

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1989

September Term, 2015

JAMES MAYES, *et ux*

v.

BB&T HOME IMPROVEMENT

Krauser, C.J.,
Friedman,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: December 23, 2016

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

The issue to be decided in this case is whether the Circuit Court for Baltimore County had authority to decide appellee's motion to dismiss appellants' amended counterclaim and to remand the case to the District Court of Maryland for Baltimore County, when, at the time the dismissal motion was granted, the circuit court had not explicitly ruled on appellee's motion for leave to file a motion to dismiss the amended counterclaim. We shall hold that the circuit court did have such authority and shall therefore affirm the judgment entered by the Circuit Court for Baltimore County.

I.

BACKGROUND

On February 9, 2015, BB&T Home Improvement, a banking division of Branch Banking and Trust Company (hereinafter "BB&T") filed a breach of contract action in the District Court of Maryland for Baltimore County against James Mayes and his wife, Melissa Mayes. The complaint alleged that BB&T, formerly Lemark Financial Services, Inc., lent James and Melissa Mayes money pursuant to a contract but the Mayes' had failed to pay the money when due. As a consequence, according to the complaint, Mr. and Mrs. Mayes owed BB&T \$10,137.17, plus interest of \$1,114.69 and attorney's fees of \$1,635.85 for a total of \$12,887.91.

Mr. and Mrs. Mayes, on March 6, 2015 filed a notice of intent to defend together with a counterclaim and a jury trial prayer. Count I of the counterclaim was captioned "Malicious Use of Process" and alleged, *inter alia*, that BB&T was not a "legal[ly established] entity [set up] and authorized to transact business within the State of

Maryland.” Count II alleged that BB&T had committed the tort of abuse of process because that last mentioned entity initiated suit without probable cause and without a valid factual basis to support the allegations set forth in the complaint. The counterclaim went on to say that BB&T instituted the complaint “with malice and with an intent to harm the [c]ounter-[p]laintiffs and for an illegal profit motive.”

The counterclaim in both Count I and Count II demanded that a judgment in the amount of \$31,000.00 be entered. Because the counterclaim prayed for damages in excess of the district court’s \$30,000.00 jurisdictional limit, the case was transferred to the Circuit Court for Baltimore County.

On April 1, 2015, a circuit court judge signed a scheduling order setting April 16, 2015 as the deadline for filing, pursuant to Maryland Rule 2-322(b), motions to dismiss. Discovery was to be completed by July 11, 2015. No deadline was set for filing amendments to the complaint or counterclaim and no trial date was set.

On April 3, 2015, BB&T filed an amended complaint. Attached to the amended complaint were documents showing that BB&T was authorized to do business in Maryland. Also attached was a home improvement credit contract, dated May 22, 2013, in which Mr. and Mrs. Mayes agreed to pay a company called “Prestige Windows & Siding” the sum of \$10,160.00 at an annual interest rate of 16.99%. Payments were to be made at the rate of \$174.67 per month. A copy of a 2013 agreement showing that Lemark Mortgage and Finance, Inc. transferred its interest in the Mayes’ home improvement loans to BB&T was attached to the amended complaint. The home improvement credit contract showed that

on the same day that the aforementioned contract was signed by Mr. and Mrs. Mayes, Prestige Windows & Siding transferred, “without recourse” the contract signed by them to Lendmark Mortgage and Finance, Inc.

On April 16, 2015, BB&T filed both an answer to the Mayes’ counterclaim, and a timely motion to dismiss the Mayes’ counterclaim and remand the case to the district court on the grounds that the counterclaim failed to state a claim upon which relief could be granted.

Six days after the motion to dismiss the counterclaim and to remand the case to the district court (hereafter “the motion to dismiss”) was filed, Mr. and Mrs. Mayes filed an amended counterclaim that abandoned the earlier abuse of process allegations and made completely new allegations against BB&T. In the amended counterclaim, the Mayes claimed that BB&T was guilty of violating the Maryland Consumer Protection Act as codified in Maryland Code (2013), Commercial Law Article § 13-301 et seq. The Mayes prayed for damages in the amount of \$31,000.00.

On April 28, 2015, BB&T filed an answer to the amended counterclaim, and also filed a motion to strike the amended counterclaim and to remand the case to the district court.

About a month later, on May 28, 2015, BB&T moved to dismiss the amended counterclaim on the grounds that it failed to state a claim upon which relief could be granted. Movant asked that the amended counterclaim be dismissed and the case remanded to the district court for trial on BB&T’s amended complaint. Contemporaneously with the

filings of the motion to dismiss, BB&T filed a motion for leave of court to file a motion to dismiss and remand. Evidently, the last mentioned motion was filed because the scheduling order had said that all motions to dismiss pursuant to Md. Rule 2-322(b) should be filed no later than April 16, 2015.

On June 1, 2015, a motions judge denied BB&T's motion to strike the amended counterclaim.¹ On June 3, 2015, Mr. & Mrs. Mayes filed an opposition to BB&T's motion for leave of court to file a motion to dismiss and remand. The thrust of what Mr. and Mrs. Mayes said in their opposition was that the court should deny the motion because BB&T should have, but never did, ask for a modification of the scheduling order that had set an April 16, 2015 deadline for filing motions to dismiss. They failed to explain, however, how the motion that the appellee filed was materially different from the motion that appellants claimed should have been filed. In any event, movants concluded their opposition by saying that they would not file and would not "waste paper, ink or effort

¹ The motion to strike was based on appellants' alleged failure to follow the dictates of Md. Rule 2-341(a) and (b). The circuit court rules:

- I cannot find any portion of the scheduling order setting a date within which an amended complaint may be filed as asserted by the Movant.
- Though the Motion alleges that new causes of action are pled, nowhere in the motion are there facts stated to tell the court what those additional causes of action are and/or how they would affect this case in progress. The court does not have the prerogative to search the amended counter-complaint and to extract therefrom what the court may feel is applicable to support the motion filed.
- While prejudice in the motion may be implied as alleged there are no specific facts set forth as is required by Rule 2-311 to demonstrate prejudice.

responding to the Plaintiff's actual Motion to Dismiss and Remand to District Court unless and until the Motion for Leave of Court to do so is granted.”

A circuit court judge, on June 19, 2015, signed a memorandum directing that the assignment office set in for hearing BB&T's motion to dismiss (not to be confused with the motion to strike) the amended counterclaim and to remand the case to the district court.

In the memorandum, the judge said:

The Movant argues that because there are no specific facts to support the cause of action in the counter-claim alleging a consumer protection violation by a non-seller of goods (The Movant) as is required by Rule 2-303 that the counter-claim (now amended) which brought this case to this court from the District Court should be dismissed and the case remanded to the District Court.

In accordance with the aforementioned memorandum, the Clerk of the Court issued a notice to counsel that BB&T's motion to dismiss the amended counterclaim and to remand was scheduled to be heard on July 20, 2015. Counsel for the Mayes asked that the hearing be postponed: that request was granted and the hearing was set for October 1, 2015. Despite having been notified that the motion to dismiss was going to be heard on its merits, Mr. and Mrs. Mayes never filed an opposition to that motion. In fact, when the motion was argued on October 1, 2015, appellants' counsel never even argued that the amended counterclaim did state a claim upon which relief could be granted. Instead, counsel argued three (3) points. First, because BB&T's motion to dismiss was filed after the April 16, 2015 deadline set forth in the scheduling order, the motion should not be considered. Second, the motions judge, on June 19, 2015, when he directed the assignment office to set the motion to dismiss in for hearing, did not grant the motion for leave to file the motion

to dismiss out of time. Third, BB&T filed its motion to dismiss the amended counterclaim after it had filed an answer which, purportedly, was not permitted.

Additionally, at the October 1, 2015 hearing, counsel for Mr. and Mrs. Mayes asked the court to give him thirty (30) days to file a second amended counterclaim. Counsel asserted that if leave to amend the counterclaim were granted he would: add “additional parties, if that is what is really required[.]” The additional parties that appellants intended to add were Prestige Windows and Siding, and Lemark Mortgage and Finance, Inc.

The motions judge took the matter under advisement and, on November 2, 2015, filed a memorandum opinion and order granting BB&T’s motion to dismiss the amended counterclaim and to remand the case to the District Court of Maryland for Baltimore County. In its memorandum, the circuit court held that the amended counterclaim would be dismissed because it set forth no cognizable cause of action. One of the reasons for dismissal was explained as follows:

The claim now alleged in the [a]mended [c]ounter-[c]omplaint is that the [p]laintiff engaged in an unfair and deceptive trade practice. The [a]mended [c]ounter-[c]omplaint does not state a claim upon which relief can be granted. First, under Md. Code, Commercial Law, §13-301, claims for unfair and deceptive trade practices must arise from transactions involving the sale of consumer goods, consumer reality, or consumer services. BB&T’s sole connection to the underlying contract is that of a financial institution, providing financing to the defendants for their underlying contract with Prestige Windows and Siding. BB&T provided no goods or services in connection with the transaction and is simply not subject to a claim under Commercial Law Art[icle] § 13-301. Therefore, any claim regarding unfair and deceptive practices against BB&T is improper.

(Footnote omitted.)

After the order to remand to the district court was filed, Mr. and Mrs. Mayes filed a timely appeal,² raising one issue:

Whether the Circuit Court for Baltimore County committed reversible error by not ruling upon appellees initial “Motion for Leave of Court to File Motion to Dismiss and Remand” prior to ruling upon appellees simultaneously filed Motion to Dismiss and Remand to District Court[.]

DISCUSSION

Before analyzing the merits of the arguments advanced by appellants, it is useful to begin by mentioning two issues that the appellants do not raise. First, they do not contend that the motions judge was substantively wrong when he ruled that their amended counterclaim did not state a claim upon which relief could be granted. Secondly, appellants do not contend that the circuit court abused its discretion by denying them the opportunity to file a second amended counterclaim so that they could state a viable counterclaim.

The sole argument made by the appellants in this appeal is that the circuit court did not have the authority to rule on BB&T’s motion to dismiss the amended counterclaim and remand the case because the circuit court had never granted BB&T permission to file the motion to dismiss out of time. Appellants word their argument as follows:

[T]he circuit court was mandated and required to formally rule on [a]ppellee’s motion for leave prior to taking up its substantive motion. Appellants further argue that the issue is not discretionary, i.e.[,] that the circuit court did not have the authority to simply skip over or ignore the motion for leave to get to the substantive motion. Appellants also assert, therefore, that the failure to rule cannot be looked at on appeal under the

² An order that remands a case from the circuit court back to the district court is an appealable final judgment. *See Brewster v. Woodhaven Building & Development, Inc., et al.*, 360 Md. 602, 613-14 (2000); *see also, Ferrell v. Benson*, 352 Md. 2, 5 (1998).

“abuse of discretion” standard. Rather, [a]ppellants assert that the failure to formally rule, when such a ruling was required, and when a ruling was requested by all parties, and was ignored by the circuit court is not only prejudicial to [a]ppellants but prejudicial to the administration of justice.

To demonstrate, had the circuit court issued a ruling granting or denying the motion for leave, then this court could have reviewed that decision under the “abuse of discretion” standard. The failure to act, however, when action is required, is itself reversible error and clearly contrary to the basic requirements for the fair administration of justice. Rule 2-322.

Appellants cite no authority to support their argument that the circuit court was “mandated and required to formally rule on [a]ppellee’s motion for leave prior to taking up its substantive motion.” But even if we assume, *arguendo*, that an explicit ruling should have been made, appellants have failed to show how they were prejudiced by that assumed error.

Motions to dismiss may be filed at any time after an answer is filed. Md. Rule 2-322(b) provides, in pertinent part:

Permissive. The following defenses may be made by motion to dismiss filed before the answer, if an answer is required: (1) lack of jurisdiction over the subject matter, (2) failure to state a claim upon which relief can be granted, (3) failure to join a party under Rule 2-211, (4) discharge in bankruptcy, and (5) governmental immunity. If not so made, these defenses and objections may be made in the answer, or in any other appropriate manner after answer is filed.

(Emphasis added.)

Maryland Rule 2-504(c) states that the scheduling order “shall be modified by the court to prevent injustice.” (Emphasis added.) Also, the Court of Appeals has said that the Maryland Rules of Procedure should be interpreted “to do justice between the parties.”

Morton v. Schlotzhauer, 449 Md. 217, 221 (2016) (quoting *Miller v. Talbott*, 239 Md. 382, 390 (1965)). Under the above circumstances, if the circuit court had ruled on appellee’s motion for leave of court to file a motion to dismiss, it would have been error to deny it because, appellants’ amended counterclaim was not even filed until the April 16, 2015 deadline for filing a dismissal motion had passed. It would have been unjust to not give BB&T any opportunity to file a dismissal motion.

Appellants claim that the court’s failure to rule on appellee’s motion “was prejudicial” to them. But nothing in appellants’ brief shows that this is true. Even if we agreed with appellants that appellee’s motion for leave to file a dismissal motion was necessary, the court’s failure to explicitly rule on that motion did not prejudice appellant in any way. For more than three months prior to the October 1, 2015 hearing date, appellants knew that the motion to dismiss was going to be heard on its merits. Appellants’ counsel surely must have known that if the motion was going to be heard on its merits, that meant the court had impliedly decided that appellee’s counsel had good reason to file the motion after the April 16, 2015 deadline. Yet at no time, either before or after this appeal was filed, did appellants ever assert that the amended counterclaim did state a viable cause of action. And, in this appeal, appellants put forth no reason why the trial judge would have been justified in denying appellee’s motion for leave to file the motion to dismiss. This is important because in every civil case an appellant must show not only that error was committed by the circuit court, but must also show that he or she was prejudiced by the circuit court’s error. *Barksdale v. Wilkowsky*, 419 Md. 649, 660 (2011). Because

appellants failed to show that they were prejudiced by the “error” allegedly committed by the circuit court by not explicitly ruling on appellee’s motion for leave to file a Rule 2-322(b) motion, we shall affirm the dismissal of the counterclaim by the Circuit Court for Baltimore County and the court’s remand order.

**JUDGMENT AFFIRMED; COSTS
TO BE PAID BY APPELLANTS.**