UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

CONSOLIDATED CASES

Nos. 0111 & 1849

September Term, 2014

AMIR & ASSOCIATES, INC., et al.

v.

PNC BANK, N.A.

Graeff,
Hotten,
Arthur,

JJ.

Opinion by Arthur, J.

Filed: June 16, 2015

This case concerns a complicated commercial transaction, in which the borrower and its bank entered into a loan agreement as well as an interest-rate swap. The loan matured before the swap terminated, and the borrower paid off the loan without terminating the swap. When the borrower ceased making required payments on the swap, the bank terminated the swap and computed an early-termination fee, which the borrower refused to pay. The bank responded by obtaining a confessed judgment against the borrower and its guarantors. The circuit court denied a motion to open, vacate, or modify the confessed judgment, and the borrower and the guarantors took this timely appeal.

QUESTIONS PRESENTED

The borrower and the guarantors present this Court with two questions, which we have consolidated and rephrased as follows:[1] did the circuit court err by denying the motion to open, vacate, or modify the confessed judgment? We answer in the negative, and we affirm.

[1] The borrower and the guarantors phrased their questions as follows:

(1) Did the lower court err in denying appellants' Motion to Vacate or in the Alternative, Open and Modify Confession of Judgment?

(2) Did the lower court err in denying appellants' Motion to Alter or Amend and Motion for Reconsideration of the court's denial of Motion to Vacate or in the Alternative, Open and Modify Confession of Judgment?

FACTUAL AND PROCEDURAL HISTORY

On June 24, 2008, Amir Farazad LLC ("Farazad LLC") refinanced a commercial loan for $2,250,000 from PNC Bank's predecessor. In connection with the refinancing, Farazad LLC and PNC entered into an interest-rate swap transaction. The loan had a five-year term and would mature on June 24, 2013; the swap, however, did not terminate until five years later, on June 24, 2018. The swap enabled Farazad LLC to obtain a fixed interest rate.[2]

Farazad LLC's new loan, in the originally-stated principal amount of $2,023,653.58, was memorialized by several documents: an Amended and Restated Term Note (the "Note"), which was signed on June 24, 2008; an International Swap Dealers Association ("ISDA") Master Agreement, which was supplemented by a Schedule to the Master Agreement, dated June 24, 2008; and a Confirmation, dated June 25, 2008.[3] Additionally, on June 24, 2008, Farazad LLC's principal, Mr. Amir Farazad, and a related corporation, Amir & Associates,

[2] A swap transaction can ensure that a party that desires a fixed interest rate, such as Farazad LLC, can effectively obtain that fixed rate from another party, such as the bank, that has access to a lower interest rate. In an interest-rate swap, "'the first counterparty pays the second at designated intervals, a specific amount of interest based on a fixed interest rate multiplied' by an agreed principal amount called the 'notional' amount." *Crofton Convalescent Ctr., Inc. v. Dep't of Health & Mental Hygiene*, 413 Md. 201, 207 (2010) (quoting Stuart Somer, *A Survey of Legal & Regulatory Issues Relevant to Interest Rate Swaps*, 4 DePaul Bus. L.J. 385, 387 (1992)). "Concurrently, the second counterparty pays the first counterparty based on a floating interest rate, such as LIBOR, applied to the notional amount." *Id.* "The notional amount is used solely to calculate the interest payments and is not exchanged between the parties." *Id.*

[3] The Confirmation sets forth many of the specific terms of the swap, such as the notional amount of the transaction, the termination date, the fixed rate, the initial floating rate, and the payment dates. Part 5(c) of the ISDA Master Agreement, which governs the swap, expressly contemplated that the parties would execute the Confirmation.

Inc., each executed an Amended and Restated Guaranty and Suretyship Agreement, in which they guaranteed the loan payments. All of these loan documents were expressly incorporated by reference into the Note.

On the afternoon of June 24, 2008, after having signed the Note on Farazad LLC's behalf, Mr. Farazad received an email from a representative of PNC Bank. The email, bearing the subject line "Loan Documents," states, in relevant part, as follows:

> A couple of items for your review:
>
> (1) I have attached the loan documents as promised for your records.
>
> (2) I also included auto debit forms for the loan payments. For simplicity and convenience we do recommend it, but it is not required. Payments can be deducted from your personal PNC checking account or I could have someone from the branch come by and open an account for Amir H. Farazad LLC if you prefer. We have all of the business formation documents, so it should be quick and easy.

One of the documents attached to the email was the three-page Confirmation, dated June 25, 2008, to which was attached a three-page "notional schedule" of payments under the swap. The letter is on PNC Bank stationery and has the subject line "Confirmation of Transaction dated as of June 25, 2008 between Amir H. Farazad LLC and PNC Bank, National Association." On page 2 of the letter, the termination date of the swap is listed as June 24, 2018. Page 3 of the letter provides space for account information that will permit the bank to automatically debit payments from Farazad LLC's account. Page 3 concludes with the following text: "Please confirm that the foregoing correctly sets forth the terms of

our agreement concerning the Transaction by executing this Confirmation below where indicated and returning a copy . . . ."

The signature line below that text bears Mr. Farazad's signature as Farazad LLC's sole member. Based on a time-stamp created by a fax machine, it appears that Mr. Farazad did not return the Confirmation to PNC until November 11, 2008, over four months after he received it.

In April 2013, Farazad LLC refinanced the PNC loan with a loan from another bank. The swap, however, was not scheduled to terminate for another five years. Consequently, Farazad LLC was obligated either to continue making swap payments or to terminate the swap, which would require the payment of an early-termination fee.

On April 25, 2013, PNC sent Farazad LLC a letter containing a quote as to the "amount required in order for you to pay the Loans in full and terminate the Swap in whole." The letter included a table explaining the amounts due. PNC sent a second letter, dated May 28, 2013, which contained an identical table with updated dollar amounts. We have reproduced the table below:

Principal Balance	$1,849,282.74
Interest due and payable	$707.43
Prepayment Fee	$8.21
Swap Termination Payment	Contact Derivative
Total	**$1,849,998.38**

In the text of the letter, PNC explained, "The final amount cannot be definitively determined until the Swap is actually terminated by you and us. You must call Bridget Davis at (412) 768-8075 to terminate the Swap."

Farazad LLC never called the bank to determine the amount of the swap termination payment. Instead, the LLC's title company wired PNC $1,849,998.38, purportedly as a final payoff, on May 29, 2013. Farazad LLC made no swap termination payment. In addition, Farazad LLC ceased making the regular swap-termination payments that were due under the ISDA Master Agreement.

PNC sent a demand letter on August 15, 2013, stating that by failing to make a scheduled swap payment by July 29, 2013, Farazad LLC had defaulted under the ISDA Master Agreement, which concerns the swap. The letter warned that because of the default, the bank had the right to terminate the swap and to impose an early-termination charge.

PNC sent a second letter on August 21, 2013. This letter stated that, in accordance with its rights under the ISDA Master Agreement the bank would terminate the swap as of September 11, 2013, and compute the charge for early termination.

On September 12, 2013, PNC sent a third letter. This letter stated that the early-termination charge, as computed in accordance with the ISDA Master Agreement, was $292,291.37.

When payment was not forthcoming, PNC filed a one-count complaint for a confessed judgment in the Circuit Court for Montgomery County on December 13, 2013. As

defendants, PNC named Farazad, LLC, Mr. Farazad, and Amir & Associates, Inc. (collectively, "Farazad").

On December 26, 2013, the court entered a confessed judgment, ordering the defendants to pay $296,283.22.[4]

On January 23, 2014, the defendants moved to vacate or, in the alternative, to open and modify the confessed judgment. As their principal defense, the defendants argued that the bank had fraudulently induced Mr. Farazad to sign the Confirmation Letter, which states that the swap would not terminate until five years after the loan matured.

After a hearing, the circuit court denied the motion to vacate in an order that was docketed on April 3, 2014. On the following day, April 4, 2014, the defendants filed both a notice of appeal and a motion to alter or amend.[5]

After a hearing, the court denied the motion to alter or amend in an order that was docketed on October 16, 2014. On October 30, 2014, Farazad filed another notice of appeal, which this Court consolidated with the first.[6]

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[4] PNC calculated this amount by adding the early termination charge ($292,291.37), interest ($422.85), attorney's fees ($3,281.11), the fee for a title report ($258.00), and overnight mail expenses ($30.00).

[5] Under Md. Rule 8-202(e), "[a] notice of appeal filed before the withdrawal or disposition of [a motion to alter or amend under Md. Rule 2-534] does not deprive the trial court of jurisdiction to dispose of the motion."

[6] The second notice of appeal was superfluous. The initial notice of appeal did "not lose its efficacy" during the pendency of the motion to alter or amend, *Edsall v. Anne Arundel Cnty.*, 332 Md. 502, 506 (1993); its "effect" was merely "delayed" until the circuit (continued...)

