Circuit Court for Montgomery County
Case No. 443678V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1613

September Term, 2019

DALE OLSON

v.

PHILIPPE MOSER

Arthur,
Reed,
Friedman,

JJ.

Opinion by Reed, J.

Filed: December 22, 2021

Appellant, Dale Olson, appeals from the Circuit Court for Montgomery County's denial of his "Motion for Entry of Default" against Appellee, Philippe Moser—the majority member and chief executive officer of Central Energy North East, LLC ("Central Energy"), Appellant's former employer. On appeal, he presents the following question for our review:

> I. Did the Circuit Court err in requiring proof of liability upon [Appellee's] default at an *ex parte* proof of damages hearing?

We answer this question in the negative and will, therefore, affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND[1]

On April 7, 2014, Appellant entered into an "Energy Partner Agreement" with Central Energy, a company engaged in brokering the purchase and sale of natural gas and electricity between commercial customers and retail energy suppliers. That contract provided, in part:

> For each customer procured for and submitted to [Central Energy] as a direct result of [Appellant's] efforts, [Central Energy] will pay [Appellant] a commission as specified on Attachment A. [Appellant's] commissions will be settled to [Appellant] on or before the 28th day of each month for any [Appellant] commissions earned during the previous calendar month.

[1] The underlying facts are largely irrelevant to the resolution of this appeal. Accordingly, we will forgo a detailed recitation thereof, and recount only those facts necessary to provide context for the issue presented. *See Kennedy v. State*, 436 Md. 686, 688 (2014) ("The circumstances leading to the charges against Petitioner in this case are largely irrelevant to this appeal, and a brief recitation of those facts [is] included only to provide context."); *Teixeira v. State*, 213 Md. App. 664, 666–67 (2013) ("It is unnecessary to recite the underlying facts in any but a summary fashion because for the most part 'they [otherwise] do not bear on the issues we are asked to consider.'" (citation omitted)).

Between November 8, 2016, and October 30, 2017, Appellant referred 32 customers to Central Energy, with whom it executed customer agreements. In 2017, a dispute arose regarding Central Energy's purported failure to timely tender Appellant's commission payments. According to Appellant, although he earned $78,406.04 in commissions during that period, he was only paid approximately $14,539. The conflict came to a head on December 5th when Central Energy terminated its contract with Appellant. In an e-mail sent the following day, Appellee represented:

> Our legal council [sic] today has secured a Cease and Desist Court Order against you hear [sic] in Montgomery County, MD. The expense for that is already being charged against your future commissions. If we transfer it to Venango County, PA and have the Sheriff come out and hand it to you the cost will be another $500.00 charged-off to you.

On February 28, 2018, Appellant filed suit against Central Energy, alleging breach of contract, unpaid wages, and intentional misrepresentation. In an amended complaint filed on October 4th, Appellant named Art Gelembiuk, a minority member of Central Energy, and Appellee as co-defendants in the suit and added a count alleging fraudulent conveyance. In an attempt to pierce the corporate veil, Appellant further alleged that Appellee and Mr. Gelembiuk had responded to his initial claim by filing "Articles of Cancellation" with the Maryland State Department of Assessments and Taxation in May 2018, claiming that they had done so "in an effort to avoid liability[.]"

Appellee failed to file an answer to Appellant's amended complaint within 60 days after having been properly served, as prescribed by Maryland Rule 2–321(b)(1). Accordingly, on February 12, 2019, Appellant moved for an order of default, which motion

the court granted by an order entered on April 26th. Although the order of default had been entered, Appellee did not move to vacate the order within 30 days of its entry pursuant to Maryland Rule 2–613(d). Given that he had declined to do so, the court held a default judgment hearing on June 25th. After hearing testimony and argument, the court denied default judgment, ruling:

> Okay. Even when it's a default judgment, the Court still has to be satisfied as to liability and damages. And I understand what damages you're claiming.
>
> * * *
>
> I don't have enough -- I'm not satisfied that there is liability in this case for defendant to, given the contract that I'm looking at -- it is clear that the agreement that was entered into between the parties was plaintiff and solely defendant Central Energy North East, LLC. And so I don't -- I mean, putting aside the issue of it being an independent contract. So I can't find liability here.
>
> * * *
>
> I know it's in default. I've read the rules and I'm looking at the rules. I still have to be satisfied that it's a liability. And yes, I recognize that [Appellee] has not answered, but even so, based on the evidence presented, I cannot find liability in this case. So judgment is denied.

On July 9, 2019, Appellant filed a motion for reconsideration. By an order entered August 21st, Appellant's motion was granted in part and denied in part. Accordingly, the court vacated its initial ruling and scheduled an *ex parte* hearing on the merits of Appellant's motion for default.

After receiving evidence and entertaining argument, the court again denied Appellant's motion, finding that the evidence adduced at the hearing had not established liability on the part of Appellee. The court reasoned, in part:

[C]ounsel acknowledged that the contract was between the plaintiff and Central Energy. And in order to pierce that corporate veil, absent fraud, you have to show that there is an alter ego in that sense between the plaintiff and the corporate entity and then of course the defendant at issue, [Appellee]. And so in terms of fraud, the court finds that the evidence is not sufficient to find that there was fraud.

The only evidence that has been presented or argued has to do with being thrown off track by a purported cease and desist order which has nothing to do with any fraud in the actual origination of the agreement between the parties. And then the further argument that a new entity with the same members in that corporation with the same business is not sufficient. The last argument going to that fraud was simply that [Appellee] shut down the company and then stated that he had no debts [or] liabilities.

None of that is sufficient to establish the fraud that would be necessary to establish that the contract between the parties was in fact one that was designed to mislead the plaintiff in terms of the agreement between the parties. And then in terms of whether or not there's been anything close to a showing that would be sufficient to establish an alter ego of Central [Energy] and [Appellee], the case law is very clear that in terms of what … section 4A–301 of Corporations and Associations permits, except as otherwise provided by this title, no member shall be personally liable for the obligations of an LLC whether arising in contract, tort, or otherwise by reason of being a member of the LLC. And there's no case that says solely by virtue of being a 95 percent controlling member, you are thereby exposing yourself to the personal liability of the corporation.

In terms of the alter ego doctrine, it is clear that complete dominion -- not only of finances, but of policy and business practice in respect to the transaction, so that the corporate entity as to this transaction had at the time no separate mind, no existence of its own, such control was used by the defendant to commit fraud or wrong, to perpetrate the violation of the statutory or some other positive legal duty -- the legal duty in this case being that of contract -- and as such control and breach of duty proximately caused the injury.

The court does not find that there was sufficient evidence to indeed pierce that corporate veil, so it denies judgment to plaintiff in favor of defendant as to those counts.

DISCUSSION

Appellant contends that Appellee's failure to file an answer to his amended complaint amounted to a tacit admission of the facts and claims contained therein. He argues that the only issues properly before the circuit court were whether it had jurisdiction to enter default judgment, whether Appellee had been properly notified of the proceeding, and the assessment of damages. Asserting that "[t]he law … leaves no room for the [c]ourt's independent determination of liability," Appellant concludes that the court "erred by requiring testimony on liability, and by inserting its own judgment in place of the [d]efault." Appellee neither filed a brief nor otherwise participated in this appeal, and has not, therefore, responded to Appellant's contentions.

Maryland Rule 2–613 governs default judgments and establishes a two-step default process. If a defendant fails to file a timely response to a plaintiff's complaint, Rule 2–613(b) provides that "the court, on written request of the plaintiff, *shall* enter an order of default" (emphasis added). After the entry of an order of default, "[t]he defendant may move to vacate the order within 30 days[.]" Md. Rule 2–613(d). If the defaulting party fails to do so or if such motion is denied, "the court, upon request, *may* enter a judgment by default that includes a determination as to liability and all relief sought, if it is satisfied (1) that it has jurisdiction to enter the judgment and (2) that the notice required by section (c) of this Rule was mailed."[2] Md. Rule 2–613(f) (emphasis added). "If, in order to enable the

[2] Maryland Rule 2–613(c) provides:

court to enter judgment, it is necessary … to establish the truth of any averment by evidence or to make an investigation of any matter, the court may rely on affidavits, conduct hearings, or order references as appropriate[.]" *Id*.

"[T]o ascertain the meaning of a … rule of procedure we first look to the normal, plain meaning of the language. If that language is clear and unambiguous, we need not look beyond the provision's terms to inform our analysis." *Davis v. Slater*, 383 Md. 599, 604 (2004) (citations omitted). While Rule 2–613(b) is, by its plain terms, mandatory ("the court … *shall* enter an order of default"), Rule 2–613(c) is clearly permissive ("the court … *may* enter a judgment by default"). *Compare Perez v. State*, 420 Md. 57, 63 (2011) ("[T]he word 'shall' indicates the intent that a provision is mandatory."), *with Brodsky v. Brodsky*, 319 Md. 92, 98 (1990) ("The word 'may' is generally understood as permissive, as opposed to mandatory, language."). Accordingly, while we review a court's ruling on a motion for an order of default *de novo*, we will not disturb a court's ruling on a motion for default judgment absent a clear abuse of discretion. *See Wells v. Wells*, 168 Md. App. 382, 393 (2006) ("The decision whether to enter a default judgment, as the word 'may' connotes, is discretionary."). *See also Heit v. Stansbury*, 199 Md. App. 155, 158 (2011) ("[U]se of the word 'may,' … connotes a discretionary act[.]").

> **(c) Notice.** Promptly upon entry of an order of default, the clerk shall issue a notice informing the defendant that the order of default has been entered and that the defendant may move to vacate the order within 30 days after its entry. The notice shall be mailed to the defendant at the address stated in the request and to the defendant's attorney of record, if any. The court may provide for additional notice to the defendant.

An order of default and a default judgment differ in two critical respects. First, while entry of the former generally establishes liability, entry of the latter determines damages. *See Michaels v. Nemethvargo*, 82 Md. App. 294, 298–99 (1990) ("An 'order of default determines liability; the default judgment determines the relief granted.'" (quoting *Hanna v. Quartertime Video & Vending Corp.*, 78 Md. App. 438, 444 (1989), *aff'd*, *Quartertime Video & Vending Corp. v. Hanna*, 321 Md. 59 (1990))). Secondly, as an interlocutory order, an order of default is subject to the court's broad revisory powers and may be amended or vacated at its discretion. *See Franklin Credit Management Corp. v. Nefflen*, 436 Md. 300, 323 (2013) ("'As an interlocutory order, [the order of default] was subject to revision within the general discretion of the trial court until a final judgment was entered on the claim.'" (citation omitted)); *Banegura v. Taylor*, 312 Md. 609, 619 (1988) ("A trial judge possesses very broad discretion to modify an interlocutory order where that action is in the interest of justice." (citing *Henley v. Prince George's County*, 305 Md. 320, 328 (1986)); *Peay v. Barnett*, 236 Md. App. 306, 317 (2018) ("Rule [2–613] provides the circuit court with broad discretion to vacate an order of default before it becomes an enrolled, final judgment."). A default judgment, by contrast, constitutes a final judgment over which the court may exercise revisory authority only within the first 30 days after the judgment was entered or upon a showing of fraud, mistake, or irregularity. *See Wells*, 168 Md. App. at 393–94. *See also* Md. Rule 2–535(a) & (b).

Against this doctrinal backdrop, we return to the contested ruling at issue. Given that the denial of default judgment and the vacation of an order of default are both

discretionary rulings, Appellant's contention that the court lacked legal authority to conduct an independent determination of Appellee's liability is without merit. It is, moreover, of no consequence that the court's ruling was made *sua sponte* rather than in response to a motion to vacate. *See Higginbotham v. Pub. Serv. Comm'n of Maryland*, 171 Md. App. 254, 266 (2006) ("'[U]nless fettered by a Rule or statute, a court ordinarily may take any action *sua sponte* that it can take in response to a motion, including dismissal of an action.'" (quoting *Fischer v. Longest*, 99 Md. App. 368, 381, *cert. denied*, 335 Md. 454 (1994))).

Notably, in the present case, the Circuit Court granted Appellant's motion for reconsideration and held a new hearing on liability. This is an important fact in our analysis because it provided Appellant notice that liability would be an issue and allowed Appellant an opportunity to present evidence on the issue of liability. Without proper notice to Appellant that liability would be an issue, the Circuit Court's *sua sponte* consideration of liability would be problematic because Appellant may not have been prepared to present evidence on the issue of liability. Here, because Appellant had notice and the opportunity to present evidence on the issue of liability, the Circuit Court's *sua sponte* consideration of liability was appropriate. The narrow issue remaining before us is, therefore, whether the court abused its discretion by denying default judgment.[3]

[3] We note that Appellant does not argue that the court abused its discretion, contending only that it erred as a matter of law. By failing to do so, Appellant has waived appellate review of this issue. *See* Md. Rule 8–504(a)(5); *Beck v. Mangels*, 100 Md. App. 144, 149, *cert. granted*, 336 Md. 405 (1994), *cert. dismissed as improvidently granted*, 337

A court abuses its discretion when its decision "'is well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.'" *Smith v. State*, 232 Md. App. 583, 599 (2017) (quoting *Norwood v. State*, 222 Md. App. 620, 643, *cert. denied*, 444 Md. 640 (2015)). Alternatively phrased, an abuse of discretion occurs "where no reasonable person would take the view adopted by the [trial] court[] … or when the court acts without reference to any guiding principles." *Aventis Pasteur, Inc. v. Skevofilax*, 396 Md. 405, 418 (2007) (internal quotation marks and citations omitted).

While the circuit court was not *required* to assess the adequacy of either Appellant's allegations or his evidence, *see Nefflen*, 436 Md. at 727–28, its decision to do so was both expressly authorized by Rule 2–613(f), *supra*, and clearly consonant with one of the principal purposes of the default judgment rule, to wit, to "'ensure that justice is done[, which] requires consideration of all relevant circumstances in any given case.'" *Abrishamian v. Washington Medical Group, P.C.*, 216 Md. App. 386, 404 (2014) (quoting *Holly Hall Publications, Inc. v. County Banking & Trust Co.*, 147 Md. App. 251, 265, *cert. denied*, 371 Md. 614 (2002)). We do not, therefore, find any abuse of discretion in the court's having elected to consider the sufficiency of either Appellant's pleadings or evidence.

Md. 580 (1995). While this issue is not properly before us, we will briefly address the matter.

Just as the court did not abuse its discretion by assessing the adequacy of Appellant's evidence, nor did it do so by denying default judgment. Given that Appellant's causes of action arose from his contractual relationship with Central Energy, Appellee could only have been found personally liable if the court had pierced the corporate veil. Absent adequate evidence warranting this extraordinary equitable remedy, the court's liability finding can hardly be held to have constituted an abuse of discretion.

Members of a limited liability company ("LLC") are generally not personally liable for debts or obligations incurred thereby. Md. Code (1975, 2014 Repl. Vol.), Corporations and Associations Article ("CA") § 4A–301. A court may, however, pierce an LLC's "corporate veil"—thereby exposing its members to personal liability—"when necessary to prevent fraud or to enforce a paramount equity." *Gore Enterprise Holdings, Inc. v. Comptroller of Treasury*, 437 Md. 492, 523–24 (2014) (internal quotation marks and citations omitted). Although, in his attempt to pierce Central Energy's corporate veil, Appellant did not cite any "paramount equity" that would warrant its members being held individually liable, he did allege fraud.

In order to make a *prima facie* showing of fraud, a plaintiff must allege facts sufficient to satisfy the following five elements:

> (1) a material representation of a party was false, (2) falsity was known to that party or the misrepresentation was made with such reckless indifference to the truth as to impute knowledge to him, (3) the misrepresentation was made with the purpose to defraud (scienter), (4) the person justifiably relied on the misrepresentation, and (5) the person suffered damage directly resulting from the misrepresentation.

Colandrea v. Colandrea, 42 Md. App. 421, 428 (1979). *See also Environmental Trust v. Graynor*, 370 Md. 89, 97 (2002). To prevail on such a claim, moreover, a plaintiff bears the burden of "establish[ing] by clear, specific acts, facts that in law constitute fraud." *Ramlall v. Mobile Corp.*, 202 Md. App. 20, 31 (2011) (quoting *Starfish Condo. Ass'n v. Yorkridge Serv. Corp.*, 295 Md. 693, 714 (1983)). *See also Dixon v. Process Corp.*, 38 Md. App. 644, 656 (1978) ("[T]he law of Maryland mandates that proof of fraud in a civil action, either in law or in equity, must be clear and convincing." (internal quotation marks and citations omitted)); *Sims v. Ryland Group, Inc.*, 37 Md. App. 470, 473 (1977) ("[A] general allegation of fraud, however strong in expression, is not sufficient unless there is an allegation of the facts and circumstances relied on as constituting the alleged fraud.").

In his complaint, Appellant alleged that Mr. Gelembiuk and Appellee had sought to dissolve Central Energy "in response to and during the pendency of a civil suit against the company in order to avoid liability." He further claimed that Mr. Gelembiuk and Appellee had sold Central Energy's accounts, "which included contracts from which [Appellant] was and would be owed monies." During the second default judgment hearing, Appellant averred that, upon initiating the dissolution of Central Energy, Appellee established a new company with Mr. Gelembiuk. Appellant asserted that the new company was incorporated in Pennsylvania, comprised of the same members as Central Energy, engaged in the same business, and purportedly profited from the sale of Central Energy's accounts. None of these allegations entailed an assertion that Appellee had knowingly made a material misrepresentation to Appellant with the intent to defraud him. Moreover, if true, the first

alleged impropriety would not necessarily have inured to Appellant's detriment. *See* CA § 4A–908(b) ("Notwithstanding the filing of articles of cancellation, the limited liability company continues to exist for the purpose of paying, satisfying, and discharging any existing debts or obligations, collecting and distributing its assets, and doing all other acts required to liquidate and wind up its business and affairs.").

Appellant further alleged that Appellee had intentionally misrepresented that Central Energy had obtained a "Cease and Desist Court Order" in an attempt to "coerce [Appellant] to cease his efforts to collect the wages he [was] owed." Although he claimed that Appellee's misrepresentation had been made in a fraudulent attempt to frustrate his efforts to collect outstanding commissions, Appellant did not introduce any evidence of his having suffered direct damage as the result of the purported misrepresentation. In any event, the facts alleged and the evidence adduced were not so compelling as to require the court to disregard Central Energy's status as an independent entity and hold Appellee independently liable.

On these facts we cannot say that the circuit court's decision to deny default judgment was manifestly unreasonable or that its discretion was "exercised on untenable grounds … or for untenable reasons." *Appraicio v. State*, 431 Md. 42, 51 (2013) (internal quotation marks and citations omitted). Finding no such abuse of discretion, we affirm the judgment of the circuit court.

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