

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT URSUY,

Plaintiff-Appellant,

v

SAWSAN YASSIN and BASHAR YASSIN,

Defendants-Appellees.

UNPUBLISHED

October 14, 2021

No. 355383

Saginaw Circuit Court

LC No. 17-035093-CK

Before: SWARTZLE, P.J., and CAVANAGH and GADOLA, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendants’ motion for summary disposition under MCR 2.116(C)(7), as barred by a prior judgment in this landlord-tenant dispute. We affirm.

This matter is before this Court for a second time. The factual and procedural background of this case was set forth in this Court’s prior opinion, *Ursuy v Yassin*, unpublished per curiam opinion of the Court of Appeals, issued September 24, 2019 (Docket No. 343211). Nevertheless, we will provide a short summary of the relevant background facts.

On January 17, 2017, plaintiff filed a complaint in district court claiming that he executed a six-month lease on February 12, 2016 pertaining to a home located at 5687 Corydalis Drive in Saginaw. According to plaintiff, a co-tenant on the lease was Steffanie Kinderman and defendants were the landlords. On September 29, 2016, plaintiff alleged, defendants obtained a judgment of possession against Kinderman, only, for repossession of the home. Subsequently, defendants obtained an order of eviction. And because neither the judgment nor order of eviction named him specifically, plaintiff alleged, defendants wrongfully removed and discarded his possessions from the home and locked him out in violation of his rights under the lease, as well as various statutory rights. Attached to plaintiff’s complaint was a list of “missing items,” which totaled \$11,040, and a copy of the purported residential-lease agreement. On the purported lease, Kinderman’s name was actually typed above the words “Tenant’s Name,” while plaintiff’s name—first name only without last name—was handwritten on a second line above those words. Next to certain provisions throughout the lease which stated “Each Tenant must initial,” only Kinderman’s initials are present. Plaintiff’s signature appears at the end of the purported lease.

In answer to plaintiff's complaint, defendants denied that plaintiff was a tenant or that he executed the lease and asserted that plaintiff's claims to the contrary were a fraud upon the court. Defendants asserted that Kinderman was the sole tenant who executed the lease, but defendants did not attach the purported lease. Defendants further asserted that Kinderman "and all occupants" were lawfully evicted from the premises after proper notice and court proceedings that were resolved in defendants' favor.

In October 2017, plaintiff filed a motion to remove the matter to circuit court, arguing that his damages exceeded the statutory limit of district court. Defendants contested the motion and moved to extend discovery beyond the cutoff date that expired on July 26, 2017. At a hearing held on November 2, 2017, the district court indicated that it would grant plaintiff's motion to remove the matter to circuit court, but would not grant defendants' motion to extend discovery.

Despite the discovery period being expired and the district court's refusal to extend the discovery period—and while the matter was still pending in the district court—on November 8, 2017, plaintiff served on defendants a request for admissions discovery document.¹ And when defendants did not respond to the untimely discovery request, plaintiff moved for summary disposition in the circuit court under MCR 2.310 based on those "admissions." Defendants did not respond to that motion. But at a hearing held by the circuit court on February 5, 2018, defendants appeared with a purported original copy of the lease which did not depict plaintiff as either a tenant or signatory on the lease. The court refused to consider defendants' evidence—as untimely—and granted plaintiff's motion for summary disposition. Subsequently, on February 15, 2018, the circuit court entered a judgment in favor of plaintiff. Defendants filed a motion for reconsideration, which the circuit court denied. Defendants then filed a motion to set aside the judgment—arguing, in part, that plaintiff's case was barred by the doctrine of collateral estoppel based on the judgment of possession previously entered in the summary proceedings—which was also denied by the circuit court.

Defendants appealed the circuit court's order granting plaintiff's motion for summary disposition, as well as the judgment in favor of plaintiff, and this Court reversed and remanded for further proceedings, primarily holding that plaintiff had no authority to serve the request for admissions and defendants had no duty to respond to the request. *Ursuy v Yassin*, unpublished per curiam opinion of the Court of Appeals, issued September 24, 2019 (Docket No. 343211); slip op p 4.

In August 2020, after the case returned to the circuit court, defendants filed a motion for summary disposition under MCR 2.116(C)(7), arguing that plaintiff's claims were barred by the doctrine of collateral estoppel. Defendants asserted that Steffanie Kinderman made an application for a rental property tenancy on February 10, 2016, and in that application Kinderman specified that only she and two children, Kaliya (age 7) and Weston (age 6), would be living in the rental home. Thereafter, Kinderman entered into a six-month residential lease dated February 12, 2016,

¹ The district court did not issue an order removing the case to the circuit court until November 21, 2017, and that order was not timestamped as received by the circuit court until December 12, 2017. On December 14, 2017, the parties were notified by the circuit court of the transfer of the case to the circuit court.

that was licensed for three people. At the end of the six-month lease term, defendants mailed a notice to quit addressed to “Steffanie Kinderman & All Occupants,” as set forth in the Summary Proceedings Act. Subsequently, defendants had to file a complaint for eviction in district court, which was served by first class mail on “Steffanie Kinderman & All Occupants.” Thereafter, a process server made five attempts at personally serving the occupants of the rental home before securing a copy of the summons and complaint on the front door of the rental home. On September 29, 2016, a hearing was held in the summary proceedings action and defendants were awarded possession of the property by default, with a vacate date of October 10, 2016. The judgment was served on Kinderman and all other occupants by the court clerk. On October 14, 2016, the district court entered an order of eviction directing the court officer to restore full possession of the property to defendants. On October 21, 2016, the court officer executed the order of eviction and restored the property to defendants. Defendants explained that although plaintiff was not a signatory to the lease and never asserted any possessory rights during the summary proceedings—despite numerous notices of those proceedings—he filed this matter claiming wrongful eviction and damages.

Defendants argued that plaintiff’s case must be dismissed as barred by collateral estoppel, which precludes the relitigation of identical issues. The three elements establishing the application of collateral estoppel were met. First, defendants argued, the issue whether defendants had the legal right to possession of the rental property was resolved in the summary proceedings where defendants won a judgment in their favor. And, second, although plaintiff was asserting that he had a possessory right in that rental property, he was offered the full and fair opportunity to litigate that issue in the summary proceedings. Kinderman and all other “occupants” of that rental home were notified numerous times about the summary proceedings and yet plaintiff chose not to defend his alleged possessory interest in the rental property. Finally, third, if defendants had lost in the eviction action, they would have been bound by that decision; thus, the mutuality element of the collateral estoppel analysis was also met. Defendants argued that since plaintiff’s entire case rested on the claim that he had a possessory interest in the rental property—and therefore his “missing items” were wrongfully removed and discarded from the home by the court officer acting under court order—defendant’s only legal remedy was to challenge the judgment entered in the eviction action. Accordingly, plaintiff’s case must be dismissed under MCR 2.116(C)(7). The attachments to defendants’ motion included a copy of Kinderman’s completed rental application; defendants’ purported copy of the residential-lease agreement—which has no reference at all to plaintiff; and documents related to the summary proceedings.

Plaintiff filed a brief in opposition to defendants’ motion for summary disposition, arguing that plaintiff was a signatory on the residential-lease agreement, and thus, defendants’ “entire Motion is based on a lie” Plaintiff requested that summary disposition be granted in his favor.

On September 14, 2020, a hearing was held on defendants’ motion for summary disposition and the parties argued consistently with their briefs. Plaintiff’s counsel admitted to the court that plaintiff was actually living at the rental premises at the time the summary proceedings were ongoing and had notice of those proceedings, but plaintiff was allegedly led to believe by defendants that those proceedings pertained only to Kinderman and not to him. Defendants’ attorney countered that even if true, once plaintiff was notified by defendants that all of his possessions were removed from the rental home and he was told not to return otherwise he would be shot—as plaintiff claimed occurred—plaintiff’s exclusive remedy was to challenge the

judgment of possession and order of eviction. The circuit court agreed with defendants, holding that any possessory rights plaintiff had with regard to the rental property were decided in the summary proceedings and plaintiff's exclusive remedies were to appeal that judgment or seek post-judgment relief—which he failed to do. Accordingly, defendants' motion for summary disposition under MCR 2.116(C)(7) was granted, and an order to that effect was entered on September 28, 2020. Subsequently, plaintiff filed a motion for reconsideration—arguing in part that defendants did not plead MCR 2.116(C)(7) as an affirmative defense—which was denied. This appeal followed.

Plaintiff argues that the trial court erred in granting defendants' motion for summary disposition because defendants did not plead MCR 2.116(C)(7) as an affirmative defense and, in any case, the judgment of possession did not apply to plaintiff because he was not a named party to the summary proceedings and did not receive proper notice. Plaintiff's arguments are unavailing.

We review de novo a decision on a motion for summary disposition. *Clay v Doe*, 311 Mich App 359, 362; 876 NW2d 248 (2015). A motion brought under MCR 2.116(C)(7) may be granted because of a prior judgment. See MCR 2.116(C)(7). “When it grants a motion under MCR 2.116(C)(7), a trial court should examine all documentary evidence submitted by the parties, accept all well-pleaded allegations as true, and construe all evidence and pleadings in the light most favorable to the nonmoving party.” *McLain v Lansing Fire Dep't*, 309 Mich App 335, 340; 869 NW2d 645 (2015). The application of collateral estoppel is also reviewed de novo as a question of law. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

Plaintiff appears to have arguably preserved his claim that the judgment of possession did not apply to him, and thus, we will consider that issue preserved. But plaintiff's argument that defendants failed to plead MCR 2.116(C)(7) as an affirmative defense was first raised in his motion for reconsideration after the trial court had already granted defendants' motion for summary disposition. Consequently, this argument is unpreserved and our review is for plain error affecting substantial rights, i.e., error that was plain and affected the outcome of the proceedings. See *Total Armored Car Serv, Inc v Dep't of Treasury*, 325 Mich App 403, 412; 926 NW2d 276 (2018) (citation omitted); *Vushaj v Farm Bureau Gen Ins Co of Mich*, 284 Mich App 513, 519; 773 NW2d 758 (2009).

Plaintiff briefly raises a procedural challenge, arguing that defendants did not list collateral estoppel as an affirmative defense, and thus, their motion for summary disposition under MCR 2.116(C)(7) should not have been granted. Generally, the failure to raise an affirmative defense as set forth in MCR 2.111(F) constitutes a waiver of that affirmative defense. See *Campbell v St John Hosp*, 434 Mich 608, 616; 455 NW2d 695 (1990). However, as defendants argue on appeal, plaintiff filed a brief opposing the merits of defendants' motion for summary disposition but did not raise any objection to the fact that collateral estoppel was not pleaded as an affirmative defense, which constituted implicit consent to the raising of a collateral estoppel defense. See *Fraser Township v Haney*, 331 Mich App 96, 98-99; 951 NW2d 97 (2020), lv granted on other grounds 506 Mich 964 (2020). And, in any case, the court's consideration of defendants' collateral estoppel argument did not constitute “plain” error. “Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999) (quotation marks and citation omitted). That defendants

had not raised the doctrine of collateral estoppel as an affirmative defense was not so clear or obvious that the trial court should have noticed. See *id.* But, as defendants argue on appeal, even if plaintiff had objected to defendants' collateral estoppel argument, MCR 2.111(F)(3) permits an affirmative defense to be raised through amendment and motions to amend the pleadings are to be granted liberally. See MCR 2.118(A)(2); *In re Kostin Estate*, 278 Mich App 47, 52; 748 NW2d 583 (2008). Accordingly, we reject plaintiff's procedural argument as without merit.

Next, plaintiff raises a substantive challenge, essentially arguing that he was not bound by the judgment of possession because he was not a specifically named party in the summary proceedings; therefore, the doctrine of collateral estoppel did not apply to this action. Plaintiff's argument ignores the fact that the foundation of his claims is his alleged possessory interest in the rental property—which was adjudicated in the summary proceedings. That is, plaintiff primarily asserted in his complaint that defendants' actions of removing and disposing of his personal property that was located in the rental home and locking him out of that rental home constituted "a constructive eviction and an illegal eviction in violation of due process in violation of the summary proceeding statute." Plaintiff also asserted in his complaint that defendants' actions occurred while plaintiff "was still in lawful possession" and constituted a constructive eviction. Further, plaintiff alleged, defendants failed to return his security deposit after his "tenancy was constructively terminated" and he was illegally evicted from the rental premises. In other words, plaintiff asserted that he had a possessory interest in the rental property that was wrongfully interfered with by defendants. Plaintiff's complaint references and relies upon MCL 600.2918 which applies to "unlawful ejection or interference with possessory interest." More specifically, as relevant here, MCL 600.2918 states:

(1) Any person who is ejected or put out of any lands or tenements in a forcible and unlawful manner, or being out is afterwards held and kept out, by force, is entitled to recover 3 times the amount of his or her actual damages or \$200.00, whichever is greater, in addition to recovering possession.

(2) Any tenant in possession of premises whose possessory interest has been unlawfully interfered with by the owner is entitled to recover the amount of his or her actual damages or \$200.00, whichever is greater, for each occurrence and, if possession has been lost, to recover possession. . . .

* * *

(3) An owner's actions do not unlawfully interfere with a possessory interest if any of the following apply:

(a) The owner acts pursuant to court order.

As clearly stated in MCL 600.2918, whether plaintiff was "any person" or "any tenant," an owner cannot be said to have unlawfully interfered with a possessory interest if the owner acted "pursuant to court order." That "court order" arises from summary proceedings to recover possession of the premises. See MCL 600.5714. And once a "court order" is entered in favor of the premises' owner in a summary proceedings action, the issue of who has "a possessory interest" in the rental property at issue is fully and finally decided unless properly challenged on direct appeal or by a post-judgment motion, as the circuit court here concluded. Plaintiff did not challenge the judgment

of possession or order of eviction entered in the summary proceedings; instead, plaintiff filed this case which is essentially a wrongful eviction action.

In their motion for summary disposition, defendants argued that plaintiff's claims were barred by collateral estoppel because defendants were adjudicated in the summary proceedings to have the superior and lawful possessory interest in the rental property—not Kinderman and “all occupants” of the rental property. The trial court agreed, as do we. “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 that prior proceeding.” *Rental Props Owners Ass’n of Kent Co v Kent Co Treasurer*, 308 Mich App 498, 528; 866 NW2d 817 (2014). “Collateral estoppel is a flexible rule intended to relieve parties of multiple litigation, conserve judicial resources, and encourage reliance on adjudication.” *Id.* at 529. The elements for application of the collateral estoppel doctrine are “(1) that a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment, (2) that the same parties had a full and fair opportunity to litigate the issue, and (3) mutuality of estoppel.” *Id.*, citing *Monat v State Farm Ins Co*, 469 Mich 679, 682-684; 677 NW2d 843 (2004). As defendants argued and the circuit court concluded, these elements were satisfied.

First, the question of fact essential to this action was whether plaintiff had a possessory interest in the rental property at the relevant time; if he had no such interest, there could be no wrongful interference with a possessory interest or wrongful eviction. That question of fact was litigated and determined in the summary proceedings which resulted in a valid and final judgment of possession in favor of defendants and then, subsequently, an order of eviction directed to Kinderman and all occupants. In other words, the identical issue of who had the superior and legally enforceable possessory interest in the rental property was actually and necessarily litigated in the summary proceedings. See *Rental Props Owners*, 308 Mich App at 529. Therefore, the first element was met.

The satisfaction of the second element appears to be plaintiff's focus on appeal because he asserts that he was “an unnamed, unserved person” with respect to the summary proceedings; thus, collateral estoppel does not bar this action. “For collateral estoppel to apply, the parties in the second action must be the same as or privy to the parties in the first action.” *Id.* While plaintiff was not specifically named in the summary proceedings—which was against Kinderman “& all occupants”—plaintiff could certainly have been considered “a party” to it because he claimed to be an “occupant” of the rental house and the objective of the summary proceedings was to evict all occupants. Plaintiff also claimed to be a signatory on the lease. “A party is one who was directly interested in the subject matter and had a right to defend or to control the proceedings and to appeal from the judgment[.]” *Id.* at 529-530. Plaintiff could have argued that he was directly interested in the summary proceedings. Plaintiff could also have sought to intervene in the summary proceedings, MCR 2.209(A)(3), MCR 4.201(A), claiming an interest relating to the rental property which could be impaired or interfered with by the disposition of the summary proceedings. Moreover, plaintiff was arguably in privity with Kinderman because they allegedly

had mutual possessory rights with respect to the rental property either as co-tenants or as co-occupants living together in the rental house.²

And for the doctrine of collateral estoppel to apply, there must have been a full and fair opportunity to litigate the issue of who had the superior and legally enforceable possessory interest in the rental property, defendants or the occupants. The fact that the judgment of possession entered in the summary proceeding was obtained by default does not defeat the application of collateral estoppel. The doctrine applies to matters that were essential to support the default judgment and clearly the determination of who had the superior and legally enforceable possessory interest in the rental property was the essential determination in the summary proceedings. See *Detroit Auto Inter-Ins Exch v Higginbotham*, 95 Mich App 213, 219; 290 NW2d 414 (1980). Therefore, the second element establishing the application of collateral estoppel was satisfied.

Finally, there was mutuality of estoppel. “Mutuality of estoppel requires that in order for a party to estop an adversary from relitigating an issue that party must have been a party, or in privity to a party, in the previous action. In other words, the estoppel is mutual if the one taking advantage of the earlier adjudication would have been bound by it, had it gone against him.” *Monat*, 469 Mich at 684-685 (quotation marks, brackets, and citations omitted). In this case, defendants would have been bound by a denial of their request for a judgment of possession if rendered in the summary proceedings. Therefore, the third element supporting the application of collateral estoppel was satisfied and we affirm the circuit court’s decision granting defendants’ motion for summary disposition under MCR 2.116(C)(7).

We also note that it appears plaintiff is, in effect, challenging the judgment of possession entered in the underlying summary proceeding action on the ground that he lacked notice. Consequently, this action arguably constitutes an impermissible collateral attack on the district court’s judgment. “[A] collateral attack occurs whenever a challenge is made to a judgment in any manner other than through a direct appeal. Therefore, a challenge brought in any subsequent proceeding or action is a collateral attack.” *People v Howard*, 212 Mich App 366, 369; 538 NW2d 44 (1995); see also *Dow v Scully*, 376 Mich 84, 88-89; 135 NW2d 360 (1965); *Jackson City Bank & Trust Co v Fredrick*, 271 Mich 538, 545; 260 NW 908 (1935). And, in any case, plaintiff’s argument on appeal that he did not have notice of the summary proceedings is unpersuasive. At the hearing on defendants’ motion for summary disposition, plaintiff’s attorney admitted that plaintiff lived at the rental house and had notice of the summary proceedings but simply did not respond because he believed it did not pertain to him. But all of the relevant documents that were served in the summary proceedings were addressed to Kinderman “& all occupants;” thus, the summary proceedings clearly pertained to him. Moreover, at minimum, the documents would have given any reasonable person who occupied the rental property notice that a response

² See e.g., *Phinisee v Rogers*, 229 Mich App 547, 553; 582 NW2d 852 (1998), quoting Black’s Law Dictionary (6th ed.), p 1199, defining privity as “mutual or successive relationships to the same right of property, or such an identification of interest of one person with another as to represent the same legal right. . . . [It] signifies that [the] relationship between two or more persons is such that a judgment involving one of them may justly be conclusive upon [the] other, although [the] other was not a party to lawsuit.”

challenging the summary proceedings—which sought eviction of all persons from the rental—was necessary. However, if plaintiff wanted to challenge the district court judgment of possession on the grounds that he was not properly served notice, he had to do so directly and not through a collateral action like this one. In effect, through this action, plaintiff is seeking a judgment that negates and nullifies the judgment of possession, as well as the subsequent order of eviction, entered in the summary proceedings which is not permissible.

Affirmed. Defendants are entitled to costs as the prevailing parties. MCR 7.219(A).

/s/ Brock A. Swartzle

/s/ Mark J. Cavanagh

/s/ Michael F. Gadola