Circuit Court for Prince George's County
Case No. CAE17-17655

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1902

September Term, 2019

MARK VOGEL

v.

THE ESTATE OF DAVID HILLMAN, ET AL.

Fader, C.J.,
Zic,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Fader, C.J.

Filed: June 16, 2021

This appeal concerns the validity of alleged oral contracts between commercial property developers regarding two hotels near the University of Maryland, College Park. Mark Vogel, the appellant, claims that David Hillman,[1] one of the appellees, promised him a 50 percent equity share in one of the hotels and a 20 percent share (later reduced to ten percent) in the other, for Mr. Vogel's efforts related to developing the hotels. Mr. Hillman acknowledges that Mr. Vogel is entitled to some compensation for his efforts but denies entering any contracts with him.

Mr. Vogel brought a complaint against Mr. Hillman containing counts for breach of contract, negligent misrepresentation, unjust enrichment, quantum meruit, and constructive trust. The Circuit Court for Prince George's County awarded summary judgment in favor of Mr. Hillman on all counts other than unjust enrichment. The court concluded that Mr. Hillman was entitled to judgment on the breach of contract counts because Mr. Vogel failed to generate a genuine dispute of material fact concerning whether the parties had reached agreement as to the essential terms of enforceable contracts. With regard to the quantum meruit and constructive trust counts, the court concluded that to the extent they were viable, they were duplicative of the unjust enrichment count. Finally, the court determined that Mr. Vogel's negligent misrepresentation count failed because his alleged reliance on Mr. Hillman's promises was not reasonable as a matter of law. The court permitted the unjust enrichment count to proceed to trial.

[1] Mr. Hillman passed away while this lawsuit was pending, and the Estate of David Hillman was substituted as the real party in interest. For readability, we will use "Mr. Hillman" to refer to the man before his death and to the estate thereafter.

On appeal, Mr. Vogel challenges the circuit court's award of summary judgment on his breach of contract, quantum meruit, and negligent misrepresentation counts. We agree with the court's breach of contract rulings with respect to one of the two hotels, because Mr. Vogel did not present evidence from which a reasonable trier of fact could conclude that the parties had reached mutual assent to the essential terms of an enforceable contract. With respect to the second hotel, however, Mr. Vogel presented evidence that, if believed, could support such a conclusion. We also agree with the circuit court's ruling concerning the quantum meruit count, but conclude that Mr. Vogel presented evidence that created a dispute of material fact sufficient to withstand summary judgment on his negligent misrepresentation claim for both hotels. We therefore will affirm in part and reverse in part the circuit court's judgment and remand for further proceedings.

Mr. Vogel also challenges the circuit court's denial of his motion for leave to amend his complaint to add new parties. In light of our rulings on the summary judgment issues, we will affirm in part and vacate in part the court's order regarding leave to amend and remand for further proceedings consistent with this opinion.

BACKGROUND[2]

The Conference Center Hotel

Mr. Vogel is an experienced real estate developer based primarily in the Washington, D.C. metropolitan area. Mr. Hillman was a prominent real estate developer,

[2] Our recitation of the background facts reflects that, in reviewing a circuit court's grant of summary judgment, we consider the factual record "in the light most favorable to the non-moving party[.]" *Steamfitters Local Union No. 602 v. Erie Ins. Exch.*, 469 Md. 704, 746 (2020).

founder and CEO of Southern Management Corporation, and an owner and operator of multifamily real estate properties in Maryland. Although Messrs. Vogel and Hillman first met in the mid-1970s and interacted socially and in connection with charitable and political causes over the years, they did not collaborate on a business venture until approximately 2008 or 2009, when Mr. Hillman approached Mr. Vogel and asked whether he would be interested in pursuing the development of a hotel together. This project would become the Conference Center Hotel,[3] which is located at 7777 Baltimore Avenue in College Park and owned by appellee The Hotel at UMCP, LLC.

In a deposition, Mr. Vogel did not recall the timing or location of his discussion with Mr. Hillman, or whether it was in person or by phone, but he testified that Mr. Hillman asked him to identify possible sites for the hotel and "proposed a fifty-fifty deal with the understanding that [Mr. Hillman] would put up the equity . . . and that [Mr. Hillman] would get a preferred return on whatever the equity requirement was." Mr. Vogel's responsibilities, as set forth in an affidavit he submitted in opposition to Mr. Hillman's motion for summary judgment, were to

> locate the site of the hotel, identify tenants for the retail space at the hotel, serve as the "goodwill ambassador" for the hotel by educating and working with local officials on the project, work on entitlement issues, and identify and pursue cost-saving mechanisms for the hotel, such as tax credits and fee waivers.

[3] Some of the underlying materials refer to the Conference Center Hotel as the Hotel at UMD, the Hotel at UMCP, the UMD Conference Hotel, and the Conference Hotel.

None of the terms of this arrangement were set forth in writing by the parties at any time before the initiation of this litigation.

Mr. Vogel did not identify another conversation with Mr. Hillman about the terms of their alleged deal until December 2016. At that time, having become aware that Mr. Hillman was ill, Mr. Vogel wanted to reduce their oral agreement to writing. Mr. Vogel therefore raised the issue in a meeting that took place at the construction site for the Cambria Hotel, the other hotel that is the subject of this litigation. During that meeting, Mr. Hillman told Mr. Vogel that he "would have to take a much smaller percentage of the Conference Hotel" in light of $70 million in cost overruns that had required Mr. Hillman to bring in additional equity investors. Mr. Vogel "understood" because, as he phrased it, he "knew that it's a different deal at 170 million than it was at a hundred million." Mr. Vogel therefore agreed that he would accept "less."[4] Mr. Hillman stated that he would need to talk with his other partners before giving Mr. Vogel "a final number for the Conference Hotel." Mr. Hillman, however, never gave Mr. Vogel such a "final number" and so the parties "never finalized the deal."

[4] At one point in his deposition, Mr. Vogel acknowledged that he had agreed he would take "less than something we talked about as a deal," but Mr. Vogel did not mention a specific amount. Later in his deposition, Mr. Vogel stated that Mr. Hillman had subsequently asked if he would accept less than ten percent. Mr. Vogel explained his willingness to accept a lower share than he believed he had previously been promised: "[W]e did a lot of business together and I liked the arrangement. I thought we would be doing business together in the future. And if he wanted to make some changes like because of the cost overruns with the hotel, he knew that I was reasonable and I trusted him."

In January 2017, Mr. Vogel sent an email to Mr. Hillman's attorney containing the following summary of what he believed the parties "need[ed] to address" concerning the Conference Center Hotel:

> We left it to where [Mr. Hillman] will respond to me. We talked about a subordinated interest for me in the hotel. I spent a couple of years handling the land acquisition as well as representing both the Spa and Franklin[Square] restaurant. I also helped on the subsidies and local issues. Because [Mr. Hillman] has so much money in this deal, it does not make s[ense] for me to put any money into this hotel. [Mr. Hillman] needs to give me what he thinks is fair.

In addition to his own testimony regarding his arrangements with Mr. Hillman, Mr. Vogel relies on other evidence that he contends demonstrates that Mr. Hillman or others who interacted with him viewed Mr. Vogel as a partner in the hotel, including:

- In a November 2011 email to a University of Maryland vice president, Mr. Hillman stated that "[t]he partners on my side . . . will be Wayne Curry and Mark Vogel. Mark has extensive experience and good credibility with the College Park people and Wayne has credibility with everyone."

- In a February 2015 email, Mr. Hillman wrote to a potential Conference Center Hotel investor: "[Mr. Vogel] is not a broker (for the hotel) but will get a small equity interest for his work so you can call him a principal if it helps." That same investor agreed during his deposition that Mr. Vogel appeared to be a partner "in many instances."

- In a deposition, an investor in the Conference Center Hotel provided the following description of his understanding of Mr. Vogel's role: "[I]t was explained to us by [Mr. Hillman], and this was my understanding throughout, that [Mr. Vogel] was a minor equity partner or that he was going to be, and it would vest, and he did not explain to us how much that was or what his position was, but what he did tell us is that [Mr. Vogel] is helping me identify and lease up parts of the project or specifically restaurants or retail to come into the hotel and also helping me work on the financing and helping me with some of the I guess what we would say some of the glad-handing and introductions that I need to make for people here in the area in College Park to help make this development, the permitting process, the zoning and everything slide through smoothly; so that he was working with him in that

capacity, and he said that when those things were accomplished, then, yes, he would be -- he would vest; he would get some money and he would have some ownership stake, although I think he did describe it as small, you know, to us."[5]

- In a deposition taken in 2015 in a different case concerning the Conference Center Hotel, Mr. Hillman testified that Mr. Vogel was "not under any contract or agreement" with him or his development company and that Mr. Hillman had no written contractual agreement with Mr. Vogel. However, Mr. Hillman responded affirmatively when asked if he "ha[d] any understandings that you consider contractual or binding with Mr. Vogel[.]" Asked to elaborate, Mr. Hillman stated:

  > He's earned some fees for procuring some of the -- A couple of the tenants, potential tenants in the hotel. And he's been assisting me in -- in working through the approval process, the entitlement process. We haven't discussed any specific amount he's to get, and he has the option of obtaining an interest in that hotel in lieu of a cash payment. And he also has the option to invest some money in the LLC also.

  Mr. Hillman then confirmed that there was no written agreement and stated that "the term -- final terms haven't been defined."

[5] In another portion of the deposition transcript, excerpts of which Mr. Vogel included as an exhibit to his opposition to Mr. Hillman's motion for summary judgment, the third-party investor testified that Mr. Hillman told him that Mr. Vogel was

> working in like an advisory capacity and helping [Mr. Hillman] do these things and as he performed, depending upon how much he produces will determine his stake, you know. Ultimately he's going to be a partner, an equity holder, but that's for [Mr. Vogel] and [Mr. Hillman] to figure out. He might have even said we have a handshake deal or whatever right now.
>
> My understanding was his ownership percentage, whatever, was vesting or was accruing based upon what he was doing for [Mr. Hillman], what he accomplished for him.

The Cambria Hotel

In 2014, Mr. Hillman asked Mr. Vogel to work with him on a second project, also in College Park, which became the Cambria Hotel,[6] located at 8321 Baltimore Avenue and owned by appellee 8321 College Park Hotel, LLC. As with the Conference Center Hotel, Mr. Vogel did not recall the timing or location of his discussion with Mr. Hillman, or whether it was in person or by phone, but he averred in his deposition and affidavit that the two agreed that Mr. Vogel would be given a 20 percent ownership interest in the Cambria Hotel in return for playing a role similar to his work on the Conference Center Hotel. In his deposition, Mr. Vogel described that role as:

> Just that looking for other tenants, subsidies, working with the county during construction, the city during the construction. [Mr. Hillman] would, you know, give me, you know, what he wanted me to do. The relationship I had with him was ["]this is what I need you to do.["] And that's, that's the way it was, my relationship with Hillman.

In his affidavit, Mr. Vogel described his responsibilities as to:

> broker the purchase of the land for the hotel, identify tenants for the retail space at the hotel, serve as the "goodwill ambassador" for the hotel by educating and working with local officials on the project, work on entitlement issues, and identify and pursue cost-saving mechanisms for the hotel, such as tax credits and fee waivers.

As with the Conference Center Hotel, Mr. Hillman was responsible for "financing the project and leading the development," and was to receive a "preferred return on whatever equity was required."

[6] Some of the underlying materials refer to the Cambria Hotel as the College Park Hotel or the Cambria College Park.

Mr. Vogel also averred that he subsequently performed his contractual obligations, including by closing on the land where the hotel would be built, working closely with an existing tenant to ensure that it would stay at the site, working to resolve zoning issues, and helping to secure "millions of dollars in tax credits and fee waivers."[7]

As with the Conference Center Hotel, the parties did not set forth any terms of the arrangement in writing. Also as with the other hotel, Mr. Vogel did not identify another conversation with Mr. Hillman about terms of their Cambria Hotel arrangement until December 2016. Unlike with the Conference Center Hotel, however, Mr. Vogel testified that the parties reached a final deal regarding the Cambria Hotel during their December 2016 meeting. Specifically, he stated that Mr. Hillman agreed that

> I would have a 10 percent interest for the work, commissions, everything that I did and then have the right to invest monies up to having a 20 percent interest. It could be a 15 percent interest. It could be an 11 percent interest. But on top of the 10 percent he would give me the right to invest monies up to where I would have a 20 percent interest in the Cambria. That's the deal I had with Hillman.

Mr. Vogel expected to receive a written contract reflecting the terms to which he and Mr. Hillman had agreed during their December 2016 meeting, but he never did. Mr. Vogel attempted to follow up with Mr. Hillman's lawyer on multiple occasions, including in the January 2017 email referenced above, in which he provided the following

[7] This description of Mr. Vogel's performance is taken from his affidavit. In his deposition, which was taken months before his affidavit, he testified that someone else was the primary negotiator with the tenant that agreed to stay and that his work on zoning and other issues consisted primarily of attending meetings while others involved in the project were also present.

summary of what he believed the parties "need[ed] to address" concerning the Cambria Hotel:

> This hotel is a different story [from the Conference Center Hotel]. I believe it will be where I have approximately a 5% interest for the work I have done. Also, [Mr. Hillman] has given me the opportunity to invest enough money so I will have a total of 15-20% interest in the Cambria. I am selling two residential properties so I need to know the latest time frame that I have to put up my money. Also, as you know on the Cambria . . . , I handled the acquisition and brokerage for CVS and Namaste.

In addition to his own testimony regarding his arrangements with Mr. Hillman, Mr. Vogel relies on the following evidence regarding Mr. Hillman's alleged acknowledgment of Mr. Vogel's role concerning the Cambria Hotel:

- In a November 2015 email to a potential tenant, Mr. Hillman referred to Mr. Vogel as "one of the investors on the [Cambria] deal," who had been "instrumental in obtaining the retail tenants" for both hotels.

- In a February 2017 email to another investor, Mr. Hillman stated: "Mark Vogel says he wants to invest something between $1.5m and $2.0 m in cash and we owe him a credit for leasing the commercial spaces."

Mr. Hillman Disclaims Any Obligation to Mr. Vogel

In March 2017, counsel for Mr. Hillman sent a letter to counsel for Mr. Vogel disclaiming Mr. Vogel's purported interest in both hotels, denying that Mr. Vogel performed any work under any agreement, declaring that Mr. Vogel was not Mr. Hillman's partner, and demanding that Mr. Vogel cease and desist making any claims to the contrary. The letter accused Mr. Vogel of "relentlessly harassing Mr. Hillman" and his counsel, disclosing Mr. Hillman's confidential medical information, "demanding unearned commissions," defaulting on a lease obligation, and refusing repeated requests to communicate only with counsel.

Procedural History Related to Summary Judgment Issues

In July 2017, Mr. Vogel filed an 11-count complaint in the Circuit Court for Prince George's County. The first six counts alleged that Mr. Hillman had breached oral agreements with Mr. Vogel concerning the hotels. In Counts I, III, and IV, Mr. Vogel sought, respectively, a declaratory judgment, specific performance, and compensatory damages with respect to the alleged breach of contract concerning the Conference Center Hotel. In Counts II, V, and VI, Mr. Vogel sought the same remedies with respect to the alleged breach of contract concerning the Cambria Hotel. Mr. Vogel sought compensatory damages from Mr. Hillman for negligent misrepresentation concerning both hotels in Count VII and alleged in Count VIII that Mr. Hillman had been unjustly enriched by the services Mr. Vogel had provided with respect to the hotels. In Count IX, Mr. Vogel sought compensatory damages on a quantum meruit theory, and he requested that the court order the creation of constructive trusts with respect to his ownership claims in both properties in Counts X and XI.[8]

Mr. Hillman and the Appellee LLCs[9] filed a motion for summary judgment regarding all counts of the complaint. In September 2019, following a hearing, the court issued a written decision resolving the motion. With respect to the breach of contract

[8] The court entered judgment against Mr. Vogel on the constructive trust counts (Counts X and XI) based on its conclusion that those counts were superfluous in light of the unjust enrichment count (Count VIII). Mr. Vogel does not challenge that ruling on appeal, so we will not address the constructive trust counts further.

[9] We will refer to appellees The Hotel at UMCP, LLC (owner of the Conference Center Hotel) and 8321 College Park Hotel, LLC (owner of the Cambria Hotel) collectively as the "Appellee LLCs."

counts (Counts I-VI), the court held that the undisputed material facts placed this case squarely within precedent establishing that purported agreements that lack definite terms, or where the parties "merely agreed to agree," were unenforceable. The court pointed to Mr. Vogel's own shifting assertions regarding the alleged terms of the deals, including differences between the terms as stated in his complaint, deposition, and affidavit; and to numerous open questions about material terms of the alleged contracts.[10] Based on what it concluded were undisputed material facts, the court held that, as a matter of law, the parties had failed to reach mutual assent on key terms of the agreements and never entered binding contracts with respect to either hotel. Although the court considered the facts concerning the Cambria Hotel to be "marginally more definitive" than the Conference Center Hotel, it employed essentially the same analysis with respect to both. The court therefore granted summary judgment to Mr. Hillman and the Appellee LLCs on Counts I through VI and entered declaratory relief with respect to Counts I and II.

[10] The court identified the following open questions that it believed "the jury would necessarily have to confront":

> [W]ho and how many other investors were coming on board in 2016; how did this impact [Mr. Vogel's] alleged 50% entitlement from 2008/09; if the new individuals were investing equity, were they entitled to a preferred return; what was the rate of preferred return; how was that preferred return to be calculated and what was the term of repayment; after the preferred return was paid, what exactly was Plaintiff Vogel entitled to 50% of – gross profits, net profits, the physical hotel; and, ultimately what was the equity investment attributable to Defendant Hillman? The questions are endless, and that is indicative of the fact that no enforceable agreement exists."

The court also entered judgment for Mr. Hillman on Count VII, for negligent misrepresentation, based on its conclusion that any reliance by Mr. Vogel on Mr. Hillman's oral representations was unreasonable because both men were sophisticated parties who chose to leave "their business arrangements undocumented." With respect to Count VIII, for unjust enrichment, the court denied Mr. Hillman's motion for summary judgment on the ground that the "record is replete with reference to Defendant Hillman specifically requesting action, advice, comment, and/or input from Plaintiff Vogel on both" hotels, and "both parties believed that Plaintiff Vogel would receive some manner of remuneration for his activities."

Finally, the court granted Mr. Hillman's motion with respect to Count IX, for quantum meruit. The court observed that quantum meruit was a measure of recovery, not an independent cause of action. To the extent the count was based on allegations concerning a contract implied-in-fact, the court held that its prior ruling regarding the indefiniteness of the alleged terms was dispositive. And to the extent the count was based on quasi-contract, the court found it duplicative of Count VIII, for unjust enrichment.

Procedural History Related to Leave to Amend Issues

The trial court's first scheduling order established a "try-by-date" of November 13, 2018 and set a pre-trial conference for August 6, 2018. The order required the parties to file any amendments to the pleadings by 60 days before the pre-trial conference. Two subsequent scheduling orders, both issued after August 6, 2018, did not set a new deadline for amendment of the pleadings.

On April 13, 2018, the Appellee LLCs served Mr. Vogel with interrogatory answers identifying all their members, including the members' capital contributions and ownership interests. The lists identified Suzanne, LLC, which Mr. Hillman controlled during his lifetime, as owner of 52.3571 percent of the interest in the Conference Center Hotel and 74.5 percent of the interest in the Cambria Hotel. The lists also identified two other entities that owned interests in both hotels and eight additional entities with interests in the Conference Center Hotel.

More than a year later, in May and June of 2019, Mr. Vogel conducted depositions through which he obtained additional information regarding these investors and the ownership agreements for the Appellee LLCs. Mr. Vogel contends that it was only then that he learned that Mr. Hillman never held any interest in either hotel in his own name and that Mr. Hillman's interests were instead held by Suzanne, LLC.

In July 2019, with summary judgment motions pending and less than two months before the scheduled start of a two-week trial, Mr. Vogel sought leave to file an amended complaint adding as defendants Suzanne, LLC and the other ten identified investors. In the amended complaint, Mr. Vogel alleged that all of Mr. Hillman's work on both hotels was performed "on behalf of Suzanne, LLC" and added Suzanne, LLC as a defendant to all counts of the complaint. In September 2019, after a hearing, the court denied Mr. Vogel's motion for leave to amend. The court concluded that Mr. Vogel did not have the right to amend his complaint without leave of court, that the motion was too late, that

granting the motion would prejudice the other parties, and, in any event, that it would be futile in light of the court's rulings on summary judgment.

Entry of Final Judgment

Although Mr. Vogel's unjust enrichment claim remained pending following the court's rulings on summary judgment and the request for leave to amend the complaint, Mr. Vogel sought certification of the rulings as a final judgment under Rule 2-602(b). With the consent of Mr. Hillman and the Appellee LLCs, the court granted the motion and certified its rulings as final. Mr. Vogel then filed this timely appeal.

DISCUSSION

A circuit court may award summary judgment when the material facts are not subject to genuine dispute and the moving party is entitled to judgment as a matter of law. Md. Rule 2-501(f). An appellate court reviews the grant of a motion for summary judgment without deference, "examining the record independently to determine whether any factual disputes exist when viewed in the light most favorable to the non-moving party and in deciding whether the moving party is entitled to judgment as a matter of law." *Steamfitters Local Union No. 602 v. Erie Ins. Exch.*, 469 Md. 704, 746 (2020) (quoting *Rowhouses, Inc. v. Smith*, 446 Md. 611, 630 (2016)). "Evidentiary matters, credibility issues, and material facts which are in dispute cannot properly be disposed of by summary judgment." *Taylor v. NationsBank, N.A.*, 365 Md. 166, 174 (2001). In determining whether a grant of summary judgment is legally correct, we ask "whether a fair minded jury could find for the plaintiff in light of the pleadings and the evidence presented, and there must be more than a scintilla of evidence in order to proceed to trial[.]" *Sierra Club v. Dominion Cove Point*

LNG, L.P., 216 Md. App. 322, 330 (2014) (quoting *Laing v. Volkswagen of Am., Inc.*, 180 Md. App. 136, 153 (2008)). Our review of an award of summary judgment is limited "to the grounds relied upon by the trial court." *Steamfitters Local Union*, 469 Md. at 746.

I. THE CIRCUIT COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT ON THE BREACH OF CONTRACT CLAIMS CONCERNING THE CONFERENCE CENTER HOTEL.

We will turn first to the three counts of Mr. Vogel's complaint that alleged a breach of contract concerning the Conference Center Hotel.[11] In Count I, Mr. Vogel alleged that he and Mr. Hillman "orally agreed that they would be equal partners in The Hotel at UMCP, LLC," and that Mr. Hillman breached that agreement. Mr. Vogel sought a declaratory judgment that he "is entitled to a 50% equity interest in The Hotel at UMCP, LLC[.]" In Count III, Mr. Vogel sought specific performance of the alleged agreement in the form of an order directing Mr. Hillman "to transfer a 50% equity interest in The Hotel at UMCP, LLC" to Mr. Vogel. And in Count IV, Mr. Vogel sought compensatory damages.

Viewing the summary judgment record in the light most favorable to Mr. Vogel, we agree with the circuit court that there are no genuine disputes of material fact and that Mr. Hillman and The Hotel at UMCP, LLC were entitled to judgment as a matter of law. There is no evidence in the summary judgment record that the parties ever reached mutual assent regarding the essential terms of an enforceable contract concerning the Conference Center Hotel.

[11] Count I, for declaratory judgment, is pled against Mr. Hillman and The Hotel at UMCP, LLC. Counts III and IV are pled against only Mr. Hillman.

A. The Circuit Court Did Not Err in Concluding that There Were No Genuine Disputes of Material Fact Precluding an Award of Summary Judgment.

Mr. Vogel argues at the outset that the circuit court erred in granting summary judgment because a dispute of material fact exists between the parties regarding the existence of a contract. Specifically, Mr. Vogel contends that "[t]he record . . . is replete with evidence that an oral contract existed," including his own deposition testimony and affidavit, Mr. Hillman's statements in a deposition taken in a different case, statements made by Mr. Hillman to third parties who testified by deposition in this case, and statements made by Mr. Hillman in emails to third parties. Mr. Vogel argues further that Mr. Hillman's reliance on other evidence that contradicts Mr. Vogel's assertion that the parties entered a valid oral contract "is the definition" of a material factual dispute that should have precluded the award of summary judgment.

The fundamental problem with Mr. Vogel's argument is that the circuit court did not base its ruling on a resolution of contested facts. The court viewed the record, including Mr. Vogel's factual allegations regarding the agreement he reached with Mr. Hillman in 2008 or 2009, in the light most favorable to Mr. Vogel as the non-moving party. The court then applied the relevant law and arrived at a legal conclusion that the evidence did not support the existence of an agreement with sufficiently definite terms to be binding and enforceable. Before considering that legal conclusion, we will first address Mr. Vogel's specific contentions that the court ignored the existence of genuine disputes regarding material facts. *See Appiah v. Hall*, 416 Md. 533, 546 (2010) ("When considering an appeal

from an order granting summary judgment, our review begins with the determination whether a genuine dispute of material fact exists[.]").

Mr. Vogel's contention that the circuit court ignored his testimony is flawed in two respects. First, to the extent that Mr. Vogel's testimony contained express or implied conclusions concerning the legal effect of his discussion with Mr. Hillman in 2008 or 2009—i.e., that the two entered a binding and enforceable agreement—the circuit court properly disregarded them. *See Dual Inc. v. Lockheed Martin Corp.*, 383 Md. 151, 162 (2004) ("Bald, unsupported statements or conclusions of law are insufficient" to create a genuine dispute of material fact (quoting *Arroyo v. Bd. of Educ.*, 381 Md. 646, 655 (2004))). Instead, the circuit court's focus, and ours, in identifying whether there existed a genuine dispute of material fact was properly on the factual allegations themselves.

Second, in reviewing the factual record, the circuit court expressly "assume[d] for this [summary judgment] motion that Plaintiff Vogel will prove" what he testified to in his deposition about his discussion with Mr. Hillman in 2008 or 2009 concerning the terms of their alleged agreement regarding the Conference Center Hotel. The court neither disregarded Mr. Vogel's testimony nor credited any contrary evidence over it. And although the court did not expressly mention Mr. Vogel's affidavit testimony on the same subject, we see no indication that the court disregarded it. Indeed, most of the non-conclusory statements in the affidavit are duplicative of Mr. Vogel's deposition testimony, albeit with added details. In any event, based on our independent review of the summary

judgment record, *see Steamfitters Local Union*, 469 Md. at 746, we have considered Mr. Vogel's affidavit and will take that testimony into account in our legal analysis.

Beyond his own testimony, Mr. Vogel contends that the court overlooked other evidence in the summary judgment record that supports his contention that he and Mr. Hillman entered a binding contract concerning the Conference Center Hotel, even if that evidence contradicts the specific terms to which he contends they agreed. That evidence consists of previously identified testimony by Mr. Hillman in a deposition in a different case, deposition testimony of third parties regarding how Mr. Hillman described Mr. Vogel's role, and statements Mr. Hillman made in emails to third parties. However, none of that evidence creates a genuine dispute of fact that is material to the legal issue on which the circuit court ruled. Most notably, none of that evidence supplies or supports the existence of definite terms of the agreement Mr. Vogel contends he and Mr. Hillman reached.

Mr. Vogel's contentions merit a further observation. He suggests that in viewing the factual record in the light most favorable to him, we are required to pick and choose (or allow him to do so) particular statements from within a document or transcript that he believes favor him and ignore important context that demonstrates otherwise. For example, in his appellate brief, Mr. Vogel relies on the following snippet of deposition testimony that Mr. Hillman gave in a different case:

> Q: Do you have any contractual arrangements with Mr. Vogel?
>
> A: Nothing in writing.

> Q: Do you have any understandings that you consider contractual or binding with Mr. Vogel?
>
> A: Yes.

Mr. Vogel points to that statement as a concession by Mr. Hillman that he had entered a final, binding contract with Mr. Vogel concerning the Conference Center Hotel. But that disregards the follow-up question and response:

> Q: Okay. Tell me about those.
>
> A: He's earned some fees for procuring some of the -- A couple of the tenants, potential tenants in the hotel. And he's been assisting me in -- in working through the approval process, the entitlement process. We haven't discussed any specific amount he's to get, and he has the option of obtaining an interest in that hotel in lieu of a cash payment. And he also has the option to invest some money in the LLC also.

To be sure, it would be improper at the summary judgment stage to view Mr. Hillman's statements as establishing that the two men had *not* come to a final agreement. But we also cannot read only part of the text and conclude that Mr. Hillman conceded something that he manifestly did not. We do not assess whether a genuine dispute concerning material facts exists by ignoring context or abandoning common sense. In any event, as we will discuss further below, even if Mr. Hillman believed that he was obligated to fairly compensate Mr. Vogel for his efforts in some way, and viewed that obligation as binding, more is required to create an enforceable contract.

Mr. Vogel also complains that by introducing new evidence that contradicted his own, Mr. Hillman disputed material facts that should have been viewed in Mr. Vogel's favor. By reference to Mr. Hillman's briefing before the circuit court, Mr. Vogel identifies three categories of evidence that he argues the circuit court should have ignored: (1) a

variety of statements made by Mr. Hillman—in emails, orally to investors who testified about them in deposition, or in Mr. Hillman's deposition in a separate case—to the effect that Mr. Vogel would have only a small interest in the Conference Center Hotel or that he and Mr. Vogel never reached a final agreement;[12] (2) promissory notes Mr. Vogel signed that contain language stating that he "shall in no event be construed for any purpose to be a partner, joint venturer or associate of [Mr. Hillman]"; and (3) statements Mr. Vogel made in the January 2017 email described above.

We discern no error in the circuit court's treatment of this evidence. Mr. Vogel himself relied on several of the statements that fall into the first category and continues to rely on those statements on appeal. The circuit court did not err in considering those same materials. Moreover, although Mr. Vogel does not agree with the content of many of the statements at issue, that does not create a dispute regarding whether the statements were made, nor does it preclude the circuit court or this Court from assessing their legal effect, if any. Of course, it would have been improper for the circuit court to have treated a factual assertion in any of those documents as established if the record contained any contrary evidence that was favorable to Mr. Vogel, but we see nothing in the record to suggest that the circuit court did so.

[12] Mr. Vogel argued below that Mr. Hillman's reliance on these statements waived any contention that they are not admissible pursuant to the dead man's statute. Mr. Hillman disagrees, asserting that he has cited them only because of Mr. Vogel's reliance on them or similar statements, and that he reserves the right to object to their admissibility at any trial of this matter. Whether Mr. Hillman has waived any objection to the use of these statements for purposes of trial is not before us and we do not pass judgment on it.

The cases on which Mr. Vogel relies concerning disputes of material fact are inapposite. In *Ramlall v. MobilePro Corp.*, the parties agreed that an oral agreement had been entered, but they disputed whether a subsequent disclosure statement constituted a memorialization of the agreement. 202 Md. App. 20, 33 (2011). This Court held that the trial court had erred in treating the disclosure statement as dispositive of the disputed terms notwithstanding contrary evidence concerning those terms. *Id.* at 39. Similarly, in *Okwa v. Harper*, 360 Md. 161 (2000), the trial court erred when, in deciding summary judgment, it "necessarily determined Appellees' accounts of the alter[c]ation to be more credible and based [its] ruling on them." 360 Md. 161, 181-82 (2000); *see also DeGroft v. Lancaster Silo Co.*, 72 Md. App. 154, 169-70, 173 (1987) (holding that the trial court erred in determining on summary judgment two facts as to which the evidence was disputed); *Russ v. Barnes*, 23 Md. App. 691, 694-96 (1974) (holding that the trial court erred in resolving a factual dispute concerning whether one written contract constituted a novation of a different written contract). In contrast to those cases, here, the circuit court did not make a factual finding on disputed evidence. Instead, it accepted the facts in the light most favorable to Mr. Vogel and arrived at a legal conclusion based on those facts. It is to that legal conclusion that we now turn.

B. The Circuit Court Correctly Held that No Enforceable Oral Contract Existed as a Matter of Law.

The circuit court awarded summary judgment to Mr. Hillman and The Hotel at UMCP on Counts I, III, and IV on the ground that, as a matter of law, "no enforceable oral agreement exist[ed]" concerning the Conference Center Hotel because "the parties failed

to reach mutual assent on the key terms" and "never actually reached the stage of a binding contract, oral or otherwise." Mr. Vogel argues that the court erred in entering summary judgment because he produced sufficient evidence for a jury to find the existence of an enforceable oral contract, even if its precise terms were in doubt. He contends that the circuit court impermissibly weighed the credibility of his evidence against Mr. Hillman's and imposed on him an unfair burden to provide contract terms with such specificity that the evidence "answer[s] all hypothetical questions[.]" Mr. Hillman responds that, setting aside Mr. Vogel's conclusory allegations of the existence of an agreement, the evidence in the summary judgment record reflects no more than a prospective collaboration, and that Mr. Vogel has admitted facts that undercut his own claims. We find no error in the circuit court's award of summary judgment on Counts I, III, and IV.

"'[A]n essential prerequisite to the creation or formation of a contract' is 'a manifestation of mutual assent.'" *Advance Telecom Process LLC v. DSFederal, Inc.*, 224 Md. App. 164, 177 (2015) (quoting *Cochran v. Norkunas*, 398 Md. 1, 14 (2007)); *see also Mitchell v. AARP Life Ins. Program*, 140 Md. App. 102, 117 (2001) ("An essential element with respect to the formation of a contract is 'a manifestation of agreement or mutual assent by the parties to the terms thereof; in other words, to establish a contract the minds of the parties must be in agreement as to its terms.'" (quoting *Safeway Stores, Inc. v. Altman*, 296 Md. 486, 489 (1983))). "Manifestation of mutual assent includes two issues: (1) intent to be bound, and (2) definiteness of terms." *Advance Telecom*, 224 Md. App. at 177 (quoting *Cochran*, 398 Md. at 14). Definiteness of terms, in addition to being a factor in its own

right, is also relevant to identifying whether the parties intended to be bound. *Falls Garden Condo. Ass'n v. Falls Homeowners Ass'n*, 441 Md. 290, 304 (2015). "If an agreement omits an important term, or is otherwise too vague or indefinite with respect to an essential term, it is not enforceable." *4900 Park Heights Ave. LLC v. Cromwell Retail 1, LLC*, 246 Md. App. 1, 31, *cert. denied*, 469 Md. 655 (2020) (quoting *Stone v. Wells Fargo Bank, N.A.*, 361 F. Supp. 3d 539, 551 (D. Md. 2019))); *see also Falls Garden*, 441 Md. at 304 ("[E]ven if an intention to be bound is manifested by both parties, too much indefiniteness [of terms] may invalidate the agreement, because of the difficulty of administering the agreement." (second alteration in original) (quoting 1 Joseph M. Perillo, Corbin on Contracts § 2.8, at 131 (Rev. ed. 1993))). "Failure of parties to agree on an essential term of a contract may indicate that the mutual assent required to make a contract is lacking." *Falls Garden*, 441 Md. at 305 (quoting *Cochran*, 398 Md. at 14); *Advance Telecom*, 224 Md. App. at 177 (same).

In *Mogavero v. Silverstein*, this Court explored the requirement that for parties to be bound by a contract, the terms of the contract must be sufficiently definite to be enforced. 142 Md. App. 259, 271-74 (2002). There, a contractor sued for breach of an oral contract in which he had agreed to "help" a less-experienced developer "with the construction end of [a] project in return for a fee of 5 percent of the estimated construction contract." *Id.* at 265. The contractor alleged that he had agreed to perform duties including to "get [the defendant] the architect, . . . get him the contractor to do the job, . . . check on the construction[,] . . . advise him in reference to the system and the design of the

architect[,] . . . [and] monitor the construction phase of the project." *Id.* at 266. After the defendant disregarded the contractor's advice regarding how to proceed with the project, the contractor believed his services had been terminated, and he ultimately sued for breach of contract and quantum meruit. *Id.* at 270.

The circuit court granted summary judgment in favor of the defendant on the ground that the alleged oral agreement was too vague to be enforceable because it was not possible to "determine what agreement, if any, was reached between the parties regarding the nature and extent of the duties that [the contractor] had undertaken." *Id.* at 271. There had also been no evidence regarding how the agreement might be affected if the cost of the project exceeded an initial estimate. *Id.* This Court agreed that the terms as described were insufficient to create an enforceable agreement. In doing so, we quoted the standard from the Court of Appeals' decision in *Robinson v. Gardiner*, 196 Md. 213 (1950):

> Of course, no action will lie upon a contract, whether written or verbal, where such a contract is vague or uncertain in its essential terms. The parties must express themselves in such terms that it can be ascertained to a reasonable degree of certainty what they mean. If the agreement be so vague and indefinite that it is not possible to collect from it the intention of the parties, it is void because neither the court nor jury could make a contract for the parties. Such a contract cannot be enforced in equity nor sued upon in law. *For a contract to be legally enforceable, its language must not only be sufficiently definite to clearly inform the parties to it of what they may be called upon by its terms to do, but also must be sufficiently clear and definite in order that the courts, which may be required to enforce it, may be able to know the purpose and intention of the parties*.

Mogavero, 142 Md. App. at 272 (quoting *Robinson*, 196 Md. at 217) (emphasis added in *Mogavero*). Applying that standard, we concluded that the agreement was so vague that there would not be a way to tell if it had been breached. *Mogavero*, 142 Md. App. at 272.

We applied the same standard in *Dolan v. McQuaide*, in which the plaintiff alleged that she had agreed with the defendant to open a carwash business together in which the parties "would be equal partners . . . and would share the net profits therefrom equally." 215 Md. App. 24, 29 (2013). After setting aside the plaintiff's "mere legal conclusions that 'an agreement' or 'a contract' existed between the parties," we determined that the plaintiff's vague allegations about the parties' arrangement were insufficient to sustain a cause of action for breach of contract or promissory estoppel. *Id.* at 33-35. We observed that to bind parties to a contract, "the express terms must be as definite as a reasonable conversation between parties who fully intend to carry out a major undertaking[.]" *Id.* at 34. There, however, "the only alleged promise was to help in 'planning,' without further detail," which was too vague as a matter of law. *Id.* We further declined to rely on evidence that the plaintiff had later performed a number of specific services, because "she did so without having discussed them in detail at the time that the alleged oral contract was formed." *Id.* We therefore affirmed the circuit court's award of summary judgment in favor of the defendant for breach of contract. *Id.* at 35.

Mr. Vogel's allegations about his oral agreement with Mr. Hillman are no more specific than those of the plaintiffs in *Mogavero* and *Dolan*. Indeed, in some ways they are less so. Mr. Vogel provided very little information about his alleged oral agreement

with Mr. Hillman reached in 2008 or 2009. He provided no information concerning the context in which the agreement was struck, as he claims not to recall it. He also provided no specifics regarding the language used by either party at the time; instead, he provided only a conclusory summary:

> In 2008 or 2009, I partnered with David Hillman ("Hillman") to develop the Conference Center Hotel . . . . The partnership agreement was structured such that I would obtain a 50% ownership interest in the Conference Center Hotel for my efforts to: locate the site of the hotel, identify tenants for the retail space at the hotel, serve as the "goodwill ambassador" for the hotel by educating and working with local officials on the project, work on entitlement issues, and identify and pursue cost-saving mechanisms for the hotel, such as tax credits and fee waivers.
>
> The structure of the partnership agreement was such that Hillman, who was responsible for financing the hotel, would contribute all of the funding to obtain a construction loan for the project. Hillman's construction loan capital contribution would be treated as a debt, such that it would earn eight (8) percent interest until he was fully compensated for his contribution.

The lack of definite terms in the alleged oral agreement, especially concerning Mr. Vogel's responsibilities, is, by itself, a sufficient basis for us to affirm the circuit court's award of summary judgment. Mr. Vogel did not present any evidence concerning the parties' intent to be bound by the terms discussed in 2008 and 2009 beyond his own conclusory allegation that the parties reached a deal. He did not identify any evidence, even within his own testimony, that the parties discussed whether they intended to be bound, whether they anticipated reducing their agreement to writing, or how they would assess whether he had satisfied his vague obligations to identify tenants, be a "goodwill ambassador," "work on entitlement issues," or "identify and pursue cost-saving mechanisms."

In the context of assessing whether parties intended to be bound by the terms of preliminary agreements, the Court of Appeals has identified the following relevant factors: "(1) the language of the preliminary agreement, (2) the existence of open terms, (3) whether partial performance has occurred, (4) the context of the negotiations, and (5) the custom of such transactions, such as whether a standard form contract is widely used in similar transactions." *Falls Garden*, 441 Md. at 302 (quoting *Cochran*, 398 Md. at 15). Here, Mr. Vogel has not provided any evidence of the language of the oral agreement, just a summary of terms of uncertain origin. Mr. Vogel does not allege that partial performance preceded the agreement. He also has not pointed to any evidence about the context of the negotiations; to the contrary, he seems to suggest that there were none: only a proposal by Mr. Hillman and an acceptance by Mr. Vogel. And with respect to custom, Mr. Vogel testified that he had no prior experience entering oral agreements with Mr. Hillman, every other similar agreement he entered with others was pursuant to a written contract, and Mr. Hillman typically entered written agreements with others.

Mr. Vogel testified that following the original agreement, he took actions to identify a site for the hotel, identify tenants, be a goodwill ambassador, and work on entitlement issues. However, the record contains no evidence that the parties agreed to definite terms concerning Mr. Vogel's responsibilities at the time of the alleged oral agreement or that they reached any subsequent agreement concerning the Conference Center Hotel. Indeed, in Mr. Vogel's deposition, he testified that "[t]he relationship I had with [Mr. Hillman]" was that Mr. Hillman would "give me, you know, what he wanted me to do," and

Mr. Vogel would do it. As in *Mogavero* and *Dolan*, allegations of such indefinite terms are insufficient to be enforceable by a court. *See, e.g.*, *Dolan*, 215 Md. App. at 34-35 ("[C]onduct cannot form an oral contract, and it cannot bind a counter-party in promissory estoppel where there has been no definite promise to perform the alleged conduct."). In sum, we agree with the circuit court that there is insufficient evidence on which a jury could determine that the parties reached mutual assent to be bound by definite terms to form an enforceable oral agreement. *See Blackburn Ltd. P'ship v. Paul*, 438 Md. 100, 108 (2014) (stating that to survive summary judgment, "[a] plaintiff's claim must be supported by more than a 'scintilla of evidence[.]'" (quoting *Beatty v. Trailmaster Prods., Inc.*, 330 Md. 726, 738 (1993))).

Perhaps as importantly, Mr. Vogel admitted in his deposition that the hotel project that he contends he and Mr. Hillman envisioned in 2008 or 2009 was not the hotel project that ultimately came to be. Mr. Vogel testified that he and Mr. Hillman originally anticipated that the hotel would be a $100 million development project and that Mr. Hillman would provide all the equity for the project, with no additional investors. However, the project ended up costing $170 million to develop, which required Mr. Hillman to "bring in partners with equity." Mr. Vogel "knew that it's a different deal at 170 million than it was at a hundred million," and so when Mr. Hillman "let [him] know that [he] would have to take a much smaller percentage," he agreed. Mr. Vogel concedes that he and Mr. Hillman never came to an agreement regarding contractual terms for the

"different deal" that ultimately emerged.[13] *See Mogavero*, 142 Md. App. at 271 (identifying the lack of "an agreement as to what would happen if the construction cost exceeded" an anticipated amount as a basis for concluding that the parties had not entered an enforceable oral agreement).

For all these reasons, we agree with the circuit court that, as a matter of law, the evidence viewed in the light most favorable to Mr. Vogel does not support a conclusion that the parties entered an enforceable oral agreement.[14] We will therefore affirm the

[13] Mr. Vogel claims support for his position from *Houston v. Monumental Radio*, 158 Md. 292 (1930), in which the Court of Appeals determined that a trial court had improperly taken from the jury a determination regarding whether the parties had entered a partnership. Mr. Vogel's reliance is misplaced. In *Houston*, the plaintiff alleged the existence of an oral agreement to split the responsibilities for, and profits from, running a radio station, with the plaintiff responsible for the technical operation of the station and the defendant responsible for the business and management side. *Id.* at 295-96. The plaintiff alleged that the defendant later incorporated the business and gave him a share of stock, promising more later. *Id.* at 297. After the plaintiff later discovered that the defendant had not given him an equal share of stock or profits and denied their alleged agreement, he sued. *Id.* at 298.

The circuit court rejected the plaintiff's claims and entered a directed verdict for the defendant, and the Court of Appeals reversed in part. *Id.* at 302-03. With respect to the plaintiff's claim that the parties had entered a partnership requiring a split of the profits before the business was incorporated, the Court determined that the plaintiff's testimony was sufficient to permit his breach of contract claim to go forward. *Id.* at 305. The Court concluded that the terms of the arrangement included a "definitely fixed" division of responsibility. *Id.* That clear division is not similar to the agreement Mr. Vogel alleges here. Furthermore, the Court's reversal was limited to the pre-incorporation earnings of the alleged partnership. The Court determined that the plaintiff had no claim for breach of contract related to the period following incorporation because there was no evidence of formation of a contract concerning the corporation. *Id.* at 305-06. Accordingly, the sole claim available to the plaintiff for the period following incorporation was a claim for compensation for services rendered. *Id.* at 306.

[14] We diverge from the circuit court's analysis in one respect, which is that court's emphasis on Mr. Vogel's evolving characterizations of the terms of his oral agreement with

circuit court's decision to enter summary judgment on Counts I, III, and IV, with respect to the alleged breach of contract concerning the Conference Center Hotel, including the declaratory judgment issued with respect to Count I.

II. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT ON THE BREACH OF CONTRACT CLAIMS CONCERNING THE CAMBRIA HOTEL.

We turn next to the three counts of Mr. Vogel's complaint that allege a breach of contract by Mr. Hillman concerning the Cambria Hotel: Count II (declaratory judgment), Count V (specific performance), and Count VI (compensatory damages).[15] The circuit court applied essentially the same analysis to these claims as to the corresponding counts concerning the Conference Center Hotel. In doing so, we believe the circuit court overlooked an important distinction in the evidence.

Mr. Vogel contends that in 2014, he reached an oral agreement with Mr. Hillman concerning the Cambria Hotel on nearly identical terms as the alleged agreement concerning the Conference Center Hotel, except that he was to receive a 20 percent interest in the Cambria Hotel. If that were the only agreement he had allegedly reached with Mr. Hillman concerning the Cambria Hotel, we would agree with the circuit court's resolution of Counts II, V, and VI for the same reasons already discussed. But it is not.

Mr. Hillman. Even if we saw the differences in Mr. Vogel's accounts as being as large as the circuit court viewed them, it would not matter, because those differences pertain to the credibility of Mr. Vogel's account. That is a pool into which we generally do not wade when addressing summary judgment. As a result, our analysis takes at face value Mr. Vogel's most fully evolved characterization of the oral agreement, as identified in his deposition and affidavit.

[15] Count II is pled against Mr. Hillman and 8321 College Park Hotel, LLC. Counts V and VI are pled against only Mr. Hillman.

Mr. Vogel testified that in December 2016, the parties reached a new oral agreement on the terms of a final deal concerning the Cambria Hotel, in which Mr. Hillman agreed to compensate him primarily for services already rendered. By that time, Mr. Vogel averred in his affidavit, he had brokered the purchase of the land for the hotel, worked with a tenant to ensure that it remained a tenant, "worked to resolve complex zoning issues," and worked with local government officials to "obtain millions of dollars in tax credits and fee waivers." Mr. Vogel testified that Mr. Hillman expressly agreed during that conversation that Mr. Vogel would receive "a 10 percent interest [in the Cambria Hotel] for the work, commissions, [and] everything that I did," with the option "to invest monies" to obtain up to an additional ten percent interest.

Because the alleged December 2016 agreement concerning the Cambria Hotel involved compensation for services already performed, it does not suffer the same problems regarding definiteness of terms concerning performance that render unenforceable the earlier agreements concerning either hotel. And although Mr. Vogel's testimony does not completely flesh out the details of his alleged interest, based on the summary judgment record, we do not think Mr. Hillman has demonstrated an entitlement to judgment as a matter of law on that claim, at least to the extent of a claim for compensatory damages.[16] Mr. Vogel's testimony about the December 2016 agreement

[16] In its memorandum opinion, the circuit court raised an issue that the parties had not addressed, which is "that membership in a limited liability company may only be obtained pursuant to the statutory framework set out by the General Assembly in the Limited Liability Company Act." The court briefly wrestled with whether it would be possible to award Mr. Vogel specific performance without "essentially rewriting the

also does not suffer the same deficiencies with respect to whether the parties intended to be bound. By December 2016, the Cambria Hotel project was well underway and there is no evidence that the project changed substantially thereafter. Moreover, Mr. Vogel testified that the parties reached a "final" agreement concerning the Cambria Hotel at the meeting, and the context for the negotiations was a meeting arranged specifically for that purpose.

Although past consideration is typically insufficient to support a present promise, *Wickman v. Kane*, 136 Md. App. 554, 563 (2001), there are exceptions. "One of them is

membership agreement," but concluded that it need not resolve that question because it decided the case on other grounds. Although it is true as a general proposition that membership in a limited liability company may be obtained only pursuant to the statutory framework in the Limited Liability Company Act, Md. Code Ann., Corps. & Ass'ns §§ 4A-101 – 4A-1303, that act also provides the members of an LLC with flexibility to alter its default provisions through the LLC's operating agreement. For example, § 4A-601(a) of the act provides that a party may become a member of an LLC only, as relevant here, at the time the LLC is formed or at "[a] later time specified in the operating agreement," and § 4A-604 provides for the assignment of economic interests in an LLC.

Here, the record does not include a copy of the operating agreement for 8321 College Park Hotel, LLC, but it does include a copy of the operating agreement for The Hotel at UMCP, LLC. According to that agreement, management of the LLC resided entirely in The Gallows Corporation, which had the authority to authorize the assignment of an economic interest in the LLC and to approve new members in the LLC. Because The Gallows Corporation was controlled by Mr. Hillman during his lifetime, it thus appears that it would have been possible for him to authorize a transfer of a percentage interest in the Conference Center Hotel to Mr. Vogel without the need to rewrite any aspect of the LLC's operating agreement. Without a copy of the agreement concerning 8321 College Park Hotel, LLC, we do not know whether it contains similar provisions. We therefore express no opinion concerning the implications for the viability of Mr. Vogel's breach of contract claims concerning the Cambria Hotel based on any provisions that may or may not be contained in the operating agreement for 8321 College Park Hotel. We also express no opinion concerning whether specific performance is an available remedy against Mr. Hillman's estate or any of the parties Mr. Vogel sought to add as defendants through his motion for leave to amend.

that a present promise to pay in consideration of an act previously done at the request of the promisor will be enforceable as supported by sufficient consideration[.]" *Reece v. Reece*, 239 Md. 649, 660 (1965). In such cases, "[t]he request of the promisor may be either express or implied." *Id.* Thus, in *Larkin v. Maclellan*, the Court of Appeals upheld a contract made with a land developer to complete construction of several apartment buildings when the contract described the consideration as "services already performed, and such further services as is consistent with their duties in the construction," and the work performed up to that point had included drafting the blueprints. 140 Md. 570, 580, 586 (1922).

Here, the record contains evidence that Mr. Hillman asked Mr. Vogel to perform services concerning the development of the Cambria Hotel, that Mr. Vogel performed services concerning that project, and that both men expected Mr. Vogel to be compensated for those services in some manner.[17] Thus, Mr. Vogel's provision of services was not gratuitous and may serve as consideration for Mr. Hillman's later promise to compensate him. *See* Restatement (Second) of Contracts § 18 (Am. L. Inst. 1981) ("Where a bargain has been fully performed on one side, there is commonly no need to determine the moment of making of the contract or whether the performing party made a promise before he performed. Those issues ordinarily become important only when a dispute arises at an earlier stage.").

[17] A corporate designee for the appellees testified in deposition that Mr. Vogel was at least entitled to compensation for brokering the deal to purchase the land for the Cambria Hotel, which had already been completed by December 2016.

For these reasons, we hold that the circuit court erred in granting summary judgment against Mr. Vogel on the ground that there was no enforceable contract as a matter of law with respect to Counts II, V, and VI concerning breach of contract as to the Cambria Hotel.

III. THE CIRCUIT COURT ERRED IN AWARDING SUMMARY JUDGMENT AS TO MR. VOGEL'S NEGLIGENT MISREPRESENTATION CLAIM REGARDING BOTH HOTELS.

Mr. Vogel argues that the court erred in granting summary judgment in favor of Mr. Hillman on Count VII, for negligent misrepresentation as to both hotels. Mr. Vogel contends that his testimony, if believed, was sufficient to establish the elements of that tort. Mr. Hillman responds that Mr. Vogel's alleged reliance on his statements was unjustified as a matter of law because the statements "were too vague and indefinite," and the parties both "were sophisticated real estate developers[.]" We agree with Mr. Vogel that genuine disputes of material fact concerning his reliance on Mr. Hillman's alleged promises precluded summary judgment on negligent misrepresentation.

A negligent misrepresentation claim presumes that a party justifiably relied on another's promises. The elements of such a claim are: (1) the defendant negligently asserted a false statement to a plaintiff to whom the defendant owed a duty of care; (2) the defendant intended the plaintiff to act upon his false statement; (3) the defendant had knowledge that the plaintiff would probably rely on the statement to plaintiff's detriment;

(4) the plaintiff acted in justifiable reliance; and (5) the plaintiff suffered resulting damages.[18] *See Lloyd v. General Motors Corp.*, 397 Md. 108, 135-36 (2007).

Here, Mr. Vogel introduced into the summary judgment record evidence that Mr. Hillman induced him to enter two business relationships by promising that he would be compensated for his efforts with ownership interests in the two hotels, pursuant to which Mr. Vogel expended significant time and effort over the course of several years. Mr. Vogel further alleged that he expended that time and effort in reliance on those promises and that a trier of fact could conclude that his reliance was reasonable.

The circuit court concluded that Mr. Vogel's alleged reliance on Mr. Hillman's statements to him was unreasonable as a matter of law based on its understanding of this Court's decision in *Goldstein v. Miles*, 159 Md. App. 403 (2004). In this appeal, Mr. Hillman similarly defends the court's decision based on *Goldstein*. We think they have both read *Goldstein* too broadly.

Although a claim for negligent misrepresentation sounds in tort, not contract, *Brock Bridge Ltd. P'ship v. Dev. Facilitators, Inc.*, 114 Md. App. 144, 161-62 (1997), such a claim can, in some circumstances, give rise to benefit-of-the-bargain damages, *see Goldstein*, 159 Md. App. at 422-23. In *Goldstein*, we observed that "[i]n determining 'the

[18] Before the circuit court, Mr. Hillman sought summary judgment on Count VII based solely on the element of reliance, assuming for purposes of argument that the other elements of that claim could be established. The circuit court ruled accordingly. As our review is limited "to the grounds relied upon by the trial court," *Steamfitters Local Union*, 469 Md. at 746, we express no opinion concerning whether Mr. Hillman would be entitled to judgment as a matter of law on any other element of negligent misrepresentation.

proper measure of damages in fraud and deceit cases,' Maryland applies the 'flexibility theory.'" 159 Md. App. at 422 (quoting *Hinkle v. Rockville Motor Co.*, 262 Md. 502, 511 (1971)). In a case that could support both types of damages, the aggrieved party "may elect to recover either 'out-of-pocket' expenses or benefit-of-the-bargain damages. The former will permit the plaintiff to recover his or her actual losses; the latter 'put[s] the defrauded party in the same financial position as if the fraudulent representations had in fact been true[.]'" *Goldstein*, 159 Md. App. at 422 (first alteration in original) (quoting *Midwest Home Distrib. v. Domco Indus.*, 585 N.W.2d 735, 739 (Iowa 1998)).

However, the "benefit-of-the-bargain rule," which is premised on a perceived contract, "is not so elastic that every victim of a false representation is entitled to receive the benefit of what he or she was promised." *Goldstein*, 159 Md. App. at 423. "To recover benefit-of-the-bargain damages, [plaintiffs] must first show that they entered into a bargain . . . [, which] is narrower in scope than an agreement but broader in scope than a contract."[19] *Id.* at 426-27. "A bargain is '[a]n agreement between parties for the exchange of promises or performances.'" *Id.* at 427 (quoting Black's Law Dictionary 143 (7th ed. 1999)). And "a promise is 'illusory when its indefinite nature defies legal enforcement.'" *Goldstein*, 159 Md. App. at 431 (quoting *Cheek v. United Healthcare Mid-Atl.*, 378 Md. 139, 150 (2003)). "For a promise to establish 'an enforceable contract [it] must express with definiteness and certainty the nature and extent of the parties' obligations.'" *Goldstein*,

[19] We noted in *Goldstein* that "[d]espite th[e] theoretical distinction, . . . the term 'bargain,' when employed in the phrase 'benefit-of-the-bargain damages,' has almost always referred to an 'enforceable contract.'" 159 Md. App. at 428.

159 Md. App. at 431 (quoting *Kiley v. First Nat'l Bank of Md.*, 102 Md. App. 317, 333 (1994)) (alteration added in *Goldstein*).

In *Goldstein*, the plaintiffs were attorneys who alleged they had been promised that if they continued to work for a law firm, the owner would later give them the opportunity to buy the firm. 159 Md. App. at 411, 415-16. After the owner sold the firm to someone else, the lawyers sued, alleging fraud and negligent misrepresentation. *Id.* at 419. Notably, because the nature of the alleged fraud rendered the lawyers' "out-of-pocket losses difficult or impossible to prove," the only measure of damages the lawyers sought for their negligent misrepresentation claim was benefit-of-the-bargain damages. *Id.* at 439 (Adkins, J., dissenting). The circuit court held that the lawyers could not obtain those damages because, as a matter of law, they could not show that the parties had ever "struck a 'bargain[.]'" *Id.* at 409 (majority opinion). This Court, in a 2-1 decision, agreed. *Id.* at 430. The panel majority held that the communications on which the alleged bargain was based failed to include several material terms of the sale, it was not possible to determine the nature of the parties' respective obligations, and the plaintiffs could not have reasonably relied on the terms. *Id.* at 431-32. That the parties were "sophisticated . . . lawyers with many years of practice" only aggravated the unreasonableness of their alleged reliance. *Id.* at 437.

We do not read *Goldstein* to hold that all negligent misrepresentation claims require proof that the parties had reached agreement on the terms of a bargain. To the contrary, for obvious reasons, that rule properly applies only to negligent misrepresentation claims

that seek benefit-of-the-bargain damages. Here, Mr. Vogel has not clearly limited his negligent misrepresentation claim to benefit-of-the-bargain damages, at least on the record submitted to this Court. If he had, we would agree that such a claim would necessarily fail for the same reasons we have already discussed above and based on *Goldstein*. However, the rule in *Goldstein* does not apply to a claim for out-of-pocket losses, to the extent Mr. Vogel can prove them. Although Mr. Vogel's status as a sophisticated businessman is relevant to whether his reliance on Mr. Hillman's oral representations was justified, the reasonableness of his reliance is a question for the jury.[20]

IV. THE CIRCUIT COURT PROPERLY AWARDED SUMMARY JUDGMENT ON MR. VOGEL'S QUANTUM MERUIT COUNT.

Mr. Vogel also challenges the circuit court's grant of summary judgment in favor of Mr. Hillman on Count IX of the complaint, for quantum meruit. The circuit court expressed three reasons for its entry of summary judgment on Count IX: (1) quantum meruit is a measure of recovery for either the breach of an implied-in-fact contract or an unjust enrichment claim, not an independent cause of action; (2) for the same reasons that

[20] In *Goldstein*, the majority concluded that the alleged reliance of the plaintiffs was unreasonable because, at least in part, all three of them "were lawyers with many years of practice under their respective belts" who "would have counseled a client that such representations were too vague to be relied upon, especially in the context of a million dollar deal." 159 Md. App. at 437. In dissent, Judge Sally Adkins disagreed, observing that, "[l]ike the proverbial shoemaker's children who go without shoes, lawyers often rely upon verbal, imperfectly defined, understandings with their partners, co-shareholders, bosses, and others." *Id.* at 463 (Adkins, J., dissenting). In any event, Messrs. Vogel and Hillman were not lawyers. Under the circumstances of this case, we do not view the sophistication of the parties as sufficient to determine that Mr. Vogel's purported reliance was unjustified as a matter of law.

Mr. Hillman was entitled to summary judgment on the breach of contract claims, a claim premised on breach of an implied-in-fact contract could not be sustained; and (3) to the extent it is premised on unjust enrichment, Count IX is duplicative of Count VIII. Mr. Vogel argues that the circuit court was incorrect both in its belief that quantum meruit is not an independent cause of action and in finding that he could not sustain a cause of action for breach of an implied-in-fact contract. The circuit court was correct on both points.

"[*Q*]*uantum meruit* is not truly a cause of action but a *measure of recovery* available in an action for contract implied-in-fact or for unjust enrichment."[21] *Dolan*, 215 Md. App. at 37-38. We have previously described the fact that quantum meruit can be used as the measure of damages in these two types of cases as being "[a] problem with quantum meruit." *Alternatives Unlimited, Inc. v. New Baltimore City Bd. of Sch. Comm'rs*, 155 Md. App. 415, 482-83 (2004). As explained in scholarly detail in *Alternatives Unlimited*, the problem arises from the way in which quantum meruit developed out of English common law, alternatively as a measure of damages in actions for breach of implied-in-fact contracts and as a measure of restitution in actions for unjust enrichment. *Id.* at 482-87. We need not explore further here the differences between those two. It is enough to recognize that

[21] Mr. Vogel bases his contrary position on *Hirsch v. Yaker*, which concerned a dispute over the unpaid balance owed on the cost of a kitchen a contractor had constructed for a couple. 226 Md. 580, 581 (1961). The Court of Appeals affirmed the trial court's ruling that the couple was entitled to "a *quantum meruit* recovery" for the unpaid balance. *Id.* at 582. Although the Court's opinion does not identify the specific cause of action the contractor brought, the Court describes quantum meruit as the basis for the recovery awarded, not the cause of action brought. *Id.* at 582-83.

wherever quantum meruit is employed, it is a "measure of recovery . . . [that] means the reasonable value of the work performed or the services rendered by a plaintiff for a defendant." *Id.* at 482. When employed in the context of an implied-in-fact contract, quantum meruit is the measure of damages owed for the breach of the contract. *Id.* at 484. When employed in the context of an action for unjust enrichment, quantum meruit is the measure of restitution, or, rather, the "gain to the defendant."[22] *Id.* at 484-85.

Here, Mr. Vogel brought separate causes of action for unjust enrichment (Count VIII) and quantum meruit (Count IX). In his unjust enrichment count, Mr. Vogel alleged that the services he provided conferred a benefit upon Mr. Hillman and the Appellee LLCs that they were aware of and accepted, and that it would be inequitable to permit them to keep that benefit. In his quantum meruit count, Mr. Vogel alleged that the services he provided conferred substantial benefits on Mr. Hillman and the Appellee LLCs that they accepted under circumstances that reasonably notified them that Mr. Vogel expected to be paid for his efforts.

[22] As we explained in *Alternatives Unlimited*, "[t]he reasonable value of the work or services performed by the plaintiff is clearly an apt measure of the plaintiff's damages when the claim is based on an implied-in-fact contract." 155 Md. App. at 486. The utility of that measure of damages is "[l]ess evident" in unjust enrichment cases, where it is presumably useful primarily, if not only, "when the unjust enrichment of the defendant cannot otherwise be measured." *Id.* In such cases, however, "the reasonable value of the services is viewed through the prism of the defendant's gain or enrichment rather than through the prism of the plaintiff's loss. The dollar amount may be the same, but the theory of recovery is different." *Id.* at 486-87; *see also Dolan*, 215 Md. App. at 38 (stating that "in an action for contract implied-in-fact, *quantum meruit* is the customary or market price of the plaintiff's services, whereas in an unjust enrichment claim, *quantum meruit* is the actual value realized by the defendant").

As the circuit court recognized, to the extent Count IX was a claim for restitution, it is duplicative of Count VIII, which survived summary judgment and remains pending. *See Alternatives Unlimited*, 155 Md. App. at 475 (stating that a claim for unjust enrichment or quasi-contract is not different from restitution; it is a form of restitution). It was thus unnecessary to maintain both counts, and the court did not err in dismissing one as duplicative. *See id.* at 488 ("One Unjust Enrichment count is enough; it need not be pled twice.").

To the extent Count IX was a claim for damages based on an implied-in-fact contract, we agree with the circuit court that the claim failed as a matter of law. "A contract implied in fact is actually a contract," *id.* at 478, which "arises from mutual agreement and intent to promise, when the agreement and promise have simply not been expressed in words," *see* 1 Richard A. Lord, Williston on Contracts § 1:5, at 20-21 (4th ed. 2002). Thus, "a contract implied-in-fact arises from actions implying definite terms,"[23] *Dolan*, 215 Md. App. at 37 (emphasis omitted), and necessarily depends on the mutual assent of the parties, a meeting of the minds regarding the material terms of the agreement, and a manifestation of an intent to be bound, *see Alternatives Unlimited*, 155 Md. App. at 478. The difference between an express contract and one that is implied-in-fact is the mode of proof. *Id.* at 478-79. Whereas an express contract is proven by the parties' oral or written words, a contract implied-in-fact is proven by circumstantial evidence. *Id.* at 479; *see also id.* at

[23] By contrast, an unjust enrichment or quasi-contract claim "arises from" the parties' conduct or "actions that do not imply definite terms." *Dolan*, 215 Md. App. at 37.

471 (stating that contracts implied-in-fact developed as "unexpressed but actual contracts that could be inferred from the actions of the contracting parties").

The circuit court was correct in ruling that, as a matter of law, Mr. Vogel's count for breach of an implied-in-fact contract fails because he has not identified evidence of either contractual terms that are sufficiently definite to be enforceable or a manifestation of an intent to be bound by such terms. Mr. Vogel has not identified any circumstantial evidence that would bridge the gaps we identified above in his claims based on an express contract. The work that Mr. Vogel actually performed in developing the Conference Center Hotel might help him prove his claim for unjust enrichment, but it cannot retroactively establish the terms of an implied-in-fact contract.[24]

In sum, we affirm the circuit court's entry of summary judgment on Count IX because: (1) to the extent that count is premised on breach of an implied-in-fact contract, it fails as a matter of law; and (2) to the extent that count is premised on unjust enrichment, it is duplicative of Count VIII.

[24] Mr. Vogel's breach of an implied-in-fact contract claim with respect to the Cambria Hotel fares no better. Our decision reversing the award of summary judgment with respect to the breach of contract claims related to that hotel was based on the deal the parties allegedly struck in December 2016. Mr. Vogel has not identified any circumstantial evidence that would support the existence of an implied contract after that time, if a trier of fact were to conclude that the parties did not reach an express agreement, and quantum meruit damages are not available for breach of an express contract. *See County Comm'rs of Caroline County v. J. Roland Dashiell & Sons*, 358 Md. 83, 98 n.8 (2000) ("A party to a valid express contract is bound by the provisions of that contract, and may not disregard the same and bring an action on an implied contract relating to the same matter, in contravention of the express contract." (quoting *Chandler v. Wash. Toll Bridge Auth.*, 137 P.2d 97, 103 (Wash. 1943))).

V. THE COURT MUST RECONSIDER MR. VOGEL'S MOTION FOR LEAVE TO AMEND AS TO THE COUNTS CONCERNING THE CAMBRIA HOTEL.

Finally, Mr. Vogel appeals the circuit court's decision to deny his motion for leave to amend to add 11 additional parties involved in the two hotel deals. Mr. Vogel argues that he learned about the interests of these other parties only late in discovery,[25] that he had a right to amend under Rule 2-341 because it was more than 30 days before the trial date, and that the parties he sought to add are necessary to the declaratory judgment counts under Rule 2-211 and § 3-405 of the Courts and Judicial Proceedings Article. Alternatively, Mr. Vogel argues that the court should have granted his motion under a discretionary standard because leave to amend should be freely granted, and the other parties would not have been prejudiced by amendment at that time. In light of our decision to reverse in part the court's entry of summary judgment against Mr. Vogel, we will affirm in part and vacate in part the court's denial of leave to amend, which the court should revisit on remand if Mr. Vogel again seeks that relief.

We review a circuit court's ruling on a motion for leave to amend for abuse of discretion. *Higginbotham v. Pub. Serv. Comm'n of Md.*, 171 Md. App. 254, 275-76 (2006); *McMahon v. Piazze*, 162 Md. App. 588, 598 (2005) ("[T]he circuit court's decision to deny leave to amend will be reversed only upon a finding that the court abused that discretion.").

[25] Mr. Vogel filed his Complaint on July 21, 2017; the court issued its first scheduling order on April 12, 2018; and because of delays, he first took depositions in May 2019. Mr. Vogel sought to amend his complaint on July 19, 2019, with trial set to begin on September 16, 2019.

The two hotel projects have different (although overlapping) sets of investors. The majority stake in both of the Appellee LLCs is held by Suzanne, LLC, an entity established by Mr. Hillman during his lifetime through a revocable trust, but which is now owned solely by that trust. Suzanne, LLC owns a roughly 52 percent interest in The Hotel at UMCP, LLC (owner of the Conference Center Hotel) and a 74.5 percent interest in 8321 College Park Hotel, LLC (owner of the Cambria Hotel). Two other entities, Izzo Master Limited Partnership ("Izzo Master") and The Gallows Corporation,[26] own the remaining interests in 8321 College Park Hotel, LLC, and they also own interests in The Hotel at UMCP, LLC. Eight other entities own additional interests in The Hotel at UMCP, LLC. Mr. Vogel's amended complaint would have named all 11 of these entities as defendants.

As an initial matter, the circuit court was correct that Mr. Vogel could not amend his complaint as of right at the time he attempted to do so. Rule 2-341 provides that "[a] party may file an amendment to a pleading without leave of court by the date set forth in a scheduling order or, if there is no scheduling order, no later than 30 days before a scheduled trial date[.]" Here, however, there was a scheduling order; in fact, there were at least three scheduling orders. In the first, the court set a deadline by which the parties could amend without leave of court of 60 days before the August 6, 2018 pre-trial conference. In the subsequent scheduling orders, both issued after that deadline had already passed, the court did not set a new deadline. The parties were therefore required to seek leave for any

[26] During his lifetime, Mr. Hillman controlled The Gallows Corporation, which owned a 0.5 percent interest in the Cambria Hotel.

subsequent amendments. *See Asmussen v. CSX Transp., Inc.*, 247 Md. App. 529, 546-47 (2020) (discussing a court's ability to set and enforce pre-trial deadlines under Rule 2-504).

Turning to Mr. Vogel's contention that the court abused its discretion in denying his motion for leave to amend, the circuit court based that decision in part on its view that amendment would have been futile in light of its summary judgment rulings. On appeal, we have affirmed the circuit court's judgment with respect to all the counts through which Mr. Vogel sought an ownership interest in The Hotel at UMCP, LLC. As a result, we agree with the circuit court that amendment of the complaint would be futile to the extent that Mr. Vogel sought to add those eight entities with a non-controlling interest only in The Hotel at UMCP, LLC.[27] *See RRC Ne., LLC v. BAA Md., Inc.*, 413 Md. 638, 673-74 (2010) (stating that a trial court should strike or deny an amended pleading if it "would be futile because the claim is flawed irreparably"). We will therefore affirm the court's denial of leave to amend to the extent that Mr. Vogel sought leave to add those eight parties.

However, because we have reversed the circuit court's judgment with respect to the analogous counts related to 8321 College Park Hotel, LLC, and because the procedural status of the case will be different on remand than at the time the court originally denied the motion for leave to amend, we think it prudent to vacate the circuit court's denial of the motion for leave to amend with respect to Mr. Vogel's request to add as parties Suzanne,

[27] Those entities are: Bobys Family Limited Partnership; Edward J. Lenkin, TOD Revocable Trust; Goldblatt Family, LLC; The Kenneth J. Feld 2006 Revocable Trust; NAJ, LLC; TZL Master Limited Partnership; Steven A. Michael Living Trust; and Cindy N. Michael Living Trust.

LLC, Izzo Master, and The Gallows Corporation. On remand, if Mr. Vogel again seeks leave to amend to add those entities, the court should consider the motion anew.

CONCLUSION

In summary, for the reasons discussed:

- We affirm the circuit court's judgment on Counts I, III, and IV, with respect to the alleged breach of contract concerning the Conference Center Hotel, and Count IX, for quantum meruit.
- We reverse and remand the circuit court's judgment on Counts II, V, and VI, with respect to the alleged breach of contract concerning the Cambria Hotel, and Count VII, for negligent misrepresentation.
- We affirm in part the circuit court's ruling denying Mr. Vogel's motion for leave to amend, to the extent he sought to add the eight new parties with interests solely in The Hotel at UMCP, LLC; and otherwise vacate the circuit court's denial of that motion.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE SPLIT EVENLY BY APPELLANT AND APPELLEES.