Circuit Court for Montgomery County
Case No. 462207V

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1861

September Term, 2022

2200 14TH STREET, INC., *et al*

v.

JEMALS 14th STREET LUMENS, LLC

Arthur,
Shaw,
McDonald, Robert N.
(Senior Judge, Specially Assigned),

JJ.

Opinion by McDonald, J.

Filed: March 21, 2025

* Under Maryland Rule 1-104, an unreported opinion may not be cited as precedent as a matter of *stare decisis*. It may be cited for its persuasive value if the citation conforms to Rule 1-104(a)(2)(B).

This landlord-tenant case arose out of the failure of a tenant, Appellant 2200 14th Street, Inc., ("Tenant") and its guarantors, Appellants Madieu and Ruth Williams, ("Guarantors") to pay rent on a commercial property in Washington D.C. to its landlord, Appellee Jemals 14th Street Lumens, LLC ("Landlord"). Tenant, which was at the time a Maryland limited liability corporation, had leased the property from Landlord's predecessor for a 10-year term for the stated purpose of operating a men's grooming salon there under a franchise agreement between Tenant's parent company and Ultimate Franchises, a California entity ("Ultimate").

In March 2018, less than three years into the lease, Tenant's parent company gave Ultimate written notice that Ultimate had breached the franchise agreement by failing to provide services to the company or even communicate with it for the previous two years. Ultimate did not respond. Tenant then informed Landlord that Ultimate had breached the franchise agreement, that Tenant deemed the franchise to have been terminated, and that Tenant would no longer operate the franchise on the premises. Tenant further informed Landlord that, under a rider to the lease, Ultimate had the right to take over the lease and that if Ultimate did not do so, Tenant wished to negotiate with Landlord to terminate the lease. Tenant stopped operating the salon or any other business on the premises, stopped paying rent, and left its fixtures and other property there.

Landlord eventually sued Tenant and Guarantors for unpaid rent and other damages in the Circuit Court for Montgomery County.[1] Tenant and Guarantors moved to dismiss

[1] Tenant was a Maryland limited liability corporation, and Guarantors were Maryland residents.

the complaint for failure to join Ultimate which, they maintained, was a necessary party. The Circuit Court denied the motion. They then filed an answer, in which they asserted that their "performance of contractual obligations was rendered impossible by Ultimate Franchise's default and termination of the franchise agreement." They also filed a counterclaim against Landlord in which they alleged that Landlord had breached the lease rider by not notifying Ultimate of Tenant's default and providing Ultimate the opportunity to assume the lease. In their counterclaim, Tenant and Guarantors asked the court to declare the lease void and award them damages against Landlord.[2] Landlord moved to dismiss the counterclaim. The Circuit Court granted the motion.

After a bench trial in November 2019 on Landlord's amended complaint, the Circuit Court entered judgment against Tenant and Guarantors for unpaid rent and other damages in favor of Landlord. The court also ruled that Tenant was not entitled to offset its damages by the value of the fixtures it had left on the premises.

On appeal, Tenant and Guarantors present five issues that we have rephrased as follows:

1. Were Tenant and Guarantors excused from performing their contractual obligations to Landlord under either the doctrine of impossibility of performance or the doctrine of frustration of purpose?

2. Did the Circuit Court err when it denied Tenant's and Guarantors' motion to dismiss Landlord's complaint for failure to join Ultimate as a necessary party?

[2] Tenant and Guarantors also filed a third-party complaint against Ultimate and obtained an order of default against it. Ultimate filed for bankruptcy. The Circuit Court stayed the third-party complaint and later ordered that the judgment that Landlord obtained against Tenant and Guarantors be deemed a final judgment.

3. Did the Circuit Court err when it dismissed Tenant's and Guarantors' counterclaim against Landlord for breach of the lease rider?

4. Did the Circuit Court err when it did not offset the judgment against Tenant and Guarantors by the value of Tenant's expenditures for the improvements, fixtures and equipment that remained after Tenant vacated the premises?

5. Did the Circuit Court err when it concluded that Landlord's alleged breach of the lease rider did not provide Guarantors with a defense to Landlord's claims under the guaranties?[3]

As explained below, the Circuit Court did not err as to any of these issues. Therefore, we affirm the judgment.

I

Background

The events that gave rise to this case are best understood in the context of the lease and associated exhibits that defined the parties' contractual relationship. Those documents, as well as related written communications, were introduced into evidence at trial.

A. The Lease and its Exhibits

At the time that Tenant entered into the lease, it was a subsidiary of Serit, Inc., which was owned by Guarantors. Serit had entered into a franchise agreement with Ultimate to operate several men's grooming salons under the brand name "18/8 Fine Men's Salon."

[3] In their reply brief, Tenant and Guarantors additionally argue that the trial court erred by finding that Landlord had mitigated its damages and by not reducing Landlord's damages by Tenant's security deposit – an issue they had not raised in their opening brief. Nor did Landlord raise this issue in its brief. Therefore, we will not address this issue. *See, e.g., Fearnow v. Chesapeake & Potomac Tel. Co. of Maryland*, 342 Md. 363, 384 (1996) ("A reply brief in the Court of Special Appeals should ordinarily be confined to responding to issues raised in the appellee's brief.").

Serit had formed Tenant to operate one of those salons at 2200-2202 14th Street, N.W., in Washington, D.C.

On August 28, 2015, Mr. Williams, as president of Tenant, signed a 10-year commercial lease on its behalf for a condominium unit ("unit" or "premises") on the first floor of 2200-2202 14th Street, N.W., in Washington, D.C. The lease was also signed by the president of 14W Partners, LLC, which owned the building at the time. 14W Partners, LLC later sold the building and assigned the lease to Landlord.

The lease described the uses to which Tenant could put the premises and spelled out the remedies available to Landlord in the event of a breach. The exhibits to the lease included (1) a guaranty signed by Mr. Williams, (2) a guaranty signed by Ms. Williams, and (3) a "Lease Rider" signed by three parties: 14W Partners, LLC**,** as the original landlord under the lease, Tenant, and Ultimate. Mr. and Ms. Williams also signed the lease rider, under the heading "seen and agreed: lease guarantors."

These four documents – lease, lease rider, and the two guaranties – governed the relationship between the parties in this case. Another document related to the venture – the franchise agreement between Tenant and Ultimate – was not attached to the lease and was not introduced at trial.

1. The Lease

Provisions Governing Tenant's Use of the Premises

The lease provided that the unit would be used "for an upscale men's grooming salon and for no other purpose" without Landlord's consent. Tenant agreed to use the unit "continuously and uninterruptedly." The lease listed "18/8 Fine Men's Salon" as Tenant's

"Trade Name" and provided that "Tenant shall operate its business in the Demised Premises solely under the Tenant's Trade Name … and under no other name." Nonetheless, the lease allowed Tenant to modify the use of the unit, subject to Landlord's consent, or to sublet it, also subject to Landlord's consent.

Provisions Applicable to Personal Property and Fixtures

The lease required that, upon its "expiration or termination," Tenant remove "Tenant's Personal Property," which the lease defined as property that could be removed from the unit without damage. After that date, any personal property left there would be "deemed to have been abandoned." In that event, Landlord could declare itself the owner of the property and "dispose of it in whatever manner Landlord consider[ed] appropriate," and Tenant "would not have any right to compensation or claim against Landlord as a result." At the same time, the lease granted Landlord a "lien and security interest" in any property that Tenant placed on the premises and prohibited Tenant from "remov[ing] any of its furniture, furnishings, Personal Property or moveable trade fixtures from the Demised Premises until all of tenant's obligations under this Lease have been fully satisfied." The lease granted Landlord the "rights and remedies of a secured party under the Uniform Commercial Code as adopted by the District of Columbia."

The lease also governed property in the form of "alterations," including items such as fixed equipment and installed partitions, fixtures, counters, hardware, lighting fixtures, and window and wall coverings. Upon expiration or termination of the lease, that property was to remain on the premises and be surrendered to Landlord or, if Tenant was not in default, could be removed by Tenant with Landlord's consent.

Remedy Provisions

The lease listed occurrences or acts that would constitute a default by Tenant. They included Tenant's failure to pay monthly rent within 10 days of the due date, failure to use the premises as permitted by the lease, "ceas[ing] to carry out its ordinary activities" on the premises" for at least five consecutive calendar days, or "vacat[ing], desert[ing], or abandon[ing]" the premises.

In the event of Tenant's default, and "for so long as it continues and subject to the conditions of the Lease Rider," the lease entitled Landlord to pursue various remedies, "the election of which, singly or one or more in combination with each other, [would be] be at the sole option of Landlord." Further, if Tenant defaulted, Landlord would have "no obligation to refund to Tenant or to credit to Tenant against any other amounts or installments coming due to Landlord hereunder any amount otherwise owed or creditable by Landlord to Tenant pursuant to the terms of this lease.…"

The lease contained two anti-waiver clauses in Landlord's favor. The first provided that "Landlord [would not] be deemed to have waived any provision of this lease, or the breach of any such provision, unless specifically waived by Landlord in writing executed by an authorized agent of Landlord." The second provided that "[n]o failure of Landlord to exercise any power given Landlord hereunder … shall constitute a waiver of Landlord's right to demand exact compliance with the terms of this lease," and "no waiver by Landlord of any provision hereof shall be deemed to have been made unless made in writing." Tenant agreed to indemnify Landlord against any claim against Landlord for liability

arising from various events, including matters "arising from "any act or omission of Tenant, its agents … contractors, [and] employees …."

In the event of the Landlord's default**,** Tenant's exclusive remedy was to bring an action for damages after giving Landlord notice that "specif[ied] the default with particularity" and 30 days in which to cure it. Tenant's remedies did not include non-payment of rent: "[N]o default or alleged default by Landlord shall relieve or delay performance by Tenant of the obligations to continue to pay [rent] hereunder as and when the same shall be due."

The lease and any related "claim or controversy" were to be governed by the laws of the District of Columbia without regard to conflict of law principles that would result in the application of another jurisdiction's law. The parties declared that each had had the opportunity to be represented by counsel, that the lease was to be deemed to have been jointly drafted, and that it would be personally guaranteed by Guarantors by their execution of the guaranties attached as exhibits to the lease.

On August 28, 2015, Madieu Williams signed the lease as Tenant's president. Ruth Williams attested to his signature as Tenant's secretary.

2. The Lease Rider

A "lease rider" among Landlord, Tenant, and Ultimate was attached to the lease as an exhibit. In it, the parties recited that they "desire[d] to provide [Ultimate] with certain rights and Landlord with certain protections in the event of defaults under the Lease, the Franchise Agreement, and related documents." The parties agreed that non-payment of rent would not "constitute a breach or default under the lease so as to allow Landlord any

acceleration of obligations, termination, cancellation or rescission … unless such Event is not cured within thirty (30) calendar days after Notice of Default … has been sent … to [Ultimate] from Landlord; or Tenant's cure period under the Lease has expired, whichever occurs last." Upon receiving notice, Ultimate was entitled to notify Landlord that it wished to take over Tenant's lease, to apply to Landlord to do so, and, if approved, to cure Tenant's defaults, and either take possession of the premises or, with Landlord's consent, assign the lease to a new franchisee. The rider stated that "[Ultimate's] ability to exercise these rights for a limited time period is intended to allow [Ultimate] to protect the 18/8 brand."

The parties to the lease rider agreed that "in the event of an inconsistency between the Lease and this Rider, the Lease will control." They further "agree[d] that the Premises will be used only for the operation of an 18/8 salon." Tenant and Ultimate declared that they "under[stood] that Landlord is entering into this Lease Rider to facilitate Tenant and [Ultimate's] business concept," and they "agree[d] to hold Landlord … harmless … with respect to all provisions hereof."

3. The Guaranties

On August 20, 2015, Madieu Williams signed a guaranty of Tenant's obligations. Ruth Williams signed an identical guaranty on August 24, 2015. With respect to a default by Tenant in the first five years of the lease, each Guarantor "guarantie[d] to the landlord, absolutely, unconditionally, and irrevocably" the payment of 12 months' rent owed by Tenant, the unamortized portions of brokers' commissions and alteration costs associated with Landlord's lease to Tenant, and attorneys' fees owed by Tenant under the lease.

Each guaranty provided that it was "an absolute and unconditional guaranty of payment … and of performance." Each Guarantor's liability was to be "primary, irrevocable, and coextensive with that of the Tenant and also joint and several with that of the Tenant and any other guarantors of the Lease …." Further, each Guarantor's liability would not be "affected, modified, or diminished by reason of … any consent, release, indulgence, or other action, inaction or omission under or in respect of the Lease …." Each Guarantor "expressly agree[d] that the validity of this Guaranty and the obligations shall in no way be terminated, affected, diminished, or impaired by reason of … any non-liability of the Tenant under the Lease, whether by insolvency, discharge in bankruptcy, or any other defect or defense which may now or hereafter exist in favor of the Tenant."

The guaranties, like the lease, were to be governed by the laws of the District of Columbia.

B. Tenant's Termination of the Franchise and of Rent Payments

Tenant paid monthly rent to Landlord from August 2017, when Landlord took over the lease by assignment, to February 1, 2018. On February 14, 2018, Serit's attorney sent to Ultimate a letter headed "Notice to Cure Material Breach of Contract." The letter stated that Ultimate had breached its franchise agreement with Serit by failing to provide the contracted-for information, materials, and assistance in marketing and, in fact, by failing to communicate at all during the previous two years. Referring to a section of the franchise agreement, the letter stated that Ultimate had 30 days in which to cure the breach and that Ultimate's failure to do so within that period would cause Serit to terminate the agreement.

Ultimate did not respond. On March 1, 2018, Tenant sent its monthly rent check to Landlord. That check was returned for insufficient funds on March 16. On March 19, 2018, Serit's attorney, this time writing also on Tenant's behalf, sent to Landlord a letter headed "Notice of Default, Franchise Agreement" and "Notice of Intent to Terminate Lease." In that letter, the attorney informed Landlord that Ultimate had breached the franchise agreement and that Tenant deemed the franchise agreement terminated. Tenant's attorney further stated that Tenant would cease to operate on the premises. The attorney noted that, under the lease rider, "Ultimate may notify Landlord of its intent to take over the lease and the parties can initiate the steps enumerated [in the lease] to obtain the Landlord's approval." The letter further stated that if Ultimate "does not intend to assume the lease," Tenant was "amenable to" assigning it, terminating it without further obligation by Tenant, "and/or other proposals by the Landlord," and that Tenant would notify Landlord by April 5, 2018 as to Ultimate's intent. Tenant did not do so.

By June 2018, Tenant had not paid rent since February and still had not reported to Landlord on whether Ultimate intended to assume the lease. A series of emails between Landlord's representatives and Tenant's attorney ensued. On June 28, 2018, Tenant's attorney informed Landlord that she "hope[d] to have something in the next week." On August 21, 2018, Landlord notified Tenant in writing that Tenant owed Landlord $59,868.51 in rent, that the arrearage was an "event of default" under the lease, and that Landlord reserved the right to exercise "any and all available rights and remedies" such as eviction, placing a lien on personal property, and suing Tenant for past and future rent, legal fees, and other damages.

C. Landlord sues for Possession of the Premises

On September 10, 2018, Landlord sued Tenant in the Landlord and Tenant Branch of the Superior Court of the District of Columbia. In its complaint, Landlord sought a judgment for possession of the premises, back rent and fees, and attorneys' fees. On January 3, 2019, that court issued a writ of execution to the United States Marshal for the District of Columbia to evict Tenant. As of that date, Tenant's furniture and other personal property remained on the premises, and Tenant had not sought to remove it during the 10 months since Tenant had ceased operations there. Tenant had also installed partitions ("millwork") on the property; Tenant did not seek permission to remove that, either. Tenant was evicted on February 14, 2019, and Landlord took possession of the premises and the property that Tenant had left there.

D. Landlord Sues Tenant and Guarantors for Back Rent

1. Landlord's Damages Action against Tenant and Guarantors

On January 29, 2019, Landlord sued Tenant and Guarantors (collectively, "Defendants") in the Circuit Court for Montgomery County. Landlord alleged three counts: one against Tenant for breach of the lease, and one count against each Guarantor for breaching their respective guaranties. Landlord sought rent in the amounts stated in the lease, attorneys' fees, and pre- and post-judgment interest.

Defendants moved to dismiss the complaint on the grounds that Landlord had not joined Ultimate which, Defendants asserted, was a necessary party under Maryland Rule 2-322(b)(3). Defendants stated that their counsel had tried unsuccessfully to contact Ultimate, that judgment in Ultimate's absence would not be adequate, and that they "[had]

remedies yet to pursue" against Ultimate. In opposition, Landlord stated that Ultimate was not a party to the lease and had no rights under the lease rider because Tenant had terminated its franchise agreement with Ultimate. The Circuit Court denied Defendants' motion.

Defendants then answered the complaint. In it, they asserted a third-party claim against Ultimate in which they alleged that Ultimate had breached the franchise agreement. Ultimate defaulted. At some point, it declared bankruptcy, and the Circuit Court stayed the third-party claim.[4]

Defendants' answer also included a counterclaim against Landlord.

2. Defendants' Counterclaim

In their counterclaim, Defendants alleged that the lease rider imposed on Landlord the "duty to notify [Ultimate] of any alleged default in order to provide the opportunity for [Ultimate] to cure such default within a specified time…." They further alleged that Landlord breached that duty and that the breach "voided any performance obligations that [Tenant] may have had for the benefit of [Landlord]." They did not allege that Landlord had accelerated, terminated, canceled, or rescinded the lease. Instead, they asked the court to "declare the lease void as a result of [Landlord's] prior breach" and to award to them "reasonable damages, … to include attorney's fees, expenses and costs … and all other relief as deemed just and equitable."

[4] The result of Ultimate's non-appearance in the case was that this Court dismissed the first appeal brought by Tenant and Guarantors for lack of a final judgment as to all parties. As noted above, the Circuit Court later certified the judgment against Tenant and Guarantors as final under Maryland Rule 2-602(b).

3. Proceedings on Landlord's Motion to Dismiss the Counterclaim

Landlord moved to dismiss the counterclaim on various grounds. During its September 4, 2019 hearing on Landlord's motion, the Circuit Court inquired into whether Landlord's action for damages had triggered the notice provision:

> THE COURT: So the landlord didn't – the landlord didn't accelerate, terminate, cancel or terminate the lease?
>
> [LANDLORD'S COUNSEL]: They didn't, that's correct. That's the first part of the rider, which, under those circumstances, perhaps you have to send notice of default. But we're just suing for rent that's accrued. We didn't terminate the lease. We didn't rescind the lease. None of those things happened. …

Then, noting that the lease rider "by its own terms" reflected "the part[ies'] desire to provide … Ultimate, with certain rights, and the landlord with certain protections," the motions court asked, "It doesn't really grant to the tenant any rights or benefits, does it?" Upon defense counsel's response that the benefit to Tenant would be to "absolve[it] of any further obligation under the lease" if Ultimate assumed the lease, the motions court stated that "that would only be true if the landlord were trying to do what [the provision] would seem to preclude … accelerate, terminate, cancel, or rescind."

The Circuit Court dismissed the counterclaim with prejudice. The Circuit Court found that "under the expressed terms of the lease rider[,] … it does not provide the tenant with the rights that the tenant has suggested here." The court found that the notice provision would have applied only if Landlord had sought to accelerate Tenant's obligations, or terminate, cancel, or rescind the lease, and that Landlord had not sought those remedies.

4. Landlord's Amended Complaint and Tenant's Amended Answer

On October 7, 2019, Landlord amended its complaint to update the amount and dates of the arrearages. In their pre-trial statement, Defendants stated that they "[sought] to amend their answer to add the defense of impossibility/frustration of purpose." They then amended their answer to allege that their "performance of contractual obligations was rendered impossible by Ultimate Franchise's default and termination of the franchise agreement." The case proceeded to trial against Defendants on the amended complaint.

E. Trial and Judgment

The Circuit Court, sitting without a jury, tried the case on November 7, 2019. Landlord called its agent and Mr. Williams to testify; Defendants called Mr. Williams as their sole witness. The court ruled from the bench.

1. The Evidence and Arguments

Through its agent, Landlord introduced the lease documents and communications described above in Part I.A. of this opinion, and various exhibits itemizing the arrearages, damages, and attorneys' fees that it claimed. The agent testified about the period of time between Tenant's notification to Landlord that Tenant deemed its franchise to be terminated and Landlord's notice of default to Tenant. In testimony not disputed by Tenant, he said that Tenant did not ask Landlord for consent either to sublet the premises to a different entity or to operate a different business and that Landlord did not have any communications with Ultimate. He stated that, as of August 2018, Tenant had not returned the keys to Landlord and had not removed its property from the premises.

The agent testified that Tenant was evicted in February 2019. Landlord listed the property with a broker in May 2019, and a new tenant signed a lease in September 2019. At the time of that lease, Tenant's property was still on the premises. Landlord did not introduce any evidence about the value of the property that was in the unit when it took possession.

Mr. Williams testified to his belief that the lease did not permit Tenant to use the premises for any purpose other than an 18/8 Fine Men's Salon-branded salon and that he could not operate an 18/8-branded salon after he terminated the franchise agreement. He testified that he discussed with Landlord the possibility that Landlord would buy out the lease and terminate it, but that he had not sought Landlord's permission to assign or sublet the premises; he was unaware that the lease provided that option. He stated that he had understood that there was "financial risk involved in becoming a franchisee", but that he had entered into the franchise agreement in the expectation that Ultimate would not default. It had appeared to him that the 18/8 franchise was "a solid business," and he "could not see that it wasn't going to work."

Mr. Williams testified as to his estimate of the value of Tenant's personal property and fixtures that had remained on the premises. Explaining a series of photographs of furniture and equipment with dollar amounts written next to each item, he stated that he had researched the prices of the identical items online shortly before trial and had written in the prices that he found for each model in new condition. He testified that the approximate value of the inventory that remained on the premises was $8,000 to $10,000 and that Tenant had paid about $95,000 or $98,000 for the millwork. He did not know

what its value was in its installed condition; he had valued it at what he had paid for it. Mr. Williams testified that he had not asked Landlord whether he could remove the property from the premises.

In his closing statement, Landlord's counsel addressed Tenant's defenses. As germane to the issues before this Court, he argued that Tenant had not proven that the termination of the franchise made it impossible for Tenant to perform under the lease, because the lease expressly permitted Tenant to seek Landlord's permission to operate under a different name, assign the lease, or sub-let the unit. Counsel further argued that Tenant had not asked to have its property back and had not proven its value anyway, and that none of the documents provided that the termination of the franchise would excuse defendants of their obligations under the lease and guaranties.

Defendants' counsel argued that the lease was void under the doctrines of impossibility or frustration of purpose because the termination of the franchise prevented Tenant from operating an 18/8 franchise there; that the lease prohibited Tenant from removing its property; and that, under ¶20 of the lease, Landlord owed Tenant a credit for the property left on the premises and bore the burden of proving its value. In a colloquy with the Circuit Court, Tenant's counsel agreed with the court's proposition that "the defendant bears the burden to prove [the value of] the property that remains," but that Tenant had introduced evidence about the value of the property, and that it was "not zero because it's clear that there were trade fixtures and that they had some value."

2. The Court's Findings and Judgment

The Circuit Court ruled from the bench that day. In analyzing the impossibility defense asserted by Defendants, the court identified three elements that needed to be established under district of Columbia law: (1) there was an unexpected occurrence or intervening act; (2) the risk of the unexpected occurrence or intervening act had not been allocated by agreement; and (3) the occurrence made performance impossible or impracticable.

The court found that the Defendants had not met the first element – the occurrence of an unexpected event – as Mr. Williams had testified that he knew that entering into a franchise posed some risk. As to the second element – whether the parties to the contract had not allocated the risk of such an event – the court found that the parties to the lease had not done so, because the lease did not include a provision that would allow Tenant to terminate it if the franchise agreement failed. As to the third element – that the unexpected event make performance impossible or impracticable – the court explained generally that the defense required proof of "objective" impossibility or impracticability and that the fact that an external event, including a third party's inability to meet its obligations to a defendant, caused a defendant's breach, did not meet that standard unless the defendant's performance of its obligations was actually impossible or impracticable. The court found that the Defendants had not established that element.[5]

[5] Additionally, the court rejected Defendants' argument that Landlord had not mitigated its damages. In this appeal Tenant and Guarantors have belatedly contested that finding only in their reply brief. See n.3 above.

As to the value of Tenant's property, the court stated that Mr. Williams' testimony about what the furnishings and millwork would cost if bought new at the time of trial did not enable the court to assess their value in used condition. The court also found that Mr. Williams did not have personal knowledge about what supplies remained in the premises.

The court found Tenant and Guarantors jointly and severally liable to Landlord for back rent and attorneys' fees.

II

Discussion

A. Whether Defendants' Performance of their Contractual Obligations was Excused by Either Impossibility of Performance or Frustration of Purpose

In their amended answer to Landlord's complaint, Defendants asserted the defense that their performance "was rendered impossible by [Ultimate's] default and termination of the franchise agreement." In the Circuit Court's ruling, as in the case law of the District of Columbia, that defense also encompasses the concept of "commercial impracticability" of performance. *See, e.g., East Capitol View Community Development Corp. v. Robinson,* 941 A.2d 1036, 1040 n.6 (D.C. 2008). For ease of reference, we shall refer to it as the impossibility defense. On appeal before this Court, Tenant and Guarantors discuss the related, but separate, defense of frustration of purpose.

1. Standard of Review

Maryland Rule 8–131(c) governs the standard of review of evidentiary findings reached by the trial court "[w]hen an action has been tried without a jury." In such a case, the appellate court "will not set aside the judgment of the trial court on the evidence unless

clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses." *Id*. A finding of fact is "clearly erroneous" when there is no "legally sufficient evidence" to support it. *In re J.J.*, 456 Md. 428, 452 (2017).

The standard of review differs when an appellant has challenged the trial court's determinations of legal questions and conclusions of law based upon its findings of fact. *Garfink v. The Cloisters at Charles, Inc*., 392 Md. 374, 383 (2006). The appellate court reviews those questions of law *de novo*. *Id*.

The interpretation of a contract is a question of law. *Sy-Lene of Washington, Inc. v. Starwood Urb. Retail II, LLC*, 376 Md. 157, 163 (2003). Under both Maryland and District of Columbia law, a lease of real property is interpreted in the same way that an ordinary contract is – that is, in accordance with the words that the parties used. *See id.* at 166; *Cap. City Mortg. Corp. v. Habana Vill. Art & Folklore, Inc*., 747 A.2d 564, 567–68 (D.C. 2000). The lease in this case specified that it was to be interpreted in accordance with District of Columbia law. Accordingly, the issues before us are governed by that jurisdiction's substantive contract law. Thus, our discussion of the defenses of impossibility of performance and frustration of purpose are with respect to our understanding of the law of the District of Columbia.

2. Impossibility of Performance

As the Circuit Court correctly noted, under District of Columbia law, a party seeking to be relieved of its contractual obligations on the grounds of impossibility must prove three things: (1) that there had been the unexpected occurrence of an intervening act; (2) that the risk of the unexpected occurrence was not allocated by agreement or custom; and

(3) that the occurrence made performance impossible or commercially impractical. *East Capitol,* 941 A.2d at 1040.

A party seeking to prove the impossibility defense faces a stiff burden of proof: the circumstances must be "extreme"[6] and the alleged impossibility must be "a real impossibility and not a mere inconvenience or unexpected difficulty."[7] The impossibility must be "'a fact, not merely a possibility.'" *Entrepreneur, Ltd. v. Yasuna*, 498 A.2d 1151, 1159 (D.C. 1985). For example, the fact that the tenant's intended use of the premises is illegal does not prove the "fact" of impossibility until the tenant has "attempt[ed] to establish a right to continue that use. … One may not rely on illegality or invalidity where the doing of that said to be forbidden may reasonably be made legal and possible through administrative or judicial action." *Id*. (citation and internal quotation marks omitted).

Performance must be "objectively" impossible – that is, the contract is incapable of performance by anyone, as opposed to the particular party.[8] Objective impossibility is not ordinarily proven by the party's reliance on a third party for the ability to perform because, absent a contractual allocation of risk, "'a party generally assumes the risk of his own inability to perform his duty.'" *East Capitol,* 941 A.2d at 1041 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 261 cmt. e). For example, the fact that a party anticipated

[6] *Island Dev. Corp. v. District of Columbia*, 933 A.2d 340, 350 (D.C. 2007).

[7] *Bergman v. Parker*, 216 A.2d 581, 583 (D.C. 1966).

[8] *East Capitol,* 941 A.2d at 1040.

funding from a particular source does not mean that performance becomes objectively impossible when the source fails to provide the funding. *Id.* at 1041-42.

3. Application of the Impossibility Defense to this Case

The first element of the impossibility defense requires the occurrence of an unexpected event. Citing Mr. Williams' testimony, the Circuit Court found that he knew that entering into a franchise posed some risk that the franchise would not succeed. That finding was not clearly erroneous. Mr. Williams' testimony supported the inference that he assessed that risk before entering into the franchise agreement. From that finding, the court concluded the failure of the franchise was not an unexpected occurrence for purposes of the doctrine of impossibility. That conclusion was legally correct and sufficient by itself to support the court's rejection of the defense. Additionally, the lease itself establishes that the parties contemplated the possibility that the franchise might end; it provided that Tenant could seek to use the unit for a different purpose or to sublet it.

To the extent that the Circuit Court also concluded that performance under the lease was not objectively impossible, as suggested by its discussion of the cases on how that element must be proven, that conclusion was also legally correct. The lease authorized Tenant to seek Landlord's permission to use the premises for a purpose other than the operation of the named franchise or to sublet it to a third party. Because Tenant did not make that attempt, the claimed impossibility was "merely a possibility." *Entrepreneur, Ltd.*, 498 A.2d at 1159.

In sum, the record supports the Circuit Court's conclusion that Tenant did not establish the defense of impossibility of performance.

4. Frustration of Purpose

The frustration of purpose defense under District of Columbia law has three elements: (1) the purpose that is frustrated must have been a "principal purpose" of a party in making the contract – a purpose "so completely the basis of the contract that, as both parties understand," the transaction would make little sense otherwise; (2) the frustration of that purpose "must be so severe that it is not fairly to be regarded as within the risks … assumed under the contract"; and (3) the "non-occurrence of the frustrating event must have been a basic assumption on which the contract was made." *Island Development Corp.,* 933 A.2d at 349-50 (citation and internal quotation marks omitted). In contrast to the impossibility of performance defense, the frustration of purpose defense excuses a promisor's performance "because changed conditions have rendered the performance bargained from the promisee worthless, not because the promissor's performance has become different or impracticable." *Id*.

While Tenant initially indicated that it would raise the frustration of purpose defense, it did not formally assert that defense in its amended answer, and the parties' opening statements addressed only the separate defense of impossibility of performance. Understandably, the Circuit Court did not address whether Tenant had proven the elements of the frustration of purpose defense in its oral opinion. There is a substantial question whether Tenant adequately preserved that issue in the Circuit Court. If Tenant had done so, an appellate court ordinarily would remand the issue to the Circuit Court for its consideration in the first instance. In this case, however, the issue is legal, both parties have briefed the frustration of purpose defense in this Court, and the waiver question seems

close enough[9] that the most efficient course for the Court and the parties is to consider that defense in light of the plain language of the lease and the facts found by the Circuit Court and reach the merits. Maryland Rule 8-131(a) (appellate court may decide issue not decided by trial court if "necessary or desirable to avoid the expense and delay of another appeal").

As indicated above, one asserting the frustration of purpose defense must establish that the relevant purpose of the defaulting party "must be so completely the basis of the contract that, *as both parties understand*, without it the transaction would make little sense." *Island Development Corp.,* 933 A.2d at 350 (emphasis added). Tenant could not establish that the termination of the franchise made the lease transaction senseless to Landlord; Landlord had entered into a contract that contemplated that Tenant might want to use the unit for a different purpose or stop using it and sublet it, and that required Tenant to keep paying rent in either event. Similarly, it is evident that those provisions of the lease would preclude establishment of the third element of the defense – that an unexpected event frustrated a "basic assumption" on which the contract was made. Given those options under the contract, Tenant could not prove that its own belief that it could only use the unit for a 18/8-branded salon was "a basic assumption" on which the contract was made.

[9] The Maryland Rules likely did not require Tenant to assert the defense in its answer. *See Ben Lewis Plumbing, Heating & Air Conditioning, Inc. v. Liberty Mut. Ins. Co*., 354 Md. 452 (1999) (holding that only the 21 affirmative defenses listed in Rule 2-232 must be pleaded separately). However, Tenant stated in its pre-trial statement that it would amend its answer to allege both impossibility of performance and frustration of purpose but then amended its answer to assert impossibility, but not frustration of purpose – a fact that could suggest that Tenant had dropped the frustration defense.

As a matter of law, the lease provisions that allowed Tenant to pursue other uses for the unit preclude Tenant's claim that its termination of the Ultimate franchise established the defense of frustration of purpose.

B. Whether the Circuit Court Erred in Denying Defendants' Motion to Dismiss the Complaint for Failure to Join a Necessary Party

Tenant and Guarantors appeal the Circuit Court's denial of their motion to dismiss Landlord's complaint for failure to join Ultimate as a necessary party to the action.

1. Standard of Review

In this case, the determination of whether Ultimate was a necessary party for purposes of Maryland Rule 2-211 raises a question of law as to whether the lease rider gave Ultimate a legally cognizable role in Landlord's enforcement of Tenant's obligations under the lease. There is some question whether an appellate court should apply an abuse of discretion or *de novo* standard of review of that issue. Nonetheless, if the court would affirm under the less deferential *de novo* standard, it perhaps goes without saying that it would affirm as well under the more deferential abuse of discretion standard. *Cf. Serv. Transp., Inc. v. Hurricane Exp., Inc.,* 185 Md. App. 25, 36-37 (2009) (noting that the law is unsettled as to whether the standard of review of a trial court's Rule 2-211 ruling is abuse of discretion or *de novo*, but concluding that it was unnecessary to resolve the question because the result would be the same either way).

2. Maryland Rule 2-211: Dismissal for Failure to Join a Necessary Party

Maryland Rule 2-211 requires a court to dismiss a complaint for failure to join a necessary party when the party's absence would result in either of two circumstances: "(1)

complete relief cannot be accorded among those already parties, or (2) disposition of the action may impair or impede the person's ability to protect a claimed interest relating to the subject of the action or may leave persons already parties subject to a substantial risk of incurring multiple or inconsistent obligations by reason of the person's claimed interest." The requisite interest "must be a legally protected interest, and not merely a financial interest or interest of convenience." *Gardner v. Bd. of Cnty. Comm'rs of St. Mary's Cnty.*, 320 Md. 63, 81 (1990) (internal citations and quotation marks omitted). The purpose of Rule 2-211 is "to assure that a person's rights are not adjudicated unless that person has had his day in court and to prevent multiplicity of litigation by assuring a determination of the entire controversy in a single proceeding." *City of Bowie v. Mie Properties, Inc.*, 398 Md. 657, 703 (2007) (internal quotation marks and citations omitted).

3. Application of Maryland Rule 2-211 to This Case

The argument that Ultimate was a necessary party to the case hinges on Tenant's and Guarantors' interpretation of the notice provision in the lease rider and on the effect of that provision after Tenant terminated the franchise. Under the provision, non-payment of rent under the lease would not "constitute a breach or default under the lease so as to allow Landlord any acceleration of obligations, termination, cancellation or rescission" unless Landlord notified Ultimate of the event and gave Ultimate the opportunity to cure the default. Within seven days of receiving the notice, or, if later, the expiration of Tenant's cure period under the lease, Ultimate could notify Landlord that it wished to take over Tenant's lease, apply to Landlord to do that, and, if approved, cure Tenant's defaults, and either take possession of the premises or, with Landlord's consent, assign the lease to a

new franchisee. The lease rider stated that "[Ultimate's] ability to exercise these rights for a limited time period is intended to allow [Ultimate] to protect the 18/8 brand." The lease listed various remedies that the Landlord could pursue in the event of Tenant's default, "subject to the conditions of the Lease Rider." Ultimate was not a party to the lease, and the lease rider made clear that "[n]othing in [it] will be construed as requiring [Ultimate] to make any payments or perform any obligations under the Lease" unless Ultimate and Landlord had agreed that Ultimate would assume Tenant's obligations.

Tenant interprets the lease rider to condition Landlord's right to collect rent on Landlord's provision of notice to Ultimate that Tenant had not paid its rent. Because that notice had not been given, Tenant and Guarantors argue, the court could not provide "complete relief." Tenant and Guarantors also argue that Landlord deprived Ultimate of its options by failing to inform Ultimate that Tenant was in default. Landlord responds that Ultimate had no liability under the lease, that the purpose of the lease rider was to protect Ultimate, not to excuse Tenant of liability under the lease, and that, in any event, Ultimate was a party to the case because Tenant filed a third-party claim against it.

Neither of the two circumstances listed in Rule 2-211 for joinder of a necessary party existed in this case. As to the first circumstance, complete relief could be accorded between Landlord and Tenant in the absence of Ultimate, because Ultimate had no obligations to Landlord under the lease – and, when made a third-party defendant by Tenant, was not absent anyway. Moreover, the lease did not condition Tenant's obligation to pay rent on Landlord's provision of notice to Ultimate; instead, it provided that "no default or alleged default by Landlord shall relieve or delay performance by Tenant of its

obligations to continue to pay [rent] … when due." That provision took precedence over anything to the contrary in the lease rider, which provided that "in the event of an inconsistency between the Lease and this Rider, the Lease will control."

As to the second circumstance – whether Ultimate's purported absence would have impeded its ability to "protect a claimed interest relating to the subject of the action" – Ultimate had not claimed any interest regarding either Tenant's non-payment of rent or the premises. Further, Landlord's failure to join Ultimate did not subject Ultimate "to a substantial risk of incurring multiple or inconsistent obligations"; Ultimate had no obligations under either the lease or the lease rider.

The Circuit Court did not err when it denied Tenant's and Guarantors' motion to dismiss Landlord's complaint for failure to join a necessary party.

C. Whether the Circuit Court Erred in Dismissing Defendants' Counterclaim against Landlord for Breach of the Lease

1. Standard of Review

An appellate court reviews the grant of a motion to dismiss *de novo*. *Reichs Ford Rd. Joint Venture v. State Roads Comm'n of the State Highway Admin*., 388 Md. 500, 509 (2005). The Court "examine[s] whether the complaint, assuming all well-pleaded facts and reasonable inferences drawn therefrom in a light most favorable to the pleader, states a legally sufficient cause of action." *Id*. The grant of a motion to dismiss "is proper only if the complaint would fail to provide the plaintiff with a judicial remedy." *Id.*

Under Maryland Rule 2-322(c), a motion to dismiss for failure of the pleading to state a claim upon which relief can be granted is converted to a motion for summary

judgment under Maryland Rule 2-501 if "matters outside the pleading are presented to and not excluded by the court." In that case, after "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 2-501," the court is to assess whether there is a genuine dispute as to material fact, and, if not, whether the undisputed facts entitle the movant to judgment as a matter of law. Maryland Rule 2-501.

On appeal, a trial court's grant of a motion for summary judgment is reviewed for legal correctness. If no material facts are in dispute, the appellate court assesses whether the trial court's ruling was legally correct. *Newell v. Runnels*, 407 Md. 578, 607-08 (2009). In doing so, the appellate court, like the trial court, considers the facts in the light most favorable to the non-moving party and resolves inferences supporting that party's position in its favor. *Id*. The appellate court ordinarily affirms the trial court's judgment only on the grounds on which the trial court relied in granting it. *Id*.[10]

In its motion to dismiss the counterclaim, Landlord referred the court to two documents already in the case record but outside the counterclaim itself. The first was the lease rider, which Landlord had attached to its complaint along with the lease and which the Tenant and Guarantors had attached to their motion to dismiss for failure to join Ultimate. The second, which Landlord had attached to its opposition to that motion, was the March 19, 2018, letter in which counsel for Tenant and Serit informed Landlord that

[10] In an assertion of fact that Landlord does not contest, Tenant and Guarantors state that the Circuit Court dismissed their counterclaim without articulating its rationale. That assertion is inaccurate; as indicated in Part I.D.3 of this opinion, the Circuit Court stated its rationale when it ruled from the bench.

Tenant had terminated its franchise agreement with Ultimate and would not continue to operate an 18/8-branded salon on the premises. The letter and the lease rider added extrinsic facts to Defendants' counterclaim and were not excluded by the Circuit Court. We will apply the standard of review applicable to the grant of a motion for summary judgment.

2. Whether the Dismissal of the Counterclaim was Legally Correct

In this Court, Tenant and Guarantors assert that they sufficiently pled a cause of action in contract by alleging the existence of a contract and a breach by the opposing party. That standard is beside the point; the question instead is whether the Circuit Court correctly found that the undisputed facts entitled Landlord to judgment as a matter of law.

The undisputed facts before the Circuit Court included the lease, the lease rider, and the March 18, 2019, letter. The parties to the lease rider were Ultimate, Landlord, and Tenant. In it, they expressed their intent to "provide [Ultimate] with certain rights and Landlord with certain protections in the event of defaults under the lease, the Franchise Agreement, and related documents." Specifically, Ultimate would have the right to receive notice of Tenant's breach of the lease and to apply to Landlord to take over the lease in the event that Landlord wished to terminate, cancel, accelerate, or rescind the lease, and Landlord would be given protection in the form of having the right to reject Ultimate's application. Thus, as noted by the Circuit Court, the lease rider was not intended to confer rights on Tenant. Also as noted by the Circuit Court, the notice provision would be triggered only by Landlord's termination, cancellation, acceleration, or rescission of the lease. Nothing in the record before the Circuit Court established that Landlord had invoked those

remedies. Instead, Landlord had elected to deem the lease to be still in effect and Tenant's obligation to pay rent to be ongoing, as evidenced by Landlord's lawsuit and Defendants' counterclaim, in which they asked the court to void the lease.

The Circuit Court did not err in its interpretation of the lease rider. We therefore affirm the court's dismissal of the counterclaim.

D. Whether the Circuit Court Erred by not Offsetting Defendants' Liability by the Value of the Property that Remained in the Unit at the Time of Eviction

Tenant and Guarantors argue that the Circuit Court erred when it did not reduce the judgment by the amount that Tenant had paid for the improvements, fixtures, and equipment that Tenant had used while it operated the salon and that remained in the unit after Tenant was evicted. Neither Tenant and Guarantors nor Landlord has provided any citation to the District of Columbia law on the measure of damages applicable to this case.

1. Standard of Review

The Circuit Court tried this case without a jury. As noted earlier, in such a case, Maryland Rule 8–131(c) requires the appellate court to review the presented issues "on both the law and the evidence," "[to] not set aside the judgment of the trial court on the evidence unless clearly erroneous," and to "give due regard to the opportunity of the trial court to judge the credibility of the witnesses." An appellate court does not defer to the trial court's conclusions of law. *Elderkin v. Carroll*, 403 Md. 343, 353 (2008).

2. The Circuit Court's Findings regarding Tenant's Valuation of the Property

As noted above at Part I.E.1 of this opinion, the only evidence concerning the value of property that Tenant owned and that remained in the unit after Tenant was evicted was

Mr. Williams' testimony about what the various items would cost if purchased new. Implicitly placing the burden of proof on Tenant, the Circuit Court found his testimony insufficient to establish the items' value and denied Tenant's request for a set-off against any judgment for unpaid rent. The Circuit Court expressly did not reach a finding either that the property had no value or that Tenant had abandoned it.

3. A Defendant's Burden of Proving the Amount of the Claimed Set-off

Generally, under District of Columbia law, "[t]he party claiming a set-off bears the burden of establishing it." *D.C. v. United Jewish Appeal Fed'n of Greater Washington, Inc*., 672 A.2d 1075, 1080 (D.C. 1996). That same general rule is true under Maryland law, under which a defendant who seeks a set-off or recoupment bears the burden of proof and must establish the loss "with a reasonable degree of certainty." *Parker v. Tilghman V. Morgan, Inc*., 170 Md. 7, 38–39 (1936); *Brosius Dev. Corp. v. City of Hagerstown*, 237 Md. 374, 383 (1965). The general rule does not necessarily apply in cases governed by the Uniform Commercial Code ("UCC") as applied in the District of Columbia. *See Gavin v. Washington Post Emps. Fed. Credit Union*, 397 A.2d 968, 971-733 (D.C. 1979) (stating that a creditor that has not given the debtor notice of the sale of the goods bears the burden of proving that the creditor has given the debtor a "fair and reasonable" credit).

Tenant did not specify to the Circuit Court, and has not specified in this Court, what lease provision, District of Columbia UCC provision, or other law would exempt this case from the ordinary rule. For that reason, we apply the ordinary rule and hold that the Circuit Court's assessment of Tenant's proof as insufficient was not clearly erroneous.

E. Whether the Circuit Court erred when it Concluded that Landlord's Failure to give Ultimate Notice of Tenant's Failure to Pay Rent did not Provide Guarantors with a Defense to Landlord's Claims under the Guaranties

The Circuit Court found the Guarantors liable for Tenant's rent obligations on the basis of their undertaking in the guaranties that "the guarantor hereby guarantees." Guarantors posit that the notice clause in the lease rider conditioned their liability on Landlord's provision of notice to Ultimate that Tenant had not paid its rent, that Landlord did not provide that notice to Ultimate, and, therefore, that Guarantors were not liable under the guaranties. Landlord responds that the guaranties do not contain such a condition.

As noted above, the interpretation of a contract presents a legal question. Accordingly, this Court reviews the Circuit Court's interpretation of the guaranties *de novo*. The guaranties do not contain the condition suggested by Guarantors. Each Guarantor "unconditionally" agreed that "if any time the Tenant shall fail to make payment when due of any of Tenant's Monetary Obligations … then the Guarantor shall forthwith pay Tenant's Monetary Obligations to the Landlord," subject only to an earlier clause specifying the calculation of the "monetary obligations." Additionally, the guaranties provided that the Guarantors' liability would not be "diminished" by "any non-liability of the Tenant under the lease, whether by insolvency, bankruptcy, or any other defect or defense which may now or hereafter exist in favor of the Tenant."

The Circuit Court did not err when it entered judgment against the Guarantors under the guaranties.

III

Conclusion

As explained above, the Circuit Court's findings of fact in this case were not clearly erroneous, and it did it not err legally. We therefore affirm the judgment.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANTS.