Circuit Court for Baltimore City
Case No. 24-C-17-002922

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 586

September Term, 2018

KOLPER PROPERTIES, INC., ET AL.

v.

BIRROTECA MANAGEMENT, LLC

Fader, C.J.,
Graeff,
Wells,

JJ.

Opinion by Fader, C.J.

Filed: June 10, 2019

Birroteca Management, LLC ("Birroteca"), the appellee, contracted with appellant Kolper Properties, Inc. ("KPI") to operate a restaurant on property owned jointly by appellants David and Candace Kolper. The contract included an option for Birroteca to purchase the property from KPI at any time during the agreement's five-year term. A careful reader will already have perceived the problem on which much of this case centers: KPI contracted to sell Birroteca property that KPI did not own.

When Birroteca announced its intention to exercise the option, KPI refused on the ground that Birroteca was in default of the terms of the agreement. Birroteca sued KPI, Mr. Kolper, and Mrs. Kolper (collectively, the "Kolper Parties") for a declaratory judgment that it had the right to purchase the property, an order directing the sale of the property, breach of contract, fraud, and negligent misrepresentation. The circuit court found largely for Birroteca, ordered the Kolper Parties to sell the property to Birroteca, and awarded monetary damages.

The Kolper Parties now argue that the circuit court erred or abused its discretion in: (1) ruling against Mr. and Mrs. Kolper on certain causes of action that Birroteca did not pursue against them; (2) ordering Mrs. Kolper to sell the property even though Birroteca did not identify any legal justification for such an order; and (3) entering judgment against Mr. Kolper for fraud and negligent misrepresentation. We will affirm the judgment against Mr. Kolper and KPI for fraud and negligent misrepresentation and against KPI for breach of contract, but will vacate the order to sell the property and the award of monetary damages. We will remand for (1) entry of a declaratory judgment and (2) further proceedings regarding damages.

BACKGROUND[1]

The Management Agreement

This dispute concerns a restaurant property that is owned by Mr. and Mrs. Kolper and located at 1520 Clipper Road in Baltimore (the "Property"). Mr. Kolper manages the Property through KPI, of which he is the sole owner and employee.

In July 2012, Robbin Haas, a part-owner of Birroteca, met with Mr. Kolper to explore operating a restaurant on the Property. During a subsequent meeting attended by Mr. Kolper, Mr. Haas, and John Knorr, Mr. Haas's business partner, Mr. Kolper presented Birroteca with a draft management agreement, which he had based on agreements that KPI had entered with others (the "Draft Agreement"). The Draft Agreement provides that (1) Birroteca, identified in the agreement as "Manager," would be solely responsible for operating the restaurant during the term of the agreement, (2) Birroteca would pay monthly rent to KPI, identified in the agreement as "Owner," and (3) Birroteca's "compensation" for operating the business would be to keep all of the profits remaining after payment of all of the obligations of the business. The Draft Agreement calls for a five-year term commencing August 1, 2012.

Birroteca's attorney reviewed the Draft Agreement, the parties negotiated some of the terms, and Birroteca returned with a final version that includes several changes (the "Final Agreement"). The following chart identifies some of the provisions of the

[1] In reviewing this challenge to the court's award of judgment following trial, we consider and present the facts in the light most favorable to the prevailing party, Birroteca. *Clickner v. Magothy River Ass'n, Inc.*, 424 Md. 253, 266 (2012).

agreement that are relevant to the parties' dispute and how, if at all, they changed from the Draft Agreement to the Final Agreement.

¶	Draft Agreement	Final Agreement
Intro	Defines KPI as "Owner" and Birroteca as "Manager"	Same
First recital	"Kolper Properties, Inc. is the owner and operator of a live entertainment and Restaurant business operating at 1520 Clipper Road, Baltimore, Maryland 21211, with Class B Beer, Wine and Liquor License . . . ."	"Kolper Properties, Inc. is the owner and operator of real property known as 1520 Clipper Road, Baltimore, Maryland 21211 on which is located a live entertainment and Restaurant business with Class B Beer, Wine and Liquor License . . . ."
1	The term of the agreement is stated as five years, with extension only by mutual consent.	Changed to provide Birroteca the right to extend the term of the agreement for an additional five years "upon the same terms and conditions as applicable to the initial term . . . ."
2	The monthly rent charge is identified as starting at $4,500 per month, subject to annual increases of three percent.	Changed to tie rent increases to adjustments in the Consumer Price Index, "but in no event more than three Percent (3%) per year."
3	Birroteca is responsible for paying all costs of operating the business, including all property and other taxes.	Changed to clarify that Birroteca's responsibility for property taxes was for "55% of total real property tax bill."
8	KPI is made responsible for assisting "in the administration of the Business operations via the telephone."	Deleted
14	Birroteca "acknowledges that the Cell tower lease and easement are not included in this agreement or lease."	Birroteca "acknowledges that the Cell tower lease and easement located adjacent to the property on which the Business is located are not included in this Agreement."
28	Title "Ownership" states that "[t]he Business and equipment are and shall at all times be and remain the sole and exclusive property of the Owner and Manager shall have no right, title or interest therein or thereto."	Substantively the same.
31	Provides that the agreement would immediately terminate upon, among other things, a default of any of Birroteca's obligations that goes uncured for five days.	Changed to make the cure period 15 days.

34	Provides that the waiver of any breach of the agreement by either party "shall not operate or be construed as a waiver of any subsequent breach."	Same
43	"Manager shall have the option to purchase the building and its contents located on the property known as 1520 Clipper Road, complete with business located therein together with a 7 day beer, wine and liquor license any time prior to August 1 2017. The agreed purchase price of Five Hundred Fifty thousand ($550,000.00). In the event the manager defaults in their obligations hereunder, they will forfeit the purchase option right. The manager shall pay all cost, expenses, transfer taxes, stamps and all other costs associated with this transfer if option is exercised."	"At <u>any</u> time prior to August 1 2017, [Birroteca] shall have the option to purchase the Business, specifically including the real property and building known as 1520 Clipper Road, Baltimore, Maryland, all of its contents there, all of its contents located there, all furniture, fixtures and equipment and other assets used in the Business and together with a 7 day beer, wine, and liquor <u>license for the Business</u>. The agreed purchase price shall be Five Hundred Fifty thousand (550,000.00). Owner agrees to complete settlement on said purchase not more than sixty (60) days after Manager gives Owner written notice of its intent to exercise the option to purchase . . . ." In the event Manager defaults in its obligations hereunder, it will forfeit the purchase option right. Manager shall pay all cost, expenses, transfer taxes, stamps and all other costs associated with this transfer if option is exercised."
44	Provides that "[a]ny & all vendors used during management agreement must be submitted to the owner, David Kolper immediately upon use of that vendor."	Deleted
45	Obligates Birroteca to "apply in timely manner (approx. 30-90 days) with his attorney if deemed necessary to transfer liquor license into [Birroteca's] name."	Changed to specify that "[w]ithin ninety (90) days of the effective date hereof, [Birroteca] shall at its own cost apply to transfer the liquor license for the Business into [Birroteca's] name" or the name of its designee.

Mr. Kolper signed the Final Agreement on behalf of KPI, above the word "OWNER," and Mr. Haas signed on behalf of Birroteca.

Although the timing is disputed, Messrs. Kolper and Haas also signed a separate document titled "Cell Tower Lease and easement." That document describes itself "[a]s part and subject to lease dated 8-1-2012 between Barroteca [sic] or Assigns, lessee or future owners and David & Constance Kolper, current owners of property, 1520 Clipper Rd, Baltimore Md 21211." The document, which is undated, states that "managers acknowledge as lessee and or future owners that they have no rights to the cell tower income or land in cell tower easement area." As discussed further below, Mr. Kolper contends that this document was executed contemporaneously with the Final Agreement, while Messrs. Haas and Knorr contend it was executed years later.

Birroteca's Attempt to Enforce the Purchase Option

In March 2017, a few months before the agreement's August 1 expiration, Mr. Kolper, on behalf of KPI, sent Birroteca a letter in which he (1) contended that Birroteca had "forfeited the purchase option" due to "active defaults in the agreement"; (2) asserted that "the forfeited [purchase] price is of inadequate value"; and (3) invited Birroteca to begin "negotiating a *mutually beneficial* outcome to the defaulted agreement." Mr. Kolper's letter did not raise the fact that KPI did not own the Property. In subsequent correspondence, KPI, through counsel, identified Birroteca's alleged "active default[]" as its failure to have the liquor license transferred into its name pursuant to paragraph 45 of the Final Agreement.

Birroteca responded days later, stating that it was unaware of any active defaults and that it was considering exercising both its "option to renew for an additional 5 year

term upon the same terms and conditions as the original term" and its "option to purchase the property." The following month, Birroteca provided written notice of its intent to exercise its option to purchase the Property for the agreed-upon sum of $550,000. In the letter, Birroteca argued that KPI had waived the requirement that Birroteca transfer the liquor license, which was to have been completed by October 30, 2012, by never asserting that Birroteca was in default and by Mr. Kolper renewing the liquor license annually in his own name without complaint.

The parties engaged in settlement negotiations through which they attempted to negotiate a renewal of the five-year management term or agree to a new purchase price, with KPI insisting on a substantially-increased management fee ($12,500 per month, up from $5,074 per month[2]) or purchase price ($1,200,000 instead of $550,000). When the parties could not come to an agreement, Birroteca filed suit.

Birroteca's Complaint

In the operative complaint, Birroteca included counts against all three Kolper Parties for declaratory judgment, fraud, and negligent misrepresentation and against KPI for breach of contract. In its count for declaratory judgment, Birroteca requested, among other relief: (1) a declaration that Birroteca has the right to exercise the purchase option under the Final Agreement; (2) a declaration that Birroteca "properly and timely" exercised that right as of April 14, 2017 and, therefore, that all management fees paid after that date must

[2] The monthly management fee, which had started at $4,500, had increased to $5,074 per month by the end of the initial term pursuant to paragraph 2 of the Final Agreement.

be credited against the purchase price; (3) a declaration that KPI must accept the option; (4) a declaration that KPI waived the requirement to transfer the liquor license; and (5) an order requiring Mr. Kolper and Mrs. Kolper, "as record owners of the property . . . to effectuate the transfer of the property to Birroteca at closing." In the counts for breach of contract, fraud, and negligent misrepresentation, Birroteca requested monetary damages and an award of attorney's fees and costs.

Trial Testimony

At trial, it was undisputed that (1) Mr. Kolper signed the Final Agreement on behalf of KPI, (2) Mrs. Kolper played no role in any of the transactions at issue,[3] (3) KPI does not, and never did, own the Property, (4) Birroteca never transferred the liquor license, and (5) other than the liquor license issue, Birroteca's other defaults under the agreement were cured timely.[4]

As relevant to this appeal, the primary points of factual disagreement at trial concerned whether KPI and Mr. Kolper misrepresented the true ownership of the Property and whether Birroteca justifiably relied on any such misrepresentation. Messrs. Haas and Knorr both testified that until recently, they understood that KPI owned the Property, not

[3] Mr. Kolper explained that he has "complete control over [KPI]," that "[n]obody else can speak for [KPI] but" him, and that "[Mrs. Kolper] has never been a party to this." Birroteca conceded that Mrs. Kolper was not involved with KPI or Mr. Kolper's dealings with Birroteca.

[4] Jasmine Moore, another part-owner of Birroteca and its controller, testified that Birroteca had bounced three checks, one for a monthly management fee and two written for taxes, but that all three had been cured within the 15-day cure period. The Kolper Parties did not dispute that these defaults had been timely cured.

the Kolpers. Pinning the blame for that erroneous understanding on KPI and Mr. Kolper, they pointed to the first recital in the Final Agreement, which expressly identified KPI as the "owner and operator of real property" on which the business was located. Although they acknowledged that Birroteca had drafted that specific language, Mr. Knorr testified that it was intended as a clarification and to be consistent with the option-to-purchase provision. Mr. Haas testified that he observed Mr. Kolper read through the entire Final Agreement before signing it without objection.

According to Mr. Knorr, the option-to-purchase provision was one of the "key terms" of the agreement for Birroteca and the subject of negotiation. Although KPI agreed to some changes to that provision, as reflected in the Final Agreement, it rejected others, including Birroteca's request to credit a portion of the monthly management fee to the purchase price if it were to exercise the option. According to Mr. Knorr, Birroteca did not investigate the actual ownership of the Property at that time because they had no reason to believe that Mr. Kolper was misleading them when "[h]e represented that [KPI] was giving us an option to purchase. . . . I mean, he had obviously had cased the building. His name was on it. He represented that he was signing for [KPI]."

Mr. Kolper testified that he did not notice that the first recital had been changed to state specifically that KPI owned the Property before he signed the Final Agreement. He admitted, however, that he was aware of the option-to-purchase provision, as well as that KPI did not own the Property and had no legal right to sell it, at the time he signed the Final Agreement. He did so anyway, he claimed, because it was his intent that if Birroteca

properly exercised the option-to-purchase provision, he "would talk to [Mrs. Kolper] to agree to mutually sell the property." When that time came, however, he believed that Birroteca was in default and so had forfeited its right to exercise the option. Mr. Knorr and Ms. Moore disputed that, claiming that Mr. Kolper had told them that the reason he did not want to sell the Property at the price stated in the Final Agreement was that "the property was worth more" now than it was when they signed the Final Agreement and he "ha[d] somebody that will pay a lot more for it."

In addition to making the case that he intended to honor the option if properly exercised, Mr. Kolper also testified that he presented two documents to Birroteca before the Final Agreement was signed that identified the Kolpers, not KPI, as owners of the Property. First, Mr. Kolper testified that the "Cell tower lease and easement" referred to in paragraph 14 of the Final Agreement was in front of the parties and executed at the same time as the Final Agreement. Messrs. Haas and Knorr, by contrast, testified that the document was not presented to Birroteca with the Final Agreement and was not signed until years later.[5]

Second, Mr. Kolper testified that, at Mr. Haas's request, he provided Mr. Haas with a copy of the most recent tax bill for the Property at the same time he provided the Draft

[5] Mr. Knorr testified at trial that he did not see the cell tower lease and easement until approximately two years after the Final Agreement was executed. Mr. Knorr pointed out that the document misspelled the name of his business—"Barroteca"—as support for his recollection that it was not part of the Final Agreement the parties had negotiated. On cross-examination, the Kolper Parties' attorney attempted to impeach Mr. Knorr with his statement at deposition that the document was signed "[w]ithin a few months" of the Final Agreement. Mr. Knorr maintained that his trial testimony was correct.

Agreement, and that the tax bill identified Mr. and Mrs. Kolper as the Property owners. The Kolpers' son, Joshua Kolper, testified that he was at the meeting and corroborated Mr. Kolper's claim. Mr. Haas, however, denied that he had ever asked for or received a property tax bill before entering the Final Agreement and also denied that anyone was present at that meeting other than himself and Mr. Kolper.[6]

Mr. Haas's and Mr. Kolper's testimony also conflicted with respect to their course of dealing regarding the liquor license for the premises. Mr. Haas testified that shortly after the Final Agreement was executed, he and Mr. Kolper agreed to put the liquor license transfer "on hold" so that the restaurant could begin operations sooner. The agreement, he asserted, was that Birroteca would handle the renewal paperwork and pay the costs, but that Mr. Kolper would sign the paperwork and keep the license in his name.[7] As evidence of the agreement, Birroteca introduced the five most recent liquor license renewal applications, all submitted after the Final Agreement was entered and all signed by Mr. Kolper. Mr. Kolper did not deny signing the renewal paperwork or that Birroteca had paid for the renewals, but he denied entering any agreement to proceed in that manner. To the contrary, he testified that he informed Mr. Haas that Birroteca was in default of its

[6] Ms. Moore, the Birroteca controller, testified that after entering the Final Agreement, Birroteca received the water and tax bills by e-mail and then forwarded payment to Mr. Kolper. Ms. Moore acknowledged that the names on the bills were those of Mr. and Mrs. Kolper, but stated that she did not know whether that was because they were the owners, presumably as opposed to contacts. In any event, Birroteca did not receive those bills until after the Final Agreement was entered.

[7] According to Mr. Haas, they learned that it would have been impossible to transfer the liquor license within 90 days, so they proceeded by agreement with a solution that allowed the restaurant to open sooner.

obligation to transfer the liquor license both verbally and through certified letters sent in November and December 2012. Mr. Kolper did not produce copies of any such letters.

The Circuit Court's Opinion and Order

On April 18, 2018, the circuit court issued a written opinion and order. The court first addressed Birroteca's request for a declaratory judgment. The court rejected the Kolper Parties' contention that Birroteca was in default for failing to transfer the liquor license, concluding that Mr. Kolper affirmatively waived that default "when he agreed to and executed annual renewal paperwork for his liquor license for the last five years" and made no attempt to terminate the agreement.[8] Because Birroteca's other defaults were timely cured and it had "timely and properly notified KPI" of its intent to exercise its purchase option, the court concluded that "Birroteca is entitled to declaratory judgment against the Defendants."

For essentially the same reasons, the court then concluded that KPI had breached its contract with Birroteca by failing to sell the Property. The court found that "Mr. Kolper was fully aware of the terms of the contract, and it wasn't until he realized the success of the restaurant that he refused to sell the property to Birroteca." The court concluded that KPI had suffered damages as a result of the breach in that (1) it had to continue paying the management fee and (2) still did not own the Property.

[8] The circuit court also rejected a notice defense raised by the defendants that is not at issue on appeal.

Turning to fraud and negligent misrepresentation, the court found that "Birroteca reasonably relied on Defendants' misrepresentations as to the true owner of the property." The court found that "Mr. Kolper asserted that KPI owned the property" while knowing that it did not, that Mr. Haas believed that KPI owned the Property and "justifiably relied on Mr. Kolper's assertions," and that "Birroteca should not be penalized because Mr. Kolper did not disclose a material fact in the Final Agreement."

Summarizing, the court concluded that it "must enter a declaratory judgment against KPI, Mr. David Kolper, and Mrs. Constance Kolper, order that they sell the property to Plaintiff Birroteca within 45 days of the date of the order, and order the transfer of the liquor license to Birroteca within the same time frame." The court then issued a written order containing the following clauses:

> **ORDERED** that DECLARATORY JUDGMENT be and is hereby **GRANTED** for Plaintiff and AGAINST Defendants; and it is further,
>
> **ORDERED** that Defendants sell the subject-matter property to the Plaintiff; and it is further,
>
> **ORDERED** that Defendants transfer the subject-matter liquor license to the Plaintiff; and it is further,
>
> **ORDERED** that money JUDGMENT in the amount of $42,619.36 be entered for Plaintiff and against Defendants for breach of contract, fraud, and negligent misrepresentation.

The court did not specify which defendants were liable on which causes of action or enter a separate declaratory judgment.

The Kolper Parties appealed.

DISCUSSION

"When an action has been tried without a jury, [we] will review the case on both the law and the evidence." Md. Rule 8-131(c). We "will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses." *Id.* So long as "any competent material evidence exists in support of the trial court's factual findings, those findings cannot be held to be clearly erroneous." *Fischbach v. Fischbach*, 187 Md. App. 61, 88 (2009) (quoting *Figgins v. Cochrane*, 403 Md. 392, 409 (2008)). When we review "mixed questions of law and fact, 'we will affirm the trial court's judgment when we cannot say that its evidentiary findings were clearly erroneous, and we find no error in that court's application of the law.'" *Fischbach*, 187 Md. App. at 88 (quoting *Conrad v. Gamble*, 183 Md. App. 539, 551 (2008)). We review legal questions for correctness without deference to the trial court's determination. *Fischbach*, 187 Md. App. at 88.

I. THE CIRCUIT COURT ENTERED JUDGMENT FOR BREACH OF CONTRACT AGAINST ONLY KPI AND FOR FRAUD AND NEGLIGENT MISREPRESENTATION AGAINST ONLY KPI AND MR. KOLPER.

The Kolper Parties' first assignments of error appear to be premised more on a misunderstanding than a disagreement. The Kolper Parties interpret the circuit court's order as entering judgment on claims (1) that Birroteca either never made (breach of contract against Mr. and Mrs. Kolper) or expressly dropped (fraud and negligent misrepresentation claims against Mrs. Kolper) and (2) as to which no supportive evidence was introduced. Read in isolation, the court's order—which enters judgment "for Plaintiff

and against Defendants for breach of contract, fraud, and negligent misrepresentation"—supports the Kolper Parties' contention.

As Birroteca responds, however, that is not a reasonable interpretation of the order when it is read in context with the court's memorandum opinion. Indeed, as Birroteca notes, the court's opinion identifies a breach only by KPI and notes expressly that Birroteca had agreed to dismiss its claims of fraud and negligent misrepresentation against Mrs. Kolper. Reading the entirety of the court's opinion and order, we do not believe that the court intended to enter judgment against Mrs. Kolper for fraud and negligent misrepresentation or against either Mr. or Mrs. Kolper for breach of contract.[9] In any event, the parties agree that the record does not support such judgments. We will affirm the circuit court's liability determination as to breach of contract against only KPI and as to fraud and negligent misrepresentation against only KPI and, as explained further below, Mr. Kolper.

II. THE CIRCUIT COURT ERRED IN ORDERING MRS. KOLPER TO SELL THE PROPERTY.

The Kolper Parties next contend that the circuit court erred in entering a declaratory judgment against Mrs. Kolper and ordering her to sell the Property to Birroteca. Birroteca responds that the court was justified in doing both because she, as part owner of the Property, was a necessary party to any sale of it. Birroteca's argument betrays a

[9] To be sure, the opinion also contains some statements that are less clear on these points, including headings that "Defendants breached the express terms of the Final Management Agreement . . ." and "Defendants committed fraud and negligent misrepresentation . . . ." Read as a whole, however, we agree with Birroteca that the court did not intend its holdings as to breach of contract, fraud, and negligent misrepresentation to include all three defendants.

fundamental misunderstanding about the nature of a declaratory judgment action. Such an action provides a mechanism by which a court may identify and declare the existing rights and obligations of the parties, not create new rights and obligations.

Declaratory judgments are authorized through the Maryland Uniform Declaratory Judgments Act. Md. Code Ann., Cts. & Jud. Proc. §§ 3-401 – 3-415 (Repl. 2013; Supp. 2018). They are used "to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." Cts. & Jud. Proc. § 3-402. Section 3-406 of the Courts and Judicial Proceedings Article provides that

> Any person interested under a deed, will, trust, land patent, written contract, or other writing constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, administrative rule or regulation, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, administrative rule or regulation, land patent, contract, or franchise and obtain a declaration of rights, status, or other legal relations under it.

The Act thus provides a right to obtain a determination regarding rights and obligations under existing law, including those based on deeds, wills, contracts, statutes, and regulations. It is not itself a source of substantive legal rights. Thus, a circuit court may enter a declaratory judgment only "if it will 'terminate the uncertainty or controversy giving rise to the proceeding' where an actual or imminent controversy exists . . . ." *MBC Realty, LLC v. Mayor and City Council of Balt.*, 403 Md. 216, 230 (2008) (quoting Cts. & Jud. Proc. § 3-409). "A pre-requisite to declaratory relief is the existence of a justiciable controversy." Paul Mark Sandler & James K. Archibald, *Pleading Causes of Action in Maryland* § 7.9, at 698 (5th ed. 2013).

Section 3-405 of the Courts and Judicial Proceedings Article requires that any "person who has or claims any interest which would be affected by the declaration" be "made a party" to the action. *See also Maryland-National Capital Park & Planning Comm'n v. Washington Nat'l Arena*, 30 Md. App. 712, 715 (1976) ("[I]n an action for a declaratory judgment, all persons interested in the declaration are necessary parties.") (quoting *Williams v. Moore*, 215 Md. 181, 185 (1957)). This provision requires the joinder of necessary parties to the declaratory judgment action so that they have the opportunity to protect their interests and to ensure that the entire controversy is resolved at once. *See Bender v. Sec'y, Maryland Dept. of Pers.*, 290 Md. 345, 350-51 (1981) ("One purpose of [§ 3-405] is to assure that a person's rights are not adjudicated unless that person has had 'his day in court.' This rule also prevents multiplicity of litigation by assuring a determination of the entire controversy in a single proceeding."). Just as with the requirement to join necessary parties under Rule 2-211(a),[10] § 3-405 does not expand the scope of the relief a court may provide beyond a declaration of the "rights, status, or other legal relations" of the parties.

