

Circuit Court for Howard County
Case No. 13-C-15-105829

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1119

September Term, 2016

VICTORY ENTERPRISES, LLC

v.

THE SAVAGE LIMITED LIABILITY
COMPANY, ET AL.

Fader, C.J.,
Beachley,
*Woodward,

JJ.

Opinion by Woodward, J.

Filed: July 18, 2019

*Woodward, Patrick L., J., now retired, participated in the hearing of this case while an active member of this Court, and as its Chief Judge; after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in the decision and the preparation of this opinion.

** 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.

Appellant, Victory Enterprises, LLC (“Victory”), appeals a default judgment entered in favor of appellees, The Savage Limited Liability Company (“Savage”), and 9375 Washington Boulevard Holding, LLC.¹ The lawsuit arose out of a dispute between the parties over a commercial lease between appellees, as landlord, and Victory, as tenant, of property located at 9375 Washington Boulevard in Laurel, Maryland (the “Property”). Victory filed suit against appellees in the Circuit Court for Howard County. Appellees filed a counterclaim for rent and attorney’s fees. Victory’s original counsel failed to take any other action in the case, ultimately leading to (1) the dismissal of Victory’s claims, (2) the entry of an order of default against Victory as to appellees’ claims, and (3) the entry of sanctions precluding Victory from introducing evidence at the hearing on appellees’ damages.

When Victory learned of the default and sanctions orders, it retained new counsel, who filed motions to alter or amend and for reconsideration seeking to strike the order of default. The trial court denied the motions and, after a hearing on damages, entered a final judgment against Victory for damages and attorney’s fees. Victory filed this timely appeal and presents two issues for our review, which we have rephrased as follows²:

¹ 9375 Washington Boulevard Holding, LLC did not file a brief and has not participated in this appeal.

² Victory’s questions as presented in its brief are as follows:

1. Whether the lower Court abused its discretion by failing to vacate the Order of Judgment of Default based on *Md. Rule 2-534* and *Md. Rule 2-535* when the Appellees failed to document the last known address of Appellant and the Clerk of the lower court filed to mail to the last known address of the Appellant in Violation of Maryland Rules

1. Whether the circuit court abused its discretion in refusing to vacate the order of default for irregularity based on the clerk's failure to document Victory's last known address and send the order of default to that address.
2. Whether the circuit court abused its discretion by precluding Victory from producing and presenting evidence at the hearing on appellees's damages.

For the reasons set forth below, we shall affirm the judgment of the circuit court.³

BACKGROUND

Victory is a limited liability company registered in Maryland. In 2011, Victory entered into a commercial lease agreement with appellees for the Property, which was to be used as a banquet hall. As a result of water leaks from the roof of the Property and appellees' alleged failure to repair those leaks, disputes arose over the amount of rent due. On September 23, 2015, 9375 Washington Boulevard Holding, LLC filed a failure to pay rent action in district court against Victory. On November 24, Victory filed a complaint against appellees in the circuit court for breach of the implied covenant of quiet enjoyment, wrongful eviction, and breach of the lease agreement. On December 29, after Victory had been evicted from the Property, appellees filed a counterclaim against Victory for breach of lease in which they requested past due rent and attorney's fees.

-
2. Whether the lower court abused its discretion by denying Appellant and its counsel to produce and present evidence to oppose Appellees' damages at the Default Judgment hearing held on July 6, 2016 in violation of the Maryland Rules and this Court's precedent case law.

³ Savage also argues that Victory is not permitted to maintain this appeal because it is a forfeited limited liability company. Victory responds that it was restored to good standing as of November 14, 2016. In light of our decision to affirm the judgment of the circuit court on other grounds, we will not address this issue.

The circumstances underlying this appeal arise largely from the fact that Victory’s original counsel, Gary Anderson, took no action in the lawsuit after filing the complaint and, apparently, failed to inform his client of subsequent developments. On February 2, 2016, after Victory had not responded timely to the counterclaim, appellees filed a Request for Order of Default. The trial court granted the request and issued a Notice of Default Order, which provided Victory with 30 days to file a motion to vacate the order. When Victory again failed to respond, appellees sought a default judgment. On May 3, 2016, the court entered a judgment by default against Victory and ordered that the matter “be set for a hearing to determine damages.”⁴

After filing their counterclaim, appellees served discovery requests on Victory. When Victory failed to respond, appellees filed a motion to compel. The trial court granted the motion and directed Victory to respond by March 18, 2016. When Victory failed to comply, appellees moved for sanctions. Again, Victory failed to respond. On May 3, 2016, the court entered an order sanctioning Victory for failing to respond to discovery. Among the relief the court ordered was that (1) “matters sought to be discovered, or any other designated facts, shall be taken to be established;” and (2) “[Victory] is prohibited from supporting or opposing designated claims or defenses, and [is] prohibited from introducing designated matters into evidence.” In the same order, the court dismissed Victory’s

⁴ The circuit court’s entry of default judgment before reaching a determination of “liability and all relief sought,” Md. Rule 2-613(f), was improper. *Franklin Management Corp. v. Nefflen*, 436 Md. 300, 321 (2013). Here, that procedural misstep was harmless, as the court ultimately followed the correct procedure to determine damages and then entered a final judgment.

complaint against appellees and found that Victory would be entitled to an award of attorney’s fees.

Central to Victory’s first argument on appeal are the addresses to which appellees’ counsel and the circuit court sent documents leading up to these May 3 orders. In appellees’ initial request for an order of default, their counsel listed as Victory’s last known address an old, no-longer-valid address for its former counsel, Mr. Anderson: 4400B Sandy Spring Road in Burtonsville. Appellees served the request for an order of default on Mr. Anderson, and the court sent the notice of the default order to Victory, using the same old address. Other contemporaneous documents, including letters attached as exhibits to the motion to compel discovery, show that appellees’ counsel was contemporaneously sending other documents to Mr. Anderson using an updated address: 416 Main Street, Suite 201 in Laurel.

After not hearing from Victory’s counsel for almost five months, Christine Cole, Victory’s sole member, went to the circuit court clerk’s office to investigate and discovered the entry of both the default judgment and the order for discovery sanctions. Ms. Cole immediately hired a new attorney,⁵ who, on May 11, 2016, filed a motion to alter or amend judgment and a motion for reconsideration on behalf of Victory. In its motion to alter or amend, filed under Maryland Rule 2-534, Victory asked the court to strike the default because Mr. Anderson “ha[d] been completely unresponsive” and had kept Victory “in the

⁵ The Court of Appeals subsequently indefinitely suspended Mr. Anderson from the practice of law in Maryland. *Attorney Grievance Comm’n of Md. v. Anderson*, 451 Md. 504 (2017).

dark.” Victory, which asserted that it could “produce voluminous credible evidence supporting its claims in this matter,” submitted affidavits from Ms. Cole to support both Mr. Anderson’s deficiencies and Victory’s defenses. In its motion for reconsideration, filed under Maryland Rule 2-535(b), Victory argued that Mr. Anderson’s unresponsiveness constituted an “irregularity” and that the order of default should be stricken. The court denied both motions on June 14, 2016.

During the subsequent hearing on damages, which was before a different judge, Victory orally renewed its motion for reconsideration “based on fraud and irregularity.” When asked to identify the irregularity, Victory’s counsel responded:

Irregularity of sending two different addresses that [Mr. Anderson’s] claiming that he has not received anything from the Court nor from the other party and then when I saw the papers, the papers were going to two different addresses including the address that [Mr. Anderson] was not operating his business in.

Appellees’ counsel responded by acknowledging that the Burtonsville address was incorrect, but stating that he had also sent all of the documents to Mr. Anderson by email and that he knew from telephone conversations that Mr. Anderson had received the emails and was aware of the filings. The court declined to disturb the prior ruling denying the motions to alter or amend and for reconsideration.

Appellees then presented evidence that they had incurred \$78,146.26 in damages and \$9,668.50 in attorney fees. The court permitted Victory’s new counsel to cross-examine appellees’ witness and note objections, but the court denied Victory’s request to present Ms. Cole as a defense witness on damages based on the prior sanctions order. At

the close of the hearing, the court issued an oral ruling stating that, “because of the failure to respond to discovery and the failure to file timely answers to the complaint and to fairly and to timely request that the order of default and the default judgment be set aside,” the court had only to determine the amount of damages for appellees. Based on the evidence appellees produced, the court awarded \$78,146.26 in damages and \$9,668.50 in attorney fees. The court issued its written ruling on July 8, 2016. Victory filed this timely appeal.⁶

DISCUSSION

Victory challenges two of the circuit court’s decisions: *first*, its decision to deny Victory’s motions to alter or amend judgment and for reconsideration, and *second*, its decision to preclude Victory from presenting evidence at the hearing on damages.

A. The Issue of Notice to Victory’s Last Known Address Was Not Preserved.

Victory argues the circuit court abused its discretion by denying its motions to alter or amend judgment and for reconsideration. Victory argues that Rule 2-613(b) required the court clerk to send notice not just to its (former) attorney, but also to the last known address of Victory itself. Victory argues that the court clerk’s failure to comply with the Rule, along with appellees’ counsel’s use of an incorrect address for Mr. Anderson, constitutes an irregularity for purposes of Rule 2-535(b) and, therefore, authorized the court

⁶ Ms. Cole, who is not a licensed attorney, filed the notice of appeal on behalf of Victory. Under Rule 2-131, “a person other than an individual may enter an appearance only by an attorney.” In the exercise of our discretion, we decline to dismiss this case on the ground that a non-attorney filed the notice of appeal because “to do so would not serve the interests of justice.” *First Wholesale Cleaners Inc. v. Donegal Mutual Ins. Co.*, 143 Md. App. 24, 38 (2002).

to strike the order of default.⁷ In addition to responding on the merits,⁸ Savage argues that the issue of Victory’s last known address was not brought to the trial court’s attention and, therefore, was not preserved for our review.

Victory’s core argument on appeal, that the clerk’s failure to serve the notice of entry of the default order on Victory itself at its last known address, is different from the argument it made to the circuit court. In its original motions to alter or amend and for reconsideration, Victory focused on the failures of its own former counsel and on the injustice of enforcing a default against it based on those failures. In its renewed motion for reconsideration presented orally at the damages hearing, Victory again mentioned the failures of its former counsel and then also briefly identified two additional issues: (1) an alleged fraud by failing to credit certain payments Victory had made; and (2) the fact that appellees’ counsel was sending documents to Mr. Anderson at two different addresses. In neither instance did Victory argue that appellees were required to identify a separate address for Victory or that the court clerk was required to send notice of the order of default to Victory itself, rather than just its counsel.

Maryland Rule 8-131 provides that an appellate court will not decide an issue “unless it plainly appears by the record to have been raised in or decided by the trial court.” Md. Rule 8-131. “The primary purpose of Rule 8-131(a) is to ensure fairness for all parties

⁷ Maryland Rule 2-535(b) provides that, “[o]n motion of any party filed at any time, the court may exercise revisory power and control over the judgment in case of fraud, mistake, or irregularity.”

⁸ Among other contentions, Savage observes that it had no valid address for Victory because Victory’s place of business was the Property, from which it had been evicted.

in a case . . . , which is accomplished by require[ing] counsel to bring the position of their client to the attention of the lower court so that the trial court has an opportunity to rule upon the issues presented.” *Wajer v. Baltimore Gas & Elec. Co.*, 157 Md. App. 228, 236, 399 (2004) (citations and quotation marks omitted). Because Victory did not raise appellees’ alleged failure to set forth Victory’s correct last known address in the request for order of default, the issue is not preserved for our review. Further, Victory had the burden of proving irregularity by “clear and convincing evidence.” *Powell v. Breslin*, 430 Md. 52, 70 (2013). Having failed to raise the issue below, Victory did not develop an evidentiary record to review for “clear and convincing evidence” of irregularity. Thus, because Victory failed to preserve this argument, we need not address it.

The only issue raised on appeal regarding the denial of Victory’s motion to alter or amend and for reconsideration that it even arguably preserved is its complaint about the appellees’ use of an old address for Victory’s counsel when serving documents relating to the default. Even if that issue was preserved, however, we find no abuse of discretion in the trial court’s denial of the motions for several reasons. As an initial matter, we note the high burden on a party to show that the denial of a motion for reconsideration was “*so far wrong—to wit, so egregiously wrong*—as to constitute a clear abuse of discretion.” *Stuples v. Baltimore City Police Dep’t*, 119 Md. App. 221, 232 (1998). Indeed, “[i]t is hard to imagine a more deferential standard than” that applied to a trial judge’s decision not to reconsider a judgment already rendered. *In re Estate of Vess*, 234 Md. App. 173, 205 (2017). “The nature of the error, the diligence of the parties, and all surrounding facts and

circumstances are relevant” to the court’s decision on whether to exercise its revisory powers. *Wormwood v. Batching Sys., Inc.*, 124 Md. App. 695, 700 (1999). This Court “will not reverse” the denial of a motion to revise “unless there is grave reason for doing so.” *Hossainkhail v. Gebrehiwot*, 143 Md. App. 716, 724 (2002).

Here, the argument now being advanced was made for the first time in what was, in effect, a motion for reconsideration of a ruling denying a prior motion for reconsideration that had been based on different arguments. The motion was made verbally at the outset of a hearing that was scheduled for a different purpose, to consider evidence of appellees’ damages. Even then, the issue was raised almost in passing, in a single sentence in the transcript that complained, in essence, that Victory’s counsel had not received papers sent to an incorrect address. Appellees’ counsel responded promptly to that argument, noting that even if the hard copy papers had not arrived, he had confirmed through conversations with Mr. Anderson that the papers had been received by e-mail. Victory did not dispute that contention.⁹ A court is not required to continuously revisit decisions previously made based on new arguments a party later identifies. *Steinhoff v. Sommerfelt*, 144 Md. App.

⁹ Moreover, as Victory seems to have recognized based on the change in its argument on appeal, an irregularity for purposes of Rule 2-535(b) cannot be based on the actions of opposing counsel, but is generally limited to actions of the court or the court clerk. *See, e.g., Early v. Early*, 338 Md. 639, 652 (1995) (An “irregularity” under Rule 2-535(b) means “a failure to follow required process or procedure.”); *Thacker v. Hale*, 146 Md. App. 203, 219-220 (2002) (Irregularities “result[ing] from a failure of process or procedure by the clerk” include “failures to send notice of a default judgment” and failures to “mail a notice to the proper address.”); *see also Md. Lumber Co. v. Savoy Constr. Co., Inc.*, 286 Md. 98, 103 (1979) (finding an irregularity where the clerk never sent notice of entry of a default judgment). Victory did not identify any evidence of an irregularity on behalf of the court clerk in its renewed motion for reconsideration.

463, 484 (2002) (A trial court “has boundless discretion not to indulge this all-too-natural desire to raise issues after the fact that could have been raised earlier but were not”) In these circumstances, we cannot say that the circuit court abused its discretion in denying the orally-renewed motion for reconsideration.

B. The Court Did Not Abuse Its Discretion in Precluding Victory from Presenting Evidence at the Hearing on Damages.

Victory’s second argument is that the trial court abused its discretion by precluding Victory from presenting evidence at the hearing on damages. “Trial judges are vested with great discretion in applying sanctions for discovery failures.” *Rodriguez v. Clarke*, 400 Md. 39, 56 (2007). “[T]his Court will not disturb a contempt order absent an abuse of discretion or a clearly erroneous finding of fact upon which the contempt was imposed.” *Kowalczyk v. Bresler*, 231 Md. App. 203, 209 (2016).

Victory contends that the circuit court abused its discretion because a defaulting party is “entitled to present evidence in mitigation of damages and cross-examine witnesses.” (quoting *Fisher v. McCrary Crescent City, LLC*, 186 Md. App. 86, 134 (2009)). Savage responds that the circuit court’s prohibition against introducing evidence at the damages hearing was an appropriate discovery sanction because Victory “failed to provide a scintilla of discovery.” We agree with Savage.

Under Maryland Rule 2-432, “[a] discovering party may move for an order compelling discovery if there is a failure of discovery. . . .” *Fisher*, 186 Md. App. at 123. “If the court grants the motion to compel, the court must issue an order compelling discovery. If a party fails to obey an order compelling discovery, the discovering party

may move for sanctions.” *Id.* (internal citation omitted). After receiving a motion for sanctions, the court “may enter such orders as are just,” including:

- (1) An order that the matters sought to be discovered, or any other designated facts shall be taken to be established for the purpose of the action in accordance with the claim of the party obtaining the order.
- (2) An order refusing to allow the failing party to support or oppose designated claims or defenses, or prohibiting the party from introducing designated matters in evidence; or
- (3) An order striking out pleadings or parts thereof, or staying further proceeding until the discovery is provided, or dismissing the action or any part thereof, or entering a judgment by default that includes a determination as to liability and all relief sought by the moving party against the failing party.

Md. Rule 2-433(a). “Ultimately, discovery sanctions are in the sound discretion of the circuit court.” *Fisher*, 186 Md. App. at 125.

In *Fisher* this Court examined the role of discovery sanctions in default judgment proceedings. *Id.* at 86. There, in addition to other sanctions, the circuit court precluded some of the defendants and their counsel from participating in the hearing on damages as a discovery sanction resulting from the defendants’ failure to provide discovery and other infractions or as a civil contempt sanction. *Id.* at 126-32. This Court found that the circuit court abused its discretion in completely precluding the defendants and their counsel from participating in the damages hearing. *Id.* at 127, 130. We explained that “[t]he complete prohibition against participation converted the damages hearing into an ex parte proceeding.” *Id.* at 135. Notably, we identified the “substantial right” of a party to be present at a hearing as a right that was “independent of the ability to present evidence.” *Id.*

In holding that the circuit court in *Fisher* abused its discretion, we expressly distinguished that complete prohibition on participation in the hearing from permissible discovery sanctions, which we said could “consist of prohibiting a particular claim or defense, prohibiting the use of information called for in discovery and not disclosed, ordering that facts sought to be discovered are taken as established, dismissing the action, and determining liability, all as appropriate to remedy a violation.” *Id.* at 135-36. What we disapproved of in *Fisher* was only the “prohibition against participation in terms of making arguments and objections.” *Id.* at 136.

Victory attempts to analogize the court’s actions here with that of the circuit court in *Fisher*. Victory, however, was not precluded from participating in the damages hearing. To the contrary, Victory and its counsel were permitted to be present at the hearing, to make objections on the record, and to participate by cross examining appellees’ witness. In short, the circuit court here did not preclude Victory from doing anything that we faulted the circuit court in *Fisher* for not allowing, and the sanctions the court did impose are among those we expressly identified in *Fisher* as permissible sanctions for discovery violations. *Id.* at 135-36. Victory’s reliance on *Fisher* is misplaced.

Here, the court imposed an appropriate sanction to remedy Victory’s violation. Appellees filed a motion for sanctions pursuant Rule 2-432 after Victory failed to produce any discovery and to respond to the court’s resulting order compelling discovery. The circuit court granted the motion and imposed sanctions expressly allowed by Rule 2-433, prohibiting Victory “from supporting or opposing designated claims or defenses” and

“from introducing designated matters into evidence.” We cannot say that the sanctions were disproportionate to Victory’s complete failure to produce any discovery. “[T]he injury inherent in failure to make discovery is unfair surprise,” and “the only effective cure for this disease is preclusion of the material withheld.” *Storetrax.com, Inc. v. Gurland*, 168 Md. App. 50, 90 (2006) (quoting *Bartholomee v. Casey*, 103 Md. App. 34, 48 (1994)), *aff’d* 397 Md. 37 (2007).

For these reasons, and in light of Victory’s complete failure to produce discovery, the court did not abuse its discretion in precluding Victory from introducing evidence at the damages hearing as a discovery sanction. Although we sympathize with the position Victory is in as a result of the apparent failings of its former counsel, that is not a substitute for the identification of error or abuse of discretion by the trial court.

**JUDGMENT OF THE CIRCUIT COURT
FOR HOWARD COUNTY AFFIRMED;
COSTS TO BE PAID BY APPELLANT.**