

Circuit Court for Prince George's County
Case No. CAL17-18379

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 00491

September Term, 2018

PRIME CONTRACTING

v.

SHAY CONSTRUCTION, ET AL.

Nazarian,
Arthur,
Reed,

JJ.

Opinion by Arthur, J.

Filed: May 20, 2019

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This is a little case with a lot of errors. The Circuit Court for Prince George’s County entered a default “judgment” before it had entered the requisite order of default and given the defendant an opportunity to move to vacate it. In fact, the court entered the default “judgment” even though the defendant had actually answered the complaint and had offered an explanation for his alleged failure to plead. But when the matter came before a judge, apparently for a hearing solely on the issue of the plaintiff’s damages, the judge decided the case on the merits, found one of the plaintiff’s several theories to be deficient, made no mention of the other theories, and directed the entry of judgment in the defendant’s favor.

The plaintiff appealed. We reverse and remand to allow the case to proceed to discovery and trial as an ordinary civil case would.

THE PROCEDURES FOR OBTAINING A DEFAULT JUDGMENT

Because this case involves an uncommon number of procedural errors in the pursuit of a default judgment, we begin with a brief overview of the Maryland circuit court procedures regarding default judgments for failure to plead.

Maryland has a two-step procedure for obtaining a default judgment when a party fails to file an answer by the pertinent deadline. The first step involves an order of default. Md. Rule 2-613(b). The second involves a judgment by default that includes a determination as to liability and all relief sought. Md. Rule 2-613(f).

Under Rule 2-613(b), if a defendant fails to file an answer within the time allotted by the rules, the court, in response to a written request, “shall enter an order of default.” Upon the entry of an order of default, Rule 2-613(c) requires the clerk to issue a notice

informing the defendant that the order has been entered and that he or she may move to vacate it within 30 days of its entry. The clerk must send the notice to the defendant's last known address and to the defendant's attorney of record, if any. *Id.*

Under Rule 2-613(d), the defendant may move to vacate the order of default within 30 days after its entry, but the motion must state the reasons for the failure to plead and the legal and factual basis for the defense. The court must vacate the order of default if it finds that “there is a substantial and sufficient basis for an actual controversy as to the merits of the action and that it is equitable to excuse the failure to plead[.]” Md. Rule 2-613(e). If the court vacates an order of default, it simply allows the case to proceed to a final disposition on the merits.

On the other hand, if the court denies the defendant's motion to vacate the order of default or the defendant fails to move to vacate the order of default, “the court, upon request, may enter a judgment by default that includes a determination as to the liability and all relief sought[.]” Md. Rule 2-613(f). If the court is unable to quantify the damages or articulate the specific relief that should be granted, Rule 2-613(f) envisions that the court may conduct an additional hearing, which is colloquially known as an “inquisition.” The court cannot properly enter a judgment of default until it has made a determination as to “all relief sought.” Md. Rule 2-613(f); *see generally Banegura v. Taylor*, 312 Md. 609, 618 (1988).

With that overview in mind, we proceed to the procedural history of this case.

PROCEDURAL HISTORY

On July 28, 2017, plaintiff Prime Contracting Inc. filed a complaint against Gary Shay and “Shay Construction.” Because “Shay Construction” is alleged to be a sole proprietorship, it is not a legal entity separate and apart from Shay himself. *Bushey v. N. Assur. Co. of Am.*, 362 Md. 626, 637 (2001) (“[t]he sole proprietorship form of business provides ‘complete identity of the business entity with the proprietor himself’”; thus, a sole proprietorship “has no legal existence apart from its owner”) (quoting 1 Z. Cavitch, *Business Organizations* § 1.04[1], at 1-23 (Matthew Bender 2000)). In substance, therefore, Prime Contracting’s complaint was against Shay alone.

The complaint contained four counts that express three, distinct bases for recovery: breach of contract, quantum meruit, and unjust enrichment. The amount in controversy was approximately \$32,000.

Prime Contracting filed an affidavit of service asserting that it served the complaint on Shay by serving his son, Kevin Shay, on October 8, 2017. Prime Contracting later filed a second affidavit of service asserting that it served the complaint on “Shay Construction” by serving Shay himself on November 22, 2017.

Shay did not respond to the complaint within 30 days of October 8, 2017, when he was allegedly served with the complaint (via his son). Consequently, on December 19, 2017, Prime Contracting filed what it called a “Motion for Order of Default” against Shay (but not against “Shay Construction”).

Although Prime Contracting’s motion nominally requested the entry of an “order of default,” which Shay could move to vacate within 30 days (*see* Md. Rule 2-613(d)),

the request for relief asked the court to “enter a judgment by default” against Shay and in favor of Prime Contracting. The motion was accompanied by a proposed order that had two substantive provisions. First, it directed the entry of something called an “order of default *judgment*,” instead of the “order of default” that is authorized under Rule 2-613(b). (Emphasis added.) Second, it granted Prime Contracting leave to take testimony to prove its damages.¹ The author of the proposed order was evidently unaware that an “order of default” is not the same as a “judgment of default,” that a “judgment” is not “entered by default” or otherwise when the court enters a mere “order of default,” and that a plaintiff is not entitled to prove its damages upon the entry of an order of default alone.

On December 22, 2017, three days after Prime Contracting filed its so-called “Motion for Order of Default,” Shay, representing himself, filed a handwritten document titled, “Answer to lawsuit and motion for default judgment.” In that document, Shay generally denied Prime Contracting’s allegations, claimed that he had never entered into a contract with Prime Contracting, and asserted that the preconditions for any payment to Prime Contracting had not been met. In addition, Shay asserted that he had not been served until 30 days earlier, on November 22, 2017, when Prime Contracting claimed to have served “Shay Construction.” Shay specifically disputed the allegation that he had been served on October 8, 2017: he asserted that he was out of town on that date; he

¹ In its own words, the proposed order allowed Prime Contracting “to take testimony, *ex parte*, before the Court to support the allegations of the Complaint upon which *judgment* has been entered by default.” (Emphasis added.)

observed that Prime Contracting claimed to have served his son, who, he said, was “under treatment for mental issues” and on “medication”; and he denied that he had received any of the legal papers from his son.

The “Motion for Order of Default” came before a circuit court judge on December 27, 2017. But even though Shay had answered the complaint by that time, even though Shay had asserted that he was not in default (because he claimed not to have been personally served until 30 days before he answered), and even though the “Motion for Order of Default” actually requested the entry of a default judgment and not a mere order of default, the judge signed Prime Contracting’s proposed order. Thus the judge directed the entry of “an order of default judgment” and granted leave for Prime Contracting to take testimony at an “ex parte” hearing to support the allegations upon which “judgment ha[d] been entered by default.” The court set the hearing before another circuit court judge on February 22, 2018.

The hearing did not go forward on February 22, 2018, because the court did not have an interpreter to assist Prime Contracting’s principal. The judge, however, volunteered some skeptical comments about Prime Contracting’s case, questioning whether Prime Contracting had entered into a contract with Shay. From the judge’s questions, it appears that he had some familiarity with Shay’s answer and opposition to the “Motion for Order of Default.” Nonetheless, no one asked how the court could have entered a “judgment” of default when there had never been an order of default and when the defendant had arguably filed a timely answer and detailed his seemingly meritorious defenses.

The parties reassembled for another hearing before the same circuit court judge on April 6, 2018, but there seems to have been no meeting of the minds as to what the hearing was supposed to concern. Prime Contracting believed that Shay’s liability had been established and that the sole purpose of the hearing was for it to quantify its damages. The self-represented defendant treated the hearing as an opportunity to argue his defenses to liability, his attack on the sufficiency of service of process, and his contention that he had never been in default. The court initially stated that the question was whether to set aside the default, as if it were deciding a motion to vacate an order of default. But then the court proceeded to decide the merits of the case: it directed the entry of judgment in favor of Shay and against Prime Contracting because it was “not convinced” that there had been a contractual relationship between Prime Contracting and Shay. The court did not address Prime Contracting’s quasi-contractual theories of recovery, quantum meruit and unjust enrichment.²

Having seen its default “judgment” against Shay suddenly transmogrified into a judgment in Shay’s favor, Prime Contracting took this timely appeal.³

QUESTIONS PRESENTED

Prime Contracting poses the following three questions:

² It is unsurprising that Prime Contracting failed to convince the court of the merits of its contractual claim: Prime Contracting thought that the court had already decided the merits and that the only issue was the amount of its damages.

³ The court did not deal with Prime Contracting’s claims against “Shay Construction.” But because “Shay Construction” is not a legal entity separate and apart from Shay, the court disposed of all claims against all parties by entering a judgment in favor of Shay. Consequently, the judgment was final and appealable.

1. Whether the Circuit Court abused its discretion when it delved into the merits of Appellant's Complaint when the issue of liability had already been foreclosed as a result of the order of default that had been entered against the Appellee Gary Shay.
2. Whether the Circuit Court abused its discretion in entering a judgment against Appellant when the court should have vacated the order of default pursuant to Md. Rule 2-613(e) if it had found that there is [a] substantial and sufficient basis for an actual controversy as to the merits of the action.
3. Whether the Circuit Court abused its dscretion [sic] when it entered a judgment against the Appellant having only evaluated Appellant's breach of contract claim but not its quantum meruit and unjust enrichment claims against the Appellee.

