

Circuit Court for Montgomery County
Case No. 444346

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 3026

September Term, 2018

CHERYL NEW, et ux.

v.

CPH 6000, LLC

Fader, C.J.
Friedman,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Harrell, J.

Filed: March 5, 2020

*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.

Appellants, Cheryl and Andrew New (“the News”), ask us to reverse the judgment of the Circuit Court for Montgomery County, which granted summary judgment in 2018 in favor of Appellee, CPH 6000, LLC (“CPH”), in this contract dispute litigation. The News contend that the imputation by the circuit court of a temporal limit on the duration of the otherwise open-ended agreement between the parties was not permitted without an evidentiary hearing.

The parties executed the underlying written agreement on or about 17 July 2006. As owners of abutting properties (which were the subject of the agreement), the parties contracted that they would install and maintain fencing and landscaping between the developments on their respective properties. Following a 2018 rezoning of its property by the County Council for Montgomery County, CPH initiated a redevelopment proposal for its property, including modifying the landscaping screen on its property to a degree inconsistent with the terms of the 2006 agreement. The News called this initiative by CPH a violation of the agreement. They sought a declaratory judgment of the parties’ rights and obligations and an injunction prohibiting violation of the agreement. Cross-motions for summary judgment were filed. The circuit court granted CPH’s motion on the basis that the implicit duration of the agreement had expired and, thus, it was no longer enforceable. The News’s motion was denied. This timely appeal by the News followed. We shall affirm the judgment of the circuit court.

THE UNDISPUTED FACTUAL BACKGROUND

The News own and reside in a single-family, detached home at 6003 Neilwood Drive, Rockville, MD 20852. Abutting the News's property is a 6.78-acre parcel, improved currently by a seven-story office building with attendant surface parking, located at 6000 Executive Boulevard, Rockville, MD 20582. The office building and parking had been built in the 1970s by a prior owner. CPH acquired the parcel on 20 January 2006. At that time, the CPH property was classified in the I-3 zone (industrial technology and business uses). The Montgomery County zoning ordinance required a minimum 100-foot setback on the CPH lot from the News's property line.

Shortly following its acquisition, CPH cleared some of the existing trees and undergrowth in the setback area abutting the News's property line so that it could expand the surface parking for the office building. CPH did not provide the News with prior notice of the removal of the trees and undergrowth. The News claimed that the removal was in violation of local ordinance requirements. CPH rejected this accusation.

On 17 July 2006, an agent for CPH wrote a letter to the News recounting the results of negotiations between the respective owners regarding the setback area. An agreement was reached, as explained in the letter, between the parties that stipulated that: (1) a fence would be installed by the News (with the costs split evenly by the parties) along the News's property line on or before 30 September 2006 and would be maintained by the News thereafter; and, (2) CPH would install described new landscaping (at its expense) in the setback area on its property by the same deadline, to be maintained by CPH. The agreement was silent regarding its duration. The parties completed timely their respective

installations.

In 2014, the CPH property was reclassified to the Employment Office (“EO”) zone as part of a comprehensive rezoning by Montgomery County. The EO zone required a minimum setback from an adjacent residential property of 45 feet. It also permitted mixed-use development of the property. Commencing in 2015 when Montgomery County initiated another master planning initiative for the area that included the parties’ properties, CPH undertook to create a plan to redevelop its property, as part of a larger scale project. The plan for the redevelopment included, among other things, the construction of new residential buildings, parking structures, new parks, bike paths, and street improvements. Of particular relevance to the present litigation, the plan included a proposal to reduce the 100-foot setback between CPH’s proposed new building closest to the News’s property with “a 50-foot landscaped buffer, as well as a green screen and a pedestrian bike path, leaving a natural barrier between the respective properties.” Following approximately two and a half years of advertised public meetings and hearings, the new plan for the area that included CPH’s and the News’s properties was approved by the Montgomery County Planning Board. That plan recommended that the CPH property be rezoned to the CRT (commercial/residential town) zone. Commensurate with this recommendation, the CPH property was rezoned in fact by the County to the CR 2.5, C-1.5, R-20, H-200 zone later in 2018. The new zone allowed greater flexibility than the I-3 or E-0 zones with regard to, among other things, setbacks.

CPH notified formally the News by letter dated 18 January 2018 of its proposed sketch plan for redevelopment of its property. The sketch plan proposed a 50-foot setback,

with attendant new landscaping, abutting the News’s property. On 16 March 2018, the News filed a two-count complaint in the Circuit Court for Montgomery County. The first count requested a declaratory judgment of the parties’ rights and obligations under the 2006 agreement. The second count sought an injunction to prohibit CPH from violating the agreement. CPH filed a motion for summary judgment on 18 May 2018.¹ The News filed their opposition to CPH’s motion on 7 June 2018 and a cross-motion for summary judgment on 18 July 2018.² CPH filed its opposition to the News’s motion on 2 August 2018.³ No party sought an evidentiary hearing. No party identified a genuine dispute as to any material fact in their cross-motions or oppositions relevant to what the duration of the 2006 agreement should be.

¹ CPH’s motion was accompanied by an affidavit executed by a Senior Vice President of CPH’s agent (the individual was also a member of CPH) in support of CPH’s view of the material facts. In its motion, CPH argued that either: (1) its obligation to maintain the landscaping within the 100 foot setback according to the 2006 agreement expired after two years, coincident with a bond period under the County’s forest conservation regulations; or, (2) if that argument was found wanting, the court should impute a reasonable duration for the 2006 agreement of two years or, at most, until the time CPH completed the redevelopment plan approval process (including attendant public hearings, at which the News could present their views to the County authorities). CPH also claimed that it was entitled to summary judgment because the News were estopped or had waived their rights under the 2006 agreement or were barred by laches for not participating in the county’s public processes leading to the re-planning and rezoning of the CPH property.

² The News disagreed with CPH’s invocation of a two-year duration for the 2006 agreement, based on the County’s bonding requirement. Instead, they contended that the duration of the agreement, based on a “reasonable person” standard for imputing the duration of the agreement, would be for as long as the News owned their property. Although the News’s opposition to CPH’s motion itemized “Facts Not in Dispute” (by reference to the affidavit accompanying CPH’s motion), they did not identify or assert any material fact they disputed.

³ CPH’s opposition was accompanied by a supplemental affidavit from the same individual who made the affidavit in support of CPH’s motion for summary judgment.

A hearing was held on the cross-motions for summary judgment on 21 August 2018. The primary legal question at the hearing was what should be the duration of the 2006 agreement. Counsel for CPH doubled-down on its assertion that the agreement did contain a durational term. Noting that the agreement referred to Montgomery County’s “bonding requirements” regarding the work to be done under the 2006 agreement, CPH claimed the agreement implicitly incorporated a two-year maintenance requirement as to the landscaping, according to Montgomery County Code Ch. 22(A)(12)(h).⁴ CPH’s counsel continued that, should the hearing judge not find merit in this argument, the court should find an implicit duration of two years or “at the latest, perhaps, when CPH goes to redevelop the property.” Counsel made note also that CPH acquired the property in 2006 with the hope of redeveloping eventually and that the News had opportunities to inform themselves, by participating in the public processes that lead to the re-planning and rezoning of CPH’s property. Moreover, the News would have an opportunity to weigh-in during the public hearings on the sketch plan of redevelopment.

Counsel for the News disagreed, noting first that the public hearing and approval processes were insufficient to protect the News’s rights because the processes would not consider the parties’ private contractual obligations from 2006, focusing instead on the broader public impact of the proposed plan. Counsel claimed also that a two-year requirement was not an appropriate duration, and instead asked the judge to interpret the duration of the agreement as extending until the News no longer owned their property.

⁴ The Code states: “A forest conservation plan must include a two-year binding agreement for maintenance of conservation areas”

This was deemed appropriate because a major impetus for executing the 2006 agreement had been to convince the News not to sue CPH over the original setback disturbance and, thus, the protections afforded by the new landscaping should accrue to their property for so long as they owned it.

By the close of the hearing, no party had pointed yet to any material fact that was in genuine dispute. Nor did any party contend that an evidentiary hearing was needed before the judge could decide what the duration of the 2006 agreement should be.

The judge took the matter under advisement. On 27 November 2018, she issued a written opinion and order granting CPH's motion and denying the News's motion. An appropriate declaration of the parties' rights was issued as well. In the opinion, the hearing judge noted that it was not disputed that the parties formed a contract that was silent as to its duration. The court rejected CPH's proposed two-year duration, based on the Montgomery County Forest Conservation Law, because it "ha[d] no application as to the duration of the letter agreement."⁵ Ultimately, the court reasoned as follows:

Both parties agree that the Court should impose a "reasonable" standard to determine the duration of this agreement. Plaintiffs contend that under a "reasonable person" standard that anyone reading the Letter Agreement and agreeing to it would believe the duration was for as long as they lived in the home. Conversely, the Defendant maintains that the Court should impose a "reasonable time" standard as to the period of time in which it was required to maintain the landscaping, asserting that the reasonable time is until the property is redeveloped.

⁵ The judge conceded that the agreement made reference to "the Montgomery County Bonding Requirement in paragraph 6 regarding Landscaping Maintenance." The court noted, however, that "Chapter 22A cited by the defendant, is silent, and makes no reference nor mention of "Bonding requirements." Further, the court rejected CPH's arguments as to estoppel, waiver and laches as to the News. None of those grounds figure in the case on appeal.

Looking at the circumstances, it is clear that the Letter Agreement has been in effect for twelve (12) years since 2006; the fence and landscaping outlined in the agreement has been installed, paid for and maintained as agreed; the plaintiffs benefitted from the natural screening buffer that obscured the view of the parking lot from their property; there is no obvious benefit that inured to the defendant based on the terms of the Fence & Landscaping Letter Agreement; and the Letter Agreement itself does not address the circumstances at the time the agreement was signed. Moreover, the proposed redevelopment replaces the 100-foot landscaped buffer between the News & CPH properties with a 50-foot landscaped buffer, a green screen and a pedestrian-bike path, such that a natural “barrier” remains between the properties.

Viewing all relevant circumstances and considerations of fairness to both sides, the Court finds that the Defendant CPH 6000 LLC is a commercial entity that has provided a benefit to its neighbor for over twelve years. It is not reasonable, under these circumstances, to restrict the defendant’s ability to redevelop its commercial property for an indefinite period, currently as long as the plaintiffs’ own their home, based on the Fence & Landscaping Letter Agreement of July 2006.

The undisputed evidence presented does not lend itself to a reasonable interpretation that a commercial entity would agree to restrict its ability to develop its property for an unknown duration of home ownership of a neighbor. Therefore, the Court hereby finds that . . . [the agreement] is unenforceable to restrict [CPH’s] right to redevelop its property.^[6]

The News appealed timely.

QUESTION PRESENTED

Appellants presented the following question, which we have rephrased:⁷

⁶ We construe the court’s conclusion as being that the duration of the agreement was twelve years, which period expired necessarily in July 2018.

⁷ Appellants’ question was framed as:

- I. Did the Circuit Court for Montgomery County err in imputing a reasonable duration for the agreement through summary judgment, without an evidentiary hearing?

STANDARD OF REVIEW

We review a declaratory judgment, entered as a result of the grant of a motion for summary judgment, for whether it was correct as a matter of law. *Long Green Valley v. Bellevale Farms*, 205 Md. App. 636, 651 (2012), *aff'd* 432 Md. 292 (2013). The interpretation of a written contract is reviewed under a non-deferential standard. *Calomiris v. Woods*, 353 Md. 425, 447 (1999).

DISCUSSION

The News argue that the circuit court erred as a matter of law in granting summary judgment in favor of CPH because there was no adequate basis from which to impute a duration to the 2006 agreement, in the absence of an evidentiary hearing. Stated differently, duration was a material fact in genuine dispute (or a wrongly decided question of law) and imputing a duration was beyond the scope of the court's role in acting on the cross-motions for summary judgment. CPH's response is two-fold. CPH argues that whether an evidentiary hearing was required was not preserved properly because no party asked for or asserted to the circuit court before it acted on the cross-motions that such a hearing was necessary. Further, CPH maintains that, even were we to find the question

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1. Did the trial court err as a matter of law when it imputed a reasonable period of time to an agreement lacking a specific temporal limitation without conducting an evidentiary hearing?

preserved, the circuit court had the authority to impute a duration to the contract based on the record before it as there was no genuine dispute of material fact generated. Therefore, the court may determine a reasonable duration for the agreement as a consequence of the cross-motions for summary judgment seeking that relief.

A circuit court may grant summary judgment “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. “In reviewing a grant of summary judgment under Maryland Rule 2-501, we independently review the record to determine whether the parties properly generated a dispute of material fact and, if not, whether the moving party is entitled to judgment as a matter of law.” *Worsham v. Ehrlich*, 181 Md. App. 711, 724 (2008) (citing *Wells Fargo Home Mortgage v. Neal*, 398 Md. 705, 714 (2007)). A challenge raised on appeal is not deemed preserved, however, “unless it plainly appears by the record to have been raised in or decided by the trial court.” Md. Rule 8-131(a). We have held that this failure of preservation includes the absence of a request for, or the necessity of, an evidentiary hearing. *Lieberman v. Mayavision*, 195 Md. App. 263, 286 (2010) (holding that when “both parties presented exhibits to the court . . . Counsel discussed the exhibits in detail . . . and the court relied on exhibits in denying appellant’s motion . . . the hearing was tantamount to an evidentiary hearing”).

We hold that the question raised in this appeal by the News was not preserved properly for our review. The question of whether an evidentiary hearing was required was raised for the first time on appeal. The News, prior to filing their brief on appeal, never

suggested that an evidentiary hearing was required.⁸ Rather, their argument was focused on prevailing as a matter of law on their motion for summary judgment, there being no material fact in dispute. This case is comparable to *Lieberman*, where the Court stated “[a]t no time, however, did appellants request an evidentiary hearing, request to present evidence to the circuit court other than the exhibits attached to the motion, or assert that they were entitled to a hearing other than that which occurred.” *Lieberman*, 195 Md. App. at 286. There, the Court held that the claim that a hearing was necessary was insufficient and was not preserved for appellate review. *Id.* Here the same is so. The News did not request the judge to take notice of additional evidence, nor did they claim an evidentiary hearing was necessary. On the contrary, the News argued in their motion for summary judgment that there was not a dispute of material fact and that the judge should impute a duration, albeit one different than that which CPH sought.

Even if we were to reach the merits, the News’s legal argument would fail ultimately. In *Lerner v. Lerner*, this Court held that “[w]hen an agreement is silent as to duration, a reasonable duration will be implied by the court.” 132 Md. App. 32, 45 (2000). The Court in *Lerner* explained what must be considered by a trial court when determining whether a reasonable duration may be imputed. A trial court must “interpret the agreement to determine if the agreement unambiguously omitted the term or if a term was present but ambiguous.” *Id.* Also “[i]n determining what constitutes a reasonable duration, reference

⁸ The News also did not file with the circuit court a motion for reconsideration or for the exercise of the trial court’s revisory powers regarding its contention that an evidentiary hearing was obligatory before the court could impute the duration of the 2006 agreement.

should be made to the subject matter of the agreement.” *Id.* (citing *Goldman, Skeen & Walder v. Cooper, Beckman & Tuerk*, 122 Md. App. 29, 47 (1998)). Finally, a court “may consider all relevant circumstances—including circumstances as of the time entering into the agreement, events thereafter, and considerations of policy and fairness.” *Id.*

The News attempt to distinguish *Lerner* from the present case. In *Lerner*, there was a bench trial that included testimony of the parties and allowed for the trial court to make a determination of the credibility of the witnesses. Pointing to language in *Lerner* that notes “a conceptual difference . . . between the process for construing an ambiguous agreement to determine the intention of the parties and determining a reasonable duration for an agreement when the parties failed to provide for its duration,” the News claim this case constitutes the former and is not proper for summary judgment. *Id.* at 46. Further, the News state that, by granting summary judgment and not holding an evidentiary hearing, the circuit court failed to consider the totality of the circumstances and decided issues of material fact that were disputed implicitly, e.g., the News and CPH’s motives and expectations for entering into the 2006 agreement.

We disagree with the News’s coloring of the proceedings and the record. The record belies that there was any such genuine dispute of material fact. The parties agree that the purpose of the agreement was to provide a degree of visual buffer between the two properties. The terms of the agreement were not disputed, as the parties knew of the performance required of each. Further, the circumstances surrounding the negotiation and execution of the agreement were undisputed, at least as of the time of summary judgment. The parties agree as to the nature of the negotiations, the timeline for forming the

agreement, and their relationship. Neither party disputes the subsequent zoning changes of CPH's property and both acknowledge the rezonings were an implementation of a broader county plan that included other nearby properties.⁹

The News's argument loses its bearings when they note at the end of their brief that the circuit court's imputation of a duration relied heavily on the fact that no real estate developer would restrict in such a manner its ability to redevelop its property, especially in the face of hoping for a more attractive rezoning "down the road." Arguing that this Court has held that "[p]eople are permitted to enter into contracts to their disadvantage," *Shallow Run Limited Partnership v. State Highway Administration*, 113 Md. App. 156, 172 (1996), the News state that whether it would be against CPH's interest to enter into such an agreement should be irrelevant to the task of imputing duration. "The mission of the trial court is to ascertain what is a reasonable time, given the purpose of the Agreement when the parties entered into it, and how they thereafter comported themselves." This appears to us to be an argument bearing on *which* of the claimed durations the circuit court should determine to be reasonable, not whether an evidentiary hearing was required before one was selected.

A determination of a reasonable time under a contract is "clearly one of law for the court." *Standard Scale & Supply Co. v. Baltimore Enamel & Novelty Co.*, 136 Md. 278 (1920). This Court has upheld a circuit court's ability to impute a reasonable duration of a

⁹ It is apparent that the judge considered the impact of the various planning and zoning changes that had occurred regarding the CPH property, which, among its impacts, justified a contraction of the minimum relevant setback from 100 feet to fifty feet.

contract on summary judgment. *Kiley v. First National Bank of Maryland*, 102 Md. App. 317, 335 (1994) (“[d]epending upon the intention of the parties, a contract, silent as to duration, may contemplate perpetual performance, performance for a reasonable time, or performance until the parties decide otherwise”). The hearing judge here considered the *Lerner* factors implicated by the undisputed material facts before her and imputed a duration for the agreement, i.e., twelve years, which resulted in the conclusion that the agreement was enforceable no longer. We hold that, on this record before us, the circuit court did not err in granting summary judgment in favor of CPH.

**JUDGMENTS OF THE CIRCUIT COURT
FOR MONTGOMERY COUNTY
AFFIRMED. COSTS TO BE PAID BY
APPELLANTS.**