Circuit Court for Queen Anne's County
Case No. C-17-CV-20-000121

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 236

September Term, 2021

DOMINION MECHANICAL CONTRACTORS, INC., ET AL.

v.

E.C. ERNST, INC.

Arthur,
Leahy,
Reed,

JJ.

Opinion by Arthur, J.

Filed: March 24, 2022

*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.

A subcontractor filed suit against its prime contractor, a Virginia corporation. The subcontractor also filed suit against five of the prime contractor's officers and employees, all of whom were alleged to be residents of Virginia. The Circuit Court for Queen Anne's County entered default judgments against the prime contractor and each of the officers and employees. They appealed.

For the reasons stated in this opinion, we conclude that the court erred in entering the default judgments. Therefore, we shall vacate the judgments and remand for further proceedings.

BACKGROUND

A. The Complaint

On June 25, 2020, appellee E.C. Ernst, Inc. ("Ernst"), filed a complaint in the Circuit Court for Queen Anne's County. As defendants, Ernst named Dominion Mechanical Contractors, Inc. ("Dominion"), as well as five of its officers and employees.

In Count I of the complaint, Ernst alleged that Dominion had breached a contract by failing to pay $54,490.00 for the labor and materials that Ernst had provided in connection with a job in Baltimore City. In Counts II through IV, Ernst alleged that each of the individual officers and employees had violated the Maryland Construction Trust Statute, Md. Code (1974, 2015 Repl. Vol.), § 9-201 to -204 of the Real Property Article,

by knowingly and wrongfully retaining and misappropriating the funds that the project owner had paid to Dominion for Ernst's work.[1]

Ernst's complaint alleged that Dominion is a Virginia corporation licensed to do business in Maryland. It also alleged that three of the individual defendants, Will McAteer, Douglas Seal, and David Coffee, are Virginia residents who "serve as principal officers of Dominion" and "exercise control over the operating accounts and finances of Dominion, including monies paid" to Dominion for Ernst's work and materials. The complaint went on to allege that the two other individual defendants, Brian Colella and Karin Fellows, are Virginia residents who "exercised control over whether to pay [Ernst] for monies received . . . for labor and material[]" by "provid[ing] signed lien releases . . . wherein they falsely asserted that Dominion had paid, or that funds paid pursuant to the lien releases would be used to pay," Ernst for its services and materials. The complaint did not allege that the individual defendants engaged in any of that alleged conduct in Maryland.

The court issued summonses on June 26, 2020. According to affidavits of service filed on August 26, 2020, Ernst personally served defendants Colella, Coffee, and

[1] In brief summary, the Construction Trust Statute states that when a contractor, such as Dominion, receives "money paid under a contract by an owner . . . for work done or materials furnished, or both, for or about a building by any subcontractor," such as Ernst, that money "shall be in held in trust." *Id.* § 9-201(b)(1). Under the statute, "[a]ny officer, director, or managing agent of any contractor . . . who knowingly retains or uses the money held in trust . . . or any part thereof, for any purpose other than to pay those subcontractors for whom the money is held in trust, shall be personally liable to any person damaged by the action." *Id.* § 9-202.

McAteer at their Virginia residences in July and August of 2020. Ernst, however, did not succeed in personally serving defendants Dominion, Seal, or Fellows before the initial summonses expired. *See* Md. Rule 2-113 (stating that a summons is effective only if served within 60 days and that, after 60 days, it becomes dormant, renewable only on the plaintiff's request).

On September 2, 2020, Ernst requested and obtained renewed summonses for defendants Seal and Fellows. In requesting the summonses, Ernst stated that it had received updated information about where to serve those defendants. The updated address for Fellows was the address of Dominion's primary place of business in Springfield, Virginia.

On September 11, 2020, Ernst filed affidavits of service for Seal and Fellows. The affidavit of service for Fellows stated that she had been served at a residential address in Dumfries, Virginia, not at the address stated on the summons.

Ernst did not serve Dominion.

B. The Default Proceedings

The individual defendants did not file timely answers. Consequently, on December 29, 2020, Ernst moved for orders of default against them. Ernst did not move for an order of default against Dominion, because it had not yet been served with process (and thus had not failed to file a timely response to the complaint).

In its motion for the entry of orders of default against the individual defendants, Ernst identified their last-known addresses. For Fellows, Ernst listed the Dumfries residence where she had been served with process.

The next day, December 30, 2020, the court granted Ernst's request and entered orders of default against the five individual defendants. Later that day, the clerk of the court sent notice of these default orders to each individual defendant at the addresses listed in Ernst's motion, with one exception: instead of sending the default order against Fellows to her residential address in Dumfries, as requested by Ernst, the clerk mailed her notice to Dominion's corporate address in Springfield, which was listed in the reissued summons.

On January 5, 2021, the court sent notice of a remote hearing to each of the individual defendants. The notice stated that the hearing would occur at 2:00 p.m. on February 23, 2021. According to the notice, the purpose of the hearing was to consider "Default and any pending motions or other motions served at least 20 days before that time and for the other matters relevant to the management of the action." As before, the clerk sent the notice for Fellows to Dominion's corporate address in Springfield, rather than her residential address in Dumfries.

On February 2, 2021, Ernst requested a renewed summons for Dominion. The next day, the court issued another summons for service on Dominion's resident agent, Corporation Trust, at an address in Maryland.

C. The Motion to Vacate the Orders of Default

At 1:52 p.m. on February 23, 2001, eight minutes before the remote hearing was to begin, the individual defendants moved to vacate the orders of default. In support of the motion, the defendants proffered that Dominion "is now insolvent and no longer in operation" and that all of the individual defendants, who "were once employees of Dominion," "believed that their interests were actively being represented by the legal counsel retained to represent them in this case." The individual defendants asserted a common defense, "that none of them had any control over Dominion's inability to pay [Ernst] because Dominion's lender . . . unlawfully seized Dominion's operating account," which contained the funds that "would have been used to pay" Ernst. Citing an unsigned affidavit that accompanied the motion, the individual defendants maintained that they "did not willfully disregard the Maryland Rules." They asserted that they had engaged counsel to represent them and Dominion, but that counsel had become ill with COVID-19 and had failed to perform his obligations. They also asserted that they had "recently" retained their current counsel.

According to the unsigned affidavit of defendant Coffee, a principal shareholder who served as Dominion's vice-president, the company's surety declared a default and withdrew bonding for Dominion's projects when the lender seized the company's operating account. As a consequence, the affidavit averred, the business became "irreversibly insolvent" and was forced "to close its doors." The affidavit also averred that Coffee had hired an attorney to represent Dominion and the individual defendants,

but that the attorney had become ill during the COVID-19 pandemic and had failed to render the services that he was engaged to perform. According to the affidavit, Coffee had taken steps to engage the individual defendants' current counsel when he learned of the pending hearing on the motion for a default judgment.

In a series of additional affidavits (one of which was unsigned), the other individual defendants echoed the assertions in the Coffee affidavit: they said that they had no ability to pay Ernst, because Dominion's lender had seized its operating account; they believed that they were being represented by counsel until they learned of the motion for a default judgment; and they took steps to engage their current counsel when they learned that their attorney had failed to perform his obligations and that the court had set a hearing on the motion for a default judgment.

In addition to these common grounds for relief, defendant Brian Colella, in an unsigned affidavit, disputed that he had ever been personally served with process.

D. The Hearing on February 23, 2021

When the remote hearing began at 2:00 p.m. on February 23, 2021, defense counsel explained that the individual defendants had reached out to her firm the previous afternoon and that she had prepared the motion to vacate as soon as the firm determined that it had no conflicts of interest. The court responded that it had entered the order of default two months earlier and that the hearing concerned the question of damages. Defense counsel replied that Dominion had "yet to be served." She added that the individual defendants had previously engaged another attorney to represent them, that the

attorney had become ill with COVID-19 and had been unable to represent them, and that the individual defendants had been unaware of the attorney's inaction.

Counsel for Ernst pointed out that the individual defendants had filed the motion to vacate more than 30 days after the deadline in Rule 2-613(d) and 48 days after the court gave notice of the hearing.[2] Counsel also pointed out that the individual defendants had not engaged counsel until the day before the hearing. He characterized the last-minute motion as "unfair" and insisted that the court proceed to consider the amount of damages.

The court told defense counsel that it would proceed to hear testimony on damages, subject to its review of the motion to vacate the orders of default.

Ernst's president proceeded to testify about the work that Ernst performed as Dominion's subcontractor. He authenticated copies of the Ernst subcontract and two invoices for work performed by Ernst, in the total outstanding amount of $54,490.00.

At the conclusion of the hearing, the court reiterated that it would review the motion to vacate before issuing a final order. Defense counsel thanked the court and

[2] In fact, notwithstanding the individual defendants' failure to move to vacate the order of default within the 30-day time limit dictated by Rule 2-613(d), the order of default was still "interlocutory in nature and [could] be revised by the court at any time up until the point a final judgment [was] entered." *Bliss v. Wiatrowski*, 125 Md. App. 258, 265 (1999); *accord Peay v. Barnett*, 236 Md. App. 306, 318 (2018); Paul V. Niemeyer, Linda M. Schuett & Joyce E. Smithey, *Maryland Rules Commentary* 669 (4th ed. 2014).

stated that she would supplement the motion with executed versions of some of the previously filed affidavits.

E. The Supplement to the Motion to Vacate

At 1:20 p.m. the following day, Wednesday, February 24, 2021, defense counsel filed a supplement to the motion to vacate the default orders. The supplement was supported by an affidavit from Will McAteer, an individual defendant who served as Dominion's president when it was operational. The supplement was also supported by a transcript of a court proceeding from October 2020 in a lawsuit by Dominion against its lender. In the transcript, the previous attorney for Dominion and the individual defendants informed a Virginia court that he had been seriously ill with COVID-19 for four months and had been almost entirely unable to work during that time. According to McAteer, Dominion was unaware of that proceeding "or the neglect caused by [the attorney's] illness" in the Virginia case until much later, and the individual defendants were unaware of the attorney's neglect in Ernst's case until earlier in the week of the default hearing.

F. The Default Judgments

Two hours after the individual defendants filed the supplement, the circuit court entered an order denying the motion to vacate the orders of default. The court simultaneously entered a default judgment in the full amount of Ernst's claim against each of the individual defendants, as well as Dominion (which had not been served). The clerk sent notices of the judgment to all the defendants at the addresses previously

identified in the summons. Thus, the notice to Fellows went to Dominion's corporate address in Springfield, instead of her residential address in Dumfries.

G. The Motion for Reconsideration

On March 5, 2021, Dominion and the individual defendants moved for reconsideration. Their motion reiterated the defenses based on the bank's seizure of Dominion's operating account and their equitable excuse for not filing a timely answer based on their reliance on prior counsel.[3] In addition, the defendants detailed a number of "procedural irregularities," which they said invalidated the default orders and judgment.

First, the defendants observed that Ernst had not served Dominion and did not request or obtain an order of default against the company. For that reason, the defendants argued that the court had never obtained jurisdiction over Dominion and, thus, that it lacked the authority to enter either a default order or a default judgment against it.

Second, the defendants asserted that there were "no facts in the record" to support the court's exercise of personal jurisdiction over any of the individual defendants, all of whom resided, worked, and were served in Virginia. They asserted that the judgments were invalid under Rule 2-613(f)(1), which requires a court to satisfy itself "that it has

[3] After the entry of a default judgment, however, defendants typically cannot reargue issues of liability in a motion asking the court to revise or reconsider its decision. *See* Md. Rule 2-613(g) ("[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"); *Franklin Credit Mgmt. Corp. v. Nefflen*, 436 Md. 300, 324 (2013) (concluding that "a defaulting defendant may not revisit issues of liability established by an unvacated order of default pursuant to a Rule 2-534 motion" to alter or amend).

jurisdiction" before it may enter a default judgment. In addition, they reiterated the contention, first made in the motion to vacate the order of default, that Ernst had never served defendant Brian Colella.

Finally, the defendants pointed out that in violation of Rule 2-613(c) the clerk had sent the notice of default order to Fellows at Dominion's corporate address in Springfield, and not to the Dumfries address that Ernst identified in its motion.[4] They argued that the judgment against Fellows was invalid under Rule 2-613(f)(1), which requires a court to satisfy itself that the notice required by Rule 2-613(c) "was mailed."[5]

On March 22, 2021, Ernst opposed the motion for reconsideration. Among other things, Ernst invoked Rule 2-323(a), which states, in substance, that the averments in a pleading (other than those as to damages) are deemed to be admitted unless they are denied in an answer or covered by a general denial. Thus, Ernst argued that the individual defendants had "conceded" that the court had personal jurisdiction over them "through their failure to respond to the complaint." Ernst dismissed the assertion that the clerk had not sent the notice of the order of default to Fellows's correct address, arguing that she did not deny that she received the notice or that she knew of the order of default. Similarly, Ernst dismissed Colella's claim that he had not been served with process,

[4] Rule 2-613(c) states, in pertinent part, that "[t]he notice [of the order of default] shall be mailed to the defendant at the address stated in the request and to the defendant's attorney of record, if any."

[5] The defendants also argued that Ernst did not file the affidavits required by the Federal Servicemembers Civil Relief Act, 50 U.S.C. §§ 3901-4043. We shall pass over those arguments because the defendants do not assert them on appeal.

calling his assertions "conclusory." Ernst did not explain how the court could enter a default judgment against Dominion even though Dominion had never been served with process.

On March 23, 2021, the day after Ernst filed its opposition, the court denied the motion for reconsideration. The defendants noted a timely appeal.

QUESTIONS PRESENTED

In their brief, the defendants raise eight, lengthy questions, which we have distilled into two:

I. Did the circuit court err in entering a default judgment against Dominion?

II. Did the circuit court err in entering default judgments against the individual defendants?[6]

We conclude that the court erred in entering default judgments against Dominion and the individual defendants. We therefore vacate those judgments and remand for further proceedings.

DISCUSSION

A. The Applicable Legal Principles

This Court has recently delineated the series of events that must occur before a court may enter a default judgment under Maryland law:

> First, the plaintiff must serve the defendant with the complaint and a summons. If the defendant fails to file a timely response, the plaintiff must request an "order of default." Md. Rule 2-613(b). The clerk must send

[6] We have reproduced the defendants' questions, verbatim, in an appendix to this opinion.

> notice of the order of default to the defendant (Md. Rule 2-613(c)), who has 30 days from the entry of the order to move to vacate the order of default by explaining the reasons for the failure to plead and the legal and factual bases for any defenses. Md. Rule 2-613(d). The court must grant a motion to vacate an order of default if it "finds that there is a substantial and sufficient basis for an actual controversy as to the merits of the action and that it is equitable to excuse the failure to plead." Md. Rule 2-613(e). If, however, the court is unpersuaded that "there is a substantial and sufficient basis for an actual controversy as to the merits of the action and that it is equitable to excuse the failure to plead," it may deny the motion to vacate. If the court denies the motion to vacate, or if the defendant fails to move to vacate the order of default, the court may, upon request, enter a default judgment. Md. Rule 2-613(f).

Pomroy v. Indian Acres Club of Chesapeake Bay, Inc., ___ Md. App. ___, 2022 WL 533898, at *1 (Feb. 23, 2022).

Furthermore, before the court may enter a default judgment, it must be satisfied that it has jurisdiction to enter the judgment and that the notice required by Rule 2-613(c) was mailed. Md. Rule 2-613(f). The notice required by Rule 2-613(c) must be "mailed to the defendant at the address stated in the request [for an order of default] and to the defendant's attorney of record, if any." Md. Rule 2-613(c).

A party can take a direct appeal from the entry of a default judgment, as the appellants (defendants below) have done here, provided that the judgment "includes a determination as to liability and all relief sought." *Franklin Credit Mgmt. Corp. v. Nefflen*, 436 Md. 300, 318 (2013). When the appellants claim that a court erred in entering default judgments because the court did not have personal jurisdiction over them, the appeal turns on a question of law, which we review de novo. *Pinner v. Pinner*, 467 Md. 463, 477 (2020).

Once a circuit court has entered a default judgment, Maryland law imposes strict limits on that court's ability to revise the judgment. *See Franklin Credit Mgmt. Corp. v. Nefflen*, 436 Md. at 320. "[A] default judgment is a final judgment for which the court's revisory power is limited." *Peay v. Barnett*, 236 Md. App. 306, 318 (2018); *accord Bliss v. Wiatrowski*, 125 Md. App. 258, 265 (1999). Although Rule 2-535(a) gives courts broad revisory powers over most judgments for the first 30 days after their entry, a default judgment entered in compliance with Rule 2-613 "is not subject to the revisory power under Rule 2-535(a) except as to the relief granted." Md. Rule 2-613(g). Similarly, a defaulting defendant may not use a motion to alter or amend the judgment under Rule 2-534 to revisit issues of liability that were established in a default of judgment. *Franklin Credit Mgmt. Corp. v. Nefflen*, 436 Md. at 324.[7]

But despite the limitations on a court's power to revise or amend a default judgment, Rule 2-613(g) "leaves open the court's power to revise the judgment under [Rule] 2-535(b)." *Peay v. Barnett*, 236 Md. App. at 320. Under Rule 2-535(b), a circuit court, "[o]n motion of any party filed at any time," "may exercise revisory power and control over the judgment in case of fraud, mistake, or irregularity," as those terms are

[7] If, however, the court enters a default judgment against one or more, but fewer than all, of the parties, the "judgment" is really just an interlocutory order, "which remain[s] subject to revision at any time prior to the entry of an order adjudicating the claims against all of the parties to the action." *Quartertime Video & Vending Corp. v. Hanna*, 321 Md. 59, 65 (1990); *see* Md. Rule 2-602(a). If the court has yet to adjudicate the claims against parties other than the party in default, the court's authority to revise the "judgment" against that party in default is "not constrained by either Rule 2-535 or Rule 2-613(f)." *Quartertime Video & Vending Corp. v. Hanna*, 321 Md. at 65.

"'narrowly defined and strictly applied'" in the case law. *Pelletier v. Burson*, 213 Md. App. 284, 290 (2013) (quoting *Thacker v. Hale*, 146 Md. App. 203, 217 (2002)); *accord Early v. Early*, 338 Md. 639, 652 (1995).

"A 'mistake' under [Rule 2-535(b)] refers only to a 'jurisdictional mistake.'" *Peay v. Barnett*, 236 Md. App. at 322 (quoting *Chapman v. Kamara*, 356 Md. 426, 436 (1999)). "The typical kind of mistake occurs when a judgment has been entered in the absence of valid service of process; hence the court never obtains personal jurisdiction over a party." *Tandra S. v. Tyrone W.*, 336 Md. 303, 317 (1994); *accord Peay v. Barnett*, 236 Md. App. at 322. Thus, "'[i]mproper service of process is a proper ground to strike a judgment under Rule 2-535[(b)].'" *Peay v. Barnett*, 236 Md. App. at 322 (quoting *Pickett v. Noba, Inc.*, 114 Md. App. 552, 558 (1997)).

Dominion alleged a jurisdictional mistake when it asserted that the court entered a default judgment against it even though it had never been served with process. The individual defendants also alleged a jurisdictional mistake when they asserted that the court entered a default judgment against them even though Maryland could not assert personal jurisdiction over them. Defendant Colella alleged a jurisdictional mistake when he challenged the court's power to proceed against him despite Ernst's alleged failure to serve him with a summons and the complaint. Finally, defendant Fellows alleged an irregularity when she asserted that the clerk had failed to send the notice of the default order to her at the correct address. Paul V. Niemeyer, Linda M. Schuett & Joyce E.

Smithey, *Maryland Rules Commentary* 669 (4th ed. 2014); *accord Henderson v. Jackson*, 77 Md. App. 393, 398 (1988).

"We review the circuit court's decision to deny a request to revise its final judgment under the abuse of discretion standard." *Jones v. Rosenberg*, 178 Md. App. 54, 72 (2008). Although that standard is ordinarily quite deferential (*see*, *e.g.*, *North v. North*, 102 Md. App. 1, 13 (1995)), "courts 'do not have discretion to apply inappropriate legal standards, even when making decisions that are regarded as discretionary in nature.'" *Morton v. Schlotzhauer*, 449 Md. 217, 231 (2016) (quoting *Wilson-X v. Department of Human Resources*, 403 Md. 667, 674-75 (2008)); *see also In re Adoption/Guardianship No. 93321055/CAD*, 344 Md. 458, 475 (1997) (stating that, in an appeal from the denial of a motion to revise under Rule 2-535(b), "the only issue before the appellate court is whether the trial court erred as a matter of law or abused its discretion in denying the motion[]").

B. The Default Judgment against Dominion

The defendants assert, and Ernst tacitly agrees, that Ernst had not effectuated service of process on Dominion when the circuit court entered the default judgment. At the time of the default judgment, therefore, the circuit court had not obtained jurisdiction over Dominion. It is axiomatic that a court cannot enter a judgment against a party over which it has not obtained jurisdiction. *See*, *e.g.*, *Hagler v. Bennett*, 367 Md. 556, 561 (2002); Restatement (Second) of Judgments § 1 (1982). It follows that the circuit court erred in entering the default judgment against Dominion and abused its discretion in not

revising the default judgment that it erroneously entered. *See Wilson v. Maryland Dep't of the Environment*, 217 Md. App. 271, 287 (2014) (stating that "a default judgment 'should not proceed until the court is completely satisfied that there has been proper notice of the impending proceedings served on the defaulting absentee party[]'") (quoting *Roddy-Duncan v. Duncan,* 157 Md. App. 197, 201 (2004)).[8]

C. The Default Judgments against the Individual Defendants

The individual defendants, all of whom are alleged to be residents of Virginia, argue that the circuit court erred in entering default judgments against them. In support of their argument, they claim that Ernst did not adequately allege a basis for a Maryland court to exercise personal jurisdiction over them.

"The defense of lack of personal jurisdiction is a question of law." *Pinner v. Pinner*, 467 Md. 463, 477 (2020). Accordingly, we conduct a de novo review of the circuit court's decision about whether it may exercise personal jurisdiction over a defendant. *Id.* Ernst, "as the plaintiff, bears the burden of establishing personal

[8] The individual defendants invoke the so-called *Frow* doctrine (*see Frow v. de la Vega*, 82 U.S. (15 Wall.) 552 (1872)) to argue that if the circuit court must vacate the default judgment against Dominion, it must vacate the judgments against each of them as well. The boundaries of the *Frow* doctrine are a bit amorphous, but the doctrine generally holds that a court may not enter a judgment against a defaulting defendant if the judgment would be logically inconsistent with a judgment in favor of a defendant who did not default. *See Curry v. Hillcrest Clinic, Inc.*, 337 Md. 412, 428-33 (1995). Here, although we are vacating the default judgment against Dominion, we are not directing the entry of judgment in favor of Dominion: Dominion's liability is yet to established. At this point, therefore, we need not explore how the *Frow* doctrine might apply if Dominion or one of the other defendants eventually obtains a favorable judgment on the merits.

jurisdiction." *Id.* Ernst contends that the individual defendants "transact[ed] . . . business" in Maryland within the meaning of subsection (b)(1) of Maryland's long-arm statute, Maryland Code (1974, 2020 Repl. Vol.), § 6-103(b)(1) of the Courts and Proceedings Article ("CJP").

On the issue of personal jurisdiction, the governing principles are well known and require little exposition. The "inquiry involves dual and overlapping considerations." *Pinner v. Pinner*, 467 Md. at 479. "'We consider whether the requirements of Maryland's long-arm statute are satisfied.'" *Id.* (quoting *CSR, Ltd. v. Taylor*, 411 Md. 457, 472 (2009)). "We also consider 'whether the exercise of personal jurisdiction comports with the requirements imposed by the Due Process Clause of the Fourteenth Amendment.'" *Id*. (quoting *CSR, Ltd. v. Taylor*, 411 Md. at 473). "Both considerations must be satisfied to find an exercise of personal jurisdiction to be proper." *Id.*

The two components of the inquiry, however, "are not mutually exclusive." *Id.* Because the Court of Appeals has frequently said that "'the reach of the long arm statute is coextensive with the limit of personal jurisdiction delineated under the Due Process Clause of the Federal Constitution, our statutory inquiry merges with our constitutional examination.'" *Id.* (quoting *Beyond Systems, Inc. v. Realtime Gaming Holding Co.*, 388 Md. 1, 22 (2005)).

In explicating the constitutional limitations on the exercise of personal jurisdiction over nonresident defendants, courts have distinguished between "specific jurisdiction," in which "the commission of certain 'single or occasional acts' in a State may be sufficient

to render a [defendant] answerable in that State with respect to those acts, though not with respect to matters unrelated to the forum connections," *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 933 (2011) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945)), and "general jurisdiction," in which the defendant's "continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." *Id.* at 924 (quoting *International Shoe Co. v. Washington*, 326 U.S. at 318); *see also Pinner v. Pinner*, 467 Md. at 480. This case involves specific, not general, jurisdiction.

In determining whether a plaintiff has established specific jurisdiction over nonresident defendants, we consider (1) the extent to which the defendants have purposefully availed themselves of the privilege of conducting activities in the State; (2) whether the plaintiff's claims arise out of those activities directed at the State; and (3) whether the exercise of personal jurisdiction would be constitutionally reasonable. *See, e.g.*, *Pinner v. Pinner*, 467 Md. at 481; *Beyond Systems, Inc. v. Realtime Gaming Holding Co., LLC*, 388 Md. at 26. To determine whether it has specific jurisdiction over a nonresident defendant, a court must conduct a "factual inquiry into the precise nature of the defendant's contacts with the forum, the relationship of these contacts with the cause of action, and a weighing of whether 'the nature and extent of contacts . . . between the forum and the defendant . . . satisfy the threshold demands of fairness.'" *Presbyterian*

Univ. Hosp. v. Wilson, 337 Md. 541, 552 (1995) (quoting *Camelback Ski Corp. v. Behning*, 312 Md 330, 336 (1988)); *accord Pinner v. Pinner*, 467 Md. at 482.

It is beyond dispute that Dominion purposefully availed itself of the benefits and protections of Maryland law by entering into a contract to perform work in Baltimore and by entering into the subcontract with Ernst in connection with that work. Hence, it is beyond dispute that a Maryland court could assert personal jurisdiction over Dominion on Ernst's claims for the breach of that subcontract. The question in this case, however, is not whether Dominion purposefully availed itself of the benefits and protections of Maryland; it is whether the individual defendants purposely availed themselves of the benefits and protections of Maryland law when they, in Virginia, allegedly caused Dominion to commit the acts that may render it liable to Ernst in Maryland.

In arguing that they did not purposely avail themselves of the benefits and protections of Maryland law, the individual defendants rely prominently on *Harte-Hanks Direct Marketing/Baltimore, Inc. v. Varilease Technology Finance Group, Inc.*, 299 F. Supp. 2d 505 (D. Md. 2004). In that case, the United States District Court, applying Maryland law, wrote that "[p]ersonal jurisdiction over an individual officer, director, or employee of a corporation does not automatically follow from personal jurisdiction over the corporation." *Id.* at 513. Citing controlling federal precedent in the District of Maryland, the court added that "a federal court may not exercise personal jurisdiction over a corporation's agent if the agent's only connection to the forum state is as an officer or employee of a non-resident corporation that committed a tort in the state, and if the

agent's own involvement in that tort occurred outside of the forum state." *Id.* at 514 (citing *Columbia Briargate Co. v. First Nat'l Bank in Dallas*, 713 F.2d 1052, 1060-61 (4th Cir. 1983)).

In *Harte-Hanks*, the federal court was employing the "fiduciary shield doctrine," an equitable doctrine that "serves to limit jurisdiction over corporate agents as considerations of equity may dictate." *Christian Books Distributors, Inc. v. Great Christian Books, Inc.*, 137 Md. App. 367, 393 (2001). The doctrine is not a "rigid rule." *Id.* Rather, it is "fact-dependent and should be applied on a case-by-case basis." *Id.* Applied properly, the fiduciary shield doctrine "will rarely produce a different result than that produced by a due process analysis." *Id.*

No Maryland case has considered whether a court may exercise personal jurisdiction over an out-of-state contractor's agents on the basis of their alleged violations of the Construction Trust Statute, through actions that were committed outside of the State in their capacity as corporate agents. In interpreting Texas's long-arm statute, however, the Supreme Court of that state held that Texas courts could not exercise personal jurisdiction over two Arizona residents who had allegedly violated Texas's construction trust statute through actions that they took, on behalf of their corporate principal, in Arizona. *Kelly v. General Interior Construction, Inc.*, 301 S.W.3d 653, 655 (Tex. 2010); *id.* at 660-61. *Kelly* is instructive.

In *Kelly* the subcontractor asserted claims against a contractor and its agents for violating the Texas Trust Fund Act, Tex. Prop. Code § 162.001 *et seq.*, a statute similar in

import to Maryland's Construction Trust Statute. The subcontractor did not allege that the agents lived in Texas, that they conducted business in Texas, or that the operative facts of the trust-fund claim occurred in Texas. *Kelly v. General Interior Construction, Inc*., 301 S.W.3d at 656.

The agents "filed a special appearance, stating they were residents of Arizona, did not own property in Texas, did not employ anyone in Texas, and did not conduct business in Texas in their personal capacities." *Id.* The trial court and the majority on the intermediate appellate court held that Texas could assert personal jurisdiction over the agents on the trust-fund claim (*id*.), but the Supreme Court reversed.

The subcontractor appears to have argued that Texas could assert personal jurisdiction over the agents under the section of the long-arm statute that "extends jurisdiction over a nonresident who 'commits a tort in whole or in part in this state.'" *Id.* at 659 (quoting Tex. Civ. Prac. & Rem. Code § 17.042(2)). Like the Maryland long-arm statute, the Texas long-arm statute reaches to the limits of due process. *See id*. at 657.

The Texas court observed that the subcontractor did not allege that the agents committed any tortious acts in Texas or that they used or retained the trust funds in Texas. *Id.* at 660. One of the agents had allegedly promised payment, but that allegation did not suffice to establish personal jurisdiction over her, because the subcontractor did "not state where this conversation occurred or make any connection with Texas." *Id.* Consequently, under Texas law, the agents could and did "negate all bases of jurisdiction." *Id.*

According to the Texas court, a trier of fact might ultimately conclude that the agents had violated the Texas trust-fund statute (*id.*), perhaps in the context of determining that their corporate principal was liable for their acts. The court cautioned, however, that "the mere commission of an act does not grant Texas courts jurisdiction over the actor." *Id.* "Rather, . . . the requirements of due process must be upheld, particularly the connection between the defendant, the forum, and the litigation . . . ." *Id.*

Similarly, the court stated that "the mere existence of a cause of action does not automatically satisfy jurisdictional due process concerns." *Id.* "A state," the court said, "is powerless to create jurisdiction over a nonresident by establishing a remedy for a private wrong and a mechanism to seek that relief." *Id.* "Instead, jurisdictional analysis always centers on the *defendant's* action for choices to enter the forum state and conduct business." *Id.* (emphasis in original). Although one of Texas's intermediate appellate courts has applied the fiduciary shield doctrine,[9] the Supreme Court of Texas based the decision in *Kelly* on statutory grounds: the plaintiff had not alleged that the acts giving rise to the claim occurred in Texas. *Id.* at 660-61.

We are persuaded by the analysis in *Kelly*. Thus, we agree that, in an action under the Construction Trust Statute, a Maryland court ordinarily cannot assert personal jurisdiction over the agents of a nonresident corporation solely on the basis of actions that they took, in their capacity as corporate agents, outside of the State of Maryland.

[9] *See Steward Health Care Systems LLC v. Saidara*, 633 S.W.3d 120, 181 (Tex. App. 2021) (Osborne, J., concurring in part and dissenting in part) (collecting authorities).

Accordingly, we hold that the circuit court erred in entering the default judgments against the individual defendants and abused its discretion in declining to vacate those judgments. Ernst's allegations were insufficient to establish that the individual defendants "transacted business" in Maryland.[10]

Our conclusion is supported by this Court's decision in *Stisser v. SP Bancorp, Inc.*, 234 Md. App. 593 (2017). In that case, we held that the directors of a Maryland corporation, all of whom were residents of other states, did not consent to personal jurisdiction in Maryland simply because of their status as directors. *Id.* at 646. In addition, we held that the directors, "who never entered Maryland in connection with [the corporation's] business," did not purposely avail themselves of the benefits and protections of Maryland law by negotiating a merger with a Texas corporation or by sending a proxy statement to the shareholders and a notice of a shareholder meeting, "because all of the relevant activity occurred outside of Maryland." *Id.* at 651-52.

In advocating for a contrary conclusion, Ernst argues that the individual defendants cannot contest the court's assertion of personal jurisdiction over them, because, Ernst says, the jurisdictional allegations in the complaint were "deemed

[10] It has been said that "[a] nonresident who has never entered the State, either personally or through an agent, may be deemed to have 'transacted business' in the State within the meaning of subsection (b)(1) as long as his or her actions culminate in 'purposeful activity' within the State." *Sleph v. Radtke*, 76 Md. App. 418, 427 (1988). In that case, however, the nonresidents' contacts with Maryland were far more deliberate and substantial than the contacts in this case. For example, the nonresidents had bought real property in Maryland and had executed a mortgage on those properties. *Id*. at 421-22. The dispute arose out of their failure to discharge their obligations on the mortgage on the Maryland properties. *Id.* at 423-25.

admitted" as a result of their failure to answer the complaint. That argument is devoid of merit. Rule 2-613(f) expressly requires a court to satisfy itself that "it has jurisdiction" to enter a default judgment. In Rule 2-613(f) the term "jurisdiction" refers both to subject-matter jurisdiction over the proceeding and to personal jurisdiction over the defendants. *See* Paul V. Niemeyer, Linda M. Schuett & Joyce E. Smithey, *Maryland Rules Commentary* 670 (4th ed. 2014). Indeed, "the primary purpose" of Rule 2-613(f) is to ensure that the court has acquired personal jurisdiction over the defendant before it enters a default judgment. *See id*. Rule 2-613(f) would have little utility if a defendant was deemed to have conceded that the court had personal jurisdiction over it whenever it failed to file a timely answer and failed to persuade the court to vacate an order of default.

Citing *Zeman v. Lotus Heart, Inc.*, 717 F. Supp. 373 (D. Md. 1989), Ernst argues that the fiduciary shield doctrine does not protect Coffee, because, Ernst says, his interests and Dominion's interests are aligned. Ernst, however, did not present this fact-intensive issue to the circuit court, so the circuit court had no opportunity to decide it. This Court may review a circuit court's factual findings, but it does not decide factual questions in the first instance.

Finally, Ernst argues that if the circuit court lacked jurisdiction over the individual defendants, a Maryland plaintiff could not enforce the Construction Trust Statute against corporate agents who committed their allegedly wrongful acts outside of the State of Maryland. This is a familiar problem in the cases pertaining to personal jurisdiction. *See*

Christian Books Distributors, Inc. v. Great Christian Books, Inc., 137 Md. App. at 379 (stating that "many courts that have criticized the [fiduciary shield doctrine] have pointed out the arguable inconsistency between the fact that the individual is subject to liability if the individual commits a tort, even though acting as an agent for a corporation, but is not subject to jurisdiction in the state in which the individual committed the tort"). But as the Texas court recognized in *Kelly*, 301 S.W.3d at 660, a state cannot create personal jurisdiction over nonresidents simply by enacting laws that purport to impose liability on them.

In any event, it is inaccurate to say that a Maryland plaintiff could never enforce the Construction Trust Statute against corporate agents who committed their allegedly wrongful conduct outside of Maryland. A Maryland court could assert jurisdiction over the agents if, for example, they have additional contacts with Maryland beyond those that are insufficient to confer jurisdiction on a Maryland court; if a material part of their allegedly wrongful conduct is committed in Maryland (*see Kelly*, 301 S.W.3d at 660); if they are domiciled in Maryland (CJP § 6-102(a)); or if they are served with process in Maryland. *Id*.; *see Pennoyer v. Neff*, 95 U.S. 714 (1878). A Maryland court could also assert personal jurisdiction over corporate agents who cause tortious injury in the State through an act or omission outside of the State if the agents have engaged in a persistent course of conduct in the State. CJP § 6-103(b)(4). Finally, when corporate agents invoke the fiduciary shield doctrine, a Maryland court could theoretically determine, based on a "fact-dependent," "case-by-case" analysis, that "considerations of equity" do not require

the court to refrain from asserting personal jurisdiction over them. *See Christian Books Distributors, Inc. v. Great Christian Books, Inc.*, 137 Md. App. at 393-94.

In summary, we conclude that Ernst did not adequately allege facts that would establish that the circuit court could properly assert personal jurisdiction over the individual defendants. For that reason, we vacate the default judgments against the individual defendants. On remand, the circuit court, in its discretion, may allow Ernst to amend its complaint to attempt to allege additional bases for the assertion of personal jurisdiction over the individual defendants.[11]

D. The Default Judgment against Fellows

Rule 2-613(f)(2) states that before a circuit court may enter a default judgment against a party the court must be satisfied that "the notice required by [Rule 2-613(c)] was mailed." Rule 2-613(c) states that "[t]he notice [of an order of default] shall be mailed to the defendant at the address stated in the request" for an order of default.

In this case, the clerk did not mail the notice of the order of default (or the ensuing notices of the hearing and the default judgment) to Fellows at the address stated in the

[11] Ernst argues that defendant Will McAteer owns residential property in Maryland, that the property is classified as his principal residence, and thus that he must be domiciled in Maryland. Consequently, Ernst argues that the circuit court could exercise personal jurisdiction over McAteer under CJP § 6-102(a), which states that "[a] court may exercise personal jurisdiction as to any cause of action over a person domiciled in . . . the State." Ernst, however, did not present any evidence of McAteer's Maryland residence to the circuit court. Nor did Ernst argue that the circuit court could exercise personal jurisdiction over McAteer because he is domiciled in Maryland. For those reasons, the issue is not before us. *See* Md. Rule 8-131(a). Ernst may assert these arguments on remand to the circuit court.

request for an order of default – the address of her residence in Dumfries. Instead, the clerk mailed the order to Dominion's business address in Springfield.

"The language of Md. Rule 2-613(f) makes plain that a trial court may enter a judgment by default if and only if it is satisfied that the notice of order of default required by Md. Rule 2-613(c) was *mailed*." *Armiger Volunteer Fire Co. v. Woomer*, 123 Md. App. 580, 589-90 (1998) (emphasis in original). "The failure of the clerk to mail the required notice of default is an irregularity that permits relief under Rule 2-535(b)." Paul V. Niemeyer, Linda M. Schuett & Joyce E. Smithey, *Maryland Rules Commentary*, *supra*, 670; *accord Henderson v. Jackson*, 77 Md. App. 393, 398 (1988). Because the notice of the default order was not mailed to Fellows in accordance with Rule 2-613(c), the court erred in entering a default judgment against her (*see* Md. Rule 2-613(f)(2)) and in declining to vacate the default judgment when the error was brought to the court's attention.

Citing an affidavit that accompanied the motion to vacate the order of default, Ernst observes that Fellows did not "claim that she was unaware of the entry of the Order of Default against her on December 30, 2020." On that basis, Ernst seems to argue that it was harmless error for the clerk to mail the notice to the wrong address. We decline to hold that a defendant is prohibited from complaining about defective notice after making a special appearance seeking relief from the very order of which she was not properly notified.

E. The Default Judgment against Colella

Defendant Brian Colella challenges the default judgment against him on the ground that he was not served with process, as stated in his affidavit filed with the individual defendants' motion to vacate the orders of default. Although he acknowledges that his denial contradicts the affidavit of service filed by Ernst, Colella contends that this factual dispute warranted an evidentiary hearing before the court entered judgment against him. He cites *Wilson v. Maryland Department of the Environment*, 217 Md. App. 271, 286 (2014), which held that it was improper, under the circumstances of that case, to "resolve a credibility determination based solely on conflicting affidavits" about whether a party had been served. In *Wilson*, this Court held that an administrative law judge erred in failing to conduct an evidentiary hearing to resolve a factual conflict about service of process where the party who objected to service supported his position with a detailed affidavit from an apparently disinterested third party. *Id.* at 278-79.

Ernst counters that Colella's "conclusory" affidavit did not warrant such a hearing. Ernst cites *Weinreich v. Walker*, 236 Md. 290, 296 (1964), in which the Court of Appeals stated that "a proper official return of service is presumed to be true and accurate until the presumption is overcome." *Accord Wilson v. Maryland Dep't of the Environment*, 217 Md. App. at 286 (stating that "[a] proper return of service is prima facie evidence of valid service of process"). According to the Court of Appeals, "the mere denial of personal service by him who was summoned will not avail to defeat the sworn return of the official process server." *Weinreich v. Walker*, 236 Md. at 296; *accord Wilson v. Maryland Dep't of the Environment*, 217 Md. App. at 285 (stating that "a mere denial of

service is not sufficient" to overcome "the presumption of validity" that adheres to a return of service). If the denial of service "'is not supported by corroborative testimony or circumstances . . . the attempted impeachment of the official return must fail.'" *Weinreich v. Walker*, 236 Md. at 296 (quoting *Weisman v. Davitz*, 174 Md. 447, 451 (1938)). In short, "the return of service of process is presumed to be true and accurate and a mere denial by a defendant, unsupported by corroborative evidence or circumstances, is not enough to impeach the return of the official process server." *Ashe v. Spears*, 263 Md. 622, 627-28 (1971).

Ernst is correct that Colella's denial was conclusory at best: he merely asserted that he "was never personally served with the lawsuit" and included no corroborative evidence to undermine the process server's affidavit to the contrary. For example, he did not assert that the process server could not have served him at his residence at the date and time cited in the process server's affidavit, because he was out of town or out of state or out of the country on that date. In these circumstances, therefore, the circuit court did not abuse its discretion in rejecting Colella's contention that Ernst failed to effectuate service of process on him. *Ashe v. Spears*, 263 Md. at 627-28; *Weinreich v. Walker*, 236 Md. at 296.

CONCLUSION

We vacate the default judgment against Dominion because the company was never served with process and, hence, never became subject to the jurisdiction of the circuit court. We vacate the default judgments against the individual defendants because Ernst

did not adequately allege a basis upon which a Maryland court could exercise personal jurisdiction over them. We vacate the default judgment against defendant Fellows on the additional ground that, in violation of Rule 2-613(f), the clerk failed to mail the notice of a default order to her at the address stated in the request for an order of default. Finally, we conclude that Colella's conclusory assertion that Ernst failed to serve him with process was insufficient to rebut the presumption of validity of the return of service.

We remand the case for further proceedings consistent with this opinion. In the court's discretion, those proceedings may include the filing of an amended complaint in which Ernst endeavors to establish an adequate basis for the assertion of personal jurisdiction over one or more of the individual defendants.[12]

JUDGMENT OF THE CIRCUIT COURT FOR QUEEN ANNE'S COUNTY VACATED; CASE REMANDED TO THAT COURT FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION; COSTS TO BE PAID BY APPELLEE.

[12] In its brief, Ernst argued that Dominion's lender did not seize Dominion's accounts until nearly four weeks after Dominion had received payment for Ernst's work. Ernst apparently intended the argument as a refutation of the defendants' defense to liability, which was that they had no power over the accounts and thus no ability to pay Ernst. Ernst supported the argument with materials that it included in an appendix to its brief. Ernst, however, did not present those arguments or those supporting materials to the circuit court. Consequently, they are not properly before us.

APPENDIX

The appellants' brief presented the following questions:

A. Whether the Circuit Court erred when it entered a final judgment of default against Defendant Dominion when the Court had no jurisdiction over Dominion because there is no evidence in the record showing that Plaintiff had served Dominion with service of process.

B. Whether the Circuit Court erred when it entered a final judgment of default against Defendant Dominion because there was no Order of Default entered against Dominion adjudicating its liability.

C. Assuming arguendo that the default judgment against Defendant Dominion is reversed and remanded as a result of the outcome of Questions A or B, whether the default judgments against the Individual Defendants must also be remanded because the Circuit Court's ruling with respect to the Individual Defendants is not a final appealable order; rather, it is an interlocutory order pursuant to Maryland Rule 2-602(a) and therefore remains subject to further revision by the Circuit Court at any time before entry of the final judgment.

D. Whether the Circuit Court erred when it entered a final judgment of default against Defendant Karin Fellows because the Notice of Default Order issued to Individual Defendant Karin Fellows dated December 30, 2020 (the "Fellows Notice") was erroneously sent by the Clerk's office to Dominion's business address, not to Ms. Fellows' personal residence as directed by Plaintiff s Request for Default Order for Ms. Fellows.

E. Whether the Circuit Court erred when it entered a final judgment of default against Defendant Brian Colella without holding an evidentiary hearing or rendering a fact finding that it had jurisdiction over Mr. Colella, as required by Maryland Rule 2-613(f), when there was affidavit quality evidence in the record that Mr. Colella was never served with process.

F. Whether under the Frow Doctrine the final judgments against all of the Individual Defendants must be reversed if the final judgment against any Defendant is reversed.

G. Whether the Circuit Court erred when it entered final judgments of default against each of the Individual Defendants without complying with the requirement in Maryland Rule 2-613(f), which required the Circuit

Court to satisfy itself that that it had jurisdiction over each Individual Defendant, when all of the facts in the record established that each of the Individual Defendants resided in Virginia and each Individual Defendant was employed by Dominion in Virginia and there were no facts in the record from which the Circuit Court could have concluded that any of the Individual Defendants had any contacts in the State of Maryland.

H. Whether the Circuit Court abused its discretion when it denied the Individual Defendants' Motion to Vacate the Orders of Default prior to entry of the default judgments based upon undisputed evidence in the Record establishing that: (1) the Individual Defendants had retained counsel to timely respond to the Complaint, (2) the Individual Defendants' attorney failed to respond on their behalf because he was incapacitated by COVID-19, and (3) the Individual Defendants each demonstrated that they had the same meritorious defense on the merits.