

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

DELLA GRACE,

Plaintiff-Appellant,

v

JAMES JOHNSON and KELLI LEWIS,

Defendants-Appellees.

---

UNPUBLISHED  
October 25, 2016

No. 327468  
Wayne Circuit Court  
LC No. 14-016056-NO

Before: GADOLA, P.J., and BORRELLO and STEPHENS, JJ.

PER CURIAM.

Plaintiff appeals by right an April 29, 2015, circuit court order dismissing her civil suit against defendants. For the reasons set forth in this opinion, we affirm.

This matter arises out of the ongoing conflicts between plaintiff and her neighbors, defendants James Johnson and Kelli Lewis, which has resulted in a number of disagreements and lawsuits over the years. Plaintiff commenced this lawsuit alleging four counts: (1) a claim of assault and battery against defendant James Johnson, stemming from an altercation that occurred on May 18, 2014; (2) a claim of trespass against Johnson, also stemming from the same altercation; (3) a claim of trespass against Johnson and defendant Kelli Lewis, alleging that defendants constructed a “spite fence” that encroaches upon her property; and (4) a claim of breach of contract against Lewis arising from a written agreement they entered in connection with a separate district court action in 2012. Defendants denied the allegations in plaintiff’s complaint and filed a motion for security for costs pursuant to MCR 2.109, contending that plaintiff’s complaint had dubious merit. Defendants also asserted that plaintiff’s complaint, which was the fourth lawsuit plaintiff had initiated against defendants, was filed for the purpose of harassing and intimidating them.

At the hearing on defendant’s motion, the parties agreed that plaintiff had been arrested for assault and battery in connection with the May 18, 2014 altercation, but disagreed about the disposition of the case. Defense counsel asserted that plaintiff was convicted on the charge, plaintiff’s counsel stated that plaintiff pleaded no contest, and the court noted that the official court record indicated that she pleaded guilty. The trial court also opined that the surveillance video had little evidentiary value as it was heavily doctored, consisting of a second-hand video recording a number of screens showing surveillance footage. Additionally, the court observed that, based on the survey, it looked as though plaintiff’s chain-link fence actually encroached on

defendants' property. On January 21, 2015, the trial court entered an order directing plaintiff to post a security bond with the court in the amount of \$5,000 within 30 days. When she failed to timely file the required bond, her suit was dismissed.

On appeal, plaintiff contends that the court erred by requiring her to post a security bond because each count of her complaint was based on a viable legal theory and supported by objective evidence. We disagree.

A trial court's ultimate decision to require a security bond is reviewed on appeal for an abuse of discretion, *In re Surety Bond for Costs*, 226 Mich App 321, 331; 573 NW2d 300 (1997), which occurs when the court's "decision results in an outcome that falls outside the range of principled outcomes," *Epps v 4 Quarters Restoration*, 498 Mich 518, 528; 872 NW2d 412 (2015). The trial court's findings of fact regarding the legitimacy of a claim are reviewed for clear error. *In re Surety Bond for Costs*, 226 Mich App at 333. "A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court's special opportunity to observe the witnesses." *In re Moss*, 301 Mich App 76, 80; 836 NW2d 182 (2013) (citation omitted).

The trial court ordered plaintiff to file a security bond for costs pursuant to MCR 2.109, which provides, in part:

On motion of a party against whom a claim has been asserted in a civil action, if it appears reasonable and proper, the court may order the opposing party to file with the court clerk a bond with surety as required by the court in an amount sufficient to cover all costs and other recoverable expenses that may be awarded by the trial court, or, if the claiming party appeals, by the trial and appellate courts. The court shall determine the amount in its discretion. [MCR 2.109(A).]

However, "security should not be required unless there is a substantial reason for doing so." *Farleigh v Amalgamated Transit Union*, 199 Mich App 631, 634; 502 NW2d 371 (1993). A substantial reason to require security for costs exists where a party's claim is based on a "tenuous legal theory of liability," *In re Surety Bond for Costs*, 226 Mich App at 331-332, or where there is a good reason to believe a party's allegations are "groundless and unwarranted," even if they cannot yet be summarily dismissed under MCR 2.116, *Farleigh*, 199 Mich App at 634 (quotation marks omitted). "In determining the legitimacy of a claim, a trial court is not strictly limited to considering the plaintiff's legal theory, but also may consider the likelihood of success on that theory." *In re Surety Bond for Costs*, 226 Mich App at 333.

