STATE OF MICHIGAN

COURT OF APPEALS

MO BETTER BLUES, LLC,

Plaintiff-Appellant,

v

SSJ PROPERTIES, LLC, SAM MAGAR, and KALES GRAND CIRCUS PARK, LLC,

and

Defendants.

KALES BUILDING II, LLC, and ROBERT BATES,

Defendants-Appellees,

UNPUBLISHED
December 15, 2015

No. 322906
Wayne Circuit Court
LC No. 14-006930

Before: RONAYNE KRAUSE, P.J., and MARKEY and M. J. KELLY, JJ.

PER CURIAM.

Plaintiff Mo Better Blues, LLC (MBB or plaintiff), appeals by right the trial court's July 23, 2014 order, dismissing with prejudice plaintiff's claims against all defendants as a result of plaintiff's failure to post a $30,000 bond as security for costs, MCR 2.109, with regard to defendants SSJ Properties LLC (SSJ), Kales Grand Circus Park, LLC (Kales GC), and Sam Magar (Magar), and deposit a $6,000 monthly escrow payment with respect to all defendants as required by the trial court's order of July 15, 2014. The required monthly escrow payment of $6,000 was the equivalent of the monthly rent MBB was required to pay under its commercial lease with defendant Kales Building II, LLC, (Kales II), acting through its managing partner, defendant Robert Bates (Bates). Plaintiff's claims all arise out its lease of space in the Kales Building (76-78 West Adams, Detroit), from defendant Kales II, acting through Bates. On July 23, 2014, after plaintiff failed to post either the $30,000 bond or the first escrow payment, the trial court ordered all of plaintiff's claims as to all defendants dismissed with prejudice. For the reasons discussed in this opinion, we affirm.

On May 26, 2015, plaintiff filed a stipulation to dismiss this appeal with prejudice as to defendants SSJ, Kales GC, and Magar. This Court's order dismissing plaintiff's appeal as to those defendants entered on June 1, 2015.[1] Clearly, plaintiff has waived any claim of error regarding the trial court's order to post a security bond of $30,000, or its subsequent order of dismissal, with respect to defendants SSJ, Kales GC, and Magar. See *Reed Estate v Reed*, 293 Mich App 168, 176; 810 NW2d 284 (2011) (stating the definition of "waiver" is the voluntary relinquishment or abandonment—express or implied—of a legal right or advantage). In addition, because the trial court's order requiring a monthly escrow payment of $6,000 applied to *all defendants*, plaintiff has also waived any claim of error regarding the required escrow payment with respect to defendants SSJ, Kales GC, and Magar. It follows that plaintiff has waived any claim of error regarding the July 23, 2014 order of dismissal, which is based both on the failure to post a $30,000 bond and failure to make a first monthly escrow payment, either of which supports the court's order of dismissal. To the extent plaintiff's claims of error with respect to Kales II and Bates regarding the escrow order have not been waived, they are moot. See *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 386; 803 NW2d 698 (2010) (an issue is moot if an event has occurred that renders it impossible for the court to grant relief or when a judgment, if entered, cannot have a practical legal effect on the existing controversy). Further, even if plaintiff's issues vis-a-vis Bates or Kales II have not been waived or rendered moot, they lack merit.

Plaintiff first argues that the trial court did not have jurisdiction to enter an order for escrow of rent payments because, under MCL 600.5704, the district court has jurisdiction over summary proceedings to recover possession of premises. We disagree.

The trial court's decision regarding a motion for security for costs is reviewed for an abuse of discretion. *In re Surety Bond for Costs*, 226 Mich App 321, 331; 573 NW2d 300 (1997). The trial court's findings of fact regarding the legitimacy of a claim and the financial ability of a party to post a bond are reviewed for clear error. *Id*. at 333. The trial court abuses its discretion when its decision falls outside the range of principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

The proper interpretation and application of a court rule or a statute is a question of law, which is reviewed de novo. *Henry v Dow Chem Co*, 484 Mich 483, 495; 772 NW2d 301 (2009); *Gen Motors Corp*, 290 Mich App at 369. The principles of statutory construction apply when interpreting Michigan's court rules. *Henry*, 484 Mich at 495. Whether a court has subject-matter jurisdiction is also question of law reviewed de novo. *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 98; 693 NW2d 170 (2005).

The trial court possessed jurisdiction to amend its initial order for security under MCR 2.109 to require a monthly escrow payment the equivalent of the rental value of the commercial space that plaintiff occupied but was not paying rent for, and did not abuse its discretion where plaintiff's lease of the space was the subject matter of plaintiff's complaint, where a judgment for

[1] *Mo Better Blues, LLC v SSJ Properties, LLC*, unpublished order of the Court of Appeals, dated June 1, 2015 (Docket No. 322906).

unpaid rent against plaintiff remained unsatisfied, and where plaintiff's complaint was virtually identical to one the trial court had dismissed in a related case.[2]

MCL 600.605 provides that circuit courts "have original jurisdiction to hear and determine all civil claims and remedies, except where exclusive jurisdiction is given in the constitution or by statute to some other court or where the circuit courts are denied jurisdiction by the constitution or statutes of this state." Thus, the circuit court is presumed to have subject-matter jurisdiction over a civil action unless Michigan's Constitution or a statute expressly prohibits it from exercising jurisdiction or gives exclusive jurisdiction over the subject matter of the suit to another court. *In re Wayne Co Treasurer*, 265 Mich App 285, 291; 698 NW2d 879 (2005). Therefore, the premise of plaintiff's argument—that the district court has exclusive jurisdiction regarding rental of premises—is not true.

Plaintiff correctly notes that MCL 600.5704 confers jurisdiction on district courts "over summary proceedings to recover possession of premises," and that such proceedings are governed by rules adopted by our Supreme Court, MCL 600.5708. Indeed, in the related case of *Greenblatt v Mo Better Blues, LLC*, (LC No. 14-001327), Judge Ryan in an order dated April 28, 2014, granted MBB's motion for summary disposition as to the receiver's claim for eviction and transferred that part of the action to district court. But Judge Ryan also entered judgment for the receiver against MBB for unpaid rent then due in the amount of $40.402.26. The judgment was consistent with MCL 600.5750, which provides summary proceedings are not a landlord's exclusive remedy. "The remedy provided by summary proceedings is in addition to, and not exclusive of, other remedies, [whether] legal, equitable or statutory." *Id*. Moreover, a judgment for possession does not merge or bar any other claim for relief, except in limited circumstances "a judgment for possession after forfeiture of an executory contract for the purchase of premises . . . ." *Id*.; see also *JAM Corp v AARO Disposal, Inc*, 461 Mich 161, 168, 170; 600 NW2d 617 (1999). Furthermore, a tenant holding over after a judgment of possession may be liable to a proper party for damages. MCL 600.5750; *Brochert v Sunset Shores Condos*, 181 Mich App 676, 678; 450 NW2d 30 (1989). Thus, the circuit court would have jurisdiction of a claim for rent or damages the equivalent of rent.

Furthermore, contrary to plaintiff's assertion, MCR 2.109(A) permits the trial court to order posting of a bond in an amount "sufficient to cover all costs and other recoverable expenses that may be awarded by the trial court," on the motion of a party against whom a claim is asserted. The trial court did so in this case on July 9, 2014, on the motion of defendants SSJ, Kales GC, and Magar. On plaintiff's motion to set aside the July 9, 2014 order, the trial court considered the order inadequate in light of the fact that it only applied to the original moving defendants, the other defendants were parties to the original lease which was the subject of plaintiff's claims, plaintiff continued to occupy the space without paying rent, and plaintiff had not satisfied a judgment for unpaid rent in the amount of $40,000. Thus, a factual basis existed

[2] Circuit court judge Daniel P. Ryan presided over the instant case and also presided over the related case of *Greenblatt v Mo Better Blues, LLC*, (LC No. 14-001327), in which Greenblatt as court-appointed receiver brought an action for eviction and unpaid rent.

justifying the trial court's exercise of discretion to modify its original order for security. Under MCR 2.109(C), the trial court had authority to "order new or additional security at any time on just terms . . . (2) if the original amount of the bond proves insufficient."

In sum, the trial court possessed jurisdiction to issue its order for plaintiff to post a bond for security, and also had jurisdiction to sua sponte issue an order modifying its original order. Plaintiff's jurisdictional argument fails on the merits. Additionally, because plaintiff has waived any claim of error regarding defendants SSJ, Kales GC, and Magar, and the July 15, 2014 order for escrow payments applied to *all defendants*, granting relief with respect to defendants Kales II or Bates would be meaningless as plaintiff failed to post the $30,000 security bond and failed to make the first ordered escrow payment. Consequently, whether the escrow order was proper vis-a-vis Bates or Kales II presents a moot question. See *Gen Motors Corp*, 290 Mich App at 386.

Plaintiff next asserts a procedural defect with respect to the trial court's orders under MCR 2.109. Plaintiff contends that when defendants SSJ, Kales GC, and Sam Magar filed their motion for security, they had not yet filed an answer to plaintiff's complaint and were therefore in default so that the motion was not properly before the trial court. Again, plaintiff has waived its claim of procedural error by dismissing its appeal as to defendants SSJ, Kales GC, and Sam Magar. See *Reed*, 293 Mich App at 176-177.

