UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1014

September Term, 2014

SECURITY SQUARE HOLDING, LLC, ET AL.

v.

SECURITY WARDS, LLC

Eyler, Deborah S.,
Nazarian,
Sharer, J. Frederick
(Retired, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: November 20, 2015

This appeal poses an existential dilemma, and to solve it we must divine the meaning, or range of meanings, of three common words—"not" and "any one"—as they appear in the termination provision of a lengthy and complicated contract. The parties are the owners of several properties that comprise Security Square Mall (the "Mall"), and the contract is their Third Agreement Modifying and Supplementing Construction, Operation and Reciprocal Easement Agreement (the "Third Agreement"). The interpretive dispute matters because if the Third Agreement has terminated, appellee Security Wards, LLC's ("Security Wards") obligations under that contract would no longer prevent it from constructing two new office buildings on its portion of the Mall property.[1]

Security Wards argues, and the Circuit Court for Baltimore County found, that the termination provision of the Third Agreement was unambiguous and that the contract terminated when the qualifying retail facility on one ("any one") of the named tracts closed in 2001. Appellant Security Square Holding, LLC ("Sec Square") counters that the Third Agreement has not terminated, and will not terminate, so long as a qualifying retail facility is operating on "any one" of the named tracts (as one still is). Sec Square contends as well that Security Wards is estopped from arguing that the contract terminated because Security Wards has touted the ongoing existence of the Third Agreement in other contexts, and specifically in filings supporting the office building proposal. We are not persuaded that judicial estoppel applies, but we find the termination provision of the Third Agreement

[1] No other legal or regulatory issues relating to the proposed office building project are before us in this case.

ambiguous, so we reverse the summary judgment in favor of Security Wards and remand for further proceedings.

I. BACKGROUND

The parties to this case (or their predecessors) developed the Mall in the early 1970s. The Mall is not a singular property, but rather a confederation of separately owned tracts that are integrated and governed according to a Construction, Operation and Reciprocal Easement Agreement ("COREA"). The COREA has been modified three times, and the operative version, the aptly named Third Agreement, was executed on August 1, 1979. Sec Square owns a tract known as the "Developer Tract"; Sears, Roebuck & Co. ("Sears") owns, not surprisingly, the "Sears Tract"; Macy's Retail Holdings, LLC ("Macy's") owns a tract now known as the "May Tract"; and Security Wards owns the "H-K Tract" (named after the Hochschild Kohn department store it once housed). Another tract, the "Penney Tract," formerly contained a J.C. Penney store; its owner, SY LLC ("SY"), has not participated in this litigation.

The COREA defines a complicated set of property and governance relationships. The only aspect of these relationships at issue here is the Third Agreement's self-executing termination clause, Section 1.1. Section 1.1 defines the Third Agreement's "Termination Date" primarily by reference to the operation (or not) of large retail facilities on the named tracts (although it also has an ultimate endpoint if no triggering events occur in the meantime):

> Section 1.1. The term "Termination Date" shall refer to the date when this Agreement shall terminate, which date shall

> be the first to occur of: . . . (iii) the date upon which, subject to the provisions of Article XIII[2] hereof, a retail facility of at least 100,000 square feet of Floor Area is *not* being operated on *any one* of the Sears Tract *or* the H-K Tract *or* the Penney Tract . . . ; or (iv) April 6, 2021.

(Emphasis added.)

In 2001, Montgomery Ward & Co., the then-lessee of the H-K Tract, filed for bankruptcy and closed the qualifying store it had been operating in that space. Currently, portions of the H-K Tract are occupied by lessees, USA Discounters and North American Trade Schools, but over half of the tract remains unoccupied, and no retail facility of at least 100,000 square feet of floor area has operated on the H-K Tract since the Montgomery Ward's store closed. J.C. Penney also closed its qualifying store on the Penney Tract in 2001. The Penney Tract is now occupied in part by a group of smaller stores known as Seoul Plaza. But the Penney Tract remains largely unoccupied too, and no retail facility of at least 100,000 square feet of floor area has operated on the Penney Tract since the J.C. Penney store closed. The Sears Tract still houses an operating retail facility of at least 100,000 square feet of floor area, and always has.[3]

This case arises from Security Wards's desire to build two five-story office buildings on the H-K Tract. On September 6, 2001, Helmsman Property Services ("Helmsman"), Security Wards's predecessor, agreed to purchase the H-K Tract, and on

[2] Article XIII creates covenants for the parties to operate their department stores on 80% of their respective tracts until fixed dates in 1997 and 1998. The operation of Article XIII is not at issue here.

[3] The May Tract also houses a qualifying store, but the presence or absence of an operating retail facility on that tract has no bearing on the operation of Section 1.1.

November 5, 2001, Helmsman entered into an Agreement and Termination of Lease ("November 5th Agreement") with the seller and with Sec Square's predecessor. Paragraph 5 of the November 5th Agreement acknowledged the fact of the Third Agreement and that any further development of the tract had to comply with (or at least not violate) it:

> *[T]he Mall is encumbered by that certain* [COREA] . . . amended and restated in the *[Third Agreement]* dated August 1, 1979 . . . . [Sec Square's predecessor] agrees that in its capacity as Developer under the [Third Agreement] it shall cooperate with Helmsman and not unreasonably withhold its consent to any use for the [H-K Tract] which complies with applicable zoning ordinances so long as (a) *it is not in clear contravention of a specific provision and intent of the [Third Agreement]*.

(Emphases added.)

Next, on December 14, 2001, Security Wards entered into a Termination Agreement with Sec Square's predecessor, in which Security Wards acknowledged that it "acquired the interest of Helmsman under the Agreement of Sale, and agreed to be bound by the provisions of the [November 5th Agreement]." In this Termination Agreement, Security Wards also represented that "as the owner of the [H-K Tract] from and after the date on which it acquires the [H-K Tract] in fee . . . , [Security Wards] *shall be bound by and responsible for obligations of the owner/anchor tenant of the [H-K Tract] under the [Third Agreement]*." (Emphasis added.)

In 2002, Security Wards entered a Common Area Maintenance and Security Services Agreement ("CAM") with the then-property manager for the Mall. Under the CAM, Sec Square's predecessor agreed to perform certain work and parking lot services, and Security Wards agreed to pay a *pro rata* share of the costs associated with those

services, which included janitorial services and maintenance of access roads. The CAM also referenced the Third Agreement in a manner that seemed to assume that it remained in effect: "Except for the Scope of Work listed above, Security Wards LLC will at its own expense maintain, manage and secure its parcel *in accordance with the COREA*." (Emphasis added.)

The parties conducted themselves in accordance with these agreements for seven years after the Montgomery Ward and J.C. Penney stores closed, and during that time, nobody expressed the view that the Third Agreement had terminated in 2001. Then, in 2008, Security Wards asked the Baltimore County Zoning Office staff for an opinion, in the form of a "Spirit and Intent Letter" ("2008 Letter"), that the construction of two five-story office buildings would be consistent with the "spirit and intent" of the governing zoning law. Security Wards's letter, which the Zoning Office countersigned,[4] represented that a new "shared parking analysis" and a 1988 parking variance created an adequate number of parking spaces for the office buildings. In 2009, Security Wards submitted a "Second Refined C.R.G. Plan" to the County Permits, Approvals and Inspections Office, and two months later sent a Notice of Termination of the Third Agreement to Sec Square, Sears, and Macy's (collectively, the "appellants"). The appellants disagreed in writing that the Third Agreement terminated, and Security Wards filed a declaratory judgment action in circuit court, which it voluntarily dismissed in May 2011. Around this same time,

[4] The countersignature represents the Zoning Office's indication that the proposed project complies with the "spirit and intent" of the zoning laws and would require no further zoning relief.

Security Wards also submitted a "Third Refined C.R.G. Plan" that relied on the same shared parking analysis as the Second Refined C.R.G. Plan. We discuss these submissions in more detail below.

On March 11, 2013, Security Wards filed the Complaint for Declaratory Relief giving rise to this case. The Complaint named the other tract owners as defendants and asked the circuit court to declare that the Third Agreement terminated in 2001, pursuant to Section 1.1, because a retail facility of at least 100,000 square feet of floor area was *no longer being operated* on at least *one* of the tracts. Sec Square read the language in exactly the opposite way, *i.e.*, that the Third Agreement remained in force because a qualifying retail facility continued to operate on *one* of the relevant tracts. Both parties took the position that the Third Agreement was unambiguous, and the parties filed cross-motions for summary judgment.

After hearings, the circuit court agreed with Security Wards's reading of the Third Agreement and entered summary judgment in its favor. The court found that Section 1.1 was not ambiguous and that the Third Agreement terminated when the Montgomery Ward store closed:

> By case law interpretation utilizing the controlling objective theory of contract interpretation in Maryland [Section 1.1] is sufficiently clear. A retail facility of at least 100,000 square feet of Floor Area no longer exists on [Security Wards]'s tract (with the 2001 bankruptcy and vacation of that Tract by Montgomery Ward) and the Third Agreement terminates.

The court rejected Sec Square's argument that other provisions in the Third Agreement compelled a different interpretation of the termination clause, and also rejected

Sec Square's argument that Security Wards was estopped by post-2001 conduct from asserting that the Third Agreement had terminated. Sec Square appeals.

II. DISCUSSION

Security Wards argued, and the circuit court agreed, that the Third Agreement terminated in 2001 when Montgomery Ward closed its store and left one of the named tracts without an operating retail facility of at least 100,000 square feet. Sec Square counters with three arguments.[5] *First*, it contends that the Third Agreement remains in force so long as "any one" of the three tracts contains a qualifying retail facility, which the Sears Tract does, and that Security Wards's interpretation of the "any one" language would render other continuing contractual obligations meaningless. *Second*, Sec Square claims that Security Wards is judicially estopped from asserting that the Third Agreement terminated because Security Wards relied (misleadingly, Sec Square alleges) on the provisions of the Third Agreement in its communications with Baltimore County zoning

[5] Sec Square phrased the issues as follows:

1. Did the trial court err in concluding as a matter of law that Appellee was not judicially estopped from asserting that the Third Agreement terminated?

2. Did the trial court err in concluding as a matter of law that the Third Agreement terminated in 2001 because a retail facility of at least 100,000 square feet ceased to be operated on one of the tracts?

3. Assuming that the Third Agreement terminated in 2001, did the trial court err in concluding as a matter of law that Appellee did not reaffirm or renew the Third Agreement?

authorities. And *third*, even if we were to find that the Third Agreement terminated, Sec Square argues that Security Wards reaffirmed or renewed it by executing subsequent agreements that relied on the Third Agreement and by acting in accordance with the Third Agreement since 2001.

Summary judgment is appropriate when there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Md. Rule 2-501(e); *Hamilton v. Kirson*, 439 Md. 501, 521-22 (2014). In deciding whether to grant a motion for summary judgment, a circuit court is not to weigh the evidence or examine credibility, but to consider "whether the evidence presents a sufficient disagreement to require submission to a jury or whether [the issues presented are] so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 251-52 (1986).

We review summary judgments *de novo* and in two steps. *First*, we determine whether there was any genuine dispute as to a material fact, *i.e.*, "a fact the resolution of which will somehow affect the outcome of the case." *King v. Bankerd*, 303 Md. 98, 111 (1985). *Second*, if there is no genuine dispute of material fact, we determine whether the party who obtained summary judgment was entitled to judgment as a matter of law. *Wooldridge v. Price*, 184 Md. App. 451, 457 (2009) (quoting *Zitterbart v. Am. Suzuki Motor Corp.*, 182 Md. App. 495, 501-02 (2008)). We review the record in the light most favorable to the nonmoving party. *Newell v. Johns Hopkins Univ.*, 215 Md. App. 217, 234 (2013).

A. Security Wards Is Not Estopped From Asserting That The Third Agreement Terminated.

Sec Square urges us to resolve this case without parsing the Third Agreement itself, but rather by applying the doctrine of judicial estoppel. Sec Square argues that because Security Wards took positions with the Baltimore County zoning office that relied on the continuing vitality of (and rights arising under) the Third Agreement after 2001, it cannot now disavow that Agreement (and Security Wards's corresponding obligations to the other tract owners). We agree that Security Wards seems to be trying to have it both ways, and we will leave it to the Baltimore County Zoning Office to decide whether it has been misled. That said, we disagree that judicial estoppel precludes Security Wards from arguing in this case that the Third Agreement terminated in 2001.

Judicial estoppel applies to "prevent[] a party from taking a position in a litigation where: (1) that party took an inconsistent position[6] . . . in an earlier litigation, (2) a court accepted the earlier inconsistent position, and (3) the party intentionally misled the court to gain an unfair advantage." *DynaCorp Ltd. v. Aramtel Ltd.*, 208 Md. App. 403, 472-70 (2012); *cf. Vogel*, 151 Md. App. at 708-09 (citation omitted) (stating that the factors are

[6] The parties disagree as to whether judicial estoppel only precludes a party from taking an inconsistent legal position, and does not apply to inconsistent factual positions. Although some cases do suggest that the distinction matters, *compare Thomas v. Bozick*, 217 Md. App. 332, 341 n.5 (2014) ("[T]he position must be one of fact rather than law or legal theory." (quoting *Vogel v. Touhey*, 151 Md. App. 682, 711 (2003))), *with DynaCorp v. Aramtel Ltd.*, 208 Md. App. 403, 468 n.33 (2012) (expressly recognizing the applicability of judicial estoppel to factual *or* legal positions) (citations omitted), *with Chaney Enters. Ltd. P'ship v. Windsor*, 158 Md. App. 1, 38-42 (2004) (referring only to a position, and never distinguishing a factual from a legal position) (citations omitted), we will assume the broader view for present purposes.

not "inflexible prerequisites[,]" and that considerations pertaining to specific facts of a case are also permitted). "[T]he doctrine of judicial estoppel 'rests upon the principle that a litigant should not be permitted to lead a court to find a fact one way and then contend in another judicial proceeding that the same fact should be found otherwise.'" *Gordon v. Posner*, 142 Md. App. 399, 425 (2002) (citations omitted). "Judicial estoppel ensures the 'integrity of the judicial process' by 'prohibiting parties from deliberately changing positions according to the exigencies of the moment.'" *Id.* (quoting *New Hampshire v. Maine*, 532 U.S. at 750 (2001) ("[O]ne cannot play fast and loose." (citations omitted)).

Sec Square accuses Security Wards of relying three different times on the Third Agreement in order to obtain permission to construct office buildings, and then later seeking to declare the Third Agreement void when it came time to begin construction.[7] *First*, in the 2008 Letter to the Zoning Review Office, Security Wards referenced an enclosed parking plan that presented parking calculations for the entire Mall property based on a shared parking chart and a 1998 parking variance in favor of the Mall. The 2008 Letter asked the Zoning Office to agree that the proposed construction would enjoy the same parking variance relief that was granted to the Mall property in 1998, and that Security Wards could proceed with construction "without any further zoning relief related to parking."[8] Sec Square argues that Security Wards relied on the Third Agreement for

[7] It is uncontested that Security Wards cannot construct the office buildings while the Third Agreement is in effect, as recognized by Security Wards: "The buildings that Security Wards proposed to build could be constructed only when the Third Agreement is deemed to have terminated."

[8] This portion of the letter reads: (continued…)

this purpose because the shared parking arrangement on which the request depends was created by the COREA, as amended.

Sec Square directs us *second* to the 2009 Second Refined C.R.G. Plan, and *third* to the 2010 Third Refined C.R.G. Plan (collectively, the "Plans"), both of which also rely on a "shared parking analysis" to arrive at their parking calculations. Sec Square explains that the parking analysis shown in the attached plan could only exist if the Third Agreement remained in effect.[9] Because the Third Agreement is the sole source of any parking easements, Sec Square contends that Security Wards must have relied on the continuing vitality of the Third Agreement when it sought and obtained approval for its proposed construction. Security Wards denies that its references to a "shared parking analysis" relied on the parking easements contained in the Third Agreement. But the existence or not of an alternative source of potential shared parking rights (Security Wards never points to one) ultimately doesn't affect the application of judicial estoppel here.

To be sure, judicial estoppel applies to positions taken in administrative proceedings, *Chesley v. City of Annapolis*, 176 Md. App. 413, 445 (2007), and "the truth is no less important to an administrative body acting in a quasi-judicial capacity than it is

> At this time, I am requesting that you provide, by countersignature below, that this proposal is within the spirit and intent of the relief granted in [the 1988 parking variance case] and that the proposed improvements to the mall property are permitted without any further zoning relief related to parking.

[9] Section 8.7 of the Third Agreement states that the parking easements established in the Third Agreement terminate when the Agreement terminates.

to a court of law." *Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597, 604 (9th Cir. 1996) (citations omitted). The doctrine applies after an initial representation in an administrative proceeding, followed by an inconsistent representation to a court. *E.g., In re Pich*, 253 B.R. 562, 569 (D. Idaho 2000) (barring debtor from claiming residency to procure a homestead exception during bankruptcy proceedings after debtor represented that he did not have a residence in order to obtain reclassification of zoning); *Abrams v. Am. Tennis Courts, Inc.*, 160 Md. App. 213 (2004) (taking a position with the Workers' Compensation Commission in order to receive benefits, then taking an inconsistent position in later litigation). But unlike this case, the initial representation must be made in an administrative proceeding that produces a legally binding order or ruling. *See, e.g., Pegram v. Herdrich*, 530 U.S. 211, 227 n.8 (2000) ("Judicial estoppel generally prevents a party from prevailing *in one phase of a case* on an argument and then relying on a contradictory argument to prevail in another phase."); *Chaney Enters. Ltd. P'ship v. Windsor*, 158 Md. App. 1, 41 (2004) ("[Judicial estoppel] is designed to prevent parties from making a mockery of justice by *inconsistent pleadings*." (quoting *Talavera v. School Bd. of Palm Beach Cty.*, 129 F.3d 1214, 1217 (11th Cir. 1997)) (emphases added)) And neither the 2008 Letter nor the Plans meets this standard. The 2008 Letter, even countersigned, carries no legal authority and is in no way binding on the zoning decision-makers.[10] The Plans, even with approval from the zoning offices, do not tie the zoning

[10] Security Wards tried to moot this case with a 2014 "Request for Zoning Verification Letter," which purports to contain "stand alone verification [] that makes clear that shared parking arrangements with [Security Square] are unnecessary" to solve the admitted parking shortage of "434 spaces short of what is required." But (continued…)

authorities to any agreements with Security Wards. Each of these documents is subject to further administrative review, and nothing in them definitively solves Security Wards's parking problems in a manner that depends on the continuing effect of the Third Agreement.

Put another way, the 2008 Letter and the Plans are advisory in nature, not final, unconditional decisions. And because the 2008 Letter and the Plans are merely *consultative*, they do not qualify as representations made in the course of *litigation* that are binding for estoppel purposes. Again, it might surprise the Baltimore County Zoning Office to learn that Security Wards can comply with the parking requirements for the office building projects only (at least at this point) through easements granted by an agreement that Security Wards claims here to be terminated. And if, after the remand we order next, a jury finds that the Third Agreement remains in place, Security Wards could have bigger problems. But those are for another day—for now, we hold that Security Wards is not estopped from arguing that the Third Agreement terminated in 2001.

Security Wards seriously overstates the contents of this letter and the same-day countersignature of the Director of the Baltimore County Department of Permits, Approvals and Inspections. In reality, all this letter contains is an admission by Security Wards that it is short of parking, the ways in which Security Wards *might* cure the issue, and a signature confirming that "no building permits may be issued for the new office buildings without a grant of a variance, the provision of additional parking on the Security Wards Parcel, or a combination of both." The letter contains no evidence, or even any representation, that any of the alternative solutions is feasible or in place, and it came too late in the day even for the circuit court to consider it. And like the circuit court, we disregard it.

B. The Termination Provision Is Ambiguous.

The parties disagree sharply about how Section 1.1 defines the Third Agreement's Termination Date, but all argue that it, and the Agreement as a whole, unambiguously compels their interpretation. Sec Square looks to the words of Section 1.1 itself and to other provisions in the Third Agreement that, it says, would be rendered meaningless by Security Wards's reading. Security Wards cites dictionary definitions of the operative words, compares the language of that section to the use of the same words in a state statute, and explains why its interpretation is in fact consistent with other provisions of the Third Agreement. We recognize that a contract provision is not ambiguous simply because the parties disagree as to its construction or urge alternative interpretations. *See Sierra Club v. Dominion Cove Point LNG, L.P.*, 216 Md. App. 322, 334 (2014). But the specific disagreement here, and the plausibility of both readings, lead us to conclude that the termination provision is ambiguous after all.

We begin with the plain language of the termination clause itself. Our cases guide us to "keep the analysis simple as the language permits: When the instrument includes clear and unambiguous language of the parties' intent, we will not sail into less charted waters to interpret what the parties thought that the agreement meant or intended it to mean." *Long Green Valley Ass'n v. Bellevale Farms, Inc.*, 432 Md. 292, 314 (2013). Under Maryland's objective theory of contracts, a contract is ambiguous when "a reasonably prudent person would consider the contract subject to more than one reasonable interpretation." *Sierra Club*, 216 Md. App. at 334; *see also Pac. Indem. Co. v. Interstate Fire & Cas. Co.*, 302

Md. 383, 389 (1985) (noting ambiguity if a contract suggests multiple meanings to reasonably prudent laypersons); *Newell*, 215 Md. App. at 235 (A contract is ambiguous if, "when read by a reasonably prudent person, it is susceptible of more than one meaning." (citations omitted)). And, importantly for this analysis, it is appropriate to consult dictionaries to interpret words or phrases in contractual provisions. *E.g., Bausch & Lomb Inc. v. Utica Mut. Ins. Co.*, 330 Md. 758, 781 (1993) (noting that the court's "first resort is to a general dictionary . . . ."); *Sierra Club*, 216 Md. App. at 335-36 (beginning with a dictionary definition to determine ambiguity); *Prison Health Servs., Inc. v. Balt. Cty.*, 172 Md. App. 1, 13-14 (2006) (citing Bryan A. Garner, A Dictionary of Modern Legal Usage 91 (2d ed. 1995)).

1. "Any one."

The ambiguity here stems from different ways the parties emphasize individual words in Section 1.1 rather than disputes over the meaning of those words. Security Wards keys on the words "any one," arguing that the absence of a retail store of at least 100,000 square feet on "any one" of the named tracts terminates the Third Agreement:

> [A] retail facility of at least 100,000 square feet of Floor Area is not being operated on **any one of** the Sears Tract **or** the H-K Tract **or** the Penney Tract . . . .[11]

Security Wards offers three arguments in favor of its interpretation. *First*, it argues that to require all three named tracts to cease operation before termination necessarily requires us to interpret the word "any" as plural. This would be wrong, according to

[11] We have emphasized here the same words Security Wards emphasized in its brief.

Security Wards, because the use of "or" in the disjunctive series of named tracts demonstrates that the parties intended to use the singular, not plural, form of "any"; further, the phrase "any one" can only be used in a singular form, so the termination clause must refer to any single named tract, and not all three.

Second, Security Wards points to dictionaries that state that the term "any" may be used in a singular or plural form, while "anyone" (referring to persons) and "any one" can only be singular, citing to Bryan A. Garner, A Dictionary of Modern Legal Usage 65 (2d ed. 1995). Moreover, the phrase "any one" means "any single member of a group of persons or things." The Random House Dictionary of the English Language 96 (2d ed. 1987). *Third*, Security Wards analogizes to Maryland Code (1974, 2006 Repl. Vol.), § 6-201 of the Courts & Judicial Proceedings Article, which states that if "there is no single venue applicable to all defendants . . . *all may be sued in a county in which <u>any one of</u> them could be sued* . . . ." (Emphasis added.)

We do not disagree with the interpretation of this text: venue is proper where any single defendant could be sued. And we do not disagree that, as Security Wards reminds us, the terms "any" and "any one" abound in Maryland law. Security Wards's interpretation, dependent on the operative phrase "any one of . . . or . . . or . . . [,]" is a reasonable interpretation of the termination clause, and is supported by linguistic evidence.

Interestingly, though, Security Wards blames Sec Square for cherrypicking portions of the broader termination provision to reach a favorable result. Security Wards accuses Sec Square of analyzing the clause in its inverse—in other words, its affirmative form. Security Wards claims that Sec Square has "altered [the meaning of] the termination

provision by swapping the phrase "is not being operated on" for the opposite phrase "is being operated on[,]" and provides a comparative chart to illustrate Sec Square's error.

Yet after chiding Security Square for "swapping" the phrase "is not being operated on," Security Wards offers a linguistic analysis that ignores the "not." Indeed, and although the parties produce differing operative phrases and interpretation, both omit the word "not" from their analyses. *See* 28B Words & Phrases 137 (West Group, 2003) (explaining that "any" takes on different meanings when used in affirmative and negative sentences).

2. "Not."

Sec Square contends that "the Third Agreement remains valid and in effect so long as a retail facility of at least 100,000 square feet is being operated on any one of the Sears Tract, the H-K Tract, *or* the Penney Tract."[12] (Emphasis added.) This interpretation effectively reads Section 1.1 to terminate the Third Agreement when:

[12] Sec Square also offers a structural argument, *i.e.*, that Security Wards's interpretation is inconsistent with the continuing obligations that other provisions of the Third Agreement impose on the parties. *See Dynacorp*, 208 Md. App. at 469-70 (determining whether a contract is ambiguous uniformly requires us to read the contract as a whole, examine contract terms in context, and decline any interpretation that would render meaningless any other provision of that contract). Sec Square's argument is plausible too, but does not render Security Wards's reading implausible or eliminate the ambiguity. On remand, of course, Sec Square is free to argue that the interplay between Section 1.1 and these other provisions supports its reading as the one the parties intended.

> [A] retail facility of at least 100,000 square feet of Floor Area is **not** being operated on **any one of** the Sears Tract **or** the H-K Tract **or** the Penney Tract . . . .[13]

(Emphases added.)

Dictionaries and other lexical sources consistently equate "not any" with "none." *E.g.*, The Random House Dictionary of The English Language 1131 (2d ed. 1987) (defining "none" as "not any," and sourcing it to archaic usage, *e.g.,* "Thou shalt have none other gods but me."); Merriam-Webster's Collegiate Dictionary 843 (11th ed. 2005) (equating "none" with "not any"); Garner's Dictionary of Legal Usage 609 (3d ed. 2011) (defining "none" as "not one" or "not any"). The Wordsworth Dictionary of Modern English Grammar ("Wordsworth") defines "none" as the *contraction* of "not any one of," and offers this example: In *The Times*, Science Editor Nigel Hawkes reports on spectators at the eruption of Mount Etna, stating that "many were thrilled, none was killed." Ned Halley, The Wordsworth Dictionary of Modern English Grammar 148 (2011). And Wordsworth specifies that "['none'] is not a modern contraction of 'not one,' as is widely believed." *Id.*

If we read the word "not" to modify the operative clause, these lexical sources support the view that termination occurs when a retail facility of at least 100,000 square feet of Floor Area is being operated on **none of** the Sears Tract or the H-K Tract or the Penney Tract. And under this reading, which is as reasonable as its counterpart, the termination clause did not terminate in 2001, and remains in full force and effect.

[13] These emphases are ours. In its brief, Sec Square emphasized the "or" at one point, then converted the actual wording into an affirmative condition and emphasized "any."

* * *

If a provision is ambiguous, the parties' intent becomes a question of fact, and summary judgment is inappropriate. *City of Bowie v. Mie Props., Inc.*, 398 Md. 657, 683-84 (2007); *Labor Ready, Inc. v. Abis*, 137 Md. App. 116, 134 (2001); *Hicks & Warren LLC v. Liberty Mut. Ins. Co.*, No. 10 Civ. 9457, 2011 WL 2436703, at *4 (S.D.N.Y. June 16, 2011) ("Where the language of a [contract] is found to be ambiguous, the parties' intent regarding incorporation of the underlying contract would be a triable question of fact and summary judgment would be inappropriate."). While the parties claim (and the trial court found) that the contract is unambiguous, we find plausible both sides' interpretation of the Third Agreement's termination language, both on the words themselves and in the context of the broader relationship. This requires the circuit court to determine, in the first instance and as a matter of fact, the intent of the parties, and to consider whatever appropriate extrinsic evidence might reveal it.[14] Accordingly, we reverse the entry of summary

[14] For example, the Third Agreement modified the termination provision contained in its predecessors. The original COREA, dated April 7, 1971, said that the "Termination Date" would occur:

> when, subject to the provisions of Article XIII hereof, on *neither* the Sears Tract *nor* the H-K Tract a retail facility of at least 100,000 square feet of Floor Area as to Sears and 100,000 square feet of Floor Area as to H-K shall be operated . . . . In all events this Agreement shall terminate fifty years (50) from the date hereof.

(Emphases added.)

The termination provision in the second modification maintained the same operative language as the COREA, but added the Penney Tract:

(continued…)

judgment and remand for further proceedings.[15]

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY REVERSED, AND CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEES.

> [the Termination Date] shall be the first to occur of: . . . (iii) the date upon which, subject to the provisions of Article XIII hereof, on *neither* the Sears Tract *nor* the H-K Tract *nor* the Penney Tract a retail facility of at least 100,000 square feet of Floor Area as to Sears, 100,000 square feet of Floor Area as to H-K and 100,000 square feet of Floor Area as to Penney shall be operated . . . ; or (iv) April 6, 2021.

(Emphases added.)

The Joint Record Extract contains copies of the three modifications (the First, Second, and Third Agreements) with handwritten notes from the parties' rounds of editing. We have not, of course, considered these prior versions or any extrinsic evidence, but note only that the provision's drafting history appears to exist.

[15] Our decision on this point eliminates any need for us to determine whether Security Wards reaffirmed or renewed the Third Agreement after 2001.