Circuit Court for Anne Arundel County
Case No. C-02-CV-16-001278

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 404

September Term, 2017

DAVID MYERS, *et al.*

V.

ANNE ARUNDEL COUNTY, *et al.*

Nazarian,
Shaw Geter,
Davis, Arrie W.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Shaw Geter, J.

Filed: April 18, 2018

In 2015, Anne Arundel County (the "County") filed, in the District Court for Anne Arundel County, a complaint against David Myers, Ekaterina Myers, and Mildred Myers (collectively the "Myers") seeking injunctive and other relief regarding the removal of vegetation on or near the Myers' property. While that case was pending, the Myers filed, in the Circuit Court for Anne Arundel County, a "counterclaim" for monetary damages and other relief against the County and several additional parties, namely, Bay Area Tree Care, Inc. ("Bay Area") and Richard E. Shortridge, Sr., Richard E. Shortridge, Jr., and David B. Shortridge (collectively the "Shortridges"). The County thereafter filed a motion to dismiss the Myers' counterclaim, and, following a hearing, the County's motion was granted. In this appeal, the Myers present the following questions for our review, which we rephrase and condense for clarity:

1. Did the circuit court err in denying the Myers their requested relief even though Bay Area and the Shortridges failed to respond to the Myers' counterclaim and failed to attend a pretrial conference?

2. Did the circuit court err in dismissing the Myers' counterclaim even though Bay Area did not request that the counterclaim be dismissed?

3. Did the circuit court err in denying the Myers' request for summary judgment?

4. Did the circuit court err in denying the Myers the right to join Bay Area as named-defendants in their counterclaim?

5. Did the circuit court err in not striking the County's motion to dismiss even though the motion lacked a valid certificate of service?

6. Did the circuit court err in dismissing the Myers' counterclaim on the grounds of governmental immunity?

For reasons to follow, we remand.

BACKGROUND

On November 19, 2015, the County instituted a civil action against the Myers in the District Court for Anne Arundel County. In its complaint, the County alleged that the Myers had submitted a "Standard Vegetation Management Plan," requesting permission to remove four trees on the Myers' property and that the County had approved the Plan but limited the proposed removal to only one tree. The County further alleged that, following its limited approval of the Myers' Vegetation Management Plan, it received information that four trees, not one, had been removed from the Myers' property in violation of the Anne Arundel County Code. The County ultimately requested, among other things, that the district court order the Myers to "abate the violation" and to comply with the directives of the County, which included replanting the trees that had not been approved for removal.

The Myers responded by filing a notice of intention to defend. Then, on December 15, 2015, the Myers filed a motion requesting that the proceedings be stayed so that they could file a counterclaim in circuit court that exceeded the jurisdictional limitations of the district court. On December 29, 2015, the district court ordered that a hearing be held on the Myers' motion to stay.

That same day, the Myers filed, in the circuit court, a "counterclaim" against the County, Bay Area, and the Shortridges, thus commencing the civil action from which the instant appeal arises. In their counterclaim, the Myers raised a number of factual allegations and legal arguments, many of which are not pertinent to the instant appeal. In summary, the Myers alleged that they had contracted with Bay Area (and its owners, the

Shortridges) to perform the work outlined in the County's revised Vegetation Management Plan, which called for the removal of one tree on the Myers' property. The Myers further alleged that, unbeknownst to them, Bay Area entered their property and mistakenly removed four trees. According to the Myers, that action set in motion a chain of events that resulted in the Myers suffering various harms and damages at the hands of both the County and Bay Area.

Specifically, the Myers' counterclaim raised five "counts." The first count, titled "Improper, Uneven Application of the Laws," alleged that the County improperly undertook various enforcement actions and demands following the removal of the trees by Bay Area. The second count, titled "Making a Defamatory Statement in Writing to a Third Person," alleged that the County, in its district court complaint, made allegations of fact that it knew were false. The third count, titled "Making a False Statement Under Penalty of Perjury," alleged that the County filed a sworn affidavit that included one or more false statements. The fourth count, titled "Making a False Statement to Cause an Investigation or Other Action to be Taken as a Result of the Statement," alleged that an "agent of the County" made one or more false assertions that were "essential to agent's justification under the law for the entirety of all the subsequent actions he and the County have undertaken since January 7, 2015." The fifth count, titled "Breach of Contract by the Company and Other Offenses," alleged that Bay Area violated its contract with the Myers when it removed the four trees and that the County undertook the district court action against the Myers knowing full-well that Bay Area was responsible.

Following the filing of their counterclaim in circuit court, but before the district court held its hearing on their motion to stay, the Myers, on January 6, 2016, informed the district court that they intended to remove the case to the United States District Court. The United States District Court for the District of Maryland eventually received the case but, on March 9, 2016, remanded the case to the district court because the federal court lacked jurisdiction. Recognizing that it had not ruled on the Myers' prior motion to stay, the district court, on April 13, 2016, stayed the case "30 days to allow [the Myers] to file in Circuit Court" and ordered that the case would be stayed "upon receiving proof of Circuit Court filing." Over the next few months, the Myers did not file anything in the district court action. Then, on September 22, 2016, the County filed, in the district court, a motion to lift the stay.

Meanwhile, on June 22, 2016, the County was served with a copy of the Myers' counterclaim and a summons from the circuit court, and the County filed an answer to the Myers' counterclaim on July 19, 2016. For reasons not entirely clear from the record, Bay Area and the Shortridges were not served until September 19, 2016. In lieu of an answer and pursuant to Maryland Rule 2-332(b), Bay Area and the Shortridges filed a motion to dismiss the Myers' counterclaim. On September 21, 2016, the Myers filed an amended countercomplaint, and, on October 12, 2016, the County responded by filing a motion to dismiss and/or a motion for summary judgment. On December 6, 2016, the circuit court ordered that a hearing be set on both motions.

In that time, the district court had granted, on November 10, 2016, the Myers' motion to stay the proceedings. Apparently, dissatisfied with the court's ruling, the Myers

filed a motion to alter or amend the judgment, which the court denied on January 11, 2017. The Myers then noted an appeal to the circuit court, and, on February 10, 2017, the case was transferred to the Myers' then-existing circuit court action (from which the instant appeal arises).

Meanwhile, the parties to the circuit court action had been scheduled to attend a pretrial conference on January 4, 2017, but that conference was stayed by the circuit court pending the outcome of the County's and Bay Area/the Shortridges' motions to dismiss, which were scheduled to be heard on February 21, 2017. Just prior to that hearing, however, Bay Area and the Shortridges, on February 16, 2017, filed a line withdrawing their motion to dismiss. Nevertheless, Bay Area and the Shortridges, by way of counsel, were present at and participated in the hearing on February 21.

At that hearing, the County argued that the Myers' counterclaim should be dismissed because there was no underlying circuit court claim to which the Myers could assert a counterclaim in circuit court. The County also argued, in the alternative, that the court should grant summary judgment, on all counts, based on governmental immunity. As for Bay Area and the Shortridges, counsel did not make any additional argument but instead concurred with "the County's assessments as far as [the Myers'] ability to file [a] counterclaim here in circuit court."

The Myers responded that, because the counterclaim alleged damages in excess of $30,000.00, Maryland Rule 3-331 required that the counterclaim be filed in circuit court. The Myers also argued that the County's motion to dismiss was untimely and did not include a valid certificate of service. Finally, the Myers argued that governmental

immunity did not apply because the County was "not acting as a government entity" and "not enforcing its own laws properly."

Regarding the timeliness of the County's motion, the circuit court found:

> The County filed a motion to dismiss and/or summary judgment and while the motion to dismiss may not have actually been within the time period, the motion for summary judgment certainly was within the time period for mandatory motions and no motion to strike the motion to dismiss was ever filed. Therefore, it is properly before the Court.

Regarding the claims against Bay Area and the Shortridges, the circuit court found:

> So, first the amended countercomplaint must be dismissed because there is no underlying complaint in this case for which to attack jurisdiction. And second, as to Bay Area, and as to Shortridges, they are not part of the case in District Court. So, that is number one.
>
> Additionally, as to Bay Area and the Shortridges, the defamatory statement in writing was allegedly made by the County and, therefore, that claim is one for which relief cannot be granted against…the Shortridges and Bay Area and for the improper uneven application of the law, that also is against the County not against those other entities.
>
> And for making a false statement under penalty of perjury and making a false statement so as to cause an investigation, those are criminal charges which only the State's Attorney can bring.
>
> And as to the breach of contract, the breach of contract would need to be filed if there was, in fact, a breach against Bay Area in the District Court and that may or may not be a proper claim.
>
> * * *
>
> So, for all of those reasons the complaint must fail as to [the Shortridges] and as to Bay Area.

Regarding the claims against the County, the circuit court found:

> Now as for Anne Arundel County, Maryland, count one, if you read it, improper uneven application of the law, seems to be an equal protection

claim and almost an *ultra vires* claim that the County has acted outside of its powers.

Those would be defenses. If, in fact, there was to be a claim in those areas, it would have to be more in the nature of a civil rights type claim where constitutional allegations are made that the County has violated the Plaintiffs' rights by unconstitutional takings, et cetera.

And that is an entirely separate world. So, count one as pled fails to state a claim upon which relief can be granted.

Count two, count three, count four, and count five, have an additional flaw in that the County has immunity. And while individual County employees may be sued, the County as a governmental entity has governmental immunity. And that is in [Courts and Judicial Proceedings] Section 5-301.

* * *

Further, it is up to the State's Attorney to decide whether or not to bring perjury charges. So, three and four would fail. And the breach of contract, again, falls on the governmental immunity issue.

Plus, the counterclaim, which is alleged, is subject to be stricken here in the circuit court because there is no underlying claim.

* * *

So, for a couple of different reasons, number one, immunity; number two, there being no actual claim up here; number three, the failure to state a claim upon which relief can be granted in terms of only the State's Attorney can act; count one being more in the nature of a defense and not in an affirmative claim.

For all of those reasons, I am required to dismiss the case and grant the County the relief they have requested as well as Bay Area and the Shortridges.

On March 1, 2017, the circuit court entered judgment against the Myers. According to the court's docket entry, however, that judgment was entered "in favor of Anne Arundel County" and no mention was made of either Bay Area or the Shortridges. Moreover, the

court's written order, signed by the court on February 21, 2017 and entered in conjunction with the aforementioned docket entry, reflects an intention by the court to limit its judgment to the County only:

> UPON CONSIDERATION of Defendant Anne Arundel County, Maryland's (and all Defendants) Motion to Dismiss and/or for Summary Judgment and the record of this matter (and after a hearing on the matter on 2/21/17), it is thereupon by the Circuit Court for Anne Arundel County, Maryland, (for the reasons stated by the Court on the record,)
>
> ORDERED, that the Defendant Anne Arundel County, Maryland's Motion to Dismiss is hereby, granted, and it is further
>
> ORDERED, that this matter is dismissed as to Defendant Anne Arundel County, Maryland, (and it is further)
>
> ORDERED, that judgment in favor of Anne Arundel County, Maryland and against the Plaintiffs be, and is hereby, entered, and it is further
>
> ORDERED, that costs are assessed against the Plaintiffs.

On March 23, 2017, the Myers filed a motion for reconsideration of the circuit court's judgment. In that motion, the Myers challenged, among other things, the court's oral rulings regarding Bay Area and the Shortridges, despite the fact that those rulings were not included as part of the court's enrolled judgment. The court ultimately denied the Myers' motion without a hearing or an explanation. On April 5, 2017, Bay Area and the Shortridges filed an answer to the Myers' amended counterclaim, along with several discovery requests. The case stalled, however, when the Myers filed the instant appeal.

Then, on December 12, 2017, the Myers filed, in the circuit court, an original complaint against Bay Area and the Shortridges, in which the Myers raised claims nearly identical to those raised in their counterclaim. Bay Area and the Shortridges subsequently

requested that the case be stayed pending the outcome of the instant appeal. The court denied that motion and ordered that the case proceed in the normal course. As of March 9, 2018, that case remained active.

DISCUSSION

We begin by noting that, except in very limited circumstances not applicable here, "[t]he right of appeal exists from a final judgment entered by a court[.]" Md. Code, Cts. & Jud. Proc. § 12-301. "The requirement that a party appeal from only a final judgment is a jurisdictional requirement." *Baltimore Home Alliance, LLC v. Geesing*, 218 Md. App. 375, 381 (2014) (citations omitted). "Because the absence of a final judgment may deprive a court of appellate jurisdiction, we can raise the issue of finality on our own motion." *Zilichikhis v. Montgomery County*, 223 Md. App. 158, 172 (2015), *cert. denied* 444 Md. 641. "And, '[w]here appellate jurisdiction is lacking, the appellate court will dismiss the appeal on its own motion.'" *Monarch Academy Baltimore Campus, Inc. v. Baltimore City Board of School Commissioners*, 457 Md. 1, 41 (2017) (citations omitted).

"A judgment is 'final' if it 'disposes of all claims against all parties and concludes the case.'" *Matter of Donald Edwin Williams Revocable Trust*, 234 Md. App. 472, 490 (2017) (citations omitted). A final judgment has three requirements:

> (1) it must be intended by the court as an unqualified, final disposition of the matter in controversy, (2) unless the court properly acts pursuant to Md. Rule 2-602(b), it must adjudicate or complete the adjudication of all claims against all parties, and (3) the clerk must make a proper record of it in accordance with Md. Rule 2-601.

Carr v. Lee, 135 Md. App. 213, 222 (2000) (citations and footnote omitted).

The requirement that a final judgment must dispose of all claims against all parties is reflected in Maryland Rule 2-602, which states:

> **(a) Generally.** Except as provided in section (b) of this Rule, an order or other form of decision, however designated, that adjudicates fewer than all of the claims in an action (whether raised by original claim, counterclaim, cross-claim, or third-party claim), or that adjudicates less than an entire claim, or that adjudicates the rights and liabilities of fewer than all the parties to the action:
>
> (1) is not a final judgment;
>
> (2) does not terminate the action as to any of the claims or any of the parties; and
>
> (3) is subject to revision at any time before the entry of a judgment that adjudicates all of the claims by and against all of the parties.

Importantly, "[t]here is no judgment merely because an oral opinion is rendered." *Renbaum v. Custom Holding, Inc.*, 386 Md. 28, 45 (2005) (citation omitted); *see also Fast Bearing Co. v. Precision Development Co.*, 185 Md. 288, 293 (1945) ("[T]he opinion is no part of the judgment."). Rather, "two acts must occur for an action by a court to be deemed the granting of a judgment: the court must render a final order and the order must be entered on the docket by the clerk." *Davis v. Davis*, 335 Md. 699, 710 (1994). Ultimately, "whether a judgment has been rendered in a particular case is an inquiry that must be made on a case-by-case basis and which focuses upon the actions and statements of the court." *Id.* at 711.

Here, it is unclear from the record whether the circuit court entered a final judgment as to all parties. Although the court announced on the record that the Myers' counterclaim should be dismissed as to the County, Bay Area, and the Shortridges, both the court's

written order and the clerk's docket entry indicated that the judgment was final as to the County only. Because the court's judgment was not "final" until docketed by the clerk, and because that docketing, along with the court's written order, granted judgment in favor of the County and made no mention of Bay Area or the Shortridges, we cannot say that the court's judgment was intended as an unqualified, final disposition of the matter in controversy.

To be sure, Maryland Rule 2-602(b) permits a court, in cases involving multiple parties, to enter a final judgment as to only one party. Under that Rule, "[i]f the court expressly determines in a written order that there is no just reason for delay, it may direct in the order the entry of a final judgment…as to one or more but fewer than all of the claims or parties." *Id.* Moreover, if, on appeal, "the appellate court determines that the order from which the appeal is taken was not a final judgment when the notice of appeal was filed but that the lower court had discretion to direct the entry of a final judgment pursuant to Rule 2-602(b)…[the appellate court may] enter a final judgment on its own initiative[.]" Maryland Rule 8-602(e)(1).

That said, the powers given to our courts by the aforementioned rules should be exercised infrequently and in the extreme:

> The discretionary power to direct entry of final judgment under Rule 2-602(b)(1) is to be used sparingly. Circumstances where an appellate court may certify an order are even more limited because not only is the appellate court limited to scenarios where the trial court could have certified the order, but the appellate court may not supersede the trial court's exercise of discretion where the trial court denies certification expressly. Courts that exercise discretion to certify a non-final judgment for appeal should balance the exigencies of the case before them with the policy against piecemeal

> appeals and then only allow a separate appeal in the very infrequent harsh case.

Waterkeeper Alliance, Inc. v. Maryland Dept. of Agriculture, 439 Md. 262, 287-88 (2014) (internal citations and quotations omitted).

In the present case, the court's written order did not include any reference to or discussion of the exigencies of the case or whether there was "no just reason for delay." Thus, even if the court intended to enter final judgment in favor of the County only, which it had every right to do, it failed to abide of the strictures of Rule 2-602(b). In similar instances, we have traditionally favored dismissal. *Smith v. Lead Indus. Ass'n, Inc.*, 386 Md. 12, 25 (2005) (citing *Canterbury Rid. Condo. v. Chesapeake Inv.*, 66 Md. App. 635 (1986)); *Allstate Ins. Co. v. Angeletti*, 71 Md. App. 210 (1987); *Carl Messenger Service v. Jones*, 72 Md. App. 1 (1987); *Tharp v. Disabled Vets.*, 121 Md. App. 548 (1998); *Murphy v. Steele*, 144 Md. App. 384 (2002)).

Nevertheless, outright dismissal is not our only option under Rule 8-602(e). If we determine that the court had discretion to direct the entry of final judgment but we do not wish to dismiss, we may, in the alternative, "remand the case for the lower court to decide whether to direct the entry of a final judgment[.]" Rule 8-602(e)(1). The Rule further provides:

> If, upon remand, the lower court decides not to direct entry of a final judgment pursuant to Rule 2-602(b), the lower court shall promptly notify the appellate court of its decision and the appellate court shall dismiss the appeal. If, upon remand, the lower court determines that there is no just reason for delay and directs the entry of a final judgment pursuant to Rule 2-602(b), the case shall be returned to the appellate court after entry of the judgment. The appellate court shall treat the notice of appeal as if filed on the date of entry of the judgment.

Md. Rule 8-602(e)(2).

We determine that the circuit court had the discretion to enter final judgment as to the County pursuant to Rule 2-602(b). Thus, we shall invoke our power under Rule 8-602(e)(1) and remand the case to the circuit court. If the court indeed meant to enter final judgment as to the County only, it shall, upon remand, make a determination that there is no just reason for delay and direct entry of a final judgment pursuant to Rule 2-602(b). At that time, the case will return to this Court for a decision on the merits. If, on the other hand, the court did not intend to enter a final judgment, it shall abide by the mandate of Rule 8-602(e)(2) and inform this Court of its decision, at which time we shall dismiss the appeal.

CASE REMANDED WITH INSTRUCTIONS. COSTS TO BE PAID BY ANNE ARUNDEL COUNTY.