

STATE OF MICHIGAN
COURT OF APPEALS

DERRICK HARPER,

Plaintiff-Appellant,

v

MARILYN PARHAM and LARRY PARHAM,

Defendants-Appellees.

UNPUBLISHED

October 25, 2007

No. 274878

Macomb Circuit Court

LC No. 05-004962-NI

Before: Zahra, P.J., and White and O’Connell, JJ.

PER CURIAM.

In this premises liability action, plaintiff appeals as of right from the circuit court’s order granting summary disposition to defendants. We affirm. This case is being decided without oral argument in accordance with MCR 7.214(E).

Plaintiff and his then-wife resided at the subject property when they quitclaimed the property to defendants for nominal consideration. Plaintiff explains that this was done because defendants “assisted them in saving their residence from a mortgage foreclosure.” Plaintiff and his then-wife continued to reside at the property until the two separated; plaintiff then moved out and his estranged wife remained.

A dispute between the parties concerning their respective rights and duties in connection with the premises arose, which culminated in a court order awarding possession to defendants. While that case was pending, plaintiff slipped and fell on a patch of ice on the property while there to visit his children, thus aggravating a back injury. Plaintiff filed this premises liability action against defendants, asserting that he was a business invitee to the premises at the time of his fall.

Defendants moved for summary disposition. The circuit court granted the motion, explaining as follows:

[H]ow can I claim that, yeah, it’s my house. I own this house and now I’m injured on it. Oh, and some Judge then, a year or two later says, you don’t own that house. Well, then I’m going to sue the . . . guy who did own it.

* * *

So, even, you know, with the logical minds that we lawyers have, doesn't there seem to be something wrong?

* * *

. . . [Defendants] had no liability, according to [plaintiff], who was the one who believed he owned it and took care of it, who was upholding the property and maintaining the property. And, on top of that, there was no agreement that showed that [defendants] were landlords for him, because he had no lease agreement, there was no document you can show, other than ownership, now, by a subsequent Court action, I don't feel that there's liability and I'm going to grant the motion.

“We review a trial court's decision with regard to a motion for summary disposition de novo as a question of law.” *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). The applicability of a legal doctrine presents a question of law this Court reviews de novo. *James v Alberts*, 464 Mich 12, 14; 626 NW2d 158 (2001).

“In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial.” *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004).

Plaintiff asserts that the circuit court erroneously applied the doctrine of judicial estoppel because, although plaintiff had maintained in a different action that he was the owner of the subject property, he did not ultimately prevail in that regard. However, although it is true that judicial estoppel applies only where the party against whom it is invoked has changed from a position successfully maintained in an earlier proceeding, see *Paschke v Retool Industries*, 445 Mich 502, 509; 519 NW2d 441 (1994), the circuit court did not invoke that doctrine. Rather, the court granted defendants summary disposition in response to plaintiff's lack of evidence showing that defendants possessed or controlled the premises at the time of his fall, or that a landlord-tenant relationship existed between the parties. The circuit court's reasoning was sound.

In his answer to defendants' motion for summary disposition, plaintiff admitted that defendants “were not in possession and control of the property” at the time of his fall. “Premises liability is conditioned upon the presence of both possession and control over the land.” *Merritt v Nickelson*, 407 Mich 544, 552; 287 NW2d 178 (1980). Because plaintiff points to no evidence, other than defendants' eventual success in court concerning the right of possession, that defendants exercised control over the premises at the time plaintiff fell, or that defendant had entered into a landlord-tenant relationship with him, the circuit court properly granted defendants' motion for summary disposition.

Affirmed.

/s/ Brian K. Zahra
/s/ Helene N. White
/s/ Peter D. O'Connell