SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2509-14T1

CAPITAL ONE BANK (USA), N.A.,
Successor in interest to
Capital One Bank,

Plaintiff-Respondent,

v.

KENNETH B. HURDLE,

Defendant-Appellant.

Argued January 31, 2017 – Decided March 2, 2017

Before Judges Yannotti and Gilson.

On appeal from Superior Court of New Jersey, Law Division, Special Civil Part, Essex County, Docket No. DC-001750-12.

Kenneth B. Hurdle, appellant, argued the cause pro se.

Carl E. Zapffe argued the cause for respondent (Fenton & McGarvey Law Firm, P.S.C., attorneys; Mr. Zapffe, on the brief).

PER CURIAM

Defendant appeals from an order entered by the Law Division on November 21, 2014, denying his motion for reconsideration of

an order entered by the court on October 3, 2014, which granted plaintiff's motion for entry of a final judgment by default, and denied defendant's cross-motion to dismiss the complaint, or permit him to file an answer. We affirm.

We briefly summarize the relevant facts and procedural history. In June 2005, defendant obtained a Visa credit card from plaintiff, and thereafter began to use it. From July 27, 2005, to July 5, 2011, plaintiff mailed monthly statements to defendant at his residential address in Maplewood, New Jersey. Defendant failed to pay amounts due and owing on the credit card account, and plaintiff declared him in default.

In January 2012, plaintiff filed a complaint in the Special Civil Part seeking $3107.40, the balance due and owing on the account, plus costs. Plaintiff requested that the clerk serve defendant by mail at his Maplewood address. The court's records established that the clerk served defendant pursuant to Rule 6:2-3(d)(1) by simultaneously mailing the summons and complaint to defendant by certified and ordinary mail.

The certified mail was returned marked "unclaimed," but the ordinary mail was not returned. Service was deemed to have been fully effected, pursuant to Rule 6:2-3(d)(4) ("if the certified mail is returned to the court marked 'unclaimed' or 'refused,' service is effective provided that the ordinary mail has not been

returned"). Defendant did not file an answer and on March 2, 2012, the clerk entered default against him pursuant to Rule 6:6-2. On May 16, 2014, plaintiff filed a motion pursuant to Rule 6:6-2(d) to enter a final judgment by default in the amount of $3107.40, plus costs.

In support of its motion, plaintiff submitted a certification of counsel stating that defendant was served with the summons and complaint, defendant had not filed a responsive pleading, and more than six months had passed since the entry of default. Plaintiff also submitted a certification of non-military service, a certification as to the source of defendant's address, and an affidavit from one of its employees stating that defendant owed $3107.40 on the account.

On June 19, 2014, defendant filed a pro se cross-motion to dismiss the complaint and submit the dispute to binding arbitration. Alternatively, defendant sought additional time in which to file an answer. Plaintiff opposed the cross-motion.

On June 23, 2014, the parties appeared for oral argument on the motions. Defendant appeared pro se. At oral argument, defendant requested an adjournment so that he could retain an attorney. The judge granted the request and adjourned the matter to July 25, 2014. Thereafter, the court further adjourned the matter several times.

On August 18, 2014, an attorney entered an appearance for defendant and on October 3, 2014, the attorneys for the parties argued the motions. The judge decided to grant plaintiff's motion and deny defendant's cross-motion. The judge memorialized his decisions in an order dated October 3, 2014. Judgment was entered against defendant in the amount of $3107.40, plus costs.

Defendant then retained new counsel, who filed a motion for reconsideration on defendant's behalf. Counsel argued that the court's prior decision was erroneous. He asserted that the final judgment should be vacated because: (1) the matter is subject to arbitration and was not properly filed in the Superior Court; (2) the judgment was obtained without proper notice; and (3) defendant established excusable neglect for his failure to answer and a meritorious defense.

Plaintiff opposed the motion. Thereafter, the attorneys for the parties presented oral argument to the court. The judge placed an oral decision on the record, finding that there was no reason to reconsider the prior order. The judge entered an order dated November 21, 2014, denying the motion for reconsideration. This appeal followed.

On appeal, defendant argues: (1) the final judgment should not have been entered because plaintiff delayed in seeking the judgment for an inordinate amount of time; (2) the court should

have dismissed the complaint because the dispute is subject to binding, mandatory arbitration; (3) the final judgment by default should be vacated because defendant established excusable neglect for his failure to answer and a meritorious defense. We find no merit in these arguments.

As noted, defendant argues that the trial court erred by denying his motion for reconsideration. Reconsideration is warranted only when the court's decision is "based on a palpably incorrect or irrational basis," or the "[c]ourt either did not consider, or failed to appreciate the significance of probative, competent evidence[.]" Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996)(quoting D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990)). Here, the trial court did not err by denying defendant's motion.

Defendant contends the trial court should not have granted plaintiff's motion for entry of the final judgment because plaintiff waited an inordinate amount of time to file that motion. The record shows that because defendant did not file a responsive pleading, the clerk of the court entered default against defendant in March 2012. Plaintiff did not file its motion for entry of the final judgment until May 2014.

Plaintiff's motion for entry of the final judgment complied with Rule 6:6-3(d), which requires a formal motion for entry of

judgment if six months have elapsed since the entry of default. Furthermore, defendant has not shown that he was prejudiced by plaintiff's delay in filing the motion. Therefore, we reject defendant's contention that the court erred by granting the motion and entering the judgment for plaintiff.

Next, defendant argues that the trial court should have granted his motion to vacate the final judgment and dismiss the complaint because the dispute was subject to binding arbitration. In support of this argument, defendant relies upon the terms and conditions of the credit card account established in 2005 when defendant opened the account.

The terms and conditions established in 2005 allowed plaintiff and the cardholders to choose arbitration as a means to resolve disputes arising under the agreement. However, as a result of a settlement of a federal class action, plaintiff agreed to remove the arbitration provision from its cardholder agreements.[1]

In January 2010, plaintiff mailed the new cardholder agreement to defendant with his monthly billing statement. Defendant could have refrained from using the credit card, but he did not do so. Consequently, on February 22, 2010, the new cardholder agreement became effective and defendant was bound by

[1] Settlement was approved by a judgment entered in Ross v. Bank of America (USA), N.A., et al., 05-CV-7116 (S.D.N.Y. July 22, 2010).

its terms and conditions. The new agreement does not give plaintiff or defendant a contractual right to arbitration.

On appeal, defendant argues that the 2010 cardholder agreement does not apply to him because plaintiff presented the new agreement to him with his monthly billing statement. Defendant did not, however, raise this issue before the trial court and therefore the issue is not properly before us on appeal. Nieder v. Royal Indemn. Ins. Co., 62 N.J. 229, 234 (1973). Even if defendant had raised this issue in the trial court, his argument is unpersuasive.

In support of his argument, defendant cites Discover Bank v. Shea, 362 N.J. Super. 200 (Law Div. 2000), appeal dismissed on other grounds, 362 N.J. Super. 90 (App. Div. 2003). In that case, the bank sought to compel arbitration based on an amendment to its existing cardholder agreements by way of a "bill stuffer" notice. Id. at 202.

The Law Division judge denied the bank's motion to compel arbitration, finding that the bank could not unilaterally change the agreement to add the clause, which required arbitration and effectively precluded class-action litigation in court. Id. at 210. The judge found that the new provision was unconscionable and therefore unenforceable.

In his decision, the Law Division judge stated that the arbitration clause was part of a contract of adhesion. Ibid. The judge wrote, "[t]here is clearly unequal bargaining power between the parties and the only purpose of the provision purporting to prevent class-wide litigation is to effectively remove the only legitimate remedy for cardholders with small claims." Ibid.

Defendant's reliance upon Shea is misplaced. The amendment to the agreement at issue in Shea deprived cardholders of "any forum in which they could reasonably vindicate their rights." Id. at 213. In this case, the amendment to the agreement ensures that cardholders can have their claims, and any claims against them, resolved in a court of law.

Furthermore, the amendment in this matter was the relief granted to members of the class in the federal litigation, and defendant was a member of the class. Therefore, Shea lends no support to defendant's argument, and he is bound by the terms and conditions of the 2010 agreement.

Defendant further argues that the trial court erred by refusing to set aside the default and entering final judgment for plaintiff. To vacate default in a matter in the Special Civil Part, the defendant must show "good cause." R. 4:43-3; R. 6:6-1. The movant has the burden of showing that the failure to answer or otherwise appear is excusable under the circumstances.

Resolution Trust Corp. v. Associated Gulf Contractors, 263 N.J. Super. 332, 344 (App. Div.), certif. denied, 134 N.J. 480 (1993).

Defendant asserts that he established excusable neglect. He claims he was not served with the summons and complaint. The record shows, however, that defendant was duly served by ordinary and certified mail at the address where plaintiff sent defendant his monthly billing statements.

Such service was proper under Rule 6:2-3(d)(1), and service was deemed to be effective pursuant to Rule 6:2-3(d)(4) because the ordinary mail was not returned and the certified mail was unclaimed. At the argument on the reconsideration motion, the judge noted that all of the court's records show that service was proper.

It is well established that a sheriff's return of service raises a presumption as to the correctness of the facts stated therein, which can only be rebutted by clear and convincing evidence. Goldfarb v. Roeger, 54 N.J. Super. 85, 90 (App. Div. 1959) (citation omitted). Moreover, "[i]t is generally held that the uncorroborated testimony of the defendant alone is not sufficient to impeach the return." Ibid. (citation omitted). Here, defendant's uncorroborated assertion that he was not served is insufficient to overcome the presumption that the service in this matter was proper.

Defendant also argues that he has a meritorious defense to the plaintiff's claim. In his motion for reconsideration, defendant first raised a potential defense. His attorney asserted that defendant was disputing various charges on the account and the calculation of late fees. Defendant did not, however, submit a certification specifying the charges he was disputing or the fees that were miscalculated, or the factual basis for the claim. Thus, defendant failed to establish that he had a meritorious defense to plaintiff's claim.

Affirmed.