

STATE OF MICHIGAN
COURT OF APPEALS

GRADY ANDREWS,

Plaintiff-Appellant,

v

GEORGE C. MALOY, a/k/a
LUMAC PROPERTIES,

Defendant-Appellee.

UNPUBLISHED

July 17, 1998

No. 200252

Wayne Circuit Court

LC No. 95-536351 NZ

Before: Murphy, P.J., and Young, Jr. and Michael R. Smith*, JJ.

MEMORANDUM.

Plaintiff appeals by right the trial court order granting summary disposition to defendant in this landlord-tenant dispute. We reverse.

Plaintiff was a tenant in an apartment owned by defendant. Plaintiff was in default on his rent, and defendant instituted summary proceedings in district court for return of possession. In a consent judgment entered October 20, 1994, it was determined that defendant had a right to possession, and that an order evicting plaintiff would be issued if he did not pay \$668.00 or move out by October 20, 1994. The judgment provided that partial payment would not prevent issuance of a writ of restitution.

Plaintiff made payments of \$600.00, but did not pay the total amount due. Defendant did not seek a writ of restitution. Plaintiff claims that he was unlawfully evicted, while defendant asserts that plaintiff abandoned the apartment.

Plaintiff brought this action on December 11, 1995, asserting that defendant interfered with his right to possession in violation of MCL 600.2918; MSA 27A.2918. After an erroneous default was set aside, defendant filed his answer. Defendant subsequently moved for summary disposition asserting that the action was barred by the one-year statute of limitations, and that he had the right to possession by virtue of the district court judgment. The trial court granted the motion.

* Circuit judge, sitting on the Court of Appeals by assignment.

Plaintiff argues that defendant waived the affirmative defense of the statute of limitations by failing to raise it in his first responsive pleading. We agree. MCR 2.111(F)(3)(a) provides that the statute of limitations is an affirmative defense which must be raised in the first responsive pleading. Defendant did not raise the defense in his answer, nor did he move to amend his pleadings. Thus, he has waived the affirmative defense. *Rowry v University of Michigan*, 441 Mich 1-12; 490 NW2d 305 (1992).

The district court judgment did not give defendant the right to evict plaintiff. The judgment provided that a writ of restitution would be issued if plaintiff failed to pay the entire amount. Defendant apparently did not obtain a writ. Whether plaintiff abandoned the apartment or was evicted is a question of fact, unsuitable for summary disposition at this stage.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Robert P. Young, Jr.
/s/ Michael R. Smith