UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1263

September Term, 2015

1909 BEL AIR ROAD, LLC

v.

F & B BUSINESS TRUST

Graeff,
Leahy,
Moylan, Jr., Charles E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: August 22, 2017

1909 Bel Air Road, LLC ("1909"), appellant, filed suit in the Circuit Court for Harford County against F&B Business Trust ("F&B"), appellee, alleging that F&B breached its contractual obligation to grant it an easement for access onto Fallston Boulevard. F&B filed a motion to dismiss, asserting that there was no such contractual obligation. The circuit court granted the motion to dismiss.

On appeal, 1909 raises two questions for our review, which we have rephrased slightly, as follows:

1. Did the circuit court err in dismissing 1909's First Amended Complaint after holding a chambers conference, as opposed to a hearing pursuant to Maryland Rule 2-311(f)?

2. Did the circuit court err in dismissing 1909's First Amended Complaint, which pleaded a viable cause of action for breach of contract?

F&B filed a Motion to Dismiss Appeal.

For the reasons set forth below, we shall dismiss the appeal.

FACTUAL AND PROCEDURAL BACKGROUND

The First Amended Complaint alleged that 1909 leases improved commercial property, located at 1909 Bel Air Road, Fallston, Maryland (the "Property") to Autowerkes, Inc., which operates a specialty automobile repair and retail sales outlet. F&B, the developer and owner of a parcel of land immediately adjacent to the Property, acquired this parcel of land for the purpose of developing a Super Walmart store.

In April 2005, prior to construction of the Super Walmart, the Harford County Planning and Zoning Department issued a "Site Plan Approval" ("SPA") to F&B for the development of the lot. The SPA provided: "A State Highway Administration ["SHA"]

Access Permit is required for the development of the site. Access is proposed by constructing one full-movement monumental-type public roadway connection (Fallston Boulevard) and one directional entrance." The SPA also stated, as pertinent to the issue raised on appeal: "Consideration should be given to accessing the property that is affected by the construction of the deceleration lane from Fallston Boulevard."

To construct the deceleration lane required by the SPA, acquisition of a 2,899 square foot portion of 1909's Property was needed. Accordingly, the SHA initiated a condemnation action in 2011, which settled for $274,000. The SHA subsequently advised F&B, in a July 30, 2012, letter, that 1909 had requested that it write to F&B and recommend that F&B reconsider the granting of an easement to 1909, which would connect the rear of the Property to Fallston Commons Boulevard. The letter stated: "On behalf of SHA, I reiterate our recommendation that as the owner of the property where the easement would be located that your client, F&B . . . give full consideration to providing an easement from Fallston Commons Boulevard to the rear of the 1909 Bel Air Road property."

On July 5, 2012, 1909 filed a two-count Complaint against F&B. On December 17, 2012, the circuit court dismissed the complaint.[1]

[1] This complaint is not in the record on appeal, but this Court's prior opinion addressing the propriety of the grant of the motion to dismiss that complaint stated that it alleged that F&B was required, by the SPA, to construct an alternative access road linking 1909's Property with Fallston Boulevard, and the operation of the Walmart and the corresponding changes to nearby traffic patterns constituted a private nuisance. 1909 also "asserted that F&B had refused to grant it an alternative access easement out of 'retaliation for 1909 not accepting prior offers in regard to the acquisition of the front portion of [1909's] property.'"

This Court affirmed the court's dismissal of the complaint for failure to state a claim upon which relief could be granted but concluded that the trial court should have granted 1909 leave to file an amended complaint "in order to clearly articulate the factual bases of its allegations." *1909 Bel Air Road, LLC et al. v. F&B Business Trust*, Nos. 1631 & 2589, Sept. Term, 2012, slip op. at 14 (filed Dec. 9, 2013). Judge Kehoe, writing for the panel, stated as follows:

> Although the complaint is inadequate, it does allege that, pursuant to the SPA, F&B agreed to consider providing alternate access to the properties affected by the construction and operation of the right-turn lane into Fallston Boulevard. There is no dispute that the 1909 property was one of those so affected.
>
> More importantly . . . whether 1909 should have access to Fallston Boulevard may involve issues of public safety, specifically, the safe movement of motor vehicles – as well as the people within them – into and out of 1909's property. At this point in this litigation, the only allegation before us is that F&B refused to grant 1909 access to Fallston Boulevard "in retaliation" for 1909's refusal to accept prior offers made to it by the State Roads Commission. Based upon the record before us, we are unwilling to conclude, as a matter of law, that a desire by F&B to retaliate against 1909 fell within the ambit of matters about which, in the words of the SPA, "consideration should be given" to determine whether access should be provided. Similarly, in light of the possible public safety concerns, we are unwilling to foreclose the possibility that 1909 could demonstrate that the provisions of the SPA, whether considered alone or in conjunction with other agreements and representations that might have been made by F&B during the course of the permitting process, provide 1909 with some right to require F&B to provide access, whether based on a third-party beneficiary theory or some other basis.
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> In our view, the complaint's allegation that F&B failed to abide by the obligations imposed on it by the SPA give rise to sufficient implications of obligation and breach such that 1909 should be given an opportunity to amend the complaint in order to clearly articulate the factual bases of its allegations.

We expressed "no opinion as to the legal or factual sufficiency of any claim asserted by 1909 on remand."

On April 10, 2014, 1909 filed a First Amended Complaint, alleging breach of contract. 1909 asserted that, pursuant to the SPA, F&B "agreed to provide alternative access consideration of and to properties affected and impacted by the construction and operation of the deceleration lane for the newly created Fallston Boulevard"; that F&B was one of the two parcels affected by the deceleration lane "that should be given an easement to enter upon Fallston Boulevard"; that it was undisputed that 1909 was "the intended third party beneficiary, and not a mere incidental beneficiary, of the terms and conditions of the SPA"; and that, by "failing and refusing to fully and properly comply with the SPA Access Obligations, F&B has breached the SPA, to which 1909 is a third party beneficiary."

1909 asserted that F&B had prepared a site plan "which contained on it a proposed access easement from the lands of 1909 Fallston Boulevard over land" owned by F&B, but the necessary easements and improvements were not made. Accordingly, 1909 asserted that it was entitled to recover consequential damages and an order directing specific performance.

On April 28, 2014, F&B filed a Motion to Dismiss First Amended Complaint. It asserted, *inter alia*, that 1909 failed to allege the "essential element that a promise must be sufficiently definite to be binding." In that regard, F&B argued that the SPA requirement was merely to give consideration to providing 1909 with access to Fallston Boulevard, and F&B was not contractually obligated to do so.

With respect to 1909's argument that it was a third-party beneficiary, F&B asserted that 1909 was required to state sufficient facts that it was an intended beneficiary, as distinguished from an incidental beneficiary, which required an allegation that the parties to the contract specifically intended to benefit 1909. It argued that 1909 failed to meet that burden.

On May 16, 2014, 1909 filed a response. It asserted that F&B's argument that it was only required to "consider" access was a material dispute of fact.

On July 29, 2014, the parties appeared before the court in chambers. Following the chambers conference, on February 6, 2015, the court entered a memorandum opinion and order granting F&B's motion. In its opinion, the court addressed whether F&B had a contractual obligation, pursuant to the SPA, to grant 1909 an easement for access onto Fallston Boulevard. The court stated that, to resolve that issue, two questions must be answered: "First, do the terms of the SPA create a contractual obligation on the part of F&B . . . to grant [1909] access? Second, if there is a contractual obligation on the part of [F&B], is [1909] in this case a third party beneficiary to that agreement?"

The court began its analysis by looking to "the terms of the contract, which in this case is the SPA entered into between [F&B] and Harford County Government." After discussing the provisions requiring "the developer to make significant improvements to Route 1, a state highway," the court stated:

> The wording of the term of the SPA created only an obligation on the part of [F&B] to "consider" granting [1909] access to Fallston Boulevard. It is clear from the allegations in [1909's] own complaint that [F&B] did consider such an option. The site plan prepared for [F&B's] project contains a proposed access easement from [1909's] property to the road in question.

> While the original construction on the road and curbs did not provide the means to implement such an easement, they were apparently required to modify existing curbs and gutters to allow such access if it was granted.
>
> The obligation of [F&B] created by the SPA was only to "consider." . . . That term in and of itself . . . does not create a specific obligation to do anything other than to give thought to a particular subject. It does not, however, compel a party to do any specific thing or create a right or obligation to actually take the action that is to be considered or thought about. The final decision to take an action or not take an action rests with [F&B] who, in this case, has apparently chosen not to grant [1909] access to Fallston Boulevard. In the opinion of this court, the contract that [1909] is relying on does not create a legal obligation to provide such access that can be enforced.

The court then considered, as an alternative ground, 1909's status as a third-party beneficiary. In that regard, the court stated:

> Even assuming that this court's decision as set forth above that there is no legally sufficient promise contained in the SPA for [1909] in this case to enforce, this court believes that [1909] still lacks standing because they are at best incidental beneficiaries to the SPA. That the agreement by its terms covers a wide variety of issues not in any way related to [1909] in this case demonstrates that it was an effort by the Harford County Planning Department to ensure that the overall site plan for [F&B's] project met all the criteria of the zoning ordinance and otherwise was satisfactory to meet the problems that could be encountered in terms of the flow of traffic and similar issues.
>
> There is absolutely no allegation by [1909] in this case that they participated in the negotiation of this agreement or that they were anything other than indirectly involved in its drafting and execution. Any actual promises or benefits contained in the SPA are limited to the actual parties to that agreement. It clearly does not intend to recognize 1909 Bel Air Road LLC as a primary party in interest to its terms and even assuming there is some sort of specifically definable promise or commitment made by the defense in this case, [1909] was clearly not privy to it.

The court concluded that the SPA did not "include an enforceable obligation on the part of F&B . . . to grant the Plaintiff in this case an easement onto Fallston

Boulevard," and 1909 was "at best an incidental beneficiary," and therefore, it had no standing to bring suit. Accordingly, the court granted F&B's motion to dismiss.

DISCUSSION

As indicated, 1909 contends that the circuit court erred in granting F&B's motion to dismiss the complaint. Prior to addressing 1909's contentions in this regard, however, we must first address F&B's Motion to Dismiss the appeal on the ground that the Notice of Appeal was not timely filed.

On February 6, 2015, the circuit court entered a Memorandum Opinion and order granting F&B's motion to dismiss the First Amended Complaint. It was not until August 3, 2015, however, that 1909 filed a Notice of Appeal. Recognizing that, pursuant to Maryland Rule 8-202, a notice of appeal generally must be filed within 30 days of the judgment, 1909 asserted that the Notice of Appeal was timely because counsel did not receive the court's ruling until "on or about July 23, 2015." Counsel stated that, although he had provided the court with an updated address, the ruling "was apparently sent to the wrong address of counsel for [1909] in deviation of Md. Rule 1-321(a)."[2]

F&B filed a Motion to Dismiss Appeal, asserting that the appeal was not timely filed, and therefore, the appeal should be dismissed. This Court stayed the appeal and remanded the case to the circuit court, without affirmance or reversal, "for it to conduct

[2] *See* Md. Rule 1-321(a) ("Service [of papers] upon the attorney or upon a party shall be made by delivery of a copy or by mailing it to the address most recently stated in a pleading or paper filed by the attorney or party[.]"); Md. Rule 1-324(a) ("Upon entry on the docket of (1) any order or ruling of the court not made in the course of a hearing or trial . . . the clerk shall send a copy of the order, ruling, or notice . . . to all parties entitled to service under Rule 1-321[.]").

further proceedings to determine whether the clerk of the circuit court erred in not sending the February 6, 2015, order dismissing the First Amended Complaint to 1909's counsel's most current address."

On May 11, 2016, the circuit court issued an order, which stated:

> It is . . . **ORDERED** as follows:
>
> (1) the failure of the court to send a copy of its Memorandum Opinion and Order to the Plaintiff's attorney's correct address when that address was noted in a number of places in the file was an irregularity; and
>
> (2) considering the totality of the circumstances the court believes that counsel for the Plaintiff acted with sufficient good faith and due diligence in this case.

On July 25, 2016, this Court issued an order lifting the stay and scheduling the case for argument.

F&B does not contest the circuit court's finding that the court clerk's error in failing to send the February 2016 order to counsel's correct address constituted an irregularity, or that counsel for 1909 acted in good faith and with due diligence. *See Gruss v. Gruss*, 123 Md. App. 311, 320 (1998) (clerk's failure to mail a copy of the court's order of dismissal to the address listed in the plaintiff's most recent pleading, pursuant to Md. Rule 1-321(a), constituted an "irregularity" under Md. Rule 2-535(b)). Thus, if 1909 had filed a motion pursuant to Md. Rule 2-535(b), which provides: "On motion of any party filed at any time, the court may exercise revisory power and control over the judgment in a case of fraud, mistake, or irregularity," the circuit court could have amended the judgment to reflect that it was entered on a subsequent date, allowing 1909 to file an appeal within 30 days after entry of the judgment, as required by Rule 8-202. The problem here is that, despite the

circuit court's finding that there was an irregularity, 1909 never filed such a motion, and therefore, the February 4, 2015, judgment is still valid and in effect, and 1909's notice of appeal remains untimely.

Maryland Rule 8-202(a) provides that, "[e]xcept as otherwise provided" in the Rule or by law, a "notice of appeal shall be filed within 30 days after entry of the judgment or order from which the appeal is taken." "This requirement is jurisdictional, and if the appeal is not timely noted, we must dismiss the appeal." *Carter v. State*, 193 Md. App. 193, 206 (2010). *Accord Comptroller of Treasury v. J/Port, Inc.*, 184 Md. App. 608, 643 (2009) ("The requirement that an order of appeal be filed within thirty days of a final judgment is jurisdictional; if the requirement is not met, the appellate court acquires no jurisdiction and the appeal must be dismissed.") (citation and quotation marks omitted).

Because the Notice of Appeal was not filed within 30 days of the February 6, 2015, entry of judgment, it was not timely filed, and we have no jurisdiction over this case. Accordingly, we must grant F&B's motion to dismiss this appeal.[3]

APPEAL DISMISSED. COSTS TO BE PAID BY APPELLANT.

[3] We do note that, even if we were to address the merits of the appeal, we would affirm the circuit court's ruling granting the motion to dismiss. We agree with the court's conclusion that the SPA required only that F&B give "consideration" to providing access to the property affected by the construction; it did not require that F&B actually grant access to 1909. Under these circumstances, if we were not dismissing the appeal, we would conclude that the circuit court properly found that 1909 did not state a cause of action for breach of contract, and it properly dismissed the First Amended Complaint.