

Circuit Court for Baltimore County  
Case No. C-03-CV-20-003543

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 311

September Term, 2021

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DEBORAH H. VOGELSTEIN

v.

ALTO DALE, LLC, ET AL

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Beachley,  
Shaw,  
Wells,

JJ.

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Opinion by Shaw, J.

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Filed: February 4, 2022

\*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This is an appeal from an order of the Circuit Court for Baltimore County granting a motion to dismiss. Deborah H. Vogelstein, appellant, filed an action against Alto Dale, LLC, Robert A. Roswell, and Marjorie B. Roswell,<sup>1</sup> appellees, seeking a declaratory judgment that as a member of the LLC, she had the right to effect a subdivision of the LLC's property. The action also sought relief on four related counts.<sup>2</sup> Appellees each moved separately for dismissal, and appellant responded opposing the motion and asking that the judge consider a motion for summary judgment in the alternative. The court, at the conclusion of a hearing, granted appellees' motions to dismiss, denied appellant's motion for summary judgment, and dismissed appellant's complaint without prejudice. Appellant timely appealed and presents the following question for our review:

1. Did the Circuit Court err in adjudging that Mrs. Vogelstein did not have the unqualified right under the Operating Agreement to effect a subdivision of the Property?

For reasons set forth below, we vacate and remand for further proceedings consistent with this opinion.

### **BACKGROUND**

Jacob and Hilda Blaustein purchased Alto Dale Farm (the "Property") in the late 1920s. The parties here are the Blausteins' grandchildren. In 1998, the Blaustein's children, who inherited the property after their parents' deaths, transferred the Property to

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<sup>1</sup> Alto Dale and Mr. Roswell are represented by the same counsel, while Ms. Roswell has her own counsel.

<sup>2</sup> These counts were not at issue in this appeal.

an LLC, which had five members at the time of its creation.<sup>3</sup> Use of the Property under the LLC is governed by an Operating Agreement. Provisions of the Operating Agreement will be discussed below as relevant.

On September 25, 2020, appellant filed a complaint for declaratory judgment and other relief in the Circuit Court for Baltimore County. A first amended complaint was filed on February 8, 2021 and sought: (1) a declaratory judgment that appellant has a right to effect a subdivision; (2) a judgment ordering the equitable subdivision of the property; (3) a judgment against appellees for unjust enrichment; (4) an order requiring specific performance by the appellees; and (5) a judgment against the appellees for breach of contract.

Appellees filed a motion to dismiss the complaint for failure to state a claim upon which relief could be granted on February 22, 2021, arguing that the Operating Agreement could not be interpreted to allow a member to “unilaterally” effect a subdivision of the Property under any theory of contracts. Appellant responded with her opposition and motion for summary judgment on March 11, laying out her interpretation of the Operating Agreement, which would allow appellant to subdivide the Property without appellees’ consent.

On March 29, 2021, the circuit court held a hearing and counsel for each party presented their arguments. In an oral ruling, the judge granted appellees’ motions to

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<sup>3</sup> When the LLC was created, there were five members: Deborah Vogelstein, Robert Roswell, Marjorie Roswell, Daniel Hirschhorn, and Sarah Shapiro. Mr. Hirschhorn and Ms. Shapiro sold their interests in 2017.

dismiss and denied appellant’s motion for summary judgment. The trial court entered its Final Order and Judgment memorializing the oral ruling on April 5, 2021.

Appellant filed a motion for reconsideration on March 31, 2021, which was denied on April 20, 2021. Appellant timely filed this appeal.

### **STANDARD OF REVIEW**

Section 3-409 of the Courts and Judicial Proceedings Article provides, in pertinent part, that:

...a court may grant a declaratory judgment or decree in a civil case, if it will serve to terminate the uncertainty or controversy giving rise to the proceeding, and if:

- (1) An actual controversy exists between contending parties;
- (2) Antagonistic claims are present between the parties involved which indicate imminent and inevitable litigation; or
- (3) A party asserts a legal relation, status, right, or privilege and this is challenged or denied by an adversary party, who also has or asserts a concrete interest in it.

The statute’s purpose is to settle and afford relief from uncertainty and insecurity with respect to the parties’ rights, status, and other legal relations. It is remedial in nature and is to be “*liberally construed and administered.*” (emphasis added). Courts & Judicial Proceedings § 3–401. When a court considers a request for declaratory relief, it is required to declare the rights of the parties in writing. *See, e.g., Bowen v. City of Annapolis*, 402 Md. 587, 608-09 (2007); *Allstate Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 363 Md. 106, 117 n.1 (2001); *Jennings v. Gov’t Employees Ins. Co.*, 302 Md. 352, 355 (1985); *Mauzy v. Hornbeck*, 285 Md. 84, 90-91 (1979).

A motion to dismiss

is rarely appropriate in a declaratory judgment action. Where a bill of complaint shows a subject matter that is within the contemplation of the relief afforded by the declaratory decree statute, and it states sufficient facts to show the existence of the subject matter and the dispute with reference thereto, upon which the court may exercise its declaratory power, it is immaterial that the ultimate ruling may be unfavorable to the plaintiff. The test of the sufficiency of the bill is not whether it shows that the plaintiff is entitled to the declaration of rights or interest in accordance with his theory, but whether he is entitled to a declaration at all; so, even though the plaintiff may be on the losing side of the dispute, if he states the existence of a controversy which should be settled, he states a cause of suit for a declaratory decree.

*Broadwater v. State*, 303 Md. 461, 466 (1985) (quoting *Shapiro v. Bd. of Cnty. Com'rs*, 219 Md. 298, 302–03 (1959)) (internal quotation marks omitted). “The court's rejection of the plaintiff's position on the merits furnishes no ground for dismissal.” *Christ by Christ v. Md. Dept. of Nat. Res.*, 335 Md. 427, 435-36 (1994).

We review a trial court's grant of a motion to dismiss *de novo*. *Myers v. State*, 248 Md. App. 422, 431 (2020). This means that we “apply[] the same standard as the circuit court and determin[e] whether that decision was legally correct.” *Reichs Ford Rd. Joint Venture v. State Roads Comm'n*, 388 Md. 500, 509 (2005). “We examine whether the complaint, assuming all well-pleaded facts and reasonable inferences drawn therefrom in a light most favorable to the pleader, states a legally sufficient cause of action.” *Id.*

“The interpretation of a contract, including the determination of whether a contract is ambiguous, is a question of law subject to *de novo* review.” *Impac Mortgage Holdings, Inc. v. Timm*, 245 Md. App. 84, 108 (2020).

### DISCUSSION

Appellees first argue that, on appeal, appellant “raises a completely new argument by cherry picking out of context part of a statement that the Circuit Court made” at the motions hearing, (i.e., “that there has to be a consensus of all of the members.”). They argue that, in the court below, appellant claimed to have a unilateral right to subdivide the land upon her own terms so that she could obtain the most valuable piece of the land. They also argue that her complaint does not claim that she has a general right to effectuate the subdivision process. As such, her arguments on appeal should not be considered.

Maryland Rule 8-131(a) provides that, “[o]rdinarily, 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 . . .” “The interests of fairness are furthered by ‘requir[ing] counsel to bring the position of their client to the attention of the lower court at the trial so that the trial court can pass upon, and possibly correct any errors in the proceedings.’” *State v. Bell*, 334 Md. 178, 187 (1994) (quoting *Clayman v. Prince George's Cnty.*, 266 Md. 409, 416 (1972)).

In the introductory portion of her complaint, appellant stated that she was “seeking a Declaratory Judgment and other relief that she is entitled as a member of Alto Dale to subdivide out the parcel of property upon which she and her family reside from the remainder of the property owned by Alto Dale.” In Count One of her complaint, appellant

requested the court to “[d]etermine and adjudicate the rights and obligations of the parties with respect to Alto Dale, each other and the proposed subdivision.” She contended that she was entitled, under Article 5, Section 5.3.4 of the Operating Agreement and Section 5.44 to subdivide the property for herself and on behalf of her son. At the motions hearing, her position was “that any member may effect the subdivision of the land at their expense.”

