Circuit Court for Montgomery County
Case No. 415698-V

ON MOTION FOR RECONSIDERATION

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2170

September Term, 2017

DEAN BERKHEIMER

v.

ROBERT J. TEST, et. al.

Meredith,
Wright,
Graeff,
JJ.

Opinion by Graeff, J.

Filed: July 26, 2019

This appeal involves conflicting claims regarding shares of stock in the Annapolitan Care Center, Inc. (the "Annapolitan"). Appellant, Dean Berkheimer, filed the one lawsuit that is the subject of this appeal, but there were other lawsuits, cross-claims and counter-claims relating to multiple transactions concerning the stock.

On June 27, 1994, Robert Test, one of the appellees, signed two agreements with Jane M. Test, James J. Matthews, Jr., Julie Matthews Howard, Joan Mary Matthews, James J. Matthews, Sr., West End Dinner Theater, Inc., Four J. Associates, and Columbia Limited Partnership (collectively, "the Matthews Family"), appellees.[1] In the Note Agreement (the "1994 Note"), Mr. Test acknowledged that he owed the Matthews Family close to $1,400,000, that he wanted to make provision for repayment, which was due upon demand, and that his performance under the 1994 Note was secured by the Pledge and Security Agreement (the "1994 Agreement"), which granted the Matthews Family a security interest in all of Mr. Test's shares of stock in the Annapolitan.

Mr. Test stated during a subsequent deposition that 56% of the Annapolitan stock was in his name, but he had an agreement in June 1994 with John Kinnamon and Donald Berkheimer, Dean's father and cross-appellant/appellee, that once certain conditions were met, they would get equal distributions.[2] Mr. Test stated that those conditions

[1] Jane M. Test signed the 1994 Note as a Partner with Columbia Limited Partnership. She is not a Matthews Family appellee. James J. Matthews, Sr., was deceased at the time the Matthews Family complaint was filed, and the Estate of James J. Matthews, Sr., was substituted as an appellee.

[2] Because two of the parties have the same last name, we will, for ease of reading, refer to them by their first names, Donald and Dean.

included satisfaction of "outstanding letters of credit provided by the Matthews family," debts due to the Matthews Family, and equalization of distributions commensurate to the amount of investment.[3]

On June 20, 1996, Mr. Test, Donald, and Mr. Kinnamon, executed a promissory note in the amount of $75,000 to Dean (the "1996 Note"). The 1996 Note provided for repayment of that amount, plus interest. It also stated that Mr. Test owned 5,600 shares of Annapolitan stock, which were pledged to secure certain obligations, "including two standby letters of credit," and upon release of the pledge on the stock, Mr. Test would transfer to Dean 300 shares of his stock.[4]

In 2013, Donald sued Mr. Test in the Circuit Court for Anne Arundel County, alleging that he was entitled to 1,867 shares of Annapolitan stock (the "Donald Litigation"). On June 11, 2015, Mr. Test and Donald entered into a settlement agreement, whereby Mr. Test agreed, among other things, to transfer 1,867 shares of Annapolitan stock to Donald, "free and clear of any pledge, lien, security interest or other encumbrance."

On March 3, 2016, Dean filed a complaint in the Circuit Court for Montgomery County, alleging that Mr. Test, Donald, and Mr. Kinnamon had defaulted on the 1996

[3] Mr. Test stated in an affidavit that he, his wife, and her family, the Matthews family, had loaned millions of dollars to the Annapolitan.

[4] The 1996 Note further provided that Donald and Mr. Kinnamon had a contingent ownership interest in the stock. And it provided that stock would be due if payments were late.

Note. He alleged that they owed principal and interest in the amount of $689,348, plus late fees of $35,100. He asked for judgment in his favor in that amount and an order compelling Mr. Test and Donald to transfer to him 3,734 and 1,867 shares of Annapolitan stock, respectively.

On February 24, 2017, James Matthews and Joan Matthews, attorneys-in-fact for the Matthews Family, filed a complaint in the Circuit Court for Montgomery County against, *inter alia*, Mr. Test, Jane Test, Donald, Dean, Tiger Investment Group LP, Mr. Kinnamon, and the Annapolitan. They alleged that all defendants knew that the stock held or owned by Mr. Test "was subject to a security interest in favor of the Matthews family" and could not be "transferred without proper consents from the Matthews family." They sought, *inter alia*, a declaration that they possessed first priority security interests in the Annapolitan stock held or owned by Mr. Test, Mrs. Test, and Donald. They moved to consolidate their case with Dean's suit against Mr. Test, Donald, and Mr. Kinnamon, which the circuit court granted.

On May 16, 2017, the Matthews Family moved for partial summary judgment, arguing that there was no dispute of fact that they held a first priority security interest in the disputed Annapolitan shares. They alleged that Mr. Test had defaulted on the 1994 Note, and the current amount due was not less than $3,007,850. On June 23, 2017, the circuit court granted the motion.

On appeal, Dean raises the following questions for our review:

1. Did the trial court err in granting summary judgment and awarding the Annapolitan shares, before discovery and trial, where there were

competing claims to the shares and disputes existed as to whether the prevailing creditor held an outstanding note or a valid security interest?

2. Alternatively, did the trial court err in awarding all of the collateral shares to the secured party, without first resolving the amount due under the note, where the 1994 Agreement limited the remedy to the *sale* of collateral stock to satisfy the debt, and required that the remainder of the shares be returned to the debtor (and, thereby, the remaining claimants)?

Donald, cross-appellant/appellee, raises the following additional questions, which we have modified slightly, as follows:

3. Did the trial court err in determining that the issuance of 1,867 shares of stock in the Annapolitan to Donald was void where the alleged secured creditor has not exercised limited remedies to sell such shares at a public or private sale?

4. Did the trial court err in granting summary judgment without the necessary joinder of the bankruptcy trustee in the chapter 7 case of Mr. Kinnamon?

For the reasons set forth below, we shall affirm, in part, and reverse, in part, the judgment of the circuit court. [5]

FACTUAL AND PROCEDURAL BACKGROUND

I.

Annapolitan

In 1994, Mr. Test, Donald, and Mr. Kinnamon transferred property they owned to the Annapolitan and turned the facility into an assisted living facility. Mr. Test owned

[5] Given our resolution of this case, we need not address the issues raised by Donald. In particular, with respect to Donald's argument that the court "erred in granting summary judgment without the necessary joinder of the bankruptcy trustee in the Chapter 7 case of [Mr.] Kinnamon," the circuit court did not address this issue in its ruling, but it can do so on remand.

56% of the outstanding shares of stock in the Annapolitan. He stated that he was the sole shareholder of the stock to facilitate Federal Housing Administration ("FHA") financing for the Annapolitan; Donald and Mr. Kinnamon "had tax issues and the FHA would not approve them as borrowers." Mr. Test had an oral agreement with Mr. Kinnamon and Donald, however, that he would hold the Annapolitan shares for their benefit, and subject to certain conditions being met, they would each be entitled to one third of Mr. Test's shares, or 18.67% of the total Annapolitan stock.[6]

In the 1994 Note executed on June 27, 1994, Mr. Test pledged his stock ownership in the Annapolitan as security for monies he had borrowed from the Matthews Family (the "Matthews Debt"). The 1994 Note was secured by the 1994 Agreement, which stated, in pertinent part, as follows:

> (a) [Mr. Test] hereby grants to the [Matthews Family] a security interest in and pledges, assigns and delivers the stock certificate(s) described in Exhibit A annexed hereto, constituting all the issued and outstanding shares of stock of the [Annapolitan] owned by [Mr. Test] (the "Stock"), accompanied by stock powers, duly executed in blank.
>
> (b) [Mr. Test] and the [Matthews Family] agree that the Stock shall be held on the terms and conditions hereinafter set forth as collateral security for the obligations of [Mr. Test] to the [Matthews Family] . . . .
>
> 2. Representations and Warranties. [Mr. Test] represents and warrants to the [Matthews Family] as follows:

[6] As indicated, *supra*, Mr. Test stated that the conditions included satisfaction of "outstanding letters of credit provided by the Matthews family," debts due to the Matthews family, and equalization of distributions commensurate to the amount of each person's investment.

> (a) that the Stock constitutes all of the issued and outstanding Stock of the [Annapolitan] owned by him;
>
> (b) that the Stock is validly issued, fully paid and nonaccesable and is not subject to any liens, charges or encumbrances whatsoever; except for a prior pledge to the Matthews [Family] in connection with certain letters of credit issued for the benefit of the [Annapolitan].
>
> * * *
>
> 3. Term. The [Matthews Family] shall hold the Stock as security for the performance by the [Annapolitan] of its obligations and liabilities under the [1994 Note], and the Stock shall be held by the [Matthews Family] until all principal and interest due to any [pledgee] under the [1994 Note] are paid in full, at which time the [Matthews Family] shall deliver the Stock to [Mr. Test] free and clear of this [p]ledge [a]greement, and this pledge agreement shall thereupon terminate.

The Matthews Family alleges that, after the 1994 Note and the 1994 Agreement were signed, Mr. Test delivered the original stock certificate representing their pledged shares in the Annapolitan to them in the office of their attorney, Thomas Colucci, who held the certificate in escrow. In a letter dated December 6, 2016, an attorney for the Matthews Family stated that Mr. Colucci's office had reported that the file, with all relevant documents, was missing.

On June 20, 1996, approximately two years after the 1994 Agreement was signed, Donald, Mr. Test, and Mr. Kinnamon executed the 1996 Note "in favor of Dean Berkheimer T/A Tiger Investment Group," in exchange for a loan of $75,000.[7] Dean

[7] Tiger Investment Group ("Tiger") was a family partnership, in which Dean and Donald were general partners, and Dean's sisters and Donald's grandchildren were limited partners. Donald made an initial contribution of $100,000 to the partnership from his personal assets, and Dean made several personal contributions to the partnership, including two contributions of approximately $40,000 each. Donald

testified in the Donald litigation that his father, Mr. Test, and Mr. Kinnamon solicited a loan from him because they "were short marketing money" for the Annapolitan.[8]

The terms of the 1996 Note required that the borrowers: (1) repay in installments the principal sum of $75,000, with interest and applicable late fees, with a maturity date of July 1, 2001; (2) transfer 300 shares of common stock in the Annapolitan to Dean; and (3) transfer an additional 300 shares of Annapolitan stock "for each and every 60 days" that payment on the note was late. The 1996 Note stated, however, that the stock was "pledged to secure certain obligations relating to the [Annapolitan], including two standby letters of credit, and cannot be released for transfer until those obligations are fulfilled."[9]

In a letter written to Donald and Mr. Kinnamon, dated July 21, 1997, Mr. Test stated that he was holding the interest in the Annapolitan (56%) on behalf of the three of them, equally. He explained the understanding that he would distribute the stock

---

testified that the 1996 loan was made from Dean's interests in Tiger. On November 15, 2016, Tiger assigned its interest in the 1996 Note to Dean.

[8] Mr. Test asserted in an affidavit that the money from the loan was spent for other purposes, i.e., $40,000 was paid to Donald; $10,800 was distributed to Burn Brae Production, a business entity owned by Mr. Kinnamon; and $24,200 was paid to the Annapolitan. In a November 8, 2016, deposition, Dean acknowledged that $40,000 went to his father, Donald, and was not used for marketing expenses.

[9] At his October 31, 2016, deposition, Mr. Kinnamon testified that he, Donald, and Mr. Test, never intended to make personal payments on the 1996 Note. Rather, they expected that the Annapolitan would be able to make payments on the note based on their forecasts of the company's cash flow. No payments were made on the note, however, and no shares were transferred. Dean did not send the borrowers a notice of default for almost 20 years, after litigation was initiated by his father relating to the Annapolitan stock.

contingent upon: (1) the "release of the liens created for the letters of credit and repayment to the Matthews family of monies due"; and (2) the "repayment from the Annapolitan of all sums advanced to the Capers/Annapolitan project by or on behalf of each of us, until the outstanding amounts due each of us is equal." At his deposition on August 17, 2016, Mr. Test stated that the letters of credit were satisfied in 2015, but that debts owed to the Matthews family had not been satisfied.[10]

In 2002, the Annapolitan went into bankruptcy. Mr. Test stated that, at that point, the corporation no longer had an obligation to repay monies advanced by the shareholders. In the petition for bankruptcy, Mr. Test did not list Donald or Mr. Kinnamon as a person who owned, directly or indirectly, voting securities of the Annapolitan. At that time, he did not believe that they had any interest, contingent or otherwise, in the Annapolitan.

II.

Donald Lawsuit

In 2013, Donald sued Mr. Test in the Circuit Court for Anne Arundel County, alleging that he was entitled to 1,867 shares of Annapolitan stock. Mr. Test contested the claim, arguing that Donald forfeited his contingent rights to the shares when he stopped participating in the Annapolitan venture. Mr. Test acknowledged, however, that he never informed Donald that his lack of participation resulted in the forfeiture of his shares.

[10] Mr. Test testified that, although he notified Dean that the letters of credit had been satisfied, he did not notify Dean of the status of the Matthews Debt.

Donald and Mr. Test ultimately settled the lawsuit. Mr. Test stated that he settled with Donald because, at the time of the litigation, he was seeking to refinance a loan with M&T Bank, and he was worried about disclosures he would be required to make regarding the lawsuit. He stated that, prior to issuing a stock certificate to Donald in settlement of the dispute, he spoke with members of the Matthews family on the phone and obtained permission to release those shares from obligations under the 1994 Agreement.

On June 11, 2015, Mr. Test and Donald executed a settlement agreement (the "Settlement Agreement"). It included the following terms: (1) Mr. Test would transfer 1,867 shares in Annapolitan stock to Donald "free and clear of any pledge, lien, security interest or other encumbrance."; (2) Mr. Test would "cause the Annapolitan to deliver a stock certificate to [Donald] representing such shares of stock within fifteen (15) days of receipt of a fully executed copy of [the Settlement Agreement]"; (3) Mr. Test would take "all steps necessary" to ensure that Donald was appointed by the Annapolitan Board of Directors as the "Chairperson of the Financial Oversight Committee" for a minimum term of three years; (4) within "five (5) days of the confirmation of the transfer of 1,867 shares of stock and his appointment as chair of the Financial Oversight Committee," the parties would "execute a Stipulation of Dismissal with Prejudice of the Litigation"; and

(5) a mutual release of all claims relating to the 1997 letter, the claims in the litigation they were settling, and the Annapolitan.[11]

On June 26, 2015, Mr. Test, in his capacity as President of the Annapolitan, executed a new stock certificate in Donald's name for the 1,867 shares. In accordance with the Settlement Agreement, Donald was designated as Chairperson of the Financial Oversight Committee and began attending stockholder and board meetings.

III.

Dean's Complaint

On February 4, 2016, counsel for Dean mailed Donald, Mr. Test, and Mr. Kinnamon a letter, informing them that, based on the terms of the 1996 Note, they were "jointly and severally liable to [his] client for principal and interest in the amount of $689,348, plus late fees of $35,100, through December 20, 2015." Counsel specifically demanded that the parties pay this sum "on or before Friday, February 12, 2016."

When no payment was made, Dean filed a complaint against Donald, Mr. Test, and Mr. Kinnamon in the Circuit Court for Montgomery County. He sought a judgment for the amount stated above and transfer of shares of stock. Mr. Test moved to dismiss Dean's complaint, arguing, among other things, that his monetary claim and his claim for stock transfers were barred by the statute of limitations.

[11] The Settlement Agreement also contained a "No Admission of Liability" clause, which stated that the parties "acknowledge that this Agreement shall not be construed as an admission by any party of any liability or wrongdoing whatsoever and that the settlement set forth herein is made by the parties solely in an effort to amicably compromise disputed claims."

On August 23, 2016, the circuit court granted Mr. Test's motion to dismiss the monetary claim. It denied the motion with respect to the stock transfer claim, reasoning that the clause of the 1996 Note relating to the transfer of shares was not barred by the statute of limitations because "it was subject to the stand-by-letters of credit," and consequently, the statute of limitations did not begin to run until they were satisfied in 2015.

On September 9, 2016, Dean filed a Second Amended Complaint.[12] He alleged, among other things, that Donald and Mr. Test breached the 1996 Note by failing to transfer 5,600 shares of Annapolitan stock to Dean, which had "accrued from the delinquency in payment of [the 1996 Note] and were due in March of 2015 upon the release of the Annapolitan stock from the pledge."[13] Dean asked the court to issue an order compelling Mr. and Mrs. Test to transfer ownership of 5,600 shares of Annapolitan stock to him, "less the 1,867 shares that [Mr.] Test previously transferred to [Donald]," and an order requiring Donald to transfer 1,867 shares of Annapolitan stock to him.

[12] There were disputes regarding whether Dean or Tiger was the proper plaintiff. On November 18, 2016, after Tiger assigned its interest in the 1996 Note to Dean, Dean filed the Second Amended Complaint, which removed Tiger and substituted Dean as plaintiff.

[13] Dean did not include Mr. Kinnamon as a defendant in the Second Amended Complaint, noting that, although Mr. Kinnamon had signed the 1996 Note as a borrower, his obligations "were discharged in his subsequent Chapter 7 bankruptcy proceeding."

IV.

Matthews Complaint

On December 6, 2016, counsel for the Matthews Family sent Mr. Test a demand letter, asserting that they had "paramoun[t] rights to all of the [Annapolitan] stock at issue" in the 2013 lawsuit brought by Donald, which had settled, and the ongoing lawsuit brought by Dean. Counsel asserted that all of Mr. Test's shares had been pledged to secure the Matthews Debt, and therefore, all transfers of the Annapolitan pledged stock, in contravention of the Matthews Family's rights, were void. They demanded that Mr. Test acknowledge the Matthews Family's rights and that "they be recognized on the books of the Annapolitan as the record owners" of the pledged shares. In support of this demand, counsel attached to the letter a copy of the 1994 Note and the 1994 Agreement, as well as U.C.C. financing statements, which counsel alleged perfected their security interest in the collateral.[14]

On February 24, 2017, James Matthews and Joan Matthews, as attorneys-in-fact for the Matthews Family, filed a Complaint for Declaratory and Ancillary Relief against Mr. Test, Mrs. Test, Donald, Dean, Mr. Kinnamon, Tiger, and the Annapolitan. They requested, *inter alia*, a declaration that they had "first priority security interests" in the

[14] The financing statements were filed with the Maryland Department of Assessments and Taxation and the Virginia State Corporation Commission on December 2, 2016. They each noted that James J. Matthews, Jr. was a secured party to a debt owed by Mr. Test, describing the collateral as: "Stock certificates constituting all the issued and outstanding shares of stock of the Annapolitan Care Center, Inc. owned and/or held by Debtor Robert J. Test."

Annapolitan stock "owned or held by Robert, Jane and Donald, directly or indirectly through Robert, which amount is not less than 56% of the total issued and outstanding shares of the Annapolitan." On March 1, 2017, they filed a motion to consolidate their case with Dean's breach of contract case, which the circuit court granted.

On February 23, 2017, one day before the Matthews Complaint was filed, Mr. and Mrs. Test and James and Joan Matthews signed a Supplemental Pledge and Security Agreement, which addressed Mr. Test's earlier act in distributing shares to his wife. The supplemental agreement provided that the Pledge and Security Agreement "appl[ied] with full force and effect" to the shares owned by Mr. Test and his wife that "are equal to not less than 56% of the total issued and outstanding shares of the Annapolitan." It further provided:

> Nothing herein shall be construed as affecting any rights as between (a) the Matthews Family and Dean Berkheimer, Donald Berkheimer, or John Kinnamon or any person or entity claiming through Dean Berkheimer[,] Donald Berkheimer, or John Kinnamon and (b) Robert and Jane, on the one hand, and Dean Berkheimer, Donald Berkheimer, or John Kinnamon, on the other hand, or any person or entity claiming through Dean Berkheimer, Donald Berkheimer, or John Kinnamon.

V.

Mr. Test's Cross-Claim and Counter-Claim

On February 23, 2017, Mr. Test filed a cross-claim against Donald and a counter-claim against Dean. With respect to the cross-claim, Mr. Test alleged that Donald had "materially breached the terms of the [1994 Agreement] by bringing, participating, and/or directing the filing and prosecution of the 1996 Note [l]itigation," and he sought contribution against Donald for any liability he sustained under the 1996 Note. With

respect to the counter-claim against Dean, Mr. Test asserted a claim of intentional interference of contract, alleging that Dean "knew that the settlement agreement between Donald . . . and [Mr.] Test released all claims regarding the Annapolitan," but Dean, nonetheless, "conspired with Donald . . . to breach the settlement agreement by filing the 1996 Note [l]itigation in his name, when he admittedly did not have standing to enforce the [note]."[15]

VI.

Summary Judgment

On May 12, 2017, Mr. Test, Mrs. Test, and the Annapolitan filed a Motion for Summary Judgment as to the Second Amended Complaint, asserting, among other things, that Dean's claims, "even if true," were "subordinate to the claims and lien of the Matthews Family." They asserted that the Matthews Family had a superior, properly perfected security interest in the Annapolitan stock, and because "the Matthews family obligations have not been satisfied," Dean was "not entitled to enforce any alleged interest he has in the Annapolitan stock." Accordingly, they argued that they were

[15] On May 15, 2017, Donald filed a cross-claim against Mr. Test, which alleged that Mr. Test

> breached his contractual obligations owed to [Donald] by (i) failing to transfer the shares free and clear of . . . "any pledge, lien, security interest or other encumbrance," and (ii) failing to satisfy the debt due to the Matthews [Family], if any, under the [1994] Agreement and related loan documents.

entitled to summary judgment on Dean's complaint. They requested a hearing on the motion. [16]

On May 16, 2017, the Matthews Family filed a Motion for Partial Summary Judgment and Request for Hearing. They alleged that their security interest was created and perfected in 1994 when the stock certificate was delivered to the Matthews Family's attorney pursuant to the 1994 Agreement, and it was perfected a second way by filing financing statements in December 2016. They requested, among other things, a declaration that: (1) the Matthews Family had a perfected, first priority security interest in the Annapolitan stock, which was superior to interests held by other parties, including Donald, Dean, and Mr. Kinnamon; and (2) that the transfer of 1,867 shares of Annapolitan stock to Donald was void.

Dean, Donald, and Mr. Kinnamon opposed the motion for summary judgment. In two separate pleadings, they alleged that there were disputes of material fact that made granting summary judgment improper.

In Dean's opposition, he first argued that his entitlement to the Annapolitan shares was not subject to the repayment of the Matthews Debt, or at the least, there were material facts in dispute on this issue. In this regard, he asserted that: (1) the 1996 Note provided that the stock was "pledged to secure certain obligations relating to the Annapolitan," but the 1994 Note described personal debts by Mr. Test, not to the

[16] Dean also filed a Motion for Partial Summary Judgment. As relevant to our discussion regarding preservation, *infra*, Dean asserted that he was entitled to summary judgment as a matter of law based on the undisputed facts of the case.

Annapolitan; and (2) Mr. Test testified that Dean's shares of stock were subject only to the repayment of the letters of credit.

Second, Dean argued that the Matthews Family did "not have a valid security interest in the collateral (shares of stock memorialized by the stock certificate)," and the security interest was not enforceable and not capable of being perfected. In that regard, Dean argued that a security interest did not attach because the "collateral was not sufficiently described under" Md. Code (2013 Repl. Vol.) § 9-108 of the Commercial Law Article ("CL"). Moreover, he asserted that the security instrument was not enforceable under CL § 9-203(b)(3)(c) because there were disputes of fact regarding whether the collateral was delivered to the Matthews Family. Finally, he asserted that, even if the 1994 Agreement was enforceable, any security interest was not perfected. He argued that a security interest in a stock certificate perfected by delivery "remains perfected until the debtor obtains possession of the stock certificate," and Mr. Test testified that he had been holding the stock certificate. With respect to the financing statement, Dean argued that it could not "perfect a security interest which never attached to the collateral under an unenforceable security instrument."

Donald and Mr. Kinnamon also filed an opposition to the motion for partial summary judgment. They argued that the motion should be denied: (1) under Maryland Rule 2-501(d) to allow for discovery; (2) for the reasons set forth in Dean's opposition; (3) because there was a dispute of material fact as to whether Donald was a "protected purchaser"; (4) and because the Matthews Family failed to join the trustee from Mr.

Kinnamon's Chapter 7 bankruptcy case as a necessary party under Maryland Rule 2-211.

On June 21, 2017, the circuit court held a hearing. Counsel for the Matthews Family noted that there were "a lot of technical issues," but he would focus on those that entitled them to summary judgment. He argued that the Matthews Family had a "first perfected security interest" in Mr. Test's shares of the Annapolitan, which represented approximately 56% of the outstanding shares. Counsel argued that, if the court agreed, "many of the claims, if not all of the others claims, should fall away." He asserted that the Matthews Family had a perfected interest because there was a security agreement with an adequate description of the collateral, i.e., "all of [Mr.] Test's interest in the Annapolitan stock," a "specifically ascertainable standard." Because the Matthews Family had "a security agreement that reasonably identifies the collateral," that "ends the matter," and the "security agreement is valid as a perfected interest that comes first in time."

Counsel argued that the Matthews Family perfected their interest in two other ways. They filed a financing statement with the Maryland Department of Assessments and Taxation in December 2016. And they had a perfected interest because the collateral was a certificated security that was delivered pursuant to a security agreement. Even if discovery would show that the certificate had been given back to Mr. Test, discovery was not necessary because there had to be other objective indicia of surrender of the interest, and there was no evidence that the Matthews Family relinquished their interest. Counsel argued that the 1994 Agreement provided that the pledge was not

released until payment or written notice of termination, which did not occur. Counsel concluded by stating that the issues between the other parties did not affect the Matthews Family, who had a perfected interest in the Annapolitan shares.

Counsel for Dean argued that the Matthews Family had not met their burden to show that there was no dispute of fact that the 1994 Agreement was valid and enforceable. He reiterated that the key issue was "whether the Matthews ha[d] a valid and enforceable security instrument," and if not, "there's nothing that's tying up Dean's access to the shares of stock." In that regard, counsel stated that the 1994 Agreement lacked an adequate description of the collateral because it did not specify the number of shares that were pledged to secure the debt. With respect to delivery, counsel argued that the evidence indicated that the stock certificate was not delivered to the Matthews Family contemporaneously with the signing of the agreement. Counsel argued that, given these "significant factual disputes," summary judgment was not appropriate at that point.

Counsel for Donald and Mr. Kinnamon began by stating that, during 20 years of business dealings, including the Donald Litigation in 2013, Mr. Test never mentioned the Matthews pledge, and Donald had no knowledge of it until the Matthews Family filed their complaint. He stated that Donald had no reason to believe that Mr. Test could not transfer the 1,867 shares of stock pursuant to the agreement, which stated that the transfer was "free and clear of all liens, claims, and encumbrances."

Counsel argued that summary judgment was not appropriate because there were disputes of fact that needed to be answered, including the terms of the original pledge

agreement for the letters of credit to determine whether the "Matthews family was perfected and continued to be perfected prior to the time [Donald] got his shares and prior to the time of Mr. Kinnamon's bankruptcy." In that regard, he noted that there was a dispute regarding who had possession of the stock certificate, and pursuant to CL § 9-313(e), a "security interest in a certificated security in registered form is perfected by delivery when delivery of the certificated security occurs under [CL §] 8-301 . . . and remains perfected by delivery until the debtor obtains the possession of the security certificate." He claimed that discovery was necessary to resolve these factual issues, and therefore, the motion for summary judgment was "premature." Additionally, counsel claimed that the trustee in Mr. Kinnamon's bankruptcy proceeding was a "necessary party" to the litigation.

Counsel for Mr. and Mrs. Test argued that the parties "always knew that the Matthews family had a secured interest in this stock." He asserted that, although there were disputed factual issues, none were material to whether the Matthews Family had a superior interest in the Annapolitan stock.

Following arguments, the circuit court granted the motion for summary judgment. It initially found that it was undisputed that Mr. Test owned the stock and had the power to transfer the rights and that value was given. It then found that the Matthews Family had an enforceable security interest in 1994 because there was a security agreement that provided a description of the collateral, which was all the stock that Mr. Test owned on that date. The court also referenced the financing statement that was filed in 2016, "prior to anyone else doing so," and it reiterated that the Matthews Family's enforceable

agreement went back to 1994. Therefore, the court stated, it was going to grant the Matthews Family's motion for summary judgment.

The court then addressed the "second theory" regarding the delivery of the stock certificate. The circuit court made the following findings:

> I think that it's not contested that the, . . . shares were delivered to the attorney previously, and there's been no indication at this point that the shares were ever delivered . . . to Mr. Test. There may be some evidence that someone else may hold the certificate, but holding it and possession is different from delivery, which would require[] [donative intent] and actual steps taken on behalf of the [Matthews Family] to deliver the shares back. So, I know there's been some discussion that this certificate may be in someone else's possession. To me that's irrelevant at this point because there's been no indication that the Matthews [Family] ever delivered it back in the sense of real property delivery, meaning that there has to be a [donative intent] and there has to be some steps on behalf of the Matthews [Family] to make that delivery. So, I think there may also be an enforceable, it may also be enforceable under Subsection (c) of 3 in that there was a certified security that was delivered. And then under the terms of the [S]ecurity [A]greement that, . . . the [S]ecurity [A]greement would remain enforceable until such time as this, the document was delivered back. And I haven't heard any evidence, or I don't think anyone's even making any claims that the Matthews [Family] ever did that. So, therefore, I believe that there's probably an enforceable, this agreement is enforceable under [Sub]section 3(c) of this agreement . . . . So, I'm going to grant the motion for partial summary judgment.

The court clarified its ruling as finding: (1) that the Matthews Family had "an enforceable interest in the numbers of shares of stock that Mr. Test owned in the Annapolitan on June 27th, 1994"; and (2) that they had "perfection and priority amongst all the claimants . . . relative to that number of shares of stock." Counsel then submitted on their pleadings regarding the other motions.

That same day, the circuit court issued a written order granting the Matthews Family's motion for partial summary judgment. This order provided, in pertinent part, as follows:

> (1) Under the Maryland Uniform Commercial Code contained in the Commercial Law Title, Plaintiffs possess valid, perfected, first priority security interests in the Annapolitan shares as against the world, including but not limited to any such shares owned or held by Defendant Robert J. Test ("Robert"), or derived directly or indirectly through Robert or as a result of any actions by Robert, which amount is not less than 56% of the total issued and outstanding shares of the Annapolitan, and such security interests apply to any such stock that may be in the possession or ownership of Defendants Jane Test ("Jane") and Donald Berkheimer ("Donald"), including but not limited to the shares referenced in Plaintiff's Complaint as the Jane Stock
>
> (2) With respect to said stock, Plaintiffs, as attorneys-in-fact for the Matthews Family, are entitled to exercise all of their rights and remedies under the Note and [1994 Agreement] dated June 24, 1994, including, but not limited to, sale or foreclosure.
>
> (3) A purported transfer of 1,867 shares of Annapolitan stock to Donald by Robert (or such greater number of shares as may be deemed to exist as a result of any dilutive actions that may have increased the number of shares to which the Plaintiff's security interest or lien applies) is void and any purported share certificates associated with said transaction are subject to the Plaintiff's valid, perfected, first priority security interests as described in this Order. Donald is hereby ORDERED to forthwith deliver such share certificate(s) in his possession, if any, to Plaintiffs.
>
> (4) Plaintiffs are entitled to possession of original certificates representing all shares subject to the Order.
>
> * * *
>
> (7) Plaintiffs may petition this Court for other and further relief that may be necessary to implement and enforce the terms hereof.

On June 23, 2017, the circuit court entered several orders, including: (1) an order denying Dean's Motion for Partial Summary Judgment; (2) an order denying Dean's

motion to dismiss Mr. Test's counterclaim against him; (3) an order denying Donald's Motion to Dismiss Count I of Cross Claim filed by Mr. Test; (4) an order denying Donald and Mr. Kinnamon's Motion to Dismiss Matthews' Complaint; (5) an order granting Mr. Test's Motion for Summary Judgment with respect to Count I of Dean's Second Amended Complaint, but denying the motion with respect to Counts II, III, IV, and V; and (6) an order granting the Matthews' Motion for Partial Summary Judgment. Dean, Donald and Mr. Kinnamon filed motions for reconsideration, which the circuit court denied. The parties subsequently filed a Stipulation of Dismissal of Outstanding Claims and Joint Motion for Entry of Final Judgment, requesting that the court: (1) dismiss without prejudice all of the claims not resolved on summary judgment; and (2) enter an order of final judgment. The circuit court granted the motion on December 27, 2017, and a final order was entered on December 28, 2017.

This appeal followed.

STANDARD OF REVIEW

Maryland Rule 2-501(f) governs motions for summary judgment and states that a trial court "shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." *See Fox v. Fidelity First Home Mortg. Co.*, 223 Md. App. 492, 507–08, *cert. denied*, 445 Md. 20 (2015). "A material fact is 'one that will somehow affect the outcome of the case."' *Id.* at 508 (quoting *Commercial Union Ins. Co. v. Harleysville Mut. Ins. Co.*, 110 Md. App. 45, 51 (1996)). "We review a grant of summary judgment without deference, and

construe the facts, and any reasonable inferences that may be drawn from them, in the light most favorable to the non-moving party." *Calvo v. Montgomery Cty.*, 459 Md. 315, 323 (2018).

DISCUSSION

I.

Dean and Donald argue that the court erred in granting the Matthews Family's motion for partial summary judgment because there were disputes of material fact relating to the competing legal rights of the parties to the Annapolitan stock.[17] They list the material facts that are in dispute as follows: (1) whether the collateral, the stock certificate, was delivered to the Matthews Family, which was material to whether the Matthews Family had an enforceable agreement against third-parties; (2) whether the Matthews Family, if they perfected a security interest by delivery, lost it by returning the stock certificate to Mr. Test; (3) whether the 1994 Note was satisfied, in which case the Matthews Family would not be entitled to the stock, and if not satisfied, "the outstanding balance due"; (4) whether the Matthews Family released their pledge regarding Donald's shares; and (5) whether Donald was a protected purchaser.[18]

[17] Mr. Kinnamon is not a party to this appeal and did not file a brief.

[18] Donald also argues, and Dean incorporates the argument, that the Matthews Family did not have an enforceable security interest because, as a matter of law, Mr. Test only had the authority to transfer his rights to the stock, not the interest that he was holding for Donald or Mr. Kinnamon. Donald does not, however, cite any dispute of fact regarding this issue. Instead, as Donald indicates, this appears to be a pure legal issue, which was not argued below and for which he cites no legal authority. Therefore, we will not address it. *See* Maryland Rule 8-131(a) ("Ordinarily, the appellate court will

The Matthews Family and Mr. Test contend that there is no dispute of fact that the Matthews family has a superior interest in the Annapolitan stock. They assert that the court properly granted the motion for partial summary judgment.

A.

Preservation

Before addressing the arguments regarding the alleged disputes of material fact, we must consider what arguments were raised in the circuit court and preserved for appellate review. Maryland Rule 2-501(b) provides that a party opposing a motion for summary judgment shall "identify with particularity each material fact as to which it is contended that there is a genuine dispute[.]" Here, as set forth above, Dean and Donald raise multiple issues on which they allege disputes of material fact. A couple of the issues, however, were not raised prior to the court's ruling on the motions for summary judgment.

In opposing the Matthews Family's motion for partial summary judgment, Dean and Donald focused primarily on the validity and enforceability of the 1994 Agreement. Neither raised below, prior to the ruling on the motions for summary judgment, the third and fourth contentions listed above, i.e., the amount due on the 1994 Note, if it was

---

not decide any . . . issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]"). *See also Fox v. Fidelity First Home Mortg. Co.*, 223 Md. App. 492, 517–18 ("'Bald, unsupported statements or conclusions of law' do not generate a dispute of material fact[.]") (quoting *Hoffman Chevrolet, Inc. v. Wash. Cty. Nat'l Sav. Bank*, 297 Md. 691, 712 (1983)), *cert. denied*, 445 Md. 20 (2015).

satisfied, and whether the Matthews Family released their pledge in the settlement with Donald. [19]

To be sure, the parties did argue that Mr. Test indicated that Dean's entitlement to the shares was subject only to the repayment of the letters of credit. Dean stated in his written opposition to the motion:

> Thus, the only requirement that had to be satisfied before the Annapolitan stock was released from escrow is payment in full of the Matthews Family letters of credit in the amount of $535,000 (which has now been satisfied), not $1.4 million. Therefore, the Annapolitan stock is not subject to a superior interest by the Matthews Family.

The argument, however, was made in the context of the argument that the Matthews Family did not have an enforceable security interest, not that the Matthews Family initially had such an interest and it subsequently was satisfied or released.[20] Indeed, immediately after the circuit court issued its ruling, which did not address the issues of satisfaction or release, there was a request for a clarification, but there was no request at that time that the court address these issues.

Under these circumstances, the arguments regarding satisfaction or release of the security interest are not preserved for appellate review. Accordingly, we will not consider them. *See Beyer v. Morgan State Univ.*, 139 Md. App. 609, 636 (2001)

[19] Dean did raise the issues below for the first time in a motion for reconsideration, but as discussed *infra*, this was not sufficient to preserve the issues for appellate review.

[20] As indicated, at the hearing on the motion for summary judgment, counsel for Dean emphasized that the "key issue" was "whether the Matthews ha[d] a valid and enforceable security instrument," and if not, there was nothing "tying up Dean's access to the shares of stock."

(disputes of material fact that have not been identified below are not reviewable on appeal), *aff'd*, 369 Md. 335 (2002); *Faith v. Keeler*, 127 Md. App. 706, 736 (same), *cert. denied*, 357 Md. 191 (1999). *See also* Maryland Rule 8-131(a) ("Ordinarily, the appellate court will not decide any . . . issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]").

B.

Reconsideration of Preservation Issue

After our initial opinion issued in this case, Dean filed a motion for reconsideration, asking this Court to reconsider our decision regarding preservation. Mr. Test and the Matthews Family opposed the motion. We have reconsidered our decision in light of these pleadings, but as explained below, our conclusion that the issues were not preserved for appellate review remains the same.

Dean references several pleadings and statements that he asserts raised the issues of satisfaction and release. After reviewing these references, in the context in which they were made, and the context of the arguments presented to the court, we agree with the Matthews Family that these references, in a case with "a sea of paper," did not adequately alert the circuit court that Dean was asserting that there was a dispute of fact on these issues, which presumably is why the court did not address such contentions.

Dean additionally argues, however, that he raised these issues in a motion for reconsideration filed with the circuit court. We agree with Dean that the issues of satisfaction and release were raised in the motion for reconsideration he filed with the circuit court. That, however, does not render the issue preserved for review. As this

Court has explained: "[A] post-trial motion to reconsider is not a time machine in which to travel back to a recently concluded trial in order to try the case better with hindsight." *Steinhoff v. Sommerfelt*, 144 Md. App. 463, 484 (2002). A party does not "enjoy *carte blanche*, through post-trial motions, to replay the game as a matter of right." *Id.*

In *Steinhoff*, after the circuit court ordered, among other things, a monetary award, appellant moved to alter and amend the court's judgment, arguing for the first time that he should be able to pay the monetary award by way of a Qualified Domestic Relations Order ("QDRO"). *Id.* at 469. This Court ruled that, because the issue of QDRO was not raised at trial, "[t]here is before us, therefore, nothing preserved for appellate review." *Id.* at 483. We stated that we would "not allow the appellant's reference to raising the issue in a post-trial motion to serve as a smokescreen obscuring the earlier and fatal non-preservation." *Id.* at 484.

Similarly, here, we conclude that Dean did not raise the issues of satisfaction and release until the motion for reconsideration, after the court granted the Matthews Family's motion for partial summary judgment. Accordingly, the argument that there was a dispute of material fact on these issues, which required denial of the motion for partial summary judgment, is not preserved for this Court's review.

Even if Dean were arguing that the circuit court abused its discretion in denying the motion for reconsideration—an argument that has not explicitly been made—we would find it to be without merit. As this Court has stated: "When a party requests that a court reconsider a ruling solely because of new arguments that the party could have raised before the court ruled, the court has almost limitless discretion not to consider

those argument[s]." *Schlotzhauer v. Morton*, 224 Md. App. 72, 85 (2015), *aff'd*, 449 Md. 217 (2016). We perceive no abuse of discretion by the circuit court in denying the motion here.

We turn now to address the merits of the issues that are properly before us.

C.

Attachment of Security Interest

The circuit court ruled that the Matthews Family had "an enforceable interest in the numbers of shares of stock that Mr. Test owned in the Annapolitan on June 27th, 1994." We agree.

Pursuant to CL § 1-201(b)(35), a "security interest" is "an interest in personal property . . . which secures payment . . . of an obligation." A security agreement "means an agreement that creates or provides for a security interest." CL § 9-102(a)(75).

Section 9-203 addresses when a party obtains an enforceable security interest. Pursuant to CL § 9-203(a), a "security interest attaches to collateral when it becomes enforceable against the debtor with respect to the collateral unless an agreement expressly postpones the time of attachment." A security interest is

> enforceable against the debtor and third parties with respect to the collateral only if:
>
> (1) Value has been given;
>
> (2) The debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party; and
>
> (3) One of the following conditions is met:

> (A) The debtor has authenticated a security agreement that provides a description of the collateral and, if the security interest covers timber to be cut, a description of the land concerned;
>
> (B) The collateral is not a certificated security and is in the possession of the secured party under § 9-313 pursuant to the debtor's security agreement;
>
> (C) The collateral is a certificated security in registered form and the security certificate has been delivered to the secured party under § 8-301 of this article pursuant to the debtor's security agreement; or
>
> (D) The collateral is deposit accounts, electronic chattel paper, investment property, letter-of-credit rights, or electronic documents, and the secured party has control under § 7-106, § 9-104, § 9-105, § 9-106, or § 9-107 pursuant to the debtor's security agreement.

CL § 9-203(b).

Here, the circuit court found that there was no dispute that value was given and that Mr. Test had the right to transfer the rights to the stock. There is no preserved argument on appeal that a dispute of fact exists regarding these findings.[21] The court also found that, pursuant to CL § 9-203(b)(3)(A), the debtor "authenticated a security agreement that provides a description of the collateral," and there is no argument on appeal that the court erred in so finding. Accordingly, there was no dispute of fact that the Matthews Family had an enforceable security interest in the Annapolitan stock in 1994. The circuit court's ruling that the Matthews Family had "an enforceable interest in the numbers of shares of stock that Mr. Test owned in the Annapolitan on June 27th, 1994," was not erroneous.

[21] *See supra* note 18.

D.

Priority of Interests

We next address the court's ruling that the Matthews had "perfection and priority" interest in the stock as against Dean, Donald, and Mr. Kinnamon. In doing so, we note the rules regarding priority of claims.

CL § 9-201 provides that, subject to certain exceptions, "a security agreement is effective according to its terms between the parties, against purchasers of the collateral, and against creditors." Courts in other jurisdictions have interpreted similar provisions to mean that, except as otherwise provided in the code's priority rules, a secured party has priority over an unsecured interest in the collateral. *See Citizens Nat. Bank of Whitley Cty. v. Mid-States Dev. Co., Inc.*, 380 N.E.2d 1243, 1248–49 (Ind. Ct. App. 1978); *United States Shoe Corp. v. Cudmore-Neiber Shoe Co., Inc.*, 419 F.Supp. 135, 138 (D.S.D. 1976).

When there are competing secured claims to the same collateral, the following priority rules apply:

> (1) Conflicting perfected security interests and agricultural liens rank according to priority in time of filing or perfection. Priority dates from the earlier of the time a filing covering the collateral is first made or the security interest or agricultural lien is first perfected, if there is no period thereafter when there is neither filing nor perfection.
>
> (2) A perfected security interest or agricultural lien has priority over a conflicting unperfected security interest or agricultural lien.
>
> (3) The first security interest or agricultural lien to attach or become effective has priority if conflicting security interests and agricultural liens are unperfected.

CL § 9-322. In sum, when there are competing security interests, the first to attach has priority, and the holder of a perfected security interest generally has priority over a conflicting, unperfected security interest.[22]

A person can perfect a security interest in a certificated security, in either of two ways.[23] The person can: (1) file a financing statement, *see* CL § 9-310(a); or (2) take delivery of the security certificate, *see* CL § 9-310(b)(7); CL § 9-313(a). In the latter situation, the security interest "remains perfected by delivery until the debtor obtains possession of the security certificate." CL § 9-313(e).

With these priority rules in mind, we shall address the claim by the Matthews Family that they had a perfected, first priority interest in the Annapolitan stock. Addressing Dean's interest, we note, initially, that he did not argue below that if the Matthews Family had an enforceable security interest, he had a higher priority interest. Rather, as indicated, he stated that the "key issue" was whether the Matthews Family had a valid and enforceable security interest, which we have concluded that they did.

On appeal, Dean argues that there was a dispute of material fact regarding whether the Matthews Family or Mr. Test had possession of the stock certificate. They assert that, pursuant to CL § 9-313, "perfection can only control so long as the Matthews

[22] One exception, which will be discussed, *infra*, involves a protected purchaser.

[23] A "certificated security" is a "security that is represented by a certificate." Md. Code (2013 Repl. Vol.) § 8-102(a)(4) of the Commercial Law Article. There is no dispute here that the stock is a certificated security.

Family, as the secured party or their agent (which cannot be [Mr.] Test as the debtor), holds the stock certificate[.]"

The circuit court found, and we agree, that there was a dispute of fact regarding who had possession of the stock certificate. Mr. Test testified during the Donald Litigation that he had possession of the stock certificate. The Matthews Family, however, denied this assertion. Clearly, that is a dispute of fact. A mere dispute of fact, however, by itself, will not defeat a motion for summary judgment. The dispute must be of a material fact, one that will affect the outcome of the case.

The dispute of fact regarding possession is not a dispute of material fact in this case because perfection by retaining possession of the stock certificate is not dispositive of the question whether the Matthews Family's interest was perfected. As indicated, perfection can be accomplished by filing a financing statement, *see* CL § 9-310(a), and there is no dispute of fact that the Matthews Family did that.

Thus, even assuming that the 1996 Agreement gave Dean an enforceable security interest, there is no argument or evidence that Dean had a perfected security interest. Under these circumstances, the circuit court properly concluded on summary judgment that the Matthews Family's perfected interest in the stock was superior to Dean's interest. *See* CL § 9-322(2) ("A perfected security interest . . . has priority over a

conflicting unperfected security interest.").[24] The court's ruling in this regard will be affirmed.

With respect to Donald, he does not argue that he had an enforceable security agreement. Although this generally would mean that the Matthews Family's interest was superior to his interest, Donald argues that he falls within an exception to this general rule because he obtained his shares in a settlement agreement prior to the perfection of the Matthews Family's interest in 2016. Donald contends that he is a "protected purchaser."

As Donald notes, several provisions in the Commercial Law Article provide protections to a buyer of a security. Section 9-317(b) provides that, with an exception not applicable here,

> a buyer, other than a secured party, of . . . a certificated security takes free of a security interest or agricultural lien if the buyer gives value and receives delivery of the collateral without knowledge of the security interest or agricultural lien and before it is perfected.

Section 9-331(a) provides:

> This title does not limit the rights of . . . a protected purchaser of a security. These . . . purchasers take priority over an earlier security interest, even if perfected, to the extent provided in Titles 3, 7, and 8 of this article.

Donald contends that there is a material dispute of fact about whether he qualifies as a "protected purchaser." Section 8-303(a) defines a "protected purchaser" as a

[24] Dean also argued that possession of the stock certificate was material because, "by its own terms, the [1994] Agreement terminated when the collateral stock certificate was returned to Test[.]" This argument was not made to the circuit court, and therefore, as with the other issues not raised below, we will not consider it.

"purchaser of a certificated or uncertificated security, or of an interest in a certificated or uncertificated security, who: (1) Gives value; (2) Does not have notice of any adverse claim to the security; and (3) Obtains control of the certificated or uncertificated security."

A person qualifies as a "purchaser" when he or she "takes by purchase," which includes "taking by sale, lease, discount, negotiation, mortgage, pledge, lien, security interest, issue or reissue, gift, or any other voluntary transaction creating an interest in property." CL § 1-201(29)-(30). This definition has been interpreted broadly as encompassing "any acquisition of rights in property which acquisition is voluntary as to the transferor." Lary Lawrence, *Anderson on the Uniform Commercial Code*, §1-201:382 (3d. ed.). If a person qualifies as a "protected purchaser," he or she not only acquires the rights of a purchaser but "also acquires its interest in the security free of any adverse claim." CL § 8-303(b).

The Matthews Family asserts that, for purposes of this appeal, they assume that Donald was a "purchaser" of the shares. They argue, however, that, as a matter of law, Donald is not entitled to priority as a purchaser. They assert two arguments in this regard.

First, the Matthews Family notes that, pursuant to CL § 8-302(a), "'a purchaser of a certificated or uncertificated security acquires all rights in the security that the transferor had or had power to transfer.'" They contend that Mr. Test did not have the power to convey any of the pledged shares free and clear of the Matthews Family's security interests.

Donald contends that there is a dispute of fact regarding Mr. Test's authority to convey the shares to him. He asserts that Mr. Test "testified that James Matthews authorized the sale and transfer of shares after the loans for the letters of credit were paid in full, and authorized the issuance of shares to Don[ald] as part of the settlement free and clear of this interest." We agree that there is a dispute of fact on this issue.

Second, the Matthews Family argue that Donald cannot be a protected purchaser because he had notice of an adverse claim to the security, asserting that "Donald knew full well that [the Matthews Family] had a valid first secured position," and even if Mr. Test stated to the contrary, Donald should have checked with them before he entered into a settlement agreement with Mr. Test.

Donald disagrees. He asserts:

> As set for[th] in the Affidavit of Donald Berkheimer, he had no prior knowledge of the existence of the Matthews Note or Matthews Pledge Agreement at the time he acquired the 1,867 shares as part of the settlement. . . . In addition, Robert Test had testified that such shares were pledged only to secure repayment of the letters of credit which had been repaid as stated earlier. Accordingly, a dispute of material fact exists between the parties as to whether Donald Berkheimer is a "protected purchaser" under § 8-303(a)(2) of the Commercial Law Article of the Annotated Code of Maryland thereby allowing him to acquire the securities free of any adverse claim.

There is no dispute here regarding the existence of an "adverse claim," which is defined as "a claim that a claimant has a property interest in a financial asset and that it is a violation of the rights of the claimant for another person to hold, transfer, or deal with the financial asset." CL § 8-102(a)(1). The issue is whether Donald had notice of the adverse claim, i.e., the 1994 Agreement, prior to obtaining his shares.

Pursuant to CL § 8-105(a), a person is deemed to have notice of an adverse claim when:

> (1) The person knows of the adverse claim;
>
> (2) The person is aware of facts sufficient to indicate that there is a significant probability that the adverse claim exists and deliberately avoids information that would establish the existence of the adverse claim; or
>
> (3) The person has a duty, imposed by statute or regulation, to investigate whether an adverse claim exists, and the investigation so required would establish the existence of the adverse claim.[25]

The circuit court did not explicitly address whether Donald was a protected purchaser. We agree with Donald, however, that there is a dispute of material fact regarding whether he had notice of the Matthews Family's claim. Donald maintains that he had no knowledge of the existence of the 1994 Note or the 1994 Agreement until he received a letter from counsel for the Matthews Family dated December 6, 2016, which was after he had received shares from his settlement with Mr. Test. The resolution of this notice issue is not a matter properly resolved on summary judgment. *See Thacker v. City of Hyattsville*, 135 Md. App. 268, 286 (2000) ("'[S]ummary judgment generally is inappropriate"' in matters involving issues of '"knowledge, intent or motive,'" which are '"best left for resolution by the trier of fact at trial[.]"') (quoting *Brown v. Dermer*, 357 Md. 344, 355–56 (2000)), *cert. denied*, 363 Md. 206 (2001). Accordingly, the circuit court erred in declaring, on a motion for summary judgment, that the Matthews Family

[25] There is no claim that Donald was required by statute or regulation to investigate whether there was an adverse claim before he received shares pursuant to the Settlement Agreement.

had a higher priority security interest in the stock transferred to Donald and that the transfer was void.

II.

In our initial opinion, we declined to reach Dean's second question presented. As indicated, this question was as follows:

> [D]id the trial court err in awarding all of the collateral shares to the secured party, without first resolving the amount due under the note, where the 1994 Agreement limited the remedy to the *sale* of collateral stock to satisfy the debt, and required that the remainder of the shares be returned to the debtor (and, thereby, the remaining claimants)?

Because we were remanding the case for further proceedings, we determined that it was appropriate to allow the issue to be fleshed out initially in the trial court.

Dean has requested that we reconsider this issue. He argues:

> The trial court's order enabled the Matthews Family to "exercise all of their rights and remedies under the Note and the Pledge and Security Agreement dated June 24, 1994, including but not limited to, sale ***or foreclosure***" . . ., but the Pledge Agreement limited their remedies to the sale of shares only, and required that any unsold shares be returned to [Mr.] Test and, in turn, his junior creditors. . . . The Matthews Family was prohibited from keeping ("foreclose") the shares for themselves, and . . . the trial court erred in creating a remedy . . . to which the Matthews Family was not entitled.
>
> * * *
>
> To enable the Matthews Family to keep all of the shares in order to satisfy an unknown, disputed amount of debt, is *commercially unreasonable*. . . . It would be bad faith for the Matthews Family to take hold of all of the shares where the indebtedness was significantly less than the value of the shares.

The Matthews Family argues in their opposition to the motion for reconsideration that the issue whether they "will properly exercise the remedies flowing from their senior, secured status is an issue that will only arise after the trial court resolves the

priority of interests between the Matthews Family and Donald (and indeed whether Donald has an interest)." On the merits, they argue that they have "discretion under the Security Agreement as to how to dispose of the shares," but they do not specifically address whether that includes the remedy of foreclosure.

Mr. Test argues that this Court's order was consistent with the remedies provision in the 1994 Agreement, i.e., "the Matthews Family is constrained by the rights and remedies provided for *under the Note and the Pledge and Security Agreement*." He similarly does not address whether these remedies include foreclosure.

Subsection 6 of the Security Agreement states, in pertinent part, as follows:

> Remedies. If an event of default shall occur, the [Matthews Family] may, after ten (10) days prior notice to [Mr. Test], sell, assign and deliver[] the whole or, from time to time, any part of the [Annapolitan stock] or any interest or part thereof, at any private sale or at a public auction, for cash, or credit or other property, for immediate or future delivery, and for such price or prices and on such terms as the [Matthews Family] reasonably may determine.

The agreement provides that the net proceeds of any such sale shall be applied to expenses, interest, the principle of the 1994 Note, and

> (iv) Fourth, only after payment in full of the above, to the payment to [Mr. Test] of any excess proceeds, along with any shares of the [Annapolitan stock] remaining unsold, subject of the receipt of notice of and the provisions of any other agreement between the parties with respect to the disposition of said excess proceeds or unsold shares.

Dean argues that the "remedy provided under the [Security Agreement] was never intended to allow the [Matthews Family] and [Mr.] Test to remove all the shares

from another creditor's reach." Rather, the Matthews Family is "entitled to only what is required to recoup the balance due—a sum that remains contested."[26]

After reviewing the parties' arguments, we reach the same conclusion we reached in our initial opinion, i.e., that given the scope of our mandate, the issue should be resolved on remand.[27]

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED, IN PART, AND REVERSED, IN PART. ORDER RULING THAT THE

[26] Dean cites to Comment 11 of CL § 9-620, which provides, in pertinent part, as follows:

> **Role of Good Faith.** Section 1-304 imposes an obligation of good faith on a secured party's enforcement under this Article. This obligation may not be disclaimed by agreement. See Section 11-302. Thus, a proposal and acceptance made under this section in bad faith would not be effective. For example, a secured party's proposal to accept marketable securities worth $1,000 in full satisfaction of indebtedness in the amount of $100, made in the hopes that the debtor might inadvertently fail to object, would be made in bad faith. On the other hand, in the normal case proposals and acceptances should be not second-guessed on the basis of the "value" of the collateral involved. Disputes about valuation or even a clear excess of collateral value over the amount of obligations satisfied do not necessarily demonstrate the absence of good faith.

[27] We do note, however, that the term foreclosure can have more than one meaning. See *Black's Law Dictionary* 789 (11th ed. 2019) (defining "strict foreclosure" as a "procedure that gives the mortgagee title to the mortgaged property–without first conducting a sale," and "power-of-sale foreclosure" as a "process by which . . . the mortgaged property is sold at a non-judicial public sale"). And given that the parties all agree that the remedies available are, as stated in the court's order, those set forth under "the Note and the Pledge and Security Agreement dated June 24, 1994," the court on remand may want to consider, for purposes of lawyer and judicial economy, deleting the words that follow that portion of the order, i.e., "including, but not limited to, sale or foreclosure."

MATTHEWS FAMILY HAD AN ENFORCEABLE SECURITY INTEREST IN THE STOCK THAT HAD PRIORITY OVER DEAN'S INTEREST AFFIRMED. JUDGMENT OTHERWISE REVERSED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID 34% BY DEAN, 33% BY ROBERT TEST, AND 33% BY THE MATTHEWS FAMILY.