IN THE

Supreme Court of Virginia

RECORD NO. 091244

AME FINANCIAL CORPORATION,

Appellant,

v.

PAUL G. KIRITSIS, EMILIE A. KIRITSIS,
and
GREENPOINT MORTGAGE FUNDING, INC.,

Appellees.

BRIEF OF APPELLEES
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STATEMENT OF THE CASE AND PROCEEDINGS

Paul and Emilie Kiritsis ("the Kiritsises") filed their Complaint with the Chesterfield Circuit Court on May 18, 2006, against defendants Fidelity Financial Mortgage Corporation ("Fidelity"), AME Financial Corporation ("AME"), Ron Duer ("Duer")[1], and Greenpoint Mortgage Funding, Inc. ("Greenpoint"). The Complaint sought relief under five separate legal theories, including (in Counts I through V, respectively) breach of contract, common law actual fraud, common law constructive fraud, conspiracy, and the Virginia Consumer Protection Act. See Joint Appendix. at pp. 1-21 ("A. at 1-21").

Following proper service of process, a document purporting to be an Answer for AME arrived at the clerk's office on June 14, 2006. This document was signed not by a Virginia-licensed attorney, nor by any attorney from any state, but rather, by Wayne Bonertz, identified only as a vice president of AME. A. 22-28.

On June 22, 2006, the Kiritsises filed a Motion to Strike and Motion for Default Judgment along with a Notice of Hearing. A. 38-41. The Kiritsises' motion challenged the purported "Answer" filed by Bonertz on the

[1] The naming of "Ron" Duer was a misnomer; this defendant's name was actually Robert Dean Duer. He was later non-suited from the case, however, and is not a party to this appeal.

grounds of his apparent unauthorized practice of law. The notice confirmed that the Kiritsises would appear before the circuit court on July 21, 2006, to seek the entry of an order striking the "Answer" and entering default judgment in the Kiritsises' favor against AME. Both the motion and the notice were mailed to Bonertz at the address he gave in his "Answer".

On July 11, 2006, the Kiritsises filed an amended motion, along with a second Notice of Hearing. A. 42-46. Again, both pleadings were mailed to Bonertz at his stated address.

Despite both instances of notice, neither Bonertz nor any other representatives of AME appeared at the hearing when court convened on July 21, 2006. By Order entered that date ("the default order"), the circuit court (Allen, J.) struck the so-called "Answer" and declared AME (along with two other defendants)[2] in default, specifically having "admitted the factual allegations in plaintiffs' Complaint by virtue of their default." A. 47-48.

On July 31, 2006, AME (this time properly by Virginia-licensed counsel), filed its Motion for Leave to File Late Responsive Pleadings (A. 49-51); AME filed a revised motion and notice on September 27, 2006 (A.

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[2] The other defendants found in default at that time – Fidelity and Duer – are not involved in this appeal.

52-55). Those motions were heard by the circuit court on October 24, 2006, at the first contested hearing in the case.

Both AME President James Pefanis and AME Vice President Robert Duer attended this hearing, but neither were called to testify; in fact, AME presented no evidence to the circuit court at all. A. 1532. After hearing counsels' opposing arguments, the court denied AME's motions. A. 1532-34. A confirming Order was entered November 21, 2006. A. 170-74.

AME then tried again, filing a Motion to Reconsider and a Motion to Declare Default Judgment Void on November 13, 2006, along with its tender of what it would file as its Amended Demurrer if permitted. A. 65-71. The circuit court held its third hearing on November 21, 2006, this time receiving both legal arguments and opposing testimony from the parties. See generally, Transcript of hearing of November 21, 2006, A. 73-156. At the conclusion of that hearing, the court announced its denial of all of AME's motions, and its maintaining of the default order. A. 143. An Order confirming those rulings was entered February 2, 2007. A. 181-83.

AME again filed a motion to seek further reconsideration. A. 175-78. At what marked the fourth hearing in the case (the third contested hearing), all dealing with the default issue, that motion was also denied; see the Order entered February 2, 2007. A. 179-80. Later, AME would file yet

another motion to reconsider, with no justification for doing so other than that a new judge (Powell, J.) had been assigned the file. A. 184-91. The circuit court granted yet another hearing, but found nothing new to persuade it to change course. A. 192-93.[3]

With agreement from all parties, the court conducted trial in two phases. On November 15, 2007, the circuit court heard evidence in support of the Kiritsises' contractual claims against Greenpoint. AME was present at this trial, but with the case against it having already been established by its default, AME did not participate. At the conclusion of that first phase of trial, the circuit court announced that the Kiritsises had prevailed and that it would grant the Kiritsises the declaratory relief they had sought against both Greenpoint (based upon the evidence at trial) and AME and Fidelity, the parties in default (based upon their default). Transcript of November 15, 2007 trial at A. 425. That ruling was later confirmed in the Order of Declaratory Judgment entered December 13, 2007. A. 679-82.

The Kiritsises elected to forgo further relief against Greenpoint, but proceeded on against AME and Fidelity, seeking a monetary award in

[3] The Circuit Court actually sanctioned AME's counsel after this hearing for bringing the same arguments forth an excessive number of times without any new matter for the court to consider.

addition to the declaratory relief. The second phase of trial on the claims raised in the Kiritsises' Complaint was held on February 4, 2008; see the transcript and exhibits from that trial at A. 690-1199. After taking matters under advisement, the circuit court issued a letter opinion on April 22, 2008 granting the Kiritsises $69,463.16 in attorney's fees, plus $25,000.00 in punitive damages, based upon the cause of action of actual fraud. A. 1405-08.[4]

On May 29, 2008, the circuit court entered its Judgment and Final Order, confirming that grant of relief and incorporating the April 22, 2008 letter opinion by reference. A. 1444-46.

On June 27, 2008, AME filed its first Notice of Appeal, and also tendered (without prior notice to the Kiritsises) a proposed *supersedeas* bond and a draft Bond Order to accept that bond, set at $95,000.00. After the Bond Order was entered, the original bond document was filed. A. 1447-54.

The Kiritsises contested the sufficiency of the amount of the bond, filing their Motion to Require Augmented *Supersedeas* Bond on July 22,

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[4] The circuit court also indicated that the Kiritsises were entitled to some monetary recovery under their contract claim (Count I of the Complaint), but those damages were lesser than, and thus subsumed in, the amounts awarded under the actual fraud claim (Count II of the Complaint). A. 1408 and n. 3.

2008. The circuit court heard that motion and ruled from the bench on August 6, 2008, granting the Kiritsises' motion in substantial part; AME was ordered to file a replacement *supersedeas* bond in the increased amount of $105,800.00 on or before August 18, 2008. A. 1479-86 The confirming, written order was entered August 18, 2008. A. 1495-97.

AME did not file the required, increased bond until it delivered xerographic copies to the clerk's office on September 4, 2008. A. 1498-1501. The original bond documents arrived at the clerk's office on September 8, 2008. A. 1502-06.

During that time and after, AME remained in active litigation before the circuit court, defending a Cross Claim filed by Greenpoint. That matter, in which AME was not in default, was tried upon evidence on February 4 and 8, 2008, but was not finally resolved until a Final Order for the Cross Claim was entered March 20, 2009. A. 1528-30. AME then filed its second Notice of Appeal on April 20, 2009. No further proceedings were had as to bonds. AME's Petition for Appeal was filed in this Court on June 19, 2009, and its Petition was granted upon rehearing on November 17, 2009.

QUESTIONS PRESENTED

1. Does this Court have jurisdiction to hear AME's appeal?

2. Did the circuit court abuse its discretion when it denied several motions by AME asking it to vacate its valid default order?

3. Were the circuit court's explicit rulings rejecting AME's challenges to the Kiritsises' Complaint in any way insufficient?

4. Has AME shown that any error in this case was not harmless?

STATEMENT OF THE FACTS

With respect to the case between the Kiritsises and AME, the facts of this case are as alleged in the Complaint, taken as confessed by AME per the default order of July 21, 2006. Those facts are therefore as follows (paragraphs are numbered as in the Complaint, see A. 1-21):

6. In the summer of 2004, the Kiritsises were shopping for a mortgage loan on terms suitable to them, to finance their intended purchase of a residential property ....

7. The Kiritsises ultimately selected a loan program offered to them by Fidelity. [terms omitted for brevity]

8. Fidelity failed to provide any written documentation of the terms of the loan as discussed orally prior to the Kiritsises' closing on the loan.

9. On July 21, 2004, the Kiritsises' visited the offices of an attorney at law of their choosing, to settle upon their purchase of the property and the loan arranged by Fidelity to finance that purchase ("the closing").

10. During this period, AME was working closely, in tandem or in concert, with Fidelity in the brokering of the Kiritsises' loan.

11. In preparation for the closing, Fidelity and AME jointly delivered to the Kiritsises' attorney loan documents which conformed to the oral representations that Fidelity had made to the Kiritsises ....

12. The loan documentation supplied to the Kiritsises' attorney proposed that the loan be made initially payable to AME, on documentary forms provided by Greenpoint.

13. At the closing, the Kiritsises duly executed all documentation as supplied, thereby completing the loan transaction and their purchase of the property. ...

14. A copy of the Adjustable Rate Note signed by the Kiritsises at the closing (signed on the form provided by Fidelity, AME and Greenpoint)("the genuine note") [was] attached as Exhibit A to [the] Complaint.

15. A few weeks after the closing, AME, acting through a lawyer it had retained, contacted the Kiritsises to demand that they execute a new promissory note, to replace the genuine note. The form of the proposed new promissory note materially differed from the genuine note, and from the terms originally discussed between the Kiritsises and Fidelity, in the following particulars:

[terms omitted for brevity]

16. In response to the contact from AME's lawyer, the Kiritsises replied in writing, advising that they would not execute the proposed new promissory note, but instead, would retain the genuine note in the form supplied by Fidelity, AME and Greenpoint, as executed at closing and duly delivered to these defendants.

17. At some time thereafter, and without notice to the Kiritsises, defendant Duer wrote upon a copy of the proposed new note his own signatures in the place and stead of those of the Kiritsises, "as AIF" (believed to mean "attorney-in-fact") for the Kiritsises. This created a new document purporting to be a promissory note from the Kiritsises, but not constituting a genuine note from the Kiritsises ("the bogus note", copy attached [to the Complaint] as Exhibit B).

18. Neither Duer nor any other person affiliated with any of the defendants had been granted a power of attorney by the Kiritsises to execute the bogus note with its materially altered terms.

19. Duer further directed another person, who upon information and belief was also a subordinate employee of AME, to execute the notarial certificate upon the bogus note, thereby intentionally, willfully and fraudulently certifying that the bogus note was the actual instrument executed by the Kiritsises in conjunction with their mortgage transaction on July 21, 2004.

20. Duer, his subordinate, and AME all knew at the time of their actions that those actions were dishonest, fraudulent, bogus, unauthorized, and in contravention of the Kiritsises' express written directives.

21. Duer and AME thereafter assigned the Kiritsises' loan to Greenpoint, and Greenpoint paid AME due consideration for the loan. However, Duer and AME delivered to Greenpoint the bogus note, and not the genuine note, in order to complete this assignment transaction. ...

23. Greenpoint and/or GMAC increased the rate of interest upon the Kiritsises' loan effective February 1, 2005 – a move that was in conformity with the bogus note, but in contravention of the genuine note.

...

25. In August 2005, the Kiritsises first realized that their loan was not being handled by Greenpoint and GMAC in conformity with the genuine note. Upon contacting GMAC, they were provided with a copy of the bogus note (as signed by Duer) for the first time.

26. The Kiritsises promptly demanded of AME, Greenpoint and GMAC that they rectify the handling of their loan. ...

29. AME has responded to the Kiritsises' demands by persisting in its false contentions that the bogus note is operative.

30. In addition, and with the participation and cooperation of Fidelity, AME has fraudulently fabricated additional documentation purporting to substantiate its contentions. In at least one instance, AME and Fidelity have cooperated to copy, cut and paste one set of the Kiritsises' signatures from one genuine document onto another, fabricated document. ....

ARGUMENT

I. THIS COURT SHOULD DISMISS AME'S APPEAL DUE TO LACK OF JURISDICTION.

In Appellees' Motion to Dismiss Appeal, the Kiritsises explained at length that the Judgment and Final Order entered May 29, 2008 was, with respect to the dispute between the Kiritsises and all defendants to their Complaint, exactly what it said it was – a ***final order***. The filing deadlines for appeals to this Court are jurisdictional. AME did not file its Petition for Appeal until June 19, 2009, more than a year after the Judgment and Final Order. For reasons explained in Appellees' Rebuttal Memorandum in Support of Motion to Dismiss Appeal, AME is simply in error in its contention that it could await the final disposition of Greenpoint's severed and wholly independent Cross Claim prior to bringing its appeal to this Court.

In addition, after invoking the statutory privilege of barring post-judgment collection actions by the Kiritsises by filing a *supersedeas* bond, AME failed to comply with mandatory statutory deadlines for filing an amended, increased bond after the circuit court ordered it to do so. Under Va. Code § 8.01-676.1.E, AME had no more than fifteen days to comply with the circuit court's Order of August 18, 2008. Though it offers excuses

for its delay, AME does not dispute that it did not file its augmented bond in time. Under those circumstances, the statute mandates that "the appeal *shall* be dismissed," without regard to the reasons for the delay.

AME never objected to the finality language in the Judgment and Final Order, did not object when it filed its first Notice of Appeal, did not object when it filed its original *supersedeas* bond, and did not object when it filed its augmented bond. In fact, AME first raised the finality question only after the circuit court clerk had already delivered the appellate record (as it stood at that time) to this Court.

The Kiritsises ask this Court to reconsider their prior Motion to Dismiss, both on the merits and on the basis that AME waived any right to contest the finality of the Judgment and Final Order by failing to make contemporaneous objections on the finality issue.

II. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN DENYING AME RELIEF FROM DEFAULT.

In its filings both in the circuit court and before this Court, AME has downplayed the significance of its default, referring to its errors in such terms as, e.g., "its technical default." Brief of Appellant at 9. But this Court, and circuit courts throughout the state, have repeatedly made clear that a

responsive pleading filed through an act constituting the unauthorized practice of law is no mere technicality, but rather, an *illegality*. See UPL 1-101 and UPC 1-3.

Under multiple precedents from this Court, the document filed by AME's vice president in this case was not merely voidable, but void – "a nullity" that was "invalid." *Glumina Bank v. D.C. Diamond Corp.*, 259 Va. 312, 315, 527 S.E.2d 775, 776 (2000)("nullity"); *Nelson v. Gecelosky*, 2000 Va. App. LEXIS 502 (2000)("invalid"). *See also Kone v. Wilson*, 272 Va. 59, 62, 630 S.E.2d 744, 745 (2006)(Motion for Judgment filed by non-attorney declared "a nullity"). Oddly, AME's brief omits any discussion of these crucial precedents.

Courts in this situation are free to proceed as if nothing of any kind had been filed. In a recent case, for example, the Henrico County Circuit Court entered default judgment without any notice to the defendant after its CEO filed unauthorized practice of law papers with the clerk's office; the court also refused later efforts by the defendant to extricate itself from default. *Modular Wood Systems, Inc. v. World Trade Group, LLP*, 77 Va. Cir. 403 (Henrico 2009). Recently, this Court denied the delinquent defendant's petition for appeal. See Record No. 091814 (December 15, 2009).

This being the well settled law, there can be no doubt that the circuit court's entry of the default order on July 21, 2006 was fully justified. AME admits as much, expressly declining to assign error to the striking of the purported "Answer" and the entry of the initial default relief. Brief of Appellant at 10. The narrow issue presented to this Court, then, is whether the circuit court abused its discretion[5] in denying later requests for relief from the July 21, 2006 default order. Clearly, it did not.

AME argues that recent amendments to Rule 3:19(b) allow for a "more forgiving standard" in assessing requests for relief from default. Actually, that rule still requires AME to show "good cause" for relief. But AME's arguments are off point, because that paragraph of the rule chiefly addresses situations involving late responses where no adverse action has yet been taken by the court. Once default judgment has already been entered, this Court has consistently upheld denials of requests for relief.

In *Glumina Bank*, for example, a Croatian attorney filed a late response to a Motion for Judgment. On appeal, the defendant conceded that this filing was "a nullity." 259 Va. at 315, 527 S.E.2d at 776. Though not required to do so, the plaintiff gave further notice of its intent to pursue default relief. No one appeared for the defendant at the noticed hearing,

[5] AME admits that review in this Court should proceed under the "abuse of discretion" standard. Brief of Appellant at 9.

and the court entered judgment. Only three days later, a Virginia attorney filed pleadings seeking relief. This Court affirmed the denial of relief, saying, "there was full compliance by the plaintiffs with each procedural requirement leading to the judgment by default.... Accordingly, we hold that the trial court properly entered the default judgment, and it will be Affirmed." 259 Va. at 318, 527 S.E.2d at 778 (citation omitted).

In making that ruling, this Court relied upon its prior holding in *Landcraft Co. v. Kincaid,* 220 Va. 865, 263 S.E.2d 419 (1980). There, a trial court granted relief from default upon a late defense motion that challenged the sufficiency of the plaintiff's pleadings. This Court found the pleadings sufficient, and therefore reversed the trial court so as to reinstate the default judgment. It is instructive that this Court saw no need to address the question of whether relief from default should simply have been granted out of mere leniency. 220 Va. at 872, 263 S.E.2d at 424.

Traditionally, this Court has looked not merely for an opportunity to grant leniency, but rather, for whether the defendant had "reasonable excuse" for defaulting. And the defendant's own "gross neglect and carelessness" are not "reasonable excuse." *See Cooper v. Davis*, 199 Va. 472, 475-76, 100 S.E.2d 691, 693-95 (1957)(cited with approval in *Landcraft*, 220 Va. at 874, 263 S.E.2d at 425).

AME argues that the circuit court erroneously applied the standards currently embodied in Rule 3:19(d), applicable to cases where final judgment has been entered, instead of Rule 3:19(b), applicable to cases that have not yet reached final judgment. Brief of Appellant at 18. This argument is wrong both as to its review of the record in this case, and as to its application of the law to this case.

First, it was AME who contended, on both October 24 and November 11, 2006, that there was no significant legal difference between its situation and the situation that would arise after a final judgment. Specifically, on November 21, 2006, the circuit judge opened the hearing by stating:

> I hasten to add to that that there hasn't been a default judgment entered. There has been a finding that the defendants are in default, but that is different from the entry of a default judgment.

A. 75-76.

AME's counsel responded to that point as follows:

> Now, your comment coming into court today was there was a difference with a default judgment and an entry of default. Judge, there may be semantically, but in the way it all plays out, there is not. ... Call it a default order, call it a default judgment, whatever.

A. 88.

In the face of AME's position, the circuit court continued to demonstrate that it understood the issue presented perfectly, emphasizing repeatedly that although its July 21, 2006 order had entered default against AME, "I haven't entered a default judgment." A. 90.

In its appeal, AME wants this Court to ignore its prior position before the circuit court, and apply a standard wholly different from the one it urged upon the circuit court. Clearly, AME has waived the right to challenge the circuit court's ruling on this point by virtue of its arguments to that court.

The record also makes clear that the circuit court was not applying Rule 3:19(d), because if it had believed that provision applied, the application of the 21-day rule would have disposed of AME's motions summarily. Without question, the circuit court was proceeding under the "good cause" standard set out in Rule 3:19(b).

AME's new arguments are still wrong, however, with respect to the legal standards governing this case. The treatise relied upon so heavily by AME in its brief suggests that while short periods of delay, perhaps occasioned by "some intervening crisis" suffered by the defendant, might well be granted leniency, courts would rightly be more stern as more and more time passed. K. Sinclair & L. Middleditch, *Virginia Civil Procedure* § 11.4[F], pp. 767-68 (5th ed. 2008). Here, we are not dealing with a brief

period of default. AME was served on May 24, 2006, and did not file a cognizable responsive pleading until July 31, 2006; its default had been ongoing for over six weeks at that point. There has never been any contention of any "intervening crisis" that hindered AME; to the contrary, AME took over a month from the time it learned that Mr. Bonertz's filing was improper just to get an attorney hired. In the interim, AME made absolutely no effort to attend a court hearing of which it had ample notice and actual knowledge, something it has never explained truthfully.

Even in cases decided under the revised version of Rule 3:19, in cases where a defendant's default has been confirmed by an interlocutory order, but the case remains active while awaiting trial on the issue of damages, courts have stiffened their requirements for showings of "good cause." That is, instead of merely granting leniency as a matter of course, courts in these circumstances look at factors like those listed in Rule 3:19(d)(1), i.e., "the extent and causes of the defendant's delay in tendering a responsive pleading, whether service of process and actual notice of the claim were timely provided to the defendant, and the effect of the delay upon the plaintiff."

In *Wyczalkowksi v. Carter*, slip op. (Loudoun County Circuit Court, May 5, 2009),[6] for example, the Loudoun Circuit Court rejected the defendant's contentions that the delay it sought to impose upon the case would not be of any prejudice to the plaintiff, saying (slip. op. at p. 7):

> I think it is completely unfair to the Plaintiff, who has done nothing but comply with the law, to have to suffer because of the Defendants' delay in negotiating with and retaining their counsel, in their delay in paying counsel so he would be in a position to finally file responsive pleadings, and counsel's failure to do what was required to have the responsive pleadings timely filed.

Against this background of both the law and AME's waiver of the legal position it now tries to advance, this Court can fully appreciate the actions of the circuit court below. On October 24, 2006, the circuit court in this case was presented for the first time with AME motions that required it to invoke the applicable legal standards for deciding how to exercise its discretion. The record before the circuit court at that time indicated that the Kiritsises had (though not required to do so) served AME with motions advising it of its default not once, but twice, and that on both occasions, AME had gotten written notices of the July 21, 2006 hearing.[7] AME offered

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[6] This slip opinion is available from *Virginia Lawyers' Weekly*'s case service, VLW no. 009-8-107.

[7] AME initially admitted receipt of both of the motions and both of the notices. See AME's Motion to be Removed from Default, A. 53, at ¶ 4. At a later hearing, AME recanted in part, claiming that it had received both

no excuse for failing to comply with the law in its initial filing, other than its own incorrect suppositions.[8] AME has to this day never explained its complete failure to appear at the hearing on July 21, 2006. The circuit court would have been justified in construing AME's failure to appear as an act in defiance of both the law, and the court's authority.

In an effort to change the subject, AME has tried to shift blame to the Kiritsises' counsel on any number of occasions. That effort persists in AME's appeal, in which it downplays a pre-default telephone conversation in which the Kiritsises' counsel explicitly informed Bonertz of the legal requirement to retain a Virginia lawyer. AME faults the circuit court for implicitly requiring AME "to accept this legal advice from the attorney for its adversary." Brief of Appellant at 15.

The true state of affairs is that AME was, like all parties, required to follow the law. The representations made by the Kiritsises' counsel to the circuit court on October 24, 2006 were not intended to show that "legal advice" had been given from an adversary. They were intended to rebut the argument advanced by AME's counsel that AME had been wholly

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motions but neither notice. A. 126. Due to this being the subject of conflicting testimony, the circuit court would have been justified in choosing not to give any weight to AME's self-serving, revised version of events.

[8] See AME's Motion to Be Removed From Default, A. 52, at ¶ 1.

ignorant of the legal requirements at the time it defaulted – that is, to show that AME's act of unauthorized practice of law was knowing and deliberate.

AME offered no other basis for excusing it from default. Indeed, AME brought both its corporate president, James Pefanis, and its vice president, Robert Duer, to the October 24, 2006 hearing, but declined to call either of them to testify. The circuit court would have been justified in drawing an inference from this failure to have Pefanis or Duer testify, that had they testified their evidence would not have supported AME's position.[9] All in all, the record fully supports the circuit court's sound exercise of its discretion in denying relief to AME on October 24, 2006.

AME returned to the court on November 21, 2006, this time to present testimony from both Pefanis and Bonertz. Over the Kiritsises' objection, the circuit court granted AME a "second bite at the apple", hearing this testimony and agreeing to reconsider its rulings from the month before. While Pefanis' testimony was perfunctory, Bonertz insisted that he had no idea his actions in filing the "Answer" over his own signature were

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[9] The current state of the law with respect to the adverse inference permissible from failure to call an available witness is well discussed in *Harper v. B&W Bandag Center, Inc.*, 226 Va. 469, 311 S.E.2d 104 (1984) and in particular, in Justice Russell's concurrence in that case. While the inference may have infrequent application in the modern era of plenary discovery, in a hearing like the one held on October 24, 2006 with no prior discovery, the inference would still apply.

improper, and further testified that he spent the better part of a month from roughly June 22 through July 25 in seeking an attorney. See generally the transcript of November 21, 2006, A. 118-27 (Bonertz) and A. 128-29 (Pefanis). No reason was given as to why, after having received the Summons and Complaint (which clearly apprised AME as of May 24, 2006, of the need to file within 21 days of service), AME took two months to come forward in court via licensed Virginia counsel.

Indeed, Bonertz's testimony demonstrated that at several junctures, his search for counsel proceeded at a leisurely pace, with periods of several days sometimes passing without any notable effort. Although Bonertz admitted timely receipt of the Kiritsises' first motion shortly after its June 22, 2006 filing, he was not able to provide any specifics as to actions he took until mid-July. A document that AME presented to the circuit court indicated that AME had contacted one Virginia attorney on July 13, 2006, then been referred to Mr. Ferris on July 17, 2006. A. 158-69. Even then, however, Mr. Ferris was, in his own words, only "investigating the case but not yet counsel of record" when he first called the Kiritsises' attorney on or about July 18-19, 2006. A. 53. AME did not retain Mr. Ferris until July 25, 2006, over a month after the date when Bonertz first learned of the challenge to the papers he had filed. A. 54.

The flurry of activity surrounding the July 21, 2006 hearing date could not have escaped the circuit court's notice. Notwithstanding AME's suddenly changing its tune to claim that it had not known of the hearing date in advance, the circuit court had ample evidence before it to the contrary. In short, AME's own documentary evidence indicated that Bonertz, in testifying that he did not know of the July 21 hearing date, had perjured himself.

That inference was confirmed when the Kiritsises' counsel testified in rebuttal to Bonertz. Counsel established under oath not only the mailing of the two written hearing notices to Bonertz, but also to having spoken with Bonertz on July 10, 2006 and having specifically discussed the upcoming hearing date with him at that time. Transcript of November 21, 2006, A. 133-34 (testimony of Bradley P. Marrs).[10] Mr. Marrs also testified to the effect that Bonertz's act of the unauthorized practice of law had been knowing and deliberate. A. 133.

In sum, the record before the circuit court on November 21, 2006 demonstrated that AME had shown a conscious disregard for the law and for the circuit court. AME had knowingly engaged in the unauthorized

[10] Below, AME made several erroneous arguments challenging the propriety of Marrs' having testified at this hearing. As AME has not assigned error on the point, however, this Court need not address those issues.

practice of law, willfully failed to appear in court on July 21, 2006, and then presented disingenuous testimony on November 21, 2006. The circuit court was well within its discretion to deny relief from the default order, and it announced its ruling to that effect at the hearing, stating, "I find no grounds on which to reverse the Court's initial finding that AME was in default, nor ... its decision announced October 24 ... to deny AME's motion to be removed from default." A. 143. That ruling was confirmed by the Order entered February 2, 2007. A. 181-83.

Even after that point, the circuit court continued to show remarkable patience, allowing AME yet another two opportunities to persuade it to reverse itself. On neither occasion did AME take responsibility for its prior actions. AME presented no new evidence and no new legal arguments, but rather, merely rehashed the same arguments that had already been thoroughly discredited and rejected. See A. 175-78 (third motion to reconsider) and A. 179-80 (order denying third motion), and A. 184-91 (fourth motion to reconsider) and A. 192-93 (order denying fourth motion to reconsider).

This case is not presented for *de novo* review. As AME has conceded,[11] the question is whether the circuit court abused its discretion in

[11] See Brief of Appellant at 9.

denying relief, after the fact, from the July 21, 2006 default order. This Court is not called upon to opine as to any bright line legal standards for application under Rule 3:19. Neither should this Court seek to substitute its judgment for that of the circuit court judges who handled this case. All that is required is for this Court to decide whether the record provided the circuit court with sufficient basis for its discretionary decisions. That is not a close question.

There can be no claim that the circuit court acted rashly or without due reflection in this case. In all respects, the circuit court handled its discretionary duties in an exemplary manner worthy of this Court's affirmance.

III. THE TRIAL COURT DID NOT, AS AME CONTENDS, FAIL TO RULE ON WHETHER THE KIRITSISES' COMPLAINT WAS LEGALLY SUFFICIENT.

AME cites *Landcraft, supra*, for the proposition that even in the face of default, a circuit court should consider whether the Complaint adequately pleads its case. Brief of Appellant at 16-17; see also AME's Assignment of Error # 3 (*id.* at 2).

AME is plainly wrong in claiming that "the trial court flatly refused to consider whether the complaint stated a proper claim." Brief of Appellant at 17. Although the circuit court did not take that issue up upon AME's first request, it did hear extensive arguments from the parties at the second phase of trial held on February 4, 2008, and it did explicitly rule at that time that the Complaint's allegations were sufficient. Transcript of February 4, 2008 trial between the Kiritsises and AME, A. 717 *et seq.* (arguments of AME's counsel), and A. 898-900 (court's findings of pleading's sufficiency).

The circuit court (Powell, J.) confirmed those rulings in a letter opinion of April 22, 2008, saying:

> [P]laintiffs alleged acts of actual and constructive fraud on the part of the defendants, and at the hearing of February 4, 2008, the Court held the claims to be sufficiently pled and denied Defendant's motion to strike.... In addition, the Court held that the breach of contract and conspiracy claims were sufficiently plead.

A. 1406-07 and n. 1.[12] That letter opinion was later incorporated by express reference into the Judgment and Final Order of May 29, 2008. A. 1444.

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[12] The Kiritsises' remaining count, alleging a violation of the Virginia Consumer Protection Act, was nonsuited. A. 1442-43. Thus, the circuit court ruled in favor of the sufficiency of all four legal claims upon which the Kiritsises proceeded to final judgment.

AME also argues that the Kiritsises have lost their contract claim (Count I of the Complaint) due to inaction by the circuit court and a failure by the Kiritsises to object or to assign error to the supposed inaction. Brief of Appellant at 16. This is plainly wrong as well. First, the Kiritsises obtained relief under, among other counts, their contract claim when they obtained the declaratory relief confirmed in the order of December 13, 2007. A. 679-82. That declaratory relief was carried forward into the final order. A. 1444. In addition, the circuit court ruled that the Kiritsises were entitled to damages under their contract claim. See the April 22, 2008 letter opinion, A. 1408 n. 3. Although those damages were lesser than, and thus subsumed into, the greater amount of damages awarded under the actual fraud claim, the Kiritsises had no reason to protest the circuit court's actions with respect to the contract claim. They therefore had no obligation to object or to assign cross error.

In all of these particulars, AME's third assignment of error is simply wrong with respect to the record in this case and thus, completely without merit.

This Court should note that AME did not assign error to the substance of the circuit court's rulings finding the Complaint's allegations sufficient, and thus, that question is not presented in this appeal. The

Kiritsises accordingly do not address the merits of the sufficiency ruling in this brief.

IV. AME HAS NOT SUFFERED PREJUDICE FROM BEING HELD IN DEFAULT.

AME has already had no fewer that three opportunities to see its evidence and arguments presented to the courts. It has lost all three times. No reason appears why this Court should intervene and overrule the circuit court's sound exercise of its discretion, just to give AME a *fourth* opportunity.

AME has always founded its defense on the argument that it obtained the Kiritsises' signatures, at the closing of their loan in 2004, on a document entitled, "Undertaking and Errors and Omissions Form". See A. 528. That document contained a limited power of attorney, empowering the lender to sign for the Kiritsises as necessary to fix minor insufficiencies in the loan documents, e.g., typographical errors. AME has persistently argued that this document empowered it to sign a wholly new note, without the Kiritsises' consent or even their knowledge, thereby binding them to

new loan terms that would increase their interest obligation by hundreds of thousands of dollars.[13]

At the November 15, 2007 trial that resulted in the award of declaratory judgment, Greenpoint advanced AME's arguments as AME's representatives watched from the gallery. Greenpoint even offered the testimony, via *de bene esse* deposition, of AME's Robert Duer, who had signed the bogus note in the Kiritsises' place. A. 338-65. After considering the AME position, the circuit court opined that the document relied upon could not be construed "sanely" to support AME's stance. Transcript of November 15, 2007 trial, A. 424, line 6. The court further opined, "there is no good faith argument" for AME's position. *Id.* at A. 425, line 9.

AME later tried the same tack in defense of Greenpoint's Cross Claim, and again, AME's contentions were rejected. See generally the transcripts of the Greenpoint v. AME trial, held February 4, 2008 and February 8, 2008.[14] AME was not in default to Greenpoint's Cross Claim,

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[13] Among other ways that this argument is patently absurd, AME has never explained how its contentions would square with the federal Truth-in-Lending Act's requirements for advance disclosure of loan terms to the borrowers.

[14] The trial of Greenpoint's Cross Claim against AME was conducted on February 4 and 8, 2008. There are two separate transcripts from February 4, 2008 – one pertaining to the Kiritsises' case, and one pertaining to Greenpoint's case. The February 4, 2008 transcript from the Greenpoint case appears to have been inadvertently omitted from the Joint Appendix,

and thus, AME was permitted to advance every bit of evidence and argument it could muster during the Greenpoint-AME trial. Yet a review of the record from that trial reveals no facts that materially departed from those alleged in the Kiritsises' Complaint, nor any other reason to fear that the relief ultimately obtained by the Kiritsises visited any injustice upon AME. Had AME's same evidence and argument come into play in defense of the Kiritsises' case, AME still would have been reduced to arguing that its Undertaking and Errors and Omissions form empowered it to increase the Kiritsises' loan obligations unilaterally and without notice. That remains a truly "insane" proposition, no less so for AME's refusal to abandon it.

In fact, AME brought its same allegations and arguments forward via a Complaint filed against the Kiritsises in the federal court system. After extensive efforts, and facing imminent dismissal from a motion for summary judgment, AME finally conceded completely in that forum, withdrawing its claim *with prejudice*.[15]

Thus, AME is currently barred from bringing any renewal of its adversarial claims against the Kiritsises, by the doctrine of *res judicata*. In

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but is still in the Record. The transcript of the February 8, 2008 proceedings in the Greenpoint case is found at A. 1200-1404.

[15] See generally the record in AME Financial Corporation v. Paul G. Kiritsis and Emilie A. Kiritsis, United States District Court for the Eastern District of Virginia, Richmond Division (Payne, J.), civil action no. 3:07cv095.

its appeal, AME has presented this Court with no reason why it should return this case to the circuit court for still more evidentiary hearings.

CONCLUSION

For the reasons stated above, appellees Paul G. Kiritsis and Emilie A. Kiritsis pray that this Court will dismiss the appeal of appellant AME Financial Corporation, or, in the alternative, that the rulings of the Chesterfield County Circuit Court will be affirmed.

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CERTIFICATE

I hereby certify on this 5th day of January, 2010 that this Brief of Appellees has been filed, and that three copies of it have been served upon each of counsel of record for the appellant and the co-appellee, all in compliance with Rules 5:28(g) and 5:26(d). Fifteen printed copies have been filed with the Clerk of the Court, and an electronic copy of the PDF version of this Brief of Appellant has been e-mailed.

Bradley P. Marrs