UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 317

SEPTEMBER TERM, 2015

ON MOTION FOR RECONSIDERATION

BARBARA DANSBY, *ex vir.*

v.

THE JACKSON INVESTMENT COMPANY, LLC

Eyler, Deborah S.,
Meredith,
Berger,
JJ.

Opinion by Eyler, Deborah S., J.

Filed: April 15, 2016

In the Circuit Court for Prince George's County, Barbara and Timothy Dansby, the appellants, brought suit against Jackson Investment Company, LLC ("Jackson"), the appellee, alleging a number of claims challenging the validity of a commercial lease (the "Lease") between the parties. Jackson brought a counterclaim for breach of the Lease and specific performance of a purchase agreement within the Lease. In a bench trial, the court granted Jackson's motion for judgment on the Dansbys' claims and ruled in favor of Jackson on its counterclaim. It entered a judgment for damages and attorneys' fees in favor of Jackson.

The Dansbys noted an appeal, presenting nine questions, which we have consolidated, reordered, and rephrased as follows:

I. Did the circuit court err in ruling that the Lease was not void?

II. Did the circuit court err in allowing Jackson to designate more than one corporate representative and in violating the rule on witnesses by doing so?

III. Did the circuit court err in several evidentiary rulings?

IV. Did the circuit court err by not allowing the Dansbys to use equitable estoppel as a defense?

V. Did the circuit court err by ordering specific performance?

VI. Did the circuit court err by not issuing a written declaratory judgment?

For the following reasons, we shall affirm in part and reverse in part the judgments of the circuit court and remand for further proceedings not inconsistent with this opinion.

FACTS AND PROCEEDINGS

The procedural history of the case and the evidence adduced at trial showed the following. For more than 30 years, the Dansbys have owned and operated T&B Dansby

Bus Rental, a company that rents buses for commercial charters. During that time, they have leased various commercial lots in the Capital Heights area of Prince George's County to store their fleet of buses.

In the fall of 2010, the Dansbys' then-current lease was set to expire. They saw a sign on a property located at 711 Eastern Avenue in Fairmont Heights (the "Property"), indicating it was for rent. The Property was .73 acres consisting of a large, unimproved lot and a small retail building. It was owned by Jackson and managed by Lewis Real Estate Services ("Lewis Realty"). The Dansbys contacted Lewis Realty and spoke to Charlotte Fox, one of its brokers. They agreed to rent the Property. According to Mrs. Dansby, Ms. Fox told her that the Property could be used to store buses; and Clarence Jackson, one of the members of Jackson, also told her that. Before they signed the Lease, the Dansbys erected a security fence on the Property.

On October 21, 2010, the Dansbys went to Lewis Realty's office to sign the Lease. A copy of the Lease was faxed to Clarence Jackson's son, Tyoka Jackson,[1] the President of Jackson, and was signed by him and by the Dansbys. The Dansbys did not read the Lease in full before they signed it. According to Mrs. Dansby, she was given a copy of the Lease that day, but it was missing several pages. (That partial copy was introduced into evidence without objection.)

[1] We shall refer to Clarence Jackson and his son, Tyoka Jackson, by their first names to avoid confusion.

The Lease calls for a three year rental term, at a yearly rent of $24,000, payable in monthly installments of $2,000. It includes a merger clause that states "all prior agreements or understandings between the parties, either oral or written, are superseded by this Lease."

Section 5 of the Lease is entitled "Use; Compliance with Laws and Agreements." Subsection 5.1, "Permitted Uses" provides in pertinent part:

> During the term of this Lease, Tenant shall use the Leased Premises solely as a parking lot for Tenant's fleet of buses, with associated office use of the Building, and for no other use without Landlord's consent, which consent shall not be unreasonably withheld, delayed or conditioned. Tenant shall be responsible for obtaining any consents from any governmental authorities for said use. Such use shall be subject to applicable zoning or other restrictions of record. Landlord makes no representation that the existing zoning classification of the Leased Premises permits the above-described use, and it shall be Tenant's sole responsibility to satisfy itself that the above-described use is permitted. . . .

Subsection 5.2, "Compliance with Laws," states, in relevant part:

> During the term of this Lease, Tenant shall comply with and cause the Leased Premises to be in compliance with (i) all laws, ordinances and regulations, and other governmental rules, orders and determinations, whether or not presently contemplated (collectively "Legal Requirements") applicable to the Leased Premises or the uses conducted on the Leased Premises. . . .

In addition, section 23, "Zoning and Permits," reads:

> Landlord agrees, upon Tenant's request, to join in applications for zoning matters, building permits, certificates of occupancy, and all other applications for licenses, permits and approvals for which the signature of Landlord is required by applicable law. However, Tenant shall be solely responsible for prosecuting those applications and obtaining any zoning, building permits, certificates of occupancy, and all other license, permits and approvals sought by Tenant, at Tenant's sole expense.

Finally, the Lease includes a "Purchase and Sale" provision, at Section 33, which reads as follows:

> Upon the expiration of the Term of this Lease, Landlord covenants and agrees to sell and convey to Tenant, and Tenant covenants and agrees to purchase and acquire from Landlord, fee simple title to the Leased Premises. The purchase price for the Leased Premises shall be $350,000.00, paid all in cash at closing. Closing shall take place immediately upon expiration of the Term of this Lease. Title shall be marketable and insurable at standard rates, and shall be conveyed by special warranty deed. Closing costs shall be divided between Landlord and Tenant in the manner that is customary for similar transfers of commercial properties in Prince George's County, Maryland.

Mrs. Dansby testified that, after she and her husband signed the Lease, they filed an application with the Maryland-National Capital Park and Planning Commission Permit Review Section (the "Commission") to obtain a permit to use the Property to store buses. Until then, she and her husband did not know that the Property was zoned Commercial Shopping Center ("CSC"), under the Prince George's County Zoning Code ("Code"). The Code does not permit property in the CSC zone to be used to store buses, and there is no permit, variance, or special exception that would allow that use. According to Mrs. Dansby, neither she nor her husband knew this before they signed the Lease. (The Dansbys attempted to enter a fax from the Commission stating that storing vehicles on the Property was prohibited. The court would not allow the evidence, which we discuss further, *infra*.)

Mrs. Dansby testified that the day after she learned that the Property could not be used to store buses, she notified Clarence, who said he would get in touch with the Mayor of Fairmont Heights. She did not hear back from him, however. That same day the Dansbys stopped using the Property to store their buses, moving them to the lot they had

rented before. The buses remained there for two months, until the Dansbys found another lot on which to store the buses. The Dansbys stopped paying rent to Jackson.

Mrs. Dansby testified that she and her husband were not represented by counsel when they signed the Lease. She specifically denied being represented by one Anitha Johnson, Esq. She testified that Ms. Johnson had represented her in other lease negotiations, but not this one. She was impeached with an email by Ms. Johnson that bore the subject line "Jackson Investment Company, LLC and T&B Dansby Bus Rental."

Clarence testified that he is the "Executive Member" of Jackson. He claimed that he did not see the Lease before it was executed and never made any representations about the zoning of the Property before the Lease was executed. He denied speaking with the Dansbys before the Lease was executed and telling them that the Property could be used to store buses. His first communication with Mrs. Dansby took place after the Lease was signed and concerned the fence the Dansbys had installed. Clarence explained that his job as Executive Member is to manage several apartment buildings owned by Jackson and that Tyoka was the only person involved with drafting the Lease and managing the Property. Clarence testified that the Dansbys contacted him as soon as they learned they could not park the buses on the Property and that he reviewed the Lease at that time.

The court took judicial notice of the Code provisions that were applicable when the Dansbys' request was submitted.

At the close of the Dansbys' case, Jackson moved for judgment pursuant to Rule 2-519. It argued that the parties' alleged mutual mistake of zoning was a mistake of law and

therefore not subject to declaratory relief as requested in Count I of the Dansbys' third amended complaint. As to Counts II and III, which alleged misrepresentation and negligent misrepresentation, it argued that that any oral representations made prior to the signing of the Lease were superseded by the Lease's merger clause. Finally it argued that the Dansbys' claim in Count IV for equitable estoppel was improperly plead because equitable estoppel is a defense rather than an affirmative cause of action. In response, the Dansbys argued that the Code prohibits the use of the Property to store buses, which was the purpose of the Lease, and therefore the Lease is an illegal contract that is not enforceable.

The court granted Jackson's motion. It found that the Lease clearly stated that the Dansbys were required to "investigate all situations as to zoning"; that they failed to thoroughly review the Lease before signing it; and that there "was no testimony that [Mrs. Dansby] made any effort to legally check to see whether . . . parking buses [on the Property] was a permissible use." The court found that the Dansbys were represented by counsel in the Lease negotiations. With respect to Count IV, the court found, as a matter of law, that "equitable estoppel in Maryland is an affirmative [defense] – not an affirmative cause of action."

Jackson proceeded on its counterclaim. Tyoka testified that he signed the Lease on behalf of Jackson. The Lease was introduced into evidence in its entirety without objection. He identified a business ledger showing that the Dansbys' unpaid rent totaled $90,704.44. He testified that Lewis Realty had attempted to re-let the Property and also to sell it, but that those efforts had been unsuccessful. He further testified that the Lease

mandated that the Dansbys properly maintain the building on the Property and they failed to do so; that the Dansbys failed to obtain the proper permits to erect the fence around the property; and that as a result Jackson received a Petition for Injunction by Prince George's County (the "County") and was forced to remove the fence and the building, at a cost of $13,550.

On cross examination, Tyoka stated that he was aware that the Dansbys had contacted Lewis Realty to get the fence back after it was taken down, but he did not speak to them directly.

At the close of Jackson's case-in-chief on its counterclaim, the Dansbys moved for judgment. The court denied their motion. The Dansbys called Tyoka to question him about the signing of the Lease. Jackson objected on the ground that the questions related to the Dansbys' claims, which already had been adjudicated. The court sustained the objection.

After counsel gave closing arguments, the court ruled from the bench on Jackson's counterclaim. It found that the Dansbys had breached the Lease by failing to pay rent and by failing to purchase the Property at the conclusion of the Lease term. The court awarded $444,354.44 in damages, which included: $90,704.44 in unpaid rent; $3,650 for the demolition of the fence; and $350,000 for the purchase of the Property. The court stated that it was finding in Jackson's favor on specific performance. At a subsequent hearing, the court awarded Jackson $100,225.25 in prevailing party contractual attorneys' fees. It entered a final judgment on March 17, 2015, totaling $544,579.69. The Dansbys noted a timely appeal.

We shall include additional facts as pertinent to the issues on appeal.

DISCUSSION

I.

The Dansbys contend the trial court erred as a matter of law by not ruling that the Lease was void, because its sole purpose was for the Dansbys to rent the Property to use to store their buses, but that use is not permitted by the Code and therefore is illegal.

Jackson counters that the terms of the Lease placed the burden on the Dansbys to obtain the appropriate zoning permission. It relies on *McNally v. Moser*, 210 Md. 127 (1956), for the proposition that "[o]ne may not rely on illegality or invalidity where the doing of that said to be forbidden may reasonably be made legal and possible through administrative or judicial action." *Id.* at 138. Jackson asserts that the Dansbys initiated the process of obtaining an exception from the zoning prohibition against using the Property to store buses, but then abandoned the process and therefore cannot complain that the Lease is illegal.

In *McNally*, a Baltimore City zoning ordinance permitted a medical practice to be operated out of a residence. Dr. Simon Moser, a chiropractor, operated his medical practice from the ground floor of his three story house in the city. When he retired, he leased the ground floor office to his colleague, Dr. Brendan McNally, to continue the practice. Two years later, the zoning ordinance was amended to prohibit physicians from operating a medical practice from a residence unless the practitioner lived in the building. Dr. McNally ceased making payments on the lease and filed a declaratory judgment action with respect

to his rights under the lease. The court ruled that the contract remained enforceable, despite the change in the zoning law, because Dr. McNally failed to show that he could not have obtained an exception to the ordinance from the zoning board.

The Court of Appeals affirmed. It held that Dr. McNally did not produce any evidence that the lease was illegal at its inception, and, moreover, the evidence showed that Dr. McNally could have applied for a permit that would have excepted him from the change in the zoning ordinance, but he did nothing. The Court stated that before a party "can say that the use of the premises . . . [is] impossible, [the party is] under the obligation . . . to attempt to establish a right to continue that use, or at least to wait until impossibility became a fact, not merely a possibility." *Id.* at 137.

As noted, Jackson argues that *McNally* governs the case at bar. The Dansbys argue that this case is distinguishable from *McNally* because use of the Property to store buses was illegal when they signed the Lease and there was no permit, special exception, variance, or any kind of exemption they could apply for or obtain that would allow them to use the Property to store buses.

The Dansbys are correct that *McNally* is distinguishable. Yet, they overlook an important provision of the Lease that undercuts their argument that it was illegal and therefore void. The Lease provides at subsection 5.1 that, during the lease term, the tenant shall use the Property "solely as a parking lot for [t]enant's fleet of buses . . . and for no other use *without the Landlord's consent*, which consent shall not be unreasonably withheld, delayed or conditioned." (Emphasis added.) The Lease thus expressly permits

the Dansbys to use the Property other than for the storage of buses, with Jackson's consent. Although the parties entered into the Lease with the intention that the Dansbys would use the Property to store their buses, the requirement that they use the Property for that purpose was subject to the exception that they could use it for another purpose with Jackson's consent.

Generally, "[a]ny bargain is illegal if either the formation or the performance thereof is prohibited by constitution or statute." *Thorpe v. Carte*, 252 Md. 523, 529 (1969) (citations omitted); *see also Goldsmith v. Mfrs' Liab. Ins. Co.*, 132 Md. 283, 286 (1918) ("[W]here the contract which the plaintiff seeks to enforce is expressly or by implication forbidden by the statute, no Court will lend assistance to give it effect."). The illegality issue in the case at bar concerns performance, with the Dansbys arguing that they would be violating the law by storing the buses on the Property. As subsection 5.1 makes plain, however, the Dansbys could use the Property for another, legal purpose, with Jackson's consent. Without proof that there was no other use that could be made of the Property that was legal, or that they proposed another, legal use of the Property to Jackson, which unreasonably withheld its consent, the Dansbys could not prevail on their claim that the Lease was void for illegality.

II.

At the outset of the trial, the Dansbys asked the court for a rule on witnesses, that is, that the witnesses would be sequestered and not be in the court room for each other's testimony. The court granted the request, but permitted Clarence and Tyoka to remain in

the courtroom during opening statements, as agents of Jackson. The Dansbys contend the court erred because Jackson was not entitled to have two corporate designees at trial, and allowing them to be present during opening statements violated the rule against witnesses.

Rule 5-615 provides in relevant part:

> [U]pon the request of a party made before testimony begins, the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses. . . . The court may order the exclusion of a witness on its own initiative or upon the request of a party at any time. The court may continue the exclusion of a witness following the testimony of that witness if a party represents that the witness is likely to be recalled to give further testimony.

"The general purpose of the sequestration of witnesses 'has been to prevent . . . [witnesses] from being taught or prompted by each other's testimony.'" *Tharp v. State*, 362 Md. 77, 95 (2000) (quoting *Bulluck v. State*, 219 Md. 67, 70–71, *cert. denied*, 361 U.S. 847 (1959)) (alteration in *Tharp*). Although "the trial court should generally order witnesses to leave the courtroom before the giving of counsel's opening statements . . . the question of timing is to be resolved by the trial court in its discretion." Lynn McClain, *Maryland Evidence, State & Federal* § 615:1a (2015); *accord U.S. v. Brown*, 547 F.2d 36, 37 (3d Cir. 1976) ("The decision as to whether witnesses should be excluded prior to counsel's opening statements is committed to the discretion of the [trial] court."). We determine whether the court abused its discretion based on the facts of the underlying case. *Hurley v. State*, 6 Md. App. 348, 351–52 (1969) (per curiam).

Rule 5-615 provides for court exclusion of witnesses during the testimony of other witnesses. It says nothing about opening statements. Moreover, the Dansbys have not

shown any prejudicial effect from having Clarence and Tyoka present during opening statements. The Dansbys aver that in opening statements their counsel asserted that they would present evidence that before they signed the Lease Clarence told them that the Property could be used to store buses; and based on this information, Clarence testified that he did not make any such representation. However, that factual assertion had been made long before trial, in the Dansbys' answers to interrogatories. There simply is no evidence that Clarence's testimony was altered in response to opening statements. *See Johnson v. State*, 21 Md. App. 214, 220 (1974), *rev'd on other grounds*, 274 Md. 536 (1975) (holding that, in the absence of any prejudicial effect, the trial court did not err in failing to sequester witnesses prior to opening statements).

III.

The Dansbys contend the trial court abused its discretion in three evidentiary rulings, specifically: by prohibiting Clarence from testifying about statements Ms. Fox made to him after the Lease was signed; by prohibiting the introduction of a written memorandum by a principal of Lewis Realty that was sent to the Dansbys before they signed the Lease; and by prohibiting the Dansbys from introducing the fax from the Commission.

(a)

At trial, the Dansbys asked Clarence about conversations he had with Ms. Fox after the Lease was executed. Jackson objected on hearsay grounds. At a bench conference, the following took place:

[COUNSEL FOR THE DANSBYS]: Your Honor, it's our position that since [Jackson] hired the real estate services . . . we take exception to the hearsay during what she told [Clarence].

[COUNSEL FOR JACKSON]: It's hearsay. Unless you get the witness here.

THE COURT: He's saying it's an exception. Their client.

[COUNSEL FOR THE DANSBYS]: Right.

THE COURT: Do you agree or disagree or don't you have any argument?

* * *

[COUNSEL FOR JACKSON]: [W]hat's been established is only what the scope of the agency was to sell or lease the property. To establish that a lease was entered into. And what [counsel for the Dansbys] is asking now is for conversations occurring after the lease. Specifically Mr. Jackson said yes there was a call after there was a problem when the issue arose. So any conversations afterwards were outside the scope of Lewis Real Estate and Charlotte Fox of Lewis Real Estate Services were hired to do so, therefore, it remains pure hearsay.

[COUNSEL FOR THE DANSBYS]: Well, Your Honor, two things. First of all, that has not been clear and circumscribed as he describes. Secondly, in respect to their responsibilities, really if there's a problem with a lease that Lewis Realty was involved in drafting, I don't see how it's – in practical sense how you can say, well, okay. We're your real estate agent and so forth, and we're responsible for communicating and drafting a lease and so forth. How you can, in any realistic real world sense, say that, okay, now there's a prior law and so forth. We prepared a lease and so forth. So even though a problem comes up with a lease that we were involved with and so forth, we can't talk to you about it or have any dealings with you about it. That doesn't make any sense.

Obviously if they were an agent and so forth involved with the lease, it just makes common sense, let alone a legal sense, that an agent in that capacity doing that would obviously have communications with the very people that hired them if a problem of this scope and nature would come up. What are you going to say? Well, you know, we can't talk to you, we're finished, we're done, so forth. That doesn't make any sense.

* * *

> THE COURT: Okay. Well, that is not really at issue. Your question was did you have any conversations with the realty people essentially, and he said yes after the lease was done. So I'm going to sustain the objection because the scope of their agency had expired at that point. It was done after the lease was signed. Their agency – the agents were supposed to sell the property, they sold the property, and that was it. You could have subpoenaed them. Maybe you do have them. I don't know. Sustained.

The Dansbys contend the court abused its discretion by ruling that Ms. Fox's agency relationship with Jackson ended after the Lease was executed and therefore her statements to Clarence were not admissible under Rule 5-803(a)(4) as an exception to the rule against hearsay.[2]

Jackson counters that the court properly determined that the agency relationship between it and Lewis Realty (and its agents) ended after the Lease was signed and that any statements Ms. Fox made at that point were inadmissible hearsay. Moreover, the Dansbys could have subpoenaed Ms. Fox to testify but failed to do so.

Rule 5-803 states in relevant part:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> > **(a) Statement by Party-Opponent.** A statement that is offered against a party and is: . . .

[2] Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." *Benton v. State*, 224 Md. App. 612, 628 (2015); *see also* Md. Rule 5-801(c). "Except as otherwise provided by these rules or permitted by applicable constitutional provisions or statutes, hearsay is not admissible." Md. Rule 5-802.

> (4) A statement by the party's agent or employee made during the agency or employment relationship concerning a matter within the scope of the agency or employment; . . .

"Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." *Proctor v. Holden*, 75 Md. App. 1, 20 (1988) (citations omitted). In real estate transactions, an agency is "terminated when the purpose for which it was created [is] accomplished–when the sale [is] made and the contract evidencing it [is] signed." *Hardy v. Davis*, 223 Md. 229, 234 (1960); *see also* Restatement (Third) of Agency § 3.09 (Am. Law Inst. 2005) ("An agent's actual authority terminates . . . upon the occurrence of circumstances on the basis of which the agent should reasonably conclude that the principal no longer would assent to the agent's taking action on the principal's behalf.").

In the case at bar, Jackson hired Lewis Realty as an agent to procure a tenant for the Property and subsequently draft a lease to that effect. Once the Lease was signed, that purpose was fulfilled and the agency relationship was terminated. Any statements made by Ms. Fox after the Lease was signed were outside the scope of the agency relationship. The court did not abuse its discretion in ruling these statements inadmissible under Rule 5-803(a)(4).

(b)

The Dansbys sought to introduce a letter of intent they received by facsimile from a principal of Lewis Realty before they signed the Lease. The letter of intent outlined the

basic terms and conditions of the tenancy. Jackson objected and the court sustained the objection on the ground that the letter of intent was not relevant.

The Dansbys argue that the letter of intent is "clear and admissible parole [sic] evidence supporting the proposition that the purchase of the [Property] was not part of the agreement between the parties." Jackson counters that "[t]here was no evidence that Section 33 [the "Purchase and Sale" provision] was ambiguous and in need of interpretation" and therefore any parol evidence was not admissible.

"Maryland law generally requires giving legal effect to the clear terms of a contract and bars the admission of prior or contemporaneous agreements or negotiations to vary or contradict a written contractual term." *Calomiris v. Woods*, 353 Md. 425, 432 (1999); *see also* (*Kasten Constr. v. Rod Enters.*, 268 Md. 318, 328 (1973) ("[W]here a contract is plain and unambiguous, there is no room for construction, and it must be presumed that the parties meant what they expressed.") "Under the parol evidence rule, a written agreement 'discharges prior agreements,' thereby rendering legally inoperative communications and negotiations leading up to the written contract." *Calomoris*, 353 Md. at 432 (quoting Restatement (Second) of Contracts § 213 (Am. Law Inst. 1979)). "Parol evidence becomes admissible only when 'the written words are sufficiently ambiguous.'" *Huggins v. Huggins & Harrison, Inc.*, 220 Md. App. 405, 418 (2014) (quoting *Calomoris*, 353 Md. at 433).

The Dansbys at no time took the position that Section 33 of the Lease was ambiguous; and the language of that section is not ambiguous, as a matter of law.

Accordingly, parol evidence, including the letter of intent, was not admissible to determine the meaning of that section.

(c)

Mrs. Dansby testified that she applied for permits with the Commission and she received a fax in response. At that point in her testimony, the Dansbys sought to introduce the fax into evidence. Jackson objected on the ground of hearsay. The following took place:

> [COUNSEL FOR THE DANSBYS]: Your Honor, first of all, it's not – this exhibit can be offered in reference to being a response to Ms. Dansby's application for the permits and so forth, separate and apart from being offered for the truth of the matter, which would be hearsay. Ms. Dansby's testified that she filed an application and so forth. The question was did she receive any response to that application that was filed. This exhibit is proof of the fact that corroborates the fact that she, in fact, applied and the fact that there was a response from the government. So I don't see the basis for an admission – I mean, objection to the fact as hearsay. It's not hearsay.
>
> THE COURT: She testified that she got a response. I don't think that counsel is contesting that she got a response. Her testimony is her testimony. It does not need to be corroborated. Sustained.

The Dansbys now contend that the fax was admissible under the business record exception to the rule against hearsay. Jackson counters that this argument is not preserved for review, and even if it were, the Dansbys "nowhere offered the document as—or sought to establish the criteria for—a business record."

We agree with Jackson that the issue is not preserved. At trial, the Dansbys argued that the contents of the fax was not hearsay. On appeal, they argue that the fax was admissible under the business records exception to the rule against hearsay. We will not

review an issue that was neither raised in nor decided by the circuit court. Md. Rule 8-131(a).

Even if preserved, the issue lacks merit. Rule 5-803(b)(6) provides that the following are not excluded by the rule against hearsay, even though the declarant is available:

> Records of regularly conducted business activity. A memorandum, report, record, or data compilation of acts, events, conditions, opinions, or diagnoses if (A) it was made at or near the time of the act, event, or condition, or the rendition of the diagnosis, (B) it was made by a person with knowledge or from information transmitted by a person with knowledge, (C) it was made and kept in the course of a regularly conducted business activity, and (D) the regular practice of that business was to make and keep the memorandum, report, record, or data compilation. A record of this kind may be excluded if the source of information or the method or circumstances of the preparation of the record indicate that the information in the record lacks trustworthiness. In this paragraph, "business" includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

The Dansbys did not produce any evidence (and as noted did not argue) that the fax satisfied the requirements of Rule 5-803(b)(6). Accordingly, the court did not err in ruling that it was inadmissible hearsay.

IV.

The Dansbys contend the trial court erred in granting Jackson's motion for judgment on their equitable estoppel claim. They argue that equitable estoppel is a basis for affirmative relief as well as a defense; that, even if it is not, "the court should have allowed [them] to use it as a defense . . . instead of simply dismissing the count"; and that, even if

they did not plead equitable estoppel as an affirmative defense, they were entitled to relief based on the evidence they produced at trial.

Jackson argues that equitable estoppel is not an affirmative cause of action, but is a defense, and under Rule 2-323(g)(7), the Dansbys were required to plead the defense in their amended answer to the amended counterclaim, which they did not do. Therefore, the defense was waived.

> In Maryland, the doctrine of equitable estoppel can be used as a defense to a claim or to avoid a defense, but not as a basis for an affirmative cause of action. *Cogan v. Harford Mem'l Hosp.*, 843 F.Supp. 1013, 1021 (D. Md. 1994) (citing *Sav-A-Stop Servs., Inc. v. Leonard*, 44 Md. App. 594 (1980), *aff'd*, 289 Md. 204 (1981)). While the doctrine of equitable estoppel operates to prevent a party from asserting his rights when, due to his conduct, permitting him to do so would be contrary to equity, the doctrine does not give rise to any affirmative duties and is not a means to recognize a preexisting legal right. *Biser v. Town of Bel Air*, 991 F.2d 100 (4th Cir. 1993 (citations omitted) (applying Maryland law); *Sav-A-Stop Servs., Inc.*, 44 Md. App. at 601.

Catholic Univ. of Am. v. Bragunier Masonry Contractors, Inc., 139 Md. App. 277, 305–06 (2001) (parallel citations omitted), *aff'd*, 368 Md. 608 (2002). The trial court did not err in granting judgment in favor of Jackson on the Dansbys' equitable estoppel claim.

Moreover, we agree with Jackson that the Dansbys waived equitable estoppel as an affirmative defense. Rule 2-323(a) provides, with certain exceptions not applicable here, that "[e]very defense of law or fact to a claim for relief in a complaint, counterclaim, cross-claim, or third party claim shall be asserted in an answer[.]" Section (g)(7) specifies that estoppel is an affirmative defense that must be set forth separately. "'[T]he failure of a defendant to include an affirmative defense in its original answer or a properly amended

answer bars the defendant from relying on the defense to obtain judgment in its favor.'" *Campbell v. Lake Hallowell Homeowners Ass'n*, 157 Md. App. 504, 587 (2004) (quoting *Gooch v. Md. Mech. Sys., Inc.*, 81 Md. App. 376, 385 (1990)). The Dansbys failed to plead estoppel in their amended answer to Jackson's amended counterclaim, thereby waiving that defense.

V.

The Dansbys contend the trial court erred by ordering specific performance of the "Purchase and Sale" provision of the Lease. They maintain that specific performance was not an available remedy and the court only could award damages.

As explained above, under that provision (Section 33), it was agreed that at the expiration of the Lease term, Jackson would sell and the Dansbys would buy the "Leased Premises"—*i.e.*, the Property—in fee simple, for $350,000 in cash. When the Lease was entered into, the Property included a small retail building.

The evidence adduced by Jackson established that the County had issued building code violation notices against the Property beginning in 2011, which were not complied with and ultimately resulted in the County filing a petition for injunctive relief, in October 2013. According to Tyoka, to resolve the petition, the County required that Jackson demolish the building because of its dilapidated condition. Jackson did so in 2014 at a cost of $9,900.

Pointing to Section 4 of the Lease, which requires the Tenant to maintain the Property, including the structures on the Property, during the Lease term, Jackson sought

to recover as damages against the Dansbys the $9,900 it paid to have the building demolished. The court rejected that claim.

In arguing that the court abused its discretion in awarding specific performance, the Dansbys repeat many of the arguments they make about the validity of the Lease to begin with. For the reasons we have explained, the Lease is valid. To the extent the Dansbys argue mutual mistake, they did not make that argument below.

The Dansbys also argue that the sales provision in Section 33 lacks material details and is inequitable and unfair. They also maintain that, even if the court properly ordered specific performance, it erred by entering a judgment against them for $350,000 for the sale price without ordering Jackson to convey the Property to them.

Jackson counters that "specific performance is not only available but a preferred remedy to a contract seller of land[.]" Quoting *Archway Motors, Inc. v. Herman*, 37 Md. App. 674, 682 (1977). It argues that the terms in the purchase provision were sufficient, the evidence did not support any finding that the "Purchase and Sale" provision was inequitable or unfair, and the court would have issued an additional order directing it to convey the Property to the Dansbys once the Dansbys paid the $350,000 portion of the judgment that is the purchase price of the Property.

The material terms of the "Purchase and Sale" provision of the Lease are complete and are not vague or lacking in necessary specificity. Ordinarily, specific performance of this sales provision would be an appropriate remedy for the breach. However, when the Lease was entered into, the "Leased premises" that is the subject of the "Purchase and Sale"

section included the small retail building. During the Lease term, the County issued building code violation notices against Jackson, as the Property owner. There was no evidence that the Dansbys contributed to these violations; indeed, the evidence showed that the Dansbys never used the building. When Jackson failed to comply with the notices, the County obtained injunctive relief, which required Jackson to demolish the building. As noted, the demolition was carried out in 2014.

The Property as it existed when the Lease was signed no longer existed when the "Purchase and Sale" obligations in Section 33 of the Lease came to fruition, at the end of the Lease term. At the former time, the Property consisted of raw land and a small retail building. At the latter time, it consisted of the raw land and a small retail building that Jackson was obligated to demolish. Thus, it was no longer possible at the end of the Lease term for Jackson to sell, and for the Dansbys to purchase, the Property in the condition it was in when the Lease was signed. In that circumstance, the court abused its discretion by ruling that Jackson was entitled to specific performance of the "Purchase and Sale" provision of the Lease. Instead, the court should have awarded damages for the breach of that provision; with the damages taking into account that the Property no longer included the small retail building.

Although the court ruled that Jackson was entitled to specific performance, it entered a judgment that included $350,000 in damages for breach of the "Purchase and Sale" provision of the Lease and, as the Dansbys point out, did not include in any order a directive that Jackson convey the title to the Property to the Dansbys. For the reasons we

have explained, specific performance should not have been awarded. On remand, the circuit court must determine the proper measure of damages by applying principles of contract law and not by merely awarding damages of $350,000 notwithstanding that Jackson still will be the fee simple owner of the Property.

VI.

Finally, the Dansbys contend that the trial court erred because it did not issue a written declaratory judgment declaring that the Lease was void. Citing *Sprenger v. Pub. Serv. Comm'n of Md.*, 400 Md. 1, 20–21 (2007), Jackson counters that the controversy here was not appropriate for resolution by declaratory judgment, and therefore the trial court was not required to enter a declaratory judgment.

"[A] declaratory judgment action is a proper vehicle to determine the validity of a contract[.]" *Young v. Anne Arundel Cty.*, 146 Md. App. 526, 595 (2002). Indeed, "when a party seeks a declaratory judgment, the court must issue one, even if it rejects the proposition advanced by the party seeking declaratory relief." *Bontempo v. Lare*, 444 Md. 344, 378 (2015). "The failure to enter a proper declaratory judgment is not a jurisdictional defect, however, and an appellate court, in its discretion, may review the merits of the controversy and remand for entry of an appropriate declaratory judgment by the circuit court." *Griffith Energy Servs., Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 224 Md. App. 252, 272 (2015) (citations omitted).

The trial court below granted Jackson's motion for judgment on the Dansbys' declaratory judgment claim, but did not issue a written order "defining the rights and

obligations of the parties" under the Lease. *Id.* at 271 (quoting *Bowen v. City of Annapolis*, 402 Md. 587, 608 (2007). On remand, the court should issue a written declaratory judgment not inconsistent with this opinion.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY VACATED AS TO SPECIFIC PERFORMANCE AND DAMAGES OF $350,000 FOR VIOLATION OF SECTION 33 OF THE LEASE; JUDGMENT OTHERWISE AFFIRMED. CASE REMANDED TO THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID ONE-HALF BY THE APPELLANTS AND ONE-HALF BY THE APPELLEE.