UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1035

September Term, 2016

ARA AVEDISIAN, ET AL.

v.

RAPID FINANCIAL SERVICES LLC, ET AL.

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

JJ.

Opinion by Berger, J.

Filed: July 12, 2017

Appellants, Ara Avedisian, Giovanna L. Gallardo, David Gavoor, March Geffroy, Scott Greenberg, Lawrence Jilk, Joseph Jundanian Revocable Trust, Rose Jundanian Revocable Trust, Brad Kotz, David Levy, Harriet Levy, Sara Levy, William Stephens, Jr., Cynthia Welsh and David Wexler (collectively, "Appellants"), appeal from an order of the Circuit Court for Montgomery County granting the motion for summary judgment filed by appellees, Rapid Financial Services, LLC ("RFS") and Back Creek Associates ("Back Creek"). In their timely appeal, Appellants raise two questions for our consideration:[1]

> I. Whether the Trial Court erred in granting Appellees' motion to dismiss and thereby barring Appellants from access to information with which to assess Appellees' compliance or non-compliance with contractual provisions requiring proportionate treatment among F&F Participants.
>
> II. In the alternative, whether the contractual term construed by the Trial Court contained an ambiguity that rendered the disposition of this case on a motion to dismiss premature, prior to discovery into evidence extrinsic to the contract itself that might resolve the ambiguity.

Perceiving no error, we shall affirm.

FACTS AND PROCEEDINGS

On December 28, 2008, RFS and non-party Rapid Advance, LLC ("Rapid") entered into a purchase agreement ("the Purchase Agreement") which established that Rapid would sell and RFS would purchase certain Rapid assets. The Purchase Agreement identified certain "friends and family" creditors of Rapid and referred to these creditors as the "F&F Participants." The Purchase Agreement provided that RFS would pay a portion of the

[1] The questions presented are taken verbatim from the brief of the Appellants.

purchase price for Rapid's assets directly to the F&F Participants. The Appellants are several of the F&F Participants.[2]

Pursuant to the Purchase Agreement, F&F Participants who delivered "F&F Participant Releases" to RFS were entitled to receive certain future payments. Section 3.2(b) of the Purchase Agreement provided that F&F Participants who executed F&F Participant Releases were entitled to receive certain amounts "on a pro rata basis in proportion to such F&F Participant's share of the F&F Debt."

The Purchase Agreement provided a separate warranty regarding payments for one F&F Participant, Bethany Group. The Purchase Agreement provided that neither RFS nor its affiliates "ha[d] directly or indirectly entered into or reached any agreement with" Bethany Group "pursuant to which any consideration will be paid to any of them, including, without limitation, pursuant to any consulting agreement." The Purchase Agreement further provided that "Bethany Group is receiving the same consideration, proportionately, as the other F&F Participants who sign and deliver the F&F Participant Releases."

In addition, the Purchase Agreement provided a mechanism for F&F Participants to verify the promise that all participants were being paid proportionally. Specifically, the

[2] Certain Appellants -- namely, David Levy, Harriet Levy, and Sara Levy (collectively, "the Levy Appellants") -- were not individual F&F Participants. Rather, each of the Levy Appellants is a trustee of an F&F Participant trust. The Appellees comment that "[n]othing in [their] brief should be deemed as an admission of any obligation or relationship, contractual or otherwise, in law or in equity, between Appellees and the Levy Appellants, individually."

Purchase Agreement provided that "[u]pon the request of . . . any F&F Participant who executes and delivers an F&F Participant Release to [RFS], [RFS]'s accountants will provide a certification as to the foregoing."

In the complaint giving rise to this appeal, the Appellants alleged that RFS and/or Back Creek and/or the principals of Back Creek negotiated side deals involving certain additional payments to various F&F Participants to reimburse them beyond the scope of their agreed pro rata portion, to the detriment of other F&F Participants. The Appellants sought a declaratory judgment that: (1) they are third-party beneficiaries to the Purchase Agreement; (2) they are entitled "to investigate whether the warranties and representations made to them regarding strict proportionality of treatment among and between all F&F Participants" were honored; (3) they are entitled to the disclosure of the Appellees' "financial books and records and relevant documents, testimony or other information reasonably required in order to determine whether the warranty of proportionality was observed"; and (4) to the extent "that evidence of disproportionate treatment is confirmed," the F& F Participant Releases are void and Appellants are entitled to additional payments. The Appellants further sought injunctive relief directing the Appellees to make financial records available to the Appellants. On June 27, 2016, the circuit court rejected the Appellants' claims and issued a comprehensive and well-reasoned memorandum opinion

and declaratory judgment, thereby entering summary judgment in favor of the Appellees.[3] This timely appeal followed.

STANDARD OF REVIEW

Although the dispositive motion submitted to the circuit court was styled as a motion to dismiss, the circuit court explained that it was treating the motion as a motion for summary judgment. Furthermore, the circuit court's order provided that "summary judgment [wa]s granted in favor of [the Appellees] on all counts." A motion to dismiss is treated as a motion for summary judgment when the trial court "is presented with factual allegations beyond those contained in the complaint to support . . . a motion to dismiss and the trial judge does not exclude such matters." *Nickens v. Mount Vernon Realty Group*, LLC, 429 Md. 53, 62-63 (2012) (internal quotation omitted).

The entry of summary judgment is governed by Maryland Rule 2-501, which provides: "The 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 court is to consider the record in the light most favorable to the non-moving party and consider any reasonable inferences that may be drawn from the undisputed facts against the moving party." *Mathews v. Cassidy Turley Md., Inc.*, 435 Md.

[3] In addition to rejecting the Appellants declaratory judgment claim with respect to disclosure of the Appellees' financial records, the circuit court rejected various other arguments advanced by the Appellants. These rulings are not challenged in this appeal.

584, 598 (2013). "Because a circuit court's decision turns on a question of law, not a dispute of fact, an appellate court is to review whether the circuit court was legally correct in awarding summary judgment without according any special deference to the circuit court's conclusions." *Id.* (citation omitted). "The mere existence of a scintilla of evidence in support of the plaintiff's claim is insufficient to preclude the grant of summary judgment; there must be evidence upon which the jury could reasonably find for the plaintiff." *Hamilton v. Kirson*, 439 Md. 501, 523 (2014) (citations and internal quotations marks omitted). "[O]rdinarily an appellate court will review a grant of summary judgment only upon the grounds relied upon by the trial court." *Id.* (citations and internal quotation marks omitted).

DISCUSSION

I.

The Appellants assert that they are entitled under Maryland law to compel RFS to produce various sources of information for the Appellants' inspection in order to satisfy themselves that RFS has complied with the terms of the Purchase Agreement. For the reasons explained herein, in our view, the Appellants are not entitled to the relief sought.

Maryland employs the objective theory of contracts, under which:

> "[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."

Spacesaver Sys., Inc. v. Adam, 440 Md. 1, 7-8 (2014) (alteration in original) (quoting *Gen. Motors Acceptance Corp. v. Daniels*, 303 Md. 254, 261 (1985)).

The Appellants do not identify any provision in the Purchase Agreement that permits their inspection of RFS's financial records or otherwise compels disclosure of information from the RFS beyond the specified certification mechanism. Rather, they assert that Maryland common law provides a basis for their right to compel information from RFS. In support of this assertion, the Appellants point to the case of *P.V. Properties Inc. v. Rock Creek Village Associates Ltd.*, 77 Md. App. 77 (1988). The Appellants characterize *P.V. Properties* as holding "that a party may bring an action for a declaratory judgment seeking a detailed itemization of the other party's performance under a contract." As we shall explain, this interpretation mischaracterizes our decision in *P.V. Properties.*

P.V. Properties involved a dispute between a landlord and tenant. *Id.* at 80. The issue on appeal was "whether a tenant in a shopping center [was] entitled to an itemization of common area maintenance expenses where the lease [was] silent in that respect and the landlord [was] unwilling to provide the desired information." *Id.* The lease provided that the tenant was required to pay a share of common area maintenance expenses and required the landlord to provide "a written statement setting forth the total actual costs incurred by the [l]andlord in operating and maintaining the common areas." *Id.* at 84. After receiving a higher bill for common area expenses than received in previous years, the tenant asked

the landlord to provide a detailed itemization of expenses in order to verify the amount charged. *Id.* at 82. The landlord refused. *Id.*

We examined the portion of the lease pertaining to common area expenses, observing that the lease provided that the landlord would provide to the tenant a "written statement setting forth the *total actual costs* incurred by the [l]andlord in operating and maintaining the common areas." *Id.* at 84 (emphasis added in opinion). We further examined a different section of the lease, which identified specific common area maintenance expenses, such as snow removal, lighting, landscaping, and certain insurance expenses. *Id.* We observed that the lease "clearly delineates the charges for which the landlord can seek reimbursement from the tenant" and commented that "[t]he purpose in outlining these charges is to ensure that the landlord does not include other charges, such as capital improvements, to the tenants as part of their common area maintenance charges." *Id.* at 86. We held that "the two sections [of the lease], read together, require[d] the landlord to provide the tenant with an annual statement which outlines in detail the type and amount of each expense it incurred." *Id*. We further explained that "[t]his requirement to itemize in detail the various expenses incurred in common area maintenance can also be *implied* from the terms of the lease." *Id.* (emphasis in original).

Our holding in *P.V. Properties* was highly fact-specific, based upon a commercial landlord/tenant dispute, and focused upon the specific language of the lease. We did not hold, as Appellants suggest, that Maryland common law provides a general basis for one party to a contract to bring a declaratory judgment action against another party to the contract seeking a detailed itemization of the other party's performance under the contract.

Indeed, the Appellants seek to characterize our holding broadly by arguing that the obligation of good faith and fair dealing implied in every contract gives rise to the implied requirement on the part of the obligor to disclose relevant accounting data and the basis on which the relevant computation was made. This is simply not what we held in *P.V. Properties.* Rather, we held that "[t]he obligation of good faith and cooperation implied in every contract gives rise to the implied requirement on the part of the landlord to disclose its cost data and the basis upon which the tenant's common area maintenance liability was computed." *Id.* at 87. We reached this holding while acknowledging the unique circumstances of the case and recognizing that, generally, courts will not impose requirements beyond the specific language of a contract. *Id.* at 86 ("Although a court generally '[w]ill hesitate to construct a contract for the parties, under certain circumstances it is necessary in the interests of justice to imply a term which was not in the contemplation of the parties.'") (quoting 3 Corbin, Contracts, § 541 at n. 69 (1960)).

Unlike *P.V. Properties*, this is not a commercial landlord/tenant dispute, the parties' contract does not require RFS to provide a specific monetary figure for expense reimbursements, and the Appellants are not required to pay RFS an unascertainable sum.[4] Pursuant to the terms of the Purchase Agreement, the Appellants are entitled to request a certification from RFS's accountants as to RFS's compliance with the proportionality requirement. The Purchase Agreement does not provide any other rights to the Appellants

[4] Furthermore, although the Appellants argued in the circuit court that they were entitled to an accounting based upon the relationship between the parties, they presented no such claim in the declaratory judgment action.

with respect to the investigation of RFS's financial records, nor does the common law grant the Appellants a right to conduct a forensic accounting.

The Appellants reliance upon *Gebhardt & Smith LLP v. Maryland Port Admin.*, 188 Md. App. 532 (2009), is similarly unavailing. The Appellants cite *Gebhardt & Smith* for the proposition that the circuit court erred by construing the Purchase Agreement as limiting the Appellants' right to validate whether the proportionality obligation was met to a mere acceptance, without more, of a simple certification by Appellees' accountants, without affording Appellants the opportunity to examine the underlying financial records of Appellees. In *Gebhardt & Smith*, another landlord/tenant case, a lease provided that the landlord's accountant's determination as to the amount of operating expenses would be a final determination of the parties, but a tenant disputed the amount of operating expenses due. *Id.* We held that, absent fraud or bad faith, the parties were bound by the specific terms of the agreement. *Id.* at 579.

Indeed, nothing in *Gebhardt & Smith* provides any basis for the Appellants' assertion that they have a "right to validate" the Appellees' compliance with the terms of the contract. Furthermore, the Appellants did not bring suit to challenge a particular accounting or allege a specific breach of contract. Rather, they sued because they thought a breach of contract *might* have occurred and they wanted to conduct a forensic accounting in order to investigate whether a breach had, in fact, occurred. In short, *Gebhardt & Smith* is inapplicable to the facts of the instant appeal. Accordingly, we hold that the circuit court did not err by entering summary judgment in favor of the Appellees.

II.

The Appellants further assert, in the alternative, that the circuit court erred by granting a motion to dismiss without allowing discovery regarding contractual ambiguities. First, we observe that the circuit court granted a motion for summary judgment, not a motion to dismiss. The circuit court expressly explained, "the court will treat this as a motion for summary judgment" and ordered that "summary judgment is granted in favor of [Appellees] on all counts."

Furthermore, the Appellants never argued that the Purchase Agreement was, in fact, ambiguous. Indeed, the Appellants expressly acknowledge that it is their "position that the relevant terms of the Purchase Agreement require no further construction, and that they are entitled to obtain access to relevant financial records of Appellees . . . ." The record reflects that the Appellants failed to raise any ambiguity argument before the circuit court. Accordingly, this issue is not properly before the appellate court. *See* Md. Rule 8-131 (providing that this Court will not consider issues not raised in or decided by the trial court). Had the Appellants believed that discovery was necessary, Appellants could have brought that to the attention of the circuit court in their response to the Appellees' dispositive

motion.[5] Because the Appellants did not argue before the circuit court that the Purchase Agreement was ambiguous, we shall not address it on appeal.[6]

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANTS.

[5] Maryland Rule 2-501(d) provides a vehicle for a party responding to a summary judgment motion who believes that discovery is necessary to fairly oppose the nation. *See* Md. Rule 2-501(d).

[6] The Appellees present various other substantive arguments as to why the Appellants' ambiguity argument is unavailing. Because this issue is unpreserved, we shall not address the substantive arguments.