Circuit Court for Prince George's County
Case No. CAE16-25989

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 658

September Term, 2017

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JUANITA PERRY, et al.

v.

WILMINGTON SAVINGS
FUND SOCIETY, FSB

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Eyler, Deborah S.,
Wright,
Graeff,
JJ.

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Opinion by Eyler, Deborah S., J.

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Filed: May 17, 2018

In the Circuit Court for Prince George's County, Bank of America, N.A. ("Bank of America"), predecessor in interest to appellee Wilmington Savings Fund Society, FSB ("Wilmington Savings"), filed suit against Juanita Perry and Rodney Simms, the appellants, mother and son, seeking, among other things, a declaratory judgment and reformation of a deed. As recorded, the deed in question conveyed real property located at 404 Nova Avenue in Capitol Heights, Maryland (the "Property") to both appellants. Bank of America alleged that when the deed was executed all interested parties intended for the Property to be conveyed to Perry only, but that by mistake Simms also was named as a grantee in the deed.

The appellants failed to timely respond to Bank of America's complaint and, upon request, the court entered an order of default against them. They unsuccessfully moved to vacate the order of default. The court thereafter entered a default judgment, reforming the deed as requested. The appellants timely appealed.

## FACTS AND PROCEEDINGS

On June 7, 2007, Perry entered into a Residential Contract of Sale to purchase the Property from James L. Fowler for $270,000. To finance the purchase, Perry applied for and received two loans from American Bank—one for $216,000 ("First Loan"), and the other for $54,000 ("Second Loan"). American Bank agreed to extend these loans to Perry on the condition that they be secured by liens against the Property.

At closing, on June 25, 2007, Perry executed two notes, one promising to repay the First Loan ("First Note") and the other promising to repay the Second Loan ("Second

Note"). Each note was secured by a deed of trust (respectively, "First Deed of Trust" and "Second Deed of Trust"). The First Deed of Trust was a first-priority lien on the Property and the Second Deed of Trust was a second-priority lien on the Property. Both Deeds of Trust identified Perry as the borrower and American Bank as the lender.

At closing, two deeds were executed: one conveying the Property to Perry as "Grantee," and the other conveying the Property to Perry *and* Simms as "Grantee." Simms had no involvement in the purchase. He was not a purchaser in the Residential Contract of Sale, and his name did not appear on the loan application, the First and Second Notes, or the First and Second Deeds of Trust. These documents all identified Perry as the sole purchaser and borrower.

Eight months after the closing, on February 15, 2008, the Deeds of Trust and the deed conveying the Property were recorded in the Land Records for Prince George's County. The deed that was recorded was the one listing Perry and Simms as "Grantee."

More than four years later, on October 4, 2012, and July 13, 2012, respectively, American Bank assigned its interest in the First and Second Deeds of Trust to Bank of America.

Perry subsequently defaulted on the First Note. In preparing to foreclose, Bank of America conducted a title search of the Property and discovered that the deed that was recorded listed Perry and Simms, not just Perry, as grantees of the Property.

On June 10, 2016, in the Circuit Court for Prince George's County, Bank of America filed suit against the appellants. It alleged that the recorded deed erroneously

included Simms as a grantee and that American Bank had extended the loans to Perry on the condition that they be secured by the entire Property. It further alleged that the recording of a deed conveying the Property to Perry and Simms, instead of to Perry alone, was a "mutual mistake" that was not the intention of the parties. Bank of America sought to have the court declare that "Perry is the sole owner" of the Property and that the Property is "subject to first and second priority liens of the First and Second Deeds of Trust[.]" It also sought reformation of the recorded deed to correct the mutual mistake to name Perry as the sole owner of the Property. Finally, as alternative vehicles for relief, it stated claims for equitable subrogation and unjust enrichment.

On July 11, 2016, the appellants personally were served with the complaint, writs of summons, and case information sheets. Two days later, Simms contacted counsel for Bank of America requesting an extension of time to file an answer. Counsel agreed to an extension until September 12, 2016.[1]

That deadline came and went and by November 9, 2016, the appellants had not yet filed a responsive pleading. On that date, Bank of America filed a Request for Entry of Order of Default. On November 21, 2016, a judge signed an order of default. Two days later, the clerk's office mailed notices to the parties scheduling an "ex parte" hearing for

[1] Pursuant to Rule 2-321(a), which provides that a party shall file a responsive pleading "within 30 days after being served," the appellants' deadline for filing a responsive pleading was August 10, 2016, absent any extension.

January 20, 2017. On December 2, 2016, the order of default was entered on the docket. That day the clerk's office mailed notices of the order to the appellants.

Meanwhile, on November 30, 2016, Perry, acting *pro se*, filed a handwritten Motion to Vacate. In it, she stated only that she owned the Property and that she had "no knowledge of Bank of America damages or Ex Parte. Bank of America sold loan to and [sic] mortgage company."

On December 21, 2016, Bank of America filed a Notice of Substitution of Parties, pursuant to Rule 2-241, asserting that Wilmington Savings should be substituted as the plaintiff because Bank of America had transferred its interest in the loans to Wilmington Savings. The same day, Bank of America also filed an Opposition to Perry's Motion to Vacate, arguing that the motion should be denied because Perry had failed to provide a legal and factual basis for a defense against the claims and to state the reason for not filing a timely answer, as required by Rule 2-613(d).

On January 4, 2017, a judge signed an order denying Perry's Motion to Vacate. The order was entered on the docket on January 11, 2017.

The January 20, 2017 hearing went forward as scheduled. At the outset, only counsel for Wilmington Savings was present. In the middle of the first witness's testimony, Simms appeared and asked for a continuance, explaining that he wanted to speak with his attorney. The court granted the continuance and set a new hearing date for February 17, 2017.

On February 10, 2017, the appellants, now acting through counsel, filed an answer, affidavits stating that it was their intent that Simms be included as a grantee in the recorded deed, and a "Motion to Vacate Order Denying Motion to Set Aside Opposition to [sic] Order of Default Filed by Defendant Perry and to Receive Pursuant to this Court's Continuing Jurisdiction a Motion to Set Aside the Order of Default as to Defendant Simms and to Accept the Attached Answer to Complaint" ("second motion to vacate").[2] In the answer they wanted the court to accept, the appellants denied "[a]ll allegations except for the allegations as to the documents shown of record in the land records" and "all liability and declarations for relief . . . ." In their second motion to vacate, they claimed not to "understand what was required to oppose an Order for Default" and complained that it would be inequitable to deprive Simms of his interest in the Property based on what they characterized as a mistake by the lender.

The rescheduled hearing went forward as planned on February 17, 2017. Counsel for Wilmington Savings argued that the bank had standing because, as the holder of the First and Second Notes, it had an interest in the Property. Near the end of the hearing, he stated that he had a proposed order for entry of final judgment, which he shared with the appellants' counsel. The court declined to make any ruling at that time, until the issue of standing was clarified.

[2] The appellants also filed a "Motion to Dismiss for Lack of Standing" ("motion to dismiss"), which they incorporated into their second motion to vacate. The motion to dismiss is not in the record extract or the appellee's appendix. The appellants do not challenge standing on appeal.

On February 24, 2017, Wilmington Savings filed an opposition to the appellants' second motion to vacate, arguing that they still had not given a reason for not timely responding to the complaint and still had not offered a meritorious defense that would justify vacating the order of default. It attached an affidavit by Thomas Mulinazzi, the attorney who "was retained . . . to prepare the Deed for the June 25, 2007 sale of" the Property. Mulinazzi attested that he "prepared the Deed for the sale of the Property from James L. Fowler to Juanita E. Perry[,]" and that he "was not instructed to prepare a Deed from James L. Fowler to Juanita E. Perry and Rodney D. Simms and ha[d] no knowledge of why another Deed for the Property exists or was recorded . . . ." In an opposition to the motion to dismiss (which, again, is not in the record extract or appendix), Wilmington Savings cited *Deutsche Bank Nat. Trust Co. v. Brock*, 430 Md. 714 (2013), to argue that it had standing to enforce the Deeds of Trust because it was in possession of the Notes and the Notes were indorsed in blank. The appellants responded that they would concede on the issue of standing if Wilmington Savings proved that it was in possession of the Notes.

On March 20, 2017, the court entered an order stating that Wilmington Savings "may have standing to pursue this action if it is the actual holder of the promissory notes" and directing "all parties [to] appear in Court on April 27, 2017 . . ., and [that Wilmington Savings] is to bring the original two notes it claims are it [sic] its possession."

The parties appeared before the court on April 27, 2017. Counsel for Wilmington Savings produced the original First Note (which was indorsed in blank), demonstrating

possession, and dismissed all claims relating to the Second Note, as that note had been released. He presented a new proposed order, which was similar to the one he had presented at the February 17 hearing, but was changed to reflect dismissal of the claims pertaining to the Second Note. The proposed order was entitled "Judgment Regarding Real Property Commonly Known as 404 Nova Avenue, Capitol Heights, Maryland, 20743." The appellants' counsel made no objection to the proposed order, merely stating, "I understand what the order says. I certainly don't agree with it[.]" Thereafter, the court signed the proposed order, and it was entered as a judgment on May 2, 2017.

In the Judgment, the court found, as relevant, that, at closing, a deed conveying the Property to Perry and Simms had been executed; that "Simms should not have been included as a Grantee on the Deed, as he did not contribute funds toward the purchase of the Property or sign the sales contract"; and that "Perry and [American Bank] intended for the Deed of Trust to be a first-priority lien on the entire Property." The court declared that "Simms has no right, title, or interest in the Property" and reformed the recorded deed "to name only . . . Perry as the owner of the Property[.]"

The appellants noted this timely appeal. Their vaguely-worded questions presented do not frame the issues that they argue on appeal, however.[3] Based on the argument section of their brief, we decipher the following issues before us:

[3] The appellants' questions presented are:

1. Did the trial court abuse its discretion?

(Continued…)

1. Did the circuit court abuse its discretion by entering a default judgment?

2. Did the circuit court err by reforming the recorded deed?

3. Did the circuit court err by entering a judgment in favor of Wilmington Savings for its claim of equitable subrogation?

For the following reasons, we shall affirm the judgment of the circuit court.

**DISCUSSION**

Default judgments are "'a means of relief against the delay and neglect of defendants.'" *Smith-Myers Corp. v. Sherill*, 209 Md. App. 494, 507 (2013) (quoting *Glass v. Glass*, 284 Md. 169, 172 (1978)). Rule 2-613 sets forth the procedure for obtaining a default judgment. "If the time for pleading has expired and a defendant has failed to plead as provided by these rules, the court, on written request of the plaintiff, shall enter an order of default." Md. Rule 2-613(b). An order of default is "'a determination of liability'" that will be overturned only if the order of default is vacated. *Franklin Credit Mgmt. Corp. v. Nefflen*, 436 Md. 300, 317 (2013) (quoting *O'Connor v. Moten*, 307 Md. 644, 647 n.2 (1986)); *see also Flynn v. May*, 157 Md. App. 389, 405

(…continued)

2. What was the nature of the judgment?

3. What is required to reform a deed?

4. Was there any evidence to support the trial court Judgment?

5. Does the doctrine of equitable subrogation apply to this case?

(2004) ("'The issue of liability is foreclosed by reason of the order of default.'" (quoting *Maryland Rules Commentary*, at 472–73 (2d ed. 1992))).

Upon entry of an order of default, the clerk of court must "[p]romptly . . . issue a notice informing the defendant that the order of default has been entered and that the defendant may move to vacate the order within 30 days after its entry." Md. Rule 2-613(c). A motion to vacate "shall state the reasons for the failure to plead and the legal and factual basis for the defense to the claim." Md. Rule 2-613(d). If the motion is timely filed and complies with subsection (d), and the court "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, the court shall vacate the order." Md. Rule 2-613(e); *see also Flynn*, 157 Md. App. at 399–402. Even when a defendant files an untimely motion to vacate, the court has discretion to vacate the order of default because it is interlocutory and a "trial judge possesses very broad discretion to modify an interlocutory order where that action is in the interest of justice." *Banegura v. Taylor*, 312 Md. 609, 619 (1988).

If a defendant fails to file a timely motion to vacate order of default or if a motion to vacate is filed and denied, "the court, upon request, may enter a judgment by default that includes a determination as to the liability and all relief sought, if it is satisfied (1) that it has jurisdiction to enter the judgment and (2) that the notice required by section (c) of this Rule was mailed." Md. Rule 2-613(f). Subsection (f) further provides,

> If, in order to enable the court to enter judgment, it is necessary to take an account or to determine the amount of damages or to establish the truth of

> any averment by evidence or to make an investigation of any matter, the court[] may rely on affidavits, conduct hearings, or order references as appropriate[.]

Obtaining a default judgment is, in effect, a two-step process. A default judgment may be entered after 1) liability is established through an order of default and 2) relief is determined. *See Franklin Credit*, 436 Md. at 315–18 (discussing history behind default judgment rule). The defaulting party may participate in any hearing held for purposes of determining the relief to be granted. *Miller v. Miller*, 70 Md. App. 1, 22 n.11 (1987).

In the instant case, Bank of America filed a complaint against the appellants, which was served, but the appellants did not file a timely responsive pleading despite requesting and receiving an extension. Two months after that extension of time had expired, Bank of America filed a request for the court to enter an order of default. Perry filed a timely motion to vacate, stating that the loan had been sold but not offering any reason for failing to timely answer the complaint and not offering any defense on the facts or the law. The motion did not comply with Rule 2-613(d) and was denied by order entered on January 11, 2017.

The court held a hearing as permitted by Rule 2-613(f), and partway through Simms appeared and requested a continuance to speak to his attorney. The court granted his request and delayed the hearing for a month. Before the second hearing, the appellants filed the second motion to vacate, arguing as a defense that Wilmington Savings did not have standing and that it would be inequitable to reform the recorded

deed. The second motion to vacate was not timely filed and did not explain why the appellants had failed to file a timely response to the complaint.

At the rescheduled hearing, the court considered the issue of standing and decided that it would not issue a final judgment until hearing further from Wilmington Savings. At a second rescheduled hearing, Wilmington Savings proved to the satisfaction of the court—and of the appellants—that it had standing.[4] The court then entered judgment in favor of Wilmington Savings.

In their brief, the appellants question the nature of the judgment entered. Although the judgment does not use the word "default," it clearly is a default judgment.

We now turn to the appellants' contentions, as gleaned from their brief.[5]

**I.**

[4]As noted, the appellants do not challenge standing on appeal.

[5] In their brief, the appellants suggest that the ruling against them was inequitable. They state,

> Equity practice is replete with maxims. But, perhaps, the most fundamental is that "equity does equity". How equitable is it to take a man's house when he and his mother are proceeding pro se and don't understand what is happening? When they hire counsel to protect their interests, how equitable is it to allow a successor bank nine (9) years after the fact to take the house away from Appellant Simms without giving them a chance to defend? I certainly understand that rules are to be complied with but in a case such as this, should the rules not be tempered by equity?

This embellishment is not argument. From our review of the record, we cannot find any instances where Wilmington Savings or its predecessors acted in bad faith, nor can we conclude that the disposition of the case was inequitable.

The appellants contend the circuit court abused its discretion by granting a default judgment without ruling on their second motion to vacate and without Wilmington Savings making a written request for entry of default judgment.

The second motion to vacate was not timely, as it was filed well beyond 30 days after the default order was entered. By not granting the second motion to vacate, the court implicitly denied it. Because the motion was untimely, the court had discretion to deny it. The motion also did not comply with Rule 2-613(d), just as the first, timely, motion to vacate had not complied with that Rule. The court did not abuse its discretion by denying the second motion to vacate in those circumstances. We note, moreover, that the court expressly addressed the standing issue, which was mentioned in the timely motion to vacate, referred to (by reference to the motion to dismiss—also untimely) in the second motion to vacate, and raised in Bank of America's motion for substitution, and resolved it to the satisfaction of all parties.[6]

The appellants maintain that a written request to enter default judgment is a condition to a court's granting such a judgment. They point to a cross reference that appears beneath Rule 2-613(f), stating: "For the requirement that a request for entry of judgment under section (f) of this Rule be served on the defendant, see Rule 1-321(c)(2)."

[6] The appellants take issue with the fact that the clerk's office scheduled a hearing, pursuant to Rule 2-613(f), before the order of default was entered and before the timely motion to vacate was filed and denied. This seems to us to have been a matter of good planning—if the motion to vacate were denied and the court wished to hold a hearing under Rule 2-613(f), the hearing date already would have been scheduled.

Rule 1-321 is entitled, "Service of pleadings and papers other than original pleadings." Subsection (c)(2) provides:

> (c) **Party in default—Exceptions**. No pleading or other paper after the original pleading need be served on a party in default for failure to appear except . . .
>
> (2) a request for entry of judgment arising out of an order of default under Rule 2-613 shall be served in accordance with section (a) of this Rule.

Section (a) states:

> (a) **Generally**. Except as otherwise provided in these rules or by order of court, every pleading and other paper filed after the original pleading shall be served upon each of the parties. If service is required or permitted to be made upon a party represented by an attorney, service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or upon a party shall be made by delivery of a copy or by mailing it to the address most recently stated in a pleading or paper filed by the attorney or party, or if not stated, to the last known address. Delivery of a copy within this Rule means: handing it to the attorney or to the party . . . .

The appellants argue that because Rule 1-321(c)(2) requires a request for entry of a default judgment to be served in accordance with Rule 1-321(a), it follows that a party seeking entry of a default judgment must make that request in writing—otherwise there would be nothing to serve. This issue is not preserved for review, however. "Ordinarily, the appellate court will not decide any [non-jurisdictional] issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]" Md. Rule 8-131(a). The appellants did not argue below that the court could not enter a default judgment without Wilmington Savings first making a written request for entry of default judgment. Indeed, when counsel for the appellants was presented, in open court, with the proposed

order constituting a judgment against his clients, he merely stated that he did not agree with it. He made no objection to the court entering the order, and certainly did not raise the argument the appellants now make. And the court did not decide the issue. Accordingly, it is not preserved for review.[7]

**II.**

The appellants next contend the court erred by reforming the deed. They argue that a deed only can be reformed based on mutual mistake and that Wilmington Savings did not allege facts sufficient to allow the court to make factual findings necessary to reform the deed. They point to their own affidavits as conclusive proof that it was their intention that Simms's name appear on the deed.

Reformation of written instruments, including deeds, is "a purely equitable action." *LaSalle Bank, N.A. v. Reeves*, 173 Md. App. 392, 408 n.9 (2007); *cf. Kishter v. Seven Courts Cmty. Ass'n, Inc.*, 96 Md. App. 636 (1993) (involving reformation of deed). A court may exercise its power to reform a deed, thereby correcting a mistake in the instrument, "'to make it conform to the real intention of the parties[.]'" *Hearn v. Hearn*, 177 Md. App. 525, 541 (2007) (quoting *Hoffman v. Chapman*, 182 Md. 208, 210 (1943)). The mistake must be mutual or "made by one of the parties accompanied by fraud, duress

[7] Were we to address the issue, it would seem to have no merit in this case because counsel for Wilmington Savings submitted the proposed order, which was a judgment, in a case in which a default order was entered, in open court, and in the presence of counsel for the appellants. Thus, a request to enter a judgment was made in a court proceeding and counsel for the appellant was "served" with the proposed judgment, fulfilling the purpose of Rule 1-321(c)(2).

or other inequitable conduct practiced on the person making the mistake by another party." *Flester v. The Ohio Cas. Ins. Co.*, 269 Md. 544, 556 (1973). The party seeking reformation "must show clearly and beyond a reasonable doubt the original intent of the parties and the existence of a mistake in the written agreement." *Kishter*, 96 Md. App. at 640–41.

As explained, the circuit court properly entered a default order and denied the two motions to vacate. In a default situation where the defendant has failed to deny averments in a pleading when a response was required, the averments as to liability are taken as admitted. Md. Rule 2-323(e); *see also Attorney Grievance Comm'n of Maryland v. Steinberg*, 395 Md. 337, 352 (2006) ("[B]ecause the averments in the Petition were not denied by Respondent in a timely filed responsive pleading, the averments . . . were treated properly as admitted."). Therefore, we look to the allegations in the complaint to determine whether there were sufficient facts to support reformation of the deed. We do not look to affidavits filed by the defaulting parties.

The facts alleged in the complaint were sufficient to show that the parties involved in the deed's execution, American Bank and Perry, intended that only Perry be a grantee of the Property. Only Perry signed the Residential Contract of Sale as the purchaser; only she applied for the loans to purchase the Property; the loans totaled the entire purchase price for the Property; only Perry executed the two promissory notes and secured those notes with deeds of trust that were intended to be liens on the entire Property; the loans were extended on the condition that they be secured by the entire Property; and Simms

had no involvement in purchasing the Property or obtaining the loans.[8] Moreover, as further alleged in the complaint, "Perry was intended to be the sole owner of the Property" so that, in the event of a default, American Bank could foreclose on its security interest in the Property. The complaint also stated the deed "contains a mutual mistake in that it lists Mr. Simms as a grantee and [therefore] does not match the intentions of the parties." These allegations became the admitted facts of the case when the appellants failed to timely deny them, and liability based on these facts was established because the appellants were unsuccessful in their attempts to vacate the order of default.

On these facts, the court had discretion as to the relief to be granted, including to enter a default judgment reforming the deed to make Perry the sole grantee of the Property. The court did not need to receive additional evidence or make further factual findings to support the equitable remedy it granted. *Cf. Billman v. State of Maryland Deposit Ins. Fund Corp.*, 86 Md. App. 1, 15–16 (1991).

Even if the court had needed to consider evidence before it could fashion equitable relief, which it did not, there was sufficient evidence in the record to support the court's decision to grant the relief it did. Wilmington Savings furnished the court with the following documents, all of which showed that only Perry was meant to be the owner of

[8] In oral argument before this Court, counsel for Perry emphasized that Simms was involved in the purchase of the Property because his name appears on the bottom of each page of the Residential Contract of Sale, which is a form document. His name is printed on the form, like the other printing on the form. At most, this signifies that the form was obtained from him (he was in the real estate business). It does not make him a party to the purchase of the Property.

the Property: the Residential Contract of Sale, the loan application, the First Note, the First and Second Deeds of Trust, and the settlement statement. It also produced a copy of the deed executed at closing that named only Perry as the grantee. In addition, it gave the court an affidavit by the attorney who was hired to draft the deed, attesting that Perry was intended to be the sole grantee of the Property because the loans were extended to Perry only on the condition that they be secured by liens against the Property in its entirety, and that could not happen unless Perry was the sole owner of the Property. Also, in an affidavit Wilmington Savings furnished to the court, its attorney in fact attested that there was no information in the lender's origination file to indicate that Perry (or Simms) intended that Simms be a co-owner of the Property. This evidence demonstrated that the parties intended for Perry to be the only grantee and that the inclusion of Simms on the recorded deed was a mutual mistake. The court therefore did not err by reforming the deed.

**III.**

In one paragraph of the judgment entered on May 2, 2017, the court stated:

> ORDERED, that Judgment be, and hereby is, entered in favor of Plaintiff Wilmington Savings . . . and against Defendants [Perry and Simms] on Count I, Declaratory Judgment, Count II, Reformation, and Count III, Equitable Subrogation[.]

The appellants contend the court erred by entering judgment in favor of Wilmington Savings on its claim for equitable subrogation. They acknowledge that the issue is moot if the court properly provided relief through reformation, but nevertheless assert that equitable subrogation only applies in a priority dispute between lienholders. They argue

that because Wilmington Savings is the only lienholder in this case, the doctrine is inapplicable.

We shall not consider the merits of this argument for two reasons. First, the issue was not preserved for review. At no point below did the appellants argue that the doctrine of equitable subrogation was inapplicable. *See* Md. Rule 8-131(a). Second, as the appellants themselves concede, the issue is now moot. We note as well that, despite the order's reference to equitable subrogation, the only action the court took was to reform the deed.

**JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY THE APPELLANTS.**