Circuit Court for Howard County
Case No. C-13-CV-20-000354

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 527

September Term, 2020

STAR MANAGEMENT GROUP, LLC

v.

ROBERT GREENBERG, P.A.

Berger,
Friedman,
Gould,

JJ.

Opinion by Berger, J.
Dissenting Opinion by Friedman, J.

Filed: April 20, 2021

*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.

This case is before us on appeal from an order of the Circuit Court for Howard County granting the Petition to Stay Arbitration filed by Robert Greenberg, P.A. ("Greenberg"). Appellant Star Management Group, LLC ("Star Management") appealed the circuit court's ruling, raising the single issue of whether the circuit court erred in granting Greenberg's Petition to Stay Arbitration. Perceiving no error, we shall affirm.

FACTS AND PROCEEDINGS

The facts relevant to the narrow issue before us in this appeal are not disputed by the parties. On October 21, 2008, Greenberg, an architectural firm, entered into a contract to provide design services to Star Management in connection with the construction of a Homewood Suites Hotel in Columbia, Maryland. The 2008 contract established the original scope of the work that Greenberg would perform and provided that "[a]ll disputes and claims shall be subject to and decided by the arbitration rules of the American Arbitration Association currently in effect." The 2008 contract further provided that "[a]ll other conditions [not specified in the contract] are covered by the standard A.I.A. Document B141 'Standard Form of Agreement between Owner and Architect.'"[1] The 2008 Contract did not include an indemnity provision.

The parties entered into a second contract on March 28, 2012 pursuant to which Greenberg agreed to provide additional services in connection with the Homewood Suites Hotel project. Like the 2008 contract, the 2012 contract provided that "[a]ll disputes and

[1] A.I.A. Document B141 is a standard form prepared by the American Institute of Architects.

claims shall be subject to and decided by the arbitration rules of the American Arbitration Association currently in effect" and that "[a]ll other conditions [not specified in the contract] are covered by the standard A.I.A. Document B141 'Standard Form of Agreement between Owner and Architect.'" Like the 2008 contract, the 2012 contract did not include an indemnity provision.

Pursuant to Section 7.2 of A.I.A. Document B141, both the 2008 and 2012 contracts require the following with respect to a demand for arbitration:

> A demand for arbitration shall be made within a reasonable time after the claim, dispute or other matter in question has arisen. In no event shall the demand for arbitration be made after the date when institution of legal or equitable proceedings based on such claim, dispute or other matter in question would be barred by the applicable statute of limitations.

Both contracts further set forth the date upon which causes of action were deemed to have accrued for the purposes of the applicable statute of limitations, providing as follows:

> Causes of action between the parties to this Agreement pertaining to acts or failures to act shall be deemed to have accrued and the applicable statute of limitations shall commence to run not later than either the date of Substantial Completion for acts or failures to act occurring prior to Substantial Completion, or the date or issuance of the final Certificate for Payment for acts or failures to act occurring after Substantial Completion.

A.I.A. Document B141 § 9.3. "Substantial Completion" is defined as

> "the stage in the progress of the Work when the Work or designation portion thereof is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended use."

The project reached Substantial Completion and received its Use and Occupancy Permit no later than August 6, 2015.[2]

In 2016, the general contractor for the Homewood Suites Hotel Project, Construction Management, Inc. ("CMI"), filed a demand for arbitration against Star Development Group, LLC ("Star Development"). Star Development is an entity separate and distinct from Star Management, the appellant in this case. Star Development had served as the construction and development manager for the owners of the project, Hopkins Hospitality Investors, LLC and Hopkins Investors. CMI sought the payment of the balance of its contract sum for the construction of the project. Star Development filed a counterclaim seeking delay damages as well as asserting various claims for defective work. Ultimately, the result of the arbitration was a determination that Star Development was liable to CMI for CMI's unpaid contract balance and for the costs of the arbitration. The arbitrators denied Star Development's delay claim. No award was issued against the Owners. Neither Star Management nor Greenberg was not a party to the arbitration. The final award was issued on June 14, 2017.

On March 26, 2020, Star Management submitted a demand for arbitration to the American Arbitration Association ("AAA") against Greenberg. Star Management sought "[i]ndemnification for losses arising from structural design problems, errors and omissions" in connection with the construction of the Homewood Suites Hotel Project.

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[2] A.I.A. Document B141 does not itself define "Substantial Completion," but it adopts all terms defined in A.I.A. Document A201, where the above-quoted definition is provided in § 9.8.1.

Greenberg filed a Petition to Stay Arbitration in the Circuit Court for Howard County on April 27, 2020. Greenberg argued that the demand for arbitration was not timely because the contract required any such claim to be filed within three years of the date of Substantial Completion. Star Management opposed Greenberg's Petition to Stay Arbitration, arguing that the arbitration demand was timely filed because it was filed within three years of the issuance of the final award in the prior arbitration proceeding. Star Management asserted that the "act or failure to act" by Greenberg that established the date of accrual under the applicable contract was the alleged refusal by Greenberg to indemnify Star Management "against the losses arising out of the June 14, 2017 Final Award" from the prior arbitration in which Star Management was not itself a party.

The circuit court held a hearing on the petition on July 14, 2020. The circuit court granted Greenberg's Petition to Stay Arbitration, explaining its reasoning as follows:

> All right, I've looked at the contract and . . . read the submissions by the parties. I guess the [c]ourt is struck by the nature of the contract itself, the language, and the fact that it was entered into by sophisticated parties with, you know, knowledge of this type of business activity.
>
> I do believe that the *Harbor Court*[3] case and the cases cited by [Greenberg] are persuasive. I think there is an interest in finality here and an open-ended arbitration provision, it's not well intended. I think parties come up to this and they recognize that they can contract out rights they may and may not have and that [is] what was done here. I think, you know, accrual and the contract here indicates it happened, you know, upon substantial completion which was well before the time in terms of limitations running in this case.

[3] The circuit court was referring to the case of *Harbor Court Assocs. v. Leo A. Daly Company*, 179 F.3d 147 (4th Cir. 1999).

> So I do not believe that it applies to the indemnification here that is argued and therefore I believe that [Greenberg] has the better argument here and the [c]ourt will grant the Petition to Stay Arbitration.

This timely appeal followed.

STANDARD OF REVIEW

We review a circuit court's decision to grant a petition to stay arbitration for legal error. *See Balt. Cnty. Fraternal Order of Police Lodge No. 4 v. Balt. Cnty.*, 429 Md. 533, 560 n.23 (2012) (citing *Montgomery Cnty. v. Fraternal Order of Police*, 427 Md. 561, 571 (2012)).

DISCUSSION

Star Management asserts that the trial court erred by granting Greenberg's Petition to Stay Arbitration. As we shall explain, we agree with the circuit court that Star Management's demand for arbitration was untimely. Accordingly, we shall affirm the circuit court's grant of Greenberg's Petition to Stay Arbitration.

The parties agree that there were two provisions in both the 2008 and 2012 contracts setting forth the applicable period in which a party could file a demand for arbitration. Both contracts provide that "[a]ll other conditions [not specified in the contract] are covered by the standard A.I.A. Document B141 'Standard Form of Agreement between Owner and Architect.'" As we explained *supra*, A.I.A Document B141 contains the following language:

> A demand for arbitration shall be made within a reasonable time after the claim, dispute, or other matter in question has arisen. In no event shall the demand for arbitration be made

> after the date when institution of legal or equitable proceedings based on such claim, dispute or other matter in question would be barred by the statute of limitations.
>
> **Causes of action between the parties to this Agreement pertaining to acts or failures to act shall be deemed to have accrued and the applicable statute of limitations shall commence to run not later than either the date of Substantial Completion for acts or failures to act occurring prior to Substantial Completion**, or the date of issuance of the final Certificate for Payment for acts or failures to act occurring after substantial completion.

A.I.A Document B141 §§ 7.2, 9.3 (Emphasis supplied.)

Greenberg asserts (and Star Management does not dispute) that the project reached Substantial Completion no later than August 6, 2015. Greenberg asserts that Star Management's arbitration demand for its indemnification claim, which sought an award for "losses arising from structural design problems, errors and omissions" in connection with the project was required to be filed within three years of the date of Substantial Completion. *See* Md. Code (2006, 2020 Repl. Vol.), § 5-101 of the Courts and Judicial Proceedings Article ("A civil action at law shall be filed within three years from the date it accrues unless another provision of the Code provides a different period of time within which an action shall be commenced."). Greenberg asserts that the indemnification claim pertained to Greenberg's alleged acts or failures to act during the design and construction of the project, and, therefore, the arbitration demand filed on March 26, 2020 seeking indemnification for losses incurred as a result of Greenberg's alleged acts or failures to act was untimely.

Star Management contends that its claims do not involve "acts or failure to act occurring prior to Substantial Completion," but instead "acts or failures to act occurring after Substantial Completion," for which claims do not accrue until the date of issuance of the final Certificate for Payment.[4] Star Management asserts that the indemnification claim could not have accrued until after the June 15, 2017 final award in the prior arbitration between CMI and Star Development. Star Management emphasizes that, under Maryland law, an action for indemnification accrues, and the limitations period commences to run, not from the time of the commission of negligence or from the time of the resulting damage, but from the time the indemnitee pays or is ordered to pay the third-party who is harmed. *See*, *e.g.*, *Hanscome v. Perry*, 75 Md. App. 605, 614 (1988) ("As to the limitations question, we think that appellant is correct in her view that an action for indemnification accrues and the limitations period commences not at the time of the underlying transaction but when the would-be indemnitee pays the judgment arising from the underlying transaction.").

Star Management asserts that the "act or failure to act" by Greenberg giving rise to its demand for arbitration was Greenberg's failure to indemnify Star Management after the issuance of the June 14, 2017 final award, which necessarily occurred after the August 6, 2015 Substantial Completion Date. As we shall explain, we are not persuaded by Star Management's interpretation of A.I.A. Document B141 § 7.2 and § 9.3 as applied to the indemnification claim at issue in this case.

[4] Greenberg's Petition to Stay Arbitration did not identify the date of the issuance of the final Certificate for Payment. Star Management asserts that, to its knowledge, such event has not yet occurred.

The United States Court of Appeals for the Fourth Circuit addressed nearly identical contractual language in the case of *Harbor Court Associates v. Leo A. Daly Company*, 179 F.3d 147 (4th Cir. 1999). The *Harbor Court* case involved claims for negligence, breach of contract, and indemnification arising from the allegedly defective design and construction of a condominium complex in Baltimore, Maryland. The contract between the developer and the architect in *Harbor Court* was "a standard agreement prepared by the American Institute of Architects, with some modifications." *Id.* at 148. The action accrual provision in the contract in *Harbor Court* was substantially similar to the accrual provision at issue in this case and provided as follows:

> As between the parties to this Agreement: as to all acts or failures to act by either party to this Agreement, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than the relevant Date of Substantial Completion of the Work, and as to any acts or failures to act occurring after the relevant Date of Substantial Completion, not later than the date of issuance of the Final Certificate of Payment.

Id. at 148-49.

In that case, construction began in mid-1984, and a Final Certificate of Completion was issued on September 11, 1987. *Id.* at 149. In 1996, after "a fifteen-square-foot area of brick suddenly, and without warning, exploded off the face of the [condominium c]omplex," structural engineers determined that the "brick veneer of the [c]omplex suffered from fundamental and latent defects in design and construction." *Id.* On September 20,

1996, the developer brought suit against, *inter alia*, the architect.[5] *Id.* The architect moved for summary judgment, pointing to the contractual language quoted above and asserting that the actions were "long-since time barred." The trial court granted summary judgment on all of the developer's claims against the architect, including the indemnification claims, and the Fourth Circuit affirmed. *Id.* at 151. The Fourth Circuit explained that it "agree[d] that the Maryland courts would enforce the contractual provision fixing the accrual date of **any civil action** to the date work on the project was substantially completed." *Id.* at 151 (emphasis supplied).

Star Management attempts to distinguish *Harbor Court*, asserting that the only holding in *Harbor Court* involving an indemnification claim "related to application of the statute of repose, not any contract clause dealing with accrual of claim." We disagree with Star Management's narrow reading of *Harbor Court.* Although the Fourth Circuit observed that "the district court granted summary judgment to the defendant on HCA/Murdock's indemnification claim for any injuries arising after September 11, 1997, the date on which the Maryland Statute of Repose expired, and dismissed the claim without prejudice with regard to any as yet unidentified injuries or damages occurring before that date," *id.* at 149, the court further reasoned that Maryland courts would enforce the accrual provision set forth in the contract for "any civil action." *Id.* at 151. "Any civil action"

[5] The case involved various third-party claims not relevant to our analysis here. The case was originally filed in the Circuit Court for Baltimore City and was subsequently removed to the United States District Court for the District of Maryland on diversity grounds.

includes a claim for indemnification. Furthermore, the Fourth Circuit made no distinction between the causes of action asserted by the developer -- negligence, breach of contract, and indemnification -- when discussing the contractual accrual provision. As in *Harbor Court*, the claims against the architect were premised upon alleged design defects that occurred prior to Substantial Completion.

We are unpersuaded by Star Management's assertion that the "act or failure to act" by Greenberg giving rise to its demand for arbitration was Greenberg's failure to indemnify Star Management after the issuance of the June 14, 2017 final award, which necessarily occurred after the August 6, 2015 Substantial Completion Date. There is no evidence in the record demonstrating that Greenberg performed any professional services after the date of Substantial Completion. The only "act or failure to act" that Star Management can identify as occurring after the date of Substantial Completion is Greenberg's alleged failure to indemnify Star Management for losses incurred in connection with the prior arbitration award -- notably, in an arbitration to which neither Star Management nor Greenberg was a party.

We reject Star Management's contention that a failure to indemnify is an "act or failure to act" occurring after substantial completion when the basis for the indemnification sought was a party's alleged acts or failures to act in connection with the design and construction of a project that reached Substantial Completion years earlier. Indeed, adopting Star Management's interpretation of the accrual provision would render the accrual provision altogether meaningless because the statute of limitations would only

commence to run at the time that Star Management demanded indemnification from Greenberg and Greenberg declined.

Star Management emphasizes that indemnification claims generally do not accrue until the indemnitee pays or is ordered to pay, but this general rule is inapplicable when parties have agreed to alter their rights via contract. *See*, *e.g.*, *Harbor Court*, *supra*, 179 F.3d at 150-51 ("In light of this established judicial commitment to protecting individuals' efforts to structure their own affairs through contract, we cannot conclude that the Maryland Court of Appeals would decline to allow parties to contract around the state's default rule establishing the date on which a relevant statute of limitations begins to run. This is especially true where, as here, the parties to the agreement are sophisticated business actors who sought, by contract, to allocate business risks in advance."); *College of Notre Dame of Maryland, Inc. v. Morabito Consultants, Inc.*, 132 Md. App. 158, 752 (2000) (specifically approving of the accrual provision set forth in A.I.A. B141 § 9.3).

Star Management's claim for indemnification against Greenberg was premised upon alleged design defects associated with the construction of the Homewood Suites Hotel in Columbia, Maryland that reached Substantial Completion on August 6, 2015. Any claims arising from acts or failures to act prior to Substantial Completion accrued on the date of Substantial Completion per the parties' contract, including any claims for indemnification as a result of such acts or failure to act. Accordingly, we hold that Star

Management's March 26, 2020 Demand for Arbitration was untimely filed, and, therefore, the circuit court properly granted Greenberg's Petition to Stay Arbitration.[6]

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

[6] Greenberg presents additional arguments as to why Star Management cannot demand arbitration, including that Star Development -- not Star Management -- was a party to the prior arbitration and that Star Management is not entitled to seek indemnification for losses sustained by another entity and that there were no indemnification provisions in either the 2008 or 2012 contracts between Star Management and Greenberg. In light of our determination that the Petition to Stay Arbitration was properly granted on timeliness grounds, we shall not address the substance of these alternative arguments.

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Dissenting Opinion by Friedman, J.

Filed: April 20, 2021

I respectfully dissent.

My brothers in the majority read Section 9.3 of the contract between the parties as modifying all aspects of the statute of limitations. I read the provision more narrowly. To my eye, the provision modified only the common law discovery rule, shortening the period during which a party may discover an "act or failure to act," and thereafter bring a claim. In my view, however, the provision was not intended to and did not modify what constitutes an "act or failure to act." As a result, the Maryland common law continues to apply and, as a result, a claim for indemnification only arises when a party seeking indemnification makes payment. *Hanscome v. Perry*, 75 Md. App. 605, 614 (1988); *see also Chevron U.S.A. Inc. v. Apex Oil Co., Inc.,* 113 F. Supp. 3d 807, 821 (D. Md. 2015) (applying Maryland law). Thus, Star Management's indemnification claim would not be time-barred under Section 9.3 until either three years after the payment or three years after the issuance of the final Certificate of Payment, whichever is earlier.

I suspect that had my view prevailed it would have provided cold comfort to Star Management who it appears, may not have made a satisfactory demand for indemnification and who likely has no contractual or other basis for its indemnification claim. Nevertheless, in my view, Star Management was entitled to lose in arbitration, not the courts.