UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1136

September Term, 2014

LESA KING WHITTEMORE

v.

PAUL T. STEIN, ET AL.

Arthur,
Leahy,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: December 19, 2016

Lesa King Whittemore brought a legal malpractice action against her former attorney, Paul T. Stein, and his law firm. Mr. Stein and the firm moved to dismiss Ms. Whittemore's claims, alleging, among other things, that they were barred by the statute of limitations.

At the end of a motions hearing, the Circuit Court for Howard County orally granted judgment in favor of Mr. Stein and his firm on grounds that neither party had advanced.

Ms. Whittemore appealed. Mr. Stein and his firm ask us to affirm the judgment on grounds on which the circuit court did not rely. We reverse the judgment below, decline to address the alternative ground for affirmance, and remand the case for further proceedings.

FACTUAL AND PROCEDURAL HISTORY

A. The Alimony Guaranty

According to the allegations in the complaint and the assertions made in connection with the dispositive motion in the circuit court, Ms. Whittemore retained Mr. Stein to represent her in a divorce case in February 2007.

On October 11, 2007, Ms. Whittemore and her husband, Mr. David Whittemore, placed a settlement agreement on the record. Under the agreement, David Whittemore agreed to make monthly alimony payments until December 2021. He also agreed to procure a guaranty for his alimony payments from his wealthy brother, Mr. Harvey Whittemore.

On July 8, 2008, the court entered the judgment of divorce, which incorporated the settlement agreement. At the hearing, Mr. Stein informed Ms. Whittemore that he had not yet obtained the signed guaranty, but that her ex-husband's attorney would get it after the hearing. After the hearing, Mr. Stein allegedly told Ms. Whittemore, "[Y]ou never have to worry about money in your life. You have a Guaranty that you can take to the bank."

Over the next month, Ms. Whittemore received copies of communications indicating that Harvey Whittemore had still not signed the guaranty. In one communication, the ex-husband's attorney wrote that Harvey Whittemore "will sign the guaranty upon his return" from a trip outside of the country. In another, the ex-husband's attorney asked Mr. Stein whether he should forward the guaranty once Harvey Whittemore had signed it.

In 2010 David Whittemore told Ms. Whittemore that he and his brother were having financial problems and that it might be necessary for his brother to file for bankruptcy protection. Ms. Whittemore called Mr. Stein to inquire about how a bankruptcy might affect the guaranty. Mr. Stein said that he would have to research her question. Ms. Whittemore told Mr. Stein not to research the bankruptcy issue at that time, because she did not want to incur fees that might prove unnecessary.

David Whittemore remained current on his monthly alimony obligations until November 2011. When he defaulted, Ms. Whittemore requested a copy of the signed guaranty from Mr. Stein. Mr. Stein said that he could not find the document.

By February 2012, after another series of letters between Mr. Stein and the ex-husband's attorney, it became clear that Harvey Whittemore had never signed the guaranty.

B. Legal Malpractice Action

On December 19, 2013, Ms. Whittemore filed a legal malpractice action against Mr. Stein and his firm. The complaint alleged that Mr. Stein breached his duty of care by not obtaining Mr. Whittemore's signed guaranty before the court entered the judgment of divorce. Against the firm, the complaint alleged a theory of vicarious liability.

Mr. Stein and his firm moved to dismiss, or alternatively, for summary judgment on Ms. Whittemore's claims. They advanced two grounds: (1) that limitations barred her claims; and (2) that she cannot prove damages, because Harvey Whittemore has suffered financial reversals and could no longer satisfy the guaranty even if it had been obtained.

C. Proceedings Before the Circuit Court

On July 11, 2014, the Circuit Court for Howard County held a hearing on the dispositive motion. Both parties asked the court to consider when Ms. Whittemore had notice of her claims such that the three-year period of limitations would begin to run. *See generally Bank of New York v. Sheff*, 382 Md. 235 (2004); *Frederick Rd. L.P. v. Brown & Sturm*, 360 Md. 76 (2000); *Supik v. Bodie, Nagle, Dolina, Smith & Hobbs, P.A.*, 152 Md. App. 698 (2003).

Mr. Stein argued that Ms. Whittemore had notice of her claims as early as July 8, 2008 (when the divorce judgment was entered), and in any event by November 2010

(when Ms. Whittemore became aware that Harvey Whittemore might file for bankruptcy). Employing either date, Mr. Stein said, Ms. Whittemore's claims were time-barred.

Ms. Whittemore challenged Mr. Stein's position on a number of grounds. She alleged that her cause of action did not accrue until November 2011, the date when her ex-husband "first fell into arrears," because that was when the guaranty was "implicated." She argued that a jury should decide when she had notice of her claims because the attorney-client relationship gave her "the right to relax her vigilance" and "the right to rely on the good faith of her lawyer." She contended that Mr. Stein engaged in "constructive fraud," which, she said, is also an issue for the jury.

At the conclusion of a motions hearing, the circuit court ruled in favor of Mr. Stein and his firm on grounds that neither party had advanced. The court appears to have concluded that Mr. Stein did not breach his duty of care in not obtaining the guaranty because Harvey Whittemore had no obligation to sign the guaranty. The court also appears to have concluded that if anyone had an obligation to obtain the guaranty, it was Ms. Whittemore's ex-husband, and not Mr. Stein.[1] The court did not address Ms. Whittemore's central allegation that Mr. Stein breached the duty of care by allowing the

[1] Notwithstanding the court's conclusion that Ms. Whittemore's ex-husband had the obligation to obtain his brother's guaranty, Ms. Whittemore asserts that the court denied a civil contempt petition against her ex-husband for failing to obtain the guaranty. Ms. Whittemore asserts that the court denied the petition after finding that her ex-husband was *not* contractually obligated to obtain the guaranty.

court to enter the judgment of divorce without ensuring that the ex-husband had first obtained the guaranty.

On July 16, 2014, the clerk entered the court's oral ruling on the docket. The court, however, did not sign a written order reflecting the disposition of the claims against Mr. Stein and his firm. *See* Md. Rule 2-601(a) (requiring that "[e]ach judgment shall be set forth on a separate document"). Ms. Whittemore nonetheless filed an appeal.

On January 5, 2015, this Court, on its own motion, remanded the case to the circuit court for the entry of the separate document that Rule 2-601(a) requires. The court signed the separate document, and the clerk entered it on the docket on January 12, 2015.

Although Ms. Whittemore filed her notice of appeal before the entry of the separate document, her notice of appeal must "be treated as filed on the same day as, but after, the entry [of the separate document] on the docket." Md. Rule 8-602(d). Consequently, her appeal is properly before us.

QUESTIONS PRESENTED

Ms. Whittemore presents two issues on appeal, which we quote:

1. Did the Circuit Court err in granting summary judgment based on the *sua sponte* theory, raised for the first time as the Court announced its ruling, that Appellees owed Appellant no duty to procure the Guaranty of Appellant's alimony payments?

2. Should this Court limit its scope of review of the Circuit Court's grant of summary judgment only to the ground advanced by the Circuit Court?

We conclude that the circuit court erred in granting judgment on grounds that were not advanced by either party. We shall not address the merits of the alternative grounds for summary judgment, as the circuit court itself did not base its decision on them.

DISCUSSION

Even though the circuit court said that it granted a "motion to dismiss," we treat the court's ruling as a grant of summary judgment because the court explicitly relied upon a number of factual averments in Ms. Whittemore's affidavit. *See Worsham v. Ehrlich*, 181 Md. App. 711, 723 (2008) ("[g]enerally the introduction of affidavits of fact will operate to convert a motion to dismiss into a motion for summary judgment") (citations omitted).

I. Grant of Summary Judgment on Grounds Not Raised by Either Party

Ms. Whittemore contends that the circuit court erred in granting summary judgment on grounds not raised by either party, because she was not given "adequate notice and an opportunity to prepare argument on that issue for the [c]ircuit [c]ourt's consideration." At oral argument, counsel for Mr. Stein defended the court's ultimate conclusion (to enter judgment against Ms. Whittemore), but with commendable candor, declined to defend the court's specific rationale.

We agree that the circuit court could not properly grant summary judgment on grounds that neither party had advanced. *See*, *e.g.*, *Davis v. Goodman*, 117 Md. App. 378, 394 (1997) ("a trial judge cannot, *sua sponte*, and without prior warning, appropriately grant summary judgment based on the plaintiff's failure to prove an

element of his or her case if the defendant has not previously contended that the plaintiff's proof was deficient as to that element") (citation omitted). Simply put, Ms. Whittemore, as the non-moving party, was "not required to respond to issues not raised by the moving parties." *Id.*; *see also* Md. Rule 2-501(f) ("The court shall enter summary judgment in favor of or against the moving party if the *motion and response* show that there is no genuine dispute as to any material fact") (emphasis added). For this reason, the judgment in favor of Mr. Stein and his firm must be reversed.

Although the court's erroneous procedure is sufficient grounds for reversal, the court's reasoning requires a brief comment, as it appears that the court misconceived Ms. Whittemore's central allegation. By focusing on the ex-husband's obligation to procure the guaranty under the settlement agreement, the court did not consider Mr. Stein's alleged obligations. In particular, the court did not address the allegation that Mr. Stein should not have allowed the court to enter the divorce judgment until Harvey Whittemore had signed the guaranty. While we express no view on the merits of that allegation or any other allegation in the complaint, we believe that the circuit court erred in basing its decision on David Whittemore's failure to comply with his obligation to obtain the guaranty while ignoring the allegation that Mr. Stein had an obligation to object to the entry of a judgment until David Whittemore had complied with that obligation.

II. Statute of Limitations as an Alternative Ground for Affirming Judgment

Mr. Stein asks us to affirm the judgment on the alternative ground that Ms. Whittemore's claims were barred by the statute of limitations. We decline to do so.

"[I]t is an established rule of Maryland procedure that, '[i]n appeals from grants of summary judgment, Maryland appellate courts, as a general rule, will consider only the grounds upon which the [trial] court relied in granting summary judgment.'" *Lovelace v. Anderson*, 366 Md. 690, 695 (2001) (quoting *PaineWebber Inc. v. East*, 363 Md. 408, 422 (2001)). "[I]f those grounds were erroneous, we will not speculate that summary judgment might have been granted on other grounds not reached by the trial court." *Gresser v. Anne Arundel Cnty.*, 349 Md. 542, 552 (1998).

Furthermore, although the rules purport to mandate the entry of judgment if there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law (Md. Rule 2-501(f)), the Court of Appeals has said that a circuit court has the discretion to deny a motion for summary judgment in favor of a full hearing on the merits even if the technical requirements for the entry of judgment have been met. *See*, *e.g.*, *Dashiell v. Meeks*, 396 Md. 149, 164 (2006) (citing *Metro. Mortg. Fund, Inc. v. Basiliko*, 288 Md. 25, 27-28 (1980)). If the grant of summary judgment is reversed because of an error in the grounds on which the circuit court relied, an appellate court ordinarily will not undertake to sustain the judgment on a ground on which the court did not rely if the court had discretion to deny summary judgment on that ground. *Lovelace*, 366 Md. at 696 (citing *PaineWebber*, 366 Md. at 422-23).

It is true that in some circumstances a court may lack the discretion to deny summary judgment on a particular ground. For example, a court may lack discretion to deny summary judgment when the record is fully developed, and the alternative ground is

a discrete variant of the ground on which the court relied. *See*, *e.g.*, *Maryland Cas. Co. v. Lorkovic*, 100 Md. App. 333, 357-58 (1994) (affirming summary judgment under one exception to the going-and-coming rule when circuit court had erroneously relied on another). In this case, by contrast, not only was the record almost totally undeveloped, but we know of no authority suggesting that a court lacks discretion to defer a ruling on the typically complex question of when a reasonable person in the plaintiff's position would have had notice that her attorney may have breached the standard of care.

Accordingly, we reverse the court's decision and remand the case for further proceedings. *See Hagerstown Elderly Assocs. Ltd. P'ship v. Hagerstown Elderly Bldg. Assocs. Ltd. P'ship*, 368 Md. 351, 366 n.6 (2002) (explaining that if the reviewing court determines that the stated grounds for a grant of summary judgment are erroneous, "[t]he proper procedure . . . is to remand" to the circuit court) (citations omitted).

JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY REVERSED. CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEES.