Circuit Court for Montgomery County
Case No. 482887V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 788

September Term, 2021

JAN BOYER
v.

EXTRA SPACE MANAGEMENT, INC.

Beachley,
Shaw,
Zic,

JJ.

Opinion by Beachley, J.

Filed: November 16, 2022

*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.

Appellant Jan Boyer filed a complaint against Extra Space Management, Inc. ("ESM"), appellee,[1] in the Circuit Court for Montgomery County claiming that ESM breached their contract by failing to provide reasonable notice to Boyer before auctioning the contents of his storage unit. ESM moved for summary judgment, asserting that there were no material facts in dispute and that it provided reasonable notice to Boyer as a matter of law. The circuit court granted ESM's motion for summary judgment. Boyer timely appealed and presents three questions,[2] which we have consolidated to a single question: Did the circuit court err in granting summary judgment?

We conclude that, although the circuit court properly determined that ESM gave Boyer "reasonable notice" as contemplated by the contract, the court erred in granting summary judgment because there is a genuine dispute of material fact concerning ESM's representations of forbearance as a result of the COVID-19 pandemic.

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[1] Boyer also sued Layth Zaker, the individual who bought the contents of his storage unit, for breach of contract. Zaker is not a party to this appeal.

[2] Boyer presented the following questions for our review:

1. Did the [c]ircuit [c]ourt err in determining that there were no material facts in dispute?

2. Did the [c]ircuit [c]ourt err in determining that ESM's actions constituted reasonable notice?

3. Did the [c]ircuit [c]ourt abuse its discretion in denying Appellant's Motion to Alter or Amend and/or for New Trial?

FACTS AND PROCEEDINGS

The facts and reasonable inferences in the summary judgment record, viewed in a light most favorable to appellant, show the following. On June 10, 2017, Boyer entered into a rental agreement with ESM for a storage unit. Paragraph 20 of the contract provides, in relevant part,

> CUSTOMER ACKNOWLEDGES AND AGREES THAT CUSTOMER'S PERSONAL PROPERTY STORED AT THE FACILITY WILL BE SUBJECT TO A CLAIM OF LIEN IN FAVOR OF OPERATOR FROM THE DATE THE MONTHLY RENTAL CHARGE AND OTHER CHARGES ARE DUE AND UNPAID, AND FOR EXPENSES REASONABLY INCURRED IN THE SALE OR DISPOSITION OF CUSTOMER'S STORED PERSONAL PROPERTY. OPERATOR MAY SELL CUSTOMER'S PERSONAL PROPERTY IN A COMMERCIALLY REASONABLE MANNER **AFTER GIVING CUSTOMER REASONABLE NOTICE**, IN ORDER TO SATISFY SUCH LIEN. CUSTOMER AGREES THAT ANY SPACE ADVERTISED AND SOLD USING AN ONLINE AUCTION PROVIDER IS DEEMED TO BE SOLD IN A COMMERCIALLY REASONABLE MANNER.
>
> A sale of Customer's personal property stored in the Space to satisfy the lien if Customer is in default may be advertised (i) in a newspaper of general circulation in the jurisdiction where the sale is to be held, (ii) by electronic mail, or (iii) on an online website (including but not limited to the website referenced in Section 22 below).

(Emphasis added). Boyer failed to make the required monthly rental payments for March, April, and May of 2020. After each missed payment, ESM called Boyer and left a voice message for Boyer to call about the status of the account. Specifically, on March 16, 2020, ESM called Boyer because the "easy payment" had been declined. Apparently in response to that call, on April 3, 2020, Boyer specifically advised ESM not to use his credit card "ending in #3934" to pay his account. ESM proceeded to make additional calls to Boyer

with attendant voice messages on April 29, May 8, May 22, June 1, and June 6, 2020. Although ESM acknowledges that the voice messages did not specifically refer to Boyer's delinquency or possible auction, Boyer's counsel conceded at argument on the summary judgment motion that Boyer "did not return the phone calls."

On May 22, 2020, ESM sent a "Notice of Lien and Foreclosure" letter to Boyer at the address Boyer provided in the contract. The Notice of Lien and Foreclosure letter specifically advised Boyer that, if the rent was not paid in 15 days, the stored property would be sold at public auction. This letter was returned to ESM as "undeliverable." On June 10, 2020, ESM published a notice in the Washington Times newspaper that stated the time, place, date, and location of the foreclosure sale. On June 13, 2020, ESM sold the contents of Boyer's storage unit at auction.

ESM did not dispute that it sent an email to Boyer concerning ESM's "Storage Response to Covid-19 (Coronavirus)." The email purports to have been sent on April 2, 2020. Relevant here, ESM's email stated:

> **LENIENCY WITH PAYMENTS**
>
> We will be delaying any auctions and are encouraging stores to be lenient on fees during this time. We will strive to live our company values and do the right thing by our customers.

Additionally, ESM did not dispute the issuance of a "Press Release" dated May 6, 2020, from Extra Space Storage, Inc. that stated, under the heading "COVID-19 Update," that: "The Company also elected to postpone all auctions and rate increases to existing customers beginning in mid-March."

On July 22, 2020, Boyer filed a complaint in the Circuit Court for Montgomery County, claiming that ESM breached its contract with Boyer by failing to provide reasonable notice before selling the contents of his storage unit. ESM ultimately moved for summary judgment. After a hearing, the court granted summary judgment in favor of ESM, concluding that there were no material facts in dispute and that, as a matter of law, Boyer received "reasonable notice" as required by the contract. The court reasoned:

> I haven't heard any dispute as to the facts that there's a contractual relationship between [] Boyer and [ESM]. [] Boyer was unable or did not pay his storage fee . . . [ESM] called and left him six messages. No evidence that he returned the calls, and granted, the evidence does indicate that [ESM] didn't go into any great detail in the message, but [] Boyer did not return the messages. . . . [Boyer was] aware that he hasn't paid the monthly fee on the storage unit for a number of months, pursuant to the contract. [ESM] is entitled to, they may sell the contents of his storage unit, per the contract. There's a valid contract in place. . . .
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> [ESM] publicized the sale in the, I believe the Washington Times, so the auction was publicized. A written notice was sent to [] Boyer, and was returned to [ESM], a couple of days, a few days before the auction. [ESM] went forward with the auction, sold the contents of the storage unit.
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> So, those seem to be the material facts in this case. Boyer has not identified any dispute as to any material facts in the case.

After the court denied his Motion to Alter or Amend Order and/or for a New Trial, Boyer timely noted this appeal.

DISCUSSION

I. THE COURT PROPERLY FOUND THAT ESM GAVE BOYER "REASONABLE NOTICE"

The standard of review for the trial court's grant of a motion for summary judgment is *de novo*. *Dashiell v. Meeks*, 396 Md. 149, 163 (2006) (citing *Rockwood Cas. Ins. Co. v.*

Uninsured Emps.' Fund, 385 Md. 99, 106 (2005)). Maryland Rule 2-501 states

> The court shall enter judgment in favor of or against the moving party if the motion [for summary judgment] 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). In our review, we construe the facts and any reasonable inferences that may be drawn from them in the light most favorable to the non-moving party. *Todd v. MTA*, 373 Md. 149, 155 (2003) (citing *Okwa v. Harper*, 360 Md. 161, 178 (2000)). "Because the decision to grant summary judgment is purely legal, we review it *de novo*, determining for ourselves whether the record on summary judgment presented a genuine dispute of material fact, and if not, whether the moving party was entitled to summary judgment as a matter of law." *Dett v. State*, 161 Md. App. 429, 441 (2005).

In this case, we must determine whether, based on the undisputed facts, the circuit court was correct in concluding, as a matter of law, that Boyer received "reasonable notice" as provided in Paragraph 20 of the contract.

Under the objective theory of contracts,

> [A court is to] determine from the language of the agreement itself what a reasonable person in the position of the parties would have meant at the time it was effectuated. In addition, when the language of the contract is plain and unambiguous there is no room for construction, and a court must presume that the parties meant what they expressed. In these circumstances, the true test of what is meant is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant. Consequently, the clear and unambiguous language of an agreement will not give away to what the parties thought that the agreement meant or intended it to mean.

Kaye v. Wilson-Gaskins, 227 Md. App. 660, 678 (2016) (alteration in original) (citing *Spacesaver Sys., Inc. v. Adam*, 440 Md. 1, 8 (2014)). Further, "[a]s a bedrock principle of contract interpretation, Maryland courts consistently 'strive to interpret contracts in accordance with common sense.'" *Credible Behav. Health, Inc. v. Johnson*, 466 Md. 380, 397 (2019) (quoting *Brethren Mut. Ins. Co. v. Buckley*, 437 Md. 332, 348 (2014)).

Our task, then, is to objectively determine what it means to give the customer "reasonable notice" as expressly provided in Paragraph 20 of the contract. More specifically, we must determine whether the undisputed facts here establish that ESM gave Boyer reasonable notice prior to sale.

Although the contract does not define "reasonable notice," under the header "NOTICE" on the last page of the contract, Paragraph 30 provides in relevant part:

> Except as otherwise required by law, or as otherwise provided for in this Agreement, written notices or demands may be personally served by electronic mail to the electronic mail address provided by Customer in this Agreement (or updated electronic e-mail address per separate notification as applicable) **or by pre-paid first class U.S. Mail to the last known address of the party to be served, as contained in this Agreement.** Such notice or demand shall be complete at [sic] on the date sent to Customer's email address listed on this Agreement (or updated e-mail address per separate notification as applicable), if personally delivered (including e-mail), **or on the date of pre-paid, properly addressed deposit with the U.S. Postal Service.**

(Emphasis added). ESM sent the "Notice of Lien and Foreclosure" to Boyer by first class mail to "4 [W]yoming [C]t., [B]ethesda, MD 20816," the address assigned to Boyer in the contract. We also note that Paragraph 29 states:

> Customer shall notify Operator of any change in Customer's address or phone number within ten (10) days of the change. Such notifications shall

> be (a) by certified mail, return receipt requested, postage prepaid, (b) delivered in person at the Facility's rental office (c) sent from customer via electronic mail so long as the change of address request originates from the e-mail address Operator has on file for Customer, including the e-mail address provided in this Agreement if applicable, or (d) made at www.extraspace.com via online account management. Failure by Customer to notify Operator shall constitute a waiver by Customer of any defense based on failure to receive any notice.

There is no evidence that Boyer ever notified ESM of any change of address during the contract term. Thus, ESM properly sent the "Notice of Lien and Foreclosure" letter to Boyer's last known address.[3] In our view, the notice provisions in Paragraphs 29 and 30 of the contract implicitly, if not explicitly, delineate what is meant by the term "reasonable notice" in Paragraph 20 of the contract.

Maryland caselaw further informs our interpretation of the term "reasonable notice." In *Kiley v. First Nat'l Bank of Md.*, 102 Md. App. 317 (1994), the appellants argued that they were injured when the bank closed their account. After noting that "[t]he law is well settled that a bank must give reasonable notice to a customer of its intent to terminate a bank account," the Court held that "[t]his means that a bank must give enough notice to allow a customer to protect his or her credit by making other banking arrangements." *Id.* at 330; *cf. Griffin v. Bierman*, 403 Md. 186, 198 (2008) (stating that notice is generally sufficient where a party sends notice to the address provided by the other party). The *Kiley*

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[3] We note that when Boyer filed his complaint in the circuit court on July 22, 2020—the month after sale of his property—he provided a Washington, D.C. address to the court. At oral argument, Boyer's counsel conceded that Boyer did not provide ESM with his new address.

Court stated that it "need not reach the issue of whether the notice was legally insufficient" because any injury the appellants sustained was "self-inflicted." *Kiley*, 102 Md. App. at 331. The Court reasoned:

> The undisputed facts demonstrate that the Bank informed the Kileys on April 15, 1992 [in a letter] that they were to close their account by April 24, 1992. The Bank also advised appellants that, if they did not close their account by that date, the Bank would close it and mail a cashier's check to them for the remaining balance. The Bank expressly warned the Kileys not to write any more checks on the account. The Kileys never asked the Bank for additional time to make other banking arrangements, and wholly failed to make any effort to establish a new account elsewhere or to inform their employers to terminate direct deposit. At their peril, they ignored the Bank and refused by their actions to stop writing checks or to assume any responsibility to protect their own credit.

Id.

We find *Kiley* instructive. Similar to the bank's letter to the Kileys regarding termination of their bank account, ESM here sent a letter to Boyer at the address identified as Boyer's mailing address in the contract. That letter expressly notified Boyer that he was in default for failing to pay rent, and further advised that Boyer's property could be sold at auction. Moreover, as in *Kiley*, Boyer himself was inferentially aware of his default as Boyer advised ESM by email that his credit card was not to be used to pay rent on the storage unit. In fact, Boyer does not claim that he was not in default at the time of the auction. In addition, Boyer's counsel conceded at the motion hearing that Boyer did not return any of the calls in response to ESM's multiple voice messages. We also note that ESM published a notice in the Washington Times, a newspaper of general circulation, that stated the time, place, date, and location of the foreclosure sale. Thus, not only did ESM

provide more forms of notice to Boyer than the notice provided by the bank in *Kiley*, but, as in *Kiley*, Boyer was aware that he was in default. *See Griffin*, 403 Md. at 203 (that Griffin "knew that she had fallen behind in mortgage payments" affects whether reasonable notice was given). Under these circumstances, we have no difficulty concluding that Boyer received "reasonable notice" of the sale as contemplated by the contract.[4]

II. ESM'S REPRESENTATIONS CONCERNING ITS RESPONSE TO THE PANDEMIC GENERATED A DISPUTE OF A MATERIAL FACT RELATED TO PRINCIPLES OF WAIVER AND ESTOPPEL

Our conclusion that ESM gave reasonable notice to Boyer pursuant to the contract's terms does not end the inquiry. Boyer argues that ESM's statements regarding the COVID-19 pandemic led him to "believe that auctions were not occurring." ESM makes no substantive argument on this point in its brief.[5]

As previously noted, ESM sent Boyer an email on April 2, 2020, stating, "We will

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[4] Boyer asserts that ESM should have given him notice by email. Although the contract authorized such notice, that was but one form of notice allowed. Boyer has cited no authority, and we are aware of none, that would support his argument that email notice was required.

[5] In the trial court, ESM argued that its COVID-related statements did not alter the parties' contractual rights because the contract contains a non-waiver clause that states, "This Agreement contains the entire agreement of the parties and no representation or agreements, oral, or otherwise, between Operator and Customer not embodied herein shall be of any force or effect (except for written addenda agreed to between the parties)." Although ESM references this issue in a footnote in the "Statement of Facts" section of its brief, it makes no appellate argument on this point. Accordingly, we shall not consider this issue. *Impac Mortg. Holdings, Inc. v. Timm*, 245 Md. App. 84, 117 (2020). Even if the issue had been sufficiently argued, ESM would not prevail. *See Hovnanian Land Inv. Grp., LLC v. Annapolis Towne Ctr. at Parole, LLC*, 421 Md. 94, 114 (2011) (stating that non-waiver provisions "may be waived by implication as well as by express agreement").

be delaying any auctions and are encouraging stores to be lenient on fees during this time." On May 6, 2020, ESM also issued a "Press Release" that stated, "The Company also elected to postpone all auctions and rate increases to existing customers beginning in mid-March." The legal effect of these documents was argued by the parties at the motion hearing.

It is well established that the doctrines of estoppel and waiver may prevent a party from enforcing their contractual rights. *See Evelyn v. Raven Realty, Inc.*, 215 Md. 467, 472 (1958). "An equitable estoppel operates to prevent a party from asserting his rights under a general technical rule of law, when he has so conducted himself that it would be contrary to equity and good conscience for him to do so." *Wright v. Wagner*, 182 Md. 483, 492 (1943). "Waiver is the intentional relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right, and may result from an express agreement or be inferred from circumstances." *Hovnanian Land Inv. Grp., LLC*, 421 Md. at 122 (quoting *Food Fair Stores, Inc. v. Blumberg*, 234 Md. 521, 531 (1964)). Although estoppel and waiver are closely related and are often confused, they are distinguishable legal doctrines. *Evelyn*, 215 Md. at 471-72. Estoppel is voluntary conduct of one party that causes the other party to rely on that conduct and detrimentally change their position, while waiver is one party's voluntary surrender of a right. *Creveling v. Gov't Emps. Ins. Co.*, 376 Md. 72, 102 (2003); *Wright*, 182 Md. at 491.

We find the Court of Appeals' opinion in *Wright v. Wagner* instructive. There, the Wrights purchased a home by executing a purchase-money mortgage to Wagner. 182 Md.

at 485-86. Five years later, the Wrights entered into a contract to sell the home to Belsky. *Id.* at 486. Belsky executed a mortgage in favor of the Wrights that was subordinate to the Wright-Wagner mortgage. *Id.* The evidence showed that Belsky agreed to assume payment of the Wright-Wagner mortgage. *Id.* For eleven years, Belsky made all payments on the Wright-Wagner mortgage, and during that period Wagner granted Belsky extensions on the mortgage, and "nothing was said to the Wrights, directly or indirectly," about the status of the mortgage. *Id.* at 488, 492. After Belsky failed to pay, Wagner filed suit against the Wrights for the balance due on the original purchase-money mortgage. *Id.* at 485. The Wrights defended on the basis that Wagner had accepted Belsky as an original mortgagor, and had not communicated with them about the mortgage for eleven years. *Id.* In ruling in favor of the Wrights, the Court stated that the Wrights' failure to take steps to protect themselves from default "can, in fairness, be attributed only to Wagner's conduct and attitude in the matter." *Id.* at 492. The Court held that Wagner's actions "amounted to both a relinquishment of his right to proceed against [the Wrights] under the covenants of the original mortgage, thus constituting a waiver . . . and of equitable estoppel to assert that right." *Id.*

Estoppel and waiver are both questions of fact. *Creveling*, 376 Md. at 102; *Hovnanian Land Inv. Grp., LLC*, 421 Md. at 122. "Given the highly factual nature of [this] inquiry, it is an uncommon case in which the issue can be resolved by summary judgment." *Hovnanian Land Inv. Grp., LLC*, 421 Md. at 123.

Based on the limited record before us, there is "at least a permissible inference," when the evidence is viewed in the light most favorable to Boyer, that ESM's email and press release constituted a waiver of ESM's right to conduct auctions during April-June, 2020, or caused Boyer to reasonably rely on ESM's representations of forbearance so as to estop ESM from conducting auctions. *Id.* at 124-25. Therefore, because a genuine dispute of material fact exists concerning the effect of ESM's pandemic-related representations, the grant of summary judgment was improper.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY REVERSED. CASE REMANDED FOR FURTHER PROCEEDINGS. COSTS TO BE PAID BY APPELLEE.