SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2577-15T4

F.A.L. REALTY, INC.,

Plaintiff-Respondent,

v.

TR & SONS REALTY, LLC,

Defendant-Appellant.

Submitted March 9, 2017 – Decided September 11, 2017

Before Judges O'Connor and Whipple.

On appeal from Superior Court of New Jersey Chancery Division, Bergen County, Docket No. F-30460-14.

Kates Nussman Rapone Ellis & Farhi, LLP, attorneys for appellant (Michael Farhi, on the brief).

Schumann Hanlon, LLC, attorneys for respondent (Eugene R. Boffa, III, of counsel; Joseph Elmo Cauda, Jr., on the brief).

PER CURIAM

Defendant TR & Sons Realty, LLC, appeals from a January 14, 2016 General Equity Part order denying its application to vacate

a final default judgment in foreclosure entered in favor of plaintiff, as well as the sheriff's sale held in this matter. Defendant sought this relief on the ground it had not been served with the complaint in foreclosure. Having reviewed defendant's arguments in light of the record and applicable principles of law, we reverse the order under review and remand for further proceedings.

I

The following facts are derived from the motion record. Defendant executed a note in favor of plaintiff F.A.L. Realty, Inc., for $628,000. The note was secured by a non-residential purchase money mortgage. Defendant defaulted on the note. In December 2013, plaintiff served defendant with a Notice of Default and Intent to Foreclose, which defendant's attorney acknowledged receiving a few weeks later. The attorney advised plaintiff that defendant would bring its payments current by April 2014, and requested plaintiff refrain from filing a complaint in foreclosure.

In February 2014, defendant informed plaintiff it could not cure the default by April 2014. In response, plaintiff agreed to modify the terms of the note and, in March 2014, the parties executed a loan modification agreement. However, defendant

failed to make any payments under that agreement and, in July 2014, plaintiff filed a complaint in foreclosure.

Plaintiff claims it served defendant in accordance with Rule 4:4-4(6). The affidavit of service, executed by a private process server, states on July 31, 2014, the summons, complaint, and foreclosure case information statement were served on defendant's managing agent. The affidavit further claims the person who accepted service refused to provide her name, but the process server described her as a sixty-five year old, white female with "red/blonde" hair, who stood five feet, three inches and weighed 125 pounds.

Defendant did not file a responsive pleading and on December 5, 2014, a default judgment in foreclosure was entered. In September 2015, a sheriff's sale was scheduled. Defendant successfully obtained an adjournment of the sale to October 23, 2015; that date was subsequently adjourned to November 14, 2015, December 4, 2015, and January 8, 2016. On November 10, 2015, defendant filed an order to show cause seeking to vacate the default judgment and sheriff's sale.

In support of its application, defendant's principal, Tarek Ramadan, submitted a certification asserting defendant had never been served with the summons and complaint. Ramadan further claimed he had not been aware a judgment had been entered, let

alone a complaint filed, until September 2015, when he learned of the scheduled sheriff's sale. He stated he attempted to negotiate a resolution but, when settlement efforts failed, filed the order to show cause. In a supplemental certification, Ramadan stated the person described in the affidavit of service who accepted the summons and complaint on defendant's behalf did not fit the description of defendant's managing agent or any of its employees.

Plaintiff's principal, Alberto Silva, executed a certification in opposition to defendant's application. Silva claimed he spoke with Ramadan on February 5, 2015, at which time Ramadan stated he was working on a "deal" that would enable defendant to pay its arrears in full to plaintiff. Silva further certified "[d]uring this conversation, I was very clear to Mr. Ramadan that either we come to [an] agreement in which he pays me in full and until such time I was not stopping the foreclosure."

Before the court decided defendant's order to show cause and despite the sale being adjourned to January 8, 2016, the sheriff's sale went forward on December 4, 2015. In its decision accompanying the January 16, 2016 order denying

defendant's "motion,"[1] the court denied the application, finding, among other things, there was no authority to vacate the judgment under Rule 4:50-1. The court did not address defendant's assertion it was not in fact served with the complaint.

II

On appeal, defendant contends plaintiff failed to serve it with the foreclosure complaint and, thus, the court erred when it did not vacate both the default judgment in foreclosure and the sheriff's sale.

The decision whether to grant a motion to vacate a default judgment shall not be disturbed absent a "clear abuse of discretion." U.S. Bank Nat'l Ass'n v. Guillaume, 209 N.J. 449, 467 (2012). However, an appellate court may reverse when the trial court gives insufficient deference to the principles governing the motion, see Davis v. DND/Fidoreo, Inc., 317 N.J. Super. 92, 100-01 (App. Div. 1998), certif. denied, 158 N.J. 686 (1999), or "when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" U.S. Bank Nat'l Ass'n,

[1] Although defendant filed an order to show cause for relief, the court determined the application was a motion, a finding neither party challenges on appeal.

supra, 209 N.J. at 467-68 (quoting Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 123 (2007)).

"Generally, where a default judgment is taken in the face of defective personal service, the judgment is void." Rosa v. Araujo, 260 N.J. Super. 458, 462 (App. Div. 1992), certif. denied, 133 N.J. 434 (1993). A motion to vacate a default judgment for lack of service is governed by Rule 4:50-1(d), which authorizes a court to relieve a party from a final judgment if "the judgment or order is void." "If defective service renders the judgment void, a meritorious defense is not required to vacate the judgment under R. 4:50-1(d)." Jameson v. Great Atl. & Pac. Tea Co., 363 N.J. Super. 419, 425 (App. Div. 2003), certif. denied, 179 N.J. 309 (2004).

Although the movant bears the burden of demonstrating grounds to vacate a default judgment, Jameson, supra, 363 N.J. Super. at 425-26, where "'there is at least some doubt as to whether the defendant was in fact served with process, . . . the circumstances require a more liberal disposition of' the motion" to vacate a default judgment. Davis, supra, 317 N.J. Super. at 100 (quoting Goldfarb v. Roeger, 54 N.J. Super. 85, 92 (App. Div. 1959)).

Rule 4:4-4(a)(6) provides service upon a corporation is made by personally serving a copy of the summons and complaint:

> [O]n any officer, director, trustee or managing or general agent, . . . or on a person at the registered office of the corporation in charge thereof, or, if service cannot be made on any of those persons, then on a person at the principal place of business of the corporation in this State in charge thereof . . . .

Although service by a sheriff, who is both a public officer and disinterested third party, has a rebuttable presumption of validity, see Garley v. Waddington, 177 N.J. Super. 173 (App. Div. 1981), that presumption has not been extended to private process servers. Here, the process server was a private one.

In our view, Ramadan's assertion under oath defendant had not been served with the summons and complaint was sufficient on this record to create a genuine issue of fact whether service was accomplished. While Silva certified he was "clear" when speaking to Ramadan in February 2015 plaintiff would not "stop the foreclosure" unless plaintiff were paid in full, we cannot conclude from such statement defendant was aware a complaint had been filed, let alone served upon it. After all, plaintiff pursued foreclosure before filing the complaint.

Plaintiff relies on Rosa, supra, 260 N.J. Super. 458, in support of its position defendant was in fact aware the complaint had been filed and thus defendant should be estopped from asserting it had not been properly served. The facts in

Rosa are different from those here. In that matter, the defendant had received the summons and complaint and turned it over to his attorney before default judgment was entered. We determined actual notice of the lawsuit comported with due process and sufficed as service of the summons and complaint. Facts analogous to those in Rosa are not present in the record supplied to us.

Because there is a question of fact whether plaintiff properly served defendant, a question the court was unable to resolve in the face of competing certifications, we reverse the January 14, 2016 order. We remand this matter for an evidentiary hearing to resolve the question whether defendant had been properly served. If so, neither the default judgment nor sheriff's sale shall be vacated. If not, the default judgment shall be vacated, but we leave to the trial court's discretion how it should proceed with the request to vacate the sheriff's sale, in light of the time that has elapsed since the property was sold.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.