SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5275-15T4

RICHARD KELLY, as executor of the ESTATE OF JACQUELINE E. KELLY,

Plaintiff-Appellant,

v.

GENCO REMODELING, INC., GENE LOMBARDI, and DONNA LOMBARDI,

Defendants,

and

PAUL VERNA,

Defendant-Respondent.

Argued August 30, 2017 – Decided September 25, 2017

Before Judges Alvarez and Gooden Brown.

On appeal from Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-2824-08.

Grant S. Ellis argued the cause for appellant (Archer Law Office, LLC, attorneys; Mr. Ellis, on the briefs).

Christopher J. Amentas argued the cause for respondent (Carosella & Associates, PC, attorneys; Mr. Amentas, on the brief).

PER CURIAM

In this case, we affirm a trial judge's order vacating a default judgment. Jacqueline E. Kelly sued defendant Genco Remodeling, Inc. under the Consumer Fraud Act, N.J.S.A. 56:8-1 to -20. In 2007, Kelly hired Genco to install windows in her home. The complaint alleges "Defendants, Gene Lombardi, Donna Lombardi and Paul Verna were the agents, successors, incorporators or owners of the Defendant, Genco Remodeling, Inc." The complaint further contends, "[Genco] was merely an alter ego of said individual Defendants, that said Defendants are thus liable to the Plaintiff for damages jointly, individually and in the alternative." Unfortunately, Kelly died during the pendency of the litigation. The caption was amended accordingly and Kelly's estate substituted as plaintiff.

On March 3, 2009, a default judgment in the amount of $47,400 was entered against the defendants "individually, severally and in the alternative." Only Verna is involved in this appeal. It is undisputed that he was Genco's registered agent and an accountant who prepared tax returns for Genco.

On July 11, 2014, the default judgment against Verna was vacated. During the course of oral argument on a subsequent motion, Verna's counsel said that he had mailed a copy of the motion, with a proposed answer attached, to the estate's counsel.

He acknowledged, however, that the order vacating the default was not forwarded. When the court sent the estate notice regarding pretrial discovery, the estate promptly filed an application to set the order aside, which application was denied on August 18, 2015. The estate unsuccessfully sought leave to take an interlocutory appeal of the order.

After an April 13, 2016 settlement conference, the parties agreed that the litigation would be dismissed with prejudice, as Kelly was not available to testify, but that the estate retained the right to appeal the order vacating the default and the order denying the motion to reinstate. We now affirm.

The estate's proofs of personal service on Verna all refer to an address in Sewell. The Sewell property is apparently the residence of the Lombardi defendants and presumably the headquarters of Genco. One of the sheriff's returns of service indicated that the daughter of the Lombardi defendants, Christina Lombardi, accepted service. Other documents were acknowledged, allegedly for Verna, by Donna Lombardi.

When deposed on June 24, 2015, Verna denied being related to the Lombardis, having socialized with them, having ever been to the Sewell address, or having been financially involved with the corporation or with any of the individual defendants. His relationship to Genco and the Lombardis was limited to the

preparation of corporate tax returns and his agreement to act as Genco's corporate agent. Verna's services for Genco appear to have ended on July 14, 2009. He also denied any knowledge of the underlying claim.

On June 14, 2011, Verna completed an information subpoena after the entry of judgment. When deposed, he said that he was served by the sheriff with the form at his Thorofare office, not at the Sewell address. Verna is a resident of Media, Pennsylvania. He recalled completing the form while the sheriff waited and wrote "N/A" across all the questions. Verna also added below his signature, "ACTED AS REGISTERED AGENT AND ACCOUNTANT FOR CLIENT ONLY." Verna assumed that his involvement in the case would end once he responded. He did not contact his attorney to address the matter until the judgment was discovered during a title search.

The estate disputes Verna's claim that the information subpoena was served upon him at his Thorofare office. The Gloucester County Sheriff's Office filed an affidavit of service regarding the completed information subpoena that stated as follows:

Date of Action 6/14/2011			Person/Corporation Served	PAUL VERNA
Time of Action				100 COUNTY HOUSE ROAD
				Sewell, NJ
ATTEMPTS	DATE	TIME	Delivered to N/A	
			Relationship N/A	

Types of Action OTHER

COMPLETED INFORMATION SUBPOENA

From this affidavit, the estate contends Verna's testimony at deposition was false.

When the judge initially heard the estate's motion to set aside the order vacating the default, he reserved decision, directing that Verna be deposed and that Verna supply his 2006, 2007, and 2008 tax returns for in camera inspection to confirm that he reported no income from Genco. The estate argued at the motion, as it did before us, that Verna was not being truthful regarding his limited involvement with Genco or the Lombardis.

The estate deposed a representative from the Gloucester County Sheriff's Office regarding protocols for service of process. Although the officer who actually served the information subpoena in this case had retired, the representative who was called described office standards and the disciplinary consequences for employees who fail to abide by them. The purpose of deposing the sheriff's officer was to demonstrate that the return of service on Verna for the information subpoena proved he was served at Sewell, not Thorofare, and that he was lying when he said he had never been to that address.

The court denied the estate's motion after receiving the transcript of Verna's deposition, and before receiving a copy of

the sheriff's representative's deposition. The judge held that pursuant to R. 4:50-2, the order vacating the default was proper. The issue of the timeliness of the application was not dispositive because, he observed, citing Farrell v. TCI of Northern N.J., 378 N.J. Super. 341, 353-54 (App. Div. 2005), when the judgment was not "transmitted to the party complaining of it, the timeliness of the application is measured by when the party had actual notice." Even if Verna had filled out an information subpoena, that would not obviate the need for proper service of the underlying complaint. Once Verna later learned of the actual existence of the default judgment, he was diligent in seeking to have it set aside. Therefore, the judge did not agree that Verna's original application to vacate the default judgment was untimely. He opined that the interest of justice required that the order remain in place. Furthermore, "if Verna's allegations are true, Verna would have a meritorious defense to liability." It would be "legally incorrect to hold Verna liable in default if the facts presented would not sustain any liability on the part of Verna for the transaction. . . ."

On appeal, plaintiff raises the following points:

> POINT 1: THE DEFAULT JUDGMENT SHOULD NOT HAVE BEEN VACATED.
>
> A. STANDARD OF REVIEW AND MOTION STANDARD.

B. RESPONDENT FAILED TO DEMONSTRATE THE CERTIFICATION OF SERVICE WAS INVALID BECAUSE RESPONDENT'S TESTIMONY ALONE WAS LEGALLY INSUFFICIENT TO CONTROVERT THE AFFIDAVITS OF SERVICE.

C. RESPONDENT FAILED TO PROVE THE JUDGMENT IS VOID BECAUSE HIS TESTIMONY IS NOT CLEAR AND CONVINCING EVIDENCE IMPEACHING THE AFFIDAVIT OF SERVICE.

D. WHEN RESPONDENT'S DELAY IN MOVING TO VACATE THE DEFAULT JUDGMENT AND THE RELATIVE PREJUDICE TO APPELLANT AND RESPONDENT ARE WEIGHED, THE DEFAULT JUDGMENT SHOULD NOT BE VACATED.

POINT 2: IN THE ALTERNATIVE, THE TRIAL COURT SHOULD NOT HAVE REACHED A DECISION PRIOR TO ALL THE EVIDENCE BEING SUBMITTED AND [SHOULD HAVE] HELD A HEARING.

Decisions regarding the vacation of default judgments should be "left to the sound discretion of the trial court, and will not be disturbed absent an abuse of discretion." Mancini v. EDS, 132 N.J. 330, 334 (1993) (citing Court Inv. Co. v. Perillo, 48 N.J. 334, 341 (1966)); see also U.S. Bank Nat. Ass'n v. Guillaume, 209 N.J. 449, 467 (2012) (requiring "clear abuse of discretion") (citations omitted). The movant bears the burden of demonstrating the grounds to vacate a default judgment. Jameson v. Great Atl. & Pac. Tea Co., 363 N.J. Super. 419, 425-26 (App. Div. 2003) (citation omitted), certif. denied, 179 N.J. 309 (2004). Doubts should be resolved in favor of the applicant in order to secure a trial upon the merits. Davis v. DND/Fidoreo, Inc., 317 N.J. Super.

92, 100-01 (App. Div. 1998) (citation omitted), certif. denied, 158 N.J. 686 (1999).

R. 4:50-1(d) governs a motion to vacate a default judgment for lack of service. Notwithstanding actual notice of the suit, a default judgment must nonetheless be set aside if there was a substantial deviation from the service of process rules. See Sobel v. Long Island Entm't Prods. Inc., 329 N.J. Super. 285, 293 (App. Div. 2000). Even absent such a substantial deviation, 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)).

In fact, where defective service has rendered a judgment void, a meritorious defense is not required. Motions made under R. 4:50-1(d) must be made within a "reasonable time" and are not subject to the absolute one year time bar. R. 4:50-2. Thus, the judge's decision, when viewed through the prism of applicable precedent, was correct.

Despite the sheriff's return of service of the information subpoena, again seemingly placing Verna at the Sewell address, Verna was never personally served with the complaint. This was a substantial deviation from the service of process rules. Nor is

it dispositive that Verna knew about the lawsuit after service of the information subpoena. See Sobel, supra, 329 N.J. Super. at 293. Verna mistakenly believed that his notation at the end of the information subpoena explaining his relationship to Genco would suffice to end the matter. In any event, his prior knowledge, whatever it may have been, is not a barrier to the court setting aside the default judgment.

During his deposition, Verna testified that he had no connection to the Lombardis, other than having acted as their accountant and registered agent. He had never been to their home. The estate position that Verna's deposition testimony was insufficient to refute the sheriff's return of service of the information subpoena simply lacks merit. No service of process of the complaint was established. Nothing in the sheriff's deposition regarding general office procedures in any way refuted Verna's sworn testimony.

Equally lacking in merit is the argument that Verna's delay in seeking to vacate the judgment caused prejudice. The estate contends that the alleged change of circumstances, namely Kelly's death, is prejudicial. However, the change of circumstances does not alter Verna's defense to liability. If Verna would not have been liable, the delay would not be prejudicial and Kelly's death has no effect on the estate's likelihood of success. The work was

performed by a corporation, and the estate would have had to have pierced the corporate veil to establish liability on even the Lombardis, which is no easy task. See e.g., Sean Wood v. Hegarty Grp., Inc. 422 N.J. Super. 500, 517-519 (App. Div. 2011).

Therefore, the judge's decision to render a decision before receiving the sheriff's representative's deposition was not unreasonable. He did not err by doing so. The judge's decision to vacate the default was not an abuse of discretion and will not be disturbed.

Affirmed.