Circuit Court for Montgomery County
Case No. 423919CV
Case No. 412696V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

Nos. 480 and 759

September Term, 2017

MADHABI SHETH, *et al.*

v.

SALEMA HORN

Eyler, Deborah S.
Leahy,
Wilner, Alan M.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wilner, J.

Filed: June 18, 2018

These two cases were filed separately – No. 759 by appellants and No. 480 by appellee. They were tried separately in the Circuit Court for Montgomery County but were argued together in this Court. Although not formally consolidated, there is a significant connection between them, and we have decided to deal with them in one Opinion, to avoid an unnecessary repetition of the procedural history and underlying facts.

As a preface, there are significant problems with the record extracts filed in these appeals. Appellee filed two motions to strike parts of the extract in No. 759 containing material that (1) is not in the trial record, and/or (2) deals with matters occurring before a settlement agreement and releases signed in May 2015 that resolved those matters, and/or (3) was not disclosed to counsel for appellee during the preparation of the record extract. The first motion was resolved by stipulation; the second we denied at oral argument but declared that we would not consider the material subject to the second motion – the last 53 pages of the extract (E 953-1011).

The problem with the extracts is not just one of wrongful *inclusion* of material in No. 759, however. As we shall note several times in this Opinion, documents that no doubt *are* in the voluminous records in these cases and that would have been helpful in understanding what occurred below have *not* been included in the record extracts. Unlike in *Eldwick Homes Ass'n v. Pitt*, 36 Md. App. 211 (1977), that has not left us unable to decide the appeals (although it has made our analysis more difficult), so we shall not dismiss the appeals, but, as the Court made clear in *Eldwick*, "we are not required to

ferret out from the record those materials which counsel should have printed in the abstract." *Id.* at 212.

COMMON BACKGROUND FACTS

Appellants (Mr. and Ms. Sheth) and appellee (Ms. Horn) owned and operated five day care centers. Disputes arose regarding the ownership and operation of those centers that led to litigation. On May 6, 2015, the parties reached a comprehensive settlement of the litigation and the underlying disputes that was implemented through a Settlement Agreement and Mutual General Release, an Acquisition Agreement, five Assignments, and two promissory notes.

The settlement documents called for appellants to become the sole owners of four of the centers and for appellee to become the sole owner of one. Because the value of the four centers to be transferred to appellants was acknowledged to be $120,000 greater than the one to be transferred to appellee, the parties agreed that, at Closing, appellants would pay appellee $60,000 in cash and execute two promissory notes payable to appellee, one for $37,800 and one for $22,200. The $37,800 note was payable in twelve monthly installments of $3,150; the other was payable in twelve monthly installments of $1,850. Both notes permitted acceleration of the outstanding balance in the event of a default.

The $37,800 note recited that it was "in consideration of the transfer to the undersigned [appellants] of certain membership rights and interests of [appellee] under [the] Acquisition of Membership Interests and Withdrawal Agreement of even date

herewith . . . as more fully set forth therein and incorporated herein by reference." The $22,200 note contained similar language except that the only obligor was Madhabi Sheth. Both notes required payment "without offset" and, with one exception, were interest-free. The exception was that, in the event of a default, the payee could collect interest at the rate of ten percent per annum accruing from the date of default and a late fee of five percent of the unpaid installment payment. Each note also contained a standard confession of judgment provision permitting the payee to confess judgment against the maker(s) in any Maryland court.

Two provisions in the Settlement Agreement are of particular importance. In paragraph 2 of that agreement, the appellants and appellee each gave the other a typical form of general release of all claims, damages, and liability of every kind, accrued or un-accrued, known or unknown, from the beginning of the world up to the date of the agreement, except obligations under the settlement documents. Paragraph 23 of the Settlement Agreement contained a confidentiality and non-disparagement provision. The parties agreed to keep in confidence the terms and conditions of the various documents they signed and all negotiations in connection therewith. In addition, they agreed not to make any statements, except under legal compulsion, or cause or encourage any others to do so, that defame, disparage, or criticize the personal or business reputation, practices, or conduct of the other, or of any entity in which the other party has an interest.

In December 2015, suspecting that appellee had been and was breaching the confidentiality and non-disparagement provisions in the Settlement Agreement,

appellants (1) filed suit against appellee for breach of contract, defamation, and other torts (No. 759), and (2) ceased payment on the promissory notes, which left an unpaid balance of $30,000. The latter action resulted in appellee sending the appellants a demand letter on August 2, 2016, and, when the default was not cured, filing a confessed judgment action to enforce the notes (No. 480). None of the pleadings in either case have been included in the record extracts.

Appellants responded to the confessed judgment action with motions to dismiss, for summary judgment, and to "merge" that action with the breach of contract action. After a hearing on October 24, 2016, the court denied the motions to dismiss and for summary judgment and concluded that appellants had not properly presented a basis for opening the confessed judgment and consolidating the two cases.

Two days later, appellants filed a second motion to open, modify, vacate, or consolidate. That motion was heard on December 28, 2016. During the course of the hearing, the judge discovered that no confessed judgment had ever been entered, so there was nothing at the moment to vacate. The problem seemed to be that appellee had neglected to file an affidavit with the confession of judgment. That defect was cured on September 6, 2016. The judge resolved that problem by entering the judgment by confession *nunc pro tunc* to September 6, 2016. The amount of the judgment was $30,000.

The court then took up the consolidation issue. Appellants' argument was that they expected to obtain a recovery in their breach of contract action, which was then scheduled for trial a few weeks hence, in January, and that they were entitled to set off

that expected recovery against their liability on the notes. Appellee disputed the claim to a setoff, arguing, as she does here, that the notes had no connection with any alleged breach of the confidentiality or non-disparagement provisions. The court "kicked that can down the road" by postponing any ruling on the request to vacate the confessed judgment until February, by which time there would be a ruling on whether, apart from appellee's argument, there was any basis for a setoff.

For reasons to be discussed below, trial in the breach of contract action, in which appellee had filed a counterclaim, did not occur in January, as was expected, but, over appellee's objection, was postponed to May 22, 2017. That became important when the hearing in the confessed judgment case resumed on February 1, 2017. The issue was largely confined to whether appellants had a right to set off against the promissory notes the prospect of a recovery in their breach of contract action. Their argument was that the Settlement Agreement, which contained the confidentiality and non-disparagement clauses, was part of the overall agreement from which the two notes arose, and thus there was an affinity to them. Appellee argued that the only consideration for the notes was the assignment of four of the day care centers to the appellants and that the breach of contract action, which focused on the confidentiality and non-disparagement provisions, had no connection whatever to their liability on the notes.

The court agreed with appellee's response, noting that "[t]here's nothing within the notes that make any mention of the non-disparagement clause" and that they "do not reference a settlement agreement or release." Rather, "the agreement itself involves the sale of the business and the confessed judgments were entered pursuant to that

agreement." On that basis, the court denied the motion to vacate. No. 480 is an appeal from that decision, which allowed the confessed judgments to stand.

Meanwhile, a number of complications arose in the breach of contract case, mostly as a result of the comings and goings of several different attorneys for appellants. The first attorney listed on the docket, when the complaint was filed on December 4, 2015, was Mark Chalpin. At some point, not reflected in the docket entries, his appearance was withdrawn and that of Andrew Ucheomumu was entered. On April 7, 2016, Mr. Ucheomumu withdrew his appearance and Steven Lewicky and Megan O'Connor entered theirs. Two months later, on June 6, 2016, they withdrew their appearance and Mr. Ucheomumu replaced them.

On December 15, 2016, Mr. Ucheomumu was suspended indefinitely from the practice of law for conduct unrelated to this case. *See Attorney Grievance v. Ucheomumu*, 450 Md. 675 (2016). The next day, Temitope Odusami entered her appearance for appellants. On December 22, that appearance apparently was converted to a limited scope appearance, but on January 5, 2017, Ms. Odusami again entered what appears to be a full appearance. The docket entry for that day shows that the appearances of Mr. Lewicky and Ms. O'Connor were withdrawn. Mr. Ucheomumu's appearance was formally withdrawn on January 13, 2017. On April 18, 2017, Ms. Odusami's motion to withdraw her appearance was granted, and Sylvia Rolinski, who ended up serving as trial counsel, entered her appearance. Ms. Odusami's motion to withdraw is not in the record

extract, but appellee asserts, without contradiction, that it was due to the appellants' failure or refusal to sign a retainer agreement and to pay her fees.[1]

Juxtaposed with this revolving door of attorneys was that the case was proceeding. In March 2016, appellee filed a counterclaim. An amended complaint was filed in May 2016 and an amended counterclaim was filed a month later. None of those pleadings are in the record extract. On March 14, 2016, a Scheduling Order was entered. That, too, appears nowhere in the record extract, but we are informed that, presumably pursuant to that Order, discovery closed on August 15, 2016. On August 8, after having received discovery material from appellee, appellants moved to extend the discovery deadline in order to take appellee's deposition. That motion was denied. On October 11, 2016, appellants sought leave to file an amended complaint in order to implead a State employee and to reopen discovery. That, too, was denied, as was a motion to reconsider the denial of appellants' request to reopen discovery.

Upon the suspension of Mr. Ucheomumu in December 2016, the appellants, apparently through Ms. Odusami, sought a postponement of the January 9, 2017 trial date. On January 13, the court granted that motion and set a new trial date of May 22, 2017. That gave the parties an additional nineteen weeks to prepare for trial. As noted, Ms. Rolinski did not enter her appearance for the appellants until April 18. She

[1] In her brief, appellee purports to quote from Ms. Odusami's motion that "[s]ince December 16, 2016, the undersigned counsel has requested, on numerous occasions, via email and in person, that the *Plaintiffs* sign a retainer agreement as requested . . . . [C]ontinued representation of the *Defendants* has and will result in an unreasonable financial burden on the undersigned counsel." (Emphasis added).

immediately moved for a further extension, which was opposed by appellee and, on May 4, was denied by Judge Rubin. Neither the docket entries nor the record extract reveal whether there was a hearing on that motion or what was presented to Judge Rubin. On May 16, an emergency motion to reconsider Judge Rubin's ruling was filed. That motion was considered and denied by Judge Debilius on May 22 – the first day of trial.

A three-day trial then commenced as scheduled, at the end of which the jury returned a verdict in favor of appellee (and the other defendants brought into the case in the appellants' amended complaint) on all counts – disparagement, defamation, injurious falsehood, and breach of contract. From the judgment entered on those verdicts, the appeal in No. 759 ensued.

NO. 759

We shall deal first with No. 759, in which appellants make three complaints:

(1) That the court erred in denying their last three requests for continuance following the suspension of Mr. Ucheomumu in light of his failure to turn over records in his file to new counsel;[2]

[2] Appellants characterize their requests to delay trial as requests for a continuance. Appellee refers to them as requests for postponement. Those terms are often used interchangeably, and no harm is usually done by using one or the other. Postponement, however, more appropriately refers to delaying the commencement of a proceeding that has not yet started. A continuance usually seeks a delay in the continuation of a proceeding that already has begun, although that can break down where the proceeding is bifurcated in some way and a delay is sought in the commencement of the bifurcated part. The requests in No. 759 clearly sought a postponement of a trial that had been scheduled but not yet begun, so we shall use that term.

(2) That the court erred in excluding appellants' evidence as a sanction for discovery violations attributable to Mr. Ucheomumu; and

(3) That the court erred in excluding evidence of events occurring before the Settlement Agreement of May 6, 2015.

Requests for Postponement

Rule 2-508(a) permits a circuit court to continue or postpone a trial "as justice may require." Section (b) of that Rule adds that, when an action has been assigned a trial date, trial "shall not be continued or postponed on the ground that discovery has not yet been completed, except for good cause shown." It has long been recognized that the decision whether to grant a request for postponement is a discretionary one for the trial court and that "generally, an appellate court will not disturb a ruling on a motion to continue [or postpone] 'unless [discretion is] arbitrarily or prejudicially exercised.'" *Neustadter v. Holy Cross Hospital*, 418 Md. 231, 241 (2011), quoting in part from *Dart Drug Corp. v. Hechinger Co.*, 272 Md. 15, 28 (1974). *See also Touzeau v. Deffinbaugh*, 394 Md. 654 (2006).

Quoting additionally from *Aventis Pasteur, Inc. v. Skevofilax*, 396 Md. 405, 436 (2007), the *Neustadter* Court confirmed that the abuse of discretion standard "is premised, at least in part, on the concept that matters within the discretion of the trial court are 'much better decided by the trial judges than appellate courts" and that "[s]o long as the Circuit Court applies the proper legal standards and reaches a reasonable conclusion based on the facts before it, an appellate court should not reverse a decision

vested in the trial court's discretion merely because the appellate court reaches a different conclusion." *Neustadter, supra*, at 242.

The emergency request of May 16 was heard on May 22 by Judge Debelius, then the circuit administrative judge. We do not know the textual contents of that motion because it is not in the record extract. The argument made by Ms. Rolinski at the hearing was that she was new in the case, that previous counsel had been suspended, and that she did not have adequate time to prepare. She advised the court that she had other existing commitments that had inhibited her ability to prepare for trial in this case and asked that trial be postponed until September – approximately four months. No argument was made at that hearing regarding documents or information collected by Mr. Ucheomumu that were not disclosed to her.

Counsel for appellee, Mr. Berlage, noted that Ms. Rolinski was "the fourth set of counsel" for the appellants, that he had advised the third attorney, presumably Ms. Odusami, that he would not oppose that attorney's motion to withdraw so long as it did not change the trial date and had advised Ms. Rolinski, before she entered her appearance, that he would object to any continuance. He stated that he was ready for trial and had all of his witnesses present.

Though recognizing that the impending trial placed Ms. Rolinski in a "difficult predicament," the court observed that the case had been pending since 2015, that appellee had consistently opposed postponements, and that trial had been postponed once from January to May, and, on that basis, the court denied the request.

In this appeal, appellants weave prominently into their argument regarding the requested postponement a series of defalcations on the part of Mr. Ucheomumu regarding discovery – both in failing to pursue areas of discovery from appellee and in failing to provide discovery requested by appellee – which led to the exclusion of that evidence at trial. Those matters were presented to the trial judge in connection with whether that evidence could be presented, and we shall discuss that matter in connection with the second issue noted above. None of that was presented to Judge Debilius, however, at the hearing he held on the request for postponement. The argument to him, on a motion to reconsider the ruling made by Judge Rubin on May 4, was simply that Ms. Rolinski did not have sufficient time to prepare.

The relevant considerations before Judge Debilius were that (1) the case had been pending for nearly a year-and-a-half, (2) discovery was to have been completed nine months earlier, (3) trial had already been postponed for nearly five months as a result of Mr. Ucheomumu's suspension, (4) the defense had consistently opposed postponements, (5) Ms. Rolinski was aware of the May 22 trial date when she agreed to enter her appearance, and (6) the defense was prepared to try the case and had its witnesses available. Whether Judge Debilius was aware that Ms. Odusami's withdrawal was due to the appellants' failure to sign a retainer agreement and pay her fees is not clear. There is no mention of it in the transcript of the hearing.

Given the setting, we do not believe that Judge Debilius abused his discretion in denying the motion to reconsider. This is not a criminal case, where a sudden withdrawal of defense counsel shortly before trial could raise significant Sixth Amendment concerns

if a postponement is not granted; nor is it one in which appellants were entirely innocent, or perhaps innocent at all, in creating the need to find a substitute for Ms. Odusami, who had been in the case since January.

Exclusion of Evidence As A Discovery Sanction

On the day of trial, appellants came into court with more than 40 documents that had never been supplied to appellee in discovery and that appellee's attorney said he had never seen, despite requests that would have included them. Sustaining his objection, the court refused to admit those documents. Appellants do not contest that the documents and identity of proposed witnesses had been requested but not supplied. Their general argument is that the failure to produce them in discovery or to turn the information over to successor counsel to was due to the incompetence or lack of diligence on the part of Mr. Ucheomumu and that they should not be held accountable for his failures. For that proposition, they cite *Hart v. Miller*, 65 Md. App. 620 (1985).

The Court of Appeals has made clear that a timely response to discovery requests is important – that the "fundamental objective of discovery is to advance 'the sound and expeditious administration of justice' by 'eliminat[ing], as far as possible, the necessity of any party to litigation going to trial in a confused or muddled state of mind, concerning the facts that gave rise to the litigation.'" *Rodriguez v. Clarke*, 400 Md. 39, 57 (2007), quoting, in part, from *Balt. Transit Co. v. Mezzanotti*, 227 Md. 8, 13 (1961).

To achieve that objective, the Court has recognized that sanctions may be required when a party fails to respond to discovery requests and, through Md. Rule 2-433, has provided a range of sanctions of varying gravity, up to, if the culprit is the plaintiff,

dismissal of the action. One of the least grave sanctions is prohibiting the defaulting party from "introducing designated matters in evidence." Its obvious purpose, apart from the general enforcement of the discovery obligation, is not so much to punish the defaulting party but to prevent trial by ambush to the obvious disadvantage of the other party, which can result whether the failure to disclose was deliberate or negligent, the fault of the party or the fault of the attorney.

In selecting what sanction, if any, is appropriate, the court first must consider all of the relevant circumstances, including whether the violation was technical or substantial, the timing of the ultimate disclosure, the reason for the violation, the degree of prejudice to the respective parties, and whether any prejudice can be cured by a postponement. *Hossainkhail v. Gebrehiwot*, 143 Md. App. 716, 725-26 (2002); *Taliaferro v. State*, 295 Md. 376, 390-91 (1983). It then must apply sound discretion in light of the relevant circumstances. *Hart v. Miller*, 65 Md. App. 620, 626-27 (1985).

The undisclosed documents, produced for the first time on the morning of trial, could, indeed, have produced a trial by ambush. Some of them were objectionable for other reasons as well; some involved matters that occurred before May 6, 2015 and were subject to the general release included in the Settlement Agreement, and one was ruled inadmissible on hearsay grounds.

There was no blanket denial, as appellants suggest. Although the circumstances were similar regarding most or all of the documents, the court examined each one separately and heard argument from both attorneys as to each before announcing a ruling. The deposition of one witness was ruled inadmissible because appellee's attorney had

never been notified that it was to be taken and had no opportunity to participate in it, and the proposed telephone testimony of another witness was disallowed because a timely request to permit that testimony, as required in Rule 2-513, had not been made.

Appellants chose Mr. Ucheomumu as their attorney, twice; he was not an appointed counsel. It was public knowledge that he was facing disbarment or suspension for a considerable period of time before the Court of Appeals entered such an order. Ms. Odusami moved to strike her appearance because she wasn't being paid and appellants had refused to sign a retainer agreement. Had that not occurred, she would have had 19 weeks to prepare for trial and produce the requested discovery. We find no abuse of discretion in the court imposing the limited sanction permitted under Rule 2-433.[3]

Pre-settlement Matters

Finally, appellants complain that the exclusion of evidence of events that occurred prior to the settlement agreement and releases entered into on May 6, 2015 was error.

[3] As noted, appellants seek succor from *Hart v. Miller*, *supra*, 65 Md. App. 620. That case is clearly distinguishable from this one. The trial court there dismissed the plaintiff's personal injury action a month before the scheduled trial date because answers to interrogatories were filed late. They were, in fact filed prior to the hearing on the motion and about a month before the scheduled trial date. This Court reversed that ruling. In doing so, the Court observed that there was no evidence that the plaintiff himself was ever aware of, much less responsible for, the delay. More important, the Court noted that the defendant had all of the material, that a great deal of preparation had gone into the case by counsel for both sides, that what remained to be done "was trivial in comparison to what had already been undertaken," that none of the delay was willful, and that, although "some sanction as to counsel was appropriate[,] dismissal was not." *Id.* at 628. That is quite different from precluding the introduction of evidence produced for the first time on the day of trial.

That evidence, they claim, was relevant to show a "course of conduct" on appellee's part that began before the settlement agreement and continued thereafter. There are at least two responses to that argument. First, much of that evidence was excluded for other reasons as well, mostly because it had not been disclosed in discovery. Second, prior to the settlement agreement, there were no confidentiality or non-disparagement provisions to be violated, and, as part of the settlement, appellee was released from all liability for any such conduct that may have occurred. The only conduct by appellee that could form a legal basis for liability, either in tort or for breach of contract, was conduct occurring after May 6, 2015.

No. 480

Two arguments are made in No. 480 – that the Circuit Court should have applied a setoff pending the outcome of No. 759, and that the court should have consolidated the two cases. Although we are inclined to find no merit in either argument, the dispositive fact is that, in light of the jury's verdicts in No. 759, the entry of judgment on those verdicts, and our affirmance of that judgment, the issues in No. 480, at this stage, are moot.

The entire basis of appellants' request to open the confessed judgment and consolidate the two cases was that they were entitled to a setoff in some undetermined and unknowable amount based on their expectation of a recovery in No. 759. Given the impossibility of determining how much of a setoff to apply, what they actually were seeking was not so much a setoff but a court-imposed extension of time to make the

contractually-mandated monthly payments. Even if we treat their request as one for a setoff, however, as they do, we know now that there was no such recovery, so there is nothing to set off. A question is moot "if, at the time it is before the court, there is no longer an existing controversy between the parties, so that there is no longer any effective remedy which the court can provide." *Falik v. Hornage*, 413 Md. 163, 186 (2010), quoting from *Attorney Gen. v. A. A. Co. School Bus*, 286 Md. 324, 327 (1979).[4]

JUDGMENTS IN NOS. 480 AND 759 AFFIRMED; APPELLANTS TO PAY THE COSTS IN BOTH CASES.

[4] As we observed at oral argument, the most obvious response to appellants' quest to apply a wholly speculative prospect of a recovery in their breach of contract action as a setoff to their liability on the notes was the fact that the notes themselves clearly stated that they were to be paid "without offset." Everyone ignored that provision, so we shall not use it as a basis for our decision.