UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0266

September Term, 2014

JANE McGRATH NEAL

v.

MONUMENT REALTY LLC

Graeff,
Kehoe,
*Zarnoch, Robert A.
(Retired, Specially Assigned),

JJ.

Opinion by Kehoe, J.

Filed: April 29, 2016

*Robert A. Zarnoch, J., participated in the hearing of this case while an active member of this Court and in the adoption of this opinion as a retired, specially assigned member of this Court.

**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.

Jane McGrath Neal appeals from a judgment of the Circuit Court for Montgomery County in favor of Monument Realty LLC. She presents one issue, which we have reworded:

> Did the trial court err in granting Monument Realty's motion for judgment notwithstanding the verdict?

Because we conclude that the answer to this question is "yes," we will reverse the judgment.

Background

Our review of a grant of a motion for judgment notwithstanding the verdict is twofold. We review *de novo* the trial court's legal conclusions, and we decide "whether on the evidence presented a reasonable fact-finder could find the elements of the cause of action by a preponderance of the evidence." *Blue Ink, Ltd. v. Two Farms, Inc.*, 218 Md. App. 77, 91 (2014) (internal citation omitted). In performing the latter function, we view the evidence in the light most favorable to the nonmoving party, here, Ms. Neal. *Gallagher v. H.V. Pierhomes*, 182 Md. App. 94, 101 (2008). We summarize the evidence presented to the jury accordingly.

This action arises out of Jeffrey Neal's breach of the terms of a marital settlement agreement executed by his former wife, Ms. Neal, and him, in anticipation of their May 2006 divorce.

At the time of the Neals' divorce, Neal was a co-owner, and a co-managing member, of Monument Realty LLC, a successful real estate development company that he had formed

in 1998 with Michael Darby. Monument Realty participated in a number of real estate projects, mostly in the Washington, D.C. metropolitan area. Monument Realty did not have a direct interest in any development project, however. Instead, Neal and Darby established separate affiliated companies – project entities – to hold title to their interests in specific projects.[1] The project entities were either owned by Neal and Darby personally or through other limited liability companies, partnerships, and other business entities in which Neal and Darby had an interest. Accordingly, we shall refer to the interests in the projects as being those of Neal and Darby.

In 2003, Neal and Darby formed Monument Realty Capital LLC ("Monument Capital"). As with Monument Realty, Neal and Darby co-owned and co-managed Monument Capital. Monument Capital's sole purpose was to serve as the borrower for a revolving line of credit loan agreement between Monument Realty, its related entities, and Lehman Brothers Holdings, Inc. Monument Capital did not hold title to any interest in the project entities, and it did not have any employees. Its functions were performed by Monument Realty employees. At trial, Darby testified that Russell Hines, at the time Monument Realty's executive vice president, Debbie Volpicelli, Monument Realty's chief financial officer, Neal, and himself were responsible for administering the Lehman credit loan agreement.

[1]The Neals' 2005 financial statement stated that Monument Realty's "'ownership' [in its development projects] is held in multiple tiers of subsidiary LLCs, each having a different profit sharing formula that varies from deal-to-deal [sic] . . . ."

The revolving credit loan agreement between Monument Capital and Lehman was complex and changed over time. In broad strokes, Monument Capital submitted draw requests to Lehman. If Lehman approved the request, it lent the money to Monument Capital, which, in turn, channeled the proceeds to the specific project entities. The sole source of repayment was the net cash flow from the project entities. Repayment of the loan was secured by Neal's and Darby's aggregate equity interests in the project entities.[2] The limit on the line of credit was initially $7 million, but Lehman increased the limit on several occasions as Monument Realty prospered and the values of its development projects soared during the heady days of the first decade of this century.

Things peaked in December 2005, when Monument Capital and Lehman signed the Fourth Amendment to the Revolving Credit Agreement. The Fourth Amendment increased the limit of the revolving line of credit by $40 million, to a total of $79.84 million. There was evidence presented to the jury that Lehman was willing to allow Monument Capital to borrow up to $20 million in order to pass the loan proceeds directly to Darby and Neal, provided that the aggregate value of the collateral, that is, the project entities, adequately secured the loan. Although the issue was disputed at trial, there was evidence from which

[2]In conjunction with the revolving credit loan agreement, Neal and Darby executed what were, in effect, conditional personal guarantees of the amounts borrowed. Their personal obligations to repay were limited to situations involving transactional misconduct, for example, misrepresentations made to Lehman relating to the line of credit. No such instances occurred, and Darby testified at trial that "we were not personally responsible for the repayment" of amounts drawn.

the jury could have concluded that substantial portions of these loan proceeds were used by Darby and Neal for personal, as opposed to business, purposes.

Pursuant to the terms of the Fourth Amendment, Monument Capital borrowed $10 million in December 2005, and distributed[3] that money directly to Neal and Darby. In June 2006, Monument Capital borrowed another $5 million from Lehman and again distributed the proceeds directly to Neal and Darby.[4] It is this 2006 draw, and the $2.25 million net payment to Neal, that is at the heart of this appeal. Ms. Neal asserts that this distribution to Neal violated an agreement signed by Monument Realty arising out of the Neals' divorce. To understand the agreement, we must consider the terms of the Neals' settlement agreement.

The Neals' Marital Settlement Agreement

After 15 years of marriage, the Neals separated in December 2003 and were divorced in May 2006. The Neals entered into a comprehensive settlement agreement on February 27, 2006. In pertinent part, the settlement agreement provided that Ms. Neal waived any claim she had to alimony or a monetary award, and, in return, Neal agreed to make a $11.2 million support payment (the "Support Payment") to Ms. Neal in increments over a four year period.

[3]Monument Realty seeks to draw a distinction between a "distribution" and an "advance." We will discuss the parties' contentions on this issue in Part IV of this opinion.

[4]At the time of the distribution, Neal owed Monument Realty $250,000. His net distribution was reduced by that amount to satisfy the indebtedness.

Specifically, Neal agreed to pay Ms. Neal: (1) $2.2 million when the separation agreement was signed; (2) $2 million on each of the first, second, and third anniversary dates of the agreement; and (3) a final payment of $3 million on the fourth anniversary date of the agreement.

The settlement agreement required Neal to execute a promissory note in the amount of $9 million, representing the balance due Ms. Neal after the settlement agreement was signed. And, most important to this appeal, the settlement agreement required Neal to deliver a "Letter of Instructions" to Monument Realty to secure payment to Ms. Neal.

With regard to the Letter of Instructions, the terms of the agreement were as follows:

> At closing, [Neal] shall formally execute and deliver an irrevocable letter of instructions . . . to Monument Realty LLC directing it to pay up to [the amounts identified above] to the Thyden Gross & Callahan[5] Attorney Trust Account for the benefit of [Ms. Neal] from any proceeds due him as a result of the liquidation of assets on the attached Personal Financial Statement. [Neal] represents that Monument Realty LLC is the disbursing agent for said assets and there is no other disbursing agent.

In accordance with the terms of the settlement agreement, Neal executed the Letter of Instructions. The letter was addressed to "Monument Realty LLC and Affiliated Companies" and stated in pertinent part (emphasis added):

> Reference is made to the limited liability companies that own interests in the properties that are listed on Schedule A attached hereto for which you serve as general partner or managing member and/or sole funds disbursing agent and in which I own a member's or partner's interest ("Companies"). As

[5]Thyden Gross & Callahan were Neal's lawyers in the divorce.

> the managing member or partner and/or sole funds disbursing agent with respect to each of the Companies and interests therein, I hereby provide you with the following instructions ("Instructions") with respect to all amounts I may be entitled to receive, directly or indirectly, or have the benefit of, from any of the Companies with respect to my interests therein *that are distributable to me or for my benefit for any reason and on account of any matter and without regard to the accounting or tax characterization of any such distributable amount*.
>
> The following amounts ("Directed Payments") shall be sent by check or wire transfer to [a trust account to be maintained by Thyden Gross & Callahan for Ms. Neal's benefit] ("Neal Account").
>
> 1. All amounts distributable to me or for my benefit from and after the date hereof up to and including the first anniversary hereof, but not to exceed $2 million less any amount you are advised by [Thyden Gross & Callahan] is in the Neal Account on that date[. . . .]

The letter contained similar directions for the second, third, and fourth years, the specific amount for each year varying according to the terms of the marital settlement agreement.

