Circuit Court for Baltimore City
Case No. 24-C-15-002304

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1451

September Term, 2016

WARRINGTON CONDOMINIUM COUNCIL, INC.

v.

MARGERY SINGER DANNENBERG PERSONAL RESIDENCE TRUST

Wright,
Shaw Geter,
Eyler, James R.,
(Senior judge, specially assigned)

JJ.

Opinion by Eyler, James, R., J.

Filed: January 3, 2018

*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 arises out of a complaint for breach of contract and declaratory judgment filed in the Circuit Court for Baltimore City by Warrington Condominium Council, Inc. ("the WCC"), appellant, against the Margery Singer Dannenberg Personal Residence Trust ("the Trust"), appellee. The Trust filed a motion for summary judgment and the WCC filed a motion for partial summary judgment. After a hearing on August 10, 2016, the circuit court granted summary judgment in favor of the Trust and denied WCC's motion for partial summary judgment. This timely appeal followed.

ISSUES PRESENTED

The WCC presents the following three issues for our consideration:

> I. Whether the circuit court erred in entering summary judgment against WCC based on the statute of limitations even though the Trust had an ongoing obligation to repair its balcony, which obligation remained unsatisfied less than three years before WCC filed suit?
>
> II. Whether the circuit court erred in entering summary judgment against WCC based upon the statute of limitations when WCC incurred the cost on the Trust's behalf of repairing the balcony less than three years before it sued the Trust to recover those costs?
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> III. Whether the circuit court erred when it disposed of Count I of the complaint in the absence of a motion to do so, and without having declared the rights of the parties.

For the reasons set forth below, we shall affirm.

FACTUAL BACKGROUND

The Warrington Condominium is a multi-level building located on North Charles Street in Baltimore City. It contains approximately fifty residential units one of which, unit 1301, is owned by the Trust. Margery Singer Dannenberg ("Dannenberg") was the

sole resident of unit 1301 until she passed away on February 28, 2016.[1] Unit 1301 is surrounded on three sides by an uncovered balcony. In 2011, the owner of unit 1201 complained that water was coming into her condominium unit from above. A subsequent investigation revealed that the water was coming from the balcony of unit 1301. After Dannenberg was notified about the situation, she retained C.A. Lindman, Inc. ("Lindman") to make repairs.

In April 2012, Lindman began removing from the tiled balcony floor the existing pavers and the liner below them. During that process, Lindman discovered that topping slabs beneath the pavers and liner were so deteriorated that it was not possible to proceed with the work as planned. Lindman submitted a change order reflecting additional costs associated with replacing the topping slabs.

Dannenberg retained Becht Engineering BT, Inc. ("Becht") to examine the balcony and make recommendations concerning the replacement of the topping slabs as recommended by Lindman. On April 18, 2012, Becht issued a written report in which it concluded, in part, as follows:

> We have been requested by the Condominium Board and their managing agent to provide our opinion as to "ownership" or responsibility to replace the deteriorated topping slab. This is an issue that is outside the scope of engineering services. However, it is our opinion that the sloped topping slab was originally installed above the structural concrete slab to facilitate movement of water towards the drains and is therefore a component of the drainage system. Further, it is our opinion that the primary cause for the deterioration of the topping slab is the roof rain water directed onto and

[1] In the record before us, the Trust and Dannenberg are, on occasion, referred to interchangeably. In this opinion, we recognize that the Trust is the owner of Unit 1301, but when discussing correspondence or actions that were taken by Dannenberg personally, we shall refer to her by name.

> across the terrace by sloped roofing, gutters and downspouts. It is our understanding from review of the Condominium Declaration documents that these components are common elements and not owned by our client.

(Emphasis in original).

At all times thereafter, the Trust acknowledged that it was responsible for the repairs that Lindman originally was hired to make, but refused to consent to the change order on the ground that, under the condominium declarations and by-laws, the WCC was responsible for those repairs.

Counsel for the WCC responded to Becht's April 18, 2012 report with a letter dated April 20, 2012, demanding that Dannenberg pay for repairs outlined in Lindman's change order. On April 30, 2012, counsel for Dannenberg wrote a letter to counsel for the WCC suggesting that a meeting be scheduled "to attempt to explain to all present how any water is getting from the Dannenberg unit and/or the balcony thereof, into the Unit below." Counsel explained that "[t]here have been various views expressed about the condition of the Dannenberg balcony and its surfaces, however, to date no determination has been made and no opinion expressed as to how water is actually getting into the Unit below." That meeting was held on May 8, 2012. In a subsequent letter dated May 11, 2012, counsel for Dannenberg again "asserted that the drainage system including the 'topping slab,' line drain and pipe are the responsibility of the Council of Unit Owners" and that "[n]o portion of [Unit 1301] "resulted in any condition underlying displacement or inconvenience of any other Unit Owner."

Although the WCC continued to assert that the Trust was responsible for the replacement of the topping slabs, it eventually entered into a contract with Lindman to

repair and replace them and to repair any other damage to the common elements of the condominium. Lindman began working in June 2012 and completed the repairs in July 2012. On or about August 2, 2012, Lindman billed the WCC $108,166.07 for its work under the contract, which included the replacement of the topping slabs and installation of a rubber membrane. The WCC demanded that the Trust pay Lindman's bill, but that demand was refused. In February 2015, the WCC paid Lindman $102,000 for the work, an amount Lindman appears to have accepted as payment in full.

On May 7, 2015, the WCC filed a complaint against the Trust seeking a declaratory judgment and damages for breach of contract. In Count I of the complaint, the WCC sought a declaratory judgment to determine whether the Trust was responsible for maintaining, repairing, and replacing the topping slabs and membrane and for the costs incurred by the WCC for making those repairs. In Count II, the WCC alleged that the Trust's failure to maintain, repair, and replace the balcony was a material breach of Article VII, § 2(a) of the by-laws[2] and § 11-108.1 of Maryland's Real Property

[2] Article VII, § 2(a) of the condominium by-laws provided:

> a. Each Unit Owner shall:
>
> i. Maintain, repair or replace at his/her own expense any portion of his/her Unit which may cause damage to any other Unit or to the Common Elements.
>
> ii. Maintain, repair or replace all balconies, terraces, patios, lawns and fences constituting a Limited Common Element, the use of which is limited to the Unit Owner(s).
>
> iii. Pay any expense which is incurred by the Council in making any repair to or replacement of the Common elements which results from the

Code.[3] The WCC claimed that the Trust was obligated to reimburse it for the costs and expenses it incurred in repairing the balcony. The WCC sought damages in the amount of $102,000 and the "costs and reasonable attorney's fees incurred in seeking to collect the monies owed[.]" The Trust denied that it had any responsibility to repair or replace the topping slabs or membrane and claimed that the WCC bore that responsibility because those items constituted common elements under the condominium declarations and by-laws.

After discovery, the Trust filed a motion for summary judgment on the ground that the WCC's breach of contract action had accrued more than three years before the filing of its complaint on May 7, 2015, and, as a result, it was barred by the applicable statute of limitations. In support of that contention, the Trust argued that when the WCC received Becht's report dated April 18, 2012, it was on notice that the Trust would not pay for the repairs included in Lindman's change order. Moreover, the April 30, 2012 letter from counsel for Dannenberg put counsel for the WCC on notice that Dannenberg and the Trust

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> negligence, willful act or failure to act of that Unite Owner, unless the casualty is a covered risk under the insurance policies maintained by the Council.
>
> iv. Comply with the Declaration, By-Laws and current Rules.

[3] Section 11-108.1 of the Real Property Code provided then, as it does now:

> Except to the extent otherwise provided by the declaration or bylaws, …, the council of unit owners is responsible for maintenance, repair, and replacement of the common elements, and each unit owner is responsible for maintenance, repair, and replacement of his unit.

Md. Code (2015 Repl. Vol.), § 11-108.1 of the Real Property Code ("RP").

refused to accept any contractual obligation for the subject repairs. As a result, the WCC was on notice of the Trust's refusal to pay for the subject repairs well before May 7, 2012.

The WCC countered that the condominium by-laws imposed on the Trust a continuing obligation to maintain, repair, or replace the balcony that was not barred by the applicable statute of limitations. In addition, under the by-laws, the Trust had a duty to reimburse it for expenses made on the Trust's behalf.

The WCC filed a motion for partial summary judgment on both counts of the complaint. It argued that the Trust was responsible for the repairs made to "the limited common element comprising the balcony" and that it was "liable to repay [the WCC] for the repairs made on [the Trust's] behalf." According to the WCC, the only issue in dispute was the amount of damages.

In opposing the WCC's motion for partial summary judgment, the Trust denied that it was responsible for any repairs other than those initially made by Lindman, denied that it caused damage to the balcony, asserted that the damage was caused by the WCC, and rejected any attempt by the WCC to recover damages under a negligence theory, as any right to pursue a negligence action had been waived in a prior settlement agreement.[4]

[4] It appears from the record before us that the insurer of unit 1201 filed suit against the WCC, Dannenberg, and others for damages caused by the alleged intrusion of water into that unit. Several of the parties filed cross-claims, including the WCC which filed a cross-claim against Dannenberg for breach of contract, negligence, and declaratory judgment in an effort to recover the money it had paid to Lindman. As part of the settlement of that matter, the WCC agreed to dismiss its negligence claim against Dannenberg, and her successors and assigns, and to refile its breach of contract claim and declaratory judgment action at a later time.

After a hearing on August 10, 2016, the circuit court entered a written order granting summary judgment in favor of the Trust, finding that the WCC "was placed on notice on at least three (3) occasions during the month of April 2012," "that [the Trust] refused to pay for topping slab repairs," and, as a result, the WCC's claim for breach of contract "accrued more than three (3) years before the complaint was filed." The court also entered a written order denying the WCC's motion for partial summary judgment.

DISCUSSION

The WCC contends that the circuit court erred in granting summary judgment against it on the ground that its breach of contract claim was time barred because (1) the Trust had an ongoing obligation to repair the balcony; (2) the Trust did not refuse to honor its obligation until May 11, 2012 which was less than three years before filing suit; and[5] (3) the Trust had a duty to reimburse the WCC, and thus, the cause of action did not accrue until the WCC paid the first invoice, in June 2012. In addition, the WCC contends the court erred in failing to declare the rights of the parties in accordance with the request for declaratory judgment.

As this appeal comes to us from a grant of summary judgment, our task is to determine whether there is any genuine dispute of material fact and, if not, whether the moving party was entitled to judgment as a matter of law. Md. Rule 2-501(f); *Taylor Elec.*

[5] The WCC did not raise this issue as a question to be decided but mentioned it in passing when discussing the effect on the date of accrual of the Trust's obligation to reimburse the WCC for the cost of repairs. Nevertheless, we address the issue and, based on the record, conclude that, in April 2012, the Trust denied any obligation for the cost of repairs relating to the change order.

Co., Inc. v. First Mariner Bank, 191 Md. App. 482, 488 (2010). "'A material fact is a fact the resolution of which will somehow affect the outcome of the case.'" *Matthews v. Howell*, 359 Md. 152, 161 (2000)(quoting *King v. Bankerd*, 303 Md. 98, 111 (1985)). If there is no genuine issue of material fact, we review the trial court's grant of summary judgment to ascertain if it was legally correct. *Jahnigen v. Smith*, 143 Md. App. 547, 555 (2002)(and cases cited therein). In the case at hand, both parties filed motions for summary judgment and argued that there was no genuine dispute of material fact. The issue to be determined, therefore, is whether the trial court was legally correct.

It is well established in Maryland that a plaintiff must file a civil action at law "within three years from the date it accrues unless another provision of the Code provides a different period of time within which an action shall be commenced." Md. Code (2013 Repl. Vol.), § 5-101 of the Courts and Judicial Proceedings Article ("CJP"). Maryland follows the "discovery rule," pursuant to which a claim will not accrue until a plaintiff knows or reasonably should know of the wrong. *See Poffenberger v. Risser*, 290 Md. 631, 636 (1981)("we now hold the discovery rule to be applicable generally in all actions and the cause of action accrues when the claimant in fact knew or reasonably should have known of the wrong.").

I.

The WCC maintains that even after the Trust formally rejected the change order proposed by Lindman, it had an ongoing obligation to repair the balcony such that each month the Trust failed to repair the balcony constituted a breach up until July 2012, when the balcony was repaired. We are not persuaded.

In support of its contention that the Trust had a continuing duty to repair the balcony even after it denied responsibility for the work detailed in Lindman's change order, the WCC directs our attention to *Singer Co. v. Baltimore Gas and Elec. Co.*, 79 Md. App. 461 (1989) and *Litz v. Maryland Dept. of Environment*, 434 Md. 623 (2013). In *Singer*, the plaintiff, a computer software engineering company, sued the power company, BG&E, for damages resulting from numerous power interruptions over the course of three years. *Singer*, 79 Md. App. at 467-69. The trial court ruled that plaintiff's causes of action accrued at the time of the initial power outage and barred the claims. *Id.* at 465-66. We disagreed, finding that BG&E had continuing obligations in contract and tort to provide the plaintiff with electricity and that each power interruption represented a separate breach of those duties, giving rise to separate causes of action. *Id.* at 472-77. We held that "where a contract provides for continuing performance over a period of time, each successive breach of that obligation begins the running of the statute of limitations anew, with the result being that accrual occurs continuously[.]" *Id.* at 426.

In *Litz*, a former property owner filed a complaint against the Maryland Department of the Environment and other defendants alleging, among other things, trespass and negligence arising out of the pollution of a lake located on the property. *Litz*, 434 Md. at 633-34. Although Litz had received notice that contaminated water was being discharged onto her property, the Court of Appeals held that because those discharges were ongoing and continued to occur during the three years prior to the time Litz filed her complaint, her negligence and trespass claims were not barred. *Id.* at 648-50.

The WCC's reliance on *Singer* and *Litz* is misplaced. In the instant case, there was only a single breach from which all of the WCC's alleged harm flowed, and that was the Trust's refusal to accept responsibility to make the repairs set out in Lindman's change order. That refusal occurred in April 2012, when the Trust notified the WCC that it refused to accept responsibility for the work covered by the change order. As that occurred more than three years before the WCC's suit was filed, the circuit court acted properly in granting summary judgment on the ground that the WCC's complaint was barred by the statute of limitations.

II.

The WCC next contends that the Trust breached its contractual obligation to reimburse the WCC for repairs made on its behalf within the limitations period. It points to Article IV, § 6(b)(xviii) of the by-laws, which authorized the WCC Board to make "alterations, additions and improvements" to the common elements and property and to charge the unit owner for that cost when "necessary to remedy a condition resulting from the Unit Owner's failure to perform maintenance and/or repair obligations to his Unit or its Limited Common Elements[.]" In support of its right to reimbursement, the WCC also references Article VII, § 2 of the condominium by-laws, which required each unit owner to:

> Pay any expense which is incurred by the Council in making any repair to or replacement of the Common Elements which results from the negligence, willful act or failure to act of that Unit Owner, unless the casualty is a covered risk under the insurance policies maintained by the Council.

The WCC contends that by its breach of contract claim it sought to recover the costs it incurred in its contract with Lindman to complete the repairs to the balcony. It argues that the cause of action for breach of contract did not accrue until the Trust failed to reimburse it for the amount it had paid to Lindman, and could not have accrued before the WCC paid the first invoice for which it seeks reimbursement. As the first invoice from Lindman was for work performed between June 4 and 22, 2012, the earliest date on which the limitations period could have begun was June 22, 2012, less than three years before its suit was filed on May 7, 2015. We disagree and explain.

As the Trust and the trial court recognized, the Court of Appeals addressed this issue in *Levin v. Friedman*, 271 Md. 438 (1974). In that case, Lawrence Levin, who was involved in the development of land, executed a performance bond to Prince George's County guaranteeing the completion of certain work in a subdivision. *Levin*, 271 Md. at 439. In May 1965, Levin sold the land. *Id.* The purchasers agreed to hold harmless Levin from all liability arising out of the failure to complete the required work. *Id.* at 440. More than two years later, the purchasers abandoned the development project. *Id.* at 440-41. On October 6, 1967, counsel for Levin sent a letter to the purchasers advising that they would be held liable under the warranty agreement. *Id.* A few months later, the bonding company advised Levin that it was responsible for completing the work and requested him to do so without further delay. *Id.* at 441. Thereafter, on June 27, 1968, Prince George's County provided Levin with an itemized list of defects in the work, but no work was done. *Id.* On December 10, 1971, the bonding company sued Levin on his agreement to indemnify it against any liability or loss as a result of its having written the bond to the county. *Id.*

On January 18, 1972, Levin filed a third-party claim against the purchasers for breach of contract. *Id.* at 442. Subsequently, Levin settled with the bond company and pursued his claims against the purchasers. *Id.* Ultimately, Levin's complaint against the purchasers was dismissed on the ground that it was barred by the statute of limitations. *Id.*

On appeal, Levin argued that his cause of action for indemnity against the purchasers could not have accrued until they either settled with the bond company or were found liable. *Id.* at 443. In rejecting that argument, the Court of Appeals found that the purchasers had agreed to carry out the required work and to hold harmless Levin from liability for failure to perform that work. *Id.* at 445. Because Levin "would have a right of action for the amount of loss in the event the purchasers failed to carry out those obligations," the hold harmless agreement was simply redundant. *Id.* As a result, the claim for failure to perform and the claim for indemnification arose at the same time. *Id.* at 445-46.

The same is true in the instant case. The WCC gave notice to the Trust of the problems with the balcony and water leaking into another unit. Just as in *Levin*, when the Trust rejected the WCC's requests to make the repairs set forth in the Lindman change order on the ground that it was not responsible to do so, it also rejected any responsibility for reimbursing the WCC for that same work. Any claim that the WCC might have had against the Trust for failure to make repairs and for reimbursement accrued at the same time. As a result, both claims against the Trust were barred by the three year statute of limitations.

III.

The WCC contends that the circuit court erred in granting summary judgment as to count one of its complaint, which sought a declaratory judgment, because the Trust's motion for summary judgment was limited to count two, which asserted a claim for breach of contract. Relying on *Commercial Union Ins. Co. v. Porter Hayden Co.*, 116 Md. App. 605, 635 (1997), the WCC argues that a trial judge may not grant summary judgment *sua sponte* and in total absence of a motion for summary judgment by the parties. It recognizes, however, that its motion for partial summary judgment was directed to both counts of the complaint. It also acknowledges that if the court properly determined the WCC's claim for breach of contract was barred by limitations-and we have concluded it was- it was proper for the court to grant the Trust's motion for summary judgment and deny the WCC's motion with respect to the breach of contract claim. Nevertheless, it maintains that the court was "required to hear the merits of Count I and enter an order defining the rights of the parties. We disagree.

The controversy between the WCC and the Trust centered on which of them was responsible for the cost of the repairs to the balcony. In order to maintain a declaratory judgment action, there must be a justiciable controversy between the parties. *See* CJP § 3-409(a)(1)(authorizing declaratory judgments only when the complaint establishes that "[a]n actual controversy exists between contending parties"); *Boyds Civic Ass'n v. Montgomery County Council*, 309 Md. 683, 689 (1987)("[U]nder the statute, the existence of a justiciable controversy is an absolute prerequisite to the maintenance of a declaratory judgment action." (internal quotation marks and citations omitted)). A controversy is

justiciable when "there are interested parties asserting adverse claims upon a state of facts which must have accrued wherein a legal decision is sought or demanded." *State Ctr, LLC v. Lexington Charles Ltd. P'ship*, 438 Md. 451, 591 (2014)(quoting *Boyds*, 309 Md. at 690)(emphasis and internal quotation marks omitted).

A justiciable claim becomes moot "if, at the time it is before the court, there is no longer an existing controversy between the parties, so that there is no longer any effective remedy that the court can provide." *Frazier v. Castle Ford, Ltd.*, 430 Md. 144, 162-63 (2013). Maryland courts generally avoid considering cases that do not present a justiciable issue because it places them "in the position of rendering purely advisory opinions, a long forbidden practice in this State." *Hatt v. Anderson*, 297 Md. 42, 46 (1983). *See also Converge Servs. Group, LLC v. Curran*, 383 Md. 462, 477 (2004)("when a declaratory judgment action is brought and the controversy is not appropriate for resolution by declaratory judgment, the trial court is neither compelled, nor expected, to enter a declaratory judgment").

In the instant case, when the circuit court determined that the WCC's breach of contract claim had not been filed in a timely manner, the right to declaratory relief was likewise barred. As we have recognized:

> "We are of the opinion that the period of limitations applicable to ordinary actions at law and suits in equity should be applied in like manner to actions for declaratory relief. Thus, if declaratory relief is sought with reference to an obligation which has been breached and the right to commence an action for "coercive" relief upon the cause of action arising therefrom is barred by the statute, the right to declaratory relief is likewise barred."

Commercial Union, 116 Md. App. at 659 (quoting *Maguire v. Hibernia Savings & Loan Soc.*, 23 Cal.2d 719, 146 P.2d 673, 681 (1944)).

Once the WCC's breach of contract claim was found to be time barred, the controversy between the parties ceased to exist, and the request for declaratory relief was likewise time barred and moot. As a result, the circuit court did not err in declining to declare the rights and duties of the parties.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED; COSTS TO BE PAID BY APPELLANT.