Circuit Court for Anne Arundel County
Case No. C-02-CV-16-001278

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2045

September Term, 2018

DAVID MYERS, *et al.*

v.

ANNE ARUNDEL COUNTY, *et al*.

Berger,
Nazarian,
Arthur,

JJ.

Opinion by Berger, J.

Filed: December 26, 2019

Appellants, David Myers, M.D., F.A.C.S., Ekaterina Myers and Mildred Myers, appeal from an order of the Circuit Court for Anne Arundel County dismissing their claim against appellee, Anne Arundel County (the "County").

The appellants present seven (7) questions for our review. Questions 1, 2 and 4 are moot as they pertain only to Bay Area Tree Care, Richard E. Shortridge, Sr., Richard E. Shortridge, Jr., and David B. Shortridge (collectively "the Shortridges"), parties who were dismissed by stipulation in the circuit court after the appellants noted this appeal.[1] We consolidate and rephrase the remaining questions properly before us pertaining to the County:[2]

[1] Because the appellants voluntarily dismissed their claims against Bay Area and the Shortridges, the issues pertaining to those parties are moot, as they no longer present a controversy for us to decide. *Young v. Fauth*, 156 Md. App. 105, 111 (2004) (a question is moot when there is no longer an existing controversy between the parties when the case comes before the court, and there is no relief which the court can provide).

[2] The appellants presented the following questions:

> 1. Were the trial court's decisions to deny appellants the relief we requested legally correct after appellees' Bay Area Tree Care, Inc., and its three owners named "Shortridge" had admitted all of appellants' averments in our pleadings and along with their lawyers failed even to attend the pretrial and settlement conference in violation of the trial court's express order to do so?
>
> 2. Was the trial court's decision to dismiss our counterclaims legally correct at the time the Bay Area Tree Care appellees did not have any active, existing motion to dismiss before the court and did not even request at the hearing that the

court dismiss our counterclaim against the BATC appellees?

3. Were the trial court's decisions not to grant appellants' requests for summary judgment and full relief as requested in our counterclaims legally correct, since none of the principals for the appellees appeared at the pretrial conference as ordered, the BATC appellees' lawyer did not even show up, and the single county attorney who attended had no authority to settle the case?

4. Were the trial court's decisions to deny appellants' the right to join the BATC appellees as counterclaim defendants, file whatever counterclaims we had against all appellees, and file them in the circuit court exactly as prescribed by MD Rule 3-331 and exactly as ordered by the district court that we appellants should do, legally correct?

5. Did the circuit court err as a matter of law in not ordering the County's motion to dismiss to be declared null and void and without legal effect and stricken from active consideration, since it lacked a valid certificate of service?

6. Did the lower court make a legal error in agreeing with appellee the County that the County is immune and by dismissing our counterclaims as a result , because any such immunity disappears per the action of the Local Government Tort Claims Act and appellants' satisfaction of the requirements of that Act through our filings of the claims specified therein?

7. Did counter-claimant defendant Anne Arundel County (appellee here) meet all five conditions necessary to render the County immune, since the County has not proven it has met even one, and since any such immunity is already superseded by the federal and state laws quoted above and also removed by appellants' prior actions of properly filing the legally defined notice of claims, proven in Exhibit 11 of the amended counter-claims (E.145-16II)? If not, then no immunity attaches to the original plaintiff the County,

1. Whether the circuit court erred in denying the appellants' motion for summary judgment where the County did not bring an individual with full authority to resolve the case to the pretrial conference.

2. Whether the circuit court erred in failing to strike the County's motion to dismiss based on an invalid certificate of service.

3. Whether the circuit court erred in dismissing the appellants' counterclaim against the County on the grounds of governmental immunity.

For the following reasons, we affirm the judgment of the circuit court.

BACKGROUND

The appellants are the owners of real property located within the Chesapeake Bay Critical Area buffer[3] in Severna Park, Maryland. On May 14, 2014, the appellants submitted a proposed plan to the County for the removal of four trees from their property.[4] According to the County, it reviewed the appellants' proposed plan and authorized the removal of one "non-native invasive Mimosa tree," and required that the appellants replant one native tree in the buffer modification area.

---

appellee herein, and the lower court erred as a matter of law in declaring the County to be immune.

[3] The "Critical Area Buffer" includes "the land immediately adjacent to tidal waters, tidal wetlands, and tributary streams," and "serves as an important protective area for aquatic resources and shoreline habitat." Maryland Department of Natural Resources, "What is the Buffer" (December 18, 2019), https://dnr.maryland.gov/criticalarea/pages/faqs.aspx#1.

[4] Section 16-3-201 of the Anne Arundel County Code requires County approval before clearing or grading land in the buffer.

After learning that four trees had been removed from the appellants' property, the County filed suit in the district court, seeking injunctive relief for the alleged violation of the Anne Arundel County Code for the unauthorized removal of trees from a critical area. The appellants responded by filing notices of their intention to defend the matter in the district court. On December 15, 2015, the appellants filed a motion requesting that the district court proceedings be stayed so that they could file a counterclaim in the circuit that exceeded the jurisdictional limits of the district court.

On December 29, 2015, the appellants filed a "counterclaim" action in the circuit court, alleging they had suffered damages as a result of the actions of the County. They amended the Counterclaim on September 21, 2016. The district court stayed the action filed in that court, and on July 22, 2016, the County filed a motion in the district court to lift to the stay.[5]

The County then filed a Motion to Dismiss and/or for Summary Judgment in the circuit court on October 12, 2016. The Certificate of Service, however, accompanying the motion contained an incorrect service date of November 12, 2016. On October 31, 2016, the appellants filed a pleading captioned as "Response, and Request for Hearing, to Counter-Claim Defendant's Motion to Dismiss and/or Summary Judgment."

Following a hearing on February 21, 2017, the circuit court granted the County's motion, and the appellants appealed that order to this Court. In an unreported opinion, we

[5] On November 27, 2018, the County voluntarily dismissed with prejudice the complaint in the district court, reporting that the alleged violation on the appellants' property had been abated.

remanded the case to the circuit court for a determination as to whether the circuit court had awarded judgment in favor of the County or all parties.[6] On July 12, 2018, the appellants entered a stipulation of dismissal in the circuit court as to Bay Area and the Shortridges. The appellants then noted the instant appeal of the circuit court's final judgment entered in favor of the County.

DISCUSSION

I. The Appellants Waived Their Argument That They Were Entitled to Summary Judgment Because the County Failed to Bring an Individual With Authority to Settle the Case to the Pretrial Conference.

The appellants argue that the circuit court erred in denying their motion for summary judgment because the County failed bring an individual with full authority to settle the case to the pretrial conference, as required by the scheduling order. The County responds that because the appellants did not raise this issue in their opposition to the County's motion to dismiss and/or for summary judgment or at the hearing before the circuit court, they have waived it for appeal.

In their reply brief, the appellants respond that they set forth "all requests for relief" in their amended counterclaims and motion for summary judgment, citing to pages 15-169 of the Record Extract. Based on our review of the record, we find no evidence that the appellants requested that the circuit court grant their motion, deny the County's motion, or otherwise sanction the County for failing to bring an individual with full authority to settle the case to the pretrial conference.

[6] *David Myers, et. al v. Anne Arundel County, et al*., No. 404, September, 2018 (filed April 18, 2018, corrected opinion filed May 9, 2018).

This Court ordinarily will not consider an issue on appeal "unless it plainly appears by the record to have been raised in or decided by the trial court." Maryland Rule 8-131(a). A trial court commits no error in failing to grant relief that was not requested by the parties. *See Hyman v. State*, 158 Md. App. 618, 631 (2004) (holding that appellant had waived for review trial court's failure to award relief that he had not requested at trial).

Because the appellants did not specifically raise before the circuit court the issue of the County's failed to bring an individual with authority to settle the case to the pretrial conference, they have failed to preserve the issue for appeal.

II. The Circuit Court Did Not Err in Failing to Strike the County's Motion to Dismiss and/or for Summary Judgment As Untimely Filed.

The appellants argue that the County's motion was "null and void" because it was filed "too late" and contained an incorrect service date of November 12, 2016. Indeed, they contend that the County's motion was actually served on October 12, 2016. The County concedes that the date on the certificate of service was incorrect, but argues that the circuit court did not err in considering the motion, as it is undisputed that the appellants were served in a timely manner as they filed a response to the motion on October 31, 2016. Therefore, the County maintains that the appellants were not prejudiced by the typographical error in the certificate of service.

Because the appellants raised these issues before the circuit court in their opposition to the County's motion, we reject the County's argument that the appellants failed to preserve these issues for appellate review. Nor do we find that the appellants waived this argument because they did not file a motion to strike the motion within fifteen days of

service as required by Md. Rule 2-322(c). Though the appellants did not file a motion to strike the County's motion to dismiss, they requested, in their opposition, that the circuit court declare the County's motion "invalid," and the court considered that request before denying it. Because this issue was raised in and decided by, the circuit court, it is preserved for our review.

Md. Rule 1-323 provides that the court clerk may not accept for filing a pleading or other paper requiring service, unless it is accompanied by "an admission or waiver of service or a signed certificate showing the date and manner of making service." In *State v. Andrews*, 227 Md. App. 350, 370 (2016), this Court determined that an error in the certificate of service of a notice of appeal did not warrant dismissal of the appeal under Md. Rule 1-323. We explained that though an "omission in the certificate of service is a defect … [w]here there is no evidence that the [opposing] party was prejudiced or that the course of the [litigation] was delayed by a defect, 'it is the practice of this Court to decide appeals on the merits rather than on technicalities.'" *Id*. (quoting *Bond v. Slavin*, 157 Md. App. 340, 352-53 (2004)).

In the present case, the record demonstrates that the appellants had, in fact, received notice of the motion. Indeed, they had filed a timely response. Because the appellants were not prejudiced by the typographical error in the certificate of service that accompanied the County's motion, the circuit court did not err in considering the County's motion to dismiss and/or for summary judgment on the merits.

The appellants further argue that the circuit court erred in considering the County's motion because the motion was untimely, as it was filed more than fifteen (15) days after

the service of their amended counterclaim on September 21, 2015.[7] Md. Rule 2-322(b) provides that certain defenses, including failure to state a claim upon which relief can be granted and governmental immunity are defenses that can "be made in the answer, or in any other appropriate manner after answer is filed." *Attorney Grievance Comm'n of Maryland v. Johnson*, 450 Md. 621, 630 n.2 (2016). Further, Maryland Rule 2-324(a) provides that "[a] defense of failure to state a claim upon which relief can be granted … and a defense of governmental immunity may be made in any pleading or by motion for summary judgment[.]" *See Kee v. State Highway Admin.*, 313 Md. 445, 460 (1988) (explaining that the defense of governmental immunity "is a nonwaivable defense to be raised by motion to dismiss, motion for summary judgment or any other pleading.").

The circuit court did not err in refusing to dismiss the County's motion to dismiss and/or for summary judgment as untimely because the motion raised the defenses of failure to state a claim upon which relief can be granted and governmental immunity, which, pursuant to Rules 2-322(b) and 2-324(a), were not required to be included in the County's answer to the appellants' amended counterclaim.

[7] Md. Rule 2-341(a) provides: "If an amendment introduces new facts or varies the case in a material respect, an adverse party who wishes to contest new facts or allegations shall file a new or additional answer to the amendment within the time remaining to answer the original pleading or within 15 days after service of the amendment, whichever is later."

III. The Circuit Court Did Not Err in Granting the County's Motion to Dismiss on the Basis of Governmental Immunity.

The appellants argue that the circuit court erred as a matter of law in granting the County's motion to dismiss on the grounds that their counterclaim was improperly filed in the circuit court and the County was entitled to governmental immunity.

This Court reviews a circuit court's grant of a motion to dismiss for failure to state a claim upon which relief could be granted to determine whether the court was "legally correct." *Unger v. Berger*, 214 Md. App. 426, 432 (2013) (citation omitted). "[W]e must determine whether the complaint, on its face, discloses a legally sufficient cause of action." *Schisler v. State*, 177 Md. App. 731, 743 (2007) (citations omitted). We "presume the truth of all well-pleaded facts in the complaint, along with any reasonable inferences derived therefrom." *Id.* (citations omitted).

The appellants argue that they filed their counterclaim against the County in the circuit court because they had incurred damages in excess of the jurisdictional limit of $30,000 in the district court. The circuit court determined that the appellants' counterclaim was improperly filed and subject to dismissal because there was no underlying claim or complaint in the circuit court.

Section 4-401(8) of the Courts and Proceedings Article ("CJP") of the Maryland Code (1974, 2013 Repl. Vol.) provides that the district court has exclusive original civil jurisdiction for a "petition filed by a county or municipality… for enforcement of … zoning codes for which equitable relief is provided[.]" There is no right to jury trial in an equitable action in the district court. *Mattingly v. Mattingly*, 92 Md. App. 248 (1992). Because the

County was required to bring its action against the appellants in the district court, they were not entitled to a jury trial on the County's complaint.

Md. Rule 3-331(f) provides:

> A party may not file a counterclaim or cross-claim that exceeds the monetary jurisdiction of the [district] court, but the court, on motion of a party having such a claim and for good cause shown, may grant a stay of the action against that party for a period and on the terms it deems proper to permit the party to commence an action in the circuit court on that claim.

The appellants were not permitted to file a counterclaim against the County in the district court in excess of $30,000. They were likewise precluded from pursuing their counterclaim against the County in the circuit court, as there was no underlying claim or complaint filed in the circuit court. *See McKlveen v. Monika Courts Condo.*, 208 Md. App. 369, 377 (2012) (holding that circuit court properly dismissed counterclaim where no corresponding complaint was filed in circuit court and the complaint filed in district court did not meet requirements for requesting a jury trial in the circuit court). Accordingly, the circuit court did not err in concluding that the appellants' counterclaim was improperly filed and subject to dismissal.

Assuming *arguendo* that the appellants' counterclaim could be deemed a "complaint," the circuit court did not err in dismissing it because it failed to state a claim upon which relief could be granted because the County was entitled to governmental immunity for its Code enforcement actions pertaining to the appellants' property.

"Maryland law is well settled that a county (or municipality) generally enjoys immunity against common law tort liability arising out of acts that are governmental, as

opposed to acts that are private or proprietary." *Clark v. Prince George's Ctny*, 211 Md. App. 548, 557 (2013) (citation omitted). An "act performed for the common good of all" is governmental; whereas an act performed "for the special benefit or profit of the corporate entity" is proprietary. *Tadjer v. Montgomery Cnty*, 300 Md. 539, 547 (1984) (holding that the county's issuance of building permits was a government function). The Court of Appeals has explained that a county's action is governmental "[w]here the act in question is sanctioned by legislative authority, is solely for the public benefit, with no profit or emolument incurring to the municipality, and tends to benefit the public health and promote the welfare of the whole public, and has in it no element of private interest, it is governmental in its nature." *Spaw LLC v. City of Annapolis*, 452 Md. 314, 359 (2017) (quoting *Anne Arundel Cnty v. McCormick*, 323 Md. 688, 696 (1991).

In Maryland, a municipality is ordinarily immune from tort liability arising from its enforcement activities. *DiPino v. Davis*, 354 Md. 18, 48 (1999). In *DiPino*, the plaintiff sought damages from a police officer and city for false imprisonment, malicious prosecution and abuse of process after he was arrested for hindering a police investigation, and the charges were subsequently dropped. 354 Md. at 25-26. The Court of Appeals held that there was no liability on the part of the city because the officer was engaged in law enforcement duties which are "quintessentially governmental in nature." *Id*. at 48.

The enforcement of building codes and ordinances are also recognized as government functions because their "primary purpose" is "to protect the health and secure the safety of occupants of buildings, and not to protect the personal or property interests of individuals." 7A McQuillin Municipal Corp. § 24:502 (3d ed.). *See, e.g.*, *Stigler v. City*

of Chicago, 268 N.E.2d 26, 29 (Ill. App. Ct. 1990) (City was immune from liability for failure to enforce municipal code); *Vrieze v. New Century Homes, Inc*., 542 N.W.2d 62, 67 (Minn. Ct. App. 1996) (City's alleged failure to enforce its issued building permit and approval of modifications to a building permit was government action shielded from liability); *O'Connor v. City of New York*, 447 N.E.2d 33, 34 (N.Y. 1983) (Municipality was not liable for inspector's failure to discover a gas leak).

In the present case, we conclude that the County was engaged in governmental action in its enforcement of the County Code regarding the removal of trees from the appellants' property. The circuit court did not err in determining that the County was entitled to governmental immunity. Moreover, as the circuit court noted, the appellants' claim fails because they did not file suit against any specific employee, and "while individual County employees may be sued, the County as a governmental entity has governmental immunity."

Under the Local Government Tort Claims Act ("LGTCA"), Md. Code (1987, 2013 Repl Vol., 2014 Supp.), CJP § 5-301 *et seq*., "a plaintiff may not sue a local government… directly but must sue, instead, the employee." *Williams v. Montgomery Cnty.*, 123 Md. App. 119, 126 (1998). "The effect of the LGTCA is to provide a remedy for those injured by local government officers and employees, acting without malice in the scope of their employment, while ensuring that the financial burden of compensation is carried by the local government ultimately responsible for the public officials' acts." *Rounds v. Maryland-Nat. Capital Park & Planning Comm'n*, 441 Md. 621, 639 (2015) (internal quotations and citation omitted). The appellants cannot proceed on a claim against the

County because they did not file suit against an individual County employees under the LGTCA, for which the County would be obligated to provide indemnification.

The appellants argue that their counterclaim should have survived the County's motion for dismissal because the County's immunity has been "superseded by Federal and State Law." The appellants rely on *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 563 (2007), for the proposition that their pleadings should be read liberally to support their claim for recovery. Even "presuming the truth of all well-facts pleaded facts in the complaint" -- as we must when reviewing a grant of a motion to dismiss -- the appellants failed to set forth a viable claim against the County. Accordingly, the circuit court did not err in finding that the County is entitled to immunity for its code enforcement action pertaining to the appellants' property and dismissing the appellants' claim.

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