

Circuit Court for Prince George's County
Case No. CAL 12-27030
The Honorable Krystal Q. Alves

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2700

September Term, 2015

CITADEL LAND, INC.

v.

EAGLEBANK

Wright,
Reed,
Friedman,

JJ.

Opinion by Friedman, J.

Filed: March 31, 2017

*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.

1802 Brightseat Road, LLC, (“the LLC”) the owner of an office building located at 1802 Brightseat Road, owes money to both Citadel Land, Inc. (“Citadel”) and EagleBank, appellant and appellee here, respectively. Among the LLC’s assets available to satisfy the debts is a stream of revenue from rents paid by tenants in the building, including two entities in the Hovnanian Enterprises family: K Hovnanian Companies (“KHOV Cos.”) and K Hovnanian Homes of Maryland (“KHOV Homes”). The Circuit Court for Prince George’s County, through garnishment and condemnation orders, first awarded the rents paid by both KHOV Cos. and KHOV Homes to Citadel. After EagleBank complained, the circuit court switched the rents paid by KHOV Cos. over to EagleBank. Finally, the circuit court ordered that the rents paid by KHOV Homes should go to EagleBank as well.

On appeal, Citadel raises two issues for our review. Citadel argues that the circuit court erred: (1) when, on its own initiative, it gave the rents paid by KHOV Homes to EagleBank, even though EagleBank never specifically mentioned those rents in its motion to vacate the garnishment; and (2) when it found that EagleBank had a prior perfected security interest in the rents garnished from both KHOV Cos. and KHOV Homes. Because we hold that the circuit court properly entered its final order for EagleBank, we affirm the judgment of the circuit court.

BACKGROUND

On June 6, 2011, 1802 Brightseat Road, LLC executed a promissory note to EagleBank in the amount of \$5.6 million to finance its acquisition of the 1802 Brightseat Road property. The property is the location of a six-story office building in the Ingle West

Office Park in Landover, Maryland. The tenants of the building include KHOV Cos. and KHOV Homes, divisions of Hovnanian Enterprises—one of the largest real estate companies in the United States.

On the same day, the LLC also executed three other documents in favor of EagleBank: (1) a security agreement that granted EagleBank a first priority security interest in certain collateral belonging to the LLC; (2) an assignment of leases and rents that gave EagleBank, as further collateral for the loan, all of the rights of the LLC to income, rents, profits, and leases from the property; and (3) a purchase money deed of trust for the property, which included language relating to the security agreement and the assignment of leases and rents. EagleBank recorded the assignment of leases and rents and the purchase money deed of trust in the land records of Prince George’s County on June 10, 2011. EagleBank also filed a UCC-1 financing statement on June 13, 2011.

Citadel, the former owner of the 1802 Brightseat Road property, also loaned money to the LLC in relation to the sale of the property. Although the record is unclear on this point, it appears that the loan between Citadel and the LLC did not grant Citadel any security interest (and Citadel has not argued otherwise). On May 2, 2014, the LLC defaulted on the loan that it owed to Citadel. Citadel filed suit for breach of contract in the Circuit Court for Prince George’s County. The circuit court granted summary judgment to Citadel in the amount of \$600,000, plus interest and costs. In two orders, each one titled “Order Condemning Garnished Property,” the circuit court ordered the garnishment of the

rents that the tenants of the 1802 Brightseat Road property were paying, and condemned those rents to Citadel. The order regarding the KHOV Homes rents (\$35,536 per month) was entered on September 10, 2014, and the order regarding the KHOV Cos. rents (\$6,647 per month) was entered on December 1, 2014.

When EagleBank discovered that the circuit court had awarded the rents to Citadel, it filed a motion to vacate the garnishment order, and to recover the rents that Citadel had already received. In its motion, EagleBank argued that it had a prior perfected security interest, and was therefore entitled to the rents.¹ But EagleBank did not quite write its motion correctly: the only relief it specifically mentioned was the rents from KHOV Cos., and it failed to mention the rents from KHOV Homes. The circuit court granted EagleBank's motion as written, vacating the garnishment order and ordering Citadel to turn over to EagleBank all rents collected from KHOV Cos. *only*.

Citadel disobeyed the court order and did not turn over the rents from KHOV Cos. to EagleBank. In response, EagleBank filed a petition in the circuit court to have Citadel held in contempt. The circuit court issued a show cause order, requiring Citadel to show why it should not grant the contempt order. After a show cause hearing, the circuit court

¹ As far as when the default specific to EagleBank occurred, EagleBank argued below that either: (1) the assignment of leases and rents only left the LLC with the right to retain rents if there was no uncured default, otherwise, EagleBank was granted an absolute assignment of rents; or (2) Citadel's judgment against the LLC constituted an event of default under the deed of trust between EagleBank and the LLC. For reasons that will become plain, we need not decide when exactly the LLC defaulted on its obligation to EagleBank.

deferred a finding of contempt, but ordered, *nunc pro tunc* to its original order, that Citadel must turn over to EagleBank all of the rents from both KHOV Cos. and KHOV Homes.²

Citadel still did not pay any of the rents to EagleBank, but instead filed a motion to vacate the court's amended order. EagleBank then filed a second petition for contempt. On January 20, 2016, after a hearing on the motion to vacate and the second petition for contempt, the circuit court entered its last order, which again deferred the contempt, but explicitly vacated the garnishments of both KHOV Cos. and KHOV Homes in favor of Citadel. The text of the order stated:

[(1)] **Ordered** that the Court finds that EagleBank holds a properly perfected senior lien on any rents owed or paid by the Garnishees to Citadel; and it is further [(2)] **Ordered** that that, based upon the evidence, the record[,], and the arguments of counsel, including without limitation that Citadel was aware of EagleBank's prior perfected lien on the rents at issue, the Court should not have entered the Garnishment Orders; and it is further [(3)] **Ordered** that, based on the foregoing, the Garnishment Orders directing that the Garnishees should submit rent payments to Citadel, shall be and hereby are vacated; and it is further [(4)] **Ordered** that within five days after the entry of this Order, Citadel shall deliver and pay to EagleBank all [rents] received from the Garnishees pursuant to the Garnishment Orders; and it is further [(5)] **Ordered** that, there being no just reason for delay, this Order shall constitute a final Order of this Court.

Thus, according to the final Order, EagleBank held a prior perfected senior lien on all the rents, the circuit court acknowledged that it should not have entered the garnishment order

² The record is unclear as to how exactly the circuit court became aware that EagleBank was entitled to the rents paid by both KHOV Cos. and KHOV Homes to Citadel.

in favor of Citadel in the first place, and Citadel had to turn over to EagleBank all of the rents received from both KHOV Cos. and KHOV Homes.

Citadel filed a timely notice of appeal of the circuit court's final order on February 12, 2016. Citadel, however, still did not pay any of the rents to EagleBank.³ Citadel also did not seek a supersedeas bond or a stay of the execution of the judgment pending the outcome of its appeal.⁴

ANALYSIS

As described above, this case occurred in three steps. *First*, the circuit court garnished and condemned the rents paid by both KHOV Cos. and KHOV Homes to Citadel. *Second*, after EagleBank filed a motion to vacate the garnishment, the circuit court awarded the KHOV Cos. rents to EagleBank. *Third*, the circuit court modified its original order and also awarded the KHOV Homes rents to EagleBank.

On appeal, Citadel argues that the circuit court erred in this third step when it modified its order on its own initiative, and awarded the KHOV Homes rents to EagleBank.

³ Although we do not have a complete record on this topic, we are able to discern that because Citadel refused to pay the KHOV Cos. and KHOV Homes rents to EagleBank, the circuit court found Citadel to be in contempt after EagleBank filed its third contempt petition. The circuit court ordered Citadel to pay, in addition to the rents, the counsel fees incurred by EagleBank in bringing its first three contempt petitions. After a show cause hearing regarding a *fourth* contempt petition filed by EagleBank, because Citadel still did not pay any of the rents to EagleBank, the circuit court issued a writ of body attachment against a corporate representative of Citadel. To the best of our knowledge, Citadel still has not satisfied its obligations to EagleBank.

⁴ See *infra* note 7.

This is because EagleBank never specifically mentioned the KHOV Homes rents in its motion to vacate the garnishment. Citadel also argues that the circuit court improperly found that EagleBank had a prior perfected security interest in the rents garnished from both KHOV Cos. and KHOV Homes because EagleBank did not submit any evidence to prove the existence of its security interest, and because EagleBank did not fulfill the conditions required by its own loan documents to demonstrate a default on the part of the LLC. We will address each of these contentions in turn.

We “will not set aside the judgment of the [circuit court] on the evidence unless clearly erroneous.” Md. Rule 8-131(c). Under this standard, “[i]f any competent material evidence exists in support of the trial court’s factual findings, those findings cannot be held to be clearly erroneous.” *Webb v. Nowak*, 433 Md. 666, 678 (2013). Questions of law, however, are reviewed *de novo*. *Clickner v. Magothy River Ass’n, Inc.*, 424 Md. 253, 266 (2012). And, we review discretionary determinations by the circuit court under the abuse of discretion standard. *Wilson v. John Crane, Inc.*, 385 Md. 185, 198 (2005) (internal quotations and citations omitted). “Furthermore, an appellate court may affirm a trial court’s decision on any ground adequately shown by the record even though the ground was not relied upon by the trial court or the parties.” *YIVO Inst. for Jewish Research v. Zaleski*, 386 Md. 654, 663 (2005).

I. Vacating the KHOV Homes Garnishment Order

Citadel first argues that the circuit court had no legal authority to correct its original order and award the KHOV Homes rents to EagleBank. Specifically, Citadel argues that EagleBank, in its motion, only requested that the circuit court vacate the garnishment order as it applied to KHOV Cos. rents, but did not specifically request that the circuit court vacate the garnishment order as it applied to KHOV Homes. Therefore, Citadel argues that it should get to keep the KHOV Homes rents because the circuit court had no power to vacate the garnishment order without a request to that effect from EagleBank.

EagleBank responds that although it did not mention KHOV Homes by name in its motion to vacate the garnishment, this was a mere misappellation, and that the circuit court was correct in liberally construing the motion. And, according to EagleBank, the circuit court had the power to, on its own initiative, correct its original order retroactively once it realized that EagleBank held a perfected senior lien on the rents from both KHOV Cos. and KHOV Homes. We agree.

First, we hold that the circuit court did not abuse its discretion when it interpreted EagleBank's motion to vacate the garnishment to have requested that Citadel turn over the rents received from both KHOV Cos. *and* KHOV Homes. Obviously, it would be better practice for EagleBank to identify correctly all assets on which it wished the circuit court to vacate its garnishment order. There are at least three pieces of evidence in the record, however, to support the circuit court's conclusion that EagleBank's motion to vacate the

garnishment could be read to refer to the rents of KHOV Homes, in addition to the rents of KHOV Cos.:

- (1) the motion mentioned the condemnation order of September 10, 2014—the date that the circuit court condemned the garnished KHOV Homes rents to Citadel;
- (2) the motion generally requested the transfer of *all* rents previously paid to Citadel pursuant to the condemnation order—the date of which referred to the condemnation of the garnished KHOV Homes rents; and
- (3) the motion requested that the circuit court “grant such other and further relief as this Court deems just and proper,” which could include awarding EagleBank the rents from both KHOV Homes and KHOV Cos.

Moreover, judicial economy dictated that EagleBank should not have to file another motion to vacate the garnishment of the KHOV Homes rents once the circuit court recognized that EagleBank had the priority senior lien over all the rents from both entities. Because of all of this, we cannot say that the circuit court abused its discretion in liberally construing EagleBank’s pleadings to reflect that EagleBank requested that Citadel turn over all of the rents from both KHOV Cos. *and* KHOV Homes.

Second, the circuit court was correct when it, on its own initiative, issued an order *nunc pro tunc* (literally, “now for then”) to fix a clerical error. The Maryland Rules contemplate two kinds of mistakes by the circuit court: judicial mistakes and clerical mistakes. The circuit court can only correct judicial mistakes on motion by a party. The

circuit court can correct clerical mistakes, however, (1) on its own initiative; and (2) *nunc pro tunc*, or retroactive, to its original order. According to the Rule:

Rule 2-535. Revisory power

(a) **Generally.** *On motion of any party* filed within 30 days after entry of judgment, the court may exercise revisory power and control over the judgment and, if the action was tried before the court, may take any action that it could have taken under Rule 2-534. A motion filed after the announcement or signing by the trial court of a judgment or the return of a verdict but before entry of the judgment on the docket shall be treated as filed on the same day as, but after, the entry on the docket.

(b) **Fraud, mistake, irregularity.** *On motion of any party* filed at any time, the court may exercise revisory power and control over the judgment in case of fraud, mistake, or irregularity.

(c) **Newly-discovered evidence.** *On motion of any party* filed within 30 days after entry of judgment, the court may grant a new trial on the ground of newly-discovered evidence that could not have been discovered by due diligence in time to move for a new trial pursuant to Rule 2-533.

(d) **Clerical mistakes.** Clerical mistakes in judgments, orders, or other parts of the record may be corrected *by the court at any time on its own initiative, or on motion of any party* after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed by the appellate court, and thereafter with leave of the appellate court.

Md. Rule 2-535 (emphasis added). As is clear from the text of the Rule, most types of mistakes can only be corrected by the circuit court in response to a motion by a party. Md. Rule 2-535(a)-(c). Only “clerical mistakes in judgments, orders, [and] other parts of the record” may be corrected by the circuit court on its own initiative. Md. Rule 2-535(d).

Not only does the circuit court’s power to correct a mistake on its own initiative depend on whether the mistake was a clerical one, but the circuit court’s power to retroactively fix previous court orders *nunc pro tunc* also depends on whether the error is of a clerical nature. *In re Timothy C.*, 376 Md. 414, 430 n.10 (2003) (citations omitted) (“[T]he purpose of a *nunc pro tunc* entry is to correct a clerical error or omission as opposed to a judicial error or omission.”).

As this Court has stated, the test to determine “whether an error in a judgment is of a judicial character, or a mere clerical mistake [that] may be corrected in the court where it was made at [any time]” is:

whether the error relates to something that the trial court erroneously omitted to pass upon[,] or [something that it] considered and passed upon erroneously, or a mere omission to preserve ... the actual decision of the court [that was otherwise] free from error. If the difficulty is found to be of [this] character, it may be remedied as a mere clerical mistake, which will not have the effect to change the judgment pronounced in the slightest degree, but merely to correct the record evidence of such judgment.

Prince George’s Cnty. v. Commonwealth Land Title Ins. Co., 47 Md. App. 380, 386 (1980) (citations omitted). Therefore, a clerical error that the circuit court can retroactively correct on its own, occurs when the circuit court reached a correct judgment, but only erred in recording the nature or scope of that judgment. Thus, we must analyze whether the error that the circuit court corrected in this case, on its own and retroactively, was merely clerical in nature.

In this case, we hold that the circuit court’s error was clerical in nature, and not judicial. As explained above, the circuit court first entered orders that garnished and condemned the rents paid by both KHOV Cos. and KHOV Homes to Citadel. Later, the circuit court granted EagleBank’s motion to vacate the garnishment and awarded EagleBank the rents paid by KHOV Cos. Once the circuit court realized that EagleBank was entitled to the KHOV Homes rents as well, the court simply fixed the scope of its original order. That is because the logic that dictated that EagleBank’s rights were superior to Citadel’s for the KHOV Cos. rents applied with equal force to the KHOV Homes rents. As the circuit court’s correction to its original order was clerical in nature—retroactively amending the scope of its prior correct legal determination—we hold that the circuit court was legally correct in issuing its order *nunc pro tunc* to fix a clerical error on its own initiative, pursuant to Rule 2-535(d).

II. EagleBank’s perfected security interest

Next, Citadel argues that the circuit court made an incorrect finding of fact that EagleBank had a prior perfected security interest. Specifically, Citadel argues that EagleBank did not submit any evidence to prove the existence of its security interest, and EagleBank did not fulfill the conditions required by its own loan documents to show a default on the part of the judgment debtor, the LLC. EagleBank counters that it produced all of the proper documentation. EagleBank also contends that Citadel is confusing the issues—whether or not a party holds a perfected security interest is not related to any

default on the part of the LLC. The circuit court found for EagleBank on both grounds, and we agree.

To the first point, Citadel has provided no basis for us to hold that the circuit court’s determination—that EagleBank’s documentary evidence proved its perfected security interest—was “clearly erroneous.” EagleBank attached four documents executed by the LLC to its motion to vacate the garnishment:

- (1) the promissory note, which mentioned the purchase money deed of trust;
- (2) the security agreement;
- (3) the assignment of leases and rents; and
- (4) the filed UCC-1 financing statement.

EagleBank recorded the assignment of leases and rents and the purchase money deed of trust shortly after the transaction in June of 2011. These documents, once they are recorded, are all that is necessary to prove a perfected security interest. *In re Fairview-Takoma Ltd. P’ship*, 206 B.R. 792, 803 (Bankr. D. Md. 1997) (citation omitted) (stating that an interest in rents is perfected as soon as the granting instrument is recorded). The circuit court reviewed the documents and decided that EagleBank produced sufficient and reliable documentation to substantiate its claim that it held a priority senior lien over all of the rents. Because competent material evidence exists in support of the trial court’s factual findings

as to the quality of EagleBank’s evidence, we cannot find the circuit court’s determination on this point to be “clearly erroneous.”⁵

As to Citadel’s second point, we agree with the trial court that whether a party holds a perfected security interest bears no relation to the existence of any default on the part of the judgment debtor. Pursuant to Section 3-204 of the Real Property Article (“RP”) of the Maryland Code, an interest created by an assignment of rents is perfected upon recordation, and nothing further is required for perfection. Md. Code Ann., RP § 3-204. The statute provides:

An interest created by a deed granting, assigning, or otherwise transferring an interest in rents or profits arising from property is perfected *upon recordation* as provided in this title:

- (1) Regardless of whether, by its terms or otherwise, the grant, assignment, or transfer is operative immediately, or upon the occurrence of a specific event, or under any other circumstances; and
- (2) Without the grantee, assignee, or transferee having to make any affirmative demand or take any further affirmative action.

⁵ In Citadel’s brief to this Court, it argued that EagleBank did not provide *any* evidence to prove the existence of a perfected security interest. At oral argument, however, Citadel contended only that EagleBank did not submit *properly authenticated* documents to the circuit court to support its claim of a priority senior lien. Citadel did not seem to contest that the documents submitted by EagleBank, if properly authenticated, would create a perfected security interest. Given this concession, even if we found for Citadel and required EagleBank to submit more or different proof, it is still unclear to us how that would benefit Citadel.

Id. (emphasis added); *see also In re Fairview*, 206 B.R. at 803 (citation omitted) (analyzing Maryland law and stating that under RP § 3-204, “the General Assembly established that under Maryland law the mortgagee’s lien interest in the rents was ‘perfected’, *i.e.*, could not be primed by a subsequent bona fide purchaser for value or judicial lien creditor, at the time the granting instrument was recorded”); *In re Millette*, 186 F.3d 638, 641-43 (5th Cir. 1999) (holding that Mississippi, which did not have a statute like RP § 3-204, would still follow this rule as if it did so that it could stay in line with the modern trend of the law expressed by a majority of states (both by statute and by judicial creation), the Restatement (Second) of Property—Mortgages § 4.2(b), and the Uniform Commercial Code’s analogous treatment of perfection of a secured interest in personal property).

In this case, EagleBank perfected its interest in the rents from KHOV Cos. and KHOV Homes in June of 2011 when it recorded the assignment of rents documents. EagleBank did not have to wait for the LLC’s default to perfect its priority senior lien, and nothing that Citadel did in relation to the LLC can affect EagleBank’s status as the priority senior lienholder in the rents. Therefore, the circuit court was correct that EagleBank did not have to show a default on the part of the LLC to demonstrate a perfected security interests in the rents.⁶

⁶ And, for the purposes of this Opinion, we do not have to decide which of EagleBank’s arguments, *see supra* note 1, carries the day to establish the date of default on the loan between EagleBank and the LLC.

CONCLUSION

Because we hold that the circuit court properly entered its final order in favor of EagleBank, we affirm the judgment of the circuit court.⁷

**JUDGMENT OF THE CIRCUIT COURT
FOR PRINCE GEORGE'S COUNTY
AFFIRMED. COSTS TO BE PAID BY
APPELLANT.**

⁷ As explained above, Citadel did not turn over any of the garnished rents from either KHOV Cos. or KHOV Homes to EagleBank. Citadel also has not sought a stay of the entry of the circuit court's judgment in favor of EagleBank pending the outcome of its appeal in this Court.

There are a number of ways for a party to stay the enforcement of a lower court judgment while the case is on appeal. According to Rule 8-422(a)(1), "an appellant may stay the enforcement of any other civil judgment from which an appeal is taken by filing with the clerk of the lower court a supersedeas bond under Rule 8-423, alternative security as prescribed by Rule 1-402(e), or other security as provided in Rule 8-424." Md. Rule 8-422(a)(1). Under the Rule, once an appeal is noted, however, these are the only ways to stay the enforcement of the judgment. *First Virginia Bank-Central Maryland v. Schumacher & Seiler, Inc.*, 97 Md. App. 432, 441 (1993). In this case, Citadel did not follow any of these methods to stay the enforcement of the circuit court's order.

Because Citadel did not seek a stay of the circuit court's judgment pending appeal in this Court, it is still liable to fulfill the judgment at this time. We remind Citadel that it cannot act as its own judge, jury, and executioner and continue to withhold the rents from EagleBank merely because it does not agree with the circuit court's judgment. Therefore, Citadel must immediately turn over all of the rents from both KHOV Cos. and KHOV Homes to EagleBank pursuant to the circuit court's orders.