Circuit Court for Harford County
Case No. 12-C-15-003443

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 962

September Term, 2017

SEAN M. McLAUGHLIN, *et al*.

v.

HUHRA HOMES, LLC.

Wright,
Arthur,
Beachley,

JJ.

Opinion by Beachley, J.

Filed: July 1, 2019

This appeal arises out of a contract dispute between homeowners, appellants Sean and Cindy McLaughlin ("the McLaughlins"), and a homebuilder, appellee Huhra Homes, LLC ("Huhra Homes"). On December 1, 2015, Huhra Homes filed a complaint against the McLaughlins in the Circuit Court for Harford County seeking a mechanic's lien and alleging breach of contract and unjust enrichment. The McLaughlins filed a counterclaim, which was settled before trial. Following a five-day bench trial, the circuit court ruled in favor of Huhra Homes and awarded it a mechanic's lien and a judgment in the amount of $24,144.15. The McLaughlins filed this timely appeal and present four questions for our review, which we have consolidated and rephrased as follows:[1]

1. Did the circuit court err in granting the mechanic's lien and awarding Huhra Homes damages under the contract despite Huhra Homes's violation of a condition precedent?

2. Did the circuit court err in awarding Huhra Homes all requested attorneys' fees?

[1] The McLaughlins presented the following questions:

1. Did the Circuit Court err in granting the mechanic's lien and awarding Huhra damages in the amount of the final progress payment under the Contract (minus applicable setoffs) despite undisputed evidence that Huhra did not satisfy the condition precedent to that payment under the Contract of providing subcontractor lien waivers to the McLaughlins?

2. Did the Circuit Court err in granting the mechanic's lien and awarding Huhra damages despite Huhra's violation of the Custom Home Protection Act by failing to hold payments to the custom home builder in trust?

3. Did the Circuit Court err in awarding Huhra attorneys' fees as a "prevailing party" under the Contract with respect to the McLaughlins' Counterclaim?

4. Did the Circuit Court abuse its discretion in awarding Huhra disproportionate, excessive and unreasonable attorneys' fees and costs under the Contract?

For the reasons discussed below, we discern no error and affirm.

FACTS AND PROCEEDINGS

In 2011, the McLaughlins purchased a tract of land in Jarrettsville, Harford County, Maryland. In 2014, the McLaughlins considered building a home for their family on the property. However, they had difficulty selling their house and eventually came to a "decision making point as far as what to do, whether to continue trying to sell the home . . . or to sell the lot or just trying to do something else with the lot." They eventually decided to build a rental property on the land.

After the McLaughlins decided to build a rental property, Mr. McLaughlin reconnected with Mr. Huhra, whom he had met approximately two years earlier at a wedding. Mr. Huhra, the owner of Huhra Homes, and the McLaughlins started contract discussions the following week. On November 14, 2014, the parties entered into a Custom Home Construction Contract ("the Contract"). The McLaughlins secured financing through BB&T and set a "draw schedule" to pay Huhra Homes at specified points during the construction. The Contract "promised delivery within 150 days" and contained an arbitration clause for contractual disputes.

"[I]n either June or July 2015, the McLaughlins noticed there was mold in the basement of the unfinished dwelling and asked [Huhra Homes] to address it." In September 2015, a storm "led to a window in the basement being broken as well as some flooding," which "caused some additional mold growing in the basement, as well as other water damage." Because of the mold and other construction issues, the McLaughlins contacted the American Arbitration Association in early October 2015 to resolve their

dispute with Huhra Homes. However, the parties were unable to arbitrate their dispute because "the fee wasn't paid." In November 2015, Huhra Homes obtained a Temporary Use and Occupancy Permit[2] from Harford County and the McLaughlins took possession of the home. However, the McLaughlins did not authorize Huhra Homes's final payment. On December 1, 2015, Huhra Homes filed a complaint in the Circuit Court for Harford County seeking a mechanic's lien on the property, and asserted claims for breach of contract and unjust enrichment.[3] The McLaughlins filed a counterclaim on March 7, 2015, alleging breach of contract, negligence, negligent misrepresentation, and violation of Maryland's Consumer Protection Act for an alleged "number of issues and defects" in the home, the location of the home on the property, and "significant issues with water intrusion and mold growth," which made the home "incomplete and uninhabitable." The McLaughlins settled their counterclaim with Huhra Homes's insurance company before trial.[4] After a five-day bench trial, the circuit court ruled in favor of Huhra Homes. The trial judge found, in relevant part:

> I carefully reviewed the contract in this case as well, and the contract is pretty clear that it has a mold disclosure term, and it basically says that

[2] The permit was temporary because a culvert pipe needed to be installed under the driveway. Huhra Homes posted a $2,000 bond for this, and, as we will discuss later, the failure to complete the driveway did not affect Huhra Homes's substantial completion of the home.

