SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2924-20

LUIS A. VARELA and
KRIS A. VARELA,

Plaintiffs-Respondents,

v.

BLOOMINGDALE AUTO GROUP, LLC, d/b/a BLOOMINGDALE AUTO GROUP – THE CAR HOUSE, and THE CAR HOUSE, LLC,

Defendants-Appellants.

Argued April 4, 2022 – Decided May 3, 2022

Before Judges Messano and Marczyk.

On appeal from the Superior Court of New Jersey, Law Division, Gloucester County, Docket No. L-0632-19.

Kevin J. Kotch argued the cause for appellants (Ferrara Law Group, PC, attorneys; Ralph P. Ferrara and Kevin J. Kotch, of counsel and on the briefs).

Lewis G. Adler argued the cause for respondents (Lewis G. Adler and Perlman-DePetris Consumer Law,

attorneys; Lewis G. Adler, Lee M. Perlman, and Paul DePetris, on the brief).

PER CURIAM

Defendants, Bloomingdale Auto Group, LLC, and the Car House, LLC, appeal from the trial court's denial of their motion to vacate a default judgment. This case arises from plaintiffs, Luis and Kris Varela's, purchase of an automobile. Plaintiffs contend defendants misrepresented the vehicle had no prior accidents. Defendants failed to answer the complaint, and the trial court subsequently entered default judgment and trebled plaintiffs' damages, based on the purchase price of the vehicle, without a proof hearing. Following our review of the record and the applicable legal principles, we affirm in part, reverse in part, and remand for a proof hearing as to damages.

I.

We derive the following facts and procedural history from the record. Plaintiffs filed a complaint on May 20, 2019. The primary claim advanced by plaintiffs was an alleged violation of the Consumer Fraud Act (CFA). Specifically, plaintiffs assert defendants failed to disclose the vehicle purchased had previously been involved in an accident. Defendants were served in June 2019, and the court entered default as to both defendants in September 2019. The amended final judgment by default was entered on January 15, 2020, for

$84,604.80.[1] The trial court's opinion stated plaintiffs' losses are "similar to a book account and because the CFA requires the court to treble damages, judgment may be properly entered here without a proof hearing." While there is no specific analysis as to how the court arrived at the total damages, the decision appears to be based on a summary of damages set forth in plaintiffs' certification, which trebles the purchase price of the vehicle.

On January 27, 2020, defendants moved to vacate the default judgment. On February 28, 2020, the trial court denied the motion. The trial court determined defendants failed to demonstrate excusable neglect in failing to respond to the complaint. Additionally, the trial court found defendants failed to establish a meritorious defense because, pursuant to Rule 1:6-6, the attorney who submitted the certification did not have personal knowledge of the facts therein.

Almost a year later, on January 13, 2021, defendants unsuccessfully renewed their motion to vacate the default judgment. The trial court denied the motion because it was not filed within a reasonable time, and because defendants

[1] The original default judgment was entered on December 20, 2019. However, the memorandum of decision attached to the order inadvertently referred to a stipulation of settlement, which did not exist. Plaintiffs filed a separate application to correct the record.

failed to establish excusable neglect. The trial court subsequently denied defendants' motion for reconsideration on May 25, 2021.

II.

Defendants contend the trial court erred in failing to vacate the default judgment as their failure to answer the complaint was the result of excusable neglect pursuant to Rule 4:50-1(a). Defendants argue their owner was in Egypt as a result of his grandmother's death at the time the complaint was served. The office manager failed to follow protocols by not forwarding the complaint to defendants' attorney. When the owner returned in October 2019, he believed the complaint had already been forwarded to the attorney. It was not until a few months later the owner realized the attorney never received the complaint. At that point, the complaint was given to the attorney, and the motion to vacate the default judgment was filed.

After learning the motion was denied, the owner attempted to contact the attorney, but the attorney was away dealing with personal matters. The owner subsequently learned the attorney's office was closed due to the COVID pandemic. The office apparently remained closed until late 2020, and it was not until early 2021 that counsel filed a renewed motion to vacate default judgment. Defendants allege their attorney took responsibility for failing to file a timely

motion, and the sins of their attorney should not be visited upon them absent demonstrable prejudice. Goldhaber v. Kohlenberg, 395 N.J. Super. 380, 391-92 (App. Div. 2007). In short, defendants aver the failure to respond to the complaint was the result of excusable neglect.

Defendants further argue the trial court erred in failing to vacate the default judgment under Rule 4:50-1(f), which allows a court to vacate a default judgment for "any other reason justifying relief from the operation of the judgment or order." Ibid. Defendants contend this case involves exceptional circumstances which warrant vacating the default judgment. Specifically, defendants assert Rule 4:50-1(f) is implicated because the trial court should not have trebled the purchase price of the vehicle in calculating damages, which was not the actual ascertainable loss. Defendants rely on Romano v. Galaxy Toyota for the proposition that the measure of plaintiffs' ascertainable loss under the CFA is not the purchase price paid for the automobile, but rather the difference in value between the vehicle the consumer received and the vehicle represented at the purchase. 399 N.J. Super. 470, 480 (App. Div. 2008). Defendants maintain the judgment plaintiffs received was far in excess of their actual damages, even if trebled. Moreover, the exceptional circumstances created by

the pandemic and the closing of defendants' attorney's office contributed to the delay which should not be chargeable to defendants.

Defendants next argue they have established a meritorious defense because plaintiffs purchased the car "as is" with no warranty. Moreover, there is no evidence defendants knew the car they sold had previously been in an accident, as the initial Carfax report indicated there was no record of any prior accident. Defendants also note the trial court improperly calculated damages by trebling the purchase price of the car as opposed to the $8,000 repair costs, pursuant to the estimate obtained by plaintiffs. Additionally, some of the repairs may have been covered by the manufacturer's warranty as the car was only one year old.

Defendants maintain this case should be remanded, at the very least, to ascertain the appropriate damages. Defendants aver there is no basis in the record for the trial court to have determined this car was a total loss justifying the use of the sales price as the measure of damages. Finally, defendants assert the trial court erred in characterizing this matter as essentially a "book account" case as opposed to holding a proof hearing as required pursuant to Rule 4:43-2(b).

Plaintiffs counter that defendants' conduct in failing to timely respond to the complaint is nothing more than carelessness on the part of the corporate defendants. Therefore, the mistake or inadvertence leading to the entry of judgment was not excusable neglect. Plaintiffs argue excusable neglect does not include a corporate defendant's unawareness of the institution of a legal action resulting from its failure to have reasonable procedures in place for the processing of civil complaints. Plaintiffs further submit defendants fail to offer sufficient proof evidencing they are entitled to relief under Rule 4:50-1(f), because the rule should only be used sparingly in situations where a grave injustice would occur.

Plaintiffs further allege defendants have failed to offer evidence of a meritorious defense. Plaintiffs contend the certification submitted by the owner in support of the motion to vacate lacks sufficient personal knowledge, as the owner was not personally involved in the sale of the vehicle. Plaintiffs also maintain the default judgment was a final order subject to one attempt at vacatur, and defendants never moved for timely reconsideration of that order. Plaintiffs further claim defendants waived their right to seek a vacatur of the default judgment as a result of the nearly year-long delay, and aver defendants are barred by estoppel and laches from seeking relief from the order.

Plaintiffs next assert they established the vehicle had "no value to plaintiffs," as it was unable to be driven and required approximately $8,000 in repairs. Plaintiffs contend the trial court correctly found their losses are similar to a book account and could be properly determined without a proof hearing. Additionally, the court properly decided the vehicle's purchase price was the ascertainable loss because plaintiffs paid for a vehicle that was inoperative and worthless to them. Plaintiffs allege they can satisfy the ascertainable loss requirement by proving they received something less than promised — here, an unusable vehicle. Accordingly, the price paid for the vehicle should be utilized to calculate the ascertainable loss.

Plaintiffs argue Romano is distinguishable from this case because it involved an alleged vehicle odometer rollback, coupled with the fact that it involved a discussion of damages following trial and not a default judgment. 399 N.J. Super. at 474-77. Plaintiffs concede the Romano court opined there was no authority for the proposition that a claimant's measure of damages in a consumer fraud action is the purchase price paid for the product. Id. at 482. However, plaintiffs rely on Furst v. Einstein Moomjy, Inc., for the proposition that ascertainable loss may be established by a product's ticketed price. 182 N.J. 1, 26 (2004). Plaintiffs further rely on D'Agostino v. Maldonado, 216 N.J. 168

(2013), where the Court declined to follow Romano in the context of a mortgage rescue scam case. Id. at 196-97.

