Circuit Court for Montgomery County
Case No. 414223-V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2305

September Term, 2016

MICHAEL DIFRANCO

v.

GREEN TOMATO, LLC

Graeff,
Fader,
Eyler, James R.,
(Senior Judge, Specially Assigned)

JJ.

Opinion by Eyler, James R., J.

Filed: June 29, 2018

This case comes to us from a decision by the Circuit Court for Montgomery County granting summary judgment in favor of Green Tomato, L.L.C. ("Green Tomato"), appellee, and against Michael DiFranco, ("DiFranco"), appellant, in an action arising out of the termination of a lease agreement. On January 29, 2016, DiFranco filed a complaint against Green Tomato, later amended, alleging breach of contract and fraud. Green Tomato filed a counter complaint against DiFranco alleging breach of contract and seeking a declaratory judgment and indemnification. Thereafter, Green Tomato filed a motion for summary judgment that DiFranco opposed. After a hearing on November 18, 2016, the circuit court granted summary judgment in favor of Green Tomato as to all counts in the complaint. There was no judgment entered with respect to the counter claim, but the court certified its grant of summary judgment as a final judgment. This timely appeal followed.

ISSUES PRESENTED

DiFranco presents 5 issues for our consideration, which we have reordered and rephrased as follows:

> I. Whether a release entered into by DiFranco in a prior action bars his claims for breach of contract and fraud in the instant action;
>
> II. Whether the circuit court erred, as a matter of law, in finding that Green Tomato did not make any false representations to DiFranco;
>
> III. Whether the circuit court erred in finding that Green Tomato did not breach its lease agreement with DiFranco;
>
> IV. Whether DiFranco's settlement in a prior action represented a full recovery of his damages; and,
>
> V. Whether DiFranco's claims in the instant case are barred by judicial estoppel.

For the reasons set forth below, we shall affirm.

FACTUAL BACKGROUND

The basic facts of this case are not in dispute. On December 30, 2011, DiFranco executed an agreement with the Anthony Pappalardo, Sr. Trust ("Pappalardo") to lease property located at 4910 and 4912 St. Elmo Avenue in Bethesda ("the Premises") for the purpose of operating his automotive shop known as BCC Automotive ("BCC Auto").[1] The lease was to commence on January 1, 2012 and expire on December 31, 2017. In September 2012, Green Tomato purchased the Premises, including the building used for the automotive shop, and the lease agreement with DiFranco was assigned to it. After the sale, DiFranco continued to operate BCC Auto on the Premises.

In August 2011, prior to Green Tomato's purchase of the Premises, Bainbridge St. Elmo Bethesda Apartments, L.L.C. ("Bainbridge") began construction of a multi-story apartment building with four levels of underground parking on a parcel of land adjacent to the Premises. Turner Construction Company ("Turner") was the general contractor for the project and Schnabel Foundation Company ("Schnabel") was the sheeting and shoring subcontractor. Bainbridge and Pappalardo entered into a temporary construction agreement that, among other things, provided Bainbridge reasonable access to the Premises for the purpose of performing certain sheeting and shoring work, including the installation of tie-backs below grade to support temporarily soldier piles and lagging for Bainbridge's construction project. Pappalardo also agreed to allow a construction crane boom to swing

[1] It is unclear from the record before us whether BCC Auto is a separate entity or a trade name used by DiFranco.

above the Premises. Bainbridge agreed to perform "all tie-back work and exercise the crane swing rights in a good, safe, and workmanlike manner" in accordance with the standards of its trade. Bainbridge agreed that in installing the tie-backs on the Premises, its contractors would "undertake no activity that could undermine the structural integrity of the Improvements located within" the Premises and would "be fully liable for any and all direct damages, losses, expenses, or injuries to persons or property caused by it or its employees, agents, contractors, or affiliates arising from tie-back work or exercise of the crane swing rights on [the Premises], [Bainbridge's] activities conducted on or about [the Premises], or [Bainbridge's] breach of any terms of this Agreement, whether or not such damages, losses, expenses or injuries are a result of the negligence or any misconduct of [Bainbridge] or its employees, agents, contractors, or affiliates."

There was no dispute below that, beginning prior to Green Tomato's purchase of the Premises, the building used by BCC Auto shifted and sustained damage "in the form of cracks to block walls" as a result of Bainbridge's construction of the apartment building and its flawed sheeting and shoring system, and that those cracks continued to "slightly expand" until sometime after Green Tomato's acquisition of the Premises. At the time the Premises were sold, Pappalardo assigned to Green Tomato all of its claims for damage to the Premises caused by Bainbridge, Turner, and their agents and contractors. In his deposition, DiFranco acknowledged that a back window and a door in the building used by BCC Auto became difficult to open and a crack in the back of that building became large enough to permit daylight to be seen through it. DiFranco also expressed some concern that the building could collapse.

Green Tomato obtained reports from three experts. On April 22, 2013, Professional Consulting Corporation ("PCC") rendered a report assessing the damage to the Premises as a result of the construction. PCC concluded that the building used by BCC Auto had "been badly damaged" as a result of the construction work and that "most of the damage could have been prevented." VIKA Engineering, L.L.C. ("VIKA"), an engineering firm, prepared a report on October 30, 2013, that was later updated on February 9, 2015. VIKA concluded that the BCC Auto building moved between September 2, 2011 and December 28, 2012, but there was no movement after March 20, 2013. Another engineering firm, Stearns Engineering ("Stearns"), was retained to evaluate the damage to the BCC Auto building. In a report dated February 3, 2014, it concluded that the building was "substantially damaged by the construction of [the apartment building], specifically by the improper installation and performance of the sheeting and shoring system for the site excavation." Stearns concluded that "the BCC Auto Shop building must be removed, replaced, and re-supported with deep foundations due to the damage and movement described above." Stearns reported that the landlord's architect projected "that demolition and reconstruction of the BCC Auto Shop building and the slabs will require a duration in excess of 120 working days of normal working hours."

In August 2013, Green Tomato and DiFranco filed a complaint for injunctive relief, nuisance, and trespass against Bainbridge and Turner alleging, among other things, that pieces of concrete had fallen onto the Premises and vehicles owned by BCC Auto and its

customers and that scaffolding had been extended over and into the Premises.[2] DiFranco alleged that if Bainbridge's construction work was permitted to continue, it would "likely render the Premises untenantable and/or unsafe for BCC Auto, its patrons, and employees."

On or about January 6, 2014, Green Tomato gave written notice to DiFranco that, pursuant to § 32(b) of the lease agreement, the lease for the Premises would expire in 3 days due to the substantial damage caused by Bainbridge's construction. Section 32(b) of the lease agreement provided:

> If the leased premises are substantially damaged or are rendered substantially untenantable by fire or other casualty, or if the landlords architect certifies that the premises cannot be repaired within one hundred twenty (120) working days of normal working hours, said period commencing with the start of the repair work, or if Landlord shall decide not to repair same, or shall decide to demolish the building or to rebuild it, then Landlord shall, within ninety (90) days after such fire or other casualty, give Tenant a notice in writing or [sic] such decision, and thereupon the term of this lease shall expire by lapse of time upon the third day after such notice is given and Tenant shall vacate the premises and surrender the same to Landlord. Upon the termination of this lease under the conditions hereinabove provided, Tenants liability for minimum annual rent shall cease as of the day following the casualty.

After receiving the notice from Green Tomato, DiFranco requested an extension to allow him to vacate the Premises on February 28, 2014. Green Tomato asked DiFranco to execute a release before granting the extension, but he refused. Thereafter, on January 24, 2014, DiFranco vacated the Premises. Green Tomato acknowledges that at some time after DiFranco vacated the Premises, it considered leasing the Premises to a new tenant either in "as-is" condition with the new tenant agreeing to repair the building formerly used

[2] *See Green Tomato, L.L.C., et al. v. Bainbridge St. Elmo Bethesda Apartments, L.L.C., et al.*, Civil Action No. 392415-V in the Circuit Court for Montgomery County.

by BCC Auto or, alternatively, for an increased amount of rent with Green Tomato making the necessary repairs. Neither alternative occurred, however; the Premises were never leased to a new tenant and the building used by BCC Auto was demolished in November 2016.

On March 13, 2014, pursuant to a joint stipulation by the parties, Green Tomato and DiFranco dismissed without prejudice their complaint for injunctive relief, nuisance, and trespass against Bainbridge and Turner. A few months later, on July 1, 2014, Green Tomato filed another action against Bainbridge, Turner, and Schnabel alleging that work on the construction project caused damage to the Premises. A short time later, BCC Auto filed suit against the same defendants also alleging that the construction project caused damage to the Premises. BCC Auto's complaint was amended to add DiFranco, individually, as a plaintiff, and eventually, the claims filed by Green Tomato, BCC Auto, and DiFranco were consolidated.

DiFranco and BCC Auto asserted claims for breach of contract and negligence. They alleged that they were third-party beneficiaries of the construction agreement between Bainbridge and Pappalardo, that Green Tomato had been assigned all the rights of Pappalardo under that agreement, that the defendants failed to construct the sheeting and shoring system in a manner that was compliant with industry standards, and that the failure of the sheeting and shoring system caused the leased property to become "unsafe for occupancy." DiFranco and BCC sought monetary damages for, "but not limited to, loss of business, relocation expenses, attorneys fees, court cost, litigation cost, and loss of income." BCC Auto and DiFranco did not make any claims against Green Tomato.

Pursuant to the scheduling order, DiFranco disclosed his experts, specifically, Green Tomato's experts plus two CPAs to testify as to financial losses resulting from his relocation.

In 2014, DiFranco submitted a claim to his insurance company for lost business, income, and relocation expenses resulting from the damage to the Premises and his being forced to vacate the building used by BCC Auto. DiFranco's insurer, Penn National, paid $38,622.

On or about January 5, 2015, Green Tomato settled, for a total of $2,750,000, its claims against Bainbridge and others for lost rent from DiFranco and BCC Auto and its claims for damages to a number of structures on the Premises, including the building used by BCC Auto. As part of that settlement, Green Tomato voluntarily dismissed with prejudice all of its claims against Bainbridge, Turner, and Schnabel. BCC Auto voluntarily dismissed all claims brought on its behalf and DiFranco voluntarily dismissed all claims against Turner and Schnabel, leaving DiFranco and Bainbridge as the sole remaining parties to the litigation. On September 10, 2015, DiFranco, individually and as the owner of BCC Auto, executed a release and settlement agreement with Bainbridge in exchange for $250,000 for the loss of his business, income, and relocation expenses. The full settlement amount of $250,000 was paid by Turner's insurer.

The release agreement entered into between DiFranco and Bainbridge provided, in part, as follows:

> 2. [DiFranco] and BCC, on behalf of themselves, . . . and all those claiming, or who may claim, on their behalf ("Releasors"), hereby completely release and forever discharge Defendants and each and all of any

> of their respective past, present, and future managers, directors, officers, representatives, employees, agents, partners, owners, members, stockholders, trustees, successors, predecessors, assignees, companies, parent companies, subsidiaries, related or affiliated companies, guarantors, attorneys, law firms, insurers (including but not limited to National Union Fire Insurance Company of Pittsburgh, PA), reinsurers, and sureties, **and all other persons, firms, companies, or entities acting by, through, under, or in concert with them, including those who are, may be, or are alleged to be jointly or jointly and severally liable with them (hereinafter collectively referred to as "Releasees"), from any and all claims, actions, causes of action, debts, suits, costs, demands, damages, expenses, remedies, and liabilities of any nature whatsoever, whether sounding in tort, contract, statute, common law or other theory, legal or equitable, against the said Releasees which the Releasors ever had, now have, or may have, or which may hereafter accrue or otherwise be acquired, known or unknown, that are in any way related to, directly or otherwise, or arise out of the Construction Project in any manner**.

Emphasis added.

On January 29, 2016, DiFranco filed this action in circuit court against Green Tomato alleging breach of contract and fraud in connection with the termination of the lease for the Premises. DiFranco asserted that Green Tomato had insufficient cause to terminate the lease agreement because the Premises were never damaged by fire or other casualty, had never been declared untenantable or condemned, Green Tomato never possessed any certification that the premises could not be repaired within the time frame allowed under the lease agreement, and the termination was untimely. According to DiFranco, it was not until after he had vacated the Premises that he learned that Green Tomato had an insufficient basis for terminating the lease agreement. DiFranco alleged that, in the litigation against Bainbridge, Turner, and Schnabel, he relied upon information supplied by Green Tomato. DiFranco maintained that Green Tomato misrepresented that

the Premises had been substantially damaged and that it made those misrepresentations with the express intent of enhancing its own claim for damages against Bainbridge and causing DiFranco to act to his detriment. DiFranco sought monetary damages for "loss of business, loss of reputation, moving expenses and loss of income."

Green Tomato filed a motion for summary judgment arguing that there was "no question" that the Premises were substantially damaged and that it complied with the terms of the lease agreement in terminating DiFranco's lease. According to Green Tomato, there was no evidence of fraud, DiFranco was attempting to recover the same damages he had already recovered in the prior action, his action was barred by the doctrine of release, he was not entitled to double recovery, and he was barred by the doctrine of judicial admissions from denying that there was substantial damage caused to the Premises as a result of the failure of the sheeting and shoring system employed by Bainbridge.

At the conclusion of a hearing on Green Tomato's motion for summary judgment, the judge concluded:

> I am persuaded in this case that the motion should be granted largely for the reasons set out by the defendant in its moving papers, but for the additional reasons that it, it seems to me, and I conclude that there is no genuine issue of fact. The premises were substantially damaged by the, frankly, by Schnabel when it did whatever it did to perform its sheeting and shoring for the [apartment building] and that there is no genuine issue of material fact, I conclude, that the premises were substantially untenantable by what Schnabel did. I also conclude that there is no genuine issue of material fact that the premises reasonably could not be repaired within 120 days from the commencement thereof.
>
> In light of those conclusions, I am persuaded that the plaintiff, the defendant is entitled to judgment as a matter of law with respect to the claim for breach of lease.

> With respect to the fraud count, I am not apprehending that there are, were any false statements of material fact at all in this case. Motion granted.

We shall include additional facts as necessary in our discussion of the issues presented.

DISCUSSION

Standard of Review

DiFranco contends that the circuit court erred in granting summary judgment in favor of Green Tomato. Our task is to determine whether there is any genuine dispute of material fact and, if not, whether the moving party was entitled to judgment as a matter of law. Md. Rule 2-501(f); *Taylor Elec. Co., Inc. v. First Mariner Bank*, 191 Md. App. 482, 488 (2010). Before determining whether the circuit court was legally correct in entering judgment, as a matter of law, in favor of Green Tomato, we independently review the record to determine if there were any genuine disputes of material fact. *Hill v. Cross Country Settlements, L.L.C.*, 402 Md. 281, 294 (2007). A material fact is a fact the resolution of which "will somehow affect the outcome of the case." *United Services Auto. Ass'n v. Riley*, 393 Md.55, 67 (2006); *Matthews v. Howell*, 359 Md. 152, 161 (2000)(quoting *King v. Bankerd*, 303 Md. 98, 111 (1985)). "A genuine dispute of material fact exists when there is evidence 'upon which the jury could reasonably find for the plaintiff.'" *Windesheim v. Larocca*, 443 Md.312,326 (2015)(quoting *Beatty v. Trailmaster Prods., Inc.*, 330 Md. 726, 739 (1993)). "We review the record in the light most favorable to the nonmoving party and construe any reasonable inferences that may be drawn from the facts against the moving party." *Myers v. Kayhoe*, 391 Md. 188, 203 (2006)(citation

omitted). If there is no genuine issue of material fact, we review the trial court's grant of summary judgment to ascertain if it was legally correct. *Duffy v. CBS Corp.*, 458 Md. 206, 217 (2018).

I.

DiFranco challenges the circuit court's determination that his claims for breach of contract and fraud were barred by the release he entered into as a part of his settlement of his prior suit against Bainbridge. He argues that the causes of action raised in the instant case were separate from those raised against Bainbridge in the prior action and, although the facts of the cases are closely related, the operative facts are different. He maintains that his claim against Bainbridge was based on a theory of negligence in the construction of the apartment building whereas his claims against Green Tomato for breach of contract and fraud arose out of alleged misrepresentations by Green Tomato that the Premises, specifically the building used by BCC Auto, was in a dangerous condition and was unsafe for occupancy. Relying primarily on the Court of Appeals' decisions in *Welsh v. Gerber Products, Inc.*, 315 Md. 510 (1989), and *Morgan v. Cohen*, 309 Md. 304 (1987), he argues that there is a difference between "a satisfaction and a release" and that the $250,000 settlement was paid by Turner's insurer in full settlement of the claims in the prior litigation, but not in full satisfaction of all claims. He maintains that under the circumstances of the instant case, it is a disputed question of fact as to whether the $250,000 settlement in the prior case was intended to fully compensate him for all of his damages. We disagree and explain.

In *Welsh*, an action was filed by Patrick and Kathleen Welsh and their minor son, Michael Welsh, against James Voigt, II, to recover damages for personal injuries sustained when the vehicle they were occupying was struck by a van driven by Voigt. *Welsh*, 315 Md. at 512. At the time of the accident, Michael was secured in a car seat manufactured by Gerber Products, Inc. ("Gerber"). *Id.* The parties eventually agreed to settle the negligence action against Voigt for an amount equal to the limits of his automobile insurance coverage. *Id.* When the settlement was announced in open court, plaintiff's counsel stated that "'[w]e are accepting the policy limits without prejudice to any rights we have against other individuals, or insurance carriers.'" *Id.* A written release was executed in favor of Voigt which purported to retain all claims against other tortfeasors subject to the *pro rata* reduction provided in the Maryland Uniform Contribution Among Tortfeasors Act, then codified at Md. Ann. Code Art. 50 §§ 16-24.[3] *Id.* at 513. The settlement was eventually approved by the court and the parties filed a "Statement of Satisfaction of Judgment" reflecting the fact that Voigt's insurer had made the agreed upon payment and the words "PAID AND SATISFIED" were entered on the docket sheet. *Id.*

Thereafter, the Welshes filed suit in the United States District Court for the District of Maryland against Gerber alleging that the car seat in which Michael was seated at the time of the accident failed to restrain him and was the proximate cause of his injuries. *Id.* at 513-14. Gerber moved for summary judgment on the ground that the satisfied judgment against Voigt precluded, as a matter of law, any effort to recover damages on behalf of

[3] Maryland's Uniform Contribution Among Tortfeasors Act is currently codified in Title 3, subtitle 14 of the Courts and Judicial Proceedings Article.

Michael for the same injury. The district court agreed and granted summary judgment in favor of Gerber. *Id.* at 514. After the case was appealed, the United States Court of Appeals for the Fourth Circuit certified to Maryland's Court of Appeals the question of whether entry of a satisfied judgment precluded, as a matter of law, further claims for injuries suffered by Michael in the automobile accident. *Id.* at 515.

The Welshes argued, *inter alia*, that the mere entry of a judgment against one tortfeasor did not release other joint tortfeasors and that they had expressly reserved the right to proceed against other tortfeasors. *Id.* at 514. They asserted that the general rule that there may be but one full satisfaction for one injury did not apply to bar their action against Gerber because they made clear, and Voigt agreed, that payment from Voigt's insurer was not intended to be adequate compensation for their injuries. *Id.* at 515. Gerber responded that the Welshes failed to accomplish the settlement with Voigt using a joint tortfeasor release and, instead, secured the entry of the judgment on the record. *Id.* Once the judgment was satisfied, the Welshes were precluded from seeking further compensation from anyone else. *Id.*

The Court of Appeals concluded that a consent judgment "does not necessarily include an actual adjudication of the issue of damages, and in appropriate circumstances a subsequent inquiry should be made to determine what the parties intended and whether the consent judgment represents an actual adjudication of a particular issue." *Id.* at 515-16. The Court held that the consent judgment must be examined "to determine whether it represented a determination of the complete equivalent of the plaintiff's damages." *Id.* at 523. The Court recognized that the "significance of affording preclusive effect to an earlier

judgment for damages lies in the enforcement of the commendable rule that a person should receive only one full satisfaction for an injury." *Id.* at 524. The Court explained:

> Courts look with favor upon the compromise or settlement of law suits in the interest of efficient and economic administration of justice and the lessening of friction and acrimony. *Chertkof v. Harry C. Weiskittel Co.*, 251 Md. 544, 550, 248 A.2d 373 (1968). We think that the position we now take with respect to the preclusive effect to be given to consent judgments will promote the settlement of cases. A defendant who insists upon the protection of a consent judgment because of the minority of a plaintiff or for other reasons may settle his case and, provided the parties are careful to properly document their true intentions and to follow the requirements of the Uniform Contribution Among Tort-Feasors Act, the plaintiff may still pursue a full recovery by proceeding against others who may be responsible for his injury.

Id. at 524-25.

The Court commented that the consent judgment entered into by the Welshes and Voigt "was simply a part of a joint tort-feasor settlement, entered for the protection of Voigt because one of the plaintiffs was a minor." *Id.* at 525. In addition, the Court recognized that the express and articulated intent of the parties to the settlement was that the judgment would not have nonmutual collateral preclusive effect on the issue of damages and, under those circumstances, the consent judgment would not bar the Welshes' proceedings against Gerber. *Id.*

In *Morgan*, which involved consolidated cases, plaintiffs who had been injured in separate motor vehicle accidents executed general releases in settlement of their damage claims against the motor vehicle operators whose negligence caused their injuries. *Morgan*, 309 Md. at 306. Thereafter, the plaintiffs filed medical malpractice actions against the physician who treated their injuries. *Id.* In concluding that a general release of the original tortfeasor did not discharge the physician as a matter of law, the Court of

Appeals recognized that whether the physician was released depended upon the terms of the particular releases. *Id.* at 317. The Court noted that the physician's alleged negligence followed, chronologically, the motor vehicle accidents and that "but for" the accidents, neither plaintiff would have been subjected to the physician's care. *Id.* at 318. But the Court also recognized that the injuries alleged to have been inflicted by the physician were not caused by the motor vehicle accidents and "were in a factual way separate harms . . . despite the fact that the original tortfeasor might also have been held liable for them." *Id.* at 318. The Court concluded that because the damage that followed from the physician's treatment was arguably not a result of the original motor vehicle accident, the language of the release was "at the very least ambiguous as to the subsequent tort and parol evidence is admissible on the issue of intent." *Id.*

The Court in *Morgan* went on to consider that in one of the cases, the judgment was entered against the operator of the motor vehicle and marked "satisfied." *Id.* at 320. On that issue, the Court wrote:

> If releases given under the circumstances of these cases do not, as a matter of law, bar action against one in Dr. Cohen's position, it follows that the satisfaction of a judgment against Jones, the original tortfeasor, in an action to which Dr. Cohen was not a party, should have no greater effect. The policy implicated here is that against double recovery for the same harm, ... But the policy against double recovery does not apply when a judgment against the original tortfeasor for the original tort only has been satisfied, at least when the subsequent tortfeasor has not been joined in that suit. *See* Restatement (Second) of Judgments §50 (1982). Like the question of intent with respect to the ambiguous releases, we are presented with a question of fact: Did the satisfied judgment include damages for both torts, or just the original tort? If the judgment in fact encompassed the former, Hovermill's claim against Dr. Cohen is barred because she has received full compensation for all her injuries; if it encompassed only the latter, her claim is not barred

> because she has been compensated only for the initial harm caused by Jones. This is a question of fact for the trial court.

Id. at 320-21.

These cases simply demonstrate that the result turns on the terms of a consent judgment or, as in this case, the release. In considering the terms of the release, we apply ordinary contract law principles. *Chicago Title Ins. Co. v Lumbermen's Mut. Cas. Co.*, 120 Md. App. 538, 548 (1998)("Releases are contractual, and they are therefore governed by ordinary contract principles."). It is well established that "'[a] release is to be construed according to the intent of the parties and the object and purpose of the instrument, and that intent will control and limit its operation.'" *Owens-Illinois, Inc. v. Cook*, 386 Md. 468, 496 (2005)(quoting *Shriver v. Carlin & Fulton Co.*, 155 Md. 51, 64 (1928)). Where the language of the release "'is plain and unambiguous there is no room for construction, and a court must presume that the parties meant what they expressed.'" *Spangler v. McQuitty*, 449 Md. 33, 73 (2016)(quoting *Owens-Illinois, Inc.*, 386 Md. at 496).

Clearly, DiFranco is an express "releasor." The settlement was for "damages that BCC and DiFranco have alleged" as a result of the construction project (the apartment building). The release expressly referenced the consolidated cases. In the absence of constitutional, statutory, or clearly important policy barriers, a general release of "all other persons, firms or corporations" serves to release other parties from liability for the claimed damages resulting from the event in question. *Pemrock, Inc. v. Essco Co.*, 252 Md. 374, 379-380 (1969)); *see also Huff v. Harbaugh*, 49 Md. App. 661, 670 (1961)(and cases cited therein). This general rule is based upon the long-standing principle that "there can be but

one recovery for a single wrong." *Id. Buckley v. Brethren Mut. Ins. Co.*, 207 Md. App. 574, 591 (2012), *aff'd*, 437 Md. 332 (2014) is not to the contrary. The result in *Brethren* was based on the statutory scheme governing uninsured and underinsured motorist coverage. *Id*.

With regard to the release at issue in the instant case, our opinion in *Ralkey v. Minnesota Mining & Mfg. Co.*, 63 Md. App. 515 (1985), is particularly persuasive. In *Ralkey*, a patient was injured when a doctor, using an electric saw to remove a cast from the patient's leg, caused the patient's leg to be cut in three places. *Id.* at 519. The patient filed a claim in the Health Claims Arbitration Office against the doctor. *Id.* Prior to arbitration, the parties settled the case and the patient executed a release of the doctor. *Id.* Shortly thereafter, the patient filed another claim against Minnesota Mining & Manufacturing Company ("3M"), the manufacturer of the casting tape. *Id.* 3M moved for summary judgment on the ground that the action was barred by the prior release. *Id.* The trial court granted the motion for summary judgment finding that the release applied to 3M as well as the doctor. *Id.* at 519-20.

On appeal, we considered whether the release barred the patient's claim against the manufacturer, who was not and could not be a party in the arbitration case. *Id.* at 520. Recognizing that under the Uniform Contribution Among Joint Tortfeasors Act a release of only one tortfeasor does not automatically discharge the others, but reduces the total amount of the claim against those remaining, we considered the specific language of the release, which provided, in part:

> "I hereby release and discharge *ROLAND CAVANAUGH, M.D.* his or their successors and assigns, **and all other persons, firms or corporations who are or might be liable**, from all claims of any kind or character which I have or might have against him or them, and especially because of all damages, losses or injuries to person or property, or both, whether known or unknown and whether developed or undeveloped, resulting or to result from *the incident which* happened on or about *March 28, 1980, and which is the subject matter of the lawsuit filed in the Health Claims Arbitration Office for Maryland, HCA No. 81-166, and styled Mary Ann Ralkey v. Roland Cavanaugh, M.D.* and I hereby acknowledge full settlement and satisfaction of all claims of whatever kind or character which I *or my* heirs, executors and administrators may have against him or them by reason of the above mentioned damages, losses, or injuries." (The release was on a printed form. The italicized portions were typed in.)

Id. at 524.

The patient argued that the phrase "and which is the subject matter of the lawsuit filed in the Health Claims Arbitration Office" limited the release to only the doctor. *Id.* at 525. Relying on the principal that "'a general release to all mankind bar[s] further suits against other entities involved in the occurrence which produced the settlement with one participant that led to the release[,]'" and recognizing that the patient "sustained only one injury during one incident – the cuts on her leg from the removal of the cast," we rejected the patient's contention. *Id.* at 525-29. We concluded that because only one incident occurred, the mere reference to the date of the incident and the "subject matter" of the arbitration proceeding did not sufficiently distinguish between the suits against the doctor and the manufacturer. *Id.* at 530.

In reaching our decision in *Ralkey*, we distinguished *Kyte v. McMillion*, 256 Md. 85 (1969) and *Huff v. Harbaugh*, 49 Md. App. 661 (1981). In *Kyte*, the plaintiff was injured in an automobile accident caused when the driver of the vehicle in which she was a

passenger attempted to outrun a police vehicle. 256 Md. at 87. After the collision, the plaintiff was taken to a hospital for treatment and, while there, she received a blood transfusion containing the wrong blood type, which caused a physical reaction. *Id.* at 87-88. The plaintiff claimed that, as a result of receiving the wrong blood type, she suffered "irreversible sensitization" that would affect her child-bearing capacity. *Id.* at 88.

The plaintiff first sued the hospital and the nurse who had given her the wrong blood. That case settled and the plaintiff executed a general release of all claims. *Id.* at 89-91. Thereafter, the plaintiff filed suit against the driver of the vehicle for injuries sustained in the collision. *Id.* at 91. The driver asserted that the plaintiff's release of the hospital and nurse also effectively released any claim against him. *Id.* The Court of Appeals disagreed, recognizing that the injuries involved were separate and distinct. Based on the particular facts of the case, the Court held that the nurse and hospital were subsequent tortfeasors. *Id.* at 106-08. The Court concluded that although the release of an original tortfeasor discharges subsequent tortfeasors, the converse is not true because "it would defy reason to hold the [subsequent tortfeasor] liable for injuries caused by the original wrong doer which were not the consequences of his own carelessness[.]" *Id.* at 106.

In *Huff*, Harbaugh purchased a building and asked his insurance agent, Huff, to obtain fire insurance coverage for it. *Huff*, 49 Md. App. at 662-63. Over the course of twenty years, Huff had been Harbaugh's insurance agent and they typically conducted business by telephone, with Huff mailing the insurance policy to Harbaugh. *Id.* at 662. With regard to the purchased building, Huff assured Harbaugh that the building would be insured and that he would receive the policy soon, but in fact, Huff failed to obtain the

insurance coverage. *Id.* at 663. While Harbaugh awaited the arrival of the insurance policy, the building was damaged by a fire that was caused by the negligent demolition of a neighboring building and spread from an adjacent building. *Id.* at 663-64. Harbaugh sued the owner and the contractor who were responsible for the damage. *Id.* at 664. That case was settled and the parties entered into a written release for "all damages arising from said occurrence[.]" *Id.* at 664-65. Upon learning that Huff had failed to obtain the requested insurance coverage, Harbaugh filed suit. *Id.* Huff responded that the release entered into in the case against the owner and contractor in the prior action also released him. *Id.* Huff also asserted that a party can recover only once for the same injury and that Harbaugh had received at least partial compensation from the other tortfeasors. *Id.* at 665.

In *Ralkey*, we distinguished both *Kyte* and *Huff* on the ground that the injuries suffered were separate and distinct. In contrast, *Ralkey* involved only one injury, the cuts on the patient's leg, which arose during the single incident of the removal of the cast. We concluded that, unlike the wrongdoers in *Kyte* and *Huff*, the doctor and 3M were joint tortfeasors under the Uniform Contribution Among Tortfeasors Act because they were both liable in tort for the same injury. Ralkey argued that the general releases in *Kyte* and *Huff* were made specific by reference to the date of the specific occurrence, language that limited the class of releasees, and the reservation of the right to pursue another party involved with a different subject matter. We rejected those arguments noting that, in *Ralkey*, there was only one incident and only one cause of action arose.

In the case at hand, DiFranco, in his suit against Green Tomato, alleged both the intentional tort of fraud and a breach of contract. Green Tomato's alleged conduct, *i.e.*,

misrepresenting that the Premises were unsafe as a basis for terminating the contract, occurred simultaneously with Bainbridge's conduct. Construction on the apartment building began in 2011, and damage resulted before Green Tomato purchased its building and well before its alleged wrongful conduct. Importantly, DiFranco's claims were based on one occurrence, being forced to relocate, producing a single "injury," i.e., loss of income and incurring moving expenses. Although DiFranco argues that there is more than one wrong at issue in the instant case, and that the release entered into with Bainbridge does not serve to release his separate claims against Green Tomato, he has acknowledged that his claimed losses in the instant case "completely derive from the loss of BCC Automotive at 4912 Saint Elmo" and that "there are no other sources of loss directly relating to this action." In addition, when further questioned about the damages claimed in the instant action, DiFranco clarified that he was claiming damages for the loss of his business, loss of income and the expenses related to relocating his business. There was no evidence presented to support a claim for punitive damages. Clearly, the occurrence in the instant case was the relocation of BCC, the same as in the claim against Bainbridge, and the resultant damages claimed in the instant case are precisely the same as those that were the subject of the release. As a result, DiFranco's claims are barred by the terms of the release entered into in DiFranco's action against Bainbridge.

II.

Assuming that DiFranco's claims for breach of contract and fraud were not barred by the release he entered into in the prior action, summary judgment was still proper in the instant case. With respect to the claim for fraud, in his amended complaint, DiFranco

alleged that Green Tomato made false representations to him that the Premises were unsafe for habitation and posed an imminent threat to the safety of DiFranco and others lawfully upon the Premises. DiFranco asserted that Green Tomato never provided written notification, as required by the terms of the lease agreement, that the Premises were substantially damaged or that an architect had determined that the period of rebuilding would be in excess of 120 days from the start of the repair work. He alleged that Green Tomato made false representations about the safety of the Premises for the purpose of enhancing its claim for damages in an action against Bainbridge and others. In addition, DiFranco argued that "[e]ven if [Green Tomato] lacked evil motive, its actions caused damage to [him]" because he materially changed his position, vacated the Premises, lost substantial income and profits, and suffered damage to his reputation.

Under Maryland law, fraud "encompasses, among other things, theories of fraudulent misrepresentation, fraudulent concealment, and fraudulent inducement." *Sass v. Andrew*, 152 Md. App. 406, 432 (2003)(internal quotations and citations omitted). Regardless of the particular theory, the plaintiff must establish the elements of fraud "by clear and convincing evidence." *Md. Envir. Trust v. Gaynor*, 370 Md. 89, 97 (2002). In order to establish a fraudulent misrepresentation, which is the theory relevant to the instant case, DiFranco was required to prove "(1) that the defendant made a false representation to the plaintiff, (2) that its falsity was either known to the defendant or that the representation was made with reckless indifference as to its truth, (3) that the misrepresentation was made for the purpose of defrauding the plaintiff, (4) that the plaintiff relied on the misrepresentation and had the right to rely on it, and (5) that the plaintiff

suffered compensable injury resulting from the misrepresentation." *Nails v. S&R, Inc.*, 334 Md. 398, 415 (1994); *accord Thomas v. Nadel*, 427 Md. 441, 451 n.18 (2012); *Sass*, 152 Md. App. at 429.

Fraud based on the active suppression or concealment of material facts or an intentional failure to disclose facts that a defendant is legally required to disclose is referred to as fraudulent concealment. With respect to active suppression or concealment of facts, fraudulent concealment consists of "any statement or other conduct which prevents another from acquiring knowledge of a fact, such as diverting the attention of a prospective buyer from a defect which otherwise, he would have observed." *Lloyd v. Gen'l Motors Corp.*, 397 Md. 108, 138 (2007). Stated otherwise, fraudulent concealment is a "situation where the defendant actively undertakes conduct or utters statements designed to, or that would, divert attention away from" a material fact. *Id.* at 138 n.11. Where the fraudulent concealment claim is based on a duty to disclose, the plaintiff is required to establish:

> (1) the defendant owed a duty to the plaintiff to disclose a material fact; (2) the defendant failed to disclose that fact; (3) the defendant intended to defraud or deceive the plaintiff; (4) the plaintiff took action in justifiable reliance on the concealment; and (5) the plaintiff suffered damages as a result of the defendant's concealment.

Blondell v. Littlepage, 413 Md. 96, 119 (2010)(internal quotations and emphasis omitted).

In support of his claim that Green Tomato falsely represented the need to vacate the premises due to substantial damage that made it unsafe to continue operating BCC Auto on the Premises, DiFranco points out that he continued to operate his business through January 2014 and did not consider the BCC Auto building to be untenantable or unsafe for occupancy. He also points out that no Montgomery County representative ever determined

that the Premises were unsafe for occupancy. According to DiFranco, prior to the January 6, 2014 termination notice, no expert, consultant, or Montgomery County official had opined that the property was unsafe for occupancy or otherwise untenantable. In addition, DiFranco directs our attention to the following testimony of Green Tomato's representative Leonard Greenberg:

> Q. Did you tell BCC their building was unsafe for occupancy?
>
> [Greenberg]: Probably. Based on the reports, not to mention it was safe for anybody to be around the Bainbridge construction site.
>
> Q. Well, based on the reports – and you're pointing to the reports here dated April 11th of this year. And they were gone in January. So which reports were based upon your statement to BCC that the building was unsafe for occupancy?
>
> [Counsel for Green Tomato]: Objection. Don't reveal any attorney work product – attorney work product-
>
> [Greenberg]: Right.
>
> [Counsel for Green Tomato]: - in answering of your question.
>
> [Greenberg]: Thank you. Attorney/client. Thank you.
>
> Q. So the basis of your not answering my question as to whether there is any report based upon which you told BCC that the building was unsafe is attorney work product?
>
> [Greenberg]: Are you putting words in my mouth?
>
> Q. I'm asking a question.
>
> [Greenberg]: I didn't – I have no comment. I don't recall.
>
> Q. All right. So I want to make sure that we are clear about what you are not recalling, Mr. Greenberg. You are not recalling whether there is any report dated earlier than April 11th of 2014 based upon which you advised BCC that the building was unsafe for occupancy?

> [Greenberg]: I think these reports were – and I can't speculate because I don't recall. This was done to price up the budget that we submitted for you guys to pay.
>
> * * *
>
> Q. I'm going to ask you the same question with respect to BCC. And frankly, I'm not – I don't recall whether I asked it with Red Tomato. So let me ask both questions again. Are you aware of any determination by Montgomery County that either Red Tomato or BCC building was unsafe for occupancy?
>
> [Greenberg]: I don't recall.
>
> Q. In fact they advised you that they were unable to say after inspection that those buildings were unsafe for occupancy?
>
> [Counsel for Green Tomato]: Objection to the form.
>
> [Greenberg]: I don't recall. They also said everything in the site was okay, too. And the building was coming out of the ground. But they were proved wrong.

Our review of the record reveals no evidence to establish misrepresentation or concealment. DiFranco acknowledged that he had observed cracks in the walls of the BCC Auto building large enough to see daylight through and that he was unable to open and shut windows properly. He also expressed concern about how far the building would move and the fact that the building might collapse in on itself. Moreover, Green Tomato shared with DiFranco information obtained from its experts in support of the litigation against Turner and others and DiFranco relied upon the opinions of those experts. DiFranco was not prohibited from talking to the experts. Even if any misrepresentation or concealment occurred, as a matter of law, there was no reasonable reliance. If DiFranco believed that the Premises were not substantially damaged, he was free to conduct his own investigation

and retain his own experts. As there was no dispute of material fact regarding misrepresentation, concealment, or reasonable reliance by Green Tomato, the circuit court acted properly in granting summary judgment against DiFranco.

III.

DiFranco argues that the circuit court erred in granting summary judgment on the breach of contract claim because there was no evidence that the damage that allegedly made the Premises untenantable was caused by "fire or other casualty" within 90 days of the notice of termination as required by paragraph 32(b) of the lease agreement. We disagree and explain.

When interpreting the lease agreement, we focus on the four corners of the agreement. *Clancy v. King*, 405 Md. 541, 557 (2008)(relying on *Cochran v. Norkunas*, 398 Md. 1, 17 (2007)). "When the language of a contract is unambiguous, the court will give effect to its plain, ordinary, and usual meaning, taking into account the context in which it is used." *Sy-Lene of Washington, Inc. v. Starwood Urban Retail II, LLC*, 376 Md. 157, 167 (2003). In contrast, a contract is "ambiguous if it is subject to more than one interpretation when read by a reasonably prudent person." *Id.* "If the contract is ambiguous, the court must consider any extrinsic evidence which sheds light on the intentions of the parties at the time of the execution of the contract. *Id.* at 167-68 (and cases cited therein). "It is a basic principle of contract law that, in construing the language of a contract, ambiguities are resolved against the draftsman of the instrument." *Burroughs Corp. v. Chesapeake Petroleum & Supply Co., Inc.*, 282 Md. 406, 411 (1978).

The plain language of §32(b) of the lease agreement provided, in relevant part, that if the leased premises were "substantially damaged" or "rendered substantially untenantable by fire or other casualty," Green Tomato was required to give DiFranco written notice of the lease termination "within ninety (90) days after such fire or other casualty."

Section 32(b) of the lease agreement provided:

> If the leased premises are substantially damaged or are rendered substantially untenantable by fire or other casualty, or if the landlords architect certifies that the premises cannot be repaired within one hundred twenty (120) working days of normal working hours, said period commencing with the start of the repair work, or if Landlord shall decide not to repair same, or shall decide to demolish the building or to rebuild it, then Landlord shall, within ninety (90) days after such fire or other casualty, give Tenant a notice in writing or [sic] such decision, and thereupon the term of this lease shall expire by lapse of time upon the third day after such notice is given and Tenant shall vacate the premises and surrender the same to Landlord. Upon the termination of this lease under the conditions hereinabove provided, Tenants liability for minimum annual rent shall cease as of the day following the casualty.

On or about January 6, 2014, Green Tomato gave written notice to DiFranco that, pursuant to § 32(b) of the lease agreement, the lease for the Premises would expire in 3 days due to the substantial damage caused by Bainbridge's construction. At no time following that notice did DiFranco object to the termination of the lease on the ground that the Premises were not substantially damaged or rendered substantially untenantable. Nor did he make Green Tomato or anyone else aware of his position that the termination of the lease was not done in accordance with the terms of the lease agreement. To the contrary, DiFranco adopted Green Tomato's position concerning the damage caused to the Premises, alleged that BCC was forced to move by virtue of the damage, claimed damages as a result,

and joined in the litigation against Bainbridge. DiFranco and BCC claimed damages beginning at the time of the relocation, not as of a subsequent point in time.

By taking those actions, DiFranco acquiesced in Green Tomato's termination of the lease agreement. In *Osztreicher v. Juanteguy*, 338 Md. 528 (1995), the Court of Appeals commented upon the definition and effect of acquiescence as follows:

> It is well settled in Maryland that "[t]he right to appeal may be lost by acquiescence in, or recognition of, the validity of the decision below from which the appeal is taken or by otherwise taking a position which is inconsistent with the right of appeal. Applying this principle, it has been held that a litigant "cannot, knowing the facts, both voluntarily accept the benefits of a judgment or decree and then later be heard to question its validity on appeal. This rule has also been applied to consent judgments. Acquiescence implies consent, although by no means express consent. *See* Black's Law Dictionary 22 (5th ed. 1979)(defining "acquiesce" as "[t]o give an implied consent to a transaction, to the accrual of a right, or to any act, by one's mere silence, or without express assent or acknowledgement")[.] It has been held that a litigant who acquiesces in a ruling is completely deprived of the right to complain about that ruling. A party who does not offer evidence on an issue as to which that party has the burden of proof acquiesces in the adverse judgment.

Osztreicher, 338 Md. at 534-35 (internal citations omitted).

The doctrine applies in a contract action. *See Pumphrey v. Pelton*, 250 Md. 662, 671 (1968) (contract may be modified by conduct and a breach may be waived by conduct); *Hovnanian Land Inv. Grp., LLC v. Annapolis Towne Ctr at Parole, LLC*, 421 Md. 94, 116 (2011) (a party has a duty to assert its rights after a breach and may be equitably estopped by conduct); *DIRECTV, Inc. v. Mattingly*, 376 Md. 302, 317 (2003)(parties are able to waive written provisions in a contract by conduct). In light of DiFranco's failure to object to Green Tomato's termination of his lease, his adoption of Green Tomato's legal arguments with respect to the damage caused to the Premises by the construction, and his

subsequent acceptance of the benefits of the settlement agreement he entered into with Bainbridge, he cannot now be heard to argue that the notice to vacate was untimely. Accordingly, the trial court did not err in granting summary judgment against him in the underlying action against Green Tomato on the breach of contract claim.

In light of our decision, we need not address the remaining issues presented.

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