Circuit Court for Montgomery County
Case No. 388040-V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1916

September Term, 2015

FORT MYER CONSTRUCTION CORP., *et al.*

v.

BANNEKER VENTURES, LLC, *et al.*

Graeff,
Leahy,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: October 10, 2017

*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.

Appellee Banneker Ventures, LLC ("Banneker"), as general contractor under a construction contract with Montgomery County Department of Transportation ("MCDOT") to remove the existing roadway and replace the utilities over a stretch of Dale Drive in Silver Spring, Maryland (the "Project"), entered into a subcontract with Fort Myer Construction Corporation ("Fort Myer"). The parties entered into the subcontract on August 16, 2012.

Although Fort Myer had 365 days to complete the work, within four days of Fort Myer's commencement of work, Banneker began sending notices to Fort Myer complaining that it was behind schedule. After two notices of default and correspondence between the parties blaming each other for delays and unexpected site conditions, they agreed to meet on October 24, 2012. Banneker revealed at the meeting that Fort Myer's subcontract contained much higher prices for several units than MCDOT agreed to pay Banneker under the prime contract. According to a letter that Fort Myer's representative wrote to Banneker's representative on the same day as the meeting, Banneker gave Fort Myer a near-ultimatum: lower its prices or it could no longer work on the Project. The letter confirmed that Fort Myer was not willing to accept the price reductions, and considered the situation a breach of the subcontract by Banneker. It then stated that Fort Myer and its subcontractors would halt work, but would not leave the worksite in a precipitous condition. Banneker never responded to this letter.

The October 24 letter also stated that Banneker had promised to pay Fort Myer for work that was already completed, however, Banneker never paid Fort Myer's subsequent invoices. On March 5, 2014, Fort Myer sued Banneker and its surety, Travelers Casualty

and Surety Company of America ("Travelers") (together with Banneker, "Appellees"), in the Circuit Court for Montgomery County. Banneker filed a counterclaim against Fort Myer for breach of contract and a cross claim against its surety, Western Surety Company ("WSC") (together with Fort Myer, "Appellants").

The case proceeded to a bench trial on July 20, 2015. At the close of Fort Myer's case in chief, the circuit court granted Banneker's motion for judgment on two of Fort Myer's three claims—Count I for breach of contract and Count II for quantum meruit.[1] The court went on, however, to find that Fort Myer materially breached the subcontract even though Banneker had not yet presented its case on the counterclaim. Thereafter, the case proceeded on damages only and following the close of all evidence, the court, in a written opinion, granted judgment in favor of Banneker and Travelers and awarded damages in the amount of $1,754,441.19. From this judgment, Fort Myer and WSC appealed, presenting the following questions:

I. "Did the lower court err in its interpretation of the notice requirements as set forth in the operative agreement?"

II. "Did the lower court err in awarding Banneker reprocurement costs associated with a subsequent breaching subcontractor?"

III. "Whether the lower court's factual findings were clearly erroneous in light of uncontroverted evidence, which supported the testimony of Fort Myer's witnesses?"

We conclude the issue raised in Fort Myer's third question is dispositive. At the

[1] In its final Order dated October 19, 2015 and entered on October 22, 2015, the circuit court decided that its prior oral ruling on Banneker and Traveler's Maryland Rule 2-519 motion for judgment, which expressly referenced counts I and II against Banneker, also extinguished Fort Myer's payment bond claim in Count III against Traveler's.

close of Fort Myer's case, the trial court was not persuaded that Banneker breached the subcontract, and we defer to the factual findings and conclusions by the court that formed the basis of its decision to grant Banneker's motion for judgment on Fort Myer's complaint. However, before Banneker put on any evidence to establish a breach by Fort Myer in support of its counterclaim, and before Fort Myer had the opportunity to defend against the counterclaim, the court decided that Fort Myer materially breached the subcontract. We hold that the circuit court's factual finding that Fort Myer breached the subcontract was clearly erroneous in light of the fact that Banneker had not presented any evidence and in light of Fort Myer's October 24, 2012 letter, which stood uncontroverted by countervailing evidence, as the only contemporaneous writing of what occurred on October 24, 2012. Therefore, we affirm the circuit court's grant of the motion for judgment to dismiss Fort Myer's complaint, but vacate the circuit court's judgment that Fort Myer materially breached the subcontract and remand the case for a new trial on the counterclaim and cross-appeal.

BACKGROUND

A. The Project

1. The Prime Contract

Banneker entered into the prime contract with the MCDOT, worth $4,258,602.19, on June 9, 2012. The prime contract was a "unit-price contract," which, according to the trial testimony of Pete Patel, Fort Myer's Senior Project Manager, is a contract "where the quantities are estimated . . . by the owner, and the unit price is the price [the contractor]

will be compensated for."[2] The prime contract had 139 line items of unit-priced work activities for which Banneker was responsible.

Relevant in this case, is the prime contract's price schedule for the following four units:

Item **No. 8008** (install 8-inch sewer) **$78,494.80**

Item **No. 8012** (install 8-inch ductile iron) **$83,811.70**

Item **No. 8017** (sewer to house connections) **$108,864.00**

Item **No. 8022** (water to house connections, copper) **$46,162.96**

On May 16, 2012, Banneker secured from Travelers a labor and materials bond and a performance bond for the Project, both in the amount of $4,045,672.08.

2. The Subcontract

Under the subcontract with Banneker, Fort Myer agreed to perform 93 of the 139 unit items of the work for the Project. The total value of the subcontract was $2,305,000.00. On July 25, 2012, Fort Myer secured a bond from WSC for its work on the

[2] The Maryland Construction Law Deskbook explains: a unit price contract:

> Unit prices are often utilized in horizontal construction such as sidewalks, roads, sewer and water projects, and other areas where there are defined measurable units that are provided by the contractor. If the contractor is running a sewer line, the sewer line can be measured and paid for on a price per foot bid for that sewer line. The contract provides for payment based upon a unit price (such as one dollar per food) multiplied by the number of units completed (10 feet). Typically, a contract utilizing a unit price contracting methodology will be bid with estimated quantities included for purposes of bid evaluation.

Construction Law Section, Maryland State Bar Association, Maryland Construction Law Deskbook 11 (Joseph C. Kovars and Michael A. Schollaert eds. 2017) (footnote omitted).

Project, in the amount of $2,305,000.00. The subcontract priced the above-mentioned units differently:

Item **No. 8008** (install 8-inch sewer) **$297,680.00**;

Item **No. 8012** (install 8-inch ductile iron) **$101,150.00**

Item No. **8017** (sewer to house connections) **$243,072.00**

Item No. **8022**. (water to house connections, copper) **$97,352.00**

These four unit prices total $739,254.00, which is $421,920.81 more than the corresponding prices under the prime contract. According to the trial testimony of Chris Kerns, Esq., Senior General Counsel and Vice President for Fort Myer, his client was not aware of the pricing Banneker had agreed to under the prime agreement until the October 24, 2012 meeting between the parties.

In Article XVII under the heading "Failure to Prosecute, Etc.", the subcontract provided that in the event Fort Myer defaulted on its obligations, Banneker would have the right, after three days written notice, to perform the work itself and deduct the costs from what it owed Fort Myer, or to terminate Fort Myer.

