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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3251-09T3

DARRYL DONLEY and OLIVER
BAINES d/b/a KRIMSON
ENTERTAINMENT,

Plaintiffs-Respondents,

v.

KEYSHIA COLE,

Defendant-Appellant,

and

IDOL MAKERZ ENTERTAINMENT,

Defendant.

Argued February 7, 2011 – Decided March 21, 2011

Before Judges Grall, LeWinn, and Coburn.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Docket No. L-10232-07.

John Robertelli argued the cause for appellant (Rivkin Radler LLP, attorneys; Mr. Robertelli, of counsel; Francis J. Leddy, III, on the brief).

Adam Silverstein, attorney for respondent.

PER CURIAM

Defendant, Keyshia Cole, a popular singer of some renown, appeals from the February 5, 2010 order denying her motion to vacate a default judgment obtained against her by plaintiff, Krimson Entertainment (Krimson)[1], in the amount of $144,936. For the reasons that follow, we affirm the denial of defendant's motion to vacate, but modify the amount of the judgment.

We summarize the pertinent factual background from: (1) the pleadings; (2) the testimony of Krimson's principal, Baines, at the proof hearing; and (3) defendant's testimony at a hearing on her motion to vacate, which the judge determined was necessary in order to assess the credibility of defendant's claims.

On May 4, 2006, Krimson entered into an oral agreement with defendant, Idol Makerz Entertainment (Idol Makerz), which Krimson believed was Cole's booking agent, for Cole to perform a concert at the Selland Arena in Fresno, California on July 28, 2006. Baines testified that he had learned "[t]hrough the [I]nternet . . . that Idol Makerz was an approved booking agent for . . . Cole." Idol Makerz sent Krimson a contract and Baines sent back a $15,000 deposit. The contract was never signed, but Baines testified that Idol Makerz had orally agreed to its terms.

[1] Plaintiffs Darryl Donley and Oliver Baines are the principals of Krimson.

Baines further testified that Krimson made arrangements for Cole and her manager, Manny Halley, to fly from Atlanta, Georgia to Fresno on the day of the concert. During that day Baines received a series of phone calls from Halley re-scheduling Cole to later flights and, ultimately, canceling her appearance.

Krimson filed suit in December 2007 against Cole and Idol Makerz, alleging breach of contract, fraud and unjust enrichment. The latter two claims were against Idol Makerz only and were based on allegations that it had fraudulently represented itself as Cole's agent, had refused to refund the $15,000 deposit and, therefore, had been unjustly enriched.

Krimson served the summons and complaint at Idol Makerz' place of business in Cranford, with the intent of serving both the agent and Cole. When Krimson sought a proof hearing, however, the judge denied the request finding that Cole had not been properly served because she had been "served in her personal capacity at her place of business, not her residence."

On September 9, 2008, Krimson served Cole at her residence in Alpharetta, Georgia, by personally serving "Mrs. Cole," Cole's "[m]other/[c]o-resident." On December 26, 2008, Krimson filed a request for entry of default against Cole; a copy of that request was mailed to Cole at the same Georgia address. On January 29, 2009, Krimson filed a notice of motion for a hearing

on damages, again serving Cole with that motion at the Georgia address. The judge ordered a proof hearing to be held on March 27, 2009; a copy of that order was also sent to Cole's Georgia address.

In addition to describing his contacts with Idol Makerz and the conversations with Halley, Baines testified that Krimson had spent $23,817 in non-refunded out-of-pocket expenses, such as transportation for Cole and Halley, marketing, promotions, and arrangements for light, sound and opening acts. In addition, Krimson claimed $79,000 in "lost revenues" based on its projection that, historically, Cole "sells out [seventy-nine] percent of her venue."

Using a formula that multiplied the ticket prices by the number of seats available at each price and then taking seventy-nine percent of that figure, the judge calculated $75,459 in lost revenues. Baines also claimed that Krimson would have received a net profit of $10,000 from a scheduled after-concert party. The judge added to those figures Krimson's $23,817 in out-of-pocket expenses and the $15,000 deposit to Idol Makerz, and calculated $124,276 in total damages[2], plus prejudgment interest from the date of the concert in the amount of $20,660.

