STATE OF MICHIGAN

COURT OF APPEALS

DAVID J. KIRCHER,

Plaintiff-Appellant,

v

RONALD A. STEINBERG,

Defendant-Appellee.

UNPUBLISHED
November 20, 2001

No. 224781
Oakland Circuit Court
LC No. 99-014959-NZ

Before: Owens, P.J., and Holbrook, Jr. and Gage, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant summary disposition pursuant to MCR 2.116(C)(8). We affirm.

Plaintiff owns rental apartments in Ypsilanti. Defendant is an attorney who in 1996 brought suit in Washtenaw Circuit Court on behalf of a tenant of plaintiff, asserting that the tenant suffered injury from a defective condition on plaintiff's premises. Ultimately, a default judgment entered against plaintiff in the amount of $75,000.

Plaintiff's instant complaint alleges that defendant violated his federal and state guarantees of due process (Counts I and II) and abused process (Count III) by obtaining in the prior action an ex parte order permitting substituted service of the tenant's complaint by mailing it to or posting it at the address of plaintiff's apartment complex. In support of the petition for alternate service in the prior action, defendant's process server filed an affidavit averring that on three consecutive dates he appeared at plaintiff's apartment complex but "on each occasion . . . was told that [plaintiff] was not there and no one knew when he would be back," and that "[f]rom past experience, I believe [plaintiff] is avoiding service and will not be available at any time to personally accept service of process." After the Washtenaw Circuit Court granted the petition for alternate service, the process server filed a proof of service indicating that he had served the summons and complaint by posting them at plaintiff's apartment complex, and also had sent by registered or certified mail to the apartment complex the summons, complaint, a petition and order extending the summons, and the petition and order permitting alternate service. Plaintiff's instant complaint alleges that in the prior action defendant intentionally failed to diligently attempt service on plaintiff before filing its petition for alternate service, suggesting that defendant should have attempted service at plaintiff's residence. According to plaintiff's complaint, he never received any form of alternate service, thus resulting in entry of a default judgment against him and the temporary placement of his apartment complex into a receivership.

Defendant moved for summary disposition of plaintiff's complaint pursuant to MCR 2.116(C)(7) and (8) on the bases that collateral estoppel precluded plaintiff's instant claims, which "have been raised and adjudicated in . . . [plaintiff's] failed attempt to set aside the default judgment," and that plaintiff's complaint failed to state any cognizable claim for relief. The trial court granted defendant's motion pursuant to subrule (C)(8) because "[t]here really is absolutely no cause of action under case law against this particular attorney as a third party suing the attorney who brought the plaintiff in," granted defendant costs, and denied plaintiff's motion for reconsideration.

Plaintiff challenges the trial court's dismissal of his complaint. We review de novo the trial court's summary disposition ruling. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

The trial court did not clearly explain what legal doctrine or principle supported its decision, so we will address the issue on which defendant relied, collateral estoppel. Collateral estoppel 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. Mutuality of estoppel generally must exist. Collateral estoppel is mutual if the one taking advantage of the earlier adjudication would have been bound by it, had it gone against him. *Barrow v Pritchard*, 235 Mich App 478, 480-481; 597 NW2d 853 (1999). As this Court has recognized, however, "there may be . . . situations in which the mutuality requirement is relaxed." *Alterman v Provizer, Eisenberg, Lichtenstein & Pearlman, PC*, 195 Mich App 422, 425; 491 NW2d 868 (1992), quoting *Lichon v American Universal Ins Co*, 435 Mich 408, 428, n 16; 459 NW2d 288 (1990). Application of a preclusion doctrine represents a question of law that we review de novo. *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 379; 596 NW2d 153 (1999).

Plaintiff's instant claims, captioned due process violations and abuse of process, essentially allege that defendant, in the prior action, inexcusably and in bad faith failed to provide plaintiff proper notice of the tenant's suit against him by attempting service at plaintiff's residence. Plaintiff also challenges the sufficiency of defendant's efforts at serving him notice of the prior proceedings by the substitute method of posting at his apartment complex. Our review of the record reflects that plaintiff likewise moved to set aside the default judgment entered in the prior action on the basis of his allegations that defendant improperly failed to serve plaintiff at his residence address, thus depriving him notice and an opportunity to contest the claim against him. Plaintiff also in the previous case challenged the sufficiency of defendant's substitute service by posting. Accordingly, we find that plaintiff in this case raises issues identical to those he brought before the Washtenaw Circuit Court. *Eaton Co Bd of Road Comm'rs v Schultz*, 205 Mich App 371, 376; 521 NW2d 847 (1994).

The Washtenaw Circuit Court necessarily addressed plaintiff's claim that he was deprived due process, and rejected the claim because "based on the affidavits of the process servers and the substantial documentation in the file [plaintiff] has been attempting to avoid service." The court concluded that because plaintiff had knowledge of the tenant's suit against him but chose to ignore it, plaintiff had not established either excusable neglect or good cause for setting aside the default judgment. Thus, the record reflects that plaintiff had a full and fair opportunity in the prior action to litigate the due process contentions that he raises now, *Kowatch v Kowatch*, 179 Mich App 163, 168; 445 NW2d 808 (1989), and that the court decided plaintiff's

claims on their merits. *DAIIE v Higginbotham*, 95 Mich App 213, 219; 290 NW2d 414 (1980) ("The doctrine of collateral estoppel applies to a default judgment."). Furthermore, the Washtenaw Circuit Court's finding that plaintiff's allegations regarding improper service did not establish good cause or a meritorious defense was essential to the validity of the default judgment. MCR 2.603(D)(1); *Rohe Scientific Corp v Nat'l Bank of Detroit*, 133 Mich App 462, 467; 350 NW2d 280 (1984) ("Collateral estoppel applies to default judgments; however, the default judgment is conclusive only as to those matters essential to support the judgment."), rev'd in part on other grounds on rehearing 135 Mich App 777; 355 NW2d 883 (1984). The prior case culminated in a valid, final default judgment, which has not been disturbed on appeal.[1]

Plaintiff correctly observes that defendant was neither a party in the tenant's prior action, nor a privy to the tenant who brought the prior action. See *Williams v Logan*, 184 Mich App 472, 478; 459 NW2d 62 (1990) (explaining that a party's attorneys did not have a sufficient interest in their client's underlying action to make the attorneys and client privies, and that the attorney-client relationship "merely made [the attorneys] independent contractors acting on behalf of their client").

> The doctrine of mutuality of estoppel requires that in order for a party to estop an adversary from relitigating an issue that party must also have been a party, or a privy to a party, in the previous action. In other words, "'[t]he estoppel is mutual if the one taking advantage of the earlier adjudication would have been bound by it, had it gone against him.'" [*Lichon*, *supra* at 427-428.]

We do not find the lack of mutuality in this case necessarily fatal to an application of collateral estoppel, however, because this Court has permitted the defensive assertion of collateral estoppel even in the absence of mutuality.

In *Alterman*, *supra*, this Court decided whether to permit a "nonmutual defensive use of collateral estoppel in the context of a legal malpractice action arising out of a civil case." *Id*. at 425. The plaintiff in *Alterman* sued his former attorney alleging that the attorney committed malpractice by permitting the plaintiff to settle a previous lawsuit while the plaintiff was mentally incompetent. *Id*. at 424. This Court found that "the acts allegedly constituting negligence, i.e., allowing or causing [the] plaintiff to settle while he was not mentally competent, are identical to the issue decided in the [prior] federal case, i.e., whether [the] plaintiff was competent at the time he signed the settlement agreement," and that the plaintiff had a full and

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[1] On May 22, 1997, Chief Judge Corrigan, "acting pursuant to MCR 7.211(E)(2)," dismissed plaintiff's claim of appeal in the prior action "because the claim of appeal was not filed in conformity with . . . MCR 7.204(A)(1)." On August 27, 1997, Chief Judge Corrigan denied plaintiff's motion for rehearing, explaining further that according to MCR 7.204(A)(1)(b) "the claim of appeal is required to be filed within 21 days of an order denying a timely filed post-judgment motion," and that while "[t]he order denying the motion to set aside default and default judgment was entered on November 15, 1996," the "claim of appeal was filed on January 2, 1997." To the extent that plaintiff challenges the authority of the Chief Judge, acting alone, to enter these orders, we decline to address this issue because plaintiff has not properly presented it for our review. *Bouverette v Westinghouse Electric Corp*, 245 Mich App 391, 404; 628 NW2d 86 (2001).

fair opportunity to litigate the competency issue in the prior federal action. *Id*. at 427. Although "the parties are not identical, no mutuality exists, and no traditional [mutuality] exceptions apply," this Court nonetheless approved the defendant attorney's defensive assertion of collateral estoppel, explaining that "the reasons articulated [by the Michigan Supreme Court] for rejecting nonmutual *offensive* collateral estoppel did not apply where the earlier adjudication was used defensively against a party who had had the opportunity to fully litigate it."[2] *Id*. at 426, 427.

Because plaintiff received a full and fair opportunity to present his same due process arguments in his tenant's prior action against him, and because the Washtenaw Circuit Court examined and decided these claims with finality, we conclude that defendant properly asserted collateral estoppel defensively, despite that mutuality of estoppel does not exist in this case, and no traditional exceptions apply. *Id*.[3] We detect no unfairness to plaintiff in preventing him from repeatedly resorting to the court system to challenge the already determined issue whether he received due process in the tenant's action against him. To the contrary, a defensive application of collateral estoppel in the context of the instant case will serve the doctrine's goals of eliminating costly repetition and conserving judicial resources. *Minicuci v Scientific Data Management, Inc*, 243 Mich App 28, 33; 620 NW2d 657 (2000).

Although the trial court apparently did not rely on collateral estoppel or the appropriate subrule, MCR 2.116(C)(7),[4] in granting defendant summary disposition, we nonetheless affirm the correct result that the trial court reached. *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 470; 628 NW2d 577 (2001).

Affirmed.

/s/ Donald S. Owens
/s/ Donald E. Holbrook, Jr.
/s/ Hilda R. Gage

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[2] The reasons articulated for prohibiting nonmutual offensive collateral estoppel include (1) lopsided justice in cases involving successive plaintiffs, (2) fear of increased litigation to avoid adverse judgments, and (3) the unfairness of declaring the defendant a loser to a competitor he had never met. *Id*. at 426.

[3] While plaintiff suggests that this Court wrongly decided *Alterman*, we note that we cannot ignore this Court's reasoning in *Alterman*, MCR 7.215(I)(1), and moreover that we do not find flawed the Court's reasoning in *Alterman*.

[4] If summary disposition is granted under one subpart of the court rule when it was actually appropriate under another, the defect is not fatal and does not preclude appellate review as long as the record permits review under the correct subpart. *Michigan Basic Property Ins Ass'n v Detroit Edison Co*, 240 Mich App 524, 529; 618 NW2d 32 (2000). In reviewing a motion under subrule (C)(7), this Court may consider all documentary evidence, construing it in the light most favorable to the nonmoving party. *Alcona Co v Wolverine Environmental Production, Inc*, 233 Mich App 238; 590 NW2d 586 (1998).