Circuit Court for Harford County
Case No. 12-C-14-001050

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2280

September Term, 2016

KING PALLET, INC.

v.

ALBAN TRACTOR CO. INC., ET AL.

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

JJ.

Opinion by Woodward, J.

Filed: August 27, 2019

*Woodward, Patrick L., J., now retired, participated in the hearing of this case while an active member of this Court, and as its Chief Judge; after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in the decision and the preparation of this opinion.

* 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 the Circuit Court for Harford County, King Pallet, Inc. ("King Pallet"),[1] appellant, filed suit against Alban Tractor Company, Inc. ("Alban"),[2] appellee, and Caterpillar, Inc. ("Caterpillar") asserting claims arising out of an alleged failure to honor an extended warranty provided by Caterpillar covering a piece of heavy machinery used by King Pallet in its mulching business.

Alban moved to dismiss the claims against it or, in the alternative, for summary judgment. After King Pallet settled with Caterpillar and voluntarily dismissed its claims against it with prejudice, the circuit court granted Alban's motion, dismissing one count of the complaint and granting summary judgment as to the remaining counts.

On appeal, King Pallet presents three questions for review, which we have rephrased as follows:[3]

[1] Appellant's name has also been spelled as "King Pallett, Inc." We adopt the spelling consistently used by the parties in the pleadings before the circuit court.

[2] King Pallet also named two other Alban entities as defendants: Alban Limited Partnership and Alban CAT. It subsequently dismissed its claims against those entities with prejudice.

[3] The questions as posed by King Pallet are:

> 1. By failing to hold a hearing on Defendant's Motion to Dismiss and/or in the Alternative, Motion for Summary Judgment and on Plaintiff's Response, where both parties requested a hearing, did the Circuit Court for Harford County violate Maryland Rule 2-311(f) which contains the provision that "the court may not render a decision that is dispositive of a claim or defense without a hearing if one was requested as provided in this section" so that this case should be remanded to the Circuit Court for discovery and a trial on its merits?
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> 2. If the written CAT Extended Warranty explicitly lists the flywheel housing of the Tub Grinder as a covered component to be repaired under the warranty,

> I. Did the circuit court err by dismissing and/or granting summary judgment in favor of Alban on all counts without holding a hearing?
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> II. Did the circuit court err by granting summary judgment as to King Pallet's breach of contract claim?
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> III. Did the circuit court err by dismissing King Pallet's claim of negligent misrepresentation?

For the following reasons, we answer King Pallet's first question in the affirmative. Accordingly, we vacate the judgment and remand the case for a hearing on Alban's motion.

BACKGROUND

In December 2010, King Pallet, a Baltimore County mulching business, purchased a used tub grinder[4] with a Caterpillar diesel engine from a business in Pennsylvania for $115,000. During the purchase agreement negotiations, King Pallet discovered that the flywheel housing in the engine was cracked. A nearby "authorized Caterpillar agent" repaired the tub grinder. The original Caterpillar factory warranty on the tub grinder was

> did Alban Tractor as an authorized franchised Caterpillar dealer, have a contractual duty to repair the cracked flywheel housing so that Alban is liable for consequential damages resulting from its refusal to make the repair and from its mistaken misrepresentation that the repair of the cracked flywheel housing was not covered by the CAT Extended Warranty?
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> 3. If the written CAT Extended Warranty explicitly lists the flywheel housing of the Tub Grinder as a covered component to be repaired under the warranty, did Alban Tractor as an authorized franchised Caterpillar [dealer] have a duty to repair the cracked flywheel housing, making Alban Tractor liable for consequential damages resulting from its refusal to make the repair and from its negligent misrepresentation that the repair of the cracked flywheel housing was not covered by the CAT Extended Warranty?

[4] A tub grinder is "used in the wood waste recycling and mulching industry."

about to expire and King Pallet negotiated an extended warranty covering the "flywheel casing" until February 26, 2014, for an additional cost of $12,500.

In March 2012, King Pallet discovered that the flywheel housing had failed again. It "submitted a claim . . . for a warranty repair to the local authorized Caterpillar dealer, Alban[,]" which operated in Elkridge, Maryland near King Pallet's business. Alban "refused to honor [the Caterpillar] [e]xtended [w]arranty." Consequently, on April 30, 2012, King Pallet arranged for the tub grinder to be towed to Pennsylvania to the same Caterpillar dealer that had repaired the flywheel housing during the negotiation of the sale. That dealer made the repair and charged King Pallet only the $500 deductible under its extended warranty. The tub grinder was towed back to King Pallet's business on August 23, 2012. King Pallet spent over $70,000 to rent a tub grinder during the repair, in addition to the towing expenses.

Less than two years later, on April 10, 2014, King Pallet filed a seven-count complaint against Alban and Caterpillar. Four counts named Alban: Count I - negligent misrepresentation; Count II - constructive fraud; Count III - breach of the duty of good faith and fair dealing; and Count IV - breach of contract. In each of these counts, King Pallet alleged that Alban was acting as an authorized agent of Caterpillar, which King Pallet asserted gave rise to a duty of care and/or caused Alban to be bound by the terms of the extended warranty agreement between King Pallet and Caterpillar.

On March 27, 2015, Alban filed a motion to dismiss or in the alternative, for summary judgment, which included a request for a hearing. Alban argued that it was entitled to judgment as a matter of law because it did not owe a legal duty to King Pallet,

did not stand in a confidential or fiduciary relationship to it, and was not a party to the extended warranty contract between King Pallet and Caterpillar. It attached to its motion photographs of the tub grinder and an affidavit made by an Alban employee detailing its contacts with King Pallet and its assessment of why the repair was not covered by the extended warranty agreement.

King Pallet opposed the motion and requested a hearing. King Pallet argued that it had plead facts sufficient to defeat the motion to dismiss and that summary judgment was not warranted, in part because the affidavit supporting Alban's motion was deficient under Rule 2-501(c).[5] King Pallet attached to its opposition an affidavit made by its owner.

On May 5, 2015, the circuit court notified the parties that a hearing on "Open Motions" would take place on June 16, 2015 at 10:30 a.m. A docket entry dated June 16, 2015 states that, on that date, there was a "Discussion in chambers. Order to be submitted." In the "Calendar Events" section of the docket, the "Open Motions" hearing is calendared and a notation states "Held off the Record." The in-chambers discussion was not transcribed and there are no other filings or docket entries indicating what occurred.

Three weeks later, on July 7, 2015, King Pallet filed a "Voluntary Notice of Dismissal With Prejudice" as to Caterpillar and, as noted, *supra*, to two other Alban entities.[6]

[5] King Pallet asserted that many of the averments in the affidavit were not made upon personal knowledge.

[6] A letter dated July 7, 2015, appears in the record from counsel for Alban to the circuit court judge who held the "Discussion in chambers" on June 16, 2015, providing him with a courtesy copy of the stipulation of dismissal "in light of [his] consideration of

There was no activity in the case for over a year. Then, on July 14, 2016, King Pallet filed a "Motion Requesting A Pre-Trial Conference." In the motion, King Pallet asserted that it "believed that the Court was holding a ruling on motion filed by [Alban], subcuria [sic]," requested a pre-trial conference to set a trial date, and stated that "[t]here are matters that remain to be tried in this matter, subject to the Court's ruling on the remaining motion as to Alban . . . ."[7]

About four months later, on November 3, 2016, the circuit court issued a memorandum order and opinion. The court dismissed the negligent misrepresentation claim, ruling that Alban did not owe King Pallet a duty of care as a matter of law, and granted summary judgment in favor of Alban as to constructive fraud, breach of a contractual duty of good faith and fair dealing, and breach of the extended warranty contract. The memorandum opinion does not reference a hearing or a discussion having occurred in chambers.

This timely appeal followed. We shall include additional facts as necessary to our discussion of the issues.

DISCUSSION

Maryland Rule 2-311(f) provides:

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the pending Motion to Dismiss." The letter advises that the only remaining defendant is Alban.

[7] Four days later, the circuit court judge who held the "Discussion in chambers" wrote to counsel for King Pallet, stating that there had been no activity in the case since July 7, 2015, and that, if there were "no further filings" within 45 days, the case would be dismissed. We presume that this letter was sent before the judge was aware of the motion for pre-trial conference.

> A party desiring a hearing on a motion, other than a motion filed pursuant to Rule 2-532, 2-533, or 2-534, shall request the hearing in the motion or response under the heading "Request for Hearing." The title of the motion or response shall state that a hearing is requested. Except when a rule expressly provides for a hearing, the court shall determine in each case whether a hearing will be held, but **the court may not render a decision that is dispositive of a claim or defense without a hearing if one was requested as provided in this section**.

(Emphasis added.)

King Pallet contends the circuit court violated this Rule in the instant case by granting Alban's dispositive motion without holding a hearing. King Pallet maintains that this Court should vacate the judgment and remand for "discovery and a trial on the merits."

Alban responds that the circuit court held a hearing in chambers on June 16, 2015, and, because Rule 2-311(f) does not specify that a hearing must be held on the record, there was no violation of the Rule in this case. To the extent that King Pallet desired an on-the-record hearing, however, Alban maintains that King Pallet was obligated to file a motion or objection at some point in the year following the off-the-record hearing or to move for reconsideration or to alter or amend the judgment after it was entered. Alternatively, Alban argues that it would serve no practical purpose to remand for a hearing because only issues of law are involved.

It is uncontroverted that both Alban and King Pallet requested a hearing on the motion to dismiss or, in the alternative, for summary judgment in compliance with Maryland Rule 2-311(f).[8] It also is beyond dispute that the grant of that motion, in whole

[8] It is worth noting that King Pallet was not obligated to request a hearing because Alban already had done so. *See Phillips v. Venker*, 316 Md. 212, 217 (1989) (A non-

or in part, was dispositive of the claims brought by King Pallet. Consequently, the court was required by Rule 2-311(f) to hold a hearing before granting the motion.

We decline Alban's invitation to treat the docket entry memorializing a "Discussion in chambers" as a hearing. As this Court explained in *Adams v. Offender Aid & Restoration of Baltimore, Inc.*, 114 Md. App. 512, 516 (1997), the purpose of Rule 2-311(f) is to "prevent a final disposition—one that removes a claim or a defense—unless the losing party has had a chance to argue *on the record* and to prevent the court from ruling incorrectly." (Emphasis added.) We elaborated:

> [T]he original intent of the Rules Committee in fashioning the rule was to leave the discretion to grant a hearing with the trial judge because "most motions are frivolous or dilatory in nature" and the disposition of the motions is "an administrative matter." *Fowler v. Printers II,* 89 Md. App. 448, 483 (1991). In his remarks on Rule 2-311(f), John F. McAuliffe, then chair of the Rules Committee, stated:
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> > It is the Committee's intent that the court be permitted to dispose of motions without hearings whenever a hearing is not deemed necessary and the ruling the court determines to be appropriate *is not dispositive of a claim or defense* . . . .
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> *Fowler,* 89 Md. App. at 484 (quoting Letter from John F. McAuliffe, Chair of the Rules Committee (Aug. 1, 1983) (emphasis supplied [in *Fowler*]).) Judge McAuliffe, for the Court [of Appeals], further explained in *Phillips v. Venker:*
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> > Under section (f) of [Maryland Rule 2-311], if the motion is one for which a hearing must be granted and the moving party demands a hearing, the court may not thereafter rule on the motion without a hearing, even if no response is filed. *The motions rule does not recognize the concept of a default in response to a motion.* Rather, the court must consider the

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moving party need not file a "redundant request[]" if the moving party already has requested a hearing with their motion).

> merits of the motion before it. ***The responding party may elect to file no response and rely on the hearing demanded by the moving party. . . .***
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> 316 Md. 212, 217 (1989) (emphasis supplied) (quoting P. Niemeyer and L. Richards, *Maryland Rules Commentary* (1984), (1988 suppl.) at page 33.) The Rules Committee and the Court clearly intended that a certain category of motions not be decided without a hearing, if either party has requested one.

Adams, 114 Md. App. at 516-17 (some alterations in original) (italicized emphasis in original) (bolded emphasis added). The history and purpose of Rule 2-311(f), as set out above, bolsters our conclusion that, at the very least, any off the record discussion must be memorialized on the record so as to give the parties an opportunity to preserve any objections or stipulations. *Cf. Fowler v. Benton*, 245 Md. 540, 549–50 (1967) (reasoning that in-chambers, off the record charge conferences were permissible "[s]o long as the record shows . . . that after such discussion in chambers opportunity is given [to] counsel to make their final objections on the record[.]").

Further, even if an off the record "hearing" is permitted by Rule 2-311(f), the docket or the record in this case reflects that that is not what occurred. Although the date of the docket entry does correspond to the scheduled hearing date, the use of the term "[d]iscussion" as opposed to "hearing" calls into question whether the parties were given an opportunity to argue their positions.[9] The circuit court's memorandum opinion and order does not reference the in-chambers discussion, much less specify that it considered

[9] Alban contends that the "Discussion in chambers" was a hearing at which "counsel for all parties were present." King Pallet has engaged new counsel since the hearing was held, and the parties did not stipulate on appeal as to the nature of the in chambers discussion on June 16, 2015.

any oral arguments on the motion. The record lacks any indicia that the parties were given the opportunity to argue their positions on Alban's motion, and we will not speculate as to what discussion, if any, may have occurred between the court and the parties. On this record, we conclude that a hearing was not held in accordance with Rule 2-311(f).

We also disagree that King Pallet waived its right to a hearing by its conduct on or after June 16, 2015. "Waiver is conduct from which it may be inferred reasonably an express or implied 'intentional relinquishment' of a known right." *Exxon Mobil Corp. v. Ford*, 433 Md. 426, 462 (2013). King Pallet requested a hearing in its opposition to Alban's motion and never affirmatively withdrew its request. Because the court had discretion to deny the motion without holding a hearing and because there is no record from which we can assess the nature of the "Discussion in chambers," we cannot reasonably infer from King Pallet's conduct after June 16, 2015, that it had relinquished its right to a hearing *if* the court intended to grant the motion. King Pallet also was not obligated to move for reconsideration or to file a motion to alter or amend the judgment to preserve its objection to a violation of Rule 2-311(f). *See, e.g., Cash & Carry Am., Inc. v. Roof Solutions, Inc.*, 223 Md. App. 451, 480 n.11 (2015) (noting a party need not file a post-judgment motion to preserve for review its argument that a court erred by entering judgment against it). Having filed a timely appeal from the final judgment, King Pallet may raise a procedural defect in that judgment as a basis for reversal.

Finally, we turn to Alban's argument, in reliance upon *Briscoe v. Mayor & City Council of Baltimore*, 100 Md. App. 124 (1994), that King Pallet was not prejudiced by the failure to hold a hearing. In *Briscoe*, the plaintiff filed a complaint challenging the

denial of his request pursuant to the public information act for certain records in the custody of the Baltimore City Police Department. *Id.* at 125–26. After the City moved to dismiss or for summary judgment, the plaintiff opposed the motion and requested a hearing. *Id.* at 127. The court did not hold a hearing, however, before granting the motion to dismiss. *Id.* On appeal, this Court held that the court had violated Rule 2-311(f), but nevertheless concluded that "no practical purpose would be served by remanding the matter for a hearing." *Id*. at 128. In a footnote, we explained that the parties had agreed and stipulated at oral argument in this Court that the case "involves only issues of law" and that there was "no need for a remand." *Id*. at 128 n.1.

Unlike in *Briscoe*, here King Pallet does not so stipulate. Without reaching the merits of Alban's motion, we note that King Pallet maintains that summary judgment was premature without the opportunity for discovery to determine the terms of Alban's franchise agreement with Caterpillar, a matter that could have been raised at a hearing on the motion. As we have stated previously, "[t]he Maryland Rules are not guides to the practice of law but precise rubrics established to promote the orderly and efficient administration of justice and . . . are to be read and followed." *Rollins v. Capital Plaza Assocs., L.P.*, 181 Md. App. 188, 197 (2008) (alteration omitted) (internal quotation marks and citations omitted). Because the record does not reflect that a hearing was held prior to the granting of a dispositive motion, despite being requested by both parties, we shall vacate the circuit court's judgment and remand this case for further proceedings.

JUDGMENT OF THE CIRCUIT COURT FOR HARFORD COUNTY VACATED; CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION; COSTS TO BE PAID BY APPELLEE.