UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2185

September Term, 2013

THOMAS E. MALONEY

v.

FOUNTAIN GLEN HOMEOWNERS ASSOCIATION, INC.

Graeff,
Hotten,
Arthur,

JJ.

Opinion by Arthur, J.

Filed: January 14, 2015

This case concerns the interpretation of a covenant or restriction that binds the homeowners in a residential community. The Circuit Court for Harford County held that appellant Thomas E. Maloney had violated the restriction by parking what the court described as a "massive" army-surplus truck in the driveway of his home. In view of that violation, the court entered a permanent injunction against parking the truck at the Maloney home. Maloney has appealed, and we affirm.

FACTUAL AND PROCEDURAL HISTORY

I. Factual Background

In 1992, Maloney and his wife purchased a single-family home in Bel Air, in a community known as Fountain Glen. The Fountain Glen community consists of numerous single-family homes on lots that are approximately a quarter of an acre in size. The residents of the community, including Maloney, are members of the Fountain Glen Homeowners Association, Inc. ("Fountain Glen" or the "association"), and are subject to the association's "Declaration of Covenants, Conditions and Restrictions" (the "Declaration").

Article VII(d) of the Declaration, titled "Restrictions on Use," states in full:

> (d) *No* junk vehicle or vehicle on which current registration plates are not displayed, trailer, *truck*, camper, camp truck, house trailer, *van or the like shall be kept upon the Property*, nor shall the repair or ordinary maintenance of automobiles or other vehicles be carried out on the Property, *except that small trucks and vans, having a capacity of not more than three-quarters (3/4) of a ton, may be parked in properly designated parking areas*.

(Emphasis added.)

At some time in or before 2011, Maloney bought a 1968 M109a3 Kaiser Jeep Shop Van Truck from the United States Government. He kept the truck at his home, drove it in parades (for example, on the Fourth of July), and used it for other recreational purposes.

The truck is camouflaged and has three axles. It is so large that it will not fit into Maloney's two-car garage (unless he deflates the tires). In fact, it stands higher than the first story of his home and is nearly as wide as the driveway. Maloney himself testified that this particular model of truck weighs more than 14,000 pounds. There was an abundance of evidence that Maloney's own truck, or at least the particular model that he owned, has a capacity or payload of 5,000 pounds. In fact, the model was known as a "deuce and a half" because its payload is two and half tons.

Upon observing the truck on Maloney's property, the Fountain Glen board of directors informed the Maloneys that they were violating Article VII(d). The board also informed the Maloneys that they were required to remove the truck from the community.

II. The Lawsuit

After the Maloneys failed to heed several written demands to remove the truck, Fountain Glen filed a complaint for a permanent injunction on May 24, 2012. Fountain Glen relied on Article VII(d), as well as Article X, § 1, of the Declaration, which provides that:

> The Association and/or any owner, shall have the right to enforce, by any proceeding at law or in equity, all restrictions, covenants, reservations, liens and charges now or hereafter imposed by the provisions of this Declaration. Failure by the Association or by any Owner to enforce any covenant or restriction herein contained shall in no event be deemed a waiver of the right to do so thereafter.

III. The Trial

After an extended period for pretrial proceedings, the circuit court scheduled a bench trial for December 4, 2013.

At the very start of that trial, some 18 months after Fountain Glen had first filed suit, Maloney moved to dismiss the complaint. He argued that the amended by-laws to the Declaration contained a dispute-resolution provision that required Fountain Glen to satisfy "conditions precedent" before filing suit – including giving due notice of a hearing before the Fountain Glen board and holding a hearing at least ten days after receipt of that notice. Because Fountain Glen had failed to provide notice or a hearing, Maloney argued, the court should dismiss the lawsuit. The court denied this eleventh-hour motion.

On the merits, Fountain Glen introduced photographs of the truck, illustrating its enormous size. Fountain Glen then called Maloney, whose evasive testimony about the size, weight, and payload of his truck was characterized by the court as "offensive" and "disingenuous[]." Nonetheless, in responses to questions about the specific model of truck that he owned, Maloney did admit that its capacity or payload was around 5,000 pounds, or two and a half tons.

