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TACOMA CITY ATTORNEY
CIVIL DIVISION

NO. 42302-2-II

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STATE OF WASHINGTON
DEPUTY

IN THE COURT OF APPEALS

STATE OF WASHINGTON

DIVISION II

ANTHONY R. G

GORDON

Appellant

v.

CITY OF TACOMA; THE CITY OF TACOMA DEPARTMENT OF
WORKS BUILDING AND LAND USE SERVICES

Respondents.

APPELLANTS BRIEF

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Brower v. Wells, 390 U.S. 400 (402) (1968)

Carver v State, 152 Wash.2d at 317-318, 96 P.3d 957

Mission Springs Inc., v. City of Spokane, 134 Wash.2d 947, 954 P.2d 250 (1998)

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West Main Assocs. v City of Bellevue, 106 Wash.2d 47 (50) 720 P.2d 782 (1986)

Statutes and Codes

Tacoma Municipal Code title 2

Wash. Const. art. I, § 22

42 U.S.C 1983

Blacks Law Dictionary, West Publishing Company, 1979

Record on Review

Findings of fact and conclusions of law (FOF) entered on May 27, 2011.

Oral Ruling (OR) made March 24 ,2011.

ASSIGNMENT OF ERROR - 1

DID THE TRIAL COURT ERR IN NOT AWARDING THE PLAINTIFF LEGITIMATE GENERAL AND ECONOMIC DAMAGES RESULTING FROM THE DEPRIVATION OF PROCEDURAL DUE PROCESS AND VIOLATION OF HIS CIVIL RIGHTS.

ISSUE - 1

The proper application of 42 U.S.C 1983 and applicable case law requires damages be awarded resulting from the city or states improper use of due process. A property tied up in litigation for a period of years due to the City's violation require a damage award for the entire period the property in encumbered.

ASSIGNMENT OF ERROR - 2

DID THE TRIAL COURT ERR IN ALLOWING THE APPLICATION OF THE COLLATERAL ESTOPPEL THEREBY DENING THE PLAINTIFF RECOVERY OF DAMAGES BASED ON THE ENTRY OF A DEFAULT JUDGEMENT IN DISTRICT COURT.

ISSUE - 1

The issue decided in the District Court case was not identical to the issue presented in the Superior Court case and thus violated the application of collateral estoppel.

ISSUE - 2

The District Court judgment was entered by way of default and thus not a Judgment on the merits which was fully and fairly litigated and thus not effected by collateral estoppel.

ISSUE - 3

The application of collateral estoppel works a significant injustice in that it rewards the City's improper and unconstitutional action which would deprive them of the use of this doctrine.

ASSIGNMENT OF ERROR - 2

DID THE TRIAL COURT ERRED IN INTRODUCING, SUA SPONTE, THE IDEA OF CONSTRUCTIVE NOTICE INTO THEIR ASSESSMENT OF DAMAGES

ISSUE - 1

The court acted improperly using constructive notice, sua sponte, in her final ruling denying the parties due process to argue for or against its application.

ISSUE - 2

There was no evidence presented to support the use of constructive notice. Further its application is used improperly in determining damages.

STATEMENT OF THE CASE

The appellant, Anthony R. Gordon owned a property located at 1643 South 84th Street, Tacoma Washington that was the subject of a corrective action initiated by the City of Tacoma citing Tacoma Municipal Code 2.1 (FOF2). The initial complaint involved what was considered, third party access, to the property. At all times relevant, The appellant resided at 8702 59th Street West, in Tacoma Washington.

On July 29, 2002, the City of Tacoma received a complaint by a third party regarding the subject property. The property inspected by the city in the first week in August. On August 7, 2002, the City attempted to contact the Appellant via telephone but was unsuccessful, leaving a message directing the Appellant to "secure his property." The City of Tacoma followed by boarding up all ingress and egress accesses to the property with 7 days following the initial complaint in violation of TMC 2.01.E(1). Between August 15, 2002 and April 15, 2003, six (6) different notices of the purported code violations and associated fines were mailed to the incorrect address of 8702 58th Street West, Tacoma Washington. All these notices contained an explanation of the violation, progressive fines, and notice of the right to appeal the City's imposition of

sanctions. The March 15, 2003 letter was mis-delivered to the correct address and received by the Appellants adult son. This notice articulated fines owed in the amount of one thousand dollars (\$1000.00), notice of the violation, and indicated there was a requirement to cure. The required cure would need to be evaluated and approved by employees of the City. The notice did not include the appeal rights correctly afforded the appellant.

The Court determined that between March 1, 2003 and March 4, 2003, that Mr. Gordon had constructive notice of both the "condition of the property" and "the actions of the city." The court further articulated that at that point accrued fines were \$875.00 and further noted that the property had been boarded up by the City. The court made no specific finding that constructive notice extended to due process component of the appellant's argument i.e. right to appeal.

Finally, on April 15, 2003, the City of Tacoma mailed notice of the purported code violation with associated fine to Mr. Gordon's correct address at 8702 59th Street West. This notice failed to articulate the notice of the Appellant's right to appeal. At the point of actual notice of the ongoing violation the fines exceeded one thousand dollars two hundred dollars (\$1,200.) At this juncture both payment of the fine and an approved "work schedule" were required before the designation of derelict property would be removed by the City. The derelict property designation made the property uninhabitable and

therefore the appellant was precluded from using it as the rental which was its only prior use.

Notice through certified mail to the correct mailing address was effected on February 15, 2005. This notice provided only a statement of the complained defects and the accrued fines needed to cure. Additionally, this notice specifically did not contain a notice of the Appellants right to appeal. Total fines due to grant use access to the subject property as of April, 2006 exceeded \$21,000.

In June of 2005, after the City of Tacoma assigned the fines associated with this case to a collection company. Mr. Gordon was pro-se and received an out of town assignment by his employer on the day set for the hearing. The collection company was granted a default judgment against the Appellant for fine and penalties accrued between 10/2002 and 11/2003. The fines and penalties were those same fines and underlying code violations that were at issue in the present case.

PROCEDURAL FACTS

On March 24, 2011, the trial court found that the City of Tacoma violated the Appellant's due process rights by not providing notice of his affirmative right to appeal the City's imposition of fines and property use restriction. In evaluating damages the Court determined that between March 1,

2003 and March 4, 2003, Mr. Gordon had constructive notice of both the "condition of the property" and "the actions of the city." The court further articulated that at the point of constructive notice accrued fines based on the purported code violation were \$875.00. The court also concluded that the time between the initial complaint and the time of constructive notice was dispositive to the assignment of damage. The court found that the "inconvenience and frustration for what I perceive to be a delay of approximately 5 months in renting this property would amount to \$7,500." Additionally, awarding 3,750.00 in lost rents for the same period. The trial court's award amounted to 11,275.00 plus partial attorney fees.

The City received money's as a result of an interim District Court collection action based on the imposition of the disputed fines. Appellant was deemed collaterally estopped from challenging or being granted recovery for those earlier District Court default judgment recovering the city's fines for the purported code violations that had accrued through September 2003.

ARGUMENT

A. PLAINTIFF IS ENTITLED TO LEGITIMATE GENERAL AND ECONOMIC DAMAGES AS A RESULT OF BEING DEPRIVED OF PROCEDURAL DUE PROCESS IN VIOLATION OF HIS CIVIL RIGHTS.

A violation of due process is a violation of civil rights. *Brower v. Wells* and its companion, *Hughes v. Well*, a consolidated case involving an action to quiet title for properties subject to foreclosure by the City of Yakima for assessment liens for improvement irrigation. Both Hughes and Browers had primary ownership rights in a property subject to a City irrigation lien. The City foreclosed their lien, but failed to provide actual notice of the foreclosure suit to Browers or Hughes. The City attempted notice via publication and mailing to an incorrect address, similar to the present case. The trial court found in favor of the City of Yakima. On Appeal, The Washington State Supreme Court reversed the trial court citing 42 U.S.C 1983 finding the City of Yakima violated the Petitioners civil rights by failing to provide necessary due process.

42 U.S.C. 1983 requires "A prima facie showing that a person acting under the color of law deprived the plaintiff of a federal or state created property right without due process of law." Property is a thing consists not merely in its ownership and possession, but the unrestricted right of use, enjoyment and disposal." This unrestricted use and disposal grants almost universal access and interaction. In the present case, the primary use restricted was that of a rental income and possible loan acquisition. "Anything which destroys any of these elements of property, to that extent destroys the property itself. The substantial value of the property lies in its use. If the right of use is

denied, the value of the property is annihilated and the ownership is rendered a barren right." In the case at bar, Mr. Gordon's primary use for this property was that of generating rental income and the general appreciation of the property value over time.

The City of Tacoma denied the Plaintiff the right use the property for rental purposes. That impairment began August 7, 2002 when the City of Tacoma boarded up the property and continued with the denial of power and a water services. The impairment was compounded with the affirmation of an extra-constitutional requirement to pay fines and develop a plan which required the City's approval correcting problems envisioned by the City. These fines, plans, and City approval, were required absent due process and the right to appeal to an independent third party. Thus, the City's actions were tantamount to a regulatory taking with the added distaste of being both capricious, arbitrary, and unchallengeable. The City's failure to provide due process created a situation where the subject of the City's action had no alternative but to comply with the city's demand or suffer every more draconian results. The City's violation of due process resulted in a municipal oligarchy answerable to only to protracted and costly litigation initiated by the plaintiff.

In *Mission Springs Inc. v City of Spokane* articulates the novel dynamic issues related to the calculation of damages in a 1983 claim. While damages are generally determined by objective fact related to loss of income, emotional

demand and the myriad of other actionable damages. When the plaintiff is able to show a action under elements of 1983, the plaintiff may be entitled to damages for the deprivation of their constitutional rights alone. The trial court inappropriately concluded that during the three years the City had the property barred from use only 5 months were subject to the City's violation of due process. The Defendant attempted to point to the various inadequacies of the property as the reason the Plaintiff failed to rent the property: ie. even if the City had allowed the plaintiff to rent the property, based existing problems, the Appellant could not have rented it. The City, and trial court, for that matter fail to recognize the reality that individuals have limited resources and tend to use those resources on projects that generate a more immediate return. The subject property was involved in a dispute with the City and was deemed (by the city) unlawful to rent regardless of the Appellant executing on other cosmetic repairs. The argument that charges the appellants failure to dedicate necessary resources to make marketable an encumbered property is nonsensical.

Prejudice must be demonstrated before procedural violations will be held to be due process violations. *Storhoff*, 133 Wash.2d at 532, 946 P.2d 783. The prejudice articulated by the Appellant during trial was the inability to rent the property due to the encumbrance by the City's "derelict property" designation.

B. THE CITY HAS NOT MET THE STRINGENT REQUIREMENT OF THE COLLATERAL ESTOPPEL RULE.

Even if collateral estoppel could apply, the State has not met the rigorous requirements of the rule. In order to invoke the doctrine, the court must find:

(1) the issue decided in the prior adjudication must be identical with the issue presented in the second; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom collateral estoppel is asserted must have *been a party or in privity with a party to the prior litigation*; and (4) application of the doctrine must not work an injustice. *Cleveland*, 58 Wn. App. at 639.

Neither the first, second, nor fourth factors have been established; consequently, even if collateral estoppel could apply, the doctrine is not applicable here.

1) There is no uniformity of issues. Courts considering the application of collateral estoppel narrowly construe the issue preclusion component of the rule. For example, in *Barnes*, the Court rejected the claim that the State was collaterally estopped from prosecuting the defendant for criminal profiteering because of its earlier civil forfeiture proceeding. 85 Wn. App. at 651. The Court found there was no identity of issues because a civil forfeiture action requires affirmative proof that the defendant successfully profited from the criminal enterprise, whereas the crime of leading organized crime merely requires the State to show the defendant acted with the purpose of *doing so*. *Id.* The only issue decided by the Gordon District Court was whether the collection company,

hired by the city, had a valid claim for damages. Specifically, did the defendant fail to pay the presumably lawful application of fines and penalties levied by the City based on a purported violation of a municipal code. In June of 2005 the court entered a default judgment in favor of the collection company granting a judgment for fines and penalties accrued through September 30, 2003.

Conversely, the issue presented to the Superior Court Trial Judge primarily focused on whether the City violated the Plaintiff's due process rights in the imposition of fines and penalties and denying his proper use of the property. Additionally, the issue of the plaintiff's damages was significantly at issue. The due process component considered by the trial court included the Plaintiff affirmative right to dispute the imposition of fines, penalties and resulting loss of property. The City's failure to provide due process was affirmed by the trial court and the plaintiff prevailed. The district court considered only whether the collection company had a valid claim for fines owned to the city and entered a default judgment accordingly. The Superior Court considered whether the same city provided due process in the imposition of the district court's fine and others. The court found that the City had not and ruled for the plaintiff.

