UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0763

September Term, 2013

KBE BUILDING CORPORATION

v.

CONSTRUCTION SERVICES OF NC, INC.

Meredith,
Graeff,
Leahy,

JJ.

Opinion by Leahy, J.

Filed: October 5, 2015

KBE Building Corporation ("KBE" "Appellant"),[1] entered into a contract as the general contractor with Waldorf Land L.L.L.P. and its principal member, Siena Corporation (collectively the "Owner"), for the construction of a new ezStorage facility in Waldorf, Maryland.[2] KBE hired Construction Services of NC, Inc. ("CSNC" "Appellee") to perform masonry work under a subcontract, but ultimately terminated CSNC for default after CSNC failed to timely cure numerous problems with the masonry walls and reinforcing. KBE completed the work using another subcontractor, and then an independent engineering firm certified the masonry work was in compliance with the plans, specifications, and applicable building codes.

After an American Institute of Architects' Certificate of Substantial Completion was issued for the ezStorage facility on January 18, 2008, the Owner withheld final payment from KBE for, among other things, failure to file a final accounting. KBE brought suit in the Circuit Court for Charles County for breach of contract and to establish a mechanic's lien, and Owner counter-claimed for failure to timely complete the work. The Owner then discovered new defects in the masonry work and amended its counter-claim accordingly. KBE responded by filing the underlying third-party complaint against CSNC

[1] Appellant, formerly known as Konover Construction Corporation, filed a certificate of amendment with the Maryland State Department of Assessments and Taxation on January 14, 2009, changing its name to KBE Building Corporation. For clarity, we shall refer to Appellant as KBE throughout this opinion regardless of the time period involved.

[2] Throughout the record, the facility is referred to as both ezStorage and EZ Storage. For consistency, we will use the former except where the latter is used in a direct quote.

on January 25, 2010. CSNC filed a motion to dismiss, followed later by a motion for summary judgment, contending in each, that paragraph 10 of the governing subcontract between CSNC and KBE limited the time for commencement of any suit related to the subcontract to within one year of substantial completion of the construction. On June 3, 2013, the Circuit Court for Charles County granted CSNC's motion for summary judgment on the basis of that one-year limitations period. This appeal followed.

Appellant KBE presents the following issues, which we have rephrased and reordered:

I. Did the circuit court err by failing to apply fundamental principles of contract interpretation in concluding that paragraph 10 of the subcontract plainly and unambiguously barred both KBE and CSNC, as contractor and subcontractor, from naming the other as a third-party defendant in any suit arising out of or relating to the subcontract more than one year after the substantial completion of CSNC's work?

II. Did the circuit court err in determining that its interpretation of paragraph 10—implementing a one-year limitation on all suits arising out of or relating to the subcontract—was an enforceable limitation under Maryland contract law?

III. Did the circuit court err in granting summary judgment to CSNC?[3]

[3] Appellant's brief contains the following questions presented:

1. "Did the court below err in granting summary judgment to CSNC by interpreting Paragraph 10 of the Subcontract as plainly and unambiguously barring either party from bringing the other in as a third-party defendant, more than one year after the completion of CSNC's work, in any suit filed by the Owner, an injured person, or some other third party, where that interpretation: (a) was not a plain-meaning construction of Paragraph 10[;] (b) was inconsistent with the narrow meaning of "claim" used elsewhere in the Subcontract and the related General Contract; [c] might bar enforcement of CSNC's indemnity, warranty and other contract (continued…)

For the following reasons, we perceive no error in the circuit court's determinations that the one-year limitations period in paragraph 10 of the subcontract applied to the underlying claims, and we conclude that there was no material fact in dispute pertinent to the court's determinations. We affirm.[4]

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obligations set forth elsewhere in the Subcontract that might not become ripe or even contingent until years later?"

2. "Did the court below err in granting summary judgment to CSNC by failing to honor the following numerous fundamental rules of contract construction?

a) Read the contract as a whole, not just individual provisions in isolation, and avoid any construction that deprives words or provisions of meaning or effect.
b) Read from the perspective of a reasonable person in the position of the parties—that is, a general contractor and a masonry subcontractor in the construction industry—including their industry's custom and practice.
c) Evaluate competing meanings in the following sequence:(i) consider each proffered meaning for disputed wording[;] (ii) decide whether each proffered meaning is objectively reasonable; (iii) eliminate any unreasonable meaning; (iv) find ambiguity only if there are two or more reasonable meanings; (v) consider admissible parol evidence to resolve or reduce such ambiguity; and (vi) then, but only then, resolve any remaining ambiguity against the proponent of the disputed words.
d) Deny enforcement of a contractual modification for a statutory limitations period—including both its length and its accrual date—is unenforceable if it is not "clear and unambiguous" as well "reasonable" under the circumstances."

3. "Did the court below err in granting summary judgment on the limitations period for a contractor's third-party claim against a subcontractor in litigation initiated by the Owner, an injured person, an owner of damaged tangible property, or some other third party, on the basis of contract wording and related case law on periods of limitation for bringing bilateral claims between the parties to the contract or subcontract at issue?"

[4] CSNC filed a cross-appeal in which it presents the following questions:

1. "Does a contract provision's "inconsistency" with another provision of the contract render that provision ambiguous?"

2. "Did the trial court apply the correct legal standard in finding "reasonable" KBE's position that Paragraph 10 applied only to claims arising under Paragraph 9?"

(continued…)

BACKGROUND

A. The Subcontract

On August 1, 2006, the parties entered into an American Institute of Architects ("AIA") standard form general contract with Owner for the construction of an ezStorage facility located at 12120 Pierce Road in Waldorf, Maryland ("the Project"). On September 29, 2006, KBE entered into a subcontract with CSNC to perform masonry work on the Project (the "Subcontract"). The Subcontract was drafted by the former general counsel for KBE, Allan Kleban. Paragraph 2, entitled "Subcontractor's Scope of Work," provides start and completion dates and incorporates various schedules, including a master schedule and a Project completion schedule. It provides that CSNC will "supply labor, material, equipment, transportation, insurance, supervision and all things necessary to furnish and install all **MASONRY WORK** for the EZ Storage facility in Waldorf, MD in strict accordance with the contract between Contractor and the Owner[.]" (Emphasis in original). Paragraph 2b, entitled "Pass Through Obligations," states:

> In respect to work covered by this Subcontract, Subcontractor shall assume all obligations, risks and responsibilities which Contractor has assumed towards Owner in the Contract Documents**, except as may be expressly**

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3. "Was the trial court's denial of the Motion to Reconsider CSNC's Motion to Dismiss correct as a matter of law?"

4. "Should the trial court have construed any ambiguities against the drafter at the motion-to-dismiss stage?"

In light of our holding, we need not reach the merits of the cross-appeal. There is no further meaningful remedy that we may provide to the cross-appellant. *See Attorney Gen. v. Anne Arundel Cnty. Sch. Bus Contractors Ass'n, Inc.*, 286 Md. 324, 327 (1979) (citations omitted) ("A question is moot if, at the time it is before the court, there is no longer an existing controversy between the parties, so that there is no longer any effective remedy which the court can provide.").

> **modified herein. In case of a conflict between this Subcontract and the Contract Documents, the Subcontract shall govern.** Nothing contained in this Subcontract shall prejudice any of the rights of the Owner or Architect under the Contract Documents. Subcontractor shall insure that each of its subcontractors and suppliers are bound to the Contract Documents in a manner similar to that set forth herein.

(Emphasis added). In the event of a dispute, paragraph 10 of the Subcontract provides:

> **Settlement of Disputes.**
> a. **Notwithstanding any other provision of this Subcontract** (including without limitation paragraph 2.b) **or the Contract Documents to the contrary, no dispute or claim of any nature arising out of or relating to this Subcontract will be subject to arbitration.** In the event Contractor and Subcontractor cannot resolve disputes, either party may prosecute its claim in a court of competent jurisdiction within the State of Maryland. **All suits must be brought in the courts of Maryland and must be commenced within one year of the date Subcontractor substantially completes its work, otherwise the claim will be deemed to have been waived.** In the event of an arbitration between Owner and Contractor, and at the sole option of Contractor, Subcontractor may be joined in such arbitration. Subcontractor shall include a similar provision in its Sub-subcontracts.

(Emphasis added).

B. CSNC's Masonry Work

CSNC began masonry work under the Subcontract on or about October 23, 2006. During that time the site was subject to routine inspections by Owner's structural engineer, Morabito Consultants, Inc. ("Morabito"). Site Visit Report #1, dated December 19, 2006, indicated that CSNC had improperly installed some of the rebar, requiring CSNC to, in one area, "take the walls down until 42[inches] of the existing #7 rebar is exposed above the wall and then rebuild and install rebar above as required." Elsewhere on the Project, where the rebar was improperly aligned, the Site Visit Report instructed that CSNC would have to drill 18-inch holes and install new rebar.

Precisely one month later, Site Visit Report #2, dated January 19, 2007, noted similar problems with rebar installation along with a failure to grout required areas. Site Visit Report #3, submitted on March 13, 2007, listed numerous problems with the masonry walls and reinforcing, including "a 6[inch] gap between the pre-cast concrete plank and the north side of the elevator tower at the 3rd floor" and the failure of "the masonry wall reinforcing [to] line up with the reinforcing that is to be placed in the plank key-way as shown in details 1 and 3 on S4.1."

After Site Visit Reports #4 and #5 indicated CSNC's continued errors and deviations from the site plan, Allan Kleban—then Vice President of Administration for KBE— took steps to terminate CSNC's Subcontract for default pursuant to paragraph 14 of the subcontract.[5] In a letter to CSNC dated July 30, 2007, Mr. Kleban stated:

> As of 5pm today, July 30, 2007, [CSNC] has failed to perform any work for weeks, failed to provide any follow-up documentation promised on July 23, 2006, and failed to respond to my letter of July 11, 2007 and follow up documentation sent on July XXX. **In brief, [CSNC] has failed to cure its**

[5] Paragraph 14 of the subcontract provides, in pertinent part:

> If, in the opinion of Contractor, Subcontractor shall at any time (1) refuse or fail to provide a sufficient number of properly skilled workmen, adequate supervision or materials or the proper quality, (2) fail in any respect to prosecute the work according to the current schedule or as directed by Contractor, (3) cause, by any action or omission, the stoppage, or delay of, interruption or interference with the work of Contractor or of any other builder or subcontractor, or (4) fail to comply with any provision of this Subcontract or the Contract Documents, then, after serving three (3) business days written notice . . . the Contractor may at its option . . . terminate the Subcontract for default. . . .
>
> In case of termination for default, Subcontractor shall not be entitled to receive any further payment until the work shall be fully completed and accepted by Owner. . . .

> **default of its contract on the EZ-Storage Waldorf Project.** Accordingly, pursuant to Paragraph 14 of the subcontract and [KBE's] Notice dated June XXX, [CSNC's] subcontract is hereby terminated for default. [KBE] will hold [CSNC] liable for its costs of reprocurement and any other costs and damages resulting from [CSNC's] bre[a]ch. **[CSNC's] right to enter the jobsite is hereby revoked**.

(Emphasis supplied).

One month later, KBE's Project Manager, Mark S. Garilli, notified CSNC in a letter dated August 29, 2007, that work had continued in CSNC's absence "to keep the schedule moving"; that CSNC had failed to cure its default; and that KBE would withhold any remaining funds left on the contract until such time as all work was completed. Mr. Garilli urged CSNC to complete the outstanding work in order to lower any future back charges against CSNC. CSNC however, did not return to the jobsite and performed no further work on the Project following the July 30, 2007, letter from Mr. Kleban.

Approximately six months later, the Project was substantially completed. On January 11, 2008, Morabito, the structural engineering firm, notified the Owner that,

> [t]o the best of our knowledge and belief, based on site visits completed by our office, and enclosed final inspection report dated January 11, 2008, from Specialized Engineering, the structural components of the above referenced project have been completed in substantial compliance with the project plans and specifications.

Enclosed with the letter was correspondence from the inspection contractor, Specialized Engineering, with an engineer's stamp certifying compliance with project specifications and applicable building codes. In regard to the reinforced steel and masonry, Specialized Engineering represented that:

> The reinforcing steel, was observed prior to the placement of concrete and masonry grout, and was found to be in accordance with the project

> specifications and plans with regard to spacing, size, type, quantity and clearances.
>
> The placement of concrete was observed during the foundation, slab, and curb and gutter concrete construction for the entire building area. The mix type, slump, air content, mix duration, and temperature of the concrete were noted. Concrete test cylinders were fabricated to represent each day's placement. The concrete compression test results were found to meet or exceed the project requirements.
>
> The placement of masonry and pre-cast plank was observed during the construction. The masonry and pre-cast plank construction was inspected for proper placement, materials and methods and was found to be in general conformance with the plans and specifications.

On January 15, 2008, the Owner took possession of the property and acquired a use and occupancy permit for the building. Architect Jack H. Helman issued a Certificate of Substantial Completion (AIA Document G704-2000) for the Project on January 18, 2008.[6]

C. Circuit Court Proceedings

The Owner withheld final payment on the contract balance alleging that KBE materially breached the General Contract by failing to provide an accurate final accounting and failing to provide lien releases.[7] On July 10, 2008, KBE filed a complaint in the Circuit Court for Charles County seeking to establish and enforce a mechanic's lien and alleging

[6] The Certificate of Substantial Completion was subsequently received and signed by KBE on March 20, 2008, and by Craig B. Pittinger, Vice President of Waldorf Land LLLP, on March 24, 2008.

[7] According to the affidavit of Craig Pittinger—submitted in response to a July 10, 2008, order issued by the court to show cause why KBE's requested mechanic's lien should not attach—Owner disputed KBE's accounting of costs and fees including, but not limited to, change order amounts, liquidated damages for late project completion, and Punch List value.

that Owner was in breach of contract for failing to make payment. On September 19, 2008, the circuit court granted an interlocutory mechanic's lien in favor of KBE in the amount of $900,000.00. After payments made by Owner to KBE, the parties filed joint consent motions to reduce the amount of the lien on September 25, 2008 and again on November 3, 2008.[8]

On February 9, 2009, Owner filed a counterclaim alleging, *inter alia*, that KBE failed to perform and complete the Project within the time required and in accordance with the contract documents. Prompted by additional concerns, the Owner employed a thermal imaging device to determine whether the insulation was installed in accordance with the plans and specifications. That inspection revealed numerous defects in the masonry work. In May of 2009, Owner notified KBE that the thermal imaging tests of the exterior masonry walls revealed that numerous proposed solid masonry piers were actually hollow and rebar was located in the block cells without grout. Owner filed its first amended counterclaim on June 1, 2009, alleging KBE failed to install insulation and construct masonry block walls on the Project in accordance with the contract documents.

Following discovery of these defects, Owner asserted that further testing was required—at the expense of KBE or its subcontractor—on the interior of the Project. KBE hired third-party structural engineers Simpson, Gumpertz & Heger to inspect the structure, and then hired several subcontractors to correct problems found in the masonry work. The remedial work was costly and painstaking as the subcontractors had to test each masonry

[8] The September 25, 2008 consent motion reduced the lien amount to $682,431.54. The November 3, 2008 motion reduced the lien amount to $451,593.52.

cell, and then undertake repairs around existing structures with minimal impairment to the Owner's tenant. It was not until December 1, 2011, that engineers certified the remedial work was satisfactorily completed.

Meanwhile, on January 25, 2010, KBE filed a third-party complaint against CSNC for breach of contract, breach of warranties, indemnity, and contribution related to the defects discovered in the masonry work.[9] The third-party complaint stated, among other things, that "defects in work performed on the Building by [CSNC] . . . constituted a material breach[] of [its] . . . subcontractor agreement[]"; "constituted a material breach of warranties"; and that "KBE is entitled to indemnity and/or contribution from . . . [CSNC]."

On May 25, 2010, the circuit court granted the parties' joint-motion to stay the proceedings for 120 days to allow the completion of repairs on the Project and to give the parties time to reach a resolution or narrow the issues to be litigated. Following an additional extension of time, KBE filed an amended third-party complaint on January 28, 2011.[10]

[9] KBE's Third-party complaint also named Royals Insulation Corporation ("Royals") as a defendant; alleging breach of contract, breach of warranties, indemnity, and contribution related to the insulation work performed by Royals. KBE filed additional third-party complaints against Oldcastle Precast, Inc., The Fireguard Corporation, and DIW Group, Inc. t/a Specialized Engineering on January 10, 2011. KBE dismissed the claims against Royals, Oldcastle Precast, and Fireguard Corp. in 2013. The suit against Specialized Engineering was disposed of through summary judgment in the circuit court, and that decision was affirmed in an unreported opinion of this Court—*KBE Building Corp. v. DIW Group, Inc.*, No. 1060, Sept. Term 2014, slip op. (filed Aug. 17, 2015).

[10] Shortly thereafter, on February 7, 2011, KBE filed a second amended third-party complaint filed merely correcting a misnomer in regard to CSNC.

KBE's amended complaint expanded on the factual bases for its third-party claims against Royals and CSNC, citing defects in the subcontractors' work with particularity and stating, in part:

> [T]he Owner has alleged that the Property has been damaged in the following ways:
>
> a. Mortar and reinforcing steel was omitted from masonry block walls in the facility, which caused masonry connections to fail and compromised the structural integrity of the building. . . .
> b. Insulation was insufficiently installed in the walls in the facility.
> c. Precast plank connections and joints were improperly grouted and reinforced, resulting in the failure of plank-to-plank connections and causing damage to the plank edges and floor sealer.
>
> * * *
>
> e. Testing and inspection of the structural components of the facility was performed inadequately, and/or KBE failed to arrange for performance of the same, resulting in defective work, failure to promptly identify issues with the project, and necessitating substantial repairs after the building was occupied.
>
> * * *
>
> g. The Owner has claims in excess of $1 Million in damages.

Additionally, KBE averred that both third-party defendants failed to procure insurance naming KBE and Owner as additional insureds, and that both had breached their obligations to KBE under their respective subcontracts by refusing to "defend, indemnify and hold KBE harmless from and against [] claims by the Owner." KBE's amended complaint added a significant number of additional counts to the original three-count complaint. As to both third-party defendants, KBE added claims for the following: breach of express warranty; breach of implied warranty of fitness for particular purpose; breach

of implied warranty of merchantability; negligence; negligent misrepresentation; express contractual indemnity; implied-in-law indemnity; and contribution.

Sixty-three days after KBE filed its second amended third-party complaint, on April 11, 2011, CSNC filed a motion to dismiss contending, among other things, that KBE had waived its claims pursuant to the one-year limitations period in Subcontract paragraph 10 entitled "Settlement of Disputes." CSNC averred, *inter alia*, that the Project reached substantial completion on January 18, 2008 (the date Architect Jack H. Helman issued the Certificate of Substantial Completion for the Project). The court denied that motion in an order dated May 23, 2011, and CSNC moved for reconsideration on June 10, 2011.

On September 21, 2011, the circuit court held a hearing on CSNC's motion for reconsideration and both parties presented extensive argument on the paragraph 10 limitations period and its construction within the framework of the subcontract. KBE argued against granting the motion to dismiss, contending that its suit against CSNC was timely filed because KBE's causes of action did not arise until Owner brought suit against KBE, and that KBE's third-party suit was timely under the applicable Maryland statute of limitations. KBE argued that "the causes of action alleged against [CSNC] in KBE's third-party suit <u>are not</u> subject to the temporal limitations set forth in [P]aragraph 10 of the KBE-CSNC Subcontract, which apply only to claims and disputes relating to performance of the Subcontract and not to claims arising in suits against KBE by [Owner] or other third parties." (Emphasis in original). Despite the language in paragraph 10 referencing a "dispute or claim of any nature arising out of or relating to th[e] Subcontract," KBE argued that when read in context against the provisions for warranties of CSNC's work (paragraph

11), CSNC's tort liability to third parties (paragraph 5), [11] and CSNC's obligation to indemnify and hold KBE harmless (paragraph 6), the reasonable interpretation of paragraph 10 is that it cannot apply to third-party claims.

In its oral ruling on the motion, the circuit court explained that it was not prepared to grant the motion to dismiss because the court believed KBE's counsel presented good arguments and raised issues that still had to be addressed. Following the denial of CSNC's motion for reconsideration, the parties proceeded with discovery, including expert witness identification. On January 4, 2013, after KBE had spent considerable time and expense on repairs to the Project, Owner and KBE reached a settlement agreement and dismissed their respective claims. The claims against third-party defendant CSNC, however, remained open.

On April 3, 2013, CSNC filed a motion for summary judgment, premised again, in substantial part, on the one-year limitations period contained in paragraph 10 of the

[11] Paragraph 5 of the subcontract executed between KBE and CSNC provides, in pertinent parts:

> a. Subcontractor hereby assumes the entire responsibility and liability for all work, supervision, labor and materials provided hereunder, whether or not erected in place, and for all plant, scaffolding, tools, equipment, supplies and other things provided by Subcontractor until final acceptance of the work by Owner. In the event of any loss, damage or destruction thereof from any cause (other than Contractor's sole negligence), Subcontractor shall be liable therefore and shall repair, rebuild and make good said loss damage or destruction at Subcontractor's cost.
>
> b. Subcontractor shall be liable to Contractor for all costs Contractor incurs as a result of Subcontractor's failure to perform this Subcontract in accordance with its terms. . . .

Subcontract.[12] On May 24, 2013, KBE and CSNC appeared before the circuit court for a hearing on CSNC's motion for summary judgment. CSNC argued that, as of its termination and exclusion from the job site on July 30, 2007, it was deemed to have substantially completed its work for the purposes of paragraph 10 of the Subcontract. Therefore, any claim against CSNC must have been commenced on or before July 30, 2007. CSNC further argued that although KBE may not have been aware of the full extent of the defects in CSNC's work, KBE's termination letter to CSNC establishes that it was aware of its causes of action at that time.

KBE, in response, reiterated the arguments made during the prior hearing on the motion to dismiss, including that the language of paragraph 10 is ambiguous and must be read in concert with the General Contract. Additionally, KBE stressed that CSNC did not meet the terms contained in paragraph 10 of having substantially completed "the work" because CSNC never completed its work under the Subcontract. The only evidence CSNC presented to show that it completed its work was that the Project itself was completed. Thus, KBE argued, "CSNC never substantially completed its work to trigger the one-year claim period referred to in paragraph 10," and, in any event, KBE maintained that the date of substantial completion was a factual determination for a jury to decide.

KBE also asserted that contingent third-party causes of action for breach of contract, breach of express warranty, negligence and negligent misrepresentation did not arise until

[12] CSNC also maintained KBE could not prevail on its claim for contribution because KBE was not a joint tort-feasor under the Maryland Uniform Contribution Among Joint Tort-Feasors Act, and that KBE could not prevail on its claim for negligent misrepresentation because it did not allege any damage caused by any statement by CSNC.

the Owner filed its counterclaim in the mechanic's lien action on February 9, 2009. KBE posited that it would be unreasonable to interpret the one-year limitations period of paragraph 10 as applicable to warranty claims under paragraph 11 of the Subcontract, which provides a warranty period of one year from the date of substantial completion. CSNC countered that the obligations under the Subcontract, including those pursuant to paragraph 11, are effective, but only for one year based on the plain and unambiguous language of paragraph 10. CSNC stated that "[t]here's a limitation put on how long these obligations survive by the parties themselves in order to allocate the risks between them[]."

On June 3, 2013, the circuit court filed its memorandum opinion and order granting summary judgment in favor of CSNC. First, the court reviewed the contractual provisions and relationship among the parties. The court noted that on August 29, 2006, KBE entered into the Subcontract with CSNC, and unlike the General Contract between KBE and the Owner, the Subcontract was not a standard AIA contract form. Rather, the Subcontract was a separate document drafted by Allan Kleban while he served as Vice President of Administration for KBE. The court observed that any ambiguity in the Subcontract would be construed against KBE as the drafting party. The Court noted that pursuant to paragraph 2(b) of the Subcontract,

> [T]he General Contract was not incorporated into the Subcontract between CSNC and KBE. Thus, regardless of any other agreement, including the General Contract between KBE and the Owner, the Subcontract controlled any dealings between KBE and CSNC relating to the Project.

Regarding the one-year limitations period in paragraph 10, the court noted:

> The Subcontract provides for no other limitations period, no other accrual date for a limitations period, nor any method of settling disputes.[] Moreover,

> the Subcontract has no definitions section defining words or terms used in the Subcontract.

(Footnote omitted). With respect to KBE's argument that applying the definition of "claim" from the General Contract limits the scope of the term in paragraph 10 of the Subcontract, the court found,

> no language in Paragraph 10 states that it applies only to claims arising during the performance of the contract. Quite to the contrary, Paragraph 10 covers "dispute[s] or claim[s] of any nature arising out of or relating to this Subcontract."

The court found the plain language of paragraph 10 of the Subcontract to be clear and unambiguous. The court concluded that the parties "agreed to a limitations period different than the statutory three-year period, and also contracted around the discovery rule which normally governs the accrual of limitations periods in Maryland." Relying on this Court's decision in *College of Notre Dame of Maryland, Inc. v. Morabito Consultants, Inc.*, 132 Md. App. 158, 169 (2000), the circuit court concluded that " parties are free to create different limitations periods and accrual dates, as Maryland courts promote parties' freedom to contract." The court then reviewed the sequence of events leading to the filing of the underlying third-party complaint, and listed the following "Summary of Undisputed Facts:"

- July 30, 2007: KBE terminated CSNC's Subcontract and bar[red] CSNC from [the] work site. CSNC did no further work on the Project.
- January 18, 2008: Morabito issued AIA Certificate of Substantial Completion.
- January 11-18, 2008: Use and Occupancy Permit issued.
- July 10, 2008: KBE filed Complaint for Mechanic's Lien against Owner.
- February 9, 2009: Owner filed Counterclaim against KBE.

- January 25, 2010: KBE filed Third-Party Complaint [a]gainst CSNC.

Addressing the differing interpretations regarding when CSNC substantially completed its work, the circuit court opined that, even if a reasonable jury could find that CSNC had not substantially completed its work by virtue of being terminated for default on July 30, 2007, certainly by January 18, 2008, CSNC's work was complete when KBE obtained a Use and Occupancy Permit and the Certificate of Substantial Completion. Concluding that KBE failed to bring its third-party complaint prior to the expiration of its contracted-for limitations period, the circuit court determined that KBE's claims were time-barred.

On June 26, 2013, KBE filed a timely notice of appeal. On July 5, 2013, CSNC filed a cross-appeal challenging the circuit court's May 23, 2011, order denying CSNC's motion to dismiss KBE's second amended third-party complaint and the September 21, 2011, order granting in part and denying in part CSNC's motion to reconsider.

We include additional facts in the discussion relevant to the issues there examined.

DISCUSSION

Standard of Review

Under Maryland Rule 2-501, summary judgment is proper where the circuit court determines that there are no genuine disputes as to any material fact and that the moving party is entitled to judgment as matter of law. Whether summary judgment was granted properly is a question of law, and we review a grant of summary judgment to determine

whether the trial court was legally correct. *Poole v. Coakley & Williams Const., Inc.*, 423 Md. 91, 109 (2011) (quoting *Walk v. Hartford Cas. Ins. Co.,* 382 Md. 1, 14, (2004)). Thus, when reviewing an entry of summary judgment, the appropriate standard of review is *de novo. Id.* at 108 (quoting *Walk*, 382 Md. at 14). We review the record in the light most favorable to the non-moving party and construe any reasonable inferences which may be drawn from the facts against the movant. *Jurgensen v. New Phoenix,* 380 Md. 106, 114 (2004). "Disputes concerning contract interpretation are questions of law and frequently regarded as appropriate for summary judgment." *Sierra Club v. Dominion Cove Point LNG, L.P.*, 216 Md. App. 322, 330 (citing *Sandler v. Exec. Mgmt. Plus,* 203 Md. App. 399, 423 (2012)), *cert. denied sub nom. Sierra Club v. Dominion Cove Point LNG*, 438 Md. 741 (2014).

I.

Fundamental Principals of Contract Interpretation

KBE maintains that the circuit court erred in failing to apply fundamental principles of contract interpretation in finding that the one-year limitations period contained in paragraph 10 of the subcontract barred KBE's claims against CSNC. First, KBE maintains that the circuit court erred in determining that the General Contract was not incorporated by reference into the Subcontract. Second, KBE contends that the circuit court erred in construing the term "claim," as used in paragraph 10 of the Subcontract, to include third-party claims and cross-claims. KBE argues that, once the definition from the General Contract is applied to paragraph 10, the language "dispute or claim of any nature arising out of or relating to the Subcontract" should be construed in harmony with KBE's

interpretation of the General Contract as limited to claims for "adjustment or interpretation of Contract terms, payment of money, extension of time." [13] Third, KBE asserts that the circuit court erred in construing the one-year limitations period in paragraph 10 in way that has an adverse impact on other rights and liabilities provided through the Subcontract.

When interpreting a contract, Maryland courts "seek to ascertain and effectuate the intention of the contracting parties." *Sierra Club,* 216 Md. App. at 331 (quoting *Phoenix Servs. Ltd. P'ship v. Johns Hopkins Hosp.,* 167 Md. App. 327, 391 (2006)). "All other rules of contract construction 'are simply in aid of this cardinal rule.'" *Hartford Acc. & Indem. Co. v. Scarlett Harbor Assocs. Ltd. P'ship*, 109 Md. App. 217, 291 (1996) (quoting *Bentz v. Mut. Fire, Marine & Inland Ins. Co.,* 83 Md. App. 524, 538 (1990)), *aff'd sub nom. Hartford Acc. & Indem. Co. v. Scarlett Harbor Associates Ltd. P'ship*, 346 Md. 122 (1997) ("*Scarlett Harbor Associates*"). "In ascertaining the parties' intent, Maryland adheres to

[13] Section 4.3 of the General Contract provides:

> A Claim is a demand or assertion by one of the parties seeking, as a matter of right, adjustment or interpretation of Contract terms, payment of money, extension of time **or other relief with respect to the terms of the Contract.** The term "Claim" also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract.

(Emphasis supplied). KBE maintains that this definition was incorporated into the Subcontract and that KBE's indemnity and contribution claims against CSNC fall outside the scope of "other relief with respect to the terms of the Contract." Under KBE's restrictive interpretation of the "other relief" clause in section 4.3, the term "Claim" is restricted to the specifically enumerated types of claims in the preceding clause—"adjustment or interpretation of contract terms, payment of money and extension of time." Plainly, however, such a restrictive reading would render the "other relief" clause pure surplusage.

the objective theory of contract interpretation." *Sierra Club,* 216 Md. App. at 331 (citing *Dumbarton Imp. Ass'n, Inc. v. Druid Ridge Cemetery Co.,* 434 Md. 37, 51 (2013)).

In *Scarlett Harbor Associates,* this Court explained:

> The primary source for determining the intention of the parties is the language of the contract itself. *Shillman v. Hobstetter,* 249 Md. 678, 688–89, 241 A.2d 570 (1968); *Brown v. Fraley,* 222 Md. 480, 489, 161 A.2d 128 (1960). Because Maryland follows the "objective" law of contracts, the court must, as its first step, determine from the language of the agreement what a reasonable person in the position of the parties would have meant at the time the agreement was effectuated. *Faw, Casson & Co. v. Everngam,* 94 Md. App. 129, 134–35, 616 A.2d 426 (1992), *cert. denied,* 330 Md. 155, 622 A.2d 1195 (1993). *See Beckenheimer's, Inc. v. Alameda Associates Limited Partnership,* 327 Md. 536, 547, 611 A.2d 105 (1992).

109 Md. App. at 291. Thus, in the context of the case on appeal, we are concerned with the reasonable expectations of the parties under the terms of the Subcontract drafted by the contractor and signed by the subcontractor. However, it is necessary to stress that

> [w]here the language of a contract is clear, there is no room for construction; it must be presumed that the parties meant what they expressed. *Board of Trustees of State Colleges v. Sherman,* 280 Md. 373, 380, 373 A.2d 626 (1977); *Devereux v. Berger,* 253 Md. 264, 269, 252 A.2d 469 (1969); *Bernstein v. Kapneck,* 46 Md.App. 231, 244, 417 A.2d 456 (1980), *aff'd,* 290 Md. 452, 430 A.2d 602 (1981). In such a case, "the true test of what is meant is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant." *General Motors Acceptance Corp. v. Daniels,* 303 Md. 254, 261, 492 A.2d 1306 (1985). "[T]he clear and unambiguous language of an agreement will not give way to what the parties thought the agreement meant or intended it to mean." *Board of Trustees of State Colleges v. Sherman,* 280 Md. 373, 380, 373 A.2d 626 (1977).

Id. Accordingly, a contract is not rendered ambiguous simply because the parties disagree as to its meaning. *Fultz v. Shaffer,* 111 Md. App. 278, 299 (1996). Rather, "[l]anguage in a contract 'may be ambiguous if it is 'general' and may suggest two meanings to a

reasonably prudent layperson.'" *Sierra Club*, 216 Md. App. at 332 (quoting *Pac. Indem. Co. v. Interstate Fire & Cas. Co.,* 302 Md. 383, 389 (1985)). If a court finds that the language in a contract is unambiguous, then it must restrain its review to the language of the contract and presume that the terms expressed in the agreement are what the parties intended. *Sierra Club,* 216 Md. App. at 332 (citing *Phoenix Servs. Ltd. P'ship*, 167 Md. App. at 392).

Clear and Unambiguous

The circuit court found that paragraph 10 is clear and unambiguous. We agree. The court found that the plain language of the one-year limitation in the Subcontract drafted by KBE is unambiguous and must be enforced as barring *all* claims related to the Subcontract, including third-party claims. Again, paragraph 10 provides:

> Notwithstanding any other provision of this Subcontract (including without limitation paragraph 2.b) or the Contract Documents to the contrary, no dispute or claim of any nature arising out of or relating to this Subcontract will be subject to arbitration. In the event Contractor and Subcontractor cannot resolve disputes, either party may prosecute its claim in a court of competent jurisdiction within the State of Maryland. All suits must be brought in the courts of Maryland and must be commenced within one year of the date Subcontractor substantially completes its work, otherwise the claim will be deemed to have been waived. In the event of an arbitration between Owner and Contractor, and at the sole option of Contractor, Subcontractor may be joined in such arbitration. Subcontractor shall include a similar provision in its Sub-subcontracts.

The meaning of "claim" is contained within the paragraph. A claim is of "any nature arising out of or relating to this Subcontract." And, although we agree with KBE's first contention—that the circuit court erred in determining that the General Contract was not

incorporated by reference into the Subcontract—what is in the General Contract is not dispositive of the outcome here.[14] We agree with the circuit court's further conclusion:

> Even if the general Contract had been incorporated into the Subcontract . . . [t]he Subcontract unequivocally states that "[i]n case of conflict between this Subcontract and the Contract Documents, the Subcontract shall govern." *See* Paragraph 2.b. In that same provision, it states that the "Subcontractor shall assume all obligations, risks and responsibilities which the Contractor has assumed towards the Owner in the Contract Documents, except as expressly modified herein." More importantly, in Paragraph 10 itself, the parties agreed to clear and unambiguous language: "Notwithstanding any other provision of this Subcontract (including without limitation paragraph 2.b) . . . no dispute of any nature arising out of or relating to this Subcontract will be subject to arbitration . . . All suits . . . must be commenced within one year of the date Subcontractor substantially completes its work. . . ." Indeed, the language that is present . . . is sufficiently clear, when considered in the

[14] In the matter *sub judice*, the Subcontract contains a limited scope-of-work flow-down clause akin to that examined in *Seal & Company, Inc. v. A.S. McGaughan Company, Inc.,* 907 F.2d 450, 453 (4th Cir. 1990)*,* in paragraph 2b:

> In respect to work covered by this Subcontract, Subcontractor shall assume all obligations, risks and responsibilities which Contractor has assumed towards Owner in the Contract Documents, except as may be expressly modified herein. In case of a conflict between this Subcontract and the Contract Documents, the Subcontract shall govern.

The limited flow-down clause is consistent with the intent of the parties to limit the scope of their agreement, to the extent plausible, to the terms of the Subcontract. Such integration clauses are commonly found to create a "rebuttable presumption in favor of a finding that the writing is a final and complete expression of the parties' agreement." 1 Bruner & O'Connor § 3:16 (citations omitted) ("Noting the general rule that 'the presence of an integration or merger clause is merely presumptive evidence of the parties' intentions as to integration.'")). In sum, while it is incorrect to say that the General Contract was not incorporated by reference into the Subcontract, certainly the extent of to which it was incorporated, based on the flow-down clause, is limited to the particular purpose for which it is referenced. *See Guerini Stone Co. v. P J Carlin Constr. Co.*, 240 U.S. 264, 277 (1916). In any case, we note that the definition of "claim" supplied by the General Contract, Section 4.3.1, is largely consistent with the usage of the word in the Subcontract.

> context of the surrounding language and circumstances of the transaction, to convey the unambiguous meaning. . . . Therefore, by the parties' own clear, unambiguous language, the Subcontract governs, irrespective of any language in the general Contract.

(Citations and internal quotation marks omitted).

KBE's second contention, that the lack of a specific provision dealing with third-party claims or cross-claims means those variants are not governed by paragraph 10, is likewise without merit as it rests on KBE's own interpretation of what "claim" means in the General Contract. The fact that the Subcontract does not enumerate every permutation of possible litigant relationships does not render the phrase "dispute or claim of any nature" ambiguous. We note also that the third-party complaint here remains a dispute between the two parties in privity, despite the involvement of Owner. CSNC seeks to enforce a limitations provision in the contract between it and KBE and not against some unaware third party. "Rather than acquiescing to the parties' subjective intent, we consider the contract from the perspective of a reasonable person standing in the parties' shoes at the time of the contract's formation." *Ocean Petroleum, Co.*, 416 Md. at 86 (citing *Cochran*, 398 Md. at 17).

Adverse Impact on Rights and Liabilities in the Subcontract

KBE asserts that the circuit court erred in construing the one-year limitations period in paragraph 10 in a way that has an adverse impact on other rights and liabilities provided through the Subcontract. It argues that because no time or accrual limitations are found in the paragraphs establishing those rights and liabilities, and such liabilities "clearly might

not arise within one year of substantial completion of CSNC's work," they cannot be read in harmony with the circuit court's construction of the one-year limitation.

CSNC counters that despite KBE's contention that "no reasonable contractor would limit its right to pass its liabilities onto its subcontractors to just one year," the plain, ordinary meaning of the limitation must govern. CSNC argues that KBE and Allan Kleban's extensive knowledge and experience in the construction industry and construction litigation reinforces that they meant what they said in the Subcontract they drafted. Further, CSNC posits that "whatever KBE subjectively thought Paragraph 10 said is not relevant to the legal interpretation[.]"

As a prime example of the potentially conflicting provisions in the Subcontract, KBE points to paragraph 11, which provides, in pertinent part that "the Subcontractor shall guarantee or warranty its work against all deficiencies and defects in materials and/or workmanship for one (1) year from the date of substantial completion of all or a designated portion of the Project." Certainly, if the one-year limitations period and the one-year warranty period run concurrently, then KBE would find it difficult to file a timely complaint based on warranty for a defect discovered on the final day of the warranty/limitation period. However, as the circuit court noted, reading the two provisions in concert does not "result in ambiguity or an illogical, unreasonable result. . . . Rather, it simply means that KBE had one year to discover any latent defects, and to bring claims for those defects within one year of CSNC substantially completing its work."

We agree with the circuit court. Although paragraph 10 significantly limits claims arising from the Subcontract, it is not, by its literal terms, in conflict with the rights and

duties under the Subcontract. As discussed, *infra*, both the Supreme Court of the United States and the Maryland Court of Appeals have long recognized the importance of the freedom of parties to contract. *See Mo., Kan. & Tex. Ry. Co. v. Harriman Bros.,* 227 U.S. 657, 672 (1913); *Maryland-National Capital Park & Planning Comm'n v. Washington Nat'l Arena,* 282 Md. 588, 606 (1978).

In conclusion, "[w]hen the clear language of a contract is unambiguous, the court will give effect to its plain, ordinary, and usual meaning, taking into account the context in which it is used." *Sy-Lene of Washington, Inc.*, 376 Md. at 167 (citations omitted). We conclude that the disputed Subcontract provision is unambiguous and susceptible to only one meaning. *See, e.g., Coll. of Notre Dame of Maryland, Inc. v. Morabito Consultants, Inc.*, 132 Md. App. 158, 164, 169 (2000). Here, giving the language of Paragraph 10 its plain meaning in the context of the Subcontract, we must conclude that it governs any dispute or claim arising out of the Subcontract and mandates that all suits based on those disputes or claims must have been brought within one year of the date that CSNC completed its work. Accordingly, under paragraph 10 of the Subcontract, KBE's claims against CSNC must have been brought in a court of competent jurisdiction "within one year of the date Subcontractor substantially complete[d] its work, otherwise the claim will be deemed to have been waived."

II.

Next, KBE contends that the circuit court erred in determining that a one-year limitation on all suits arising out of or relating to the Subcontract was an enforceable limitations provision under Maryland contract law. Although KBE acknowledges that

parties to a contract may enforce provisions limiting bilateral claims, it maintains that the application of a contractual limitations period to a claim "in the context of litigation initiated by some third party" is unreasonable, not supported by precedent, and contrary to public policy.

CSNC asserts that Maryland courts have routinely enforced contractual limitations periods shorter than the statutory limitations period based primarily on the freedom of the parties to contract as they wish. CSNC notes that Maryland enforces contractual waivers of rights even where claims under those rights have not yet arisen. Further, CSNC asserts that KBE was aware of defects in the masonry work (even if not the full extent of the defects) as early as the site reports beginning in December of 2006, and could have initiated its claims against CSNC at the time of CSNC's termination for default on July 30, 2007.

In *College of Notre Dame of Maryland, Inc. v. Morabito Consultants, Inc.*, ("*Morabito"*), we observed:

> The Supreme Court has recognized the general principle that parties' freedom to contract should be given effect absent clear policy considerations to the contrary. *See Missouri, Kan. & Tex. Ry. Co. v. Harriman Bros.,* 227 U.S. 657, 672, 33 S. Ct. 397, 57 L. Ed. 690 (1913). The Court explained that the policy underlying statutes of limitations is to "encourage promptness in the bringing of actions, [so] that the parties shall not suffer by loss of evidence from death or disappearance of witnesses, destruction of documents, or failure of memory." *Id.* at 672, 33 S. Ct. 397. The Court concluded that "there is nothing in the policy or object of such statutes which forbids the parties to an agreement to provide a shorter period, provided the time is not unreasonably short." *Id.*
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> * * *
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> The Court of Appeals also has recognized the freedom of parties to contract:

> Maryland courts have been hesitant to strike down voluntary bargains on public policy grounds, doing so only in those cases where the challenged agreement is patently offensive to the public good, that is, where 'the common sense of the entire community would . . . pronounce it' invalid. This reluctance on the part of the judiciary to nullify contractual arrangements on public policy grounds also serves to protect the public interest in having individuals exercise broad powers to structure their own affairs by making legally enforceable promises, a concept which lies at the heart of the freedom of contract principle.
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> *Maryland-National Capital Park & Planning Comm'n. v. Washington Nat'l Arena,* 282 Md. 588, 606, 386 A.2d 1216 (1978) (alterations in original) (citations omitted).

132 Md. App. at 173-74.

Private parties are generally free to provide their own limitations period for bringing suit, and courts generally permit parties to agree on a limitations period shorter than that authorized by statute, as long as the period is reasonable. 2 Richard K. Allen & Stanley A. Martin, Construction Law Handbook, § 34.04[G][4] at 1341 (2d ed. 2009). Indeed, contractual modifications setting a time for accrual of a cause of action or modifying a limitations period are generally not disfavored in the law. *Morabito*, 132 Md. App. at 169.

In *Harbor Court Associates v. Leo A. Daly Co.*, the United States Court of Appeals for the Fourth Circuit rejected arguments that under Maryland law an accrual clause in a construction contract should be struck down as against public policy even where the loss resulted from "fundamental and latent defects in design and construction." 179 F.3d 147, 149-51 (4th Cir. 1999). The Fourth Circuit noted that, at that time, "the only courts to consider a contractual accrual date provision have all enforced it." *Id.* at 151 (citations omitted). Indeed, since that decision many of our sister states have also concluded that

public policy does not prohibit sophisticated parties from circumventing the "discovery rule" by contractually setting the point for accrual of claims even in the presence of latent defects. *See, e.g.*, *Gustine Uniontown Associates, Ltd. ex rel. Gustine Uniontown, Inc. v. Anthony Crane Rental, Inc.*, 892 A.2d 830, 836 (Pa. Super. Ct. 2006) (upholding the application of a contractual accrual provision); *New Welton Homes v. Eckman*, 830 N.E.2d 32, 35 (Ind. 2005) (declining to apply the discovery rule over a contractual accrual provision and stating that "Indiana law generally holds that contractual limitations shortening the time to commence suit are valid, at least so long as a reasonable time is afforded." (citation and internal quotation marks omitted)); *Keiting v. Skauge*, 543 N.W. 2d 565, 567 (Wis. Ct. App. 1995) (holding that the right to contract for both a shortened limitations period and the date from which the time period begins to run is supported by public policy). As the court in *Trinity Church v. Lawson-Bell*, aptly observed "the very purpose of the substantial completion clause is to protect the construction professionals against the assertion of claims based on latent defects after the statute of limitations has expired." 925 A.2d 720, 732 (N.J. Super. Ct. App. Div. 2007).

In *Schultz v. Cooper*, despite an allegation of defects in the design plan that could not have been discovered until years after construction (when the resulting damages became apparent) the Court of Appeals of Kentucky opined that,

> the contract between the owner and the architect . . . included a clearly drafted provision requiring that the limitations period of all claims arising out of the contract commence upon substantial completion of the work.
>
> * * *

> We agree . . . that the abbreviated period of limitations provided for under the terms of the parties' contract was reasonable under the circumstances. The contract was agreed upon by parties enjoying equal bargaining power, and courts traditionally honor the ability of private parties on equal footing to structure their own affairs through contract.
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> * * *
>
> The discovery rule . . . is a clearly worded default rule governing the date upon which a period of limitations begins. The parties in this case made a deliberate election to replace that date with a date certain for the accrual of any action. Neither the courts nor the legislature have found such private deviations from the statute to be unconscionable or violative of public policy. On the contrary, the courts have specifically sanctioned the validity of such provisions as part and parcel of the freedom of parties to fashion their own agreements.

134 S.W. 3d 618, 620-21 (Ky. Ct. App. 2003) (internal citations omitted).

Returning to *Harbor Court*, the Fourth Circuit noted that the Court of Appeals of Maryland also "may be said to have made a clear policy choice to establish the discovery rule as the default rule governing the date upon which its statutes of limitation begin to run." *Id.* at 150. Notwithstanding, the Fourth Circuit reasoned that under Maryland law where "neither the courts nor the legislature of the state have explicitly prohibited parties to an agreement from departing from th[e discovery] rule, . . . an attempt by sophisticated parties to contract around a rule developed for the protection of the blameless and unwary [was not] unenforceable as against the public policy of the state" based on the Court of Appeals' "considerable reluctance to strike down voluntary bargains on public policy grounds."[15]

[15] In *Harbor Court*, the Fourth Circuit also quoted the portion of the Maryland Court of Appeals opinion in *Maryland–National Capital Park and Planning Comm'n v. Washington National Arena,* 282 Md. at 606 in support of the proposition (continued…)

We considered the Fourth Circuit's *Harbor Court* analysis in our examination of the validity of contractual accrual and limitations provisions in building or construction contracts in *Morabito*. 132 Md. App. at 175-77. There, the appellant, College of Notre Dame of Maryland, Inc. ("the College"), entered into a contract with an architectural firm to provide services for the renovation of a campus building. *Id.* at 162. Subsequently, the architect entered into an agreement with Morabito Consultants, Inc. for structural engineering services. *Id.* at 163. Upon inspection, Morabito Consultants declared the building to be structurally sound; however, later inspection revealed that Morabito was incorrect. The College filed a complaint in the circuit court against, Morabito Consultants, Inc., and Frank T. Morabito alleging negligence and breach of contract.[16] *Id.* at 165. Morabito Consultants and Frank Morabito filed a motion to dismiss the complaint on the ground that the limitations provision in the contract between the College and the architect, incorporated in the contract between the architect and Morabito Consultants, Inc., was

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that Maryland courts would strike down a voluntary bargain on public policy grounds "only in those cases where the challenged agreement is patently offensive to the public good." 179 F.3d at 150.

[16] The relevant contract provision in *Morabito* provided:

> Causes of action between the parties to this Agreement pertaining to acts or failures to act shall be deemed to have accrued and the applicable statutes of limitations shall commence to run not later than either the date of Substantial Completion for acts or failures to act occurring prior to Substantial Completion, or the date of issuance of the final Certificate for Payment for acts or failures to act occurring after Substantial Completion.

132 Md. App. at 164.

applicable and that the action was time-barred. *Id*. We noted that "[o]ther state courts, in the absence of statute and subject to a finding of reasonableness, have held such provisions valid and enforceable." *Id.* at 173 (citing Annotation, *Validity of Contractual Time Period, Shorter Than Statute of Limitations, for Bringing Action,* 6 A.L.R.3d 1197, 1240-41 (1966 & Supp. 1999) (collecting and citing cases)). Determining that the public policy in favor of parties' freedom to contract generally supports the enforceability of contractual modification of accrual and limitations, we stated:

> In light of these well-settled holdings recognizing that parties' freedom to contract should be given effect absent clear policy considerations to the contrary, we conclude that parties may agree to a provision that modifies the limitations result that would otherwise pertain provided (1) there is no controlling statute to the contrary, (2) it is reasonable, and (3) it is not subject to other defenses such as fraud, duress, or misrepresentation. In terms of the enforceability of the specific accrual provisions in the documents at issue in this case, there is more limited judicial guidance. Further, the validity of the accrual provision is an issue of first impression in Maryland.

Id.

KBE attempts to rely on a caveat to our holding in *Morabito* for the proposition that a contractual suit limitation that does not clearly define the kind of suit at issue is unreasonable and unenforceable. In *Morabito,* we stated:

> We do not purport, by virtue of our holding, to address the validity of contractual suit limitations in all cases. In this case, there is no suggestion of duress, fraud, misrepresentation, or unequal bargaining power. The result might well be different in those circumstances. Additionally, our holding is limited to a suit for repair costs by a contracting party. We are not addressing claims for damages to person or property sustained by a contracting party or for contribution/indemnity by a contracting party as a result of an action brought by a third party against the contracting party.

Id. at 178. However, unlike the parties' posture in *Morabito*, which warranted caution, we are not presented with the application of a contractual limitations provision enforced against a third-party not in privity with the party asserting the limitation. Rather, in the present matter, the parties are in direct privity and the limitations provision CSNC seeks to enforce is contained within the agreement executed between KBE and CSNC (not incorporated from another document or passed through to a third-party beneficiary).

Here, the underlying action was initiated by KBE and not a third party. Further, as in *Harbor Court*, the parties are both "sophisticated business actors who sought, by contract, to allocate business risks in advance." 179 F.3d at 151 ("[R]ather than rely on the 'discovery rule,' which prolongs the parties' uncertainty whether or if a cause of action will lie, the parties to this contract sought to limit that period of uncertainty by mutual agreement to a different accrual date."). Moreover, numerous courts from other jurisdictions, when presented with a broad contractual provision regarding accrual and limitations on "claims" or "causes of action," have applied the clear language of the limitation as consistent with sound public policy without regard for the specific nature or posture of the claim. *See, e.g.*, *Trinity Church v. Lawson-Bell*, 925 A.2d 720, 732 (N.J. Super. Ct. App. Div. 2007) (holding that the defendants, including a third-party defendant, were entitled to enforce the time limitations provisions of their contracts); *Gustine Uniontown Associates*, 892 A.2d at 837 (holding that the contract language establishing the accrual date for "causes of action" applied to both contract and tort-based claims); *Schultz*, 134 S.W.3d at 619 (holding that a provision setting the accrual date and shortening

the limitations period for "any alleged cause of action" applied to breach of contract, breach of warranty, and negligence claims).

The courts of Maryland have found no difficulty in upholding contractual limitations periods in the absence of a controlling statute to the contrary or a clear showing of fraud, misrepresentation, or other unconscionable conduct. *See Amalg. Cas. Ins. Co. v. Helms,* 239 Md. 529, 540 (1965) (approving a contractual limitations period shorter than that provided by statute of limitations), *abrogated in part by statute as recognized in Daniels v. NVR, Inc.,* 56 F. Supp. 3d 737, 742 (D. Md. 2014)*; Morabito,* 132 Md. App. at 174; *Scarlett Harbor Assocs. Ltd. P'ship,* 109 Md. App. at 252 (holding that a tolling agreement created the parties' own private, contractually established limitations period). Accordingly, in addressing whether the limitations provision in this case is valid, the three bases for analysis articulated in *Morabito*, *supra*, are appropriate.

First, we have found no controlling statute that prevents parties to a construction contract from bargaining for a contractual limitations period.[17] The general statute of limitations for a civil action, including a breach of contract action, is three years from the date the cause of action accrues, as set forth in Maryland Code (1973, 2013 Repl. Vol.)

[17] The legislature has chosen to declare provisions in insurance and surety contracts that shorten periods of limitations to be against public policy and unlawful. *See* Maryland Code (1995, 2011 Repl. Vol.), Insurance Article § 12-104. However, that provision is inapplicable in the matter *sub judice*. Additionally, we note that, although potentially applicable to KBE's claims, CJP § 5-108 is a statute of repose applying to injury to person or property occurring after completion of improvement to realty, and does not address the discovery rule or the general period of limitations for a civil action predicated on a contract. *See Morabito*, 132 Md. App. at 172.

Courts and Judicial Proceedings Article ("CJP") § 5–101. *Millstone v. St. Paul Travelers*, 183 Md. App. 505, 511 (2008), *aff'd*, 412 Md. 424 (2010). "[T]he purposes of statutes of limitation are to provide adequate time for a diligent plaintiff to bring suit as well as to ensure fairness to defendants by encouraging prompt filing of claims." *Ahmad v. Eastpines Terrace Apartments, Inc.*, 200 Md. App. 362, 372 (2011) (alteration in original) (quoting *Fairfax Sav., F.S.B. v. Weinberg & Green,* 112 Md. App. 587, 612 (1996)). However, there is no statutory bar to prohibit the modification of the general Maryland statute of limitations by contract. *Morabito*, 132 Md. App. at 172.

Second, as we have stated, a statutory limitations period may be shortened by agreement, so long as the limitations period is not unreasonably short. *See Harriman Bros.,* 227 U.S. at 672. We have previously upheld the imposition of a one-year contractual limitations period and determined that "there is no public policy prohibition against judicial enforcement of the one-year limitation period." *Harvey v. N. Ins. Co. of N.Y.*, 153 Md. App. 436, 445 (2003) Indeed, "[c]ourts have frequently found contractual limitations periods of one year (or less) to be reasonable." *In re Cotton Yarn Antitrust Litig.,* 505 F.3d 274, 287 (4th Cir. 2007) (citations omitted) (concluding that a one-year contractual limitations period was reasonable); *see also Daniels*, 56 F. Supp. 3d at 743 (holding that a one-year limitations period in a homebuyer's contract is reasonable in the absence of any authority to the contrary).

In the present matter, where the parties are both sophisticated business actors who sought, by contract, to allocate business risks in advance, we find no basis to conclude that the limitations period KBE drafted into its Subcontract with CSNC is unreasonable. KBE

presents no specific argument as to why a limitation on a bilateral claim is reasonable, whereas a limitation on a procedurally third-party claim between the two parties to the Subcontract is not. Rather, KBE asserts that "the Subcontract also refers to various liabilities that would arise when someone other than KBE or CSNC serves a claim or suit, but the clear and unambiguous wording of paragraph 10 regarding resolution of disputes does not refer to such potential non-bilateral liabilities."

We recognize that, generally, a cause of action for those various liabilities, such as a right of indemnity or contribution, does not accrue until a party seeking such rights suffers or pays a judgment or settlement. *Read Drug & Chem. Co. of Baltimore City v. Colwill Const. Co.*, 250 Md. 406, 422-23 (1968); *see also Tadjer v. Montgomery Cnty.*, 61 Md. App. 492, 497 (1985). However, paragraph 10 by its plain language governs "dispute[s] or claim[s] of any nature arising out of or relating to this Subcontract." We have recognized that parties' freedom to contract as they wish extends to the ability "to contract away rights and consequences that normally would flow . . . from a contract." *Noor v. Centreville Bank*, 193 Md. App. 160, 169 (2010) (quoting *White v. Simard,* 152 Md. App. 229, 248 (2003)). *See, e.g., John L. Mattingly Const. Co. v. Hartford Underwriters Ins. Co.*, 415 Md. 313, 319 (2010) (stating that "'Waivers of Subrogation,' or waivers of the opportunity to make subrogation claims . . . are prevalent in construction contracts" (quoting *Hartford Underwriters Ins. Co. v. Phoebus*, 187 Md. app. 668, 677 (2009))). KBE presents no authority to support that its bargained-for-limitation violates public policy.

Finally, KBE has presented no argument that the limitations period in the Subcontract was the product of fraud, duress, or any other unconscionable conduct. Thus,

no basis exists for invalidating the one-year contractual limitations period on those grounds. Finding no authority to the contrary, this Court holds that, under the specific circumstances of this case, the one-year contractual limitations period in the Subcontract is reasonable and does not violate public policy or Maryland contract law.

III.

KBE argues that a number of the facts relied upon by the trial court were in dispute and that the trial court's characterizations were erroneous.[18] Having determined, as a matter of law, that the Subcontract paragraph 10 limitations period does apply to bar all claims brought more than one year after the subcontractor substantially completed its work, the material fact in this case becomes the determination of the date of substantial completion. Specifically, we must decide whether, under the facts of this case, the date that CSNC is deemed to have substantially completed its work was genuinely in dispute and therefore must be submitted to a finder-of-fact.

On July 30, 2007, KBE terminated CSNC's subcontract for default pursuant to paragraph 14 of the Subcontract via a letter from Vice President of Administration for KBE, Mr. Kleban. Thereafter, CSNC was excluded from the work site and never completed the masonry work. KBE contends that CSNC, therefore, never substantially completed its work. In its Memorandum Opinion and Order, the circuit court observed that

[18] KBE contends that the circuit court was incorrect in: its assertion that KBE was on actual or constructive notice of the defects in CSNC's work; its determination of when CSNC's work was substantially completed; and its characterization of significance of the dates of the Certificate of Substantial Completion, the Occupancy Permit, the Complaint for Mechanic's Lien, Owner's Counterclaim, and KBE's third-party claim.

this "argument makes the date CSNC substantially completed its work a moving target, one with possibly no end, since CSNC was barred from the work site."

On appeal, rather than fully relying on the assertion of perpetual incompletion to avoid any application of the one-year limitations period, KBE conceded in its brief that "at minimum [CSNC] should not be heard to contend that substantial completion occurred at any time before the work actually was completed by other subcontractors." CSNC contends that the date it "substantially complete[d] its work" should be construed as the date KBE terminated its Subcontract and excluded it from the work site. Alternatively, it argues that the date of the issuance of the architect's Certificate of Substantial Completion—upon which Owner accepted the work as substantially complete and assumed full possession of the building—must be deemed the date of substantial completion for the purpose of the paragraph 10 limitation. The circuit court agreed, finding that "the Certificate of Substantial Completion and the Use and Occupancy Permit, which were both issued on or about January 18, 2008, indicate that CSNC's work was substantially completed."

"Substantial Completion" is generally defined as "that point in the construction where the work is sufficiently complete that the owner may occupy or utilize the work for the use for which it was intended." 3 Bruner & O'Connor Construction Law § 8:23; *see also Kinetic Builder's Inc. v. Peters*, 226 F.3d 1307, 1315 (Fed. Cir. 2000) (citing *Franklin E. Penny Co. v. United States,* 524 F.2d 668, 677 (Ct. Cl. 1975) ("A project should be considered substantially completed when it is capable of being used for its intended purpose.")). Ordinarily, the date of substantial completion is a question of fact as to

whether the work truly can be put to its intended use. 5 Bruner & O'Connor Construction Law § 15:15. However, courts have recognized the ability of parties to link the date of substantial completion directly to the issuance of the Certificate of Substantial Completion by contract. *See, e.g., Hilliard & Bartko Joint Venture v. Fedco Sys., Inc.*, 309 Md. 147, 156-57 (1987) (observing, in dicta, that a contractual provision providing that "[t]he Architect shall conduct inspections to determine the Dates of Substantial Completion and final completion . . . and shall issue a final Certificate for Payment," linked the date of completion to the issuance of the architect's certificate).

As the circuit court in the matter *sub judice* noted, "even if a reasonable jury could find that CSNC did not substantially complete its work after being barred from the work site," the date of substantial completion for the whole Project necessarily includes the substantial completion of the masonry work in the Subcontract.[19] Because we are looking at the date of substantial completion for the entire Project (which encompasses the subcontracted for masonry work), we look to the pertinent provisions of the General Contract. Moreover, even KBE argued before the circuit court that "substantial completion" is a term of art and that the definition contained in the General Contract should be applied to paragraph 10 of the Subcontract. The General Contract recognizes the

[19] Additionally, we note that paragraph 2 of the Subcontract provides that the completion date for the work under the Subcontract is set by "Attached Schedule Titled 'ezStorage – Waldorf, Maryland M06-044-01 Master Schedule Created 7-15-2006.'" This master schedule was mandated by General Contract § 3.10. Thus, the master schedule and dates of completion set under the General Contract are part of the limited flow-down incorporation into the Subcontract necessary for the specific work contracted for.

traditional standard for substantial completion as applicable to the Project as a whole in § 9.8.1:

> Substantial Completion is the stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended use.

Furthermore, § 9.8.4 of the General Conditions of the Contract for Construction directly links the date of substantial completion to the issuance of the architect's Certificate of Substantial Completion. It provides:

> When the Work or designated portion thereof is substantially complete**, the Architect will prepare a Certificate of Substantial Completion which shall establish the date of Substantial Completion**, shall establish responsibilities of the Owner and Contractor for security, maintenance, heat, utilities, damage to the Work and insurance, and shall fix the time within which the Contractor shall furnish all items on the list accompanying the Certificate. Warranties required by the Contract Documents shall commence on the date of Substantial Completion of the Work or designated portion thereof unless otherwise provided in the Certificate of Substantial Completion.

(Emphasis added). This precise language has been construed by other courts as conclusively establishing the date of substantial completion as the date of the issuance of the Certificate of Substantial Completion, and as removing the necessity for further factual inquiry. *See, e.g., 15th Place Condo. Ass'n v. S. Campus Dev. Team, LLC*, 14 N.E.3d 592, 601 (Ill. App. Ct. 2014) ("[A]ny evidence regarding when substantial completion may have occurred that does not comport with the terms that were contracted to by the parties is not material and cannot create a material issue of fact.").

In the matter *sub judice*, KBE established through contract that the date of substantial completion is the date on which the Certificate of Substantial Completion was

issued—January 18, 2008. As the court in *15th Place Condo. Ass'n*. observed, this removed the question of the date of substantial completion from the province of the fact-finder, so long as the date of the issuance of the Certificate of Substantial Completion is not in dispute. 14 N.E.3d at 601. It was on that date that the work on the entire Project—including the masonry work under the Subcontract—was deemed substantially complete and the ordinary limitations periods began to run on all other claims and warranties. We find no basis to determine that while the rest of the work is deemed complete for purposes of accrual and limitations, CSNC's work remains incomplete by virtue of their exclusion from the work site.

Substantial completion does not require exact performance of every detail; rather, the test applied by the architect "is one of function and is concerned with whether the owner can make use of the work as it intended." 2 Bruner & O'Connor Construction Law § 5:184 (discussing the duties of the project architect under standard form General Contract AIA Document A201-1988). The issuance of a Certificate of Substantial Completion is evidence, although not necessarily conclusive, that substantial completion has been achieved. *See, e.g., Hagerstown Elderly Assocs. Ltd. P'ship v. Hagerstown Elderly Bldg. Associates Ltd. P'ship,* 368 Md. 351, 355 (2002). Likewise, a certificate of occupancy is evidence of substantial completion bearing on when an owner may utilize the work for its intended use. 3 Bruner & O'Connor Construction Law § 8:23; *see, e.g., Hagerstown Elderly Associates Ltd. P'ship*, 368 Md. at 359 ("[T]he building [] first became available for its intended use in December, 1983, when the City of Hagerstown's final inspection was

completed, a certificate of occupancy was issued, CDA's permission to occupy all units was issued, and the first occupancy by a tenant occurred.").

Significant deviations from the plans and specifications may, in extreme cases, preclude a finding of substantial completion. 3 Bruner & O'Connor Construction Law § 8:23 states, in pertinent part:

> Defective construction, if substantial enough, can prevent a finding of substantial performance. Nevertheless, if the work can be used for its intended purpose notwithstanding the defects, a few courts have found that substantial completion has been achieved.

(Footnotes omitted). KBE does not argue that the latent defects found in CSNC's masonry work negated the substantially complete status of the Project as a whole. Nor has KBE provided sufficient argument to raise such an issue. Rather, it argues that the Project was not "satisfactorily completed" until the remediations were complete. However, there is a clear distinction in construction law between "substantial completion" and "final completion" (or 100% completion). *See* 5 Bruner & O'Connor Construction Law § 15:15. Indeed, KBE itself relied on the status of the Project as substantially complete when filing its original Mechanic's Lien Complaint.

Accordingly, we hold that the date of substantial completion regarding all work on the Project was contractually set by KBE, and that there was no dispute that CSNC's work was complete by January 18, 2008 when the Certificate of Substantial Completion and the Use and Occupancy permit were issued. Because there is no genuine dispute as to any

material fact, the circuit court's grant of summary judgment in favor of CSNC was proper. *See* Rule 2–501(f).

JUDGMENT OF THE CIRCUIT COURT FOR CHARLES COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT/CROSS-APPELLEE.