Circuit Court for Baltimore City
Case No.: 24C21001692

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 698

September Term, 2022

PAPA MENU, INC., ET AL.

v.

GW REAL ESTATE OF MARYLAND, INC.

Wells, C.J.,
Beachley,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: May 15, 2023

*At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

This is an appeal from summary judgment in favor of commercial landlord GW Real Estate of Maryland, Inc. ("GWRE"), appellee, on its claim for nonpayment of rent due on leased premises in Baltimore City. Tenant Papa Menu, Inc. ("PMI"), appellant, and guarantor Abdul Aziz, challenge the judgments of the Circuit Court for Baltimore City against them on grounds that they concede they are raising for the first time in this Court. Even though neither PMI, nor Mr. Aziz, answered the complaint or responded to GWRE's motion for summary judgment, we are asked to exercise discretion under Md. Rule 8-131(a) to review their novel and unsupported claims that GWRE "fraudulently induced [PMI] to execute a lease agreement containing statutorily prohibited clauses" and that the "lease contains factual misrepresentations" regarding "state tax assessments" and "utility power generation and metering."

Because the motion court did not err in granting summary judgment, and we decline to address matters that could and should have been raised in the circuit court, we shall affirm the judgments.

BACKGROUND

For clarity, we set forth the relevant facts and legal proceedings in the following timeline:

> **October 10, 2018:** GWRE and PMI signed a 60-month "Lease Agreement" (the "Lease") for a portion of the premises at 10 East Baltimore Street, Baltimore, Maryland 21202 (the "Premises"). PMI agreed to "pay all charges for electricity, water, gas, telephone, oil and other utility services used on the Premises[.]" Remedies for failure to pay rent include recovery of "all costs and expenses incurred in the enforcement of any provisions of the Lease or in obtaining damages or in prosecuting a suit for possession against the Tenant, including its reasonable attorney's fees and court costs." PMI "waive[d] trial by jury in any action" arising from the Lease or tenancy.

Signing on behalf of PMI were Abdul Aziz, Mohin Uddin, and Jamal Hossain.

In a separate "Guaranty of Lease" (the "Guaranty"), "members or spouses of members of Papa Menu Inc." agreed to "jointly and severally unconditionally guarantee" payment and performance under the Lease. They also "waive[d] trial by jury in any action . . . brought by Landlord against Guarantors[.]" The Guaranty was signed by Aziz, Uddin, and Hossain.

April 21, 2021: In the Circuit Court for Baltimore City, GWRE filed a complaint against PMI, Hossain, Aziz, and Uddin, asserting separate counts for breach of the Lease and Guaranty, and for unlawful detainer.

June 17, 2021: The circuit court clerk entered on the docket a typewritten "response to a writ of summons pertaining to case no. 24-C-21-001692 which is in relation to the defendant, Papa Menu Inc., et al. withholding rent from the plaintiff, GW Real Estate of MD" (the "Response"). Dated June 15 and signed by Mr. Aziz, this Response cites pandemic-related problems and states that PMI "has been dealing with a loss of business and other financial difficulties" that "has left the business, along with millions of others in the country, unable to fulfill our responsibilities." Claiming to be "a long standing family business that" has been "a local favorite[,]" Mr. Aziz pledged to "continue with our efforts to increase our revenue so we may make all rental payments on time[,]" but asked forbearance "through these [financial] difficulties" and offered to pay $1,500 a month until pandemic-affected business "improves[.]" Mr. Aziz attached a certificate of service to GWRE's attorney.

May-June 2021: GWRE filed returns showing personal service of the summons and complaint on Mr. Hossain on May 6, 2021; Mr. Aziz on June 1, 2021; PMI's resident agent Mohamed J. Abedin on June 22, 2021; and Mr. Uddin on June 22, 2021.

October 1, 2021: The circuit court entered identical typewritten statements signed by Mr. Hossain and Mr. Uddin, "apologiz[ing] for being late to this matter." Each stated that he was "no longer working at this business, nor . . . a shareholder in this business." Citing personal guarantees of the Lease, each agreed to the nominated mediator and attached a certificate of service to GWRE's counsel.

April 15, 2022: GWRE filed a Motion for Partial Summary Judgment as to Count I of the complaint, for breach of the Lease and Guaranty, accompanied by affidavits authenticating the Lease and Guaranty, along with

documentation showing the amount of unpaid rent and the attorney's fees incurred to recover the arrearage.

