UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 02574

September Term, 2015

ON MOTION FOR RECONSIDERATION

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BANK OF AMERICA, N.A.,

v.

RANDEL BURGESS, ET UX.

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Wright,
Berger,
Shaw Geter,

JJ.

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Opinion by Shaw Geter, J.

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Filed: April 25, 2017

This is an appeal from the dismissal of an action in the Circuit Court for Baltimore County, which sought to reform a previously recorded Deed and Deed of Trust. Appellant Bank of America filed a Complaint and Notice of Lis Pendens against appellee Randel Burgess and his wife, Pamela Burgess, concerning a property titled to them which appellant averred was not properly secured by the bank's interest. When appellees failed to answer the Complaint, appellant requested an Order of Default, which was granted. During the hearing on the inquisition of damages, the judge requested evidence from appellant regarding whether it held the current Note. Appellant appeared without a witness to answer the court's inquiry, and thus, it was agreed that the matter would be continued. At the second hearing, wherein representatives for appellants established that they held the Note, but failed to produce the document itself, the Court again expressed its concern over the request for reformation. Thereafter, in a Memorandum Opinion, the court dismissed appellant's complaint, finding appellant's failure to enter the Note into evidence prohibited the Court from declaring the rights of the parties pursuant to that Note or otherwise granting the relief requested.

On appeal, appellant presents the following question for our review:

1. Whether the Circuit Court erred as a matter of law or abused its discretion by dismissing the Complaint *sua sponte*, with prejudice, and without a further hearing when Mr. and Mrs. Burgess did not seek to vacate the default order and did not appear at the hearing on the inquisition on damages?

For the reasons set forth below, we shall reverse the order of the circuit court and remand for further proceedings with this opinion.

## BACKGROUND

In June of 2003, Randel Burgess, appellant, applied for, and obtained, a refinance loan for property located at 9107 Hamor Road, Randallstown, Maryland (the "Property"). The loan was evidenced by a Note, which Mr. Burgess signed. In order to secure payments under the Note, Mr. Burgess also signed a Deed of Trust dated June 20, 2003. The same day, Mr. Burgess signed a new Deed which added his wife, Pamela Burgess, to the title of the Property. Mrs. Burgess did not sign the Deed of Trust. The lender, Aegis Wholesale Corporation, requested, therefore, that the Deed of Trust be recorded prior to the Deed, which would ensure that Mrs. Burgess' title to the Property was subject to the Deed of Trust.

On July 11, 2003, the Land Instrument Intake Sheet, the Deed, and the Deed of Trust were filed in the Land Records Office for Baltimore County, Maryland. The Intake Sheet set forth the proper order in which to record the Deed of Trust and Deed. However, the documents were erroneously recorded in reverse order. As such, the Deed of Trust failed to secure a lien against the Property with respect to Mrs. Burgess.

On January 5, 2007, in an effort to correct the error, the Deed of Trust was re-recorded. The re-recorded Deed of Trust noted,

> Instrument being RE-RECORDED to correct prior mis-indexing. The original intention, per Intake Sheet recorded in L/F 18373/683, was for the DOT to be recorded immediately prior to the Deed. Inadvertently the Deed was recorded before the DOT.

Sometime thereafter, appellant Bank of America became the holder of the Note and Deed of Trust. On January 23, 2015, they filed a Complaint in the Circuit Court for

Baltimore County for Specific Performance, Declaratory Relief, Breach of Contract, and Equitable Mortgage. They sought in Count I, Specific Performance, to have the court order Mr. and Mrs. Burgess to sign the Deed of Trust "and any other necessary documents" to secure repayment of the loan with a first priority lien against the Property, and to enter a judgment in favor of Bank of America in the amount of $131,616.00; the amount of the loan, plus attorney's fees. In Count II, appellant sought a declaratory judgment that would "terminate the controversies between the parties," determining the ownership interests of the Property and liens and priorities of those liens on and against the Property, and determining the rights and liabilities of the parties with respect to the Note and the Deed of Trust. In Count III, Breach of Contract, appellant contended Mr. Burgess had breached the Note and Deed of Trust by not cooperating in securing the repayment of the Note with a first-priority lien on and against the Property, and requested damages in the amount of the loan. In Count IV, Equitable Mortgage, appellant requested the court to enter a judgment holding that the Dead of Trust created a first-priority lien on and against the entire Property.

The Burgesses did not file an answer to the complaint within the thirty days prescribed by Maryland Rule 2-321(a), and, consequently, Bank of America filed for Entry of an Order of Default, which was granted. On March 26, 2015, notices were sent to the Burgesses, in accordance with Rule 2-613(c), advising that they had 30 days to file a motion to modify or vacate the Order of Default. Appellees did not file a response.

On May 7, 2015, the court sent notices to the parties for a September 29, 2015 hearing on the inquisition of damages. Appellees did not appear. Appellant presented

argument regarding its request for relief and the court expressed concern that there was no evidence that Bank of America was the current holder of the Note and Deed of Trust. The hearing was continued, pending testimony from a bank representative.

At the second hearing on October 20, 2015, a representative testified that Bank of America was the current holder of the Deed of Trust secured by the Property. However, the Note that secured the Deed was not provided or entered into evidence. The court then questioned appellants on the legal basis for the relief sought. The court asked "what provision [of] the Real Property Article confers on [the court], the authority, to grant the relief you're asking for," and reform the obligations of the parties under the Note and Deed. Appellants responded that it was not cited in their complaint and then provided a proposed judgment order to the judge. The hearing was adjourned.

Thereafter, appellant neither submitted further memoranda nor sought to provide the Note to the Court. On December 14, 2015, the court *sua sponte* dismissed the Complaint. In its Memorandum Opinion, the court explained that

> "[i]n absence of the [N]ote this Court is unable to declare the rights of a party pursuant to the [N]ote or otherwise grant the [appellant] the relief prayed in the Complaint, particularly in light of the 'rigid requirements' [set by the burden of proof in a case seeking reformation of a contract]."

The Court continued that "[t]he evidence necessary to support the reformation must be clear, strong and convincing" to establish that "the reformation was in the intention of both parties." This lack of "clear, strong and convincing" evidence, the court found, therefore, prohibited the Court from granting the relief sought.

This appeal followed.

## STANDARD OF REVIEW

"[U]nless fettered by a Rule or statute, a court ordinarily may take any action *sua sponte* that it can take in response to a motion, including dismissal of an action." *Fischer v. Longest*, 99 Md. App. 368, 381 (Md. Ct. Sp. App. 1994). In reviewing the dismissal, "we must determine whether the complaint, on its face, discloses a legally sufficient cause of action" by "presum[ing] the truth of all well-pleaded facts in the complaint, along with any reasonable inferences derived therefrom." *Higginbotham*, 171 Md. App. at 264. "Dismissal is proper only if the facts and allegations, so viewed, would nevertheless fail to afford plaintiff relief if proven." *Id.*

## DISCUSSION

### I. The Circuit Court did not abuse its discretion in denying default judgment under Maryland Rule 2-613.

Default judgments are a two-step process governed by Maryland Rule 2-613. Subsection (b) of that rule provides that if a defendant fails to respond within the time required, "the court, on written request of the plaintiff, shall enter an order of default." The defendant thereafter has thirty days to file a motion to vacate. Md. Rule 2-613(d). If no such motion is filed, or if they file a motion to vacate that is denied,

> "the court, upon request, *may* enter a judgment by default that includes a determination as to liability and all relief sought, if it is satisfied (1) that it has jurisdiction to enter judgment and (2) that the notice required by section (c) of this Rule was mailed."

Md. Rule 2-613(f).

In the case at bar, appellant contends that liability was determined by the order of default, and, therefore, the court, by dismissing the complaint, improperly revisited liability

"without the legal basis to do so." Appellant relies on *Franklin Credit Management Corp. v. Nefflen*, in which the Court of Appeals held that a defaulting defendant who did not move to vacate the order of default could not later contest the liability established by the order. 436 Md. 300, 324-25 (2013). Appellant contends that the reasoning in *Franklin* also prohibits judges from later amending an order of default after the initial 30 days has passed.

In *Franklin*, the Court of Appeals examined the default judgment process, detailing the "two-step framework, whereby under Rule 2-613(b), 'the entry of an order of default [is] the initial step towards entry of default judgment." *Franklin*, 436 Md. at 317. "This order [of default] is a determination of liability," *Id.* at 317 (quoting *Bienkowski v. Brooks*, 386 Md. 516), and "[i]f an order of default is entered, pursuant to Rule 2-613(b), the defaulting party has the right to move to vacate pursuant to subsection (d), and if the order of default remains, it is dispositive only as to liability." *Id.* at 317 (quoting *Montgomery Cnty v. Post*, 166 Md. App. 381, 389 (2005)). "If the defendant fails to vacate the order of default or if the motion to vacate is denied, a court may proceed with the assessment of damages and the entry of a default judgment under Rule 2-613(f)." *Id.* at 318.

The defendants in *Franklin*, who had been properly served, failed to respond to the initial complaint and did not appear for the default hearing. Following testimony from the plaintiff, the circuit court entered a default judgment against Franklin which assessed damages. On appeal, the Court of Appeals held that the defendants were barred from filing a motion under Rule 2-534, or any other such post-judgment motion, to amend the judgment with regards to liability. *Franklin*, 436 Md. at 326. The Court found that "[t]he limitation on post-judgment motions [which allows only motions to amend relief granted,

not to issues of liability] is consistent with what the Rules Committee sought to achieve by recommending a two-step default judgment process," ensuring that appeals ultimately vacating the default would not be taken after the court had already assessed damages, and which prevents the defendant from trying to unfairly obtain "a second crack." *Id.* at 319.

Appellant contends that the Court's reasoning, limiting post-judgment motions to amend relief only, also prohibits judges from amending order of defaults after the initial 30 days have passed. We disagree. In *Franklin*, citing *Banegura v. Taylor*, the Court of Appeals held that, despite the establishment of liability, a judge has significant discretion to set aside an order of default prior to the entry of a final judgment. *Franklin Credit Management Corp.*, 436 Md. 300, 323 n.23 (2013). In *Banegura*, the Court addressed a court's discretion to alter an order of default. They there found:

> "[t]he amendment to the rule [establishing the two-step default process found in Rule 2-613] was specifically designed to avoid piecemeal appeals, and no appeal may be taken from the entry of an order of default. Likewise, an immediate appeal could not have been taken from the denial of Banegura's motion to strike the default order. That order was interlocutory, because it did not dispose of the entire claim. As an interlocutory order, it was subject to revision within the general discretion of the trial court until a final judgment was entered on the claim."

*Banegura v. Taylor*, 312 Md. 609, 618-19 (1988) (internal citations omitted). The court continued:

> "Banegura's motion to strike, filed more than thirty days after the entry of the order of default, must be viewed as a request that the trial court invoke its authority to revise an order intended to be final in nature, but which was, in fact, interlocutory. A trial judge possesses very broad discretion to modify an interlocutory order where that action is in the interest of justice."

*Banegura v. Taylor*, 312 Md. 609, 619 (1988) (citing *Henley v. Prince George's County*, 305 Md. 320, 328 (1986)).

An order of default, consequently, "is an interlocutory order subject to [the] broad general discretion of the [trial] court." *Holly Hall Publications, Inc. v. County Banking & Trust Co.*, 147 Md. App. 251, 261 (Md. Ct. Sp. App. 2002) (citing *Banegura v. Taylor*, 312 Md. 609, 618-19 (1988)). The circuit court, therefore, in the present case, was not prohibited from amending the order of default before the entry of a default judgment.

Appellant also contends that, even if the court could properly amend the order of default, the court abused its discretion in denying default judgment. Maryland Rule 2-613 provides that a judge *may* enter a judgment of default if the defendant does not file a motion to vacate the order of default or if the motion to vacate is denied. We have previously held that "may" connotes discretion in the statutory context. *See Wells v. Wells*, 168 Md. App. 382, 393 (2006). As we stated in *Goodman v. Commercial Credit Corp.*, "to be sure, [the court] could have, as the [appellant] maintain[s] that it must have," granted default judgment in favor of appellant when the appellee failed to file any response or notice, but "[t]he trial court was not obliged to grant judgment for the [appellant]." *Goodman*, 364 Md. at 492. "Since the trial court [denied default judgment], the question…is whether, in so ruling, the trial court abused its discretion." *See Id.*

"Where the decision or order of the trial court is a matter of discretion[,] it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons," or "where no reasonable person would take the view adopted by the [trial] court…."

*Goodman v. Commercial Credit Corp.*, 364 Md. 483, 492 (2001) (internal citations omitted); *Beyond Sys., Inc. v. Realtime Gaming Holding Co., LLC*, 388 Md. 1, 28 (2005) (citations and internal quotation marks omitted).

The circuit court, in its Memorandum Opinion, stated that the court could not declare the obligations of the parties under the note "as [appellant's] [c]omplaint seeks relief based upon an alleged 'material breach' of the terms of a Note which was not entered into evidence." "In absence of the note this [c]ourt is unable to declare the rights of a party pursuant to the note or otherwise grant the [appellant] the relief prayed in the [c]omplaint, particularly in light of the 'rigid requirements'" imposed by the burden of proof in cases seeking reformation of a contract.

During the initial hearing, the Court expressed its reluctance to reform the Deed, and requested the testimony of a bank official. At the subsequent hearing, Bank of America provided a witness, but they did not provide the Court with the document pertinent to a determination of the issue before it, *i.e.* the Note. Thus, in our view, appellants simply failed to supply the evidence necessary to support a declaration or judgment in their favor.

Under these circumstances, it cannot be said that the court's decision was "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." We, therefore, find that the circuit court did not abuse its discretion in denying default judgment.

**II. The Court did not err in dismissing Counts I, II, and III *sua sponte*.**

Appellant avers that the circuit court's dismissal of their claims for specific performance, declaratory judgment, and breach of contract *sua sponte* was in error. They

contend that the only "plausible basis" for the court to have dismissed these claims was for failure to state a claim on which relief could be granted. In that case, the circuit court was required to assume the truth of all material and relevant facts pled, as well as inferences reasonably drawn from those facts. Appellant further contends that, because the Burgess' liability under these claims did not arise solely from the Note, but also from the Deed of Trust, it was not necessary to enter the Note into evidence.

In reviewing the dismissal, "we must determine whether the complaint, on its face, discloses a legally sufficient cause of action" by "presum[ing] the truth of all well-pleaded facts in the complaint, along with any reasonable inferences derived therefrom." *Higginbotham*, 171 Md. App. at 264. "Dismissal is proper only if the facts and allegations, so viewed, would nevertheless fail to afford plaintiff relief if proven." *Id.*

In the case *sub judice*, the court found that the evidence presented, even "presum[ing] the truth of all well-pleaded facts in the complaint" in favor of appellant, did not meet the burden of proof needed for reformation of a contract without the Note. "Before a court will reform an agreement, the Court must determine" by "clear, strong and convincing" evidence, "that the desired reformation was the intention of both parties." *Brockmeyer v. Norris*, 177 Md. 466, 474 (1940).

The court made clear its reluctance to reform the Deed without evidence that appellant did, indeed, hold the Note. As the Court noted during the hearing, "the Deed of Trust merely secures the [N]ote," thus indicating to Bank of America that the Note was the primary document. Despite the court's statements, appellants never provided the document to the Court.

Moreover, appellant's contention that because liability arose from both the Note and Subject Deed of Trust, only the Deed of Trust was required, is misguided. Appellant's requested relief for the three counts was based on both the Note and the Deed of Trust. Moreover, the claim for breach of contract was based predominantly on the alleged breach of the Note. The Court's *sua sponte* determination that it could not grant appellant's requested relief under the Note without it, was not, therefore, an abuse of discretion.

Appellant also contends that the court erred in dismissing the complaint without holding a third hearing under Maryland Rule 2-311(f). Appellants argue that, because the Court did not indicate that it was contemplating a dismissal of the Complaint, the court abused its discretion in not providing an opportunity for further argument.

Rule 2-311(f) states in relevant part:

> "Except when a rule expressly provides for a hearing, the court shall determine in each case whether a hearing will be held, but the court may not render a decision that is dispositive of a claim or defense without a hearing *if one was requested* as provided in this section."

In the present case, appellant was fully afforded the opportunity to present their case. In fact, there were two hearings where the Court was called upon to make a dispositive decision. On both occasions appellant had the ability to present witnesses and evidence regarding liability and damages to the court without opposition. "When a party appears and participates at trial but fails to present sufficient evidence in support of [their] claim, dismissal of that claim follows as a matter of course." *Bodnar v. Brinsfied,* 60 Md. App. 524, 537 (1984).

Accordingly, we hold that the circuit court did not err in failing to hold an additional hearing prior to dismissing the Complaint.

**A. The circuit court erred in dismissing appellant's equitable mortgage claim.**

Appellant's claim for equitable mortgage, however, did not rely on the Note. Appellant relied solely on the deed of trust, and argued that should it "be imperfect or lack some formality prescribed by law, it created an equitable lien on and against the entire" property. Again, "[d]ismissal is proper only if the facts and allegations, [viewed in the light most favorable to the plaintiff], would nevertheless fail to afford plaintiff relief if proven." *Id.* "Consideration of the universe of 'facts' pertinent to the court's analysis of the motion are limited generally to the four corners of the complaint and its incorporated supporting exhibits, if any." *RRC Northeast, LLC v. BAA Maryland, Inc.*, 431 Md. 638, 643 (2010).

"The Court of Appeals has held that an agreement purporting to be a mortgage may be treated as such under the doctrine of equitable mortgages." *Taylor Elec. Co., Inc. v. First Mariner Bank*, 191 Md. App. 482, 498 (2010). "It is well settled in this state…that generally where an instrument intended to operate as a mortgage fails as a legal mortgage because of some defect or infirmity in its execution, an equitable mortgage may be recognized, with priority over judgments subsequently obtained." *Lubin v. Klein*, 232 Md. 369, 371 (1963) (internal citations omitted). "The theory underlying the equitable mortgage doctrine is that an instrument which is intended to charge certain lands, even though defectively executed, is nevertheless considered to be evidence of an agreement to

convey, and a court of equity should enforce the obligation despite the technical defects in the instrument." *Id.*

In the case *sub judice*, appellant's complaint, on its face, does disclose a legally sufficient claim for equitable mortgage. Viewed in the light most favorable to appellants, the deed of trust and intake sheet, which were entered into evidence, are agreements which purport to establish a first-priority lien against the property. Therefore, we find that it was error to dismiss the claim for equitable mortgage. Accordingly, we remand.[1]

**JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY REVERSED. REMAND FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. APPELLEES TO PAY ALL COSTS.**

[1] Because we are remanding the case for further proceedings, we need not address whether the circuit court erred in dismissing the complaint with prejudice.