UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0081

September Term, 2014

CAPITAL FUNDING GROUP, INC.

v.

CREDIT SUISSE SECURITIES (USA) LLC, *et al.*

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*Zarnoch,
Graeff,
Leahy,

JJ.

Opinion by Zarnoch, J.

Filed: December 16, 2015

* Zarnoch, Robert A., J., participated in the conference of this case while an active member of this Court; he participated in the adoption of this opinion as a retired, specially assigned member of this Court.

** 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.

In February of 2010, Appellant Capital Funding Group, Inc. (CFG) brought suit in the Circuit Court for Montgomery County against four entities: Appellees Credit Suisse Securities (USA) LLC, Column Guaranteed, LLC, Column Financial, Inc. (collectively, Credit Suisse), and Walker and Dunlop LLC (W&D). The case went to trial in July of 2013 and a jury found that the Appellees had breached a contract and were also liable for unjust enrichment. The jury awarded damages of $1.75 million for the first claim and $10.4 million for the second. Credit Suisse and W&D moved, and the circuit court agreed, to revise the judgment under Rule 2-535, concluding that *Cnty. Comm'rs of Caroline Cnty. v. J. Roland Dashiell & Sons, Inc.*, 358 Md. 83 (2000), precluded CFG from recovering under both theories. CFG also moved for a new trial, and the motion was denied. CFG appealed.

We conclude that because the breach of contract and unjust enrichment claims involve the same transaction between the parties, the court did not err in revising the judgment. Nor do we find grounds for a new trial. Thus, we affirm.

FACTS AND PROCEEDINGS

CFG is a commercial mortgage lender specializing in providing financing for "skilled nursing facilities," (SNFs) such as nursing homes. In "large-portfolio transactions," defined by the U.S. Department of Housing and Urban Development (HUD) as those involving more than 50 buildings and more than $250 million, purchasers

typically get bridge loans[1] from an investment bank. That loan is normally repaid to investors through the sale of commercial mortgage-backed securities (CMBS).[2] CFG has established itself in this industry because of its ability to refinance CMBS through a HUD program, administered pursuant to Section 232 of the National Housing Act, which provides mortgage insurance for this debt. *See* 12 U.S.C. 1715w; 24 C.F.R. § 232.1 *et seq*. According to CFG, private investors and HUD regulators apply different valuation methodologies to these securities; as such, CFG has developed a unique "Bucket Methodology" that facilitates HUD's valuation of the debt. Because of this methodology, the firm's extensive proprietary database, and its long history working on these transactions, CFG is recognized as the national leader of the HUD 232 Program, and has made loans that make up approximately 13% of HUD's entire Section 232 health care portfolio.

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[1] A bridge loan is a "short term loan that is taken out until permanent financing can be arranged." David Logan Scott, *Wall Street Words: An A to Z Guide to Investment Terms for Today's Investor* 40 (2003).

[2] A CMBS is a type of mortgage-backed security that is secured by the loan on a commercial property,

> Mortgage-backed securities (MBS) are debt obligations that represent claims to the cash flows from pools of mortgage loans. . . . Mortgage loans are purchased from banks, mortgage companies, and other originators and then assembled into pools by a governmental, quasi-governmental, or private entity. The entity then issues securities that represent claims on the principal and interest payments made by borrowers on the loans in the pool, a process known as securitization.

See http://www.sec.gov/answers/mortgagesecurities.htm (last accessed December 1, 2015) [http://perma.cc/DR93-3FAP].

CFG worked with investment bankers from Credit Suisse on at least three occasions. In these transactions, Credit Suisse's role was to underwrite the initial CMBS, while CFG would perform the HUD-guaranteed refinancing. The transactions were large and involved extensive work; the "Life Care deal," between 2000 and 2003, involved $493 million in refinancing and 68 properties; the "Sava deal," between 2004 and the present, dealt with $900 million in refinancing and 175 facilities; and the "Beverly deal" begun in 2005 and the subject of this litigation, involved $1.4 billion in refinancing and 264 facilities.

Typically, CFG and Credit Suisse did not enter into written contracts for these transactions. CFG's sole owner, Jack Dwyer, worked with Leonard Grunstein, a lawyer and businessman, on the Sava deal and the Beverly deal. In 2005, Dwyer and Grunstein learned that Beverly Enterprises was for sale, and entered into an agreement with Credit Suisse through its Managing Director Richard Lerner and Ronald Silva, a money manager. Silva was responsible for finding an investor to provide $325 million in equity for the project; Credit Suisse would provide a bridge loan through an initial CMBS financing; and CFG would perform the HUD-guaranteed refinancing. Neither party contests that, in this particular instance, there was an express oral contract between the parties. The exact scope of this agreement is the subject of this appeal.

It is undisputed that Credit Suisse promised not to compete with CFG for the opportunity to perform the HUD refinancing of the debt on the Beverly transaction. As Dwyer later testified, Credit Suisse also promised him that it would keep his "information

confidential." Also, "they promised to only use it for this particular deal, they promised that I had the deal, and they promised not to compete against me in the deal." Dwyer explained that his promise to perform the financing was important, as "all" Credit Suisse was "concerned about [wa]s whether I had the capability to get the deal done because they were going to put half a billion dollars at risk."

Beverly Enterprises was acquired in March of 2006, and Credit Suisse issued the CMBS in April. CFG claims that, "having no contractual obligation to do so, CFG helped Credit Suisse market and sell the CMBS to potential investors." In addition to communicating with investors, CFG claims it "performed hundreds of hours of work between August and October 2005 underwriting the transaction to determine how much HUD would be willing to guarantee for each of the 200-plus properties in the portfolio." Although Credit Suisse admits this work was completed, the investment bankers contend that this work was part of, not extraneous to, the original contract.

Despite these efforts, Silva decided not to hire CFG for the HUD refinancing of the Beverly portfolio. Instead, Silva's company hired Credit Suisse (and Column Generated, LLC) to perform the work. Credit Suisse assigned W&D the right to perform the Beverly HUD refinancing. However, W&D was never able to complete that task. In May 2011, Silva's company terminated W&D's services and, instead, chose to refinance its existing debt through a term loan provided by Citibank and the Royal Bank of Canada.

In May 2007, CFG and Grunstein unsuccessfully sued Silva and the related entities in the Delaware Court of Chancery. That case was tried in December 2012 and

decided in September 2014. *See Grunstein v. Silva*, 2014 WL 4473641 (Del. Ch. 2014), *aff'd sub nom Dwyer v. Silva*, 113 A.3d 1080 (Del. 2015).[3]

In 2009, CFG learned that W&D was attempting to perform the HUD refinancing and decided to file suit. In its Amended Complaint, filed August 15, 2011,[4] CFG sued

[3] The Delaware court considered similar theories of breach of contract and unjust enrichment, except that CFG filed those claims against Silva, not W&D. On the unjust enrichment claim, the court held that "[m]uch of Dwyer's claim may be disposed of because the work he completed to further this transaction was performed pursuant to a contract with [Credit Suisse] and was compensated through that relationship." *Id.* at *36.

The Court of Chancery then concluded that

> Dwyer also acted officiously and in his own self-interest for those services he provided beyond those which CFG was contractually obligated to provide to CFSB. Grunstein and Dwyer began voluntarily working on the project before Silva became involved. Dwyer worked with CSFB on the earlier Mariner transaction, and he sought to advance his relationship with CSFB as well as to eventually earn fees from a HUD refinancing in the Beverly transaction. His work was thus a gratuity to build goodwill and position himself as a party with intimate knowledge of the transaction in order to complete a HUD refinancing when, and if, such a need arose. . . .
>
> Silva has thus not been unjustly enriched by the actions of Grunstein and Dwyer because they acted officiously and provided their services in pursuit of their own self-interest. *Either could* have *and indeed attempted to secure consideration for the work he provided*. They elected to pursue the business relationship without adequately protecting their preparatory efforts, but by making such a choice they cannot later claim unjust enrichment for such *voluntarily provided services*.

Id. at *36-37 (Emphasis added) (Citations omitted).

[4] To comply with the Circuit Court for Montgomery County's requirement that all cases be tried within 18 months of being filed, the parties agreed to dismiss the initial action and refile a new case, identical to the first.

W&D and Credit Suisse[5] for breach of contract, unjust enrichment, and unfair competition. CFG's complaint set forth the following relevant counts:[6]

> Count I: Breach of Credit Suisse's contract with CFG not to compete against CFG for the HUD-guaranteed Beverly Refinancing.
>
> Count V: Unjust enrichment resulting from Credit Suisse's retention of benefits received through CFG's assistance in the Beverly transaction.

A Joint Pretrial Statement, signed by both parties, the Plaintiff's statement of facts and claims stated:

> <u>Count One: Breach of Contract</u>. Defendants breached their agreement that CFG would perform the Beverly refinancing, and that Defendants would not perform that refinancing, by actively soliciting and obtaining the engagement to perform the Beverly Refinancing.
>
> . . .
>
> <u>Count Five: Unjust Enrichment</u>. CFG conferred a benefit on Defendants by determining the release prices necessary to complete the initial Beverly CMBS financing and otherwise assisted in that financing. CFG provided these release prices and its assistance only after Defendants promised that CFG would perform the Beverly Refinancing, Defendants would not perform the Beverly Refinancing, and that Defendants would keep CFG's proprietary information confidential and not use the proprietary information for any purpose other than the initial Beverly CMBS financing. . . .

A two-week jury trial was held in July 2013, and only Counts I and V went to the jury. On the second-to-last day of trial, the court held an off-the-record conference in chambers to discuss jury instructions and the verdict sheet. This conference occurred just hours after the court had denied the motion of Credit Suisse and W&D for directed

[5] CFG initially sued only W&D but learned in discovery that Credit Suisse had engaged W&D to perform the refinancing.

[6] Because the other counts did not go to the jury and are not the subject of this appeal, we see no need to discuss them.

verdict on the breach of contract and unjust enrichment claims. The circuit court later recalled the details of this conference:

> It occurred to me as I was listening to your argument that for any post-judgment issues in the event of a recovery by the plaintiffs [] the record needs to reflect that there was a conference in chambers, and that the plaintiffs acknowledged that they could not recover the unjust enrichment sums in addition to breach of contract sums, were they to recover verdicts in their favor on both if they were alternative theories, and [there] was some discussion about theoretically, whether or not you might have a double recovery, and the plaintiff agreed, notwithstanding the theoretical possibility based on the facts in this case, they were not pursuing that recovery that they can only recover under one theory but not both. And I think that the record needs to reflect that fact, okay?

The court then explained to the jury that "the plaintiff, Capital Funding Group, has presented alternative claims for damages; however the plaintiff is only entitled to one recovery. You should consider each claim separately and return your verdict as to each."

CFG asked the jury to award $91 million in damages for Count I, breach of contract, and $30 million in damages for Count V, unjust enrichment. The jury returned a verdict of $1.75 million for Count I, and $10.4 million for Count V.[7] The verdict sheet asked the jury three times to determine whether an "enforceable agreement" was entered into that was breached. The jury answered "yes" to these questions before it reached the issue of unjust enrichment.

The court then asked CFG's counsel, "insofar as the stipulation of the *election*, there can only be one recovery. . . . So, do you know what you're going to do?"

[7] The court later remarked that it was "unlikely that anybody expected the jury to return a larger amount for unjust enrichment than for breach of contract."

(Emphasis added). CFG's counsel responded, "I'm sure it won't be a surprise – and if I say this in-artfully, please excuse me – but we'll take the unjust enrichment."

Immediately, defense counsel objected, on the grounds that since the jury had concluded there was a contract, and the unjust enrichment claim related to the same services covered in the contract, that the unjust enrichment claim became a "legal nullity" and that CFG must accept only the breach of contract damages. For the moment, the court did not embrace this theory.

In a post-trial motion, Credit Suisse and W&D repeated these contentions. They also said that they understood the court's discussion with the parties before the verdict to mean that CFG would be entitled to only one recovery.

On January 31, the court heard argument and stated its recollection of the chambers conference:

> Let me make clear – I frankly from my point of view think that it is reasonable that both of you interpreted it as you said. . . . As I said, based upon my discussions from my presiding over the case in the earlier conversations and motions in the case, I was alert that you for the plaintiffs believed that perhaps there was a theory that would allow you to recover for both, so you may well and reasonably have understood by what I was saying that, you know, you were foregoing that argument, and were only going to recover on one, but you could then elect which one, *but I never used the term "elect," which would have given the defendants notice, perhaps, that I had bought into that argument in the chambers conference is what I'm saying*.

(Emphasis added).

The court explained that in its view, the services at issue in the breach of contract and unjust enrichment claim were

> precisely the same. . . . That has never been in dispute – that the services are identical. . . . There is no easier case on the question of subject matter than this one, and [CFG's] position has been from the get-go that the services were one in the same, and I don't understand them today to be contending otherwise." . . . While it is my recollection that the plaintiffs had this theory that potentially they could recover on both, [] this is not something that had ever been thoroughly briefed, discussed, or argued anywhere during the life of this case.

The court then revised the verdict, entering a judgment for only $1.75 million on the breach of contract claim. CFG then filed a motion for new trial, challenging the circuit court's ruling. That motion was denied and CFG appealed.

QUESTIONS PRESENTED

1. Did the circuit court err when it granted Credit Suisse's motion to revise the judgment under Rule 2-535?[8]

2. Did the circuit court err when it denied CFG's motion for a new trial?

DISCUSSION

I. Motion to Revise the Judgment

CFG's central argument is that the court erred in its legal determination that the existence of a contract precluded recovery on its unjust enrichment claim. As we will discuss in greater detail, ordinarily, an unjust enrichment action only exists where there is no contract. But CFG contends that its claims for breach of contract and for unjust enrichment concerned two distinct subject matters, and that therefore, it can recover for unjust enrichment even when a separate contract existed. We are unconvinced. Both of

[8] CFG's original question was "Did the Circuit Court err when it granted defendant Credit Suisse's motion to modify the *jury's verdict*?"

CFG's contractual theories concerned the same subject matter. And because the jury found there was a contract, CFG can only recover on the breach of contract claim.

A court's exercise of its revisory power under Rule 2-535 is reviewed for abuse of discretion. *Pelletier v. Burson*, 213 Md. App. 284, 289 (2013) ("We review the circuit court's decision to deny a request to revise its final judgment under the abuse of discretion standard"); *Maryland Bd. of Nursing v. Nechay*, 347 Md. 396, 408 (1997) ("[T]he discretion reposed in the trial court is a discretion which must be exercised liberally, lest technicality triumph over justice") (Quotation omitted). "A judge has substantially broader discretion when revising a non-jury verdict *or when revising a jury verdict based purely on a legal issue*, but much more limited discretion when revising a jury verdict." *Turner v. Hastings*, 432 Md. 499, 512 (2013) (Emphasis added); *see also Kleban v. Eghrari-Sabet*, 174 Md. App. 60, 86 (2007) ("A grant of a motion for judgment n.o.v., while encroaching on the province of the jury, is permitted only when the evidence and permissible inferences permit only one conclusion with regard to the ultimate legal issue. Such a limitation would also apply to the court's grant or denial of a motion to revise a jury verdict, pursuant to Rule 2-535").

CFG characterizes the court's ruling as revising "the jury verdict," but Credit Suisse and W&D argue it is more accurately termed a revision of "the judgment." Md. Rule 2-535. The circuit court granted CFG's request to revise the *judgment* based on the legal principle that there can be no recovery in unjust enrichment where an express contract defining the rights and remedies of the parties exists. *See Dashiell,* 358 Md. at

101. It is well-established that "legal issues are not within the province of the jury." *Turner,* 432 Md. at 513. Here, the court revised the judgment based upon a legal conclusion that CFG could not recover on both breach of contract and unjust enrichment claims. We review this question *de novo*.

CFG argues that the court erred in two respects: 1) that the court incorrectly failed to apply the exceptions to the general rule of non-recovery for unjust enrichment set forth in *Dashiell*, 358 Md. at 100; and 2) that Credit Suisse and W&D bore the burden of raising the existence of an enforceable contract as an affirmative defense to the claim for unjust enrichment.

A. Exceptions to *Dashiell*

"It is settled law in Maryland, and elsewhere, that a claim for unjust enrichment may not be brought where the subject matter of the claim is covered by an express contract between the parties." *Dashiell*, 358 Md. at 96 (quoting *FLF, Inc. v. World Publications, Inc.,* 999 F.Supp. 640, 642 (1998)). "[U]njust enrichment and quantum meruit, both 'quasi-contract' causes of action, are remedies to provide relief for a plaintiff when an enforceable contract does not exist but fairness dictates that the plaintiff receive compensation for services provided." *Id.* at 96-97 (quoting *Dunnaville v. McCormick & Co.*, 21 F.Supp. 2d 527, 535 (1998)). "Generally, courts are hesitant to deviate from the principle of the rule and allow unjust enrichment claims only when there is evidence of fraud or bad faith, there has been a breach of contract or a mutual recission of the

contract, when recission is warranted, or when the express contract does not fully address a subject matter." *Id.* at 100.

CFG argues that three of these exceptions apply: 1) the express contract does not fully address the subject matter of the parties' dealings; 2) there is evidence of fraud or bad faith; and 3) Credit Suisse and W&D breached the contract.

1. Scope of Contract

We hold that the contract between the parties, fluid and unwritten as it was, did "fully address the matters at issue in the unjust enrichment claim." *See Dashiell*, 358 Md. at 100. In *Dashiell*, there was an express contract between the parties that "defined the entire relationship of the parties with respect to its general subject matter." *Id.* at 101. Specifically, a provision allowed the County to withhold liquidated damages for delay in construction. *Id.* The Court of Appeals determined that the "attempt to recover under a theory of quasi-contract is nothing more than a unilateral attempt to amend the agreement in a manner that the law does not allow." *Id.*

From the outset of this litigation, CFG argued that an express contract existed which governed the conduct of the parties. CFG describes the contract this way: "Credit Suisse agreed not to compete for the HUD refinancing of the Beverly properties, and CFG agreed that it would perform the HUD refinancing on that deal." CFG then claims that it provided "extra-contractual assistance selling and marketing the CMBS to potential investors, which it was unjust for Credit Suisse to retain based on Mr. Lerner's lies." "CFG's role in the marketing of the CMBS was to explain to potential investors

that the critical component of the entire CMBS – the HUD exit strategy – was credible and achievable." Dwyer, for instance, participated in telephone conference calls with potential investors to help sell the CMBS, and CFG allowed Credit Suisse to include "its work product" on the HUD exit strategy in presentations to potential investors. A key issue in this case, therefore, is whether the contract that the jury found to exist between CFG and Credit Suisse encompassed all of the work Dwyer performed.

The Appellees respond that CFG conceded that its efforts in marketing the CMBS were part of the same subject matter because it agreed to a jury instruction specifying that the contract and unjust enrichment claims were "alternative claims" on which only "one recovery" would be permitted. The Appellees point out that, had these two claims in fact concerned two different subject matters, then CFG could have presented them both independently. In the parties Joint Pretrial Statement, Count V for unjust enrichment was presented "[i]n the alternative" to Count I, for breach of contract, and that damages for the "value of [CFG's] services" would only be appropriate if damages were not awarded on the contract claim. Therefore, Credit Suisse and W&D reason, CFG cannot, after arguing that the two counts were alternative claims regarding the same subject matter, turn around and declare they were actually independent claims regarding distinct subject matters.

We agree with the observation of Appellees that CFG's theory has evolved over time. CFG has not pointed to one instance where, prior to the verdict, CFG ever argued that the CMBS marketing work was outside the scope of the parties' contract.

CFG's Amended Complaint, filed August 15, 2011, explains what CFG considered the "Agreement Between CFG and the Credit Suisse Defendants":

> 70. CFG, in consideration of the Borrower's and the Credit Suisse Defendants' promise that CFG would get the opportunity to perform the Beverly Refinancing and the right to earn those fees and the Credit Suisse Defendants promise to keep its information confidential, *agreed to and did provide assistance to the Credit Suisse Defendants and the Borrower in connection with the initial financing*.
>
> . . .
>
> 130. By soliciting and contracting to perform the Beverly Refinancing . . . Defendants breached their agreement with FCG that, *in return for the significant assistance that CFG provided to the Credit Suisse Defendants in connection with the initial financing of the Beverly Acquisition*, CFG would perform the Beverly Refinancing.
>
> . . .
>
> 132. By soliciting and contracting to perform the Beverly Refinancing . . . Defendants prevented CFG from receiving the fruits of the contract, specifically the Beverly Refinancing, *which was consideration for CFG's assistance to the Credit Suisse Defendants in connection with the Beverly Acquisition*. . . .
>
> 133. CFG has been damaged by Defendants' breach of contract. CFG did not obtain the right to perform the Beverly Refinancing and has not been compensated for the work it performed in connection with the initial financing of the Beverly Acquisition.

(Emphasis added).

Thus, CFG's Amended Complaint clearly states that that its work for Credit Suisse to market the debt to acquire Beverly was part of the consideration in the contract. Furthermore, in its memorandum of law in opposition to Appellees' motion to dismiss the breach of contract claim, CFG reiterated its contention that Credit Suisse's obligations were "in return for CFG's assistance with the initial financing." In its Second Amended

Complaint, CFG claimed that it "fulfilled its obligations" because it had "performed extensive underwriting and structuring work to determine what amounts would be insured by HUD." Further, in the section explaining its breach of contract claim, CFG stated that it "provided consideration to the Credit Suisse Defendants in the form of the significant assistance it provided to them in connection with the initial financing and the Credit Suisse Defendants sought out and accepted that help."

Because the breach of contract claim and the unjust enrichment claim both involved CFG's work on the initial financing and thus concerned the same subject matter, the court correctly instructed the jury that CFG was "only entitled to one recovery." CFG did not oppose this instruction. In its closing argument, CFG stated that "the only recompense that Mr. Dwyer asked for from Credit Suisse [f]or *working with them and doing all the work that they did* was the request that Credit Suisse simply not compete with the HUD refinancing."

These assertions support the court's reasoning that the work on the initial CMBS financing of the Beverly Transaction was part of the contract. This was CFG's contention from the start of the litigation, and their argument only changed once the jury awarded them more for unjust enrichment than for breach of contract. CFG then advanced a new theory, which the court rejected.

Because the jury found that a contract existed, and because the breach of contract and unjust enrichment claims covered the same subject matter, the court correctly held that CFG was entitled to recovery only on a breach of contract theory.

CFG provides an incomplete characterization of the parties' agreement. Given that there was no express written contract, the duties of the parties were not clearly defined. A great deal of analysis and communication with investors occurred, most of which was based on a calculation that it would lead to profitable opportunities in the future. *See Dashiell*, 358 Md. at 101 ("Parties entering into a contract assume certain risks with the expectation of a beneficial return; however, when such expectations are not realized, they may not turn to a quasi-contract theory for recovery." (quoting *Batler, Capitel & Schwartz v. Tapanes,* 517 N.E.2d 1216, 1219 (Ill. 1987)).

The record indicates that CFG's obligation was to provide assistance with the CMBS offering. CFG did this because it knew that once the CMBS debt was issued, it stood a strong chance to be chosen to refinance that debt through the HUD program. CFG is a leader in such refinancing, and understandably believed that it would be well-positioned to earn that lucrative opportunity. Thus, CFG and Dwyer, in particular, worked closely with Credit Suisse to convince investors that there would be a solid exit strategy through the HUD refinancing, once the CMBS was issued. The consideration in this contract was always Credit Suisse's promises that it would not compete with CFG in getting the chance to refinance the CMBS debt and that it would not use CFG's proprietary methodology or confidential information to its own advantage. But it did. The jury accordingly found Credit Suisse breached the contract.

2. The Fraud Exception

CFG argues a second exception applies, stating that "Credit Suisse's fraudulent and bad faith conduct bars it from relying on the contract defense to unjust enrichment." CFG avers that

> Mr. Lerner assured Mr. Dwyer in early 2006 that Mr. Silva still intended to refinance the properties through HUD, knowing all the while that that statement was not true. . . . Mr. Lerner made a material, intentional misrepresentation to Mr. Dwyer, and Mr. Dwyer relied on that misrepresentation in granting Credit Suisse permission to use CFG's information. Moreover, Credit Suisse was hounding CFG for its help - knowing full well that CFG anticipated that the borrower would complete a HUD refinancing with CFG - and at the same time Credit Suisse was attempting to offer the borrower non-HUD refinancing alternatives, effectively preventing CFG from obtaining any benefit from the vast amount of work it was providing to Credit Suisse.

As the court noted, the mere existence of fraud is insufficient to satisfy the exceptions listed in *Dashiell*. 358 Md. at 100 (Doctrine does not apply "when there is evidence of fraud or bad faith"). Instead, the fraud exception only applies to the "formation" of the contract. To this, CFG argues that there is substantial evidence to show that Credit Suisse acted fraudulently and in bad faith in the initial formation of the contract and that therefore "the Circuit Court should have found that there was sufficient evidence to support a jury's finding that the fraud or bad faith exception applied and, for that reason, should have denied Credit Suisse's motion to modify the jury's verdict."

CFG claims that Lerner lied to CFG when he told them that Silva had intended to do a HUD refinancing of the CMBS debt. Though this was ultimately untrue, there is no evidence in the record to establish the elements of fraud; nor did jury instructions address

fraud. It appears that it was only after the court revised the judgment that CFG began to argue that Appellees had defrauded them. We see no convincing evidence in the record that this was their intent prior to the formation of the contract. As CFG admitted in its Amended Complaint, it continued to do business with Credit Suisse and related entities even after the Delaware litigation began. For these reasons, we hold that the fraud exception to *Dashiell* does not save CFG's unjust enrichment claim.

3. Breach of Contract

CFG next argues that the court "erred by not finding sufficient evidence to support a jury finding that *Dashiell*'s breach of contract exception applies." *See* 358 Md. at 100 (citing *Feng v. Dart Hill Realty, Inc.*, 601 A.2d 547, 548 (Conn. App. 1992)). CFG states, without citation or explanation, that this "breach of contract exception" means that "[a] party who breaches a contract, as Credit Suisse has done here, should not be able to assert that same contract as a defense to a claim for unjust enrichment."[9]

The Court of Appeals quoted *Feng* in its general description of what courts around the country have held. What the *Feng* court actually said was: "Proof of a contract enforceable at law precludes the equitable remedy of unjust enrichment; *at least in the absence of a breach of the contract by the defendant*, a nonwillful breach by the plaintiff; or a mutual rescission of the contract." 601 A.2d at 548 (Emphasis added) (Citations omitted). The authorities *Feng* cites appear to stand for the unremarkable proposition that restitution may provide an alternative remedy for breach of contract. *See, e.g.*, 3

[9] CFG's argument on this point is confined to a single paragraph in its brief.

Restatement (Second) of Contracts (1981) § 373 comment a. More instructive is that neither *Feng*, nor any case it cites, nor any case relied on by CFG involved a plaintiff who has prevailed on both contract and unjust enrichment claims merely because a breach has been found.[10]

The U.S. Court of Appeals for the Second Circuit in *Reilly v. Natwest Markets Group Inc.*, 181 F.3d 253 (2d Cir. 1999), did confront the situation we face here. Reilly sued his former employer for both breach of contract and quantum meruit, and he prevailed in a liability trial on the contract claim. At the damages trial, both his breach of contract and quantum meruit claims went to the jury, which awarded damages on both theories.[11] Reilly elected the quantum meruit damages. On appeal, the Second Circuit reversed, noting:

> In this case, the liability jury determined that Reilly had an enforceable contract that governed his termination. Once that jury found that Reilly had an enforceable contract, he could not seek to recover under *quantum meruit* in the subsequent damages trial. . . . Because Reilly "chose not to rescind the agreement" his recovery is limited by the terms of his express contract.

Id. at 263-64 (Citations omitted). Similarly here, once the jury found that CFG had an enforceable agreement and a breach of that agreement, its quasi-contractual unjust enrichment remedy was precluded by the terms of the express contract between the

[10] We have found no outside authorities that recognize a breach of contract "exception" to or "defense" against an unjust enrichment claim.

[11] The quantum meruit damages were $5.5 million, and the contract damages were $2.054 million. 181 F.3d at 262.

parties. The circuit court aptly noted that CFG's articulation of a breach of contract exception would "consume[] the rule of Dashiell." Therefore, we reject this contention.

In sum, the circuit court made the correct legal determination that the CFG could only recover for breach of contract, and thus did not abuse its discretion in exercising its revisory power.

B. Existence of Contract as an Affirmative Defense

CFG devotes a substantial portion of its brief arguing that Appellee Suisse had the burden to raise an "affirmative defense," *i.e.*, that the existence of an express contract precluded recovery for unjust enrichment. *See Armstrong v. Johnson Motor Lines, Inc.,* 12 Md. App. 492, 500 ("An affirmative defense is one which directly or implicitly concedes the basic position of the opposing party, but which asserts that notwithstanding that concession the opponent is not entitled to prevail because he is precluded for some other reason."

CFG's argument is based on a misunderstanding that often arises from the language of Rule 2-323. *See, e.g.*, *Liberty Mut. Ins. Co. v. Ben Lewis Plumbing, Heating & Air Conditioning, Inc. (Ben Lewis I)*, 121 Md. App. 467, 477 (1998). Section (a) provides that "*[e]very defense* of law or fact to a claim for relief in a complaint, counter-claim, cross-claim or third-party claim shall be asserted in an answer, except as provided by Rule 2-322." (Emphasis added). Section (g) of the same Rule goes on to enumerate

twenty-one "required" defenses.[12] As we noted in *Liberty*, the Federal Rules contain almost identical language, except that they include a residual clause: "any other matter constituting an avoidance or affirmative defense." Fed. R. Civ. P. 8(c).

Although not concluding whether other "affirmative defenses" were mandatory, we observed in *Ben Lewis I* that:

> Niemeyer and Schuett in Maryland Rules Commentary stress the language of Rule 2-323(g), and suggest that "[Any] defense not included on the list need *not* be raised in the answer to be preserved." Niemeyer and Schuett, *Maryland Rules Commentary,* p. 197 (1992). (Emphasis in original). Notwithstanding that statement they note the ambiguity caused by subsection (a) and conclude by stating: "Good pleading mandates that all known defenses be stated, even though the Rule specifies that only the listed defenses must be raised." Professors John A. Lynch, Jr. and Richard W. Bourne, in Modern Maryland Civil Procedure (1993), do not attempt to reconcile the two sections; rather, they argue that due process requires an interpretation that mandates that all non-enumerated affirmative defenses be specifically pleaded. *Supra,* § 6.7(c) and (4), p. 413-14.

121 Md. App. at 477 n. 2. *Ben Lewis I* involved a contract claim where defendant sought to rely on "negligent misrepresentation as a defense." We held that a defense based on negligent misrepresentation should not have been entertained because Lewis did not plead it as an affirmative defense in its answer. *Id.* at 475-79.

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[12] Whether proceeding under section (c) or section (d) of this Rule, a party shall set forth by separate defenses:

> (1) accord and satisfaction, (2) merger of a claim by arbitration into an award, (3) assumption of risk, (4) collateral estoppel as a defense to a claim, (5) contributory negligence, (6) duress, (7) estoppel, (8) fraud, (9) illegality, (10) laches, (11) payment, (12) release, (13) res judicata, (14) statute of frauds, (15) statute of limitations, (16) ultra vires, (17) usury, (18) waiver, (19) privilege, and (20) total or partial charitable immunity.

The Court of Appeals rejected this analysis, but nonetheless affirmed without "fully resolv[ing] the interrelationship of §§ (a) and (g) of Rule 2-323." *Ben Lewis Plumbing, Heating & Air Conditioning, Inc. v. Liberty Mut. Ins. Co. (Ben Lewis II)*, 354 Md. 452, 466 (1999). The Court explained:

> The plain language of section (g) evidences the intent that the class of affirmative defenses that are to be set forth separately in an answer *not be open ended*. That intent is further evidenced by the Minutes of the Rules Committee meeting of September 14, 1979. After considering each affirmative defense set forth in then Maryland Rule 342, the Committee turned its attention to Federal Rule of Civil Procedure 8(c) and addressed each item enumerated therein. The twentieth item was "[a]ny other matter constituting an avoidance or affirmative defense." Minutes of Sept. 14, 1979 at 16. The Minutes then record the following decision:
>
>> "Several Committee members objected to a 'catch-all' phrase being listed as a requirement. The consensus was that only those items included on the list are required to be specially pleaded. A motion to delete subsection (20) carried."

Id. at 465. Ultimately, however, the Court did not look to section (g), but relied on Rule 2-323(d). The Court noted that the defendant "filed a boilerplate answer containing thirteen numbered defenses, none of which averred any facts and one of which was a general denial under Maryland Rule 2-323(d)." *Id.* at 459; *see* Rule 2-323(d) ("When the action in any count is for breach of contract, debt, or tort and the claim for relief is for money only, a party may answer that count by a general denial of liability.") Thus, the Court was able to resolve the case without definitively addressing the operation of section (g) and concluded:

> This case is an action for breach of contract and the claim for relief is for money only. We are dealing with one of the specified causes governed by § (d) of the rule. Section (d) retains the general issue plea of common law pleading. Section (d) is a more specific provision then § (a). In the causes

> specified in § (d) in which a general denial is filed, it is not necessary for the pleader to assert "[e]very defense of law or fact" in the answer, except for those specifically enumerated in § (g). Inasmuch as Lewis pled a general denial, Lewis did not waive its defense of negligent misrepresentation by not pleading it specially.

Ben Lewis II, 354 Md. App. at 466-67.

CFG asks us to follow a reported Texas decision that states that "[t]he existence of an express contract is an affirmative defense to an equitable claim of quantum meruit or unjust enrichment." *Protocol Technologies, Inc. v. J.B. Grand Canyon Dairy, L.P.*, 406 S.W.3d 609, 614 (Tex. App. 2013).[13] *Protocol* does not apply a waiver analysis to this "affirmative defense" but even if it did, Texas has a catch-all defense in its pleading rules. *See* Tex. R. Civ. P. 94 ("In pleading to a preceding pleading, a party shall set forth affirmatively . . . any other matter constituting an avoidance or affirmative defense.") This is simply not the case in Maryland.[14] Credit Suisse and W&D did not have to raise the existence of the contract as an affirmative defense.

[13] CFG calls on us to rely on an unreported Nevada decision, which we do not consider. *See Kendall v. Howard County*, 204 Md. App. 440, 445 n.1 (2012) *aff'd,* 431 Md. 590 (2013).

[14] Another reported case cited by CFG makes only passing reference to the issue without actually stating a rule of law. *See In re Del-Met Corp.*, 322 B.R. 781, 826 (Bankr. M.D. Tenn. 2005) ("Whether these Defendants will prove an existing, enforceable contract sufficient in scope to preclude recovery for unjust enrichment remains to be seen.") Cases cited by CFG simply do not state what it hopes to be the law viz., that a defendant must raise the affirmative defense of an express contract to defeat an unjust enrichment claim lest it be waived.

II. Motion for a New Trial

Maryland Rule 2-533 governs a motion for a new trial. "[T]he grant or refusal of a new trial is within the sound discretion of the trial court. . . ." *Kleban v. Enghrari-Saber*, 174 Md. App. 60, 82 (2002). Such motions are not routinely granted. *Owens-Corning Fiberglass Corp. v. Mayor and City Council of Baltimore City*, 108 Md. App. 1, 29 (1996). Accordingly, a motion for new trial is reviewed for abuse of discretion. *Univ. of Md. Med. Sys. Corp. v. Gholston,* 203 Md. App. 321, 329 (2012).

For instance, new trial motions are granted when the court is convinced the verdict is against the weight of the evidence, that there was extreme misconduct at trial, or the existence of dispositive, newly discovered evidence. *See, e.g.*, *Yiallouros v. Tolson*, 203 Md. App. 562, 580 (2012) (reversing trial court's denial of motion for new trial on grounds the verdict was excessive); *Abrishamian v. Barbely*, 188 Md. App. 334, 346-51 (2009) (recognizing the trial court's right to grant a new trial where the verdict is "against the weight of the evidence"); *Christ v. Wempe*, 219 Md. 627, 642-43 (1959) (upholding denial of motion for a new trial on grounds of juror misconduct).

This case does not fit any of the circumstances warranting the grant of a new trial Maryland courts have recognized. At its core, CFG's argument is that it was prejudiced by its understanding that it would be able to "elect" between recovery for breach of contract or unjust enrichment.

CFG claimed that it was entitled to a new trial because it was significantly prejudiced by the events occurring during the July 18, 2013 conference regarding jury

instructions and the verdict sheet, and its reliance on its understanding of those events. Specifically, CFG believed, after the conference, that it would be permitted to "elect" between a recovery on its breach of contract claim and its unjust enrichment claim. CFG claims this understanding affected its strategy regarding the form of the verdict sheet, the nature of the jury instructions, and the content of CFG's closing argument.

CFG insists that it reasonably understood the court's statement in the chambers conference to mean that it could present both the breach of contract and unjust enrichment claims to the jury and then "elect" which of them it preferred. It points to one statement, made after the jury reached its verdict: "[t]hen counsel, insofar as the stipulation, the election, there can only be one recovery. So insofar as a judgment actually entered, we have a little bit of, like I said, an issue. . . So do you know what youre going to do?"

Read in isolation, this would appear to support its claim. But CFG has failed to show that the word "elect" or "election" appears in the trial transcript until after the jury verdict, so the only evidence before us of the court's statements comes in the parties' conflicting affidavits and the court's own recollection. And though CFG claims the court used that the term in the chambers conference, the trial judge directly refuted this claim.[15]

[15] "I don't think I ever used the word 'election' during the course of that conference"; ("I never used the term "elect," which then would have given the defendants notice, perhaps, that I had brought into that arguments in the chambers conference"; "[T]he first time the court ever used the term "election" was only after the jury had rendered their verdict. It's not a term I ever use in the conference on instructions."

Ultimately, CFG's central contention rests on the movant's recollection of an off-the-record conference, and where that recollection differs from that of the court itself. We are not in a position to credit one party's recollection of events over that of the court, especially when there is no evidence of misconduct and no newly discovered evidence. *See Yiallouros*, 203 Md. App. at 580.

CFG also claims that the court acknowledged it was prejudiced by its understanding of the conference in chambers, but omits the court's full statement: ("You're both prejudiced I guess."). Moreover, CFG has shown no case where a party won a new trial simply as a result of its own misunderstanding of a judge's statement, particularly where Maryland law clearly does not permit recovery on both breach of contract and unjust enrichment involving the same subject matter. The circuit court did not err in denying the motion for a new trial.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.