UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1550

September Term, 2014

EMERALD BAY TOWNHOUSE
CONDOMINIUM ASSOCIATION, ET AL.

v.

PHILIP M. CIOFFIONI

Meredith,
Berger,
Nazarian,

JJ.

Opinion by Nazarian, J.

Filed: August 5, 2015

Seven of the eight owner/members of the Emerald Bay Townhouse Condominium (the "Condominium") would like to assign the Condominium's eight boat slips and four piers on a unit-by-unit basis. But the boat slips and piers are general common elements of the Condominium to which all eight members have undivided rights of access. And limiting any owner's access to any slip or piers would require the Condominium to convert the boat slips and piers from general common elements to limited common elements, a change that requires unanimous consent of the membership. The member dissenting from the assignment plan, Philip M. Cioffioni, prevailed in two separate lawsuits that decided this very question, neither of which the Condominium appealed.

This case grows out of the Condominium's effort to achieve the same result through a bylaw amendment, a process that requires only a two-thirds vote of the Condominium's Board of Directors (the "Board"). In 2009, the Board adopted a resolution (the "Resolution") under which each of the boatslips would be leased to the adjacent unit owner for a term of ten years. Mr. Cioffioni filed suit in the Circuit Court for Worcester County to enjoin enforcement of the Resolution, and the court held, on his motion for summary judgment, that the Resolution converted a general common element to a limited common element, which, because it lacked unanimous consent, worked an *ultra vires* taking of the individual unit owners' property rights. We agree and affirm.

I. BACKGROUND

In 2008, Mr. Cioffioni filed suit in the circuit court against Emerald Bay Townhouse Condominium Association (the "Association") to enjoin two unit owners from maintaining boatlifts on two of the boatslips without permitting all of the unit owners to use them. On

April 30, 2009, the circuit court entered a declaratory judgment holding that every unit owner had the right to use each of the eight boatslips because the boatslips were "general common elements." Because denying some of the unit owners the right to use the two boatlifts would also deny them their right to use two of the boatslips, the circuit court ruled that every unit owner, including Mr. Cioffioni, must be allowed to use the two boatlifts unless the unit owners consented unanimously to a different arrangement. The Association did not appeal this ruling, nor does it contest its validity now.

On July 6, 2009, the Association filed a petition in the circuit court requesting, among other things, that the circuit court declare the four piers and the eight boatslips "limited common elements" that every unit owner did not have the right to use. Mr. Cioffioni, based on the circuit court's earlier ruling, moved to dismiss the Association's petition. The circuit court granted Mr. Cioffioni's motion and dismissed the petition. This ruling was not appealed by the Association.

On November 22, 2009, the unit owners approved, over Mr. Cioffioni's objection, an amendment to Article VIII, Section 6 of the Association's bylaws, which provided:

> Additionally the Council of Unit Owners has the authority to grant easements, rights-of-ways, licenses, leases in excess of 1 year, or similar interests affecting the common elements of the Condominium if the grant is approved by the affirmative vote of unit owners having 66 2/3 percent or more of the votes, and with the express written consent of the mortgagees holding an interest in those units as to which unit owners vote affirmatively.

Under this bylaw amendment, the Board, with the support of the majority of the unit owners and over Mr. Cioffioni's objection, adopted the Resolution on January 3, 2010. The Resolution provided that each unit owner would lease (for $300) the boatslip immediately adjacent to his respective unit for a period of ten years.

On June 3, 2010, the Association filed a petition in the circuit court seeking a declaration that it had the authority to lease the boatslips to the unit owners pursuant to the Resolution. The circuit court denied the petition without a hearing. Nevertheless, the Association executed long-term leasing arrangements with seven of the eight unit owners pursuant to the Resolution (everyone except Mr. Cioffioni). The leases were recorded in the land records of Worcester County on September 30, 2011.

