Circuit Court for Baltimore City
Case No. 24-C-20-002841

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 617

September Term, 2021

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SINGLETARY & WEATHERS HOME IMPROVEMENT, LLC, ET AL.

v.

INFINITY CAPITAL FUNDING, LLC

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Arthur,
Tang,
Zarnoch, Robert A.,
Senior Judge, Specially Assigned,

JJ.

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Opinion by Tang, J.

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Filed: September 22, 2022

This appeal arises from a claim for breach of an agreement. In the Circuit Court for Baltimore City, Infinity Capital Funding, LLC ("Infinity"), appellee,[1] filed suit against appellants, Singletary & Weathers Home Improvement, LLC ("S&W") and Robert Singletary, its owner and operator, for breach of contract or, alternatively, for unjust enrichment or quantum meruit. Infinity moved for summary judgment. The court held a hearing and entered judgment against S&W and Mr. Singletary for breach of contract, awarding damages, pre-judgment interest, and attorneys' fees. S&W and Mr. Singletary moved to revise the judgment to reduce the damages in conformity with the court's bench ruling, to eliminate or reduce the amount of pre-judgment interest, and to eliminate the award of attorneys' fees against Mr. Singletary. The court granted the motion to revise, in part, and entered a revised judgment.

S&W and Mr. Singletary appeal from the revised judgment, presenting four questions,[2] which we condense and rephrase as two:

[1] Infinity did not file a brief in this Court. By order entered December 14, 2021, this Court granted its attorney's motion to strike his appearance. A copy of that order twice was sent to Infinity's mailing address in California but was returned undelivered. On the second occasion, the reason given was "Vacant, Unable to Forward."

[2] The questions as posed by S&W and Mr. Singletary are:

> 1. Did the Circuit Court err in granting Plaintiff's Motion for Summary Judgment when there were genuine disputes of material facts raised by the papers, including Defendants' properly affirmed Affidavit?
>
> 2. Did the Circuit Court err in granting Plaintiff's Motion for Summary Judgment when Plaintiff's Motion was based upon an Affidavit which only affirmed that "the allegations in the Motion for Summary Judgment and Memorandum in Support of Summary Judgment are true and accurate to the

I. Did the circuit court err by ruling that the affidavit in support of Infinity's motion for summary judgment complied with Maryland law?

II. Did the circuit court otherwise err by granting summary judgment in favor of Infinity?

For the following reasons, we answer the first question in the negative and the second question in the affirmative and shall reverse the judgment.

## BACKGROUND

On or about July 18, 2018, S&W, a Maryland limited liability company owned and operated by Mr. Singletary, and Infinity, a California limited liability company, executed an "Agreement for the Purchase and Sale of Future Receipts" ("Agreement"). Under this arrangement, Infinity provided a fixed, up-front capital infusion in return for a percentage share of S&W's future accounts receivable.[3]

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best of my personal knowledge and belief" and failed to satisfy the foundational requirements for alleged business records?

3. Did the Circuit Court err in granting Plaintiff's Motion for Summary Judgment when there were disputed factual issues concerning whether the particular transactions were usurious loans masquerading as purchase agreements, whether the Agreement and/or Guaranty were contracts of adhesion, and whether the facts supported the defenses of procedural unconscionability and/or substantive unconscionability defenses?

4. Did the Circuit Court err and/or abuse its discretion in the pre-discovery granting of Plaintiff's Motion for Summary Judgment and refusing Defendants' requests to defer ruling to allow discovery (supported by an Affidavit of Defense Not Available), when many of the key facts would be in Plaintiff's sole possession and thus only available through discovery?

[3] S&W and Mr. Singletary characterize the Agreement as a merchant cash advance agreement, in which a seller "sells" its future receivables for a present influx of cash. In a merchant cash advance agreement, according to S&W and Mr. Singletary, the seller agrees

**A. The Relevant Terms of the Agreement**

Infinity, as "Buyer," agreed to pay S&W $30,000 ("Purchase Price") in exchange for a promise by S&W, as "Seller," to pay Infinity $42,000 ("Purchased Amount") from its future receipts[4] by means of direct withdrawals from its bank account every business day. The Agreement set an "Initial Daily Amount" of $285.71, which was calculated by multiplying S&W's average monthly sales ($42,000) by an agreed specified percentage (14.29%) divided by the average number of business days in a calendar month.

A clause titled, "Seller May Request Changes to the Daily Amount (IMPORTANT PROTECTION FOR SELLER)," empowered S&W to request adjustments to the Daily Amount, no more than once per month, if its actual future receipts were not consistent with the forecasted receipts and no "Event of Default," as defined in the Agreement *infra*, had occurred. If S&W exercised its right to request a change, it was obligated to provide information requested by Infinity to "assist in this reconciliation." "Upon reasonable verification of such information," Infinity was required to "adjust the Daily Amount on a going-forward basis to more closely reflect [S&W's] actual Future Receipts times the Specified Percentage."

Paragraph 2 of the Agreement titled, "Nonrecourse Sale of Future Receipts (THIS IS NOT A LOAN)," provided, in part:

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to give the buyer more in future receivables than the amount received from the buyer, who effectively collects interest at a usurious rate.

[4] "Future Receipts" was defined to include all payments received by S&W "in the ordinary course of [its] business."

> [S&W] is selling a portion of a future revenue stream to [Infinity] at a discount, not borrowing money from [Infinity]. There is no interest rate or payment schedule and no time period during which the Purchased Amount must be collected by [Infinity]. If Future Receipts are remitted more slowly than [Infinity] may have anticipated or projected because [S&W]'s business has slowed down, or if the full Purchased Amount is never remitted because [S&W]'s business went bankrupt or otherwise ceased operations in the ordinary course of business, and [S&W] has not breached this Agreement, [S&W] would not owe anything to [Infinity] and would not be in breach of or default under this Agreement. [Infinity] is buying the Purchased Amount of Future Receipts knowing the risks that [S&W]'s business may slow down or fail, and [Infinity] assumes these risks . . .

Paragraph 13.1 defined an "Event of Default" as "the occurrence of any of the following events":

> (a) [S&W] interferes with [Infinity]'s right to collect the Daily Amount; (b) [S&W] violates any term of covenant in this Agreement; (c) [S&W] uses multiple depository accounts without the prior written consent of [Infinity]; (d) [S&W] changes its depositing account or its payment card processor without the prior written consent of [Infinity]; (e) [S&W] defaults under any other agreement with [Infinity], or breaches any of the terms, covenants and conditions of any other agreement with [Infinity], or (f) [S&W] fails to provide timely notice to [Infinity] such that in any given calendar month there are four or more ACH transactions attempted by [Infinity] that are rejected by [S&W]'s bank.

Paragraph 14.1, the "Remedies" provision, provided that upon an Event of Default, the specified percentage automatically increased to 100% of S&W's future receipts, and Infinity was entitled to collect the "full undelivered Purchased Amount," plus fees, charges, and all reasonable attorneys' fees and costs.

The Agreement was to be governed by California law.

Appendix A to the Agreement set out a list of fees and charges that S&W would be "liable for" in addition to the Purchased Amount. The fees included the $350 origination fee, a $35 fee "each time [S&W] fails to notify [Infinity] in a timely manner that the Daily

Amount will not be available in the Account"; all costs to collect under the Agreement, including attorneys' fees "related to the enforcement of any other remedies available to [Infinity] if [S&W] defaults"; and a "Default Fee of $2,500 charged upon the occurrence of any Event of Default" after written notice to S&W.

Simultaneously with the execution of the Agreement, Mr. Singletary signed a "Personal Guaranty of Performance" ("Guaranty"), "irrevocably, absolutely and unconditionally" guaranteeing "prompt and complete performance" of the terms of the Agreement. The Guaranty likewise was to be governed by California law.

**B. Infinity's Complaint**

On June 29, 2020, Infinity filed suit against S&W and Mr. Singletary. It set out certain terms of the Agreement and alleged that S&W and Mr. Singletary "failed to remit the full Purchase[d] Amount pursuant to the Agreement"; that Infinity demanded payment, but none was received; and that "the outstanding Purchase[d] Amount due and owing [was $30,225.19]." Count I asserted a claim for breach of contract against S&W and Mr. Singletary, restating the same facts and adding that the "failure to provide payment pursuant to the Agreement is a material breach of the contract[.]" Counts II and III asserted, in the alternative, claims against S&W for unjust enrichment (Count II) and quantum meruit (Count III).[5] In each count, Infinity sought recovery of the principal amount of $30,225.19, pre-judgment interest, post-judgment interest, and court costs. Count I also

[5] In those counts, Infinity alleged that it rendered goods and services to S&W; that S&W accepted the benefit of the goods and services; that it did so with knowledge that it was expected to pay in full for the goods and services; and that it failed to make payment in full.

sought contractual attorneys' fees. S&W and Mr. Singletary answered the complaint, denying liability and asserting ten defenses, including illegality and usury.

**C. Infinity's Motion for Summary Judgment**

On July 24, 2020, within a month after filing the complaint, Infinity moved for summary judgment based on the above stated facts. It sought judgment for the unpaid principal amount of $30,225.19, $1,586.82 in pre-judgment interest, and $6,362.40 in attorneys' fees, for a total of $38,174.41. Infinity supported its motion with an affidavit made by Isaiah Kenigsberg, Infinity's controller and custodian of records, attaching five exhibits: (1) the Agreement, (2) the Guaranty, (3) an account statement maintained by Infinity for S&W ("Account Statement"),[6] (4) a pre-judgment interest worksheet, and (5) an affidavit of attorneys' fees with exhibits.

In paragraph 2 of his affidavit, Mr. Kenigsberg averred that "the allegations in the Motion for Summary Judgment and Memorandum in Support of Summary Judgment are true and accurate to the best of [his] personal knowledge and belief." In paragraph 3, Mr. Kenigsberg affirmed that the first three exhibits (the Agreement, Guaranty, and Account Statement) "were exact duplicates of records that (a) were made at or near the time of the occurrence of the matters set forth herein by, (or from information transmitted by) a person

[6] The Account Statement reflected that Infinity debited the Daily Amount from S&W's account from July 20, 2018 through October 3, 2018. Thereafter, it charged S&W a $35 fee on 15 occasions between October 3 and October 31. On November 13, 2018, it applied a payment received from S&W to reimburse seven of the $35 fee charges, plus $25 towards the eighth fee. On September 4, 2019, Infinity charged S&W a $2,500 "Default Fee."

with knowledge of those matters, (b) were made and kept in the cour[se] of regularly conducted business activity of the business, and (c) were made and kept as a regular practice of [Infinity]'s business." In paragraphs 4 through 13, Mr. Kenigsberg stated the facts set forth in the memorandum in support of summary judgment, which mirrored the facts set forth in the complaint. Mr. Kenigsberg concluded the affidavit with the following affirmation, "I do solemnly affirm under the penalties of perjury and upon personal knowledge that the contents of the foregoing paper are true."

### D. S&W and Mr. Singletary's Opposition to the Motion for Summary Judgment

S&W and Mr. Singletary opposed the motion for summary judgment on three grounds. First, they argued that under California law, it was impermissible for Infinity to pursue mutually inconsistent contract claims and quasi-contractual claims simultaneously. Second, they asserted that Mr. Kenigsberg's affidavit was insufficient under Rule 2-501 because of his averment in paragraph 2 that the allegations of the motion for summary judgment were based on his "belief."

Third, they argued that summary judgment was premature and unfounded because the Agreement was subject to fact-based challenges of unconscionability and adhesion. They maintained that discovery was necessary to show that the Agreement was a loan, disguised as a sales contract, and was void as against public policy and/or unenforceable under California law. They cited California cases holding that the issue of whether a contract was a sale of future receivables or a loan subject to California usury law was a fact-dependent inquiry. They further maintained that the $2,500 default fee was unlawful

under California law (as well as under Maryland law) as a penalty. S&W and Mr. Singletary urged the court to defer ruling on summary judgment until discovery permitted them to develop the record more fully. They supported their motion with an "Affidavit of Defense Not Available" under Rule 2-501(d).[7]

On the day prior to the hearing on the motion for summary judgment, S&W and Mr. Singletary filed a supplement to their opposition, attaching an affidavit made by Mr. Singletary.[8] Mr. Singletary averred that he had "on multiple occasions" requested a change to the Daily Amount as permitted under the Agreement because S&W's "actual receipts were less than predicted." He stated that Infinity neither responded to his change requests by requesting further information, nor did it adjust the Daily Amount.

**E. The Court's Ruling on the Motion for Summary Judgment**

The motions hearing took place on January 6, 2021. Infinity argued that the "basic breach" of the Agreement was that it paid S&W $30,000 and, in exchange, S&W promised to pay Infinity $42,000 but did not. Infinity offered to waive its claim to the "$12,000 differential between the $30,000 that [S&W] received and the [$42,000] that [Infinity]

[7] Rule 2-501(d) provides: "If the court is satisfied from the affidavit of a party opposing a motion for summary judgment that the facts essential to justify the opposition cannot be set forth for reasons stated in the affidavit, the court may deny the motion or may order a continuance to permit affidavits to be obtained or discovery to be conducted or may enter any other order that justice requires."

[8] Though the docket entries reflect that the supplemental opposition was not filed until February 3, 2021, nearly a month after the hearing at which summary judgment was granted, the transcript of the hearing makes clear that Infinity's counsel and the court had received it in advance. Further, the court specified in ruling on the motion that it had considered the supplemental opposition in making its decision.

would have ultimately received" to take the "pot of alleged factual complaints off the table," adding that "any complaint about usury or unconscionability is no longer relevant." Consequently, it reduced the principal amount sought from $30,255.19 to $18,255.19. With respect to Mr. Singletary's affidavit, Infinity challenged the sufficiency of disputed facts.

Counsel for S&W and Mr. Singletary argued as a threshold matter that Mr. Kenigsberg's affidavit was legally deficient. Counsel then turned to "the heart of the matter," which was whether the Agreement was "a loan in sheep's clothing," reasoning that this, along with issues of adhesion and unconscionability, were issues of fact under California law. They also argued that the affidavit in support of the supplemental opposition generated a factual dispute about whether S&W sought a reduction in the Daily Amount.

In rebuttal, Infinity maintained that even if the Agreement were void under California law, S&W received $30,000 and only had paid "roughly" $14,500. It asserted that S&W and Mr. Singletary were obligated to pay back the funds advanced to them by Infinity and asked the court to put the parties back where they would have been at the beginning of the transaction.

The court ruled from the bench. First, the court concluded that Infinity properly pleaded its claims in contract and in quasi-contract in the alternative. Second, it ruled that because Mr. Kenigsberg's affidavit was affirmed under penalties of perjury and upon personal knowledge, it was not deficient under Maryland law. Third, the court ruled:

> With respect to the various quote fact-based challenges, the Court rejects those as well. This is a commercial agreement, and I'm not sure actually how [Infinity]'s counsel originally described this hearing as, I don't know if he used the word mundane or what, but this – I just – I don't see how there's a defense to this.
>
> There is clear contractual language, it's supported by affidavit in terms of the failure to pay, and the Court finds that the motion as set forth provides ample grounds for the Court to grant the relief as request in the full amount, the $18,255.19, the Court will grant that judgment in favor of [Infinity], as well as the attorneys' fees and interest.

That same day, the court signed an order granting summary judgment in favor of Infinity. Despite the bench ruling, the order reflected the original principal amount of $30,225.19, plus pre-judgment interest at a rate of 6% in the amount of $1,586.82, and attorneys' fees in the amount of $6,362.40, for a total judgment of $38,174.41. The docket entries reflect that the order was entered on January 14, 2021.

**F. S&W and Mr. Singletary's Motion to Revise the Judgment**

Twenty days later, on February 3, 2021, S&W and Mr. Singletary filed a motion to revise the judgment.[9] S&W and Mr. Singletary argued that the court mistakenly entered judgment for the original amount sought by Infinity instead of the reduced amount awarded at the hearing, and that the pre-judgment interest and attorneys' fees also must be recalculated based upon the reduced amount.[10] Alternatively, they maintained that pre-

[9] Though captioned as a motion to alter or amend under Rule 2-534, because it was filed more than ten days but less than thirty days post-judgment, we shall treat it as a motion to revise under Rule 2-535. *Pickett v. Noba, Inc.*, 114 Md. App. 552, 557 (1997).

[10] The affidavit of attorneys' fees made by Infinity's counsel averred that the fee agreement between Infinity and the law firm was for a contingent fee of 20% of the "gross amount of any amount recovered, before the payment of expenses."

judgment interest was not expressly allowed under the Agreement or the Guaranty and was not warranted in this case given that the amount sought by Infinity was not definite. Finally, because the Guaranty did not include an attorneys' fees provision, they maintained that the award of fees only could be against S&W. Infinity opposed the motion to revise.

By order entered May 27, 2021, the court granted the motion to revise, in part, and entered a revised judgment. It reduced the judgment consistent with its bench ruling, awarding Infinity $22,851.57, "consisting of principal of $18,255.19, pre-judgment interest in the amount of $945, and attorneys' fees in the amount of $3,651.38[.]" Within thirty days of the entry of the revised judgment, S&W and Mr. Singletary noted this appeal.[11]

## STANDARD OF REVIEW

Summary judgment is appropriate when the material facts in a case are not subject to genuine dispute and the moving party is entitled to judgment as a matter of law. Md. Rule 2-501(f). This Court reviews the grant of a motion for summary judgment without deference, "examining the record independently to determine whether any factual disputes exist when viewed in the light most favorable to the non-moving party and in deciding

[11] Because S&W and Mr. Singletary filed their post-judgment motion more than ten days after the entry of the January 14, 2021 judgment, it did not toll the time to appeal from that judgment. *See Johnson v. Francis*, 239 Md. App. 530, 541 (2018) ("Rule 8-202(c) provides for an exception that tolls the running of [the 30-day appeal] period while the court considers certain motions, including motions . . . that are filed *within ten days of entry of the judgment or order* under Rule 2-534 and/or 2-535.") (cleaned up) (emphasis added). When, as here, however, a motion "to revise a final judgment is filed within thirty days and the court in fact revises the judgment, and there has been no intervening order of appeal, the prior judgment loses its finality and the revised judgment becomes the effective final judgment in the case." *Gluckstern v. Sutton*, 319 Md. 634, 651 (1990) (quoting *Yarema v. Exxon Corp.*, 305 Md. 219, 241 (1986)). Consequently, the appeal from the revised judgment was timely.

whether the moving party is entitled to judgment as a matter of law." *Steamfitters Local Union No. 602 v. Erie Ins. Exch.*, 469 Md. 704, 746 (2020) (citing *Rowhouses, Inc. v. Smith*, 446 Md. 611, 630 (2016)). "Evidentiary matters, credibility issues, and material facts which are in dispute cannot properly be disposed of by summary judgment." *Taylor v. NationsBank, N.A.*, 365 Md. 166, 174 (2001). In determining whether a grant of summary judgment is legally correct, we ask "whether a fair minded jury could find for the plaintiff in light of the pleadings and the evidence presented, and there must be more than a scintilla of evidence in order to proceed to trial[.]" *Sierra Club v. Dominion Cove Point LNG, L.P.*, 216 Md. App. 322, 330 (2014) (quoting *Laing v. Volkswagen of Am., Inc.*, 180 Md. App. 136, 153 (2008)).

## DISCUSSION

### I.

S&W and Mr. Singletary contend that Mr. Kenigsberg's affidavit was deficient, and, consequently, could not support the grant of summary judgment. We disagree.

Rule 2-501(c) requires that an affidavit supporting a motion for summary judgment "shall be made *upon personal knowledge*, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit." (Emphasis added). Rule 1-304 provides,

> The statement of the affiant . . . may be made by signing the statement in one of the following forms:
>
> * * *

> Personal Knowledge. "I solemnly affirm under the penalties of perjury and upon personal knowledge that the contents of this document are true."

Here, Mr. Kenigsberg identified himself as Infinity's controller and custodian of records. He averred that the Agreement, the Guaranty, and the Account Statement for S&W maintained by Infinity were business records of the company. He affirmed the affidavit upon personal knowledge using the form language in Rule 1-304.[12] We conclude that the matters and facts contained in the affidavit would be admissible in evidence, and the affidavit satisfied the summary judgment rule. The court did not err by relying upon Mr. Kenigsberg's affidavit.

**II.**

"[I]t is a settled principle of Maryland appellate procedure that ordinarily an appellate court will review a grant of summary judgment only upon the grounds relied upon by the trial court." *Bishop v. State Farm Mut. Auto Ins*., 360 Md. 225, 234 (2000). In the case before us, the original judgment and the revised judgment do not specify upon which of the three alternative counts of the complaint judgment was entered. Given that the court awarded attorneys' fees pursuant to the fee shifting provision of the Agreement, however, it is implicit that judgment was entered on Count I of the complaint for breach of contract.

[12] S&W and Mr. Singletary contend that paragraph 2 of the affidavit stating that "the allegations in the Motion for Summary Judgment and Memorandum in Support of Summary Judgment are true and accurate to the best of my personal knowledge and belief" renders the affidavit insufficient. They overlook, however, that Mr. Kenigsberg signed the affidavit "under the penalties of perjury and upon personal knowledge that the contents of the foregoing paper are true." The "contents" of the affidavit included other paragraphs that stated the facts set forth in the memorandum in support of summary judgment, which mirrored the facts set forth in the complaint.

This also is consistent with the court's reasoning that the Agreement contained clear contractual language and that Mr. Kenigsberg's affidavit supplied evidence of a breach of the Agreement. Accordingly, we focus our analysis on the breach of contract claim.[13]

To prevail on a claim for breach of contract under either Maryland or California law, a plaintiff must establish the existence of a contract and a breach of its terms. *See RRC Northeast, LLC v. BAA Maryland, Inc*., 413 Md. 638, 658 (2010) ("in order to state a claim for breach of contract, a plaintiff need only allege the existence of a contractual obligation owed by the defendant to the plaintiff, and a material breach of that obligation by the defendant"); *Oasis W. Realty, LLC v. Goldman*, 250 P.3d 1115, 1121 (Cal. 2011) ("the elements of a cause of action for breach of contract are (1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff"). S&W and Mr. Singletary contend that whether they breached the Agreement and Guaranty is a disputed question of fact. We agree and shall reverse the grant of summary judgment.

Infinity's breach of contract claim is premised on S&W and Mr. Singletary's failure to "remit the Full Purchase[d] Amount pursuant to the Agreement." It is not clear whether the alleged breach specifically relates to the cessation of the Daily Amount withdrawals from S&W's account and/or the non-payment of the "full undelivered Purchased Amount"

[13] Given our conclusion that the court granted summary judgment on the breach of contract count, the unjust enrichment and quantum meruit counts are not before us.

under the Remedies provision of the Agreement.[14] In either event, the terms of the Agreement expressly permitted change requests, identifying them as an "IMPORTANT PROTECTION FOR [S&W.]" They specified that S&W was selling an interest in its "future revenue stream," that there was no "payment schedule," and "no time period during which the Purchased Amount must be collected by Buyer." Infinity expressly accepted the "risk[] that [S&W]'s business may slow down or fail[.]" Consequently, if S&W's revenue stream decreased and it made a timely request for an adjustment to the Daily Amount, the fact of non-payment would not necessarily result "in breach of or default under this Agreement[.]"

As noted, Mr. Singletary averred in his affidavit that he asked Infinity on "multiple occasions" to adjust the Daily Amount because S&W's "actual receipts were less than predicted[.]" According to Mr. Singletary, Infinity "did not request additional information pursuant to the [Agreement], but also did not adjust the Daily Amount." Viewing the facts in the light most favorable to S&W and Mr. Singletary, as the non-moving parties, as we must, there is a genuine dispute of material fact as to whether S&W breached the Agreement and, by extension, whether Mr. Singletary breached the Guaranty.[15]

[14] Assuming the latter, we observe that pursuant to the Remedies provision of the Agreement, the "full undelivered Purchased Amount" becomes "due and payable in full immediately" *when an Event of Default occurs*. Mr. Kenigsberg, however, appeared to presuppose, without explanation, that an Event of Default (defined in the Agreement *supra*) had occurred, triggering the Remedies provision that accelerated the payment of the "full undelivered Purchased Amount."

[15] Because our holding requires reversal, we need not address the alternative argument, raised by S&W and Mr. Singletary, regarding the enforceability of the Agreement under California law.

**JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED. COSTS TO BE PAID BY APPELLEE.**