UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1484

September Term, 2014

JACQUELINE F. CASSELL

v.

CLAY D. MASH, *et al.*

Eyler, Deborah S.,
Nazarian,
Friedman,

JJ.

Opinion by Nazarian, J.

Filed: September 23, 2015

Even parties who default are entitled to *some* quantum of notice and opportunity before their failure to respond turns into a judgment. Normally, a failure to respond begets a Notice of Default, service of that notice, and an opportunity at least to move to vacate the default before judgment. *See* Md. Rule 2-613. It might seem on the surface that appellant Jacqueline F. Cassell had a fair opportunity to prevent a judgment—after all, the Circuit Court for Cecil County held a trial in this case. But because the unusual proceedings here placed Ms. Cassell in a worse position than she would have been in had the default judgment process been followed, the circuit court should have granted her Motion to Vacate Judgment. We reverse and remand.

I. BACKGROUND

In 1998, the Mashes agreed to sell their home to their son, Rodney Mash, on the condition that he assume and make payments on the mortgage held by PNC Mortgage Corporation of America ("PNC"). By deed dated April 6, 1998, the Mashes conveyed to Rodney an undivided one-half interest in the property, as a joint tenant. Rodney used some of the PNC loan to pay part of the purchase price, and the rest of the loan to pay off personal credit card debt.

Rodney approached his parents in early 2000 and asked them to transfer their remaining interest in the property—the other half—to him so that he could obtain a new loan. The Mashes knew that Rodney would again use the new loan to satisfy additional personal debts, and they refused. Weeks later, the Mashes learned that Rodney had failed

to make timely payments on the PNC mortgage, and to avoid foreclosure, they advanced him the amount in arrears.

This still didn't satisfy Rodney, who contacted co-defendant Millenium Lending Group, Inc. ("Millenium") and obtained a new loan for $206,250, again using the home as collateral. Millenium arranged for BNC Mortgage, Inc. ("BNC") to serve as the lender and for co-defendant Drescher & Associates, P.A. ("Drescher, P.A.") to provide closing and title services. On April 3, 2000, Rodney met with Ms. Cassell, a notary public, to conduct the closing, and without the knowledge or consent of the Mashes, executed a deed conveying title from the Mashes and Rodney to Rodney alone. Although the Mashes never appeared before Ms. Cassell or signed the new deed, Ms. Cassell notarized their "signatures." Ms. Cassell also notarized forged signatures of the Mashes on the mortgage with BNC. Accompanying the loan documents was an affidavit, notarized by Ms. Cassell, certifying that the Mashes had appeared personally before her at the closing and signed the affidavit. A second forged deed, also notarized by Ms. Cassell, then conveyed the property from Rodney alone back to Rodney and his parents.

Suspicion led to investigation, and the Mashes learned about the forged deed and accompanying BNC mortgage. Just as with the PNC mortgage, Rodney failed to make payments on the BNC mortgage. And once again, in an effort to avoid foreclosure, the Mashes satisfied the amount of the fraudulent BNC mortgage.

The Mashes filed suit on April 2, 2003 against Rodney, Millenium, Aaron Albers (a Millenium employee), Mr. Drescher, Drescher, P.A., Ms. Cassell (alleged to be acting as "the agent, servant and/or employee of" Millenium or Drescher, P.A.), and Professional

Title Services, Inc. By February 2004, the only parties successfully served were Mr. Drescher and Drescher, P.A. At that time, the Mashes entered into a settlement agreement with Mr. Drescher and Drescher, P.A., in which they agreed to dismiss their lawsuit against those two defendants and their "agents, insureds, servants, employees" with prejudice in exchange for $60,000. Eventually, the Mashes obtained Notices of Default and default judgments against Rodney, Millenium, Mr. Albers, and Professional Title Services, Inc. Importantly, though, and for reasons the record does not reveal, the Mashes never obtained a Notice of Default or a default judgment against Ms. Cassell.

Instead, they managed to serve her and proceeded to trial, even though she defaulted as well. The Writ of Summons, Complaint, and Civil Non-Domestic Case Report were mailed unsuccessfully to addresses in West Grove, Pennsylvania and Phoenix, Maryland,[1] but she was served personally inside the District Court in Baltimore City on March 31, 2004. On April 27, 2004, Ms. Cassell was admitted to court-ordered drug rehabilitation; she remained there until May 28, 2004, and never responded to the Complaint. Before she was served, trial had been scheduled for May 17, 2004. But when Ms. Cassell failed to answer, the plaintiffs did not ask the Clerk to issue a Notice of Default—they simply proceeded to (a bench) trial, and the court went forward without Ms. Cassell or anyone on her behalf present. In fact, the only parties present at trial were the Mashes—again, all other defendants remained unserved or had been released. And perhaps not surprisingly, the court found Ms. Cassel liable for fraud, conversion, disparagement of title, civil

[1] The Phoenix address was Ms. Cassell's parents' house.

conspiracy, aiding and abetting, and violations of the Maryland Consumer Protection Act. In addition, the court awarded damages to the Mashes against other all defendants, jointly and severally, in the amount of $314,178.12 in compensatory damages, $14,122.25 in statutory damages, and $100,000 in punitive damages, with 10% post-judgment interest per annum. Notice of this judgment was mailed to Ms. Cassell at her parents' address in Phoenix.[2]

Years passed with no activity, including no collections activity. But in May 2012, the Mashes petitioned to renew their favorable judgment, and a notice of renewal was mailed to the defendants. Over the months that followed, summonses and notices of scheduled hearings were mailed to Ms. Cassell at both the West Grove address and another address in Abingdon listed in the court's file, to no avail. Finally, on September 13, 2013, a Harford County sheriff approached the Abingdon residence and spoke with a disgruntled resident. Despite initially denying that Ms. Cassell lived there, the Sheriff left a "note" [3] with the resident, who apparently was Ms. Cassell's husband. Then, on December 2, 2013, at the same Abingdon address, the same sheriff served Ms. Cassell personally, noting the following exchange: "Subject was identified and she stated that she was the correct subject.

[2] Ms. Cassell argued that notice of the judgment was only mailed to West Grove; however, the record reveals that judgment was never mailed to West Grove and was mailed repeatedly to Phoenix.

[3] Handwritten in the explanation for why Ms. Cassell was unserved on that occasion, the sheriff noted the "runaround" at the house, then that he "left [sic] note with the husband."

She then refused the papers and they were dropped on the porch. I (Deputy Dailey 186) advised her that she was served[.]"

Ms. Cassell responded on December 27, 2013 with a Motion to Vacate Judgment grounded in Md. Rule 2-535. She contended, among other things, that: (1) the $100,000 award of punitive damages had been entered without a finding of actual malice or personal gain on her part and without consideration of her finances; (2) the settlement agreement between the Mashes and Drescher, P.A. included and released her; (3) the circuit court had repeatedly sent documents to the wrong address; (4) the service of process she received on March 31, 2004 was defective for failing to include a Notice of Trial; (5) court-ordered incarceration had prevented her from answering or otherwise responding to the service; and (7) the Mashes should have obtained and served a Notice of Default rather than proceeding to trial. After a hearing on July 29, 2014, the circuit court denied the Motion. Ms. Cassell filed a timely Notice of Appeal.

II. DISCUSSION

There can be no serious dispute that this case arrives in this Court on an irregular posture. Ms. Cassell defaulted, but was never "defaulted," in the Rule 2-613 sense of the term. Judgment was entered, but mailed to a dubious (and ultimately ineffective) address, and the Mashes let a long time go by without following up. Add in the settlement with two key parties, which seems on its face to encompass Ms. Cassell, not to mention the punitive damages award, and we find ourselves with serious questions about the validity of this judgment.

Even so, the question for us is not whether we as trial judges would have granted the Motion to Vacate, but whether the circuit court abused its discretion when it declined to exercise its revisory power under Md. Rule 2-535. *Das v. Das*, 133 Md. App. 1, 15 (2000). "'The real question under this standard is whether justice has not been done,' and the judgment will be reversed only if 'there is a grave reason for doing so.'" *Id.* (quoting *B & K Rentals v. Universal Leaf*, 73 Md. App. 530, 537 (1994)). Instead, abuse of discretion occurs when a ruling is "clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result" or when the ruling constitutes an "untenable judicial act that defies reason and works an injustice." *North v. North*, 102 Md. App. 1, 13-14 (1994) (citations omitted).

A. The Circumstances Giving Rise To This Judgment Qualify As Irregular.

Md. Rule 2-535 permits a trial court to disturb an enrolled judgment after the broad 30-day revisory period only for fraud, mistake, or irregularity. Md. Rule 2-535. We can narrow the list quickly in this case. Mistake in this context "must necessarily be confined to those instances where there is a jurisdictional mistake involved," *Bernstein v. Kapneck*, 46 Md. App. 231, 239, *aff'd*, 290 Md. 452 (1981), and there is no jurisdictional question here. Similarly, fraud for these purposes is limited to extrinsic fraud, *i.e.*, fraud *collateral to* the issues tried in the case. *Tandra S. v. Tyrone W.*, 336 Md. 303, 315-16 (1994),

superseded by statute, Md. Code (1999, 2006 Repl. Vol.) § 5-1006 of the Family Law Article.[4]

That leaves us with irregularity which, as used in Rule 2-535, is "the doing or not doing of that, in the conduct of a suit at law, which, conformable to the practice of the court, ought or ought not to be done." *Weitz v. MacKenzie*, 273 Md. 628, 631 (1975). Most often, this takes the form of a failure to give notice to a party when notice is due. A qualifying irregularity, which arises from nonconformity of process or procedure, is not to be confused with an "error," which usually "connotes a departure from truth or accuracy of which a party had notice and could have challenged." *Pelletier v. Burson*, 213 Md. App. 284, 290 (2013). Instead, an exercise of revisory power is justified where the judgment was not entered in conformity with the practice and procedures commonly used by the court that entered it. *Home Indem. Co. v. Killian*, 94 Md. App. 205, 217 (1992).

A defendant who fails to respond to a properly served summons and complaint is in default, and Rule 2-613 provides a procedure through which the plaintiff can seek and obtain judgment on an expedited basis. But a default judgment is not automatic, and the default judgment procedure affords the defendant notice that default has been entered against her, and an opportunity to move to vacate the judgment within thirty days. Md. Rule 2-613(c). The goal of Rule 2-613 is not to impose a punitive sanction, but rather "to ensure that justice is done." *Abrishamian v. Washington Med. Group, P.C.*, 216 Md. App. 386, 404 (2014). And nothing about the nature or history of this case prevented or impeded

[4] The superseding statute addresses the substantive arguments in *Tandra*, which are entirely irrelevant to the procedural issues that drive our analysis here.

the Mashes from following the normal default procedure. To the contrary, the Mashes pursued and obtained default judgments against every other non-responsive defendant.

For reasons not apparent from the record, though, the Mashes proceeded differently against Ms. Cassell, and the result left her in a demonstrably worse position than if the Mashes had followed Rule 2-613. Rather than obtaining a Notice of Default—which couldn't have been turned into a default judgment without proof that it had been mailed to a valid address, Md. Rule 2-613(b), (c), (f); *Armiger Vol. Fire Co. v. Woomer*, 123 Md. App. 580, 589-92 (1998)—the Mashes and the circuit court proceeded to trial and judgment (and with lingering questions about whether she had received notice of the trial date, although that was something she could have learned on her own). Because the resulting judgment was mailed to an incorrect address, she may not have known it had ever been entered—again, she could have followed up on her own to determine the status of the case and the existence or not of a judgment, but the unusual procedure left her without a layer of notice that the Rules specifically mean defaulted defendants to receive. *See Beyer v. Morgan State Univ.*, 369 Md. 335, 354 (2002) (failing to give notice to a party entitled to it is a "substantial irregularity" that can justify vacation of a judgment). And for that reason, we disagree that the intervening years dissipated (or resulted a waiver of) Ms. Cassell's right to ask the circuit court to vacate the judgment and, to the extent permissible under the Rules, to assert defenses on the merits.

B. Ms. Cassell Acted With Ordinary Diligence, In Good Faith, And Presented Potentially Meritorious Defenses.

Once a party has established the existence of fraud, mistake, or irregularity, she must show she acted with ordinary diligence, in good faith, and have a meritorious defense. *J.T. Masonry Co., Inc. v. Oxford Constr. Servs., Inc.*, 314 Md. 498, 506 (1989). Ordinary diligence required Ms. Cassell to move to vacate the judgment as soon as she learned of the judgment and investigated the facts. *See Fleisher v. Fleisher*, 60 Md. App. 565, 573 (1984). That standard was met here. In the absence of a proper Notice of Default, we can't tell from this record whether Ms. Cassell received notice of the judgment in any form before 2013. At the earliest, she might have known something was up in September 2013, but even that contact with the sheriff leaves questions about what information was or was not conveyed. The best approximation of the notice she would have received under Rule 2-613, then, was the personal service she received on December 2, 2013, and her Motion to Vacate Judgment followed on December 27, 2013.

And although we offer no opinion on the merits of the arguments she sought to raise in her Motion to Vacate, Ms. Cassell's contentions regarding the effect of the Mashes' settlement agreement with Drescher, P.A., her exposure to joint and several liability with other defendants, and the findings underlying the punitive damages award all relate to the threshold validity of the judgment and damages awards, and if successful would reduce or eliminate the judgment altogether. Under these unusual circumstances, the circuit court abused its discretion in denying Ms. Cassell's Motion to Vacate Judgment, and we shall

reverse and remand to allow Ms. Cassell the opportunity to assert her defenses to the Mashes' claims.

JUDGMENT OF THE CIRCUIT COURT FOR CECIL COUNTY REVERSED, AND CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEE.