UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1163

September Term, 2014

JAMES CHESLEY, et al.

v.

TOWN OF HIGHLAND BEACH

Meredith,
Leahy,
Reed,

JJ.

Opinion by Meredith, J.

Filed: June 18, 2015

This appeal arises out of a condemnation action initiated by the Town of Highland Beach, appellee, in June 2013 to acquire a parcel of real property owned by James Chesley, Phyllis Chesley, and Gayle Butcher, appellants. In April 2014, the Circuit Court for Anne Arundel County granted partial summary judgment in favor of appellee on the issue of the necessity of the taking. After a two day trial in July 2014, the jury returned a verdict finding that appellants were entitled to $23,250 in just compensation. On appeal, appellants challenge the grant of partial summary judgment in favor of appellee, as well as discovery sanctions imposed on them and the amount of the jury's award.

QUESTIONS PRESENTED

Appellants presented three questions for our review, which we have rephrased as follows because of the inaccurate wording of appellants' questions:[1]

1. Did the circuit court err in granting the Town's motion for partial summary judgment?

2. Did the circuit court err in granting the Town's motion to strike appellants' expert witness designation?

3. Was the jury's assessment of damages erroneous as a matter of law?

[1] Appellants submitted the following questions for our review:

> 1. Did the Trial Court Err in Granting Plaintiff's Motion for Partial Summary Judgment Where Defendants Presented Evidence of Bad Faith?
> 2. Did the Trial Court Err in Granting Plaintiff's Motion to Strike Gayle Butcher's Timely Filed Expert Designations?
> 3. Does the Assessment of Damages Constitute Just Compensation Where it Fails to Include Any Compensation for the Value of the Defendant's Right to Store Their Personal Property on Lot 19?

Because we answer these three questions in the negative, we affirm the judgment of the Circuit Court for Anne Arundel County.

FACTS & PROCEDURAL HISTORY

Highland Beach is a small, waterfront municipality in Anne Arundel County, located on the western shore of the Chesapeake Bay. Initially developed as a resort community, Highland Beach now has approximately 100 year-round residents. Appellants are the owners of a parcel of unimproved real property located at 1313 Douglass Avenue in Highland Beach, otherwise known as "Lot 19." Appellants do not live on the property, but instead use it to store a number of boats and other miscellaneous motor vehicles. Since 1990, a local zoning ordinance has been in effect that precludes appellants from building a home on the property. Two separate court proceedings have confirmed the fact that, under current land use restrictions, the lot is too small for building a home.

On February 21, 2012, the appellee adopted a resolution for the Town to acquire the property at 1313 Douglass Avenue for the development of a rainscaping park and overflow parking for the nearby Town Hall. Resolution 2012-01 stated, in pertinent part:

> Whereas, Highland Beach, a progressive community, is working on a number of initiatives to restore and protect the environment. In 1999, the Town received the U.S. EPA Chesapeake Bay Partner Community Bronze Award for environmental stewardship. In 2003, the Town received the U.S. EPA Chesapeake Bay Partner Community Silver Award for environmental excellence. The Green Town Hall, awarded U.S.G.B.C Platinum certification in 2007, has a green roof and is surrounded by three rain gardens. Two additional rain gardens, as well as a beach shore restoration project, also serve the community. The latest environmental project is the Highland Beach Rainscaping Park and Off-site Parking facility; and

> Whereas, the Rainscaping Park project is an additional component of the Town's overall watershed protection, which includes a series of rain gardens and check dams throughout Highland Beach, to prevent potentially polluted stormwater runoff from entering the Chesapeake Bay and Blackwalnut Creek. Features include vegetated open space planted with low maintenance native species, and pervious surfaces for occasional overflow parking associated with Town Hall functions; and
>
> Whereas, the Town is severely limited in parking to accommodate official Town meeting and Citizen's Association events at the Town Hall, and is in need of additional parking to supplement the two parking spaces at the Town Hall; and
>
> * * *
>
> Whereas, the Board of Commissioners has determined that acquisition of the unimproved property at 1313 Douglass Avenue within the corporate limits of the Town and located within close proximity to Town Hall is necessary and desirable for the development of the Town's Rainscaping Park and for overflow parking for Town Hall.
>
> Now, therefore, be it resolved by the Mayor and Board of Commissioners of the Town of Highland Beach, that the Town shall proceed to acquire the property at 1313 Douglass Ave. for the development of a rainscaping Park and Off-Site Parking for Town Hall; and
>
> Be it further resolved by the Mayor and Board of Commissioners that if efforts to acquire the property at 1313 Douglass Avenue by negotiation are unsuccessful, the Mayor and Board of Commissioners hereby authorize acquisition of said property by condemnation.

After appellants rejected the Town's proposal to negotiate a sale, the Town adopted Resolution 2013-03 authorizing the acquisition by eminent domain.

In June 2013, appellee filed a condemnation action in the Circuit Court for Anne Arundel County, asserting a legal right to acquire the property through eminent domain. In

the complaint, appellee indicated that it intended to use the property to build a rainscaping park and provide off-site overflow parking for the town hall. Appellants were subsequently served with process, and on July 30, 2013, appellants, acting *pro se*, filed an answer to the complaint. On July 19, 2013, the circuit court issued a scheduling order that required, among other things, that the "[d]eadline for defendant(s) to disclose expert witnesses pursuant to Rule 2-402(g)(1)" was October 31, 2013, and the "[d]eadline for completion of all depositions, and other methods of oral and written discovery" was January 14, 2014.

On October 31, 2013, appellants, still unrepresented by counsel, filed a document that purported to be their expert witness designation. The document listed six "potential expert witnesses," but actually named only three of the potential witnesses, and failed to include any information about the subject matter or substance of the proposed testimony of any of the witnesses as required by Maryland Rule 2-402(g)(1). On November 22, 2013, appellee filed a motion to strike appellants' expert witness designation, arguing that it failed to provide the information described in Maryland Rule 2-402(g)(1), including "the subject matter on which the expert is expected to testify; [and] the substance of the findings and the opinions to which the expert is expected to testify and a summary of the grounds for each opinion." Appellee represented to the court that it had made repeated unsuccessful attempts, both informally and through written interrogatories served upon appellants, to obtain additional information about the experts and their proposed testimony. On December 2, 2013, appellants filed a document captioned "Designation of Rebuttal Experts" that listed the names and addresses of two

potential experts, but again failed to include any information about the substance of their opinions and testimony. In February 2014, appellee filed a motion to strike the rebuttal expert designation.

Meanwhile, on December 20, 2013, appellee filed a motion for partial summary judgment with respect to its right to take the property by eminent domain. The motion argued that there was no genuine dispute that the taking was necessary to accomplish a legitimate public purpose. The motion was accompanied by an affidavit from William H. Sanders, III, the Mayor of Highland Beach, stating that the Town's board of commissioners had determined that it was "necessary and desirable" to acquire the property to develop a rainscaping park and parking facility, in furtherance of the Town's broader "environmental stewardship" initiative.

On February 18, 2014, the court entered an order, mailed to all parties, scheduling a motions hearing for April 7, 2014, to address all pending motions. On February 28, 2014, appellants filed two documents with the court — the first, titled "Motion to Dismiss," characterized the condemnation as "frivolous and discriminatory" and asserted that the taking was unnecessary "since there are other properties available closer to the town hall than lot 19 that would be [sic] that would better serve the public use for 'parking and storage.'" The second paper, titled "Objection to Plaintiff's Motions," opposed all five pending motions that had been filed by appellee. The only statement in that objection that was responsive to the motion for partial summary judgment was: "The plaintiffs have shown no evidence that this

condemnation is necessary given the fact that there are other properties available that would better serve the public use for parking and storage. The defendants' witness has presented evidence and can testify that this fact is true." Neither the appellants' motion to dismiss nor their Objection to Plaintiff's Motions was accompanied by any exhibits, affidavits, or other evidence.

The circuit court conducted a motions hearing on April 7, 2014. None of the appellants appeared, although Ms. Butcher's husband — who is not an attorney — did attend. At the end of the hearing, the court granted appellee's motion for partial summary judgment. The court also granted appellee's motion to strike appellants' expert witness designation and rebuttal witness designation, stating, "pursuant to 2-402(g)(1), Ms. Butcher's expert and rebuttal expert designation is deficient for the reasons indicated in the Plaintiff's motion." But the court also included in its written order a provision giving Ms. Butcher five days to cure the deficiencies. The court also ruled *in limine* that appellants could not argue at trial that the property should be valued as if suitable for building a home because the undisputed evidence before the court showed that the property was zoned such that a home could not be built on the premises. Finally, the circuit court ruled that, as a sanction for Ms. Butcher's failure to appear at the scheduled deposition, Ms. Butcher would not be permitted to testify at trial. The court denied appellants' motion to dismiss.

A jury trial was scheduled for July 8 and 9, 2014, on the issue of the amount of compensation to be paid to appellants. On July 7, 2014, an attorney entered an appearance to represent appellants in the case.

At trial, appellee presented expert testimony from George Peabody, an MAI appraiser, who testified that the fair market value for the subject property was $14,250. Peabody also opined that an adjacent fragment of property owned by appellants had a value of $9,000. Appellant James Chesley testified that, in his opinion as an owner, the property was worth $179,000. Mr. Chesley also testified that it would cost him $12,000 per year to store his vehicles elsewhere if the Town took Lot 19. The jury also viewed the property. The jury returned a verdict finding that appellants were entitled to $23,250 in just compensation. This appeal followed.

DISCUSSION

On appeal, appellants raise three claims of error. First, they contend that the circuit court erred by granting summary judgment in favor of appellee on the issue of the necessity of the taking. Second, they argue that the court erred by preventing appellants from presenting expert testimony at trial. Third, appellants assert that the jury verdict was simply wrong, because it failed to value the property at its highest and best purpose. We perceive no error.

I. Grant of Appellee's Motion for Partial Summary Judgment

Appellants contend that the circuit court erred by granting appellee's motion for partial summary judgment because, they claim, there was a genuine dispute of fact regarding whether the taking was necessary. They argue that, because they alleged in their response that other properties in the area were more suitable for constructing a parking lot, there was a genuine dispute over the necessity of the condemnation, and summary judgment was inappropriate.

We review a circuit court's grant of summary judgment *de novo*. *Standard Fire Ins. Co. v. Berrett*, 395 Md. 439, 450 (2006). Maryland Rule 2-501(a) provides: "Any party may make a motion for summary judgment on all or part of an action on the ground that there is no genuine dispute as to any material fact and that the party is entitled to judgment as a matter of law." Once the moving party files a motion that complies with Rule 2-501(a), the nonmoving party must file a response that identifies with particularity any fact in dispute, supported by evidence that controverts the factual assertions made in the motion. Mere conclusory denials are not legally sufficient to defeat a properly supported motion for summary judgment. To survive a motion for summary judgment, "the party opposing summary judgment 'must do more than simply show there is some metaphysical doubt as to the material facts,'" and instead must present "evidence upon which the jury could reasonably find [in his favor]." *Beatty v. Trailmaster Prods., Inc.*, 330 Md. 726, 738–39

(1993) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)).

In this case, appellants' response to the motion for partial summary judgment was totally inadequate to comply with Maryland Rule 2-501(b), which provides:

> A response to a written motion for summary judgment shall be in writing and shall (1) identify with particularity each material fact as to which it is contended that there is a genuine dispute and (2) **as to each such fact, identify and attach the relevant portion of the specific document, discovery response, transcript of testimony (by page and line), or other statement under oath that demonstrates the dispute. A response** asserting the existence of a material fact or controverting any fact contained in the record **shall be supported by an affidavit or other written statement under oath**.

(Emphasis added.) Here, appellants presented no affidavit or other facts admissible in evidence to controvert the assertions made in Mayor Sanders's affidavit.

Maryland courts will not interfere with a municipality's attempt to acquire property via eminent domain absent evidence that the taking is unnecessary, or where "the decision of the condemnor is so oppressive, arbitrary or unreasonable as to suggest bad faith." *Levitsky v. Prince George's Cnty.*, 50 Md. App. 484, 488 (1982). Appellants contend that the conclusory allegations contained in their opposition to the motion for partial summary judgment — namely, that some other, unidentified property would "better serve the public use for parking and storage" — demonstrate that the taking was not necessary, and therefore, summary judgment on the issue of necessity was inappropriate. This argument fails for two reasons.

First, a condemnation action is not rendered "unnecessary" simply because some other site might be a better location for the project. A taking need not be absolutely necessary "as long as it can be shown to be reasonable under the circumstances." *Id*. *Accord Anne Arundel County v. Burnopp*, 300 Md. 343, 349 (1984). Appellants cite no authority for the proposition that the mere suggestion that another site might be a superior location for a project renders a taking unreasonable and unnecessary. Highland Beach's Mayor specifically stated in the affidavit submitted in support of appellee's motion for summary judgment that the town council had determined that the taking was "necessary and desirable" for the proposed project. There was *no evidence* presented to challenge the validity of this assertion.

Second, as noted above, appellants utterly failed to identify any evidence in their opposition to the motion for summary judgment demonstrating the existence of a genuine dispute of material fact, as required by Rule 2-501(b). Other than a bare allegation that some other site was better suited for the project, appellants completely failed to present or even identify any evidence that properly generated a dispute of material fact. *See Fearnow v. Chesapeake & Potomac Tel. Co.*, 104 Md. App. 1, 49 (1995) ("Neither general allegations of facts in dispute nor a mere scintilla of evidence will suffice to support the non-movant's position. . . .") (*rev'd on other grounds* in *Fearnow v. Chesapeake & Potomac Tel. Co.*, 342 Md. 363 (1996)).

To the extent appellants now assert that the condemnation action was in bad faith, their argument suffers from similar fatal defects. First, appellants did not articulate this

argument in their opposition to the motion for partial summary judgment, and therefore it is not preserved for our review. *See* Maryland Rule 8-131(a) ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court. . . ."). Second, the response to the motion for summary judgment provided the court no "affidavit or other written statement under oath" to support the assertion of bad faith. Accordingly, the circuit court did not err by granting appellee's motion for partial summary judgment.

II. Grant of Appellee's Motions to Strike Appellant's Experts

Appellants also contend that the circuit court erred by striking their expert witness designations. As a preliminary matter, the appellants have not preserved this point because they *never* proffered what evidence they might have elicited from the witnesses if they had been permitted to call them. In the absence of a proffer, we have no way of considering whether the appellants were prejudiced by any alleged error. *S. Kaywood Cmty. Ass'n v. Long*, 208 Md. App. 135, 164 (2012).

Moreover, even if we were to excuse lack of preservation, appellants do not dispute that they failed to fully provide the information described in Maryland Rule 2-402(g) during discovery. Instead, appellants simply assert that appellee would not have been prejudiced if the witnesses had been permitted to testify, and they argue that they should be entitled to leniency because they were *pro se* at the time.

A similar plea for relief from the discovery rules was made by *pro se* litigants in *Rodriguez v. Clarke*, 400 Md. 39, 54-55 (2007). The Court of Appeals there stated: "Trial judges are vested with great discretion in applying sanctions for discovery failures." *Id.* at 56. Accordingly, we will reverse only where the sanction imposed by the circuit court amounts to an abuse of discretion. *Id.* at 57. A court abuses its discretion when it makes a decision "well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *North v. North*, 102 Md. App. 1, 14 (1994). In *Rodriguez*, the Court of Appeals held the circuit court did not abuse its discretion by excluding expert testimony as a sanction for the *pro se* litigants' failure to provide discovery. 400 Md. at 68.

In the present case, appellants failed to provide requested information about the subject and substance of the proposed experts' testimony. Appellee made repeated attempts, both informally and through written interrogatories, to obtain the requested information, and appellants repeatedly failed to provide the required discovery. Under such circumstances, the circuit court did not abuse its discretion in striking appellants' experts. *See Rodriguez, supra*, 400 Md. at 74 (holding that a trial court did not abuse its discretion by striking testimony of *pro se* plaintiffs' expert where plaintiffs repeatedly refused to comply with Rule 2-402(g) and provide requested information about proposed expert testimony).

III. Jury Award of Just Compensation

Finally, appellants contend that the jury's award was insufficient as a matter of law because the award failed to account for the property's most profitable use (which, appellants asserted, was use as a storage facility for various boats and other vehicles). But the jury's verdict was supported by competent evidence and was not clearly erroneous.

As appellee notes, the question of value of condemned property is fundamentally a question for the jury to decide. *See Montgomery Cnty. v. Soleimanzadeh*, 436 Md. 377, 392 (2013) ("We have stated repeatedly that '[t]he question of fair market value is ultimately an issue for the trier of fact.'") (quoting *Solko v. State Roads Comm'n of State Highway Admin.*, 82 Md. App. 137, 148 (1990)). We will not disturb the jury's determination where there is evidence in the record to support its award of just compensation. *Solko, supra*, 82 Md. App. at 148. Here, there was ample evidence presented at trial to support the jury's determination of the fair market value of Lot 19. Appellee presented testimony from a qualified expert regarding the fair market value of the property and the adjoining fragment that appellants would continue to own but would be landlocked. Appellants were permitted to cross-examine appellee's expert, and James Chesley was permitted to testify that he believed the property was worth $179,000. The jury's award was the total value the appellee's appraiser placed on the two parcels owned by appellants. There was ample evidence to support the jury's determination of fair market value, and therefore, the jury's award of just compensation was not inadequate as a matter of law. On the contrary, we note that the jury

appears to have awarded the appraised value of both Lot 19 and the landlocked parcel even though appellants will retain ownership of the small parcel.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.