STATE OF MICHIGAN

COURT OF APPEALS

CURT HOLDER, DAVID CLEMONS, GREG WIER, TRACY ROSE and KRISTEN FISHER,

Plaintiffs-Counter Defendants-Appellants,

v

SMITH SECURITY CORPORATION,

Defendant-Counter Plaintiff-Appellee.

UNPUBLISHED
December 17, 1999

No. 207150
Oakland Circuit Court
LC No. 96-529113 CK

SMITH SECURITY CORPORATION, STEVEN H. SMITH and PAMELA SMITH,

Plaintiffs-Counter Defendants-Appellees,

v

COMMISSIONED SECURITY, INC., and JAMES M. COPAS,

Defendants-Counter Plaintiffs-Appellants.

No. 207151
Oakland Circuit Court
LC No. 96-522721 CK

Before: Cavanagh, P.J., and Doctoroff and O'Connell, JJ.

PER CURIAM.

In these consolidated appeals, appellants Holder, Clemons, Wier, Rose, Fisher, Copas, and Commissioned Security, Inc., (CSI) appeal as of right from a judgment in favor of appellees Steven and Pamela Smith and Smith Security Corporation (Smith Security). We affirm. Furthermore, we find

appellants' appeal to be vexatious and therefore remand to the trial court for an award to appellees of actual damages and expenses, including reasonable attorney fees, incurred as a result of this appeal.

This case concerns appellee Smith Security's attempt to enforce covenants not to compete that were executed by appellants. Smith Security operates a security guard business that provides security services, including uniformed guards to a number of clients in the metro Detroit area. All the individual appellants in this action are former employees of Smith Security. Each individual appellant executed a covenant not to compete as a condition of their employment with Smith Security. Ultimately, each of the six either quit, was terminated, or was laid-off. Shortly thereafter, appellant Copas established CSI, which also provided security services, and appellants Holder, Clemons, Wier, Fisher, and Rose began working for CSI.

I

Appellants argue on appeal that the trial court erred in issuing the preliminary injunctions in this case without first holding an evidentiary hearing. Because the preliminary injunctions have expired and permanent injunctions were entered, appellants' challenge to the earlier preliminary injunctions is moot and need not be addressed. See *Alliance for the Mentally Ill of Michigan v Dep't of Community Health*, 231 Mich App 647, 656; 588 NW2d 133 (1998). Any challenge to the permanent injunctions is likewise moot because they too have expired. See *Crawford Co v Secretary of State*, 160 Mich App 88, 93; 408 NW2d 112 (1987) ("An issue is moot when the occurrence of an event makes it impossible for the court to fashion a remedy.").

II

Appellants Copas and CSI argue that the trial court abused its discretion by entering a default judgment, striking their pleadings, and denying their motion to set aside the default judgment. We disagree.

This Court reviews discovery sanctions for an abuse of discretion. *Mink v Masters*, 204 Mich App 242, 244; 514 NW2d 235 (1994). Likewise, the ruling on a motion to set aside a default judgment is entrusted to the discretion of the trial court. Unless there has been a clear abuse of discretion, the trial court's ruling will not be set aside. *Alken-Ziegler, Inc v Waterbury Headers Corp*, ___ Mich ___, ___; ___ NW2d ___ (Docket No. 111783, issued 10/12/99), slip op pp 7-8.

Although MCR 2.313(B)(2)(c) authorizes the entry of a default judgment as a sanction for discovery abuses, default is a drastic measure and should be used with caution. *Mink*, *supra* at 244. In the instant case, the sanction of default was warranted because of appellants' "blatant refusal to comply with the discovery request and the court orders compelling compliance." See *id*. at 245. Two months after appellees' interrogatories and requests for production were served on appellants, they had not provided responses. On November 8, 1996, the trial court entered a stipulated order, requiring appellants to respond to the outstanding discovery by November 14, 1996. When appellants did not comply, the court entered another order on December 4, 1996, requiring appellants to respond to all discovery requests. Again, appellants failed to comply. As a result, on December 18, 1996, appellants

were fined $500 and again ordered to respond to all discovery requests. Nearly two months later, on February 5, 1997, the trial court entered yet another order directing appellants to respond to all discovery requests. The record thus reveals a history of recalcitrance or deliberate noncompliance with discovery orders, and the harsh sanction of default was therefore appropriate. See *Thorne v Bell*, 206 Mich App 625, 634; 522 NW2d 711 (1994). Contrary to appellants' claim, in light of their failure to comply with the discovery order even after the imposition of a monetary sanction, the trial court could reasonably have concluded that an additional fine would be an inadequate sanction. Therefore, the trial court did not abuse its discretion in entering a default judgment against appellants Copas and CSI.

Appellants also contend that the trial court should have granted their motion to set aside the default judgment pursuant to MCR 2.612(C)(1)(a), (c), and (f). Appellants, however, have failed to adequately explain why they should be relieved from judgment.[1] The record is replete with examples of appellants' refusal to comply with discovery. Accordingly, the trial court did not abuse its discretion in denying appellants' motion to set aside the default judgment.

III

Appellants Holder, Fisher, Clemons, Wier, and Rose next argue that the trial court erred in granting appellees' motion for summary disposition pursuant to MCR 2.116(C)(9), even though the motion was premised on MCR 2.116(C)(10). On appeal, an order granting or denying summary disposition is reviewed de novo. *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999).

A motion for summary disposition pursuant to MCR 2.116(C)(9) seeks a determination whether the opposing party has failed to state a valid defense to the claim asserted against it. It is tested by the pleadings alone, with the court taking all well-pleaded allegations as true and determining whether the defenses are so clearly untenable as a matter of law that no factual development could possibly deny the plaintiff's right to recovery. *Fancy v Egrin*, 177 Mich App 714, 722; 442 NW2d 765 (1989). In contrast, a trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the evidence shows that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. *Smith*, *supra*.

After carefully reviewing the record, we conclude that the trial court did not grant appellees' motion for summary disposition solely because appellants' defenses were so clearly untenable as a matter of law that no factual development could possibly deny appellees' right to recovery.[2] Rather, the trial court determined, based on the evidence presented, that the covenants not to compete were enforceable pursuant to MCL 445.774a(1); MSA 28.70(4a)(1). Accordingly, we find this argument to be without merit.

Furthermore, appellants have failed to adequately argue and present evidence to support their claim that the trial court "arbitrarily and contrary to law, dismissed appellants' legitimate defenses" that the covenants lacked mutuality and were too restrictive, and that appellees committed fraud. A party may not merely announce a position and leave it to this Court to discover and rationalize a basis for the claim. *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 178; 568 NW2d 365 (1997).

IV

Appellants next claim that the trial court committed reversible error by binding appellants to its pretrial ruling on appellees' equitable claims regarding the validity of the covenants not to compete. However, appellants' comparison of this case to *Smith v Univ of Detroit*, 145 Mich App 468; 378 NW2d 511 (1985), is not apt because in the present case the trial court determined that the covenants conformed to the requirements of the statute *as a matter of law*. All the facts upon which the trial court relied were undisputed. Appellants conceded in their complaints that they signed the covenants, and conceded within the covenants that the agreements were reasonable and required to protect appellees' business. Accordingly, we find no error.

V

Appellants argue that the trial court abused its discretion when it quashed their subpoenas served two days before trial. This Court reviews a trial court's decision to grant or deny discovery for an abuse of discretion. *SCD Chemical Distributors, Inc v Medley*, 203 Mich App 374, 382; 512 NW2d 86 (1994).

Appellants correctly argue that subpoenas issued pursuant to MCR 2.506(A)(1) may be issued after the end of the discovery period. See *Boccarossa v Dep't of Transportation*, 190 Mich App 313, 316; 475 NW2d 390 (1991). A subpoena, however, must also be relevant. Here, appellants have failed to address the basis for the trial court's decision, namely, that the subpoenas were not relevant. Accordingly, we are not persuaded that the trial court abused its discretion. See *Roberts & Son Contracting, Inc v North Oakland Development Corp*, 163 Mich App 109, 113; 413 NW2d 744 (1987) ("Since counsel has failed to address an issue which necessarily must be reached, the relief he seeks . . . may not be granted.").

VI

Appellants next argue that the trial court abused its discretion in denying their motion to dismiss. Appellants, however, fail to challenge or address the basis of the trial court's determination that their motion to dismiss appellees' claim for money damages was untimely. Therefore, appellants are not entitled to the relief which they seek on this ground. See *id*. Moreover, pursuant to MCR 2.401(B), a trial court may enter a scheduling order setting time limitations for processing a case, and may adhere to such an order.

VII

Appellants also argue that improper comments by counsel for appellees and the trial court regarding the issuance of the injunctions denied them a fair trial. With regard to the comments by counsel for appellees, appellants did not object either to the trial court's prior ruling on the matter[3] or when counsel informed the jury, pursuant to the trial court's ruling, that certain facts had already been established and injunctions had been issued. Consequently, this issue is not preserved for appellate review. See *In re Hildebrant*, 216 Mich App 384, 389; 548 NW2d 715 (1996). In any case, relief is

not warranted because appellants have not established that the disclosure had any effect on the jury's verdict. See *Watkins v Manchester*, 220 Mich App 337, 339; 559 NW2d 81 (1996).

With regard to the improper comments allegedly made by the trial court, appellants have failed to identify the remarks to which they refer, and we therefore decline to address this issue. As previously stated, a party may not merely announce a position and leave it to this Court to discover and rationalize a basis for the claim. *Joerger*, *supra*.

VIII

Appellants' remaining arguments are not preserved because they failed to raise them in the statement of questions presented. See MCR 7.212(C)(5); *Phinney v Perlmutter*, 222 Mich App 513, 564; 564 NW2d 532 (1997). Accordingly, we decline to address them.

IX

We conclude that the present appeal is vexatious because it was taken without any reasonable basis for belief that there was a meritorious issue to be determined on appeal. See MCR 7.216(C)(1)(a); *Dillon v DeNooyer Chevrolet Geo*, 217 Mich App 163, 169; 550 NW2d 846 (1996). Therefore, pursuant to MCR 7.216(C)(2), we remand to the circuit court for a determination of appellees' actual damages and expenses, including reasonable attorney fees incurred in defending against this appeal.

Affirmed. Remanded to the trial court for an award of actual damages and expenses incurred on appeal. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Martin M. Doctoroff
/s/ Peter D. O'Connell

[1] Because appellant Copas did not argue in the trial court that, as CSI was the "disobedient party," the trial court should not have entered a default judgment against him, he has waived that argument. See *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993).

[2] Indeed, appellants' argument is misleading in that it presents only one sentence from the trial court's seven-page opinion.

[3] Appellants claim that they did not object because they did not want to alert the jury to the significance of the information. However, the trial court's ruling occurred outside the presence of the jury.