Circuit Court for Montgomery County
Case No. 4196860V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0369

September Term, 2017

CUSHMAN & WAKEFIELD OF MARYLAND, INC., ET AL.

v.

DRV GREENTEC, LLC

Wright,
Arthur,
Kenney, James A., III,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: June 18, 2018

Cushman & Wakefield of Maryland Inc. ("Cushman") and Sloan Street Advisors Inc. ("Sloan"), appellants, brought suit against DRV Greentec, LLC ("DRV"), appellee, over payment of brokerage commissions after an option to a commercial lease ("Lease") was exercised. This appeal arises from the Circuit Court of Montgomery County's order granting a motion for summary judgment in favor of appellee against appellants.

Aggrieved by the circuit court's ruling, Cushman and Sloan present four questions for our consideration, which we have reworded:[1]

[1] In Cushman's brief, they phrase the questions as follows:

> A. Whether the Trial Court was erroneous as a matter of law in holding that Appellant[s] Brokers, who were express third-party beneficiaries of the Commercial Lease they negotiated, were required to be in privity of contract with Appellee as successor Landlord in order to enforce their third-party beneficiary rights against Appellee, which expressly undertook to perform all of the obligations of Landlord under the Lease.
>
> B. Whether the Trial Court was erroneous as a matter of law in concluding that Appellee did not expressly assume the obligation in the Lease to pay Appellants their commission where Appellee expressly accepted assignment of the original July Lease and expressly represented three different times to three different parties, including its seller, its lender, and its trustee, that it assumed and would perform "all" obligations of the lease.
>
> C. Whether the Trial Court was erroneous as a matter of law in limiting successor liability merely because Appellee did not acquire the assets of its predecessor corporation, MGP, or because Appellee did not have the same directors or shareholders as its predecessor corporation, MGP.
>
> D. Whether the Trial Court was erroneous as a matter of law in concluding that the covenant to pay the brokerage commission did not run with the land where the lease term reflects the intent of the original covenanting parties to have the covenant run with the land.

1. Did the circuit court properly find that appellee was required to be in privity of contract with appellants as successor landlord to enforce a third-party beneficiary right against the appellee?

2. Did the trial court properly find that appellee did not expressly assume the obligations in the lease agreement to pay the appellants a brokerage commission where the appellee accepted assignment of the original July 2010 lease?

3. Did the circuit court properly find that the covenant in the lease to pay brokerage commissions upon renewal did not run with the land?

4. Did the circuit court properly find that appellee is not a successor for the purposes of successor liability?

For the following reasons, we answer all the questions in the affirmative and, therefore, affirm the judgment of the circuit court.

BACKGROUND

In 2009, MGP Greentec IV, LLC ("MGP") owned the property located at 7700 Hubble Drive, Greenbelt, Maryland 20706 ("the Property"). The Property housed two buildings with an adjoining lobby, totaling 12,000 square feet. Cushman contracted with MGP to provide commercial real estate brokerage services to find a new tenant for the Property. The Property was vacant when MGP contracted with Cushman as the exclusive listing agent to find a tenant for the Property.

Concurrently, National Aeronautics and Space Administration ("NASA") was searching for office space for its Joint Polar Satellite System ("JPSS") program. NASA retained Sloan to provide commercial real estate brokerage services to find an appropriate office space for JPSS. NASA and Sloan decided to use TRAX International Corporation

("TRAX"), a government contractor, to act as the entity to lease and manage the space for NASA's JPSS program.

On July 15, 2010, MGP, as landlord, and TRAX, as tenant, entered into the Lease with an initial term of approximately five years, which included an option to renew for an additional five-year term.[2] Section 17 of the Lease provided that the landlord, MGP, would pay both the tenant's and landlord's brokerage commission.[3]

MGP mortgaged its interest in the Property under a Leasehold Deed of Trust and Security Agreement, dated October 13, 2005. As further security on the mortgage loan, MGP assigned its interest in any future leases of the Property and entered into an Assignment of Leases and Rents, dated October 31, 2005. MGP defaulted on its loan, which was governed by the aforementioned documents, and MGP's lender instituted a foreclosure proceeding on September 24, 2010.

[2] The Lease between MGP and TRAX went into effect on or before November 1, 2010.

[3] Section 17 of the Lease in relevant parts states:

> Landlord agrees to compensate [Cushman and Sloan] in accordance with a separate agreement, and agrees to indemnify Tenant against any claims, damages, cost, expenses, attorneys' fees or liability for compensation or charges with may be incurred by Tenant as a result of any claims of non-payment made by the Real Estate Brokers. Notwithstanding anything to the contrary contained herein, in no event shall Tenant have any liability for Real Estate Broker commissions. In addition, in the event Tenant exercises its Option to Renew pursuant to Section 32 below, Landlord shall pay [Sloan] a fee of $617,928.50, and [Cushman] a fee of $463,446.37.

The Property was purchased on January 6, 2011, at a foreclosure sale by Bank of America, the successor to the lender syndicate, which had originally financed the loan (hereinafter Bank of America and its successor banks are referred to as "the Bank"). The Bank marketed the property for sale and circulated an offering memorandum, which stated that sale was made "subject to a Deed of Lease from [MGP] Landlord, to [TRAX], dated July 15, 2010." On January 6, 2011, the substitute trustee for the property sold MGP's interest to the lender, the Bank, at the foreclosure sale. The Circuit Court for Prince George's County ratified the sale by order on April 1, 2011.

The Bank then marketed the Property for sale and circulated an offering memorandum which noted under the Financial Analysis that the tenant, TRAX, had a 66 month lease, and it further noted that the landlord was to pay the tenant's broker $617,928.50 and the landlord's broker $463,446.37 should the tenant renew for a five-year term. Also in a section labeled "Argus assumptions," the offering memorandum listed the collective cost of the brokerage fee.[4]

On January 20, 2012, DRV entered into an Agreement of Purchase and Sale with the Bank ("Purchase Agreement.") The Purchase Agreement conveyed and transferred the lease to DRV. Section 11 of the Purchase Agreement stated "[t]his agreement

[4] The Argus software is a tool used by commercial real estate brokers to determine and generate cash flow reports using a lease by lease modeling method with market assumptions. Argus assumptions, also known as market lease assumptions, control what happens to a lease after it expires and goes to market. *See* ARGUS Valuation - DCF Step-By Step Guide, ARGUS Software, Inc.,67 (April 25, 2011), http://downloads.argussoftware.com/VALDCF/15B/StepByStepGuide.pdf

(including the exhibits hereto) contains the entire agreement between [the Bank] and [DRV], and no oral statements or prior written matters not specifically incorporated herein shall be of any force or effect." On February 24, 2012, DRV and the Bank signed an Amended Agreement of Purchase and Sale, where both parties agreed to amend the price of the sale for the Property. On March 29, 2012, DRV and the Bank signed the Assignment and Assumptions of Tenant Lease and Contracts ("Assignment Agreement").[5] The Assignment Agreement stated that DRV, the assignee: "agrees to perform all of the covenants, agreements and obligations under the Lease and Contracts binding on Assignor or Real Property, Improvements, or Personal Property (such covenants, agreements and obligations being herein collectively referred to as the "Contractual Obligations"), as such Contractual Obligations shall arise or accrue from and after the date of this Assignment."

In March 2015, near the end of TRAX's five-year tenancy, TRAX consulted with Sloan about whether to exercise its renewal option, per the Lease. On August 17, 2015, TRAX renewed its tenancy based on the terms and conditions as specified in Section 32 of the Lease. Thereafter, Cushman and Sloan requested DRV to pay the renewal brokerage commissions of $617,928.50 and $463,446.37. DRV, believing there was no obligation to pay the brokerage commissions, refused.

On April 13, 2016, appellants filed a Complaint against appellee, alleging breach of contract, successor liability, and *quantum meruit* for unjust enrichment and requested a

[5] On March 29, 2012, DRV also purchased the ground lease.

declaratory judgment. On May 26, 2016, appellee filed a Motion to Dismiss, which the circuit court denied on August 3, 2016. Appellants filed a Motion for Summary Judgment on January 25, 2017. Appellee filed a Motion for Summary Judgment on January 27, 2017. On March 16, 2017, the circuit court held a hearing on the party's motions.

In a written Memorandum Opinion and Order filed on April 12, 2017, the circuit court found that there was no breach of contract, because the covenant to pay the brokerage commission in the Lease did not run with the land; that appellee was not liable under successor liability, because DRV was not a successor to MGP that acquired MGP assets; and that quasi-contract claims, like *quantum meruit*, cannot be asserted when an express contract defining the rights and remedies of the parties exist. For those reasons, the circuit court granted appellee's motion and denied appellants' motion.

Additional facts will be included as they become relevant to our discussion, below.

DISCUSSION

All of appellants' questions flow from the circuit court's granting of summary judgment in favor of DRV. When we review a circuit court's grant of summary judgment we consider, *de novo*, first, whether a genuinely disputed material fact existed, requiring a trial, and second, if a trial by a fact-finder is not required, whether the court was legally correct. *Haas v. Lockheed Martin Corp*., 396 Md. 469, 478 (2007); *Dashiell v. Meeks*, 396 Md. 149, 163 (2006). The standard for reviewing the grant of summary judgment is settled law, and codified in Md. Rule 2-501(a) which states: "[a]ny party may

file a written motion for summary judgment on all or part of an action on the ground that there is no genuine dispute as to any material fact and that the party is entitled to judgment as a matter of law." When the facts are susceptible to more than one inference, we view the facts in the light most favorable to the non-moving party. *Laing v. Volkswagen of Am., Inc.*, 180 Md. App. 136, 152-63 (2008). Put another way, we "construe any reasonable inferences that may be drawn from the facts against the moving party." *Myers v. Kayhoe*, 391 Md. 188, 203 (2006). Ordinarily, we may uphold the grant of summary judgment only on the grounds relied on by the circuit court. *Ashton v. Brown*, 339 Md. 70, 80 (1995). At its core, the parameters for appellate review of a grant for summary judgment is determining "whether a fair minded jury could find for the plaintiff in light of the pleadings and the evidence presented, and there must be more than a scintilla of evidence in order to proceed to trial [.]" *Laing*, 180 Md. App. at 153.

There are no material facts in genuine dispute here bearing on the legal basis upon which summary judgment was granted. The parties agree that TRAX opted to renew the Lease for another five-year term; that appellants requested a brokerage commission they believe they were entitled to; and that appellee declined to pay the commission. Therefore, we shall consider whether the grant of summary judgment by the circuit court in favor of DRV was correct as a matter of law. *Haas*, 396 Md. at 479.

I.

Before we address these issues, we must take time to discuss the statute of frauds.[6] Md. Code (1973, 2013 Repl. Vol.), § 5-901 of the Courts and Judicial Proceedings Article ("CJP") states:

> Unless a contract or agreement upon which an action is brought, or some memorandum or note of it, is in writing and signed by the party to be charged or another person lawfully authorized by that party, an action may not be brought:
>
> (1) To charge a defendant on any special promise to answer for the debt, default, or miscarriage of another person;
>
> (2) To charge any person on any agreement made on consideration of marriage; or
>
> (3) On any agreement that is not to be performed within 1 year from the making of the agreement.

Here, appellee entered into a written agreement for a commission that would only be owed if the tenant renewed the Lease for another five-year term. MGP, not appellee, signed the Lease. Accordingly, if we were to only examine the four corners of the contract, appellee would not be bound to the terms of the agreement because they never signed the Lease, and such a failure would implicate the statute of frauds. Our discussion

[6] In 1677 the English Parliament enacted, during the reign of King Charles II, legislation entitled "An Act for prevention of Frauds and Perjuryes". That law, quickly became known by the stylistic name, "The Statute of Frauds." *Collection & Investigation Bureau of Maryland, Inc. v. Linsley*, 37 Md. App. 66, 66 (1977). When the proprietary colony of Maryland, along with other English Colonies, declared its independence on July 4, 1776, the common law of England and English statutes then existent were carried over into what is now the sovereign StJuly 4, 1776, the common law of England and English statutes then existent were carried over into what is now the sovereign State of Maryland. *Id*.

of the statute of frauds is just a precursor of our task as appellants allege that, despite not signing the agreement, appellee should still be bound to pay the brokerage commission.

