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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-0911-16T3

MARIA A. CONTRERAS,

Plaintiff-Appellant,

v.

JHONY CONTRERAS,

Defendant-Respondent.

Argued January 30, 2018 — Decided February 23, 2018

Before Judges Hoffman and Mayer.

On appeal from Superior Court of New Jersey,
Chancery Division, Family Part, Hudson County,
Docket No. FM-09-1906-13.

Nirmalan Nagulendran argued the cause for
appellant (Miller, Meyerson & Corbo,
attorneys; Nirmalan Nagulendran, of counsel
and on the briefs).

Meghan K. Gulczynski argued the cause for
respondent (Bonilla Sindoni, LLC, attorneys;
Meghan K. Gulczynski, of counsel and on the
brief).

PER CURIAM

Defendant appeals from the September 20, 2016 Family Part
order denying his motion to vacate the parties' judgment of divorce

(JOD), and granting plaintiff's motion to enforce litigant's rights. We affirm.

I

The parties married in 1994. They have three children. Plaintiff filed for divorce in March 2013. Defendant failed to file an answer, resulting in the entry of default; nevertheless, the parties engaged in "extensive" settlement negotiations.

On June 24, 2014, the Family Part held a default hearing. Shortly before the hearing, defense counsel requested an adjournment, which the court denied, reasoning the hearing had been adjourned "a couple times" already. Defense counsel agreed that if the parties could not reach a settlement before the scheduled hearing, defendant would "accept whatever default judgment is entered except for his post-judgment motion to recalculate alimony, if awarded, and child support."

At the scheduled hearing, only plaintiff and her counsel appeared. Plaintiff's counsel represented that defense counsel informed her defendant consented to the default judgment and the relief requested in the notice of proposed judgment, but reserved the right to seek modification of alimony. Defendant did not file a case information statement or produce any financial information. The court granted the default JOD awarding plaintiff child support and alimony, and also ordered defendant to pay an additional amount

per week toward his arrears of alimony and child support. The court also addressed equitable distribution.

Defendant alleges his attorney at that time agreed to file a motion for reconsideration after the court entered the default judgment; however, he failed to do so. Defendant also alleges he attempted to hire a new attorney to file the motion and he failed to do so as well. Defendant finally hired another attorney, who filed the motion to vacate default judgment under review and the current appeal.

Defendant failed to comply with the JOD, and was jailed multiple times for non-payment of support. On February 5, 2015, the Family Part granted plaintiff's unopposed motion for enforcement of litigant's rights, ordering defendant to make several payments in accordance with the JOD. On April 28, 2015, the Hudson County Probation Division held an enforcement hearing where both parties appeared; following the hearing, a judge ordered defendant to pay a portion of his arrears by the following day, or be subject to arrest. Defendant failed to make that payment and was arrested. On May 13, 2015, the Family Part held an ability to comply hearing and found no basis to reduce defendant's required support payments. The court also ordered defendant to make several scheduled arrears payments, including one immediate payment. After defendant made the immediate payment, the judge released him

from custody, restored his driver's license and vacated the arrest warrant against him; however, the judge also warned defendant that he was subject to re-arrest if he failed to make future payments.

On August 6, 2015, the Family Part granted plaintiff's unopposed motion, ordering defendant to pay plaintiff's attorney fees including the cost of transferring the marital home to plaintiff, and scheduled another enforcement hearing. On May 23, 2016, following another enforcement hearing, a judge ordered defendant to make several lump sum payments as well as weekly payments for child support, alimony and arrears; defendant was again subject to arrest if he failed to make the required payments.

On July 21, 2016, more than two years after the court entered the default JOD, defendant filed a motion to vacate. On September 20, 2016, the Family Part issued a written order denying defendant's motion and granting plaintiff's motion to enforce litigant's rights. That order also emancipated the parties' children with the consent of both parties, thereby terminating future child support. This appeal followed.

On appeal defendant argues we should vacate the JOD because his situation warrants exceptional relief. Alternatively, defendant argues we should vacate the JOD because he has a meritorious defense and any neglect on his part was excusable.

The decision whether to grant a motion to vacate a default judgment under Rule 4:50-1 is "left to the sound discretion of the trial court, and will not be disturbed absent an abuse of discretion." Mancini v. EDS ex rel. N.J. Auto. Full Ins. Underwriting Ass'n, 132 N.J. 330, 334 (1993). An abuse of discretion occurs "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 v. Guillaume, 209 N.J. 449, 467 (2012) (quoting Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 123 (2007)).

Defendant first argues we should vacate the JOD because his situation warrants exceptional relief under Rule 4:50-1(f). Courts have the authority to grant relief under Rule 4:50-1(f) where it is "necessary to achieve a fair and just result." Manning Eng'g, Inc. v. Hudson Cty. Park Comm'n, 74 N.J. 113, 122 (1977). However, "because of the importance in the finality of judgments, relief under subsection (f) is available only when 'truly exceptional circumstances are present.'" In re Guardianship of J.N.H., 172 N.J. 440, 473 (2002) (quoting Hous. Auth. of Morristown v. Little, 135 N.J. 274, 286 (1994)).

Where a party seeks to vacate a default judgment under Rule 4:50-1(f), the court should "treat its application indulgently." Mancini, 132 N.J. at 336 (citing Marder v. Realty Constr. Co., 84

N.J. Super. 313, 319 (App. Div. 1964)). In Mancini, the court entered a default judgment against the defendant after it failed to respond to multiple notices allegedly due to a mix-up in the mailroom. Id. at 335. The court held the defendant's neglect was not excusable under Rule 4:50-1(a); however, the circumstances were "sufficiently exceptional" to grant the defendant relief under Rule 4:50-1(f). Id. at 335-36. The court reasoned the defendant's conduct "was neither willful nor calculated" and defendant paid plaintiffs' counsel fees and deposited the amount of the judgment in an escrow account. Id. at 336. Furthermore, the defendant filed a motion to vacate less than two months after the Law Division entered the default judgment. Id. at 333.

"Motions made under any Rule 4:50-1 subsection 'must be filed within a reasonable time.'" Deutsche Bank Tr. Co. Ams. v. Angeles, 428 N.J. Super. 315, 319 (App. Div. 2012) (quoting Orner v. Liu, 419 N.J. Super. 431, 437 (App. Div. 2011)). Whether a party has moved timely rests in the court's sound discretion, guided by equity and the need to terminate litigation within a reasonable time to further the proper administration of justice. Garza v. Paone, 44 N.J. Super. 553, 558 (App. Div. 1957) (citations omitted).

Here, the trial court found defendant waited an unreasonable amount of time to file the motion to vacate. We find no abuse of

discretion in the trial court's decision. Defendant had ample opportunity to file the motion. Defendant and/or his counsel appeared at several hearings during the more than two years between the JOD and the filing of the motion to vacate, so he was well aware of the entry of the JOD.

Furthermore, even if defendant filed in a reasonable time, this case does not present an exceptional situation warranting vacation under Rule 4:50-1(f). Defendant alleges his various attorneys promised to file a motion, then failed to do so; however, if that is the case, it does not amount to exceptional circumstances. Unlike Mancini, here, defendant waited to file the motion to vacate for more than two years, and he refused to pay the judgment against him to the point of being arrested and imprisoned. Defendant claims he is unable to pay the judgment; however, nearly a year after the JOD was entered, the court held an ability to comply hearing and found no basis to alter the original support payments. The only evidence defendant offers of his current income is his 2015 tax return and he has refused to turn over any financial documents regarding his business. Defendant failed to meet his burden of proof that he is unable to pay the required support. Therefore, defendant failed to establish exceptional circumstances to warrant vacating the JOD.

III


Alternatively, defendant argues he has a meritorious defense and any neglect on his part was excusable. Although defendant does not specifically cite Rule 4:50-1(a), a motion to set aside a default judgment pursuant to Rule 4:50-1(a) requires "a showing of excusable neglect and a meritorious defense." Guillaume, 209 N.J. at 468. "'Excusable neglect' may be found when the default was 'attributable to an honest mistake that is compatible with due diligence or reasonable prudence.'" Ibid. (quoting Mancini, 132 N.J. at 335). "Mere carelessness or lack of proper diligence on the part of an attorney is ordinarily not sufficient to entitle his [or her] clients to relief from an adverse judgment in a civil action." Baumann v. Marinaro, 95 N.J. 380, 394 (1984) (quoting In re T., 95 N.J. Super. 228, 235 (App. Div. 1967)).

In addition, motions filed under Rule 4:50-1 sections (a), (b), and (c) must be filed within one year of the judgment. R. 4:50-2. As a result, defendant's motion to vacate under Rule 4:50-1(a) is time barred under Rule 4:50-2. Defendant failed to file the motion to vacate the JOD for more than two years. Furthermore, even if defendant's motion were timely, we discern no excusable neglect. Defendant alleges his various attorneys promised to file a motion, then failed to do so. Counsel's lack of diligence is not excusable neglect. See Baumann, 95 N.J. at 394.

Nothing in our decision precludes defendant from filing a future motion for reduction in alimony, where he can present competent evidence of changed circumstances. To date, defendant has inexplicably failed to make such an application.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION