Circuit Court for Montgomery County
Case No. 481170-V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1173

September Term, 2020

4607, LLC

v.

COBBLER-FRIENDSHIP HOLDINGS, LLC, ET AL.

Fader, C.J.,
Nazarian,
Leahy,

JJ.

Opinion by Fader, C.J.

Filed: October 8, 2021

The parties are the appellant, 4607, LLC, to whom we will refer as "Seller"; and the appellees: 1788 Holdings, LLC, Cobbler-Friendship Holdings, LLC ("Cobbler"), and The Chevy Chase Land Company of Montgomery County, Maryland, to whom we will refer collectively as "Purchasers."[1] The central issue is whether the Circuit Court for Montgomery County correctly determined that the parties had agreed to arbitrate a dispute concerning the price of a parcel of real property. Based on that determination, the court granted the Purchasers' motion to compel arbitration and dismissed the Seller's claim for declaratory relief regarding the dispute. A secondary issue is whether the court correctly dismissed Seller's claim for breach of contract.

In 2015, Seller and 1788 Holdings entered into a purchase agreement (the "Purchase Agreement") pursuant to which Seller agreed to sell to 1788 Holdings an improved parcel of land located at 4607 Willard Avenue, Chevy Chase, Maryland (the "Property"). The price to be paid for the Property was to be resolved based on a formula that depended on a calculation of square footage. That calculation, in turn, depended on a legal determination of the areas that should be included in it. Exhibit F to the Purchase Agreement therefore provided a process in which each of the parties was to arrive at its own determination of square footage—the "Seller Determination" and the "Purchaser Determination"—and, if different, attempt to reconcile them. The final step in the process, if the parties could not reach resolution earlier, was submission of the dispute to "a third independent Law Firm

[1] The Chevy Chase Land Company of Montgomery County, Maryland, is named in the underlying complaint "as a defendant solely in its capacity as a part owner of [] Cobbler and as an interested party[.]" It will not make another appearance in this opinion.

(the 'Third Firm')," for arrival at a "Third Determination." The agreement provided that the average of calculations of "the two closest determinations . . . will be final and binding on the Seller and Purchaser for purposes of calculating the Square Footage," and, ultimately, the purchase price, "absent manifest error by the Third Firm."

Although Exhibit F does not use the term "arbitration," we agree with the circuit court that the process described is, in substance, an agreement to arbitrate the parties' dispute about the purchase price of the Property. Accordingly, we will affirm the circuit court's order compelling arbitration and its dismissal of Count II of Seller's complaint, which sought declaratory relief concerning the calculation of square footage and the purchase price. We will, however, reverse in part the dismissal of Count I of the complaint, in which Seller alleged that Purchasers had breached the Purchase Agreement by, among other things, initially refusing to submit the dispute over the purchase price to the Third Firm according to the procedures outlined in Exhibit F. We conclude that Seller's breach of contract claim fell at least partially outside the scope of the parties' arbitration agreement. However, because Seller concedes that its only remaining claim for "damages" due to Purchasers' alleged breaches is for recovery of attorneys' fees and costs it seeks as a prevailing party, our remand will be limited to resolving that claim.[2]

[2] The Third Firm issued an arbitration award on October 29, 2020. In a separate action, Seller filed a petition to vacate or modify the award, to which Purchasers responded with a counter-petition to confirm the award. *See 4607, LLC v. Cobbler-Friendship Holdings, LLC, et al.*, No. 484108-V (filed Nov. 24, 2020). On August 31, 2021, two days before oral argument in this appeal, the circuit court entered an order granting Purchasers' petition, denying Seller's, and entering judgment against Seller in the amount of $338,855.09. Purchasers then filed a motion to dismiss this appeal as moot, which Seller opposed. Given the continued dispute concerning whether the proceeding before the Third

BACKGROUND[3]

The Purchase Agreement

The Purchase Agreement established a relatively elaborate formula for determining the purchase price for the Property, which depended primarily on a determination of "the maximum amount of any square footage . . . which the owner of the Real Property is entitled to include for purposes of calculating the development potential of the Real Property, as determined in accordance with Montgomery County laws, rules, regulations and ordinances," even if 1788 Holdings would not be able to use all of that area (together, the "Square Footage"). Calculating the Square Footage thus involved both a mathematical calculation and, more critically, the interpretation of Montgomery County laws, rules, regulations and ordinances. Cutting through some complication in the formula, the purchase price of the Property would be the Square Footage multiplied by $240.

The Purchase Agreement established a "Review Period," originally set to expire on November 6, 2015 but extended to November 20, 2015, during which the parties were to attempt to reach agreement on the Square Footage. If they were unable to reach agreement during the Review Period, the Square Footage would "be calculated . . . in accordance with Exhibit F" to the Purchase Agreement.

Firm should have been treated as an arbitration, we fail to see how the resolution in the circuit court of the other action moots this appeal and so will deny the motion to dismiss.

[3] In this factual recitation, we "assume the truth of, and view in a light most favorable to the non-moving party, all well-pleaded facts and allegations contained in the complaint, as well as all inferences that may reasonably be drawn from them[.]" *Shailendra Kumar, P.A. v. Dhanda*, 426 Md. 185, 193 (2012) (quoting *Parks v. Alpharma, Inc.*, 421 Md. 59, 72 (2011)).

Exhibit F, in turn, established a phased process for resolving the purchase price following expiration of the Review Period. In the first phase, contained in paragraphs (A) and (B) of Exhibit F, Seller and 1788 Holdings were each to retain law firms to arrive at determinations of the Square Footage: the Seller Determination and the Purchaser Determination. Seller and 1788 Holdings were to exchange those determinations simultaneously within ten days of the expiration of the Review Period. If that process did not resolve the purchase price,[4] the parties agreed in paragraph (C) of Exhibit F to jointly retain a Third Firm to reach a Third Determination of the Square Footage. Paragraph (C) set deadlines for the identification, retention, and completion of the Third Firm's work pursuant to which the Third Determination was to be completed within 15 days of completion of the Seller and Purchaser Determinations.

Paragraph (C) imposed the following requirements with respect to submission of the matter to the Third Firm: (1) neither Seller nor 1788 Holdings was to "directly communicate with the Third Firm regarding the calculation of the Square Footage"; (2) "[a]ll communications with the Third Firm shall be conducted jointly by Seller's Law Firm and Purchaser's Law Firm"; (3) the Third Firm was to be instructed "not to communicate with Seller or Purchaser without simultaneously communicating with the

[4] According to paragraph (B) of Exhibit F, the exchange of the Seller and Purchaser Determinations could resolve the purchase price in three ways: (1) if the Seller Determination was lower than the Purchaser Determination, the Seller Determination would be used; (2) if the two determinations were within five percent of each other, their average would be used; and (3) if the Seller Determination was more than five percent higher than the Purchaser Determination, the law firms retained by each party were to engage in a reconciliation process to attempt to arrive at a resolution.

other"; and (4) the Third Firm was to be provided "[a]ll data and other relevant information affecting the calculation of the Square Footage that were available to the Law Firms that conducted the Seller Determination and the Purchaser Determination," along with copies of those determinations. The Third Determination was then to be used to arrive at a final and binding determination of the Square Footage as follows: "The average of the calculations of the Square Footage under the two closest determinations (of the Third Determination, the Seller Determination and the Purchaser Determination) will be final and binding on the Seller and 1788 Holdings for purposes of calculating the Square Footage, the FAR[5] and the Purchase Price, absent manifest error by the Third Firm."

Paragraph (D) of Exhibit F set forth how the purchase price was to be determined if the process described above was not completed by the closing date for the transaction. In that event, the parties were to close with an estimated purchase price of $3.5 million, to be paid with a cash payment of $1.75 million and execution of a note with a principal balance of $1.75 million, subject to a later adjustment once the actual purchase price was determined.[6] Pursuant to section 2(a) of the Purchase Agreement, the note was to bear interest at five percent per year.

[5] Pursuant to the Purchase Agreement, the Square Footage was to be used to calculate the floor acquisition ratio, or "FAR," which in turn was to be used to calculate the purchase price. For simplicity and because the calculation itself is not relevant to the issues in this appeal, we generally omit any discussion of the interim step of calculating the FAR.

[6] A purchase price of $3.5 million would be consistent with a Square Footage calculation of 14,583.33.

Section 18(b) of the Purchase Agreement, the final provision that is relevant for our purposes, provided for an award of reasonable attorneys' fees and costs to the prevailing party "[i]n connection with any litigation arising out of this Agreement."

The Closing

The parties closed the transaction on December 1, 2015 without first coming to agreement on the purchase price. The closing involved a series of related transactions, including, as relevant here:

- Seller and 1788 Holdings executed an amendment to the Purchase Agreement, which recited that they were "currently in the process of calculating the Square Footage, the FAR and the Purchase Price in accordance with the Process described in Section 2(b) and Exhibit F" and would close the transaction on the basis of the estimated purchase price of $3.5 million.

- 1788 Holdings assigned to Cobbler all of its rights and obligations under the Purchase Agreement. The assignment agreement, however, provided that 1788 Holdings was "not . . . released from any of its obligations under the Purchase Agreement."

- Cobbler executed a Deed of Trust Note (the "Note"), in which it promised to pay to Seller the principal amount of $1.75 million, plus interest, with a maturity date no later than January 31, 2020.[7]

- Seller conveyed the Property to Cobbler for a total price of $3.5 million.

Determining the Purchase Price

In December 2015, Seller retained attorney Robert R. Harris of the law firm of Lerch, Early & Brewer, who ultimately provided a Seller Determination that the Square Footage was 15,520 square feet, which would have yielded a purchase price of $3,724,800.

[7] The Note provided that the maturity date would occur before January 31, 2020 based on the commencement of demolition or development activities, receipt of all permits necessary for development, or the occurrence of a default.

In its complaint, Seller alleged that Purchasers failed to engage timely in the process contemplated by the Purchase Agreement to determine the final purchase price and misled Seller about the extent of its development activities. In any event, years passed without any apparent progress on arriving at agreement on the purchase price. Then, on January 28, 2020, three days before the maturity date of the Note, Cobbler notified Seller that it had obtained legal opinions from two attorneys, both of whom had arrived at a Purchaser Determination of 13,002 square feet,[8] which would have yielded a purchase price of $3,120,480. Because the difference between the Seller and Purchaser Determinations was greater than five percent, Cobbler suggested that the parties "should promptly employ the resolution procedure which had been agreed to in Exhibit F" if the attorneys were unable to reconcile the difference.

The January 31 maturity date of the Note passed without Purchasers paying any portion of the balance due on it.

On February 5, 2020, the parties agreed to retain attorney Françoise M. Carrier of the law firm Bregman, Berbert, Schwartz & Gilday, to serve as the Third Firm to make the Third Determination. However, the parties were unable to agree on what materials should be submitted to the Third Firm, with the primary dispute being Purchasers' objection to Seller including materials that had been reviewed and relied upon by its counsel in arriving

[8] One of the primary disagreements between the parties that contributed to the difference in their calculations was whether the Square Footage should include a portion of a right-of-way along Willard Avenue. The dispute thus centered on an issue of legal interpretation, not math.

at the Seller Determination, but which Purchasers contended were "not 'facts'" and were "classic hearsay" that were not "contemplated" to be part of the Exhibit F process.

The Litigation

In April 2020, still without any agreement on how to submit the dispute to the Third Firm, Seller initiated this action by filing a two-count complaint in the Circuit Court for Montgomery County. In Count I, Seller contended that 1788 Holdings and Cobbler had breached the Purchase Agreement by, among other things, refusing to: engage in good faith to determine the Square Footage or to reconcile the Seller and Purchaser Determinations; pay at least $1,275,600 of the amount due on the Note, which was the amount remaining to be paid based on the Purchaser Determination; and permit Seller to transmit the entirety of its Seller Determination to the Third Firm. Seller sought a judgment of $1,275,600; compensatory damages and prejudgment interest; an order requiring Purchasers to engage in good faith in the steps required by Exhibit F; and an award of attorneys' fees and costs pursuant to both the Purchase Agreement and the Note. In Count II, Seller sought a declaratory judgment: (1) determining "the proper sales price of the Property"; (2) declaring that the 2518 square feet by which the Seller Determination exceeded the Purchaser Determination was appropriately included in the calculation of Square Footage; (3) alternatively, "declaring, determining and appointing an independent third firm" to provide the Third Determination; and (4) awarding Seller attorneys' fees and costs.

Later in April, Seller filed a separate action to foreclose on the Property for nonpayment of the balance due on the Note. *See Roy L. Kaufmann and/or Glenn W.D.*

Golding, as the Appointed Substitute Trustees of Seller, LLC v. Cobbler-Friendship Holdings, LLC, et al., No. 481587-V (filed April 24, 2020).

In July 2020, Purchasers filed a motion to compel arbitration and to dismiss the complaint. With respect to the motion to compel, Purchasers argued that Exhibit F contained an arbitration agreement pursuant to which the parties had agreed to submit any dispute concerning Square Footage and the final purchase price to the Third Firm for a final and binding determination. With respect to the motion to dismiss, Purchasers contended that Seller failed to state a claim on which relief could be granted because: (1) Count I did not allege a breach of any obligation owed under the Purchase Agreement; and (2) the declaratory judgment sought in Count II would not serve a useful purpose in light of the agreement to arbitrate. In its opposition, Seller argued that paragraph (C) of Exhibit F was not an enforceable arbitration provision and that Purchasers had waived the ability to compel arbitration by delaying the Exhibit F process for four years. Seller also argued that it had sufficiently stated a claim for breach of contract in Count I. Seller did not make any argument opposing dismissal of Count II, the declaratory judgment count.

During a hearing in August 2020, with the foreclosure sale looming, Seller agreed to postpone the foreclosure in return for Purchasers' agreements to (1) pay $1,275,600, which was the amount of the outstanding principal balance based on the Purchaser Determination, and (2) submit the dispute, including all of the information included in the Seller and Purchaser Determinations, to the Third Firm to provide the Third Determination.

