Circuit Court for Prince George's County
Case No. CAE16-10213

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1323

September Term, 2017

NUZBACK KATHRYN A. REVOCABLE TRUST, *et al*.

v.

NAZARIO FAMILY, LLC

Graeff,
Berger,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: November 15, 2018

Appellee, Nazario Family, LLC ("Nazario"), filed a complaint in the Circuit Court for Prince George's County against appellants, Nuzback Kathryn A. Revocable Trust, Peter Nuzback, and Kathryn Nuzback (collectively referred to as "Nuzback"), seeking a decree to quiet title, under a claim of adverse possession, to a right-of-way. Nuzback filed a motion to dismiss and a motion for sanctions, which the circuit court denied. Thereafter, Nazario filed a motion for summary judgment. The circuit court granted Nazario's motion and Nuzback filed a motion for reconsideration, which the circuit court denied. On appeal, Nuzback raises three issues,[1] which we consolidate and rephrase as follows:

1. Whether the circuit court erred in awarding Nazario judgment as a matter of law on its quiet title claim.

2. Whether the circuit court abused its discretion in denying Nuzback's motion for reconsideration.

[1] The issues, as framed by Nuzback are as follows:

1. Whether the Court erred in granting summary judgment on a claim to quiet title to an allegedly abandoned right-of-way where Appellant objected to Appellee's standing to seek quiet title to land that evidence showed belonged to either the State of Maryland or Prince George's County?

2. Whether the Court erred in granting summary judgment on a claim for quiet title based on adverse possession where the record contained a dispute of material facts concerning the exclusivity and hostility elements, and the Court did not permit witness testimony in opposition?

3. Whether the Court erred in denying the Motion for Reconsideration without hearing where Appellants attached a sworn affidavit disputing the factual allegations?

For the reasons explained herein, we affirm.

FACTS AND PROCEEDINGS

On June 4, 2008, Nazario purchased land in the "Oak Crest" subdivision in Prince George's County from J. Patrick Edelmann. Prior to selling the property to Nazario, Mr. Edelmann operated the Bay 'n Surf restaurant, which was originally constructed in 1965. Nuzback owns property -- Nuzback's Bar -- directly south of Nazario's property. East of the two properties lies Magnolia Street, a road that runs solely through a residential neighborhood. The properties are separated by a 285 by 50-foot-wide right-of-way that approaches, but does not have vehicular access to Magnolia Street. Nuzback's Bar is improved by a 50-space parking lot that is in its rear. After zoning regulations prohibited use of the parking lot, Nuzback filed an application for a nonconforming use, and the Prince George's County Planning Board approved the continued use on July 2, 2015. In the application, Nuzback did not attest to any prior use of the right-of-way or otherwise request to use the right-of-way for overflow parking.

On February 5, 2015, Nazario filed a plat of subdivision with the County in an attempt to divide its lot into two, split north to south. In the plat, Nazario incorporated approximately half of the right-of-way in the southern lot. The County approved the plat of subdivision, and on June 25, 2015, Nazario transferred the northern lot to Adventist Healthcare Urgent Care Centers, Inc. Here, Nazario asserts that it has the right, via adverse possession, to the portion of the right-of-way that was not incorporated in the plat.

Nazario claims in its Verified Amended Complaint that, after investigating, it determined that in 1890, when the Oak Crest plat was originally subdivided, a public dedication of the right-of-way was proposed to Prince George's County. According to Nazario, Prince George's County never accepted the dedication and consequently, title in the right-of-way never vested in the County. Nazario alleges that Mr. Edelmann, the former owner, used and possessed the remaining, unclaimed portion of the right-of-way in an actual, hostile, open, notorious, exclusive, and continuous manner for more than 20 years, so that employees and customers could park and access the restaurant. Nazario further claims that it used the right-of-way in the same manner as Mr. Edelmann, thereby tacking Mr. Edelmann's claim to the right-of-way through adverse possession.

On March 29, 2016, Nazario filed a Complaint to Quiet Title against "All Parties Unknown" in the Circuit Court for Prince George's County. On November 22, 2016, Nazario filed a Verified Amended Complaint naming Nuzback Kathryn A. Revocable Trust, Peter Nuzback, and Kathryn Nuzback as defendants. Joseph Nazario, managing member of Nazario Family, LLC, attached a sworn affidavit to the Verified Amended Complaint. In the affidavit, Joseph Nazario stated that Mr. Edelmann used and possessed the Magnolia Street right-of-way in an adverse manner between 1978 and 2008 until the property was sold. Nuzback did not submit any affidavit or other verified pleading to rebut the claims set forth in the Verified Amended Complaint or affidavit.

On June 9, 2017, Nuzback filed a motion to dismiss the Verified Amended Complaint contending that the right-of-way was a public road and was therefore exempt

from adverse possession claims. In response, Nazario filed a motion for summary judgment arguing that it was entitled to judgment as a matter of law. Nazario maintained that Nuzback failed to submit any affidavit pursuant to Md. Rule 2-501(b) to refute the claim that Nazario acquired the right-of-way through adverse possession.

The Circuit Court for Prince George's County held a hearing on August 2, 2017 and granted Nazario's motion for summary judgment, ruling that Nuzback failed to present any evidence to dispute the claims. The court, therefore, determined that there was no genuine dispute of material fact and that Nazario was entitled to judgment as a matter of law. Thereafter, Nuzback filed a motion for reconsideration and attached a sworn affidavit from Brendon Nuzback. In the affidavit, Brendon Nuzback stated that Nuzback asserted dominion over the right-of-way "well over the last 21 years." On October 27, 2017, the circuit court denied the motion for reconsideration. This appeal followed.

STANDARD OF REVIEW

We first address the standard of review applicable to appeals from motions for summary judgment. Under the Maryland rules, a circuit court "shall enter judgment in favor of or against the moving party 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(f). The nonmoving party's written response must "(1) identify with particularity each material fact as to which it is contended that there is a genuine dispute and (2) as to each such fact, identify and attach the relevant portion of the specific document, discovery response, transcript of

testimony . . . , or other statement under oath that demonstrates the dispute." Md. Rule 2-501(b). Any "response asserting the existence of a material fact or controverting any fact contained in the record shall be supported by an affidavit or other written statement under oath." *Id.* "An affidavit supporting or opposing a motion for summary judgment shall be made upon personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit." Md. Rule 2-501(c).

"The purpose of the summary judgment procedure is not to try the case or to decide the factual disputes, but to decide whether there is an issue of fact, which is sufficiently material to be tried." *Jones v. Mid-Atl. Funding Co.*, 362 Md. 661, 675 (2001) (citations omitted). Thus, "[i]n reviewing the grant of a summary judgment motion, we are concerned with whether a dispute of material fact exists," *id.* (citations omitted), and our review is *de novo*. *MAMSI Life & Health Ins. Co. v. Callaway*, 375 Md. 261, 278 (2003) (citing *Green v. H & R Block, Inc.*, 355 Md. 488, 502 (1999)). In doing so, we review the same record and issues of law as the trial court and are "tasked with determining whether the trial court reached the correct result as a matter of law." *Id.* (citing *Tyma v. Montgomery Cnty.*, 369 Md. 497, 504 (2002); *Murphy v. Merzbacher*, 346 Md. 525, 530-31 (1997)). We view the evidence in the light most favorable to Nuzback as the nonmoving party. *Jones, supra*, 362 Md. at 676.

DISCUSSION

I.

Nuzback first asserts that the circuit court erred in awarding Nazario judgment as a matter of law on its quiet title claim. Nuzback takes two positions: (1) summary judgment was improper because either Prince George's County or the State owned the right-of-way; and (2) summary judgment was improper because Nuzback demonstrated a dispute of material fact.

We are not persuaded by Nuzback's attempt to frame this as an adverse possession claim against the government. While it is true that "adverse possession does not run against the State," *Cent. Collection Unit v. Atl. Container Line*, 277 Md. 626, 629 (1976) (citations omitted), Nazario raised sufficient evidence through its Verified Amended Complaint and exhibits that after an investigation, it determined that neither Maryland nor Prince George's County owned the right-of-way. Prince George's County approved Nazario's plat of subdivision that incorporated approximately half of the right-of-way. Had the County owned the right-of-way, it almost certainly would not have approved the subdivision. We also disagree with Nuzback's contention that Maryland owns the right-of-way, because

Magnolia Street is not a State highway or otherwise associated with a route number.[2] *See What is a County Road*, Prince George's County Md., https://www.princegeorgescountymd.gov/1006/What-is-a-County-Road ("State roads are identified by a route number and a name."). Nuzback failed to present any evidence to the contrary before the circuit court.[3]

Nuzback also contends that summary judgment was improper because Nazario was unable to prove, as a matter of law, that its use of the right-of-way satisfied the required elements of adverse possession. Mainly, Nuzback argues that it historically exercised ownership over the right-of-way, and therefore, Nazario could not have had exclusive control over the right-of-way. Nazario's Verified Amended Complaint and accompanying

[2] There is no evidence in this record that either the State or the County own the right-of-way. Accordingly, Nuzback's citation to the Court of Appeals' recent decision in *Estate of Zimmerman v. Blatter*, 458 Md. 698 (2018) is misplaced. In that case, the Court of Appeals retroactively applied Md. Code (1974, 2015 Repl. Vol.), § 14-108(b) of the Real Property Article ("RP") to hold that summary judgment was improper where the party claiming adverse possession failed to join the disputed property's record owner as a defendant. *Estate of Zimmerman v. Blatter*, *supra*, 458 Md. at 707. By contrast, in this case, there is no record owner of the right-of-way. Accordingly, there was no record owner for Nazario to name as a defendant.

[3] Nazario attached judicial admissions by Maryland and Prince George's County in its supplemental brief, in which both entities admitted having no ownership interest in the right-of-way. Supplemental Brief of Appellee at 3 (attaching Answer of Defendant-State of Maryland, ¶ 22, *Nuzback Kathryn A. Revocable Trust v. Prince George's Cnty., Md.*, No. CAE-18-11322 (Prince George's Cnty. Cir. Ct. June 29, 2018), *and* Answer of Defendant-Prince George's County, ¶ 1, *Nuzback Kathryn A. Revocable Trust v. Prince George's Cnty., Md.*, No. CAE-18-11322 (Prince George's Cnty. Cir. Ct. July 6, 2018)). These facts were not presented to the circuit court and, therefore, are not relevant to this appeal.

affidavit[4] of Joseph Nazario assert that Nazario adversely possessed the right-of-way, listing each element required to prove adverse possession. Nazario also produced Nuzback's nonconforming use application, which made no mention of prior use of the right-of-way. Instead of submitting an affidavit to rebut Nazario's evidence, Nuzback relied solely on its perfunctory denials in the Answer to the Verified Amended Complaint, and the proffers made in the pleadings and during the summary judgment hearing.

Nuzback failed to produce any admissible evidence in arguing against the motion for summary judgment. Indeed, it is well-settled that an "opponent cannot rely on formal denials or general allegations[,]" *Bond v. Nibco, Inc.*, 96 Md. App. 127, 135 (1993), and "[a] mere 'naked assertion that there is a dispute between the parties as to the facts of the matter' is insufficient 'to raise such issue and ineffectual to prevent a summary judgment.'" *Lerner v. Ammerman*, 56 Md. App. 134, 144 (1983) (quoting *Guerassio v. Am. Bankers Corp.*, 236 Md. 500, 503 (1964)).

In its response to Nazario's summary judgment motion, counsel for Nuzback stated that "[d]efendants intend to assert evidence at trial that [d]efendants have engaged in acts of adverse possession and do have a claim to the right-of-way." Our task on appeal is not to consider what Nuzback could have gathered after the hearing; instead, we must consider

[4] Nuzback also contends that summary judgment was improper because Joseph Nazario's sworn affidavit contains inadmissible hearsay. We refrain from addressing the admissibility of the affidavit since that issue was not before the circuit court during the summary judgment proceedings. *Brown v. Contemporary OB/GYN Assocs.*, 143 Md. App. 199, 248 (2002) ("[A] party who does not raise an issue at trial, and later pursues the point in a post-trial motion, is precluded from raising the substantive issue on appeal.").

the evidence in the record that was presented to the circuit court. Nuzback did not present a scintilla of admissible evidence to defeat Nazario's motion for summary judgment. *See Clark v. O'Malley*, 169 Md. App. 408, 424 (2006) (holding that there was no genuine dispute of material fact where the appellant "failed to support the alleged dispute with affidavits or other documentation."), *aff'd* 404 Md. 13 (2008). Nuzback was served with the Verified Amended Complaint on November 22, 2016. The hearing on Nazario's motion for summary judgment occurred on August 2, 2017. In that period -- just over eight months -- Nuzback could have undertaken various discovery methods or filed an affidavit pursuant to Md. Rule 2-501(b).

Md. Rule 2-501(b) expressly provides that "[a] response asserting the existence of a material fact or controverting any fact contained in the record *shall* be supported by an affidavit or other written statement under oath." Md. Rule 2-501(b) (emphasis added). We hold that the grant of summary judgment was proper because Nuzback did not introduce any affidavit or written statement under oath for the circuit court to consider in ruling on Nazario's motion. The circuit court, therefore, did not err in granting Nazario's motion for summary judgment.

Nuzback also takes the position that even if there were no disputes of material fact, the circuit court improperly granted Nazario relief that it did not specifically request. Nuzback's theory is that Nazario requested a declaration of absolute ownership over the right-of-way in its Verified Amended Complaint, but the circuit court instead granted the relief of quieting title against Nuzback. We disagree. Clearly, Nazario asked for both a

declaration of absolute ownership and the "granting [of] quiet title to the Remainder Property." The circuit court granted the latter, consistent with the relief Nazario requested.

II.

We next consider whether the circuit court erred in denying Nuzback's motion for reconsideration. We apply the abuse of discretion standard when reviewing a trial judge's denial of a motion for reconsideration. *Hossainkhail v. Gebrehiwot*, 143 Md. App. 716, 723-24 (2002). To be sure, a motion for reconsideration is discretionary in nature. *Wilson-X v. Dep't of Human Res.*, 403 Md. 667, 674-75 (2008). "Questions within the discretion of the trial court are 'much better decided by the trial judges than by appellate courts . . . .'" *Wilson v. John Crane, Inc.*, 385 Md. 185, 198 (2005) (citations omitted). There is an abuse of discretion when "the court acts without reference to any guiding rules or principles," or "the ruling under consideration is clearly against the logic and facts and inferences before the court." *Sindler v. Litman*, 166 Md. App. 90, 123 (2005) (citations omitted). To warrant a reversal, the judgment of the trial court must be "beyond the fringe of what the court deems minimally acceptable." *Id.* "[A] [p]ost-trial motion to reconsider is not a time machine in which to travel back to a recently concluded trial in order to try the case better with hindsight . . . . Losers do not enjoy carte blanche, through post-trial motions, to replay the game as a matter of right." *Steinhoff v. Sommerfelt*, 144 Md. App. 463, 484 (2002).

The burden upon the party moving for reconsideration is a heavy one, as the judge need not revisit the merits after she has already made a decision. *Id.* "Above and beyond arguing the intrinsic merits of an issue, [the moving party] must also make a strong case

for why a judge, having once decided the merits, should in his broad discretion deign to revisit them." *Id.* at 484-85.

Nuzback asserts that the circuit court abused its discretion on multiple grounds. First, Nuzback contends that the circuit court was obligated to hold a hearing before denying the motion for reconsideration. We disagree. Indeed, no Maryland rule requires a court to hold a hearing on a motion to reconsider. *Lowman v. Consol. Rail Corp.*, 68 Md. App. 64, 77 (1986) ("We hold, therefore, that [Md.] Rule 2-311(f) does not require the court to grant a request for a hearing on a motion to reconsider . . . ."). Nuzback's claim that the circuit court abused its discretion in refusing to allow witness testimony at the summary judgment hearing is also mistaken. To oppose summary judgment, a party must assert that a disputed fact exists, and evidence of the disputed fact "shall be supported by an *affidavit* or *other written statement under oath*." Md. Rule 2-501(b) (emphasis added). Although Nuzback wished to present testimony before the circuit court at the time of the hearing, Nuzback presents no authority permitting the circuit court to entertain testimony at summary judgment hearings.

We also reject Nuzback's contention that the circuit court abused its discretion in considering Joseph Nazario's affidavit even if it did contain inadmissible hearsay. Nuzback did not object to the affidavit at the hearing on Nazario's motion for summary judgment. Indeed, Nuzback's only objection to the contents of the affidavit was presented in Nuzback's motion for reconsideration. Critically, "the trial judge has boundless

discretion not to [consider] objections after the fact that could have been [made] earlier but were not." *Steinhoff*, *supra*, 144 Md. App. at 484.

Finally, Nuzback argues that the circuit court abused its discretion in denying the motion for reconsideration since the affidavit attached to the motion set forth the disputed facts. Nuzback asks us to consider our opinion in *Wormwood v. Batching Sys., Inc.*, 124 Md. App. 695, 700 (1999) for the proposition that "justice has not been done." Other than its passing reference to *Wormwood*,[5] Nuzback has presented us with no authority to support its theory that the circuit court "act[ed] beyond the letter or reason of the law." *Wilson-X*, *supra*, 403 Md. at 677 (quoting *Jenkins v. State*, 375 Md. 284, 296 (2003)). Nuzback used the motion for reconsideration to present new evidence that could have been presented before the summary judgment hearing. On this record, the circuit court did not abuse its discretion in denying the motion for reconsideration.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

[5] In *Wormwood*, the circuit court dismissed a petition seeking judicial review of an administrative agency's decision because the record was not timely transmitted to the circuit court. 124 Md. App. at 697. We reversed, holding that "a failure to transmit timely a record, in literal violation of [Md.] Rule 7-206(d), does not mandate dismissal of a petition for judicial review." *Id.* The issue was whether dismissal was mandatory when the appellant substantially complied with the Rule and the record was ultimately before the court in a timely manner. *Id.* In our view, *Wormwood* is clearly distinguishable from the posture of the extant appeal.