Circuit Court for Washington County
Case No. 21-C-17-059260

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1688

September Term, 2017

FOX SUBACUTE AT MECHANICSBURG, LLC

v.

DIANE ESTEP

Kehoe,
Berger,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: July 22, 2019

For reasons not relevant to the issue presented in this appeal, appellant, Fox Subacute at Mechanicsburg, LLC, obtained a default judgement against appellee, Diane Estep, in the Court of Common Pleas of Cumberland County, Pennsylvania, on November 22, 2016. Fox enrolled the judgment in the Circuit Court for Washington County, Maryland, on February 27, 2017. On July 21, 2017, Estep filed motions in the circuit court to vacate the judgment and to stay enforcement, alleging lack of personal jurisdiction. Following a hearing, the court granted her motion to vacate, and Fox noted this appeal, asking this Court to consider two issues, which we have slightly recast for clarity:

1. Did the circuit court err by applying an incorrect legal standard to conclude only "actual notice" of legal proceedings could satisfy due process requirements?

2. Did the circuit court err in finding that Estep's four-month delay in challenging the entry of a judgment constituted due diligence?

For the reasons that follow, we shall affirm the judgment of the circuit court.

BACKGROUND

On June 1, 2009, Estep, acting under a power of attorney granted by Michael Nemir, executed an admission agreement to provide Nemir with care in Fox's nursing facility located in Mechanicsburg, Cumberland County, Pennsylvania. In August 2009, Estep became the guardian of the person of Nemir and co-guardian of his property, pursuant to a consent agreement in a guardianship action initiated in the Circuit Court for Washington County, Maryland. Thereafter, Estep executed two additional admission agreements with Fox in her capacity as both attorney-in-fact and guardian, ensuring payment to Fox from

Nemir's funds. Nemir passed away on September 14, 2012, leaving an outstanding balance for Fox's services.

On February 2, 2015, Fox filed suit against Estep, individually, alleging breach of contract based on her failure to ensure Fox's payment for services rendered to Nemir.[1] Fox made several unsuccessful attempts to serve Estep personally at her residence on Hicksville Road in Washington County, Maryland over the course of a year. As a result, Fox moved for alternative service by publication, which the court granted, directing publication in a newspaper of general circulation in Washington County. However, Fox chose to have the notice published in the Frederick News-Post, a daily newspaper published in Frederick County, Maryland. The court imposed the additional requirements of service by first-class mail and certified mail with return receipt.

Thereafter, Fox sought and received a default judgment against Estep, personally. In February 2017, Fox enrolled the Pennsylvania default judgment in the Circuit Court for Washington County and the Clerk's office mailed notice of the entry of foreign judgment to Estep. In July 2017, Estep moved to vacate the judgment, challenging the Pennsylvania court's personal jurisdiction. Following a hearing, the circuit court found insufficient service and granted her motion to vacate.

DISCUSSION

[1] Nemir's estate was not a party to the underlying lawsuit and the record is silent as to any attempts by Fox to collect the debt from the estate at probate or by any other means. Presumably, the estate was insolvent.

Personal Jurisdiction – Long-Arm Statute

At this point, for added perspective, we engage in a tangential discussion, recognizing that the underlying questions of enforceability by Fox of its service agreement against Estep personally has yet to be litigated.

First, "we note the general rule that, in personal actions, 'jurisdiction must be acquired over a person in order for a court to impose a personal liability or obligation upon a defendant in favor of a plaintiff.'" *Kortobi v. Kass*, 182 Md. App. 424, 436 (2008) (quoting *Allen v. Allen*, 105 Md. App. 359, 367 (1995)), *aff'd*, 410 Md. 168 (2009).

In her alternative argument, Estep argues that Pennsylvania's long-arm statute did not permit the exercise of personal jurisdiction over her in her *individual capacity*. She asserts that "[s]ection 5322(a) [of the Pennsylvania statute] does not authorize the exercise of jurisdiction over [her] …. [because] [s]he did not transact any personal business in Pennsylvania …. [and her] activity in Pennsylvania was conducted entirely on behalf of Michael Nemir and not for herself." Equating her involvement to that of a corporate officer, she relies on the "fiduciary shield doctrine" to support the assertion that "'individuals performing acts in a state in their corporate capacity are not subject to the personal jurisdiction of the courts of that state for those acts….'" (Quoting *Nat'l Precast Crypt Co. v. Dy-Core of Pennsylvania, Inc.*, 785 F. Supp. 1186, 1191 (W.D. Pa. 1992)).

Estep executed three separate contracts with Fox on behalf of Nemir on: June 1, 2009; May 4, 2010; and, although undated, alleged to have been executed on September 21, 2010.

The contracts referred to Estep as the "Responsible Party." Specifically, the contract explained Estep's role as, "an individual … who has interest in the Resident's welfare; has legal access *to the Resident's income or resources* which are available to pay for Facility's services; and agrees to assume certain responsibilities in connection with Resident's care as stated in this Agreement[.]" (Emphasis added). In the initial agreement, Estep selected the first payment option, which provided that:

> *Resident will pay the charges personally from his or her own funds*. If it appears the Resident has lost the ability to handle his or her assets competently, the Facility may require the Resident to establish a trust or power of attorney arrangement to assure proper payment of charges incurred at the Facility.

(Emphasis added).

In the second contract, none of the payment options were selected. However, at that point, Estep had been appointed guardian of Nemir's person and co-guardian of his property by the Circuit Court for Washington County.[2]

Finally, in the third, undated, contract Estep selected the second payment option, which provided:

> Responsible party will pay the charges *from funds held as trustee, agent or fiduciary for Resident.* When this option is checked, the Facility acknowledges that Responsible Party has not agreed to pay charges at the Facility other than from the Resident's funds. Nonetheless, to ensure that the Facility receives payment for care and services rendered to the Resident and as further consideration for the Facility's admission of the Resident, Responsible party makes the following promises regarding management of Resident's funds.

[2] Appointed co-guardian of the property of Nemir was Gary L. Irving, a certified public accountant with an office in Hagerstown. Irving is not involved either in this appeal or the underlying litigation.

(Emphasis added).

The obligations and duties imposed under the 2005 Power of Attorney, the 2009 consent order, and the Fox agreements provided that Estep was responsible for ensuring that Nemir's care was paid from Nemir's assets. This became clear in the August 2009 guardianship proceedings, when the Maryland court entered a consent order appointing Estep as Nemir's guardian and co-guardian of his property. We find nothing in this record imposes personal liability on Estep for Nemir's care. That conclusion, of course, does not compel our decision for, as we have noted, the personal liability of Estep has not been litigated.

Service of Process – Notice Requirements

Fox first asks this Court to determine whether the circuit court applied the correct legal standard to conclude that only "actual notice" of the lawsuit would satisfy due process service requirements.

In the underlying lawsuit, Estep moved to vacate the entry of the foreign judgment, claiming that the Pennsylvania court lacked personal jurisdiction over her and was without authority to enter the judgment. Her two supporting arguments, which continue with this appeal, were that the Pennsylvania long-arm statute does not confer personal jurisdiction over her and that service was inadequate.

While the circuit court acknowledged that Estep raised challenges to both Pennsylvania's long-arm statute extending personal jurisdiction over her and the sufficiency of process, the court expressly based its decision only on the fact that it "agree[d] with Estep that Fox ha[d] not provided adequate service."

On appeal, Fox contends that the circuit court "erred by applying an incorrect legal standard to conclude only 'actual notice' of legal proceedings could satisfy Ms. Estep's right to due process." Estep responds that Fox was required to give actual notice of the Pennsylvania lawsuit but, even if actual notice was not required, service was otherwise deficient.

Generally, "we review the circuit court's decision whether to grant a motion to revise a judgment pursuant to Md. Rule 2-535(b) under an abuse of discretion standard." *Peay v. Barnett*, 236 Md. App. 306, 315 (2018) (footnote omitted) (citations omitted). However, a circuit court's decision of "'[w]hether a person has been served with process is essentially a question of fact[,]'" *Peay*, 236 Md. App. at 316 (quoting *Wilson v. Md. Dep't of Env't*, 217 Md. App. 271, 286 (2014)), and will be overturned only if clearly erroneous. *See* Rule 8-131(c).

In its Opinion and Order, the circuit court explained that "[a]fter careful review of the evidence, [it] finds by a preponderance of the evidence that Estep did not receive actual notice of the foreign legal proceedings." The court found:

> Estep testified at the hearing that she was unaware of the proceedings that had been taking place in Pennsylvania and that she believed that the issues related to the estate had been dealt with. This testimony, taken under oath and subject to cross-examination, bolstered Estep's claim that she did not receive actual notice of the proceedings. Cross-examination did not pinpoint the unidentified person who signed the receipt for the notice that was sent by first-class mail. Her testimony presented at the hearing appeared credible and was not inconsistent with the evidence presented.
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> * * *
>
> The exhibits presented show that efforts at personal service failed. The return receipt on Fox's service by mail bore an illegible signature that does not

> resemble Estep's. A vehicle registered to Estep was present at the address, but the process server noted that it appeared as though nobody lived at the address and that the vehicles at the address appeared to be abandoned, junk cars. The process server noted that mail had accumulated in the mailbox and had not been collected in several days. No evidence in the record suggests that Estep regularly reads the Frederick News-Post….[3]

The court relied primarily on *Miserandino v. Resort Properties, Inc*., 345 Md. 43 (1997). Miserandino challenged the entry of a Virginia judgment in a Maryland circuit court for lack of personal jurisdiction, where the underlying service was effectuated by only regular first-class mail. 345 Md. 47, 52. On the facts before it, the Court of Appeals determined that the plaintiff had not attempted any other means of service or demonstrated a need for alternative service to "justify relaxation of the ordinary and available methods of service that offer a considerably higher degree of probability of actual notice." *Id*. at 66.

The *Miserandino* Court stated that by utilizing notice by first-class mail: "We hold that the means selected by the Virginia legislature to accomplish notice of service of original process in this case does not measure up to this test, and are constitutionally inadequate to afford the due process required by the United States Constitution." 345 Md. at 67. The Court stated that "[t]he method chosen to acquire personal jurisdiction over nonresident individuals – notice by first-class mail – 'is not reasonably calculated to reach those who could easily be informed by other means at hand.'" *Id*. (quoting *Mullane v. Cent. Hanover Bank & Tr. Co*., 339 U.S. 306, 319 (1950)).

[3] Nor is there any evidence in the record that the Frederick News-Post is a newspaper of general circulation in western Washington County, where Estep's residence was located.

In challenging the circuit court's application of *Miserandino*, Fox relies on its own interpretation of the Court's opinion, specifically asserting that "[t]he standard is not 'actual notice,' but rather [sic] whether such notice is, at a minimum, 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" (Quoting *Miserandino,* 345 Md. at 53). Emphasizing the lack of a particular procedure, Fox points to language in *Miserandino* that "'[d]ue process is flexible and calls only for such procedural protections as the particular situation demands…. [P]rocedures adequate under one set of facts may not be sufficient in a different situation.'" (Quoting *Miserandino,* 345 Md. at 52). Fox argues that *Miserandino* could be construed to require less than actual notice if means are employed that would be "'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" (Quoting *Miserandino*, 345 Md. at 53).

Sufficiency of Service of Process

Alternatively, Estep contends that "[e]ven if [her] receipt of actual notice was not required, the default judgment is invalid because service of process on [her] was otherwise defective or inadequate[,]" and that the "Pennsylvania long-arm statute did not authorize exercise of jurisdiction over [her][.]"

Estep outlined a long list of additional efforts she contends Fox should have employed in its attempt to locate and serve her with process. In addition to those efforts, Estep claims that the "[c]ourt-authorized alternative service was inadequate." To support her argument that Fox should have employed additional efforts, Estep points to an official

note to Rule 430 of the Pennsylvania Rules of Civil Procedure, that provides an illustration of what "a good faith effort to locate the defendant includes …." Pa.R.C.P. 430(a).

Fox had attempted service by certified mail to the Hicksville Road address, private process servers, a skip trace search, a private investigator, a Maryland MVA search, and a postal records search. Despite those efforts, Estep asserts that "Fox made no inquiry of other neighbors, conducted no examination of courthouse records, and conducted no internet search[,]" and because of that, "Fox's investigation was insufficient to allow service by publication under [Pa.] Rule 430." (Internal quotations and citations omitted).

Estep next challenges the adequacy of the purported notice by publication as alternative service – an argument which we find to have merit. She contends that, "[a]lthough permitted by [Pa.] Rule 430(b)(1), publication by advertising a notice of the lawsuit 'once in one newspaper of general circulation within the county' was not 'reasonably certain to inform' [her]." (Quoting *Mullane*, 339 U.S. at 315). She adds that "[t]he court's addition of certified and first class mailing to publication of notice did not increase the likelihood of actual notice because mailing had been employed previously without success."

The Pennsylvania statute governing service of process on non-residents requires, in pertinent part:

> (a) Manner of service. -- When the law of this Commonwealth authorizes service of process outside this Commonwealth, the service, *when reasonably calculated to give actual notice*, may be made:
>
> (1) By personal delivery in the manner prescribed for service within this Commonwealth.

* * *

(3) By any form of mail addressed to the person to be served and requiring a signed receipt.

* * *

(5) As directed by a court.

42 Pa. Stat. and Cons. Stat. Ann. § 5323(a) (emphasis added). *Accord* Pennsylvania Rule of Civil Procedure (Pa.R.C.P.) 404 (providing that original process can be served "by mail in the manner provided by Rule 403").[4]

Pennsylvania appellate courts have explained the limited applicability of alternative service in its relation to due process:

> Because "service by publication is the exception, not the rule," the plaintiff must first meet the requirements of Rule 430(a) to avail itself of the publication provisions within Rule 430(b). *Deer Park Lumber, Inc. v. Major*, [559 A.2d 941, 945] (1989). Rule 430(a) prescribes that a motion for leave to make alternative service must include "an affidavit stating the nature and extent of the investigation undertaken to locate the defendant." *Deer Park*, 559 A.2d at 944. The affidavit must demonstrate that the plaintiff exhibited "due diligence and good faith" in attempting to locate the defendants. [*Sisson v. Stanley*, 109 A.3d 265, 271 (2015)]. One illustration of a good faith effort involves "(1) inquiries of postal authorities including inquiries pursuant to the Freedom of Information Act […], (2) inquiries of relatives, neighbors, friends, and employers of the defendant, and (3) examinations of local telephone directories, voter registration records, local tax records, and motor vehicle records." Note, Pa.R.Civ.P. 430(a). While this illustration "[is] by no means exhaustive, [it] is at least indicative of the types of procedures [intended under] Rule 430. In essence, it provides that more than a mere

[4] Rule 403 of the Pennsylvania Rules of Civil Procedure further provides that "[i]f a rule of civil procedure authorizes original process to be served by mail, a copy of the process shall be mailed to the defendant by any form of mail *requiring a receipt signed by the defendant or his authorized agent*. Service is complete upon delivery of the mail." Pa.R.C.P. No. 403 (emphasis added).

> paper search is required before resort can be had to the publication provisions of Rule 430(b)." *Deer Park*, 559 A.2d at 946.

N. Forests II, Inc. v. Keta Realty Co., 130 A.3d 19, 31 (Pa. Super. Ct. 2015).

Following several unsuccessful attempts of personal service, Fox moved for alternative service by publication, which included an affidavit with exhibits attesting to efforts expended and personal service attempts made. When the first unsuccessful attempt by certified mail was returned as "unclaimed," Fox employed a professional process server. Following the process server's three unsuccessful attempts to personally serve Estep in February and March of 2015, Fox ordered a skip trace search, which confirmed her most recent address to be on Hicksville Road in Washington County.[5] Thereafter, the process server made three additional unsuccessful attempts in April 2015, where, on one occasion, domestic animals were observed. The server contacted a neighbor who confirmed "a lot of traffic" at that address but could not confirm whether anyone resided there.

Following those failed attempts, Fox employed a private investigation firm that ran an MVA search, which yielded two vehicles registered by Estep at the Hicksville Road address. The firm also conducted a postal records search for other possible addresses for Estep but were unable to find any.

The private investigator/process server made five additional attempts in April 2016, all unsuccessful. During those attempts, the server made several observations, including the presence of several "junk" cars, an occasion when there were "[w]orkers in the yard

[5] Hicksville Road is in rural Washington County, near Clear Spring, north of Old U.S. Route 40, just south of the Mason-Dixon Line.

area," that Estep was not present on any occasion, that Estep's car was present on multiple occasions, the garage was closed on some occasions and open on others, and generally no response.

Despite those extensive efforts, the Pennsylvania court, apparently still not satisfied with notice by publication being the only means for providing notice to Estep, added the further requirement that service be effectuated by publication and both first-class and certified mail. As to publication, the court ordered service "by publication by advertising a notice of the action once in one newspaper of general circulation within Washington County, Maryland[.]"

However, for reasons not explained in the record, Fox opted to publish the notice, not in the Hagerstown Herald-Mail, a newspaper of general circulation in Washington County, but in The Frederick News-Post, a newspaper published some 40 miles from Estep's Clear Spring home. Fox's noncompliance with the special order was also noncompliance of the requirements directed by Pa. Rule 430, which states in relevant part that:

> If service of process by publication has been authorized by rule of civil procedure or order of court, the publication shall be by advertising a notice of the action once in the legal publication, if any, designated by the court for the publication of legal notices and in one newspaper of general circulation within the county.

Pa.R.C.P. No. 430(b)(1).

Fox's failure to comply with the special order's directions for alternative service by publication and the requirements of Pa. Rule 430, amount to inadequate service of process on Estep. Furthermore, the return receipt for the certified mailing contained an illegible

signature, which Estep testified under oath at the motions hearing was not hers and that she had not authorized anyone else to sign for her certified mail. Pennsylvania Rule 403 requires "a receipt signed by the defendant or his authorized agent." Pa.R.C.P. No. 403. Thus, pursuant to the noncompliance of the Pennsylvania court's special order and the requirements of the Pa. Rules, service was inadequate to give Estep notice of the lawsuit and an opportunity to defend against it or to confer personal jurisdiction over her.

Revisory Authority – Waiver and Due Diligence

Fox's second challenge takes issue with the circuit court's finding that Estep's four-month delay in moving to vacate the entry of foreign judgment did not constitute a lack of due diligence, which it asserts, was an abuse of the court's discretion. Fox contends that, "[a]ssuming *arguendo* there was a procedural defect constituting a mistake thereby allowing a final judgment to be challenged, [Estep] did not act with ordinary diligence to challenge the judgment and therefore should not be entitled to the relief requested."

The court found that "Estep acted with due diligence by retaining counsel and mounting this challenge after learning of the entry of judgment." The court explained that "[t]he record does not show that Estep was aware of the action's existence from the outset, and she challenged the entry of judgment within months of learning of it."

The circuit court addressed the limitations of its revisory authority, pursuant to Md. Rule 2-535(b), which permits a court to exercise revisory authority beyond 30 days in the case of fraud, mistake, or irregularity. Rule 2-535(b). The court further relied on *Pickett v. Noba, Inc.*, 114 Md. App. 552 (1997), where we said that when considering whether to vacate a foreign judgment, "[i]mproper service of process is a proper ground to strike a

judgment under Rule 2-535." 114 Md. App. at 558 (citing *Miles v. Hamilton*, 269 Md. 708, 714 (1973)).

"'Under Maryland law, an enrolled judgment can be set aside for mistake or irregularity. Mistake is limited, however, to jurisdictional error, such as where the Court lacks the power to enter judgment.'" *Pelletier v. Burson*, 213 Md. App. 284, 291 (2013) (quoting *Green v. Ford Motor Credit Co*., 152 Md. App. 32, 51 (2003)). "The existence of fraud, mistake, or irregularity must be shown by 'clear and convincing evidence.'" *Burson*, 213 Md. App. at 290 (quoting *Davis v. Attorney Gen*., 187 Md. App. 110, 123-124 (2009)). However, we have also said that "[o]ne seeking the aid of the court in setting aside an enrolled judgment must, in addition to showing fraud, mistake, irregularity, or clerical error, show 'that the person seeking the revision acts with ordinary diligence and in good faith upon a meritorious cause of action or defense.'" *Bland v. Hammond*, 177 Md. App. 340, 357 (2007) (quoting *J.T. Masonry Co., Inc. v. Oxford Const. Services, Inc*., 314 Md. 498, 506 (1989)). *Accord Platt v. Platt*, 302 Md. 9, 13 (1984).

But, we have recently held that "[t]he 'diligence and good faith' test, does not apply to cases in which the court must decide whether a 'jurisdictional mistake' justifies its exercise of its Rule 2-535(b) revisory power." *Peay*, 236 Md. App. at 327. In *Peay*, we concluded that "the circuit court has no discretion to deny a motion to vacate a default judgment, based only on the equitable consideration of whether the defendant acted diligently and in good faith, where the circuit court never obtained personal jurisdiction over the defendant." *Id*. at 326-27. Instead, "[w]hen a defendant raises improper service of process as grounds to revise a default judgment as a 'mistake' under Rule 2-535(b), the

circuit court must determine, if applicable, whether the judgment is nonetheless valid by virtue of the defendant's waiver of lack of personal jurisdiction." *Id*. at 327. Thus, we review decisions on motions to revise final judgments under an abuse of discretion standard. *Burson*, 213 Md. App. at 289 (quoting *Jones v. Rosenberg*, 178 Md. App. 54, 72 (2008)).

In *Peay*, we applied a two-part test to determine whether a defendant has waived the right to challenge a lack of personal jurisdiction. First, the "question is whether the plaintiff made a good faith effort to serve under the rules governing service of process[,]" which in this case would be the applicable Pennsylvania rules. 236 Md. App. at 330 (citation omitted). Second, "the defendant must have 'actual [notice] of the commencement of the action and his [or her] duty to defend.'" *Id*. (quoting *U.S. to Use of Combustion Sys. Sales, Inc. v. E. Metal Products & Fabricators, Inc*., 112 F.R.D. 685, 689 (M.D.N.C. 1986)).

Applying the two-part test to the facts of the instant appeal, we conclude that because Fox was unable to obtain personal service on Estep, and the signature found on the return receipt did not match Estep's, which was supported by her testimony that neither she nor an authorized agent had signed it, the only basis on which effective service could be found is by the publication of notice in the Frederick News-Post. The record does not provide evidence that the Frederick News-Post is a newspaper of general circulation in Washington County. Nor does Fox offer any rational explanation why it chose to publish notice in a newspaper published some 40 miles from Estep's residence, as opposed to the Hagerstown Herald-Mail, which is a daily newspaper of general circulation in Washington

County. On this record, we find Fox's effort at notice by publication to be insufficient to confer personal jurisdiction on Estep.

As there is no evidence that Estep received actual notice of the lawsuit until receipt of the clerk's notice of enrollment of the foreign judgment in the circuit court, the record does not support a finding that Estep waived her right to vacate the foreign judgment based on deficient service of process. Finding neither clear error nor abuse of discretion, we affirm.

JUDGMENTS OF THE CIRCUIT COURT FOR WASHINGTON COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.