Circuit Court for Prince George's County
00CAL1323508

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1711

September Term, 2016

NATIONAL SURETY CORPORATION

v.

K&C FRAMING, INC., ET AL.

Eyler, Deborah S.,
Berger,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: April 17, 2018

In the Circuit Court for Prince George's County, National Surety Corporation ("National Surety"), as subrogee of Metropolitan Apartments at Camp Springs, LLC ("Metropolitan"), sued WCS Construction, LLC ("WCS"), the general contractor on a large construction project, and numerous subcontractors for negligence and "breach of the contract/breach of warranty[.]"[1]

WCS and the subcontractors moved for summary judgment on the ground that Metropolitan had waived its subrogation rights in its contract with WCS ("the Prime Contract"), and therefore National Surety's claims against them were barred. WCS and some of the subcontractors also moved for summary judgment on the ground that Metropolitan had waived any right to loss of use damages in the Prime Contract and therefore National Surety's claims for business interruption damages were barred. The circuit court granted summary judgment in favor of WCS and the subcontractors on both grounds.

On appeal, National Surety presents four questions,[2] which we have condensed and rephrased as three:

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[1] The case was consolidated with an action by Metropolitan against the same parties (and others) seeking recovery of uninsured losses.

[2] The questions, as posed by National Surety, are:

1. Did Defendant WCS Construction meet its burden of showing that it is entitled to summary judgment on National Surety's subrogation claim?

(Continued…)

I. Did the circuit court err by granting summary judgment in favor of WCS based upon Metropolitan's waiver of subrogation in the Prime Contract?

II. Did the circuit court err by granting summary judgment in favor of the subcontractor appellees based on Metropolitan's waiver of subrogation in the Prime Contract?

III. Did the circuit court err by granting summary judgment in favor of WCS and the subcontractor appellees based upon a waiver of loss of use damages in the Prime Contract?

For the following reasons, we shall affirm the judgment of the circuit court.

FACTS AND PROCEEDINGS

In 2003, Metropolitan contracted with Global Construction, LLC ("Global"), to be the construction manager for Metropolitan's planned 367-unit apartment complex in Camp Springs, Prince George's County ("the Project"). Global acted in that capacity until September 6, 2005, when Metropolitan terminated the contract with Global.[3] WCS began acting as the construction manager for the Project soon after Global was

(…continued)

2. Did Defendant WCS Construction meet its burden of showing that it is entitled to summary judgment on National Surety's claims for loss of use?

3. Did Defendants Marside Contractors, Ramsey Masonry, and Mid-Atlantic Air meet their burden of showing that they are entitled to summary judgment?

4. Did Defendant K&C Framing meet its burden of showing that it is entitled to summary judgment?

[3] Litigation ensued between Global and Metropolitan. The claims were resolved by a settlement in which Metropolitan released Global from claims for construction defects prior to September 6, 2005.

terminated. Around seven months later, on April 10, 2006, WCS executed the Prime Contract with Metropolitan. That contract, which we shall discuss in greater detail, *infra*, consisted of standard form AIA documents, as modified by the parties.

On January 31, 2007, while work on the Project was in progress, WCS filed a complaint to establish a mechanics' lien against Metropolitan, in the Circuit Court for Prince George's County. In the mechanics' lien case, WCS alleged that Metropolitan was not making payments as required by the Prime Contract. The parties agreed to hold the mechanics' lien case in abeyance and engage in settlement negotiations. Work continued on the Project and, on May 4, 2007, the Project was "substantially completed" within the meaning of that phrase in the Prime Contract.

On June 12, 2007, Metropolitan and WCS entered into a "Settlement Agreement and Final Release of Claims and Waiver of Liens" ("the Settlement Agreement"). We shall discuss the pertinent terms of the Settlement Agreement, *infra*. On July 31, 2007, the Project was fully completed and final payment was made, in compliance with the Settlement Agreement.

Four years later, on August 23, 2011, central Maryland experienced a 5.8 magnitude earthquake, with its epicenter in north-central Virginia. In the aftermath, the Project suffered significant water intrusion and a mold outbreak, necessitating extensive repairs. Metropolitan took the position that the damage was a result of latent defects in construction for which WCS was responsible. At that time, the Project was covered by a property and business loss insurance policy Metropolitan had purchased from National

Surety. Metropolitan submitted claims for its losses to National Surety, which denied them in part. Litigation between National Surety and Metropolitan ensued in the United States District Court for the Eastern District of Virginia.

On August 21, 2013, in the Circuit Court for Prince George's County, National Surety filed the instant subrogation action against WCS, the subcontractors, and seven other defendants.[4] A first amended complaint was filed on November 22, 2013, stating claims for negligence in construction and "breach of contract/breach of warranty" against each defendant.

Thereafter, following binding arbitration between National Surety and Metropolitan, the extent of Metropolitan's losses covered by the National Surety policy was found to be $39,333,460, comprising $27,633,900 in property damages and $11,699,560 in business interruption damages. An order approving the binding arbitration appraisal in that amount was entered by the United States District Court for the Eastern District of Virginia on March 22, 2016. *Metropolitan Apartments at Camp Spring, LLC v. National Surety Corp.*, No. 1:14-CV-107, 2016 WL 4650007 (E.D. Va. Mar. 22, 2016).

On May 13, 2016, WCS filed a motion for summary judgment in the instant case, arguing that on the undisputed material facts it was entitled to judgment on all of

[4] The subcontractors who were sued and are appellees in this Court are K&C Framing, Inc. ("K&C"); Marside Contractors, Inc. ("Marside"); Mid-Atlantic Air, Inc. ("Mid-Atlantic"); and Ramsey Masonry Company, Inc. ("Ramsey").

National Surety's claims as a matter of law because Metropolitan had waived its subrogation rights in the Prime Contract. By separate motion for summary judgment, it argued that it was entitled to summary judgment based upon Metropolitan's waiver of loss of use damages in that contract. Also, between May 13 and 16, 2016, the four subcontractor appellees moved for summary judgment on various bases not pertinent to the issues on appeal. They each subsequently supplemented their motions to adopt WCS's argument that National Surety's claims were barred by the waiver of subrogation. Ramsey and Mid-Atlantic also adopted the arguments from WCS's motion for summary judgment based upon the waiver of loss of use damages.

In its opposition to the motions, National Surety argued that the subrogation waiver in the Prime Contract no longer was operative, for either of two reasons. First, the Settlement Agreement had extinguished the waiver by modification. Second, and alternatively, the Settlement Agreement was a substitute contract that discharged all prior rights and obligations under the Prime Contract, including the waiver of subrogation. National Surety maintained that to the extent the Settlement Agreement did not unambiguously extinguish or discharge the waiver of subrogation, its effect on that waiver provision was an issue of fact that was not susceptible of decision on summary

judgment.[5] National Surety made the same argument regarding the loss of use damages waiver in the Prime Contract.

On August 26, 2016, the court heard argument on the motions for summary judgment. It ruled that the parties to the Settlement Agreement intended that it modify the Prime Contract but not that it be a "complete substitute" for the Prime Contract, and that the waivers of subrogation and loss of use damages in the Prime Contract were not extinguished by that modification. It determined that the waivers were binding on National Surety, as Metropolitan's subrogee, and barred its claims against WCS and against Marside, Ramsey, and Mid-Atlantic.

On September 19, 2016, the court granted summary judgment in favor of subcontractor K&C and against National Surety for the "reasons stated in open Court on August 26, 2016, [and at a subsequent hearing on] September 2, 2016."

This timely appeal followed.

STANDARD OF REVIEW

Our standard of review on appeal from the grant of summary judgment is well-established:

> An appellate court reviewing a summary judgment examines the same information from the record and determines the same issues of law as the trial court. *PaineWebber Inc. v. East*, 363 Md. 408, 413, 768 A.2d 1029, 1032 (2001) (citation omitted) . . . . We recently reiterated the standard of

[5] National Surety also argued that WCS could not enforce the subrogation waiver because it did not render contractually compliant work. It does not advance this argument on appeal.

review for a trial court's grant or denial of a motion for summary judgment in *Myers v. Kayhoe*, 391 Md. 188, 892 A.2d 520 (2006):

> The question of whether a trial court's grant of summary judgment was proper is a question of law subject to *de novo* review on appeal. *Livesay v. Baltimore*, 384 Md. 1, 9, 862 A.2d 33, 38 (2004). In reviewing a grant of summary judgment under Md. Rule 2–501, we independently review the record to determine whether the parties properly generated a dispute of material fact and, if not, whether the moving party is entitled to judgment as a matter of law. *Id*. at 9–10, 862 A.2d at 38. We review the record in the light most favorable to the nonmoving party and construe any reasonable inferences that may be drawn from the facts against the moving party. *Id*. at 10, 862 A.2d at 38.

[*Myers*] at 203, 892 A.2d at 529.

United Servs. Auto. Ass'n v. Riley, 393 Md. 55, 67 (2006). Thus, we review the circuit court's grant of summary judgment in favor of WCS and the subcontractor appellees on National Surety's claims *de novo*.

DISCUSSION

Pertinent Documents

Before addressing the questions presented, we shall review the relevant terms of the Prime Contract and the Settlement Agreement, as they are central to all the issues.

Prime Contract

The Prime Contract consisted of two main documents: 1) "AIA Document A131 CMc-2003 and AGC Document 566, Standard Form Agreement Between Owner and Construction Manager" ("the A131 Document"); and 2) "AIA Document A201-1997, General Conditions of the Contract for Construction" ("the General Conditions").

The A131 Document identified Metropolitan as the "Owner" and WCS as the "Construction Manager" and spelled out WCS's responsibilities in taking over from Global; its compensation; its reimbursement for costs; and other matters. As pertinent, it required that, during the construction phase of the Project, Metropolitan "purchase and maintain liability and property insurance, including waivers of subrogation, as set forth" in the General Conditions.[6] § 8.2. It stated that, during the construction phase of the project, "[c]laims, disputes or other matters in question between the parties" shall be resolved as provided in sections 4.3 through 4.6 of the General Conditions, and that "[c]laims arising out of or relating to the [Prime] Contract shall be decided by Arbitration . . . ." § 9.1.

In the General Conditions, Metropolitan was identified as the "Owner" and WCS was identified as the "Contractor." Section 1.1.1, "The Contract Documents," described all the documents making up the Prime Contract, including "Modifications issued after execution of the [Prime] Contract." As pertinent, a "Modification" is defined as "a written amendment to the [Prime] Contract signed by both parties[.]" Section 1.1.2, entitled "The Contract," stated that "[t]he [Prime] Contract may be amended or modified only by a Modification."

In Section 3.5, WCS gave Metropolitan the following warranty:

[6] The Project had a pre-construction phase and a construction phase. All pre-construction phase language was deleted from the Prime Contract because construction already was underway when WCS started work.

> The Contractor [WCS] warrants to the Owner [Metropolitan] and Architect that materials and equipment furnished under the Contract will be of good quality and new unless otherwise required or permitted by the Contract Documents, that the Work[7] will be free from defects not inherent in quality required or permitted, and that the Work will conform to the requirements of the Contract Documents.

Section 4.3 of the General Conditions governed “Claims and Disputes.” A “Claim” was defined as a “demand or assertion by one of the parties seeking, as a matter of right, adjustment or interpretation of Contract terms, payment of money, extension of time or other relief with respect to the terms of the Contract[,]” and “other disputes and matters in question between the Owner [Metropolitan] and Contractor [WCS] arising out of or relating to the Contract.” § 4.3.1. Deadlines were established for notices of claims, § 4.3.2; performance was to continue pending resolution of a claim, § 4.3.3; and claims by WCS were to be submitted to Metropolitan for decision, §§ 4.4.1 and 4.4.2. “If a [c]laim relates to or is the subject of a mechanic’s [sic] lien,” the party asserting the claim “may proceed in accordance with applicable law to comply with the lien notice or filing deadline prior to resolution of the [c]laim by [Metropolitan] by other legal proceedings,” § 4.4.8. With some exceptions not pertinent, claims arising out of or relating to the Prime Contract, and not resolved through negotiations between the Metropolitan and WCS, were “subject to arbitration[,]” unless the parties agreed otherwise. § 4.6.1 and 4.6.2.

[7] The “Work” was defined to mean “the construction and services required by the Contract Documents, *whether completed or partially completed*, . . . includ[ing] all other labor, materials, equipment, and services provided or to be provided by the Contractor to fulfill the Contractor’s obligations.” (Emphasis added.)

Section 11.4 of the General Conditions governed "Property Insurance." Metropolitan was required to purchase and maintain property insurance on the Project, covering its interests and those of WCS and the sub (and sub-sub) contractors, until final payment was made "or until no person or entity other than the Owner [Metropolitan] has an insurable interest in the property required . . . . to be covered, whichever is later." § 11.4.1.

At section 11.4.7, both parties generally waived their subrogation rights and agreed that the waiver of subrogation would extend to subcontractors, agents, and employees:

> Waivers of Subrogation. *The Owner [Metropolitan]and Contractor [WCS] waive all right against (1) each other and any of their subcontractors, sub-subcontractors, agents and employees, each of the other,* and (2) the Architect, Architect's consultants, separate contractors described in Article 6, if any, and any of their subcontractors, sub-subcontractors, agents and employees, *for damages caused by fire or other causes of loss to the extent covered by property insurance obtained pursuant to this Section 11.4 or other property insurance applicable to the Work*, except such rights as they have to proceeds of such insurance held by the Owner [Metropolitan] as fiduciary. . . . The policies shall provide such waivers of subrogation by endorsement or otherwise. *A waiver of subrogation shall be effective as to a person or entity even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, did not pay the insurance premium directly or indirectly, and whether or not the person or entity had an insurable interest in the property damaged.*

(Emphasis added.) Section 11.4.5 also addressed waiver of subrogation, for property insurance obtained post-construction, through a policy other than the one in effect during construction:

> [I]f after final payment property insurance is to be provided on the completed Project through a policy or policies other than those insuring the

> Project during the construction period, the Owner [Metropolitan] shall waive all rights in accordance with the terms of Section 11.4.7 for damages caused by fire or other causes of loss covered by this separate property insurance. All separate policies shall provide this waiver of subrogation by endorsement or otherwise.

In addition, Metropolitan agreed to waive its right to claim damages against WCS for loss of use, regardless of whether it was insured against that risk:

> Loss of use insurance. The Owner [Metropolitan] at the Owner's option, may purchase and maintain such insurance as will insure the Owner against loss of use of the Owner's property due to fire or other hazards, however caused. *The Owner waives all rights of action against the Contractor [WCS] for loss of use of the Owner's property, including consequential losses due to fire or other hazards however caused.*

§ 11.4.3 (emphasis added).

Settlement Agreement

As noted, the Settlement Agreement was executed fourteen months after the Prime Contract was signed, while the mechanics' lien action was pending and after the Project was substantially completed but before final payment was made. In the recitals, which were "expressly incorporated into [the Settlement] Agreement as material provisions," the parties stated:

- Certain "disputes have arisen regarding the Parties' performance, rights and obligations under the [Prime] Contract and relating to the Project including, but not limited to Metropolitan's alleged nonpayment of monies claimed as owing by WCS";

- WCS filed a mechanics' lien action against Metropolitan, which still was pending but which the parties had deferred having the court resolve;

- During the pendency of the mechanics' lien case, Metropolitan made payments to WCS totaling more than $1.5 million, including a $700,000 payment constituting the first installment under the Settlement Agreement; and

- the parties “desire to fully and finally settle any and all claims between them relating, in any respect, to the [Prime] Contract, the Project, the Property, and the Work, including but not limited to all disputes that form the basis for the [mechanics’ lien case], any claims by Metropolitan or the Councils[8] against WCS, and any claims by Metropolitan against WCS’s surety, except as set forth below with respect to WCS’s warranty obligations and obligations regarding latent defects.”

In the body of the Settlement Agreement, the parties agreed that the “final amount due and owing on the [P]roject” was $2,059,380, which comprised “certain specific change orders” enumerated on an attached schedule and “certain specific amounts of alleged unpaid retention.” ¶ 4. Metropolitan agreed to pay WCS that amount in three installments, the first of which, as mentioned, already had been paid. *Id*. The timing and amounts of the payments from Metropolitan to WCS were set forth at ¶¶ 5–9.[9] Metropolitan agreed that if it defaulted on its payment obligations and, after written notice, failed to cure its default within 5 business days, WCS was “entitled to continue and commence the [mechanics’ lien action] as if [the] agreement never existed,” except that its claims would be reduced by the payments already received. ¶ 10. WCS agreed not to submit any “further change orders,” except those specified in an attached schedule, ¶ 13, and to continue to negotiate with its subcontractors in an attempt to reduce “the claims for unpaid retention.” ¶ 11. If those negotiations were successful, the payments

[8] The Project had been developed into condominiums, and “Councils” referred to the Councils of Unit Owners of three such condominium associations, which also were parties to the Settlement Agreement.

[9] Metropolitan also agreed to pay certain amounts, above the $2,059,380 due and owing to WCS, to specified subcontractors who performed work on the Project before WCS became involved in it.

under the Settlement Agreement would be reduced by those amounts. *Id.* Upon a "final audit of the Project," the payments could be further reduced. ¶ 12. WCS agreed that its subcontractors had been paid in full (or would be paid in full after payment under the agreement). ¶ 17. WCS and Metropolitan further agreed that, after signing the Settlement Agreement, they would execute a consent order to continue the stay in the mechanics' lien case, ¶ 15, and, upon receipt of the final payment under the Settlement Agreement, WCS would dismiss that action. ¶ 14.

The Settlement Agreement included mutual releases. WCS agreed that, upon receipt of the agreed upon installment payments, it would

> release and discharge Metropolitan . . . [and Metropolitan's] insurers . . . from all rights, claims, damages, debt, liens, demands, and actions of any nature whatsoever, whether known or unknown, whether foreseen or unforeseen, or whether already occurred or occurring hereafter (collectively, "Claims"), for monies due by reason of the labor and/or work performed and materials, supplies, and equipment furnished in connection with the [Prime] Contract, the Contract Work, the Project, and/or the Property through the date hereof, and any and all other Claims of any nature whatsoever that WCS may now have or may hereafter have against [Metropolitan and its insurers] related to the [Prime] Contract, the Project, the Property, and the Work.

¶ 2. Metropolitan, in turn, agreed as follows:

> Upon WCS's actual receipt of [the final payment], Metropolitan . . . .shall release WCS and its sureties from any and all rights, claims, damages, demands, and actions which they may have against WCS and/or its sureties related to the [Prime] Contract, the Project, and the Work, provided, however, that (a) this Agreement shall not operate to release any obligation undertaken pursuant to this Agreement, (b) this Agreement shall not operate to release any claims or rights that Metropolitan may have against WCS and/or its sureties under any warranty or guaranty, and (c) this Agreement shall not operate to release any claims or rights that Metropolitan may have against WCS and/or its sureties for latent defects.

¶ 3.

In indemnification clauses, WCS agreed to indemnify, defend, and hold harmless Metropolitan for any claims brought against Metropolitan "arising or growing out of or in anyway [sic] connected with costs and expenses related to the Project or Property that are herein represented as being paid or that will be satisfied[,]" ¶ 18; and Metropolitan agreed to indemnify, defend, and hold harmless WCS for any claims arising from the Project except claims arising under a warranty or guaranty or for latent defects. ¶ 19. WCS expressly acknowledged that "any and all obligations regarding warranties, guaranties, and latent defects arising out of or relating to the Work shall survive this Agreement." ¶ 22.

Paragraph 35, a merger clause, provided that the Settlement Agreement was the "entire understanding with respect to the matters herein set forth" and there are "no representations, warranties, agreements, arrangements, understandings, oral or written, between or among the Parties hereto relating to the subject matter of the Agreement that are not fully expressed herein."

I.

Waiver of Subrogation - WCS

Ordinarily, when an insured sustains losses due to another's negligence or breach of contractual duties, and the insurer pays the insured for those losses, the insurer becomes subrogated to the rights of the insured against the other party. *See, e.g., Stancil v. Erie Ins. Co.*, 128 Md. App. 686, 693 (1999). Parties to construction contracts

frequently reallocate their risks of loss, however, by agreeing to waive their subrogation rights:

> "Construction contracts often contain provisions which require the parties to waive their right to claim damages against one another up to the amount of insurance coverage available for their losses." 4 PHILIP L. BRUNER & PATRICK J. O'CONNOR, JR., BRUNER & O'CONNOR ON CONSTRUCTION LAW § 11:100, at 306 (2002). A subrogation waiver "is a risk-shifting provision premised upon the recognition that it is economically inefficient for parties to a contract to insure against the same risk." *TX. C.C., Inc. v. Wilson/Barnes Gen. Contractors, Inc.*, 233 S.W.3d 562, 567 (Tex. App. 2007). As a matter of policy,
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>> subrogation waiver[s] encourage[ ] parties [to a construction contract] to anticipate risks and to procure insurance covering those risks and also facilitate[ ] and preserve[ ] economic relations and activity. Because a property owner can generally acquire insurance to protect the property against fire and other perils, in the context of a construction contract, the waiver of subrogation clause shifts the ultimate risk of loss resulting from such perils to the owner to the extent damages are covered by insurance.
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> *Id.* at [567] (citations omitted). Generally, waivers of subrogation clauses are included in construction contracts "to cut down the amount of litigation that might otherwise arise due to the existence of an insured loss." 4 BRUNER & O'CONNOR, *supra*, § 11:100, at 306–07.

Hartford Underwriters Ins. Co. v. Phoebus, 187 Md. App. 668, 677 (2009), *aff'd sub nom. John L. Mattingly Constr. Co., Inc. v. Hartford Underwriters Ins. Co.*, 415 Md. 313 (2010).

In the Prime Contract, Metropolitan and WCS reallocated their risks of loss by means of waiver of subrogation clauses, as described above. Specifically, Metropolitan was required to obtain property insurance on the Project and to waive its subrogation rights, and, if after completion it obtained property insurance through a different carrier,

it likewise would waive its subrogation rights. Thus, neither Metropolitan nor its insurer would be entitled to pursue tort or contract claims against WCS for those insured damages and losses.

National Surety acknowledges that its subrogation waiver in the Prime Contract is a complete bar to its claims against WCS if the waiver remains in effect. It contends, however, that the waiver of subrogation provision in the Prime Contract did not survive the execution of the Settlement Agreement. It maintains that the Settlement Agreement was a substitute contract or novation that extinguished the Prime Contract entirely and, consequently, the waiver of subrogation provision in it.[10]

WCS responds that the Settlement Agreement only was intended to resolve the payment dispute between WCS and Metropolitan that was the subject of the mechanics' lien case, not to replace the Prime Contract in its entirety. It maintains, moreover, that a waiver of subrogation is not a right, claim, debt, lien, demand, or action and therefore was not covered by its release of Metropolitan in the Settlement Agreement. It also argues that a waiver of subrogation is a "unit of consideration" that Metropolitan received upon entering into the Prime Contract that cannot be "superseded by a substitute agreement."

[10] Some courts use the term "novation" to mean the introduction of a new party to an existing contract; in Maryland, however, that term is used interchangeably with the term "substitute contract." *Leisner v. Finnerty*, 252 Md. 558, 563 (1969).

In granting summary judgment in favor of WCS, the circuit court concluded that the Settlement Agreement was devoid of "any language, express or implicit" evincing an intent by the parties to substitute that agreement for the Prime Contract. In its view, the Settlement Agreement's expressed preservation of Metropolitan's right to bring claims against WCS for breach of warranty, breach of guaranty, or latent defects in construction evidenced the parties' intention simply to "narrow[] the universe of potential claims" that Metropolitan could bring, not to modify or extinguish the waiver of subrogation (or the loss of use waiver) in the Prime Contract.

"A novation is a new contractual relation[.]" *Dist. Nat'l Bank of Washington v. Mordecai*, 133 Md. 419, 427 (1919). It "immediately discharges" claims under a prior agreement, permitting "recovery . . . only [to] be had upon the substituted contract." *Clark v. Elza*, 286 Md. 208, 214 (1979). It has four essential elements: "'(1) A previous valid obligation; (2) the agreement of all the parties to the new contract; (3) the validity of such new contract; and (4) the extinguishment of the old contract, by the substitution of the new one.'" *Leisner v. Finnerty*, 252 Md. 558, 564 (1969) (quoting *Dist. Nat'l Bank*, 133 Md. at 427). "[I]n order to effect a novation, there must be a clear definite intention on the part of all concerned that such is the purpose of the agreement, for it is a well settled principle that novation is never to be presumed." *Dist. Nat'l Bank*, 133 Md. at 427. "[T]here does not have to be an *expressed* intention to substitute the new agreement for the previous contract[,]" however. *Leisner*, 252 Md. at 565 (emphasis added). "'Where not expressly stated, the legal effect of [a] later contract on [a] former

[contract] must be garnered from a four corners' examination of the contractual instrument in question.'" *Allstate Ins. Co. v. Stinebaugh*, 374 Md. 631, 646 (2003) (quoting *Shawnee Hosp. Auth. v. Dow Constr*., 812 P.2d 1351, 1353–54 (Okla. 1990)).

"[T]he interpretation of a contract, including the question of whether the language of a contract is ambiguous, is a question of law subject to *de novo* review." *Myers*, 391 Md. at 198. "A court construing an agreement under [the objective theory of contracts] must first determine from the language of the agreement itself what a reasonable person in the position of the parties would have meant at the time it was effectuated." *Gen. Motors Acceptance Corp. v. Daniels*, 303 Md. 254, 261 (1985). "'[W]hen the language of the contract is plain and unambiguous there is no room for construction, and a court must presume that the parties meant what they expressed.'" *Spangler v. McQuitty*, 449 Md. 33, 73 (2016) (quoting *Owens–Illinois, Inc. v. Cook*, 386 Md. 468, 496 (2005)).

The central issue in this appeal is whether Metropolitan and WCS intended for the Settlement Agreement to completely replace the Prime Contract, or whether they intended for the Settlement Agreement to modify the Prime Contract. And if their intention was to modify the Prime Contract, did the modification retain the waiver of subrogation. National Surety argues that by "fully and finally settl[ing] any and all claims between them relating, in any respect, to the [Prime]Contract" and granting each other broad releases, WCS and Metropolitan agreed to waive all claims and rights arising under the Prime Contract, thereby extinguishing that agreement and substituting the Settlement Agreement for it. In its reply brief, National Surety maintains that

Metropolitan's reservation of its right to bring claims against WCS for breach of warranty, breach of guaranty, or latent defects did not incorporate the Prime Contract, in whole or in part, because those are common law, not contractual, claims. National Surety also takes the position that, to the extent those unreleased claims incorporated aspects of the Prime Contract, the parties made clear that they were the *only* aspects of the Prime Contract that "survived" the Settlement Agreement. Thus, the waiver of subrogation provision, which was not expressly incorporated into the Settlement Agreement, did not survive.

WCS responds that the "terms of the [S]ettlement [A]greement evince an intent not to 'extinguish . . . the old contract, by the substitution for it of the new one'" (quoting *Leisner*, 252 Md. at 564). It maintains that the Settlement Agreement expressly "incorporates the [Prime] Contract insofar as any warranty, guaranty, or latent defect claims arise from that document," and because those provisions incorporate other provisions of the Prime Contract, the remaining provisions of the Prime Contract, including the waiver of subrogation, could not have been extinguished by the Settlement Agreement.

We agree with WCS that, as a matter of law, the summary judgment record does not support a finding that the parties to the Settlement Agreement clearly and definitely intended to extinguish the Prime Contract and replace it. We explain.

In three separate locations, the Settlement Agreement specifies that Metropolitan will not lose any claims for breach of warranty and guaranty and for latent defects. In

paragraph 22, "WCS acknowledges and agrees that any and all obligations regarding warranties, guaranties, and latent defects arising out of or relating to the Work shall survive this Agreement." Similarly, in the release in paragraph 3 and the indemnity agreement in paragraph 19, Metropolitan specifies that it is not releasing any claims or rights regarding warranties, guaranties, or latent defects. In the latter provision, the claims referenced are described as being "under any warranty or guaranty[.]" The only reasonable reading of the "survival" and "under" language is that the claims for breach of warranty and guaranty and for latent defects that are being retained are those originally conferred by the Prime Contract. (Indeed, notwithstanding that it argues novation, National Surety acknowledges in its opening brief that specified obligations survived the Settlement Agreement.) The language pointed out above undercuts National Surety's argument about common law claims and makes clear that parts of the Prime Contract survived the execution of the Settlement Agreement. And, if parts of the Prime Contract survived, it is not reasonable to conclude that the parties intended for the Prime Contract to be extinguished and for the Settlement Agreement to replace it. Rather, the only reasonable conclusion that can be drawn from this language is that the parties intended to modify the Prime Contract, as the General Conditions expressly allowed them to do.

The language in the Settlement Agreement that preserves Metropolitan's warranty, guaranty, and latent defect claims under the Prime Contract is sufficient in and of itself to compel the conclusion that a novation was not intended by the parties. Rather, the Settlement Agreement was intended to modify the Prime Contract. We further conclude

from other portions of the Settlement Agreement that the modification was not intended to extinguish the waiver of subrogation provisions of the Prime Contract and did not do so.

The language in the Whereas Clauses makes clear that the context for the settlement memorialized in the Settlement Agreement was the existing mechanics' lien dispute. The agreement states that "certain disputes *have arisen* regarding the Parties' performance, rights and obligations under the [Prime] Contract and relating to the Project including, but not limited to Metropolitan's alleged nonpayment of monies claimed as owing by WCS[.]" (Emphasis added.) Thus, the backdrop for the Settlement Agreement was the then-existing dispute between Metropolitan and WCS about failure to make payments as due under the Prime Contract. It was WCS, not Metropolitan, that was the driving party in that dispute, asserting that Metropolitan was not paying it as promised under the Prime Contract, and it was the mechanics' lien action, filed by WCS in furtherance of that claim, that was pending and was the impetus for the settlement. There were no disputes that "ha[d] arisen" between the parties over future obligations of either of them, including the subrogation waiver.

In addition, in paragraph 2 of the Settlement Agreement, WCS first and foremost released Metropolitan from all rights and claims "for monies due" by reason of the work WCS had performed on the Project. The broader release language immediately following nevertheless refers to "Claims," which by definition in the earlier part of the same paragraph is claims for money due. The full paragraph cannot reasonably be read to

include a release by WCS of the subrogation waiver in the Prime Contract, a provision beneficial to it, over which there was no existing dispute and which did not involve a claim for money due. Finally, the parameter of the merger clause is that it is the "entire understanding [of the parties] *with respect to the matters herein set forth*." (Emphasis added.) The "matters set forth" did not operate to extinguish the Prime Contract and did not concern the waiver of subrogation.

As noted, National Surety maintains that if there was a modification (not a novation) the modification only retained those portions of the Prime Contract that the Settlement Agreement expressly stated were being retained. In fact, the guiding legal principle is that when there is a contract modification, the language of the original contract remains effective except to the extent that it is inconsistent with the modification. *See* 29 Richard A. Lord, *Williston on Contracts* § 73:17 (4th ed. 2003) ("A contract containing a term inconsistent with a term of an earlier contract between the same parties is interpreted as including an agreement to rescind the inconsistent term in the earlier contract.") To be sure, there are many parts of the Prime Contract that could not have survived because they were inconsistent with the Settlement Agreement, *i.e.*, those having to do with payment. The subrogation waiver was not inconsistent with the Settlement Agreement. In fact, it went hand in hand with the survival of claims for breach of warranty and guaranty, and for latent defects, under the Prime Contract.

The subrogation waiver was included in the Prime Contract to shift the risk of loss, specifically, for our purposes, loss in the form of property damage, away from WCS

and onto Metropolitan's insurer in the event that the property damage is caused by a breach of contract/warranty on WCS's part in the construction of the Project. Therefore, it only becomes meaningful as a defense to claims by Metropolitan or its insurer—National Surety—to recover damages from WCS for property damage that was covered by insurance. In the absence of Metropolitan's obtaining post-construction insurance (a highly unlikely eventuality), WCS could protect itself from the cost of property damage caused by its own wrongdoing by obtaining its own insurance. If Metropolitan obtained insurance against property loss, which it did and which property owners must do to satisfy lenders, WCS would rest assured in the knowledge that it would not be exposed to liability, as under the waiver of subrogation, the risk of loss would be borne by Metropolitan's insurer. National Surety's position—that Metropolitan's right to bring claims against WCS for breach of warranty, etc., survived, but that WCS's protection against those claims through the subrogation waiver did not—is itself inconsistent and is not a reasonable result to infer the parties sought to accomplish by settling a case brought by WCS to obtain payment on the Project.

We are not persuaded to the contrary by the cases National Surety relies upon. *Allstate v. Stinebaugh*, 374 Md. 631 (2003), and *Shawnee Hospital Authority v. Dow Construction*, 812 P.2d 1351 (Okl. Sup. Ct.1990), both addressed the question whether prior agreements to arbitrate certain disputes were superseded by later agreements that included inconsistent language.

In *Allstate*, a consent order entered into by the parties to an automobile tort case and two potentially responsible insurers provided that a dispute over how settlement funds would be allocated between the insurers would be decided in court. A prior agreement between the insurers had called for any such dispute to be decided by arbitration. The Court of Appeals held that the consent order superseded the earlier agreement and therefore the circuit court properly denied the motion to compel arbitration. The Court observed that the consent order "could be viewed as modifying the prior arbitration agreement" under the "'well settled [principle] that an earlier agreement may be modified by a later one, by mutual consent.'" 374 Md. at 650 (quoting *Thomas v. Hudson Motor Car Co.*, 226 Md. 456, 460 (1961)).

The *Allstate* Court discussed *Shawnee,* in which a property owner and construction company entered into a contract that called for arbitration of disputes. During construction, the owner sued the construction company for being in breach of the contract.[11] The case went to trial but settled before verdict. The settlement agreement specified that the construction company's obligations under the contract were terminated except for "after-arising claims from latent construction defects" and that the trial court would retain jurisdiction over controversies arising under the settlement agreement. Thereafter, the owner moved to reopen the litigation to enforce the terms of the settlement agreement regarding latent defects. The construction company moved to compel arbitration. When that motion was denied, it noted an interlocutory appeal.

[11]A motion to compel arbitration was denied but not appealed.

The Oklahoma Supreme Court affirmed the order denying arbitration. It noted, "[b]efore full performance, contractual obligations may be discharged by a subsequent agreement whose effect is to alter, modify or supersede the terms of the original agreement or to rescind it altogether." *Id.* at 1353. It concluded that the construction company's "rights and liabilities under the construction contract were discharged and stood superseded by the settlement agreement," except that it remained obligated to correct any latent defects, and the arbitration clause in the construction contract was "not invocable to resolve the . . . after-arising latent defect claims reserved by the settlement agreement," as the terms of the settlement agreement were "complete in themselves and supersede[d] all prior agreements of the parties." *Id.* at 1355.

These cases are inapposite because, in both, a party to the original contract was seeking to enforce a term of that contract that the parties had modified in their subsequent agreement. Neither case hinged on whether there was a novation, *i.e.*, a completely new and substituted contract. Nor did the cases involve a change, by means of a settlement agreement, in a term of the parties' original contract that was unrelated to a term of the original contract that one party was maintaining still was in effect.

Fidelity Deposit Co. of Maryland v. Olney Associates, 72 Md. App. 367 (1987), also is inapposite. In that case, after a property owner and construction company entered into a contract, the company filed a mechanics' lien action and the owner sued the company and its surety for breach of contract. A few months later the owner and the company entered into a settlement in which they agreed that a certain sum would be paid

by the owner to the company upon completion of the work. The agreement provided that the surety was not being released from its liability. After receiving most of the money due under the settlement agreement, the company failed to complete the work.

The owner sued the company for breaching the settlement agreement and sued the surety for delay damages under the original contract. The surety was granted summary judgment on the delay damages claim. A jury returned a verdict in favor of the owner against the company. The company appealed, and the owner cross-appealed. On the cross-appeal, we concluded that "both parties intended to release and discharge *all pending claims* in exchange for a negotiated final payment and the completion of an agreed upon punch list." 72 Md. App. at 380 (emphasis added). The owner's delay damage claim was pending when the settlement was reached. Because the releases in the settlement agreement extinguished the parties' rights to pursue prior claims, including those pending, the claim for delay damages was no longer viable.

Although there is discussion in the *Olney* case of substitute contracts, what was central there was that the settlement agreement included releases of the pending claims between the parties that were the subject of the litigation. Nothing in the case concerned the effect of the settlement agreement on possible future claims.

For all of these reasons, we conclude that the evidence on the summary judgment record could not show a clear intention by the parties to extinguish the Prime Contract and substitute the Settlement Agreement for it. Rather, the Settlement Agreement modified the Prime Contract. The waiver of subrogation provision in the Prime Contract,

being unrelated to the parties' dispute and being related to the claims for breach of warranty and guaranty and for latent defects that were retained by the modification, was not extinguished. Accordingly, the circuit court did not err in granting summary judgment to WCS on the ground that National Surety's claims against it were barred by the subrogation waiver in the Prime Contract between Metropolitan and WCS. [12]

II.

Waiver of Subrogation - Subcontractors

The circuit court also ruled that National Surety's claims against the subcontractor appellees were barred by the waiver of subrogation provision in the Prime Contract. National Surety maintains that that ruling was in error both because the waiver of subrogation was extinguished by the Settlement Agreement, a contention we already have rejected, and because the subcontractors did not meet their burden to show they were entitled to summary judgment on the basis of the waiver of subrogation.

[12] It is not necessary to address WCS's alternative argument that Metropolitan's waiver of subrogation in the Prime Contract could not have been eliminated by novation because it was consideration already given upon execution of the Prime Contract. WCS bases its argument on *Kaye v. Wilson-Gaskins*, 227 Md. App. 660 (2016), in which we held that, unlike a covenant not to sue, a release is an executed transaction that "immediately discharges any obligation within the scope of the agreement" and "takes effect immediately." *Id*. at 680. "Therefore, a release cannot be breached because *complete performance is tendered at the moment release is effectuated." Id*. (emphasis added) (citations omitted). Obviously, the waiver of subrogation provision in section 11.4.5 of the Prime Contract is not a release, and applies conditionally, when insurance coverage is obtained on the completed Project after final payment and only after a claim is asserted for damages that otherwise are covered by insurance. We merely note that it does not appear to be analogous to the release in *Kaye*.

As pertinent, in the waiver of subrogation clause, Metropolitan and WCS agreed to "waive all right against (1) each other *and any of their subcontractors, sub-subcontractors*, agents and employees, each of the other, . . . for damages caused by fire or other causes of loss to the extent covered by property insurance obtained pursuant to this Section 11.4 or other property insurance applicable to the Work . . . ." (Emphasis added.) National Surety alleged in its complaint that Marside, Ramsey, Mid-Atlantic, and K&C were subcontractors for WCS and, while acting in that capacity, each had performed negligently or breached its contractual duties, resulting in losses to Metropolitan, some of which were reimbursed by National Surety.

In the subcontractors' motions for summary judgment, as supplemented, they adopted and/or restated WCS's argument that the waiver of a subrogation in the Prime Contract barred National Surety's claims *as a matter of law*. National Surety did not argue before the circuit court that a subcontractor may not invoke the waiver of subrogation clause and, on appeal, it merely states that the subcontractors failed to "show facts that would entitle them to invoke" the waiver. This argument lacks merit. The plain and unambiguous language of the waiver of subrogation clause in the Prime Contract makes WCS's subcontractors intended third-party beneficiaries of that provision. *See 120 West Fayette Street. LLLP v. Mayor of Balt.*, 426 Md. 14, 35–36 (2012) ("An individual is a third-party beneficiary to a contract if the contract was intended for his [or her] benefit and it . . . clearly appear[s] that the parties intended to recognize him [or her] as [a] primary party in interest and as privy to the promise.")

(quotations omitted); *Midwestern Indem. Co. v. Sys. Builders, Inc.*, 801 N.E.2d 661 (Ind. App. 2004) (holding that a subcontractor was a third-party beneficiary of the waiver of subrogation clause in an A201 standard form construction contract), *abrogated on other grounds by Bd. Of Comm'rs of Cty. Of Jefferson v. Teton Corp.*, 30 N.E. 3d 711 (Ind. 2015); 2 Philip L. Bruner & Patrick J. O'Connor, Jr., *Bruner and O'Connor on Construction Law* § 5:231 (2002) (explaining that the waiver of subrogation appearing in AIA standard form General Conditions applies to subcontractors and protects them from subrogation actions brought by the owner's insurer).[13]

The circuit court did not err by granting summary judgment in favor of the subcontractors for the same reasons justifying the entry of summary judgment in favor of WCS.

III.

Loss of Use Waiver

The circuit court also granted summary judgment to WCS and the subcontractor appellees based upon the waiver of loss of use damages clause in the Prime Contract. In light of our conclusion that WCS and the subcontractor appellees were entitled to

[13] With respect to Marside, National Surety argues that there was a dispute of material fact as to whether Marside had a subcontract with WCS because, in its motion for summary judgment, Marside denied the existence of such a subcontract. Thus, it asserts that Marside cannot invoke the waiver of subrogation clause. We agree with Marside that this argument is waived because National Surety did not raise it at any time in the circuit court. In any event, to the extent that Marside did not enter into a subcontract with WCS, we would nevertheless affirm the grant of summary judgment because National Surety would have no claims against Marside absent its alleged contractual relationship with WCS.

summary judgment on liability on all of National Surety's claims, we need not address National Surety's argument that the court erred by entering summary judgment on damages on this alternative basis.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY THE APPELLANT.