UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1243

September Term, 2015

WILLIAM G. BAKER, PERSONAL REPRESENTATIVE OF THE ESTATE OF DORIS SHEPARD

v.

L & E BUSTAMANTE CONCRETE CO., INC.

Nazarian,
Leahy,
Salmon, James P.
(Retired, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: August 17, 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.

On January 20, 2015, L & E Bustamante Concrete Co., Inc. ("Bustamante") filed, in the Circuit Court for Cecil County, a verified complaint to establish and enforce a mechanic's lien. The defendant named in the verified complaint was Doris B. Shepard and the property against which Bustamante sought a lien was 187 Plum Point Road, Elkton, MD ("the Property"). The complaint alleged that Ms. Shepard owned the Property; that between September 23 and October 8, 2014, Bustamante had, pursuant to a contract with Generation Contracting, Inc., poured concrete for slabs, footings and walls for an "original construction" of a building on the Property; and that the amount owed to Bustamante under the contract with Generation Contracting, Inc. was $40,155.75. Bustamante further alleged that on December 9, 2014, it sent Ms. Shepard, by certified mail, a notice of intent to claim a mechanic's lien on the Property in the amount of $40,155.75, which was the sum still owed to it. A copy of the December 9, 2014 missive was attached to the complaint, as was a post office receipt showing that Ms. Shepard received the letter on December 15, 2014.

On March 10, 2015, a Cecil County circuit court judge signed a show cause order that read, in pertinent part, as follows:

> ORDERED, that the Defendant is directed to show cause by filing a counter-affidavit or verified answer within 15 days after service of this Order, specifically, on or before the 14th day of April, 2015, why a lien for the amount claimed should not attach upon the land and improvements described in the Complaint, provided that a copy of this Order together with copies of the Complaint to Establish and Enforce Mechanic's Lien and exhibits filed shall have been served by private process on the Defendant by the 30th day of March, 2015;

> AND IT IS FURTHER ORDERED, that a hearing will be held in this case on the 15th day of April, 2015, at 1:30 o'clock p.m., which date is no later than forty-five (45) days from the date of this Order;
>
> AND IT IS FURTHER ORDERED, that the Defendant is advised that she has the right to appear and present evidence at the aforementioned hearing;
>
> AND IT IS FURTHER ORDERED, that the Defendant is warned that if she fails to file a timely counter-affidavit or verified answer or fails to appear and present evidence at the hearing, the facts set forth in the Plaintiff's Affidavit shall be deemed admitted and the hearing waived, and the Court may enter an Order forthwith establishing the lien as to her.

After the show cause order was served, William G. Baker filed an entry of appearance on behalf of Ms. Shepherd. Mr. Baker is the son of Ms. Shepherd, but is not an attorney licensed to practice law in Maryland.

Mr. Baker also filed an answer to the show cause order as the "attorney in fact" for his mother. The answer was not verified nor was a counter-affidavit filed.

A hearing was held on the complaint to establish and enforce mechanic's lien on April 15, 2015. Mr. Baker appeared at the hearing, as did counsel for Bustamante. Ms. Shepherd did not appear.

At the April 15, 2015 hearing, counsel for Bustamante pointed out, accurately, the following: 1) that Mr. Baker, a non-attorney, had no right to represent a party in a case like

this one, and 2) even if it were true that Mr. Baker was his mother's "attorney in fact," that status gave him no right to represent his mother in a court proceeding.[1]

Counsel for Bustamante made an oral motion to strike the answer, which the court granted during the April 15th hearing.[2] At that hearing, the court also refused to allow Mr. Baker to represent his mother during the hearing or to argue on her behalf.

At the conclusion of the hearing, the presiding judge announced that he would grant Bustamante's request for a mechanic's lien against the Property. Immediately after that announcement was made, counsel for Bustamante advised the court that the amount of the

[1]Maryland's prohibition against the unauthorized practice of law does not have an exception for those who are granted a power of attorney or those who called themselves an "attorney in fact" for another. *See* Md. Code (2010 Repl. Vol.), Business Occupations & Professions Article, section 10-601. Moreover, Md. Rule 1-311 requires the signature of an attorney or that of a party on all pleadings and papers filed with the court. Once again, there is no exception for an "attorney in fact" or persons who have a power of attorney for another. In *Ross v. Chakrabarti, et al*., 194 Md. App. 526, 534 (2010), we said:

> Under Maryland Code, § 10-601(a) of the Business Occupations & Professions Article ("BOP"), "a person may not practice, attempt to practice, or offer to practice law in the State unless admitted to the Bar." And practicing law is defined to include "giving legal advice," "representing another person before a unit of the state government," "preparing . . . [a] document that is filed in a court or affects a case that is or may be filed in a court," and "giving advice about a case that is or may be filed in a court[.]" BOP § 10-101(h).

(Footnote omitted.)

[2]At oral argument, counsel for appellant admitted that the circuit court did not err in striking appellant's answer.

lien should be reduced by $3,098 because there had been some work that his client once believed had been done but it later was learned that it had been incorrect in that belief.

On June 5, 2015, the circuit court signed a document entitled "Judgment Establishing Final Mechanic's Lien and Granting Motion to Enforce Lien." By that order, which was docketed on June 10, 2015, a lien was established in the amount of $37,057.75 against the Property.

On June 17, 2015, Ms. Shepard, by counsel, filed a pleading entitled "Motion for New Trial, or in the Alternative, to Vacate Judgment and Dissolve the Lien." The motion was not under oath or verified, but attached to the motion were the following documents:[3]

[3]It was improper to simply attach documents to Ms. Shepard's post-trial motion. In *Tall v. Board of School Commissioners of Baltimore City*, 120 Md. App. 236, 244-45 (1998), we explained:

> A party must lay the proper foundation for a document that is attached to a motion. *See Diffendal v. Kash and Karry Serv. Corp.*, 74 Md. App. 170, 181, 536 A.2d 1175 (1988). In their treatise, Niemeyer and Schuett explain:
>
> > A document can be made part of the motion only through affidavit, deposition, or answers to interrogatories that adequately lay the proper foundation for the document's admission into evidence. Authenticity and relevancy of the document must be shown. Attaching documents to a motion for summary judgment without the necessary affidavit is no more acceptable than standing up in open court and attempting to offer the same documents into evidence without a witness or a stipulation.

(continued...)

1) a copy of the contract between Ms. Shepard and Generation Contracting, Inc. dated June 19, 2014 showing that appellant had contracted to pay Generation Contracting, Inc. $357,000 to build a house on the Property; 2) a document dated February 1, 2015, signed by Generation Contracting, Inc. confirming that Ms. Shepard had paid Generation Contracting, Inc. $150,000 for work that was performed at the Property. The document also confirmed that Generation Contracting, Inc. was releasing its right to a mechanic's lien against the Property. On the same date that the motion, with exhibits, was filed, Ms. Shepard, by William G. Baker "POA" (presumably meaning power of attorney), filed an affidavit. The affidavit read as follows:

> 1. I am the Owner of the subject property (hereinafter "Property") located at 187 Plum Point Road, in Elkton, Maryland and the Defendant named herein.
>
> 2. I hired Generation Contracting, Inc. to construct a single family dwelling on my land for my own residence for the contract amount of $357,000.00.
>
> 3. Generation Contracting[,] Inc. was paid $150,000.00 for the work it performed on the Property and has failed to finish its contractual obligations.
>
> 4. There are no further monies owed to Generation Contracting[,] Inc. and it will cost at least $250,000.00 to complete the construction of my residence.

[3](...continued)
Paul V. Niemeyer & Linda M. Schuett, *Maryland Rules Commentary* 332 (2d ed.1992); *see Moura v. Randall,* 119 Md. App. 632, 641-42, 705 A.2d 334 (1998); *see also Hartford Accident and Indem. Co. v. Scarlett Harbor Assocs. Ltd.,* 109 Md. App. 217, 264, 674 A.2d 106 (1996) (stating that "a document, otherwise admissible, may be used to show the existence of a factual dispute"), *aff'd*, 346 Md. 122, 695 A.2d 153 (1997).

> 5.I received a copy of the Complaint to Establish Mechanics Lien filed by the Plaintiff, L&E Bustamante Concrete Co.[,] Inc., in the above referenced court.
>
> 6. I filed or caused to be filed a Notice of Appearance (pro se) and Answer to the Petition in this matter to preserve my rights.
>
> 7. Due to her health, Doris B. Shepard was not able to appear personally at the court for hearing in this matter.
>
> 8. Ms. Shepard's Power of Attorney, William G. Baker, appeared on behalf of Ms. Shepard at the hearing.
>
> 9. I am over the age of 18, am of sound mind and am competent to testify upon the matters stated herein.
>
> I hereby affirm under penalty of perjury that the foregoing is true and accurate to the best of my information and belief.
>
> _____/s/_____
> Doris B. Shepard, Defendant
> By and through her Power of Attorney
> William G. Baker

(Emphasis added.)

The first six paragraphs of the affidavit would lead one to believe that it was Ms. Shepard, individually, that signed the affidavit. Paragraph seven, however, would lead a reader to believe otherwise. Moreover, the signature line clearly indicates that it was Mr. Baker who signed the affidavit and that he purported to do so based on his Power of Attorney. But regardless as to who signed the affidavit, there is no representation in the affidavit that, at the time that Ms. Shepard received notification from Bustamante that it intended to file a lien (December 15, 2014) that the landowner had paid the prime contractor

(Generation Contracting, Inc.) the full amount she owed as of that date. According to documents attached to Ms. Shepard's post-judgment motion (*see* note 2, *supra*), she had paid the prime contractor a total of $100,000 as of June 17, 2014 and she received a document signed by an agent of Generation Contracting, Inc. on February 1, 2015 stating that a total of $150,000 had been paid for work done on the property. What isn't revealed in the documents filed post-judgment, is when the additional $50,000 was paid. Moreover, the document attached didn't indicate that the general (or prime) contractor conceded that it had been paid in full - instead, the documents merely indicate that, as of February 1, 2015, the general contractor had waived its right to assert a mechanic's lien.

On July 22, 2015, the circuit court denied Ms. Shepard's motion for new trial and/or motion to vacate judgment and to dissolve the lien. In its order, the court gave the following reasons for that denial:

> The Finding of this Court that 1) the "Affidavit" attached to the Defendant's motion is not signed by the affiant, 2) the motion fails to set forth the reasons for the Defendant's failure to file a counter-affidavit or verified answer, 3) the motion fails to set forth the reason for the Defendant's failure to appear at the show cause hearing and present evidence, 3)[sic] due to the improper affidavit attached to Defendant's motion, the motion fails to set forth a meritorious defense to the Plaintiff's claims, and 4)[sic] the motion fails to set forth any reasons why it is equitable to excuse Defendant's failure to plead and the Court cannot find, under all the circumstances, that it is equitable to excuse the failure to plead or present evidence at the show cause hearing and it is therefore;

ORDERED, that the "Affidavit" attached to Defendant's motion and the allegations in reliance on said "Affidavit" are hereby stricken, and it is further;

ORDERED, that the Defendant's Motion for New Trial, or in the Alternative, to Vacate Judgment and Dissolve the Lien is hereby DENIED.

Ms. Shepard filed a timely appeal to this Court. Thereafter, Ms. Shepard died and the Personal Representative of her estate was substituted as the appellant in this case.

In this timely appeal, appellant makes three arguments which are phrased as follows:

I. The circuit court erred in granting a mechanic's lien against appellant's property because a failure to submit an answer or counter-affidavit to a petition for a mechanic's lien does not constitute an admission that the petition is legally sufficient.

II. The circuit court erred in establishing a final mechanic's lien against appellant's property because the appellee failed to prove that it was entitled to a lien as a matter of law and there were genuine disputes as to matters of material facts.

III. The circuit court erred in issuing a mechanic's lien in favor of appellee because appellee failed to meet its burden to prove the amount of indebtedness between the general contractor and homeowner.

I.
FIRST ARGUMENT

Maryland Code Annotated (2015 Repl. Vol.), Real Property Article (Real Prop.), section 9-106(a)(2) reads:

> If the owner desires to controvert any statement of fact contained in the affidavit supporting the petitioner's claim, he must file an affidavit in support of his answer showing cause. The failure to file such opposing affidavit shall constitute an admission for the purposes of the proceedings of all statements

> of fact in the affidavit supporting the petitioner's claim, but shall not constitute an admission that such petition or affidavit in support thereof is legally sufficient.
>
> Appellant argues that Bustamante's complaint was
>
> "arguably sufficient to establish an interlocutory lien against the [P]roperty as that burden is small, but it fell short of being legally sufficient to establish a final mechanic's lien. . . . Ms. Shepard's arguable failure to file a proper answer to the [a]ppellee's complaint constitutes a mere admission of the allegations contained therein but did not constitute an admission that the petition was legally sufficient to establish the lien."

(Footnotes omitted.)

We see no validity in the portion of the above argument in which appellant claims that the allegations in the complaint fell short of what Bustamante needed to allege in order to show entitlement to a mechanic's lien. It is of course true that Ms. Shepard did not explicitly admit that Bustamante was entitled to a lien by her failure to file a valid answer. But Bustamante filed a verified complaint, and afterwards Ms. Shepard filed no valid answer; therefore the allegations in the complaint were uncontradicted. As the Court of Appeals pointed out in *Winkler Construction Company, Inc. v. Jerome, et al.*, 355 Md. 231, 238 (1999) when a verified answer to the complaint has not been filed, the court may enter a judgment establishing a lien in the amount claimed if the pleadings, admissions and evidence show that there is no genuine dispute of material fact and the lien, as claimed, should attach as a matter of law.

We reject appellant's contention that, in this case, there was a showing of a genuine dispute of material fact. Appellant argues that not only did Ms. Shepard "attempt to file pleadings contesting the lien[,] but she also attempted to present evidence of her dispute." The short answer to appellant's contention is that a failed attempt to show a material dispute of fact quite obviously is not the equivalent of showing a material dispute of fact.

Appellant also makes the following argument:

> Here it is noted that the complaint filed by Bustamante does not assert that there are any monies owed by Ms. Shepard to Generation Contracting. Pursuant to Maryland law, Bustamante as a subcontractor could not be entitled to a mechanic's lien against Ms. Shepard's property unless there was evidence to show that she owed monies to the general contractor. *See Ridge Sheet Metal Co. v. Sorrell*, 69 Md. App. 364, 370 (1986) and Md. Code Ann., Real Prop. § 9-104(f)(3).

(Citations to Record Extract omitted.)

The *Ridge Sheet Metal* case does not stand for the proposition for which appellant cites it. The Court said:

> Prior to the amendments in chapter 251, the mechanic's lien law codified at [Real Prop.] § 9-104(a) provided in pertinent part:
>
> > "**(a) Notice required to entitle subcontractor to lien.** – A subcontractor is not entitled to a lien under this subtitle unless, within 90 days after doing the work or furnishing the materials, he gives written notice of his intention to claim a lien. . . ."
>
> Chapter 251 added an important provision to § 9-104(a). Section (a)(2) now states that a subcontractor who performs work on a single family residence is not entitled to a lien unless the subcontractor gives proper notice within 90 days and "the owner *has not made full payment* to the contractor prior to

> receiving" notice of the subcontractor's intent to claim a lien. Md. Real Prop. Code Ann. § 9-104(a)(2) (1974, 1981 Repl.Vol., 1986 Cum.Supp.).

Ridge Sheet Metal, 69 Md. App. at 370 (emphasis supplied).

As can be seen, what the statute requires is not a showing that the owner owes money to the general contractor at the time the complaint to establish a lien was filed; instead, there must be a showing that as of the time the property owner received notice of the subcontractor's intent to file, a lien the owner owed the general contractor money.

The Court, in *Winkler, supra*, made clear that it was unnecessary for the subcontractor to state how much the owner currently owed the general contractor. The pertinent rule was set forth in *Winkler*, 355 Md. at 254-55, as follows:

> [W]e adhere to our general rule that the overall burden of proving an entitlement to a lien remains with the claimant. If a subcontractor who has supplied labor or material to a single family dwelling properly alleges that which the statute and the Rule require, however, it may be presumed that, at the time the contractor's notice was sent, the owner was indebted to the prime contractor in an amount at least equivalent to the subcontractor's claim. Such a presumption is not pulled from the ether, but is justified by (1) the appropriate inference arising from § 9-114, enacted together with § 9-104(a)(2) and (f)(3), that the owner will not have settled in full with the prime contractor without an assurance that all subcontractors have been paid, (2) the fact that, as between the owner and the subcontractor, any contrary information is peculiarly within the knowledge of the owner, and (3) the fact that the owner has an ample opportunity to raise the issue and present the relevant evidence.
>
> If the owner fails to raise the issue and present evidence on it, the court may credit the presumption, as in *District Hgts. Apts.* [*v. Noland Co.*, 202 Md. 43 (1953)], in determining whether the plaintiff has met the burden of establishing its entitlement to a lien. If the owner does raise the issue and

> presents evidence sufficient, *prima facie*, to establish that, at the time the subcontractor's notice was sent, the owner either had paid the prime contractor in full or was indebted for an amount less than the subcontractor's claim, a question of fact will be created as to which the plaintiff will have the ultimate burden of persuasion. This approach gives full force and effect to § 9-104(a)(2) and (f)(3) without unduly crippling a subcontractor's ability to obtain a lien.
>
> Applying this principle to the case at hand, it is clear that the circuit court did not err in establishing the lien. The owners had ample opportunity to raise the issue of their indebtedness to the prime contractor and consistently failed to do so. They ignored the court's show cause order by neither filing an answer nor appearing at the hearing. Even after the lien was established, they failed, in their motion to alter the judgment, to raise the issue. It was not until they moved to stay enforcement of the lien, in October, that they complained of Winkler's failure to prove an indebtedness on their part to Valley Homes, but even then they made no assertion that they were not so indebted. To this day, they have never even alleged, much less offered evidence on, the status of the prime contract <u>when Winkler's notice was sent</u>. There <u>thus</u> being no countervailing evidence before the court, it could properly presume that the owners were still indebted to Valley Homes in the amount of at least $5,760 when they received Winkler's notice. That coupled with the admissions arising from the owners' failure to respond to the show cause order, sufficed to warrant the establishment of a lien.

(Emphasis added, footnote omitted.)

In the case *sub judice*, Ms. Shepherd did not claim (prior to the court's final order, which was filed on July 22, 2015) that at the time that she received the notice of lien (December 15, 2014), that she did not owe the general contractor at least the amount claimed by Bustamante. Instead appellant merely claimed that on February 15, 2015 - which was more than two months after she received the notice of lien - that Ms. Shepard owed the

general contractor no money. In other words, she failed to rebut the presumption discussed in *Winkler*.

Reading the verified complaint in its entirety, coupled with the presumption explained in *Winkler*, Bustamante's complaint showed that it was entitled to a lien against the Property.

II.
SECOND ARGUMENT

Appellant's second argument is very similar to its first, except that the second argument acknowledges that under *Winkler* the owner must prove the amount owed by the owner to the prime or general contractor at the time the owner receives a notice of lien from the subcontractor. Appellant argues:

> Maryland mechanic's lien law provides a "residential exception" to the mechanic's lien, the goal of which is *"to limit[ ] the liability of an owner to a subcontractor for work performed and materials rendered by the subcontractor on a single family dwelling erected on the owner's land for his own residence, to the extent that the owner has rendered payment to the contractor." See Ridge v. Brennen*, 366 Md. 336, 340, 783 A.2d 691, 693 (2001). Under Md. Code Ann., Real Prop. § 9-104(f)(3), the lien of the subcontractor against a single family dwelling being erected on the land of the owner for his own residence shall not exceed the amount by which the owner is indebted under the contract at the time the notice is given. *Emphasis added.*
>
> In the case at hand, Bustamante has not alleged the amount by which the owner was indebted to the general contractor under the contract at the time the notice of intent to file a lien was given and has not provided any evidence to show that they are entitled to a lien as a matter of law. Bustamante's pleadings merely established that they performed work for Generation Contracting for which they were not paid.

> In light of the Answer filed by Mr. Baker on behalf of Ms. Shepard, but later struck by the court, and the statements of Mr. Baker at the Show Cause hearing, it was clear to the Court that the owner alleged that full payment was rendered to the general contractor. Therefore, at the very least, there were disputes as to material facts in the matter and the court should have entered an interlocutory order for lien and set the matter down for a trial.

The argument set forth in the first two paragraphs just quoted would be meritorious, if the Court of Appeals had not established in *Winkler*, *supra*, a presumption that, at the time the owner receives the notice sent by the subcontractor the owner owed the prime or general contractor at least an amount equal to the claim of the subcontractor who claims the lien. 355 Md. at 254-55. Contrary to appellant's argument, even if the answer had not been stricken and even if what Mr. Baker said at the April 15, 2015 hearing was fully credited, Ms. Shepard failed to even allege that, as of the date the notice of lien was received by her, no money was owed to the general contractor.[4] In fact, neither the answer nor Mr. Baker, when he attempted to speak at the hearing on behalf of his mother, even mentioned the notice of lien.

Under Argument II, appellant relies on several allegations of fact Ms. Shepard made in her motion for new trial. Such reliance is misplaced. First, the circuit court struck the

[4]Strangely, the answer filed by Mr. Baker on behalf of his mother even denied that his mother owned the Property. Also, at the April 15, 2015 hearing, Mr. Baker did not testify, or attempt to do so; instead, he simply argued that the general contractor, as of the date of the hearing, had been paid in full.

affidavit filed in support of the new trial motion and appellant, in this appeal, does not argue that the court erred in doing so. Second, Md. Rule 2-311(d) provides:

> **Affidavit.** A motion or a response to a motion that is based on facts not contained in the record shall be supported by affidavit and accompanied by any papers on which it is based.

Thus, contrary to appellant's (implied) argument, the circuit court judge did not err in failing to give weight to the unsworn allegations. *See Scully v. Tauber*, 138 Md. App. 423, 431 (2001) (the motions court should not have given weight to statements made in support of a motion that were not supported by affidavit).

But even if the motion for new trial was supported by an affidavit in perfect form, the argument appellant now makes would not succeed. That argument is:

> [T]he Motion for a New Trial filed by Appellant's counsel shortly after entry of the order establishing the lien also alleged that full payment was rendered to Generation Contracting. These allegations, if proven, would render any lien against the Property invalid. If the homeowner does not owe any monies to the general contractor then the subcontractor is not entitled to a lien as a matter of law. *See Ridge Sheet Metal Co. v. Morrell*, 69 Md. App. 364, 370 (1986). While the failure of Ms. Shepard to file a proper counter-affidavit or answer to Bustamante's complaint certainly prohibited her from being able to contest the allegations of facts made therein concerning the work performed and value of the same, that failure did not satisfy Bustamante's burden to show that it was entitled to a lien as a matter of law.

That argument is invalid because it misconstrues the applicable law. As previously mentioned, the test is not whether, at the time the matter comes to court, the owner owes the prime or general contractor money. The test is: after considering the presumption

enunciated in *Winkler*, *supra*, did the owner owe the prime or general contractor at least the amount of the mechanic's lien at the time the owner received his or her notice of lien?

III.
THIRD ARGUMENT

Appellant's final argument is very similar to the first two except that in the last argument appellant contends that the presumption discussed in *Winkler* is here inapplicable because in *Winkler* the defendant "failed to respond at all to the complaint" and, as a consequence, "the court was not on notice that the owner disputed the mechanic's lien or claims." Also, according to appellant, "the record is clear that Ms. Shepard disputed the claim of Bustamante." Whether the court knew (based on Ms. Shepard's answer that was stricken or by way of statements made by Mr. Baker to the court when he attempted to act as his mother's lawyer) that Ms. Shepard disputed Bustamante's mechanic's lien is irrelevant under *Winkler*. As noted earlier, under *Winkler*, absent countervailing evidence, there is a presumption that the owner was still indebted to the prime or general contractor in an amount at least equal to the amount claimed by the subcontractor at the time the owner received the subcontractor's notice of lien. 355 Md. at 254-55. Here, as in *Winkler*, there was no countervailing evidence to rebut that presumption. Bustamante proved everything necessary to show entitlement to the lien it claimed. Thus, the circuit court did not err in

either establishing the lien in the first place or in denying Ms. Shepard's post-judgment motions that attempted to set the lien aside.

JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANT.