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SUPERIOR COURT OF NEW JERSEY
HUDSON COUNTY
Law Division
Docket No. L-2345-17

BRIGHT FUTURE DAYCARE CENTRE,
A NJ Non-Profit Corporation

Plaintiff

v.

Decision on Reconsideration

REGINALD MCCRAE, MT PISGAH AME,
CHURCH, BALLENTRE REALTY ASSOCIATES

Defendants

BALLENTRE REALTY ASSOCIATES,

Third-Party Plaintiff

v.

ROONEY SAHAI, Both individuals
And in his capacity as representative
Of Bright Future Daycare Center, Inc.,
John Doe and/or Jane Doe

Third-Party Defendants

Decided: April 18, 2019

Adrian E. Bermudez Perez for Bright Future Daycare Centre and Sooney Sahai.

Thomas R. Kobin and Philip W. Lamparello for Ballente Realty Associates (Chasan Lamparello Mallon & Cappuzzo, PC, attorneys).

JEFFREY R. JABLONSKI, P.J. Ch.

Defendant/Third-Party Plaintiff, Ballente Realty Associates (Ballente), filed this application seeking reconsideration of this court's two orders both entered on February 25, 2019, reinstating Plaintiff/Third-Party Defendant's complaint and vacating the third-Party defendant's default. This court finds that the proper exercise of discretion requires the denial of the requested relief.

The plaintiff, Bright Future Daycare Center (Bright Future) is a federally-funded, non-profit organization that provides nutrition and care to underprivileged children under the Child and Adult Care Food Program administered by the US Department of Agriculture. It operates its business at 577 Bergen Avenue in Jersey City. Ballente owns 577 Bergen Avenue and took title to the property from Mt. Pisgah African Methodist Episcopal Church ("Mt. Pisgah") through a tax sale foreclosure in November 2015.

This matter stems from Ballente's landlord-tenant eviction action for nonpayment of rent and an accusation that Bright Future was a holdover tenant. On April 1, 2012, Mt. Pisgah and Bright Future entered into a lease agreement where Bright Future would

lease 577 Bergen Avenue from Mt. Pisgah. The term of the lease was from April 1, 2012, until March 31, 2017. After obtaining ownership of the property in November 2015, Ballente filed a landlord-tenant complaint on December 19, 2016, against Bright Future for possession of the premises alleging non-payment of rent since October 2016. According to representations made at oral argument, that complaint was dismissed since Ballente did not include the proper notices in its complaint. Later, on May 8, 2017, Ballente filed a second complaint for possession. As part of the landlord-tenant proceedings, Bright Future was required to pay rent into court pending a hearing on habitability issues that might result in a reduction of rent due to Ballente.

On June 5, 2017, Bright Future sued Ballente for attempting to evict Bright Future from the property using an alleged fraudulent lease entered into by the parties. Ballente did not answer the complaint and default was entered on July 17, 2017. Ballente then moved to vacate the default on August 1, 2017. In its certification in support of that unopposed motion, Ballente questioned service of the summons and complaint upon it. This court granted the application, vacated Ballente's default, and permitted Ballente to file an answer and a third-party complaint against Rooney Sahai, principal of Bright Future. Similarly, on September 29, 2017, following a separate application, this court vacated default against the Defendants, Reginald McCrae and Mt.

Pisgah, and allowing those defendants to answer as well. On August 10, 2017, Ballente filed its third-party complaint against Mr. Sahai. Mr. Sahai did not answer the third-party complaint and default was requested on March 28, 2018.

Notices for discovery were followed by applications to compel discovery beginning on September 11, 2017. These events resulted in a February 16, 2018, order compelling production of certain documents and permitted the recovery of counsel fees. After additional purported non-compliance with these orders, Ballente moved to dismiss the complaint under R. 4:23-2 and R. 4:43. The application was granted and Bright Future's complaint was dismissed with prejudice on June 8, 2018. A default judgment was also entered under R. 4:23-2 in favor of Ballente on its counterclaim and third-party complaint. Despite the matter resulting from perceived discovery violations, that order also made substantive conclusions that "the lease between Plaintiff Bright Future Daycare center and Defendant Mt. Pisgah African Methodist Episcopal Church expired on March 31, 2017"¹, awarded possession of 577 Bergen Avenue, and ordered the immediate eviction of Bright Future from the premises. This court also ordered a

¹ At oral argument on this motion, counsel for Bright Future correctly characterized this decision as a substantive conclusion that Ballente's version of the lease was the correct lease.

proof hearing within 30 days to assess any compensatory damages owed. The application was unopposed.

Ballente then took a number of post-judgment enforcement actions. A judgment of possession was requested following this order on June 21, 2018, for property located at **577 Bergenline Avenue, Jersey City**. In August, Ballente sought an award of attorney fees and brought an application for this relief. This application was also unopposed by Bright Future. Relief was granted on August 24, 2018.

Realizing an error in the address provided in the judgment of possession, Ballente then requested an amended judgment of possession. This was granted on September 12, 2018. This court stayed the enforcement of the judgment of possession until October 24, 2018, to permit the Plaintiff's orderly removal from the premises. A review of that order does not reflect that the application was opposed.

Ultimately, on November 30, 2018, Mr. Sahai, individually, sought to vacate the judgment of possession, the writ of possession, and any attorney fee award. Application was also made for a stay of the eviction in December 2018. On December 6, 2018, this court denied the request for a stay and also noted that a motion seeking similar relief was made returnable on December 21, 2018. Bright Future similarly moved for identical relief on December 7, 2018.

On January 16, 2019, this Court denied Mr. Sahai's motion to vacate the June 8, 2018, default judgment and to stay the pending eviction. On January 14, 2019, Plaintiff recorded a lis pendens against the property. On January 25, 2019, this court again denied Bright Future's application to stay the eviction until February 15, 2019. Bright Future moved to vacate the dismissal and to transfer venue to another county. Ballente opposed the motion and also sought affirmative relief including unrestricted access to 577 Bergen Avenue, a request to cure a purported rent deficiency and to deposit funds into court, payment of holdover rent, a requirement that Bright Future pay all utilities, a discharge of the lis pendens, and a restraint that any further applications be barred without the permission of the court. Relief was partially granted and partially denied on February 25, 2019.

Before the entry of the order, but following argument on the applications and despite the affirmative relief sought by Ballente in its cross motion, Ballente wrote to this court indicating that this court was deprived of jurisdiction to enter any of the relief sought by Bright Future. This court answered those inquiries by letter of February 25, 2019.

On February 25, 2019, this Court entered two orders at issue here. In the first, this court partially granted Bright Future's motion. Specifically, this order vacated dismissal, but denied Bright Future's request to transfer the matter to Passaic County.

This court also signed a second order partially granting Ballente's cross-motion. That order permitted Ballente to have unfettered access to the property located at 577 Bergen Avenue in Jersey City. Ballente was to provide Bright Future with 48 hours notice prior to accessing the property. Bright Future was also ordered to deposit all rent due, at the amount of \$4,000 per month, for the months of December, January, February and March by March 10, 2019. Bright Future was responsible for making payments on all electric utilities, and Ballente was responsible for making all water payments. This Court denied, however, Ballente's requests to require the Bright Future to pay \$92,000 in holdover rent, pay all utilities, discharge the lis pendens, and restrain the Plaintiff from filing future applications. This court established a discovery schedule and set the matter for trial in November.

The order was uploaded to e-courts on February 25, 2019. Ballente moved to reconsider this matter 21 days later on March 18, 2019. This application was opposed and a cross-motion was brought by Bright Future seeking attorney fees.

Ballente contends this court must reconsider the orders it entered on February 25, 2019, because default of the third-party complaint against Mr. Sahai was vacated sua sponte, failing to give Ballente an opportunity to file an opposition. Ballente also contends that this court neglected to identify why service was problematic or what documents with which the parties were not

served. To Ballente, a proof hearing is necessary to determine whether service upon Bright Future was proper. Ballente argues this court failed to consider the procedural history of the case when it concluded that the Bright Future had diligently prosecuted the case.

In opposition, Bright Future contends that Ballente untimely filed this motion for reconsideration and failed to introduce any new evidence that was not previously available. Rather, according to Bright Future, Ballente merely attempts to re-litigate issues that were already addressed by this court. Bright Future also takes specific issue with the fact that Ballente failed to credibly address the purported service upon Bright Future two addresses that do not exist: 572 Bergen Street and 577 Bergenline Avenue in Jersey City.

A motion for reconsideration to alter a judgment or order must be served 20 days after receiving service of the order or judgment. R. 4:49-2. "The motion shall state with specificity the basis on which it is made, including a statement of the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred . . ." R. 4:49-2. "Reconsideration is a matter within the sound discretion of the Court, to be exercised in the interest of justice." 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)). For the reasons

that follow, the proper exercise of discretion requires the denial of the motion to permit this litigation to be concluded on its substantive merits, rather than to permit the matter to be resolved procedurally.

First, however, it must be noted that the application is untimely. Rule 4:49-2 requires parties seeking reconsideration of an order to file such a motion within twenty days after service of the order. The twenty-day limitation is fixed and a court may not enlarge the deadline. R. 1:3-4(c). This motion was filed on the 21st day after service of the order. Therefore, the application is denied as untimely.

Second, alternatively and more substantively, a motion for reconsideration is unwarranted where the apparent purpose of the motion is for the movant to express disagreement with the Court's initial decision. D'Atria, 242 N.J. Super. at 401. Essentially, "a litigant must initially demonstrate that the court acted in an arbitrary, capricious, or unreasonable manner, before the court should engage in the actual reconsideration process." Id. Reconsideration should be used only where (1) the court has expressed its decision based upon a palpably incorrect or irrational basis, or (2) it is obvious that the court did not consider, or failed to appreciate the significance of probative evidence. Id. In the interest of justice, this court may consider new or additional evidence that a party brings to the court's

attention on reconsideration that could not have been previously provided to the court. Id. "Nevertheless, motion practice must come to an end at some point, and if repetitive bites at the apple are allowed, the core will swiftly sour. Thus, the court must be sensitive and scrupulous in its analysis of the issues in a motion for reconsideration." Id. at 401-402.

At oral argument, Ballente argued extensively and took issue with this court's statement that Bright Future had prosecuted its case diligently. In opposition, Bright Future is critical of the service efforts that were taken by Ballente's existing counsel. Curiously, Bright Future argues that there was never any issue regarding service upon that entity at all when former counsel defended Ballente. It was only after current counsel replaced the prior attorneys was service became a problem. This position is strengthened by the numerous address deficiencies that appear in the record as to attempted service upon Bright Future after present counsel substituted for prior counsel, and the mistakes made in addressing items to Bright Future post judgment.

Ballente has simply not produced evidence that this court finds credible that demonstrates that personal service was effected upon Mr. Sahai. "It is elementary that service must be accomplished in accordance with pertinent rules in such a way as to afford notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of

the action and afford them an opportunity to present their objections.” Jameson v. Great Atlantic and Pacific Tea Co., 363 N.J. Super. 419, 425 (App. Div. 2003). The primary way to obtain in personam jurisdiction over a defendant is by personal service. R. 4:4-4(a). 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). A court may therefore vacate default judgment when the evidence of service casts a reasonable doubt that the party was properly served and on notice. See Jameson, 363 N.J. Super at 425.

There is reasonable doubt that service of dispositive motion papers were properly served upon Bright Future in this matter. In addition to the noted concerns as to the addresses to which process was allegedly sent, and the absolute denials made by counsel for Bright Future that his office was available to receive documents, this court notes that the matter was, indeed prosecuted by Bright Future from the moment that it filed its complaint seeking affirmative relief. It also does not make reasonable sense that Bright Future would simply and abruptly cease litigation while at the same time continuing to meet its payment obligations under prior court orders.

This court finds it did not err in its February 25, 2019, orders. First, this Court finds it properly vacated default and reinstated Bright Future’s complaint. Ballente has not produced

any new evidence in support of its motion for reconsideration. Despite its several assertions claiming Mr. Sahai was aware of the third-party complaint, it did not produce any evidence supporting these claims other than its argument. On the other hand, ample evidence was again produced by Bright Future suggesting Mr. Sahai was not properly served with the third party complaint.

Perhaps most concerning is Ballente's repeated reliance on the two affidavits of service filed, which Ballente contends demonstrates Mr. Sahai was properly served. Defendant produced an affidavit of service as to Mr. Sahai on October 16, 2017, and March 20, 2018. It is uncontroverted that Bright Future and Mr. Sahai operate its business at 577 Bergen Avenue in Jersey City. The affidavit indicates that on October 10, 2017, Bright Future was served with a summons and Answer, crossclaim and counterclaim at Bright Future Daycare at the address of **572 Bergen Street, Jersey City**. As was advised in this court's prior decision, the address noted in the affidavit of service is incorrect. Therefore, while Ballente is generally correct that affidavits of service may be presumed to be accurate, that presumption does not extend to an affidavit asserting that service was effected upon a party at an address that does not exist. Moreover, Bright Future produced a copy of a first class mail letter that was delivered from Ballente's attorney to Mr. Rooney Sahai c/o Bright Future Daycare at the address of **572 Bergen Street, Jersey City**. The series of

incorrect addresses, in conjunction with the testimony of Mr. Sahai, casts reasonable doubt as to whether he was properly served and warranted vacating default to allow Mr. Sahai to properly defend the matter on its merits.

Defendant's argument that this court entered an order vacating default against Mr. Sahai sua sponte is misplaced. Counsel for Bright Future entered an appearance on behalf of third-party defendant, Mr. Rooney Sahai, on January 23, 2019. The applications heard by this Court on February 22, 2019 sought, in part, vacation of the dismissal of Bright Future's Complaint and default judgment entered against Mr. Sahai. Although no formal application was brought specifically as to Mr. Sahai, the arguments that were made would be identical to those set forth by Bright Future's attorney. This is a matter of form over substance and does not represent any undue prejudice to Ballente. If the application were granted as to Bright Future, this court is convinced that if counsel did not assume representation of Mr. Sahai, Mr. Sahai would have asserted the same arguments. Judicial economy demands this resolution.

This court is not unmindful of the fact that the original order that led to subsequent applications granted an application resulting in a dismissal of Bright Future's complaint with prejudice. As recently noted, "dismissal with prejudice is 'the ultimate sanction] and [] should be imposed 'only sparing' and

'normally . . . ordered only when no lesser sanction will suffice to erase the prejudice suffered by the non-delinquent party.'" Salazar v. MKGC+Design, 2019 N.J. Super. LEXIS 48 (Approved for publication April 8, 2019) (quoting Robertet Flavors, Inc. v. Tri-Form Const. Inc., 203 N.J. 252 (2010)). Further the prior court's order impermissibly granted substantive relief without any proof of the underlying facts to the prejudice of Bright Future. At bottom, this court granted an unopposed motion awarding "drastic relief" by means of a "with prejudice" dismissal of the action because of a purported and alleged discovery violation. Very recent case law simply does not permit this result.

According to the Appellate Division, as a "fundamental observation", in our "justice system, 'justice is the polestar and our procedures must ever be molded and applied with that in mind.'" Salazar, 2019 N.J. Super. at 8 (quoting New Jersey Highway Auth. v. Renner, 18 N.J. 485, 495 (1955)). "There is an absolute need to remember that the primary mission of the judiciary is to see justice done in individual cases. Any other goal, no matter how lofty, is secondary. Salazar, at 8.

The order at issue here is the June 8, 2018, order that dismissed Bright Future's complaint with prejudice. All subsequent orders refused to vacate that directive and actually confirmed it. This court finds that since the entirety of the matter was not resolved by that order, that order can only be

considered as interlocutory and therefore subject to modification for good cause shown and in the interest of justice. The interlocutory nature of the June 8, 2019, order was correctly conceded by counsel for Ballente at oral argument. Specifically, since the order provided for a proof hearing on damages all of the claims were resolved. R. 4:42-2. That rule, combined with its interpretive precedent, reveals that it is "well established" that an interlocutory order may be "subject to revision at any time before the entry of final judgment in the sound discretion of the court in the interest of justice." R. 4:42-2; Lombardi v. Masso, 207 N.J. 517, 534 (2011). This court finds that the interests of justice requires the relief that was ordered in February.

In sum, in this application, Ballente attempts to relitigate the same issues that were addressed on February 22, 2019. No new evidence that was not previously available was produced and although argument is made as to the issue of service, and Ballente has not submitted any proof that Mr. Sahai was properly served. Further, Ballente has not presented any evidence that this court based its decision on a palpably incorrect or irrational basis, or that the Court failed to consider certain evidence. Therefore, this court did not act arbitrarily, capriciously, nor unreasonably and the motion for reconsideration is denied.

It is also noted that despite substantial briefing in support of the application, comprehensive submissions in reply, and

significant oral argument over two days, Ballente has not addressed, at all, the substantive merits (or lack of them) of Bright Future's claims- other than a brief and predicate notation to a factual dispute as to the existence of a lease and the issue regarding its present ability to address the repairs that required the deposit of the rent into court in 2017.

Therefore, Ballente's application for reconsideration is **denied**. Similarly, since this application provided an opportunity for Ballente to address the issues concerning the vacation of the default against Mr. Sahai personally and be heard completely regarding that relief, Bright Future's request for attorney fees is similarly **denied**.

Finally, at oral argument, assertions were made that Ballente is unduly prejudiced as a result of the continuation of a prior order that requires the payment of rent into court pending a hearing to ascertain whether Bright Future would be entitled to a rent deduction because of certain issues that might have impacted on the habitability of the property. Suggestion is made by Ballente that rents, going forward, should be paid directly to Ballente rather than into court. According to Ballente, this resolution would preserve the existing funds to offset any rent abatement that might be ordered. However, it is also noted by Bright Future that no repairs have been made, at all, and the business continues to operate and rents be paid despite at least a colorable issue

having been raised in the landlord-tenant matter as to the possibility of relief. Consequently, the application to pay the rent going forward to Ballente is denied. However, this court is not unmindful of the fact that Ballente possesses financial responsibilities toward the premises in the form of the payment of taxes, insurance and, by order of this court, a portion of the utilities. Although this court does not believe that Ballente should profit from its lack of attention to obligations as a landlord to ensure the habitability of the premises, it should also not be unduly penalized for financial maintenance of the property. Therefore, Ballente shall submit a certification of expenses incurred including, and limited to, taxes, mortgage payments (if any) and insurance for this court to consider reimbursement of those funds from the corpus of the funds currently held by the Trust Fund unit. This certification shall be submitted on or before **May 6, 2019**.

The prior orders of this court have created barriers impairing the substantive resolution of this matter. The recent orders of this court have sought to, and have eliminated, those procedural impediments. At oral argument, counsel for Bright Future noted that a trial date was scheduled for August 2019. The trial date is now scheduled for November 4, 2019, with the opportunity to have complete discovery- a goal that is required by our

jurisprudence. This is only a short 3 months following that which was expected by the parties when the complaint was filed.

To the extent that some "penalty" be imposed for purported discovery violations, the attorney fee provisions included in this court's prior orders shall remain in place.