Circuit Court for Montgomery County
Case No. 462653V

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND**

No. 0644

September Term, 2021

QUEENS MANOR GARDENS, LLC

v.

PARK CHARLES OFFICE ASSOCIATES
LLC, ET AL.

Nazarian,
Reed,
Zic,

JJ.

Opinion by Zic, J.

Filed: February 9, 2023

* 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.

** At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

Appellees, Park Charles Office Associates, LLC ("Park Charles Office") and Gallows Manager, LLC ("Gallows Manager"), filed a four-count Amended Complaint against Cathy Bernard and appellant, Queens Manor Gardens, LLC ("Queens Manor"). Appellees sought judgment against Queens Manor for its failure to pay capital call obligations, pursuant to the Park Charles Office Associates, LLC Operating Agreement (the "Operating Agreement"). Queens Manor filed an Amended Counterclaim alleging that appellees breached the Operating Agreement by executing an amendment without its consent, issuing capital calls they did not have the authority to issue, and fraudulently inducing Queens Manor into a refinance transaction.

After a motions hearing, the circuit court granted appellees' motion for summary judgment on Queens Manor's Amended Counterclaim and concluded its claims were barred by the statute of limitations. After a bench trial on appellees' Amended Complaint, the circuit court found in favor of Park Charles Office on its breach of contract claim against Queens Manor because Queens Manor breached the Operating Agreement when it failed to make capital contributions in 2018. In reaching this conclusion, the circuit court found that Queens Manor waived its right to claim that: (1) the capital calls in question were not allowed under the Operating Agreement and (2) that Park Charles breached the Operating Agreement when it executed the First Amendment. The circuit court found in favor of Queens Manor and Ms. Bernard on the remaining counts.

QUESTIONS PRESENTED

Queens Manor presents two questions for our review, which we rephrased and recast as follows:[1]

1. Did the circuit court err in granting appellees' motion for summary judgment on Queens Manor's Amended Counterclaim?

2. Did the circuit court err in finding that Queens Manor had breached the Operating Agreement?

For the reasons that follow, we answer both questions in the negative and affirm the judgment of the circuit court.

BACKGROUND

In 2003, Park Charles Office and Park Charles Apartments Associates, LLC ("Park Charles Apartments") bought a mixed-use "high rise building in downtown Baltimore right off of Charles Street" with commercial, residential, and parking space ("Park Charles Property"). Based on the amount of capital invested in the purchase of the Park Charles Property, the entities agreed upon a 60/40 split whereby 60% of expenses

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[1] Queens Manor phrased the questions presented as follows:

> 1. Did the Circuit Court err in finding that Queens Manor had breached the Park Charles Office Associates LLC Operating Agreement where the Operating Agreement prohibited capital calls to pay the debts and liabilities of Park Charles Office and the capital calls at issue were used to pay Park Charles Office's debts and liabilities?
>
> 2. Did the Circuit Court err in granting Park Charles Office's and Gallows' motion for summary judgment on Queen Manor's Amended Counterclaim when Queens Manor was unaware of the content of the First Amendment until July 2018?

and profits would be attributed to Park Charles Apartments, and 40% would be attributed to Park Charles Office. In 2007, Park Charles Office and Park Charles Apartments appointed Southern Management Corporation ("Southern Management") as the managing agent for the Park Charles Property.

Appellee Park Charles Office's ownership consists of two limited liability members, co-appellee Gallows Manager and appellant Queens Manor. Ms. Bernard is the main interest holder of Queens Manor, holding 86.71% interest in the limited liability company. Since 2003, Park Charles Office has been regulated under the Operating Agreement, outlining the members' "rights and obligations to one another and the Company." The Operating Agreement grants the manager of Park Charles Office "full and complete responsibility for the management of the Company's business," as well as "the right, power, and authority to . . . lease, sell, mortgage, convey, improve, alter, renovate, refinance the property of the Company; to borrow money and execute promissory notes; to secure the same by mortgage upon the Company's property and to convey such Company property." Pursuant to the Operating Agreement, The Gallows Corporation served as the initial manager of Park Charles Office.

At the end of 2003, David Hillman, then-CEO of Southern Management, wrote a letter to all partners explaining the introduction of an online portal on a "website designed and maintained exclusively for partners." Monthly statements, operating reports, and distribution checks were switched from paper to digital form on the website with the goal of giving partners "more detailed information than . . . provided in the past." Ms.

Bernard claimed that although she was aware of the website, she never visited or used the portal.

The Park Charles Office trial balances, which summarized the entity's credits and debits, were prepared and provided by Hillman & Glorioso, PLLC ("Hillman & Glorioso"), Southern Management's accounting firm. In addition to trial balances, Hillman & Glorioso prepared and provided supporting schedules and income, loan, and financial information relating to the Park Charles Office tax returns for the Park Charles Property to both Southern Management and Ms. Bernard.

In 2007, the Park Charles Property was included in a cross-collateralized refinancing (the "2007 Refinance") with 67 other entities, where each entity was "liable for the entire debt pool." Hillman & Glorioso produced the financial statements outlining the details and liabilities of the 2007 Refinance. Another refinancing contract was negotiated in 2012 (the "2012 Refinance").

On November 1, 2012, Southern Management and Park Charles Office's attorney, Steven Michael, contacted Thomas Sippel, Queens Manor's attorney, regarding the 2012 Refinance. The email stated:

> As I have related to you, the Park Charles Apartments are being included in the Southern Management Corporation related pool of properties which will be refinanced by Freddie Mac in December, 2012. Since the financing is being originated under Freddie Mac CME loan program, it will be necessary to replace the current Manager, The Gallows Corporation, with a new special purpose Delaware limited liability company (Gallows Manager, LLC) which must hold a [0].5% equity interest in Park Charles Office Associates,

> LLC, in order for the qualify [sic] as a borrower under this loan program . . . .
>
> * * *
>
> If sufficiently explained, I will furnish you the forms for Queens Manor Gardens, LLC to assign a [0].5% interest and an amendment to the Park Charles Office Associates, LLC Operating Agreement, substituting Gallows Manager, LLC as LLC's Manager and the reallocation of the membership interests to reflect the change from a single member entity.

The Gallows Corporation, Southern Management, and Hillman & Glorioso continued to email and discuss the 0.5% membership interest transfer to Gallows Manager and the required amendment to the Operating Agreement with Queens Manor. The transaction details were also forwarded to Ms. Bernard for her review. In his testimony, Mr. Glorioso agreed that "the lender would not do the loan unless this assignment took place." After Ms. Bernard communicated her questions and concerns, Mr. Sippel forwarded an Assignment Agreement to Mr. Michael as part of the 2012 Refinance. The Assignment Agreement outlined that, as of November 29, 2012, Queens Manor would assign to Gallows Manager "[0].5% membership interest in Park Charles Office Associates, LLC." Ms. Bernard signed the agreement on behalf of Queens Manor. The Assignment Agreement did not address anything regarding amendments to the Operating Agreement.

The First Amendment to the Operating Agreement of Park Charles Office was made effective on December 20, 2012. The First Amendment included substituting The Gallows Corporation with Gallows Manager as the "Managing Member" of Park Charles

Office, as well as the 0.5% transfer of membership interest to Gallows Manager. David Hillman signed the First Amendment as the President of The Gallows Corporation, the sole member of Gallows Manager. No other member of Park Charles Office signed the First Amendment and Queens Manor alleged that it did not see the First Amendment any time prior to 2018. A memorandum titled "IMPORTANT INFORMATION" was sent out to all partners involved in the 2012 Refinance and posted on Southern Management's website for partners upon completion of the 2012 Refinance on January 17, 2013. The memorandum included specific details regarding the terms of the 2012 Refinance such as the interest rate, the prepayment penalty, and the tax implications of the refinance.

According to Hillman & Glorioso, except in 2012 when the 2012 Refinance took place, every year since 2003 the "income from the Park Charles Office was not sufficient to pay its operating expenses and debt service . . . and capital improvements." To operate within this deficit, Southern Management loaned Park Charles Office a sum of money that needed to be repaid. As a result, Southern Management sent capital calls to all investors of the Park Charles Property, including Park Charles Office, to "contribute to the capital of the Company . . . their *pro rata* share (as determined by reference to such Member's interest in the Company) of any and all costs and expenses incurred by the Company in connection with the business and purpose of the Company." Queens Manor paid each capital call made in 2011, 2012, 2014, and 2015.

On June 21, 2018, Suzanne Hillman, the then-current CEO of Southern Management, issued a memorandum informing the Park Charles Property investors that

competitive rental pricing and drastic market changes had raised property expenses, creating a need for more capital contributions. The memorandum included a capital call for a total contribution of $1,400,000 as well as a summary statement indicating $560,000 was owed by Park Charles Office based on the 60/40 split between Park Charles Office and Park Charles Apartments.

A second memorandum was sent out on September 6, 2018, reiterating the June 2018 capital call to all the members of Park Charles Office to reimburse Southern Management for their previous capital contributions. In response to Queens Manor's lack of payment after the September 2018 reminder was sent out, Alexia McClure, counsel for Park Charles Office, Gallows Manager, and Southern Management, reached out to Ms. Bernard stating Queens Manor was in material breach of the Operating Agreement for its failure to contribute its share of the $557,000 June 2018 capital call. Robert A. Snyder, Jr., counsel for Queens Manor, wrote back to Ms. McClure stating that Queens Manor's failure to contribute was a "financial, business and investment decision to stop throwing money into a bottomless pit with respect to a bad investment."

Hillman & Glorioso issued another capital call of an additional $453,720 to Queens Manor on February 15, 2019, for reimbursement of the funds Southern Management allocated the past year on "operating losses, property improvements and principal curtailments on the property loan." This capital call indicated that the Park Charles Property was operating within a deficit of $1,140,000 and that a capital contribution from all investors would be required.

Another capital call memorandum was issued by Hillman & Glorioso on September 23, 2019 to the Park Charles Property investors. The memorandum stated that the Park Charles Property investors would need to contribute $2,200,000 over two payments. The memorandum included a breakdown with $880,000 owed by Park Charles Office but did not indicate the amount for which Queens Manor was responsible.

On September 28, 2020, Gallows Manager issued a capital call to Queens Manor to reimburse Southern Management for previous capital advances in the amount of $2,208,900, an accumulation of past unpaid capital calls, covering "operating shortfalls, unfunded capital calls and refinancing costs."

Appellees Park Charles Office and Gallows Manager filed a four-count Amended Complaint against Ms. Bernard and appellant Queens Manor after Queens Manor's failure to fulfill its capital call obligations under the Operating Agreement. In Counts I and II, appellees alleged that Queens Manor breached the Operating Agreement by failing to pay the 2018 capital call. In Count III, Park Charles Office alleged that Queens Manor and Ms. Bernard fraudulently induced Park Charles Office into agreeing to Queens Manor's transfer of 0.5% interest to Gallows Corporation, the 2012 Refinance, and the First Amendment to the Operating Agreement. Park Charles Office alleged that it relied on Queens Manor's fraudulent misrepresentations that Queens Manor would honor these agreements and that such misrepresentations "proximately . . . caused substantial damages, harm, and losses." In Count IV, Gallows Manager alleged oppression by Queens Manor because Queens Manor failed to pay the 2018 capital calls.

Appellees sought monetary damages for financial loss and equitable relief in the form of expelling Queens Manor as a member of Park Charles Office.

In its Amended Answer, Queens Manor alleged prior material breach as follows:

> Plaintiffs' claims are barred because, on information and belief, Plaintiffs committed a prior breach of the Operating Agreement by expending funds for reasons not solely for the business purpose of the Company. On information and belief, Plaintiffs may have breached the Operating Agreement by investing in, or transferring funds to AAO, LLC, and B-Noteholder, LLC.

Appellant Queens Manor filed an eight-count Amended Counterclaim against Park Charles Office and Gallows Manager. Counts I and II alleged that Park Charles Office and Gallows Manager breached the Operating Agreement by (1) attempting to make material changes to the Operating Agreement absent consent from Park Charles Office members; (2) "transferr[ing] money to, and invest[ing] in, AAO, LLC and B-Noteholder with the LLC Transfers"; and (3) by requiring Queens Manor to fund capital into Park Charles Office when those funds were allegedly not being allocated for business-related purposes by Park Charles Office and Gallows Manager. Queens Manor sought monetary damages from appellees, removal of Gallows Manager as manager of Park Charles Office, and revocation of Gallows Manager's membership interest in Park Charles Office.

Count III alleged that Park Charles Office and Gallows Manager frequently participated in fraud and sought rescission of the Assignment Agreement conveying 0.5% of Queens Manor's membership interest to Gallows Manager. Count IV alleged the same fraud but requested monetary relief.

Count V alleged that the First Amendment was executed in violation of the Operating Agreement and sought judgment declaring the First Amendment as void *ab initio*.

Count VI, as a derivative action against Gallows Manager and on behalf of Park Charles Office, alleged breach of contract. Queens Manor alleged that the First Amendment was executed without its consent and that Queens Manor was fraudulently induced into the 2012 Refinance and the Assignment Agreement.

Counts VII and VIII alleged that Gallows Manager owed fiduciary duties to Queens Manor and that these duties were breached for the same reasons outlined in Count VI. Count VII sought damages from Gallows Manager and Count VIII sought damages from Park Charles Office.

On November 20, 2020, Park Charles Office and Gallows Manager filed a Motion for Summary Judgment against Queens Manor on all counts of the Amended Counterclaim pursuant to Maryland Rule 2-501. Park Charles Office and Gallows Manager's rationale for summary judgment can be summarized as the following: (1) the statute of limitations and doctrine of laches bars Queens Manor's claims for each of its alleged counts; (2) appellees made no fraudulent misrepresentations or omissions during the 2012 Refinance; (3) Queens Manor was aware in November 2012, before the 2012 Refinance took place, that an amendment to the Operating Agreement was needed to execute the Refinance; and (4) Gallows Manager's transfer of capital to AAO, LLC and

B-Noteholder, LLC "was disclosed in [Southern Management]'s January 2013 Memorandum of 'IMPORTANT INFORMATION.'"

Regarding the membership interest in AAO, LLC and B-Noteholder, LLC, Park Charles Office and Gallows Manager argued that Queens Manor had received information through David Hillman regarding the prepayment premiums as well as the transfer of capital to AAO, LLC and B-Noteholder, LLC. Hillman & Glorioso claimed to have also relayed information regarding their 2012 Trial Balance to Ms. Bernard detailing information on the 2012 Refinance as well as the debt accrued on the property, the prepayment penalty amount, and the approximate loan expense for the 2012 Refinance. Park Charles Office and Gallows Manager further stated that Queens Manor's allegation of fraud on the Operating Agreement Amendment was unfounded because Queens Manor was aware in November 2012, prior to the 2012 Refinance, that an amendment to the Operating Agreement was necessary for the 2012 Refinance to take place.

Queens Manor's response to the Motion for Summary Judgment can be summarized as follows: (1) Park Charles Office and Gallows Manager inaccurately asserted that Queens Manor had the knowledge and "necessary information regarding the 2012 Refinance and related transaction" without support by the record evidence; (2) material facts as to whether Queens Manor had knowledge remained in dispute and thus summary judgment was not appropriate; (3) Park Charles Office and Gallows Manager were "not entitled to summary judgment as a matter of law" because the counterclaims

were "claims in recoupment, which are not subject to the general three-year limitations period"; and (4) "the limitations period [was] tolled by the continuation of events doctrine and the statutory fraud exception" under § 5-203 of the Courts & Judicial Proceedings Article.

On the Motion for Summary Judgment, the circuit court ruled that "there are no genuine issues of material fact with respect to the claims pled in the [A]mended [C]ounterclaim" and that "the claims pled are barred by the three-year statute of limitations." The circuit court found that the events surrounding Queens Manor's claims "were either known or knowable well more than three years before the [C]ounterclaim was filed." Furthermore, the circuit court was not persuaded by Queens Manor's tolling of the statute of limitations argument under § 5-203 of the Courts & Judicial Proceedings Article "about how the so-called fraud kept the plaintiff in ignorance of their cause of action, how the fraud was discovered, [and] why there was a delay in discovering the fraud." Thus, the circuit court granted Park Charles Office and Gallows Manager's Motion for Summary Judgment on all counts of Queens Manor's Amended Counterclaim.

A bench trial took place from February 22, 2021 through March 1, 2021. The circuit court found that Queens Manor breached the Operating Agreement by failing to pay the 2018 capital calls. The circuit court also held that Queens Manor waived its right to claim that the capital calls were impermissible because Queens Manor had paid previous capital calls. Similarly, the circuit court held that Queens Manor waived its

right to claim a defense of prior breach by Park Charles Office because Queens Manor did not request a copy of the First Amendment until 2016. On June 10, 2021, the circuit court ordered judgment to be entered in favor of appellees in the amount $2,208,900 on Count I. Judgment was entered against Queens Manor but in favor of Ms. Bernard. On Count II, seeking equitable relief for breach of contract, judgment was entered in favor of Queens Manor. On Count IV for member oppression, judgment was entered in favor of Queens Manor.

A Second Amended Judgment Order was signed on July 8, 2021, that indicated judgment in favor of Queens Manor and Ms. Bernard on Count III of Plaintiff's Amended Complaint for fraudulent misrepresentation and omission.

This timely appeal followed.

DISCUSSION

Queens Manor challenges the circuit court's judgment, arguing that it erred in granting summary judgment against Queens Manor on its Amended Counterclaim and in finding that Queens Manor breached the Operating Agreement. For the following reasons, we affirm the circuit court's judgments.

I. THE CIRCUIT COURT DID NOT ERR IN GRANTING APPELLEES' MOTION FOR SUMMARY JUDGMENT ON QUEENS MANOR'S AMENDED COUNTERCLAIM.

The Supreme Court of Maryland (at the time named the Court of Appeals of Maryland)[2] has set forth the appropriate standard of review in cases where the circuit court grants summary judgment:

> We review the [c]ircuit [c]ourt's grant of summary judgment as a matter of law. *Goodwich v. Sinai Hosp. of Balt., Inc.*, 343 Md. 185, 204 (1996) ("The standard of review for a grant of summary judgment is whether the trial court was legally correct." (citation omitted)). Before determining whether the [c]ircuit [c]ourt was legally correct in entering judgment as a matter of law in favor of [appellees], we independently review the record to determine whether there were any genuine disputes of material fact. *Hill v. Cross Country Settlements, LLC*, 402 Md. 281, 294 (2007). A genuine dispute of material fact exists when there is evidence "upon which the jury could reasonably find for the plaintiff." *Beatty v. Trailmaster Prods., Inc.*, 330 Md. 726, 739 (1993) (citation omitted). "We review the record in the light most favorable to the nonmoving party and construe any reasonable inferences that may be drawn from the facts against the moving party." *Myers v. Kayhoe*, 391 Md. 188, 203 (2006) (citation omitted).

Windesheim v. Larocca, 443 Md. 312, 326 (2015). Appellate courts "ordinarily may uphold the grant of summary judgment only on the grounds relied on by the trial court." *Ashton v. Brown*, 339 Md. 70, 80 (1995).

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[2] At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022. *See also* Md. Rule 1-101.1(a) ("From and after December 14, 2022, any reference in these Rules or, in any proceedings before any court of the Maryland Judiciary, any reference in any statute, ordinance, or regulation applicable in Maryland to the Court of Appeals of Maryland shall be deemed to refer to the Supreme Court of Maryland . . . .").

A. Motion to Dismiss Appeal

In response to Queens Manor's appeal, Park Charles Office and Gallows Manager filed a motion to dismiss the appeal regarding the circuit court's decision to grant summary judgment against Queens Manor on the Amended Counterclaim. Queens Manor agreed that Counts II, VI, and VIII should be dismissed as moot because Queens Manor has since abandoned its membership interest in Park Charles Office. Maryland Rule 8-602(c)(8) permits this court to dismiss part of an appeal when "the case has become moot." As such, Queens Manor's appeals for Counts II, VI, and VIII are dismissed.

B. The Circuit Court Did Not Err When It Granted Summary Judgment.

Queens Manor argues that the circuit court erroneously granted appellees' Motion for Summary Judgment because the record indicated a dispute of material facts. Further, Queens Manor argues the circuit court incorrectly concluded that it was placed on inquiry notice and such a determination is one for the fact finder and inappropriate for summary judgment.

Park Charles Office and Gallows Manager argue that summary judgment was proper because the facts material to when Queens Manor's cause of action accrued were not in dispute. Appellees argue that Queens Manor was undisputedly on inquiry notice when it received the 2012 Trial Balance and other documents showing the share of the loan, the total loan amount, the prepayment, and the loan cost. Appellees argue that even

if Queens Manor never received the proposed amendment to the Operating Agreement, Queens Manor knew it did not receive it in 2012.

According to § 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." Pursuant to the discovery rule, a cause of action accrues, and the limitations begin to run, when a claimant is on notice. *Est. of Adams v. Cont'l Ins. Co.*, 233 Md. App. 1, 25 (2017). A claimant is on notice when the claimant "knew or reasonably should have known of the wrong." *Poffenberger v. Risser*, 290 Md. 631, 636 (1981). When a claimant should have known of the wrong, the claimant is considered to have been on inquiry notice of the wrong. *Id.* at 637. Inquiry notice occurs "when a [claimant] gains knowledge sufficient to prompt a reasonable person to inquire further" and "a reasonably diligent inquiry would have disclosed whether there is a causal connection between the injury and the wrongdoing." *Ga.-Pac. Corp. v. Benjamin*, 394 Md. 59, 89-90 (2006) (citations omitted).

"When a cause of action accrues is usually a legal question for the court." *Moreland v. Aetna U.S. Healthcare, Inc.*, 152 Md. App. 288, 296 (2003). "Depending on the nature of the assertions being made with respect to the limitations plea, th[e] determination [of whether the action is barred] may be one solely of law, solely one of fact, or one of law and fact." *Id.* (quoting *Poffenberger*, 290 Md. at 634). Therefore, a question of accrual can be determined by the judge. *Est. of Adams*, 233 Md. App. at 37.

When there are no disputes of material fact that require remand to a fact finder, summary judgment is appropriate and can be affirmed by this Court. *Id.* (affirming grant of summary judgment motion in dismissing claims as time-barred when the appellants could have independently verified important facts that would give rise to their claim because appellants knew they did not receive all available insurance proceeds).

Here, Queens Manor was on inquiry notice of its claims because it had knowledge that would have prompted a reasonable person to investigate. All of Queens Manor's claims derive from the 2012 Refinance and the First Amendment to the Operating Agreement. Although Queens Manor argues it did not know about the refinancing or the First Amendment, it did not dispute that it received the 2012 Trial Balance. The 2012 Trial Balance disclosed the amounts and descriptions of the 2012 Refinance transactions. Additionally, Queens Manor was sent a memorandum on January 17, 2013 that included specific details regarding the terms of the 2012 Refinance such as the interest rate, the prepayment penalty, and the tax implications of the refinance.

Similarly, Queens Manor did not dispute that it knew an amendment to the Operating Agreement, which would require Queens Manor to give up some ownership in Park Charles Office, was required to complete the refinancing. Queens Manor did not dispute that it knew in 2012 that it gave up a percentage of Park Charles Office. A reasonable person would have investigated after realizing that the terms of the previously suggested amendment had occurred, even if it had never seen the amendment. Further, a reasonable investigation would have led Queens Manor to facts surrounding the

amendment and the refinancing in 2012. The undisputed facts show that Queens Manor was on inquiry notice of its claims by 2012. The circuit court correctly found that Queens Manor waited at least "five and a half years to look for an amendment."

1. Recoupment

Queens Manor argues that the three-year statute of limitations did not apply to Queens Manor's Amended Counterclaim because of the doctrine of recoupment. Queens Manor argues that its claims are claims of recoupment because they were brought in response to an underlying adverse action. Additionally, Queens Manor argues that because the counterclaims were brought defensively, they were not barred by the statute of limitations.

Appellees argue that the doctrine of recoupment does not apply to Queens Manor's Amended Counterclaim for three reasons. First, the Amended Counterclaim sought affirmative relief. Second, Queens Manor sought damages from Gallows Manager even though Gallows Manager did not seek damages from Queens Manor. Third, Queens Manor's claim in recoupment did not arise out of the same transaction that gave rise to appellees' complaint.

Recoupment is "a diminution or a complete counterbalancing of the adversary's claim based upon circumstances arising out of the same transaction on which the adversary's claim is based." *Cane v. EZ Rentals*, 450 Md. 597, 607 n.8 (2016) (quoting *Imbesi v. Carpenter Realty Corp.*, 357 Md. 375, 380 (2000)). "[A] claim in the nature of a recoupment defense survives as long as the plaintiff's cause of action exists, even if

affirmative legal action upon the subject of recoupment is barred by a statute of limitations." *Imbesi*, 357 Md. at 389 (quoting *Minex Res., Inc. v. Morland*, 467 N.W.2d 691, 699 (N.D. 1991)). When recoupment has been applied to prevent the use of the statute of limitations to bar a claim, the application has been limited to defensive uses. *Imbesi*, 357 Md. at 391. As such, parties cannot seek affirmative relief in claims for recoupment. *Id.* at 388. Additionally, recoupment claims "must arise out of the same transaction that is the subject matter of the plaintiff's action." *Id.* at 389-90 (quoting *Morland*, 467 N.W.2d at 699).

Queens Manor's Amended Counterclaim does not satisfy the requirements for recoupment and cannot, therefore, overcome the application of statute of limitations. First, Queens Manor sought affirmative equitable and declaratory relief as opposed to seeking diminution of recovery. For example, Queens Manor requested relief in the form of an injunction, recission of the Assignment Agreement, monetary damages and voidance of the First Amendment to the Operating Agreement.

Second, Queens Manor's Amended Counterclaim is not a claim for recoupment because it does not arise out of the same transaction as appellees' complaint. Here, appellees' claims are based on events in 2018 when Queens Manor failed to pay capital calls. In contrast, Queens Manor's counterclaims arose in 2012 with regard to the refinancing and amendment to the Operating Agreement. The fact that different claims arise from a business agreement between two parties does not necessitate that the claims arose from same subject matter. *See Finger Lakes Cap. Partners, LLC v. Honeoye Lake*

Acquisition, LLC, 151 A.3d 450, 453-55 (Del. 2016) (holding that a counterclaim was not a claim for recoupment even though it arose from the same general agreement of two parties to do business together when one party's claim arose from the management of portfolio companies and the other party's claim arose from the sale of one of those portfolio companies).

Because Queens Manor sought affirmative relief and its claims did not arise out of the same transaction, Queens Manor's Amended Counterclaim is not a claim in recoupment. Therefore, the statute of limitations applies, and the circuit court correctly dismissed Queens Manor's claims as time-barred.

2. Tolling for Fraud and Continuation of Events

Queens Manor argues that even if the Amended Counterclaim was subject to the statute of limitations, the limitations period was tolled for two reasons. First, Queens Manor argues that the continuation of events doctrine applies here because the parties had a fiduciary relationship. Accordingly, the cause of action did not accrue, and the limitations period did not begin to run, until Queens Manor was on actual notice of facts that would cause an ordinary person to suspect an abuse of that relationship. Second, Queens Manor argues that the fraud exception tolled the statute of limitations. Queens Manor argues that its factual allegations of fraud should have created a sufficient question of material fact to preclude summary judgment.

Appellees argue that because Queens Manor had at least inquiry notice of its claim, the existence of a confidential relationship could not serve to toll the limitations

period. Additionally, appellees argue that in order for the fraud exception to apply, Queens Manor would have had to show a triable issue as to how Park Charles Office and Gallows Manager kept Queens Manor in ignorance of its right of action, how Queens Manor discovered the fraud, why it did not discover the fraud sooner, and what diligence Queens Manor exercised to discover the fraud. Appellees argue that because the record is clear that Queens Manor did not exercise diligence, summary judgment was correct.

Maryland courts have recognized the "'continuation of events' theory, pursuant to which the statute of limitations may be tolled when a confidential or fiduciary relationship exists between the parties." *Fitzgerald v. Bell*, 246 Md. App. 69, 89 (2020) (quoting *Frederick Rd. Ltd. P'ship v. Brown & Sturm*, 360 Md. 76, 97-98 (2000)). A confidential relationship, however, does not eliminate a party's duty to investigate or absolve a party of any knowledge of its claim. *Fitzgerald*, 246 Md. App. at 102-03 (holding the statute of limitations was not tolled when the party had received a copy of a note that indicated payment was due on demand). "The confiding party", in other words, "is under no duty to make inquiries . . . unless and until something occurs to make him or her suspicious." *Frederick Rd.*, 360 Md. at 98.

Section 5-203 of the Courts and Judicial Proceedings Article also provides a basis for which the statute of limitations can be tolled. That section provides: "If the knowledge of a cause of action is kept from a party by the fraud of an adverse party, the cause of action shall be deemed to accrue at the time when the party discovered, or by the exercise of ordinary diligence should have discovered the fraud." Md. Code Ann., Cts. &

Jud. Proc. § 5-203. This Court has stated that, "the complaint relying on the fraudulent concealment doctrine must also contain specific allegations of how the fraud kept the plaintiff in ignorance of a cause of action, how the fraud was discovered, and why there was a delay in discovering the fraud, despite the plaintiff's diligence." *Est. of Adams v. Cont'l Ins. Co.*, 233 Md. App. 1, 42 (2017) (quoting *Doe v. Archdiocese of Wa.*, 114 Md. App. 169, 187 (1997)).

Even if we accept that Queens Manor and Park Charles Office were in a fiduciary relationship, Queens Manor was not permitted to completely sit on its rights once it had knowledge of its claim. Contrary to its assertions, Queens Manor had knowledge of its claims when it received the 2012 Trial Balance and the January 17, 2013 memorandum, and we will not toll the statute of limitations period when a party has knowledge of its claim regardless of its relationship with the other party.

Similarly, even if we assume that appellees intentionally did not inform Queens Manor of the First Amendment, Queens Manor had knowledge of the loan amount increase and the Assignment Agreement which would have informed a reasonable person that the refinancing occurred. Therefore, Queens Manor was on notice and obligated to take steps to investigate if it wanted to exercise its rights. We agree with the circuit court that the record was undisputed that Queens Manor waited "five and a half years to look for an amendment to a $70 million deal."

We hold that Queens Manor was on inquiry notice of its claims when it received the 2012 Trial Balance, the January 17, 2013 memorandum and the Assignment

Agreement. Therefore, neither of the bases for tolling apply here, and the circuit court correctly concluded that Queens Manor's claims are barred by the statute of limitations. Accordingly, we affirm the circuit court's decision to grant summary judgment.

II. THE CIRCUIT COURT DID NOT ERR IN FINDING THAT QUEENS MANOR BREACHED THE OPERATING AGREEMENT.

Maryland Rule 8-131(c) provides the standard for appellate review of bench trials:

> When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It 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.

Maryland appellate courts accordingly adopt a deferential standard when reviewing the sufficiency of the evidence and "[i]f there is any competent material evidence to support the factual findings of the trial court, those findings cannot be held to be clearly erroneous." *YIVO Inst. for Jewish Rsch. v. Zaleski*, 386 Md. 654, 663 (2005) (citing *Solomon v. Solomon*, 383 Md. 176, 202 (2004)). "[W]hether subsequent conduct of the parties amounts to a modification or waiver of their contract is generally a question of fact . . . ." *Hovnanian Land Inv. Grp., LLC v. Annapolis Towne Ctr. at Parole, LLC*, 421 Md. 94, 122 (2011) (quoting *Univ. Nat'l Bank v. Wolfe*, 279 Md. 512, 523 (1977)). Therefore, the circuit court's findings of waiver will only be set aside if the judgment is clearly erroneous. *YIVO*, 386 Md. at 663.

A. The Circuit Court's Finding of Waiver of Prior Breach Is Supported by the Evidence at Trial.

Queens Manor contends that the circuit court should not have granted judgment in favor of appellees because appellees improperly executed the First Amendment. Such improper execution would constitute a prior breach by appellees and would absolve Queens Manor of its obligations under the contract. Appellees argue that the circuit court correctly concluded that Queens Manor waived this argument when it impliedly consented to the First Amendment by not taking any action.

Waiver is "the intentional relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right, and may result from an express agreement or be inferred from circumstances." *Myers*, 391 Md. at 205 (quoting *Creveling v. GEICO*, 376 Md. 72, 96 (2003)). "[A]cts relied upon as constituting a waiver of the provisions of a contract must be inconsistent with an intention to insist upon enforcing such provisions." *Hovnanian*, 421 Md. at 122 (quoting *Gold Coast Mall, Inc. v. Larmar Corp.*, 298 Md. 96, 109 (1983)). A party may also waive a defense of prior breach by failing to assert remedies for that breach. *See Nat'l Sch. Studios, Inc. v. Mealy*, 211 Md. 116, 131 (1956) ("It has been held in this State that one may waive the breach of the contract and later be bound by his election."). "A party's inaction or silence is relevant, especially when that party is silent in response to a breach." *Hovnanian*, 421 Md. at 123 (citing *Jaworski v. Jaworski*, 202 Md. 1, 10 (1953)).

The evidence admitted at trial supports the circuit court's finding that Queens Manor "waived its right to claim that [Park Charles Office] breached the Operating

Agreement by executing the First Amendment without its consent and signature." As discussed above, Queens Manor was on notice and had knowledge of the First Amendment to the Operating Agreement well before appellees brought suit. Even if the execution of the First Amendment was a breach, Queens Manor waived the right to use that as a prior breach defense because it did not take any action until this litigation began and, therefore, waived the breach. The circuit court's decision is afforded deference and we will not reverse its decision without clear error.

Because Queens Manor waived any argument of prior breach by Park Charles Office, the circuit court correctly found in favor of appellees.

B. Queens Manor Did Not Brief the Circuit Court's Finding that Queens Manor Waived Its Ability to Claim that the Capital Calls Were Impermissible.

Queens Manor argues that Section 11.01(b)(xix) of the First Amendment forbids capital calls for the purpose of raising money to pay the debts and liabilities of Park Charles Office. Queens Manor argues that because evidence at trial established the capital calls were made for that purpose, and Park Charles Office offered no evidence that the capital calls were made for a permissible purpose, the circuit court erred in entering judgment in favor of Park Charles Office. Park Charles Office and Gallows Manager argue that neither the Operating Agreement nor the First Amendment prohibit capital calls for the purpose of raising money to pay the debts and liabilities of Park Charles Office. As such, Park Charles Office was allowed to make the capital calls and

the circuit court was correct in finding that Queens Manor breached the Operating Agreement when it failed to pay the capital calls.

With regard to the breach of contract claim, the circuit court stated the following in its written opinion:

> [T]he court concludes that a reasonably prudent person in the same position as the Members of [Queens Manor], that is, an experienced real estate investor, would have easily understood the capital contribution requirements of the Operating Agreement. In addition, the memos accompanying the cash calls made by David Hillman, which stated that Southern Management Corporation intended to use the capital contributions to cover expenses, are nearly identical to the expense items identified by Suzanne Hillman and Frank Glorioso in the memos accompanying their cash calls. By making the capital contributions requested by David Hillman from 2011 to 2015, [Queens Manor] waived its ability to claim that the capital contributions requested by Suzanne Hillman and Frank Glorioso were not allowed under the Operating Agreement.
>
> The court also concludes that, after Cathy Bernard signed the Assignment Agreement, [Queens Manor] knew or should have known about the contents of the First Amendment to the Operating Agreement. In failing to request a copy of the First Amendment until 2016, [Queens Manor] also waived its right to claim that [Park Charles Office] breached the Operating Agreement by executing the First Amendment without its consent and signature.
>
> In sum, the court concludes that the Operating Agreement and the First Amendment were both fully enforceable contracts that, by failing to make the capital contribution requested in June of 2018, [Queens Manor] breached the contract.

In addition to finding that Queens Manor waived its argument that appellees improperly executed the First Amendment, the circuit court also held that Queens Manor

waived its ability to argue that the capital calls Queens Manor failed to pay were impermissible under the terms of the parties' agreements. Queens Manor, however, does not argue in its appellate brief that this conclusion was an error. Therefore, we decline to address it on appeal and uphold the circuit court's ruling that Queens Manor waived its ability to argue that the capital calls were impermissible.[3] *See* Md. Rule 8-504(a)(6) (requiring that a brief contain "[a]rgument in support of the party's position"); *see also Honeycutt v. Honeycutt*, 150 Md. App. 604, 618 (2003) ("We need not address this argument because, by failing to present it in their initial brief, appellants have waived the argument on appeal." (quoting *Bryan v. State Roads Comm'n of State Highway Admin.*, 115 Md. App. 707, 715 n.6 (1997))).

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

[3] Because we uphold the circuit court's finding that Queens Manor waived its ability to argue that the capital calls were impermissible, and the circuit court did not interpret the Operating Agreement and the First Amendment, we need not address the parties' contentions regarding the permissibility of the capital calls or interpret the related provisions of the Operating Agreement and the First Amendment. *See Sutton v. FedFirst Fin. Corp.*, 226 Md. App. 46, 80 n.18 (2015) ("[T]his Court generally will not decide an issue 'unless it plainly appears by the record to have been raised in or decided by the trial court.'") (quoting Md. Rule 8-131(a)).