SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0943-16T2

FIFTH THIRD BANK, a/k/a
OLD KENT BANK,

Plaintiff-Respondent,

v.

R. MAXIMILIAN GOEPP, III,
BARRY J. FRY, ESTATE OF CARLA GOEPP,
A.M. RICHARDSON, PC, and
CHARIOT RECOVERY, INC.,

Defendants,

v.

BARRY J. FRY, CHARIOT RECOVERY, INC.,
and A.M. RICHARDSON, PC,

Third-Party Plaintiffs-
Appellants,

v.

CHICAGO TITLE COMPANY,

Third-Party Defendant-
Respondent,

and

HILDEGARDE WENNING MEECH,

Third-Party Defendant.

Submitted November 28, 2017 – Decided December 18, 2017

Before Judges Carroll and Mawla.

On appeal from Superior Court of New Jersey, Chancery Division, Mercer County, Docket No. F-024167-08.

Richardson & Richardson, LLC, and Ambrose M. Richardson (Solomon Blum Heymann LLP) of the New York bar, admitted pro hac vice, attorneys for appellants (Coulter K. Richardson and Ambrose M. Richardson, on the briefs).

Blank Rome LLP, attorneys for respondent Fifth Third Bank (Edward W. Chang and David A. DeFlece, on the brief).

Herrick, Feinstein LLP, attorneys for respondent Chicago Title Insurance Company (Michelle M. Sekowski, of counsel and on the brief).

PER CURIAM

In this mortgage foreclosure action, defendants Barry J. Fry ("Fry"), A.M. Richardson, P.C. ("Richardson"), and Barry Sharer ("Sharer"), Chapter 7 Bankruptcy Trustee (collectively, "appellants"), appeal from a September 16, 2016 order denying their motion to vacate an August 13, 2014 consent order dismissing the case without prejudice. The trial court denied the motion as untimely. On appeal, appellants contend the Chancery judge erred in denying their motion, as the circumstances required the consent order be vacated. Following our review of these arguments in light of the record and the applicable law, we affirm.

Plaintiff Fifth Third Bank filed the action in June 2008, seeking to foreclose on property in Princeton owned by defendant R. Maximilian Goepp III ("Goepp"). Also named as defendants were the estate of Goepp's deceased sister Carla Goepp ("Carla"), and junior mortgagees Fry, Richardson, and Chariot Recovery, Inc. ("Chariot"). Fry, Richardson, and Chariot filed a contesting answer that also asserted cross-claims against Goepp and Carla seeking judgment on their respective notes and mortgages, and a third-party complaint against Chicago Title Insurance Company ("Chicago Title") relating to a prior denial of coverage of a fraud claim asserted against Goepp by another sister, Hildegarde Wenning Meech ("Meech"). Goepp filed a non-contesting answer with respect to the first and subordinate mortgages, and cross-claims against Chicago Title and Meech.

Goepp thereafter filed for bankruptcy, and Sharer was appointed trustee. Counsel for Fry and Chariot was later appointed by the United States Bankruptcy Court to serve as special counsel to Sharer to bring claims of Goepp's bankruptcy estate against Chicago Title.[1]

[1] Prior to this appeal being submitted, the Bankruptcy Court approved the sale and assignment of the bankruptcy estate's claim against Chicago Title. Consequently, the Bankruptcy Trustee has withdrawn the appeal as against Chicago Title.

Defendants later moved for summary judgment dismissing plaintiff's foreclosure complaint. Ultimately, the parties entered into a "Consent Order Dismissing Case Without Prejudice" (the "consent order"), which was filed with the court on August 13, 2014. In relevant part, the consent order states:

> The parties hereby stipulate and agree that the case be voluntarily dismissed without prejudice and without costs against any party;
>
> IT IS ON THIS 13th day of August, 2014, hereby:
>
> ORDERED, that the claims of Fifth Third Bank in this action shall be voluntarily dismissed on consent, and without prejudice or costs to any party.

The consent order was executed by all parties except Chicago Title. On August 12, 2014, appellants' counsel advised the court that Chicago Title's signature was not required because it "did not participate in the motion, and is not adversely affected by it." On August 22, 2014, plaintiff filed a notice of voluntary dismissal, "request[ing] that the within matter be voluntarily dismissed."

In September 2015, appellants filed a motion for summary judgment seeking to enter judgment on their subordinate mortgage liens. Appellants assert they were then advised by the court that the foreclosure action had been dismissed. In January 2016, appellants filed a motion to correct the docket pursuant to Rule

1:13-1, seeking to restore the case to the active trial list. The court heard argument on February 5, 2016, and entered an order on February 25, 2016, denying both motions. Appellants did not appeal that order.

In the interim, Goepp's default under the first mortgage purportedly continued, and on December 21, 2015, plaintiff filed a new foreclosure action ("the 2015 action"). In June 2016, appellants filed a contesting answer with cross-claims and a third-party complaint against Chicago Title, essentially renewing the claims they presented in the prior action. Appellants also filed a motion pursuant to Rule 4:50 seeking relief from the consent order and to restore their claims in the prior action. Appellants contended the consent order was only intended to dismiss plaintiff's claims without prejudice. Plaintiff, Meech, and Chicago Title opposed the motion.

Judge Paul Innes considered oral argument and denied appellants' motion. The judge noted the motion was filed nearly two years after the consent order was entered, and accordingly it was time-barred under Rule 4:50-2. A memorializing order was entered and this appeal followed.

Before us, appellants assert they are entitled to relief under Rule 4:50-1(f), which does not contain a time limit. They base their argument on their contentions the motion judge

disregarded: (1) the text and context of the consent order; (2) the fact all parties did not sign the consent order; (3) the prejudice to appellants because their claims may now be barred by the statute of limitations; and (4) the jurisdiction of the Bankruptcy Court to resolve claims involving Goepp. We do not find these arguments persuasive.

Consent judgments resolving litigation are authorized by Rule 4:42-1, Midland Funding, LLC v. Giambanco, 422 N.J. Super. 301, 310-11 (App. Div. 2011), and are "not strictly a judicial decree, but rather in the nature of a contract entered into with the solemn sanction of the court." Cmty. Realty Mgmt. v. Harris, 155 N.J. 212, 226 (1998) (quoting Stonehurst at Freehold v. Twp. Comm. of Freehold, 139 N.J. Super. 311, 313 (Law Div. 1976)). Stated differently, a consent judgment is "an agreement of the parties under the sanction of the court as to what the decision shall be." Fid. Union Trust Co. v. Union Cemetery Ass'n, 136 N.J. Eq. 15, 25 (Ch. 1944) (internal citations omitted), aff'd, 137 N.J. Eq. 456 (E & A 1946).

"[A] consent judgment may only be vacated in accordance with R[ule] 4:50-1." Harris, 155 N.J. at 226 (quoting Stonehurst at Freehold, 139 N.J. Super at 313); see DEG, LLC v. Twp. of Fairfield, 198 N.J. 242, 261 (2009) ("The rule does not distinguish between consent judgments and those issued after trial."); see

also Pope v. Kingsley, 40 N.J. 168, 173 (1963) ("A consent judgment has equal adjudicative effect to one entered after trial or other judicial determination." (citations omitted)).

A motion to vacate a judgment may be granted upon proof of one of the enumerated bases set forth in the rule. "Rule 4:50-1 is not an opportunity for parties to a consent judgment to change their minds; nor is it a pathway to reopen litigation because a party either views his settlement as less advantageous than it had previously appeared, or rethinks the effectiveness of his original legal strategy." DEG, 198 N.J. at 261.

Under Rule 4:50–1, the trial court may relieve a party from an order or judgment for 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.

Motions made under Rule 4:50-1 must be filed within a reasonable time. R. 4:50-2; see also Deutsche Bank Trust Co. Ams. v. Angeles, 428 N.J. Super. 315, 319 (App. Div. 2012). Motions based on Rule 4:50-1(a), (b), and (c) must be filed within a year of the judgment. Angeles, 428 N.J. Super. at 319. However, the one-year limitation for subsections (a), (b), and (c) does not mean that filing within one year automatically qualifies as "within a reasonable time." Orner v. Liu, 419 N.J. Super. 431, 437 (App. Div. 2011); R. 4:50-2.

> [T]he 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). 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.
>
> [Orner, 419 N.J. Super. at 437.]

A motion for relief under Rule 4:50-1 should be granted sparingly and is addressed to the sound discretion of the trial court, whose determination will not be disturbed absent a clear abuse of discretion. U.S. Bank Nat'l Ass'n v. Guillaume, 209 N.J. 449, 467 (2012). "[A]buse of discretion only arises on demonstration of 'manifest error or injustice[,]'" Hisenaj v. Kuehner, 194 N.J. 6, 20 (2008) (quoting State v. Torres, 183 N.J. 554, 572 (2005)), and occurs when the trial court's decision is "made without a rational explanation, inexplicably departed from

established policies, or rested on an impermissible basis." Guillaume, 209 N.J. at 467. Accordingly, this court's task is not "to decide whether the trial court took the wisest course, or even the better course, since to do so would merely be to substitute our judgment for that of the lower court. The question is only whether the trial judge pursued a manifestly unjust course." Gittleman v. Cent. Jersey Bank & Trust Co., 103 N.J. Super. 175, 179 (App. Div. 1967), rev'd on other grounds, 52 N.J. 503 (1968).

Here, we find no abuse of discretion by the trial court. Notably, appellants do not include a copy of their motion for relief from the consent order in their appendix.[2] Appellants' failure to do so hampers to a degree our review of their argument that they sought relief pursuant to Rule 4:50-1(f). Notwithstanding, their brief before the trial court was supplied by opposing counsel and clearly shows they sought relief under subsection (a) of the rule, based on mistake, inadvertence, surprise, or excusable neglect. Consequently, appellants' motion was time-barred under Rule 4:50-2, as the motion judge properly found.

[2] The appendix must include "such other parts of the record . . . as are essential to the proper consideration of the issues[.]" R. 2:6-1(a)(1)(I).

Regardless, appellants do not qualify for relief under subsection (a) of the rule. The kind of mistake contemplated by the rule has been described as one that the parties could not have protected themselves against during the litigation. DEG, 198 N.J. at 263. Such is not the case here. Moreover, appellants' neglect or inadvertence is not excusable since they have failed to demonstrate it was "compatible with due diligence or reasonable prudence." Mancini v. EDS, 132 N.J. 330, 335 (1993) (citing Bauman v. Marinaro, 95 N.J. 380, 394 (1984) and Tradesmens Nat'l Bank & Trust Co. v. Cummings, 38 N.J. Super. 1, 5 (App. Div. 1955)).

To the extent appellants now assert they are entitled to relief under Rule 4:50-1(f), we decline to consider arguments raised for the first time on appeal. See Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234-35 (1973) (discussing the limited circumstances in which an appellate court will consider an argument first raised on appeal). However, even if we were to consider this contention, relief under this subsection of the rule is only available when "truly exceptional circumstances are present." Guillaume, 209 N.J. at 484 (quoting Hous. Auth. of Morristown v. Little, 135 N.J. 274, 286 (1994)). "The rule is limited to 'situations in which, were it not applied, a grave injustice would occur.'" Ibid. (quoting Little, 135 N.J. at 289). Appellants do not meet that standard here.

Appellants also argue the consent order is invalid because Chicago Title did not sign it, and because Goepp purportedly signed a previous version of it. However, the doctrine of invited error precludes appellants from asserting the absence of Chicago Title's signature invalidates the consent order, since appellants' counsel represented to the court it was not required. See Brett v. Great Am. Recreation, 144 N.J. 479, 503 (1996) ("The doctrine of invited error operates to bar a disappointed litigant from arguing on appeal that an adverse decision below was the product of error, when that party urged the lower court to adopt the proposition now alleged to be error."). Moreover, even if Goepp mistakenly signed a prior draft of the consent order, this does not excuse his failure to timely seek relief. R. 4:50-1(a); R. 4:50-2.

To the extent we have not specifically addressed appellants' remaining arguments, we find they lack sufficient merit to warrant further discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.