Notably, the subcontract provided that Fort Myer had 365 calendar days, from August 13, 2012, to complete its work.

3. Problems on the Project

Problems started within several days of the 365 day relationship. Fort Myer began work on the Project on August 23, 2012. Four days later, Banneker began sending Fort

Myer letters and emails, generally labeled as "notices of delay" or "notices of deficiency."[3] According to the trial testimony of Mr. Kerns, Fort Myer immediately "ran into concrete slabs that had apparently been placed there by [Montgomery] County some years before that because the soil was so unstable that it couldn't support these utilities."[4] Fort Myer also found "voids," which they then had to fill in before continuing work. Thus, according to Kerns, the discovery of rock and voids delayed Fort Myer's performance on the Project.

On September 18, 2012, Billy Tose, Banneker's project manager, sent via email to Fort Myer's Senior Project Manager, Pete Patel, a "72 Hour Cure Notice," notifying Fort Myer of its "inability to furnish proper material submittals in a complete and timely manner." According to the notice, Montgomery County would not pay for any contract line item without approved submittals. The notice further stated that Fort Myer had three days to submit all line items, and that "[i]f Banneker d[id] not receive all these line items complete and in its entirety [sic], then Banneker reserve[d] the right to obtain the remaining submittals using its own personnel with all related costs being charged to [Fort Myer]." Three days elapsed, but Banneker did not call a default.

Meanwhile, Fort Myer was having problems with its own subcontractor, Anchor Construction Corporation ("Anchor"), as a result of the unstable site conditions. Fort Myer

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[3] In an August 27, 2012 letter to Mr. Patel, Billy Tose, Banneker's Project Manager complained that, among other things, MCDOT had to stop Fort Myer's construction activities that day because Fort Myer failed to notify MCDOT and Banneker that they were not going to perform the underground utility portion of their scope of work, and Banneker provided traffic control resources for work that was stopped, wasting valuable resources.

[4] According to Fort Myer, MCDOT did not disclose the existence of these slabs.

hired Anchor to perform the storm drain and sewer line work, but Anchor began work before an agreement was in place. Then, on September 24, 2012, Anchor's Senior Project Manager, Jack Burlbaugh, emailed Fort Myer a letter stating that Anchor would be unable to accept Fort Myer's offered contract on the Project without an understanding on covering rock extraction costs because Anchor encountered rock it would have to break and excavate while performing its work on the Project. Anchor informed Fort Myer that it would not work past Manhole #4 on the Project, which, according to Anchor's estimate, would give Fort Myer two weeks to find a replacement subcontractor.

On October 3, 2012, Mr. Tose sent an email to Manuel Fernandes, a Vice President and crew manager of Fort Myer, regarding the resolution of "field production issues," apparently concerned that the Project was falling behind schedule. He sent another letter and email to Mr. Fernandes eight days later, citing further concerns that the Project was behind schedule and requesting a meeting at Banneker's field office in Silver Spring on October 15, 2012.

The meeting took place as scheduled, but Banneker and Fort Myer were apparently unable to resolve their outstanding issues. That afternoon, Mr. Tose emailed Mr. Fernandes another "72 Hour Cure Notice," "to notify that [Fort Myer] has been hereby put on notice for their inability to maintain progress according to the project schedule sent to [Fort Myer] on September 13, 2012." The notice stated that, pursuant to the schedule, Fort Myer was to have completed installation of the new sewer system through Manhole #5, along with the attendant sewer house connections, by that point, but that Fort Myer had only progressed to halfway between Manholes #3 and #4 and had connected no sewers to

houses. The notice instructed that Fort Myer increase their daily production immediately, and provided 72 hours to furnish enough manpower and equipment to install:

> no less than one complete, new sewer house connection, **and to install the remaining eleven (11) manholes in no more than two working days**. If F[ort Myer] does not provide the necessary manpower and equipment to meet these benchmarks, then Banneker will supplement [Fort Myer]'s workforce at the cost of [Fort Myer] until the project is brought back on schedule. Banneker will also reserve the right to impose any and all corrective action should production again fall behind schedule at any later date.

(Emphasis added).

The notice also stated that Fort Myer had not been providing the sediment and erosion control maintenance and reporting requirements of the subcontract and warned that "[i]f Banneker does not receive these reports at the end of the 72 hour period, then Banneker will take over the management of the sediment and erosion control measures of the countract away from F[ort Myer] and deduct the costs from the monthly invoices from F[ort Myer]."

On October 18, 2012, Mr. Patel responded with a four-page letter addressing the issues raised by Banneker in the notices. Mr. Patel's letter detailed the problems they had encountered concerning the unexpected concrete encountered underneath Dale Drive and an unexpected road collapse. The following is an excerpt:

> As you are aware, there have also been delays on this project that have affected the schedule, but the portion of the schedule that we have seen does not reflect those facts and appropriate delays. For example: F[ort Myer] and its subcontractor had estimated production based on the information provided in the contract drawings. During installation of the sewer main F[ort Myer] encountered hard rock (not identified on the boring logs), rather than the soil and fragmented rock that was reported. Subsequently, hoe-ramming and excavating hard rock has impacted our operations, for [sic] which F[ort Myer] has repeatedly informed Banneker. . . . F[ort Myer] advises that if the

> Owner, and/or Banneker does not timely provide directives and appropriate change orders to address the rock and our extra costs, that such will further and significantly delay this project.
>
> In addition, F[ort Myer] expected to reuse the soil that was on site, as the boring logs showed those materials to be suitable for reuse. However, as a result of differing site conditions, much of the on-site materials were deemed to be unsuitable, and therefore F[ort Myer] had to haul off and truck those materials away, dispose of the materials (with concurrent dumping fees), and to haul in and install CR-6 aggregate[.]
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> * * *
>
> Further, the project was subject to a road collapse, to which the owner responded and directed remedial operations, which alone took at least three additional calendar days. Again, the schedule does not reflect such delays.

Mr. Patel also pointed out that the partial schedule Fort Myer received from Banneker on September 13, 2012, did not provide sufficient time to mobilize or for necessary submittals and approvals. In short, the partial schedule did not allow for enough time for Fort Myer to complete its work. On cross-examination, Mr. Patel admitted that Fort Myer was also behind on the schedule it had submitted, but that schedule was dated August 28, 2012. Mr. Patel complained that Banneker had never provided Fort Myer with Banneker's own Project schedule, despite several prior requests from Fort Myer, and therefore, Fort Myer was unable to determine whether it was actually behind in the overall Project schedule. The letter concluded by stating that Fort Myer was not behind schedule for the simple reason that Fort Myer had never received Banneker's schedule.

Despite these letters, Banneker did not supplement Fort Myer's workforce after 72 hours, as its October 15 letter threatened it would do.

4. The October 24 Meeting and Fallout

On the morning of October 24, 2012, Mr. Tose and Omar Karim (Banneker's President) met with Mr. Fernandes, Mr. Kearns, and Caesar Casanova (a project manager for Fort Myer).

According to Fort Myer's version of this meeting (Banneker never introduced any evidence prior to the Court's ruling on the motion for judgment), most of which was elucidated in the trial testimony of Mr. Kerns, Banneker presented Fort Myer with its schedule of unit prices and announced that it had made a mistake in regard to the prices of four unit items for which it had agreed to accept far less under the prime agreement (*supra*). According to Mr. Kerns, Banneker requested that Fort Myer "change [its] contract to reflect those unit prices[.]" The difference between the original subcontract price and the requested modification was close to $500,000.00. Mr. Karim informed the Fort Myer representatives that Banneker could not obtain financing to fund the shortfall. According to Mr. Kerns, when they reached this impasse, Banneker and Fort Myer agreed that Fort Myer would walk away from the subcontract in exchange for payment for Fort Myer's completed work. Mr. Kerns testified:

> We didn't accuse him of breaching but we did, I think we used the term anticipatory breach.
>
> Mr. Karim understood that, I think, but you know, we said, look, you know, why don't we just, you know, terminate, let's just walk away. If what you're saying is you can't really complete this contract, you can't perform, then the only thing remaining is to walk away. And Omar says, that's fine. Let's just walk away. I said, so, we get paid for our quantities to date. We'll continue helping assist you in recovering of additional costs for unforeseen site conditions. We understand that.
>
> And so, we'll terminate the contract. We'll go to a place where, you know, it's, it would be logical for someone to start and stop, or start anew.

> We'll stop at a place that makes some sense. We'll make sure there's no safety issues on the project, maintenance traffic issues. We talked about them, we had a bypass system in place.

On cross examination, Mr. Kerns agreed that Banneker did not terminate Fort Myer or modify the subcontract during the meeting.

Later that same day, Mr. Fernandes, representing Fort Myer, sent Mr. Karim and Mr. Tose a letter, with the subject line "Meeting and Discussions of October 24, 2012; Response to Proposal to Modify Contract Unit Prices; Notice of Termination of Operations."[5] In the letter, Fort Myer declined to accept Banneker's offer to lower its prices for the Project and agreed to demobilize, pursuant to the events of the meeting that morning, stating:

> This letter is in response to your disclosures and a proposal provided to us this morning requesting that Fort Myer [] modify its contract unit prices in order, as you suggested, to be in line with prices apparently agreed upon in the prime contract between Banneker [] and the Owner. Unfortunately, we cannot do so.
>
> * * *
>
> While Fort Myer generally desires to work with Banneker [], your sudden disclosure of this very significant issue poses enormous and overwhelming problems to the continuation of any further work on this project by Fort Myer and its subcontractors. We now realize that the work we have been completing, and are contemplating to continue, will result in major losses for Banneker over the next few months. In our meeting this morning, it was revealed that these losses are likely to be in the neighborhood of a half a million Dollars. You even admitted that, if Fort Myer could not so amend its prices, it would mean that "we cannot go forward together." It was clear from our discussions that Banneker has no current source of funds

[5] On cross examination, counsel for Banneker made much of the fact that Mr. Kerns could not provide contemporaneous notes from the meeting, despite the fact that Mr. Kerns drafted the letter to Banneker, which Mr. Fernandez signed, later that same day.

> to pay for the differences between our current unit prices as discussed above.
>
> We not only agree with you that we cannot go forward together following this disclosure, but have concluded that by providing further work for which payment cannot be funded, such will present unacceptable risks. We have also concluded that Fort Myer did not enter its subcontract based upon these premises; rather, Fort Myer had relied upon Banneker to have concluded at least similar, and likely higher prices for comparable units of this subcontractor in contract with the owner—or at least have an alternative source of funding. **As we view it, this situation is a breach by Banneker of its obligations to Fort Myer and its subcontractors.**
>
> As a result of these conclusions, we and our subcontractors will halt work and demobilize as quickly as possible. However, we will not leave the work or the worksite in a precipitous condition, and will attempt to stop in a fashion that will allow others to easily pick up where we have left off (i.e., we will stop pipe work at Manhole No. 4).
>
> **In our meeting, you promised to deliver a check by Friday for overdue payments from August. We trust that this commitment will continue to be honored.**

(Emphasis supplied). Banneker did not deliver the check and never responded to the letter. Fort Myer demobilized that same day. The record does not reflect that Banneker ever responded to the demobilization, or provided Fort Myer notice of any reprocurement costs,[6]

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[6] During the last two days of trial on damages, after the circuit court ruled on the motion for judgment and also found that Fort Myer had breached the subcontract, Banneker presented its case in support of its reprocurement costs. Mr. Karim testified that Banneker had difficulty finding one subcontractor who could complete the entire scope of work that Fort Myer had originally been slated to perform and that they eventually "w[oun]d up managing 21 different subcontractors, suppliers and vendors."

Banneker contracted with Creighton Construction Corporation ("Creighton") in late 2012 to complete line items 8008, 8017, 8018, and 8019 at a price "about "$3, $400,000 cheaper, less expensive than Fort Myer for those four particular line items." Mr. Karim further testified that Creighton "didn't work out too well[,]" and Banneker terminated Creighton approximately six weeks after it started work on the Project. Creighton demobilized in late February 2013. Notably, on March 4, 2013, Mr. Karim sent a letter providing Creighton notice of termination in the following terms: "As a result of C[reighton]'s continued breach of the terms of the Contract, including, but not limited to, the above-mentioned reasons, this letter serves as C[reighton]'s Notice of Termination of the Contract between C[reighton] and Banneker in connection with the Dale Drive Project." Mr. Karim's letter further stated that Banneker would enter the premises, take

or made a claim against the WSC bond until Banneker filed the counterclaim in the underlying case.

5. Reprocurement and Continued Work on the Project

After Fort Myer's demobilization, Banneker attempted to reprocure the Project to substitute another subcontractor. Mr. Karim testified at the damages hearing about Banneker's reprocurement efforts:

> Aside from being shocked and [] pretty disappointed, we immediately went to re-procure the project. We looked at the work that Fort Myer was doing and we contacted just everybody in the universe we could. We started with the potential sewer subcontractors. We went to WSSC approved list and called almost every subcontractor on there to find out who would be interested in giving us bids. And then we methodically went about re-procuring the project. We went then to retaining wall contractors. And then re-procured the project beginning almost immediately after they left the job all the way to the fall of 2013.

On April 1, 2013, Banneker submitted a claim for $276,610.00, via letter, to Philadelphia Indemnity Insurance Company ("Philadelphia Indemnity"), Creighton's surety, based on Creighton's default, which ultimately settled for $170,000.00.

According to Mr. Karim's testimony, Banneker then brought Hybrid, another company, to augment Creighton's work for two weeks, before Banneker was able to contract with Total Civil Construction and Engineering, LLC, the entity that ultimately completed the sewer work.

possession of all materials on site for the purposes of completing the Project, and hold Creighton responsible for paying any contract damages suffered by Creighton's default.

6. Bond Claim

From November 2012—the month after Fort Myer demobilized—until April 2013, Fort Myer submitted invoices to Banneker for the work on the Project that Fort Myer had completed before demobilizing. After receiving no response, on April 25, 2013, Fort Myer made a claim against the Travelers bond, requesting $266,732.21. Travelers then sent Banneker a letter, asking for its response to Fort Myer's claim. Banneker responded via letter dated May 31, 2013, stating that Fort Myer had breached the contract and disagreeing with Fort Myer's breakdown as to the amount owed. The letter ends, however, by stating the following: "If F[ort Myer] agrees to th[e] breakdown [of this letter], Banneker is prepared to pay it $108,398.33 at the signing of a lien waiver and $6,583.56 upon receipt of retainage by Montgomery County."

Travelers denied Banneker's claim via letter to Fort Myer dated June 19, 2013. The Travelers letter stated, in pertinent part:

> Based upon your executed proof of claim and supporting documentation, the Surety understands your position to be that you entered into a subcontract with [Banneker] in the amount of $2,117,067. However, two months into the project, you left the job and did not complete your work. You are claiming that payment is due for the portion of the work you are allegedly completed in the amount of $266,732.21. This total includes retainage and charges for extra work (change orders 1 – 8) which total $107,307.91. (You have not provided signed approved change orders which would support this amount.)
>
> In addition, [Banneker] advises that they are holding retainage of 5% and that the retainage is not due and owing until such time as the Owner of the project releases retainage to [Banneker] upon completion of the project. Based upon the amount you claim to have completed, retainage of $13,336.61 should have been withheld. As the project is not complete, pursuant to your subcontract, this amount is not currently due and owing and must be respectfully denied. This would leave a balance on your claim of $253,395.60. Notably, you do not withhold retainage in your pay

> applications to [Banneker], but you are withholding 5% retainage from your sub subcontractor, Anchor, who appears to have performed a large part of your subcontract with [Banneker].
>
> On the other hand, [Banneker] advises that the actual work completed by Fort Myer and approved by the Owner is valued at $131,671.16 and that the retainage on that amount is $6,583.56 leaving a balance earned and unpaid of $125,087.60.
>
> However, [Banneker] has also incurred direct costs to repair and complete your work in place which total $42,047.01. This amount has been backcharged to your subcontract leaving a balance of $83,040.59. Additionally, [Banneker] advises that there is approved extra work for Change Orders #1, 5, 6, and 7 which totals $25,357.74, resulting in a total amount earned and unpaid of $108,398.33, which [Banneker] will pay upon receipt of a signed Lien Release. The retainage of $6,583.56 will be paid upon receipt of retainage from [Banneker]. . . .
>
> However, your proof of claim also states that you currently have outstanding amounts which may be due to suppliers and sub subcontractors on the project of $190,659.96, an amount for which the Surety and [Banneker] may potentially be liable. This amount exceeds the balance which [Banneker] has indicated is currently due.

Given the preceding rationale, Travelers denied Fort Myer's claim against the bond.

B. The Lawsuit

1. The Pleadings

On March 5, 2014, Fort Myer filed a complaint against Banneker and Travelers, alleging that Banneker obtained a $4,045,672.08 payment bond from Travelers for the Project and that Banneker contracted—for the sum of $2,305,000.00—with Fort Myer to serve as a subcontractor for the Project. Fort Myer next alleged that (1) Fort Myer and its subcontractors performed work on the Project in accordance with the contract specifications from August 20, 2012 to October 30, 2012; (2) Fort Myer submitted change orders that were required due to unforeseen and changed site conditions, including unforeseen rock excavation; (3) Fort Myer received approval or direction from Banneker

to proceed with the extra work; (4) Fort Myer submitted pay applications to Banneker in the amount of $266,732.21 for the work Fort Myer and its subcontractors performed and was never paid; (5) representatives from Banneker and Fort Myer had a meeting on October 24, 2012, at which meeting Banneker demanded that Fort Myer change its unit prices to more closely mirror the prices that Banneker had given to MCDOT; and that (6) Banneker told Fort Myer that, if Fort Myer did not agree to this, Fort Myer and Banneker could no longer work together. Fort Myer alleged that this conduct constituted anticipatory repudiation.

Count I of the complaint was for breach of contract against Banneker and requested $497,232.20, representing $266,732.21 for the work performed plus $230,500 in lost profits. Count II was for quantum meruit and requested $266,732.21 from Banneker. And Count III was against Travelers and requested $266,732.21 from the payment bond.

Travelers filed an answer on April 30, 2014, denying liability. Banneker followed suit on May 2, 2014, and also filed a counterclaim against Fort Myer and a cross claim against WSC, Fort Myer's surety, under the bond Fort Myer obtained for its portion of the Project.

Banneker's counterclaim and crossclaim alleged that Article III of the subcontract included a broad indemnity provision and WSC had issued payment and performance bonds for Fort Myer's portion of the Project, in the amount of $2,305,000.00. Banneker next alleged that (1) Fort Myer began work on the project on August 23, 2012; (2) Fort Myer's performance was deficient from the start; (3) Banner notified Fort Myer several times of the deficiencies; (4) Fort Myer threatened to pull its forces—including Fort Myer's

own subcontractors—off the Project; (5) Banneker notified Fort Myer that it was in default of the subcontract; and (6) Fort Myer abandoned its work on the Project on October 24, 2012, notifying Banneker in writing that it would no longer work on the Project. Banneker further claimed that Fort Myer's conduct constituted an anticipatory repudiation; that Fort Myer made false statements it improperly attributed to Banneker employees; and, that as a result of Fort Myer's breach, Banneker incurred substantial additional costs to complete Fort Myer's subcontract obligations.

In Count I, Banneker asserted a breach of contract claim against Fort Myer, requesting $2,000,290.00; and, in Count II, Banneker asserted a claim under the performance bond against Fort Myer and WSC for $2,000,290.00.[7]

2. The Trial

The four-day bench trial started on July 20, 2015. Fort Myer presented evidence for two days, including Mr. Kerns's and Mr. Patel's testimony, described *supra*. Fort Myer also called Mr. Fernandes to testify. He testified similarly to Mr. Kerns as to what occurred during the October 24 meeting, and on cross examination, Mr. Fernandes, like Mr. Kerns, admitted that he had no contemporaneous notes or documents from the meeting. Banneker's counsel attempted to impeach Mr. Fernandes with his deposition testimony, in particular his deposition testimony stating that Banneker put nothing in writing concerning any proposed price change in the October 24 meeting.

During the second day of Fort Myer's case, Fort Myer called Roxanne Castle, a

[7] Fort Myer and Banneker both filed motions for summary judgment on April 30, 2015. On June 11, 2015, the circuit court denied these motions after a hearing.

senior claims representative for Travelers. Ms. Castle first explained the difference between payment bonds and performance bonds and stated that Travelers issued both on behalf of Banneker and for the Project. Ms. Castle confirmed that Fort Myer made a payment bond claim in April 2013. During Ms. Castle's testimony, Fort Myer's counsel attempted to draw attention to the difference in Banneker's conduct upon Creighton's breach and Fort Myer's alleged breach to suggest that Banneker did not consider Fort Myer's abandonment of the Project a breach. Fort Myer then closed its case.

C. Judgment under Maryland Rule 5-219

Banneker moved for judgment under Maryland Rule 2-519.[8] Following argument by counsel on the motion, the court orally granted Banneker's motion as to Fort Myer's Counts I (breach of contract) and II (quantum meruit). The court announced its ruling from the bench:

> In this case, there is no claim pled for mutual termination or rescission although those words were used by one or more of the plaintiff's witnesses.

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[8] Maryland Rule 2-519 provides in pertinent part:

(a) **Generally.** A party may move for judgment on any or all of the issues in any action at the close of the evidence offered by an opposing party, and in a jury trial at the close of all the evidence. The moving party shall state with particularity all reasons why the motion should be granted. No objection to the motion for judgment shall be necessary. A party does not waive the right to make the motion by introducing evidence during the presentation of an opposing party's case.

(b) **Disposition.** When a defendant moves for judgment at the close of the evidence offered by the plaintiff in an action tried by the court, the court may proceed, as the trier of fact, to determine the facts and to render judgment against the plaintiff or may decline to render judgment until the close of all the evidence. When a motion for judgment is made under any other circumstances, the court shall consider all evidence and inferences in the light most favorable to the party against whom the motion is made.

There is no claim for that pled.

So the first argument of the defendants is that as to the issue of anticipatory repudiation based on the evidence adduced at trial, their view is that the evidence is not legally sufficient to sustain a claim of anticipatory repudiation. I agree. The doctrine is not in doubt. It is clearly out and has not been changed. The Court does not credit or find worthy of belief the description by Mr. [Ker]ns of what happened at the meeting. I don't credit his recitation or assessment of what happened or what the defendant said. I note as well that either he kept no notes of the meeting or he threw them away. I find that at most interesting and probably telling that when one is preparing to craft what turned out to be . . . a for the record letter which was the letter of October 24, 2012 . . . that it's clear that Mr. Ker[ns] was not relying on the memory of Mr. Fernande[s] because he had no memory really, I find, of what happened. Mr. Fernande[s] was, I find, repeatedly impeached by his deposition testimony on at last three key points about what happened. And in addition, the Court does not read the October 24 letter as a letter confirming in any way, in my judgment, based on the evidence which I credit, that there was anticipatory repudiation. First of all, it is styled notice of termination, i.e., we quit, which is fine. Fort Myer is a well-established, experienced building contractor, the record discloses, in the Washington Metropolitan area, and knew these are sophisticated parties and know well how to say the following. You could do it on a postcard, respectfully. Dear Banneker, this will confirm that at the meeting, if it were true, you anticipatorily breached the contract. Therefore, since you did, I am relieved of my obligation to perform. Have a nice day. Look forward to working for you in the future. That's what it would have said. This letter doesn't say that. This letter is clearly a placeholder, I find, . . . while . . . Fort Myer was deciding what, if anything, its position was. I find that its attempt to graft, to make this case fit into the doctrine of anticipatory repudiation was an afterthought. After there is going to be litigation, people sat down and said, okay, now, what legal theories can we possibl[y] shoehorn this into. Respectfully, I find that doesn't fit because I don't believe that's what happened at the meeting. **The argument is made, well, there's no testimony to the contrary. That's true. But I disbelieve the evidence on this point that has been presented. And since I disbelieve it, there is no obligation or need or requirement that I consider anything else. Party is not required to contest everything somebody says.** It is not. The fact that in this context I find that the defendant didn't send their own self-serving for the record letters of no moment. Fort Myer made it clear, I find based on all the evidence which I credit, we're done. We're out of here. In fact, I find Fort Myer had already made this decision before they went to the meeting. Anchor, its sub, with whom it had no contract and with whom it took the position we ain't paying you for rock. We ain't paying you for bad soils.

> Anchor had already walked or said it was going to walk. Fort Myer decided, I find, they're done. We're done. It ain't worth it. That's what this case is about. . . . They had had enough of this job. They got other things to do. The assertion that Fort Myer's witnesses have made, . . . we are ready, willing and able to []perform. I don't believe it. There's no evidence which I credit that they were going to do that or were interested in doing that or wanted to do that in any way, shape or form. The conduct of their sub had made it clear to Fort Myer that, hmmmm, this is a money losing proposition. We're going to cut our losses. We're going to put our time and effort somewhere else and we'll turn this over to litigation and go after the bonds. Which is what they did. They had no intention, I find, Fort Myer, when they walked into the meeting to perform. They're done. So there was no, I find, anticipatory repudiation.
>
> **I do find that there was a material breach by Fort Myer.** Breach of a contract is a failure to perform that contract in whole or in part intentionally, I find, in this case. **Since that breach is material, I find it excuses performance on the part of Banneker, which I find did not breach the contract.**

(Emphasis added). Because the court found that Fort Myer had materially breached the contract, the court found that Fort Myer could not recover damages. As to Fort Myer's claimed damages, the court stated:

> They have not proven that the defendant has breached and they have not proven lost profits with reasonable certainty. They have not shown through any legally sufficient evidence or evidence which I credit the fact of damage, the damage proceeded from Banneker's breach of the contract, or that the estimation of the amount of damage was done using well accepted analytical methods that had failed in each and every respect, I find, based upon the evidence of record which I credit regarding the lost profits.

The court also found against Fort Myer on its quantum meruit claim, explaining that "[i]f there is an express contract fully covering the subject matter of the parties' understanding, which [the court] f[ou]nd to be the case [], there can be no recovery in quantum meruit."

Because the court had already found that Fort Myer materially breached the

contract, Banneker then presented its case on reprocurement costs damages. Banneker presented the testimony of Mr. Karim (as set forth earlier in this opinion), and in addition, presented the testimony of Michael Seminara, whom the court qualified as an expert "in the areas of re-procurement and also an analysis of the reasonableness or lack thereof of the defendant's efforts to re-procure in this case." Mr. Seminara testified that he reviewed Project documents, all contracts between Banneker and the subcontractors and Banneker and Montgomery County, as well as correspondence, project design drawings, and meeting minutes. He also reviewed a number of depositions, and that he interviewed Mr. Karim. Based on this, Mr. Seminara testified that it was his opinion "that Banneker acted appropriately and reasonably in [its] actions to manage the re-procurement of the work that was originally contracted to Fort Myer." He testified that he came to this conclusion because Banneker (1) acted expediently in reprocurement and (2) solicited many bids to try to find the best rate for the Project.

Banneker also presented the expert testimony of an accountant, Dr. David Strayeski. He testified that it was his expert opinion "that Banneker incurred $1,645,000 and change of costs, additional costs, above and beyond what it would have paid Fort Myer Construction Company." He arrived at this conclusion by taking invoices and billings from replacement subcontractors and suppliers and comparing them to the Fort Myer line items.

In rebuttal, Fort Myer produced the testimony of its forensic accounting expert witness, James Kern. He compared the unit prices Banneker agreed to pay Creighton to the unit prices in the Banneker-Fort Myer Subcontract. He observed that line items 8008, 8017, 8018, and 8019 in the Creighton subcontract were approximately $300,000.00 lower

than those in the original Fort Myer Subcontract. He also observed that, based on his review of the invoice and Mr. Strayeski's expert materials, those four line items "had a total cost of $854,297[,]" but that the increased costs "due to Creighton's default" on those line items was $591,887.00.

At the end of Banneker's case, Fort Myer moved for judgment pursuant to Maryland Rule 2-519. After argument, the court found that WSC's bond contained no notice provision. The court further stated that it was persuaded by Banneker's expert testimony on damages. The court then denied Fort Myer's motion for judgment.

D. The Judgment

The court requested further briefing on damages, as well as written closing arguments, before issuing a final decision on the amount of damages. Banneker requested a total of $2,188,445.29 in damages, which included legal fees, costs, and prejudgment interest.

In its opinion, signed on October 19, 2015, the court first ruled against Fort Myer on Count III of its complaint—the guaranty claim against Travelers—on the rationale that, because a surety may assert any defense of the principal and because the court had ruled in favor of Banneker against Fort Myer on its complaint, it was also proper to rule against Fort Myer in its claim against Travelers. Notably, the court stated that "a final judgment will be entered in favor of Banneker and Travelers, and against Fort Myer, on Counts I, II, and III of Fort Myer's complaint."

As to the contract interpretation issue concerning Article XVII of the Subcontract,[9]

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[9] The subcontract contained the following Article XVII, concerning breach:

> Article XVII. Should the Subcontractor at any time, whether before or after final payment, refuse or neglect to supply a sufficiency of skilled workers or materials of the proper quality and quantity, or fail in any respect to prosecute the Work with promptness and diligence, or cause by any act or omission the stoppage, impede, obstruct, hinder or delay of or interference with or damage to the work of Banneker or of any other contractors or subcontractors on the Project, or fail in the performance of any of the terms and provisions of this Agreement or of the other Contract Documents, . . . then in any of such events, each of which shall constitute a default hereunder on the Subcontractor's part, Banneker shall have the right, in addition to any other rights and remedies provided by this Agreement and the other Contract Documents or by law, after three (3) days written notice to the . . . (a) to perform and furnish through itself or through others any such labor or materials for the Work and to deduct the reasonable, necessary and actual cost thereof from any monies due or to become due to the Subcontractor under this Agreement and/or (b) to terminate the employment of the Subcontractor for all or any portion of the Work, enter upon the premises and take possession, for the purpose of completing the Work, of all project related materials[.] . . . In case of such termination of the employment of the Subcontractor, the Subcontractor shall not be entitled to receive any further payment under this Agreement until the Work shall be wholly completed[.] . . . [I]f the unpaid balance of the amount to be paid under this Agreement shall exceed the cost and expense incurred by Banneker in completing the Work, such excess shall be paid by Banneker to the Subcontractor; but if such cost and expense shall exceed such unpaid balance, then the Subcontractor and its surety, if any, shall pay the difference to Banneker. Such cost and expense shall include, not only the reasonable, necessary and actual cost of completing the Work to the satisfaction of Banneker and the Architect and of performing and furnishing all labor, services, materials, equipment, and other items required therefore, but also all losses, damages, costs and expenses, (including reasonable legal fees and disbursements incurred in connection with reprocurement, in defending claims arising from such default and in seeking recovery of all such reasonable, necessary and actual cost and expense from the Subcontractor and/or its surety), and disbursements sustained, incurred or suffered by reason of or resulting from the Subcontractor's default. . . .

the court stated that:

> During the July bench trial, the court interpreted the notice provision to give Banneker the right, but not the obligation, to provide Fort Myer with notice of its default. The provision is a not condition precedent [sic] and thus did not obligate Banneker to give such notice before Banneker could assert a cause of action. Fort Myer and Western Surety have not presented any arguments, at trial or in their post-hearing brief, to persuade the court otherwise. Accordingly, the court concludes that Banneker was not obligated to provide Fort Myer three-days written notice before Banneker could proceed with remedies.

The court made several deductions from Banneker's claim of $2,188,445.29 in damages.[10] In its opinion entered on October 22, 2015, the court directed the clerk to enter judgment against Fort Myer and WSC, in favor of Banneker, in the amount of $1,754,441.19, totaling Banneker's reprocurement costs, attorney's fees, and costs.[11] Fort

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[10] The court first reduced Banneker's claim by $24,122.00 because Banneker had conceded that it had not paid one contractor, Peak, that amount of money. Further, the court credited Fort Myer with $12,231.00 because Banneker's expert, Dr. David Strayewski, had conceded at trial that Banneker's damages would be reduced by $12,231.00 for emergency road work performed during the collapse of the road at one point during the Project. The court also did not award $266,743.62 in damages to Banneker, for "additional management costs" due to project delays because it found that Banneker had represented to Montgomery County that Creighton, not Fort Myer, was responsible for those delays. Finally, the court determined that Banneker was not entitled to prejudgment interest because "the amount of Banneker's alleged damages w[as] uncertain, indefinite, and un-liquidated."

[11] The judgment entered by the clerk on October 22, 2015, *does not* encapsulate all of the commands of contained in the court's opinion. The judgment states:

> **I HEREBY CERTIFY** that the following Judgment was entered in the above entitled case on October 22, 2015:
>
> > JUDGMENT ENTERED AND RECORDED ON THE JUDGMENT INDEX IN FAVOR OF THE BANNEKER VENTURES LLC AND AGAINST FORT MYER CONSTRUCTION CORPORATION AND WESTERN SURETY COMPANY IN THE AMOUNT OF ONE MILLION SEVEN HUNDRED FIFTY-FOUR THOUSAND FOUR HUNDRED FORTY-ONE DOLLARS AND NINETEEN

Myer and WSC filed a notice of appeal on November 4, 2015.

DISCUSSION

Appellants' third issue is dispositive, so we begin our discussion there. Appellants ask us to hold that the circuit court's factual findings were clearly erroneous in "in light of uncontroverted evidence, which supported the testimony of Forth Myer's witnesses." They posit that, although the court did not credit Fort Myer's evidence, Banneker did not present evidence to prove breach of contract by Fort Myer or to contradict Fort Myer's assertions. Appellants urge that it presented uncontradicted evidence that Fort Myer demobilized only after Banneker agreed that Fort Myer should "'walk away'" from the Project and that the court failed to take into account the difference between Banneker's behavior with respect to Fort Myer and Creighton. *Id.*

Appellees respond by contending that a trial court ruling on a Maryland Rule 2-519

CENTS ($1,754,441.19).

(Emphasis in original). Thus, the separate document constituting the judgment in this case does not mention Travelers. Additionally, there is no docket entry reflecting the judgment in favor of Travelers against Fort Myer, notwithstanding the circuit court's instruction in its written opinion that "a final judgment will be entered in favor of Banneker and Travelers, and against Fort Myer, on Counts I, II, and III of Fort Myer's complaint." The parties have not recognized or briefed this issue, but the judgment entered in this case runs afoul of the separate document rule. Maryland Rule 2-601(a) provides that "[e]ach judgment shall be set forth on a separate document and include a statement of an allowance of costs[.]" Failure to do so, as here, however, is procedural error, not jurisdictional. *Balt. Cty. v. Balt. Cty. Fraternal Order of Police Lodge No. 4*, 439 Md. 547, 566 (2014). The Court of Appeals has held that the parties waive this issue when neither party objected to the absence of a separate document and the circuit court intended its ruling to be a final judgment. *See Suburban Hospital, Inc. v. Kirson*, 362 Md. 140, 156 (2000). As in *Kirson*, neither party identified this issue and the circuit court "clearly intended[,]"for there to be a final judgment entered because its memorandum opinion disposed of all claims against all parties. *See id.* Therefore, we determine the issue was waived.

motion may evaluate all the evidence and may reject the testimony of a witness on credibility grounds, even if that testimony is uncontroverted by any other evidence. They argue that, "[i]f Fort Myer were correct, then no motion for judgment could ever be granted, and the purpose of the Rule would be undermined."

Standard of Review

Maryland Rule 2-519 permits a party in a bench trial to "move for judgment on any or all of the issues in any action at the close of the evidence offered by an opposing party[.]" The court may then "proceed as the trier of fact, to determine the facts and to render judgment against the plaintiff or may decline to render judgment until the close of all the evidence." *Id.*

On appellate review of a trial court's grant of judgment under Rule 2-519, we defer to the trial court's factual findings unless they are clearly erroneous. *Cattail Assocs., Inc. v. Sass*, 170 Md. App. 474, 486 (2006) (citations omitted). "We frequently have observed that "'[i]t is not our role as an appellate court to re-evaluate or re-weigh the testimony and other evidence presented at trial and substitute our judgment for that of the trial court.'" *Sweet v. State*, 163 Md. App. 676, 689 (2005) (citation omitted). Although our review is deferential, "'[a] finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Kusi v. State*, 438 Md. 362, 383 (2014) (citation omitted). We review any legal conclusions *de novo*. *Id.* (citation omitted).

Parsing the Issues for Review

The court's factual findings at issue, as we understand them, are that: (1) Fort Myer

failed to prove that Banneker breached the subcontract anticipatorily and that (2) Fort Myer materially breached the subcontract. But before we resolve whether or not these findings were clearly erroneous, it is important to recall the point in the trial at which the court made its rulings.

The trial below encompassed two sets of claims: (1) Appellants' claims against Appellees, alleging anticipatory repudiation, and (2) Appellees' counterclaims against Appellees, alleging material breach. Only the Appellants presented their case-in-chief and, with it, evidence to suggest that Banneker repudiated the subcontract. At the close of the Appellants' case, Appellees, as defendants, moved for judgment as a matter of law *on plaintiffs' claims* under Maryland Rule 2-519. And, the record discloses that Banneker did not introduce any evidence during plaintiff's case. The court was not persuaded by the evidence presented, and found that Fort Myer failed to demonstrate that Banneker anticipatorily repudiated the subcontract. Given the immense deference we afford the trial court's factual findings, we can discern no error in its judgment. At this point in the trial, however, the court concluded not only that the Appellants had failed to prove their case, but also that Appellees were entitled to judgment on their counterclaim that Fort Myer materially breached the subcontract—a claim on which Appellees had not yet presented any evidence. This was error. We explain.

A. Plaintiffs' Claim of Anticipatory Repudiation

A contracting party repudiates or breaches a contract "when 'in anticipation of the time of performance one definitely and specifically refuses to do something which he is obliged to do, so that it amounts to a refusal to go on with the contract, it may be treated as

a breach by anticipation and the other party may, at his election, treat that contract as abandoned, and act accordingly.'" *C.W. Bloomquist & Co., Inc. v. Capital Area Realty Investors*, 270 Md. 486, 494 (1973) (internal citations omitted). But refusal to perform must be positive and unconditional." *Id.* So although "'a mere expression of inability to perform in the future is not a repudiation of duty and cannot be operative as anticipatory breach[,]'" an "'expression[] of inability on his part to perform will justify the other party in nonperformance[.]'" *Id.* at 495 (citation omitted).

As the party alleging anticipatory repudiation, Fort Myer bore the burden of persuading the trial court of its claims by a preponderance of the evidence. The trial court found, however, that "the evidence [wa]s not legally sufficient to sustain a claim of anticipatory repudiation." The court "d[id] not credit or find worthy of belief" Mr. Kerns' description of what happened at the October 24 meeting between Fort Myer and Banneker. It also discredited Mr. Fernandes' testimony, finding that it was "impeached by his deposition testimony on at last three key points about what happened." The trial court weighed the evidence Appellants presented and was left unpersuaded. When Appellants argued that its evidence was the *only* evidence presented, the court responded: "You keep saying 'the only evidence.' That, there's an assumption built in there that[] it['s] believed. Because if it's not believed, then it's zero." The court explained, it did not believe Fort Myer's account of what happened at the October 24 meeting, and stated that Banneker need not present evidence or testimony to the contrary because the court disbelieved Fort Myer's evidence. In short, the court was not persuaded.

This Court addressed a similar circumstance in *Yonga v. State*, 221 Md. App. 45

(2015). There, the appellant's case relied on the testimony of two witnesses, both of whom the trial judge found to be not credible. The trial judge explained that their testimony "defie[d] comprehension" and she concluded that she "d[id]n't believe a word that they said[.]" Writing for this Court, Judge Moylan instructed that the significance of the trial judge's disbelief in the "uncontradicted testimony offered by the proponent of a proposition who bears the burden of proof" is that on appellate review, the proponent "has nothing." *Id.* at 95. He explained that the distinction between a fact-finder being persuaded by something and being unpersuaded is critical:

> It is a far, far different phenomenon when one is simply unpersuaded. To be unpersuaded, there is no burden of production that has to be satisfied. To be unpersuaded, there is no level of persuasion that has to be applied. . . .
>
> "[I]t is far easier to sustain as not clearly erroneous the decisional phenomenon of not being persuaded than it is to sustain the very different decisional phenomenon of being persuaded. Actually to be persuaded of something requires a requisite degree of certainty on the part of the fact finder (the use of a particular burden of persuasion) based on legally adequate evidentiary support (the satisfaction of a particular burden of production by the proponent). There are with reasonable frequency reversible errors in those regards. Mere non-persuasion on the other hand, requires nothing but a state of honest doubt. It is virtually, albeit perhaps not totally, impossible to find reversible error in that regard."

Id. at 96 (quoting *Starke v. Starke*, 134 Md. App. 663, 680-81 (2000) (emphasis omitted)).

Given the trial court's expressed disbelief in the testimony of Fort Myer's witnesses, and based on the deference we afford the trial court to weigh their credibility, "it is as if [Fort Myer's] witnesses had never been called or as if their testimony did not exist." *Id.* at 95. Accordingly, we must affirm the circuit court's finding that Fort Myer failed to prove by a preponderance of the evidence that Banneker anticipatorily repudiated the subcontract.

B. Counter-Plaintiffs' Claim of Fort Myer's Breach

In their counterclaim, Appellees alleged that Fr. Myer breached the subcontract. "A breach of contract is a failure without legal excuse to perform any promise which forms the whole or part of a contract, and may be inferred from the refusal of a party to recognize the existence of a contract, or the doing of something inconsistent with its existence[.]'" *C.W. Bloom* 269 Md. 569, 579-80 (1973) (internal citations omitted). The law deems a breach to be material "if it affects the purpose of the contract in an important or vital way." *Sachs v. Regal Sav. Bank*, 119 Md. App. 276, 283 (1998), *aff'd sub nom., Regal Sav. Bank, FSB v. Sachs*, 352 Md. 356 (1999) (citations omitted). To prevail on a claim for breach of contract, it is the plaintiff's burden—in this case, the counter-plaintiff's burden—to prove, by a preponderance of the evidence, "that the defendant owed the plaintiff a contractual obligation and that the defendant breached that obligation." *Taylor v. NationsBank, N.A.*, 365 Md. 166, 175 (2001) (citation omitted).

The circuit court here found "that there was a material breach by Fort Myer. Breach of a contract is a failure to perform that contract in whole or in part intentionally, I find, in this case."[12] We review this finding for clear error. *Cattail Assocs.*, 170 Md. App. at 486.

Considering the trial court granted judgment on Appellees' counter-claims before their case-in-chief or their presentation of *any* evidence, whatever evidence there was to preponderate over, was not presented in support of Banneker's claim. Even accepting that

[12] The court did not specify when it determined Fort Myer breached the subcontract. Without this information, we can only speculate as to whether or how the Article XVII notice provision would or should have applied in this case, and therefore, we do not address this issue.

the court saw Appellants' evidence as "zero," the status quo ante on Appellees' counterclaims remained in equipoise.

Before this Court, the only evidence Appellees cite in their brief (at page 25) to support of their claim that Fort Myer abandoned its obligations under the subcontract was Mr. Karim's testimony from the second part of the trial *after* the court had already granted judgment in their favor on their counterclaim. For example**,** Fort Myer's letter and its witnesses' testimony constituted the only affirmative evidence of what took place during and immediately after the meeting on October 24. Even if the court did not find the letter or Fort Myer's witnesses credible, there was no other testimony presented to support a different version of what happened on October 24. As it stands on the record before us, Banneker did not respond to Fort Myer's letter and offered no contemporaneous writing of its own to support its version of events. Banneker also did not respond to the invoices sent from Fort Myer to Banneker from November 2012 to April 2013. Although Banneker's failure to respond may not have persuaded the trial court that Banneker breached the subcontract, had Fort Myer had the opportunity to defend against Banneker's case on the counterclaim, Fort Myer may have been able to establish upon cross-examination of Banneker's witnesses that Banneker did not consider Fort Myer to be in breach of the subcontract.[13] Although the court correctly noted that Fort Myer did not plead mutual

[13] Appellants point out in their briefing the difference between Banneker's conduct with respect to Creighton and with respect to Fort Myer. After Fort Myer informed Banneker that it would demobilize, Banneker took no further action. In contrast to this, Banneker affirmatively called a breach on Creighton, *sending Creighton a letter* so stating. Further, Banneker submitted a claim on Creighton's bond promptly, which Banneker did not do on Fort Myer's bond until litigation commenced.

rescission in its complaint, Fort Myer may have been able to prevail in its defense to the counterclaim that the parties came to an impasse on October 24th and agreed to walk away. Sophisticated parties in the construction field typically send letters to create paper trails so that they have factual support, should litigation arise in the future, especially in the event of a potential breach. *Cf.* Construction Law Section, Maryland State Bar Association, Maryland Construction Law Deskbook 122-23, 126-27 (Joseph C. Kovars and Michael A. Schollaert eds. 2017) (detailing notice considerations in the event of breach and offering practice tips).

The court's grant of judgment in Appellees' favor on their counterclaim, *sua sponte*, was contrary to Rule 2-519's purpose, which the Court of Appeals has explained "is 'to allow a party to test the legal sufficiency of his opponent's evidence before submitting evidence of his own.'" *Driggs Corp. v. Maryland Aviation Admin.*, 348 Md. 389, 402 (1998) (citation omitted). A party's motion under this rule is purely legal: "whether, as a matter of law, the evidence produced during A's case . . . is legally sufficient to permit a trier of fact to find that the elements required to be proved by A in order to recover have been established by whatever standard of proof is applicable." *Id.* The failure of party A—here, Fort Myer—to produce evidence sufficient to permit the court to find that it satisfied all the elements of its claim did not, in turn, suffice to prove the elements in the defendants' counterclaim.

This Court's decision in *Collins/Snoops Associates v. CJF, LLC*, 190 Md. App. 146 (2010), which also dealt with a subcontractor's claim of breach and contractor's counterclaim of breach, helps illustrate the determinative point on this appeal. In

Collins/Snoops, a contractor terminated a subcontractor after its partial completion of the contracted work; the subcontractor sued the contractor, *inter alia*, for breach, and the contractor filed a counterclaim asserting that the subcontractor breached. *Id.* at 150, 155. The trial court's opinion noted that there was evidence in the record to support each party's claim, but determined that neither party had proved that the other party breached the subcontract. *Id.* at 159. As a result, the trial court entered judgment in the contractor's favor on the subcontractor's claim and in favor of the subcontractor on the contractor's counterclaim. *Id.* at 150. Both parties appealed. *Id.*

In affirming the judgments of the trial court, we explained that, "[o]n a claim for breach of contract, the plaintiff (*or counterplaintiff*) asserting the claim for damages bears the burden of proving all elements of a cause of action, including plaintiff's own performance of all material contractual obligations." *Id.* at 161 (emphasis added). Given this, we set out the parties' dual burdens of persuasion:

> [O]n Subcontractor's claim for breach of contract, Subcontractor had the burden of persuading the court that the lack of progress and delay was not attributable to any default in the Subcontractor's contractual obligations, whereas, on Contractor's counterclaim, it was Contractor's burden to persuade the court that Subcontractor was at fault for the delay.

Id. at 161-62.

The same is true here. Appellants bore the burden of persuading the court that Banneker repudiated the subcontract anticipatorily, which they failed to do. The burden then became Appellees' to persuade the court of its counterclaim: that Fort Myer breached the subcontract without justification. Further, because the trial never proceeded to Appellees' case-in-chief, Appellants were not afforded an opportunity to present a defense

against the counterclaim or to present a justification for its breach.[14] *See* 23 Williston on Contracts § 63:14 (4th ed.) ("The plaintiff or party alleging the breach has the burden of proof on all of its breach of contract claims. . . . Once the facts of breach are established, the defendant has the burden of pleading and proving any affirmative defense that legally excuses performance."); *see also Fromm Sales Co. v. Troy Sunshade Co.*, 222 Md. 229, 233 (1960) ("The burden of showing such justification or excuse is on the party who first breached the agreement and thereafter seeks to defend his action.").

Because Appellees did not present any evidence in support of their claim that Fort Myer breached, and Appellants had not yet defended against that claim, the circuit court clearly erred in finding Fort Myer in material breach of the subcontract. We must, therefore, vacate the circuit court's judgment in favor of Appellees on their counterclaim and the corresponding damages award, and remand for a trial on those claims.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED IN PART AND REVERSED IN PART. CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. EACH PARTY TO PAY THEIR OWN COSTS.

[14] In their answer to Appellees' counterclaim, Appellants raised several affirmative defenses aside from Banneker's alleged repudiation, including its own breach of the contract and estoppel, while reserving its rights to add additional defenses that it became aware of during trial. *See Creamer v. Helferstay*, 294 Md. 107, 114–15 (1982) (explaining that rescission of a contract exists as a defense against attempted enforcement of the contract).