SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2239-20

STEVEN D'AGOSTINO,

Plaintiff-Appellant,

v.

MARY ELLIOT, d/b/a ELLIOT TRANSCRIPTION SERVICE, and KATHLEEN PRICE, d/b/a PRICE TRANSCRIPTION SERVICE,

Defendants-Respondents.

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Argued April 25, 2022 – Decided May 6, 2022

Before Judges Fasciale and Petrillo.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, Docket No. SC-000784-20.

Steven D'Agostino, appellant, argued the cause pro se.

Respondents have not filed a brief.

PER CURIAM

Pro se plaintiff Steven D'Agostino appeals from two orders of the Law Division, Special Civil Part dated February 11, 2021, and March 18, 2021. Defendant Kathleen Price d/b/a/ Price Transcription Service (Price) is in default and did not participate in the proceedings below or this appeal.

The first is an order which both entered judgment and simultaneously dismissed all four counts of the complaint following a proof hearing on February 11, 2021. The order effectively constituted a no-cause of all of plaintiff's claims, yet still awarding him $91.25 in damages. The second order, dated March 18, 2021, denies plaintiff's application to amend the first judgment. The relief sought in the second proceeding appears to be a reconsideration of the trial court's no-cause order. We agree. For the reasons explained, we reverse both orders and remand with instructions that a new proof hearing be conducted before a different judge.

I.

On November 13, 2020, plaintiff filed suit against Price in the Small Claims Section of the Special Civil Part for breach of contract, breach of good faith and fair dealing, fraud (including common law and consumer fraud combined in one count) and infliction of emotional distress (whether plaintiff alleges intentional or negligent conduct here is not clear as no specific

allegations constituting the elements of one or the other are set forth).[1] According to the complaint, plaintiff "hired Price to transcribe motion hearings for a currently pending appeal in the United States District Court of N[ew] J[ersey]." On May 7, 2020, after consulting with Price by telephone about the scope of the transcription project, plaintiff received an invoice for $255.50 representing Price's estimated fee for seventy transcribed pages at $3.65 per page which, according to plaintiff, is the fee for federal court matters. Plaintiff sent a check to Price which was not received and then issued a second check. This second check was received. This process took a few weeks and, once Price confirmed receipt of the check, plaintiff expected the transcript within a "week or so."

The transcript was not received within the expected time frame due, according to plaintiff, to unreasonable delay on Price's part thus forcing plaintiff to seek an extension of time to file his appeal. Plaintiff further alleges that Price did not prepare a verbatim transcript but instead, claiming to have an English

[1] Plaintiff also sued Mary Elliot d/b/a Elliot Transcription Service in the same lawsuit but settled his claims against that party on the day of trial. Those claims were unrelated to the claims against Price. It is unclear, and for present purposes of no moment, why both parties were sued in one case for totally unrelated claims.

degree, corrected his grammar and made other changes that did not reflect exactly what was said at the proceeding being transcribed. In addition to the transcript, Price delayed in sending the audio recording to plaintiff. Other errors in the transcript were detected by plaintiff upon his comparison of the audio recording to the transcript. Price is alleged to have been non-responsive to multiple calls and emails during this period, eventually fixing some of the errors but not others.

Price's final product was forty-five pages long. Plaintiff had paid $255.50 in advance, as per the estimated seventy pages set forth in Price's invoice. Plaintiff requested a refund of $91.25 and, according to plaintiff, Price agreed to send plaintiff a check in that amount by mail. After the check was not received, plaintiff alerted Price who agreed to send a second check. Neither check was ever received.

Plaintiff recounts his strained interactions with Price during this time and his disbelief in her representations about having sent him the first and second checks. While admitting recurring problems with mail delivery to his home, plaintiff discounts that possibility as being the reason why the check from Price never arrived. After the passage of more than a week, and the second check having still not arrived, plaintiff initiated a complaint against Price with the New

Jersey Administrative Office of the Courts (AOC). The AOC lacked jurisdiction over the matter, according to plaintiff and as per an email contained in his appendix from a member of AOC staff, due to the matter at issue being a federal case as opposed to one pending in the Superior Court of New Jersey.

Subsequent communications between plaintiff and Price were unproductive and confrontational. Plaintiff characterizes Price as being dishonest in her statements about sending him the first or second check and maintains that she lied to him and that he has "IRREFUTABLE PROOF that she did not and could not have sent [him] that [second] check[.]" Plaintiff cites embedded digital data contained in photographs of the replacement check supposedly sent to him by Price through email in support of his position that she was not telling the truth about the mailing of at least one, and possibly both, of the refund checks. According to plaintiff, the digital data demonstrates that the photo was taken after the date the check was supposedly sent and as such is proof positive that Price lied when saying a second check was sent.

Trial was scheduled for November 13, 2020, to take place by Zoom.[2] Price did not appear at the appointed time. As such, she was held in default, per

[2] Because this suit was filed in the Smalls Claims Section of the Special Civil Part, defendant was not required to file an answer. R. 6:3-1(6).

Rule 6:6-2. Once it was evident that Price was not present and was in default, plaintiff asked that the judge conduct a proof hearing. According to plaintiff he was told by the judge that no proof hearing would be necessary. Plaintiff took this to mean that he could seek entry of default judgment by filing a certification with the clerk's office as per Rule 6:6-3(a) and proceeded to do so on January 27, 2021. After he filed for entry of judgment, the matter was nonetheless scheduled for a proof hearing on February 11, 2021.[3]

At the proof hearing, the trial judge asked plaintiff a series of questions about the claim and the interaction plaintiff had with Price. Referencing a "preponderance of the evidence standard" the judge made clear that he was not persuaded that plaintiff was able to make out his cause of action for fraud, intentional or otherwise; no clear finding was made one way or the other regarding the contract claim; and no mention was made of the emotional distress claim. The court awarded plaintiff $91.25 in damages as well as $54 in court costs.

[3] Judgment for an amount that is not for a sum certain requires testimony in open court or on an affidavit containing the information that would be offered orally. R. 6:6-3(c). Given the proposed trebling, fee shifting, and allegations of personal injury and fraud, this was precisely the kind of case that required a hearing.

A form of order was thereafter submitted by plaintiff and entered by the court on February 11, 2021. As to each count the order specifically states that the court was "not persuaded by [p]laintiff's evidence and testimony that defendant Kathleen Price . . ." "breached her contract with [p]laintiff;" "committed common law fraud;" "committed consumer fraud;" and "committed a fraud upon the court." No reference to emotional distress was included in the order. The order further states that the court "WAS persuaded by [p]laintiff's evidence and testimony that defendant Kathleen Price had overcharged [p]laintiff for transcripts in the amount of $91.25."[4]

On March 1, 2021, plaintiff filed a motion to reconsider the court's decision of February 11, 2021. The motion was not opposed and was heard on March 18, 2021. In the motion, plaintiff argued that the trial court had applied the wrong standard at the proof hearing by requiring plaintiff to prove his causes of action. At oral argument, plaintiff presented his position; that position was rejected by the court. The court gave no consideration to plaintiff's argument

[4] It is difficult to reconcile the order with the award of damages. All claims were dismissed by virtue of the court's factual findings that it was "not persuaded" by the proofs (the propriety of which exercise shall be addressed infra) yet damages were awarded. If the causes of action were not proven, we cannot discern the basis for an award of damages. Reference to the transcript of the proof hearing provides little help.

that the wrong standard had been applied the first go-round, perceiving the argument as a mere "rehashing" of what was said before and thus, ostensibly, not satisfying the reconsideration standard. Plaintiff stated that he was not rehashing what he had said at the proof hearing, but the court saw it otherwise concluding that "it [was] exactly the same thing" as was raised before. The motion was then denied. On appeal, plaintiff argues the trial court applied the wrong legal standard when conducting the proof hearing.

II.

"Findings by the trial judge are considered binding on appeal when supported by adequate, substantial and credible evidence. ' . . .[An] appellate court's function is a limited one: [the appellate court does] not disturb the factual findings and legal conclusions of the trial judge unless [the appellate court is] convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice,' and the appellate court therefore ponders whether, on the contrary, there is substantial evidence in support of the trial judge's findings and conclusions." Mt. Hill v. Twp. Comm. of Middletown, 403 N.J. Super. 146, 192-93 (App. Div. 2008) (quoting Rova Farms Resort, Inc. v. Invs. Ins. Co. of America, 65 N.J. 474, 484 (1974)).

In this case, as is apparent from the order, the court made factual findings based on the undisputed evidence. Those findings were reached after a weighing of the evidence. Chief among the several problems with this tack is that it runs afoul of the mandated approach to be taken by a trial court at a proof hearing. "When a trial court exercises its discretion to require proof of liability as a prerequisite to entering judgment against a defendant who has defaulted, what is required . . . is that the plaintiff adduce proofs which show that the facts alleged 'might have been the case' or, to say the same thing in different words, that they could conceivably be proved at trial, and that, if proved, they would establish the legally required elements of plaintiff's claim for relief." Heimbach v. Mueller, 229 N.J. Super. 17, 23 (App. Div. 1988) (internal citation omitted) (quoting Trans World Airlines v. Hughes, 449 F.2d 51, 64 (2d Cir. 1971)).

This is not what occurred here. Instead, the trial court simply did not believe plaintiff's proofs. As was the case in Heimbach, "[t]here was nothing before the trial judge to disprove that plaintiffs' testimony 'might . . . have been the case.'" Id. at 24 (internal citations omitted) (omission in original). Thus, as in Heimbach, "it was error for the trial judge to have entered judgment in favor of defendant on the ground that [he] did not believe plaintiffs' proofs." Id. at 25.

We are constrained to reverse not because we conclude that the outcome reached is not possible, but rather because the means of getting there imposed too heavy a burden on plaintiff and gave a wholly improper benefit of the doubt as to every issue to the defaulted defendant. Despite our deferential standard of review when considering a trial court's findings of fact, this case falls into that corridor of cases where that deference must yield to the reality of the record below. There simply is no evidence, when viewing the proofs through the proper lens, to have allowed the court to reach to reach the conclusions it did, in the way that it did. To decide otherwise would, in our view, be plainly unfair.

III.

Plaintiff is correct that the judge went out of his way to give the defaulted party the benefit of every doubt. Reference to the proof hearing transcript makes this abundantly clear where the judge offers other possible explanations, without any basis in the record, for why Price may have done what she did. It seems in some instances that the judge accepts as true what plaintiff alleges but nevertheless ultimately concludes that none of it amounts to a claim.

This is a Special Civil Part case and the process for entry of default is spelled out in Rule 6:6-3(c). That said, the Rule parallels Rule 4:43-2(b). That Part IV Rule grants a trial court the discretion to require proof of the quantum

of damages as well as entitlement to relief, prior to entry of default judgment. EnviroFinance Grp., LLC v. Env't Barrier Co., LLC, 440 N.J. Super. 325 (App. Div. 2015) (internal citations omitted); see also Kolczycki v. City of E. Orange, 317 N.J. Super. 505, 514 (App. Div. 1999) ("[T]he trial court has the discretionary power to require proof of liability."). However, "[w]here the trial court undertakes to exercise such discretion, the court should ordinarily apply the prima facie standard to plaintiff's proofs, thus not weighing evidence or finding facts but only determining bare sufficiency." Kolczycki, 317 N.J. Super. at 514 (citing Heimbach, 229 N.J. Super. at 20-24). "[P]rima facie [evidence is evidence] that, if unrebutted, would sustain a judgment in the proponent's favor." Baures v. Lewis, 167 N.J. 91, 118 (2001).

Here plaintiff correctly argues that the court drifted well past its charge. The question is simple: does plaintiff make out a prima facie case, as defined above, as to the liability of defendant Price on each of the counts. If yes, why? If no, why? The outcome can only be reached following an evaluation of the proofs offered by the plaintiff to gauge sufficiency or inadequacy for the purpose of a prima facie showing. It was incorrect for the judge to simply ponder what Price might have as an excuse for her conduct. Given the elements of at least three of the causes of action (both of the fraud counts and the emotional distress

claim) as well as the heightened burden of proof required for fraud claims, it is possible that the judge could have made a finding that plaintiff did not make out a prima facie case as to those claims. In order to do so the judge should have examined the proof from a completely different and more lenient perspective than he did and then made specific findings and conclusions regarding whether a prima facie case was made out. R. 1:7-4. To deny judgment against a defaulted defendant, some required element of plaintiff's prima facie case must be missing, or some obvious rule of law must provide cause to bar the claim. Heimbach, 229 N.J. Super. at 23-24. No such analysis was done here.

A plaintiff's case at a proof hearing is not impervious to wilting under certain circumstances. The court has the authority to sua sponte refuse to enter judgment if the complaint on its face fails to state a cause of action even if the defendant is in default. See Prickett v. Allard, 126 N.J. Super. 438 (App. Div. 1974). Moreover, a court may dispose of a case at a proof hearing if the evidence presented is so "inherently incredible that the trial judge is justified in refusing to believe it." Heimbach, 229 N.J. Super. at 24 n.3. Generally speaking though, as we noted in Heimbach, it has been recognized for well over 100 years, that "a defendant's default admit[s] every allegation of fact in the complaint which was susceptible of proof by legitimate evidence except: (1) allegations which

were made indefinite or erroneous by other allegations of the complaint, (2) allegations which were contrary to facts of which the court would take judicial notice, or (3) allegations which were contrary to uncontroverted material in the file of the case." Id. at 22-23 (citing Trans World Airlines, 449 F.2d. at 63). None of the three exceptions to this presumed admission are evident on this record.

A plaintiff is indulged here, as one would be in opposing a motion to dismiss. The analysis at a proof hearing goes further than just the pleadings though; it requires an examination of the proofs as well. If that unrebutted showing of proof, in light of the allegations, including the elements of each claim and the burden of proof to prevail, is enough to support the maintenance of the claim, i.e., a prima facie case, there is enough for a liability finding and the court proceeds to damages. It is a very low burden for plaintiff, but it is plaintiff's burden to bear.

This burden, despite its lightness, still requires some minimal showing. The objective, of course, is to prevent frivolous claims that simply cannot sustain liability and thus cannot lead to a damages award. The purpose of a proof hearing is not to impose liability and award damages solely because a defendant has failed to appear and is in default. Rather, the proof hearing

operates to entitle plaintiff to make a lesser showing than a full-blown trial would require. Default is not a TKO, but it is, at least, a standing eight count. The final blow is not delivered until entry of judgment which, in a case such as the one at issue, can only be entered once the described showing is made to the satisfaction of the trial judge applying the well-known standard we have described.

IV.

For these reasons, the judgment must be vacated and the matter remanded. As stated at the outset, upon remand the matter shall be assigned to a different judge. Though not exactly the same as credibility findings, the judge here improperly weighed the evidence and formed an opinion as to its adequacy. In fairness to the judge, we believe it prudent in such a scenario to have the matter heard by a different judge. See R.L. v. Voytac, 199 N.J. 285, 306 (2009) ("Because the trial court previously made credibility findings, we deem it appropriate that the matter be assigned to a different trial court.").

On remand, the newly assigned judge shall convene a new proof hearing within forty-five days and consider all proofs and testimony in light of the standard described. Notice of the hearing must be served on the defendant. If the court concludes that the plaintiff does not make out a prima facie case as to

any of the causes of action plead, then the court must specifically state why as to each claim, considering the proofs offered, the elements of the cause of action, and the burden of proof. If the judge determines that plaintiff is entitled to damages in any amount, he or she must indicate under what counts of the complaint damages are being awarded and note the court's specific conclusions as to why damages are being awarded in that amount on that count.

Inasmuch as we have reversed the court's first order, we need not address plaintiff's appeal of the denial of motion for reconsideration, that order is vacated, having been mooted by this decision. We decline to exercise original jurisdiction as was requested.

Reversed and remanded. We do not retain jurisdiction.