UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0642

September Term, 2015

WIENCEK + ASSOCIATES ARCHITECTS + PLANNERS, P.C.

v.

COMMUNITY HOMES HOUSING, INC.

Wright,
Berger,
Reed,

JJ.

Opinion by Berger, J.

Filed: July 12, 2016

This appeal arises out of an order of the Circuit Court for Montgomery County granting appellee's, Community Homes Housing, Inc.'s ("CHH's"), motion for judgment against appellant, Wiencek + Associates Architects + Planners, P.C., ("Wiencek") pursuant to Md. Rule 2-519. Specifically, Wiencek contends the circuit court erroneously concluded that a document executed by the parties did not constitute an enforceable contract.

On appeal, Wiencek presents one issue for our review,[1] which we rephrase as follows:

> 1. Whether the circuit court erred in considering parol evidence to determine if a document executed by both parties was a contract.
>
> 2. Whether the circuit court's finding that a document executed by both parties was not a contract was clearly erroneous.

For the reasons set forth below, we shall affirm the judgment of the Circuit Court for Montgomery County.

FACTUAL AND PROCEDURAL BACKGROUND

On June 1, 2011, the parties entered into an "Agreement to Redevelop and Preserve Affordable Housing" (the "HUD Agreement"). Under the terms of the HUD Agreement, Wiencek would provide professional design services to assist CHH in applying for financing and insurance from the Department of Housing and Urban Development ("HUD") in exchange for CHH's promise to hire Wiencek as the Architect for the approved project. The

[1] The issue, as presented by Wiencek, is:

> 1. Whether the trial court erred when it concluded that the Design Agreement never became effective?

express terms of the HUD Agreement conditions Wiencek's reimbursement of costs expended to prepare the application to HUD on the issuance of a "Firm Commitment" from HUD. Indeed, under this agreement the parties stipulated that:

> If HUD declines to so issue its Firm Commitment, then all costs and expenses incurred by the Architect to produce the Firm Application Design and Construction Exhibits shall be the sole responsibility of the Architect and the Owner shall not be responsible for reimbursing the Architect for any of said costs.

In order to submit a complete application to HUD, CHH and Wiencek were under the understanding that they must provide HUD with a B108 document ("B108" or "the B108") prior to receiving a Firm Commitment. A B108 is a "Standard Form of Agreement Between Owner and Architect for a Federally Funded or Federally Insured Project." The B108 is a template document created by the American Institute of Architects used by parties to draft a contract for the services an architect will render. On February 1, 2012, CHH and Wiencek executed a B108 document and included the document in their application to HUD. The B108 outlined a project for the renovation of a five-site development totaling 300 units across Columbia, Maryland. In the B108, CHH estimated that the project would cost approximately $26,416,577.00.

Article 11 of the B108 outlined the terms of compensation that CHH would provide Wiencek. Pursuant to that article, it was represented that Wiencek would be compensated in the amount of $1,690,899.00 for providing architectural services. Payment was to be made "monthly in proportion to services performed." Notably, the B108 document made no

mention of the HUD Agreement, or the parties' prior understanding that Wiencek would not be entitled to payment unless and until HUD had issued a Firm Commitment. The B108 also contained a merger or integration clause purporting to limit the scope of the agreement to the express terms of the document. The merger clause incorporated a "HUD Amendment to AIA Document B108" (the "HUD Amendment") into the scope of the B108 document.

Section 13 of the HUD Amendment provides:

> The funds for this Project, including Architect's funds under this Agreement, will be provided, as the case may be, from the proceeds of a Loan from a Lender who in turn obtained a commitment for mortgage insurance from HUD . . . . Although Architect may agree to provide a greater degree of services for additional compensation, require compensation for reimbursable expenses or termination expenses, or require basic compensation in excess of that provided by the Building Loan Agreement or Capital Advance Agreement for such services, the obligation to compensate Architect for the greater degree of services or the aforesaid expenses shall not be enforceable against Owner, Lender, US Treasury, HUD or the Project; provided, however, that any entity or individual other than Owner may agree to be responsible to Architect for payment thereof and, in such case be identified below.
>
> Provider of additional payment pursuant to paragraph 13 of this Amendment, if any.
>
> N/A

Representatives from both Wiencek and CHH testified that they executed the B108 document because it was a necessary component of the "standard HUD checklist" that must be competed in order to obtain HUD guaranteed financing. Moreover, the parties declined to incorporate the payment terms of the HUD Agreement into the B108 agreement because

they understood that in order to obtain HUD approval, the B108 could not be contingent on HUD granting said approval. Although the B108 agreement makes no mention of the terms of the HUD agreement, a letter from Wiencek's counsel to CHH suggests that the parties understood Wiencek's payment to be contingent on HUD approval.

After the parties executed the B108 document, the Firm Commitment Application was submitted to HUD. In a letter dated June 29, 2012, HUD declined to issue a Firm Commitment for the project. HUD refused to guarantee the loan made to finance the project because under the proposal CHH intended to increase rent by 110%. Following HUD's failure to issue a Firm Commitment, Wiencek demanded payment pursuant to the B108 document. CHH, however, refused to pay, claiming that it was the parties' understanding that CHH would have no duty to pay unless and until HUD issued a Firm Commitment.

Subsequently, on April 17, 2014, Wiencek filed a four-count complaint alleging that CHH breached the contract. Count one of Wiencek's complaint alleged that CHH breached the B108 by not paying for the architectural services rendered. Count two of the complaint alleged that CHH breached the HUD Agreement by failing to make best efforts to obtain a Firm Commitment from HUD. Counts three and four, respectively, sought recovery on theories of quantum meruit and unjust enrichment. Over the course of May 4-6, 2015, the court held a bench trial on the merits of Wiencek's breach of contract claims. At the conclusion of Wiencek's case-in-chief, CHH made a motion for judgment on counts one and two of Wiencek's complaint. The court granted CHH's motion for judgment with regard to

count one. At the conclusion CHH's case, the trial court rendered judgment in favor of CHH on the remaining counts.

This timely appeal followed. Notably, in the present appeal, Wiencek only challenges the grant of CHH's motion for judgment with respect to count one of its complaint. Additional facts will be discussed as necessitated by the issues presented.

DISCUSSION

I. Standard of Review

This appeal is raised in the context of the trial court granting CHH's motion for judgment. A motion for judgment is governed by Maryland Rule 2-519 which provides:

> **(a) Generally.** A party may move for judgment on any or all of the issues in any action at the close of the evidence offered by an opposing party, and in a jury trial at the close of all the evidence. The moving party shall state with particularity all the reasons why the motion should be granted. No objection to the motion for judgment shall be necessary. A party does not waive the right to make the motion by introducing evidence during the presentation of an opposing party's case.
>
> **(b) Disposition.** When a defendant moves for judgment at the close of the evidence offered by the plaintiff in an action tried by the court, the court may proceed, as the trier of fact, to determine the facts and to render judgment against the plaintiff or may decline to render judgment until the close of all the evidence. When a motion for judgment is made under any other circumstance, the court shall consider all evidence and inferences in the light most favorable to the party against whom the motion is made.

Md. Rule 2-519.

Wiencek contends that we are to review the grant of a trial court's motion for judgment under the *de novo* standard. In the context of a jury trial, the second sentence of Md. Rule 2-519(b) applies so as to prevent the judge from usurping the role of the fact finder. *See e.g.*, *C & M Builders, LLC v. Strub*, 420 Md. 268, 291 (2011) ("When, as here, a defendant moves for judgment based on . . . the legal insufficiency of plaintiff's evidence, a trial judge must determine if there is 'any evidence, no matter how slight, that is legally sufficient to generate a jury question.'" (quoting *Tate v. Bd. of Educ.*, 155 Md. App. 536, 544-45 (2004)). In an action tried by the court, however, the first sentence of Md. Rule 2-519(b) is operative, which allows the court to "proceed, as the trier of fact, to determine the facts and to render judgment." Md. Rule 2-519.

To understand the rationale of this rule, it is critical to understand the burdens of proof borne by the parties. The colloquial term "burden of proof" can properly be disentangled to encompass two similar yet distinct burdens, namely, the burden of production, and the burden of persuasion. The burden of production "is satisfied by making out a prima facie case . . . [which includes] the duty of going forward with evidence at the beginning." James B. Thayer, *The Burden of Proof*, 4 Harv. L. Rev. 45, 69 (1890). Stated differently, if the burden of production is not satisfied, it "means that the evidence thus far offered on a specific fact-in-issue, if believed, would not justify a jury of rational and impartial persons in finding the fact-in-issue in favor of the party having the burden." 9 Wigmore, *Evidence* § 2498a, at 336 (3d. Ed. 1940). Indeed:

> In analyzing whether a proponent has met the burden of production, the court lists the constituent elements of the proposition to be proved -- the crime, the tort, the contract, etc. -- and then determines whether the evidence in the case, if given the maximum credibility and maximum weight, could permit the fact finder fairly to find each of those constituent elements.

Terumo Med. Corp. v. Greenway, 171 Md. App. 617, 626 (2006). Accordingly, in order to satisfy the burden of production, the court must be able to affirmatively conclude that a fact finder could fairly accept a litigant's factual proposition given the evidence presented. On the other hand, the burden of persuasion "is the device for deciding an issue on which at the close of the case the mind of the trier is in equilibrium." Edmund M. Morgan, *The Law of Evidence, 1941-1945*, 59 Harv. L. Rev. 481, 492 (1946).

Whether a plaintiff has satisfied the burden of persuasion is determined by the trier of fact after hearing the evidence and determining the probative value of each piece of evidence. *In re Adoption/Guardianship of Amber R.*, 417 Md. 701, 720 (2011). Whether the burden of production has been satisfied, however, is a matter of law to be determined in all instances by the court. *See District of Columbia v. Singleton*, 425 Md. 398, 407 (2012) (court determines whether "plaintiffs' evidence is insufficient to create a triable issue"). Accordingly, the second clause of Md. Rule 2-519(b) is designed to allow a judge to render judgment when a plaintiff has failed to satisfy their burden of production in all cases. The first sentence of Md. Rule 2-519(b), however, permits the judge to render judgment when the plaintiff has failed to satisfy their burden of persuasion only when the judge and the fact finder are one in the same.

In the context of a breach of contract action, as Wiencek notes, "[t]he interpretation of a contract . . . is a question of law, subject to *de novo* review." *Towson Univ. v. Conte*, 384 Md. 68, 78 (2004). The initial inquiry as to whether there is a contract, or the later inquiry as to whether CHH breached that contract, however, is a factual question that is reviewed under the clearly erroneous standard. *See Gordy v. Ocean Park, Inc.*, 218 Md. 53, 60 (1958) ("[B]efore the court can construe a contract, there must exist a contract; and, if it be claimed that an instrument of writing, although in form a complete agreement, was not intended by the parties to be binding upon them, the question as to whether or not the instrument was so intended is one for the jury.").

Stated differently, if a contract exists, we will pay no deference to the trial court's interpretation of the contract at issue. On the other hand, the question as to whether there is a contract is a factual inquiry. That factual question is one that falls within the provisions of the first sentence of Md. Rule 2-519(b), to which will defer to the trial judge's findings so long as they are not clearly erroneous. "'If any competent material evidence exists in support of the trial court's factual findings, those findings cannot be held to be clearly erroneous.'" *Figgins v. Cochrane*, 403 Md. 392, 409 (2008) (quoting *Schade v. Md. State Bd. of Elections*, 401 Md. 1, 33 (2007)).

II. The Circuit Court Did Not Err in Admitting Parol Evidence to Determine Whether the B108 Constituted a Contract.

Wiencek argues that the trial court erred by considering "parol evidence to vary the effective date of the [B108 agreement] and to controvert the integration clause." CHH, for

its part, avers that the admission of parol evidence was proper because it was offered to determine whether the contract was effective. We hold that the circuit court did not violate the parole evidence rule because extrinsic evidence was not offered to add or modify any terms to the B108 agreement.

Generally, parol or extrinsic evidence is inadmissible to vary the terms of an integrated contract. *Foreman v. Melrod*, 257 Md. 435, 441 (1970) ("'All prior and contemporaneous negotiations are merged in the written instrument, which is treated as the exclusive medium for ascertaining the extent for their obligations.'" (quoting *Markoff v. Kreiner*, 180 Md. 150, 154-55 (1941)). Indeed, once a completely integrated contract has been identified, a litigant will not be permitted to offer extrinsic evidence to supplement or modify the terms of that contract. The reason we subscribe to the parol evidence rule is because in Maryland, we employ the objective theory of contracts, under which:

> "[A court is to] determine from the language of the agreement itself what a reasonable person in the position of the parties would have meant at the time it was effectuated. In addition, when the language of the contract is plain and unambiguous there is no room for construction, and a court must presume that the parties meant what they expressed. In these circumstances, 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. Consequently, the clear and unambiguous language of an agreement will not give away to what the parties thought that the agreement meant or intended it to mean."

Spacesaver Sys., Inc. v. Adam, 440 Md. 1, 7-8 (2014) (alteration in original) (quoting *Gen. Motors Acceptance Corp. v. Daniels*, 303 Md. 254, 261 (1985)).

Were we to condone the introduction of extrinsic evidence to subvert the text of a completely integrated agreement, we would betray our commitment to the objective interpretation of contracts. Indeed, the parol evidence rule is a device that prevents the legal questions involving the interpretation of contracts from digressing into factual inquires into the subjective intent of the parties. Accordingly, we generally will not permit a litigant to vary the terms of a completely integrated agreement through the admission of extrinsic evidence.

Although extrinsic evidence cannot be admitted to add of modify the terms of a complete integration, extrinsic evidence can be relied upon to serve other purposes. For example, "[a]ll courts generally agree that parol evidence is admissible when the written words are sufficiently ambiguous." *Calomiris v. Woods*, 353 Md. 425, 433 (1999). Stated differently, parol evidence cannot be used to *add or alter* the terms of a completely integrated contract, but it can be used to *define* ambiguous terms. Likewise, "[i]t is well settled that the parol evidence rule does not prevent the introduction of parol evidence indicating that the written instrument was not to become effective as an instrument, until a prior condition or event had occurred." *Foreman*, *supra*, 257 Md. at 442. "Parol evidence is admissible, therefore, to show that a writing never became effective as a contract or that it was void or voidable." *Tricat Indus., Inc. v. Harper*, 131 Md. App. 89, 108 (2000). Stated differently:

> In respect to the application of the 'parol evidence rule' to issues such as: (1) have the parties made a contract; (2) is that contract void or voidable because of illegality, fraud, mistake, or any other reasons; (3) did the parties assent to a particular writing as

> the complete and accurate 'integration' of that contract, Chief Judge Brune, quoting Professor Corbin (3 Corbin, Contracts s 573, 360 (rev. 1960)) said . . . for the Court:
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> > . . . In determining these issues, or any one of them, there is no 'parol evidence rule' to be applied. On these issues, no relevant evidence, whether parol or otherwise is excluded . . . .

4500 Suitland Road Corp. v. Ciccarello, 269 Md. 444, 451 (1973) (quoting *Whitney v. Halibut, Inc.*, 235 Md. 517, 527 (1964) (internal quotation omitted)).

In this case, CHH avers that parol evidence was admissible to show that "the B108 never became effective as a contract." Indeed, the parties agree that it is appropriate for the trier of fact to rely on extrinsic evidence to determine whether "the written instrument was not to become effective **as an instrument**." *Foreman*, *supra*, 257 Md. at 442 (emphasis added). Wiencek, however, asserts that this principle does not apply when the contract is a complete integration complete with a merger clause. To be sure, section 13.1 of the B108 document declares that it "represents the entire and integrated agreement between the Owner and the Architect . . . ." CHH contends, however, that the trial judge appropriately relied upon extrinsic evidence to find that there was no contract. We agree with CHH.

Wiencek relies on the Court of Appeals's holding in *Saliba v. Arthur Charlotte, Inc.*, 259 Md. 588 (1970), for the proposition that parol evidence cannot be used when the contract at issue is a complete integration. In *Saliba,* a buyer and a seller executed a written agreement for the purchase of 262 car seat covers. *Id.* at 589. Further testimony revealed, however, that the parties orally agreed that the purchase was conditioned on buyer acquiring

manpower to assist in his upholstery shop. *Id.* at 590. In analyzing the effect of the parties' oral arrangement, the trial judge noted that "Saliba was resting his defense upon a 'condition precedent'" which was impermissible under the parol evidence rule. *Id.* at 591.

In rendering its decision, the Court of Appeals relied on *Foreman* and the principle that:

> "Where parties to a writing which purports to be an integration of a contract between them orally agree, before or contemporaneously with the making of the writing, that it shall not become binding until a future day or until the happening of a future event, the oral agreement is operative if there is nothing in the writing inconsistent therewith."

Id. at 593 (quoting Restatement (First) of Contracts § 241 (1932)). Nevertheless, the Court of Appeals determined that it was improper for the trial court to find the oral agreement to be a condition precedent because there was no finding as to whether the contract was a complete integration. *Id.* at 594. Critically, the Court of Appeals did not mandate that the written agreement between the parties be enforced. Rather, the Court of Appeals merely remanded the case for the trial court to determine whether the document was an integration between the parties. *Id.*

Wiencek asks us to hold that *Saliba* is similar to the case *sub judice* because, it claims that the merger clause makes the B108 agreement a complete integration, thereby precluding CHH from establishing a condition precedent to its duty to pay through parol evidence. *Saliba*, however, does not stand for the proposition that parol evidence is inadmissible to establish the validity of a contract when the document contains an integration or merger

clause. Indeed, *Saliba* is distinguishable from this case because there the trial court found the oral arrangement to be a condition precedent without first determining whether there was an integration. Here, however, the trial judge found that the B108 agreement was not an integration.

The issue as to whether a condition exists and has been satisfied assumes the existence of a contract in the first instance. Of course, parol evidence generally will not be admitted to add or alter the terms of a complete integration by adding a condition that was not reflected in the integration. In this case, however, the question is not whether there was a prior or contemporaneous agreement to impose a condition precedent to CHH's duty to pay under the parties' integrated agreement. Rather, the question is whether the B108 document is truly a manifestation of mutual assent in the first instance. The justification asserted by Wiencek for refusing to consider parol evidence to determine whether a contract exists is misplaced because it suggests that we must enforce the merger clause of the contract in order to determine whether the contract in which the merger clause is found is valid. Accordingly, we reject the contention that a merger clause precludes a party from presenting parol evidence to determine whether a document constitutes an integration. We, therefore, hold that the circuit court did not err in considering parol evidence under the circumstances of this case.

II. The Circuit Court Did Not Err in Finding That the B108 Document Did Not Constitute a Contract.

Having concluded that the circuit court did not err in considering parol evidence, Wiencek further contends that the trial court erred in holding that the B108 agreement had yet to become effective. Specifically, Wiencek contends that this case is similar to *Foreman, supra*, where the Court of Appeals refused to permit a party to establish that the effective date of a contract was different from the express terms of that contract. *Foreman, supra*, 257 Md. at 443-44. CHH avers, however, the trial court was not clearly erroneous in finding that there was not a contract in the first instance. We agree with CHH.

For the reasons stated in Part II, *supra*, *Foreman* is distinguishable from this case because -- like *Saliba* -- *Foreman* involved the court's interpretation, rather than its identification of the contractual agreement. *Foreman*, *supra*, 257 Md. at 443 ("The parties to the contract, after a preliminary oral negotiation, reduced their agreement to writing for the purpose of embodying their contract in its final form."). Critically, in this case the trial judge found that the B108 document was not executed "for the purpose of embodying their contract in its final form." *Id.* Indeed, contrary to *Foreman*, the question at issue here is not one of contract interpretation, but one of contract identification.

"A manifestation of mutual assent by the parties to a contract is essential to its formation." *Post v. Gillespie*, 219 Md. 378, 384 (1959) (citing Restatement (First) of Contracts § 20 (1932)). We will generally presume that an executed agreement signed by both parties evinces a manifestation of mutual assent. *Walther v. Sovereign Bank*, 386 Md.

412, 429-30 (2005) ("[A] party that voluntarily signs a contract agrees to be bound by the terms of that contract."). Stated differently:

> Any person who comes into a Court of equity admitting that he can read, and showing that he has average intelligence, but asking the aid of the Court because he did not read a paper involved in the controversy, and was thereby imposed on, should be required to establish a very clear case before receiving the assistance of the Court in getting rid of such document.

Smith v. Humphreys, 104 Md. 285, 290 (1906).

Indeed, the general rule is for the court's identification of a contract to be guided objectively by the outward manifestations of the parties. *See e.g.*, *Lucy v. Zehmer,* 84 S.E.2d 516, 520-21 (Va. 1954) (holding that the subjective intent of an offeror who was "high as a Georgia Pine" when he scribbled an offer on a bar napkin was irrelevant, so long as the offeree "was warranted in believing[] that the contract represented a serious business transaction."). Accordingly, we will generally defer to the objective manifestations of the parties when determining the existence of a contract. The exception to this general rule is where the parties execute what appears by any objective standard to be a contract, but *both* parties harbor the subjective intent that they are not to be bound by their agreement.

To illustrate this concept, in *S. St.-Ry. Adver. Co. of Balt. v. Metropole Shoe Mfg. Co. of Balt.*, 91 Md. 61 (1900), the Court of Appeals held that a written document executed between parties was not an enforceable contract when the document was executed for the purpose of inducing third-parties to similarly contract with the advertising company. Likewise, in *A.D. Birely & Sons v. Dodson*, 107 Md. 229 (1908), the Court of Appeals

considered a purported sales contract void when both parties understood there to be no contract, but executed the document so that the seller could represent to a third-party that the sale was in accordance with a trust agreement that bound the seller. The Court of Appeals has articulated that "[p]arol evidence is admissible to show that what appears on its face to be a full and complete contract was not intended to be a contract at all." *Rinaudo v. Bloom*, 209 Md. 1, 8-9 (1956).

In the instant case, the trial judge was presented with a B108 agreement that appeared on its face to be a fully integrated, complete, and binding contract. After hearing testimony about the intent of *both* the parties when executing the B108 document, however, the trial judge expressly found that:

> The weight of the evidence shows that the parties fully well knew that the February 1st, 2012 agreement was not to come into effect, or to take effect, until there was a firm commitment from HUD, and the loan that was to be guaranteed or insured by HUD closed. And I think that that's real clear if you look at all of the evidence.
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> . . .
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> So on balance, and acting as the trier of fact in this case, as to Count 1, I am not persuaded by a preponderance of the evidence that the parties ever intended the February 1st, 2012 contract, on which the plaintiff relies in Count 1, to take effect as of February 1st, 2012. In fact, I think what the evidence clearly shows to me, and I am persuaded that, in fact, what happened was that the parties only intended it to take effect if there was a firm commitment issued by HUD that, and loan proceeds as a consequence of that firm commitment.

Critically, this is not an instance where there was an objective manifestation of material assent, but no subjective "meeting of the minds" as was the case in *Lucy*, *supra*. Indeed, the fact that CHH might not have appreciated the significance of the document that it affixed its signature, alone, is generally insufficient to void a contract. Moreover, the fact that this contract was executed to influence HUD is likewise insufficient to void the document. Rather, the trial judge here found that there was a meeting of the minds that the parties were **only** executing the B108 to influence HUD **and** that the document was not going to bind the parties.

The trial judge's conclusion that the parties did not intend to be bound by the B108 document was supported by the fact that, under the prior HUD agreement, the parties clearly expressed that Wiencek was to bear the risk that HUD might not issue a firm commitment. Moreover, the judge relied on a letter dated August 16, 2012, from Wiencek's counsel declaring that "Payment of Wiencek's fee . . . is conditioned upon the lender obtaining a Firm Commitment Letter from HUD and closing the loan." Further, Mr. Wiencek himself conceded that it was his understanding that Wiencek would not get paid unless and until HUD issued a Firm Commitment. Additionally, the trial court was persuaded by the testimony of Grace Morris, then a member of CHH's board, who declared that it was her understanding that the parties were only executing the B108 in an effort to influence HUD to issue a firm commitment. Accordingly, the record contains ample evidence supporting the judge's factual finding that both parties were of the understanding that the B108 agreement

was not a contract. As such, the trial court was not clearly erroneous in its determination that a contract did not exist under the circumstances of this case.

Notwithstanding the substantial evidence indicating that the parties executed the B108 agreement for the sole purpose of influencing HUD -- and did not intend to be bound by the document -- Wiencek asserts that a certification as to the authenticity of the B108 precludes a finding that the document was not a contract. To be sure, at the conclusion of the B108 agreement, both parties signed a certification that provides:

> Each signatory below hereby certifies that the statements and representations contained in this instrument and all supporting documentation thereto are true, accurate, and complete. This instrument has been made, presented, and delivered for the purpose of influencing an official action of HUD in insuring the Loan, and may be relied upon by HUD as a true statement of the facts contained therein.

We agree with Wiencek that if the B108 document was executed with a mutual intent that it was not binding between the parties, then the parties' representation to HUD may have been inaccurate. We, however, disagree that we must enforce B108 as a contract between CHH and Wiencek to remedy any misrepresentation the parties may have made to HUD.

In some jurisdictions -- not Maryland -- Wiencek's argument that the B108 document is enforceable as a contract because it was executed for the purpose of influencing HUD might have merit. For example, in Montana when a contractor and an owner executed what appeared on its face to be a contract for the purpose of influencing the Veterans' Administration to guaranty the owner's loan, the Supreme Court of Montana enforced that

agreement between the parties. *Higby v. Hooper*, 221 P.2d 1043, 1045-46 (Mont. 1950). There, the agreement specified that the cost for the project would not exceed a certain amount. *Id* at 1045. When the costs exceeded the specified amount, the contractor argued that the parties understood the document not to be a contract, but merely a document executed for the purpose of influencing the Veterans' Administration. *Id.* at 1052-53. In response, the Montana Supreme Court determined that:

> The law does not allow parties to a contract to show that it was got up as a sham to deceive and defraud. *Graham v. Savage*, 110 Minn. 510, 126 N.W. 394, 396, 136 Am.St.Rep. 527, 19 Ann.Cas. 1022. So here the defendant will not be permitted to defeat his own solemn written contract by saying that it was given solely for a fraudulent and deceitful use. 'He is estopped thus brazenly to assert his own covinous purpose.' *Hunter v. Byron*, 92 Wash. 469, 159 P. 703, 704. *See* R.C.M.1947, sec. 13-801. *Cf. Federal Farm Mortgage Corp. v. Hatten*, 210 La. 249, 26 So.2d 735; *Ewing v. Ford*, 31 Wash.2d 126, 195 P.2d 650; *Fereria v. Nunn*, Cal.App.1950, 220 P.2d 20; *Young v. Neill*, Or.1950, 220 P.2d 89, 94.

Id. at 1053.

Higby and the cases cited therein, however, do not reflect the state of the law in Maryland. As we articulated *supra*, if two parties execute what appears to be a contract with a mutual understanding that the parties are not to be bound by its terms, the contract is a nullity as between them. This is so even if the parties represent their pseudo-agreement to third parties. *See generally Rinaudo*, *supra*, 209 Md. at 8-9; *A.D. Birely & Sons*, *supra*, 107 Md. 229; *S. St.-Ry. Adver. Co. of Balt.*, *supra*, 91 Md. 61. While we echo the sentiment of the Montana Supreme Court -- that we are not to condone the making of fictitious contracts

for the purpose of influencing third-parties -- we disagree that the remedy is to enforce the purported agreement between the parties. Rather, if HUD believes that it was harmed by a misrepresentation made to it, that is a right for HUD -- not Wiencek -- to assert.[2] We, therefore, reject Wiencek's contention that the parties' certification to HUD precludes CHH from arguing that the B108 document was not a contract.

III. Conclusion

For the reasons stated herein, the circuit court did not err in considering parol evidence in determining whether the parties had entered into a contract. Furthermore, the circuit court was not clearly erroneous in finding that the parties shared the understanding that the B108 document they signed was not an enforceable agreement. Moreover, we reject Wiencek's assertion that we must enforce the B108 document because the parties represented to HUD that it was a contract. We, therefore, hold that the circuit court did not err in granting CHH's motion for judgment as to Wiencek's claim for breach of contract in count one of his complaint.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY THE APPELLANT.

[2] To be clear, we do not hold here that Wiencek or CHH actually made a misrepresentation to HUD. Rather, we merely hold that if the parties' intent in executing the B108 is inconsistent with the certification they made to HUD, any rights that flow from that inconsistency belong to HUD and not Wiencek.