

Circuit Court for Howard County  
Case No. 13-C-07-69573

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 1804

September Term, 2017

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LUBNA KHAN

v.

ZUBAIR ARIF KHAN NIAZI

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Wright,  
Graeff,  
Scharer, J. Frederick,  
(Senior Judge, Specially Assigned)

JJ.

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Opinion by Wright, J.

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Filed: December 21, 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 is an appeal from an order entered by the Circuit Court for Howard County in this domestic relations action. Lubna Khan, appellant, takes issue with a ruling in favor of Zubair Khan Niazi, appellee,<sup>1</sup> entered below in which the Chancellor denied her request to modify the court’s agreement and the alternate order, a specific performance for breach of contract, or justifiable reliance.

The parties have appeared before this Court on numerous occasions. A recent opinion by Judge Stuart R. Berger affirming the granting of the absolute divorce, provides some background. We noted that “Khan and Niazi were married in a religious ceremony in Pakistan on September 21, 1987.” *Khan v. Niazi*, No. 1302, Sept. Term 2010 (filed July 9, 2012), slip op. 2 The parties then moved to the United States, completed medical residencies and fellowships, and pursued careers as physicians. During the marriage, the couple had two children, one of whom is emancipated. *Id.*

The marriage “began to sour,” and the parties initially filed suit for limited divorce in the Circuit Court for Howard County. On May 22, 2009, the circuit court entered a judgment of limited divorce and, among other relief, awarded joint physical and shared legal custody of Omar K. (“Omar”), the parties’ minor child. Khan subsequently filed a complaint for absolute divorce. Following a hearing, the circuit court took the case under advisement and on July 15, 2010, entered a judgment of absolute divorce. The court awarded Khan alimony, a monetary award, and granted her the use and possession of the marital home. *Id.*, slip op. at 3. Subsequent litigation also came to this Court involving a

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<sup>1</sup> The appellee did not participate in this appeal.

dispute over legal custody in *Omar Khan v. Niazi*, No. 0662; No. 0992, Sept. Term 2011 (filed December 13, 2012).

Khan raises the question, which we have attempted to state succinctly:<sup>2</sup>

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<sup>2</sup> Khan's questions presented in her brief are as follows:

- (1) Did the trial court err as a matter of law to change an enrolled judgment dated April 20, 2017, on material issue of fact that [Khan] was not required to refinance marital home under the Agreement when the judgment was governed by *res judicata* and collateral estoppel and the court lacked jurisdiction?
- (2) Did the trial court err as a matter of law for awarding attorney fee to [Naizi] without a fee shifting statute or making a finding lack of substantial justification in filing the claim pursuant to Md. R[ule] 1-341?
- (3) Was the trial court's denial of [Khan's] motion to modify the settlement agreement in the alternate order specific performance for breach of contract or justifiable reliance, and motion for summary judgment without granting a hearing [Khan] requested, legally correct when [Md.] Rule 2-311(f) requires the trial court to hold a hearing before rendering a decision disposing of a claim or defense?
- (4) Did the trial court err as a matter of law when it held [Khan] was seeking to interfere in the contractual rights of [Naizi] without applying the principles of contract law in deciding the rights and obligation of the parties under June 19, 2014, Contract?
- (5) Did the trial court err as a matter of law when it did not decide on the party's statutory rights to access the mortgage account pursuant to Maryland Commercial law instead altered an enrolled judgment when it lacked jurisdiction to alter an enrolled judgment to grant relief to [Naizi]?
- (6) Was the trial court's denial of [Khan's] motion to alter or amend or revise a court order legally correct, when [Khan] had rights as a borrower under GAM Article § 12-1022(a)(2) as a debtor pursuant Md. Code Ann., Com. Law § 9-203(a)(b)(1)(2), and [Naizi] mortgage note was legally not enforceable after he quitclaim the deed of trust?

Whether the circuit court judge erred when he denied to modify a settlement agreement?

On May 24, 2014, the parties attempted to enter into an agreement in the circuit court for final disposition of the marital home. The terms of the agreement were recited by Naizi’s counsel. Under the agreement, Naizi was to quitclaim his title to the marital home while Khan took the responsibility to pay the carrying costs of the mortgage. The parties were asked to put the agreement in writing and submit it to the court. The parties failed to do so. Therefore, the court passed an order incorporating what it considered constituted the agreement that was placed on the record in an order dated July 17, 2014. On May 24, 2014, Naizi deeded the property to Khan by way of a quitclaim deed.<sup>3</sup> Khan signed the deed of trust as a co-borrower and Naizi signed the promissory note.

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<sup>3</sup> “Black’s Law Dictionary defines a quitclaim deed as:”

A deed that conveys a grantor’s complete interest or claim in certain real property but that neither warrants nor professes that the title is valid . . . .

A quitclaim deed purports to convey only the grantor’s *present interest in the land*, if any, rather than the land itself. Since such a deed purports to convey whatever interest the grantor has at the time, its use excludes any implication that he has good title, or any title at all. Such a deed in no way obligates the grantor. If he has no interest, none will be conveyed. If he acquires an interest after executing the deed, he retains such interest. If, however, the grantor in such deed has complete ownership at the time of executing the deed, the deed is sufficient to pass such ownership . . . . A seller who knows that his title is bad or who does not know whether his title is good or bad usually uses a quitclaim deed in conveying.’ Robert Kratovil, *Real Estate Law* 49 (6<sup>th</sup> ed. 1974)

*Jenkins v. City of College Park*, 379 Md. 142, 168 (2003) (quoting *Black’s Law Dictionary* 424 (7<sup>th</sup> ed., 1999)) (emphasis in original).

On June 19, 2014, the parties agreed that Khan was authorized by Naizi to directly communicate with the mortgagee and access and manage the mortgage account on behalf of Naizi. Naizi sent his authorization to the mortgagee and directed Khan to communicate directly with the mortgagee on matters related to the mortgages. On April 4, 2017, Naizi asked that the mortgagee, “[p]lease remove Ms. Lubna Khan as my authorized agent/facilitator/operator or negotiator related to any mortgages [or] related issues for property at 12339 Wake Forest Road,” and stated that “all matters must be authorized and communicated with [him] only,” in effect rescinding the prior authorization.

Khan alleges that she was unable to communicate with the mortgagee, access online accounts, and receive insurance proceeds held by the mortgagee for repairs of marital home. Khan inquired from mortgagee how to re-establish access with the mortgagee, and Khan was advised that she would require a court order to access the mortgage account.

On December 14, 2016, Naizi filed an amended petition for contempt. Naizi claimed specifically that Khan was in contempt of court for her failure to refinance the mortgage on the former marital home, as mandated in the court’s order of July 17, 2014.

On August 22, 2017, Khan filed a motion requesting that the court “modify court agreement in the alternative specific performance for breach of contract or justifiable reliance with exhibits” and requested a hearing. A hearing was held before a Magistrate on April 4, 2017. On April 5, 2017, the Magistrate issued a Report and

Recommendations. On April 19, 2017, the circuit court signed an order after having read and considered the Magistrate’s findings of fact and recommendations. Naizi never filed an exception or took an appeal.

On September 12, 2017, Naizi filed his counter motion to modify court agreement. Naizi alleged he rescinded the authorization because Khan had refused to refinance the property pursuant to the agreement, and had changed the passwords and login identifications denying Naizi access to his mortgage account. Naizi contended that in order to gain control of the mortgage account, he rescinded the authorization. Naizi also stated that Khan was required to pay the mortgage under the terms of the agreement.

On September 20, 2017, Khan filed a “motion to dismiss with prejudice Md. Rule 2-322(b) in the alternative motion to strike Md. Rule 2-322(b) and attorney fees and exhibits.” The circuit court denied Khan’s motion to dismiss and did not grant a hearing. On September 29, 2017, Khan filed a motion for summary judgment and requested for a hearing. Naizi did not file a response.

The circuit court set a motions hearing for October 13, 2017, and Naizi sought a postponement. Khan opposed the postponement because Naizi had notice. The circuit court judge vacated the hearing and signed an order denying Khan all relief and ruling that Khan failed to refinance the property pursuant to his court order of July 17, 2014. The circuit court judge also granted Naizi’s attorney’s fees and denied Khan’s all other motions.

On October 19, 2017, Khan filed a motion to alter or amend or revise, and Naizi filed his opposition. Khan, raising the issue of *res judicata* and collateral estoppel, argued that she was not required to refinance pursuant to the agreement, and that the agreement foreclosed all issues/claims related on her refinance. Therefore, she argued that Naizi was barred from raising the same issues/claims in a subsequent proceeding.

Naizi responded by arguing that the finding was made by the Magistrate and therefore, was not a final order and was not adopted by the circuit court judge in his order. Further, he agreed that pursuant to the order of July 17, 2014, in exchange for his signing a quitclaim deed and relinquishing to Khan all of his rights and his interest in the marital home, Khan was required to assume all responsibility for the property, including, but not limited to, the mortgages, taxes, any other bills and expenses, lawn care maintenance, home owner's association fees, and any expenses beyond insurance and repairs currently being made on the property.

Naizi further avered that included in the parties' negotiation was the understanding that Khan would refinance the mortgage on the marital home and relieve Naizi of the responsibility of having to carry the burden of the mortgage on his credit. Naizi also argued that, at some point thereafter, he permitted Khan to have access to his mortgage account so that she could directly have information on when to make payments on the mortgage and the amount due. The motion for reconsideration was denied on November 17, 2017.

### **Standard of Review**

Under Md. Rule 8-131(c), following a bench trial, we “review the case on both the law and the evidence.” We will not set aside the judgment of the circuit court on the evidence unless clearly erroneous, and we defer to the circuit court’s judgment on the credibility of witnesses. *Nesbit v. Gov’t Emps. Ins. Co.*, 382 Md. 65, 72 (2004) (citing Md. Rule 8-131(c)). Appellate courts, however, do not defer to the circuit court on questions of law: “When the trial court’s order involves an interpretation and application of Maryland statutory and case law, our Court must determine whether the lower court’s conclusions are legally correct under a *de novo* standard of review.” *Banks v. Pusey*, 393 Md. 688, 697 (2006) (quoting *Gray v. State*, 388 Md. 366, 375 (2005)).

### **Discussion**

Although this case has a long and torturous past, including several appeals to this Court, the first cause action of note as to this appeal occurred at the hearing of May 23, 2014. There, the parties proffered that there was a purported agreement as to marital property, and the court asked the parties to put the agreement on the record. The colloquy went as follows:

MR. RHODES: Your Honor, the parties currently own a home, which was the marital home, at 12339 Wake Forest Road in Ellicott City, Maryland. That home currently is empty. It was being used pursuant to the use and possession order by Ms. Khan. Dr. Niazi has agreed to waive any and all rights and sign a quitclaim deed with respect to the property in favor of Ms. Khan. But he is relinquishing all rights and interest to that property.



It's my understanding that as a result of that, Ms. Khan will immediately assume – assume all responsibility for that property, including but not limited to, the mortgage, taxes, any other bills and expenses, lawn care, maintenance, home owner's association fees, and any expenses beyond insurance or repairs that are currently being made on that property.

Dr. Niazi will also take steps that are necessary to insure that the insurance proceeds, which are necessary for current repairs being made to that property are assigned to Ms. Khan. Or that if they're not assigned, that he will make sure that any proceeds that are issued for the repairs to that property are immediately made available to Ms. Khan. He'll make no efforts whatsoever to interfere with the insurance proceeds with respect to those repairs.

And as of today, both parties are agreeing to waive any and all monetary claims which were made, or could have been made or asserted today or prior to today.

THE COURT: Okay.

MR. RHODES: That's the sum and substance of the agreement, Your Honor.

