

STATE OF MICHIGAN
COURT OF APPEALS

JOYCE LYNN MEMMINGER,

Plaintiff-Appellant,

v

MCKINLEY PROPERTIES, INC.,

Defendant-Appellee.

UNPUBLISHED

September 29, 2009

No. 285542

Wayne Circuit Court

LC No. 08-100187-CZ

Before: Saad, C.J., and Whitbeck and Zahra, JJ.

PER CURIAM.

In this action asserting fraudulent misrepresentation and breach of an assumed duty to provide security, plaintiff Joyce Memminger appeals as of right from a circuit court order that granted defendant McKinley Properties, Inc.'s motion for summary disposition, which McKinley Properties brought pursuant to MCR 2.116(C)(7), (8), and (10). We affirm. We decide this appeal without oral argument.¹

I. Basic Facts And Procedural History

On September 21, 2004, Joyce Memminger's ex-husband, Leonard Memminger accosted her and held her hostage at her gated apartment complex, which was managed by McKinley Properties. When she attempted to escape, he shot her twice. He entered a no-contest plea.

The present action is the second lawsuit that Joyce Memminger brought against McKinley Properties in an attempt to recover for her injuries. In the first action, to which Leonard Memminger was also a party, Joyce Memminger alleged that Leonard Memminger gained unauthorized access because of the negligent acts of McKinley Properties and its agents and that McKinley Properties breached express and implied warranties by permitting Leonard Memminger's unauthorized access. In that action, McKinley Properties moved for summary disposition pursuant to MCR 2.116(C)(10) on the basis that it did not have a duty to protect Joyce Memminger from a criminal attack, it did not create a dangerous condition, and it had not voluntarily assumed any duty.

¹ MCR 7.214(E).

In its decision, the trial court noted that a landlord had only a duty to exercise reasonable care and failed to see a prima facie case of liability. The trial court went on to say that McKinley Properties did not act unreasonably or negligently in terms of protecting not only Joyce Memminger but also other people in the complex. The trial court denied Joyce Memminger's request to amend the complaint to allege other causes of action but did not specify a reason for the denial. The trial court commented, "I don't know if there's any way for me to prohibit the filing of a new case, but I'm granting summary disposition on this motion here." The trial court dismissed the complaint with respect to McKinley Properties with prejudice, and later denied Joyce Memminger's motion for reconsideration. Although the trial court granted summary disposition to Leonard Memminger with respect to his liability, the case against him evidently went to trial on the issue of damages.

Joyce Memminger then filed the present action alleging that McKinley Properties "fraudulently induced" her to rent the apartment by making false and misleading statements about the security measures used at the facility and that she relied on those statements when renting the apartment. According to the complaint, before she leased the apartment, Joyce Memminger repeatedly informed McKinley Properties' agent Deanna Filarski of the importance of security in her decision where to live. According to Joyce Memminger, Filarski and security personnel assured her that her ex-husband would not be permitted on the premises. Joyce Memminger alleged that Filarski and security personnel repeatedly made representations about the security measures that were untrue including that:

- the security gate was the only way anyone could access the property, "when it was well known that people, residents and non-residents alike, regularly entered by going over the perimeter fence, or through the fence at locations of breach, disrepair, distortion and/or irregularity;"
- every non-resident seeking admission was required to register at the security gate house, when in fact the procedure was not applied to non-resident pedestrians;
- the grounds were patrolled 24 hours by security personnel, when in fact they were patrolled only during evening hours by a person who also divided his time with other properties;
- non-residents were not admitted without authorization of a resident contacted by phone by the security guard, when in fact, the security personnel never sought authorization before allowing admission;
- the perimeter fence surrounded the entire property and prevented unauthorized access, when in fact it was regularly scaled, and other breaches and irregularities prevented it from serving as a physical barrier.

In addition to asserting that McKinley Properties fraudulently induced her to rent and reside at the apartment, Joyce Memminger alleged that McKinley Properties "assumed the duty of

preventing” Leonard Memminger’s unauthorized access to the property and that McKinley Properties was “estopped from denying its liability.”²

Defendant moved for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10). In the trial court’s bench ruling on that motion, it mentioned res judicata, but did not rely on res judicata in granting McKinley Properties’ motion:

Well, I think there’s room for arguing res judicata and collateral estoppel with regard to these arguments. And I think some of them do apply, but the Court nevertheless, because there are some different claims here, went through an evaluation of those claims. And as Mr. Jarrett has indicated, you know, things are a little different. I mean, we even had a trial on the case, a trial with her husband and a lot of facts came out then. And he was very clever and sneaky and kind of hard to use words to describe how he snuck into the building and got up to her apartment and shot her the way he did.

But the one thing that is pretty clear here with respect to both the false representations and the assumption of duty is that the apartment did give a disclaimer. They talked about all their security features and what they could and couldn’t do. They had it seemed most of the stuff in place, but, as we all recognize, no system is infallible against the activities of a criminal, and in fact they say that in their warranty.

In fact, it says the management of this apartment community, and I’m quoting, does not promise, warrant, or guarantee the safety of [sic] security of residents, personal property against the criminal actions of other residents, or third parties. Each resident has responsibility to protect him or herself and to maintain appropriate insurance to protect his or her belongings. Residents should contact an insurance agent to arrange appropriate fire and theft insurance on the property, and it kind of goes on and it does talk about clever criminals.

And, you know, the law is pretty clear that defendants are not responsible for the criminal acts of third parties. And for her to have some kind of total reliance on the complex’s security is really I think unreasonable reliance.

So even if res judicata doesn’t apply, I would think summary judgment is appropriate with regard to false representations and assumption of duty and collateral estoppel. So the Court accordingly is going to grant the motion for summary disposition

The trial court then entered a written order stating that summary disposition was granted for the reasons stated on the record.

² The dismissal of the “estoppel” claim is not at issue on appeal.

II. Summary Disposition

A. Standard Of Review

Joyce Memminger argues that the trial court erred by failing to recognize the distinction between the claims made against McKinley Properties in this action and those asserted in a prior action between these parties. Joyce Memminger further contends that res judicata bars only the claims that were actually litigated, and because these claims were not asserted in the prior action, res judicata does not apply.

Summary disposition pursuant to MCR 2.116(C)(7) is appropriate where a claim is barred by prior judgment.³ This Court reviews de novo a trial court's decision on a motion for summary disposition.⁴ The application of a legal doctrine, such as res judicata, is a question of law that is also subject to de novo review.⁵

B. Res Judicata

Joyce Memminger's argument is legally flawed because res judicata applies not only to claims that were actually litigated, but also claims that could have been resolved in the prior action. Res judicata “bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first.”⁶ The doctrine applies to “claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not.”⁷

This Court uses a transactional test to determine if a matter could have been resolved in a prior case.⁸ Joyce Memminger does not address this test. She also does not address whether, exercising reasonable diligence, she could have raised the claims in the first action. Although she unsuccessfully attempted to amend the complaint in the first action, she did not appeal the trial court's denial of her motion. The comments to § 25 of Restatement of Judgments state, “It is immaterial that the plaintiff in the first action sought to prove the acts relied on in the second action and was not permitted to do so because they were not alleged in the complaint and an application to amend the complaint came too late.”⁹ The Reporter's Notes further state, “With

³ *RDM Holdings, Ltd v Continental Plastics Co*, 281 Mich App 678, 687; 762 NW2d 529 (2008).

⁴ *Id.* at 686.

⁵ *Id.*

⁶ *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 418; 733 NW2d 755 (2007), quoting *Adair v Michigan*, 470 Mich 105, 121; 680 NW2d 386 (2004).

⁷ *ANR Pipeline Co v Dep't of Treasury*, 266 Mich App 190, 213; 699 NW2d 707 (2005).

⁸ *Washington*, *supra* at 420.

⁹ Restatement Judgments, 2d, § 25, Comment b, p 210.

respect to a court's refusal in the first action to allow late amendment, the plaintiff, if aggrieved, would be expected to pursue any right of appeal within that action.”¹⁰

C. Disclaimer

Moreover, the trial court's ruling was not premised on res judicata, but rather on the effect of a disclaimer in a form, “Resident Security Notice and Acknowledgement.” Joyce Memminger does not address the effect of the disclaimer. Her failure to address the basis for the trial court's decision precludes appellate relief.¹¹

Affirmed.

/s/ Henry William Saad
/s/ William C. Whitbeck
/s/ Brian K. Zahra

¹⁰ *Id.* at 225-226.

¹¹ *Roberts & Son Contracting, Inc v North Oakland Dev Corp*, 163 Mich App 109, 113; 413 NW2d 744 (1987).