UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1663

September Term, 2014

DAVID LEE POSEY, ET AL.

v.

SCOTT FRIEDMAN

Kehoe,
Berger,
Nazarian,

JJ.

Opinion by Kehoe, J.

Filed: June 15, 2016

Appellants, David Lee Posey and Tobin Doyle, appeal from a judgment of the Circuit Court for Montgomery County, the Honorable Ronald B. Rubin presiding, in favor of Scott Friedman. Appellants raise four issues, which we have consolidated and reworded:

1. Did the court err in granting Friedman's motion for summary judgment on the basis that appellants failed to present evidence that the corporate veil should be pierced?

2. Did the court err in considering Friedman's motion for summary judgment before discovery was completed?

We will affirm the judgment of the circuit court.

Background

Appellants were unsecured creditors of two limited liability companies, 439 North Frederick Avenue, LLC, and 1311 Madison, LLC. Friedman was the successor managing member of both companies. Appellants complain because when the assets of the two companies were sold, and the proceeds distributed to creditors, they were not repaid. Appellants allege that the reason they weren't repaid was fraud on Friedman's part. They filed suit against him based on that theory.

Friedman filed a motion for summary judgment. After a hearing, the circuit court granted judgment in Friedman's favor as to all claims brought by appellants.[1] Appellants now challenge the judgment of the circuit court on the grounds that: (1) they presented

[1]There was a third plaintiff to this suit, David Scott Posey, who, in addition to being a creditor, was a member of either or both of the limited liability companies. The circuit court denied Friedman's motion for summary judgment as to Posey's claims arising out of his status as a member. David Scott Posey subsequently dismissed his remaining claims and is not a party to this appeal.

sufficient evidence of fraud to generate an issue of material fact, and (2) the circuit court erred by ruling on the summary judgment motion before discovery was completed. We shall address each alleged error in turn.

Analysis

(1)

Appellants assert that the circuit court erred in granting Friedman's motion for summary judgment because the court framed its analysis in terms of whether the companies' corporate veils could be pierced on the ground of a paramount equity. According to appellants, "[t]heir consistent position was that Friedman had fraudulently diverted funds and that his fraud, standing alone, would suffice to pierce the corporate veil and establish personal liability." Moreover, appellants contend that the circuit court failed to consider a document titled "Analysis of Payments From 1311 Madison LLC & 439 North Frederick Avenue LLC" (the "Analysis") which was appended to their amended opposition to the motion for summary judgment. Appellants assert that the circuit court "ignored" the contents of the Analysis and that this was error because the Analysis "at the very least, demonstrated a substantial 'disagreement over inferences that can be reasonably drawn from [the] facts[.]'"

We begin with appellants' contention that Friedman had committed fraud. In their brief, appellants fail to identify any false statements made by Friedman, and, further, how those false statements worked to their prejudice. *See Colandrea v. Colandrea*, 42 Md. App. 421, 428 (1979) (identifying the elements of fraud). If this were not fatal—and it is, *see* Md. Rule 8-504 (a)(6) ("A brief shall . . . include . . . [a]rgument in support of the party's position on each issue.")—appellants' claim would nonetheless fail because there is nothing in the extract that could form the basis for an inference that Friedman committed fraud.

As they frame their contentions in their brief, appellants' entire case depends upon the Analysis, which they claim demonstrates that there is at least a factual dispute that Friedman committed fraud. Appellants are incorrect. The Analysis was neither signed nor made under oath and consists solely of conclusory and unsupported statements. As a result, the document would not be admissible in evidence and, therefore, is inadequate to establish a dispute as to a material fact in a summary judgment proceeding. *See* Md. Rule 2-501(b). In other words, for the purpose of the motion for summary judgment, this document had no significance whatsoever.[2]

[2]Even if the circuit court considered the Analysis, there is nothing in that document that provides a basis for a fact-finder to reasonably infer that Friedman made material misrepresentations of fact to either appellant or that he was otherwise guilty of actual or constructive fraud in his management of the two companies.

At oral argument, appellants' counsel suggested that affidavits attached to appellants' oppositions[3] to Friedman's motion for summary judgment established a dispute as to material fact regarding their fraud claim.[4] This argument is not persuasive. The oppositions, and the affidavits attached to them, establish a dispute of material fact as to whether Friedman breached his duties as manager to other members of the two limited liability companies.[5] But appellants were not members; they were unsecured creditors and there is nothing in the affidavits to support a reasonable inference that Friedman engaged in fraudulent conduct as to them. We find no error in the court's decision to grant summary judgment.

(2)

Appellants also assert that "because discovery had not yet been completed, the Motion for Summary Judgment was not ripe for adjudication." Appellants contend that the circuit court was aware that Friedman had not complied with all of their discovery requests when it considered the motion. In support, appellants argue that they had "filed

[3]They filed an opposition and an amended opposition.

[4]The oppositions and their exhibits should have been included in the record extract. *See* Md. Rule 8-501(c) ("The record extract shall contain all parts of the record that are reasonably necessary for the determination of the questions presented by the appeal and any cross-appeal."). Because none of those documents, other than the Analysis, are included in the extract, we are not obligated to consider them. *See, e.g., Konover v. WHE*, 142 Md. App. 476, 494 (2002).

[5]See footnote 1.

a Motion to Compel Production that had been granted by the [c]ircuit [c]ourt" and that they had informed the court, in their amended opposition to the motion for summary judgment, that Friedman failed to comply with the court's order.

Friedman counters that appellants' "argument fails both factually and as a matter of law." According to Friedman, both parties engaged in extensive discovery, which included numerous extensions of the discovery period for appellants. With regard to the above referenced motion to compel, Friedman asserts that four days after the motion was granted, "the complete company business records of both LLCs were made available for inspection and copying[.]" Friedman points out that "neither Plaintiff . . . filed a motion for Order to Show Cause or other relief claiming that this production of third-party business records was deficient or incomplete," and that all business records were produced well before the summary judgment hearing and scheduled trial. As to the law, Friedman concedes that a trial court may, in its discretion, delay ruling on a pending motion for summary judgment because discovery is incomplete. However, Friedman contends that appellants did not file an affidavit pursuant to Md. Rule 2-501(d), asserting that the facts supporting their opposition to the motion for summary judgment could not be set forth because discovery was incomplete or that Friedman had failed to provide discovery.

During oral argument, counsel for appellants directed us to the affidavits attached to their opposition to Friedman's motion for summary judgment to support the contention that they could not adequately respond to the motion without the production of certain documents, specifically, the financial records of the the two companies. The opposition to Friedman's motion for summary judgment was not provided in the record extract,[6] but, after reviewing the motion and accompanying affidavits, we conclude that the affidavits substantially complied with Md. Rule 2-501(d). Our analysis does not end here, however. After appellants filed their opposition, Friedman produced some, if not all, of the financial records. Appellants subsequently filed an amended opposition to the motion for summary judgment. And, although appellants did not express satisfaction with the completeness of the documents produced, they did not renew their request to deny or to stay the motion as premature, nor did they file another Rule 2-501(d) affidavit, addressing in specific terms what additional information they needed to respond to the motion for summary judgment. Moreover, at the summary judgment hearing, appellants alluded in passing to their dissatisfaction with the Friedman's responses to their

[6]Among other shortcomings, the record extract lacks: (1) a complete copy of the docket entries; (2) a copy of the complaint and answer; (3) a copy of Defendant's Motion for Summary Judgment; (4) a copy of Plaintiffs' Opposition to Defendant's Motion for Summary Judgment; (5) a copy of Plaintiffs' Amended Opposition to Defendant's Motion(s) for Summary Judgment; and (6) a complete copy of the transcript of the summary judgment hearing (the existing copy omits nearly the entirety of the court's ruling).

discovery requests, but they did not request that the circuit court defer ruling on Friedman's motion. We conclude that appellants can fairly be said to have abandoned their Rule 2-501(d) contention.

THE JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY IS AFFIRMED. APPELLANTS TO PAY COSTS.