UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0271

September Term, 2013

CHRISTOPHER LORD

v.

HANNON ARMSTRONG CAPITAL, LLC

Meredith,
Woodward,
Sharer, J. Frederick
(Retired, Specially Assigned),

JJ.

Opinion by Meredith, J.

Filed: July 27, 2015

* 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 Lord, appellant, appeals the entry of judgment against him and in favor of his former employer, Hannon Armstrong Capital, LLC ("Hannon Armstrong"), appellee, in Lord's suit seeking damages for Hannon Armstrong's alleged failure to pay him certain commissions and bonuses. After a five-day bench trial was conducted in the Circuit Court for Anne Arundel County, the court took the matter under advisement. Thereafter, the circuit court filed a written opinion and entered judgment in favor of Hannon Armstrong on all claims.

QUESTIONS PRESENTED

Appellant presented this Court with six issues on appeal, which we have distilled and restated for clarity as follows:[1]

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[1]The questions presented in appellant's brief were as follows:

1. Did the trial court commit legal error when it determined that Lord had no right to a commission under contract law or the MWPCL [Maryland Wage Payment and Collection Law] because HA President Jeffrey Eckel ("Eckel") had unfettered discretion to eliminate Lord as a Plan participant on the eve of commission payment, three and one-half years after the plan was issued, after Lord had performed all work required of him, after the April 2009 Plan Amendment kept Lord as a participant (even though his role had ended), and even though Eckel paid the other two Plan participants their full commissions — $688,765.81 to John Christmas ("Christmas") and $983,951.00 to David Watson ("Watson")?

2. Did the trial court commit legal error by determining that the 2009 Plan Amendment was a gratuity revocable at Eckel's discretion and did not require payment of a commission to Lord, when the amendment substantially reduced the amount of the commission payable to Lord under the original Plan but made the commission payable at an earlier time, and even though Eckel entered into an agreement with Lord as to the terms of the amendment and he memorialized it in a memorandum to HA's Board?

(continued...)

1. Did the trial court err in determining that Hannon Armstrong was not legally obligated to pay appellant a commission on the Hudson Ranch project?

2. Did the trial court err in determining that Hannon Armstrong was under no contractual or legal obligation to continue paying appellant the quarterly net cash fee income bonus ("NCFI bonus") once he left the General Counsel position?

3. Did the trial court err in determining that Hannon Armstrong did not breach appellant's Executive Agreement when, beginning in January 2010, it began to treat $100,000 of his salary as a draw against future commissions?

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[1](...continued)

3. Did the trial court misconstrue Lord's Executive Agreement when it concluded that it provided no protection for Lord's commission under the Plan, despite the fact that the Executive Agreement contained explicit language precluding Eckel from eliminating Lord's commission under the Plan while paying the other plan participants their full commissions?

4. Did the trial court err by holding that Lord did not perform all that was required of him to qualify for a commission, when the Plan did not contain or need to contain specific benchmarks or list specific responsibilities, Lord performed all that the Plan required, and Eckel amended the plan in April 2009, keeping Lord as a plan participant despite the fact that Lord's role had largely ended a year earlier?

5. Did the trial court err by finding HA did not breach Lord's Executive Agreement or violate the MWPCL by terminating Lord's NCFI Bonus, even though Lord had a pre-existing contractual right to the Bonus, the Executive Agreement did not supercede any incentive compensation plans, the NCFI Bonus was an essential part of his total compensation package, akin to profit sharing, and Eckel treated the NCFI Bonus as a contractual obligation?

6. Did the trial court err by finding that HA's reduction of Lord's base salary, making $100,000 of it a draw against commissions, did not violate Lord's Executive Agreement or violate the MWPCL, when the Executive Agreement clearly prohibited a reduction in Lord's base salary or the conversion of any part of his base salary to a draw against commissions?

For the reasons that follow, we will affirm the judgment of the Circuit Court for Anne Arundel County.

FACTS AND PROCEDURAL HISTORY

Hannon Armstrong is an Annapolis-based company that performs structured financings, raises capital, and invests in sustainable infrastructure for federal, state and local governments and companies. During the relevant time, Jeffrey Eckel ("Eckel") was Hannon Armstrong's President and CEO. On April 1, 2002, Hannon Armstrong hired appellant (sometimes referred to as "Lord") to serve as General Counsel. Lord held the position of General Counsel from 2002 through 2008. In 2008, Lord discontinued serving in the General Counsel position, and was given the title of Senior Vice President - Business Development. He continued in the latter role through July 2010.

When Lord was hired as General Counsel in 2002, he signed an employment agreement (the "Initial Employment Agreement"), which set forth the terms and conditions of his employment. The Initial Employment Agreement provided his compensation would be as follows:

> For all services rendered by the Employee, Employer shall compensate Employee in such amounts and upon such terms as the parties may agree from time to time. The current agreement is outlined in Exhibit A attached hereto and made a part hereof.

Exhibit A provided that Lord would be paid an annual salary of $187,500 and earn a quarterly bonus and a discretionary annual bonus. The quarterly bonus, generally referred to by the parties as the net cash fee income bonus ("NCFI bonus"), was a commission paid

across all transactions of the company, and at all times relevant to this matter was at the rate of 1.5%.

As General Counsel, Lord did not originate transactions, but was involved as legal counsel in all transactions that the company closed. Appellant described his role as General Counsel as "[b]asically to have responsibility for the legal aspects of the business . . . . [P]rimarily my activities were focused on the transactions and making sure they closed and made money for the company. And I didn't expose us . . . unduly to any legal risks or other risks." The quarterly NCFI bonus rewarded the General Counsel for all transactions conducted by the entire company, but the General Counsel was not otherwise eligible for commissions.

By contrast, employees responsible for originating transactions did not receive a quarterly NCFI bonus across all transactions, but instead, generally received a lower base salary but a higher commission on those transactions they originated. Commissions for those employees who originated transactions were calculated based upon "Commission Rate Guidelines" issued by Hannon Armstrong from time to time.

The "Hudson Ranch" project is at the heart of this case. The Hudson Ranch project followed a different model than had been typical for Hannon Armstrong's previous business deals. Though the "core business" of Hannon Armstrong had been "about financing developers," Hannon Armstrong's plan was to not only finance, but also develop, the Hudson Ranch project.

In November 2006, Hannon Armstrong promulgated "Development Commission Rate Guidelines" (sometimes referred to as the "Development Guidelines") that would apply to the Hudson Ranch project in lieu of the standard Commission Rate Guidelines. The distinctive Development Guidelines were issued in connection with the Hudson Ranch project in order to recognize the complexity of the project, which "involved the investment of [Hannon Armstrong's] own capital and was going to take much longer to complete." The trial court found that the purpose of the Development Guidelines was "to create an incentive for employees who would be participating in a multi-year project." The Development Guidelines listed three participants: John Christmas ("Christmas"), Dave Watson ("Watson"), and Lord, the appellant.

The Development Guidelines described the basis for computing a commission on the Hudson Ranch project as follows:

> All Cash Receipts (such as investment banking fees, realized "spread", development fees, sales of undeveloped project assets, residual interests, management fees etc.) are treated equally. All cash receipts are net of external transaction expenses net of the costs of servicing. Any cash receipts that are deferred past the permanent financial closing date become Cash Receipts when received. *Cash Receipts are further reduced by an amount equal to 2.0 times the external out-of-pocket and estimated internal costs of Hannon Armstrong associated with the applicable Project's development.*

(Emphasis added.) This language meant that no commissions would become payable under the Development Guidelines until Hannon Armstrong had recouped twice the development costs it put into the project, including all three phases of the project (*i.e.*, Hudson Ranch 1, Hudson Ranch 2, and Hudson Ranch 3).

The Development Guidelines also contained the following provision, which was captioned "Administration of the Program":

> The President shall have full power and authority to administer the Program. To the extent the program no longer is deemed to be appropriate to the circumstances of the Company, **the program may be changed in any respect without notice to participant**.

(Emphasis added.)

Pursuant to the Development Guidelines, Christmas was to receive 35% of the commission pool, Watson was likewise to receive 35% of the commission pool, Lord was to receive 15%, and 15% was left unallocated. The following language appeared in the Development Guidelines:

> At the primary financial closing for each of the Projects (presumably the permanent financial closing), the Participants and the President will review the relative contributions of each of the Participants to the realization of value, the amount of cooperation and teamwork exhibited during the development period on the applicable projects as well as any other projects which are approved for development and allocate the Unallocated amounts among the Participants. To the extent the Participants want to include other members in the Commission Pool, subject to approval of the President, they may allocate any of the Unallocated amounts to others.

On May 31, 2007, MissionPoint Capital ("MissionPoint"), acquired an ownership interest in Hannon Armstrong, and the Board was reconstituted to consist of Eckel and two executives from MissionPoint, namely, Mark Cirilli ("Cirilli") and Jeff Possick ("Possick"). Hannon Armstrong's governing Operating Agreement was amended and restated at the time of the MissionPoint acquisition. The Operating Agreement granted the Board authority over certain aspects of the business. Although Cirilli and Possick were generally kept apprised

of employee matters and compensation issues, individual employee compensation decisions were generally delegated to Eckel and handled by him.

On May 31, 2007, in conjunction with the MissionPoint purchase, Lord executed a new employment agreement ("Replacement Employment Agreement"). He was, at the time, still serving in role of General Counsel. Lord's Replacement Employment Agreement provided for an increase in his annual salary to $275,000, and retained the possibility of receiving an annual bonus at the discretion of the Board. The Replacement Employment Agreement did not mention the quarterly NCFI bonus Lord had been previously receiving, but Hannon Armstrong nevertheless continued to pay the NCFI bonus during Lord's tenure as General Counsel.

Paragraph 15 of the Replacement Employment Agreement provided, under the heading "Entire Agreement; Amendment":

> This Agreement contains the entire agreement and understanding by and between Employer and Executive with respect to the subject matter hereof, including any employment agreement previously entered into by the Executive and Employer, and no representations, promises, agreements, or understandings, written or oral, not contained herein shall be of any force or effect. No change or modification hereof or waiver with respect hereto shall be valid or binding unless the same is in writing and signed by both Employer and Executive.

In January 2008, Lord's annual salary as General Counsel was increased to $284,625.00.

Effective May 1, 2008, after several months of discussion, Lord stopped serving as the General Counsel, and he became a Senior Vice President of Business Development. In this new role, Lord was encouraged to originate transactions for the benefit of Hannon Armstrong. According to Lord, Eckel repeatedly reassured him that his compensation would

not diminish when he moved to the new position because he would now be eligible to earn larger commissions on transactions he originated. Eckel's account of the discussions pointed out that Lord wanted to make more money than he was making as General Counsel, and for that reason, Eckel encouraged the move to a business development position, pointing out that, although these positions carried a lower base salary, they have a much higher upside in the form of commissions.

In late July or August 2008, Lord realized that he had not been paid the quarterly NCFI bonus for the quarter that had just ended. He "was upset," and went to talk to the CFO, who referred him to Eckel. Lord testified that, when he went to Eckel to ask about the NCFI bonus, Eckel just said: "[Y]ou're not going to get it." Lord said that Eckel "was adamant. He did not want to discuss it further[.]"

For his part, Eckel testified that Lord was no longer entitled to the NCFI bonus because Lord was no longer the General Counsel, and Eckel was "astonished that we could have miscommunicated on this point having had so many discussions about how compensation works in our company and how it changes once you're not — no longer the general counsel[.]" Eckel testified that he and Lord had had "many, many conversations" about compensation before Lord changed positions, and he was sure that he had told Lord before he left the General Counsel position that Lord would no longer be receiving the NCFI bonus. Lord, on the other hand, insisted that he would not have made the move to a business development role if he had known that he would no longer receive the NCFI bonus.

Regardless of this dispute, however, at all times after Lord's move to the business development position on May 1, 2008, his monthly paycheck remained the same as it had been when he left the role of General Counsel: 1/12 of $284,625.00.

In April 2009, Hannon Armstrong amended the Development Guidelines. Eckel explained during his testimony at trial: "I thought it was in our best interest to modify that plan to permit commissions to be paid on investment banking fees that we were anticipating to get." The original Development Guidelines called for the payment of commissions once Hannon Armstrong had recovered two times the development costs it had invested on all three phases of the contract, Hudson Ranch 1, Hudson Ranch 2, and Hudson Ranch 3. The amended Development Guidelines eliminated Hudson Ranch 2 and Hudson Ranch 3 from the commission calculation, and enabled commissions to be paid at an earlier juncture on the investment banking fees realized from Hudson Ranch 1. The commission allocation among the various participants did not change under the amended Development Guidelines.

The lion's share of Lord's personal work on the Hudson Ranch project had been completed during his tenure as General Counsel. Lord conceded that nothing he did on the Hudson Ranch project during his tenure as General Counsel was outside the scope of his duties in that role. Lord also conceded that he was fully paid his regular General Counsel salary and the quarterly NCFI bonus during that time frame. Lord spent less than a week on the Hudson Ranch project after switching to the business development position in 2008, and no time at all in 2009 or 2010.

On January 12, 2010, Lord and Eckel had a meeting, which Eckel memorialized in an e-mail to appellant. With respect to the issues in this appeal, Eckel began at that time treating $100,000 of Lord's annual salary as a draw against future commissions. But Lord's monthly paycheck remained the same as it had been when he was General Counsel. In April 2010, Hannon Armstrong purported to pay Lord $42,998.72 as a "commission" on the Howard/Honeywell transaction, from which was deducted three months of "draw" in the total amount of $24,999.99 ($8,333.33 for the February, March and April draws), leaving a net "commission" of $17,998.73. Despite these changes in the description of Lord's compensation, the monthly amount of his paycheck remained undiminished. Lord did not consent to this change in his compensation arrangement; on the contrary, he believed that it violated his Replacement Employment Agreement.

Construction financing on Hudson Ranch 1 closed in May 2010, and, as a result, Hannon Armstrong generated a commission pool of $1,967,902.30. Watson was paid 50% of the commission pool, *i.e.*, $983,951.15, and Christmas was paid 35% of the pool, *i.e.*, $688,765.81. Lord was paid zero percentage of the pool. Eckel testified that he had determined at that point that Lord did not deserve any commission on that project. Lord maintained, however, that under the terms of the Development Guidelines, he had a vested right to a 15% commission on Hudson Ranch 1. This dispute led to the cessation of Lord's employment in July 2010. This litigation followed.

STANDARD OF REVIEW

Because this case was tried without a jury, our review is conducted pursuant to Maryland Rule 8-131(c), which provides:

> 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 of the trial court to judge the credibility of the witnesses.

We accept a trial court's findings of fact, unless they are clearly erroneous. However, we owe no deference to a trial court's conclusions of law. In *Tribbitt v. State*, 403 Md. 638, 644 (2008), the Court of Appeals explained:

> [W]e refrain from engaging in de novo fact-finding and accept the trial court's factual findings unless they are clearly erroneous. *Glover v. State*, 368 Md. 211, 221–22, 792 A.2d 1160, 1165–66 (2002). When we review a trial court's determinations of legal questions or conclusions of law based on those findings of fact, however, the clearly erroneous standard does not apply. *Heat & Power Corp. v. Air Prods. & Chem. Inc.*, 320 Md. 584, 591, 578 A.2d 1202, 1205 (1990). Instead, we review de novo the trial court's "relation of those facts to the applicable law." *Storetrax.com, Inc. v. Gurland*, 397 Md. 37, 50, 915 A.2d 991, 998 (2007); *see also Schisler v. State*, 394 Md. 519, 535, 907 A.2d 175, 184 (2006) (noting that when an issue "involves an interpretation and application of Maryland constitutional, statutory or case law, our Court must determine whether the trial court's conclusions are 'legally correct' under a de novo standard of review").

DISCUSSION

Lord's contentions in this appeal can be divided into three categories. First, he contends that he was entitled to, and improperly deprived of, a commission on the Hudson Ranch project as provided in the Development Guidelines or, alternatively, under the terms

of his Replacement Employment Agreement. Second, he contends that he was entitled to continue being paid the NCFI bonus after he no longer served in the General Counsel position. Finally, he contends that Eckel's January 2010 decision to begin treating $100,000 of his salary as a non-recourse draw against future commissions breached § 3a of the Replacement Employment Agreement, which provided that Lord's salary could not be reduced without his consent. In his complaint, appellant specifically alleged that Hannon Armstrong breached the Maryland Wage Payment and Collection Law, Maryland Code (1991, 2008 Repl. Vol.), Labor & Employment Article ("L & E"), § 3-501 *et seq*. (sometimes referred to as the "MWPCL"), and also committed a common-law breach of contract.

Hannon Armstrong's response to these contentions is that Eckel's decision to deny appellant a commission on Hudson Ranch was not only warranted based on Lord's failure to substantially contribute to the success of that project, but also was authorized by Eckel's reserved authority under the Development Guidelines, which provided that the "President shall have full power and authority to administer the Program," including the authority to change the Program "in any respect without notice to participant." With regard to Lord's allegation that Hannon Armstrong wrongfully stopped paying Lord the NCFI bonus once he was no longer General Counsel, Hannon Armstrong points to the Replacement Employment Agreement, entered into in 2007, which contains no mention of the NCFI bonus and does include an integrating "entire agreement" merger clause. Finally, Hannon Armstrong disputes Lord's contention that the decision to treat a portion of Lord's salary as a draw was

a wrongful reduction in appellant's salary given that appellant's monthly paycheck never changed.

I. Hudson Ranch commission.

The trial court found that Lord "has not established an entitlement to a commission on the Hudson Ranch project under either the MWPCL or any theory of breach of contract." The court explained:

> In order to accept Mr. Lord's position, the Court would have to disregard the express language of the [Development] Guidelines[,] which give the President broad discretion to change the program in any respect. Since the commissions on this project were paid even though they were not required by the express language of the plan, there was no longer any contractual obligation or enforceable promise to pay such commissions within the contemplation of the MWPCL.
>
> Moreover, this is not a situation in which the employee has done everything required of him to earn a commission so that he might argue entitlement to it despite the discretionary language of the plan. . . . Mr. Lord acknowledged his understanding that the allocation of a 15% commission to him was based upon the expectation that he was going to have a significant role in supporting the project going forward. . . . Mr. Lord has not established any objective measure by which he could prove that he did everything required of him to earn the commission. . . . [T]he weight of the evidence establishes that Mr. Lord did not provide any substantial support for the project after the Development Commission Rate Guidelines were issued and that overall Mr. Lord's involvement in the project was minimal compared to that of Mr. Watson. Mr. Lord has not established entitlement to a commission for the Hudson Ranch project. . . .

(Citations omitted.)

The trial court's findings of fact were not clearly erroneous, and the legal conclusions were sound. We reject Lord's argument that Hannon Armstrong's language in the

Development Guidelines referring to a 15% commission for Lord was an enforceable promise under contract law or the MWPCL. The plain language of the Development Guidelines, which reserved to Eckel the right to change the program *in any respect*, and without notice to any participant, did not constitute a promise to pay a commission on Hudson Ranch to Lord regardless of whether he performed any further work on the project, or, for that matter, regardless of whether Hannon Armstrong recouped twice the development costs.

In *Cheek v. United Healthcare of Mid-Atlantic, Inc.*, 378 Md. 139, 148-49 (2003), the Court of Appeals observed:

> An "illusory promise" appears to be a promise, but it does not actually bind or obligate the promisor to anything. An illusory promise is composed of "words in a promissory form that promise nothing." Corbin on Contracts § 5.28 (2003). "They do not purport to put any limitation on the freedom of the alleged promisor. If A makes an illusory promise, A's words leave A's future action subject to A's own future whim, just as it would have been had A said nothing at all." *Id*. Similarly, the Restatement of Contracts explains that "[w]ords of promise which by their terms make performance entirely optional with the 'promisor' whatever may happen, or whatever course of conduct in other respects he may pursue, do not constitute a promise." Restatement of Contracts 2d § 2 cmt. e. Likewise, "the promise [that] is too indefinite for legal enforcement is the promise where the promisor retains an unlimited right to decide later the nature or extent of his performance. The unlimited choice in effect destroys the promise and makes it merely illusory." 1 Samuel Williston, Contracts, § 4:24 (4th Ed. 1990).

The words of the Development Guidelines make it clear that the obligation to pay commissions on Hudson Ranch was not set in stone as of November 2006. The testimony made it clear that there were two discrete phases of the project: origination and development.

At the time the Development Guidelines were promulgated, the origination phase, for which Christmas had been primarily responsible, was largely complete, and the development phase, for which Watson was largely responsible, was just getting underway. It would have made no sense for Hannon Armstrong to have irrevocably committed itself to a division of commissions (commissions based, in part, on "[r]ewarding the lead execution party of the development process") at a time when virtually all of the development work had yet to be done.

The Development Guidelines are an example of an arrangement in which "the promisor retains an unlimited right to decide later the nature or extent of his performance," *Cheek*, *id*., 378 Md. at 149 (quoting 1 Williston on Contracts, § 4:24 (4th ed. 1990)). In sum, we agree with the trial court's conclusion that the Development Guidelines do not constitute an enforceable promise to pay appellant a 15% commission on Hudson Ranch that supports his claim for breach of contract.

Citing *Questar Builders, Inc. v. CB Flooring, LLC,* 410 Md. 241 (2009), Lord argues that the trial court erred in construing the Development Guidelines to contain only an illusory promise because Maryland courts prefer an interpretation that renders a contract enforceable, rather than unenforceable. This rule of construction, however, is inapplicable here because it applies only where the contract language is ambiguous. *Kelley Constr. Co., v. Wash. Suburban Sanitary Comm'n,* 247 Md. 241, 247 (1967). Here, as the trial court found, the contract language was unambiguous.

Lord argues that, "viewing the [Development Guidelines] as a whole and giving effect to each provision precludes a construction which would allow Eckel unfettered discretion to selectively eliminate" Lord's allocated share. Lord contends that the inclusion of language in the Development Guidelines permitting Eckel to allocate the unallocated share as he saw fit, when viewed in conjunction with the guidelines' failure to include language specifically permitting Eckel to terminate or reduce the allocated shares, demonstrates that Eckel did not have authority to do the latter. In fact, however, as the trial court found, the Development Guidelines did include language that unambiguously permitted Eckel to terminate or reduce not only the unallocated share, but also the allocated shares. The language giving Eckel the "full power and authority to administer the Program" *and* to change it "in *any* respect without notice to participant" (emphasis added) did just that.

Undeterred, Lord argues that, if Eckel had unfettered discretion to selectively reduce or eliminate allocated shares in any manner he chose, there would be no need for a provision permitting Eckel to distribute the unallocated shares in any manner he chose, rendering the additional allocation provision meaningless and unnecessary, thereby "violating the basic rule of contract construction" that a court will not unnecessarily read contractual provisions as meaningless. *Torman, Inc. v. Passano,* 391 Md. 1, 14 (2005). In this case, however, the provision permitting Eckel to distribute the unallocated shares in any manner he chose was not rendered meaningless by the other provision. Rather, the allocation provision restated and reinforced Eckel's broad authority to change all allocations "in any respect without

notice" to any participant. Interpreting the provision as written — as the trial court did — is not inconsistent with any other provision, nor does it require that another provision be disregarded or rendered meaningless.

Lord offers several other alternative arguments as to why he is due a commission on Hudson Ranch. He argues that the language of another Hannon Armstrong commission plan – the General Commission Plan – should control how the Development Guidelines are interpreted. But Maryland follows the objective law of contract interpretation and construction. Where, as here, the language of the Development Guidelines is plain and unambiguous, we will not look to language in a contract separately entered into under other circumstances to assist in interpretation of a plain and unambiguous agreement.

As another alternative argument, Lord contends that, under the Development Guidelines, he could not be denied his allocated share without Board approval. But the language of the Development Guidelines places no limits on the President's broad power and authority. The fact that Eckel may have solicited Board approval for the original Development Guidelines, and for the April 2009 Amendments to the Development Guidelines, does not mean that he was *required* to seek approval of his decision to allocate the commissions as he was expressly authorized to do. Rather, the plain language of the Development Guidelines controls this question, and the plain language vested Eckel with the authority and power to do what he did.

Moreover, even if the Development Guidelines had not been expressly subject to modification at Eckel's discretion (a hypothesis we do not accept), the factual condition precedent for commissions to be payable under those guidelines — *viz*, the recoupment by Hannon Armstrong of two times the development costs it invested in the Hudson Ranch project — was never satisfied, and for that reason, no commissions were due to anyone under the Development Guidelines. The trial court found: "[U]nder the express terms of the Development Commission Rate Guidelines, there were no commissions due unless the investors first realized their return on investment, *which did not occur*." (Emphasis added.) That factual finding was not clearly erroneous, and that alone is fatal to Lord's claim that he was due additional commissions on account of the Hudson Ranch project.

Lord also argues, however, that, even if the original Development Guidelines did not contain an enforceable promise to pay Lord a commission, the April 2009 Amendments to the Development Guidelines were a "bargained-for exchange" that provided Lord with an enforceable promise to pay a 15% commission. In essence, Lord argues that he gave up the right to claim a commission on the second and third phases of the Hudson Ranch project under the original Development Guidelines in exchange for an earlier, more certain payment of a commission on only the first phase of the Hudson Ranch project in the Amended Development Guidelines. Appellee responds that this argument was not made to the circuit court. But, even if we assume that it was, we reject this argument because it presupposes that the original Development Guidelines contained an enforceable promise which Lord gave up,

a proposition we have already rejected. Because Lord did not have an enforceable right to a commission under the original Development Guidelines, the April 2009 Amendments to the Development Guidelines were not a bargained-for exchange.

Lord further argues in the alternative that, even if neither the original Development Guidelines nor the April 2009 Amended Development Guidelines contained an enforceable promise to pay Lord a 15% commission, the Replacement Employment Agreement, signed in 2007, protected him from being denied a commission on Hudson Ranch if the other participants received a commission. The Replacement Employment Agreement promised Lord a base salary and a *discretionary* annual bonus. It does not mandate payment of commissions of any kind, let alone a commission on the Hudson Ranch project. Lord points to Section 3(c), which is captioned "Benefits and Expenses," and Lord notes that it provides: "Executive shall receive such other benefits as may be granted to senior management of Employer generally, examples of such benefits that Executive may receive are health, dental, life or disability insurance and vacation benefits." The section further states:

> Employer shall not make any changes in such benefit plans and arrangements that would adversely affect Executive's rights or benefits thereunder, unless such change occurs pursuant to a plan or arrangement applicable to all senior management of Employer and does not result in a proportionately greater reduction in the rights benefits to Executive as compared with any other senior management of Employer.

Lord argues that the term "benefits" in this section should be construed to include "bonuses" and "incentive compensation," including performance-based commissions, despite the fact that none of these terms appear in this section of the Replacement Employment Agreement.

We agree with the trial court that the language of Section 3(c) is plain and unambiguous, and that the benefits to which it refers are those that "may be granted to senior management of Employer generally." Such benefits include health, dental, life or disability insurance and vacation benefits, and do not include performance-based items of compensation like performance bonuses or commissions.

Lord asserts that Section 3(d) of the Replacement Employment Agreement, dealing with severance, compels a different interpretation. Section 3(d) provides:

> In addition to the Severance Payment, if any, upon termination of Executive's employment with Employer for any reason[,] . . . Employer shall pay the Base Salary and benefits otherwise payable to the Executive under this Section 3 through the last day of Executive's actual employment by Employer, including all unpaid bonus or incentive compensation that has not yet been paid that is then due to the Executive.

Lord argues that Sections 3(c) and (d), when read together, provide a definition of "benefits" that encompasses both health and welfare benefits *and* bonuses and incentive compensation. We disagree. Reading the term "benefits" in this section as Lord suggests to expand the employer's obligation to pay commissions that were not otherwise payable would produce an absurd result.

Moreover, even if some bonus payments might theoretically fall within Section 3(c), the Hudson Ranch commissions under the Development Guidelines clearly do not. Section 3(c) relates only to "such other benefits as may be granted to senior management of the Employer *generally*." (Emphasis added.) The Development Guidelines did not provide for payment of commissions to senior management *generally*. The only participants identified

in the Development Guidelines were Christmas, Watson and Lord, and the program did not include, for example, Eckel, who was part of senior management. Because the commissions available under the Development Guidelines were not payable to senior management "generally," they clearly do not come within the purview of Section 3 of the Replacement Employment Agreement.

We also agree with the trial court that Lord failed to demonstrate that Hannon Armstrong's actions violated the MWPCL. Under L & E § 3-501(c)(2), a "wage" can include a bonus and a commission. Generally, under the MWPCL, an employer is required to pay an employee "all wages due for work that the employee performed before the termination of employment[.]" L & E § 3-505(a). But a condition precedent to a successful claim for unpaid wages under the MWPCL is a showing by an employee that he has done "everything required to earn the wages." *Medex v. McCabe*, 372 Md. 28, 41 (2002). In *Catalyst Health Solutions, Inc. v. Magill*, 414 Md. 457, 473 (2010), a case dealing with unvested stock options, we put it this way: "[O]nly when wages have been promised as part of the compensation for the employment arrangement and *all conditions agreed to in advance* for earning those wages have been satisfied, will Section 3-505 requiring payment of wages due apply." (Emphasis in original.)

Here, aside from the fact that the Development Guidelines represented nothing more than an illusory promise to pay commissions at some future time, Lord failed to show that he had done "everything required to earn the wages." *Medex, id.,* 372 Md. at 41. Watson

— the project development team leader on Hudson Ranch — testified that he could not recall any substantive contributions by Lord once the development phase began in earnest. Lord's own testimony conceded that no work he performed on Hudson Ranch was outside the scope of his regular duties as general counsel. "There is no enforceable contractual obligation created when an employer offers an employee a bonus for doing that which the employee is already required to do." *Id.*

The circuit court did not err in rejecting Lord's claim for compensation relative to the Hudson Ranch project.

II. NCFI bonus.

Lord claimed that Hannon Armstrong was contractually obligated to continue paying him the NCFI bonus once he left the General Counsel position. He argued that the NCFI bonus was guaranteed by his Initial Employment Agreement entered into in 2002, which, Lord insists, was not superceded by the 2007 Replacement Employment Agreement. The trial court found, however, that the Replacement Employment Agreement superceded the Initial Employment Agreement, and the fact that Hannon Armstrong continued, for a time, to pay Lord the NCFI bonus, in spite of the absence of a contractual requirement to do so, did not create an enforceable obligation to continue making those gratuitous payments. Lord argues that the trial court erred in this regard because, he contends: (1) the Replacement Employment Agreement did not supercede the Initial Employment Agreement; (2) the Benefits and Severance provisions of the Replacement Employment Agreement protected

his right to continued payment of quarterly NCFI bonuses under his Initial Employment Agreement; and (3) even if the first two arguments fail, the parties orally modified the Replacement Employment Agreement by their conduct. We see no merit in Lord's arguments.

By its plain terms, ¶ 15 of the Replacement Employment Agreement — the merger provision quoted above — superceded the Initial Employment Agreement. Paragraph 15 also provides that "[n]o change or modification hereof or waiver with respect hereto shall be valid or binding unless the same is in writing and signed by both Employer and Executive."

"When a contractual clause is unambiguous, it is the function of the court objectively to interpret its meaning." *Labor Ready, Inc. v. Abis*, 137 Md. App. 116, 127-28 (2001). We perceive no ambiguity in this aspect of the Replacement Employment Agreement. "Words used in a contract must be given their plain and ordinary meaning, unless the contract indicates otherwise." *Id*. at 128. The trial court did not err in concluding that the plain and unambiguous language of the Replacement Employment Agreement fully superceded the earlier employment agreement and eliminated Lord's contractual right to be paid the quarterly NCFI bonus.

Lord's argument that the Benefits and Expenses and Severance provisions of the Replacement Employment Agreement protected his contractual right to continued payment of the quarterly NCFI bonus from his Initial Employment Agreement is without merit. Lord's argument is based upon an unreasonable interpretation of these provisions. It is true

that the Replacement Employment Agreement recognized that Lord might be eligible for some form of incentive compensation at such time as he left Hannon Armstrong, and this is the reason that the Replacement Employment Agreement provides in section 3(d) that, "upon termination of Lord's employment, Hannon Armstrong shall pay "all unpaid bonuses and incentive compensation that has not been paid *that is then due*." (Emphasis added.) But this is a far cry from "expressly recogniz[ing]," as Lord argues, the existence of an enforceable promise to pay the NCFI bonus under the superceded Initial Employment Agreement.

Lord's final argument regarding the NCFI bonus is that the Replacement Employment Agreement was modified orally or by the conduct of the parties to impose an obligation on Hannon Armstrong to pay the NCFI quarterly bonus. This argument fares no better than his other arguments. The trial court found that there was no meeting of the minds between Lord and Eckel regarding the continued payment of the quarterly NCFI bonus after he left the General Counsel position. The trial court stated:

> When [appellant] and Mr. Eckel discussed the move from General Counsel to business development, there was no express promise or discussion about the continued payment of the quarterly bonus. The evidence does not establish the elements of a contractual agreement, including definiteness and certainty and a meeting of the minds on the essential terms. . . . Thus, [appellant] cannot sustain his claim for the quarterly NCFI bonus under the MWPCL or under a breach of contract theory.

This factual finding is supported by evidence in the record.

Although it is true that contracts with express non-modification clauses *can* be later modified by conduct, *see, e.g., Hovnanian Land Inv. Group, LLC, v. Annapolis Town Center*

at Parole, LLC, 421 Md. 94 (2011), "our case law does require mutual knowledge and acceptance, whether implicit or explicit, of the non-conforming action." *Id*. at 120 (internal citations omitted). "[W]hether subsequent conduct of the parties amounts to a modification or waiver of their contract is generally a question of fact to be decided by the trier of fact." *Id*. at 122 (internal citations omitted). Here, the trier of fact found no such conduct, and that finding was not clearly erroneous.

III. The Howard/Honeywell transaction.

Section 3a of the Replacement Employment Agreement states that Lord's base salary "shall not . . . be decreased without Executive's consent." But, beginning in January 2010, Hannon Armstrong began to treat $100,000 of Lord's base salary as an advance payment of commissions that Lord was expected to earn in the future. Lord argues that, by treating part of his pay as an advance against future commissions, Hannon Armstrong effectively reduced his base salary. The trial court, however, rejected this argument, finding as follows:

> [I]n January 2010 [Hannon Armstrong] started treating $100,000 of [appellant's] salary as a draw against future commissions. The draw was recoverable only from future commissions and was without recourse against his salary. Despite [the employer] characterizing a part of the monthly pay check as a draw, **[appellant] received his full salary every month without reduction.** Thus, there was no breach of [appellant's] Executive Agreement. Even if there had been a nominal breach, [appellant] suffered no damages since **he continued to receive the full amount of his salary, regardless of how it was characterized.**

(Emphasis added.)

Lord posits that he ***earned*** a commission in April 2010 in the amount of $42,998.72 on the Howard/Honeywell transaction, and that Hannon Armstrong improperly used $24,999.99 of this commission to pay back Lord's accumulated draws, reducing his commission to $17,998.73, thereby breaching the Replacement Employment Agreement and violating the MWPCL. We might have agreed with Lord but for the fact that the trial court found as a matter of fact that, although Lord *received* funds that were characterized as a commission on the Howard/Honeywell transaction, he did not actually ***earn*** that commission. This finding was not clearly erroneous because Lord admitted that he did no work on the Howard/Honeywell transaction. There was also other evidence that the "commission" on this transaction was a "gift" or gratuitous payment rather than a commission earned by performance. Eckel testified that the commission was given to Lord in order to

> get him to see that the state and local market was an opportunity, that it was producing commissions. [Appellant's] complaint was that he was in an uncertain market and he wasn't completely confident, and I kept saying there's a huge market out here, and as our current business will attest, there is in any kind of assets, not just solar, and so I made the choice to give him this [commission] as a sort of carrot. [Appellant], there's money here. I'll give you the origination piece which otherwise wouldn't have been allocated to anybody since I originated it and I don't get a commission. I said, let's give you the origination piece. It's — you know, I'm trying to show you here where the money is.

Given the fact that Lord at all times received an amount equal to his full base salary, and given the factual finding that Lord did not ***earn*** a commission on the Howard/Honeywell transaction, we conclude that Hannon Armstrong never actually reduced Lord's net base

salary in order to repay draws, and therefore, Hannon Armstrong did not breach the plain language of the Replacement Employment Agreement.

Lord fares no better in connection with his claim under the MWPCL. The trial court's factual finding that he did not actually ***earn*** a commission on the Howard/Honeywell transaction precludes recovery under the MWPCL: "[W]hat is due an employee who terminates employment with an employer are wages for work performed before termination, or all compensation due to the employee as a result of employment including any remuneration, other than salary, that is promised in exchange for the employee's work." *Whiting-Turner v. Fitzpatrick*, 366 Md. 295, 303 (2001). The Howard/Honeywell transaction was, in Eckel's words, "a carrot," which is another way of saying it was "merely a gift, a gratuity, revocable at any time before delivery." *Id*. at 306. The trial court's finding of fact in this regard was not clearly erroneous.

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