VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 28th day of July, 2022.

Present: Goodwyn, C.J., Powell, Kelsey, McCullough, and Chafin, JJ., and Russell and Mims, S.JJ.

Southway Builders, Inc., Appellant,

against Record No. 210310
Circuit Court No. 2019 14920

United States Surety Company, et al., Appellees.

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

Upon consideration of the record, briefs, and argument of counsel, for the reasons below, the Court is of opinion that there is no error in the judgment of the Circuit Court of Fairfax County.

BACKGROUND

Southway Builders, Inc. (Southway), a general contractor, entered a subcontract with MAAMECH Mid Atlantic, Inc. (MAAMECH) for the procurement of plumbing and HVAC services for the Laurel Hill Adaptive Reuse Project (the Project), located in Virginia. Southway and MAAMECH, both Maryland corporations, executed the subcontract in Maryland. The subcontract contains a choice-of-law provision, requiring that "[t]he validity, interpretation and performance of this Subcontract shall be governed by the Laws of the State of Maryland."

Under the subcontract, MAAMECH took out a performance bond (the Performance Bond),[1] as principal, with Southway as obligee, to provide Southway insurance that MAAMECH would perform its obligations under the subcontract. United States Surety Company and U.S.

[1] The parties also took out a payment bond to provide security to MAAMECH in the case of nonpayment by Southway, but that bond is not relevant to the instant appeal.

Specialty Insurance Company (collectively, the Sureties) issued the Performance Bond in Maryland. The Performance Bond incorporates the subcontract, with the terms of the Performance Bond controlling in the event of any conflict or inconsistency between the documents. The maximum sum payable under the Performance Bond for MAAMECH's failure to perform is $4,931,936.

Section 6 of the Performance Bond includes a provision (the Limitation Provision) limiting when Southway may bring a claim under the Performance Bond. The Limitation Provision states:

> Any proceeding, legal or equitable, must be instituted, if at all, within one (1) year after the Principal first defaulted or was declared by the Obligee to be in default, or within one (1) year after the Principal ceased work on the Project, or within one (1) year after the Surety has refused to perform pursuant to this Bond, whichever first occurs.

Section 6 also includes a provision (the Saving Provision) for an alternative limitation period if the Limitation Provision is void under applicable law. The Saving Provision states that "[i]f the [Limitation Provision is] void or prohibited by law, the minimum period of limitations available to sureties as a defense in the jurisdiction where any proceeding is instituted shall apply."

On March 15, 2017, after a disagreement over the timeliness of MAAMECH's work, Southway declared that MAAMECH had defaulted on the subcontract. Southway notified MAAMECH and the Sureties of the declaration of breach by letter. On April 21, 2017, Southway filed, with the Sureties, a written claim under the Performance Bond.

On May 11, 2017, Southway and the Sureties entered a Memorandum of Understanding (the MOU) to ensure that work continued on the Project while the Sureties investigated Southway's claim, thereby mitigating the Sureties' potential liability. The MOU obligated the parties to cooperate in identifying necessary suppliers, vendors, and contractors to facilitate work on the Project. Additionally, the MOU contained the following provision:

> Any disputes arising under this MOU, the Subcontract, or the [Performance Bond] shall be resolved in a competent jurisdiction located in the State of Virginia and in accordance with the terms of the Subcontract and the [Performance Bond], and interpreted and adjudicated solely in accordance with the laws of the State of Virginia.

On April 30, 2018, based on the Performance Bond's Limitation Provision, the Sureties denied, as time-barred, Southway's claim for payment under the Performance Bond, and on

November 1, 2019, the Sureties filed a declaratory judgment action in the Circuit Court of Fairfax County, seeking a declaration that Southway was time-barred from suing under the Performance Bond because of the Limitation Provision.[2] The complaint alleged that, under the Performance Bond and the MOU, Southway needed to bring suit on the Performance Bond no later than March 15, 2018, one year from the date Southway declared MAAMECH to be in breach. Southway failed to do so.

The Sureties moved for summary judgment, arguing that no material facts remained in dispute, and that the Limitation Provision in the Performance Bond and the MOU entitled them to a declaratory judgment that Southway's claim under the surety was barred by the Limitation Provision, as a matter of law.

Southway filed a brief in opposition, asserting that Maryland law applies to the Performance Bond because it was issued in Maryland, and that the Limitation Provision in the Performance Bond was void *ab initio* under Maryland law. As for the MOU, Southway argued that because the Limitation Provision was void *ab initio*, the MOU could not revive the Limitation Provision. It asserted that the maximum limitation period in Virginia—five years—should apply to the filing of a claim under the Performance Bond, and that its claim was therefore timely.

After a hearing on the motion for summary judgment, the circuit court held that Virginia law governs the enforceability of the Limitation Provision in the Performance Bond, and that the Performance Bond's Limitation Provision was not void. It noted that parties to a contract "may agree to contract to enforce a shorter time limit than fixed by statute." Additionally, the circuit court ruled that the Limitation Provision did not offend public policy and was not unreasonably short. The circuit court found no material facts remained in dispute and granted the Sureties' motion for summary judgment.

The circuit court entered a final order memorializing its ruling on the motion for summary judgment, "finding that Virginia law applies to disputes and claims under the

[2] Before filing the declaratory judgment action, Southway sued MAAMECH for breach of the subcontract, and the Sureties under the Performance Bond, in Maryland. The Maryland court ultimately dismissed the case against the Sureties for improper venue. Because the Maryland case does not affect the arguments on appeal, it will not be discussed further.

Performance Bond . . . and that Southway is time-barred from bringing a claim on the Performance Bond."

Southway appeals.[3] We granted four assignments of error:

1. The trial court erroneously granted summary judgment and declaratory judgment in favor of the Sureties and against Southway Builders, Inc. by ruling that Southway was time-barred from bringing a claim on the performance bond against the Sureties relating to MAAMECH's work on the project.

2. In granting the Sureties' motion for summary judgment, the trial court erroneously applied the wrong standard of review by construing all disputed facts in favor of the moving party (the Sureties) rather than in favor of the non-moving party (Southway Builders, Inc.).[4]

3. The trial court failed to interpret or give any meaning to the key paragraph of the performance bond which stated that if that paragraph was void or prohibited by law, the minimum period of limitations available to sureties as a defense in the jurisdiction where any proceeding is instituted shall apply.

4. The trial court erroneously applied Virginia law to the terms of the performance bond that was issued and delivered in Maryland and subject to Maryland law.

ANALYSIS

Southway argues that Maryland law applies to the Performance Bond because the parties executed the Performance Bond in Maryland. According to Southway, under Maryland law, the Limitation Provision is void *ab initio* and thus constitutes a legal nullity. Southway alleges that the default limitation period in Virginia is five years and that, because the Limitation Provision in the Performance Bond is void, the five-year limitation period prescribed by Code § 8.01-246 should apply to its claim related to the Performance Bond. As to the MOU, Southway contends that the parties cannot resurrect the void Limitation Provision in the Performance Bond by agreeing to apply Virginia law to their dispute, because the Limitation Provision was void *ab initio*. As we explain below, we disagree.

[3] On November 20, 2020, Southway filed suit against the Sureties in the circuit court to recover on the Performance Bond. Southway and the Sureties jointly moved to stay that case, and the motion was granted by the circuit court.

[4] We dismiss assignment of error two because the parties did not brief the matter. *See* Rule 5:27(d); *AlBritton v. Commonwealth*, 299 Va. 392, 412 (2021).

We review a circuit court's interpretation of an agreement de novo. *Virginia Fuel Corp. v. Lambert Coal Co., Inc.*, 291 Va. 89, 97–98 (2016). "[I]n an appeal of a decision awarding summary judgment, the trial court's determination that no genuinely disputed material facts exist and its application of law to the facts present issues of law subject to de novo review." *Mount Aldie, LLC v. Land Tr. of Va., Inc.*, 293 Va. 190, 196–97 (2017).

"Surety sounds in contract." *Callison v. Glick*, 297 Va. 275, 290 (2019). "It is quite generally held that a [surety contract] contains the essential elements of an insurance contract, and is construed accordingly." *American Sur. Co. v. Plank & Whitsett, Inc.*, 159 Va. 1, 9–10 (1932). "In actions on any contract that is not otherwise specified and that is in writing and signed by the party to be charged thereby, or by his agent, [an action shall be brought] within five years whether such writing be under seal or not[.]" Code § 8.01-246(2). "No provision in any insurance policy shall be valid if it limits the time within which an action may be brought to less than one year after the loss occurs or the cause of action accrues." Code § 38.2-314.

Assuming arguendo that Virginia choice-of-law rules required the circuit court to apply Maryland law, and Maryland law rendered the Limitation Provision void, the Saving Provision in the Performance Bond would apply to the applicable limitation period. The Saving Provision states that if the Limitation Provision in the Performance Bond is deemed void, then the "minimum period of limitations available to [S]ureties as a defense in [Virginia] shall apply."

The Performance Bond is construed as an insurance contract under our precedent. *See American Sur. Co.*, 159 Va. at 9–10. Code § 38.2-314 states that parties to an insurance contract may provide for a minimum limitation period of one year. The five-year limitation period proposed by Southway is the default limitation period for causes of action sounding in contract; it is not the minimum period the Saving Provision dictates. *See* Code § 38.2-314.

Construing the Saving Provision according to its plain meaning,[5] the "least possible" limitation period "valid" in an insurance contract in Virginia is one year. *See id.* Therefore, even if the Limitation Provision were void, thereby triggering the Saving Provision, the

[5] Webster's defines "minimum" as "the least quantity assignable, admissible, or possible." Webster's Third New International Dictionary 1438 (1993). "Available" means "valid . . . capable of use . . . immediately utilizable." Webster's Third New International Dictionary 150 (1993).

Performance Bond's terms would still prescribe a one-year limitation period because that is the minimum limitation period available in Virginia.

CONCLUSION

Accordingly, we affirm the judgment of the Circuit Court of Fairfax County. This order shall be certified to the Circuit Court of Fairfax County.

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Teste:

Clerk