Circuit Court for Baltimore County
Case No. 03-C-18-008515

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3321

September Term, 2018

MICHAEL BRIAN KAVANAUGH, *ET AL.*

v.

CONGRESSIONAL BANK

Meredith,
Nazarian,
Wells,

JJ.

Opinion by Nazarian, J.

Filed: February 13, 2020

This is the second iteration of this dispute to come to this Court, a fact that foreshadows the outcome. The first iteration began on January 20, 2011, when Michael Brian Kavanaugh and Jeffrey Weber filed a Complaint for Accounting in the Circuit Court for Baltimore County. They alleged that their former employer, American Bank Holdings, Inc. ("American Bank"), owed them $246,040.78 from a loss reserve account. Litigation ensued, and this case made its way up to the Court of Appeals, then back down. In December 2017, the circuit court ruled that Messrs. Kavanaugh and Weber were entitled to an accounting, the results of which revealed that they were owed nothing. They didn't seek reconsideration or appeal.

Round Two began on June 24, 2018, when Messrs. Kavanaugh and Weber demanded arbitration, pursuant to their employment agreements, from Congressional Bank, American Bank's successor-in-interest, to recover the allegedly unpaid loss reserve funds. Congressional Bank filed a petition in the circuit court for a declaratory judgment decreeing that Messrs. Kavanaugh and Weber had waived their right to arbitration. They responded with a petition to compel arbitration. After a hearing, the court found that they had waived their right to arbitration and entered summary judgment in favor of Congressional Bank. Messrs. Kavanaugh and Weber appeal. For the reasons set forth below, we affirm.

I. BACKGROUND

On August 4, 2008, Messrs. Kavanaugh and Weber entered into a Co-Branch Manager Employment Agreement ("Agreement") with American Bank. The Agreement

required American Bank to establish a "loss reserve" account[1] with funds earned by Messrs. Kavanaugh and Weber. Messrs. Kavanaugh and Weber were to deposit 10 basis points[2] on all loan transactions into the loss reserve. On termination of their employment with American Bank, assuming no fault or breach by either party, Messrs. Kavanaugh and Weber would receive 25% of the remainder of the account after six months, and 50% of the remainder of the account after one year. The Agreement also contained an arbitration clause that encompassed all disputes other than petitions for equitable relief:

> 17. **Arbitration of All Disputes.** Any controversy or claim, other than petitions for equitable relief, arising out of or relating to this Agreement, or the breach hereof (including arbitrability of any controversy or claim), shall be settled by arbitration, in Bethesda, Maryland and in accordance with the laws of the State of Maryland by three arbitrators, one of whom shall be appointed by Employer, one by Employee, and the third of whom shall be appointed by the first two arbitrators.

On August 28, 2009, Messrs. Kavanaugh and Weber resigned from their employment, and nobody alleges any fault on the part of any party.

On January 1, 2016, Congressional Bank acquired American Bank. The Agreement also provided that the rights and obligations of the Agreement continued for any successor-in-interest:

[1] The purpose of loss reserves is to set aside funds to offset financial losses or obligations. The amount set aside "represent[s] the amount thought to be adequate to cover estimated losses in the loan portfolio. When a loan is charged off, it is removed from the loan portfolio as an earning asset, and its book value is deducted from the reserve account for loan losses." Barron's Business Guides, Dictionary of Banking Terms 273 (6th ed. 2012).

[2] A "basis point" is the "smallest measure in quoting yields on bonds, mortgages, and notes, equal to one one-hundredth of one percentage point, or .01%." Barron's Business Guides, Dictionary of Banking Terms 50 (6th ed. 2012).

> 15. **Successors and Assigns.** Employee may not, under any circumstances, delegate any of Employee's rights or obligations hereunder without first obtaining the written consent of Employer. This Agreement shall inure to the benefit of and be binding upon the parties hereto and their respective successors, assigns, and personal representatives, including any successor of Employer by merger, consolidation or other reorganization.

A. Messrs. Kavanaugh and Weber's Complaint For Accounting

On or about January 20, 2011, Messrs. Kavanaugh and Weber filed a Complaint for Accounting.[3] They alleged that upon termination, American Bank failed to pay them what they were owed from the loss reserve:

> 9. [Messrs. Kavanaugh and Weber] have made numerous proper requests for statements and supporting documentation for the expenses, loses and/or any other monetary transaction that has contributed to the Loss Reserve Account for the period of [their] employment.
>
> 10. The amount owed to [Messrs. Kavanaugh and Weber] from American [Bank] is believed to be $246,040.78 plus amounts due from the Loss Reserve Account for August 2009.
>
> 11. At this time [Messrs. Kavanaugh and Weber] believe they are due the sum of $246.040.78 plus amounts due from the Loss Reserve Account for August 2009, and have made several proper requests of American [Bank] to address the matter of the Loss Reserve Account and pay [Messrs. Kavanaugh and Weber] in accordance with the Agreement.
>
> 12. [Messrs. Kavanaugh and Weber] are fearful that, unless enjoined by an order of this court, American [Bank] will continue to withhold records of the Loss Reserve Account and any transactions that have effected it during the timeframe of [Messrs. Kavanaugh and Weber's] employment, as well as any other financial records insofar as they may apply to the subject

[3] An "accounting" is a "lawsuit to compel a defendant to account for and pay over money owed to the plaintiff but held by the defendant (often the plaintiff's agent)." *Accounting*, Black's Law Dictionary (11th ed. 2019).

matter of this lawsuit.

As relief, Messrs. Kavanaugh and Weber only demanded an accounting of the loss reserve; they never requested money damages. They attached Interrogatories and Requests for Production of Documents, which were sent to American Bank on February 9, 2011.

American Bank answered the Accounting Complaint. *American Bank Holdings, Inc. v. Kavanaugh*, 436 Md. 457, 460 n.4 (2013). The circuit court issued a scheduling order, and on May 3, 2011, American Bank filed a Petition to Compel Arbitration and Stay All Proceedings and Request for a Hearing. *Id.* at 461, n.5. That motion was denied, and American Bank appealed to this Court, which dismissed the appeal. *Id.* at 461. On December 30, 2013, the Court of Appeals affirmed, holding that "[a]n order denying a request to compel arbitration, styled as a motion or petition, filed in an existing action . . . cannot be viewed as a final judgment, unlike that situation when a Petition to Compel Arbitration filed on its own is denied, which terminates the action." *Id.* at 478–79.

B. American Bank Attempts Unsuccessfully To Compel Arbitration Again, And The Accounting Litigation Proceeds To An End

On November 6, 2014, American Bank filed another Petition to Order Arbitration, this time as the Plaintiff in a separate proceeding, and moved promptly for summary judgment. At some point, the court consolidated the Accounting Litigation and Petition to Order Arbitration. On May 19, 2015, the circuit court issued an order, vacating an earlier order that had initially granted American Bank's summary judgment motion and allowing the Accounting Litigation to proceed. The court explained that the Agreement expressly carved out claims for equitable relief from the arbitration clause and that the Accounting

Litigation sought no monetary damages:

> With respect to [American Bank's] Motion, which merely reasserts its previous arguments that [Messrs. Kavanaugh and Weber] are required to arbitrate their claim for an accounting should the Court reinstate [Messrs. Kavanaugh and Weber's] Complaint, the Court continues to find [American Bank's] arguments without merit. The terms of the parties' arbitration agreement expressly exclude from arbitration those claims seeking equitable relief and an accounting is equitable in nature. In spite of [American Bank's] arguments to the contrary, it is simply not the case that [Messrs. Kavanaugh and Weber] seek any legal relief. If [Messrs. Kavanaugh and Weber] obtain the relief they here seek, [American Bank] will not be required to pay them anything. Instead, [Messrs. Kavanaugh and Weber] would receive only information about the account and would then need to institute a legal action for breach of contract to obtain any monetary damages. Should [Messrs. Kavanaugh and Weber] file such a claim, [American Bank] will then be able to seek to compel arbitration of that separate–legal and not equitable–dispute.

From there, the Accounting Litigation continued. According to Messrs. Kavanaugh and Weber's brief, "[a]fter extensive discussions with [American Bank's] counsel the parties agreed to a Stipulated Clawback/No-disclosure Agreement and Discovery Order and discovery was exchanged on or about March 14th, 2016 via Hightail."[4] According to Congressional Bank (not in its brief but in its Memorandum of Law in Support of Motion to Dismiss Amended Complaint For Accounting or, Alternatively, Motion for Summary Judgment), "American Bank propounded its Answers to Interrogatories and Response to

[4] In their brief, Messrs. Kavanaugh and Weber characterized the discovery "as a laughable 'document dump' of materials that in no fashion provided any reliable information whatsoever." Neither party includes this discovery order in their Extract or Appendix, though.

Plaintiffs' Requests for Productions of Documents on October 5, 2015, before the January 1, 2016 acquisition," and Messrs. Kavanaugh and Weber "also had an opportunity to depose former American Bank employees as well as Congressional [Bank] employees." And according to American Bank, "the Loss Reserve Account upon which [Messrs. Kavanaugh and Weber] were to be paid was maintained at $0 from January 1, 2010 through and until the January 1, 2016 acquisition."

From the circuit court's perspective, a lot of time went by with no activity, and on April 13, 2017, the circuit court notified the parties of contemplated dismissal. The parties responded, and on July 17, 2017, the court issued a scheduling order that set a deadline of September 1, 2017 for Messrs. Kavanaugh and Weber to conclude discovery, and a deadline of October 27, 2017 for them to notify Congressional Bank of any intent to pursue money damages or other relief. On November 3, 2017, Messrs. Kavanaugh and Weber filed an Amended Complaint for Accounting, and alleged the following:

> 10. [Messrs. Kavanaugh and Weber] have made numerous proper requests for statements and supporting documentation for the expenses, [losses] and/or any other monetary transaction that has contributed to the Loss Reserve Account for the period of [Messrs. Kavanaugh and Weber's] employment.
>
> 11. The amount owed to [Messrs. Kavanaugh and Weber] from American [Bank] is $246,040.78 plus amounts due from the Loss Reserve Account for August 2009.
>
> 12. At this time the Plaintiffs are due the sum of $246,040.78 plus amounts due from the Loss Reserve Account for August 2009, and have made several proper requests of American [Bank] to address the matter of the Loss Reserve Account and pay [Messrs. Kavanaugh and Weber] in accordance with the Agreement.

> 13. American [Bank] has consistently and adamantly refused without reason or justification to make an accounting or showing in connection with the forgoing sums, transactions, and amounts of the Loss Reserve Account during the duration of [Messrs. Kavanaugh and Weber's] employment to account for monetary amounts now properly due to [Messrs. Kavanaugh and Weber].
>
> 14. [Messrs. Kavanaugh and Weber's] are fearful that, unless enjoined by an order of this court, American [Bank] will continue to withhold records of the Loss Reserve Account and any transactions that have effected it during the timeframe of [Messrs. Kavanaugh and Weber's] employment, as well as any other financial records insofar as they may apply to this subject matter of this lawsuit.
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> 15. On or about January 1st, 2016 Defendant American Bank [] merged or was otherwise acquired by Defendant Congressional [Bank] and as such is now liable to Appellants . . . .

On November 14, 2017, Congressional Bank moved to dismiss, or in the alternative, for summary judgment. At some point before the hearing on Congressional Bank's motion, Messrs. Kavanaugh and Weber filed a Motion to Compel Further Discovery and for Sanctions. At the December 14, 2017 hearing, court granted Congressional Bank's summary judgment motion and denied Messrs. Kavanaugh and Weber's motion for further discovery and sanctions:

> THE COURT: Given the procedur[al] posture, I will rule on the Plaintiffs' Motion to Compel. Having heard the proffered response from the Defense, that there simply are no more documents, there are no more individuals who are knowledgeable who can speak to the issues that have been raised by the Plaintiffs' Amended Complaint, I'm going to deny Paper Number 55000, Plaintiffs' Motion to Compel Further Discovery or for Sanction. Having closed discovery, the issues that have been raised by the [] Plaintiffs, and with that the claim for an accounting arising from the August 4th, 2008 [] Branch Manager Employment Agreement are now before the Court. I [] find that the claim has, at this point, been

> fully satisfied to the extent possible by the completion of discovery. I accept that the Defendant has produced all of available documents. That all persons with knowledge of the [] facts raised by the Plaintiffs' Complaint have been deposed. And in as much as there is no claim for money damages that has yet been asserted, and it is my opinion, although it's really not essential, that if it was asserted, I think it would be barred by limitations. But [] as I just indicated earlier, I think that claim would have to have been brought, if at all, by August the 28th of 2013. But [] that's probably dicta, based on what's before the Court. So, having said all that, the Court grants the Defendant's Motion for Summary Judgment and/or to Dismiss. I believe there is no genuine dispute as to any material fact that remains open in the case. All known facts have been produced to the Plaintiffs, thereby satisfying the Plaintiffs' demand for an accounting. Having provided the accounting, and no further relief available to the Plaintiffs at this point, the Defendant is entitled to judgment as a matter of law.

C. Messrs. Kavanaugh and Weber's Petition To Compel Arbitration And Congressional Bank's Complaint For Declaratory Judgment

On July 24, 2018, Messrs. Kavanaugh and Weber mailed a letter to Congressional Bank demanding arbitration "regarding a dispute of owed monies from the Loss Reserve Account as established in the Co-Branch Manager Employment Agreements." The demand raised ten separate claims[5] and sought money damages totaling $3 million each. In response, Congressional Bank filed a Complaint for Declaratory Judgment in the circuit court, and asked the court to decree that they had waived arbitration:

> a) There does not exist any enforceable agreement between [Congressional Bank] and the [Messrs. Kavanaugh and Weber] requiring the arbitration of any claims; and

[5] These claims included: 1) breach of contract, 2) quantum meruit, 3) unjust enrichment, 4) promissory estoppel/detrimental reliance, 5) negligence, 6) negligent hiring/retention/supervision, 7) fraud, 8) intentional misrepresentation, 9) negligent misrepresentation, 10) civil conspiracy.

> b) [Messrs. Kavanaugh and Weber] have no right to compel arbitration of any claim against [Congressional Bank]; and
>
> c) Any and all of [Messrs. Kavanaugh and Weber's] claims related to their Employment Agreements have already been fully litigated and/or resolved by the Final Judgment entered in the Accounting Litigation on February 7, 2018 in Case No. 03-C-11-000593; and
>
> d) Any and all of [Messrs. Kavanaugh and Weber's] claims related to their Employment Agreements are barred by the doctrines of collateral estoppel and/or res judicata; and
>
> e) Any and all of [Messrs. Kavanaugh and Weber's] claims related to their Employment Agreements are barred by the statute of limitation and/or laches; and
>
> f) [Messrs. Kavanaugh and Weber's] demand for arbitration is moot, stale and/or otherwise legally barred; and that, pursuant to § 3-410 of Maryland's Courts and Judicial Proceedings Article, all costs associated with this action be awarded in favor of [Congressional Bank].

Congressional Bank also filed a Motion and Memorandum of Law in Support of Summary Judgment and asked the court for declaratory relief as a matter of law. On November 19, 2018, Messrs. Kavanaugh and Weber filed a Petition to Compel and Order Arbitration, alleging that "[a]ll prior litigation was outside of the arbitration clause as a Complaint for Accounting was a request for equitable relief" and "[t]he parties have never arbitrated any controversy regarding the funds properly due and owed as a result of the Loss Reserve Account provision of the Employment Agreement."

After a hearing, the circuit court entered summary judgment in favor of Congressional Bank. The court summarized the complex procedural history underlying this case at the December 19, 2019 hearing:

> THE COURT: There is an Employment Agreement that contains a clear and unambiguous arbitration clause and it has

> paragraph 15 which says that the successors and assigns provision of the contract would appear to bind Congressional [Bank] who took over by merger or some other corporate change. So, we start with that.
>
> We have got two individuals who left the employment in August of 2009 and we're here in December of 2018. So, you know, nine plus years later. There was a complaint for an accounting that was filed on January 20th of 2011 which contained sort of a dollars and cents assertion that they thought the accounting would show was owed. So, clearly they were on notice of a belief and had a good faith belief that they were owed money at least as of January 20th of 2011.
>
> Then the history of the accounting case just goes on, and on, and on and finally was resolved last year with the order of [the circuit court] entered on December 18th of 2017, which entered judgment in favor of American Bank and Congressional [Bank] as successor in interest because by that point in time [Messrs. Kavanaugh and Weber] in this case were no longer seeking an accounting. They basically walked away from it.
>
> But throughout the course of that litigation there was this whole effort to force [Messrs. Kavanaugh and Weber] to either arbitrate whatever claim they had for monetary damages, which was resisted by [Messrs. Kavanaugh and Weber], and even [the circuit court] set a deadline for them to say, yes, we have a monetary claim or, no, we don't. No monetary claim was ever asserted, judgment was entered, the deadline for making a monetary claim that was established by the Court, which I think is something within the purview of the Court to do in a case of this nature, the deadline passed with no claim being asserted and then the current declaratory action gets filed in August of this year after a case was filed by the [Messrs. Kavanaugh and Weber] in Harford County and the complaint or petition for arbitration in this case was filed November 19th, 2018.

The court then detailed its reasons for granting summary judgment in favor of Congressional Bank:

> THE COURT: The claim here today is basically that fraud on

> the part of American Bank somehow delays or tolls limitations and, therefore, they can now assert the claim because until November of last year they didn't really know how they had been harmed by American Bank. That to me is just completely contrary to the normal law that applies in terms of limitations. It is not when you know all of the specifics of your claim or the exact amount by which you have been harmed, it is when you're on knowledge that you knew or should have known that a claim existed. To me that goes back to 2011 when they first made a claim.
>
> So, whether it is limitations or latches or by virtue of res judicata based upon the rulings that [the circuit court] made, consistent with the Court of [Appeals's] analysis in *RTKL* and other similar cases, even though this case, if it were to go forward on a claim for damages, would be one that would have to be arbitrated?
>
> I think at some point this Court can say that you have lost your right to arbitrate, that the matter is concluded. For the reasons stated I think under any of the above theories that the claim is barred.

Messrs. Kavanaugh and Weber noted a timely appeal. We supply additional facts below as necessary.

II. DISCUSSION

Messrs. Kavanaugh and Weber raise three issues in their brief,[6] but they really

[6] Messrs. Kavanaugh and Weber phrased the questions presented in their brief as follows:

> 1. Did the Circuit Court for Baltimore County have subject matter jurisdiction over the matter when the Co-Branch Manager Employment Agreements contained mandatory arbitration clauses in which the arbitration panel was expressly to be the decision maker for whether any claim is subject to arbitration?
> 2. Did the passage of time in Appellants' filing their demand for arbitration despite only receiving knowledge of the breach of contract through no fault of their own on November 14th, 2017 by way of a formal pleading of

reduce to one: whether the circuit court erred in granting summary judgment after finding, based on the undisputed record, that Messrs. Kavanaugh and Weber waived their right to demand arbitration. We review *de novo* a circuit court's determination of waiver of arbitration premised on a conclusion of law. *Cain v. Midland Funding, LLC*, 452 Md. 141, 150–51 (2017). We hold that the circuit court granted summary judgment properly in favor of Congressional Bank, and affirm.

A. The Appellants' Brief And Extract Violate The Maryland Rules.

Before moving to the merits, though, Congressional Bank asks us to dismiss the appeal as a sanction for numerous violations of Maryland Rules 8-501 and 8-504 in Messrs. Kavanaugh and Weber's Record Extract and brief. The Bank contends that the Extract does not contain parts of the record that are reasonably necessary to decide the issues presented on appeal, and that the Extract is paginated improperly. The Bank also asserts that Messrs. Kavanaugh and Weber fail to include material facts in their Statement of Facts while including facts not material to this appeal. The Bank notes as well that Messrs. Kavanaugh and Weber fail to cite to the Extract in support of the factual contentions in their brief, and that the brief has no Standard of Review section.

Congressional Bank is correct on *all* of these points. In addition, the appellants'

> Congressional; not through the formal discovery process in which the parties had engaged in beginning March 14th, 2016 and completed, constitute waiver, laches or make their demand outside of the statute of limitations?
>
> 3. Was the Appellant's demand for arbitration previously litigated in accordance of the doctrine of laches?

Table of Authorities isn't paginated and the Extract, among its other omissions, leaves out the Judgment Order and the transcript of the hearing at which the circuit court explained its rulings. At the same time, their extract contains federal agency filings relating to American Bank's former Chief Executive Officer that have nothing to do with the issues before us on appeal.

When asked at oral argument to explain the violations, counsel for Messrs. Kavanaugh and Weber didn't dispute them, but brushed them off glibly as "minor problems" and stated baldly that the Bank hadn't been prejudiced. When pressed to explain how the violations were minor and how he knew his opponents weren't prejudiced, counsel not only failed to answer the question, but revealed that he hadn't even attempted to identify to opposing counsel the portions of the record he intended to include in the extract or to resolve any disputes with them, as Maryland Rule 8-501(d) requires.

We prefer, whenever possible, to resolve appeals on the merits, and we normally respond to well-founded complaints of Rules failures by identifying them and warning counsel not to repeat the errors in the future. And because the appellants' violations of the Rules ultimately didn't prevent us from reviewing the merits of this case, we will deny the Bank's motion to dismiss the appeal this time, although we could readily have granted it. We cannot, however, ignore altogether counsel's casual dismissal of the violations and, more to the point, their impact on his opponent and the Court. To that end, we direct the Clerk to include the costs that the Bank incurred in preparing its Appendix in the costs we will assess to the appellants in this appeal. Md. Rule 8-608(a).

B. The Circuit Court Correctly Granted Summary Judgment For Congressional Bank.

Now, on to the merits. Messrs. Kavanaugh and Weber assert as an initial matter that the circuit court lacked subject matter jurisdiction to decide the timeliness of their demand for arbitration, that timeliness is a matter committed to the arbitrator. They're wrong. "[T]imeliness of a demand for arbitration is a threshold question, which is, in the first instances, for the courts." *Frederick Contractors, Inc. v. Bel Pre Med. Ctr, Inc.*, 274 Md. 307, 315 (1975). "Because an inappropriate delay in demanding arbitration acts as a relinquishment of the contractual right to compel such a proceeding, where that matter is in dispute, its resolution constitutes, in effect, a determination of whether the agreement to arbitrate still exists; and, under the statute, that *is* a proper issue for the court." *Stauffer Constr. Co., Inc. v. Bd. of Educ. of Montgomery Cty.*, 54 Md. App. 658, 668 (1983).

From there, they argue that the circuit court erred in finding that they had waived arbitration because the Accounting Litigation sought only equitable relief. They assert that the petition for equitable relief "was completely separate and distinct from the current demand to arbitrate as it is only now that the controversy exists (monies known to be due and owed to Appellants and discovery of the funding or lack thereof of the Loss Reserve Account)." Congressional Bank responds that Messrs. Kavanaugh and Weber have waived any right to arbitrate because they could have raised all claims during the Accounting Litigation, but chose not to. We agree with the Bank.

Although not tied *per se* to the limitations period that normally attaches to a claim subject to arbitration, a party's right (even contractual right) to pursue a claim in arbitration

has a finite life span:

> Even if a valid agreement to arbitrate was once made, courts may also evaluate, under [Courts and Judicial Proceedings Article] § 3-208, the *continued* existence of the right to arbitrate. A party may, by a subsequent act or omission, waive its right to arbitration. In this context, waiver is the intentional relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right, and may result from an express agreement or be inferred from circumstances. An intention inconsistent with enforcement of the right to arbitration should be clearly established and should not be inferred from equivocal acts or language. If waived, the right to compel arbitration is regarded as having been voluntarily relinquished and thus treated as though it had never existed.

Gannett Fleming, Inc. v. Corman Constr., Inc., 243 Md. App. 376, 392–93 (2019) (cleaned up). A failure to make a timely demand for arbitration is one form of waiver. *Id.* at 394. And there are two ways in which a court can find a right to arbitrate waived due to "inappropriate delay" in asserting that right. *Id.* at 393–94. The *first* way, which doesn't apply here, "a party may fail to make a demand for arbitration within the time limits spelled out in the text of the agreement itself." *Id.* at 394. The *second* way, which does, is if the arbitration agreement sets no deadlines, "a right to arbitration may be waived if the party waits too long to assert the right to arbitration and instead 'engages itself substantially in the judicial forum.'" *Id.* (*quoting The Redemptorists v. Coulthard Servs., Inc.*, 145 Md. App. 116, 141 (2002)).

The Court of Appeals considered in *Charles J. Frank, Inc. v. Associated Jewish Charities of Balt., Inc.* whether and to what extent "participation as a party in a judicial proceeding constitutes a waiver of the right to arbitrate . . . ." 294 Md. 443, 449 (1982).

The Court stated:

> In our view, even when participation in a judicial proceeding involving arbitrable issues arising under a contract constitutes a waiver of the right to arbitrate those issues raised and/or decided in the judicial proceeding, such conduct is not necessarily inconsistent with an intention to enforce the right to arbitrate unrelated issues arising under the same contract. Such conduct, in and of itself, is too equivocal to support an inference of an intentional relinquishment of the right to arbitrate issues other than those raised and/or decided in the judicial proceeding. We are persuaded that when a party waives the right to arbitrate an issue by participation in a judicial proceeding, the waiver is limited to those issues raised and/or decided in the judicial proceeding and, absent additional evidence of intent, the waiver does not extend to any unrelated issues arising under the contract.

Id. at 454. And this Court applied those principles, and clarified the framework, in *Brendsel v. Winchester Constr. Co., Inc.*:

> [T]he degree of participation in litigation . . . that will effect a waiver of the right to arbitrate an otherwise arbitrable dispute. . . . focuse[s] on the consistency *vel non* between the [person's] litigation conduct and his assertion of his right to arbitrate-and whether the litigation conduct was tantamount to a refusal to arbitrate.

162 Md. App. 558, 578 (2005). And *finally*, this Court in *Abramson v. Wildman* expounded factors weighing for or against waiver of arbitration through participation in litigation:

> Participation in a judicial proceeding that results in a final judgment may, in certain circumstances, waive the right to arbitrate. Some "limited participation" in judicial proceedings does not constitute a waiver. Whether an answer directed to the merits is filed is a factor. Participation in "extensive" discovery is a factor in determining waiver. However, also relevant is whether a party utilized discovery devices that would not have been available in arbitration. Delay in attempting to compel arbitration, by itself, may not be conclusive, although coupled with prejudice to the other party can support a finding of

> waiver. The filing of suit can be a significant act in a waiver calculus, and in some instances it perhaps could be dispositive. Nevertheless, if there is a legitimate reason for participating in litigation, it will not be deemed a waiver.

184 Md. App. 189, 200–01 (2009) (cleaned up).

The Accounting Litigation amply qualifies as substantial engagement in prior litigation, and in two separate ways. *First*, Messrs. Kavanaugh and Weber filed and pursued the Accounting Litigation, and specifically declined to include claims for monetary damages and other relief under their employment agreement (presumably to avoid arbitration). Their participation in the Accounting Litigation cannot remotely be considered "limited"—it lasted for more than six years and traveled all the way up to the Court of Appeals, and then proceeded to an end in the circuit court, where they obtained the relief they requested, such as it was. By itself, their "failure to assert the right to arbitration, the subsequent resort to discovery, and the participation in pre-trial activities [was] sufficient to show a waiver of right to arbitration." *RTKL Assocs., Inc. v. Four Villages Ltd. P'ship*, 95 Md. App. 135, 144 (1993).

Second, and independently, any claims beyond those raised and resolved in the Accounting Litigation are barred by *res judicata*. The parties are identical, the claims all arise from the identical employment agreements, and Messrs. Kavanaugh and Weber had repeated opportunities to raise and litigate them fully and fairly in the course of the Accounting Litigation proceedings. *Powell v. Breslin*, 430 Md. 52, 63–64 (2013) ("In Maryland, the doctrine of res judicata precludes the relitigation of a suit if (1) the parties in the present litigation are the same or in privity with the parties to the earlier action;

(2) the claim in the current action is identical to the one determined in the prior adjudication; and (3) there was a final judgment on the merits in the previous action."). The claims they now seek to arbitrate arose indisputably from the same common nucleus of operative facts as the equitable claim they raised in the Accounting Litigation. *Anne Arundel Cty. Bd. of Educ. v. Norville*, 390 Md. 93, 109 (2005) ("[I]f the two claims or theories are based upon the same set of facts and one would expect them to be tried together ordinarily, then a party must bring them simultaneously."). They certainly could have preserved their right to litigate their equitable claim separately from those subject to arbitration—if, for example, they filed both together, or in sync at least, and asked one tribunal for a stay while the other finished. *Id.* But once the Accounting Litigation came to a conclusion—and especially after the circuit court offered them, in so many words, the opportunity to raise any other available claims in that case—any "new" claims arising from those facts were barred. *Powell*, 430 Md. at 62. For all of these reasons, the circuit court did not err in granting Congressional Bank's motion for summary judgment and entering the Judgment Order in its favor.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. APPELLANT TO PAY COSTS OF APPEAL, INCLUDING THE COSTS OF PREPARING APPELLEE'S APPENDIX.