Circuit Court for Prince George's County
Case No.: CAL2019746

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 933

September Term, 2021

JOQUA' D. BURTON

v.

PRECIOUS M. WEST

Kehoe,
Arthur,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kehoe, J.

Filed: May 10, 2022

Joqua' D. Burton, appeals from a judgment of the Circuit Court for Prince George's County entered in favor of appellee, Precious M. West. Ms. Burton presents the following question for our review, which we have reformatted:

> Did the trial court err by denying [her] ex parte relief based upon the order of default entered against [Ms. West]?

For the reasons we shall discuss, we will vacate the court's judgment and remand this case for further proceedings.

BACKGROUND

This appeal arises from a collection action. Ms. Burton lent Ms. West $36,000 and, in return, the latter executed a promissory note[1] wherein she undertook to pay the $36,000 to Ms. Burton "in full or in part" upon the sale of a residential property in Washington, D.C. The note further provided that "[i]f a balance is due once the sale is completed[,] the balance shall be negotiated for payment." The note also provided that if the balance was not paid when it was due, the borrower would additionally be liable for "all costs of collection, including attorney's fees." Ms. West sold the property, but it was a "short sale," so there were no proceeds available to pay any part of the balance due.

In December 2020, Ms. Burton filed a civil action alleging that the property was sold in September of 2020, and that Ms. West had failed to repay any of the amount due under the note. Ms. West failed to file an answer or other responsive pleading. On March 8, 2021,

[1] The note was unsigned but Ms. West does not dispute the enforceability of the instrument.

Ms. Burton filed a motion for order of default. Ms. West did not respond, and on April 22, 2021, the court entered an order of default against her. *See* Md. Rule 2-613(b).[2] At this point, this routine collection case began to go awry.

On May 18, 2021, Ms. West, acting pro se, filed a motion to vacate the order of default. She did not include a certificate of service, as required by Md. Rule 1-323. Although the motion was docketed by the clerk's office, no judicial action was taken on it.

Next, and pursuant to Md. Rule 2-613(f), the court scheduled an ex parte hearing on damages.[3] The court took this step even though Ms. Burton had not asked the court to enter a judgment against Ms. West, which is a necessary prerequisite to such a hearing.[4]

---

[2] Md. Rule 2-613(b) states:

> Order of Default. 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. The request shall state the last known address of the defendant.

[3] A hearing to establish damages in connection with an order of default has commonly been referred to as an "ex parte" hearing in Maryland. *See*, *e.g.*, *Att'y Grievance Comm'n of Maryland v. Sinclair*, 305 Md. 430, 433 (1986); *Kochhar v. Amar Nath Bansal*, 222 Md. App. 32, 36 (2015).

[4] Md. Rule 2-613(f) states (emphasis added):

> If a motion [to vacate the order of default] was not filed under section (d) of this Rule or was 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. 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,

(continued)

At the hearing, Ms. Burton appeared with counsel and Ms. West appeared pro se. Ms. Burton's counsel called her client as a witness and she testified that she had not received any amounts due and owing pursuant to the promissory note. Counsel requested judgment in her client's favor in the amount of $36,000, as well as attorneys' fees, interest, and court costs. The court permitted Ms. West to testify. Ms. Burton did not object to this.

Ms. West conceded that she had borrowed $36,000 from Ms. Burton. She presented two defenses: The first was that Ms. Burton refused to agree to a schedule of payments after the note had gone into default. The second was that Ms. West did not have the right to collect attorney's fees.

Both Ms. Burton and her counsel challenged Ms. West's assertion that there had been no negotiations regarding payment of the amount due. Although the court permitted Ms. West to testify about her version of the settlement discussions, namely that none had occurred, the court refused to permit Ms. Burton to testify on that issue, even though Ms. West indicated that she had no objection to Ms. Burton's doing so. Nor did the court permit Ms. Burton's counsel to address the issue.

After further dialogue between the court, counsel, and Ms. West, the court stated that it "denie[d] the request for *ex parte*—for a judgment on *ex parte* proof at this time. The *ex parte* proof is zero." On June 11, 2021, the circuit court entered an order granting judgment "in favor of [Ms. West] and against [Ms. Burton]. All relief is denied." The order was filed

> may rely on affidavits, conduct hearings, or order references as appropriate and, if requested, shall preserve to the plaintiff the right to trial by jury.

on June 15, 2021. In the interim between the date of the hearing and the date that the judgment was entered, Ms. Burton filed a motion for reconsideration, a new trial, or to alter or amend the judgment. On July 22, 2021, the court's order denying Ms. Burton's post-trial motion was filed. Ms. Burton filed a notice of appeal on August 18, 2021.

ANALYSIS

We review a trial court's decision to grant or deny a motion to alter or amend a judgment for abuse of discretion. *Rose v. Rose*, 236 Md. App. 117, 129 (2018). However, a "court's discretion is always tempered by the requirement that the court correctly apply the law applicable to the case." *Id.* (quoting *Arrington v. State*, 411 Md. 524, 552 (2009)).

In her brief, Ms. Burton correctly points out that Ms. West's motion to vacate the order of default entered against her was a nullity because she was not served with it and because the motion itself was unaccompanied by a certificate of service. Based on this premise, Ms. Burton makes three arguments: *first*, that the circuit court erred in scheduling a hearing pursuant to Md. Rule 2-613(f) because she had not requested a default judgment; *second*, that the circuit court erred in addressing the underlying merits of her claim; and *third*, that the court erred in permitting Ms. West to testify at the hearing. For these reasons, she asserts that the court's judgment in Ms. West's favor must be reversed.

Her first and third contentions are not preserved for appellate review because Ms. Burton did not raise either contention at the ex parte hearing. *See* Md. Rule 8-131(a) (Other than certain jurisdictional issues, "[o]rdinarily, the appellate court will not decide any . . .

issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]").

Ms. Burton's second appellate contention is preserved for review. For the reasons that we will explain, the circuit court erred when it entered judgment for Ms. West.

Md. Rule 2-613 sets out the process by which a party may obtain a judgment by default. *Peay v. Barnett*, 236 Md. App. 306, 317 (2018). If the defendant fails to file an answer or other responsive pleading within the time limit provided by the relevant Maryland Rule, the plaintiff may request entry of an order of default. Md. Rule 2-613(b). The clerk of the court is required to notify the defendant of the entry of the order of default and that the defendant may move to vacate the order." Md. Rule 2-613(c). The defendant may file such a motion within 30 days after the entry of the order of default. Md. Rule 2-613(d). The motion "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). Thereafter, "[i]f 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).

Ms. West's motion to vacate the order of default was defective. Although it was timely filed, it was not accompanied by a properly executed certificate of service, as is required by Md. Rule 1-323.[5] The circuit court's clerk's office should not have accepted the motion

[5] Md. Rule 1-323 states in pertinent part:

(continued)

for filing, and its action in doing so did not cure the defect in Ms. West's response. *See Lovero v. Da Silva*, 200 Md. App. 433, 446 (2011) ("[A] pleading or paper required to be served by Rule 1-321 that does not contain an admission or waiver of service or a signed certificate showing the date and manner of making service cannot become a part of any court proceeding[.]"). Moreover, Ms. Burton's counsel represented to the court that she never received a copy of the motion. Ms. West did not, and does not, dispute this assertion. The legal effect of all of this is that the order of default remains effective and, therefore, the issue of Ms. West's liability on the note was not properly before the court. *See, e.g. Franklin Credit Mgm't v. Nefflin*, 436 Md. 300, 317 (2013) (An "order of default is, in effect, an adverse finding as to liability.") (cleaned up). Although an order of default is conclusive as to liability, a plaintiff must still prove her damages.[6] *Montgomery County v. Post*, 166 Md. App. 381, 389 (2005) ("If an order of default is entered, pursuant to Rule 2–613(b), the defaulting party has the right to move to vacate pursuant to subsection (d), and if the order of default remains, it is dispositive only as to liability.").

> The clerk [of court] shall not accept for filing any pleading or other paper requiring service . . . unless it is accompanied by an admission or waiver of service or a signed certificate showing the date and manner of making service. . . .

[6] Md. Rule 2-613(f) states in pertinent part:

> 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 and, if requested, shall preserve to the plaintiff the right to trial by jury.

Because the order of default in this case was never vacated, there were only two issues properly before the circuit court:

First, the court had to satisfy itself that it had jurisdiction over the case and that the Md. Rule 2-613(c) notice of entry of an order of default had been mailed to the defendant. Neither of these issues were disputed at the circuit court or on appeal.

Second, the court was required "to determine the amount of damages[.]" Md. Rule 2-613(f). In such a hearing, the defendant is entitled to present evidence as to the amount of damages but not as to liability. *See Nefflin*, 436 Md. at 317 (If an order of default is not vacated, "it is dispositive only as to liability."); *Flynn v. May*, 157 Md. App. 389, 405 (2004) ("In any hearing held before entry of [a default] judgment, the defendant may appear to present evidence on the issue of damages, but may not offer evidence on liability. The issue of liability is foreclosed by reason of the order of default.").

Returning to the case before us, it is clear that the procedure followed by the circuit court was problematic in several respects.

First, the court erred as a matter of fairness and due process by permitting Ms. West to testify that she was not obligated to Ms. Burton because the latter had refused to negotiate a payment schedule with her, while refusing to allow Ms. Burton to testify on the same issue. Equally problematic was the court's refusal to permit Ms. Burton's counsel to address this issue.

Second, the substance of Ms. West's testimony was that, although she had borrowed $36,000 from Ms. Burton, she was not obligated to repay it because the latter failed to

negotiate a payment schedule with her. In effect, Ms. West's position was that negotiating a payment schedule was a condition precedent to Ms. Burton's right to enforce the note. As a matter of contract interpretation, Ms. West may possibly be correct, but her argument that the note is unenforceable goes to her liability, and not to the amount of damages incurred by Ms. Burton. We emphasize that after the order of default was entered and not vacated, the assertions in Ms. Burton's complaint—including that Ms. West had failed to make the payment required by the note—are deemed admitted as matter of law. *Attorney Grievance Comm'n v. Thomas*, 440 Md. 523, 550 (2014) ("An Order of Default was entered in the case, and not vacated. Thus, we accept those averments as admitted.")[7]

Because it is unclear to what extent liability, an issue not properly before the court, was considered in entering judgment in favor of Ms. West, we shall vacate the judgment and remand for further proceedings. We provide the following for the assistance of the court and the parties on remand:

(1) Although the issue was not preserved for appellate review, Ms. Burton is correct in pointing out that she never requested the circuit court to enter a default judgment against

[7] *Thomas* was an attorney discipline case. At that time, Md. Rule 16-754(c) stated in pertinent part:

> Failure to answer. If the time for filing an answer [to a petition for disciplinary or remedial; action] has expired and the respondent has failed to file an answer in accordance with section (a) of this Rule, the court shall treat the failure as a default and the provisions of Rule 2–613 shall apply.

Thomas, 440 Md. at 547 n.24. Former Rule 16-754(c) is now codified without change as Md. Rule 19-744(c)

Ms. West. In the absence of such a request, the court failed to follow the dictate of Md. Rule 2-613(f) by scheduling a hearing on the issue of damages. *See Pomroy v. Indian Acres Club of Chesapeake Bay*, 254 Md. App. 109, 121 (2022) ("The failure to abide by the procedures set forth in Md. Rule 2-613 is reversible error."). On remand, the court should not schedule a hearing unless and until Ms. Burton takes the affirmative step of requesting a default judgment.

(2) The order of default entered against Ms. West has not been vacated. Accordingly, the court should accept the averments in plaintiff's complaint as admitted and should consider only the question of damages in awarding any relief to Ms. Burton.

(3) If Ms. Burton files an amended complaint that "introduces new facts or varies the case in a material respect," the amended complaint should be treated like an original complaint and, if Ms. West wishes to challenge the new facts or allegations contained in the amended complaint, she may do so by timely filing an answer or other responsive pleading. *See Pomroy*, 254 Md. App. at 119–21.

Finally, if Ms. Burton requests a default judgment, then the court should schedule a hearing to determine damages. Ms. West has the right to present evidence as to damages. *See Flynn v. May*, 157 Md. App. at 405.

Ms. West does not appear to dispute that she borrowed $36,000 from Ms. Burton. The note does not provide for the payment of interest. However, the note does provide that Ms. West must pay for "all costs of collection, including reasonable attorney's fees[.]" Thus, it appears that the only factual issue left for the court to decide is the amount of attorney's

fees and expenses. The standards for determining the amount of such awards in case like this are set out in Md. Rule 2-704.

THE JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY IS VACATED AND THIS CASE IS REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEE.