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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0959-21

TRACY MORRIS,

Plaintiff-Appellant,

v.

BRAVO 1-9 CONSTRUCTION
CORP., EDWARD RENSHAW
and SAMMY ABOUZID,

Defendants,

and

HASSAIM FOSTOK a/k/a
SAM FOSTOK,

Defendant-Respondent.

BRAVO 1-9 CONSTRUCTION
CORP.,

Plaintiff,

v.

MICHAEL FOSTOK,

Defendant.

Submitted October 6, 2022 – Decided November 3, 2022

Before Judges Firko and Natali.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, Docket No. L-3260-13.

Tracy Morris, appellant pro se.

Respondent has not filed a brief.

PER CURIAM

Plaintiff Tracy Morris appeals from an October 28, 2021 Law Division order denying her motion seeking default judgment in the amount of \$68,166.53 and granting defendant Hassaim Fostok's,¹ also known as Sam Fostok, motion to vacate default judgment.² For the reasons that follow, we reverse and remand for a plenary hearing.

I.

¹ Defendant's first name is alternatively referred to as Hassaim and Haissam in the record. We do not know which is correct. We will hereafter refer to him as defendant.

² Defendants Bravo 1-9 Construction Corp., Edward Renshaw, and Sammy Abouzid reported they settled their dispute with plaintiff and are not participating in this appeal.

We discern the following facts from the record. The parties met on a dating site in 2012. According to plaintiff, defendant "swindled" \$240,000 from her to invest in his construction company. The venture failed. On August 20, 2013, plaintiff filed a complaint in the Law Division seeking to recover her \$240,000 sum. On January 31, 2016, the parties achieved a settlement, and a detailed written agreement was prepared by their respective counsel. Plaintiff agreed to accept \$62,000 in full settlement of her \$240,000 claim against defendant. The settlement agreement provided defendant would remit \$32,000 to plaintiff's attorneys within forty-five days of the execution of the settlement agreement and pay an additional \$30,000 to plaintiff in installment payments of \$5,000 annually on the first day of January each year from 2017 to 2022.

The settlement agreement also provided that in the event defendant failed to make the scheduled payments, a default judgment in the amount of \$75,000, less credits for any payments he made, would be entered against him in favor of plaintiff. In addition, the settlement agreement provided the document was the "entire and exclusive agreement" between the parties "with respect to the captioned action and all other matters currently in dispute between them." And, the agreement could not be "changed, modified or amended except in writing," and "duly signed by the party" against whom any proposed change was sought.

A stipulation of dismissal with prejudice was authorized by the parties to be filed by their counsel within ten days after defendant's initial payment to plaintiff was made.

On March 17, 2016, defendant made the initial \$32,000 lump sum payment in accordance with the terms of the settlement agreement. However, he did not make the first \$5,000 installment payment due on January 1, 2017. Consequently, on March 17, 2017,³ plaintiff filed a motion seeking entry of a default judgment against defendant as per the terms of the settlement agreement.

The prior judge requested additional certifications addressing whether defendant and his counsel were aware that plaintiff had spoken to law enforcement authorities and whether plaintiff was seeking additional monetary damages over and above the civil settlement agreement in the criminal proceedings. The record before us does not contain this information. Therefore, we cannot ascertain if the civil settlement agreement was intended to be vacated or modified when the criminal restitution was awarded.

Defendant failed to make the January 1, 2018 installment payment. On February 12, 2018, the prior judge denied plaintiff's motion for entry of default

³ Plaintiff claims she filed her motion on March 17, 2017, however, the prior judge's order states the motion was filed on April 21, 2017.

judgment against defendant in the amount of \$75,000 and ordered enforcement of the settlement terms. The judge ordered all funds presently held in escrow—\$10,000—to be turned over to plaintiff and that attorney's fees and costs be awarded to plaintiff. After reviewing submissions on the attorney's fees and costs issue, on May 2, 2018, the prior judge awarded plaintiff \$8,166.53 for counsel fees and costs incurred relative to being compelled to file a motion to enforce the settlement agreement terms. Thereafter, the \$10,000 escrow was paid to plaintiff. The record is unclear as to whether defendant ever paid the \$8,166.53 counsel fee and costs award.

On July 27, 2018, defendant pled guilty to second-degree theft by failure to make proper disposition.⁴ He was diverted into a pre-trial intervention (PTI) program and ordered to pay restitution to the victim, who is not identified by name, but presumably is plaintiff, in the amount of \$75,000, which the plea form indicates was "agreed upon." In order to satisfy his \$75,000 restitution, defendant agreed to make a one-time payment of \$15,000 plus monthly payments of \$1,666 for a period of thirty-six months. On July 30, 2018, defendant made a \$15,000 payment towards his criminal restitution upon his entry into the PTI program. Plaintiff asserts defendant has paid about \$4,500 in

⁴ N.J.S.A. 2C:20-9.

additional restitution payments, but he has defaulted on the \$1,666 monthly payments mandated to be paid by the probation department.

In March 2020, plaintiff filed a second motion for entry of default judgment in the civil case based on defendant's failure to pay the January 1, 2020 installment payment of \$5,000.⁵ On May 20, 2020, the judge granted plaintiff's motion and found defendant was in default of the settlement agreement terms. Default judgment was entered against defendant in the sum of \$58,166.53. No explanation was provided by the judge as to how this figure was arrived at.

On July 16, 2020, plaintiff assigned her default judgment against defendant to Paul Miller of United Obligations. On August 21, 2020, defendant filed a motion to vacate default judgment. On September 4, 2020, Paul Miller filed a document entitled "Joinder of Parties" seeking to intervene as an additional plaintiff under Rule 4:28(a)(2), but no formal notice of motion under Rule 1:6-2 was filed. The record does not indicate if the application was granted or not.

On February 12, 2021, the subsequent motion judge conducted oral argument via Zoom on defendant's motion to vacate the default judgment. He

⁵ Plaintiff's second motion for entry of default judgment is not included in the appendix.

was represented by counsel and plaintiff was self-represented. The judge noted plaintiff lacked standing to defend defendant's motion because she no longer owned the debt due to the assignment to Miller, who did not appear. Nonetheless, the judge reviewed defendant's financial obligations in both the civil and criminal actions. Plaintiff stated defendant made "three payments of the \$15,000," and the judge confirmed plaintiff received \$32,000 towards the restitution amount from the probation department.⁶ The judge found: (1) by the time plaintiff filed her motion, she no longer owned the debt; and (2) in 2018, a \$15,000 payment was made by defendant towards his restitution obligation in the criminal action.

Plaintiff argued the civil settlement and criminal restitution were separate obligations of defendant. She asserted defendant is obligated to pay her as per the terms of the civil settlement agreement—\$62,000 if he paid on time, \$75,000 if by default—plus \$75,000 in criminal restitution. The judge disagreed and explained:

THE COURT: No, no. The 30—no, no. The 32 is—because the 32 counts for the 75. If he paid 32 plus an[] additional 30, he would have paid in full, so you have to give him credit for the first 32.

⁶ We note a substantial portion of the February 12, 2021 motion transcript indicates the testimony and colloquy is "indiscernible," thus making it difficult for us to determine accurately the parties' respective positions.

But anyway. I'm going to grant the application. I find there's enough confusion that once you get some more discovery there could be indications of full payment. And the \$15,000 restitution is interesting. I understand your argument. But his argument is wait a second, I'm still giving you the money of \$15,000. It's not per month like in the agreement, but you're getting all \$30,000. I gave you 5 pursuant to the yearly payout, and I gave you—I guess was it 15 a lump sum for the restitution?

[COUNSEL FOR DEFENDANT]: He paid the 15 on time and there were four subsequent payments of \$1,000 each. And then there were some smaller payments made. Basically what—the way that I'm looking at all of this is that she got additional—she got the 75 as the rest—it was transferred over as a restitution thing in the criminal. That's why they're the same numbers. So she can't—

THE COURT: No, no. Well he only paid 62. He was only going to pay 62 if he paid on time, correct?

[COUNSEL FOR DEFENDANT]: And I find it would be 62, [j]udge. Yes.

THE COURT: Okay. So he paid 32. He paid 15 under the civil. All right. That's 47. And then he paid 15 in restitution under the criminal. That's 62. And what about this unpaid . . . attorney's fees of \$8,000?

[PLAINTIFF]: That was (indiscernible).

THE COURT: Who did he—which attorney was owed that?

[PLAINTIFF]: (Indiscernible).

THE COURT: And so did he pay him?

[PLAINTIFF]: No.

THE COURT: And you paid him?

[PLAINTIFF]: Yes.

[COUNSEL FOR DEFENDANT]: Judge, just by way of background, Your Honor, that was a different application. That was to—

THE COURT: That was just (indiscernible). I saw that. And that's not in the settlement agreement either.

[COUNSEL FOR DEFENDANT]: That is not in the settlement agreement.

THE COURT: [Plaintiff], please contact the people who you have assigned the—assigned your judgment to. And tell them that I have granted the application. Which means that [counsel for defendant] now has to file an answer on behalf of [defendant] and that your—these people are entitled to discovery.

[PLAINTIFF]: Okay.

THE COURT: The people that you have assigned the judgment to. Which means they'll say, okay, show me all the documentation regarding past checks. Because I saw one \$5,000—I don't know if it was a voucher or something, but that's all I saw in the exhibits. Perhaps he has them. But you seem to agree that he's paid 15. He agrees he stopped paying after 19 I guess right. 19 was his last payment. So that's not even in—that's not even really in controversy. The part

in controversy is whether the restitution on the criminal matter is credited to paying the judgment in the civil matter.

[PLAINTIFF]: The prosecutor (indiscernible).
The assistant prosecutor—

THE COURT: Who was it?

[PLAINTIFF]: (Indiscernible).

THE COURT: Yeah.

The judge concluded the civil and criminal matters were "all about the same amount of money [plaintiff] claim[s] [she] lost. The same total." When the judge questioned plaintiff about the amount of money she lost, she responded "\$240,000." The judge granted defendant's motion to vacate default judgment without prejudice to plaintiff filing a future motion to enter default judgment. A memorializing order was entered.

On February 16, 2021, Miller reassigned the claim back to plaintiff, thereby re-conferring standing to her. Immediately thereafter, plaintiff notified defendant's attorney in writing of the default. Defense counsel replied that defendant's July 30, 2018 restitution payment "settles the civil agreement." In March 2021, plaintiff filed a third motion for entry of default judgment against defendant in the amount of \$68,166.53. On October 28, 2021, the judge denied plaintiff's motion erroneously reiterating she had assigned the default judgment

to Miller and "was paid the entire amount in the settlement agreement before it was due." This appeal followed.

Plaintiff presents the following argument for our consideration:

THE TRIAL COURT ERRED IN VACATING
DEFAULT JUDGMENT TO DEFENDANT
BECAUSE PLAINTIFF SERVED DEFENDANT
CORRECTLY, PLAINTIFF OWNS THE
JUDGMENT, AND RESTITUTION FROM A
CRIMINAL CASE DOES NOT SATISFY A CIVIL
CASE.

II.

A court deciding a motion to vacate a judgment must balance "the strong interests in the finality of litigation and judicial economy with the equitable notion that justice should be done in every case." Jansson v. Fairleigh Dickinson Univ., 198 N.J. Super. 190, 193 (App. Div. 1985), superseded on other grounds by statute, R. 4:23-5 (amended 1990), as recognized in Albarran v. Lukas, 276 N.J. Super. 91, 94 (App. Div. 1994); see also Manning Eng'g Inc., v. Hudson Cnty. Park Comm'n, 74 N.J. 113, 120 (1977). A decision to vacate a judgment pursuant to Rule 4:50-1 "warrants substantial deference[] and should not be reversed unless it results in a clear abuse of discretion." U.S. Bank Nat'l Ass'n v. Guillaume, 209 N.J. 449, 467 (2012).

However, "[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)). If there are any doubts, they should be resolved in favor of the party seeking relief. Mancini, 132 N.J. at 334.

The sole contention in this matter is whether defendant's payments made toward his criminal restitution be credited towards his obligations under the civil settlement agreement. This State espouses a strong public policy to make victims of crimes whole for the losses they suffered. The criteria for imposition of fines and restitution stipulates:

The ordering of restitution pursuant to this section shall not operate as a bar to the seeking of civil recovery by the victim based on the incident underlying the criminal conviction. Restitution ordered under this section is to be in addition to any civil remedy which a victim may possess, but any amount due the victim under any civil remedy shall be reduced by the amount ordered under this section to the extent necessary to avoid double compensation for the same loss, and the initial restitution judgment shall remain in full force and effect.

[N.J.S.A. 2C:44-2(f).]

The interplay of the settlement agreement and restitution was never adjudicated in the matter under review. The prior motion judge requested certifications on this exact issue, which ostensibly, based upon our review of the record, were either never submitted or are missing from the appendix. And, the record does not contain any transcripts from defendant's criminal proceeding; only the plea agreement form was provided.

In State v. DeAngelis, the defendant filed a motion to vacate a criminal restitution order after settling with the victim in a civil action arising out of the same operative facts. 329 N.J. Super. 178, 180 (App. Div. 2000). We affirmed the trial court's findings and concluded that the civil settlement agreement and release signed by the plaintiff did not release the defendant from his obligations under the restitution order. Id. at 189. We reasoned a private agreement to extinguish restitution is contrary to public policy and thus void, as the State and judicial system have an interest in restitution separate and apart from simply compensating the victim. Id. at 183. Moreover, we noted that the victim was not a party in the criminal matter. Ibid.

Unlike DeAngelis, where the defendant sought to extinguish the criminal restitution amount by settling with the victim through a civil manner, the parties here initially came to a settlement in the civil litigation and then defendant

entered a plea agreement, which included restitution, in the criminal matter. But from the limited record presented to us on appeal, it appears neither the civil motion judges nor the criminal part judge ever clarified whether the parties' settlement agreement in the civil litigation was to be vacated, credited, modified, or remain in place after restitution was ordered. We do not accept defense counsel's position that the July 30, 2018 restitution "settles the civil litigation" without more. We are convinced there is a legitimate, material question of fact on that issue.

Moreover, plaintiff is uncertain as to the amount defendant still owes for restitution, alleging that it is \$55,000 or possibly over \$61,000. The amount cannot be ascertained from the record on appeal. Based on the foregoing, we conclude the judge misapplied his discretion in granting defendant's motion to vacate default judgment, and we vacate the October 28, 2021 order in its entirety.

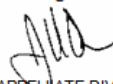
We remand this matter to the trial court to conduct a plenary hearing on the following issues: (1) whether defendant's payments towards his criminal restitution were intended by the sentencing judge to be credited towards his payments and obligations pursuant to the terms of the parties' civil settlement agreement; and (2) what amount, if any, is owed to plaintiff in both the civil and

criminal matters. The judge shall also determine if all or any part of the \$8,166.53 counsel fees and costs award entered on May 2, 2018, was ever paid to plaintiff. We express no opinion as to the outcome of the plenary hearing or how it should be conducted.

To the extent we have not specifically addressed any remaining arguments raised by plaintiff, we conclude they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Reversed and remanded. We do not retain jurisdiction.

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



CLERK OF THE APPELLATE DIVISION