

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 0870

September Term, 2015

RJD FAMILY TRUST

v.

PEGASUS HOME CORP., ET AL.

Woodward,
Kehoe,
Zarnoch, Robert A.
(Retired, Specially Assigned),

JJ.

Opinion by Zarnoch, J.

Filed: July 7, 2016

* 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.

Following the foreclosure in 2010 of a rental property owned by appellant, RJD Family Trust, an agent of RJD found that the property had been “guttled,” with all fixtures and pipes removed from the home. The foreclosure purchaser, appellee Pegasus Home Corp., ultimately did not pay the purchase price, and the foreclosure action was dismissed in 2011. In 2013, RJD brought suit against Pegasus, among others, alleging trespass and conversion of the fixtures on the property.¹ After a hearing, the Circuit Court for Anne Arundel County entered judgment in favor of Pegasus on all counts. RJD appealed on July 3, 2015, and now presents two issues for our review:

1. “Whether the circuit court erred in excluding evidence of the Appellee’s other real estate transactions which involved prematurely entering and renovating foreclosure properties.”
2. “Whether the circuit court erred as a matter of law in ruling that the Appellee could access the Property prior to ratification of the foreclosure sale.”

For the following reasons, we affirm the judgment of the circuit court.

¹ RJD filed a complaint against Pegasus, David Simard, an officer of Pegasus, Linda Wedeen, a member of Pegasus, Chase Home Finance LLC, and Friedman & MacFadyen, P.A., alleging conversion, trespass, civil conspiracy, intentional interference with prospective advantage, and respondeat superior. The latter two defendants were not served. On April 30, 2015, summary judgment was entered in favor of Linda Wedeen on all counts, and in favor of the remaining two defendants, Pegasus and Simard on civil conspiracy. Prior to trial, the court dismissed the counts against Chase Home Finance LLC and Friedman & MacFadyen, P.A. for intentional interference with prospective advantage and respondeat superior because of RJD’s failure to serve these defendants. RJD does not contest the correctness of these rulings.

BACKGROUND

RJD was deeded the property at issue in this case in 2002, and subsequently operated the Annapolis home as a rental property. Sometime before September 30, 2010, RJD defaulted on its debt obligations, and Chase Home Finance foreclosed on the property. On September 30, 2010, Pegasus purchased the property at a foreclosure sale, and petitioned the circuit court for possession of the property; however, no writ of possession was issued. Pegasus did not pay the purchase price, and the foreclosure action was dismissed in 2011.

In the fall of 2010, an unknown person entered the property and removed many of its fixtures, including cabinets and copper plumbing. An employee of RJD discovered the damage after an inspection on December 12, 2010. On December 12, 2013, RJD filed a complaint against Pegasus, alleging, among other things, trespass and conversion.

At trial², held on May 13, 2015, Loren John Williams, the trustee of RJD, testified for RJD that a tenant was in possession of the property at the time of the foreclosure and that the tenant had stopped paying rent in late November or early December of 2010.³ Abbey Williams, the wife of Mr. Williams, testified that she had visited the property sometime between December 2010 and March 2011, and personally saw that the property

² Prior to the start of trial, the court granted Pegasus's motion to preclude testimony on evidence of damages resulting from lost rents because RJD had previously stated that no such evidence existed.

³ Williams was incarcerated from 2004 through the date of trial for unrelated criminal conduct.

had been ransacked. Glenn Archibald, a home repair and renovation contractor, testified as an expert witness as to reasonableness of the costs to repair residential property. He stated that repairs to the home would cost approximately \$16,000.

David Simard, an officer of Pegasus, testified that Pegasus’s only direct contact with the property was after the foreclosure sale, when he directed a contractor to check on the property. He stated that “If [the contractor] found a door ajar or a window open . . . he would have gone in and secured the property.” RJD introduced Simon’s testimony from a 2014 deposition, in which he stated, “there was a complaint for response by one of the contractors saying that the property was vandalized and the locks should be changed and secured.” Simard also testified that he allowed a termite contractor to enter the property for pest control, but that the termite contractor was not working under his direction.

RJD asked Simard, “in your normal practice for other properties, just generically, do you ever make a habit of entering the property before the sale is ratified?” Simard responded, “If the property is vacant and . . . if it's not secured we will definitely enter the property . . . [t]o secure the property and . . . make any necessary repairs that are necessary for the safe keeping of it.”

When asked if Pegasus had entered a different property prior to ratification of the sale to begin renovations, Simard replied “I don't recall, but we could have. And we could have actually made improvements or whatever repairs in that property prior to ratification. That is a good possibility, if that’s . . . where you're leading to. I’ll freely

admit that.”⁴ RJD then asked “How often would you do something of that nature?” However, Pegasus objected to the question, arguing that Pegasus’s usual conduct was not relevant. In sustaining Pegasus’s objection, the court stated, “there was a recent . . . case that said that 5-404(b) is only applicable in the context of a (indiscernible.) . . . [and] you could not introduce [evidence of other crimes, wrongs, or acts including delinquent acts] to prove motive, intent, common scheme or whatever in a non-criminal case.” Simard denied that Pegasus had done any renovation work on the property at issue in this case.

At the conclusion of the RJD’s case, Pegasus moved for judgment on the remaining counts—trespass and conversion. With respect to trespass count, the court stated:

I’m going to grant the motion as to the trespass. I don’t believe you’ve proven that they had a trespass on the property given what’s been proven, which is that a [termite] exterminator . . . was permitted. The -- the only thing that he admitted on the stand was that he permitted a termite person to go on the property to check it out and secure it.

With respect to conversion count, the court stated:

Well, it’s your burden of proof to show that this defendant did these acts. What – how have you proved that? Because your client was not – was incarcerated at the time that the acts alleged occurred. His wife came in and testified as to the photographs that she didn’t take, but she said they looked like what she saw. . . . But she was very unclear as to whether she went in before or after the sale. . . . She just said the fall. . . . Well, someone could come in and steal everything, couldn’t they? Vandals do . . . a lot of

⁴ RJD sought to impeach Simard with records from Redfin, a real estate information service, to prove that it was Pegasus’s customary practice to buy properties at foreclosure sales and renovate them before the sales were ratified. However, because Simard testified that, in some circumstances, Pegasus did make improvements to properties prior to ratification, RJD was not able to use the Redfin document.

damage. ... I don't think you have met your burden of proof and I'm going to grant his motion as to conversion as well.

The court entered judgment for Pegasus on May 15, 2015.⁵ RJD filed a motion for new trial on May 26, 2015.⁶ Pegasus filed an opposition, and the court denied the motion on June 4, 2015. RJD filed this appeal on July 3, 2015.

DISCUSSION

RJD argues that the court erred in excluding evidence that Pegasus regularly entered the properties it purchased at foreclosure sales and made renovations to those properties before the sales were ratified. Specifically, RJD argues that the court erroneously concluded that one could not introduce character evidence “to prove motive, intent, common scheme or whatever in a non-criminal case.” Pegasus argues that the evidence was irrelevant, and that, even if admitted, it alone would not have permitted RJD to prove the elements of its conversion claim.

This court articulated the standard for appellate review of a trial court's evidentiary decisions in *Angelakis v. Teimourian*:

First, Maryland Rule 5-103(a) provides that “[e]rror may not be predicated upon a ruling that admits or excludes evidence unless the party is prejudiced by the ruling.” Second, “[T]he admission or exclusion of evidence is a function of the trial court which, on appeal, is traditionally viewed with great latitude.” And third, “[A]n appellate court will only

⁵ Pegasus's counterclaim questioning the validity of the trust was dismissed as moot in light of the judgment against RJD.

⁶ Pegasus has not raised the issue of the timeliness of RJD's appeal.

reverse upon finding that the trial judge's determination was both manifestly wrong and substantially injurious.’”

150 Md. App. 507, 525 (2003) (Internal citations omitted).

RJD is correct in arguing that character evidence *can be* admitted in a civil case to prove motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident. *See Ruffin Hotel Corp. of Maryland v. Gasper*, 418 Md. 594, 625 (2011). Such evidence is admissible, subject to the relevancy requirements of Maryland Rule 5-401, and the balancing requirements of Rule 5-403, i.e. whether the evidence’s probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. *Id.*

In this case, the evidence RJD sought to present was not categorically barred by Rule 5-404—it could have been relevant to show a motive or plan, and the court could have allowed or rejected the evidence after an analysis under Rule 5-403. Nevertheless, we conclude that the circuit court’s failure to allow the evidence was harmless error, because the substance of the evidence was admitted by Simard on direct examination. *See Angelakis*, 150 Md. App. at 525 (finding erroneous exclusion of evidence harmless where substance of evidence was admitted by witness).

Simard stated that Pegasus occasionally entered property before ratification to secure the property and make repairs and renovations. When asked about a particular property on O’Keefe Drive, Simard stated, “I don't recall, but we could have. And we could have actually made improvements or whatever repairs in that property prior to

ratification. That is a good possibility . . . I’ll freely admit that.” RJD was not prejudiced by the failure to admit the testimony at issue—any error the court made in excluding testimony was harmless in light of the other information admitted at trial. *See* Md. Rule 5-103(a).

RJD also contends that the court erred in concluding that Pegasus’s use of self-help to secure the property did not constitute trespass. Pegasus responds that a foreclosure purchaser is allowed to take reasonable measures to secure the property and prevent waste prior to obtaining a writ of possession from the court.

RJD directs us to no decision, nor can we find one, where a foreclosure purchaser was found to have trespassed by securing the property prior to ratification of the sale. The Court of Appeals has consistently acknowledged the right of a purchaser to enter the property prior to obtaining a writ of possession “to prevent waste, secure the property, or make legally and imminently required improvements or repairs.” *Legacy Funding LLC v. Cohn*, 396 Md. 511, 516-17 n.3 (2007); *see Nickens v. Mount Vernon Realty Group, LLC*, 429 Md. 53, 70-76 (2012) (reaffirming the right of a foreclosure purchaser to use reasonable self-help to secure the property). Here, the circuit court found that “[t]he . . . only thing that [Simard] admitted on the stand was that he permitted a termite person to go on the property to check it out and secure it.” Because these reasonable self-help

measures do not constitute trespass, the court did not err in finding that no trespass occurred.

**JUDGMENT OF THE CIRCUIT
COURT FOR ANNE ARUNDEL
COUNTY AFFIRMED. COSTS TO BE
PAID BY THE APPELLANT.**