On October 29, 2020, Ms. Carrier issued the Third Determination, which concluded that the Square Footage was 10,730 square feet, which would yield a purchase price of

$2,575,200, well below both the Seller and Purchaser Determinations. Ms. Carrier's letter stated that she had performed her own research in addition to considering "the Montgomery County Zoning Code . . . and Zoning Map, opinions provided by land use counsel to both parties, numerous plats, and deeds related to the Subject Property and its surroundings, and exhibits prepared by engineering firms retained by both parties." The formula provided in paragraph (C) of Exhibit F required calculation of the Square Footage by averaging the two closest determinations, which were the Purchaser Determination of 13,002 and the Third Determination of 10,730. According to that formula, therefore, the final Square Footage was 11,866 square feet, which yielded a purchase price of $2,847,840.

On November 12, 2020, Seller filed an amended complaint in which it updated the factual and procedural background and asserted that the Third Determination was "manifestly erroneous." In the amended Count I, for breach of contract, Seller asserted that Purchasers had breached the Purchase Agreement in several ways and "only attempted to rectify their breach of the Purchase Agreement by paying the undisputed minimum amount due on the Note . . . and by permitting [Seller] to transmit its proposed Seller Determination to [the Third Firm] after [Seller] filed the Instant Case to enforce these obligations." Seller contended that those successes made it the prevailing party in the litigation and so entitled it to a contractual award of the attorneys' fees and costs it had incurred in filing this case and the foreclosure action. In Count II, Seller sought a declaratory judgment declaring: (1) that the Third Determination was manifestly erroneous; (2) the proper sales price of the Property; and (3) that the 2518 square feet by which the Seller Determination exceeded the Purchaser Determination was appropriately

included in the calculation of Square Footage. Seller also sought an award of its attorneys' fees and costs.

Four days later, on November 16, the court heard argument on Purchasers' motion to compel and to dismiss the complaint.[9] At the end of the hearing, the court orally granted the motion, ruling that "Exhibit F constitutes a contract to arbitrate[.]" Observing that the absence of the word "arbitration" is not dispositive, the court concluded that paragraph (C) of Exhibit F manifested "mutual assent" to have the dispute resolved outside of the court system. In granting the motion to dismiss, the court referenced only the declaratory judgment count, concluding that "if something is remitted to arbitration, it cannot, at the same time, be the subject of a declaratory action." The court did not separately address the status of the breach of contract claim, but nonetheless granted in full "[t]he request to dismiss this case." The court emphasized that its ruling was exclusively procedural and did not address the substantive issues that were to be (and, by that point, actually had been) arbitrated.[10]

[9] Seller argues for the first time on appeal that Purchasers' motion to dismiss the complaint was moot by the time the court heard argument on it because Seller had filed an amended complaint four days earlier. By not raising that issue with the circuit court, Seller has waived it. *See* Md. Rule 8-131(a). For that reason, and because the arguments in the motion to dismiss applied equally to the initial complaint and the amended complaint, we will not consider that contention.

[10] The court also announced that it would stay the foreclosure case for 90 days.

In a subsequent written order, the court granted Purchasers' motion and ordered "that this case is DISMISSED with prejudice on the procedural grounds stated by the Court and without prejudice on other grounds."[11] Seller filed this timely appeal.

DISCUSSION

I. THE CIRCUIT COURT DID NOT ERR IN GRANTING THE MOTION TO COMPEL ARBITRATION.

"Through arbitration agreements, parties forgo the judicial forum otherwise available to settle their disputes and commit to resolve the matter privately." *Gannett Fleming, Inc. v. Corman Constr., Inc.*, 243 Md. App. 376, 289 (2019). "By contract, they determine what is subject to arbitration—the substantive scope of the arbitration clause—and also define the procedural rules to be followed when a dispute arises. In Maryland, arbitration is considered a 'favored' alternative method of dispute resolution[.]" *Id.*

The Maryland Uniform Arbitration Act ("MUAA"), §§ 3-201 – 3-234 of the Courts and Judicial Proceedings Article (2020 Repl.), which governs the judicial enforcement of arbitration agreements, "embodies a legislative policy favoring enforcement of executory agreements to arbitrate." *Gold Coast Mall, Inc. v. Larmar Corp.*, 298 Md. 96, 103-04 (1983). To effectuate this policy, the MUAA "strictly confines" the court's role to

[11] The parties appear to have different theories about the status of Count I based on the court's statement that its ruling was "without prejudice on other grounds." In light of the court's comments in its oral ruling, which it incorporated by reference in its written order, we interpret the court's order to have dismissed the entire case with prejudice to the parties' ability to bring the claims again in court. By emphasizing that it did so on procedural grounds, the court clarified that the dismissal was without prejudice to the parties' substantive arguments, which were to be resolved by the arbitration process and any subsequent judicial review.

determining whether "an agreement to arbitrate the subject matter of a particular dispute" exists. *Id.*; *see also Stauffer Constr. Co. v. Bd. of Educ. of Montgomery County*, 54 Md. App. 658, 664 (1983) (stating that under the MUAA, "courts are generally enjoined . . . from interfering with the arbitration process," except for their authority to compel or to stay arbitration). "Until an arbitration is concluded, the jurisdiction of Maryland courts generally may be invoked only to determine, as a threshold matter, whether a dispute is in fact arbitrable." *Gannett Fleming*, 243 Md. App. at 390. When faced with a petition to compel or stay an arbitration, therefore, a court's role is "to consider 'but one thing—is there in existence an agreement to arbitrate the dispute sought to be arbitrated?'" *Id.* (quoting *Stauffer Constr.*, 54 Md. App. at 665). A court's consideration of such a petition does not concern the merits of the dispute. *Id.*

"Generally, a trial court's finding that a dispute is subject to arbitration is a conclusion of law, subject to review *de novo* by this court." *Gannett Fleming*, 243 Md. App. at 391; *see also Walther v. Sovereign Bank*, 386 Md. 412, 422 (2005).

A. Exhibit F Is an Enforceable Arbitration Agreement.

Seller's primary contention on appeal is that paragraph (C) of Exhibit F does not constitute an enforceable arbitration provision because it does not provide the parties with an opportunity to be heard by, or present their dispute to, the Third Firm. Purchasers counter that in agreeing to Exhibit F, the parties expressly agreed to arbitrate any dispute concerning the Square Footage and, thereby, the final purchase price. Based on the plain language of paragraph (C) of Exhibit F, we agree that it constitutes an enforceable arbitration agreement.

Because "[a]rbitration is contractual in nature," this Court applies the theory of objective contract interpretation to ascertain whether an arbitration agreement exists. *Rourke v. Amchem Prods., Inc.*, 153 Md. App. 91, 123 (2003), *aff'd*, 384 Md. 329 (2004). We afford the words of the contract "their ordinary and usual meaning, in light of the context within which they are employed," *Wells v. Chevy Chase Bank, F.S.B.*, 363 Md. 232, 251 (2001), and if the contractual language is unambiguous, we "give effect to its plain meaning," *Rourke*, 153 Md. App. at 125. "The 'clear and unambiguous language of an agreement will not give way to what the parties thought the agreement meant or intended it to mean.'" *Soc'y of Am. Foresters v. Renewable Nat. Res. Found.*, 114 Md. App. 224, 234 (1997) (quoting *Bd. of Trs. of State Colls. v. Sherman*, 280 Md. 373, 380 (1977)). Under the theory of objective contract interpretation, "'the true test of what is meant is . . . what a reasonable person in the position of the parties would have thought' the contract meant" based on the words used. *Soc'y of Am. Foresters*, 114 Md. App. at 234-35 (quoting *Gen. Motors Acceptance Corp. v. Daniels*, 303 Md. 254, 261 (1985)).

If the contractual language is susceptible of more than one meaning to a reasonably prudent person, it is ambiguous. *4900 Park Heights Avenue LLC v. Cromwell Retail 1, LLC*, 246 Md. App. 1, 29 (2020). "To determine whether a contract is susceptible of more than one meaning, the court considers 'the character of the contract, its purpose, and the facts and circumstances of the parties at the time of the execution.'" *Id.* (quoting *Phoenix Servs. Ltd. P'ship v. Johns Hopkins Hosp.*, 167 Md. App. 327, 392 (2006)). "Because of Maryland's public policy favoring the use of arbitration to resolve disputes, courts should

resolve doubts about the scope of arbitrable issues in favor of arbitrability." *Gannett Fleming*, 243 Md. App. at 400-01.

As we have observed, the essence of an arbitration agreement is that the "parties forgo the judicial forum otherwise available to settle their disputes and commit to resolve the matter privately." *Id.* at 389. Here, the language of paragraph (C) is susceptible of only one reasonable interpretation: Seller and Purchasers agreed to submit the issue of the calculation of the Property's Square Footage and, thereby, the final purchase price, for resolution in a non-judicial forum. Under the plain language of paragraph (C), the parties agreed to a process for attempting to reconcile their own determinations; a method for selecting and retaining an independent Third Firm; the permitted manner of communications with the Third Firm (i.e., through counsel and not ex parte); the materials required to be provided to the Third Firm; the specific calculation that the Third Firm was to perform in arriving at the Third Determination; and the way in which the Third Determination would be used to determine the final purchase price. Most notably, the parties agreed that the outcome of the process "will be final and binding on the Seller and Purchaser for calculating the Square Footage, the FAR and the Purchase Price, absent manifest error by the Third Firm." A reasonable person in the position of the parties would have understood from these provisions that the parties had agreed to submit any dispute concerning Square Footage and the final purchase price for "final and binding" resolution in a non-judicial forum. Seller has not pointed us to any provision of the Purchase Agreement that is inconsistent with that unambiguous language.

Although paragraph (C) of Exhibit F does not use the term "arbitration," we have previously held that that is not required. *See Soc'y of Am. Foresters*, 114 Md. App. at 234. In *Society of American Foresters*, this Court held that a contractual provision stating that "disagreement" on certain issues "will be settled by" a "three-member panel" constituted an enforceable agreement to submit the dispute to binding arbitration even though the provision did not use the terms "arbitration," "arbitrator," or "binding." *Id.* at 236-37. We opined that "'no particular form of words is indispensable to the making of a valid agreement to adjust and mediate a dispute without resort to litigation,'" and explained that "the language need not include the word 'arbitrate' nor 'arbitration[,]'" so long as there is "some reliable evidence from the language actually employed in the contract that the parties intended the contested issue to be subject to arbitration, the intent of the parties being the controlling factor." *Id.* at 236 (quoting *Joseph F. Trionfo & Sons, Inc. v. Ernest B. LaRosa & Sons, Inc.*, 38 Md. App. 598, 605 (1978)).

Similar to *Society of American Foresters*, the language of paragraph (C) of Exhibit F unambiguously establishes an intent that any dispute concerning Square Footage and, ultimately, the final purchase price be resolved outside of a judicial forum according to the process established by that provision. No magic words were required for the circuit court to enforce that language as an arbitration provision.

Seller's contention that paragraph (C) of Exhibit F does not constitute an enforceable arbitration provision because it does not provide a mechanism for the parties to be heard by or present their dispute to the Third Firm misses the mark. Although Seller correctly points out that arbitration proceedings must "comport with basic requirements of

due process," *Mandl v. Bailey*, 159 Md. App. 64, 87 (2004); *MCR of Am., Inc. v. Greene*, 148 Md. App. 91, 115 (2002), Seller has failed to identify how paragraph (C) is in any way deficient on that score. Paragraph (C) neither prevents either party from presenting its case to the Third Firm nor precludes communication with the Third Firm. Instead, it embodies an *agreement* as to how the parties were to (1) present their cases to the Third Firm—through submission of "[a]ll data and other relevant information affecting the calculation of the Square Footage that were available to the Law Firms that conducted the Seller Determination and the Purchaser Determination," as well as the actual determinations; and (2) communicate with the Third Firm—jointly, not ex parte, and only through their retained counsel. Seller has not identified anything about that agreed-upon procedure that offends due process.[12] We conclude, therefore, that the circuit court did not err in granting Purchasers' motion to compel arbitration.[13]

[12] Notably, Seller does not argue that paragraph (C) of Exhibit F was a contract of adhesion or that it was hidden in boilerplate. To the contrary, Seller's counsel described the transaction to the circuit court as "a transaction between sophisticated parties, [with] lawyers involved."

[13] We observe that in issuing its ruling from the bench, the circuit court expressly stated—correctly, in our view—that it was "not ruling on the standard of review that would apply" in any proceeding to review the arbitration award. The effect, if any, of the parties' agreement that the calculations resulting from the Third Determination would be final and binding "absent manifest error by the Third Firm" on the appropriate standard for review of the arbitration award was not before the circuit court in this action. That issue was appropriately left to be resolved in connection with the petitions to confirm or vacate the arbitration award.

B. Purchasers Are Not Precluded from Enforcing Arbitration by Waiver.

Seller also argues that even if paragraph (C) of Exhibit F were an arbitration clause, Purchasers waived their ability to enforce it because they "failed to honor the terms of the Exhibit F Process[.]" Specifically, Seller contends that because Purchasers "unilaterally delay[ed]" the Exhibit F process for four years and "frustrat[ed]" Seller's submissions to the Third Firm, they waived their right to demand arbitration. In response, Purchasers deny any delay and assert, in any event, that Seller has "at every opportunity . . . sought to enforce the process in Exhibit F."

Seller's waiver argument is without merit. As Purchasers point out, from at least February 2020 until its receipt of the Third Determination, Seller consistently sought to proceed with the process established in paragraph (C) of Exhibit F. Indeed, Seller has contended that one of the reasons it was compelled to initiate both this litigation and the foreclosure action was *Purchasers'* refusal to properly engage in that process; and in Seller's amended complaint, it claimed prevailing party status because of its success in forcing Purchasers to engage in the paragraph (C) process. Moreover, in August 2020, Seller affirmatively agreed to proceed with the paragraph (C) process as part of the agreement to postpone the foreclosure sale.

At bottom, Seller's issue is not with being compelled to use the paragraph (C) process but with the treatment of that process as an arbitration. Seller would thus have had the parties participate jointly in the paragraph (C) process, precisely as they did, but then have had the outcome of the process reviewed in this action as something other than an

arbitration award, rather than in a separate action as an arbitration award. Regardless of whether Seller might have been able to successfully resist invocation of the paragraph (C) process entirely in 2020, had it been inclined to do so, we fail to see how Purchasers' delays in participating in that process could convert the process from an arbitration into something else. By steadfastly demanding that the parties use that process and then affirmatively and voluntarily agreeing to do so, Seller waived any opposition to proceeding with the paragraph (C) process based on Purchasers' untimely participation in it. It was thus appropriate for the circuit court to enforce the parties' agreement.

II. THE CIRCUIT COURT ERRED IN DISMISSING COUNT I OF THE COMPLAINT WITHOUT RESOLVING SELLER'S CLAIM OF ENTITLEMENT TO A CONTRACTUAL AWARD OF ATTORNEYS' FEES AND COSTS AS A PREVAILING PARTY.

Seller contends that regardless of whether the circuit court was correct to compel arbitration, the court erred in dismissing its breach of contract claim because that claim was not subject to resolution in the Exhibit F process. Purchasers respond that dismissal was proper because "[e]ach one of the purported breaches relates to the parties' dispute over the calculation of 'the square footage, the FAR, and the purchase price.'" We agree with Seller that at least some elements of its claim for breach of contract did not fall within the scope of the arbitration agreement and so will reverse in part the dismissal of Count I. Nonetheless, based on Seller's concession that its damages are limited to attorneys' fees it seeks to recover as a prevailing party, that is the only claim the circuit court must confront on remand.

"[T]he standard of review of the grant or denial of a motion to dismiss is whether the trial court was legally correct." *Blackstone v. Sharma*, 461 Md. 87, 110 (2018). In reviewing the grant of a motion to dismiss, we "examine only the sufficiency of the pleading," *Soc'y of Am. Foresters*, 114 Md. App. at 232-33 (quoting *Lubore v. RPM Assocs., Inc.*, 109 Md. App. 312, 326 (1996)), and "must assume the truth of, and view in a light most favorable to the non-moving party, all well-pleaded facts and allegations contained in the complaint, as well as all inferences that may reasonably be drawn from them," *RRC Ne., LLC v. BAA Md., Inc.*, 413 Md. 638, 643 (2010). Dismissal is proper "only if the allegations and permissible inferences, if true, would not afford relief to the plaintiff, *i.e.*, the allegations do not state a cause of action for which relief may be granted." *Id.* at 643-44.

As an initial matter, we are concerned here only with Count I of the complaint, in which Seller alleged multiple breaches of contract. In opposing the motion to dismiss in the circuit court, Seller did not make any argument that Count II, the claim for declaratory relief, should withstand the motion to dismiss. In its appellate brief, although Seller identifies as one of its questions presented whether the circuit court erred in dismissing Count II, it does not present any argument on that issue. As a result, Seller has waived any argument that the court erred in dismissing Count II, at least to the extent such an argument would diverge from its arguments concerning the order compelling arbitration. *See Klauenberg v. State*, 355 Md. 528, 552 (1999) ("[A]rguments not presented in a brief or not presented with particularity will not be considered on appeal."); Md. Rule 8-504(a)(6) (stating that an appellate brief must include "[a]rgument in support of the party's position

on each issue"). Even if not waived, we would conclude that the circuit court did not err in dismissing Count II because, to the extent it did not overlap with Count I and was not moot, it sought declaratory relief on issues that were exclusively within the scope of the arbitration provision.

Focusing on Count I, Seller's original complaint asserted that Purchasers had breached the Purchase Agreement by, among other things, refusing to pay at least the "undisputed minimum amount due on the Note of $1,275,600" and to engage in the various steps in the process of resolving the final purchase price required by the Purchase Agreement. Seller thus sought a judgment for the undisputed minimum amount due on the Note; compensatory damages; an order requiring Purchasers to engage in good faith to mutually agree on the Square Footage, to reconcile the difference between the Seller Determination and the Purchaser Determination, and to permit Seller to forward its Seller Determination in full to the Third Firm; and an award of attorneys' fees and costs incurred in this action and the related foreclosure action. Subsequent developments, especially Purchasers' payment of $1,275,600 of the amount due on the Note and the parties' agreement concerning how to go forward with the paragraph (C) process, rendered moot much of the relief Seller had requested in Count I. Nonetheless, in its amended complaint, Seller claimed to have suffered damages as a result of Purchasers' breaches in the form of attorneys' fees and costs to which it claims a contractual entitlement as the prevailing party. At oral argument, Seller confirmed that its claim for damages is limited to the attorneys' fees and costs to which it claims a right to recover as the prevailing party.

In their motion to dismiss, Purchasers sought dismissal of Count I on the ground that the factual allegations of the complaint did not support Seller's claim that Purchasers had breached the Purchase Agreement. In ruling on the motion to dismiss, the circuit court did not address the sufficiency of the factual allegations supporting Count I; indeed, it did not discuss Count I at all. Instead, the court's rationale for dismissing the complaint appears to have been addressed exclusively to the request for declaratory relief in Count II: "[I]f something is remitted to arbitration, it cannot, at the same time, be the subject of a declaratory action."

In general, "[w]here there is a broad arbitration clause, calling for the arbitration of any and all disputes arising out of the contract, all issues are arbitrable unless expressly and specifically excluded." *Gold Coast Mall*, 298 Md. at 104; *see also, e.g.*, *Rosecroft Trotting & Pacing Ass'n v. Elec. Race Patrol, Inc.*, 69 Md. App. 405, 409, 411 (1986) (holding that a "catch-all" provision to arbitrate "*any* dispute . . . *concerning, pertaining, or relating* to the performance of" an audio-visual services contract applied to a non-disparagement clause). "However, when presented with a narrowly drawn commercial arbitration clause, the court should consider whether the conduct in issue is on its face within the scope of that clause." *The Redemptorists v. Coulthard Servs., Inc.*, 145 Md. App. 116, 146 (2001) (emphasis removed) (quoting *Gelco Corp. v. Baker Indus. Inc.*, 779 F.2d 26, 28 (8th Cir. 1985)). Accordingly, if an arbitration provision "cannot reasonably be construed to cover [a particular] dispute . . ., arbitration need not be compelled." *Id.* (emphasis removed). "Whether a claim falls within the scope of an arbitration agreement turns on the factual allegations encompassed in the . . . complaint." *The Redemptorists*,

145 Md. App. at 151. In undertaking this factual inquiry, we "resolve any doubts concerning the scope of arbitrable issues in favor of arbitration while respecting the contract nature of arbitration." *Rourke*, 153 Md. App. at 123.

Here, paragraph (C) of Exhibit F defined a narrow and specific scope for arbitration: "to calculate the Square Footage," which, in turn, is final and binding on the parties solely "for purposes of calculating the Square Footage, the FAR and the Purchase Price." Many of the breach allegations contained in Count I of the complaint do not fall within that narrow scope. Because "no arbitration agreement exists . . . if 'the controversy sought to be arbitrated is not within the scope of the arbitration clause of the contract,'" *Gannett Fleming*, 243 Md. App. at 400 (some quotation marks removed) (quoting *Gold Coast Mall*, 298 Md. at 106), the circuit court erred in dismissing, rather than staying, Count I in deference to the arbitration proceeding,[14] *see The Redemptorists*, 145 Md. App. at 152-56 (holding that although several claims were "linked to" or "dependent upon" the arbitrable issue, the claims were not subject to arbitration and so should have been stayed pending completion of the arbitration); *NRT Mid-Atl., Inc. v. Innovative Props., Inc.*, 144 Md. App. 263 (2002) (concluding that tort claims related to an arbitrable contractual claim should have been stayed pending arbitration), *disagreed with on other grounds as stated in Addison v. Lochearn Nursing Home, LLC*, 411 Md. 251, 272 n.13 (2009).[15]

[14] Whether the circuit court could or should have stayed adjudication of Count I pending adjudication of the arbitration is now a moot question because the arbitration has been concluded.

[15] During the circuit court hearing, the court asked Seller's counsel what, if any, issues in its complaint would remain pending if the court were to compel arbitration.

Although we would ordinarily remand for the parties to litigate Count I in its entirety, we cannot overlook Seller's concession that its claim for "damages" is limited to the claim for attorneys' fees and costs to which it claims an entitlement as the prevailing party, by virtue of its success in obtaining (1) partial payment on the Note and (2) Purchasers' agreement to go forward with the paragraph (C) process in the manner Seller argued was required. Such a claim is governed by Rule 2-705. Unlike where attorneys' fees are available as damages for breach of contract, *see generally* Md. Rule 2-704, a claim for attorneys' fees pursuant to a contractual prevailing party provision is not treated as an element of damages to be adjudicated in the case-in-chief, but is to be determined by the court only after "a finding by the court in favor of a party entitled to attorneys' fees as a 'prevailing party,'" Md. Rule 2-705(e). Any award of attorneys' fees must then "be included in the judgment on the underlying cause of action but shall be separately stated." Md. Rule 2-705(g). We will therefore reverse the award of judgment in favor of Purchasers as to Count I of the complaint but remand only for the limited purpose of deciding Seller's claim for attorneys' fees and costs as the prevailing party. In doing so, we express no opinion concerning whether Seller is the prevailing party.

Counsel's response focused on review of "the Carrier opinion" and did not reference the breach allegations. During oral argument before this Court, Purchasers contended that Seller's response to the court's question waived its ability to challenge the dismissal of Count I. We disagree. "Waiver rests upon the intention of the party, and therefore, acts relied upon as constituting waiver must unequivocally demonstrate that waiver is intended." *Taylor v. Mandel*, 402 Md. 109, 135-36 (2007) (internal citation omitted). In context, and in light of the briefing before the circuit court at the time, Seller's response was not an affirmative waiver of its breach of contract claim.

CONCLUSION

In sum, we affirm the circuit court's order compelling arbitration and the dismissal of Count II of the complaint, reverse the dismissal of Count I of the complaint, and remand for further proceedings as set forth in this opinion.

MOTION TO DISMISS APPEAL DENIED.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED IN PART AND REVERSED IN PART. CASE REMANDED FOR PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID 75% BY APPELLANT AND 25% BY APPELLEES.