SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1000-21

SBMUNI%LB-HONEY BADGER,

Plaintiff-Respondent,

v.

CHARLES NOVINS, MRS. JORGE A. ALARCON, wife of JORGE A. ALARCON, FOREST HILL CONDOMINIUM ASSOCIATION, and JOE LARYEA,

Defendants,

and

JORGE A. ALARCON,

Defendant-Appellant.

Argued February 16, 2023 – Decided March 1, 2023

Before Judges Whipple and Marczyk.

On appeal from the Superior Court of New Jersey, Chancery Division, Essex County, Docket No. F-008845-18.

James Young argued the cause for appellant.

Amber J. Monroe argued the cause for respondent (Gary C. Zeitz, LLC, attorneys; Amber J. Monroe, on the brief).

PER CURIAM

Defendant Jorge Alarcon appeals from the trial court's November 12, 2021 order denying his motion to vacate a default judgment entered against him in a foreclosure action. Following our review of the record and applicable legal principles, we reverse and remand.

I.

Charles Novins was the owner of 25 Manchester Place, Newark (the property) prior to the Internal Revenue Service (IRS) foreclosing on the property in 2014 pursuant to a delinquent federal tax lien. There is no deed granting title to the IRS. In April 2015, defendant purchased the property from the IRS via quitclaim deed. This deed was recorded in Essex County in May 2015.

In November 2018, defendant discovered various creditors, including plaintiff SBMUNI%LB-Honey Badger, held outstanding tax liens on the property.[1] At that time, defendant obtained an "Outside Lien Redemption

[1] Plaintiff asserts defendant's recorded deed lacked a valid legal description of the property and was outside the chain of title because there was no conveyance

Statement" from the City of Newark (Newark) informing him $11,359.04 was owed to plaintiff. Defendant attempted to pay plaintiff the full amount on November 30, 2018.[2]

Defendant alleges in March 2019, someone appeared at the property claiming to be the owner and asked him to leave. Upon contacting Newark, defendant learned plaintiff had refused to accept his November 2018 payment. Unbeknownst to defendant, plaintiff had filed a complaint for foreclosure of the tax lien on the property in April 2018. Defendant was not included as a party because, according to plaintiff, his deed was not in the chain of title and thus did not appear in a title search. Following an October 2018 writ of execution, a sheriff's sale was held in March 2019, and the property was sold to the third party who later approached defendant.

Plaintiff voluntarily filed a motion to set aside the March 2019 sheriff's sale, which the court granted in August 2019. According to plaintiff, the third party backed out after discovering defendant's interest in the property.

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from Novins. Furthermore, there was no recorded deed for the United States from the IRS foreclosure.

[2] The other creditors were successfully paid off at that time. Plaintiff was the only creditor who refused the tender to redeem because it asserted defendant did not have a recorded interest in the property.

According to plaintiff, defendant—in addition to paying the original amount—had to pay interest as well as reimburse plaintiff for two real estate tax payments made in March and September of 2019. In February 2020, when defendant attempted to pay only the original amount plus interest through December 3, 2018, his redemption was not accepted.

Plaintiff contends on February 27, 2020, it informed defendant it would file a foreclosure action if defendant did not redeem the tax lien within a week. Plaintiff subsequently filed an amended complaint on March 3, 2020, this time including defendant as a party. Three days later, plaintiff attempted to serve the complaint at the property upon someone purporting to be defendant's wife. Defendant maintains he was never served and, therefore, was not aware the amended complaint was filed. Defendant also claims he is not married and has never lived at the property. Defendant further asserts the deed to the property clearly indicated he resided at 1172 Madison Avenue in Teaneck and that all records in the Newark Tax Assessor's office also reflect his Teaneck address. Following the sheriff's sale, plaintiff notes defendant's email to plaintiff indicated someone "showed up at my door claiming to be the owner . . . and

giving me notice to leave," which plaintiff argues demonstrates defendant was living at the property.[3]

On July 30, 2020, plaintiff filed a motion for entry of an order setting a time, place, and amount of redemption. Plaintiff sent this motion via certified mail to the property's address. The court granted the motion and entered an order dated August 21, 2020. The court also gave defendant until October 20, 2020 to redeem the lien. Defendant did not redeem the lien.

Plaintiff filed a motion for entry of final judgment on November 20, 2020, and the court entered final judgment on February 19, 2021. In September 2021, defendant moved to vacate the default judgment. The trial court found defendant did not establish mistake, inadvertence, surprise, or excusable neglect under Rule 4:50-1. It reasoned:

> [Defendant] is asking [t]he [c]ourt to find that his error in not responding to the proper procedure for the redemption of the tax sale certificate should be deemed excusable neglect, but human error is not excusable neglect. And in this case, particularly, the defendant had significant opportunities to redeem the tax sale certificate, and rather than pay the full amount that was due on the taxes[,] he chose not to.

[3] However, plaintiff's own certification of inquiry indicates, "[w]e requested that Guaranteed Subpoena attempt to serve defendant, Mrs. Jorge A. [Alarcon], wife of Jorge . . . with the Summons and Complaint. . . . As a result of our inquiry, we have concluded the given name of Mrs. Jorge [Alarcon] . . . could not be determined."

. . . .

> [Defendant] was placed on notice directly by the plaintiff of the tax sale certificate and his right to redeem, and was given at least a three-month period, from December 12[,] 20[19] to March 3[,] 2020, when plaintiff put on hold its motion for final judgment to give to [defendant] the opportunity to redeem the tax sales certificate for the full amount, which he chose not to do.

The court denied the motion to vacate judgment on November 12, 2021. This appeal followed.

Defendant raises the following points on appeal:

> POINT 1
>
> THE TRIAL COURT [ABUSED] ITS DISCRETION IN FAILING TO EXERCISE ITS BROAD EQUITABLE POWER UNDER RULE 4:50-1.
>
> > A. RELIEF PURSUANT TO R. 4:50-1(a) - Excusable Neglect.
> >
> > B. RELIEF PURSUANT TO R. 4:50-1(D) - THE JUDGMENT OR ORDER IS VOID DUE TO INSUFFICIENT SERVICE OF PROCESS.
> >
> > C. RELIEF PURSUANT TO R. 4:50-1(f) - ANY OTHER REASON JUSTIFYING RELIEF FROM THE OPERATION OF THE JUDGMENT OR ORDER.

POINT 2

RESPONDENT IS BARRED FROM FEES AND COST PURSUANT N.J.S.A. 54:5-97.1 . . . BECAUSE THEY FAILED TO SERVE [DEFENDANT] WITH THIRTY (30) DAY NOTICE AS REQUIRED BY STATUTE. (Not Raised Below).

II.

"The trial court's determination under [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). An abuse of discretion "arises when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" Flagg v. Essex Cty. Prosecutor, 171 N.J. 561, 571 (2002) (quoting Achacoso-Sanchez v. Immigr. & Naturalization Serv., 779 F.2d 1260, 1265 (7th Cir. 1985)).

The motion judge is obligated to review a motion to vacate a default judgment "'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)). "All doubts . . . should be resolved in favor of the parties seeking relief." Ibid.[4]

Rule 4:50-1 offers litigants a broad opportunity for relief from a final judgment or order:

> On motion, with briefs, and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment or order for the following reasons: (a) [M]istake, 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

[4] A motion to vacate default judgment implicates two often competing goals: The desire to resolve disputes on the merits, and the need to efficiently resolve cases and provide finality and stability to judgments. "The rule is designed to reconcile the strong interests in finality of judgments and judicial efficiency with the equitable notion that courts should have authority to avoid an unjust result in any given case." Manning Eng'g Inc. v. Hudson Cnty. Park Comm'n, 74 N.J. 113, 120 (1977); see also Hodgson v. Applegate, 31 N.J. 29, 43 (1959) (interest in finality must be balanced with the goal of doing justice in the case); Nowosleska v. Steele, 400 N.J. Super. 297, 303 (App. Div. 2008) (stating courts have liberally exercised power to vacate default judgments "in order that cases may be decided on the merits"). In balancing these two goals, our system is sympathetic to the party seeking relief, because of the high value we place on deciding cases on the merits. Although the movant bears the burden of demonstrating its failure to answer should be excused and default judgment vacated, Jameson v. Great Atl. & Pac. Tea Co., 363 N.J. Super. 419, 425-26 (App. Div. 2003), close issues should be resolved in the movant's favor. Mancini, 132 N.J. at 334. The decision whether to grant or deny a motion to vacate a default judgment must be guided by equitable considerations. Prof'l Stone, Stucco & Siding Applicators, Inc. v. Carter, 409 N.J. Super. 64, 68 (App. Div. 2009) (holding "Rule 4:50 is instinct with equitable considerations.").

> 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.

If the relief is sought on contested facts, an evidentiary hearing must be held. Nolan ex rel Nolan v. Lee Ho, 120 N.J. 465, 474 (1990).

A.

A tax sale foreclosure judgment is void where there was defective service of process on the property owner. M & D Assocs. v. Mandara, 366 N.J. Super. 341, 352–53 (App. Div. 2004). The interplay between Rule 4:50-1(d) (void judgments) and Rule 4:50-2 triggers constitutional due process concerns. "[A] judgment entered without notice or service is constitutionally infirm." Peralta v. Heights Med. Ctr., Inc., 485 U.S. 80, 84 (1988) (holding a requirement that a meritorious defense be presented in order to vacate a void judgment violated due process). "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the

action and afford them the opportunity to present their objections." Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950). The absence of notice violates "the most rudimentary demands of due process of law." Armstrong v. Manzo, 380 U.S. 545, 550 (1965).

We have recognized, however, equitable doctrines might preclude relief from the void judgment. For example, in Sobel v. Long Island Entertainment Productions, Inc., 329 N.J. Super. 285, 293-94 (App. Div. 2000), we indicated where the defendant had actual notice of the suit prior to entry of judgment because service of process was effectuated at his home, although not on a family member, the defendant might be estopped by his failure to act within a reasonable time. See also Wohlgemuth v. 560 Ocean Club, 302 N.J. Super. 306, 314-17 (App. Div. 1997).

Defendant contends he was never properly served with the amended foreclosure complaint. The court did not squarely address that issue. Instead, the court focused on the fact defendant was on notice of the tax sale certificate and his right to redeem. The fact that defendant was aware of the tax sale certificate does not obviate the need for him to be properly served with the complaint. That is, there is no indication defendant was aware of the suit prior to the entry of the default judgment. The judge appears to have applied Rule

4:50-1(a) to deny the motion to vacate the default judgment finding there was no mistake, surprise, or excusable neglect. However, defendant also moved to vacate pursuant to Rule 4:50-1(d), claiming the judgment was void for lack of personal jurisdiction due to defective service. A motion pursuant to Rule 4:50-1(d) does not require proof of excusable neglect and a meritorious defense. See Jameson, 363 N.J. Super. at 425. Rather, such a motion requires proof the judgment is void, such as where there is a lack of personal jurisdiction due to defective service.

Although plaintiff maintains there is evidence defendant was properly served, a return of service is not conclusive evidence of effective service. Rather, it "raises a presumption that the facts as therein recited are true." Goldfarb v. Roeger, 54 N.J. Super. 85, 90 (App. Div. 1959); see also Jameson, 363 N.J. Super. at 426. "If some evidence is presented tending to disprove the return, but is not sufficient to establish that the return is false, the presumption is nevertheless eliminated from the case." See Jameson, 363 N.J. Super. at 426-27. "Once the presumption is removed from [the] case, it remains plaintiff's

overall burden of persuasion to demonstrate that service upon [defendant] was achieved[.]" Id. at 428-29.[5]

Here defendant maintains he never lived at the property where plaintiff purportedly served defendant's wife. Moreover, defendant claims he was not married. Additionally, plaintiff asserts his correct address is in Teaneck—not Newark—as evidenced by the deed in this case, which reflects his Teaneck address, along with the records from the Newark Tax Assessor's office. We recognize plaintiff alleges defendant's prior statements suggest he may have been residing at the property. However, defendant has established there is a clear question of fact as to whether he was properly served with the summons and complaint. We conclude the trial judge should have conducted a plenary hearing to resolve this issue as it goes to the fundamental issue of whether defendant had notice of the lawsuit. For this reason, we would ordinarily

[5] Plaintiff mistakenly relies on Garley v. Waddington, 177 N.J. Super. 173 (App. Div. 1981), and ignores we remanded that matter for a plenary hearing where there was a fact issue regarding the sufficiency of service. Id. at 182. Moreover, plaintiff's reliance on Rosa v. Araujo, 260 N.J. Super. 458 (App. Div. 1992), is also misplaced. We determined due process considerations were satisfied there, even though the individual served in that matter was not the appropriate person, because the record revealed defendant "concededly received the summons and complaint prior to the entry of default judgment, was aware of the nature of the lawsuit, and turned the matter over to an attorney for representation." Id. at 463. There is no indication in this matter defendant acknowledged he received the complaint, let alone provided it to his attorney.

remand for a plenary hearing. However, because we determine below defendant is entitled to vacate the default judgment pursuant to Rule 4:50-1(f), the trial court will not have to conduct a plenary hearing to address the defective service issue.

B.

To obtain relief from a default judgment under Rule 4:50-1(a), a defendant must demonstrate both excusable neglect and a meritorious defense. Dynasty Bldg. Corp. v. Ackerman, 376 N.J. Super. 280, 285 (App. Div. 2005). "'Excusable neglect' may be found when the default was 'attributable to an honest mistake that is compatible with due diligence or reasonable prudence.'" Guillaume, 209 N.J. at 468 (quoting Mancini, 132 N.J. at 335). To determine if a defense is meritorious, courts "[m]ust examine defendant's proposed defense . . . ." Bank of N.J. v. Pulini, 194 N.J. Super. 163, 166 (App. Div. 1984). "New Jersey courts have always had the inherent equitable power to vacate judgments and, with respect to default judgments, have exercised great liberality in doing so in order that cases may be decided on the merits." Nowosleska, 400 N.J. Super. at 303 (citing Loranger v. Alban, 22 N.J. Super. 336, 342 (App. Div. 1952)).

The failure to establish excusable neglect under Rule 4:50-1(a) does not automatically act as a barrier to vacating a default judgment pursuant to Rule 4:50-1(f) where the equities indicate otherwise. See Morales v. Santiago, 217 N.J. Super. 496, 504-05 (App. Div. 1987) (vacating judgment under Rule 4:50-1(f) after a proof hearing due to "misgivings" about the merits of plaintiff's claim even though defendant's attorney had not adequately presented defendant's case on the motion to vacate); see also Siwiec v. Fin. Res., Inc., 375 N.J. Super. 212, 218-20 (App. Div. 2005) (vacating judgment because even though defendant did not establish excusable neglect, under subsection (f), plaintiff's right to judgment presented a novel question of law, and defendant was extended neither a notice of proof hearing nor a right to participate).

Subsection (f) of Rule 4:50-1, the "catchall" category, allows the court to vacate a final judgment for "any other reason justifying relief from the operation of the judgment or order." Ibid. "No categorization can be made of the situations which would warrant redress under subsection (f) . . . [t]he very essence of [subsection] (f) is its capacity for relief in exceptional situations. And in such exceptional cases its boundaries are as expansive as the need to achieve equity and justice." Court Inv. Co. v. Perillo, 48 N.J. 334, 341 (1966); see also DEG, LLC v. Twp. of Fairfield, 198 N.J. 242, 269-71 (2009). In order to obtain

relief under subsection (f), the movant must demonstrate the circumstances are exceptional, and that enforcement of the order or judgment would be unjust, oppressive, or inequitable. Nowosleska, 400 N.J. Super. at 304-05; City of E. Orange v. Kynor, 383 N.J. Super. 639, 646 (App. Div. 2006). For relief under subsection (f), "strict bounds should never confine its scope." Hodgson, 31 N.J. at 41.

This case has a complicated procedural history as set forth above. In short, defendant acquired the property from the IRS through a quitclaim deed. We find it compelling that when defendant first learned of the outstanding tax liens in November 2018, he attempted to pay off the liens. In fact, liens from other creditors were successfully paid off at that time. It was not until March 2019 defendant learned plaintiff had refused to accept the November 2018 payment because defendant's deed was apparently not in the chain of title. Despite not accepting the payment, plaintiff later voluntarily moved to set aside the sheriff's sale recognizing defendant's interest in the property. To be sure, defendant's efforts thereafter were not a model of efficiency in paying off the liens owed to plaintiff. However, the situation was further complicated when plaintiff thereafter filed an amended complaint in March 2020, this time naming defendant, but allegedly not properly serving him as discussed more fully above.

Viewing this matter indulgently, as required by Rule 4:50-1, we are satisfied the circumstances are sufficiently exceptional to entitle defendant to relief under Rule 4:50-1(f), and the matter should be adjudicated on the merits. Again, enforcement of the judgment would be unjust, given the unusual procedural history and defendant's good faith attempts to pay off liens, coupled with the chain of title issues.

We are therefore constrained to reverse the trial court's denial of defendant's motion to vacate the default judgment and remand for defendant to have an opportunity to file an answer to the complaint.[6] To the extent we have not otherwise addressed the arguments of either party, we have determined they lack sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E).

Reversed and remanded.

[6] Defendant shall file an answer within thirty-five days from the date of this opinion. Given the procedural history of this case, on remand the trial court may implement an expedited management order to move this case toward a timely resolution. Additionally, because we are vacating the default judgment, we need not address defendant's arguments pursuant to N.J.S.A. 54:5-97.1, which can be addressed by the trial court if defendant files a contesting answer.