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Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1477-15T3

MAIMOUNAT AKEGNAN,

Plaintiff-Respondent,

v.

BENJAMIN FAGANS and FULTON
CONSTRUCTION & CARPETING, INC.,

Defendants-Appellants,

and

JOYCE N. MOORE, JOHN KRILLA,
NEW JERSEY HOME FUNDING GROUP,
LLC,

Defendants.

Argued March 16, 2017 – Decided October 12, 2017

Before Judges Suter and Guadagno.

On appeal from the Superior Court of New
Jersey, Law Division, Bergen County, Docket
No. L-7201-13.

Peter J. Koulikourdis argued the cause for
appellants (Koulikourdis and Associates,
attorneys; Joseph A. Takach, on the brief).

Daniel S. Eichhorn argued the cause for
respondents (Cullen and Dykman, LLP,
attorneys; Mr. Eichhorn, on the brief).

The opinion of the court was delivered by
SUTER, J.A.D.

Defendants Benjamin Fagans and Fulton Construction & Carpeting, Inc. (defendants) appeal the October 23, 2015 order denying reconsideration of their unsuccessful motion to vacate a default judgment entered against them in favor of plaintiff Maimounat Akegnan (plaintiff) for \$279,184. Because defendants did not show any basis for reconsideration, there was no abuse of discretion in denying the motion.

We relate only the facts that are necessary. In 2013, plaintiff filed suit against defendants arising from three real estate transactions. Plaintiff alleged with respect to a first property in New York, that she paid defendants \$24,184.50. When that real estate deal could not be completed, she alleged defendants owed her these monies. Two other potential investment properties were located in New Jersey. The first on Gloria Lane in Monroe was to be plaintiff's for her personal use. She alleges she paid defendants \$91,000 for this property but when that transaction was not finalized, defendants reimbursed her only a portion of her investment, leaving a balance of \$32,440. The second property, on Spotswood Gravel Hill Road in Monroe, involved an investment by plaintiff of \$255,000. The seller of that

property terminated the transaction when defendants could not obtain financing. Plaintiff contends defendants owe her these funds. The complaint alleged causes of action against defendants for fraud, negligent misrepresentation, unjust enrichment, conversion, breach of fiduciary duty, breach of contract and good faith and fair dealing, civil conspiracy and RICO.¹

Defendants did not file an answer and were defaulted. Plaintiff's motion for the entry of a default judgment was granted in April 2014, entering judgment in the amount noted.

It was not until July 2015, that defendants filed a motion to vacate the default judgment. Defendant Benjamin Fagans claimed he did not recall being served with the complaint despite the process server's return of service. He acknowledged learning about the complaint and receiving it by regular mail. He then started looking for documents to support his defenses, but being unaware of the deadlines and having a need to retain a person to translate some of the documents, did not file an answer.

Judge Robert C. Wilson denied the motion to vacate on August 3, 2015. He found based on the proof of service and defendant's actual knowledge of the complaint that defendant Benjamin Fagans

¹ Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.A. §§ 1961-1968.

was served with process both personally and as agent for Fulton Construction & Carpeting, Inc. (Fulton). The judge concluded that defendants were not entitled to relief under Rule 4:50-1(a), (b), and (c), because the time for filing under those sections had expired. Under subsection "f", the judge found no exceptional circumstances or legal basis to vacate the judgment. See R. 4:50-1(f). Defendants did not assert a meritorious defense but simply denied "they took all the monies from plaintiff."

Defendants filed a motion for reconsideration. The motion included, without any certification, a purported contract between plaintiff and defendants for the New York transaction and copies of the front and back of a few checks written on Fulton check stock. Defendants reiterated their prior arguments but added that plaintiff did not pay what she was supposed to for two of the real estate deals.

On October 23, 2015, Judge Wilson denied reconsideration, concluding that his earlier order of August 3, 2015 was "based on correct reasoning" and that defendants did not "demonstrate[] good cause to overturn" the previous order. The court noted "all factual predicates, including exhibits" were available to defendants when they requested to vacate the default judgment. Defendants' motion was based on "events that allegedly occurred

from 2009 through 2012." The court previously considered defendants' "asserted defenses" and determined they were not meritorious. Defendants had not shown excusable neglect. There was "evidence that [d]efendant [Benjamin] Fagans received notice of the litigation, . . . was aware of the ongoing litigation, and presumably received and reviewed the documents at issue in this matter."

Defendants appeal only the October 23, 2015 order denying reconsideration. They contend the court erred because they submitted additional documents, which showed defendants complied with their obligations. All of defendants' other arguments on appeal are directed to the August 3, 2015 order that denied their request to vacate the default judgment. That order is not properly before us. See W.H. Industries, Inc. v. Fundicao Balancins, Ltda, 397 N.J. Super. 455, 458 (App. Div. 2008) ("It is clear that it is only the orders designated in the notice of appeal that are subject to the appeal process and review."); Fusco v. Bd. of Educ. of City of Newark, 349 N.J. Super. 455, 461-62 (App. Div.) (reviewing only denial of the plaintiff's motion for reconsideration and refusing to review the original grant of summary judgment because that order was not designated in the notice of appeal), certif. denied, 174 N.J. 544 (2002).

"[A] trial court's reconsideration decision will be left undisturbed unless it represents a clear abuse of discretion." Pitney Bowes Bank, Inc. v. ABC Caging Fulfillment, 440 N.J. Super. 378, 382 (App. Div. 2015). The grounds for reconsideration are limited. State v. Puryear, 441 N.J. Super. 280, 294 (App. Div. 2015). Reconsideration is not appropriate merely because a litigant is dissatisfied with a decision. D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Reconsideration is appropriate only where "1) the [c]ourt has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the [c]ourt either did not consider, or failed to appreciate the significance of probative, competent evidence." Ibid. Reconsideration may also be granted where "a litigant wishes to bring new or additional information to the [c]ourt's attention which it could not have provided on the first application." Ibid.

We discern no abuse of discretion here. The trial court's decision denying reconsideration was reasonably based on consideration of all the evidence. Defendants were served with the complaint, were aware of it, and failed to answer. Defendants submitted nothing new to rebut this finding. Defendants attached, without a certification, a purported contract for one of the transactions, which confirmed rather than disputed that there was

some type of financial transaction between plaintiff and defendants involving real estate in New York. That defendants may have paid some money toward one of the transactions proves nothing about their obligations, and more importantly, does not address plaintiff's claim that defendants owed her money. The copies of the checks were uncertified and lacking in explanation. The court considered all the information before it and expressed its decision cogently.


If we were to consider the August 3, 2015 order that denied defendants' motion to vacate the default judgment, our review would conclude that Judge Wilson did not abuse his discretion in denying defendants' motion to vacate. See In re Adoption of Child of Indian Heritage, 111 N.J. 155, 184(1988) (observing that "a motion for vacation of judgment is addressed to the sound discretion of the trial court, whose resolution of the motion will not be disturbed on appeal unless it results from a clear abuse of discretion."). Defendants appear to limit their argument under Rule 4:50-1 to subsection "f" providing relief for "any other reason justifying relief from the operation of the judgment or order." R. 4:50-1(f). Subsection "f" should be used "sparingly," First Morris Bank & Trust v. Roland Offset Serv., Inc., 357 N.J. Super. 68, 71 (App. Div.), certif. denied, 176 N.J. 429 (2003),

and relief is available only when "truly exceptional circumstances are present." Hous. Auth. of Morristown v. Little, 135 N.J. 274, 286 (1994).

There were no exceptional circumstances raised here. The excuse that time was needed to gather documents and to translate them was not supported by any proof of the volume of the documents or the time to translate them. Defendants' alleged meritorious defenses were boilerplate without any substance for the court's consideration. Although they contend now that plaintiff's proofs were inadequate to show defendants breached these contracts or that they intended to convert funds for their benefit, defendants are raising these issues for the first time on appeal. We decline to address what the trial court did not have the opportunity to address. See State v. Galicia, 210 N.J. 364, 383 (2012) (observing that "[g]enerally, an appellate court will not consider issues . . . which were not raised below."). Defendants did not establish there was excusable neglect, any meritorious defenses or a lack of service.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION