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This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3424-20**

KELLY A. FUSCO,

Plaintiff-Respondent,

v.

JOSEPH SHERIDAN,

Defendant-Appellant.

Argued May 5, 2022 – Decided June 14, 2022

Before Judges Haas and Mitterhoff.

On appeal from the Superior Court of New Jersey,
Chancery Division, Family Part, Cape May County,
Docket No. FD-05-0130-20.

Richard F. Klineburger, III, argued the cause for
appellant (Klineburger and Nussey, attorneys; Richard
F. Klineburger, III, on the brief).

Respondent has not filed a brief.

PER CURIAM

Defendant Joseph Sheridan appeals from a June 28, 2021 order of the Superior Court of Cape May County Family Part denying his application to vacate a December 19, 2019 child support order entered against him. Having reviewed the record and the applicable law, we conclude that the order must be vacated as personal jurisdiction was not established in accordance with the Rules of Court. On remand, retroactivity of any modification is preserved to the original filing date of October 25, 2019. See N.J.S.A. 2A:17-56.23a.

Plaintiff in this case, Kelly Fusco, is the mother of defendant's seven-year-old daughter. The couple was never married. Defendant presently resides in Pennsylvania and plaintiff resides in New Jersey with their daughter.

On October 15, 2019, plaintiff filed a complaint for child support. A copy of the complaint was originally sent to defendant's mother's address in New Jersey. Thereafter, Cape May Social Services learned that defendant resided in Pennsylvania and confirmed his Pennsylvania address by a government agency request on July 10, 2019. The return date of plaintiff's child support application was originally November 19, 2019, but the court relisted it to December 19, 2019 to permit service by regular and certified mail at defendant's Pennsylvania address. The certified mail was refused, and the regular mail was never returned.

Defendant did not appear for the December 19, 2019 hearing, at the conclusion of which the subject child support order was entered against him. On March 23, 2021, defendant moved to vacate the order.

On June 28, 2021, after a hearing at which defendant testified, the judge rejected as incredible defendant's claim that he was never served. The judge found that service was effective and that defendant simply ignored the summons. He therefore denied the application to vacate the order.

On appeal, defendant claims that he was never served in accordance with Rule 4:4-4 and that Cape May Social Services did not file an affidavit of diligent inquiry prior to resorting to service via certified and regular mail under Rule 4:4-5. Although we agree with the judge that defendant's claims of ignorance are entirely specious, we conclude that the trial court erred in entering the child support order because defendant did file and answer or otherwise appear in response to the service by regular and certified mail.

The decision whether to grant a motion to vacate is "left to the sound discretion of the trial court, and will not be disturbed absent an abuse of discretion." Mancini v. EDS, 132 N.J. 330, 334 (1993). "[W]here the motion is based on [Rule] 4:50-1(f), for 'any other reason justifying relief from the operation of the judgment or order,' the motion must be supported by 'truly

exceptional circumstances' in the interests of finality of judgments." M & D Assocs. v. Mandara, 366 N.J. Super. 341, 350 (App. Div. 2004) (quoting Hous. Auth. of Morristown v. Little, 135 N.J. 274, 286 (1994)).

Rule 4:4-5 provides:

(a) **Methods of Obtaining In Rem Jurisdiction.** Whenever, in actions affecting specific property, or any interest therein, or any res within the jurisdiction of the court, or in matrimonial actions over which the court has jurisdiction, wherein it shall appear by affidavit of the plaintiff's attorney or other person having knowledge of the facts, that a defendant cannot, after diligent inquiry, as required by the rule be service within the State, service may, consistent with due process of law, be made by any of the following four methods:

(1) personal service outside this State as prescribed by R. 4:4-4(b)(1)(A) and (B); or

(2) service by mail as prescribed by R. 4:4-4(b)(1)(C); . . .

Rule 4:4-4(b)(1) provides:

(b) **Obtaining In Personam Jurisdiction by Substituted or Constructive Service.**

(1) By mail or personal service outside the State. If it appears by affidavit satisfying the requirements of R. 4:4-5(b) that despite diligent effort and inquiry personal service cannot be made in accordance with paragraph (a) of this rule, then, consistent with due process of law, in personam jurisdiction may be obtained over any defendant as follows:

. . . .

(C) mailing a copy of the summons and complaint by registered or certified mail, return receipt requested, and, simultaneously, by ordinary mail to: (1) a competent individual of the age of 14 or over, addressed to the individual's dwelling house or usual place of abode; (2) a minor under the age of 14 or a mentally incapacitated person, addressed to the person or persons on whom service is authorized by paragraphs (a)(2) and (a)(3) of this rule; (3) a corporation, partnership or unincorporated association that is subject to suit under a recognized name, addressed to a registered agent for service, or to its principal place of business, or to its registered office. Mail may be addressed to a post office box in lieu of a street address only as provided by R. 1:5-2.

Although plaintiff did not file an affidavit of diligent inquiry before resorting to service by mail, it is clear from the record that plaintiff attempted to serve defendant in the State of New Jersey without success. Thereafter, plaintiff confirmed defendant's address via government agency request to the local postmaster that defendant was receiving mail at that address. Indeed, at oral argument defendant affirmed that he was living at that address at the time the mail was delivered. Under the circumstances, we agree with the judge that plaintiff made sufficient diligent efforts prior to resorting to alternative service outside the state.

Rule 4:4-4(b) governs service outside the state. The plain language of the Rule allows either personal service or service by simultaneous certified and regular mail. Plaintiff's manner of service therefore comported with the Rule and would not warrant reversal.

That, however, does not end our inquiry. Rule 4:4-4(c) provides:

Optional Mailed Service. In lieu of personal service prescribed by paragraph (a) of this rule, service, in lieu of personal service, may be made by registered, certified or ordinary mail, provided, however, that such service shall be effective for obtaining in personam jurisdiction only if the defendant answers the complaint or otherwise appears in response thereto, and provided further that default shall not be entered against a defendant who fails to answer or appear in response thereto. This prohibition against entry of default shall not apply to mailed service authorized by any other provision of these rules. If defendant does not answer or appear within 60 days following mailed service, service shall be made as is otherwise prescribed by this rule, and the time prescribed by R. 4:4-1 for issuance of the summons shall then begin to run anew.

As we explained in Sobel v. Long Island Ent. Prods., Inc., 329 N.J. Super. 285, 293 (App. Div. 2000):

In other words, by the terms of the rule, it is not sufficient that a defendant somehow receive a copy of the summons and complaint within sufficient time to file an answer. Even in a case where out-of-state service by mail would have been permissible if an affidavit of diligent inquiry had been filed showing that in-state service could not be accomplished, see R. 4:4-

4(b)(1)(C), service by mail which fails to comply with the rules will not confer in personam jurisdiction. R. 4:4–4(c).

In this case, defendant's failure to answer the complaint or appear at the hearing rendered service ineffective and triggered the requirement to serve him personally. Because service was ineffective, personal jurisdiction was not established and the court therefore erred in entering a support order against him. On remand, once service is effected, retroactivity of any support order shall be retroactive to October 25, 2019, the date of the filing of the original complaint.

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

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



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