Circuit Court for Montgomery County
Case No.: 414402V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

Nos. 946, 1531, & 1784

September Term, 2016

WSC/2005 LLC, ET AL.

v.

TRIO VENTURE ASSOCIATES, ET AL.

Eyler, Deborah S.,
Beachley,
Shaw Geter

JJ.

Opinion by Shaw Geter, J.

Filed: October 5, 2017

This consolidated appeal involves an arbitration settlement agreement that was reached between the parties in the midst of a multi-week jury trial in April 2005. Under the terms of a Purchase and Sale Agreement (PSA), appellants bought appellees' interest in a joint venture that owns commercial office buildings at 6011 and 6100 Executive Boulevard in Rockville, Maryland. A clause in the PSA specified that contingency payments were to be made on the occurrence of enumerated leasing conditions. In August 2006, appellants sold 6100 Executive Boulevard to a third party; appellees later filed a demand for arbitration, arguing that the sale constituted a breach of the PSA. After holding a hearing, the arbitrator found that, because of the sale, appellants did not exercise good faith or commercially reasonable efforts in leasing 6100 Executive Boulevard, and he awarded appellees $3.5 million, as well as interest to run from the date of the breach.

The parties collectively raise three issues arising from the arbitrator's award and ensuing petition to vacate in the Circuit Court for Montgomery County that we have reworded as follows [1]:

I. Did the circuit court err in denying appellants' petition to vacate the arbitration award?

II. Did the circuit court err in remanding the case to the arbitrator to determine the applicable interest rate under the PSA?

[1] Both sides have appealed orders from the circuit court. In the interest of clarity, we will refer to the following parties as appellants: WSC/2005, LLC; Simon and Ruth Wagman; Washington Science Center Joint Venture; Gary Cohen; Deborah Ellick; and Philip Cohen. We will refer to the other parties as appellees: Trio Venture Associates; Myron Levin; Jean Levin; Lawrence Guss, individually, as Trustee under will of Alexander Guss, and as General Partner of the Guss Family Limited Partnership; and the Guss Family Limited Partnership.

III. Did the circuit court err in denying appellees' petitions for attorneys' fees and costs?

For the reasons described below, we shall affirm in part and vacate in part.

BACKGROUND

In April 2005, the parties entered into a settlement agreement in the midst of a multi-week jury trial in the Circuit Court for Montgomery County, the terms of which are contained in the PSA underlying this dispute. As appellants put it in the proceedings below, "it was a separation, a settlement, between parties that didn't like each other much, certainly didn't trust each other much, and had been involved in fighting with each other for the four-plus, five-plus years before this agreement was signed." Under the PSA, appellees transferred their 58-1/3% interest in the Washington Science Center Joint Venture (WSCJV)—which owns commercial office buildings at 6011 and 6100 Executive Boulevard in Rockville, Maryland—to appellants. Pursuant to Paragraphs 3.A through 3.C of the PSA, appellants paid appellees $10 million in 2005:

> 3. The purchase price shall be paid as follows:
>
> A. Upon the Effective Date, the Purchasers . . . shall pay to the Sellers . . . the sum of Two Hundred Thousand Dollars ($200,000.00) . . . .
>
> B. On or before Monday, April 25, 2005, the Purchasers . . . shall deliver a check in the sum of Three Hundred Thousand Dollars ($300,000.00) . . . .
>
> C. On or before Monday, August 22, 2005, (i) Purchasers . . . shall deliver a check . . . in the sum of Nine Million Five Hundred Thousand Dollars ($9,500,000.00) . . . and (ii) a check . . . in the sum of Five Hundred Thousand Dollars ($500,000) . . . as a pre-payment on the first contingency payment to become due as set forth in Section D and E below.

Paragraphs 3.D and 3.E include two additional future payments of $3.5 million, contingent on one of the following conditions:

> D. Three Million Five Hundred Thousand Dollars ($3,500,000.00) at the earlier of: (i) the placement of a construction loan for the building of a new office building to be located at 6015 Executive Boulevard, Rockville, Maryland (it being understood and agreed that the WSCJV shall use commercially reasonable efforts to finance and develop the 6015 property as soon as is practicable, but in no event shall financing and development be required until the building is pre-leased on terms acceptable to the WSCJV, in its sole and exclusive discretion) or (ii) such time as WSCJV shall break ground . . . on the construction of a new office building to be located at 6015 Executive Boulevard . . . .
>
> E. Three Million Five Hundred Thousand Dollars ($3,500,000.00) . . . delivered to Sellers' counsel . . . at such time as one of the following occurs: (i) the current government tenants . . . at 6011 and 6100 Executive Boulevard, Rockville, MD, renew their leases for a term of not less than ten (10) years (excluding options), or (ii) if condition (i) does not occur, then the third (3rd) business day after both buildings (i.e. 6011 and 6100 Executive Boulevard) in the aggregate are not less than seventy-five percent (75%) leased to and occupied by tenants for terms of not less than five (5) years in each case (excluding options) it being understood that the WSCJV will use commercially reasonable efforts to obtain renewal leases on terms and conditions acceptable to WSCJV as soon as is practical . . . .

In the event that payment is not made under Paragraph 3.D or 3.E, the method by which interest would accrue is set forth in Paragraph 3.F:

> F. The parties agree that with reference to the contingent payments set forth in Sections D and E above, that the payment(s) to be made shall be allocated between principal and interest in accordance with the rules and Regulations of the Internal Revenue Service regarding the use of Applicable Federal Rates ["AFR"] for instruments with unstated interest (the total payment to be made shall not be affected by this allocation). The interest rates to be applied in arriving at the appropriate allocation between principal and interest shall be as follows: (1) to the extent payment is not made within nine years, 4.33 percent, the annual AFR provided for long-term instruments executed during August 2005 with a term of nine years or longer; (2) to the extent payment is made more than three years after August, 2005, but less than nine years after August, 2005, 3.92 percent, the AFR provided for mid-term instruments

> executed during August 2005 with a term of more than three years and less than nine years; and (3) to the extent payment is made in three years or less, 3.58 percent, the AFR provided for short-term instruments executed during August 2005 with a term of less than three years. The purpose of this provision is to apply an interest rate that complies with the AFR Regulations so as to use an applied interest rate and avoid having interest imputed. Accordingly, should it be finally determined that an incorrect rate was chosen, the parties agree to adjust the rates provided in this Paragraph, if needed to fully comply with the AFR Regulations.

On August 31, 2006, approximately eighteen months after the parties signed the PSA, appellants sold 6100 Executive Boulevard to a third party for $32.5 million. The sale was recorded in the land records of Montgomery County, but no other notice was provided to appellees, who believed that appellant WSCJV remained the owner of both buildings. Following appellees' inquiry in 2010 into the contingency payments under Paragraphs 3.D and 3.E, Richard Cohen sent appellee Lawrence Guss the following letter on April 7, 2010:

> Dear Larry,
>
> Glad everything is going well. As to WSC, the leases with [the national institute of health] in 6011 expire September 30, 2014. As to 6100, the [national institute of health] leases expire on February 1, 2014. Accordingly, there is no possible triggering event until at least 2014.
>
> Best regards,
> Richard S. Cohen

Appellees did not learn about the sale until they ran a title search in January 2014. Three months later, on March 13, 2014, appellees sent appellants a letter requesting a meeting. Appellees claimed that the sale of 6100 Executive Boulevard triggered the $7 million contingency payments under Paragraph 3.D and 3.E of the PSA, and that the meeting would provide a good way to start the "45-day cooling off period," which is defined in the PSA as follows:

> The Parties agree that, to the extent a dispute arises under this Agreement, the Parties shall attempt to resolve such dispute. If after a 45 day "cooling off" period (which 45 day period shall commence by any Party setting forth, in writing, his, or her or its position with respect to such dispute, and providing such writing to the other Parties), the Parties are not able to resolve any such dispute, the Parties, within 15 days of the end of such "cooling off" period, shall submit their dispute to binding and final arbitration.

Both parties believed that the March 2014 letter triggered the cooling off period, although it was not sent to all individuals designated for notice under the PSA. The parties met one month later, but no settlement was reached. On February 10, 2015, appellees sent appellants a "CORRECTED-45 Day Letter." The February 2015 letter narrowed the scope of the dispute by eliminating the Paragraph 3.D claim; it also added specificity to the 3.E claim: appellees stated that a breach occurred when appellants sold 6100 Executive Boulevard, and appellants were obligated to pay the $3.5 million contingency set forth in Paragraph 3.E as of the date of the sale—August 31, 2006. All parties designated for notice received a copy of the February 2015 letter.

After a period of unsuccessful negotiation, appellees filed a demand for arbitration on April 6, 2015, raising two claims of breach of the PSA, fraud, unjust enrichment, and failure to provide information. Appellants subsequently filed a motion to dismiss or, in the alternative, for summary judgment; and appellees contemporaneously filed an opposition, as well as a motion for summary judgment as to the breach and failure to provide information claims. The Honorable Paul A. McGuckian (Ret.) was selected by the parties to serve as the arbitrator.

On September 16, 2015, the arbitrator held a hearing on the open motions. As pertinent here, appellants argued that the demand should be dismissed as untimely because

it was not filed within the cooling off period or within three years of the breach, as required by Maryland's statute of limitations. Next, appellants argued that the leasing contingency in Paragraph 3.E of the PSA had not been triggered. Appellants stated that the parties intended the purchase price to be $10 million with the possibility, but no certainty, that future payments would be made.

Appellees, on the other hand, argued that their demand complied with the requirements of the PSA. Appellees asserted that the PSA did not restrict the number of cooling off periods; the February 10, 2015 letter triggered one such cooling off period; and, as a result, their April 6, 2015 demand was timely filed. Appellees also argued that the demand was timely under Maryland's three-year statute of limitations by virtue of the discovery rule. Finally, appellees maintained that appellants did not use commercially reasonable efforts in selling 6100 Executive Boulevard, and pursuant to Paragraph 3.E of the PSA, appellants were obligated to pay them $3.5 million.

The arbitrator issued a written opinion on November 19, 2015.[2] Concerning the timeliness of the demand, the arbitrator found that the language in the PSA does not limit the number of times the cooling off period may be triggered or restrict one party's ability to trigger the cooling off period more than once per dispute. Because the February 2015 letter reframed the dispute—namely, it eliminated appellees' claim under Paragraph 3.D, and it further developed the 3.E claim—the arbitrator found that the demand was timely filed. This finding, the arbitrator noted, is consistent with the general spirit of arbitration,

[2] The arbitrator issued an amended opinion on December 1, 2015, for the sole purpose of correcting an inadvertent omission of two parties that were signatories to the PSA.

which is to limit the expense of litigation between highly contentious parties and to encourage the parties to resolve disputes on their own.

Alternatively, the arbitrator ruled that the March 2014 letter did not trigger the 45-day cooling off period because notice was not provided to all parties required by the PSA. Next, the arbitrator found that although the sale of 6100 Executive Boulevard was filed in the land records of Montgomery County, appellant Richard Cohen's April 7, 2010 letter did not indicate or suggest a need for appellees to conduct an investigation as to the building's ownership. Therefore, the arbitrator found that the land records provided mere constructive notice, the statute of limitations was tolled until appellees discovered the sale in 2014, and appellees' demand was timely filed.

Concerning appellees' breach of contract claims, the arbitrator first looked at the terms of the PSA. Based on the language in Paragraph 3, "[t]he purchase price shall be paid as follows," the arbitrator found that a "reading of the PSA leads [him] to conclude that the parties intended the purchase price of the joint venture interests to be $17 million to be paid in various intervals and upon the occurrence of certain events." In selling 6100 Executive Boulevard, the arbitrator found that appellants did not exercise good faith or commercially reasonable efforts to obtain renewal leases on terms and conditions that would satisfy Paragraph 3.E. As a result, the arbitrator granted appellees' motion for summary judgment as to the breach of contract claims and awarded appellees $3.5 million

less payments that had already been credited against that sum.[3] The arbitrator dismissed the remaining claims.[4]

On December 3, 2015, appellants moved for reconsideration of the arbitration opinion, raising a number of arguments. First, appellants argued that appellees were required to prove that the leasing thresholds were met in both buildings before payment was due under Paragraph 3.E. Second, appellants argued that before liability can be imposed for the frustration of a condition, appellees were required to prove "but for" causation. Because appellees failed to do so, the arbitrator improperly imposed an impermissible contract penalty and/or forfeiture. Third, appellants argued that the PSA was ambiguous because it set forth the manner in which the purchase price was to be paid, while at the same time calling the Paragraph 3.E payment "contingent." Fourth, appellants argued that the arbitrator erred in finding that appellees could trigger the cooling off period more than once per dispute. Fifth, and finally, appellants argued that the award of prejudgment interest was improper because appellees failed to prove that the obligation to pay became certain, definite, and liquidated as of a known date.

Appellees, on the other hand, argued that the breach of contract award was not a contractual penalty or forfeiture, but rather damages as of the date appellants destroyed

[3] In their opposition to appellants' motion to dismiss demand for arbitration, appellees acknowledged that the $3.5 million payment "is to be reduced by the advance payments made of $500,000 when the settlement documents were re-done, and of $202,000 paid on April 18, 2006, under Par[agraph] 2 of the Indemnity Agreement[.]"

[4] The arbitrator also granted appellants' motion to dismiss the breach of contract claims against parties that were not signatories to the PSA: Richard S. Cohen; Roswil, Inc., Roswil Neuro, Inc.; WSC/6001, LLC; and WSC/6011, LLC.

their ability to perform under the contract. Next, appellees argued that the interpretation of the PSA is a legal question and there is no ambiguity warranting parol evidence. Finally, appellees argued that interest was due as of August 31, 2006, and owed at the rate of 4.33%, pursuant to Paragraph 3.F.

The arbitrator issued a written opinion on appellants' motion for reconsideration on January 6, 2016. Regarding the timeliness of the demand, the arbitrator found that the language of the PSA is unambiguous and does not limit the number of times the cooling off period may be triggered; further, appellees' March 2014 letter did not trigger the cooling off period because it was not sent to all individuals designated for notice. The arbitrator likewise found that the language of Paragraph 3.E is unambiguous, and found that payment is "contingent" with respect to timing, but not whether appellees would receive payment at all. Next, the arbitrator found that it is immaterial whether the requirements for the second building were met because the sale of 6100 Executive Boulevard made it impossible for appellants to satisfy Paragraph 3.E's leasing requirement. Further, the arbitrator held that appellees were not required to prove but for causation because a party to a contract cannot escape liability by its own failure to perform a condition and thus prevent completion of the transaction. Finally, the arbitrator noted that the PSA provides the authority to include interest "at such rate and from such date as [he] may deem appropriate," and the arbitrator awarded interest in accordance with Paragraph 3.F, to run as of August 31, 2006.

Appellants filed a petition to vacate the arbitration award on February 2, 2016, in the Circuit Court for Montgomery County. They raised three primary arguments: the

award imposed an extra-contractual penalty and/or forfeiture, the arbitrator resolved disputed material factual issues, and the arbitrator miscalculated the interest that was owed. Appellees filed a motion to dismiss, arguing that the petition was not timely filed, it sought to re-litigate issues decided by the arbitrator, and the award of interest was within the arbitrator's authority per the rules of the PSA. Appellees also sought attorneys' fees and costs for the proceeding. Following a hearing, the circuit court issued an order on June 3, 2016, finding: the petition was timely filed, the arbitrator did not manifestly disregard applicable law, the award of prejudgment interest was within the authority and discretion of the arbitrator, and the granting of attorneys' fees and costs was not justified. Appellants thereafter timely appealed the denial of their petition to vacate.

In response, appellees filed a cross-appeal of the denial of their request for attorneys' fees and costs on July 7, 2016. They also filed a motion to dismiss appellants' appeal as prematurely filed. Appellees argued that their pending motion for judgment before the circuit court demonstrated that an unresolved issue remained between the parties and further, appellants' position leaves open the possibility of multiple appeals. Appellants filed an opposition, arguing that an order denying a petition to vacate an arbitration award is a final, appealable order because it settles the rights of the parties and puts the losing party out of court. Appellants also argued that the pending motion is a separate issue and has no bearing on the appealability of a petition to vacate. This Court denied the motion to dismiss.

Meanwhile, on June 2, 2016, appellants wired appellees $3,775,052, which consisted of the award amount—$2,788,000 ($3.5 million less payments already made)—

plus prejudgment interest of $977,052. Appellants confirmed the payment of the award in an email to appellees, and appellants explained that the interest was paid at a rate of 3.58% with simple, not compounding, interest. Appellees, believing that the interest should have been compounded semi-annually at the rate of 4.33%, filed a motion for judgment of unpaid portion of arbitration award in the Circuit Court for Montgomery County on July 6, 2016. Appellees also filed a motion for reconsideration of their previously denied request for attorneys' fees, and they filed an additional request for fees and costs for the preparation of the motion for unpaid interest.

Appellants filed an opposition, arguing that the award did not assess a specific amount of prejudgment interest, nor did it prescribe the methodology and assumptions to be used in assessing prejudgment interest. Appellants also argued that the court did not have jurisdiction to resolve the dispute. The circuit court issued a subsequent order on August 24, 2016, finding that at least two of the three rates in Paragraph 3.F of the PSA were applicable to the arbitration award. Next, the court held that it had jurisdiction over the dispute, and it remanded the case to the arbitrator "for decision on the issue of pre-judgment interest, specifically, to identify the chosen interest rate, proper method of calculating interest, and a specific award of interest due." The court denied each of appellees' motions regarding attorneys' fees and costs. Both parties appealed the August 2016 order.

STANDARD OF REVIEW

Maryland appellate courts apply two standards when reviewing an arbitration award. The trial court's decision to grant or deny a petition to vacate, confirm, or correct

an arbitration award is a conclusion of law, which we review *de novo*. *Walther v. Sovereign Bank*, 386 Md. 412, 422 (2005); *see also Prince George's Cty. Police Civilian Emps. Ass'n v. Prince George's Cty.*, 447 Md. 180, 192 (2016) ("An appellate court reviews without deference a trial court's ruling on a petition to vacate an arbitration award."); *Wells v. Chevy Chase Bank, F.S.B.*, 363 Md. 232, 250 (2001).

The parties disagree as to the standard that applies when reviewing the arbitrator's award. Appellants note the PSA does not specify that the Maryland Uniform Arbitration Act (MUAA) governs, and they argue that arbitration agreements in Maryland "are governed by common law, unless they expressly provide that the [MUAA] should apply." *Balt. Cnty. Fraternal Order of Police Lodge No. 4 v. Balt. Cnty.*, 429 Md. 533, 553 n.18 (2012). Appellants thus argue that common law should apply, and the award should not be overturned unless the arbitrator demonstrates a manifest disregard of the law. Conversely, appellees cite *Coleman v. Columbia Credit Co.*, 42 Md. App. 198 (1979) and argue that since the PSA involves an agreement to arbitrate under Maryland law, the MUAA, not common law, sets the applicable standard.[5]

We agree with appellees. The Court of Appeals has made clear that "the [MUAA] expresses the legislative policy favoring enforcement of agreements to arbitrate." *Allstate Ins. Co. v. Stinebaugh*, 374 Md. 631, 641 (2003); *see also Crown Oil & Wax Co. of*

[5] It should be noted that both parties cited the MUAA in the proceedings below. For example, the opening paragraph of appellants' petition to vacate states "Petitioners . . . by counsel and *pursuant to Md. Code Ann., Cts. & Jud. Proc. § 3-224*, petitions this Honorable Court to vacate an Arbitration Award entered in favor of Respondents . . . ." (Emphasis added). Appellees also cited section 3-224 of the MUAA in their motion to dismiss appellants' petition to vacate.

Delaware v. Glen Constr. Co. of Virginia, 320 Md. 546, 558 (1990) (noting that "Maryland courts have consistently stated that the [MUAA] embodies a legislative policy favoring the enforcement of executory agreements to arbitrate"); *Charles J. Frank, Inc. v. Associated Jewish Charities of Baltimore, Inc.*, 294 Md. 443, 448 (1982) (observing that the MUAA "embodies a legislative policy favoring enforcement of executory agreements to arbitrate"). In applying this principle, we have held that an agreement to submit a dispute "to the arbitration procedure, whether or not it would otherwise have been required by the underlying agreement to be so submitted" is sufficient to trigger the application of the MUAA. *Coleman*, 42 Md. App. at 200–01. There is a narrow exception that exists in the context of employment relationships, which is illustrated by the footnote appellants cite in *Balt. Cnty. Fraternal Order of Police Lodge No. 4*. *See Wilson v. McGrow, Pridgeon & Co.*, 298 Md. 66, 74 (1983) (referring to the Legislative Council's explanation accompanying the text of the MUAA and indicating that an "exclusion was placed into the act in Section 1 excluding the applicability of the entire act to arbitration agreements between employers and employees. This was done at the specific request of labor union representatives"). This case, however, does not involve a labor dispute; the MUAA thus provides the standard of review that applies to the arbitrator's award.

When reviewing an arbitrator's award, judicial review "is extremely limited, and a party seeking to set it aside has a heavy burden." *Letke Sec. Contractors, Inc. v. United States Sur. Co.*, 191 Md. App. 462, 472 (2010). "In fact, the standard of review of arbitral awards 'is among the narrowest known to the law.'" *Id.* (quoting *Litvak Packing Co. v. United Food & Commercial Workers*, 886 F.2d 275, 276 (10th Cir. 1989)). "We will not

vacate an arbitration award simply because the court would not have made the same award as the arbitrator, or for mere legal error." *Letke Sec. Contractors, Inc.*, 191 Md. App. at 472–73; *see also Nick-George Ltd. P'ship v. Ames-Ennis, Inc.*, 279 Md. 385, 389 (1977) (noting that the General Assembly has "expressly proscribed any possibility of substitution of a reviewing court's judgment for that of the arbitrator"). This standard "serves to strike a balance between the need for efficient, speedy, and economical dispute resolution, and the need to establish justified confidence in arbitration among the public." *Letke Sec. Contractors, Inc.*, 191 Md. App. at 473.

The applicable statute governing the vacation of an arbitration award is section 3-224 of the Courts and Judicial Proceedings Article, which states:

> (b) The court shall vacate an award if:
>
> > (1) An award was procured by corruption, fraud, or other undue means;
> >
> > (2) There was evident partiality by an arbitrator appointed as a neutral, corruption in any arbitrator, or misconduct prejudicing the rights of any party;
> >
> > (3) The arbitrators exceeded their powers;
> >
> > (4) The arbitrators refused to postpone the hearing upon sufficient cause being shown for the postponement, refused to hear evidence material to the controversy, or otherwise so conducted the hearing, contrary to the provisions of § 3-213 of this subtitle, as to prejudice substantially the rights of a party; or
> >
> > (5) There was no arbitration agreement as described in § 3-206 of this subtitle, the issue was not adversely determined in proceedings under § 3-208 of this subtitle, and the party did not participate in the arbitration hearing without raising the objection.

Md. Code Ann., Cts. & Jud Proc. (CJP) § 3-224(b) (West 2013).

This Court has previously engrafted two additional grounds under section 3-224 to set aside an arbitration award. In *O–S Corp. v. Samuel A. Kroll, Inc*., for example, we held that an award may be vacated if it is "based on a completely irrational interpretation of the contract." 29 Md. App. 406, 409 (1975). Similarly, in *MCR of America, Inc. v. Greene*, we held that an award may be vacated when it is made "in manifest disregard of the law." 148 Md. App. 91, 117 (2002). But the continued viability of these cases is unclear in light of *Downey v. Sharp*, where the Court of Appeals held:

> [T]he grounds for vacating awards under the [MUAA] do not expressly include the two additional grounds for vacating awards utilized by the Court of Special Appeals, namely awards which were "completely irrational" and awards which demonstrated "manifest disregard of the law." Moreover, we disagree with the Court of Special Appeals that these two grounds are encompassed by the statutory grounds of an award that was "procured by . . . undue means," § 3–224(b)(1), or an award which exceeded the arbitrators' "powers," § 3–224(b)(3).

428 Md. 249, 262 (2012). The Court of Appeals ultimately concluded that the MUAA did not apply to the facts of that case and thus reserved on the issue of whether an award may be vacated on the grounds that it is "completely irrational" or in "manifest disregard of the law." *Id.* at 264–65. We need not resolve that issue either. As we shall explain below, regardless of the standard that applies, the arbitrator's award is fully supported by the language in the PSA and in accordance with applicable law.

I. Arbitration Proceedings

A. Cooling Off Period

The first issue for review relates to the 45-day cooling off period set forth in the PSA. Appellants argue that in granting appellees' motion for summary judgment, the

arbitrator engaged in fact finding and "impermissibly substituted his own judgment to find that the parties must have intended to allow multiple 'cooling-off periods' *ad seriatim* (even though this would allow any party that missed the 45-day deadline to circumvent it by making a new, slightly tweaked demand and re-doing the process)." Conversely, appellees argue that the 45-day provision is a condition precedent to any arbitration that is filed.

The arbitrator provided two bases to support his finding that appellees complied with the 45-day cooling off period. First, the arbitrator explained that appellees' March 13, 2014 letter did not trigger the cooling off period because it was not sent to all individuals designated for notice:

> [The March 13, 2014] letter did not trigger the cooling off period under the Arbitration Provision. The Arbitration Provision specifically outlines the manner in which the 45-day period is triggered. It states, the "45 day period shall commence by any Party setting forth, in writing, his, her, or its position with respect to such dispute, and *providing such writing to the other Parties*." (emphasis added). Paragraph 14 requires that any notices must be delivered to individuals designated to receive such notices. Mr. Sloan and Mr. Schram are to receive notices on behalf of the Purchasers (WSC/2005 LLC and Simon and Ruth Wagman).
>
> Based on the record, the March 13, 2014 letter was provided to Mr. Schwalb (on behalf of Richard S. Cohen and WSCJV) and not to Mr. Sloan and Mr. Schram (on behalf of Purchasers) as required under Paragraph 14 of the PSA. Therefore, the March 13, 2014 letter did not trigger the 45-day cooling off period. The February 10, 2015 letter, however, did trigger the 45-day cooling off period, because it was sent to "the other Parties," namely Mr. Sloan and Mr. Schram on behalf [of] the Purchasers. The 45-day cooling off period ended on March 27, 2015, and the deadline to file the demand for arbitration was April 11, 2015. [Appellees] filed their Demand on April 6, 2015, and therefore the Demand was timely filed.

Second, the arbitrator ruled that the demand was timely filed because the PSA did not limit the number of cooling off periods, and the February 10, 2015 letter both narrowed the scope of the dispute and further developed appellees' statement of position:

> In this case, the statement of position in the March 13, 2014 letter was framed differently after the parties met in April 2014. In the February 10, 2015 letter, the statement of position was narrowed in one respect (i.e. the elimination of the dispute over the 6015 construction contingency), but further developed in another. Additionally, the language in the Arbitration Provision does not limit the number of times the cooling off period may be triggered or restrict the disputing party's ability to trigger the cooling off period more than once per dispute. Therefore, the Arbitrator agrees with [appellees] in concluding that the Arbitration Provision sets forth a condition precedent to the filing of any demand for arbitration. This principle is consistent with the general spirit of arbitration, which is to limit the expense of litigation between highly contentious parties and encourage the parties to resolve their disputes on their own.

Following appellants' motion for reconsideration, the arbitrator provided further clarification, stating that the language of the PSA is unambiguous, and he reiterated that the PSA did not limit the number of times the cooling off period may be triggered. The arbitrator went on to hold that even if the PSA did limit the number of times the cooling off period may be triggered, the outcome would be unchanged: all parties designated for notice did not receive a copy of the March 2014 letter, so it could not have triggered the cooling off period. We agree. Both rationales underlying the arbitrator's holding independently establish that appellees' demand was timely filed. Accordingly, appellants' argument that the arbitrator engaged in fact finding does not provide a basis to vacate the award as his decision was based on the documents submitted by the parties.

B. Arbitrator's Award

Appellants next challenge the merits of the award, raising three arguments. First appellants argue that appellees should have been required to prove that the minimum leasing requirements were met for both 6100 and 6011 Executive Boulevard. Since they were not required to do so, the arbitrator imposed an impermissible penalty and/or forfeiture by awarding appellees the Paragraph 3.E contingency payment. Second, even if appellees were not required to prove the leasing thresholds for both buildings, they were still required to prove "but for" causation, and did not do so. Third, the arbitrator erred when he awarded prejudgment interest from the date 6100 Executive Boulevard was sold. We shall address each of these arguments in turn.

1. Minimum Leasing Requirements

According to appellants, Paragraph 3.E of the PSA only requires them to pay an additional $3.5 million contingency payment when either of two minimum leasing thresholds is met for both office buildings. By focusing on conditions for just one building (6100 Executive Boulevard), appellants maintain that the arbitrator relieved appellees from their contractual burden to demonstrate a total aggregate leasing level that reached the stipulated leasing contingency threshold for both buildings. At the very least, appellants argue, the term "contingency" is ambiguous and its meaning should not have been decided by summary judgment. As a result, in ruling for appellees, the arbitrator violated a fundamental principle of contract law that a party is entitled to the benefit of its bargain, but nothing more, and the award turned the PSA's contingency payment into an impermissible penalty and/or forfeiture.

Appellees, by contrast, argue that appellants' future performance under the PSA was tied to the occurrence of certain conditions. Specifically, under Paragraph 3.E, appellants were obligated to use commercially reasonable efforts to lease the office buildings at 6100 and 6011 Executive Boulevard—yet failed to do so. Further, appellees argue that the sale of 6100 Executive Boulevard made it impossible for the Paragraph 3.E contingency to be fulfilled, and it is not up to the breaching party to decide what remedy should be awarded. Finally, appellees contend that the arbitrator's award is not a penalty or forfeiture, but rather the benefit of the bargain specified in the PSA.

In his ruling, the arbitrator noted that the covenant of good faith and fair dealing requires a party to refrain from doing anything that has the effect of frustrating the right of the other party to receive a benefit under the contract between them. *See Clancy v. King*, 405 Md. 541, 570–71 (2008). Applying that principle to the facts of this case, the arbitrator found that "there is no evidence on which a fact-finder could conclude that [appellants] exercised good faith, commercially reasonable efforts, or any effort to satisfy Paragraph 3.E." The arbitrator explained:

> First, [appellants] offer no facts suggesting that [appellant] WSCJV made any effort to satisfy the leasing contingency between the time the PSA was executed and the time the building was sold. Second, and most significantly, Richard S. Cohen's own representation that the leasing contingency could not be triggered until 2014 suggests that no effort could have been made to renew leases from the time the PSA was executed in 2005 and the time the building was sold in 2006, because the leases were not even set to expire until 2014.

The arbitrator next addressed the purchase price of the joint venture interests, noting that both parties agreed the terms of the PSA are clear and unambiguous. If, as appellants

maintained, the purchase price was $10 million with the possibility, but no certainty, of future payments, then the arbitrator would not have the discretion to award a remedy because appellants had already paid that sum. If, on the other hand, the purchase price was $17 million, then the arbitrator would be fully justified in awarding the $3.5 million contingency in Paragraph 3.E. Ultimately, the arbitrator found that the language of the PSA is unambiguous, and he concluded that "the parties intended the purchase price of the joint venture interests to be $17 million to be paid in various intervals and upon the occurrence of certain events," reasoning:

> The PSA states in Paragraph 2: "Seller hereby sells and Purchasers hereby purchase . . . the 58 1/3% Ownership Interest, *for the sum set forth in paragraph 3 below* and the other terms and conditions contained in this agreement. (emphasis added). Paragraph 3 states that "*The purchase price shall be paid as follows: . . .*" (emphasis added). From there, subparagraphs A through E set out the payment schedule, totaling $17 million. [Appellants] assert that the leasing contingency under Paragraph 3.E indicates that the parties intended the purchase price to be a $10 million with the possibility, but with no certainty that there would be other payments made. However, the PSA must be viewed in context of the entire contract, and a reading of the entire contract is contrary to [appellants'] interpretation. In harmonizing the $17 million purchase price and the terms of the PSA as a whole, it appears that the purpose of the conditions of obtaining a construction loan and meeting leasing thresholds is to ensure sufficient funds to finance the payments of $3.5 million. Therefore, the Arbitrator agrees with [appellees] that the PSA sets forth when (and not whether) payments are due.

(footnotes omitted). Finally, the arbitrator found that appellees were not required to prove the leasing requirements for the second building had been met because the sale of 6100 Executive Boulevard made it impossible for appellants to satisfy Paragraph 3.E's leasing requirement:

> [Appellant] WSCJV had control over the condition precedent and they had control over the sale of the 6100 Executive Boulevard. [Appellants] will not

> be allowed to use the sale of 6100 Executive Boulevard which prevented the leasing contingency to be satisfied to escape liability for the $3.5 million due to [appellees] as partial payment of the full $17 million purchase price for [appellees'] 58.33% venture interests in WSCJV.

As a result, the arbitrator granted appellees' motion for summary judgment as to the breach of contract claims, he awarded appellees $3.5 million less payments that had already been credited against that sum, and he awarded interest in accordance with Paragraph 3.F, to run as of August 31, 2006.

While appellants may disagree with the arbitrator's interpretation of the purchase price and the contingency payment in Paragraph 3.E, that does not render the language of the PSA ambiguous, nor does it turn the award into an impermissible penalty and/or forfeiture. Further, both parties agreed that the terms are unambiguous, and this court will not substitute its own independent judgment to interpret the PSA. Accordingly, we find that the arbitrator's award is fully supported by the language in the PSA, and there is no error in the arbitrator's findings, let alone reversible error to vacate the award.

2. Causation

Appellants argue that despite recognizing the applicable legal standard, the arbitrator ignored a basic principle of contract law that appellees were required to prove "but for" causation. In support of this position, appellants argue that the treatise upon which the arbitrator relied clarifies that "with regard to the nonperformance of a condition precedent, the prevention doctrine assumes a 'but for' test: that but for one party's conduct, the other party to the contract would have performed the condition, or it otherwise would have occurred." 13 Richard A. Lord, *Williston on Contracts* § 39:8 (4th ed. 2013). This

notion is misguided. The treatise clearly states that some jurisdictions do not require any causation at all.[6] *Id.* And even where causation is required, it applies only when the nonbreaching party fails to perform. *Id.* There is no dispute that appellees fully performed under the PSA; therefore, there is no requirement for them to prove but for causation.

[6] The first paragraphs of section 39:8 state:

> The rule that nonperformance by one party to a contract is excused if the other party hinders or prevents the performance or makes it impossible applies only if the failure to perform was not caused by the prevented party's own inability to perform. In other words, absent the prevention, the prevented party must otherwise have been able to perform. In light of this requirement, there is authority to the effect that with regard to the nonperformance of a condition precedent, the prevention doctrine assumes a "but for" test: that but for one party's conduct, the other party to the contract would have performed the condition, or it otherwise would have occurred.
>
> However, some courts take an even sterner view, rejecting any requirement that, following wrongful prevention, the prevented party must show its own ability to perform, and declaring that when a defendant has prevented performance, it is not necessary for the plaintiff to allege and prove its own readiness and ability to perform. Rather, it is reasoned, the fact that some speculation is involved as to what might have occurred had the offending party not wrongfully prevented the happening of a condition to recovery on the contract should not preclude application of the prevention doctrine any more than the plaintiff's similar inability to prove with exactitude the precise amount of damages should preclude a recovery on the ground of uncertainty of damages after the defendant's breach and for the same reason: The need for speculation is attributable to the party who prevented the performance of the contract, and "the defendant whose acts constitute a significant reason for the other party's inability to perform, should not be able to avoid an agreed duty merely because he can point to some other causative factor."

(footnotes omitted).

3. Start Date for Prejudgment Interest

Appellants argue that the arbitrator erred in awarding prejudgment interest as of August 31, 2006. Specifically, appellants maintain there is no evidence to show that the obligation to pay had become due, certain, definite, and liquidated at that time, *see Pulte Home Corp. v. Parex, Inc.*, 174 Md. App. 681, 770–71 (2007), *aff'd*, 403 Md. 367 (2008), since it remained possible that either leasing contingency could have been met. As a result, appellants argue that the earliest possible date for payment is September 2014, the date the leases for 6100 and 6011 Executive Boulevard expired. Appellees, by contrast, argue that interest was awarded as of the date appellants breached the contract, and that the award is sufficiently definite and certain.

We agree with appellees. Appellants' argument rests on the mistaken premise that appellees were required to prove the leasing thresholds at 6100 and 6011 Executive Boulevard were met before payment was due under the PSA. Yet the arbitrator found that appellants breached the implied covenant of good faith and fair dealing and, as a result of the breach, it was impossible to satisfy Paragraph 3.E's leasing requirement. And, as indicated, the arbitrator's award is fully supported by the language in the PSA. The award is thus due, certain, and definite as of the date of the breach, and the arbitrator did not err in awarding prejudgment interest as of August 31, 2006.

II. Remand

There are two threshold questions we must answer before turning to the issue of remand. First, did the court have subject matter jurisdiction to rule on appellees' motion

for judgment of unpaid interest? Second, was the motion timely filed? We shall answer both of these questions in the affirmative.

A. Subject Matter Jurisdiction

Appellants argue that the circuit court erred in remanding the case to the arbitrator because the issues appellees raised in their July 7, 2016 appeal—namely, the entry of a judgment reflecting the circuit court's decision and the terms thereof—concerned the same subject matter as appellees' motion for judgment of unpaid portion of arbitration award that was pending before the circuit court. As a result, appellants argue that the court lacked subject matter jurisdiction to hear the motion. Conversely, appellees argue that their July 7 appeal, which addressed a request for fees and costs, concerned a separate issue from their motion for judgment, which addressed alleged unpaid interest from the arbitration award.

We agree with appellees. Although it is true that a trial court may not act to frustrate the actions of an appellate court, *In re Emileigh F.*, 355 Md. 198, 202–03 (1999), the Court of Appeals has explained that "the trial court may continue to act with reference to matters not relating to the subject matter of, or matters not affecting, the appellate proceeding," *State v. Peterson*, 315 Md. 73, 80 (1989). Here, appellees' July 7 appeal did not address the issue of prejudgment interest. The circuit court thus retained jurisdiction to hold a hearing and rule on appellees' motion.

B. Timeliness

Next, appellants argue that even if the circuit court had subject matter jurisdiction, appellees waived their right to raise the interest issue in the arbitration and circuit court

proceedings. Appellants note that the issue was not addressed in the arbitrator's November 2015 or January 2016 opinion, and that appellees needed to move to modify or correct the award. Appellants argue that there are only two avenues for this to occur: file a motion to modify or correct the award with the arbitrator under CJP 3-222, or with the circuit court under 3-223. Appellees did not do so. Similarly, appellants argue that the circuit court has revisory power over the award only on the limited grounds of fraud, mistake, and irregularity because appellees failed to file a timely motion under Md. Rule 2-535.

Appellees, by contrast, argue that they were not required to file a motion for judgment within thirty days because the arbitrator's award was not a final judgment. First, appellees argue the circuit court held that the arbitrator had the authority to decide their motion for prejudgment interest but did not enter a judgment for the amount to be paid; second, by its very language allowing the subsequent filing of a motion for judgment, the ruling was not intended to be a final judgment; and third, while holding that an award, including the interest awarded, was owed, the court did not enter judgment for the amount that was owed. Appellees also argue that if they are precluded from seeking entry of judgment when no judgment had been entered, appellants would have complete control over the amount payable under the award.

The circuit court issued a memorandum opinion and order on appellees' motion for judgment of unpaid portion of arbitration award on August 24, 2016. The court recognized that as a general rule, once an arbitrator has made a final award, he has no more authority and can do nothing more in regard to the subject matter of the arbitration. *Mandl v. Bailey*, 159 Md. App. 64, 83–84 (2004). The court, however, noted two exceptions to this rule—

where an award is not complete because it does not adjudicate an issue submitted for decision and when an award leaves doubt about whether the submission has been fully executed. *Id.* at 84. The court, relying on *Mandl*, found that both exceptions are applicable and remanded the case to the arbitrator "for decision on the issue of pre-judgment interest, specifically, to identify the chosen interest rate, proper method of calculating interest, and a specific award of interest due."

On appeal, appellants seek to distinguish *Mandl*. Appellants argue that while the party in that case failed to file a timely motion to modify the arbitration award, "the proceedings were still open because the respondent had timely moved for reconsideration on several issues, all of which but one were resolved and the record again was closed." As a result, appellants argue *Mandl* "confirms that, having failed to raise the issue before a final award was entered or during the narrow window for reconsideration, [appellees] waived it." We see the issue differently.

While it is true that appellees would have been obligated to file a petition to modify or correct the award within twenty days per CJP 3-222, ninety days per CJP 3-223, or thirty days per Md. Rule 2-535, none of those provisions are applicable in this case. Rather, appellant's motion involved a request to *enforce a judgment*. The relevant MUAA provision, therefore, is CJP 3-228, which provides:

> (a)(1) If an order confirming, modifying, or correcting an award is granted, a judgment shall be entered in conformity with the order.
>
> (2) The judgment may be enforced as any other judgment.

Unlike CJP 3-222 or 223, or Md. Rule 2-535, section 228 does not impose a deadline by which a party must seek to enforce a judgment. The rule, as the Court of Appeals explained in *Chillum-Adelphi Volunteer Fire Dep't v. Button & Goode, Inc.*, is that a court will enter "a money judgment on that award and enforce [the parties'] contract to be so bound unless, notwithstanding that the arbitrator's decision may have been erroneous, the facts show that he acted fraudulently, or beyond the scope of the issue submitted to him for decision, or that the proceedings lacked procedural fairness." 242 Md. 509, 517 (1966).

In this case, the circuit court dismissed appellants' petition to vacate arbitration award with prejudice on June 3, 2016. The court also ordered "that the Judgment shall be entered . . . in any amount due and unpaid as assessed by the Arbitration Award." When appellees subsequently filed their motion for judgment of unpaid interest, they sought to enforce the previously entered judgment and were thus not restricted by CJP 3-222, 223, or Md. Rule 2-535. Next, it cannot be said that the arbitrator's decision was erroneous, he acted fraudulently, beyond the scope of the issues submitted, or that the proceedings lacked procedural fairness: as previously explained, the award is fully supported by the language in the PSA. As a result, we find that appellees' motion for judgment of unpaid interest was timely filed.

C. Merits

As to the merits of the motion for judgment of unpaid interest, appellants note that the interest rates set forth in Paragraph 3.F of the PSA contain three possible interest calculations. Because Maryland law calls for simple interest, and the award concluded that payment was due within three years of the date of the PSA, appellants argue that the

applicable interest rate is 3.58%. Appellees, by contrast, argue that interest was run from the date of the breach (August 31, 2006) and payment was made on June 2, 2016. Since payment occurred nine years after August 2005, the applicable interest rate is 4.33%. Moreover, pursuant to the PSA, appellees argue that the applicable federal rate calls for interest to be compounded semiannually. We agree with appellees.

Paragraph 3.F of the PSA states the following:

> F. The parties agree that with reference to the contingent payments set forth in Sections D and E above, that the payment(s) to be made shall be allocated between principal and interest in accordance with the rules and Regulations of the Internal Revenue Service regarding the use of Applicable Federal Rates ["AFR"] for instruments with unstated interest (the total payment to be made shall not be affected by this allocation). The interest rates to be applied in arriving at the appropriate allocation between principal and interest shall be as follows: (1) to the extent payment is not made within nine years, 4.33 percent, the annual AFR provided for long-term instruments executed during August 2005 with a term of nine years or longer; (2) to the extent payment is made more than three years after August, 2005, but less than nine years after August, 2005, 3.92 percent, the AFR provided for mid-term instruments executed during August 2005 with a term of more than three years and less than nine years; and (3) to the extent payment is made in three years or less, 3.58 percent, the AFR provided for short-term instruments executed during August 2005 with a term of less than three years. The purpose of this provision is to apply an interest rate that complies with the AFR Regulations so as to use an applied interest rate and avoid having interest imputed. Accordingly, should it be finally determined that an incorrect rate was chosen, the parties agree to adjust the rates provided in this Paragraph, if needed to fully comply with the AFR Regulations.

In ruling on appellees' motion for judgment of unpaid interest, the circuit court found that the arbitrator "is best-situated to review the Arbitration Award and clarify the complained of ambiguities." The award applies three interest rates for three periods in time: first, 3.58% if payment is made three years or less from August 2005; second, 3.92% if more than three years but less than nine years from August 2005; and third, 4.33% if more than

nine years from August 2005. There is no dispute that the arbitrator awarded interest to run as of August 31, 2006, or that payment was made on June 2, 2016. Since the time between those dates is greater than nine years, the applicable interest rate is 4.33%. Similarly, Paragraph 3.F states that interest is to be compounded according to the AFR—not Maryland common law. Because the Internal Revenue Code provides that interest is computed "by using a discount rate equal to the applicable Federal rate, compounded semiannually," 26 U.S.C. § 1274(b)(2)(B) (2012), the arbitrator's award should have been compounded semiannually. Therefore, as a matter of law, we find that the circuit court erred in remanding the case to the arbitrator to clarify the complained of ambiguities.

III. Attorneys' Fees

The final issue for review is whether appellees are entitled to attorney's fees. Appellees argue that the circuit court erred in denying their requests for attorneys' fees and costs, and they ask for further attorneys' fees and costs incurred in the preparation of this appeal. Appellees maintain that they are entitled to the award because appellants have attempted to re-litigate issues decided by the arbitrator and have made repeated misstatements that, in turn, have spurned further litigation. Appellees argue that they are entitled to recover under *Blitz v. Beth Isaac Adas Israel Congregation*, 352 Md. 31 (1998). Appellants, on the other hand, argue that attorneys' fees may be awarded only when a party unjustifiably refuses to abide by an arbitration award, and that the award is discretionary, not mandatory. Appellants also argue that the circuit court did not have jurisdiction to deny appellees' renewed request for fees in its August 24, 2016 order.

We agree with appellants. The issue in *Blitz* was whether "the prevailing party in a binding arbitration proceeding may recover reasonable attorneys' fees when the losing party's unjustified refusal to comply with the award requires the prevailing party to institute and successfully prosecute an action in order to confirm and enforce the arbitration award." *Id.* at 33. The respondent did not seek to vacate, modify, or correct the award, nor did he respond timely to the petitioner's motion to confirm the award. *Id.* at 34. Then, on the day after the court signed the petitioner's summary judgment order, the respondent filed his response to the summary judgment motion, as well as a petition to vacate or modify. *Id.* Here, by contrast, appellants timely filed a petition to vacate the arbitrator's award. Further, while we disagree with appellants' interpretation of the PSA (and their arguments as to the appealability of the circuit court's order), we are not persuaded that their claims are nonmeritorious. Therefore, *Blitz* is distinguishable, and appellees are not entitled to attorneys' fees or costs either on appeal or from the proceedings below.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED IN PART AND VACATED IN PART AS STATED IN THE OPINION. COSTS TO BE DIVIDED EQUALLY BETWEEN THE PARTIES.