UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0530

September Term, 2014

CLIFFORD CAIN, JR.

v.

MIDLAND FUNDING, LLC

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*Zarnoch,
Leahy,
**Hotten,

JJ.

Opinion by Leahy, J.

Filed: April 21, 2016

*Zarnoch, Robert A., J., participated in the hearing and conference of this case while an active member of this Court; he participated in the adoption of this opinion as a retired, specially assigned member of this Court.

**Hotten, Michelle D., J., participated in the hearing of this case while still an active member of this Court but did not participate in the preparation or adoption of this opinion.

In 2009, Midland Funding, LLC ("Appellee"), sought and obtained a small claims judgment on a credit card debt owed by Appellant Clifford Cain, Jr. ("Mr. Cain"). After this Court's decision in *Finch v. LVNV Funding, LLC*, 212 Md. App. 748, 764, *reconsideration denied* (Sept. 3, 2013), *cert. denied sub nom. LVNV Funding v. Finch & Dorsey*, 435 Md. 266 (2013), holding that a judgment entered in favor of an unlicensed debt collector is a void judgment as a matter of law, Mr. Cain filed a putative class action for damages related to Midland's unlicensed debt collection. Midland filed a petition to compel arbitration pursuant to the Cardmember Services Agreement between Mr. Cain and CitiBank. After a hearing, the Circuit Court for Baltimore City concluded that the contractual right to compel arbitration was not barred by the doctrine of merger as Mr. Cain contended. The court also found that Midland had not waived the right to compel arbitration, and that "the present action clearly falls within the purview of the arbitration agreement."

Mr. Cain filed a timely appeal and presents the following questions, which we have reordered:

I. Did any and all rights Midland had as assignee under the purported 2003 credit card contract between Mr. Cain and Citibank merge into the 2009 judgment that Midland obtained based on that credit card agreement?

II. Did Midland waive its right to invoke arbitration under any valid agreement that may have existed between Mr. Cain and Citibank by (i) filing suit against Mr. Cain in 2009 and obtaining a judgment against him in the District Court of Maryland, and (ii) litigating a nationwide class action in federal court for five years that included Mr. Cain as a class member, without ever once invoking that arbitration provision?

III. Is a finding of prejudice required under Maryland law to establish that Midland waived its right to arbitrate, and if so, were Mr. Cain and the proposed class prejudiced by Midland's actions?

We conclude that the arbitration provision was not merged into the 2009 small claims judgment and that it remains applicable to the separate cause of action now advanced by Mr. Cain. Additionally, the circuit court did not clearly err in determining that Midland's conduct in this case did not reflect a refusal to arbitrate, that Midland's petition to compel arbitration was not unduly delayed, and thus, that Midland had not waived the right to compel arbitration. We affirm.

BACKGROUND

On or about October 15, 2003, Mr. Cain opened an AT&T Universal Savings and Rewards Card account with Citibank ("Citibank Account"). In February 2005, Citibank issued a "Notice of Change in Terms, Right to Opt Out, and Information Update" applicable to the Citibank Account. That notice, making changes effective April 2, 2005, provided, in pertinent part:

> **The Changes to the Arbitration Provision:** . . . [W]e are replacing the existing Survival and Severability of Terms section with the section shown below.
>
> ***Survival and Severability of Terms*:**
>
> This arbitration provision shall survive: (i) termination or changes in the Agreement, the account, or the relationship between you and us concerning the account; (ii) the bankruptcy of any party; and (iii) any transfer, sale or assignment of your account, or any amounts owed on your account, to any other person or entity. If any portion of this arbitration provision is deemed invalid or unenforceable, the entire arbitration provision shall not remain in force. No portion of this arbitration provision may be amended, severed, or waived absent a written agreement between you and us.

According to his own testimony, Mr. Cain ceased using or making payments on the Citibank Account sometime in 2007.[1] On August 29, 2008, pursuant to a bill of sale, Citibank assigned all rights, title, and interest in the debt on the Citibank Account to Midland. The "Bill of Sale, Assignment, and Assumption Agreement" executed by Citibank and Midland provided that "the Bank does hereby transfer, sell, assign, convey, grant, bargain, set over and deliver to [Midland], and to [Midland's] successors and assigns, the Accounts described in Section 1.2 of the [Purchase and Sale Agreement]." Thereafter, on March 30, 2009, Midland filed a complaint in the district court in Baltimore City to collect the outstanding balance on the Citibank Account. The district court entered judgment for Midland in the amount of $4,520.54 on August 19, 2009.

Although Midland was doing business as a "collection agency" as defined by the Maryland Collection Agency Licensing Act ("MCALA")—codified at Maryland Code (1992, 2004 Repl. Vol., 2009 Supp.) Business Regulation Article ("BR"),[2] § 7-101 *et*

[1] In the summer of 2005, Mr. Cain reported his card lost or stolen and was issued a replacement card with a new number. Accordingly, there are two separate card numbers reflected on the account documents at different points in time**.**

[2] BR § 7-101 provides, in part:

> (c) *Collection agency.* – "Collection agency" means a person who engages directly or indirectly in the business of:
>
> (1)(i) collecting for, or soliciting from another, a consumer claim; or
>
> (ii) collecting a consumer claim the person owns, if the claim was in default when the person acquired it;
>
> (2) collecting a consumer claim the person owns, using a name or other artifice that indicates that another party is attempting to collect the consumer claim; (continued…)

seq.—the company was not licensed as a debt collector in Maryland until January 15, 2010. On June 28, 2013, this Court published its opinion in *Finch v. LVNV Funding, LLC*, and stated:

> [W]e hold that a judgment entered in favor of an unlicensed debt collector constitutes a void judgment as a matter of law. Accordingly, any judgments obtained by LVNV in the district court while operating as an unlicensed collection agency are void.
>
> * * *
>
> We hold that because the underlying judgments are void, appellants may collaterally attack these judgments in a circuit court action.

212 Md. App. at 764 (footnote omitted).

The Putative Class Action Complaint

On July 30, 2013, Mr. Cain filed a putative class action against Midland in the circuit court arguing that Midland's failure to comply with the licensure requirements in BR § 7-301[3] rendered Midland unable to engage in debt collection activities and, relying on

> (3) giving, selling, attempting to give or sell to another, or using, for collections of a consumer claim, a series or system of forms or letters that indicates directly or indirectly that a person other than the owner is asserting the consumer claim; or
> (4) employing the services of an individual or business to solicit or sell a collection system to be used for collection of a consumer claim.

[3] BR § 7-301 provides:

> (a) Except as otherwise provided in this title, a person must have a license whenever the person does business as a collection agency in the State.
> (b) This section does not apply to:
> (1) a regular employee of a creditor while the employee is acting under the general direction and control of the creditor to collect a consumer claim that the creditor owns; or (continued…)

Finch, maintained that the August 2009 judgment obtained against Mr. Cain was void. Mr. Cain sought to represent a class comprised of:

> Those persons sued by MIDLAND in Maryland state courts from October 30, 2007 through January 14, 2010 for whom MIDLAND obtained a judgment for an alleged debt, interest or costs, including attorney's fees in its favor in an attempt to collect a consumer debt.

The complaint asserted five causes of action, including requests for declaratory and injunctive relief based on Midland's activities as an unlicensed collection agency, and a claim for unjust enrichment. Mr. Cain sought relief in the form of a money judgment "of a sum directly related to the [now void] judgment sums, pre- and post-judgment interest and costs (including attorney's fees)[.]" The complaint further alleged that Midland's unlicensed collection activities violated the Maryland Consumer Debt Collection Act ("MCDCA"), Maryland Code (1975, 2005 Repl. Vol., 2009 Supp.) Commercial Law Article ("CL"), § 14-201 *et seq.*, and the Maryland Consumer Protection Act ("MCPA"), CL § 13-301 *et seq*.

On September 6, 2013, the parties filed a consent motion to stay the case pending the resolution of *Finch v. LVNV* in the Court of Appeals. The circuit court entered the requested stay on September 12, 2013. Less than a month later, on October 8, the Court of Appeals denied certiorari in *LVNV Funding v. Finch & Dorsey*, 435 Md. 266 (2013).

> (2) a regular employee of a licensed collection agency while the employee is acting within the scope of employment.

The Petition to Compel Arbitration

Midland filed a petition to compel arbitration and stay the proceedings pursuant to Maryland Code (1973, 2013 Repl. Vol.) Courts and Judicial Proceedings Article ("CJP"), §§ 3-202, -207, -209 on October 24, 2013. In the alternative, Midland moved to dismiss the complaint. Midland argued that, pursuant to the Card Agreement governing the Citibank Account, any disputes arising out of the account are subject to binding arbitration, and that Citibank's right to enforce the arbitration provision in that agreement passed to Midland when it purchased and was assigned the account in 2008.

Mr. Cain filed an opposition to the petition to compel arbitration on October 25, 2013, arguing, in part, that the case should not proceed to arbitration because "no private arbitrator could possibly issue any declaration to void the state court judgments obtained by [Midland]." Mr. Cain further argued that arbitration is a matter of contract and requires consent, and maintained that no contract between Midland and Mr. Cain existed. Rather, Mr. Cain maintained that Midland "only proffer[ed] a 2011 form agreement that can be downloaded from a website" while the "only activity [Midland] allege[d] on the account occurred between July 2006 and November 2007." Thus, Mr. Cain argued that Midland had failed to produce any valid and enforceable contract to arbitrate upon which a court could make the requisite determination that an agreement exists before ordering arbitration pursuant to CJP § 3-207.[4]

[4] CJP § 3-207 provides:

(continued…)

On October 30, 2013, the circuit court entered an order lifting the September 12 stay. On November 12, 2013, Midland filed an amended petition to compel arbitration, providing as an attached exhibit an "exemplar copy of the Cardmember Services Agreement that applied to AT&T Universal Card accounts as of October 15, 2003[.]" Midland also submitted the affidavit of Ezra S. Gollogly, Esq., affirming that he had requested, from Citibank's customer relations department, copies of the Cardmember Services Agreements that applied to AT&T Universal Card accounts as of October 15, 2003 and April 6, 2007. Copies of those agreements were appended to Mr. Gollogly's affidavit.

Mr. Cain responded to the amended petition on December 2, 2013, and argued that:

> Here, Midland has not even claimed through any affidavit that the form agreements, it has referred to as nothing more than "exemplars," are applicable to the [Mr. Cain's] account. . . . [Midland] expects the Court to ignore its failures and make unwarranted assumptions to alleviate its burden to prove that [Mr. Cain] ever agreed to arbitrate.

(a) *Refusal to arbitrate.* — If a party to an arbitration agreement described in § 3-202 of this subtitle refuses to arbitrate, the other party may file a petition with a court to order arbitration.
(b) *Denial of existence of arbitration agreement.* — If the opposing party denies existence of an arbitration agreement, the court shall proceed expeditiously to determine if the agreement exists.
(c) *Determination by court.* — If the court determines that the agreement exists, it shall order arbitration. Otherwise it shall deny the petition.

On December 17, 2013, Mr. Cain filed a motion to certify the class. Two days later, however, the circuit court entered an order staying all discovery in the case pending resolution of the petition to compel arbitration.[5]

On February 20, 2014, the circuit court heard argument on the petition to compel arbitration. Regarding the existence and/or applicability of an agreement to arbitrate, Midland posited that, pursuant to CJP § 3-208(c)[6], "if there is a substantial and bona[ ]fide dispute . . . then it is for [the court] to make the determination after a trial." In response, however, Mr. Cain argued that Midland had generated no bona fide dispute as to whether an agreement existed.

After hearing arguments from both parties, the court concluded:

> The Court, in this case, and on the occasion of any Motion to Compel Arbitration, must determine whether there is an agreement to arbitrate.
>
> If there's no dispute that there's an agreement to arbitrate, that's when the role of this Court ends and the case goes off to arbitration. There is a

[5] The circuit court's stay order entered on December 19 also recognized as still pending Midland's motion for protective order (filed November 14, 2013) and Mr. Cain's opposition to that motion (filed on December 3, 2013). The motion for protective order, however, does not affect the substance of this appeal.

[6] CJP § 3-208 provides:

(a) *Petition to stay.* — If a party denies existence of the arbitration agreement, he may petition a court to stay commenced or threatened arbitration proceedings.
(b) *Filing of petition.* — (1) A petition to stay arbitration shall be filed with the court where a petition to order arbitration has been filed. (2) If a petition for order to arbitrate has not been filed, the petition to stay arbitration may be filed in any court subject to venue provisions of Title 6 of this article.
(c) *Determination of existence of arbitration agreement.* — If the court determines that existence of the arbitration agreement is in substantial and bona fide dispute, it shall try this issue promptly and order a stay if it finds for the petitioner. If the court finds for the adverse party, it shall order the parties to proceed with arbitration.

> bona[ ]fide dispute as to the existence of the terms of agreement to arbitrate the existence of an arbitration agreement. And I [am] compelled, given the denial of the existence of the arbitration agreement by Mr. Cain, as I hear and see his denial of the terms of an arbitration agreement within the meaning of [CJP] 3-207(b), to then proceed -- well, the instruction is under (c) of 3-207, "If the Court determines that the agreement exists, it shall order arbitration. Otherwise, it shall deny the petition unless there's a denial of the existence of the arbitration agreement."
>
> Then I am to proceed expeditiously to determine if the agreement exists. And I am compelled in these circumstances, given the denial by Mr. Cain, to proceed under 3-208(c), the existence of the arbitration agreement is in substantial and bona[ ]fide dispute. I [cannot] rely on [Midland's Counsel's] affidavit to conclusively establish the existence of the agreement and its terms as of the relevant time in 2003. I must then try this case promptly and order a stay if I ultimately find for [Midland].

Subsequently, on February 24, 2014, the circuit court entered an order stating that because a substantial and bona fide dispute existed, "the Court shall proceed expeditiously to try the issue and determine if the arbitration agreement exists[.]" The court's order also allowed the parties to "exchange discovery requests and/or conduct limited deposition examinations . . . limited solely to the existence of an arbitration agreement . . . ."

On March 6, 2014, Mr. Cain filed a notice of video deposition for Midland's corporate designee. Then, on March 19, 2014, Midland filed a motion for protective order arguing that the topics on which the corporate designee was to be prepared to testify exceeded the scope of the limited discovery provided in the February 24 order. Mr. Cain opposed that motion on March 24. Following a March 28, 2014 hearing, the circuit court granted in part and denied in part the motion for protective order on March 31.

The Bench Trial on the Existence of an Agreement to Arbitrate

On April 16, 2014, the circuit court held a bench trial on the limited issue of the existence of the agreement to arbitrate between the parties in accordance with CJP § 3-208(c). In his testimony, Mr. Cain maintained that the only agreement he could remember receiving was mailed to him in the week before the bench trial. However, Mr. Cain acknowledged that he knew that "there were terms" and agreed that "some place there was an agreement in which [he] and the credit card company agreed to what the terms of [his] use of the card would be . . . ." Midland entered exhibits including copies of Mr. Cain's Citibank Account statements, which were authenticated by Mr. Cain during his testimony. One of those statements included the notice of change in terms reproduced above. Midland also presented the video deposition testimony of Elizabeth Barnett, Senior Program Manager and Vice President in the legal department for Citibank, N.A., who testified that she was asked to gather information maintained by Citibank on the history of Mr. Cain's account, including Mr. Cain's card agreements, "archived customer service notes . . . [and] statements for [Mr. Cain's] account[.]"[7] Ms. Barnett identified Midland's Exhibit 2 (then defense deposition Exhibit 9) as "the card agreement that was provided to

[7] Ms. Barnett further testified that she requested the initial card agreement and any changes in terms related to arbitration for Mr. Cain's account. She testified that Citibank's records revealed that Mr. Cain should have received a Cardmember Services Agreement in October 2003 or shortly thereafter, and that there was no indication in the account records that any mail had been returned undelivered.

[her] as being the agreement for Mr. Cain's account at the time he opened it in October 2003."

On May 1, 2014, the circuit court entered a memorandum opinion and order granting the petition to compel arbitration. The court stated:

> [T]his court finds that [Midland's] Exhibit 2 was the credit card agreement between Citibank and [Mr.] Cain in and following 2003, and the arbitration provisions were contained within the credit card agreement.
>
> * * *
>
> [Mr. Cain's] credit card agreement set out the arbitration terms reproduced below in substantial part:
>
> > **ARBITRATION:**
> > **PLEASE READ THIS PROVISION OF THE AGREEMENT CAREFULLY. IT PROVIDES THAT ANY DISPUTE MAY BE RESOLVED BY BINDING ARBITRATION. ARBITRATION REPLACES THE RIGHT TO GO TO COURT, INCLUDING THE RIGHT TO A JURY AND THE RIGHT TO PARTICIPATE IN A CLASS ACTION OR SIMILAR PROCEEDING. IN ARBITRATION, A DISPUTE IS RESOLVED BY AN ARBITRATOR INSTEAD OF A JUDGE OR JURY. ARBITRATION PROCEDURES ARE SIMPLER AND MORE LIMITED THAN COURT PROCEDURES.**
> >
> > **Agreement to Arbitrate:**
> > Either you or we may, without the other's consent, elect mandatory, binding arbitration for any claim, dispute, or controversy between you and us (called "Claims").
> >
> > **Claims Covered:**
> > • **What Claims are subject to arbitration?** All Claims relating to your account, a prior related account, or our relationship are subject to arbitration, including Claims regarding the application, enforceability, or interpretation of this Agreement and this arbitration provision. All Claims are subject to arbitration, no matter what legal theory they are based on or what remedy (damages, or injunctive or declaratory relief) they seek. This includes Claims based on contract,

tort (including intentional tort), fraud, agency, your or our negligence, statutory or regulatory provisions, or any other sources of law; Claims made as counterclaims, cross-claims, third-party claims, interpleaders or otherwise; Claims made independently or with other claims. A party who initiates a proceeding in court may elect arbitration with respect to any Claim advanced in that proceeding by any other party. Claims and remedies sought as part of a class action, private attorney general or other representative action are subject to arbitration on an individual (non-class, non-representative) basis, and the arbitrator may award relief only on an individual (non-class, non-representative basis).

• **Whose Claims are subject to arbitration?** Not only ours and yours, but also Claims made by or against anyone connected with us or you claiming through us or you, such as a co-applicant or authorized user of your account, an employee, agent, representative, affiliated company, predecessor or successor, heir, assignee, or trustee in bankruptcy.

• **What time frame applies to Claims subject to arbitration?** Claims arising in the past, present, or future, including Claims arising before the opening of your account, are subject to arbitration.

• **Broadest interpretation.** Any questions about whether Claims are subject to arbitration shall be resolved by interpreting this arbitration provision in the broadest way the law will allow it to be enforced. This arbitration provision is governed by the Federal Arbitration Act (the "FAA").

• **What about Claims filed in Small Claims Court?** Claims filed in small claims court are not subject to arbitration, so long as the matter remains in such court and advances only an individual (non-class, non-representative) Claim.

How Arbitration Works:

* * *

At any time you or we may ask an appropriate court to compel arbitration of Claims, or to stay the litigation of Claims pending arbitration, even if such Claims are part of a lawsuit, unless a trial has begun or a final judgment has been entered. Even if a party fails to exercise these rights at any particular time, or in connection with any particular Claims, that party can still require arbitration at a later time or in connection with any other Claims.

* * *

Survival and Severability of Terms:
•This arbitration provision shall survive: (i) termination or changes in the Agreement, the account, or the relationship between you and us concerning the account; (ii) the bankruptcy of any party; and (iii) any transfer, sale or assignment of your account, or any amounts owed on your account, to any other person or entity. If any portion of this arbitration provision is deemed invalid or unenforceable, the remaining portions shall nevertheless remain in force. Any different agreement regarding arbitration must be agreed to in writing.

* * *

This Court finds that the present dispute clearly falls within the scope of the arbitration provisions agreed between [Mr. Cain] and Citibank.

* * *

Given the broad scope of the agreement and the absence of exclusions relevant to the present action, this Court finds that the subjects of dispute articulated in the Complaint fall within the scope of the arbitration agreement.

* * *

The claims brought by [Mr.] Cain in the present action are distinct from [Appellee] Midland's small claims court action in District Court involving the same parties. While the present action is related to certain aspects of the small claims action, [Mr. Cain] seeks additional relief well beyond the scope of voiding judgment entered in the District Court action. Once the class action demands for relief were initiated in this Court, [Midland] did not sit on its rights; rather, it sought arbitration at the first available juncture in this case. Accordingly, this Court finds that the prior small claims action is distinct from the present action and, because, [Midland] made a prompt motion to compel in this action, [Midland] has not waived its right to compel arbitration.

(Emphasis in original) (footnote omitted).

Mr. Cain noted a timely appeal on May 6, 2014.[8] Additional facts will be presented as the discussion requires.

DISCUSSION

A trial court's decision on whether an agreement to arbitrate exists is a conclusion of law, which we review *de novo*. *Freedman v. Comcast Corp.*, 190 Md. App. 179, 191-92 (2010) (citing *Holloman v. 192 Circuit City Stores, Inc.,* 391 Md. 580, 588 (2006)). Similarly, after the court has determined the existence of an agreement to arbitrate, the interpretation of that agreement—including whether a given dispute is subject to arbitration—is a question of law reviewed *de novo. All State Home Mortg., Inc. v. Daniel*, 187 Md. App. 166, 180 (2009) (citing *Walther v. Sovereign Bank,* 386 Md. 412, 422 (2005)). A trial court's finding of whether a party has waived its contractual right to arbitration is, however, a factual determination that we will reverse only if clearly erroneous. *Commonwealth Equity Servs., Inc. v. Messick*, 152 Md. App. 381, 393-94 (2003) (citations omitted).

Mr. Cain's issues on appeal do not challenge the circuit court's determinations regarding the literal existence of an agreement to arbitrate. Rather, Mr. Cain now challenges whether the arbitration provision survived the 2009 district court judgment and whether Midland has waived the right to arbitrate.

[8] "In Maryland, an order of a circuit court compelling arbitration completely terminates the action in the circuit court and is an appealable final judgment under CJ § 12-301." *Freedman v. Comcast Corp.*, 190 Md. App. 179, 190 (2010) (citing *Wells v. Chevy Chase Bank, F.S.B.*, 363 Md. 232, 241 (2001)).

I.

Merger into the 2009 Judgment

Before the circuit court, Mr. Cain argued that, even if an arbitration agreement existed between the parties, once Midland had obtained a judgment against Mr. Cain regarding the unpaid credit card debt, the arbitration clause merged into that judgment and was no longer effective. Mr. Cain cited to the portion of the arbitration provision contained in the trial exhibits which stated "[a]t any time you or we may ask an appropriate court to compel arbitration of Claims . . . unless a trial has begun or a final judgment has been entered." Midland, in response, argued that the present dispute was distinct from the 2009 district court action, but was still related to Mr. Cain's Citibank Account and the relationship between Citibank and Mr. Cain—making it subject to arbitration.

The circuit court agreed with Midland's interpretation and stated:

> [Mr. Cain] filed his Complaint in the Circuit Court and challenges [Midland's] unlicensed debt collection practices over several years, seeking relief that goes well beyond simply voiding the judgment entered in the District Court in [Midland's] collection action several years ago. [Mr. Cain] seeks to obtain declaratory and injunctive relief well outside the limited scope of the prior collection action in the small claims court. Now, [Mr. Cain] asserts claims of unjust enrichment and seeks relief under two distinct statutes. The present action is not in the nature of rehashing or reconsidering the small claims judgment against [Mr.] Cain; rather, this action uses the prior judgment as a springboard for [Mr. Cain's] damage claims addressing [Midland's] general debt collection practices. Therefore, this Court rejects [Mr. Cain's] assertion that the prior judgment precludes [Midland's] ability to compel arbitration under the terms of the agreement, and finds that the present action clearly falls within the purview of the arbitration agreement.

Mr. Cain argues, on appeal, that the circuit court was incorrect in its determination that his claims are "well outside the limited scope of the prior collection action." Further,

Mr. Cain maintains that any contractual right to demand arbitration was "'terminated in the judgment' Midland obtained against [Mr.] Cain previously[,]" because it was part of the same contract on which Midland sued Mr. Cain. Mr. Cain maintains that under the Rule of Merger all substantive rights in the contract, including the right to compel arbitration, merged into the 2009 district court judgment.

Midland's position is that merger is simply inapplicable because there has been no attempt to relitigate any issue or claim previously reduced to a judgment. Rather, Midland maintains that it "is instead exercising its contractual right to arbitration in its defense of different claims." Midland asserts that its contractual right to compel arbitration had no bearing on its claim for damages in the small claims action and points out that the provision itself provides that it "'shall survive termination or changes in the agreement . . . .'"

Maryland appellate courts recognize that, under the rule of merger, "'a simple contract is merged in a judgment or decree rendered upon it, and that all its powers to sustain rights and enforce liabilities terminate[] in the judgment or decree . . . .'" *Accubid Excavation, Inc. v. Kennedy Contractors, Inc.*, 188 Md. App. 214, 232-33 (2009) (quoting *Jackson v. Wilson,* 76 Md. 567, 571 (1893)). The Restatement (Second) of Judgments § 18 (1982) defines the rule of merger as follows:

> When a valid and final personal judgment is rendered in favor of the plaintiff:
>
> (1) The plaintiff cannot thereafter maintain an action on the original claim or any part thereof, although he [or she] may be able to maintain an action upon the judgment; and

> (2) In an action upon the judgment, the defendant cannot avail himself [or herself] of defenses he [or she] might have interposed, or did interpose, in the first action.

Certainly, "a claim merges into a judgment obtained with respect to that claim." *United Book Press, Inc. v. Maryland Composition Co.*, 141 Md. App. 460, 474 (2001) (citing Restatement (Second) of Judgments § 18 cmt. a (1982)). However, where the cause of action is separate and distinct from that on which the earlier judgment was obtained and is not founded in the contract on which that judgment was obtained, the new claim is not necessarily merged into the judgment. *See, e.g.*, *Id.* ("The cause of action against appellee is a separate cause of action on a separate contract between appellant and appellee. Mr. Cain's claim against appellee did not merge into its judgment against Strathmore."). Addressing the discharge of contractual duties following a judgment or arbitral award, *Corbin on Contracts* states:

> If the existence or extent of a primary or secondary contractual duty is the focus of a cause of action in a court having jurisdiction over the matter, a final judgment on that cause of action extinguishes **the duty**.
>
> * * *
>
> If the antecedent duty is confirmed by a judgment for the plaintiff and the performance of the duty is either decreed or damages are ordered or restitution for the breach of the duty is granted, the duty is said to be discharged by merger. **The primary contractual duty and the secondary duty to make reparation for breach are merged in the confirming judgment.** As long as the judgment has not been set aside on some sufficient ground, the legal relations of the parties are now determined by the judgment.

13 Joseph M. Perillo, Corbin on Contracts § 73.3, p. 492-93 (Rev. ed. 2003) (emphasis added) (footnotes omitted).

Some contractual rights may be preserved despite merger. *Monarc Constr., Inc. v. Aris Corp.*, 188 Md. App. 377, 398 (2009) (citing *Caine & Weiner v. Barker*, 713 P.2d 1133, 1135 (Wash. Ct. App. 1986) ("[W]here the original obligation provides for special rights or exemptions, in some circumstances these may be preserved and recognized despite merger.")). "[D]espite the general rule that underlying rights and obligations are extinguished by the judgment, the doctrine is designed to promote justice and should not be carried further than that end requires." *Caine & Weiner*, 713 P.2d at 1135 (citing 11 Am. Jur. 2d *Bills & Notes* § 922 (1963); 50 C.J.S. *Judgments* § 599 (1947)). Indeed, in both *Monarc Construction*, 188 Md. App. at 398, and *SunTrust Bank v. Goldman*, 201 Md. App. 390, 404-05 (2011), this Court recognized the possibility that parties could avoid the merger bar by clearly stating their intent in the contract that a fee shifting position shall not merge into a judgment on the primary duty in the contract.[9]

Mr. Cain relies on *Allstate Ins. Co. v. Stinebaugh*, 374 Md. 631 (2003), arguing that the consent order in *Stinebaugh* had the same purpose and effect as a court judgment on a contract claim, *i.e.*, to supersede, by merger, the original contract by defining duties and resolving the contract claim. However, in *Stinebaugh*, the parties entered into a general arbitration agreement, but "subsequently b[ou]nd themselves to a Consent Order that

[9] In *SunTrust Bank*, we also observed that "[a] merger can be avoided by legislative action, *i.e.*, a legislative body may create a statutory remedy allowing parties to collect post-judgment legal expenses incurred when the underlying contract provides for the award of attorneys' fees." 201 Md. App. at 403.

contemplate[d] judicial resolution of a particular controversy." *Id.* at 635. Examining the effect of the consent order on the prior agreement to arbitrate, the Court of Appeals stated:

> The Consent Order clearly indicates where the liability determination was to occur-"The Cross-claims between Defendants shall remain at issue and subject to resolution on the currently scheduled trial date of May 17, 2001, or may be resolved by other means mutually agreed to by all Defendants." The [] language is prospective in character. Thus, the Consent Order clearly superseded the arbitration agreement and discharged any right Allstate may have had to arbitrate the negligence controversy.

Id. at 649-50 (footnote omitted). Plainly, the right to arbitrate in *Stinebaugh* was superseded by a subsequent agreement of the parties that, in part, spoke directly to that right. *Id.* The doctrine of merger, therefore, played no role and Mr. Cain's reliance on *Stinebaugh* is misplaced.

In the matter *sub judice*, we agree with the circuit court's conclusion that "[t]he present action is not in the nature of rehashing or reconsidering the small claims judgment against [Mr.] Cain; rather, this action uses the prior judgment as a springboard for [Mr. Cain's] damage claims addressing [Midland's] general debt collection practices." The 2009 action was based on the claim that Mr. Cain breached the primary duty under the contract—to make payments on the account. The breach in the 2009 action was the failure to pay and the remedy sought was the payment of monies owed under the contract. Accordingly, "[t]he primary contractual duty and the secondary duty to make reparation for breach are merged in the confirming judgment." *See* 13 Joseph M. Perillo, Corbin on Contracts § 73.3, p. 493. *Cf. Accubid Excavation, Inc.*, 188 Md. App. at 233 (determining that the contractual attorneys' fees claimed were part of the damages

claim and therefore merged into the final judgment). The present action, however, does not arise from a duty created by the Citibank Account contract, nor does it seek damages or other remedy for any breach of that contract. Rather, it seeks, as the circuit court characterized it, "relief well beyond the scope of voiding judgment entered in the District Court action."

We acknowledge that the primary contractual duty and the ability to seek damages for breach, as well as "[a]ll issues, theories, and alternative remedies relevant to the cause of action in the first suit," were merged into the judgment. *See* 13 Joseph M. Perillo, Corbin on Contracts § 73.3, p. 493. The arbitration clause, however, is not tied to a specific contractual duty. Rather, it applies to "[a]ll Claims relating to [Mr. Cain's] account . . . or [the] relationship" between Mr. Cain and CitiBank, including "[c]laims and remedies sought as part of a class action." Moreover, the arbitration provision in Mr. Cain's contract also contains a survival and severability of terms clause, reproduced *supra*, which provides that the provision survives "termination or changes in the Agreement, the account, or the relationship between you and us concerning the account[.]"

We affirm the circuit court's decision that the arbitration provision was not merged into the 2009 judgment, and it remains applicable to the separate cause of action subsequently advanced by Mr. Cain.

II.

Waiver

Mr. Cain argues that, by "avail[ing] itself of the judicial system with respect to Mr. Cain in March of 2009, when it filed a debt collection action against him . . . and pursued that action through judgment[,]" Midland waived the right to arbitrate. Mr. Cain maintains that the present action is so closely related to the 2009 district court action that Midland waived arbitration as to both claims. Mr. Cain also points to Midland's use of the judicial system in negotiating and seeking court approval of two class settlements in *Vassalle v. Midland Funding LLC*, 708 F.3d 747 (6th Cir. 2013). Mr. Cain asserts that he was a member of the putative class in *Vassalle* and that, to his knowledge, Midland never attempted to invoke arbitration against him or any other member of that class in that case. Further, Mr. Cain argues that, by delaying the request to compel arbitration in this case by requesting a stay until the Court of Appeals's review of *Finch v. LVNV Funding, LLC*, *supra*, 212 Md. App. 748 (2013) was complete, Midland engaged in "blatant procedural gamesmanship" and thereby waived the right to arbitrate.

Midland asserts that none of its actions constituted a knowing and intentional waiver of the right to arbitrate this dispute. Midland points to the arbitration provision itself which states, in pertinent part, that "[c]laims filed in small claims court are **not subject to arbitration**, so long as the matter remains in such court and advances only an individual (non-class, non-representative) Claim." (Emphasis added by Midland). Thus, Midland argues that it could not have sought to compel arbitration of the 2009 claim, once filed in

small claims court, and that filing the small claims action cannot constitute waiver. Further, Midland argues that the issues and claims in the present matter are unrelated to those raised and decided in the 2009 proceeding. Finally, Midland asserts that the *Vassalle* case, filed in the United States District court for the Northern District of Ohio, is unrelated to the present matter and that "[Mr.] Cain and the putative class members in this case are not part of the *Vassalle* class."

"A party to a contract may waive a right under the contract; accordingly, a party to a contract that confers a right to arbitrate may waive that right." *Brendsel v. Winchester Constr. Co.*, 162 Md. App. 558, 573 (2005) (citing *Charles J. Frank, Inc. v. Assoc. Jewish Charities of Baltimore, Inc.,* 294 Md. 443, 448 (1982) ("*Frank*"); *Messick, supra*, 152 Md. App. at 393), *aff'd,* 392 Md. 601 (2006). In *Brendsel v. Winchester Construction Co.,* this Court stated:

> Waiver is "the intentional relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such a right." *Frank, supra,* 294 Md. at 449, 450 A.2d 1304; *The Redemptorists v. Coulthard Services, Inc.,* 145 Md. App. 116, 136, 801 A.2d 1104 (2002). "[A]cts relied upon as constituting waiver of the provisions of a contract must be inconsistent with an intention to insist upon enforcing such provisions." *Frank, supra,* 294 Md. at 449, 450 A.2d 1304 (quoting *BarGale Indus., Inc. v. Robert Realty Co.,* 275 Md. 638, 643, 343 A.2d 529 (1975)). The Maryland Uniform Arbitration Act "embodies a 'legislative policy in favor of the enforcement of agreements to arbitrate.'" *Harris v. Bridgford,* 153 Md. App. 193, 201, 835 A.2d 253 (2003) (quoting *Allstate Ins. Co. v. Stinebaugh,* 374 Md. 631, 641, 824 A.2d 87 (2003)); *Gold Coast Mall* [*v. Larmar Corp.,*] 298 Md. [96,] 103, 468 A.2d 91 [(1983)]. For that reason, **the intent to waive a right to arbitrate "must be clearly established and will not be inferred from equivocal acts or language."** *Frank, supra,* 294 Md. at 449, 450 A.2d 1304;

> *see also RTKL Assoc., Inc. v. Four Villages Ltd. P'ship,* 95 Md. App. 135, 143, 620 A.2d 351 (1993).

162 Md. App. at 574 (emphasis added).

The Court of Appeals considered, for the first time, in *Frank*, whether and to what extent "participation as a party in a judicial proceeding constitutes a waiver of the right to arbitrate issues raised and/or decided in that proceeding." 294 Md. at 449. The Court stated:

> In our view, even when participation in a judicial proceeding involving arbitrable issues arising under a contract constitutes a waiver of the right to arbitrate those issues raised and/or decided in the judicial proceeding, such conduct is not necessarily inconsistent with an intention to enforce the right to arbitrate unrelated issues arising under the same contract. Such conduct, in and of itself, is too equivocal to support an inference of an intentional relinquishment of the right to arbitrate issues other than those raised and/or decided in the judicial proceeding. We are persuaded that when a party waives the right to arbitrate an issue by participation in a judicial proceeding, the waiver is limited to those issues raised and/or decided in the judicial proceeding and, absent additional evidence of intent, the waiver does not extend to any unrelated issues arising under the contract. Our conclusion that waiver of the right to arbitrate cannot be inferred in the absence of a clear expression of intent is consonant with Maryland's legislative policy favoring enforcement of executory agreements to arbitrate.

Id. at 454. In *Brendsel*, this Court, applying the principles first laid out in *Frank*, observed that

> [i]n the two decades between the decisions of the Court of Appeals in *Frank, supra,* and [*Walther v. Sovereign Bank*, 386 Md. 412 (2005)], *supra,* this Court has on several occasions considered the degree of participation in litigation by a defendant that will effect a waiver of the right to arbitrate an otherwise arbitrable dispute. The analyses in these cases also has focused on the consistency *vel non* between the defendant's litigation conduct and his

> assertion of his right to arbitrate-and **whether the litigation conduct was tantamount to a refusal to arbitrate**.

162 Md. App. at 578 (emphasis added).

In *Abramson v. Wildman*, the appellant filed a breach of contract action in August 2004, and thereafter filed an answer to the resultant counterclaim, propounded interrogatories and a request for production of documents. 184 Md. App. 189, 193 (2009) Seven months after the initiation of the action, in April 2005, the appellant sought to compel arbitration. *Id.* at 193. This Court upheld the circuit court's determination that the appellant had waived the right to arbitrate and stated that "unlike those cases where a party's involvement in some phase of litigation was legitimately explainable and thus, not inconsistent with an intent to arbitrate . . . appellant has given no reason for persisting in the litigation." *Id.* at 202. However, the Court observed that "[s]ome 'limited participation' in judicial proceedings does not constitute a waiver." *Id*. at 200 (citing *Harris v. Bridgford,* 153 Md. App. 193, 206 (2003)). The Court contemplated factors in determining waiver, including: the filing of suit, filing "an answer directed to the merits," "[p]articipation in 'extensive' discovery,'" and "[d]elay in attempting to compel arbitration." *Id.* at 200-01 (citations omitted). *See also Messick*, 152 Md. App. at 398-99 (affirming the circuit court's ruling that two defendants in construction litigation waived their contractual right to arbitrate by filing answers, initiating and participating in discovery, and not filing motions to compel arbitration until a scheduling order was in place). The Court also pointed out that delay, by itself, may not be conclusive. *Id.* at 200.

"[I]f there is a legitimate reason for participating in litigation, it will not be deemed a waiver." *Id.* at 201 (citation omitted).

Here, Midland is correct in its assertion that the 2009 small claims action was not an arbitrable dispute under the agreement in this case. The agreement explicitly provides that "Claims filed in small claims court are not subject to arbitration, so long as the matter remains in such court and advances only an individual (non-class, non-representative) Claim." Thus, it cannot be said that the absence of an attempt to compel arbitration of that claim was evidence of a refusal to arbitrate on the part of Midland.

Moreover, assuming that Mr. Cain was a class member in the *Vassalle* case, that case arose out of a challenge to Midland employees' practice of robo-signing "between 200 and 400 computer-generated affidavits per day for use in debt-collection actions, without personal knowledge." *Vassalle*, 708 F.3d at 752. Participation in the judicial proceedings in *Vassalle* may constitute a waiver of the right to arbitrate those issues raised and/or decided in that judicial proceeding; however, "such conduct is not necessarily inconsistent with an intention to enforce the right to arbitrate unrelated issues[.]" *See Frank,* 294 Md. at 449; *see also MicroStrategy, Inc. v. Lauricia*, 268 F.3d 244, 250 (4th Cir. 2011) ("Because these claims are distinct, both factually and legally, from [the plaintiff's] discrimination claims, the litigation surrounding these claims cannot support a finding that [the defendant] waived its right to arbitrate the unrelated claims."); *Doctor's Assocs., Inc. v. Distajo*, 107 F.3d 126, 133 (2nd Cir. 1997) ("[O]nly prior litigation of the same legal and factual issues as those the party now wants to arbitrate results in waiver of

the right to arbitrate."). Likewise, Midland's filing of "over a thousand similar debt collections in the state courts against other consumers[,]" is not evidence of a refusal to arbitrate a dispute with Mr. Cain.

Mr. Cain filed this action on July 30, 2013. The docket entries in the circuit court indicate that an affidavit of service of process on Midland was filed on August 21, 2013. The next filing in the judicial action was the September 6 consent motion to stay pending the resolution of *Finch v. LVNV Funding*. Midland did not file an answer to the complaint and seek the benefit of discovery, as was the case in *Abramson*. Rather, Midland's first action was to seek a stay of the action pending an appellate decision on a matter of law central to Mr. Cain's claims, with Mr. Cain's consent. Once the stay was lifted, Midland promptly filed its petition to compel arbitration. Midland's consent motion for stay of the proceedings was a "legitimate reason for participating in litigation," and such limited participation does not equate to waiver. *See Abramson*, *supra*, 184 Md. App. at 201 (citation omitted). Moreover, we do not perceive the passage of time during the consented-to stay pending a decision by the Court of Appeals as a delay intentionally caused by Midland.

On December 19, 2013, the circuit court stayed all discovery in the case pending resolution of Mr. Cain's opposition to the petition to compel arbitration, which denied the existence of an agreement to arbitrate. Thereafter, the court allowed limited discovery on the issue of the existence of an arbitration agreement. This is distinct from participation in discovery on the merits, and therefore distinguishes this case from *Abramson* and *Messick*.

Participation in such limited discovery, aimed only at asserting the right to compel arbitration, does not waive the very right that Midland was attempting to assert. *Cf. Walther*, 386 Md. at 447-50 (holding that the filing of a petition to compel arbitration "was not a full-course plunge into the courts, but rather an effort to petition the court to compel the parties to adhere to the terms of their agreement to arbitrate 'any claim, dispute, or controversy[,]'" and did not constitute a waiver of the arbitration agreement. (citation omitted)).

We agree with the circuit court's conclusion that "the prior small claims action is distinct from the present action and, because, [Midland] made a prompt motion to compel in this action, [Midland] has not waived its right to compel arbitration."

III.

Prejudice

Having already determined that Midland did not waive its contractual right to compel arbitration, we need not address Mr. Cain's question as to whether a finding of prejudice is a necessary prerequisite to a finding of waiver. Nevertheless, without deciding, we note that the federal district courts in Maryland have made clear the necessity for a determination of prejudice before finding that waiver has occurred. In *Brooks v. Prestige Financial Services, Inc.*, a plaintiff initiated an action alleging violations of the Maryland Consumer Protection Act in a lender's attempt to collect on its loan. 827 F. Supp. 2d 509, 512 (D. Md. 2011). When the lender moved to stay proceedings and to compel arbitration, the plaintiff argued that by delaying the filing of its motion to arbitrate until

commencement of the discovery process, the lender had waived the arbitration provision. *Id.* The court, however, determined that the "delay was not so egregious as to prejudice Plaintiff and operate as a waiver of Defendant's right to arbitrate." *Id.* at 513. "[T]he dispositive question is whether the party objecting to arbitration has suffered *actual prejudice*." *Id.* at 516 (quoting *MicroStrategy, Inc.*, 268 F.3d at 249 (emphasis in *Brooks*)).

Prejudice is an appropriate factor often considered by the court in Maryland. *See, e.g.*, *Abramson*, 184 Md. App. at 200-01 ("Delay in attempting to compel arbitration, by itself, may not be conclusive, . . . although coupled with prejudice to the other party can support a finding of waiver."); *RTKL, supra*, 95 Md. App. at 144 (finding it unnecessary to decide whether delay alone can support a finding of waiver where prejudice was also found); *Messick,* 152 Md. App. at 398 (same).

In summary, we hold that the arbitration provision was not merged into the 2009 small claims judgment and it remains applicable to the separate cause of action subsequently advanced by Mr. Cain. The circuit court did not clearly err in determining that Midland's conduct in this case did not amount to a waiver of the right to compel arbitration. We affirm.

JUDGMENTS AFFIRMED.
COSTS TO BE PAID BY APPELLANT.