Circuit Court for Montgomery County
Case No. 426962-V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0265

September Term, 2017

ARNOLD SUSSMAN

v.

DIAMONDHEAD CASINO CORPORATION

Nazarian,
Arthur,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: October 19, 2018

Diamondhead Casino Corporation obtained a judgment against appellant Arnold Sussman and others in the United States Bankruptcy Court for the District of Delaware. In accordance with the Uniform Enforcement of Foreign Judgments Act ("UEFJA"), Md. Code (1974, 2013 Repl. Vol.), §§ 11-801 to -807 of the Courts and Judicial Proceedings Article ("CJP"), Diamondhead filed the Delaware judgment in the Circuit Court for Montgomery County.

Sussman moved to reopen and vacate the judgment under CJP § 11-802(b) and to stay the enforcement of the judgment under CJP § 11-804(b). The trial court denied the motion to reopen and vacate the judgment, except to the extent that the judgment had been paid by Sussman's fellow judgment-debtors. The court granted Sussman's motion to stay the enforcement of the judgment upon the posting of a bond in the approximate amount of the remaining principal due under the judgment.

Sussman appealed. We affirm.

BACKGROUND

Sussman is a shareholder and creditor of Diamondhead. For several years, he and other Diamondhead shareholders have been involved in a battle against the management of the corporation.

In February 2015 Sussman and his allies launched an unsuccessful proxy battle to remove and replace the corporation's directors. *See In re Diamondhead Casino Corp.*, 2016 WL 3284674, at *4 (Bankr. D. Del. June 7, 2016). Shortly after they lost the proxy battle, Sussman and his allies filed a petition to force Diamondhead into an involuntary bankruptcy proceeding under Title 7 of the United States Bankruptcy Code. "[T]hese

petitioning creditors moved for the appointment of a chapter 7 trustee" (*In re Diamondhead Casino Corp.*, 2016 WL 3284674, at *1), who would take the place of the corporation's management.

On June 7, 2016, the bankruptcy court filed a 46-page opinion in which it concluded that Sussman and the other shareholders had filed the involuntary petition in bad faith. *Id*. at *22. The court based that conclusion on its finding that the "primary concern in filing the involuntary petition was to effect a change in management to benefit their investments as stockholders[,]" which is not "a proper purpose for filing an involuntary bankruptcy petition." *Id.*[1] Accordingly, the bankruptcy court dismissed the bankruptcy case. *Id.* at *23.

Under 11 U.S.C. § 303(i)(1), if a bankruptcy court dismisses an involuntary petition, it may award costs or a reasonable attorney's fee. Pursuant to that statute, the Delaware bankruptcy court entered a judgment in favor of Diamondhead and against Sussman and five other creditors, jointly and severally, in the amount of $56,886.13. In accordance with well-established principles of federal bankruptcy law, the judgment, which was filed on September 1, 2016, expressly stated that the amounts set forth therein, and the payment thereof, "are not subject to any claim of setoff." Sussman did not appeal the bankruptcy court's decision.

On November 11, 2016, Diamondhead filed the Delaware bankruptcy court judgment in the Circuit Court for Montgomery County. Sussman responded by moving

[1] Sussman admitted to filing the petition in part because he had no faith in management.

to reopen and vacate the judgment. He argued that Diamondhead had committed fraud by failing to disclose payments that it had received on the judgment, that he was entitled to a defense of setoff in the amount that he had lent to Diamondhead in connection with a promissory note, and that it was unfair for Diamondhead to collect the entire judgment from him.

The court denied the motion, except to the extent that others had paid any portion of the judgment. The court stayed the enforcement of the judgment upon the posting of a cash bond of $36,000, the principal amount that remained unpaid as of the date of the ruling.

QUESTIONS PRESENTED

Sussman presents the following questions, which we have consolidated and rephrased for clarity:

1. Did the trial court err in refusing to allow a setoff against the judgment in the amount of an unsecured promissory note?

2. Did the trial court err in not reopening and revising the foreign judgment under Rule 2-535 because of claims of fraud, irregularity, or mistake?

3. Did the trial court err in refusing to reopen and revise or vacate the judgment because of a failure to marshal assets?

4. Did the trial court err in refusing to grant a stay upon the posting of a $50,000 promissory note as collateral for security?[2]

[2] Sussman formulated the questions as follows:

1. Did the trial court err by applying language in the Delaware foreign judgment that judgment debtors (including Appellant) could not apply set off, where Maryland law permits Maryland judgment defendants set off?

For the reasons discussed below, we affirm the judgment.

ANALYSIS

I. The Uniform Enforcement of Foreign Judgments Act

Article IV, section 1, of the United States Constitution provides, in relevant part, that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." Under the Full Faith and Credit Clause, a judgment from another state is, except in very limited circumstances, entitled to enforcement in this or any other state.

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2. Are Maryland courts required to refuse their judgment debtors the defense of "set off" if a foreign judgment provides that a judgment shall not be subject to set off?
3. Is the defense of "set off" a defense to the "enforcement" of a judgment or to the "existence" of a judgment?
4. Is marshalling of assets a defense to the "enforcement" of a judgment or to the "existence" of a judgment?
5. May a Maryland judgment debtor obtain discovery to determine the amount of set off which he is entitled?
6. Is a Maryland judgment debtor who posts adequate collateral entitled to a stay to determine the amount of set off to which he is entitled?
7. May a Maryland judgment debtor obtain discovery to determine the amount of credit for payment to which he is entitled?
8. Is a Maryland judgment debtor who posts adequate collateral entitled to a stay to determine the amount of credit for payment to which he is entitled?
9. May a Maryland judgment debtor obtain discovery to determine the amount of marshalling of assets to which he is entitled?
10. Is a Maryland judgment debtor who posts adequate collateral entitled to a stay to determine the amount of marshalling of assets to which he is entitled?

A number of Sussman's questions concern his entitlement to post-judgment discovery. We decline to consider those questions, because his brief contains no argument in support of his position. *See, e.g.*, *Abbott v. State*, 190 Md. App. 595, 631 n.14 (2010).

The UEFJA sets forth the mechanism for obtaining full faith and credit of a foreign judgment. The statute applies to the judgments of state and federal courts alike. *See* CJP § 11-801 (defining the term "foreign judgment" to mean "a judgment, decree, or order of a court of the United States or of any other court that is entitled to full faith and credit in this State").

Under the UEFJA, a judgment creditor may file an authenticated copy of the foreign judgment with the circuit court, as Diamondhead did in this case. CJP § 11–802(a). If properly authenticated and filed, a copy of the foreign judgment "has the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating, staying, enforcing, or satisfying as a judgment of the court in which it is filed." CJP § 11–802(b).

The UEFJA "'was not intended to alter any substantive rights or defenses which would otherwise be available to a judgment creditor or judgment debtor in an action for an enforcement of a foreign judgment.'" *Mike Smith Pontiac, GMC, Inc. v. Mercedes-Benz of North America, Inc.*, 356 Md. 542, 555 (1999) (quoting *Guinness PLC v. Ward*, 955 F.2d 875, 892 (4th Cir. 1992)). The defenses to a foreign judgment consist of defenses to the validity of a judgment and defenses to the enforcement of a judgment. *Mike Smith Pontiac*, 356 Md. at 561.

Defenses to the validity of a judgment involve whether the judgment is entitled to full faith and credit. *See id*. (citing *Concannon v. Hampton*, 584 P.2d 218, 221 (1978)). The validity of the judgment depends principally on whether the foreign court lacked jurisdiction, and whether the jurisdictional question was "'fully and fairly litigated and

finally decided[.]'" *See Legum v. Brown*, 395 Md. 135, 147 (2006) (quoting *Durfee v. Duke*, 375 U.S. 106, 111 (1963)). "'[A] foreign judgment cannot be collaterally attacked on the merits.'" *Osteoimplant Tech., Inc. v. Rathe Prods., Inc.*, 107 Md. App. 114, 119 (1995) (quoting *Matson v. Matson*, 333 N.W.2d 862, 867 (Minn. 1983)).

Defenses to enforcement include full or partial payment (*Mike Smith Pontiac*, 356 Md. at 562), settlement or accord and satisfaction (*see Guinness PLC v. Ward*, 955 F.2d at 889), and the prohibition on executing against the assets of a spendthrift trust. *See Bauernschmidt v. Safe Deposit & Trust Co.*, 176 Md. 351, 355 (1939). Presumably, they include the other statutory exemptions from execution that are enumerated in CJP § 11-504. We assume that they also include the grounds for setting aside an enrolled judgment under Md. Rule 2-535(b): clear and convincing evidence[3] of fraud, mistake, or irregularity, as those terms are "'narrowly defined and strictly applied'" in the case law. *Pelletier v. Burson*, 213 Md. App. 284, 290 (2013) (quoting *Thacker v. Hale*, 146 Md. App. 203, 217 (2002)); *accord DOCRX, Inc. v. EMI Servs. of North Carolina, LLC*, 758 S.E.2d 390, 397 (N.C. 2014) (stating that, under the UEFJA, defenses to enforcement are limited to those "such as" the defenses "that the judgment creditor committed extrinsic fraud, that the rendering state lacked personal or subject matter jurisdiction, that the judgment has been paid, that the parties have entered into an accord and satisfaction, that the judgment debtor's property is exempt from execution, that the judgment is subject to

[3] *See, e.g., Powell v. Breslin*, 430 Md. 52, 70 (2013); *Pelletier v. Burson*, 213 Md. App. 284, 290 (2013); *Davis v. Attorney General*, 187 Md. App. 110, 123-24 (2009).

continued modification, or that the judgment debtor's due process rights have been violated").

II. Setoff

Sussman argues that he is entitled to a setoff against the Delaware judgment because Diamondhead owes him $50,000 on an unsecured promissory note. Sussman challenges the portion of the judgment that decrees that his payment obligation is not subject to any claim of setoff.

Citing *Mike Smith Pontiac*, Sussman claims that he is challenging the enforcement, not the validity, of the Delaware judgment. Sussman claims that under *Mike Smith Pontiac* he is entitled to set off the amount of Diamondhead's unliquidated, unsecured debt to him against the amount of the judgment. Diamondhead responds that Sussman is attempting to relitigate the merits of the Delaware case or to use this case as the appeal that he did not take.

Assuming for the sake of argument that setoff might be a defense to the enforcement of a judgment in some cases, it is not a defense in this case. Here, the bankruptcy court expressly decreed that Sussman's obligation under the judgment was "not subject to any claim of setoff." The bankruptcy court did so in order to effectuate the policies underlying the United States Bankruptcy Code: if a person causes a company to suffer damages by filing a bad faith petition to force it into an involuntary bankruptcy, he should not be able to avoid his statutory liability for those damages by holding up an obligation that, he claims, the company owes to him. Otherwise, there would be little to deter a creditor from filing a bad-faith petition. *See In re Macke Int'l Trade, Inc.*, 370

B.R. 236, 255 (9th Cir. 2007); *U.S. Bank, Nat'l Ass'n v. Rosenberg*, 581 B.R. 424, 429 (E.D. Pa.), *aff'd*, ___ Fed. Appx. ___, 2018 WL 3640987 (3d Cir. 2018); *In re Diloreto*, 442 B.R. 373, 377 (E.D. Pa. 2010); *In re Schiliro*, 72 B.R. 147, 150 (Bankr. E.D. Pa. 1987).

Sussman's attack is not on the enforcement of the judgment, but on the merits of the judgment. On the merits, the bankruptcy court's order does not merely obligate Sussman to pay a sum of money to Diamondhead; it also prohibits him from raising the defense of setoff. Sussman had the opportunity to challenge that prohibition in the bankruptcy court, but he either failed to challenge it or failed to persuade the court of the merits of his challenge. Sussman also had the opportunity to challenge the order on appeal, but he failed to pursue that option as well. He may not defend against the judgment on grounds that "'could have been presented in the action in which the judgment was rendered.'" *Osteoimplant Tech., Inc. v. Rathe Prods., Inc.*, 107 Md. App. at 121 (quoting *Thompson v. Safeway Enters., Inc.*, 385 N.E.2d 702, 705 (Ill. App. Ct. 1979)).

The Delaware court specifically prohibited the use of setoff, and any attack on that prohibition should have been raised in Delaware, as it is now barred by the doctrine of res judicata. The circuit court correctly precluded Sussman from raising a claim of setoff to collaterally attack a judgment that expressly prohibits him from raising such a claim.[4]

[4] Sussman correctly observes that a defendant may use the defense of setoff to open a confessed judgment. He fails to recognize, however, that a confessed judgment is an interlocutory order that is entered on an ex parte basis (*see* Md. Rule 2-611(b)) and is freely stricken out upon a showing of any meritorious defense. *See, e.g., Schlossberg v.*

III. Fraud, Mistake, or Irregularity

Maryland Rule 2-535(b) states the trial court's revisory power over enrolled judgments:

> 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.

At various points, Sussman has argued that the trial court erred in not revising the judgment under Rule 2-535 because of fraud or irregularity. In support of that argument, Sussman asserted that Diamondhead failed to disclose payments that it had received from his co-obligors, in partial satisfaction of the judgment.

It is doubtful whether the alleged nondisclosure would amount to fraud or irregularity, within the meaning of Rule 2-535(b). "Fraud" means "extrinsic fraud" of the type that prevents an adversarial trial (*see*, *e.g.*, *Pelletier v. Burson*, 213 Md. App. at 290-91), for example, by bribing the judge or paying opposing counsel to throw the client's case. "Irregularity" typically involves "a failure to provide required notice to a party[.]" *Mercy Med. Ctr., Inc. v. United Healthcare of the Mid-Atlantic, Inc.*, 149 Md. App. 336, 375-76 (2003). Sussman has made no effort to explain how the alleged nondisclosure satisfies the narrow definitions of those terms, as they are used in Rule 2-535(b). *See Pelletier v. Burson*, 213 Md. App. at 290.

Citizens Bank of Maryland, 341 Md. 650, 655 (1996). A confessed judgment differs markedly from a final judgment on the merits that is entered after a full and fair opportunity for litigation, such as the judgment in this case.

But even if he had, the circuit court would not have erred in declining to vacate or reopen the judgment in the circumstances of this case. Diamondhead explained that it did not receive the payments from the other judgment-debtors until after it had filed the Delaware judgment in Montgomery County, so its original filing was not false or irregular in any way. Furthermore, Diamondhead disclaimed any entitlement to any portion of the judgment that Sussman's co-obligors had paid. Finally, the circuit court relieved Sussman of any obligation to pay any portion of the judgment that had been paid, or that even had been agreed to be paid.

In substance, if not in form, Sussman's claims of fraud and irregularity were an assertion of partial payment as a defense to enforcement, which it was proper for him to do. *See Mike Smith Pontiac*, 356 Md. at 563 (citing *Coane v. Girard Trust Co*., 182 Md. 577, 583 (1944)). The court granted him all of the relief to which he was entitled, and possibly more. Sussman has no right to any additional relief.

IV. Marshaling Assets

Sussman avers that it is "neither fair nor reasonable" that Diamondhead should seek the collection of the judgment "entirely" from him.[5] He appears to contend that a Maryland court can and should compel Diamondhead to collect the judgment from unpaid distributions that it allegedly owes to some of his co-obligors. He claims to find support in *Phillips v. Cook*, 239 Md. 215 (1965), which he cites for the proposition that

[5] Of course, Diamondhead has not attempted to collect the judgment "entirely" from Sussman: it has received payments from others, and Sussman has received a credit for those payments.

"[t]he equitable concept of marshalling of assets is a principle of Maryland law." He argues that "[m]arshalling of assets is an equitable defense to the enforcement of a judgment."

Contrary to Sussman's assertions, *Phillips v. Cook* has nothing to do with marshalling assets – in fact, the term "marshalling assets" does not even appear in the opinion. The case principally concerns whether there was sufficient evidence to establish that a partner was engaged in the partnership's business when he crashed a partnership vehicle into the plaintiffs' vehicle. *Id*. at 219-22. The case also concerns a plaintiff's right "to proceed against the members of the partnership as individuals as well as co-partners" once they have established that a partner caused them to suffer tortious injury while he was engaged in the partnership's business. *See id*. at 224. *Phillips v. Cook* does not say a word about foreign judgments, and it certainly does not require a judgment-creditor (under either a foreign or a domestic judgment) to satisfy the judgment out of assets in its possession or control before attempting to collect against a judgment-debtor's personal assets.

Sussman's "marshalling assets" argument appears to be a variant of his setoff argument. Instead of arguing that Diamondhead must reduce the judgment against him by the principal amount of his note, he argues that Diamondhead must reduce the judgment against him by the amount of any unpaid distributions that it allegedly owes to

him or others. The argument has even less merit than the setoff argument that the circuit court correctly rejected. [6]

V. Stay Based on Promissory Note as Security

The circuit court stayed the enforcement of the judgment against Sussman on the condition that he post a cash bond of $36,000, an amount that approximated the principal amount of the judgment at the time of the decision. Sussman complains that the circuit court should have allowed him to stay the judgment by "post[ing]" his $50,000 promissory note, or perhaps his Diamondhead shares.

Sussman cites no authority as to why he was entitled to a stay after "posting" the note or the shares. Although he mentions the concept of "collateral," he does not elaborate on what the "posting" would entail – *e.g.*, does he mean that he would pledge the note or the shares to Diamondhead and that the company would take possession of them during the pendency of the stay? In fact, his argument consists of only two sentences – one in which he refers to his willingness "to post" the note, and a second in

[6] Although Sussman does not cite the governing cases on the subject, Maryland does recognize "[t]he equitable doctrine of marshaling," which "rests upon the principle that a creditor having two funds to satisfy his debt may not by his application of them to his demand defeat another creditor who can resort to only one of the funds." *In re Careful Laundry*, 204 Md. 360, 374 (1954); *see Kuechler v. Peoples Bank*, 602 F. Supp. 2d 625, 631 (D. Md. 2009) ("marshaling of assets is an equitable doctrine applicable in a situation in which multiple creditors have claims to the property of one debtor"); *In re R.L. Kelly and Sons*, 125 B.R. 945, 954 (Bankr. D. Md. 1991) ("[t]he doctrine of marshalling allows a court in equity, including a bankruptcy court, to require a creditor who has two funds as collateral from a common debtor to resort first to the fund which will not defeat a secured creditor with a junior position"). By its terms, the equitable doctrine of marshalling applies only in cases involving two or more creditors, and only to prevent a senior creditor from prejudicing junior creditors. Because this case involves a single creditor, the doctrine obviously does not apply here.

which he mentions the possibility of "posting" his Diamondhead shares. *But see* Md. Rule 8-504(b)(6) (requiring that a brief contain "[a]rgument in support of the party's position on each issue").

Diamondhead counters that if the court had granted Sussman a stay on the condition that he "post" the promissory note, it would have allowed him to do exactly what the bankruptcy court prohibited: avoid the consequences of his bad-faith filing by setting off the principal amount of his note against the judgment. In addition, Diamondhead argues that because its common stock was trading at only $.07 a share, Sussman's 35,000 shares of common stock would have a value of only $2,460, which would not afford adequate security against a $36,000 judgment.

Although a court may accept security other than surety on a bond (*see* Md. Rule 1-402(e)), "the inherent power of trial and appellate courts to fix the terms and conditions for the stay of execution of judgments has not been circumscribed by rule or statute so as to limit the discretion of the court to modify the penalty of a supersedeas bond required for the stay of execution of a money judgment." *O'Donnell v. McGann*, 310 Md. 342, 345 (1987). Sussman does not explain how the trial court abused its discretion in determining that the proper type and amount of security was a cash bond of $36,000, and not the "posting" of the promissory note, as he proposed. Furthermore, in view of Diamondhead's cogent criticisms of Sussman's proposal, the court's exercise of discretion seems perfectly sound. For those reasons, we have no basis to conclude that the court abused its discretion in staying enforcement on the condition that Sussman post a bond.

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