UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0758

September Term, 2014

BEVERLY ALLEN

v.

BRECK RIDGE PARTNERS, LLC

Krauser, C.J.,
Nazarian,
Arthur,

JJ.

Opinion by Krauser, C.J.

Filed: November 20, 2015

Beverly Allen, appellant, brought suit for breach of contract, in the Circuit Court for Montgomery County, against her former landlord, Breck Ridge Partners, LLC., alleging that Breck Ridge had failed, during Allen's tenancy, to remedy a mold infestation in her apartment. After prevailing in a jury trial, Allen filed a "petition for legal fees and expenses" seeking to recover attorney's fees and costs from Breck Ridge. She was entitled to attorney's fees, she contended, under a clause of the residential lease she had signed when she rented her apartment from Breck Ridge. Specifically, that clause provided that, in the event "any action" was brought to enforce the provisions of the lease, "the prevailing party in such action shall be reimbursed by the other party for all reasonable attorney's fees" and other costs incurred.

At the conclusion of the ensuing hearing on that petition, the court dismissed it, ruling, first, that Allen could not maintain any action, including a claim for attorney's fees, based on the original contract because the contract had "merged" into the judgment in her favor and, second, that Allen's claim for attorney's fees should have been presented to the jury as part of her claim for damages.

Allen noted this appeal, contending that the circuit court had erred in dismissing her petition. We agree and shall reverse the judgment of the circuit court and remand this case to that court so it may consider the amount of attorney's fees to be awarded Allen.

The Tenancy in Question

On June 2, 2009, Allen signed a lease to rent an apartment from Breck Ridge for a one-year term, ending on May 31, 2010. Included in that lease was a clause captioned "ATTORNEY'S FEES AND COURT COSTS," which provided: "Should any action be

brought by either party hereto to enforce any provision of this Lease, the prevailing party in such action shall be reimbursed by the other party for all reasonable attorney's fees, necessary expenses, and court costs incurred by the prevailing party in the action."

Within the first few months of her tenancy, Allen complained to Breck Ridge of a mold infestation in her apartment. But Breck Ridge, according to Allen, failed to then remedy the mold infestation, and that failure resulted in damage to her personal property as well as adversely affecting the health of her and her children. The persistence of the mold ultimately purportedly forced Allen to move out of the apartment before the term of her one-year lease had expired. And, upon relocating, she ceased to make any further rental payments to Breck Ridge.

Legal Proceedings

On March 29, 2013, Allen filed, in the District Court of Maryland for Montgomery County, a complaint for breach of contract, alleging that Breck Ridge had failed to maintain her apartment in a reasonably safe condition and had deprived her of her right to peacefully occupy the property. Breck Ridge requested a jury trial, and the case was forwarded to the Circuit Court for Montgomery County. Breck Ridge thereafter filed a counterclaim for outstanding rent, which included a request for attorney's fees and expenses and a reference to the clause in the lease that entitled the prevailing party to those fees and expenses. Allen subsequently filed an amended complaint that repeated her breach of contract claim[1] and

[1] The amended complaint also added two new claims, one for negligence and one for violation of the Maryland Consumer Protection Act. At trial, Breck Ridge moved for judgment on those claims and the circuit court granted that motion. Allen does not, however, challenge that ruling.

requested "damages in the amount of $70,000, plus prejudgment interest and attorneys' fees."

A jury subsequently found for Allen on her claim for breach of contract and against Breck Ridge on its counterclaim for outstanding rent, and awarded Allen $19,400 in "total compensatory damages." One month later, Allen filed, in the circuit court, a "petition for legal fees and expenses," contending that, under the terms of the lease she had signed, she was entitled to attorney's fees as the "prevailing party" in her breach of contract action. Attaching to the petition her counsel's bill for legal services, a declaration from her counsel regarding his experience and hourly rate, and a list of the average hourly rates of attorneys in the Baltimore-Washington area, Allen sought $30,050 in attorney's fees and $3,682.29 in costs and expenses.

At the conclusion of a hearing on that petition, the court dismissed Allen's petition for attorney's fees. After declaring that the claim for attorney's fees should have been submitted to the jury for it to decide, the court ruled that the contract upon which the claim for fees was based had "merged" into the judgment.

Discussion

I.

Allen first contends that the circuit court erred in dismissing her petition for attorney's fees based on the doctrine of "merger." She asserts that the merger doctrine would only have come into play, not at the moment the jury rendered its verdict, as the circuit court found, but after the court had issued an order awarding the prevailing party in the litigation its attorney's fees and costs.

"An appellate court will disturb a trial court's award of attorneys' fees based on a contractual agreement between the parties only if the trial court abused its discretion." *SunTrust Bank v. Goldman*, 201 Md. App. 390, 397 (2011) (internal citation omitted); *see also Collins v. Collins*, 144 Md. App. 395, 447 (2002) ("An award of attorney's fees will not be reversed unless a court's discretion was exercised arbitrarily or the judgment was clearly wrong."). Nevertheless, when the attorney's fees provision in the parties' contract states that the prevailing party[2] "shall" be entitled to reasonable attorney's fees, the trial court does "not have discretion to refuse to award fees altogether" and "commit[s] an error of law by failing to award appellant[] any reasonable attorney's fees." *Myers v. Kayhoe*, 391 Md. 188, 207–08 (2006). And, finally, the trial court's exercise of its discretion "is always tempered by the requirement that the court correctly apply the law applicable to the case." *Schlotzhauer v. Morton*, 224 Md. App. 72, 84 (2015) (internal quotation marks and citation omitted).

In concluding that the doctrine of "merger" precluded Allen from seeking attorney's fees in this matter, the circuit court, quoting the Restatement (Second) of Judgments § 18, defined that doctrine by stating, "when a valid and final personal judgment is rendered in favor of the plaintiff, the plaintiff cannot thereafter maintain an action on the original claim or any part thereof, although he or she may be able to maintain an action upon the judgment." Then, citing this Court's decision in *Monarc Construction, Inc. v. Aris*

[2] In the context of attorney's fees, a "prevailing party" is a party that "succeeds on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Congressional Hotel Corp. v. Mervis Diamond Corp.*, 200 Md. App. 489, 498 n.3 (2011) (internal quotation marks and citations omitted).

Corporation, 188 Md. App. 377 (2009), the circuit court explained that the merger of the contract with the judgment "on the merits of a breach of contract claim precludes any subsequent, post-merger attempt to collect attorney's fees that were awarded solely based upon the provisions of the merged contract." It therefore concluded that, because the contract upon which Allen relied upon for her claim of attorney's fees had merged into the judgment rendered in her favor on the breach of contract claim, she was thereafter precluded from relying on the terms of that contract to petition, post-judgment, for attorney's fees.

But, the "merger doctrine" comes into play only when there has been a "final" judgment. And, as shall become apparent, there was not yet a final judgment, in the instant case, with which the underlying contract, and its provision for attorney's fees, could merge, and therefore invocation of that doctrine was inapposite.

This conclusion is supported by, and consistent with, our decision in *Mattvidi Associates Limited Partnership v. NationsBank of Virginia*, 100 Md. App. 71 (1994). In that case, NationsBank lent over four million dollars to Mattvidi for a construction project. *Id.* at 75. The project fell behind schedule, and Mattvidi eventually defaulted on the loan. *Id.* at 75–76. NationsBank then filed suit seeking "to collect the amounts due and owing under [the] defaulted promissory note." *Id.* at 82, 76. Following a bench trial, the circuit court found in NationsBank's favor, awarding it various amounts of principal, accrued interest, and late charges. *Id.* at 78. Then, a month after judgment was entered in its favor, NationsBank filed a petition for attorney's fees pursuant to a clause in the promissory note which provided that the bank was entitled to "actual reasonable attorneys' fees" expended

in efforts to collect on the note. *Id.* at 78, 93. The circuit court granted that petition and awarded NationsBank attorney's fees and expenses. *Id.* at 78. An appeal by Mattvidi followed. *Id.* at 78–79.

A question raised in that appeal was its timeliness. We pointed out, in a footnote, that although judgment had been "entered on the awards of principal, interest, and late charges, . . . the bank also had a contractual right to attorney's fees, so those fees were part of its damage claim. For this reason, judgment in [that] case was not final until judgment on the attorney's fees award was entered . . . ." *Id.* at 78 n.1.

The Court of Appeals came to a similar conclusion in *G-C Partnership v. Schaefer*, 358 Md. 485 (2000). G-C Partnership brought an action in the Montgomery County circuit court for breach of a guaranty agreement. *Id.* at 486. That agreement contained a provision under which Louis Schaefer (and other guarantors) agreed to "reimburse" G-C Partnership "for all legal and other expenses paid or incurred in enforcing" the guaranty agreement. *Id.* Although G-C Partnership sought "damages measured by preference payments and by investment loss," the circuit court determined, on "cross-motions for summary judgment, . . . that [G-C Partnership was] entitled to damages based on preference payments, but not to damages based on investment loss." *Id.* at 486–87. G-C Partnership noted an appeal from that ruling. *Id.* at 487. Then, months after that appeal had been noted, the circuit court held a hearing on the issue of attorney's fees and entered judgment in favor of G-C Partnership in the amount of $478,611.49, "for damages plus $167,514.00 for attorney's fees." *Id.*

Although this Court had affirmed the circuit court's ruling on the summary judgment motions, the Court of Appeals, after granting G-C Partnership's petition for writ of certiorari, dismissed the appeal "for want of a final judgment." *Id.* at 486. The Court explained that the circuit court "did not have discretion to direct the entry of a final judgment . . . based on the summary judgment rulings" because it had not yet determined the issue of attorney's fees, which were "awardable pursuant to the contract" and formed "part of the claim for breach of contract." *Id.* at 488. Implied by the Court's dismissal of the appeal, though not expressly stated in its decision, was that there was no final judgment until the attorney's fees, which were permitted by contract, had been awarded by the circuit court.

In light of the decisions rendered in *Mattvidi* and *G-C Partnership*, we conclude that there was no "final judgment" in this case until the circuit court ruled on Allen's petition for attorney's fees. And it is the lack of a final judgment, with which the underlying contract would merge, that distinguishes this case from *Monarc Construction, Inc. v. Aris Corporation*, 188 Md. App. 377 (2009), upon which the circuit court relied in dismissing Allen's petition for fees on the basis of merger.

In that case, Monarc, a general contractor, entered into a subcontract with Aris Corporation, in which Aris agreed to perform certain construction work. *Id.* at 381. After "disputes" arose between the parties, they "entered into a Settlement Agreement aimed at resolving their disputes." *Id.* at 381. Paragraph 15 of that agreement provided, in part, that, in the event "that any party [was] required to enforce the terms or conditions of the

Agreement in court, the prevailing party shall recover all costs and expenses incurred in or arising from such action, including reasonable attorney's fees." *Id.* at 382.

In spite of the settlement agreement, disputes between the parties persisted. *Id.* at 381. Monarc ultimately brought an action against Aris, in the Montgomery County circuit court, for breach of the settlement agreement, which ended with the entry of a default judgment against Aris in the amount of $184,574.40. *Id.* at 381–82. That judgment "included attorney's fees incurred by [Monarc] through the date of the judgment." *Id.* at 382. Then, after recording the judgment in Virginia, Monarc filed suit, in that state, seeking the judicial sale of Virginia property owned by Aris. *Id.* at 382–83.

After the judgment was finally satisfied, two-and-a-half years later, Monarc once again filed suit in Maryland and, relying on the attorney's fees provision of the settlement agreement, sought to recover "attorneys' fees and related costs incurred" after the entry of the original judgment. *Id.* Aris then moved to dismiss that action, asserting that "as a matter of law, the Settlement Agreement merged into the prior judgments, such that [Monarc's] suit on the Settlement Agreement could not be brought for the purposes of recovering additional attorney's fees." *Id*. The circuit court dismissed the suit, and we affirmed, finding that Monarc's claim for the post-judgment attorney's fees it had incurred "was not legally cognizable, in light of the merger of the Settlement Agreement into the judgment issued" by the circuit court. *Id.* at 389, 392.

The *Monarc* decision makes clear that the doctrine of merger prevents a party from relying on a contractual provision to seek ***post-judgment*** attorney's fees, that is, fees it incurred in enforcing the judgment. *See also Accubid Excavation v. Kennedy Contractors*,

188 Md. App. 214, 233 (2009) (stating that, "once a contract has been merged into the judgment, post-merger attempts to collect attorney's fees authorized only by the merged contract cannot be sustained"). But the critical difference between *Monarc* and the instant case is that, here, Allen petitioned for attorney's fees ***before*** the contract, which provided the basis for those fees, had merged into a final judgment. Indeed, as we have explained, there was no final judgment, and thus no merger, until the question of attorney's fees had been decided by the circuit court. The circuit court's application of the merger doctrine in this case was legally incorrect and therefore an abuse of discretion.

II.

Allen next contends that the circuit court erred in dismissing her petition for attorney's fees on the grounds that the issue of fees should have been presented to the jury for its determination. She maintains that she was required to do nothing more than assert a claim for attorney's fees in her complaint, and that the "proper procedure" was for the jury to decide the breach of contract claim and then for the circuit court to make an award of attorney's fees to the prevailing party.[3]

[3] Allen also contends that, by including her claim for attorney's fees in her complaint, she complied with the requirements of Maryland Rule 2-705, which, in its own words, applies to "a claim for an award of attorneys' fees to [sic] attributable to litigation in a circuit court pursuant to a contractual provision permitting an award of attorneys' fees to the prevailing party in litigation arising out of the contract." But, as the circuit court noted, Rule 2-705 and, moreover, the entirety of Chapter 700 of Title 2 of the Maryland Rules, which addresses "claims for attorneys' fees and related expenses," took effect on January 1, 2014—nine months after Allen's case had been forwarded to the Montgomery County circuit court. Consequently, those rules did not apply to Allen's case, and their provisions have no effect on our decision.

There is nothing in Maryland law that bars a prevailing party, in a breach of contract action, from petitioning the court for attorney's fees if that party had not first presented the claim for fees to a jury.[4] To the contrary, in *Admiral Mortgage, Inc. v. Cooper*, 357 Md. 533 (2000), a case involving attorney's fees permitted by statute rather than by contract, the Court of Appeals held that it was error for the jury, rather than the judge, to decide the amount of attorney's fees. In that case, Calvin Cooper filed suit in the Circuit Court for Baltimore County to recover unpaid commissions from Admiral Mortgage, Inc., his former employer. *Id.* at 536. That action was brought under sections 3-505 and 3-507.1 of the Labor and Employment Article, and, as provided by those sections, Cooper sought not only the unpaid commissions but also "treble damages, attorneys' fees, and costs." *Id.* A jury awarded Cooper "damages of $28,000 plus $12,709 in attorneys' fees." *Id.*

Maryland's highest court granted Admiral Mortgage's petition for writ of certiorari, after this Court affirmed the judgment, to consider "whether the trial court erred in allowing the jury to determine the issue of treble damages, attorneys' fees, and costs." *Id.* The Court of Appeals concluded that "the determination of attorneys' fees, and costs, [was] for the judge," not the jury. *Id.* at 553.

[4] This seeming lack of uniform procedure for requesting and awarding attorney's fees may have been the impetus for the enactment, in 2014, of the new Maryland Rules on this topic. The Standing Committee on Rules of Practice and Procedure, in its Report to the Court of Appeals proposing the new rules, explained that the rules were "principally designed to set forth procedures for dealing with claims for attorneys' fees and related expenses," and noted that the development of those rules "turned out to be far more complicated than initially appeared, in large part because the contexts in which these claims arise vary and both the procedures suitable for their resolution and the substantive and evidentiary standards . . . vary with the context."

In so holding, the Court explained that there were "good reasons for having the judge, rather than a jury, determine the amount of fee[s] to be paid by the losing party under a statutory fee-shifting provision." *Id.* at 552. For instance, attorney's fees "may continue to accrue after the verdict is rendered, if post-trial motions or appeals are filed, so the jury cannot determine them definitively." *Id.* at 547. Moreover, the Court opined that attorney's fees, "when allowed, have traditionally been set by the judge, who is usually in a far better position than a jury to determine what is reasonable," as that determination "would include consideration of the factors set forth in Rule 1.5 of the Maryland Rules of Professional Conduct, among which are 'the novelty and difficulty of the questions involved' and 'the skill requisite to perform the legal service properly,'" factors that were "more apt to be within the expertise of a judge rather than of lay jurors." *Id.* at 547–48, 552–53.

Although *Admiral Mortgage* addressed attorney's fees authorized by statute, we believe that the same "good reasons" discussed by the Court of Appeals for having a judge, rather than a jury, decide the amount of attorney's fees apply equally to contractually based claims for attorney's fees.[5] In light of the foregoing, we hold that it was proper for Allen, as the prevailing party in this matter, to petition the court for attorney's fees after the jury

[5] Although the newly adopted rules pertaining to attorney's fees and related expenses in civil proceedings do not apply to this case, as they were not enacted at the time this action was filed, we will note, for what it may be worth, that Rule 2-705(e) states that "[u]pon a jury verdict . . . in favor of a party entitled to attorneys' fees as a 'prevailing party,' the court shall determine the amount of an award . . . ."

had rendered its verdict in her favor, and she was not required to first request an award of attorney's fees from the jury. The circuit court's ruling otherwise was legally incorrect.

III.

Finally, Breck Ridge contends that, should we find that the circuit court erred in dismissing Allen's petition, Allen should nonetheless be prohibited from collecting attorney's fees because she failed to disclose, in discovery, that she sought such fees. Breck Ridge claims that it asked, in interrogatories it sent to Allen, that she disclose "all expenses and other economic damages, past and future" incurred as a result of the breach of contract, along with the method by which those expenses were calculated. Allen's responses did not include any information relating to attorney's fees, which Breck Ridge contends were an element of damages. This failure to disclose the amount of attorney's fees she sought had, Breck Ridge contends, "a direct impact," on its "decision making process" and its ability to "make an intelligent assessment of risk factors for trial."

We review for abuse of discretion a trial court's determination of the "appropriate remedy for failure to comply with the discovery rules." *Mattvidi*, 100 Md. App. at 94. In this case, however, although the issue of Allen's failure to disclose the amount of attorney's fees she sought was raised by Breck Ridge, in its opposition to Allen's petition for fees, that issue was neither addressed nor decided by the circuit court in its ruling dismissing the petition. That ruling was, as we have explained, based on the doctrine of merger and the belief that the issue of attorney's fees should have been presented to, and decided by, the jury. Hence, the circuit court did not reach the question of whether a discovery violation had occurred and, if it had, what the sanction for that violation should be. As it did not

reach these issues, neither shall we. Instead, they shall be left to the circuit court to address on remand.

IV.

We reverse the circuit court's ruling dismissing Allen's petition for attorney's fees on the grounds of merger and failure to present the claim for fees to the jury and remand for that court to consider the amount of fees to award. The circuit court, in so doing, has the discretion to determine whether the amount of fees Allen requested was reasonable. However, as the contract provided that the prevailing party "***shall*** be reimbursed by the other party for all reasonable attorney's fees, necessary expenses, and court costs incurred by the prevailing party in the action," the court does not "have the discretion to refuse to award fees altogether." *Myers*, 391 Md. at 207–08.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY REVERSED. CASE REMANDED TO THAT COURT FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEE.