Circuit Court for Prince George's County
Case No. CAL21-13442

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 123

September Term, 2023

DIANN MARTIN

v.

21ST MORTGAGE CORPORATION

Wells, C.J.,
Beachley,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Beachley, J.

Filed: March 11, 2024

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

In October 2021, appellant Diann Martin filed a lawsuit in the Circuit Court for Prince George's County against 21st Mortgage Corporation ("21st Mortgage") alleging breach of contract related to the sale of real property. 21st Mortgage filed a motion to dismiss, arguing that the sales contract prohibited a party from initiating a lawsuit prior to attempting mediation. The circuit court first stayed the case for 90 days to allow the parties to mediate; however, when 21st Mortgage renewed its motion to dismiss at the end of the 90-day period, the circuit court granted the motion to dismiss. Ms. Martin filed this timely appeal and presents the following question for our review:

> Did the circuit court judge incorrectly interpret a real estate sales contract to require dismissal of an action perceived to have been initiated before satisfaction of a mediation first provision?

We hold that dismissal was appropriate and affirm.

BACKGROUND[1]

On September 28, 2018, Ms. Martin entered into a sales contract to purchase a house from 21st Mortgage. In the contract, 21st Mortgage agreed to make several repairs to the property, the majority of which 21st Mortgage never completed. Closing occurred on November 6, 2018. After Ms. Martin moved into the house, she noticed several additional problems, primarily with potential defects in the electrical and plumbing work.

The sales contract contained the following paragraph relevant to this appeal:

> 35. MEDIATION OF DISPUTES: Mediation is a process by which the parties attempt to resolve a dispute or claim with the assistance of a neutral mediator who is authorized to facilitate the resolution of the dispute. The mediator has no authority to make an award, to impose a resolution of the

[1] Because this is an appeal from the grant of a motion to dismiss, we assume the truth of the facts recited in Ms. Martin's complaint.

> dispute or claim upon the parties or to require the parties to continue mediation if the parties do not desire to do so. *Buyer and Seller agree that any dispute or claim arising out of or from this Contract or the transaction which is the subject of this Contract shall be mediated through the Maryland Association of REALTORS®, Inc. or its member local boards/associations* in accordance with the established Mediation Rules and Guidelines of the Association or through such other mediator or mediation service as mutually agreed upon by Buyer and Seller, in writing. Unless otherwise agreed in writing by the parties, mediation fees, costs and expenses shall be divided and paid equally by the parties to the mediation. If either party elects to have an attorney present that party shall pay his or her own attorney's fees.
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> Buyer and Seller further agree that the obligation of Buyer and Seller to mediate as herein provided shall apply to all disputes or claims arising whether prior to, during, or within one (1) year following the actual contract settlement date or when settlement should have occurred. *Buyer and Seller agree that neither party shall commence any action in any court regarding a dispute or claim arising out of or from this Contract or the transaction which is the subject of this Contract, without first mediating the dispute or claim, unless the right to pursue such action or the ability to protect an interest or pursue a remedy as provided in this Contract, would be precluded by the delay of the mediation*. In the event the right to pursue such action, or the ability to protect an interest or pursue a remedy would be precluded by the delay, Buyer or Seller may commence the action only if the initial pleading or document commencing such action is accompanied by a request to stay the proceeding pending the conclusion of the mediation. If a party initiates or commences an action in violation of this provision, the party agrees to pay all costs and expenses, including reasonable attorneys' fees, incurred by the other party to enforce the obligation as provided herein. The provisions of this paragraph shall survive closing and shall not be deemed to have been extinguished by merger with the deed.

(Emphasis added).

On October 25, 2021, Ms. Martin filed a complaint against 21st Mortgage, alleging breach of contract and violation of the Consumer Protection Act. 21st Mortgage moved to dismiss, arguing that Ms. Martin failed to mediate the dispute before filing a complaint, as required by Paragraph 35 of the contract. Ms. Martin thereafter filed an amended complaint, which included a request to stay the action pending the completion of mediation.

The amended complaint, however, is silent as to any specific efforts to mediate and does not assert that it is being filed "to protect an interest or pursue a remedy [that] would be precluded by delay."

After a hearing on 21st Mortgage's motion to dismiss, the circuit court granted a 90-day stay to allow the "parties to mediate pursuant to the contract." The court's 90-day stay order expired on October 18, 2022. On October 17, 2022, 21st Mortgage filed a renewed motion to dismiss. In this motion, 21st Mortgage alleged that it had initiated mediation through the Maryland Association of Realtors, but that Ms. Martin had twice failed to respond to the mediator's requests for information. In Ms. Martin's opposition to the renewed motion to dismiss, she alleged that she had provided information to the mediator, albeit after the deadline set by the mediator to do so. She also alleged that 21st Mortgage had "placed a hold on the mediation process," thereby preventing mediation from moving forward.

After a hearing on October 19, 2022, Judge William A. Snoddy lifted the stay, allowing the renewed motion to dismiss to go forward. However, he also ruled that the case could not be stayed a second time: "[I]f by the time Judge Alves gets to the renewed Motion to Dismiss, if you haven't done the mediation, then she's going to have to rule on the motion. But she can not stay the matter any further for this purpose."

A hearing was held on February 27, 2023, before Judge Krystal Quinn Alves on 21st Mortgage's renewed motion to dismiss. 21st Mortgage argued that the court was "bound to enforce the part[ies'] contractual agreement" to limit their right to file suit in

court prior to mediation. 21st Mortgage further argued that dismissal was appropriate because of Ms. Martin's failure to cooperate with mediation during the 90-day stay, and because mediation is a condition precedent to filing suit under the contract.

Ms. Martin's attorney explained that he did not provide the requested information to the mediator before the deadline set by the mediator because Ms. Martin was still attempting to obtain estimates for the cost of repairs. He argued that Paragraph 35 should be interpreted to limit the mediation requirement to only the first year after settlement. He further argued that Paragraph 35 should not be compared to an arbitration agreement, noting that "There's no case that converts a mediation clause to an arbitration clause or that compares a mediation clause to the law regarding arbitrations." Finally, he argued that dismissal of a complaint was not contemplated in the language of Paragraph 35, but rather that the penalty for not mediating before filing suit was payment of the opposing party's attorney's fees.

The court issued its ruling from the bench, first noting that the "one year" language in Paragraph 35 did not mean that mediation must occur within one year of settlement. The court continued:

> And the [c]ourt has to look at, according to what [Ms. Martin] signed, did mediation occur prior to her filing suit. That's the simple question. And I think the simple answer to that question is, no, it didn't. And I understand why you filed it, because you were running up against the statute of limitations. But three years is a lot of time. And unfortunately I don't know what happened, but I'm going to have to -- and again, I sympathize with [Ms. Martin]. But I think the language is pretty clear and unambiguous, I'm going to have to grant their motion. And I even gave you an extra 90 days and I don't know what happened in there.

> But the 90 days really didn't matter. Because at the time that you filed the complaint, and I understand why you filed the complaint, because you were running up against the statute of limitations, mediation hadn't happened. So I'm going to have to grant [21st Mortgage's] motion.

Ms. Martin thereafter filed this timely appeal.

DISCUSSION

Ms. Martin's appellate argument emphasizes that Paragraph 35 is a mediation provision, not an arbitration provision, and should therefore not be interpreted similarly to an arbitration provision. She argues that dismissal is not an appropriate remedy because Paragraph 35 does not mention dismissal: "The specific language indicates that at worst the offending party would incur the expense of paying reasonable attorney's fees and costs for efforts to require an aggrieved party to participate in mediation." Ms. Martin cites no caselaw or other legal authority in the "Argument" section of her brief.[2]

21st Mortgage responds that dismissal was appropriate because the contract required Ms. Martin to "at the very least, initiate the mediation process and, having failed to do so, [she] bargained away her right to file suit." According to 21st Mortgage, Paragraph 35 "barred filing suit without first initiating the mediation process[,]" and the court was bound to enforce that provision of the contract.

We review the grant of a motion to dismiss by assessing "whether the trial court's

[2] Although this Court may refuse to consider any argument not supported by legal authority, *see Silver v. Greater Balt. Med. Ctr., Inc.*, 248 Md. App. 666, 711 n.12 (2020) (citing *HNS Dev., LLC v. People's Couns. for Balt. Cnty.*, 425 Md. 436, 459 (2012)), we shall exercise our discretion to consider Ms. Martin's appellate arguments. We note, however, that we shall strictly limit our discussion to the arguments she has presented in her brief.

decision was legally correct." *Ledford v. Jenway Contracting, Inc.*, 259 Md. App. 534, 541 (2023) (quoting *Ceccone v. Carroll Home Servs., LLC*, 454 Md. 680, 691 (2017)). In doing so, we "assume the truth of factual allegations made in the complaint and draw all reasonable inferences from those allegations in favor of the plaintiff." *Id.* at 540 (quoting *Ceccone*, 454 Md. at 691). "Dismissal is proper only if the alleged facts and permissible inferences, so viewed, would, if proven, nonetheless fail to afford relief to the plaintiff." *Id.* at 540–41 (quoting *Ricketts v. Ricketts*, 393 Md. 479, 492 (2006)).

"The interpretation of a contract, including the determination of whether a contract is ambiguous, is a question of law, subject to *de novo* review." *Spacesaver Sys., Inc. v. Adam*, 440 Md. 1, 7 (2014) (quoting *Towson Univ. v. Conte*, 384 Md. 68, 78 (2004)). Where contract language is "plain and unambiguous, there is no room for construction, and it must be presumed that the parties meant what they expressed." *Shutter v. CSX Transp., Inc.*, 226 Md. App. 623, 635 (2016) (quoting *Pantazes v. Pantazes*, 77 Md. App. 712, 720 (1989)). Where a contract is ambiguous, "Maryland follows the objective approach to contract interpretation[,]" in which "'the true test of what is meant is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it to mean.'" *Sang Ho Na v. Gillespie*, 234 Md. App. 742, 752 (2017) (quoting *Ocean Petroleum, Co. v. Yanek*, 416 Md. 74, 86–87 (2010)).

By its express terms, Paragraph 35 unambiguously makes mediation a condition precedent to filing suit. Paragraph 35 provides that "neither party shall commence any action in any court . . . without first mediating the dispute." Indeed, Ms. Martin admits that

"Paragraph 35 requires that the parties engage in mediation before commencing any court action," which she further acknowledges is a "common feature of mediation clauses[.]"

Addressing Ms. Martin's first appellate argument, she asserts that there is a "key distinction" between mediation and arbitration. Although Ms. Martin fails to articulate how the distinction between mediation and arbitration is relevant to this case, we presume that she contends that Paragraph 35 cannot be interpreted under the Maryland Uniform Arbitration Act. Md. Code (1974, 2020 Repl. Vol.), § 3-201 through § 3-234 of the Courts and Judicial Proceedings Article. On that point, we have no disagreement. To the extent Ms. Martin argues that Maryland caselaw construing mandatory arbitration provisions has no relevance, we note that this Court has stated that "mediation and neutral evaluation have become, throughout the nation and increasingly throughout this State, equally 'favored method[s] of dispute resolution,' and we can see no rational basis for not enforcing agreements to utilize such methods in much the same manner as agreements to arbitrate are enforced." *Annapolis Pro. Firefighters Loc. 1926 v. City of Annapolis*, 100 Md. App. 714, 724 (1994) (alteration in original) (quoting *Anne Arundel County v. Fraternal Ord.*, 313 Md. 98, 105 (1988)). "[A] written agreement to submit either an existing or a future dispute to a form of alternative dispute resolution that is not otherwise against public policy will be enforced at least to the same extent that it would be enforced if the chosen method were arbitration." *Id.* at 725.

Although caselaw interpreting arbitration clauses could be informative, we are most persuaded by the analysis in *Pacific Home Improvement, LLC v. Rodriquez*, No. TDC-21-

1788, 2022 WL 13956160 (D. Md. Oct. 21, 2022), a case that construed the identical mediation provision set forth in Paragraph 35 of the contract in this case. The U.S. District Court for the District of Maryland held:

> [T]he Mediation Clause provides that "neither party shall commence any action in any court regarding a dispute or claim arising out of or from this Contract or the transaction which is the subject of this Contract, without first mediating the dispute or claim." *Id.* There is no dispute that PHI did not initiate or even request mediation before filing suit. The Court therefore finds that PHI filed this case in violation of the Mediation Clause.
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> By failing to even attempt mediation before filing suit, PHI breached the Contract and failed to comply with a condition precedent to suit. Consistent with the case law on this issue, dismissal is therefore warranted.

Id. at *4–5. Other courts have held that "failure to mediate a dispute pursuant to a contract that makes mediation a condition precedent to filing a lawsuit warrants dismissal." *Tattoo Art, Inc. v. Tat Int'l, LLC*, 711 F. Supp. 2d 645, 651 (E.D. Va. 2010) (quoting *Brosnan v. Dry Cleaning Station, Inc.*, No. C-08-02028, 2008 WL 2388392 at *2 (N.D. Cal. June 6, 2008)); *see also Pruett v. U.S. Bank Nat'l Ass'n*, No. 1:12CV00006, 2012 WL 5465554 at *1–2 (W.D. Va. May 4, 2012) (holding that dismissal was appropriate where plaintiff failed to allege in complaint that mediation occurred or that mediation requirement was waived); *3-J Hosp., LLC v. Big Time Design, Inc.*, No. 09-61077-CIV, 2009 WL 3586830 at *2 (S.D. Fla. Oct. 27, 2009) ("Where the parties' agreement requires mediation as a condition precedent to arbitration or litigation [and a party fails to mediate], the complaint must be dismissed."). The Supreme Court of Maryland has noted the "long-held rule that, where a cause of action depends on satisfaction of a condition precedent, the plaintiff 'must allege

performance of such condition or show legal justification for nonperformance.'" *Davis v. Frostburg Facility Operations, LLC*, 457 Md. 275, 289 (2018) (quoting *Cannon v. McKen*, 296 Md. 27, 38 (1983)).

Our review of the record reveals that Ms. Martin failed to comply with Paragraph 35's mediation requirement prior to filing suit. Although Ms. Martin's amended complaint requested a stay "until the conclusion of mediation," it is apparent that she did not pursue mediation before filing suit. At the February 27, 2023 hearing, Ms. Martin's counsel admitted that mediation had not been initiated before she filed her complaint. Indeed, Ms. Martin's counsel indicated that he contacted the mediator's office on October 7, 2022, nearly one year after filing the original complaint. Consistent with the express terms of the contract and applicable caselaw, we conclude that dismissal was warranted.

Implicitly recognizing that she did not abide by the condition precedent contained in Paragraph 35, Ms. Martin's next argument focuses on the penultimate sentence of Paragraph 35: "If a party initiates or commences an action in violation of this provision, the party agrees to pay all costs and expenses, including reasonable attorneys' fees, incurred by the other party to enforce the obligation as provided herein." She argues that this sentence limits the consequences of failure to mediate to only the payment of the opposing party's attorney's fees, baldly asserting that "[d]ismissal was not a viable recourse according to paragraph 35." We disagree.

"Maryland courts follow the 'American Rule' for granting attorneys' fees. Under the American Rule, 'in the absence of a statute, rule or contract expressly allowing recovery

of attorneys' fees, a prevailing party in a lawsuit may not ordinarily recover attorneys' fees.'" *Bontempo v. Lare*, 217 Md. App. 81, 134 (2014) (citation removed) (quoting *Bausch & Lomb Inc. v. Utica Mut. Ins. Co.*, 355 Md. 566, 590 (1999)), *aff'd*, 444 Md. 344 (2015). The "attorney's fees" provision here does not expressly limit remedies to payment of attorney's fees. *See O'Brien & Gere Eng'rs, Inc. v. City of Salisbury*, 447 Md. 394, 407 (2016) ("[P]arties must at least use clear language to show their agreement to limit available remedies."). Rather, it creates an exception to the American Rule that may be applied in addition to other remedies. Indeed, the language in the sentence relied upon by Ms. Martin is similar to the first sentence of Paragraph 36 of the contract:

> In any action or proceeding between Buyer and Seller based, in whole or in part, upon the performance or non-performance of the terms and conditions of this Contract, including, but not limited to, breach of contract, negligence, misrepresentation or fraud, the prevailing party in such action or proceeding shall be entitled to receive reasonable attorney's fees from the other party as determined by the court or arbitrator.

In our view, the contract language creates an additional remedy for the award of attorney's fees. Unlike recovery of attorney's fees, which generally are available only if written into the contract, other available remedies need not be expressly mentioned in the contract. *See Thomas v. Cap. Med. Mgmt. Assocs., LLC*, 189 Md. App. 439, 468 (2009) ("[A] trial court may award attorneys' fees only . . . where . . . a contract between the parties *specifically* authorizes attorneys' fees." (second and third alterations in original) (quoting *Maxima Corp. v. 6933 Arlington Dev. Ltd. P'ship*, 100 Md. App. 441, 452 (1994))); *O'Brien & Gere Eng'rs*, 447 Md. at 408 ("[A] contract will not be construed as taking away a common-law remedy unless that result is imperatively required." (quoting *Mass. Indem. &*

Life Ins. Co. v. Dresser, 269 Md. 364, 369–70 (1973))). We reject Ms. Martin's argument that attorney's fees is the only remedy available for violating the mediation-first provision of the contract.

By failing to initiate mediation before filing suit Ms. Martin failed to comply with an express condition precedent of the contract. Accordingly, the court did not err in granting 21st Mortgage's motion to dismiss.[3]

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

[3] We reiterate that we have addressed only those arguments made by Ms. Martin in her brief. Thus, for example, we express no opinion about the propriety of the court's determination not to extend the 90-day stay order.