Circuit Court for Prince George's County
Case No. C-16-CV-22-000626

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 273

September Term, 2024

3911 25TH AVE. LLC

v.

BURKE & HERBERT BANK & TRUST COMPANY, ET AL.

Beachley,
Tang,
Battaglia, Lynne A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Tang, J.

Filed: April 9, 2025

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

This appeal arises from the grant of summary judgment by the Circuit Court for Prince George's County in favor of appellees Burke & Herbert Bank & Trust Company (the "Bank") and its employee, Tyrone Washington ("Washington"), on claims of fraud, negligent misrepresentation, and breach of contract asserted by appellant 3911 25th Ave. LLC (the "Borrower"). All claims and disputes in this litigation relate to the Bank's charge of default interest totaling $144,211.09 on two commercial loans made to the Borrower. The sole issue is whether the circuit court erred in granting summary judgment.[1] For the following reasons, we affirm the judgment of the circuit court.

FACTUAL BACKGROUND

Loan Documents

The Borrower is a Maryland limited liability company whose membership interests are held equally by Alireza Aliaskari ("Aliaskari") and Tarek Aly ("Aly"). In May and June

[1] The issues as presented in the Borrower's brief are:

1. Upon *de novo* review, did the trial court properly grant summary judgment on the eve of the scheduled jury trial on the claim for fraud, given the specific grounds and supporting evidence provided and the disputed material facts?
2. Upon *de novo* review, did the trial court properly grant summary judgment on the eve of the scheduled jury trial on the claim for negligent misrepresentation, given the specific grounds and supporting evidence provided and the disputed material facts?
3. Upon *de novo* review, did the trial court properly grant summary judgment on the eve of the scheduled jury trial on the claim for breach of contract, given the specific grounds and supporting evidence provided and the disputed material facts, including the disputed material facts on the issue of waiver?
4. Upon *de novo* review, should the trial court's decision be reversed and the case remanded to permit the jury trial to take place?

2016, the Bank made two loans to the Borrower for $3,200,000 and $300,000, respectively.[2] The interest on the notes was 4% with a maturity date of May 2023. The monthly payment due on the combined loan of $3,500,000 totaled $18,586.77.

The Borrower executed a set of loan documents for each loan that included a commercial loan agreement, promissory note, and deed of trust. The deeds of trust were recorded against two parcels of real property located on Colebrooke Drive and Iverson Street in Temple Hills, Maryland (collectively, the "Property").[3] In addition, Aly and Aliaskari each signed a guaranty for the $3,200,000 loan.

The loan documents contain provisions defining what constitutes an event of default by the Borrower. Paragraph 8 of the deeds of trust requires the Borrower to "pay all taxes . . . relating to the Property when due." Paragraph 14.D of the deeds of trust provides that the Borrower would be in default if it "fails to perform any condition or to keep any promise or covenant of this Security Instrument." Likewise, Paragraph 8.E of the commercial loan agreements provides that "[a] default occurs under the terms of any other Loan Document," referring to all the documents executed as part of or in connection with the loans.

The loan documents outline remedies in the event of the Borrower's default. Paragraph 9 of the commercial loan agreements states that the Bank could, at its option,

[2] The Borrower originated the loans with a small community bank but later refinanced with the Bank.

[3] According to the Borrower, the Property was "extremely valuable," "significant income-producing residential apartment complex[es.]"

accelerate the maturity of the amount due on the loans. Additionally, Paragraph 3.A of the promissory notes indicates that the Bank may increase the 4% interest rate to 8% if it declares a default under the terms of the loan documents:

> A. Interest After Default. If [the Bank] declare[s] a default under the terms of the Loan, . . . [the Bank] may increase the Interest Rate otherwise payable as described in this section [here, 4%]. *In such event, interest will accrue on the unpaid Principal balance of this Note at a rate equal to the rate in effect prior to default [here, 4%], plus 4.000 percent, until paid in full.*

(emphasis added).

The loan documents also contain anti-waiver provisions. In relevant part, Paragraph 15 of the deeds of trust provides that "[t]he acceptance by [the Bank] of any sum in payment or partial payment on the Secured Debts after the balance is due or is accelerated . . . will not constitute a waiver of [the Bank's] right to require full and complete cure of any existing default."

The loan documents further specify that any modification to their terms must be in writing. According to Paragraph 19 of the promissory notes, "This Note may not be amended or modified by oral agreement. No amendment or modification of this Note is effective unless made in writing and executed by [the Borrower and the Bank]." Similarly, Paragraph 13 of the commercial loan agreements states: "This Agreement may not be amended or modified by oral agreement. No amendment or modification of this Agreement is effective unless made in writing and executed by [the Borrower and the Bank]." Additionally, Paragraph 25 of the deeds of trust specifies: "This Security Instrument may not be amended or modified by oral agreement. No amendment or modification of this

Security Instrument is effective unless made in writing and executed by [the Borrower and the Bank].”

Iverson Street Property

The Borrower failed to timely pay the real property taxes assessed against the Iverson Street property by December 31, 2020.[4] As a result, that property was sold at a tax sale on June 15, 2021.

On December 9, 2021, the Prince George’s County Office of Finance issued a notice that the Iverson Street property was sold at a tax sale, which the Bank received. On December 14, Washington informed Aliaskari that the property was in a tax sale and asked Aliaskari to call him. Thereafter, Aliaskari received the County’s notice about the tax sale. On December 30, 2021, the Borrower redeemed the property by paying the full redemption amount to Prince George’s County.

Notice of Default

On Thursday, January 5, 2022, Washington issued the Borrower a Notice of Default and Acceleration (“Notice of Default”). In relevant part, the Bank declared the Borrower in default because the Borrower failed to pay all taxes relating to the Iverson Street property “when due.”[5] As a result of the default, the Bank “elected to accelerate the maturity” of the

[4] According to Aliaskari’s and Aly’s affidavits, the Borrower’s bookkeeper and her family were having medical issues, which caused the bookkeeper to miss a tax payment on the Iverson Street property.

[5] The Colebrooke Drive property also had past taxes due as of December 31, 2020, but the Notice of Default did not mention these unpaid taxes.

loans and "elected to invoke the default rate of interest" of 8% per annum, effective January 2021. The Bank demanded immediate payment of the loans.

Upon receiving the Notice of Default, Aliaskari attempted to contact Washington the following day, Friday, January 6. He first tried to call Washington, but Washington "wouldn't answer his calls," so he texted him. Aliaskari was able to speak with Washington on Monday. Aliaskari was dismayed when he received the Notice of Default because, as he informed Washington, the property taxes for the Iverson Street property were eventually paid.

Aliaskari and Washington had "several different conversations" about the loans, first that Washington would speak to the Bank about "refinancing the loan out of [the Bank]" and later about a forbearance agreement. Specifically, on January 12, Washington requested the Borrower's financials for 2021. The next day, Aliaskari responded that he would provide the documents and asked where the parties were "as far as our discussion about the loan." Washington responded that he did not have an update yet.

Aly emailed Washington: "You promised to give me a final update on the [B]ank's position yesterday. We're very interested to continue our long-term successful relationship if possible." Washington responded: "I didn't get to meet with the credit officer yet. As soon as I do, I will certainly set up a call with you and [Aliaskari]."

On January 25, Aly emailed Washington again: "This issue hasn't been resolved for over two weeks, even though we provided all the documentation needed. Please understand this matter's very stressful. Hope to hear from you soon."

On January 26, Aliaskari texted Washington requesting the "Bank's position."

Memo to File

On January 26, Washington issued a Memo to File (the "memo") that was directed to the Bank's chief credit officer and managing director. The memo stated that the Bank was "pursuing a strategy to encourage the [Borrower] to refinance the above loan with an outside institution or sell the property."

The memo provided the following background:

Date:	**Event:**
3/11/2021	On March 11, 2021 Loan operations contacted the previous RM [relationship manager] to notify them of a Lereta Tax Service flagged account for delinquent property taxes.
6/15/2021	On June 15, 2021 the Bank[']s collateral [Iverson Street property] was sold at tax sale for unpaid property taxes in the amount of $116,474.52.
12/9/2021	The Bank was notified by Prince George[']s County Office of Finance the property was sold at tax sale. This notice was for one property parcel. The second parcel [Colebrooke Drive property] has outstanding real estate taxes from 2021 currently due in the amount of $68,936.77.
12/10/2021	[Washington] reached out to [Aliaskari] (guarantor) to inform him of the tax sale notification received. He stated he would pay the taxes on 12/14/2021.
1/5/2022	[Washington] issued a default letter on the above referenced loan because the property was sold at tax sale.

1/13/2022 **RM was updated on current status:**

> The tax lien certificate [for the Iverson Street property] was redeemed on 12/30/2021.
>
> The outstanding covenant documents have been received.
>
> The guarantor stated the outstanding property tax bill [for the Colebrooke Drive property] will be paid by February 10, 202[2].

The purpose of the memo was to seek approval to modify the loans. The proposed modification involved a forbearance agreement based on the following terms: execution of a forbearance agreement with an expiration date of August 2, 2022; the Borrower's payment of past due property taxes associated with the Colebrooke Drive property by February 4, 2022;[6] increasing the interest rate on the loans from 4% to 5% until August 2, 2022; and increasing the collective monthly payments to $20,000 until August 2, 2022.

The memo outlined the "Next Steps":

- Should account not be paid in full by the end of the Forbearance Agreement (August 2, 2022) each loan . . . will be imposed with the full default rate of 8%.
- Should account not be paid in full by the end of Forbearance Agreement (August 2, 2022) each loan . . . will be imposed with the [respective] full default monthly payments of $24,698 . . . and $2,315 . . . .

The memo also included the "LOAN DETAILS" for each loan. The memo indicated that the status of the larger loan had an "Outstanding Balance: $2,737,011.09," an "Interest Rate: 8% (Default Rate)," and "Accrued Interest: $122,013.94 (Default calculation from

[6] On January 25, 2022, the Borrower paid the delinquent taxes on the Colebrooke Drive property.

1/21/2021).” The memo indicated that the status of the smaller loan had an “Outstanding Balance: $257,102.83,” an “Interest Rate: 8% (Default Rate)” with “Accrued Interest: $11,460.71 (Default calculation from 1/21/2021).”

On February 2, the Bank approved Washington’s recommendation to modify the loans as outlined above. The chief credit officer, the managing director, and Washington signed the memo, approving the recommended modifications. Thereafter, the Bank executed a Forbearance Agreement for the Borrower to review and countersign.

On February 3, Washington emailed Aliaskari and Aly: “[A]s discussed in our conversation today, I have attached the forbearance agreement for your review and signature. You can e-mail me a signed copy. The document needs to be returned by Friday, February 11, 2022.”

On February 11, Washington sent a follow-up email asking whether the Borrower intended to proceed with the forbearance agreement: “The forbearance agreement is due today. Do you plan on proceeding with the forbearance?” Aly requested that Washington resend the Forbearance Agreement so the Borrower’s attorney could review it.[7] At some point, Aliaskari told Washington that he would send the forbearance agreement to counsel, and Washington responded using a curse word.

[7] According to Aliaskari, he did not receive the Forbearance Agreement initially because Washington’s email went to his spam folder.

Forbearance "Agreement"

It was undisputed that the Borrower never countersigned the Forbearance Agreement and that it was not binding. However, the parties referred to various provisions of the document throughout the circuit court proceeding to support their respective positions regarding the Borrower's claims. Thus, we highlight the relevant provisions below.

Paragraph 2 states that the Borrower and guarantors "acknowledge and agree that the amounts due under the Loan Documents as of February 15, 2022 are as set forth in **Exhibit A** attached hereto." Exhibit A indicates that the "Total Payoff" for the larger loan was $2,863,976.28, which included "Accrued Interest" of $126,915.19. The "Total Payoff" for the smaller loan was $269,078.43, which included "Accrued Interest" of $11,925.60.

Paragraphs 4.2 and 4.3 of the Agreement state that the Borrower shall make monthly payments of $18,000 and $2,000 under the respective loans commencing January 20, 2022, and continuing monthly during the forbearance period without waiver or release of the Bank's rights to assert the full default rate of interest under the loan documents:

> 4.2 Borrower shall make monthly payments under the First Loan Note [for $3,200,000] in the total amount of Eighteen Thousand Dollars ($18,000.00) per month commencing on the payment due for January 20, 2022 and continuing monthly during the Forbearance Period. Interest shall be imposed and calculated at a restated rate of five percent (5%) per annum during the Forbearance Period, without waiver or release of Bank's rights to assert the full default rate of interest as provided for under the First Loan Documents.
>
> 4.3 Borrower shall make monthly payments under the Second Loan Note [for $300,000] in the total amount of Two Thousand Dollars ($2,000.00) per month commencing on the payment due for January 20, 2022 and continuing monthly during the Forbearance Period. Interest shall be imposed and

> calculated at a restated rate of five percent (5%) per annum during the Forbearance Period, without waiver or release of Bank's rights to assert the full default rate of interest as provided for under the Second Loan Documents.

Paragraph 6 provides that "[e]xcept as expressly modified hereby, all of the terms of the Loan Documents remain in full force and effect."

Paragraph 8 confirms the "Obligations," defined as "[a]ll amounts due and payable" under the loan documents:

> Confirmation of Obligations. Borrower and Guarantor acknowledge, ratify, and confirm the Obligations as evidenced by the Loan Documents and further acknowledge, ratify, and confirm that Borrower and Guarantors shall otherwise remain absolutely and unconditionally obligated to pay the Bank all present and future indebtedness that is owed to the Bank with respect to the Loan Documents and the Obligations evidenced thereby.

Paragraph 12 incorporates an anti-waiver provision:

> No Implied Waivers by Bank. The Borrower and the Guarantors acknowledge and agree that the execution of this Agreement by the Bank is not intended nor shall it be construed as (a) an actual or implied waiver of any default under any of the Loan Documents (including the Guaranties), (b) an actual or implied waiver of any condition or obligation imposed upon the Borrower and/or the Guarantors pursuant to the Loan Documents, except to the extent, if any, expressly specified herein, or (c) an actual or implied waiver of any claim or amount due and payable to the Bank with respect to the Obligations [all amounts due and payable under the loan documents].

Refinance of Loans

In February 2022, the Borrower decided to refinance the loans with another bank because the Bank "was making it clear they did not want [the Borrower's] business." According to Aliaskari, Washington "kept asking when [the Borrower] would refinance."

The closing on the refinance occurred in July 2022. Between January 2022 and July 2022, the Borrower voluntarily made monthly payments of $20,000, which the Bank accepted.

As part of the refinance, the Bank provided the Borrower with payoff letters for the loans. The Borrower was surprised to learn that the payoff amounts included default interest totaling $144,209.09, calculated at 8% from January 1, 2021. Ultimately, the Borrower paid the full payoff amounts to complete the refinance, but it asserted that it was paying the default interest under protest.

PROCEDURAL BACKGROUND

Complaint

After the refinance, the Borrower filed suit against the Bank and Washington, alleging three counts. Under the operative complaint, Count I alleged fraud against the Bank and Washington. The Borrower alleged that the Bank and Washington made representations and omissions, including:

> (a) representing on January 5, 2022 that the [Borrower] was in default under the loans, based on, among other reasons, a tax sale for which the [Borrower] had already exercised its legal right of redemption and paid all related tax and other amounts due in full;
>
> (b) representing that [the Bank] would accept $20,000 per month payments on the loans, representing principal and interest, and would not seek to levy a “default rate of interest” of four percent more [than] (and double the amount of) what the original loans provided for;
>
> (c) confirming the representations that [the Bank] would accept $20,000 per month payments on the loans, representing principal and interest, and would not seek to levy a “default rate of interest” of four percent more than (and doubling) what the original loans provided for by signing and providing the “Forbearance Agreement” . . . ;

(d) accepting the $20,000 per month payments for the months of February 2022[8] through July 2022, so as to signify acceptance without reservation;

(e) failing to assert any shortfall, deficiency in payment, partial payment, or other indication that the $20,000 per month was less than [the Bank] claimed to be entitled;

(f) failing to inform the [Borrower] that [the Bank] was purporting to accrue additional "Interest" amounts on the loans to the [Borrower];

(g) keeping secret, until just on the eve of the [Borrower's] efforts to refinance the loans, that [the Bank] was purporting to accrue additional "Interest" amounts on the loan to the [Borrower]; and

(h) issuing inaccurate payoff documents to the [Borrower].

The Borrower alleged that neither the Bank nor Washington informed the Borrower before closing on the refinance that these representations were false or that the omissions were made, creating the false impression that the Bank was not seeking default interest. The Borrower further alleged that it reasonably and justifiably relied on these false representations and omissions, which induced it to take actions it would not have taken otherwise. This included advancing funds to the Bank and accepting an agreement it would not have accepted otherwise. The Borrower claimed significant damages as a result.

Count II alleged negligent misrepresentation against the Bank and Washington. The Borrower alleged that the Bank and Washington made misrepresentations and omissions, detailed in the fraud count above. The Borrower claimed that these misrepresentations and omissions were made negligently by the Bank and Washington at a time when they owed a "duty of care and candor" to the Borrower. This included a duty to inform the Borrower

[8] Although the Borrower alleged that payments were made beginning in February, affidavits and deposition testimony established that those payments began in January.

that it was making only a partial payment on an obligation and that the Bank was accruing default interest despite accepting these payments. As in the fraud count, the Borrower alleged that it reasonably and justifiably relied on these misrepresentations and omissions, resulting in damages.

Count III alleged breach of contract against the Bank. The Borrower asserted that there was an agreement between the Borrower and the Bank, in which the Bank agreed to accept monthly payments of $20,000 and to refrain from seeking default interest on the loans. The Borrower alleged that the Bank, through the Forbearance Agreement, signified its agreement to accept the $20,000 per month payments (representing a 1% increase in the interest rate) and not to charge the default rate of 8%. The Borrower asserted that, by assessing default interest on the loans after repeatedly accepting $20,000 monthly payments without objection, the Bank breached that agreement.

Discovery

During discovery, the Bank deposed Aliaskari. He testified that, apart from the Forbearance Agreement, there was no communication in which the Bank or Washington represented to the Borrower that the Bank agreed to waive or forego default interest:

> [DEFENSE COUNSEL]: Did Mr. Washington ever tell you the bank was going to waive the default interest rate?
>
> [ALIASKARI]: We had several different conversations—I cannot give you dates; it was back and forth—and he was going to talk to the bank because— as far as refinancing the loan out of [the Bank]. And we discussed, afterwards, forbearance agreement.
>
> * * *
>
> [DEFENSE COUNSEL]: Anywhere in [text messages], do you see any agreement by Mr. Washington or [the Bank] to waive the default interest?

[ALIASKARI]: We just—this—he discussed the forbearance agreement.

* * *

[DEFENSE COUNSEL]: Is there any agreement in [emails] by Mr. Washington or [the Bank] to waive or forego charging default interest?

[ALIASKARI]: Once again, no. Forbearance agreement.

* * *

[DEFENSE COUNSEL]: Is there anything in the [other] e-mails where Mr. Washington or [the Bank] agreed to waive the default interest rate? . . .

[ALIASKARI]: Well, basically, the forbearance agreement. That was it.

* * *

[DEFENSE COUNSEL]: Mr. Aliaskari, I just want to make sure I understand what your testimony is about the—any assertion that the bank agreed to waive the default interest, because you said you can't recall.

I've shown various texts, and am I correct that there's nothing in the texts showing that Mr. Washington or anyone at [the Bank] agreed to waive the default interest rate? Is that right?

[ALIASKARI]: With the exception of [the] forbearance agreement.

[DEFENSE COUNSEL]: Okay. So nothing in the texts?

[ALIASKARI]: Nothing in the texts.

* * *

[DEFENSE COUNSEL]: Are you aware of an e-mail where Mr. Washington says, the bank agrees to waive the default interest? Because I didn't see that in your production. Is there one?

[ALIASKARI]: I don't know. I got to look at my e-mails. The only thing I'm emphasizing on is [the] forbearance agreement that was signed by Ty Washington.

* * *

[DEFENSE COUNSEL]: And do you recall any oral communications where Ty Washington or anyone at [the Bank] told you they would waive the default interest?

[ALIASKARI]: I don't recall.

Aliaskari testified that the Bank's waiver of default interest was reflected in Paragraph 4 of the Forbearance Agreement. He interpreted this paragraph as an agreement to increase the monthly payment to $20,000 and to waive default interest:

> [DEFENSE COUNSEL]: [Y]ou said several times that . . . the alleged agreement to waive default interest is in the forbearance agreement. Where is that?
>
> [ALIASKARI]: Well, it says 5 percent and increasing on the first trust to—from the payment of 16,000 semichanged to 18,000. And the—for second trust, from 15, 1600 to 2,000 . . . .
>
> [DEFENSE COUNSEL]: Does the agreement say the bank agrees to waive the default interest rate[?]
>
> [ALIASKARI]: Through this document, yeah.
>
> [DEFENSE COUNSEL]: Where?
>
> [ALIASKARI]: Five percent.

Defense counsel directed Aliaskari to Paragraphs 4.2 and 4.3 of the Forbearance Agreement and pointed out that the language in those sections explicitly reserved the Bank's right to assess the default interest rate. Aliaskari acknowledged this language but stated that he interpreted it to mean "it's 5 percent in writing."

Aliaskari testified that the Borrower "voluntarily" made monthly payments of $20,000 for the months of January through July 2022.

No other depositions were taken. The Bank's January 26, 2022 memo, *supra*, was among the documents produced by the Bank during discovery.

Motion for Summary Judgment

The Bank moved for summary judgment on all counts. It attached to its motion Aliaskari's deposition transcript, an affidavit from the Bank's director of commercial real

estate, the loan documents, the notice of delinquent property tax on the Iverson Street property issued by the Prince George's County Office of Finance, and the Bank's Notice of Default. The Borrower filed an opposition and included the memo and affidavits from Aliaskari and Aly. The court held a hearing on the motion.

On the fraud count, the Bank argued that there was no dispute that neither the Bank nor Washington communicated to the Borrower that the Bank would waive the right to collect default interest; Aliaskari admitted that no such communication existed. Rather, Aliaskari testified that the representation to waive the Bank's right to collect default interest was reflected in the Forbearance Agreement signed by the Bank. The Bank argued, however, that Paragraph 4 of the Forbearance Agreement made clear that the Bank expressed no such intention to waive its right to assert the default rate of interest. Moreover, the Bank argued that the Borrower's alleged reliance on the purported false statements was clearly unreasonable based on the language in the Forbearance Agreement.

Regarding the negligent misrepresentation claim, the Bank argued that it had no duty to the Borrower to disclose its intentions to collect default interest after accepting monthly payments of $20,000 because the relationship between a bank and its customers is contractual and not fiduciary or duty-based in nature. Moreover, in light of the language in the Forbearance Agreement, any reliance on the purported misrepresentations was not reasonable.

Finally, regarding the breach of contract claim, the Bank argued that the Borrower could not point to a specific provision of the Forbearance Agreement that the Bank

allegedly breached. To the extent the Borrower's claim relied on something other than the Forbearance Agreement, the Bank argued that it was barred by the Commercial Loan Statute of Frauds, which prohibits recovery based on a verbal promise to lend or borrow on a verbal modification of an existing agreement. *See* Md. Code Ann., Cts. & Jud. Proc. § 5-408.

The Borrower opposed the motion for summary judgment. At the outset, the Borrower challenged three assertions by the Bank. First, it disputed the Bank's assertion that the Borrower defaulted on the loans. Although the Borrower made a late payment on property taxes for the Iverson Street property, leading to a tax sale, the Borrower redeemed the property and cured the default on December 30, 2021, a few days before the Bank issued the Notice of Default. The Borrower argued that the Bank was therefore aware that the Notice of Default was "wrong." The Borrower pointed out that the memo issued on January 26, 2022 indicated that the Bank no longer considered the Borrower in default, as the Bank knew at that time that the Borrower had already redeemed the Iverson Street property.

Second, the Borrower disputed the Bank's claim that it had not waived default interest. Despite the Bank's assertion in the Notice of Default that it was seeking default interest, the Borrower contended that the memo evidenced the Bank's subsequent waiver of this interest. The Borrower claimed that the Bank acted accordingly by accepting $20,000 monthly payments without raising any objections about the absence of default interest. The Borrower argued that the memo "absolutely says it right here" that the Bank

elected not to charge default interest. Even if the memo was not explicit about the Bank's decision to waive default interest, it at least suggested that the Bank intended to revisit the issue of default interest no earlier than August 2, 2022. Additionally, the Borrower pointed out that although the loan documents expressly require any modifications of the loans to be in writing, oral or implicit modification could nonetheless occur.

Third, the Borrower asserted that the Bank and Washington misunderstood the bases of its claims. According to the Borrower, they incorrectly believed the Borrower was relying on the existence of a binding Forbearance Agreement to support its position. The Borrower clarified that this Forbearance Agreement was not binding; the document was relevant only to demonstrate the Bank's and Washington's agreement not to charge default interest.

Turning to each count, the Borrower stated that the fraud claim was based on a series of misrepresentations and omissions itemized in the complaint, above. The Borrower argued that the memo, the existence of which had been unknown to the Borrower until it was provided during discovery, proved that the Bank and Washington pursued a strategy to "injure and damage" the Borrower, forcing it to either refinance the loans with another institution or sell the Property. According to the Borrower, they "agreed and approved" to accept monthly payments totaling $20,000, were aware that the tax sale issue had been resolved as of December 30, 2021, and decided that any consideration of default interest at the rate of 8% would be deferred until August 2, 2022.

The Borrower contended that the parties' years-long relationship that extended to other loans was "precisely the sort of situation in which good faith and reasonable expectations of appropriate conduct between the parties requires candor and honesty, such that the [Borrower] had the right to rely on the information that the [Bank and Washington] provided." The Borrower also emphasized the parties' course of dealing in which the Borrower paid, and the Bank accepted, monthly $20,000 payments without objection. Given the years-long relationship and course of dealing, the Borrower argued that it was a question for the jury to determine whether the Bank and Washington could remain silent and conceal relevant information from the Borrower. As for the reasonableness of its reliance, the Borrower argued that that, too, was for the jury to determine.

Regarding negligent misrepresentation, the Borrower contended that the allegations in the complaint touched on all elements of the claim. It argued that the evidence established that the Bank and Washington repeatedly accepted monthly payments of $20,000 that did not include default interest. Then, as the Borrower was about to close on the refinancing of the loans, the Bank "sprung" default interest charges retroactive to January 2021. The Borrower reiterated the "context of the parties' dealings" as significant to the element of the "duty to speak with reasonable care." The Borrower argued that it had the right to rely on the actions and statements made by the Bank and Washington; the Borrower was not aware of their "secret plan" to impose default interest; and the Bank and Washington were obligated to disclose to the Borrower that the $20,000 monthly payments were insufficient.

Regarding the breach of contract claim, the Borrower argued that the memo demonstrated the Bank's approval of loan modification, specifically by increasing the interest rate by one point (from 4% to 5%). The Borrower then paid $20,000 per month, consistent with that modification, without the Bank asserting any default interest. The Borrower explained that the memo, signed by the Bank, reflected what it had "agreed to do." As for the Forbearance Agreement, the Borrower claimed that the Bank "agreed on part" of what was in the document, and the other "part of it was [that] we won't have default interest."

Circuit Court's Decision

After hearing arguments, the circuit court granted summary judgment in favor of the Bank and issued a written opinion and order. The court determined that there was no dispute of fact regarding the Borrower's default on the loans due to the failure to pay property taxes on the Iverson Street property when due. Although the Borrower redeemed the property, it still defaulted on the loans. The court concluded that the loan documents:

> were explicitly clear that the terms of the loan **cannot be altered, modified, or amended unless in writing and executed and signed by both parties. . . .** [B]ecause there is no writing signed by *both* parties which modify the existing loan documents, the original loan documents control. . . . [E]ven if the Forbearance Agreement were to be considered by the [c]ourt, it nonetheless does not waive or release the Bank's rights to assert the full default rate of interest at any time.

Regarding the first two counts, the court concluded that the Borrower failed to offer evidence that satisfied the elements of fraud and negligent misrepresentation. The court evaluated both claims together because they share common elements. It explained:

[The Borrower] asserts that the Memo to File that was produced during discovery is primary evidence of a "secret" fraudulent scheme engaged in by the [Bank and Washington]. [The Borrower] further alleged that the scheme resulted in defrauding [the Borrower] since [it] relied on the truth of the representations and w[as] damaged because of them. That is not the case here.

Mr. Washington, through the Memo to File, informed his superiors of a potential resolution of the defaulted loans. Mainly, to have the [Borrower] refinance the commercial loans with another banking institution. The Bank asserted during the motions hearing that they were in fact allowed to have internal[] meetings amongst one another to determine how to handle the defaulted loans, given that [the Borrower's] default was causing the Bank harm. Other than mere speculation, [the Borrower] offers no evidence that satisfies the elements necessary to pursue a fraud or negligent misrepresentation claim.

The Forbearance Agreement the [Borrower] depends on reflects the proposal included in the Memo to File. The agreement was a proposed modification that was sent to [the Borrower], which [it] failed to sign. Therefore, the "Agreement" was merely an offer, which was not accepted by the [Borrower]. [The Borrower's] understanding of the proposed agreement was clear given that [it] began the monthly payments within the Forbearance Period, as required under the proposed agreement. Nonetheless [the Borrower] failed to sign it, did not return it, failed to advise the bank that [it] was in agreement with the proposal, and, thus, failed to accept the proposal. Therefore, because the proposed agreement was not signed by both parties, it remained a proposal to the [Borrower].

[The Borrower] claims that by accepting the monthly payments without any word from the Bank that it would still assert its right to the full default rate of interest, that they falsely misrepresented a material fact. This argument is without merit. The Bank had no duty to disclose its intentions concerning collecting default interest because the relationship between a bank and its customers is contractual and not fiduciary or duty-based in nature. See *Yousef v. Trustbank Sav.*, F.S.B., 81 Md. App. 527, 536-537 (1990) ("[i]t is pellucid that, in Maryland, the relationship of a bank to its customer in a loan transaction is ordinarily a contractual relationship. . . and is not fiduciary in nature. . . Consequently, appellants . . . cannot attach to the [Bank] the assumption of any greater duty than that specified in the [loan] agreement."). Considering the [Bank and Washington] had no duty to disclose [their] intentions, they also had no duty to inform the [Borrower] that the monthly payments were only a partial payment. Particularly because

> the [Borrower] knew the loan was still outstanding and, thus, they were partial payments.

As for the breach of contract claim, the court concluded "there was no evidence . . . to confirm that there was ever a contract" and, "without a valid contract, the [Borrower was] unable to recover" on the claim.

The Borrower timely appealed. We shall include additional facts as necessary in the discussion.

STANDARD OF REVIEW

Maryland Rule 2-501 provides that summary judgment shall be entered "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." That is, the circuit court must first determine "whether there is a dispute as to a material fact sufficient to require an issue to be tried." *Frederick Rd. Ltd. P'ship v. Brown & Sturm*, 360 Md. 76, 93 (2000). If there is no such dispute and if the nonmoving party has "failed to make a sufficient showing on an essential element" of its claim, for which it has the burden of proof, summary judgment is appropriate in favor of the movant. *Cent. Truck Ctr., Inc. v. Cent. GMC, Inc.*, 194 Md. App. 375, 386 (2010) (citation omitted).

In assessing the propriety of a grant of summary judgment, we apply a *de novo* standard of review. *River Walk Apartments, LLC v. Twigg*, 396 Md. 527, 541 (2007). In doing so, we consider the facts, as well as all reasonable inferences that may be drawn from those facts, in a light most favorable to the nonmoving party. *Frederick Rd. Ltd. P'ship*,

360 Md. at 94. Generally, appellate courts will consider only the grounds upon which the trial court relied in granting summary judgment. *Cent. Truck Ctr., Inc.*, 194 Md. App. at 387.

DISCUSSION

The Borrower argues that the circuit court erred in granting summary judgment on all counts. It contends that the court misconstrued its claims and the evidence, viewed the evidence in the light most favorable to the movants, and ignored disputes of material fact. We address the Borrower's arguments regarding the counts for fraud, negligent misrepresentation, and breach of contract seriatim.

I.

FRAUD

Fraud encompasses, among other things, theories of fraudulent misrepresentation and fraudulent concealment or non-disclosure. *See Sass v. Andrew*, 152 Md. App. 406, 432 (2003). Regardless of the theory, the plaintiff must establish the elements of fraud "by clear and convincing evidence." *Md. Env't Tr. v. Gaynor*, 370 Md. 89, 97 (2002). The Borrower's fraud claim involves the theories of fraudulent misrepresentation and concealment or non-disclosure. Before delving into the analysis, we provide an overview of the relevant law for both theories.

A.

Overview of Fraudulent Misrepresentation

The elements of fraudulent misrepresentation are:

> (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.

Cent. Truck Ctr., Inc., 194 Md. App. at 388 (citation omitted).

Under the first element, a "false representation" is a "statement, conduct, or action that intentionally misrepresents a material fact." *Sass*, 152 Md. App. at 429. To be actionable, then, a false representation "must be of a material fact." *Gross v. Sussex Inc.*, 332 Md. 247, 258 (1993). "A 'material' fact is one on which a reasonable person would rely in making a decision," *Sass*, 152 Md. App. at 430, or a fact that "the maker of the misrepresentation knows . . . [the] recipient is likely to regard . . . as important." *Gross*, 332 Md. at 258 (citation omitted).

Under the second element, the plaintiff must prove that the defendant either knew that the representation was false or was recklessly indifferent in the sense that he knew that he lacked knowledge as to its truth or falsity. *Ellerin v. Fairfax Sav., F.S.B.*, 337 Md. 216, 231 (1995).

Under the third element, the misrepresentation must be made with the deliberate intent to deceive:

> An action cannot be supported for telling a bare, naked lie, *i.e.*, saying a thing which is false, knowing or not knowing it to be so, and without any design to impose upon or cheat another, and without intention that another should rely upon the false statement and act upon it; but if a falsehood be knowingly told, with an intention that another should believe it to be true and act upon it, and that person does act upon it and thereby suffers damage, the party telling the falsehood is responsible in damages in an action for deceit . . . .

McAleer v. Horsey, 35 Md. 439, 453 (1872) (citation omitted).

Under the fourth element, the test for assessing reasonable reliance is to "view the act in its setting, which will include the implications and the promptings of usage and fair dealing." *Giant Food, Inc. v. Ice King, Inc.*, 74 Md. App. 183, 192 (1988) (citation omitted). That said, "[t]he terms of a written contract can, of course, be used as evidence of the reasonableness of [a plaintiff's] reliance upon alleged misrepresentations contrary to those terms." *Parker v. Columbia Bank*, 91 Md. App. 346, 364 (1992); *see also Call Carl, Inc. v. BP Oil Corp.*, 554 F.2d 623, 631 (4th Cir. 1977) (noting that a party has no right to rely upon "allegedly fraudulent statements made in the face of plainly contradictory contractual language").

B.

Overview of Concealment or Non-Disclosure

Concealment or non-disclosure is another theory of fraud. *See Lubore v. RPM Assocs., Inc.*, 109 Md. App. 312, 329 (1996) (noting that the tort of deceit is also called "concealment or non-disclosure"). "Concealment and non-disclosure are closely related and in any given situation usually overlap." *Fegeas v. Sherrill*, 218 Md. 472, 476 (1958). Fraudulent concealment "is any statement or other conduct which prevents another from

acquiring knowledge of a fact, such as diverting the attention of a prospective buyer from a defect which otherwise, he would have observed." *Lloyd v. Gen. Motors Corp.*, 397 Md. 108, 138 (2007) (citation omitted). Non-disclosure, on the other hand, "requires only that the defendant remain silent about, or omit, facts." *Id.* at 138 n.11; *Fegeas*, 218 Md. at 476 ("Non-disclosure is a failure to reveal facts. It may exist where there is neither representation nor concealment." (citation omitted)).

Under the theory of concealment or non-disclosure, fraud can occur:

> where it is effected by misleading and deceptive talk, acts, or conduct, or is accompanied by misrepresentations, or where, in addition to a party's silence, there is any statement, word, or act on his part, which tends affirmatively to the suppression of the truth, or to a covering up or disguising of the truth, or to a withdrawal or distraction of a party's attention from the real facts.

Lubore, 109 Md. App. at 330 (citation omitted).

Like fraudulent misrepresentation, there are five elements under the theory of concealment or non-disclosure. The first two elements differ from those of fraudulent misrepresentation. Under the theory of concealment or non-disclosure, the plaintiff must show that (1) the defendant owed a duty to the plaintiff to disclose a material fact and (2) the defendant failed to disclose that fact. *Id.* at 329. The other three elements are the same. *Id.* The plaintiff must show that (3) the defendant intended to defraud or deceive the plaintiff; (4) the plaintiff took action justifiably relying on the concealment; and (5) the plaintiff suffered damages from the defendant's concealment. *Id.*

Under the first element, "[a] duty to disclose arises in certain relationships such as a confidential or fiduciary relationship." *Hogan v. Md. State Dental Ass'n*, 155 Md. App.

556, 566 (2004). A fiduciary relationship "carries with it the requirement of utmost good faith and loyalty and the obligation of (the fiduciary) to make full disclosure of all known information that is significant and material to the affairs of (the fiduciary relationship)." *Impala Platinum Ltd. v. Impala Sales (U.S.A.), Inc.*, 283 Md. 296, 324 (1978) (cleaned up). "[T]he principle of utmost good faith covers not only dealings and transactions occurring during the (fiduciary relationship) but also those taking place during the negotiations leading to the formation of the (fiduciary relationship)." *Id.* (citation omitted).

However, "[j]ust because the relationship between the parties is not such that a duty to disclose is owed does not mean that [a plaintiff] is legally foreclosed from maintaining a deceit action against [a defendant]." *Lubore*, 109 Md. App. at 330. Even absent such a duty, "[o]ne who conceals facts that materially qualify affirmative representations may be liable for fraud." *Id.* (citation omitted). In addition, "if what is stated amounts to a 'partial and fragmentary' disclosure, that misleads because of its incompleteness," the speaker has "a duty to disclose the additional information necessary to prevent it from misleading the recipient." *Id.* at 330–31 (citations omitted).

C.

Analysis

1. Allegations (a) – (h) of the Complaint

The Borrower argues that the court misunderstood its fraud claim as relying on the existence of a binding Forbearance Agreement. The Borrower explains that the fraud claim was based on the false representations and omissions made by the Bank and Washington,

itemized in the complaint under allegations (a) through (h), that the Bank would not seek default interest.

We organize these allegations into two categories. The first category, comprising allegations (a), (b), (c), and (h), alleges various affirmative statements made by the Bank and Washington regarding the default interest. The second category, comprising allegations (d) through (g), alleges omissions by the Bank and Washington regarding the collection of default interest. The first category involves the theory of fraudulent misrepresentation while the second involves the theory of concealment or non-disclosure.

a. False Representations - Allegations (a), (b), (c), and (h)

In the complaint, the Borrower alleged that the Bank and Washington falsely represented on January 5, 2022 that the Borrower was in default under the loans (allegation (a)). The Borrower argues that the statement was false because it had a few days earlier exercised its legal right of redemption and paid in full all related taxes and other fees due for the Iverson Street property. Therefore, the Borrower maintains that it was no longer in default under the loans when the Bank and Washington issued the Notice of Default. Moreover, the Borrower argues that the Bank and Washington were aware when they sent the Notice of Default that the Borrower had redeemed the property. Thus, according to the Borrower, the Bank and Washington knowingly falsely represented that the Borrower was in default under the loans when they issued the Notice of Default.

There is no dispute that the Borrower was in default under the terms of the loan documents when the Notice of Default was issued on January 5, 2022. Under Paragraph

8.E of the commercial loan agreements, the Borrower acknowledged: "I will be in default if . . . [a] default occurs under the terms of any other Loan Document." Under Paragraph 8 of the deeds of trust, the Borrower agreed to pay all taxes "relating to the Property when due." The Borrower undisputedly failed to pay the property taxes on the Iverson Street property when they were due. Accordingly, the Notice correctly stated that "[t]he Borrower's failure to pay the taxes . . . 'when due' therefore is a default under the [loan documents]."

The fact that the Borrower redeemed the Iverson Street property on December 30, 2021 did not change the fact that the Borrower remained in default on the loans for its failure to timely pay property taxes on the property. The Borrower does not cite any provision in the loan documents that provides a contractual right to cure the default by redeeming the property, and during oral argument before this Court, the Borrower acknowledged that the loan documents contained no such remedy. The Notice of Default did not falsely represent that the Borrower was in default.

The Borrower also alleged that the Bank and Washington represented they would accept $20,000 monthly payments on the loans and would not seek to levy a "default rate of interest" (allegation (b)); confirmed these representations by signing and providing the Forbearance Agreement (allegation (c)); and issued inaccurate payoff documents to the Borrower that included default interest (allegation (h)).

We conclude that no reasonable jury could find that the Bank or Washington affirmatively represented the Bank would accept $20,000 per month payments without

seeking default interest. Aliaskari testified that there were no communications, oral or written, in which the Bank or Washington represented that the Bank would not pursue default interest, other than the purported representation in Paragraph 4 of the Forbearance Agreement. However, Paragraph 4 plainly does not state that the Bank would waive default interest.

The Borrower also contends that the memo constituted a representation that the Bank and Washington would not seek default interest. Setting aside that the Borrower could not have relied on representations in the memo because it was not sent to the Borrower, the memo does not contain any representation that the Bank would not seek the default interest.

Finally, the claim that the Bank and Washington provided inaccurate payoff documents to the Borrower is based on the assertion that the Bank would not pursue default interest. However, as explained above, there was no evidence to support this assertion. As a result, there was no evidence from which a reasonable jury could find that the payoff statements were inaccurate.

b. Concealment or Non-Disclosure – Allegations (d), (e), (f), and (g)

The complaint alleged that the Bank and Washington accepted $20,000 monthly payments so as to signify acceptance without reservation (allegation (d)); failed to disclose that these monthly payments by the Borrower were less than what the Bank claimed to be entitled to (allegation (e)); failed to inform the Borrower that the Bank was accruing default interest (allegation (f)); and kept secret, until just before the Borrower's refinancing the loans, that the Bank had been accruing default interest (allegation (g)). The Borrower

contends that these alleged omissions created a false impression that the Bank and Washington would not seek default interest.

Regarding the duty element, the Borrower argues that the court erred in concluding that the Bank and Washington had no duty to disclose that they were seeking default interest when accepting the $20,000 monthly payments. The Borrower claims that the Bank and Washington had a duty to disclose this information regardless of the absence of a fiduciary relationship. As we understand from various points in its brief, the Borrower contends that a duty to disclose may arise from (1) the parties' contractual relationship or (2) other circumstances.[9]

i. Parties' Contractual Relationship

The Borrower seems to argue that the covenant of good faith and fair dealing implied in every contract (presumably referring to the loan documents) required the Bank and Washington to take affirmative actions to disclose to the Borrower that they were

[9] Throughout the briefing, the Borrower cites various cases accompanied by brief parenthetical-style quotations or phrases, without providing substantive discussion of these cases. It is unclear whether certain parentheticals were intended to raise specific arguments, as there was no independent analysis of these cases or further explication of the Borrower's position regarding their import. We decline to fill in any gaps or speculate about the Borrower's potential arguments from these parentheticals. *See* Md. Rule 8-504(a)(6); *Klauenberg v. State*, 355 Md. 528, 552 (1999) ("[A]rguments . . . not presented with particularity will not be considered on appeal."); *Elecs. Store, Inc. v. Cellco P'ship*, 127 Md. App. 385, 405 (1999) (explaining that it is not our "responsibility to attempt to fashion coherent legal theories to support [an] appellant's sweeping claims"); *see also Cook v. Richard T. Kiko Agency, Inc.*, 209 N.E.3d 148, 161 (Ohio Ct. App. 2023) ("A citation's parenthetical is not a proper method for a party to raise a specific argument."). To the extent we are able discern arguments raised by the Borrower, we address them as best we can.

accruing default interest when the Bank accepted the Borrower's $20,000 monthly payments. We disagree.

The covenant of good faith and fair dealing "does not obligate a lender to take affirmative actions that the lender is clearly not required to take under its loan documents." *Parker*, 91 Md. App. at 366. Instead, the duty "simply prohibits one party to a contract from acting in such a manner as to prevent the other party from performing his obligations under the contract." *Id.* The Supreme Court of Maryland has elaborated:

> [W]hile the implied duty of good faith and fair dealing recognized in Maryland requires that one party to a contract not frustrate the other party's performance, it is not understood to interpose new obligations about which the contract is silent, even if inclusion of the obligation is thought to be logical and wise. An implied duty is simply a recognition of conditions inherent in expressed promises.

Blondell v. Littlepage, 413 Md. 96, 114 (2010) (quoting *E. Shore Mkts., Inc. v. J.D. Assocs., Ltd. P'ship*, 213 F.3d 175, 184 (4th Cir. 2000)); *accord Polek v. J.P. Morgan Chase Bank, N.A.*, 424 Md. 333, 362–63 (2012) ("Absent special circumstances, . . . no new obligations on the parties are imposed, where the contract is silent, by the implied covenant of good faith and fair dealing."). Here, the loan documents clearly did not require the Bank or Washington to inform the Borrower that the Bank was seeking default interest after receiving the monthly payments of $20,000.

ii. Circumstances of the Parties' Years-Long Relationship and Course of Dealing

The Borrower contends that other circumstances demanded that the Bank and Washington disclose that the Bank was seeking default interest. The Borrower maintains

that the parties' years-long relationship "is precisely the sort of situation in which good faith and reasonable expectations of appropriate conduct between parties requires candor and honesty" and consideration must be given to the actions and communications of the parties in context including the "parties' relationship and their course of dealing." Thus, it contends that a jury should decide whether the Bank and Washington "could properly remain silent, and conceal relevant information that [Borrower] did not have, in the context of this relationship."

Although the Borrower tacitly acknowledges the absence of a fiduciary relationship between the parties, it insinuates that the Bank and Washington owed the Borrower fiduciary-like obligations. However, "Maryland law is cautious in creating fiduciary obligations between banks and borrowers, absent special circumstances." *Polek*, 424 Md. at 366; *see Yousef v. Trustbank Sav., F.S.B.*, 81 Md. App. 527, 536 (1990) ("[T]he relationship of a bank to its customer in a loan transaction is ordinarily a contractual relationship between debtor and creditor and is not fiduciary in nature." (citation omitted)). Absent "special circumstances," courts are "exceedingly reluctant" to impose any duties on lenders not found in the loan agreement. *Parker*, 91 Md. App. at 369.

In *Parker v. Columbia Bank*, 91 Md. App. 346 (1992), we described four contexts in which such "special circumstances" may exist. *Id.* at 370–71. The four special circumstances include where the lender: "(1) took on any extra services on behalf of [the borrowers] other than furnishing the money . . . ; (2) received any greater economic benefit from the transaction other than the normal [loan]; (3) exercised extensive control . . . ; or

(4) was asked by [the borrowers] if there were any lien actions pending." *Id.* (alterations in the original). The Borrower did not argue below, nor does it argue on appeal, that the parties' years-long relationship and course of dealing fall under any of the special circumstances under *Parker*. Nor does the Borrower cite, and our search does not reveal, any evidence in the record suggesting that one or more of these "special circumstances" exists.

The Borrower cites *Giant Food, Inc. v. Ice King, Inc.*, 74 Md. App. 183 (1988), a case involving negligent misrepresentation, to support the argument that the Bank and Washington had a duty to disclose that the Bank was seeking default interest based on the years-long relationship and course of dealing between the parties. The Borrower quotes a passage from the case about viewing the actions and communications in context, "which will include the implications and promptings of usage and fair dealing." *Id.* at 192. The Borrower suggests that a jury should decide whether a duty existed because these circumstances must be considered. The Borrower also invokes the case to support the overlapping duty element under its negligent misrepresentation claim. For purposes of clarity and efficiency, we will discuss the case in the section on negligent misrepresentation below. As we explain later, the Borrower's reliance on *Giant Food* does not advance its argument that disputes of material fact exist on the element of duty.

Finally, the Borrower makes a passing reference to the exception that, absent a duty to disclose, "[o]ne who conceals facts that materially qualify affirmative representations may be liable for fraud." *See Lubore*, 109 Md. App. at 330. The Borrower does not provide

any analysis of how this exception applies to this case. *See* n.8, *supra*. Nevertheless, based on our review of the record, no reasonable jury could conclude that the Bank or Washington concealed or suppressed the fact that the Bank was seeking default interest or concealed or suppressed facts that materially qualified any representations to the Borrower.

2. Intent to Deceive

Even if there were genuine disputes of material fact as to the first elements of fraudulent misrepresentation and concealment/non-disclosure (false representation and duty to disclose a material fact, respectively), both of those claims would nonetheless fail because there were no genuine disputes of material fact as to the common third element of fraudulent misrepresentation and concealment/non-disclosure—that the Bank and Washington intended to defraud or deceive the Borrower.

In its opposition to the motion for summary judgment, the Borrower argued that the memo "reveal[ed] that this was all part of a planned 'strategy' by [the Bank and Washington] to injure and damage" the Borrower, so that it would "be forced to refinance the loans or sell its very valuable Property." The Borrower claimed that, based on the memo, the Bank and Washington were "secretly planning and accruing exorbitant 'default interest' charges while telling and demonstrating the contrary." According to affidavits by the Borrower's members, the memo "confirmed everything we had been saying—and showed how [the Bank and Washington] tried to mislead us." At the hearing on the motion, the Borrower asserted that the memo, which was produced during discovery, was something the Bank "tried to hide" and "never wanted [the Borrower] to see."

There was no evidence in the summary judgment record from which a reasonable jury could conclude that the Bank or Washington intended to defraud or deceive the Borrower. The memo, on which the Borrower relies as key evidence, does not suggest that the Bank secretly planned to surprise the Borrower with default interest right before the refinance. Instead, the memo's purpose was to request approval for modifying the loans on terms later reflected in the Forbearance Agreement sent to the Borrower. There was no evidence that the Bank or Washington took any steps to prevent the Borrower from learning that the Bank was seeking default interest. Nor was there evidence that they actively engaged in conduct or made statements intended to divert the Borrower's attention from the fact that they were seeking default interest. *See Lubore*, 109 Md. App. at 330; *Lloyd*, 397 Md. at 138.

3. Justifiable Reliance

Even if there were genuine disputes of material fact as to the first and third elements of fraudulent misrepresentation and concealment/non-disclosure, there were no disputes of material fact as to the common fourth element—justifiable reliance.

As stated, the terms of a written contract can be used as evidence of the reasonableness of a plaintiff's reliance upon alleged misrepresentations contrary to those terms. *Parker*, 91 Md. App. at 364. "Although in certain instances, fraud can be premised on representations that are inconsistent with a written agreement," *First Union Nat'l Bank v. Steele Software Sys. Corp.*, 154 Md. App. 97, 161 (2003), there was no evidence in this

case that would permit a reasonable jury to conclude that the Borrower's reliance on the alleged misrepresentation was reasonable.

First, the record established, and the Borrower does not contend otherwise, that the Borrower and its members were sophisticated and experienced borrowers. Aliaskari testified that he began purchasing investment properties in 1984 and started forming companies to buy these properties in 2008. His investments included approximately one hundred residential properties. In 2010, he and Aly established additional companies, including 3911 25th Ave. LLC, to acquire commercial real estate. As part of the process of purchasing commercial real estate, these entities secured various commercial loans. *See Parker*, 91 Md. App. at 362 (explaining that while reliance by an unsophisticated and inexperienced residential borrower on a bank's advice and representations regarding financing might be reasonable, a commercial borrower's reliance on the same representations by the bank might be unreasonable as a matter of law).

Second, the documents that the Borrower relied on, which purportedly represented that the Bank would not pursue default interest, contain terms that contradict this claim. Again, setting aside that the Borrower could not have relied on representations in the memo because the memo was not sent to the Borrower, the memo indicated that the loans were in default status, that a default rate of 8% was being applied, and that default interest had been accruing since January 2021.

Additionally, Exhibit A of the Forbearance Agreement, which was sent to the Borrower, detailed the "Balance Due on Loans" as of February 15, 2022. The "Total

Payoff" amount for the larger loan was $2,863,976.28, which included "Accrued Interest" of $126,915.19. For the smaller loan, the "Total Payoff" was $269,078.43, which included "Accrued Interest" of $11,925.60. The "Accrued Interest" amounts were consistent with those specified in the "LOAN DETAILS" section of the memo, calculated using the 8% default interest rate from January 2021. Moreover, the document included a provision confirming the Borrower's obligation to pay all amounts due and payable under the loan documents and indicating that the Bank was not waiving any claim or amount due. Therefore, under the circumstances, the Borrower's reliance on the purported misrepresentation that the Bank would not seek default interest was not justifiable as a matter of law. *See, e.g.*, *First Union Nat'l Bank*, 154 Md. App. at 167 (concluding that sophisticated business entity could not reasonably rely on an agreement or representation that was specifically negotiated out of the parties' contract); *Md. Env't Tr. v. Gaynor*, 370 Md. 89, 92 n.3, 98–99 (2002) (in negotiating terms of environmental easement, clear language of letter to plaintiffs, one of whom was an attorney with substantial experience in environmental matters, precluded reliance on earlier, inconsistent statements); *James v. Goldberg*, 256 Md. 520, 529–30 (1970) (holding that plaintiff, a law school graduate, had no right to rely upon allegedly false statement by landlord that a lease would be legally assigned to plaintiff because the terms of the lease required written consent by the landlord to any assignment or subtenancy); *Mellon Bank Corp. v. First Union Real Est. Equity & Mortg. Invs.*, 951 F.2d 1399, 1406 (3d Cir. 1991) (in transaction negotiated by two sophisticated businessmen, oral promises that directly contradict the written agreement

could not reasonably be relied upon); *Call Carl, Inc. v. BP Oil Corp.*, 554 F.2d 623, 630–31 (4th Cir. 1977) (oral representation that contract would only be terminated with good cause could not be relied upon in face of clear contractual right to the contrary (citing *James*, *supra*)).

For the reasons stated, the court did not err in granting summary judgment in favor of the Bank and Washington as to the Borrower's fraud claim.

II.

NEGLIGENT MISREPRESENTATION

The Borrower reiterates many of the arguments used in support of the fraud claim. It asserts that it was undisputed that both the Bank and Washington agreed to accept monthly payments that did not include default interest, but later "sprung" the default interest on the Borrower just before it finalized the refinance of the loans. The Borrower maintains that the Bank and Washington were obligated to inform it that the $20,000 monthly payments were inadequate and did not account for default interest. Furthermore, the Borrower contends that the Bank and Washington were "actively hiding the truth" about the Bank's pursuit of default interest.

A.

Overview of Negligent Misrepresentation

As with fraud, the tort of negligent misrepresentation embodies five elements. *Twelve Knotts Ltd. P'ship v. Fireman's Fund Ins. Co.*, 87 Md. App. 88, 100 (1991). The first three elements are that: (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; and (3) the defendant has knowledge that the plaintiff will probably rely on the statement, which, if erroneous, will cause loss or injury. *Id*. at 100-01. "The last two elements—justifiable reliance and damage—are similar to what is required for an action for fraud." *Id.* at 101.

Fraud and negligent misrepresentation both require the making of a false statement of material fact. *Gross*, 332 Md. at 259. Fraud, however, requires scienter on the part of the defendant, *i.e.*, an intent to deceive the other party. *Id.* at 260. While "fraud is an intentional tort requiring the defendant to know that his or her representation is false," meaning that the representation was made "either knowingly or in conscious disregard of its truth," negligent misrepresentation requires only that the conduct "falls below the standard of care the maker of the statement owes to the person to whom it is made." *Id.*

Under the theories of both concealment/non-disclosure and negligent misrepresentation, a plaintiff must demonstrate a duty owed to them by the defendant. *Parker*, 91 Md. App. at 367; *see also Blondell*, 413 Md. at 119–24 (considering the duty elements of fraudulent concealment and negligence together).

B.

Analysis

The claim for negligent misrepresentation fails for many of the same reasons as the claim for fraud. The allegations of false statements and omissions in this claim are identical to those supporting the Borrower's fraud claim. Thus, for the reasons explained previously,

we conclude that there was no evidence to suggest that the Bank or Washington made false representations or omissions regarding the Bank's intention not to seek default interest.

As mentioned earlier, the Borrower relies on *Giant Food, Inc. v. Ice King, Inc.*, 74 Md. App. 183 (1988), to support the argument that, based on the circumstances of the parties' years-long relationship and course of dealing, the Bank and Washington had a duty to disclose that the Bank was seeking default interest when the Borrower made monthly payments of $20,000. It argues that, like in *Giant Food*, the instant case involves a professional relationship in which there was pecuniary interest that imposed a duty of care on the Bank and Washington. However, the Borrower's reliance on the case does not advance its argument that disputes of material fact exist on the element of duty.

Giant Food involved negligent misrepresentations made by Giant to Ice King's employee during negotiations over a contract that did not materialize. Giant's representations about its commitment to buy ice from Ice King included very specific terms: "the type, price, quality, and quantity of ice;" "the delivery terms;" "the location of Ice King's plant at a site most suitable to Giant;" "the size of the storage facility needed to satisfy Giant's demand;" "arrangements for inspection of Ice King's plant by Giant representatives;" and "the demand by Giant that Ice King supply further samples of ice and a certificate of insurance." *Id.* at 191.

The Supreme Court of Maryland explained that "the duty to furnish the correct information arises when the relationship is of the nature that one party has the right to rely upon the other for information." *Id.* at 189. Though "[t]he precise degree of the relationship

that must exist before recovery will be allowed is a question that defies generalization," most commonly, "the duty to speak with reasonable care is based on a business or professional relationship, or one in which there is a pecuniary interest." *Id.* at 189–90.

Notwithstanding the absence of an oral or written contract, the Court concluded that a "special relationship" existed between the parties by virtue of their communications that extended over several months. *Id.* at 190. The Court explained that such communications "amounted to a business relationship involving the prospective pecuniary interest on the part of both parties." *Id.* Moreover, Giant knew that Ice King's employee was investing everything into building an ice plant, believing that he had a commitment from Giant. *Id.* at 191. And when Ice King's employee sought reassurance as to whether there was a "deal" with Giant, Giant assured him that "everything was all right." *Id.* at 192. This evidence, if believed, indicated the presence of an "intimate nexus" akin to a contractual relationship or its "equivalent." *Id.* at 191 (citing *Jacques v. First Nat'l Bank*, 307 Md. 527, 534–37 (1986) (concluding that bank that had agreed to process loan application owed customer duty of care in processing application)). Thus, the Court concluded that there was at least a jury question as to whether Giant was under a duty to Ice King. *Id.* at 192.

As for justifiable reliance, the Court viewed the act in its setting, including the implications and the promptings of usage and fair dealing. *Id.* at 192; *see Vill. of Cross Keys, Inc. v. U.S. Gypsum Co.*, 315 Md. 741, 757 (1989) (noting a "close interrelationship of the concepts of duty and reliance"). The Court explained that the evidence showed that Ice King's employee had had several discussions with Giant. *Giant Food, Inc.*, 74 Md.

App. at 193. Moreover, the Court explained why, based on these discussions, a reasonable businessperson in Ice King's employee's position might well have been justified in believing a deal was in place:

> [A]lthough no written contract existed between the parties, . . . the evidence strongly suggested that a "businessman in [Ice King's employee's] shoes" might have reasonably relied on the informal "deal" or "gentlemen's agreement" that is the custom of the trade. The evidence demonstrated that neither of Giant's previous ice suppliers had written contracts. It was clear that Giant's practice was *not* to issue written contracts. That a lending institution viewed the "deal" between Giant and Ice King as reliable underscores why it was reasonable for [Ice King's employee] to rely upon the information supplied by [Giant].

Id.

In contrast, here, there was no evidence of extensive discussions regarding the Bank's commitment or assurances that it would not seek default interest. The evidence cited by the Borrower established only that it voluntarily paid $20,000 per month between January and July 2022, which the Bank accepted without objection; Aliaskari, through another entity, had obtained another commercial loan with the Bank; and Aliaskari, Aly, and their other related entities were customers of the Bank.

Furthermore, there were no facts that "strongly suggested" that a commercial borrower in the Borrower's position "might have reasonably relied" on the purported representation that the Bank would not seek default interest. *Id.* For the reasons explained earlier on the fraud claim, the Borrower's reliance on this purported misrepresentation was not reasonable as a matter of law. Accordingly, the court did not err in granting summary

judgment in favor of the Bank and Washington regarding the Borrower's claim of negligent misrepresentation.

III.

BREACH OF CONTRACT

"To prevail in an action for breach of contract, a plaintiff must prove that the defendant owed the plaintiff a contractual obligation and that the defendant breached that obligation." *Taylor v. NationsBank, N.A.*, 365 Md. 166, 175 (2001).

The Borrower asserts that it never claimed the Forbearance Agreement was binding. Instead, it contends that the document served as written evidence of the Bank's agreement to waive the default interest, a decision later confirmed "with undeniable finality" by the memo. According to the Borrower, the actions of the Bank and Washington as of the date of the memo's issuance demonstrated that they agreed not to charge default interest and had abandoned plans to do so. Furthermore, the Borrower explains that the Bank acted consistently with the waiver of default interest by accepting payments of $20,000 without objection.

The Maryland Supreme Court summarized the general principles of waiver:

> Waiver is the intentional relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right, and may result from an express agreement or be inferred from circumstances. Waiver may result from implication and usage, or from any understanding between the parties which is of a character to satisfy the mind that a waiver is intended. Acts relied upon as constituting a waiver of the provisions of a contract must be inconsistent with an intention to insist upon enforcing such provisions. Even if the relevant statements and communications of the parties are uncontested, the court must determine whether those statements (and actions)

> amounted to an understanding between the parties that the condition would no longer be enforceable.

Hovnanian Land Inv. Grp., LLC v. Annapolis Towne Ctr. at Parole, LLC, 421 Md. 94, 122–23 (2011) (cleaned up). "[O]ur case law . . . require[s] mutual knowledge and acceptance, whether implicit or explicit, of the non-conforming action." *Id.* at 120. "A waiver of a contractual provision must be clearly established and will not be inferred from equivocal acts or language." *Myers v. Kayhoe*, 391 Md. 188, 205 (2006). A court looks at the "totality of a party's actions when determining whether waiver, or modification of the contract, has occurred." *Hovnanian*, 421 Md. at 122.

These principles apply even where the written contract contains a non-waiver clause. *See id.* at 121–22. In other words, the parties to a contract may modify the agreement by their conduct "notwithstanding a written agreement that any change to a contract must be in writing." *Univ. Nat'l Bank v. Wolfe*, 279 Md. 512, 522 (1977). When there is a non-waiver clause, the party asserting the defense of waiver "must show an intent to waive *both* the contract provision at issue *and* the non-waiver clause." *Hovnanian*, 421 Md. at 123 (emphasis added). "The waiver of the non-waiver clause need not be explicit and independent from the underlying waiver; rather, waiver of that clause may be implied from the very actions which imply waiver of the condition precedent . . . ." *Id.* at 125. As a general matter, "[g]iven the highly factual nature of the waiver inquiry, it is an uncommon case in which the issue can be resolved by summary judgment." *Id.* at 123.

"In some instances, however, the waiver, or lack thereof, may be so apparent that a court can make a determination as a matter of law." *Woznicki v. GEICO Gen. Ins. Co.*, 443

Md. 93, 119 (2015) (citing *Hovnanian*, 421 Md. at 124). The case of *Canaras v. Lift Truck Services, Inc.*, 272 Md. 337 (1974), is instructive. *Canaras* involved a dispute over an employment contract that provided for a one-year term of employment beginning on December 1, 1971. *Id.* at 340–41. The contract contained a renewal option that, if exercised, would give rise to an additional five-year term of employment. *Id.* at 341. The option provided that the renewal would occur automatically unless the employer gave the employee written notice of its intention not to exercise the option "at least nine full months prior to November 1, 1972"—i.e., on or before February 1, 1972. *Id.* Because the employer was reluctant to enter into the contract, however, it was not executed until May 18, 1972. *Id.* at 341–42.

The employee argued that, by waiting to execute the contract until after the original deadline to inform him of its intention not to renew had passed, the employer had waived its option to not renew. *Id.* at 357. The Supreme Court of Maryland rejected the employee's implied waiver argument. *Id.* In discussing the requirements for a finding of implied waiver, the Court explained that a waiver "may result from implication and usage, or from any *understanding between the parties* which is of a character to satisfy the mind that a waiver is intended." *Id.* at 360–61 (emphasis added) (quoting 5 Samuel Williston, *Law of Contracts* § 678 (3d ed. 1961)). In rejecting the employee's contention, the Court explained that "[t]here was no evidence offered that at the time the contract came to be executed—or thereafter—the principals of [the employer] made any statements to [the employee], nor

[was] there any evidence of any conduct on their part from which it could be said that there was an intentional relinquishment of the rights [under the renewal option]." *Id.* at 361–62.

Woznicki v. GEICO General Insurance Co., 443 Md. 93 (2015), is also instructive. The case involved an injured motorist whose insurance company, GEICO, denied her uninsured-motorist coverage for settling with the other insurance company without complying with the procedural requirements of § 19-511 of the Maryland Code, Insurance Article. *Id.* at 101–02. GEICO filed for summary judgment and the motorist opposed, arguing that there were factual disputes as to whether a GEICO representative had orally consented to the pending settlement during a phone call with the motorist's attorney, thereby waiving the statutory requirement to provide written notice of settlement. *Id.* at 119–20. The summary judgment record consisted of the deposition testimony of the attorney, who testified that he believed the phone conversation amounted to a waiver. *Id.* at 120–22.

The Supreme Court of Maryland concluded that the attorney's testimony was not enough to defeat summary judgment because his account of the phone call contained no "indication that GEICO informed [him], or that [he] requested, that GEICO was waiving compliance with" the procedural requirements of the statute. *Id.* at 122. The Court explained that "[n]o rational trier of fact could conclude that [the attorney's] sole statement that it was his understanding that he had obtained GEICO's consent, standing alone, constituted a waiver, express or implied, of the statutory or contractual requirements imposed on [the motorist]." *Id.* at 124. It continued:

> Given [the attorney's] own testimony, it can hardly be said that the GEICO representative and [the attorney] had "mutual knowledge and acceptance . . . of the non-conforming action." *Hovnanian*, 421 Md. at 120. [*The attorney's*] *subjective understanding of this conversation is simply not enough to establish a genuine dispute of material fact*. To hold otherwise would permit a jury to impermissibly engage in speculation on the basis of a single unsubstantiated statement.

Id. (cleaned up and emphasis added).

Likewise, in the instant case, no rational trier of fact could conclude that the Bank's and/or Washington's actions constituted a waiver, express or implied, of the Bank's right to seek default interest. It was undisputed that neither the Bank nor Washington ever made a statement to the Borrower indicating that default interest would be waived. *See Canaras*, 272 Md. at 361–62; *see also Myers*, 391 Md. at 206–07 (finding no waiver from one party's statement because that statement was not communicated to the other party). The Notice of Default issued on January 5 unequivocally declared a default and stated that the Bank was seeking default interest. Contrary to the Borrower's assertion otherwise, the memo issued weeks later confirmed that the loans were in default and accruing default interest at that time. Additionally, Exhibit A of the Forbearance Agreement, sent to the Borrower the following month, showed that the payoff amounts included the full principal along with accrued default interest as of February 15.

It cannot be concluded from these facts that there was "mutual knowledge and acceptance" or an "understanding between the parties" that the Bank intended to waive its right to seek default interest merely because the Bank accepted monthly payments of $20,000 without objection. *Hovnanian*, 421 Md. at 120, 122. That conduct alone was not

"inconsistent with [the Bank's] intention" to seek default interest, *id.* at 122; nor did the parties' conduct amount to "mutual assent, or the practical equivalent thereof," to the Bank's purported waiver of default interest. *DIRECTV, Inc. v. Mattingly*, 376 Md. 302, 318 (2003).

CONCLUSION

We hold that no reasonable jury could conclude that the elements of fraud and negligent misrepresentation discussed above were met. We also hold that no reasonable jury could conclude that the Bank agreed to waive default interest to support a breach of contract claim. The Borrower's subjective interpretation of the memo, Paragraph 4 of the Forbearance of Agreement, and the Bank's conduct in accepting increased monthly payments without objection does not establish genuine disputes of material fact sufficient to overcome summary judgment. *See Woznicki*, 443 Md. at 124 (explaining that the "subjective understanding of [the parties' course of dealing] is simply not enough to establish a genuine dispute of material fact"); *Barwick v. Celotex Corp.*, 736 F.2d 946, 963 (4th Cir. 1984) ("Genuine issues of material fact cannot be based on mere speculation or the building of one inference upon another."). For the reasons stated, we reach the same conclusion as the circuit court, albeit through slightly different channels, and affirm its decision to grant summary judgment on all counts.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.