The first count of plaintiff's complaint alleged a claim of assault and battery against Johnson on the basis of the May 18, 2014 altercation. "To recover civil damages for assault, [the] plaintiff must show an 'intentional unlawful offer of corporal injury to another person by force, or force unlawfully directed toward the person of another, under circumstances which create a well-founded apprehension of imminent contact, coupled with the apparent present ability to accomplish the contact.'" *VanVorous v Burmeister*, 262 Mich App 467, 482-483; 687 NW2d 132 (2004) (quotation and citation omitted), overruled on other grounds by *Odom v Wayne County*, 482 Mich 459; 760 NW2d 217 (2008). In a civil action for battery, the plaintiff

must prove that a “wilful and harmful or offensive touching of another person which results from an act intended to cause such a contact.” *VanVorous*, 262 Mich App at 483 (citation omitted).

In response to defendants’ motion for security for costs, plaintiff relied primarily on her surveillance video as “conclusive” proof of the alleged assault and battery. However, the trial court found the video evidence to be unreliable because it was “heavily doctored,” and this conclusion is well supported by the questionable video contents. As noted by the trial court, rather than providing the full recordings from her surveillance cameras, plaintiff chose to submit a second-hand recording of several monitors showing playbacks of the event, strategically moving between screens to avoid potentially damaging portions of the footage. Moreover, even the piece-meal video did not support plaintiff’s claim where the court found that plaintiff was the initial aggressor and Johnson could have asserted a self-defense theory at trial. In sum, the trial court did not abuse its discretion in requiring a bond for plaintiff’s assault and battery claim where plaintiff’s potential for recovery on that theory was limited.

The exact nature of the third count of plaintiff’s complaint is unclear, as it is labeled as a trespass claim arising from the construction of defendants’ fence, but raises theories of liability under both trespass and nuisance law. Despite the unartful articulation of plaintiff’s third count, the trial court did not abuse its discretion in requiring bond for this count given that the record did not support that defendants’ fence was improper or amounted to a trespass.

To the extent that plaintiff’s third count was intended as a nuisance claim, it is similarly unwarranted. A plaintiff may bring a nuisance action against a defendant who builds a fence that obstructs access to the plaintiff’s property if the fence serves no useful purpose to the defendant and was constructed solely for malicious purposes. *Kuzniak v Kozminski*, 107 Mich 444, 445-446; 65 NW 275 (1895). However, a fence or other obstruction that serves a useful purpose to the owner cannot form the basis of a “spite fence” nuisance claim, even if its construction was partially motivated by malice. *Id.* at 446. In this case, the record supported that defendants’ fence served a useful purpose because defendants used it to confine their dog to their yard. Accordingly, to the extent plaintiff asserted a nuisance claim in her third count, the trial court did not abuse its discretion in requiring plaintiff to post bond for that claim.

In her fourth count, plaintiff alleged a breach of contract claim against Lewis. “A party claiming a breach of contract must establish (1) that there was a contract, (2) that the other party breached the contract and, (3) that the party asserting breach of contract suffered damages as a result of the breach.” *Dunn v Bennett*, 303 Mich App 767, 774; 846 NW2d 75 (2014) (quotation marks omitted).

Plaintiff’s claim arises from a prior lawsuit where these parties entered into a mediation agreement. Plaintiff alleged that she was damaged by Lewis’s breach of this agreement, but failed to specify in what manner Lewis breached the terms of the agreement. In her response to defendants’ motion for costs, plaintiff again avoided indicating how Lewis breached the agreement. Accordingly, the trial court did not clearly err by determining that plaintiff was unlikely to be successful on her breach of contract claim and it did not abuse its discretion in requiring plaintiff to post bond for this claim.

Finally, in her second count, plaintiff alleged a separate trespass claim. This claim appears to arise from the incident where Johnson entered onto plaintiffs property—allegedly to follow one of Lewis’ children who had entered to retrieve a ball—which ultimately led to the physical altercation between plaintiff and defendant Johnson. Plaintiff’s trespass claim was inextricably linked to her other claims. Given that the court found that plaintiff’s other claims were tenuous and that plaintiff was unlikely to prevail on them, we cannot conclude that the trial court abused its discretion when it found that it was “reasonable and proper” not to sever the trespass claim from the bond requirement. MCR 2.109(A).

In sum, the trial court did not abuse its discretion by granting defendants’ motion for security for costs and directing plaintiff to file a security bond with the court where plaintiff was unlikely to recover on any of her claims. *In re Surety Bond for Costs*, 226 Mich App at 331-333; MCR 2.109(A). Accordingly, the trial court did not err in dismissing plaintiff’s complaint when plaintiff failed to file the required security bond. *Id.* at 332.

Affirmed. No costs awarded. MCR 7.219(A). We do not retain jurisdiction.

/s/ Michael F. Gadola  
/s/ Stephen L. Borrello  
/s/ Cynthia Diane Stephens