

STATE OF MICHIGAN
COURT OF APPEALS

SMITH BUILDING & DEVELOPMENT
CORPORATION,

UNPUBLISHED
February 8, 2002

Plaintiff-Appellant,

v

CITY OF ROCHESTER, ROCHESTER CITY
MANAGER, and ROCHESTER POLICE CHIEF,

No. 226922
Oakland Circuit Court
LC No. 99-015213-AA

Defendants-Appellees.

Before: Cavanagh, P.J., and Neff and B. B. MacKenzie*, JJ.

PER CURIAM.

Plaintiff commenced this action, seeking declaratory and injunctive relief with regard to the validity and future enforcement of the City of Rochester's noise ordinance, § 9.1-11,¹ and also requesting money damages in connection with the city's past enforcement of the ordinance with regard to four parcels of real property owned by plaintiff. The trial court granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(4). We affirm in part, reverse in part, and remand for further proceedings.

¹ This ordinance, as originally adopted in 1958, provided, in pertinent part:

Noises. Each of the following acts is declared unlawful and prohibited, but this enumeration shall not be deemed to be exclusive, namely:

* * *

(2) Construction Noises. The erection (including excavating therfor (sic)), demolition, alteration, or repair of any building, the cutting of any trees with power saws, and the excavation of streets and highways, except between the hours of 7 o'clock A.M. and 6 o'clock P.M. on week days, unless a permit be first obtained from the Manager.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Plaintiff argues that the trial court erred in holding that it lacked jurisdiction over the action because an actual controversy no longer existed once plaintiff completed construction on, and sold, each of the four properties identified in the complaint. This Court reviews a trial court's decision on a motion for summary disposition de novo. *USA Jet Airlines, Inc v Schick*, 247 Mich App 393, 396; ___ NW2d ___ (2001). The issue of subject matter jurisdiction is a question of law that this Court also reviews de novo. *W A Foote Memorial Hospital v Dep't of Public Health*, 210 Mich App 516, 522; 534 NW2d 206 (1995).

Although we conclude that the trial court erred insofar as it determined that it lacked jurisdiction over plaintiff's claims for injunctive and declaratory relief, we nonetheless agree that summary disposition of these claims was appropriate. MCR 2.116(C)(4) provides that summary disposition may be granted if "[t]he court lacks jurisdiction of the subject matter." The court rule governing a request for a declaratory judgment, MCR 2.605, provides, in pertinent part:

(A) Power to Enter Declaratory Judgment.

(1) In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted.

(2) For the purpose of this rule, an action is considered within the jurisdiction of a court if the court would have jurisdiction of an action on the same claim or claims in which the plaintiff sought relief other than a declaratory judgment.

As this Court stated in *Kuhn v East Detroit*, 50 Mich App 502, 504; 213 NW2d 599 (1973), "the existence of an 'actual controversy' is condition precedent to invocation of declaratory relief." Thus, where no case or actual controversy exists, the circuit court lacks subject-matter jurisdiction to enter a declaratory judgment. *McGill v Automobile Ass'n of Michigan*, 207 Mich App 402, 407; 526 NW2d 12 (1994). A case or actual controversy generally does not exist where the injuries sought to be prevented are merely hypothetical; there must be an actual injury or loss. *Id*; *Citizens for Common Sense in Government v Attorney General*, 243 Mich App 43, 54-55; 620 NW2d 546 (2000). Although declaratory relief may be appropriate in some cases even though actual injuries or losses have not yet occurred, an actual controversy will be found in such cases only where declaratory relief is necessary to guide a litigant's future conduct in order to preserve the litigant's legal rights. *Citizens for Common Sense in Government*, *supra* at 55; *Fieger v Commissioner of Ins*, 174 Mich App 467, 470; 437 NW2d 271 (1988).

In the instant case, it is clear that an actual case or controversy existed between the parties when this action was commenced. Plaintiff was involved in the construction of four homes located within the city and defendants' enforcement of its noise ordinance resulted in work stoppages and the prosecution of some subcontractors. Subsequently, however, construction on the properties was completed and the properties were sold. Although the trial court viewed these events as divesting it of jurisdiction, more properly characterized, they merely rendered plaintiff's requests for injunctive and declaratory relief moot. Generally,

[a] moot case is one which seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision, in advance, about a right before it has been actually asserted and tested, or judgment upon some matter which, when rendered, for any reason cannot have practical legal effect upon the then existing controversy. [*Menominee County Taxpayers Alliance, Inc v Menominee County Clerk*, 139 Mich App 814, 819-820; 362 NW2d 871 (1984).]

In other words, an issue is moot when it presents only an abstract question of law, or “when an event occurs that renders it impossible for a reviewing court to grant relief.” *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998).

Contrary to the trial court’s ruling, any mootness attributable to the completion and sale of the homes did not divest the court of jurisdiction. A court does not lose jurisdiction over a case that becomes moot. *Mead v Batchlor* 435 Mich 480, 487; 460 NW2d 493 (1990); *Smolen v Dahlmann Apartments, Ltd*, 127 Mich App 108, 120; 338 NW2d 892 (1983). Instead, “mootness reflects ‘a policy of judicial self-restraint which prevents the litigation of issues whose outcome has ceased to be of any importance.’” *Smolen, supra*, quoting *Woodson v Dep’t of Social Services*, 27 Mich App 239, 246 n 9; 183 NW2d 465 (1970). Indeed, a court may decide a moot case or determine a moot question “where this appears to be in the public interest, as for guidance in future cases.” *Mead, supra*, quoting 20 Am Jur 2d, Courts, § 81, p 443. Additionally, disposition based on mootness is not appropriate where the underlying conduct is capable of repetition, while still evading judicial review. See *Mead supra*; *Barkley v Detroit*, 204 Mich App 194, 199; 514 NW2d 242 (1994). Therefore, the trial court erred in granting summary disposition of plaintiff’s claims for injunctive and declaratory relief on the basis that it lacked jurisdiction.

Nonetheless, it is apparent that summary disposition of plaintiff’s claims for declaratory and injunctive relief was appropriate under the circumstances. The ordinance in question was amended during the pendency of the underlying litigation. Thus, there was no longer any danger that future controversies would arise under the challenged ordinance and, accordingly, no need to enjoin enforcement of the old ordinance or obtain declaratory relief in order to guide the parties’ future conduct concerning the ordinance. Rather, future construction would be governed by the amended ordinance and, should plaintiff seek to challenge that ordinance, it may do so in an appropriate action. Therefore, we hold that summary disposition of plaintiff’s claims for injunctive and declaratory relief was appropriate.

However, we agree that plaintiff’s claim for money damages, based on defendants’ past enforcement of the ordinance, was improperly dismissed. See *Smolen, supra* at 120 (when other remedies sought are not moot, such as a request for monetary compensation, the underlying issue may be decided). Accordingly, we reverse the trial court’s order insofar that it granted summary disposition of this claim. We express no opinion regarding the merits of this claim, which were neither considered nor decided by the trial court.

While we believe that our disposition renders it unnecessary to consider plaintiff’s remaining claim that the trial court erred in denying its request to amend its complaint to identify other properties, we are satisfied that the court did not abuse its discretion in denying leave to amend, given that the ordinance in question had been amended. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997).

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh

/s/ Janet T. Neff

/s/ Barbara B. MacKenzie