Circuit Court for Anne Arundel County
Case No. C-02-CV-15001277

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1175

September Term, 2016

MARYLAND LAND CONSULTING, LLC

v.

LOYAL ORDER OF MOOSE #1456

Graeff,
Arthur,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: October 9, 2018

*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.

On September 19, 2011, appellant/cross-appellee, Maryland Land Consulting, LLC (MLC), and appellee/cross-appellant, Loyal Order of Moose, Lodge #1456 (Moose), entered into a contract for the sale of land located in Glen Burnie, Anne Arundel County.

On March 18, 2015, settlement not having occurred, Moose, in writing, gave MLC notice that the agreement was terminated based on MLC's nonperformance. MLC filed a complaint in the Circuit Court for Anne Arundel County sounding in breach of contract and specific performance. Moose responded with a counter-claim seeking a declaratory judgment that MLC was in breach of the agreement. Moose also sought damages and attorneys' fees.

Following a bench trial, the circuit court ruled that MLC had materially breached the contract, permitting Moose to terminate the agreement. The court also awarded contractual attorneys' fees to Moose as the prevailing party; however, it applied the non-refundable deposits Moose received from MLC pursuant to the terms of the contract as an off-set to the attorneys' fees awarded.

MLC has appealed the court's finding that it breached the contract, and Moose has filed a cross-appeal based on the court's application of the non-refundable deposits to the attorneys' fees award.

For the reasons we discuss, we shall affirm the court's finding that MLC breached the contract. However, we shall remand to the circuit court for determination of appropriate attorneys' fees.

BACKGROUND

Moose owned a large tract of land on Crain Highway, Glen Burnie, from which it agreed to sell 5.6 acres to MLC, while retaining the balance. That agreement was memorialized in a written contract of sale, the interpretation of which is the subject of this litigation. The contract contained a "sketch plan" provision that provided, in pertinent part, that "Buyer will diligently pursue sketch plan approval as it is in Buyer and Sellers [sic] best interest to move as quickly as possible …." Submission of a sketch plan[1] by a developer, and its review by the permitting authorities, is an integral aspect of the Anne Arundel County permitting process.

Following the initial agreement, the contract was amended five times – in October 2011, February 2012, April 2012, June 2012, and September 2012 – each amendment extending the deposit deadlines or the settlement time. None of the settlement dates set out in the extensions was met. In March 2015, MLC again attempted to amend the contract with a sixth addendum that included a provision requiring Moose to acknowledge that MLC had fully satisfied its contractual obligations thus far and that any delay was through no fault of its own, as well as providing that Moose ratify the contract to ensure that it was in "full force and effect."

Finally, MLC having failed to initiate the sketch plan process, three and one-half years after execution of the contract, and the additional provisions of the proposed sixth addendum, Moose gave written notice of termination of the contract.

[1] A "sketch plan", as defined by the Anne Arundel County Code, "means the application and materials submitted with an application for sketch plan review." Anne Arundel Cty. Code § 17-1-101(80) (2005).

Following a four-day bench trial, the court determined that MLC had "failed to diligently pursue sketch plan approval and … that [MLC] materially breached the contract." The court awarded attorneys' fees to Moose, as the prevailing party, but credited MLC for any award of attorneys' fees and costs with the non-refundable deposits it had already paid to Moose, leaving Moose the opportunity to seek an amount of attorneys' fees and costs in excess of the deposit.

Standard of Review

Our review of matters tried without a jury is compelled by Maryland Rule 8-13l(c):

> [A]ppellate court[s] 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.

Md. Rule 8-131(c).

