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Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1017-16T4

FRANZBLAU DRATCH, PC,

Plaintiff-Respondent,

v.

BRIAN MARTIN,

Defendant-Appellant.

Submitted November 15, 2017 – Decided December 12, 2017

Before Judges Nugent and Geiger.

On appeal from Superior Court of New Jersey,
Law Division, Essex County, Docket No. L-3435-
13.

Peter A. Ouda, attorney for appellant.

Franzblau Dratch, PC, respondent pro se
(Stephen N. Dratch, on the brief).

PER CURIAM

Defendant Brian Martin appeals a September 23, 2016 order
granting reconsideration and reinstating a default judgment
entered against him. We reverse.

We glean the following facts from the record. This is a collection action brought by plaintiff Franzblau Dratch, PC, against defendant, its former divorce client, for unpaid legal fees totaling \$17,839.49. Plaintiff's initial attempts to serve defendant with process were unsuccessful. After unsuccessfully moving for leave to serve defendant by substituted service, plaintiff engaged a private process server who served the summons and complaint on an individual at defendant's residence who identified herself as Cassandra Martin. Plaintiff alleges Cassandra Martin identified herself to the process server as defendant's relative and roommate. On April 2, 2014, default judgment was entered against defendant.

Plaintiff claims it mailed a copy of the default judgment to defendant on May 12, 2014. Approximately two weeks later, plaintiff served defendant with a post-judgment discovery demand to which defendant responded by email. Thereafter, defendant's attorney wrote to plaintiff regarding the post-judgment discovery demand. Subsequently, on June 9, 2014, plaintiff asked defendant's attorney for copies of defendant's tax returns. Plaintiff also propounded a May 18, 2015 notice of post-judgment deposition.

Settlement discussions ensued with the parties agreeing to settle the matter for a \$3500 lump sum payment, but defendant never paid the settlement amount. Instead, in February 2016,

defendant retained counsel and moved to vacate the default judgment and for leave to file a counterclaim. Defendant denied plaintiff properly served him, claiming that Cassandra Martin was not his relative, not a member of his household, and was unknown to him. He also contended he has meritorious defenses to the collection action, including breach of contract, unreasonable and unnecessary legal fees, and legal malpractice. Plaintiff opposed the motion.

On March 4, 2016, the trial court granted defendant's motion. In addition to erroneously indicating the motion was unopposed, the judge added handwritten comments on the order indicating defendant had demonstrated both excusable neglect and a meritorious defense required under Rule 4:50-1. The order vacated the default judgment and granted defendant leave to file an answer and counterclaim within thirty days.

Defendant then filed an answer and counterclaim, which asserted multiple affirmative defenses, including failure to state a cause of action and lack of jurisdiction over the defendant because of improper service. The answer also asserted that the legal fees sought by plaintiff "were neither reasonable nor necessary." The counterclaim alleged plaintiff committed legal malpractice by failing to oppose the default motion filed by defendant's wife in the divorce action.

Plaintiff then moved for reconsideration, which was opposed by defendant and denied by the trial court on April 29, 2016.¹ In handwritten comments on the order, the judge stated: "Defendant has demonstrated (1) excusable neglect – in not receiving service – and (2) a meritorious defense – a counterclaim for legal malpractice[.] R. 4:50-1."

Plaintiff moved a second time for reconsideration. Defendant opposed the motion. On September 23, 2016, the judge granted the motion. In rendering her decision, the judge did not address defendant's arguments on the merits. Rather, she simply stated it had recently come to her attention that the order vacating the default and the first order denying reconsideration "were impermissibly stamped with [her] signature without [her] authorization." The judge further indicated that after reviewing all the papers submitted in opposition to defendant's motion to vacate the default, she found "that defendant should not have been granted the relief he requested." Accordingly, she granted plaintiff's second motion for reconsideration, reinstated the default judgment, and dismissed defendant's answer and counterclaim. This appeal followed.

¹ Although the wording of the order does not state the motion for reconsideration is denied, the parties consider the order to have denied plaintiff's motion to rescind the March 4, 2016 order and reinstate the default judgment.

Plaintiff represented defendant in a contested divorce action. During the discovery phase of the case, plaintiff moved to withdraw as defendant's counsel claiming defendant had failed to pay outstanding legal fees. Plaintiff further claimed defendant engaged in conduct that resulted in plaintiff making incomplete representations to the divorce court. At the same time that plaintiff's motion to be relieved was pending, defendant's wife moved to enter default against him in the divorce case, claiming defendant had failed to provide court-ordered discovery.

Plaintiff's motion to be relieved as counsel and defendant's wife's motion for discovery sanctions had the same return date. Defendant contends he provided the court-ordered discovery to his wife. Defendant thought plaintiff would oppose his wife's discovery motion on that basis, but plaintiff did not submit any opposing papers to the divorce court. As a result, the divorce court granted his wife's unopposed motion and entered a default against defendant for failure to provide discovery. The divorce court then concluded the divorce action by conducting a proof hearing rather than a trial. The divorce court did not permit defendant to present any affirmative evidence on the issues of alimony and child support during the proof hearing. Defendant contends this restriction resulted in the divorce court imposing unreasonably high alimony and child support obligations.

On appeal, defendant argues the trial court abused its discretion by ultimately denying his motion to vacate the default judgment entered against him without making any findings or stating its analysis.

Motions to reopen or set aside a judgment are governed by Rule 4:50-1. Defendant sought to reopen the judgment under subsections (d) and (f) of the rule, which provide that the court may relieve a party from a final judgment if "the judgment or order is void," R. 4:50-1(d); or "any other reason justifying relief from the operation of the judgment or order," R. 4:50-1(f). Motions brought under subsections (d) and (f) "shall be made within a reasonable time . . . after the judgment, order or proceeding was entered or taken." R. 4:50-2.

An application to vacate a default judgment is "viewed with great liberality, and every reasonable ground for indulgence is tolerated to the end that a just result is reached." Marder v. Realty Const. Co., 84 N.J. Super. 313, 319 (App. Div.), aff'd, 43 N.J. 508 (1964). Ordinarily, "a default judgment will not be disturbed unless the failure to answer or otherwise appear and defend was excusable under the circumstances and 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." Pressler & Verniero, Current N.J. Court Rules, comment 4.1 on R. 4:50-1 (2018).

On two occasions, the trial court found that defendant had demonstrated excusable neglect and a meritorious defense. Yet, when deciding plaintiff's second motion for reconsideration, the trial court came to a different conclusion without making any new findings or providing any analysis, in clear violation of Rule 1:7-4(a), which requires the court to "find the facts and state its conclusions of law thereon." See Bennett v. Lugo, 368 N.J. Super. 466 (App. Div.) (holding that unsupported findings made after "reviewing the moving papers" are "wholly inadequate"), certif. denied, 180 N.J. 457 (2004); Morales v. Santiago, 217 N.J. Super. 496 (App. Div. 1987) (concluding the trial court failed to abide by Rule 1:7-4 when it denied defendant's motion to vacate default judgment without finding sellers were served with process and without ordering a plenary hearing to resolve the issue).

Defendant argues his right to due process was violated. Fundamental to due process is providing a defendant with notice of a lawsuit and an opportunity to be heard. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their

objections." O'Connor v. Abraham Altus, 67 N.J. 106, 126 (1975) (quoting Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314, 70 S. Ct. 652, 657, 94 L. Ed. 2d 865, 873 (1950)). "Failure to give notice violates 'the most rudimentary demands of due process of law.'" Peralta v. Heights Med. Ctr., Inc., 485 U.S. 80, 84, 108 S. Ct. 896, 899, 99 L. Ed. 2d 75, 81 (1988) (quoting Armstrong v. Manzo, 380 U.S. 545, 550, 85 S. Ct. 1187, 1190, 14 L. Ed. 2d 62, 65 (1965)).

A party satisfies the notice requirement if they properly serve the defendant with a summons and complaint. A party may obtain in personam jurisdiction over a defendant "by leaving a copy thereof at the individual's dwelling place or usual place of abode with a competent member of the household of the age of 14 or over then residing therein." R. 4:4-4(a)(1).

Here, defendant contends the court lacked in personam jurisdiction because plaintiff did not serve him with the summons and complaint in accordance with Rule 4:4-4(a)(1). He alleges that Cassandra Martin was not a member of his household because she did not live in his residence. Plaintiff contends it properly served defendant with process because Cassandra Martin was a member of defendant's household. The trial court did not conduct a hearing to determine whether Cassandra Martin was a member of defendant's household. The court should not have determined that

disputed factual issue on conflicting certifications. See Eaton v. Grau, 368 N.J. Super. 215, 222 (App. Div. 2004).

If Cassandra Martin was not a resident of defendant's household, service was improper, defendant's right to due process was violated, the court lacked in personam jurisdiction over the defendant, and the judgment is void.

"It is clear that a court cannot exercise its power to the detriment of a litigant when in personam jurisdiction has not been established, and that such action would violate the Due Process Clause." Berger v. Paterson Veterans Taxi Serv., 244 N.J. Super. 200, 205 (App. Div. 1990) (citing Peralta, supra, 485 U.S. 80, 108 S. Ct. 896, 99 L. Ed. 2d 75). Where the service of process is so defective that the default judgment is void, due process requires the court grant a motion to set aside a judgment even if it was not made in a timely fashion. Id. at 204-06. In addition, if the court lacks in personam jurisdiction, the defendant is not required to demonstrate a meritorious defense. Peralta, supra, 485 U.S. at 86-87, 108 S. Ct. at 900, 99 L. Ed. 2d at 82.

We hold the trial court erred by denying defendant's motion to reopen the default judgment without conducting a hearing to resolve the disputed issue of whether plaintiff properly served defendant. We reverse the September 23, 2016 order and remand for further proceedings consistent with this opinion. In light of our

ruling, we need not reach the issue of whether the court should have granted defendant's motion under Rule 4:50-1(f).

Reversed and remanded. We do not retain jurisdiction.

I hereby certify that the foregoing is a true copy of the original on file in my office.



CLERK OF THE APPELLATE DIVISION