III.

"The trial court's determination under [Rule 4:50-1] warrants substantial deference and should not be reversed unless it results in a clear abuse of discretion." U.S. Bank Nat'l Ass'n v. Guillaume, 209 N.J. 449, 467 (2012). An abuse of discretion "arises when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" Flagg v. Essex Cty. Prosecutor, 171 N.J. 561, 571 (2002) (quoting Achacoso-Sanchez v. Immigr. & Naturalization Serv., 779 F.2d 1260, 1265 (7th Cir. 1985)).

The motion judge is obligated to review a motion to vacate a default judgment "'with great liberality,' and should tolerate 'every reasonable ground for indulgence . . . to the end that a just result is reached.'" First Morris Bank & Tr. v. Roland Offset Serv. Inc., 357 N.J. Super. 68, 71 (App. Div. 2003) (alteration in original) (quoting Mancini v. EDS ex rel. N.J. Auto. Full Ins. Underwriting Ass'n, 132 N.J. 330, 334 (1993)). "All doubts . . . should be resolved in favor of the parties seeking relief." Mancini, 132 N.J. at 334.

Rule 4:50-1 offers litigants a broad opportunity for relief from a final judgment or order:

> On motion, with briefs, and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment or order for the following reasons: (a) mistake, inadvertence, surprise, or excusable neglect; (b) newly discovered evidence which would probably alter the judgment or order and which by due diligence could not have been discovered in time to move for a new trial under R. 4:49; (c) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (d) the judgment or order is void; (e) the judgment or order has been satisfied, released or discharged, or a prior judgment or order upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or order should have prospective application; or (f) any other reason justifying relief from the operation of the judgment or order.
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> [Ibid.]

A.

To obtain relief under Rule 4:50-1(a), a defendant must demonstrate both excusable neglect and a meritorious defense. Ibid. "'Excusable neglect' may be found when the default was 'attributable to an honest mistake that is compatible with due diligence or reasonable prudence.'" Guillaume, 209 N.J. at 468 (quoting Mancini, 132 N.J. at 335). To determine if a defense is meritorious courts "[m]ust examine defendant's proposed defense . . . ." Bank of New Jersey

v. Pulini, 194 N.J. Super. 163, 166 (App. Div. 1984). Although attorney carelessness, lack of diligence, and inadvertence may be enough to establish good cause in some circumstances, they are "insufficient grounds for the establishment of excusable neglect . . . ." Burns v. Belafsky, 326 N.J. Super. 462, 471 (App. Div. 1999), aff'd, 166 N.J. 466 (2001); see also SWH Funding Corp. v. Walden Printing Co., 399 N.J. Super. 1, 10 (App. Div. 2008) (finding "Rule 4:50-1(a) relief [was] not available, because inadvertence of counsel alone is insufficient, as a matter of law, to establish 'excusable neglect.'").

We are satisfied the trial court properly exercised its discretion in finding defendants failed to establish excusable neglect. Defendants' initial delays in failing to forward the complaint to counsel, coupled with their failure to follow up with counsel for nearly a year after the first motion to vacate was denied, is not compatible with due diligence or reasonable prudence. Moreover, counsel's failure to act when the initial motion to vacate was denied is also an insufficient ground to establish excusable neglect under the circumstances. Accordingly, we affirm that aspect of the trial court's decision. That does not, however, end our inquiry.

B.

The failure to establish excusable neglect under Rule 4:50-1(a) does not automatically act as a barrier to vacating a default judgment pursuant to Rule 4:50-1(f) where the equities indicate otherwise. See Morales v. Santiago, 217 N.J. Super. 496, 504-05 (App. Div. 1987) (vacating judgment under Rule 4:50-1(f) after a proof hearing due to "misgivings" about the merits of plaintiff's claim even though defendant's attorney had not adequately presented defendant's case on the motion to vacate); Siwiec v. Fin. Res., Inc., 375 N.J. Super. 212, 218-20 (App. Div. 2005) (vacating judgment because even though defendant did not establish excusable neglect, under subsection (f), plaintiff's right to judgment presented a novel question of law and defendant was extended neither a notice of proof hearing nor a right to participate).

Subsection (f) of Rule 4:50-1, the "catchall" category, allows the court to vacate a final judgment for "any other reason justifying relief from the operation of the judgment or order." Ibid. "No categorization can be made of the situations which warrant redress under subsection (f). The very essence of subsection (f) is its capacity for relief in exceptional situations. And in such exceptional cases its boundaries are as expansive as the need to achieve equity and justice." Court Inv. Co. v. Perillo, 48 N.J. 334, 341 (1966); see also DEG,

LLC v. Twp. of Fairfield, 198 N.J. 242, 269-71 (2009). In order to obtain relief under subsection (f), the movant must demonstrate that the circumstances are exceptional, and that enforcement of the order or judgment would be unjust, oppressive, or inequitable. Nowosleska v. Steele, 400 N.J. Super. 297, 304-05 (App. Div. 2008); City of E. Orange v. Kynor, 383 N.J. Super. 639, 646 (App. Div. 2006).

Rule 4:43-2(a) states that after a default has been entered, final judgment can be entered by the clerk if the claim against a defendant is for a "sum certain or for a sum which by computation can be made certain . . . ." Ibid. Likewise, Rule 4:43-2(b) provides that "[i]f to enable the court to enter judgment . . . it is necessary to . . . determine damages . . . the court . . . on notice to the defaulting defendant . . . may conduct such proof hearing . . . as it deems appropriate." Ibid. We have noted, "[i]t is axiomatic that where, following the entry of a default, a plaintiff seeks unliquidated damages, judgment should not ordinarily be entered without a proof hearing." Chakravarti v. Pegasus Consulting Group, Inc., 393 N.J. Super. 203, 210-11 (App. Div. 2007); see Beech Forest Hills, Inc. v. Morris Plains, 127 N.J. Super. 574, 580-82 (App. Div. 1974); see also Sema v. Automall 46 Inc., 384 N.J. Super. 145, 153 (App. Div. 2006) (defining unliquidated damages). Moreover, we have held that damages are unliquidated

"'where they are an uncertain quantity, depending on no fixed standard . . . and can never be made certain except by accord or verdict.'" Sema, 384 N.J. Super. at 153-54 (citing Schettino v. Roizman Dev., Inc., 158 N.J. at 486 (quoting 25 C.J.S. Damages § 2 (1966))). Generally, after a default, a plaintiff is entitled to "all of the damages" that can be "prove[n] by competent, relevant evidence." Heimbach v. Mueller, 229 N.J. Super. 17, 28 (App. Div. 1988). The question on appeal here is whether there was sufficient evidence supporting the trial court's findings of fact and conclusions of law, and whether those findings could be made without a proof hearing.

The trial court determined this case was akin to a "book account." We disagree. Book account cases can often be decided without a proof hearing because they typically involve liquidated damages. We have observed, "liquidated damages are those the amount whereof has been ascertained by judgment or by the specific agreement of the parties, or which are susceptible of being made certain by mathematical calculation from known factors." Sema, 384 N.J. Super. at 153 (quoting 25 C.J.S. Damages § 2 (1966)); see also 22 Am. Jur. 2d Damages § 489 (2003) (stating "'Liquidated damages' are damages the amount of which has been made certain and fixed either by the act and agreement

of the parties or by operation of law to a sum which cannot be changed by the proof.").

The CFA damages in this matter are not liquidated. Moreover, the trial court relied on plaintiffs' hearsay statements that the vehicle was "worthless" despite plaintiffs' lack of expertise in the area of automotive repair. In addition, the court appears to have relied on a hearsay statement on an invoice from a Toyota dealership (where the vehicle was inspected), which stated, "[t]he sales advisor called us to tell us that the vehicle had been in a 'serious accident.'" This is not the type of competent, relevant evidence contemplated by our caselaw that a court can rely upon in entering default judgment.

Further, by deciding this case on the papers, as opposed to a proof hearing, defendants were denied the opportunity to challenge plaintiffs' evidence by way of cross-examination and arguments with respect to damages. See Jugan v. Pollen, 253 N.J. Super. 123, 129-31 (App. Div. 1992); see also BJL Leasing Corp. v. Whittington, Singer, Davis and Co., 204 N.J. Super. 314, 322-23 (App. Div. 1985); Beech Forest Hills, 127 N.J. Super. at 581-82. Given the trial court's failure to conduct a proof hearing, coupled with the court's mistaken consideration of certain evidence, defendants have established exceptional

circumstances and enforcement of the default judgment would be unjust pursuant to Rule 4:50-1(f).

IV.

On remand, the trial court shall be guided by Romano. Romano involved a CFA case where the plaintiff purchased a vehicle and later learned its odometer had been rolled back. We noted in Romano, "[d]etermination of what constitutes an 'ascertainable loss' under the CFA, although nebulous, is not novel." 399 N.J. Super. at 479. We determined that plaintiffs must suffer "an objectively ascertainable loss or damage," which could be measured by "expert proof of diminution of value" of the plaintiffs' property or "out of pocket expenses causally connected with the claimed defect perpetuated by the defendant." Id. at 479. We stated:

> In fraud cases, "[c]ompensatory damages are designed 'to put the injured party in as good a position as he would have had if performance had been rendered as promised.'" 525 Main St. Corp. v. Eagle Roofing Co., 34 N.J. 251, 254 (1961) (quoting 5 Corbin, Contracts § 992, p. 5 (1951) and 1 Restatement, Contracts § 329, comment a (1932)). Generally, courts have measured damages by applying two methods. First, the "benefit of the bargain" rule allows recovery for the difference between the price paid and the value of the property had the representations made been true. D'Ercole Sales, Inc. v. Fruehauf Corp., 206 N.J. Super. 11, 21 (App. Div. 1985); Correa, supra, 196 N.J. Super. at 284, 284 (App. Div. 1984). The second commonly

> applied damage calculation is the "out of pocket" approach, which provides recovery for the difference between the price paid and the actual value of the property acquired. Ibid. These approaches each seek to make "an injured party whole," Furst, 182 N.J. at 11, and both methods are designed to fairly and reasonably compensate that injured party for the damages or losses proximately caused by the alleged consumer fraud. "[A] given formula is improvidently invoked if it defeats a common sense solution." 525 Main St. Corp., supra, 34 N.J. at 254.
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> [Id. at 483.]

Significantly, for the purposes of this case, we further noted in Romano, "[t]he measure of plaintiff's ascertainable loss for CFA purposes cannot be the purchase price . . . paid for the automobile, but the difference between the vehicle . . . received and the vehicle as represented at purchase." Id. at 484. On remand, the trial court shall evaluate damages utilizing the analysis in Romano.

We recognize the Court in D'Agostino did not follow Romano in a case involving a mortgage rescue scam. D'Agostino, 216 N.J. at 197. However, D'Agostino did not question the Romano court's reasoning for determining how to calculate damages in the context of an alleged CFA violation regarding the sale of an alleged defective vehicle. Rather, the D'Agostino Court's criticism of Romano centered on our determination that the plaintiff there did not suffer an ascertainable loss, because she successfully sought recission under the UCC and

was restored to the economic position she was in prior to the purchase. D'Agostino, 216 N.J. at 196-97. That issue is not before us. The trial court here made no such determination regarding recission and simply endeavored to calculate plaintiffs' damages by relying on the purchase price of the vehicle. Accordingly, the trial court shall utilize the framework set forth above in Romano in calculating damages.

Finally, it is well-settled that whether a defaulting defendant may participate in a proof hearing, and the extent of such participation, is a matter of judicial discretion. Jugan, 253 N.J. Super. at 129-31. We leave it to the trial court to determine the scope of defendants' participation. See Pressler & Verniero, Current N.J. Court Rules, cmt. 2.2.3 on R. 4:43-2 (2022). We remind the court it has an independent obligation to assess plaintiffs' evidence regarding both liability and damages at a proof hearing. "When a trial court exercises its discretion to require proof of liability as a prerequisite to entering judgment against a defendant who has defaulted, what is required . . . is that the plaintiff adduce [a prima facie case.]" Heimbach, 229 N.J. Super. at 23.

We affirm the trial court's denial of defendants' motion to vacate default judgment under Rule 4:50-1(a). We are constrained to reverse the trial court's denial of defendants' motion to vacate pursuant to Rule 4:50-1(f) based on the

deficiencies noted above and remand for a proof hearing on the issue of damages in accordance with Rule 4:43-2. To the extent we have not otherwise addressed the arguments of either party, we have determined they lack sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E).

Affirmed in part, reversed in part, and remanded for a proof hearing as to damages.