Fountain Glen also called its community manager, Ron Rims, who testified, based on his personal experience in the Army during the Vietnam era, that the model of truck that Maloney owned was known as a "deuce and a half" because it had a payload or capacity of two and a half tons, or 5,000 pounds. Based on the operator's manual for the specific model of truck that Maloney owned, Rims testified that the truck's payload was 5,000 pounds, or

two and a half tons. Finally, based on the MVA certificate of title for Maloney's own truck, Rims also testified that the "gross vehicle weight" was 20,280 pounds and that "shipping weight" was 15,280 pounds – which implies that its capacity or payload was the difference between the two, or 5,000 pounds.

At the close of Fountain Glen's case-in-chief, both parties moved for judgment. The Court denied Maloney's motion and held Fountain Glen's "in abeyance, [to] give the defense an opportunity to make whatever case it needs to make" in response to Fountain Glen's request for injunctive relief.

In his case, Maloney called a private investigator, who had taken photographs of a van and three SUVs that were parked in the Fountain Glen community, and an automotive expert. Although the court excluded the photographs, it permitted Maloney's expert to review them and to testify that they depicted vehicles whose payloads exceeded three-quarters of a ton. On the basis of that testimony, Maloney argued that those vehicles did not fall within the exception in Article VII(d) for "small trucks and vans, having a capacity of not more than three-quarters (3/4) of a ton[.]" Maloney concluded that, in view of the alleged proliferation of these large consumer vehicles, Fountain Glen was arbitrarily enforcing the restriction against him and that the restriction was unenforceable because its purpose had been frustrated.

IV. The Ruling

At the close of Maloney's case, the trial court ruled from the bench, granting Fountain Glen's request for injunctive relief.

The court found that the truck was not merely large, but "massive." The court further found that the truck, which it called "an eyesore," "greatly exceeds" the three-quarter-ton capacity that Article VII(d) permits.

The court went on to reject Maloney's defenses. In particular, the court found that the purpose of the restriction was not to prohibit consumer vehicles, such as minivans or SUVs. Because Maloney's three-axle, army-surplus truck was plainly not a consumer vehicle, the court rejected his arguments based on the alleged proliferation of SUVs, minivans, and pickup trucks.

On December 23, 2013, the court entered a written order granting Fountain Glen's request for injunctive relief and compelling Maloney and his wife to remove the truck from his property. On January 2, 2014, Maloney filed a timely notice of appeal.[1]

QUESTIONS PRESENTED

Maloney presents three questions for review, which we reorder and restate as follows:

I. Did the circuit court err in denying Maloney's motion for judgment, at the close of Fountain Glen's case-in-chief, on the theory that Fountain Glen failed to present sufficient evidence?

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[1] After Maloney noted his appeal, the court awarded over $14,000 in attorneys' fees to Fountain Glen. Because Fountain Glen had a contractual right to its fees, the circuit court's judgment did not become final until the court had decided how much in fees to award. *See*, *e.g.*, *Carr v. Lee*, 135 Md. App. 213, 223-24 (2000). Nonetheless, even though Maloney appealed before the entry of the final judgment, the case is still properly before us under Code (1973, 2013 Repl. Vol.) § 12-303(3)(i) of the Courts and Judicial Proceedings Article, because it is an appeal from an order granting an injunction. Maloney's wife did not appeal, but presumably would benefit if the judgment were reversed.

II. Did the circuit court erroneously prevent Maloney from introducing evidence that Fountain Glen had selectively enforced the restriction or that the restriction was no longer valid because of changed circumstances?

III. Did the circuit court err in denying Maloney's motion to dismiss because of Fountain Glen's failure to conduct a hearing before the Fountain Glen board before filing suit?[2]

DISCUSSION

I. Maloney Withdrew His Motion for Judgment

Maloney contends that the circuit court erred in denying his motion for judgment because, he says, "there was simply no evidence that established the capacity" of his truck. We need not address his contention because by offering evidence after the court denied the motion, Maloney withdrew it (Md. Rule 2-591(c)) and gave up his right to appeal from the denial of it. *Driggs Corp. v. Maryland Aviation Admin.*, 348 Md. 389, 403 (1998).

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[2] Maloney phrased his questions for review in the following manner:

I. Whether the Circuit Court erred by denying Mr. Maloney his right to present evidence that the Declaration had been arbitrarily and selectively enforced, and had outlived its purpose?

II. Whether the Circuit Court erred by denying Mr. Maloney's motion for judgment at the close of Fountain Glen's case, even though no evidence was presented during Fountain Glen's regarding the capacity of Mr. Maloney's vehicle?

III. Whether the Circuit Court erred by allowing Fountain Glen to enforce their Declaration without fulfilling the condition precedent contained in their Declaration?

Maryland Rule 2-519(a) provides that "[a] party may move for judgment on any or all of the issues in any action at the close of the evidence offered by an opposing party, and in a jury trial at the close of all the evidence." Rule 2-519(b) further provides that, "[w]hen a defendant moves for judgment at the close of the evidence offered by the plaintiff in an action tried by the court, the court may proceed, as the trier of fact, to determine the facts and to render judgment against the plaintiff or may decline to render judgment until the close of all the evidence."

Because the trial judge is the finder of fact in a bench trial, the judge "'is not compelled to make any evidentiary inferences in favor of the party against whom the motion for judgment is made'" before *granting* a defendant's motion for judgment. *See*, *e.g.*, *Saxon Mortgage Servs., Inc. v. Harrison*, 186 Md. App. 228, 262 (2009) (quoting *Bricker v. Warch*, 152 Md. App. 119, 135-36 (2003)); *see also Bricker*, 152 Md. App. at 136 (in granting defendant's motion for judgment in bench trial, trial judge is "allowed to evaluate the evidence as though he [or she] were the jury, and to draw his [or her] own conclusions as to the evidence presented, the inferences arising therefrom and the credibility of the witnesses testifying"). Accordingly, if the judge *grants* a defendant's motion for judgment at the end of the plaintiff's case in a bench trial, the appellate court reviews the judge's factual findings under the deferential standard of Md. Rule 8-131(c). *Saxon*, 186 Md. App. at 861.[3]

[3] Rule 8-131(c) provides that, in an appeal from an action tried without a jury, we review the judgment of the trial court on both the law and the evidence and will not set aside the trial court's judgment on the evidence unless it is clearly erroneous, giving due regard to the opportunity of the trial court to judge the credibility of the witnesses.

Here, however, we are asked to review the court's decision to *deny* a defendant's motion for judgment at the end of the plaintiff's case in a bench trial. When a court denies such a motion, defendants have two options: they may either may rest their case and offer no evidence, or they may offer evidence in support of their defense. *Driggs*, 348 Md. at 403. If the defendant offers no evidence, he or she may raise an appellate challenge to the circuit court's determination that the plaintiff's evidence was legally sufficient. *Id.* On the other hand, if the defendant offers evidence, he or she "withdraws the motion" (Md. Rule 2-519(c)) and "may not complain on appeal about the denial of it." *Driggs*, 348 Md. at 403.

Maloney chose the second option, of offering evidence in support of his case. In so doing, he withdrew his motion and gave up his right to appeal from the denial of it. Md. Rule 2-519(c); *Driggs*, 348 Md. at 403. Consequently, we have no authority to consider Maloney's assertion that the circuit court erred in denying his motion for judgment at the end of Fountain Glen's case.[4]

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[4] Even if we considered Maloney's argument, we would conclude that it lacks merit. The evidence clearly showed that Maloney's truck had a payload or capacity of more than three-quarters of a ton and, thus, that it did not fall within the exception for "small trucks." While Maloney evaded questions about the capacity of his particular truck, even he admitted, in response to questions about the specific model of truck that he owned, that its capacity or payload was around 5,000 pounds, or more than three times the maximum amount permitted by the exception. In addition, Fountain Glen introduced evidence, based on the community manager's military service, that the payload of that specific model of truck was about 5,000 pounds, or two and half tons, which is why it was called a "deuce and a half." Finally, Fountain Glen introduced the certificate of title for Maloney's own truck, which indicated that its capacity (in the sense of the difference between its gross weight and its shipping weight) was 5,000 pounds, or two and half tons.

II. The Circuit Court Did Not Err in Excluding Evidence that Article VII(d) Was Invalid and Unenforceable

During Maloney's cross-examination of Fountain Glen's community manager and, later, during his case-in-chief, the circuit court prohibited him from eliciting certain evidence that Fountain Glen had not enforced the covenant against the owners of consumer vehicles, such as a Toyota Tundra. The court ruled that that evidence was irrelevant. Maloney complains about that decision even though the court later allowed Maloney's expert to use some of that evidence in support of his testimony that the restriction's purpose had been "frustrated" because of changed circumstances.

After the court's second ruling, during the testimony of Maloney's private investigator, Maloney made a proffer of the evidence that the court excluded: it consisted of a total of four photographs, of a van, two Toyota Tundras, and a Hyundai Santa Fe Sport, all of which were parked in the Fountain Glen community in April 2013. Maloney had no evidence that any of these vehicles actually belonged to a Fountain Glen resident – and indeed, the van bore the insignia of a plumbing and electrical contractor that may have been doing work at one of the houses.[5] Nonetheless, Maloney contended that the photographs

[5] At oral argument, Maloney argued that a resident would violate the Declaration merely by having a visitor who drove a vehicle with a payload in excess of three-quarters of a ton. Under Maloney's interpretation, a resident would violate the Declaration whenever a UPS truck made a delivery to his or her house, and probably whenever a plumber or electrician came to make a repair. Because Maloney's interpretation leads to these absurd consequences, it must be wrong. *McAllister v. McAllister*, 218 Md. App. 386, 405 n.8 (2014).

would show that the association had selectively enforced the restriction and that the restriction had become invalid because of an alleged proliferation of large consumer vehicles.

A court's evidentiary rulings are typically subject to review only for abuse of discretion. *See*, *e.g.*, *Old Frederick Rd., LLC v. Wiseman*, 213 Md. App. 513, 526 (2013) ("[a] trial judge's decision to admit or exclude evidence will not be set aside absent an abuse of discretion"). The court's discretion is particularly broad in a bench trial, where the court itself functions the finder of fact. *See CR-RSC Tower I LLC v. RSC Tower I LLC*, 429 Md. 387, 406 (2012). In view of that highly deferential standard of review, we see no abuse of discretion, because the photographs had no tendency to prove either selective enforcement or changed circumstances. Md. Rule 5-401.

The complaint of selective enforcement has no merit. Because of the semantic conflict regarding whether an SUV is or is not a "truck"[6] within the meaning of Article VII(d), the language was susceptible of more than one reasonable interpretation. Consequently, the circuit court, as the finder of fact, was required to determine what the drafters of Article VII(d) intended. *Della Ratta, Inc. v. Am. Cmty. Developers, Inc.*, 38 Md. App. 119, 130 (1977). In so doing, the court expressly found that the ambiguous language of the restriction did not apply to consumer vehicles, such as those depicted in three of the

[6] At oral argument, Maloney contended that SUVs are "trucks," within the meaning of the Declaration, because (he said) they are built on a truck chassis.

four photographs. Maloney has offered no basis to conclude that the court's interpretation is clearly erroneous or otherwise incorrect.[7]

The complaint of changed circumstances has no merit either. While restrictive covenants may become invalid and unenforceable "if the original plan of improvement has been abandoned," or if the "character of neighborhood had changed so as to defeat the purpose of the restriction[]" (*Kirkley v. Seipelt*, 212 Md. 127, 134-35 (1957)), the onus is on Maloney to show that the restriction has outlived its purpose. *City of Bowie v. MIE Props., Inc.*, 398 Md. 657, 685 (2007).

"[C]hief among the factors considered in evaluating the present circumstances relevant to determining the continuing validity of a restrictive covenant is whether there has been a 'radical change in the neighborhood causing the restrictions to outlive their usefulness.'" *Id.* at 687 (quoting *Chevy Chase Vill. v. Jaggers*, 261 Md. 309, 316 (1971)). When only a few decades have passed since the creation of the covenants, the courts have invalidated them only upon evidence of a change so substantial that it completely frustrates the purpose of the restriction. *City of Bowie*, 398 Md. at 691 (collecting authorities).[8]

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[7] Moreover, because the parties' conduct may shed light on the meaning of ambiguous contractual provisions, the absence of any enforcement actions against SUV owners could constitute evidence that, in the view of Fountain Glen and the members of the Fountain Glen community, even large SUVs are not "trucks." *See Dinges v. Dinges*, 43 Md. App. 50, 55 (1979) (identifying "conduct of the parties" as a factor a court should use to construe the meaning of an ambiguous contractual provision).

[8] As examples of such a change, the *City of Bowie* Court cited *Esso Standard Oil Co. v. Mullen*, 200 Md. 487, 490 (1952), which voided a "residential-only" covenant after 45 years after looking to broader surroundings of the affected land and concluding the (continued...)

Maloney has no such evidence in this case, even considering the four photographs that the court excluded. At most, Maloney has shown that some people are driving large consumer vehicles, which is hardly a new development. He offered no evidence that large consumer vehicles are more prevalent today than they were in the past,[9] let alone that they have become so prevalent Fountain Glen can no longer prevent him from parking a completely different kind of vehicle – a three-axle, seven-ton, army-surplus truck – in the community.

In essence, Maloney's argument appears to be that because some residents may be driving larger consumer vehicles than they drove in the past, he (and others) are entitled to park "massive" trucks, such as his seven-ton army-surplus truck, or perhaps 18-wheel tractor trailers, dump trucks, cement mixers, construction equipment, etc., in the community. It is immediately apparent that Maloney's conclusion does not follow in any way from his premise. The circuit court correctly and sensibly rejected it.

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[8] (...continued)
"neighborhood is now dominantly and progressively commercial"; *Ford v. Union Trust Co.*, 196 Md. 112, 117-18 (1950), which held that a residential-use covenant was void because of pervasive commercial development and the physical impossibility of residential development; *Talles v. Rifman*, 189 Md. 10, 15 (1947), which invalidated a covenant requiring detached housing after finding that on "practically all of the improved property surrounding [the relevant property], there have been erected row houses, so that the entire neighborhood has become a row house community"; and *Whitmarsh v. Richmond*, 179 Md. 523, 525 (1941), which voided a covenant limiting land for residential uses when "practically all of the properties adjacent to the property [involved in the case] are being used for commercial purpose[s]."

[9] In fact, one of the protypical SUVs, the Chevrolet Suburban, has been manufactured continuously since 1935 (though they were built as military transport vehicles during World War II). http://en.wikipedia.org/wiki/Chevrolet_Suburban (last viewed Dec. 31, 2014).

III. The Circuit Court Did Not Err in Finding that Fountain Glen's Complaint Was Not Barred by Failure to Satisfy a Condition Precedent.

Maloney lastly argues that the amended by-laws to the Declaration created "conditions precedent" to Fountain Glen's right to file a legal action against a Fountain Glen homeowner. He cites Article XV, § 1, of the by-laws, which is titled "Dispute Resolution Procedure," and which states:

> The Board or its designated committee shall not impose a fine, suspend voting rights (unless the suspension is related to the Owner's failure to provide a current address or unless a statement of lien has been filed against the Lot and the lien has not been satisfied), or infringe upon any other rights of an Owner or other occupant for violation of the Declaration, the Bylaws, or Rules and Regulations unless and until the following provisions are followed.

The "following provisions" are: (1) written demand to cease and desist from the alleged violation; (2) written notice of a hearing to be held before the board; and (3) a board hearing, to be held no fewer than ten days after the receipt of the written notice, where an owner "has the right to present evidence and present and cross-examine witnesses" and shall be afforded "a reasonable opportunity to be heard."[10]

Maloney argues that Fountain Glen violated the by-laws by failing to give him notice of a board hearing and failing to conduct such a hearing before filing suit. The circuit court rejected the motion, reasoning that it conflicted with the Declaration, which expressly

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[10] It is not altogether clear that the by-laws actually impose any restriction on the association's ability to ask a court for injunctive relief against a recalcitrant homeowner, like Maloney. A suit for injunctive relief is not the imposition of a fine or the suspension of voting rights. Hence, the by-laws could constitute a condition precedent to suit only if a request for injunctive relief, in and of itself, amounts to some kind of an "infringe[ment]" upon any of Maloney's "other rights." We shall assume, for the sake of argument, that it is.

governs in case of any conflict. Upon our *de novo* review of the circuit court's legal conclusion, we agree that the circuit court was correct.

Article 10, § 5, of the Declaration states that, "[i]n the case of any conflict between this Declaration, the Articles of Incorporation and the By-Laws of the Association, the Declaration shall control." Article X, § 1, of the Declaration grants the association the unqualified "right to enforce, by any proceeding at law or in equity, all restrictions, covenants, reservations, liens and charges now or hereafter imposed by the provisions of this Declaration": it imposes no conditions precedent on the association's right to pursue legal action. Therefore, to the extent that the amended by-laws might be read to conflict with the Declaration by imposing some kind of precondition to litigation, the circuit court correctly concluded that the Declaration governs.

JUDGMENT OF THE CIRCUIT COURT FOR HARFORD COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.