The exceedingly narrow application of the issue preclusion component of the doctrine in Barnes shows the City's anticipated assertion of identical

issues has no merit. 85 Wn. App. at 651. The first element of the collateral estoppel doctrine is not established.

2) There is no final judgment on the merits of the issues presented in this appeal.

The State must "show that in the earlier litigation there was a final judgment on the merits of the issue at hand." Barnes, 85 Wn. App. at 651 . Additionally, The proponent must provide the reviewing court with a sufficient record of the prior litigation to facilitate such analysis ... Where it is not clear whether an issue was actually litigated, or if the judgment is ambiguous or indefinite, application of collateral estoppel is not proper. Id. (internal citation omitted). In Barnes, the Court found that because Barnes had not provided a record of the summary judgment proceeding, the Court could not 'say that the summary judgment court's adjudication of the issue of Barnes's role in leading organized crime was "sufficiently firm to be accorded conclusive effect.'" Id. at 652 The State has provided no record to show that this issue was "actually litigated" - presumably because none exists. Although the Gordon default judgment is a final judgment, the District Court failed to even consider much less adjudicate the question whether Mr. Gordon's due process rights were violated invalidating and purported application of fine, penalties and denied use of private property.

3) The party against whom collateral estoppel is asserted must have been a party or in privity with a party to the prior litigation. In the case at bar, the "prior" case was the result of the fines and penalties at issue in the case at bar. The City assigned the collection action to a third party collection company. It appears here that there is both privity between the City and the Collection company and that Mr. Gordon was a party.

4) Application of the doctrine would work an injustice.

Last, even if the first three predicates of the collateral estoppel doctrine are met, the City must show application of the doctrine does not work an injustice against Mr. Gordon - i.e., does not contravene public policy. Cleveland, 58 Wn. App. at 640. This the State cannot do. Mr. Gordon's employment with the federal Government required his presence out of the state at the time of the entry of the judgment. Mr. Gordon was appearing pro se therefore a default judgment was entered in his absence. The State has provided no record to show that Gordon's inability to be present at the previous judgment, based solely on the same fines and actions, critical to the superior court action somehow impacted or impacts his ability to bring the later action citing the city's violation of Due Process. This Court should conclude that sound public policy militates against adopting the State's argument, and find that the fourth element of the collateral estoppel doctrine has not been established.

A critical component of the collateral estoppel doctrine largely focuses on public policy and the procedural fairness of the administrative proceeding. 152 Wash.2d at 317-318, 96 P.3d 957. The Christensen court noted “[t]here is nothing inherently unfair about [precluding re-litigation of an issue] provided the party has the full and fair opportunity to litigate, there is no significant disparity of relief, and all the other requirements of collateral estoppel are satisfied.” Id. at 313, 96 P.3d 957. In the present case there is a significant element of unfairness. While the Appellant had the opportunity to appear, the trial court admits, the Appellant was in the midst of traumatic personal issues. The interests of fairness, in light of the totality of the circumstances, mitigates in fair of the Appellant.

The doctrine of collateral estoppel derives from civil law and “bars re-litigation between the same parties of issues actually determined at a previous trial” Ashe v. Swenson, 397 U.S. 436, 442, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). Setting aside for the moment the question whether the issues presented in this appeal were “actually decided.” Again, in the case at bar, where was no actual factual prior litigation. It is well settled that the entry of a default judgment is the poorest form of judicial action

C.THE COURT ERRED IN THEIR SUA SPONTE INTRODUCCION OF CONSTRUCTIVE NOTICE INTO THEIR ASSESSMENT OF DAMAGES

"Such notices as implied or imputed by law, as in the case of notice of documents which have been recorded in the appropriate registrar of deeds or probate. Notice with which a person is charged by reason of the notorious nature of the thing being noticed, as contrasted with actual notice of such thing." Blacks Law Dictionary 284.

In the present case there are 4 pieces of information that are critical to the City's statutory notice requirement; 1) Nature of code violation; 2) Fine; 3) Method to cure; 4) Right to appeal the City's conclusion. The primary notice deficiency in this case is information relating to the right to appeal. TMC 2.01.090 By the time actual notice was provided to the Appellant, notice of the right to appeal was specifically excluded from the mailing.

On February 28, 2003, a certified letter was received but unopened by the Appellant. On March 15, 2003, the city mailed a letter providing notice of the first 3 prongs on the statutory requirement. As stated, neither these notices nor any subsequent notices articulated the right to appeal. The lack of notice of the right to appeal produced a profound due process problem for the City. This violation of due process was a paramount issue considered by the trial court. The trial court determined that between March 1, 2003 and March 4, 2003, Mr. Gordon had constructive notice of both the "condition of the property" and "the actions of the city.(FF5.17)" Since actual notice was arguably provided by this time it is reasonably inferred that the constructive notice discussed is of the appellants right to appeal. This analysis is corroborated by the fact the trial court awarded 5 months of "lost rents." That 5 months' rent accruing between the initiation of that action by the city in August 2003 and the point of "constructive notice" in March of 2003.

The trial court relied heavily on testimony of the Appellant's history in the area of real estate and his prior involvement with the city in correcting similar problems with other properties. This testimony prompted the trial court to find that the Appellant had constructive notice "the city's actions" and of his

rights. The right of appeal the city's decision would likely not fit within the required analysis of being so "notorious" as to be deemed well known or common knowledge as defined by Blacks.

The Appellant was not allowed to rent the property for a period in excess of 3 years. During that time, fines had accrued to over \$21,000 which would have been required before the City would released the property for rental. Mr. Gordon disputed the City's findings and their imposition of the fines since he became aware of them. Though the appellant's ability to effectively receive redress was barred by the City failing to allow an appeal of their finding.

Noting that actual notice of his appeal rights had not been established, the court found that had constructive notice of the right to appeal. "Constructive notice may be subdivided into: (a) Where there exists actual notice of matter, to which equity has added constructive notice of facts, which an inquiry after such matter would have elicited; and (b) where there has been a designed abstinence from inquiry for the very purpose of escaping notice." See *id.* at 609, 784 P.2d 1280 (quoting *Black's Law Dictionary* 957 (5th ed.1979)) (emphasis by the court). The court found that Vahl had constructive notice in both senses. See *id.* First, "she had actual notice of matters to which the law may equitably add constructive notice of facts which would have been discovered upon reasonable inquiry" because (1) she had received the three citations that resulted in the revocation, (2) revocation was mandatory under the law and she was presumed to know the law, and (3) she apparently received actual notice of the certified mail. *Id.* Second, Vahl had apparently refused to claim the certified mail for the purpose of avoiding notice. See *id.* The court held that "notice by certified mail to the correct address as shown in department records at the time of the mailing satisfies the State's burden of proof under [the statute]." *Id.* at 610, 784 P.2d 1280.

CONCLUSION

Appellant/Plaintiff ask the court to reverse the trial courts and hold that Trial court erred in the calculation of damages associated to the City's due process violation. Additionally, Appellant ask the court to reverse the trial court's finding that the Appellant was collaterally estopped from recovering the prior associated District Court collection judgment. Finally, Appellant ask the court to reverse the trial court's finding that the Appellant had "constructive notice" of the "actions of the city" and his due process right to appeal. Further, finding that the method of curing the deficiency could be provided constructively.

DATED :

March 14,2012

BY: 
Anthony R. Gordon

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M. Elson

TACOMA CITY ATTORNEY
CIVIL DIVISION

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WASHINGTON STATE COURT OF APPEALS
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ANTHONY R GORDON,
Plaintiff,

No. 42302-2-II

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CITY OF TACOMA and THE CITY OF TACOMA)
DEPARTMENT OF PUBLIC WORKS)
BUILDING AND LAND USE SERVICES)
DIVISION,)
Defendant.)

DECLARATION OF SERVICE

I *Anthony R Gordon* do hereby declare under penalty of perjury, that I served a true and correct copy of the above captioned APPELLANTS BRIEF to the Office of the City Attorney at 747 Market Street, Room 1120, on the ____ day of April, 2011.

Dated this *2nd* day of *April*, 2012 at Tacoma, Washington.

Anthony R Gordon
Anthony Rick Gordon