Circuit Court for Anne Arundel County
Case No. C-02-CV-19-000012

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 362

September Term, 2020

G&S ASSOCIATION SERVICES, LLC,
ET AL.
v.

HOMEX CONSTRUCTION, LLC

Berger,
Leahy,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, James R., J.

Filed: May 24, 2021

*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.

G&S Association Services, LLC ("G&S") and Ghilda L. Fries, appellants, appeal from an order of the Circuit Court for Anne Arundel County denying their motion to revise a default judgment. They contend that the default judgment must be vacated because they were denied the right to participate in the default judgment hearing.

For the reasons set forth below, we affirm the judgment of the circuit court.

BACKGROUND

On January 3, 2019, Homex Construction, LLC ("Homex"), appellee, filed a complaint for breach of contract and related claims against G&S and Ms. Fries, in her capacity as G&S's managing agent. According to the complaint, in January of 2017, Homex entered into an oral subcontract with G&S, a company specializing in providing property management services to homeowners' associations, community associations, and neighborhood associations. Between March 14, 2018 and November 8, 2018, Homex performed repair, maintenance, and construction work on certain properties managed by G&S, at a cost of $49,847.92. Despite Homex's demands for payment, G&S failed to pay Homex for its services.

Appellants did not file a responsive pleading. On June 25, 2019, Homex requested an order of default, which the circuit court entered on July 12, 2019. Appellants did not move to vacate the default. On August 21, 2019, Homex moved for default judgment, and a default judgment hearing was scheduled for October 30, 2019.

Ms. Fries appeared *pro se* at the default judgment hearing, seeking to represent herself and G&S, and to introduce evidence in defense of Homex's claims. Homex

objected to Ms. Fries' attempt to represent G&S, a corporation, at the hearing. The circuit court noted Homex's objection but determined that, because G&S and Ms. Fries were in default, Ms. Fries was precluded from introducing evidence and cross-examining Homex's witnesses. After hearing testimony and reviewing evidence presented by Homex, the court granted Homex's motion for a default judgment against appellants in the amount of $49,847.92. The default judgment order was entered on November 12, 2019. Appellants did not note an appeal from that judgment.

On April 23, 2020, appellants filed a motion to revise the default judgment, arguing that the judgment should be vacated because the trial court's failure to permit Ms. Fries to present evidence or cross-examine witnesses at the default judgment hearing constituted an irregularity within the meaning of Maryland Rule 2-535(b). Homex opposed the motion. On May 18, 2020, the trial court entered an order denying appellants' motion to revise. Appellants noted an appeal on June 17, 2020.

DISCUSSION

Appellants contend that the circuit court erred in refusing to vacate the default judgment on the basis of an "irregularity" that occurred when the trial court precluded them from participating in the hearing and presenting evidence in their defense. Appellants assert that the trial court had the discretion to hear evidence showing that they had a meritorious defense to the action, namely, that:

> (a) Appellant G&S was not a party to any agreement alleged in this action; (b) [Homex] was aware of that fact as it had repeatedly invoiced and received check payments from G&S Maintenance Group, which is owned by LeMa, which in turn does not own Appellant G&S; and (c) there is no basis for Appellant Fries' individual liability, which solely arises from her alleged

> control over funds provided to an improperly-named defendant in Appellant G&S.

Had the trial court permitted Ms. Fries to participate in the hearing, appellants contend that the trial court "would likely have concluded that [a]ppellants were not proper parties to this action and would not have entered any award for [a]ppellee." Appellants further contend that they should have been permitted to present testimony and challenge the amount of damages sought by Homex because the hearing was a damages hearing, not a default hearing as to liability.[1]

Homex responds that appellants' argument is an impermissible "substantive attack" on the merits of the trial court's decision at the default judgment hearing. Homex argues that the trial court's ruling prohibiting appellants from introducing evidence at the default judgment hearing did not constitute an "irregularity" within the meaning of Rule 2-535(b), and even if it did, appellants failed to act in good faith and with ordinary diligence in seeking to revise the judgment.

Rule 2-535(a) provides a trial court with "broad discretion . . . to revise its judgment within thirty days after entry." *Peay v. Barnett*, 236 Md. App. 306, 319 (2018). In the case of a default judgment, the circuit court's revisory power under Rule 2-535(a) is further limited only "as to the relief granted" in the judgment. Rule 2-613(g). A circuit court may revise a final judgment only upon a showing of fraud, mistake or irregularity under Rule

[1] *See Greer v. Inman*, 79 Md. App. 350, 357 (1989) (explaining that, in the case of a claim for unliquidated damages, though the defaulting party is prohibited from introducing evidence as to liability at the damages hearing, the defaulting party may participate in the hearing and produce evidence in mitigation of damages).

2-535(b). *See* Md. Code (1974, 2020 Repl. Vol.), § 6-408 of the Courts & Judicial Proceedings Article. The party seeking revision of the judgment must show the existence of fraud, mistake or irregularity "by clear and convincing evidence." *Peay*, 236 Md. App. at 321 (internal quotations omitted) (quoting *Pelletier v. Burson*, 213 Md. App. 284, 290 (2013)). "Moreover, the party moving to set aside the enrolled judgment must establish that he or she 'acted with ordinary diligence and in good faith upon a meritorious cause of action or defense.'" *Thacker v. Hale*, 146 Md. App. 203, 217 (2002) (citing *Platt v. Platt*, 302 Md. 9, 13 (1984)).

"We review a trial court's determination of whether there was fraud, mistake, or irregularity for clear error and legal correctness." *Davis v. Attorney General of Md.*, 187 Md. App. 110, 129 (2009). We review a trial court's decision whether to vacate the judgment, based upon its analysis of the equitable factors, for abuse of discretion. *Id.* (citations omitted); *accord Pelletier*, 213 Md. App. at 289. We will reverse the denial of a motion to revise a final judgment only where "no reasonable person would take the view adopted by the [trial] court, or when the court acts without reference to any guiding rules or principles." *Powell v. Breslin*, 430 Md. 52, 62 (2013) (internal quotation marks and citation omitted).

The terms fraud, mistake, and irregularity are "narrowly defined and strictly applied," so as "to ensure finality of judgments." *Thacker*, 146 Md. at 217. "Irregularity," as used in Rule 2-535(b), "has been defined as 'doing or not doing that . . . which, conformable with the practice of the court, ought or ought not to be done. . . ." *Estime v. King*, 196 Md. App. 296, 307 (2010) (quoting *J.T. Masonry Co. v. Oxford Constr. Services*,

Inc., 74 Md. App. 598, 607 (1988)). "[A]n irregularity in the contemplation of Rule 2-535(b) is not an error, which in legal parlance, generally connotes a departure from truth or accuracy of which a [party] had notice and could have challenged, but a nonconformity of process or procedure." *Pelletier*, 213 Md. App. at 290.

Irregularities which invoke the court's revisory powers typically involve some failure of process or procedure by the clerk of court, for example, failures to send a party notice or mail a notice to the correct address, and failures to effect proper publication. *See Thacker*, 146 Md. App. at 219-20. *See also Davis*, 187 Md. App. at 129 (lack of notice or service to interested persons in trust termination procedure were irregularities); *Gruss v. Gruss*, 123 Md. App. 311 (1998) (failure to mail an order of dismissal to correct address constituted an irregularity); *Director of Finance of Baltimore City v. Harris*, 90 Md. App. 506 (1992) (finding an irregularity where clerk refused to accept and file a motion to vacate order of default, but remanding due to absence of a finding of good faith and due diligence).

Review of a procedural "irregularity" for purposes of revising an enrolled judgment does not include review of the correctness of the judgment. "[T]he Court of Appeals consistently has rejected attempts to exercise revisory power over judgments that have been called into question on their merits, rather than on the basis of questionable procedural provenance." *Thacker*, 146 Md. App. at 220. As the Court made clear in *New Freedom Corp. v. Brown*, 260 Md. 383, 386 (1971): "An appeal from a denial of a motion to strike or rescind a judgment does not serve as an appeal from that judgment."

In *Thacker*, we determined that the inclusion of an acceleration clause in an enrolled judgment providing for a monetary award, though arguably included in error, did not

constitute an irregularity within the meaning of Rule 2-535(b). *Thacker*, 146 Md. App. at 222. We explained that the error was not an "irregularity" because it did not result from "a failure to follow prescribed or customary judicial practice or procedure." *Id*.

The Court of Appeals reached a similar result in *Hagler v. Bennett*, 367 Md. 556, 559-60 (2002), where a mother challenged a default judgment entered years earlier against her, her husband and her son. She argued that the judgment creditor had mistakenly obtained the judgment against her husband, who was not a signatory to the underlying loan, and therefore, the judgment was void. *Id*. at 560. The circuit court denied mother's request to set aside the judgment, finding that there was no showing of fraud, mistake or irregularity in the judgment. *Id*. The Court of Appeals affirmed, explaining that the mistaken identity defense, though possibly meritorious, was required to be plead in the circuit court case, and in the absence of such a defense, judgment was properly entered in full conformance with the rules. *Id.* at 561.

In *Das v. Das*, 133 Md. App. 1, 23 (2000), the trial court refused to set aside an order striking the appearance of counsel, though the order had been entered without first conducting a hearing or receiving a response from the party who had retained the counsel. This Court concluded there was no irregularity or error in process or procedure where the party had notice, a duty to stay informed, and respond to counsel's impending withdrawal from the case. *Id*. at 221. *See also Autobahn Motors, Inc. v. City of Baltimore*, 321 Md. 558, 563 (1991) (reversing an order that revised a judgment in order to correct the city's typographical error in its property measurements.)

In this case, the trial court's entry of a default judgment without first providing appellants the opportunity to present evidence in their defense, was not an "irregularity" in process or procedure within the meaning of Rule 2-535(b). As valid as appellants' defenses may have been, the merits of those defenses are not before us in this appeal.

Even if there had been an irregularity in the judgment, appellants were required to act with "ordinary diligence," specifically, in this case, to file a motion to vacate the default order "as soon as [they] learned of its existence and had investigated the facts." *Fleisher v. Fleisher*, 60 Md. App. 565, 573 (1984); *Bland v. Hammond*, 177 Md. App. 340, 357 (2007) ("Ordinary diligence includes moving to vacate a judgment 'as soon as' a party learns of the judgment and investigates the facts.") (citations omitted).

During the default judgment hearing, Ms. Fries informed the court that she received the summons for Homex's lawsuit one month prior to the default judgment hearing. At that time, she had an obligation to obtain the complaint and investigate Homex's claim. Although she was aware of the lawsuit, she did not file any pleadings. She also informed the court that she had learned of the entry of default two weeks prior to the default judgment hearing. She provided no explanation, however, as to why she did not respond to the complaint or move to vacate the default judgment. Moreover, because Ms. Fries was present at the hearing on the default judgment, she was aware of the court's ruling granting judgment in favor of Homex on the date it was ordered. Appellants have provided no explanation as to why they did not file a timely post-trial motion, and instead waited five months after the judgment was entered to seek to revise it. As the circuit court observed,

appellants "had opportunity after opportunity" to defend against Homex's claims, which they inexplicably allowed to "pass [them] by."

We conclude that there was no irregularity in this case within the meaning of Rule 2-535(b) that would have permitted the court to revise the default judgment, and even if there had been, appellants failed to demonstrate that they exercised ordinary diligence in seeking to revise the judgment. We therefore affirm the judgment of the circuit court.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANTS.