

STATE OF MICHIGAN
COURT OF APPEALS

STANLEY McKEOWN and AMY McKEOWN,
Plaintiffs-Appellants,

UNPUBLISHED
November 6, 2012

v

ROSE STELKIC and CLAIRRIDGE ESTATES
APARTMENTS, LLC,

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

Defendants-Appellees.

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

RONAYNE KRAUSE, J (*concurring in part and dissenting in part*)

I respectfully dissent, because upon review of the District Court's record, it is apparent that the District Court not only did not genuinely consider most of plaintiffs' claims, the District Court formally either did not dismiss any of them with prejudice or did not dismiss them at all. Consequently, it is impossible for them to have been res judicata and the Circuit Court erred in dismissing them pursuant to MCR 2.116(C)(7). However, because plaintiffs do not raise on appeal the circuit court's dismissal of their intentional infliction of emotional distress claim pursuant to MCR 2.116(C)(10), I concur in affirming the dismissal of that particular claim.

It has long been established that courts speak only through their orders. *Harnau v Haight*, 212 Mich 66, 69; 179 NW 473 (1920). A dismissal without prejudice is not an adjudication on the merits. *ABB Paint Finishing, Inc v Nat'l Union Fire Ins Co of Pittsburgh, Pa*, 223 Mich App 559, 562; 567 NW2d 456 (1997); see also *Citizens Mortgage Corp v Second Avenue Ltd Dividend Housing Ass'n*, 400 Mich 836; 255 NW2d 203 (1977) and *Mitchell v Bay Probate Judge*, 155 Mich 550, 554-555; 119 NW 916 (1909).

The district court's order, entered February 26, 2009, dismissing plaintiffs' claims was explicitly without prejudice. Although that order ostensibly is captioned with only one of the three District Court docket numbers, no other dispositive orders were entered by the District Court other than a judgment of possession. Consequently, the issue of whether defendants were entitled to possession would be res judicata, but all other issues are not res judicata: either the single order was intended to address all of the pending issues other than possession, or any of the issues not brought in the one docket number specifically addressed by the order were never adjudicated at all. Either way, other than the fact that defendants are entitled to possession, none of the issues should have been dismissed on the basis of res judicata pursuant to MCR

2.116(C)(7). The trial court properly did not dismiss plaintiffs' remaining claims pursuant to MCR 2.116(C)(10), because there are clearly questions of fact whether defendants were aware of plaintiffs' need for accommodation. Those claims should be remanded for trial.

/s/ Amy Ronayne Krause