Circuit Court for Baltimore City
Case No. 24-C-18-004244

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 866

September Term, 2019

JOEYSAM, INC., *ET AL.*

v.

YON SUK YOM

Fader, C.J.,
Nazarian,
Adkins, Sally D.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: September 22, 2020

In January 2018, Sang M. Pak purchased a grocery and liquor store from New Chuho Enterprises, Inc. ("New Chuho"), an entity owned solely by Yon Suk Yom. An inventory of liquor valued at approximately $62,000 was included in the transaction. Ms. Pak assigned her interest in the business to JoeySam, Inc. ("JoeySam"), and they agreed to pay for the inventory in the form of $17,000 in cash and a $45,000 Confessed Judgment Promissory Note (the "Note"). Ms. Pak and JoeySam paid the $17,000, but never paid anything towards the Note.

After sending a notice of default to Ms. Pak and JoeySam, Ms. Yom filed a complaint for confessed judgment in the Circuit Court for Baltimore City. The circuit court entered judgment in Ms. Yom's favor, but later vacated it after Ms. Pak and JoeySam filed a motion arguing that they were entitled to a reduction because some of the liquor was spoiled and/or old. After a bench trial, the circuit court disagreed and again entered judgment in Ms. Yom's favor. Ms. Pak and JoeySam appeal and argue *first*, that this case should be dismissed for failure to join New Chuho as a necessary party and, *second*, that the circuit court erred by declining to reduce the amount owed under the Note. We affirm.

I. BACKGROUND

On January 5, 2018, Ms. Pak purchased Kim's Grocery and Liquor and its inventory (collectively, the "Business") from New Chuho. New Chuho is owned solely by Ms. Yom, who also serves as its president and secretary. As part of the purchase transaction, Ms. Pak

assigned her interest in the Business to JoeySam.[1]

The purchase price of the Business was $25,000 plus the cost of the inventory, which included the Business's alcoholic beverage inventory. After having a contractor value the inventory, the parties agreed on a purchase price of $62,025.24 to be paid as $17,000 in cash and $45,000 in a Confessed Judgment Promissory Note.[2] Ms. Yom and New Chuho

[1] On the same day, the parties entered into a second transaction: Ms. Pak purchased the real property on which the Business is located from Ms. Yom and Chu Ho Yom. That transaction is not the subject of this dispute.

[2] The confessed judgment clause in the Note states as follows:

> 17. **CONFESSION OF JUDGMENT.** IF THIS NOTE OR ANY INSTALLMENT DUE HEREUNDER IS NOT PAID WHEN DUE (SUBJECT TO APPLICABLE NOTICE PROVISIONS HEREIN), BORROWER HEREBY APPOINTS AND AUTHORIZES ANY ATTORNEY OF ANY COURT OF RECORD TO BE BORROWER'S TRUE AND LAWFUL ATTORNEY-IN-FACT, AND IN BORROWER'S NAME AND STEAD, TO ACKNOWLEDGE SERVICE OF ANY AND ALL LEGAL PAPERS ON ANY KIND OF SUIT BROUGHT FOR COLLECTION OF THIS OBLIGATION AND TO APPEAR FOR BORROWER IN ANY COURT OF COMPETENT JURISDICTION IN THE STATE OF MARYLAND OR ANY OTHER STATE OR TERRITORY OF THE UNITED STATES OF AMERICA AND TO ACKNOWLEDGE AND CONFESS JUDGMENT AGAINST BORROWER AND IN FAVOR OF THE LENDER OF THIS NOTE FOR (i) THE ENTIRE PRINCIPAL AMOUNT OF THIS NOTE THEN REMAINING UNPAID, (ii) INTEREST THEREON THEN ACCRUED AND UNPAID, (iii) COURT COSTS, AND (iv) ATTORNEYS' FEES IN THE AMOUNT OF FIFTEEN PERCENT (15%) OF THE AMOUNTS OF PRINCIPAL AND INTEREST THEN DUE AND PAYABLE. . . . EXCEPT FOR ANY RIGHTS SET FORTH IN MARYLAND RULE 2-611, BORROWER HEREBY WAIVES THE RIGHT OF APPEAL AND STAY OF EXECUTION.

were identified as the lenders on the Note, and Ms. Pak and JoeySam were identified as the borrowers. The parties do not dispute that the payment arrangement was different than the arrangement in the Asset Purchase Agreement, which provided that the cost of the inventory would be paid to New Chuho in certified funds at the time of settlement. The Asset Purchase Agreement defined the "Inventory" as "saleable" unopened bottles and elucidated that the purchase price would be determined by an inventory conducted within 24 hours of the closing:

> The salable, unopened inventory (unopened bottles) (the "Inventory") shall be purchased dollar for dollar based on the Seller's wholesale purchase invoice cost. The cost of said Inventory shall be paid to Seller in certified funds at the time of settlement.
>
> The Parties agree to conduct a full inventory within 24 hours prior to the Closing date, unless otherwise mutually agreed in writing due to a scheduling conflict. If a third party is hired to conduct the inventory, the Parties agree to share equally the cost and expenses of the third party inventory services. The Purchaser shall pay agreed inventory amount to the Seller in certified funds at Closing.

Although they changed the method of payment, the parties followed the procedure for valuing the Inventory set forth in the Asset Purchase Agreement: the day before closing, a third-party contractor examined the liquor, which was stored in the basement of the store, and determined that the wholesale purchase invoice cost of the inventory was $62,025.24. Ms. Pak was present at the time but did not observe the inventory process directly because, she testified, she had asthma and "normally [didn't] go down [into] the basement." Ms. Pak also signed a Statement of Satisfaction in which, among other things, she represented that she had "inspected the Business Premises, the assets of the Business to be conveyed

including the equipment, fixtures, furniture, leasehold improvements, and I am satisfied with the conditions of the Business, its assets and the Business Premises and accept them in 'AS IS' conditions." The Statement also acknowledged that "[a]ll of the contingencies and conditions requirement [sic] to be satisfied in order to proceed to closing have been either satisfied, waived or removed."

Ms. Pak paid the $17,000 by check and agreed to pay the remaining $45,000 under the Note to New Chuho and Ms. Yom by June 30, 2018. Ms. Pak and JoeySam failed to pay anything toward the Note by that date, and on July 3, 2018, Ms. Yom and New Chuho sent them a notice of default.

On July 18, 2018, Ms. Yom (but not New Chuho) filed a Complaint for Confessed Judgment under Maryland Rule 2-611 against Ms. Pak and JoeySam. The Complaint sought judgment in the amount of $47,643.91, the unpaid principal on the Note plus interest and attorneys' fees. On July 30, 2018, the circuit court entered judgment in the requested amount. *See* Md. Rule 2-611(a). On September 7, 2018, Ms. Pak and JoeySam filed a motion to vacate the confessed judgment, and the circuit court vacated the judgment on November 30, 2018. *See* Md. Rule 2-611(d), (e).

On May 8, 2019, the circuit court held a bench trial. Ms. Pak and JoeySam did not dispute that nothing had been paid on the Note. They argued instead that they were entitled to a reduction of $20,000 on the amount owed because, they asserted, a portion of the liquor was spoiled. Ms. Pak testified that about "four or five months" after her purchase of the store she "saw something floating inside [a] bottle" while dusting. She had not been down

in the basement at all—she always sent employees to retrieve additional bottles—but at that point she did go down to the basement to check the bottles of Alize, the type of liquor in which she had noticed something floating. She saw that "all of them [were] spoiled and rotten" and that some of the bottles were "old" or "outdated," and she estimated the value of the spoiled bottles at $20,000. There is no evidence, other than Ms. Pak's testimony, supporting the quantity and value of the allegedly spoiled bottles:

> [MS. PAK'S ATTORNEY]: So it is your belief that a significant amount of the inventory was spoiled and/or outdated?
>
> [MS. PAK]: And -- yes. It's still -- it's still in the basement.
>
> [MS. PAK'S ATTORNEY]: And you've done a count on that inventory and it's your belief that it's about $20,000 of inventory; correct?
>
> [MS. PAK]: Probably. I think so. Probably more than that. I'm not sure, but roughly I think.

The circuit court issued its ruling in open court finding in favor of Ms. Yom and rejecting Ms. Pak and JoeySam's arguments concerning their entitlement to a setoff. The circuit court entered judgment in the amount of $49,353.02 on May 16, 2019. Ms. Pak and JoeySam filed a Notice of Appeal on June 7, 2019. We supply additional facts as necessary below.

II. DISCUSSION

Ms. Pak and JoeySam raise two issues on appeal, which we re-order and rephrase. *First*, was New Chuho a necessary party under Rule 2-211(a) and, if yes, is dismissal the proper remedy? *Second*, did the circuit court err in entering the confessed judgment in full

rather than allowing a reduction of $20,000 for spoiled inventory?[3]

We hold *first*, that even if we assume that New Chuho was a necessary party, it did not need to be joined under these circumstances and *second*, that the circuit court did not err in declining to reduce the amount owed under the Note.

When, as here, an action has been tried without a jury, we review it on both the law and the evidence. Md. Rule 8-131(c). We "will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses." *Id.* We afford no deference to the circuit court's legal conclusions. *Goshen Run Homeowners Assoc., Inc. v. Cisneros*, 467 Md. 74, 88 (2020).

A. Even If New Chuho Were A Necessary Party, Its Joinder Was Not Required.

Maryland Rule 2-211 requires joinder of a party if, in the party's absence, the already-named parties may not be afforded complete relief, the unnamed party may be impaired from protecting its interests, or an already-named party is at risk of incurring multiple or inconsistent obligations:

> (a) Persons to be joined. Except as otherwise provided by law,

[3] Ms. Pak, JoeySam, and Yon Suk Yom phrase the Questions Presented as follows:

> 1. Did the circuit court err in not allowing defendant to raise as a defense to the complaint for confessed judgment, a set off for spoiled product that was the consideration for the note?
>
> 2. Does the failure to join as plaintiff, New Chuho Enterprises, Inc., a joint obligee of the confessed judgment note[,] require dismissal of this action for failure to join a necessary party under Maryland Rule 2-211(a)?

> a person who is subject to service of process shall be joined as a party in the action if in the person's absence
>
> (1) complete relief cannot be accorded among those already parties, or
>
> (2) disposition of the action may impair or impede the person's ability to protect a claimed interest relating to the subject of the action or may leave persons already parties subject to a substantial risk of incurring multiple or inconsistent obligations by reason of the person's claimed interest. . . .

Md. Rule 2-211. The primary purposes of the compulsory joinder rule are "to assure that a person's rights are not adjudicated unless that person has had his 'day in court' and to prevent multiplicity of litigation by assuring a determination of the entire controversy in a single proceeding." *City of Bowie v. Mie Properties, Inc.*, 398 Md. 657, 703 (2007) (cleaned up) (*quoting Bodnar v. Brinsfield*, 60 Md. App. 524, 532 (1984)).

The failure to join a necessary party is a basis for a motion raising a preliminary objection to a lawsuit, but the objection is not waived if no such motion is filed. Md. Rules 2-322, 2-324.[4] And unlike most trial court-level errors,[5] the failure to join a necessary party *may* be raised for the first time on appeal, as Ms. Pak and JoeySam do here. *Mahan v. Mahan*, 320 Md. 262, 273 (1990); *Bodnar*, 60 Md. App. at 532. If the appellate court

[4] Rule 2-322 provides that "failure to join a party under Rule 2-211" is a permissive defense that may be made by a motion to dismiss, in the answer, or "in any other appropriate manner after answer is filed." Rule 2-324 provides that "a defense of failure to join a party under Rule 2-211" may be made in any pleading, by a motion for summary judgment, or at the trial on the merits.

[5] Ms. Yom argues that Ms. Pak and JoeySam "appear to confuse the issue of personal jurisdiction with the issue of necessary party." But that is not the case—although their argument is sparse, Ms. Pak and JoeySam do cite cases in which the question of joining a necessary party was raised, and addressed, for the first time on appeal.

determines that a party is a necessary party, the usual remedy is to remand the case to permit an opportunity for joinder. *See Mahan*, 320 Md. at 273; *see also Eyler v. Eyler*, 92 Md. App. 599, 603 (1992); *see also Bodnar*, 60 Md. App. at 532.

Under some circumstances, though, a remand to join a necessary party may not be required. For instance, joinder is not required when an unnamed but necessary party has effectively had his "day in court" by virtue of its knowledge of the litigation, the potential for the litigation to affect its rights, and its failure to intervene. *City of Bowie*, 398 Md. at 703; *Serv. Trans., Inc. v. Hurricane Exp., Inc.*, 185 Md. App. 25, 41 (2009); *Bodnar*, 60 Md. App. at 533 (*citing Reddick v. State*, 213 Md. 18, 30 (1957)). In that sort of case, joinder is not necessary because "such person is concluded by the proceedings as effectually as if he were named on the record." *Bodnar*, 60 Md. App. at 533–34 (*quoting Reddick*, 213 Md. at 30). And where the unnamed party is a closely-held corporation, the owners' or officers' participation in the litigation establishes a corporation's "knowledge" of the litigation and its potential for affecting its rights. *City of Bowie*, 398 Md. at 704; *see Bodnar*, 60 Md. App. at 536.

Ms. Pak and JoeySam ask us to dismiss the appeal *in toto* for failure to join New Chuho. But they cite no authority to support that contention, and the cases they do cite indicate that at most the proper remedy would be to remand the case to the circuit court to allow for the opportunity to join New Chuho. *See Eyler*, 92 Md. App. at 603; *see also Mahan*, 320 Md. at 273; *see also Bodnar*, 60 Md. App. at 532.

In this case, no remand is necessary. Even if we assume that New Chuho is a necessary party by virtue of being named in the Confessed Judgment Promissory Note, New Chuho had its "day in court" when Ms. Yom, its sole owner, president, and secretary, litigated the case in full. New Chuho had the opportunity to appear formally and assert its rights under the Note but didn't. *City of Bowie*, 398 Md. at 704; *Bodnar*, 60 Md. App. at 536. New Chuho's rights under the Note were concluded by the judgment as if it had been named as a party, and there is no risk of additional proceedings. *Bodnar*, 60 Md. App. at 533–34. Remanding under these circumstances would exalt form over substance—indeed, it would multiply proceedings that can be concluded appropriately on the existing posture.

B. The Circuit Court Did Not Err In Declining To Reduce The Amount Owed Under the Note.

Now on to the merits. Ms. Pak and JoeySam argue that the judgment should be reduced by $20,000 to account for the value of spoiled and/or expired liquor that Ms. Pak discovered about four to five months after purchasing the store. Their argument fails for several reasons. We hold that even if the legal argument that Ms. Pak and JoeySam raised in the circuit court—that Ms. Yom breached the sales contract by providing liquor that was not "saleable"—were a meritorious defense to the confessed judgment, the legal argument that Ms. Pak and JoeySam raise for the first time on appeal—that the Note was invalid for failure of consideration—is both not preserved and waived, and that Ms. Pak and JoeySam failed to meet their burden of proof on the merits of either.

To put the parties' arguments into context, we begin with some background on the confessed judgment procedure:

> A confession of judgment clause in a debt instrument is a device designed to facilitate collection of a debt. It is a provision by which debtors agree to the entry of a judgment against them without the benefit of a trial in the event of a default on the debt instrument. As a general rule, a judgment by confession is entitled to the same faith and credit as any other judgment.

Goshen Run, 467 Md. at 103–04 (*quoting Schlossberg v. Citizens Bank*, 341 Md. 650, 655 (1996)). But confessed judgments are viewed with skepticism, and courts "have been liberal in considering attacks on confessed judgments" because the process "lends itself to fraud and abuse":

> Because the widespread practice of including a provision authorizing a confessed judgment in promissory notes lends itself to fraud and abuse this Court has made clear that judgments by confession are to be freely stricken out on motion to let in defenses.

Id. (*first quoting Pease v. Wachovia SBA Lending, Inc.*, 416 Md. 211, 230–31 (2010); *then quoting Schlossberg*, 341 Md. at 655 (cleaned up)).

Maryland Rule 2-611 sets forth the procedure for obtaining and defending confessed judgments. A confessed judgment creditor files a complaint attaching the debt instrument that authorizes the confessed judgment and an affidavit specifying the amount due. Md. Rule 2-611(a), (b). The clerk issues a notice informing the defendant that judgment has been entered. Md. Rule 2-611(c). The defendant may then file a motion to vacate the judgment; the motion must "state the legal and factual basis for the defense to the claim." Md. Rule 2-611(d). If the circuit court "finds that there is a substantial and sufficient basis for an actual controversy as to the merits of the action, the court shall order the judgment by confession opened, modified, or vacated and permit the defendant to file a responsive

pleading." Md. Rule 2-611(e). Those steps were followed in this case except that Ms. Pak and JoeySam did not file a responsive pleading after the confessed judgment was entered—the case simply proceeded to trial on the merits in Ms. Yom's motion.

Although confessed judgments are disfavored, confessed judgment debtors may only raise "'a defense to the claim,'" *i.e.*, a defense challenging either "1) the execution of the promissory note itself or 2) the amount of debt due on the note." *NILS, LLC v. Antezana*, 171 Md. App. 717, 728 (2006). A debtor may not challenge the underlying "debt or obligation which may have led to the making of the promissory note":

> If, for instance, a promissory note accompanied by a confession of judgment is given, the resulting judgment by confession is not a confessed acknowledgment of any debt or obligation which may have led to the making of the promissory note. What is allegedly confessed is simply the validity of the promissory note itself or the amount due on the note. By the same token, a "meritorious defense to the claim" is not a defense to everything that may have gone before in the long and possibly tortuous financial history between the parties. A "defense to the claim" is a defense challenging 1) the execution of the promissory note itself or 2) the amount of debt due on the note.

Id. at 728.

Whether a defense qualifies as "meritorious" is a question of law for the court. *Id.* Some examples of meritorious defenses include forged signatures on the note, signing the note under duress, previous partial payment on the note, or a valid setoff:

> If it is alleged, for instance, that the signature on the promissory note was a forgery, that is self-evidently "a defense to the claim." If it is alleged that the note was not voluntarily made but was the product of legally cognizable duress, that is "a defense to the claim." If it is alleged that the promissory note

> was signed by one not authorized to bind the obligor, that is "a defense to the claim." If it is alleged that the amount due on the promissory note should be reduced by a partial payment that has already been made, that is "a defense to the claim." If it is alleged that the amount due on the note should be reduced by a set-off, that is "a defense to the claim."

Id. at 728–29. In *Antezana*, the defendant attacked the debt underlying the judgment, arguing, among other things, that the amount of the notes (totaling $150,000) represented an unenforceable late fee. *Id.* We held that the argument did not fall into either category of allowable defenses because it raised issues separate and apart from the execution of the promissory notes or the amount due. *Id.*

Other cases illustrate valid challenges to the amount due. In *Garliss v. Key Federal Savings Bank*, we held that a defense based on the partial satisfaction of a mortgage obligation was an allowable defense to a confessed judgment. 97 Md. App. 96, 105 (1993). In other words, the mortgagors were allowed to assert that they were entitled to a credit against a confessed judgment because the mortgagee had also instituted a foreclosure action that resulted in partial satisfaction of the same mortgage. *Id.* Similarly, in *Cropper v. Graves*, the parties bound by a confessed judgment were allowed to claim credits against the judgment from an agreement under which they earned credits toward payment on the note. 216 Md. 229, 234 (1958). Finally, in *Gambo v. Bank of Maryland*, a statutory requirement that the lender dispose of collateral in a commercially reasonable manner—which the lender had not done—provided the grounds for a valid setoff to the amount owed under a confessed judgment. 102 Md. App. 166, 186–87 (1994).

In their appellate brief, Ms. Pak and JoeySam did not raise the breach of contract

argument but raised a new argument: that the spoiled liquor amounted to a failure of consideration. In contrast to the breach of contract argument, the failure of consideration argument may attack the execution of the Note, which might be "meritorious" and an allowable defense to the claim as a matter of law. *See Goshen Run*, 467 Md. at 107 ("[A]lthough the confessed judgment process is not unconstitutional on its face, there are situations in which the judgment may be challenged if the debtor did not knowingly, intelligently, and voluntarily waive his or her rights prior to execution of the contract or note. These situations exist where the contract is one of adhesion, there is great disparity in bargaining power, *or the debtor receives nothing for the cognovit provision*." (emphasis added)); *see Antezana*, 171 Md. App. at 728–29. But as we explain below, this argument fails as well, both as a procedural matter and on the merits.

First, Ms. Pak and JoeySam failed to present sufficient legal argument in their brief to support this contention. The only legal authority they cited in their appellate brief is *Venners v. Goldberg*, 133 Md. App. 428 (2000), a case in which they assert "this court specifically held that the defense of failure of consideration is available to a defendant in an action to enforce a Confessed Judgment Promissory Note." But *Venners* did not involve a confessed judgment under Rule 2-611 at all. *Id.* at 434. It involved a "sealed" promissory note that was a "negotiable instrument under the Uniform Commercial Code, as codified in Md. Code (1975, 1997 Repl. Vol.), § 3-104 of the Commercial Law Article." *Id.* (cleaned up). And Ms. Pak and JoeySam did not explain how the analysis in *Venners* concerning sealed promissory notes applies here. This is the entire argument on this point

in their brief:

> I. THE CIRCUIT COURT ERRED IN NOT ALLOWING DEFENDANT TO RAISE AS A DEFENSE TO THE COMPLAINT FOR CONFESSED JUDGMENT, A SET OFF FOR SPOILED PRODUCT THAT WAS THE CONSIDERATION FOR THE NOTE.
>
> The Circuit Court was clearly erroneous in ruling that on a Complaint for a Confessed Judgment Promissory Note that the Borrower could not raise as a defense, a set off based upon the fact that the goods that were sold in consideration for the Note were spoiled. In *Venners v. Goldberg*, 133 Md. App. 428, 758 A.2d 567 (2000), this court specifically held that the defense of failure of consideration is available to a defendant in an action to enforce a Confessed Judgment Promissory Note.
>
> Although the trial court indicated as an alternate basis for its decision, that it could not determine whether the product spoiled before or after the date of settlement, it appears that the court's reasoning was clouded by its determination that no defense could be raised to a Confessed Judgment Promissory Note.

"[A]rguments not presented in a brief or not presented with particularity will not be considered on appeal." *Klauenberg v. State*, 355 Md. 528, 551–52 (1999); *see Beck v. Mangels*, 100 Md. App. 144, 149 (1994); *see also* Md. Rule 8-504(a)(5) (requiring that an appellate brief contain "[a]rgument in support of the party's position"). The argument is not presented with particularity, and Ms. Pak and JoeySam have waived that defense on appeal.

Second, they also failed to preserve the failure of consideration argument because they have not identified, and we did not find, anywhere in the record, where they raised this argument before the circuit court. Md. Rule 8-131(a) ("Ordinarily, 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 . . . ."). They did not rely on a failure of consideration defense either in their motion to vacate or in oral argument before the circuit court. Instead, their defense at trial was that Ms. Yom breached the Asset Purchase Agreement by including spoiled, non-saleable liquor in the transferred inventory.

Third, assuming for present purposes that setoff was an available defense, we would still affirm the circuit court's decision on the merits as to both arguments. As an initial matter, it is undisputed that Ms. Pak and JoeySam *did* receive consideration in exchange for signing the Note—there is no dispute that they received and, even more to the point, accepted the whole inventory of liquor. As a legal matter, even if a partial failure of consideration were sufficient to invalidate a promissory note, Ms. Pak and JoeySam failed to meet their burden to establish that defense to the confessed judgment. *See Antezana*, 171 Md. App. at 727. The only proof they offered of the spoliation itself and of the quantity and value of the allegedly spoiled liquor was Ms. Pak's unsubstantiated testimony, which the circuit court found insufficient, and that finding isn't clearly erroneous. *See* Md. Rule 8-131(c). Furthermore, the breach of contract argument would fail on the merits for the same reason. By Ms. Pak's own admission, she did not discover the alleged spoliation until "four or five months" after the sales transaction occurred. There was *no* evidence that any of the liquor was not saleable at the time of closing, and there's no way to know what condition it was in at the time of closing.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. APPELLANT TO PAY COSTS.