

STATE OF MICHIGAN
COURT OF APPEALS

22022 MICHIGAN AVENUE LLC,

Plaintiff-Appellee,

v

TAHRIK ALCODRAY, TAA FORT HOLDINGS
LLC, CONDOR CAPITAL GROUP LLC,
HUSSEIN ABBASS, RIZZO
ENVIRONMENTAL SERVICES, INC., and
TECHNICAL LOGISTICS CORPORATION,

Defendants,

and

BROME BURGERS & SHAKES LLC,

Defendant-Appellant.

UNPUBLISHED

April 12, 2018

No. 335839

Wayne Circuit Court

LC No. 15-013275-CH

Before: GLEICHER, P.J., and BOONSTRA and TUKEL, JJ.

PER CURIAM.

Defendant Brome Burgers & Shakes LLC (“Brome”) appeals as of right a stipulated order of dismissal with prejudice and without costs or attorney fees. But Brome’s true issue on appeal relates to the trial court’s earlier denial of Brome’s motion for entry of a stipulated judgment under MCR 2.405 that would have dismissed Brome as a party. However, because Brome lacks appellate standing, we have no jurisdiction over the appeal, and we dismiss.

Plaintiff brought this cause of action against several defendants, including Brome, alleging claims of trespass, nuisance, and unjust enrichment stemming from defendants’ use of plaintiff’s property during a construction project. After all the defendants, with the exception of Brome and defendant Rizzo Environmental Services, Inc. (“Rizzo”), were dismissed from the case pursuant to stipulated orders of dismissal, plaintiff made an offer to stipulate to the entry of a *judgment* of dismissal with prejudice and without costs or attorney fees, as to Brome only. Brome accepted the offer and subsequently moved for entry of a judgment in accordance with the offer pursuant to MCR 2.405(C)(1). On the basis of the accepted offer of judgment, Rizzo

moved for summary dismissal of plaintiff's claims against it under MCR 2.116(C)(7), arguing that the effect of the accepted offer of judgment under MCR 2.405 required the court to enter a judgment of dismissal, which functions as a full and final adjudication of plaintiff's claims, thereby extinguishing those claims and precluding plaintiff from pursuing those claims against other tortfeasors. The trial court, determining that the offer was not for a "sum certain" and that the offer, which was for a dismissal with prejudice as to Brome only, did not have the preclusive res judicata effect of a judgment as to other alleged tortfeasors that MCR 2.405 intends, denied Brome's motion for entry of judgment pursuant to MCR 2.405, as well as Rizzo's motion for summary dismissal. The court subsequently entered a stipulated order dismissing Brome from the case without costs or attorney fees, from which Brome attempts to invoke this Court's jurisdiction under MCR 7.203(A) as an appeal of right.¹

As a threshold matter, we hold that Brome lacks standing to bring the appeal. "To maintain an appeal, a person must ordinarily be 'aggrieved' by the lower court's decision." *Spires v Bergman*, 276 Mich App 432, 441; 741 NW2d 523 (2007), citing MCR 7.203(A) and *Dep't of Consumer & Industry Servs v Shah*, 236 Mich App 381, 385; 600 NW2d 406 (1999); see also *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 291-292; 715 NW2d 846 (2006). "An aggrieved party is not one who is merely disappointed over a certain result. Rather, to have standing on appeal, a litigant must have suffered a concrete and particularized injury," where the injury arises from the actions of the trial court. *Federated Ins Co*, 475 Mich at 291-292. As a result, "[a] party who could not benefit from a change in the judgment has no appealable interest." *Manuel v Gill*, 481 Mich 637, 644; 753 NW2d 48 (2008) (quotation marks and citation omitted).

Absent standing, "one cannot rightfully invoke the jurisdiction of the court." *Bowie v Arder*, 441 Mich 23, 42; 490 NW2d 568 (1992) (quotation marks and citation omitted); see also MCR 7.203(A) (providing that this Court "has jurisdiction of an appeal of right filed by an aggrieved party"). Accordingly, if a court determines that a party lacks standing, it must "recognize its lack of jurisdiction and act accordingly by staying proceedings, dismissing the action, or otherwise disposing thereof, at any stage of the proceeding." *In re Fraser's Estate*, 288 Mich 392, 394; 285 NW 1 (1939).

Brome challenges the court's order denying its motion for entry of judgment pursuant to MCR 2.405. However, Brome does not assert how it suffered any particularized or concrete injury from the court's denial of its motion for entry of judgment, which, like the stipulated order of dismissal appealed from, sought dismissal of the case against it, with prejudice and without costs or attorney fees. However, regardless of whether the case ended with the "judgment" proposed by Brome or with a "dismissal with prejudice," Brome has been dismissed as a party with prejudice and without costs or attorneys' fees. Moreover, in either instance, Brome would

¹ The trial court also dismissed Rizzo with prejudice and closed the case. Rizzo is not a party to this appeal.

be fully insulated from any subsequent, identical suit on the basis of *res judicata*.² In other words, Brome has not shown how it would improve its position or otherwise benefit if we were to grant the relief Brome has requested on appeal—i.e., that the trial court erred when it denied Brome’s motion for entry of a judgment of dismissal pursuant to MCR 2.405. Indeed, Brome’s argument on appeal, as well as before the trial court, concerns the effect of the court’s decision on the preclusive effect of the entered order with respect to the liability of *other* potential alleged tortfeasors, not how this Court can rectify a situation for Brome.

Dismissed.

/s/ Mark T. Boonstra

/s/ Jonathan Tukel

² “[A] voluntary dismissal with prejudice acts as an adjudication on the merits for purposes of *res judicata*.” *Adam v Bell*, 311 Mich App 528, 532; 879 NW2d 879 (2015). “[T]he decision whether to grant dismissal with or without prejudice, by definition, determines whether a party may re-file a claim or whether the claim is permanently barred.” *ABB Paint Finishing v Nat’l Union Fire Ins Co of Pittsburgh*, 223 Mich App 559, 562; 567 NW2d 456 (1997). Likewise, a judgment entered pursuant to a party’s acceptance of an offer of judgment under MCR 2.405 functions as a full and final adjudication on the merits and *res judicata* applies to consent judgments. *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 299; 769 NW2d 234 (2009); *Ditmore v Michalik*, 244 Mich App 569, 576; 625 NW2d 462 (2001). Accordingly, the court’s stipulated order of dismissal with prejudice, as well as the proposed judgment of dismissal pursuant to MCR 2.405, is an adjudication on the merits for *res judicata* purposes barring plaintiff from raising its claims against Brome again.

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GLEICHER, P.J. (*concurring*).

I concur with the result reached by the majority, but on different grounds. In my view, defendant Brome Burgers & Shakes LLC has standing to bring this appeal. The issue it presents, however, lacks merit.

Brome’s appeal focuses on the manner in which this case ended. When plaintiff 22022 Michigan Avenue LLC decided to discontinue its lawsuit against Brome, it served Brome with an offer to stipulate to entry of judgment “pursuant to MCR 2.405.” Brome filed an acceptance of the offer of judgment. Another defendant in the matter, Rizzo Environmental Services, Inc., then moved for summary disposition under MCR 2.116(C)(7), arguing that Brome’s acceptance of plaintiff’s offer operated as a full and final adjudication of plaintiff’s claims against *all* defendants. Plaintiff promptly pivoted. Apparently concerned that Rizzo might be right, plaintiff filed a motion for entry of judgment of dismissal with prejudice as to Brome accompanied by an argument that its own offer to stipulate to entry judgment was defective. The parties debated these issues in the circuit court, which concluded that plaintiff’s offer did not

constitute an offer of judgment within the meaning of MCR 2.405 because it encompassed only dismissal with prejudice and without costs or attorney fees, and lacked a “sum certain.”

Brome preferred that the trial court enter a *judgment* against plaintiff, as Brome believed, and argued in the trial court, that only a judgement would provide it with res judicata protection in the event that plaintiff filed another lawsuit arising from the same facts. The circuit court rejected this argument, and Brome filed this appeal.

The majority holds that Brome is not an “aggrieved” party as it has not suffered “a concrete and particularized injury.” This phrase comes from *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 291; 715 NW2d 846 (2006). The entire quote, which more fully describes the status of being “aggrieved” for the purpose of an appeal, reads as follows:

An aggrieved party is not one who is merely disappointed over a certain result. Rather, to have standing on appeal, a litigant must have suffered a concrete and particularized injury, as would a party plaintiff initially invoking the court’s power. The only difference is a *litigant* on appeal must demonstrate an injury arising from either the actions of the trial court or the appellate court judgment rather than an injury arising from the underlying facts of the case. [*Id.* at 291-292 (emphasis added).]

Brome claims that the trial court erred by concluding that the offer of judgment was invalid, and that the error results in an injury because it opens the door to another lawsuit against Brome arising from the same factual nexus. In support of this argument Brome cites this Court’s opinion in *Haberkorn v Chrysler Corp*, 210 Mich App 354, 378; 533 NW2d 373 (1995), in which we declared:

An agreement to settle does not necessarily result in a judgment. Although it usually results in a stipulated order of dismissal with prejudice, such an order does not constitute an adjudication on the merits. It merely “signifies the final ending of a suit, not a final judgment on the controversy, but an end of that proceeding.” [Quoting 9A Michigan Law & Practice, Dismissal & Nonsuit, § 2, p 137.]

Based on this language, Brome could reasonably conclude that the order of dismissal entered by the trial court left it at risk for another lawsuit, as the res judicata doctrine bars a subsequent action only when the prior action was decided on the merits. *Adair v Michigan*, 470 Mich 105, 121; 680 NW2d 386 (2004). Brome was aggrieved because it did not receive the complete relief that it sought. Further, Brome had to challenge the order by way of this appeal, since in the event plaintiff files another suit against Brome arising from the same facts, Brome would be precluded from collaterally attacking the order in the subsequent proceeding. See *SS Aircraft Co v Piper Aircraft Corp*, 159 Mich App 389, 393; 406 NW2d 304 (1987) (“The decision of a court having jurisdiction is final when not appealed and cannot be collaterally attacked.”).

The majority attempts to fix Brome’s appellate predicament with dictum. After determining that Brome lacks standing, the majority invokes a line of authority postdating *Haberkorn* holding that “a voluntary dismissal with prejudice acts as an adjudication on the

merits for purposes of res judicata.” *Adam v Bell*, 311 Mich App 528, 532; 879 NW2d 879 (2015). *Adam* drew this proposition from *Limbach v Oakland Co Bd of Co Rd Comm’rs*, 226 Mich App 389, 395; 573 NW2d 336, 340 (1997), which cited as its authority *Brownridge v Mich Mut Ins Co*, 115 Mich App 745, 748; 321 NW2d 798 (1982). *Brownridge*, in turn, imported the rule from *Astron Indus Assocs, Inc v Chrysler Motors Corp*, 405 F2d 958 (CA 5, 1968). Indisputably, there is conflicting, or at least confusing, authority in this state regarding whether a voluntary dismissal with prejudice operates to preclude future litigation on the merits.

Bearing this background in mind, I conclude that Brome was aggrieved by an order entered against its will that it believed inadequate to protect its rights. No less an authority than the United States Supreme Court has held that a prevailing litigant may be aggrieved for standing purposes if the litigant seeks reformation of an order that affects the litigant’s further rights. See *Deposit Guaranty Nat’l Bank v Roper*, 445 US 326, 332-336; 100 S Ct 1166; 63 L Ed 2d 427 (1980); *Electrical Fittings Corp v Thomas & Betts Co*, 307 US 241; 59 S Ct 860; 83 L Ed 1263 (1939). More recently, the Supreme Court summarized, “So long as the litigants possess the requisite personal stake, an appeal presents a case or controversy, no matter that the appealing party was the prevailing party below.” *Camreta v Greene*, 563 US 692, 702; 131 S Ct 2020; 179 L Ed 2d 1118 (2011).

On the merits of this appeal, however, the Supreme Court’s plurality opinion in *Knue v Smith*, 478 Mich 88, 93; 731 NW2d 686 (2007), supports the trial court’s ruling that the offer of judgment rule contemplates that an offer lacking a “sum certain” does not satisfy MCR 2.405(A)(1). I would affirm on this ground.

/s/ Elizabeth L. Gleicher