NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
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June 28, 2023

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Re: ***Jae W. Chung v. Chungsu Kim, et. al.***
Case No. CL–2022–1955

Dear Counsel:

The issue before the Court is whether a party who willfully defaults in a lawsuit may vacate the resulting default judgment a year later by alleging that the plaintiff's *ex parte* proof was untrue.

The Court holds Virginia Code § 8.01-428 permits a defaulting defendant to re-open a default judgment up to two years after entry by simply alleging the plaintiff testified untruthfully to secure it. Once re-opened, the defaulting party must then prove the plaintiff materially lied, defrauding the court.

[1] Plaintiff died prior to the Defendants at issue bringing the present motion. Richard MacDowell, Esquire, represented to the Court that Plaintiff's estate's administrator retained him to represent the estate. The Court will impose a deadline for the estate to formally intervene.

Because the Defendants in the present case allege Plaintiff secured his default judgment through materially fraudulent statements, and because they raise their claim within two years of the judgment, the Court must grant the Defendants' Motion to Reopen the case so that they may return with their alleged proof of fraud.

I. FACTUAL OVERVIEW: A KNOWING DEFAULT.

Plaintiff Jae W. Chung ("Plaintiff") sued Defendants Chungsu Kim and Sunmi Cho ("Defendants") and others for fraud in the inducement and for fraudulent conveyance. The Defendants knowingly defaulted after proper service, likely thinking any judgment against them would be eliminated in bankruptcy. Clearly, they had a change of heart. Debt obtained by fraud is nondischargeable in bankruptcy. 11 U.S.C. § 523(a)(2)(A). They now ask the Court to set aside the default judgment and let them have the trial they willfully ignored. They complain that Plaintiff supported his default judgment motion with false testimony in the form of an affidavit, calling this fraud on the Court.

Plaintiff filed a Complaint February 11, 2022, alleging Fraud in the Inducement and Fraudulent Conveyance against the individual Defendants at issue, Chungsu Kim and Sunmi Cho.[2] In the Complaint Plaintiff alleges that Defendants fraudulently induced him to lend them $3,145,000 through three Promissory Notes, using knowingly false statements. Plaintiff alleged that some of the funds were then used to purchase property solely in Defendant Cho's name.

Plaintiff properly served Defendants March 7, 2022, by posting on the front door of their homes. Defendants admit they knew of the Complaint, but did not file a response or otherwise appear in the case. They explain that they lacked knowledge of the consequences of a judgment, and they believed that Plaintiff would be unable to obtain judgment against them.

When Defendants failed to respond to the lawsuit, Plaintiff quickly filed a Motion for Default Judgment on April 7, 2022. The Court found Defendants to be in default on April 22, 2022, and scheduled the matter for an *ex parte* damages hearing.[3] At that hearing, on June 3, 2022, the Court entered a Final Order. For Count 1 it awarded Plaintiff $2,917,000 against Defendant Kim for compensatory damages, plus $350,000 for punitive damages. For Count 2 it awarded Plaintiff $228,000 against both Defendants, plus $350,000 for punitive damages. The Final Order also awarded attorneys fees and costs.

To secure the Final Order, Plaintiff filed an affidavit signed and notarized June 2, 2022. In the affidavit, Plaintiff affirmed the facts and allegations in the Complaint. Specifically, he swore that he loaned Defendants $3,145,000, that he was not repaid, and that Defendant Cho used at least $228,000 of the loan to purchase a residence recorded only under Cho's name. Plaintiff also supplied to the Court copies of the three promissory notes, signed by the parties.

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[2] The returns of service by the Sheriffs for Defendants J2K Corporation and BT Appliance Design Center Incorporated both state that they were "[n]ot found." The Default Judgment Order was not entered against them, and they have not made an appearance in this matter. They are not a party to this Motion to Reopen and Vacate.
[3] The Court ordered judgment in favor of Plaintiff, against Kim for Count 1, and against Cho for Count 2.

Following the entry of the Final Order, Plaintiff commenced aggressive, unsuccessful, collection activity. Then, on May 26, 2023, nearly a year after the entry of the Default Judgment Order, and after the Plaintiff died, Defendants filed a Motion to Reopen and a Motion to Vacate Default Judgment. They complain that Plaintiff had secured his default judgment through an affidavit filled with false information. Defendants seek to vacate the Final Judgment under Virginia Code § 8.01-428(A) due to "fraud on the court."

Plaintiff objects to reopening and possibly vacating the default judgment for three reasons. First, he argues the Defendants improperly raised their claims as a motion within the default judgment case, and instead should have raised them in an independent action. Second, he argues Defendants motion is untimely under both Rule 1:1 of the Rules of the Supreme Court of Virginia and under the equitable doctrine of laches. On the latter point he emphasizes that Defendants waited to file almost a year after a judgment on which they knowingly defaulted, and after Plaintiff died and can no longer testify or aid the prosecution. Third, he asserts Defendants' own affidavit used to support their motion is facially defective.

II. ANALYSIS: DEFAULT JUDGMENTS ARE SECOND-TIER JUDGMENTS WORTH MUCH LESS THAN REGULAR JUDGMENTS.

Circuit courts typically lose jurisdiction to vacate or modify final judgments 21 days after entry. VA. SUP. CT. R. 1:1. There are some exceptions, however. Relevant to the present case is Virginia Code § 8.01-428(A), which in part permits setting aside default judgments. It reads,

> "Upon motion of the plaintiff or judgment debtor and after reasonable notice to the opposite party, his attorney of record or other agent, the court may set aside a judgment by default or a decree pro confesso upon the following grounds: (i) fraud on the court, (ii) a void judgment, (iii) on proof of an accord and satisfaction, or (iv) on proof [of a Soldier Sailors Act matter]. Such motion on the ground of fraud on the court shall be made within two years from the date of the judgment or decree."

Distinguished from this part of the statute is Virginia Code § 8.01-428(D), applicable to "other judgments or proceedings." This part of the statute reads,

> "*Other judgments or proceedings.*--This section does not limit the power of the court to entertain at any time an independent action to relieve a party from any judgment or proceeding, or to grant relief to a defendant not served with process as provided in § 8.01-322, or to set aside a judgment or decree for fraud upon the court." (Emphasis in original).

Thus, under paragraph A of the statute, a party involved in a default judgment may set aside the judgment after proving, *inter alia*, "fraud on the court" or "a void judgment." The former carries a two-year statute of limitations period for bringing the challenge. The latter has

no limitation period, which is unsurprising because void judgments are void and can be challenged anytime. *State Farm Mut. Auto. Ins. Co. v. Remley*, 270 Va. 209, 218 (2005).

Under paragraph D of the statute, a party may bring a challenge for "fraud upon the court" as an independent action without reference to a two-year limitation period.[4]

Courts treat the term "fraud on the court" differently if the fraud is intrinsic or extrinsic. "'The judgment of a court, procured by *intrinsic* fraud, *i.e.*, by perjury, forged documents, or other incidents of trial related to issues material to the judgment, is *voidable* by direct attack at any time before the judgment becomes final; the judgment of a court, procured by *extrinsic* fraud, *i.e.*, by conduct which prevents a fair submission of the controversy to the court, is *void* and subject to attack, direct or collateral, at any time.'" *State Farm*, 270 Va. at 218 (quoting *Jones v. Willard,* 224 Va. 602, 607 (1983)); accord *Peet v. Peet*, 16 Va. App. 323, 236-37 (1993) ("'Intrinsic fraud' includes perjury, use of forged documents, or other means of obscuring facts presented before the court and whose truth or falsity as to the issues being litigated are passed upon by the trier of fact."); *McClung-Logan Equip. Co., Inc. v. Harbour Constructors, Co.*, 2019 WL 6792473 *4 (Va. Dec. 12, 2019).

"Extrinsic fraud does not include fraud relating to a 'matter on which the judgment or decree was rendered,' or involving an 'act or testimony the truth of which was, or might have been, in issue in the proceeding before the court which resulted in the judgment that is thus assailed.' Rather, the fraud must be 'extrinsic or collateral to the questions examined and determined in the action.' Extrinsic fraud includes such circumstances as bribery of a judge or juror, fabrication of evidence by an attorney, preventing another party's witness from appearing, intentionally failing to join a necessary party, or misleading another party into thinking a continuance had been granted." *Ellett v. Ellett*, 35 Va. App. 97, 100-01 (2001) (internal citations omitted).

Thus, under this bright line principle, false statements by a party in an affidavit are intrinsic fraud, making it voidable, and thus subject only to direct attack before the judgment is final or, under Rule 1:1 within 21 days afterwards. [5]

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[4] The different terms within paragraphs A and D of the statute, "fraud on the court" and "fraud upon the court," are a distinction without a difference. While statutory construction typically requires that courts give meaning to different words used by the legislature in the same statute, *City of Richmond v. Virginia Electric and Power Company*, 292 Va. 70, 75 (2016) (internal citations omitted), here the words "on" and "upon" have the same meaning. The word "upon" is merely a formal preposition for the word "on." It has no other meaning. *On*, NEW OXFORD AM. DICTIONARY (3rd Ed., 2010).

[5] The intrinsic-extrinsic line has some blur. In *Batrouny v. Batrouny*, 13 Va. App. 441, 444 (1991), a husband moved to set aside a portion of a final decree of divorce more than 21 days after entry. He alleged fraud upon the court from his then-wife's false statement that both her children were of the marriage when she knew one of them was not. Under the bright line rule, her false statement was intrinsic fraud and time barred since the husband was not challenging a default judgment with its statute of limitations extension. However, the Court of Appeals implicitly treated the statement as extrinsic fraud to permit the stale challenge. Accord *Wilson v. Commonwealth*, 108 Va. Cir. 97 (Fairfax Apr. 20, 2021) (expanding the definition of extrinsic fraud to include "fabricating evidence," which the bright line rule would place in the category of intrinsic fraud, relying weakly on *Terry v. Commonwealth*, 2018 WL 1633489 (Va. Apr. 5, 2018), which *assumed without deciding* that false statements to obtain a warrant were extrinsic

The Court holds that the term "fraud on the court" as used in Virginia Code § 8.01-428(A)(i) for default judgments means "intrinsic fraud." It reaches this conclusion for two reasons. First, the statute separates "fraud on the court" from "void judgment[s]." Void judgments arise from issues extrinsic to the merits—such as lack of jurisdiction or extrinsic fraud. So, "fraud on the court" must be something different. Intrinsic fraud is a type of fraud which is logically different from extrinsic fraud. Second, the statute grants a two-year deadline for asserting fraud on the court but leaves void judgments to their indefinite challenge state. This makes sense when one considers the forgoing authority on intrinsic and extrinsic fraud. The former must be raised almost immediately, the latter may be raised at any time. This explains the statutory need to grant a two-year extension to the otherwise 21-day challenge limit to "fraud on the court" (intrinsic fraud) while leaving alone the indefinite deadline to challenge a "void judgment" (extrinsic fraud).

Virginia Code § 8.01-428(D) does not interfere with this balance. That section of the statute permits a collateral challenge to a judgment because of fraud upon the court without any deadline. However, as the intrinsic-extrinsic bright line rule makes clear, it applies only to extrinsic fraud upon the court for cases other than setting aside default judgments. Unlike in paragraph A of the statute, paragraph D requires one seeking to set aside a judgment based on extrinsic fraud to do so in the form of an independent action.

While arguably a harsh, rigid result in the present case, where Defendants willfully defaulted and the Plaintiff has subsequently died, there is logic to the legislature's grant of an extended statute of limitations period for challenging default judgments. "The law favors the trial of causes on the merits and default judgments are not favored." 35B C.J.S. FedCivProc § 1162. By permitting a defendant to wait up to two years to challenge a default judgment, the law creates an incentive for a plaintiff to not only notify a defendant of a lawsuit, but to encourage a response. It may be expedient for a plaintiff to file a lawsuit, hope for no response, and then rush to the courthouse on the 21st day seeking a default judgment. However, making default judgments second-tier judgments, worth much less than a judgment on the merits, the legislature subtly encourages plaintiffs to slow down and to really try to get the defendant to participate.

In the present case, the Defendants allege that Plaintiff secured his default judgment based on a false affidavit. If true, his false statements are intrinsic fraud. While normally Defendants had only 21 days after judgment entered to challenge a voidable judgment procured

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fraud). *Wilson* expanded "fabricating evidence by an attorney" into "fabricating evidence" by misstating *Jones*, 224 Va. at 607. The former fraud is intrinsic because it is a fabrication during the litigation by a party; the latter is extrinsic because it was tampering by a non-party—the lawyer. Some other cases may seem to blur the bright line rule, but do not. *Gulfstream Bldg. Assocs., Inc. v. Britt*, 239 Va. 178, 184 (1990) (holding that a property owner committed extrinsic fraud by not joining a necessary party to the lawsuit who would have contested his submission of an incorrect real estate survey plat); *Khanna v. Khanna*, 18 Va. App. 356, 359 (1994) (failure of husband to notify wife of a divorce action and filing an affidavit that he performed due diligence but could not locate her is extrinsic fraud). In both *Gulfstream* and *Khanna*, the extrinsic fraud was really the failure to join or notify a necessary party of the lawsuits. Failure to notify the other side of a dispute is textbook tampering with the judicial machinery resulting in extrinsic fraud. The fact that the parties lied about their extrinsic fraud is of no matter, even though a party lying under oath in a proceeding is properly classified as intrinsic fraud.

by intrinsic fraud, a statute extended their deadline to two years after the entry of the Final Order. VA. CODE ANN. § 8.01-428(A)(i). The same statute does not require one to raise the attack in an independent action. There is no allegation of extrinsic fraud in the motion—no allegations that the proper parties were not joined, improper notice to the parties, bribery of court officials, or that there was any other act that would block a fair trial on the merits. Rather, the alleged fraud is a classic example of intrinsic fraud—false statements material to the judgment.

Because Virginia Code § 8.01-428(A)(i) extends a two-year statute of limitations for setting aside default judgments based on intrinsic fraud, Plaintiff's claims that Defendants' motions are untimely due to Rule 1:1 or laches are wrong. Similarly, his argument that Defendants procedurally needed to file an independent action to challenge the default judgment as mandated under paragraph D of the statute is incorrect. The present case properly falls under paragraph A, which does not require an independent action. Finally, Plaintiff's argument that Defendants' own affidavit used to seek a hearing on their Motion to Vacate is facially defective is rejected, because the Court cannot tell that it is valid or not until it takes evidence, which it will do at the hearing on the Motion to Vacate.

III. CONCLUSION.

For the reasons stated herein, the Court will grant Defendants Cho's and Kim's Motion to Reopen. Kim and Cho have alleged that, in the default judgment proceeding, Plaintiff committed intrinsic fraud on the Court through alleged false statements. Intrinsic fraud on the court is a ground to reopen a matter that was closed by a final default judgment order if brought within two years of entry of the order. Defendants properly brought this action as a motion in the default judgment case, and timely filed it under 8.01-428(A). The parties must schedule an evidentiary hearing on the connected Motion to Vacate the Default Judgment.

An appropriate Order is attached.

Kind regards,

[redacted]

David A. Oblon
Judge, Circuit Court of Fairfax County
19th Judicial Circuit of Virginia

Enclosure

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

JAE W. CHUNG,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CL–2022–1955
	)	
CHUNGSU KIM, *et al.*,	)	
	)	
Defendants.	)	

ORDER

THIS MATTER came before the Court June 16, 2023, on Defendants Chungsu Kim's and Sumi Cho's ("Defendants") Motion to Reopen and Motion to Vacate Default Judgment. It is

ADJUDGED for the reasons set forth in the Opinion Letter issued this day, which is incorporated into this Order by reference, Defendants' Motion to Reopen should be granted and their Motion to Vacate should be scheduled for an evidentiary hearing. Therefore, it is

ORDERED Defendants' Motion to Reopen is GRANTED;

ORDERED the parties shall schedule a hearing on Defendants' Motion to Vacate through Calendar Control; and

ORDERED counsel for the late Plaintiff Jae W. Chung's estate must formally intervene within 21 days.

THIS CAUSE CONTINUES. THIS IS NOT A FINAL ORDER. THE COURT RETAINS JURISDICTION TO ADJUDICATE THE MOTION TO VACATE.

[redacted]

Judge David A. Oblon

JUN 28 2023

Entered

PURSUANT TO RULE 1:13 OF THE RULES OF THE SUPREME COURT OF VIRGINIA, ENDORSEMENT OF THIS ORDER IS WAIVED BY DISCRETION OF THE COURT. ANY DESIRED ENDORSEMENT OBJECTIONS MAY BE FILED WITHIN TEN DAYS.