SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0368-15T2

VAN BRI REALTY, INC.,
a New Jersey Corporation,

Plaintiff-Respondent,

v.

MICHAEL BLUMENTHAL,
individually,

Defendant-Appellant,

and

LIBRA LABORATORIES, INC.,
a New Jersey Corporation,
LIBRA TECHNICAL CENTER
LIMITED LIABILITY COMPANY,
a New Jersey Limited Liability
Company,

Defendants.

Submitted January 31, 2017 – Decided August 17, 2017

Before Judges Suter and Guadagno.

On appeal from Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-0880-14.

Harmon H. Lookhoff, attorney for appellant.

Norris, McLaughlin & Marcus, PA, attorneys for respondent (Timothy P. McKeown, of counsel and on the brief).

PER CURIAM

Defendant Michael Blumenthal (Blumenthal) appeals the August 7, 2015 orders that entered an $87,950 default judgment against him arising from a commercial lease and denied his cross-motion to vacate the judgment. We affirm.

Plaintiff Van Bri Realty, Inc. is the predecessor in interest to JJP Realty Company (JJP). Blumenthal is the president of Libra Laboratories, Inc. (Libra) and managing member of Libra Technical Center, L.L.C. (Technical). Commencing in December 1999, JJP and Libra entered into a one-year commercial lease under which Libra rented a 3500 square foot building in Metuchen for $29,400 annually, paid $2450 per month. After the lease expired, Libra continued to occupy the premises as a hold-over tenant, and shortly thereafter, Blumenthal formed Technical. Plaintiff contended that Technical occupied the same commercial premises, operating Libra's business.

Plaintiff filed a complaint seeking to evict Libra for non-payment of rent. A consent judgment of possession[1] was entered against Libra, and the premises were vacated in August 2013. In

[1] The consent judgment was not included in the record.

February 2014, plaintiff filed a complaint in the Law Division against Blumenthal, Libra and Technical, seeking judgment for unpaid rent, attorney's fees and costs arising from the commercial lease. Although the complaint was served on all defendants, Libra and Technical never answered it and were defaulted. On October 10, 2014, plaintiff obtained a $141,850 default judgment in its favor against Libra and Technical for amounts due under the lease, and recorded the default judgment as a lien.

Blumenthal, representing himself, filed an answer to the Law Division complaint in April 2014. He denied personal liability for the unpaid rent or other charges, contending that Libra and Technical were separate legal entities, Technical did not operate from the commercial premises, records of the businesses were "locked in storage," plaintiff breached the contract, and defendants were due an offset for repairs and renovations made to the demised premises.

Plaintiff propounded interrogatories and requests for documents. Blumenthal's time to answer discovery was extended to July 1, 2014, but he never answered it. On August 22, 2014, plaintiff was granted an order under Rule 4:23-5(a)(1) that struck Blumenthal's answer without prejudice for failure to provide discovery, conditioning reinstatement upon compliance and payment of $100.

Blumenthal obtained counsel, but discovery still was not answered. At plaintiff's request, an order was entered on February 6, 2015 that struck Blumenthal's answer with prejudice under Rule 4:23-5(a)(2), and a default was entered against him. After that, plaintiff requested the entry of a default judgment against Blumenthal, explaining in the supporting certification that although Libra's corporate charter expired in 2005, Blumenthal continued to conduct business at the leased premises through Libra and two other corporations, of which he was president, from April 2005 until August 2013 when Blumenthal and his entities moved out of the premises under the consent order.

A default judgment was entered in favor of plaintiff and against Blumenthal on May 8, 2015, but the requested damages of $87,950 was crossed out on the order, and added was the notation the parties were to schedule a proof hearing with the court.

On June 23, 2015, the day of the scheduled proof hearing, the parties reached an agreement, evidenced by the June 30, 2015 order which included the language "the parties having conferred prior to the taking of testimony on [p]laintiff's [p]roof [h]earing and the consent of the [p]arties having been placed on the record in open [c]ourt."[2] The June 30, 2015 order provided that the May 18,

[2] We have not been provided with a transcript of a proceeding relative to the order. However, Blumenthal's statement of the case

2015 default judgment entered against Blumenthal was "deemed vacated upon" defendant's posting in five days of a "non-rescindable" bond in the amount of $87,950. Blumenthal was given forty-five days to respond to outstanding discovery. If Blumenthal answered the discovery and served it on plaintiff, the order permitted him to move to reinstate his answer. If he failed to obtain a bond or to provide discovery, plaintiff could "apply for the entry of [a] default and default judgment" against Blumenthal for $87,950.

Blumenthal could not obtain the requisite bond. Plaintiff moved to reinstate the default and default judgment for liability that had been entered on May 8, 2015, and also to enter a default judgment for damages against Blumenthal in the amount of $87,950. Blumenthal filed a cross-motion to vacate "any default or default judgment previously entered," for his counsel to represent Libra and Technical in addition to himself, to file a responsive pleading for "all" defendants and for reasonable discovery. In his supporting certification, Blumenthal recounted his recent health history, including renal failure, prostate cancer, surgery and radiation; described his financial difficulties; explained he was

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provided in this appeal references the date of June 30, 2015, saying "at which time an apparent resolution of the matter was reached by settlement of the default matters."

entitled to offsets exceeding $70,000 for repairs made to the leased commercial building; and advised that Technical was set up as a consulting company with no physical operations "per se." Plaintiff opposed the cross-motion, contending any repairs by Blumenthal were made without the permission of the landlord and clarifying the requested damages of $87,950 was for the period Blumenthal operated Libra at the premises without a corporate charter.

On August 7, 2015, the previous default and default judgment were re-entered against Blumenthal. The order entered a default judgment in favor of plaintiff and against Blumenthal for $87,950. In a separate order also dated August 7, 2015, the court denied Blumenthal's cross-motion. Handwritten on the order was the notation that Blumenthal failed to post the required bond and was not entitled to relief under Rule 4:50-1 because he still had not complied with Rule 4:23-5(a)(1) and (2).[3]

Blumenthal appeals the August 7, 2015 orders contending the "defaults and default judgments" should be vacated "to afford fairness and justice to the parties" where the neglect was not willful or calculated. We are not persuaded by this argument.

[3] Blumenthal indicates there is no transcript of this proceeding.

Although Blumenthal's notice of appeal states the appeal is by himself and the "corporate defendants," we clarify here that the default judgments against Libra and Technical are not part of this appeal. The August 7, 2015 order entered a judgment against Blumenthal, not Libra or Technical, and only Blumenthal filed the cross-motion seeking relief. Libra and Technical did not appeal the default judgment entered against them in October 2014. They are out of time to appeal that order. See R. 2:4-1(a). The brief in this appeal does not mention why the default judgments entered against Libra and Technical should be vacated. Because issues related to Libra and Technical were not raised in the merits brief, they are waived. Gormley v. Wood-El, 218 N.J. 72, 95 n.8 (2014); Drinker Biddle v. N.J. Dep't of Law & Pub. Safety, Div. of Law, 421 N.J. Super. 489, 496 n.5 (App. Div. 2011) (noting that claims not addressed in merits brief are deemed abandoned). See Pressler & Verniero, Current N.J. Court Rules, cmt. 5 on R. 2:6-2 (2017). Thus, Libra and Technical are not parties to this appeal.

Blumenthal appeals the August 7, 2015 orders. Because his notice of appeal did not reference other orders entered in this case, no other orders are before us on appeal. See W.H. Indus., Inc. v. Fundicao Balancins, Ltda, 397 N.J. Super. 455, 458 (App. Div. 2008) ("It is clear that it is only the orders designated in the notice of appeal that are subject to the appeal process and

review."). Thus, the June 30, 2015 order was not appealed, which allowed for the entry against Blumenthal of an $87,950 default judgment if he did not post a bond or answer discovery.

It is Rule 4:50-1 that "governs an applicant's motion for relief from default when the case has proceeded to judgment." U.S. Bank Nat'l Ass'n v. Guillaume, 209 N.J. 449, 466 (2012). Once the court has entered a default judgment, relief from the judgment must satisfy one of the following reasons:

> (a) mistake, inadvertence, surprise, or excusable neglect; (b) newly discovered evidence which would probably alter the judgment or order and which by due diligence could not have been discovered in time to move for a new trial under R. 4:49; (c) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (d) the judgment or order is void; (e) the judgment or order has been satisfied, released or discharged, or a prior judgment or order upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or order should have prospective application; or (f) any other reason justifying relief from the operation of the judgment or order.
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> [R. 4:50-1.]

An application to vacate a default judgment pursuant to Rule 4:50-1 is to be "viewed with great liberality, and every reasonable ground for indulgence is tolerated to the end that a just result

is reached." Marder v. Realty Constr. Co., 84 N.J. Super. 313, 319 (App. Div.) (citation omitted), aff'd, 43 N.J. 508 (1964).

We review the decision whether to grant a motion to vacate a default judgment under an abuse of discretion standard. See Mancini v. EDS, 132 N.J. 330, 334 (1993); see also Guillaume, supra, 209 N.J. at 467 (requiring "a clear abuse of discretion" to vacate). An abuse of discretion occurs when the trial court's decision, "without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." Flagg v. Essex Cty. Prosecutor, 171 N.J. 561, 571 (2002) (quoting Achacoso-Sanchez v. Immigration and Naturalization Serv., 779 F.2d 1260, 1265 (7th Cir. 1985)).

The court did not err in denying Blumenthal's request to vacate the default judgment against him. He seeks relief only under subsection (f), "the elusive 'catch-all' category." Pressler & Verniero, supra, cmt. 5.6.1 on R. 4:50-1. "[I]n order to obtain relief under this subsection, the movant must ordinarily show that the circumstances are exceptional and that enforcement of the order or judgment would be unjust, oppressive or inequitable." Ibid. (citing Guillaume, supra, 209 N.J. at 484) (other citations omitted). Those circumstances are not present here.

The June 30, 2015 order resulted from an agreement between the parties to resolve the issues prior to a proof hearing. Under the order, Blumenthal agreed to condition the vacation of the default judgment against him on his posting an $87,950 bond. Blumenthal did not provide the agreed upon bond nor did he answer the discovery. Plaintiff then moved to re-enter the default judgment for $87,950, which was the amount provided for in the order.

We agree that in light of the June 30, 2015 order, the court did not abuse its discretion when it denied Blumenthal's application to vacate the default judgment. Blumenthal did not provide discovery. Counsel represented him when the June 30 order was entered. The order was based on a settlement. Because Libra's charter had expired, Blumenthal faced liability. Leventhal v. Atl. Rainbow Painting Co., Ltd., 68 N.J. Super. 406, 413 (App. Div. 1961) ("[P]ersons who carry on the business of a corporation . . . after the charter has expired, or after dissolution, become personally liable as general partners."). See also Mortg. Graders, Inc. v. Ward & Olivio, LLP, 225 N.J. 423, 437 (2016) ("A dissolved corporation exists solely to prosecute and defend suits, and not for the purpose of continuing the business for which it was established." (quoting Lancellotti v. Maryland Cas. Co., 260 N.J. Super. 579, 583 (App. Div. 1992))); N.J.S.A. 14A:12-9(1) (stating

that a dissolved corporation "shall carry on no business except for the purpose of winding up its affairs"). The dollar amount set forth in the June 30 order apparently represented rental charges for the period after Libra's corporate charter expired and while Blumenthal operated from the premises. No abuse of discretion was demonstrated on this record.

Affirmed.