On June 17, 2013, Mr. Cioffioni filed suit against the Association and asked the court to enjoin enforcement of the leases. He alleged that the leases were legally invalid because they were not approved with the unanimous consent of the unit owners, and on September 16, 2013, he filed a motion for summary judgment on those same grounds. The circuit court denied the motion on February 11, 2014, and found that the individual unit owners were necessary parties. Mr. Cioffioni filed an amended complaint on March 21, 2014 that named the individual unit owners. During a hearing on July 29, 2014, Mr. Cioffioni asked for the circuit court to reconsider his motion for summary judgment. The circuit court granted Mr. Cioffioni's motion for reconsideration and, on August 15, 2014, issued a memorandum opinion granting Mr. Cioffioni's motion for summary judgment. The circuit court ruled "that the leasing of the boatslips to individual unit owners via an

amended by-law [was] an *ultra vires* taking of [the] individual unit owners' rights" that could only be accomplished with the unanimous consent of the unit owners. The Association and the individual unit owners (collectively, the "Appellants") noted a timely appeal.

II. DISCUSSION

There is no serious dispute that the Appellants are trying, through this lease mechanism, to achieve the same assignment of boatslips and piers that they have failed to accomplish through a reassignment of these general common elements. They also don't dispute that they have fought and lost this battle before, but they argue instead that Md. Code (1974, 2010 Repl. Vol.), § 11-125(f)(1) of the Real Property Article ("RP"), independently authorized the Association to lease the boatslips to individual unit owners for their exclusive use.[1] We disagree.

Our task in reviewing a summary judgment is to determine "whether the trial court's grant of the motion was legally correct." *Laing v. Volkswagen of Am., Inc.*, 180 Md. App. 136, 152-53 (2008) (citations omitted). A motion for summary judgment is properly

[1] The Appellants present the following questions for our review:

> 1. Does RP § 11-125(f)(1) authorize the subject bylaw amendment to allow leases for a term of more than one year of common area boatslips?
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> 2. Should reasonable attorney's fees and costs be awarded to the Appellants?

granted if "there is no genuine dispute as to any material fact and the party in whose favor judgment is entered is entitled to judgment as a matter of law." Md. Rule 2-501(f). When "the facts are susceptible to more than one inference, the court must view the inferences in the light most favorable to the non-moving party." *Laing*, 180 Md. App. at 153 (citations omitted).

The Maryland Condominium Act (the "Act"), codified at RP § 11-101 *et seq.*, "regulates the formation, management, and termination of condominiums in Maryland." *Ridgely Condo. Ass'n, Inc. v. Smyrnioudis*, 343 Md. 357, 360 (1996). Under the Act, the owner of property may subject the property to a condominium regime by recording a declaration, bylaws, and a condominium plat among the land records of the county in which the property is located. RP § 11-102(a). The Act requires the declaration to set forth: (1) the name of the condominium; (2) a description of the condominium; (3) a general description of each unit; (4) a general description of the common elements and a designation of which of them will act as limited common elements. RP § 11-103(a). The Act defines "common elements" as "all of the condominium except the units" and divides them into two separate categories: (1) "limited common elements," which are "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" and (2) "general common elements," which are "all the common elements except the limited common elements." RP § 11-101(c). Put another way, a common element is a general common element unless the condominium's declaration or plat expressly reserves it for the exclusive

use of only some of the unit owners. *See Ridgely Condo. Ass'n, Inc.*, 343 Md. at 370 ("In terms of the Maryland Condominium Act the lobby was a general common element, the use of which all of the tenants enjoyed equally.").

After the condominium regime is in place, an amendment to the condominium's declaration that seeks to redesignate a general common element as a limited common element requires the consent of all the unit owners. *See id.* at 360-61 ("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 . . . redesignating general common elements as limited common elements."); *see also* RP § 11-103(c)(iv) ("Except as otherwise expressly permitted by this title and by the declaration, an amendment to the declaration may not redesignate general common elements as limited common elements without the written consent of every unit owner and mortgagee."). This is so because every unit owner owns his proportionate share in the undivided whole of the condominium's general common elements, and this ownership interest cannot be limited in any manner without the owner's consent. *See Jurgensen v. New Phoenix Atl. Condo. Council of Unit Owners*, 380 Md. 106, 117-18 (2004) ("[The appellant] is (or was) a percentage owner of all general common elements of the Condominium, as are all unit owners . . .").

The parties agree, and the circuit court previously decided, that the eight boatslips are general common elements that every unit owner was entitled to use, not least because the boatslips are not expressly designated as limited common elements in the

Condominium's plat or declaration. RP § 11-101(c). Accordingly, in order to redesignate the boatslips as limited common elements reserved for the exclusive use of less than all of the unit owners, the Association was required to obtain unanimous consent from the unit owners to amend the Condominium's declaration to that effect. RP § 11-103(c)(iv). The Appellants contend this time, however, that they are not redesignating the slips as limited common elements. Instead, they say that by leasing the boatslips to the individual unit owners, the Association merely exercised its authority under RP § 11-125(f)(1)[2] to grant

[2] RP § 11-125(f)(1) provides:

> The declaration or bylaws may give the council of unit owners authority to grant easements, rights-of-way, licenses, leases in excess of 1 year, or similar interests affecting the common elements of the condominium if the grant is approved by the affirmative vote of unit owners having 66 ⅔ percent or more of the votes, and with the express written consent of the mortgagees holding an interest in those units as to which unit owners vote affirmatively. Any easement, right-of-way, license, or similar interest granted by the council of unit owners under this subsection shall state that the grant was approved by unit owners having at least 66 ⅔ percent of the votes, and by the corresponding mortgagees.

The statute permits a condominium association to grant leases in the common elements of the condominium with the consent of only two-thirds of the unit owners. Accordingly, the Association did not need the unanimous consent of the unit owners to grant a lessee the right to use the boatslips. However, nothing in RP § 11-125(f)(1) allows a condominium association to grant a lessee the *exclusive* right to use a common element. Rather, when RP § 11-125(f)(1) is read in context, it authorizes the Board to lease common elements to others, alongside or in addition to the unit owners, not to diminish or otherwise re-define the property rights of the unit owners themselves. In any event, it is unclear how the Association could have been exercising its authority under RP § 11-125(f)(1) in *leasing* the slips to the individual unit owners when all of the unit owners already (continued…)

leases of the Condominium's common elements, an action that required approval by only two-thirds of the unit owners.

But although it is true that the Board has the authority to execute leases as a general matter, we disagree that the Board has the authority to lease narrowed versions of its own general common elements back to its unitholders. Before executing these leases, each unit owner had the right to use any of the eight boatslips because they were, and are, general common elements. Put another way, each unit owner already owned his proportionate share of the undivided group of boatslips. After executing a lease, however, each unit owner was entitled only to use the boatslip adjacent to his unit, which was exclusively reserved for his use during the term of the leases. Put yet another way, each leasing unitholder paid an extra $300 to restrict his access to boat slips *he already owned*. We understand the Board's frustration with Mr. Cioffioni's refusal to cooperate with everyone else's vision, but we agree with the circuit court that this leasing strategy was an attempt to end-run the unanimous consent requirement for converting general common elements and the court's earlier rulings to that same effect.

We faced an analogous set of facts in *Alpert v. Le'Lisa Condo.*, 107 Md. App. 239 (1995). In *Alpert*, we upheld a condominium association's non-unanimous decision to

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owned them. *See Jurgensen*, 380 Md. at 115 ("[I]n regard to the common elements, [a unit owner] can be said to have a tenancy in common in the general common elements with all of the other Condominium unit owners.").

amend the bylaws to reserve certain parking spaces for the exclusive use of specific unit owners. *Id.* at 255-56. The condominium's declaration had designated the parking spaces as general common elements equally available to all of the owners. *Id.* at 244. After a dispute developed, thirty-one of the thirty-two unit owners (the Alperts being the dissenting owner) voted to amend the bylaws so that the parking spaces located under the building and shielded from the elements would be assigned based on length of ownership in the condominium (*i.e.*, the most senior unit owner who did not have a space under the building would receive such a space whenever a unit with a space under the building was sold). *Id.* at 244-45. The Alperts sued to enjoin enforcement of the amendment and, on appeal, argued that the condominium association lacked authority to designate specific parking spaces for the exclusive use of individual unit owners without the unanimous consent of the unit owners. *Id.* at 246. We reviewed the bylaw amendment under a "reasonableness" standard and determined that the amendment was reasonable because it "restricted the use of parking spaces in order to avoid a chaotic free-for-all by assigning each unit owner a parking space." *Id.* at 255-56. Accordingly, we upheld the bylaw amendment as legally valid. *Id.*

If *Alpert* remained good law, we would be hard-pressed to find a reason to overturn the Association's decision to reserve each boatslip for the exclusive use of the adjacent unit owner, even though the decision was made without Mr. Cioffioni's consent. But we expressly overruled *Alpert* only two years later in *Sea Watch Stores Ltd. Liab. Co. v. Council of Unit Owners of Sea Watch Condo.*, 115 Md. App. 5 (1997). Relying on *Ridgely*

Condo. Ass'n, Inc., which the Court of Appeals decided in the time between *Alpert* and *Sea Watch Stores Liab. Co.*, we stated in so many words "that what was done in *Alpert* cannot be done . . . [and] we hereby expressly overrule its holding." *Sea Watch Stores Ltd. Liab. Co.*, 115 Md. App. at 25. And we did so because in *Ridgely Condo. Ass'n.*, the Court of Appeals held that a condominium association's adoption of a resolution prohibiting clients of the commercial units from utilizing the condominium's lobby, which was designated a general common element in the condominium's declaration, required unanimous consent:

> 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 RP § 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 RP § 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.
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> 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.

343 Md. at 369-71. As such, we were constrained to find in *Sea Watch Store Liab. Co.* that "*Alpert* and the Court of Appeals's *Ridgely* are plainly inconsistent." 115 Md. App. at 25.

Eight years later, the Court of Appeals agreed with our interpretation of *Ridgely Condo. Ass'n, Inc.* in *Jurgensen*, 380 Md. 106. In that case, Mr. Jurgensen sued his condominium association after the association reduced the size of a parking space designated for his unit through a sign posted on the space. *Id.* at 112-13. Despite the sign's presence, the Court determined that the parking space was a general common element because it was never identified in the condominium's declaration or plat as a limited common element. *Id.* at 116-17. Because "[o]nly the unanimous written consent of all unit owners could have changed [the] parking space . . . from a general common element to a limited common element [and t]here is no evidence that any such consents were ever given," the Court held that Mr. Jurgensen never acquired exclusive rights to use the parking space in the first place. *Id.* at 120. Noting that *Alpert* was a factually similar case, the Court seized the opportunity to weigh in on our decision to overrule *Alpert*: "The *Sea Watch* decision correctly interpreted this Court's holding in *Ridgely*, a holding that we reiterate now-there cannot be a redesignation of common elements without the unanimous written consent of all the unit owners of a condominium." *Id.* at 121.

Together, *Alpert*, *Ridgely Condo. Ass'n, Inc.*, *Sea Watch Stores Ltd. Liab. Co.*, and *Jurgensen* support the circuit court's decision that the Condominium was not authorized to assign general common element parking spaces, whether for cars or boats, without the unanimous consent of the unit owners. The Condominium's general authority to lease general common elements doesn't work where the lessees already hold property rights—indeed, ownership rights—broader than the leasehold interest they're purporting to buy in

exchange for consideration above and beyond their existing interest. In First Year Property terms, the unit holders held a fatter bundle of sticks before they signed their leases with the Board (a body comprised of themselves, for what that's worth) than they did after. We decline to read the Act in a manner that allows the Appellants to circumvent the court's earlier rulings that the slips are general common elements, as creative as the leasing strategy might be and as frustrating as Mr. Cioffioni might be as a unit owner and neighbor.

Our decision to affirm summary judgment in Mr. Cioffioni's favor answers as well the Appellants' request for attorneys' fees.

JUDGMENT OF THE CIRCUIT COURT FOR WORCESTER COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANTS.