UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0098

September Term, 2014

TANZEEL UL RAOOF

v.

WILLIAM EUGENE HESEN, II, ET AL.

Wright,
Leahy,
Rodowsky, Lawrence F.
(Retired, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: June 18, 2015

On March 11, 2013, appellees, William Eugene Hesen, II and his wife, Holly McIntire Hesen (collectively, the "Hesens"), filed a complaint in the Circuit Court for Anne Arundel County against appellant, Tanzeel Ul Raoof ("Raoof"), alleging that Raoof sold them a vehicle that had been stolen and to which he held no clean title. On March 18, 2013, the circuit court issued a writ of summons, and on April 19, 2013, the Hesens filed an affidavit stating that service was made on Raoof on April 3, 2013.

Having not received an answer or any other pleading from Raoof, the Hesens filed an amended request for entry of order of default on September 12, 2013.[1] On October 23, 2013, the circuit court granted the Hesens' request and entered an order of default against Raoof. On December 19, 2013, the Hesens filed a motion for entry of judgment by default, which the circuit court granted on December 27, 2013, ordering that judgment be entered against Raoof "in the amount of $34,480.00, $7,500.00 for punitive damages, $2,377.20 for prejudgment interest accruing at the legal rate, $6,896.00 for reasonable attorneys' fees and $145.00 for filing and court costs," for a total of "$51,398.20 with 10 percent post-judgment interest on the principal of amount of $41,980.00."

On January 30, 2014, Raoof filed a motion to vacate entry of default and entry of judgment, alleging that he "was never served with the Complaint and did not receive notice of the same until after the Court entered judgment against him." On March 10, 2014, the circuit court denied Raoof's motion, and Raoof timely appealed on April 1, 2014.

[1] The Hesens filed an initial request for order of default on July 22, 2013, but the circuit court denied it without prejudice on August 27, 2013, "for the failure to file a Non-Military Affidavit."

Initially, Raoof presented five questions for our review.[2] On April 3, 2015, however, he filed a "Line" with this Court, in part "withdraw[ing] . . . any issue relating to service of process." Therefore, we are left to consider only the following two questions, which are not predicated on whether proper service was made on Raoof:

1. Did the circuit court abuse its discretion in entering default judgment?

2. Did the circuit court err or abuse its discretion in awarding punitive damages and attorney fees?

We answer "no" to the first question and "yes" to the second. As such, we vacate the portion of the circuit court's judgment that awarded punitive damages and attorney's fees to the Hesens, and remand for further proceedings so that the court may reevaluate those issues.

[2] Those questions were as follows:

1. Whether the trial court had personal jurisdiction over [Raoof] enabling it to issue valid degrees and orders?

2. Did the court below abuse its discretion and impose an unjustified punitive sanction when it refused to vacate the order of default in the face of evidence that the judgment was the result of "fraud, mistake or irregularity[?]"

3. Did the court below err in ordering a default judgment when the [Hesens] failed to plead sufficient facts to establish a claim for relief?

4. Did the court below err in awarding punitive damages and attorney fees by default and, alternatively, were the fees awarded excessive and unreasonable?

5. Did the court below err by failing to conduct a hearing based on allegation that the Affidavit of Service was ineffectual to prove proper service of process?

Facts[3]

In their complaint, the Hesens alleged the following:

> 8. In or about October 2012, the Hesens encountered an internet advertisement by [Raoof] on Craigslist.com for the sale by owner of a 2011 Chevrolet Suburban (the "Vehicle"). The Hesens intended to use the Vehicle primarily for personal, household and/or family purposes.
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> 9. After reviewing the listing, the Hesens contacted [Raoof] via telephone to discuss the Vehicle's specifications and the potential purchase of the Vehicle from [Raoof].
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> 10. During that conversation the Hesens then requested that [Raoof] provide them with the Vehicle's vehicle identification number ("VIN"). [Raoof] subsequently depicted the Vehicle's VIN in a photograph that he forwarded to the Hesens. Specifically, the photograph sent by [Raoof] to Mr. Hesen represented the Vehicle's VIN as being 1GNSKJE31BR070625.
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> 11. Mr. Hesen then met with [Raoof] in order to inspect the Vehicle in person.[4] During the course of this meeting, [Raoof] represented to Mr. Hesen that he was the lawful owner of the Vehicle. During the course of this meeting, [Raoof] also represented to Mr. Hesen that he was selling the Vehicle due to unrelated financial issues [Raoof] was experiencing at that time related to the sale of a house.
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> 12. Following this meeting, the Hesens requested a "CarFax" report for the Vehicle, which indicated that the Vehicle was originally registered in the state of New York and was subsequently transferred to the state of Maryland by [Raoof].

[3] We caution Raoof in submitting a brief that, as the Hesens point out, "wholly failed to comply with Md. Rule 8-504(a)." Pursuant to Md. Rule 8-504(a)(4), the statement of facts should include "[r]eference . . . to the pages of the record extract supporting the assertions." Raoof's brief, however, completely failed to include any citations. Accordingly, we consider only those factual allegations supported by record in this case. *See Rollins v. Capital Plaza Assocs., L.P.*, 181 Md. App. 188, 201 (2008) ("[w]e cannot be expected to delve through the record to unearth factual support favorable to [the] appellant") (citation omitted) (alterations in original).

[4] According to the Hesens, this meeting took place at 1019 Dumbarton Road, Glen Burnie, Maryland 21060. Raoof, however, maintains that this meeting took place "across the street from his residence in Odenton, Maryland."

13. Based upon reasonable reliance upon the representations of [Raoof] as set forth above, that the VIN was 1GNSKJE31BR070625, that he was the lawful owner of the Vehicle and that he was selling it for unrelated financial reasons, the Hesens purchased the Vehicle from [Raoof] for the approximate "Blue Book" value of $32,000.

14. Thereafter, [the Hesens] applied for a loan from MCT Federal Credit Union for the purchase price of $32,000, which was approved on or about October 19, 2012.

15. Mr. Hesen then met [Raoof] at his bank located in Glen Burnie, Maryland, in order to pay [Raoof] the purchase price of $32,000 in the form of a cashier's check and take possession of the Vehicle.

16. Following the sale the Hesens completed the necessary steps and expended significant costs to have the Vehicle properly titled and registered in their name. Specifically, the Hesens paid $90 to have the Vehicle properly inspected; $2,240 in sales tax to register the Vehicle in Maryland; and $150 in tag and registration fees for the Vehicle.

17. Subsequently, in or about February 2013, the Hesens were contacted by a Detective of the Howard County Polic[e] Department's Auto Theft Unit who advised [the Hesens] that the Vehicle had previously been stolen and illegally re-plated with fraudulent VIN numbers. Indeed, the VIN identified by [Raoof] as being 1GNSKJE31BR070625 in the photograph he had previously sent to the Hesens was not the Vehicle's true and accurate VIN.

18. As a result the Hesens had not obtained legal title to the Vehicle and the police took the vehicle from them at that time.

19. Upon information and belief learned after the vehicle was seized by the police, [Raoof] had recently purchased the Vehicle for a substantially reduced price and intended to sell it at a profit. Given the substantially reduced price [Raoof] paid for the Vehicle, [he] knew or should have known that the Vehicle was stolen and/or that [Raoof] had not obtained clean title at that time he purchased it. Accordingly, at the time [Raoof] purportedly re-sold the Vehicle to the Hesens, [Raoof] knew or should have known that he did not have the legal authority to sell and/or transfer clean title of the Vehicle to the Hesens as he had claimed.

> 20. Regardless of [Raoof's] actual or constructive knowledge of the title of the Vehicle, [he] did not have clean title in the Vehicle to sell to the [Hesens].

Based upon these allegations, the Hesens brought claims of: (I) breach of contract; (II) unjust enrichment; (III) breach of express warranty; (IV) breach of implied warranty of title; (V) intentional misrepresentation/deceit/fraud; and (VI) unfair and/or deceptive trade practices.

After the circuit court issued a summons for Raoof, the Hesens obtained a certified copy of Raoof's driving record from the Motor Vehicle Administration ("MVA"), which reflected his residence as 1019 Dumbarton Road, Glen Burnie, Anne Arundel County, Maryland 21060-7008 (the "Glen Burnie Address"). On April 19, 2013, the Hesens filed an affidavit with the circuit court stating that service was made on Raoof "on 4/3/2013 at 6:45:00 PM at 1019 Dumbarton Rd, Glen Burnie, MD 21060" and that the documents were "[a]ccepted by: Abdul Raoof, father & co-resident."

On January 30, 2014, after the circuit court had entered a default judgment in the Hesens' favor, Raoof filed a motion to vacate entry of default and entry of judgment, alleging in pertinent part:

> 2. In their Request for Entry of Default and Motion for Judgment, the [Hesens] assert that service of process was effectuated upon [Raoof]. This is not true . . . .
>
> 3. [Raoof] was never served with the Complaint and did not receive notice of the same until after the Court entered Judgment against him.
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> 4. [Raoof] has numerous defenses to the causes of action alleged by the [Hesens].

> 5. The entry of a Judgment against [Raoof] is improper in this matter. [Raoof's] constitutional rights have been violated. [Raoof] must be given an opportunity to respond to the [Hesens'] allegations before a Judgment can be finalized.

In support of his motion, Raoof averred:

> Mr. Raoof does not reside at [the Glen Burnie Address]. Mr. Raoof was never provided with a copy of the Complaint or Service of Process. Mr. Raoof currently resides at 503 Branch Lane, Odenton, Maryland 21113 [(the "Odenton Address")]. Mr. Raoof has maintained his residence at the [Odenton Address] during the [Hesens'] attempts to serve [him]. The [Hesens] failed to serve their Complaint on Mr. Raoof at his residence and the court clerk failed to properly notify Mr. Raoof that there was an order of default filed against him.

Raoof thus argued:

> [T]he Order of Default and Entry of Judgment must be vacated because (i) this Court lacks jurisdiction over Mr. Raoof as he was never served, (ii) the entry of the "default judgment" constitutes an "irregularity" within the meaning of Maryland Rule 2-535(b), and (iii) Mr. Raoof has a meritorious defense to the claims asserted against him in the Complaint.

After the circuit court denied Raoof's motion without a hearing, this appeal followed.

Discussion

I. Entry of Default Judgment

Raoof challenges the circuit court's propriety in entering a default judgment pursuant to Md. Rule 2-613(f). According to Raoof, "the facts alleged by the [Hesens] do not support causes of action for unfair and/or deceptive trade practices, or fraud." He further asserts that, because the court did not make a threshold determination of liability, it erred in entering the judgment.

Maryland Rule 2-613(f), which addresses entry of default judgments, states:

> If a motion [to vacate the order of default] was not filed under section (d) of this Rule or was filed and denied, the court, upon request, may enter a judgment by default that includes a determination as to liability and all relief sought, if it is satisfied (1) that it has jurisdiction to enter the judgment and (2) that the notice required by section (c) of this Rule was mailed. If, in order to enable the court to enter judgment, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any matter, the court may rely on affidavits, conduct hearings, or order references as appropriate, and, if requested, shall preserve to the plaintiff the right of trial by jury.

"The decision whether to enter a default judgment, as the word 'may' connotes, is discretionary." *Wells v. Wells*, 168 Md. App. 382, 393 (2006). "Because the defendant has an opportunity, under section (d) of Rule 2-613, to vacate the order of default that, in effect, is an adverse finding on liability, the defendant does not enjoy the same opportunity once the default judgment is entered." *Id.* "Rather, under section (g) of the Rule, [a] default judgment entered in compliance with this Rule is not subject to the revisory power under Rule 2-535(a) except as to the relief granted." *Id.* (citation and internal quotation marks omitted).

In this case, Raoof did not file a motion to vacate the order of default pursuant to Md. Rule 2-613(d), but instead filed one "pursuant to Rules 2-533, 2-534, and 2-535," on January 30, 2014. Because, under the rules cited by Raoof, his motion was untimely filed,[5]

[5] Maryland Rule 2-533, which addresses "Motion for New Trial," states that "[a]ny party may file a motion for new trial within ten days after entry of judgment." Likewise, Md. Rule 2-534, entitled "Motion to Alter or Amend a Judgment," provides that the court may open the judgment or amend its findings "on motion of any party filed within ten days after entry of judgment." Finally, Md. Rule 2-535(a) provides that the court may exercise revisory power "[o]n motion of any party filed within 30 days after entry of judgment." Because Raoof filed his motion on January 30, 2014 – more than 30 days after the entry of the judgment by default, then the circuit court had no discretion to entertain his motion.

then it was within the circuit court's discretion to enter a default judgment, upon the Hesens' request, if the court was satisfied that it had jurisdiction to enter such judgment and that the notice of the order of default was sent to Raoof. As there is no dispute that the court had jurisdiction, and that relevant notice was sent to Raoof's last known address,[6] it follows that the court did not abuse its discretion in entering the default judgment.

To the extent that the circuit court declined to conduct a hearing to establish the truth of any averment by evidence, "we assume that the circuit court carefully considered all of the asserted grounds and determined that all or at least enough of them merited the decisions ultimately implemented." *Smith-Myers Corp.*, 209 Md. App. at 504 (citation omitted). As such, following the court's entry of default judgment, Raoof's only recourse was to ask the court to revise the relief it granted to the Hesens. *See* Md. Rule 2-613(g); *see also Pac. Mortgage & Inv. Grp., Ltd. v. Horn*, 100 Md. App. 311, 332 (1994) ("A judgment by default constitutes an admission by the defaulting party of its liability for the causes of action set out in the complaint . . . . [Any challenges] to the issue of its liability [] can not be raised on appeal.") (Internal citation omitted).

[6] Although Raoof had not filed any pleadings, service was completed when the Hesens mailed notice to the Glen Burnie address – which was his last known address. Md. Rule 1-321(a) ("Service upon the attorney or upon a party shall be made by delivery of a copy or by mailing it to the address most recently stated in a pleading or paper filed by the attorney or party, or if not stated, to the last known address"); *see also Smith-Myers Corp. v. Sherill*, 209 Md. App. 494, 506 (the relevant procedural rule in this case, Md. Rule 2-613, only "requires the court to satisfy itself that notice of the entry of an order of default was mailed to the defaulting defendant's last known address), *cert. denied*, 431 Md. 447 (2013).

II. Punitive Damages & Attorney's Fees

Next, Raoof contends that "the default judgment ordered by the trial court included an award of attorney fees and punitive damages that was excessive and unreasonable." Without citing any authority, Raoof avers that "[a]ny award of attorney fees is wholly inappropriate when the only count alleged by the [Hesens] to merit attorney fees is [a Maryland Consumer Protection Act ("MCPA")] violation." Alternatively, Raoof argues that "[b]ased on the limited time required to proceed with this action the amount awarded for attorney fees was excessive." With regard to punitive damages, Raoof contends that any award was inappropriate because the Hesens "failed to establish by clear and convincing evidence that the conduct of [] Raoof was performed with actual malice."

Punitive damages may be awarded when the defendant's conduct rises to the level of actual malice. *See Owens-Illinois, Inc. v. Zenobia*, 325 Md. 420, 460-62 (1992); *Middle States Holding Co., Inc. v. Thomas*, 340 Md. 699, 702 (1995); *U.S. Gypsum Co. v. Mayor & City Council of Balt.*, 336 Md. 145, 188 (1994).

> [I]n order to properly plead a claim for punitive damages, a plaintiff must make a specific demand for that relief in addition to a claim for damages generally, as well as allege, in detail, facts that, if proven true, would support the conclusion that the act complained of was done with 'actual malice.' Nothing less will suffice.

Scott v. Jenkins, 345 Md. 21, 37 (1997); *see also Owens-Illinois, Inc.*, 325 Md. at 469 ("in *any* tort case a plaintiff must establish by clear and convincing evidence the basis for an award of punitive damages") (emphasis in original). This is because "[p]unitive damages are awarded based upon the heinous nature of the defendant's tortious conduct, and they serve the purpose of punishing the particular tortfeasor and deterring conduct similar to

that which underlay the tort." *Darcars Motors of Silver Spring, Inc. v. Borzym*, 379 Md. 249, 263 (2004) (alteration in original accepted) (internal citations and quotation marks omitted).

When assessing a punitive damages award, "[a]nother important factor involves defendant's financial status in that the 'amount of punitive damages should not be disproportionate to . . . the defendant's ability to pay.'" *Merritt v. Craig*, 130 Md. App. 350, 371 (2000) (quoting *Bowden v. Caldor, Inc.*, 350 Md. 4, 28 (1998)). Furthermore, "the amount of punitive damages 'must not be disproportionate to the gravity of the defendant's wrong.'" *Id.* (quoting *Bowden*, 350 Md. at 27). "[M]erely because a defendant may be able to pay a very large award of punitive damages, without jeopardizing the defendant's financial position, does not justify an award which is disproportionate to the heinousness of the defendant's conduct." *Bowden*, 350 Md. at 38. "Finally, there should be a proportional relationship between the compensatory and punitive damage awards." *Merritt*, 130 Md. App. at 371 (citing *Bowden*, 350 Md. at 28).

As the circuit court in this case did not hold a hearing, the Hesens did not prove by clear and convincing evidence that Raoof's acts were done with actual malice; nor did the court hear any evidence establishing Raoof's ability to pay. Accordingly, we vacate the court's award of punitive damages and remand the case so that the court may hold a hearing on that issue.

Turning back to the issue of attorney's fees, the MCPA provides that "[a]ny person who brings an action to recover for injury or loss under this section and who is awarded damages may also seek, and the court may award, reasonable attorney's fees." Md. Code

(1975, 2013 Repl. Vol.), § 13-408(b) of the Commercial Law Article ("CL").[7] Ultimately, "[t]he court's decision whether to award attorneys' fees and, if so, the amount of the award, is to be made upon a consideration of the total circumstances of the case[,]" which "include the amount of money in controversy in the case and the results obtained." *Hoffman v. Stamper*, 155 Md. App. 247, 344-45 (2004) (internal citations omitted), *aff'd in part, rev'd in part and remanded*, 385 Md. 1 (2005). And, "[b]ecause we are remanding the case for a new trial on the issue of punitive damages, we shall vacate the award of attorneys' fees." *Id.* at 344.

On remand, therefore, the circuit court should first hold a hearing on the issue of punitive damages and, thereafter, reevaluate its award of attorney's fees based on the totality of the circumstances. In doing the latter, the court should determine whether Raoof is considered a "merchant" under the MCPA. *See* CL § 13-101(g); *see also* CL § 13-101(d).

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED IN PART AND VACATED IN PART. CASE REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE DIVIDED EQUALLY BETWEEN THE PARTIES.

[7] "The Act allows consumers to recover from persons who engage in deceptive trade practices related to the sale or offering for sale of consumer goods[.]" *Hogan v. Maryland State Dental Ass'n*, 155 Md. App. 556, 563 (2004) (citing CL § 13-303 & *Consumer Protection Div. v. Outdoor World Corp.*, 91 Md. App. 275, 288 (1992)); *see also* CL § 13-101(d)(1) ("'consumer goods' . . . mean . . . goods . . . which are primarily for personal, household, family, or agricultural purposes"). "A 'person' is a 'merchant' because section 13-101(g) defines 'merchant' as one who 'directly or indirectly either offers or makes available to consumers any consumer goods . . . .'" *Hogan*, 155 Md. App. at 563.