Here, the circuit court's order exceeds the bounds of relief available under the declaratory judgment statute by ordering relief against Mrs. Kolper in spite of the fact that no party even identified, much less proved, any legal basis for doing so. Birroteca never

[10] "[T]here is no difference in the rule as to necessary parties between a declaratory judgment proceeding and any other proceeding in personam." *Gardner v. Board of County Comm'rs of St. Mary's County*, 320 Md. 63, 76 (1990) (quoting *Maryland Naturopathic Ass'n v. Kloman*, 191 Md. 626, 631 (1948)).

asserted a breach of contract claim against Mrs. Kolper and it expressly dropped its claims against her for fraud and negligent misrepresentation. The record is devoid of any basis for finding an obligation by Mrs. Kolper that is grounded in contract, statute, rule, regulation, will, deed, or any other source of law or obligation that could form the basis for a declaratory ruling against her.

Birroteca argues that the court did not err in ordering Mrs. Kolper to sell her interest in the Property because, it asserts, she is a "necessary party" in light of her ownership interest in the Property. Although it is undoubtedly true that Mrs. Kolper is a necessary party to any legal action seeking to divest her of her interest in the Property, that necessity does not obviate the requirement that Birroteca prove a legal right to divest her of that interest. Stated differently, Birroteca would only be entitled to a declaration that Mrs. Kolper has an obligation to sell her interest in the Property if it could prove that she has a legal obligation to do so. It is not enough for Birroteca to prove that others—here, Mr. Kolper and KPI—have that obligation, or that those others cannot provide the relief Birroteca seeks. Birroteca never attempted to establish a legal basis for its claim for relief against Mrs. Kolper, nor did the court identify one. As a result, we must vacate the court's entry of declaratory judgment and its order to sell the Property and the liquor license to Birroteca.

For guidance on remand, we also observe that the court, in ruling on Birroteca's request for declaratory relief, is required to declare the rights and obligations of the parties in a separate document. "[W]hether a declaratory judgment action is decided for or against

the plaintiff, there should be a declaration in the judgment or decree defining the rights of the parties under the issues made." *Bowen v. City of Annapolis*, 402 Md. 587, 608 (2007) (quoting *Case v. Comptroller*, 219 Md. 282, 288 (1959)). When a court intends to enter a declaratory judgment, "the court must, in a separate document, state in writing its declaration of rights of the parties, along with any other order that is intended to be part of the judgment." *Secure Fin. Serv., Inc. v. Popular Leasing USA, Inc.*, 391 Md. 274, 281 (2006) (quoting *Allstate v. State Farm*, 363 Md. 106, 117 n.1 (2001)); *see also* Md. Rule 2-601(a)(1) (mandating that "[e]ach judgment shall be set forth on a separate document . . . ."). "[T]he terms of the declaratory judgment itself must be set forth separately" from any memorandum, "[a]lthough the judgment may recite that it is based on the reasons set forth in an accompanying memorandum . . . ." *Allstate*, 363 Md. at 117 n.1.

Here, the court's order states that Birroteca's request for declaratory relief is granted, but it does not include any statement identifying the rights and obligations of the parties. On remand, the court must issue an order, separate from any memorandum opinion, that declares the rights and obligations of each of the parties with respect to the Property and the purchase option of the Final Agreement. Consistent with this opinion and the court's decision below, that declaration should include at least the following: (1) any default by Birroteca under the Final Agreement was either timely cured or waived by KPI; (2) Birroteca properly and timely exercised its option to purchase the Property; (3) KPI has a contractual obligation to sell the Property to Birroteca under the terms set forth in paragraph 43; (4) KPI breached the Final Agreement by failing to convey the Property to

Birroteca; and (5) Mrs. Kolper is not legally obligated to sell her interest in the Property to Birroteca.

III. THE CIRCUIT COURT'S FACTUAL FINDINGS UNDERLYING ITS JUDGMENT IN FAVOR OF BIRROTECA AS TO FRAUD ARE NOT CLEARLY ERRONEOUS.

Finally, the Kolper Parties assert that the trial court's "factual findings regarding the elements of fraud" were clearly erroneous and require reversal. We disagree.[11]

To prevail on a claim of fraud, the claimant must prove by clear and convincing evidence, that: (1) "the defendant made a false representation to the plaintiff"; (2) "its falsity was either known to the defendant or that the representation was made with reckless indifference as to its truth"; (3) "the misrepresentation was made for the purpose of defrauding the plaintiff"; (4) "the plaintiff relied on the misrepresentation and had the right to rely on it; and" (5) "the plaintiff suffered compensable injury resulting from the misrepresentation." *Ellerin v. Fairfax Sav., F.S.B.*, 337 Md. 216, 229 (1995) (quoting *Nails v. S & R*, 334 Md. 398, 415-16 (1994)). "The recipient of a fraudulent misrepresentation of fact is justified in relying upon its truth, although he might have ascertained the falsity of the representation had he made an investigation." *Rozen v. Greenberg*, 165 Md. App. 665, 677 (2005) (quoting *Restatement (Second) of Torts* § 540). "The exception to this

[11] The Kolper Parties assert in a footnote that although they do not agree that negligent misrepresentation applies to the relationship between Birroteca and KPI, which was governed by a contract, they have made a strategic choice not to challenge separately the court's judgment for negligent misrepresentation because "this Court's finding as to the validity of the fraud judgment will be determinative as to both counts." In light of their decision not to make that challenge, we will not address it, except to note that it would not apply to the claim for negligent misrepresentation against Mr. Kolper, who was not a party to the Final Agreement.

general rule arises when, 'under the circumstances, the facts should be apparent to [a person of the plaintiff's] knowledge and intelligence from a cursory glance or he has discovered something which should serve as a warning that he is being deceived . . . ." *Rozen*, 165 Md. App. at 677 (quoting *Gross v. Sussex Inc.*, 332 Md. 247, 269 (1993) (alteration in *Rozen*). "[M]ere vague, general, or indefinite statements . . . should, as a general rule, put the hearer upon inquiry, and there is no right to rely upon such statements." *Goldstein v. Miles*, 159 Md. App. 403, 436 (2004) (quoting *Fowler v. Benton*, 229 Md. 571, 579 (1962)).

The question of whether the record supports the trial court's conclusion that Birroteca presented clear and convincing evidence that KPI and Mr. Kolper committed fraud is not a close one. Construing the evidence in the light most favorable to the prevailing party, as we must, *Clickner*, 424 Md. at 266, the record contains evidence to support each element of Birroteca's fraud claim. First, Birroteca presented evidence from which a trier of fact could conclude that Mr. Kolper, acting on behalf of KPI, made the false representation that KPI owned the Property: (1) implicitly, by presenting Birroteca with the Draft Agreement, which designates KPI as "Owner" and gives Birroteca "the option to purchase the building and its contents located on the property . . . complete with business located therein . . ."; and (2) expressly, by reviewing and then executing the Final Agreement, which contains an express representation that KPI "is the owner and operator of [the Property]."

Second, Mr. Kolper admitted that at the time he presented the Draft Agreement and signed the Final Agreement, he knew that KPI did not own the Property. Third, the court could reasonably infer from Mr. Kolper's actions, as they were described by Messrs. Haas and Knorr, that he made the misrepresentations with the fraudulent intent of inducing Birroteca to enter the Final Agreement. Fourth, Birroteca presented evidence—including Mr. Knorr's testimony as to the importance to Birroteca of the option-to-purchase provision—from which the court could reasonably conclude that Birroteca justifiably relied on the misrepresentations in entering the Final Agreement. Fifth, Birroteca proved that it suffered damages, including having to continue paying management fees and being denied ownership of the Property. That is enough to sustain the court's judgment.

The Kolper Parties argue that the circuit court's judgment on the fraud count must be reversed because it was based on three clearly erroneous factual determinations: (1) "when Mr. Haas initially inquired about the property, Mr. Kolper asserted that KPI owned the property," (2) "Mr. Kolper failed to disclose that he and his wife were the true owners of the property and not KPI," and (3) "Mr. Haas reasonably relied on this misrepresentation." We review each in turn.

With respect to the finding that "when Mr. Haas initially inquired about the property, Mr. Kolper asserted that KPI owned the property," the Kolper Parties maintain that no witness testified to any conversation in which Mr. Kolper provided that specific response. We do not interpret the circuit court's finding as narrowly as the Kolper Parties do. The court's statement identifies an initial inquiry "about the property" by Mr. Haas,

which all parties acknowledge occurred, and a response by Mr. Kolper asserting that KPI owned the Property. Although no witness testified that Mr. Kolper made that specific assertion verbally, Messrs. Haas and Knorr just as clearly viewed the Draft Agreement, which was presented at the second or third meeting of the parties, as including at least an implicit representation that KPI owned the Property. Indeed, how could KPI have offered to sell the Property to Birroteca if it did not own the Property? Viewed in the light most favorable to Birroteca, the court's finding is not clearly erroneous.

Moreover, even if we were persuaded that the Kolper Parties are correct to read into the court's finding an inaccurate conclusion that Mr. Kolper's assertion was both verbal and contemporaneous with Mr. Haas's initial inquiry, we would find such an error harmless. That is because the importance of the finding is the court's conclusion that it was Mr. Kolper, not Birroteca, that introduced the representation that KPI owned the Property. The record contains ample support for that. Although the Kolper Parties place great emphasis on the fact that it was Birroteca that altered the first recital paragraph, Mr. Knorr testified that this was merely an attempt to clarify the language and make it consistent with the option-to-purchase paragraph. That testimony is bolstered by (1) provisions KPI included in the Draft Agreement, including the designation of KPI as "Owner" and the option-to-purchase provision and (2) Mr. Haas's testimony that Mr. Kolper read the amended Final Agreement in his presence and then signed it. As a signatory to the contract, Mr. Kolper "is presumed to have read and understood its terms . . . ." *Holloman v. Circuit City Inc.*, 391 Md. 580, 595 (2006).

The Kolper Parties also contend that the court's factual finding that "Mr. Kolper failed to disclose that he and his wife were the true owners of the property and not KPI" is clearly erroneous because they introduced evidence that (1) the Draft Agreement contained a statement in paragraph 44 that identified Mr. Kolper as the "owner," but Birroteca removed that paragraph, (2) Mr. Kolper testified that the cell tower lease and easement, which identified Mr. and Mrs. Kolper as owners of the Property, was signed at the same time as the Final Agreement, and (3) Mr. Kolper and his son both testified that Mr. Haas reviewed a property tax bill identifying Mr. and Mrs. Kolper as owners of the Property before signing the Final Agreement.

Mr. Haas, however, denied ever seeing the cell tower lease and easement or the property tax bill before signing the Final Agreement. The circuit court was under no obligation to believe Mr. Kolper's testimony over that of Birroteca's witnesses. *Johnson v. State*, 142 Md. App. 172, 192 (2002) ("Weighing the credibility of witnesses and resolving any conflicts in the evidence are tasks proper for the fact finder. In performing this role, the fact finder has discretion to decide which evidence to credit and which to reject.") (internal citation omitted). And the statement in paragraph 44, which related to the approval of vendors, was hardly the place one would expect to find a clarification regarding ownership of the Property, especially when (1) the rest of the document identified KPI, not Mr. Kolper, as "Owner," (2) in the immediately preceding paragraph, KPI, the only Kolper Party signatory to the agreement, gave Birroteca an option to purchase the Property, (3) Mr. Kolper was KPI's sole representative, and (4) even under the Kolper

Parties' interpretation of the provision it would still be a misrepresentation, as it omits any mention of Mrs. Kolper. The circuit court's finding that Mr. Kolper failed to disclose the true ownership of the Property was not clearly erroneous.

The third finding the Kolper Parties allege to be clearly erroneous, citing evidence already discussed, is that Mr. Haas reasonably relied on this misrepresentation. For the same reasons already discussed, we disagree. The record contains conflicting testimony regarding whether Messrs. Haas and Knorr relied on Mr. Kolper's misrepresentation and, if so, whether such reliance was justified. Although a different factfinder could have reached the opposite conclusion, the circuit court's finding was not clearly erroneous.

Finally, the Kolper Parties contend that there was no evidence of fraudulent intent on the part of Mr. Kolper because (1) he did not notice the change to the first recital in the Final Agreement and (2) he testified that it was his intent that if Birroteca had exercised the option to purchase the Property at a time when it was not in default, he "would talk to [Mrs. Kolper] to agree to mutually sell the property." Once again, however, the Kolper Parties ask us to resolve disputed evidence in their favor. That is not our role. Although the circuit court could have believed Mr. Kolper's assertion that he did not intend to mislead Birroteca, it was not obligated to do so. Birroteca presented contrary evidence from which the court could, and did, infer that Mr. Kolper intended to defraud Birroteca. *See Tufts v. Poore*, 219 Md. 1, 10 (1959) ("A person's intention or state of mind at any particular time is difficult to prove. A fraudulent pre-existing intent not to perform a promise made cannot be inferred from the failure to perform the promise alone. But, it

may be considered with the subsequent conduct of the promisor and the other circumstances surrounding the transaction in sustaining such an inference.") (internal citation omitted).

CONCLUSION

In light of our decision to vacate the circuit court's order granting declaratory judgment and directing Mr. and Mrs. Kolper to sell the Property to Birroteca, we will also vacate the court's award of damages on the breach of contract, fraud, and negligent misrepresentation counts. That award of damages, measured by the amount of management fees Birroteca had paid KPI between the end of the initial term of the Final Agreement and trial, was clearly premised on the understanding that no further management fees would be paid and no further damages incurred because Mr. and Mrs. Kolper would sell the Property to Birroteca as ordered. That is no longer the case.

On remand, the court should reassess damages in light of our decision. That reassessment will likely occur against the backdrop of one of two scenarios. First, it is possible that Mr. and Mrs. Kolper will now decide to sell the Property to Birroteca on the terms stated in the Final Agreement. As noted, Mr. Kolper testified that it was his intent all along that if Birroteca were to exercise its option properly, he would convince Mrs. Kolper "to mutually sell the property." The circuit court determined that Birroteca's exercise of its option was proper and the Kolper Parties have not challenged that determination on appeal. Thus, it is possible that Mr. and Mrs. Kolper will now decide to

go ahead with the sale. If so, the court will need to determine whether Birroteca has suffered any additional damages as a result of the delay in completing the sale.

Second, if Mr. and Mrs. Kolper do not sell the Property to Birroteca, the court—lacking the power to order Mrs. Kolper to go forward with the sale—will need to determine what damages Birroteca suffered as a result of KPI's breach of the Final Agreement and KPI's and Mr. Kolper's fraud and negligent misrepresentation.

In addition, as discussed above, the court must enter a declaratory judgment setting forth the rights and obligations of the parties, and must do so in a document separate from any memorandum opinion it issues.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED AS TO LIABILITY OF (1) KPI FOR BREACH OF CONTRACT AND (2) KPI AND DAVID KOLPER FOR FRAUD AND NEGLIGENT MISREPRESENTATION. JUDGMENT OTHERWISE VACATED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID 50% BY THE APPELLANTS AND 50% BY THE APPELLEE.