

STATE OF MICHIGAN
COURT OF APPEALS

CHERYL DENISE SEWELL,

Plaintiff-Appellee,

v

CLEAN CUT MANAGEMENT, INC. and
JOHN DOE,

Defendants,

and

JEFFREY CRUSE, individually, and d/b/a CLEAN
CUT MANAGEMENT,

Defendant-Appellant.

UNPUBLISHED

December 3, 1999

No. 208148

Wayne Circuit Court

LC No. 96-619687 NO

Before: Whitbeck, P.J., and Saad and Hoekstra, JJ.

PER CURIAM.

Defendants¹ Clean Cut Management, Inc., and Jeffrey Cruse, owner of Clean Cut Management, appeal as of right from an order of judgment entered in the Wayne Circuit Court following a jury verdict awarding \$59,700 damages to plaintiff, Cheryl Denise Sewell, for claims of personal injury and wrongful eviction. We affirm.

I. FACTS AND PROCEEDINGS

Plaintiff rented a lower flat in a house owned by defendant. In May 1995, defendant filed a complaint for termination of tenancy in the 36th District Court.² Plaintiff maintained that she was not paying rent because defendant had failed to correct serious defects in the house's heating, plumbing, electricity, and porch steps. On May 23, 1995, the parties entered into a consent judgment granting defendant the right to possession and ordering plaintiff's eviction if plaintiff failed to pay \$450 rent by June 2, 1995. However, the consent judgment also required defendant to make several repairs before the money became due on June 2. Plaintiff did not pay the rent on June 2. She continued to maintain

that the majority of repairs had not been completed. However, defendant contended that the repairs had been made, and that plaintiff had signed off on a repair request form on May 31, 1995. On June 5, 1995, defendant submitted the repair request form to the District Court and requested a writ of restitution. The court issued the writ of restitution on June 7, 1995. Although plaintiff contends that the writ was wrongfully issued because defendant failed to make the requisite repairs, plaintiff never moved in the district court to have the writ set aside nor appealed the district court's order to circuit court.

Plaintiff learned from neighbors that her possessions had been removed to the front lawn of the house. Aided by family and friends, she began to retrieve her belongings from the house. Although the 36th District Court bailiff who executed the eviction order testified that he and his workers had removed all of plaintiff's property from the house, several items, including furniture and appliances, were inside when plaintiff arrived. On July 15, 16 or 17, plaintiff and her sister were carrying a chest of drawers down the porch steps.³ Plaintiff slipped on the steps and landed on her back. The chest fell on top of her, but she was able to shield her stomach.

This accident occurred about three months after plaintiff had undergone kidney transplant surgery, so plaintiff was worried about damage to the kidney. Plaintiff testified that the kidney was fine until 5:00 p.m. the next day, when she experienced stomach pain and difficulty in urination. A urologist, Dr. Konnak, testified that he diagnosed plaintiff as having an injury to the ureter, which was blocked and leaking. He testified that the condition and the delayed reaction were consistent with the accident. Doctors fitted plaintiff with a tube in her kidney, but eventually the doctors were able to correct the blockage to the ureter.

On March 26, 1996, plaintiff filed a two-count complaint against defendant in the circuit court. In Count I, plaintiff sought damages for her personal injury. Plaintiff alleged that as a tenant of the house, she was an invitee, and that defendant breached its duty toward her by failing to keep the steps in a reasonably safe condition. In Count II, plaintiff alleged that defendant had wrongfully evicted her, resulting in damage to her personal possessions. Plaintiff alleged that the order of eviction was wrongful because defendant failed to make repairs as required by the consent judgment.

The case proceeded to trial. During trial, at the close of plaintiff's proofs, defendant moved for a directed verdict. Defendant argued that plaintiff had been lawfully evicted, so that she could not recover for loss to personal property. Defendant also argued that plaintiff could not recover for personal injury because she was unable to recall how she fell. The trial court denied this motion, and the jury awarded plaintiff damages.

Defendant moved for judgment notwithstanding the verdict (JNOV). Defendant argued that because plaintiff did not move to have the writ of restitution set aside, her claim for wrongful eviction was barred by res judicata and collateral estoppel. Defendant also argued that because plaintiff had been evicted, she was a trespasser on the property at the time of the injury, and that defendant had not breached the duty of care owed to a trespasser. Plaintiff did not actually respond to the res judicata/collateral estoppel argument, other than to reiterate her claim that the eviction had been wrongfully entered. She also argued that she was entitled to enter the property to retrieve her belongings. The trial court denied this motion.

II. ANALYSIS

Defendant contends that the district court's writ of restitution precluded plaintiff's lawsuit under the related doctrines of res judicata and collateral estoppel. Defendant's argument fails under a recent decision by our Supreme Court.

Res judicata bars an action when the following conditions are satisfied: (1) a former suit was decided on the merits, (2) the issues in the second action were or could have been resolved in the former action, and (3) both actions involved the same parties or their privies. *Phinisee v Rogers*, 229 Mich App 547, 551-552; 582 NW2d 852 (1998). Closely related to the res judicata doctrine is the rule of collateral estoppel, which "precludes relitigation of an issue in a subsequent, different cause of action between the same parties when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding." *Barrow v Pritchard*, 235 Mich App 478, 480; 597 NW2d 853 (1999), quoting *Porter v Royal Oak*, 214 Mich App 478, 485; 542 NW2d 905 (1995).

According to defendant's argument, the district court's writ of restitution is a final order authorizing plaintiff's eviction, barring the circuit court action for wrongful eviction, because the wrongful eviction action would necessarily open the issue of whether the district court correctly issued the writ of restitution. Plaintiff could have moved in the district court for relief from judgment pursuant to MCR 2.612(C), or appealed the judgment to the circuit court under MCL 600.5753; MSA 27A.5753, but she cannot re-open this issue as a circuit court tort action.

In *JAM Corporation v AARO Disposal, Inc.*, __ Mich __; __ NW2d __ (Docket No 112119, rel'd 9/28/1999), the plaintiff landlord leased property to the defendant tenant. Because of irregularities in the plaintiff's corporate registration, the defendant came to believe that the plaintiff did not really own the property, and stopped paying rent. *Id.*, slip op at 2-3. The plaintiff brought district court summary proceedings for possession, but did not seek any money damages for unpaid rent. *Id.*, slip op at 2. The plaintiff was unable to satisfy the district court that it was duly registered to do business in Michigan. Consequently, the district court found that the lease was null and void from its inception, and dismissed the plaintiff's case with prejudice. *Id.*, slip op at 3-4.

The plaintiff in *Jam Corp* filed a new action in the circuit court for breach of contract and other causes of actions related to the defendant's failure to make rental payments.⁴ *Id.*, slip op at 5. The defendant moved for summary disposition on the ground that the district court's judgment that the lease was null and void barred the plaintiff's new complaint under the doctrines of res judicata and collateral estoppel. *Id.* The circuit court agreed and dismissed the complaint with prejudice. *Id.*, slip op at 6. This Court affirmed.⁵

The Supreme Court noted that MCL 600.5750; MSA 27A.5750 provides that the remedy provided by summary proceedings for recovery of possession was not an exclusive remedy. *Id.*, slip op at 8. The Court concluded that "in light of the first sentence of MCL 600.5750; MSA 27A.5750

clarifying that the remedy is not exclusive, it is evident that judgment in these summary proceedings, *no matter who prevails*, does not bar other claims for relief.” *Id.*, slip op at 10 (emphasis supplied). Applying the Supreme Court’s reasoning here, we conclude that defendant’s successful claim for a writ of restitution in circuit court does not bar plaintiff’s claim for relief in circuit court.

Defendant also argues that res judicata and collateral estoppel bar plaintiff’s personal injury action. Defendant reasons that plaintiff was a trespasser by virtue of the writ of restitution, therefore defendant did not owe her any duty except to refrain from injury her by willful and wanton conduct. *Wymer v Holmes*, 429 Mich 66, 71 n 1; 412 NW2d 213 (1987) (citing Prosser & Keeton, Torts (5th ed), § 58; Rest Torts, 2d, § § 329, 333). However, under *JAM Corp*, the district court’s order did not preclude the jury from deciding whether plaintiff was a trespasser, licensee, or invitee.

Affirmed.

/s/ William C. Whitbeck

/s/ Henry William Saad

/s/ Joel P. Hoekstra

¹ For convenience, we will use the singular term “defendant” when referring collectively to Clean Cut Management and Cruse.

² In March 1995, defendant filed a complaint against plaintiff for nonpayment of rent. This lawsuit was dismissed when defendant failed to appear at a hearing.

³ Plaintiff’s complaint, answers to interrogatories, and trial testimony are inconsistent with respect to the date of the accident.

⁴ The plaintiff also tried to appeal the district court judgment. The Supreme Court noted that the final outcome of these efforts was “not revealed by the materials before us.” *Id.*, slip op at 4; see also slip op at 4 n 5.

⁵ Unpublished opinion per curiam, issued January 16, 1998 (Docket No 193594).