STATE OF MICHIGAN

COURT OF APPEALS

KIMBERLY DINEHART, individually and as Next Friend to ALEXANDER WALTERS, NATALIE WALTERS, LILIAN WALTERS, BRADLEY DINEHART, and BENTON DINEHART, Plaintiffs-Appellants,	UNPUBLISHED August 10, 2017
v	No. 333867 Kalamazoo Circuit Court
GREAT LAKES PROPERTY GROUP TRUST, doing business as DRAKES POND APARTMENTS, and CAMELOT SERVICE COMPANY INC., Defendants-Appellees.	LC No. 2014-000544-NO

Before: HOEKSTRA, P.J., and MURPHY and K.F. KELLY, JJ.

PER CURIAM.

In the present case, plaintiffs brought claims of negligence and premises liability relating to the purported presence of mold in two apartments occupied by plaintiffs between 2012 and 2013. Defendant Great Lakes Property Group Trust, doing business as Drakes Pond Apartments ("Drakes Pond"), is the owner of both apartments, and defendant Camelot Services Company, Inc. cleaned the ductwork in the second apartment. The trial court granted summary disposition to both defendants under MCR 2.116(C)(7) and to Drakes Pond under MCR 2.116(C)(10). Because plaintiffs' claims relating to the second apartment are precluded by previous proceedings in district court and no material question of fact remains regarding mold in the first apartment, we affirm.

In October of 2012, plaintiff Kimberly Dinehart, her children, and her husband moved into "the Dillingham apartment" at Drakes Pond Apartments.[1] In December of 2012, water leaked through the apartment ceiling during a rainstorm. As a result of the leak, plaintiff asked

[1] References to "plaintiff" are to plaintiff Kimberly Dinehart. The other plaintiffs in this case are plaintiffs' children.

to change apartments, and she and her family moved to another apartment, "the Hemmingway apartment," in the same complex. During plaintiffs' occupancy of the Hemmingway apartment, Drakes Pond hired Camelot to clean the duct system in the apartment.

In April of 2013, Drakes Pond served plaintiff and her then-husband with a notice to quit for non-payment of rent, and Drakes Pond filed an action in Kalamazoo District Court for possession and unpaid rent. A bench trial was held in district court, during which plaintiff and her husband argued that they were lawfully entitled to withhold rent due to the "hazardous living conditions in the apartment" caused by the presence of mold. Plaintiff personally testified that she and her children had been ill because of mold in both apartments.[2] In contrast, three Drakes Pond employees testified that there was no mold or moisture in the Hemmingway apartment and that plaintiff had never made such a claim until served with a notice to quit. Ultimately, the district court entered judgment in favor of Drakes Pond, concluding that Drakes Pond was entitled to past due rent. The district court specifically considered, and rejected, plaintiff's assertion that the Hemmingway apartment was uninhabitable due to mold.

Plaintiff and her family vacated the apartment in June of 2013. In October of 2014, plaintiff filed the present suit in circuit court, proceeding individually and as next friend for her children. With regard to Drakes Pond, plaintiffs brought claims of negligence and premises liability, asserting that both apartments had mold and that she and her children suffered various mold-related ailments as a result of living in the Dillingham and Hemmingway apartments. With regard to Camelot, plaintiffs claimed that Camelot was negligent in failing to discover mold during the duct cleaning in the Hemmingway apartment.

Following motions by Drakes Pond and Camelot, the circuit court granted summary disposition under MCR 2.116(C)(7) and (C)(10). The circuit court concluded that both defendants were entitled to summary disposition under MCR 2.116(C)(7) because collateral estoppel precluded plaintiffs' claims of mold in the Hemmingway apartment. Related to the Dillingham apartment, the circuit court granted summary disposition to Drakes Pond under MCR 2.116(C)(10) because plaintiffs had failed to demonstrate a material question of fact relating to whether there was mold in that apartment. Plaintiffs now appeal as of right.

I. COLLATERAL ESTOPPEL

On appeal, plaintiffs first argue that the circuit court erred in its application of collateral estoppel. Specifically, plaintiffs maintain that collateral estoppel is inapplicable because the issue in the district court was rent, not mold, and as such the question of mold in the Hemmingway apartment was not "actually litigated" in the district court. Plaintiffs also claim

[2] The district court declined to consider plaintiff's hearsay testimony regarding whether a plumber saw mold in the Hemmingway apartment. The district court also excluded a mold report from Wonder Makers Environmental because the samples were collected by plaintiff personally and she was not an expert qualified to offer such evidence. Plaintiff did not attempt to offer testimony from the plumber or expert testimony from someone at Wonder Makers Environmental.

that the district court proceedings did not provide a full and fair opportunity to litigate the mold question because plaintiff was not represented by an attorney, the district court excluded some of her mold evidence, and the district court essentially disregarded plaintiff's lay testimony on mold. In contrast, in the circuit court proceedings, plaintiffs now have the benefit of counsel and they are pursing more complex claims which involve a higher amount in controversy than the rent at issue in district court.

We review de novo a trial court's decision to grant a motion for summary disposition. *Rental Props Owners Ass'n of Kent Co v Kent Co Treasurer*, 308 Mich App 498, 526; 866 NW2d 817 (2014). Likewise, the application of collateral estoppel is a question of law that is reviewed de novo. *Holton v Ward*, 303 Mich App 718, 731; 847 NW2d 1 (2014). When collateral estoppel precludes a claim, summary disposition is properly granted under MCR 2.116(C)(7). *Minicuci v Sciencific Data Mgt, Inc*, 243 Mich App 28, 42; 620 NW2d 657 (2000). "In determining whether summary disposition under MCR 2.116(C)(7) is appropriate, a court considers all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them." *Garrett v Washington*, 314 Mich App 436, 441; 886 NW2d 762 (2016) (citation omitted).

"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*, 308 Mich App at 528. The purpose of the doctrine is "to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *Monat v State Farm Ins Co*, 469 Mich 679, 692-293; 677 NW2d 843 (2004).

> Generally, for collateral estoppel to apply three elements must be satisfied: (1) a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment; (2) the same parties must have had a full and fair opportunity to litigate the issue; and (3) there must be mutuality of estoppel. [*William Beaumont Hosp v Wass*, 315 Mich App 392, 398; 889 NW2d 745 (2016) (citation omitted).]

Considering each of the elements in turn, we conclude that collateral estoppel applies to this case and the trial court properly granted summary disposition to defendants under MCR 2.116(C)(7) with regard to plaintiffs' claims of mold in the Hemmingway apartment.

First, the issue of mold is a question of fact essential to the judgment that was actually litigated in district and determined by a valid and final judgment in district court. Central to plaintiffs' claims for negligence and premises liability is the assertion that there is mold in the Hemmingway apartment. This question of mold was also necessary to the district court's decision because plaintiff raised the mold question as a defense in district court, asserting that the

mold rendered the apartment uninhabitable and thereby excused the nonpayment of rent.[3] See MCL 554.139; MCL 600.5720(1)(f); *Rome v Walker*, 38 Mich App 458, 464; 196 NW2d 850 (1972). Considering testimony from plaintiff and Drakes Pond's employees, the district rejected plaintiff's claim that there was mold in the Hemmingway apartment. Based on this finding, the district court concluded that the rent owing was "proper" and the district court entered a valid judgment in favor of Drakes Pond. Plaintiffs did not appeal that judgment, and it is now final. See *Leahy v Orion Twp*, 269 Mich App 527, 530; 711 NW2d 438 (2006). Because the mold issue was "actually litigated" in the district court proceedings, the district court decision may have a preclusive effect in circuit court. See *Sewell v Clean Cut Mgmt, Inc*, 463 Mich 569, 577; 621 NW2d 222 (2001).

Turning to the second element of collateral estoppel, plaintiffs do not dispute the conclusion that the action involved the same parties or their privies.[4] Instead, plaintiffs claim that the district court proceedings did not afford a full and fair opportunity to litigate the issue of mold. As set forth in *Monat*, there are several factors relevant to the determination of whether a party had a "full and fair opportunity to litigate" an issue, and in our judgment none of these factors favor re-litigation of the mold issue.[5] In arguing to the contrary, plaintiffs suggest that

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[3] Taking the district court's remarks out of context, plaintiffs argue on appeal that the question of mold was not "actually litigated" in district court because the district court stated on the record that the "only issues" were "unpaid rent, how much is it and in this case whether there's a reason why it's unpaid." However, in context, the "reason" why the rent might be unpaid was the argument that the mold rendered the apartment uninhabitable and this excused the nonpayment of rent. See MCL 554.139; MCL 600.5720(1)(f).

[4] Although the children were not parties to the district court case, collateral estoppel also applies to privies to the parties in the first action. *Rental Props Owners Ass'n of Kent Co*, 308 Mich App at 529. We agree with the circuit court that privity exists in this case between plaintiff and her children given their functional working relationship as a family unit as well as their shared interest in establishing the existence of mold in the Hemmingway apartment. See generally *Adair v State*, 470 Mich 105, 122; 680 NW2d 386 (2004). Indeed, the children's interests—as residents of the apartment—were presented and protected during the district court proceedings insofar as plaintiff asserted that Drakes Pond violated its obligation to provide a safe residence and that she and her children had suffered negative health consequences as a result.

[5] See *Monat*, 469 Mich at 683 n 2. First, plaintiff had the opportunity to appeal the district court decision. See MCR 4.201(N). Second, the issue at hand is not a question of law; rather, the dispute is a factual one—namely, whether there was mold in the Hemmingway apartment, and there have been no intervening changes to the law that would affect the litigation of the mold issue. Third, contrary to plaintiffs' arguments, nothing in the quality or extensiveness of the district court proceedings warrants a redetermination of the mold issue in the circuit court. Fourth, plaintiff was not subjected to a more demanding burden of proof in the district court than she will face in the circuit court. See *Mayor of Cadillac v Blackburn*, 306 Mich App 512, 521; 857 NW2d 529 (2014); M Civ JI 100.02. Fifth, plaintiff has not shown a clear and convincing need for re-litigation of this issue. The district court decision has no notable public impact beyond the parties involved, the circuit court action was foreseeable given that plaintiffs knew of

the district court proceedings were somehow lesser than the proceedings available to them in circuit court because plaintiff lacked an attorney in district court, the district court excluded some of plaintiff's mold evidence, and the district court disregarded plaintiff's lay mold testimony. To the extent plaintiff complains that some of her evidence regarding mold was not received by the district court, the district court's application of established rules of evidence—which apply in circuit court—does not suggest that the district court proceedings were somehow lesser in terms of quality or extensiveness. Similarly, insofar as plaintiff emphasizes that she did not have an attorney in district court, plaintiff could have had an attorney, MCR 4.201(C)(2); and her election to proceed *in propria persona* in district court does not entitle her to re-litigate the mold question. See generally *Totman v Sch Dist of Royal Oak*, 135 Mich App 121, 126; 352 NW2d 364 (1984) ("[A] person acting *in propria persona* should be held to the same standards as members of the bar."). Likewise, while plaintiff contends that the trial court should not have discounted her lay opinions on mold, the credibility of her testimony was for the district court, *Drew v Cass Co*, 299 Mich App 495, 501; 830 NW2d 832 (2013); and, the district court's weighing of the evidence does not demonstrate that plaintiff received less than a full and fair opportunity to litigate the issue of mold. Overall, contrary to plaintiff's arguments, the district court proceedings afforded plaintiff a full and fair opportunity to litigate the issue of mold.

Finally, with respect to the third element of collateral estoppel, there is also mutuality of estoppel with respect to Drakes Pond because Drakes Pond was equally bound by the district court's decision and the district court action would have had a preclusive effect on Drakes Pond's ability to re-litigate the mold question had the district court determined that there was mold in the Hemmingway apartment. See *Holton*, 303 Mich App at 731; *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 341; 657 NW2d 759 (2002). In comparison, mutuality of estoppel does not exist with respect to Camelot because Camelot was not a party to the district court action and Camelot does not claim to be a privy of Drakes Pond. However, Camelot is asserting collateral estoppel defensively, and mutuality is not required if, as in this case, "it is asserted defensively to prevent a party from relitigating an issue that such party has already had a full and fair opportunity to litigate in a prior suit." *Monat*, 469 Mich at 691-692. Consequently, Camelot may use collateral estoppel defensively to prevent the re-litigation of the mold question.[6]

In sum, plaintiffs' claims relating to mold in the Hemmingway apartment are precluded by the district court's judgement in favor of Drakes Pond, and the trial court properly granted summary disposition to both defendants under MCR 2.116(C)(7).

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the alleged presence of mold and their health ailments at the time of the district court proceedings, and, faced with an action for possession for non-payment of rent, plaintiff had an adequate opportunity and incentive to obtain a full and fair adjudication of the mold issue in district court. While it may be true that the circuit court case potentially involves a greater amount in controversy, the incentives in the district court were not insignificant given that plaintiff faced monetary consequences as well as the loss of the family's residence.

[6] On appeal, Camelot also argues that res judicata applies in this case. However, the circuit court did not consider this issue and we decline to decide the matter on appeal. See *Autodie, LLC v Grand Rapids*, 305 Mich App 423, 431; 852 NW2d 650 (2014).

II. THE DILLINGHAM APARTMENT

With respect to the Dillingham apartment, the trial court granted summary disposition to Drakes Pond under MCR 2.116(C)(10) based on the conclusion that no material question of fact remained regarding the presence of mold in the Dillingham apartment. Plaintiffs contest this determination on appeal, asserting a question of fact remains in light of a mold report prepared by Wonder Makers Environmental in January of 2013. We disagree.

As noted, we review de novo a trial court's decision to grant a motion for summary disposition. *Rental Props Owners Ass'n of Kent Co*, 308 Mich App at 526. A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint, and it is properly granted if the evidence fails to establish a genuine issue of material fact. *Farm Bureau Gen Ins v Blue Cross Blue Shield of Mich*, 314 Mich App 12, 19; 884 NW2d 853 (2015). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

"When reviewing a motion brought under MCR 2.116(C)(10), this Court considers the pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties in the light most favorable to the nonmoving party." *Braverman v Granger*, 303 Mich App 587, 596; 844 NW2d 485 (2014). However, under MCR 2.116(G)(6), "[e]vidence offered in support of or in opposition to the motion can be considered only to the extent that it is substantively admissible." *Veenstra v Washtenaw Country Club*, 466 Mich 155, 163; 645 NW2d 643 (2002). "Speculation and conjecture are insufficient to create an issue of material fact." *Ghaffari v Turner Const Co*, 268 Mich App 460, 464; 708 NW2d 448 (2005).

In this case, Drakes Pond moved for summary disposition under MCR 2.116(C)(10) based on the assertion that plaintiffs failed to present substantively admissible evidence of mold in the Dillingham apartment. In response, the only evidence plaintiffs cite is the Wonder Makers Environmental report from January of 2013, which is based on samples collected by plaintiff personally on January 3rd and January 6th and then sent to Wonder Makers for analysis.[7] Contrary to plaintiffs' arguments, this document does not demonstrate a material question of fact with regard to mold in the Dillingham apartment.

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[7] Although not addressed by the circuit court, we agree with Drakes Pond that summary disposition was also appropriate because there is no evidence that plaintiff was qualified to collect samples or that her methods of collection were reliable. Absent samples collected in a reliable manner, the test results would be unreliable and the expert opinions expressed in the report would be inadmissible. See generally *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 779; 685 NW2d 391 (2004) ("MRE 702 requires the trial court to ensure that each aspect of an expert witness's proffered testimony—including the data underlying the expert's theories and the methodology by which the expert draws conclusions from that data—is reliable."). Absent this report—which is the only evidence cited by plaintiffs to establish the presence of mold in the Dillingham apartment—Drakes Pond was entitled to summary disposition under MCR 2.116(C)(10).

First of all, the Wonder Makers report lists the Hemmingway apartment address, and the report contains no mention of the Dillingham apartment or which of several locations identified in the report are in the Dillingham apartment. It is thus challenging to see how the report can be seen as evidence that mold existed in the Dillingham apartment. Second, even accepting plaintiff's assertion that the report applies to both apartments because, according to her testimony, she collected samples from both apartments, the fact remains that the report offers nothing more than the speculative possibility that there might be mold in the Dillingham apartment. Specifically, the report indicates that, with regard to the January 3rd samples, the "fungal material in the middle hallway was elevated in comparison to the out-of-doors sample." According to the report, this "suggest[s]" a "possible" indoor source of mold in the middle hallway area. But, the report goes on to state that "further investigation" is needed to determine if the mold "is indoors or out-of-doors;" and, *if* an indoor source is discovered, "remediation is required to avoid negative health effects and to reduce exposure to building occupants." The results related to January 6th are even less helpful to plaintiffs' position because plaintiff did not obtain an outdoor sample, which Wonder Makers needed as a comparison to assess the level of mold indoors and to consider whether indoor spores were affected by the out-of-door levels.

At best, the Wonder Makers report indicates that "further investigation" *might* uncover a mold source in the Dillingham apartment. However, in response to a motion for summary disposition under MCR 2.116(C)(10), it is not enough to suggest that a record might be developed to support a claim. See *Smith v Globe Life Ins Co*, 460 Mich 446, 455 n 2; 597 NW2d 28 (1999). In other words, the conjecture and speculation set forth in the Wonder Makers report is insufficient to meet plaintiffs' burden of establishing a material question of fact. See *Libralter Plastics, Inc v Chubb Group of Ins Companies*, 199 Mich App 482, 486; 502 NW2d 742 (1993). The trial court did not err by granting summary disposition on this basis.

Affirmed. Having prevailed in full, defendants may tax costs under MCR 7.219.

/s/ Joel P. Hoekstra
/s/ William B. Murphy
/s/ Kirsten Frank Kelly