UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0209

September Term, 2014

ONEWEST BANK GROUP, LLC

v.

PRIME VENTURERS, ET AL.

Woodward,
Zarnoch,
Leahy,

JJ.

Opinion by Zarnoch, J.

Filed: May 13, 2015

This appeal represents another chapter in a long-running dispute between a lender, property owners and a developer over a parcel of land in Carroll County. The litigation has already resulted in one appeal to this Court, *Prime Venturers v. OneWest Bank Grp., LLC*, 213 Md. App. 122 (2013), the vacating of a previous judgment and remand to the Circuit Court for Carroll County for further proceedings. We can reach and decide only one of the many issues decided by the circuit court on remand and advanced here by appellant, OneWest Bank Group, LLC, *viz*., the correctness of the grant of injunctive relief. On this question, we affirm in part and reverse in part. However, because the judgment on remand did not finally dispose of all or even most of the other claims and because we can find no principled basis to exempt the present case from the final judgment rule, we are forced to dismiss this appeal as to all other issues.

FACTS AND PROCEEDINGS

In light of the detailed factual recital in our 2014 opinion, we need only sketch the backdrop of this controversy. Prime Venturers, a general partnership, owned approximately 3.1477 acres of land, located on Ridge Road in Sykesville. The developer intended to subdivide 1.6848 acres. Prime Venturers agreed to convey all of the land to Cheryl and David Leupens, who intended to live on 1.4629 acres. The parties also executed a repurchase agreement, which provided that once the 1.6848 tract had been subdivided, the Leupens would reconvey this property to Prime Venturers for $1.00. In addition, this agreement stated:

> [The Leupens] further agree that they will make their lender, or any subsequent lender of theirs financing the subject property, aware of the

> contents of this Agreement, and will provide such assurances to [Prime Venturers] as necessary that any such lender will agree, upon [Prime Venturers'] request, to release the portion of the property intended to be reconveyed unto [Prime Venturers], from any mortgage or deed of trust covering the subject property, for no consideration.

In 2003, the Leupens paid $264,000 of the $330,000 purchase price of the Property with a mortgage from National City Mortgage. The mortgage loan was secured by a deed of trust against only one lot. In 2007, the Leupens refinanced and borrowed $414,200 from AmTrust Mortgage Corporation. This loan, however, was secured by the entire 3.1477 acres of the property under a refinance deed of trust. OneWest subsequently took possession of the refinance deed of trust and assumed the rights of AmTrust.

In 2009, Prime Venturers obtained subdivision approval, recorded the subdivision plat in the land records of Carroll County, and requested that the Leupens reconvey the portion of the property specified in the repurchase agreement. The developer requested that OneWest release its lien on the 1.6848 acres, but the lender refused.

On April 7, 2010, Prime Venturers sued the Leupens and OneWest in the Circuit Court for Carroll County seeking a declaratory judgment that it had a right to an unconditional release of OneWest's lien on 1.6848 acres of the property (Count I), as well as an injunction ordering release of the lien (Count II). In addition, Prime Venturers asserted damage claims for injurious falsehood-disparagement of title (Count III), tortious interference with contract (Count IV), and breach of a statutory obligation to release the

lien (Count VI).[1] Count VI was based on Md. Code (1974), 2010 Repl. Vol., Real Property Article (RP) § 7-106(e), which provides:

> If the holder of a lien on real property or his agent fails to provide the release within 30 days, the person responsible for the disbursement of funds in connection with the grant of title to the property, after having made demand therefor, may bring an action to enforce the provisions of this section in the circuit court for the county in which the property is located. In the action the lienholder, or his agent, or both, shall be liable for the delivery of the release and for all costs and expenses in connection with the bringing of the action, including reasonable attorney fees.

OneWest subsequently filed a counterclaim seeking a declaration that it was entitled to enforce its lien on the property as a first-priority lien. One April 11, 2011, the court granted summary judgment to OneWest on its counterclaim, finding that the repurchase agreement had been superseded by the deed of conveyance. The court also dismissed all the claims of Prime Venturers.[2]

[1] The Complaint erroneously labeled this as "Count VI" although it was the fifth and final count of the Complaint. As all subsequent references label it "Count VI," we will refer to this claim in this fashion.

[2] Prime Venturers had filed a motion for partial summary judgment on Counts I, II and V of the Complaint. The developer contended that: 1) it was entitled to a release of the lien on the basis of the recorded repurchase agreement; 2) OneWest was subject to the terms of the repurchase agreement at the time of the refinancing of the property; and 3) after the subdivision plat was recorded, OneWest had no greater right to maintain its lien on Prime Venturers' lots than if the mortgage obligation had been fully satisfied," citing to RP § 7-106(e). OneWest opposed the motion, arguing, among other things, that: 1) the prior lender, AmTrust, was not made aware of the repurchase agreement; 2) the repurchase agreement placed no duties on the mortgage lender, just on the Leupens; 3) Prime Venturers had not presented sufficient facts to support a claim for injunctive relief; and 4) RP § 7-106 applied only to transactions where the prior liens were paid in full.

When this motion was denied, Prime Venturers filed a motion to reconsider the denial of its motion for partial summary judgment. This motion was denied.

Prime Venturers appealed. We reversed the circuit court, holding that the repurchase agreement was a collateral obligation to, and therefore did not merge into, the deed. *Prime Venturers*, 213 Md. App. at 143. We remanded for further proceedings to "address Prime Venturers' argument that its recording of the agreement put OneWest on notice of Prime Venturers' interest and prevented it from claiming to be a bona fide purchaser for value," as well as "other issues the court deems pertinent in light of our holding." *Id*.

Upon remand, on March 4, 2014, the circuit court, without a hearing, granted Prime Venturers' previously-denied motion for reconsideration and motion for partial summary judgment and denied OneWest's previously-granted motion for summary judgment. Specifically, the court ordered that:

> 1) [P]artial summary judgment be… entered in favor of…Prime Venturers against …OneWest…in the form of a judgment under Count I declaring that the Plaintiff is entitled to a release without consideration from OneWest Bank, F.S.B's Deed of Trust of all that property consisting of 1.6848 acres and designated as "parcel to be reconveyed" as recorded among the Land Records of Carroll County…
>
> 2) Pursuant to Count II that OneWest…shall release said 1.6848 acre parcel within thirty (30) days, failing which this Court will appoint a Trustee to do so at its expense…
>
> 3) Partial Summary Judgment be and the same is hereby ENTERED in favor of Plaintiff against OneWest…on liability under County VI (sic) of Plaintiff's Complaint [and]
>
> 4) Counts III and IV of the Plaintiff's Complaint be set for trial along with damages under Count VI (sic).

The court's written opinion grounded Prime Venturers' right to relief on the repurchase agreement.

> OneWest is obligated to release the Lots, not due to any contractual obligation of its own; rather that obligation stems from the Leupens' covenant to do so which runs with the land and binds OneWest as a successor in interest.[3]

The opinion did not specifically mention RP § 7-106(e), although the court had to have considered the application of the statute to enter judgment on Count VI of the complaint.

On March 24, 2014, OneWest filed a motion for reconsideration of the court's summary judgment ruling[4], or in the alternative, to certify the judgment as final.[5] Without

[3] The opinion said that Prime Venturers' rights were not contingent, were not an option and did not constitute an unreasonable restraint on alienation of the property. The court added that the repurchase agreement created a right for the developer of equitable conversion which subordinated OneWest's rights. The court did not expressly reject OneWest's assertion of the rights of a bona fide purchaser for value, but its rationale necessarily denied OneWest this status.

[4] Among OneWest's contentions in this motion was that Prime Venturers did not have standing to seek relief under RP § 7-106(e).

[5] In support of certification, the lender argued:

> Delaying the appeal would have an adverse economic impact on OneWest because the alternative is requiring the parties to try this case, after which OneWest will simply appeal the Court's opinion as to partial summary judgment. It is abundantly clear that OneWest can have no monetary liability to the Plaintiff. The Plaintiff does not have standing to sue with respect to the statutory claim and it cannot plead or prove sufficient facts in support of its common law claims for liability. There is no reason to require the parties to put on evidence of damage at trial when there can be no monetary liability. If the parties can litigate the appeal now, if OneWest is successful on appeal, trial will not be necessary and, if OneWest is unsuccessful on appeal, the issues for trial will be clear. Requiring the parties to go through with trial now saves nothing and is wasteful, as OneWest will necessarily appeal the present ruling following any trial.
>
> OneWest's appeal will be as to all claims, so there is no concern of duplicative litigation involving other pending, similar claims. Certifying the partial summary judgment as a final order for purposes of appeal will not result in piecemeal litigation. Rather, it will result in a single, streamlined proceeding without multiple trials. There is

comment, the court denied reconsideration and certification on April 17, 2014. OneWest noted a timely appeal.

QUESTIONS PRESENTED

OneWest asks:

1. Did the trial court err in granting an affirmative injunction requiring OneWest to record a lien release when the statute upon which the court relied, R.P. § 7-106, does not apply to the facts of this case?

2. Did the trial court err in denying OneWest's motion for summary judgment on Prime Venturers' injurious falsehood claim?

3. Did the trial court err in denying OneWest's motion for summary judgment on Prime Venturers' tortious interference claim?

4. Did the trial court err by failing to find that the Repurchase Agreement constituted an unreasonable restraint on alienation?

5. Did the trial court err in finding that Prime Venturers has an interest in the Property?

6. Did the trial court err in finding that the Repurchase Agreement is an enforceable covenant affecting the Property?

7. Did the trial court err in refusing to certify its entire summary judgment ruling as final for the purposes of appeal?

We have recast these questions in the following manner:

1. Are all of the circuit court's rulings on the questions advanced by OneWest final judgments that may be appealed to this Court?

2. If the granting of an injunction is appealable, which predicate legal determinations are properly before us?

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no need to require the parties to try a case only to end up right back in the Court of Special Appeals, where these issues could have been resolved before a costly trial. This Court can and must avoid an unnecessary trial and let the parties move these significant issues to the appellate level.

3. If the violation of RP § 7-106(e) was the basis for the granting of injunctive relief, does that statute apply where there has been no payment in satisfaction of the lien?

4. If violation of the repurchase agreement is the basis for the granting of injunctive relief, did the circuit court err in granting the injunction?

DISCUSSION

I. Final Judgment / Piecemeal Appeals

At the outset we must determine which issues of this obviously interlocutory appeal are properly before us. The circuit court granted full relief on two counts of the complaint: Count I, the declaratory judgment, and Court II, the injunction. On Count VI, the RP § 7-106(e) claim, a determination was made solely on liability not monetary relief. As to the other damage claims, Counts III and IV, summary judgment was denied. OneWest seeks our consideration of all of these questions. In one sense, OneWest is trying to avoid the disparaging label of piecemeal appeal by seeking to appeal all interlocutory rulings. While imaginative, this strategy simply will not work. Consolidating all interlocutory orders does not transform the result into a final judgment.

Casting the appealability issue as whether the circuit court erred in failing to certify the entire summary judgment ruling under Md. Rule 2-602[6] does little to advance

[6] (a)Except as provided in section (b) of this Rule, an order or other form of decision, however designated, that adjudicates fewer than all of the claims in an action (whether raised by original claim, counterclaim, cross-claim, or third-party claim), or that adjudicates less than an entire claim, or that adjudicates the rights and liabilities of fewer than all the parties to the action:

(1) is not a final judgment;

(2) does not terminate the action as to any of the claims or any of the parties; and

OneWest's position. The Court of Appeals has yet to determine whether refusal to enter judgment under Rule 2-602(b) is an appealable final order. *See Silbersack v. Acands, Inc.*, 402 Md. 673, 683 (2008). But even if such a denial is reviewable, the circuit court has greater discretion to deny such a request than it does to grant one. *Id*. at 684.[7] And certification is permitted only if this is one of the "very infrequent hardship cases" crying out for certification. *Id*. at 686. The arguments advanced by OneWest for certification under Rule 2-602(b), *see* n. 5, *supra*, are the kind that any litigant faced with an

(3) is subject to revision at any time before the entry of a judgment that adjudicates all of the claims by and against all of the parties.

(b) If the court expressly determines in a written order that there is no just reason for delay, it may direct in the order the entry of a final judgment:

(1) as to one or more but fewer than all of the claims or parties; or

(2) pursuant to Rule 2-501(f)(3), for some but less than all of the amount requested in a claim seeking money relief only.

An appellate counterpart to this Rule is found in Md. Rule 8-602(e)(1) which states:

If the appellate court determines that the order from which the appeal is taken was not a final judgment when the notice of appeal was filed but that the lower court had discretion to direct the entry of a final judgment pursuant to Rule 2-602 (b), the appellate court may, as it finds appropriate, (A) dismiss the appeal, (B) remand the case for the lower court to decide whether to direct the entry of a final judgment, (C) enter a final judgment on its own initiative or (D) if a final judgment was entered by the lower court after the notice of appeal was filed, treat the notice of appeal as if filed on the same day as, but after, the entry of the judgment.

[7]OneWest relies on *USA Cartage Leasing, LLC v. Baer*, 202 Md. App. 138 (2011), to support certification here. However this is a case where a circuit court certified the judgment, not one where certification was refused. Moreover, this was an alternative ground for the appealability of declaratory / injunctive relief, *id.* at 169 - - issues separate from those that remained in the circuit court. *Id*. at 172. Finally, the appellant was able to point to the hardship of an invasion of his constitutionally protected property rights. *Id.* OneWest can make no such showing. This case is only about money.

interlocutory order in a multiple claim case might make. They do not make this the "very infrequent harsh case."[8]

For these reasons, the circuit court did not err in declining to certify the denial of OneWest's summary judgment on the damage claims under Counts III and IV and the claim for monetary relief under Count VI.[9]

II. Appealability of the Injunction and Predicate Determinations

At first blush, Counts I (declaratory judgment) and the liability determination under County VI would appear to suffer from the same finality defects as the monetary relief counts. However, it is clear that OneWest can appeal the injunction granted under Count II under Md. Code (1973, 2013 Repl. Vol.), Courts and Judicial Proceedings Article, § 12-303(3)(i) and we are empowered to review legal determinations that constitute the basis for that injunction. *USA Cartage Leasing, supra*, 202 Md. App. at 169; *Carroll County v. Forty West*, 178 Md. App. 328, 373 (2008).

Because the declaratory judgment mirrors the language of the injunction, Count I raises no concerns with respect to review of predicate determinations. However, our ability to review the liability determination for violation of RP § 7-106(e) under Count VI is not

[8] The right to relief on the damage claims is also intensely factual, a premise conceded by OneWest when it asserts that "the trial court decided a number of disputed issues of material fact."

[9] Of course, we are not free to certify the judgment under Rule 8-602(e)(1), because as *Addison v. Lochearn Nursing Home, LLC*, 441 Md. 251 (2009) teaches, it is "only when a trial judge had not acted to refuse certification would an appellate court be able to certify finality." *Id.* at 266.

as clear.[10] The statute is not expressly mentioned in the circuit court's opinion or in the injunction language. Rather, the court singularly noted that OneWest is obliged to release the liens because it is bound by the repurchase agreement. *See* p. 5, *supra.*[11]

On the other hand, although not mentioned in its opinion, the court in its order did determine liability under RP § 7-106(e) and it is possible that the 30-day period incorporated into the injunction for release of the lien stems from this statute. Although resolution of the appealability issue is not without doubt, we will consider the application of this statute as one basis for entry of the injunction.[12]

III. Application of RP § 7-106(e)

OneWest argues that RP § 7-106(e) applies only to 1) the release of liens by settlement agents or attorneys, 2) after disbursing payoff funds. It urges the first contention on the basis of *Green v. Taylor*, 142 Md. App. 44 (2001),[13] and the second contention on the basis of RP § 7-106(d), which provides:

> Any person who has a lien on real property in this State, or the agent of the lienholder, *on payment in satisfaction of the lien*, on written request, shall furnish to the person responsible for the disbursement of funds in connection with the grant of title to that property the original copy of the executed release of that lien. If the lien instrument is a deed of trust the original promissory note marked

[10] Both parties appear to believe that the statutory issue is properly before us.

[11] This issue is clearly appealable.

[12] Of course, this does not mean that the judgment on Count VI is appealable. We are reaching the issue only as a predicate determination to the judgment on Count II.

[13] This is an issue we need not address.

> "paid" or "canceled" in accordance with § 3–105(d)(1) of this article constitutes an executed release. If the lien instrument is a mortgage, the original mortgage marked "paid" or "canceled" in accordance with § 3–105(d)(2) of this article constitutes an executed release. This release shall be mailed or otherwise delivered to the person responsible for the disbursement of funds:
>
> (1) Within seven days of the receipt, by the holder of the lien, of currency, a certified or cashier's check, or money order *in satisfaction of the debt*, including all amounts due under the lien instruments and under instruments secured by the lien; or
>
> (2) Within seven days after the clearance of normal commercial channels of any type of commercial paper, other than those specified in paragraph (1), received by the holder of the lien *in satisfaction of the outstanding debt*, including all amounts due under the lien instruments and under the instruments secured by the lien.

(Emphasis added).

Prime Venturers urges us to focus solely on § 7-106(e) and its asserted purpose: "to hold a lienholder responsible when it fails to release a lien to which the agent is entitled." The developer argues that this remedy applies when the lien "is no longer valid," not just to instances when the debt or lien has been satisfied.

A fundamental rule of statutory construction is the court's obligation to examine the whole statute, not just isolated portions. *In re Stephen K.*, 289 Md. 294, 298 (1981). Here, the whole statute is RP § 7-106(d) and (e). This is apparent upon an examination of the 1984 session law, Chapter 497, *Laws of 1984*, that enacted § 7-106(e). The very same law that gave us § 7-106(e) amended § 7-106(d) to add the words "on payment in satisfaction of the lien." Subsection (e) originally keyed liability to failure to provide the release "in accordance with the provisions of this section." An amendment to the bill deleted this

language and substituted "within 30 days" with the obvious purpose of giving lienholders more than the 7 days specified in § 7-106(d) before liability could be incurred.

One fundamental problem with Prime Venturers' proffered interpretation of the statute is that the 30-day deadline in § 7-106(e) would have no referent. If read in conjunction with § 7-106(d), the 30 days in subsection (e) would run from the date of "the payment in satisfaction of the lien." This is also consistent with language in *Green v. Taylor*, *supra*, where this Court described § 7-106(e) as not intended to apply to every circumstance "in which a lienholder is paid off." 142 Md. App. at 54.

To sum up, RP § 7-106(e) applies only when the lienholder fails to release the lien after the payment of the debt or lien has taken place. That has not happened in this case. Therefore, in our view the statute has not been violated and § 7-106(e) cannot serve as a basis or predicate for the injunction issued by the circuit court.

IV. Propriety of Granting an Injunction

The injunction issued by the circuit court could still stand if justified by OneWest's violation of the repurchase agreement. This is a purely legal question.[14] Assuming that the court granted the injunction because of a violation of the repurchase agreement, we also hold that the court correctly found that Prime Venturers' rights to the Property were superior to OneWest's. The circuit court noted that: "OneWest is obligated to release the Lots, not due to any contractual obligation of its own; rather that obligation stems from the

[14] On appeal, OneWest does not challenge whether the standards for an injunction have been met.

Leupens' covenant to do so which runs with the land and binds OneWest as a successor in interest." The terms of the agreement clearly established a mechanism for release of the lien, a mechanism that subsequent lenders are unable to avoid.

The relevant portion of the repurchase agreement provides:

> [The Leupens] agree to take the title to said 3.1477 acres, subject to their agreement, by the execution hereof, to reconvey to [Prime Venturers], the portion of said property, approximately [] 1.6848 acres, for ONE DOLLAR ($1.00), at such point in time as [Prime Venturers] is able to record a subdivision plat through the proper authorities of Carroll County, Maryland, for the remainder of said property, said plat to contain no more than five (5) additional building lots.
>
> [The Leupens] further agree that they will make their lender, or any subsequent lender of theirs financing the subject property, aware of the contents of this Agreement, and will provide such assurances to [Prime Venturers] as necessary that any such lender will agree, upon [Prime Venturers'] request, to release the portion of the property intended to be reconveyed until [Prime Venturers], from any mortgage or deed of trust covering the subject property, for no consideration.

Although the Leupens failed to alert AmTrust/OneWest of the repurchase agreement, it is undisputed that they filed the agreement in the Carroll County land records and it is indexed there. Therefore, as a matter of law, OneWest was therefore on constructive notice of the agreement. *Washington Mut. Bank v. Homan*, 186 Md. App. 372, 394-95 (2009). Maryland rules clearly require that "*any* instrument affecting title to real property, to be both recorded *and to be indexed*" in order to "facilitate the creation of constructive notice in respect to any action that 'affects title to . . . real property.'" *Greenpoint Mortgage Funding, Inc. v. Schlossberg*, 390 Md. 211, 229 (2005) (quoting Md. Rule 12-102). Because the repurchase agreement was recorded and indexed before

AmTrust's refinancing, OneWest's interest in the Property was subordinate to Prime Venturers'.

OneWest argues that the repurchase agreement is itself void because it constitutes an unreasonable restraint on alienation. It argues that the agreement is an option in gross, and such options must, under *Commonwealth Realty Corp. v. Bowers*, 261 Md. 285 (1981), be no longer than five years in duration. Prime Venturers responds that this rule from *Bowers* is *dicta* and that the rule against perpetuities controls this case. *See Brown v. Parran*, 120 Md. App. 653, 658 (1998) ("Under the traditional rule adhered to in Maryland, the future interest, at the effective date of the instrument creating it, must vest within the period of the rule (life in being plus 21 years"). Because Paragraph 9 of the agreement provides that Prime Venturers must record the Plat within ten years, the contract is not an invalid restraint on alienation.

OneWest admits in its brief that the repurchase agreement's ten year term does "not clearly violat[e]" the rule against perpetuities. However, OneWest urges us to consider that contract an option in gross, without explaining why.

An option is "a continuing offer to sell during the duration [of the option agreement] which on being exercised by the optionee becomes a binding and enforceable contract." *David A. Bramble, Inc. v. Thomas*, 396 Md. 443, 455 (2007) (Quotation omitted). Yet as we held on the initial appeal of this case, the repurchase agreement was a "collateral obligation" to reconvey the Lots, and it was clearly not an obligation to enter into a contract for sale of the land. As Prime Venturers explains, it did not have the "option" to purchase

the land; the conveyance of the lots depended not on Prime Venturers' decision to exercise a right to purchase, but rather on the successful subdivision of the Lots.

We also disagree with OneWest's contention that *Bowers*' holding applies in this case. In *Bowers*, a prospective land purchaser paid $100 for the "privilege of purchasing for $18,000" a plot of land. This contract provided that it "shall extend for 180 days; or, *if the requisite zoning and permits*, described in Article 4 hereof have not been finally issued or denied beyond appeal, until 15 days after such final action thereon." 261 Md. at 287 (Emphasis added). *Bowers* concluded that this provision was (1) "void and unenforceable as violating the rule against perpetuities, and, [2] in any event, . . . [it] would be an unreasonable restraint on alienation." *Id.* Only in passing did the Court discuss the possibility that as an "option in gross," the context might have a five year limitation that would potentially be a ground to invalidate it.[15]

[15] In *Bowers*, the Court of Appeals discussed "[a]n especially helpful and provocative Law Review Article [] by Albert Langeluttig entitled 'Options To Purchase And The Rule Against Perpetuities,' 17 Va. L. Rev. 461-472 (1931)." That article explained that "all options in gross for a longer period than five years should be held void as an unreasonable restraint on alienation."

> The real objection to options in gross is that by the use of such options an individual, or a small group, at small cost *could obtain control of, and dictate the use of, huge bodies of land*. The same policy which lies back of the mortmain acts and the acts limiting the power of corporations to hold land, should prohibit this use of the device of long term options.

Id. at 303 (Emphasis added) (citing Langeluttig, *supra* at 471).

Unlike in *Bowers*, paragraph 2 of the repurchase agreement limits its duration to ten years. Thus, we see no reason why this contract creates an unreasonable restraint on alienation.

OneWest next argues that the repurchase agreement is not an enforceable covenant because it does not "touch and concern the land." *See Gallagher v. Bell*, 69 Md. App. 199, 208 (1986) (Quotation omitted) (The required elements for a covenant are that: "(1) the covenant 'touch and concern' the land; (2) the original covenanting parties intend the covenant to run; and (3) there be some form of privity of estate. A fourth requirement, 'sometimes mentioned,' is that the covenant be in writing").

OneWest argues that "[t]here is nothing in the repurchase agreement that benefited or burdened either the Leupens or Prime Venturers with respect to their occupation of the Property, as nothing was required to be done other than transferring the property upon the occurrence of certain contingencies." Prime Venturers counters that the refinance deed of trust states that the title of the lender is "unencumbered, except for encumbrances of record," and is "subject to any encumbrances of record." It claims that rights reserved in the repurchase agreement clearly constitute "encumbrances." Specifically, Prime Venturers' right to reacquire the land for no additional consideration was an encumbrance that directly touched and concerned the land.

In *Gallagher v. Bell*, 69 Md. App. 199, 209-10 (1986), this Court said:

> The Maryland Court of Appeals, on several occasions, has defined the "touch and concern" test in terms of whether performance of the covenant will "tend necessarily to enhance [the] value [of the land] or render it more convenient

> or beneficial to the owners or occupants." That, of course, looks at the issue essentially from the benefit point of view. . .
>
> > [I]f the covenantor's legal interest in land is rendered less valuable by the covenant's performance, then the burden of the covenant satisfies the requirement that the covenant touch and concern land. If, on the other hand, the covenantee's legal interest in land is rendered more valuable by the covenant's performance, then the benefit of the covenant satisfies the requirement that the covenant touch and concern land.

The contract here, the repurchase agreement, clearly burdens the Leupens—they could not dispose of it as they wished, but rather had an obligation to reconvey it to Prime Venturers. Whether or not it was proper for the Leupens to further encumber the land by using all of the lots as collateral in the refinancing, the existence of the repurchase agreement clearly imposed an obligation on whoever held title to the land, because, as we previously held, that Agreement did not "merge" and thus was binding on subsequent owners. *See Prime Venturers*, 213 Md. App. at 143.

Because AmTrust and then OneWest were on constructive notice of the properly filed repurchase agreement, and in light of our previous holding that the agreement was collateral to, and did not merge with, the deed, we uphold the court's grant of an injunction requiring release of the lien.

APPEAL DISMISSED IN PART. JUDGMENT OF THE CIRCUIT COURT AFFIRMED IN PART AND REVERSED IN PART. CASE IS REMANDED FOR FURTHER PROCEEDINGS. COSTS TO BE DIVIDED EQUALLY BETWEEN THE PARTIES.