Circuit Court for Prince George's County
Case No. CAE17-36416

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1147

September Term, 2018

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LEAUTRY DIXON AND VALERIE DIXON

v.

BANK OF AMERICA, N.A.

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Leahy,
Shaw Geter,
Gould,

JJ.

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Opinion by Gould, J.

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Filed: December 9, 2019

Appellants Leautry Dixon and Valerie Dixon were sued by Appellee Bank of America, N.A. ("BOA") in the Circuit Court for Prince George's County. They failed to respond to the complaint, failed to respond to a motion for an order of default, failed to timely move to vacate the order of default after it was entered, and failed to timely oppose a motion for summary judgment. As a result, the trial court entered orders of default and summary judgment against both Dixons, and a default judgment against Ms. Dixon. Appellants maintain on appeal that the trial court abused its discretion by not rescuing them from the consequences of their own neglect. We find otherwise, and therefore, we affirm the judgment of the circuit court.

## FACTS AND LEGAL PROCEEDINGS

On October 31, 2006, Leautry Dixon obtained a $100,000 home equity line of credit from BOA, evidenced by a promissory note (the "Note") and secured by a deed of trust (the "Deed of Trust") on property he jointly owned with his wife, Valerie Dixon (the "Loan"). The Deed of Trust was fatally flawed in two respects: (1) Ms. Dixon's name and signature were nowhere to be found; and (2) the legal description of the property was incomplete. On their face, these defects rendered the Deed of Trust unenforceable, leaving the Note unsecured.

After BOA became alerted to the problems with the Loan documents, it filed a complaint against both Mr. Dixon and Ms. Dixon, seeking a declaratory judgment and

other relief calculated to fix the problems with the Deed of Trust.[1] BOA joined the State of Maryland as a defendant because it held a tax lien on the property and therefore was a necessary party. BOA requested that the relief be granted *nunc pro tunc* to October 31, 2006, when the Loan documents were executed, to ensure that it would have a valid and perfected lien against the Dixons' property.

The Dixons were personally served with process on December 10, 2017. The service papers included a summons that stated: "You are hereby summoned to write a written response by pleading or motion to the attached complaint . . . [w]ithin 30 days after service of this summons upon you."

The Dixons' response to the complaint was due on January 9, 2018. The Dixons failed to respond. BOA moved for an order of default against both of them. The court granted the motion for a default order as to Ms. Dixon on February 6, 2018. For reasons unknown, no such order was entered against Mr. Dixon at that time.[2]

As required by Maryland Rule 2-613(c), on February 6, 2018, the court sent a notice to Ms. Dixon, which stated:

> You are hereby notified that an Order of Default has been entered against you in the [case] on [February 6, 2018] . . . .

[1] Specifically, BOA's complaint included counts for a Declaratory Judgment (Count 1), Declaratory Judgment-Equitable Mortgage, in the alternative (Count 2), and Declaratory Judgment-Constructive Trust, Implied, and Resulting Trust, in the alternative (Count 3). The complaint sought various relief, including: that the court declare that BOA "is entitled to a valid, enforceable, and perfected lien/interest/encumbrance against the entire Property, pursuant to the Note and Deed of Trust, *nunc pro tunc* to October 31, 2006," and that the legal description of the property in the Deed of Trust be reformed.

[2] Counsel for BOA surmised that the clerk's office inadvertently sent the judge only one default order for signature.

> You may move to vacate the Order of Default within thirty (30) days of [February 6, 2018]. The motion shall state the reasons for the failure to plead and the legal and factual basis for the defense to the claim.

The notice also explained that an ex parte hearing on the default order was scheduled for April 13, 2018, and that a pretrial conference was scheduled for April 27, 2018.[3] Ms. Dixon neglected to file a motion to vacate the order of default.

On March 20, 2018, BOA filed a motion for summary judgment against both Dixons, supported by a memorandum of law, an affidavit from an assistant vice-president of BOA, and various documents related to the Loan and the underlying property. Pointing to Rule 2-323(e), BOA contended that the allegations of the complaint were deemed admitted, and therefore, there were no genuine disputes of material fact. BOA argued that, based on the undisputed facts, and as a matter of law, it was entitled to the relief it requested in the complaint. The Dixons were served with copies of the summary judgment papers, and once again, failed to respond.

The Dixons finally made an appearance in the case by showing up to the April 13 hearing with counsel. The Dixons' counsel gallantly tried to extricate them from the predicament in which they put themselves: counsel made an oral motion for leave to file a motion to vacate the order of default, to respond to the complaint, and to respond to the motion for summary judgment. The court repeatedly gave counsel an opportunity to explain the good cause justifying these requests.

[3] The record also reflects that the Dixons were sent a copy of the State's answer to the complaint, the court's scheduling order, and an additional notice of hearing for the April 13 hearing and the April 27 conference.

Counsel explained that Ms. Dixon failed to timely respond to the complaint or move to vacate the default because she had been overwhelmed and unable to focus on the case, unfamiliar with the process, and occupied with a "variety of things" including tending to her sick mother in Pennsylvania. She also claimed that it had taken her time to raise the funds to retain counsel.

Unmoved by counsel's explanations for Ms. Dixon's neglect, the trial court stated: "They've done nothing. There's no motion pending, no answer filed, no request to vacate, no response to the motion for summary judgment. Literally nothing." The court further stated that it had not "heard any cause, let alone a good cause," and that when people "choose to blissfully and ignorantly go along," they do so at their own risk. The court then ruled on the motion:

> Okay. I'm going to deny the verbal request for a motion to vacate the default. The time has long since passed, I've heard no valid reason for the failure to plead and, more, the failure to file a timely motion to vacate, other than head in the sand. And as I said, when someone puts their head in the sand, they do so at their own risk.

After ruling, the court proceeded with the scheduled ex parte hearing and took testimony from BOA's corporate representative. That same day, the court signed an order granting BOA's request for a default judgment against Ms. Dixon as well as a separate order granting an order of default against Mr. Dixon.

The judgment of default against Ms. Dixon determined that BOA was entitled to a valid lien against the Dixons' property, including Ms. Dixon's interest in the property, *nunc pro tunc* to October 31, 2006, and reformed the Deed of Trust to correctly describe the property, also *nunc pro tunc* to October 31, 2006.

On April 23, 2018 and April 26, 2018, the Dixons made a flurry of filings in another attempt to turn back the clock. They filed: (1) a motion to vacate the default order against Mr. Dixon; (2) a motion to reconsider the denial of the motion to vacate the order of default against Ms. Dixon; (3) an opposition to the motion for summary judgment; and (4) an answer to the complaint.

In the motion for reconsideration, Ms. Dixon once again sought to vacate the order of default against her. In addition to repeating the reasons for her inaction proffered at the April 13 hearing, Ms. Dixon stated that she had never intended to be involved in the line of credit that her husband had secured, and that with all of the other issues in her life overwhelming her, she had trusted her husband to deal with the litigation and "did not appreciate that she needed to actively do something to protect her interests in this matter."

BOA opposed the Dixons' motions and filed a motion to strike the Dixons' untimely answer. The Dixons did not respond to the motion to strike.

In June 2018, the court entered orders striking the Dixons' answer, denying the Dixons' motions, granting summary judgment in favor of BOA against both Mr. Dixon and Ms. Dixon, determining that BOA was entitled to a valid lien on the property against the interest of both Mr. Dixon and Ms. Dixon, *nunc pro tunc* to October 31, 2006, and reforming the Deed of Trust to correctly reference the property *nunc pro tunc* to October 31, 2006.

This timely appeal followed.

## DISCUSSION

The Dixons present six questions on appeal, which we have consolidated and condensed as follows:[4]

1. Did the circuit court abuse its discretion by declining to vacate the order of default against Ms. Dixon?

[4] The questions presented by the Dixons are:

1. Does the circuit court have the authority to vacate an order of default when the request is made more than 30 days after the order of default was granted?

2. Did the circuit court abuse its discretion by failing to vacate an order of default against Valerie Dixon when Bank of America was not entitled to the relief they sought and the entry of an order of liability against her would have the effect of forcing her to be a party to a contract that she did not enter?

3. Did the circuit court abuse its discretion by failing to vacate an order of default against Valerie Dixon when she appeared in court with counsel and stated her intention to defend against this matter and an order of default had been granted as to one defendant and not the other?

4. Did the circuit court abuse its discretion by failing to vacate an order of default against Leautry Dixon after he appeared in court with counsel and stated his intention to defend against this matter before the order of default was granted, and when Bank of America is not entitled to the relief they seek?

5. Did the circuit court err in granting a motion for summary judgment against Leautry and Valerie Dixon when Bank of America provided no documents to support the material facts alleged in the motion and the court made no factual findings and gave no legal basis to support its decision?

6. Did the circuit court err in striking the answer filed by Leautry and Valerie Dixon?

2. Did the circuit court abuse its discretion by declining to vacate the order of default against Mr. Dixon?

3. Did the circuit court err in granting a motion for summary judgment against Mr. and Ms. Dixon?

4. Did the circuit court err in striking the answer filed by Mr. and Ms. Dixon?

## *ORDERS OF DEFAULT*

### *Standard of Review*

Trial courts have broad discretion "to determine whether to grant or deny a motion to vacate an order of default." Attorney Grievance Comm'n v. Alston, 428 Md. 650, 673 (2012) (citations omitted). The court's decision "will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." Jenkins v. City of College Park, 379 Md. 142, 165 (2003) (cleaned up).

Under an abuse of discretion standard, an appellate court will not disturb the trial court's ruling "unless it is 'well removed from any center mark imagined by the reviewing court and beyond the fringe of what the court deems minimally acceptable.'" Patterson v. State, 229 Md. App. 630, 639 (2016) (quoting McGhie v. State, 224 Md. App. 286, 298 (2015)); see also Aventis Pasteur, Inc. v. Skevofilax, 396 Md. 405, 418 (2007) (citations omitted) (cleaned up) (court abuses its discretion "where no reasonable person would take the view adopted by the trial court or when the court acts without reference to any guiding principles").

With these principles guiding our analysis, we turn to the specific arguments advanced by the Dixons.

*Order of Default Against Ms. Dixon*

When boiled down to their essence, Ms. Dixon makes two arguments in support of her contention that the trial court abused its discretion by failing to vacate the default order against her. First, she contends that the trial court applied the wrong legal standard because it was under the misimpression that it did not have authority to vacate the default order more than 30 days after it had been entered.

Ms. Dixon's second argument is that there were multiple substantive reasons to justify allowing her to defend the case on the merits. In that regard, Ms. Dixon argues that she had a valid defense to BOA's claims because she was not a party to the Loan. She also argues that because no default had yet been entered against Mr. Dixon, BOA had not been prejudiced by her failure to timely respond and, moreover, the possibility that Mr. Dixon could have prevailed created the potential for inconsistent verdicts.

A resolution of both arguments requires us to first determine the legal standards applicable to Ms. Dixon's untimely request to vacate the default order. Ms. Dixon's request implicated three rules. The first is Rule 2-613(d), which allows the defaulted party to move to vacate the default.[5] There are three requirements to a proper Rule 2-613(d) motion: (1) it must be filed within 30 days of the default: (2) it must establish good cause

[5] Rule 2-613(d) provides: "The defendant may move to vacate the order of default within 30 days after its entry. The motion shall state the reasons for the failure to plead and the legal and factual basis for the defense to the claim."

for the failure to timely respond to the complaint; and (3) it must state the factual and legal basis for a defense to the claims on the merits. See Franklin Credit Mgmt. Corp. v. Nefflen, 436 Md. 300, 317-18 (2013) ("The determination of liability in the order, however, may be vacated upon motion of a defendant who has been provided notice and files such within the thirty-day window, if the defendant can demonstrate an equitable reason for failure to plead and that there is an actual controversy on the merits.").

The second relevant rule is Rule 1-204, which is applicable because Ms. Dixon failed to timely move to vacate the order of default. Rule 1-204(a) provides in pertinent part: "When these rules or an order of court require or allow an act to be done at or within a specified time, the court, on motion of any party and for cause shown, may . . . on motion filed after the expiration of the specified period, permit the act to be done if the failure to act was the result of excusable neglect."

The third applicable rule is Rule 2-311, which provides:

> (a) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, and shall set forth the relief or order sought.
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> ***
>
> (c) A written motion and a response to a motion shall state with particularity the grounds and the authorities in support of each ground. A party shall attach as an exhibit to a written motion or response any document that the party wishes the court to consider in ruling on the motion or response unless the document is adopted by reference as permitted by Rule 2-303(d) or set forth as permitted by Rule 2-432(b).
>
> (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.

Putting the requirements from those three rules together, as a result of her failure to timely move to vacate the default order, Ms. Dixon had the burden of: (1) establishing good cause for her failure to timely respond to the complaint; (2) establishing excusable neglect for her failure to timely move to vacate the order of default; (3) stating the factual and legal basis for a defense on the merits; and (4) providing an affidavit or other evidentiary support for any facts not already contained in the record. Put simply, Ms. Dixon needed to provide a valid reason for her inaction and show that she had a legitimate defense.[6]

Against this backdrop, we now turn to Ms. Dixon's first argument—that the trial court did not believe it had authority to vacate the default order and therefore applied the incorrect legal standard. Ms. Dixon bases this argument on a snippet of the lengthy colloquy between the court and her counsel at the April 13 hearing, during which the trial court said: "We've got a couple of problems. First of all, I don't know that I have any authority to vacate an order of default that was entered two months, three months ago."

In its full context, however, a different picture emerges. The hearing was scheduled for ex parte proof, pursuant to Rule 2-613(f), for the relief BOA was seeking in a default judgment against Ms. Dixon. Nevertheless, even though the hearing was not scheduled for Ms. Dixon to make an oral motion to vacate the default, the court patiently heard from the Dixons' counsel. Under these circumstances, the trial court cannot be faulted for initially questioning, almost rhetorically, its authority to vacate a default that had been entered months prior.

[6] The latter requirement makes perfect sense: why give a defaulting party another chance to defend on the merits if, in fact, it had no meritorious defense?

More importantly, the transcript reflects that the court did *not* deny Ms. Dixon's request on the basis that it lacked the authority to grant it. Rather, the transcript unambiguously shows that the trial court gave counsel a fair opportunity to persuade it that good cause existed for Ms. Dixon's failure to respond to the complaint and failure to timely move to vacate the default but was unconvinced by her argument. The court denied Ms. Dixon's request because it had "heard no valid reason for the failure to plead and, more, the failure to file a timely motion to vacate, other than head in the sand." Accordingly, we reject Ms. Dixon's contention that the court failed to apply the correct legal standard.

Ms. Dixon's second argument—that there were substantive reasons to allow her to defend the case on the merits—fares no better. Even if we assume *arguendo* that (i) she had a valid defense to BOA's claim, (ii) BOA would have suffered no prejudice if the default had been vacated, and (iii) there was a risk of inconsistent verdicts,[7] none of that mattered because, as shown above, by the time Ms. Dixon decided to participate in the litigation, she had the burden of not only showing a factual and legal basis for a defense, but also adequately explaining her failures to respond until that point, which she did not do.[8] Under these circumstances, the trial court was well within its discretion to deny Ms.

[7] Ms. Dixon overstates the risk of inconsistent verdicts. BOA had moved for an order of default against Mr. Dixon at the same time it did against Ms. Dixon. It was only through happenstance that the order of default had not been entered against him as well. As of April 13, BOA's motion for an order of default against Mr. Dixon was unopposed and ripe for a decision. The trial court was aware of this procedural posture and we presume knew that the default order would promptly be entered against Mr. Dixon, which is what happened.

[8] Moreover, in her written motion for reconsideration of her motion to vacate the order of default, Ms. Dixon did not offer any new material information to explain her

Dixon's request. See Banegura v. Taylor, 312 Md. 609, 620 (1988) ("failure to comply with [Rule 2-613] may not deprive the trial judge of the right to grant the motion, but it may furnish justification for the denial of it").

*Order of Default Against Mr. Dixon*

Mr. Dixon's arguments on appeal are even less persuasive than those of his wife. Mr. Dixon argues that the court abused its discretion in failing to vacate the order of default against him because "the court was well aware that Mr. Dixon intended to defend against the case," and therefore the "sanction of default was unusually harsh in this case. But, as explained above, that's not the criteria applicable to a motion to vacate an order of default.[9]

In his motion to vacate the default order against him, Mr. Dixon merely reiterated his wife's unsuccessful excuses, explaining that he failed to respond to the complaint because "he was quite overwhelmed by the personal and financial responsibilities of his life during that time, and was unable to retain counsel." Mr. Dixon failed to provide an affidavit pursuant to Rule 2-311(d). The trial court did not abuse its discretion by remaining unconvinced by Mr. Dixon's unsupported and vague excuses. For that reason alone, we affirm.[10]

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complete inaction. See Steinhoff v. Sommerfelt, 144 Md. App. 463, 484 (2002) (motions for reconsiderations are not opportunities for a do-over). In addition, she did not support her motion with an affidavit or other evidence as required by Rule 2-311.

[9] Moreover, there is nothing usual about entry of an order of default when a defendant fails to respond to a complaint. In fact, that's what the rule contemplates.

[10] In assessing the merits of Mr. Dixon's excuses, we assume that the trial court noticed the irony in the fact that one of Ms. Dixon's unsuccessful excuses was that she had believed that her husband would handle the litigation because it was his loan, not hers. In

But, there's more. To establish the "legal and factual basis" prong of Rule 2-613, Mr. Dixon argued that BOA was not entitled to the relief it sought because his wife, Ms. Dixon, was not a party to the Loan and she had never agreed to secure the Loan with their jointly owned home. Thus, Mr. Dixon's defense was that he had not been authorized to grant the property interest conveyed by the Deed of Trust to secure his line of credit with BOA.

This argument is remarkable for its chutzpah. Mr. Dixon contractually agreed to secure the Loan with a lien on the property. Indeed, by signing the Deed of Trust, Mr. Dixon covenanted that he was "lawfully seised of the estate hereby conveyed and has the right to grant and convey the Property. . ." In essence, therefore, Mr. Dixon's defense to this lawsuit means that at best, he breached his contractual duty to BOA when he took out the Loan, and, at worst, he committed fraud by falsely representing his authority to grant the lien. Either way, the trial court was well within its discretion to deny Mr. Dixon's motion, given the lack of merit to his proffered defense.

*THE MOTION FOR SUMMARY JUDGMENT*

Maryland Rule 2-501 provides that a motion for summary judgment is appropriate when "there is no genuine dispute as to any material fact and [the moving] party is entitled to judgment as a matter of law." A "material fact is a fact the resolution of which will somehow affect the outcome of the case." King v. Bankerd, 303 Md. 98, 111 (1985). The party opposing the summary judgment motion "must present admissible evidence

other words, one of Ms. Dixon's excuses rested on the assumption that Mr. Dixon was unburdened by her problems and would timely respond on behalf of both of them.

demonstrating the existence of a dispute of material fact." Hines v. French, 157 Md. App. 536, 549 (2004). The court must review the motion "in the light most favorable to the non-moving party." Gallagher v. Mercy Medical Center, Inc., 463 Md. 615, 627 (2019).

We review an order granting summary judgment de novo. Wooldridge v. Price, 184 Md. App. 451, 457 (2009) (quotation omitted). We must first determine whether there was a genuine dispute of material fact—a fact that would affect the outcome of the case—on the summary judgment record. Id. at 457-58. If there is no genuine dispute of material fact, we must determine whether the circuit court reached the correct legal result. See Windesheim v. Larocca, 443 Md. 312, 326 (2015).

BOA's motion for summary judgment included a statement of material facts supported by a copy of the original Deed to the Dixons' property, the Note, and the Deed of Trust, as well as an affidavit from an assistant vice-president of BOA. The affidavit was purportedly made upon personal knowledge. Among other things, BOA's affiant swore under oath that BOA and the Dixons intended to create a lien on the property, and that due to inadvertence, Ms. Dixon did not sign the Note or Deed of Trust.

The Dixons argue that the court erred in granting summary judgment because BOA failed to provide a proper affidavit to support its motion for summary judgment. The Dixons argue that the BOA representative who signed the affidavit could not have had personal knowledge that Ms. Dixon intended to sign the Deed of Trust but inadvertently failed to do so. Thus, they argue that the court erred in finding that the material facts had been established as undisputed.

The Dixons are correct about the affidavit submitted by BOA. Under Rule 2-501(c), "[a]n affidavit supporting or opposing a motion for summary judgment shall be made upon personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit." Here, the affiant swore that she had "personal knowledge that the following matters are true and correct." She claimed to have reviewed the "business records" and that her "personal knowledge [wa]s based upon [her] review of such business records." She then went on to state that:

> 9. Bank of America, N.A. and Leautry Dixon and Valerie A. Dixon intended to create a lien or mortgage on the entire Property to secure payments under the Loan.
>
> 10. Due to inadvertence, Valerie A. Dixon, one of the record owners of the Property, did not sign the Deed of Trust.

We find it troubling that BOA's corporate representative swore under oath to have acquired personal knowledge from unspecified business records that Ms. Dixon had "intended to create a lien or mortgage on the entire Property to secure payments under the Loan." We have examined the business records contained in the court's record and found nothing to reveal Ms. Dixon's state of mind in 2006, when Mr. Dixon obtained the Loan. Moreover, even if such a record had existed, a mere review of that record would not bestow upon BOA's affiant personal knowledge of Ms. Dixon's state of mind in 2006. At best, her review of that record would have given her second-hand knowledge. The affidavit therefore, was not a proper basis for establishing the undisputed material facts.

Fortunately for BOA, there was another basis on which it properly established the undisputed material facts. As set forth above, by virtue of the Dixons' failure to respond to the complaint, all of the allegations in the complaint were admitted pursuant to Maryland Rule 2-323(e).[11] On that basis alone, the summary judgment motion was properly supported, and therefore the trial court did not err in granting it.[12]

*MOTION TO STRIKE ANSWER*

The Dixons argue that the court erred in striking their answer filed over two months after being served with the complaint because (i) a default judgment had not been entered against Mr. Dixon, and (ii) the answer demonstrated that the Dixons had a meritorious defense. Neither argument is persuasive.

First, the Dixons failed to respond to the motion to strike their answer. They have therefore waived on appeal any arguments they would have made there. See Md. Rule 8-131(a); Nalls v. State, 437 Md. 674, 691 (2014).

Second, there is no rule or case that supports the Dixons' arguments. As discussed above, under Rule 2-321(a), the Dixons had 30 days to respond to the complaint. If they had wanted more time, they could have moved for more time pursuant to Rule 1-204. But they didn't. The Dixons had no right to file an untimely answer after the 30-day period

[11] Rule 2-323(e) provides that "[a]verments in a pleading to which a responsive pleading is required, other than those as to the amount of damages, are admitted unless denied in the responsive pleading or covered by a general denial."

[12] The Dixons do not dispute that BOA was entitled to judgment as a matter of law based on the facts that had been deemed undisputed.

had passed, and because they did not satisfy the requirements under Rule 1-204 for an extension of time, the court did not abuse its discretion in striking their answer.

**JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANT.**