Moreover, plaintiff cites no provision of the court rules, or caselaw, that specify when a motion for security for costs may or may not be made. As such, plaintiff has abandoned this issue. "[W]here a party fails to cite any supporting legal authority for its position, the issue is deemed abandoned." *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

Furthermore, court rules are interpreted like statutes, *Henry*, 484 Mich at 495, and nothing will be read into a clear court rule that is not within the manifest intention of our Supreme Court derived from the language of the court rule itself. See *Polkton Charter Twp*, 265 Mich App at 102 (discussing rules of statutory interpretation). Consequently, plaintiff's reading of the court rules must fail.

Finally, the factual premise of plaintiff's argument is also specious. The parties moving for security, defendants SSJ, Kales GC, and Magar, were not in default when they did so. Plaintiff's complaint was filed on May 29, 2014; Kales GC and SSJ were served with the summons and complaint on June 11, 2014, and Magar was served on June 25, 2014. MCR 2.108(A)(1) provides: "A defendant must serve and file an answer *or take other action permitted by law or these rules* within 21 days after being served with the summons and a copy of the complaint . . . ." See, also, *Huntington Nat Bank v Ristich*, 292 Mich App 376, 381; 808 NW2d 511 (2011). Defendants SSJ, Kales GC, and Magar filed their motion for security for costs on July 1, 2014, within 21 days after being served. Consequently, at the time defendants SSJ, Kales GC, and Magar filed their motion, the time period within which to "file an answer or take other action permitted by law or these rules" had not yet expired. While an argument could be made that a motion for security for costs is not within the phrase "other action permitted by law," see *Huntington Nat Bank*, 292 Mich App at 387-388 (noting such actions are generally in the nature

of an attack on the pleadings), defendants were clearly not in default when the motion was filed.[3] Indeed, the entry of the default of a party requires action by the clerk of the court after "a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, and that fact is made to appear by affidavit or otherwise . . . ." MCR 2.603(A)(1). See *Bullington v Corbell*, 293 Mich App 549, 561; 809 NW2d 657 (2011); *Huntington Nat Bank*, 292 Mich App at 379, 381. So, the factual premise of plaintiff's argument, that SSJ, Kales GC, and Magar were in default when they filed the motion for security for costs, fails.

Last, plaintiff argues that the trial court abused its discretion by failing to waive security for costs because plaintiff raised legitimate claims and was financially unable to post a bond. See MCR 2.109(B)(1). Again, we briefly examine the merits of this claim and disagree.

MCR 2.109(B)(1), on which plaintiff relies, provides: "The court may allow a party to proceed without furnishing security for costs if the party's pleading states a legitimate claim *and* the party shows by affidavit that he or she is financially unable to furnish a security bond." (Emphasis added); see *In re Surety Bond*, 226 Mich App at 332. Thus, plaintiff must show both that it has a legitimate claim and also establish by affidavit that it "is financially unable to furnish a security bond." With respect to the first prong, legitimacy of a claim, the trial court may consider the likelihood of success on the theory presented. *Id*. at 333. Because the trial court had previously dismissed, on motion for summary disposition, the identical claims of plaintiff in a related lawsuit, the trial court did not clearly err by determining the likelihood of plaintiff succeeding on the merits of its claims was extremely small. This finding alone is sufficient to deny application of the MCR 2.109(B)(1) exception. See e.g., *Hall v Harmony Halls Recreation, Inc*, 186 Mich App 265, 270-271; 463 NW2d 254 (1990), quoting *Gaffier v St Johns Hosp*, 68 Mich App 474, 478; 243 NW2d 20 (1976), noting that " 'the fulcrum of the rule's balance is the legitimacy of the indigent plaintiff's theory of liability.' " While the record reflects the court considered plaintiff's claim of poverty, it also confirms that plaintiff did not satisfy the second prong of the exception by providing the trial court with an affidavit regarding its financial ability. Thus, the trial court did not clearly err in its determination that MCR 2.109(B)(1) did not apply.

In sum, the trial court did not abuse its discretion granting and then amending an order for security under MCR 2.109 where plaintiff's claim arose out of a commercial lease of space that plaintiff continued to occupy without paying rent or satisfying a judgment for unpaid rent, and where plaintiff's complaint was virtually identical to the one the trial court had previously dismissed on motion for summary disposition in a related lawsuit.

We affirm. As the prevailing party Defendants may tax costs under MCR 7.219.

/s/ Amy Ronayne Krause
/s/ Jane E. Markey
/s/ Michael J. Kelly

[3] SSJ, Kales GC, and Magar filed their answer to plaintiff's complaint on July 14, 2014.