[3] Huhra Homes originally named BB&T as a defendant, but BB&T was dismissed on January 12, 2017.

[4] The record indicates that the McLaughlins settled with Huhra Homes's insurance company the day before trial; however, at oral argument, counsel stated settlement occurred a week or two before trial.

there will be some amount of mold found in homes, and that it is not [Huhra Homes's], or the builder's, responsibility to address that, it's the owners' responsibility to address that.

To the extent that Mr. Huhra did attempt to do so, that was more gratuitous than anything else. He wasn't required to do that, it was the [McLaughlins'] responsibilities to take care of that. I sense that there was more frustration and dissatisfaction about the pace of the work in completing the home overall that sort of found its way into the frustration about the mold itself. But when you ultimately examine the contract, and in listening to the evidence itself, the responsibility was not that of [Huhra Homes]. The contract is pretty clear with respect to that.

* * *

So to what extent there had been mold in the home before Mr. Huhra had turned it over to the McLaughlins, I don't find that to be relevant at this point given that there was nobody that opined about the amount of mold or responsibility laying with Mr. Huhra at the time -- prior to the delivery of the home in this case, which is the relevant time frame. And even if there had been, the responsibility still was with the McLaughlins in this matter.

* * *

So I think there was substantial completion in terms of what the contract required, which is: When can an owner occupy the home? Mr. Huhra did what he was required to do.

Now, with respect to any mold remediation and when the McLaughlins wanted to move in, they certainly were able to do that with a [Temporary Use and Occupancy Permit], and I know they have raised an objection about the safety of it based on what their experts found, but that wasn't until much later after Mr. Huhra's responsibility for delivery of the home had passed.

* * *

Again, the Mold Disclosure Provision indicates that the builder gives no warranty with respect to the mold. [Huhra Homes] performed the contract, I believe, as specified. Even by as early as September 2015, the county inspection found that 98 percent of the work had been done. What really remained were a few punch list type items to be completed as a result of the storm, the water damage. So replacing the carpet, making sure that the

> baseboards were put back in, making sure that all the windows were in, the electrical panel, but in terms of other than the mold issue, those were all relatively minor things that needed to be done.
>
> The contract also provides that a draw is not to be withheld for minor punch list type items. By October, if things were substantially completed in this case [Huhra Homes would] be entitled to the draw.
>
> The issue of the [Temporary Use and Occupancy Permit] really was not a relevant factor in my decision in this case. Mr. McLaughlin had taken out the permit for that culvert pipe underneath the driveway, and because the fee hadn't been paid, Mr. Huhra paid that so they could at least get a [Temporary Use and Occupancy Permit]. I think in terms of the work that needed to be done on that, though, [Huhra Homes] had done what [Huhra Homes] was required to do at that point.
>
> * * *
>
> So, as I've indicated, I do find that [Huhra Homes] has substantially performed in this case, entitling [it] to judgment; however, that judgment is to be offset by certain amounts that were paid by the McLaughlins to several of the subcontractors: Manor Electric, Complete Home Solutions, and ATK. The amounts that they paid exceeded the amounts that would have been contracted for under the job.
>
> * * *
>
> Then also -- so subtracting [amounts paid by the McLaughlins to Manor Electric, Complete Home Solutions, and ATK] from the $28,900, the amount due and owing, judgment for [Huhra Homes] on the contract and the unjust enrichment claim because . . . the McLaughlins, substantially benefited to the detriment of [Huhra Homes] in this case, is $24,144.15. And [Huhra Homes] also is entitled to prejudgment interest. I think under the contract it was 1.5 percent, and then . . . [Huhra Homes] also is entitled to reasonable attorney[s'] fees in this case.

The court did not immediately issue an order for attorneys' fees, and the parties filed additional memoranda on that issue. The court subsequently awarded Huhra Homes "$63,818.50 in attorney[s'] fees, $4,150.00 in expert costs, and $1,575.68 in expenses." The McLaughlins noted this timely appeal. Additional facts will be provided as necessary

to address the issues raised on appeal.

STANDARD OF REVIEW

Trials without a jury are governed by Md. Rule 8-131(c), which states:

> When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.

Additionally, "'[t]he interpretation of a contract . . . is a question of law,' which we review de novo." *Ocean Petroleum, Co., Inc. v. Yanek*, 416 Md. 74, 86 (2010) (quoting *Clancy v. King*, 405 Md. 541, 556-57 (2008)).

DISCUSSION

I. THE MECHANIC'S LIEN CLAIM

On appeal, the McLaughlins argue that the circuit court erred when it granted Huhra Homes damages despite "undisputed evidence that Huhra did not satisfy the condition precedent" to receive the final draw payment. They argue that "under the plain language of the Contract, the McLaughlins' obligation to pay Huhra did not arise unless and until Huhra provided lien waivers from 'all applicable subcontractors.'" They further argue that the circuit court made an "implicit" finding that Huhra Homes did not satisfy this condition precedent when it reduced Huhra Homes's judgment by the amounts the McLaughlins paid to Manor Electric, Complete Home Solutions, and ATK. Alternatively, they argue that Huhra Homes violated the Custom Home Protection Act ("CHPA") because it failed to "hold payments . . . in trust."

As previously stated, on November 11, 2014, the McLaughlins and Huhra Homes

signed the Contract. The Contract provided that Huhra Homes would build a home on the McLaughlins' property for $145,000 within "150 days from foundation." Final payment under the Contract was due "on the Substantial Completion Date." The Contract defined this date as

> the date when the construction is sufficiently complete, in accordance with this Contract, so that the Owner can occupy or utilize the Improvement for use as a personal residence. For the purposes of this Contract, the Owner shall be deemed to be able to occupy or utilize the Improvement for use as a personal residence upon issuance of a final inspection certification by the appropriate governmental authorities and upon completion of the Dwelling including punch list items noted in the pre-inspection walk-through.

The Contract also required Huhra Homes to provide "waivers of liens from all applicable subcontractors" in order to receive draw payments. The relevant section of the Contract provides:

> **16. <u>SUBCONTRACTORS.</u>**
>
> A subcontractor is a person or entity who has a direct contract with the Builder to perform any of the work at the site. Subject to the provisions of this paragraph, the Builder shall be authorized to engage those subcontractors it deems necessary to perform the work in accordance with the provisions of the Contract.
>
> Pursuant to Section 10-506(2) of the Maryland Custom Home Protection Act, a Contractor shall identify to the extent known, the names of the primary subcontractors who will be performing a portion of the work. Builder shall deliver to Owner within thirty (30) business days of any progress payment made by Owner, a list of the subcontractors or materialmen who have provided more than Five Hundred and No/100 Dollars ($500.00) of goods or services to date and indicated [sic] which of them have been paid by the Contract. *It shall be a condition precedent to Owner's obligation to pay Builder or any of the progress payments as described herein, that Builder shall provide waivers of liens from all applicable subcontractors, suppliers, materialmen for which Owner made payment to Builder in the preceding Draw progress payment.* A list of the primary subcontractors who will be working on the Dwelling is attached.

(Emphasis supplied).

The McLaughlins made draw payments on March 9, 2015; March 25, 2015; May 12, 2015; and June 8, 2015. However, by mid-July 2015, the relationship between Huhra Homes and the McLaughlins "started to strain." Mr. McLaughlin testified that

> We [the McLaughlins] in our minds had envisioned, you know, we're at the 150 [day] mark, we're about 30 days past his verbal commitment of 120, and the home was, I believe, paid -- we were over $100,000 in, and we had no proof that anybody had been paid. I had been notified by numerous people that they were not paid, and it was a serious concern.
>
> * * *
>
> Mr. Huhra explained to me that this was not part of his process, it's not part of his way of managing construction of a home, and that the bank required payments or proof of payments and lien releases, and that was his intention was to provide this information to the bank at the end of construction.

Despite this strain, the McLaughlins made a draw payment on July 28, 2015. However, on September 25, 2015, Mr. McLaughlin sent Mr. Huhra a letter to "formally notify you of my request that you complete the construction of my home in accordance with our contract" and "[i]f held in trust, for the items we funded to you in-full to you over 45 days ago, yet not paid-in-full to the subcontractors or materialmen, please provide an explanation behind your failure to disperse [sic] the funds and/or produce the waiver of liens within a reasonable period after the receipt." Huhra Homes did not provide the lien waivers in response to Mr. McLaughlin's letter. When the final draw payment came due on October 22, 2015, the McLaughlins did not authorize BB&T to release the funds.

Despite these issues, Mr. Huhra and Mr. McLaughlin completed the final walk-through on November 10, 2015. On November 17, 2015, Huhra Homes sent the

McLaughlins a Temporary Use and Occupancy Permit. Three days later, on November 20, 2015, the McLaughlins took possession of the home and terminated the contract with Huhra Homes. The McLaughlins never paid Huhra Homes the final draw payment. On December 3, 2015, Huhra Homes, through counsel, sent the McLaughlins lien waivers or written confirmation of payment for all subcontractors except Manor Electric, Complete Home Solutions, and ATK. As to the three unpaid subcontractors, Huhra Homes's counsel stated:

> Three subs have not received their final payments because your clients have not disbursed the final $28,900 owed to Huhra Homes. If your client would like to pay them directly, that would be fine. Just let us know when they have been paid and send us releases. These are the amounts owed:
>
> a. Electrical - Manor Electric - $3,350.00
> b. Insulation - Complete Home Solutions - $2,608.14
> c. Interior doors and trim - ATK - $5,032.71.

The McLaughlins directly paid those amounts to Manor Electric, Complete Home Solutions, and ATK by January 8, 2016.[5]

The McLaughlins' appellate argument is straightforward. They contend that their contractual obligation to pay was based on a "condition precedent"; specifically, that Huhra Homes "provide lien waivers from 'all applicable subcontractors.'" As they see it, Huhra Homes's failure to provide lien waivers from Manor Electric, Complete Home Solutions, and ATK relieved the McLaughlins of their duty to pay Huhra Homes.

Maryland courts follow "an 'objective theory of contract interpretation, giving

[5] At oral argument, the McLaughlins confirmed that they were unaware of any other unpaid subcontractors.

effect to the clear terms of agreements, regardless of the intent of the parties at the time of contract formation.'" *Precision Small Engines, Inc. v. City of College Park*, 457 Md. 573, 585 (2018) (quoting *Myers v. Kayhoe*, 391 Md. 188, 198 (2006)). "[I]f the language employed is unambiguous, 'a court shall give effect to its plain meaning and there is no need for further construction by the court.'" *Id*. (quoting *Walker v. Dep't of Human Resources*, 379 Md. 407, 421 (2004)). "The court's interpretation should not permit an absurd or unreasonable result." *Middlebrook Tech, LLC v. Moore*, 157 Md. App. 40, 66 (2004). Concerning conditions precedent, "when a condition precedent is unsatisfied, the corresponding contractual duty of the party whose performance was conditioned on it does not arise." *Chesapeake Bank of Md. v. Monro Muffler/Brake, Inc.*, 166 Md. App. 695, 708 (2006) (quoting *B & P Enters. v. Overland Equip. Co.*, 133 Md. App. 583, 606-07 (2000)).

However, the failure to comply with a condition precedent does not necessarily mean that the non-compliant party loses all rights to recover under a contract. In *B & P Enters. v. Overland Equip. Co.*, this Court addressed such a situation. 133 Md. App. 583. There, a landlord and tenant (a motor vehicle towing and storage company) entered into a commercial lease which included a parking lot to store vehicles. *Id*. at 590-92. During the term of the lease, the tenant's use of the lots was interrupted by citations for permit violations, the sale of some of the property, and failure to provide proper fencing, all of which were the landlord's responsibility under the lease. *Id*. at 592-98. After unsuccessfully attempting to resolve multiple issues involving the landlord's failure to comply with the lease's terms, the tenant filed a complaint in the circuit court. *Id*. at 593-99. The parties' lease contained the following provisions:

> **ARTICLE 13. DEFAULT**
>
> * * * * * *
>
> **13.3. Landlord's Default**. If Landlord fails to perform any covenant, condition, or agreement contained in this Lease within thirty (30) days after receipt of written notice from Tenant specifying such default, or if such default cannot reasonably be cured within thirty (30) days, if Landlord fails to commence to cure within said thirty (30) day period, then Landlord shall be liable to Tenant for any damages sustained by Tenant as a result of Landlord's breach. . . . If, after notice to Landlord of default, Landlord fails to cure such default as provided herein, then Tenant shall have the right to cure such default at Landlord's expense. . . .
>
> * * * * * *
>
> **ARTICLE 15. GENERAL PROVISIONS**
>
> * * * * * *
>
> **15.22. Notices**. Wherever in this Lease it is required or permitted that notice or demand be given or served by either party to this Lease to or on the other, such notice or demand shall be in writing and shall be deemed duly served or given only if personally delivered or sent by United States mail, certified or register [sic], postage prepaid, to the address of the parties as specified below. . . .

Id. at 602-03. Although the tenant communicated multiple times with the landlord concerning the landlord's breaches and the landlord conceded it had notice, the tenant never personally delivered its request to the landlord, nor did it send the request via certified mail or registered mail as required by the contract. *Id.* at 603.

This Court held that the notice provision contained an express condition concerning notice of a default. *Id.* at 609. However, the tenant's failure to comply with that condition did not end the Court's inquiry. *Id.* at 610. The Court quoted Restatement (Second) of Contracts § 229, which states

> To the extent that the non-occurrence of a condition would cause disproportionate forfeiture, a court may excuse the non-occurrence of that condition unless its occurrence was a material part of the agreed exchange.

Id. at 610 (quoting Restatement (Second) of Contracts § 229). The Court then looked to the commentary for additional clarification:

> In determining whether the forfeiture is "disproportionate," a court must weigh the extent of the forfeiture by the obligee against the importance to the obligor of the risk from which he sought to be protected and the degree to which that protection will be lost if the non-occurrence of the condition is excused to the extent required to prevent forfeiture.

Id. (quoting Restatement (Second) of Contracts § 229 cmt. b.).

Using this guidance, the Court held that the notice requirement "undoubtedly protects the parties . . . by insuring that no question arises as to whether a contracting party is . . . on notice[,]" but that the "extensive paper trail" in the record made clear that the landlord had actual notice. *Id*. at 612. Therefore, the "notice effected pursuant to [the lease requirements] in this case would have been, at best, duplicative" and there was no prejudice to the landlord. *Id*. at 612-13. Although the Court determined that the notice provision constituted a condition precedent to contractual performance, it refused to enforce that provision in light of the landlord's actual notice. *Id.* at 613.

Similarly, in construction contracts, Maryland courts have considered whether the builder has substantially performed the contract for purposes of determining whether a condition precedent has been met. *Gamble v. Woodlea Const. Co.*, 246 Md. 260 (1967). In *Gamble*, disputes concerning "the performance of the building contract" arose between the Gambles and their home builders. *Id*. at 262. During the arbitration process, work on the house stopped. *Id.* Eventually, the parties came to an agreement that, among other

things, the construction would immediately resume, and the project would be completed within twenty-one days, subject to weather delays. *Id*. On the twenty-first day, the house was not finished. *Id*. The exterior of the house required work that was delayed due to the weather, the interior floors still required sanding and finishing, and "other relatively small interior items" remained unfinished. *Id*. at 262-63. Eleven days later, the Gambles "ordered [the builder] off the job and refused permission to do further work." *Id*. at 263. The Gambles refused to make any further payments, moved into the house, and completed the work themselves. *Id*.

After setting forth the applicable law of substantial completion, the Court held that the circuit court was not clearly erroneous in finding that the builder had substantially performed the contract. *Id*. at 264-65. Quoting *Hammaker v. Schleigh*, 157 Md. 652, 668-69 (1929), the Court stated

> In a building contract where the plaintiff, in good faith, performs all that the contract requires, although not at the time or in the manner required, but substantially as agreed, except in respect to those things which he is prevented from performing through the breach or default of the owner, the plaintiff is entitled, when the owner has received the fruits of plaintiff's work, material and labor, to recover, since full performance has failed in those things which are not of the essence of the contract, and since otherwise there would be a forfeiture of the plaintiff's beneficial work, labor and material to the unjust enrichment of the owner.
>
> * * * The mode of ascertaining the real benefit derived by the owner from the substantial performance of the contract where there has been no willful breach going to the essence of the contract, but comparatively slight omissions and defects in performance, which can be readily ascertained, measured, and compensated in damages, is ordinarily to estimate the whole work at the price fixed by the contract, and to deduct from the amount whatever sum would be required to complete the part of the work left unfinished through the default of the contractor.

Gamble, 246 Md. at 264-65 (alternation in original) (emphasis removed) (quoting *Hammaker*, 157 Md. at 668-69). The determination of "whether there has been substantial compliance and whether a deviation from contract requirements is willful or justified, is ordinarily a question for the trier of the facts." *Id*. at 265 (quoting *Evergreen Amusement Corp. v. Milstead*, 206 Md. 610, 621 (1955)).

Here, neither party disputes that the lien waiver requirement was a condition precedent to Huhra Homes's right to receive draw payments. The lien waivers were intended to protect the McLaughlins against any subcontractor lien that could be filed against the McLaughlins and their property if Huhra Homes failed to pay the subcontractors. The parties likewise do not dispute that Manor Electric, Complete Home Solutions, and ATK had not been paid as of the December 3, 2015 letter from Huhra Homes's attorney. Although Huhra Homes's failure to provide lien waivers for these subcontractors constituted a breach of a condition precedent in the contract, the McLaughlins personally paid Manor Electric, Complete Home Solutions, and ATK. The circuit court reduced Huhra Homes's claim by those amounts, thereby giving the McLaughlins full credit for their payments to satisfy the three remaining subcontractors. After the McLaughlins made those payments, there is no evidence that any other subcontractor could have properly filed a mechanic's lien against the McLaughlins' home. Because no subcontractor could successfully file a mechanic's lien against the

McLaughlins' home, there was no need for the protection of the lien waiver provision.[6] Therefore, the circuit did not err in determining that the condition precedent concerning lien waivers did not bar Huhra Homes's mechanic's lien claim.[7]

The circuit court further found that "there was substantial completion in terms of what the contract required, which is: When can an owner occupy the home? Mr. Huhra did what he was required to do." The contract defines "substantial completion date" in § 9.2 as

> the date when the construction is sufficiently complete, in accordance with this Contract, so that the Owner can occupy or utilize the Improvement for use as a personal residence. For the purposes of this Contract, the Owner shall be deemed to be able to occupy or utilize the Improvement for use as a personal residence upon the issuance of a final inspection certification by the appropriate governmental authorities and upon completion of the Dwelling including punch list items noted in the pre-inspection walk-through.

This is modified later in the contract by § 9.3:

[6] We also acknowledge that Huhra Homes is correct that Complete Home Solutions and ATK could not have asserted liens because the time to do so had expired under Md. Code (1974, 2015 Repl. Vol.), § 9-104(a) of the Real Property Article ("RP"). RP § 9-104(a) requires subcontractors to give "written notice of an intention to claim a lien" within "120 days after doing the work." Here, Complete Home Solutions and ATK completed their work by July 15, 2015, more than 120 days before Huhra Homes filed suit. The record is unclear concerning when Manor Electric completed its work.

[7] Concerning the McLaughlins' lien waiver argument based on the CHPA, we see no significant difference between the CHPA's lien waiver requirement and § 16 of the Contract. *See* RP § 10-505(6) ("The custom home contract shall: . . . [r]equire that the custom home builder provide waivers of liens from all applicable subcontractors, suppliers, or materialmen within a reasonable time after the final payment for the goods or services they provide."). Regarding the McLaughlins' argument that the CHPA required Huhra Homes to hold the McLaughlins' payments in trust, the McLaughlins readily conceded at oral argument that the remedy for any trust violation is to file a consumer protection claim.

> Between November 1st and June 1st, the Dwelling shall be considered substantially complete and ready for occupancy under the terms hereof even though the exterior painting, lot grading, seeding, sodding, planting, retaining walls, patios, fences, sidewalks and/or driveways and other minor items of a cosmetic or seasonal nature are not complete. No escrow will be withheld from the Builder and no draw will be delayed due to inability to complete exterior work because of weather conditions.

Here, the McLaughlins took possession of the home and terminated the contract with Huhra Homes on November 20, 2015. We note that a determination of "substantial completion" under § 9.2 is not dependent on the builder providing lien waivers.[8] We conclude that the trial court was not clearly erroneous in finding that the home was substantially complete when the McLaughlins took possession in November 2015. Accordingly, we affirm the circuit court's award of $24,144.15 to Huhra Homes as contract damages.

II. ATTORNEYS' FEES

Next, the McLaughlins argue that the circuit court erred to the extent it awarded Huhra Homes attorneys' fees related to the McLaughlins' counterclaim because Huhra Homes was not the "prevailing party" as to the claim. As previously stated, the McLaughlins settled their counterclaim with Huhra Homes's insurance company before trial. They argue that "[a] party who settles prior to trial - particularly one who is the payor in connection with the settlement - and does not obtain a judgment is not a prevailing party" on the counterclaim. The McLaughlins also argue that the circuit court erred in its

[8] The reason the McLaughlins only had a temporary Use and Occupancy Permit was because of an issue concerning the driveway. Because the McLaughlins took possession in November, the driveway did not have to be finished under § 9.3 of the Contract.

application of the standard for attorneys' fees awarded under a contract for three reasons: (1) "the [c]ircuit [c]ourt utterly failed to apply [the Md. Rule 19-301.5] standard in any meaningful way" and "in purely conclusory fashion" awarded Huhra Homes the entire amount of its request; (2) "the [c]ircuit [c]ourt failed entirely to perform the proportionality analysis required by Rule 19.301.5 . . . to determine whether the attorneys' fees requested were significantly disproportionate to the dollar amount at issue"; and (3) the court awarded the request in full "at least in part for punitive reasons." We reject the McLaughlins' arguments and affirm the award.

The Contract contains two separate provisions that allow for attorneys' fees:

> 6. **PROGRESS PAYMENTS**
>
> * * *
>
> 6.6. No escrow will be withheld from any payment due to the Builder for any reason unless the Builder agrees to the same in writing. If the Builder must use legal action to secure payment of any funds due hereunder, the Owner shall be responsible for all reasonable expenses, including, but not limited to, reasonable attorneys fees, administrative expenses, and court costs, incurred by the Builder in the collection of said past due funds.
>
> * * *
>
> 11. **DISPUTE RESOLUTION**
>
> * * *
>
> 11.2 Owner and Builder, however, shall have the right at the time any arbitration procedure is initiated to elect to disaffirm this agreement to arbitrate, and instead exercise his or its right to pursue any remedy available to him or it under this Contract in a Court of competent jurisdiction. Notice of the party's election to disaffirm this agreement to arbitrate must be in writing and be in accordance with the terms of this Contract. In the event the parties so disaffirm arbitration and proceed in a Court of competent jurisdiction, the prevailing party shall be entitled to an award of reasonable

attorney's fees. Owner waives right to trial by jury.

In its bench opinion, after the circuit court determined that the McLaughlins owed Huhra Homes $24,144.15 in compensatory damages, the court stated,

> In this case, in reviewing the work that was done, the nature of the obligation of [Huhra Homes] in this case, the nature of the litigation in this matter, I believe that [Huhra Homes] is entitled to a reasonable attorney[s'] award or fee award of 15 percent.

Huhra Homes's attorney reminded the court that the parties "had an agreement [that] we would submit the attorney[s'] fees and experts' fees afterwards" and requested time to brief the court on these issues. The court agreed to "hold off on an order" until it received the briefings. However, it also commented that

> I don't want to prejudge it, but I really do think, as I said earlier, this is a case that could have been resolved a lot sooner with a lot less expense to both sides either by way of arbitration or even in the district court. I think what brought it into the circuit court, there being the counterclaim and the jury trial prayer, that sort of raises the expectations about how much time the [c]ourt will give you to try a case. But I will be honest, I don't think this is a $50,000 attorney[s'] fee case. I do think it's a 15 percent of the amount. So you're more than willing to submit that, I will hear from the other side, but I don't want to be disingenuousness in telling you that I am going to engage in any different analysis.

The parties thereafter submitted memoranda on attorneys' fees. Huhra Homes requested "$63,818.50 in attorney[s'] fees, $4,150.00 in expert costs, and $1,575.68 in expenses[.]" Huhra Homes claimed that "[t]he bulk of these expenses were the result of overcoming the [McLaughlins] 'going on the offense' as part of their effort to avoid the repercussions of breaching the contract, including a meritless counterclaim."

The court, in a written opinion, granted Huhra Homes's request and awarded it all requested fees and costs. The trial judge admitted that she initially believed that an

appropriate attorneys' fees award would be 15% of the judgment; however, the court stated that "[u]pon further review of the evidence, I now take this opportunity to better exercise my discretion and revise this award." The court found that

> First, although this matter originated as a mechanic's lien, the elements of breach of contract, and the competing counter-claim and cross-claim greatly enhanced the case's complexity. Although the counter-claim was settled and the cross-claim ultimately was dismissed, these dispositions occurred on the eve of trial, but still required [Huhra Homes] to prepare for a significantly more involved matter at trial. The [McLaughlins] called six experts to testify versus the two experts [Huhra Homes] called to testify. In addition, [Huhra Homes] endured the indignity of being charged by the [McLaughlins] with criminal trespass. This incident was ultimately dismissed by the State of Maryland prosecuting attorney, however, that was not until [Huhra Homes] was subjected to the potential for public derision over what was a contract dispute, not an incident that reflected any illegal transgression the trespass laws were enacted to proscribe.

The court then considered the Md. Rule 19-301.5 factors and found that

> I am persuaded that the evidence upon which I concluded [Huhra Homes] met [its] burden of proof (factors 1 and 4), the invoices for the experts called by [Huhra Homes] relative to their testimony (factor 1), the attorney fee invoices submitted by [Huhra Homes] (factor 3), and the information provided in [Huhra Homes's] Memorandum Regarding Attorney[s'] Fees (factors 1-3, 5-7) all substantiate [Huhra Homes's] argument that $3,621.68 is an insufficient amount of attorney[s'] fees in this case.
>
> * * *
>
> Finally, and more importantly, [Huhra Homes] is entitled to an award of attorney[s'] fees and costs that appreciates the totality of circumstances involved in preparing the case (from the initial investigation to organizing for trial), trying the case (ensuring the appearance of witnesses and the presentation of tangible [ ] evidence), and obtaining the desired results. The last one is not always an adequate means by which to evaluate the first two. Here, I now realize that 15 percent of the judgment is not an adequate means by which to judge the reasonableness of the fees [Huhra Homes] incurred given the factors outlined in Md. Rule 19-301.5.

"Contract provisions providing for awards of attorney's fees to the prevailing party in litigation under the contract generally are valid and enforceable in Maryland." *Myers*, 391 Md. at 207. "The trial court's determination of the reasonableness of attorney's fees is a factual determination within the sound discretion of the court, and will not be overturned unless clearly erroneous." *Id*. A factual determination is not clearly erroneous "[i]f there is any competent and material evidence to support the factual findings of the trial court[.]" *L.W. Wolfe Enters., Inc. v. Md. Nat'l Golf, L.P.*, 165 Md. App. 339, 343 (2005) (quoting *YIVO Inst. for Jewish Res. v. Zaleski*, 386 Md. 654, 663 (2005)). "An award of attorney's fees will not be disturbed unless the court 'exercised [its] discretion arbitrarily or [its] judgment was clearly wrong.'" *Ochse v. Henry*, 216 Md. App. 439, 455 (2014) (alteration in original) (quoting *Danziger v. Danziger*, 208 Md. 469, 475 (1955)).

When considering an attorneys' fee award based on contract, the trial court should consider the factors set forth in Md. Rule 19-301.5.[9] *Monmouth Meadows Homeowners Ass'n., Inc. v. Hamilton*, 416 Md. 325, 336-37 (2010). These factors include:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment of the attorney;
>
> (3) the fee customarily charged in the locality for similar legal services;

[9] This rule was formerly known as Rule 1.5(a) of the Maryland Lawyers' Rules of Professional Conduct.

> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the attorney or attorneys performing the services; and
>
> (8) whether the fee is fixed or contingent

Md. Rule 19-301.5(a)(1)-(8). When applying these factors, "trial judges should consider the amount of the fee award in relation to the principal amount in litigation" and "the relative size of the award is something to be evaluated." *Monmouth Meadows*, 416 Md. at 337. However, a court is not required to "explicitly comment on or make findings with respect to each factor." *Id.* at 337 n.11.

Here, the plain language of the contract supports the court's decision to award Huhra Homes attorneys' fees. Section 6.6 of the Contract states that

> If the Builder must use legal action to secure payment of any funds due hereunder, the Owner shall be responsible for *all* reasonable expenses, including, but not limited to, reasonable attorneys fees, administrative expenses, and court costs, incurred by the Builder in the collection of said past due funds.

(Emphasis added).[10] The circuit court found that arbitration did not occur because "the fee

[10] The circuit court apparently relied upon § 11.2 of the Contract to make the award. However, because this is a suit "to secure payment of any funds due," § 6.6, which has no requirement that Huhra Homes be the prevailing party, is most applicable. Furthermore, § 11.1's provision includes "[a]ll disputes between the parties that may arise under [the] Contract" and is therefore much broader than the narrower § 6.6 provision. Using the plain meaning of the Contract, suits involving payments are distinct from any other disputes that may arise under the Contract. At oral argument, the McLaughlins stated that it did not

wasn't paid." Because arbitration was not an option, Huhra Homes's only option to recover the funds due under the Contract was to file suit. After Huhra Homes initiated legal action, the McLaughlins chose to file a counterclaim and, to the extent that the attorneys' fees requested involved defense of the counterclaim,[11] they were a reasonable expense of proceeding with a suit to collect monies due under § 6.6 of the Contract.

Furthermore, the McLaughlins' other contentions concerning attorneys' fees lack merit. The circuit court referenced the Rule 19-301.5 factors and considered the proportionality of the award of damages in its written opinion. The circuit court expressly mentioned all but one of the Rule 19-301.5 factors in its opinion, and noted in a footnote that the eighth factor (whether the fee was fixed or contingent) was not applicable in this case. Regarding proportionality, the circuit court, having just made its judgment on damages, initially thought that the attorneys' fees should be approximately 15% of the

matter which fee provision the court used for the purposes of appellate review. Regardless, "an appellate court may affirm a trial court's decision on any ground adequately shown by the record even though the ground was not relied upon by the trial court or the parties." *YIVO Inst. for Jewish Res.*, 386 Md. at 663 (citing *Offutt v. Montgomery Cty. Bd. of Educ.*, 285 Md. 557, 563 n.3 (1979)).

[11] In its memorandum regarding attorneys' fees, Huhra Homes says that in its role as counter defendant, it was represented by staff counsel at the insurance company, "and thus was provided with thousands of additional dollars of legal services." Huhra Homes did not request any payment of these fees under the "collateral source doctrine." In their response, the McLaughlins stated that:

> The defense of the counterclaim and specifically the legal fees of [insurance company staff counsel] were <u>not</u> paid for by Huhra and therefore cannot be the cause of the unreasonable fees.

At oral argument, the McLaughlins candidly conceded that it was "unclear" whether any of Huhra Homes's claimed fees were related to defense of the counterclaim.

judgment. However, the trial court "better exercise[d] [its] discretion" when it accepted Huhra Homes's argument concerning an increased amount of attorneys' fees and concluded:

> Finally, and most importantly, [Huhra Homes] is entitled to an award of attorney[s'] fees and costs that appreciates the totality of circumstances involved in preparing the case (from the initial investigation to organizing for trial), trying the case (ensuring the appearance of witnesses and the presentation of tangible of evidence), and obtaining the desired result. The last one is not always an adequate means by which to evaluate the first two. Here, I now realize that 15 percent of the judgment is not an adequate means by which to judge the reasonableness of the fees [Huhra Homes] incurred given the factors outlined in Md. Rule 19-301.5.

In our view, the court adequately considered proportionality of the award in making its attorneys' fee determination.

Finally, although the circuit court noted that Huhra Homes "endured the indignity" of being charged with criminal trespass, there is nothing in the court's opinion that suggests that its award was punitive in nature. Therefore, we hold that the trial court properly exercised its discretion and affirm its attorneys' fees award in favor of Huhra Homes.

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