

STATE OF MICHIGAN
COURT OF APPEALS

BARBARA POTENGA,

Plaintiff-Appellant,

v

BABCOCK GARDEN COURT CO-
OPERATIVE,

Defendant-Appellee.

UNPUBLISHED
September 23, 2003

No. 240560
Oakland Circuit Court
LC No. 99-018340-NZ

Before: Whitbeck, C.J. and Talbot and Zahra, JJ.

PER CURIAM.

Plaintiff appeals as of right from the circuit court's order granting defendant's motion for summary disposition. We affirm.

Facts and Procedural History

In 1991, plaintiff purchased an ownership interest in a cooperative apartment for exclusive use of a unit from defendant for \$40,000. The purchase agreement also provided that plaintiff pay \$170 a month for membership in the cooperative. Plaintiff made timely membership payments until she was incarcerated in psychiatric hospitals from April to November 1998. In late September 1998, defendant filed a complaint for non-payment of rent. On October 7, 1998, the 44th District Court entered a default judgment against plaintiff for failure to pay unpaid carrying charges, past due assessments and court costs. On October 23, 1998, defendant applied for a writ of restitution to evict plaintiff, which was issued on November 3, 1998. The writ was apparently executed and possession was restored to defendant.

On October 18, 1999, plaintiff filed a complaint in the instant case alleging conversion, trespass to chattels, breach of contract, violation of constitutional rights,¹ intentional infliction of emotional distress and civil conspiracy. On May 23, 2000, plaintiff appealed the 44th District Court's order of eviction and restitution to the circuit court asserting improper service. The circuit court granted leave, but remanded the case to the 44th District Court to determine whether

¹ This claim was voluntarily dismissed.

plaintiff had been properly served. The 44th District Court determined that plaintiff was duly served, and plaintiff appealed that decision to the circuit court. The circuit court affirmed the district court's ruling, finding that plaintiff waived her right to challenge the 44th District Court's jurisdiction because her lawyer entered a general appearance. Consequently, defendant moved for summary disposition in the present case, arguing that the 44th District Court's judgment of possession barred plaintiff's claims. After a hearing, the trial court granted defendant's motion and dismissed plaintiff's claims for conversion, trespass to chattels, breach of contract as res judicata. The trial court also dismissed plaintiff's intentional infliction of emotional distress and civil conspiracy claims. On appeal, plaintiff claims that the trial court improperly dismissed its claims for conversion, trespass to chattels, breach of contract and civil conspiracy.

A. Motion to Stay Proceedings

Plaintiff first argues that the trial court erred in staying the present case pending the outcome of defendant's district court eviction proceeding against plaintiff. We disagree. First, we note that the lower court record does not reflect that plaintiff objected to defendant's motion to stay proceedings. Issues first raised on appeal are ordinarily not subject to review. *Booth Newspapers, Inc v University of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993). Regardless, the trial court properly stayed the proceeding pending resolution of the related district court proceedings. Plaintiff brought claims for conversion and trespass to chattels. The trial court stayed the proceedings pending the district court's determination whether plaintiff was properly served in the eviction proceeding. Whether the eviction was lawful is relevant to plaintiff's claims. See *Sewell v Clean Cut Management, Inc*, 463 Mich 569, 576-577; 621 NW2d 222 (2001). The trial court properly determined that the outcome of the eviction proceeding was relevant to issues in the instant case. Moreover, plaintiff has failed to show prejudice resulting from the decision to stay the proceedings. Therefore, plaintiff has failed to show error requiring reversal.

B. Res Judicata

Plaintiff next argues that the trial court erred in finding plaintiff's conversion, trespass to chattels, and breach of contract claims barred by res judicata. The trial court granted defendant's motion for summary disposition under MCR 2.116(C)(7). This Court reviews a trial court's grant of summary disposition under MCR 2.116(C)(7) de novo. *Horace v Pontiac*, 456 Mich 744, 749; 575 NW2d 762 (1998). In reviewing a motion under MCR 2.116(C)(7), this Court accepts as true all well pleaded allegations unless specifically contradicted by affidavits or other documentary evidence. *Stamps v Taylor*, 218 Mich App 626, 630; 554 NW2d 603 (1996). The pleadings and any documentary evidence offered in support of the motion are reviewed in a light most favorable to the nonmovant. *Id.* Res judicata precludes the prosecution of an action when: (1) the first action was decided on the merits; (2) the matter contested in the second case was or could have been resolved in the first; and (3) both actions involve the same parties or their privies. *Bd of Co Rd Comm'rs for the Co of Eaton v Schultz*, 205 Mich App 371, 375-376; 521 NW2d 847 (1994).

In summary proceedings, joinder of claims is not mandatory and a judgment in such a case, no matter who prevails, does not bar other claims for relief that could have been raised but were not. *JAM Corp v AARO Disposal, Inc*, 461 Mich 161, 169-170; 600 NW2d 617 (1999). However, the judgment is conclusive as to any claims that are actually litigated in the summary

proceedings action.” *Sewell, supra*. Further, “where the district court judgment and writ have not been reversed or vacated, they are conclusive on the narrow issue whether the eviction was proper.” *Id.*, at 577.

With regard to plaintiff’s claims for conversion and trespass to chattels, we find that these claims are res judicata. These claims allege that defendant purposefully obtained plaintiff’s apartment and removed her personal belongings. The factual basis of these claims is equivalent to a claim for improper eviction (eviction is defined, in part, as the “the act of depriving a person of the possession of land or rental property which he has held or leased.” Black’s Law Dictionary (6th ed)). Since, the district court previously determined that there was a proper eviction, plaintiff’s claims for conversion and trespass to chattels are res judicata. *Sewell, supra*.

Moreover, the district court entered a judgment of possession which granted defendant the right to the premises. *Sewell, supra* at 575. Plaintiff’s claims for conversion and trespass to chattels would only relitigate whether defendant had the right to the premises. “Nothing in the statute . . . stands for the proposition that, having litigated in the district court the question who has the right to the premises, that question can be relitigated de novo in a subsequent suit.” *Id.* Therefore, because plaintiff’s claims for conversion and trespass to chattels were actually litigated, the trial court properly dismissed those claims as res judicata.

Regarding plaintiff’s claim for breach of contract, plaintiff argues that defendant breached its contract with plaintiff in executing the eviction and sale of her property. In ruling on defendant’s complaint for possession, the district court determined that plaintiff did not have a right to continued possession because she was in breach of contract; owing defendant unpaid carrying charges and past due assessments. The judgment is conclusive as to any claims that are actually litigated in the summary proceedings action. *Sewell, supra* at 576-577. Because plaintiff’s complaint in the circuit court was predicated upon a breach of that same contract, the district court’s ruling on that issue is conclusive and bars plaintiff from relitigating the issue. Therefore, the trial court did not err in granting defendant’s motion for summary disposition.

C. Conspiracy Claim

Plaintiff last argues that the trial court erred in dismissing her civil conspiracy claim. The trial court granted defendant’s motion for summary disposition regarding this claim under MCR 2.116(C)(8) and (10). Since the parties presented evidence outside of the pleadings, it is appropriate to review the issue under MCR 2.116(C)(10). *Kubisz v Cadillac Gage Textron, Inc*, 236 Mich App 629, 633 n 4; 601 NW2d 201 (1998). A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek v Dep’t of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). Summary disposition of all or part of a claim or defense may be granted when “[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.” MCR 2.116(C)(10).

“A civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or

unlawful means.” *Admiral Insurance Co v Columbia Casualty Insurance Co*, 194 Mich App 300, 313; 486 NW2d 351 (1992), citing *Feaheny v Caldwell*, 175 Mich App 291, 307, 437 NW2d 358 (1989). Here, the trial court found that plaintiff failed to prove an underlying tort. We agree, after having determined that the trial court properly dismissed plaintiff’s claims for conversion and trespass to chattels. Thus, plaintiff’s civil conspiracy claim was properly dismissed. *Id.*, citing *Early Detection Center, PC v New York Life Ins Co*, 157 Mich App 618, 632, 403 NW2d 830 (1986).

Affirmed.

/s/ Judge William C. Whitbeck

/s/ Judge Michael J. Talbot

/s/ Judge Brian K. Zahra