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| 511 WILLOW AVENUE CONDOMINIUM ASS'N,<br><br>Plaintiff/Respondent,<br><br>-against-<br><br>MARTIN J. KIELY,<br><br>Defendant/Appellant. | **SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION**<br><br>Docket No. A-000678-23<br><br>***Civil Action***<br><br>**On Appeal From:**<br>Superior Court of New Jersey<br>Law Division, Civil Part<br>Hudson County<br><br>**Trial Court Docket No.:**<br>HUD-L-705-21<br><br>**Sat Below:**<br>Hon. Joseph Turula, P.J.Civ. |

# BRIEF AND APPENDIX OF DEFENDANT/APPELLANT, MARTIN J. KIELY

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## STATEMENT OF FACTS

Defendant/Appellant Martin J. Kiely (hereinafter referred to as "Kiely") owns two of four condominium units located at 511 Willow Avenue, Hoboken, New Jersey. 511 Willow Avenue Condominium Association (hereinafter referred to as "Willow"), the Plaintiff/Respondent, is the entity that governs the condominiums.

Well before any pleadings were filed in the Superior Court, Kiely advanced nearly $14,000.00 to repair condominium common elements, including an emergency replacement of the main sewer connection serving the development (Da154-Da155, Second Kiely Cert., ¶¶4-5). Although these repairs were made with Willow's blessing, Willow never reimbursed Kiely for the expenditure. Ibid. Accordingly, Kiely elected to treat the expenditure as a credit toward association dues payable on his two units. (Da155, Second Kiely Cert., ¶6).

While the parties disputed the accounting of Kiely's association dues, Willow began charging interest and legal fees to Kiely's accounts (Da27-Da28, Sanford Cert., ¶8(d) & ¶10(d); Da36 & Da37, Statements of Account). Ultimately, in or around the Fall of 2020, the parties—with the assistance of counsel—came to a tentative agreement to resolve their dispute, whereby Kiely would receive credit for payments made on behalf of the association but would remain responsible for interest and legal fees accrued (Da124, Settlement, ¶3.1).

However, as the parties finalized their discussions, Kiely additionally discovered that the roof over his units, an association common element, was leaking (Da155, Kiely Cert., ¶9). When he advised Willow of the leaks, he was instructed not to attempt to repair them at his own expense. Id. at ¶10. However, Willow also refused to provide Kiely with any assurance that it would, in fact, perform a repair. Id. at ¶11.

This new issue caused a breakdown in the parties' settlement discussions, and Willow rejected tender[1] of a payment made by Kiely's attorney under the settlement agreement. Ibid.

About three months later, Willow filed a lawsuit to collect the full amount of unpaid dues, late charges, and legal fees shown on Kiely's association account statement (Da8, Complaint). Due to an error by Willow's process server, Willow never effectuated personal service upon Kiely (Da156, Second Kiely Cert., ¶¶17-19). Instead, Willow obtained jurisdiction over Kiely by way of substituted mail service to the vacant condominium units he owned in the association.

The uncontested case proceeded to final judgment by default (Da4, March 18, 2022 Order Entering Judgment). As a result, Kiely was deprived of his

[1] Kiely acknowledges that the tender was delivered after a deadline established by Willow, and does not dispute that Willow was within its rights to reject payment.

ability to contest the accounting that Willow presented to the court in support of the judgment. Kiely was further unable to assert his own claims, relating to the water damage that had rendered his condominium units untenantable.

## STATEMENT OF PROCEDURAL HISTORY

On February 19, 2021, Willow filed a Complaint in the within action, seeking recovery of association fees claimed due and owing (Da8, Complaint). Although Willow was well aware that the Defendant resided at 39 Shore Drive, Highlands, New Jersey, which was listed on the Statement of Account for each of Kiley's units (Da36-Da37, Statements of Account), Willow requested process service at a number of other addresses (see, generally Da43 to Da61, Process Service Records and Due Diligence Reports). These addresses included the locations 12 Shore Drive and 5 Ocean Drive in Highlands, New Jersey, which Willow's process server noted were nonexistent (Da43, 12 Shore Drive Report; Da52, 5 Ocean Drive Report).

It appears that in February of 2021, after confirming 12 Shore Drive did not exist, the process server correctly identified 39 Shore Drive as Kiely's address and attempted to serve him there (Da43, 12 Short Drive Report). However, as Kiely explains, the individual who attempted service on that occasion must

have misread the address or knocked on the wrong door, as he wound up speaking to Kiely's neighbor (Da156, Second Kiely Cert., ¶¶18-19).

Willow conducted a USPS address change search, which returned Kiely's correct address (39 Shore Drive) as well as B5 Oceanview Terrace, Highlands, New Jersey, a condominium unit sometimes occupied by his sister (Da57, Process Service Report). Willow's process server evidently communicated with the leasing office for the latter property, and reported back that B5 Oceanview Terrace was either vacant or occupied by Kiely's sister. Ibid. According to the leasing office, Kiely resided at 39 Shore Drive.

Notwithstanding, Willow next attempted personal service at Kiely's vacant Unit No. 4 within the 511 Willow Ave. Condominium Association (Da60, 511 Willow Service Report). In or around August of 2021, Willow engaged a private investigator to again to serve Kiely.

According to the investigator's unsigned and unacknowledged affidavit of process, further attempts were made to effect personal service at the following addresses:

> 39 Shore Drive, Highlands, NJ;
> B5 Oceanview Terrace, Highlands, NJ;
> 5 Ocean Ave., Highlands, NJ;
> 45 Navesink Ave., Highlands, NJ; and
> 55 5th St., Highlands, NJ.
>
> [Da74, Uncertified Process Affidavit]

That document is also accompanied by an uncertified investigative report (Da76, Investigation Report).

Willow sought an Order authorizing substituted service of process. That relief was initially denied, but Willow renewed its motion (Da65, Pl. Cert. on Motion for Sub. Service) and on September 24, 2021 obtained an Order confirming Defendant could be served by sending regular and certified mail to the condominium unit located at B5 Oceanview Terrace, Highlands, New Jersey (Da6, Sept. 24, 2021 Order Authorizing Service).

On November 8, 2021, Willow sought to enter a default on the docket, citing Defendant's failure to file an Answer to the Complaint within the time specified by the September 24, 2021 Order (Da93, Req. for Default). Several months later, on March 1, 2022, Willow moved to enter a default judgment in the amount of $201,837.63 together with attorney's fees and costs (Da26-Da29, Sanford Cert.). That application was granted, and on April 6, 2022, judgment was entered by default (Da4, Order Entering Judgment).

Kiely asserts that he was unaware of the pending lawsuit until several months later, when he contacted Willow (Da136-137, August 3, 2022 Emails). Willow then advised Kiely it had obtained a default judgment. Ibid. Only days later , Kiely filed a *pro-se* motion seeking to vacate Willow's judgment and reopen the case (Da117, Kiely Pro-Se Cert.).

On September 9, 2022, the trial court denied Kiely's application on the sole basis that he had failed to present a meritorious defense to Willow's claims (Da3, Sept. 9, 2022 Order).

Kiely subsequently retained two different attorneys to prepare and file a motion to vacate the Plaintiff's default judgment (see Da165-Da167, Kiely Emails with Prior Counsel). However, neither attorney was able to prepare and file the application. Ibid. Finally, Kiely was able to retain new Counsel, and again sought to vacate the judgment (Da153, Second Kiely Cert.).

On September 22, 2023, The Hon. Joseph A. Turula, P.J. Civ. entered an Order denying the application, on the basis that Kiely was "properly served process" and had failed to show "the excusable neglect needed to vacate [a] default judgment…" (Da2, Sept. 22, 2023 Order). This appeal follows.

## STANDARD OF REVIEW

Defendant/Appellant Kiely seeks appellate review of the lower court's September 22, 2023 Order on that basis that the Trial Court mistakenly exercised its discretion in denying the motion to vacate.

"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 on Behalf of New Jersey

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.), aff'd, 43 N.J. 508 (1964). The decision rests in the "sound discretion of the trial court, where… there is a mistaken exercise of that discretion, reversal is in order." Davis v. DND/Fidoreo, Inc., 317 N.J.Super. 92, 101 (App. Div. 1998) (quoting Mancini, 132 N.J. at 334, (citing Housing Auth. V. Little, 235 N.J. 274, 283-84 (1994)).

Where the application concerns a default judgment, the court's discretion must be "guided by equitable principles, and in conformity with the prescription that 'any doubt should be resolved in favor of the application to set aside the judgment to the end of securing a trial upon the merits.'" Davis, 317 N.J.Super. at 100-101 (quoting Goldfarb v. Roeger, 54 N.J.Super. 85, 92 (App.Div.1959) and Loranger v. Alban, 22 N.J.Super. 336, 342 (App.Div.1952)), see also Mancini, 132 N.J. at 334, (citing Arrow Mfg. Co. v. Levinson, 231 N.J.Super. 527, 534 (App.Div.1989)).

Typically, an abuse of discretion will only "arise[ ] when a decision is 'made without a rational explanation, inexplicably depart[s] from established policies, or rest[s] on an impermissible basis.' " Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002) (quoting Achacoso-Sanchez v. Immigr. and Naturalization Serv., 779 F.2d 1260, 1265 (7th Cir.1985)). Although this standard of review "defies precise definition," the "functional approach ... examines

whether there are good reasons for an appellate court to defer to the particular decision." Ibid.

Discretion, however, means legal discretion, "in the exercise of which the judge must take account of the law applicable to the particular circumstances of the case and be governed accordingly." Alves v. Rosenberg, 400 N.J.Super. 553, 563 (App.Div.2008) (quoting State v. Steele, 92 N.J.Super. 498, 507 (App.Div.1966)). "Obviously, if the trial judge misconceives the applicable law or misapplies it the exercise of legal discretion lacks a foundation and becomes an arbitrary act." Ibid. (internal quotations omitted). "In this regard, the trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Alves, 400 N.J.Super. at 563 (quoting Maglies v. Estate of Guy, 193 N.J. 108, 116 (2007)).

## LEGAL ARGUMENT

In the instant case, the lower court mistakenly exercised its discretion when it denied Kiely's motion to vacate default judgment. The court considered the application only under Rule 4:43-1, failed to appreciate that Willow's issuance of process pursuant to an order authorizing substituted service does not prove Kiely's actual receipt of process, and improperly resolved doubts regarding process service in favor of Willow. Furthermore, the court failed to consider

that Willow improperly procured the order authorizing substituted service, as well as its default judgment, with incompetent evidence prohibited by R. 1:6-2(a) and R. 1:6-6.

An application for relief from a default judgment is governed by Court Rule 4:43-3. Applications to vacate a judgment by default are "viewed with great liberality, and every reasonable ground for indulgence is tolerated to the end that a just result is reached." Marder v. realty Construction Co., 84 N.J.Super. 313, 319 (App. Div), aff'd 43 N.J. 508 (1964).

A motion to set aside a default judgment pursuant to R. 4:43-3 should be granted "for good cause shown…" R. 4:43-3. To establish good cause the movant must demonstrate that her underlying failure to appear was excusable under the circumstances, as well as a meritorious defense to the cause of action itself or the quantum of damages assessed. U.S. Bank Natn'l As'n v. Guillaume, 209 N.J. 449, 468-469 (2012). However, the presentation of a meritorious defense is not required where the movant's failure to appear resulted from defective service of process. See Peralta v. heights Medical Center, Inc., 485 U.S. 80 (1988) and Midland Funding LLC v. Albern, 433 N.J.Super. 494, 501 (App. Div. 2013).

However, R. 4:50-1 provides additional means to vacate a judgment, whether or not secured by default. 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." Baumann v. Marinaro, 95 N.J. 380, 392 (1984). A decision to vacate a judgment lies within the sound discretion of the trial judge, guided by principles of equity. Hous. Auth. of Morristown v. Little, 135 N.J. 274, 283 (1994).

R. 4:50-1 provides a number of justifications to vacate a judgment: Section (a) permits vacation of a judgment due to "mistake, inadvertence, surprise, and excusable neglect." Section (d) allows the vacation of any order that is "void," and (e) permits vacation for *any reason justifying such relief*. In the present case, Sections (a), (d) and (e) are each consonant with the issues that Defendant now brings before the Court.

As discussed more fully below, the lower court's failure to consider the basis for *vacatur* raised under Rule 4:50-1, and to afford Kiely the benefit of all reasonable doubts arising from the motion record, resulted in a departure from the applicable law as well as the guiding principles of equity, and thereby sustained a judgment that was substantially larger than it should have been. This Panel should correct that mistake by vacating Willow's default judgment and remanding this case for pretrial discovery.

## POINT I

**(Da1)**

**THE LOWER COURT'S MISTAKEN EXERCISE OF DISCRETION ALLOWED WILLOW TO UNJUSTLY OBTAIN A JUDGMENT NEARLY TWICE THE VALUE OF THE ACTUAL CLAIM**

This Panel should reverse the lower court's decision, because between substantial justice and procedure should be resolved in favor of doing justice.

In our judicial system, "justice is the polestar and our procedures must ever be molded and applied with that in mind." New Jersey Highway Auth. v. Renner, 18 N.J. 485, 495 (1955) (citing X-L Liquors v. Taylor, 17 N.J. 444, 454 (1955)). "There is an absolute need to remember that the primary mission of the judiciary is to see justice done in individual cases. Any other goal, no matter how lofty, is secondary." Santos v. Estate of Santos, 217 N.J.Super. 411, 416 (App. Div. 1986).

In that vein, the Court Rules "shall be construed to secure a just determination, simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay." R. 1:1-2(a). "Unless otherwise stated, any rule may be relaxed or dispensed with by the court in which the action is pending if adherence to it would result in an injustice." Ibid.

Our system of justice also strives for the fair disposition of cases on the merits. See Viviano v. CBS, Inc., 101 N.J. 538, 547 (1986); Stanley v. Great Gorge Country Club, 353 N.J.Super. 475, 486 (Law Div. 2002). Our courts balance this policy goal against the competing goal to achieve "expeditious and efficient" litigation. Leitner v. Toms River Reg'l Sch., 392 N.J.Super. 80, 91 (App. Div. 2007). Accordingly, litigation deadlines should be extended in the interests of justice and to avoid punishing litigants unfairly. Id. at 91-94. The Court's efforts to strike a balance between fairness and trial-date certainty is reflected in Rule 4:24-1(c) governing extensions of discovery, which was amended as part of the Best Practices project in order to achieve these objectives. Pressler & Verniero, N.J. Court Rules, cmt. 4 on R. 1:1-2 (2019). Notwithstanding, our courts traditionally tip the scale in favor of a fair adjudication on the merits:

> [W]here the court system is not in a position to schedule a meaningful arbitration or trial date, ***a sanction that results in a deprivation of a litigant's day in court on the merits is anathema to the fair and efficient administration of justice***. We are reminded of Justice Clifford's apt comment that "[o]ur rules of procedure are not simply a minuet scored for lawyers to prance through on pain of losing the dance contest should they trip." Stone v. Old Bridge Tp., 111 N.J. 110, 125 (1988) (dissenting opinion). The rules do not exist for their own benefit. The rules, instead, are only a framework for the fair and uniform adjudication of cases brought into our system. Ragusa v. Lau, 119 N.J. 276, 283-84

> (1990) (the rules "should be subordinated to their true role, i.e., simply a means to the end of obtaining just and expeditious determinations between the parties on the ultimate merits.").
>
> [Ponden v. Ponden, 374 N.J.Super. 1, 10-11 (App. Div. 2004), emphasis added]

Our courts observe these principles in the context of cases that have been disposed by default, as well. It is well-recognized that courts hearing applications to vacate default judgments should view the arguments set forth by the movant with "great liberality" and, moreover, "should tolerate every reasonable ground" to reopen a matter in order to ensure "a just result…" Nowosleska v. Steele, 400 N.J.Super. 297, 303 (App. Div. 2008); Mancini v. EDS, 132 N.J. 330, 334 (1993). Default judgments may be unfair because they are entered unopposed and without the presentation of any contrary evidence; our courts must therefore resolve all doubts in favor of the party seeking relief from a default judgment. Ibid.

The "anathema" described by the Ponden Panel, above, is precisely what occurred in this case when the lower court denied Kiely's motion to vacate Willow's default judgment. Kiely is not to blame for the fact that Willow failed to serve him with process, and his failure to Answer to the complaint is excusable given that substituted service was not made to his actual residence. Indeed, as discussed further below, the lower court's failure to properly consider the

appropriate inquiries regarding Kiely's default, and deprived him of valid defenses and set-off claims that potentially cut Willow's claim in half.

### A. KIELY PRESENTED A MERITORIOUS CHALLENGE TO THE CALCULATION OF THE WILLOW'S DAMAGES, BASED UPON PREVIOUSLY ACKNOWLEDGED CREDITS

Kiely explains that the instant dispute over association dues tracks back to the allocation of credits for payments made by the Defendant, in reliance upon the association's prior approval, for the repair of common facilities (Da154, Second Kiely Cert., ¶4). Defendant advanced $13,200.00 that the association required to replace a main sewer line serving its condominiums. Ibid. In addition, the Defendant advanced $500.00 for masonry repairs to the stoop outside the building. Ibid. These unreimbursed advances, which total $13,700.00, would have a dramatic impact upon balance as calculated by the Plaintiff.

As Kiely incurred expenses on behalf of the association to repair common elements of the condominium property several years prior to the commencement of this action, his defense is not just a simple offset to the total damages calculation provided by the Plaintiff. The allowance of credits would drastically reduce the interest charges claimed by the Plaintiff; accounting for compounded interest charged on that sum, the appropriate reduction would be of an amount

greater than $60,000.00. The Defendant should be allowed to challenge the Plaintiff's calculation of damages based upon the credits he claims are due to him by the association.

Notably, Willow did not detail the actual calculation of dues incurred between 2013 and 2019. Instead, Plaintiff offers an accounting that simply asserts there is a "balance forward" figure of $97,179.01 for Unit 4, and a "balance forward" figure of $82,404.46 for Unit 1, accrued as of December 1, 2019 (Da36-Da37, Statements of Account; Da27-Da29, Sanford Cert. ¶¶7-11).

The only detail provided is that the "balance forward" includes a charge for attorney's fees, possibly calculated in the amount of 20% of the balance asserted as due and owing on each unit (Da29, Sanford Cert., ¶13). Further, that figure must include interest and late charges, as detailed in the calculation of additional sums accruing from January 1, 2020 forward. Id. at ¶11; Da13, Pl's. Complaint, ¶24(b-e).

However, the record available to the trial court demonstrated that the interest and late charges included in the calculation are in excess of $70,000.00, as interest is charged at a rate of 18% per annum on past-due amounts in excess of $1,500.00 (Da13, Pl's. Complaint, ¶24(d)). The amount of interest that would accrue on Plaintiff's $13,700.00 credit over a nine-year period (2013 through

2021), calculated at 18% per annum compounding annually, is a whopping $60,765.71.

Accordingly, if Plaintiff is in fact due a credit for the expenses be covered for the association, in reliance upon the Association's prior approval, then the actual amount due and payable to the Plaintiff may actually be as little as $127,371.91.[2]

Plaintiff additionally has actionable counterclaims against the Plaintiff, based upon the Association's failure to repair the deteriorating roofing over his condominium units, which potentially offset the damages recoverable by the Plaintiff. For some years, the Defendant had asked the association to repair the leaking roof in his two units. In or around 2019, the President of the association confirmed that the roof was the association's responsibility and advised Defendant that he should not to have the roof repaired himself. However, the Association has yet to perform any repairs. This ongoing failure has caused damage to the units, and rendered them untenantable. As a result, Defendant has suffered direct damage to his property as well as consequential economic losses.

[2] This figure was derived by subtracting calculated interest of $60,765.71, and the claimed credit of $13,700.00, from the total judgement amount of $201,837.63.

## B. THE JUDGMENT INCLUDES ATTORNEYS FEES, THOUGH THAT RELIEF WAS DENIED BY THE MARCH 18, 2022 ORDER FOR ENTRY OF JUDGMENT

There is, additionally, an error in the amount of the award entered by way of the Judgment, as the court expressly rejected Willow's bid for attorney's fees.

Willow sought a 20% enhancement to the compensatory portion of the Judgment, relying upon a provision of its By-Laws that states:

> In the event that the Board shall effectuate collection of said charges by resort to Counsel, the Board may add to the aforesaid charge or charges a sum or sums equal to twenty (20%) percent of the gross amount due as counsel fees, in addition to such costs allowable by law.
>
> [Da29, Sanford Cert., ¶13]

Although the provision for an award of legal fees was struck out of the Order entered on March 18, 2022 (Da5), attorneys' fees of $15,501.23 are included in both of the liens previously filed against Unit No. 1 and Unit No. 4 (Da33 & Da34, 2017 Liens). That amount is roughly twenty percent (20%) of the sum of the Past Due Maintenance Fee, Late Fees, Interest, and Special Assessments listed on both liens.

Regardless, $31,002.46 is a patently unreasonable legal fee to charge for preparing and recording a pair of association fee liens. Even $15,501.23 appears unreasonable unless the charges represent billing for other work. But in that

case, one would not expect identical fees listed on both lien documents. It seems very likely that the total charges amounted to $15,501.23 and that Mr. Kiely has been double-charged.

These lien documents garner additional import because Willow's accounting of the association dues only go back as far as December 1, 2019 (Da36 & Da37, Statements of Account). The tabulation for Unit No. 4 begins with a "balance forward" figure of more than $97,000.00 and the figure for Unit No. 1 exceeds $82,000.00. Because Willow did not present a calculation of charges incurred prior to December 1, 2019 the only insight into prior years is set forth in the association liens (Da33 & Da34, 2017 Liens).

Willow acknowledges, by way of footnotes in the Complaint, that its $201,837.63 default judgment includes the aforementioned legal fees (Da12-Da13, Pl's. Complaint, fn's. 1-2). But that disclosure is omitted entirely from the Certification of James Sanford submitted in support of its application to enter a judgment by default (Da27-Da29, Sanford Cert., ¶¶5-11). Instead, Willow seeks an additional twenty percent (20%) enhancement of the total sum—which already includes legal fees—pursuant to By-Laws (Da29, Sanford Cert., ¶13).

The inclusion of the above-discussed fee award is both unjust and contrary to the statement of reasons set forth on the bottom of the Court's decision. The

Order for entry of judgment specifies that "[t]he attorney's fees are hereby denied without prejudice subject to refiling pursuant to R. 4:42-9, as the required certification addressing the R.P.C. factors 1.5(a) was not provided" (Da5, Order Entering Judgment). If the court determined that attorney's fees were not to be included in the Judgment, then the Judgment should be reduced by more than $31,000.00..

Now that Appellant has explained the unjust nature of the judgment that is the subject of this appeal, this Brief proceeds to discuss how the lower court mistakenly exercised its discretion.

## POINT II

**(Da1)**

**THE LOWER COURT MISTAKENLY EXERCISED ITS DISCRETION BY DENYING KIELY'S MOTION TO VACATE THE DEFAULT JUDGMENT FOR INEFFECTIVE SERVICE**

The lower court's determination that Kiely was properly served is unsupported, and deviates from the indulgent standard that should be employed on a motion to vacate a default judgment. Without providing any explanation for how it reached that conclusion, it is impossible to determine whether the decision

afforded Kiely the benefit of reasonable doubts drawn from the record, or the handicap of a credibility determination drawn from conflicting papers. For these reasons, the September 22, 2023 Order should be reversed.

### A. AN ORDER AUTHORIZING SERVICE BY MAIL IS NOT IRREBUTTABLE PROOF OF EFFECTIVE SERVICE

When considering the efficacy of process service in connection to a motion to vacate a default judgment, the appropriate inquiry is not whether Plaintiff obtained an order for substituted service, but whether there was a "substantial deviation from service of process rules." M & D Associates v. Mandara, 366 N.J.Super. 341, 353 (App. Div. 2004). In the event of a substantial deviation, the court must find that the alternative form of process service met the requirements of "fundamental fairness" and "due process" under the circumstances. Id. at 355-56.

Moreover, the application for substituted service must be made on competent evidence. Ibid. R. 1:6-6 requires that a court may only hear a motion on "facts not appearing of record or not judicially noticeable" if such facts are set forth "on affidavits made on personal knowledge…" R. 1:4-4 requires any such affidavit to be signed with a certification as follows: "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

Twenty years ago, the Appellate Division considered an appeal from a R. 4:50-1(d) motion to vacate a default judgment obtained by way of substituted service of process. M&D Associates v. Mandara, 366 N.J.Super 341 (App. Div. 2004). The Panel determined that the judgment should be vacated, reasoning that substituted service was ineffective despite a court order authorizing the same. In particular, the Plaintiff who sought an order for substituted service filed an affidavit of inquiry indicating that the defendant could not be located despite searching a phone book, records of the Department of Motor Vehicles, the county tax office, and county voting records. Id. at 353. The Defendant in question was, in fact, listed in both the DMV and county voting records. Id. at 354. Accordingly, the Appellate Division determined that the affidavit filed by the Plaintiff was insufficient, and that "fundamental fairness" and "due process" required the Plaintiff to instead obtain and file affidavits from the appropriate custodian of records attesting as to the results of each search. Id. at 355-56.

The issue presented here is not whether service by mail is a deviation substantial enough to implicate consideration of fundamental fairness, but whether it is fundamentally fair deny relief from judgment where there exists a reasonable doubt that service was delivered to the wrong address. After all, a court order authorizing service by mail is not immutable. Even a sheriff's return of service is rebuttable by clear and convincing evidence. Morales v. Santiago, 217

N.J.Super. 496, 504 (App. Div. 1987); Garley v. Waddington, 177 N.J.Super. 173, 180–181 (App.Div.1981).

In this case, Kiely's residential address at 39 Shore Drive was well known to Willow. That was the address set forth in Paragraph 8 ("Notices") of the settlement agreement Willow drafted in 2020 (D126), and as well as on each of the partial statements of account (Da36 & Da37) that Willow attached to its Complaint and later offered in support of its application to enter judgment.

Why, then, did Willow spend six months directing its process servers to attempt service at every other conceivable address?

Willow initially attempted to serve process at non-existent addresses, (Da52, 5 Ocean Report; Da55 Second 5 Ocean Report), including one just down the road from 39 Shore Drive (Da43). A server was sent to the non-existent 12 Shore Drive address on February 28, 2021 (Da44), and again on March 16, 2021 (Da49). That order was evidently placed notwithstanding the fact that the process server's main office had already "located the house owned by Martin J. Kiely [a]s 39 Shore Drive" (Da43).

Willow directed its process server to B5 Oceanview Terrace on March 19, 2021 (Da57, Process Server Report), which again resulted in a contact that again pointed Willow back to 39 Shore Drive (Da58, Process Server Report).

Despite repeatedly being directed to Kiely's actual residence (Da43, Da58, Da63). The Plaintiff ultimately obtained an Order for substituted service by certified and regular mail to the B5 Oceanview Terrace address (Da6). While Kiely owned the condominium unit with that address, Willow's process server promptly reported that he had contacted the leasing office, confirmed the condominium was either vacant or occupied by Kiely's sister, and that Kiely's correct address was 39 Shore Drive (Da58, Process Server Report).

Although Willow's process server evidently attempted to serve Kiely at 39 Shore Drive of its own accord, (Da43), it appears Willow did not place a process service order to that address until August of 2021 (Da74, Unsworn Affidavit of Service).

Willow ultimately served by mail at the B5 Oceanview Terrace address despite the fact that in each case the certified mail tracking details indicated "redelivery scheduled" (Da82 & Da84, USPS Tracking Details) or were marked "unclaimed" by the Post Office and returned to Willow's Counsel (Da107 & Da117, Returned Mail).

Notably, R. 4:4-3 specifies that service by simultaneous ordinary and registered mail is considered effective "if the addressee ***refuses*** to claim or accept delivery of registered mail and if the ordinary mailing is not returned" (emphasis

added). The Rule's use of "refuses" must contemplate an affirmative act on the part of an individual to whom process service is directed, as the alternative would encourage gutter service.

It is also pertinent that the Rule specifies registered mail rather than mail with a return receipt requested. Regular mail delivered to vacant homes is not going to be returned because there is no one to receive it in the first place, whereas the same vacant condition will ensure the return of an envelope that requires a signature.

In this case, the mail returned to Plaintiff does not show any indication of being "refused" as would be necessary to establish service under R. 4:4-3. The mailings are simply "unclaimed" (see Da101, Returned Mail). The "redelivery scheduled" notations on the tracking for earlier-dispatched mailings also weigh against a finding that the mail was "refused." If Kiely had rejected delivery of those items, why would the Post Office make another attempt at delivery?

It therefore seems that the lower court improvidently granted Willow's motion to confirm substituted service by mail, and the resulting Order should not have been treated as definitive proof that Kiely was "properly served process" on September 22, 2023 (Da2, Order).

## B. KIELY SHOULD HAVE RECEIVED THE BENEFIT OF REASONABLE DOUBT, NOT A CREDIBILITY DETERMINATION

To the extent the lower court treated the September 24, 2021 Order authorizing service by mail as dispositive on the issue of proper service, Kiely was deprived of the favorable inferences that should have been drawn from the record. Further, it appears that the court may have made a determination that Kiely's Certification was not as credible as the proofs presented by Willow in support of its motion to confirm service and, later, to enter judgment.

Kiely asserts he was not in receipt of the Complaint, and was unaware that a lawsuit was underway until after a judgment had already been rendered against him by default (Da118-Da119, Kiely Pro-Se Cert., ¶¶7-10; Da157, Second Kiely Cert., ¶¶22-25). As Defendant explains:

> 18) I have learned that the Plaintiff filed two motions for substituted service, as they claimed they were unable to serve me. They claimed they attempted to serve me at 12 Shore Drive, Highlands, New Jersey, where I do not live, and at my home, which is 39 Shore Drive, Highlands, New Jersey. This is detailed in a Certification filed by Plaintiff's Counsel, which also includes a process server's due diligence affidavit indicating that an individual by the name of "Soprano" was residing in my home.
>
> 19) The person that Plaintiff's process server spoke to is my neighbor, which leads me to conclude that the process server must have misread the address provided by Plaintiff, and knocked on the wrong door.

[Da156]

The explanation that Kiely offers for his default is more feasible when considered in conjunction with the Willow's anomalous effort to serve process.

The logical approach would have started at 39 Shore Drive; the address that Willow already had for Kiely. Instead, Willow repeatedly attempted service at locations where service was bound to fail. Willow's actions could reasonably be viewed as stratagem to develop a record that would eventually invite service by mail, and increase the odds of obtaining a default judgment.

While Kiely's sworn statement offers an explanation for the initial report of contact at 39 Shore Drive in February of 2021 (Da43, Process Server Report), it admittedly contradicts other proofs offered by Willow in the course of pursuing a judgment. The most notable of these are the "Affidavit of Service" (Da74) and related report (Da76) authored by Willow's private investigator.

But the investigation report is not presented in the form of a Certification or Affidavit that complies with R.1:4-4. In fact, the private investigator's "Affidavit of Service" is not signed or certified in accordance with R. 1:4-4, either (Da74). Even the acknowledgement block is blank. Ibid.

In fact, none of the "proofs of due diligence" supplied by Plaintiff's process server were, in fact, affidavits or certifications, as would be required by the

line of M&D Associates. Willow presented these documents through a Certification of Plaintiff's Counsel (Da65), which offered and asked the court to draw conclusions from hearsay documents.

Appending those documents to a certification signed by Plaintiff's Counsel does not cure the defect, as R. 1:6-6 still requires facts to be presented to the court by way of "affidavits made on personal knowledge, setting forth only facts which are admissible in evidence to which the affiant is competent to testify…"

It is axiomatic that trial courts should not decide contested issues of material fact on the basis of conflicting affidavits without considering the demeanor of witnesses at a hearing. Conforti v. Guliadis, 245 N.J. Super. 561, 565 (App. Div. 1991); Conrad v. Michelle & John, Inc., 394 N.J. Super. 1, 12-13 (App. Div. 2007). There is certainly no reason that a court should judge the credibility of Kiely's Certification based upon the conflicting information set forth in the *unsworn* statements offered by the Plaintiff.

Willow did not comply with the rule set forth in M&D Associates, and improperly obtained its Order for Substituted Service based upon incompetent evidence. Considering the indulgent review to which Kiely is entitled on a motion to vacate a default judgment, the lower court clearly erred in concluding that Kiely was in fact served.

## POINT III

**(Da1)**

**THE TRIAL COURT FAILED TO ANALYZE THE APPLICATION UNDER RULE 4:50-1(f)**

Even if the lower court had provided support for its finding that Willow had effectuated good service in order to obtain a default judgment, it still erred by concluding its analysis when it determined Kiely had not shown excusable neglect. Because the trial court did not make a ruling upon other grounds for relief that Kiely asserted under R. 4:50-1, the decision is not entitled to deference and should be reversed.

Excusable neglect may guard the threshold to relief under R. 4:50-1(a), but it does not bar a litigant from relief under R. 4:50-1(f). See Morales v. Santiago, 217 N.J. Super. 496, 504-05 (App. Div. 1987) (vacating judgment under Rule 4:50-1(f) to address "misgivings" on the merits of a claim resulting in default judgment, notwithstanding clear deficiencies in the motion for relief); Siwiec v. Fin. Res., Inc., 375 N.J. Super. 212, 218-20 (App. Div. 2005) (vacating judgment where defendant failed to establish excusable neglect, as a default judgment had been rendered on a novel claim).

R. 4:50-1(f) provides the court with authority to vacate a judgment for

"any other reason justifying relief from the operation of the judgment or order." This provision is regarded as the "catch-all" justification for granting relief from a judgment:

> No categorization can be made of the situations which warrant redress under subsection (f)… the very essence of (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 Invest Co. v. Perillo, 48 N.J. 334, 341 (1996)]

Nevertheless, a movant's right to relief depends upon a showing that circumstances are exceptional, and that the enforcement of the judgment would be unjust, oppressive or inequitable. See U.S. Bank Nat'l. Assoc. v. Guillaume, 209 N.J. 449, 484 (2012); Lawson Mardon Wheaton Inc. v. Smith, 160 N.J. 383, 404-407 (1999); Badalmenti v. Simpkiss, 422 N.J.Super. 86, 103 (App. Div.), certif. den., 208 N.J. 600 (2011). In deciding if relief is warranted, a court may consider the movant's delay, the justification for its request, and the potential prejudice to the responding party. Parker v. Marcus, 281 N.J.Super. 589, 593 (App. Div. 1995).

Kiely submits that the totality of circumstances surrounding the entry of Plaintiff's default judgment warrant relief under R. 4:50-1(f). First, as has been previously discussed, there is reasonable doubt as to whether or not Plaintiff

succeeded in effectuating service of process upon the Defendant under R. 4:4-3. Moreover, as discussed *infra*, there is a reasonable doubt as to whether Willow's mailed notices were actually delivered to Kiely, and therefore whether he ever received notice that default had been entered against him on the docket, as required by R. 4:43-1.

The failure to notify Kiely that a default had been entered upon the docket caused material prejudice. Only nine days after discovering that judgment had been entered against him, Kiely filed a *pro-se* application to vacate (Da119). Had Defendant been properly notified of the default, as required by R. 4:43-1, his application likely would have been sufficient to vacate the default and enter an answer out of time. Instead, the application was denied for failure to set forth a cognizable defense. Kiely was there fore prejudiced because he was faced with a heavier burden.

Kiely thereafter sought the assistance of Counsel to prepare and file a conforming motion under R. 4:50-1. However, his efforts to secure the assistance of Counsel were hampered by the death of his nephew, occurring on September 18, 2022 (Da157, Kiely Cert, ¶¶29-30).

Defendant engaged James Burke, Esq. as Counsel on or about February 8, 2023, for the purpose of vacating the Plaintiff's default judgment (Da158, Kiely

Cert, ¶30). Unfortunately, Mr. Burke was unable to handle the application, and on or about March 3, 2023 referred Kiely to Robert Roglieri, Esq. for the same purpose (Id. at ¶¶31-32). Although Kiely also retained Mr. Roglieri to prepare and file the necessary motion, no motion was filed. Thus, Kiely terminated Mr. Roglieri, obtained a refund of his retainer fee, and retained his present Counsel to file the motion. Id. at ¶¶33-34.

Kiely evidently acted with alacrity to address the default judgment, and sought to reopen this matter to assert his defenses. Although his initial *pro-se* effort was unsuccessful, and his subsequent efforts were derailed shortly thereafter by a personal tragedy, Kiely did retain two other attorneys to prepare the proper motion to vacate the default judgment on the grounds of excusable neglect and the failure of process service. He did so while several months remained to file a timely motion under R. 4:50-1(a).

Defendant submits that these factors, in conjunction with the Plaintiff's failure to serve Defendant with process, constitute exceptional circumstances that warrant reopening of the default judgment pursuant to R. 4:50-1(f).

## CONCLUSION

By virtue of the foregoing arguments and authorities, Defendant/Appellant Martin J. Kiely respectfully submits that this Court should reverse the September 22, 2023 Order denying his motion to vacate default judgment, and remand this matter to the Law Division for further proceedings.

Respectfully Submitted,

**SCHUMANN HANLON MARGULIES, LLC**
*Counsel for the Defendant/Appellant*

***/s/ John J Clark IV, Esq.***
John J Clark IV, Esq.

# Superior Court of New Jersey

## Appellate Division

Docket No. A-0678-23

| | |
|---|---|
| 511 WILLOW AVENUE CONDOMINIUM ASSOCIATION, INC.<br><br>*Plaintiff*,<br><br>v.<br><br>MARTIN J. KIELY,<br><br>*Defendant.* | SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION<br><br>Docket No.: A-0678-23<br><br>**CIVIL ACTION**<br><br>On Appeal from the Superior Court of New Jersey, Law Division, Civil Part, Hudson County<br><br>Docket No. Below: HUD-L-0705-21<br><br>SAT BELOW: Joseph A. Turula, P.J.Cv. |

**OPPOSITION BRIEF ON BEHALF OF PLAINTIFF-RESPONDENT TO APPELLANT'S APPEAL OF DENIAL OF MOTION TO VACATE DEFAULT JUDGMENT.**

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## PRELIMINARY STATEMENT

This case involves defendant Martin J. Kiely's ("**Defendant**") appeal of the lower court's denial of his motion to vacate the default judgment entered against him and in favor of plaintiff 511 Willow Avenue Condominium Association, Inc. ("**Plaintiff")**. The underlying dispute concerns Plaintiff's attempts to recover an enormous amount of association fees owed to it by Defendant, who is the owner of two (2) of the Plaintiff's condominium units (the "**Property**").

By virtue of his ownership of the Property, Defendant is a member of the Plaintiff's association ("**Association**") and he must therefore pay corresponding condominium fees as required by the Association Master Deed and By-laws. That is not disputed. Likewise, Defendant does not dispute that he owes the Association money. Instead, he argues that he owes *less* than the amount stated in the judgment that was entered against him and that he was not properly served.

However, Defendant's instant appeal constitutes a third attempt by him to challenge the default judgment that was entered against him on March 18, 2022. On September 9, 2022, Defendant's first motion to vacate the default judgment was properly denied for failure to present a meritorious defense, and on September 22, 2023, Defendant's second motion to vacate the default judgment was similarly properly denied for failure to demonstrate excusable neglect.

The default judgment was precipitated by Defendant's regrettable attempts at evading service by Plaintiff—which itself follows Defendant's practice of skirting his obligation to pay the condominium fees he admits he owes to Plaintiff—and the granting of Plaintiff's motion for substitute service.

In any event, the lower court's denial should be affirmed because:

1. The lower court did not abuse its discretion in finding that Defendant failed to demonstrate excusable neglect to warrant vacating the default judgment;
2. Defendant has again failed to identify any meritorious defense to warrant vacating the default judgment;
3. The lower court did not abuse its discretion in finding that service was properly effectuated on defendant in accordance with the substitute service order; and
4. Defendant's remaining arguments are without merit.

Therefore, the lower court's order denying Defendant's second motion to vacate default judgment should be affirmed.

.

## PROCEDURAL HISTORY

On February 19, 2021, Plaintiff filed its Complaint against the Defendant. (Da8).

On or about April 27, 2021, Plaintiff moved for substitute service pursuant to *Rule* 4:4-4(b)(3). (Pa135 to 136). On or about May 14, 2021, the Court denied that motion without prejudice, and directed Plaintiff to establish whether a DMV check was performed, and whether service had been attempted by certified mail. (*Ibid.*)

Thereafter, Plaintiff not only performed a DMV check and sent certified mail, it also hired a private investigator to confirm Defendant's address. (Pa18).

On or about August 30, 2021, Plaintiff moved again for substitute service pursuant to *Rule* 4:4-4(b)(3). (*Ibid.*) On or about September 24, 2021, an order was entered granting substitute service at Defendant's last known address at B5 Oceanview Terrace, Highlands, New Jersey 07732. (*Ibid.*) The Order deemed that service on the defendant was effectuated as of the date of the order. (*See id.*)

Pursuant to the order entered on or about September 24, 2021, the deadline for Defendant to answer, move or otherwise plead with respect to the complaint was no later than October 29, 2021. (*See id.*) Defendant failed to answer, move, or otherwise plead by that date.

Accordingly, on or about November 4, 2021, Plaintiff requested that the Clerk of Court enter default against Defendant. (Pa137). On November 8, 2021, the Clerk

of the Court entered Default against Defendant. (Pa22). On or about November 8, 2021, Plaintiff sent a copy of the request for default to Defendant. (Pa23).

On or about December 17, 2021, Plaintiff sent the notice of entry of default to Defendant. (Pa24). On or about January 21, 2022, the certified mail enclosing the notice of default was returned to sender as unclaimed and unable to forward. (Pa25).

On March 1, 2022, Plaintiff moved for default judgment. (Da4 to 5). On March 18, 2022, the Court granted Plaintiff's motion for default judgment, in part, and in the amount of $201,837.63. (*Id.*) On August 23, 2022, our office received Defendant's purported motion to vacate the default judgment. On September 9, 2022, the lower court denied Defendant's first motion to vacate default judgment "for failure to present a meritorious defense to the case." (Da3).

On June 21, 2023—ten (10) months since Defendant's prior motion—Defendant filed his second motion to vacate default judgment. (*See* Da1 to 2). On September 22, 2023, the lower court once again denied Defendant's motion to vacate default judgment. (*Id.*)

## PLAINTIFF'S OPPOSITION STATEMENT OF FACTS

Defendant is the owner of two (2) of the Plaintiff's condominium units (collectively, the "**Property**") located at the Plaintiff's address: (a) Block #167, Part of Lot #3 C0001, Unit 1, 511 Willow Avenue, Hoboken, New Jersey 07030 ("**Unit 1**"); and (b Block #167, Part of Lot #3 C000C, Unit 4, 511 Willow Avenue, Hoboken, New Jersey 07030 ("**Unit 4**"). (Pa32 to 91). By virtue of his ownership of the Property, Defendant is a member of the Plaintiff's association. (Pa82 to 132). By virtue of being a member of the Association, Defendant must pay corresponding fees as required by the Association Master Deed and By-laws. (*See ibid.*)

On or about February 28, 2017, Plaintiff filed liens against Unit 1 and Unit 4 for amounts still unpaid by Defendant. (Da33 to 35). As a result of the liens, Defendant has been on notice of his debt for over three (3) years. (Pa28). As of December 1, 2020, Defendant had not paid common expenses pursuant to the terms of the Master Deed and Bylaws of the Association and owes the Association a sum of $92,435.80 for Unit 1, which continues to accrue. (Pa28 to 29).

As of November 1, 2020, Defendant had not paid common expenses pursuant to the terms of the Master Deed and Bylaws of the Association and owes the Association a sum of $109,401.63 for Unit 4, which continues to accrue. (Pa29 to 30). As of December 1, 2020 and without limitation, Defendant owes Plaintiff a total of at least $201,837.63 for the Property, which continues to accrue. Defendant does

not dispute that he owes an extraordinary sum of unpaid association dues to Plaintiff; instead, he asserts that there should be a set-off for an expenditure he alleges he incurred to repair a main sewer connection to one of the condominium units. (Def.'s Br. at 1). Notably, Defendant states that "[he] elected to treat the expenditure as a credit toward" the unpaid dues, and does not identify any agreement by the Plaintiff to reimburse him for the alleged expenses. Indeed, Defendant specifically identifies an instruction by Plaintiff "not to attempt to repair" a subsequent element of the Unit at his own expense. (Def.'s Br. at 2).

Additionally, Defendant asserts that "[d]ue to an error by [Plaintiff's] process server, [Plaintiff] never effectuated personal service[,]" but Defendant fails to note the extensive efforts taken by Plaintiff's agents to effectuate personal service on Defendant. Although not an exhaustive list, Plaintiff attempted to serve process on Defendant as follows:

- On or about February 19, 2021, March 1, 2021 and March 10, 2021, Plaintiff requested that Defendant's former counsel accept service of process via email. He did not respond.
- On February 23 and 28, 2021, after counsel did not initially respond, **Plaintiff's process server attempted to personally serve Defendant at 39 Shore Drive, Highlands, New Jersey 07732**. (Pa140 to 146).
    - Defendant has admitted that 39 Shore Drive is his address. (Def.'s Br. at 3-4).
- On March 19, 2021, Plaintiff's process server attempted to personally serve Defendant with the aforementioned documents at B5 Oceanview

Terrace, Highlands, New Jersey 07732, which was an address Plaintiff's private investigation firm, Apex Investigations, confirmed. (Pa16).

  - Defendant has admitted that he is the owner of this property, which he sometimes allows his sister to occupy. (Def.'s Br. at 4).

  - Defendant's former attorney, Mr. Roglieri, confirmed that B5 Oceanview Terrace was Defendant's address. (Da163). In that same email thread, Defendant himself confirmed that B5 Oceanview Terrace was his address. (Da165 to 166).

- On or about March 11, 2021, Plaintiff attempted to personally serve Defendant at 5 Ocean Drive, Highlands, New Jersey 07732, which was another address that Apex Investigations confirmed as a recent address for Defendant. (Pa11).

- On March 16 and 17, 2021, Plaintiff's process server attempted to personally serve Defendant with the aforementioned documents at the 511 Willow Avenue, Unit #4, Hoboken, New Jersey 07030, which is one of the properties at issue in the Complaint. (Pa13).

- On August 7, 8, and 15, 2021, Mr. Mark Rusin of Apex Investigations attempted to personally serve Defendant with the aforementioned documents at 39 Shore Drive, Highlands, New Jersey 07732 and B5 Oceanview Terrace as well as three (3) other addresses. *See id.*

  - As previously stated, Defendant has admitted that 39 Shore Drive is his address. (Def.'s Br. at 3-4).

  - Mr. Rusin also made telephonic contact with an individual who is believed to be Defendant's daughter Veronica. She agreed to forward a message to Defendant. (Pa146).

  - Moreover, Mr. Rusin also left a telephonic message on Defendant's voicemail machine. (*See id.*)

Accordingly, two different process servers (DGR Legal and Apex Investigations) made no less than three attempts to serve Defendant at his admitted home address (39 Shore Drive). Defendant's assertion that Plaintiff's process server

"must have misread the address or knocked on the wrong door" is, therefore, entirely unconvincing. (Def.'s Br. at 3-4).

Furthermore, the September 24, 2021 order authorized substitute service on B5 Oceanview Terrace, Highlands, New Jersey 07732. Defendant now admits that he owns that address that is "sometimes occupied by his sister." (Def.'s Br. at 4). However, this is contradicted by an email exchange with Defendant's former attorney, Mr. Roglieri, wherein Defendant and the prior attorney each confirmed that B5 Oceanview Terrace was Defendant's address. (Da163, Da165 to 166).

Indeed, Defendant has a history of flouting court processes. Defendant, a former police officer, was previously indicted for using a vacant property as his own address and collect FEMA (Federal Emergency Management Agency) funds as a result. (Pa151 to 153). Hence, this is not the Defendant's first time using his ownership of multiple properties to obstruct the fair administration of our judicial system.

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## LEGAL ARGUMENT

## STANDARD OF REVIEW

"The decision whether to grant [a motion to vacate default judgment] is left to the sound discretion of the trial court and will not be disturbed absent an abuse of discretion." *Triffin v. Maryland Child Support Enforcement Admin.*, 436 N.J. Super. 621, 629 (Law Div. 2014) (citing *Mancini v. EDS*, 132 N.J. 330, 334 (1993)) (emphasis added). An abuse of discretion will usually only "arise[ ] when a decision is 'made without a rational explanation, inexplicably depart[s] from established policies, or rest[s] on an impermissible basis.'" *Flagg v. Essex Cty. Prosecutor*, 171 N.J. 561, 571 (2002) (quoting *Achacoso-Sanchez v. Immigration and Naturalization Serv.*, 779 F.2d 1260, 1265 (7th Cir. 1985)).

*Rule* 4:50-1(a) authorizes relief from a judgment entered as a result of "mistake, inadvertence, surprise or excusable neglect." *DEG, LLC v. Twp. of Fairfield*, 198 N.J. 242, 262-63 (2009). "The four identified categories . . . , when read together, as they must be, reveal an intent . . . to encompass situations in which a party, through no fault of its own, had engaged in erroneous conduct or reached a mistaken judgment on a material point at issue in the litigation." *Id.* at 262. Only "litigation errors that a party could not have protected against" are afforded relief under *Rule* 4:50-1(a). *Id.* at 263.

"The law regarding vacating default judgment pursuant to *Rule* 4:50–1 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.'". *Triffin*, 436 N.J. Super. at 629 (quoting *Mancini*, 132 N.J. at 334). Indeed, the Court Rule permitting judgments to be reopened as designed to extend a remedy only in rare situations. *See Greenberg v. Owens*, 31 N.J. 402, 405 (1960).

"A default judgment will not be disturbed unless 1) the neglect to answer or otherwise appear and defend was excusable under the circumstances, and 2) the defendant has a meritorious defense, either to the cause of action itself or, if liability is not disputed, to the quantum of damages assessed." *Triffin*, 436 N.J. Super. at 629 (emphasis added). The failure to demonstrate either prong is fatal to a motion to vacate default judgment.

## POINT I

### THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT DEFENDANT FAILED TO DEMONSTRATE EXCUSABLE NEGLECT.

As previously stated, "[t]he decision whether to grant such a motion is left to the sound discretion of the trial court and will not be disturbed absent an abuse of discretion." *Triffin*, 436 N.J. Super. at 629 (citing *Mancini*, 132 N.J. at 334). Accordingly, for Defendant's appeal to be successful, he must prove that the lower court abused its discretion when it found that he failed to demonstrate excusable neglect. Defendant has failed to prove that the lower court abused its discretion. Accordingly, the appeal should be denied.

Indeed, "[s]everal cases have liberally construed the term excusable neglect . . . [however,] excusable neglect or mistake leading to a default will not be recognized when the conduct was merely careless and reflected a lack of diligence or planning . . . ." *Triffin*, 436 N.J. Super. at 629-30.

Here, the lower court found that Defendant lacked excusable neglect because "they were properly served process and their personal loss, though unfortunate, d[id] not justify the defendant's failure to answer as it occurred nineteen months after the case commenced . . . and six months after default judgment was entered." (Da 1 to 2).

Defendant appears to largely abandon any argument concerning whether his "neglect to answer or otherwise appear and defend was excusable under the circumstances". Instead, Defendant relies on his argument of improper service and the argument that lack of excusable neglect does not bar relief under *Rule* 4:50-1(f). Those arguments are addressed below and do not demonstrate any basis for overturning the lower court's denial of Defendant's motion. *See infra* Points III & IV, respectively. In any event, there is simply no excusable neglect that Defendant could demonstrate to excuse his utter failure to move to vacate the default judgment until about August 23, 2022, which is more than five months after default judgment was entered on March 18, 2022; 18 months after the complaint was filed on February 19, 2021, and after numerous services attempts to addresses that Defendant admits he was associated with, *see infra* Point III.

To the extent that Defendant seeks to remedy his failure to address his lack of excusable neglect in his Reply submission, we respectfully request an opportunity to submit a surreply limited to that issue.

## POINT II

### DEFENDANT FAILED TO IDENTIFY ANY MERITORIOUS DEFENSE SUFFICIENT TO VACATE DEFAULT JUDGMENT.

Defendant must also prove that the lower court abused its discretion when it found that he failed to identify any meritorious defense sufficient to vacate the default judgment. *See Triffin*, 436 N.J. Super. at 629 (citing *Mancini*, 132 N.J. at 334) ("[a] default judgment will not be disturbed unless . . . the defendant has a meritorious defense, either to the cause of action itself or, if liability is not disputed, to the quantum of damages assessed."). Defendant failed to prove such abuse of discretion with regard to his alleged meritorious defenses as well. Therefore, for this additional reason, the appeal should be denied.

In this regard, Defendant does not dispute liability. Instead, he raises two arguments concerning the quantum of damages, neither of which has merit, and neither of which constitutes a meritorious defense:

1. Defendant has alleged counterclaims and/or claims for offsets regarding monies he allegedly advanced to the Plaintiff to pay for building repairs, which he asserts overly inflates the value of the default judgment entered against him.
2. That the March 19, 2022 default judgment allegedly included attorneys' fees that the Court denied for failure to provide the required certification addressing the RPC 1.5(a) factors.

The underlying dispute in this case concerns Defendant's failure to pay over $200,000 in his fees to the Association. Defendant does not address Plaintiff's claim

that he is in significant arrears to the Association for unpaid association dues. Defendant simply has no excuse for his brazen failure to pay his dues. Indeed, even if Defendant had viable counterclaims—which he does not—that would not be a basis for vacating default judgment, as such claims could be raised in a separate action.

Instead, Defendant claims he is entitled to offsets for supposed credits he afforded the Association to repair certain common elements of the Property. Notably, Defendant states that "[he] elected to treat the expenditure as a credit toward" the unpaid dues, and does not identify any agreement by the Plaintiff to reimburse him for the alleged expenses. Defendant's allegations are bereft of any documentary evidence or any written agreement between the Defendant and the Association. Defendant essentially asks this Court to take his word, several years into a defaulted litigation in which he chose not to appear, that there was such a handshake or verbal agreement with the Association to undertake over $13,000 in repairs even though he admits the Association told him he would not be reimbursed for any such repairs. (Def.'s Br. at 2). Thus, we submit that Defendant's allegations are not credible and unsupported by convincing evidence.

Indeed, Defendant specifically identifies an instruction by Plaintiff "not to attempt to repair" a subsequent element of the Unit at his own expense. (Def.'s Br. at 2). Accordingly, not only was there no agreement that Defendant would be

reimbursed for any repairs he made, Defendant actually *admits* the Association instructed him not to make the repairs because he would not be reimbursed for them.

Finally, respecting Defendant's argument concerning the Court's denial of attorneys' fees, he confuses attorneys' fees that the Plaintiff incurred "for previous collection efforts between years 2012-2017"[1] for Unit 1, and "for previous collection efforts between years 2013-2017"[2] for Unit 4 on the one hand, and attorneys' fees that Plaintiff incurred in commencing the instant action and engaging in the necessary motion practice that resulted in the entry of default judgment against Defendant, on the other hand.

As alleged in the Complaint, the former category of attorneys' fees relates to fees for collection efforts by the Plaintiff regarding the Defendant's unpaid association dues pursuant to. (Da10 to 11). Those efforts, included, without limitation, filing liens against the units owned by the Defendant. Defendant expressly agreed to pay for those reasonable fees in accordance with Article 2.2(1)(a) of the Bylaws of the Association, which states:

> It shall be the right and duty of the governing board to attempt to recover unpaid common charges, together with interest thereon, and expenses of the proceeding, **including reasonable attorney's fees**, in an action brought against any unit owner in default of his obligation

[1] (Da12 to 13).

[2] (Da13 to 14).

> to pay the same; or by foreclosure of the lien on any unit in respect to which such default occurred.

Moreover, Defendant's argument that the Complaint included a footnote acknowledging the inclusion of those fees in the damages sought, while the February 22, 2022 Certification of James Sanford did not, is entirely irrelevant. Plaintiff's disclosure in the complaint—the case initiating document—means that this disclosure was made at the very inception of the case, and the lower court was well aware of the extent of Plaintiff's request. Indeed, the Complaint was included as an exhibit to Plaintiff's motion for default judgment. (Da8 to 20).

The latter category of attorneys' fees (associated with the motion for default judgment itself) was not included as damages in Plaintiff's motion for default judgment and the request for such attorneys' fees was nevertheless denied without prejudice subject to refiling." (*See* Da4 to 5; emphasis added). Therefore, Defendant's argument regarding attorneys' fees does not constitute a basis to overturn the lower court's decision to deny Defendant's motion to vacate.

## POINT III

## THE COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT SERVICE WAS PROPERLY EFFECTUATED ON DEFENDANT IN ACCORDANCE WITH THE COURT'S SEPTEMBER 24, 2021 ORDER.

"Defective serve that results in a 'substantial deviation from service of process rules' typically makes a judgment void." *M & D Associates v. Mandara*, 366 N.J. Super. 341, 352-53 (App. Div. 2004) (citing *Jameson v. Great Atl. & Pac. Tea Co*., 363 N.J. Super. 419, 425 (App.Div.2003); *Sobel v. Long Island Entm't Prods., Inc.*, 329 N.J. Super. 285, 293 (App.Div.2000)). However, "even if there . . . [is] a technical defect in the method of service of process, defendant would not be automatically entitled to vacate the default judgment against him." *Citibank, N.A. v. Russo*, 334 N.J. Super. 346, 352 (App. Div. 2000). "Where due process has been afforded a litigant, technical violations of the rule concerning service of process do not defeat the court's jurisdiction." *Ibid.* (quoting *Rosa v. Araujo*, 260 N.J. Super. 458, 463 (App.Div.1992)). "Thus, 'not every defect in the manner in which process is served renders the judgment upon which the action is brought void and unenforceable.'" *Ibid.* (quoting *Rosa*, 260 N.J. Super. at 462).

Defendant raises an oft-repeated argument that he was not served properly. This argument is plainly without merit as service was effectuated on Defendant in accordance with the Court's September 24, 2021 order pursuant to *Rule* 4:4-4(b)(3)

granting substitute service on Defendant's last known address at B5 Oceanview Terrace, Highlands, NJ 07732. That order deemed that service on the defendant was effectuated as of the date of the order. Therefore, not only was there no "technical defect" in the service of process, which would nevertheless not provide a basis for overturning the lower court's order, but service was properly effectuated.

Indeed, while Defendant now attempts to distance himself from his admitted ownership of B5 Oceanview Terrace—as a condominium unit sometimes occupied by his sister (Def.'s Br. at 4)—he confirmed in an email exchange with his former attorney that his address was B5 Oceanview Terrace, which was enclosed to Defendant's motion below as Exhibit H. (Da163). In fact, in Defendant's email dated April 24, 2023, he stated:

> I was failed by your firm. I want my 5000.00 retainer back and my documents. I want no communication from the attorney or you.
>
> I will pickup the documents and check for the money on Tuesday unless you FedEx to me on Monday.
>
> Your associate lied to me IN WRITING! Check his emails for yourself.
>
> **Martin Kiely**
> **B5 Oceanview Terrace**
> **Highlands, New Jersey**
> **07732**
>
> PS NO communication I do not wan your firm's representation. I do not trust you firm or Roglieri.

Sent from my iPhone

(Da165; emphasis added).

That same day, April 24, 2023, Defendants prior attorney, Mr. Roglieri replied by stating, in part: "We understand that you have terminated our representation. We will FedEx your file to: **Mr. Martin Kiely, B5 Oceanview Terrace, Highlands, New Jersey 07732**." (Da163; emphasis added).

If that were not enough, Defendant also asserts that his *other* admitted address at "39 Shore Drive was well known to [Plaintiff]." (Def.'s Br. at 22). However, the fact is that personal service *was* attempted at the address Defendant **admits** was his home address—39 Shore Drive, Highlands, New Jersey 07732—**at least three (3) separate times**.

Plaintiff not only hired a process serving company, but also a private investigator to attempt service of process at not only 39 Shore Drive, but also numerous other addresses owned by Defendant. Accordingly, two different process servers (DGR Legal and Apex Investigations) made no less than three attempts to serve Defendant at his admitted home address (39 Shore Drive). Defendant's assertion that Plaintiff's process server "must have misread the address or knocked on the wrong door" is, therefore, entirely unconvincing. (Def.'s Br. at 3-4).

Indeed, Plaintiff's motion for substitute service was the culmination of a long series of service attempts at addresses associated with the Defendant, and his evasion of service, *to wit*:

- On or about February 19, 2021, March 1, 2021 and March 10, 2021, Plaintiff requested that Defendant's former counsel accept service of process via email. He did not respond.
- On February 23 and 28, 2021, after counsel did not initially respond, **Plaintiff's process server attempted to personally serve Defendant at 39 Shore Drive, Highlands, New Jersey 07732**. (Pa140 to 146).
    - Defendant has admitted that 39 Shore Drive is his address. (Def.'s Br. at 3-4).
- On March 19, 2021, Plaintiff's process server attempted to personally serve Defendant with the aforementioned documents at B5 Oceanview Terrace, Highlands, New Jersey 07732, which was an address Plaintiff's private investigation firm, Apex Investigations, confirmed. (Pa16).
    - Defendant has admitted that he is the owner of this property, which he sometimes allows his sister to occupy. (Def.'s Br. at 4).
    - Defendant's former attorney, Mr. Roglieri, confirmed that B5 Oceanview Terrace was Defendant's address. (Da163). In that same email thread, Defendant himself confirmed that B5 Oceanview Terrace was his address. (Da165 to 166).
- On or about March 11, 2021, Plaintiff attempted to personally serve Defendant at 5 Ocean Drive, Highlands, New Jersey 07732, which was another address that Apex Investigations confirmed as a recent address for Defendant. (Pa11).
- On March 16 and 17, 2021, Plaintiff's process server attempted to personally serve Defendant with the aforementioned documents at the 511 Willow Avenue, Unit #4, Hoboken, New Jersey 07030, which is one of the properties at issue in the Complaint. (Pa13).

- On August 7, 8, and 15, 2021, Mr. Mark Rusin of Apex Investigations attempted to personally serve Defendant with the aforementioned documents at 39 Shore Drive, Highlands, New Jersey 07732 and B5 Oceanview Terrace as well as three (3) other addresses. *See id.*
    - As previously stated, Defendant has admitted that 39 Shore Drive is his address. (Def.'s Br. at 3-4).
    - Mr. Rusin also made telephonic contact with an individual who is believed to be Defendant's daughter Veronica. She agreed to forward a message to Defendant. (Pa146).
    - Moreover, Mr. Rusin also left a telephonic message on Defendant's voicemail machine. (*See id*.)

Therefore, Defendant's arguments regarding service are baseless. As a matter of law, service was effectuated on the Defendant on September 24, 2021.

Nevertheless, Defendant relies substantially on *M & D Associates* to argue that service was not effectuated. There, the Appellate Division ordered that default judgment be vacated where substitute service was effectuated via publication. There are several key distinguishing facts present in *M & D Associates* that are not present in this matter; therefore, the Court should not find the case persuasive at all.

In *M & D Associates*, the movant moved for substitute service by publication, a method that the Appellate Division noted "is hardly favored and is the method of service that is **least likely** to give notice." *Id.* at 353 (emphasis added) (citing *Modan v. Modan*, 327 N.J. Super. 44, 48 (App. Div. 2000)). The Appellate Division specifically noted that "[a]s contrasted with the service by court order as found in *R.* 4:4–4(b)(3) and 4:4–5(d), *R.* 4:4–5(c) is an alternative method of service of

process, but it must be consistent with due process." *Ibid.* Substitute service by publication "specifically requires a diligent inquiry prior to service . . . ." *Ibid.* Therefore, it is no wonder that the Appellate Division found that service was defective enough to warrant vacating judgment when the movant's affidavit was plainly inaccurate and defective itself.[3]

In contrast, Plaintiff did not serve Defendant by publication. Instead, the September 24, 2021 substitute service order was granted pursuant to *Rule* 4:4-4(b)(3) and, as previously stated, was granted in accordance with the following recitation of facts:

- On or about February 19, 2021, March 1, 2021 and March 10, 2021, Plaintiff requested that Defendant's former counsel accept service of process via email. He did not respond.
- On February 23 and 28, 2021, after counsel did not initially respond, **Plaintiff's process server attempted to personally serve Defendant at 39 Shore Drive, Highlands, New Jersey 07732**. (Pa140 to 146).
    - Defendant has admitted that 39 Shore Drive is his address. (Def.'s Br. at 3-4).
- On March 19, 2021, Plaintiff's process server attempted to personally serve Defendant with the aforementioned documents at B5 Oceanview Terrace, Highlands, New Jersey 07732, which was an address Plaintiff's private investigation firm, Apex Investigations, confirmed. (Pa16).
    - Defendant has admitted that he is the owner of this property, which he sometimes allows his sister to occupy. (Def.'s Br. at 4).

[3] As stated by Defendant, the "affidavit of inquiry indicat[ed] that the defendant could not be located despite searching a phone book, records of the Department of Motor Vehicles [DMV], the court tax office, and county voting records." (Def.'s Br. at 21). However, "[t]he [d]efendant in question was, in fact, listed in both the DMV and county voting records." (*Ibid.*)

  - Defendant's former attorney, Mr. Roglieri, confirmed that B5 Oceanview Terrace was Defendant's address. (Da163). In that same email thread, Defendant himself confirmed that B5 Oceanview Terrace was his address. (Da165 to 166).

- On or about March 11, 2021, Plaintiff attempted to personally serve Defendant at 5 Ocean Drive, Highlands, New Jersey 07732, which was another address that Apex Investigations confirmed as a recent address for Defendant. (Pa11).

- On March 16 and 17, 2021, Plaintiff's process server attempted to personally serve Defendant with the aforementioned documents at the 511 Willow Avenue, Unit #4, Hoboken, New Jersey 07030, which is one of the properties at issue in the Complaint. (Pa13).

- On August 7, 8, and 15, 2021, Mr. Mark Rusin of Apex Investigations attempted to personally serve Defendant with the aforementioned documents at 39 Shore Drive, Highlands, New Jersey 07732 and B5 Oceanview Terrace as well as three (3) other addresses. *See id.*

  - As previously stated, Defendant has admitted that 39 Shore Drive is his address. (Def.'s Br. at 3-4).

  - Mr. Rusin also made telephonic contact with an individual who is believed to be Defendant's daughter Veronica. She agreed to forward a message to Defendant. (Pa146).

  - Moreover, Mr. Rusin also left a telephonic message on Defendant's voicemail machine. (*See id.*)

Therefore, Plaintiff's substitute service was not subject to submission of an affidavit of inquiry and, in any event, was substantially supported by the aforementioned service attempts. In that regard, Plaintiff's agents made no less than three (3) service attempts at Defendant's admitted address at 39 Shore Drive. It was only after two (2) failed attempts on February 23 and 28, 2021, at serving Defendant at that address that Plaintiff's agents sought to serve Defendant elsewhere. Indeed, a

third attempt at serving Defendant at 39 Shore Drive, as well as attempts to contact him telephonically were unsuccessful. It was only based on these recurring service attempts that Plaintiff successfully moved for substitute service at an address (B5 Oceanview Terrace) with which Defendant admits he has an association.[4] (*See* Def.'s Br. at 4, 23).

Moreover, Defendant's argument that Plaintiff's mailing to him by regular and certified mail was not "refused" is both off base and irrelevant. (Def.'s Br. at 23-24). First, Defendant appears to misattribute a quotation from *Rule* 1:5-4(b) ("If the addressee fails to claim or refuses to accept delivery of certified or registered mail . . .") (Def.'s Br. at 23-24), to *Rule* 4:4-3. However, *Rule* 1:5-4(b) states that "[i]f service is simultaneously made by ordinary mail and certified or registered mail, service shall be deemed complete on mailing of the ordinary mail." *R.* 1:5-4(b). Therefore, even under Defendant's argument, service would have been deemed completed upon Plaintiff's mailing of ordinary mail.

Second, Defendant's reliance on *Rule* 4:4-3 seems to be an error, as that rule is not relevant to this analysis. Instead, the relevant rule is *Rule* 4:4-4(b)(3), which states that "any defendant may be served as provided by court order, consistent with due process of law." *R.* 4:4-4(b)(3). As already explained, the lower court's

[4] Indeed, on May 14, 2021, the lower court denied Plaintiff's initial substitute service motion, and required Plaintiff to take the additional steps of completing a DMV check or attempting service "by way of certified mail." (Pa135 to 136).

September 24, 2021 order deemed that service had been effectuated via regular and certified mail as of the date of the order.

Furthermore, the Appellate Division noted in *M & D Associates*, the movant's "motion to vacate was, under the circumstances, brought within a reasonable time." *Id.* at 352. However, Defendant's motion was untimely pursuant to *Rules* 4:50-1 and 4:50-2. Importantly, *Rule* 4:50-2 states that such a motion "**shall** be made within a reasonable time, and for reasons (a), (b) and (c) of R. 4:50-1 **not more than one year after the judgment**, order or proceeding was entered or taken." *R.* 4:50-2; emphasis added. The one-year time limit imposed by the Rule represents the "**outermost** time limit for the filing of a motion." *Orner v. Liu*, 419 N.J. Super. 431, 437 (App. Div. 2011). Indeed, even "[t]he fact that [a] motion was filed within one year after entry of judgment does not make it timely." *Jackson Const. Co. v. Ocean Twp.*, 182 N.J. Super. 148, 161 (Tax. 1981).

Here, Defendant cannot hide from the facts of this matter:

- On March 18, 2022, this Court entered default judgment against Defendant.
- More than a year has passed.
- It was not until June 21, 2023, that Defendant filed his second motion to vacate; the lower court's denial of which is the basis for the instant appeal.

Accordingly, the instant motion to vacate is untimely.

Indeed, even to the extent that Defendant seeks to vacate the judgment pursuant to *Rule* 4:50-1(d), his motion is still not timely. "The Rule does not mean that it is reasonable to file such a motion within one year; the one-year period represents only the outermost time limit for the filing of a motion based on Rule 4:50–1(a), (b) or (c)." *Orner v. Liu*, 419 N.J. Super. at 437. "All Rule 4:50 motions must be filed within a reasonable time, which, in some circumstances, may be less than one year from entry of the order in question." *Ibid.* Here, Defendant's renewed motion was not brought within a reasonable amount of time because:

- Defendant became aware of the default judgment entered against him no later than August 12, 2022, since that was the date that he filed his first motion to vacate.
- On September 9, 2022, the Court denied Defendant's first motion to vacate. Over ten months have passed since that date, affording Defendant more than enough time to file a motion before this Court.
- Defendant allegedly took steps to hire at least two (2) attorneys to assist him in moving to vacate the default judgment. Defendant's lack of diligence in confirming that his retained attorneys were working to vacate the judgment entered against him is not an excuse. In fact, it is more evidence that Defendant sat idly as the time to move to vacate the judgment expired.

Simply put, enough is enough. The aforementioned Rules were put in place to preclude the very issue that is now before this Court. Not only is the appeal time barred, it is the third attempt to vacate the same default judgment. Plaintiff should not be forced to continue to defend against such meritless claims.

## POINT IV

### DEFENDANT'S REMAINING ARGUMENTS ARE ENTIRELY WITHOUT MERIT AND DO NOT ASSERT ANY BASIS FOR OVERTURNING THE LOWER COURT'S ORDER.

Defendant's remaining arguments can be summarized as follows:

- The lower court should have granted Defendant all favorable inferences in deciding his motion to vacate default judgment, (Def.'s Br. at 25-27); and
- Defendant is entitled to relief under *Rule* 4:50-1(f) under the "totality of circumstances", (Def.'s Br. at 28-31).

Neither argument is a viable basis for overturning the lower court's decision to deny Defendant's second motion to vacate default judgment.

Defendant argues that the lower court "deprived [him] of the favorable inferences that should have been drawn from the record." (Def.'s Br. at 25). Defendant does not cite any authority for the assertion that the lower court should have granted him favorable inferences in considering his motion to disrupt *the status quo* and vacate a properly entered default judgment. To the extent that Defendant relies on the proposition that "[a]ll doubts . . . should be resolved in favor of the party seeking relief[,]" that reliance is misplaced. *See Triffin*, 436 N.J. Super. at 629; *see also Arrow Mfg. Co., Inc. v. Levinson*, 231 N.J. Super. 527, 534 (App. Div. 1989). That proposition is not synonymous with Defendant's argument that all inferences should be weighed in his favor. The former principle requires that doubts (if they

exist) be resolved in favor of the movant, while Defendant's assertion would require that an affirmative inference be drawn in Defendant's favor.

Here, there are no "doubts" that need to be resolved; the facts are clear. Plaintiff's motion for substitute service was granted on an address that Defendant admits he was associated with, that motion was supported based on the accurate facts of attorney certifications that were supported by substantial documentary evidence, and the lower court rejected Defendant's two (2) attempts to vacate the subsequent default judgment.

Defendant also argues that he is entitled to relief under *Rule* 4:50-1(f) based on the totality of the circumstances. (Def.'s Br. at 28-31). "However, when the application [to vacate default judgment] arises solely under subsection (f), the policy favoring finality of judgments becomes more important." *First Morris Bank & Trust v. Roland Offset Serv., Inc.*, 357 N.J. Super. 68, 71 (App. Div. 2003). "Therefore, relief 'is available only **when truly exceptional circumstances are present**.'" *Ibid.* (emphasis added) (quoting *Housing Auth. of Town of Morristown v. Little*, 135 N.J. 274, 286 (1994)). "[S]ubsection (f) is to be used 'sparingly' and only 'in situations in which, were it not applied, a *grave injustice* would occur.'" *Ibid.* (emphasis in original) (quoting *Little*, 135 N.J. at 286).

> Examples of exceptional circumstances implicating grave injustice and warranting reopening of a judgment have included such matters as protection of a family, which included five minor children from being evicted from

> public housing and rendered homeless, *Little,* 135 N.J. at 290–94; protection of a public fund, *Mancini v. EDS on Behalf of New Jersey Auto. Full Ins. Underwriting Ass'n,* 132 N.J. 330, 337–38 (1993); the prevention of recovery for damages for breach of an illegal public contract, *Manning Eng'g, Inc. v. Hudson County Park Comm'n,* 74 N.J. 113, 123–25 (1977); and prevention of harm to a party misled by his attorney who was subject to disciplinary proceedings that ultimately led to disbarment, *Court Inv. Co. v. Perillo,* 48 N.J. 334, 344–47 (1966).
>
> *First Morris Bank*, 357 N.J. Super. at 72.

No such exceptional circumstances are present in this case. This is a straightforward case of a condominium association (Plaintiff) attempting to recover a substantial amount of association fees from the owner (Defendant) of two of the association's condominium units. Defendant does not dispute that he owes Plaintiff for unpaid association fees, he merely disputes the amount of the unpaid fees. (Def.'s Br. at 14-15). Unlike in *First Morris Bank*, where exceptional circumstances were found, this is not a case of eviction of minor children, protection for a public fund, fraud, or wrongdoing by an unethical attorney. *First Morris Bank*, 357 N.J. Super. at 72. Indeed, this dispute has only reached this stage because Defendant first evaded service, went dormant for over thirteen (13) months after default judgment, and now appeals the lower court's correct denial of his second motion to vacate.

In fact, Defendant's arguments respecting *Rule* 4:50-1(f) is essentially a summary of his prior points:

1) that service was not effectuated;

    a. **Response:** The Court's September 24, 2021 order permitted Plaintiff to serve Defendant at his last known address B5 Oceanview Terrace, Highlands, New Jersey 07732. Such service was effective as of the date of that order.

2) that Plaintiff failed to notify the Defendant of the default;

    a. **Response**: Defendant was served with the Court's entry of default in accordance with the Court's September 24, 2021 order. (Pa3 to 4, Pa36 to 37).

3) Defendant's efforts to secure assistance of counsel were hampered by the death of his nephew;

    a. **Response:** Defendant's unfortunate loss did not occur until September 18, 2022, several months after default and default judgment had already been entered. This is no excuse for failing to appear in the action. Moreover, Defendant still had six (6) months to move to vacate the default judgment in accordance with Court Rule 4:50-2. He failed to do so.

4) Defendant retained three (3) separate attorneys in an attempt to move to vacate the judgment against him. Defendant's first two (2) attorneys allegedly failed to file the necessary motion.

    a. **Response**: Defendant's lack of diligence in ensuring that his attorneys filed the necessary papers before this Court is entirely unrelated to his initial failure to appear in this matter since its inception on February 19, 2021. Moreover, since Defendant apparently retained Mr. James Burke, Esq. on or about February 8, 2023, and Mr. Robert Roglieri, Esq., on or about March 3, 2023, he had at least two (2) attempts at securing legal representation before the one-year deadline imposed by Court Rule 4:50-2. He failed to do so. Defendant ultimately did retain counsel to assist him in filing the motion, but that filing was not until June 21, 2023, ten (10) months after Defendant's prior motion.

There are no exceptional circumstances sufficient to warrant the Court's disruption of the default judgment pursuant to *Rule* 4:50-1(f).

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that Defendant's appeal should be denied and the trial court's order denying Defendant's motion to vacate default judgment should be confirmed.

Respectfully submitted,

**NISSENBAUM LAW GROUP, LLC**
*Attorneys for Plaintiff*

BY: */s/Anthony C. Gunst IV*
Anthony C. Gunst, IV

Dated: April 15, 2024

.

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April 29, 2024

***Via eCourts Appellate***
Superior Court of New Jersey
Appellate Division, Team 04
PO Box 006
Richard J. Hughes Justice Complex
Trenton, NJ 08625

**Re: 511 Willow Avenue Condominium Ass'n. v. Martin J. Kiely**
**Docket No. A-000678-23**

Dear Honorable Judges of the Panel:

This firm represents the Defendant/Appellant, Martin J. Kiely, in the above-noted matter. Please accept the following Letter Brief as the Defendant/Appellant's reply to the submission of Plaintiff/Respondent, 511 Willow Avenue Condominium Association. Please note that Defendant/Appellant hereby reserves all arguments raised in his initial brief, filed March 14, 2024, to the extent not addressed directly herein.

**John J Clark IV, Esq.**
ATTORNEY AT LAW

March 25, 2024

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**John J Clark IV, Esq.**
ATTORNEY AT LAW
March 25, 2024

## PRELIMINARY STATEMENT

The Plaintiff asks this Panel to hold that procedural niceties are superior to the interests of substantial justice, but does so without having abided by those procedural niceties in the first instance. Plaintiff obtained an order authorizing substituted service, as well as its default judgment, with incompetent hearsay evidence prohibited by R. 1:6-2(a) and R. 1:6-6. If this court agrees with Plaintiff's position that form should prevail over substance, then what is good for the goose is good for the gander.

## LEGAL ARGUMENT

### POINT ONE

### (Da1)

### MR. KIELY IS ENTITLED TO REASONABLE INFERENCES IN HIS FAVOR, AND PLAINTIFF HAS NOT RESOLVED DOUBTS AS TO THE EFFICACY OF PROCESS SERVICE

Although Plaintiff submits that the court should not consider Defendant's arguments regarding reasonable inferences and credibility determinations, Plaintiff devotes a great deal of its briefing to attacking Mr. Kiely's credibility. But Plaintiff cannot resolve reasonable doubts regarding the efficacy of service

upon Mr. Kiely by parroting the hearsay statements that were initially (and improperly) put before the trial court. However, certain of Plaintiff's accusations and assumptions warrant discussion at the outset of this memorandum. Those items, in particular, are the insinuation that Defendant always resided at B5 Oceanview Terrace, and that contact was made with third-persons, including Kiely's former (and now disbarred) attorney.

## A. IT IS IRRELEVANT THAT MR. KIELY MOVED TO B5 OCEANVIEW TERRACE IN 2023, AFTER SELLING HIS HOME

Plaintiff repeatedly draws attention to the fact that in May of 2023, Mr. Kiely instructed attorney Robert Roglieri, Esq. to send a copy of his file to B5 Oceanview Terrace. Plaintiff clearly suggests that Mr. Kiely never actually lived at 39 Shore Drive in Highlands, New Jersey, and that his proper service address was always the Oceanview Terrace condominium. However, that is not the case.

Mr. Kiely sold his 39 Shore Drive residence in March of 2023, well after a default judgment had been entered against him. This is demonstrated by copies of a Notice of Settlement (Da185) and Deed (Da187) recorded in February and March of 2023, respectively. Thereafter, Mr. Kiely moved into the condominium unit at B5 Oceanview Terrace.

It follows that Mr. Kiely instructed Mr. Roglieri to forward a copy of his file to the B5 Oceanview Terrace address because he could no longer receive mail at 39 Shore Drive property, which had just been sold. Indeed, an email sent by Mr. Kiely to Mr. Roglieri shortly before the date on the Deed indicates that he is in the process of moving (Da191, Email to Roglieri dated March 7, 2023).

Plaintiff has not demonstrated that Mr. Kiely lived at B5 Oceanview Terrace while the case was pending. Rather, Plaintiff points to further evidence that, at all relevant times, Mr. Kiely lived at 39 Shore Drive, Highlands, New Jersey.

## B. PLAINTIFF ASKED MR. CICALA TO ACCEPT SERVICE WHILE HE WAS IN THE MIDST OF A DISBARMENT HEARING

Plaintiff also notes, several times, that three attempts were made to effect service through Joseph Cicala, Esq., who represented Mr. Kiely in pre-litigation negotiations. However, these communications occurred while Mr. Cicala was undergoing a disciplinary hearing that resulted in his disbarment for misappropriation of his client's funds. Furthermore, Plaintiff admits that Mr. Cicala never responded and there is no reason to infer that Mr. Cicala made Mr. Kiely aware of those emails.

Plaintiff indicates that emails were sent to Mr. Cicala in January, February, and March of 2021 requesting that he acknowledge service on behalf of Mr. Kiely. However, Mr. Cicala was evidently engaged in an attorney disciplinary proceeding in the months of January and February of 2021. A March 29, 2022 Opinion rendered by the Disciplinary Review Board specifies that Mr. Cicala was engaged in motion practice, as well as an attorney disciplinary hearing, before a special master in January and February of 2021 (Da197, Da199, Cicala DRB Opinion). The outcome of that hearing was a recommendation for disbarment, which was ultimately entered by way of an Order dated June 23, 2022 (Da254, Cicala Disbarment Order).

It is hardly surprising that Mr. Cicala never responded to Plaintiff's email inquiries. Nor would it be reasonable to infer that Mr. Cicala ever notified Mr. Kiely of the email communications he received.

## POINT TWO

## (Da1)

## PLAINTIFF DID NOT PARTICIPATE BELOW BECAUSE HE WAS UNAWARE OF THE LITIGATION, BUT TOOK IMMIDIATE ACTION UPON LEARNING OF THE CASE

Plaintiff also argues that no excuse has been made for Mr. Kiely's failure to answer the Complaint prior to entry of a default judgment. Mr. Kiely seeks relief from this default judgment on the basis that he was never properly served and, regardless, that he was never actually aware of the pendency of the Plaintiff's lawsuit.

The record on this appeal, which includes two Certifications by Mr. Kiely, is quite clear on the point that Mr. Kiely first became aware of the action in August of 2023, when he was notified that Plaintiff held a default judgment (Da118-119; Da157). To that end, Mr. Kiely perhaps engaged in excusable neglect by failing to collect and read *regular mail* that Plaintiff dispatched to B5 Oceanview Terrace in the midst of the COVID-19 pandemic.

There is no doubt, however, that Mr. Kiely acted promptly and assiduously upon developing *actual knowledge* that Plaintiffs had filed a lawsuit. He

immediately filed a pro-se application to vacate the judgment which was denied "for failure to present a meritorious defense to the case" (Da3).

Thereafter, Mr. Kiely retained Counsel for assistance (Da158, Kiely Cert, ¶30). When that attorney advised he could not help, Mr. Kiely retained yet another lawyer, Robert Roglieri, Esq. Id. at ¶¶31-32. And when Mr. Roglieri failed to act with sufficient diligence, Mr. Kiely hired this firm to ensure a proper application was made. Id. at ¶¶33-34.

Plaintiff blames Mr. Kiely for failing to keep track of his earlier attorneys, but the record shows quite the opposite. Mr. Kiely therefore should not be held accountable for the failures of his earlier lawyers.

## POINT THREE

**(Da1)**

**THE SERVICE BY MAIL RULE REQUIRES THE AFFIRMATIVE ACT OF REFUSAL**

Plaintiff argues that Defendant misinterprets R. 4:4-3's use of the word "refuses" when addressing constructive service by mail. However, Defendant's

interpretation relies on the plain text of the Rule and adopting Plaintiff's contrary interpretation would legitimize gutter service.

As a preliminary note, Defendant does correctly cite to Rule 4:4-3 in support of this argument. The complete quote is drawn begins at the third sentence in paragraph (a), and reads as follows:

> The party making service may, at the party's option, make service simultaneously by registered or certified mail and ordinary mail, and if the addressee refuses to claim or accept delivery of registered mail and if the ordinary mailing is not returned, the simultaneous mailing shall constitute effective service. Mail may be addressed to a post office box in lieu of a street address only as provided by R. 1:5-2. Return of service shall be made as provided by R. 4:4-7.
>
> [R. 4:4-3(a)]

However, Plaintiff is likewise correct to note the corresponding use of the word "refused" in R. 1:5-4(a), which states:

> **(a) Service by Ordinary Mail if Registered or Certified Mail Is Required and Is Refused.**
>
> Where under any rule, provision is made for service by certified or registered mail, service may also be made by ordinary mail simultaneously or thereafter, unless simultaneous service is required under these rules.
>
> [R. 1:5-4(a) (emphasis retained)]

But Plaintiff is ***incorrect*** when it argues that R. 1:5-4(b) renders such service

effective upon dispatch. Although that paragraph of the Rule does describe conditions where service is deemed effective upon the mailing of ordinary mail, it applies only to "service by mail of any paper referred to in R. 1:5-1." R. 1:5-4(b). Notably, R. 1:5-1 specifically addresses service of papers required *after initial service of process*.

To be clear, Defendant argues that Plaintiff failed to effectuate original process service in this case, or alternatively that the initial process service was deficient.

The certified mail tracking details Plaintiff's certified mailings to B5 Oceanview Terrace address indicated "redelivery scheduled" (Da82 & Da84, USPS Tracking Details) or were marked "unclaimed" by the Post Office and returned to Willow's Counsel (Da107 & Da117, Returned Mail). These notations do not indicate that the mail was "refused," but rather that USPS found no one at the property to whom the certified mail could be delivered.

If this Panel accepts the Plaintiff's interpretation of R. 4:4-3, as did the lower court, then it would permit unscrupulous plaintiffs to obtain default judgments as a matter of course simply by utilizing simultaneous mail service to addresses that have verified to be vacant.

**John J Clark IV, Esq.**
ATTORNEY AT LAW
March 25, 2024

## POINT FOUR

## (Da1)

## THE TWELVE-MONTH LIMIT ONLY APPLIES TO APPLICATIONS MADE UNDER RULE 4:50-1(a) THROUGH (c)

Plaintiff argues that Defendant's appeal is time barred under the twelve-month limit imposed by R. 4:50-2, but that time limit only pertains to sections (a), (b) and (c) of R. 4:50-1. The instant appeal concerns an application to vacate filed under R. 4:50-1(d) and (f). Pursuant to R. 4:50-2, the application need only be made "within a reasonable time."

Given the immediate (though unsuccessful) action taken by Defendant upon learning of the judgment in August of 2023, and the various issues he had in securing the assistance of counsel thereafter, the Appellate Division should consider this application timely under R. 4:50-2.

**John J Clark IV, Esq.**
ATTORNEY AT LAW
March 25, 2024

## POINT FIVE

## (Da1)

## PLAINTIFF DOES NOT ADDRESS ITS SUSPICIOUS FAILURE TO SERVE BY MAIL AT KIELY'S KNOWN ADDRESS

Finally, Plaintiff does not squarely address why it apparently avoided serving at the 39 Shore Drive address that it already had associated with Kiely, or the deficiencies in proofs submitted to the lower court in support of its motions to authorize substituted service or to enter final judgment by default. Instead, Plaintiff argues that Defendant's reliance upon M & D Associates v. Mandara, 366 N.J.Super. 341, 353 (App. Div. 2004) is misplaced because service was not made by publication. However, the import of M & D Associates is not the manner of service, but rather that if the plaintiff had complied with R. 1:6-6, it would have obtained the correct service address of a necessary defendant.

The M & D plaintiff's attorney filed an affidavit of inquiry indicating that he had "contacted the Passaic County Voter Registration Board, checked the telephone book, and reviewed the records of the tax office," but had been unable to locate an address to serve the defendant in question. Id. at 347. However,

that defendant had been living at the same New Jersey address since 1990, and was in fact listed in the voting rolls. the Appellate Division reasoned that if the plaintiff had obtained "a certification from a custodian of documents from the Board of Election" rather than relying upon "hearsay statements," it would have identified the appropriate address for service of process. Id. at 355.

The issue at bar is largely the same insofar as the Plaintiff could easily have determined that 39 Shore Drive was Kiely's correct address for service of process, and that Plaintiff similarly relied upon hearsay in order to obtain an Order authorizing service.

Plaintiff repeatedly attempted service at non-existent addresses, all in the vicinity of Kiely's actual 39 Shore Drive residence (Da52; Da55; Da43; Da44; Da49, Process Service Reports). Indeed, Plaintiff's initial process server evidently advised that it had "located the house owned by Martin J. Kiely [a]s 39 Shore Drive" (Da43). And, when Plaintiff initially attempted service at B5 Oceanview Terrace, the report from the process server again pointed back to 39 Shore Drive (Da58). Furthermore, when Plaintiff obtained a USPS address change report, that document also pointed to 39 Shore Drive (Da63).

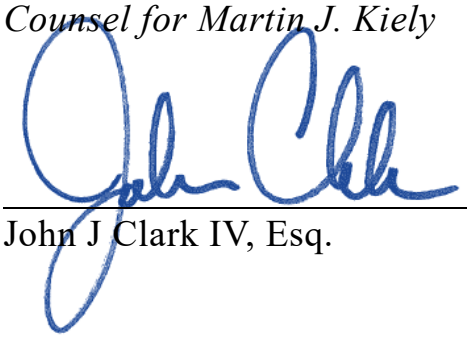
So, why did the Plaintiff choose to serve by mail at B5 Oceanview Terrace instead of 39 Shore Drive? Defendant submits it is because Plaintiff was hoping to obtain a default.

## CONCLUSION

By virtue of the foregoing arguments and authorities, Defendant/Appellant Martin J. Kiely respectfully submits that this Court should reverse the September 22, 2023 Order denying his motion to vacate default judgment, and remand this matter to the Law Division for further proceedings.

Respectfully Submitted,

**SCHUMANN HANLON MARGULIES, LLC**
*Counsel for Martin J. Kiely*



John J Clark IV, Esq.