

STATE OF MICHIGAN
COURT OF APPEALS

DIANE LORRAINE GIANCASPRO,
Plaintiff-Appellee,

UNPUBLISHED
October 17, 2013

v

LISA ANN CONGLETON,
Defendant-Appellant.

No. 314254
Berrien Circuit Court
LC No. 2007-002194-DC

Before: MURRAY, P.J., and DONOFRIO and BORRELLO, JJ.

PER CURIAM.

Defendant appeals as of right the January 7, 2011 order denying her custody of the minor daughters she adopted with plaintiff. For the reasons set forth in this opinion, we affirm.

This is the second time this matter has been before this Court. Initially, this Court provided the following determination:

[t]his case concerns three minor children. The parties in this matter have never been married, but they began cohabiting in 1995. At some point, defendant adopted the children as the sole legal parent in the People’s Republic of China. The parties then petitioned to adopt the children in the state of Illinois, pursuant to Illinois law. We have not been provided with any Illinois documentation, and neither party cited any Illinois law in the trial court. Defendant contended that plaintiff was “added as a second parent by way of the second parent adoption procedure in Illinois, on the basis of the same-sex lesbian relationship between the parties.” Plaintiff contended that the parties co-petitioned for adoption, and the Judgment of Adoption was based on the parties having resided together for at least five years and the children having resided with both of them since March 3, 2003. In any event, it is undisputed that a valid Judgment of Adoption was entered by an Illinois court, under which both parties are recognized as the children’s adoptive parents under Illinois law.

The parties’ relationship with each other broke down, and in August 2007, plaintiff filed her complaint “for custody, support and parenting time” pursuant to Michigan’s Child Custody Act, MCL 722.21 *et seq.* Defendant moved for dismissal, arguing primarily that the relief plaintiff sought in this action was contrary to both Michigan and Federal public policy, so the Full Faith and Credit

Clause, US Const, art IV, § 1, was inapplicable. The trial court concluded that there was no public policy exception to the Full Faith and Credit Clause, but that the Full Faith and Credit Clause only extended as far as recognizing the fact and validity of the Illinois adoption by both parties. The trial court further concluded that *enforcement* thereof was, however, not available under Michigan's Child Custody Act, because that would be violative of Michigan's public policy. The trial court ruled that "[t]he court's position is just simply clearly that they are co-parents with equal rights as it stands presently. There are no other . . . existing orders." The trial court therefore granted defendant's motion for summary disposition. [*Giancaspro v Congleton*, unpublished opinion per curiam of the Court of Appeals, issued February 19, 2009 (Docket No. 283267), slip op at 1-2.]

This Court held that "the trial court correctly recognized that the Illinois Judgment of Adoption, under which both parties were made the adoptive parents of the minor children, must be recognized as valid and binding in Michigan, irrespective of whether such an adoption could be granted by a Michigan court." *Id.*, at 3. This Court then stated that "the question is really whether Michigan's legal framework for protecting and promoting the best interests and welfare of children within its jurisdiction excludes children with a parent or parents who could not have adopted them under Michigan law." *Id.* This Court went on to find that:

[a]s discussed, the Full Faith and Credit Clause compels the courts of this state to recognize, pursuant to the Illinois Judgment of Adoption, that both parties *are* adoptive parents of the minor children. Therefore, the plain language of the [Michigan] Child Custody Act requires the conclusion that each of the parties is a "parent;" because that fact is binding, the parties' relationship with each other simply does not matter. As a consequence, this action constitutes a child custody dispute between parents, under which "the best interests of the child control." [*Id.*, at 4.]

Thus, this Court found that "plaintiff has validly stated a claim on which relief can be granted under the Child Custody Act in Michigan." *Id.*, at 5. This Court reversed the trial court's dismissal of plaintiff's case and "remanded for further proceedings under the Child Custody Act consistent with this opinion and with the Illinois adoption judgments or orders." *Id.*

On May 18, 2009, defendant filed another motion for summary judgment/motion to dismiss. Within that motion, defendant alleged that while plaintiff adopted the minor children as a second parent in Illinois, plaintiff, defendant, and the minor children were not residents of Illinois at the time of the adoptions. Accordingly, defendant argued that Illinois did not have jurisdiction to enter the adoption orders and that the trial court in this case should not recognize the validity of the adoption orders. On February 10, 2010, the trial court entered an order denying defendant's motion for summary disposition/to dismiss. The trial court found that:

[p]ursuant to the mandate from the Court of Appeals:

1) This Action constitutes a child custody action;

- 2) the Judgments of Adoption entered in Illinois are entitled to full faith and credit in the State of Michigan under the U.S. Constitution;
- 3) these Judgments of Adoption establish each party as an adoptive parent of the minor children; and
- 4) the Illinois Judgments of Adoption cannot be collaterally attacked in Michigan.

On October 7, 2010, the trial court began a bench trial regarding plaintiff's request for legal and physical custody of the children. During the trial, plaintiff testified that she had a summer home in Union Pier, Michigan from 1996 to 2004, and that her home in Union Pier became her full residence in 2004.

Defendant, however, testified that she, plaintiff, and Lily lived in Michigan in 1999. At one point during defendant's testimony, she started to explain that she and plaintiff purchased a house in Lakeside, Michigan. Plaintiff's counsel objected on relevance grounds, and defendant argued the testimony was relevant to show, contrary to plaintiff's testimony, that defendant and plaintiff lived in Michigan before 2004. The trial court sustained plaintiff's relevance objection; holding that because *res judicata* and collateral estoppel barred defendant's claim that Illinois courts lacked jurisdiction to enter the adoption order, defendant's testimony regarding state residences was irrelevant.

On December 8, 2010, the trial court issued its opinion from the bench. The trial court found that eight of the best interests factors under MCL 722.23 favored plaintiff, found that three of the factors were neutral or inapplicable, and made other findings under factor (1). The trial court granted plaintiff sole legal and physical custody of the minor children and ordered that defendant receive extended parenting time with the minor children. On January 7, 2011, the trial court entered an order consistent with its opinion.

On January 28, 2011, defendant filed a motion for reconsideration and a motion to reopen proofs. Defendant again alleged that she, plaintiff, and the minor children lived in Michigan full time at the time of the adoption of the children in 2000 and 2004. Defendant argued that the Illinois courts thus did not have jurisdiction¹ to enter the adoption orders and on that basis, defendant moved the trial court to reopen the proofs to allow her to introduce evidence of the Illinois courts' lack of jurisdiction and to reconsider its grant of custody to plaintiff.

On December 17, 2012, the trial court entered an order denying defendant's motions. The trial court denied defendant's motion to reopen proofs on the ground that it would be

¹ Though not specifically stated, we find from defendant's pleadings in this matter that her sole argument on the issue of the jurisdiction of the Illinois Circuit Courts which issued the respective adoptions in this matter centers on her contention that she was not a resident of Illinois at the time of the respective adoptions. Thus, defendant is not challenging the subject matter jurisdiction of the Illinois courts. Rather, defendant is challenging whether the Illinois courts had personal jurisdiction over her and the minor children at the time the adoptions were entered.

inappropriate to disturb the finality of the trial court's custody order in this case. The trial court denied defendant's motion for reconsideration on the ground that this Court found in the preceding appeal that the Illinois adoption orders should be recognized as valid and binding. This appeal then ensued.

On appeal, defendant's sole argument is that the trial court abused its discretion in failing to grant defendant's motions for reconsideration and to reopen proofs because the Illinois courts lacked jurisdiction over her to enter the adoption orders and therefore the orders were not entitled full faith and credit in Michigan. The basis on which defendant relies to assert her jurisdictional argument is that she was not a resident of Illinois at the time of the adoptions.

Initially we note that defendant's claim of lack of personal jurisdiction is somewhat novel in that it is being asserted by a person who (1) voluntarily sought the jurisdiction of the Illinois courts, and (2) requested the very relief (adoption) that was awarded. Typically, case law on the issue of personal jurisdiction centers on questions involving persons or corporations against whom judgments have been levied. Despite the novelty of defendant's claim we begin our analysis by noting that Illinois, like Michigan, subscribes to the general proposition that once one voluntarily submits themselves to the jurisdiction of the court, they waive all objections to personal jurisdiction and subject themselves to the authority of that court. See, *KSAC Corp v Recycle Free, Inc*, 364 Ill App 3d 593, 594, 846 NE2d 1021 (2006), holding that: "A general appearance was held to waive all objections to personal jurisdiction and subject the party to the authority of the court."

The record reveals that defendant admitted before the trial court that she and plaintiff both told the Illinois courts under oath that they were residents of Illinois at the time of the adoptions. That admission is reflected in both adoption orders because both Illinois courts explicitly found that defendant and plaintiff were residents of Illinois during the six months before the adoption orders were entered. Based on those findings, the Illinois courts found that they had jurisdiction over plaintiff and defendant. While it is somewhat inviting to end our analysis of defendant's claim by holding that the trial court could not have abused its discretion by failing to indulge a litigant in a legal argument over whether a state court possessed personal jurisdiction over someone who had submitted an affidavit to that very court swearing under oath that the court did have jurisdiction, and then requested and thereafter was granted from that court the very relief requested by the person now contesting that court's jurisdiction over her, we turn to defendant's arguments as presented in her brief.

Assuming, solely for the purpose of a complete decision on the issues as presented that defendant has a legal argument regarding the personal jurisdiction of the Illinois courts that issued the adoption orders, we turn to defendant's assertion that she has a right to posit a collateral jurisdiction challenge under the Full Faith and Credit Clause. Relying, in part, on *Underwriters Nat'l Assurance Co v North Carolina Life & Accident & Health Ins Guaranty Assn*, 455 US 691, 705; 102 S Ct 1357; 71 L Ed 2d 558 (1982), this Court held that a collateral jurisdictional challenge under the Full Faith and Credit Clause is permitted by Michigan courts. *Pecoraro v Rostagno-Wallat*, 291 Mich App 303, 314-315; 805 NW2d 226 (2011). The difficulty for defendant on this issue is that her argument that a judgment of a foreign jurisdiction is invalid and thus not entitled to recognition in Michigan under the Full Faith and Credit Clause

is an affirmative defense. See *Northern Ohio Bank v Ket Assoc, Inc*, 74 Mich App 286, 287; 253 NW2d 734 (1977). Under MCR 2.111(F)(3):

An affirmative defense must be stated in a party's responsive pleading or in a motion for summary disposition made before the filing of a responsive pleading, or the defense is waived. MCR 2.111(F)(3); *Chmielewski v Xermac, Inc*, 216 Mich App 707, 712; 550 NW2d 797 (1996), aff'd 457 Mich 593; 580 NW2d 817 (1998). Although the listing of affirmative defenses is non-exclusive in MCR 2.111(F)(3), *Campbell v St John Hosp*, 434 Mich 608, 616; 455 NW2d 695 (1990), the court rule lists such examples as contributory negligence, the existence of an agreement to arbitrate, assumption of risk, payment, release, satisfaction, discharge, license, fraud, duress, estoppel, statute of frauds, statute of limitations, immunity granted by law, and want or failure of consideration. Further, this Court has explained the nature of affirmative defenses by stating that an affirmative defense "does not controvert the plaintiff's establishing a prima facie case, but . . . denies that the plaintiff is entitled to recover on the claim for some reason not disclosed in the plaintiff's pleadings. . . . For example, the running of the statute of limitations is an affirmative defense." *Stanke*, 200 Mich App at 312. In addition, "an affirmative defense presumes liability by definition." *Rasheed v Chrysler Corp*, 445 Mich 109, 132; 517 NW2d 19 (1994). *Citizens Ins Co of America v Juno Lighting, Inc*, 247 Mich App 236, 24-242; 635 NW2d 379 (2001).

In this case, defendant's first responsive pleading was filed on August 23, 2007. Defendant did not raise a personal jurisdictional issue in regard to the Illinois adoption orders under the Full Faith and Credit Clause until May 18, 2009. Accordingly, we must find that this issue is waived. *Citizens Ins Co*, 247 Mich App at 241-242; *Chmielewski*, 216 Mich App 712. As such, we must also find the trial court did not abuse its discretion in denying defendant's motion for reconsideration and her motion to reopen proofs. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000); *Mixon v Mixon*, 237 Mich App 159, 163; 602 NW2d 406 (1999).

Hence, assuming that defendant could mount a direct challenge to the Illinois courts' personal jurisdiction over her and the other parties to the adoptions, and assuming that defendant has not waived the defense of personal jurisdiction, we would then find that defendant's argument under the Full Faith and Credit Clause is barred under the doctrine of judicial estoppel.

Our Supreme Court has described the doctrine as follows:

Sometimes described as the doctrine against the assertion of inconsistent positions, judicial estoppel is widely viewed as a tool to be used by the courts in impeding those litigants who would otherwise play "fast and loose" with the legal system. Bigelow, *Estoppel* (6th ed), Paragraph 783. Since *Hamilton*, the doctrine has been adopted by most state and federal courts, in slightly varying forms. *Paschke v Retool Indus*, 445 Mich 502, 510; 519 NW2d 441 (1994).(internal citation omitted.)

This Court has held: “Under the doctrine of judicial estoppel, a party that has unequivocally and successfully set forth a position in a prior proceeding is estopped from setting forth an inconsistent position in a later proceeding.” *Detroit Int’l Bridge Co v Commodities Export Co*, 279 Mich App 662, 672; 760 NW2d 565 (2008), lv den 483 Mich 977 (2009). The party’s position in the prior proceeding must be “wholly inconsistent” with the party’s position in the later proceeding. *Szyszlo v Akowitz*, 296 Mich App 40, 51; 818 NW2d 424 (2012), lv den 492 Mich 857 (2012).

In this proceeding, defendant now claims that she lied to the Illinois courts and that she and plaintiff were not actually residents of Illinois during the time before the entry of the adoption orders. This argument is disingenuous in that it allows defendant to enjoy the benefits of the adoption orders for as many years as she could while now attempting to nullify the effect of the adoptions because she deems it advantageous to her. This appears to be the exact type of “fast and loose” play with the legal system judicial estoppel is designed to prevent. *Paschke*, 445 Mich at 509. This Court therefore finds that because defendant unequivocally and successfully asserted that she was a resident of Illinois during the adoption proceedings, she is estopped from setting forth a wholly inconsistent position in this proceeding. *Detroit Int’l Bridge Co*, 279 Mich App at 672.

In conclusion, this Court finds that defendant cannot mount a direct challenge to the personal jurisdiction exercised by the Illinois courts in this matter because she (a) voluntarily submitted to their jurisdiction, thereby precluding any objection thereto, *KSAC Corp*, 364 Ill App 3d at 594 and; (b) swore that she was a resident of Illinois and that the Cook County courts had jurisdiction over the parties based on their residency in that jurisdiction, and; (c) requested from those very courts the adoptions which she and plaintiff were awarded. Additionally, her argument that the adoption orders are not entitled full faith and credit in Michigan is waived under MCR 2.111(F)(3) and barred by judicial estoppel. Hence, defendant fails to show that the trial court made any error in refusing to allow defendant to advance the argument that the Illinois courts did not have jurisdiction over her at the time the adoptions were entered. We therefore conclude that the trial court did not abuse its discretion in denying defendant’s motion to reopen proofs, *Mixon*, 237 Mich App at 163. Nor did the trial court abuse its discretion in denying defendant’s motion for reconsideration. *Luckow*, 291 Mich App at 426; *Churchman*, 240 Mich App at 233.

Affirmed. Plaintiff being the prevailing party is entitled to costs. MCR 7.219(A).

/s/ Christopher M. Murray
/s/ Pat M. Donofrio
/s/ Stephen L. Borrello