STATE OF MICHIGAN

COURT OF APPEALS

OPENINGS, a Michigan Limited Partnership,

Plaintiff/Cross-Defendant-Appellee,

v

R-CLASSICS, INC., and VICKERS AND ASSOCIATES, INC.,

Defendants,

and

DAVID R. KRATZE, R-STUFF, INC., and ULTRA BRIGHT BLIND CLEANING COMPANY,

Intervening Plaintiffs-Appellants.

UNPUBLISHED
November 5, 1996

No. 179330
LC No. 93-458375-CZ

Before: White, P.J., and Smolenski and R.R. Lamb,* JJ.

PER CURIAM.

Intervening Plaintiffs appeal as of right an order that denied their motion to amend their intervening complaint and dismissed this complaint. We affirm.

Intervening Plaintiffs first argue that the trial court erred in dismissing their intervening complaint where no motion to dismiss this complaint was ever made. Intervening plaintiffs contend that the court must have believed that the intervening complaint failed to state a cause of action for damages for plaintiff's alleged seizure of intervening plaintiffs' property pursuant to the temporary restraining order. Intervening plaintiffs contend that this was error because the intervening complaint did state a cause of action. Specifically, intervening plaintiffs first contend they could seek damages under a theory of wrongful enjoinment.

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

As noted by intervening plaintiffs, MCR 3.310(D)(1) provides in relevant part as follows:

> Before granting a preliminary injunction or temporary restraining order, the court may require the applicant to give security, in the amount the court deems proper, for the payment of costs and damages that may be incurred or suffered by a party who is found to have been wrongfully enjoined or restrained.

As used in the court rule, a person is "wrongfully" enjoined, and thus entitled to seek damages, when, "based on the determination made on the merits of the underlying controversy between the parties," the injunction "should not have been issued at all." *In re Prichard Estate*, 169 Mich App 140, 151; 425 NW2d 744 (1988) (construing GCR 1963, 718.3[1], the predecessor to MCR 3.310[D]).

In this case, the trial court's February 23, 1994 order quashed the temporary restraining order "for the reasons set forth on the record" and ordered that intervening plaintiffs could "remove their property from the premises within thirty (30) days . . . ." However, this Court is unable to discern whether the trial court made a determination on the merits of the underlying controversy that the temporary restraining order should not have been issued because no transcript of this hearing has been provided to this Court. An appellant who fails to provide the record in support of his issues is considered to have abandoned those issues on appeal. *Taylor v Blue Cross and Blue Shield of Michigan*, 205 Mich App 644, 654; 517 NW2d 864 (1994).

In addition, recovery for wrongful enjoinment is limited to the amount of the bond "absent a showing that the preliminary injunction was issued maliciously or in bad faith." *Prichard*, *supra* at 152. In this case, the trial court did not require plaintiff to furnish any security when it issued the temporary restraining order. Intervening plaintiffs allege error in the failure of the restraining order to state why security was not required as mandated by MCR 3.310(D)(2). However, we decline to find that intervening plaintiffs were prejudiced by this error where intervening plaintiffs were not yet parties to this action when the trial court issued the temporary restraining order, and later abandoned efforts to require security.

Intervening plaintiffs also allege error in the failure to the trial court to require plaintiff to provide security. Again, we find no error. Because an injunction is always subject to modification if merited by the facts, a party can thus request an increase in security. *Prichard*, *supra* at 148, 152. However, in this case intervening plaintiffs abandoned a request that plaintiff provide security. Our review of the record indicates that in October 1993 intervening plaintiffs moved to set aside the restraining order. This motion further requested that the court require plaintiff to post a $75,000 security bond should the motion be denied. This motion was noticed for hearing for November 3, 1993 and again for November 10, 1993. However, no transcript of any such hearing has been provided to this Court and the record contains no order or any other indication that a hearing on intervening plaintiffs' October motion was held.

In February 1994, intervening plaintiffs filed a supplemental motion to quash the restraining order and brief in support thereof. This motion and brief alleges that the court instructed intervening plaintiffs at a January 24, 1994 settlement conference to renew their motion to quash the restraining order. However, this motion and brief do not request that plaintiff post a security bond should the motion be denied. Following a February 23, 1994 hearing, of which, as indicated previously, no transcript has been provided to this Court, the trial court entered an order quashing the restraining order. Thus, we decline to find any error in the failure of the court to require plaintiff to post a security bond where it appears that intervening plaintiffs abandoned this issue below. Where there has been no showing or allegation that the temporary restraining order was issued maliciously or in bad faith, we conclude that the general rule that recovery is limited to the amount of the bond is applicable to this case. Thus, in summary, we cannot conclude that intervening plaintiffs have stated a cause of action for wrongful enjoinment.

Next, intervening plaintiffs contend that they are entitled to seek damages for plaintiff's "contempt" in refusing to release the property to intervening plaintiffs contrary to the February 23, 1994 order that provided intervening plaintiffs could remove their property from plaintiff's premises. A trial court has inherent authority to punish persons for contemptuous disobedience to the court, i.e., a willful disregard or disobedience of the authority or orders of the court. *Homestead Development Co v Holly Twp*, 178 Mich App 239, 245; 443 NW2d 385 (1989). MCL 600.1721; MSA 27A.1721 authorizes a court to order payment of a sum to indemnify a party that has sustained a loss as a result of the other party's contempt. *Id*.

However, the record contains no indication that plaintiff was found in contempt of the February 23, 1994 order. Rather our review of the record indicates that following the issuance of the February 23, 1994 order, a dispute arose between plaintiff and intervening plaintiffs concerning whether defendants or intervening plaintiffs owned the property to be removed. Intervening plaintiffs' April 1994 motion to disqualify the trial court states that intervening plaintiffs sought enforcement of the February 23, 1994 order at a March 10, 1994 hearing, but that the trial court refused to enforce this order. Plaintiff's response to this motion states that the trial court held in abeyance a ruling concerning whether plaintiff was in violation of the February 23, 1994 order pending the deposition of intervening plaintiff David Kratze. We note that no transcript of this alleged March 10, 1994 hearing was provided to this Court. We also note that intervening plaintiffs' counsel conceded at the July 20, 1994 hearing that the court, after issuing the February 23, 1994 order, verbally informed the parties that "I'm going to hold it . . .", apparently in reference to either the February 23, 1994 order or the disputed property. Accordingly, we cannot conclude that intervening plaintiffs are entitled to seek any compensation under a theory of contempt where plaintiff was never found in contempt of the February 23, 1994 order.

Because intervening plaintiffs have failed to persuade this Court that they were entitled to recover damages or compensation under the theories alleged on appeal, i.e., wrongful enjoinment or contempt, we cannot conclude that the trial court erred in dismissing the intervening complaint. Nor can we conclude that the trial court abused its discretion in denying intervening plaintiffs' motion to amend their complaint. *Early Detection Center, PC v New York Life Ins Co*, 157 Mich App 618, 624-625; 403 NW2d 830 (1986).

Affirmed.

/s/ Helene N. White
/s/ Michael R. Smolenski
/s/ Richard R. Lamb