We "will review the case on both the law and the evidence[,]" Md. Rule 8-131(c), "defer[ing] to the trial court's findings of fact, and will not disturb those findings unless they are clearly erroneous." *Kunda v. Morse*, 229 Md. App. 295, 303 (2016). However, because a "court's legal conclusions do not receive the same deference[,]" we will review the "court's application of law to facts *de novo*." *Id.* Accordingly, when "an appeal present[s] both legal and factual issues, we shall review each issue under the appropriate standard." *Id.*

When discerning the meaning of a particular contractual provision at issue, "Maryland courts employ 'an objective approach to contract interpretation, according to

which, unless a contract's language is ambiguous, we give effect to that language as written without concern for the subjective intent of the parties at the time of formation.'" *Frederick Classical Charter Sch., Inc. v. Frederick Cty. Bd. of Educ*., 454 Md. 330, 415 (2017) (quoting *Ocean Petroleum, Co. v. Yanek*, 416 Md. 74, 86 (2010)), *reconsideration denied* (Aug. 24, 2017). "Ambiguity will be found if, to a reasonable person, the language used is susceptible to more than one meaning, or it is of a doubtful meaning." *Ubom v. SunTrust Bank*, 198 Md. App. 278, 286 (2011) (citing *Anderson Adventures, LLC v. Sam & Murphy, Inc*., 176 Md. App. 164, 179 (2007)). "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*. (internal quotations and citation omitted).

DISCUSSION

MLC presents one question for our review, which we have slightly edited:

> Did the circuit court err when it found that Moose was entitled to repudiate its sale of land contract with MLC on the ground that MLC had breached an essential provision in the contract?

From that broad question MLC offers four sub-contentions, challenging: (1) the language of the sketch plan provision, *i.e*., whether it constitutes a "time is of the essence" requirement; (2) whether the parties intended the sketch plan provision to be a material part of the contract; (3) whether Moose produced sufficient evidence to prove a material breach; and, (4) whether the court properly considered the "complete factual predicate" in reaching its decision.

Time is of the Essence

MLC first asserts that, "[a]s a matter of law, the 'sketch plan' provision does not constitute an express agreement that 'time is of the essence' to the contract …." To the extent that the contract does not contain the phrase "time is of the essence," MLC is correct.

Although not referring to "time is of the essence" in its oral ruling, the trial court found that the contract "states that [MLC] will diligently pursue sketch plan approval" and that "[t]he words, acts, and deeds of [Moose] neither prevented [MLC] from pursuing sketch plan approval for the townhouse subdivision, nor constituted an alteration of the contract." The court found further that "strict contract construction dictates that [MLC] failed to diligently pursue sketch plan approval" and, because of that, "[MLC] materially breached the contract."

Considering the language of the sketch plan provision of the contract, we address MLC's arguments I and II together. First, MLC argues that if a contract does not expressly provide that "time is of the essence", in those words, then time is not of the essence.

The "sketch plan" provision is found in paragraph 7 of the contract:

> Buyer will *diligently* pursue sketch plan approval as it is in Buyer and Sellers best interest to move as *quickly as possible* however Seller understands that Buyer has no influence with Anne Arundel County Planning and Zoning and cannot give a time frame for the approval.

(Emphasis added).

A contractual requirement that is "of the essence" means that it is "so important that if the requirement is not met, the promisor will be held to have breached the contract and a rescission by the promisee will be justified. As such, a "time-is-of-the-essence" clause is "[a] contractual provision making timely performance a condition." *Time-is-of-the-Essence Clause*, BLACK'S LAW DICTIONARY (10th ed. 2014). With respect to the meaning of the particular language found in paragraph 7 of the MLC contract, Black's defines "diligent" as, "1. Careful and attentive; persistent in doing something; industrious; assiduous <a diligent student>. 2. Carried out with care and constant effort <a diligent search>." *Diligent*, BLACK'S LAW DICTIONARY (10th ed. 2014).

The express language of the sketch plan provision imposes upon MLC the obligation to "diligently pursue" approval. Thus, we agree that MLC was required to be "persistent" in efforts to obtain approval and to "[c]arr[y] out [its pursuit] with care and constant effort …." *Id*. The record before us reflects, and the court found, that the contract was executed on September 19, 2011, and was terminated in March 2015, three and one-half years later, when Moose discovered that MLC had done nothing to initiate the permitting process with the appropriate Anne Arundel County agencies.

The sketch plan provision, however, is not the only mention of timeliness within the contract. Moose's obligations, in paragraph 13 of the contract, for example, require that seller work with buyer to sign all necessary documents "that are necessary for the subdivision process in a *timely manner*." With respect to the rights and obligations of the buyer, paragraph 14 states, in pertinent part, that: "It shall be the Buyers right to hire,

direct, control and supervise the necessary experts to obtain the subdivision of the property and to work with Anne Arundel County to have the property subdivided in a *timely manner*." (Emphasis added). Finally, paragraph 25, the final settlement language, provides, in relevant part, that:

> The settlement and final sale and purchase of the Property hereunder pursuant to this Contract shall be 120 days following recorded record plat of the final subdivision of the property or sooner. Final settlement shall be *no later than* September l, 2014 or 120 … days from receipt of recorded record plat of the final subdivision of the Property, whichever occurs first. If the Buyer is unable to obtain a recorded subdivision plat for the Property by this date, *provided that Buyer has diligently pursued same and is continuing to diligently pursue same*, then the Seller shall grant extensions of six (6) months as necessary for settlement to occur hereunder….

(Emphasis added).

For support, MLC directs our attention to *String v. Steven Dev. Corp*., 269 Md. 569 (1973), where the Court articulated the effect of a time restriction clause within a contract:

> "Parties may, no doubt, make time an essential part of a contract, and in such cases, the failure by one of the parties to perform his part of the obligation within the time prescribed, discharges the other from all liability under the contract. *Whether time is to be considered as of the essence of the contract, must, of course, depend upon the intention of the parties*. When this intention is expressed in clear and unambiguous terms, the contract must speak for itself, and the liability of the parties must be determined by the plain and obvious meaning of the language used. *If, however, this intention is not expressed in clear and direct terms, courts may look to the acts and conduct of the parties*, in order to find out the meaning which they themselves have put upon the contract."

String, 269 Md. at 575-76 (emphasis in *String*) (quoting *Scarlett v. Stein*, 40 Md. 512, 525-526 (1874)).

The Court also discussed that, even when time of essence clauses are not strictly enforced, "'[i]t means that neither party will be held strictly to the time limited, not that either party will be at liberty to disregard it entirely.'" *Id*. at 577-78 (quoting *Doering v. Fields*, 187 Md. 484, 491 (1947)). MLC's contention that it did not materially breach the contract because time was not of the essence is not supported by either the language of the contract or the conduct of the parties.

In an alternative argument, MLC contends that "if a sale of land contract has both a time is of the essence provision and a date for completion of the transaction provision, in the absence of proof that the purchaser cannot satisfy the purchaser's obligations before the completion date, the seller cannot repudiate the contract in advance of the agreed upon completion date." Therefore, MLC argues, because the third addendum, dated April 24, 2012, provided the final settlement date to be no later than September 1, 2016, and up to four six-month extensions beyond that date, pursuant to the fifth addendum, dated September 14, 2012, that Moose's repudiation in March 2015 was premature, at best. MLC further argued that there was "no evidence that [MLC] would have been unable to settle on the property on or before the dates agreed to in Addenda 3 and 5[.]"

The record and witness testimony controvert this argument. Henry W. Seay, Jr. and Ronald W. Johnson, representing MLC,[2] both testified that the sketch plan would

[2] Seay represented MLC throughout the transaction. MLC is owned by Seay's wife, Holly Seay. Johnson was identified as MLC's project engineer.

take three to four months to be ready for submission to the county planning office, and two to two and one-half years for final approval**.** Having failed to prepare a sketch plan or to file anything with the county planning office by March 24, 2015, and facing an approval time frame of two to three years, there was more than sufficient evidence from which the court could conclude that MLC could not have been able to settle on the property by September 1, 2016. In fact, on direct examination, Johnson agreed that, from the date the contract was terminated in March 2015, final development plan approval could not have been expected for some time between March and September 2017.

Material Breach

MLC further contends that "the acts and conduct of the parties subsequent to the execution of the contract provide overwhelming evidence that the parties did not intend the 'sketch plan' provision to be a *material* part of the contract." (Emphasis in original). We find no support for this argument in the record. Moreover, because MLC's remaining arguments are also connected to the evidence produced and factual findings made therefrom, we address them together.

"Generally, a breach of contract is defined as a 'failure, without legal excuse, to perform any promise that forms the whole or part of a contract.'" *Kunda*, 229 Md. App. at 304 (quoting *Weaver v. ZeniMax Media, Inc.*, 175 Md. App. 16, 51 (2007)). Further, we have defined "[a] promise, as referred to in that definition, is 'a manifestation of intention to act … in a specified way, so made as to justify a promisee in understanding that a commitment has been made.'" *Id.* (quoting *Weaver*, 175 Md. App. at 51). As

drafter of, and party to, the contract, MLC committed to hire experts in order "to obtain the subdivision of the property" and to "work with Anne Arundel County to have the property subdivided *in a timely manner*."[3] In order to obtain a subdivision approval, and to comply with the timeliness requirements of the contract of sale, MLC also promised to "*diligently pursue* sketch plan approval[.]"

That particular provision of the contract is found in paragraph 7, the "DEPOSIT" section, and was directly tied to the second deposit, which was originally for $150,000 and due within 30 days after county approval of the sketch plan. To stress the temporal significance of the sketch plan approval, the contract included the provision for the buyer's diligent pursuit, and qualified the provision's purpose, "as it is in Buyer and Sellers best interest to move *as quickly as possible* …." (Emphasis added). Approval of a sketch plan is the prerequisite to the creation of a subdivision[4] and a subdivision is required in order to create two parcels from one tract.[5]

Having failed to file any documents with Anne Arundel County in three and one-half years, without any contractual reason for delay, MLC breached its promises to

[3] "Final plan review of subdivisions … may only proceed after the sketch plan has been approved or the Planning and Zoning Officer has granted a modification to eliminate the sketch plan review requirement." Anne Arundel Cty. Code, § 17-3-301(a) (2005).

[4] "Unless a modification of the requirement for the filing of an application for sketch plan approval is granted, a subdivision … shall be initiated by filing an application for sketch plan approval prepared by and under the seal of a qualified professional." Anne Arundel Cty. Code § 17-3-201(a) (2005).

[5] A "subdivision" of property, "means the division of land so as to create two or more lots[.]" Anne Arundel Cty. Code § 17-1-101(84) (2005).

"diligently pursue" sketch plan approval and to "obtain the subdivision" in a "timely manner." Having determined that there was in fact a breach, we look to whether the breach was material.

The Restatement (Second) of Contracts provides courts with conditions to be considered when determining whether a "failure to render or to offer performance" is material to the contract, by:

> (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected; (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived; (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture; (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; [and] (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Restatement (Second) of Contracts § 241 (1981).

Of those conditions, the last two are most relevant to the question before us. MLC's "likelihood" to be able to cure its non-performance is, indeed, highly *unlikely*, if not impossible. MLC failed to file anything with Anne Arundel County within the three and half years of the life of the contract. Moreover, it made continuous misrepresentations which induced Moose to grant extensions.

For example, by letter of October 19, 2011, just weeks after the execution of the contract, MLC sought the first extension for the initial deposit:

> I feel that it is also in the best interest of the Moose to stay with me since it would take anyone new coming in at least 4 months just to get to where I am….

* * *

> I know how much it means to the membership of the Moose to get this project underway and the best plan is to move forward with what we have now.

A letter of February 6, 2012 seeking to induce a second extension represented that:

> The plan is to get the preliminary plat approved before next year however if this issue cannot be resolved it could take at least 2 years to get to preliminary plat for the townhouse subdivision if this should happen [MLC] would no longer be interested in the project and will withdraw their contract.
>
> I will try to explain; [MLC] will have to have written approval from planning and zoning that they will let the submission of the townhouse subdivision co-inside [sic] with the submission of subdividing the property into 2 parcels; otherwise the Moose will have to subdivide the property into 2 parcels then transfer the new parcel to [MLC] at which time they would then have to apply for the townhouses and this is what would add an additional 1 year or so onto the project putting it in danger of losing the schools.
>
> We do expect to get the approval however we will need for the Moose to extend the time due for the second non refundable [sic] deposit to give us time to get the necessary approval from the county. We do need to move forward as quickly as possible with the addendum so the [MLC] can continue to move forward with the county….

The second addendum, resulting from that letter, left the February 9, 2012 due date for the second deposit open-ended for up to 63 days from the date of the addendum. The new date for the second $50,000 deposit was conditioned on, "[MLC] obtaining approval acceptable to [MLC] from Planning and Zoning allowing the submission of the townhouse project to co-inside [sic] with the submission of the subdivision of the Moose property." Further, it afforded MLC the sole authority to determine whether the

condition had been satisfied, providing that: "[MLC] must obtain approval acceptable to [MLC] from Planning and Zoning within 60 days of [Moose] signing this addendum."

Yet again, on April 23, 2012, MLC sought a third addendum to the contract, seeking to move the deposit date to June 30, 2012, and seeking to extend the closing date:

> We also talked about extending the final date of the contract to allow for the additional time that it is going to take to get the subdivisions through the county process, if they will not let the two subdivisions go through at the same time, which I believe they will but I have to protect myself just in case it doesn't work that way. I know that it is in everyone's best interest to get this done as soon as possible and I will not delay on my end.

The third addendum, executed April 29, 2012, extended the final settlement date to be "no later than" September 1, 2016, four years and four months from the date of the addendum and almost five years from the date of the initial contract. The fourth addendum extended the deposit due date once more to August 20, 2012. The fifth and final executed addendum extended the initial deposit due date, by allowing for $25,000 of the deposit to be paid "within 4 days of the signing of th[e] addendum and $25,000 due within 4 days of Anne Arundel County accepting a storm water management program for th[e] property and the neighboring properties acceptance of a right of entry if necessary …." The addendum also added a limit to the number of future extensions to four six-month extensions beyond the September 1, 2016 settlement date and provided a right-of-first-refusal clause to afford MLC the opportunity to choose whether to purchase the "remaining Moose property" over any other interested future buyer.

The meeting minutes admitted into evidence from various Moose meetings from 2013 through 2014, with Seay appearing on behalf of MLC, also noted various

misrepresentations that Seay had made at those meetings to lead Moose to believe MLC had been diligently working towards a sketch plan:

- March 6, 2013 – Meeting with Seay and architects, notes: "Storm management has a verbal approval but not in writing."

- June 11, 2013 – "[Seay] reported that things were still going forward with the County. Mr. Seay reported that the county left up on the amount of parking needed and will approve a possible new Moose Building on the Side of the Property."

- January 14, 2014 – "[Seay] reported the project will be in 2 parts. The Land Deal stays the same. Will need another agreement for the Building and a $ 25,000 [sic] Deposit paid by Seay and he needs to Sub [sic] Divide the Land. The plimary [sic] plans - after 2 building Plats and then Settlement. Phase 2 will be a new building."

- October 1, 2014 – Seay reported at the meeting that "primary drawing for the Apartment [sic] have been completed[,]" and "Phase A on Apartments have been submitted to Anne Arundel County for approval."

- November 5, 2014 – "[Seay] reported that $ 20,000 [sic] has been Deposit [sic] for Engineering. Entire Project for New Moose Building and New Apartment Site…. He is waiting for decision for New Building and will give $25,000 in Signing on New Contract."

In a January 20, 2014 follow-up letter to Moose for the New Building Committee Meeting the week prior, MLC recognized the two separate projects between the subdivision and the Moose building project, and represented, in relevant part, that:

> As far as [MLC's] contract with the Moose, we have been steadily moving forward with different scenarios, however, we are at a standstill until the Moose decides on how they want to proceed….

Finally, its proposed sixth addendum, provided to Moose in early March 2015, sought to, *inter alia*, have Moose grant the "right to further extend the outside settlement

date" beyond September 1, 2018, with the only temporal limitation being that it must vest "within the life of Holly Seay plus ten (10) years." Notably absent from the proposed sixth addendum is any mention of the new Moose building project or any delay allegedly caused thereby, despite such contrary assertions made at trial and before this Court. The addendum's stated reason for delay in obtaining subdivision of the property represents that "the subdivision of the Property as [sic] been delayed as a result of inadequate school capacity, [MLC] is nonetheless proceeding at this time with incurring engineering fees and other costs on an as-needed basis."

Given the testimony from both Ronald Johnson and Henry Seay, *supra*, preparation of the sketch plan would have taken three to four months, and between two and two and one-half years for final approval by the permitting authorities.

The court found that the contract was terminated March 24, 2015, when the termination letter was ratified by the Moose membership. Erring on the conservative side, adding three months for sketch plan submission, thereby taking the date to June 24, 2015, plus the estimated two years for final approval, the evidence before the court moves the earliest possible settlement date to June 24, 2017, which would be consistent with Johnson's concession on direct examination, *supra*. Considering that the amended final settlement date was September 1, 2016, with four six-month extensions being granted only "*as necessary*," and only if MLC has "*diligently pursued*" recorded subdivision plat to that point, it would have been impossible for MLC to have obtained final plat approval as proposed.

In addition to the due diligence that the contract required, the contract only contemplates the sale of the land and what must occur before the sale can be completed, without any mention of the potential construction of a new Moose building. The contract repeatedly addresses the "subdivision," "sketch plan," and "final plat," signifying the importance of the subdivision of the property as an essential term of the contract. In particular, when the contract describes the property to be sold, it refers to the "preliminary sketch plan" and "what the Seller and Buyer desire *the final plat* to be approved as[.]" As to settlement, the contract provides that the "[d]ate of settlement will be 120 days following *recorded record plat of the final subdivision of the property*." In the section that relates to the deposits, the contract requires the second deposit to be received "within 30 days following *sketch plan approval* by Anne Arundel County." That section also imposes the duty on MLC to "diligently *pursue sketch plan approval*." Seller's obligations were to "work with Buyer *during the subdivision process*" and to sign all documents "that are *necessary for the subdivision process* in a timely manner." It is clear that sketch plan approval was the seed from which the balance of the time obligations were to grow.

MLC was granted the right to "hire, direct, control and supervise the necessary experts *to obtain the subdivision of the property* and to work with Anne Arundel County *to have the property subdivided* in a timely manner." MLC also bore the duty to "hire, direct, control and supervise the engineering firm … [in order] to *obtain a subdivision of the property* into 2 (two) parcels[.]"

The contract provides that the final settlement "shall be 120 days *following recorded record plat of the final subdivision* of the property or sooner[,]" and that "[f]inal settlement shall be no later than September 1, 2014 or 120 … days from *receipt of recorded record plat of the final subdivision* of the property[.]" Finally, the contract contains a provision to allow for extensions if MLC "is unable to *obtain a recorded subdivision plat* for the Property[.]" There is nothing in the record to suggest that MLC was, in any way, constrained or hindered by Moose from moving forward with preparation of the sketch plan or application for subdivision approval.

It is clear from the express language of the contract and conduct of the parties that subdivision approval and timeliness of completion were essential elements of the agreement. MLC failed to make diligent efforts to complete the first most basic and important step in the subdivision process – the sketch plan. That failure, coupled with the failure to meet the essential timeliness requirements was, in our view, a material breach. We find no error in the trial court's findings and ruling.

Burden of Persuasion

MLC also proffers that:

> The following propositions are generally applicable to contract actions: (1) The defendant who seeks judicial relief from a contractual obligation has a burden of production, i.e., the defendant must produce evidence that generates a genuine issue of fact on the question of whether the plaintiff has failed to satisfy a *material* obligation imposed by the contract. (2) If the defendant satisfies that burden of production, the plaintiff must prove by a

> preponderance of the evidence that the plaintiff has satisfied that obligation.[6]

However, other than that bald assertion, MLC points us to nothing in the record that supports a suggestion that the court somehow shifted the burden of proof to it, as the counter-defendant. Nor does MLC cite us to any authority that supports its assertion. Hence, we need not address MLC's burden of production contentions.

Cross-Appeal – Attorneys' Fees Award

In its cross-appeal, Moose argues that the court erred in crediting the total amount received from the contractual non-refundable deposits against the award of attorneys' fees.

In its consideration of the award of counsel fees, the court expressly stated that it would credit "any award of attorneys' fees and costs" with the $75,000 that Moose has already received in deposits. Explaining further that, "[i]f [Moose] can demonstrate reasonable attorneys' fees and costs in excess of $75,000, the Court will hold a hearing thereon, upon a hearing request[.]" The court left open the opportunity for Moose to request a hearing in order to make that determination. Moreover, there was no evidence offered or considered by the court as to what would constitute a reasonable attorneys' fees award.

"'Contract provisions providing for awards of attorney's fees to the prevailing party in litigation under the contract generally are valid and enforceable in Maryland.'"

[6] Nor was this question presented to, or decided by, the trial court.

Ochse v. Henry, 216 Md. App. 439, 458 (2014) (quoting *Myers v. Kayhoe*, 391 Md. 188, 207 (2006)). "An award of attorney's fees will not be disturbed unless the court 'exercised [its] discretion arbitrarily or [its] judgment was clearly wrong.'" *Id*. at 455 (quoting *Danziger v. Danziger*, 208 Md. 469, 475 (1955)).

The Contract contained an express provision regarding the award of attorneys' fees in an action related to it, providing that:

> In any action … between Buyer and Seller based, in whole or in part, upon the performance or non-performance of the terms and conditions of this Contract, including, but not limited to, breach of contract, negligence, misrepresentation or fraud, *the prevailing party in such action or proceeding shall be entitled to receive reasonable attorney's fees from the other party as determined by the court or arbitrator*….

(Emphasis added).

The Court of Appeals has determined that, typically,

> [w]hen a contract provides for attorneys' fees in the event of litigation, Maryland Lawyers' Rule of Professional Conduct 1.5 is the foundation for analysis of what constitutes a reasonable fee. Additionally, the trial court has discretion to consider any other factor reasonably related to a fair award of attorneys' fees[,] and the trial court need not explicitly comment on or make findings with respect to each factor nor hold an evidentiary hearing to determine a proper fee award[.]

CR-RSC Tower I, LLC v. RSC Tower I, LLC, 429 Md. 387, 465 (2012) (internal quotations and citations omitted) (footnotes omitted).

If, *arguendo*, we were to decide that the court effectively awarded $75,000 in attorneys' fees, then our review would be of the reasonableness of the court's award. The record is silent, however, of any evidence to support the award of a $75,000 fee. Hence, we shall remand to the circuit court for the limited purpose of a determination of an

appropriate award of attorneys' fees. In doing so, we recognize that the contract provisions regarding the non-refundable deposit *vis-à-vis* counsel fees are separate and are not in any way interdependent.

JUDGEMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY IN FAVOR OF APPELLEE/CROSS-APPELLANT AFFIRMED; CASE REMANDED FOR THE LIMITED PURPOSE OF A DETERMINATION OF ATTORNEYS' FEES; COSTS TO BE PAID BY APPELLANT.