Circuit Court for Baltimore City
Case No. 24-C-16-000705

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2487

September Term, 2016

ANDREW C. MOORE, *ET AL.*

v.

ROLAND PARK ROADS &
MAINTENANCE CORP.

Kehoe,
Berger,
Wilner, Alan M.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kehoe, J.

Filed: July 10, 2018

*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 appeal arises out of a dispute between Andrew and Whitney Moore and the Roland Park Roads and Maintenance Corporation (the "Corporation") regarding covenants (the "Covenants"), which the Corporation asserts encumber the Moores' residence in the Roland Park neighborhood of Baltimore City. The Moores filed a civil action in the Circuit Court for Baltimore City seeking a declaratory judgment to the effect that the Roland Park Covenants (1) do not apply to their property or (2) if the Covenants do apply, the Corporation misapplied them when it denied the Moores' proposal to build a garage on their property. The circuit court denied relief. The Moores raise two issues on appeal, which we have reworded:

> (1) Did the trial court err when it decided that the Covenants applied to the Moores' lot?
>
> (2) Did the trial court err when it concluded that business judgment rule applied to the Corporation's decision to deny the Moores' application?

We will affirm the judgment.

Background

A. The Roland Park Covenants and Their Application to the Moores' Property

Roland Park is a residential community in Baltimore that was established over a century ago. Properties in the community were subject to covenants. The original version of these covenants was imposed by a deed recorded in the land records of Baltimore City and Baltimore County in 1909. The Corporation was also established in 1909. Since that time, it has been responsible for maintaining the development, enforcing the development's covenants, and collecting fees to support these activities. One of the 1909 covenants

provided that no building or structure was to be constructed on a lot in the development unless a plan for the improvement had been submitted to, and approved by, the Corporation. At some point in the past, the Corporation delegated its review and approval responsibilities to the Architectural Review Board (the "Board").

The 1909 version of the covenants expired in 1959. Beginning in 1989, the Corporation requested that the owners of properties within the community execute a new declaration (the "Declaration") imposing a new version of the covenants. Along with many, but not all, of the Roland Park property owners, two of the Moores' remote predecessors-in-title, Hunter Francis and Millicent Francis, signed the Declaration. It was recorded in 1990.

Two covenants imposed by the Declaration are relevant to this appeal. The first pertains to the Corporation's architectural review authority (emphasis added):

> No building shall be started, erected, maintained, altered or converted on or any [parcel subject to the Covenants] until the plans therefor, including specifications of construction, design and color schemes, and a plat location plan showing the location and grade of driveways, walks and structures of every kind to be erected, have been submitted to and approved by Roland Park Roads and Maintenance Corporation, its successors or its assigns, of the rights hereunder. *Said Corporation, in passing on said plans, shall consider the proposed use of the proposed building, the material of which it is to be constructed, its color and design, the harmony thereof with the surrounding area and properties, its location and the outlook it presents on surrounding properties.* No fence, signs, bill boards, or advertising sign of any kind shall be erected on any lot unless approved, in writing, by the Corporation.

The second covenant pertains to the Declaration's applicability to subsequent owners. We will discuss this in Part 1 of our analysis.

The property changed hands several times in the years that followed, with the Moores purchasing it in 2013. Each deed included a covenant of special warranty that was worded almost identically to the following covenant in the Moores' deed when they acquired the property in 2013:

> AND the said parties of the first part hereby covenant(s) that they have not done or suffered to be done any act, matter or thing whatsoever, to encumber the property hereby conveyed; that they will warrant specially the property hereby granted, and that they will execute such further assurances of the same as may be requisite.

B. The Proposed Garage

The Moores wanted to make a number of alterations to their lot, including constructing a garage on their property. Their original vision included a two story, three-car garage in the rear of their property. They submitted their plans to the Architectural Review Board. The Board's minutes from meetings in the Fall and Winter of 2014 show that it granted approval for some of the Moores' projects, including a permeable parking pad, pending zoning approval. However, the members of the Board were concerned about other aspects of the project, including the proposed garage. They asked the Moores for more detailed information.

In 2015, the Moores submitted detailed plans, including the garage. The plan proposed a 33 foot by 24 foot three-car structure with storage space above the garage. They also wanted to install solar panels on the roof of the garage.

Minutes from the Board's August 2015 meeting show that Board members were concerned that the proposed garage was out of sync with the surrounding properties. This feedback was communicated to the Moores by email, and after several months of emails and other communications back and forth, the Moores submitted a revised application for consideration by the Board at its December 2015 Meeting. Several aspects of the garage that troubled the Board, namely the too-tall gable roof and the three-car capacity, remained in the plan. The Board did not approve the garage. Although the Moores did not attend all of the Board's meetings in which their proposal was discussed, the trial court found that they were allowed to participate in the December meeting of the Board, which the court characterized as "the key meeting" in the review process.

The Moores were also required to obtain a variance from Baltimore City, as the proposed garage would extend into the minimum side yard setback. The Corporation opposed the variance, arguing that the garage was too large and would be overly intrusive for neighbors. The Zoning Administrator denied the application, but the Moores appealed to the Baltimore City Board of Municipal and Zoning Appeals, and that agency granted the Moores a variance in December 2015. The Board found that the variance was appropriate given the property's unique setting as a corner lot, and that the plans would not be injurious to neighboring property owners.

The Moores, still stymied by the Board's denials after subsequent resubmissions of the garage application, filed the current action.

We won't belabor the procedural history. The Corporation filed a motion for summary judgment, contending first, that the property was subject to the operation and effect of the Covenants; and second, that the Board's decision was insulated from judicial scrutiny by operation of the business judgment rule. The court granted the motion in part. It decided that there were no disputes of material fact as to the applicability of the Covenants and concluded that the Covenants did indeed apply to the property. However, the court concluded that there were issues of material fact concerning appropriateness of the Board's review process.

After a two day court trial, the court made the following findings of fact and conclusions of law:

(1) The Corporation (and by extension the Board) was not subject to the Maryland Homeowners Association Act, RP §§ 11B-101–118.

(2) Assuming for purposes of analysis that the Act did apply, the Board substantially complied with RP § 11B-111, which imposes notice and open meeting requirements upon homeowners association governing bodies and committees.

(3) The business judgment rule applied to shield the Board's decision to deny the Moores' application from judicial scrutiny.

Analysis

The trial court decided one of the issues before it by summary judgment and the others after a court trial.

The Court of Appeals recently summarized the appropriate standard of review for a court's decision to grant a motion for summary judgment:

> A court may grant summary judgment in favor of the moving party "if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." Md. Rule 2–501(f). Because the grant of summary judgment is a question of law, it is "subject to a non-deferential review on appeal." In conducting this *de novo* review, we evaluate the record in the light most favorable to the non-moving party and construe any reasonable inferences that may be drawn from the well-plead facts against the moving party.

Schneider Elec. Buildings Critical Sys., Inc. v. W. Sur. Co., 454 Md. 698, 704-05 (2017) (citation and some quotation marks omitted).

We review a ruling in a bench trial according to Md. Rule 8-131(c):

> When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.

In this exercise, "'we must consider the evidence in the light most favorable to the prevailing party and decide not whether the trial judge's conclusions of fact were correct, but only whether they were supported by a preponderance of the evidence.'" *Shader v. Hampton Imp. Ass'n, Inc.*, 217 Md. App. 581, 617 (2014), *aff'd*, 442 Md. 148 (2015)

(quoting *City of Bowie v. MIE Properties, Inc*., 398 Md. 657, 676–77). Issues of law are reviewed *de novo*. *Id.*

1. The Moores' property is subject to the Declaration.

A covenant that runs with the land binds not only the parties that enter into the covenant but also successive owners as well. *County Commissioners of Charles County v. St. Charles Associates Ltd. P'ship*, 366 Md. 426, 448-449 (2001). The test for determining whether a covenant runs with the land is well established. "Under Maryland law, a covenant can run with the land if: '(1) the covenant touch[es] and concern[s] the land; (2) the original covenanting parties intend the covenant to run; and (3) there be some privity of estate and that (4) the covenant be in writing.'" *Id.* at 450 (quoting *Mercantile-Safe Deposit and Trust Co. v. Mayor and City Council of Baltimore*, 308 Md. 627, 632 (1987)) (some quotation marks omitted).

The Moores contend that the trial court was wrong when it granted the Corporation's motion for summary judgment on the issue of whether the Declaration applied to their property. The Moores do not argue that the covenant requiring architectural review is not in writing, that it does not "touch and run with" the land, or that there is an absence of privity of estate. Their argument is that there was a dispute of material fact as to whether the Francises and their successors-in-title intended the covenant to run with the land. The Moores assert that the covenants of special warranty contained in the deeds executed by the Francises and other owners in the chain of title is evidence that the Francises, and their successors in title, did not intend the Declaration to bind run with the property. The

argument has an initial appeal—after all, why would the Francises covenant that they had not encumbered the property if they intended the Declaration be binding? Ultimately, however, it is unconvincing.

Maryland courts interpret instruments purporting to convey interests in land by applying principles of contract interpretation. *Miller v. Kirkpatrick,* 377 Md. 335, 351, (2003). As this Court explained in *Gunby v. Olde Severna Park Improvement Association*, 174 Md. App. 189, 242–43, *aff'd,* 402 Md. 317 (2007) (emphasis added):

> These principles require consideration of the character of the contract, its purpose, and the facts and circumstances of the parties at the time of execution. . . .
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> * * *
>
> *We construe a deed without resort to extrinsic evidence, if the deed is not ambiguous.* In interpreting a deed whose language is clear and unambiguous on its face, the plain meaning of the words used shall govern without the assistance of extrinsic evidence.

In the present case, the instrument encumbering the Moores' property with the covenants is the Declaration. We will examine extrinsic evidence, i.e., the Francises' deed, only if we conclude that the relevant language in the Declaration is ambiguous.

The pertinent provision in the Declaration states:

> 6. All of the covenants, conditions and restrictions herein shall be held and construed to run with and bind the land . . . and shall operate in perpetuity, except that after twenty-five (25) years from the date hereof, the then owners representing sixty (60) percent of the lots . . . by instrument duly executed and recorded among the Land Records, may amend, repeal, cancel or annul any and all of the covenants, conditions and restrictions mentioned herein.

"Language in a deed is considered ambiguous . . . if, when read by a reasonably prudent person, it is susceptible of more than one meaning. The determination of ambiguity is a question of law[.]" *Gunby,* 174 Md. App. at 243 (quotations marks and citation omitted). A reasonably prudent person reading paragraph 6 of the Declaration would conclude that the covenants contained in it were intended to run with the land. We agree with the trial court's legal determination that the covenant is unambiguous as a matter of law. Therefore, there is no reason for us to consider the Francises' deed of conveyance.[1] The trial court did not err when it concluded that there was no issue of material fact and that the Declaration encumbered the Moore property as a matter of law.

2. Assuming for purposes of analysis that the Corporation is subject to the provisions of the Maryland Homeowners Association Act, the Board substantially complied with the Act's notice and open meeting provisions.

The Moores also contend that Roland Park is subject to the Homeowners Association Act, RP § 11B-101 *et seq.* (the "Act"). Specifically, they contend that the Architectural Review Board failed to follow legally-mandated procedures when it held closed meetings and made decisions without the Moores being present. These violations, they argue, undercut the Corporation's ability to rely on the business judgment rule in this case.

[1] Were we to do so, the outcome would be the same. A covenant of special warranty does not invalidate a prior conveyance by the grantor but rather protects a grantee against a claim against the property that exists as a result of an act by the grantor or a claim asserted against the grantor. The grantor is obligated to defend against such a claim on behalf of the grantee and, if the defense is unsuccessful, is liable in damages. *See, e.g., Dillow v. Magraw*, 102 Md. App. 343, 365 (1994), *aff'd*, 341 Md. 492 (1996) (obligation to defend a claim); *Wempe v. Schoentag*, 163 Md. 647, 650 (1933) (liability in damages).

The trial court concluded that the Act did not apply to the Corporation. Its decision was based in large part upon a written opinion submitted by an expert witness. The expert noted that his opinion was based upon his "general familiarity with the declarations applicable to several Roland Park lots." He qualified his opinion by noting that he had not made "an exhaustive examination" of the land records to find out if a declaration imposing fees had in fact been filed.

The Act defines a homeowners association as follows:

> (i)(1) "Homeowners association" means a person having the authority to enforce the provisions of a declaration.
>
> (2) "Homeowners association" includes an incorporated or unincorporated association.

RP § 11B-101(i).

"Declaration" is also a defined term in the Act. RP § 11B-101(d) states in pertinent part:

> (d)(1) "Declaration" means an instrument, however denominated, recorded among the land records of the county in which the property of the declarant is located, that creates the authority for a homeowners association to impose on lots, or on the owners or occupants of lots . . . any mandatory fee in connection with the provision of services or otherwise for the benefit of some or all of the lots, the owners or occupants of lots, or the common areas.

As we have already discussed, the trial court concluded that the Corporation was not a homeowners association within the purview of the Act. As an alternative basis for its decision, the court assumed for purposes of analysis that the Act did apply. With this as a premise, the court concluded that the Board substantially complied with the notice and

open meetings provisions of the Act. We will proceed on the same assumption, and reach the same conclusion.[2]

RP § 11B-111 states in pertinent part:

> Except as provided in this title, and notwithstanding anything contained in any of the documents of the homeowners association:
>
> (1) Subject to the provisions of item (4) of this section, all meetings of the homeowners association, including meetings of the board of directors or other governing body of the homeowners association or a committee of the homeowners association, shall be open to all members of the homeowners association or their agents;
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> (2) All members of the homeowners association shall be given reasonable notice of all regularly scheduled open meetings of the homeowners association;
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> * * *
>
> (4) A meeting of the board of directors or other governing body of the homeowners association or a committee of the homeowners association may be held in closed session only for the following purposes:
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> * * *
>
> (iii) Consultation with legal counsel on legal matters;
>
> (iv) Consultation with staff personnel, consultants, attorneys, board members, or other persons in connection with pending or potential litigation or other legal matters;
>
> * * *
>
> (5) If a meeting is held in closed session under item (4) of this section:

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[2] The parties' briefs do not contain extensive discussions of the applicability of the Act to the Roland Park development. Resolving this issue may be more complicated than the briefs suggest. However, this is not the case to undertake such an attempt. *See Master Financial, Inc. v. Crowder*, 409 Md. 51, 80 n.1 (2009) ("For good reason, it is rare that the Court will add an issue not raised by the parties in either the lower courts or this Court.").

> (i) An action may not be taken and a matter may not be discussed if it is not permitted by item (4) of this section[.]

The trial court concluded that the Board substantially complied with § 11B-111. It based this conclusion on the following findings (1) the Board "generally" gave notice of meetings that were published before the meetings; (2) the Moores attended at least the "key meeting," (the court was referring to a meeting that took place on or about December 1, 2015 that resulted in a definitive denial of the Moores' proposal); (3) the Moores were permitted to give a presentation at that meeting; (4) although portions of the meetings were closed, the closed sessions were for the purposes of consultation with legal counsel, a permitted basis for closing a meeting pursuant to RP § 11B-111(4); (5) there were discussions between the Moores and the Board outside of meetings in which "information was shared back and forth"; (6) the Moores "certainly were not blocked from . . . attending" Board meetings; and (7) the members of the Board were entitled to rely on the opinion from a lawyer to the effect that the Act did not apply to the Corporation.

To this Court, the Moores argue that two of these findings were clearly erroneous. First, they argue that the record demonstrates that "the key meeting" actually occurred in September because it was at that meeting that the Board decided that the proposed garage was too large for the site and its surroundings. There is evidence to support this, but it is also clear that the Board did not make a final decision until they met with the Moores at the December meeting. Second, the Moores assert that they were not permitted to attend the September meeting. However, the portion of the record that they cite in their brief as

supporting this contention does not do so. We conclude that the trial court's findings that the critical meeting of the Board was the one in December and that the Moores were not prevented from attending meetings were not clearly erroneous.

On the record before us, we cannot say that the court's conclusion that the Board substantially complied with § 11B-111 was either clearly erroneous or an error of law.

3. The Board's decision was not arbitrary, whimsical, or captious.

Finally, the Moores argue that the trial court used the wrong standard when applying the business judgment rule. They contend the trial court used the standard that we laid out in *Black v. Fox Hills North Community Ass'n, Inc.*, 90 Md. App. 75 (1992), and reiterated in *Reiner v. Ehrlich*, 212 Md. App. 142 (2013), while the appropriate standard is actually found in cases such as *Harbor Improvement Ass'n, Inc. v. Downey*, 270 Md. 365 (1973), and *Kirkley v. Siepelt,* 212 Md. 127 (1957). To the extent that *Harbor Improvement* and *Kirkley*, on the one hand, and *Fox Hills* and *Reiner*, on the other, articulate different judicial approaches to the review of decisions like that of the Board in this case, any distinction is immaterial in this case.

In *Fox Hills*, the issue was whether a decision by a homeowners association's architectural review committee was consistent with the community's architectural and design standards. 90 Md. App. at 79–80. Instead of addressing the contention on its merits, this Court held that the decision of the architectural review committee was not subject to judicial review because the business judgment rule "precludes judicial review of a

legitimate business decision of an organization, absent fraud or bad faith." *Id.* at 82. We concluded:

> The decision which the association made to approve the Kupersmiths' fence was a decision which it was authorized to make. Whether that decision was right or wrong, the decision fell within the legitimate range of the association's discretion. . . . There was no allegation in the complaint of any fraud or bad faith. Absent fraud or bad faith, the decision to approve the fence was a business judgment with which a court will not interfere.

Id. at 83.

We applied the same principle in *Reiner.* 212 Md. App. at 155–56. In *N.A.A.C.P. v. Golding*, 342 Md. 663, 673 (1996), the Court of Appeals cited *Fox Hills* with approval, and concluded the business judgment rule insulates corporate and association decisions from judicial scrutiny "absent fraud, irregularity, or arbitrary action." *Id.* at 678.

In *Kirkley*, the Court of Appeals held that (emphasis added):

> [A]ny refusal to approve the external design or location . . . would have to be based upon a reason that bears some relation to the other buildings or the general plan of development; and this refusal would have to be *a reasonable determination made in good faith, and not high-handed, whimsical or captious in manner*.

212 Md. at 133.

The Court reiterated and applied the *Kirkley* standard in *Harbor Improvement.* 270 Md. at 374.

We think that "arbitrary" and "whimsical and captious" embrace the same concept. *Kirkley* makes it clear that a decision that is made without regard to "other buildings and the general plan of development" is "whimsical and captious." Such a decision could also

be accurately characterized as "arbitrary." There may be cases in which the distinction between not reviewing an organization's decision unless it is shown to be arbitrary (*Golding, Fox Hills,* and *Reiner*), and reviewing a decision to decide if it is arbitrary (*Kirkley* and *Harbor Improvement*), might be important. This is not such a case.

The Declaration provides that, before the Board grants or denies an application, it must:

> consider the proposed use of the proposed building, the material of which it is to be constructed, its color and design, the harmony thereof with the surrounding area and properties, its location and the outlook it presents on surrounding properties.

The Board spent months reviewing the Moores' various garage proposals, communicated with them about the Board's concerns, and allowed for multiple resubmissions of the application. The Board followed its own review process, which includes accepting written applications supplemented by written descriptions, photographs, and architectural drawings; sending letters to neighbors informing them of the application; and meeting to consider the application. The meetings were memorialized with detailed minutes. The Board's denial letter provided a clear reason, noting that the proposed garage was too large in proportion to the house and the site. As the Board explained in the minutes from its meetings and at trial, the proposed garage was too wide compared to that of neighboring properties, and the Board members believed that there were no other three-car, two story garages behind row houses in Roland Park. The Board also made it clear to the Moores that it would approve "either a 2-car garage with a gable roof similar to others on the lane or a 3-car garage with hip roof."

In other words, the Board's decision was one "based upon a reason that bears some relation to the other buildings or the general plan of development" and was certainly not "arbitrary, whimsical nor captious." To the extent that *Kirkley* and *Golding* articulate different standards, the Board's decision in this case satisfies both.

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