Circuit Court for Talbot County
Case No. C-20-CV-19-000099

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 431

September Term, 2021

PETERBILT OF BALTIMORE LLC

v.

CAPITOL GATEWAY PROPERTIES, LLC

Nazarian,
Friedman,
Zic

JJ.

Opinion by Nazarian, J.

Filed: March 21, 2022

This case involves an option to purchase property and raises the question of whether the putative buyer triggered it successfully. In 2013, as part of an agreement to settle a federal lawsuit, Capitol Gateway Properties, LLC ("Capitol Gateway") agreed to lease real property located at 8300 Ardwick Ardmore Road, Landover, Maryland (the "Property") to Peterbilt of Baltimore LLC ("Peterbilt"). In exchange for Peterbilt agreeing to pay above market rent on the Property, Capitol Gateway agreed to include a purchase option (the "Option") in the lease.[1]

In 2019, Peterbilt sought to exercise the Option and buy the Property. For reasons we will explain, Capitol Gateway took the position that Peterbilt failed to exercise it properly and, as a result, Capitol Gateway declined to continue with the sale process. Peterbilt then brought this lawsuit to enforce the Option. After discovery and cross-motions for summary judgment, the Circuit Court for Talbot County denied Peterbilt's summary judgment motion, granted summary judgment in favor of Capitol Gateway, and denied Capitol Gateway's request for attorney's fees. Peterbilt appeals the circuit court's summary judgment rulings, Capitol Gateway cross-appeals the denial of attorney's fees, and we affirm.

I. BACKGROUND

On January 13, 2014, Peterbilt, as tenant, and Capitol Gateway, as landlord, entered into a lease agreement for a base term of ten years. The Option, laid out in Section 17 of

[1] Capitol Gateway didn't want to sell the Property to Peterbilt at that time, believing it "would become more valuable in the future[.]"

the lease, allowed Peterbilt to buy the Property after the first and second five-year terms of the tenancy. To exercise the Option, Peterbilt was required to "give timely written notice to the Landlord . . . advising Landlord of the exercise of the Option," and the notice triggered a multistep procedure to determine the purchase price:

> In the event Tenant timely exercises the Option, the purchase price ("Purchase Price") shall be the fair market value ("FMV") of the Premises as of the date the Option was exercised. If the parties are unable to agree upon the FMV within fifteen days of the date the Option was exercised, they shall thereafter each have an additional fifteen days to obtain the name of a certified real estate appraiser from their respective attorneys or banks, which appraisers must have at least fifteen years of commercial appraising experience in the greater District of Columbia metropolitan area. The parties shall advise one another of their respective appraiser's name, address, and business, and the appraisers shall thereupon have sixty days to each perform their independent appraisal and to issue their report as to the FMV. Each party will provide the other with a copy of their report within ten (10) days thereafter. FMV shall be based upon the highest and best use of the Premises, whatever use that may be.
>
> The FMV (and the Purchase Price) shall be the average of the two appraisals if the appraised amounts differ by 10% or less (said percentage to be measured from the higher of the two). If the difference is greater than 10%, the appraisers shall have thirty days to confer and determine if they can agree on the FMV and, if not, to jointly agree to the appointment of a third appraiser. The third appraiser shall thereupon have sixty days to perform an appraisal and to issue a report as to the FMV. The third appraiser's determination of FMV shall be the Purchase Price, unless it is more or less than the other two appraisals, in which event, if lower than the other two then the lower of the original two shall apply and if higher than the other two then the higher of the original two shall apply.

At the risk of jumping ahead, the circuit court, in its opinion on the parties' motions for summary judgment, summarized Section 17 in seven distinct steps:

(1) Peterbilt could exercise the Option within 120 days of the 5th or 10th anniversaries of the lease by giving written notice to [Capitol Gateway].

(2) The parties were to try and agree to a fair market value of the property within 15 days of the written notice.

(3) If the parties were unable to agree upon the fair market value, then they each had an additional 15 days to obtain the name of a certified real estate appraiser from their respective attorneys or banks.

(4) Both parties were to advise one another of their respective appraiser's contact information, the appraiser would have 60 days to perform their independent appraisal, and a copy of the report must be provided to the other party within 10 days thereafter.

(5) The fair market value of the Property would be the average of the two appraisals if the amounts between the two differed by 10% or less.

(6) If the difference was greater than 10%, then the appraiser[s] would have 30 days to come together to determine if they could agree on a fair market value. If they could not agree, they would jointly agree to appoint a third appraiser and both parties would jointly bear the cost of the third appraiser.

(7) The appointed third appraiser would have 60 days to perform their appraisal and issue their report. Their appraisal price would be the fair market value of the Property unless it was less than the original two appraisals, then the lowest of the original appraisals would be the fair market value, or if it was more than the original appraisals, then the highest of the original appraisals would be the fair market value.

Step 6 is the focus of this appeal. Peterbilt asserts that the parties completed the first part of Step 6—it says it submitted an appropriate appraisal, and that because the difference in appraisals was greater than 10%, the two original appraisers "c[a]me together to determine if they could agree on a fair market value." And since this part was completed,

Peterbilt maintains the parties were required to have their two original appraisers "jointly agree to appoint a third appraiser[.]" Capitol Gateway, conversely, argues that the parties never completed the first part of Step 6 because Peterbilt's appraisal wasn't a purchase appraisal and because Peterbilt didn't itself control it. As such, Capitol Gateway contended that the process ended, no third appraiser was required, and the Option failed.

