Richard N. Henry et ux.	*	In the
	*	
Appellants	*	COURT OF SPECIAL APPEALS
	*	
vs.	*	No. 2325
	*	
Tanie Guirand et al.	*	September Term, 2012
	*	
Appellees	*	

ORDER

Upon consideration of Appellants' Motion for Reconsideration of the unreported opinion filed on January 10, 2014, Appellee Bel Pre Recreational Association, Inc.'s Request to Issue Reported Opinion and Request for Correction of Reference to Inapplicable Statute and Appellants' Response to Appellee's Request to Issue Reported Opinion and Request for Correction of Reference to Inapplicable Statute, it is this 19th day of November, 2014 by the Court of Special Appeals,

ORDERED that Appellants' Motion for Reconsideration is granted in part and denied in part; and it is further

ORDERED that the Appellee's Request for Correction of Reference to Inapplicable Statute is granted; and it is further

ORDERED that Appellee's Request to Issue Reported Opinion is denied; and it is further

ORDERED that a revised opinion consistent with the relief granted herein shall be filed simultaneously with this Order.

For a Panel of the Court
Judge's signature appears on original Order

Christopher B. Kehoe, Judge

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2325

September Term, 2012

UPON MOTION FOR RECONSIDERATION

RICHARD N. HENRY ET UX.

v.

TANIE GUIRAND ET AL.

Krauser, C.J.
Kehoe,
Salmon, James P.
(Retired, Specially Assigned)

JJ.

Opinion by Kehoe, J.

Filed: November 19, 2014

This is an interlocutory appeal filed by appellants Richard and Brenda Henry pursuant to Courts and Judicial Proceedings Article ("CJP") § 12-303(3)(iii)[1] from an order of the Circuit Court for Montgomery County granting summary judgment in favor of appellee Bel-Pre Recreational Association, Inc. (the "Association") on counts two, three, and four of the Henrys' complaint. The circuit court did not dismiss the complaint's remaining count against Tanie and Pierre Guirand, who are next-door neighbors of the Henrys.[2] At the time the instant appeal was filed, that claim remained outstanding. The Henrys present two questions for our review, which we reorder and slightly rephrase:

> I. Did the circuit court err in granting summary judgment in favor of the Association on counts two, three, and four on the grounds that the Henrys failed to state a claim upon which relief could be granted and that the business judgment rule applied to preclude the claims asserted?
>
> II. Did the circuit court err in granting summary judgment in favor of the Association on counts two, three, and four on the ground of *res judicata*?

Because we answer the first question in the negative, we need not address the second and we will affirm the decision of the circuit court.[3]

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[1]CJP § 12-303(3)(iii) permits the interlocutory appeal of an order "refusing to grant an injunction$_{[\cdot]}$." Because the circuit court's order effectively denied the injunction requested by the Henrys, we will address the substantive bases of the court's decision. *See USA Cartage Leasing v. Baer*, 202 Md. App. 138, 169 (2011), *aff'd*, 429 Md. 199 (2012) (collecting cases).

[2]The Guirands are not parties to this appeal.

[3]"[T]he elements required to support a *res judicata* defense [are] 1) that the parties in the present litigation are the same or in privity with the parties to the earlier dispute, 2) that the claim presented in the current action is identical to the one determined in the prior (continued...)

BACKGROUND

The Complaint

On June 19, 2012, the Henrys filed a four-count complaint against the Guirands and the Association. The claims were all premised on the Henrys' allegation that the Guirands had planted a row of Leland Cypress trees along the shared border between the Henry and Guirand properties, in violation of certain provisions set forth in their community's "Declaration of Covenants" (the "Declaration"). In count one, the Henrys alleged that the Guirands had breached the Declaration by planting and maintaining a "growing fence" of a height greater than forty-two inches, and requested relief "in the form of an [o]rder prohibiting [the] Guirand[s] from further violations of the Declaration, . . . and mandating that [the] Guirand[s] cut the 'growing fence' trees . . . to a height not in excess of forty two inches, and maintain said 'growing fence' trees at a height not to exceed forty two inches at all times in the future." In counts two and four, the Henrys sought injunctive and declaratory relief related to what they deemed to be an unjustified failure by the Association's Board of Directors (the "Board") to enforce the Declaration against the Guirands.[4] In count three, the

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[3](...continued)
adjudication, and 3) that there was a valid final judgment on the merits." *Chaires v. Chevy Chase Bank*, 131 Md. App. 64, 74-75 (2000). The parties do not dispute that the first two elements are satisfied. The Henrys, however, assert that the third element is not satisfied because the CCOC dismissed their case on jurisdictional grounds without holding a hearing on the merits of their contentions. Because we find the Association's remaining argument to be dispositive of the issue before us, we need not resolve this dispute.

[4]The Board considered the Henrys' request during a meeting in which the Henrys (continued...)

Henrys sought punitive damages for alleged breaches of fiduciary duty related to the Board's enforcement decisions. At the heart of their claims against the Association was the Henrys' assertion that the Board's decision not to enforce the covenants against the Guirands was invalid because one Board member, Ed Frantz, participated in the Board's deliberative process and, eventually, cast the deciding vote against filing an enforcement action against the Guirands. The Henrys assert that Frantz had a "growing fence" on his own property and accordingly should not have participated or voted.

The Association's Motion

In response, the Association moved to dismiss or, in the alternative, for summary judgment on the counts against it, arguing that the Henrys had failed to state a claim upon which relief could be granted, or, alternatively, that the Henrys' claims were barred by the doctrine of *res judicata*.

The Association's argument as to its first ground was based on its position that its enforcement decision in the instant case was discretionary and, therefore, protected by the business judgment rule. It asserted, in pertinent part:

> In the course of the Board's debate on whether to take further action to compel the Guirands to trim their trees, Mr. Frantz acknowledged that some might view certain trees on his lot as violations of the same covenant. This was more than a disclosure to the Board, it was a suggestion to the Board that it should consider whether it was fair to the Guirands to be required to take action without reviewing whether there were other violations in the neighborhood and

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[4](...continued)
participated, but it ultimately decided not to pursue the matter further.

> taking action in those matters as well.[5] The [Henrys] equate Mr. Frantz's circumstance with a "conflict of interest". . . . The crucial point is [although] a director and a corporation may have interests that conflict, what matters is whether a [d]irector takes actions that are not in the interest of the community. Mr. Frantz made clear his belief that voting to require the Guirands to cut their trees was not in the community's interest, because of the challenge that the Guirands could make as to the fairness of their being required to comply in the context of conditions on many properties in the community.

After holding a hearing on the motion, the circuit court dismissed counts two, three, and four on the grounds set forth by the Association.

This appeal followed.

ANALYSIS

In ruling on the Association's motion, the circuit court considered matters outside the four corners of the complaint and its exhibits. We will, therefore, treat the motion as one for summary judgment. *See* Md. Rule 2-322(c); *D'Aoust v. Diamond*, 424 Md. 549, 573 (2012). We review a circuit court's grant of summary judgment *de novo*. *Harford County v. Saks Fifth Ave. Distrib. Co.*, 399 Md. 73, 82 (2007). We must determine whether there exists a dispute as to any material fact and whether the circuit court was legally correct. *Lombardi v. Montgomery County*, 108 Md. App. 695, 710 (1996). In making this determination, we consider the facts in the record "in the light most favorable to the non-moving part[y]." *Georgia-Pacific Corp. v. Benjamin*, 394 Md. 59, 74 (2006).

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[5] In the case before the CCOC, the Henrys conceded that there were multiple properties in the community in violation of the same covenant. The record before us does not contain the precise number of violating properties.

Applying this standard, we affirm the judgment of the circuit court. We view this case as very similar—except in one aspect—from the one presented to this Court in *Black v. Fox Hills*, 90 Md. App. 75 (1992). Therein, in considering a challenge to a decision of a homeowner's association's board not to enforce covenants, we stated (emphasis added):

> The decision which the association made to approve the Kupersmiths' fence was a decision which it was authorized to make. Whether that decision was right or wrong, the decision fell within the legitimate range of the association's discretion. As such, the association was under no obligation to proceed against the Kupersmiths to remove the fence. There was no allegation in the complaint of any fraud or bad faith. **Absent fraud or bad faith, the decision to approve the fence was a business judgment with which a court will not interfere.** The complaint against FHNCA was properly dismissed.

90 Md. App. at 83.

The difference between the present case and *Fox Hills* is the role of Frantz. The Henrys assert that *Fox Hills* is distinguishable because the Board's decision not to enforce the covenant against the Guirands was tainted by bad faith on the part of Frantz, who voted against filing an enforcement action against the Guirands.[6] In their view, Frantz was required, as a matter of law, to abstain from voting on the decision whether to enforce the covenant against the Guirands. Frantz's failure to do so, they continue, constitutes bad faith and, therefore, removed the Board's decision from the ambit of the business judgment rule and *Fox Hills*. We find this contention unpersuasive. In explaining why, we begin by considering some basic principles of Maryland corporation law.

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[6]The Board split 4-4 in its vote on whether to enforce the covenant against the Guirands.

Corporations and Associations Article ("CA") § 1-102(a) provides that "[e]xcept as expressly provided by statute, the provisions of this article apply to every Maryland corporation and their corporate acts."[7] There being no relevant exception, Maryland's version of the business judgment rule, codified in CA § 2-405.1, applies to non-stock corporations such as homeowner's associations. The statute provides in pertinent part:

> **Liability of directors, standard of care.**
> (a) A director shall perform his duties as a director, including his duties as a member of a committee of the board on which he serves:
> (1) In good faith;
> (2) In a manner he reasonably believes to be in the best interests of the corporation; and
> (3) With the care that an ordinarily prudent person in a like position would use under similar circumstances.
> * * * *
> (e) An act of a director of a corporation is presumed to satisfy the standards of subsection (a) of this section.

Although § 2-405.1 has been on the statute books since 1976, there are no reported Maryland decisions that attempt to define the concept of "good faith" in this context. Accordingly, we look to other sources. One widely-respected commentator has suggested that the term "good faith" in § 2-405.1 embraces several different but overlapping concepts:

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[7]CA § 5-201, which pertains specifically to nonstock corporations, is to the same effect. It reads:

> **Application of Maryland General Corporation Law.**
> The provisions of the Maryland General Corporation Law apply to nonstock corporations unless:
> (1) The context of the provisions clearly requires otherwise; or
> (2) Specific provisions of this subtitle or other subtitles governing specific classes of corporations provide otherwise.

> "Good faith," as applied to a director pursuant to Section 2-405.1(a)(1), is the absence of any desire to obtain a personal benefit or a benefit for some person other than the corporation.... "Good faith" is generally synonymous with ... the duty of loyalty or the duty of fair dealing.
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> * * * *
>
> In addition, to be acting in good faith, a director may not approve an action that he knows is in violation of the law.... [or] apply an invalid provision of the corporation's by-laws to the detriment of a stockholder.

James J. Hanks, Jr., MARYLAND CORPORATION LAW § 6.6[b] at 170-72 (1990, 2014 Suppl.). Hanks also comments that "[p]roving that a director has an interest in an action creates a *prima facie* case that the director was not [acting] in good faith...." *Id.* at 172. Finally, Hanks observes that "the test for good faith is an objective one." *Id.* at 171.

The application of these principles to the record viewed in the light most favorable to the Henrys yields the following:

First, and most importantly, we do not agree with the Henrys' contention that Frantz was "clearly self-interested ... in voting against sending a letter to the Guirands directing them to bring the subject row of trees into compliance" with the covenants. Franz would have been "self-interested" in the decision if its resolution would have personally benefitted or harmed him. The question before the Board was whether to pursue an enforcement action against the Guirands, not the Frantzes. There is no evidence in the record suggesting that Frantz would have been personally benefitted one way or the other by the Board's decision. Our conclusion might be different if the question before the Board was whether to pursue enforcement proceedings against all properties within the subdivision but that question was neither before the Board nor us.

Second, Frantz's actions otherwise meet the tests for "good faith" enunciated by Hanks. Maryland's interested director statute, CA § 2-419,[8] requires a director to disclose the problematic interest to the other board members. There is no dispute that Frantz did this.[9] The minutes of the meeting at which the motion to enforce the restriction against the Guirands failed shows that Franz was troubled by the implications, both legal, financial and ethical,

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[8]Section 2-419 states in pertinent part:

Interested director; disclosure and vote.
(a) If subsection (b) of this section is complied with, a contract or other transaction between a corporation and any of its directors or between a corporation and any other corporation, firm, or other entity in which any of its directors is a director or has a material financial interest is not void or voidable solely because of any one or more of the following:
(1) The common directorship or interest;
(2) The presence of the director at the meeting of the board or a committee of the board which authorizes, approves, or ratifies the contract or transaction; or
(3) The counting of the vote of the director for the authorization, approval, or ratification of the contract or transaction.
(b) Subsection (a) of this section applies if:
(1) The fact of the common directorship or interest is disclosed or known to:
(i) The board of directors or the committee, and the board or committee authorizes, approves, or ratifies the contract or transaction by the affirmative vote of a majority of disinterested directors, even if the disinterested directors constitute less than a quorum; or
(ii) The stockholders entitled to vote, and the contract or transaction is authorized, approved, or ratified by a majority of the votes cast by the stockholders entitled to vote other than the votes of shares owned of record or beneficially by the interested director or corporation, firm, or other entity; or
(2) The contract or transaction is fair and reasonable to the corporation.
* * * *

[9]Although Gordon Klang, another member of the board, expressed his view in an email that Frantz should not be involved in the decision-making process, the board minutes do not indicate that he raised the issue in a board meeting, much less that his concern was shared by any other board member.

of embarking upon a program of selective enforcement. These concerns are appropriate factors for consideration in a director's exercise of his or her discretion.

We conclude that the record demonstrates that Franz's participation in the Board's deliberative process was in good faith. In the absence of fraud or bad faith, the Association's decision not to enforce the covenant against the Guirands is subject to the business judgment rule.[10] *See Fox Hills*, 90 Md. App. at 81-82. The circuit court did not err in granting summary judgment in favor of the Association.[11]

THE JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY IS AFFIRMED AS TO COUNTS 2, 3, AND 4. APPELLANTS TO PAY COSTS.

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[10]In their reply brief, the Henrys suggest that Susan Hoye, another Board member, had a "conflict of interest" because her property had a fence that violated a height restriction in the Declaration. There is some terminological imprecision here—Hoye's duties to the Association are governed by CA § 2-405.1 and not by the somewhat different concepts of "conflict of interest," as that term is used in the fields of public ethics and lawyers' rules of professional conduct. In any event, Hoye did not have a personal interest in the Guirand matter for the same reasons that Frantz did not.

[11]The Association's motion to strike portions of the Henrys' reply brief is denied as moot.