Circuit Court for Baltimore County
Case No. 03-C-17-001117 CN

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2265

September Term, 2017

ALLYNNORE M. JEN, ET AL.

V.

CHICAGO TITLE INSURANCE COMPANY

Meredith,
Graeff,
Berger,

JJ.

Opinion by Berger, J.

Filed: April 2, 2019

This case arises out of an order of the Circuit Court for Baltimore County denying a motion to vacate dismissal filed by Allynnore M. Jen and Claude M. Shuler, appellants (the "Jen-Shulers"). The case had been dismissed pursuant to Maryland Rule 2-507. In this appeal, the Jen-Shulers present two questions[1] for our review, which we have consolidated and rephrased as a single question as follows:

> Whether the circuit court abused its discretion by denying the Jen-Shulers' motion to vacate dismissal.

For the reasons explained herein, we shall affirm.

FACTS AND PROCEEDINGS

The Jen-Shulers have owned a home located at 20 Edelweiss Way in Parkton, Maryland, since 1998. In conjunction with their purchase of the property, the Jen-Shulers purchased a title insurance policy from Chicago Title Insurance Company ("Chicago Title"), appellee.

In 2013, the Jen-Shulers became engaged in a dispute with their next door neighbor over the Jen-Shulers' access to a common driveway. The neighbor erected wooden barriers and a split-rail fence across the common driveway and along the boundary line of the two adjoining properties. This had the effect of preventing the Jen-Shulers from accessing the

[1] The questions, as presented by the Jen-Shulers, are:

> 1. Did the clerk err by dismissing the case pursuant to Maryland Rule 2-507(b) when a summons had been requested and issued and was still active?
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> 2. Was the court clerk's failure to send a Maryland Rule 1-324 notice of dismissal to all parties an irregularity that warrants vacating the dismissal?

public road from their property. The Jen-Shulers ultimately engaged in litigation with their neighbor. Following a bench trial, the circuit court ruled in favor of the Jen-Shulers in early 2015.

The Jen-Shulers filed a claim with Chicago Title, asking Chicago Title to cover the costs, attorney's fees and expenses incurred in the lawsuit against their neighbor. The Jen-Shulers alleged that the dispute with the neighbor stemmed from a title defect that originated in 1974 when the developer of the subdivision failed to record an express access easement to give the lots legal and physical access to the nearby public roadway. The Jen-Shulers alleged that Chicago Title was obligated under the terms of the title insurance policy to pay the costs, attorney's fees, and expenses incurred in the litigation with the neighbor. Chicago Title denied the Jen-Shulers' claim. Following multiple requests for reconsideration, the Jen-Shulers filed a claim against Chicago Title before the Maryland Insurance Administration culminating in a final ruling by the Maryland Insurance Commissioner. Both the Jen-Shulers and Chicago Title filed petitions for judicial review of the Commissioner's decision, and the petitions for judicial review are currently pending in the circuit court.

On February 3, 2017, the Jen-Shulers filed the complaint against Chicago Title that initiated the case currently before this Court on appeal. The complaint alleged breach of contract and sought a declaratory judgment that Chicago Title had (1) a duty to prosecute and defend the Jen-Shulers' claims against their neighbor; and (2) a duty to indemnify the Jen-Shulers for all consequential damages related to the alleged title defect. A writ of summons was issued by the clerk of the court on February 7, 2017.

The Jen-Shulers attempted to serve the complaint at the Maryland Insurance Administration on February 21, 2017. The complaint was not served, however, because it did not include the $15.00 fee required by Md. Code (1995, 2017 Repl. Vol.), § 2-112(a)(11) of the Insurance Article.

On June 13, 2017, the clerk issued a "Notification to Parties of Contemplated Dismissal" which provided the following:

> Pursuant to Maryland Rule 2-507 this proceeding will be "DISMISSED FOR LACK OF JURISDICTION OR PROSECUTION WITHOUT PREJUDICE," 30 days after service of this notice, unless prior to that time a written motion showing good cause to defer the entry of an order of dismissal is filed."

The Jen-Shulers did not file a motion to defer dismissal. Instead, on June 20, 2017, the Jen-Shulers filed a Line to Reissue Summons. The clerk reissued a writ of summons on June 23, 2017.[2]

On August 10, 2017, the clerk dismissed the case for lack of jurisdiction. By this time, eight weeks and two days had passed since the Notification of Contemplated Dismissal was issued, and six weeks and six days had passed since the second writ of summons was issued.

[2] The court file contains a second Notification of Contemplated Dismissal dated June 29, 2017, which also warned that the case would be dismissed after thirty days unless a written motion showing good cause to defer dismissal was filed. The docket, however, contains the notation "ENTERED IN ERROR" in relation to the second notification. It is, therefore, unclear whether the second notification was actually sent to the parties.

The Jen-Shulers served Chicago Title on August 21, 2017. On August 28, 2017, the Jen-Shulers filed an affidavit of service. The affidavit stated that Chicago Title had been served at the Maryland Insurance Administration.

The Jen-Shulers assert that they remained unaware that the lawsuit had been dismissed until October 26, 2017, when they learned of the dismissal via a telephone call with the clerk. The Jen-Shulers maintain that the clerk never sent and they never received any written notification that the case had been dismissed. On October 27, 2017, the Jen-Shulers filed a motion to vacate dismissal, arguing that the clerk's dismissal of the case was improper. Chicago Title filed an opposition to the motion to vacate on November 13, 2017, and the Jen-Shulers filed a reply on November 28, 2017. The circuit court denied the Jen-Shulers' motion to vacate dismissal on December 18, 2017. The Jen-Shulers noted this timely appeal on January 17, 2018.

DISCUSSION

The Jen-Shulers assert that the circuit court's refusal to vacate dismissal served to "potentially depriv[e]" them of their "day in Court." The Jen-Shulers note that although they do not believe a refiled action would be time-barred, they anticipate that Chicago Title would make such an argument. "We review the circuit court's decision to deny a request to revise its final judgment under the abuse of discretion standard." *Pelletier v. Burson*, 213 Md. App. 284, 289 (2013) (quoting *Jones v. Rosenberg*, 178 Md. App. 54, 72 (2008)). The Court of Appeals has articulated the appropriate standard of review as follows:

> As regards [an appellant's] challenge to [a trial judge's] denial of his Md. Rule 2-535(b) motion, abuse of discretion is the benchmark. *Das v. Das*, 133 Md. App. 1, 15, 754 A.2d 441,

> 449 (2000). Abuse of discretion occurs "where no reasonable person would take the view adopted by the [trial] court," or when the court acts "without reference to any guiding rules or principles." *North v. North*, 102 Md. App. 1, 13-14, 648 A.2d 1025, 1031 (1994). We will find an abuse of discretion when the ruling is "clearly against the logic and effect of facts and inferences before the court[,]" when the decision 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." *Id.* (internal quotation marks omitted).

Powell v. Breslin, 430 Md. 52, 62 (2013).

The Jen-Shulers assert that the circuit court clerk's failure to send notice of dismissal to all parties as required by Maryland Rule 1-324 constitutes an irregularity warranting reversal under Rule 2-535(b).[3] Indeed, Chicago Title does not dispute that Rule 1-324 required the clerk to notify parties of "any order or ruling of the court not made in the

[3] Rule 2-535 provides, in pertinent part:

> (a) On motion of any party filed within 30 days after entry of judgment, the court may exercise revisory power and control over the judgment and, if the action was tried before the court, may take any action that it could have taken under Rule 2-534. A motion filed after the announcement or signing by the trial court of a judgment or the return of a verdict but before entry of the judgment on the docket shall be treated as filed on the same day as, but after, the entry on the docket.
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> (b) On 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.

course of a hearing or trial." As we shall explain, however, the circuit court did not err in denying the Jen-Shulers' motion to vacate the dismissal filed in this case.

The Jen-Shulers rely on the case of *Dypski v. Bethlehem Steel Corp.*, 74 Md. App. 692 (1988), when arguing that the circuit court should have granted their motion to vacate. In *Dypski*, we held that a trial court clerk's failure to send a copy of an order of dismissal constituted "an irregularity within the meaning of Md. Rule 2-535(b)" and "[t]he hearing court was, therefore, empowered to revise the judgment." *Id.* at 699. As we shall explain, *Dypski* is inapplicable to the present case.

First, we observe that the timeline of the proceedings in *Dypski* differed significantly from the present case. In *Dypski*, a notice of contemplated dismissal was dated January 14, 1986, and subsequently was sent to the parties. *Id.* at 694. Dypski moved to defer dismissal, and the circuit court entered an order on February 10, 1986, deferring dismissal for a period of one year. The order provided that if the "case . . . is not tried or otherwise disposed of in said one year period, it *shall be dismissed* for want to prosecution at the expiration thereof." (Emphasis supplied by the *Dypski* court.) Discovery ensued during the summer of 1986. Trial was set for September 1986 but was postponed by agreement of the parties due to the unavailability of an expert witness. *Id.* at 695.

On February 25, 1987, the case was dismissed for lack of prosecution and judgment was entered against Dypski. Dypski was not notified of the dismissal but instead learned about the dismissal after receiving a statement of costs from the circuit court on March 3, 1987. Dypski moved to revise the judgment pursuant to Rule 2-535 and to suspend the dismissal. The circuit court denied his motion, reasoning that the thirty-day discretionary

period for revising a judgment under Rule 2-535(a) had expired. On appeal, we held that the failure to send notice to Dypski was an irregularity under Rule 2-535, and, therefore, the circuit court was empowered to revise the judgment. *Id.* at 699. We reasoned that "[t]he failure to notify Dypski of the dismissal of the case caused him to lose his opportunity to file timely motions under the less stringent requirements of Md. Rules 2-534 and 2-535(a)," and, "[a]s a result, Dypski was limited to challenging the order under Rule 2-535(b), as an irregularity." *Id.* at 697. We, therefore, remanded the case to the circuit court. *Id.* at 700.

In *Dypski*, over a year had expired between the latest docket entry or other communication from the court and the entry of the subsequent dismissal of the case. In contrast, in the present case, the Notification of Contemplated Dismissal was issued less than two months before the subsequent dismissal. In this case, the relatively short time period between the issuance of the Notification of Contemplated Dismissal and the subsequent dismissal mitigates any potential for confusion by the parties.

More importantly, in the present case, the circuit court did not deny the Jen-Shulers' motion to vacate dismissal on the basis that the motion was filed beyond the thirty-day discretionary period for revising a judgment under Rule 2-535(a) as did the circuit court in *Dypski*, nor did the Jen-Shulers' motion to vacate reference any particular rule. Rather, the circuit court's order emphasized that the Jen-Shulers had "failed to file a motion to defer dismissal within 30 days following service of the Notice of Contemplated Dismissal" and expressly found that the Jen-Shulers "failed to show the due diligence required to vacate the dismissal order."

An irregularity is "the doing or not doing of that, in the conduct of a suit at law, which, confirmable to the practice of the court, ought or ought not to be done." *Manigan v. Burson*, 160 Md. App. 114, 121 (2004) (internal quotation and citation omitted). "In other words, an 'irregularity' is a failure to follow required process or procedure." *Early v. Early*, 338 Md. 639, 652 (1995). Assuming *arguendo* that the circuit court's failure to send notice of dismissal constituted an irregularity under *Dypski* and Rule 2-535, the existence of an irregularity alone does not entitle a party to whatever relief is sought in a motion to revise pursuant to Rule 2-535(b). *Director of Finance v. Harris*, 90 Md. App. 506, 514 (1992). Indeed, we have explained:

> The existence of an irregularity, however, either under the statute or the Rule, does not, of itself, entitle Harris to have the judgment stricken. It simply allows him to invoke the revisory power of the court that otherwise would be unavailable.
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> In order to obtain relief under Rule 2-535(b) or [Md. Code 2006, 2013 Repl. Vol.),] § 6-408 [of the Courts and Judicial Proceedings Article], Harris must show that he is acting in good faith and with diligence and that he has a meritorious defense to the complaint. *Shaw v. Adams*, 263 Md. 294, 296, 283 A.2d 390 (1971). In the circumstances here, Harris must present a satisfactory explanation of why, on at least the first occasion that he sent his motion to the clerk for filing and possibly on the second as well, he failed to serve the City Solicitor with a copy of it, in clear violation of Rule 1-321(a). He must present a satisfactory explanation of why he waited five months before filing his motion to strike the default judgment. He must offer a satisfactory explanation, beyond merely stating that he was in prison and was acting *pro se*, why he failed to answer the initial complaint within the time allowed. And he must demonstrate, beyond bald allegations, that he has a meritorious defense to the complaint. He has, to

> this point, done none of these things, and because he has not, the court erred in striking the enrolled judgment.

Id. at 514-15.

The record in this case reflects that the circuit court did not deny the Jen-Shulers' motion to vacate on the basis that the Jen-Shulers failed to demonstrate fraud, mistake, or irregularity. Unlike *Dypski*, the circuit court exercised discretion in denying the motion and finding that the Jen-Shulers "failed to show the due diligence required to vacate the dismissal order." The circuit court considered the particular circumstances of the case and exercised discretion in making its ruling.

When an irregularity is found, and a trial court acquires revisory power over an enrolled judgment, the question is whether the circuit court abused its discretion by declining to grant the motion. *New Freedom Corp. v. Brown*, 260 Md. 383, 386 (1971) ("An appeal from a denial of a motion to strike or rescind judgment does not serve as an appeal from that judgment and the question presented is whether or not the hearing judge abused his discretion."). As we shall explain, we cannot say that the circuit court's denial of the Jen-Shulers' motion to vacate dismissal constituted an abuse of discretion.

The Notification of Contemplated Dismissal expressly warned the Jen-Shulers that "[p]ursuant to Maryland Rule 2-507 this proceeding will be 'DISMISSED FOR LACK OF JURISDICTION OR PROSECUTION WITHOUT PREJUDICE,' 30 days after service of this notice, unless prior to that time a written motion showing good cause to defer the entry of an order of dismissal is filed." Critically, the Jen-Shulers did not file a motion to defer dismissal within the designated time period and the case was subsequently dismissed.

The circuit court's issuance of the Notification of Contemplated Dismissal and subsequent dismissal of the case was consistent with Rule 2-507, which provides as follows:

> (a) This Rule applies to all actions except actions involving the military docket and continuing trusts or guardianships.
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> (b) An action against any defendant who has not been served or over whom the court has not otherwise acquired jurisdiction is subject to dismissal as to that defendant at the expiration of 120 days from the issuance of original process directed to that defendant.
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> (c) An action is subject to dismissal for lack of prosecution at the expiration of one year from the last docket entry, other than an entry made under this Rule, Rule 2-131, or Rule 2-132, except that an action for limited divorce or for permanent alimony is subject to dismissal under this section only after two years from the last such docket entry.
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> (d) When an action is subject to dismissal pursuant to this Rule, the clerk, upon written request of a party or upon the clerk's own initiative, shall serve a notice on all parties pursuant to Rule 1-321 that an order of dismissal for lack of jurisdiction or prosecution will be entered after the expiration of 30 days unless a motion is filed under section (e) of this Rule.
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> (e) On motion filed at any time before 30 days after service of the notice, the court for good cause shown may defer entry of the order of dismissal for the period and on the terms it deems proper.
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> (f) If a motion has not been filed under section (e) of this Rule, the clerk shall enter on the docket "Dismissed for lack of jurisdiction or prosecution without prejudice" 30 days after service of the notice. If a motion is filed and denied, the clerk shall make the entry promptly after the denial.

In the present case, the clerk issued a Notification of Contemplated Dismissal pursuant to Rule 2-507(d). No motion having been filed within thirty days of service of

the notice pursuant to Rule 2-507(e), the clerk dismissed the case pursuant to Rule 2-507(f). This is precisely what is required by the rule. Indeed, the Court of Appeals has explained that Md. Rule 2-507 "is self-executing, in the sense that it is actuated by inaction of the parties and the passage of time." *Stanford v. District Title Ins. Co.*, 260 Md. 550, 554 (1971); *Powell v. Gutierrez*, 310 Md. 302, 308 (1987) ("If no motion [to defer dismissal] is filed, the case should be automatically dismissed and removed from the active docket.").

Furthermore, the circuit court acted within its discretion in denying the Jen-Shulers' motion to vacate dismissal despite the clerk's failure to issue notice of the dismissal. By the time the alleged irregularity occurred, the dismissal had already been completed after the Jen-Shulers failed to comply with the requirements of Rule 2-507. The burden was on the Jen-Shulers, therefore, to demonstrate that they acted "with ordinary diligence and in good faith upon a meritorious cause of action or defense." Md. Rule 2-535(b).

In their motion to vacate dismissal and before this Court, the Jen-Shulers emphasized that they filed a line to reissue summons after receiving the Notice of Contemplated Dismissal and that a summons was reissued. They assert that the line requesting reissuance of the summons constituted "unequivocal evidence that they intended to move the case forward with due diligence," and, therefore, that dismissal was inappropriate and inconsistent with the purpose of Rule 2-507. The Court of Appeals has characterized the purpose of Rule 2-507 as focused "on pruning the docket of dead cases" and not "to penalize plaintiffs for having lax attorneys." *Powell v. Gutierrez*, 310 Md. 302, 308 (1987). Nonetheless, the language of Rule 2-507 is clear, and the Jen-Shulers have failed to present us with any authority to support their position that a line requesting the

reissuance of a summons is somehow equivalent to a motion to defer dismissal pursuant to Rule 2-507(e). The circuit court's denial of the Jen-Shulers' motion to vacate is entitled to broad discretion which we will not disturb on appeal. Accordingly, we affirm.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANTS.