

Circuit Court for Baltimore County
Case No. C-03-CV-21-001821

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1983

September Term, 2021

KKPP, LLC

v.

FIRST MOUNTAIN LAND, LLC

Wells, C.J.,
Nazarian,
Ripken,

JJ.

Opinion by Nazarian, J.

Filed: December 5, 2022

* 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.

First Mountain Land, LLC (“First Mountain”) filed a declaratory judgment action in the Circuit Court for Baltimore County against KKPP, LLC (“KKPP”) seeking to determine the title to a parcel of land. When KKPP failed to file a timely Answer to First Mountain’s complaint, First Mountain moved for an Order of Default and the Clerk issued it. KKPP filed a timely Motion to Vacate the Order of Default, citing a technological error in the electronic filing system that interfered with KKPP’s ability to file its Answer. But although the court agreed that KKPP’s untimeliness was excusable, it denied the Motion to Vacate after finding that KKPP had not presented a sufficient factual basis to establish a defense, as required by Maryland Rule 2-613(d). KKPP filed a Motion for Reconsideration of the Order Denying Motion to Vacate Order of Default, and the court denied that motion on the same grounds as it denied the Motion to Vacate. Default judgment was entered against KKPP, and KKPP now appeals the Orders denying KKPP’s Motion for Reconsideration and granting Judgment by Default. We agree with KKPP that it had proffered a sufficient basis to establish a defense on the merits and we reverse and remand for further proceedings consistent with this opinion.

I. BACKGROUND

On January 15, 2021, KKPP executed a contract to sell three lots of land, which we’ll collectively call Parcel 1, to First Mountain. KKPP executed a deed formalizing the transfer. Parcel 1 contained a one-story residential structure that First Mountain intended to renovate. Around March 2021, KKPP notified the Baltimore County Government that

First Mountain had expanded the existing footprint of the structure and that it was encroaching on an adjacent parcel of land, Parcel 2, that belonged to KKPP.

First Mountain responded by filing a complaint for declaratory judgment against KKPP. First Mountain alleged that the residential structure’s footprint had always been situated in part on Parcel 2 and that KKPP intentionally conveyed only part of the land on which the structure stood. Citing the doctrine of merger for zoning purposes, First Mountain sought a declaration that it was the rightful owner of Parcel 2. First Mountain filed its complaint on August 3, 2021 and effected service of process on KKPP on August 13, 2021, which made KKPP’s answer due on September 13, 2021.

When KKPP didn’t answer by the deadline, First Mountain moved for an Order of Default on September 17, 2021, and the Clerk issued a Notice of Default three days later. KKPP received a copy of the Notice on September 22. The Notice explained that KKPP could file a Motion to Vacate the Order of Default within 30 days and must “state the reasons for the failure to plead, as well as the legal and factual basis for the defense to the claim.”

KKPP filed a timely Motion to Vacate Order of Default on September 30, 2021. In its motion, KKPP asserted that it had attempted to submit its Answer on September 13, 2021, but because of “technical issues and administrative error,” the Answer was not received by the Odyssey FileandServe system. KKPP then described the legal basis for its defense and stated that the factual issues have been identified and were “detailed further in [KKPP]’s Answer, attached hereto as Exhibit A.” First Mountain opposed the Motion to

Vacate on October 15, 2021. And although the court found that the late submission of the Answer was the result of excusable neglect, the court denied the Motion to Vacate because KKPP had not “set[] forth specific facts to support the analysis of case law cited or Ru[1]e 2-613, and no facts are accompanied by an affidavit as is required by Rule 2-3[1]1(d).”¹

On November 19, 2021, KKPP filed a Motion for Reconsideration of Order Denying Motion to Vacate Order of Default. The Motion for Reconsideration asserted that “[t]here is a legitimate dispute supported by fact, documentation and affidavit as to whether the original structure present on [Parcel 1] encroached upon the boundaries of [Parcel 2],” and attached an affidavit from KKPP’s resident agent, Suzana Kuriadom. First Mountain opposed by arguing that the court already had denied KKPP’s Motion to Vacate and that there is no rule permitting KKPP to file a Motion for Reconsideration. While the Motion for Reconsideration was pending, First Mountain filed a Motion for Judgment by Default on January 5, 2022, which KKPP opposed as premature.

After a hearing on February 10, 2022, the Motion for Reconsideration was denied, and First Mountain’s Motion for Judgment by Default was granted. During the hearing, the court agreed with the earlier ruling that KKPP had not alleged sufficient facts to support a meritorious defense and stated specifically that “[t]here was no affidavit filed, and that is a

¹ The circuit court cited to Rule 2-341(d). However, Maryland Rule 2-341(d) addresses the joinder of new parties to an action through amended pleadings and doesn’t address any of the issues in this case. We agree with KKPP’s contention that the court intended to cite to Rule 2-311(d), which states that “[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.” Any references to the order denying the Motion to Vacate in this opinion will use that Rule number.

specific requirement of the rule.” Accordingly, the court held that there were no grounds to grant the Motion for Reconsideration. The next day, default judgment was entered against KKPP. KKPP filed this timely appeal.

II. DISCUSSION

This appeal boils down to two issues: *first*, whether the circuit court concluded erroneously that it doesn’t have the authority to consider facts in documents other than affidavits to determine whether KKPP presented a factual basis for its defense to First Mountain’s claims; and *second*, whether the trial court erred in denying KKPP’s Motion for Reconsideration on the grounds that KKPP failed to set forth a factual basis for a meritorious defense.² We hold that the circuit court erred in finding that it lacked the

² KKPP phrased the Questions Presented in its brief as follows:

1. Did the trial court err in determining, after argument of Appellant’s Motion for Reconsideration, that “specific facts [. . .] showing a sufficient and substantial basis for the motion” were required to be presented in affidavit form as a requirement of Maryland Rule 2-613?
2. Did the trial court err to the extent that it relied upon Appellant’s Motion to Vacate Order of Default failing to meet requirements stated in Maryland Rule 2-341(d) as grounds for non-vacatur, leading to the court’s immediate subsequent determination that judgment by default should be entered?
3. Did the trial court abuse its discretion in finding that Appellant had raised insufficient bases to support a meritorious defense to Appellee’s Complaint for Declaratory Judgment as required by Maryland Rules 2-613 and/or Rule 2-311, and in relying upon this to support non-vacatur?
4. Did the trial court abuse its discretion in determining, during the February 10, 2022 hearing on Appellant’s Motion for Reconsideration of Order Denying Appellant’s Motion to Vacate Order of Default, that a pleading submitted by attachment in support of a Motion is not a party’s attestation

Continued . . .

authority to rely on KKPP’s Answer to determine whether KKPP presented a factual basis for its defense to First Mountain’s claims and that the court erred in denying KKPP’s Motion for Reconsideration on the basis that KKPP presented insufficient factual support for its defense. We reverse the court’s denial of the Motion for Reconsideration and the Order and Entry of Default Judgment.

A. The Court Erred In Concluding That It Couldn’t Consider KKPP’s Answer In Assessing The Factual Basis For KKPP’s Defense To First Mountain’s Claims.

During a hearing on KKPP’s Motion for Reconsideration, the court stated that it “[id] [not]³ believe [it] ha[d] the authority to substitute the exhibits or accompanying pleadings

of facts to which said party must be bound, such that it is sufficiently similar to an affidavit?

5. Did the trial court err in determining that it did not have the authority to vacate the Order of Default on the grounds raised in Appellant’s Motion for Reconsideration and arguments presented during the February 10, 2022 hearing?
6. Did the trial court err in awarding title of Lots 4, 5 and 6 to Plaintiff, for no consideration owed and without setting a hearing on the Appellee’s Motion for Judgment by Default given this Motion’s lack of sufficient proof of damages, thereby unreasonably depriving Appellant of its interest in real property?

First Mountain phrased its Questions Presented as follows:

1. Did the Circuit Court abuse its discretion by properly denying an impermissible motion for reconsideration of its earlier denial of a motion to vacate an order of default?
2. Did the Circuit Court abuse its discretion by entering judgment by default following the consideration and denial of Appellant’s motion to vacate the earlier order of default?

³ While the word “not” does not appear in the hearing transcript, we recovered the audio recording of the hearing and confirmed that the court said “not” and that its omission from the transcript was an error.

to the Motion to [s]ubstitute for that which 2-613 requires” KKPP argues here that “allegations stated outside the form of an affidavit can and should be considered as part of a court’s evaluation of a movant’s compliance with Maryland Rule 2-613 (d) and (e).” In support, it cites to cases in which the court considered factual statements made within the body of a motion to vacate and to cases where the court afforded no greater value to facts set forth in an affidavit over facts stated within the motion itself. First Mountain responds that KKPP’s Motion to Vacate was required to include “an affidavit to support . . . specific averments concerning a factual or legal defense,” and, without one, the Motion failed to satisfy Maryland Rules 2-613 and Rule 2-311.

“When the trial court’s order ‘involves an interpretation and application of Maryland statutory and case law,’” we apply a *de novo* standard of review. *Nesbit v. Gov’t Emps. Ins. Co.*, 382 Md. 65, 72 (2004) (quoting *Walter v. Gunter*, 367 Md. 386, 392 (2002)). Default judgment is governed by Maryland Rule 2-613, which sets up a two-phase process between default and judgment:

(a) **Parties to whom Applicable.** — In this Rule, the term “plaintiff” includes counter-plaintiffs, cross-plaintiffs, and third-party plaintiffs, and the term “defendant” includes counter-defendants, cross-defendants, and third-party defendants.

(b) **Order of default.** — If 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. The request shall state the last known address of the defendant.

(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.

(d) **Motion by defendant.** — 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.

(e) **Disposition of motion.** — If the court finds that there is a substantial and sufficient basis for an actual controversy as to the merits of the action and that it is equitable to excuse the failure to plead, the court shall vacate the order.

(f) **Entry of judgment.** — If a motion was not filed under section (d) of this Rule or was filed and denied, the court, upon request, may enter a judgment by default that includes a determination as to the 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. . . .

An order of default under Rule 2-613(b) is interlocutory; it’s subject to the court’s “revision at any time before the entry of a judgment that adjudicates all of the claims by and against all of the parties.” Md Rule 2-602(a);⁴ *see Holly Hall Publ’ns, Inc. v. Cnty. Banking & Trust Co.*, 147 Md. App. 251, 261 (2002) (an order of default is an interlocutory order).

⁴ The court stated at the beginning of the hearing that one of its objectives was “to determine whether this Court, first of all, has the authority to . . . reconsider the Order of Default that’s been issued.” Although the court didn’t make any findings about its authority to grant the Motion for Reconsideration and vacate the Order of Default, it indicated its belief that litigants, pursuant to statute, get one opportunity to vacate the Order of Default and that allowing KKPP to file a Motion for Reconsideration gave them another bite at that apple. Given that the Order of Default is an interlocutory order and can be revised by the trial court until a final disposition resolving all of the claims in the case is made, we see no reason why KKPP could not file a timely revisory motion.

Rule 2-613 doesn't require parties to present facts through an affidavit, nor does it preclude the court from considering factual assertions the challenging party makes in a Motion to Vacate or in its attachments. And courts have determined previously that denials of factual claims in a complaint are sufficient to form a factual basis for a party's defense. In *Attorney Grievance Commission of Maryland v. Ward*, the Court of Appeals decided whether the trial court abused its discretion in granting a motion to vacate an order of default. 394 Md. 1, 22 (2006). In his motion to vacate, Mr. Ward stated, in relevant part, that he "challenges all of the factual allegations set forth in the Petition for Disciplinary Action and demands strict proof." *Id.* at 17. This was the only assertion in the motion that pertained to a factual basis for Mr. Ward's defense against the Attorney Grievance Commission's claims, and no affidavits were filed. *Id.* The hearing court granted Mr. Ward's motion to vacate and the Court held that the court had not abused its discretion in doing so. *Id.* at 22. The Court reasoned that while his motion to vacate lacked specific details, Mr. Ward "demanded proof that he violated the MRPC, and challenged the validity of Bar Counsel's factual allegations." *Id.* This satisfied the requirements of Rule 2-613 and the hearing court had not abused its discretion in granting his motion. *Id.*

KKPP's Motion to Vacate stands on the same footing. KKPP attached its Answer to First Mountain's complaint as an exhibit to its Motion to Vacate and referred the court to the Answer for the factual dispute between the parties: "[T]he Plaintiff has identified in its Complaint issues of fact pertaining to the ownership interests of both parties, regarding which Defendant has conflicting information, giving rise to a material factual dispute

(detailed further in Defendant’s Answer, attached hereto as Exhibit A).” The Answer included several paragraphs in which KKPP denies allegations made by First Mountain and “demands strict proof thereof.” KKPP challenged First Mountain’s factual assertions in the identical manner as the respondent in *Ward*, and the circuit court erred in concluding that it was not authorized to consider KKPP’s Answer.

B. The Court Erred In Denying KKPP’s Motion For Reconsideration Because KKPP Presented A Factual Basis For A Meritorious Defense To First Mountain’s Declaratory Judgment Action.

At the end of the hearing on KKPP’s Motion for Reconsideration, the court found that a Motion to Vacate must conform with the requirements set forth in Rule 2-613, but included an affidavit in its stated list of requirements:

Rule 2-613 does have certain requirements to vacate an Order of Default, one being that there must be sufficient factual basis and defenses alleged, that there’s a meritorious claim to be adjudicated, there must be accompanied an affidavit of the Declarant as to those facts, and there must be an excusable reason why the motion—why the Answer was not filed timely.

I totally agree with [the motion judge] that there was some kind of excusable error, but I also agree with [the motion judge] that there were not sufficient facts alleged to form a basis for a meritorious defense. There was no affidavit filed, and that is a specific requirement of the rule.

The hearing court denied KKPP’s Motion for Reconsideration on the grounds that the court hadn’t erred in denying KKPP’s Motion to Vacate, and the court ordered default judgment against KKPP.

KKPP argues now that the court abused its discretion in denying its Motion for Reconsideration because its Answer to First Mountain’s complaint, which was an exhibit

to the Motion to Vacate, provided a factual basis for a meritorious defense and satisfied the requirements of Rule 2-613. Although the Motion to Vacate was not accompanied by an affidavit (and thus didn't comply with Rule 2-311), KKPP argues that “[h]olding the perceived procedural inadequacy of non-compliance with Rule 2-311 in higher esteem than the prescribed equitable consideration in Rule 2-613 appears to run roughshod over the body of case law defining well-raised grounds for a meritorious defense” In response, First Mountain asserts, echoing both of the circuit court decisions, that KKPP only provided conclusory allegations in its Motion to Vacate and failed to submit an affidavit containing additional facts in support of KKPP’s factual basis for its defense, violating both Rules 2-613 and 2-311.

We review the court’s denial of the motion to vacate the Order of Default for abuse of discretion. *Holly Hall*, 147 Md. App. at 267. We find an abuse of discretion in instances “where no reasonable person would take the view adopted by the trial court or the trial court acts without any guiding rules or principles.” *Shih Ping Li v. Tzu Lee*, 210 Md. App. 73, 96 (2013) (cleaned up).

Default judgments are not meant to be a punitive sanction for noncompliance with procedural regulations. *Holly Hall*, 147 Md. App. at 262 (citing *Royal Ins. Co. of Am. v. Miles & Stockbridge, P.C.*, 133 F. Supp. 2d 747, 768 (D. Md. 2001)). Instead, they function as a party’s admission of liability where the party fails, without excuse, to respond to the allegations in a properly served complaint. *Ward*, 394 Md. at 19 (citing *Holly Hall*, 147 Md. App. at 261–62). That said, “the Maryland Rules and caselaw contain a preference for

a determination of claims on their merits; they do not favor imposition of the ultimate sanction absent clear support.” *Holly Hall*, 147 Md. App. at 267. And as a result, courts usually should “exercise their discretion in favor of a defaulting party” and allow a case to proceed on the merits if the party shows that it has a meritorious defense and excusable error. *Id.* at 263 (quoting *Royal Ins. Co. of Am.*, 133 F. Supp. 2d at 768).

In its Motion to Vacate, KKPP contended, and the court agreed, that the Answer was not filed in a timely manner due to excusable error. KKPP submitted the Answer to First Mountain’s complaint as an exhibit and referred to the Answer for details on the factual basis for its defense. In its Answer, KKPP denied First Mountain’s factual allegations about the location of the structure’s foundation on Parcel 1 and “demand[ed] strict proof.” Had KKPP successfully filed the Answer on time, there is no dispute that its Answer, by itself, would have joined the issues on the merits. Above and beyond attaching the Answer, KKPP also included a short explanation of its defenses in the motion. And that, in our view, was enough for KKPP to establish a factual basis to support a meritorious defense against First Mountain’s claims.

First Mountain relies heavily on *Carter v. Harris* to argue that KKPP’s Motion to Vacate was deficient because it failed to provide a *detailed* factual analysis to support its defense. 312 Md. 371, 376–77 (1988). But over the three decades since *Carter* was decided, Maryland’s default judgment jurisprudence demonstrates a preference to err on the side of adjudicating cases on the merits rather than discarding them for nominal noncompliance with procedural rules. Maryland courts take a “broad philosophical approach to default

judgment” and place rigid conformity to the Rules behind the interests of justice. *Flynn v. May*, 157 Md. App. 389, 403 (2004); *see also Royal Ins. Co. of Am.*, 133 F. Supp. 2d at 768 (“Maryland courts have repeatedly held that a trial court’s discretion to vacate default judgments must be exercised liberally, lest technicality triumph over justice.” (cleaned up)). This philosophical approach applies to orders of default as well. *See Holly Hall*, 147 Md. App. at 261–67.

We agree that KKPP “could have done a better job of complying with the first prong of Rule 2-613(d)” and asserted facts with greater clarity. *Ward*, 394 Md. at 21. But “[t]echnicality, while important, should not be elevated to an exalted status,” and KKPP’s Motion to Vacate with attached exhibits provided more than a conclusory allegation that a factual basis for a meritorious defense existed. *Holly Hall*, 147 Md. App. at 266 (citation omitted). Moreover, KKPP’s Motion to Vacate was filed promptly, there was “no continuing pattern of neglect,” and no apparent prejudice suffered by First Mountain because of the late-filed answer. *Id.* at 267. Accordingly, the Motion to Vacate the Order of Default should have been granted, and the court abused its discretion in denying it.

We note as well that KKPP’s failure to include an affidavit with the Motion to Vacate should not, at least on its face, have led to the motion being denied. Although Rule 2-311 requires generally parties to support facts outside the record with an affidavit, Rule 2-613 doesn’t require one specifically, which makes sense in light of the reality that there is no record at the default judgment stage; the motion to vacate seeks an opportunity to file an initial responsive pleading, a request that should be denied only where it’s equitable to

do so. *Id.* Again, KKPP’s Answer would have been sufficient by itself to allow the case to proceed to the merits but for the technological failure that the court itself found excusable. The circuit court erred, then, to the extent that it viewed Rule 2-613 as requiring KKPP to file an affidavit as a condition of establishing a meritorious defense.

And *finally*, the circuit court erred in declining to consider the additional documents KKPP included with its Motion for Reconsideration, which at that point included an affidavit from Suzana Kuriadom, KKPP’s resident agent. During the hearing on the Motion for Reconsideration and in its ruling, the court confined its analysis to whether the motion judge had erred in denying KKPP’s Motion to Vacate and appeared to disregard the additional statements contained in the Motion for Reconsideration and the attached affidavit. At that stage, however, the court should have considered “the affidavits and other documents *subsequently placed before the court*” in determining whether a sufficient legal and factual basis existed in support of KKPP’s defense to First Mountain’s claims. *Id.* at 260 (emphasis added). The Motion for Reconsideration and attached affidavit, supplemented by the originally filed Motion to Vacate and Answer, demonstrated further that KKPP had a meritorious defense to First Mountain’s claims.

First Mountain takes issue with the wording of the oath in Ms. Kuriadom’s affidavit because it’s not identical to the wording of the oath forms listed in Maryland Rule 1-304. The precise words from Rule 1-304 aren’t required, though, for the purpose of identifying a potentially meritorious defense. Had the affidavit been filed at a merits stage of the case, such as summary judgment, where the affidavit needed to qualify as admissible evidence

of a disputed fact, stricter compliance with the format of the oath might make more sense. But since Ms. Kuriadom’s affidavit was filed in support of vacating an Order of Default due to a technical error, and only for the purpose of establishing a potential defense, strict conformance with Rule 1-304 isn’t necessary. In other default judgment cases, this Court has accepted affidavits that did not track the language in Rule 1-304 precisely. *See Bethesda Title & Escrow, LLC v. Gochmour*, 197 Md. App. 450, 453 (2011) (accepting affidavits without an oath form stated in Rule 1-304 but noting that the proper form was not used). And in any event, Ms. Kuriadom affirmed in her affidavit that “under penalty of perjury [she] asserts the following as factual to the best of her knowledge, information and belief,” language sufficiently similar to one of the forms listed in Rule 1-304. Accordingly, the court erred in denying KKPP’s Motion for Reconsideration without considering statements within the Motion for Reconsideration or the attached affidavit.

**JUDGMENT OF THE CIRCUIT COURT
FOR BALTIMORE COUNTY REVERSED.
CASE REMANDED TO THE CIRCUIT
COURT FOR BALTIMORE COUNTY FOR
FURTHER PROCEEDINGS CONSISTENT
WITH THIS OPINION. APPELLEE TO
PAY COSTS.**