The remaining terms of the letter instructed, as follows (emphasis added):

> Any amounts distributable to me or for my benefit in excess of the amounts described above during each of the years in the four-year period ending on February 24, 2010 shall be distributable to me or for my benefit in accordance with customary practices or otherwise in accordance with any instructions sent by me to you . . . .
>
> The Instructions given in this letter are hereby deemed to be irrevocable . . . and . . . may not be changed, altered or delayed by any subsequent action, instruction or election by me or any other person . . . . *You are hereby authorized and directed to take any and all other actions necessary or appropriate in order to cause the Directed Payments to be deposited in the Account*.

* * *

> These Instructions shall be ongoing and continuing and shall continue in full force and effect despite my death. Any questions regarding the interpretation of the Instructions or any action or omission you propose to take or suffer to occur as a result of these Instructions shall be directed to Ain & Bank, P.C.,[6] upon whose written authorization you shall be entitled to rely in all respects.

Schedule A, attached to the Letter of Instructions, was a projection of Neal's share of the proceeds from Monument Realty's real estate development projects through January 1, 2009 "[a]nd [t]hereafter." Schedule A identified specific project entities by name[7] (the "Schedule A Project Entities"). Schedule A also identified a "Lehman Pay-Down" to be deducted from the anticipated net cash flow from each project prior to any distribution to Neal. In total of Neal's projected distributions after deducting the "Lehman Pay-Down" amounted to $10.1 million. Neal's and Darby's interests in most of the Schedule A Project Entities were also pledged to Lehman as collateral.

Neal signed the Letter of Instructions. Darby signed on Monument Realty's behalf, and thus Monument Realty "Acknowledged and Agreed to" the terms of the letter. Although Monument Realty agreed to be bound by the terms of the Letter of Instructions, neither Darby nor Neal informed any officer or employee of Monument Realty, including key

[6]Ms. Neal's divorce counsel.

[7]Schedule A also described other projects more broadly, e.g., "a land assemblage in SE Washington."

employees Hines and Volpicelli, of the existence of the letter or that Neal's right to receive distributions was restricted in any way.

Neal paid Ms. Neal $2.2 million when the separation agreement was signed on February 27, 2006. As we have related, in June 2006, Monument Capital borrowed $5 million from Lehman and paid $2.25 million to Neal. It is Ms. Neal's contention that at least a portion of the $2.25 million should have been paid into the Neal Account maintained by Thyden Gross & Callahan. But this did not happen. No money was ever paid into the Neal Account pursuant to the Letter of Instructions. Other than the June 2006 distribution of $2.25 million, neither Monument Realty, Monument Capital, nor any of the Schedule A Project Entities made distributions to Neal between 2006 and 2010.[8]

Neal's relationship with Darby deteriorated in 2008 and thereafter. In a series of transactions in 2009 and 2010, Darby purchased Neal's interests in Monument Realty and its affiliates.

Neal paid Ms. Neal $2 million on February 26, 2007, the first anniversary of the signing of the settlement agreement. Thereafter, Neal failed to make the remaining payments due under the settlement agreement, and, in 2011, Ms. Neal obtained a judgment against him for the remainder of the money owed under the agreement.

[8]Darby testified that neither he nor Neal received distributions from the Schedule A Project Entities between February 2006 and February 2010, explaining that "money that came from any of the profits associated with the sale of properties was used to pay down the line of credit."

The Present Action

Ms. Neal learned of the various transactions between Neal, Darby, Monument Realty, and Monument Capital in her post-judgment efforts to collect the amounts due to her under the marital settlement agreement. Ms. Neal then filed the present action against Darby, Monument Realty, and MR 270 Capital, LLC, a Monument Realty affiliate. The operative complaint is Ms. Neal's second amended complaint, which sets out six substantive causes of action: breach of contract, intentional and negligent breaches of fiduciary duty; actual and constructive fraud; and conspiracy.

After a four-day jury trial, the court submitted only the breach of contract claim to the jury, and only as to Monument Realty. By special verdict, the jury found that, in the words of the special verdict form, Monument Realty had "breached the Letter of Instructions by allowing payment of $2,000,000 to Jeffrey Neal on June 21, 2006." The jury awarded Ms. Neal $300,000 in compensatory damages.

Monument Realty then filed a motion for judgment notwithstanding the verdict. Pertinent to the issues raised on appeal, Monument Realty argued that the Letter of Instructions was unambiguous as to the Schedule A Project Entities and that Monument Capital was not such an entity. Second, Monument Realty contended that the advance from Monument Capital to Neal was not a distribution from a Schedule A Project Entity, but, rather, a direct loan from Lehman, who "wanted Messrs. Neal and Darby to come up with new real estate development opportunities." Third, Monument Realty contended that

Monument Capital was not a party to the Letter of Instructions and was not an affiliate of Monument Realty. Alternatively, Monument Realty argued that, even if Monument Capital was an affiliate of Monument Realty, Ms. Neal could recover against Monument Realty for Monument Capital's wrongdoing only by piercing Monument Realty's corporate veil, which she did not attempt to do.

Ms. Neal's response focused on two points. First, she argued that the jury could have reasonably concluded that the 2006 "draw down by Mr. Neal was an advance payment for a portion of his equity in the project entities," and that the draw down was either a direct violation of the Letter of Instructions or a breach of the implied covenant of good faith and fair dealing. Second, Ms. Neal contended that there was ample evidence that Monument Capital was an affiliate of Monument Realty and, accordingly, a party to the Letter of Instructions.[9]

After hearing argument on the motion, the trial court granted Monument Realty's motion. In issuing its ruling, the court reasoned as follows:

> I think I made a mistake during the trial by letting this go to the jury, in addition to the reasons that were set out by the defendants, which I adopt. It seems to me that this contract is not ambiguous, that applying the objective law of contracts that, what I may have done was read into it a term that's not there. The company at issue here[10] is simply not listed on Schedule A. It could have

[9]As alternative relief, Ms. Neal sought a new trial. The court denied this motion and Ms. Neal does not assert that the trial court erred in doing so on appeal.

[10]The trial court was referring to Monument Capital.

> been, but it wasn't. And since it wasn't listed on Schedule A, it's not an entity with respect to which Ms. Neal had distribution rights.
>
> I understand Clancy,[11] but I remind myself that the implied covenant of good faith and fair dealing cannot be employed to imposing new contract terms that could have been bargained for, but were not. The implied covenant of good faith cannot be used to rewrite a contract to make it-- the Supreme Court of Delaware said in the case, to rewrite a contract to appease a party who later wishes to rewrite it because he or she believes that they didn't make a good deal. I'm just using this by reference, I'm not adopting it. I know it's from Delaware, the Blaustein case[12] filed on January 21, 2014, backed by the Supreme Court of Delaware. The implied covenant does not allow a court to add a term or a condition, or anything to a contract that's not in there that the parties could have agreed to themselves. They considered it in the original bargaining positions at the time of contract, so for all of those reasons, the motion for a new trial is denied. The motion for JNOV as to count one is granted, and the motion for judgment, Madam Clerk, as to counts seven and eight of the amended complaint are granted.

In other words, the trial court granted Monument Realty's motion for judgment notwithstanding the verdict because it concluded that the Letter of Instructions was unambiguous and applied only to distributions from the entities listed on Schedule A, and Monument Capital is not listed on Schedule A. Because the money that constitutes the June

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[11] *Clancy v. King*, 405 Md. 541 (2011).

[12] *Blaustein v. Lord Baltimore Capital Corp*., 84 A.3d 954, 559 (Del. 2014):

> The implied covenant of good faith and fair dealing cannot be employed to impose new contract terms that could have been bargained for but were not. Rather, the implied covenant is used in limited circumstances to include what the parties would have agreed to themselves had they considered the issue in their original bargaining positions at the time of contracting.

(quotation marks and footnotes omitted).

2006 distribution went from Lehman to Monument Capital and thence to Darby and Neal, the trial court reasoned that the Letter of Instructions was not violated. Furthermore, the trial court decided that Monument Realty did not violate its implied covenant of good faith and fair dealing because that covenant does not have the effect, as a matter of law, of adding obligations to a contract upon which the parties did not agree. Therefore, concluded the trial court, Monument Realty did not violate the Letter of Instructions and entry of judgment notwithstanding the verdict was warranted.

Analysis

I. Standard of Review

As we explained in *Gallagher v. H.V. Pierhomes*, 182 Md. App. 94, 101 (2008), a "motion for judgment notwithstanding the verdict under Rule 2-532 tests the legal sufficiency of the evidence. The court will deny the motion if there is any evidence, however slight, upon which a reasonable jury could have reached its verdict." (citation and quotation marks omitted).

In arguing that the trial court erred in granting the motion for judgment notwithstanding the verdict, Ms. Neal asserts that:

> The evidence presented at trial legally supports the jury's conclusion that [Monument Realty] breached the LOI by making the June 2006 payment directly to Mr. Neal. The jury heard evidence from which it could find that the payment was in essence an advance on Mr. Neal's equity in the Project Entities that were specifically identified in and covered by the LOI, which was directed to "Monument Realty LLC and Affiliated Companies." The jury also heard evidence legally sufficient for it to determine that Monument Realty

> Capital . . . is an "affiliate" of Monument (specifically an affiliate borrowing company) and was therefore covered by LOI.
>
> * * * *
>
> Mr. Neal, in his capacity as an agent of [Monument Realty], made representations to [Ms. Neal] relative to Monument's financials, told her that the LOI would cover any and all payments that would potentially go to him relative to any and all of his Monument interests, such that she would be paid (up to a certain level), before he would receive a penny.[13]

For its part, Monument Realty contends that the terms of the Letter of Instructions do not support Ms. Neal's assertions. In particular, Monument Realty argues that Monument Capital was not its "affiliate" and the money disbursed to Neal in 2006 was not a "distribution" from any of the Schedule A Project Entities. Monument Realty points out that Monument Capital was not among the entities listed on Schedule A. However, Monument Realty argues that, even if Monument Capital is deemed to be its affiliate, at worst, Ms. Neal's evidence demonstrated that Monument Capital breached the Letter of Instructions, but that Monument Capital was not a party to the suit. Finally, while Monument Realty concedes that it was bound by an implied covenant of good faith and fair dealing, it asserts that the evidence does not support a conclusion that it violated the covenant.

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[13]For purposes of appeal, Monument Realty does not dispute that Neal was its agent. As the trial court instructed the jury:

> Limited liability company members are generally considered to be agents of the LLC. And each member is an agent of the LLC . . . for the purpose of its business. This holds true, particularly with the managing members of an LLC.

Although we do not agree in all respects with Ms. Neal's reasoning, we conclude that the trial court erred in granting the motion for judgment notwithstanding the verdict. In our analysis, we will begin by considering the terms of the Letter of Instructions. We will then turn to whether Monument Capital was an "affiliate" of Monument Realty and whether the 2006 disbursement was a "distribution" under the terms of the Letter of Instructions. We conclude that the answer is "yes" to both of those questions. Finally, we will address how the implied covenant of good faith and fair dealing applies to this case. We conclude that, by agreeing to be bound by the terms of the Letter of Instructions, Monument Realty obligated itself to avoid taking action that would "injur[e] or frustrat[e] the right of [Ms. Neal]" created by the letter. *See Clancy v. King*, 405 Md. 541, 571 (2008) (internal quotation marks and citation omitted). Because, in our view, there was evidence which supported the reasonable conclusion that Monument Realty did, in fact, impair the value of the Letter of Instructions to Ms. Neal, we will reverse the judgment and remand the case with instructions for the court to enter judgment on Ms. Neal's behalf.

II. The Proper Interpretation of the Letter of Instructions

Maryland "adheres to the principle of the objective interpretation of contracts." *Clancy v. King*, 405 Md. 541, 556–57 (2008). This means that courts:

> consider the contract from the perspective of a reasonable person standing in the parties' shoes at the time of the contract's formation. Thus, the true test of what is meant is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant.

Ocean Petroleum, Co. v. Yanek, 416 Md. 74, 86 (2010) (citations and quotation marks omitted). Maryland courts accomplish this "by considering the plain language of the disputed provisions in context, which includes not only the text of the entire contract but also the contract's character, purpose, and the facts and circumstances of the parties at the time of execution." *Id*. at 88 (citations and quotation marks omitted).

The Letter of Instructions was signed by Neal as partial consideration for Ms. Neal's waiver of claims to alimony and a monetary award. At this point in the litigation, Monument Realty does not dispute that Ms. Neal was a third-party beneficiary to the Letter of Instructions. The Letter of Instructions does not explicitly state that its terms were intended to secure Neal's multi-year obligation to make support payments to Ms. Neal. However, Darby was aware that the Letter of Instructions was executed as part of the Neal's divorce settlement. And, as a general rule, knowledge of an agent with regard to the subject matter of the agency relationship is attributable to the principal. Managing members are agents of a limited liability company for purposes of the company's business. *See* Corporation and Associations Article § 4A-401(a)(1). Accordingly, the jury was certainly entitled to find that Darby, an extremely sophisticated businessman, should have realized the purpose of the Letter of Instructions.

With these as "the facts and circumstances of the parties at the time of execution," *Ocean Petroleum*, 416 Md. at 86, we move to the terms of the Letter of Instructions itself. An objective person reviewing the letter would conclude:

> (1) The letter itself was directed to "Monument Realty LLC and Affiliated Companies."
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> (2) Neal instructed those entities to make "Directed Payments" annually to the "Neal Account."
>
> (3) The amount of the Directed Payment for 2006 was $2 million.
>
> (4) The funding source of the Directed Payments was "all amounts that [Neal] may be entitled to receive directly, or indirectly, or have the benefit of" from the Schedule A Project Entities "that are distributable to [Neal] or for [his] benefit for any reason and on account of any matter and without regard to the accounting or tax characterization of any such distributable amount."
>
> (5) The Instructions were "ongoing and continuing" and were irrevocable. Pursuant to the Instructions, Monument Realty promised "to take any and all other actions necessary or appropriate in order to cause the Directed Payments to be deposited in the Account[.]"
>
> (6) Questions regarding interpretation of the Instructions were to be directed to Ms. Neal's counsel in the divorce action for resolution.

The purpose and intent of the Letter of Instructions is clear: Monument Realty and its affiliates agreed to transfer the first $2 million of Neal's distributions from the Schedule A Project Entities to the Neal Account in order to secure payment of his support obligation to Ms. Neal. Had the terms of the Letter of Instructions become operative, Ms. Neal would have benefitted in two ways: first, there would be a direct source of funding for the Support Payments, and second, the terms of the Letter of Instructions incentivized Neal to make the payments on a timely basis because, until he did so, any distributions from the Schedule Project A entities would not be to his benefit. To the extent that Neal extracted the value of his equity in any of the Schedule A Project Entities to his own use without making payments

on the Support Obligation, the benefits that Ms. Neal anticipated from the Letter of Instructions would be diminished.

The trial court would have been correct in granting the motion for judgment NOV only if there was no evidence from which the jury could reasonably conclude that: (1) Monument Capital was an affiliate of Monument Realty, and thus bound by the Letter of Instructions; (2) the $2.25 million paid to Neal in 2006 was effectively a distribution to Neal "for any reason and on account of any matter and without regard to the accounting or tax implications of any such distributable amount"; and (3) the $2.25 million payment violated of an express or implied term of the Letter of Instructions.

We will now turn to these issues.

III. Was Monument Capital an Affiliate of Monument Realty?

As we noted above, the Letter of Instructions was addressed to "Monument Realty LLC and Affiliated Companies," and Monument Realty asserts that Monument Capital was not its affiliate. Monument Realty presents no legal authority for its contention and, in any event, the argument is meritless. We begin with the definition of "affiliate" in a widely-used legal dictionary that was current at the time the Letter of Instructions was drafted:

> A corporation that is related to another corporation by shareholdings or other means of control.

BLACK'S LAW DICTIONARY 63 (8th Ed. 2004).[14]

[14]The definition of "affiliate" in the current version of Black's Law Dictionary is substantively identical. *See* BLACK'S LAW DICTIONARY 69 (10th Ed. 2014).

At trial, Darby testified that he and Neal had been co-owners and co-managing members of Monument Realty from the time the company was formed in 1998 through 2009. Monument Capital's limited liability agreement was introduced as an exhibit at trial; it states that Neal and Darby were its sole members and the co-managing members. Also in evidence was another agreement between Darby and Neal dated June 1, 2008,that characterized Monument Realty and Monument Capital as the "Monument Entities," and stated that "MR/MC [are] "engaged in the business of acquiring, financing, developing, constructing, owning, operating, managing, leasing [etc.]" personal property, and providing services to entities that sought to develop or invest in real property. Further, Ms. Neal introduced as an exhibit a letter from Russell Hines, who at the time was Monument Realty's president, to her counsel, referring to Monument Capital as "an affiliate" of Monument Realty. Considering, as we must, this evidence in the light most favorable to Ms. Neal, we conclude that there was sufficient evidence of common ownership and control for the jury to conclude that the two business entities were affiliates.

Monument Realty contends that "the only logical reading of the Letter of Instructions is that 'and Affiliates' referred to the Project Entities specifically included in Schedule A." But this is not consistent with the terms of the Letter of Instructions itself. The letter is addressed to "Monument Realty LLC and Affiliated Companies" and states that Monument Realty is the "general partner or managing member and/or sole funds disbursing agent" for the Schedule A Project Entities. If we conclude that the "Affiliated Companies" identified

as addressees of the letter are only the Schedule A entities, then there would be no reason to direct the Letter of Instructions to any entity other than Monument Realty. We decline to treat the words "and Affiliated Companies" as meaningless surplusage. Such a result is inconsistent with Maryland's objective approach to contract interpretation. *Jones v. Hubbard*, 356 Md. 513, 534 (1999) ("Implied in [the objective] test [for interpreting contracts] is that the interpretation of the language is to be of the entire language of the agreement, not merely a portion thereof.").

IV. An "Advance" or a "Distribution"?

Before the trial court, and in its contentions before this Court, Monument Realty seeks to draw a distinction between distributions from the Schedule A Project Entities and disbursements from Monument Capital to Neal and Darby, which Monument Realty terms "advances." According to Monument Realty, the Letter of Instructions applies to "distributions," but not to "advances." The short answer to Monument Realty's contention is that there was evidence presented to the jury, in the form of Monument Capital's ledger sheet, that Monument Capital characterized the June 2006 payment to Neal as a "draw and distribution."[15] A trial court should deny a motion for judgment NOV even if there is "any

[15]In its brief, Monument Realty asserts that "Mr. Darby and Mr. Hines testified that the loan advances were used for many reasons, including funding operations, reinvestments in Monument Realty's projects, and payments of employee bonuses." However, the testimony cited by Monument Realty refers to the uses made of the *December 2005* payments to Darby and Neal, which were made before the Letter of Instructions was executed. There was no testimony that the *June 2006* payment to Neal was intended for (continued...)

evidence, however slight" in favor of the non-moving party on the controverted issue. *Gallagher v. H.V. Pierhomes*, 182 Md. App. at 10. Monument Capital's business record meets that threshold.

V. The Covenant of Good Faith and Fair Dealing

Ms. Neal presents several rationales as to why Monument Realty, as opposed to Monument Capital, breached the Letter of Instructions. In our view, one is dispositive.

Ms. Neal contends that Monument Realty breached the covenant of good faith and fair dealing, implied in the Letter of Instructions, by allowing Neal to convert his equity interest in the Schedule A Project Entities into cash, and thus reducing the value of the security for the Support Payment.

Monument Realty counters that it did not breach its duty of good faith and fair dealing. According to Monument Realty, the covenant of good faith and fair dealing is only implicated to the extent that it prevents one party from impeding upon the other party's ability to perform, and precludes either party from engaging in destructive competition. Without belaboring the point, Monument Realty's interpretation of Maryland law is incorrect—Maryland courts have applied the implied covenant of good faith and fair dealing in contexts other than destructive competition. *See, e.g.*, *CR–RSC Tower I, LLC v. RSC Tower I, LLC*, 429 Md. 387, 450–51 (2012) (implied covenant of good faith and fair dealing

(...continued)
anything other than his personal use.

applies in commercial real estate leases); *Questar Builders v. CB Flooring*, 410 Md. 241, 261 (2009) (covenant of good faith and fair dealing applies in "termination for convenience" clause in a construction contract); *Julian v. Christopher*, 320 Md. 1, 9 (1990) (landlord's refusal to consent to a sublease violates implied covenant of good faith and fair dealing).

The law of this State is clear—as a general matter, every contract contains a covenant of good faith and fair dealing, and where such a covenant is not express, it will be implied. *Clancy v. King*, 405 Md. 541, 565–66 (2008). Moreover, whether such covenant has been breached is a question of fact for the jury. *Id.* at 571. In *Clancy,* the Court of Appeals explained that "under the covenant of good faith and fair dealing, a party impliedly promises to refrain from doing anything that will have the effect of injuring or frustrating the right of the other party to receive the fruits of the contract between them." *Id.* at 570–71 (quoting *E. Shore Mkts., Inc. v. J.D. Assocs., Ltd. P'ship*, 213 F.3d 175, 184 (4th Cir. 2000)). Put another way, "the implied duty of good faith and fair dealing recognized in Maryland requires that one party to a contract not frustrate the other party's performance, it is not understood to interpose new obligations about which the contract is silent, even if inclusion of the obligation is thought to be logical and wise. An implied duty is simply a recognition of conditions inherent in expressed promises." *Blondell v. Littlepage*, 185 Md. App. 123, 148 (2009).

The Letter of Instructions directed "Monument Realty and its Affiliated Companies" to transfer to the Neal Account "all amounts that [Neal] may be entitled to receive" from the

Schedule A Project Entities "that are distributable to [Neal] or for [Neal's] benefit for any reason and on account of any matter and without regard to the accounting or tax characterization of any such distributable amount." As we have discussed previously, by agreeing to the Letter of Instructions, Monument Realty promised to "to take any and all other actions necessary or appropriate in order to cause the Directed Payments to be deposited in the [Neal] Account[.]" The evidence was that Monument Realty made no efforts whatsoever in this regard. Whether Monument Realty's inaction was consistent with its duty of good faith and fair dealing is a question of fact. *Clancy*, 405 Md. at 571.

The jury was presented with sufficient evidence to conclude that the 2006 disbursement to Neal had the effect of reducing Neal's equity interest in the Schedule A Project Entities. In effect, because of the 2006 disbursement, any distribution eventually payable to Neal from any of the Schedule A Project Entities would be reduced. This clearly had the effect of injuring Ms. Neal's rights under the Letter of Instructions.

The jury also heard testimony from which it could find that Monument Realty had no intention to fulfill its obligations under the Letter of Instructions. As we have discussed, neither Neal nor Darby informed anyone who worked for them, notably Hines and Volpicelli, of the existence of the Letter of Instructions. Darby testified that there were two reasons why it was not necessary for him to show the Letter of Instructions to Monument Realty employees: (1) the letter's personal nature; and (2) whether distributions were to be made was a discretionary decision to be made by Neal and him.

But the jury could have concluded that the fact that the Letter of Instructions was related to Neal's marital difficulties was not a valid reason to keep the letter secret, especially in light of the letter's substantive terms. Similarly, the jury could have been skeptical of Darby's claim that, because distributions were discretionary, no one needed to know of the Letter of Instructions's existence. To the contrary, the Letter of Instructions set out explicit, and very precise, limitations upon Neal's right to receive any distributions, in order to protect Ms. Neal. The jury thus could have reasonably concluded that Darby's and Neal's failure to inform *anyone* of the existence of the Letter of Instructions was indicative of a lack of good faith on their, and thus Monument Realty's, part.

Alternatively, the jury could have remembered that, by accepting and acknowledging the Letter of Instructions, Monument Realty promised Ms. Neal that it would "take any and all other actions necessary or appropriate in order to cause the Directed Payments to be deposited in the [Neal] Account[.]" The jury could have concluded that Monument Realty breached this duty by permitting Neal to by-pass the protections contained in the Letter of Instructions and directly tap into his equity in the Schedule A Project Entities, thus reducing the amounts of future "Directed Payments."

Conclusion

In summary, Monument Realty's contentions that Monument Capital was not its affiliate, and thus not bound by the Letter of Instructions, are unpersuasive. Monument Realty's argument that there was no evidence that the $2.25 million payment to Neal was

not a distribution to him is fatally undermined by the fact that Monument Capital itself characterized the transfer as a "distribution." Because we read the scope of Monument Realty's duties under the Letter of Instructions more broadly than did the trial court, we hold that there was sufficient evidence from which the jury could have concluded that conduct on Monument Realty's part that had "the effect of injuring or frustrating the right of [Ms. Neal] to receive the fruits of the contract between them[.]" *Clancy*, 405 Md. at 571. The trial court erred when it granted Monument Realty's motion for judgment notwithstanding the verdict and the verdict in favor of Ms. Neal must be reinstated.

THE JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY IS REVERSED AND THE CASE REMANDED TO REINSTATE THE JURY'S VERDICT OF $300,000 IN FAVOR OF APPELLANT. APPELLEE TO PAY COSTS.