Circuit Court for Howard County
Case No. 13-C-17-110330

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2478

September Term, 2017

JAMES LEVEQUE

v.

CHRISTOPHER ESVELD, et ux.

Leahy,
Reed,
Friedman,

JJ.

Opinion by Friedman, J.

Filed: July 18, 2019

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. MD. RULE 1-104.

Christopher and Lauren Esveld wanted to buy an easement[1] over the property of their neighbor, James Leveque. They wrote a contract of sale and drew diagrams of the affected property. Soon after both sides signed the contract, Leveque got cold feet and tried to call off the deal. The Esvelds sued for specific performance of the contract and won. Leveque has appealed to this Court, arguing that the contract is unenforceable and that a motion for judgment should have been granted. We disagree and affirm the judgment of the circuit court.

BACKGROUND

Leveque owns real property in Dayton, Maryland. The Esvelds own an adjacent parcel of land. The Esvelds were interested in purchasing a portion of Leveque's property that bordered their land, but the parties learned that applicable Howard County law prohibits such a subdivision of Leveque's property.[2] As a result, the parties discussed the possibility of creating an easement that would allow the Esvelds to use, if not own, the subject property.[3] To that end, Christopher Esveld drafted the following contract of sale:

> In consideration of the sum $70,000 (seventy thousand) I, James Leveque agree to grant Christopher and Lauren Esveld

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[1] "An easement is a non-possessory interest in the real property of another that can arise either by express grant or implication." *Emerald Hills Homeowners' Ass'n, Inc. v. Peters*, 446 Md. 155, 162 (2016) (cleaned up). An express easement, "otherwise sufficiently described," may be created by a memorandum that satisfies the Statute of Frauds. *Kobrine, L.L.C. v. Metzger*, 380 Md. 620, 636 (2004).

[2] We take no position on the correctness of this conclusion. We merely report that it was the parties' conclusion.

[3] We do not comment on the merits of this unusual easement arrangement. The Esvelds may someday come to regret this deal as much as Leveque already does. But, our proper function is to enforce the binding deals that people make.

> a Maintenance and Utility Easement of the portion of the property located at 4505 Ten Oaks Rd, Dayton, MD 21036, that includes the barn and land [southwest] of the common driveway (*see attached diagram*). The [Leveques] will maintain ownership of the property, but the Esvelds will have exclusive use of the barn/property and be free [to] improve upon the property including, but not limited to installing a paved driveway, building a shed, etc. The Esvelds will be responsible for maintaining the property and any and all structures.
>
> * * *
>
> The Esvelds will be responsible for obtaining a survey to determine the boundaries for the Easement.

Emphasis added.

The parties signed the contract on the evening of August 31, 2016. The relationship between the parties soured soon thereafter.

As a result, the Esvelds filed a complaint for specific performance of the contract of sale. At a bench trial, the Esvelds introduced a copy of the contract of sale. Despite that the contract itself says that there is an "attached diagram," there was nothing attached. Christopher Esveld explained the omission. He testified that he had created the diagram by printing a picture of Leveque's property from the State Department of Assessment and Taxation (SDAT) website, cropping out parcels belonging to neighbors, and then outlining and shading in by hand the portion of Leveque's land over which they were purchasing the easement. Esveld testified that he showed Leveque a copy of the diagram when the parties signed the contract and then gave him a photocopy and emailed copy of the diagram later that evening. Esveld further testified that Leveque had seen the diagram in May 2016. While the diagram was marked for identification as Plaintiff's Exhibit 2, it was not

admitted into evidence (although a second version of the diagram was admitted later as Defendant's Exhibit 2).[4]

At the close of the Esvelds' case, Leveque made a motion for judgment, which the circuit court denied. Leveque then testified that Christopher Esveld emailed him a copy of the diagram identified as Plaintiff's Exhibit 2 after the parties signed the contract of sale, but he denied being shown the diagram at the time of the signing. When presented at trial with the diagram of the property identified as Defendant's Exhibit 2, Leveque also testified that this diagram was emailed to him after the parties signed the contract. He acknowledged receiving emailed copies of both diagrams in May 2016, but he denied understanding that either diagram was the diagram referred to in the contract of sale. Leveque moved into evidence the diagram identified as Defendant's Exhibit 2 at the close of his testimony.

Testifying as a rebuttal witness, Lauren Esveld stated that the diagram identified as Plaintiff's Exhibit 2 was shown, but not given, to Leveque at the time the parties signed the contract of sale. On cross-examination, she acknowledged that she could not say definitively which of the two diagrams identified at trial was shown to Leveque on August 31, 2016.

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[4] As far as this Court can tell, the only differences between the diagrams are that Defendant's Exhibit 2 has the word "EASEMENT" written over the outlined and shaded portion of Leveque's property and includes small drawings showing the locations of the Esvelds' and Leveque's homes. Both diagrams are otherwise identical, having the exact same outlined and shaded area of Leveque's property from the SDAT printout marked as the "Proposed Purchase" area.

After hearing the parties' closing arguments, the circuit court granted the Esvelds' complaint for specific performance, and this appeal followed.

DISCUSSION

I. ENFORCEABILITY OF THE CONTRACT OF SALE

Leveque argues on appeal that the contract of sale between the parties is too vague and uncertain to be enforceable by specific performance. He makes three arguments in support of this position. *First*, he contends the contract cannot be enforced because the referenced diagram of the easement area was not physically attached to it. *Second*, he contends the contract is unenforceable because a survey of the land meant to constitute the easement had not yet been completed. *Finally*, he asserts that a factual dispute about which of two diagrams of the property the parties intended to attach to the contract renders it unenforceable.

The interpretation of a contract is a question of law that we review de novo. *Ocean Petroleum, Co. v. Yanek*, 416 Md. 74, 86 (2010). We review the circuit court's factual findings for clear error. *Newell v. Johns Hopkins Univ.*, 215 Md. App. 217, 235 (2013); MD. RULE 8-131(c).

To be enforceable, a contract must express "with definiteness and certainty the nature and extent of the parties' obligations and the essential terms of the agreement." *Maslow v. Vanguri*, 168 Md. App. 298, 321-22 (2006). "In other words, an agreement that omits an important term, or is otherwise too vague or indefinite with respect to essential terms, is not enforceable." *Id*. at 322. A sufficient description of the property is an essential term in contracts concerning the ownership and use of land. *DeLeon Enters., Inc. v. Zaino*,

92 Md. App. 399, 406 (1992); *Boyd v Mercantile-Safe Deposit & Trust Co.*, 28 Md. App. 18, 22-23 (1975).

In making a blanket assertion that the circuit court had to conclude the contract was unenforceable simply because the diagram of the easement area was not physically attached to it,[5] Leveque entirely ignores that the circuit court found the written description of the easement—"the portion of the property located at 4505 Ten Oaks Rd, Dayton, MD 21036, that includes the barn and land [southwest] of the common driveway"—clear and unambiguous[6] on its face. On appeal, Leveque fails to provide any explanation for why this written description of the easement area, standing alone, was too uncertain or ambiguous for the circuit court to find a valid contract between the parties for the sale of the easement, even assuming the diagram of the property was not physically affixed to the contract of sale. We will not make the argument for him, *Catler v. Arent Fox, LLP*, 212 Md. App. 685, 712 (2013) (holding that failure to brief an issue constitutes forfeiture of the right to appeal from that portion of a court's order), nor do we take issue with the circuit court's assessment that the written description of the easement area in the contract of sale was sufficiently clear. *Sears v. Polan's 5 cent to $1.00 Store of Annapolis, Inc.*, 250 Md.

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[5] It is not entirely clear that Leveque made this specific "lack of attachment" argument before the circuit court. Instead, he appears to have primarily taken the position below that the diagram itself contributed to the vagueness of the contract because it included hand-drawn markings and no dimensions, among other purported infirmities. He does not repeat that argument here, so we do not address it.

[6] As the circuit court recognized, language in a contract is only ambiguous if a reasonable person would find the language susceptible to more than one interpretation. *Ocean Petroleum, Co. v. Yanek*, 416 Md. 74, 87 (2010).

525, 527, 529 (1968) (holding that description of land in contract was sufficiently definite where property was described as 40 acres more or less south of specific road and east of an abandoned railroad).

Regardless of whether the diagram was physically affixed to the contract of sale or properly incorporated by reference,[7] the circuit court correctly recognized that, when evaluating whether the *remedy* of specific performance is appropriate, "the description [of land which is the subject of the contract] need not be given with such particularity as to make a resort to extrinsic evidence unnecessary. Reasonable certainty is all that is required." *Boyd*, 28 Md. App. at 23. We see no fault in the circuit court, after having found the written description of the easement area reasonably certain, thereafter utilizing the

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[7] Seemingly unsupported is Leveque's categorical assertion that a court cannot utilize the incorporation by reference doctrine when a contract, rather than just referring to a document, states that a document is "attached," but the parties fail to attach the document to the contract. In fact, Maryland law is to the contrary. *Patton v. Wells Fargo Fin. Md., Inc.*, 437 Md. 83, 109 (2014) ("Under Maryland law, the parties to a contract may voluntarily agree to define their contractual rights and obligations by reference to documents or rules external to the contract."); *Ray v. William G. Eurice & Bros.*, 201 Md. 115, 117-118, 128 (1952) (plans and specifications were incorporated by reference into contract to build a house where the written contract "specifically and explicitly" referred to the documents even if they were not physically attached to the contract, though the contract stated the documents were "attached"). Interestingly, it appears that before the circuit court the parties, including Leveque, occasionally behaved as if the diagram was part of the contract of sale. As a result of this conduct, as well as testimony from the Esvelds that the diagram was shown to Leveque at the time everyone signed the contract, Leveque's acknowledgment that he received copies of the diagram that same evening, and his testimony that he had seen the diagram in May 2016, it seems the circuit court would have been well supported in concluding that the diagram was in fact incorporated by reference into the contract of sale if expressly asked to make such a finding. 11 WILLISTON ON CONTRACTS § 30:25 (4th ed. 2019) (summarizing the requirements of the incorporation by reference doctrine). Thus, from our perspective, Leveque places too much emphasis on the purported lack of physical attachment between the diagram and the contract.

diagram of the property and the testimony of the parties to conclude there was a sufficient meeting of the minds between the parties about what property was meant to be included in the easement to grant specific performance.[8] *DeLeon Enters., Inc.*, 92 Md. App. at 411 ("meeting of the minds" required to grant specific performance).

In this regard, we are not persuaded by Leveque's third claim that there was some material unresolved factual dispute created by Lauren Esveld's testimony about which diagram of the easement area the parties intended to attach to the contract of sale. The circuit court, as the finder of fact, pointed out that the only differences between the diagram identified as Plaintiff's Exhibit 2 and the diagram moved into evidence as Defendant's Exhibit 2 are that Defendant's Exhibit 2 has the word "EASEMENT" written over the outlined and shaded portion of Leveque's property and includes small drawings showing the locations of the Esvelds' and Leveque's homes. *See supra* n.4. Both diagrams are, in all material respects, identical, having the exact same outlined and shaded area of Leveque's property from the SDAT printout marked as the "Proposed Purchase" area. Further, Leveque acknowledged receiving the diagrams in May 2016 and after signing the contract of sale. He has not identified any clearly erroneous factual finding by the circuit court that would entitle him to appellate relief.

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[8] Although it was not raised, let alone briefed, we emphasize that we see nothing inconsistent with the circuit court's determination that the written description of the property was unambiguous as it considered contract enforceability and the court's desire to confirm that view by reference to the diagrams as it considered the equitable relief of specific performance.

Finally, Leveque provides no legal authority for his cursory assertion that a survey of the land meant to constitute the easement had to be completed before the circuit court could grant specific performance. Instead, as noted by the circuit court, "[t]he fact that the agreement itself calls for a survey to render the description more precise does not affect the validity of the contract providing there is sufficient identity of the land to have allowed a meeting of the minds of the parties to the contract." *Sears*, 250 Md. at 529; *accord Baker v. Dawson*, 216 Md. 478, 491 (1958) ("A description may be sufficient although the contract necessarily contemplates a survey to prepare a more complete description." (Cleaned up)). Considering the circuit court's unchallenged finding that the written description of the easement area was sufficiently clear and the parties' express agreement in the contract of sale that a survey of the property would be completed by the Esvelds, here, too, Leveque fails to identify any basis for appellate relief.

II. MOTION FOR JUDGMENT UNDER MARYLAND RULE 2-519

In asking this Court to reverse the circuit court's denial of his motion for judgment at the conclusion of the Esvelds' case-in-chief, Leveque's only claim of error is that the circuit court improperly considered the diagram of the easement area when denying the motion though that diagram had not yet been moved into evidence.

Preliminarily, Leveque appears to have waived any challenge to the circuit court's denial of his motion. Specifically, if a party's motion for judgment is denied, the party may offer evidence in its own defense, but in doing so, the party "effectively withdraws the motion for judgment and may not complain on appeal about the denial of it." *Driggs Corp. v. Md. Aviation Admin.*, 348 Md. 389, 403 (1998) (citing MD. RULE 2-519(c)). Here, after

his motion was denied, Leveque testified in his own defense and moved into evidence Defendant's Exhibit 2, waiving his right to challenge the circuit court's denial of his motion before this Court.

Even if this issue is properly before us, we are not persuaded that the circuit court engaged in any reversible error. As the Esvelds point out, Leveque expressly asked the court to consider the diagram identified as Plaintiff's Exhibit 2 when ruling on his motion, even though he took the position that the diagram was further evidence that the contract of sale was too vague and too ambiguous to be enforceable. We will not fault the circuit court for doing exactly what Leveque asked of it simply because the court did not arrive at the conclusion for which he had hoped. *Cf. State v. Rich*, 415 Md. 567, 575 (2010) (addressing the invited error doctrine applicable in the criminal setting and noting that it "stems from the common sense view that where a party invites the trial court to commit error, he cannot later cry foul on appeal" (cleaned up)); *MEMC Elec. Materials, Inv. v. BP Solar Int'l, Inc.*, 196 Md. App. 318, 335 (2010) ("[I]t is well-settled that failure to state a reason [why the motion for judgment should be granted] serves to withdraw the issue from appellate review." (Cleaned up)). There also is no dispute that when the circuit court rendered its final judgment, the diagram of the easement area identified as Defendant's Exhibit 2 *was* in evidence. MD. RULE 2-519(b) ("When a defendant moves for judgment at the close of the evidence offered by the plaintiff in an action tried by the court, the court ... may decline to render judgment until the close of all the evidence.").

Because Leveque fails to identify sufficiently any reversible error by the circuit court, we affirm.

JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.