plaintiff's initial contention is that the trial court erroneously found that his

motion to strike was directed at defendant's motion to quash. Plaintiff's motion was specifically directed to paragraph six of the return to the writ of certiorari. The writ sought "a transcript of all records and proceedings of the Board of Adjustment prior to the approval of said permit and as are complained of in the petition or as may be pertinent thereto together with the facts and circumstances surrounding the issuance of said permit and said approval." Paragraph six contained references to suit I against Edwards and the City of Garner itself. As such, it was pertinent to the legality of the certiorari proceedings and could be considered as additional evidence. See rule 315, R.C.P. Additionally, the return to the writ is to contain the record together with the facts of the case. Rule 309, R.C.P.

While the trial court erroneously found that the motion was directed to the motion to quash, the evidence sought to be struck was pertinent and the motion was properly denied.

Plaintiff's second contention is that defendant's return to the writ waived their right to file a motion to quash. The issues in certiorari are complete and the case is ready for judgment when the return to the writ is filed; no answer to the petition is required or provided for. Wood v. Iowa State Commerce Commission, 253 Iowa 797, 804-05, 113 N.W.2d 710 (1962). The proper instrumentality by which to challenge a proceeding in certiorari is by a motion to quash. Hinrichs v. Iowa State Highway Commission, 260 Iowa 1115, 1129, 152 N.W.2d 248 (1967). This is especially true after the writ has been issued. See Kounce v. City of Des Moines, 230 Iowa 760, 761, 298 N.W. 636 (1941).

In the instant case, plaintiff argues that defendant should have filed its motion to quash prior to filing the return to the writ. It chose to make the return and at the same time raise the affirmative defense of issue preclusion through its motion to quash. As an answer is not required, we find defendant did not waive his right to file a motion to quash by making its return.

The traditional prerequisites to the application of res judicata were identified in Goolsby v. Derby, 189 N.W.2d 909, 913 (Iowa 1971): "(1) identity of issues raised in successive proceedings, (2) determination of these issues by a valid final judgment to which such determination is necessary, and (3) identity of the parties or

privity. . . ." **Goolsby** then modified the requirement of privity by eliminating the necessity of mutuality when the doctrine is invoked defensively against one who was so identified in the prior litigation so as to have had a full and fair opportunity to litigate the issue or claim. See Larsen v. McDonald, 212 N.W.2d 505, 507 (Iowa 1973). The test used in considering whether a second action is for the same cause of action as the first is whether the same evidence would sustain both. If so, then the judgment in the former is a bar to the subsequent action. Bloom v. Steeve, 165 N.W.2d 825, 828 (Iowa 1969).

In Richardson v. Dunlap Livestock Auction, Inc., 210 N.W.2d 834, 836 (Iowa 1973), the elements establishing issue preclusion, adopted by the Supreme Court in **Goolsby** were set out: (1) identity of the consent issue, (2) full opportunity to litigate that issue in the previous suit and (3) actual adjudication of the issue in that suit. And in **Goolsby**, the Supreme Court also stated the most important factors in considering collateral estoppel notwithstanding a lack of mutuality or privity are: (1) whether the doctrine is used offensively or defensively and (2) whether the party adversely affected by collateral estoppel had a full and fair opportunity to litigate the relevant issue in the action resulting in the judgment. 189 N.W.2d at 916.

Generally, the denial of a temporary injunction does not deprive plaintiff of the right to a trial on the merits of his petition seeking a permanent injunction, nor is it an adjudication against such right. Even though temporary relief is properly denied, a permanent injunction may be granted where trial on the merits justifies such a decree. Iowa City v. Muscatine Development Co., 258 Iowa 1024, 1033, 141 N.W.2d 585 (1966). See also, Board of Education v. Board of Education, 260 Iowa 840, 844-45, 151 N.W.2d 465 (1967).

The trial court erred in sustaining defendant's motion to quash. In the instant case plaintiff initially agreed, but later objected, to the hearing on temporary injunction serving as the hearing on permanent injunction. Plaintiff stated he would submit evidence on the intent of the drafters of the ordinance at the hearing on permanent injunction. While not passing on the admissibility or relevancy of plaintiff's additional evidence, it is apparent plaintiff proposed to present further

evidence on the issue of the meaning of ordinance number 108. Although in a given case issue preclusion might result from a hearing on temporary injunction, we believe the plaintiff in this case did not have such a full and fair opportunity to litigate the issue at the hearing on temporary injunction as to justify invoking the doctrine of issue preclusion.

The judgment of the trial court is reversed and remanded with directions to hold a hearing on the return to the writ of certiorari and enter a decision on the merits.

Reversed and remanded.