Circuit Court for Prince George's County
Case No. CAL2016404

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0865

September Term, 2021

UNIVERSITY OF MARYLAND

GLOBAL CAMPUS

v.

HOLDER CONSTRUCTION GROUP, LLC

Wells, C.J.
Leahy,
Ripken

JJ.

Opinion by Ripken, J.

Filed: July 19, 2022

This case arises out of a contract between University of Maryland, Global Campus ("UMGC") and Holder Construction Group, LLC ("Holder") for the renovation of a conference center owned by UMGC.[1] Following defects in the renovation, UMGC filed a claim against Holder for breach of contract seeking to recover approximately $700,000 of costs incurred to remedy the defects. A procurement officer granted UMGC's request. Holder appealed that grant to the State Board of Contract Appeals ("the Board").

During the proceedings before the Board, UMGC filed a motion to compel documents that Holder withheld during discovery as privileged. The Board denied UMGC's motion. The Board then granted summary disposition in favor of Holder, and UMGC filed a petition for judicial review in the Circuit Court for Baltimore City. Holder filed a motion to dismiss the petition for judicial review for improper venue. The Circuit Court for Baltimore City denied Holder's motion to dismiss, but transferred the case to the Circuit Court for Prince George's County. Holder thereafter filed a motion to dismiss the petition as untimely filed in that court. The Circuit Court for Prince George's County denied Holder's motion to dismiss and affirmed the Board's decision granting summary disposition. UMGC filed a timely appeal challenging the Board's denial of its motion to compel and the grant of the motion for summary decision in favor of Holder. Holder also filed a cross-appeal challenging both denials of its motions to dismiss.

[1] At the time of the procurement contract, UMGC was named University of Maryland University College.

ISSUES PRESENTED

As it did in the proceedings below, UMGC argues that the Board erred in its denial of the motion to compel and the grant of summary decision. UMGC presents four questions for our review:

> I. Did the Board err in concluding that Holder's contractual obligations to perform a constructability review and to remedy any defective work were conditioned on UMGC providing written notice of Holder's defective work?
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> II. Did the Board err in determining that there was no genuine dispute of material fact as to whether Holder had been provided contractual notice of its defective work, when there is no dispute that UMGC communicated with Holder for months about problems with the carpet installation prior to remedying the errors itself?
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> III. Did the Board err in determining that documents that were not authored by, sent to, or created at the direction of an attorney were protected from disclosure by the work product doctrine?
>
> IV. Did the Board err in concluding that the work product protection cannot be waived?

Holder also takes issue with the circuit courts' decisions, arguing that the courts should have dismissed the case. Holder presents two questions for our review:

> I. Did the Circuit Court for Baltimore City err in denying Holder's motion to dismiss and transferring the Petition to the Circuit Court for Prince George's County?
>
> II. Did the Circuit Court for Prince George's County err in refusing to dismiss the Petition where it was not timely commenced in the proper venue?

For the reasons to follow, we hold that the Board's grant of summary decision and the Board's denial of the motion to compel were not erroneous. We further hold that the circuit courts for Baltimore City and Prince George's County did not err in denying Holder's

motions to dismiss. We affirm the judgments of the Circuit Court for Prince George's County.

FACTUAL AND PROCEDURAL BACKGROUND

On May 3, 2011, UMGC issued a request for proposals for the renovation of the University of Maryland University College Inn and Conference Center. The Inn and Conference Center was owned by UMGC and managed by Marriott International, Inc. ("Marriott"). Holder submitted its bid, and UMGC selected Holder as the Construction Management at Risk ("CMR")[2] for the project. The two parties entered into a contract dated July 25, 2011.

The relevant contract terms included the following: As CMR, Holder was responsible for installing the selected building materials according to the architect's design specifications. In particular, Holder was responsible for installing new carpet and carpet padding throughout the building. Holder was required to provide pre-construction services in the form of a constructability review to "identify[] design errors and omissions, coordination, and interdisciplinary conflicts in the design" and to improve the design by

[2] COMAR 21.05.10.01B(1) defines CMR as:

> [A] project delivery method wherein a construction manager provides a range of preconstruction services and construction management services which may include, but are not limited to, cost estimation and consultation regarding the design of the project, prequalifying and evaluating trade contractors and subcontractors, awarding the trade contracts and subcontracts, scheduling, cost control, and value engineering.

"Typically, the [CMR] assumes all risk for cost, scheduling, and performance of trade contracts." *Balfour Beatty Constr. v. Maryland Dep't of Gen. Servs.*, 220 Md. App. 334, 342 (2014).

"eliminating added costs and negative effects on the quality of construction." All work was required to conform to the contract requirements. Regarding defective and non-conforming construction, General Conditions ("GC") § 4.08 states:

> Any unacceptable or defective work, whether the result of poor workmanship, use of defective materials, damage through carelessness or any other cause, found to exist shall be removed and replaced by work and materials which shall conform to the contract requirements or shall be remedied otherwise in an acceptable manner authorized by the architect.

Finally, regarding UMGC's remedies should Holder fail to conform to the contract requirements, GC § 4.11 provides:

> If the Contractor should neglect to prosecute the Work properly or fail to perform any provision of this contract, [UMGC] after three (3) days' written notice to the Contractor may make good such deficiencies and may deduct the cost thereof from the monies then or thereafter due the Contractor.

Additionally, the contract provided that written notice "[s]hall be deemed to have been duly served if delivered in person" or "if delivered to or sent by registered mail."

Prior to installing the carpeting, Holder reviewed the specifications and the contract documents for constructability and took no issue with the carpeting products. In February 2013, Holder dispatched a subcontractor to begin installing the carpet and carpet padding throughout the public corridors, meeting rooms, and ballrooms.

Shortly after installation, the parties observed that the carpet began to de-laminate from the carpet padding. Holder attempted to make repairs by reapplying adhesive between the carpet and the padding. In September 2013, UMGC sent Holder an email stating that the carpet was still separating from the padding and forming large bubbles. Holder again applied more adhesive between the carpet and the padding. In March 2014, UMGC sent

Holder an email explaining that it was still having problems with the carpet de-laminating and that the parties needed to reach a solution to correct the problem.

Following a series of email exchanges between the parties concerning the defective carpet and Holder's numerous unsuccessful attempted repairs, in November 2014, Holder notified UMGC of its intent to retain a third-party consultant to test samples of the carpet and carpet padding to determine the root cause of the de-lamination issue. In February 2015, UMGC emailed Holder again asking Holder to repair the carpet de-laminations in the building. Holder responded that it had yet to find an adhesive that would adhere to the padding, and that although it was continuing to look for one, Holder opined that the padding was defective and no adhesive would adhere to it without eventually de-laminating. Holder stated that it would continue to resolve any safety issues, but due to the "tremendous amount of time and effort regluing several areas of the conference center, only to have them de-bond over and over again," it would not provide additional regluing. On March 17, the consultant emailed Holder and UMGC with its lab report results which determined that the root cause of the carpet de-lamination issue was the carpet padding material.

On March 26, UMGC contacted Marriott directing it to move forward with the removal and replacement of the carpeting through a third-party contractor. Holder was not copied on, nor does the record reflect notified of, this email at the time it was sent. Holder was not asked to remove and replace the carpet, nor did UMGC request Holder to further repair the carpeting. Holder did not learn about Marriott soliciting proposals for removal and replacement of the carpet and padding until "sometime between April 29, 2015 and May 7, 2015."

On May 7, 2015, UMGC directed Holder to have the consultant finalize his lab report.[3] That day, Holder sent the consultant an email stating that UMGC had decided to buy new carpet and padding for the project.

On June 29, 2015, Holder sent UMGC the consultant's finalized lab report results, which reiterated that the root cause of the carpet de-lamination issue was the carpet padding material. Holder indicated that because the carpet padding was at issue, it believed that it had "no additional liability in this issue," but remained "committed to serving [UMGC] and its mission." According to Holder's vice president Todd Fehd ("Fehd")[4], at this point, Holder was waiting for direction from UMGC as to how to respond to the issue and was willing to remove and replace the carpet. He further testified that "Holder achieved approximately $300,000 in cost savings on the Project due to the difference between the [Contract] (as amended) and the amount billed by UMGC. Under the Contract, these cost savings reverted back to UMGC." According to Fehd, had UMGC directed Holder to remove and replace the padding and carpeting, Holder "could have used the 'cost savings' to offset a portion of the costs of performing the work." UMGC did not respond to the June 29 correspondence.

[3] Holder was told by UMGC that the purpose of obtaining the report was to support a future claim or lawsuit against the carpet padding manufacturer. Ultimately litigation was not pursued against the manufacturer. In argument before the Board, counsel for UMGC stated that it had a case against Holder as the CMR and a case against the carpet manufacturer, and that it pursued litigation against Holder because "a products liability case is a little harder to make out than a breach of contract case against a construction manager at risk that refuses to do what its obligated to do under the contract."

[4] At the time of contract claim, Fehd was the senior project manager for Holder.

In July 2015, UMGC entered into a contract with a new contractor to remove and replace the carpeting throughout the building. That contractor completed its removal and replacement of the carpeting on January 13, 2016, which caused UMGC to incur costs in the amount of $699,718.99.

UMGC sent a letter dated November 14, 2017, to the procurement office to serve as its affirmative claim against Holder to "recover the cost incurred by [UMGC] for the removal and replacement of the defective carpet and padding." On April 13, 2018, the procurement officer granted UMGC's claim for reimbursement of $699,718.99. Holder appealed the procurement officer's decision to the Board.

During the discovery stages before the Board, Holder responded to a request for production of documents by providing numerous documents, as well as a privilege log asserting that 25 listed documents were withheld as "work product" and "prepared in anticipation of litigation at the direction of an attorney." UMGC filed a motion to compel the production of those materials arguing that none of the individuals listed on the privilege log as authors or recipients of the documents were attorneys.

Holder thereafter de-designated 23 of those 25 documents and turned them over to UMGC, but it maintained that the two remaining documents were privileged work product. The two remaining documents consisted of a December 2017 email chain conversation[5]

[5] An email chain consists of one or more messages between at least two persons discussing a unified topic. *See, e.g.*, *American Oversight v. U.S. Dep't of Health & Hum. Servs.*, 380 F. Supp. 3d 45, 51 (2019) ("It is commonly understood that an email chain operates as a single record. The very nature of a 'reply' . . . necessarily implies that the communication is responsive to the message that came before, and therefore it incorporates what came before, and the two form a unified exchange.").

between Holder employees in response to UMGC's affirmative contract claim and a draft response pleading. Holder filed an affidavit from its former counsel affirming that the documents were made at his direction and constituted privileged work product. It also notified the Board that it de-designated the 23 documents and attached the redacted documents.

On June 17, 2020, the Board held a hearing on the motion to compel. Fehd testified that Holder received the contract claim letter on December 15, 2017. Fehd testified that both the email conversations and the draft response concerned Holder's discussion and analysis of how to respond to UMGC's contract claim against Holder. Fehd also testified that Holder had retained outside counsel, who provided legal advice to Holder related to UMGC's claim. On cross-examination, Fehd stated that he did not know if the emails were created at the direction of outside counsel, but that he knew that Holder's vice president for risk management was communicating with the outside counsel.

The Board concluded that Holder satisfied its burden to show that the two documents were created in anticipation of litigation. The Board stated that the burden then shifted to UMGC to demonstrate a substantial need and undue hardship to discover the documents at issue. UMGC responded that it could not make that showing. The Board denied UMGC's motion to compel.

Holder filed a motion for summary disposition arguing in part that UMGC failed to provide Holder with a notice to cure in violation of GC § 4.11. The Board held a hearing on that motion on July 1, 2020. In addition to the parties' arguments, the Board considered UMGC's March 26, 2015 email to Marriott, UMGC's May 7, 2015 email to Holder, and

an affidavit from Fehd. Holder argued that the March 2015 email demonstrated that UMGC was already moving forward with the removal and replacement of carpeting, and that Holder was not made aware of the removal until May 2015. Holder argued that it was not provided the requisite three-day written notice.

UMGC responded that Holder was responsible as the CMR for all construction means and methods and was contractually obligated to remedy defective construction. UMGC further stated that Holder had indicated in a March 2015 email that it would not be making any further repairs, so UMGC directed Marriott to move forward. In response to the Board's question as to how UMGC complied with the written notice requirement, UMGC responded that its emails discussing the defective carpeting served the purpose of providing notice. The Board further directed UMGC to point to a specific document that provided the notice, and UMGC reiterated its emails constituted written notice, but conceded that it had not provided written notice hand delivered or by registered mail.

At the end of the hearing, the Board issued an oral ruling and found that "there [was] no genuine dispute of material fact that necessitates a hearing on the merits." It stated that the issues in the appeal were questions of law related to Holder's scope of responsibility and UMGC's written notice. The Board found:

> As to the scope of responsibility, we hold that it was Holder's responsibility to comply with the construction manager's obligations under Section 5 of the RFP. Holder had the option and ability to conduct whatever tests it deemed necessary to determine the efficacy of using the UMGC or Marriott-specified carpet and padding. In electing not to do so, Holder assumed the risk that the carpet installation might fail.
>
> As such, under Section 4.08(b) of the General Conditions of the contract, Holder had the obligation to remove and replace the carpet and padding once UMGC determined that it was not satisfied with the attempts

> to repair.
>
> As to whether UMGC provided the requisite written notice under the contract, we hold that it is undisputed that UMGC did not provide written notice delivered either in person or via registered mail; that UMGC was not satisfied with the attempted repairs; and was demanding that Holder remove and replace the carpet pursuant to its obligation to do so under Section 4.08(b) of the General Conditions of the contract.
>
> Accordingly, we conclude that there was no breach of the contract by Holder because Holder's obligation to remove and replace the carpet and padding was never triggered.

UMGC appealed both the Board's denial of the motion to compel and the grant of summary decision to the Circuit Court for Baltimore City. Holder filed a motion to dismiss the case arguing that Baltimore City was an improper venue. The Circuit Court for Baltimore City denied Holder's motion to dismiss but transferred the case to the Circuit Court for Prince George's County. There, Holder filed another motion to dismiss arguing that UMGC's petition for judicial review was not timely filed in Prince George's County. The circuit court denied that motion and affirmed the Board's decisions denying the motion to compel and granting summary disposition. UMGC thereafter filed its timely appeal to this Court. Holder filed its cross-appeal.

STANDARD OF REVIEW

"The Board is an administrative agency whose decisions are subject to the same standard of judicial review as other agencies." *Montgomery Park, LLC v. Maryland Dep't of Gen. Servs.*, 254 Md. App. 73, 98 (2022). We review the agency's decision directly and are "limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law." *Id.* (internal quotation marks

omitted) (quoting *Montgomery v. E. Corr. Inst.*, 377 Md. 615, 625 (2003)). Under the substantial evidence standard, the reviewing court "must uphold an agency's determination if it is rationally supported by the evidence in the record, even if the reviewing court, left to its own judgment, might have reached a different result." *Id.* We must affirm "if, after reviewing the evidence in a light most favorable to the agency, we find a reasoning mind reasonably could have reached the factual conclusion the agency reached." *Id.* (internal quotation marks omitted) (quoting *Geier v. Md. State Bd. of Physicians*, 223 Md. App. 404, 430 (2015)).

We review an agency's legal conclusions *de novo*. *Montgomery Park, LLC*, 254 Md. App. at 99. "Even with regard to some legal issues, a degree of deference should often be accorded the position of the administrative agency." *E. Corr. Inst.*, 377 Md. at 625. "We, therefore, ordinarily give considerable weight to the administrative agency's interpretation and application of the statute that the agency administers." *Id.* "Furthermore, the expertise of the agency in its own field of endeavor is entitled to judicial respect." *Id.* at 626.

A circuit court's determination of whether venue is proper is a legal question we review *de novo*, and its decision to transfer to the proper venue is reviewed for an abuse of discretion. *Payton-Henderson v. Evans*, 180 Md. App. 267, 276–285 (2008). Finally, a motion to dismiss for untimely filing is a legal question, which we review *de novo*. *See Modell v. Waterman Family Ltd. P'ship*, 232 Md. App. 13, 19–20 (2017).

DISCUSSION

"The Board's two-step process in deciding a motion for summary decision begins with the determination of whether there is 'any genuine issue of material fact.'" *Manekin*

Constr. Inc. v. Md. Dep't of Gen Servs., 233 Md. App. 156, 174 (2017) (quoting Code of Maryland Regulations ("COMAR") 21.10.05.06D(2)(a)). Once the Board resolves all inferences in favor of the non-moving party and finds there to be no dispute of material fact, the Board then "determine[s] whether the moving party is entitled to prevail as a matter of law." *Id.*

I. THE BOARD DID NOT ERR IN GRANTING SUMMARY DECISION IN FAVOR OF HOLDER.

UMGC contends that the Board erred in granting summary decision in two respects. First, UMGC argues the Board improperly concluded that Holder's contractual obligations were premised on UMGC giving written notice of defect. UMGC maintains that a written demand was not needed for Holder to comply with the contract terms. Rather, according to UMGC, the Board should have determined that Holder was in breach of the contract in providing defective work and failing to remedy that defective work, irrespective of whether UMGC gave the requisite notice. Second, UMGC contends that it was error to conclude that no notice was given because Holder had actual notice of the defective carpet installation.

A. The Board's Interpretation of the Contract Was Not Erroneous.

Maryland courts follow an "objective theory of contract interpretation." *Credible Behav. Health, Inc. v. Johnson*, 466 Md. 380, 393 (2019). "Under this approach, the primary goal of contract interpretation is to ascertain the intent of the parties in entering the agreement and to interpret the contract in a manner consistent with that intent." *Id.* (internal quotation marks omitted). "[T]he primary source for determining the intention of

the parties is the language of the contract itself." *Cnty. Comm'rs for Carroll Cnty. v. Forty W. Builders, Inc.*, 178 Md. App. 328, 376 (2008). If the language of a contract is unambiguous, "a court shall give effect to its plain meaning and there is no need for further construction by the court." *Precision Small Engines, Inc. v. City of Coll. Park*, 457 Md. 573, 585 (2018) (quoting *Walker v. Dep't of Human Resources*, 379 Md. 407, 421 (2004)). "We will not displace an objective reading of the contract with one party's subjective understanding." *Pinnacle Grp., LLC v. Kelly*, 235 Md. App. 436, 456 (2018).

We turn to the contract language. First, Holder was required to conduct a constructability review and ensure that the materials used and renovations made were consistent with that which was required by the contract. Further, pursuant to GC § 4.08, "[a]ny unacceptable or defective work, whether the result of poor workmanship, use of defective materials, damage through carelessness or any other cause . . . shall be removed and replaced by work and materials which shall conform to the contract requirements or shall be remedied otherwise in an acceptable manner." The plain language indicates that Holder was responsible for remedying the defects, and Holder's obligation to do so was not conditioned on written notice.

However, GC § 4.11, requires that UMGC provide to Holder three days written notice prior to taking action itself in remedying the deficiencies and seeking costs, and such written notice shall be delivered in person or by registered mail. This provision is harmonious with the remainder of the contract. Read together, the provisions indicate that Holder, as the CMR, was contractually required to remedy any defects in construction, and pursuant to 4.11, UMGC was required to provide Holder with three days written notice of

its intent to remedy the deficiencies through a third party if it wanted to seek compensation from Holder for doing so. The Board's interpretation of these two provisions was not erroneous. *See Bd. of Liquor License Comm'rs for Balt. City v. Kougl*, 451 Md. 507, 514 (2017) ("[T]he expertise of the agency in its own field of endeavor is entitled to judicial respect.").

B. UMGC Did Not Provide the Requisite Notice to Recover Costs.

We now turn to whether UMGC provided three days written notice to Holder prior to remedying deficiencies with an outside contractor pursuant to GC § 4.11. UMGC argues that it provided the requisite notice through the numerous email correspondence between the parties regarding the defective carpet. UMGC alternatively argues that whether the given notice complied with contract terms is irrelevant because Holder had actual notice based on the correspondence. Holder responds that the requisite notice was never given. Though Holder acknowledges the email correspondence detailing the defective carpet, it maintains that, in those emails, UMGC requested Holder "repair" the carpet, but at no time requested Holder "remove and replace" the carpet.

"Where a contractor performs defective work, the owner is entitled to the reasonable costs to correct the defective work. The owner, however, under the terms of most construction contracts must give the contractor notice of the incomplete or defective work and opportunity to cure before it will be entitled to complete or correct the work itself." *U.K. Const. & Mgmt., LLC v. Gore*, 199 Md. App. 81, 93 (2011) (quoting Tamara Mcnulty, Maryland Construction Law 180 (2007)). "The right to cure is a fundamental contractor right." *Id.* (quoting Troy Michael Miller, Construction Checklists 92 (2008)). *Compare*

Walter v. Atlantic Builders Group, Inc., 180 Md. App. 347, 361–63 (2008) (holding that an owner had the right to terminate the contract with the contractor because the contractor failed to cure the defective work and the owner notified the contractor within the requisite seven-day period provided in the contract), *with Keystone Engineering Corporation v. Sutter*, 196 Md. 620, 623 (1951) (holding that although strict compliance with contractual notice prior to termination was not required because the contractor's remedies "w[ere] not limited by the general contract which, in its designation of the method by which the contract might be terminated, states that this is 'without prejudice to any other right or remedy.'").

Where a breaching party is denied the "opportunity to make corrections," that party is "relieved from its obligation to do so," which in turn "fatally impair[s] [a] breach of warranty claim with respect to the defects at issue." *U.K. Const. & Mgmt., LLC v. Gore*, 199 Md. App. 81, 95 (2011). "This is certainly so where [] the defendant expresses a willingness to make the repairs and, nonetheless, the plaintiff elects to make the repairs herself." *Id.* at 94–95.

As noted, the plain language of section 4.11 of the contract reveals that only "after three days written notice may [UMGC] make good on deficiencies and deduct costs thereof." We conclude that there was no dispute of material fact regarding the Board's conclusion that UMGC failed to give Holder the requisite notice required by section 4.11 of the contract. To be sure, it is undisputed that Holder had notice and knowledge of the defective carpet as evidenced by the correspondence between the parties. However, UMGC provided no evidence to demonstrate that it provided Holder with written notice delivered in person or by registered mail that UMGC was going to contract with an outside contractor

to remove and replace the carpet and seek compensation. Moreover, Holder indicated that it would continue to assist UMGC, and Fehd testified that Holder was awaiting direction from UMGC and was willing to remove and replace the carpet. We are not persuaded by UMGC's argument that the Board failed to consider the facts in the light most favorable to UMGC, given its lack of evidence in support of its conclusory assertions. *See Gurbani v. Johns Hopkins Health Systems Corp.*, 237 Md. App. 261 (2018) ("[M]ere general allegations or conclusory assertions which do not show facts in detail and with precision will not suffice to overcome a motion for summary judgement.").

We conclude that the Board did not err in finding that Holder was entitled to prevail as a matter of law based on the contract terms. UMGC argues that Holder had actual notice, and relies on *B & P Enterprises v. Overland Equip. Co.*, 133 Md. App. 583 (2000), as instructive. There, a lease agreement between a landlord and a tenant provided that if the landlord failed to perform any term of the contract within 30 days after receiving written notice, personally delivered or sent by certified registered mail, from the tenant specifying such default, the tenant had the right to cure the default at the landlord's expense. *Id.* at 602–03. This Court held that although the tenant did not provide the requisite written notice, the landlord had "actual, ongoing knowledge" of the tenant's complaints, and the landlord was not prejudiced by the lack of strict compliance with the notice requirements, thus any written notice in strict compliance with the contract would have been duplicative. *Id.* at 612.

As Holder notes, the contract in that case concerns a residential lease, and we have found no Maryland cases, nor have any been cited, in which strict compliance with notice

to cure requirements in construction contracts may be excused by actual notice. In any event, UMGC did not point to anything in the record nor were we able to locate anything demonstrating UMGC provided any notice that would be substantially equivalent to the requirements in GC § 4.11. Although there is correspondence between the parties documenting the faulty carpeting, nothing therein indicates that UMGC informed Holder that it was in default for not replacing the carpet, that Holder needed to remove and replace the carpet, or that if Holder did not replace the carpet, UMGC would do so after three days and seek costs. UMGC's emails and communications to Holder were lacking in form and substance. Accordingly, even if the content of UMGC's emails and communications to Holder was transmitted in writing via registered mail or by hand delivery, the substance still would not have sufficed to convey the necessary information to provide the requisite notice under GC § 4.11. Therefore, *B & P Enterprises v. Overland Equip. Co.*, 133 Md. App. 583 (2000), is inapplicable.

By failing to notify Holder of its intent to remove and replace the carpet, UMGC relieved Holder of the obligation to pay costs, fatally impairing UMGC's breach of contract claim with respect to the reimbursement for carpet reparations. UMGC was foreclosed under the contract from recovering costs, and the Board did not err in granting summary decision in favor of Holder.

II. THE BOARD DID NOT ERR IN DENYING UMGC'S MOTION TO COMPEL.

UMGC also argues that the Board erred in denying its motion to compel the two documents that Holder claimed constituted work product. UMGC contends: first, the documents are not work product because they were not prepared by, directed to, or received

by an attorney; and second, that any claim of privilege was waived by the de-designation of the other 23 documents supplied by Holder during discovery.

"[I]n a case before the Appeals Board, a party may obtain discovery about any matter that: (1) is not privileged; and (2) is relevant to the subject matter involved in that case." Md. Code, State Finance & Procurement Article ("SFP") § 15-221(c). The Board's regulations further provide that privileged material includes "documents and tangible things prepared in anticipation of litigation or for hearing by or for another party or by or for that other party's representative (including the party's attorney, consultant, or surety)." COMAR 21.10.06.14(B). A party asserting that a document is privileged bears the burden of so proving. Once a party asserts that a document is privileged, the party seeking to compel production of that document must demonstrate that the "materials are otherwise discoverable," that the party seeking discovery "has substantial need of the materials in preparation of its appeal," and that the party seeking discovery "is unable without undue hardship to obtain the substantial equivalent of the materials by other means." COMAR 21.10.06.14(B)(1). Even where a party seeking discovery of privileged materials demonstrates these three elements, the Board nonetheless "shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." COMAR 21.10.06.14(B)(2).

Holder specified in its privilege log that the documents constituted mental impressions related to the ongoing contractual dispute with UMGC. In support of its claim that the two documents were privileged work product, Holder introduced testimony from Fehd that the emails contained Holder employee analysis of UMGC's claim as well as a

draft responsive pleading to UMGC's claim. Holder also produced an affidavit from Holder's counsel at the time of the contract claim stating that he reviewed the privilege log and affirmed that the documents were created at his direction to respond to the claim. Though UMGC claims that Fehd's testimony that he did not remember whether the correspondence or draft response was made at the direction of Holder's attorney demonstrates that Holder did not meet its burden, we disagree. We hold that the Board's conclusion that the documents constituted privileged work product is supported by substantial evidence in the record.[6]

Following the Board's determination that the documents were privileged work product, UMGC offered no witness testimony or other evidence to demonstrate it had a substantial need of the materials or could not obtain the materials without undue hardship. Rather, it focused its argument on the fact that the materials were not privileged because they were not prepared by an attorney. The Board rejected that argument, noting that the language of COMAR 21.10.06.14(B) does not require an attorney's involvement for a document to be considered privileged work product. In affording deference to the Board's interpretation of its own regulation, *E. Corr. Inst.*, 377 Md. at 625–26, we perceive no error

[6] UMGC implies that it was erroneous for the Board to conclude that the documents were work product prior to holding an in-camera review of those documents. We uncovered no cases, nor were any cited by UMGC, whereby the Board is required to hold an in-camera hearing to determine if documents are privileged where the Board has substantial evidence in the form of direct testimony, affidavits, and redacted documents to support its conclusion.

in that conclusion.[7]

Finally, UMGC's claim that the Board found that the privilege under COMAR 21.10.06.14(B) could never be waived is without merit. Initially we note that the Board made no such finding. Rather, the Board determined that the declassification of 23 documents and testimony about the documents did not waive any claim related to the two documents that remained privileged. Such a finding cannot be characterized as the Board declaring that privilege can never be waived.

As to those specific documents, the Board did not err in finding that a claim of privilege was not waived. During the hearing on the motion to compel, UMGC argued that Holder waived its privilege claim because Fehd testified about emails from November 2017 which UMGC asserts were "no different in nature than the two documents Holder continued to withhold." Documents prepared in anticipation of litigation are no longer protected when those specific documents are voluntarily disseminated. *Diggs & Allen v. State*, 213 Md. App. 28, 78 (2013). Voluntarily dismissing a claim of privilege as to one document does not affect a different document's privilege. The Board concluded as much, finding that Holder did not waive its privilege for the December 2017 emails merely

[7] UMGC argues that COMAR 21.10.06.14(B) is substantively identical to Maryland Rule 2-402(d), and that *E.I. du Pont de Nemours & Co.*, 351 Md. 396, 407 (1998), specified that Rule 2-402(d) "protects from discovery the work of an attorney done in anticipation of litigation or in readiness for trial." UMGC urges us to apply the same reasoning to the COMAR provision and limit that provision to work product that has attorney involvement. We decline to do so and reiterate that we give significant deference to an agency's interpretation of its own regulation. *See Bd. of Liquor License Comm'rs for Balt. City v. Kougl*, 451 Md. 507, 514 (2017) ("[T]he expertise of the agency in its own field of endeavor is entitled to judicial respect.").

because it voluntarily disseminated the November 2017 emails. Nor did Holder waive its privilege by declassifying the other materials. We hold that the Board did not err in denying UMGC's motion to compel.

III. HOLDER'S CLAIMS OF ERROR ARE WITHOUT MERIT.

Last, Holder's cross claims assert error with the circuit court's procedural handling of the case. Holder asserts that the Circuit Court for Baltimore City was required to dismiss UMGC's petition for judicial review for improper venue rather than transferring the action.[8] Holder relatedly claims that the Circuit Court for Prince George's County should have dismissed the action because UMGC's petition for judicial review was not timely filed in that court. We address each in turn and conclude that these contentions are meritless.

A. The Circuit Court for Baltimore City Did Not Err.

A party may seek judicial review of the Board's final decision "in accordance with" the contested case subtitle of the Maryland Administrative Procedure Act ("APA"). SFP § 15-223. Pursuant to the APA, "a petition for judicial review shall be filed with the circuit

[8] We note that Holder's cross-appeal of the Baltimore City Circuit Court's decision to transfer the case is properly before this Court. The Court of Appeals held in *Brewster v. Woodhaven Bldg. & Dev. Inc.*, a party opposing an order transferring venue may "either [] file an appeal from the order within 30 days of its entry, or [] wait until the litigation has been completed in the transferee court and appeal from that court's final judgment on the ground that the case should not have been transferred." 360 Md. 602, 617–18 (2002). Additionally, pursuant to Maryland Rule 8-202(e), if one party files a timely notice of appeal, the other party "may file a notice of appeal within ten days after the date on which the first notice of appeal was filed[.]" UMGC filed its notice of appeal of the Circuit Court for Prince George's County order on August 9, 2021. Holder filed its notice of appeal ten days later on August 19, 2021.

court for the county where any party resides or has a principal place of business." Md. Code, State Government Article ("SG") § 10-222(c). A party challenging venue may file a motion to dismiss for improper venue pursuant to Maryland Rule 2-322(a). The party asserting improper venue has the burden of proof and "must do more than merely raise 'a bare allegation that venue was improper, unsupported by affidavit or evidence.'" *Pac. Mortg. & Inv. Grp. v. Horn*, 100 Md. App. 311, 322 (1994) (quoting *Odenton Dev. Co. v. Lamy*, 320 Md. 33, 39 (1990)).

In deciding a motion for improper venue, "[t]he venue chosen by the plaintiff is either proper, as a matter of law, or it is not." *Payton-Henderson*, 180 Md. App. at 276. "If a court sustains a defense of improper venue but determines that in the interest of justice the action should not be dismissed, it may transfer the action to any county in which it could have been brought." Md. Rule 2-327(b). "[A] transfer instead of dismissal is discretionary, [and] dismissal rarely serves a useful purpose." *Payton-Henderson*, 180 Md. App. at 274.

Here, the parties agreed that venue was improper in the Circuit Court for Baltimore City because Holder has no principal place of business in Maryland, and UMGC has its principal place of business in Prince George's County. We hold that the determination that Baltimore City was an improper venue was legally correct, and we discern no abuse of discretion in the circuit court's transfer of the case to the Circuit Court for Prince George's County pursuant to Maryland Rule 2-327.

Holder's argument that the Baltimore City Circuit Court was required to dismiss the case is unavailing. Holder argues that there is nothing in the SFP Article, the APA, or the

Title 7 Rules that authorizes the circuit court to transfer a case in a judicial review action. The Maryland rules of civil procedure apply to judicial review actions in the circuit courts,[9] and those rules expressly provide the circuit court with the discretion to transfer a case to the proper venue. *See* Md. Rule 2-327(b); *see also* Md. Rule 1-201 (stating the Maryland Rules "shall not be construed to extend or limit the jurisdiction of any court or, except as expressly provided, the venue of actions."). We conclude the Circuit Court for Baltimore City did not abuse its discretion in transferring the case.

B. The Circuit Court for Prince George's County Did Not Err.

A petition for judicial review must be filed within 30 days from the final decision of the agency. Md. Rule 7-203. "The time for initiating an action for judicial review is in the nature of a statute of limitations." *Colao v. Cnty. Council of Prince George's Cnty.*, 346 Md. 342, 362 (1997). Importantly, the timely filing of an action in an incorrect forum tolls the statute of limitations for a civil claim. *Cain v. Midland Funding, LLC*, 475 Md. 4, 55 (2021); *Bertonazzi v. Hillman*, 241 Md. 361, 371 (1966) (recognizing a judicial tolling exception where a complaint was filed timely, but in the wrong venue).

Here, the Board issued its final decision on July 1, and UMGC filed its petition for judicial review in the Circuit Court for Baltimore City on July 23—within the thirty-day window. That filing tolled the thirty-day time bar to judicial review of the Board's decision, despite Baltimore City being an improper venue. Accordingly, when the case was

[9] Maryland Rule 1-101(b) provides: "Title 2 applies to civil matters in the circuit courts, except for Juvenile Causes under Title 11, Chapters 100, 200, 400, and 500 of these Rules and except as otherwise specifically provided or necessarily implied."

transferred to the Circuit Court for Prince George's County, the petition for judicial review remained timely. Therefore, the Prince George's County Circuit Court did not err in denying Holder's motion to dismiss the judicial review petition as untimely.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AND THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE DIVIDED EQUALLY BY APPELLANT AND APPELLEE.