STATE OF MICHIGAN

COURT OF APPEALS

STANLEY McKEOWN and AMY McKEOWN,

Plaintiffs-Appellants,

v

ROSE STELKIC and CLAIRRIDGE ESTATES APARTMENTS, LLC,

Defendants-Appellees.

UNPUBLISHED
November 6, 2012

No. 303524
Macomb Circuit Court
LC No. 2009-004393-NZ

Before: K. F. KELLY, P.J., and SAWYER and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiffs appeal from an order of the circuit court granting summary disposition in favor of defendants on the basis of res judicata, MCR 2.116(C)(7), and no genuine issue of material fact, MCR 2.116(C)(10). We affirm.

This dispute has its roots in a landlord-tenant dispute. Plaintiffs resided at the Clairridge Estates Apartments during 2008, under a lease that expired January 31, 2009. In August 2008, defendant Clairridge began eviction proceedings for non-payment of rent. Plaintiffs counterclaimed, seeking money damages. The parties resolved that dispute. But on January 1, 2009, plaintiffs were served with a 30-day notice to quit as their lease was ending and defendants did not intend to renew it. Plaintiffs defended against this eviction as well and a counterclaim seeking damages. Both counterclaims arose from plaintiffs' allegations that defendants failed to accommodate Stanley McKeown's medical condition arising from an April 2008 hospitalization for congestive heart failure.

Following a hearing, the district court granted Clairridge Estates possession of the apartment. Thereafter, plaintiffs instituted the instant action against Clairridge and its rental agent, Rose Stelkic. The complaint alleged claims for breach of contract, violation of the Persons With Disabilities Civil Rights Act (PWDCRA), MCL 37.1401 *et seq*., violation of the Civil Rights Act, MCL 37.2501 *et seq*., violation of the Fair Housing Act (FHA), 42 USC 2604 *et seq*., and intentional infliction of emotional distress. The circuit court ultimately concluded that the first four claims were precluded by the doctrine of res judicata due to the litigation in the district court and that there was no genuine issue of material fact regarding the last claim.

The question whether a claim is barred by res judicata is reviewed de novo. *Adair v State of Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004). Plaintiffs first argue that their claims

are not barred by res judicata because the two actions did involve the same parties or their privies. See *id.* at 121. Specifically, plaintiffs argue that Stanley McKeown was not a party to the eviction actions. This is only partially correct as the defendants in the eviction action were identified as "Amy McKeown and all occupants," which would clearly include Stanley McKeown as a defendant. But it is true that he was not named as a counterplaintiff in the counterclaims.

In any event, as the Court pointed out in *Adair*, *id.* at 122, "a perfect identity of the parties is not required, only a 'substantial identity of interests' that are adequately presented and protected by the first litigant." Plaintiffs argue that there was not an identity of interests between Amy and Stanley McKeown. We disagree. The entire basis for the counterclaims, as well as the defense to the ultimate eviction, in the district court was Stanley McKeown's medical condition and the need for an accommodation by a change of apartment from the third to the first floor. That is, Amy McKeown could only prevail on her own claims by successfully advocating Stanley's claims.

Next, plaintiffs argue that not all of their claims could have been resolved in the district court because some arose at a later time. See *Adair*, *id.* at 121. But all had to have arisen by the time of the eviction in the second district court proceeding. Therefore, while perhaps not all of the claims could have been resolved in the earlier district court proceeding, they could have been resolved in the later proceeding.

Finally with respect to the res judicata argument, plaintiffs argue that the issues "could not have been resolved by the District Court because it was incapable and unwilling to protect the Plaintiffs-Appellants' federal rights." This may or may not be true. But the proper venue to argue that a court mishandled a matter is to appeal from the court's judgment, not to file a new case in a different court.

Plaintiffs' other issue on appeal is that the trial court erred in granting summary disposition based upon no genuine issue of material fact on their PWDCRA, FHA and breach of contract claims. But the trial court only granted summary disposition on this basis on the intentional infliction of emotional distress claim. And plaintiff does not challenge that decision on appeal. Accordingly, there is no basis to reverse on this issue.

Finally, turning to the issue raised by the dissent, that res judicata does not apply because the district court dismissed plaintiffs' claims without prejudice, we initially note that plaintiffs do not make this argument on appeal. That is perhaps because the record before us does not support that argument. There were three district court actions in this case, a revival of the 2008 eviction action, a new eviction action for nonpayment of rent, and a new eviction action based upon the termination of the lease. The order referred to by the dissent only dismissed one of the actions. Specifically, it was the action with the district court docket number 09-01442TLT. That order arises out of a hearing conducted the same day, February 26, 2009, in all three docket numbers. One of the issues at the hearing was whether the tenants' claim of retaliatory eviction was a defense. The landlord argued, and the district court agreed, that it could only be a defense to the nonpayment of rent claim, but not to the termination of the lease claim. This lead the district judge to express the opinion that, because he was going to rule in favor of the landlord on the termination of the lease issue, it did not make sense to spend time arguing about whether there

was a retaliatory eviction defense to the nonpayment of rent claim. The landlord agreed and stated that that claim would be withdrawn. That is the order referred to by the dissent; it only represents the voluntary dismissal of the 2009 nonpayment of rent action. This was not the action in which plaintiffs filed their counterclaim. It is clear from the transcript of that hearing that the district judge was ruling on the merits of both the eviction based upon the termination of the lease and the counterclaim. In sum, the dismissal without prejudice in the district court action referenced by the dissent does not affect the res judicata analysis.

Affirmed. Defendants may tax costs.

/s/ Kirsten Frank Kelly
/s/ David H. Sawyer