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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO
LEVEL 1

DAVID D. ALLTOP, et al.

Plaintiffs

vs.

OHIO DEPARTMENT OF NATURAL
RESOURCES

Defendant

CASE NO. 4:90CV2043

HON. GEORGE W. WHITE

MEMORANDUM AND
ORDER

The plaintiffs are owners of several parcels of property located in Mahoning County, Ohio. Their property was part of the 166 acre Olive Craig farm that was conveyed by Olive Craig's heir to plaintiffs' predecessors in title in 1919 and 1920. Prior to these conveyances Olive Craig conveyed an interest in a 49 acre parcel of the farm to the City of Youngstown for reservoir purposes only, by deed dated March 29, 1921. More than 70 years later the City conveyed its interest to the defendant Ohio Department of Natural Resources. The plaintiffs operate a restaurant and marina on their land that has been in operation by various owners or their lessees since 1948. Plaintiffs maintain on the 49 acre parcel docks, wharfs, gasoline tanks and pumps, a lighthouse, a shed and concession building, electric lights, lines and poles, fencing, picnic grills and a concrete boat ramp. When

1 Olive Craig conveyed the land to the City of Youngstown she
2 reserved the right of access to the reservoir to be
3 constructed and reserved the same riparian rights consistent
4 with its purpose as a reservoir she held in the Mahoning
5 River. Two of plaintiffs' predecessors in title to a portion
6 of plaintiffs' property were sued in the Court of Common Pleas
7 of Mahoning County, Ohio by the City of Youngstown in
8 Youngstown v. Brooks, Case No. 170874. The defendants in that
9 case filed an answer and cross-claim but, due to the death of
10 their attorney and illness of one of the defendants, failed
11 to appear at trial. An ex parte judgment was rendered.
12 Plaintiffs contend that the decision in City of Youngstown v.
13 Brooks is contrary to a related decision in the Ohio Court of
14 Appeals, Mallory v. Dillon, 18 OLA 239 (1934), which
15 plaintiffs argue is favorable to them. Furthermore,
16 plaintiffs assert that for various reasons the Brooks case is
17 not applicable. Even if Brooks is applicable it constitutes
18 a taking of property without just compensation in violation
19 of the Fifth and Fourteenth Amendment to the United States
20 Constitution. Despite the Courts ruling in Brooks, the Brooks
21 defendants continued to operate their marina business on this
22 property for eleven years without the City making an effort
23 to execute the judgment. These defendants sold the property
24 to plaintiffs immediate predecessor. At this time the City
25 required the new owners to obtain a lease-permit in order to
26 continue operating the marina. Plaintiffs assert in their

1 complaint that the City's allowance of a lease-permit and
2 continual renewal of such lease-permit demonstrates that
3 operation of a marina was not inconsistent with the terms of
4 the reservation and the City and State's use of the lake as
5 a reservoir is contrary to the findings in Brooks. The City's
6 twenty-two year failure to give notice or execute the Brooks
7 injunction and by lease-permit allowing a marina shows that
8 the City's representation to the Court in obtaining an ex
9 parte judgment was a misrepresentation and is therefore
10 subject to collateral attack. Also, the death of the attorney
11 for the Brooks defendants, their resultant dependence on his
12 office to keep them aware of the proceedings in the case and
13 their failure to receive notice of the trial is another reason
14 for collateral attack on the Brooks case, as well as the
15 illness of one of the defendants and necessity of the three
16 other defendants to attend to her. Plaintiffs allege that
17 other marinas are operating in this area, further
18 demonstrating that plaintiffs use is not inconsistent with
19 defendants' possession and use of the lake as a reservoir.
20 Plaintiffs request a preliminary and permanent injunction
21 enjoining defendants from removing improvements on the land
22 from interfering with their use of the property as a marina.
23 In their second claim, and in the alternative, plaintiffs
24 request the Court to modify the Brooks injunction by deleting
25 the mandate to remove the docks and other marina property.
26 Finally, the third claim seeks a declaratory judgment that

1 they will suffer irreparable destruction of their property
2 because of defendant's interference. The above facts and
3 arguments were taken from plaintiffs' complaint. The
4 complaint does not contain a short and plain statement of the
5 grounds upon which the Court's jurisdiction depends as
6 required by Rule 8(a) of the Federal Rules of Civil Procedure.
7 The action appears to arise under the Civil Rights Act of
8 1871, 42 U.S.C. §1983 so jurisdiction is invoked by 28 U.S.C.
9 §§1331 or 1343. This matter is before the Court upon
10 defendant's motion to dismiss and or summary judgment.
11 Because matters outside the pleadings will be considered, the
12 motion shall be treated as one for summary judgment. See Rule
13 12(b).

14 Defendant contends that this action is barred by the
15 doctrine of res judicata. Besides City of Youngstown v.
16 Brooks, the present plaintiffs filed an action on November 27,
17 1989 in the Mahoning County Court of Common Pleas, Case No.
18 89-CV-02499. The Court ruled that the Alltops had no right
19 to operate a marina on state property. The plaintiffs
20 appealed that decision and on October 19, 1990 the Court of
21 Appeals affirmed the trial court's decision. An appeal is
22 pending before the Ohio Supreme Court. Comparison of the
23 complaint in this federal action with the second amended
24 complaint in Alltop v. Ohio Department of Natural Resources
25 in the state court shows that the two complaints are almost
26 identical. The same issues were raised in both cases.

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28 U.S.C. §1738 provides that the records and judicial proceedings of any court of any state shall have the same full faith and credit in every court in the United States as they have in the courts of the state from which they are taken. The United States Supreme Court has held that §1738 applies to §1983 actions. Allen v. McCurry, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980). In such cases a federal court would be required to give state court judgment preclusive effect based on claims preclusion, collateral estoppel or issue preclusion. Gutierrez v. Lynch, 826 F.2d 1534, 1537 (6th Cir. 1987). In determining whether res judicata applies the court must look to state law. Id at 1537. In Ohio, a subsequent suit is barred if the defendant can demonstrate that there has been a final judgment rendered on the merits by a court of competent jurisdiction, the parties are identical to those of the former action or in privity with them and the subsequent suit involves the same claim or cause of action. Norwood v. McDonald, 142 Ohio St. 299, 305, 52 N.E.2d 67 (1943). Res judicata also bars claims that might have been litigated in the first case. Rogers v. Whitehall, 25 Ohio St.3d 67, 494 NE.2d 1387, 1388 (1986). The Court decisions in the instant case satisfy all the above criteria.

The issue in the Brooks case, the Alltop state court case and the case at bar is whether the "riparian right" reservation in Olive Craig's deed to the City of Youngstown

1 gave her successors the right to use certain real property for
2 commercial marina purposes. In Brooks the Court states: "The
3 Court finds that the interests of all the defendants herein
4 are determinable from the reservation above, and that this
5 determination resolves all causes of action herein." The
6 Court further held that the reservation did give Alltops'
7 predecessors the right to operate a marina and they were
8 required to remove marina equipment and buildings. The Common
9 Pleas Court and the Court of Appeals in the Alltop case also
10 arrived at the same conclusion.

11 In Ohio a person is in privity if he succeeds to an
12 estate or interest in the same thing. See Nationwide
13 Insurance Co. v. Steigerwalt, 21 Ohio St.2d 87, 255 NE.2d 570
14 (1970); Metalworking Machinery Co. v. Fabco, 17 Ohio App.3d
15 91, 477 NE.2d 634 (1984). The Ohio Department of Natural
16 Resources is successor in title to the City of Youngstown.
17 The Alltops are predecessors in title because they are owners
18 of the same property in question in the Brooks and Alltop
19 state court cases.

20 Absolute identity exists between the parties to this
21 action and the parties in the Alltop case. The Court in
22 Alltop ruled that the Brooks case was res judicata to the
23 Alltop case. In fact, the state court considered all the
24 issues raised by plaintiffs in this federal case. Any federal
25 question was raised in the state court case as the complaints
26 in that case and this federal case are almost identical and

1 the state court could have ruled on these issues. The Court
2 ruled that plaintiffs could not operate a marina so they would
3 not be entitled to just compensation.

4 The Sixth Circuit has ruled that collateral estoppel
5 applies despite the fact that an appeal is pending before the
6 Ohio Supreme Court. Richardson v. City of South Euclid, 904
7 F.2d 1050, 1052 (6th Cir. 1990). The case at bar is merely
8 an attempt to relitigate the issues that were before the state
9 court.

10 Plaintiffs argue that the Brooks injunction has no
11 effect due to denial of due process because of the failure to
12 notify the Brooks defendants of trial or judgment. However,
13 the journal entry in the Brooks case states in the first
14 paragraph:

15 "This 22nd day of November, 1967, this
16 cause came on for trial upon the
17 petition, answer, cross-petition of
18 defendants, other pleadings, and the
19 evidence. The defendants each and all
20 being duly served and notified, failed to
21 appear. The Court being advised of the
22 defendants' repeated failures to appear,
23 and being advised further in the
24 premises, found that a legitimate
25 controversy was demonstrated by the
26 pleadings and evidence, proceeded to
judgment thereon."

It appears that all the defendants were notified of the
trial. There is no indication why they did not appear. The
same issue was raised by the plaintiffs in the second amended
complaint in the state court case and could have been
litigated there.

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Plaintiffs have sued the Ohio Department of Natural Resources. The Eleventh Amendment provides:

The judicial power of the United States shall not be construed to extend to any suit in law or in equity, commenced or prosecuted against one of the United States by citizens of another State, or by Citizens or Subjects of any Foreign State.

This Amendment precludes a suit against a state by a citizen of another state. The United States Supreme Court extended the Eleventh Amendment barring a federal court from entertaining a suit brought by a citizen against his own state. Hans v. Louisiana, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890), Lee v. Western Reserve Psychiatric Habilitation Center, 747 F.2d 1062, 1065 (6th Cir. 1984). The Ohio Department of Natural Resources is a state agency. Ohio Revised Code Section 121.02(F) and Chapter 1501. Apparently, plaintiffs agree that the action is barred by the Eleventh Amendment and have offered to amend their complaint substituting state officials. Plaintiffs may bring an action alleging violation of federal law for prospective injunctive relief against the proper state official. Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984). However, the Courts decision that res judicata applies precludes such amendment.

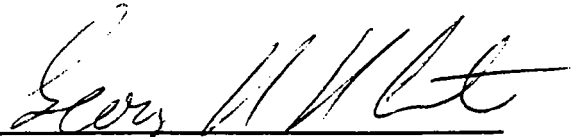
Defendant argues that this Court should abstain from hearing this action. In Colorado River Water Conservation District v. United States, 424 U.S. 800, 96 S.Ct. 1236, 47

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L.Ed.2d 483 (1976), the Supreme Court added a fourth doctrine of abstention. Colorado held that a federal court may decline to take jurisdiction of an action because of concurrent state litigation. Whether or not to do so is within the Court's discretion. Will v. Calvert Fire Insurance Co., 437 U.S. 655, 98 S.Ct. 2552, 2558, 57 L.Ed.2d 504 (1978). Neptune v McCarthy, 706 F.Supp. 958, 964 (D. Mass. 1989). Deference may be proper even if federal law is involved. Taking jurisdiction over this action will not result in duplicative litigation because this Court has applied the doctrine of res judicata. Therefore, the Court will not abstain.

Accordingly, the Court finds that this action is barred by the doctrine of res judicata. Defendant's motion for summary judgment is granted. The Court also finds that the action, in its present form is barred by the Eleventh Amendment but plaintiffs could have received leave to amend their complaint to substitute the proper party. Therefore, the action will not be dismissed on the basis of the Eleventh Amendment. Defendants' argument for abstention is denied.

IT IS SO ORDERED.


George W. White 1-30-91
UNITED STATES DISTRICT JUDGE