May 16, 2022: At the conclusion of a motion hearing at which none of the defendants appeared, the circuit court signed an order granting "Partial Summary Judgment as to Count I of the Complaint" and entering "judgment . . . in favor of Plaintiff GW Real Estate of MD, Inc. and against Defendants Papa Menu, Inc., Jamal Hossain, Mohin Uddin, and Abdul Aziz, jointly and severally, as to Count I of the Complaint for the principal amount of $218,660.56, pre-judgment and post-judgment interest at the legal rate, which is $19,607.56 through April 6, 2022, reasonable attorneys' fees of $2,512, and costs."

May 17, 2022: The circuit court clerk received a typewritten letter addressed to GWRE, dated May 14, 2022, and signed by Mr. Aziz and Mr. Hossain, purporting to respond to "a writ of Summons pertaining to" this case. The letter states that "Papa Menu Inc, has been dealing with a loss of business and other financial difficulties since 2019 due to coronavirus pandemic and also my store has been broke and took all my inventories two times." [Sic] They proposed to pay $1,000 in monthly rent "until the business sale goes up." A certificate of service indicates service by mail on GWRE's attorney.

May 18, 2022: The court clerk entered judgments consistent with its written order and issued notices of the recorded judgment.

May 26, 2022: The judgments against PMI, Hossain, Aziz, and Uddin were indexed and notices of the recorded judgments were issued and mailed to addresses on file.

June 14, 2022: GWRE filed a notice of dismissal without prejudice for the remaining unlawful detainer count, pursuant to Md. Rule 2-506(a)(1) ("[A] party who has filed a complaint . . . may dismiss all or part of the claim without leave of court by filing (1) a notice of dismissal at any time before the adverse party files an answer[.]"). GWRE noted that "[t]he only defendant against which that Count was filed, Papa Menu, Inc., has not appeared in this Action or filed an Answer" and that "[t]here are no further Counts in this case, as the Court previously entered an Order granting Plaintiff's Motion for Partial Summary Judgment (*Docket Entry No. 16/1*)," so that "this Action should be closed and the June 21, 2022 Trial removed."

June 15, 2022: The circuit court clerk received a handwritten notice of appeal from "Defendant Papa Menu, Inc., by and through his undersigned counsel," Raymond Wu, who nevertheless identified himself as "counsel for Defendant Abdul Aziz[.]"

DISCUSSION

In light of the nature and timeline of this litigation, we first consider whether we have appellate jurisdiction, and if so, over whom. The parties' briefs do not address the issue, but "we must dismiss a case *sua sponte* on a finding that we do not have jurisdiction[.]" *Miller & Smith at Quercus, LLC v. Casey PMN, LLC*, 412 Md. 230, 240 (2010). *See* Kevin F. Arthur, *Finality of Judgments and Other Appellate Trigger Issues* § 2 (MICPEL 2018) (hereinafter "*Finality of Judgments*"). Resolving questions as to whether there is a final appealable judgment and whether Mr. Aziz is properly before this Court, we shall treat both PMI and Mr. Aziz as appellants and exercise our discretion under Md. Rule 8-602(g) to treat the judgment entered on May 18, 2022, as a final appealable order. For reasons that follow, we will deny appellants' request for plain error relief and affirm the judgments against them.

Appellate Jurisdiction

The right to appellate review is entirely statutory. *See Washington Suburban Sanitary Comm'n v. Lafarge N. Am., Inc.*, 443 Md. 265, 274 (2015). Although a party may immediately appeal from an interlocutory "order entered with regard to the possession of property with which the action is concerned . . . or the refusal to modify, dissolve, or discharge such an order[,]" Md. Code, § 12-303(1) of the Courts & Judicial Proceedings Article ("CJP"), there was no such order in this case because the motion court did not address GWRE's unlawful detainer claim seeking possession of the Premises.

Consequently, we apply CJP § 12-301, authorizing an "appeal from a final judgment entered in a civil . . . case by a circuit court." A "final judgment" is statutorily defined to

mean a decision from which an appeal may be taken, CJP § 12-101(f), which courts have interpreted as a decision that is "so final as either to determine and conclude the rights involved or to deny the appellant the means of further prosecuting or defending his or her rights and interests in the subject matter of the proceeding." *Rohrbeck v. Rohrbeck*, 318 Md. 28, 41 (1989) (italics omitted). *See generally Finality of Judgments*, § 4 (recognizing that the Supreme Court of Maryland,[1] then named the Court of Appeals, "has frequently stated that the accepted test for finality is whether the court's ruling has the effect of putting the parties out of court and denying them the means of further prosecuting the case or the defense").

"The final judgment rule embodies Maryland's strong policy against 'piecemeal appeals' – that is, multiple appeals in a single case." *Id*. § 2 (citing *Waterkeeper All., Inc. v. Md. Dep't of Agric.*, 439 Md. 262, 278 (2014)). To be a final judgment, the ruling in question must have the following three attributes:

> (1) it must be intended by the court as an unqualified, final disposition of the matter in controversy, (2) unless the court acts pursuant to Maryland Rule 2-602(b) to direct the entry of a final judgment as to less than all of the claims or all of the parties, it must adjudicate or complete the adjudication of all claims against all parties; (3) it must be set forth and recorded in accordance with Rule 2-601.

[1] At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022. *See, also*, Md. Rule 1-101.1(a) ("From and after December 14, 2022, any reference in these Rules or, in any proceedings before any court of the Maryland Judiciary, any reference in any statute, ordinance, or regulation applicable in Maryland to the Court of Appeals of Maryland shall be deemed to refer to the Supreme Court of Maryland….").

Metro Maint. Sys. S., Inc. v. Milburn, 442 Md. 289, 298 (2015). *See Rohrbeck*, 318 Md. at 41; *O'Sullivan v. Kimmett*, 252 Md. App. 653, 668 (2021); *Finality of Judgments*, § 4.

Moreover, under the Maryland Rules, a judgment is not final unless and until it is "entered pursuant to these rules." Md. Rule 1-202(o). We distinguish the rendition of judgment, *i.e.*, the court's judicial declaration of its decision, either orally or in writing, from both the judgment itself, which must be "set forth on a separate document" that is signed by the judge, and the entry of that judgment on the docket, which is the "purely ministerial" act by the court clerk in creating a public record of the judgment. *See* Md. Rule 2-601(a); *Finality of Judgments,* § 6; *Jones v. Hubbard*, 356 Md. 513, 520-21 (1999). Once the clerk enters a final judgment on the docket, the parties must file a notice of appeal within 30 days. *See* Md. Rule 2-601(a)(4); *Finality of Judgments*, § 6-7.

Applying these standards, courts have consistently held that when "it remains for the trial court to take some action to dispose of the case, an order is not final." *Finality of Judgments,* § 4. Consequently, an order granting partial summary judgment that does not resolve all pending claims is not tantamount to the entry of a final appealable judgment. *Id*. *See Porter Hayden Co. v. Com. Union Ins. Co.*, 339 Md. 150, 162 (1995) (holding that because "declaration with respect to the two policies of insurance covering the years 1948-1949 and 1949-1950 resolved only part of Porter Hayden's action" for relief under "all policies," and court "did not purport to certify its judgment under Rule 2-602[,]" the order granting a "motion for partial summary judgment, standing alone, was not a final judgment in the action").

When the challenged order "disposes of one or more but fewer than all of the 'claims' in the case[,] . . . and . . . the court expressly determines in a written order that there is no just reason to delay the entry of final judgment[,]" Md. Rule 2-602(b) authorizes the court "to transform an otherwise interlocutory ruling into a final judgment[.]" *Finality of Judgments*, § 32. For purposes of this rule, a "claim" is broadly defined to "encompass[] all the legal theories that might yield a single recovery for injuries arising out of a single transaction," so that even though a particular complaint "involve[s] multiple counts, causes of action, or legal theories," there may be "only one 'claim' within the meaning of Rule 2-602(b)." *Id*. § 38.

Maryland Rule 8-602 is the appellate enforcement mechanism for these finality principles. Although subsections 8-602(a)-(c) authorize dismissal of premature appeals, subsection (g) is a "savings provision" that authorizes an appellate court to direct the entry of a final judgment in limited circumstances:

> (g) **Entry of judgment not directed under Rule 2-602.**
>
> (1) If 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, as it finds appropriate, may . . . enter a final judgment on its own initiative[.]
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> * * *
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> (3) If the appellate court enters a final judgment on its own initiative, it shall treat the notice of appeal as if filed on the date of the entry of the judgment and proceed with the appeal.

Md. Rule 8-602(g).

Applying these principles to this grant of partial summary judgment on one count of a multi-count complaint, we will exercise our discretion to enter final judgment under Rule 8-602(g). Here, when the motion court's judgment on Count I for breach of the Lease and Guaranty was entered on the court's docket as a separate money judgment on May 18, 2022, that was not an immediately appealable final judgment because GWRE's complaint contained a detainer count seeking possession of the Premises. Although the motion court did not certify that judgment for immediate appeal under Md. Rule 2-602(b), it could have done so when GWRE dismissed the detainer count without prejudice on June 14, 2022, which was one day before this notice of appeal was filed, because there are no other claims arising from PMI's nonpayment of rent for the period covered by the money judgment pending in the circuit court.

We are mindful that a party cannot transform a non-final order into a final judgment by dismissing without prejudice a pending claim that is "inexorably intertwined" with the claim on appeal because it "involve[s] the same set of facts." *See Miller & Smith at Quercus*, 412 Md. at 239, 248-53. A contrary rule would impermissibly allow a dismissing party to confer appellate jurisdiction while retaining the right to litigate the dismissed claim later, thereby permitting piecemeal litigation at the option of the parties and at the expense of the final judgment rule. *See id*.

Here, GWRE's dismissal of the detainer count was without prejudice, but this case differs from the scenarios disapproved in *Miller & Smith at Quercus*, holding that the parties seeking appellate review could not transform an interlocutory ruling into an appealable final judgment merely by stipulating to the dismissal of all other pending claims

and counterclaims without prejudice. *See id*. at 248-53. In contrast to those parties' contrived circumvention of the final judgment rule, in this case, GWRE, the party who dismissed the remaining count without prejudice, did not seek appellate review and does not challenge the judgment in this Court.

Nor would entertaining this appeal invite piecemeal litigation. If PMI is not still in possession of the Premises or in arrearage on rent, GWRE has no claim for detainer. *See generally* Md. Code, § 8-401 of the Real Property Article (governing repossession of premises based on nonpayment of rent). If PMI remains on the Premises, GWRE will have to establish any future claim for possession based on the post-judgment record.

Because there is no pending matter before the circuit court and any future litigation must be predicated on the parties' post-judgment course of dealing, in the interest of judicial economy, we will exercise our discretion to enter final judgment under Md. Rule 8-602(g)(1). *Cf., e.g., McCormick v. Medtronic, Inc*., 219 Md. App. 485, 506 (2014) (holding that because "it would make little sense not to permit the appeal to proceed" based on "a 'technical' problem[,]" dismissal would "only prolong the litigation and increase the financial hardship that the plaintiffs face[,]" and that "the circuit court could have certified its ruling as final under Rule 2-602(b), we have the power, under Rule 8-602([g])(1)(C), to enter a final judgment on our own initiative, which we hereby do"); *Appiah v. Hall*, 183 Md. App. 606, 621 (2008) (holding that where matters that were pending before circuit court when appeal was noted were "now all resolved[,]" and "[t]here is no other basis upon which [appellees] can assert that the instant appeal is not from a final judgment[,] . . . we see no valid basis which would preclude our exercise of discretion under 8-602([g]) to enter

a final judgment"), *aff'd on other grounds*, 416 Md. 533 (2010). Under these circumstances, where there is no longer any finality obstacle precluding our exercise of discretion to enter judgment under Rule 8-602(g), "it would make little sense not to permit the appeal to proceed." *McCormick*, 219 Md. App. at 506.

Next, we address the ambiguity in who is before this Court. GWRE argues that we must dismiss the appeal as to Mr. Aziz because he has not filed a notice of appeal. In support, GWRE cites *Hoang v. Hewitt Ave. Assocs., LLC*, 177 Md. App. 562, 613 (2007), holding that "when judgments are entered against multiple parties, but not all of them pursue an appeal, the appellate court cannot alter a judgment against a party who did not note an appeal."

Although we affirm that principle, we are not persuaded that it applies here, because even though the handwritten notice of appeal states that "Defendant Papa Menu, Inc., by and through his undersigned counsel, hereby notes an appeal[,]" it also identifies the undersigned attorney as "Counsel for Defendant Abdul Aziz." And the brief filed in this Court by that counsel states: "Appellants-Tenants Abdul Aziz and Papa Menu, Inc., file this brief[.]" On this record, we find that the notice of appeal is ambiguous as to whether it was filed on behalf of both PMI and Mr. Aziz. We also recognize that if, instead of exercising our discretion to enter judgment and entertain this appeal, we were to dismiss it for lack of a final judgment, the circuit court could then enter such a final judgment, thereby triggering a new 30-day period for Mr. Aziz to file an unambiguous notice of appeal. In these circumstances, we resolve the ambiguity in the current notice of appeal by preserving Mr. Aziz's right of appeal and promoting judicial economy.

Plain Error Review and Relief

PMI and Mr. Aziz concede that in the circuit court, they did not assert any of the defenses and arguments they now present in their brief to this Court. Instead, they contend, "[t]his case is suitable for the exercise [of] this [C]ourt's discretionary authority under Md. Rule 8-131 to address a question not raised in the lower court."

Under that rule and longstanding jurisprudence, "[o]rdinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal." Md. Rule 8-131(a). "[T]he animating policy behind Rule 8-131(a) is to ensure fairness for the parties involved and to promote orderly judicial administration." *McDonell v. Harford Cnty. Hous. Agency*, 462 Md. 586, 602 (2019) (quotation marks and citation omitted). "An appellate court must consider these 'twin goals' before reviewing an unpreserved issue." *Id*. (citation omitted).

Neither PMI, nor any of the individual defendants, filed opposition to GWRE's motion for partial summary judgment or appeared at the motion hearing. Although the court received a letter from Mr. Aziz and another defendant on the day after the hearing, they merely admitted PMI's nonpayment of rent while requesting a rent reduction and forbearance.

Now, PMI and Mr. Aziz ask this Court to exercise our "discretionary authority under Md. Rule 8-131 to address issues not raised in the lower court." As framed in their brief, they argue that (1) GWRE "fraudulently induced" them to execute the Guaranty, which

contains "statutorily prohibited clauses" that "purported to deny all legal recourse to [them] under any and all circumstances, even intentional wrongdoing on the part of" GWRE; and (2) "the Lease contains factual misrepresentations" regarding "state tax assessments" and "utility power generation and metering[.]" In support of these contentions, however, appellants cite evidence that appears to be simply inserted into their record extract, without authentication or any explanation as to why it was not timely submitted to the circuit court in opposition to summary judgment.

We decline to consider the proffered arguments and evidence because doing so would be unfair to GWRE, which has sought relief over a two year period during which neither PMI, nor any of the individual defendants, have proffered a viable defense to their failure to appear or their payment obligations. Plain error review is not an appropriate remedy for the predictable consequences of such silence. *See, e.g., Gittin v. Haught-Bingham*, 123 Md. App. 44, 50 (1998) (observing that "no Maryland court has adopted the 'plain error' approach" to award relief under Md. Rule 8-131(a) where appellant failed to make the sufficiency and legal arguments he was belatedly advancing on appeal). In any event, for the reasons explained next, we discern no error or prejudice that would warrant the extraordinary exercise of such discretion.

Summary Judgment

Because these appellants timely challenged the grant of summary judgment, we ask whether that decision was legally correct for the reasons stated by the motion court. *See* Md. Rule 2-501; *Gambrill v. Bd. of Educ. of Dorchester Cnty.*, 481 Md. 274, 297 (2022). Reviewing the motion record in the light most favorable to the non-moving party, we may

affirm the judgment only on the grounds relied upon by the motion court. *See Gambrill*, 481 Md. at 297.

We conclude that the motion court did not err in granting summary judgment in favor of GWRE. Based on the unopposed affidavits establishing that PMI's rent was due and unpaid, in the amount set forth in the authenticated invoices and ledgers, there was no dispute that PMI breached the Lease and that Mr. Aziz and the other individual defendants breached the Guaranty. Although the two appellants who have belatedly challenged GWRE's claim are far too late to raise their defenses, we point out that the Lease expressly contradicts their complaints about "fraudulent inducement" and "misrepresentations" regarding "state tax assessments" and "utility power generation and metering." In particular, the Lease states that it "constitute[s] the entire agreement . . . with respect to the Premises" and provides that, as is common in commercial rentals, the parties expressly "waive trial by jury in any action . . . involving the Premises or the rights of the parties under this Lease" and "this Guaranty[.]"

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANTS.