

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

October 17, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-0643

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

DAVID K. KALAN,

Plaintiff-Appellant,

v.

CITY OF ST. FRANCIS,

Defendant-Respondent.

APPEAL from an order of the circuit court for Milwaukee County:
MICHAEL P. SULLIVAN, Judge. *Affirmed and cause remanded with directions.*

Before Wedemeyer, P.J., Sullivan and Fine, JJ.

PER CURIAM. David K. Kalan appeals *pro se* from an order dismissing his complaint and assessing costs for pursuing a frivolous claim against the City of St. Francis. We affirm the circuit court's order, find the appeal frivolous, and award the City attorney fees as costs. The case is remanded to the trial court with directions to determine the amount of the City's reasonable attorney fees for the appeal.

The chronology leading up to the filing of the present lawsuit is difficult to determine. This is at least the fourth legal proceeding between these parties, and neither side provides an adequate background of the facts in their briefs. Additionally, Kalan lacks a basic understanding of legal principals. During the course of these controversies, he often relied upon legal concepts irrelevant to the issues raised by the cases.

What is clear from the documents in the record is that Kalan owned three lots in the City of St. Francis. Two were located on Nicholson Avenue and one on Ellen Street. In 1990, the municipal court of St. Francis imposed fines for Kalan's failure to maintain the Ellen Street property. Kalan appealed the fines to the circuit court and requested a jury trial. In August 1990, Kalan obtained a building permit for the Ellen Street lot, which he alleges allowed him twenty-four months to complete the construction. Later, Kalan was notified that work would have to be completed by May 1, 1991. Kalan alleges that the reduction in the time to complete the work was retaliation for appealing the fine.

While the appeal from the municipal court case was pending, the City filed an action in circuit court alleging violations of building codes and local ordinances involving all three lots. The details of the City's claims are not available because the record does not include a copy of the complaint. This litigation was settled by a stipulation entered on the record at a hearing on October 16, 1991. Kalan was represented by counsel.

The stipulation provided that the City would hire a contractor to construct swales and landscape the Nicholson Avenue lots, that Kalan would satisfy work orders issued for those lots within fourteen days after which the City would issue occupancy permits for those properties, and that the Ellen Street lot would be transferred to the City and its building demolished. The judgment entered in the case incorporated the stipulation and included language transferring title to the Ellen Street property to the City. The City also obtained the dismissal of Kalan's appeal from the municipal court fine.

On September 23, 1992, Kalan was sent notice that the work performed by the City's contractor on the Nicholson lots totaled \$20,734.46. He subsequently obtained an estimate that the work could have been completed for

\$3,312. In January 1993, he filed a motion to reopen the prior circuit court judgment, claiming it was unjust because the excessive cost of the work was not within the contemplation of the parties. The motion was denied on June 7, 1993; however, this court reversed the order in September 1994. The trial court was directed to evaluate Kalan's motion to determine whether the facts he alleged, if true, constituted "extraordinary circumstances" allowing the judgment to be reopened. *City of St. Francis v. Kalan*, No. 93-1671, slip op. at 11 (Wis. Ct. App. Sept. 13, 1994).

Prior to the filing of the motion to reopen the earlier judgment, Kalan filed a civil rights action in federal court, alleging discrimination. The federal district court concluded that the issue was barred by the earlier judgment in the circuit court case. *Kalan v. City of St. Francis*, No. 92-C-1306, unpublished memorandum and order at 8-9 (E.D. Wis. July 26, 1993).

After the federal litigation was dismissed and this court issued its decision in the earlier appeal, Kalan filed the present *pro se* action. He alleges discrimination and breach of contract. Both claims appear to be based upon the alleged reduction in the time to complete the Ellen Street building project. In motions, he also purports to raise a civil conspiracy claim. From papers filed in the case, it is apparent Kalan also protests the dismissal of the appeal from the municipal fine, claiming that the stipulation settling the City's circuit court case did not apply to the appeal and that the two cases were not consolidated.

The City filed a motion to dismiss the present case. The trial court granted the motion because the claims were barred by *res judicata*. The prior circuit court case involved the same facts, and the dismissal of the federal lawsuit barred the discrimination claim. The court declined to find that Kalan had filed the action to harass the City; however, it did conclude that Kalan was charged with knowing that his claims were without a reasonable basis in law and in equity. Therefore, the court found the complaint was frivolous and assessed costs against Kalan.

Res judicata or claim preclusion, as the doctrine is now denominated, makes a final adjudication on the merits in a prior action a bar to subsequent actions between the same parties as to all matters that were or might have been litigated in the earlier action. *Northern States Power Co. v.*

Bugher, 189 Wis.2d 541, 550, 525 N.W.2d 723, 727 (1995). For earlier proceedings to bar the present suit under claim preclusion, three factors must be present. *Id.* at 551, 525 N.W.2d at 728. First, there must be identity between the parties or their privies in both proceedings; second, there must be identity between the claims in the two proceedings; and third, there must be a final judgment on the merits in the earlier proceeding. *Id.* Identity of claims exists if the claims arose from the same transaction, incident, or factual situation. *Id.* at 554, 525 Wis.2d at 729. Therefore, the emphasis is on the underlying facts and not the number of legal theories that can be developed from the facts. *Id.* Additionally, a pending appeal does not deprive an otherwise final judgment of its preclusive effect unless and until the judgment is reversed. *Town of Fulton v. Pomeroy*, 111 Wis. 663, 669, 87 N.W. 831, 833 (1901). Whether the doctrine of claim preclusion applies to bar relitigation of an issue is a question of law that this court decides *de novo*. *Northern States Power*, 189 Wis.2d at 551, 525 N.W.2d at 728.

When the trial court entered its order in the present case, the federal court had determined that claim preclusion barred the discrimination claim because it was foreclosed by the earlier circuit court judgment. The pending motion to reopen the circuit court judgment, which had not been granted, does not prevent the circuit court judgment from barring all matters that were or might have been litigated in that case. The judgment in the federal court case is a final judgment that precludes the discrimination claim from being considered in this case.

The judgment in the prior circuit court case also precludes Kalan from raising a breach of contract or civil conspiracy claim in this case. The prior case involved violation of building codes and municipal ordinances at the Ellen Street property. According to the facts recited in the federal court decision, the City's complaint alleged violations of the terms of the building permit. Kalan's breach of contract claim regarding the building permit and his civil conspiracy allegations are relevant to whether Kalan had, in fact, violated the permit's terms. They could have been raised in a counterclaim. *See* § 802.07(1), STATS. Therefore, claim preclusion bars Kalan from raising these claims in a subsequent proceeding. The trial court properly dismissed the complaint.

In the briefs Kalan filed in this appeal, he does not challenge the trial court's finding that the lawsuit was frivolous. Because he does not raise an issue regarding this portion of the trial court's order, we do not review it.

Kalan repeatedly raised two concerns that deserve comment. By stipulation, Kalan agreed that the Ellen Street property would be transferred to the City. The circuit court order transferring title merely accomplished what Kalan had agreed would be done. As part of the consideration for the transfer of property, the City agreed to forego efforts to collect fines it claimed against that property and the Nicholson Street lots. Contrary to Kalan's belief, the Ellen Street property was not taken without compensation, and the trial court did not exceed the stipulation by incorporating language transferring title in the judgment.

Further, once the City acquired the Ellen Street property, it was legally obligated by the stipulation and the circuit court judgment to abandon attempts to collect the fines. The City's abandonment of its collection of the fines levied against the Ellen Street property rendered Kalan's appeal of those fines moot. The City informed the circuit court branch handling the appeal proceedings that the appeal should be dismissed on that basis, and the circuit court properly dismissed the appeal.

Finally, the City has requested that this court find Kalan's appeal frivolous and award it attorney fees as costs. We conclude that Kalan's appeal is without any reasonable basis in law or equity and can not be supported by a good faith argument for an extension, modification, or reversal of existing case law. *See* § 809.25(3), STATS. Consequently, we hold that the appeal is frivolous and remand the case to the trial court to determine the amount of reasonable attorney fees to be assessed against Kalan for this appeal.

By the Court. – Order affirmed and cause remanded with directions.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.