Circuit Court for Montgomery County
Case No. 432567V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2393

September Term, 2017

ADAORA NOUMMY, ET AL.

v.

SHABANA I. MALIK

Fader. C.J.,
Friedman,
Leahy,

JJ.

Opinion by Fader, C.J.

Filed: April 18, 2019

Adaora Noummy and Elite Multi Specialty Clinic LLC ("Elite"), the appellants, appeal from orders of the Circuit Court for Montgomery County denying their motions to vacate default orders and a default judgment. They claim that the orders and judgment must be vacated because they were never properly served. Finding no error or abuse of discretion by the circuit court, we affirm.

BACKGROUND

In 2015, Ishtiaq A. Malik sold his medical office, Advanced Walk In Urgent Care, LLC, to Ms. Noummy and Elite. In connection with the sale, Ms. Noummy, individually and on behalf of Elite, signed a promissory note "representing the deferred purchase price to be paid for the sale of the assets of the business operated by" Mr. Malik. Mr. Malik later assigned the note to his wife, appellee Shabana I. Malik.

On May 4, 2017, Ms. Malik filed a suit against Ms. Noummy and Elite to collect payments that were allegedly overdue under the terms of the promissory note. Ms. Malik alleged that, "[a]s of the date of filing of this complaint, the defendants have failed and refused to pay twenty-six (26) of the $5000.00 per month payments required under the terms of the Note." Ms. Malik sought damages for breach of the note "in the amount of $125,000.00,[1] together with late fees of $2,400.00, together with prejudgment interest at the legal rate on these undisputed sums, together [sic] such additional sums as shall accrue under the terms of the Note through the date of trial, and for the costs of suit." Ms. Malik also sought damages on the grounds of quantum meruit and fraud.

[1] Twenty-six payments of $5,000 would total $130,000. The complaint does not explain the inconsistency between that figure and Ms. Malik's demand for $125,000.

Ms. Malik hired a private process server, Leonard Raab, to effectuate service. According to an affidavit of service filed with the circuit court, Mr. Raab made several attempts to serve Elite through Ms. Noummy, who is designated as Elite's resident agent in its articles of organization. Mr. Raab described those attempts in his affidavit:

> Mr. Raab made a total of 12 attempts at various times and was always told Ms. Noummy wasn't in or had just left and would be in at a later date, Ms. Noummy was never in when he was told she would be working. The Office Manager [i.e., Ms. Noummy] would never make herself available, and on June 14, Mr. Raab called from outside of Ms. Noummy's office and asked if the Office Manager was in and was told she was in, a minute later he went in office and she had just stepped out and would be back soon, waited half hour and she never returned.

Mr. Raab's affidavit states that he then served papers instead on Elite's receptionist, Keiry Rodriguez, on June 29, 2017.

According to a separate affidavit of service filed with the circuit court, Mr. Raab then served Ms. Noummy in her individual capacity on July 1, 2017 by serving papers at the address listed for Ms. Noummy in Elite's articles of organization, 3207 Barcroft Drive, Upper Marlboro. Mr. Raab's affidavit states that he served papers on "Michael Wheeler, In Hand Personally, a person of reasonable age and discretion at [Ms. Noummy's] usual place of residence: 3207 Barcroft Drive, Upper Marlboro MD 20774."

On August 11, Ms. Malik filed motions for default[2] against Elite and Ms. Noummy. The court entered orders of default as to both on August 29 and scheduled a hearing for

[2] Along with her motions, Ms. Malik attached (1) the affidavits of service for Ms. Noummy and Elite; (2) an affidavit of non-military service as to Ms. Noummy; (3) an affidavit of grantee as first-time Maryland home buyer signed by Ms. Noummy noting her as the grantee of the property at 3207 Barcroft Drive; and (4) a printout from Maryland

"Damages/Ex Parte Proof" for October 18, 2017. On September 19, Ms. Malik filed a motion to "establish[] the amount of her damages against the defendants . . . through the use of the affidavits accompanying th[e] Motion" pursuant to Rule 2-613(f). In an order that is dated October 12, 2017, the court granted the motion and entered a final judgment in favor of Ms. Malik against defendants Ms. Noummy and Elite, awarding damages of $151,980.00 and interest of $11,577.42. The judgment was entered on the docket four days later, on October 16, 2017.[3]

Also on October 16, which was 48 days after entry of the orders of default, Ms. Noummy and Elite filed a motion to vacate the orders on the ground that they "were never served despite the affidavits purporting that actual and proper service had taken place." As to Elite, they asserted that Ms. Rodriguez "is not the resident agent" for the company and, moreover, that "she had resigned from [Elite] prior to the date of service." To support that claim, they attached what they describe as a "notarized affidavit." The attachment, however, purports to be a letter of resignation, dated June 15, 2017 and effective June 28, 2017, that bears what appears to be a standard depository stamp such as would be used to submit checks for deposit to a bank. The text of the stamp, which appears upside down in small print on top of other text, is:

Business Express identifying, among other things, Ms. Noummy as Elite's resident agent, with an address of 3207 Barcroft Drive.

[3] Ms. Noummy and Elite did not include the final judgment in their record extract. In their brief, they assert that the circuit court "granted [Ms. Malik] a judgment for approximately $160,000 on October 16, 2017 . . .," citing only to the docket entries, without noting that the order had been signed on October 12, 2017.

PAY TO THE ORDER OF
BANK OF AMERICA
BOWIE, MD 20175-1712
FOR DEPOSIT ONLY
ELITE NUCLEAR CARDIO
DIAGNOSTICS LLC
446[]

The letter is neither notarized nor an affidavit.[4]

As to service on Ms. Noummy, she and Elite argued that she "does not reside at the address indicated on the affidavit of service, nor does she have any relationship with the person who was served in the affidavit of service." They did not provide the court with any affidavit or other sworn document to support or explain their claims. Instead, they provided: (1) a utility bill in Ms. Noummy's name for an address in Glenn Dale, Maryland for the billing period March 20 through April 19, 2017; and (2) what appears to be a lease renewal form for the same address (the address is partially redacted but still visible), dated May 12, 2017. The lease renewal form indicates that the lease would be up for renewal on July 22, 2017 and identifies the tenants as Daniel O. Ogan and Ms. Noummy. The only signature on the form is that of Ms. Noummy.

On October 25, Ms. Noummy and Elite filed an answer and a motion to vacate the judgment "for improper and otherwise lack of service in this case." With respect to service on Elite, Ms. Noummy and Elite made essentially the same argument as in their motion to vacate the order of default and attached the same letter of resignation by Ms. Rodriguez.

[4] At oral argument, counsel for Ms. Noummy and Elite identified the depository stamp as the basis for their assertion that the letter was a "notarized affidavit."

As to service on Ms. Noummy individually, they argued that service was improper because "she does not know Mr. Wheeler" and she "has been living in Glenn Dale, Maryland since July 2016." In support, Ms. Noummy and Elite attached a purported lease agreement for the address in Glenn Dale that names as tenants Mr. Ogan and Ms. Noummy, for the period of July 22, 2016 through July 21, 2017. The lease agreement contains signatures of Ms. Noummy and Mr. Ogan, but not the landlord. Ms. Noummy and Elite did not submit an affidavit or otherwise explain or authenticate the lease agreement.

Ms. Malik opposed the motion. In addition to the affidavits of service and Elite's articles of organization, Ms. Malik produced a copy of a deed and real estate tax bill "from the online records of government agencies," dated as of October 18, 2018, both identifying Ms. Noummy as the owner of 3207 Barcroft Drive.

On December 13, 2017, the court held a hearing on the motions. The court denied the motion to vacate the default orders on December 14 and it denied the motion to vacate the judgment on December 28. Ms. Noummy and Elite noted this appeal.

DISCUSSION

THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANTS' MOTIONS TO VACATE.

Ms. Noummy and Elite contend that the circuit court erred in denying their motions to vacate because they were not properly served. We review the court's denial of Ms. Noummy and Elite's motion to vacate the orders of default for abuse of discretion. *Das v. Das*, 133 Md. App. 1, 15 (2000). We review the court's decision to deny their motion to vacate the judgment based on a jurisdictional mistake for abuse of discretion. *Peay v.*

Barnett, 236 Md. App. 306, 315-16 (2018). "The existence of a factual predicate of fraud, mistake, or irregularity, necessary to support vacating a judgment under Rule 2-535(b), is a question of law. If the factual predicate exists, the court's decision on the motion is reviewed for abuse of discretion." *Wells v. Wells*, 168 Md. App. 382, 394 (2006) (citing *In re Adoption/Guardianship No. 93321055/CAD*, 344 Md. 458, 475 n.5 (1997)).

A. The Circuit Court Did Not Abuse Its Discretion in Denying Appellants' Motions to Vacate the Orders of Default.

Rule 2-613 governs orders of default and default judgments. It "provides the circuit court with broad discretion to vacate an order of default before it becomes an enrolled, final judgment." *Peay*, 236 Md. App. at 317. A defendant seeking to vacate an order of default must move to do so "within 30 days after its entry." Md. Rule 2-613(d). "If a motion [to vacate] was not filed under section (d) . . . or was filed and denied, the court, upon request, may enter a judgment by default that includes a determination as to liability and all relief sought." Rule 2-613(f). "Because the defendant has an opportunity . . . to vacate the order of default that, in effect, is an adverse finding on liability, the defendant does not enjoy the same opportunity once the default judgment is entered." *Peay*, 236 Md. App. at 318 (quoting *Franklin Credit Mgmt. Corp. v. Nefflen*, 208 Md. App. 712, 733 (2012)).

Ms. Noummy and Elite filed their motions to vacate the orders of default 48 days after those orders were entered and four days after the court signed the default judgment. Ms. Noummy and Elite thus failed to file a timely motion "under section (d)" and, therefore, the circuit court properly entered the default judgment in compliance with Rule

2-613(f). We find no error or abuse of discretion in the circuit court's denial of their untimely motion to vacate the orders of default.

B. The Circuit Court Did Not Abuse Its Discretion in Denying Appellants' Motions to Vacate the Default Judgments.

A default judgment that is properly entered under Rule 2-613 is subject to the circuit court's general revisory power under Rule 2-535(a) only "as to the relief granted," not as to liability. Md. Rule 2-613(g). As to liability, such a judgment may "be stricken or revised only upon a showing of fraud, mistake, or irregularity . . ." under Rule 2-535(b).[5] *Peay*, 236 Md. App. at 320 (quoting *Dir. of Fin. of Balt. City v. Harris*, 90 Md. App. 506, 511 (1992)). Ms. Noummy and Elite do not raise any issues relating to the relief awarded by the circuit court.[6] Instead, they challenge the court's authority to award judgment against them at all based on allegedly improper service. We now turn to that claim.

[5] Rule 2-535(b) provides: "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."

[6] Ms. Noummy and Elite note that the court entered the default judgment without holding the previously scheduled hearing on damages. Ms. Malik, however, had moved to establish damages through affidavits, which the Rule expressly permits. *See* Md. Rule 2-613(f) ("If, in order to enable the court to enter judgment, it is necessary to take an account or to determine the amount of damages . . . , the court, may rely on affidavits, conduct hearings, or order references as appropriate and, if requested, shall preserve to the plaintiff the right to trial by jury."). In any event, Ms. Noummy and Elite do not challenge the relief awarded by the circuit court, so the fact that that relief was awarded based on affidavits rather than after a hearing is not relevant to their claims. Ms. Noummy and Elite could have sought to introduce evidence regarding their jurisdictional defense at the hearing that had been scheduled to address damages, had that hearing gone forward. However, they had not filed anything at all in the case or otherwise made known their intention to contest jurisdiction at the time the court signed the order entering judgment and canceled the hearing.

A party moving to set aside a judgment under Rule 2-535(b) "carr[ies] [a] significant burden of proof" to show "[t]he existence of fraud, mistake, or irregularity . . . by 'clear and convincing evidence.'" *Peay*, 236 Md. App. at 321 (quoting *Das v. Das*, 133 Md. App. 1, 18 (2000)). Moreover, a movant who carries that burden must also "establish that he or she 'act[ed] with ordinary diligence and in good faith upon a meritorious cause of action or defense.'" *Thacker v. Hale*, 146 Md. App. 203, 217 (2002) (quoting *Platt v. Platt*, 302 Md. 9, 13 (1984)). Mistake, under Rule 2-535(b), "is limited to a jurisdictional mistake" such as a judgment "entered in the absence of valid service of process; hence the court never obtains personal jurisdiction over a party." *Chapman v. Kamara*, 356 Md. 426, 436 (1999) (quoting *Tandra S. v. Tyrone W.*, 336 Md. 303, 317 (1994)). Appellants allege improper service of process as to both Elite and Ms. Noummy. We address each in turn.

1. The Circuit Court Did Not Abuse Its Discretion in Declining to Vacate the Judgment as to Elite.

Elite is a Maryland limited liability company ("LLC"). An LLC may be served "by serving its resident agent." Md. Rule 2-124(h). However, "if a good faith attempt to serve the resident agent has failed, service may be made upon any member or other person expressly or impliedly authorized to receive service of process." *Id.* "A proper return of service is *prima facie* evidence of valid service of process," and although "the presumption of validity can be rebutted," "a mere denial of service is not sufficient." *Wilson v. Md. Dept. of Env't*, 217 Md. App. 271, 285 (2014). The denial must be "supported by corroborative evidence by independent, disinterested witnesses." *Id.* (quoting *Ashe v. Spears*, 263 Md. 622, 628 (1971)).

The affidavit of service Ms. Malik presented to the court is prima facie evidence of valid service of process. *See id.* It notes that Mr. Raab "made a total of 12 attempts at various times" to serve Ms. Noummy, Elite's resident agent. Having failed in those attempts, Mr. Raab served Ms. Rodriguez, who he identified as Elite's receptionist.

Ms. Noummy and Elite contend that before Mr. Raab was permitted to make service on anyone other than Ms. Noummy, Ms. Malik was required to obtain a court order allowing for substituted service. However, as Ms. Malik points out, the Rule contains no such requirement. Instead, Rule 2-124(h) provides express authorization to make service "upon any member or other person expressly or impliedly authorized to receive service of process" if a good faith effort to serve the resident agent has failed. Here, the assertions in Mr. Raab's affidavit fulfill the predicate to his ability to use that alternative.

Ms. Noummy and Elite also contend that Ms. Rodriguez does not qualify as a "person expressly or impliedly authorized to receive service of process" because (1) she was a receptionist and (2) she resigned before she was served. On this record, we find no merit in either contention. Mr. Raab's affidavit of service suggests that Ms. Noummy, Elite's registered agent and office manager, was attempting to evade service. No one else was identified to receive service. In that circumstance, it was reasonable to expect that serving Elite's receptionist—who was presumably charged with accepting communications received in the ordinary course of business and ensuring that they make it to the right person—was reasonably calculated to give the LLC fair notice of the lawsuit. Ms. Noummy and Elite have not identified any admissible evidence to the contrary.

As to their contention that Ms. Rodriguez had resigned before Mr. Raab served her, Ms. Noummy and Elite also have not identified any admissible evidence to support that claim. Instead, the sole piece of evidence they offered is a document that purports to be Ms. Rodriguez's letter of resignation effective the day before Mr. Raab's affidavit stated he made service. But although Ms. Noummy and Elite characterize the letter as a "notarized affidavit," it is neither notarized nor an affidavit. Instead, it is simply an unauthenticated letter that has been stamped as though it were a bank deposit and that is unsupported by any affidavit, certification, or testimony. With this as the sole support for the claim of jurisdictional mistake as to Elite,[7] the circuit court did not abuse its discretion in denying the motion to vacate the judgment as to it.

[7] At oral argument, counsel for Ms. Noummy and Elite argued that they could have presented competent evidence on this and other points if granted an evidentiary hearing on their motion to vacate, and that they were in fact prepared to present such evidence during argument on the motion. As an initial matter, that contention is not properly before us. Although the statement of facts in Ms. Noummy and Elite's brief references that there was no evidentiary hearing and that Ms. Noummy was not permitted to testify, their brief contains no argument on this issue and it is not covered by their questions presented. *See Fed. Land Bank of Balt., Inc. v. Esham*, 43 Md. App. 446, 457-58 (1979) ("In prior cases where a party initially raised an issue but then failed to provide supporting argument, this Court has declined to consider the merits of the question so presented but not argued."). And even if properly presented, "[n]othing in the Maryland Rules" requires a hearing on a Rule 2-535 motion, let alone an evidentiary hearing. *Shih Ping Li v. Tzu Lee*, 210 Md. App. 73, 116 (2013) (noting the circuit court did not err or abuse its discretion in denying a husband's motion to revise under 2-535(b) without a hearing or addressing the wife's response and the husband's reply). Moreover, the motion filed by Ms. Noummy and Elite failed to identify *any* admissible evidence in support of their claims. We cannot find an abuse of discretion in the trial court's refusal to hold an evidentiary hearing to explore whether such evidence might exist elsewhere.

2. The Circuit Court Did Not Abuse Its Discretion in Declining to Vacate the Judgment as to Ms. Noummy.

Service of process on Ms. Noummy, as an individual, could be made "(1) by delivering to the person to be served a copy of the summons, complaint, and all other papers filed with it; (2) . . . by leaving a copy . . . at the individual's dwelling house or usual place of abode with a resident of suitable age and discretion; or (3) by mailing to the person to be served a copy . . . by certified mail . . . ." Md. Rule 2-121(a). Ms. Malik filed with the circuit court an affidavit of service from Mr. Raab stating that he personally served the subpoena and complaint on Mr. Wheeler, "a person of reasonable age and discretion, at [Ms. Noummy's] usual place of residence: 3207 Barcroft Drive, Upper Marlboro," on July 1, 2017.

Ms. Noummy and Elite contend that service on Mr. Wheeler at 3207 Barcroft Drive was inadequate as to Ms. Noummy because she no longer resided at that address and did not know Mr. Wheeler.[8] As proof, she attached to her motion an undated lease for a

[8] For the first time on appeal, Ms. Noummy and Elite also appear to question the facial sufficiency of Mr. Raab's affidavit of service as to Ms. Noummy based on the absence of a statement in it that Mr. Wheeler was a resident at the Barcroft Drive address. Asked at oral argument where in the record below she preserved this argument, her counsel identified only the italicization he supplied in the following sentence from the motion to vacate: "The Maryland Rules permits **service** of process to be made by leaving a copy of the summons, complaint, and all other papers filed with it at the individual's dwelling house or usual place of abode *with a resident of suitable age and discretion.* MD Rule 2-121(a)(2)." (emphasis supplied by appellants). However, the motion does not argue that Mr. Wheeler did not reside at 3207 Barcroft Drive or that the affidavit is deficient for not stating that he did. Instead, Ms. Noummy's argument was that *she* did not reside at that address.

We do not consider the italicization indicated above to have provided the circuit court with fair warning that Ms. Noummy was challenging the sufficiency of Mr. Raab's

property in Glenn Dale, Maryland, for the term July 22, 2016 through July 21, 2017. The lease document is electronically signed and initialed by Ms. Noummy and another individual identified as a tenant, but is neither signed nor initialed by the landlord. Moreover: (1) neither the lease nor Ms. Noummy's claim that she was not living at 3207 Barcroft Drive as of July 1, 2017 is supported by any affidavit, certification, testimony, or other admissible evidence; and (2) even if true that she was listed as a tenant on a lease for a property in Glenn Dale, Maryland as of July 1, 2017, which is all the unexecuted lease purports to show, that is not necessarily inconsistent with her being a resident at 3207 Barcroft Drive. Indeed, Ms. Malik produced public records identifying Ms. Noummy as owning that property as of that date and identifying Ms. Noummy as Elite's resident agent and that as her address.

As a result, Ms. Noummy failed to support her claim of jurisdictional mistake with "corroborative evidence by independent, disinterested witnesses," *Wilson*, 217 Md. App. at 285 (quoting *Ashe*, 263 Md. at 628), and so failed to demonstrate clear and convincing evidence sufficient to set aside the judgment under Rule 2-535(b). The circuit court thus did not abuse its discretion in denying the motion to vacate the judgment with respect to Ms. Noummy.

affidavit. Because the issue presented is one of personal jurisdiction, which can be waived, *Peay*, 236 Md. App. at 327, and not subject matter jurisdiction, which cannot, *Green v. McClintock*, 218 Md. App. 336, 358 (2014), Ms. Noummy is not entitled to raise it for the first time on appeal. *See* Rule 8-131(a) ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court . . . .").

As their final contention of error, Ms. Noummy and Elite claim that Ms. Malik perpetuated a fraud by failing to disclose that the sales agreement on which the promissory note was based contains an arbitration clause. In addition to responding substantively to this argument, Ms. Malik points out that it was never raised before the circuit court and so is not properly considered here. *See* Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court . . . ."). We agree that the argument was not preserved and so decline to consider it.

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