STATE OF MICHIGAN

COURT OF APPEALS

P.A.G., INC., TALSMA DRYWALL, INC., LAKE EFFECT INTERIOR INSTALLATIONS, WALSH CONSTRUCTION COMPANY, INC., and WEST MICHIGAN LANDSCAPING & CONSTRUCTION,

Plaintiffs-Appellants,

and

BURGESS CONCRETE CONSTRUCTION COMPANY, FEYEN-ZYLSTRA ELECTRIC, INC., HOME ACRES BUILDING SUPPLY COMPANY, L.L.C., and HURST MECHANICAL, INC.,

Plaintiffs,

v

ALPINIST ENDEAVORS, L.L.C., AVASTAR PARK INDUSTRIAL CONDOMINIUM ASSOCIATION, JOHN C. BUCHANAN, SR. TRUST, by JOHN C. BUCHANAN, SR., Trustee and Individually, SHEILA K. BUCHANAN, JOHN C. BUCHANAN TRUST, by JOHN C. BUCHANAN, JR., Trustee and Individually, MICHAEL HOHNSTEIN, d/b/a HOHNSTEIN CONSTRUCTION SERVICES, MERCANTILE BANK OF MICHIGAN, and WELCH TILE & MARBLE COMPANY, INC.,

Defendants-Appellees,

and

BUIST ELECTRIC, INC., K&K CONCRETE OF HOLLAND, L.L.C., LIGHT CORPORATION, INC., TOTAL FIRE PROTECTION, INC., and VAN DUINEN ELEVATOR COMPANY,

Defendants.

UNPUBLISHED
June 26, 2014

No. 309253
Kent Circuit Court
LC No. 10-007905-CH

Before: MURPHY, C.J., and SHAPIRO and RIORDAN, JJ.

PER CURIAM.

Plaintiffs, P.A.G., Inc., Talsma Drywall, Inc., Lake Effect Interior Installations, Walsh Construction Company, Inc., and West Michigan Landscaping and Construction, appeal as of right the trial court order dismissing their claims. The trial court had granted summary disposition to Alpinist Endeavors, LLC (Alpinist), Avastar Park Industrial Condominium Association (Avastar Park), the John C. Buchanan, Sr. Trust (Jack Sr. Trust), John C. Buchanan, Sr. (Jack Sr.), Sheila Buchanan (Sheila), and Mercantile Bank of Michigan (Mercantile Bank). The trial court also dismissed the claims against the John C. Buchanan Trust (Jack Jr. Trust) and John C. Buchanan, Jr. (Jack Jr.). We affirm.

I. FACTUAL BACKGROUND

Alpinist was comprised of two members: the Jack Sr. Trust and the Jack Jr. Trust. In 2006, Alpinist financed the purchase of the former Lear Corporation plant in Walker, Michigan, with a $4.8 million loan from Mercantile Bank in exchange for a mortgage on the property. Alpinist then transformed the plant into five industrial condominium units, and the property officially became known as Avastar Park.

However, Jack Jr. and Jack Sr. had a falling out. In 2009, they began negotiations for a "take-out transaction" in which Jack Jr. would purchase the membership interest of the Jack Sr. Trust in Alpinist Endeavors. The take-out transaction involved the construction of "a motion picture / movie studio" in Unit 4 and Unit 5 in Avastar Park. Jack Jr. and those working on his behalf represented that they had obtained approval for $10 million from the State of Michigan in film tax credits. Nevertheless, Jack Jr. informed Jack Sr., the managing member of Alpinist, that in order to sell the two units to the studio group, he needed to make some improvements to them. Jack Sr. granted Jack Jr. permission to make the improvements, but required Jack Jr. to have each hired contractor sign a lien waiver acknowledging that Alpinist had not requested the work or material nor was Alpinist responsible for payment. Thereafter, plaintiffs—various construction entities—made improvements to Unit 4 and Unit 5.

Ultimately, the film tax credits were never issued. Plaintiffs were never paid and subsequently filed construction liens on Unit 4 and Unit 5. Plaintiffs initiated this instant lawsuit requesting foreclosure of their construction liens and alleging breach of contract, promissory estoppel and unjust enrichment, and concert of actions. They subsequently filed an amended complaint, alleging breach of contract, actionable fraud, fraud in the inducement, silent fraud, innocent misrepresentation, promissory estoppel/unjust enrichment, concert of action, and foreclosure of their construction liens.

The trial court eventually approved the sale of Unit 4 for over $2 million. The trial court released proceeds of the sale to Mercantile Bank, but left enough in escrow to account for plaintiffs' liens. After further litigation, the trial court released the remaining proceeds of the sale to Mercantile Bank, finding that its mortgage had priority over plaintiffs' liens. The court

ultimately granted summary disposition to defendants, and plaintiffs now appeal on several grounds.

II. SALE OF UNIT 4

A. STANDARD OF REVIEW

Plaintiffs first contend that the trial court erred in granting Alpinist permission to sell Unit 4 to a third party. We review *de novo* issues concerning this Court's jurisdiction. *Chen v Wayne State Univ*, 284 Mich App 172, 191; 771 NW2d 820 (2009).

B. ANALYSIS

In the trial court order dated November 24, 2010, it approved the sale of Unit 4 to a third-party. The order was designated final pursuant to MCR 2.604(b). This Court "has jurisdiction of an appeal of right filed by an aggrieved party from . . . [a] final judgment or final order of the circuit court . . . as defined in MCR 7.202(6) . . . ." MCR 7.203(A)(1). Pursuant to MCR 7.202(6)(a), a final judgment or order in a civil case includes "the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties," or "an order designated as final under MCR 2.604(B)."

In accordance with MCR 2.604(B), the trial court directed that the November 24, 2010 order was a final order. Plaintiffs did not file a claim of appeal from that order. Instead, they waited until the entry of a subsequent final judgment—the March 16, 2012 order—to raise any issue about the November 24th order. Although a party may appeal a final order and raise issues relating to prior orders, "[w]hen a final order is entered, a claim of appeal from that order must be timely filed. A party cannot wait until the entry of a subsequent final order to untimely appeal an earlier final order." *Surman v Surman*, 277 Mich App 287, 294; 745 NW2d 802 (2007).

Here, plaintiffs could have, but chose not to, pursue an appeal from the November 24th order. Accordingly, we do not have jurisdiction over plaintiffs' claims relating to the November 24th order. *Surman, supra*.

III. RELEASE OF PARTIAL FUNDS

A. STANDARD OF REVIEW

Plaintiffs next argue that the trial court erred in releasing a portion of the funds in the escrow account to Mercantile Bank because it did not safeguard costs, interest, and attorney fees, and that pursuant to MCL 570.1116, the amount in escrow should have been twice the amount of the construction liens. Because this specific argument was not raised and decided below, it is unpreserved for appellate review. *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). Our review is therefore limited to plain error affecting substantial rights. *Rivette v Rose-Molina*, 278 Mich App 327, 328; 750 NW2d 603 (2008).

B. ANALYSIS

Pursuant to the Construction Lien Act (CLA), MCL 570.1101 *et seq.*, a trial court "may allow reasonable attorneys' fees to a lien claimant who is the prevailing party." MCL 570.1118(2). However, "[a] construction lien acquired pursuant to this act *shall* not exceed the amount of the lien claimant's contract less payments made on the contract." MCL 570.1107(1) (emphasis added). "[B]ecause the statute expressly states that the amount of the lien is limited to the amount owed for the work performed, . . . the award of attorney fees is not properly added to the amount of a construction lien, but must instead be awarded by way of a judgment separate from the lien itself." *CD Barnes Assoc, Inc v Star Heaven, LLC*, 300 Mich App 389, 428; 834 NW2d 878 (2013). Thus, the trial court did not plainly err in failing to account for attorney fees and costs. *Id.*; *Rivette*, 278 Mich App at 328.

In regard to plaintiffs' alternative argument, a construction lien may be discharged when "a bond, with the lien claimant as oblige, is filed with the county clerk" and is "in the penal sum of twice the amount for which the lien is claimed[.]" MCL 570.1116(1); *ER Zeiler Excavating, Inc v Valenti Trobec Chandler Inc*, 270 Mich App 639, 646; 717 NW2d 370 (2006). In an action to enforce a claim on the bond, a trial court may reduce the amount of the bond, require additional surety, or grant any other relief that it considers equitable. MCL 570.1116(3)(a)-(c).

While plaintiffs now highlight this bond procedure, it was not used to remove the construction liens in the instant case. Therefore, plaintiffs have not demonstrated plain error in the trial court's allowance of less than "twice the amount" of the claimed construction liens remaining in the escrow account. Furthermore, even if MCL 570.1116(1) applied, the trial court did not plainly err because it was permitted to reduce the amount of the bond in its discretion. MCL 570.1116(3)(a).

Thus, plaintiffs' claim that the trial court failed to retain an adequate amount in escrow is meritless.

IV. PRIORITY

A. STANDARD OF REVIEW

Plaintiffs next contend that the trial court erred in releasing the remaining funds to Mercantile Bank without first determining the validity of plaintiffs' construction liens. Because the trial court considered documentary evidence submitted by the parties, we construe the motion as having been granted pursuant to MCR 2.116(C)(10). *Cuddington v United Health Services, Inc*, 298 Mich App 264, 270; 826 NW2d 519 (2012). A grant or denial of a motion for summary disposition under MCR 2.116(C)(10) is reviewed *de novo*. *MEEMIC Ins Co v DTE Energy Co*, 292 Mich App 278, 280; 807 NW2d 407 (2011). The motion for summary disposition "tests the factual support for a claim and should be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Id.* "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).

B. ANALYSIS

On appeal, plaintiffs do not challenge the trial court's priority analysis. Rather, they posit that the trial court erred in granting summary disposition on count VIII of their complaint without first determining the validity of their construction liens. We disagree.

In count VIII of their complaint, plaintiffs sought enforcement of their construction liens through foreclosure. They alleged that their constructions liens had priority over Mercantile Bank's mortgage, so they were entitled to foreclosure of Unit 4 and Unit 5. The trial court disagreed, and found that Mercantile Bank's mortgage had priority.

Now on appeal, plaintiffs concede that the trial court correctly ruled on the priority issue. Although plaintiffs proffer various ways in which the sale of the property could have unfolded, it is not clear how these hypothetical situations are relevant. The trial court's ruling was specifically tailored to count VIII of the complaint, in which plaintiffs premised their claims on a finding that their construction liens had priority, and justified them foreclosing. Because plaintiffs no longer even attempt to assert that, we find no error in the trial court's dismissal of count VIII.[1]

Additionally, plaintiffs have abandoned any argument that the trial court should have held an evidentiary hearing to determine whether Mercantile Bank was entitled to all of the net proceeds from the sale of Unit 4. Plaintiffs did not timely request an evidentiary hearing. *Kernen v Homestead Dev Co*, 252 Mich App 689, 692; 653 NW2d 634 (2002) ("Plaintiffs' failure to request an evidentiary hearing constituted a forfeiture of the issue."). They also present no legal authority to support their position that Mercantile Bank, despite its first priority standing, was somehow barred from collecting the proceeds from the sale of Unit 4. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give issues cursory treatment with little or no citation of supporting authority." *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003) (quotation marks and citation omitted).

V. FRIVOLOUS

A. STANDARD OF REVIEW

Plaintiffs next contend that the trial court erred in finding that count IV of the original complaint was frivolous.[2] We review a trial court's frivolous finding for clear error. *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002). "A decision is clearly erroneous where, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id.* at 661-662.

B. ANALYSIS

[1] Contrary to plaintiffs' position on appeal, the trial court did not eliminate plaintiffs' construction liens, as Unit 5 was not subject to this sale.

[2] Plaintiffs do not challenge the amount of the sanctions.

When an attorney signs and submits a document to the court, he represents that he has read the document, that to the best of his knowledge it is well grounded in fact and is warranted by law, and that it is not submitted for any improper purpose. MCR 2.114(C), (D). "If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction[.]" MCR 2.114(E).[3]

In count IV of the original complaint, plaintiffs alleged that Jack Sr. and Jack Jr. engaged in "concerted activities," including presenting the State of Michigan with "a falsely inflated appraisal value" of the property "in an attempt to procure tax credits," that they engaged in "an illegal scheme" and used "false pretenses," i.e., giving the state of Michigan "materially false" information to obtain the tax credits, and that the concerted actions violated criminal codes.

"In order to prove a claim of concert of action, the plaintiff must show that *all* defendants acted tortiously, pursuant to a common design[.]" *Jodway v Kennametal, Inc*, 207 Mich App 622, 631; 525 NW2d 883 (1994) (emphasis added) (quotation marks and citation omitted). In the instant case, plaintiffs produced no evidence to support their claims against Jack Sr. The affidavits that Jack Sr. presented established, in part, the following: (1) Jack Sr. had almost no contact with Jack Jr. since September 2008; (2) in the summer and fall of 2009, Alpinist continued negotiations to sell Units 3 and 4 despite Jack Jr.'s film studio plan; (3) Jack Jr. denied the request of Robert Nolan, Jack Sr.'s attorney, to speak with any state agencies regarding the film tax credits; and (4) when Nolan received a copy of the application for the film tax credits submitted by Joseph Peters, the managing member of West Michigan Film, it already had been approved by the Michigan Film Office and the State Treasurer.

Plaintiffs did not produce any meaningful evidence to support their allegations against Jack Sr. nor to refute defendants' evidence. The trial court even allowed for 60 days of discovery and granted plaintiffs leave to file an amended complaint. In those 60 days, plaintiffs conducted no discovery. Rather than coming forth with discovery to support their allegations, they simply filed an amended complaint omitting the allegations that Jack Sr. engaged in criminal activity to defraud the State of Michigan. Under these circumstances, we are not left with a definite and firm conviction that the trial court erred in finding that the allegations of

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[3] Pursuant to MCL 600.2591, "frivolous" means at least one of the following conditions has been met:

> (i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
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> (ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
>
> (iii) The party's legal position was devoid of arguable legal merit.

illegal and criminal behavior against Jack Sr. were without basis and frivolous. *Kitchen*, 465 Mich at 661-662.[4]

We also reject plaintiffs' suggestion that the trial court's finding was in error because the court failed to hold an evidentiary hearing. "MCR 2.114 does not provide a procedure to be followed before sanctions can be imposed." *Vittiglio v Vittiglio*, 297 Mich App 391, 405; 824 NW2d 591, 598 (2012) (quotation marks and citation omitted). All that is required is that a party receives reasonable notice and an opportunity to be heard before the trial court imposes sanctions. *Id.* Here, plaintiffs do not claim a lack of notice or the denial of an opportunity to be heard. Thus, their claims are meritless.

We also reject plaintiffs' claim that the trial court could not find the allegations frivolous because they were protected by "judicial immunity." Plaintiffs are importing this concept from a defamation case. See *Oesterle v Wallace*, 272 Mich App 260, 265; 725 NW2d 470 (2006). They provide no support for their argument that such considerations are relevant or proper in the context of MCR 2.114 sanctions. *Peterson Novelties, Inc*, 259 Mich App at 14. Thus, we find their argument meritless.

VI. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

Plaintiffs argue that the trial court erred in granting summary disposition to Alpinist and the Jack Sr. defendants[5] regarding their remaining fraud and unjust enrichment claims. We review *de novo* the trial court's decision on a motion for summary disposition. *MEEMIC Ins Co*, 292 Mich App at 280.

B. AGENCY

On appeal, plaintiffs present an agency theory of liability as it relates to the John Sr. defendants. Plaintiffs contend that there was a genuine issue of material fact regarding whether Jack Sr. "controlled everything behind the scenes."

As we have recognized, "[t]he test of whether an agency has been created is whether the principal has a right to control the actions of the agent." *Meretta v Peach*, 195 Mich App 695, 697; 491 NW2d 278 (1992). "The authority of an agent to bind the principal may be either actual or apparent." *Id.* at 698. Actual authority, in turn, may be express or implied. *Id.* "Implied authority is the authority which an agent believes he possesses." *Id.* "Apparent authority arises where the acts and appearances lead a third person reasonably to believe that an agency relationship exists. However, apparent authority must be traceable to the principal and

[4] While plaintiffs curiously highlight the criminal proceedings against Jack Jr., that does not illuminate why they asserted claims against Jack Sr.

[5] The Jack Sr. defendants are: Jack Sr., the Jack Sr. Trust, Sheila, and Avastar Park.

cannot be established only by the acts and conduct of the agent." *Alar v Mercy Mem Hosp*, 208 Mich App 518, 528; 529 NW2d 318 (1995).

There is no evidence of an agency relationship in this matter. It is undisputed that Jack Sr. granted Jack Jr. permission to make the improvements to Units 4 and 5. However, that alone does not raise a genuine issue of material fact regarding an agency relationship. In the context of the improvements, there was no evidence that Jack Sr. or Alpinist controlled Jack Jr. or the improvements. Nothing in the record demonstrates that the Jack Sr. defendants or Alpinist controlled which contractors were hired, the agreed upon fees, or the specific nature of their work. Further, Jack Sr. required Jack Jr. to obtain signed lease waivers, wherein the contractors acknowledged that Alpinist was not in control of or responsible for the improvements. Jack Jr. agreed to that term, which is further evidence that neither party understood Jack Jr. to be the agent of Jack Sr.

Moreover, there was no contract between plaintiffs and the Jack Sr. defendants and Alpinist. None of the plaintiffs communicated with Jack Sr.[6] Jack Jr. informed Juan Marquez, the owner of plaintiff Lake Effect Interior Installations, that the contract would be with Blue Bridge Ventures. When Marquez informed Jack Jr. that he would be filing a construction lien, Jack Jr. told him that Alpinist was not the proper party. Jack Jr. also signed the proposal submitted by Paul Talsma, the owner of Talsma Drywall, Inc., and crossed out the name "Alpinist Endeavors" and instead wrote "Blue Bridge Ventures" on the proposal. Jack Jr. obtained lien waivers from Ken Walsh, the owner of plaintiff Walsh Construction Company, and Rene Rios, the owner of plaintiff West Michigan Landscaping and Construction. In addition, Marquez, Talsma, Walsh, and Rios submitted invoices to Blue Bridge Ventures. While G. John Beck, the owner of plaintiff P.A.G., was given the billing information for Alpinist and knew that Jack Jr. and Jack Sr. owned the building, he also admitted that he had never heard of Alpinist Endeavors and was told that Jack Jr. was in charge of billing. Accordingly, Beck submitted his invoices to Jack Jr. There is no evidence that Jack Jr. forwarded such invoices to Alpinist.

Thus, plaintiffs produced no evidence of an agency relationship derived from either actual or apparent authority. While plaintiffs repeatedly assert that John Sr. knew that John Jr. was insolvent, mere knowledge of such a situation does not create an agency relationship. Because there is no genuine issue of material fact regarding whether Jack Jr. was the agent of Alpinist or Jack Sr., plaintiffs' subsequent argument that the trial court erred in granting

[6] While plaintiffs assert that Sheila was at Avastar Park daily, they have failed to identify specific deposition pages to support that assertion. " 'Facts stated must be supported by specific page references to the transcript, the pleadings, or other document or paper filed with the trial court.' MCR 7.212(C)(7). We will not search the record for factual support for plaintiffs' claims." *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 388; 689 NW2d 145 (2004). Nor would this fact, standing alone, create a genuine issue of material fact regarding agency.

summary disposition on their fraud claims, which are premised on an agency theory, is without merit.[7]

C. UNJUST ENRICHMENT

Plaintiffs also contend that the trial court erred in granting summary disposition to Alpinist and the Jack Sr. defendants on their alternate claim for unjust enrichment. We again disagree.

Not all enrichment is necessarily unjust. *Karaus v Bank of New York Mellon*, 300 Mich App 9, 23; 831 NW2d 897 (2012). To prevail on a claim for unjust enrichment, "a plaintiff must establish (1) the receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant." *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 195; 729 NW2d 898 (2006).

Here, implicit in plaintiffs' argument is the belief that Alpinist and the Jack Sr. defendants should have informed them about the film tax credits. However, plaintiffs presented no evidence that Alpinist and the Jack Sr. defendants even knew or should have known that Jack Jr. did not inform plaintiffs about the tax credits. Jack Sr. never discussed the improvements with plaintiffs. He also went to great lengths to ensure that the contractors were forewarned that they could not rely on Alpinist for payment for their work. Accordingly, plaintiffs have failed to raise a question of fact regarding whether Alpinist's and the Jack Sr. defendants' receipt of the improvements to Unit 4 and Unit 5 was unjust or inequitable. *Morris Pumps*, 273 Mich App at 196.

The trial court did not err in granting summary disposition to Alpinist and the Jack Sr. defendants on their claim for unjust enrichment.

VII. SUMMONS & COMPLAINT

A. STANDARD OF REVIEW

Lastly, plaintiffs contend that the trial court improperly dismissed Jack Jr. and the Jack Jr. Trust.[8] We review a trial court's decision to dismiss an action for an abuse of discretion.

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[7] To the extent that plaintiffs argue Alpinist and the Jack Sr. defendants directly committed silent fraud, the argument is without merit. "[F]or the suppression of information to constitute silent fraud there must exist a legal or equitable duty of disclosure." *Roberts v Saffell*, 280 Mich App 397, 404; 760 NW2d 715, 719 (2008). Moreover, "a plaintiff must show some type of representation by words or actions that was false or misleading and was intended to deceive." *Id.* Plaintiffs fail to articulate any legal or equitable duty to disclose, nor do they identify any false or misleading representation that was intended to deceive.

[8] Plaintiffs do not distinguish John Jr. from the John Jr. Trust in their argument, and we will not search for arguments not raised. See *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998).

Vicencio v Ramirez, 211 Mich App 501, 506; 536 NW2d 280 (1995). "A trial court abuses its discretion when it reaches a decision that falls outside the range of principled outcomes." *Huntington Nat'l Bank v Ristich*, 292 Mich App 376, 383; 808 NW2d 511 (2011).

We review *de novo* the legal question of whether a trial court possessed personal jurisdiction over a party. *WH Froh, Inc v Domanski*, 252 Mich App 220, 225; 651 NW2d 470 (2002). We also review *de novo* the legal question of the proper interpretation and application of court rules. *Henry v Dow Chemical Co*, 484 Mich 483, 495; 772 NW2d 301 (2009).

B. ANALYSIS

"A civil action is commenced by filing a complaint with a court." MCR 2.101(B). When a complaint is filed, the court clerk shall issue a summons. MCR 2.102(A). Generally, "[a] summons expires 91 days after the date the complaint is filed." MCR 2.102(D). If a defendant is not served before the summons expires, the action is deemed dismissed as to that defendant. In pertinent part, MCR 2.102(E) provides:

> (1) On the expiration of the summons as provided in subrule (D), the action is deemed dismissed without prejudice as to a defendant who has not been served with process as provided in these rules, unless the defendant has submitted to the court's jurisdiction. As to a defendant added as a party after the filing of the first complaint in the action, the time provided in this rule runs from the filing of the first pleading that names that defendant as a party.
>
> (2) After the time stated in subrule (E)(1), the clerk shall examine the court records and enter an order dismissing the action as to a defendant who has not been served with process or submitted to the court's jurisdiction. The clerk's failure to enter a dismissal order does not continue an action deemed dismissed.

The filing of an amended complaint does not extend the life of a summons. *Durfy v Kellogg*, 193 Mich App 141, 144; 483 NW2d 664 (1992).

Here, plaintiffs concede that Jack Jr. was not served within the time provided in MCR 2.102(D). Thus, at the time the summons expired, Jack Jr. had not been served. Jack Jr. did not submit to the trial court's jurisdiction, MCR 2.102(F)(1), nor did plaintiffs make any attempt to modify or extend the initial summons, MCR 2.102(C). Because the summons had expired, "the action [wa]s deemed dismissed without prejudice." MCR 2.102(E).

Instead of refiling the action against Jack Jr., plaintiffs filed an amended complaint in the same action. Contrary to plaintiffs' arguments on appeal, the filing of the amended complaint did not set aside the dismissal of the action against Jack Jr. nor did it extend the initial summons. *Durfy*, 193 Mich App at 143-144 ("No provision is made for extending the life of a summons merely because of the filing of an amended complaint. Indeed, such a rule would essentially vitiate the time limit on the life of a summons because a party could automatically obtain an

extension merely by filing an amended complaint.").[9] Furthermore, none of the circumstances present in MCR 2.102(F) exist in this case.

Accordingly, the trial court did not abuse its discretion in dismissing the claims against Jack Jr. and the Jack Jr. Trust. *Vicencio*, 211 Mich App at 506.

VIII. CONCLUSION

Plaintiffs did not properly appeal the November 24th order regarding the sale of Unit 4, so any claims regarding that order are not properly before us. We find no error in the release of the escrow funds to Mercantile Bank, the finding that count IV of the initial complaint was frivolous, or the trial court's grant of summary disposition regarding the remaining claims against the Jack Sr. defendants and Alpinist. We also agree with the trial court's ruling as it relates to dismissal of the claims against Jack Jr. and the Jack Jr. Trust. We have reviewed all remaining claims and find them to be without merit. We affirm.

/s/ William B. Murphy
/s/ Douglas B. Shapiro
/s/ Michael J. Riordan

[9] Plaintiffs' attempt to distinguish *Durfy* based on the statute of limitations is unpersuasive, as this issue involves civil procedure pursuant to the court rules, not the statute of limitations. Further, plaintiffs have failed to support their contention that the filing of an amended complaint vitiates the summons and service requirements of MCR 2.102, as such an interpretation runs counter to the plain language of the court rules.