Circuit Court for Montgomery County
Case No. 440980-V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3385

September Term, 2018

MAHIRI JONES

v.

AFFORDABLE HOME IMPROVEMENTS, LLC

Meredith,
Leahy,
Shaw Geter,

JJ.

Opinion by Meredith, J.

Filed: June 16, 2020

On March 29, 2017, Mahiri Jones ("Jones"), appellant, entered into a contract with Affordable Home Improvements, LLC ("AHI"), appellee, for the purpose of renovating a single-family home located at 2105 Lanier Drive in Silver Spring, Maryland. After a dispute arose between Jones and AHI, AHI filed a complaint in the Circuit Court for Montgomery County alleging breach of contract. Although Jones was served with the complaint, the civil information report, a scheduling order, and a writ of summons, Jones never filed an answer (or preliminary motion pursuant to Maryland Rule 2-322). Instead of requesting an order of default pursuant to Maryland Rule 2-613, AHI opted to present evidence on liability and damages against the non-responding defendant at a bench trial at which Jones did not appear. Based upon the testimony and exhibits presented by AHI, the trial court found that Jones had breached the contract, and the court entered a judgment against Jones in favor of AHI in the amount of $27,029.64 on October 9, 2018.

Jones, self-represented, filed a motion to vacate the judgment on November 7, 2018. AHI opposed the motion. The circuit court summarily denied Jones's motion to vacate, and this appeal followed.

The question on appeal is whether the circuit court abused its discretion in denying Jones's motion to vacate.[1]

[1] The questions presented by Jones in his brief are as follows:

1. Did the lower court err by proceeding to judgment against a party who had not answered or responded to the complaint without complying with the procedural requirements of Rule 2-613 for default judgment?

continued…

For the reasons we explain herein, we affirm the circuit court's judgment denying Jones's motion to vacate.

FACTUAL AND PROCEDURAL BACKGROUND

On December 6, 2017, AHI filed a complaint which alleged in pertinent part:

> 4. On or about [March] 29, 2017, plaintiff [AHI] and defendant [Jones] entered into a contract pursuant to which plaintiff agreed to perform various numerous home improvements, construction, and renovations to defendant[']s property located at 2105 Lanier Drive, Silver Spring, MD.
>
> 5. In exchange for plaintiff's labor and materials referenced in the contract, the defendant agreed to pay plaintiff for said services, labor and materials.
>
> 6. The plaintiff fully performed the contract between the plaintiff and defendant and supplied all of the requested labor, materials, services, improvements and renovations. The defendant, however, breached said contract by failing and refusing to pay unto the plaintiff all sums due and owing and required by the contract to be paid to the plaintiff.
>
> 7. That, as a result of the defendant's breach of contract as aforesaid, the plaintiff has suffered damages including but not limited to loss of monies expended for labor and materials, loss of profits and loss of all monies required to be paid pursuant to aforesaid contract.
>
> 8. The aforesaid contract further provided for the defendant to pay unto the plaintiff interest at the rate of two percent per month on past due accounts plus attorney's fees in the amount of twenty-five percent of the amount due and owing.
>
> Wherefore, plaintiff demands judgment against defendant in the sum of $20,477.00 plus interest at the rate of 2% per month from June 2017 until the date of judgment plus attorney's fees of $9239.25.

---

continued…

> 2. Did the Court err by denying appellant Jones' motion to vacate the judgment?

On June 19, 2018, Jones was personally served with the complaint, the information report, scheduling order, and the summons. The summons advised Jones to file "a written response by pleading or motion" in the circuit court within 30 days after service of the summons. The summons also warned "THE PERSON SUMMONED" that "[f]ailure to respond within the time allowed may result in a default judgment or the granting of the relief sought against you." An affidavit of service was filed by a private process server on June 20, 2018.

Jones did not file an answer within the time required by Maryland Rule 2-321(a); nor did he file a preliminary motion under Rule 3-222.

On July 26, 2018, counsel for AHI appeared for a scheduled pre-trial hearing. Jones did not appear. At the pre-trial hearing, counsel for AHI indicated during the following colloquy that he would be filing a motion for default:

> THE COURT: Okay. All right. So what are we doing here today, then?
>
> [COUNSEL FOR AHI]: Well, I think we need to get a date.
>
> THE COURT: Okay.
>
> THE CLERK: And, counsel, will you be filing a motion for default? Correct?
>
> [COUNSEL FOR AHI]: I will next week, yes.

But counsel for AHI never filed a request for entry of an order of default pursuant to Maryland Rule 2-613(b), and the case proceeded to a bench trial on October 4, 2018.

Jones did not appear. At the outset of the bench trial, the circuit court confirmed that counsel for AHI was not seeking a default judgment:

> THE COURT: All right. . . . You are here for trial this morning and not - - you don't have a default order, so - -
>
> [COUNSEL FOR AHI]: Right.
>
> THE COURT: - - you're not seeking a default judgment?
>
> [COUNSEL FOR AHI]: Right.
>
> THE COURT: Okay. All right. Very good.

AHI presented one witness—Sydney Paskel (the owner and president of AHI)—and six exhibits, which were all received in evidence by the circuit court. Paskel testified that, on March 29, 2017, AHI entered into a contract with Jones, who was "rehabbing a home to resell[,]" located on Lanier Drive in Silver Spring, whereby AHI would remodel the home's kitchen, bathroom, basement, and deck, and would perform other exterior work on the home. The contract was admitted in evidence as Exhibit 1, and change orders signed by Jones were admitted as Exhibits 2, 3, and 3A. According to Paskel, AHI performed renovation work under the terms of the parties' contract until June 2017, when Jones became dissatisfied with AHI's services and "locked [AHI] out of the premises." The amount still owed to AHI under the contract was $20,477.00. Paskel testified that the amount of prejudgment interest that accrued between June 2017 and the time of trial (approximately 15 months) was, based upon the agreed interest rate in the contract, $6,552.64. Paskel also pointed out that the contract provided for the payment of attorney's fees.

Ruling from the bench, the trial judge explained why the court was ruling in favor of AHI:

> [THE COURT]: Okay. Just briefly, so the Court has reviewed the exhibits numbered 1, 2, 3, 4, 5, 3A, and 6, which is counsel's affidavit for attorney's fees. [Exhibit] 1 seems to be ratified clearly by, Mr. Jones signed the contract, and each of the accompanying change orders are initialed - - the contract is initialed and signed. The change orders are signed by Mr. Jones.
>
> **The Court confirmed service, which is at Docket Entry #19, of - - service of Mr. Jones. Mr. Jones has not filed any responsive pleadings.** Though he acknowledges in Plaintiff's 5 on, in an e-mail that's dated in 2017, he acknowledges that there's a dispute over the work, he did not appear this morning to put his case on with respect to any disputes.
>
> So based on the testimony from Mr. Sydney Paskel, the owner of Affordable Home Improvement[s], LLC, who testified that the contract dated March 29th, 2017, between the parties, along with the four change orders for Mr. Paskel and members of his company, or employees, to conduct the, I guess, conduct the remodeling and restoration of the home on Lanier Drive, looking at Plaintiff's 3, which details the payments made by Mr. Jones, as well as Mr. Paskel's explanation that when suit was filed, that his accountant in the company had made an error, the Court will find that the amount owed still for this project is $20,477 - - I'm looking to make sure I have the exact right amount - - with 2 percent prejudgment interest per month, which is consistent with the contract, which would be 409.54 per month. Let's see. Prejudgment interest being for 16 months would come to $6,552.64, plus the 20,477, so judgment in the amount of $27,029.64; attorney's fees in the amount of $2400, and post-judgment interest will accrue at the legal rate.

(Emphasis added.)

On October 9, 2018, the circuit court entered a judgment in favor of AHI against Jones in the amount of $27,029.64.

On November 7, 2018, Jones, self-represented, filed a "Motion to Vacate Judgment." Although the motion stated in the first paragraph that "Defendant files this

motion within thirty days of the judgment pursuant to Md. Rule § 2-613," the motion made no other reference to that rule or any lack of compliance with that rule. Instead, the motion focused on service of the summons and complaint, and asserted:

> 13.) Plaintiff returned a third time attempting to perfect service on June 19, 2018, with a complaint attached maintaining substantial errors including the wrong address and no dates of record for incidents of said breach. See complaint attached.
>
> 14.) Defendant was waiting to receive a properly drafted complaint to which he would have to respond.
>
> 15.) The defendant was never personally served with a proper complaint in this process as required by law. Accordingly, Plaintiff has still failed to properly serve defendant under Maryland Rule § 2-124(b).
>
> * * *
>
> 18.) Defendant contends he has a meritorious defense to the claims alleged against him and seeks relief from this court to litigate this claim.

No affidavit was filed in support of the motion to vacate, and there was no elaboration as to specific details of "a meritorious defense."

AHI filed an opposition, emphasizing that Jones had failed to file a response to the complaint despite being served, by his own admission, on June 19. AHI asserted: "The defendant has failed to set forth any meritorious defense as required by the rules of procedure," and "[d]efendant has set forth no legal basis whatsoever for vacating the judgment herein."

On December 21, 2018, the circuit court entered an order simply denying Jones's motion to vacate the judgment. On January 15, 2019, Jones noted this appeal from that denial.

STANDARD OF REVIEW

Jones did not file a notice of appeal within 30 days after entry of the judgment on October 9, 2018. Instead, Jones filed a "motion to vacate" the judgment on November 7, 2018. But the post-judgment motion was not filed in time to toll the deadline for noting an appeal of the judgment entered against him. *See* Maryland Rule 8-202(c) ("[W]hen a timely motion is filed pursuant to Rule . . . 2-534, the notice of appeal shall be filed within 30 days after entry of . . . an order . . . disposing of a motion pursuant to Rule . . . 2-534."); *Kamara v. Edison Bros. Apparel Stores*, 136 Md. App. 333, 336 (2001) ("[A]ppellant filed a motion to alter or amend judgment under Rule 2-534 within ten days of the entry of judgment, thus extending the time for appeal until 30 days after the court ruled on the motion to alter or amend . . . ."); Md. R. 8-202(c) Committee Note ("A motion filed pursuant to Rule 2-535, if filed within ten days after entry of judgment, will have the same effect as a motion filed pursuant to Rule 2-534, for purposes of this Rule."); *Unnamed Att'y v. Att'y Grievance Comm'n*, 303 Md. 473, 486 (1985) ("A motion filed more than ten days after a judgment but within thirty days of the judgment, under Rule 2-535(a), would still have no effect upon the running of the thirty day appeal period."); *Pickett v. Noba, Inc*., 114 Md. App. 552, 557 (1997) ("If [a motion under Rule 2-535] is filed within ten days of judgment, it stays the time for filing the appeal; if it is filed more than ten days after judgment, it does not stay the time for filing the appeal.").

Accordingly, the appeal in this case is timely only with respect to the circuit court's order entered on December 21, 2018, denying Jones's motion to vacate the judgment.

"An appeal from the denial of a motion asking the court to exercise its revisory power is not necessarily the same as an appeal from the judgment itself. Rather, the standard of review is whether the trial court abused its discretion in declining to revise the judgment." *Bennett v. State Dep't of Assessments and Taxation*, 171 Md. App. 197, 203 (2006) (quoting *Green v. Brooks*, 125 Md. App. 349, 362 (1999)), *cert. denied*, 397 Md. 396 (2007).

In *Abrishamian v. Barbely*, 188 Md. App. 334, 350 (2009), we explained:

> [T]he duty to exercise discretion is a guard against "arbitrary or capricious" actions or a judge's "unyielding adherence to [a] predetermined position." We presume that a trial judge correctly exercised discretion, knows the law, and performed his or her duties properly. A judge does not need to state every consideration or factor, so long as the record supports a reasonable conclusion that appropriate factors were taken into account in the exercise of discretion.

"An abuse of discretion constitutes 'an untenable judicial act that defies reason and works an injustice.'" *Li v. Lee*, 210 Md. App. 73, 98 (2013) (quoting *Das v. Das*, 133 Md. App. 1, 15 (2000)). The abuse of discretion standard is highly deferential in most contexts, but even more so in the context of a revisory motion. *See Estate of Vess*, 234 Md. App. 173, 205 (2017). It is not necessarily an abuse of discretion to decline to revise a judgment to correct an error, and the "nature of the error, the diligence of the parties, and all surrounding facts and circumstances are relevant" to the court's decision on

whether to exercise its revisory powers. *Wormwood v. Batching Sys., Inc.*, 124 Md. App. 695, 700 (1999). This Court will not reverse the denial of a motion to revise "unless there is a grave reason for doing so." *Hossainkhail v. Gebrehiwot*, 143 Md. App. 716, 724 (2002). And, as previously mentioned, because "a trial judge is presumed to know the law, the judge is not required to set out in detail each and every step of his [or her] thought process." *Thomas v. City of Annapolis*, 113 Md. App. 440, 450 (1997).

Although Jones made no argument based upon Rule 2-535(b) in his initial brief, he asserts in his reply brief that his motion to vacate was filed under Rule 2-535(b), seeking relief from an irregularity, namely, the failure to apply the notice requirements of Rule 2-613. Rule 2-535(b) provides: "On motion of any party filed at any time, the court may exercise revisory power and control over the judgment in case of fraud, mistake, or irregularity." But the Court of Appeals has held: "The terms 'fraud, mistake, or irregularity' as used in Rule 2-535(b) . . . are narrowly defined and are to be strictly applied." *Early v. Early*, 338 Md. 639, 659 (1995). In addition, the Court of Appeals has held that, in order for the court to exercise its revisory power under Rule 2-535(b), there must be not only clear and convincing evidence of "fraud, mistake, or irregularity," but also good faith and due diligence on the part of the movant, as well as a meritorious defense:

> **A court, however, will only exercise its revisory powers if, in addition to a finding of** fraud, mistake, or **irregularity,** or failure of an employee of the court or of the clerk's office to perform a duty required by statute or rule, **the party moving to set aside the enrolled judgment has acted with ordinary diligence, in good faith, and has a meritorious defense or cause of action.** Moreover, it is well established that there must

> be clear and convincing evidence of the fraud, mistake, or irregularity before a movant is entitled to have a judgment vacated under Rule 2-535(b).

Tandra S. v. Tyrone W., 336 Md. 303, 314 (1994) (internal citations omitted) (superseded by statute on other grounds) (emphasis added).

In *Peay v. Barnett*, 236 Md. App. 306, 315-16 (2018), we summarized the standard of review applicable to rulings on motions to revise a judgment pursuant to Rule 2-535(b) as follows:

> Typically, 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. *See* Rule 2–535(b); *Wells v. Wells*, 168 Md. App. 382, 394, 896 A.2d 1082 (2006) ("The existence of a factual predicate of fraud, mistake, or irregularity, necessary to support vacating a judgment under Rule 2–535(b), is a question of law. **If the factual predicate exists, the court's decision on the motion is reviewed for abuse of discretion**.") (Citation omitted).

(Emphasis added; footnotes omitted.)

DISCUSSION

Jones first asserts that, "when the defendant fails to plead or otherwise respond to the complaint, the plaintiff must seek an order of default[.]" Jones contends therefore that, because AHI did not seek an order of default, the circuit court "lacked legal authority to proceed to a trial and enter *judgment* against Jones." (Emphasis in original.) Next, Jones contends that the circuit court abused its discretion in denying the motion to vacate because "the court failed to cite reasons for its decision[.]" Shifting gears somewhat in his reply brief, Jones adds an argument that "the failure to comply with the

procedural requirements of Rule 2-613 represents an irregularity that warrants relief under Rule 2-535(b)."

We are not persuaded that the circuit court abused its discretion in denying Jones's motion to vacate the judgment. The argument upon which Jones places principal reliance on appeal is his argument that the process described in Rule 2-613 for addressing a defendant's failure to respond to a summons is mandatory. He cites *Armiger Volunteer Fire Co., Inc. v. Woomer*, 123 Md. App. 580 (1998), in which this Court said: "The language of Md. Rule 2–613(f) makes plain that a trial court may enter a judgment by default if and only if it is satisfied that the notice of order of default required by Md. Rule 2–613(c) was *mailed*." *Id*. at 589-90. But this argument was *not* made in the circuit court in Jones's motion to vacate. As the Court of Appeals said in another context, "[t]here is, as yet, no requirement that trial judges be clairvoyant." *Tibbs v. State*, 72 Md. App. 239, 247 (1987). A trial judge considering a motion to vacate a judgment does not commit an abuse of discretion by failing to be persuaded by an argument the party did not articulate. In *Sifrit v. State*, 383 Md. 116, 136 (2004), the Court of Appeals explained that trial judges are not expected to imagine "offshoots of the argument actually presented":

> Arguably, the theory now advanced by [the defendant] is simply a more detailed version of the one advanced at trial. To accept this argument, however, we would have to require trial courts to imagine all reasonable offshoots of the argument actually presented to them before making a ruling on admissibility. We decline to place such a substantial burden on the trial court. Based on the argument presented during trial to support the admission of Elizabeth Sifrit's testimony, we conclude that the trial court did not err in excluding the testimony.

And Jones did not file a timely appeal from the judgment entered on October 9, 2018. His appeal is timely only with respect to the denial of his motion to vacate. Jones did not argue, either in the circuit court or in his opening brief in this court, that the circuit court should have vacated the October 9 judgment pursuant to Rule 2-535(b) based upon an irregularity in the court's failure to require the default notices prescribed by Rule 2-613.

Of equal importance, as the quoted excerpt from *Tandra S.* above makes plain, a party seeking to vacate a judgment pursuant to Rule 2-535(b) must—*in addition to* demonstrating an irregularity—show that the party has a "meritorious defense." 336 Md. at 314. Jones merely made a conclusory claim of a meritorious defense, and did not support his motion with an affidavit as required by Rule 2-311(d) substantiating his claim of a meritorious defense. In *Scully v. Tauber*, 138 Md. App. 423, 431 (2001), this Court held that facts set forth in a motion that does not comply with Maryland Rule 2-311(d) are not "appropriately before the court." We stated: "The motions court had no right to consider any 'fact' set forth by appellee in his opposition due to appellee's failure to comply with Rule 2-311(d)." *Id.*

Given the fact that Jones's motion to vacate did not articulate an argument that the court erred by failing to provide notices required by Rule 2-613, and the fact that his motion was not supported by an affidavit demonstrating that he had a meritorious defense, we conclude that the trial judge did not abuse her discretion in denying the motion.

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