COURT OF SPECIAL APPEALS OF MARYLAND

No. 1187
September Term, 2020
No. CSA-REG-1187-2020

VS CLIPPER MILL, LLC

Appellant,

v.

THE COUNCIL OF UNIT OWNERS OF THE MILLRACE CONDOMINIUM, INC., *et al.*,

Appellees.

Appeal from the Circuit Court for Baltimore City
The Honorable John S. Nugent

BRIEF OF AMICI CURIAE PUBLIC CITIZEN FOUNDATION AND AMERICAN CIVIL LIBERTIES UNION OF MARYLAND

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INTEREST OF AMICI CURIAE

The interest of amici curiae is set forth in the accompanying motion for leave to file this brief.

QUESTIONS PRESENTED

1. If section 4.9 of the Clipper Mill Community Declaration is properly construed as prohibiting homeowners from criticizing the developer who built and sold their homes absent the developer's consent, is the clause barred by the federal and state laws forbidding nondisparagement agreements in consumer contracts?

2. Did section 4.9 of the Clipper Mill Community Declaration waive the First Amendment right of homeowners to express their views about the developer who built their community?

3. Does speech about development activities lose its status as speech about a matter of public concern when the speaker has a private reason for speaking?

4. Did the Circuit Court below properly find that this action was filed in bad faith?

STATEMENT

Amici agree with appellees' statement of the case, statement of facts, and standard of review.

ARGUMENT

I. IF CONSTRUED AS PLAINTIFF ALLEGES, PARAGRAPH 4.9 OF THE CLIPPER MILL DECLARATION WOULD VIOLATE FEDERAL AND STATE LAWS FORBIDDING NONDISPARAGEMENT CLAUSES IN CONSUMER CONTRACTS.

Courts may not enforce private contract terms that violate federal statutes. See, e.g., *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 83-84 (1982) (quoting *Hurd v. Hodge*, 334 U.S. 24, 34-35 (1948)). Here, plaintiff VS Clipper Mill ("VS")alleges that the Clipper Association Declaration forbids homeowners from criticizing VS's development plans, because it contains a nondisparagement clause to which the homeowners became subject by buying a home within the community. If plaintiff were correct, the clause would flatly violate the federal Consumer Review Fairness Act ("CRFA"), 15 U.S.C. § 45b, and Section § 14-1325 of the Maryland Commercial Code.[1]

Subsection (b) of the CRFA provides that "a provision of a form contract is void from the inception of such contract if such provision . . . prohibits or restricts the ability of an individual who is a party to the form contract to engage in a covered

[1] Unlike the CRFA argument, neither party argued below that the individual defendants were protected by Maryland's statutory ban on consumer nondisparagement agreements. That issue is offered by amici as an alternate ground for affirmance. *See State v. Carter*, 244 A.3d 1041, 1057 (Md. 2021); *Unger v. State*, 48 A.3d 242, 255 (Md. 2012).

communication." 15 U.S.C. § 45b(b)(1)(A) (effective March 14, 2017). The CRFA defines "form contract" as "a contract with standardized terms—(I) used by a person in the course of selling or leasing the person's goods or services; and (ii) imposed on an individual without a meaningful opportunity for such individual to negotiate the standardized terms." 15 U.S.C. § 45b(a)(3)(A).

Although the CRFA does not define "standardized term," the phrase is most naturally read in the context of the statute to refer to generalized terms appearing in form contracts. In that the complaint alleges that every homeowner in the Clipper Mill community becomes party to the allegedly speech-restrictive litigation clause simply by virtue of buying a home in the community, it is apparent that this clause qualifies as a "form contract."

A real estate agreement is also a contract for the sale or lease of "goods or services." Courts commonly treat the phrase "goods or services" as including contracts in connection with real property. *See*, *e.g.*, *DeBerry v. First Govt. Mortg. and Inv'rs Corp.*, 170 F.3d 1105, 1108 (D.C. Cir. 1999); *Miller v. BAC Home Loans Servicing*, 726 F.3d 717, 725 (5th Cir. 2013); *Javins v. First Nat. Realty Corp.*, 428 F.2d 1071, 1075-1076 (D.C. Cir. 1970); *Setai Hotel Acquisition v. Miami Beach Luxury Rentals,* No. CV 16-21296-CIV, 2017 WL 1608891, at *2-3 (S.D. Fla. Apr. 28, 2017) (treating the sale of condominium units as being within the definition of

"goods and services"); *23 Realty Assocs. v. Teigman*, 624 N.Y.S.2d 155, 157 (App. Div. 1995) (rentals of residential homes are "goods and services" covered by consumer protection statute). Similarly, federal trademark law, which applies to marks that identify "goods or services" in the marketplace, 15 U.S.C. § 1112, includes a specific class for registering trademarks pertaining to real estate affairs such as real estate sales and developments.[2]

Because the homes are goods, and developing and selling them is a service, the VS Community Declaration and Clause 4.9 in particular were "used . . . in the course of selling or leasing . . . goods or services." *See* 15 U.S.C. § 45b(a)(3)(A). VS imposed the Community Association Declaration on the individual defendants without offering "a meaningful opportunity for negotiation." 15 U.S.C. § 45b(a)(3)(A).

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[2] *See, e.g.*, *Taylor v. Thomas,* 624 Fed. Appx. 322, 326 (6th Cir. 2015); *Cent. 21 Real Est. Corp. v. Meraj Intern. Inv. Corp.*, 315 F.3d 1271, 1278 (10th Cir. 2003); *Cent. 21 Real Est. Corp. v. Cent. 21 Real Est.*, 929 F.2d 827, 830 (1st Cir. 1991); *BPI Lux S.a.r.l. v. Bd. of Managers of Setai Condo. Residence at 40 Broad St.*, 18 CIV. 1621 (NRB), 2019 WL 3202923, at *1 (S.D.N.Y. July 16, 2019); *DCS Real Est. Investments v. Yapor Corp.*, 6:14-CV-777-ORL-DAB, 2015 WL 12780447, at *3 (M.D. Fla. Feb. 26, 2015); *Talisker Corp. v. Prime W. Jordanelle*, 2:06-CV-1034 TC, 2008 WL 4279642, at *5 (D. Utah Sept. 12, 2008). *See also Vesta Corp. v. Vesta Mgt. Services,* CV H-15-719, 2016 WL 8710440, at *2 (S.D. Tex. Sept. 30, 2016) ("'international class 36,' which includes "residential real estate management services, and . . . 'international class 37,' which includes real-estate development and construction").

"Covered communication" means "a written, oral, or pictorial review, performance assessment of, or other similar analysis of . . . the goods, services, or conduct of a person by an individual who is party to a form contract with respect to which such person is also a party." 15 U.S.C. § 45b(a)(2). This definition plainly applies to the communications at which the complaint is directed, "analysis . . . of the . . . services or conduct of" the developer which, defendants thought, were detrimental to the very goods they had bought, homes in the Clipper Mill community; and the communications were made by one contracting party with respect to another. Consequently, if VS were correct in its contentions about the alleged contractual breach at issue, VS would be pursuing a contract claim that is barred by federal law.

As construed by VS, the contract clause at issue would also violate Section 14-1325 of the Maryland Commercial Code, entitled "Prohibited Nondisparagement Clauses in Consumer Contracts." Section 14-1325(b) provides, "A contract . . . for the sale . . . of consumer goods or services may not include a provision waiving the consumer's right to make any statement concerning: (1) The seller or lessor; (2) Employees or agents of the seller or lessor; or (3) The consumer goods or services." Section 14-1325(a) defines "consumer goods or services" as "goods or services that are primarily for personal, household, or family purposes." And Section 14-1325(c) forbids any person to (1) "seek enforcement of a contract provision prohibited under

subsection (b) of this section; or (2) [p]enalize a consumer for making any statement protected under subsection (b) of this section.

As construed by VS, section 4.9 of the Community Declaration violates section 14-1325. VS built, and defendants bought, residential townhouses and condos, which by definition are "primarily for personal household or family purposes." This lawsuit seeks enforcement of the illegal contract clause, and the punitive damages claim in particular seeks to "penalize" the individual defendants for their speech. The complaint is therefore subject to dismissal under Maryland's statutory ban on nondisparagement clauses in consumer contracts, as well as pursuant to the federal prohibition.

II. VS HAS NOT SHOWN CLEAR AND CONVINCING EVIDENCE THAT, WHEN DEFENDANTS BOUGHT THEIR HOMES, THEY WAIVED THEIR FIRST AMENDMENT RIGHT TO SPEAK IN OPPOSITION TO THE DEVELOPER.

VS argued below that, by purchasing a home within the Clipper Mill Community, and by constituting themselves as homeowner associations within that community, both the individual and the organizational defendants waived the First Amendment rights that would otherwise have protected their right to express their views about VS's development activities. E.158-159, 452-453. Amici agree that First Amendment rights, like other constitutional rights, can be waived by a valid

contract. But the court below was correct in holding that waiver of constitutional rights should not be found lightly, but rather is subject to special standards that were not met here.

This lawsuit implicates the First Amendment because VS asked a court, a government body, to use state power to impose damages and require defendants to act in accordance with a court order enunciating VS' rules. The First Amendment regulates such lawsuits. For example, in *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971); *Organization for a Better Austin v. Keefe*, 402 U.S, 415 (1971); *Shelley v. Kraemer*, 334 U.S. 1 (1948), private individuals sought damages or equitable relief, but because the private parties invoked government power, the Supreme Court subjected the claims and the relief sought to constitutional scrutiny.

Waiver of rights under the United States Constitution is a federal question controlled by federal law. *Brookhart v. Janis*, 384 U.S. 1, 4 (1966). There is a presumption against the waiver of constitutional rights, and for a waiver to be effective it must be clearly established that there was 'an intentional relinquishment or abandonment of a known right or privilege.'" *Id.* (citation omitted) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). "A waiver of First Amendment rights may only be made by a 'clear and compelling' relinquishment of them." *National Polymer Products v. Borg-Warner Corp.*, 641 F.2d 418, 423 (6th Cir. 1981). To

show that the defendants waived their First Amendment right to oppose its development plans in public comments and in appearing before the Planning Commission, VS had to show by "clear and compelling" evidence, *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 145 (1967); *Sambo's Restaurants v. City of Ann Arbor*, 663 F.2d 686, 690 (6th Cir. 1981), that the defendants "voluntarily, intelligently, and knowingly waived" their rights. *See e.g.*, *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 187 (1972); *Overbey v. Mayor of Baltimore,* 930 F.3d 215, 223 (4th Cir. 2019); *United States v. Local 1804-1*, 44 F.3d 1091, 1098 n.4 (2d Cir.1995); *In re Blessen H,*, 392 Md. 684, 698-699 (2006). Waiver can neither be presumed nor lightly inferred, *Doe v. Marsh*, 105 F.3d 106, 111 (2d Cir. 1997); *Leonard v. Clark*, 12 F.3d 885, 889 (9th Cir. 1993); *Legal Aid Soc'y v. City of N.Y.*, 114 F. Supp. 2d 204, 227 (S.D.N.Y. 2000); *Brammer v. KB Home Lone Star*, 114 S.W.3d 101, 110 (Tex. App.–Austin 2003); *see also Perricone v. Perricone*, 972 A.2d 666, 682 (Conn. 2009), and courts "must indulge every reasonable presumption against waiver," *Intermor v. Inc. Vill. of Malverne*, No. 03CV5164(JFB)(AKT), 2007 WL 2288065, at *8 (E.D.N.Y. Aug. 8, 2007) (citation omitted).

Consequently, for a contract to be deemed a waiver of First Amendment rights, the proponent of waiver must show that waiver was explicit on the face of the contract. *Rodgers v. U.S. Steel Corp.*, 536 F.2d 1001, 1007 (3d Cir. 1976); *Legal Aid*

Soc'y, 114 F. Supp. 2d at 227. When the language is merely vague or ambiguous, no waiver should be found. *Ruzicka v. Conde Nast Publications*, 733 F. Supp. 1289, 1298 (D. Minn. 1990), *aff'd on other grounds*, 939 F.2d 578 (8th Cir. 1991). Purported waivers of constitutionally significant rights must be narrowly construed. *U.S. Dept. of Energy v. Ohio*, 503 U.S. 607, 626–27 (1992); *U.S. v. Chavez-Salais*, 337 F.3d 1170, 1172–73 (10th Cir. 2003); *U.S. v. Ready*, 82 F.3d 551, 556 (2d Cir. 1996); *Natl. Polymer Products*, 641 F.2d at 424 (6th Cir. 1981); *Legal Aid Society*, 114 F. Supp. 2d at 227.

Here, at best, any waiver of free speech rights is ambiguous. On its face, Section 4.9 of the contract only limits the circumstances in which the Clipper Mill Association may speak and in which others subject to the Declaration may speak on behalf of the Clipper Mill Association.[3] Nothing in the contract suggests that homeowners are giving up their right to express their own opinions, on their own

[3] "4.9 Litigation. Anything in this Community Declaration or the other Clipper Mill Documents to the contrary notwithstanding, **neither the Clipper Mill Association, nor any Person acting or purporting to act on its behalf shall** (a) file any (I) civil, criminal or administrative proceeding in or with any court or administrative body or officer, or (ii) appeal of or objection to any decision or other action made or taken by any court, administrative body or officer, in any judicial or administrative proceeding, or (b) testify or submit evidence, . . . or otherwise take a formal position on any issue under consideration, in any such proceeding or appeal, in all cases until the action is approved in writing by, or by the Votes of Voters holding at least 75 percent of the Total Qualified Votes held by all Voting Members." E.18, ¶37 (Emphasis added).

account or through their own homeowner associations, about ways in which proposed development activities would be harmful to the public at large or to the homeowners in particular. Nor is there any allegation in the complaint that the homeowners were told that they were waiving their own First Amendment rights to express their views about the further development of the community in which they were buying their homes. Accordingly, the circuit court properly held that plaintiff-appellant did not show a waiver of free speech rights, and did not state a valid claim for breach of contract.

III. THE CIRCUIT COURT PROPERLY HELD ON A MOTION TO DISMISS THAT THE LAWSUIT WAS BROUGHT IN BAD FAITH AND WAS SUBJECT TO THE ANTI-SLAPP STATUTE.

The circuit court held that this action was brought in bad faith, and held that it could properly address the issue of bad faith even though the issue arose on a motion to dismiss. It also held that defendants' speech was addressed to an issue of public concern, and accordingly held that the case was subject to dismissal under Maryland's Anti-SLAPP law. VS contests these holdings on appeal, but the circuit court was unquestionably correct.[4]

First, the circuit court properly held that defendants' speech before the

[4] The parties and the court below assumed that "bad faith" means subjective bad faith. The Court should reserve the question whether a finding of objective bad faith would suffice.

Planning Commission, to the public about the issues pending at the Planning Commission, and their ensuing litigation on those issues, was addressed to matters of public concern and hence were under the protection of the anti-SLAPP law. In a variety of contexts, courts in other states have held that zoning matters raise issues of public concern. *Fabiano v. Hopkins*, 352 F.3d 447, 454–55 (1st Cir. 2003); *Bryant Woods Inn, Inc. v. Howard County, Md.*, 911 F. Supp. 918, 928 (D. Md. 1996), *aff'd*, 124 F.3d 597 (4th Cir. 1997) ("We can conceive of few matters of public concern more substantial than zoning and land use laws."). And courts have held that speech and litigation addressed to zoning and other land use issues are subject to state anti-SLAPP laws. *See Rosenaur v. Scherer*, 105 Cal. Rptr. 2d 674 (Cal. App. 3d Dist. 2001); *DePiero v. Burke*, 873 N.E.2d 260, 262 (Mass. App. 2007); *Levy v. City of Santa Monica*, 8 Cal. Rptr. 3d 507, 513 (Cal. App. 2d Dist. 2004); *Hoffman v. Davenport-Metcalf*, 851 A.2d 1083, 1092 (R.I. 2004), citing *Cove Road Development v. Western Cranston Industrial Park Associates*, 674 A.2d 1234, 1239 (R.I.1996); *Browns Mill Dev. Co. v. Denton*, 543 S.E.2d 65, 68 (Ga. App. 2000), *aff'd on other grounds*, 561 S.E.2d 431 (Ga. 2002).

Moreover, regardless of whether VS is correct that some of the individual defendants were motivated to speak in the hope of achieving a compromise involving the provision of additional parking spaces, that motivation would not make the speech

any less addressed to a matter of public concern. People are often motivated to speak on issues of public concern because their personal interests are at stake. Members of the Izaak Walton League may address a conservation issue about a specific lake or forest because they personally fish or hunt there; farmers may express concern about industrial pollution because they are worried about effects on their crops; city dwellers may speak out on issues of police reform because they are afraid about how they and their children may be treated when walking down the street, or, conversely, because they want their neighborhoods to receive more intense police protection. None of these private motivations would prevent speech addressed to these issues from being treated as issues of public concern. *See*, *e.g.*, *Reuland v. Hynes*, 460 F.3d 409, 417 (2d Cir. 2006); *Fabiano*, 352 F.3d at 454-55; *Tompkins v. Vickers*, 26 F.3d 603, 606 (5th Cir. 1994).

Second, the circuit court properly held that this action was brought in bad faith. VS objects that bad faith is an intensely fact-bound issue that can never be addressed at the motion to dismiss stage, but the circuit court properly rejected that argument. As circuit court reasoned, by adopting a statute that provides for the early dismissal of abusive litigation addressed to speech on issues of concern but made that dismissal subject to a finding of bad faith, the legislature must have intended to allow trial courts to make decisions about bad faith in the course of deciding motions to dismiss.

Although bad faith is difficult to establish at the pleading stage of a lawsuit, the standard is not an impossible one. In enacting the anti-SLAPP law, the State legislature plainly expected that it could be used successfully to protect Maryland defendants against abusive lawsuits addressed to their exercise of First Amendment rights. This is such a lawsuit.

As the circuit court held, there were several circumstantial bases for finding that this case was brought in bad faith—including the pleading of a demand for $50,000,000 in punitive damages, an amount more than three hundred times the amount of actual damages pleaded. Considering the constitutional due process limits on punitive damages awards, *see State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003), and in light of the offer from plaintiff's counsel at oral argument to drop the specific amount of punitive damages in an effort to preserve his clients' lawsuit, E.566, the circuit court properly treated the pleading of grossly excessive punitive damages as a strong indicator of bad faith.

The bad faith finding is also supported by the facts that this lawsuit was brought only five days after VS suffered a serious setback in the litigation over defendants' objections to the Planning Commission, as well as by plaintiff's highly intrusive discovery requests demanding, for example, the banking records of the individual defendants going five years back from the date of the litigation, along with

a demand for electronic information preservation that was more suited to major litigation between big companies than a suit over alleged contract breach by several homeowners.

Although not addressed by the court below in its bad faith analysis, the suit's utter lack of merit also supports the bad faith finding. Other courts have held that lack of merit alone can be sufficient to find bad faith. *In re 60 E. 80th St. Equities*, 218 F.3d 109, 116 (2d Cir. 2000); *McKnight v. Super. Ct.*, 215 Cal. Rptr. 909, 912 (Cal. App. 2d Dist. 1985); *Coyne-Delany Co. v. Capital Dev. Bd. of State of Ill.*, 717 F.2d 385, 390 (7th Cir. 1983).

Here, plaintiff's claims all turned on a contract clause which, on its face, barred only the issuance of statements or taking of actions that purported to be on behalf of the Clipper Mill Association. But the complaint never alleged that the individual or organizations defendants had improperly held themselves out as speaking for the Clipper Mill Association. On appeal, VS now contends that defendants "purported to act on behalf of the Clipper Mill Association," Appellant Brief at 9, 27, and faults the trial court for improperly rejecting that contention. However, the complaint took precisely the opposite tack: It never alleged that defendants had purported to act on behalf of the Clipper Mill Association, but rather that Section 4.9 forbade the defendants from speaking in their individual capacity, and allowed them to speak

about matters affecting the Clipper Mill community only if they did so through the Clipper Mill Association. E.10, 15-19, ¶¶5, 34-39. Indeed, the prayer for relief in Count III, for declaratory relief, clearly spelled out VS's theory of the case, that the contract barred both the organizational and individual defendants from expressing any views adverse to its development plans "except through the Clipper Mill Association," E.38-39, ¶¶ g, G, I.[5] That claim was utterly lacking in merit; combined with the rule that waivers of free speech rights must be narrowly construed, and with the unlawful character of nondisparagement clauses in consumer contracts, the lawsuit here was so lacking in merit that dismissal on bad faith grounds was warranted.[6]

CONCLUSION

[5] A single conclusory sentence in each of its two opposition briefs below asserted that the complaint included "a plausible claim that Defendants acted or purported to act on behalf of the Clipper Mill Association in violation of section 4.9." E.158, 444. However, VS below did not identify any specific paragraph of its complaint that supposedly set forth such an allegation. Its brief in this Court points generally to pages 20 to 26 or 13 to 26 of the Record Extract, Br. 9, 27, without citing any specific paragraph of the Complaint as supporting this characterization. In fact, the complaint contains no such allegation.

[6] VS has argued that its complaint adequately pleaded constitutional malice, Brief at 31-32. but its complaint alleges only common law malice—evil intent—and not knowledge or reckless disregard of probably falsity, which is required for constitutional malice. *Batson v. Shiflett*, 325 Md. 684, 602 A.2d 1191, 1215 (Md. 1992).

The decision dismissing the complaint pursuant to Maryland's anti-SLAPP law should be affirmed.

Respectfully submitted,

/s/ Paul Alan Levy
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May 14, 2021

Certification of Word Count and Compliance with Rule 8-112

1. This brief contains 3,759 words, excluding the parts of the brief exempted from the word count by Rule 8-503.

2. This brief complies with the font, spacing, and type size requirements stated in Rule 8-112.

/s/ Paul Alan Levy

CERTIFICATE OF SERVICE

I hereby certify that on this date, this proposed amicus brief is being e-filed, and that no later than the next business day, two copies of the brief will be mailed to counsel for appellant and appellees by first-class mail, potage prepaid:

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