

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 3056

September Term, 2018

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MAYOR AND CITY COUNCIL OF  
BALTIMORE

v.

AEG LIVE MID-ATLANTIC, LLC

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Meredith,\*  
Kehoe,  
Leahy,

JJ.

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Opinion by Meredith, J.

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Filed: July 29, 2021

\*Meredith, Timothy E., J., now retired, participated in the hearing of this case while an active member of this Court, and after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in the decision and the preparation of this opinion.

\*This is an unreported opinion, and it 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.

In the Circuit Court for Baltimore City, AEG Live Mid-Atlantic, LLC (“AEG”), appellee, posted an injunction bond required to support the preliminary injunction it had obtained to prohibit the Mayor and City Council of Baltimore (“Baltimore City” or “the City”), appellant, from going forward with the contract that Baltimore City had awarded to AEG’s competitor, Live Nation Worldwide, Inc. (“Live Nation”), relative to management and operation of the Pier Six concert venue (sometimes referred to as the Pier 6 Pavilion). After AEG voluntarily dismissed its suit, AEG asked that the bond be released. Baltimore City opposed release of the bond, and moved to recover damages pursuant to the bond. After a non-evidentiary hearing on motions, the circuit court entered a final order denying Baltimore City’s motion to recover damages, and ordered the clerk of the circuit court to release the injunction bond to AEG. Baltimore City noted this timely appeal.

### **QUESTIONS PRESENTED**

Baltimore City presented the following question for our review:

Did the circuit court err when it granted summary judgment prior to an evidentiary hearing when material facts were in dispute?

Because we conclude, upon viewing the facts in the record in the light most favorable to the appellant, that there were material facts in dispute at the time the circuit court considered the competing motions regarding the City’s claim for damages pursuant to the injunction bond, we answer “yes” to the City’s question. We will vacate the judgments and remand the case for further proceedings in the circuit court.

## STANDARD OF REVIEW

After a hearing on motions that the circuit court “treated as a motion [for] summary judgment hearing,” the circuit court entered summary judgment in favor of AEG, ruling (1) that the City could not recover damages pursuant to the injunction bond, and (2) that the bond be released. In an appeal from the grant of a summary judgment, we are obligated to view the record in the light most favorable to the losing party, here, the City.

Pursuant to Maryland Rule 2-501(f), summary judgment should be granted only where “there is no genuine dispute as to any material fact and . . . the party in whose favor judgment is entered is entitled to judgment as a matter of law.”

The Court of Appeals addressed the standard for appellate review of a judgment entered pursuant to a motion for summary judgment in *La Belle Epoque, LLC v. Old Europe Antique Manor, LLC*, 406 Md. 194 (2008):

[“]In considering a trial court’s grant of a motion for summary judgment, this Court reviews the record in the light most favorable to the non-moving party. *Bednar v. Provident Bank of Maryland, Inc.*, 402 Md. 532, 542, 937 A.2d 210, 215 (2007); *Rhoads v. Sommer*, 401 Md. 131, 148, 931 A.2d 508, 518 (2007) (“We review the record in the light most favorable to the non-moving party and construe any reasonable inferences that may be drawn from the facts against the moving party”); *Harford County v. Saks Fifth Ave. Distribution Co.*, 399 Md. 73, 82, 923 A.2d 1, 6 (2007) (In reviewing a trial court’s decision on a motion for summary judgment, “we seek to determine whether any material facts are in dispute and, if they are, we resolve them in favor of the non-moving party”); *Serio v. Baltimore County*, 384 Md. 373, 388-89, 863 A.2d 952, 961 (2004); *Lovelace v. Anderson*, 366 Md. 690, 695, 785 A.2d 726, 728 (2001) (In reviewing a grant of the defendants’ motions for summary judgment, “we must review the facts, and all inferences therefrom, in the light most favorable to the plaintiffs”). If no material facts are placed in genuine

dispute, this Court must determine whether the Circuit Court correctly entered summary judgment as a matter of law. See Maryland Rule 2–501(f); *Bednar*, 402 Md. at 532, 937 A.2d at 216; *Saks*, 399 Md. at 82, 923 A.2d at 6; *Prop. and Cas. Ins. Guar. Corp. v. Yanni*, 397 Md. 474, 480, 919 A.2d 1, 5 (2007); *Standard Fire Ins. Co. v. Berrett*, 395 Md. 439, 451, 910 A.2d 1072, 1079 (2006); *Ross v. State Bd. of Elections*, 387 Md. 649, 659, 876 A.2d 692, 698 (2005).<sup>[7]</sup>

406 Md. at 208-09 (quoting *Anderson v. The Gables*, 404 Md. 560, 570-71 (2008)).

The Court of Appeals explained in *United Services Auto. Ass’n v. Riley*, 393 Md. 55, 66-67 (2006):

When reviewing the grant or denial of a motion for summary judgment we must determine whether a material factual issue exists, and all inferences are resolved against the moving party. Even where the underlying facts are undisputed, if those facts are susceptible of more than one permissible inference, the choice between those inferences should not be made as a matter of law, but should be submitted to the trier of fact. The function of a summary judgment proceeding is not to try the case or to attempt to resolve factual disputes but to determine whether there is a dispute as to material facts sufficient to provide an issue to be tried.

(Citations and internal quotation marks omitted.)

And in *Okwa v. Harper*, 360 Md. 161, 182 (2000), the Court of Appeals observed:

The summary judgment process is not properly an opportunity for the trial court to give credence to certain facts and refuse to credit others. See *Pittman v. Atlantic Realty Co.*, 359 Md. 513, 537, 754 A.2d 1030, 1042-43 (2000) (citations omitted) (the trial judge is not permitted to weigh evidence in deciding a motion for summary judgment); *Sheets v. Brethren Mut. Ins. Co.*, 342 Md. [634] at 638, 679 A.2d at 542 [(1996)] (“[i]n granting a motion for summary judgment, the trial court does not resolve factual disputes, but instead is limited to ruling as a matter of law”); *Dobbins v. Washington Suburban Sanitary Comm’n*, 338 Md. 341, 345, 658 A.2d 675, 677 (1995) (“the trial court does not determine facts, but instead rules on the motion [for summary judgment] as a matter of law”).

## **FACTUAL AND PROCEDURAL BACKGROUND**

### **Baltimore City Seeks Manager for the Pier Six Concert Venue**

The Pier Six concert venue is owned by Baltimore City. In 2016, the management contract for booking and presenting concerts at Pier Six and operating the facility was due to end on December 31. The City delegated to Baltimore Development Corporation (“sometimes referred to as “BDC”) the task of issuing a request for proposals (“RFP”)—and then reviewing responses—from concert managers who might be interested in submitting bids to assume responsibility for managing Pier Six after the current management contract expired. Baltimore Development Corporation developed and circulated an RFP that solicited proposals from companies experienced in “facilities development, management and the promotion, production and presentation of live entertainment for the Pier 6 Pavilion in Baltimore’s Inner Harbor.”

Three concert management companies submitted proposals. The two proposals that Baltimore Development Corporation deemed most attractive were submitted by AEG and Live Nation.<sup>1</sup>

AEG and Live Nation are rival entertainment management companies, arguably the two largest providers of such services in the world. Each submitted a proposal, and after being offered an opportunity to supplement the proposal, each submitted an

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<sup>1</sup> Live Nation’s proposal was submitted jointly with SMG, another major concert venue and facilities operator. The parties referred to Live Nation in the record as “Live Nation/SMG” or “Live Nation and SMG.” For simplicity, we shall refer to that jointly-contracting group as “Live Nation” herein unless we specifically indicate that we are referring to only one of the two entities.

amended proposal. Baltimore Development Corporation recommended to the City's Board of Estimates (sometimes referred to as the "BOE")—the final decision maker responsible for engaging the new management company—that it award the management contract to Live Nation. In November 2016, the Board of Estimates accepted the recommendation of Baltimore Development Corporation and agreed to award to Live Nation an "Exclusive Management, Operating And Booking Agreement" to provide live entertainment events from January 1, 2017 thru December 31, 2023 at the Pier 6 Pavilion (the "Pier 6 Agreement").

AEG, however, protested the award, and requested an opportunity to make a presentation to the Board of Estimates at its final 2016 meeting. The Board granted that request, and AEG appeared at the November 30, 2016 meeting of the Board of Estimates. But the Board's decision to award the management contract to Live Nation remained unchanged, and the City entered into a contract with Live Nation on November 30, 2016.