STANDARD OF REVIEW

Under Md. Rule 2-611(d), a defendant may move to open, modify, or vacate a confessed judgment. Under Rule 2-611(e), "[i]f the court finds that there is a substantial and sufficient basis for an actual controversy as to the merits of the action, the court shall order the judgment by confession opened, modified, or vacated and permit the defendant to file a responsive pleading."

In other words, upon a motion to open, modify, or vacate a confessed judgment under Rule 2-611(d), "the court must determine whether the defendant has a potentially meritorious defense to the confessed judgment complaint." *Schlossberg v. Citzens Bank*, 341 Md. 650, 656 (1996); *accord Nils, LLC v. Antezana*, 171 Md. App. 717, 726 (2006). "The court does not, however, decide the merits of the controversy at this stage." *Schlossberg*, 341 Md. at 656; *accord Nils*, 171 Md. App. at 726. Instead, the court must open, modify, or vacate the confessed judgment to allow the defendant to file a responsive pleading if the defendant raises defenses "going to the merits of the claim" (*Remsburg v. Baker*, 212 Md. 465, 469 (1957); *accord Nils*, 171 Md. App. at 727), and "if the evidence adduced in support of the motion is sufficient to persuade the fair and reasoned judgment of an ordinary [person] that there are substantial and sufficient grounds for an actual controversy as to the merits of the case." *Remsburg*, 212 Md. at 469; *accord Nils*, 171 Md. App. at 727.

[6] (...continued)
court ruled. *Id.*; *accord Bd. of Liquor License Comm'rs for Baltimore City v. Fells Point Café, Inc.*, 344 Md. 120, 134 (1996).

Whether a defense is meritorious is a question of law. *Nils*, 171 Md. App. at 727-28; *see also Shafer Bros. v. Kite*, 43 Md. App. 610, 606 (1979). Accordingly, we afford no deference to the circuit court's conclusions in that regard. *See Pease v. Wachovia SBA Lending, Inc.*, 416 Md. 211, 220 (2010).

DISCUSSION

A. The Bank's Right to Confess Judgment Under the Note for a Breach of the Swap Agreement

Farazad LLC and its co-defendants argue that the bank did not have the authority to enter a confession of judgment, because, they say, the Note's confession of judgment provision does not apply to a default under the ISDA Master Agreement, which concerns the swap. PNC responds that confession of judgment was proper because the Note incorporated the ISDA Master Agreement, so that once a default occurred under any of the loan documents, including the ISDA Master Agreement, the bank became entitled to a confessed judgment. We agree with PNC.

When a contract is unambiguous, this Court defers to the contract's plain meaning. *See Dumbarton Imp. Ass'n, Inc. v. Druid Ridge Cemetery Co.*, 434 Md. 37, 51 (2013) (quoting *Slice v. Carozza Props., Inc.*, 215 Md. 357, 368 (1958)) ("The written language embodying the terms of an agreement will govern the rights and liabilities of the parties, irrespective of the intent of the parties at the time they entered into the contract, unless the

written language is not susceptible of a clear and definite understanding"); *Huggins v. Huggins & Harrison, Inc*., 220 Md. App. 405, 417 (2014).

Paragraph 6 of the Note, which is captioned as "Other Loan Documents," states in relevant part:

> This Note is issued in connection with a letter agreement or loan agreement between the Borrower and the Bank, dated on or before the date hereof, and the other agreements and documents executed and/or delivered in connection therewith or referred to therein, the terms of which are incorporated herein by reference (as amended, modified or renewed from time to time, collectively the "Loan Documents") . . . .

This provision defines the term "Loan Documents" as the Note itself, as well as the "*other agreements* and documents executed and/or delivered in connection therewith or referred to therein." (Emphasis added.) We read this unambiguous definition of "Loan Documents" to include the contemporaneous ISDA Master Agreement as one of the "other agreements." Consequently, through paragraph 6, the ISDA Master Agreement is incorporated by reference into the Note.

Paragraph 7 of the Note, which is captioned as "Events of Default," identifies which events trigger a default under the Note. Those events include: "(ii) the occurrence of any event of default or any default and the lapse of any notice or cure period, or any Obligor's failure to observe or perform any covenant or other agreement under or contained in any Loan Document." This definition, also unambiguous, means that the failure to make

payments pursuant to the ISDA Master Agreement, which is one of the Loan Documents, would constitute an "Event of Default" under Paragraph 7.[7]

In case of an Event of Default, Paragraph 8 of the Note, which is captioned as "Power to Confess Judgment," authorizes the Bank to "confess judgment against the Borrower." Therefore, Paragraph 8 authorizes the bank to confess judgment against Farazad LLC if the LLC fails to make payments pursuant to the ISDA Master Agreement, which is precisely what the bank did.[8]

In arguing for a contrary conclusion, Farazad LLC and its guarantors cite *Bank of America, N.A. v. JB Hanna, LLC*, 766 F.3d 841 (8th Cir. 2014). There, the borrower obtained a loan that matured in 2010 and, several months later, an interest-rate swap that terminated in 2015. *Id.* at 846. The Eighth Circuit determined that the swap and the loan were separate contracts because the parties admitted as much, the parties executed the agreements several months apart, and the agreements were governed by different choice-of-law provisions. *Id.* at 852.

[7] In his initial reaction to the language of this complex commercial provision, the trial judge commented, "[T]hat's not in English, I don't know what that means." Upon further scrutiny, however, the court concluded that the clause was unambiguous – and that it unambiguously meant that a default under any Loan Document gave rise to an Event of Default under the Note. We are satisfied by our own reading that the terms of Paragraph 7 unambiguously define an Event of Default to include a default under the ISDA Master Agreement, as one of the Loan documents.

[8] In addition, the default under the Note authorized the bank to confess judgment under the separate guaranties that it had obtained from Farazad LLC's guarantors, Mr. Farazad and Amir & Associates.

Here, by contrast, the Note and the swap were contemplated as two parts of a single, contemporaneous transaction, the purpose of which was to obtain the fixed interest rate that Farazad LLC sought. We are satisfied that the Note incorporated the ISDA Master Agreement and that a default under the ISDA Master Agreement empowered the bank to confess judgment under the Note. Therefore, the circuit court correctly rejected any contention to the contrary.

B. The Miscellaneous Defenses

In the appeal, Farazad LLC and the guarantors raise a number of miscellaneous defenses, at least one of which they did not raise below. Whether preserved or not, we reject each of the miscellaneous defenses.

1. Misrepresentation

Mr. Farazad claims that PNC misrepresented the terms of the agreement by modifying the duration of the swap from five years to 10 in the Confirmation and concealing the modification by burying it in a form that the bank described as simply an automatic debit authorization. Mr. Farazad claims to have signed the Confirmation only because the accompanying email led him to believe it was only an automatic debit authorization, not realizing that it was the Confirmation containing material terms of the swap. PNC argues that the duty to read contracts prevents Mr. Farazad and his companies from making a misrepresentation argument. We agree.

In Maryland, "[o]ne is under a duty to learn the contents of a contract before signing it[.]" *Holzman v. Fiola Blum, Inc.*, 125 Md. App. 602, 629 (1999) (quoting 17 C.J.S. Contracts § 137(b) (1963)); *see also Sass v. Andrew*, 152 Md. App. 406, 440 (2003). Mr. Farazad was under such a duty when he signed the Confirmation. Had he read no farther than the top of page 2 of the six-page Confirmation, he would have seen that the "Termination Date" for the swap was June 24, 2018 – 10 years, rather than five, after the date of the transaction. Similarly, had Mr. Farazad read as far as the "Notional Schedule" of swap payments, which covers the last three pages of the Confirmation, he would have seen that his LLC was required to make payments on the swap for 10 years, rather than five, until June 24, 2018.

"A misrepresentation is generally immaterial if the party to whom it is made reasonably could have ascertained the true facts." *Sass*, 154 Md. App. at 440. In the circumstances of this case, it is beyond any serious dispute that Mr. Farazad had a fair opportunity to acquaint himself with the terms of the swap, but failed to do so.

Farazad LLC and its guarantors direct our attention to *Benjamin v. Erk*, 138 Md. App. 459 (2001), which, they say, requires a different conclusion. There, the elderly, retired plaintiff was pressured into quickly signing a number of papers when his friend and advisor were out of the room. *Id.* at 466. On that record, this Court held that there was a triable issue of fact as to whether the plaintiff had justifiably failed to closely read every aspect of the contract and to discover a material alteration. *Id.* at 481-82. Here, by contrast, Mr. Farazad

was under no pressure to review and return the Confirmation. To the contrary, it appears that he took more than four months to review and return it, as the time-stamp from a facsimile machine indicates that he did not send it back until November 11, 2008.

Further belying the argument that PNC concealed the true identity of the Confirmation within a routine automatic debit form is the fact that, at first glance, the document is plainly identifiable as the Confirmation. The letter is on PNC stationery and bears Farazad LLC's address, the bold-print subject line says "Confirmation of Transaction," and the first line of the letter reads, "The purpose of this letter agreement is to confirm the terms and conditions of the rate swap transaction . . . entered into between Amir H. Farazad LLC and PNC Bank . . . on the Trade Date specified below." These signifiers, in conjunction with the duty to read a contract, convince us that the defendants did not have a meritorious defense based on misrepresentation.

Finally, Farazad LLC received notice that the ISDA Master Agreement and the corresponding Schedule, which Mr. Farazad acknowledges receiving and executing, would accompany a Confirmation. The very first line of the Master Agreement makes reference to the Confirmation Letter as a governing component of the agreement. Additionally, section 9(e)(ii) of the Master Agreement states: "A confirmation shall be entered into as soon as practicable . . . evidenc[ing] a binding supplement to this Agreement." The Schedule to the Master Agreement also contains a provision titled "Confirmations," which makes reference to the forthcoming Confirmation. In fact, the Master Agreement and the Schedule lack some

of the essential terms of the swap, such as the length or the method for calculating the interest rate; this information can only be found in the Confirmation Letter.

In summary, Mr. Farazad had ample time to comply with the obligation to read and understand the Confirmation, and PNC did not conceal the Confirmation from him. To the contrary, the swap agreement was incomplete without the additional information that the Confirmation provided. For these reasons, the circuit court did not err in finding no meritorious defense of misrepresentation.

2. Lack of Consideration

Farazad LLC and its guarantors argue that the bank gave no consideration for the modification in the swap term from five years to 10. The bank correctly responds that Farazad LLC and its guarantors failed to raise this argument in the circuit court and, consequently, failed to preserve it for appellate review. *See* Md. Rule 8-131(a) (generally limiting the scope of appellate review to issues that "plainly appear[] by the record to have been raised in or decided by the trial court"). We cannot reverse the circuit court for failing to credit an argument that no one made.

Nonetheless, even if the issue of consideration were preserved, we would see no basis to reverse. Farazad LLC received a loan of more than $2 million and, as a result of the swap transaction, a fixed-rate schedule of payments. *See Blumenthal v. Heron*, 261 Md. 234, 243 (1971) (reciting "elementary principle that the law will not enter into an inquiry as to the adequacy of the consideration").

3. Setoff

In their motion to alter or amend, Farazad LLC and its guarantors raised a new argument that PNC Bank overcharged $431,271.65 in interest on the loan. PNC argues that Farazad LLC provided scant evidence in support of his contention and that the circuit court properly denied the motion. Again, we agree with the bank.

In general, a circuit court has broad discretion when deciding whether to grant motions to alter or amend. *See*, *e.g.*, *Benson v. State*, 389 Md. 615, 653 (2005). On review, we ordinarily apply an abuse of discretion standard. *See Miller v. Mathias*, 428 Md. 419, 438 (2012). The circuit court did not abuse its broad discretion in denying the motion to alter or amend.

Farazad LLC and the guarantors supported their allegation of overcharging with one document – a two-sentence letter from an accountant, accompanied by a financial table, which it introduced during a hearing on the post-judgment motion. The document did not explain how the accountant had reached his conclusion or even whether he had read and understood the swap agreement. The accountant himself did not appear to testify and to explain his conclusion or to subject himself to cross-examination. Nor did the accountant express his conclusion in the form of an opinion to a reasonable degree of probability within his field of expertise. Finally, Farazad LLC and the guarantors did not explain why they had failed to detect this $400,000 overpayment until months after the court had denied the initial motion to open, vacate, or modify the confessed judgment. After expressing understandable

skepticism at the accountant's conclusion, the circuit court denied the motion to alter or amend.

Farazad LLC and its guarantors failed to produce credible evidence to support the allegation that it had overpaid on the loan, and the evidence that it did present was not in proper form. *See* Md. Rule 2-311(d) ("[a] motion or a response to a motion that is based on facts not contained in the record shall be supported by affidavit and accompanied by any papers on which it is based"). A naked, unsworn conclusion, with no supporting information about the basis (if any) for the conclusion, does not rise to the level of showing that "there are substantial and sufficient grounds for an actual controversy as to the merits of the case." The circuit court, therefore, correctly concluded that Farazad LLC and its guarantors had not established a meritorious defense of set-off.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.