Circuit Court for Howard County
Case No.: 13-C-16-108656

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2329

September Term, 2017

LUBNA KHAN

v.

CUSTOM CONTRACTOR REMODELING, INC., *ET AL*.

Nazarian,
Arthur,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: September 30, 2019

Dr. Lubna Khan owns a condo into which water leaked and, eventually, flooded. She complained to her condominium association, the Fieldstone 5920 Condominium Association ("Fieldstone"), and its management company, American Community Management, Inc. ("ACM"). They engaged contractors to address the problems, but the situation devolved quickly into conflict and, eventually, litigation. Dr. Khan brought suit in the Circuit Court for Howard County and, after a bench trial, the court entered judgment for the defendants. Dr. Khan appeals and we affirm.

I. BACKGROUND

Dr. Khan owns unit No. 106C in the Fieldstone 5920 Condominium (the "Condo") in Columbia. ACM served as the Fieldstone's management company. In 2013, Dr. Khan lived in North Carolina; beginning on July 1 of that year, she rented the Condo to Kurt and Leslie Rindoks (the "Tenants").

As the Tenants moved into the Condo on August 21, 2013, Ms. Rindoks discovered water leaking into the unit from the condensate drain line on the Condo's air conditioning system. She told Dr. Khan immediately, and Dr. Khan complained to ACM. Everyone agrees that this drain line is a common element of the condominium property and Fieldstone's (and therefore ACM's) responsibility to repair.

ACM engaged a variety of contractors, including Community Cooling, which examined the condensate line; Bob Tull Carpeting, which removed wet carpet and padding; and Custom Contractors and Remodeling, Inc. ("CCRI"), which removed wet drywall and other damp materials. ACM paid these contractors directly. Dr. Khan also engaged

BGE Home Products & Services, Inc. ("BGE Home"), with whom she had a home warranty. BGE Home cut out a section of the condensate line, and at that point, ACM believed the problem was solved.

A week later, though, an additional leak was found, still from the condensate line. ACM hired another plumbing contractor, which concluded that the problem was outside the unit, and ACM hired an excavating company to dig it up and make repairs. In the process of that work, it was discovered that the condensate line had been attached incorrectly in the first place. Those repairs were completed on September 12, 2013, and everyone agrees that there have been no leaks since. ACM then hired CCRI again to remove materials damaged by the new leak, and ACM paid directly for this work.

But at that point, the damage inside the Condo still needed to be repaired, and it is the process of getting that work done that seems to lie at the heart of this case. CCRI prepared a proposal to ACM to do this restoration work, but that proposal didn't include mold remediation. Dr. Khan wanted work to begin immediately, before CCRI had received a deposit from ACM; when CCRI declined, the tension increased, and CCRI decided not to perform any further work in the Condo. ACM sought to hire alternate contractors, then learned three days later that Dr. Khan had contacted some on her own.

Further tension arose from Dr. Khan's belief that there was mold inside the Condo. Ms. Rindoks had seen some mold at the time the leak first was discovered, but the affected area had been removed as part of the remediation. As the relationship between Dr. Khan and ACM deteriorated, though, Dr. Khan contended on September 24, 2013, that there was

mold in the Condo. ACM retained another contractor, Air, Land, and Water ("ALW"), to inspect and test for mold. The first time ALW came, they couldn't perform the testing because the Condo's windows had been open, but they came back on September 27 and discovered low levels of mold. ACM advised Dr. Khan of the results on September 30 and proposed to have ALW continue to test the Condo to ensure that the mold was removed. ACM also proposed on September 30 to hire another contractor, Powercraft Contracting Company, to perform the remaining restoration work, and Bob Tull to remove additional damp and moldy carpet.

Later that day, Dr. Khan informed ACM that she would not allow any ACM contractors into the Condo to perform any work. She also instructed the Tenants not to speak with ACM and not to permit entry to any ACM contractor. Those instructions held, and ACM's contractors never were allowed to enter from that point forward. Fieldstone offered on October 4 to provide a hygienist to prepare a scope of work and remediate the Condo or to allow Dr. Khan to use her own contractors, provided she paid any expenses above the cost of Fieldstone's contractor. Dr. Khan declined.

As this all was happening, ACM reported the losses to Fieldstone's insurer and received payments from the insurer to pay for the work that had been performed and proposed. ACM held the insurance proceeds in escrow and, at trial, agreed to pay Dr. Khan $6,500 from that account to cover work performed by her waterproofing contractor, All About Waterproofing. The remaining proceeds have not been paid.

Dr. Khan retained All About Waterproofing to remediate any mold, and they

performed that work by December 1, 2013. She retained another contractor to perform the remaining restoration work; the work was completed, but the contractor never was paid.

In the meantime, Dr. Khan told the Tenants to vacate the Condo, even though their lease remained in effect. They left as of October 1, 2013, and Dr. Khan kept their security deposit. Dr. Khan moved her belongings into the Condo in April 2014 and occupied it beginning sometime in May or June. Although she continued to live in North Carolina until then, she also filed a claim with her insurance company for the losses relating to the Condo's water leak, including alternative housing expenses.

Dr. Khan brought suit against Fieldstone and ACM on August 5, 2016. Her complaint alleged in Counts I and II that Fieldstone and ACM had been negligent in maintaining and repairing the plumbing and water lines to the Condo. In Count III, the complaint alleged that Fieldstone breached its contractual duties to her to operate, repair, and maintain the Condo and surrounding area and in failing to remediate mold and repair the Condo. She filed a separate suit on August 18, 2016 against CCRI, alleging nearly identical negligence and breach of contract claims against it as well. She claimed three categories of damages: damages for structural harm to the Condo, damages relating to mold, and damages for lost rents.

After discovery, all of the defendants moved for partial or full summary judgment. The court denied the motions, the cases were consolidated, and the consolidated case proceeded to trial on Dr. Khan's claims for breach of contract and negligence against Fieldstone and CCRI and for negligence only against ACM. After a four-day bench trial,

the court entered judgment in favor of Fieldstone, ACM, and CCRI except for a payment of $6,500.00 that ACM had agreed to pay to Dr. Khan from its insurance proceeds to cover the costs of remediating mold. Dr. Khan appeals.

II. DISCUSSION

Dr. Khan lists nine appellate issues in her opening brief.[1] As best we can tell, she argues that the circuit court relied on evidence she believes was inadmissible in finding in

[1] Dr. Khan phrased the questions on appeal in her brief as follows (reproduced *verbatim*):

> I. COURT'S COMMITTED LEGAL ERROR WHEN ITS LEGAL CONCLUSION RESTED ON INADMISSIBLE EVIDENCE
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> II. COURT'S JUDGMENT DIRECTLY CONTRAVEN THE POLICIES SET FORTH UNDER THE ACT, REGULATIONS, MISAPPREHENDS LEGISLATIVE INTENT AND CONFLICTS WITH APPELLANT PRECEDENT AND GOVERNING INSTRUEMENTS
>
> III. COURT COMMITTED LEGAL ERROR WHEN IT DID NOT HOLD CCRI LIABLE FOR BREACH OF DUTY OF CARE
>
> IV. COURT ERRED WHEN IT HELD THERE WAS NO CONTRACT IS SUBJECT TO DENOVO REVIEW
>
> V. THE COURT CCOMMITTED LEGAL ERROR WHEN IT DID NOT HOLD FS/ACM FOR VIOLATING SECTION 11-114(d) AS A INSURANCE TRUSTEE
>
> VI. THE COURT COMMITTED LEGAL/PREJUDICIAL ERROR IN QUALIFYING MOONEY AS AN EXPERT WITNESS IN ESTIMATING WHEN IT DID NOT MEET THE THRESHOLD OF ADMISSIBILITY UNDER MD RULES 2-504 & 5-702(1)(3)
>
> VII. COURT COMMITTED LEGAL ERROR IN ITS DENIAL OF THE APPLICATION OF COLLATERAL SOURCE RULE

favor of CCRI, disagrees with the court's conclusion that CCRI and ACM weren't negligent,[2] disagrees with the court's decision to qualify CCRI's president as an expert witness, disagrees with the court's damages rulings on her lost rent claims, and disagrees that Fieldstone's settlement offer mooted her contract claim. Fieldstone and ACM reduce her questions to four and add one of their own.[3] We agree that the circuit court decided the

> VIII. COURT COMMITTED LEGAL ERROR WHEN IT HELD THAT OFFER OF RELIEF BY APPELLEES TO THE APPELLANT MOOTS APPELLANT'S CLAIM
>
> IX. COURT COMMITTED ERROR OF LAW IN ITS APPLICATION OF GAM SECTION 8-402.1 IN HOLDING APPELLANT CLAIM FOR LOSS RENT AS VOID WHEN IT ACKNOWLEDG APPELLANT FACED LIABILITY

[2] There was no claim in the case that Fieldstone or ACM had an independent duty as an "insurance trustee," a status with which we are unfamiliar in any event.

[3] Fieldstone and ACM identified the following questions in their brief:

> I. THE TRIAL JUDGE'S DETERMINATION THAT FIELDSTONE AND ACM WERE NOT NEGLIGENT IS SUPPORTED BY COMPETENT AND MATERIAL EVIDENCE AND IS NOT CLEARLY ERRONEOUS
>
> II. THE TRIAL JUDGE'S DETERMINATION THAT FIELDSTONE DID NOT BREACH THE CONTRACT IS SUPPORTED BY COMPETENT AND MATERIAL EVIDENCE AND IS NOT CLEARLY ERRONEOUS
>
> III. THE TRIAL JUDGE PROPERLY PERMITTED MOONEY TO TESTIFY AS AN EXPERT WITNESS
>
> IV. DR. KHAN IS NOT ENTITLED TO DAMAGES
>
> V. DR. KHAN VIOLATED RULE 8-501 DESPITE TWO EXTENSIONS

CCRI joined the Fieldstone's and ACM's complaints about Dr. Khan's record extract and consolidated the merits into the contentions that she "raises questions and arguments that are neither proper nor meritorious arguments" and that she "failed to meet her burden of proof."

liability issues correctly, that the court did not err in allowing Mr. Mooney to testify as an expert, and, for those reasons, that Dr. Khan was not entitled to damages beyond those Fieldstone agreed separately to pay.[4]

A. The Circuit Court Did Not Err In Finding For The Defendants.

We review judgments entered after bench trials deferentially. "When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity to judge the credibility of the witnesses." Md. Rule 8-131(c). "If there is any competent material evidence to support the factual findings of the trial court, those findings cannot be held to be clearly erroneous." *YIVO Inst. for Jewish Research v. Zaleski*, 386 Md. 654, 663 (2005). "The trial court's conclusions of law, however, are not entitled to the deference of the clearly erroneous standard." *Della Ratta v. Dyas*, 414 Md. 556, 565 (2010). Although she often describes them as errors of law, most of Dr. Khan's complaints about the judgments in favor of

[4] The appellees also ask us to dismiss the appeal as a sanction for numerous violations of Maryland Rule 8-501 in Dr. Khan's Record Extract. Among other things, they complain that the Extract contains documents not admitted in the circuit court, as well as documents not reasonably necessary to decide the issues presented on appeal. They identify inconsistencies between the trial exhibits as admitted and as reproduced in the extract, as well as discrepancies between the Extract on MDEC and the hard copy Dr. Khan served them. And they note that Dr. Khan, a lawyer representing herself, had two extensions of time to comply with Rule 8-501.

The appellees are right about Dr. Khan's Record Extract—it's a mess and does not comply with Rule 8-501. Rather than taking the time to analyze and confirm all of the alleged violations, though, we have focused on the merits of this case, and we will do so without dismissing the appeal or imposing sanctions.

Fieldstone, ACM, and CCRI dispute the circuit court's resolution of factual disputes. We have reviewed the record, and it amply supports the trial court's conclusions that Dr. Khan did not prove that Fieldstone and ACM had been negligent in maintaining and repairing the plumbing and water lines to the Condo, that Fieldstone had breached its contractual duties to stop the leaks and repair damage, or that CCRI had been negligent or breached contractual duties in performing repair work on the Condo.

The overall thrust of Dr. Khan's complaints, whether she expresses them in contract or negligence terms, is that Fieldstone and its contractors had a duty to stop the flow of water from a common area of the condominium property into the Condo and to repair or remediate any damages, including mold, and that they failed to do so. Fieldstone had a contract with ACM to serve as its property manager and ACM hired a variety of contractors, primarily CCRI, to perform the work. The complaint contains claims both for breach of contract and negligence, but the claims seem fundamentally contractual—Fieldstone's duties to Dr. Khan arise from its obligations to condominium owners, ACM's duties arise from its contractual relationship with Fieldstone, and CCRI's duties arise from its contractual relationship with ACM. Even so, the trial court allowed all of her claims to go to trial.

Despite their more involved headings, sections I through V of the Argument in Dr. Khan's brief disagree with the conclusions the trial court reached from the evidence and testimony. She contends, for example, that she "pointed to irreconcilable material conflicts in Appellees['] testimony, during course of trial, including trial exhibits,

Appellees[’] deposition[s], and closing argument,” and concludes that the “[c]ourt[’s] legal conclusion was [an] error of law.” She argues that the judgment in favor of the appellees is inconsistent with the Condominium Act and Fieldstone’s by-laws, that the alleged violations of the Condominium Act are evidence of negligence, that she drew a connection between the alleged violations and her injuries, and that Fieldstone and ACM stood in the position as “insurance trustees.” But each of these arguments leads to the identical conclusion, *i.e.*, that the trial court erred by not finding in her favor. And she reaches these conclusions by disagreeing with the trial court’s weighing of the evidence and arguments, or, said slightly differently, by arguing that the court failed to accord sufficient weight or significance to her positions.

It is not our role to try the case anew or re-weigh the trial evidence. *See Della Ratta*, 414 Md. at 584 (“As an appellate court, we do not re-weigh the evidence, but rather determine whether sufficient evidence exists to support the trial court’s judgment.”). And indeed, that evidence is largely undisputed. Everyone agrees about the fact, timing, and source of the leaks. There were no material disputes of fact about which parties took which steps in response to the leaks, who bore the costs, and the results. The dispute lies in the conclusions that flow from these facts, and specifically the circuit court’s conclusion that Dr. Khan had not proven her claims.

Stated generally, Dr. Khan argued in the circuit court, and argues here, that the appellees violated their duties to her. They countered that they did everything they could to stop the leaks and fix the damage, that Dr. Khan wasn’t satisfied with the work they did,

and that she prevented them from doing the rest of the job. The circuit court denied the appellees' motions for summary judgment, allowed Dr. Khan to put on the evidence she wanted, and denied the appellees' motions for judgment. And after hearing the evidence and testimony, the court found that Fieldstone and ACM had not been negligent in maintaining and repairing the plumbing and water lines to the Condo, that Fieldstone had not breached its duties to operate, repair, and maintain the Condo and surrounding area and in failing to remediate mold and repair the Condo, and that CCRI had not been negligent or breached its contractual duties to Dr. Khan.

This case had a full airing on the merits. The circuit court had a full opportunity to assess the credibility of the witnesses and evaluate the evidence. The circuit court's conclusions were supported amply by the evidence and, therefore, were not clearly erroneous.

B. The Court Did Not Err In Accepting Mr. Mooney As An Expert Witness.

Second, Dr. Khan argues that the circuit court erred in qualifying CCRI's president, Martin Mooney, as an expert witness at trial. She contends that Mr. Mooney was not disclosed as a potential expert in the joint pre-trial statement and that she was prejudiced as a result. Fieldstone responds that it had in fact identified Mr. Mooney as a potential expert in responses to interrogatories, that Mr. Mooney was qualified by his training, expertise, and certifications to testify about the cost of repairing the Condo, and that the evidence underlying Mr. Mooney's cost estimates had been admitted separately, before he took the stand. We agree with Fieldstone.

Maryland Rule 5-702 authorizes the court to admit expert testimony "if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue." At the threshold, the court "shall determine (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony." *Id*. Mr. Mooney testified that he had thirty years of experience in the construction industry, a license from the Maryland Home Improvement Commission, and certifications in water mitigation and microbial remediation. On direct examination, the court limited him to testimony about his experience and the work he did in preparing the estimates to repair the Condo. On redirect, though, Fieldstone produced the interrogatory response identifying Mr. Mooney as a potential expert, and after further questions qualified him as an expert in estimating the cost of repairs for structural damages. After being qualified, Mr. Mooney responded to the testimony of Dr. Khan's expert, Mr. Gould, about the costs of repairing the Condo. Aside from Mr. Mooney's expertise, no new evidence was introduced after he was qualified—all of the evidence relating to the damages the Condo sustained and the costs to repair it had already been admitted by the time Mr. Mooney assumed expert witness status.

In a bench trial, the court has broad discretion to determine whether expert testimony would be helpful and, once admitted, to give it the weight it deserves. *Basso v. Campos*, 233 Md. App. 461, 477 (2017) ("Trial courts have wide latitude in deciding whether to qualify a witness as an expert or to admit or exclude particular expert testimony,

and we review the trial court's decision for an abuse of discretion.) (cleaned up). Although it is not obvious that Mr. Mooney needed to be qualified as an expert in order to testify about the cost of repairing the Condo, or even to react to another estimate, we see no abuse of discretion in the court's decision to qualify him. He testified not only about what he thought, as CCRI's principal, the Condo repairs would cost, but he testified as well about the proposal of another contractor on that same Condo. The court was free to weigh the experts' testimony as it saw fit, and aside from the fact that it (obviously) wasn't favorable to Dr. Khan, she suffered no prejudice from the court's decision to qualify Mr. Mooney or allow his expert testimony.

C. Dr. Khan Is Not Entitled To Damages.

Finally, our decision to affirm the circuit court's rulings on liability resolves Dr. Khan's damages arguments on appeal. As it turns out, Fieldstone agreed to pay Dr. Khan $6,500 for mold remediation after her expert testified that another contractor had completed the job successfully. Dr. Khan had prevented Fieldstone and ACM and their contractors from performing the work, but Fieldstone agreed to pay for it even though the circuit court's liability rulings would have absolved Fieldstone from liability altogether. And without some basis on which to reverse the liability findings against her, there is no basis on which Dr. Khan could recover damages.

JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED. APPELLANT TO PAY COSTS.