Circuit Court for Howard County
Case No. 13-C-15-105913

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1680

September Term, 2016

LESLIE DENTON

v.

ITEZZ, INC., et al.

Graeff,
Berger,
Krauser, Peter B.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Krauser, J.

Filed: June 22, 2018

Appellee Itezz, Inc., brought an action, in the Circuit Court for Howard County, against appellant Leslie Denton, alleging that Denton, while president of Itezz, had diverted corporate funds for her own personal use. The relief sought by Itezz was an accounting and a judgment in the amount of money she had allegedly diverted.

Contending that Itezz's suit was baseless, Denton filed a motion to dismiss that action and then a motion, under Maryland Rule 1-341, for legal costs and expenses, against Itezz and its counsel, V. Peter Markuski, Jr., Esquire. Although the Howard County circuit court denied both of those motions, it later granted Denton's subsequent motion to dismiss. Itezz did not appeal that dismissal nor did Denton appeal the denial of her pre-judgment motion for costs and expenses. Instead, Denton filed a post-judgment motion for legal costs and expenses, to which Itezz responded with an opposition, stating only that the post-judgment motion was barred by *res judicata*. The circuit court denied that motion, without explanation, whereupon Denton filed a Rule 2-534 motion to alter or amend that denial, which was also denied.

In this appeal, Denton contends that the circuit court erred in denying both her pre-judgment and post-judgment motions for legal costs and expenses as well as her motion to alter or amend, without "making the required record of its findings as to bad faith and/or substantial justification," which, she notes, is required when a pending motion for costs and expenses is not clearly without merit.

Itezz and its counsel (hereinafter, collectively referred to as "Itezz") respond that, Denton may not raise, on appeal, the denial of either motion for costs and expenses, because

Denton had failed to timely appeal the circuit court's denial of her pre-judgment motion for legal costs and expenses, and, having not appealed her pre-judgment motion, her post-judgment motion for costs and expenses is barred by *res judicata*.

Although we agree that Denton's failure to timely appeal the denial of her pre-judgment Rule 1-341 motion prevents her from challenging that ruling on appeal, we do not agree that she is precluded, by the doctrine of *res judicata*, from contesting the denial of her post-judgment Rule 1-341 motion for legal costs and expenses. And, because that post-judgment motion was not clearly without merit, and yet, no findings were made as to bad faith and/or substantial justification, we shall vacate the circuit court's denial of that motion and remand to the circuit court for it to do so. Consequently, we do not reach the circuit court's denial of Denton's motion to alter or amend the aforesaid rulings.

I.

Neither the record nor any of the briefs filed by the parties to this appeal provide much background information. In fact, the briefs filed by both sides begin their recounting of the circumstances giving rise to Itezz's suit, with the filing of that action in 2015. We have nonetheless pieced together, from the record, something less than a full and robust history of the events leading up to the lawsuit that underlies this appeal.

In 2002, Leslie Denton and Allen Scott Horodyski, who was then Denton's husband, agreed that Denton would replace Horodyski as the president of Itezz, Inc., and have ownership of all of Itezz's company stock. However, notwithstanding those changes,

Horodyski was to run the company on a day-to-day basis. Then, in 2007, Denton conveyed all of her rights, title, and interest in Itezz to Horodyski, and Horodyski assumed the presidency of Itezz.

However, several days after that conveyance occurred, Denton, on August 14, 2007, without any authorization or authority to do so, withdrew $41,196.63 from an Itezz bank account. A year later, the couple entered into a separation agreement. But, notwithstanding that agreement, problems persisted between the two of them. Then, in 2010, Denton and Horodyski sought to resolve their on-going differences through arbitration. The arbitration proceedings that ensued culminated in an arbitration agreement, in which Denton agreed to pay Itezz $41,196.63, which was, in the words of that agreement, "the amount of money [Denton had] removed from the Itezz corporate bank account" in 2007, and thereafter did so.

Nonetheless, Itezz, five years later, filed the lawsuit, which ultimately gave rise to this appeal, claiming that Denton, during her presidency of Itezz, had diverted $250,000 of company assets for her own personal use. Itezz sought, not only a judgment in that amount, but requested, among other things, that Denton "be required to account for all funds she received on behalf of the Itezz from January 1, 2006 to August 31, 2007."

Denton responded to that complaint with a motion to dismiss, suggesting that the applicable statutory time for filing such an action had lapsed, as the alleged misconduct, Denton explained, had occurred "a decade" earlier, that is, in 2006 and 2007, which was, as she put it, "well beyond the applicable three year general statute of limitations . . . ." The

circuit court initially denied Denton's motion to dismiss because of the purported "insufficiency" of its certificate of service.

However, later, Denton sought, and was granted, permission to file what she entitled an "interlineated motion to dismiss." In that motion, Denton raised the same grounds for dismissal alleged in her initial motion to dismiss, that is, that Itezz's claim was "well beyond the applicable" statute of limitations. The court accepted Itezz's previously filed opposition to Denton's prior motion to dismiss, asserting that the discovery rule had tolled the limitations period, as a response to Denton's "interlineated" motion.

That same month, Denton also filed a "Motion for Order of Payment of her Costs and Expenses," under Maryland Rule 1-341. Denton asserted that such a motion was warranted, as Itezz had "maintained" the action, presently before the circuit court, "in bad faith and/or without substantial justification," as the action had no "grounds for support, let alone good grounds" and had been brought solely for the "purposes of pure harassment . . . ."

In support of that claim, she cited, among other things, Itezz's responses to two interrogatories: Interrogatories Nos. 7 and 14. Interrogatory No. 7 requested that Itezz "[s]tate in detail your computation of each category of damages, and showing the method that you employed to make the computation, identifying the facts that you relied upon to make your compensation, and identifying the documents showing such facts and/or persons who will testify to such facts." But, in responding to that interrogatory, Itezz, Denton

pointed out, failed to identify specific damages but simply stated that "[u]pon completion of discovery, I will supplement this Interrogatory."

Nor was Itezz's response to Interrogatory No. 14 any more edifying, Denton complained. That interrogatory instructed Itezz to "[i]dentify each instance in which you allege that the Defendant diverted or otherwise misappropriated Itezz customer payments and/or Itezz revenues and for each such instance identify the documents or witnesses providing the information upon which you base your allegation and state he [sic] information so provided[,]" Itezz's response consisted on no more than: "The only current diversion that am [sic] aware of by [Denton] occurred on August 14, 2007[,] when the Defendant wrote a check on an Itezz bank account for $41,196.63 when she had no authority regarding any Itezz accounts after August 10, 2007 at 2:00 p.m."

As the only "diversion" identified by Itezz in those interrogatories was the same "diversion" that had been addressed in Denton's and Horodyski's arbitration agreement, that is, Denton's unauthorized withdrawal of $41,196.63 from an Itezz bank account in August 2007 (which, in accordance with that agreement, Denton had paid back), Denton claimed, in that Rule 1-341 motion, that the instant action was "without any grounds for support" and requested that Itezz and its counsel be ordered to pay her legal costs and expenses. The circuit court summarily denied that motion, on May 18, 2016. But, then, a month later, that court summarily granted Denton's "interlineated" motion to dismiss.

No appeal from that decision was subsequently taken by Denton or Itezz. Instead, Denton filed, on July 14, 2016, a post-judgment Rule 1-341 motion, seeking payment, from

Itezz and its counsel, her legal costs and expenses. In that motion, she once again asserted that Itezz had maintained its suit against her "in bad faith and/or without substantial justification." She insisted that Itezz "knew the claim was not within the realm of legitimate advocacy," as the applicable limitations period had passed; that Itezz had made "false statements of fact in order to excuse the late filing"; and, finally, that Itezz "consistently failed to comply with Maryland Rules, delaying or obstructing" discovery "for months." Although Itezz filed an opposition, that opposition did not address the merits of Denton's motion for legal costs and expenses but simply asserted that the denial of Denton's earlier motion for costs and expenses served as "*res judicata* with respect to [her] current motion."

On August 9, 2016, the circuit court denied Denton's post-judgment motion for legal costs and expenses but did so without any explanation or without findings as to bad faith or substantial justification. Seven days later, Denton filed a Rule 2-534[1] motion to alter or amend the court's denial of that post-judgment motion for costs and expenses. The next month, the circuit court summarily denied that motion to alter or amend, whereupon Denton noted this appeal.

[1] Maryland Rule 2-534 provides, in pertinent part:

> In an action decided by the court, on motion of any party filed within ten days after entry of judgment, the court . . . may amend its findings or its statement of reasons for the decision, may set forth additional findings or reasons, may enter new findings or new reasons, may amend the judgment, or may enter a new judgment. . . .

II.

Denton contends that the circuit court erred in denying her pre-judgment and post-judgment Rule 1-341 motions for legal costs and expenses, without making findings as to whether Itezz had maintained its suit against Denton in "bad faith and/or" without "substantial justification." Maryland caselaw requires, she points out, that such findings be made, under Rule 1-341, when the motion at issue is not clearly without merit. She therefore requests that this Court reverse and remand for the trial court to make that determination.

Itezz counters that this Court should decline to review the circuit court's denial of Denton's Rule 1-341 pre-judgment and post-judgment motions for legal costs and expenses, as the denial of the former was not preserved for appeal and, that being so, appellate review of the latter, which it maintains raised the very same issues, is barred by *res judicata*. We agree with Itezz, as noted earlier in this opinion, that the denial of Denton's pre-judgment Rule 1-341 motion has not been preserved for appellate review because Denton failed to file a timely appeal from the judgment subsequently entered, as required by Rule 8-202.[2] But, we do not agree with Itezz that appellate review of the denial

[2] Rule 8-202 provides, in pertinent part:

> (a) Generally. Except as otherwise provided in this Rule or by law, the notice of appeal shall be filed within 30 days after entry of the judgment or order from which the appeal is taken. In this Rule, "judgment" includes a verdict or decision of a circuit court to which issues have been sent from an Orphans' Court.

of Denton's subsequent post-judgment Rule 1-341 motion is barred by the doctrine of *res judicata* for the reasons that follow.

To begin with, Maryland Rule 1-341 "dictates the remedial authority of the court in any civil action to require a party to pay an opposing party's attorney's fees for unjustified proceedings." *Christian v. Maternal-Fetal Med. Associates of Maryland, LLC*, —Md.—, 2018 WL 1904302, at *6 (Apr. 23, 2018). Specifically, it provides:

> In any civil action, if the court finds that the conduct of any party in maintaining or defending any proceeding was in bad faith or without substantial justification, the court, on motion by an adverse party, may require the offending party or the attorney advising the conduct or both of them to pay to the adverse party the costs of the proceeding and the reasonable expenses, including reasonable attorneys' fees, incurred by the adverse party in opposing it.

In short, when a party pursues an action in "bad faith or without substantial justification," that party and/or its counsel may be ordered, by a court, "to pay to the adverse party the costs of the proceeding and the reasonable expense . . . incurred by the adverse party" in defending against that action. *Id.* Bad faith, under Rule 1-341, "means vexatiously, for the purpose of harassment or unreasonable delay, or for other improper reasons." *Inlet Associates v. Harrison Inn Inlet, Inc.*, 324 Md. 254, 268 (1991). It may be found not only "where the action is filed in bad faith but" also "in the conduct of the litigation." *Johnson v. Baker*, 84 Md. App. 521, 531 (1990) (quotation omitted). "[S]ubstantial justification," on the other hand, exists when "the litigant's position" is "fairly debatable and within the realm of legitimate advocacy." *Garcia v. Foulger Pratt Dev., Inc.*, 155 Md. App. 634, 676 (2003) (quotations omitted).

However, and of particular relevance to this appeal, "[w]here . . . the record does not clearly reflect the meritlessness of the Rule 1-341 motion, the trial court must make findings as to bad faith and/or substantial justification when denying the motion." *Fowler v. Printers II, Inc.*, 89 Md. App. 448, 487 (1991). That is because, without "such a finding, it is impossible for an appellate court to review the circuit court's decision." *Id.*

Having outlined the purpose and scope of Rule 1-341, we turn now to the doctrine of *res judicata*. That doctrine "bars the relitigation of a claim if there is a final judgment in a previous litigation where the parties, the subject matter and causes of action are identical or substantially identical as to issues actually litigated and as to those which could have or should have been raised in the previous litigation." *R & D 2001, LLC v. Rice*, 402 Md. 648, 663 (2008). The three elements of *res judicata* are "(1) that the parties in the present litigation are the same or in privity with the parties to the earlier dispute; (2) that the claim presented in the current action is identical to the one determined in the prior adjudication; and, (3) that there has been a final judgment on the merits." *Anne Arundel Cty. Bd. of Educ. v. Norville*, 390 Md. 93, 107 (2005).

Among other things, Itezz failed to satisfy the second element of *res judicata*, namely, "that the claim presented in the current action is identical to the one determined in the prior adjudication." *Anne Arundel Cty. Bd. of Educ. v. Norville*, 390 Md. 93, 107 (2005). Indeed, Denton's post-judgment Rule 1-341 motion specifically cited, as grounds for a finding of bad faith, conduct of Itezz that occurred after Denton's pre-judgment motion for legal costs and fees was denied. For example, in that post-judgment motion, she claims

that, following the denial of her pre-judgment motion for costs and expenses, Itezz continued to make numerous misrepresentations to the court suggesting, among other things, that, during her presidency of the company, Denton had withheld "client payments from Itezz, though Itezz knew that allegation to be false. Moreover, Denton maintained that, following the denial of her pre-judgment motion for costs and expenses, Itezz had caused substantial and unwarranted "delays in the discovery process." Thus, the claims made by Denton in her post-judgment motion for costs and expenses were not "identical" to the allegations she made in her pre-judgment motion and, consequently, as the second element of *res judicata* was never met, that doctrine has no application here.

Furthermore, in *Jenkins v. Cameron & Hornbostel*, 91 Md. App. 316 (1992), this Court invoked a principle that provided additional grounds, in that case, for denying the *res judicata* claim at issue and that principle is of no less relevance here. The *Jenkins* Court avowed: "*Res judicata* . . . may be invoked only when there are similar claims raised in two separate proceedings." *Id.* at 334. Here, there were not two separate proceedings, as a post-judgment Rule 1-341 motion, we have observed, is "collateral to the action between the parties." *Johnson v. Wright*, 92 Md. App. 179, 182 (1992).[3] And, a "collateral proceeding" is one "brought to address an issue incidental to the principal proceeding." *Black's Law Dictionary* 1241 (8th ed. 2005). That is to say, it is not a wholly separate

[3] Post-judgment Rule 1-341 motions are permitted as "a trial court may entertain a motion for costs even though the principle suit has been concluded." *Litty v. Becker*, 104 Md. App. 370, 376 (1995).

proceeding. Hence, as *res judicata* requires similar claims in separate proceedings, that doctrine does not apply here.

Finally, the cases cited by Itezz, in support of its assertion that *res judicata* applies to the post-judgment motion at issue, are clearly distinguishable from the instant case. In those cases, the doctrine of *res judicata* was either found to preclude relitigating a claim in a second, separate proceeding, or to prevent a party from challenging the underlying dispute after it had been affirmed by this Court, or to bar "possible verdicts," in a criminal case, following a "hasty" and improper acquittal. Moreover, none of those cases involve a Rule 1-341 motion. *See Alvey v. Alvey*, 225 Md. 386, 389 (1961) ("This bill is based upon the exact same facts and subject matter adjudicated by this Court in the first case . . . ."); *Colandrea v. Wilde Lake Cmty. Ass'n, Inc.*, 361 Md. 371, 392-93 (2000) ("In the present cause, the parties are the same parties included in the 1995 circuit court case and in the HUD proceeding."); *Bank of New York Mellon v. Nagaraj*, 220 Md. App. 698, 708 (2014) ("In Maryland, a trial court no longer has jurisdiction to modify a judgment after it has been affirmed on appeal.") (quotation omitted); *Burkett v. State*, 98 Md. App. 459, 471-72 (1993) (concluding that a "hasty [and improper] judgment of acquittal" as to a "greater inclusive offense" served as "res judicata or former jeopardy" and therefore removed the "aggravating factors" of that offense "from the universe of possible verdicts in this case").

III.

Having determined that we are not precluded by *res judicata* from considering the merits of Denton's contention, we shall now address that contention, which is that the circuit court erred in denying her post-judgment motion for legal costs and fees under Rule 1-341, without making any findings as to whether Itezz had maintained its suit against Denton in "bad faith and/or" without "substantial justification," which the court was required to do unless the motion was "patently groundless," that is, that the motion was clearly without merit. *Fowler v. Printers II, Inc.*, 89 Md. App. 448, 487 (1991).

Interestingly enough, Itezz, instead of challenging Denton's list of acts of "bad faith," states in its brief that it is "not necessary to counter" Denton's "suppositions since almost every allegation predates the final non-appealable Order denying the First Bad Faith Motion, and the Second Bad Faith Motion being barred by *res judicata*."

Given the record before us and the lack of a specific response from Itezz as to the merit of Denton's post-judgment motion, it is not clear that Denton's post-judgment Rule 1-341 motion for costs and expenses was meritless. And, as noted, absent any findings, from the circuit court, as to bad faith or lack of substantial justification concerning Denton's claims against Itezz and its counsel, "it is impossible for" us "to review the circuit court's" denial. *Fowler v. Printers II, Inc.*, 89 Md. App. 448, 487 (1991). Hence, a remand for those findings to be made is warranted. *Id.*

We anticipate that the circuit court, on remand, will "first find" whether the conduct of Itezz and/or its counsel in "maintaining the action, was without substantial justification

or was done in bad faith." *Christian v. Maternal-Fetal Med. Associates of Maryland, LLC*, —Md.—, 2018 WL 1904302, at *7 (Apr. 23, 2018). If it finds that either was so, then, it "must separately find that the acts committed in bad faith or without substantial justification warrant the assessment of attorney's fees." *Id.* In so doing, the circuit court should keep in mind that Rule 1-341 "serves as a deterrent and is intended to compensate as opposed to punish," and that "an award of attorney's fees is considered an extraordinary remedy, which should be exercised only in rare and exceptional cases." *Id.* (citations and quotations omitted).

JUDGMENT OF THE CIRCUIT COURT AFFIRMED. ORDER DENYING POST JUDGMENT RULE 1-341 MOTION VACATED. CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEES.