SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4719-16T1

CHRISTINA R. KEMPA,

Plaintiff-Respondent,

v.

CANVAS HOUSE ANTIQUES AND DESIGN CENTER, INC., and PERRY FORD,

Defendants-Respondents,

and

CHERYL FORD,

Defendant-Appellant.

Submitted April 9, 2018 – Decided May 8, 2018

Before Judges Sabatino and Rose.

On appeal from Superior Court of New Jersey, Law Division, Ocean County, Docket No. L-3084-15.

Sinn, Fitzsimmons, Cantoli, Bogan, West & Steuerman, attorneys for appellant (Raymond D. Bogan, on the brief).

Sendzik & Sendzik, PC, attorneys for respondent Christina R. Kempa (Jay C. Sendzik, on the brief).

PER CURIAM

Defendant Cheryl Ford appeals from a May 18, 2017 Law Division order denying her motion to vacate default judgment. Having considered the arguments of the parties and the applicable law, we reverse and remand the matter to the trial court with instructions to vacate the default judgment and permit defendant to file an answer or otherwise respond to plaintiff's complaint.

I.

Defendant and her husband, Perry Ford,[1] owned and operated Canvas House Antiques and Design Center, Inc., an antique shop in Point Pleasant. Defendant suffered a serious injury in an accident, rendering her incapable of participating in the business, and requiring Perry to become its sole operator. Defendant's personal injury action resulted in a gross settlement of $1,875,000 to her, and a per quod payment of $125,000 to Perry.

Plaintiff Christina R. Kempa developed a business and personal relationship with defendant and Perry, having rented space and sold her wares at Canvas House from 1999 to 2015. Over time, but prior to settlement of defendant's accident case, plaintiff allegedly loaned money to Canvas House, defendant and

[1] Perry and Canvas House were named as defendants, but are not parties to this appeal. We use Mr. Ford's first name for clarity. No disrespect is intended.

Perry. Loans totaling $26,896.50 were memorialized in a written agreement dated October 14 or 15, 2010.[2] Plaintiff claims Perry requested the loans for personal and business purposes, and promised to pay the loans "in full upon the receipt of [defendant's] settlement . . . within the next year of the agreement." Apparently drafted without the assistance of counsel, the agreement purportedly was signed by plaintiff, Perry, and defendant. However, defendant denies she signed the document, and claims her signature was forged.

Plaintiff claims she made additional loans, totaling $145,176.03, to defendants "based upon their oral agreements to repay" her. Plaintiff further asserts Perry issued sixteen bad checks to her totaling $12,630.08 from the Canvas House business account for her antiques that were sold to customers.

On November 4, 2015, plaintiff filed a complaint in the Law Division against Perry, Canvas House, and defendant alleging, among other claims, that they breached the loan agreement by failing to repay amounts owed. According to the affidavit of service, defendant was personally served with the complaint on January 11, 2016. However, on January 31, 2016, defendant sent

[2] The first page of the loan agreement is dated October 15, 2010, but the signature page indicates, "This three page agreement is dated 10/14/2010."

an email to plaintiff's counsel, stating that she had just received the summons and complaint because it was delivered to her neighbor's address. After defendants failed to answer, default was entered on February 24, 2016. On May 3, 2016, pursuant to Rule 4:43-2, the motion judge entered default judgment, in plaintiff's favor against all three defendants, in the amount of $152,250.82.[3]

Plaintiff sought post-judgment discovery to compel enforcement of the judgment. Defendant personally accepted service of the judge's second order for post-judgment discovery but failed to comply. Plaintiff then moved to find defendant in contempt of court. After receiving that motion, defendant moved to vacate default judgment, contending her medical condition and pending divorce constituted excusable neglect for her failure to answer the complaint.

In particular, defendant claimed the property settlement agreement, ("PSA") effective March 30, 2016, annexed to her judgment of divorce, expressly requires Perry to indemnify her for

[3] We note our concern regarding the propriety of plaintiff's aggregate claims against defendant and, consequently, the amount of damages awarded against defendant, based on plaintiff's affidavit of amount due and non-military service in support of entry of default judgment. See R. 4:43-2; R. 1:5-7.

claims arising from plaintiff's lawsuit. Paragraph 5.6 of the PSA provides, in pertinent part, as follows:

> Wife shall have no responsibility for any debts, obligations, taxes, or otherwise for any liabilities arising out of Canvas House Antiques (or any successor company), and husband shall indemnify and hold wife harmless with respect to same, no matter when said debts arose. This includes any personal and or corporate obligations related to Canvas House Antiques, or husband, whether incurred during the marriage or after. . . . Husband's full indemnification of wife in relation to Canvas House Antiques shall include all lawsuits filed against Perry Ford, Canvas House Antiques, and Cheryl Ford (in relation to Canvas House Antiques), including the lawsuit originated by Christina Kempa, filed by Jay C. Sendzik, Esq.

Defendant also asserted several meritorious defenses, including that her signature was forged on the October 2010 agreement, and she was not a party to, or responsible for, the oral loans made to Perry.

Following oral argument, the motion judge rendered an oral decision on the record on May 12, 2017, denying defendant's motion to vacate the default judgment. Without elaborating, the judge found defendant "had notice on multiple occasions of this lawsuit" and failed to establish excusable neglect or present a meritorious defense. This appeal followed.

On appeal, defendant renews her argument that the default judgment should have been vacated, claiming the motion judge

erroneously found she failed to establish mistake or excusable neglect pursuant to Rule 4:50-1(a), and erred in finding she did not present a meritorious defense to the underlying complaint.

II.

We review an order denying a motion to vacate a default judgment under the abuse of discretion standard. US Bank Nat'l Ass'n v. Guillaume, 209 N.J. 449, 467 (2012). Where the trial court gives insufficient deference to the principles governing the motion, we must reverse. Davis v. DND/Fidoreo, Inc., 317 N.J. Super. 92, 100-01 (App. Div. 1998).

Further, our review of a "motion under Rule 4:50-1 should be guided by equitable principles." Farrell v. TCI of N. N.J., 378 N.J. Super. 341, 350 (App. Div. 2005) (citation and internal quotation marks omitted). Indeed, we generally place a high value on deciding cases on the merits. "A court should view 'the opening of default judgments . . . with great liberality,' and should tolerate 'every reasonable ground for indulgence . . . to the end that a just result is reached.'" Mancini v. EDS ex rel. N.J. Auto Full Ins. Underwriting Ass'n, 132 N.J. 330, 334 (1993) (quoting Marder v. Realty Constr. Co., 84 N.J. Super. 313, 319 (App. Div. 1964)).

Although the movant bears the burden of demonstrating that its failure to answer should be excused and default judgment

vacated, Jameson v. Great Atlantic & Pacific Tea Company, 363 N.J. Super. 419, 425-26 (App. Div. 2003), close issues should be resolved in the movant's favor. Mancini, 132 N.J. at 334. In the end, the decision whether to grant or deny a motion to vacate a default judgment must be guided by equitable considerations. Prof'l Stone, Stucco & Siding Applicators, Inc. v. Carter, 409 N.J. Super. 64, 68 (App. Div. 2009) ("Rule 4:50 is instinct with equitable considerations.").

"In order to achieve relief pursuant to subsection (a) [of Rule 4:50-1] . . . the defendant must be prepared to 'show that [1] [her] neglect to answer was excusable under the circumstances and [2] that [she] has a meritorious defense.'" Dynasty Bldg. Corp. v. Ackerman, 376 N.J. Super. 280, 285 (App. Div. 2005) (quoting Marder, 84 N.J. Super. at 318). The categories in subsection (a), "when read together, as they must be, reveal an intent by the drafters to encompass situations in which a party, through no fault of its own, has engaged in erroneous conduct or reached a mistaken judgment on a material point at issue in the litigation." DEG, LLC v. Twp. of Fairfield, 198 N.J. 242, 262 (2009)

Mistake is "intended to provide relief from litigation errors that a party could not have protected against." Id. at 263 (citations and internal quotation marks omitted). Of significance

here, the failure to assert a particular claim in litigation is not the type of mistake contemplated by Rule 4:50-1(a). Ibid.; Hendricks v. A.J. Ross Co., 232 N.J. Super. 243, 248-49 (App. Div. 1989). While the indemnification provision might ultimately relieve defendant from damages if plaintiff establishes her claims, it does not exempt defendant from filing an answer, moving to dismiss, or asserting a cross-claim for indemnification.[4] See DEG, LLC, 198 N.J. at 263.

We are likewise unpersuaded that excusable neglect warrants vacation of the default judgment. As our Supreme Court has recognized, "Carelessness may be excusable when attributable to an honest mistake that is compatible with due diligence or reasonable prudence." Mancini, 132 N.J. at 335 (citing Baumann v. Marinaro, 95 N.J. 380, 394 (1984)).

Here, defendant claims the contentious divorce proceedings with Perry, and her serious medical condition, necessitating treatment with multiple prescribed medications from numerous physicians, constitutes excusable neglect. However, in her motion to vacate default judgment, defendant apparently conceded she was personally served with the complaint, and received the motion for

[4] Our opinion does not, however, preclude defendant from seeking enforcement against Perry of the indemnification provision in the Family Part.

contempt, and several documents related to the litigation via regular mail. Thus, the record indicates defendant was aware of the complaint, but failed to respond.

While we are sympathetic to defendant's medical condition, that condition did not prevent her from appreciating the ramifications of litigation, and does not establish excusable neglect where, as here, she retained counsel in her divorce proceeding, and negotiated an indemnification provision attempting to limit her liability in the present litigation. Cf. Bergen-Eastern Corp. v. Koss, 178 N.J. Super. 42, 45-46 (App. Div. 1981) (upholding a finding of excusable neglect where an elderly woman could not mentally appreciate the service of a complaint against her due to "continuing, serious psychiatric problems").

Although we are not persuaded by defendant's claims of mistake or excusable neglect, pursuant to Rule 4:50-1(a), there are substantial indicia of meritorious defenses as to her alleged liability for the debts, and the calculated amount of the judgment. We have recognized that even where a defendant's claim of excusable neglect is weak, judges can use their discretion to vacate the judgment where the defendant proffers a meritorious defense. See Siwiec v. Fin. Res., Inc., 375 N.J. Super. 212, 220 (App. Div. 2005).

In Siwiec, we explained "In some circumstances . . . [the] requirement[of excusable neglect coupled with a meritorious defense] may be relaxed in the interests of justice under R[ule] 4:50-1(f)." Id. at 219. That subsection permits vacation of a final judgment on "any other [grounds] justifying relief from the operation of the judgment or order." Id. at 219-20 (quoting R. 4:50-1(f)). Although the trial court in Siwiec found the defendant failed to establish excusable neglect, we "nonetheless vacate[d] the judgment, because we perceive[d] significant issues concerning the sufficiency of plaintiffs' proofs." Id. at 218. In particular, the defendant relied on false assertions that the case was closed and the complaint dismissed. Id. at 217. For this reason, we held courts may grant a defendant's application to vacate a default judgment despite weak proof of excusable neglect. Id. at 220.

We also applied Rule 4:50-1(f) in Morales v. Santiago, 217 N.J. Super. 496 (App. Div. 1987). There, in a contract dispute involving the sale of real property, we found serious faults with the plaintiff's proofs regarding the existence of a binding contract and damages. Id. at 505. While acknowledging "a meritorious defense [alone] is ordinarily not a ground for setting aside a default judgment[,]" we vacated the default judgment

because the defendants "suffered a substantial judgment that appear[ed] to be undeserved on the merits." Ibid.

We reiterate, as we did in Morales, that "a judgment may be vacated [pursuant to Rule 4:50-1(f)] only in exceptional cases," but "the boundaries of that subsection . . . 'are as expansive as the need to achieve equity and justice.'" Id. at 504 (quoting Court Inv. Co. v. Perillo, 48 N.J. 334, 341 (1966)). Further, the "usual deference that we must pay to a trial judge's determination of a[] R[ule] 4:50-1 motion is less compelling . . . where[, as here,] the judge made no findings to explain the reasons why he denied the motion."[5] Ibid.

In the present case, defendant raises numerous affirmative defenses, including the statute of frauds, N.J.S.A. 25:1-5 to -16, and forgery.

Initially, defendant claims the statute of frauds protects her from liability tied to the oral loan agreements, which comprised more than $100,000 of the $152,250.82 judgment.[6] See N.J.S.A. 25:1-15 ("A promise to be liable for the obligation of another person, in order to be enforceable, shall be in a writing

[5] Although the motion judge's oral ruling was thin on analysis, because we are vacating his order, we see no point in remanding for a statement of reasons.

[6] Defendant collaterally argues she was not party to the oral loans and thus is not liable to plaintiff.

signed by the person assuming the liability or by that person's agent.").

In her complaint, plaintiff contends "Perry and [defendant], personally, and on behalf of Canvas House, promised to repay all loans in full." The record indicates that none of plaintiff's checks or bank transfers representing the loan proceeds was payable to defendant. With the exception of one check, all checks were payable to "Canvas House Antiques." The remaining check was payable to an attorney, with a notation in the memo line indicating: "Perry Ford: Divorce Retainer."[7] Plaintiff's claim that defendant is personally responsible as the guarantor of Perry's oral debts, in excess of $100,000, appears to be a proper subject of N.J.S.A. 25:1-15, although we do not resolve that question here conclusively.

Further, in Delaware Valley Wholesale Florist, Inc. v. Addalia, 349 N.J. Super. 228, 232-33 (App. Div. 2002), we held that forgery constituted a meritorious defense. That case concerned a guaranty of corporate indebtedness where the defendant

[7] Section 8.1 of the PSA provides, in pertinent part: "each party shall be solely responsible for his or her legal . . . fees incurred in connection with the negotiation and execution of this Agreement and obtaining a Judgment of Divorce." We do not understand how plaintiff could have appropriately certified, by referencing the check, that defendant owed plaintiff money for her ex-husband's counsel fees.

claimed her signature on the guaranty was forged. Id. at 229. The defendant failed to answer the complaint and an arbitration award was entered in plaintiff's favor. Id. at 230. The defendant moved to set aside the award, but the trial court denied her motion. Ibid. Ultimately, the defendant's former husband admitted to signing defendant's name on the document, but claimed he did so with her permission. Ibid. While the judgment in Addalia arose from the defendant's failure to appear at the arbitration, we analogized that situation to a "judgment [on] . . . a motion to vacate[, which] 'should be viewed with great liberality, and every reasonable ground for indulgence is tolerated to the end that a just result is reached.'" Id. at 232 (citations omitted). Thus, we concluded the defendant's forgery claim was a "meritorious defense worthy of judicial determination." Id. at 233.

Here, defendant asserts her signature on the separate signature page of the October 15, 2010 loan agreement was forged. In support, she notes the first page of the agreement explicitly states "[t]his agreement is between: Christina Kempa . . . and Perry Ford." Defendant is not identified as a party to the agreement. Although in Addalia the former husband admitted to forging the defendant's signature, and there is no such admission here, the forgery determination is an issue for the trier of fact.

In sum, we find the trial court mistakenly exercised its discretion in denying defendant's motion where, as here, she has asserted meritorious defenses. Accordingly, we reverse and remand the matter to the trial court. On remand, the trial court shall enter an order vacating the final judgment, solely as to defendant, forthwith. Defendant may then file a responsive pleading within fourteen days, and the trial court shall conduct a case management conference within thirty days to set an appropriate discovery schedule.

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