THE COURT: All right. So, we have the Wake Forest Road property, the defendant is going to waive any and all rights to the property. He will be executing the quitclaim deed, whereas Ms. Khan will assume the responsibility for the property, which includes mortgage, the whole nine yards, et cetera, except for the issue of the insurance proceeds. Your client is going to take whatever steps necessary to make sure the insurance proceeds for the repair are made available to Ms. Khan. And then the parties are going to waive any other monetary claims that exist between the two of them?

MR. RHODES: Is that correct?

THE COURT: Is that correct? Okay.

DR. KHAN: I just needed some – Your Honor, can I speak?

THE COURT: Sure. It's your turn.

DR. KHAN: I just needed some clarification. I think Mr. Rhodes did an excellent job of trying to bring this to some conclusion of this property. But the only issues I would like to raise is that Mr. Niazi is willing to sign the quit claim, that's fine. That – that brings the property under my responsibility, but only to the extent that when it is signed.

The insurance proceeds is an issue because at time – as you know, the insurance company always never come forth. There can be a lot of negotiation. As I understand, Encompass – and this is not of my – to my knowledge, I just came to know about it today, the environmentalist was sent to look for some mold issues that occurred on the property. There is – and I don't – I don't mind that because we agreed to that, but there is a limit to [\$]15,000, so I'll – I may end up spending a lot of money on trying to bring the property to par.

The assignable rights is an issue. Mr. Niazi is – is willing to do that. Mrs. Niazi is also on the insurance as well. Both – both have to be free and clear, and should be made sure that the rights of the company is going to back up the rights of – that they are trying to assign to me. Because if insurance doesn't pay for some reason, I will end up having to negotiate with the insurance. I may end up having to go to the Insurance Commission if I do not have that assignable right to be able to. That will put, you know, that will put the entire burden of repair on my shoulder depending on how far Mr. Niazi will be able to communicate with them in terms of getting the receipt forward or move forward.

So, I was assuming that this is deliverable. If it's not, the cost of the repairs, is, as I understand is close to \$100,000.

THE COURT: So, what are you saying?

DR. KHAN: So, I was – I am hoping that at the time that Mr. Niazi signs the quitclaim deed that he's also able to produce assignable rights both from Mrs. Niazi as well as Mr. Niazi a letter from Encompass stating that these rights are now being assigned to me, and that I am – and the – the coverage, I will assume the coverage from thereon. And that I will be able to – and it will be dated back to the point where this damage occurred, so that I can negotiate with them.

MR RHODES: If I may, Your Honor. There is actually an attorney who represents Encompass Insurance Company here in the courtroom. Because when the – when Ms. Khan filed to ask that the Court withhold

those proceeds from the insurance, they were going to intervene in the case because they, obviously, are an interested party with respect to those proceeds. I'm not sure what issue she has at this point. We've agreed to assign.

THE COURT: I'm a little confused. That's what I'm – okay.

DR. KHAN: Well, this assignable rights means – your know, Your Honor. I'm not trying to tell you. What I'm saying is I want to make sure. The reason for the Court treasury account was that there were four parties on the check. And to make it more easy and so the repairs are properly done, I requested a court treasury account where the proceeds come and the Court can oversee that all parties are cooperating towards bringing the property back to par where it was to start with after the damage had occurred.

I still am okay and fine with the insurance proceed[s]. Because from my understanding from the attorney, a mortgagee, which is two mortgage companies that hold a note on the property [and] actually have rights. And instead of me going to the mortgage company, that I have relationship with, and they may not communicate with me, I thought that the treasury – Court treasury account would be the best way to go. So, the money comes in and the Court oversees, as I submit the bills, that the contractor is paid without me having to, you known, go to the mortgage company.

Also, I will attempt to refinance. I had – I had available mortgage way back in last July. The deal didn't go through. So, I am – I may need some time to bring myself to maybe refinance to get myself all them mortgage, of which Mr. Niazi holds at this time. But that will take some time. But in the meantime, I assume responsibility upon signing of the quitclaim deed, and upon signing of the assignable rights from the Encompass that I will assume all responsibility of the property.

THE COURT: Okay. It sounds to me that you are in agreement. But it sounds like you're trying to add certain conditions or certain understandings for this thing to go through. It's either you have an agreement and you accept the terms that you all talked about or you don't, and I have a hearing, and I'm the one that makes the decision. And as you well know, you're not going to like what I do. So, it's in your best interest to come to an agreement, because I am 99 percent certain when I have to decide, neither one of you are going to like it, no matter what the issues are.

So, I really am pleased to see that you all have come to an agreement. But I want to make sure, unequivocally, that you are in agreement with what Mr. Rhodes has placed on the record. If you're not, that's fine. I'm going to take a lunch break and come back at 2:00 and fix your problem.

So, I just need a yes or no from you, do you accept the agreement that Mr. Rhodes has placed on the record? Yes or no? One word. Either one.

DR. KHAN: Yes, Your Honor. But to the extent that assignable rights should come through on the insurance, because it's \$100,000 cost. If the insurance says that you were not on the policy in terms of – that you – we cannot assign your rights, that policy was under Mr. Niazi, and that you may not – then that – that means that I've accepted another deficit of \$100,000 on my head.

MR. RHODES: Maybe I can help, Judge.

THE COURT: Okay.

MR. RHODES: We've agreed to assign those rights. But even if the rights, for some odd reason under the insurance contract are not assignable, Dr. Niazi had agreed that any insurance proceeds that are available, he will still make every single penny of those proceeds available to – to Ms. Khan. He will not touch a single cent of it.

He agrees that once the property is transferred, everything with respect to those insurance proceeds are available to her.

DR. KHAN: And my only – and I – applaud the – I mean, I'm not in disagreement with that. But the only thing is sometimes insurances don't want to pay for certain things, or they want to cut corners. So, in terms of negotiating with the insurance, I – I want to have that leverage so that I can make sure that they – the proper work is done, and the house is repaired to – I'm not saying that it's – it's –

THE COURT: Let me ask you then, if he is going to do whatever he has to do to assign that over to you, or if it's not assignable, whatever he gets to turn it over to you, what is it that you still want to do? I'm a little confused here.

DR. KHAN: I understand. Maybe I wasn't clear. Insurance has paid \$43,000. Mr. Niazi's contractors came and they felt the \$43,000 was not sufficient funds.

THE COURT: Okay.

DR. KHAN: So, in that situation, who communicates with the insurance to insure that they up their payments so that the house gets repaired. That's all, Your Honor. If I don't have those assignable rights, I cannot communicate with them. I don't know to what extent Mr. Niazi would be able to negotiate with them. So, I – it will be just what the insurer pays, and I accept, and the rest I – I take it as a deficit. That's what I was trying to say.

MR. RHODES: We actually did go through all of this, Your Honor. And – and perhaps the attorney for the insurance company can explain that this really is a simple issue that's being made much worse than it is.

THE COURT: Okay. Ma'am, if I can just have your name for the record, so we know who – since everything is recorded, we know who is talking.

MS. MCNAIR: Yes. Good afternoon. Melissa McNair from Budow & Noble. I represent Encompass Insurance Company.

THE COURT: Thank you, Ms. McNair.

MS. MCNAIR: I have talked to both parties, and it is my understanding that the quitclaim deed will be signed. Therefore, Dr. Niazi will no longer have an insurable interest in the house. The policy can be reissued in Dr. Khan's name only, and she can talk directly to them. She has been talking directly to them for months about repairs and other things. And, you know having – it's been difficult because she is in North Carolina, and they're just trying to get it resolved.

So, they have been talking to her for months. I have a whole Redweld full of e-mails that she's been sending. So, there is no problem. I'm not sure what she is talking about with an assignment of rights. If he doesn't have an insurable interest in the house, there is no issue.

THE COURT: Okay.

The circuit court waited, to no avail, for the parties to submit a consent agreement for its signature and then took it upon himself to issue the following:

**Order**

WHEREAS, the parties having come before this Court on May 23, 2014, and having reached an agreement that was placed on the record, and the parties after being placed under oath, having acknowledged the agreement as their voluntarily and binding agreement; and

WHEREAS, the parties were to submit a Consent Order to this Court and have failed to do so, and have informed the Court that they cannot agree on certain language to be included in an Order, therefore, it is then, by the Circuit Court for Howard County, Maryland, this 17<sup>th</sup> day of July, 2014, hereby

ORDERED, ADJUDGED, AND DECREED, that the transcript of the May 23, 2014 hearing, is the binding Agreement of the parties; and it is further

ORDERED, ADJUDGED, AND DECREED, that the parties Agreement shall be governed by the language of the transcript attached herein, and said transcript of the Agreement shall be incorporated, but not merged into this Order of Court; and it is further

ORDERED, ADJUDGED, AND DECREED, that the parties shall equally divide the costs of the transcript, and shall pay the costs of the transcript within 10 days of the date of this Order.

As discussed above, Naizi filed an amended petition for contempt as a result of Khan's failure to refinance the property. A hearing was held before a Magistrate on April 4, 2017.

The Magistrate issued the following Report and Recommendations:

**Finding of Facts**

After hearing the testimony from the Plaintiff and Defendant, as well as a review of the exhibits, the Magistrate issued the following Report and Recommendations:

1. The Defendant-moving party arrived to the courtroom at 8:59 a.m. for a start time of 9 a.m.
2. Defendant filed Amended Petition for contempt of Court on 12/14/16. Defendant claims that Plaintiff is in contempt of court order of July 17, 2014. That order incorporated the parties' agreement that was placed on the record in May 2014. The parties were not able to agree on language for a consent order and therefore the court issued an order that incorporated the agreement per the transcript of the proceedings.
3. Defendant complains specifically that the Plaintiff is in contempt of court for her failure to refinance the mortgage on the former marital home. Counsel for Defendant placed the parties' agreement on the record at the hearing on May 23, 2014. The agreement is recited on pages 4 and 5 of the transcript. It reads: "Your Honor, the parties currently own a home, which was the marital home, at 12339 Wake Forest Road in Ellicott City, Maryland. That home currently is empty. It was being used pursuant to the use and possession order by Ms. Khan. Dr. Niazi has agreed to waive any and all rights and sign a quitclaim deed with respect to that property in favor of Ms. Khan. But he is relinquishing all rights and interest to that property. It's my understanding that as a result of that, Ms. Khan will immediately assume – assume all responsibility for that property, including but not limited to, the mortgage, taxes, and any other bills and expenses, lawn care, maintenance, home owner's association fees, and any expenses beyond insurance or repairs that are currently being made to that property are assigned to Ms. Khan. Or that if they're not assigned, that he will make sure that any proceeds that are issued for the repairs to that property are immediately made available to Ms. Khan. He'll make no efforts whatsoever to interfere with the insurance proceeds with respect to those repairs. And as of today, both parties are agreeing to waive any and all monetary claims which were made, or could have been made or asserted today or prior to today."
4. Counsel for Defendant concluded his recitation of the agreement on pages 4 and 5 of the transcript by stating: "That's the sum and substance of the agreement, Your Honor."
5. Although later in the transcript, the Plaintiff, Dr. Khan, who was not represented by an attorney at the hearing in May 2014, in discussing her understanding of her ability to receive the insurance proceeds for repairs to the home, also stated: "Also, I will attempt to refinance. I had – I had available mortgage way back in last July. The deal didn't go through. So, I

am – I may need some time to bring myself to maybe refinance to get myself all the mortgage, of which Mr. Niazi holds at this time. But that will take some time. But in the meantime, I assume responsibility upon signing of the quitclaim deed, and upon signing of assignable rights from the Encompass that I will assume all responsibility of the property.”

6. It is clear from a plain reading of the transcript, that Plaintiff’s refinance of the loans on the property were not part of the agreement placed on the record. Even if the parties had meant for that parameter to be part of their agreement, the language of the transcript regarding the refinance, which language is incorporated into the court’s order of July 2014, is not sufficiently clear and precise that Plaintiff’s failure to refinance the loan on the property constitute willful contempt of the court’s order.

7. Further, Plaintiff, Dr. Khan did make two attempts to refinance the home after the May 2014 hearing and both of those attempts to refinance failed. Plaintiff has pursued litigation with the insurance company to pay for necessary repairs to the home for damage which includes water damage and perhaps mold damage as well.

8. In one effort, the Plaintiff was denied a mortgage because of her credit history. In another effort, she was denied a mortgage because of the condition of the home and its need for repairs.

9. Defendant has failed to prove that the Plaintiff is in willful contempt of court order.

### **Recommendations**

That the Defendant’s petition for contempt be denied.

On April 19, 2017, the circuit court signed an order after having read and considered the Magistrate’s finding of fact and recommendations.

UPON CONSIDERATION of the pleadings filed in the premises and the testimony received in a hearing on the 4<sup>th</sup> day of April, 2017, before the Magistrate, her report having been read and considered, it is, then, by the CIRCUIT COURT FOR HOWARD COUNTY, MARYLAND, this 19<sup>th</sup> day of April, 2017,



ORDERED, ADJUDGED, AND DECREED, that the Defendant's Petitions to for Contempt (D.E. #594/0 & 601/0) are hereby denied.

As noted, Naizi never filed an exception or took an appeal.

As a result of Khan's aforementioned "motion to modify court agreement in the alternative specific performance for breach of contract or justifiable reliance with exhibits and request for hearing" filed on September 12, 2017, and responses, the circuit court issued with the following order:

### **Order**

Upon consideration of Plaintiff's Motion to Modify Court Agreement or in the Alternative Specific Performance for Breach of Contract or Justifiable Reliance with Exhibit and Request for Hearing, filed on August 22, 2017, and Response thereto, filed on September 12, 2017, it is thereupon this 5<sup>th</sup> day of October, 2017, by the Circuit Court for Howard County, Maryland,

ORDERED, that the Plaintiff's Motion be, and the same is hereby, DENIED because Plaintiff has not complied with this Court's July 18, 2014 Order. Pursuant to the July 18 Order, Plaintiff was to refinance the mortgage on the parties' marital home at 12339 Wake Forest Road, Clarksville, Maryland 21029. Plaintiff has failed to do so. Plaintiff now seeks to interfere with the contractual relationship between Defendant and his mortgagee. Therefore, the Court finds that Plaintiff is not entitled to a modification of this Court's July 18 Order, specific performance for breach of contract or justifiable reliance; and it is further

ORDERED, that the Defendant shall be, and is hereby, GRANTED, reasonable attorney's fees for having to prepare and file this motion; and it is further

ORDERED, that the amount of reasonable attorney fees owed to the Defendant by the Plaintiff shall be determined by the Court upon the submission of a Fee Petition or Line regarding fees with supporting documentation.

The motion for reconsideration to alter or amend or revise the court order and response was filed after the court denied the motion, and Khan filed this timely appeal.

A review of the above leads this Court to the conclusion that there does not seem to be a straight line between what was purported to be an agreement placed on the record on May 24, 2014, and the circuit court's order of October 5, 2017. We must view the travails of this specific proceeding through the inter-relationship between the Magistrate and the circuit court judge.

A Magistrate assesses the credibility of the testifying witnesses and, after establishing a factual record, draws conclusions from the facts to make recommendations. *Levitt v. Levitt*, 79 Md. App. 394, 399 (1989). A circuit court shall defer to the Magistrate's fact-finding where it is supported by credible evidence, and it is not, therefore, clearly erroneous. *Kierein v. Kierein*, 115 Md. App. 448, 453 (1997) (quotation and citation omitted); *see also Best v. Best*, 93 Md. App. 644, 651 (1992) (a trial court should defer to the fact-finding of a Magistrate where the fact-finding is not clearly erroneous). A trial court, however, should exercise its independent judgment in applying the facts to the ultimate disposition because “[a] given set of facts does not lead mechanically to a single, automatic disposition but may support a range of discretionary dispositions.” *Wenger v. Wenger*, 42 Md. App. 596, 602 (1979); *see also Leineweber v. Leineweber*, 220 Md. App. 50, 60-61 (2014) (when a Magistrate submits a proposed order to the circuit court and exceptions are made to the Magistrate's recommendation,

the circuit court must engage in independent consideration of the exceptions) (citation omitted).

The Magistrate’s Report and Recommendations of April 4, 2017, could not be clearer that she was finding that Khan’s refinance of the loans on the property were not part of the agreement placed on the record. The resultant court order of April 19, 2017, only indicated that the Magistrate’s Report was “read and considered,” and that the petition for contempt was denied. The language in the court’s order of July 17, 2014, was not explicit as to whether the circuit court even considered the issue of Khan’s failure to refinance the property.

To further confuse matters, the later issued circuit court’s order of October 5, 2017, states specifically that Khan was to refinance the mortgage on the property. The circuit court’s prior order of April 19, 2017, did not indicate if the court was deferring to the Magistrate’s fact-finding and whether it was exercising its independent judgment, and in what manner, if any, it was applying the facts to the ultimate disposition. Specifically, there was no reason given as to why the circuit court denied the petition for contempt.

Therefore, at this point, we are unable to reconcile the two court orders giving due consideration to the Magistrate’s factual findings and our own review of the transcript of the May 23, 2014 hearing. The dual doctrines of *res judicata* and collateral estoppel, as raised by Khan, may well be implicated if there was a prior circuit court finding that

Khan was required to refinance the property.<sup>4</sup> We are, therefore, of the opinion that it would be in the interest of justice and judicial expediency to remand the case for further proceedings instead of entering a final order affirming, reversing, or modifying the

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<sup>4</sup> *Res judicata* and collateral estoppel are branches of a doctrine known as estoppel by judgment. *Res judicata* prevents the same parties from relitigating any suit based on the same cause of action in the first suit, and collateral estoppel precludes the re-litigation of any issue that has been actually litigated and determined by a valid and final judgment. *Bank of New York v. Georg*, 456 Md. 616, 667-68 (1017). The distinction between the two was first discussed in depth by the Court of Appeals in *LeBrun v. Marcey*, 199 Md. 223 (1952) where, quoting from two earlier Supreme Court cases, it noted:

The scope of the estoppel of a judgment depends upon whether the question arises in a subsequent action between the same parties upon the same claim or demand or upon a different claim or demand. In the former case a judgment upon the merits is an absolute bar to the subsequent action. In the latter the inquiry is whether the point or question to be determined in the later action is the same as that litigated and determined in the original action . . . . In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose . . . . But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action.

(Quotations and citations omitted).

judgment from which the appeal was taken. Md. Rule 8-604(d);<sup>5</sup> *Eastgage Assocs. v. Apper*, 276 Md. 698, 702 (1976). The circuit court upon remand should clarify by way of explanation or modification of its final order, taking into account the Magistrate’s findings of fact, and the circuit court’s orders of April 14, 2017, and October 5, 2017.

**JUDGMENT DENYING APPELLANT’S  
MOTION TO MODIFY COURT  
AGREEMENT IN THE ALTERNATIVE  
SPECIFIC PERFORMANCE FOR  
BREACH OF CONTRACT OR  
JUSTIFIABLE RELIANCE VACATED.  
CASE REMANDED TO THE CIRCUIT  
COURT FOR HOWARD COUNTY FOR  
PROCEEDINGS, CONSISTENT WITH ITS  
OPINION. COSTS TO BE EQUALLY  
SHARED BETWEEN THE PARTIES.**

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<sup>5</sup> Md. Rule 8-604(d) **Remand.** (1) Generally. If the Court concludes that the substantial merits of a case will not be determined by affirming, reversing or modifying the judgment, or that justice will be served by permitting further proceedings, the Court may remand the case to a lower court. In the order remanding a case, the appellate court shall state the purpose for the remand. The order of remand and the opinion upon which the order is based are conclusive as to the points decided. Upon remand the lower court shall conduct any further proceedings necessary to determine the action in accordance with the opinion and order of the appellate court.