Circuit Court for Anne Arundel County
Case No. C-02-CV-000843

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2755

September Term, 2018

SYSTEMS 4, INC.

v.

WESTFIELD PROPERTY MANAGEMENT LLC

Berger,
Arthur,
Woodward, Patrick L.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: May 15, 2020

Westfield Property Management, LLC ("Westfield"), filed suit against Systems 4, Inc., in the Circuit Court for Anne Arundel County, alleging that Systems 4 failed to return the unearned portion of a deposit after Westfield terminated a contract for Systems 4's services. Systems 4 filed a multi-count counterclaim and amended counterclaim, alleging that Westfield owed additional money for its services. The circuit court granted Westfield's motions to dismiss a majority of the counts in the various counterclaims, and Systems 4 voluntarily dismissed others. After a bench trial on Westfield's complaint and the remnant of the counterclaim, the court ruled in Westfield's favor, ordered Systems 4 to return the unearned portion of the deposit, and awarded attorneys' fees to Westfield under a fee-shifting provision in the contract.

Systems 4 appealed. We shall affirm.

FACTUAL AND PROCEDURAL HISTORY

Westfield is the property manager of the Westfield Annapolis Mall and the agent for Annapolis Mall Owner LLC, the mall's proprietor.[1] Systems 4 specializes in the design, installation, and maintenance of computer-based energy and facility-management systems ("EFMS") for the control of heating, ventilation, and air conditioning ("HVAC") in buildings. Systems 4 installed the EFMS at the Annapolis Mall in 2006 and regularly provided maintenance and upgrades to the systems thereafter.

As of 2016, the Mall had some building systems that the EFMS did not control. The Mall's facilities manager, Ron Twardowski, approached Systems 4 in April 2016 to

[1] Westfield serves as the property manager and agent for numerous Westfield shopping malls located throughout the United States.

assist in preparing a scope of work proposal ("SOW") for bidding a project to expand the EFMS to the HVAC systems that it did not control. Systems 4's owner, Mary Anne Kirgan, met with Twardowski to determine which HVAC systems could be added to the EFMS and the parts of the system that needed repair. Systems 4 thereafter prepared the SOW documents for Westfield.

In May 2016 Westfield issued a Request for Proposal ("RFP") for contractors to submit bids in accordance with the SOW documents. In response to the RFP, Systems 4 submitted a bid, which included the conditions that it would be paid for all labor and expenses in the event of cancellation and that Westfield would not share Systems 4's software.

In June 2016 Westfield informed Systems 4 that it was the lowest bidder. Around that time, Twardowski told Kirgan that once the project was completed Westfield intended to implement a new program called "Ecowise 2," which would connect to the Mall's EFMS and allow Westfield to monitor all of its malls from its primary office in California. Upon Westfield's request, Systems 4 designed the interface for Ecowise 2 and the EFMS between June and August 2016.

On August 9, 2016, Twardowski informed Systems 4 that Westfield had approved its bid and that it could begin the work described in the RFP. Twardowski added that Westfield would draft a formal contract for the parties to execute.

On August 26, 2016, Westfield produced a draft contract that included a clause requiring Westfield to make two equal payments of $137,435. The clause provided for the first payment to be made within fifteen days of the agreement's execution and for the

second payment to be delivered within thirty days of the receipt of an invoice from Systems 4 following completion of the work. The contract contained a cancellation clause that permitted Westfield to terminate the contract for any reason by providing seven days' notice. The contract also contained an integration clause that stated that the contract comprises the entire agreement between the parties and that it supersedes all prior agreements or negotiations. According to its terms, the contract would become effective on September 1, 2016, and would continue in effect until November 20, 2016, or until terminated in accordance with its provisions.

Kirgan signed the contract ("2016 Contract") on August 28, 2016, and emailed a signed copy to Westfield two days later. Although Westfield signed the contract a few days later, Systems 4 claims to have never received a copy of the countersigned agreement. Systems 4, regardless, continued its work in reliance on Westfield's prior notice to proceed.

Because Westfield did not make the first $137,435 payment within fifteen days after the execution of the 2016 Contract as it was required to do, Systems 4 sent an invoice on September 27, 2016, titled "Deposit Requisition." The invoice described the payment terms as "50% Deposit and 50% When Complete."

On October 27, 2016, Westfield paid Systems 4 the requested $137,435. A day before the payment, however, Westfield directed Systems 4 to stop all work under the 2016 Contract until the parties further discussed the EFMS's integration into the Ecowise 2 platform. Twardowski then asked Systems 4 to provide a more cost-effective design option for the interface between the EFMS and the Ecowise 2 platform. In a conference

call on October 28, 2016, the parties discussed an alternative design, and Systems 4 provided the details for its new design on November 1, 2016.

On November 11, 2016, Westfield informed Systems 4 that it would not move forward with the design proposal. Westfield explained that the proposed solution did not meet the company's current specifications for the energy-management system that it intended to implement and that it would re-bid the project. After receiving the notice, Systems 4 attempted to convince Westfield not to terminate the contract and to allow the project to move forward.

On November 30, 2016, Westfield sent Systems 4 a letter stating that the 2016 Contract was terminated, effective December 7, 2016. The letter requested an itemized list of all expenses that Systems 4 had incurred, with supporting documentation, to be "deducted from the deposit" that Westfield had paid. Systems 4 did not provide the list of expenses or return the unearned portion of the deposit.

Westfield and its counsel sent multiple follow-up letters. Westfield ultimately requested that the list of expenses be provided by February 27, 2017. Kirgan requested a fourteen business-day extension to compile the list.

The fourteen days passed, but Systems 4 did not submit a list of expenses. Consequently, Westfield sent an email to Kirgan on March 17, 2017, requesting that Systems 4 return the deposit in order to avoid legal action. Kirgan replied that Systems 4's attorney would speak with Westfield's attorney "to resolve [the] situation." After Westfield heard nothing from Systems 4's counsel for several days, Westfield filed a

brief, one-count complaint for breach of contract against Systems 4 in the Circuit Court for Anne Arundel County.

On May 9, 2017, Systems 4 answered Westfield's complaint and filed a six-count, thirty-one-page counterclaim for a variety of claims related to the 2016 Contract. In Counts I and II of the counterclaim, Systems 4 sought over $5 million for the unauthorized use or distribution of its software and the unlawful misappropriation of its trade secrets. Systems 4 alleged that Westfield permitted an unauthorized download of Systems 4's EFMS software.

In addition, Systems 4 asserted several counterclaims regarding the work that it claimed to have performed. In Count III, Systems 4 alleged that its response to the RFP resulted in a binding agreement between the parties; that Westfield was prohibited from cancelling the agreement because of the conditions that Systems 4 had inserted into its bid; and that Westfield owed over $40,000, in addition to the $137,435 already paid to Systems 4, for Systems 4's work in preparing the RFP. In the alternative, in Count IV, Systems 4 alleged that, under the 2016 Contract, Westfield owed $1,417.50, in addition to the $137,435, for Systems 4's work in preparing the RFP and the SOW. In Counts V and VI, Systems 4 also alleged, in the alternative, that if the court determined that the 2016 Contract did not require Westfield to pay for the preparation of the RFP and the SOW or if that work was beyond the scope of the 2016 Contract, Westfield owed $1,417.50 for the work under a theory of quantum meruit.

Westfield moved for partial dismissal of the counterclaim pursuant to Md. Rule 2-322 for failure to state a claim upon which relief can be granted. Westfield argued that

the 2016 Contract's integration clause barred any claims under the RFP and that the existence of a valid contract between the parties precluded Systems 4 from asserting the quantum meruit claims.

The circuit court held a hearing on August 7, 2017, and granted Westfield's motion. The court dismissed Counts III, V, and VI (the claims alleging a breach of Systems 4's response to the RFP and the quantum meruit claims), with prejudice. The court also dismissed Count IV, the claim alleging a breach of the 2016 Contract, but granted Systems 4 leave to amend.

On October 4, 2017, Systems 4 filed a thirty-five-page amended counterclaim with two additional counts, Counts VII and VIII. The additional counts alleged the breach of an oral contract or an established course of dealing in connection with Systems 4's services in evaluating the existing conditions at the Mall, preparing the SOW, and integrating the Ecowise 2 program.

Westfield moved for dismissal of Counts VII and VIII on October 19, 2017, arguing that Systems 4 was barred from filing these claims because they had the same factual basis as Counts III, V, and VI, which the court had dismissed with prejudice. In response to the motion, the circuit court held a hearing and dismissed Counts VII and VIII, with prejudice, on February 1, 2018. Meanwhile, Systems 4 had voluntarily dismissed Counts I and II, its claims for the alleged misuse of its software and the alleged misappropriation of its trade secrets.

On June 22, 2018, the circuit court held a bench trial on Westfield's complaint and the sole remaining count of Systems 4's amended counterclaim – Count IV. On

September 5, 2018, the court issued a memorandum opinion in which it ruled entirely in Westfield's favor. The court found that Westfield's original payment was "a deposit for work not necessarily already performed under the August 31, 2016 contract and that Systems 4 was not entitled under the contract to be paid for work outside the precise parameters of the contract," such as preparing the SOW or RFP and evaluating the equipment conditions at the Mall. The court allowed Systems 4 to retain $53,061.59 of the deposit for the work that it had performed, but ruled that Westfield was entitled to its attorneys' fees as the prevailing party under a fee-shifting clause in the contract. Westfield subsequently submitted its request for attorneys' fees, and the circuit court awarded $146,254.99 in fees and expenses on November 27, 2018.

Systems 4 noted an appeal after the court's initial ruling and noted a timely amended appeal after the court granted the attorneys' fees.

QUESTIONS PRESENTED

Systems 4 presents six questions, which we have rephrased for concision:

1. Did the court erroneously rely upon a document not attached to the pleadings in granting Westfield's first partial motion to dismiss?

2. Did the court err in dismissing Counts VII and VIII of the amended counterclaim with prejudice?

3. Did the court err in concluding that the 2016 Contract had not expired by the time Westfield filed its complaint?

4. Did the court erroneously find that the $137,435 payment was a deposit, rather than the "pro rata value of the work performed"?

5. Did the court erroneously hold that Westfield was the prevailing party for purposes of awarding attorneys' fees?

6. Did the court err by including attorneys' fees incurred by Westfield in addressing claims outside the scope of the 2016 Contract?[2]

For the reasons discussed herein, we answer each question in the negative.

Consequently, we shall affirm the judgment below.

[2] Systems 4 formulated its questions as follows:

1. In granting Westfield's Motion to Dismiss with prejudice Counts III, V and VI of Systems 4's Counterclaim, whether the Court erred when it relied upon Westfield's September 17, 2016 letter, which was not attached to the pleadings and which Systems 4 denied receiving, to find the alleged August 31, 2016 contract precluded claims based on breach of Systems 4's RFP proposal and *quantum meruit*?

2. Whether the Court erred in dismissing with prejudice Counts VII and VIII of Systems 4's Amended Counterclaim that were based on new claims for breach of oral contract and established course of dealing, since such claims were unrelated to and fell outside the scope of the August 31, 2016 contract?

3. Whether the Court erred in concluding Westfield could terminate the August 31, 2016 contract when, by its express terms, the contract had already expired when they did so?

4. Whether the Court erred in construing the termination provision in the August 31, 2016 contract to permit Westfield to recover a portion of the payment made

STANDARD OF REVIEW

This Court conducts a de novo review of a trial court's decision to grant a motion to dismiss. *See, e.g.*, *Bradley v. Bradley*, 214 Md. App. 229, 234 (2013). To determine whether a pleading, "on its face, discloses a legally sufficient cause of action," *Fioretti v. Md. State Bd. of Dental Exam'rs*, 351 Md. 66, 72 (1998), we "'accept all well-pled facts in the complaint, and reasonable inferences drawn from them, in a light most favorable to the non-moving party.'" *Sprenger v. Pub. Serv. Comm'n of Maryland*, 400 Md. 1, 21 (2007) (quoting *Converge Servs. Grp., LLC v. Curran*, 383 Md. 462, 475 (2004)). "'Dismissal is proper only if the alleged facts and permissible inferences, so viewed, would, if proven, nonetheless fail to afford relief to the plaintiff.'" *Pendleton v. State*, 398 Md. 447, 459 (2007) (quoting *Ricketts v. Ricketts*, 393 Md. 479, 492 (2006)). If the circuit court does not disclose its reasons for granting a motion to dismiss, this Court may "affirm the judgment if the record discloses any reason why the trial court was legally

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instead of finding the payment represented the "pro rata value of the work performed," since the contract work had already commenced?

5. Whether the Court erred in holding Westfield was the prevailing party for purposes of awarding attorneys' fees, when the Court's ruling in fact found in favor of (and against) both Westfield and Systems 4?

6. In granting Westfield's Request for Attorneys' Fees, whether the Court erred in failing to separate those fees incurred by Westfield addressing claims unrelated to the August 31, 2016 contract?

correct." *Valentine v. On Target, Inc.*, 112 Md. App. 679, 681-82 (1996) (citing *Briscoe v. Mayor & City Council of Baltimore*, 100 Md. App. 124, 128 (1994)).

When a case is tried without a jury, the standard of review in this Court is governed by Maryland Rule 8-131(c):

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

We review the trial court's legal conclusions de novo. *Goff v. State*, 387 Md. 327, 337-38 (2005). "The interpretation of a written contract is a question of law for the court subject to *de novo* review." *Nova Research, Inc. v. Penske Truck Leasing Co., L.P.*, 405 Md. 435, 448 (2008). De novo review requires this Court to determine whether the trial court's decisions are "legally correct." *Walter v. Gunter*, 367 Md. 386, 392 (2002).

DISCUSSION

I. Formation of Contract

Although Systems 4 pursued a number of counterclaims under the 2016 Contract, it asserts, as a "threshold issue in this case," that the parties never entered into a binding contract. In support of that assertion, Systems 4 argues that there was no mutual assent to the agreement. Systems 4 bases that argument on Westfield's alleged failure to return the 2016 Contract after signing it. Although Systems 4's brief is less than entirely clear, it apparently intends to argue that because the 2016 Contract is not (in its view) a binding agreement, the circuit court erred in dismissing the counterclaims for quantum meruit

(Counts V and VI) and the counterclaim that was based on a putative agreement (the RFP) that would have been superseded by the 2016 Contract (Count III).[3]

"[T]he validity of a contract depends upon the 'two prerequisites of mutual assent . . . namely, an offer and an acceptance.'" *County Comm'rs for Carroll Cty. v. Forty West Builders, Inc.*, 178 Md. App. 328, 377 (2008) (quoting 3 ERIC M. HOLMES, HOLMES'S APPLEMAN ON INSURANCE 2D, § 11.1, at 93 (1998)). Therefore, a "manifestation of mutual assent" to the terms of the agreement is essential to form a contract. *Cochran v. Norkunas*, 398 Md. 1, 14 (2007). The manifestation of mutual assent requires the parties to demonstrate an intention to be bound to the same terms of the contract. *Id.*

Nonetheless, "[n]otification of acceptance [to the opposing party] is not essential to the formation of a contract." *Porter v. Gen. Boiler Casing Co., Inc.*, 284 Md. 402, 410 (1979) (citing *Chesapeake Supply & Equip. Co. v. Manitowoc Eng'g Corp.*, 232 Md. 555, 567 (1963)). Instead, under Maryland law, "acceptance can be accomplished by acts as well as words." *Id.* at 409 (citing *Duplex Envelope Co. v. Baltimore Post Co.*, 163 Md.

[3] There does not seem to have been any real question that Westfield signed the 2016 Contract. Westfield attached a signed copy of the 2016 Contract to its complaint. Moreover, in Westfield's answer, which it filed contemporaneously with its motion to dismiss parts of the initial counterclaim, Westfield admitted that it had signed the 2016 Contract. Westfield's copy of the 2016 Contract did not bear the same date as Systems 4's copy, because Westfield signed it a few days later than Systems 4 did. Nonetheless, at the hearing on Westfield's motion to dismiss parts of the original counterclaim, Systems 4's attorney conceded that the two documents were otherwise "identical." Thus, even though both parties signed an "identical" contract, Systems 4 evidently contends that the contract is not binding, because Westfield allegedly failed to return a copy of the signed document to Systems 4.

596, 605 (1933)). "[N]o formal acceptance is required." *Id*..

Similarly, unless the terms of a contract make the parties' signatures a condition precedent to its formation, a signature is not required to bring a contract into existence. *All State Home Mortg., Inc. v. Daniel*, 187 Md. App. 166, 181-82 (2009); *accord Porter v. Gen. Boiler Casing Co., Inc.*, 284 Md. at 410-11 (stating that "there need be no signatures unless the parties have made them necessary at the time they expressed their assent and as a condition modifying that assent"). "The purpose of a signature is to demonstrate 'mutuality or assent[,]' which could as well be shown by the conduct of the parties." *Porter v. General Boiler Casing Co., Inc.*, 284 Md. at 410.

The 2016 Contract does not require the parties' signatures as a condition precedent to its validity or effectiveness. Consequently, the trial court was permitted to conclude that the Contract came into existence based on evidence that the parties exhibited their assent to it.

Both parties manifested their assent to the 2016 Contract by performing in accordance with it – Systems 4, for example, by demanding payment; and Westfield, by making a payment.[4] The parties' conduct demonstrates their intention to be bound to the contract's terms, and Westfield was not required by law to notify Systems 4 of its assent.

[4] In paragraph 38 of its original counterclaim, Systems 4 alleged: "In connection with the Accepted RFP Proposal and the Unratified Second Contract," Systems 4's term for the 2016 Contract, "on September 27, 2016, Systems 4 submitted an invoice to Westfield in the amount of $137,435[.]" In the same paragraph, Systems 4 went on to allege that "on or about October 28, 2016 Westfield processed payment on Systems 4's invoice."

The 2016 Contract contained no term requiring notification of acceptance or a certain manner of acceptance for it to be executed. Therefore, the circuit court correctly concluded that the parties mutually assented to the 2016 Contract.[5]

II. Consideration of Matters Outside of Pleadings

Systems 4 asserts that, in granting Westfield's motion to dismiss a number of counts of the initial counterclaim, the circuit court erroneously relied on a document not attached to the pleadings to conclude that the parties entered into a binding contract. Systems 4 specifically asserts that the court considered a letter dated September 17, 2016, from Westfield to Systems 4, that allegedly transmitted a countersigned copy of the 2016 Contract. According to Systems 4, the court's consideration of the letter led it to dismiss Counts III, V, and VI of the counterclaim with prejudice, on the ground that the 2016 Contract supersedes all previous agreements and precludes the assertion of any quasi-contractual claims for quantum meruit.

Maryland Rule 2-322(c) provides, in pertinent part, as follows: "If, on a motion to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 2-501,

[5] The foregoing discussion assumes that Systems 4 is asserting the putative absence of mutual assent as a challenge to the grant of the motion to dismiss part of its original counterclaim. At trial, Westfield established that it signed the 2016 Contract and returned a copy of the signed contract to Systems 4. Thus, viewing the evidence at trial in the light most favorable to Westfield, the party that prevailed, there is no question that Westfield manifested its assent to the 2016 Contract exactly as Systems 4 says it was required to do.

and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 2-501." In light of Rule 2-322(c), when a court rules on a motion to dismiss for failure to state a claim upon which relief can be granted, the universe of "facts" pertinent to the court's analysis is generally limited to the four corners of the complaint and its supporting exhibits, if any. *D'Aoust v. Diamond*, 424 Md. 549, 572 (2012).[6] Nonetheless, in considering a motion to dismiss for failure to state a claim, a court is not prohibited from reviewing materials outside of the complaint, as long as it does not rely on those materials in granting the motion. *McCauley v. Suls*, 123 Md. App. 179, 186 (1998) (treating ruling as the grant of a motion to dismiss where, even though the court looked at and commented on materials outside of the pleadings, the court based its decision strictly on the allegations in the pleadings).

In its oral opinion in this case, the circuit court made it clear that it did not rely on the letter in making its decision. The court correctly recognized that "Maryland law . . . doesn't require a formal acceptance process." Hence the court correctly concluded that it was "not dispositive" that Systems 4 claimed not to have received a copy of the contract as executed by Westfield. In addition, the court correctly concluded that the contract could be "binding on Systems 4 or on Westfield" notwithstanding Westfield's alleged failure to return a fully executed copy to Systems 4.

[6] For a discussion of some of the circumstances in which a court may consider a document outside of the complaint without transforming a motion to dismiss into a motion for summary judgment, see *Margolis v. Sandy Spring Bank*, 221 Md. App. 703, 710 n.4 (2015); and *Advance Telecom Process LLC v. DSFederal, Inc.*, 224 Md. App. 164, 175 (2015).

In this regard, the court observed that the parties appeared to have performed some of their obligations under the 2016 Contract: according to the counterclaim, Systems 4 had submitted the $137,435 invoice, and Westfield paid it. *See supra* n.4. In other words, the court recognized that the parties, through their alleged conduct, had confirmed the existence of the agreement. Therefore, despite its reference to a document outside the four corners of the complaint, the court did not err in granting Westfield's partial motion to dismiss several counts of the original counterclaim.

III. Dismissal of Counts VII and VIII of Amended Counterclaim

After the circuit court dismissed some counts of the original counterclaim, with prejudice, Systems 4 asserted Counts VII and VIII of its amended counterclaim. Those counts alleged the breach of an oral contract and the breach of an established course of dealing. Systems 4 asserted those counts as a vehicle to recover payment for evaluating the existing conditions at the Mall, preparing the SOW, and facilitating the use of the Ecowise 2 program – the same items for which Systems 4 sought payment in the counts that the court had previously dismissed, with prejudice.

On Westfield's motion, the circuit court dismissed Counts VII and VIII. The court did not err in dismissing those counts, because it correctly recognized that they were just a repackaged version of the legal theories that it had already dismissed, with prejudice.

Systems 4 argues that the court erred in dismissing Counts VII and VIII, because, it says, the court ignored the allegation that those counts concerned work that was "separate and apart" from the services that Systems 4 was to perform under the 2016 Contract. In view of that allegation, Systems 4 argues that the court could not properly

conclude that the integration clause of the 2016 Contract barred the assertion of the legal theories in Counts VII and VIII. Systems 4 is incorrect.

In deciding a motion to dismiss for failure to state a claim, a court must assume the truth of factual allegations and the reasonable factual inferences that may be drawn from them, but it need not accept the truth of legal conclusions. *See, e.g.*, *Margolis v. Sandy Spring Bank*, 221 Md. App. at 713. Consequently, the court was not required to accept the truth of Systems 4's conclusion that Counts VII and VIII concerned work that was "separate and apart" from the services that Systems 4 was to perform under the 2016 Contract. *Id.* Instead, the court was permitted to inquire into the substance of the 2016 Contract to ascertain whether Systems 4's conclusion was borne out by the facts.[7]

Section 18.1 of the 2016 Contract contains the integration clause: "[T]his Agreement contains all of the agreements of the parties hereto with respect to any matter covered or mentioned in this Agreement, and no prior agreement, negotiations, brochures, arrangements, or understanding pertaining to any such matter shall be effective for any purpose unless expressed herein." By its terms, the integration clause bars the assertion of a claim based on a prior "agreement" or "understanding" that pertains to "any matter covered or mentioned in" the 2016 Contract.

Exhibit A to the 2016 Contract describes the "scope of services" that Systems 4 was to perform. The scope of services included software enhancements, which would

[7] Systems 4 attached the 2016 Contract as a supporting exhibit to both of its counterclaims. Consequently, the court could consider the terms of that document without transforming Westfield's motion to dismiss into a motion for summary judgment. *See, e.g.*, *D'Aoust v. Diamond*, 424 Md. at 572.

include evaluating the existing conditions at the Mall, and facilitating the use of the Ecowise 2 program. Therefore, to the extent that Counts VII and VIII sought to recover damages for those services on the basis of an agreement other than the 2016 Contract, they failed to state a claim upon which relief could be granted.

Additionally, Exhibit D of the 2016 Contract is the SOW that Systems 4 prepared. In these circumstances, any "agreement" or "understanding" pertaining to the SOW is obviously an understanding pertaining to a "matter covered or mentioned in" the 2016 Contract. Therefore, to the extent that Counts VII and VIII sought to recover damages on the basis of any such "agreement" or "understanding," they too failed to state a claim upon which relief could be granted.

In summary, the circuit court did not err in dismissing Counts VII and VIII for failure to state a claim upon which relief can be granted.[8]

[8] Westfield argues, incorrectly, that res judicata barred the assertion of Counts VII and VIII. It did not. Res judicata requires, among other things, a final judgment on the merits. *See, e.g., Anne Arundel Cty. Bd. of Educ. v. Norville*, 390 Md. 93, 106 (2005). But the dismissal of fewer than all the counts of a multi-count pleading "(1) is not a final judgment; (2) does not terminate the action as to any of the claims or any of the parties; and (3) is subject to revision at any time before the entry of a judgment that adjudicates all of the claims by and against all of the parties." Md. Rule 2-602(a); *see Miller & Smith at Quercus, LLC v. Casey PMN, LLC*, 412 Md. 230, 248 (2010). Indeed, even if the court had dismissed the counterclaim in its entirety, there would not yet have been a final judgment, as Westfield's complaint remained pending. *See, e.g., Carl Messenger Service, Inc. v. Jones*, 72 Md. App. 1, 5-6 (1987). Westfield also argues, incorrectly, that Systems 4 was "bound" by an "admission," elsewhere in its pleadings, that the work for which it sought compensation in Counts VII and VIII was "performed in connection with the" 2016 Contract. Westfield fails to recognize that a party is permitted to plead alternative, and even inconsistent, theories. Md. Rule 2-303(c). Systems 4 was not precluded from alleging that the work was outside the scope of the contract merely because it had also alleged, in the alternative, that the work was inside the scope. *Cf. Eagan v. Calhoun*, 347 Md. 72, 86-88 (1997) (holding that a party was estopped to take a

IV. Termination of Contract

Section 1 of the 2016 Contract provides that the agreement "will become effective on September 1, 2016 and will continue in effect until November 20, 2016, or until terminated as provided in this Agreement." Because Westfield did not send its termination letter until November 30, 2016, Systems 4 argued that the contract had already expired when Westfield sought to terminate it. Consequently, Systems 4 asserted that Westfield could not compel Systems 4 to return the deposit. Instead, in Systems 4's view, it was apparently entitled to retain the entire deposit – even the portions that it had not yet earned.

The circuit court dismissed Systems 4's argument that it was entitled to a windfall because of the timing of the termination:

> The Court has considered Systems 4's arguments that the contract terminated and expired on November 20, 2016 and that as a result of that purported expiration, Westfield was precluded from taking any action to recover the unused portion of the deposit. The Court is not persuaded that this is a reasonable and sensible interpretation of the provisions of this contract. Westfield was entitled to file this suit and to recover any funds paid that cannot be offset by work actually done by Systems 4 under this contract.

The court's interpretation is entirely correct, as the parties' conduct evidences an agreement to extend the term of the contract beyond November 20, 2016. For instance, after November 11, 2016, when Westfield informed Systems 4 that it would not move forward with its design proposal, Systems 4 attempted to persuade Westfield not to end

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position that was inconsistent with the position that he had taken in other litigation concerning the same factual issue).

the project. Systems 4's efforts at persuasion persisted until Westfield sent the termination letter nineteen days later. As the agreement permits the parties to continue the contract "until terminated," it would be reasonable to find that the parties extended the agreement beyond November 20, 2016, based on their conduct.

Systems 4 argues that Westfield breached the implied covenant of good faith and fair dealing by using the termination provision after November 30, 2016, to reclaim the entire payment and to deprive Systems 4 of the "fruits of the contract." Systems 4 cites *Questar Builders, Inc. v. CB Flooring, LLC*, 410 Md. 241, 281 (2009), which states that, "[U]nder the covenant of good faith and fair dealing, a party [exercising discretion must] refrain from doing anything that will have the effect of frustrating the right of the other party to receive the fruits of the contract between them." (Alteration in original.) This argument is without merit. In the termination letter, Westfield envisioned that Systems 4 would receive just compensation for the work it performed because it would retain part of the deposit to cover its costs and expenses, if it produced documentation.

V. Recovery of Deposit

Systems 4 challenges the circuit court's finding that Westfield's $137,435 payment was a deposit, which Systems 4 was obligated to return to the extent that it had not performed the required services. According to Systems 4, Westfield's payment was for the "pro rata value of the work performed" by Systems 4. Systems 4 concludes that it was entitled to retain the entire payment.

Systems 4 bases its argument on Section 4.3 of the agreement, which covers termination:

> In the event that this Agreement is terminated by [Westfield] prior to the completion of the Services, without any default by [Systems 4], [Westfield] shall pay to [Systems 4] . . . the pro-rata portion of the Contract Price which reflects the value of Services actually completed in proportion to the Contract Price as of the date of termination . . . . In the event that the Agreement is terminated prior to the commencement of any of the Services, without any default by [Systems 4], [Westfield] shall pay . . . to [Systems 4] the sum of [Systems 4's] reasonable, verifiable out-of-pocket costs . . . that are incurred by [Systems 4] through the date of such termination by [Westfield].

Systems 4 also cites Section 3.3, which states, in part: "No part of the Contract price shall be due for work not actually completed or performed, and accepted by [Westfield]."

Because the project had already commenced when Westfield tendered the $137,435 payment, Systems 4 argues that under these terms the payment must have been for services that it had already provided. Therefore, according to Systems 4, it had no obligation to return any portion of that payment.

Westfield responds that the circuit court found as a matter of fact that the payment was "a deposit for work not necessarily already performed under the August 31, 2016 contract." That finding is reviewed under the clearly erroneous standard and will not be disturbed "if there is any competent evidence to support" it. *Spaw, LLC v. City of Annapolis*, 452 Md. 314, 339 (2017).

The record includes enough evidence to support a finding that the payment was a deposit. The invoice that Systems 4 sent to Westfield for the first payment was titled "Deposit Requisition." It described the payment terms as "Payments: 50% Deposit and 50% When Complete." The invoice did not indicate that it was for work already

performed. Moreover, the agreement required Westfield to make the first payment within fifteen days of execution of the 2016 Contract, suggesting that the payment was for prospective work. Based on this evidence, the court was not clearly erroneous in finding that the first payment was a deposit.

VI. Prevailing Party for Attorneys' Fees

Because the court determined that Westfield was the prevailing party, it awarded Westfield all of its attorneys' fees under the fee-shifting clause in the 2016 Contract.[9] Systems 4 challenges the court's determination that Westfield was the prevailing party.

The designation of the prevailing party for the purposes of awarding attorneys' fees is a question of law that we review de novo. *Giant of Maryland, LLC v. Taylor*, 221 Md. App. 355, 368 (2015). A party is considered a prevailing party if it "succeeds on any significant issue that achieves some of the benefit sought in bringing the action." *Friolo v. Frankel*, 373 Md. 501, 523 (2003); *accord Royal Inv. Grp., LLC v. Wang*, 183 Md. App. 406, 458 (2008) (holding that a litigant that wins "on the core claims that formed the basis of the dispute between the parties" is the prevailing party). The trial court in this case ruled in Westfield's favor on its sole claim against Systems 4 and on all counts brought by Systems 4 in the counterclaim and amended counterclaim. Westfield, therefore, was clearly the prevailing party in the underlying litigation.

Md. Rule 2-705 applies to a claim for an award of attorneys' fees pursuant to a

[9] Section 18.3 of the 2016 Contract states: "If any action is brought by either party against the other party, relating to or arising out of this Agreement, . . . the prevailing party shall be entitled to recover from the other party all reasonable attorneys' fees, costs and expenses incurred" relating to the action.

contractual provision that permits such an award to the prevailing party in litigation arising out of the contract. Under Rule 2-705(f)(1), a court must consider the factors set forth in Rule 2-703(f)(3) and the principal amount in dispute in the litigation, among other things, in deciding a claim for attorneys' fees under a contractual fee-shifting provision.

Under Md. Rule 2-703(f)(3)(H), a circuit court must consider "the amount involved and the results obtained." Systems 4 argues that Westfield achieved only partial success, because Westfield recovered only $84,283.41 of the $137,435.00 deposit, and, therefore, that the court should have reduced the fee award. Furthermore, Systems 4 argues that the court abused its discretion in awarding $145,406.70 in fees, when Westfield recovered considerably less than that amount in damages. It cites *Ochse v. Henry*, 216 Md. App. 439, 453 (2014), which held that if a party has achieved only partial success, the court may award attorneys' fees that are proportional to the amount recovered.

The size of the attorneys' fees award is determined "within the sound discretion of the trial judge and will not be overturned unless clearly erroneous." *Dent v. Simmons*, 61 Md. App. 122, 127 (1985). In *Reisterstown Plaza Association v. General Nutrition Center, Inc.*, 89 Md. App. 232, 248 (1991), this Court upheld an attorneys' fee award of $141,784.42, even though the actual damages were $79,337.91, because the prevailing party won on all counts and successfully defended against substantial claims from the opposing party. Conversely, in *Ochse v. Henry*, 216 Md. App. at 459, this Court held that a trial court did not abuse its discretion when it awarded only a portion of the fees,

where the prevailing party had succeeded on just one of four counts and did not succeed on the count that was its primary focus at trial. Because Westfield succeeded in its single claim for relief and in defeating the multitude of counterclaims brought by Systems 4, the court did not abuse its discretion in awarding Westfield the entirety of its attorneys' fees.

VII. Attorneys' Fees Related to 2016 Contract

In its final argument, Systems 4 disputes the trial court's award of fees that it claims were unrelated to the 2016 Contract. Systems 4 argues that the bulk of the fees related to its counterclaims, including the alleged trade secret violations, the quantum meruit claims, and claims alleging the breach of other contracts, and thus were outside of the scope of the 2016 Contract.

The fee-shifting clause in the 2016 Contract permits the recovery of fees "relating to or arising out of this Agreement, the transaction described herein or the enforcement hereof." In view of that "broad and wide ranging" language, the circuit court correctly found Systems 4's argument to be "without merit." All of the counterclaims were related to the field repairs and software enhancements for the Mall's HVAC system, which is the "transaction" covered by the 2016 Contract. Count I alleged the breach of the terms of the 2016 Agreement that protected Systems 4's software, and Count II alleged that the same conduct gave rise to a statutory claim for misappropriation of trade secrets. Count III alleged that Westfield breached the RFP that was integrated into the 2016 Contract. Count IV sought damages for work under the 2016 Contract. Counts V and VI sought damages for the same work under a theory of quantum meruit, if the work was outside of 2016 Contract's scope, and hence they were "related to" the 2016 Contract. Counts VII

and VIII of the amended counterclaim sought damages for the same work as did Counts III, V, and VI, and hence were "related to" the 2016 Contract as well.

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