Circuit Court for Montgomery County
Case No. 422551V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1652

September Term, 2019

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DAWN PERLMUTTER, et al.

v.

TRINA VARONE, et al.

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Nazarian,
Shaw Geter,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

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PER CURIAM

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Filed: November 16, 2020

*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.

In this appeal from a civil action in the Circuit Court for Montgomery County, Dawn Perlmutter and Thomas Bolick, appellants, challenge the court's failure to enter default judgment against appellee Scott Perlmutter, and denial of a motion against all appellees[1] "to Set Aside/Vacate Rulings" (hereinafter "motion to set aside or vacate"). For the reasons that follow, we shall affirm the judgments of the circuit court.

We recount some of the pertinent facts from our most recent opinion in the parties' dispute:

> On February 8, 2011, appellants filed suit in the circuit court, alleging, *inter alia*, that [appellees Trina and Jeffrey Varone] and Rabbi Raichik committed fraud and/or exerted duress on [Ms. Perlmutter's late mother Joan] Sutton in the execution of her will. The circuit court granted [appellees'] motions to dismiss, and we affirmed that decision in an unreported opinion. *See Perlmutter v. Varone*, No. 1518, Sept. Term 2011 (filed May 20, 2013) (hereinafter *Sutton I*).
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> Following the opening of [Ms.] Sutton's estate in the Orphans' Court for Montgomery County, appellants filed a petition to caveat the will, alleging that the will was a product of forgery and/or fraud. The Orphans' Court dismissed appellants' petition, and this Court affirmed in an unreported opinion. *See In re: the Estate of Joan D. Sutton*, No. 1323, Sept. Term 2011 (filed Aug. 7, 2013) (hereinafter *Sutton II*). While the appeals in *Sutton I* and *Sutton II* were pending, appellants filed a complaint for declaratory judgment in the Orphans' Court, making many of the same arguments as previously litigated. The Orphans' Court dismissed appellants' complaint, and this Court affirmed in an unreported opinion. *See In re: the Estate of Joan D. Sutton*, No. 2754, Sept. Term 2011 (filed Oct. 7, 2013) (hereinafter *Sutton III*).
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> Appellants then turned to the federal courts, first filing a complaint in the United States District Court for the District of Columbia, alleging many of the same issues previously litigated. The district court dismissed based on improper venue. *See Perlmutter v. Varone*, 59 F. Supp. 3d 107 (D.D.C. 2014) (hereinafter *Sutton IV*). Appellants then filed suit in the United States

[1]The other appellees are Trina Varone, Jeffrey Varone, Rabbi Shalom Raichik, Gary Altman, Esq., Altman & Associates, and Mark Roseman.

> District Court for the District of Maryland, and restated several of the previous allegations and also raised new causes of action, including that appellees violated the Racketeer Influenced and Corrupt Organizations Act ("RICO"). The district court dismissed the complaint, finding that *res judicata* and/or the statute of limitations barred the action. The United States Court of Appeals for the Fourth Circuit affirmed in an unpublished decision. *See Perlmutter v. Varone*, 645 F. App'x 249 (4th Cir. 2016) (hereinafter *Sutton V*).

*Perlmutter v. Varone*, No. 2127, September Term 2016 (filed March 5, 2018), slip op. at 3-5 (footnote omitted).

> On June 22, 2016, appellants, proceeding *pro se*, filed [a] complaint . . . in the Circuit Court for Montgomery County, alleging fraud, conspiracy to commit conversion, accounting, negligence, and declaratory relief against all appellees. All appellees, save for Scott Perlmutter ("Scott"), filed motions to dismiss, contending that the complaint was barred by *res judicata* and/or the statute of limitations.
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> Following a hearing, the circuit court granted these motions. The court also awarded attorney's fees to certain appellees and included a pre-filing order, prohibiting appellants from filing any further pleadings without first seeking leave of court. The court subsequently denied appellants' motion for a new trial and motion to file an amended complaint (both filed in violation of the pre-filing order). On November 29, 2016, appellants filed a motion for summary judgment (in violation of the pre-filing order), ostensibly against all appellees, but Scott was the only appellee remaining in the case. On December 6, 2016, appellants filed a notice of appeal of the orders granting appellees' motions to dismiss and award of attorney's fees. On February 2, 2017, the court denied appellants' motion for summary judgment. On February 23rd, appellants filed an amended notice of appeal.

*Id.* at 1-2 (footnotes omitted). In an unreported opinion, we affirmed the judgments of the circuit court imposing sanctions on appellants, and dismissed the remainder of the appeal on the ground that appellants' "notice of appeal [did] not encompass any additional appealable interlocutory orders." *Id.* at 3, 6.

In December 2018, appellants asked the clerk of the court to issue a new summons for Scott. In March 2019, the court permitted appellants to serve Scott by publication of a notice and mailing the notice to Scott's last known address. Appellants subsequently published in the Montgomery County Sentinel an "Order of Publication," which notified Scott, in pertinent part, "that his response must be filed no later than" May 28, 2019.

On that date, appellants filed a "Motion for an Order of Default," in which they moved for the entry of "an Order of Default and Default Judgment" against Scott. On May 30, 2019, Scott filed an opposition to the motion, in which he "direct[ed] the [court's] attention to . . . the vexatious and unsupported nature of this pending action," and incorporated the "arguments and defenses" previously presented by the other appellees. Scott further contended that, although he "is still employed at the same health care facility which was founded by" Ms. Sutton, he "never received any pleadings from" appellants, and "expeditiously retained [c]ounsel to protect his rights." Scott also filed a motion to dismiss, in which he contended that "all of the facts noted in" the complaint "do not relate [to] and/or present any identifiable or viable cause of action against" him, and hence, appellants failed "to state a cause of action upon which relief can be granted." On June 3, 2019, the court denied appellants' motion on the ground that Scott had "filed an opposition/responsive pleading." On July 31, 2019, the court granted Scott's motion to dismiss, dismissed the complaint with prejudice as to Scott, adopted and incorporated "the prior Order . . . finding that [appellants] are vexatious litigants," and imposed "the same pre-filing requirements . . . upon [appellants] as related to" Scott "as applicable to the other defendants."

On August 1, 2019, appellants filed, against all appellees and apparently in violation of the pre-filing order, the motion to set aside or vacate, in which appellants re-presented many of the same arguments as previously litigated, and requested that "all orders/judgment[s]" in the case "be purged/vacated/struck." On August 15, 2019, appellants filed an amended, but substantively identical, motion. On October 2, 2019, the court denied the motion.

Appellants first contend that, for numerous reasons, the court "erred and abused [its] discretion in denying [the] motion to enter . . . default judgment." We disagree. When the time for pleading expired on May 28, 2019, appellants were entitled not to default judgment, but to an order of default. *See* Rule 2-613(b) ("[i]f the time for pleading has expired and a defendant has failed to plead as provided by these rules, the court, on written request of the plaintiff, shall enter an order of default"). Also, we have recognized that "a default judgment is not meant to be a punitive measure that penalizes a party for breaching a procedural regulation," *Holly Hall v. County Banking*, 147 Md. App. 251, 262 (2002) (internal citation omitted), and that "Maryland courts ordinarily exercise their discretion in favor of a defaulting party if the party establishes that there is a meritorious defense and shows that its fault was excusable." *Id.* at 263 (citations omitted). Here, Scott incorporated into his opposition to appellants' motion, and raised in his motion to dismiss, the same arguments and defenses upon which the other appellees previously obtained dismissals of the actions against them. Also, Scott "expeditiously retained [c]ounsel" and filed his opposition to appellants' motion and his motion to dismiss only two days after the

expiration of the time for pleading. Any fault on Scott's part in failing to file a timely response was excusable, and hence, the court did not err in failing to enter default judgment.

Appellants next contend that the court "abused [its] discretion/erred" in denying the motion to set aside or vacate, because "[a]ll of the material facts presented in" the complaint "remain uncontroverted." We disagree. The Court of Appeals has stated that the "doctrine of res judicata bars the relitigation of a claim if there is a final judgment in a previous litigation where the parties, the subject matter[,] and causes of action are identical or substantially identical as to issues actually litigated[.]" *Board of Ed v. Norville*, 390 Md. 93, 106 (2005). Here, the parties against whom appellants filed the motion to set aside or vacate, the subject matter of the motion, and the causes of action cited within are identical or substantially identical as to issues that have been actually litigated on at least six occasions. Appellants' contentions are barred by the doctrine of res judicata, and hence, the court did not err in denying the motion to set aside or vacate.

**JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANTS.**