Circuit Court for Baltimore County
Case No. 03-C-17-011539

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3322

September Term, 2018

SAXON'S INC.

v.

MACKENZIE RETAIL, LLC, ET AL.

Kehoe,
Berger,
Shaw Geter,
JJ.

Opinion by Berger, J.

Filed: July 31, 2020

This appeal arises from an action filed in the Circuit Court for Baltimore County. Saxon's, Inc., Appellant ("Saxon's"), is a retail jewelry store which entered into a lease with Boulevard at Box Hill 4 LLC ("the Landlord"). Saxon's leased retail space at the Boulevard at Box Hill, a shopping center in Abingdon, Maryland ("the Shopping Center"). MacKenzie Retail, LLC ("MacKenzie") and Thomas L. Fidler ("Fidler"), Appellees, were agents of MacKenzie Commercial Real Estate Services, LLC, the broker for the Landlord with the exclusive right to negotiate Saxon's lease with the Landlord ("the Lease").[1] Following Saxon's discontent with the lack of national chain stores leasing space at the Shopping Center, Saxon's filed a Complaint against Appellees, alleging that Fidler made false promises, which induced Saxon's into signing the Lease. Saxon's filed an Amended Complaint on February 3, 2018, which included counts for misrepresentation, negligent misrepresentation, fraud, negligence, promissory estoppel and detrimental reliance.

Appellees filed a Motion to Dismiss and/or Motion for Summary Judgment in response to Saxon's Amended Complaint. Following a hearing in the Circuit Court for Baltimore County, the court granted summary judgment in favor of Appellees as to the intentional misrepresentation, negligent misrepresentation, fraud, and negligence claims. The court further dismissed Saxon's claim for promissory estoppel and detrimental reliance and found that Saxon's claims were barred by the statute of limitations. This timely appeal followed.

[1] Fidler is the Executive Vice President and Principal of MacKenzie.

Saxon's presents the following issues for our review, which we have rephrased for clarity:

> I. Whether Saxon's claims are barred by the statute of limitations, despite the parties renegotiating and expressly agreeing to lease and rent adjustments.
>
> II. Whether the circuit court erred in granting Appellees' Motion to Dismiss and/or Motion for Summary Judgment?

For the reasons stated herein, we hold, that Appellant's claim was barred by limitations. Further, we hold that the circuit court did not err in in granting Appellees' Motion for Summary Judgment and Motion to Dismiss. We, therefore, affirm the judgment of the Circuit Court for Baltimore County.

FACTS AND PROCEDURAL HISTORY

Saxon's is a retail jewelry store which had two locations in Harford County in Bel Air and Abingdon at the time it entered into the Lease. Fidler was a frequent customer of the Bel Air store and had a personal relationship with Saxon's owners, Kevin Ferrell and Lance Hirsch. During late 2012 and early 2013, Saxon's engaged in negotiations with Fidler to lease retail space at the Boulevard at Box Hill, a shopping center in Abingdon, Maryland. Ferrell and Hirsch negotiated with MacKenzie on its behalf for approximately seven months before it signed the Lease.

The retail space that Saxon's ultimately occupied was approximately 2,039 square feet and was situated in a retail building of approximately 49,000 square feet. The space was part of the Boulevard at Box Hill shopping center. Construction of the Shopping Center was advertised as a three-phase project. Phase I was complete at the time the parties

entered into negotiations. At that time, Wegman's, Joe's Crab Shack, Panera Bread and PNC had already opened.

Saxon's alleged that Appellees made various promises concerning the Shopping Center during the course of the lease negotiations. According to Saxon's, Fidler continuously made promises that national chains were coming to the Shopping Center as part of Phase III, including Carrabba's Italian Restaurant, Red Brick Station, Carter's Kids, the Yankee Candle, Chico's, Grilled Cheese and Co., Tilly's, and Floyd's Barber Shop. Saxon's also alleged that Fidler represented that the retail space that Saxon's ultimately leased was the only space available and that other jewelry stores had inquired about the property. Saxon's further alleged that Fidler represented to Ferrell and Hirsch that a lease had already been executed for the retail space they were interested in leasing. Nevertheless, the space remained vacant throughout Saxon's tenancy. Saxon's ultimately entered into the Lease with the Landlord on July 24, 2013, and opened "XO by Saxon's."[2] The base rent at the time Saxon's signed the Lease was $5,777.16 per month. In its Complaint, Saxon's alleged that it purchased $400,000.00 worth of jewelry in preparation for its new retail location. It further constructed a new showroom, costing approximately $375,000.00.

As Saxon's observed that national chains were not leasing space in the Shopping Center during Phase II and phase II of construction, Saxon's began to express its displeasure to Appellees. On December 3, 2013, Saxon's sent Fidler a letter expressing its

[2] The Lease included a clause that established Appellees as the agents of the Landlord and "Landlord related parties."

displeasure with the situation. Specifically, Saxon's expressed "major concern" about the lack of nationally recognized tenants in the Shopping Center. Thereafter, Appellees agreed to reduce Saxon's rent in May 2014, February 2015, December 2015, and December 2016. In December 2017, Appellees again agreed to reduce Saxon's rent to $4,500 per month. In April 2018, Saxon's closed its retail store in the Shopping Center.

Saxon's filed a Complaint against Appellees on November 17, 2017 and an Amended Complaint on February 3, 2018. The Amended Complaint included claims for intentional and negligent misrepresentation, negligence, fraud, and promissory estoppel. Saxon's requested compensatory and punitive damages for its monetary loss, loss of standing and reputation to its brand, and loss of potential business ventures as a result of Appellees' promises. In response to the Amended Complaint, Appellees filed a motion to Dismiss Amended Complaint and/or Motion for Summary judgment. Appellees argued that Saxon's claims were barred by the statute of limitations and that Saxon's lacked standing to sue Appellees. Appellees further asserted that Saxon's did not justifiably, reasonably, or actually rely on any representation made by them and that Saxon's did not allege any actionable fraud.

Following a hearing in the Circuit Court for Baltimore County, the court invited Saxon's to brief the duty it alleged was owed by Appellees in support of its general negligence claim. Subsequently, the court dismissed Saxon's promissory estoppel claim and granted summary judgment in favor of Appellees regarding Saxon's claims for fraud, negligent misrepresentation, intentional misrepresentation, and negligence. The circuit

court further observed that Saxon's failed to assert its claims within the applicable limitations period, and granted summary judgment in favor of Appellees.

STANDARD OF REVIEW

"A trial court may grant summary judgment where the motion for summary judgment, and any opposition thereto, establish that there is no dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." *Washington Mut. Bank v. Homan*, 186 Md. App. 372, 387 (2009). "A trial court's disposition of summary judgment motions is subject to *de novo* review on appeal." *Id.* at 387-88. "Before determining whether the circuit court's decision was legally correct, however, appellate courts must first determine whether there is any genuine dispute of material facts." *Id.* "Any factual dispute is resolved in favor of the non-moving party." *Dashiell*, *supra*, 396 Md. at 163. "Only when there is an absence of a genuine dispute of material fact will the appellate court determine whether the trial court was correct as a matter of law." *Id.*

We review the grant of a motion to dismiss *de novo* as well. *Advance Telecom Process LLC v. DSFederal, Inc.*, 224 Md. App. 164, 174 (2015). "In reviewing the grant of a motion to dismiss, we must determine whether the complaint, on its face, discloses a legally sufficient cause of action." *Britton v. Meier*, 148 Md. App. 419, 425 (2002) (quoting *Fioretti v. Md. State Bd. of Dental Exam'rs,* 351 Md. 66, 72 (1998)). "We will affirm the circuit court's judgment 'on any ground adequately shown by the record, even one upon which the circuit court has not relied or one that the parties have not raised.'" *D.L. v. Sheppard Pratt Health Sys., Inc.*, 465 Md. 339, 350 (2019) (citing *Sutton v. FedFirst*

Fin. Corp., 226 Md. App. 46, 74 (2015), *cert. denied*, *Sutton v. FedFirst Fin.*, 446 Md. 293 (2016).

I. Saxon's claims are barred by limitations.

Saxon's signed the Lease with the Landlord on July 24, 2013 and first expressed its displeasure with the Lease in a letter dated December 3, 2013. Saxon's contends that the limitations period did not begin to run in 2013 because Appellees continued to make false promises during conversations and negotiations through 2017. Appellees, in response, assert that the limitations period accrued in December 2013, when Saxon's sent the first letter detailing its complaints regarding the Lease, or at the latest, in May 2014 when the first rent reduction was made. Appellees contend that Saxon's had discovered all facts that formed the basis of its claims by that date.

