VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 22nd day of October, 2015.

Baistar Mechanical, Inc., Appellant,

against Record No. 141781
Circuit Court No. CL2013-7048

Billy Casper Golf, LLC, Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of Fairfax County.

Upon consideration of the record, briefs, and argument of counsel, the Court is of opinion that the circuit court erred in finding that Billy Casper Golf, LLC (BCG) was entitled to liquidated damages pursuant to paragraph 6(B) of the relevant subcontract, when it is undisputed that Baistar Mechanical, Inc. (Baistar), not BCG, terminated the contract.

Baistar contracted with the federal government to perform grounds maintenance and snow removal services at the Armed Forces Retirement Home in Washington, D.C. In December 2011, Baistar entered into a subcontract with BCG for it to perform the ground maintenance work at the facility for one year with the option for the agreement (the subcontract) to renew for four subsequent one-year periods. Under the subcontract, Baistar was to pay BCG a base fee of $16,000 per month, which would increase to $17,000 per month in February 2013 if the subcontract was renewed for a subsequent term. In addition to this base fee, the subcontract states that Baistar shall pay BCG "for any additional services, including snow removal, tree removal, emergency services, special events, and any additional work that may arise as specifically set forth in Exhibit B" (additional fees).

Beginning on May 24, 2012, the parties exchanged emails and held a meeting to address issues Baistar was having with BCG's performance. In October 2012, the parties renewed the subcontract for a second term to last from December 15, 2012 until December 14, 2013.

Baistar failed to pay the monthly base fee for December 2012 and January 2013. In January 2013, Baistar notified BCG that it was terminating the subcontract, purportedly for cause, because BCG failed to devote sufficient staff to the job.

The subcontract requires a party to give written notice and an opportunity to cure an "event of default" before the other party can terminate the subcontract for cause. It also states, "Notwithstanding anything to the contrary, neither Contractor nor BCG shall be entitled to any notice and cure period for a default that occurs more than two (2) times in any twelve (12) month period."

Paragraph 6 of the subcontract contains several provisions regarding termination. Paragraph 6(B) provides,

> Termination Fee: Contractor [Baistar] Default: In the event BCG terminates this Agreement due to Contractor Default, and BCG no[t] being in default, BCG shall receive from Contractor, within (60) days of termination, a termination fee ("Termination Fee"), which shall be equal to the base fee times the remaining months in the term. The above formula also applies to any renewal term.

Paragraph 6(C) provides,

> Contractor's Reserved Right of Termination for Cause. Contractor shall have the right to terminate the Agreement, without the payment of a Termination Fee, Cancellation Fee or other penalty if such termination is a result of an Event of Default by BCG.

Finally, paragraph 6(D) of the subcontract states,

> Termination Fee: Termination for Convenience: Contractor may terminate the Agreement upon ninety (90) days prior written notice to BCG and payment of a Termination Fee. The Termination Fee shall be calculated as and [sic] the total of the base fee times the remaining months in the term, times 50%. The above formula will also apply during the renewal term. Provided however, the Termination Fee pursuant to this paragraph shall not be less than sixteen thousand dollars ($16,000). Should Contractor terminate this Agreement without providing to BCG ninety (90) days prior written notice, the Termination Fee shall be equal to the balance of the contract, calculated as the base fee times the months remaining in the term.

On April 15, 2013, BCG filed suit against Baistar in the Circuit Court of Fairfax County, claiming that Baistar terminated the subcontract without giving BCG notice and an opportunity to cure the purported defaults. BCG claimed that the defaults alleged in Baistar's termination

letter did not happen, and that Baistar terminated the subcontract for convenience. Therefore, BCG argued that Baistar owed BCG a termination fee for the remainder of the term, February 2013 through November 2013, as well as payment for the unpaid work it had performed prior to the termination.

After the parties presented evidence, the circuit court found that Baistar had failed to provide BCG with adequate notice of the alleged defaults or an opportunity to cure those defaults prior to termination, as required by the subcontract, and quoting paragraph 6(B) of the subcontract as justification, awarded BCG a termination fee of $170,000, as well as $32,000 for unpaid work performed by BCG. The circuit court found that the termination fee provision was not an invalid liquidated damages clause because the amount of actual damages incurred as a result of the termination were uncertain and the amount awarded was not disproportionate to the possible loss. Baistar appeals.

Baistar claims that the circuit court erred by awarding BCG liquidated damages based on paragraph 6(B) because paragraph 6(B) only applies when BCG terminates the subcontract. In this instance, it is undisputed that Baistar terminated the subcontract.

This claim involves an issue of contractual interpretation, so we review the circuit court's decision de novo. Doctors Co. v. Women's Healthcare Assocs., 285 Va. 566, 571, 740 S.E.2d 523, 525 (2013). Baistar is correct that paragraph 6(B) only applies in the event BCG terminates the subcontract. Here, Baistar, not BCG, terminated the subcontract. Therefore, the circuit court erred in applying paragraph 6(B) to award a termination fee. The circuit court did not rule upon whether BCG was entitled to a termination fee pursuant to paragraph 6(D) of the subcontract. Therefore, we will remand this case to the circuit court for it to decide whether BCG is entitled to a termination fee because of Baistar's termination of the subcontract, and for it to consider whether and to what extent BCG may be entitled to actual damages because of Baistar's alleged breach of the subcontract.

Although we reverse and remand the circuit court's decision based on the court's error in applying paragraph 6(B), we will address Baistar's other assignments of error so that our analysis may assist the circuit court in deciding issues that are likely to arise on remand. See Harman v. Honeywell Int'l, Inc., 288 Va. 84, 95-96, 758 S.E.2d 515, 522 (2014) (holding that even though one error alone required reversal of the circuit court's decision, it was appropriate to

address the appellant's "remaining arguments because they involve issues that are likely to arise in the retrial of the case"). We conclude that other than the circuit court's error in applying paragraph 6(B), rather than deciding the applicability of paragraph 6(D), the circuit court did not err in any of its decisions that are the subject of Baistar's Assignments of Error in this appeal.

Baistar asserts that the circuit court erred in holding that Baistar was required to provide BCG with prior notice and an opportunity to cure defaults that occurred more than two times during a twelve-month period. Baistar does not assign error to the circuit court's determination that Baistar did not give BCG any proper notice concerning any alleged default, but it states that the plain language of the subcontract does not require notice for any of the numerous alleged defaults if more than two alleged defaults occur during a twelve-month period. This assertion raises an issue of contractual interpretation, so we review the circuit court's decision de novo. Doctors Co., 285 Va. at 571, 740 S.E.2d at 525.

Paragraph 5(B) of the subcontract states:

> Notice and Cure. When either party to this Agreement believes that the other party (the "Defaulting Party") has committed an Event of Default, it shall give written notice thereof to the Defaulting Party, and the Defaulting Party shall have [various grace periods] but in no event will the Defaulting Party have more than sixty (60) days in the aggregate to cure such default. Notwithstanding anything to the contrary, neither Contractor nor BCG shall be entitled to any notice and cure period for a default that occurs more than two (2) times in any twelve (12) month period.

Paragraph 5(C) states in relevant part, "If the Defaulting party does not cure the default within the grace period provided in Paragraph 5B . . . , the other party may terminate this Agreement on thirty (30) days written notice to the other party . . . ."

In construing a contract a court must read the contract as a single document, the meaning of which is gathered from all its associated parts when assembled as the unitary expression of the agreement of the parties. See First Am. Title Ins. Co. v. Seaboard Sav. & Loan Assoc., 227 Va. 379, 384, 315 S.E.2d 842, 845 (1984). Any interpretation of a contract must be reasonable and just. American Realty Tr. v. Chase Manhattan Bank, N.A., 222 Va. 392, 403, 281 S.E.2d 825, 831 (1981). If possible, the language of one contract provision should not be interpreted in such

a way as to render another provision meaningless. First Am. Title Ins. Co., 227 Va. at 386, 315 S.E.2d at 846; see also American Realty Tr., 222 Va. at 404, 281 S.E.2d at 831.

Paragraph 5(B) of the subcontract provides a procedure for giving notice and an opportunity to cure defaults. It would be unreasonable to construe the provision as urged by Baistar, because such interpretation would allow a party to ignore two of the other party's defaults without providing it proper written notice and opportunity to cure and then terminate the subcontract for cause after a subsequent default without ever giving proper notice and an opportunity to cure. Such an interpretation would render the majority of both paragraph 5(B) and paragraph 5(C) meaningless. Therefore, the circuit court accurately interpreted paragraph 5(B) of the subcontract to require that a party provide compliant notice and an opportunity to cure a purported default on two occasions in the past twelve months before it can terminate the subcontract for a default without notice and an opportunity to cure.

Baistar claims that the termination fee provision in the last sentence of paragraph 6(D) does not apply after the initial term of the subcontract because the liquidated damages formula set forth in that sentence does not explicitly state that such formula shall apply after renewal. Although it states that the first liquidated damages formula in paragraph 6(D) shall apply during any renewal term, the subcontract is silent in that regard concerning an alternative liquidated damages clause in the last sentence of that paragraph. Nowhere does paragraph 6(D) limit itself to the initial term. Thus there may be a claimed ambiguity concerning the applicability of the liquidated damages formula in the last sentence of paragraph 6(D) to subsequent terms of the subcontract. This raises an issue of contractual interpretation, so we review the matter de novo. Doctors Co., 285 Va. at 571, 740 S.E.2d at 525.

When a contractual provision is ambiguous, the interpretation adopted by the court must be reasonable and just. Dart Drug Corp. v. Nicholakos, 221 Va. 989, 993-94, 277 S.E.2d 155, 157-58 (1981). General rules of construction "should not be applied mechanistically, with the result that the intention of the contracting parties is thwarted." American Realty Tr., 222 Va. at 403, 281 S.E.2d at 831. The construction of an ambiguity depends upon the intent of the parties as evidenced by the entire contract viewed in light of the circumstances under which the contract was made. Taylor v. Sanders, 233 Va. 73, 75, 353 S.E.2d 745, 747 (1987).

Baistar's proposed interpretation would lead to subsequent renewal terms of the subcontract only including one of two alternative methods of calculating liquidated damages based upon the notice provided to the faultless party. Baistar's proffered interpretation would require it, during subsequent renewal terms, to pay a termination fee if it terminated the subcontract with notice, but no termination fee if it terminated the subcontract without notice. This would make the application of the first formula in paragraph 6(D) to subsequent renewal terms meaningless. In fact, Baistar's interpretation would have the subcontract provide Baistar with a financial incentive to terminate the subcontract without notice over terminating it with notice. Where there is ambiguity, we will not apply such an unreasonable construction. See Reid v. Boyle, 259 Va. 356, 367, 527 S.E.2d 137, 143 (2000). Therefore, the termination fee in the last sentence of paragraph 6(D) did continue to apply after the initial term.

Finally, Baistar claims that the circuit court erred by awarding BCG a termination fee because the termination fees required by paragraph 6 of the subcontract constitute impermissible liquidated damages. First, Baistar claims that the termination fee provisions are invalid because there are several different formulas for the termination fees in paragraph 6 and because BCG's actual damages could have been definitively measured, and the amount awarded pursuant to the fee is grossly in excess of BCG's actual damages. Additionally, Baistar claims that because the liquidated damages clauses in paragraph 6 are not enforceable, BCG must prove its damages to a reasonable certainty, and BCG has failed to do so. These alleged errors raise mixed questions of law and fact, so we defer to the circuit court's findings of fact and review its application of the law to the facts de novo. See Commonwealth ex rel. Fair Hous. Bd. v. Windsor Plaza Condo. Ass'n, 289 Va. 34, 58-59, 768 S.E.2d 79, 91 (2014); Langman v. Alumni Ass'n of the Univ. of Va., 247 Va. 491, 498, 442 S.E.2d 669, 674 (1994) ("The trial court's findings of fact are binding upon this Court unless they are plainly wrong or unsupported by the evidence.").

"Parties to a contract may agree in advance about the amount to be paid as compensation for loss or injury which may result from a breach of the contract when the actual damages contemplated at the time of the agreement are uncertain and difficult to determine with exactness and when the amount fixed is not out of all proportion to the probable loss." O'Brian v. Langley Sch., 256 Va. 547, 551, 507 S.E.2d 363, 365 (1998) (citation and internal quotation marks omitted); see also Boots, Inc. v. Singh, 274 Va. 513, 518, 649 S.E.2d 695, 698 (2007) ("[A]

liquidated damages clause is invalid only when the actual damages contemplated at the time of the agreement are shown to be certain and not difficult to determine or the stipulated amount is out of all proportion to the actual damages." (emphasis omitted)). The party challenging the validity of a liquidated damages clause has the burden of proof. Boots, Inc., 274 Va. at 517, 649 S.E.2d at 697; O'Brian, 256 Va. at 551, 507 S.E.2d at 365. In situations where there is a relevant liquidated damages clause, an aggrieved party need only prove its actual damages if the liquidated damages clause is shown to be unenforceable. See O'Brian, 256 Va. at 552, 507 S.E.2d at 366.

There is no authority for the proposition that multiple formulas for calculating liquidated damages under differing circumstances renders the applicable liquidated damages invalid. In regard to whether BCG's actual damages from Baistar's termination were "susceptible of definitive measurement," the circuit court found that the actual damages would be difficult to discern because BCG's profit from the contract varied each month. This finding was supported by evidence that BCG's profit fluctuated due to weather conditions and changing demands for its services. Further, the fact that BCG could have received additional fees of an unspecified amount pursuant to the subcontract made its expected profit, and thus actual damages, unpredictable. Therefore, the court's factual finding that BCG's actual damages were difficult to discern is entitled to deference from this Court.

Concerning whether the termination fee awarded was disproportionate to probable damages, the circuit court found that the $170,000 awarded to BCG pursuant to the termination fee provision was not disproportionate to probable damages. As discussed above, the possibility that BCG could have earned additional fees made its potential profit on the subcontract open-ended, so the circuit court's factual finding was supported by evidence in the record.

Baistar failed to prove that BCG's actual damages were capable of definitive measurement or that the liquidated damage award was disproportionate to BCG's actual damages. Therefore, the liquidated damages clauses in paragraph 6 of the subcontract are not invalid and are enforceable. Further, an aggrieved party need not prove its actual damages in the presence of a valid liquidated damages clause, so any such award would be valid even if BCG did not prove its damages to a reasonable degree of certainty.

Accordingly, for the above reasons, we reverse the judgment of the circuit court and remand for further proceedings consistent with this Order.

This order shall be certified to the said circuit court.

A Copy,

Teste:

Patricia L Harrington

Clerk