In our view, appellant’s complaint and oral argument in the circuit court, established that she wanted the property to be subdivided in a manner that would include her present residence. However, appellant clearly requested a declaratory judgment to determine the rights and obligations of the parties. Her use of the term “unilateral” as opposed to “general” does not preclude our review, and we hold that her arguments were properly preserved.

The procedural posture of the case before the circuit court was a hearing on the motions to dismiss. Thus, the question before us is whether there was a legally sufficient cause of action, when considering well-pleaded facts and reasonable inferences in the light most favorable to the appellant, such that the motions to dismiss were properly granted.

The sections of the Operating Agreement at issue here are:

5.3. **Extraordinary Transactions.** Notwithstanding anything to the contrary in this Agreement, the General Manager shall not undertake any of the following without the concurrence of the Members:

...

5.3.4. Twenty years after the execution date of this Operating Agreement any Member may effect a subdivision of the Land at their expense. Existing Members will have the right to purchase any subdivided portion of the Land from the Company at Appraised Value value [sic] as described in Section 6.6.

5.4. **Member Built Improvements.** Members shall have the opportunity to build personal residences and other improvements upon the Land as provided in this Section 5.4.

...

5.4.4. If a child of a Member wishes to build a residence on the Land the Members shall cause the Land to be subdivided; provided that such child (i) is at least 23 years of age, (ii) intends to use such residences as his or her principal residence, and (iii) intends to commence construction of the residence immediately upon the subdivision. Subdivision will be handled in a manner that reflects the value of the ownership interest of each Member. The child of the Member must build on his or her parent's subdivided portion of the Land.

5.7.2. Except as otherwise provided in this Agreement, the affirmative vote by Member Consensus shall be required to approve any matter coming before the Members. If a Member cannot participate in a meeting and provides no proxy, each Member agrees that the absent Member will be deemed to have voted affirmatively on each matter coming to a vote.

Both parties agree that the Operating Agreement is clear and unambiguous and that it is determinative of this dispute,<sup>4</sup> even though their conclusions differ. Both parties also agree that the objective law of contracts applies here, which instructs:

...when interpreting a contract, courts seek to ascertain and effectuate the intention of the contracting parties. In ascertaining the parties' intent, Maryland adheres to the objective theory of contract interpretation. The objective theory of contract interpretation requires that a court must first determine from the language of the agreement itself what a reasonable person in the position of the parties would have meant at the time it was effectuated. In addition, when the language of the contract is plain and unambiguous there is no room for construction, and a court must presume that the parties meant what they expressed. In these circumstances, the

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<sup>4</sup> At this time, we see no need to determine whether the Operating Agreement is actually clear and unambiguous.



true test of what is meant is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant.

*Sierra Club v. Dominion Cove Point LNG, L.P.*, 215 Md. App. 322, 331-32 (2014) (cleaned up).

In appellant’s view, the Operating Agreement gives her the right to effect a subdivision of the Property without the consent of appellees and further to effect a subdivision for the purpose of building a home for her son. Appellees, conversely, argue that the Operating Agreement requires Member Consensus<sup>5</sup> on such a request. Appellees contend that Section 5.7.2 governs all decisions about how and when the Property will be subdivided because subdivision is a matter that must come before the members, and therefore, it is implied that Section 5.4.4 requires Member Consensus. Ultimately, they argue, when the Operating Agreement is read as a whole, appellant may not subdivide the land on behalf of herself or her son without member consensus.

In examining the facts in the light most favorable to appellant, we hold that there exists a legally sufficient cause of action, such that dismissal was not appropriate. The plain language of Section 5.3.4 provides, that, after the 20 year period,

any Member may effect a subdivision of the Land at their expense. Existing Members will have the right to purchase any subdivided portion of the Land from the Company at Appraised Value value [*sic*] as described in Section 6.6.

The preceding language, under the 5.3 Heading, Extraordinary Transactions, states, in

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<sup>5</sup> “‘Member Consensus’ means the approval of action by the Company by at least all but one of the Members and also concurrence of at least 51% of the Percentages held by the Members.”

pertinent part, that “the General Manager shall not undertake any of the following without the concurrence of the Members.” Section 5.4.4 of the Agreement discusses the construction of dwellings for the children of Members and the provision contains no explicit requirement for member consensus. Further, the Operating Agreement does not specify what “matters” come before the Members other than extraordinary transactions.

We observe that no language expressly or implicitly precludes a member from unilaterally initiating the subdivision process. Rather, the scope and manner in which such action can be taken, and the financial transactions associated therewith as well as the involvement and decision making by the general manager and the members would need to be determined. Appellant here has stated sufficient facts that support her claim that a legal cause of action exists.

The circuit court, in granting appellees’ motion to dismiss, held:

...The Operating Agreement, which is essentially, needs it is requested to be interpreted with different basically different views on it is is really where we are now. There is no disagreement about it in terms of ambiguity or clarity. Both sides—or all sides have indicated that they believe it is unambiguous. The Plaintiffs in this case are focusing on a right that they say that she says she has with respect to subdividing the property...she is a minority shareholder, is essentially making a demand and I’m talking about it in a legal sense, making a demand that she have the right unilateral right to subdivide this property based on a provision in the Operating Agreement. And let me get to that just a it’s under, essentially, the 5-5.4 of the set title, the Provision of the Operating Agreement, that she has the right to do that, which I’m I see this as taking that and looking at it in somewhat in a vacuum. It has to be taken into account with respect to the other provisions in the Agreement, the totality of what the Agreement says, not just part of what it says. And the language, the language is clear to this Court, that that here has

to be a consensus of all the members in, in order to do that.

The court's order stated, in pertinent part:

ORDERED, ADJUDGED AND DECREED that the LLC's Operating Agreement is clear and unambiguous as admitted by the parties; and it is further

ORDERED, ADJUDGED AND DECREED that the plaintiff does not have the right under the LLC's Operating Agreement to subdivide the property owned by the LLC upon terms unilaterally chosen by her as alleged in the First Amended Complaint and the exhibits attached to the First Amended Complaint...

Neither the court's oral ruling nor written order specifically addressed appellant's claim that she could effect a subdivision to build a residence for her son. On its face, the order appears to have determined the merits of the case and declared that appellant did not have the right to a unilateral subdivision under her own terms. The order does not, however, address whether appellant lacked a sufficient claim or cause of action for subdivision of the property under any other circumstances. Appellant's complaint clearly stated that a declaratory judgment would terminate the controversies between the parties and appellant requested that the court declare their rights and obligations.

As previously stated, the procedural posture of the case was whether appellant had stated a claim upon which relief could be granted and not a determination of the merits of her claim. The court erred when it granted the motion to dismiss, but when granting the motion to dismiss, it also rendered a declaration that appellant could not unilaterally subdivide the property. "A situation in which a motion to dismiss a declaratory judgment action is properly granted is where it challenges "the legal availability or appropriateness

of the remedy.’” *Popham v. State Farm Mut. Ins. Co.*, 333 Md. 136, 140 n.2 (1993)

(quoting *Hunt v. Montgomery Cnty.*, 248 Md. 403, 409 (1968)). As we noted above,

the test of the sufficiency of the bill is not whether it shows that the plaintiff is entitled to the declaration of rights or interest in accordance with his theory, but whether he is entitled to a declaration at all; so, even though the plaintiff may be on the losing side of the dispute, if he states the existence of a controversy which should be settled, he states a cause of suit for a declaratory decree.

*Broadwater v. State*, 303 Md. 461, 466 (1985) (quoting *Shapiro v. Bd. of Cnty. Com'rs*, 219 Md. 298, 302–03 (1959)).

Here, appellant presented the court with a legally sufficient cause of action. As such, dismissal was error.

**JUDGMENT OF THE CIRCUIT COURT  
FOR BALTIMORE COUNTY VACATED  
IN PART AND REMANDED TO THE  
CIRCUIT COURT FOR FURTHER  
PROCEEDINGS NOT INCONSISTENT  
WITH THIS OPINION; COSTS TO BE  
PAID BY APPELLEE.**