[2] See further discussion of the calculation of damages below.

Therefore, the judge entered a default judgment against Cole in the amount of $144,936.[3]

On or about August 12, 2009, Cole filed a motion to vacate the default judgment and for leave to file an answer, in which she generally denied the allegations and asserted that she had "never executed and/or in any way entered into a contract with [Krimson]." Cole certified that Idol Makerz was not authorized to act as her agent and, in fact, that she had never had any business relationship with that agency.

Cole acknowledged that she owns a residence at the address in Alpharetta, Georgia, where her mother was served, but claimed that she does "not permanently reside at that location"; in September 2008, she was living temporarily in California. Cole asserted that she "spent only approximately sixty . . . days" at the Georgia property, and described the system she maintains for keeping track of mail that comes to her there, through an assistant. She stated that shortly before August 12, 2009, the assistant forwarded to her a "package of mail" which included the "pertinent pleadings . . . [in] this matter."

[3] The default judgment was entered against Cole and Idol Makerz "jointly and severally"; Idol Makerz was also ordered to reimburse Krimson its $15,000 deposit within thirty days. Idol Makerz filed no responsive pleadings and made no appearances in the proceedings below.

Halley also submitted a certification denying that he ever had any contact with Krimson or Idol Makerz. In a supplemental certification, Cole identified her agent as Cora Lewis, and denied that she had ever authorized either Halley or Lewis to bind her to a concert appearance in Fresno.

The judge heard oral argument on September 30, 2007. Cole argued that the default judgment should be vacated because she had demonstrated excusable neglect for her failure to timely answer the complaint and she had a meritorious defense. The judge determined that she wanted to hear Cole testify before resolving the motion because, the judge stated, Cole's certifications were not clear on the issue of when she first learned of the litigation.

On December 7, 2009, Cole testified. She explained that until December 2008 she had no system in place to receive mail from Georgia because "[she] ha[d] a business manager [who] handle[d] all [her] personal and business affairs." She fired her business manager in December 2008 and "decided to take on all [her] personal affairs [her]self." In August 2009 she hired an assistant to take responsibility for forwarding her mail because she "would no longer be in Georgia that much." She also used the services of a neighbor who sometimes collected her fan mail which he "keeps . . . until he sees [her]." She could not,

however, recall the neighbor's name. In August 2009, among the package of mail sent by her assistant, Cole found "a letter that said [she] had gotten sued or something," which she did not understand; she then contacted her attorney.

The judge rendered an oral decision on February 4, 2010, finding that service had been properly effected upon Cole on September 9, 2008, when a process server personally served a copy of the summons and complaint on her mother at the Georgia residence; the judge found such service complied with the pertinent court rules. The judge noted that there was "no certification from . . . Cole's mother that she did not in fact accept service as is certified by the process server . . . . [N]or is there any other competent evidence before the [c]ourt indicating that service was defective."

The judge further found that Cole's certifications were "unconvincing in that they appeared to have been carefully crafted to avoid addressing certain issues[,]" and that Cole's testimony had failed to address those concerns. The judge assessed Cole's credibility as follows:

> The [c]ourt is unable to make any findings of fact based on . . . Cole's testimony. She could not remember many things including whether she ever even once visited her own house in Georgia in the year September 2008 through August 2009, despite certifying in her August 12[], 200[9] certification . . . that over the previous

> year she had spent about [sixty] days in her house.
>
> . . . Her testimony about how she took care of her mail was frankly incredible. At one point she testified that her neighbor whom she never mentioned earlier and whose name she could not recall would collect her mail. . . .
>
> This testimony appears to have been invented on the spot. . . .
>
> Her testimony about how she received her mail made no sense and did not support her claims in her certifications that although her assistant forwards her mail to her, she did not receive either the complaint or any of the other various notices relating to this matter. . . . Cole's testimony was confused and at times non[]sensical. . . .
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> . . . .
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> . . . The [c]ourt must therefore reluctantly conclude that the confusion and disparity from . . . Cole's testimony resulted from her failure to be truthful to the [c]ourt.
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> Given the lack of credibility of . . . Cole's testimony, the [c]ourt can not give any credence to any of the facts presented in either of her certifications or in her testimony . . . .

Having "established that there was valid service[,]" the judge addressed "the test for vacating a default[,]" as set forth in Marder v. Realty Constr. Co., 84 N.J. Super. 313, 318 (App. Div.) ("a defendant seeking to reopen a default judgment must show that the neglect to answer was excusable under the

circumstances and that he has a meritorious defense"), aff'd, 43 N.J. 508 (1964). The judge acknowledged that Cole had a meritorious defense in her claim that "there was no contract between her and [Krimson] in this case." With respect to excusable neglect, however, the judge found that Cole failed to meet her burden of proof on this issue because her "testimony and certification with regard to when and how she received notice [we]re inherently not credible."

On appeal, defendant contends the judge erred in: (1) "failing to give weight to the exceptional circumstances warranting relief pursuant to R. 4:50-1(f)"; (2) failing to address her "jurisdictional argument[]"; (3) "disregard[ing] undisputed evidence, which established excusable neglect"; (4) denying her motion "despite no prejudice existing on the part of [Krimson]"; (5) awarding damages in the absence of "competent and persuasive evidence to prove liability on [her] part"; and (6) incorrectly determining the amount of damages due to Krimson. We concur with this last point. As to the remaining contentions, we affirm.

Defendant brought her motion to vacate the default judgment under Rule 4:50-1(a) (excusable neglect) and (f), which contemplates the possibility of relief from judgment for "any . . . reason" justifying such relief other than the specific

grounds provided in sections (a) through (e) of the rule. Defendant couched her grounds for relief under section (f) as "exceptional circumstances," namely, her "allegations of fraud perpetrated by the purported principles [sic] of the fictitious entity known as 'Idol Makerz' as . . . applied to [defendant]."

Where a party seeks the specific relief of vacating a default judgment, the burden upon that party is clear; the threshold requirement of excusable neglect must be satisfied and then the question of a meritorious defense is considered. Marder, supra, 84 N.J. Super. at 318. Cole's allegations of fraud go to the issue of a meritorious defense, as the motion judge noted. However, Cole patently failed to make the requisite showing of excusable neglect for her failure to timely answer Krimson's complaint. As noted, service of the summons and complaint was effected upon Cole's mother, a "co-resident" at Cole's Georgia address, on September 9, 2008. Nothing in the record disputes this.

Rule 4:4-4(b)(1)(A) provides that in personam jurisdiction over an out-of-state resident may be obtained "in the same manner as if service were made within this State or by a public official having authority to serve civil process in the jurisdiction in which the service is made." Rule 4:4-4(a)(1) permits personal service "by leaving a copy . . . [of the

summons and complaint] at the individual's dwelling place or usual place of abode with a competent member of the household of the age of [fourteen] or over then residing therein."

Cole's mother was personally served by a process server in Alpharetta, Georgia. This constituted effective "[s]ubstituted or [c]onstructive [s]ervice[,]" R. 4:4-4(b), upon Cole. Her claim that the judge erroneously ignored the fact that she did not receive "actual notice" of the complaint is, therefore, of no merit.

Moreover, a significant factor in the judge's decision on this point was the judge's determination that Cole was not credible. Cole never specifically addressed the fact that her mother had been personally served with the summons and complaint in September 2008; her testimony about the various methods by which she received mail from Georgia was inconsistent to a degree leading the judge to find it incredible. We defer to those findings. State v. Locurto, 157 N.J. 463, 471 (1991) (internal citations omitted).

Cole cites Morales v. Santiago, 217 N.J. Super. 496 (App. Div. 1987), for the proposition that relief from a default judgment is proper under Rule 4:50-1(f) where the evidence at the proof hearing, "even when viewed indulgently, demonstrates that the defendant is not liable." Id. at 505. Cole claims

that because the default judgment was entered against her "without competent and persuasive evidence to support her liability[,]" she is entitled to relief even in the absence of excusable neglect for her failure to answer the complaint.

Cole's reliance upon Morales is misplaced. We are satisfied that Krimson presented adequate and competent evidence of Cole's liability for its damages resulting from her failure to perform the concert pursuant to the agreement negotiated, in good faith on Krimson's part, with Idol Makerz. The fact that no signed written contract was executed is not, in and of itself, a fatal deficiency in Krimson's proofs.

Baines' testimony established his good faith reliance on Idol Makerz' holding itself out as Cole's booking agent. He documented the $15,000 deposit as well as out-of-pocket expenses totaling $23,817. The lost revenue from ticket sales was determined according to a formula based upon the venue's ticket prices and the "seventy-nine percent" adjustment reflecting Coles' historical record in audience attendance.

We turn to Cole's contention that the judge failed to address her jurisdictional argument. Cole did not raise a claim of lack of jurisdiction in her motion papers. The issue first arose during oral argument at the September 30, 2009 hearing, presumably based on her attorney's letter to the judge dated

September 29, 2009, raising various issues including jurisdiction.

After extensive argument on the issue of excusable neglect, Cole's counsel commented that "the only other issue that arises to [him] is the jurisdictional question." The judge responded that jurisdiction was not the basis of Cole's motion and that "[Cole] didn't say she has no contacts in New Jersey." Counsel conceded that Cole had "three concerts here, and . . . she merchandizes, and does other things here."

The judge stated that "if we want to get into that, . . . that's going to require a hearing[,]" adding that the issue was not "adequately addressed in [Cole's] certification for [the judge] to make a finding." The judge invited counsel to pursue the issue when defendant testified.

At the December 2009 hearing, Cole did not address jurisdictional issues. She gave no testimony as to the nature and extent of her contacts with New Jersey, or the lack thereof. Therefore, we consider Cole to have abandoned this issue, as she forfeited the opportunity offered by the judge at the end of the September hearing to address the issue of jurisdiction at the December hearing. Even in her brief, the only factual contention Cole raises on this point is that she never had a valid contract with Krimson and, therefore, had no contact with

New Jersey. This assertion, of course, fails to address the pertinent question which, she acknowledges, the judge "invit[ed [her] to assert . . . ." As the moving party seeking relief from judgment, the burden was on Cole to establish all grounds for relief including the lack of jurisdiction. As Cole failed to "accept" the judge's "invitation" to create a record on this issue, we are in no position to address it.

We consider the remainder of Cole's arguments addressed to issues other than the calculation of damages to be without sufficient merit to warrant discussion in this opinion. R. 2:11-3(e)(1)(E).

We turn, finally, to the calculation of damages to which Krimson is entitled. The judge awarded $124,276 plus prejudgment interest. We are satisfied that that amount was incorrectly calculated both due to a mathematical error and the judge's "double counting" in determining the amount of lost revenue.

Baines testified that tickets for the concert were sold on a tiered basis as follows: 200 tickets available at $25; 601 tickets available at $35; 312 tickets available at $40; 1108 tickets available at $45; and 60 tickets available at $65. Therefore, the total ticket revenue that could have been generated from ticket sales is $92,275. Baines also testified

that historically a concert headlined by Cole would sell out seventy-nine percent of a venue. Multiplying the total potential revenue by the expected ticket sales of seventy-nine percent arrives at $72,897.25 in expected lost revenue. The judge miscalculated this total as $75,459.

Krimson would have paid its $38,817 in expenses from the revenue generated by ticket sales. The judge, however, added the $38,817 in expenses to the gross figure for ticket sales, thereby awarding Krimson its out-of-pocket expenses twice. In other words, awarding Krimson total lost revenue plus its out-of-pocket expenses resulted in double counting and an excessive award.

We have also deducted the $10,000 Krimson claims it would have earned from an after-concert party. Review of the contract from Idol Makerz reveals no mention of obligating Cole to appear at such a party. We conclude, therefore, that Krimson failed to establish that Cole's appearance at the party was part of the oral agreement with Idol Makerz.

These adjustments result in a modified judgment amount of $72,897.25. Prejudgment interest on that amount from December

24, 2007[4], the date on which the complaint was filed, to March 27, 2009, the date of the judgment, totals $6,581.71. We therefore modify the judgment to $79,478.96. The matter is remanded solely for the purpose of entry of an amended judgment.

Affirmed as modified.

[4] The trial judge miscalculated the prejudgment interest from the date of breach rather than the date of the institution of the action as provided by Rule 4:42-11(b).