Circuit Court for Calvert County
Case No.: 04-C-13-000630

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2029

September Term, 2015

V. CHARLES DONNELLY, et al.

v.

CHRISTINE M. MCNELIS, et al.

Woodward, C.J.,
Shaw Geter,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Shaw Geter, J.

Filed: March 15, 2018

*This is an unreported opinion, and may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This case arises from a real estate loan taken out by an LLC for the purchase of an unimproved lot, and guaranteed by the members of the LLC. Appellants V. Charles Donnelly and Deborah Steffen, and appellees Catherine McNelis and Christine Erickson-File are members of Solomons Two, LLC ("Solomons Two"), a Maryland limited liability company that obtained the loan from appellee, Branch Banking and Trust Company ("BB&T"). The loan documents were later sold to LSCG Fund 11, LLC ("LSCG"). When the loan was not repaid, BB&T, and then, as substitute, LSCG, filed an action for confessed judgment against Solomons Two, Donnelly, and Steffen. LSCG agreed to release McNelis and Erickson-File after payment.

Appellants then sued several parties, including appellees, [1] in the Circuit Court for Calvert County, alleging various tort and contract claims arising out of the default of the BB&T loan. The circuit court ultimately found appellants had failed to present sufficient evidence that they suffered damages, and dismissed the claims. Appellants appealed. Subsequently, in a different action, appellants obtained documents from negotiations that occurred between McNelis, Erickson-File, and LSCG. Appellants then filed a motion to alter, amend, or revise the court's judgment in the case *sub judice* under Maryland Rule 2-535, arguing fraud, irregularity, or mistake. Appellants also filed, in this Court, a motion to remand the case. This Court stayed the then pending appeal and remanded the case back

[1] Appellees in the present case are Christine McNelis; Catherine Erickson-File; The McNelis Group, LLC; BB&T; 14554 Solomons Island Road, LLC; and LSCG Fund 11, LLC. Appellants filed their complaint in the circuit court against eight parties, including appellees.

to the trial court for a determination on the motion to revise. The circuit court held a hearing on the Rule 2-535 motion, and denied it, finding appellants had not sufficiently proven extrinsic fraud. Appellants again appealed.

Appellants present the following questions for our review:

1. Did the Circuit Court err in granting summary judgment in favor of BB&T on the basis that Donnelly was merely a "guarantor" and not a "borrower" under a second deed of trust executed for the Solomons Two Loan in February of 2012, prior to default on the Note?

2. Did the Circuit Court err in granting McNelis, File, The McNelis group, 14554 Solomons Island Road and LSCG summary judgment at the conclusion of appellants' case in chief before the jury, when it determined that appellants had not presented any evidence showing damages as a result of appellees' wrongful actions?

3. Did the Circuit Court err by not allowing the case to go to the jury, especially since the finding of a breach of contract requires the submittal of the case on the issue of nominal damages when there is a breach of contract and there are no actual damages?

4. Did the Circuit Court abuse its discretion in denying appellants' Motions to Alter, Amend or Revise the judgments entered based on extrinsic fraud and not allowing limited discovery regarding the appellees' withholding of documents material to appellants' presentation of its case to the jury?

For the following reasons, we affirm in part and remand in part.

BACKGROUND

In 2005, V. Charles Donnelly ("Donnelly"), Deborah Steffen ("Steffen"), Christine McNelis ("McNelis"), and Catherine Erickson-File ("Erickson-File") formed Solomons Two, LLC ("Solomons Two"), a Maryland limited liability company. Donnelly held a one percent member interest in Solomons Two, Steffen a forty-nine percent interest, and McNelis and Erickson-File a fifty percent interest.

In 2006, Solomons Two and Donnelly, in his individual capacity, purchased real property located at 14554 Solomons Island Road, Solomons, Maryland 20688 (the "Property"). Solomons Two holds a ninety percent interest in the property, and Donnelly holds a ten percent interest. The Property is an unimproved lot of 15,000 square feet zoned commercial/residential. It was intended for the construction of a 14,500 square foot mixed use commercial/residential building. At the time of the purchase, Solomons Two took out a loan with appellee BB&T in the amount of $696,000.00 for a portion of the purchase price.[2] As part of the financing arrangement, Solomons Two executed a Note with BB&T for the $696,000.00, which Donnelly, Steffen, McNelis and Erickson-File individually guaranteed for any and all indebtedness. In addition, Solomons Two executed a Deed of Trust with BB&T, securing the Note with its ninety percent interest.

The loan was modified four times from 2006 through 2012. In February 2012, while modifying the loan for a fifth time, BB&T required Donnelly to execute a "Deed of Trust and Security Agreement" ("2012 deed of trust"), which clarified the original deed of trust, and included Donnelly's ten percent interest, not just Solomon Two's ninety percent interest. This final extension matured on May 19, 2012.

The members initially made payments on the various notes and debts of the company from a PNC Bank[3] loan and their personal funds. However, sometime in 2012,

[2] In addition to the BB&T Note, a take-back note was executed with the seller of the property and personal funds were used to finance the remaining purchase price of the Property.

[3] Solomons Two also took out a loan for $200,000 with PNC to fund the development of the property.

Donnelly and Steffen ceased making payments to cover their share of the company notes and debts to Solomons Two.

On March 27, 2012, Donnelly, Steffen, McNelis, and Erickson-File executed an agreement, providing for the transfer of McNelis and Erickson-File's interest in Solomons Two upon certain terms and conditions. The documents provided that appellants would agree to immediately pursue refinancing of the BB&T first mortgage on the property, for the purpose of releasing McNelis and Erickson-File from any liability on the BB&T Note and Deed of Trust.[4] "Upon execution [of the release], [McNelis and Erickson-File] agree to immediately pursue a refinancing or pay off the PNC second mortgage on the Solomons Two, LLC property to remove [Donnelly and Steffen] from any liability on the PNC Note and Deed of Trust." "The mutual release of the parties shall occur at the same time with proof of release provided to each party."

Donnelly and Steffen, however, were unable to complete the refinancing and modification, or obtain a sixth extension, from BB&T, nor secure other funding to pay off the loan.[5] On August 13, 2012, BB&T declared the First Deed of Trust in default. In October, BB&T initiated a confessed judgment suit against Solomons Two, as well as

[4] The agreement also contained other provisions, including that, in addition to keeping all payments related to Solomons Two and the property current, and that "[a]s of March 29, 2012 the adjustment amount owed to [McNelis and Erickson-File] from [Donnelly and Steffen] is $9,035.02."

[5] There is in the record evidence Donnelly attempted to negotiate an extension, modification, or refinancing of the Note. However, the negotiations ultimately fell through. According to a letter from counsel for BB&T, dated July 13, 2012, to Donnelly, after communications from Donnelly threatening suit for fraudulent misrepresentation and breach of fiduciary duty, the refinancing was not completed.

against Donnelly, Steffen, McNelis, and Erickson-File as individual guarantors, for $689,650.55.

Around the same time, BB&T entered into negotiations with McNelis and Erickson-File to release them from liability for the Solomons Two loan. However, the agreement was not completed, as BB&T requested Donnelly's consent as a condition precedent, which was not given.[6]

Thereafter, on November 30, 2012, BB&T sold all of its rights and interest in the First Deed of Trust, Note, and loan documents to LSCG Fund 11, LLC ("LSCG"), a private capital group.[7] Donnelly and Steffen were not informed by any party of the sale of the loan documents. There is in the record an undated letter from BB&T to Solomons Two, informing them of the sale of the loan. However, Donnelly asserted that it was sent to Solomons Two's P.O. box, which neither he nor Steffen had access to.

During this time, McNelis and Erickson-File discovered they could purchase the Note from LSCG for $250,000, which was less than the principal amount due on the loan. In furtherance of that, they formed a new LLC, 14554 Solomons Island Road, LLC ("14554 Solomons Island"). LSCG and 14554 entered into a loan purchase and sale agreement on January 15, 2013.

[6] Donnelly was cc'd on an email concerning the agreement, requesting his consent, which is in the record.

[7] BB&T sold the loan documents to LSCG's parent company, which assigned the loan documents to LSCG the same day.

McNelis and Erickson-File also entered into negotiations with LSCG to release them from their personal guarantees. The consideration for their release was a $150,000.00 payment from McNelis and Erickson-File to LSCG, which was made via McNelis' real estate company, The McNelis Group, LLC (the "McNelis Group"). This was memorialized in a "Settlement Agreement" dated January 29, 2013. The agreement stated the release payment was not to be credited against the note balance then due on the property, but reserved the option to credit the $150,000 in the future. The release agreement also included the January 15th agreement as an "option agreement."

On January 24, 2013, Donnelly served McNelis with a complaint for partition or sale in lieu of partition of the property.[8] McNelis and Erickson-File never completed the purchase from LSCG.

On February 28, 2013, LSCG sent a letter to Solomons Two, Donnelly, and Steffen, informing them that they had become the holder of the note. The letter demanded payment, as of the date of the letter, of $470,249.43. "Interest continues to accrue on the unpaid principal balance due and owing as aforesaid at the Default Rate, which is currently…$107.02 *per diem* for each and every day from and after February 28, 2013." Donnelly responded, demanding disclosure as to why McNelis and Erickson-File were not included in the demand letter.

LSCG, who had been substituted as plaintiff in the action, on March 6, 2013, filed an amended complaint for confessed judgment against Solomons Two, Donnelly, and

[8] There is no information in the record regarding this suit.

Steffen. McNelis and Erickson-File were not included as defendants in the amended complaint.

By letter on March 8, 2013, LSCG provided appellants with copies of the bill of sale and assignment of loan documents from BB&T to LSCG, and the assignment of security instruments. LSCG also noted in the letter that, "[w]hile [they were] not at liberty to disclose copies or details of any correspondence or agreements between LSCG and Christine McNelis and/or Catherine Erickson-File, [they could] tell [appellants] that LSCG has agreed to compromise and release Ms. McNelis and Ms. Erickson-File from their obligations under their guarantees for $150,000, which has already been paid."

The judgment by confession was entered March 9, 2013, against Solomons Two, Donnelly, and Steffen, both jointly and severally, in the amount of $470,249.43, "plus additional pre-judgment interest at the rate of eight and one-quarter percent (8.25%) *per annum* or one hundred seven and 08/100 dollars ($107.08) *per diem* for each and every day from and after February 28, 2013 until entry of judgment, attorneys' fees in the amount of seventy thousand five hundred forty-four and 16/100 dollars ($70,544.16)…and court costs." The judgment totaled $540,793.59.

Donnelly and Steffen moved to vacate the confessed judgment in April. In opposing the motion, LSCG attached as exhibits their January 15th agreement with McNelis and Erickson-File.

On May 9, 2013, appellants filed their initial complaint in the Circuit Court for Calvert County. Writs of summons were issued, but never served on appellees. On July

7, 2013, appellants filed a "First Amended Complaint and request of Jury Trial." Writs of summons were re-issued and served. After several motions to dismiss were heard and denied,[9] answers were filed by the remaining defendants and discovery was exchanged among the parties. The exchange of discovery brought about motions to compel and for sanctions and, as a result, the trial court appointed an independent examiner to review documents withheld from discovery or redacted on the basis of privilege or work product. The independent examiner issued a report on June 8, 2015. In it, the examiner stated:

> McNelis had complied with the requirements of Maryland Rule 2-402(e), but that there were 23 items that McNelis had argued were outside of the scope of the present litigation, that the examiner found were discoverable, and 5 items were not described with sufficient particularity so as to allow the appellants to determine the nature of the items.
>
> LSCG's privilege log did not comport with Rule 2-402(e), because they were not listed with sufficient detail to enable appellants to assess the applicability of the privilege claimed, but that there were other documents properly claimed under the attorney-client privilege.

The examiner ultimately found that "[a]bsent an agreement between the parties, [appellants] are entitled to a full evidentiary hearing before the Court to determine whether a particular item is in fact 'work product' and whether they can demonstrate a 'substantial need' for disclosure despite the claimed protection." However, no further pre-trial discovery motions were filed.

Meanwhile, appellees had begun filing motions for summary judgment. Following these, but prior to the court's ruling on the same, appellants filed a second amended

[9] One motion to dismiss was granted against a party not involved in the instant appeal.

complaint, which set forth nine causes of action: count I, breach of contract against McNelis and Erickson-File; count II, breach of contract against BB&T and LSCG; count III, concealment and non-disclosure against McNelis, Erickson-File, BB&T, and LSCG; count IV, civil conspiracy against all appellees; count V, tortious interference with prospective advantage against LSCG, McNelis, and the McNelis Group; count VI, tortious interference with contract against all appellees; count VII, tortious interference with prospective advantage against BB&T; count VIII, fraud against all appellees; and count IX, tortious interference with prospective advantage against McNelis and Erickson-File. Appellees filed motions to strike the second amended complaint, which were denied on September 9, 2015.

Thereafter, appellees McNelis and Erickson-File filed a motion to dismiss count IX, which the court granted. The trial court heard the previously pending motions for summary judgment of the parties and reserved ruling. On the second day of trial, the judge granted the motion for summary judgment filed by BB&T as to counts two, three, and seven, and continued to reserve ruling on BB&T's remaining counts and the others' motions.

At the close of appellant's case, BB&T renewed their motion for summary judgment as to the reserved counts, counts IV, VI, and VIII, which the court granted. The following day, the court granted the remaining defendants' motions for summary judgment.

The court first found that, "[t]he only evidence presented in this case for the [appellants] with regard to any damages is that, A, the property is worth 1.1 million dollars now, or B, the amount of debt has been reduced with the stipulation previously made by

[McNelis and File's counsel] that the individual [appellees] are liable for contribution to the [appellants] in the event that there is collection against the appellees." "[T]aking the testimony in the light most favorable to the non-moving party even," the court found it could not find on the evidence presented "that there is any damage suffered by the [appellants], and I have to grant the motion on behalf of LSCG and the individual [appellees,] the McNelis Group and 14554, LLC."

Appellants later filed a motion to alter, amend, or revise the court's judgment under Maryland Rule 2-534, which the trial court denied. In an order dated November 12, 2015, the court again found appellants had not proved they had suffered any damages, and the motions for summary judgment was properly granted. The circuit court noted that, while the $150,000 paid by McNelis and Erickson-File for their release did not have to be applied to the overall debt by Solomons Two, it was credited to the debt. The court also noted again that, in the event the LLC did not pay the debt, if appellants were directed to make payments on the debt, McNelis and Erickson-File would in turn be liable for contribution. The court concluded:

> In granting the summary judgment motion the court opined that it was more likely than not that the [appellees] McNelis and [Erickson-File] had breached certain duties to the [appellants]. However, the [appellants] had the burden of proof in their case in chief to present evidence of their damages. The evidence was to the contrary and there is nothing in the motion that spells out any damages.
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> The [appellees'] Summary Judgment Motion had been reserved prior to trial. It was felt by the court that [appellants] were due an opportunity to present their case in open court. At the conclusion of [appellants'] case the court once again looked at the summary judgment motion and came to the conclusion that it must be granted.

Appellants noted a timely appeal.

Two months later, in a bankruptcy case involving Solomons One, LLC,[10] BB&T submitted an itemized billing statement which listed documents related to Solomons Two. Appellants used the itemized billing, in a separate case involving only Donnelly and BB&T, to petition the U.S. District Court to require BB&T produce additional documentation.[11] The U.S. District Court granted appellant's request and ordered BB&T to produce the specified additional documentation.

Following BB&T's production of those documents, on February 2, 2016, appellants filed a motion to alter, amend, or revise the court's judgment in the case *sub judice* in the circuit court under Maryland Rule 2-535.[12] They argued appellees withheld documents during discovery which denied them a fair trial. Appellants also filed, in this Court, a motion to remand; motion to strike the ADR agreement between appellants, McNelis, Erickson-File, and BB&T; [13] and a motion for appropriate relief. This Court stayed the

[10] Solomons One, LLC is another company which involves Donnelly, Steffen, McNelis, and File, as well as two additional members.

[11] The subject of the federal case was the failed negotiations between Donnelly and BB&T regarding the refinancing of the Solomons Two loan, wherein appellants also argued Donnelly was a borrower under the 2012 deed of trust. *Donnelly v. Branch Banking and Trust Co.*, 971 F.Supp.2d 495 (2013). The district court found he was not and dismissed the case.

[12] Maryland Rule 2-535(b) states "[o]n motion of any party filed at any time, the court may exercise revisory power and control over the judgment in case of fraud, mistake, or irregularity."

[13] In the January 11, 2016 Settlement Agreement between BB&T and appellants, appellants agreed to dismiss their appeal of the circuit court's ruling, with prejudice, and to "not undertake any effort to challenge any of the rulings of the Calvert County Circuit

then pending appeal and remanded the case back to the trial court for a determination on the motion to revise.[14] The trial court denied the motion on August 2, 2016, finding appellants "failed to present a colorable claim" of extrinsic fraud. Appellants then filed this timely appeal.

STANDARD OF REVIEW

"With respect to the trial court's grant of a motion for summary judgment, the standard of review is *de novo*." *Dashiell v. Meeks*, 396 Md. 149, 163 (2006) (internal citations omitted). "Prior to determining whether the trial court was legally correct, an appellate court must first determine whether there is any genuine dispute of material facts." *Id.* (internal citations omitted). "Any factual dispute is resolved in favor of the non-moving party." *Id.* (internal citations omitted). "Only when there is an absence of a genuine dispute of material fact will the appellate court determine whether the trial court was correct as a matter of law." *Id.* (internal citations omitted).

DISCUSSION

I. Did the Circuit Court err in granting summary judgment in favor of BB&T on the basis that Donnelly was merely a "guarantor" and not a "borrower" under a second deed of trust executed for the Solomons Two Loan in February of 2012, prior to default on the Note?

Court" in the case *sub judice*, in exchange for payment of $2,500. Appellants did not return the check upon the filing of the Rule 2-535 motion for reconsideration.

[14] We specifically held that "the [instant] appeal is remanded, without affirmance or reversal, to permit the circuit court to consider appellant['s] Motion to Revise…and the responses thereto, to conduct any proceedings it deems necessary and then to grant or deny the motions." We also denied appellant's request to strike the ADR agreement, and his request for appropriate relief.

During oral argument, appellants notified the Court that they and BB&T had entered into an ADR agreement, and that we need not address this issue as it is moot.

II. The circuit court did not err in granting McNelis, Erickson-File, The McNelis Group, 14554 Solomons Island Road and LSCG's motion for summary judgment at the conclusion of appellants' case in chief before the jury, when it determined that appellants had not presented any evidence showing damages.

Appellants argue the circuit court erred in granting the motions for summary judgment against appellees McNelis, Erickson-File, The McNelis Group, 14554 Solomons Island Road, and LSCG, when it determined that appellants had not presented evidence establishing damages. "Donnelly and Steffen claimed damages arising from the payment obligation thrust on them for the entire Solomons Two Note indebtedness, the damages arising from their own liability for funds personally borrowed to fund the project, the economic harm to their interests in the Solomons Two investment and related, consequential damages." "On some Counts, Donnelly and Steffen sought punitive damages such as the civil conspiracy and fraud Counts, as well as consequential damages." Appellants specifically point to five instances in the record where evidence of damages was submitted to the court: (1) the testimony of Donnelly that Solomons Two was worth $1.1 million, with $700,000 in debt; (2) Donnelly's testimony that he is personally liable for the DiGiovanni's loan; [15] (3) the loss of the 10% of the profits Donnelly would have received from the Solomons Two project; (4) Steffen's testimony to 'fiscal damage'

[15] The 'DiGiovanni's loan' was the 'take back' note executed at the time Solomons Two purchased the property with the original owner of the land, DiGiovannie's Dock of the Bay, LLC. The borrowers on the Note are Solomons Two and Donnelly, for $75,000.00, which provides for Donnelly's 10% interest in the property.

incurred, including additional expenses, loss of retirement accounts, and general categories of costs for project, and (5) the payment of McNelis and Erickson-Files' $150,000 to be released from their individual guarantees on the loan. They also contend that their obligation under the Solomons Two loan increased upon the release of McNelis and Erickson-File.

Appellees collectively[16] argue appellants' reliance on these instances is misplaced. They first argue that appellants offered no evidence of the value of the property or the business, nor did appellants offer any evidence as to how those values constituted damages to them as individuals. With regards to the DiGiovanni's loan, they argue "there is no action pending for payment of the DiGiovanni Note." Moreover, "Donnelly has the same right he has always had to claim contribution from the other members if he is ultimately responsible for more than his proportionate share pursuant to either the loan documents or the Operating Agreement." As such, they argue it is "evident [that] any personal obligation that Donnelly entered into under the DiGiovanni loan was a risk he assumed at the time of purchase that has no connection to the [a]pellants' cause of action."

With regards to the 10% interest in Solomons Two's income, they continue that, by appellant's own testimony, Solomons Two was generating only "nominal income," "although he could not recall the source [or amount] of the nominal income." Next, they argue Steffen's testimony of her expenses "was specifically aimed at costs associated with

[16] Appellees McNelis, Erickson-File, the McNelis Group, and 14554 Solomons Island Road filed a joint brief, and LSCG filed a separate brief. All appellees, however, argue much the same points.

payment of the 'bills' and 'obligation[s]' of the company" "which [Steffen] admits she and Donnelly stopped making payments on in 2012 and had not made any payments on since." Finally, they argue that there was no resulting harm in their $150,000 payment to LSCG releasing them from their personal guaranties on the loan. "[Appellants'] argument overlooks the fact that the Circuit Court found the element of damages missing for each one of [a]ppellants' causes of action because McNelis' and Erickson-File's payment actually reduced the amount of money for which [a]ppellants are responsible on account of the Loan."

The court, in its oral ruling, stated:

> The problem I have is very simple. The only evidence presented in this case for the [appellants] with regard to any damages is that, A, the property is worth 1.1 million dollars now, or B, the amount of debt has been reduced with the stipulation previously made by [counsel for appellees McNelis and Erickson-File] that the individual [appellees] are liable for contribution to the [appellants] in the event that there is a collection against the plaintiffs.
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> With that admission and stipulation, I find that the – and I will tell you, I find that there is little question in my mind at this juncture that there was a breach, little question in my mind that there was concealment and everything that's been alleged. I do not see on the evidence presented, taking the testimony in the light most favorable to the non-moving party even, that there is any damage suffered by the plaintiffs, and I have to grant the motion on behalf of LSCG and the individual [appellants,] the McNelis Group[,] and 14554, LLC.

The circuit court, thereafter, in denying the first motion for reconsideration, held:

> To summarize the [appellants] argue that [their] injuries were unique and separate from any injuries to the LLC. The motion continues at great length to point out the breaches committed by the [appellees]. Time and again the [appellants] refer to the individual direct economic injury. Yet consistent with all of the evidence presented at trial, the motion does not demonstrate any damage.

> [Appellants] again point to the release granted to McNelis and File crafted to "specifically exclude any application of the $150,000.00 payment by McNelis and File to [appellants'] debt under the guarantee agreement." Yet as was clearly presented at trial, in fact the $150,000.00 was applied to the debt.
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> Additionally, [appellants] point out their ongoing liability for the entire debt if the LLC does not pay the debt. However, McNelis and File stipulated on the record at trial that they in turn would be liable for contribution in the event [appellants] were directed to make payments on the debt.
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> In granting the summary judgment motion the court opined that it was more likely than not that the [appellees] McNelis and File had breached certain duties to the [appellants]. However, the [appellants'] had the burden of proof in their case in chief to present evidence of their damages. The evidence was to the contrary and there is nothing in the motion that spells out any damages.
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> The [appellees'] summary judgment motion had been reserved prior to trial. It was felt by the court that [appellants] were due an opportunity to present their case in open court. At the conclusion of [appellants'] case the court once again looked at the summary judgment motion and came to the conclusion that it must be granted.

"It is well-established in Maryland that a complaint alleging a breach of contract 'must of necessity allege with certainty and definiteness *facts* showing a contractual obligation owed by the defendant to the plaintiff and a breach of that obligation by defendant.'" *RRC Northeast, LLC v. BAA Maryland, Inc.*, 413 Md. 638, 655 (2010) (emphasis in original) (citing *Continental Masonry Co., Inc. v. Verdel Constr. Co., Inc.*, 279 Md. 476, 480 (1977)). "[U]pon proof of liability, the non-breaching party may recover damages for 1) the losses proximately caused by the breach, 2) that were reasonably foreseeable, and 3) **that have been proven with reasonable certainty**." *Thomas v. Capital Medical Management Associates, LLC*, 189 Md. App. 439, 464 (2009) (emphasis added) (citing *Hoang v. Hewitt Ave. Assocs., LLC*, 177 Md. App. 562, 594 (2007)). To

establish tortious interference of a contract with prospective advantage, appellants were required to establish: "(1) [I]ntentional and willful acts; (2) calculated to cause damage to the plaintiffs in their lawful business; (3) done with the unlawful purpose to cause such damage and loss, without right or justifiable cause on the part of the defendants (which constitutes malice); and (4) **actual damage and loss resulting**." *K & K Management, Inc. v. Lee*, 316 Md. 137, 155 (1989) (internal citations omitted and emphasis added).

In the present case, the court did not err in finding appellants had failed to prove any damages. Appellants failed to argue below, and did not argue here, how appellees' actions connected to the value of Solomons Two. Rather, they argued that subtracting the debt on the loan from the value of the property gave the 'profit involved' in the enterprise. They offered no explanation, however, of whether this profit was gained without selling the property, nor how appellees' actions hindered him from this profit.[17] Nor did appellants establish how Donnelly's liability under the DiGiovanni note was affected by appellees' actions.

With regards to Donnelly's claim for the 10% profit he would be due, we hold the court did not err in finding he had not presented evidence of the actual damage. "To recover damages for lost profits, a plaintiff must establish three elements: '…(i)…that a breach by a defendant was the cause of the loss; (ii)…when the contract was executed, the defendant could have reasonably foreseen that a loss of profits would be a probable result of a breach;

[17] Appellant argued before this Court that, although the Property is now for sale following Donnelly's complaint for partition or sale in lieu of partition of the property, it no longer had this value because the site plan had expired.

and (iii) lost profits…can be proved with 'certainty.'" *Della Ratta, Inc. v. American Better Community Developers, Inc.*, 38 Md. App. 119, 138 (1977) (citing *M & R Builders v. Michael*, 215 Md. 340, 345-46 (1958)).

"To establish damages for lost profits with 'reasonable certainty' does not mean that they must be established in an exact pecuniary amount." *Della Ratta*, 38 Md. App. at 143. In Maryland, "[t]he evidence must…lay some foundation enabling the fact finder to make a fair and reasonable estimate of the amount of damage." *Thomas v. Capital Medical Management Associates, LLC*, 189 Md. App. 439, 465 (2009) (citing *Della Ratta*, 38 Md. App. at 143). "The damages must be susceptible of ascertainment in some manner other than by mere speculation, conjecture, or surmise and by reference to some fairly definite standard, such as market value, established experience, or direct inference from known circumstances." *Della Ratta*, 38 Md. App. at 143.

At all times before and during the litigation, the property was an unimproved lot. Donnelly himself testified that he did not believe Solomons Two had, at that point, received any profit, and if so, he did not know how much it could have been. Thus, there was no basis in the record on which the court could have determined with any degree of certainty the probable profit Donnelly could have recovered.

Steffen's testimony as to her financial losses, moreover, occurred before 2012, when the parties agreed to cease making payments on the loan. That was well before the negotiations between the appellees and before the default. This too, then, cannot serve as evidence of any damages incurred because of the appellees' actions.

In regards to the $150,000 payment, we find the court did not err in noting it was credited to the debt. When BB&T filed its petition for confessed judgment, it requested $689,650.55, which included the principal balance due, plus interest, costs, and fees. When LSCG submitted its amended petition for confessed judgment, having removed McNelis and Erickson-File as defendants, it requested $540,793.59, including principal balance due, plus interest, costs, and fees.

Finally, appellants' assertion that their liability under the loan increased upon LSCG's release of McNelis and Erickson-File from the guaranty agreements is without merit. The 2006 guaranty agreement, signed by appellants, states:

> As inducement to Branch Banking and Trust Company ("Bank" to extend credit to and to otherwise deal with SOLOMONS TWO, LLC ("Borrower"), and in consideration thereof, **the undersigned [appellants] (and each of the undersigned jointly and severally if more than one) hereby absolutely and unconditionally guarantees to Bank and its successors and assigns the due and punctual payment of any and all notes, drafts, debts, obligations and liabilities, primary or secondary (whether by way of endorsement or otherwise), of Borrower**, at any time, now or hereafter, incurred with or held by Bank, together with interest, as when the same become due and payable, whether by acceleration or otherwise, in accordance with the terms of any such notes, drafts, debts, obligations or liabilities or agreements evidencing such indebtedness, obligation or liability including all renewals, extensions and modifications thereof.
> …
> It is understood that any such notes, drafts, debts, obligations and liabilities may be accepted or created by or with bank at any time and from time to time without notice to the undersigned, and the undersigned hereby expressly waives presentment, demand, protest, and notice of dishonor of any such notes, drafts, debts, obligations and liabilities or other evidences of any such indebtedness, obligation or liability.
> …
> **This obligation and liability on the part of the undersigned shall be primary, and not a secondary, obligation and liability, payable immediately upon demand without recourse first having been had by**

> **Bank against the Borrower or any other guarantor, person, firm or corporation**…

The 2012 deed of trust notes that it "shall remain as security for full payment of the Debt and for performance of any obligation evidenced by the Note or other Document, notwithstanding…(d) the release of any party who has assumed payment of the Debt or who assumed any other obligations under this Deed of Trust, the Note or other Document." It further states "[n]one of the foregoing shall, in any way, affect the full force and effect of the lien of this Deed of Trust or impair Beneficiary's right to a deficiency judgment in the event of foreclosure against Grantor or any party who had assumed payment of the Debt of who payment [or] who assumed any other obligations the performance of which is secured by this Deed of Trust." The documents were signed on February 17th, by Donnelly, Steffen, Erickson-File, and McNelis' under "Guarantor's Signatures."

"[A] contract of guarantee 'is collateral to and independent of the principal contract that is guaranteed and, as a result, the guarantor is not a party to the principal obligation." *Mercy Medical Center, Inc. v. United Healthcare of the Mid-Atlantic, Inc.*, 149 Md. App. 336, 357-58 (2003) (citing *General Motors Acceptance Corp. v. Daniels*, 303 Md. 254, 260 (1985)). "A guarantor is therefore secondarily liable to the creditor on his contract and his promise to answer for the debt, default, or miscarriage of another becomes absolute upon default of the principal debtor and the satisfaction of the conditions precedent to liability." *Id.* In *General Motors*, we held:

> "[T]he guarantor agrees that…if the [principal obligor in the agreement] defaults the guarantor will pay the resulting damages provided the guarantor is notified of the principal's default. As such, the guarantor insures the ability

> or solvency of the principal….Fourth, and in sum, the guarantor promises to perform if the principal does not."

303 Md. at 260. "A creature of tort law, joint and several liability 'applies when there has been a judgment against multiple defendants.'" *Honeycutt v. U.S.*, 137 S.Ct. 1626, 1631 (2017) (internal citations omitted). If more than one defendant is included in the judgment, "each defendant is held liable for the entire amount." *Id*.

Appellants were, at all times since 2006, entirely liable for the amount of the loan. Releasing McNelis and Erickson-File from their personal guaranties did not increase their liability. Moreover, the court did not abuse its discretion in noting that appellee's payment for release had actually reduced appellant's obligation under the loan, and that, hypothetically, McNelis and Erickson-File would be contributorily liable if judgment was sought from either appellant.

"The inquiry performed [in a motion for summary judgment] is the threshold inquiry of determining whether there is the need for a trial – whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). We hold the trial court did not err in determining appellants had not sufficiently established damages, even considering the evidence in the light most favorable to appellants.

III. Did the Circuit Court err by not allowing the case to go to the jury, especially since the finding of a breach of contract requires the submittal of the case on the issue of nominal damages when there is a breach of contract and there are no actual damages?

Appellants present for our review the question of whether the Court erred in failing to send to the jury the issue of nominal damages. They contend the finding of a breach requires the awarding of nominal damages even if actual damages cannot be proved. Neither they nor appellees, however, addressed this issue before us or in their briefs.

The Court of Appeals has "firmly established by [its] prior decisions that where a breach of contract occurs, one may recover nominal damages even though he has failed to prove actual damages." *Hooton v. Kenneth B. Mumaw Plumbing & Heating Co., Inc.*, 271 Md. 565, 572 (1974) (internal citations omitted). In granting the motions for summary judgment in favor of appellees McNelis, Erickson-File, The McNelis Group, 14554 Solomons Island Road, and LSCG, the court held:

> The problem I have is very simple. The only evidence presented in this case for the [appellants] with regard to any damages is that, A, the property is worth 1.1 million dollars now, or B, the amount of debt has been reduced with the stipulation previously made by [counsel for appellees McNelis and Erickson-File] that the individual [appellees] are liable for contribution to the [appellants] in the event that there is a collection against the plaintiffs.
>
> With that admission and stipulation, I find that the – **and I will tell you, I find that there is little question in my mind at this juncture that there was a breach, little question in my mind that there was concealment and everything that's been alleged**. I do not see on the evidence presented, taking the testimony in the light most favorable to the non-moving party even, that there is any damage suffered by the plaintiffs, and I have to grant the motion on behalf of LSCG and the individual [appellants,] the McNelis Group[,] and 14554, LLC.

The circuit court did not articulate what the breach was nor which party committed the breach. As such, we will remand for clarification, and, thereafter, for the determination of any necessary nominal damages.

IV. The court did not abuse its discretion in denying appellants' Motions to Alter, Amend or Revise the judgments, finding appellants had failed to prove fraud.

Maryland Rule 2-535(b) states "[o]n motion of any party filed at any time, the court may exercise revisory power and control over the judgment in case of fraud, mistake, or irregularity." "Rule 2-535(b) requires a showing, by clear and convincing evidence, that a proceeding was infected with fraud, mistake, or an irregularity." *Powell v. Breslin*, 430 Md. 52, 70 (2013) (internal citation omitted). "The terms 'fraud, mistake, or irregularity' as used in Rule 2-535(b)…are narrowly defined and are to be strictly applied." *Early v. Early*, 338 Md. 639, 652 (1995) (internal citation omitted). "Only extrinsic fraud will justify the reopening of an enrolled judgment; fraud which is intrinsic to the trial itself will not suffice." *Bland v. Hammond*, 177 Md. App. 340, 351 (2007) (internal citation omitted). "In determining whether extrinsic fraud exists, 'the question is not whether the fraud operated to cause the trier of fact to reach an unjust conclusion, but whether the fraud prevented the actual dispute from being submitted to the tier of fact at all.'" *Id.* (citing *Hresko v. Hresko*, 83 Md. App. 228, 232 (1990) (internal citations omitted)).

"We review the circuit court's decision to deny a request to revise its final judgment under the abuse of discretion standard." *Pelletier v. Burson*, 213 Md. App. 284, 289 (2013) (quoting *Jones v. Rosenberg*, 178 Md. App. 54, 72 (2008)). Abuse of discretion occurs "where no reasonable person would take the view adopted by the [trial] court," or when

the court acts "without reference to any guiding rules or principles." *Powell*, 430 Md. at 62 (2013) (quoting *North v. North*, 102 Md. App. 1, 13-14 (1994)).

Appellants argue that the court's denial of their motion to alter, amend, or revise the judgments based on fraud, without allowing limited discovery, was an abuse of discretion. "The record before the trial court showed over 300 pages of documents withheld that went to the heart of Donnelly's status at trial – merely a guarantor with no rights or a 'borrower' as BB&T defined him in its withheld documents." According to them, "[t]he failure to produce documents, subsequently discovered 2 to 3 months after trial and the summary judgments were essentially tied to [appellants'] narrative of the case and defenses at trial in two major ways." They first argue that among the documents not produced were billing statements from BB&T identifying him as a 'borrower' for the transaction. Secondly, he contends that the draft agreements from the failed negotiations between BB&T and appellants were withheld because they also referred to him as "borrower." "The failure of the curtailment offer and settlement, [appellants] alleged, triggered the conspiracy between BB&T and other defendants in the case to exclude [appellants] from any information about the negotiations with the other members of the LLC and a plot to deliberately harm [appellants'] interests." "BB&T made the absence of any written documentation regarding the Curtailment Offer a significant theme in its attack on the duties owed [appellants] (none) and [appellants'] lack of credibility."

The circuit court, in its order on appellants' motion to revise, stated:

> The thrust of [appellants'] motions is an allegation of extrinsic fraud which, it is claimed, prevented the [appellants] from presenting their case at

> [trial.] The "fraud" alleged is that the Defendant[s], BB&T in particular, withheld documents that should have been presented in discovery.
>
> Perhaps telling is the pleading itself. Terms such as "raise concerns" and "may have" tend to mirror the arguments made by [appellants] at the hearing. The concerns raised, however, and as suggested by the court at the hearing, are of the type that might be raised in a different proceedin[g], for example, an attorney grievance complaint. In fact, in one form or another many of them have been, be it in the bankruptcy court, the Federal District Court, and even in a prior appeal of this case to the Court of Special Appeals. Having reviewed the pleadings, the exhibits filed[,] and the arguments made in open court[,] this court cannot and does not find that there was extrinsic fraud. The original trial in this matter was well presented. The near inescapable conclusion is that even if the additional documents and exhibits had been produced, the [appellants] would still have suffered no damages.
>
> Prior to this case of actions having been alleged, these [appellees] were guarantors on a Note. Following, the forbearance granted to Ms. McNelis and to Ms. Erickson-File the [appellants] continued to be guarantors but now the note's principle has been very substantially reduced. [Appellants'] "exposure" was significantly less. Assuming arguendo that there was extrinsic fraud, and this court finds that [appellants] have failed to present a colorable claim of such, the [appellants] are in an even better position as a result.

We first note appellant's claim of breach for the failed modification negotiations with BB&T is not a claim in the instant appeal. It was not one of the counts in either complaint, but was addressed in a separate suit before the U.S. District Court, as appellants explicitly noted in their second amended complaint.[18] *Donnelly v. Branch Banking and Trust Co.*, 971 F.Supp.2d 495, 508-09 (2013). The District Court found that there was no

[18] Appellants, in the second amended complaint, noted "The curtailment offer and acceptance and failure to complete settlement is the subject of a separate action filed in the Circuit Court for Calvert County on February 4, 2013 [citations omitted], which has been removed to the United States District Court for the District of Maryland…The acts and causes of action alleged in the present complaint are separate and distinct from the action pending in Federal District Court."

agreement between the parties. *Id.* at 508-09. Therefore, we will not further address that claim.

We find the circuit court did not abuse its discretion in holding that the production of the draft agreements from those negotiations would not have affected the outcome in the matter *sub judice*, and that appellants had not sufficiently proved the extrinsic fraud necessary under Rule 2-535(b). Donnelly's contention that the documents refer to him as a 'borrower' is misleading. Each draft begins by listing the parties, noting

> (i) Solomons Two, LLC, a Maryland limited liability company ("Borrower"),
>
> (ii) V. (Vernon) Charles Donenlly, an individual ("Donnelly"),
>
> …
>
> (iii) Deborah A. Steffen, an individual ("Steffen").

"The Lender [defined as BB&T] is the holder of a Promissory Note dated July 27, 2006, made by Borrower payable to the order of Lender in the principal amount of Six Hundred Ninety-Six Thousand and No/100 Dollars." The documents continue that

> [r]epayment of the Note is guaranteed by Donnelly, Erickson-File, Steffen and McNelis (collectively, the "Guarantors") pursuant to four certain Guaranty Agreements…and the Loan is evidence and/or secured by, among other things, the following: (i) a Deed of Trust and Security Agreement dated July 27, 2006, from Borrower to certain trustees for the benefit of Lender…; (ii) a Deed of Trust and Security Agreement dated February 19, 2012, from Donnelly (as to his undivided 10% interest in the Property).

Moreover, the language of the drafts makes clear the "Borrower" in question is an entity:

> (I) All debt of Borrower to any members or shareholders shall be fully and completely subordinate to any debt to the Lender. Borrower shall not make…distributions or pay any dividends to members or shareholders…

> (J) …Borrower shall not acquire or sell any subsidiaries.
>
> (K) …Borrower shall not merge or consolidate with, or acquire all or substantially all of the assets, stock, partnership interests or other ownership interests of, any other entity or person.
>
> …
>
> (M) Borrower shall not, voluntarily or by operation of law, sell, transfer, convey, lease, pledge, encumber, assign, grant a security interest in or otherwise hypothecate or dispose of any legal or beneficial interest in the Borrower, nor change the management thereof, without the prior written consent of the Lender.

The documents consistently distinguish between the "Borrower" and the "Indebted Parties." It further clarifies that "[c]apitalized terms in this Agreement and not otherwise defined herein shall have the same meaning as in the Loan Documents." Our review of the billing records does not contradict this assessment. We find no instance of the billing statements referring to Donnelly as 'the borrower,' nor do we believe that, even assuming, *arguendo,* that they did, that would somehow contradict Donnelly's status as found in the actual signed documents.[19]

Nor are appellants' postulations that the breakdown of these negotiations, which the circuit court was aware of during the trial, led to a conspiracy between the appellees, sufficient or establish fraud. Nor do they lead one to believe that appellants were wholly unable to try their claims before the court because of the lack of these documents. On the contrary, appellants were provided ample opportunity to argue their claims.

[19] The only documents in the record from BB&T that refer to Donnelly as a 'borrower' are regarding a $50,000 loan, which is clearly not the Solomons Two loan at issue.

As such, we find the court did not abuse its discretion in denying their motion for reconsideration.

JUDGMENT OF THE CIRCUIT COURT FOR CALVERT COUNTY AFFIRMED IN PART AND REMANDED IN PART. COSTS TO BE PAID BY APPELLANT.