Prime Contracting's first question reveals its incomprehension of the procedures concerning orders of default and judgments by default: an order of default does not foreclose a defendant from contesting liability. On the other hand, Prime Contracting's second and third questions are closer to the mark: whether the purpose of the final hearing was to quantify Prime Contracting's damages (as Prime Contracting thought) or to determine whether an order of default should be vacated (as the judge initially seemed to have thought), it should not have ended with a judgment against Prime Contracting. Accordingly, we shall reverse the judgment against Prime Contracting and remand for further proceedings consistent with this opinion.

DISCUSSION

This case first threatened to go off the procedural rails when Prime Contracting asked the court to enter a default judgment and to schedule a hearing on damages before it had issued an order of default and given Shay an opportunity to move to vacate it. The case went off the rails in earnest when the court granted Prime Contracting's request for a

default judgment even though Shay had filed an answer and had disputed the assertion that he was in default. It became a true procedural train wreck when the court entered a judgment against Prime Contracting instead of vacating the earlier order and sending the parties to discovery.

Prime Contracting was not entitled to a default judgment and a hearing on damages merely because Shay had allegedly failed to file a timely answer. At most, Prime Contracting was entitled to an order of default (*see* Md. Rule 2-613(b)), which Shay could move to vacate by explaining his failure to plead and disclosing his defenses. *See* Md. Rule 2-613(d). The circuit court erred in granting Prime Contracting’s “Motion for Order of Default,” because the motion, in substance, requested a default judgment and a hearing on the sole issue of damages.

The circuit court also erred in granting Prime Contracting’s “Motion for Order of Default,” because it failed to note that three days after Prime Contracting had filed its “Motion for Order of Default” Shay filed an answer to the complaint and a response to the motion. In that document, Shay succinctly detailed his legal and factual defenses, as well as the factual basis for his contention that he was not in default at all. In view of Shay’s answer, the court had no basis even to enter an order of default, much less a default judgment.⁴

⁴ To its credit, the clerk’s office understood that the court could enter, at most, an order of default, which Shay could move to vacate. Consequently, in accordance with Rule 2-613(c), the clerk sent a notice to Shay, at his last known address, informing him that he could move to vacate the order with 30 days after its entry. Of course, Shay had already answered the complaint and opposed the entry of any kind of default remedy when the court ruled.

Finally, the court erred in entering a judgment against Prime Contracting at the end of a hearing that, in the best case scenario for Shay, would only concern whether the default ruling should be vacated. While the court correctly recognized that the unrepresented defendant had asserted legal and factual defenses to the contractual claim and that there was a serious question about whether he had ever been in default at all, the appropriate response to those concerns was not to short-circuit the proceedings by entering a judgment on the merits in the defendant’s favor; it was to vacate the default ruling and to allow the parties to proceed to discovery, summary judgment, and (if necessary) a trial on the merits. This is particularly true given that Shay’s principal defense, that he had no written or oral contract with Prime Contracting, would not necessarily defeat the quasi-contractual claims for quantum meruit and unjust enrichment.

Ordinarily, we review a ruling concerning an order of default for abuse of discretion. *See, e.g., Das v. Das*, 133 Md. App. 1, 15 (2000); *see also Attorney Grievance Comm’n v. Ward*, 394 Md. 1, 20 (2006) (collecting authorities for the proposition that “a hearing court has ‘broad general discretion’ to determine whether to grant or deny a motion to vacate an order of default”). “Nevertheless, a ‘court’s discretion is always tempered by the requirement that the court correctly apply the law applicable to the case.’” *Schlotzhauer v. Morton*, 224 Md. App. 72, 84 (2015) (quoting *Arrington v. State*, 411 Md. 524, 552 (2009)), *aff’d*, 449 Md. 217 (2016). Because the circuit court misapplied the law of procedural defaults on several occasions, we must

reverse the judgment in Shay’s favor, as well as the earlier “order of default judgment” against Shay.

On remand, this case should proceed like any other civil case in which a defendant has filed an answer. Thus, the court should enter a scheduling order, and the parties should proceed to discovery, summary judgment, and (if necessary) a trial.

**JUDGMENT OF THE CIRCUIT COURT
FOR PRINCE GEORGE’S COUNTY
REVERSED; CASE REMANDED TO
THAT COURT FOR FURTHER
PROCEEDINGS CONSISTENT WITH
THIS OPINION; COSTS TO BE EVENLY
DIVIDED BETWEEN APPELLANT AND
APPELLEE.**