A. Peterbilt Exercises Its Option To Purchase The Property.

On January 22, 2019, Peterbilt, through its attorney Neil Ruther, sent timely written notice to Capitol Gateway seeking to exercise Peterbilt's Option to purchase the Property. In the letter, Mr. Ruther wrote that "[p]ursuant to the terms of Section 17 if the Parties are unable to agree on a purchase price within fifteen (15) days Tenant will select an appraiser to conduct an appraisal of the Property and will notify Landlord of the qualifications of the appraiser." A month before this letter, Peterbilt had applied to PNC Bank (the "Bank") "to obtain financing in the amount of the 'lesser of $6,000,000 or 80% of appraised value.'"

By letter dated January 30, 2019, Peterbilt and Capitol Gateway agreed to waive the fifteen-day period in Section 17 of the lease "to facilitate negotiations which might lead to an agreement on price without the necessity of appraisals." The waiver was to last indefinitely, "until either [party] serves notice on the other of the termination of negotiations thus triggering the need to pursue the appraisal remedy." Each party would then have "15 days from the date of any such notice to employ appraisers to complete the valuation process contained in the Lease." Peterbilt also offered Capitol Gateway $3,645,000 for the Property. Capitol Gateway didn't respond to Peterbilt's offer, but did

clarify that the triggering provision did "not mean that the appraisers must do the appraisal in 15 days." Peterbilt agreed that "the 15 days is only the time to hire an appraiser," but noted that "[h]aving said that the Bank has already hired [an appraiser] for us."

On February 26, 2019, Peterbilt notified Capitol Gateway that the appraiser hired by the Bank, Patrick Kerr of Newmark Knight Frank ("Newmark"), appraised the Property at $2,800,000, then withdrew its original purchase offer. Because the Bank would "only loan 80% of the value determined by [Mr. Kerr]," it was "no longer practical for [Peterbilt] to pursue a sale at the purchase price stated in [the] letter to [Capitol Gateway] of January 30, 2019." Instead, Peterbilt offered Capitol Gateway $2,800,000 for the Property. In the event that Capitol Gateway rejected the new offer, Peterbilt informed Capitol Gateway that "this letter constitutes notice that the parties should proceed to obtain appraisals as required by the procedures outlined in Section 17 of the lease." Mr. Kerr's appraisal (the "Newmark appraisal") was attached to the letter.

In response, Capitol Gateway hired Ron Lipman and Kevin Kagen of Lipman, Frizzell & Mitchell ("Lipman") to appraise the Property. Capitol Gateway sent written notice of this decision to Peterbilt on March 7, 2019, noting that "[t]he Option has language indicating they have 60 days to complete the appraisal," and that they would assume Peterbilt is "ok with the 60 days beginning on next Monday, March 11, but please confirm." Peterbilt agreed. Lipman valued the Property at $4,530,000. Capitol Gateway sent this appraisal (the "Lipman appraisal") to Peterbilt on May 7, 2019.

Peterbilt responded that same day, stating that "[i]t is apparent that the two

appraisers have reached very different conclusions" about the value of the Property. Not wanting to "resort to the somewhat complicated procedures outlined in the lease," Peterbilt offered to purchase the Property for $3,900,000:

> We note that Lipman attached to its appraisal an "unsolicited" purchase offer in the form of a non binding term sheet. The term sheet contained a purchase price that is roughly halfway between the values fixed in the two appraisals. Peterbilt . . . is willing to purchase the property for $3,900,000.00 the price designated in the term sheet. . . . This offer will remain open until the close of business on Thursday, May 9, 2019 after which it will automatically expire.
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> If [Capitol Gateway does] not accept this offer it is our preference to follow the procedures outlined in the lease to establish a binding purchase price. Toward that end we will advise the appraiser hired by our bank to contact Lipman Frizzell to discuss a compromise valuation.

Capitol Gateway, through its attorney Alan Hoff, rejected the offer and made a counteroffer of $4,300,000. Capitol Gateway followed up with an email stating that if Peterbilt would not accept Capitol Gateway's counteroffer, then "the appraisers have thirty days to confer to see if they can agree on the [fair market value] and, if not, to agree on a 3rd appraiser."

On May 14, 2019, Mr. Lipman called Mr. Kerr to discuss the differences between the Lipman appraisal and the Newmark appraisal, but Mr. Kerr was out of town. Mr. Lipman and Mr. Kagen relayed this information to Capitol Gateway, and added that once Mr. Kerr "gets back into town, we are going to try to arrange an in person meeting with [him] to discuss our valuations." They also informed Capitol Gateway that the "primary difference between" the Lipman appraisal and the Newmark appraisal was the Property's excess land value:

> The three appraiser process in the lease lets us confer to agree on fair market value, and when we talk to the Newmark . . . appraisers, we are going to attempt to get them to appreciate that the subject has valuable excess land which they missed in their valuation. It should be noted that the two [] appraisers who signed the Newmark appraisal did not inspect the subject property and most likely did not properly understand the excess land component. . . .
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> We want to take the time to meet with them to avoid having to select a third appraiser . . . .

But this in-person meeting between Mr. Lipman and Mr. Kerr never happened. On May 23, 2019, Mr. Hoff sent Mr. Ruther an email recapping a phone conversation between them two days earlier:

> You called two days ago to tell me that the appraiser, [Mr.] Kerr, had told you that he had heard from . . . [Mr.] Lipman and [Mr.] Kag[e]n. He told you that he wasn't aware that his appraisal was being done as part of a purchase option, that he had been engaged by the bank (not by your client [Peterbilt]), and that he was unwilling to engage in the processes spelled out in the Option. You informed me that he was firm in his position on this. Later that day, I heard from [Mr.] Kag[e]n that he had had a similar conversation with [Mr.] Kerr and that [Mr. Kerr] refused to go through the processes spelled out in the Option. I then looked at [Mr.] Kerr's appraisal, and it does confirm that he was engaged by the bank.

As a result, Capitol Gateway declared "a failure on the part of [Peterbilt] to comply with the option." Capitol Gateway maintained that "this failure voids [Peterbilt's] exercise of the option and is also a breach of the option terms," and Mr. Hoff informed Mr. Ruther that Peterbilt "will not be entitled to purchase the property until the next option period and will remain as a tenant at the property."[2]

[2] Peterbilt's next opportunity to exercise the Option comes in January 2024.

Mr. Ruther replied that Mr. Hoff was missing "one important fact[,] . . . . that the Bank has given its permission, indeed requested, that the appraiser comply with the terms of the lease and participate in the selection of a third appraiser." Mr. Ruther reminded Mr. Hoff that Capitol Gateway "knew [Peterbilt was] using the Bank's appraiser." He claimed that under the explicit terms of Section 17, Peterbilt only had to *name* an appraiser and wasn't required to *hire* an appraiser. He asked Mr. Hoff for thirty additional days to appoint a third appraiser.

Capitol Gateway declined Peterbilt's request for a thirty-day extension. On May 24, 2019, Mr. Hoff communicated to Mr. Ruther that his "client was supposed to pick an appraiser for purposes of the option." But his client "didn't do that." Rather, [t]he bank picked one for itself in connection with your client's possible loan. The appraiser was not hired by your client." Mr. Hoff claimed that Peterbilt was asking Capitol Gateway to "ignore [Mr.] Kerr's inadequate and undervalued appraisal and go right to the step where an independent appraiser is appointed":

> That is not what was agreed to in the contract. The process in the contract was carefully crafted and, had [Mr. Kerr's] appraisal been done correctly, that process could still have been relevant depending on where a third appraisal might have ended up.
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> * * *
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> What you are suggesting ignores one or more steps that were important to the process, including the phase where the experts sit down to see if they can reach a consensus on the value.

After receiving this email, Mr. Ruther emailed Rick Maletsky, general counsel for Newmark concerning Mr. Kerr's refusal to talk with Mr. Lipman about the appraisals. Mr.

Maletsky provided Mr. Ruther with the name and contact information of a third appraiser, but also told Mr. Ruther to "[p]lease confirm that the proposal of the individual below ends Newmark's involvement in this matter." When that individual had a conflict of interest, Mr. Maletsky provided Mr. Ruther with the name of another appraiser, John T. Farrell, but reminded Mr. Ruther "we are providing this name as a courtesy in order to help you find a competent appraiser to assist your client in its process. We are not actively involved in this matter and our appraisal is the property of PNC and was produced for the specific circumstances which their Appraisal Unit engaged us for."

On June 4, 2019, Mr. Ruther provided Mr. Hoff with Mr. Farrell's contact information, and added that Peterbilt was "quite willing to accept the name of any other appraiser which [Lipman] suggests as long as he or she is properly qualified[.]" Mr. Ruther also told Mr. Hoff that if Mr. Lipman, as Capitol Gateway's appraiser, did "not participate in selecting a third appraiser," Capitol Gateway would be "in breach of the lease" and Peterbilt would "pursue [] remedies."

Mr. Hoff responded three days later. Referring back to his May 24, 2019 letter to Mr. Ruther, Mr. Hoff wrote that "[l]ike me, [Lipman] is of the view that there is no appraisal to which they can respond[.]" Mr. Hoff charged Peterbilt with "piggyback[ing] on a bank appraisal that clearly provides that it may only be used by the bank and that clearly limits its use to loan underwriting purposes and prohibits any other use." Because Peterbilt failed to comply with Section 17 of the lease, Mr. Hoff concluded that Capitol Gateway was not required to proceed forward with the Option. Mr. Hoff told Mr. Ruther

that his client was "prepared to defend a lawsuit" and would be entitled to recover fees should the court find that Peterbilt breached the contract.

B. Peterbilt Sues Capitol Gateway.

On June 26, 2019, Peterbilt sued Capitol Gateway in the Circuit Court for Talbot County. In its complaint, Peterbilt sought *first* to "compel specific performance of the terms and conditions of an Option to purchase certain real estate which is leased to Peterbilt[.]" Peterbilt asked that the court direct Capitol Gateway to "immediately instruct its appraisers . . . to cooperate in the selection of a third appraiser consistent with the terms of the Option . . . ." *Second*, Peterbilt asked for $1,500,000 in damages resulting from Capitol Gateway's breach of contract, which caused "Peterbilt [to] sustain[] monetary damages including but not limited to the payment of an above market rent which it could have avoided." *Third*, Peterbilt sought declaratory relief, asking the court to "determine and adjudicate the rights of the parties with respect to the exercise of the Option and the obligation of [Capitol Gateway] to direct its agents to participate in the selection of a third appraiser" and to "accept the results" of this third appraiser.

Capitol Gateway filed its answer on August 5, 2019. It denied that it had breached Section 17 of the lease and contended that Peterbilt was the party in breach of contract. Capitol Gateway asserted that it was not required to appoint a third appraiser because "[Mr.] Kerr and his company were not even hired by [Peterbilt.]" Therefore, "the appraisal is fundamentally wrong and cannot be used to meet the procedural requirements of the Lease[.]" Capitol Gateway claimed that Peterbilt's "recitation of the procedure is missing

a step, as the next step was for the appraisers to confer to attempt to agree on a value," a process with which Mr. Kerr refused to engage.

At the conclusion of discovery, the parties filed cross-motions for summary judgment. Peterbilt moved for partial summary judgment as to liability, asking the court to declare Capitol Gateway "in default of the obligations of the lease and the purchase option[.]" Peterbilt asserted that Section 17 of the lease "did not require either party to actually directly employ an appraiser but merely to name one from either their attorneys or their bank." (Emphasis in original.) Peterbilt agreed that because the Lipman appraisal and the Newmark appraisal differed by more than 10%, the two appraisers were required to discuss whether they could agree on a fair market value. However, Peterbilt insisted that this discussion took place when Mr. Lipman called Mr. Kerr:

> The language of the option does not require any particular level of negotiation between the two appraisers. It merely requires that they communicate. That they did. . . . The language does not require any specific level or quality of discussion. It does not require the appraisers to negotiate their positions or to change their views as to the value. The two appraisers did "confer" on at least two occasions. The result of that was that Mr. Kerr would not discuss changing his valuation or allow the use of his appraisal in the process of determining value of the Property.

Peterbilt also faulted Capitol Gateway for denying Peterbilt the opportunity to cure any alleged breach under Section 16 of the lease, which provides:

> The occurrence of any of the following shall constitute a default . . . the violation of any of the other terms, covenants, or conditions of this Lease by Tenant, which violation shall remain uncured for a period of thirty (30) days after notice thereof in writing from Landlord to Tenant; provided that, if

> the violation is of a nature that cannot be cured within thirty (30) days, Tenant shall not be deemed to be in default under this Lease if Tenant has commenced to cure the violation within the original thirty (30) day period and continues to pursue such cure with commercially reasonable diligence.

Peterbilt asserted that it had "any number of options . . . to seek alternatives" and cure the defect:

> It would certainly have been possible to hire another appraiser who on completion of his work would have discussed valuation with the Lipman firm. Alternatively, Mr. Kerr might have been prevailed upon to perform this duty. In either event [Capitol Gateway] would not have sustained any injury had either of these methods of cure been permitted since it was collecting its usual rent and did not want to sell the property in the first place.

In its motion for summary judgment, Capitol Gateway asserted that "the express language of the Option" led to the conclusion that Peterbilt breached Section 17 of the lease when it provided Capitol Gateway with Mr. Kerr's contact information, because Peterbilt "did not engage Mr. Kerr and he was not their appraiser; he was the Bank's appraiser." (Cleaned up.) Capitol Gateway argued that Peterbilt further breached the lease when Mr. Kerr refused to confer with Mr. Lipman. Because Peterbilt missed these necessary steps and "destroyed the process," Capitol Gateway "had no obligation to engage in the sham proceeding that [Peterbilt] attempted to force upon [it]." Based on Peterbilt's default of the lease, Capitol Gateway also asserted that it was entitled to attorney's fees.

The circuit court held a hearing on the parties' motions on March 17, 2021. The prominent issue during the hearing was whether the procedure laid out in Section 17 of the lease constituted a condition precedent or a covenant. Capitol Gateway asserted that the difference was "largely irrelevant," because the outcome was the same either way—

Peterbilt failed to comply substantially with the terms of the lease. Peterbilt argued that the distinction between a condition precedent and a covenant was "crucial" because "should the Court decide that this was a covenant, it does not dictate the same conclusion as the failure of the condition precedent." The court agreed that if the procedure constituted a condition precedent, failure to perform each step of the Option would end the inquiry, but if the procedure was a covenant, Peterbilt might have been entitled to an opportunity to cure:

> [I]n terms of the option if a condition precedent fails then the parties have never reached the agreement of sale. And then the offer would not have been accepted. But if it's a breach of a covenant then you get back potentially into the other remedies that exist under the lease including the cure.
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> * * *
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> [M]y question is the option to be treated as a carve out of the lease. But this is an option . . . . An option is not a mere offer to solve but a binding agreement supported by consideration. If the option, if a condition precedent fails then the option is not exercised. The option is not exercised that's the end of the story. . . . However if it's a breach and/or a default . . . then the cure provisions I think under Section [16].

The court asked Peterbilt "if the naming of Mr. Kerr does not comply with Section 17 why is that not a failure of the condition precedent?" Peterbilt responded that naming Mr. Kerr as appraiser and any steps after were "not material to the overall purpose of the option. The overall purpose of the option is to effect a sale at a price. And there were alternative means of determining a price." Peterbilt maintained that it was not in breach. But if the court disagreed, it said the failure of a covenant did not provide Capitol Gateway with the "right to terminate or effect recission of the entire contract."

On May 6, 2021, the circuit court issued an order and opinion denying Peterbilt's motion for partial summary judgment and granting Capitol Gateway's motion for summary judgment as to all counts but attorney's fees. The court disagreed with Peterbilt's assertion that it complied with the procedures set forth in Section 17 of the lease and that it was required only "to name an appraiser, not hire or engage one." Instead, the court found, Section 17 required the parties to obtain an appraiser who went "beyond just performing an appraisal on the Property." Indeed, "[t]he selected appraisers had to communicate that appraisal value to the opposing party, negotiate if their values were not within 10%, and jointly appoint a third appraiser if the two parties could not agree on a fair market value." This Peterbilt failed to do:

> It is clear that Mr. Kerr and Newmark were engaged by the Bank and were not going to submit with the responsibilities listed in the Option because Peterbilt was not their client. Mr. Kerr continuously asserted to multiple people that his appraisal was only for the use of the Bank and he refused to even discuss his appraisal with any other individual because it was performed only for the Bank. Peterbilt had no control over Mr. Kerr and could not force him to follow the procedures laid out in the Option, despite contacting the general counsel for Newmark, Mr. Maletsky. In fact, when Mr. Arscott [the president of Peterbilt] reached out to the Bank and Mr. Ruther reached out to Mr. Maletsky in an attempt to resolve an issue, Peterbilt was recognizing that they had not obtained an appraiser who would finish the responsibilities needed to fully exercise the Option. Mr. Maletsky also made it abundantly clear when he provided the name of two additional appraisers, that Newmark was providing the names only as a courtesy to Peterbilt, that they were not actively involved in this matter, and that their appraisal was the property of the Bank and was produced for the specific circumstances for which they were hired.

The court concluded "that Peterbilt failed to obtain an appraiser who could carry out the obligations of the Option. Thus, Peterbilt, in the naming of Mr. Kerr, was not in accordance with the terms of the Option."

Despite finding that Peterbilt failed to comply with the Option, the court did not find its noncompliance to be a breach of contract, but "a failure to fulfill a condition precedent." Under the procedural posture of the Option, "[e]ach step was a condition precedent for the next step, which ultimately would lead to the sale of the Property." Because Peterbilt failed to satisfy a condition precedent, Capitol Gateway "was no longer required to perform under the Option and did not need to name a third appraiser like Peterbilt wanted." And since there was no breach, Peterbilt was not entitled to cure under Section 16 of the lease and Capitol Gateway was not entitled to attorney's fees.

Peterbilt filed a timely notice of appeal. Two days later, Capitol Gateway filed a cross-appeal. We supply additional facts as necessary below.

II. DISCUSSION

Peterbilt challenges the circuit court's decision to deny its motion for summary judgment. Peterbilt raises two arguments that, it claims, compel us to reverse the judgment of the circuit court.[3] *First*, Peterbilt argues the circuit court erred in finding that Capitol

[3] Peterbilt phrased the Questions Presented as follows:

> 1. WHETHER THE CIRCUIT COURT ERRED IN RULING THAT CGP WAS ENTITLED TO COMPLETELY RESCIND THE PURCHASE OPTION BECAUSE OF A MINOR FLAW IN THE PROCESS OF DETERMIINING THE PURCHASE PRICE WHEN THERE WAS NO PREJUDICE TO THE LANDLORD AND THE LEASE

Gateway was not required to appoint a third appraiser. *Second*, Peterbilt contends that the circuit court erred in denying Peterbilt the right to cure any alleged defect. *Finally*, Capitol Gateway argues in its cross-appeal that the circuit court erred when the court denied its request for attorney's fees.

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." Md. Rule 2-501(f). "When a case is decided on summary judgment,

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PROVIDED A PROCEDURE FOR ARRIVING AT A FINAL VALUE.

2. WHETHER THE CIRCUIT COURT ERRED IN REFUSING TO ENFORCE A RIGHT TO CURE ANY ALLEGED DEFECT IN THE PROCESS OF DETERMINING THE PURCHASE PRICE SPECIFICALLY PROVIDED IN THE LEASE.

Capitol Gateway phrased the Questions Presented as follows:

1. Whether Appellant was entitled to compel the sale of the property where it repeatedly failed to adhere to the material processes agreed to in the purchase option that were created to establish the fair market value of the property.
2. Whether Appellant properly attempted to cure its breaches where the only cure it proposed was to ignore the fundamental procedures of the purchase option that were developed to ensure that the purchase price reflected the fair market value.
3. Having breached the terms and conditions of the purchase option contained in a lease, whether Appellant is contractually required to pay Appellee's legal fees where the parties' lease requires an award of attorneys' fees where there is a breach of the "terms, covenants, or conditions" and also "under any circumstances in connection with this Lease", including "a breach of Tenant's obligations or covenants".

there have not been factual findings by a judge or jury." *Pifer v. Irwin Indus. Tool Co.*, 252 Md. App. 57, 79 (*citing Mohammad v. Toyota Motor Sales, Inc.*, 179 Md. App. 693, 702 (2008)), *cert. granted*, 476 Md. 584 (Dec. 9, 2021). We review the circuit court's decision to grant summary judgment *de novo*, "consider the record in the light most favorable to the non-moving party and consider any reasonable inferences that may be drawn from the undisputed facts against the moving party." *Mathews v. Cassidy Turley Md., Inc.*, 435 Md. 584, 598 (2013).

This appeal turns on the law of contract interpretation. We "follow[] the law of objective contract interpretation," and our "duty is to determine the intention of the parties as reflected in the terms of the contract." *Sy-Lene of Wash., Inc. v. Starwood Urb. Retail II, LLC*, 376 Md. 157, 166 (2003) (citations omitted). "'Leases are contracts and, as such, are to be construed by application of the well established rules of contract interpretation.'" *Chesapeake Bank of Md. v. Monro Muffler/Brake, Inc.*, 166 Md. App. 695, 706 (2006) (*quoting Middlebrook Tech, LLC. v. Moore*, 157 Md. App. 40, 65 (2004)).

"When a contract's language is expressed in clear and unambiguous terms, the court will not engage in construction, but will look solely to what was written as conclusive of the parties' intent." *Moore*, 157 Md. App. at 66 (citation omitted); *see also Gebhardt & Smith LLP v. Md. Port Admin.*, 188 Md. App. 532, 565 (2009) (*quoting All State Home Mortg., Inc. v. Daniel*, 187 Md. App. 166, 181 (2009)) ("'If a contract is unambiguous, the court must give effect to its plain meaning and not contemplate what the parties may have subjectively intended by certain terms at the time of formation.'"). And "[a] contract is

ambiguous if it is subject to more than one interpretation when read by a reasonably prudent person." *Sy-Lene,* 376 Md. at 167 (citation omitted).

A. The Circuit Court Did Not Err In Concluding That Capitol Gateway Was Not Required To Appoint A Third Appraiser.

Peterbilt alleges that the circuit court erred in finding that Capitol Gateway was not required to appoint a third appraiser under Section 17 of the lease. *First*, Peterbilt argues that any alleged defect in its performance to that point was not material because it did not "strike[] at the heart, the very purpose, of the bargain." Peterbilt argues *second* that a discussion between the two original appraisers (Mr. Lipman and Mr. Kerr) was not a condition precedent to further performance under the Option. Therefore, the argument goes, Capitol Gateway was not permitted to the rescind the Option.

1. The terms of the Option are material.

Peterbilt characterizes the circuit court's findings as "effectively rul[ing] that <u>any variation</u> from the procedures set out in the Purchase Option for determining the purchase price was material and would justify [Capitol Gateway's] termination of the option rights." (Emphasis in original.) It asks us to hold that the terms of the Option are not material and that its deviations didn't justify Capitol Gateway's refusal to appoint a third appraiser. Capitol Gateway refutes this characterization, arguing that "[t]he terms of an option are, by their very nature, material." We agree with Capitol Gateway.

"'It is well settled that to be valid, the exercise of an option must be unequivocal and in accordance with the terms of the option.'" *Chesapeake Bank*, 166 Md. App. at 718 (*quoting Katz v. Pratt St. Realty Co.*, 257 Md. 103, 118 (1970)). Therefore, "when the

optionee decides to exercise his option, he must act unconditionally and according to the terms of the option." *Id.* (cleaned up).

Citing *Speed v. Bailey*, 153 Md. 655 (1927), Peterbilt argues that Capitol Gateway "had no right to terminate the option" because "[t]he 'root' of this contract was that the landlord agreed to sell the property to the tenant," and "the requirement of a discussion between the two initial appraisers was only a minor and nearly immaterial part" of the process. In *Speed*, the Court of Appeals held that "substantial compliance with the terms of the contract" precludes the non-breaching party from rescinding the contract:

> It is not every partial failure to comply with the terms of a contract by one party which will entitle the other party to abandon the contract at once. In order to justify an abandonment of it and of the proper remedy growing out of it, the failure of the opposite party must be a total one—the object of the contract must have been defeated or rendered unattainable by his misconduct or default. . . . Before partial failure of performance of one party will give the other the right to recission, the act failed to be performed must go to the root of the contract, or the failure to perform the contract must be in respect to matters which would render the performance of the rest a thing different in substance from that which was contracted for. When a covenant goes only to a part of the consideration of a contract, is incidental and subordinate to its main purpose, and its breach may be compensated in damages, such a breach does not warrant a rescission of the contract.

Id. at 660 (cleaned up).

But Peterbilt's failure to follow the steps laid out in Section 17 went to "the root of the contract." *Id.* Peterbilt acknowledges that the parties created the Option as part of a settlement agreement. Capitol Gateway was unwilling to sell the Property to Peterbilt at the time, and, as Capitol Gateway asserts in its brief, the agreement to include the Option

within the lease "was of considerable significance to Peterbilt[.]" The parties' inability to agree on the fair market value of the Property on their own was why the procedures set forth in Section 17 were created. This "process was of paramount importance," according to Capitol Gateway's brief, because "it was exactly what the parties agreed to as the method of determining the fair market value and the purchase price of the Property." Therefore, the steps Peterbilt was required to follow in order to exercise the Option and purchase the Property were material terms of the agreement.

2. A meeting between the two original appraisers was a condition precedent to appointing a third appraiser.

Peterbilt also contests the circuit court's finding "that a debate on value between [Mr.] Kerr and [Mr.] Lipman was a condition precedent to further performance" by Capitol Gateway. It contends that "there is no language in the option from which the Court could have drawn any such conclusion."[4] Peterbilt instead characterizes the intended discussion between the two original appraisers as a covenant that "does not trigger a complete failure of the agreement unless the basic purpose of the agreement itself is frustrated completely."[5]

"A condition precedent has been defined as a fact, other than mere lapse of time,

[4] Further, Peterbilt argues that "it is obvious that the parties contemplated that the two appraisers likely would not reach an agreement if their appraisals differed by more than 10%. In that anticipated event, they provided for a further procedure through which a final purchase price could be obtained; that was the appointment of a third appraiser." But this "further procedure" occurs only *after* the two original appraisers confer, and that meeting never happened here.

[5] Capitol Gateway also characterizes Peterbilt's actions as "breaches of covenants rather than as a breach of a condition precedent," on the theory that a breach of a covenant would entitle Capitol Gateway to recover attorney's fees.

which, unless excused, must exist or occur before a duty of immediate performance of a promise arises." *Chirichella v. Erwin*, 270 Md. 178, 182 (1973) (cleaned up). "Although no particular form of words is necessary in order to create an express condition, such words and phrases as 'if' and 'provided that,' are commonly used to indicate that performance has expressly been made conditional . . . ." *Gebhardt*, 188 Md. App. at 567 (cleaned up). "The question whether a stipulation in a contract constitutes a condition precedent is one of construction dependent on the intent of the parties to be gathered from the words they have employed and, in case of ambiguity, after resort to other permissible aids to interpretation." *Id.* (citations omitted).

"Generally, when a condition precedent is unsatisfied, the corresponding contractual duty of the party whose performance was conditioned on it does not arise." *B & P Enters. v. Overland Equip. Co.*, 133 Md. App. 583, 606–07 (2000) (citation omitted). So if "a contractual duty is subject to a condition precedent . . . there is no duty of performance and there can be no breach by non-performance until the condition precedent is either performed or excused." *All State*, 187 Md. App. at 182 (cleaned up). Moreover, "because of the potentially severe implications of the imposition of a condition precedent, courts have been careful to distinguish a condition precedent from a covenant, which ordinarily requires only substantial compliance." *Gebhardt*, 188 Md. App. at 567 (cleaned up). "Where the language in the contract is doubtful, we will interpret the language as embodying a promise or constructive condition rather than an express condition." *Richard F. Kline, Inc. v. Shook Excavating & Hauling, Inc.*, 165 Md. App. 262, 274 (2005) (internal

quotations omitted).

The circuit court found that each of the seven steps laid out in Section 17 "was a condition precedent for the next step, which ultimately would lead to the sale of the Property." So "if one step was not completed by one party, the performance of the other party would not arise." And as such, the court found that Capitol Gateway was not required to continue performing under the Option because "Peterbilt did not engage an appraiser who would perform the essential functions that were required by the Option. Rather, they used the Bank's appraiser and Mr. Kerr would not meet with [Mr.] Lipman to try and agree to the fair market value[.]"

We agree that the steps laid out in Section 17 were conditions precedent. The *first* sentence at issue provides that "[i]f the parties are unable to agree upon the [fair market value] within fifteen days of the date the Option was exercised, they shall thereafter each have an additional fifteen days to *obtain* the name of a certified real estate appraiser from their respective attorneys or banks . . . . " (Emphasis added.) The circuit court acknowledged that "the language does not state engage or hire," but reasoned that the appraisers were responsible for "beyond just performing an appraisal on the Property." They also had to carry out other obligations, which brings us to the *second* sentence, which provides that "[i]f the difference [in the two original appraisals] is greater than 10%, the appraisers shall have thirty days to confer and determine if they can agree on the [fair market value] and, *if* not, to jointly agree to the appointment of a third appraiser." (Emphasis added.)

Although there is a preference for interpretating the terms of a contract to be a covenant as opposed to a condition precedent, *see* Restatement (Second) of Contracts § 227(1)-(3) (1981), that preference applies only when the language is ambiguous or unclear. This language is neither. Section 17 required the parties unambiguously to "obtain" the name of an appraiser and provide that name to the other party. Peterbilt did "obtain" Mr. Kerr's name as an appraiser and provided Mr. Kerr's contact information to Capitol Gateway. But Section 17 also required unambiguously that *if* the differences in appraisals was greater than 10%, *then* the two original appraisers were required to meet and determine if they could agree on a fair market value.

Mr. Lipman and Mr. Kagen valued the Property at $4,530,000 while Mr. Kerr valued the Property at $2,800,000. Because this difference was (much) greater than 10% (measured from either appraisal) Mr. Lipman and Mr. Kerr had thirty days to discuss whether they could agree on a fair market value. *If* the two appraisers held this discussion and couldn't agree on a fair market value, *then* they were required to appoint a third, independent appraiser. In other words, the selection of a third appraiser depended on such a discussion between Mr. Lipman and Mr. Kerr happening. That is a classic condition precedent.

As we know, the discussion between Mr. Lipman and Mr. Kerr never occurred, so this condition precedent failed. When Mr. Lipman originally called Mr. Kerr on May 14, 2019, Mr. Kerr responded that he was out of town and would call back when he returned. When the two eventually spoke, Mr. Kerr was surprised that Mr. Lipman had a copy of the

Newmark appraisal. Mr. Kerr was not "aware, prior to [Mr. Lipman's] phone call, that the appraisal was being used in connection with the exercise of a purchase option[.]" Mr. Kerr told Mr. Lipman "I can't discuss it," then refused to engage Mr. Lipman in any further conversation about the differences in appraisals and whether the two could "work through any differences" and agree on a fair market value.[6]

Within the meaning of Section 17, then, Mr. Lipman and Mr. Kerr never conferred to see if they could agree on a fair market value for the Property. And again, Section 17 allowed the two original appraisers to appoint a third appraiser *only if* they had such a discussion and couldn't agree on a value. Mr. Lipman and Mr. Kerr never reached the point of disagreeing on a fair market value because they never discussed the differences in their appraisals in the first place. Mr. Kerr's refusal to confer with Mr. Lipman *did not* amount to a discussion about whether the two appraisers could agree on a fair market value.[7] And because this discussion was a condition precedent to the appointment of a third appraiser (and eventually, to the sale of the Property), Peterbilt's failure to satisfy that condition

[6] The parties spend a great deal of words and effort debating the legality and ethics of Ms. Kerr's positions—whether he was allowed to limit the application of the Newmark appraisal to a potential mortgage, or whether an appraisal, by its very nature, must determine the fair market value of a property for all purposes; whether Mr. Kerr was allowed to limit the use of the Newmark appraisal to the Bank's purposes; and whether the Bank could have, should have, or actually did transfer to Peterbilt any rights to use the Newmark appraisal. We don't know the answers to these questions and we express no views on them. We only decide that under the facts as they occurred, and no matter why, Peterbilt failed to deliver a qualifying appraisal or an independent appraiser willing to undertake the actions required by the Option.

[7] Peterbilt concedes that the conversation between Mr. Kerr and Mr. Lipman "did not focus on a debate over value."

relieved Capitol Gateway of its obligation to appoint a third appraiser.

B. The Court Did Not Err In Finding That Peterbilt Had No Right To Cure.

Peterbilt alleges *next* that the circuit court erred when it denied Peterbilt the right to cure any alleged defect under Section 16 of the lease. Peterbilt argues that Capitol Gateway should have accepted Peterbilt's request for a thirty-day extension to resolve the issue and find a third appraiser. Capitol Gateway responds that Peterbilt "forfeited any right to cure as a result of its ongoing violations of the terms of the Option and by its failure to propose a real cure." Asking for thirty additional days, Capitol Gateway asserts, was not a remedy, but "a meaningless effort to move forward by doing exactly what it had done: ignore the material processes and safeguards that were at the core of the Option and simply appoint a third appraiser."

Both parties are incorrect. Capitol Gateway was not required to accept Peterbilt's request for a thirty-day extension because it had no further duty to perform under the Option. Similarly, Peterbilt never forfeited a right to cure because it never had such a right in the first place. As discussed above, each step in the Option was a condition precedent, and the right to continue was contingent on completion of all preceding steps. "An unexcused failure to perform makes it impossible for a breach to occur and, therefore, no remedy for enforcement is available . . . ." *Griffith v. Scheungrab*, 219 Md. 27, 34 (1958) (citations omitted). In other words, the failure of the requirement to hold a meeting between the two original appraisers to discuss fair market value eliminated any obligation by Capitol Gateway to proceed further. Because a condition was not fulfilled, the right to enforce the

remaining provisions in the lease never came into existence. The circuit court did not err in finding Section 16 of the lease inapplicable and that Peterbilt was not entitled to an opportunity to cure.

C. The Court Did Not Err In Denying Capitol Gateway's Request For Attorney's Fees.

Lastly, Capitol Gateway contends in its cross-appeal that the circuit court erred in determining that it was not entitled to an award of attorney's fees. Capitol Gateway argues that because Peterbilt defaulted, Capitol Gateway was entitled to a remedy under Section 16 of the lease, which provides, in relevant part:

> Tenant shall pay to Landlord, as additional rent, promptly upon demand, all reasonable costs and expenses incurred by Landlord in pursuing any remedy upon an event of default, including, but not limited to, reasonable attorneys' fees, court costs, and other necessary disbursements or expenses of litigation.

But as we already discussed, Section 16 of the lease doesn't apply here because Peterbilt was not in default—Peterbilt failed to fulfill a condition precedent.

Capitol Gateway argues alternatively that even if a meeting between the two original appraisers was a condition precedent and not a covenant, it nevertheless was entitled to attorney's fees under Section 10 of the lease, which requires Peterbilt to indemnify it against both first-party and third-party actions:

> Tenant shall . . . indemnify Landlord . . . against any and all claims for damages whatsoever; and the costs of defending against the same (including reasonable attorneys' fees), of any kind or nature . . . arising in any manner or under any circumstances in connection with the Premises or this Lease (including without limitation a breach of Tenant's obligations or covenants under this Lease), regardless of whether such

claim shall be caused by Tenant . . . .

Capitol Gateway asserts that this "purposely broad" language "is intended to make [Capitol Gateway] whole." And because Peterbilt "chose to file this lawsuit to enforce its misguided claim," Capitol Gateway claims that it was forced "to defend on the basis that [Peterbilt] did not abide by its obligation."

"We construe the language of an indemnification provision in accordance with its customary, ordinary, and accepted meaning." *Steamfitters Loc. Union No. 602 v. Erie Ins. Exch.*, 469 Md. 704, 748 (2020) (citation omitted). Section 10 states unambiguously that Peterbilt must indemnify Capitol Gateway "against any and all claims for damages . . . (including reasonable attorneys' fees) . . . arising . . . under any circumstances in connection with the Premises or this Lease . . . regardless of whether such claim shall be caused" by Peterbilt. Under the objective theory of contract interpretation, it might seem that this obligation could entitle Capitol Gateway to attorney's fees under Section 10 of the lease. The problem, however, is that Capitol Gateway raised this theory of recovery for the first time on appeal. Under Maryland Rule 8-131(a), we "will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court." "The purpose of this Rule is . . . to require counsel to bring the position of their client to the attention of the lower court at the trial so that the trial court can pass upon, and possibly correct any errors in the proceedings." *Maryland State Bd. of Elections v. Libertarian Party of Md.*, 426 Md. 488, 517 (2012) (cleaned up). And "[o]rdinarily, an appellate court should review a grant of summary judgment only on the grounds relied upon by the trial court."

Id. (citations omitted).

During the hearing on the parties' motions for summary judgment, Capitol Gateway acknowledged that it was entitled to attorney's fees only if a meeting between the two original appraisers to discuss fair market value was a covenant and not a condition precedent:

> But if Your Honor finds in fact that this was a condition precedent then and that it was not honored by Peterbilt . . . that's the end of the analysis then technically we don't have a breach that would entitle us to attorney's fees. If however and, and I had actually thought this through, if Your Honor finds that it is a covenant and that they had materially breached it and determined that they did not properly exercise any cure rights . . . . Then in that case we do have in that situation in essence the formation of the contract which has been breached which would entitle my client's to attorney's fees in that situation.

At no point during the hearing did Capitol Gateway contend that it was entitled to attorney's fees under the indemnification provision in Section 10 of the lease.[8] The circuit court never had the opportunity to consider awarding attorney's fees under Section 10. Indeed, in its order and opinion, the circuit court relied only on its finding that Section 16 didn't apply to conclude that Capitol Gateway was not entitled to attorney's fees. Because Capitol Gateway failed to raise this issue at the trial level, the issue is unpreserved.

JUDGMENT OF THE CIRCUIT COURT FOR TALBOT COUNTY AFFIRMED. APPELLANT TO PAY COSTS.

[8] Moreover, in its motion for summary judgment, Capitol Gateway asserted that it was entitled to attorney's fees under Section 16 of the lease because Peterbilt was "clearly in default of the Lease." Again, there was no mention of indemnification under Section 10.