UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

Nos. 0651 and 2023

September Term, 2014

CONSOLIDATED CASES

O.J.B./MID-ATLANTIC REALTY JV, LLC

v.

GNRW PROPERTIES, LLC, ET AL.

Meredith,
Arthur,
Sharer, J. Frederick
(Retired, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: August 4, 2016

This case presents a dog's breakfast of arguments and allegations concerning a commercial ground lease in Bethesda. At its core, the case involves an assertion that the current lessee, O.J.B./Mid-Atlantic Realty IV LLC ("O.J.B."), has an option to lease certain properties adjacent to the property that it has leased. To enforce the alleged option and other, related claims of right, O.J.B. filed suit against the owner of the properties, GNRW Properties LLC ("GNRW"), and the current lessor, Bethesda Marvels LLC ("Marvels").

On a motion for judgment at the end of a bench trial, the circuit court rejected O.J.B.'s claims in their entirety. Later, the court denied a contractual claim for attorneys' fees asserted by GNRW and Marvels.

O.J.B. appealed, and GNRW and Marvels cross-appealed. We affirm.

THE FACTS

We recount the pertinent facts in the light most favorable to GNRW and Marvels, the parties that prevailed below. *Green v. McClintock*, 218 Md. App. 336, 341 (2014); *L.W. Wolfe Enters., Inc. v. Maryland Nat'l Golf L.P.*, 165 Md. App. 339, 343 (2005). Those facts are as follows:

A. The Ground Lease

In 1982 Abraham Morrison owned a number of lots at and around the intersection of Glenbrook Road and Rugby Avenue in downtown Bethesda. In a 104-page lease dated as of January 1, 1982 (the "Ground Lease"), Morrison leased several of those lots, for a term of 60 years, to Survival Technologies, Inc. ("STI").

The Ground Lease specifically identified the "Demised Premises" as Lots 6, 7, and A in a subdivision known as "Northwest Park" and as Lots 431, 432, 433, and 434, and the westerly half of Lot 435 in the subdivision known as "Woodmont." It envisioned that STI would construct an office building on the Demised Premises. Despite its length and complexity, the Ground Lease did not contain an integration clause.

At some point in the early 1980s, STI constructed a two-story office building on the site. The building remains in place today. Its address is 8101 Glenbrook Avenue.

B. Section 10.1(j)

Section 10.1(j) of the Ground Lease refers obliquely to an option that would entitle the lessee to lease "certain" adjacent parcels:

> Lessee [STI] has a valid and binding option to lease certain parcels adjacent to the Demised Premises (hereinafter the "Option Property.") If Lessee exercises said option, Lessee plans to erect a building on the Option Property that will be physically integrated with the building it plans to erect on the Demised Premises. Lessee also plans to erect building [sic] on the Demised Premises in such a manner that, if the permitted height limit is increased, Lessee will add to the building on the Demised Premises to a height of approximately five stories.

After this reference to an option, section 10.1(j) continues with some vague language about what might occur if zoning requirements change:

> Lessor consents to the concept of the changes described in the preceding paragraph. Lessor also consents to the concept of the more general notion that, if the zoning requirements relating to the Demised Premises and the Option Property are changed over time so as to permit the construction of a larger building on such property, Lessee may build a larger building. (These consents would be subject, in all cases, to the other specific requirements of this Lease, including the provisions of this Section 10.)

C. The Option to Lease

Although the Ground Lease specifically identified the Demised Premises by lot numbers, the name of the subdivisions in which those lots were located, and the square-footage of those lots, the Ground Lease did not identify the location or square-footage of what section 10.1(j) called the "Option Property." Instead, the Ground Lease spoke only of "certain parcels adjacent" to the Demised Premises. The Ground Lease contained no language actually granting an option, nor did it specify the time period during which the lessor could exercise the option, the manner in which the lessor had to exercise the option, or the amount of rent that the Lessor would have to pay for the property subject to the option.

The missing terms are contained in a separate option agreement, dated April 20, 1982, between Morrison and STI (the "Option to Lease"). The Option to Lease specifically described the square-footage of the Option Property (21,905.87 square feet); it recited the consideration for the Option to Lease (the grant of 1,000 shares in STI); it set a four-year term for the option and allowed for a six-year extension; it specified the amount of additional rent that the lessor would have to pay if it exercised the option (just under $66,000 in 1981, with a CPI escalation clause, plus charges and impositions, such as property taxes); it specified the manner by which the lessor had to exercise the option (in writing, within the option period, while tendering the annual rent a year in advance); it provided that the option expires by its own terms if the lessor does not exercise it within

the four-year term plus any extensions; and, unlike the Ground Lease, it contained an integration clause.

Attached to the Option to Lease was a drawing illustrating that the Option Property consists of the eastern half of Lot 435 and the entirety of Lots 436, 437, 438, 439, 440, 441, and 442. Those lots extend eastward along Rugby Avenue, away from the intersection with Glenbrook Road. The Option to Lease was not an exhibit to the Ground Lease.

D. Recordation

STI recorded the Ground Lease, but neither party recorded the Option to Lease. The Real Property Article did not require that the Option to Lease be recorded, as it had a duration of less than seven years. Nor was either party contractually obligated to record it.

E. Lot 633

Later in 1982, Morrison resubdivided his several lots to combine the Demised Premises and the Option Property into a single lot. As a result of the resubdivision, a new Lot 633 comprised what had formerly been Lots 6, 7, and A, Lots 431, 432, 433, and 434, and the westerly half of Lot 435 (the Demised Premises) and the eastern half of Lot 435 and the entirety of Lots 436, 437, 438, 439, 440, 441, and 442 (the Option Property).

F. The Expiration of the Option to Lease

STI did not exercise the Option to Lease during the four-year term and did not exercise its right to extend the option for an additional six-year term. On December 12,

1989, STI wrote to Morrison to confirm that it had not exercised or extended the option and that the option had, therefore, expired by its own terms.

G. The 1999 Amendment of Ground Lease

On January 27, 1999, Morrison and the then-current lessee signed a document titled "Amendment of Ground Lease," which was later recorded in the land records in Montgomery County. Among other things, the Amendment of Ground Lease amended the definition of the real property that was subject to the Ground Lease to clarify that the Ground Lease did not extend to all of Lot 633, but only to 25,733 square feet of it. The Amendment of Ground Lease specifically described that property by metes and bounds rather than by lot numbers that no longer existed (as the Ground Lease did).

The parties affirmed that the Amendment of Ground Lease described "all of the real property that is subject to the terms and conditions of the Ground Lease." The parties also affirmed that, except as expressly stated in the Amendment of Ground Lease, "all terms, conditions and obligations as originally set forth in the Ground Lease remain in full force and effect, without reservation or revision."[1]

[1] In an unrecorded estoppel certificate in 2003, Morrison's personal representative, as lessor, represented that, except as set forth in the 1999 Amendment of Ground Lease, the Ground Lease as amended had not been assigned by the lessor, modified, amended, or supplemented. In that document, the personal representative also represented that the Ground Lease as amended represented the entire agreement between the parties as to the leasing of the land.

H. O.J.B.'s Acquisition of the Lessee's Rights

Over the ensuing 25 years, both the lessor and the lessee assigned their respective interests to others. By 2006, GNRW was the owner and lessor, and Glenbrook Office LLC was the lessee. The lessee's principal, Ernest L. Marcus, was, on occasion, a business partner of O.J.B.'s principal, Stuart D. Schooler.

Schooler became interested in the property in May 2006. He investigated the property. He obtained a copy of the Ground Lease. He researched the land records. He explored the viability of expanding the existing building. He concluded that the building would support a five-story structure. He ascertained that a single entity owned all of Lot 633. He claims to have asked his occasional partner, Marcus, about the option mentioned in the Ground Lease, but Marcus said that he had not focused on it.

On August 1, 2006, O.J.B. and Glenbrook Office LLC entered into a purchase and sale agreement, through which O.J.B. acquired the office building at 8101 Glenbrook Road and the rights under the Ground Lease. The agreement recites a purchase price of just under $5.9 million.

Meanwhile, Schooler tried to communicate with the lessor, GNRW, but one of its owners was in Australia. Schooler succeeded in communicating with GNRW's agent. The agent did not tell Schooler about any documents that might affect the Ground Lease, such as the expired and unrecorded Option to Lease.

GNRW, as lessor, signed a document concerning the assignment to O.J.B. In that document GNRW "approved" the form and content of various exhibits, which included a

description of the Ground Lease. The description referred to the original Ground Lease and to the 1999 Amendment, among other documents, but it did not mention the expired Option to Lease.

I. O.J.B.'s Attempts to Rent the Option Property and to Extend the Term of the Ground Lease

On January 3, 2007, Schooler wrote to a GNRW representative, expressing O.J.B.'s interest in entering into a ground lease for the 21,000 square feet of adjacent property, which he identified as the part of Lot 633 with the addresses of 4901 and 4907 Rugby Avenue. Schooler proposed that O.J.B. would lease the additional space on the same terms and conditions as those in the Ground Lease, which would result in an additional $153,000 in annual rent. Schooler also proposed that the new ground lease would last until 2057 and that O.J.B. and GNRW would extend the existing Ground Lease until 2057 as well. (Without an extension, the Ground Lease would expire at the end of 2041.) Schooler did *not* claim that the Ground Lease gave O.J.B. an option to lease that adjacent property. GNRW did not accept Schooler's proposal.

In approximately April of 2009, O.J.B. asked GNRW to consider extending the Ground Lease. O.J.B. did not claim to own an option to lease the adjacent property. GNRW did not accept Schooler's proposal.

In a letter dated September 10, 2010, O.J.B., through Schooler, wrote to GNRW's agent, asking, again, to extend the Ground Lease on the existing terms until 2057. O.J.B. expressed an interest in constructing 14,500 square feet of additional space above the existing two-story building at 8101 Glenbrook Road. In addition, O.J.B. mentioned that

the Ground Lease was at least 15 percent above the market rate. Although the letter quoted section 10.1(j) of the Ground Lease, which mentions the option, O.J.B. did *not* claim to own an option to lease the adjacent property. GNRW did not accept Schooler's proposal to extend the Ground Lease.

J. O.J.B.'s Purported Exercise of an Option

In a letter dated October 2, 2012, O.J.B., through Schooler, informed GNRW that it was "delighted" to give notice that it was exercising an option contained in section 10.1(j) of the Ground Lease. O.J.B.'s letter defined the property subject to the option as the entire balance of Lot 633, totaling 20,473 square feet, and known as 4901 and 4907 Rugby Avenue. Although O.J.B. had proposed to rent that same property for an additional $153,000 per year in Schooler's letter of January 3, 2007, it now took the position that it was obligated to pay only the carrying costs on the adjacent property – real estate taxes, personal property taxes, and utility bills. O.J.B. expressed its intention to demolish the existing improvements on the "Option Property," to develop new improvements on it, and to integrate the new improvements into the existing structure on the "Demised Premises."

GNRW responded in a letter dated November 27, 2012, in which it rejected O.J.B.'s claim to have an option. In that letter, GNRW informed O.J.B. that the Ground Lease referred to the separate Option to Lease between STI and Morrison, by which STI, for consideration, had acquired a time-limited option to rent what is now the easterly portion of Lot 633 in exchange for additional rental payments. GNRW attached STI's

letter of December 12, 1989, which confirmed that the unrecorded option had expired decades earlier. In addition, GNRW observed that O.J.B. itself had recognized that it had no option in 2007, when it proposed to rent the adjacent premises for an additional $153,000 per year.

K. The Assignment to Marvels

On September 1, 2013, GNRW entered into a ground lease for the entirety of Lot 633 with Bethesda Marvels, LLC ("Marvels"). As a consequence, Marvels effectively replaced GNRW as the lessor of the Demised Premises. At the same time, Marvels became the lessee of the Option Property. GNRW retained its fee simple ownership.

THE PLEADINGS

O.J.B. commenced this case on January 31, 2013. For purposes of this appeal, the operative pleading is the second amended complaint, which O.J.B. filed on December 2, 2013. The second amended complaint contained five counts.

Count I involved an effort to enforce the option that O.J.B. claimed to have found in section 10.1(j) of the Ground Lease. In that count, O.J.B. requested a decree of specific performance that would require Marvels, the new lessor, to lease the Option Property to O.J.B. "on the terms and conditions contained in the Ground Lease." In the alternative, Count I requested an award of $20 million in damages against GNRW, representing the losses that O.J.B. claimed to have suffered as a result of its inability to lease and develop the Option Property.

Count II concerned the concept of floor-area ratio or "FAR," in which the square-footage of a proposed structure is confined to some multiple of the square-footage of the real property on which it is constructed.[2] As an alternative to the relief requested in Count I, Count II requested a declaration that O.J.B. could use all of the square-footage of the Option Property in calculating the maximum height and density of the structure that it planned to construct on the Demised Premises. In the alternative, Count II requested an award of $20 million in damages to compensate O.J.B. for the loss of the right to use the square-footage from the Option Property to calculate the height and density of the proposed structure.

Count III concerned GNRW's assignment of its rights as lessor to Marvels. As an alternative to the other relief that it had requested, O.J.B. alleged that the assignment had interfered with its development rights and resulted in damages. Although the allegations were sketchy, the alleged damages appear to have included the loss of O.J.B.'s ability to build on the Demised Premises to the maximum limits of height, density, and area permitted under the applicable law.

Count IV alleged that GNRW failed to disclose the existence of the documents that released the option. On the basis of the alleged nondisclosure, O.J.B. asserted a claim for negligent misrepresentation. It claimed $20 million in damages.

[2] For example, if the property consists of 10,000 square feet, and the FAR is 2:1, the owner can construct a structure of 20,000 square feet.

Count V alleged that GNRW had breached the Ground Lease by assigning its interest as lessor to Marvels. It requested a declaration that GNRW could not assign its interest to Marvels and that the ground lease with Marvels was void. In the alternative, it requested a judgment in the amount of $20 million to compensate O.J.B. for the loss of development rights allegedly resulting from the ground lease with Marvels.

THE CIRCUIT COURT'S FINDINGS

A bench trial commenced in the circuit court on March 24, 2014. Over the next four days, O.J.B. presented its case.

At the end of O.J.B.'s case, GNRW and Marvels moved for judgment under Md. Rule 2-519(b), which permits the court, "as the trier of fact, to determine the facts and to render judgment against the plaintiff" or to "decline to render judgment until the close of all the evidence." Notably, even if a rational factfinder could find in the plaintiff's favor on the basis of the evidence presented in the plaintiff's case, a court may grant a motion for judgment under Rule 2-519(b) as long as the court itself is unpersuaded by the plaintiff's evidence. *See, e.g.*, *Lettering Unlimited v. Guy*, 321 Md. 305, 308 (1990).

The trial court delayed its decision on the motion for judgment, so that it could become familiar with the case law and review the evidence. In an oral ruling in open court on April 30, 2014, the court announced its intention to grant the motion for judgment. From the lengthy and detailed explanation of the decision, it is plain that the court was utterly unpersuaded by O.J.B.'s presentation.

A. Count I

In Count I O.J.B. asked the court to enforce an option that it claimed to have on the Option Property by way of section 10.1(j) of the Ground Lease. The court did not accept O.J.B.'s contentions.

In its oral opinion, the court observed that the Ground Lease lacked many of the essential terms of an option: it contained no language granting an option; it did not clearly identify the property that was subject to the option; it did not disclose the length of the option, the method of exercising the option, or the consideration for the option; and it said nothing about the amount of rent that the lessor would have to pay on the additional property if it exercised the option. By contrast, all of those terms were contained in the separate Option to Lease, which had expired years before O.J.B. acquired an interest in the Ground Lease.[3]

O.J.B. contended that it was a bona fide purchaser whose option rights under the recorded Ground Lease were unaffected by the unrecorded Option to Lease. The court rejected that contention, expressly finding both that O.J.B. had not "sustained its burden of proof" and that O.J.B. "was on inquiry notice" about the Option to Lease. The court repeated its observation that "essential details" of an option were "glaringly missing" from the Ground Lease, the "most glaring omission" being the lack of any description of the Option Property.

[3] The court noted that the Ground Lease contained no integration clause, but it did not clearly attribute the absence of an integration clause to the need to look to the Option to Lease in order to fully explain the terms of the Ground Lease.

Although O.J.B. had made "creative arguments" to conjure the essential details into existence, the court found the arguments to be "strained" and "unpersuasive." There were, said the court, "so many material defects" in the description of the option in the Ground Lease as "to make it impossible to believe that the [G]round [L]ease alone granted a separate option to lease." Schooler, the court said, was a very experienced developer who had testified as an expert in this very case, but "even [a] novice in the real estate industry" "would have to wonder" how one could have an option on real property in downtown Bethesda with no description by metes and bounds, no lot numbers, no addresses, and no references to any surveys. "No person of ordinary intelligence," the court found, "would believe that an option to lease property would be so loosely defined" – "certainly not in Bethesda business district" and certainly not between two sophisticated parties.

Repeating its observation that the Ground Lease did not define the duration of the option, the court rejected O.J.B.'s contention that the option would have lasted for the entire 60-year term of the lease. O.J.B.'s contention, the court said, "defies credulity" and was "just not persuasive." Later, the court characterized O.J.B.'s argument as "fanciful thinking" – "[c]reative, but too good to be true."

The court was similarly unpersuaded by O.J.B.'s contention that because the Ground Lease did not specify what rent it would pay for the Option Property after it exercised the option, O.J.B. would not have been required to pay anything other than the taxes and utility charges on that portion of the property. "Do they really believe," the

court asked incredulously, that "there w[ould] be no additional[] rent required under this option . . . for 60 years?" "In downtown Bethesda," the court said, "bells should have been ringing."

The court went on to observe that, "at first," O.J.B. did not even recognize that it had the alleged option. The court cited O.J.B.'s letter of January 3, 2007, in which it offered to lease the adjacent 21,000 square feet for an additional $153,720 a year.[4] According to the court, "[t]he January 2007 letter . . . suggests that in 2007 [O.J.B.] had another understanding of the [G]round [L]ease" – i.e., one in which O.J.B. could get access to the adjacent property only by persuading GNRW to enter into a costly new lease, and not merely by exercising an option. The court also cited O.J.B.'s letter of September 10, 2010, in which it asked GNRW to extend the term of the Ground Lease at an above-market rate, but made no mention of having an option. The court found it notable that O.J.B. did not claim to have an option until after GNRW had rebuffed several requests to lease the adjacent property and to extend the duration of the Ground Lease.

Additionally, the court found that the lack of an integration clause in the Ground Lease, combined with the lack of material terms for a valid option, "should have []rung warning bells." "There was," the court said, "other evidence to be had" – specifically, the Option to Lease, which contained all of the material terms of the option.

[4] The court mistakenly stated that O.J.B. proposed to pay an additional $188,480 in rent for the adjacent 21,000 square feet; the $188,480 figure represented the sum that O.J.B. was paying for the Demised Premises at that time.

In addition to finding that O.J.B. had not sustained its burden of proving that it was a bona fide purchaser that took without notice of the unrecorded Option to Lease, the court found that limitations barred O.J.B.'s claims. From its review of the Ground Lease in 2006, the court said, O.J.B. knew or should have known to inquire further about the terms of the option, including the possibility that those terms were contained in an unrecorded option of less than seven years' duration. The court charged O.J.B. with the knowledge that it would have gained – knowledge of the contents of the Option to Lease – had it conducted the inquiry that it was obligated to conduct in 2006, more than six years before it filed suit. Although Schooler was unable to meet with GNRW's owners before O.J.B. acquired its interest in the Ground Lease, "nothing prevented [O.J.B.] from making a formal written request for verification or information with respect to this option."

Finally, the court rejected O.J.B.'s claim for specific performance of the option in the Ground Lease. The court reasoned that specific performance would require a sufficient description of the property, but that the Ground Lease, which referred only to "certain parcels adjacent," contained no intelligible description of the property that was subject to option.

B. Count II

In Count II O.J.B. claimed the contractual right to use all of the square-footage of the Option Property in calculating the FAR – the permissible height and density – of a

proposed structure on the Demised Premises. The court found that O.J.B. had not proved its claim by a preponderance of the evidence.

Section 10.1(j) of the Ground Lease envisioned that the lessee might construct a building of up to five stories on the Demised Premises. The applicable FAR regulations, however, apparently would not have permitted a structure of that height on a property with the square-footage of the Demised Premises alone. Consequently, O.J.B. argued that Morrison, the lessor, must have intended to allow the lessee to use some of the square-footage from the Option Property in calculating the permissible height and density of the structure on the Demised Premises.

In fact, the existing two-story building does exceed the permissible FAR by a small margin: the regulations permit a density or FAR of 1:1, but the building has a FAR of 1.08:1. O.J.B.'s expert testified that this additional density must have come from the Option Property. The court, however, discounted his testimony, saying, "[W]e don't know how the demised zone had more FAR than [the regulations] permitted."

The court observed that under the Option to Lease Morrison was willing to lease the Option Property to the lessor only upon the payment of substantial amounts of additional rent. Under O.J.B.'s theory, however, the lessor would compromise any ability to develop the Option Property because it would forfeit all of the square-footage of that property, for no consideration. The court's statements imply a conclusion that O.J.B.'s theory was economically implausible.

The court went on to observe that the Ground Lease itself is silent with regard to the putative transfer of density rights from the Option Property to the Demised Premises. Section 10.1(j) discusses a hypothetical contingency under which the lessee will build a five-story building "if the permitted height limit is increased." Section 10.1(j) also discusses the lessor's "consent" to various "concepts," including the "more general notion" that the lessee "may build a larger building" if new zoning requirements permit one. This court characterized this as "pretty loose language," which "certainly does not support [O.J.B.'s] claim for the balance of the available FAR from the [Option Property]."

O.J.B. had argued that in 1982, when Morrison combined the Demised Premises and the Option Property into a single lot, Lot 633, he must have intended to permit the lessor of the Demised Premises to use the square-footage of the Option Property in calculating the height and density of the structure on the Demised Premises. The court rejected that argument, citing evidence of "a variety of other reasons for lot consolidation," such as convenience or ease in the building-application process. The court found "no evidence and no documentation" of an agreement that the lessee could use the square-footage of Lot 633 in its entirety in calculating the permissible height and density of a structure on the Demised Premises alone. The court expressly found no language granting any such right.[5]

[5] Much as the court found that limitations barred Count I, so too did it find that the Statute of Frauds barred Count II. *See* Md. Code (1974, 2010 Repl. Vol.), § 5-104 of the Real Property Article ("[n]o action may be brought on any contract for the sale or (cont.)

C. Count III

In Count III O.J.B. alleged that by assigning its rights as lessor to Marvels, GNRW had interfered with O.J.B.'s development rights. The court treated Count III as a variation on Count V, in which O.J.B. alleged that GNRW had breached the Ground Lease by assigning its rights as lessor to Marvels. Because the court granted the motion for judgment on Count V (*see infra* at 20-21), it also granted a motion for judgment on Count III.

D. Count IV

In Count IV, O.J.B. alleged that GNRW had negligently misrepresented the continued viability of an option by failing to disclose the documents reflecting the release of the option. The court found that O.J.B. had failed to prove by a preponderance of the evidence that it had justifiably relied on any alleged misrepresentations. *See Weisman v. Connors*, 312 Md. 428, 444 (1988) (to establish a claim for misrepresentation, a plaintiff must establish, among other things, that he or she justifiably took action in reliance on the misrepresentations). The court also found that O.J.B.'s contributory negligence barred its claims.

disposition of land or of any interest in or concerning land unless the contract on which the action is brought, or some memorandum or note of it, is in writing and signed by the party to be charged or some other person lawfully authorized by him"). Absent a writing, "signed by the party to be charged," and conveying the density rights on the Option Property to the lessor of the Demised Premises, the court would not accept O.J.B.'s claims in Count II.

The court recognized that in an arm's-length transaction, such as O.J.B.'s acquisition of the rights in the Ground Lease, a party like GNRW must speak truthfully when it actually speaks, but it ordinarily has no affirmative disclosure obligation – i.e., no duty to volunteer or disclose information. *See, e.g.*, *Lubore v. RPM Assocs., Inc.*, 109 Md. App. 312, 329-30 (1996). If, however, a party makes statements that are incomplete and potentially misleading, the party may have an obligation to volunteer or disclose additional information to clarify what it has said. *See id.* at 330-31.

In approving the assignment to O.J.B., GNRW had represented that the terms, conditions, and obligations of the original Ground Lease remained in effect. On the basis of that representation, the court accepted the premise that GNRW could be faulted for making partial and fragmentary disclosures about the status of the alleged option in the Ground Lease. Nonetheless, the court found that O.J.B. "could have and should have made further inquiry" about "the particulars of any option."

The court explained that "[t]he [G]round [L]ease itself had serious warnings signs, which should have been apparent to most people, and particularly those persons with the sophistication and experience of Mr. Schooler." As it had before, the court mentioned the lack of any legal description of the Option Property, the lack of any reference to the additional rent that the lessee would have to pay if it exercised the option, and the lack of any specified duration for the option. In view of these and other omissions in the Ground Lease's discussion of the option, the court concluded that O.J.B. could not have reasonably relied on a representation that it might still have some kind of option.

Similarly, the court concluded that O.J.B. was contributorily negligent in failing to request more information about the terms of the option. As before, the court cited the "glaring omissions" as to the option's "essential terms" and "the lack of [an] integration clause." O.J.B., the court found, "failed to heed the clear warning signs that something was not right, or more accurately that material terms were missing." Additionally, the court cited O.J.B.'s negligence in failing to investigate how it could somehow use the density from "an undefined option property for free."[6]

E. Count V

In Count V O.J.B. alleged that GNRW had breached the Ground Lease by assigning its interest as lessor to Marvels while retaining fee simple ownership of the land. The court found that O.J.B. had failed to sustain its burden of proof.

O.J.B. based its allegation on section 1.01(c) of the Ground Lease, which defines the term "Lessor." Section 1.01(c) states: "The term 'Lessor' shall mean Landlord, these terms being mutually interchangeable, and shall also mean only the owner for the time being of the Demised Premises." O.J.B. argued that the definition of "Lessor" prohibited GNRW from assigning its interest as lessor.

[6] At the conclusion of its remarks on Count IV, the court referred to the letter of January 3, 2007, in which Schooler proposed to pay an additional $153,720 per year to rent the same property that, he later said, O.J.B. had the option to lease at no expense other than the cost of the taxes and utility payments on the land. The court drew no clear conclusion, but it seemed to imply that, at least at first, O.J.B. did not believe that it had an option – and hence that O.J.B. did not in fact rely, justifiably or otherwise, on some representation that it did.

The court rejected O.J.B.'s contention that GNRW had, in effect, breached a definition. The court reasoned that if the definition of "Lessor" were interpreted to prohibit GNRW from assigning its interest as lessor unless it assigned its fee simple ownership of the land, section 1.01(c) would conflict with section 30.01 of the Ground Lease, which contemplates a separation between the lessor and the owner of the interest in fee simple.[7] The court cited *Julian v. Christopher*, 320 Md. 1, 9 (1990), which states that "[i]f a clause in a lease is susceptible of two interpretations, public policy favors the interpretation least restrictive of the right to alienate freely." On that basis, the court adopted the interpretation that permitted GNRW to assign the leasehold interest.

As an additional ground for its decision, the court found that even if GNRW had breached the Ground Lease by assigning its leasehold interest, the breach was not material. Among other things, the court relied on *Homa v. Friendly Mobile Manor, Inc.*, 93 Md. App. 337, 353 (1992), which states that "[e]ven when a third party assignee assumes the duties of the assignor who is the original party to the contract, the assignor remains liable under the contract and answerable in damages if the assignee's performance is not in strict fulfillment of the contract."

[7] Section 30.01 provides in pertinent part: "The fee title of the Lessor and leasehold estate of the Lessee shall at all times be separate and apart, and shall in no event be merged, notwithstanding the fact that this Lease or the leasehold estate created hereby, or any interest either thereof, may be held directly or indirectly by or for the account of any person who shall own the fee estate in the Demised Premises, or any portion thereof."

THE REQUEST FOR ATTORNEYS' FEES

GNRW and Marvels moved for an award of attorneys' fees. As the basis for an award, they cited section 20.11 of the Ground Lease. Section 20.11 states: "In the event Lessee breaches any of the terms or conditions of this Lease, Lessee shall pay Lessor's legal expenses and attorneys' fees incurred by Lessor in enforcing the Lease and in attempting to cure any of the Lessee's defaults."

On May 27, 2014, the court rejected the request for fees. It reasoned that O.J.B. did not "breach" the lease merely by advancing legal positions that the court did not accept.

OTHER DEVELOPMENTS AFTER THE ORAL RULING

The court made its oral ruling on the merits on April 30, 2014. At that time, however, it had not yet embodied its judgment in a separate document, as Rule 2-601(a) requires. Nor had it issued a written declaration of the parties' rights on the counts on which O.J.B. had requested a declaratory judgment. *See, e.g.*, *Union United Methodist Church, Inc. v. Burton*, 404 Md. 542, 549-50 (2008) (collecting numerous authorities for the proposition that, when a declaratory judgment action is brought and the controversy is appropriate for resolution by declaratory judgment, the court must enter a written declaratory judgment). In fact, at that time, the court had not yet fully adjudicated the dispute, because the contractual claim for attorneys' fees remained outstanding. *See Mattvidi Assocs. L.P. v. NationsBank of Virginia, N.A.*, 100 Md. App. 71, 78 n.1 (1994).

Nonetheless, despite the absence of separate documentation reflecting the judgment, a written declaratory judgment, and a complete adjudication of the issues in dispute, O.J.B. filed what it called a "motion to alter or amend the judgment" on May 9, 2014. The court denied the "motion to alter or amend the judgment" on May 30, 2014, three days after it denied the motion that O.J.B. be required to pay its adversaries' attorneys' fees.[8]

Although the court had still not entered a separate document reflecting its judgment on the claims in O.J.B.'s pleading or a written declaration of the parties' rights, O.J.B. filed a premature notice of appeal on June 4, 2014.

On July 7, 2014, the court embodied its oral rulings in a separate document that contained a written declaration of the parties' rights. That document became the final judgment.

On July 16, 2014, GNRW and Marvels filed a timely motion to alter or amend the judgment in one respect. In declaring the parties' rights, the court had initially written that "Lessee Plaintiff [O.J.B.] has no contractual right to use any unused FAR from the

[8] As GNRW and Marvels correctly recognized in their brief, O.J.B.'s "motion to alter or amend" was, at most, a motion to revise an interlocutory ruling. *See* Md. Rule 2-602(a) (in general, "an order or other form of decision, however designated, that adjudicates fewer than all the claims in the action . . . , or that adjudicates less than an entire claim . . . (1) is not a final judgment; (2) does not terminate the action as to any of the claims or any of the parties; and (3) is subject to revision at any time before the entry of a judgment that adjudicates all of the claims by and against all of the parties"); *Quartertime Video & Vending Corp. v. Hanna*, 321 Md. 59, 64 (1990) (an interlocutory order is subject to revision within the general discretion of the trial court until a final judgment is entered).

[Option] Property." GNRW and Marvels asked the court to amend that statement to say "Lessee Plaintiff [O.J.B.] has no contractual right to use any unused FAR from the [Option] Property, said unused FAR being all the FAR associated with the [Option] property other than what may have been used in fact to construct the existing STI Building on the Demised Premises circa 1982." (Emphasis in original.)

Over O.J.B.'s opposition, the court granted the motion to alter or amend and issued an amended judgment on August 22, 2014. The amended judgment changed the original judgment in only one respect: by adopting the precise, additional language that GNRW and Marvels had requested. In contravention of Rule 2-311(e), however, the court did not conduct a hearing before granting the motion to alter or amend.[9]

Recognizing that the court had failed to conduct the hearing, GNRW and Marvels filed a timely motion to alter or amend the amended judgment on September 2, 2014.[10] The second motion to alter or amend was identical to the first, except that it alerted the court to the need to conduct a hearing.

On October 21, 2014, the court conducted a hearing on the second motion to alter or amend. After rejecting O.J.B.'s argument that the premature notice of appeal had divested it of jurisdiction to consider the motion, the court entered a second amended

[9] The failure to conduct such a hearing can be harmless error. *See Green v. Taylor*, 142 Md. App. 44, 59-60 (2001).

[10] Although Tuesday, September 2, 2014, was the eleventh calendar day after the court issued the amended judgment, the motion was still timely under Rule 2-534, because the tenth day was Labor Day. *See* Md. Rule 1-203(a)(1).

judgment on November 18, 2014. In substance, the second amended judgment was identical to the first, except for a recitation that the court had issued it after conducting a hearing.

On November 20, 2014, O.J.B. filed a second notice of appeal. On November 25, 2014, GNRW and Marvels noted a cross-appeal from the court's denial of their request for attorneys' fees.

QUESTIONS PRESENTED

O.J.B.'s brief presents the following questions, which we quote:

1. Did the trial court err by utilizing a sophisticated purchaser standard and relying on evidence not in the record in finding that O.J.B. was not a *bona fide* purchaser of its lessee interest in the ground lease?

2. Did the trial court err in eschewing the ground lease's grant of a right to build additional floors in O.J.B.'s building on the leasehold and adopting a construction of the ground lease that rendered that express right nugatory?

3. Did the trial court err in finding that O.J.B. was contributorily negligent and did not justifiably rely on GNRW's representation where there were no facts known or apparent to O.J.B. at the time of its closing that suggested the existence of unrecorded documents?

4. Did the trial court err in disregarding the ground lease's unambiguous provision requiring that its lessor must also be the fee simple owner of the real property underlying the leasehold?

5. Did the trial court exceed its jurisdiction in amending its final judgment after O.J.B. filed a notice of appeal?

In their cross-appeal, GNRW and Marvels present one question: Did the circuit court err in ruling that GNRW [and Marvels] are not entitled to attorneys' fees? O.J.B. has moved to dismiss the cross-appeal.

We deny the motion to dismiss the cross-appeal and conclude that the circuit court did not err in any respect. Accordingly, we shall affirm the judgment in its entirety.

STANDARD OF REVIEW

In violation of Rule 8-504(a)(5), O.J.B.'s brief contains no discussion of the applicable standard of review. The omission is unsurprising because on most of the issues the standard of review does not favor O.J.B.

Four of O.J.B.'s five questions challenge the circuit court's decision to grant a motion for judgment at the end of the plaintiff's case in a bench trial. The disposition of such a motion is governed by Md. Rule 2-519(b), which provides in pertinent part that, "[w]hen a defendant moves for judgment at the close of the evidence offered by the plaintiff in an action tried by the court, the court may proceed, as the trier of fact, to determine the facts and to render judgment against the plaintiff . . . ."

Under Rule 2-519(b), a trial judge may evaluate the evidence, as though he or she were the jury, and draw his or her own conclusions as to the evidence presented, the inferences arising therefrom, and the credibility of the witnesses testifying. *See, e.g.*, *Lettering Unlimited*, 321 Md. at 308; *Homa*, 93 Md. App. at 358; *Pahanish v. Western Trails, Inc*., 69 Md. App. 342, 353 (1986). "Unlike a jury trial, the trial judge is not compelled to make any evidentiary inferences in favor of the party against whom the motion for judgment is made." *Bricker v. Warch*, 152 Md. App. 119, 135 (2003); *accord Pahanish*, 69 Md. App. at 353. Instead, "[t]he trial judge may reject the testimony of a

witness on grounds of credibility, even if it is uncontroverted by other evidence." *Homa*, 93 Md. App. at 358 (citing *P. Flanigan & Sons v. Childs*, 251 Md. 646, 652 (1968)).

"[W]e review the trial court's factfinding under Md. Rule 2-519(b) using the clearly erroneous standard." *Id.* (citing *Lettering Unlimited*, 321 Md. at 308); *accord Bricker v. Warch*, 152 Md. App. at 135-36. In ascertaining whether the trial court's factual conclusions were clearly erroneous, we decide "only whether there is any evidence legally sufficient to support the findings of the court." *Homa*, 93 Md. App. at 359. "[W]e assume the truth of all evidence and inferences fairly deducible therefrom that support the factual conclusions of the trial court[.]" *Id.* (citing *Pahanish*, 69 Md. App. at 354). It is almost impossible for a judge to be clearly erroneous when he or she is simply not persuaded of something. *Bricker v. Warch*, 152 Md. App. at 137.

O.J.B. makes little if any effort to argue that the circuit court's findings were clearly erroneous. Indeed, O.J.B. largely ignores the circuit court's findings. In their place, O.J.B. largely reiterates the arguments that the circuit court rejected. In effect, O.J.B. proceeds as though it were entitled to a de novo appeal in this Court. It is not, at least on the issues pertaining to the motion for judgment.

We do, however, conduct a de novo review of O.J.B.'s question about whether the circuit court exceeded its jurisdiction in amending its final judgment after O.J.B. filed its premature notice of appeal. *See, e.g., Pickett v, Sears, Roebuck & Co.*, 365 Md. 67, 77 (2001). Similarly, we conduct a de novo review of the cross-appeal concerning whether

the circuit court erred in ruling that GNRW and Marvels are not entitled to attorneys' fees. *See, e.g., Weichert Co. of Maryland, Inc. v. Faust*, 419 Md. 306, 317 (2011).

DISCUSSION

A. The Option

In Count I O.J.B. claimed that it could exercise an option under the Ground Lease notwithstanding that the unrecorded Option to Lease had expired at least 25 years earlier. In rejecting that claim, the circuit court found that Ground Lease did not contain the essential elements of an option and, as a consequence, that O.J.B. was on inquiry notice about the existence of the unrecorded Option to Lease. In reaching that decision, the court rejected O.J.B.'s contention that it was a bona fide purchaser that acquired its interest free and clear of the unrecorded Option to Lease.

The court's conclusion was by no means clearly erroneous. It was supported by an abundance of evidence, most notably the complete absence of any language by which the parties to the Ground Lease defined the terms of the alleged option. The Ground Lease did not grant an option, did not specify the property that was subject to the option, did not state the duration of the option, did not identify any consideration for the option, and did not establish the additional rent that the lessee would have to pay if it exercised the option and leased the additional (but unidentified property). It would be almost impossible to conclude that the court was clearly erroneous in finding O.J.B.'s position to be unpersuasive. *See Bricker v. Warch*, 152 Md. App. at 137.

Nonetheless, O.J.B. attacks that conclusion, arguing, first, that the circuit court held O.J.B. to too high a standard. O.J.B. appears to agree that, "[i]n determining whether a purchaser had notice of any prior equities or unrecorded interests, so as to preclude him from being entitled to protection as a bona fide purchaser, the rule is that if he had knowledge of circumstances which ought to have put a person of ordinary prudence on inquiry, he will be presumed to have made such inquiry and will be charged with notice of all facts which such an investigation would in all probability have disclosed if it had been properly pursued." *Fertitta v. Bay Shore Dev. Corp*., 266 Md. 59, 72 (1972). O.J.B. contends, however, that the circuit court held it to the standard of a sophisticated real estate developer, not to the standard of a person of ordinary prudence.[11]

O.J.B. fails to recognize that the demands of ordinary prudence are contextual: they expand or contract depending on the circumstances. In this case, the appropriate standard was that of an ordinarily prudent person engaged in a $5.9 million real estate transaction that involved the acquisition of a two-story office building and the assumption of the rights and obligations under a 60-year ground lease, 104 pages in length, on which some 35 years still remained.

[11] It is mildly ironic that O.J.B. would complain about being held to the standard of a sophisticated real estate developer. The record discloses that O.J.B.'s principal, Schooler, operates a business named the "Maven Group," whose letterhead represents that its members have been "experts in real estate since 1991." "Maven" (also spelled "meyven") is a Yiddish loan-word that means "expert" or "connoisseur." http://www.yiddishdictionaryonline.com/ (last viewed July 22, 2016).

In finding that the "glaring" omissions in the Ground Lease put O.J.B. on inquiry notice of the existence of the separate document that defined the terms of the option, the circuit court appropriately held O.J.B. to the standard of the ordinarily prudent person *in the situation and circumstances* of this case. If a person of ordinary prudence could not understand the 104-page Ground Lease and its implications, he or she would find someone who did. The court was not clearly erroneous in finding that a person of ordinary prudence would have inquired further.[12]

Arguing for a contrary conclusion, O.J.B. cites the circuit court's reference to Schooler, who testified as an expert in the case, "a very experienced developer with over 30 years' experience." O.J.B. omits to note the court's subsequent comments that "*even the novice in the real estate industry* . . . would have to wonder how" one could have an option without a legal description of the property that was subject to the option and that "[*n*]*o person of ordinary intelligence* would believe that an option to lease property would be so loosely defined" as the alleged option in the Ground Lease. (Emphasis added). Simply put, the court understood and applied the right standard, its accurate observations of Schooler's professional experience notwithstanding.

[12] Similarly, because the court could reasonably find that a person of ordinary prudence would have been on notice of the omissions in the Ground Lease, the court was not clearly erroneous in concluding that limitations began to run from the time of O.J.B.'s first review of that document in 2006. Consequently, the court was not clearly erroneous in concluding that the three-year statute of limitations barred O.J.B.'s claim, which it first asserted in 2013.

Separately, O.J.B. complains that the circuit court relied on facts outside of the record. In particular, O.J.B. complains of three references, in the course of the court's lengthy oral opinion, to the Bethesda real estate market. We are unpersuaded.

It is true that, "[i]n a bench trial, the court may not rely on facts that are not in the record." *Massey v. State*, 173 Md. App. 94, 125 (2007). Nonetheless, a court need not blind itself to matters of common knowledge. In any event, the court had heard four days of testimony, including testimony from at least three experts, about the complex transactions that had occurred in connection with this one Bethesda lot. The court's conclusion did not become clearly erroneous merely because of its references to the costly and competitive Bethesda market in which those very transactions occurred.

B. The Right to Use The Square-Footage from the Adjacent Property

As an alternative to its argument that section 10.1(j) gave the lessee a 60-year option to lease the Option Property for no consideration and no additional rent (other than the payment of taxes and utilities), O.J.B. argued that under section 10.1(j) the lessee has had the right to use all of the square-footage from the Option Property in calculating the maximum permissible height and density of a structure on the Demised Premises.

O.J.B. did not and could not base that argument on any express grant of a right to use the square-footage from the Option Property, because section 10.1(j) undeniably contains no such grant. Instead, O.J.B. based its argument on the statement that in section 10.1(j) that "if the permitted height limit is increased, Lessee will add to the building on the Demised Premises to a height of approximately five stories."

O.J.B. observed that section 10.1(j) does not explicitly restrict the lessee to the use of the square-footage from the Demised Premises alone in computing the permissible height and density of that hypothetical five-story structure. Accordingly, O.J.B. reasoned that Morrison did not explicitly reserve the square-footage of the adjacent Option Property for the sole use of the development of the Option Property. Invoking the premise that grants may be implied, but that reservations generally will not, O.J.B. concluded that the lack of any express reservation means that section 10.1(j) implicitly grants the lessee the right to use all of the square-footage from the Option Property in computing the permissible height and density of a structure on the Demised Premises.

This implied grant would appear to have a number of unusual consequences. First, it would apparently restrict (if not prohibit) any development of the Option Property for as long as the grant remained in existence (presumably 60 years), because the Option Property's square-footage could be used only to compute the permissible height and density for a structure on the Demised Premises, and not for a structure on the Option Property itself. Second, the implied grant would undermine the rationale for the Option to Lease, because the lessee would have little incentive to exercise the option, lease the Option Property, and pay scores of thousands of dollars per year in additional rent, if it already had the right (for no additional charge) to use the Option Property's square-footage to calculate the maximum height and density of a potential structure on the Demised Premises.

The court concluded that O.J.B. had failed to prove this claim by a preponderance of the evidence. Although the two-story structure on the Demised Premises slightly exceeds the permissible density under the applicable regulations, the court was unpersuaded that Morrison and STI intended to divest the owner of the Option Property of the right to use its square-footage in calculating the height and density of a structure on the Option Property itself. In the court's view, it was difficult to square any such intention with the Option to Lease, in which Morrison was willing to part with rights in the Option Property only in exchange for substantial additional payments.

In its brief, O.J.B. complains that "[t]he sole fact" on which the circuit court relied was that the Option to Lease required the lessee "to pay additional rent to *lease* the remainder of Lot 633." In response, one is tempted to ask how many "facts" the court needs for there to be "any evidence legally sufficient to support the findings[.]" *Homa*, 93 Md. App. at 359. If the lessee already had the right to use all of the density from the rest of Lot 633 in calculating the permissible height and density of the structure on its own leasehold, it was reasonable for the court to ask why the Option to Lease would ever require the lessee "to pay additional rent to *lease* the remainder of Lot 633"? To put it another way, if the lessee could strip away all of the density from the adjacent property with no obligation to pay for what it took, it was reasonable for the court to ask why the lessee would ever pay anything to lease that property. The court was not clearly erroneous in finding O.J.B.'s contentions to be unpersuasive.

Although it is unnecessary to say anything more to uphold the circuit court's decision on Count II, it is worth noting that section 10.1(j) begins by discussing the lessee's option. Before section 10.1(j) states that lessee will build a larger building on Demised Premises "if the permitted height limit is increased," it mentions another condition – the exercise of the option (in the Option to Lease). In view of that earlier condition, it is entirely possible to read section 10.1(j) to say that the lessee's rights depend on the exercise of the option, which never occurred.

Similarly, it is worth noting that section 10.1(j) contains a wealth of vague language about the lessor "consent[ing]" to various "concepts" and to "the concept" of another "more general notion." As the circuit court recognized, this is not the language of an enforceable agreement to do anything.[13]

C. Negligent Misrepresentation

In concluding that O.J.B. had failed to prove its negligent misrepresentation claim, the circuit court found that O.J.B. could not justifiably rely on any alleged misrepresentations about the status of the option, because the absence of essential terms in the Ground Lease put O.J.B. on inquiry notice of the need to inquire further. The court also found that O.J.B. was contributorily negligent in failing to inquire further. We see no basis to conclude that either of those findings was clearly erroneous.

[13] This language from section 10.1(j) is reminiscent of the statement by a fatuous Hollywood partygoer in Woody Allen's *Annie Hall*: "Right now, it's only a notion, but I think I can get money to make it into a concept, and later turn it into an idea."

A person is on inquiry notice if he or she "had knowledge of circumstances which ought to have put a person of ordinary prudence on inquiry[.]" *Fertitta*, 266 Md. at 72. The reference to "a person of ordinary prudence" implies that the question of whether someone has inquiry notice is a question of fact. Similarly, the issue of contributory negligence is ordinarily a question of fact. *See, e.g.*, *Faith v. Keefer*, 127 Md. App. 706, 746 (1999).

Because the Ground Lease lacks most if not all of the essential terms of any option, the circuit court, as finder of fact, could reasonably find that a prudent person in O.J.B.'s position would have inquired further to ascertain what the terms were and whether they were embodied in a separate document.[14] The court could also have reasonably found that, had O.J.B. inquired further, GNRW would have provided the Option to Lease – as it did shortly after O.J.B. purported to exercise the "option" in the Ground Lease. Those conclusions afford ample support for the court's rejection of the negligent misrepresentation claim.

D. The Assignment to Marvels

O.J.B. asserts that GNRW breached the lease by assigning its lessor interest to Marvel, while retaining the underlying ownership of the land. O.J.B. relies on what it calls "the definitional language of section 1(c) of the Ground Lease." That section reads:

[14] Because the Ground Lease had no integration clause, a separate document could assist in explaining its meaning.

"The term 'Lessor' shall mean Landlord, these terms being mutually interchangeable, and shall also mean only the owner for the time being of the Demised Premises."

O.J.B. argues that "shall" represents mandatory language, so that the lessor must always adhere to the definition or else be in breach. We disagree with O.J.B.'s conclusion for two reasons. First, the circuit court was not clearly erroneous in concluding that the obscure language of section 1(c) ("only the owner for the time being") was susceptible of multiple interpretations, at least one of which is preferable to O.J.B.'s because it does not result in a restraint on alienation. Second, a party cannot breach a definition.

The circuit court relied on section 30.01 of the Ground Lease, which states, in part, that the "Lease or the leasehold estate created hereby or any interest in either thereof, may be held directly or indirectly, by or for the account of any person who shall own the fee estate in the demised premises or any portion thereof." This language envisions that the "Lease" "may be held" "for the account of" the person who "own[s] the fee estate in the demised premises." In other words, the language envisions a potential separation of interests between the owner in fee simple and the lessor. To the extent that that language conflicts with O.J.B.'s restrictive interpretation of the definition of "Lessor" in section 1(c), the circuit court correctly rejected O.J.B.'s interpretation, because that interpretation frustrates rather than facilitates the alienation of interests in real property.

More important, it is impossible to breach a definition. The lease uses the phrase "Lessor shall mean," not "Lessor shall be" or "Lessor shall not be." This language acts

as a limitation on who is a lessor, not on what a lessor may do. In form and function, this is a definition, not a limitation. At most, the original definition no longer applies now that the lessor is no longer "the owner for the time being." Failing to fulfill the terms of a definition does not put a party in breach of contract; it takes the party outside of the definition.[15]

E. Jurisdiction to Declare Rights and Amend Judgment

O.J.B. argues that the circuit court "lacked jurisdiction" to declare the parties' rights and to amend its judgment. In support of that contention, O.J.B. asserts that its June 4, 2014, notice of appeal "deprived" the circuit court of jurisdiction to proceed. O.J.B.'s position reveals an unawareness of basic principles of appellate jurisdiction.

Subject to only a few, narrow exceptions, a party to a civil case may appeal only from a final judgment on the merits. *See, e.g.*, *Addison v. Lochearn Nursing Home, LLC*, 411 Md. 251, 273-74 (2009). "'[T]wo acts must occur for an action by a court to be deemed the granting of a judgment[.]'" *Hiob v. Progressive American Ins. Co.*, 440 Md. 466, 485 (2014) (quoting *Jones v. Hubbard*, 356 Md. 513, 520 (1999)). "First, there must be a rendition of the judgment by the court; second, there must be entry of the judgment by the clerk." *Id.*

[15] In any case, the circuit court correctly recognized that even if GNRW had breached the Ground Lease by assigning its interest as lessor to Marvels, the breach was not material, as GNRW admits that it remains liable to O.J.B. for the lessor's obligations. *Accord Homa*, 93 Md. App. at 353.

Since the 1997 amendments to Rule 2-601(a), "the judgment of the court – whether rendered by oral pronouncement, written memorandum, or otherwise – must also be 'set forth on a separate document.'" *Id.* at 486 (quoting Md. Rule 2-601(a)). In other words, Rule 2-601(a) requires a "piece of paper (or electronic document)" that "set[s] forth" "an unqualified decision of the court as to which party has prevailed and what relief, if any, is awarded." *Hiob*, 440 Md. at 486.

In this case, the circuit court did not set forth its judgment in a separate document until July 7, 2014, when it signed an order granting the motion for judgment on O.J.B.'s claims, declaring the parties' rights, and denying the motion for attorneys' fees by GNRW and Marvel. O.J.B.'s initial appeal, filed on June 4, 2014, was, therefore, premature.

"[W]hen an order of appeal is filed before there is an appealable judgment, 'the order of appeal is of no force and effect.'" *Makovi v. Sherwin-Williams Co.*, 311 Md. 278, 282-83 (1987) (quoting *Blucher v. Ekstrom*, 309 Md. 458, 463 (1987)). "A 'premature . . . order of appeal would . . . not confer appellate jurisdiction.'" *Id.* at 283 (quoting *Md.-Nat'l Capital Park & Planning Comm'n v. Crawford*, 307 Md. 1, 38 n.17 (1986)). "As a premature order of appeal is of no force and effect, and confers no jurisdiction on the appellate court, it obviously does not divest the trial court of jurisdiction to enter final judgment in the case." *Id.*

In advocating a contrary conclusion, O.J.B. cites *Kent Island, LLC v. DiNapoli*, 430 Md. 348, 360-61 (2013). *Kent Island* refutes rather than supports O.J.B.'s position.

In *Kent Island* the Court of Appeals rebuked this Court for incorrectly stating that a *proper and timely appeal* (and not a premature one, as in this case) divested a circuit court of jurisdiction. "We have," the Court wrote, "noted repeatedly . . . that in the absence of a stay, trial courts retain fundamental jurisdiction over a matter despite the pendency of an appeal." *Id.* at 360-61. Thus, even in the case of a *proper and timely appeal*, a trial court ordinarily may continue "to entertain proceedings during the pendency of an appeal, so long as the court does not exercise its jurisdiction in a manner affecting the subject matter or justiciability of the appeal." *Id.* at 361. The trial court may not "*exercise* that jurisdiction in a manner that affects either the subject matter of the appeal or the appellate proceeding itself" once the appellate court properly obtains jurisdiction. *Jackson v. State*, 358 Md. 612, 620 (2000) (emphasis in original). Still, a "post-judgment ruling by a circuit court that has that effect may be subject to reversal on appeal, but it is not void *ab initio* for lack of jurisdiction to enter it." *Id.*

In summary, O.J.B.'s jurisdictional argument lacks any semblance of merit. By filing a premature notice of appeal that was "of no force and effect" (*Makovi*, 309 Md. at 283), O.J.B. could not and did not divest the circuit court of jurisdiction to enter a final judgment and to amend that judgment.[16]

[16] In its reply brief, O.J.B. makes a new argument that did not appear in its opening brief: it contends that under *Leese v. Department of Labor, Licensing and Regulation*, 115 Md. App. 442 (1997), the circuit court could not grant the second motion to alter or amend after it had omitted to conduct a hearing on the first. Generally, this Court has no obligation to address grounds that a party does not include in the initial brief. *See, e.g.*, *Oak Crest Vill., Inc. v. Murphy*, 379 Md. 229, 241-42 (2004); *Chang v. Brethren Mut. Ins. Co.*, 168 Md. App. 534, 550 n.7 (2006). We have, however, (cont.)

F. The Cross-Appeal Concerning Fees

GNRW and Marvels cross-appealed from the circuit court's denial of their contractual claim for attorney's fees. Before considering the merits of that cross-appeal, we must first consider O.J.B.'s motion to dismiss it.

O.J.B. moved to dismiss the cross-appeal on two grounds. First, O.J.B. contended that the cross-appeal was untimely. Second, O.J.B. contended that GNRW and Marvels had no right to appeal because they were not aggrieved by the court's ruling.

The second contention can be jettisoned summarily. The ruling in question is the second amended judgment, which the court entered on November 18, 2014. Although the court amended its earlier judgments at the request of GNRW and Marvels, they are still aggrieved by the second amended judgment, because (like the earlier judgments) it denies their request for attorneys' fees.

O.J.B.'s first argument is more abstruse. O.J.B. points out that after the court declared the parties' rights on July 7, 2014, GNRW and Marvels filed a timely motion to alter or amend under Md. Rule 2-534. The court granted that motion, albeit without holding the required hearing, on August 22, 2014. Because the court did not hold a hearing before granting the motion to alter or amend, GNRW and Marvels filed another timely motion, styled as a motion to alter or amend under Md. Rule 2-534, in which they asked the court enter a substantively identical judgment after holding a hearing.

considered and rejected the same argument in denying O.J.B.'s motion to dismiss its adversaries' cross-appeal. *See infra* at 41-45.

Ordinarily, a motion to alter or amend would stay the 30-day period for GNRW and Marvels to note an appeal until after the motion is withdrawn or decided. *See* Md. Rule 8-202(c). O.J.B., however, cites *Leese v. Department of Labor, Licensing and Regulation*, 115 Md. App. 442 (1997), for the proposition that the second motion to alter or amend, even if filed in a timely manner within 10 days of the judgment, should be treated as a revisory motion under Rule 2-535, which does not stay the 30-day period for noting an appeal. Based on its reading of *Leese*, O.J.B. asserts that GNRW and Marvels were required to note their cross-appeal within 30 days of August 22, 2014, when the circuit court amended its initial judgment without conducting a hearing. Because GNRW and Marvels did not note the cross-appeal until November 25, 2014, O.J.B. concludes that it is untimely.[17]

O.J.B.'s argument fails, because it has misread *Leese*. *Leese* concerns the situation in which a party files a second motion to alter or amend after the court has *denied* its first motion. *Leese* holds that if a court *denies* a party's initial motion to alter or amend, any successive post-judgment motion, however characterized and whenever filed, must be treated as a revisory motion under Rule 2-535, which does not stay the time for taking an appeal, and not as a motion to alter or amend, which does stay the time for

[17] O.B.J. appears not to have realized that if the cross-appeal was untimely, then its protective appeal, filed after the second amended judgment, might be untimely as well. In that event, O.J.B.'s appellate rights would depend on the efficacy of the premature notice of appeal that it filed after the court announced its rulings, before the court entered a judgment. Fortunately for O.J.B., the premature notice of appeal would relate forward to the entry of a final judgment, making it timely. *See* Md. Rule 8-602(d).

taking appeal. *See Leese*, 115 Md. App. at 445. Otherwise, the *Leese* court reasoned, a party could extend the time for filing an appeal *ad infinitum* simply by filing successive motions that nominally invoked Rule 2-534. *See Leese*, 115 Md. App. at 445.

This case does not involve a situation like the one in *Leese*. Here, the court granted, rather than denied, the first motion to alter or amend that GNRW and Marvels filed. GNRW and Marvels filed the second motion to alter or amend not because they were abusively attempting to extend their time for filing an appeal, but because they conscientiously recognized that the court had inadvertently erred in granting the first motion without conducting a hearing.

In these circumstances, the second motion to alter or amend stayed the 30-day period for noting an appeal until November 18, 2014, when the circuit court granted the motion. *See* Md. Rule 8-202(c). Because GNRW and Marvels filed their cross-appeal within 30 days thereof, the cross-appeal is timely. For that reason, we deny O.J.B.'s motion to dismiss.

On the merits, GNRW and Marvels base their claim for fees on a contractual provision stating that if the "Lessee breaches any of the terms or conditions of this Lease, Lessee shall pay Lessor's legal expenses and attorneys' fees incurred by Lessor in enforcing the Lease and in attempting to cure any of the Lessee's defaults." Under the terms of this provision, O.J.B. can become liable for attorneys' fees only if it "breaches" the Ground Lease or commits some "default" that the lessor must attempt to cure.

GNRW and Marvels argue that O.J.B. breached the lease by asserting contractual rights that it did not have. We disagree that such an assertion, in itself, amounts to a breach or default.

GNRW and Marvels argue that "a contract party that asserts an untenable right, alien to the subject contract and/or in contravention of the agreed contract terms is guilty of breach; *viz.*, an attempted repudiation of the deal (as written and agreed) and a refusal to abide by the terms actually agreed to." Their position is based on a misreading of the cited authorities, none of which we are required to follow in any event.

GNRW and Marvels rely on *In re WBZE, Inc.*, 220 B.R. 568, 571-72 (D. Md. 1998), as authority for the proposition that "demand for performance to which party is not entitled is a repudiation of the contract and breach." *In re WBZE, Inc.* actually holds that a party repudiates an agreement when "prior to the time of performance, [it] definitely and specifically refuses to do something which it is obligated to do." *Id.* at 571-72. Demanding something not contractually required amounts to a repudiation only if the demanding party "states definitely that, unless his demand is complied with, he will not render his promised performance[.]" *Id.* at 572 (quoting *Corbin on Contracts*, § 973, at 910 (1951)).

In essence, this rule prevents a party from holding the other party hostage, threatening to withhold performance unless he or she gets something that is not otherwise due. The rule, however, does not prevent a party simply from making claims that a court does not find persuasive. While O.J.B. certainly made some unpersuasive arguments,

nothing in the record suggests that O.J.B. threatened to withhold performance under the lease unless GNRW or Marvels agreed to do something that they were not required to do.[18]

In effect, GNRW and Marvels want to transform a provision for an award of fees against a party in breach or default into a provision for an award of fees to a prevailing party in any dispute under the agreement, regardless of whether it involves a breach or default. The circuit court correctly declined to do so.

CONCLUSION

In summary, we deny O.J.B.'s motion to dismiss the cross-appeal by GNRW and Marvels, and we affirm the circuit court in every respect.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. APPELLANT'S MOTION TO DISMISS CROSS-APPEAL DENIED. APPELLANT TO PAY SIX-SEVENTHS OF COSTS; APPELLEES TO PAY ONE-SEVENTH OF COSTS.

[18] GNRW and Marvels also cite *Hubler Rentals, Inc. v. Roadway Exp., Inc.*, 637 F.2d 257, 259 (4th Cir. 1981), for the proposition that "purported termination done in a manner other than as prescribed by the contract 'was a repudiation of the agreement constituting a breach.'" GNRW and Marvels did not inform us that this quotation describes the district court's findings in that case. Nor did GNRW inform us that the Fourth Circuit reversed that part of that district court's decision. On the merits, *Hubler* dealt with a party that terminated a contract in an impermissible manner, not one that breached the contract by demanding more than the contract provided. Beyond that, *Hubler* mainly concerns whether one breaching party may collect damages from another breaching party, an issue that does not arise in this case. *Id. Hubler* does nothing to advance the analysis on the issue of fees.