Circuit Court for Prince George's County
Case No. CAE15-00485

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 01481

September Term, 2016

CODALE COMMERCIAL FUNDING, LLC

v.

VILLAGES OF MARLBOROUGH COMMUNITY ASSOCIATION, INC.

Wright,
Arthur,
Friedman,

JJ.

Opinion by Friedman, J.

Filed: April 12, 2018

This appeal concerns the disputed ownership of land, formerly maintained as a golf course, in the Villages of Marlborough Community and the set of restrictive covenants that bind that land. For the reasons that follow, we affirm the Circuit Court for Prince George's County and hold that the land belongs to the Appellee, Villages of Marlborough Community Association, Inc.

BACKGROUND

In 1985, the Marlboro Development Corporation (the "Developer") sought to obtain a "density bonus"[1] from the District Council for Prince George's County that would allow the Developer to build additional homes in the Villages of Marlboro neighborhood in Upper Marlboro, Maryland. In exchange for this density bonus, the Developer agreed to designate 131.6 acres within the development that was maintained as a golf course (the "Property") as open space for the community.

The Developer memorialized its commitment to provide open space by executing a set of restrictive land covenants to run with the land, which it recorded in the Prince George's County land records. The Covenants declare their purpose to be "retaining the subject 131.6 acres as a part of the open space network," and provide that that the Developer planned to continue maintaining the open space as a golf course. In relevant

[1] A density bonus is a provision in a zoning code that incentivizes a developer "to exact desired amenities or improvements in exchange for greater development rights." 1 RATHKOPF'S THE LAW OF ZONING AND PLANNING § 1:14 (4th ed. 2017). The Prince George's County Code allows for such incentives by providing that "greater densities shall be granted … for each of the uses, improvements, and amenities … which are provided by the developer and are available for public use … [t]o make possible a livable environment capable of supporting the greater density and intensity of development permitted." Prince George's County Code § 27-545(a)(1) (2018).

part, Paragraph 4 of the Covenants states that "[s]hould [the Developer] or its assignee, as provided herein, ever cease to own or operate the … open space as a golf course for a period of at least 365 consecutive days, the … golf course shall revert automatically to [the Association]." It is this reversion clause that becomes the focus of the dispute.

In June of 2008, Marlboro Golf, LLC purchased the golf course Property subject, of course, to the Covenants. Appellant Codale Commercial Funding, LLC financed the purchase and secured its loan by a deed of trust on the Property. Marlboro Golf never made a payment on the loan, and in 2010, Codale foreclosed on the Property. Codale purchased the Property at the foreclosure sale, and obtained title pursuant to a Trustee's Deed. Codale recorded its Trustee's Deed four months later.

After recording its deed, Codale visited the Property for the first time. It discovered that the golf course's club house had been severely vandalized, the grounds were in poor condition, and it appeared as though the grass had not been re-seeded in many years.[2] Codale determined that it would be "economically infeasible" to reopen the Property as a golf course. Between April 2011 and January 2015, Codale maintained the Property as an open space, but did not operate the Property as a golf course at any point. Codale continued to pay for real estate taxes on the Property during this time.

[2] It is unclear when, exactly, the Property stopped operating as a golf course. The testimony regarding its closing date ranged from as early as 1995 to as late as 2010. Because neither party contests that the golf course ceased to operate for a consecutive period of more than 365 days, it is not necessary for us to ascertain the exact date on which the golf course closed.

After concluding that it was not economically feasible to reopen the Property as a golf course, Codale entered into discussions with members of the Association to consider alternate development options. These discussions primarily took place during the Association's Board of Directors meetings. Codale estimated that reopening the Property as a golf course would cost as much as $5 million, and pledged that it would continue to pay to maintain the Property as open space because it evidently believed that, as the owner, it had a legal duty to do so. Codale and members of the Association also discussed the Covenants, and disagreed on whether the reversion clause had been triggered by virtue of the fact that the Property had ceased operations as a golf course. Members of the Association expressed concern that the Association could not afford the maintenance costs of the Property, but did not officially agree, as a Board, to forego enforcement of the Covenants at any point. These discussions with Codale ended when the Association's members voted unanimously to authorize the Board to enforce the reversion clause in Paragraph 4 of the Covenants and acquire title to the Property.

The Association filed a declaratory judgment action to determine ownership and quiet title. Codale counterclaimed and added tort causes of action against the Association including negligent misrepresentation, fraud, and unjust enrichment. After a two-day bench trial, the circuit court entered judgment for the Association, declaring it the owner of the Property. Codale appealed.

STANDARD OF REVIEW

We review an action tried without a jury on both the law and the evidence. Md. Rule 8-131(c). We will not reverse the judgment of the circuit court on the evidence unless its

findings of fact are clearly erroneous. *Id.* "If there is any competent evidence to support the factual findings [of the circuit court], those findings cannot be held to be clearly erroneous." *Della Ratta v. Dyas*, 414 Md. 556, 565 (2010) (quoting *Solomon v. Solomon*, 383 Md. 176, 202 (2004)). We review the trial court's legal conclusions without deference, and thus "the interpretation of a restrictive covenant, including a determination of its continuing validity, is subject to *de novo* review." *City of Bowie v. MIE Props., Inc.*, 398 Md. 657, 677 (2007); Md. Rule 8-131(c).

DISCUSSION

Codale raises several challenges, which we have consolidated into the following three arguments: *first*, that the Property never reverted to the Association and that Codale remains the record owner; *second*, that, in the alternative, the Covenants specifically exempted certain parcels of the Property from the reversion clause and those exempt parcels are still owned by Codale; and *third*, that the Association was unjustly enriched by Codale's payment of maintenance expenses and real estate taxes on the Property during the period when Codale believed it was the owner of the property, and Codale is therefore entitled to restitution from the Association. We will discuss, and reject, each of these arguments in turn.

I. OWNERSHIP OF THE PROPERTY: PARAGRAPH 4 OF THE COVENANTS

Codale argues that ownership of the Property never reverted to the Association and that, as a result, the circuit court erred in declaring that the Association is the owner of the Property. In particular, Codale argues (1) that the reversion clause in Paragraph 4 of the Covenants was never triggered, (2) that if it was, the Covenants are unenforceable, and

(3) that even if the reversion was triggered and the Covenants are enforceable, the Association waived its rights to enforce the Covenants, and Codale remains the owner of the Property. We disagree with each of Codale's contentions, and hold that the Covenants are enforceable. As a result, under Paragraph 4, ownership of the Property reverted to the Association immediately after the Property ceased to be operated as a golf course for 365 days.

A. The Reversion

Codale's first argument turns on the meaning of the word "or." Paragraph 4 of the Covenants provides, "[s]hould [the Developer] or its assignee … **ever cease to own or operate** the subject open space as a golf course for a period of at least 365 consecutive days, the subject golf course **shall revert** automatically to [the Association]." (emphasis added). Codale argues that even though the Property ceased operating as a golf course for 365 consecutive days, because Codale never ceased to *own* the Property (as reflected by its recorded deed) the reversion could not have occurred. In other words, Codale interprets Paragraph 4 as providing that should it "ever cease to own [**and**] operate the subject open space as a golf course for a period of at least 365 consecutive days," the Property would revert to the Association. Codale's interpretation of the Covenant effectively means that *only if* the Developer or its assignee ceased to *own* the Property, in any capacity, would it revert to the Association.

In interpreting a covenant, "where the language of the instrument containing a restrictive covenant is unambiguous, a court should simply give effect to that language

unless prevented from doing so by public policy or some established principle of law." *City of Bowie*, 398 Md. at 682 (cleaned up).[3] Thus, unless we determine that the language of a covenant is ambiguous, we enforce the covenant in accordance with its plain meaning. *Id.*; *Chestnut Real Estate P'ship v. Huber*, 148 Md. App. 190, 202 (2002) ("Restrictive covenants are meant to be enforced as written."); *Dumbarton Imp. Ass'n, Inc. v. Druid Ridge Cemetery Co.*, 434 Md. 37, 53 (2013) ("[I]f the language of the covenant is unambiguous, it is the only source to which we look, except to confirm the plain meaning of the covenant.").

Codale's interpretation of Paragraph 4 would require us to ignore the plain meaning of the Covenants because it can only succeed if we read the word "or" as meaning "and." We cannot accept this interpretation, as the unambiguous language in Paragraph 4 provides for *two distinct scenarios* that would cause the Property to revert to the Association: either (1) Codale **ceased to own** the Property as a golf course; **or** (2) Codale **ceased to operate** the Property as a golf course for a period of 365 consecutive days. (emphasis added). Because the original covenanting parties chose to use the word "or" when drafting the reversion clause rather than the word "and," if *either* of these events occurred, the Covenants require that the Property reverts automatically to the Association. *See*

[3] "Cleaned up" is a new parenthetical intended to simplify quotations from legal sources. *See* Jack Metzler, *Cleaning Up Quotations*, J. APP. PRAC. & PROCESS (forthcoming 2018), https://perma.cc/JZR7-P85A. Use of (cleaned up) signals that to improve readability but without altering the substance of the quotation, the current author has removed extraneous, non-substantive clutter such as brackets, quotation marks, ellipses, footnote signals, internal citations or made un-bracketed changes to capitalization.

WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY (2d. ed. 2003) (defining "and" as a conjunction "used to connect *grammatically coordinate* words, phrases, or clauses" and defining "or" as a conjunction "used to connect words, phrases, or clauses representing *alternatives*") (emphasis added). Here, it is undisputed that the Property ceased to be operated as a golf course for more than 365 consecutive days. Thus, applying the plain meaning of the word "or," once the Property ceased being operated as a golf course for 365 consecutive days, the Property reverted to the Association. The circuit court, therefore, did not err in finding that Paragraph 4 of the Covenants was triggered and that the Property reverted to the Association.

Moreover, Codale's interpretation of the reversion clause does not comport with basic principles of contract interpretation. A "contract must be construed in its entirety and, if reasonably possible, effect must be given to each clause so that a court will not find an interpretation [that] casts out or disregards a meaningful part of the language of the writing unless no other course can be sensibly and reasonably followed." *Dumbarton*, 434 Md. at 52 (cleaned up). Codale's interpretation essentially creates a condition that could never be satisfied: by focusing solely on whether a party owns the Property, the reversion could never be triggered based on the Property ceasing to be operated as a golf course for 365 days. Indeed, if a party does not own the Property, it cannot maintain it as a golf course. Because Codale's proposed interpretation would require us to disregard material language in the Covenant, we must reject it.

B. Continuing Enforceability of the Covenants

Sometimes, when circumstances have changed so much that the original purpose of a restriction on the use of land can no longer be fulfilled, courts will invalidate the restriction. *City of Bowie*, 398 Md. at 685. Codale's second argument relies on this "changed circumstances" principle. It argues that changes in the economics of the neighborhood have made it prohibitively expensive to operate a golf course on the Property and that, as a result, the court must invalidate the Covenants. The circuit court declined to do so, and so do we.

Under the changed circumstances doctrine, "the proper legal standard … is to examine whether, after the passage of a reasonable period of time, the continuing validity of the covenant cannot further the purpose for which [the covenant] was formed in light of changed relevant circumstances." *Id.* Put otherwise, a covenant has continuing validity unless there has been a "radical change in the neighborhood causing the restrictions to outlive their usefulness." *Id.* at 687 (quoting *Chevy Chase Village v. Jaggers*, 261 Md. 309, 316 (1971)). We note that "ensuring the best fiscal outcome is not the test for the ongoing validity of a covenant." *Dumbarton*, 434 Md. at 67. As such, "[w]e may not invalidate a plainly written covenant to save a party from what may prove to [have been] a poor business decision." *City of Bowie*, 398 Md. at 683.

In finding that the Covenants are still enforceable, the circuit court concluded that there had not been any changed circumstances in the neighborhood. It reasoned, first, that because "[t]he Covenants were recorded in anticipation of a residential community" and "the proposed development *is* a residential community[,] … [t]here has not been a complete

or radical change to the neighborhood." (emphasis added). Second, the circuit court noted that even if the neighborhood *had* changed from a residential community, Codale failed to present sufficient evidence of any changed circumstances because it did not introduce "any statistical data or supportive documentation" indicating a change in the economics of the area. Thus, the circuit court was not persuaded that the economics in the neighborhood had changed so drastically that the Covenants should no longer be enforced. We defer to the circuit court's findings of facts unless clearly erroneous. *State v. Smith*, 374 Md. 527, 535 (2003). After reviewing the record, we agree with the circuit court that Codale failed to establish any radical change in circumstances that would require us to invalidate the Covenants. *City of Bowie*, 398 at 687.

What's more, Codale incorrectly asserts that the purpose of the Covenants is to provide the Association with an operational golf course and that, because it is no longer economically feasible to reopen the Property as a golf course, the purpose of the Covenants cannot be fulfilled. Because we determine the purpose of a covenant by examining its actual language, *Dumbarton*, 434 Md. at 62, we think that the better view of the Covenants' original purpose is simply to provide open space. The Preliminary Statement of the Covenants provides:

> One of the public benefit features provided by [the Developer] in their Basic Plan was the open space consisting of a 131.6 … acres, currently utilized as a golf course.… **It is for the purpose of retaining the subject 131.6 acres as part of the open space network** which provided, in part, … the density bonus, that this Declaration of Covenants has been imposed by [the Developer] for itself, its heirs and assigns.

The plain language reveals that the purpose of the Covenants is to provide open space to the Association, *either* as an operating golf course *or* as open space owned by the Association, in exchange for the Developer obtaining a density bonus to build additional homes in the community. We conclude that the circuit court's enforcement of the reversion clause furthers this purpose: the Developer received its density bonus, and now the Association, in the absence of an operating golf course, has obtained ownership over the open space Property. We, therefore, affirm.

C. Waiver by Acquiescence

Codale next argues that it owns the Property because the Association waived its right to enforce the reversion clause in Paragraph 4. As support, Codale provides exhaustive details of its communications with members of the Association's Board of Directors. It alleges that at various times, Board members expressed concern over the financial burden that would result from the Property's ownership reverting to the Association, and indicated that those members did not wish to enforce the Covenants because maintenance of the Property would be expensive. Codale contends that the Association thereby agreed that it would not enforce the Covenants, and, as a result, waived its right to do so.

The equitable defense of waiver by acquiescence is defined in Maryland as "a covenantee abiding the violative actions of the covenantor defendant." *City of Bowie*, 398 Md. at 698. In other words, if the Association, as the covenantee, knowingly tolerated Codale's non-compliance with the Covenant, Codale could prevent the Association from

enforcing the Covenants. *Id.* Codale, as the party seeking to show that the Association waived its right to enforce the reversion, bears the burden of proving the defense. *See id.* at 699.

Whether the Association waived enforcement of the Covenants is a factual question. *Id.* The circuit court concluded that "[w]hile single members of the Board of Directors [of the Association] expressed their personal preferences and opinions, the Board of Directors, as a whole, never entered into any agreement with [Codale] regarding the Property." The circuit court further found that the Association had no obligation to enforce the Covenants until Codale's behavior "stirred them to enforcement." *Schlicht v. Wengert*, 178 Md. 629, 637 (1940). We agree with the circuit court that the Association did not waive that right by waiting to take action until Codale repeatedly declared itself owner of the Property—thereby "stirring the Association to enforcement"—rather than enforcing the Covenants immediately after the reversion occurred. *Id.* at 636-67 ("Toleration of violations, out of friendship or lack of inclination until incidental annoyances grew to make [covenantee] feel a grievance, could not be construed as surrender of those rights."). Thus, we see no clear error by the circuit court and affirm its determination that the Association did not waive its right to enforce the reversion.[4]

[4] Because we conclude that the Property automatically reverted to the Association once the Property stopped operating as a golf course for 365 consecutive days, we need not address Codale's claim that the Association negligently misrepresented to Codale that the Association would not "exercis[e] the Covenant" or enforce the reversion. The Association had no duty to "exercis[e] the Covenant" because the reversion occurred *automatically*, as provided for by the express language of the Covenant. *City of Bowie*, 398 Md. at 696 ("we are bound to interpret … the Covenants … as written. …We may not add to the instruments

II. SCOPE OF THE REVERSION: PARAGRAPH 6 OF THE COVENANTS

Codale next argues that even if the Property reverted to the Association, the circuit court erred in its application of Paragraph 6 of the Covenants, which exempts certain parcels within the Property from the reversion clause. Paragraph 6 of the Covenants reads, "[t]hese Covenants shall be effective only as to those portions of the … open space that are included in any final plats of subdivision for property contiguous to the … open space." Codale contends that under this Paragraph, certain parcels within the Property should have been excluded by the circuit court and that Codale remains the rightful owner of those excluded parcels. Further, Codale vigorously maintains that the *Association*, as the party seeking to enforce the Covenants as a whole, should have borne the burden of proving which parcels were subject to the reversion and which were excluded by the language in Paragraph 6. We conclude that the circuit court did not err in determining the scope of the reversion because Codale, in fact, bore the burden of proof and it failed to produce sufficient evidence that certain parcels were excluded under Paragraph 6.

The party seeking to enforce a restrictive covenant bears the burden of proving its validity. *City of Bowie*, 398 Md. at 685; *Steuart Transp. Co. v. Ashe*, 269 Md. 74, 88 (1973). As discussed in Part I of this opinion, the Association satisfied its burden of proof that

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that which the consenting parties neglected to bargain for in the course of their dealings."). Any statement by an individual member of the Association that the Association did not want the Property, therefore, is immaterial, because ownership reverted to the Association automatically. If the parties intended for the Association to be required to affirmatively invoke the Covenants or exercise its right to ownership once the Property reverted, they could have provided for that expressly in the language of the Covenants. Because they did not, we construe "automatically" to mean "automatically," and determine that no additional action was required by the Association to obtain legal ownership over the Property. *Id.*

Paragraph 4 of the Covenants is enforceable, that its purpose was not frustrated, and that, based on its plain language, the Property reverted to the Association. Thereafter, Codale, as the party seeking to exclude certain parcels from the Association's reversion in an attempt to retain those parcels for itself, bears the burden of proving which parcels are excluded from the Property. *See Plummer v. Waskey*, 34 Md. App. 470, 486 (1977) ("The proponent of an issue bears the burden of that issue."). Not only is Codale legally incorrect in asserting that the Association bore the burden, but common sense dictates that a party cannot bear the burden of proving what it *does not* get.

The circuit court concluded that Codale did not meet its burden in showing that certain parcels should be excluded from the Property that reverted to the Association. "The phrase 'burden of proof' encompasses two distinct burdens: the burden of production and the burden of persuasion." *Bd. of Trustees, Cmty. College of Balt. Cnty. v. Patient First Corp.*, 444 Md. 452, 469 (2015). To meet its burden of production, Codale was required to present "sufficient evidence on [the] issue to present a triable issue of fact." *Id.* After producing such evidence, Codale bore the burden of persuasion that the certain parcels it identified were excluded from the reversion under Paragraph 6. *Id.* at 470. If, however, "two … conclusions [could] be inferred from the evidence adduced and neither [could] be said to have been proved," the circuit court was required to rule against Codale, as the party bearing the burden. *Id.* At trial, Codale introduced visual depictions of the original recorded plats of the subdivision in which the Property is located. The circuit court, however, found that these exhibits were "illegible and indecipherable" and "not convincing to determine [which] parcels [are] contiguous to the Property." It ultimately concluded that

"this Court has insufficient evidence to determine which parcels, if any, are excluded by Paragraph 6 of the Covenants." If Codale's exhibits had been legible, they might have satisfied the burden of production, but, in any event, the circuit court found that Codale failed to meet the burden of persuasion.

Whether certain parcels of land were included in final plats of subdivision contiguous to the Property and were thus exempt from the reversion is a question of fact that we review for clear error. Md. Rule 8-131(c). Under this standard, we "[do] not sit as a second trial court, reviewing all the facts to determine whether an appellant has proven his case." *L.W. Wolfe Enters., Inc. v. Maryland Nat'l Golf, L.P.*, 165 Md. App. 339, 343 (2005) (quoting *Lemley v. Lemley*, 109 Md. App. 620, 628 (1996)). Rather, we afford substantial deference to the circuit court's factual findings so long as they are supported by the evidence. *YIVO Inst. for Jewish Research v. Zaleski*, 386 Md. 654, 663 (2005). Here, the circuit court concluded that Codale failed to present competent and material evidence to establish which parcels, if any, were excluded from the Property under Paragraph 6 of the Covenants. Even if the evidence submitted could have satisfied the burden of production—and we are skeptical that it did—we are equally unable to read the exhibits presented by Codale. That the circuit court was not persuaded to find certain parcels exempt from the reversion, therefore, was not clear error. As a result, We affirm the circuit court's ruling regarding the scope of the Property that reverted to the Association.

III. UNJUST ENRICHMENT

Finally, we address Codale's argument that the Association was unjustly enriched by Codale's payment of maintenance expenses and real estate taxes on the Property during

the period when Codale mistakenly believed it owned the Property. Codale contends that the Association induced it to make these payments by indicating that it did not want the Property and would not enforce the Covenants. Alternatively, if the Property had already reverted to the Association at this time, Codale argues that the Association bore the responsibility for the payments. As a result, Codale contends that it is entitled to restitution from the Association. The circuit court, however, found that Codale "was well aware of its right not to pay … knew or should have known that the Board of directors, collectively, never decided that the Property should not revert to the [Association]" and that "it was [Codale's] choice to pay the expenses with the hope the [Association's] Board Members would support [Codale's] development plan." Accordingly, the circuit court found no unjust enrichment and denied Codale's request for restitution. As we shall explain, we agree with the circuit court.

A successful claim of unjust enrichment must establish three elements:

> (1) A benefit conferred upon the defendant by the plaintiff;
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> (2) An appreciation or knowledge by the defendant of the benefit; and
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> (3) The acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without the payment of its value.

Hill v. Cross Country Settlements, LLC, 402 Md. 281, 295 (2007). Courts will not find unjust enrichment where "the benefit was conferred by a volunteer or intermeddler," or when "one person, without request, knowingly pays the debt of another." *Id.* at 296, 302. The ultimate determination of whether retention of the benefit is inequitable is a fact-

specific question, determined by considering "the facts in the record, and the reasonable inferences drawn from those facts, in a light most favorable to the non-moving party." *Id.* at 301.

We agree with the circuit court that the Association was not unjustly enriched because Codale paid the real estate and maintenance fees gratuitously and in part for its own benefit. The circuit court found that (1) throughout the time that Codale contributed financially to the Property, it was engaged in discussions with the Association regarding ownership and potential redevelopment; (2) Codale voluntarily financed the maintenance and restoration of the Property in the hopes that the Association would give up its right to the Property to support Codale's re-development plans; and (3) the Association and Codale never officially agreed that the Association would give up its right to enforce the Covenants, so Codale either knew or should have known that it had no legal duty to pay for any expenses related to the Property. These findings, which have ample support in the record, establish that Codale gratuitously contributed to the maintenance and real estate expenses for the Property, despite knowing about the reversion clause in the Covenants, in an attempt to further its business interests. Thus, it was not inequitable for the Association to retain the benefits under these circumstances. *See Hill*, 402 Md. at 302 (a plaintiff who makes payments officiously cannot recover under a theory of unjust enrichment). We conclude, therefore, that the circuit court did not err in denying Codale's claim for unjust enrichment.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.