

Circuit Court for Baltimore County
Case No. 03-C-17-001032

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1288

September Term, 2017

BRIAN POLING T/A TRIPLE 3 CONTRACTING

v.

CHESAPEAKE EMPLOYERS INSURANCE
COMPANY

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

JJ.

Opinion by Arthur, J.

Filed: November 15, 2018

*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 Baltimore County entered an order of default against appellant Brian Poling t/a Triple 3 Contracting Co., because he failed to file a timely response to a complaint. Poling filed an untimely motion to vacate the order of default, which the circuit court denied. After a hearing on damages, the court entered a money judgment against Poling.

Poling appealed. He raises two questions, which we have restated for clarity and concision:

1. Did the circuit court abuse its discretion in refusing to vacate the order of default?
2. Did the court err in entering a money judgment against Poling?¹

Because we see no error or abuse of discretion, we shall affirm the judgment.

BACKGROUND FACTS

Poling obtained workers' compensation insurance from Chesapeake Employers' Insurance Company for the period from February 3, 2015, until February 3, 2016. In his

¹ Poling formulated the questions as follows:

1. Did the Court [a]buse its [d]iscretion in [r]efusing to [v]acate the Order of Default, [w]hen the Defendant was [u]nrepresented, a Motion to Vacate the Order of Default was made prior to the entry of a Default Judgment and extenuating circumstances as well as the basis for Appellant's meritorious defenses were provided to the court?
2. Did the Court err in entering a monetary judgment in favor of the Appellee when there was no evidence to support Appellee's calculations that additional premiums were due, no monies had ever been paid out on the policy, no attempts were made to verify whether the workers Appellee counted as employees were independent contractors and Appellee did not even attempt to verify whether those workers had their own workers compensation insurance?

application for coverage, Poling represented that subcontractors would perform 80 percent of his work, but that no work would be subcontracted without certificates of insurance – i.e., without evidence that the subcontractors themselves had their own insurance. Chesapeake relied on that representation in issuing the insurance policy.

Because workers’ compensation premiums are based in part on the employer’s payroll, Chesapeake audited Poling’s payroll figures at the end of the policy term. *See Richard Beavers Constr., Inc. v. Wagstaff*, 236 Md. App. 1, 30 (2018) (noting that “workers’ compensation insurance premiums are typically based on audits of the employer’s payroll figures”). The audit required Poling to identify how much he had paid to uninsured subcontractors, because the use of those subcontractors increases Chesapeake’s exposure under the policy.

The audit disclosed that during the term of the policy Poling had paid over \$476,000 to 10 uninsured subcontractors. Poling did not provide certificates of insurance for any of the uninsured subcontractors.

On the basis of the audit, Chesapeake concluded that Poling’s payroll had been underestimated by more than \$476,000, which resulted in an increase in premiums in the amount of \$49,360. Consequently, on March 15, 2016, Chesapeake sent Poling a notice, informing him that he owed \$49,360. The notice told Poling that he could dispute the results of the audit, but neither he nor his insurance agent made any effort to do so.

On May 1, 2016, Chesapeake cancelled Poling’s policy for 2016-17, because he had failed to pay the premiums that had been billed. On August 1, 2016, Chesapeake sent Poling a final invoice in the amount of \$64,166, which consisted of \$49,360 for the

2015-16 policy period and a prorated charge of \$14,806 for several months in which the 2016-17 policy was in effect. Poling did not pay.

On February 1, 2017, Chesapeake filed suit in the Circuit Court for Baltimore County, alleging that Poling had breached the insurance contracts by failing to pay the premiums that were due. Chesapeake served Poling on February 14, 2017. Therefore, Poling was required to respond by March 16, 2017. *See* Md. Rule 2-321(a) (stating that, in general, “[a] party shall file an answer to an original complaint . . . within 30 days after being served”). He did not respond.

On April 6, 2017, three weeks after the deadline for Poling’s response, Chesapeake moved for an order of default under Md. Rule 2-613(b). The court signed the order of default on April 10, 2017, and the clerk entered it on the docket two days later.

The clerk mailed the order of default to Poling on April 12, 2017. In accordance with Md. Rule 2-613(c), the clerk informed Poling that he could move to vacate the order of default within 30 days and that his motion was required to state the reasons for his failure to plead, as well as the legal and factual basis for his defense.

Poling had until May 12, 2017, in which to move to vacate the order of default. *See* Md. Rule 2-613(d). He did not meet that deadline. Consequently, the circuit court scheduled a hearing on the issue of damages for July 18, 2017.

On June 19, 2017, four months after Chesapeake served him with the complaint, two months after the clerk mailed him the order of default, and five weeks after the deadline for moving to vacate the order of default, Poling moved to vacate the order of

default. The untimely motion asserted that Poling had failed to file a timely response to the complaint because he had been mourning the death of a family member four months earlier. It claimed that Chesapeake’s complaint was based on an unspecified “misinterpretation” of Poling’s tax returns and an unidentified “clerical error” by Poling’s insurance agent. It included two exhibits: a death certificate for Poling’s family member and a proposed answer. The proposed answer contained no substantive detail about any of Poling’s alleged defenses.

Chesapeake opposed the motion to vacate, arguing, among other things, that it was untimely and that Poling had not discharged his obligation to detail the legal and factual bases for his defenses. The opposition represented that Poling had attempted to negotiate a payment plan immediately after he had been served, that Chesapeake’s counsel informed of his obligation to file an answer within 30 days of service, that he stopped returning calls even though he had been informed of the relevant deadlines, and that he had attempted to reinitiate settlement discussions after he had learned of the scheduled hearing on damages. Poling did not dispute those representations.

On July 17, 2017, the day before the scheduled hearing on damages, the circuit court denied Poling’s motion to vacate the order of default.

At the hearing on damages on July 18, 2017, Poling, through counsel, attempted to persuade the circuit court to reconsider the denial of his motion to vacate the order of default. The court declined to reconsider its ruling. The court also declined to permit Poling to introduce evidence about his liability, reasoning that that question had been resolved in the denial of the motion to vacate the order of default.

On the basis of the evidence at the hearing, the circuit court entered judgment against Poling and in favor of Chesapeake in the amount of \$64,166 on July 25, 2017. Poling filed a timely appeal on August 22, 2017.²

DISCUSSION

Poling principally complains of the circuit court’s decision to deny his motion to vacate the order of default. The parties agree that we review that decision for abuse of discretion. *Accord Attorney Grievance Comm’n v. Ward*, 394 Md. 1, 20 (2006) (collecting authorities for the proposition that “a hearing court has ‘broad general discretion’ to determine whether to grant or deny a motion to vacate an order of default”); *see also Banegura v. Taylor*, 312 Md. 609, 619 (1988) (stating that a “motion to strike, filed more than thirty days after the entry of the order of default, must be viewed as a request that the trial court invoke its authority to revise an order intended to be final in nature, but which was, in fact, interlocutory”).

A trial court abuses its discretion when its ruling is “‘clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result,’ when the ruling is ‘violative of fact and logic,’ or when it constitutes an ‘untenable judicial act that defies reason and works an injustice.’” *King v. State*, 407 Md. 682, 697 (2009) (quoting *North*

² On August 11, 2017, before he filed the notice of appeal, Poling filed what he called a “motion to alter” the judgment. But because he did not file the “motion to alter” until more than 10 days after the clerk had docketed the judgment, the motion was not a motion to alter or amend under Rule 2-534. Instead, it was only a revisory motion under Rule 2-535(a), which did not stay the 30-day deadline for noting an appeal. *See* Md. Rule 8-202(c); *Estate of Vess*, 234 Md. App. 173, 195 (2017). Had Poling not appealed when he did, the merits of this case would not be before us.

v. North, 102 Md. App. 1, 13-14 (1994)). To amount to an abuse of discretion, “[t]he decision under consideration has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.” *King v. State*, 407 Md. at 697 (quoting *North v. North*, 102 Md. App. at 14).

The failure to file a timely motion to vacate would, in itself, justify the denial of the motion. *Attorney Grievance Comm’n v. Johnson*, 450 Md. 621, 638 (2016). Thus, to affirm the judgment, we need only observe that Poling did not file his motion to vacate until more than five weeks after the deadline.

Even if the motion were timely, however, the court would not have abused its discretion in denying it. Under Rule 2-613(d), a motion to vacate must disclose the legal and factual basis for the defense, but Poling’s motion contained nothing besides vague references to a “misinterpretation” of tax information and a “clerical error” by an insurance agent. It is not enough for a defendant to state, in a conclusory fashion, that he or she has a meritorious defense, as Poling essentially did in this case. *See Carter v. Harris*, 312 Md. 371, 376-77 (1988). In any event, Chesapeake based its claim on the audit of Poling’s payroll records, not on tax information or on any submission from Poling’s agent. Therefore, the alleged defenses could not possibly have affected Poling’s liability.

Furthermore, it was hardly an abuse of discretion for the circuit court to conclude that Poling had not adequately explained his failure to answer the complaint in a timely fashion. In particular, Poling’s claim, that he was completely unable to respond for more

than four months because of a death in his family, is belied by the undisputed evidence that he was aware of the proceedings, was informed of the deadline for a response, and communicated with Chesapeake about a potential resolution on several occasions.

Poling’s brief largely ignores the inadequacy of his untimely motion to vacate. Instead, Poling focuses on evidence that he attempted to introduce at the hearing on damages, such as the 1099-MISC tax-reporting forms that he issued to certain contractors³ and the forms by which a few of the contractors elected not to become his “covered employees” under the Workers’ Compensation Act (two months after Chesapeake filed this suit). Poling complains that the circuit court refused to entertain that evidence because it refused to reconsider the order denying his motion to vacate the order of default. Poling, however, cites no basis to conclude that the circuit court abused its “broad discretion” in declining to reconsider its earlier ruling (*see Banegura v. Taylor*, 312 Md. at 619), especially given that Poling could already have made every one of his factual and legal arguments when his motion to vacate the order of default was due.

In addition to his challenge to the court’s exercise of discretion in denying his motion to vacate the order of default, Poling advances a nominal challenge to the basis for the award of damages. The challenge is nominal in the sense that Poling mentions it

³ Taxpayers use the Form 1099-MISC to “[r]eport payments made in the course of a trade or business to a person who’s not an employee or to an unincorporated business.” <https://www.irs.gov/faqs/small-business-self-employed-other-business/form-1099-misc-independent-contractors/form-1099-misc-independent-contractors> (last viewed Nov. 7, 2018). Nonetheless, the receipt of a 1099-MISC form or the execution of an independent contractor agreement is not dispositive of whether a person is an employee as opposed to an independent contractor. *See, e.g., Injured Workers’ Ins. Fund v. Orient Express Delivery Serv., Inc.*, 190 Md. App. 438 (2010).

in his list of questions presented, but says little in support of it. To the extent that Poling advances any argument, it is not so much an attack on the award of damages as it is an effort to relitigate the issue of liability – i.e., an argument that Chesapeake did not do enough to prove its entitlement to prevail in the first place. That issue was settled when the court correctly exercised its discretion to deny the motion to vacate the order of default.

Finally, Poling contends that by allegedly “allowing” the order of default “to act as” what he calls “an enrolled judgment on the issue of liability,” the circuit court deprived him of his ability to assert a third-party claim against his insurance agent.⁴ Although Poling did not include this issue in his list of questions presented, we are not precluded from considering it. *Simmons v. State*, 392 Md. 279, 292 n.1 (2006); *Janelinsins v. Button*, 102 Md. App. 30, 35 (1994). But because Poling points to no place in the record where he raised this issue in the circuit court, he has not preserved it for appeal. *See* Md. Rule 8-131(a). Furthermore, even if he had preserved it, the argument would have no merit: as a practical matter, Poling’s default may have prevented him from asserting a third-party claim in Chesapeake’s action against him, but the default had no effect on Poling’s ability to assert a claim for contribution or indemnification in some separate action against someone who may be liable to him for all or part of his liability to Chesapeake.

⁴ Poling does not explain how one could have an “enrolled judgment” on a single, discrete issue, such as liability.

**JUDGMENT OF THE CIRCUIT COURT
FOR BALTIMORE COUNTY AFFIRMED;
APPELLANT TO PAY ALL COSTS.**