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BV001 REO BLOCKER, LLC Plaintiff, v. HB (USA) PROPERTIES, LLC Defendant.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION: BERGEN COUNTY DOCKET No. F-002097-19 **OPINION** Argued: February 14, 2020 Decided: April 17, 2020

Appearances: Susan B. Fagan-Rodriguez, (Robert A. Del Vecchio, LLC, attorneys) for Plaintiff
Bruce H. Levitt, (Levitt & Slafkes, P.C., attorneys) for Defendant

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HON. EDWARD A. JEREJIAN, P.J.Ch.

This matter is before the Court by way of Motion to Vacate Default Judgment filed on November 27, 2019 by Defendant HB (USA) Properties, LLC ("Defendant"), by and through counsel Levitt & Slafkes, P.C., Bruce H. Levitt, Esq. appearing. On December 12, 2019, Plaintiff BV001 Reo Blocker, LLC ("Plaintiff"), by and through counsel Robert A. Del Vecchio, LLC, Susan B. Fagan-Rodriguez, Esq. appearing, filed opposition to Defendant's Motion. On December 17, 2019, Defendant filed a reply to Plaintiff's opposition. Oral argument was heard on February 14, 2020.

LEGAL STANDADRD

A default may be set aside upon the movant's showing of good cause. R. 4:43-3. The required good-cause showing for setting aside an entry of default is less stringent than the standard imposed by R. 4:50-1 for setting aside a default judgment. See e.g., U.S. Bank v. Guillaume, 209

N.J. 449, 466-467 (2012). The Court is required to view an application to vacate a default with great liberality. See, e.g., DYFS v. P.W.R., 410 N.J. Super. 501, 508 (App. Div. 2009), rev'd on other grounds 205 N.J. 17 (2011).

A finding of good cause under R. 4:43 requires the Court to exercise sound discretion in light of the facts and circumstances of the particular case. See O'Connor v. Abraham Altus, 67 N.J. 106, 129 (1975). Before entry of default is set aside, the defendant must, at the very least, show the presence of a meritorious defense worthy of judicial consideration. Local 478 v. Baron Holding Corp., 224 N.J. Super. 485, 489 (App. Div. 1988). When the defendant takes no action to respond to the foreclosure complaint, and where the record reflects no excuse for the defendant's inaction, the Court will not grant relief from an entry of default. Guillaume, 209 N.J. at 469. Additionally, a party's motion to vacate default must be accompanied by either an answer to the complaint and Case Information Statement or dispositive motion pursuant to R. 4:6-2. R. 4:43-3.

Under R. 4:50-1, the court may vacate a final judgment or order under the following grounds:

(a) mistake, inadvertence, surprise, or excusable neglect;

(b) newly discovered evidence which would probably alter the judgment or order and which by due diligence could not have been discovered in time to move for a new trial under R. 4:49;

(c) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(d) the judgment or order is void;

(e) the judgment or order has been satisfied, released or discharged, or a prior judgment or order upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or order should have prospective application; or

(f) any other reason justifying relief from the operation of the judgment or order.

ANALYSIS

In the present case, Plaintiff filed the foreclosure Complaint on January 30, 2019. Plaintiff previously provided evidence that Defendant was served with the Complaint on February 6, 2019 via personal service, thus warranting the entry of default against Defendant. Nevertheless, Junichi Paul Landau ("Landau"), acting on behalf of Defendant as its agent, claims that he failed to file a timely answer because of health issues, family issues, and ineffective assistance of counsel.

As background, Landau states in his certification that Defendant acquired the property in question, 14 Summit Street, Tenafly, New Jersey (the "Property"), in 2013 for a purchase price of $1,075,000.00 in an all cash transaction, and in which no mortgage was attained. Subsequently, in February of 2019, a tax lien foreclosure was entered against the property. In response to the service of the tax lien foreclosure, Landau, the sole member and agent of Defendant, hired an attorney as his legal representation in the tax lien foreclosure action. See Landau Certification, ¶ 4-5.

Around the same time as the tax lien foreclosure action, Landau was dealing with ongoing medical issues such as tonsillar cancer, and new medical issues involving his eyesight, back pain, and a stage 4 diagnosis of prostate cancer in May 2019. Moreover, a few months earlier, around February and March of 2019, Landau's eyesight issues resulted in him needing surgery, and he was also bedridden due to back pain throughout the month of April of 2019. Simultaneously with these health issues, Landau also represents that he was dealing with severe mental health issues of

his two children involving depressive disorder and schizophrenia and which required constant attention. See Landau Certification, ¶ 6, 8-11.

Additionally, in response to the tax lien foreclosure action, and after hiring counsel to serve as legal representation, Landau allegedly informed counsel that he had family members who could aid in paying off the tax lien. Given that Landau had informed his attorney of his ability to pay the tax lien, and also given the personal and familial health issues ongoing at the time, Landau represents that nothing further was done on his end, he was relying on his attorney, and awaiting further instructions from his attorney as to paying off the tax lien. See Landau Certification, ¶ 11, 14.

On July 10, 2019, Plaintiff served Defendant with a Motion to Enter Final Judgment, and final judgment was ultimately entered on July 31, 2019. Upon receipt of the motion, Landau was informed by counsel that he had until August 19, 2019 to pay off the outstanding taxes that were owed. On August 14, 2019, Landau went to the tax collector to provide payment but was informed that judgment had already been entered and Defendant's house was transferred to the lienholder.

Subsequently, Defendant moved to vacate default judgment on November 17, 2019. Given the health issues Landau was facing at the time of this tax lien foreclosure, in addition to the health issues of his children, and the purported misinformation, or lack of information, from his attorney, Defendant argues that final judgment should be vacated due to extraordinary circumstances and in the interests of justice pursuant to Rule 4:50-1(f).

Plaintiff argues that (1) Defendant is time barred because it did not move to vacate final judgment, on grounds other than fraud or lack of jurisdiction, within three months after the entry of final judgment pursuant to N.J.S.A. 54:5-87; (2) Defendant was provided with due process; (3) attorney error is not excusable; (4) subparagraph (f) of R. 4:50-1 is used sparingly; and (5)

Defendant is unable to demonstrate excusable neglect or exceptional circumstances that would warrant granting relief under R. 4:50-1.

First, Plaintiff argues that Defendant surpassed the 30-day window to move to vacate final judgment, Plaintiff contends that after this three-month window the only grounds that Defendant could move under to vacate final judgment would be fraud in the conduct of the suit or lack of jurisdiction. N.J.S.A. 54:5-87; see Borough of New Shrewsbury v. Block 115, Lot 4, 74 N.J. Super. 1, 9 (App. Div. 1962) (citing Lakewood Tp. V. Block 251, Parcel 34, 48 N.J. Super. 581, 586 (App. Div. 1958)); see also Town of Phillipsburg v. Block 1508, Lot 12, 380 N.J. Super 159, Footnote 8, (App. Div. 2005).

Defendant contends that the limitations set forth in N.J.S.A. 54:5-87 do not apply here because: (1) in appropriate cases, moving to vacate final judgment is not limited to fraud or lack of jurisdiction grounds, but includes the grounds expressed in R. 4:50-1 after the three-month window to vacate; and (2) in foreclosure actions, conflicts involving a statute regarding practice and procedure generally result in the court rules taking priority. Bergen-Eastern Corp. v. Koss, 178 N.J. Super. 42, 45 (App. Div. 1981); M & D Associates v. Mandara, 366 N.J. Super. 341, 351 (App. Div. 2004). As such, Defendant argues that the Motion to Vacate Final Judgment should not be barred, and the Court is not precluded from hearing this matter.

In Koss, the Appellate Division concluded that vacating a foreclosure judgment is not limited to the grounds of N.J.S.A 54:5-87, and thus not limited solely to fraud or lack of jurisdiction after the 30-day window to file the motion. Rather, the Appellate Division noted that vacating a foreclosure judgment also includes the grounds listed in R. 4:50-1. Koss, 178 N.J. at 45. In making this finding, the Appellate Division held that "[w]hile the three-month limit would ordinarily govern a motion to vacate a foreclosure judgment based on a tax sale for reasons other than fraud

or lack of jurisdiction, in an appropriate case relief may be granted on an application brought beyond that time period." Id.

In Koss, the defendant, a 74-year-old widow who had ongoing psychiatric problems and numerous hospitalizations due to mental issues, was granted relief under R. 4:50-1 and allowed to vacate the foreclosure judgment. In part, the trial court judge found that the defendant had shown her inaction in responding to the foreclosure action was due to inadvertence, mistake, or excusable neglect.

Similarly, this matter is an "appropriate case" to seek relief from a foreclosure judgment outside of the 30-day window set by N.J.S.A. 54:5-87, given the myriad of issues Defendant faced as this matter commenced. Here, just like in Koss, R. 4:50-1 has supremacy over the foreclosure statutes that Plaintiff cites as controlling. Thus, Defendant is entitled to move to vacate judgment on grounds other than fraud or lack of jurisdiction.

Even in spite of this conclusion, Plaintiff raises various substantive arguments as to why the relief should not be granted. First, Plaintiff argues that attorney negligence cannot form the foundation of relief for excusable neglect under R. 4:50-1. In support of this contention, Plaintiff cites to the Baumann case, where the Supreme Court of New Jersey denied attorney error as grounds for vacating a judgment under R. 4:50-1. Baumann v. Marinaro, 95 N.J. 380 (1984). Moreover, in Baumann, the Court found that carelessness or lack of proper diligence from an attorney is generally insufficient for that attorney's client to attain relief from an adverse judgment in a civil action. Baumann, 95 N.J. at 394; (citing In re T, 95 N.J. Super. 228, 235 (App. Div. 1967)). Moreover, the Court also quoted the Appellate Division in In re T which stated that "[s]uch carelessness may be excusable when attributable to honest mistake, accident, or any cause not

incompatible with proper diligence, but in such case the moving party is required to show a meritorious cause." Id.

On the other hand, Defendant cites to Janssen v. Fairleigh Dickinson University, where the Appellate Division reversed the trial court's order denying the plaintiffs motion to vacate dismissal of their complaint for failure to answer interrogatories. In this case, the plaintiffs sued their school for negligence in failing to provide adequate security. After the defendant university filed an answer and forwarded interrogatories to the plaintiffs' attorney, the attorney never sent the interrogatory answers back to the defendant and never responded to the defendant's requests. Janssen v. Fairleigh Dickinson University, 198 N.J. Super. 190, 192 (App. Div. 1985).

Ultimately, the Appellate Division stated:

> To be sure, instances of misconduct or incompetence are relatively rare in the legal profession. When they occur, however, the financial penalties heaped upon the client are often disastrous. Against this backdrop, we believe that the sins or faults of an errant attorney should not be visited upon his client absent demonstrable prejudice to the other party.

Janssen, 1989 N.J. Super. at 194.

Moreover, in Janssen, the Appellate Division expressed the following factors that are generally considered when determining whether procedural rules should be relaxed:

> (1) the extent of the delay;
>
> (2) the underlying reason or cause;
>
> (3) the fault or blamelessness of the litigant; and
>
> (4) the prejudice that would accrue to the other party.

Id. at 195.

Ultimately, in weighing these four factors, the Appellate Division found that, despite four years having lapsed since the entry of the dismissal order against the plaintiffs, the trial court's order should be reversed because the plaintiffs were blameless and the defendant would not be prejudiced.

Here, in applying the Janssen factors, it is evident that the delay in time in filing the Motion to Vacate is significantly less than the plaintiffs delay in Janssen; Defendant filed its Motion to Vacate four months after being served with the Motion to Enter Final Judgment. In addition, Defendant (and Landau acting as Defendant's agent) is blameless for the failure to file the Motion in time and for the failure to pay off the tax lien by the deadline. Lastly, Plaintiff would not be prejudiced if default judgment is vacated. Rather, if default judgment is vacated, Plaintiff would be in the exact same position it would have been in had the tax lien been paid off originally; Plaintiff's tax sale certificates would have been satisfied and the debt it was owed paid in full.

In Baumann, which was cited by Plaintiff, the Court stated that there is no New Jersey case directly on point for the issue of whether attorney error constitutes exceptional circumstances under R. 4:50-1(f). However, in that case specifically, the Court held that exceptional circumstances did not exist when the defendants' attorney failed to call a witness, apprise the defendants of an upcoming hearing, and file motions in a timely fashion. Thus, the Court denied the defendants' application to vacate a jury verdict. Baumann, 95 N.J. at 394-95; see also Domena v. New Jersey Re-Ins. Co., 2015 N.J. Super. Unpub LEXIS 433 at * 4.

Here, Defendant's attorney's errors differ from that of the Baumann case. In Baumann, the Court found that the defendants had counsel for their trial and had the ability to move for a new trial within the allotted time frame. However, here, no such remedy existed for Defendant. Defendant's attorney purportedly gave Defendant misinformation, which Defendant relied on in

attempting to pay off the tax lien. Defendant had the necessary funds and was ready to pay off the tax lien, but was denied this relief because of attorney error.

Next, as to the substantive merits of Defendant's argument that default judgment should be vacated on the grounds of R. 4:50-1(f), courts are permitted to vacate judgments under this rule for "any other reason justifying relief from the operation of the judgment or order." The Supreme Court of New Jersey held that relief from default judgment is justified under R. 4:50-1(f) when there are "truly exceptional circumstances." U.S. Bank Nat. Ass'n v. Guillaume, 209 N.J. 449, 484 (2012) (citing Housing Authority of Morristown v. Little, 135 N.J. 274, 286 (1994); quoting Baumann v. Marinaro, 95 N.J. 380, 395 (1984). Moreover, the Supreme Court of New Jersey emphasized this high standard given the importance that is placed upon the finality of judgments. Guillaume, 208 N.J. at 484.

Furthermore, when exceptional circumstances exist and R. 4:50-1(f) applies, the scope of this rule is "as expansive as the need to achieve equity and justice." Court Inv. Co. v. Perillo, 48 N.J. 334, 341 (1966); Little, 135 N.J. at 290; Palko v. Palko, 73 N.J. 395, 398 (1977). However, as the Supreme Court of New Jersey notes, "[t]he rule is limited to 'situations in which, were it not applied, a grave injustice would occur.'" Guillaume, 208 N.J. at 484 (quoting Little, 135 N.J. at 289). Nonetheless, R. 4:50-1 is broad in scope and encompasses a "limitless variety" of fact patterns. Little, 135 N.J. at 289.

In addition, R. 4:50-1 has been found to permit a court to provide relief, for a party or his or her legal representation, from a final judgment, order or proceeding, "whenever necessary to prevent a manifest denial of justice." Manning Engineering, Inc. v. Hudson County Park Com., 74 N.J. 113 (1977).

Next, Defendant argues that a grave injustice would occur if default judgment is not vacated because of the value of the home in comparison to the amount that was owed in tax liens. Defendant contends that the home is valued at $1.15 million and that the amount owed is $180,000.00. Thus, Defendant argues that if default judgment is not vacated, then Plaintiff stands to receive a windfall of close to $1 million, along with the fact that Landau would be evicted from his family home.

In support of this contention, Defendant cites to Nowosleska v. Steele, where the Appellate Division vacated a default judgment in a foreclosure action. In this case, the Appellate Division reasoned that it would be a grave injustice for the defendants to lose their house, valued at $405,000.00, when the debts owed on the house were $145,000.00. Nowosleska v. Steele, 400 N.J. Super. 297, 304-05 (App. Div. 2008). As such, Defendant argues that given the value of the home and the amount owed, it would be a grave injustice to bar Defendant from the opportunity to pay off the tax lien.

Lastly, Defendant contends that the Court should also consider Landau's personal and familial health situations when determining whether to vacate default judgment. Defendant reiterates that under Perillo, exceptional circumstances are as broad as necessary in order to attain equity and justice. Perillo, 48 N.J. at 341. Ultimately, Defendant argues the Court should weigh the harm to Landau's family, against any prejudice that Plaintiff may face; Defendant contends no such prejudice exists here for Plaintiff.

As to any grave injustice or excusable neglect, Plaintiff argues that the more recent case law surrounding R. 4:50-1 has found that courts should use the rule sparingly and in exceptional circumstances. Plaintiff contends that Defendant is unable to demonstrate excusable neglect and the existence of a meritorious defense. Moreover, Plaintiff cites to First Morris Bank and Trust v.

Roland Offset Service Inc., 357 N.J. Super. 68 (App. Div. 2003), and interprets this case as a finding from the Appellate Division that denies the notion that a financial windfall constitutes an exceptional circumstance.

However, Plaintiff misstates the finding of the First Morris Bank case, which this Court views as much narrower than Plaintiff's interpretation. In First Morris Bank, the so-called "windfall" was a twenty percent collection fee attained by the plaintiff bank, which was included in the default judgment, and was a part of the plaintiff's complaint. Moreover, the Appellate Division determined that collection fees, such as the one awarded to the plaintiff, are commonplace in commercial loan transactions. Thus, the Appellate Division held that given the context of the case in a commercial setting and the presumptively reasonable percentage of the collection fee, the collection fee at issue could not constitute a grave injustice.

The purported windfall could not be more different from the factual situation in First Morris Bank. Here, unlike in First Morris Bank, Plaintiff stands to gain close to $1 million if default is vacated, when it was only owed a debt of approximately $180,000.00. The financial benefit that Plaintiff characterizes as a windfall in First Morris Bank, was a collection fee, almost like an attorney fee, that was included in a default judgment. Whereas here, at issue is a tax debt that was owed to Plaintiff, prior to the commencement of this lawsuit, that now could become worth the value of the Property if default is not vacated.

Moreover, the instant case is further distinguished from First Morris Bank in that the Appellate Division in that case was solely focused on whether a financial benefit allotted to the plaintiff fell within R. 4:50-1(f). Whereas here, Plaintiff not only stands to gain an actual windfall, which would be a grave injustice in this context, but this case also encompasses a variety of other serious issues, such as attorney negligence, Landau's health issues, and the health issues of his

children. Thus, unlike in First Morris Bank, the grave injustice here includes the totality of these additional factors in conjunction with Plaintiff's windfall, putting this case well within the purview of R. 4:50-1.

In the same vein, Plaintiff also argues that excusable neglect is in congruence with the notion of due diligence and that Defendant took no action in this case until final judgment. As such, Plaintiff contends that Defendant does not meet the level of excusable neglect.

It is not necessary for the Court to address the issue of whether excusable neglect existed, which would fall under R. 4:50-1(a), because Defendant's argument rests on R. 4:50-1(f) and thus the Court focuses its analysis on subparagraph (f) as well.

Defendant not only hired an attorney once this action commenced, but also communicated with his attorney in order to satisfy the tax lien and understand when this payment was due. Defendant also ensured that it had acquired the funds necessary to pay off the debt, and actively attempted to pay off the tax lien before the date that Defendant's attorney told him the payment was due. This is not a case in which a litigant sat idly and allowed the case to age. Rather, Defendant took every action that it thought was necessary to satisfy its debt, while also dealing with a host of serious personal and familial health issues.

In Guillaume, the defendants (the "Guillaumes") argued that the foreclosure judgment entered against them should be vacated after the plaintiff bank failed to include its name on the notice of intention to foreclose. The Supreme Court of New Jersey ultimately found that the Guillaumes did not reach the level of exceptional circumstances for vacating default judgment under R. 4:50-1(f); the Guillaumes' argument relied on the allegation that the plaintiff relied on incompetent proof. The Supreme Court of New Jersey determined that the Appellate Division properly concluded that the plaintiff's proof complied with the governing rule in effect at the time

and the Guillaumes chose to not appear or seek representation before the entry of default judgment. As such, the Court held that exceptional circumstances did not exist to justify vacating default judgment under R. 4:50-1(f). Guillaume, 209 N.J. at 484-485.

However, here, the facts portray a clear-cut example of not only exceptional circumstances, but also of a grave injustice if default judgment is not vacated.

Given the lack of effective assistance of counsel in this matter, the potential windfall that may be imparted upon Plaintiff should final judgment be upheld, the overwhelming hardship caused by health issues for Landau and his family, and a potential eviction from one's family home, coupled with the fact that Plaintiff will not face any undue prejudice by granting Defendant's Motion because Plaintiff still stands to gain a satisfaction of the debt owed to it, the Court finds that Defendant has satisfied R. 4:50-1(f).

For the foregoing reasons, the Court grants Defendant's Motion to Vacate entry of Default. An Order accompanies this decision.