First, similar to their argument in the circuit court, appellants aver that they are the named and intended third-party beneficiaries of the Lease, rendering the absence of privity in contract with appellee irrelevant. In response, appellee contends that the lack of privity is precisely the reason they were under no obligation to pay the commissions appellants believe is owed.

In general, a third-party beneficiary status arises when two parties enter into an agreement with the intent to confer a direct benefit on a third party, allowing the third party to sue on the contract despite the lack of privity. *Flaherty v. Weinberg*, 303 Md. 116, 125 (1985). A third-party beneficiary may sue for breach of contract when "the accompanying circumstances and performances of the promise will satisfy an actual or supposed or asserted duty of the promise to the beneficiary . . . ." *Weems v. Nanticoke Home Inc.*, 37 Md. App. 544, 552 (1977).

Both parties direct us to *120 W. Fayette St., LLLP v. Mayor of Baltimore*, 426 Md. 14 (2012), which is instructive. In *120 W. Fayette St., LLLP*, the Court opined that:

> At common law, only a party to a contract could bring suit to enforce the terms of a contract. The common law rule has expanded to permit "third-party beneficiaries" to bring suit in order to enforce the terms of a contract. An individual is a third-party beneficiary to a contract if the contract was intended for his [or her] benefit and it . . . clearly appear[s] that the parties intended to recognize him [or her] *as the primary party* in interest and as privy to the promise. It is not enough that the contract merely operates to an individual's benefit: [a]n incidental beneficiary acquires by virtue of the promise no right against the promisor or the promisee.

426 Md. 14, 35-36 (2012) (quotations omitted) (citations omitted) (emphasis added). The circuit court judge correctly determined that one possible way of recovery was by appellants being found to be a third party beneficiary.

Here, the contract at issue is a Lease that was clearly drafted to benefit the tenant, to ensure that they had the ability to fully use and enjoy the Property, and the landlord, to protect their interest in the property and outline their obligations to the tenant. The Lease only references the brokerage commissions in one section of the Lease, with the remainder of the Lease outlining the rights and obligations of the parties to the Lease. Additionally, nothing in the Lease suggest that appellants were the primary parties in interest to the Lease agreement. As such, appellants are merely incidental beneficiaries, not third-party beneficiaries to the Lease.

Appellants rely on *Spivak v. Madison-54th Realty Co*., 303 N.Y.S.2d 128 (N.Y. Sup. Ct. 1969) to support their argument that they should be able to recover as third-party beneficiaries but an examination of the opinion indicates otherwise. In *Spivak,* the court states: "*In this connection, it also occurred to me, in an effort to view plaintiff's cause in as favorable light as possible*, that she might be a third-party beneficiary of the leasing agreement under the theory of *Lawrence v. Fox*, (20 N.Y. 268 (1859))." 303 N.Y.S.2d at 133 (emphasis added). However, in *Spivak*, the court further clarified that in order to be bound the broker not only must insist upon clear reference in the lease to their commission and a requirement therein as to their future commissions but the assignee must "assume [] the obligations and he accept[] the benefits . . . of the option." 303

N.Y.S.2d at 128. The New York *nisi prius* court went on to state that "[i]n the absence of such precautions, plaintiff cannot, in fairness, complain of defendants' claimed machinations to avoid the additional commissions." *Id.* *Spivak* supports the argument of the appellee and not the appellants.

Additionally, appellants cite several cases from other jurisdictions where a third-party broker sought brokerage commissions, but these cases are unavailing because in each case the party from whom the commission was sought signed or accepted the contract, which is not what happened in the case before us. *See*, *India.com v. Dalal*, 412 F.3d 315, 317-18 (2d Cir. 2005) (agent for defendant purchaser prepared and signed the brokerage agreement on their behalf); *Ambrose Mar-Elia Co. v. Dinstein*, 543 N.Y.S.2d 658, 659-60 (N.Y. App. Div. 1989) (holding that defendants purchasers' agent prepared a brokerage agreement on their behalf and, therefore, bound the defendant, even though they did not sign the agreement); *Edward S. Gordon Co. v. Blodnick, Shultz & Abramowitz, P.C.*, 540 N.Y.S.2d 816 (N.Y. App. Div. 1989) (defendants were signatories of both a sublease containing a brokerage commission provision and the commission agreement); and *Ficor, Inc. v. National Kinney Corp.*, 412 N.Y.S.2d 621 (N.Y. App. Div. 1979) (defendants signed a sales contract containing a brokerage commission provision which identified the defendants as the parties responsible for payment of the Plaintiff's brokerage commission).[7] This string of cases supports the conclusion that to be bound to

[7] The only case with binding authority discussing the issue of brokerages fees that appellants cite on this matter is *Eastern Associates, Inc. v. Sarubin*, 274 Md. 378 (1975). In *Eastern Associates, Inc.*, the Court of Appeals held that a broker seeking to recover on

an agreement to pay a brokerage commission one must sign the agreement.[8] Here, appellee did not sign the Lease, which listed payment of the brokerage commissions, or either of the commission agreements referenced in the Lease.

Addressing directly a central requirement of the third-party beneficiary theory, appellants contend that when appellee assumed the obligations in the Lease owed to the tenant as the new landlord, they also assumed the duty to pay the commission. We disagree.

When appellee purchased the property from the Bank, they signed an Assignment Agreement. The Assignment Agreement in pertinent part states:

> "Assignee [appellee] assumes and agrees to perform all of the covenants, agreements and obligations under the Lease and Contracts binding on the Assignor or the Real Property, Improvements, or Personal Property (such covenants, agreements and obligations being herein collectively referred to as the 'Contractual Obligations') as such Contractual Obligations shall arise accrue from and after the date of this Assignment."

the basis of custom must prove the customary commission was certain, uniform, and notorious. *Id.* at 403. *Spivak* was cited in *Eastern Associates, Inc.*, only because the brokerage agreement in *Spivak* called for commissions at the customary rate "as approved by the New York Real Estate Board." The Court acknowledged that *Spivak* was factually inopposite, therefore, lending no support for the holding in *Eastern Associates, Inc*.

[8] Appellants do not make an argument that appellee authorized an agent to sign on their behalf. *Progressive Casualty Insurance Company v. Ehrhardt*, 69 Md. App. 431, 439 (1986) (Authorized agents may subject principal to personal liability and create rights in its favor. This ability to bind the principal, however, is limited to the extent which the agent is authorized to act.)

The fallacy in appellants' argument about the Assignment Agreement lies in the assignment itself. The assignor in the agreement was the Bank, not MGP, the owner and landlord of the Property when it was foreclosed on.

Maryland courts have addressed the issue of assignments with respect to mortgages and concluded that the sale of real property "subject to" a mortgage does not impose any liability on the purchaser for the personal obligation of the seller unless the purchaser assumes those obligations. *Rosenthal v. Heft*, 155 Md. 410, 419 (1928) (citing *Chilton v. Brooks*, 72 Md. 544, 559 (1890)) ("[T]he mere purchase of property subject to an existing mortgage does not create a personal obligation on the part of the purchaser to pay it."). If the purchaser does not assume the personal obligations, the seller remains personally liable for such obligation. *Chilton*, 72 Md. at 554.

Although Maryland courts have addressed this issue with mortgages, they have not addressed this issue with respect to leases, but other jurisdictions have. On this specific point, we return to *Spivak*, where a broker sought to recover a commission, from the owner of a property that accepted the assignment of a lease, upon a tenant's exercise of an option to renew its lease. 303 N.Y.S.2d at 128. The court ruled that "[e]ven where he covenants that his assignment is to be 'subject' to the terms of the lease, that language, without more definite words of promise, does not make him liable as by privity of contract." *Id*.

The taking of title "subject to" a lease is not sufficient to constitute express assumption of a personal covenant within the lease. In *Regency Advant L.P. v. Bingo*

Idea-Watauga, Inc., the broker there, as do the appellants in this case, argued that appellant assumed the obligation to pay a brokerage commission by signing the assignment of the lease and by the language in the lease. 928 S.W.2d 56, 60-61 (Tex. App. Tex. 1995), *aff'd in part and rev'd in part on other grounds*, 936 S.W.2d 275 (Tex. 1996). The *Regency Advant L.P.* court concluded that appellant must expressly agree to the assignment of the commission agreement. *Id.* at 61. *Also see, Coggins v. Joseph*, 504 So.2d 211, 213-14 (Miss. 1987) ("The rule is well settled that in the absence of an affirmative assumption, a grantee is not liable on any covenants or agreements by which the grantor may have bound himself, unless, of course, the covenant runs with the land."). *See also, Gurney, Becker & Bourne, Inc. v. Bradley*, 476 N.Y.S.2d 677, 677 (N.Y. Sup. Ct. 1984); *Longley-Jones Assocs. v. Ircon Realty Co.*, 493 N.E.2d 930, 930 (N.Y. App. Div. 1986); *see also, Regency Advant. L.P.*, 936 S.W.2d at 275 (new owner's assumption of "all terms, covenants, and conditions of the leases" is not sufficient to constitute assumption of covenant to pay brokerage commission); *Wharton Assocs. v. Continental Indus. Capital LLC*, 29 N.Y.S.3d 717, 718-19 (N.Y. Sup. Ct. 2016) (as brokerage commission covenant does not run with the land, express assumption of lease without express assumption of commission agreement is insufficient to bind new owner). In uniformity with Maryland's law on the assignment of mortgages, and other states as to leases, we hold that unless the party assuming the lease expressly agrees to assume the personal obligations of the seller, they are not bound to such obligations.

Next, although the Offering Memorandum advises potential buyers of the brokerage fees, it was nothing more than a marketing piece circulated by the Bank's agent and received by DRV. The Bank and DRV entered into a written purchase and sale agreement, and there is no reference in the agreement to DRV's assumption of any liability for renewal commission. The agreement states that it is fully integrated, *i.e.*, the document reflects the parties' entire agreement. The Offering Memorandum was a notice without any signatures and did not impose a contractual obligation to pay a brokerage commission upon the purchaser.

Finally, as to this issue, we think it is important to note that in appellants' brief they comment about how appellee agreed to honor the Lease when they signed the Assumption Agreement and have enjoyed the Lease. Our holding in this case in no way suggests that a Landlord who assumes a commercial lease can sidestep their obligations to their tenants.

II.

The next legal theory that appellants rely on to urge this Court to reverse the circuit court ruling is that the brokerage commissions were covenants that run with the land. We disagree. Under Maryland law, a covenant runs with the land if: (1) the covenant touches and concerns the land; (2) the original covenanting parties intended the covenant to run; and (3) some form of privity exist. *Gallagher v. Bell*, 69 Md. App. 199, 208 (1986). A fourth requirement that the covenant be in writing may be required. *Id.*

Also, though it is not a requirement, covenants that run with the land "tend necessarily to enhance [the] value [of the land]." *Mercantile-Safe Deposit & Tr. Co. v. Mayor & City Council of Baltimore*, 308 Md. 627, 633 (1987).

As to the first requirement, appellants contend that the renewal option, paired with the requirement to pay, touches and concerns the land. Appellants point to section 31.8 of the Lease as evidence that the original parties intended for the covenant to run with the land.[9] Appellee dismisses this language as simply boilerplate that does not truly ascertain the intention of the original contracting parties.

Appellant's argument is not persuasive because the brokerage commissions, which are at issue, are separate from the renewal contract and are a personal obligation between MGP and the former landlord and appellants. This is further established by the two separate brokerage agreements that appellant signed with MGP. Appellant asserts that the brokerage commission and the renewal option are "inextricably intertwined." In the context of determining if the commission runs with the land, we find it very easy to distinguish the two because the brokerage commission does not affect the title to or the possession, use, or enjoyment of the property. *Spivak*, 303 N.Y.S.2d at 132. Appellant relies on *Gallagher*, 60 Md. App. at 211, to argue that covenants to pay money have often been found to run with the land. In that opinion, we clarified that the covenants involved, paying rent and taxes, keeping demised or mortgaged property insured, and repairing,

[9] Section 31.8 in pertinent part states: "Binding Effect: Choice of Law. This Lease shall bind the parties, their heirs, personal representatives, successors and permitted assigns."

rebuilding, or maintaining property. *Id* at 211-12. The brokerage commission at issue does not fall into any of these categories, nor are they analogous because they are a personal obligation, not one that encumbers the property. *See* 12 Am. Jur. 2d Brokers § 226 (stating that the brokers commission is a "personal covenant binding only on the original owner and any party assuming the original owners' obligations, not a covenant that ran with the leased property so as to be binding on the subsequent owner when it acquired title and took an assignment of the lease.").

III.

Finally, we shall address the issue of successor liability. We have held that, "a corporation which acquires the assets of another corporation is not liable for the debts and liabilities of the predecessor corporation." *Martin v. TWP Enterprises Inc.*, 227 Md. App. 33, 49 (2016) (*quoting Baltimore Luggage Co. v. Holtzman*, 80 Md. App. 282, 290 (1989). While this is the general rule, in Maryland, we have recognized four exceptions where the predecessor corporation's debts and liabilities become the obligation of the successor corporation when: (1) there is an expressed or implied assumption of liability; (2) the transaction amounts to a consolidation or merger; (3) the purchasing corporation is a mere continuation of the selling corporation; or (4) the transaction is entered into fraudulently to escape liability for debts. *Baltimore Luggage*, 80 Md. App. at 290 (internal citations omitted).

Relying on the "implied assumption" exception to the theory of successor liability, appellants contend that appellee has taken the place of the original landlord, and therefore

is liable for the commission. Appellants primarily rely on *Isle of Thye Land Co. v. Whisman*, 262 Md. 682 (1971), where the Court of Appeals first recognized the "implied assumption" exception, as support for this argument, which at best is based on a set of facts which are not similar to the ones before us, or at worst do not support appellants' position.[10]

In *Isle of Thye Land Co.*, the articles of transfer evidencing the sale of all the predecessor corporation's assets to the successor corporation was never filed with the State Department of Assessments and Taxation. *Id*. at 706. The Court of Appeals determined that the successor corporation was still liable under a land sale contract entered into by its predecessor where the successor corporation sought to exercise an option reserved under the contract to acquire additional land. *Id*. at 707. Unlike in *Isle of Thye Land Co.*, in the present case the appellants were not parties to the contract in dispute, rather they were at most incidental beneficiaries. Moreover, unlike in *Isle of Thye Land Co.*, appellee in the present case had only agreed to assume the duties and obligation in the Lease as the new landlord of the Property. In *Isle of Thye Land Co.*, the appellant was attempting to disavow a contractual agreement in its entirety under the guise of a newly formed corporation. Whereas, in the present case, the record indicates that appellee was a company that purchased a property from a Bank that was acquired at a foreclosure sale.

[10] Appellants also cited two non-Maryland cases, *Wawak Co. v. Kaiser*, 90 F.2d 694 (7th Cir. 1937), and *Citizens Suburban v. Rosemount Development*, 244 Cal. App. 2d 666 (1966), that are either factually distinguishable or unpersuasive.

Appellants argue that the appellee is a successor landlord, and therefore, liable under successor liability, which conflates successor liability with the concept of a party succeeding an interest of an unrelated party under an agreement and deed. The two concepts are legally distinct. We see no error in the circuit court's finding that appellee is not liable for the payment of the brokerage commission under a theory of successor liability. As we have discussed, *supra*, there was no implied or expressed liability assumed by appellee to pay the brokerage commission. Moreover, there is nothing in the record, nor appellants' brief, that suggest the transaction was a merger between appellee and MGP, or that appellee is a mere continuation of MGP, because the Property was purchased in a foreclosure sale. Accordingly, we hold that the appellee is not liable to appellants for the brokerage commission under the theory of successor liability.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANTS.