Circuit Court for Worcester County
Case No. C-23-CV-22-000003

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 0238

September Term, 2023

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709 PLAZA, LLC

v.

PLAZA CONDOMINIUM, INC., ET AL.

Wells, C.J.,
Arthur,
Ripken,

JJ.

Opinion by Arthur, J.

Filed: August 6, 2024

*This is an unreported opinion. It may not be cited as precedent within the rule of stare decisis. It may be citated as persuasive authority only if the citation conforms to Md. Rule 1-104(a)(2)(B).

A shareholder filed a shareholder's derivative action against the corporation's board of directors, claiming that the board members had breached their fiduciary duties. The board moved for summary judgment, arguing that its actions were protected from judicial review by the business judgment rule. The circuit court granted summary judgment in favor of the board.

The shareholder appealed, contending that the circuit court had erred in granting summary judgment when issues of material fact remained in dispute. We reverse.

FACTUAL BACKGROUND

The pertinent facts, viewed in the light most favorable to the party that opposed summary judgment, here, the shareholder, are as follows:

Plaza Condominium, Inc. (the "Condominium"), is a Maryland corporation that has its principal place of business in Ocean City, Maryland. The Condominium is managed by an elected, five-member board of directors (the "Board"). During the time period at issue in this case, the members of the Board were Mike Brown, Michael Gill, Robert Lesnick, Maria Winters, and Charles Deegan.

The Condominium's building is a 17-floor structure comprised mostly of living units. The building contains space for a restaurant operated on-site by a vendor who is awarded a lease for the space by the Board.

Since 2003, the restaurant space has been leased by Two Burroughs, Ltd., which is owned by James and Lee Burroughs (collectively, the "Burroughses"). During the course of the lease, the Burroughses operated the Jungle Bar and Restaurant in the on-site

restaurant space. A lease, entered in 2019, provided that it would expire on October 31, 2021, unless the parties mutually agreed in writing to another three-year extension.

On March 3, 2021, the Board issued a request for proposals (an "RFP") to determine whether other vendors were interested in operating the on-site restaurant and, if so, whether they might offer "broader services, higher rent, and lower costs to the Condominium." The RFP contained instructions for prospective vendors to complete proposals with specific criteria. The Board sent a copy of the RFP to the Burroughses.

On March 28, 2021, the Burroughses formally notified the Board that they intended to renew the existing lease. The Burroughses did not respond to the RFP.

On April 21, 2021, the Burroughses, through their attorney, sent a letter to the Condominium's building manager and Board. In the letter, the attorney noted that the Burroughses had given written notice of their intent to renew the lease. He asserted that the Board was "soliciting proposals from other restauranters [sic] with a design to oust the tenants who have been there for 17 years." He referred to the "obligation of good faith and fair dealing in every contract," which, he claimed, "appears to be wanting under the circumstances here present." He charged that, in the presence of "several unit owners," a Board member, Mr. Gill, had told Mr. and Ms. Burroughs that "three members of the Board 'hated them'" and had told Mr. Burroughs that "'the Board thinks you are too old.'" He also charged that, when "several of the unit owners advised" another Board member, Mr. Gill, that "age discrimination was illegal, his response was: 'Well, that's what they think[;] it's not in writing.'" "[I]t appears," the Burroughses'

attorney asserted, that "the Board is acting out of malice," and not "good faith." He cited the statutory prohibition on age discrimination in the leasing of commercial property.[1] He also cited the statutory prohibition on "attempt[ing], directly or indirectly, alone or in concert with others, to commit a discriminatory act[.]"[2] He closed by asking for a response to the Burroughses' request to renew the lease.

Two days later, on April 23, 2001, the Burroughses, through their attorney, sent a second letter to the building manager and the Board. The letter quoted an email from an unnamed unit owner, who reportedly said that she had asked the building manager, Steve Kenny, if "they were trying to get rid" of the Burroughses with the RFP. According to the unnamed unit owner, Mr. Kenny responded that "he and the Board liked [the Burroughses], but they were not certain [the Burroughses] wanted to remain in the lounge[,] so they issued the RFP." The attorney's letter asserted that, "[i]f this is an accurate representation of the conversation between Mr. Kenny and the owner, it is an outright lie." The letter continued: "I fear that unless the Board and Manager are candid with the unit owners, there will be political repercussions with respect to the governance of the condominium regime." Mr. Burroughs later said that the Burroughses intended this communication as "a threat."

[1] Md. Code (1984, 2021 Repl. Vol.), § 20-501 of the State Government Article.

[2] Md. Code (1984, 2021 Repl. Vol.), § 20-801(2) of the State Government Article.

On April 27, 2021, the building manager, Mr. Kenny, responded to the letters from the Burroughses' counsel. In the letter, Mr. Kenny denied the allegations of bad faith. He asserted that it is "a well-established 'Best Practice' to seek proposals from established vendors[.]" He reminded counsel that the Board had sent the RFP to the Burroughses and that the responses were due on May 4, 2021. He informed counsel that all responses would "be evaluated using a points system assigned by each Board Member for each important requirement identified in an RFP submittal." He closed by denying the allegations of ill will and malice.

Two vendors submitted written responses to the RFP by the deadline. As previously stated, the Burroughses did not submit a response.

On May 8, 2021, the Board met in an open session that unit owners were allowed to attend. At this session, the two proposed vendors and the Burroughses made presentations. According to Mr. Brown, one of the directors, every unit owner who commented said that they preferred the Burroughses to the other vendors.

In an executive session following the open session, the Board met to evaluate the presentations. According to Mr. Brown, the Board chose to discard the scoring method because four of the five Board members believed that it was "unworkable" in view of the format of the presentations.

On May 9, 2021, the day after the open session, one director, Mr. Gill, wrote that the Board had "narrowed its search" to two parties, one of which was the Burroughses. Mr. Gill observed that the Burroughses' proposal was economically inferior to the

competing proposal. Referring to the Burroughses' proposal, he wrote: "[W]e cannot in good conscience award a contract to anyone at ½ of market value." He added: "[T]he average unit cannot subsidize Burroughs to the tune of $400 per unit, per year." Referring to the Burroughses' supporters among the unit owners, he wrote: "we must counter this vociferous group of 25 individuals who would give their soul to have [the Burroughses] continue forever." "We must," he wrote, "put this back on the owners." He envisioned sending a "simple" "message to the ownership." He concluded the email by writing: "I am furious that we have been played on this one." "But," he wrote, "it is time to counter with the knockout blow"—apparently referring to the proposed message to the owners.

On the following day, May 10, 2021, Mr. Kenny, the building manager, sent an email to the Board. The email attached a proposed message or survey for the unit owners, which the record extract does not appear to include. In his email, Mr. Kenny wrote that he and Mr. Brown had reviewed the attachment. According to Mr. Kenny, he and Mr. Brown "discussed optics for the association" and "shifting the liability from the board to the owners (so to speak)."

According to Mr. Brown, the Board sent a survey to the owners. The record does not appear to contain the survey itself, but Mr. Brown testified that it included a comparison of the Burroughses' lease and the competing proposal from a restaurateur named Cooper.

There is nothing in the record to indicate that the Board informed the owners of the Burroughses' claims that the Board had acted in bad faith or with malice or that members of the Board had allegedly violated the statutory prohibition against age discrimination in commercial leasing. Nor is there anything in the record to indicate that the Board informed the owners that the Burroughses had threatened legal action, including legal action against members of the Board, unless the Board renewed the lease.

On May 29, 2021, the Board held its annual "town hall meeting," which many owners attended. Before that meeting, one of the directors, Mr. Deegan, had prepared a detailed, four-page letter to the owners, in which he explained how and why the RFP came about, informed the owners that the Burroughses' rental payment was set at less than half of market value, and rebutted concerns about Cooper's competing proposal. According to Mr. Deegan, however, the Board refused to send his letter to the owners. Instead, Mr. Deegan said, very late in the town hall meeting with the owners, the Board distributed some kind of bullet-point document, which the record does not contain. According to Mr. Brown, "every owner who spoke at that meeting was in favor of renewing" the Burroughses' lease.

Mr. Deegan resigned from the Board on June 12, 2021, shortly before the Board voted to decide whether to renew the Burroughses' lease. After Mr. Deegan resigned, the remaining Board members voted unanimously to renew the lease.

Mr. Brown testified that the Board based its decision "on many factors." Among other things, Mr. Brown cited the responses to the RFP; the presentations at the meeting

on May 8, 2021; the comments and opinions expressed by the owners; the Burroughses' long relationship with the condominium; concerns about Cooper's financial wherewithal and his ability to obtain a liquor license; and concerns that Cooper, unlike Mr. and Ms. Burroughs, did not live in or near Ocean City and would be operating restaurants both in Baltimore and in Ocean City.

Mr. Brown did not mention the Burroughses' claims that the Board had acted in bad faith or with malice or that members of the Board had allegedly violated the statutory prohibition against age discrimination in commercial leasing. Nor did he mention that the Burroughses had threatened legal action, including legal action against members of the Board, unless the Board renewed the lease.

THIS LITIGATION

After the Board renewed the Burroughses' lease, 709 Plaza, LLC, a unit owner at the Condominium, filed a shareholder's derivative complaint against the four members of the Board who approved the renewal of the Burroughses' lease. 709 Plaza also named the Condominium as a nominal defendant. 709 Plaza claimed that the Board members owed fiduciary duties of "care, loyalty, good faith, and candor" to the Condominium and that they had breached those duties by renewing the Burroughses' lease.

In addition to damages, 709 Plaza sought declaratory relief, including a declaration that the Burroughses' lease was void and unenforceable. In response to a court order, 709 Plaza amended its complaint to include the Burroughses as necessary parties in the claim for declaratory relief.

After the conclusion of discovery, the Burroughses and the Board moved for summary judgment. Both argued that the Board members were insulated from liability by the business judgment rule—a rebuttable presumption that directors act in good faith, in a manner they reasonably believe to be in the best interests of the corporation, and with the care that an ordinarily prudent person in a like position would use under similar circumstances. *See* Md. Code (1975, 2014 Repl. Vol., 2021 Supp.), § 2-405.1(g) of the Corporations and Associations ("CA") Article; *Eastland Food Corp. v. Mekhaya*, 486 Md. 1, 35 (2023). In essence, they argued that the Board had evaluated the merits and demerits of the competing proposals and had made a judgment call that the Burroughses' proposal was the better of the two even though it was not the most financially advantageous.

709 Plaza responded by arguing that factual issues remained in dispute. Among other things, 709 Plaza argued that the Board members breached their duty to act in good faith and in a manner they reasonably believed to be in the Condominium's best interest when they authorized the Condominium to enter into a lease at a below-market rental rate in order to avoid the Burroughses' threats of litigation and "political repercussions." It also argued that the Board members breached their duty to act in good faith because they had an undisclosed financial interest in avoiding the Burroughses' threat of litigation. 709 Plaza concluded that its evidence was sufficient to rebut the presumption of the business judgment rule.

After a hearing, the circuit court issued a memorandum opinion and order in which it granted the motion for summary judgment. In its recitation of the facts, the circuit court primarily described the relevant events as they were presented in the Board's motion. The circuit court made no mention of the facts presented by 709 Plaza. Thus, it made no mention of the letters sent by the Burroughses, accusing the Board members of bad faith, malice, and age discrimination and threatening future legal action. It made no mention of the internal email in which the building manager discussed "shifting the liability from the board to the owners." And it made no mention of the email in which a director stated the Board "could not in good conscience" approve the award of the lease to the Burroughses because their rent payment was only half of the market value and required "the average unit" to "subsidize Burroughs to the tune of $400" per year. The court did not explain why it made no mention of these facts.[3]

[3] In their reply to 709 Plaza's opposition to the motions for summary judgment, the Board members contended that the court should not consider the arguments about the Board members' conflicts of interest because 709 Plaza had not disclosed those arguments until it filed its opposition. The Board pointed out that, when it deposed 709 Plaza's corporate designee, the designee did not cite the conflicts of interest as a basis for the claim. From the materials in the record extract, however, it appears that 709 Plaza may not have known of at least some of the factual bases for the allegations of conflict of interest until just before the Board filed its motion. For example, the record extract reflects that Mr. Deegan, the director who resigned from the Board because of his opposition to extending the Burroughses' lease, produced at least one of the Board's internal communications to counsel for all parties on January 16, 2023, just 11 days before the Board moved for summary judgment. In any event, the circuit court did not expressly rely on the allegedly untimely disclosure as a basis not to consider 709 Plaza's arguments.

Based on its view of the facts, the circuit court concluded that the presumption of the business judgment rule was unrebutted and that a court should not intervene. The court said that 709 Plaza's "central argument" was that the Board breached its fiduciary duties because the Cooper proposal was "objectively better" than the Burroughses' proposal. The court reasoned that the Board was entitled to consider factors other than which proposal was the "most financially rewarding." "In a sense," the court wrote, "it would be improper for Board members to *only* take financial factors onto consideration and disregard any other information." (Emphasis in original.) Furthermore, the court stressed that the Board was "not required to be correct all the time," but only to act "in good faith, and with sufficient reasoning."

The court concluded that the Board had met that standard in this case. It wrote that "the Board's decision to award the Lease to the [Burroughses] was measured, calculated, and based on legitimate grounds." It stated that 709 Plaza had failed to produce any contrary evidence. Therefore, the circuit court granted summary judgment to the Condominium and the Burroughses.[4]

[4] Although 709 Plaza requested a declaratory judgment, the court did not declare the parties' rights. The court erred in not entering a declaration. *See*, *e.g.*, *Harford Mut. Ins. Co. v. Woodfin Equities Corp*., 344 Md. 399, 414 (1997); *accord Baltimore County v. Balt. Cnty. Fraternal Order of Police Lodge No. 4*, 439 Md. 547, 566 (2014) (stating that "the Circuit Court erred by failing to declare the rights of the parties, if a declaratory judgment was sought properly"). "The fact that the side which requested the declaratory judgment did not prevail in the circuit court does not render a written declaration of the parties' rights unnecessary." *Harford Mut. Ins. Co. v. Woodfin Equities Corp*., 344 Md. at 414. The error, however, is procedural, and not jurisdictional. *See*, *e.g.*, *Baltimore County v. Balt. Cnty. Fraternal Order of Police Lodge No. 4*, 439 Md. at 566.

709 Plaza filed a timely notice of appeal.

QUESTION PRESENTED

709 Plaza has presented one question for our review, which we have rephrased: Did the circuit court err in granting the motions for summary judgment?[5] Because we answer that question in the affirmative, we reverse the circuit court's judgment.

STANDARD OF REVIEW

When a party moves for summary judgment, the court "shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine 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." Md. Rule 2-501(f). The issue of whether a trial court properly granted summary judgment is a question of law. *Butler v. S & S P'ship*, 435 Md. 635, 665 (2013). In an appeal from the grant of summary judgment, this Court conducts a de novo review to determine whether the circuit court's conclusions were legally correct. *Bennett v. Ashcraft & Gerel, LLP*, 259 Md. App. 403, 447 (2023).

> When reviewing a grant of summary judgment, we determine whether the parties properly generated a dispute of material fact and, if not, whether the moving party is entitled to judgment as a matter of law. This Court considers the record in the light most favorable to the nonmoving party and construe[s] any reasonable inferences that may be drawn from the facts against the moving party.

[5] 709 Plaza presented its question as follows: Did the Circuit Court err by finding that Appellants had not adduced sufficient material facts, including the reasonable inferences drawn therefrom, that a finder of fact could not determine that, in this instance, exceptions to the business judgment rule existed?

Blackburn Ltd. P'ship v. Paul, 438 Md. 100, 107-08 (2014) (internal citations and quotation marks omitted).

"The party opposing a motion for summary judgment must produce admissible evidence to show that a genuine dispute of material fact . . . does exist." *Rite Aid Corp. v. Hagley*, 374 Md. 665, 684 (2003). "For the purposes of summary judgment, a material fact is 'a fact the resolution of which will somehow affect the outcome of the case.'" *Romeka v. RadAmerica II, LLC*, 485 Md. 307, 330 (2023) (quoting *USA Cartage Leasing, LLC v. Baer*, 202 Md. App. 138, 174 (2011), *aff'd*, 429 Md. 199 (2012)).

DISCUSSION

Under Maryland law, "[a] director of a corporation shall act: (1) [i]n good faith; (2) [i]n a manner the director reasonably believes to be in the best interests of the corporation; and (3) [w]ith the care that an ordinarily prudent person in a like position would use under similar circumstances." CA § 2-405.1(c).

The business judgment rule dictates that "[a]n act of a director of a corporation is presumed to be in accordance with subsection (c) of this section." CA § 2-405.1(g). In other words, the business judgment rule expresses a presumption that a director of a Maryland corporation has acted "on an informed basis, in good faith and in the honest belief that the action taken was in the best interest of the company." *Oliveira v. Sugarman*, 451 Md. 208, 221 (2017) (quoting *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984), *overruled on other grounds*, *Brehm v. Eisner*, 746 A.2d 244 (Del. 2000)).

"A presumption," however, "is just that—a presumption." *Eastland Food Corp. v. Mekhaya*, 486 Md. 1, 35 (2023). "The presumption does not end the inquiry, but merely places the burden upon the person attacking the directors' decision to prove a lack of good faith or the absence of an informed basis for the challenged decision." *Id.* at 43 (Booth, J., concurring). "Once a challenger 'presents evidence adequate to rebut the presumption, the burden of production shifts back to the corporation or the directors, as the case may be, to present evidence that the directors acted in accordance with Section 2-405.1.'" *Id.* at 61-62 (Booth, J., concurring) (quoting James J. Hanks, Jr., *Maryland Corporation Law* § 6.09, at 6-75 (2d ed. 2020, 2022 Supp.).

In *Eastland Food Corp. v. Mekhaya*, 486 Md. at 35, the Court recognized that a shareholder had alleged facts sufficient to overcome the presumption of the business judgment rule. "In a nutshell," the shareholder alleged that the directors had permitted two of the owners "to loot the company by taking corporate funds for personal use." *Id.* He also alleged that the directors had "excluded him from sharing in the company's profits while allowing" two of the other owners "to take profits through excessive compensation." *Id.* "At the pleading stage," the Court stated, "these allegations suffice[d] to overcome section 2-405.1's presumption that the directors complied with the standard of care." *Id.*

In this case, the circuit court disposed of the case on summary judgment, not on a motion to dismiss. Nonetheless, the governing principles are similar. To defeat a motion for summary judgment in which a corporate board relies on the business judgment rule as

a defense to its actions, a shareholder, like 709 Plaza, must produce admissible evidence that, when viewed in the light most favorable to the shareholder, tends to prove that the directors did not act in good faith, or in a manner that they reasonably believed to be in the best interests of the corporation, or with the care that an ordinarily prudent person in a like position would use under similar circumstances. *See Danielewicz v. Arnold*, 137 Md. App. 601, 638 (2001).

The Board characterizes this as a simple case in which the directors exercised their business judgment to choose between two competing proposals. Each proposal had its merits and demerits. From an economic standpoint, the Cooper proposal was more advantageous than the Burroughses' proposal, but the Board had concerns about Cooper's ability to perform—about his financial wherewithal, his ability to get a liquor license, and his ability to manage two restaurants that were more than 100 miles from one another. Thus, the Board says, after due deliberation, it exercised its considered judgment to select the Burroughses' proposal. Even if someone else might have evaluated the relevant factors differently and reached a different conclusion, the Board argues that a court must defer to its exercise of discretion.

If this case were only as simple as the Board says it is, then the business judgment rule would require us to affirm the grant of summary judgment. But the case is not so simple.

"The protection of the business judgment rule 'can be claimed only by disinterested directors whose conduct otherwise meets the tests of business judgment.'"

Boland v. Boland, 423 Md. 296, 329 (2011) (quoting *Werbowsky v. Collomb*, 362 Md. 581, 609 (2001)) (further citation and quotation marks omitted). "[T]his means that directors can neither appear on both sides of a transaction nor expect to derive any personal financial benefit from it in the sense of self-dealing, as opposed to a benefit which devolves upon the corporation or all stockholders generally." *Id.*; *see also Cherington Condo. v. Kenney*, 254 Md. App. 261, 286 (2022) (recognizing that "'self-dealing' is aligned with the bad-faith conduct sufficient to rebut the business judgment presumption").

In this case, the Board members had an undisclosed financial interest in renewing the Burroughses' lease because the Burroughses had accused them of bad faith and malice and threatened to file suit for age discrimination. By renewing the lease and rejecting Cooper's competing proposal, the Board members would exculpate themselves from the undisclosed threat of litigation and from potential liability. In these circumstances, a jury could find that this undisclosed conflict of interest rebuts the presumption that the Board members acted in good faith and in the honest belief that the action taken was in the best interest of the company.

Furthermore, a jury could find that, because the Board members could not reject the Burroughses' proposal without subjecting themselves to suit, they attempted to "shift[] the liability from the board to the owners (so to speak)" by delegating the decision to the owners. Then the Board arguably failed to provide the owners with adequate information to evaluate the proposals, because it did not disclose why it was

abdicating its decision, it did not allow Mr. Deegan to distribute his detailed analysis to the owners, and it may not have handed out the bullet-point analysis until late in the town hall meeting at which the owners discussed the competing proposals. When the owners voted in favor of the Burroughses' proposal, the Board accepted it. At a minimum, there is a genuine dispute of material fact about whether the Board members acted in a manner that they reasonably believed to be in the best interests of the corporation when they approved the renewal of a lease that one member said they "could not in good conscience" approve.

In short, the evidence presented by 709 Plaza "suggest[s] the corporate directors did not act in accordance with the rule." *Oliveira v. Sugarman*, 451 Md. at 221. The circuit court, therefore, erred in granting the motion for summary judgment.

The Board and the Burroughses argue that we should not consider what they call the Board's "potential conflict" because 709 Plaza first raised that issue in response to the motions for summary judgment. We are unpersuaded.

The Board and the Burroughses acknowledge that the amended complaint alleges that the Board members breached their fiduciary duties. They complain, however, that the amended complaint did not specifically allege that the Board members had a conflict of interest or a personal financial interest in approving the renewal of the Burroughses' lease. Citing *Gatuso v. Gatuso*, 16 Md. App. 632, 637 (1973), they argue a court has "no authority, discretionary or otherwise, to rule on a question not raised as an issue by the pleadings[.]"

The Board and the Burroughses misunderstand the function of pleadings, such as a complaint. Md. Rule 2-303(b) states that "[a] pleading shall contain only such statements of fact as may be necessary to show the pleader's entitlement to relief[.]" A pleading "shall not include argument, unnecessary recitals of law, evidence, or documents, or any immaterial, impertinent, or scandalous matter." *Id.* Under this "liberal pleading standard, 'a plaintiff need only state such facts in his or her complaint as are necessary to show an entitlement to relief.'" *Wheeling v. Selene Fin., LP*, 473 Md. 356, 375 (2021) (quoting *Johns Hopkins Hosp. v. Pepper*, 346 Md. 679, 698 (1997)).

A plaintiff is not required to plead evidence. In fact, a plaintiff is required *not* to plead evidence. It follows that the failure to detail the evidentiary basis for the claim of breach of fiduciary duty in a complaint is not a basis upon which a court, on summary judgment, may refuse to consider admissible evidence that generates a genuine dispute of a material fact.[6]

The Board and the Burroughses go on to argue that, under *Dietrich v. State*, 235 Md. App. 92, 101-02 (2017), the court could not consider "a claim" first raised in opposition to a motion for summary judgment. *Dietrich* does not support their position.

Dietrich alleged that Maryland's sex offender registry laws were being applied retroactively, in violation of the prohibition on ex post facto laws in Article 17 of the

[6] In any event, the documents regarding the Board's conflict of interest were presumably in the Board's sole possession before 709 Plaza filed suit. It is unclear how 709 Plaza could possibly have known of those documents before it obtained them in discovery. Thus it is unclear how 709 Plaza could have included allegations about those documents in its pleadings.

Maryland Declaration of Rights. *Id.* at 95. On summary judgment, however, he argued for the first time that the statutes "violate[d] his right to interstate travel under the Privileges and Immunities Clause of the Fourteenth Amendment to the United States Constitution." *Id.* at 101-02. Because his complaint did not allege that the statute violated his federal constitutional right to interstate travel, this Court held that "that claim is unpreserved" and declined to review it. *Id.* at 102.

This case is not the same as *Dietrich*. In its pleadings, 709 Plaza alleged a single legal theory—that the Board breached its fiduciary duties in approving the renewal of the Burroughses' lease. The factual basis for that allegation has changed and developed over time, as 709 Plaza learned more about the transaction through the course of discovery, but the legal theory has remained the same. Unlike Dietrich, 709 Plaza did not advance a "new claim" for the first time of summary judgment.

It may be that 709 Plaza ought to have disclosed the factual bases for its claim earlier than it did—though 709 Plaza appears to have learned of some of those bases only days before the summary judgment motions were filed. *See supra* n.3. But even if 709 Plaza committed a discovery violation, it is hard to see how the Board was prejudiced by the belated disclosure of information that it knew about all along.

In summary, we must reverse the judgment of the circuit court and remand the case for a trial on the question of whether the directors breached their fiduciary duties in approving the renewal of the Burroughses' lease. Because 709 Plaza requested a declaratory judgment, the court, on remand, must declare the parties' rights (*see supra*

n.4) in accordance with the jury's factual findings. *See Goldman, Skeen & Wadler, P.A. v. Cooper, Beckman & Tuerk, L.L.P.*, 122 Md. App. 29, 56-57 (1998).

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