UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0097

September Term, 2015

SHERRY WELLING

v.

BALTIMORE CITY BOARD OF
SCHOOL COMMISSIONERS, ET AL.

Wright,
Nazarian,
Wilner, Alan M.
(Retired, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: January 13, 2016

Sherry Welling filed suit against the Baltimore City Board of School Commissioners, and later added Tamecca Chester, then-principal of Glenmount Elementary School (we will refer to them collectively as the "Board") after the Board decided not to renew her contract after fourteen years of employment. After some procedural wrangling we will detail below, the Board filed a second motion for summary judgment after the original dispositive motions deadline had passed. Ms. Welling moved to strike the Board's motion, but did not file any opposition to it. After a hearing, the Circuit Court for Baltimore City denied the motion to strike and granted summary judgment in favor of the Board. She appeals both decisions and we affirm.

I. BACKGROUND

Ms. Welling was hired by the Baltimore City Public Schools ("BCPS") as an elementary school teacher in August 1998. She taught at Brehms Lane Elementary School until June 2002, then transferred to Glenmount Elementary School. By letter dated May 29, 2012, BCPS's Human Capital Office notified her that her employment would be terminated, effective June 30, 2012, for the stated reason that she had not taken the required steps to renew her certification through the Maryland State Department of Education ("MSDE"). She filed a complaint[1] against the Board in the Circuit Court for Baltimore City seeking "reinstatement, damages and injunctive relief to redress the deprivation of [her] rights . . . [under] the Family and Medical Leave Act of 1993 ("FMLA")." She alleged that

[1] This original complaint was filed on September 26, 2013.

"BCPS used [her] FMLA leave as a negative factor in her discipline, evaluation, and termination[,] . . . [which] is clearly an interference with . . . [her] rights and actionable under 29 U.S.C. § 2615(a)(1)."

On February 28, 2014, Ms. Welling amended her complaint to seek

> reinstatement, damages and injunctive relief to redress the deprivation of rights secured to [her] by the Family and Medical Leave Act of 1993 ("FMLA"), 29 U.S.C. Sections 2601 et seq., the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. Sections 12101 et seq., Title 20 of Maryland's State Government Article ("Title 20"), Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e et seq. ("Title VII"), and the Maryland Wage, Payment and Collection Law.

Her amended complaint alleged that she

> required medical leave during her employment from September 22, 2011 through September 30, 2011 while she underwent reconstructive surgery on her left third finger as a result of a serious medical condition involving nerve neuroma and a nerve deficit[;] . . . again from December 9, 2011 through December 12, 2011 as a result of a serious medical respiratory condition[;] . . .[and] again from January 13, 2012 through February 3, 2012 after being hospitalized for outpatient treatment at Sheppard Pratt Health System as a result of a depressive disorder and an anxiety disorder.

According to the amended complaint, Ms. Welling had notified her employer of the need and voluntarily provided a doctor's note for each medical leave of absence taken, and "[t]he Board [never] made . . . [any] additional inquiries to deem whether FMLA leave was appropriate." The amended complaint charged that despite all of this, "[t]he Board used

[the appellant]'s FMLA leave as a negative factor in her discipline, evaluation, and termination."

In addition, the amended complaint alleged that "the Board discriminated against [her] on the basis of her . . . disabled son, . . . who was diagnosed at age two with autism[,]" by not allowing her to use FMLA leave to care for him, and that "[w]hile the Board may argue that the termination is a result of a lapsed certification, it is the Board that caused [the appellant's] certification to lapse."[2]

On January 10, 2014, the court issued a scheduling order that set a discovery deadline of September 8, 2014 and a deadline of October 9, 2014 for the filing of dispositive motions. The Board noticed Ms. Welling's deposition for September 5, 2014, but the deposition did not occur that day because of a scheduling conflict on the part of her counsel. Counsel for the Board became aware of this conflict upon receiving a facsimile message dated September 2, 2014, in which the counsel stated that the deposition "must be postponed for another day [due to an emergency hearing set on another matter]."

On September 5, 2014, the Board filed a Motion to Amend the Scheduling Order for the purpose of taking the appellant's deposition. Ms. Welling responded on September 12, 2014, and alleged–inexplicably, according to the Board–that "there is no

[2] The amended complaint states that "[the appellant] submitted her renewal documents on a timely basis on September 28, 2011, but the Board did not process her paperwork for her certification."

legitimate reason to amend the scheduling order . . . [because the parties have agreed that] the deposition will be taken on September 26, 2014." Even so, Ms. Welling failed to appear on that date, apparently because the court had not yet ruled on the Motion to Amend the Scheduling Order. On October 31, 2014, a motions judge granted the Motion to Amend the Scheduling Order and ordered that "[t]he discovery deadline is extended to November 18, 2014 to allow [for the appellant to be deposed]." Ms. Welling's deposition ultimately took place on the final day of the extended discovery period.

On December 10, 2014, the Board filed a Motion to Dismiss or in the Alternative Motion for Summary Judgment (the "Dispositive Motion").[3] The Board argued that "Counts III, IV, and V of the amended complaint should be dismissed because [the appellant] has failed to state a claim upon which relief can be granted," and that it was entitled to summary judgment as to Counts I, II, IV, and V because there were no genuine issues of material fact. Ms. Welling responded on December 17, 2014 with a Motion to Strike, in which she argued that the court should strike the Dispositive Motion on the grounds that it was filed "beyond the time allotted in the Scheduling Order."[4] Importantly, and as counsel acknowledged at oral argument in this Court, Ms. Welling *filed* no

[3] The parties had filed, and the court had denied, cross-motions for summary judgment earlier in the case. Those motions are not before us.

[4] Ms. Welling was referring by implication to the fact that while the deadline for taking her deposition was amended to November 18, 2014, the October 9, 2014, deadline for the filing of dispositive motions remained unchanged.

opposition to the Dispositive Motion, nor any other argument or evidence relating to its merits.

The court convened a hearing on both motions on February 27, 2015, during which counsel for Ms. Welling referred to her deposition and an affidavit incorporating the allegations in her complaint, but admitted neither into the circuit court record.[5] That same day, "[f]or the reasons stated on the record at the hearing," the court issued an Order granting summary judgment in favor of the Board, and denying the Motion to Strike. This timely appeal followed.

II. DISCUSSION

Although Ms. Welling raises challenges both to the denial of her Motion to Strike and the court's decision to grant the Dispositive Motion, her decision not to oppose the Dispositive Motion on the merits effectively leaves us with nothing to review in that regard. Her appeal, then, turns on whether the circuit court erred in denying the Motion to Strike, and we see no abuse of discretion in that decision.

[5] Before oral argument, Ms. Welling filed a Motion for Reset Argument and for Appropriate Relief that sought to postpone argument so that counsel could reconstruct the hearing record. There appears to be some dispute as to whether this hearing was recorded; counsel for Ms. Welling requested a transcript, but it may or may not have been prepared, and it may not exist. For the reasons we explain below, we find that we do not need a transcript in order to review and resolve this appeal, and we denied the Motion for Reset Argument and for Appropriate Relief by separate order.

A. The Circuit Court Did Not Abuse Its Discretion In Denying The Motion To Strike.

Ms. Welling moved to strike the Dispositive Motion on the ground that the Board filed it late, and specifically after the dispositive motions deadline in the scheduling order had passed. She cites Md. Rule 2-504, which requires the circuit court in every civil action to "enter a scheduling order . . . [containing] a date by which all dispositive motions must be filed, which shall be no earlier than 15 days after the date by which all discovery must be completed." *Id.* at (a)(1) and (b)(1)(E). She contends that the original scheduling order, which contained a discovery deadline of September 8, 2014, and a motions deadline of October 9, 2014, was only amended for the purpose of allowing the Board to depose her, and that all other deadlines remained unchanged. From this, she argues, the Dispositive Motion, which was filed on December 10, 2014, was untimely and that the circuit court should have stricken it.

The Board counters that "the only reason that the [Dispositive Motion] was filed after the discovery deadline was because of Appellant's failure to appear for a properly noticed deposition." Their Dispositive Motion followed Ms. Welling's deposition—which was not taken until after the original close of discovery, and only then after the court intervened and ordered it—by about three weeks. And, the Board argues, the temporal propriety of dispositive motions is driven by broader questions of judicial economy rather than wooden adherence to the original schedule:

> [a circuit] court's decision to entertain a motion for summary judgment filed after the deadline is appropriate where "it would

> be against the interests of judicial economy for a party to be forced to move forward with trial after determining there are no genuine facts in dispute, and he or she is entitled to judgment as a matter of law, merely because the dispositive motion deadline has passed."

(quoting *Benway v. Maryland Port Admin.*, 191 Md. App. 22, 43 (2010)). Under these circumstances, the Board claims, it would have made no sense for it to file the Dispositive Motion before it took Ms. Welling's deposition which, again, was delayed only because of her "refus[al] to appear for a properly noticed deposition [on September 26, 2014]."

Our review here is deferential. "The decision whether to grant a motion to strike is within the sound discretion of the trial court." *First Wholesale Cleaners Inc. v. Donegal Mut. Ins. Co.*, 143 Md. App. 24, 41 (2002) (citing *Lancaster v. Gardiner*, 225 Md. 260, 269-70 (1961), and *Patapsco Assoc. Ltd. Part. v. Gurany*, 80 Md. App. 200, 204 (1989)). It is not for us to decide whether we would have granted the motion ourselves—rather,

> [a]n abuse of discretion occurs "where no reasonable person would take the view adopted by the [trial] court[ ] . . . or when the court acts without reference to any guiding principles, and the ruling under consideration is clearly against the logic and effect of facts and inferences before the court [ ] . . . or when the ruling is violative of fact and logic." *Beyond Systems, Inc. v. Realtime Gaming Holding Co., LLC,* 388 Md. 1, 28 (2005) (citations and internal quotation marks omitted) (alterations and omissions in original).

Bacon v. Arey, 203 Md. App. 606, 667 (2012).

We discern no abuse of discretion here, for two reasons. *First*, the Board's motion was filed after the original deadline only because Ms. Welling's deposition was delayed by a discovery dispute. Hers was not a peripheral deposition—she was the plaintiff and the

primary witness, and it would have been unreasonable to require the Board to file dispositive motions without it. The Board asked for her deposition in a timely manner and the dispute over whether and when she would appear extended past the time allotted. And the Board would have had plenty of time to file the Dispositive Motion by October 9, 2014, the original motions deadline, had Ms. Welling appeared as (re)scheduled on September 26, 2014. But she didn't, and it was not unreasonable for the court to decide not to reward the delay with a free pass from summary judgment. *Cf. Campbell v. State*, 37 Md. App. 89, 90 (1977) ("'The sporting theory of justice, the "instinct of giving the game fair play," . . . is so rooted in the profession in America that most of us take it for a fundamental legal tenet.'" (quoting Roscoe Pound, "The Cause of Popular Dissatisfaction with the Administration of Criminal Justice," 29 A.B.A.Rep. 395, 404)).

Second, Md. Rule 2-501, at least as it read at the time, permitted a party to move for summary judgment "at any time in a proceeding." *Baker, Watts & Co. v. Miles & Stockbridge*, 95 Md. App. 145, 161 (1993) (citing Md. Rule 2–501(a); *Myers v. Montgomery Ward & Co.,* 253 Md. 282, 289-90 (1969); *Ralkey v. Minn. Mining & Mfg. Co.,* 63 Md. App. 515, 522 (1985); *Joy v. Anne Arundel County,* 52 Md. App. 653, 660-61 (1982)). Although it is true, as the Board points out in a footnote, that "Rule 2-501 was revised in July 2015 to add the requirement that permission from the court is required for motions for summary judgment to be filed after the deadline for dispositive motions[,] . . . [t]his requirement was not a part of the rule prior to July 2015" (citing Md. Rule 2-501(a) (2015 revision)). We disagree, then, that "the [circuit] court act[ed] without reference to

any guiding principles," *Bacon*, 203 Md. App. at 667 (quoting *Beyond Systems, Inc.,* 388 Md. at 28), when it denied the Motion to Strike.

B. The Dispositive Motion Was Never Opposed.

Citing *Vanhook v. Merchants Mut. Ins. Co.*, 22 Md. App. 22, 26 (1974), Ms. Welling argues, correctly, that in order for a moving party to be entitled to summary judgment, he or she "must clearly demonstrate the absence of any genuine issue of material fact such that judgment should be rendered as a matter of law." From this indisputably true principle, she contends that the circuit court failed to consider the transcript of her deposition, in which she made "sworn statements . . . under oath which contradicted the position of the [appellees] and established a contest," and thus to recognize "controverted facts on each issue [before it]" when it granted summary judgment summary judgment in favor of the Board.

The Board responds that "the circuit court was legally correct when it granted [its] motion for summary judgment." They characterize her affidavit and deposition testimony as a "[f]ormal denial[] or general allegation[] . . . [and is thus] not sufficient to establish a dispute" (citing *Bagwell v. Peninsula Reg'l Med. Ctr.*, 106 Md. App. 470, 488 (1995)), and argue that Ms. Welling "can point to no evidence or testimony in the record to establish [that the circuit court did not consider the affidavit and/or deposition testimony] . . . in its decision to grant [the] motion for summary judgment." The Board asserts that despite her claims to the contrary, Ms. Welling "did not include [her affidavit or deposition testimony] in her response to [the] motion for summary judgment," and that she "fails to identify with

particularity how either document would have [been admissible and] created a genuine dispute of material fact related to any of the seven counts alleged in [her] amended complaint." And finally, the Board contends that in her Motion to Strike, which was her only response to the Dispositive Motion, Ms. Welling "only addressed the procedural issue of the motion for summary judgment being filed after the deadline in the scheduling order . . . [and thus] fail[ed] to address any of the [motion for summary judgment's] substantive issues."

On appeal, we look first at whether there were, in fact, genuine disputes of material fact:

> [i]n reviewing the grant of summary judgment, [an appellate court] must consider the facts reflected in the pleadings, depositions, answers to interrogatories and affidavits in the light most favorable to the non-moving parties, the plaintiffs. Even if it appears that the relevant facts are undisputed, "if those facts are susceptible to inferences supporting the position of the party opposing summary judgment, then a grant of summary judgment is improper."

Ashton v. Brown, 339 Md. 70, 79 (1995) (quoting *Clea v. City of Baltimore*, 312 Md. 662, 677 (1988)). We view the facts in the light most favorable to the non-moving party and "ordinarily may uphold the grant of a summary judgment only on the grounds relied on by the trial court." *Brown*, 339 Md. at 80. And if the material facts are undisputed, "[t]he standard of review for a grant of summary judgment is whether the trial court was legally correct." *Sadler v. Dimensions Healthcare Corp.*, 378 Md. 509, 533 (2003) (quoting *Goodwich v. Sinai Hosp. of Baltimore, Inc.*, 343 Md. 185, 204 (1996)).

In this instance, there were no disputes of material fact because the Dispositive Motion was never opposed. Counsel acknowledged as much at oral argument in this Court, and also that Ms. Welling's affidavit and deposition transcript never made it to the circuit court record (which precludes us from considering them here). It may be that her testimony, in either form, could have created a factual dispute that precluded summary judgment. But a party cannot defeat a proper summary judgment motion simply by claiming that disputes exist. *Piney Orchard Comm. Ass'n, Inc. v. Piney Pad A, LLC*, 221 Md. App. 196, 221 (2015). Her failure to oppose the Dispositive Motion with admissible evidence left the Board's motion unopposed, and leaves us nothing to review.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.