UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1033

September Term, 2014

ELVATON TOWNE CONDOMINIUM REGIME II, INC., *et al.*

v.

WILLIAM KEVIN ROSE, *et al.*

Meredith,
Woodward,
Wright,

JJ.

Opinion by Meredith, J.

Filed: April 21, 2016

* This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This appeal and cross-appeal arise from a case filed in the Circuit Court for Anne Arundel County by William and Dawn Rose ("the Roses"), appellees/cross-appellants, against Elvaton Towne Condominium Regime, II, Inc., and Wentworth Property Management, LLC, appellants/cross-appellees.[1] The Roses own a residential condominium unit in the Elvaton Towne Condominiums in Glen Burnie, Maryland. Elvaton asserted that the Roses were delinquent in their payment of condominium fees, and, as a consequence, Elvaton informed the Roses that, until they brought their account current, they were not permitted to use the community pool and were not permitted to park within the complex from 9 p.m. until 6 a.m. Elvaton also filed an action against the Roses in the District Court of Maryland for Anne Arundel County, in which Elvaton asserted its entitlement to a lien against the Roses' condominium unit.

The Roses then filed, in the Circuit Court for Anne Arundel County, a complaint against Elvaton that included a count requesting a declaratory judgment declaring that Elvaton was not authorized to prevent the Roses from using the complex's common areas due to an alleged delinquency. The Roses' complaint also included two counts in which they asserted that Elvaton's debt-collection practices in this instance violated the Maryland Consumer Debt Collection Act ("MCDCA") and the Maryland Consumer Protection Act

[1]Subsequent to the filing of the complaint, Wentworth Property Management changed its name to FirstService Residential MidAtlantic, LLC. It appears, from the docket, that FirstService was substituted in as a party-defendant on October 30, 2013. For simplicity's sake, because Wentworth/FirstService was merely the agent through which Elvaton attempted to collect its condo fees, we will generally refer to the appellants/cross-appellees here as "Elvaton."

("MCPA"). The Roses filed a motion to stay the district court action while the circuit court action was pending, and a stay of the district court proceeding was granted.

Prior to trial, Elvaton obtained a ruling from the circuit court precluding the Roses from litigating in the circuit court the validity of the debt which was the subject of the pending district court suit. This ruling is the target of the Roses' cross-appeal. After trial, the circuit court found in favor of the Roses on their claim that Elvaton was not permitted to restrict their use of the common areas as a means of debt collection, and the court issued a declaratory decree to that effect. Elvaton contends on appeal that the court erred in doing so.

QUESTIONS PRESENTED

In its appeal, Elvaton presents the following question:

> Whether the Circuit Court erred in declaring that Maryland law and Elvaton's Declaration and Bylaws do not provide the authority to implement rules that temporarily suspend unit owners who are delinquent in their assessments from using the community parking lot and pool?

In their cross-appeal, the Roses ask:

> Did the Circuit Court err as a matter of law by declaring that Mr. and Mrs. Rose did not have the right to determine and adjudicate the rights and liabilities of the parties[,] including the validity of the Statement of Lien[,] in the Circuit Court[,] and were required to pursue such claims and facts only in the District Court of Maryland?

We answer "no" to both questions, and affirm.

FACTS AND PROCEDURAL HISTORY

The evidence at trial revealed the following. On September 26, 2007, the Roses bought their condominium unit at Elvaton's complex. Mrs. Rose acknowledged at trial that they purchased their unit subject to Elvaton's Declaration and Bylaws. The Declaration for Elvaton Towne Condominiums, Regime Two ("Declaration") was recorded among the land records of Anne Arundel County on June 18, 1975. Among other things, the Declaration provided that "all streets, curbs, sidewalks, . . . [and] parking areas," were among the general common elements as to which each unit owner would have a fractional ownership interest.[2]

"General common elements" are defined in Maryland Code (1974, 2010 Repl. Vol.), Real Property Article ("RP"), § 11-101(c)(3) as follows:

> (c) (1) "Common elements" means all of the condominium except the units.

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[2]Exhibit 2 to the Declaration was captioned "Schedule of Percentage Interest in the Common Elements and Common Expenses and Common Profits of each unit Elvaton Town Condominiums, Regime Two," and provided:

> Each unit shall have the same Percentage Interest in the Common Elements and the Common Expenses and the Common Profits. The Percentage Interest of each unit in the Condominium Regime, expressed as a fractional formula, always shall have as its numerator, the number one (1); and the denominator thereof shall be the total number of units from time to time submitted to the Condominium Regime, beginning with the total number of units in Phase 1 with the addition thereto of the total number of units in future phases (additional phases) as may be submitted from time to time to the Condominium Regime.

> (2) "Limited common elements" means those common elements identified in the declaration or on the condominium plat as reserved for the exclusive use of one or more but less than all of the unit owners.
>
> (3) "General common elements" means all the common elements except the limited common elements.

The Declaration specified that there were "no limited common elements within the Regime created herein." Accordingly, all common elements within the Regime were "general common elements" pursuant to RP § 11-101(c).

The Declaration further provided, at § 7(C), that "[t]he common elements shall be exclusively owned in common by all of the Unit Owners," and, at § 7(F), stated:

> Each Unit Owner, in proportion to his Percentage Interest, shall contribute toward payment of the Common Expenses, and no Unit Owner shall be exempt from contributing toward said Common Expenses either by waiver of the use or enjoyment of the common Elements, or any of them, or by the abandonment of his unit. The contribution of each Unit Owner toward Common Expenses shall be determined, levied and assessed as a lien, all in the manner set forth in the By-Laws which are being recorded among the Land Records of Anne Arundel County simultaneously herewith.

The developer made explicit that it was "the intention of Developer that **each Unit Owner . . . shall have the right to use all of the recreational facilities for so long as same, including swimming pool and bath house, shall exist** . . . . This right shall be a right appurtenant to each condominium unit." (Emphasis added.)

The By-Laws, recorded the same day as the Declaration, provided, in pertinent part:

- ARTICLE V - Directors

* * *

Section 3: Powers and Duties. The Board of Directors shall have all the powers and duties necessary for the administration of the affairs of the Condominium . . . . **The powers and duties of the Board of Directors shall include but not be limited to the following**:

* * *

(b) **to establish and provide for the collection of assessments from the Unit Owners** and for the assessment and/or enforcement of liens therefor in a manner consistent with law and the provisions of these By-Laws and the Declaration;

* * *

(d) **to promulgate and enforce such rules and regulations, and such restrictions on, or requirements, as may be deemed proper respecting the use, occupancy and maintenance of the project, and the use of the general and limited common elements, as are designated, to prevent unreasonable interference with the use and occupancy of the Condominium and of the general and limited common elements by the Unit Owners, all of which shall be consistent with laws and the provisions of these By-Laws and the Declaration.**

* * *

- ARTICLE IX - Condominium Fees/Assessments

Section 1: Annual Condominium Fees/Assessments

(a) Each Unit Owner shall pay to the Council, monthly, a sum equal to one-twelfth (1/12) of the Unit Owner's proportionate share of the sum required by the Council pursuant to the Percentage Interests in Common Expenses and Common Profits . . . to meet its annual expenses, including but in no way limited to the following:

(1) The cost of all operating expenses of the Condominium Regime as the same may be constituted from time to time, and services furnished, including charges by the Council for facilities and services furnished by it;

(2) The cost of necessary management and administration, including fees paid to any Management Agent;

(3) The amount of all taxes and assessments levied against the Council or upon any property which it may own or which it is otherwise required to pay, if any;

(4) The cost of fire and extended liability insurance on the Property and the cost of such other insurance as the Council may effect;

(5) The cost of furnishing water, electricity, heat, gas, garbage and trash collection and/or utilities, to the extent furnished by the Council;

(6) The cost of funding all reserves established by the Council, including, where appropriate, a general operating reserve and/or reserve for replacements;

(7) The estimated cost of repairs, maintenance and replacements of the Condominium including general common elements, to be made by the Council; and

(8) The cost of all operating expenses, repairs, maintenance and replacements for roads, curbs and walkways.

* * *

Section 4: <u>Non-Payment of Assessment.</u>

(a) A Unit Owner shall be liable for all assessments, or installments thereof, coming due while he is the owner of a unit. . . .

(b) All assessments, until paid, constitute a lien on the units on which they are assessed, if a statement of lien is recorded within

two years after the date the assessment becomes due. The lien shall be effective against a unit from and after the time a Statement of Condominium Lien is recorded among the Land Records of the County where the unit is located, stating the description of the unit, the name of the record Owner, the amount due and the period for which the assessment was due. The Statement of Condominium Lien shall be signed and verified by an officer or agent of the Council of Unit Owners as specified in the By-Laws and then may be recorded. On full payment of the assessment for which the lien is claimed the Unit Owner shall be entitled to a recordable satisfaction of the lien.

(c) Any assessment, or installment thereof, not paid when due shall bear interest, from the date when due until paid at the rate not exceeding the maximum permissible legal rate per annum.

(d) The Council shall notify the holder of the first mortgage on any unit for which any assessment levied pursuant to these By-Laws becomes delinquent for a period in excess of thirty (30) days, and in any other case, where the Unit Owner is in default with respect to the performance of any other obligation hereunder for a period in excess of thirty (30) days.

* * *

Section 6 : <u>Acceleration of Installments</u>. Upon default in the payment of any one or more monthly installments of any assessment levied pursuant to these By-Laws, or any other installment thereof, the entire balance of said assessment may be accelerated at the option of the Board of Directors, and be declared due and payable in full.

Section 7: <u>Enforcement</u>. The lien may be enforced and foreclosed by the Council of Unit Owners, or any other person specified in the By-Laws, in the same manner, and subject to the same requirements, as the foreclosure of mortgages or deeds of trusts on real property in the state containing a power of sale, or an assent to a decree. Suit for any deficiency following foreclosure may be maintained in the same proceeding and suit to recover a money judgment for unpaid assessments may be maintained without waiving the lien securing the same. No action may be brought to foreclose the lien unless

brought within three (3) years following the recordation of the Statement of Condominium Lien. No action may be brought to foreclose the lien except after ten (10) days written notice to Unit Owner given by registered mail, return receipt requested, to the address of the Unit Owner shown on the books of the Council of Unit Owners.

* * *

- Article X - Use Restrictions

Section 3: Prohibited Uses and Nuisances.

* * *

(b) There shall be no obstruction of any general — common elements, except as herein provided. Nothing shall be stored upon any general — common elements, except as herein provided, without the approval of the Board of Directors. **Vehicular parking upon general common elements may be regulated by the Board of Directors**. . . .

* * *

(r) **There shall be no violation of any rules for the use of the general or limited common elements which may from time to time be adopted by the Board of Directors and promulgated among the Unit Owners by said Board in writing; and the Board of Directors is hereby, and elsewhere in these By-Laws, authorized to adopt such rules**.

* * *

- Article XV - Amendment

Section 1. Amendments. **These By-Laws may be amended by the affirmative vote of Unit Owners representing 75% of the total votes of the Condominium Regime**, as then constituted, at any meeting of the Unit Owners duly called for such purpose in accordance with the provisions of the Real Property Article, Section 11-104 of the Annotated Code of Maryland. . . .

* * *

- Article XVIII - Compliance-Interpretation-Miscellaneous

* * *

> Section 2. Conflict. **These By-Laws are subordinate and subject to all provisions of the Declaration and to the provisions of the Real Property Article, Section 11-101, through and including Section 11-128**, Annotated Code of Maryland, as amended. All of the terms hereof, except where clearly repugnant to the context, shall have the same meaning as in the Declaration or the aforesaid statute. **In the event of any conflict between these By-Laws and the Declaration, the provisions of the Declaration shall control**, in the event of any conflict between these By-Laws and the Real Property Article, Section 11-101, through and including Section 11-128, Annotated Code of Maryland, as amended, **the provisions of the statute control**.

(Emphasis added.)

At some point prior to June 1, 2012, Elvaton contended that the Roses had fallen behind on their monthly assessments. Mrs. Rose testified that a member of Elvaton's Board of Directors handed her a letter advising her that, effective June 1, 2012, the Roses would not be permitted to park in either of their two assigned spaces in the parking lot because Elvaton considered the Roses to be delinquent on their assessments.[3] Mrs. Rose further testified that, prior to her receipt of the June 1, 2012, letter, she had received a letter from Elvaton

[3]This letter was admitted into evidence as Plaintiffs' Exhibit 7, but it does not appear in the electronic case file (MDEC). There is no paper file. It was not included in either party's record extract.

describing "the new policy regarding the parking rules of not being able to park if you allegedly owe money."[4]

Mrs. Rose also described an "e-mail of reminders for the community" which she received "around June 4," and which informed the residents that "[t]he new towing policy will also be taking effect beginning this week. Any resident that is delinquent and[/]or turned over for collection that is not on a payment plan arrangement will be subject to being towed at their expense[.]"[5] As a result of "the new policy regarding the parking rules," the Roses had to park on a county road outside the community.[6] The Roses were also barred from

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[4]The letter to which Mrs. Rose is referring was admitted into evidence as Plaintiffs' Exhibit 8, but it does not appear in the electronic record of this case.

[5]This e-mail was received into evidence as Plaintiffs' Exhibit 9, but as noted above, there are no exhibits in the record.

[6]The parking rules promulgated by Elvaton precluded any owner who was delinquent in paying assessments from parking in the owner's assigned parking spots or elsewhere within the condominium complex from 9 p.m. until 6 a.m. As pertinent here, the parking rules provided:

> § 2 E. The right to park within the Council's Property shall automatically be suspended for any unit owner . . . that is more than forty-five (45) days past due in the payment of condominium assessments and other charges for any condominium unit in the community. The suspension of the parking permit shall remain in effect until the unit's account is brought current. Notwithstanding the aforementioned, the Board of Directors shall have the right to reinstate the parking privilege of any delinquent unit owner if warranted by an exceptional reason as determined by the Board of Directors.

(continued...)

using the community pool for the summers of 2012 and 2013 due to Elvaton's policy providing that a resident who was delinquent in payment of assessments would not be permitted to use the pool, even as the guest of another passholder.[7]

Elvaton recorded a Statement of Lien against the Roses' condominium on October 12, 2011, and filed suit against the Roses in the District Court of Maryland for Anne Arundel County on January 10, 2012, contending that the Roses owed Elvaton $1,581.32, plus interest of $107.59 and attorney's fees of $608.50.[8]

On July 26, 2012, the Roses filed, in the Circuit Court for Anne Arundel County, a six-count Complaint against Elvaton, Wentworth, and Elvaton's debt-collection attorney,

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[6](...continued)

> F. Any unit owner . . . whose parking privilege has been revoked shall have his parking privileges reinstated upon payment in full of all past due condominium assessments and other charges. The records of the Council shall be the official records for purposes of determining any balance due and whether a unit owner is current in the payment of all condominium assessments and other charges.

[7]Mrs. Rose testified that her mother lives elsewhere in the Elvaton community, and Mrs. Rose was able, using her mother's address, to get her pool passes validated for the summer of 2012. However, Elvaton foreclosed that option in the summer of 2013.

[8]It appears, from the record, that Elvaton filed a supplement to this debt-collection suit on July 10, 2012, asserting — as it did in the first suit — that the Roses had been delinquent in their assessments since September, 2010, and that their balance as of July 10 was $2,619.69 plus $140.73 in interest, $608.50 in attorney's fees, "and a trial attendance fee to be determined."

John Oliveri, and his firm, Oliveri & Associates, LLC.[9] Count One of the Complaint was an action for declaratory judgment pursuant to Maryland Code (1973, 2006 Repl. Vol.), Courts & Judicial Proceedings Article ("CJ"), § 3-406, in which the Roses asked the court to make four declarations:

> (1) that this Court determine and adjudicate the property rights of the Roses and all Unit Owners as to the unhindered use of general common areas including parking areas and the community recreational areas;
>
> (2) that this court determine and adjudicate the rights and liabilities of the parties with respect to the assessments and other fees allegedly due from the Roses to Elvaton;
>
> (3) that this court determine and adjudicate the rights and liabilities of the parties with respect to the Statement of Lien; and
>
> (4) that this Court declare the Statement of Lien recorded in the land records of Anne Arundel County at book 23888 page 0474 to be void ab initio or, in the alternative, released[.]

The parties and the court referred to these as "Declarations 1, 2, 3, and 4."

On July 26, 2012, in addition to filing their complaint in circuit court, the Roses filed a motion to stay the district court case while the circuit court case was ongoing. The motion was granted, and the district court case was stayed.

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[9]The counts against Mr. Oliveri and his firm, which alleged defamation, a violation of the Fair Debt Collection Practices Act, and a violation of the Maryland Consumer Debt Collection Act, were dismissed with prejudice on July 17, 2013. Counsel for the Roses confirmed at oral argument that they are not pursuing any appeal as to these counts.

In the circuit court, on April 29, 2014, Elvaton obtained an order granting, in part, its motion for summary judgment as to requested Declarations 2, 3, and 4 of Count 1 of the Roses' complaint. This ruling had the effect of precluding the Roses from disputing the validity of the underlying debt at trial in the circuit court because, the circuit court ruled, that was to be determined in the district court trial.

On May 9, 2014, the parties presented evidence on the remaining counts of the Roses' complaint, namely, requested Declaration 1 of Count I, as well as Count IV (alleging a violation of the Maryland Consumer Debt Collection Act) and Count V (alleging a violation of the Maryland Consumer Protection Act.).

On June 27, 2014, the court issued a memorandum opinion and order. The court found in favor of Elvaton on Counts IV and V, and counsel for the Roses confirmed at oral argument that they are not pursuing any appeal as to these counts. But the court ruled in favor of the Roses on Declaration 1 of Count I, and declared:

> pursuant to MD. ANN. CODE, CTS. & JUD. PROC., § 3-406 that Defendants Elvaton Towne Condominium, Regime II, Inc. and Wentworth Property Management, LLC n/k/a FirstService Residential MidAtlantic, LLC are not authorized by law, contract, or otherwise to hinder or prohibit the use of general common areas, including parking areas and community recreational areas, by Plaintiffs William Kevin Rose and Dawn Delana Jones-Rose and their family for their alleged failure to pay association assessments.

In the memorandum opinion, the circuit court explained its analysis:

> Declaration 1 of Count I requests the Court "determine and adjudicate the property rights of the Roses and all Unit Owners as to the unhindered use of general common areas including parking areas and the community

recreational areas." Plaintiffs seek a Declaration that precluding a condominium unit owner from "access, use and enjoyment" of the common areas of the condominium is impermissible under Maryland law, and the Elvaton Declaration does not specifically provide for an exception as required by the Maryland Condominium Act. MD. CODE ANN. REAL PROP. § 11-108(a).

The Act states "the common elements may be used only for the purposes for which they were intended and, except as provided in the declaration, the common elements shall be subject to mutual rights of support, access, use, and enjoyment by all unit owners." *Id.* In addition, the Court of Appeals in *Ridgely Condominium Association, Inc. v. Smyrnioudis*, 343 Md. 357 (1996), addressed the distinction between a preclusion of property rights and a use restriction. The Court found a by-law amendment which prevented the commercial unit owners' clients from using the lobby revoked a "right" and not "a mere personal privilege." *Id*. at 370.

Defendants argue that the revocation in *Ridgely* was a permanent one, whereas in the present case the Roses would be allowed to use the pool and parking lot again, eventually. This may or may not be true. Whether the Roses' delinquency is cured or whether they intend to cure it is unknown. If the Roses do not become current on their assessment, it may be permanent. The use of the pool and parking lot is not "a mere personal privilege." The Roses, as well as other Unit Owners, have an absolute right to use these common elements unless the Declaration or By-Laws explicitly provide otherwise.

Beyond the *Ridgely* decision, the Court finds the two letters from the Maryland Office of the Attorney General to be persuasive and insightful in the present case. The first, dated May 7, 2010, dealt with a condominium association intending to tow parked vehicles belonging to any residents who were delinquent in their accounts. The Office of the Attorney General opined the action would be considered a violation of the Maryland Condominium Act. It also determined "[a]n association's remedies for recovering unpaid assessments and fees were *limited* to those in the governing documents," (emphasis added) which in that case included "declaring a lien on the unit and/or a suit for a money judgment in the event of a delinquency." The second letter, dated September 27, 2013, is similar and states "either the declaration itself or the by-laws could contain authority to limit [common use elements] as part of provisions concerning the assessment and collection of common

> expenses and restrictions and requirements respecting the use of the common areas."
>
> Here, the authority is not contained in the Declaration or By-laws. Defendants cite parts of the Declaration and By-laws to support their claim of authority, ignoring Article IX Section 4 and 7 dealing with enforcement. These sections give Elvaton the authority to file a lien and/or bring an action to collect delinquent assessments, just like in the case mentioned in the May 2010 OAG's letter. Article IX Sections 4 and 7 do not grant Elvaton explicit authority to use pool and parking restrictions as enforcement mechanisms.
>
> In the present case, Elvaton used both of the explicit enforcement mechanisms available under the By-laws. It filed a statement of lien and a collection action in the District Court for Anne Arundel County. **Unless Elvaton amends its By-laws to include a pool and parking rule as a tool for the enforcement of delinquent assessments, it cannot prohibit the Roses from using the common elements as a sanction for not paying the assessment**.

(Emphasis added; footnotes omitted.) It is this ruling that is the subject of Elvaton's appeal.

STANDARD OF REVIEW

Maryland Rule 8-131(c) guides our review. It provides:

> When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.

Here, the court was asked to interpret the Declaration and Bylaws, to assess whether Elvaton's "parking rules" (and its contention that it was empowered to bar delinquent unit owners from the pool) were authorized under either written instrument. "'That, as a general rule, the construction or interpretation of all written instruments is a question of law for the

court is a principle of law that does not admit of doubt.'" *Olde Severna Park Improvement Ass'n v. Gunby*, 402 Md. 317, 329 (2007) (quoting *Gordy v. Ocean Park, Inc.*, 218 Md. 52, 60 (1958)). Accordingly, we review the circuit court's ruling *de novo*. *Thomas v. Capital Medical Management Associates, LLC*, 189 Md. App. 439, 453 (2009).

DISCUSSION

I. ELVATON'S APPEAL

Elvaton argues that it was permitted, under the Declaration and By-Laws, and in accordance with statutory law, to regulate the use of the common elements by prohibiting delinquent owners from using the parking lot and pool. It contends that such regulation does not effect a "taking," and in any event, the restriction would not be a permanent deprivation of an owner's property right because, posits Elvaton, if the delinquent owner brings the owner's account current, the privilege to use these common elements will be restored. Elvaton characterizes its regulation of the common elements in this manner as a "reasonable and temporary use restriction," not a permanent deprivation of a property interest. It contends that the trial court "read[ ] the Bylaws too narrowly" in finding that neither the Bylaws nor the Declaration explicitly permit Elvaton to restrict the use of common elements as a collection method. Rather, Elvaton contends that, because there is no requirement that the Declaration or Bylaws "specifically set forth the Rules" regarding the parking lot and pool, and the Declaration and Bylaws give the Board authority generally to "promulgate use

restrictions with regard to common elements," Elvaton was authorized to restrict the Roses' use of the common elements. We are not persuaded.

Elvaton does not dispute that its Declaration and Bylaws do not explicitly address whether or not it can prevent use of common elements by owners it considers to be delinquent. It points generally to the Board's power under the Declaration and Bylaws to promulgate and enforce rules "respecting the use, occupancy and maintenance of the project," and seems to urge an interpretation of the governing documents that would give the Board of Directors unlimited power to take any action it "deemed proper" to regulate the use of the general common elements. We note, however, that the provision in the Bylaws that authorizes the Board to promulgate and enforce rules also specifies that the purpose of such rules is "to prevent unreasonable interference with the use and occupancy of the Condominium and of the general and limited common elements by the Unit Owners, all of which shall be consistent with laws and the provisions of these By-Laws and the Declaration." We are not persuaded that the rules adopted to coerce payment of assessments met this purpose.

"When a controversy arises as to a resident's right as a unit owner in a condominium, the courts must examine the condominium enabling statutes for relevant provisions, consider the master deed or declaration, study the bylaws, and attempt to reconcile the three." *Dulaney Towers Maintenance Corp. v. O'Brey*, 46 Md. App. 464, 465-66 (1980). "Condominiums, and their creation, are, in the main, controlled by statute where statutes

exist, as in Maryland." *Jurgensen v. New Phoenix Atlantic Condominium Council of Unit Owners*, 380 Md. 106, 119 n.14 (2004).

The Maryland Condominium Act, found at RP §§ 11-101 *et seq*., is the key statute pertinent to the controversy in this case. The Court of Appeals discussed the Act in *Ridgely Condominium Ass'n, Inc. v. Smyrnioudis*, 343 Md. 357 (1996), and provided the following overview:

> The Maryland Condominium Act (the Act), Maryland Code (1996 Repl. Vol.) §§ 11-101 *et seq*. of the Real Property Article, regulates the formation, management, and termination of condominiums in Maryland. The Act was originally enacted by Ch. 387 of the Acts of 1963, as the Horizontal Property Act in response to § 104 of the Federal Housing Act of 1961, Pub. L. No. 87-70, 75 Stat. 149, which made federal mortgage insurance available to condominiums in states where title and ownership were established for such units. The Act was based on the Federal Housing Administration's Model Horizontal Property Act of 1961. 66 Op. Atty. Gen. 50, 52 (1981). The legislature amended and recodified the Act by Ch. 641 of the Acts of 1974.
>
> Under the Act, property becomes a condominium upon the recording of a declaration, bylaws, and a condominium plat. § 11-102. The declaration must include the name of the condominium; a description of the entire project, the units, and the common elements; and the percentage interests in the common elements and votes appurtenant to each unit. § 11-103(a). The declaration may be amended with the written consent of at least 80% of the unit owners, except that **unanimous consent of the owners is required for some amendments, such as altering percentage interests in common elements, changing the use of units from residential to nonresidential and vice versa, and redesignating general common elements as limited common elements.** §§ 11-103(b); 11-107(c).
>
> **The bylaws govern the administration of the condominium and must include the** form of the condominium administration and its powers, meeting procedures, and **fee collection procedures**. § 11-104(a), (b). The former § 11-111(f) also required the bylaws to include restrictions on the use

> of units and common elements. The 1974 amendments made inclusion of such use restrictions in the bylaws optional. Section 11-104(c) now provides: "The bylaws may also contain any other provision regarding the management and operation of the condominium including any restriction on or requirement respecting the use and maintenance of the units and the common elements." **The bylaws may be amended by at least a 2/3 vote of the unit owners.** § 11-104(e)(2).
>
> The Council of Unit Owners, which may delegate its powers to a Board of Directors, governs the affairs of the condominium and may adopt rules for the condominium. §§ 11-109(a),(b), 111(a). **If there is any conflict between the provisions of the various documents governing the condominium, the statute controls, then the declaration, plat, bylaws, and rules in that order. § 11-124(e)**.[10]

Id. at 360-61 (emphasis added; footnotes omitted). The *Ridgely* Court also observed:

> A condominium is a "communal form of estate in property consisting of individually owned units which are supported by collectively held facilities and areas." *Andrews v. City of Greenbelt*, 293 Md. 69, 71, 441 A.2d 1064 (1982).
>
>> The term condominium may be defined generally as a system for providing separate ownership of individual units in multiple-unit developments. In addition to the interest acquired in a particular apartment, each unit owner also is a tenant in common in the underlying fee and in the spaces and building parts used in common by all the unit owners.
>
> 4B Richard R. Powell, Powell on Real Property ¶ 632.1[4] (1996). A condominium owner, therefore, holds a hybrid property interest consisting of an exclusive ownership of a particular unit or apartment and a tenancy in

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[10]The current version of RP § 11-124(e) similarly provides the following priorities for resolution of conflicts: "If there is any conflict among the provisions of this title, the declaration, condominium plat, bylaws, or rules adopted pursuant to § 11-111 of this title, the provisions of each shall control in the succession listed hereinbefore commencing with 'title'."

> common with the other co-owners in the common elements. *Andrews*, *supra*, 293 Md. at 73-74, 441 A.2d 1064; *see also Starfish Condo. v. Yorkridge Serv.*, 295 Md. 693, 703, 458 A.2d 805 (1983); Black's Law Dictionary 295 (6th ed. 1990).
>
> In exchange for the benefits of owning property in common, condominium owners agree to be bound by rules governing the administration, maintenance, and use of the property. *Andrews, supra*, 293 Md. at 73, 441 A.2d 1064. Upholding a rule prohibiting the consumption of alcohol in a condominium's clubhouse, a Florida court observed:
>
>> It appears to us that inherent in the condominium concept is the principle that to promote the health, happiness, and peace of mind of the majority of the unit owners since they are living in such close proximity and using facilities in common, each unit owner must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property. Condominium unit owners comprise a little democratic sub society of necessity more restrictive as it pertains to use of condominium property than may be existent outside the condominium organization.
>
> *Hidden Harbour Estates, Inc. v. Norman*, 309 So.2d 180, 181-82 (Fla. Dist. Ct. App.1975); *see also Nahrstedt v. Lakeside Village Condo*., 8 Cal.4th 361, 33 Cal. Rptr.2d 63, 878 P.2d 1275, 1281 (1994) ("Use restrictions are an inherent part of any common interest development and are crucial to the stable, planned environment of any shared ownership arrangement."); *Dulaney Towers v. O'Brey*, 46 Md. App. 464, 466, 418 A.2d 1233 (1980) ("The courts stress that communal living requires that fair consideration must be given to the rights and privileges of all owners and occupants of the condominium so as to provide a harmonious residential atmosphere.").

Id. at 358-60 (footnotes omitted).

Ridgely addressed a controversy that arose when a 239-unit, apartment-style condominium complex in Towson adopted a rule that restricted the use of a general common element by certain of the unit owners. The Ridgely complex included seven commercial units

on the first floor that were "used as professional offices," which was expressly permitted in the bylaws. Someone going to one of the commercial units could either enter the unit directly via an exterior door, or could enter through the building's lobby and an interior door to the unit. In 1990, the complex completed a $125,000 renovation of the building's lobby, which was paid for via condominium fees. Around that time, citing "security concerns," the board of directors

> sought to have the commercial unit owners voluntarily agree to have visitors use the exterior entrances to their units exclusively. When this effort failed to achieve full compliance, the Board of Directors, in the spring of 1991, adopted a resolution which provided that: "Effective September 1, 1991, clients of commercial units owners and tenants shall not utilize the Condominium's lobbies."

Id. at 363. Three owners of commercial units sued, seeking to enjoin the association from preventing visitors and clients of the commercial units from using the lobby. Shortly thereafter, the board amended the bylaws to codify the limitation upon the commercial unit owners' use of the lobby.

The owners of the commercial units won at trial, and on appeal to this Court. The condominium association's petition for writ of *certiorari* was granted, and the association asked the Court of Appeals to determine whether the trial court and this Court had used the correct standard for evaluating the bylaw amendment. But the Court of Appeals did not have to reach that question because it held that "the Association did not have the authority to enact the rule at issue here by amending the bylaws[.]" *Id*. at 366. The linchpin of the holding was

the Court's conclusion that the use of the lobby, which was undisputedly a common element, was a property interest, "not a 'mere personal privilege,'" and the board could not, either by rule or by amendment to the bylaws, deprive the commercial unit owners of a property interest.

The association in *Ridgely* claimed that the rule was "merely a use restriction" which could be imposed via bylaw amendment with the vote of 2/3 of the unit owners. *Id.* at 366. But the Court of Appeals rejected that argument. The *Ridgely* Court explained:

> Here, the rule at issue affected an "interest" in property. The bylaw amendment revoked the commercial unit owners' right to have their clients use the lobby. That right resembles an easement, which is an interest in property.
>
> * * *
>
> **In terms of the Maryland Condominium Act the lobby was a general common element, the use of which all of the tenants enjoyed equally. This was consistent with § 11-108(a) requiring that, "except as provided in the declaration, the common elements shall be subject to mutual rights of . . . access, use, and enjoyment by all unit owners."** By by-law amendment, the Association has attempted to deny that mutuality of use of a general common element. Further, under § 11-106(a), "[e]ach unit in a condominium has all of the incidents of real property." By by-law amendment, the Association has attempted to reduce the "easement" that the professional office units enjoyed in the lobby, and that "easement" is one of the incidents of the ownership of a professional office unit.
>
> For these reasons, we hold that **it was beyond the power of the Association by by-law amendment to purport to deprive the owners of the professional office units of their rights under the declaration and under the Maryland Condominium Act to the enjoyment of the lobby for the ingress and egress of their business invitees**.

Id. at 369-71 (emphasis added). *See also Jurgensen, supra*, 380 Md. at 120 ("Only the unanimous written consent of all unit owners could have changed parking space number 32 from a general common element to a limited common element."); *Sea Watch Stores Ltd. Liability Co. v. Council of Unit Owners*, 115 Md. App. 5, 23 (1997) ("less than all unit owners may not arbitrarily and unilaterally amend bylaws that take away any of the incidents or rights in real property that existed when the condominium was created" (citing *Ridgely*)).

The Court's analysis of the commercial unit owners' property interest in the lobby in *Ridgely* is applicable to Elvaton's rules restricting use of its parking lot and pool. In this case, the right to park in the complex's parking lot, and the right to use the pool, were not mere personal privileges; they were rights "appurtenant to the condominium unit and [which] would be conveyed with the unit." *Ridgely, supra*, 343 Md. at 370. The Roses "own an undivided percentage interest in the common elements" in accordance with the Declaration and RP § 11-107(a). The statute further provides that "[t]he percentage interests shall have a permanent character and . . . may not be changed without the written consent of all of the unit owners and their mortgagees." RP § 11-107(c). As discussed above, RP § 11-108(a) provides: "the common elements shall be subject to mutual rights of support, access, use, and enjoyment by all unit owners."

With respect to the parking lot, the Declaration itself provides that parking areas are common elements, and "[t]he common elements shall be exclusively owned in common by all of the Unit Owners." With respect to the pool, the Declaration provides that "[i]t is the

intention of Developer that each Unit Owner . . . shall have the right to use all of the recreational facilities for so long as same, including swimming pool and bath house, shall exist . . . **This right shall be a right appurtenant to each condominium unit.**"(Emphasis added.) Under the principles set forth in *Ridgely*, Elvaton could not restrict the Roses' use of the common elements by promulgating a rule designed to make it easier for the association to collect its fees and assessments.

Our holding is supported by the *amicus* brief filed by the Consumer Protection Division of the Office of the Attorney General of Maryland, which points out the weakness in Elvaton's argument that this case is distinguishable from *Ridgely* because the parking and pool restrictions here are not a "permanent" deprivation of a property right. The Consumer Protection Division's brief asserts: "There is no temporary-infringement exception from complying with the collection procedures in the Condominium Act. If there were, a condominium association could collect disputed debts by 'temporarily' blocking a hallway or lobby to prevent a unit owner's accessing the unit."[11]

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[11]The *amicus* brief includes the following "Summary of Argument":

> The trial court correctly held that Elvaton's restriction of the Roses' use of general common areas to collect a disputed debt was not merely the revocation of a privilege, but an impermissible infringement of a property right. As the court recognized, the plain language of the Condominium Act prevents a condominium regime from restricting a unit owner's property rights in the common elements of a condominium, except as authorized by a declaration of the condominium. The Condominium Act sets forth a procedure

(continued...)

Elvaton has not persuaded us that a temporary deprivation of property rights in derogation of the Maryland Condominium Act would be permitted for the purpose of collecting past due fees and assessments as a supplemental alternative to the options that are expressly authorized by the Condominium Act. Accordingly, we conclude that the circuit court did not err in declaring that Elvaton could not adopt rules restricting the allegedly delinquent owners' right to use common elements. Such authority does not exist in Elvaton's Declaration or Bylaws, and absent an amendment to those documents, such authority does not exist in the Maryland Condominium Act. *See, e.g.*, RP §§ 11-103(c), 11-104(c).

II. THE ROSES' CROSS-APPEAL

A. Elvaton's Motion to Dismiss Cross-appeal

As noted in their cross-appeal, the Roses contend that the circuit court's Amended Order of April 29, 2014, was in error. The Amended Order revised an earlier denial by the court of the parties' cross-motions for summary judgment, which were heard on January 13, 2014, and denied on January 31, 2014. As pertinent to the cross-appeal, in its January 31, 2014 order, the court recognized that Elvaton had argued that it was entitled to summary judgment on requested Declarations 2, 3, and 4 of the Roses' complaint, for three reasons: 1) because the Roses had failed to dispute the validity of the lien pursuant to the provisions

[11](...continued)
for collecting past due fees and assessments, and Elvaton's use of its own collection method was unlawful.

of Real Property § 14-203(c), the Maryland Contract Lien Act; 2) because the Roses are in error in asserting that they do not owe any outstanding amounts to Elvaton; and 3) because a declaratory judgment action is not the proper vehicle to resolve the dispute regarding the validity of the underlying debt when there is a pending district court case that will deal with that issue.

The court's opinion of January 31, 2014, recognized that the Roses opposed Elvaton's motion for summary judgment on Declarations 2, 3, and 4 by arguing "that the MCLA specifically allows for them to file the instant litigation to determine whether there is or was probable cause to establish a lien and whether Elvaton complied with the MCLA." The opinion also noted that the Roses had filed their own motion for partial summary judgment as to their Count 1, Declaration 1.

After the January hearing, the court initially denied the motions for summary judgment/partial summary judgment on January 31, 2014, finding as follows, with regard to Count 1, Declarations 2, 3, and 4:

> After a review of the memoranda and pertinent law, the Court has determined that summary judgment is not appropriate for the second, third, and fourth declarations in Count 1 of [the Roses'] Complaint. [Elvaton] argues that because the District Court proceedings will ultimately decide the issues presented in the second, third, and fourth declarations requested by [the Roses], declaratory relief should be entered in [Elvaton's] favor. "Ordering declaratory relief 'to decide an issue, even though the issue is presented in another pending case between the parties,' is reserved for 'very unusual and compelling circumstances.'" *Vargas-Aguila* [*v. State, Office of Chief Medical Examiner*, 202 Md. App. 375] at 383 [(2011)] (quoting *Haynie v. Gold Bond Bldg. Products*, 306 Md. 644, 651 (1986)).

> The Court finds that the issues presented for declaratory relief in declarations two, three, and four of [the Roses'] Complaint will ultimately be decided in the District Court case. Further, the Court has not found, nor has counsel presented any unusual and compelling circumstances that would render declaratory judgment an appropriate remedy here. Therefore, declaratory relief, as a matter of law is inappropriate.
>
> Finding that declaratory judgment is inappropriate because the District Court will ultimately determine the issues requested in Declaration[]s two, three, and four of [the Roses'] Complaint, the Court will not address [Elvaton's] other arguments in favor of summary judgment for Count I, Declarations two, three, and four of [the Roses'] Complaint.

The order accompanying the opinion provided that it was "ORDERED, that [the Roses'] Motion for Partial Summary Judgment as to Count I-Declaratory Judgment is DENIED," and it was also "ORDERED, [that Elvaton's] Motion for Summary Judgment is DENIED."

It appears from the record that, on February 11, 2014, Elvaton's counsel faxed the circuit court a letter, which the court treated as a motion to reconsider. In the letter, counsel asserted that "there appears to be a discrepancy between the Opinion and the Order entered by the Court denying [Elvaton's] Motion for Summary Judgment," and further represented:

> On page 13 of the Opinion, the Court agreed with [Elvaton] that declaratory judgment to determine the validity of the debt and the Statement of Lien was, as a matter of law, inappropriate because the issue is to be decided in the District Court case. The Court, however, denied [Elvaton's] Motion for Summary Judgment believing that [Elvaton was] requesting the Court to enter a declaratory judgment that the debt and the Statement of Lien were in fact valid. However, [Elvaton has] not filed a Counterclaim in this case seeking affirmative declaratory relief. [Elvaton's] Motion for Summary Judgment was not seeking affirmative declaratory relief, but requesting summary judgment in its favor that [the Roses] did not have the legal right to

> assert the second, third, and fourth declarations in their Complaint. [FN 1 OMITTED] Therefore, because [the Roses] did not have the legal right to seek declaratory relief, summary judgment should be entered in [Elvaton's] favor. Based on the Court's Opinion, it appears that partial summary judgment should have been entered in favor of [Elvaton] with regard to the second, third, and fourth declarations sought in Count I.

The next day, the court notified the parties that it had received Elvaton's letter, and that the Roses had "until February 26, 2014, before the Court rules on the issue presented by [Elvaton]." We see no indication that the Roses responded to Elvaton's February 11 letter, or to the court's notice of February 12.

On April 29, 2014, the court filed an Amended Memorandum Opinion and Order granting, in part, Elvaton's motion for summary judgment. The amended memorandum opinion explained that, "[a]fter consideration of [Elvaton's] correspondence, the pertinent case law, and review of the file,"

> the Court has now determined that Summary Judgment is appropriate in favor of [Elvaton] for declarations two, three, and four of Count I of [the Roses'] Complaint. Although declaratory judgment is normally not appropriate when the issues will ultimately be decided in another matter, it should be granted in this particular circumstance, because [the Roses], as ordered now, could still request declaratory relief for the second, third, and fourth declarations of Count I of their Complaint.

The order granting Elvaton partial summary judgment on the second, third, and fourth declarations of the Complaint also declared as follows:

> DECLARED, that [the Roses] do[ ] not have the right to request from this Court in this matter to determine and adjudicate the rights and liabilities of the parties with respect to the assessments and other fees allegedly due from the Roses to Elvaton, and it is hereby further,

> DECLARED, that [the Roses] do[ ] not have the right to request from this Court in this matter to determine and adjudicate the rights and liabilities of the parties with respect to the Statement of Lien, and it is hereby further,
>
> DECLARED, that [the Roses] do[ ] not have the right to request from this Court in this matter to declare the Statement of Lien recorded in the land records of Anne Arundel County at book 23888 page 0474 to [be] void *ab initio* or, in the alternative released . . . .

At trial, this order had the effect of preventing the Roses from presenting any testimony or evidence regarding the validity of the lien underlying this case, or of the debt underlying the lien. In their cross-appeal, the Roses argue that the court erred in making this ruling. They argue that the circuit court is the only proper place for a declaratory judgment action, and that the district court "lacks jurisdiction pursuant to the Maryland Contract Lien Act." Now, argue the Roses, the court's amended order has left them "faced with *res judicata* issues." They argue in their brief: "In other words, the Roses were denied the right to seek a declaratory judgment in the Circuit Court and are, arguably, now precluded from raising the issues in the District Court which never had proper jurisdiction for declaratory relief in the first instance." Elvaton's response to the Roses' argument on cross-appeal is multifaceted, but it begins with a motion to dismiss for failure to comply with Rules 8-411 and 8-413(a), both of which require an appellant to include the transcript "necessary for the appeal" as part of the appellate record. In their cross-appeal, the Roses take issue with the court's order of April 29, 2014, which amended the order the court had filed on January 31, 2014, after the parties argued their cross-motions for summary judgment on January 13,

2014. There is no transcript in the record, however, of the January 13 hearing. Elvaton argues that Maryland rules require that the transcript of the January 13 hearing had to be included in the record on appeal, and that it was the Roses' responsibility, as cross-appellants, to pay for the transcript and ensure that it was included.

Although 8-602(a)(6) provides that an appellate court may, in its discretion, dismiss an appeal for failure to comply with Rule 8-413, dismissal is not mandatory. Because Elvaton has not persuaded us that it has been prejudiced by the omission of that transcript, we decline to dismiss the Roses' cross-appeal.

B. Cross-appeal merits

As outlined above, Elvaton filed a district court lawsuit against the Roses regarding the alleged delinquency. The Roses were successful in having that litigation stayed while the circuit court considered their complaint and request for declaratory judgment. In the Roses' circuit court action, Count I asked the circuit court to declare: that the Roses did not owe the same debt that was the subject of the district court action (Declaration 2); that the Statement of Lien that Elvaton obtained was not valid, even though the Roses did not avail themselves of the statutory remedy that exists to contest such a lien (Declaration 3); and that the Statement of Lien as recorded in the Land Records was void *ab initio* (Declaration 4). Pursuant to the Amended Order of April 29, 2014, the circuit court would not allow the Roses to litigate the merits of the condominium association's claims relative to a delinquency

in the circuit court because those claims were the subject of the pending district court action that had been stayed.

In their cross-appeal, the Roses contend that, because only the circuit court has jurisdiction to issue a declaratory judgment, their right to procedural due process was "wrongfully denied." They argue that they "had a legal right to having a declaration to declare the means and status of their debt declared in the Circuit Court." They point out that the district court case could have been consolidated with their circuit court complaint if Elvaton had so requested pursuant to CJ § 6-104(b)(1).

They also complain that they were wrongfully denied their right to contest the Statement of Lien in the district court action, and assert on appeal that Maryland Contract Lien Act "specifically established circuit courts as the courts with jurisdiction to adjudicate issues raised by the Act," for which the Roses cite RP § 14-203(c)(1), without explaining why they did not invoke the statute at the time Elvaton filed the Statement of Lien.[12]

In our view, the circuit court's refusal to hear the Roses' claim for a declaratory judgment relative to the validity of the allegedly delinquent fees that were already the subject

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[12]RP § 14-203(c)(1) provides:

> A party to whom notice is given under subsection (a) of this section may, within 30 days after the notice is served on the party, file a complaint in the circuit court for the county in which any part of the property is located to determine whether probable cause exists for the establishment of a lien.

of a properly-filed suit in the district court was fully consistent with our holding in *Vargas-Aguila v. State, Office of Chief Medical Examiner*, 202 Md. App. 375, 382 (2011).

Further, we reject the Roses' contention that they "are now faced with *res judicata* issues . . . [and] are, arguably, now precluded from raising the issues in the District Court which never had proper jurisdiction for declaratory relief in the first instance." Because the circuit court, in its Amended Order dated April 29, 2014, expressly declined to rule on the merits of issues regarding the Statement of Lien, we perceive no prejudice to the Roses. Moreover, Elvaton would be estopped from raising a claim of *res judicata* regarding this issue because it has expressly argued in its brief in this Court that *res judicata* would not bar the Roses from litigating liability in the district court action. Elvaton stated in its reply brief:

> *Res judicata* would not affect the Roses' defense in the District Court Action regarding the amount of the debt . . . because . . . the validity of the debt cannot be litigated in the declaratory judgment, MCDCA, and MCPA claims. The Roses' remaining claims in the Circuit Court action (*i.e.* the validity of the [parking and pool "rules"] and the enforcement of [the same] as a violation of the MCDCA and MCPA) do not present *res judicata* issues with regard to the Roses' defense in the District Court Action as they do not present the same issues that will be decided in the District Court.

(Footnotes omitted.) *Cf. McKlveen v. Monika Courts Condominium*, 208 Md. App. 369, 382 (2012) (*res judicata* did not apply because the claims litigated in the circuit court action were not identical to those asserted in the district court).

Here, the Roses sought a declaration by the circuit court that the debt which was to be litigated in the district court case was invalid. They were not entitled to such a

declaration; another court already had jurisdiction of that issue, and although Elvaton could have consolidated the debt case with the circuit court case, it was not required to do so. Nor did the Roses invoke the "special statutory remedy . . . [the legislature] provided" to challenge the creation of a lien, *i.e.*, RP § 14-203(c). *See Vargas-Aguila, supra*, 202 Md. App. at 385 ("'[i]f a statute provid[es] a special form of remedy for a special type of case, that statutory remedy shall be followed in lieu of a [declaratory judgment] proceeding.'") (quoting CJ § 3-409(b)).

Like the circuit court, we see no impairment of the Roses' defenses to Elvaton's claim of delinquency, and no error in the circuit court's decision not to adjudicate the merits of the issues pending in the district court.

MOTION TO DISMISS CROSS-APPEAL DENIED.
JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANTS.