

Circuit Court for Prince George's County
Case No. CAL16-40448

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1080

September Term, 2017

1501 SOUTHERN LLC

v.

S.F.C., LLC

Leahy,
Reed,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: November 13, 2019

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

The Circuit Court for Prince George’s County entered judgment in favor of S.F.C., LLC (“Appellee”) after it filed a complaint for default on a confessed judgment note seeking damages of \$3,655,618.06 from 1501 Southern LLC (“Appellant”). Contending that a prior payment of \$135,000 to Appellee applied towards the payment of the Note, Appellant filed a motion to open and modify the default judgment by \$135,000. The trial court denied Appellant’s motion on the ground that there was not a substantial or sufficient basis for an actual controversy as to the merits of the action pursuant to Md. Rule 2-611(e). It is from that denial that Appellant files this timely appeal. In doing so, it brings one question for our review:

- I. Did the circuit court err in denying Appellant’s motion to open and modify judgment pursuant to Md. Rule 2-611(e)?

For the foregoing reasons, we affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

On December 11, 2015, Appellant executed a confessed judgment note (“Note”) promising to pay a principal sum of \$3,250,000.00 (“the Loan”), plus interest, to Appellee. Full payment of the Note was due on June 10, 2016. However, Appellant failed to pay off the note by June 10, 2016. Appellee subsequently sent demand letters to Appellant in July 2016 and August 2016 demanding \$3,549,361 and \$3,567,263.11 respectively, totals reflecting the principal sum of the Note plus interest.

In November 2016, Appellant provided Appellee with a \$135,000 insurance check (“Check”) for property owned by Khalid Mohamed, the member/manager of Appellant. Though the Check stemmed from a different property than the property secured by the

Note, Appellant intended for the \$135,000 to be applied towards payment of the Note. However, Appellee did not credit the Check as payment towards the balance due on the Note and continued to demand Appellant pay the entire principal sum due on the Note plus interest.

On November 14, 2016, Appellee filed its complaint for default on the Note in the Circuit Court for Prince George’s County. On December 13, 2016, the circuit court entered judgment by confession against Appellant in the amount of \$3,655.618.06. On March 21, 2017, Appellant filed a Motion to Open and Modify the Confessed Judgment, arguing that it was entitled to a setoff for the amount of the Check provided to Appellee. On July 6, 2017, the circuit court denied Appellant’s motion, stating that Appellant failed to demonstrate a “substantial and sufficient basis for an actual controversy as to the merits of the action pursuant to Maryland Rule 2-611(e).” It is from the denial that Appellant files this timely appeal.

STANDARD OF REVIEW

Pursuant to Maryland Rule 2-611(d), a court must open, modify, or vacate a confessed judgment “if [it] finds that there is a substantial and sufficient basis for an actual controversy as to the merits of the action...” A trial court’s legal conclusions – including whether the evidentiary proffers of a defendant seeking to open, modify or vacate a confessed judgment qualify as a meritorious defense – are reviewed under non-deferential appellate scrutiny. *See Nils, LLC v. Antezana*, 171 Md. App. 717, 727-28 (2006) (“On the issue of whether what is offered by a party seeking to open, modify, or vacate a confessed judgment qualifies as a meritorious defense, that is a question of law for the judge.”); *see*

also Shafer Bros. v. Kite, 43 Md. App. 601, 606 (1979) (“The issue of what can constitute a meritorious defense, assuming that the supporting facts are believed, is a question of law.”).

DISCUSSION

A. Parties’ Contentions

Appellant contends that the circuit court erroneously denied Appellant’s motion and that it should have submitted the issue to a trier of fact. In doing so, Appellant argues that it has properly presented a “meritorious defense” to the confessed judgment, namely that the \$135,000 partial payment made to Appellee constitutes a setoff and requires the judgment against Appellant to be modified. Appellant notes that Appellee has neither returned nor rejected the partial payment. Further, Appellant states that Appellee agreed to apply the proceeds of the Check to the Loan. As such, Appellant feels it has satisfied its burden and is entitled to a reduced judgment reflecting the \$135,000 payment made to Appellee.

Appellee believes the denial by the circuit court was proper because Appellant failed to set forth a meritorious defense to the confessed judgment. Relying on Maryland Rule 2-611(e), Appellee contends that Appellant has not provided any legal basis requiring Appellee to accept or apply the \$135,000 payment as a setoff for the debt under the Note. Further, Appellee states that the Check was not tendered until after Appellant had defaulted on the Loan, meaning an application of the Check as a setoff would not be proper. Finally, Appellee argues that it “never applied the Check to the debt, never deposited the Check, and never cashed or negotiated the Check.” As such, Appellee asserts that Appellant has

failed to demonstrate there are “substantial and sufficient grounds for an actual controversy” and cannot be entitled to any kind of credit. We agree.

B. Analysis

Maryland Rule 2-611(a) contains the procedure for confessing judgment. Confession of judgment is not a judicial act, but rather the *pro forma* entry of a judgment by the clerk of the circuit court. *See EMI Excavation, Inc. v. Citizens Bank of Maryland*, 91 Md. App. 340, *cert. denied*, 327 Md. 523 (1992). Upon receiving the notice required by Rule 2-611(b), a defendant may move to open, modify, or vacate a judgment by confession, offering evidence constituting a defense to the note upon which the judgment was confessed. *Id.*¹

In *Schlossberg v. Citizens Bank*, 341 Md. 650, 655 (1996), the Court of Appeals set forth the procedures to be followed when a motion to open, modify, or vacate a confessed judgment is filed.

Rule 2–611 governs the procedure for confessed judgments in Maryland. *Judgment by confession may be entered by the circuit court clerk upon the filing of a complaint* accompanied by the original or a copy of the instrument authorizing the confessed judgment and an affidavit specifying the amount due and stating the address of the defendant. Md. Rule 2–611(a). Upon entry of a judgment by confession, *the clerk is required to notify the defendant of the entry of judgment and of the deadline for filing a motion to “open, modify or vacate” the judgment.* Md. Rule 2–611(b).

¹ Judgments by confession are not favored in Maryland. Maryland courts have long recognized that promissory notes containing provisions authorizing confession of judgment lend themselves far too readily to fraud and abuse. *See Keiner v. Commerce Trust Co.*, 154 Md. 366 (1927). As such, judgments by confession are freely stricken “on motion to let in defenses.” *Id.* at 370 (quoting *Phillips v. Taylor*, 148 Md. 157, 163 (1925)).

If the defendant so moves, the circuit court must determine whether there is a “substantial and sufficient basis for an actual controversy as to the merits of the action.” Md. Rule 2–611(d). In other words, *the court must determine whether the defendant has a potentially meritorious defense to the confessed judgment complaint.* The court does not, however, decide the merits of the controversy at this stage. MARYLAND RULES COMMENTARY, at 466. If the court finds that a basis for a defense exists, the rule requires the court to order that the confessed judgment be opened, modified, or vacated so that the defendant can file a responsive pleading to the plaintiff’s complaint and the merits can be determined. Md. Rule 2–611(d).

Schlossberg, 341 Md. at 655–56 (emphasis supplied).

As the moving party on a motion to open, modify, or vacate a confessed judgment, the debtor is allocated the burden of proof. *Nils, LLC v. Antezana*, 171 Md. App. 717, 726 (2006). The debtor must prove that there is a meritorious defense to the execution or amount of the confessed judgment itself. In *Remsburg v. Baker*, 212 Md. 465, 569 (1957), the Court of Appeals spoke on both the allocation and nature of the burden of proof:

Necessarily, *one making the motion assumes the burden of supporting the facts alleged in it*, and as to all matters not going to the merits of the controversy, such as surprise or deceit in the entry of the judgment itself, he must prove such facts by a fair preponderance of the evidence. But *as to defenses going to the merits of the claim upon which the judgment rests*, a different rule prevails. In such cases, *if the evidence adduced in support of the motion is sufficient to persuade the fair and reasoned judgment of an ordinary man that there are substantial and sufficient grounds for an actual controversy as to the merits of the case, the defendant should be deemed to have met the burden of showing that he has a meritorious defence.* In other words, if the evidence is such that persons of ordinary judgment and prudence could honestly and fairly draw different inferences from it, one favoring the plaintiff and the other the defendant, the court should not itself decide that conflict, but should submit it to a jury.

(Emphasis supplied). *See also Billingsley v. Lincoln National Bank*, 271 Md. 683, 689 (1974); *Gambo v. Bank of Maryland*, 102 Md. App. 166, 185 (1994) (“In connection with a motion to vacate, the moving party has the burden of presenting evidence sufficient to

support the purported defense.”); *Garliss v. Key Federal Savings Bank*, 97 Md. App. 96, 104 (1993) (“One moving to strike a judgment by confession has the burden of presenting evidence satisfactorily supporting its purported defense.”); *Shafer Brothers v. Kite*, 43 Md. App. 601, 605 (1979). The issue of whether what is offered by a party seeking to open, modify, or vacate a confessed judgment qualifies as a meritorious defense is a question of law for the judge. *Gambo*, 102 Md. App. at 185 (“What constitutes a meritorious defense is a question of law.”).

The question before this Court is whether the Check issued by Appellant to partially set-off the debt owed to Appellee on the Note constitutes a meritorious defense. In *Gelzer v. Scamoni*, 238 Md. 73 (1965), the Court of Appeals held “that a showing of a set-off . . . is a ‘meritorious defense’ so as to open a confessed judgment[.]” However, “one must adduce evidence in support of his motion sufficient to persuade the fair and reasoned judgment of an ordinary man than there are substantial and sufficient grounds for an actual controversy as to the merits of the case.”²

Appellant contends that the \$135,000 in proceeds from the Check should be applied to the debt owed to Appellee on the Note. Appellant argues that the Check was provided to Appellee to partially satisfy its debt, which Appellant states was agreed to by Appellee.

² The Court applied the standards established in *Stankovich v. Lehman*, 230 Md. 426 (1936). *Stankovich* set forth the test to be applied to determine whether an alleged defense to a confessed judgment is a ‘meritorious’ one. 230 Md. at 432 (“To be successful in moving to strike a judgment by confession, one must adduce evidence in support of his motion sufficient to persuade the fair and reasoned judgment of an ordinary man than there are substantial and sufficient grounds for an actual controversy as to the merits of the case.”).

Unfortunately, Appellant's assertions are without merit. As provided in *Stankovich*, the party bringing a motion under Rule 2-611(d) must provide evidence sufficient to persuade a fair and reasonable person to conclude there are substantial and sufficient grounds for an actual controversy. In *Garliss v. Key Federal Sav. Bank*, 97 Md. App. 96 (1993), Garliss moved to vacate a confessed judgment against him on the grounds that he was entitled to a set-off. However, at his hearing, Garliss was unable to produce any evidence that he had been damaged by Key and was entitled to such a set-off. *Id.* at 104. As such, this Court affirmed the decision by the circuit court to deny Garliss' motion.

Here, Appellant's motion provided no evidence corroborating its allegations. Appellant has provided no evidence that Appellee agreed to apply the proceeds of the Check in partial satisfaction of the debt owed on the Note. Further, Appellant has provided no evidence that Appellee even accepted or deposited the Check. Simply put, Appellant has failed to satisfy its burden in proving that substantial and sufficient grounds for an actual controversy exists.

Also, Appellant and Appellee disagree as to whether a payment made after the due date on the Note would have constituted a valid set-off for purposes of Rule 2-611(d). In *Antezana*, this Court held that a defense challenging the amount of debt due on a note based on a valid set-off or partial payment previously made constitutes a meritorious defense. 171 Md. App. 717, 728-30 (2006) (emphasis added). Appellant contends that any payments made after the debt became due on June 10, 2016 and accepted by Appellee are valid set-offs under *Antezana*. Appellee argues that Appellant's reliance on *Antezana* is misplaced.

In this case, an acceleration clause in the Note made the entire outstanding debt owed by Appellant due after Appellant defaulted. An acceleration clause gives the creditor the ability to accelerate the due date of all outstanding debt owed on a note by a debtor after the debtor defaults. *See Gerber v. Karr*, 231 Md. 180 (1963). Once an acceleration clause is effected, the creditor has discretion in accepting any partial payments offered by the debtor in satisfaction of the outstanding debt owed. As such, Appellee was not required to accept the Check as partial payment for the outstanding debt owed on the Note. The mere offer by Appellant to partially satisfy its debt to Appellee does not constitute a valid set-off.

However, once partial payment is *accepted* by a creditor, albeit before or after an acceleration clause is effected, the holding in *Antezana* applies. Had Appellee accepted the Check as partial payment for the outstanding debt owed by Appellant, Appellant would be entitled to a reduction of the confessed judgment equal to the amount of the Check. Unfortunately, Appellant provided no evidence that Appellee accepted the Check. As such, the circuit court's decision to deny Appellant's motion was proper.

Accordingly, we affirm the judgment of the Circuit Court for Prince George's County.

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