Circuit Court for Baltimore City
No. 24-C-21-004794

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 0316

September Term, 2022

XL INSURANCE AMERICA, INC.

v.

LITHKO CONTRACTING, LLC, *et al.*

Reed,
Albright,
Wright, Alexander, Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Albright, J.

Filed: October 13, 2023

*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 case is about the breadth of a contractual subrogation waiver. XL Insurance America, Inc. ("XL" or "Appellant") is the all-risk insurer of Amazon.com, Inc. and its subsidiaries (collectively "Amazon"). After paying Amazon's first-party claim for damage to a warehouse that Amazon had built (and then leased) in Baltimore City, XL sued the subcontractors that had developed and built the warehouse, filing a complaint in the Circuit Court for Baltimore City. As Amazon's putative subrogee, XL alleged that the subcontractors' negligence caused Amazon's damages. Appellees are three subcontractors, the successor-in-interest to a fourth subcontractor, and a fifth company alleged to be a successor-in-interest. On concluding that the subcontractors and the successor-in-interest were the beneficiaries of a subrogation waiver, and that the fifth company was not a successor-in-interest,[1] the circuit court granted summary judgment to Appellees. XL followed with this timely appeal.

XL presents two questions for our review, which we have rephrased:[2]

[1] The fifth company argued in the alternative. First, it claimed that it was not liable because it was not involved in the development or construction of the warehouse or otherwise responsible for the alleged negligence of those who were. Second, it argued that it, too, would have been protected from XL's claims by subrogation waivers. Accordingly, even though we agree with the circuit court that the fifth company was not liable, we include it among those for whom we discuss the availability (or not) of a subrogation waiver.

[2] XL phrased its questions as follows:

1. Did the trial court reversibly err by holding that, as a matter of law, XL's claims against the defendant subcontractors are barred by waivers of subrogation in the underlying contracts,

1. Did the trial court reversibly err in granting summary judgment in favor of Appellee subcontractors on the basis that XL's claims against Appellees are barred by contractual waivers of subrogation?

2. Did the trial court reversibly err in granting summary judgment in favor of Appellee Lithko Holdings, LLC on the basis that it was not liable to XL?

For the reasons below, we answer "yes" to the first question and "no" to the second. Accordingly, we reverse in part and affirm in part and remand for further proceedings not inconsistent with this opinion.

BACKGROUND

I. The Amazon Warehouse and Subrogation Lawsuit

In 2014, a subsidiary of retail giant Amazon.com, Inc.[3] entered into two agreements with Duke Baltimore, LLC ("Duke"). Under the first, styled a Development Agreement, Duke agreed to serve as general contractor for construction of an Amazon warehouse in southeast Baltimore (the "Project"). The second agreement was a Lease by which Duke agreed to serve as landlord for Amazon at the warehouse once construction

where none of these waivers apply to claims made by XL (Amazon's insurer) against any subcontractor?

2. Did the trial court reversibly err by dismissing XL's claims against Defendant Lithko Holdings based on that entity having no involvement in the construction of the warehouse, where XL's claims are based on that entity being a successor-in-interest to a company that was involved in the warehouse construction?

[3] That subsidiary was Amazon.com.dedc, LLC. No party argues that the distinction between Amazon.com.dedc, LLC and Amazon.com, Inc. is relevant here.

was complete. After these agreements were executed, Duke separately contracted with subcontractors, including several of the Appellees, to develop and build the warehouse.[4] Amazon took occupancy of the completed warehouse later that same year.

In 2016, one of the Project subcontractors, Lithko Contracting, Inc., a domestic Ohio corporation, converted itself into a Delaware limited liability company, Lithko Contracting LLC. Lithko Holdings, LLC, a Delaware limited liability company, was established just prior to the conversion.[5]

In 2018, a tornado damaged the warehouse's roof, which caused a portion of the warehouse's exterior wall to collapse inward. These damages prompted an indemnity payment to Amazon by XL, Amazon's all-risk insurer for the warehouse.

In 2021, XL filed this subrogation suit.[6] XL alleged that Amazon's damage was caused by the subcontractors' negligence in designing and building the warehouse. The

[4] Under its agreement with Amazon, Duke Baltimore, LLC was contractually obligated to hire subcontractors. Nonetheless, it was not Duke Baltimore, LLC, but Duke Realty Corporation, an affiliate, that actually entered into the subcontracts. Although the parties initially appeared to dispute the significance of this distinction, XL ultimately conceded that it is not relevant to the present appeal. For purposes of this appeal, the term "Duke" therefore collectively refers to Duke Baltimore, LLC and Duke Realty Corporation.

[5] As to the relationship between Lithko Holdings, LLC and Lithko Contracting LLC, Lithko Holdings, LLC claimed in the circuit court that Lithko Contracting, LLC's only member was another entity, Lithko Acquisitions, LLC, and that Lithko Holdings, LLC, in turn, owned Lithko Acquisitions, LLC. This claim appeared in Lithko Holdings, LLC's summary judgment reply but was not verified.

[6] Subrogation is "the substitution of one person to the position of another, an obligee, whose claim he has satisfied." *G.E. Cap. Mortg. Servs., Inc. v. Levenson*, 338

complaint named eight defendants.[7] XL later voluntarily stipulated to dismissal of its claims against three. The remaining defendants (all Appellees) were LJB, Inc. ("LJB"), ECS Mid-Atlantic, LLC, Ira G. Steffy & Son, Inc., Lithko Contracting, LLC, and Lithko Holdings, LLC. XL's theory against the first three was that they were subcontractors on the Project. Against the last two, XL alleged that they were successors-in-interest to Project subcontractor Lithko Contracting, Inc.

Several of the Appellees filed dispositive motions against XL. *First*, LJB sought summary judgment, arguing that waivers of subrogation in the Development Agreement and in its subcontracts with Duke barred XL's claim against it.[8] LJB argued first that it was entitled to enforce the Development Agreement's subrogation waiver as an intended third-party beneficiary, and second, that XL's claim was barred by the subcontract's

Md. 227, 231 (1995). In effect, subrogation allows a party to "step into the shoes of another in order to pursue a cause of action." *Pulte Home Corp. v. Parex, Inc.*, 174 Md. App. 681, 742 (2007), *aff'd*, 403 Md. 367 (2008). In a subrogation action, "the substituted person can exercise no right not possessed by his predecessor, and can only exercise such right under the same conditions and limitations as were binding on his predecessor." *Hill v. Cross Country Settlements, LLC*, 402 Md. 281, 313 (2007) (internal quotations omitted).

[7] Two of the defendants subsequently filed cross claims for indemnification against other defendants. Following the circuit court's grants of summary judgment, the parties stipulated to dismissal of the cross claims as moot.

[8] Maryland courts recognize that parties to a contract may waive their subrogees' right to bring subrogation claims. *Gables Constr., Inc. v. Red Coats, Inc.*, 468 Md. 632, 655 (2020).

subrogation waiver because Amazon, XL's putative subrogee, was a party to the subcontract. XL opposed LJB's motion.[9]

Second, Lithko Contracting, LLC and Lithko Holdings, LLC moved for dismissal or summary judgment, adopting LJB's waiver-of-subrogation theory. Lithko Holdings, LLC also argued that it had no liability because it was not formed until several years after the Project contracts were executed. In support of this argument, Lithko Holdings, LLC asserted that Lithko Contracting, LLC was the successor-in-interest to Lithko Contracting, Inc. With its motion, Lithko Holdings, LLC submitted records from the Ohio Secretary of State showing that Lithko Contracting, Inc. became Lithko Contracting, LLC in March 2016, thereby transferring all the former's assets and obligations to the latter. In its opposition to this motion, XL repeated the allegations in its complaint and asserted that it was entitled to discovery on whether Lithko Holdings, LLC was liable as a successor to Lithko Contracting, Inc.

The circuit court heard argument on the motions and agreed that Appellees were third-party beneficiaries of the subrogation waivers:

> I do find that when reading the Development Agreement in concert with the lease agreement and the subcontracts for these moving parties, the Court does find that the Defendants are intended beneficiaries of the subrogation waiver.

[9] In addition to this summary judgment motion, LJB had filed another one arguing that it owed no relevant duty to Amazon. The circuit court denied this motion as moot. Here, LJB does not press lack of duty as an alternative ground for affirming summary judgment.

> I do agree with the Defendants that the contract documents reflect the intent that all parties include mutual waivers at each level of the contracting and subcontracting process. Specifically looking at the Development Agreement at Section 3.2, 4.3, 12.3(a) and (b), and 12.4, the lease agreement at [Page] 11, the LJB subcontract that's 1.4 and 6.2, the SEG subcontract at 1.4 and 7, and the Lithko subcontract at 1.4 and 4.2.…
>
> As to the Lithko motion, the Court further finds that Lithko Holdings was not a party to the contracts. It was formed after completion of the project. As such, summary judgment is also warranted as to Lithko Holdings for this additional reason. Having found that the waiver of subrogation does apply to the subcontractors, Court's going to grant the motion for summary judgment, which will be Docket Entry 30, as to Specialty Engineering,[10] 37 as to LJB, and 43 as to Lithko, Court's going to deny 16, which was the other LJB motion for summary judgment. We're going to deny that as moot, having granted summary judgment on the waiver of subrogation.[11]

This timely appeal followed.

II. The Contracts

A. Development Agreement

In the Development Agreement between Amazon and Duke, Duke agreed to serve as general contractor for the Project and to hire subcontractors to complete development

[10] Defendant Specialty Engineering filed a motion for summary judgment on the waivers-of-subrogation issue, but it was one of the three defendants whose claims XL voluntarily agreed to dismiss and is not an Appellee in this case.

[11] Following the circuit court's rulings, XL agreed to an order dismissing its claims against the two subcontractors who had not moved for summary judgment, ECS Mid-Atlantic, LLC, and Ira G. Steffy & Son, Inc., without prejudice to XL's right to appeal. This was because XL and these subcontractors agreed that XL's claims against them would have been subject to the same waivers of subrogation. Thus, even though ECS Mid-Atlantic, LLC and Ira G. Steffy & Son, Inc. did not move for summary judgment in the circuit court, judgments were entered in their favor in the circuit court, XL appealed from those judgments, and both ECS Mid-Atlantic, LLC and Ira G. Steffy & Son, Inc. are Appellees here.

and construction of the warehouse. Sections 3.1-3.2 and 7.1-7.3 of the Development Agreement identified several individual subcontractors for Duke to hire and specified how Duke was to carry out the bidding process for remaining subcontractors. In Section 12.3, Amazon and Duke each agreed to indemnify, defend, and hold harmless the other for losses caused by their own actions or omissions or those of their respective "agents, contractors, subcontractors, servants, employees, licensees, or invitees."[12] Section 12.4 of the Development Agreement contains the following subrogation waiver:

> Notwithstanding any other provision of this Agreement, neither party shall be liable to the other party or to any insurance company (by way of subrogation or otherwise) for any loss of, or damage to, any of its property located within the Project or upon, or constituting a part of, the Project, which loss or damage arises from the perils that could be insured against under the ISO Causes of Loss-Special Form Coverage…This waiver applies whether or not the loss is due to the negligent acts or omissions of Landlord [i.e., Duke] or Tenant [i.e., Amazon], or their respective officers, directors, employees, agents, contractors, or invitees.

B. Lease

Amazon and Duke also signed a Lease for the warehouse. The Lease explicitly incorporated the Development Agreement by reference. The fifth paragraph of Section 9 of the Lease includes a subrogation waiver that differs slightly (but immaterially) from that in the Development Agreement: in the first sentence, it substitutes the word "Lease" for "Agreement" and the word "Premises" for "Project." Therefore, for clarity, we use the

[12] These others connected with Amazon or Duke are, respectively, referred to collectively as "Tenant Parties" and "Landlord Parties."

singular shorthand "Development Agreement subrogation waiver" to refer jointly to the waivers in the Development Agreement and the Lease.

C. Exhibit I to the Development Agreement

Under terms set out in Exhibit I of the Development Agreement, Duke promised Amazon that it would put certain language in each of its subcontracts for the Project. This language, much of which guarantees Amazon enforceable rights under the subcontracts, appears in an addendum to each subcontract titled "ATTACHMENT 1: STATE CHANGES TO THE CONTRACT DOCUMENTS (MARYLAND)." Included in Section 4.2 of Attachment 1[13] is a subrogation waiver similar, but not identical, to the one in the Development Agreement. Section 4.2 reads:

> Notwithstanding any other provision of the Contract Documents, no party shall be liable to another party or to any insurance company (by way of subrogation or otherwise) for any loss of, or damage to, any of its property located within the Project or upon, or constituting a part of, the Project, which loss or damage arises from the perils that could be insured against under the ISO Causes of Loss-Special Form Coverage…This waiver applies whether or not the loss is due to the negligent acts or omissions of a party or Tenant [i.e., Amazon], or their respective officers, directors, employees, agents, contractors, or invitees.

[13] In each subcontract, the subrogation waiver appears in Section 4.2 of Attachment 1, but in Exhibit I of the Development Agreement it is found in Section 4.3. For clarity, we refer to the subcontracts' subrogation waivers using the terms "Section 4.2" and "Attachment 1."

D. Subcontracts

In addition to the subrogation waiver in Attachment 1, each Appellee's subcontract contains another subrogation waiver between that Appellee and Duke.[14] But each subcontract also includes a provision specifying that Attachment 1 controls if it is inconsistent with any other language in the subcontract: "[w]here any language of this Agreement or the other Contract Documents conflicts or is inconsistent with the state-specific changes [i.e., Attachment 1], the state-specific changes shall control"). In the circuit court and here on appeal, the parties have thus focused their arguments on the Attachment 1 subrogation waiver instead of the separate, contract-specific subrogation waivers.

STANDARD OF REVIEW

Summary judgment is available when "there is no genuine dispute as to any material fact and [a] party is entitled to judgment as a matter of law." Md. Rule 2-501(f). A party moving for summary judgment must show an absence of genuine dispute of

[14] Although in other respects the subcontracts vary in language and structure, the subrogation waivers are identical. They read as follows:

> Duke and the [subcontractor] waive all rights against (1) each other and any of their subcontractors, agents and employees, and (2) the Owner [i.e., Duke Baltimore], separate contractors, and any of their subcontractors, agents and employees, for damages caused by fire or other causes of loss to the extent covered by Builder's Risk or other property insurance applicable to the Work, except such rights as they may have to proceeds of such insurance. The [subcontractor] shall require similar waivers of its consultants (and cause its insurers and their insurers to recognize and consent to such waiver of rights).

material fact. *Clark v. O'Malley*, 169 Md. App. 408, 423 (2006), *aff'd sub nom. Mayor & City Council of Balt. v. Clark*, 404 Md. 13 (2008). To meet this burden, the moving party must "support his or her various contentions by placing before the court facts that would be admissible in evidence or otherwise detailing the absence of evidence in the record to support a cause of action." *Washington Mut. Bank v. Homan*, 186 Md. App. 372, 390 (2009) (cleaned up).

We review a grant of summary judgment *de novo. Webb v. Giant of Md., LLC*, 477 Md. 121, 347-48 (2021). "The standard for appellate review of a trial court's grant or denial of a summary judgment motion is whether the trial court was legally correct." *Maryland Cas. Co. v. Blackstone Int'l Ltd.*, 442 Md. 685, 694 (2015) (internal quotations omitted). To answer that question, we "conduct an independent review of the record to determine whether a genuine dispute of material fact exists and whether the moving party is entitled to judgment as a matter of law." *Id.* "We review the record in the light most favorable to the nonmoving party and construe any reasonable inferences that may be drawn from the facts against the moving party." *United Servs. Auto. Ass'n v. Riley*, 393 Md. 55, 67 (2006) (internal quotations omitted). Additionally, "the interpretation of a contract, including the question of whether the language of a contract is ambiguous, is a question of law subject to *de novo* review." *W. F. Gebhardt & Co. v. Am. Eur. Ins. Co.*, 250 Md. App. 652, 666 (2021) (quoting *Credible Behav. Health, Inc. v. Johnson*, 466 Md. 380, 392 (2019)).

DISCUSSION

We first discuss the waiver issue common to all Appellees and then turn to the liability issue that applies only to Lithko Holdings, LLC.

I. Waivers of Subrogation

A. The Parties' Contentions

1. XL's Contentions

XL's primary contention is that the subrogation waivers in the Project contracts do not protect the subcontractors. The Development Agreement waives subrogation between Amazon and Duke, and the subcontracts separately waive subrogation between Duke and the subcontractors. Neither of these two distinct subrogation waivers extends any further. XL contends that the circuit court erred by reading beyond the language of the contracts to craft a "master waiver of subrogation" that protected all parties to the Project under a single waiver. We summarize XL's three primary arguments.

First, XL contends that the waiver in Section 12.4 of the Development Agreement unambiguously protects Amazon and Duke from mutual liability and subrogation but does not extend to the subcontractors. It stresses that the first sentence of Section 12.4 uses binary language, "neither party" and "the other party," to identify the parties protected by the subrogation waiver. XL also contrasts the Development Agreement waiver's operative language, which makes no mention of subcontractors, with that of the American Institute of Architect (AIA) form contract used in *Gables Constr., Inc. v. Red*

Coats, Inc., which does explicitly include subcontractors. 468 Md. 632 (2020).[15] Amazon and Duke could have chosen to use such language but did not. XL argues that the Development Agreement must be enforced as written.

Second, XL contends that Appellees do not qualify as intended third-party beneficiaries of the subrogation waiver in the Development Agreement. XL notes that under Maryland law, an intended third-party beneficiary of a promise must show that the promise was intended for its direct benefit. *CR-RSC Tower I, LLC v. RSC Tower 1, LLC*, 429. Md. 387, 457 (2012). There is no evidence that Amazon and Duke intended the subrogation waiver in the Development Agreement to directly benefit Appellees.

Third, XL contends that Amazon is not a party to the subcontracts, and that therefore, the subrogation waiver in Attachment 1 is not binding on XL as Amazon's subrogee. According to XL, the language of the subcontracts is clear and unambiguous in identifying the parties thereto, and Amazon is not among them. XL acknowledges that the subcontracts use non-binary language, "no party" and "another party," to identify the parties protected by the subrogation waiver, but it adds that two sentences later, Section 4.2 includes the phrase "party or Tenant [i.e., Amazon]." XL argues that this phrasing

[15] The AIA form contract provides: "The Owner and Contractor waive all rights against (1) each other and any of their subcontractors, sub-subcontractors, agents and employees, each of the other, and (2) any of their subcontractors, sub-subcontractors and employees, for damages caused by fire or other causes of loss to the extent covered by property insurance obtained pursuant to this Section…" *Gables*, 468 Md. at 640.

guides interpretation of the term "party" in Section 4.2: because Amazon is referred to separately, "party" does not include Amazon.

2. Appellees' Contentions

Appellees contend that summary judgment was proper because the contractual waivers of subrogation barred XL's claims against them. They make two arguments to support their position and oppose XL's arguments.

First, Appellees argue that they were intended third-party beneficiaries of the subrogation waiver in the Development Agreement and were therefore entitled to enforce that waiver against Amazon and XL. They infer such an intent from the third sentence of the Development Agreement's subrogation waiver, which specifies that the waiver applies "whether or not the loss is due to the negligent acts or omissions of [Duke] or [Amazon], or their respective…contractors." They argue that, by explicitly stating that the subrogation waiver applies to losses caused by subcontractors, Amazon and Duke expressed their intent that the waiver also cover the subcontractors. They also maintain that their reading of this sentence is more reasonable than XL's. In Appellees' view, XL's reading—that the third sentence of Section 12.4 just clarifies that the Section 12.4 waiver applies to direct and vicarious claims against Amazon or Duke—would render the third sentence redundant when it is read together with the indemnity clauses between Amazon and Duke in Section 12.3.

More broadly, Appellees contend that Amazon and Duke's intent becomes clear when the surrounding circumstances are considered. They argue that by requiring Duke

to provide the subcontractors with subrogation waivers similar to the waiver in the Development Agreement, Amazon revealed "a clear intent to establish a risk-allocation scheme whereby the risk of loss or damage would be borne by insurance and not by any of the parties to the Contract Documents."

Second, Appellees argue that the subrogation waivers in Appellees' subcontracts are binding on Amazon, and therefore XL, because, although not explicitly named as such, Amazon was a contract party to the subcontracts. Appellees note that Black's Law Dictionary defines a party as "[s]omeone who takes part in a transaction." They argue that Amazon meets this definition and qualifies as a contract party because Amazon influenced the language of the subcontracts and reserved itself significant rights under them in Attachment 1. For example, one term that Amazon required Duke to include in the subcontracts was the right for Amazon to "participate in all material phases of the Project" and even "in its sole discretion, [to] assume and perform all rights and obligations under the Contract Documents."

B. Analysis

The parties' arguments turn largely on interpretation of the subrogation waivers in the Development Agreement and subcontracts. Maryland courts take an "objective approach" to contract interpretation. "The court is to give effect to the plain meaning of the contract, read objectively, regardless of the parties' subjective intent at the time of contract formation." *Impac Mortg. Holdings, Inc. v. Timm*, 474 Md. 495, 507 (2021) (citing *Myers v. Kayhoe*, 391 Md. 188, 198 (2006)). Accordingly, courts first look to the

"four corners" of an agreement to determine if its language is plain and unambiguous. *Cochran v. Norkunas*, 398 Md. 1, 17 (2007). If the language is plain and unambiguous, then the "true test" of an agreement's meaning is "what a reasonable person in the position of the parties would have thought it meant." *Impac*, 474 Md. at 507 (quoting *Dennis v. Fire & Police Employees' Ret. Sys.*, 390 Md. 639, 656-57 (2006). Courts must construe contracts in their entirety and, where reasonably possible, give effect to each clause and avoid "cast[ing] out or disregard[ing] a meaningful part of the language of the writing." *Dumbarton Imp. Ass'n, Inc. v. Druid Ridge Cemetery Co.*, 434 Md. 37, 52 (2013) (internal quotations omitted). Additionally, "[i]t is a fundamental principle of contract law that it is improper for the court to rewrite the terms of a contract, or draw a new contract for the parties, when the terms thereof are clear and unambiguous, simply to avoid hardships." *Gebhardt & Smith LLP v. Maryland Port Admin.*, 188 Md. App. 532, 566 (2009) (internal quotations omitted).

Here, the parties agree that the Development Agreement and subcontracts are unambiguous. Our task, therefore, is to read those contracts as a reasonable person in the position of the parties would and to give effect to the contracts' plain meaning, without regard to the subjective intent of the contracting parties.

1. Appellees were not intended third-party beneficiaries of the subrogation waiver in the Development Agreement

Appellees first contend that summary judgment was proper because they had the right to enforce the subrogation waiver in the Development Agreement as intended third-party beneficiaries.

At common law, only parties to a contract had the right to enforce it. *120 W. Fayette St., LLLP v. Mayor and City Council of Balt.*, 426 Md. 14, 35 (2012). But Maryland law has "evolved" to recognize that "certain beneficiaries to a contract may also bring an action to enforce its terms." *CX Reinsurance Co. Ltd.*, 481 Md. at 486. Specifically, a third party may enforce a contract "if the contract was intended for his or her benefit and it clearly appears that the parties intended to recognize him or her as the primary party in interest and as privy to the promise." *120 W. Fayette St.*, 426 Md. at 35-36 (cleaned up). The "crucial fact" in determining whether a third party is an intended beneficiary is "whether the pertinent provisions in the contract were inserted to benefit the third party." *CX Reinsurance Co. Ltd.*, 481 Md. at 487.

A contract beneficiary who is not an intended beneficiary is an "incidental beneficiary" and does not acquire any enforcement rights against the contract parties. *Id.* at 488. A contract beneficiary is merely incidental when a contract is "clearly entered into first and foremost for the benefit of the parties that signed [it]." *CR-RSC Tower I*, 429 Md. at 459.

To determine whether a third party is an intended beneficiary, "we look to 'the intention of the parties to recognize a person or class as a primary party in interest as expressed in the language of the instrument and consideration of the surrounding circumstances as reflecting upon the parties' intention[.]'" *Id.* at 458 (quoting *Ferguson v. Cramer,* 349 Md. 760, 767 (1998)). Although courts may look to extrinsic evidence from

the surrounding circumstances of a transaction,[16] the "primary source" for determining whether a third party is an intended beneficiary is "the language of the contract itself." *Volcjak v. Washington Cty. Hosp. Ass'n*, 124 Md. App. 481, 509 (1999). *See also CX Reinsurance*, 481 Md. at 489 ("[The Maryland Supreme Court] recognized the parties' intent, as evidenced by the terms of the contract itself, as the primary determinant of whether a third party is an intended or an incidental beneficiary to a given contract").

Here, Appellees do not contend that they are contractual parties to the Development Agreement, only that they are intended third-party beneficiaries of its subrogation waiver. Our inquiry, then, is whether Duke and Amazon inserted the subrogation waiver in the Development Agreement to benefit the Appellees. We conclude that they did not.

a. The contract language

Mindful that contract language is the "primary source" for determining whether a third-party beneficiary is intended, we first consider the language of the Development Agreement. *Volcjak*, 124 Md. App. at 509. Tellingly, Appellees do not point to any language in the Development Agreement that explicitly contemplates treating Appellees as intended third-party beneficiaries. If Duke and Amazon did intend for Appellees to be third-party beneficiaries, such an omission would be surprising, especially considering

[16] Consideration of extrinsic evidence in determining whether contracting parties intended their promises to benefit third parties appears to be a deviation from the parole (or extrinsic) evidence rule. *CR-RSC Tower I*, 429 Md. at 458 n.61; *CX Reinsurance*, 481 Md. at 487 n.6.

that Duke knew how to make itself an intended third-party beneficiary, and did so, in the subcontract it entered into with Appellee ECS Mid-Atlantic, LLC: "the Contractor [i.e., Duke] is an intended third-party beneficiary of all agreements between the Testing Agency [i.e., ECS] and its consultants and subcontractors."

Unable to point to any similarly explicit language in the Development Agreement, Appellees argue nonetheless that Amazon's and Duke's intent can be inferred from the agreement's language. We do not see how. The first sentence of Section 12.4 provides that "neither party shall be liable to the other party or to any insurance company (by way of subrogation or otherwise) for any loss of, or damage to, any of its property." Grammatically, the binary words "neither" and "other" that modify "party" limit the waiver of liability to two entities. In context, those entities can only reasonably be the contractual parties and signatories, Amazon and Duke. In other words, Amazon and Duke are each protected from suit brought by the other or by "any insurance company." By itself, then, the subrogation waiver in the first sentence of Section 12.4 protects just two parties, Amazon and Duke. Similar binary language appears elsewhere in the Development Agreement, including Section 16.2.

Appellees argue nonetheless that the third sentence of Section 12.4 extends, or at least implies the intent to extend, the subrogation waiver to subcontractors. The third sentence reads: "This waiver applies whether or not the loss is due to the negligent acts or omissions of Landlord [i.e., Duke] or Tenant [i.e., Amazon], or their respective officers, directors, employees, agents, contractors, or invitees." Appellees suggest that extending

the scope of losses covered under the subrogation waiver to include loss caused by others' negligent acts or omissions is effectively the same thing as extending the waiver to the subcontractors. But changing when a waiver applies is not the same as changing who it protects. Here, the phrase "[t]his waiver" has a clear referent: the waiver language at the beginning of Section 12.4. Read plainly, the rest of the third sentence sets out what sort of losses the subrogation waiver applies to, but it does not change who the subrogation waiver protects. Moreover, because the first sentence of Section 12.4 unambiguously provides that the subrogation waiver only protects Amazon and Duke, for Appellees' interpretation to hold we must read the third sentence of Section 12.4 as directly contradicting, and superseding, the first. Such a labored reading of Section 12.4 is not reasonable.

Appellees point out language in various other provisions of the Development Agreement. For example, argue Appellees, Section 12.3 defines the term "Landlord Parties" broadly to include, among other things, Project subcontractors. But as discussed above, the subrogation waiver in Section 12.4 unambiguously applies to only two parties, so even if the specific term "Landlord Parties" in Section 12.3 is read to modify the general term "party" in Section 12.4, there is no reasonable way to read the subrogation waiver as applying to the five Appellees, let alone all the potential "Landlord Parties."

In sum, the language of the Development Agreement's subrogation waiver does not support Appellees' position that Amazon and Duke intended them to be third-party

beneficiaries of that waiver. Section 12.4 plainly and unambiguously limits the waiver's protection to Amazon and Duke.

b. Surrounding circumstances

While contract language is the "primary source" when determining whether contracting parties intended a promise to benefit a third party, courts may also consider the surrounding circumstances of a transaction. *CR-RSC Tower I,* 429 Md. at 458. Our review of cases suggests that courts evaluating third-party beneficiary claims put little weight on evidence from surrounding circumstances.[17] Surrounding-circumstances evidence may be used to reinforce a third-party beneficiary determination based primarily on contract language, but we have found no case in which surrounding-circumstances evidence was held to supersede unambiguous contract language. *See, e.g., Shillman v. Hobstetter*, 249 Md. 678, 689 (1968) (noting that surrounding circumstances of a contract confirmed intent expressed in written agreement). Moreover, when courts have relied on

[17] *See, e.g., CX Reinsurance*, 481 Md. at 497 (dismissing party's contention that "surrounding circumstances of liability insurance policies establish that those policies are not private private contracts between the insurer and the policyholder to benefit only the policyholder"); *CR-RSC Tower I*, 429 Md. at 456, 461 (finding that evidence relating to surrounding circumstances of construction project, including deposition testimony, did not "change the crucial fact that the breached covenants were not inserted to benefit the third party" (cleaned up)); *120 W. Fayette St.*, 426 Md. at 36 (finding that a party was not an intended third-party beneficiary based solely on language of agreement without considering surrounding circumstances).

surrounding-circumstances evidence, they have looked to specific facts and evidence from the case record rather than unsupported assertions or inferences.[18]

Here, Appellees look to the surrounding circumstances of the Project to argue that Amazon and Duke intended Appellees to be third-party beneficiaries of the Development Agreement subrogation waiver. Specifically, Appellees contend that Amazon required Duke to include the Attachment 1 subrogation waiver in its subcontracts because Amazon wished to protect itself from potential claims by subcontractors and it knew that the waiver's "multilateral" language would be broad enough to do so. Because the language of the Development Agreement subrogation waiver and Attachment 1 subrogation waiver is nearly identical, Appellees conclude that Amazon must have also intended for the Development Agreement to apply to Appellees. We disagree.

As discussed above, a party moving for summary judgment bears the burden of proof to show that no genuine dispute of material fact exists. *Clark*, 169 Md. App. at 423. The movant may do so by producing admissible evidence or by showing that the evidence on the record does not support a cause of action. *Washington Mut. Bank*, 186 Md. App. at 390. When considering a motion for summary judgment, evidence and the

[18] In *Lovell Land, Inc. v. State Highway Admin.*, for example, our Supreme Court (then called the Court of Appeals) looked beyond the language of an agreement between Howard County and the State Highway Administration (SHA) concerning a parcel of unimproved land to determine whether appellant was an intended third-party beneficiary of that agreement. 408 Md. 242 (2009). The Supreme Court relied on specific, supported facts to conclude that the county and SHA inserted language in the agreement about public use of the property not to benefit appellant but instead to comply with statutory requirements. *Id.* at 265-67.

reasonable inferences that may be drawn from it must be construed in a light most favorable to the non-moving party. *United Servs. Auto. Ass'n*, 393 Md. at 67.

Appellees' surrounding-circumstances argument, detailed above, is not supported by any admissible evidence, and therefore provides no support for their contention that they are entitled to summary judgment as third-party beneficiaries of the Development Agreement. Appellees' theory, that Amazon required Duke to include the Attachment 1 subrogation waiver in all subcontracts to protect itself from subcontractors' claims, relies on two unsupported assertions about Amazon's knowledge and intent. First, Appellees assert that Amazon "knew that the [Attachment 1] waiver provided multilateral protection," and second, that Amazon "knew that the inclusion of the [Attachment 1] waiver in the subcontracts would protect it from claims by the subcontractors." But Appellees have marshalled no extrinsic evidence of Amazon's knowledge or intent at the time that it entered the Development Agreement, nor do they point to any such evidence in the record. In other words, Appellees have not shown an absence of genuine dispute about what Amazon actually knew or intended when it entered into the Development Agreement.

Even if Appellees had made such a showing, it would likely not have changed the third-party beneficiary determination because, as surrounding-circumstances evidence, it would not supersede the Development Agreement's language, which unambiguously establishes that Appellees were not intended third-party beneficiaries.

2. Amazon is not a contractual party to the subcontracts

Appellees' second contention is that summary judgment was appropriate because Amazon was a party to the subcontracts, and therefore the subcontracts' subrogation waivers should have been enforceable against Amazon and XL. We disagree. The language of the subcontracts is clear: each agreement identified two contractual parties, Duke and the respective subcontractor. For example, the subcontract with Appellee Ira G. Steffy & Son, Inc., is titled "AGREEMENT BETWEEN DUKE AND SUBCONTRACTOR" and its title page reads as follows:

> Agreement made this 18th day of March, 2014,
> Between "Duke": Duke Realty Limited Partnership […]
> and the "Subcontractor": Ira G Steffy & Son Inc […]
> for the following "Project": Project Rook-Baltimore, MD […]
> […]
> Duke and the Subcontractor agree as set forth below…[19]

Only Duke and Ira G. Steffy & Son, Inc. signed the agreement. We believe that a "reasonable person in the position of the parties" reading that subcontract for its plain meaning would necessarily conclude that the only parties to it are Duke and Ira G. Steffy & Son, Inc. *Impac*, 474 Md. at 507.

Appellees argue that Amazon should nonetheless be considered a party to the subcontracts because it exercised control over their language and reserved enforceable rights for itself in Attachment 1. We find this argument unpersuasive as well. Appellees

[19] The other Appellees' subcontracts have functionally identical title and signature pages.

cite no rule or authority to justify ignoring the plain meaning of the subcontracts and considering Amazon a party based only on its interest in the subcontracts. In fact, as we discussed above, a non-party to a contract can have enforceable rights under it as an intended third-party beneficiary. Amazon having enforceable rights under the subcontracts does not necessarily make it a party to them, and Appellees make no real argument as to why Amazon should be considered a party to the subcontracts instead of a mere third-party beneficiary.[20] Moreover, Appellees' argument would require us to look well beyond the four corners of the subcontracts (or even of all the Project contracts) and divine the parties' subjective intent. Our case law is clear: courts interpret plain and unambiguous contract language objectively and remain within the four corners of the agreement. *Impac*, 474 Md. at 507.

II. Successor Liability

The circuit court also ruled that Lithko Holdings, LLC was not liable to XL. On appeal, XL argues that the circuit court misunderstood the legal basis for its claim against

[20] Appellees contend, and suggest that XL *also* contended, that Amazon was an intended third-party beneficiary of Section 4.2, the subrogation waiver in each subcontract. Appellees then say that they must have been intended third-party beneficiaries of the Development Agreement's subrogation waiver, as well, because the Development Agreement and the subcontracts comprise one contract and their nearly identical subrogation waivers must be interpreted harmoniously. This argument fails. Appellees point to nothing in the Development Agreement to indicate that it and each subcontract constitute one contract. To be sure, the Development Agreement obligates Duke to insert certain language into each subcontract. But this obligation does not make the Development Agreement and each subcontract "one contract," particularly because the Development Agreement does not list the subcontracts among the items incorporated into it.

Lithko Holdings, LLC, which was not that Lithko Holdings, LLC was itself directly liable to XL, but instead that Lithko Holdings, LLC may have liability as a successor-in-interest to Lithko Contracting, Inc., an entity that subcontracted for Duke on the Project. XL argues that summary judgment was improper because Lithko Holdings, LLC did not show that it was not a successor-in-interest of Lithko Contracting, Inc. Additionally, XL argues that the circuit court's grant of summary judgment was premature because it was entitled to discovery as to Lithko Holdings, LLC's successor liability. We disagree with both arguments and affirm the circuit court's grant of summary judgment as to Lithko Holdings, LLC.

A. Background and the Parties' Contentions

Lithko Holdings, LLC moved for summary judgment on the basis that it was not liable to XL. In its motion, Lithko Holdings, LLC asserted that "Lithko Contracting, LLC acquired Lithko Contracting, Inc. and assumed its assets and liabilities, including its rights and obligations under the Subcontract Agreements." As evidence, Lithko Holdings, LLC submitted records from the Ohio Secretary of State showing that in 2016 Lithko Contracting, Inc. became Lithko Contracting, LLC. Lithko Holdings, LLC concluded that another entity, Lithko Contracting, LLC, was the successor-in-interest of Lithko Contracting, Inc.

In its opposition to Lithko Holdings, LLC's motion for summary judgment, XL merely repeated the allegations from its complaint and asserted that summary judgment was premature because it was entitled to discovery on the question of successor liability.

XL did not provide evidence of Lithko Holdings, LLC's successor liability, nor did it dispute the authenticity of the Ohio records provided by Lithko Holdings, LLC.

The circuit court granted summary judgment to Lithko Holdings, LLC on the basis that it was not liable to XL.

B. Analysis

As discussed earlier, summary judgment is appropriate when there are no disputed issues of material fact and the movant is entitled to judgment as a matter of law. Md. R. 2-501(f). On appeal, we conduct an "independent review of the record" to decide whether both of those conditions are met. *Maryland Cas. Co.*, 442 Md. at 694. In so doing, we construe all reasonable inferences from supported facts against the moving party. *United Servs. Auto. Ass'n*, 393 Md. at 67.

Additionally, once a movant for summary judgment meets its burden of demonstrating an absence of a genuine dispute of material fact, the burden of production shifts to the non-moving party to provide sufficient facts admissible in evidence demonstrating that a genuine dispute of material fact does exist. *Thomas v. Shear*, 247 Md. App. 430, 447 (2020); *see also Hamilton v. Kirson*, 439 Md. 501, 522 (2014) ("[I]n order to defeat a motion for summary judgment, the opposing party must show that there is a genuine dispute as to a material fact by proffering facts which would be admissible in evidence." (internal quotation omitted)). Under Maryland Rule 2-501(b), a non-moving party's response to a motion for summary judgment must "identify with particularity each material fact as to which it is contended that there is a genuine dispute" and provide

documentation for any such fact. Specifically, "the party opposing the motion for summary judgment must demonstrate the existence of a genuine dispute as to a material fact by producing factual assertions, under oath, based on the personal knowledge of the one swearing out an affidavit, giving a deposition, or answering interrogatories." *Zilichikhis v. Montgomery Cty.*, 223 Md. App. 158, 179 (2015) (cleaned up). An opposing party's "[b]ald, unsupported statements or conclusions of law" or mere references to allegations in a complaint are insufficient to show the existence of a genuine dispute of material fact. *Thomas v. Bozick*, 217 Md. App. 332, 340 (2014).

Here, Lithko Holdings, LLC established that another entity, Lithko Contracting, LLC, assumed the liability in question. Lithko Contracting, Inc., an Ohio corporation, became Lithko Contracting, LLC, a Delaware limited liability company, in 2016. Under Ohio law, a converted entity takes on "[a]ll assets and property of every description of the converting entity" as well as "[a]ll obligations belonging or due to the converting entity." OHIO REV. CODE ANN. § 1701.821(A)(3)(a)-(b). In other words, if Lithko Contracting, Inc. had any liability for the damage to Amazon, that liability was assumed by another entity.

XL's unverified claim that it needed more time to conduct discovery was insufficient to stave off summary judgment. A litigant claiming to need more time to oppose a summary judgment motion must verify in an affidavit or other written statement under oath why "…the facts essential to justify the opposition cannot be set forth…" Md. Rule 2-501(d). Here, XL provided no such affidavit. In other words, even read

generously, XL's opposition did not outline what facts it would rely on to show that Lithko Holdings, LLC was responsible for Lithko Contracting, Inc.'s debts or verify why those facts could not be set forth. Thus, we see no error in the granting of summary judgment to Lithko Holdings, LLC.

CONCLUSION

In sum, we hold that the circuit court erred in granting summary judgment to Appellees on the basis that XL's claims were barred by contractual waivers of subrogation. We also hold that the circuit court properly granted summary judgment to Appellee Lithko Holdings, LLC on the basis that it was not liable to XL. Thus, we reverse in part, affirm in part, and remand to the circuit court for further proceedings not inconsistent with this opinion.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY FOR APPELLEES LITHKO CONTRACTING, LLC; LJB, INC.; IRA G. STEFFY & SON, INC.; AND ECS MID-ATLANTIC, LLC REVERSED.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY FOR APPELLEE LITHKO HOLDINGS, LLC AFFIRMED.

COSTS TO BE PAID ONE FIFTH BY APPELLEE LITHKO CONTRACTING, LLC; ONE FIFTH BY APPELLEE LJB, INC.; ONE FIFTH BY APPELLEE IRA G. STEFFY & SON, INC.; ONE FIFTH BY APPELLEE ECS MID-ATLANTIC, LLC; AND ONE FIFTH BY APPELLANT.

THE CASE IS REMANDED TO THE CIRCUIT COURT FOR BALTIMORE CITY FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION.