Circuit Court for Howard County
Case No. 13-C-15-106114

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1824

September Term, 2016

MORRIS & RITCHIE ASSOCIATES, INC.

v.

H&H ROCK, LLC t/a H&H ROCK COMPANIES, *et al.*

Graeff,
Leahy,
Shaw Geter,

JJ.

Opinion by Graeff, J.

Filed: January 30, 2018

This appeal arises from a contract dispute between appellant, Morris & Ritchie Associates ("MRA"), and appellees, H&H Rock, LLC t/a H&H Rock Companies ("H&H Rock"), Rock Realty, Inc. ("Rock Realty") (collectively, the "Corporate Appellees"), and Mark K. Levy, principal of Rock Realty, Inc. and H&H Rock, LLC. MRA initially sued the Corporate Appellees in the Circuit Court for Howard County, alleging, *inter alia*, breach of contract for failure to pay for civil engineering and other services performed by MRA between 2006 and 2014 for a land development project in Howard County. MRA alleged that the Corporate Appellees failed to make payment on 51 invoices, issued between 2007 and 2014 pursuant to three written proposals. It alleged that, on February 24, 2010, the parties entered into a Letter Agreement providing that the Corporate Appellees would pay all outstanding fees by December 31, 2010, that the Corporate Appellees defaulted on this agreement, and Mr. Levy subsequently acknowledged the debt due and promised payment "to induce MRA into continuing to provide the services."

MRA filed a motion for summary judgment, which the court denied. Instead, the court granted partial summary judgment in favor of the Corporate Appellees on 46 of the 51 invoices, finding, as argued by the Corporate Appellees, that these invoices were barred by the statute of limitations and the record was devoid of evidence demonstrating that the limitations period had been tolled in any fashion. MRA filed a motion to reconsider, which the court denied.

The Corporate Appellees then tendered payment for the amount allegedly owed on the remaining five invoices. It subsequently moved for summary judgment on the ground that MRA's remaining claims were moot.

MRA then filed a First Amended Complaint, reiterating the counts of breach of contract and unjust enrichment against the Corporate Appellees, adding two new claims of detrimental reliance/promissory estoppel and fraud, and adding Mr. Levy as a defendant on these two claims. MRA alleged that it had been harmed because of the court's partial grant of summary judgment on the 46 invoices. On October 13, 2016, the court granted summary judgment on all claims in favor of appellees.

On appeal, MRA presents the following questions for this Court's review, which we have revised slightly as follows:

1. Did the circuit court abuse its discretion or err in denying MRA's Motion for Summary Judgment and entering partial summary judgment in favor of the Corporate Appellees?

2. Did the circuit court abuse its discretion in denying MRA's Motion for Reconsideration?

3. Did the circuit court err in entering full summary judgment in favor of appellees.

For the reasons set forth below, we affirm, in part, and reverse, in part, the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

I.

The Contracts

MRA performed engineering and other services for appellees pursuant to three proposals accepted by Mr. Levy, a principle of H&H Rock and Rock Realty. The first contract, (Proposal One – # 15129.02), which Mr. Levy accepted on June 23, 2006,

provided that MRA would be paid a lump sum of $127,000.00, exclusive of any out-of-pocket expenses and "[a]ny hourly work included in this proposal and extra work, which [MRA was] requested to perform," which would be billed at the hourly rates provided in the proposal.

The second contract, (Proposal Two – # 15129.03), provided for Surveying, Land Planning and Civil Engineering Services relating to a relocation of model homes for a lump sum fee of $114,100.00. Out-of-pocket expenses and "[a]ny hourly work included in this proposal and extra work, which [MRA was] requested to perform" would be billed at the hourly rates set forth in the proposal.

The third contract, (Proposal Three – # 15129.04), submitted on June 28, 2007, for Sketch Plan Services, provided for a lump sum fee of $68,500.00, exclusive of out-of-pocket expenses. "Any hourly extra work" that MRA was requested to perform would be billed at the hourly rates provided.[1]

Each of the proposals provided that billing would occur on a monthly basis, with payment due 30 days after invoicing. The proposals also incorporated MRA's General Provisions, which stated, in pertinent part, as follows:

> **8. PAYMENTS**
>
> Invoices will be submitted by MRA on a monthly basis as work proceeds. . . . Payments will be due and payable in full within thirty (30) days of the date of invoice, without retainage, and will not be contingent upon

[1] All three proposals were signed by Mr. Levy, but the first two proposals were directed to Rock Realty, and the third proposal was directed to H&H Rock Companies. MRA contends that Rock Realty merged into H&H Rock Companies. The Corporate Appellees contend that they are "distinct entities."

> receipt of funds from third parties. In the event that the Client objects to all or any portion of any invoice, the Client shall notify MRA of the objection within fifteen (15) days from date of the invoice, given reasons for the objection, and pay that portion of the invoice not in dispute. If at any time, an invoice remains unpaid for a period in excess of thirty (30) days, a service charge of one and one half percent (1 1/2%) per month from the date of the invoice, an effective maximum rate of eighteen percent (18%) per annum, will be charged on past due accounts. If fees are not paid in full within thirty (30) days of the due date, MRA reserves the right to pursue all appropriate remedies, including stopping work and retaining all documents without recourse. In the event a lien or suit is filed or arbitration is sought to collect overdue payments under the Agreement, Client agrees to indemnify and hold harmless MRA from and against any and all reasonable fees, expenses, and costs incurred by MRA including but not limited to court costs, arbitrators and attorney's fees, and other claim-related expenses. In the event the Client fails to pay any invoice in full, MRA shall have the right to institute collection procedures. The Client shall be responsible for all costs of collection including litigation costs, reasonable attorney's fees not to exceed 30% of the amount due, and court costs.

MRA sent invoices to the attention of Mr. Levy at the address associated with H&H Rock. Each invoice identified the proposal number for which the invoice was associated.

At the time the complaint was filed, MRA alleged that two invoices submitted in 2010 for work performed pursuant to Proposal One, in the amount of $705.68, remained unpaid.[2] Twenty invoices for work performed pursuant to Proposal Two, billed between 2007 and 2009, in the amount of $129,058.48, remained unpaid. With respect to Proposal Three, 29 invoices, billed between 2009 and 2014, in the amount of $208,440.38, remained unpaid. MRA completed the services associated with the Proposals in 2014.

[2] That amount represented the principal balance, plus interest.

II.

Proceedings Below

A.

MRA's Complaint

On December 18, 2015, MRA filed a complaint against the Corporate Appellees, alleging breach of contract and unjust enrichment/quantum meruit. MRA alleged that, between 2006 and 2014, the Corporate Appellees engaged MRA's services for a residential land development project pursuant to three written proposals, and pursuant to the agreed terms, MRA invoiced them for the work performed. MRA alleged that, despite occasional payments of those invoices, "[a]s of February 24, 2010, a number of MRA's Invoices remained outstanding and unpaid," and "MRA refused to provide any further Services until H&H Rock Companies acknowledged and agreed to pay the outstanding debt." The complaint further alleged:

> 14. By letter to H&H Rock Companies dated February 24, 2010, (the "Letter Agreement"), and signed by [the Corporate Appellees'] President, Mark Levy, [the Corporate Appellees] agreed and acknowledged that they were
>
> - In agreement with all proposals, contracts, services, and invoices provided by MRA in conjunction with the Development;
>
> - That all outstanding charges were fair and reasonable and owed to MRA by [the Corporate Appellees];
>
> - That all outstanding fees owed to MRA would be paid from unit sales or upon [the Corporate Appellees'] receipt of new financing, except that in any event all fees owed to MRA had to be paid off by December 31, 2010;

- And that, in the event [the Corporate Appellees] failed to make payment as agreed, interest would accrue at the rate of 8% from the date of the letter.[3]

15. [The Corporate Appellees] defaulted under the terms of the Letter Agreement by failing to make payments as and when agreed.

16. Despite [the Corporate Appellees'] failure to abide by the Letter Agreement, from time to time [the Corporate Appellees] continued to seek Services from MRA, and from time to time MRA continued to provide those Services.

17. From time to time, in order to induce MRA into continuing to provide the Services for the Development, Mr. Levy would acknowledge the outstanding Invoices due and owing to MRA, and on behalf of [the Corporate Appellees] would promise to remit payment for all or part of the unpaid Invoices.

18. By way of example, and not limitation, Mr. Levy affirmed [the Corporate Appellees'] debts and promised payment of the unpaid Invoices through emails sent to MRA on or about April 19, 2013, April 22, 2013, February 12, 2014, February 25, 2014, February 27, 2014, September 26, 2014, November 12, 2014, November 21, 2014, and April 9, 2015, and through numerous oral conversations over the years.[4]

19. In addition, in or about 2014, in an effort to induce MRA into performing more Services, Mr. Levy promised to make payments and allow MRA to secure the balance owed by [the Corporate Appellees] by providing a third position mortgage on a 2.1 acre parcel of land in Howard County, Maryland in favor of MRA. A draft document evidencing this promise was

[3] The February 24, 2010, Letter Agreement was not attached to or incorporated into MRA's complaint or the motion for summary judgment. A copy was not submitted to the court until MRA's Motion for Reconsideration.

[4] As with the Letter agreement, MRA did not include a copy of these emails as an exhibit to its complaint or motion for summary judgment.

> prepared on behalf of Mr. Levy by [the Corporate Appellees'] counsel and presented to MRA. Mr. Levy then failed to execute the document.[5]
>
> * * *
>
> 27. On multiple occasions and as recently as April 9, 2015, [the Corporate Appellees] have reaffirmed the amounts owed to MRA for the Services as set forth on the unpaid Invoices.

B.

MRA's Motion for Summary Judgment

On February 18, 2016, two months after filing the complaint, MRA moved for summary judgment on its breach of contract claim.[6] MRA argued that, "[i]n or about 2014," it had completed its services, but the Corporate Appellees "refused to remit payment," and therefore, they had "defaulted and materially breached the terms of the Proposals." MRA requested judgment in the amount of $338,204.58, which represented $233,597.22 in principal plus $104,607.36 in interest through January 28, 2016.

In support of its motion for summary judgment, MRA submitted the three proposals, the outstanding invoices related to those proposals, a statement of account reflecting the amounts owed under those invoices, and the general provisions of the contract, providing that MRA would submit invoices on a monthly basis, and payment was due in full within

[5] MRA did not include a copy of this draft document as an exhibit to its complaint or motion for summary judgment.

[6] The Corporate Appellees were served with both the complaint and the motion for summary judgment on February 10, 2016, even though MRA did not file its motion with the court until February 18, 2016.

30 days of the date of the invoice. MRA also submitted the affidavit of Timothy Madden, a Principal in the Land Development and Planning Division of MRA. In the affidavit, Mr. Madden stated that MRA provided services pursuant to the three proposals, that MRA regularly issued invoices for services performed, and although the Corporate Appellees, "from time to time," made payments, they failed to remit payment in full for MRA's services, which were completed in 2014. Mr. Madden stated that, pursuant to a February 24, 2010, Letter Agreement, the parties changed the interest rate for the outstanding invoices from 18% to 8% and "forgave that outstanding interest owed by [the Corporate Appellees] in exchange for [their] promises to pay certain outstanding principal amounts by a date certain."

On March 16, 2016, the Corporate Appellees filed an answer to MRA's complaint and a Response to Plaintiff's Motion for Summary Judgment and Request for Hearing.[7] Corporate Appellees asserted that MRA was not entitled to summary judgment, but instead, Rock Realty was entitled to judgment as a matter of law and MRA's claims against H&H Rock, with the exception of five outstanding invoices issued pursuant to Proposal Three, were barred by the statute of limitations.

The Corporate Appellees noted that each proposal expressly provided that billing would occur on a monthly basis with payment due within 30 days, and therefore, they

[7] The court initially granted MRA's motion for summary judgment on March 18, 2016, unaware that the Corporate Appellees had filed an answer to the complaint and a response to MRA's motion for summary judgment. The court subsequently vacated that order and set a date for a hearing on the motion for summary judgment.

argued that the statute of limitations for a breach of contract began to run on each individual invoice when payment became due. They set forth the following chart regarding the limitations period for each invoice:

Invoice No.	Date of Issuance	Commencement of Statute of Limitations	Termination of Statute of Limitations
102958	08/09/2007	09/08/2007	09/08/2010
103588	09/05/2007	10/05/2007	10/05/2010
104577	10/09/2007	11/08/2007	11/08/2010
105403	11/02/2007	10/02/2007	12/02/2010
107173	01/08/2008	02/07/2008	02/07/2011
107842	02/05/2008	03/06/2008	03/06/2011
108363	02/28/2008	03/29/2008	03/29/2011
109293	04/08/2008	05/08/2008	05/08/2011
110017	05/01/2008	06/01/2008	06/01/2011
113881	10/02/2008	11/01/2008	11/01/2011
115328	12/03/2008	01/02/2009	01/02/2012
115960	01/05/2009	02/05/2009	02/05/2012
116652	02/04/2009	03/06/2009	03/06/2012
117073	03/03/2009	04/02/2009	04/02/2012
117706	04/08/2009	05/08/2009	05/08/2012
118731	06/01/2009	07/07/2009	07/01/2012
119322	07/08/2009	08/07/2009	08/07/2012
119323	07/08/2009	08/07/2009	08/07/2012
119912	08/04/2009	09/03/2009	09/03/2012
119913	08/04/2009	09/03/2009	09/03/2012
120614	09/02/2009	10/02/2009	10/02/2012
120615	09/02/2009	10/02/2009	10/02/2012

121317	10/05/2009	11/04/2009	11/04/2012
121954	11/03/2009	12/03/2009	12/03/2012
121955	11/03/2009	12/03/2009	12/02/2012
122670	12/01/2009	12/31/2009	12/31/2012
123571	01/08/2010	02/07/2010	02/07/2013
123813	01/29/2010	02/28/2010	02/28/2013
124437	03/01/2010	03/31/2010	03/31/2013
125807	04/09/2010	05/09/2012	05/09/2013
126548	05/07/2010	06/06/2010	06/06/2013
127061	06/02/2010	07/02/2010	07/02/2013
127457	07/07/2010	08/06/2010	08/06/2013
128937	08/09/2010	09/08/2010	09/08/2013
129314	09/02/2010	10/02/2010	10/02/2013
129315	09/02/2010	10/02/2010	10/02/2013
130445	10/07/2010	11/06/2010	11/06/2013
133671	03/01/2011	03/31/2011	03/31/2014
134694	04/07/2011	05/07/2011	05/07/2014
135069	05/04/2011	06/03/2011	06/03/2014
139342	10/10/2011	11/09/2011	11/09/2014
140468	12/06/2011	01/05/2012	01/05/2015
143070	03/19/2012	04/18/2012	04/18/2015
147152	08/15/2012	09/14/2012	09/14/2015
147992	09/11/2012	10/11/2012	10/11/2015
149900	11/12/2012	12/12/2012	12/12/2015
151324	12/11/2012	01/10/2013	01/10/2016
152140	01/07/2013	02/06/2013	02/06/2016
153533	03/07/2013	04/06/2013	04/06/2016

157116	05/23/2013	06/22/2013	06/22/2016
11014756	01/16/2014	02/15/2014	02/15/2017

The Corporate Appellees argued that, because the complaint was not filed until December 18, 2015, the claims for all but the last five invoices were barred by the statute of limitations, and they were entitled to judgment as a matter of law as to those 46 invoices.

In addition to the statute of limitations argument, the Corporate Appellees argued that MRA's motion for summary judgment should be denied because they had not had an opportunity for discovery. They attached the affidavit of Mr. Levy, which, in addition to generally disputing MRA's claims, declared that, because MRA's claims spanned a period of approximately 10 years, the Corporate Appellees had not had sufficient time to review the authenticity of the invoices, to review any related communications, to interview employees regarding same, to review bank statements and other financial records, or conduct other necessary discovery, including the deposition of Mr. Madden and the issuance of third-party subpoenas.

In conjunction with its response, the Corporate Appellees submitted a proposed order. The order proposed that judgment be entered in favor of Rock Realty and that H&H Rock have an opportunity to conduct discovery. MRA did not file a reply.

On May 3, 2016, the court held a hearing on MRA's motion for summary judgment. During the hearing, counsel for MRA contended that "[t]he only question presented by [the Corporate Appellees] is whether the Statute of Limitations is sufficient to prevent entry of

judgment [on] the factual record before this Court." Counsel stated that there were "no material facts" in dispute "relevant for purposes of analyzing statute of limitations."

In response to the court's question regarding why, apart from the five invoices that were issued within three years of filing suit, the other claims were not barred by the statute of limitations, counsel stated that the statute of limitations did not begin to run until 2014, "when services ceased to be performed." He argued that it was not disputed that services were provided over time, and pursuant to *Singer Co., Link Simulation Sys. Div. v. Baltimore Gas & Electric Co.*, 79 Md. App. 461 (1989), "where you have a contract for services and services are performed under that contract, you don't have to – even if they are earlier invoices or earlier bill dates, you don't have to file suit until three years after the services cease to be performed."

Counsel for MRA further argued that, "where you have a contractual relationship between the parties and their invoices that are at issue between the parties, you have to look at the course of dealing between the parties, including whether payments were made from time to time that were after, theoretically, the thirty days required by the invoices." He asserted that there was "some evidence of the course of dealing between the parties," pointing to Exhibit F, which contained "an invoice dated July 8th, 2009 and a partial payment was made on that as recently as June 10th of 2013, which was approximately four years after that invoice issue[d]."

Counsel noted that there was no dispute that invoices were issued for services, that payments were made from time to time, but payments were not made for all invoices.

Counsel then stated that Mr. Levy did "not contest, as alleged in the Complaint, that he promised any payments on numerous occasions," but "[a]t the end of the day, that allegation is not relevant for the Motion for Summary Judgment because whether he promised or not, is immaterial under Maryland's Law on the Statute of Limitations."

Counsel for the Corporate Appellees clarified that they did "dispute liability [and] whether all the purported services were provided or that such services were . . . properly provided and they [did] dispute that the invoices properly reflect[ed] any services that were provided." Although the affidavit by Mr. Levy merely disputed the allegations, that was all he was able to say given that discovery had not yet taken place. Counsel argued "that in and of itself is sufficient for the court to deny the current Motion for Summary Judgment."

Counsel noted, however, that the Corporate Appellees had raised the Statute of Limitations as a defense. He stated:

> Now [MRA's] Counsel attempts to rely on facts alleged in the complaint, rather than the facts alleged in the Motion for Summary Judgment. There's nothing in the Motion for Summary Judgment that says anything about an acknowledgment of debt and Mr. Levy would dispute that if that allegation had been within the Motion for Summary Judgment. But that is not part of the Motion for Summary Judgment. No reply has been filed in this case.
>
> The Response to the Motion for Summary Judgment raises Statute of Limitations and what the Statute of Limitations provides is that for all but five of these invoices, this claim is barred as a matter of law. Now [MRA] rel[ies] on a case that suggests that the Statute of Limitations when services are provided, the Statute of Limitations does not begin to run on the date of the invoice. It starts to run on the date of the – the date the service were provided. And that may be in cases in which the parties did not purportedly agree that the Statute of Limitations would begin to run on a specific date.

> In this case Your Honor, based on the invoices that have been attached to the Motion for Summary Judgment, those invoices provide the date is due upon thirty days of the issuance of the invoice. So the case cited by [MRA's] Counsel is simply inapplicable in this case. According to [MRA] the parties already agreed the Statute of Limitations would begin to run thirty days after the issuance of each invoice.

MRA's counsel, in reply, again argued that, "because the services were provided until 2014, the Statute of Limitations does not apply." He further argued that it was "a stretch to say that invoices show that the parties[,] each time an invoice was issued, agree[d] that [the] Statute of Limitations would run. All they show is that interest would begin to run."

On May 4, 2016, the court issued an order: (1) denying MRA's motion for summary judgment; and (2) granting summary judgment in favor of the Corporate Appellees for all debts, "with the exception of any invoice that became due or overdue, in violation of the contract, on or after December 18, 2012."[8] The court rejected MRA's argument that the cause of action did not accrue until the conclusion of the services in 2014, finding "that the statute of limitations for each new breach of the contract began to accrue at the time each breach occurred, not at the conclusion of all business between the parties almost a decade after the first dated proposal in question." The court concluded that "all unpaid debts,

[8] The court identified the Corporate Appellees' response to MRA's motion for summary judgment as "Defendant's Response to Plaintiff's Motion for Summary Judgment and Request for Hearing ('Counter-Motion')." It characterized the counter motion as alleging "that the majority of the claims presented [were] barred by the statute of limitations," and therefore, the Corporate Appellees sought summary judgment in their favor.

overdue in violation of the contractual agreement between the parties for more than three years from the filing of this case on December 18, 2015, are barred by the statute of limitations." Thus, it found that all claims on the outstanding invoices for Proposal One and Two were barred by the statute of limitations.

With respect to Proposal Three, dated June 28, 2007, the court stated:

> [MRA] alleges that twenty-nine (29) invoices are unpaid in part or in full from Proposal Three . . . . The invoices range from July 8, 2009 through January 16, 2014. The court finds that the cause of action on each invoice began to accrue once the invoice was thirty days past due. That was the time that the parties agreed [MRA] would be entitled to pursue all appropriate remedies, including collection procedures on each individual invoice. The Court finds that all invoices that were more than thirty days past due on December 18, 2012 are barred by the [statute] of limitations in this case. Once the cause of action accrued (thirty days past invoice issue date) [MRA] had three years in which to file suit on that invoice. The Court finds that five invoices are not barred by the statute of limitations: Invoice 151324, Invoice 152140, Invoice 153533, Invoice 157116, and Invoice 11014756. These five invoices were the only identified invoices for this time period.

The court next addressed the argument that, because the statute of limitations for all of the invoices relating to Proposals One and Two, the only proposals to which Rock Realty was a party, expired by the time MRA brought suit, Rock Realty was entitled to judgment as a matter of law on all claims. The court found "that a factual question exists as to which Defendant, if any, was a party to Proposal Three," and therefore, the court declined "to award summary judgment on any issue related to the last five invoices."

The court then discussed MRA's argument that there had been an extension of the statute of limitations, stating as follows:

> [MRA] alleges that the parties reached a new agreement on February 24, 2010 whereby [the Corporate Appellees] promised to "pay certain

> outstanding principal amounts by a date certain" in order for forgiveness of outstanding interest and a lower future interest rate . . . . [MRA] does not attach this agreement, nor does [MRA] indicate what the new agreed deadline was, or what "certain outstanding principal amounts" this agreement applied to. The Court notes that it would be [MRA's] burden to establish that the statute of limitations was either renegotiated by the parties or extended by further agreement and to provide the terms for that superseding agreement. Even had a superseding agreement been made in 2010, the Court has concerns, without exploring the new terms, that the statute of limitations could have run on any alleged subsequent agreement by the time this suit was filed in December of 2015. The Defendant has convinced the Court that the invoices, except for those in which the cause of action accrued within three years prior to filing, are barred by the statute of limitations. The record is void of any further agreement between the parties to acknowledge the debt or extend the statute of limitations. The Court has not been presented with any specific evidence of any new dates agreed to, other than the three proposals and invoices. Therefore, the Court has no basis to find the statute of limitations was tolled or extended by agreement to a future date in this case.
>
> [MRA] further argued that a course of dealing between the parties may have implied extending the statute of limitations. The Court does not have any evidence before it that a course of dealings led to such an implied extension of the statute of limitations. Exhibit F that [MRA] attached to the Motion purports to show an agreed upon reduced interest rate on certain invoices. Exhibit F shows three payments received on 51 (fifty-one) outstanding invoices. The court does not find this to be evidence of a sufficient course of conduct between the parties to extend the statute of limitations in the manner [MRA] suggests.

C.

Motion for Reconsideration

On May 17, 2016, MRA filed a motion for reconsideration, asserting that the court's ruling "should be reconsidered to review additional evidence that [MRA] was unable to present at the hearing because a 'Cross-Motion for Summary Judgment' was not before the

Court."[9] MRA submitted two affidavits with its motion. In Mr. Madden's affidavit, he alleged that, between 2010 and 2013, Mr. Levy had made various promises to make payment. The affidavit of Frank Hertsch similarly alleged that there were discussions in 2013 and 2014 where Mr. Levy promised to pay the outstanding invoices. In addition to the two affidavits, MRA, for the first time, submitted to the court the February 24, 2010, Letter Agreement, the various emails that it believed demonstrated an acknowledgment of the debt, and a draft mortgage, which MRA also asserted demonstrated an acknowledgment of the debt.[10]

[9] MRA argued that it was improper for the court to grant partial summary judgment in favor of the Corporate Appellees because the court improperly treated their response in opposition to MRA's motion for summary judgment as a cross-motion for summary judgment.

[10] The February 24, 2010, Letter Agreement was directed to H&H Rock Companies, but we note that it identified the three proposals, including Proposals One and Two, which were solely between MRA and Rock Realty. The agreement provided:

> MRA understands that you are in agreement with all of our proposals and contracts for services and the amendments thereto, are satisfied with the quality of services MRA has provided to H&H Rock in regards to the referenced projects, have reviewed/reconciled the attached statement of account and are in agreement with the total amounts shown as due to our firm.
>
> By signing this document, you hereby acknowledge and agree that the outstanding invoices and charges included in the attached statement of account are fair and reasonable charges for the services satisfactory [sic] performed by MRA and further agree that H&H Rock owes all amounts as shown therein.
>
> You further agree to pay all fees due on Village Towns Phase III-A and III-B, area 1 out of proceeds from the sale of units to your contracted

MRA requested judgment in its favor, stating:

> [t]he Letter Agreement expressly demonstrates that MRA expected, and [the Corporate Appellees] promised, payment in full by the end of 2010. Mr. Levy's oral and written promises in 2013 and 2014 establish that [the Corporate Appellees] acknowledged and intended to pay their debts, thus extending the statute of limitations to at least April 2016, well after [MRA's] filing of this lawsuit.

Alternatively, it requested that the court vacate its prior grant of partial summary judgment and allow discovery to proceed.

The Corporate Appellees responded to MRA's motion for reconsideration, arguing that the court correctly granted partial summary judgment in its favor because MRA did not "present any competent evidence to suggest that the accrual of its purported cause of action had been tolled." They asserted that MRA's argument, that the court was precluded from entering judgment in its favor because it did not label its response as a "Cross Motion for Summary Judgment," was disingenuous, noting that they specifically requested that the court enter judgment in Rock Realty's favor on the ground that the claims were barred by

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> homebuilder, or by October 1, 2010, whichever comes first. Phase IV fees shall be paid when you have secured financing for the projects with another financial institution, or when Lots are sold to your contracted homebuilder, or by December 1, 2010 whichever comes first. H&H Rock agrees to pay all MRA fees for the New Colony Village project when you have secured financing for the project, or by December 31, 2010, whichever comes first.
>
> In the event that payments are not received by the due dates prescribed herein, interest at the annual rate of 8% shall accrue on all outstanding amounts from the date of this letter.

Mr. Levy signed the document, under the terms "Agreed and Accepted," on March 10, 2010.

the statute of limitations. In any event, the Corporate Appellees argued that "the Court was authorized to enter judgment in favor of [the Corporate Appellees] since the evidence clearly established that [MRA's] claim was barred, in part, by the statute of limitations."[11]

With respect to the additional evidence included in the motion for reconsideration, the Corporate Appellees asserted that MRA was estopped from relying on this evidence because it was in MRA's possession at the time it filed for summary judgment and intentionally omitted. They noted that MRA initially argued that the "statute of limitations was tolled because the services allegedly were not completed until 2014," and it should not be permitted to argue, on motion for reconsideration, that the "limitations period was renewed because [the Corporate Appellees] allegedly acknowledged the purported debt." They asserted that this would allow MRA to pursue alternative theories "in piecemeal fashion by filing multiple dispositive motions" based on information that previously was intentionally omitted.

In any event, the Corporate Appellees argued that the claims were still barred by the statute of limitations because the evidence presented did not constitute a sufficient acknowledgment of the debt or proof of a course of dealings between the parties that modified the contract terms. With respect to the February 24, 2010, Letter Agreement, they argued that Rock Realty was never a party to that agreement, so even if "H&H Rock

[11] The Corporate Appellees also disputed MRA's contention that it was deprived of an opportunity to respond, noting that MRA "could have filed a reply following the receipt of [the Corporate Appellees'] Response."

agreed to pay all fees purportedly due, as of February 24, 2010" on all three proposals, the Letter Agreement did not "constitute an acknowledgment of the purported debt by Rock Realty." Moreover, because payment under this agreement was due on December 31, 2010, and the action was not filed until December 18, 2015, they argued that any breach of this agreement was barred by the statute of limitations.

Regarding the other communications alleged to be acknowledgements of debt, the Corporate Appellees asserted that they "reflect a dispute over the purported debt, rather than an acknowledgment of such alleged debt," and MRA did not rely on those communications in its motion for summary judgment because they were "settlement discussions and reveal [MRA's] improper billing practices." They asserted, *inter alia*, that none of the communications referred to a specific proposal or a specific amount due, and therefore, they were insufficient "to demonstrate a clear, direct, and unqualified acknowledgment of the purported debt."

Addressing the claim that the parties' course of dealing modified the payment terms of the proposal, the Corporate Appellees stated that this claim was "baseless," asserting that there was "absolutely no evidence of the specific alleged course of dealing that would have resulted in modification of the proposals." They argued that, to establish a contractual term had been modified by conduct, MRA was required to establish the manner in which the payment terms were modified, but it failed to do so.

In reply, MRA reiterated its arguments and presented additional evidence in support of its claim that a course of dealing altered the parties' contracts. It argued that Mr. Levy's

repeated statements about needing additional time to pay the invoices and frequent late payments or partial payments on older invoices demonstrated a course of dealing. MRA further argued that, during an April and May 2013 meeting, Mr. Levy unequivocally affirmed the debt and promised to make payments.

On June 24, 2016, the court denied the motion for reconsideration. It stated that, after consideration of MRA's motion and the Corporate Appellees' response: "The motion is hereby DENIED."

D.

Motions for Summary Judgment

On July 13, 2016, the Corporate Appellees filed a motion for summary judgment on the claim regarding the remaining five invoices. They asserted that, although they denied liability, "to avoid the cost and inconvenience of ongoing litigation," they tendered a payment of $22,285.28, under protest, on July 5, 2016.[12] The Corporate Appellees alleged

[12] In support of the motion for summary judgment, the Corporate Appellees included an affidavit from Mr. Levy stating, among other things, that "at no time, in the 3 years prior to December 18, 2015, the date on which [MRA] filed the Complaint, did Rock Realty or H&H Rock promise to pay the disputed debt or acknowledge the validity of the disputed debt." In its response, MRA included portions of the transcript of Mr. Levy's deposition, which proceeded after the initial partial summary judgment ruling because five of the invoices at issue in MRA's complaint were not dismissed. Dispute ensued at the deposition regarding its scope, with counsel for Mr. Levy taking the position that Mr. Levy would testify only "concerning the last five invoices in the third contract." After some questioning, and instruction for Mr. Levy not to answer questions not relevant to the last five invoices, the deposition was postponed so that MRA could file a motion to compel. It then was dismissed as moot in view of the court's subsequent grant of full summary judgment in favor of appellees.

that, because this payment fully satisfied MRA's alleged damages, MRA's breach of contract claim was moot, and because they had not been unjustly enriched, they were entitled to judgment as a matter of law on MRA's claim for unjust enrichment/quantum meruit. The Corporate Appellees also submitted proof of its tendered payment in support of the motion for summary judgment. Both the check and accompanying letter noted that the payment was being made under protest, but in satisfaction of a disputed claim.[13]

MRA opposed the motion for summary judgment, arguing that, on July 18, 2016, five days after the motion was filed, it filed a First Amended Complaint, which alleged new claims and theories of liability against the Corporate Appellees and added Mr. Levy as a defendant.[14] MRA argued that the motion for summary judgment did not address the new claims, and therefore, it could not demonstrate the absence of material fact.

The Corporate Appellees responded that MRA did not dispute receiving the payment, and therefore, MRA's claims were moot. They asserted that, although MRA

[13] MRA deposited the check on October 28, 2016, after the court ruled on the motion.

[14] The amended complaint reasserted the claims of breach of contract and unjust enrichment against the Corporate Appellees and added two new claims, detrimental reliance/promissory estoppel and fraud, against the Corporate Appellees and Mr. Levy. In these new claims, MRA asserted that Mr. Levy, on behalf of H&H Rock Companies, made materially false statements and misrepresentations that MRA would receive payment on outstanding invoices, and "MRA relied on the false promises in forbearing from filing suit against H&H Rock Companies [and] by continuing to provide the Services to H&H Rock Companies." The amended complaint alleged that, "[d]ue to this Court's entry of partial summary judgment in favor of [the Corporate Appellees] on Counts I and II herein, MRA has suffered damages as a result of MRA's reliance on [the] fraudulent representations."

continued to attempt to re-litigate the claims disposed of in the initial grant of partial summary judgment on the ground that it was subject to revision, the court's decision on those claims was "dispositive" in that it "conclusively settle[d] the matter."

With respect to the new claims, the Corporate Appellees asserted that the claim for detrimental reliance/promissory reliance in Count III of the amended complaint failed as a matter of law because, *inter alia*, the claim was nothing more than an attempt to revive MRA's breach of contract claim on those invoices previously dismissed based on the statute of limitations.[15] They asserted that they did not hold out any inducements not to file suit or indicate that the statute of limitations would not be raised as a defense.

With respect to the fraud claim, the Corporate Appellees argued that the claim should be dismissed because MRA did not plead fraud with sufficient particularly, and "statements that are promissory in nature generally are not actionable." They further asserted that Mr. Levy did not make the communications with a present intent to defraud MRA. Finally, they argued that the court's denial of MRA's motion for reconsideration constituted an adjudication on the communications, and therefore, they could not be used to support a claim of fraud if they were insufficient for the court to rely on in reconsidering its previous grant of partial summary judgment.

[15] The Court of Appeals has indicated a preference for the term "detrimental reliance," as opposed to "promissory estoppel." *Pavel Enterprises, Inc. v. A.S. Johnson Co.*, 342 Md. 143, 146 n.1 (1996). We also will use that term.

Mr. Levy also filed a motion to dismiss, or, in the alternative, a motion for summary judgment, reiterating many of the arguments made by the Corporate Appellees. He further argued that he could not be held personally liable for the debt.

E.

The Court's Order

On October 13, 2016, after a hearing, the court granted summary judgment in favor of appellees. With respect to the breach of contract claim, the circuit court noted that it previously had found that the statute of limitations barred all claims except those relating to five invoices, which subsequently were paid. With respect to Count II, MRA's unjust enrichment claim, the court stated that such a claim was inappropriate because there was a contract between the parties, which the defendants had "paid and satisfied." As discussed in more detail, *infra*, the court also ruled in favor of appellees on the newly added claims of detrimental reliance and fraud. Accordingly, the court granted judgment in favor of appellees on all counts of the amended complaint.

This appeal followed.

DISCUSSION

MRA contends that the court made several errors in its rulings. Before addressing the merits of these contentions, we must first address appellees' motion to dismiss the appeal on the ground that it is moot. In this regard, appellees note that, on October 28, 2016, the day after MRA filed its notice of appeal, MRA deposited the $22,385.28 check that the Corporate Appellees tendered as payment for the "amount allegedly due all

purported claims that accrued on or after December 18, 2012." Appellees assert that MRA's "acceptance of the check constituted an accord and satisfaction," which resulted in a release of claims against appellees.

MRA urges the Court to deny the motion to dismiss. It contends that the "only claims barred by the doctrine of accord and satisfaction are those related to the five (5) invoices" issued subsequent to December 18, 2012 ("*i.e.*, the bar date for limitations as determined by the trial court."). It asserts that the tendered payment was not made "in full satisfaction of all of MRA's claims on fifty-one outstanding invoices." MRA further argues that the payment does not bar its claims against Mr. Levy because the check was not sent on his behalf, and it was sent before the amended complaint adding him as a defendant was filed.

In *Sutton v. FedFirst Fin. Corp.*, 226 Md. App. 46, 68 (2015), *cert. denied,* 446 Md. 293 (2016), we set forth the standard regarding mootness as follows:

> "A case is moot when there is no longer an existing controversy when the case comes before the Court or when there is no longer an effective remedy the Court could grant." *Prince George's Cnty. v. Columcille Bldg. Corp*., 219 Md. App. 19, 26 (2014) (quoting *Suter v. Stuckey*, 402 Md. 211, 219 (2007)). "This Court does not give advisory opinions; thus, we generally dismiss moot actions without a decision on the merits." *Green v. Nassif*, 401 Md. 649, 655 (2007) (quoting *Dep't of Human Res., Child Care Admin. v. Roth*, 398 Md. 137, 143 (2007)). "In rare instances, however, we 'may address the merits of a moot case if we are convinced that the case presents unresolved issues in matters of important public concern that, if decided, will establish a rule for future conduct.'" *Roth*, 398 Md. at 143-44 (quoting *Coburn v. Coburn*, 342 Md. 244, 250 (1996)).

In determining whether the appeal in this case is moot, we must determine whether MRA's action in cashing the check in the amount requested for the five invoices pending after the

initial summary judgment ruling constituted an accord and satisfaction of the other 46 outstanding invoices involved in the lawsuit.

"An accord and satisfaction is a completed compromise of a disputed claim." *Wickman v. Kane*, 136 Md. App. 554, 561, *cert. denied*, 364 Md. 462 (2001). It is "a method of discharging a contract or cause of action, whereby *the parties agree* to give and accept something in settlement of the claim or demand of the one against the other, *and perform such agreement, the 'accord' being the agreement, and the 'satisfaction' its execution or performance*." *Weston Builders & Developers, Inc. v. McBerry, LLC*, 167 Md. App. 24, 54 (quoting *Jacobs v. Atlantco Ltd. P'ship*, 36 Md. App. 335, 340-41 (1977)), *cert. denied*, 392 Md. 726 (2006). A valid accord and satisfaction requires a meeting of the minds of the parties. *Id.* at 56-58. Accord and satisfaction is an affirmative defense, and the burden of proof is on the party asserting the defense. *Id.* at 55.

Md. Code (2013 Repl. Vol.) § 3-311 of the Commercial Law Article (CL) addresses accord and satisfaction as follows:

> (a) If a person against whom a claim is asserted proves that (i) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, (ii) the amount of the claim was unliquidated or subject to a bona fide dispute, and (iii) the claimant obtained payment of the instrument, the following subsections apply.
>
> (b) Unless subsection (c) applies, the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim.

Here, the Corporate Appellees included the following notation on the memo line of the check: "Paid Under Protest in Satisfaction of Disputed Claim." The letter, included with the subject check, provided, in pertinent part, as follows:

> Please find enclosed a check payable to your client, Morris & Ritchie Associates, Inc. ("MRA"), in the amount of $22,385.28, which satisfies the disputed claim in the above referenced matter. [The Corporate Appellees'] payment is remitted under protest and does not constitute an acknowledgement of the alleged debt in this matter. Indeed, [the Corporate Appellees] deny both liability and MRA's claimed damages. [The Corporate Appellees'] denial of liability and damages applies not only to the invoices referenced herein, but also to any and all sums that MRA has claimed to be due in this matter and any other purported claim, regardless of whether such claim has been asserted in this matter. [The Corporate Appellees] also dispute the reasonableness of MRA's purported attorney's fees allegedly incurred to date and reject any suggestion that such fees are exclusively attributable to the invoices referenced herein. Nevertheless, the enclosed payment is remitted in order to avoid the expense and inconvenience of ongoing litigation, especially since the cost of litigation will likely exceed the remaining amount in controversy in this matter. The enclosed payment is remitted without prejudice to [the Corporate Appellees'] claims, rights, interests, defenses, and remedies.

Appellees argue that this check and letter "clearly included conspicuous statements indicating that [the] Corporate Appellees tendered the instrument in full satisfaction of [MRA's] claim." MRA, by contrast, asserts that "[t]he only fair reading of the letter and accompanying Check is that [the] Corporate Appellees were submitting payment to resolve the Five Invoices identified therein, and not the numerous other claims which the court had already resolved in favor of [the] Corporate Appellees." In that regard, it notes that the "ongoing litigation" referred to the surviving claims on the five invoices. MRA asserts that "there was no indication, express or implied, that the Check was intended to resolve every claim asserted by MRA."

The language of the letter at some points suggests that it addresses only the five invoices ("the remaining amount in controversy"), and at other points suggests that the payment involves all claims (check "which satisfies the disputed claim in the above referenced matter"). Given the lack of a clear meeting of the minds regarding the scope of the claim involved, we conclude that the Corporate Appellees failed to meet their burden of proving the affirmative defense of accord and satisfaction regarding the 46 invoices at issue in this appeal. Accordingly, the appeal is not moot, and we turn to address the merits of MRA's claims of error.

I.

Partial Summary Judgment on Initial Complaint

MRA contends that the court's May 2016 ruling, denying its motion for summary judgment and granting partial summary judgment to the Corporate Appellees, was erroneous. It asserts that it "submitted undisputed evidence of the Contracts and Services, the lack of payment of Invoices, the parties' course of dealing, and [the Corporate Appellees'] acknowledgement of the debt," and the Corporate Appellees "failed to identify with particularity any material facts in dispute." With respect to the Corporate Appellees' assertion that the claim was barred by the statute of limitations, MRA argues that they failed to meet their burden of pleading or proving the statute as an affirmative defense, and at most, generated a dispute of fact. It also contends that the court erred in granting partial summary judgment in favor of the Corporate Appellees because no cross-motion for

summary judgment was filed, and the court "did not provide notice" that the court intended to treat the Corporate Appellees' response as a cross-motion.

The Corporate Appellees contend that the circuit court did not abuse its discretion in denying MRA's motion and "correctly entered partial summary judgment" in their favor. They assert that, after they "satisfied their burden of pleading and proving that, with the exception of the last five invoices, [MRA's] claims were barred by the statute of limitations," the burden shifted to MRA "to establish that the limitations period had been modified," and MRA failed to meet this burden.[16]

Pursuant to Maryland Rule 2-501(f), a trial court "shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." With respect to MRA's claim that the court had no authority to grant summary judgment in the Corporate Appellees' favor because they did not file a cross-motion for summary judgment, we note, initially, that the Corporate Appellees did ask for judgment in favor of Rock Realty and argued that the statute of limitations barred the claims for all but five of the invoices. MRA was on notice that the Corporate Appellees were requesting judgment in their favor.

Moreover, as this Court has explained:

[16] The Corporate Appellees also argue that the court properly denied MRA's motion for summary judgment because they had not yet had an opportunity to obtain discovery relating to the claims. Because the court ultimately ruled based on the statute of limitations, and we affirm that ruling, we need not address this argument.

> Although a judge still may *not*, absent a motion, grant a judgment *sua sponte* in favor of a third party, he may grant a judgment not only *for the moving party* but also *against the moving party* (to wit, in favor of the opposing party). A cross ruling is no longer dependent on a cross motion. The prerogative to grant a summary judgment is now at least two-directional, even if not multi-directional.

Commercial Union Ins. Co. v. Porter Hayden Co., 116 Md. App. 605, 636, *cert. denied*, 348 Md. 205 (1997). *Accord Fraternal Order of Police Montgomery Cty. Lodge 35, Inc. v. Manger*, 175 Md. App. 476, 493 (2007) ("A court may grant summary judgment to the non-moving party absent a cross-motion for summary judgment."). MRA's argument that the circuit court did not have the authority to grant summary judgment in favor of the Corporate Appellees is without merit.

Turning next to the merits of the court's ruling, this Court recently set forth the standard of review of an order granting a motion for summary judgment as follows:

> "On review of an order granting summary judgment, our analysis 'begins with the determination [of] whether a genuine dispute of material fact exists; only in the absence of such a dispute will we review questions of law.'" *D'Aoust v. Diamond*, 424 Md. 549, 574 (2012) (quoting *Appiah v. Hall*, 416 Md. 533, 546 (2010)). We review the record "'in the light most favorable to the non-moving party and [we] construe any reasonable inferences that may be drawn from the well-pled facts against the moving party.'" *Id.* (quoting *Muskin v. State Dep't of Assessments & Taxation*, 422 Md. 544, 554-55 (2011)).
>
> If, after reviewing the record, we determine "there is no material fact in dispute," we then "determine whether the trial court correctly granted summary judgment as a matter of law." *Doe v. Md. State Bd. of Elections*, 428 Md. 596, 606 (2012). "Our determination of whether the trial court's grant of summary judgment is proper 'is a question of law, subject to a non-deferential review on appeal.'" *Id.* (quoting *Tyler v. City of College Park*, 415 Md. 475, 498 (2010)).

Woolridge v. Abrishami, 233 Md. App. 278, 307-08 (quoting *Heit v. Stansbury*, 215 Md. App. 550, 555 (2013)), *cert. denied*, 456 Md. 96 (2017).

There is a different standard of review, however, regarding a trial court's ruling denying a motion for summary judgment. "Although a trial court's decision to grant a motion for summary judgment is subject to *de novo* review on appeal," a court has "discretionary authority to *deny* a motion for summary judgment in favor of a full hearing on the merits, even when the moving party 'has met the technical requirements of summary judgment.'" *Fischbach v. Fischbach*, 187 Md. App. 61, 75 (2009) (quoting *Dashiell v. Meeks*, 396 Md. 149, 164-65 (2006)). Accordingly, the standard of review for a denial of a motion for summary judgment is whether the court abused its discretion. *Id*. *Accord Dashiell*, 396 Md. at 164 ("'Although a trial court is allowed discretion to *deny* a motion for summary judgment in favor of a full hearing on the merits, a court cannot draw upon discretionary power to *grant* summary judgment.'") (quoting *Foy v. Prudential Ins. Co. of Am.*, 316 Md. 418, 423 (1989)). With these standards of review in mind, we will address the parties' contentions.

A.

Statute of Limitations

Maryland Code (2013 Repl. Vol.) § 5-101 of the Courts and Judicial Proceedings Article (CJP) provides: "A civil action at law shall be filed within three years from the date it accrues unless another provision of the Code provides a different period of time within

which an action shall be commenced." The parties do not dispute that the applicable statute of limitations in this case is three years.

The dispute here involves when the cause of action accrued. A cause of action for breach of contract typically accrues at the time of the breach. *Kumar v. Dhanda*, 426 Md. 185, 195 (2012).

MRA asserts that, "[w]here an undertaking requires a continuation of services, or the party's right depends upon the happening of an event in the future, the statute of limitations begins to run only from the time the services can be completed or from the time the event happens." Although it does not specify in its brief the date that the cause of action accrued, MRA appears to claim, as it did below, that its cause of action for breach did not accrue until 2014, at the earliest, when it completed its services and the Corporate Appellees failed to remit payment for all outstanding invoices.

The Corporate Appellees contend that when, as here, a contract requires payment in individual installments, the statute of limitations begins to run when each successive installment is due, but unpaid. They contend that, because the three proposals in this matter each provided that billing would occur on a monthly basis, with payment due 30 days after invoicing, the "claim accrued 30 days following the issuance of each invoice, rather than upon the completion of [MRA's] purported services." We agree.

The common law rule "firmly entrenched [] in Maryland" provides that, when a debt is payable in separate installments, "the statute of limitations begins to run on each individual installment as it becomes due." *Avery v. Weitz*, 44 Md. App. 152, 154 (1979).

Accord 31 Richard A. Lord, *Williston on Contracts* § 79:17 (4th ed. 2004) ("If, by its terms, the money is payable is installments . . . [a] separate cause of action arises on each installment, and the statute of limitations runs separately against each.").

Here, as discussed, each proposal unambiguously provided that billing for services would occur monthly, with payment due 30 days after the issuance of the invoice. Accordingly, the circuit court properly found that, pursuant to the three proposals, MRA's cause of action for breach of contract accrued on the date each invoice at issue became due, not when the services were completed.[17]

[17] MRA's reliance on *Singer Co., Link Simulation Sys. Div. v. Baltimore Gas & Electric Co.*, 79 Md. App. 461 (1989), is misplaced. That case did not involve an installment contract, but rather, it involved Baltimore Gas & Electric Co.'s contractual obligation to provide electricity, which was repeatedly breached by successive power outages. *Id.* at 473. The circuit court, applying the discovery rule, determined that Singer's breach of contract action accrued immediately after the first power outage. *Id.* at 474-75. This Court disagreed, holding that,

> where a contract provides for continuing performance for over a period of time, each successive breach of that obligation begins the running of the statute of limitations anew, with the result being that accrual occurs continuously and a plaintiff may assert claims for damages occurring within the statutory period of limitations.

Id. at 475. That case, however, is not helpful to MRA. Although the Court held that Singer could bring suit more than three years after the first power interruption, we held that any claims made were "limited to those alleged breaches and resulting damages which occurred within three years of the filing of the suit." *Id.* This supports the circuit court's finding here that all but five invoices were barred by the statute of limitations.

B.

Extension of the Statute of Limitations

MRA next argues that, "even if limitations was otherwise a potentially valid defense," the court erred in granting partial summary judgment in favor of the Corporate Appellees because "it had evidence of Appellees' promises to pay that would toll limitations and revive the debt." MRA further argues that the parties' course of conduct modified the payment terms and tolled the statute of limitations.

1.

Acknowledgment of the Debt

We address first the argument that MRA presented evidence that appellees acknowledged the debt. In *Jenkins v. Karlton*, 329 Md. 510, 531 (1993), the Court of Appeals explained that the statute of limitations may be tolled or reset where the defendant promises to pay or acknowledges the debt:

> Maryland law has long recognized that acknowledgement of a debt barred by limitations removes the bar to pursing the remedy. An acknowledgement, sufficient to remove the bar of limitations, need not expressly admit the debt, it need only be consistent with the existence of the debt. Nor must it be an express promise to pay a debt; just as an express promise to pay a debt barred by limitations revives the remedy, a mere acknowledgement of such a debt will remove the bar of the statute, because if the debtor acknowledges the debt it is implied that he promises to pay. An acknowledgement of a debt can occur prior to the running of limitations, in which event, rather than removing the bar of limitations, it both tolls the running of limitations and establishes the date of the acknowledgment as the date from which the statute will now run.

(Internal citations and quotations omitted). An acknowledgment "sufficient to remove the bar of the statute of limitations requires an admission by the debtor, in word and/or deed,

that the debt is still owed by the debtor." *Columbia Ass'n, Inc. v. Poteet*, 199 Md. App. 537, 560 (2011).

When MRA moved for summary judgment on its breach of contract claim against the Corporate Appellees, it was based on evidence of nonpayment of invoices issued between 2007 and 2014. As a result, MRA submitted the following evidence in support of its motion: the three proposals, the outstanding invoices, and a statement of account detailing the dates and amounts of 51 invoices submitted from August 2007 until January 2014, partial payments on three invoices, and the sums owed. Mr. Madden stated in his affidavit that these documents were true and correct.

The Corporate Appellees responded that the breach accrued at the time each individual invoice became due, and judgment as a matter of law should be entered in their favor because, "with the exception of [MRA's] claim for the amount allegedly due under the last five invoices," MRA's purported claims were barred by the statute of limitations. In support, they set forth a chart reflecting, for each invoice, the date of issuance, the due date, and the termination of the statute of limitations. MRA did not file a response to this pleading.

MRA argued at the hearing in the circuit court that the breach accrued on the date the services were completed in 2014. Although, at this point in the litigation, MRA has produced documents and affidavits relating to its current claim that Mr. Levy acknowledged the debt, no such documents or affidavits were provided to the circuit court at the time it was addressing MRA's motion for summary judgment. Indeed, MRA's

counsel stated during the hearing on the motion that allegations pertaining to Mr. Levy's promised payments were "not relevant for the Motion for Summary Judgment because whether he promised or not, [was] immaterial under Maryland's Law on the Statute of Limitations."

Nevertheless, in its brief on appeal, MRA asserts that, "through its pleadings and at the hearing, [it] had submitted undisputed allegations indicating that, even if limitations was otherwise a potentially valid defense, it had evidence of Appellees' promises to pay that would toll limitations and revive the debt." When questioned about this at oral argument, counsel for MRA could point only to allegations in the complaint. Unverified pleadings, however, standing alone, are not facts "for summary judgment purposes." *Vanhook Merchants Mut. Ins. Co.*, 22 Md. App. 22, 27 (1974). MRA did not include evidentiary support, whether by affidavit or other documentary proof, corroborating the allegations in its unverified complaint that Mr. Levy had affirmed the debt. Accordingly, based on the record before the court at the time, MRA did not show a dispute of material fact regarding whether the statute of limitations was tolled by an acknowledgement of the debt. *See Johns Hopkins Univ. v. Ritter*, 114 Md. App. 77, 91-92 (1996) ("The court's decision to deny summary judgment, of course, has to be viewed in the light of the documents before the court at the summary judgment proceeding."), *cert. denied*, 346 Md. 28 (1997).

In any event, as counsel ultimately conceded, at oral argument, that the issue of acknowledgment of the debt to toll the statute of limitations was not raised in the initial

motion for summary judgment proceedings. Indeed, as indicated, counsel expressly stated at the hearing that any alleged promised payments were not relevant to the statute of limitations issue.

Under these circumstances, MRA cannot argue on appeal that the circuit court erred in finding that the claims were barred by the statute of limitations because there was evidence of acknowledgment of the debt. *Guerassio v. Am. Bankers Corp.*, 236 Md. 500, 505 (1964) ("[A]ppellants may not overturn a summary judgment by raising here an issue that was not plainly disclosed as a genuine issue in the trial court."). *Accord*; *Law Offices of Taiwo Agbaje, P.C. v. JLH Props., II, LLC*, 169 Md. App. 355, 371-72 (2006) (argument not raised in summary judgment proceedings not preserved for appellate review); *Faith v. Keefer*, 127 Md. App. 706, 737 (challenge to grant of summary judgment raised for first time on appeal is not preserved for review), *cert. denied*, 357 Md. 191 (1999).

MRA contends, however, that the statute of limitations is an affirmative defense, and it was the Corporate Appellees' burden to prove that the statute of limitations barred the claim. We disagree.

To be sure, the statute of limitations is an affirmative defense, and the general rule is that the party raising it has the burden to prove "that the cause of action accrued prior to the statutory time limit for filing suit." *Newell v. Richards*, 323 Md. 717, 725 (1991). Where, however, a plaintiff is "trying to evoke an exception to the statute of limitations," the plaintiff has the burden to prove the exception. *Id.* at 726.

Other states similarly apply that principle to facts analogous to this case. *See Howells v. Macon*, 447 So.2d 814, 815 (Ala. Civ. App. 1984) ("[T]he burden to reasonably satisfy the trial court that any payments or support constitute an acknowledgment" rests with the party seeking "to toll the statute."); *Hopkins v. Loeber*, 69 N.E.2d 104, 107 (Ill. App. Ct. 1946) (the burden "of affirmatively showing" that a letter acknowledged the debt and tolled the statute of limitations rested on the party asserting the acknowledgement); *Chauser v. Babin*, 412 So.2d 1005, 1007 (La. 1982) ("In an action on a note, when on its face the note is prescribed and the plaintiff alleges that prescription has been interrupted by payment, the plaintiff has the burden of proving the interruption of prescription."); *Corrales v. Murwood, Inc.*, 232 S.W.3d 609, 612 (Mo. Ct. App. 2007) ("'Where a note on its face shows that it is barred by the statute of limitations, the burden of proof is on the holder to show that the statute has been tolled by the making of a payment within the statutory period prior to the bringing of the action.'") (quoting *Wallace Cotton Co. v. Estate of Wallace*, 722 S.W.2d 103, 106 (Mo. Ct. App. 1986)); *Greer Limestone Co. v. Nestor*, 332 S.E.2d 589, 596 (W. Va. 1985) (a partial payment "must impliedly be taken as an acknowledgment of the debt," but "the burden of proof rests on the creditor to demonstrate that the statute of limitations has been renewed.").

Based on the reasoning of these cases, we hold that, where the statute of limitations is asserted as a defense for a claim that, on its face, appears to be barred by the statute of limitations, the plaintiff has the burden to show that the statute of limitations was tolled by an acknowledgement, or a course of conduct. Here, as indicated, MRA failed at this stage

of the proceeding to produce any evidence, or even argue, that the statute of limitations was tolled based on an acknowledgment of the debt. Thus, we decline MRA's request to reverse the circuit court's ruling on this ground.

2.

Modification by Course of Conduct

MRA next asserts that the court erred in finding that the claims on all but five of the invoices were barred by the statute of limitations because "it presented evidence of the parties' course of dealing," which it alleges modified the payment terms of the proposals. It points to Mr. Madden's affidavit, which was offered in support of its motion for summary judgment and provided, in pertinent part, that "[f]rom time to time, [the Corporate Appellees] would make payments or partial payments of the Invoices." It also relies on the Statement of Account, which showed "partial payments on certain Invoices," which it asserts served to toll the statute of limitations.[18] MRA contends that this evidence

[18] At the hearing, the only reference to payments made more than thirty days after the invoice was due was one invoice, dated July 8, 2009, with partial payment made on June 10, 2013, approximately four years after the issuance of the invoice. Counsel for MRA argued that this was "at least some evidence of the course of dealings between the parties." On appeal, the Corporate Appellees dispute this payment date, asserting that payment on the July 2009 invoice actually was on July 24, 2012. The alleged error regarding the payment date was not raised below, and that dispute does not impact our resolution of this appeal.

"generated disputes of material fact," but it was ignored by the circuit court in its ruling on the motion for summary judgment.[19]

The Corporate Appellees disagree. They argue that MRA failed to present any evidence to establish a course of dealing, asserting that "[t]he phrase 'from time to time' does not establish a pattern of conduct that would allow a court to determine a common understanding of the parties," and that "three payments made on approximately 50 invoices over the course of 7 years" does not reflect or establish "a pattern of conduct to allow the court to determine the manner in which the parties allegedly modified the payment terms."

The circuit court did not, as MRA alleged, ignore the argument that a course of conduct modified the terms of the initial contracts. The court addressed the argument but found that it did "not have any evidence before it that a course of dealings led to such an implied extension of the statute of limitations." It noted that the Statement of Account reflected "three payments received on 51 (fifty-one) outstanding invoices," but it did "not find this to be evidence of a sufficient course of conduct between the parties to extend the statute of limitations in the manner [MRA] suggests." As explained below, we perceive no error in this ruling.

[19] Contrary to MRA's assertion on appeal, counsel for MRA stated at the hearing below that there were "no material facts" in dispute "relevant for purposes of analyzing [the] statute of limitations."

Parties may modify a contract by mutual consent, which can be shown by the parties' conduct. *DirecTV, Inc. v. Mattingly*, 376 Md. 302, 318 (2003). The Court of Appeals has explained:

> The parties to a contract may agree to vary its terms and enter into a new contract embodying the changes agreed upon and a subsequent modification of a written contract may be established by a preponderance of the evidence. Assent to an offer to vary, modify or change a contract may be implied and found from circumstances and the conduct of the parties showing acquiescence or agreement.

Cole v. Wilbanks, 226 Md. 34, 38 (1961). *Accord Myers v. Kayhoe*, 391 Md. 188, 205 (2006) (parties to a contract may waive the requirements of a contract by their conduct); *Pumphrey v. Pelton*, 250 Md. 662, 670 (1968) ("The conduct of parties to a contract may be evidence of a subsequent modification of their contract.").

To modify a contract by course of conduct, "[t]he course of conduct must evince a meeting of the minds" and "must satisfy each element of a contract, including offer, acceptance, and consideration." *O'Grady v. BlueCrest Capital Mgmt. LLP*, 111 F. Supp. 3d 494, 502 (S.D.N.Y. 2015), *aff'd*, 646 Fed. Appx. 2 (2d Cir. 2016). This is because "a party cannot *unilaterally* alter an existing bilateral agreement." *Midfield Concession Enter., Inc. v. Areas USA, Inc.*, 130 F. Supp. 3d 1122, 1135 (E.D. Mich. 2015). Accordingly, "[w]hether the parties agreed to modify the contract can be deduced from their prior course of conduct if it is unequivocal and the terms of modification are definite, certain, and intentional." *Id. Accord DirecTV*, 376 Md. at 319 (the conduct of the parties, however, must indicate an "informed acceptance of the new contractual terms."). Although modification or waiver of a contract term generally is a question of fact, *Hovnanian Land*

Inv. Grp., LLC v. Annapolis Towne Ctr. at Parole, LLC, 421 Md. 94, 122 (2011), summary judgment is proper where no rational trier of fact could conclude that the terms of a contract were modified. *Myers*, 391 Md. at 206-07.

Here, MRA relied on Exhibit F, its statement of account, in support of its motion for summary judgment to evidence that the parties' course of conduct modified the payment terms of their contracts. The statement of account, which spans approximately seven years, and includes 51 invoices, shows three isolated payments issued more than 30 days after the issuance of the invoice, one 37 days later, one close to four years later, and one approximately five months later. This evidence was not sufficient for a rational trier of fact to find an agreement to modify the payment terms of the contract. *See Dallas Aerospace, Inc. v. CIS Air Corp.*, 352 F.3d 775, 783 (2d Cir. 2003) ("[A] single act of accepting payment is not a course of performance sufficient to demonstrate mutual assent."); *Aetna Life Ins. Co. v. Kepler*, 116 F.2d 1, 6–7 (8th Cir. 1941) (acceptance in the past of overdue premiums on three occasions did not constitute a course of dealing because the previous acceptance of the overdue premiums had not become a custom, habit or a practice and "[u]nrelated acts of forgiveness of the occasional delinquencies of a policyholder do not ordinarily constitute a course of dealing."); *Dunnigan v. First Bank*, 585 A.2d 659, 661 (Conn. 1991) (two separate transactions did not establish a "continual course of business dealings."); *Smith v. Christofalos*, 392 N.E.2d 756, 759 (Ill. App. Ct. 1979) (acceptance of a single late payment did not establish course of conduct); *Boone v.*

Standard Acc. Ins. Co. of Detroit, 66 S.E.2d 530, 535 (Va. 1951) ("[A] single transaction does not establish a course of conduct or course of dealing.").

The circuit court, based on the limited evidence before it, properly granted partial summary judgment in favor of the Corporate Appellees. No rational trier of fact could conclude, on the evidence presented at the motion for summary judgment, that the terms of the contracts were modified by a course of conduct.

II.

Motion for Reconsideration

MRA next contends that the circuit court erred in denying its motion for reconsideration, asserting that its motion for reconsideration "marshalled staggering evidence" that the parties either varied the contract terms through their course of dealing or that the Corporate Appellees acknowledged the debt, tolling the statute of limitations. It argues that "[t]he court abused its discretion when it wordlessly denied the Motion for Reconsideration, depriving MRA of its rights and proverbial 'day in court.'"

The Corporate Appellees contend that the court did not abuse its discretion in denying MRA's motion for reconsideration. They assert that MRA "failed to present any documents to the trial court to establish that the parties modified the Contracts by their alleged course of dealing." They also argue that MRA failed to present evidence of an unqualified acknowledgment of the debt, asserting that the communications presented reflected "a dispute over the purported debt, rather than an acknowledgement of such alleged debt."

"An appeal from the denial of a motion asking the court to exercise its revisory power is governed by the abuse of discretion standard." *Cent. Truck Ctr., Inc. v. Cent. GMC, Inc.*, 194 Md. App. 375, 397 (2010). *Accord Wormwood v. Batching Sys., Inc.*, 124 Md. App. 695, 700 (1999) ("An appeal from a denial of a motion to revise or 'motion for reconsideration,' pursuant to Rule 2-535(a), does not serve as an appeal from the underlying judgment, and the applicable standard is whether the court abused its discretion."), *cert. denied*, 354 Md. 113 (1999). As the Court of Appeals recently explained:

> Abuse of discretion occurs "where no reasonable person would take the view adopted by the [trial] court," or when the court acts "without reference to any guiding rules or principles." *North v. North*, 102 Md. App. 1, 13-14, 648 A.2d 1025, 1031 (1994). We will find an abuse of discretion when the ruling is "clearly against the logic and effect of facts and inferences before the court[,]" when the decision is "clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result[,]" when the ruling is "violative of fact and logic[,]" or when it constitutes an "untenable judicial act that defies reason and works an injustice." *Id.*

Powell v. Breslin, 430 Md. 52, 62 (2013).

Motions for reconsideration are not a vehicle to re-litigate the merits of a claim. *Schlotzhauer v. Morton*, 224 Md. App. 72, 85 (2015), *aff'd*, 449 Md. 217 (2016). "Losers do not enjoy *carte blanche* . . . to replay the game as a matter of right." *Steinhoof v. Sommerfelt*, 144 Md. App. 463, 484 (2002). Accordingly, when a party brings a motion requesting "that a court reconsider a ruling solely because of new arguments that the party could have raised before the court ruled, the court has almost limitless discretion not to

consider those argument[s]." *Schlotzhauer*, 224 Md. App. at 85. This is because a motion to reconsider

> is not a time machine in which to travel back to a recently concluded trial in order to try the case better with hindsight. The trial judge has boundless discretion not to indulge this all-too-natural desire to raise issues after the fact that could have been raised earlier but were not or to make objections after the fact that could have been earlier but were not.

Steinhoof, 144 Md. App. at 484.

Here, MRA was using the motion for reconsideration to relitigate the statute of limitations issue, arguing new theories and presenting new evidence that could have been presented at the summary judgment proceeding. We cannot find an abuse of discretion by the circuit court in denying the motion under these circumstances.

III.

Full Grant of Summary Judgment on Amended Complaint

MRA's final argument on appeal addresses the circuit court's ruling granting summary judgment in favor of appellees on the amended complaint. As indicated, the amended complaint reasserted the claims of breach of contract and unjust enrichment, although it added more allegations regarding the course of dealing between the parties and promises to pay by Mr. Levy. It also added two new claims and included Mr. Levy as a defendant for those claims. MRA contends that the court erred in granting summary

judgment on Count I, Breach of Contract, Count III, Detrimental Reliance, and Count IV, Fraud.[20] We will address each argument, in turn.

Before addressing the ruling on the individual counts, we note that, at the point that the court made its ruling, the Corporate Appellees had tendered payment, under protest, for $22,285.28, the amount of the claims regarding the five invoices that the court initially found were not barred by the statute of limitations. MRA does not dispute that these claims were satisfied, and it does not challenge the circuit court's ruling in that regard. We agree that summary judgment on these five invoices was warranted, and we affirm the circuit court's ruling in this regard. We still must address, however, the court's rulings regarding the other 46 invoices.

[20] MRA includes in this argument an assertion that the court abused its discretion in depriving MRA of its right to finish Mr. Levy's court-ordered deposition. Other than this single statement, MRA does not address this contention, and it has not been presented to this Court as one of the Questions Presented. Accordingly, we will not address the argument. *See Sutton v. FedFirst Fin. Corp.*, 226 Md. App. 46, 80 n.18 (2015) (declining to analyze an argument not adequately briefed on appeal), *cert. denied*, 446 Md. 293 (2016); *Diallo v. State*, 413 Md. 678, 692–93 (2010) ("'[A]rguments not presented in a brief or not presented with particularity will not be considered on appeal.'" (quoting *Klauenberg v. State*, 355 Md. 528, 552, 735 A.2d 1061, 1074 (1999)); *Green v. N. Arundel Hosp. Ass'n, Inc.*, 126 Md. App. 394, 426 1999, *aff'd*, 366 Md. 597 (2001) ("Appellants can waive issues for appellate review by failing to mention them in their 'Questions Presented' section of their brief. Confining litigants to the issues set forth in the 'Questions Presented' segment of their brief ensures that the issues presented are obvious to all parties and the Court.").

A.

Breach of Contract

In granting the motion for summary judgment on the breach of contract claim against the Corporate Appellees in the amended complaint, the circuit court stated that it previously had granted partial summary judgment in favor of the Corporate Appellees for all claims that accrued before December 18, 2012, and it had denied MRA's motion for reconsideration. The court then ruled that appellees were entitled to summary judgment on all claims in the amended complaint.

MRA contends that, in so ruling, the court erred. It asserts that "the parties' course of dealing, including the 2010 Letter Agreement, Levy's promises between 2010 and 2015, and other actions and omissions, tolled any applicable limitations period on the invoices," and therefore, the court's ruling "contravened established Maryland law and was legally incorrect."

The Corporate Appellees contend that the court correctly granted summary judgment on the breach of contract claim. They characterize MRA's amended complaint as a second motion for reconsideration of the court's earlier grant of partial summary judgment, and they assert that the court "did not abuse its discretion in denying [MRA's] second request for reconsideration." Finally, they assert that "no evidence was presented to establish modification of the Contracts and none of the subject communications included a clear, distinct, and unqualified acknowledgment of the purported debt."

The parties do not address on appeal the propriety of realleging, in an amended complaint, claims on which summary judgment has already been granted. In the circuit court, however, the Corporate Appellees did move to strike the amended complaint. They asserted, among other things, that the court had already ruled in their favor on the claims that accrued prior to December 18, 2012, and MRA was "not entitled to circumvent the Court's adjudication of its claims by filing the First Amended Complaint, in which it completely disregards the Court's prior rulings." The circuit court denied that motion, and appellees do not challenge that ruling in their brief. Accordingly, the propriety of the amended complaint realleging claims that already had been ruled upon is not before us. Rather, the issue presented is whether the circuit court properly granted summary judgment on the amended complaint. *See Gonzales v. Boas*, 162 Md. App. 344, 355 ("[A]mended complaint supercedes the initial complaint," rendering the amended complaint the operative pleading in this case), *cert. denied*, 388, Md. 405 (2005).

Although the circuit court previously had granted partial summary judgment in favor of the Corporate Appellees for all claims that accrued before December 18, 2012, the procedural posture of the case, at the time the court granted summary judgment on the First Amended Complaint, was significantly different. The amended complaint contained significantly more allegations regarding the course of conduct of the parties and promises of payment. And in contrast with the lack of evidence produced during the initial motion for summary judgment, MRA attached the affidavits of Mr. Madden and Mr. Hertsch and other documents incorporated therein. In his affidavit, Mr. Madden asserted, among other

things, that he met with Mr. Levy on April 18, 2013, and "Mr. Levy repeatedly acknowledged, on behalf of each [Corporate Appellee], that the outstanding amounts were owed to MRA and that he had every intention of paying them in full." Mr. Hertsch similarly asserted that, in exchange for forbearing suit, Mr. Levy promised to pay all outstanding debts owed to MRA, that it was not uncommon for MRA to be paid for its services when a development was completed, or when its customer/developer received additional financing," and that, on April 18, 2013, Mr. Levy met with him and Mr. Madden and acknowledged the debt each Corporate Appellee owed to MRA. He further asserted that email communications with Mr. Levy, incorporated into the affidavit and made as recent as April 9, 2015, related to acknowledgments of the Corporate Appellees' debt. The Corporate Appellees also filed an affidavit by Mr. Levy, disputing these assertions and stating that he "never promised that [he] would ensure that MRA was paid."

Thus, unlike the proceedings on the initial summary judgment motion, at the proceedings on the motion for summary judgment on the amended complaint, there was evidence of a dispute as to whether there was an acknowledgment of the debt that tolled the statute of limitations. The court, therefore, erred in deciding the case based solely on the earlier ruling.

The Corporate Appellees argue, however, that summary judgment was appropriate because "none of the subject communications included a clear, distinct, and unqualified acknowledgment of the purported debt." We disagree. The affidavit by Mr. Madden alleges that Mr. Levy "repeatedly acknowledged, on behalf of each Defendant, that the

outstanding amounts were owed to MRA and that he had every intention of paying them in full," which Mr. Levy denies in his affidavit. The affidavits and other evidence presented regarding the motion for summary judgment on the First Amended Complaint created a material dispute of fact regarding whether the debt was acknowledged by Mr. Levy, on behalf of the Corporate Appellees.

The circuit court erred in granting summary judgment on Count I, breach of contract, on the amended complaint. Whether there was an acknowledgment(s) that tolled the statute of limitations on the invoices that have not been paid is a question for the trier of fact.

B.

Detrimental Reliance

In addressing Count III, detrimental reliance, the court stated that a contract existed, which related to the substance of MRA's allegations, and none of the "four exceptions to the general rule that a party may not recover in quasi-contract if an express contract addresses the same disputed subject matter" applied. The court explained:

> [MRA] has not alleged that [the Corporate Appellees] committed fraud in executing the Proposals. [MRA] has not characterized its relief sought as restitution and/or rescission. In fact, [MRA] seeks expectation interests by way of payment of money for the alleged outstanding invoices. The Proposals, as discussed in this Court's Prior Memorandum (D.E. 23/0) and Opinion (D.E. 24/0), served as an express contract, which addressed the same subject matter as this promissory estoppel claim. An alleged promise not to assert a statute of limitations defense does not create an independent cause of action for promissory estoppel, and does not toll a statute of limitations without showing that the promisor held out inducement for the promisee not to file suit or indicated that the statute of limitations would not be pleaded. *Booth Class Co., Inc. v. Huntingfield Corp.*, 304 Md. 615, 624

> (1985). There is no indication in the record [appellees] made any such inducements or indications.
>
> Additionally, an acknowledgement of a debt may be sufficient to remove a purported debt from the purview of the statute of limitations, *Brown v. Hebb*, 167 Md. 535, 542 (1934); however, that acknowledgment must be unqualified, clear, and distinct. *Potterton v. Ryland Group, Inc.*, 289 Md. 371, 375 (1981); *Brosius Dev. Corp. v. City of Hagerstown*, 237 Md. 374, 380 (1965). [Appellees'] alleged communications do not constitute clear and unconditional promises to pay the alleged debts, but rather reference general and ambiguous goals and opinions. The Court grants the Supplement to [the Corporate Appellees'] Motion for Summary Judgment as to Count 3 – Detrimental Reliance / Promissory Estoppel.

The circuit court turned next to Mr. Levy's individual liability on Count 3, detrimental reliance. It noted that Mr. Levy was an agent for the Corporate Appellees during the communications with MRA. The court then stated:

> Agency law dictates Mr. Levy is not personally liable for his representations, unless he explicitly agreed to being held personally liable for the alleged debts of [the Corporate Appellees], or he entered contracts on his own personal behalf. *Odyssey Travel Center, Inc. v. RO Cruises, Inc.*, 262 F. Supp. 2d 618, 626 n.6 (D. Md. 2003); *Hill v. Cty. Concrete Co.*, 108 Md. App. 527, 532 (1996). The Court finds no evidence of Mr. Levy going outside the bounds of traditional agency law to personally guarantee the alleged debts of [the Corporate Appellees].

Accordingly, the court granted summary judgment in favor of Mr. Levy on this count.

MRA contends the circuit court erred in granting summary judgment on the claim of detrimental reliance. It does not take issue with the court's ruling, supported by case law, that a quasi-contract claim, such as detrimental reliance, generally is "untenable" when an express contract exists between the parties. *Ver Brycke v. Ver Brycke*, 379 Md. 669, 693 n.9 (2004). *Accord Odyssey Travel Ctr., Inc. v. RO Cruises, Inc.*, 262 F. Supp. 2d 618, 626 (D. Md. 2003) ("Promissory estoppel is a quasi-contractual claim, which is an

equitable remedy that permits recovery 'where, in fact, there is no contract, but where circumstances are such that justice warrants a recovery as though there had been a promise,'" but "'[n]o quasi-contractual claim can arise when a contract exists . . . concerning the same subject matter on which the quasi-contractual claim rests.'") (quoting *Swedish Civil Aviation Admin. v. Project Mgmt. Enters., Inc.*, 190 F. Supp. 2d 785, 792 (D. Md. 2002)). And there is no dispute that a contract existed here. MRA argues, however, that the court erred in finding that recovery in quasi-contract was not appropriate here.

As MRA notes, there are exceptions to the general rule that a party may not seek recovery in quasi-contract if a contract exists. The following circumstances permit deviation from the rule: "when there is evidence of fraud or bad faith, there has been a breach of contract or a mutual rescission of the contract, when rescission is warranted, or when the express contract does not fully address a subject matter." *Ver Brycke*, 379 Md. at 693 n.9 (quoting *Dashiell*, 358 Md. at 100).

MRA contends that it presented evidence of two exceptions to the general rule that quasi-contractual claims are not permitted when there is an express contract. The exceptions it asserts are applicable here are: (1) bad faith or fraud in the formation of the contracts; and (2) the contracts "did not address the subject matter of the parties' modified terms."

The fraud or bad faith exception to this rule, that no quasi-contractual claim exists when there is a contract between the parties, involves fraud or bad faith "in the making of the agreement." *Eyerman v. Mary Kay Cosmetics, Inc.*, 967 F.2d 213, 222 (6th Cir. 1992).

Accord R.J. Wildner Contracting Co. v. Ohio Tpk. Comm'n, 913 F. Supp. 1031, 1043 (N.D. Ohio 1996). In this regard, MRA's argument is that it presented evidence of "Levy's actions and promises, which supported the inferences that Levy did not intend to perform the Contracts when he executed them, and/or that he made subsequent, independently enforceable promises to pay the Invoices with the present intent to defraud MRA into waiving its right to file a collection action."

In rejecting this claim, the circuit court stated that MRA had "not alleged that the [appellees] committed fraud in executing the Proposals." We agree. MRA has not pointed us to, and we have not found, any specific allegations in the First Amended Complaint alleging fraud in the formation of the contracts.

MRA's second claimed exception fares no better. Quasi-contractual relief is available "when an express contract does not fully address a subject." *Klein v. Arkoma Prod. Co.*, 73 F.3d 779, 786, *cert. denied*, 519 U.S. 815 (8th Cir. 1996). *Accord Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 516 N.E.2d 190, 193 (N.Y. 1987) (plaintiff could not sue in quasi-contract when an express contract detailed the applicable terms and conditions, including project design changes and compensation).

Here, the proposals "defined the entire relationship of the parties with respect to its general subject matter," *Dashiell*, 358 Md. at 101, and specifically defined the payment terms of the invoicing. The circuit court properly found that "[t]he Proposals . . . served as an express contract, which addressed the same subject matter as this promissory estoppel claim." The court did not err in finding that MRA could not seek relief for contractual

damages under a quasi-contract theory, and it properly granted summary judgment in favor of appellees on Count III, detrimental reliance.

C.

Fraud

With respect to MRA's claim of fraud, the court stated that MRA failed

> to plead this claim with the required level of specificity or support for the scienter element. At most, Mr. Levy's comments consisted of future predictions and goals. Statements that are promissory about the future are generally not actionable, as they are regarded as predictions and not fraudulent. *Miller v. Fairchild Indus.*, 97 Md. App. 324, 342-43 (1993). There is no specific support in the record as to statements made with the present intent to defraud. The Court grants [the] Motion for Summary Judgment as to Count 4 – Fraud.
>
> Furthermore, the court's discussion and findings on agency law with regard to Count 3 also apply to this Count.

Accordingly, the court granted summary judgment in appellees' favor on Count IV, Fraud.

MRA contends that the court erred in granting summary judgment on this claim because it "presented ample evidence of Levy's fraudulent and bad faith conduct. To the extent this evidence was disputed – and much was not – it merely generated triable issues of fact."

Appellees contend that the court properly granted summary judgment on the fraud claim because MRA failed to plead fraud with particularity, and the claim was "predicated on conclusory statements." They argue that MRA "failed to present any evidence to dispute Mr. Levy's assertion that he did not make any false statements with the present intention to induce [MRA] into delaying suit," and it failed to allege any facts supporting

its statement that appellees did not intend to pay the invoices. They note that MRA did not file a counter-affidavit disputing the statements in Mr. Levy's affidavit that: (1) he "did not make any false statements [to MRA] with the present intention to induce [MRA] into delaying suit"; and (2) the communications MRA identified were settlement discussions made "in a good faith attempt to resolve" disputed claims, but he never promised to pay the disputed debt or make any promissory statements with "the present intention not to perform."

To defeat a motion for summary judgment on a claim for fraudulent misrepresentation, a plaintiff must establish the following:

> (1) that the representation made [was] false;
>
> (2) that its falsity was either known to the speaker, or the misrepresentation was made with such a reckless indifference to truth as to be equivalent to actual knowledge;
>
> (3) that it was made for the purpose of defrauding the person claiming to be injured thereby;
>
> (4) that such person not only relied upon the misrepresentation, but had a right to rely upon it in the full belief of its truth, and that he would not have done the thing from which the injury resulted had not such misrepresentation been made; and
>
> (5) that he actually suffered damage directly resulting from such fraudulent misrepresentation.

Miller v. Fairchild Indus., Inc., 97 Md. App. 324, 341-42 (quoting *Martens Chevrolet, Inc. v. Seney*, 292 Md. 328, 333 (1982)), *cert. denied*, 333 Md. 172 (1993).

This Court's decision in *Miller* is instructive. In that case, the employee plaintiffs sued Fairchild Industries Inc. ("Fairchild") for fraud after Fairchild closed its Hagerstown

factory. *Id.* at 330. The employees' fraud claim was based on statements that Fairchild had made, prior to closing, containing upbeat predictions about the company's future. *Id.* at 330-31. Although we noted that promissory statements generally will not give rise to a claim of fraud, we stated that such statements could be actionable if they were "made with the present intention not to perform." *Id.* at 343, 346. Because the plaintiffs had "utterly failed to produce any evidence that Fairchild believed that its future in Hagerstown was dim at the time the statements were made," however, we held that they "failed to make the necessary showing to defeat [Fairchild's] motion for summary judgment on the fraudulent misrepresentation claims." *Id.* at 343, 345.

Similarly, here, the circuit court determined that MRA failed to plead its claim of fraud with "the required level of specificity or support for the scienter element," noting that there was "no specific support in the record as to statements made with the present intent to defraud." We agree. As in *Miller*, 97 Md. App. 324, MRA failed to proffer evidence that the alleged statements made by Mr. Levy were made with an intention to defraud. Accordingly, the circuit court properly granted summary judgment on the fraud claim.

MOTION TO DISMISS DENIED. JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED, IN PART, AND REVERSED, IN PART. CASE REMANDED FOR FURTHER PROCEEDINGS ON COUNT I OF THE FIRST AMENDED COMPLAINT. COSTS TO BE PAID 75% BY APPELLANT AND 25% BY APPELLEES.