

STATE OF MICHIGAN
COURT OF APPEALS

HERBERT J. STRATHER,

Plaintiff/Counterdefendant-
Appellant,

v

1300 LAFAYETTE EAST COOPERATIVE,
INC.,

Defendant/Counterplaintiff-
Appellee.

UNPUBLISHED
April 16, 2013

No. 308547
Wayne Circuit Court
LC No. 10-014032-CZ

Before: MARKEY, P.J., and TALBOT and DONOFRIO, JJ.

PER CURIAM.

Plaintiff appeals as of right the judgment in favor of defendant in this landlord-tenant dispute. Because the trial court did not abuse its discretion by denying plaintiff's request to amend his admissions and the trial court properly granted summary disposition for defendant, we affirm.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Plaintiff was a shareholder of units 508 and 509 in defendant's residential cooperative housing community. In October 2009, defendant commenced a summary proceedings action against plaintiff in the 36th District Court for nonpayment of rent. On October 19, 2009, the district court entered a default judgment of possession that required plaintiff to pay a total of \$2,516 or vacate the units on or before October 29, 2009. Because plaintiff did not pay the amount due or vacate the units, the district court entered an order of eviction on November 12, 2009. According to plaintiff, he attempted to pay the outstanding amount due on December 7, 2009, but defendant refused to accept his payment. On the same day, defendant authorized a bailiff of the 36th District Court to execute the order of eviction and plaintiff's personal property was removed from the units. Plaintiff alleges that he lost personal property worth more than \$25,000 as a result of the eviction.

On December 3, 2010, plaintiff filed this action against defendant alleging conversion of his personal property, violation of the Michigan Consumer Protection Act, MCL 445.901 *et seq.*, fraud, breach of duty to act in good faith, and unlawful interference with possessory interest.

Defendant filed a countercomplaint against plaintiff seeking the amount due under plaintiff's occupancy agreement with defendant plus attorney fees and costs.

Thereafter, defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(10). Defendant argued that on February 9, 2011, it served plaintiff with requests for admission to which plaintiff failed to respond. Defendant attached to its motion a letter dated March 14, 2011, in which defendant asked that plaintiff either contact defendant or respond to the discovery requests by March 21, 2011. Defendant indicated in the letter that it would file an appropriate motion if plaintiff failed to do so. Defendant argued that, by virtue of plaintiff's failure to respond to the requests for admission, they were deemed admitted. Defendant further argued that, in light of plaintiff's admissions, it was entitled to summary disposition on its countercomplaint and res judicata barred plaintiff's action because plaintiff did not seek to set aside the default judgment of possession or order of eviction in the district court and plaintiff did not appeal any of the district court's orders.

In response to defendant's motion, plaintiff filed a pleading entitled "Plaintiff's Motion to Amend Answers to Defendant's Request for Admission to Plaintiff." Plaintiff argued that he was unable to timely respond to defendant's requests for admission because his eviction at the hands of defendant resulted in the loss or destruction of documents necessary to answer defendant's requests. Plaintiff indicated that he had made diligent efforts to recover the materials and was now prepared to respond to the requests. In particular, plaintiff argued that requests #10, #11, and #12 must be denied. Those requests provided as follows:

REQUEST TO ADMIT 10. Admit the Plaintiff did not possess or have access to sufficient funds to pay the 36th District Court Judgment on the date the Judgment balance was due being October 29, 2009 as described in paragraph 4a of the 36th District Court Judgment.

* * *

REQUEST TO ADMIT 11. Admit the Plaintiff did not at anytime attempt to pay the entire balance due (\$2,516.00) on the 36th District Court Judgment.

* * *

REQUEST TO ADMIT 12. Admit the Plaintiff had actual knowledge of the 36th District Court Judgment prior to the time the 36th District Court Officer removed the personal property from the Premises.

Plaintiff also filed an answer to defendant's motion, arguing that res judicata did not bar his claims because defendant obtained its judgment through extrinsic fraud and that defendant was not entitled to summary disposition on its counterclaims because it failed to mitigate its damages.

In response to plaintiff's motion to "amend" his answers to defendant's requests for admission, defendant argued that plaintiff failed to respond in any manner to the discovery requests that defendant served more than 100 days previously and could not "amend" answers that were never provided. Defendant contended that plaintiff did not request an extension of time to answer the discovery requests and did not assert that he was unable to answer the

requests because of the unavailability of documents. Defendant further argued that plaintiff offered no evidentiary support for his assertion that defendant caused his documents to be destroyed and failed to appeal the district court's orders.

Following a hearing, the trial court denied plaintiff's motion, stating that plaintiff had not shown good cause to amend his admissions. Thereafter, the court denied plaintiff's motion for reconsideration and granted defendant's motion for summary disposition with the exception of the amount of damages on defendant's counterclaim. The trial court stated:

This is a matter where no motion to stay the eviction was filed. There was an attempt, from what the plaintiff says, to pay all of the money owed for the two units and [defendant] . . . decline[d] to accept it. They [sic] had the right to decline to accept it.

* * *

This is not a complex case. Either [plaintiff] paid on time or didn't pay on time, but first of all, I think there's - - it's clear res judicata because any and all issues could have been raised in the District Court, and if they were not before the judgment, clearly after the judgment entered, there could have been a motion to vacate judgment, motion for reconsideration and any other postjudgment remedies that were available to the . . . plaintiff. . . . [T]he motion for summary disposition is granted except as to the counterclaim, because motions for summary disposition may be granted except as to the amount of damages and the plaintiff is allowed to bring proofs because the plaintiff alleges that there should have been some mitigation of damages by leasing or selling the units to others or making attempts to do so.

Ultimately, the trial court entered a judgment in defendant's favor in the amount of \$7,500.

II. MOTION TO AMEND PLAINTIFF'S ADMISSIONS

Plaintiff first argues that the trial court erred by denying his motion for leave to amend his admissions. We review for an abuse of discretion a trial court's decision whether to allow a party to amend an admission. *Medbury v Walsh*, 190 Mich App 554, 556; 476 NW2d 470 (1991). "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

MCR 2.312 provides, in relevant part:

(A) Availability; Scope. Within the time for completion of discovery, a party may serve on another party a written request for the admission of the truth of a matter within the scope of MCR 2.302(B) stated in the request that relates to statements or opinions of fact or the application of law to fact

(B) Answer; Objection.

(1) Each matter as to which a request is made is deemed admitted unless, within 28 days after service of the request, or within a shorter or longer time as the court may allow, the party to whom the request is directed serves on the party requesting the admission a written answer or objection addressed to the matter. . .

* * *

(D) Effect of Admission.

(1) A matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of an admission. For good cause the court may allow a party to amend or withdraw an admission. . . .

“Thus, where a party served with a request for admissions neither answers nor objects to the request, the matters in the request are deemed admitted.” *Medbury*, 190 Mich App at 556.

Plaintiff concedes that he did not respond to the requests for admission within the 28-day time period provided by the court rule. He also concedes that he failed to respond within the extended time period that defendant allowed and that he did not object to the requests. Rather, plaintiff waited until after defendant filed its motion for summary disposition to respond in any manner to the requests for admission. At that time, plaintiff claimed that he was unable to timely respond to the requests because defendant caused his documents to be destroyed during the eviction that occurred more than 14 months before defendant served plaintiff with the requests. Plaintiff provided no documentary evidence substantiating that assertion and offered no explanation why he was unable to obtain the information in February 2011 but was purportedly able to obtain the information in May 2011 when he filed his motion to amend his answers to the requests. Accordingly, under the facts and circumstances of this case, the trial court did not abuse its discretion by denying plaintiff’s motion for leave to amend his admissions.

III. MOTION FOR SUMMARY DISPOSITION

Plaintiff next argues that the trial court erred by granting summary disposition for defendant. We review de novo a trial court’s decision on a motion for summary disposition. *Anzaldúa v Neogen Corp*, 288 Mich App 526, 528; 794 NW2d 634 (2010). In reviewing a motion for summary disposition under MCR 2.116(C)(10), we consider “the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party.” *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). “Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law.” *Id.*

Plaintiff argues that the trial court erroneously granted summary disposition for defendant on the basis of res judicata because defendant obtained the district court judgment through extrinsic fraud. Generally, the doctrine of res judicata bars claims actually litigated in a prior action as well as claims that arose out of the same transaction and could have been litigated in the prior action. *Sprague v Buhagiar*, 213 Mich App 310, 313; 539 NW2d 587 (1995). Extrinsic fraud is an exception to the doctrine of res judicata. *Id.* “Extrinsic fraud is fraud outside the facts of the case: ‘fraud which actually prevents the losing party from having an adversarial trial

on a significant issue.” *Id.*, quoting *Rogoski v Muskegon*, 107 Mich App 730, 736; 309 NW2d 718 (1981). Intrinsic fraud, on the other hand, “is a fraud within the cause of action itself.” *Id.* at 314. Examples of intrinsic fraud include perjury, fraud in inducing a settlement, fraud committed in the context of discovery, and fraud in the inducement or execution of an underlying contract. *Id.* Only extrinsic fraud may be alleged in an independent action. *Id.* A party’s remedy for intrinsic fraud must be sought by a motion for relief from judgment pursuant to MCR 2.612(C). *Id.*

Plaintiff argues that his claims were not barred by res judicata because defendant obtained the district court judgment through extrinsic fraud. In particular, plaintiff asserts that defendant failed to provide him with keys to the mailboxes for units 508 and 509 and that defendant agreed to send all housing-related documents to plaintiff’s business address. Plaintiff further asserts that despite defendant’s knowledge that he had no keys to the mailboxes, defendant sent notice of the summary proceedings action and all pleadings to one of his mailboxes. Plaintiff claims that, as a result, he was unaware of the summary proceedings action until after the judgment had been entered, the time for filing a motion to set aside or appeal the judgment had expired, and the order of eviction had been granted. Plaintiff alleged in his complaint that he became aware of the summary proceedings action on December 7, 2009, the same day that a bailiff executed the order of eviction.

Plaintiff failed to establish a justiciable question of fact for trial. As the trial court recognized, plaintiff could have filed a postjudgment motion for relief raising his claim of fraud. By failing to respond to defendant’s request to admit #12, plaintiff admitted that he had actual knowledge of the district court proceeding before the bailiff removed personal property from the premises. By failing to respond to defendant’s request to admit #6, plaintiff admitted that he did not request the 36th District Court to stay the enforcement of the order of eviction. Similarly, by failing to respond to defendant’s request to admit #7, plaintiff admitted that he did not appeal the order of eviction. “[T]he admissions resulting from a failure to answer a request for admissions may form the basis for summary disposition.” *Medbury*, 190 Mich App at 556. Thus, plaintiff could have raised his fraud claim in the context of the district court action, but he failed to do so. He has not shown that he was prevented from raising and litigating the issue. As such, the trial court properly granted summary disposition for defendant on the basis of res judicata.

Affirmed. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Jane E. Markey
/s/ Michael J. Talbot
/s/ Pat M. Donofrio