Circuit Court for Talbot County
Case No. C-20-CV-20-000079

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1334

September Term, 2020

WILLOW CONSTRUCTION, LLC

v.

THE JOHN R. CROCKER COMPANY

Beachley,
Shaw Geter,
Adkins, Sally D.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Adkins, Sally D., J.

Filed: October 28, 2021

As a general contractor, Willow Construction, LLC ("Willow" or "Contractor") entered a subcontract with The John R. Crocker Company ("Crocker" or "Subcontractor"). Due to issues arising out of this subcontract, Crocker requested mediation and later arbitration to resolve an alleged payment deficiency. Willow objected to both mediation and arbitration on the grounds that Crocker failed to comply with a condition precedent to mediation and thus arbitration. After Willow's motions to terminate arbitration with the arbitrator were unsuccessful, Willow filed a claim in circuit court to stay arbitration, seeking summary judgment and declaratory relief. The circuit court found an agreement to arbitrate, entered a declaratory judgment, denied Willow's motion for summary judgment, and granted Crocker's motion for summary judgment. Finally, the circuit court ordered that the case return to the arbitrator.

Willow presented us with two questions on appeal:

1. Was Crocker contractually required to present its claim for additional costs to the Architect for an "Initial Decision" as condition precedent to mediation?

2. Are the admissions of Crocker in its Answer, that it did not submit its claim to the Architect for an Initial Decision prior to filing its Request for Mediation, taken together with the Architect's Affidavit attesting the same, a sufficient basis for entry of summary judgment in Willow's favor that Crocker failed to fulfill the conditions precedent to mediation and arbitration?

For the reasons below, we affirm.

FACTS AND PROCEDURAL HISTORY

The Prime Contract and General Conditions

On February 22, 2017, Willow and YMCA of the Chesapeake, Inc. ("YMCA" or "Owner") entered a construction contract through an *AIA Document A133-2009, Standard Form of Agreement Between Owner and Construction Manager as Constructor* ("Prime Contract"). The Prime Contract incorporates the *AIA A201-2007, General Conditions of the Contract for Construction* ("General Conditions") through Article 1, §1.3 and Article 12, §12.2 of the Prime Contract.

The documents involved in this case contain various flow-down clauses.[1] One such flow-down clause is in Article 5 of the General Conditions, which states in relevant part:

> **§ 5.3 SUBCONTRACTUAL RELATIONS**
> By appropriate agreement, written where legally required for validity, the Contractor shall require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound to the Contractor by terms of the Contract Documents, and to assume toward the Contractor all the obligations and responsibilities, . . . which the Contractor, by these Documents, assumes toward the Owner and Architect.[2]

Under this clause—as well as the flow-down clauses contained in the Subcontract, which will be discussed in relevant part below—Willow asserts that Crocker is bound by the

[1] Flow-down clauses, sometimes referred to as "conduit" clauses, are often used in construction contracts. *See* T. Bart Gary, *Incorporation by Reference and Flow-Down Clauses*, 10 Constr. Law. 1, 46 (1990). These clauses typically provide that a subcontractor will "assume toward the general contractor all of the obligations and responsibilities the contractor assumes toward the owner in the general contract." *Id.* Typically, the converse is also true, where a contractor will assume toward the subcontractor all the obligations and responsibilities the owner assumes toward the contractor. *See id.*

[2] The Contract Documents are defined in Article 1, § 1.1.1 of the General Conditions. In relevant part, the Contract Documents include, but are not limited to, the agreement between the Owner and Contractor and Conditions of the contract.

provisions located in Article 15 of the General Conditions that address the necessary steps the Owner and Contractor must take to bring about a Claim.[3]

The relevant portions of Article 15 of the General Conditions are as follows:

> **§ 15.1.2 NOTICE OF CLAIMS**
> Claims by either the Owner or Contractor must be initiated by written notice to the other party and to the Initial Decision Maker with a copy sent to the Architect, if the Architect is not serving as the Initial Decision Maker. Claims by either party must be initiated within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later.
>
> **§ 15.2 INITIAL DECISION**
> **§ 15.2.1** Claims, excluding those arising under Sections 10.3, 10.4, 11.3.9, and 11.3.10, shall be referred to the Initial Decision Maker for initial decision. The Architect will serve as the Initial Decision Maker, unless otherwise indicated in the Agreement. Except for those Claims excluded by this Section 15.2.1, **an initial decision shall be required as a condition precedent to mediation of any Claim** arising prior to the date final payment is due, unless 30 days have passed after the Claim has been referred to the Initial Decision Maker with no decision having been rendered. Unless the Initial Decision Maker and all affected parties agree, the Initial Decision Maker will not decide disputes between the Contractor and persons or entities other than the Owner. (emphasis added).
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> **§ 15.3 MEDIATION**
> **§ 15.3.1** Claims, disputes, or other matters in controversy arising out of or related to the Contract except those waived as provided for in Sections 9.10.4, 9.10.5, and 15.1.6 **shall be subject to mediation as a condition precedent to binding dispute resolution.** (emphasis added).
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> **§ 15.4 ARBITRATION**
> **§ 15.4.1** If the parties have selected arbitration as the method for binding dispute resolution in the Agreement, any Claim subject to, but not resolved by, mediation shall be subject to arbitration which, unless the parties

[3] The General Conditions Article 15, §15.1.1 defines a Claim as "a demand or assertion by one of the parties seeking, as a matter of right, payment of money, or other relief with respect to the terms of the Contract" and includes "other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract."

> mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Arbitration Rules in effect on the date of the Agreement. A demand for arbitration shall be made in writing, delivered to the other party to the Contract, and filed with the person or entity administering the arbitration. The party filing a notice of demand for arbitration must assert in the demand all Claims then known to that party on which arbitration is permitted to be demanded.

Article 15 of the General Conditions outlines the necessary steps that the Contractor and Owner would have to take to initiate a dispute resolution process. Willow contends that these are also the steps that Crocker must follow—in addition to the steps outlined in the Subcontract—in order to initiate the dispute resolution process.

The Subcontract

On February 22, 2018, Willow entered a contract with Crocker through an *AIA A401-2007 Standard Form of Agreement Between Contractor and Subcontractor* ("Subcontract"). The Subcontract incorporates the General Conditions through Article 1, §1.2 of the Subcontract:

> **§1.2** Except to the extent of a conflict with a specific term or condition contained in the Subcontract Documents, the General Conditions governing this Subcontract shall be the AIA Document A201™–2007, General Conditions of the Contract for Construction.[4]

The Subcontract contains a flow-down clause—in addition to the flow-down clause in Article 5, §5.3 of the General Conditions—in Article 2 of the Subcontract that provides in relevant part:

[4] The "Subcontract Documents" that are referenced in Article 1, §1.2 of the Subcontract are defined in Article 1, §1.1 and Article 16, §16.1 of the Subcontract to include the Subcontract and the Prime Contract, including the Contract Documents enumerated in the Prime Contract.

> **ARTICLE 2 MUTUAL RIGHTS AND RESPONSIBILITIES**
>
> [T]o the extent that the provisions of AIA Document A201–2007 apply to this Agreement pursuant to Section 1.2 and provisions of the Prime Contract apply to the Work of the Subcontractor, the Contractor shall assume toward the Subcontractor all obligations and responsibilities that the Owner, under such documents, assumes toward the Contractor, and the Subcontractor shall assume toward the Contractor all obligations and responsibilities which the Contractor, under such documents, assumes toward the Owner and the Architect. The Contractor shall have the benefit of all rights, remedies and redress against the Subcontractor that the Owner, under such documents, has against the Contractor, and the Subcontractor shall have the benefit of all rights, remedies and redress against the Contractor that the Contractor, under such documents, has against the Owner, insofar as applicable to this Subcontract. **Where a provision of such documents is inconsistent with a provision of this Agreement, this Agreement shall govern**.[5] (emphasis added).

Simply put, Willow owes Crocker the same obligations that YMCA owes Willow, and Crocker owes Willow the same obligations that Willow owes YMCA, unless the obligation arises from a provision in an incorporated document that is inconsistent with a provision in the Subcontract.

Article 5 and Article 6 of the Subcontract outline the process for bringing claims and resolving disputes between the Subcontractor and Contractor. The Subcontract provides in Article 5, §5.2 that the Work within the general scope of the Subcontract may be revised and that the Subcontractor "prior to the commencement of such changed or revised Work, shall submit promptly to the Contractor written copies of a claim for

[5] The agreement Article 2 of the Subcontract refers to as "this Agreement" is the Subcontract.

adjustment to the Subcontract Sum and Subcontract Time . . . ."[6] The Subcontract further states in Article 5, §5.3 that the "Subcontractor shall make all claims promptly to the Contractor for additional cost, extensions of time and damages for delays or other causes **in accordance with the Subcontract Documents**." (emphasis added).

Article 6 of the Subcontract more specifically describes the process for dispute resolution between the Subcontractor and Contractor. Crocker suggests that Article 6 of the Subcontract is inconsistent with the dispute resolution provisions outlined in Article 15 of the General Conditions. The relevant portions of Article 6 of the Subcontract are as follows:

> **§ 6.1 MEDIATION**
> **§ 6.1.1** Any claim arising out of or related to this Subcontract, except those waived in this Subcontract, **shall be subject to mediation as a condition precedent to binding dispute resolution.** (emphasis added).
>
> **§ 6.2 BINDING DISPUTE RESOLUTION**
> For any claim subject to, but not resolved by mediation pursuant to Section 6.1, the method of binding dispute resolution shall be as follows: . . . Arbitration pursuant to Section 6.3 of this Agreement[.]
>
> **§ 6.3 ARBITRATION**
> **§ 6.3.1** If the Contractor and Subcontractor have selected arbitration as the method of binding dispute resolution in Section 6.2, any claim subject to, but not resolved by, mediation shall be subject to arbitration which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Arbitration Rules in effect on the date of the Agreement. A demand for arbitration shall be made in writing, delivered to the other party to the Subcontract, and filed with the person or entity administering the arbitration.

[6] Work is defined in Article 8 of the Subcontract as the Scope of Work found in "Attachment No. 1." Attachment No. 1 defines Crocker's specific "Work" to be done on the project and additionally states that Crocker is to "[p]rovide and maintain adequate manpower for the duration of [its] work to accommodate the Contractors schedule."

> The party filing a notice of demand for arbitration must assert in the demand all claims then known to that party on which arbitration is permitted to be demanded.

The Subcontract itself—excluding incorporated documents—does not mention a condition precedent to mediation.

Procedural History

In May 2019, Crocker substantially completed its portion of work that Willow contracted it to provide. In December 2019, Crocker submitted to the American Arbitration Association ("AAA") a request for mediation regarding its claim for additional payment from Willow for costs incurred from increased manpower and overtime pay.[7]

Willow alleges it received the supporting documents for mediation on March 6, 2020, which indicated that Crocker was seeking an additional $144,588.00 to cover the additional costs incurred under the Subcontract. On March 13, 2020, Willow objected to Crocker's Request for Mediation, on the grounds that Crocker never submitted its claims to the Initial Decision Maker, the Architect Mr. Robert M. Asbury. This—Willow claims—Crocker was required to do under General Conditions Article 15. On March 18, 2020, AAA terminated Crocker's Request for Mediation and no mediation ever occurred.

Crocker subsequently filed with AAA a demand for arbitration. After an arbitrator ("Arbitrator") was selected by the parties, Willow filed with AAA an Objection to Jurisdiction of Arbitrator, Objection to Arbitrability of Claim, and Application for

[7] The merits of Crocker's claims, e.g., alleged breach of contract and alleged withholding of retainage, are not the subject of this appeal.

Dismissal Upon Dispositive Motion. In July 2020, Arbitrator issued an order denying Willow's objections without prejudice and provided Willow the "ability to renew its Motion to Dismiss at the arbitration hearing once all relevant facts have been presented."

In July 2020, Willow filed a Petition to Stay Arbitration and Complaint for Declaratory Judgment in the Circuit Court for Talbot County. After Crocker submitted an answer, Willow filed a Motion for Summary Judgment. Crocker subsequently filed a Response and Cross-Motion for Summary Judgment. The circuit court issued a declaratory judgment finding an agreed upon dispute resolution process between the parties, denied Willow's Motion for Summary Judgment, and granted Crocker's Motion for Summary Judgment.

The circuit court also addressed whether Crocker waived its right to mediation and arbitration by failing to notify the Architect of its claim. In its words, the "Subcontract Agreement sets forth a dispute resolution procedure that is different from the one set forth in the [Prime] Contract. The procedure in the [S]ubcontract would therefore control." The court concluded that the Subcontract did not require Crocker to notify the Architect of its claims.

Willow filed a timely Notice of Appeal to this Court. The circuit court entered an order staying enforcement of the judgment until all appellate proceedings are completed.

STANDARD OF REVIEW

The standard of review for denial of a motion for summary judgment is whether the circuit court judge abused its discretion. *Dashiell v. Meeks*, 396 Md. 149, 165 (2006).

When a lower court enters a declaratory judgment as a result of granting a motion for summary judgment, the standard of review is "whether that declaration was correct as a matter of law." *Piney Orchard Cmty. Ass'n, Inc. v. Piney Pad A, LLC*, 221 Md. App. 196, 206 (2015) (cleaned up) (citing *Olde Severna Park Improvement Ass'n, Inc. v. Gunby*, 402 Md. 317, 329 (2007)). Under this standard, when there is no genuine dispute of fact, "we review the trial court's ruling on the law, considering the same material from the record and deciding the same legal issues as the circuit court." *Messing v. Bank of Am., N.A.*, 373 Md. 672, 684 (2003) (citing *Green v. H & R Block, Inc.*, 355 Md. 488, 502 (1999)).

DISCUSSION

We see no material dispute of fact in this case.[8] The parties agree to the contents of the Prime Contract, Subcontract, and General Conditions. They disagree on whether certain provisions in the General Conditions apply to the Subcontractor—an issue of contract interpretation. "The interpretation of a contract . . . is a question of law." *Questar Builders, Inc. v. CB Flooring, LLC*, 410 Md. 241, 262 (2009) (quoting *Sy-Lene of Washington, Inc. v. Starwood Urb. Retail Il, LLC*, 376 Md. 157, 163 (2003)).

Willow argues that the circuit court erred in interpreting the contract to conclude that Article 6 of the Subcontract and Article 15 of the General Conditions are inconsistent. In making such a finding, the circuit court decided that Article 6 of the Subcontract controls

[8] The circuit court notes that a factual dispute over whether Crocker submitted its claim to the Initial Decision Maker, the alleged condition precedent to mediation, is an issue for the arbitrator to decide. However, the dispute between Willow and Crocker is one of contract interpretation, a matter of law, on whether a condition precedent to mediation/arbitration applies to Crocker.

the dispute resolution process between the Subcontractor and Contractor—thereby concluding that Crocker did not have an obligation to submit its claim to the Initial Decision Maker. This Court reviews this contract interpretation as a matter of law.

"The cardinal rule of contract interpretation is to effectuate the intentions of the parties." *Owens-Illinois, Inc. v. Cook*, 386 Md. 468, 497 (2005) (citing *Kasten Constr. Co., Inc. v. Rod Enters., Inc.*, 268 Md. 318, 328 (1973)). "In seeking to discern the parties' intention, we construe the contract as a whole, giving effect to every clause and phrase, so as not to omit an important part of the agreement." *Owens-Illinois, Inc.*, 386 Md. at 497. (citations omitted). Contracts involving multiple instruments should be construed together as part of a single contract. *See Rocks v. Brosius*, 241 Md. 612, 637 (1966). "[W]here the contract comprises [of] two or more documents, the documents are to be construed together, harmoniously, so that, to the extent possible, all of the provisions can be given effect." *Schneider Elec. Buildings Critical Sys., Inc. v. W. Sur. Co.*, 231 Md. App. 27, 44 (2016) (quoting *Nationwide Mut. Ins. Co. v. Regency Furniture, Inc.*, 183 Md. App. 710, 722–23 (2009)), *aff'd*, 454 Md. 698 (2017). Still, contract interpretation can be analogized to statutory interpretation in the sense that "no word, clause, sentence or phrase shall be rendered surplusage, superfluous, meaningless or nugatory." *Orkin v. Jacobson*, 274 Md. 124, 130 (1975) (citing *Thomas v. Police Comm'r*, 211 Md. 357, 361 (1956). Contracts shall be interpreted to avoid surplusage, if possible. *See Jeffrey Sneider-Maryland, Inc. v. LaVay*, 28 Md. App. 229, 240 (1975).

In interpreting the Subcontract as a whole, the Court must look to the plain language of the Subcontract, including all documents incorporated into the Subcontract. *See Schneider Elec. Buildings Critical Sys., Inc. v. W. Sur. Co.*, 454 Md. 698, 706–07 (2017), *aff'g*, 231 Md. App. 27 (2016). The language of the Subcontract is clear that—as evidenced in Article 1, §1.2 of the Subcontract—the General Conditions are incorporated into the Subcontract. However, Article 2 of the Subcontract makes clear that "[w]here a provision of [the General Conditions] is inconsistent with a provision of this [Subcontract], this [Subcontract] shall govern." In short, the Subcontract's provisions are given precedence over the General Conditions provisions, if the provisions in the General Conditions and Subcontract are inconsistent with one another.

The order of precedence clause is invoked, if we determine that provisions in Article 15 of the General Conditions are inconsistent with the dispute resolution procedures in Article 6 of the Subcontract. We consider instructive an opinion from the Court of Federal Claims, which tackled a similar issue in *Apollo Sheet Metal, Inc. v. U.S.*, 44 Fed. Cl. 210 (1999).

In *Apollo Sheet Metal, Inc.*, the defendant claimed that the section of the performance specification document requiring the plaintiff to construct the water removal system according to "sound engineering principles and modern practice" was inconsistent with the directions in the drawings—one of the incorporated documents—to install a 24-inch diameter pipe. *Id.* at 212–14. The order of precedence clause would give the performance specification control, if there were inconsistencies. *Id.* at 214.

The Court of Federal Claims concluded that invocation of the order of precedence clause was inappropriate because the terms were not inconsistent in the sense that they both could not be satisfied. *See id.* The court described examples of inconsistencies in contracts, such as when "two provisions conflict regarding the length, width, height, placement, time, duration, or other such particularized specifications." *Id.* The court offered an analogy to determine inconsistencies that may be helpful in our case. "In metamorphical terms, an order of precedence clause is invoked to resolve inconsistencies between apples and apples, one green, the other red." *Id.* In *Apollo*, the court found that the inconsistency was not between apples and apples, but rather apples and oranges—one performance specification and one design specification. *Id.* The court further explained that to invoke the order of precedence clause would render part of the contract meaningless.

> [I]nvoking an order of precedence clause in a situation such as this would 'violate one of the cardinal principles of contract interpretation, that an interpretation which gives reasonable meaning to all parts of an instrument is preferred to one which leaves a portion of it useless, inoperative, void, meaningless, or superfluous.'

Id. (cleaned up) (citing *Blake Constr. Co., Inc. v. U.S.*, 597 F.2d 1357, 1359 (Ct. Cl. 1979)).

The *Apollo* court's analogy fits well here. We are dealing not with apples and oranges, as in *Apollo*, but rather, apples and apples—one dispute resolution clause and another dispute resolution clause. Article 6 of the Subcontract defines the dispute resolution process under the Subcontract as two steps: mediation then arbitration. Article 15 of the General Conditions defines the dispute resolution process as three steps: Initial Decision, then mediation, and then arbitration. These two provisions are inconsistent with

one another as they provide two different procedures to bring about dispute resolution. Although courts are hesitant to find that silence in one provision automatically creates a conflict with another provision, *see Edward R. Marden Corp. v. U.S.*, 803 F.2d 701, 704–05 (Fed Cir. 1986), we are persuaded to invoke the order of precedence clause here for the reasons set forth below.

Courts favor interpretations of contracts that avoid surplusage. *See, e.g.*, *Jeffrey Sneider-Maryland, Inc.*, 28 Md. App. at 240; *Dumbarton Improvement Ass'n, Inc. v. Druid Ridge Cemetery Co.*, 434 Md. 37, 52 (2013). Here, Article 6 sets forth the explicit process to bring mediation and binding dispute resolution under the Subcontract. The General Conditions provide identical provisions for bringing mediation and dispute resolution under the Prime Contract—with a material exception. The General Conditions add a prerequisite in Article 15: that claims be submitted to the Initial Decision Maker. Yet, if we interpreted Article 15 of the General Conditions to apply to the Subcontractor, Article 6 would be rendered useless and superfluous.

Willow has a different view of how to apply the avoiding surplusage rule. It asserts that if we fail to require Crocker to submit its claims to the Initial Decision Maker, Article 15, §15.2 of the General Conditions would be surplusage. We do not agree. Even if Crocker, a subcontractor, is not subject to the Article 15 dispute resolution procedures of the General Conditions these provisions still have meaning—they provide the dispute resolution process between the Contractor and Owner. No one asserts otherwise.

Article 6 of the Subcontract sets forth a clear procedure to resolve disputes between the general contractor and its subcontractor. Therefore, Crocker is not subject to the condition precedent of submitting its claim to the Initial Decision Maker.

Our above interpretation of the contract squarely forecloses Willow's contention that Crocker waived its right to mediation and arbitration. *See Stauffer Constr. Co., Inc. v. Bd. of Educ. of Montgomery Cnty.*, 54 Md. App. 658, 667 (1983) (noting courts have the jurisdiction to determine whether a party waived its right to arbitration.) Accordingly, Willow is not entitled to summary judgment or declaratory judgment for failure to comply with a condition precedent because Crocker has no obligation to submit its claim to the Initial Decision Maker.

CONCLUSION

We affirm the circuit court in entering declaratory judgment determining an agreed upon dispute resolution process, denying Willow's motion for summary judgment, and granting Crocker's motion for summary judgment. On remand, the circuit court shall refer the matter to arbitration on the remaining disputes.

JUDGMENT OF THE CIRCUIT COURT FOR TALBOT COUNTY AFFIRMED; CASE REMANDED WITH INSTRUCTIONS TO REFER ALL REMAINING DISPUTES TO ARBITRATION. COSTS TO BE PAID BY APPELLANT.