Although the term of the contract with Live Nation was scheduled to begin on January 1, 2017, AEG filed a petition for judicial review in the Circuit Court for Baltimore City on December 28, 2016. The petition stated that AEG "files this Petition for Judicial Review of the Baltimore City Board of Estimates' Approval of the Pier 6 Contract Between the City of Baltimore and SMG/Live Nation, pursuant to Maryland Rules 7-201 and/or 7-401[.]" The circuit court designated the case as Civil Action No. 24-C-16-007059.

### **AEG's Request for Stay of the Contract**

At the time it filed the petition for judicial review on December 28, 2016, AEG also filed an “Emergency Motion to Stay Enforcement of Contract Between City of Baltimore and SMG/Live Nation Pending Judicial Review against . . . the City.” The motion indicated that the stay was being sought pursuant to Rules 7-205, 7-201, 7-401, and 7-402.

The circuit court commenced a hearing on the requested stay the following day, and concluded the hearing on December 30, 2016, at which time the court granted the injunction requested by AEG subject to the filing of a bond in the amount of \$750,000. The court entered an order that stated:

This case came before this Court on 29 December 2016 on the Petitioner, AEG Live Mid-Atlantic, LLC's, *Writ of Administrative Mandamus Request*.

This Court has heard extensive arguments from both sides as to whether a temporary restraining order should be issued based on the Petitioner's, *Writ of Administrative Mandamus Request*.

Based on the reasons stated on the record[], it is this **30th** day of **December, 2016**, by the Circuit Court for Baltimore City, hereby:

**ORDERED**, that the Petitioner, AEG Live Mid-Atlantic, LLC's, *Writ of Administrative Mandamus Request*, is **GRANTED**; and it is further,

**ORDERED**, that the Mayor and City Council of Baltimore, Board of Estimates, its agents, and officers are hereby precluded from executing the contract with respect to Pier 6 Concert Pavilion RFP [Request for Proposal]; and it is further,

**ORDERED**, that this stay shall remain in effect pending resolution of this *Writ of Administrative Mandamus Request*; and it is further,

**ORDERED**, that Petitioner, AEG Live Mid-Atlantic, LLC, post bond in the amount of **\$750,000.00**; and it is further,

**ORDERED**, that such bond be posted within seven (7) days of the date of this Order.

On January 6, 2017, AEG posted a bond in the circuit court in the amount of \$750,000.00. The parties did not include a copy of the bond in the record extract, but the Maryland Rules relative to injunctions provide in Maryland Rule 15-503(a): “Except as otherwise provided in this Rule, a court may not issue a temporary restraining order or preliminary injunction unless a bond has been filed. The bond shall be in an amount approved by the court for the payment of any damages to which a party enjoined may be entitled as a result of the injunction.” *See also Phoenix Pad Co. v. United States, to Use of American Coat & Pad Co.*, 111 Md. 549, 555-56 (1909) (“The general rule is that in an action upon an injunction bond the recovery must be confined to such actual damages as the plaintiff may be able to show were suffered by him. This damage must be the natural and proximate consequence of the issuing of the injunction. This rule, or measure of damages, is so well settled that no authorities need be cited to support it.”).

On January 4, 2017, Baltimore City noted an immediate appeal of the circuit court’s injunction. *See* Maryland Code (1973, 2013 Repl. Vol.), Courts & Judicial Proceedings Article, § 12-303(3)(i), authorizing an interlocutory appeal from an order “[g]ranted or dissolving an injunction[.]” That appeal was docketed in this Court as No. 2374, September Term, 2016.



Contending that the injunction had been issued without any apparent assessment by the circuit court of any of the factors required by cases such as *Department of Transportation v. Armacost*, 299 Md. 392, 404-05 (1984), Baltimore City also filed emergency motions in this Court and in the circuit court seeking to “dissolve or stay the injunction” enjoining the execution of the contract for Live Nation to assume management of Pier Six. After receiving a response from AEG, this Court granted the City’s emergency motion on February 8, 2017, and ordered that “the injunction issued by the circuit court be and hereby is stayed pending the resolution of the . . . appeal” (*i.e.*, Appeal No. 2374). (The circuit court did not rule on Baltimore City’s emergency motion until March 3, 2017, at which point it denied the motion as moot in view of the stay that had already been entered by this Court.)

### **The First Appeal Was Dismissed**

The City’s interlocutory appeal from the circuit court’s order entered on December 30, 2016, remained pending in this Court until January 2018. After the parties had filed briefs and the appeal was scheduled for oral argument, this Court issued a show cause order on January 18, 2018, directing the parties to show cause why the appeal should not be dismissed as moot given the fact that the parties’ briefs addressed the issuance of a preliminary injunction that had been stayed.

AEG filed a response on January 31, 2018, in which it asserted that the City’s interlocutory appeal should be dismissed as moot. AEG represented that it had, on that same date, filed in the Circuit Court for Baltimore City a dismissal of its petition for

judicial review, and it attached a copy of its “Notice of Dismissal As Moot,” in which it stated: “Petitioner, AEG Live Mid-Atlantic, LLC, hereby dismisses its Petition for Judicial Review in the above-captioned matter AS MOOT.”

Upon receipt of AEG’s response, this Court dismissed Appeal No. 2374, and explained in the order of dismissal:

Because the only issue on appeal appeared to be the validity of an injunction [entered December 30, 2016] that had been stayed [by this Court’s order of February 8, 2017], and because the stay has presumably permitted Baltimore City and its counterparty under the contract to perform their contractual obligations for nearly a year, this Court, on January 18, 2018, asked the parties to address whether the case was moot. In response, appellant [sic, appellee] AEG dismissed its petition in the circuit court, expressly asserting that the petition [for judicial review] is moot.

As a result of AEG’s dismissal of its petition, the circuit court’s order of December 29, 2016 [sic, December 30, 2016] is of no further effect. Therefore, the appeal from that order is moot. Accordingly, it is this 5th day of February 2018, by the Court of Special Appeals,

**ORDERED**, that the above-captioned appeal be, and is hereby, dismissed as moot. Md. Rule 8-602(10).

### **Modification of the Live Nation Agreement**

In the meantime, while the interlocutory appeal was pending, and before the petition for judicial review of the Board of Estimates’ award was dismissed by AEG, the City and Live Nation had made efforts to salvage the 2017 summer concert season despite the hiatus caused by the circuit court’s issuance of an injunction prohibiting the City from “executing the contract” with Live Nation.

Rather than request that its rental obligation be abated for only the 39 or so days that AEG’s injunction had prohibited Live Nation from taking possession and

management of the Pier Six concert venue, in a letter dated April 11, 2017, Live Nation asserted that, because the injunction was in effect during a particularly critical time for scheduling summer concerts, AEG's injunction had had a significant impact on its ability to prepare for the 2017 concert season, and the financial impact upon Live Nation exceeded a 39/365ths fraction of its rental obligation. Live Nation asked Baltimore Development Corporation to renegotiate the terms of the management contract. The letter requested that Live Nation be relieved of its contractual obligation to pay the City any rent for the entire first year of the contract term "due to the legal actions taken by outside parties causing delays in [Live Nation's] operations of the venue for 2017." Live Nation stated in its letter:

As we discussed in the meeting, our timeline for solicitation of sponsorships, premium seat sales, improvements and maintenance, and the booking of concerts at Pier Six Pavilion have all been materially disrupted by the court imposing an injunction. **Sponsorship has been impacted by \$480,000, premium seats by \$40,000, and we have lost several shows due to our abbreviated working period, which affects all revenue streams.** As we discussed, the legal action was out of the control of both parties.

\* \* \*

Taking the above into account, Live Nation and SMG propose that 2017 be treated differently than originally contemplated in the Lease. **We believe that the Lease needs to be amended so that there will be no rent due for 2017**, the term will be extended by one year, that the Capital improvements will be allowed to be made over the period of 2017 and 2018 . . . **and we will not have any requirement for a specific number of events in 2017** (although we are trying to still book thirty to thirty five shows for 2017). Live Nation and SMG also would like to exercise the option to pick up the three year renewal at the end of the new proposed term and this can be confirmed in the amendment.

(Emphasis added.)

The Pier 6 Agreement with Live Nation, as negotiated in 2016, included a provision that contemplated suspending performance obligations in the event of a “force majeure.” Paragraph 27 of the agreement provides:

**27. Force Majeure.** For the purpose of any of the provisions of this Agreement, neither the City nor Operator [*i.e.*, Live Nation], as the case may be, nor any successor in interest, shall be considered in breach of or default in any of its obligations *in the event of enforced delay in the performance of its obligations due to causes beyond its control* (exclusive of shortage of funds), *including but not restricted to*, strikes, lockouts, actions of labor union, lack of availability of qualified or trained personnel or trades, riots, floods, fires, explosions, or other casualties, or acts of God, acts of government (other than the City), *decrees and orders of courts*, and acts of the other party. It is the purpose and intent of this Section that in the event of the occurrence of such an event, this Agreement shall be extended for the period of the enforced delay; provided, however, that the party seeking the benefit of the provisions of this Section shall, within ten (10) days after the notice of default from the other, give written notice to the other party thereof of the cause or causes thereof.<sup>2</sup>

(Emphasis added.)

The Baltimore Development Corporation—the City’s agent with respect to recruiting the Pier Six management company—agreed that the delay caused by the AEG injunction warranted a modification of Live Nation’s contract. Based upon its own

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<sup>2</sup> The annual base rent payable to the City under the management agreement was \$400,000. If a per diem adjustment had been calculated on a straight 365 days-per-annum basis, the base rent would have been adjusted by \$1,095.89 per diem. An abatement for only the first 39 days of 2017 during which AEG’s injunction was not stayed would have resulted in a rental reduction of \$42,739.71. But Live Nation argued that the financial damage it suffered as a consequence of the delay caused by the injunction was far greater than that, and asserted that a much greater abatement of rent was appropriate.

analysis, Baltimore Development Corporation concluded that a reduction in the first year's base rent from \$400,000 to \$73,975 was reasonable under the circumstances. Evidence regarding this analysis was set forth in an affidavit of Kimberly Clark, the Executive Vice President of the Baltimore Development Company, who stated that, after receiving Live Nation's letter requesting that the Agreement be modified to require no rental payments for the first year, the BDC performed its own analysis to determine whether a rent reduction was appropriate as a consequence of the problems caused by AEG's injunction. Ms. Clark stated in her affidavit:

**[T]he BDC engaged in an extensive analysis of the losses enumerated by Live Nation/SMG because of the injunction to determine what, if any, modifications were required to the Agreement. . . . Based on this analysis, the BDC determined that a base rental payment of \$73,975 (as opposed to the originally agreed upon \$400,000) for the first year of the Agreement (2017) was appropriate under the circumstances.**

(Emphasis added.)

In a memorandum to the Board of Estimates dated June 16, 2017, recommending that the BOE agree to a modification of the Pier Six Agreement reducing the first year's rent, Baltimore Development Corporation explained:

**. . . Such modification . . . is being requested due to the implication, and applicability, of the force majeure clause** outlined in the Agreement as a result of protracted litigation brought by a vendor who was not awarded the Agreement.

\* \* \*

In its lawsuit, AEG sought and received a stay (or preliminary injunction) to prevent the Agreement from taking effect prior to the court's review of the validity of same.

This stay was ultimately lifted on February 8, 2017 after the court's decision was appealed to the Court of Special Appeals of Maryland. . . . Currently, the appeal process is ongoing and the City is optimistic that a favorable resolution will be achieved.

However, the initial injunction issued by the Circuit Court of Maryland for Baltimore City did negatively impact the efforts of the chosen vendor, Live Nation and SMG. In particular, **because Live Nation and SMG were unable to perform any activities related to the Agreement from January 1, 2017 to February 8, 2017, their timeline for solicitation of sponsorships, premium seat sales, improvements and maintenance, and the booking of concerts at Pier Six Pavilion were all materially disrupted. As a result, Live Nation and SMG estimates that sponsorships have been impacted by Four Hundred Eighty Thousand Dollars (\$480,000.00), premium seats by Forty Thousand Dollars (\$40,000), and they lost several shows due to the abbreviated working period.**

**The modification to the first year rent structure compensates for these material disruptions while still ensuring that the City is provided with significant compensation for the use of a valuable City facility.** BDC [*i.e.*, Baltimore Development Corporation] projects an income stream of at least Eighty Thousand One Hundred Dollars (\$80,100.00) for Performance Year 2017, which is approximately Fifty-One Thousand One Hundred Dollars (\$51,100.00) higher than the revenues obtained from the prior contractual agreement with Pier VI Concert Pavilion Partners, LLC in 2016. Moreover, this slight modification does not affect the revenue streams anticipated for the subsequent Performance Years and will further help foster an amicable partnership with Live Nation and SMG for the foreseeable future.

(Emphasis added.)

On June 28, 2017, the Board of Estimates approved the "First Amendment to Exclusive Management, Operations, and Booking Agreement" (*i.e.*, to the Pier 6 Agreement). The amendment provided:

RECITALS

A. Operator [*i.e.*, Live Nation] and the City entered into an Exclusive Management, Operations and Booking Agreement dated November 30, 2016, in which the City engaged and retained the services of the Operator to operate, manage, and book the facilities located at 731 Eastern Avenue, Block 890, Lot 18 and 18A, and otherwise known as the Pier Six Concert Pavilion in Baltimore City, Maryland.

**B. The parties have agreed to amend the Agreement to change the amounts owed to the City in annual rent for Performance Year 2017 in light of the implication, and applicability, of the *force majeure* clause as a result of protracted litigation brought by a vendor [*i.e.*, AEG] who was not awarded the Agreement in the Request for Proposals process.**

NOW, THEREFORE, in consideration of the foregoing Recitals, each of which is hereby incorporated in and made a substantive part of this Amendment, the sum of Ten Dollars (\$10.00) cash in hand paid, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the undersigned hereby declare as follows:

1. Amendments to Lease. Paragraph 4(a) of the Agreement is deleted in its entirety and replaced with the following:

(a) During each Performance Year (as that term is hereinafter defined), **Operator shall pay the City the following: (a) Seventy-Three Thousand Nine Hundred Seventy-Five Dollars (\$73,975.00) in base rent in year one (1), Four Hundred Thousand Dollars (\$400,000.00) in base rent in years two (2) and three (3), Four Hundred Twenty-Five Thousand Dollars (\$425,000.00) in base rent for years four (4) through six (6), and Four Hundred Fifty Thousand Dollars (\$450,000.00) in base rent for years seven (7) through ten (10); and (b) two and one half percent (2 ½%) of Gross Ticket Revenue (hereinafter defined) and rental fees received for private use of the Facilities above Two Million Five Hundred Thousand Dollars (\$2,500,000.00) for each Performance Year.** For Performance Year 2017, the base rent shall be due in its entirety on October 1st, of that Performance Year. . . .

(Emphasis added.)

### **City's Motion for Damages Pursuant the Injunction Bond**

Although AEG filed its Notice of Dismissal of its petition for judicial review on January 31, 2018, for reasons that are not clear, the circuit court did not docket the dismissal of the suit until an order of court was entered December 3, 2018. In the interim, on May 25, 2018, AEG filed a motion in the circuit court requesting the release of its \$750,000.00 injunction bond.

On June 8, 2018, Baltimore City not only opposed AEG's motion to release the injunction bond, but also moved to recover damages, pursuant to the bond, for the losses it claimed it suffered as a consequence of the injunction. In its motion and supporting memorandum, the City asserted that the modification of the Pier 6 Agreement had resulted in a loss of revenue for the City—from an anticipated "\$400,000.00" to "\$75,000.00."<sup>3</sup> Citing *Redwood Hotel v. Korbein*, 197 Md. 514, 521 (1951), and *Gray v. Veirs*, 33 Md. 159 (1870), the City argued that it was entitled to recover damages from AEG's injunction bond because the City's motion for damages was "brought after the final determination of the underlying action in which the injunction was issued" and the City suffered "lost profits, as a 'natural and proximate consequence of the injunction.'"

In support of its motion for damages caused by the injunction, the City filed affidavits of Ted Mankin (the Senior Vice President of Booking for the East Region of Live Nation); Kimberly Clark (the Executive Vice President of the Baltimore

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<sup>3</sup> As noted above, the amended amount of base rent for 2017, pursuant to the agreed-upon modification, was, more precisely, \$73,975.00.



Development Corporation); and William Cole (the President and CEO of the Baltimore Development Corporation). The City also filed an analysis performed by the Baltimore Development Corporation that was given to the Board of Estimates in support of the recommendation that it accept an amendment to the Pier 6 Agreement. The City requested “a prompt evidentiary hearing . . . to supplement the record . . . with . . . testimony and exhibits[.]”<sup>4</sup>

On October 9, 2018, AEG filed an opposition to Baltimore City’s motion to recover damages, asserting that Baltimore City was not entitled to recover damages on the injunction bond. In support of its opposition, AEG argued that the City’s alleged damages were not caused by the injunction but rather were “a mischaracterization of [the City’s] voluntary agreement to reduce the rent obligation,” and were “either self-inflicted, unrealized, or speculative.” (Capitalization altered.)

At the motions hearing on November 14, 2018, the circuit court announced that the only matters before it were AEG’s motion to release the injunction bond and

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<sup>4</sup> Although the format of that request for a hearing on the City’s motion did not comply with Maryland Rule 2-311(f), the circuit court did set the case in for a motions hearing (that took place) on November 14, 2018, and an evidentiary hearing scheduled for December 11, 2018, but the court entered a summary judgment before the date of the evidentiary hearing.

Baltimore City's motion to recover damages on the injunction bond. It also acknowledged that the hearing was not "the evidentiary hearing."<sup>5</sup>

The motion judge did not announce a decision at the conclusion of the arguments on the motions, but took the parties' motions under advisement. Later that day, the judge signed an order that: (1) granted AEG's motion to release the \$750,000.00 bond, (2) denied the City's motion to recover damages on the injunction bond, (3) ordered that the clerk release the surety bond and return the bond certificate to AEG, and (4) ordered the matter "shall proceed for an evidentiary hearing" on December 11, 2018. The judge did not provide any further explanation for the rulings (either from the bench or in any written opinion).

At the request of counsel for the City, the court conducted a telephone conference with counsel for both parties, who were seeking clarification about the order's reference to an evidentiary hearing scheduled for December 11, 2018. Following the telephone

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<sup>5</sup> At one point during the motions hearing, the court asked counsel for the City a fact question that was not addressed to the court's satisfaction in the affidavits, and counsel responded as follows:

THE COURT: So do you want to answer that for me in the meantime?

[COUNSEL FOR CITY]: And so the affidavit doesn't – if there was an evidentiary hearing obviously the representative of Live Nation would specifically be able to say when those – when those discussions happened.

THE COURT: Yes, but this is not the evidentiary hearing. This is here on your motion for damages on the injunction bond.

conference, counsel for the City submitted a draft revised order that was based upon “the guidance provided by the Court.”

That order was signed by the court on December 3, 2018, and docketed on December 10, 2018. The order did not change the judge’s November 16 rulings granting AEG’s motion to release the bond and denying Baltimore City’s motion to recover damages. But the order stated that “the hearing held on November 14, 2018, . . . shall be treated as a motion [for] summary judgment hearing[.]” and the order clarified that the court would not proceed with “the evidentiary hearing scheduled for . . . December 11, 2018[.]”

Baltimore City promptly noted this appeal.

### **DISCUSSION**

As noted above, it is generally not appropriate for the court to dispose of a case by way of summary judgment if there is a genuine dispute as to any material fact. The motion court must consider the record in the light most favorable to the non-moving party, and on appeal, the appellate court must do likewise.

Here we conclude, upon viewing the admissible evidence that was in the record at the time of the motions hearing, that the circuit court erred by granting summary judgment with respect to the City’s claim that it was entitled to recover compensation under the injunction bond for damages that were caused by AEG’s injunction.

Although the court appeared to express skepticism during the motions hearing regarding the City’s claim that the City—as distinct from Live Nation—suffered damages

*caused by* the injunction, the affidavits in the record, if viewed in the light most favorable to the City, sufficiently raised a genuine factual issue regarding that claim.

The City's theory of damages appears to be that it made a sound business judgment to mitigate damages by granting Live Nation an abatement of rent in the amount of approximately \$325,000. In support of this contention, the City presented affidavit evidence that Live Nation was indeed due a compensatory rent reduction because of losses it suffered as a consequence of the delay caused by AEG's injunction. Whether a trier of fact can be persuaded of that after weighing all the evidence presented at an evidentiary hearing remains to be seen, but the court "is not permitted to weigh evidence in deciding a motion for summary judgment." *Okwa*, 360 Md. at 182 (citing *Pittman v. Atlantic Realty Co.*, 359 Md. at 537).

As part of the support for its contention that it made a reasonable business judgment to mitigate potential losses by giving Live Nation a rent adjustment due to the AEG injunction, the City filed an affidavit of Ted Mankin, the Senior Vice President of Booking for the East Region of Live Nation Worldwide, Inc., who stated in his affidavit, in part:

3. In reliance on this contract, Live Nation immediately began implementing and launching its booking strategy for Pier Six Pavilion integrating the venue into the marketing and routing for the United States 2017 concert season. Live Nation contacted Artists' managers and representatives to announce that Live Nation/SMG were the new exclusive operators and bookers and would be making offers for show dates. . . . **Due to the delay, Live Nation was forced to stop marketing the venue, could not confirm that booked dates were in fact going to happen, was unable to put tickets on sale by the**

**intended date**, and in some cases had to relocate the Artist to play an alternative venue.

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5. **The injunction had a detrimental impact on our 2017 sponsorship revenue. In order to secure sponsorships, companies had to be approached in January and February as this was the time when they were making decisions and setting budgets. Missing this window damaged our business from a financial standpoint estimated in up to 80% of our projected sponsorship revenue, which equates to \$480,000.**

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8. Live Nation's touring department was in the processes of confirming multiple boutique size tours, but **with the delay in our ability to confirm shows, Pier Six Pavilion lost out on potential dates resulting in damages to Live Nation and the reputation of Pier Six Pavilion as a desired venue to play.** Live Nation was unable to book the following shows estimating in total of \$190,000.00 in potential revenue lost.

- All Time Low – relocated to another facility
- Idina Menzel – relocated to another facility
- Widespread Panic – did not occur

(Emphasis added.)

Kimberly Clark, the Executive Vice President of the Baltimore Development Corporation, stated in her affidavit:

2. . . . The [Pier 6] Agreement provided for, among other things, \$400,000 in annual base rent payable to the City and deposited into the City's General Fund, as well as additional profit-sharing revenues for the City if gross receipts exceeded \$2.5 Million.
3. **As a result of this injunction, all activities related to the upcoming concert season at Pier Six came to a grinding halt.** Live Nation/SMG were unable to book a substantial number of acts. . . . In fact, **records provided by Live Nation/SMG revealed their estimated losses from the injunction exceeded \$500,000; a figure that has been recently**

**confirmed as actual and concrete damages** in Live Nation's affidavit attached to the City's motion to recover damages[.]

4. **As a direct result of the granting of the injunction, the City and Live Nation/SMG were forced to revisit the terms of the Agreement** for the operations and management of Pier Six. Specifically, in a letter dated August 11, 2017, Live Nation/SMG requested, among other things, that the Agreement be modified to relieve them of any obligation to provide rental payments for the first year (2017).

\* \* \*

7. . . . If the injunction had not been granted, there would have been no reason to revisit the terms of the Agreement. Consequently, **the City was forced to make these modifications to the Agreement based on the demonstrated effect the injunction was having (and ultimately had) on the ability to prepare for the upcoming concert certain [sic] (e.g., booking certain acts, negotiating sponsorships, and making necessary repairs), the result of which was a direct loss of \$325,000 of revenues the City would otherwise have earned.**<sup>6</sup>

(Emphasis added.)

These excerpts (and other statements made in affidavits in the record) were sufficient to warrant an evidentiary hearing at which the City would have a full opportunity to present evidence that the City had suffered losses caused by AEG's injunction. We shall vacate the judgments of the Circuit Court for Baltimore City and remand the case for further proceedings consistent with this opinion.

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<sup>6</sup> As noted above, it was beyond dispute that Live Nation was prohibited by AEG's injunction from managing and assuming occupancy of Pier Six for the first 39 days of the contract term; we cannot say as a matter of law that the City had no obligation to adjust the rent that Live Nation was obligated for pay for the first full year of the Agreement.

**JUDGMENTS OF THE CIRCUIT COURT  
FOR BALTIMORE CITY VACATED;  
CASE REMANDED FOR FURTHER  
PROCEEDINGS CONSISTENT WITH  
THIS OPINION.  
COSTS TO BE PAID BY APPELLEE.**