Md. Code (1977, 2013 Repl. Vol., 2019 Suppl.), § 5-101 of the Courts and Judicial Proceedings Article ("CJ") provides that "[a] civil action at law shall be filed within three years from the date it accrues unless another provision of the Code provides a different period of time within which an action shall be commenced." "In Maryland, the general rule is that the running of limitations against a cause of action begins upon the occurrence of the alleged wrong, unless there is a legislative or judicial exception which applies." *Poole v. Coakley & Williams Const., Inc.*, 423 Md. 91, 131 (2011). Maryland utilizes the discovery rule in order to determine the accrual date, which the Court of Appeals has explained as follows:

> Recognizing the unfairness inherent in charging a plaintiff with slumbering on his rights where it was not reasonably possible to have obtained notice of the nature and cause of an injury,

> this Court has adopted the discovery rule to determine the date of accrual. *Hahn v. Claybrook,* 130 Md. 179, 186-187, 100 A. 83, 85–86 (1917). The discovery rule tolls the accrual of the limitations period until the time the plaintiff discovers, or through the exercise of due diligence, should have discovered, the injury. Thus, before an action is said to have accrued, a plaintiff must have notice of the nature and cause of his or her injury.

Frederick Rd., supra, 360 Md. at 95-96.

The Court of Appeals has consistently held "that 'the question of accrual in § 5-101 is left to judicial determination,' unless the determination rests on the resolution of disputed facts regarding discovery of the wrong." *Poole*, *supra*, 423 Md. at 131 (quoting *Frederick Rd., supra*, 360 Md. at 95). The Court of Appeals has also noted "that '[a] grant of summary judgment is appropriate where the statute of limitations governing the action at issue has expired.'" *Poole*, *supra*, 423 Md. at 130 (quoting *Frederick Rd. Ltd. P'ship v. Brown & Sturm,* 360 Md. 76, 94 (2000)) (alteration in original).

In support of its argument that the limitations did not begin to run until 2017, Saxon's relies on *Litz v. Maryland Dep't of Env't*, 434 Md. 623, 646 (2013). *Litz* involved an action for trespass, negligence, nuisance, and inverse condemnation against the Maryland Department of the Environment, as well as the related town and county. Litz alleged that the actions of each contributed to the pollution of a lake situated on her property. *Id.* at 633-34.

Indeed, the Court of Appeals has observed that "[t]he 'continuing harm' or 'continuing violation' doctrine ... tolls the statute of limitations in cases where there are continuing violations." *Id.* The Court of Appeals explained that "[w]hen a claimant brings

a cause of action for continuing acts of negligence . . . . 'every repetition of the wrong creates further liability and creates a new cause of action, and a new statute of limitations begins to run after each wrong perpetuated.'" *Litz*, *supra*, 434 Md. at 646 (quoting *MacBride v. Pishvaian,* 402 Md. 572, 584 (2007). "Therefore, 'violations that are continuing in nature are not barred by the statute of limitations merely because one or more of them occurred earlier in time.'" *Id.* at 646 (quoting *MacBride*, *supra*, 402 Md. at 584). Damages, however, "for such causes of action are limited to those occurring within the 'three year period prior to the filing of the action.'" *Id.* at 646 (quoting *Shell Oil Co. v. Parker,* 265 Md. 631, 636 (1972)).

Critically, in *Litz*, the plaintiff included well-plead facts, which supported her contention that limitations did not bar her claims. *Id.* at 648-49. Although Litz was notified of the pollution by the town in the 1990s, the Court held that a trier of fact could conclude that the town's duties were ongoing and continuous and that the town had continued to breach this duty until three years before the Complaint was filed. *Id.* at 649. Here, the record reflects that Saxon's did not present any facts about specific conversations and promises that occurred past December 2013, which it relied upon or suffered new damages as a result thereof. Further, Saxon's attempt to characterize each rent reduction as an entirely new lease agreement is unpersuasive. Saxon's refers only to the initial lease, and has produced no evidence of a lease that contains new or different provisions than the original, other than the reductions in rent. We agree with Appellees that any wrongs and damages flow from Saxon's initial entry into the retail lease in 2013. The continuing harm doctrine, therefore, does not apply to the circumstances of the instant case.

Because the continuing harm doctrine does not apply, we apply the general discovery rule to determine whether Saxon's claims are barred by limitations. Saxon's acknowledged that it was aware of the facts that formed the basis of its claims in the December 3, 2013 letter to Fidler and Appellees first made a rent reduction to the Lease in May of 2014. Indeed, the circuit court observed that Saxon's had not produced verified facts identifying when any post-contractual representations were made beyond December of 2013. We agree. Saxon's, therefore, had until May of 2017 at the latest, to pursue its claims.

II. The circuit court did not err in granting Appellees' Motion to Dismiss and Motion for Summary Judgment.

Even, assuming arguendo, that Saxon's claims were not barred by limitations, the circuit court correctly dismissed Saxon's promissory estoppel claim and granted summary judgment in favor of Appellees regarding Saxon's claims for fraud, negligent misrepresentation, intentional misrepresentation, and negligence. In its Memorandum Opinion, the circuit court analyzed Saxon's fraud, negligent misrepresentation, and intentional misrepresentation claims together as each require similar elements.[3] Negligent misrepresentation requires the following elements to be proven:

> (1) The defendant, owing a duty of care to the plaintiff, negligently asserts a false statement;
> (2) The defendant intends that his statement will be acted upon by the plaintiff;

[3] The circuit court further granted summary judgment in favor of Appellees on Saxon's negligence claims for the same reasons as it dismissed its claim for negligent misrepresentation.

> (3) The defendant has knowledge that the plaintiff will probably rely on the statement, which, if erroneous, will cause loss or injury;
>
> (4) The plaintiff, justifiably, takes action in reliance on the statement; and
>
> (5) The plaintiff suffers damage proximately caused by the defendant's negligence.

Balfour Beatty Infrastructure, Inc. v. Rummel Klepper & Kahl, LLP, 226 Md. App. 420, 457–58 (2016), *aff'd*, 451 Md. 600 (2017).

Similarly, in order to recover damages in an action for fraud, the following elements must be proven:

> 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.

Sass v. Andrew, 152 Md. App. 406, 429 (2003). "A 'false representation' is a statement, conduct, or action that intentionally misrepresents a material fact." *Id.* "A 'material' fact is one on which a reasonable person would rely in making a decision." Id. at 430. This Court has explained the following in regard to whether a plaintiff had the right to rely on a misrepresentation:

> Maryland law is generally consistent with § 540 of the *Restatement (Second) of Torts:* "The recipient of a fraudulent misrepresentation of fact is justified in relying upon its truth, although he might have ascertained the falsity of the representation had he made an investigation." *See Gross v. Sussex,* 332 Md. 247, 264–69, 630 A.2d 1156 (1993); *Schmidt v. Millhauser,* 212 Md. 585, 592–93, 130 A.2d 572 (1957). The exception to this general rule arises when, "under the circumstances, the facts should be apparent to [a person of the plaintiff's] knowledge and intelligence from a cursory glance or he has discovered something which should serve as a warning that he is being deceived...." *Id.* (quoting W. Page Keeton *et al., Prosser & Keeton, on the Law of Torts* § 108 at 752 (5th ed.1984)).

Rozen v. Greenberg, 165 Md. App. 665, 677 (2005). Finally, in order to succeed on a claim for intentional misrepresentation, the following elements must be proven:

> (1) that a representation made by a party was false;
>
> (2) that either its falsity was known to that party or the misrepresentation was made with such reckless indifference to truth to impute knowledge to him;
>
> (3) that the misrepresentation was made for the purpose of defrauding some other person;
>
> (4) that that person not only relied upon the misrepresentation but had the right to rely upon it with full belief of its truth, and that he would not have done the thing from which damage resulted if it had not been made; and
>
> (5) that that person suffered damage directly resulting from the misrepresentation.

Brass Metal Prod., Inc. v. E-J Enterprises, Inc., 189 Md. App. 310, 353 (2009) (quoting *B.N. v. K.K.,* 312 Md. 135, 149, 538 A.2d 1175 (1988)). Critically, each claim requires

that the plaintiff had the right to rely on a representation, or that the Plaintiff justifiably relied upon the representation.

Notably, the Lease explicitly disclaims liability for the promises that Saxon's relies upon:

> 16.28 No Representation. Landlord reserves the absolute right to effect other tenancies in the Property as Landlord shall determine in the exercise of its sole business judgment. Tenant does not rely on the fact, nor does Landlord represent: (l) that as of or after the Commencement Date any specific tenant, or occupant, or the number of tenants, or occupants, shall occupy any space in the Property or in surrounding buildings; (2) hours or days that such other tenants shall or may be open for business, or Gross Sales which may be achieved by Tenant or any other tenants in the Property; or (3) that any portion or portions of the Building shall be used for any specific purpose. A vacation or abandonment of premises or cessation of operations by any other tenant(s) in the Property or any change in the use of any portion or portions of the Property shall not in any way release Tenant from its obligations under this Lease.

The Lease further disclaims liability for the types of damages sought by Saxon's:

> 16.13 Landlord's Liability and Transfer by Landlord.
> IN NO EVENT SHALL LANDLORD OR ANY LANDLORD RELATED PARTIES BE LIABLE TO TENANT FOR ANY LOST PROFIT, DAMAGE TO OR LOSS OF BUSINESS OR ANY FORM OF SPECIAL, INDIRECT OR CONSEQUENTIAL DAMAGE. . . .

Emphasis in original. Both provisions of the lease specifically and expressly disclaim any liability for the relief sought by Saxon's. The circuit court correctly determined that Appellees were entitled to judgment as a matter of law because there was no dispute of material fact regarding the Lease provisions.

Further, the Lease contained an integration clause. The integration clause provided that . . . . "[o]ther than as specifically set forth in the Lease, no representations, understandings, or agreements have been made or relied upon in the making of this Lease. . . ." Generally, "[c]ourts should refrain from considering outside evidence of prior statements or understandings when interpreting a contract that contains an integration clause because the clause indicates that the contract is the complete iteration of the parties' agreement." *Pinnacle Grp., LLC v. Kelly*, 235 Md. App. 436, 462 (2018), *cert. denied sub nom.*, *Pinnacle Grp. v. Kelly*, 459 Md. 188 (2018).

Nevertheless, in *Greenfield v. Heckenbach*, 144 Md. App. 108, 130 (2002), we held that "a plaintiff can successfully bring a tort action for fraud that is based on false pre-contract promises by the defendant even if (1) the written contract contains an integration clause and even if (2) the pre-contractual promises that constitute the fraud are not mentioned in the written contract." We further observed that "in a suit for negligent misrepresentation, where equitable relief is prayed, the existence of a general merger clause, standing alone, will not prevent the plaintiff from introducing evidence concerning pre-contractual promises, which are not mentioned in the written contract." *Greenfield*, *supra*, 144 Md. App. 108 at 138.

Greenfield, however, is distinguishable from the instant case. *Greenfield* involved a contract for the sale of an unimproved residential property, which contained a general integration clause. *Id.* at 112, 117. The sellers alleged that prior to the sale, the buyers made representations to the sellers that they would not obstruct the seller's view of the water. *Id.* at 115-16. The buyers additionally represented specific locations of proposed

improvements to be made to the property. *Id.* at 116. When the buyers made improvements to the property that were inconsistent with the pre-contractual promises, the sellers sought both legal and equitable relief. *Id.* at 119. Here, however, the Lease did not simply contain a general integration clause. It included a detailed provision disclaiming the representations that Saxon's claims to have relied upon. We further note that *Greenfield* focused on pre-contractual promises. In contrast, Saxon's claims involve actions and alleged representations which occurred after the lease was signed. Accordingly, Appellees were entitled to judgment as a matter of law on Saxons' claims for fraud, negligent misrepresentation, intentional misrepresentation, and negligence.

The circuit court dismissed Saxon's promissory estoppel claim because generally, promissory or equitable estoppel is not available when there is an express agreement between the parties. We agree. *See Cty. Comm'rs of Caroline Cty. v. J. Roland Dashiell & Sons, Inc.*, 358 Md. 83, 96 (2000) (Explaining that it is universally accepted that the existence of an express contract precludes recovery in quasi-contractual theories.). Thus, Saxon's had not pled a legally sufficient cause of action for promissory estoppel or detrimental reliance and Appellees were entitled to dismissal of this claim.

In sum, the circuit court correctly determined that Saxon's claims were barred by the statute of limitations. We further agree with the circuit court's grant of dispositive motions in favor of the Appellees on the merits of Saxon's claims. We, therefore, affirm the judgment of the Circuit Court for Baltimore County.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANTS.