UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 461

September Term, 2016

THE TRADITIONS AT GREENWAY FARM, LLC, ET AL.

v.

NOVO REALTY, LLC

Eyler, Deborah S.,
Graeff,
Harrell, Glenn T. Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: May 2, 2017

The Circuit Court for Harford County granted summary judgment in favor of Traditions at Greenway Farms, LLC ("Traditions") and The Southern Land Company, Inc. ("Southern Land"), the appellants,[1] and against Novo Realty, LLC ("Novo"), the appellee, in an action by Traditions for a declaratory judgment and specific performance or damages. The action concerned a contract of sale for real property located in the City of Havre de Grace ("City").

In this appeal, Traditions presents three questions, which we have rephrased:

> I. Did the circuit court violate Rule 2-311(f) by granting summary judgment in favor of Novo without holding an on-the-record hearing?
>
> II. Did the circuit court err as a matter of law by determining that a pending lawsuit by K. Hovnanian Homes of Maryland LLC ("KHOV") was not an encumbrance on the Property?
>
> III. Did the circuit court err by finding that Traditions breached the contract of sale by refusing to come to closing, thereby forfeiting its deposit?

For the following reasons, we answer all three questions in the negative and shall affirm the judgment of the circuit court.

FACTS AND PROCEEDINGS

In 2003, Greenway Investments, LLC ("Greenway") purchased Greenway Farms, a 134 acre undeveloped tract of land on Pulaski Highway in the City. It subdivided Greenway Farms into three parcels: Parcel 1 (48.5 acres), Parcel 2 (40 acres), and Parcel 3 (45.7 acres).

[1] We shall refer to the appellants collectively as "Traditions" except when necessary to distinguish between them.

Through a series of transactions between 2003 and 2006, KHOV acquired Greenway's ownership interests in all three parcels. Parcel 1 was owned outright by an assignee of KHOV, and Parcels 2 and 3 were mortgaged. KHOV had the right to develop all three parcels and planned to do so, beginning with Parcel 1. KHOV in fact developed Parcel 1 and in doing so developed not only the residential lots but all the necessary infrastructure on that parcel.

In February 2007, KHOV recorded in the Land Records for Harford County a "Declaration of Covenants and Conditions" ("2007 Declaration") requiring future owners of Parcels 2 and 3 to pay KHOV for the costs of the infrastructure on Parcel 1. By then, however, the collapse of the housing market and ensuing recession had made conditions unfavorable for the development of Parcels 2 and 3. In 2008, Parcels 2 and 3 were sold at foreclosure to Greenway Holdings 2 (Parcel 2) and Greenway Holdings 3 (Parcel 3). Greenway Holdings 2 and 3 granted indemnity deeds of trust in favor of Cecil Bank. Development plans for those parcels stalled and, in April 2014, Parcels 2 and 3 again were sold at foreclosure. Novo, a wholly owned subsidiary of Cecil Bank, purchased both parcels.

On November 28, 2014, Novo entered into an "Agreement of Sale and Purchase" ("the Sales Contract") with Traditions under which Traditions would purchase Parcels 2

and 3 ("the Property") for $3 million.[2] Traditions planned to develop the Property as an apartment community, which would require modification of the site plan and zoning changes as the approved development plans were for townhouses.

The pertinent terms of the Sales Contract were as follows. Article 1 required Traditions to pay two deposits into escrow: a $100,000 first deposit when the Sales Contract was executed and a $200,000 second deposit within three days after a "Study Period" expired. § 1.3. The deposits would be deemed non-refundable upon the expiration of the "Study Period" so long as Traditions had not terminated the Sales Contract in compliance with other terms and Novo had not breached its obligations under the Sales Contract. § 1.4.

Article II governed the Study Period, which began when the Sales Contract was executed and expired on December 31, 2014. During the Study Period, Traditions could "investigat[e] and evaluat[e] . . . all aspects of the Property and its suitability for purchase" at its "sole expense." § 2.1. Up to 5:00 p.m. on the last day of the Study Period, Traditions could "terminate [the Sales Contract] upon written notice delivered to [Novo.]" *Id.* Upon turning over to Novo copies of all tests and studies performed during the Study Period, Traditions would recover the first deposit. *Id.*

Article III governed "Representations and Warranties; Title Matters." Within five days of executing the Sales Contract, Traditions was to apply for a title insurance binder

[2] The Sales Contract was with Southern Land, which, on December 11, 2014, assigned its interest in the contract to Traditions, in accordance with section 7.4 of the contract.

or report of title; and within thirty days of executing the Sales Contract, it was to notify Novo of any "objectionable title matters." § 3.4. Upon receipt of that notification, Novo could elect to remedy the matters, in which case it was obligated to "proceed diligently at its expense [to do so]," or to notify Traditions that it did not wish to remedy the matters. *Id.* In the latter scenario, Traditions could elect, within ten days of receipt of Novo's notice, to waive in writing the matters. If it did not, the Sales Contract would be "deemed automatically terminated" and Traditions would recover its deposit. *Id.*

Section 3.4 further defined four categories of "Title Defects" that would not be deemed accepted by Traditions, even if not identified in the preliminary title binder or report. Those included 1) defects that Novo had agreed to remedy; 2) "any mortgages, deeds of trust, or other monetary liens or encumbrances (which [Novo] hereby agrees to satisfy and release of record at or prior to the Closing)"; 3) "any unrecorded easements, leases, or encumbrances affecting the Property"; or 4) any "matters of record placed against the Property without [Traditions'] prior consent" after execution of the Sales Contract. *Id.* (emphasis in original). Novo was required, at its sole expense, to take "all such reasonable action as may be required" to remedy these Title Defects. *Id.* If it was unable to do so prior to closing, Traditions could terminate the Sales Contract and recover its deposit *or* proceed to closing "without any reduction in the Purchase Price." *Id.*

Article IV specified that closing would take place on March 15, 2015.

Article VI governed default and remedies. It provided that Novo's remedy for a default by Traditions was termination of the Sales Contract; and upon termination, the deposit "shall be delivered to and retained by [Novo] as liquidated damages and not as a penalty[.]" § 6.1(a). Traditions' remedy for default by Novo was to terminate the Sales Contract, receive a return of its deposit plus reimbursement for expenses incurred not to exceed $25,000, or to seek specific performance. § 6.1(b).

On December 31, 2014, the date the Study Period was set to expire, the parties executed a first amendment to the Sales Contract extending the date on which Traditions was required to notify Novo of objectionable title matters until January 15, 2015; extending the Study Period until March 2, 2015; and postponing closing until March 31, 2015.

By letter dated January 15, 2015, Traditions sent its "Title Defect Notice" to Novo. It attached a copy of a revised title commitment letter issued by Old Republic National Title Insurance Company. The letter identified four title defects, including the 2007 Declaration recorded by KHOV. On January 20, 2015, Novo responded, advising Traditions in writing that it was not going to take any action.

Two days later, on January 22, 2015, Traditions learned that on November 28, 2012, KHOV had filed suit against the City, regarding Parcel 1, in the Circuit Court for Harford County ("the KHOV lawsuit"). In the suit, KHOV sought to enforce the terms of a proposed "Infrastructure Capital Projects Cost Recoupment Agreement" ("the Recoupment Agreement") that it had negotiated with the City in an effort to recover some

of the costs it had expended for the infrastructure on Parcel 1, including "access and emergency roads, water and sewer lines, and storm water management ["SWM"] ponds." (The 2007 Declaration had been extinguished in the 2008 foreclosure proceedings against Parcels 2 and 3, thus preventing KHOV from enforcing that Declaration against subsequent owners of these parcels.) KHOV was of the view that the owners of Parcels 2 and 3 would benefit from its installation of infrastructure on Parcel 1 because ingress and egress to those parcels was over Parcel 1, they would need to connect to the water and sewer lines, and they would need to use the SWM ponds.

In the proposed Recoupment Agreement, KHOV had agreed to construct extensions to certain access roads to the boundaries of Parcels 2 and 3 and to dedicate the roads to the City; and to construct the utilities and the SWM facilities, dedicate them to the City, and permit Parcels 2 and 3 to connect to them. KHOV and the City agreed that it would be "inequitable to impose [the costs of the Infrastructure] on KHOV, resulting in a windfall financial advantage for the owner(s) of [Parcels 2 and 3]." The proposed Recoupment Agreement provided for a pro-rata recovery of those costs over a period not to exceed 21 years. The total cost of the infrastructure benefiting Parcels 2 and 3 was $1,368,094.47, which amounted to $3,304.57 per residential dwelling unit.[3] Under the proposed Recoupment Agreement, that amount would be recovered by a special assessment levied on Parcels 2 and 3, "at the same time a building permit application for

[3] A May 27, 2005 Site Plan showed that a total of 414 residential units were intended to be developed on Parcels 2 and 3. Apparently, the $3,304.57 number was arrived at by dividing $1,368,094.47 by 414.

new construction [of a residential dwelling unit on Parcel 2 or Parcel 3] is submitted to the City." Recoupment Agreement, § 2.E. KHOV only was entitled to those recoupment fees actually collected by the City.

The proposed Recoupment Agreement was approved by the City Council on October 4, 2010. Thereafter, the then-owners of Parcels 2 and 3 contacted the Mayor and voiced opposition. They informed the City Attorney that they intended to submit a revised development plan that would eliminate any need to rely upon the infrastructure on Parcel 1. KHOV agreed to modify the Recoupment Agreement to provide that the recoupment fee only could be assessed against a residential dwelling unit that actually used the infrastructure on Parcel 1. Amendment to Recoupment Agreement, § 2.I. While KHOV continued to move forward with the construction of the infrastructure on Parcel 1, negotiations over the proposed Recoupment Agreement broke down. Ultimately, the Mayor refused to sign it. That prompted KHOV to sue the City for declaratory relief, a writ of mandamus, or, in the alternative, damages for breach of contract. KHOV did not name the owners of Parcels 2 and 3 as defendants. When Traditions discovered the existence of the KHOV lawsuit, on January 22, 2015, cross-motions for summary judgment were pending in the circuit court in that case.

In a letter dated January 23, 2015, captioned "Supplemental Title Defect Notice," Traditions' attorney informed Novo's attorney that it had learned that the Property was subject to a *lis pendens*, *i.e.*, the KHOV lawsuit. Counsel for Traditions took the position that the KHOV lawsuit was an "unrecorded encumbrance" in the amount of $1,368,000

that Novo was required to satisfy and release prior to closing, under section 3.4(iii) of the Sales Contract.

In a subsequent letter dated January 30, 2015, Traditions responded to Novo's January 20, 2015 letter. It agreed to waive certain objectionable title matters, but did not agree to waive its objection to the 2007 Declaration, which it characterized as a "monetary encumbrance upon the Property," under section 3.4(ii), or its objection to the KHOV lawsuit, which it characterized as an "unrecorded monetary encumbrance upon the Property[,]" under section 3.4(iii).

By letter of February 3, 2015, Novo responded 1) that the 2007 Declaration had been extinguished by the sale of Parcels 2 and 3 at foreclosure after the 2007 Declaration was recorded; and 2) because Novo was not a defendant in the KHOV lawsuit and the lawsuit did not affect or concern title to the Property, the suit was not a *lis pendens* and had no impact on Novo's ability to convey good and marketable title. As Novo did not plan to take any further action, it advised Traditions to "satisfy itself as to the impact that the KHOV Case" had and, if it determined that the KHOV lawsuit made the purchase economically unfeasible, to "accelerat[e] its termination rights . . . prior to the expiration of the Study Period . . . so that the Property may be remarketed."

On March 2, 2015, the parties entered into a second amendment to the Sales Contract, the terms of which are not relevant to the issues on appeal. Also on that date, the Study Period ended. Two days later, Traditions paid the second deposit into escrow.

On March 19, 2015, Traditions obtained a new commitment for title insurance, this time from First American Title Insurance Company ("First American"), with an effective date of February 10, 2015.[4] The title commitment identified the KHOV lawsuit as an encumbrance on title to the Property. Exception 14 to the policy stated:

> This policy does not insure against any loss, damage, assessments or liens imposed by the City . . . after the date of policy, in connection with or stemming from the [KHOV lawsuit] or the Recoupment Agreement referenced therein. [First American] will not be obligated to undertake a defense against the City . . . in the event any assessment, liens of [sic] fees required to be paid as a result of the aforesaid action.

By letter of March 23, 2015, First American explained its position on the KHOV lawsuit. ("First American Letter"). In its view, the KHOV lawsuit "directly affects [the Property]" because if KHOV were to be "successful in obtaining the declaratory relief sought, the [P]roperty will be encumbered by a potential aggregate lien of $1,368,094.47 which must be paid before building permits will be issued, or before improved lots may be conveyed out." First American further took the view that even if the KHOV lawsuit were resolved in favor of the City, it had "grave concerns about future litigation or retaliatory actions by [KHOV] in its efforts to seek reimbursement for capital projects costs it expended in Phase 1 of Greenway Farms, which would benefit Parcels 2 and 3." Even though KHOV no longer had "direct rights of enforcement against [the owners of the Property], . . . indirect enforcement and future litigation [was] a real risk," particularly

[4] Unlike Old Republic, First American agreed that the 2007 Declaration had been "wiped out by foreclosure of a superior Deed of Trust" and thus was not an exception to title.

given that the "only ingress/egress access to [the Property] is over the roads laid out across Parcel 1, constructed by [KHOV]." Finally, First American stated that it would not be surprised if KHOV filed suit against the owners of the Property for unjust enrichment if it were unsuccessful in its pending lawsuit. For all those reasons, First American would not be able to issue a standard owner's policy with "the usual guaranty of access unless there is an assurance that [KHOV] will not interfere with [access to the Property over Parcel 1]."

On March 24, 2015, Traditions wrote to Novo, enclosing the First American Letter and reiterating its position that the KHOV lawsuit was an encumbrance on the Property that Novo had to satisfy and release prior to closing. Two days later, Novo notified Traditions in writing that it rejected Traditions' request that it satisfy and release the KHOV lawsuit.

On March 30, 2015, the day before closing, Traditions filed the suit that gave rise to this appeal. In Count I, it sought a declaration that the KHOV lawsuit was an encumbrance that Novo was required to satisfy and release prior to closing. In Count II, it sought preliminary and permanent injunctive relief directing Novo to satisfy and release the KHOV lawsuit. In Count III, it sought $300,000 in damages for breach of contract for costs it had expended during the Study Period, plus attorneys' fees, interest, and costs, and also sought the return of its $300,000 deposit.

On May 7, 2015, Novo filed its answer and a motion for summary judgment with request for a hearing. In the motion, it argued that the KHOV lawsuit was not a *lis*

pendens because it did not concern title to the Property and for that same reason it was not an encumbrance on the Property that Novo was required to satisfy and release under the terms of the Sales Contract. It emphasized that even if KHOV were successful in its suit against the City, the result would not be a lien on the Property, but the potential for the future imposition of a special assessment against residential units on the Property. Novo attached twenty-six exhibits, including the Sales Contract, as amended; the correspondence between the parties concerning the KHOV lawsuit; the First American Letter; the proposed Recoupment Agreement and amendment to Recoupment Agreement; the complaint in the KHOV lawsuit; and KHOV's opposition to the City's motion for summary judgment in that case. In Count I (declaratory relief), Novo asked the court to declare that the KHOV lawsuit was not an encumbrance *and* that Traditions had breached the Sales Contract by refusing to come to closing, thereby forfeiting its deposit. It asked the court to enter judgment in its favor on Count II (specific performance) and Count III (breach of contract).

On June 2, 2015, Traditions filed an opposition to Novo's motion for summary judgment and requested a hearing, attaching the City's motion for summary judgment in the KHOV lawsuit, as well as many of the same exhibits submitted by Novo.

On July 13, 2015, in the KHOV lawsuit, the circuit court granted summary judgment in favor of the City, ruling that the October 4, 2010 City Council approval of the proposed Recoupment Agreement did not create a binding contract between KHOV and the City. KHOV noted an appeal to this Court, which remains pending. *See K.*

Hovnanian Homes of Maryland, LLC et al. v. Mayor and City Council of Havre de Grace, et al., No. 1214, Sept. Term 2015.

On September 9, 2015, in the case at bar, the circuit court held an in-chambers, off-the-record hearing during which counsel for the parties presented oral argument for and against Novo's motion for summary judgment. Thereafter, on April 28, 2016, the court issued a memorandum opinion and order granting Novo's motion. After setting out the history of the Property and the KHOV lawsuit, the court turned to the question "whether the pending litigation in the KHOV case constitutes an encumbrance or other matter affecting the title to the Property." The court reasoned that if the answer to that question were "no," Novo was entitled to summary judgment as a matter of law. If the answer to that question were "yes," summary judgment would not be appropriate because there was a genuine dispute of material fact as to whether Novo had breached the Sales Contract by its conduct.

The court answered that central question in the negative. Citing *Ochse v. Henry*, 202 Md. App. 521, 530 (2011), it explained that "in assessing whether an encumbrance exists, there must first be some right or interest in the land held by a third party." It relied upon this Court's decision in *Strass v. District-Realty Title Insurance Corp.*, 31 Md. App. 690 (1976), which we shall discuss *infra*, to conclude that the KHOV lawsuit and the prospective special assessment allowed under the proposed Recoupment Agreement did not amount to a present encumbrance on the Property. This was so, the court reasoned,

because the "the possibility of a 'recoupment fee' or special assessment on the [Property] is far too attenuated to be considered inevitable[.]"

The court then turned to Novo's argument that Traditions had breached the Sales Contract by refusing to come to closing, thereby forfeiting its deposit. The court reasoned that Traditions in fact had breached the Sales Contract by refusing to close until Novo satisfied and released the KHOV lawsuit, as the lawsuit was not an encumbrance; that, in any event, Traditions violated the Sales Contract, as amended, by not notifying Novo of the KHOV lawsuit until after the January 15, 2015 deadline; and that, even if Novo was obligated to satisfy and release the KHOV lawsuit prior to closing, once Novo notified Traditions that it did not intend to take any action, Traditions could waive its objection *or* terminate the Sales Contract and recover its deposit, but it did neither. Instead, it filed suit and refused to close. Thus, Traditions had breached the Sales Contract and Novo was entitled to keep the $300,000 deposit.

The court entered a declaratory judgment that same day, stating:

> **(1) DECLARED** that [the KHOV lawsuit] does not constitute an encumbrance; and further
> **(2) DECLARED** that [Traditions] ha[s] breached the [Sales Contract] in this case, and therefore, forfeited any and all deposit funds paid pursuant thereto; and
> **(3) ORDERED** that [Novo]'s Motion for Summary Judgment be **GRANTED**.

Traditions noted this timely appeal. We shall include additional facts in our discussion of the issues.

STANDARD OF REVIEW

Our standard of review on appeal from the grant of summary judgment is well-established:

> An appellate court reviewing a summary judgment examines the same information from the record and determines the same issues of law as the trial court. *PaineWebber Inc. v. East*, 363 Md. 408, 413, 768 A.2d 1029, 1032 (2001) (citation omitted). . . . We recently reiterated the standard of review for a trial court's grant or denial of a motion for summary judgment in *Myers v. Kayhoe*, 391 Md. 188, 892 A.2d 520 (2006):
>
> > The question of whether a trial court's grant of summary judgment was proper is a question of law subject to *de novo* review on appeal. *Livesay v. Baltimore*, 384 Md. 1, 9, 862 A.2d 33, 38 (2004). In reviewing a grant of summary judgment under Md. Rule 2–501, we independently review the record to determine whether the parties properly generated a dispute of material fact and, if not, whether the moving party is entitled to judgment as a matter of law. *Id*. at 9–10, 862 A.2d at 38. 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. *Id*. at 10, 862 A.2d at 38.
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> *Id*. at 203, 892 A.2d at 529.

United Servs. Auto. Ass'n v. Riley, 393 Md. 55, 67 (2006).

DISCUSSION

I.

As a threshold matter, Traditions contends the circuit court violated Rule 2-311(f) by granting summary judgment in favor of Novo without holding a hearing on the record. Novo responds that because neither party complied with that rule in requesting a hearing, the court was not required to hold one. Moreover, the court did hold a hearing, although

it was in-chambers and not recorded; Traditions waived its right to an on-the-record hearing by failing to object to the in-chambers hearing; and because this appeal concerns purely legal issues, remand for an on-the-record hearing would serve no purpose.

Under Rule 2-311(f), "[a] party desiring a hearing on a motion" shall request one in the title of the motion or response *and* in the body of the motion or response under a heading titled "Request for Hearing." In ruling on the motion, "the court may not render a decision that is dispositive of a claim or defense without a hearing if one was requested [in compliance with the rule]." *Id.* When the moving party requests a hearing, there is no need for the non-moving party to file a "redundant request[.]" *Phillips v. Venker*, 316 Md. 212, 217 (1989).

In the case at bar, Novo did not include a request for a hearing in the title of its motion for summary judgment or in the body of that motion. Instead, it filed a separate paper requesting a hearing. That paper was filed the same day that Novo filed its motion for summary judgment and was docketed. In Traditions' opposition to the motion for summary judgment, it requested a hearing under a separate heading, but did not include the request in the title of its opposition. Its request for a hearing also was docketed.

Although Novo is correct that neither party strictly complied with Rule 2-311(f) in requesting a hearing, each party substantially complied, both requests were docketed, and we agree with Traditions that the court was obligated to hold a hearing before granting Novo's motion for summary judgment.

We agree with Novo, however, that because the court held an in-chambers hearing that was not recorded, and Traditions did not object to the hearing going forward in that manner, it has waived this contention of error.[5] *See Exxon Mobil Corp. v. Ford*, 433 Md. 426, 462 (2013) ("Waiver is conduct from which it may be inferred reasonably an express or implied 'intentional relinquishment' of a known right."); *see also Brockington v. Grimstead*, 176 Md. App. 327, 355 (2007), *aff'd* 417 Md. 332 (2010) ("Generally, a waiver is the intentional relinquishment of a known right, or conduct that warrants such an inference."). We also agree that even if not waived, a remand for the court to hold a new, on-the-record, hearing would serve no practical purpose because the issues before this Court are purely legal. *See, e.g., Briscoe v. Mayor & City Council of Baltimore*, 100 Md. App. 124, 128 (1994).

II.

Section 3.4 of the Sales Contract includes as a condition of Traditions' obligation to close upon the purchase of the Property that it be free of "encumbrances," except those expressly permitted. Traditions contends the circuit court erred as a matter of law in ruling that the KHOV lawsuit was not an encumbrance on the Property within the meaning of the Sales Contract. Quoting Friedman on Contracts, §4A:1 (Encumbrances) (May 2016), it maintains that "encumbrance" must be construed broadly to include "any

[5] Traditions claims that because Novo moved for summary judgment, it had the "burden" to ensure that the court held a hearing. We disagree. Both parties requested a hearing and both parties could waive that request by their affirmative conduct inconsistent with that request.

right in a third party which diminishes the value or limits the use of the land." It argues that the KHOV lawsuit diminished the value of the Property because, if KHOV were to succeed, the City would be required to "recoup more than $1.3 million in infrastructure fees from [the owners of the Property]." In Traditions' view, the circuit court misread *Strass*, 31 Md. App. at 690, which Traditions asserts supports *its* position, not Novo's.

Novo responds that the court correctly ruled that the KHOV lawsuit was not an encumbrance on the Property on the closing date (or at any time) because the parties to that litigation had no right or interest in the Property and would not acquire any right or interest through the resolution of that litigation. It maintains that the court correctly analyzed our decision is *Strass*, which is dispositive.

"'An encumbrance is any right or interest held by someone other than the grantee or grantor which diminishes the value of the estate but not so much that it leaves the grantee with no title at all.'" *Ochse*, 202 Md. App. at 530 (quoting *Magraw v. Dillow*, 341 Md. 492, 502 (1996)). It includes "security instruments, leases, mechanics' liens, property tax assessment liens, easements, future interests and covenants running with the land at the time of conveyance, other than those specifically set forth in the deed.'" *Id.* (quoting *Magraw*, 341 Md. at 502).

In *Strass*, we considered when a special assessment imposed by the City of Rockville against certain residential properties in order to recoup costs it had incurred in constructing water and sewer lines became an encumbrance on the properties. The plaintiffs were nine married couples. They sued their title insurance company, seeking a

declaration that "assessments levied by the City of Rockville against [their] residential lots for benefits resulting from installation of water and sewer lines . . . were liens or encumbrances insured against by [their title insurance] purchased at the time [each couple settled on their home]." *Strass*, 31 Md. App. at 691. The title insurance policies had been issued over a ten-month period with effective dates ranging from September 1970 to June 1971. The policies insured against any loss or damage occasioned by "[l]iens or encumbrances," excepting, as pertinent, "encumbrances arising after the effective date of [the] Policy." *Id.* at 693. The special assessments levied against the nine residential lots were brought about by the passage of an ordinance on October 12, 1971, after the effective dates of the plaintiffs' policies.

The plaintiffs asserted that their properties were "at least *encumbered* by the prospective assessments long before the title policies were issued." *Id.* at 699 (emphasis in original). They pointed to two ordinances enacted by the City of Rockville that, in their view, made the levy of the special assessments inevitable before the effective dates of their title insurance policies. First, in 1968, the City of Rockville enacted an ordinance authorizing the installation of the water and sewer lines, issuing bonds, and stating that "special annual benefit assessments" would be levied on the benefitted properties to repay the principal and interest on those bonds. Second, in August 1970, the City of Rockville enacted an ordinance authorizing the issuance of additional bonds to finance the water and sewer lines, with similar language authorizing the future levies.

This Court held that neither the 1968 nor the 1970 enactment created an encumbrance on the plaintiffs' properties. Rather, the special assessments were levied and became an encumbrance on the properties on October 12, 1971. We emphasized that until then, the City of Rockville was permitted, but not required, to levy the special assessments to recoup the costs of installing the water and sewer lines. While the two ordinances that pre-dated the issuance of the title policies authorized the special assessments, "[t]hose assertions of future intent cannot be said to be the equivalent to a present levy, nor to establish present liability to an eventual lien." *Id.* at 703. We stated that "the assessments . . . were not encumbrances until they were inevitable, and that as long as the City had the option to levy them or not, they were not inevitable until they were levied." *Id.* at 704. For that reason, we further held that the title policies did not insure against the special assessments.

Returning to the case at bar, we agree with Novo that our decision in *Strass* compels the conclusion that the Recoupment Agreement and the KHOV lawsuit seeking to enforce it were not an encumbrance on the Property on the date of closing.[6] Section 35 of the City Charter empowers the Mayor and City Council to "levy and collect taxes in the form of special assessments upon property in a limited and determinable area for special benefits conferred upon such property by the installation or construction, of water mains, sanitary sewer mains, stormwater sewers, [and other infrastructure]." That power may be exercised by the passage of an ordinance or resolution. City Charter, § 34. All

[6] They are not an encumbrance now either.

ordinances and resolutions must be passed by a majority vote of the City Council and approved by the Mayor. City Charter, § 19.

The Recoupment Agreement was in the nature of a contract between KHOV and the City, the terms of which would have required the City to impose a special assessment on the Property and remit the fees collected to KHOV. That Agreement was approved by the City Council, but not by the Mayor. In its lawsuit, KHOV asserted that the Recoupment Agreement was nevertheless a binding contract that the Mayor was obligated to sign, and that his failure to do so was a breach of the contract.

Unlike in *Strass*, where the City of Rockville had adopted two ordinances creating financing for infrastructure and authorizing the future imposition of a special assessment on the properties benefitting from the infrastructure, here, the City had not taken the final action necessary to approve the Recoupment Agreement and had taken no action to pass an ordinance or resolution imposing a special assessment on the Property. Moreover, however the KHOV lawsuit ultimately is resolved, it will not in and of itself result in an encumbrance on the Property. The only relief KHOV sought and could be awarded is a declaration that the Mayor is required to sign the Recoupment Agreement (or a writ of mandamus directing the Mayor to do so) or, in the alternative, a judgment *against the City* for breach of contract in the amount of $1,368,094.47. We note that the amended Recoupment Agreement, which clarified that a dwelling will not be subject to a special assessment if it does not use the Parcel 1 infrastructure, has never been approved by the City Council or the Mayor; and even if it was, that change was brought about because the

then-owners intended to develop the Property without making use of the infrastructure on Parcel 1.

A special assessment on the Property plainly was not *inevitable* as of the date of closing; and the possibility of a future special assessment against the Property was not an encumbrance when the Sales Contract was executed or at any time prior to closing.

III.

Traditions contends the circuit court erred in two ways by declaring that it had breached the Sales Contract by refusing to attend closing, thus forfeiting the $300,000 deposit.

First, and as a threshold matter, Traditions asserts that the circuit court lacked the authority to declare that it had breached the Sales Agreement, because Novo did not file a counterclaim. It relies upon this Court's decision in *Baltimore Teachers Union v. Mayor and City Council of Baltimore*, 108 Md. App. 167 (1996). That case did not involve a declaratory judgment action and is inapposite.

The Maryland Uniform Declaratory Judgment Act, codified at Md. Code (1973, 2013 Repl. Vol.), sections 3-401 – 3-415 of the Courts and Judicial Proceedings Article ("CJP"), authorizes a court to

> grant a declaratory judgment or decree in a civil case, if it will serve to terminate the uncertainty or controversy giving rise to the proceeding, and if: (1) An actual controversy exists between contending parties; (2) Antagonistic claims are present between the parties involved which indicate imminent and inevitable litigation; or (3) A party asserts a legal relation, status, right, or privilege and this is challenged or denied by an adversary party, who also has or asserts a concrete interest in it.

CJP § 3-409(a). Here, there was an actual controversy between the parties over whether the KHOV lawsuit was an encumbrance and whether, in light of that determination, either Novo or Traditions had breached the Sales Contract by its actions (or failure to act). The court had authority to declare the rights and liabilities of the parties under the Sales Contract and it did not err or exceed its authority in doing so.

On the merits, Traditions argues that the circuit court erred by treating the KHOV lawsuit as a category three Title Defect under section 3.4 of the Sales Contract, as opposed to as a category two Title Defect. This argument is foreclosed by our resolution of the second issue in this appeal. As discussed, the circuit court determined correctly that the KHOV lawsuit was not an encumbrance on the Property. In assessing whether Traditions breached the Sales Contract, however, it reasoned that *even if the KHOV lawsuit were an encumbrance*, it would be an "unrecorded encumbrance" under section 3.4(iii) of the Sales Contract. Traditions asserts that the court should have determined that the KHOV lawsuit was a "monetary encumbrance," under a section 3.4(ii) exception. Category two Title Defects were those that Novo was required to "satisfy and release of record at or prior to the Closing," whereas category three Title Defects were ones that Novo only was required to take "reasonable action to remove." For the reasons already discussed, the circuit court did not err by ruling that the KHOV lawsuit was not an encumbrance and, as such, Traditions' notification to Novo of the existence of the KHOV lawsuit did not trigger any obligation by Novo to act.

Section 1.4 of the Sales Contract, titled "Deposit Non-Refundable," states, in pertinent part, that if the Study Period expires and Traditions has not exercised its termination rights, "the Deposit shall be deemed non-refundable in all circumstances," unless Novo refused to proceed to closing or took some action to encumber the title to the Property after the expiration of the Study Period. Traditions does not assert that either exception applies. Section 6.1(a) provides that if Traditions failed to perform any of its obligations under the Sales Contract, which would include coming to closing if it had not lawfully terminated the contract, Novo's remedy would be retention of the deposit. When Novo notified Traditions that it did not intend to take any further action relative to the KHOV lawsuit, the Study Period had not yet expired and Traditions was within its rights to terminate the Sales Contract and recover its deposit. It did not do so. Having elected not to exercise its termination right, it breached the Sales Contract by refusing to close on the sale of the Property, and the deposit became nonrefundable. The circuit court did not err in so declaring.

JUDGMENT AFFIRMED. COSTS TO BE PAID BY THE APPELLANTS.