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This opinion shall not "constitute precedent or be binding upon any court."
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-1062-16T1

JUERGEN HERMANNNS,

Plaintiff-Respondent,

v.

PASTORIUS HOME ASSOCIATION, INC.,

Defendant-Appellant,

and

BERNICE HICKS individually, and
MEMBERS OF THE PASTORIOUS BOARD
OF DIRECTORS,

Defendants.

Submitted November 28, 2017 – Decided December 19, 2017

Before Judges Reisner and Hoffman.

On appeal from Superior Court of New Jersey,
Law Division, Middlesex County, Docket No. L-
2160-15.

Dugan, Brinkmann, Maginnis & Pace, attorneys
for appellant (Stephen M. Winning, on the
brief).

Gareth David De Santiago, attorney for
respondent.

PER CURIAM

Defendant Pastorius Home Association, Inc. (Association or defendant) appeals from a September 30, 2016 order denying its motion to vacate an August 3, 2016 order entering default based on defendant's failure to appear for trial. Defendant also seeks relief from an August 23, 2016 judgment, entered after a proof hearing, awarding approximately \$100,000 in favor of plaintiff Juergen Hermanns. Because defense counsel did not receive timely notice of the scheduled trial, and because defendant appears to have a meritorious defense, we conclude that the trial court misapplied its discretion in denying the motion. Therefore, we reverse the September 30, 2016 order, vacate the August 3, 2016 order and the August 23, 2016 default judgment, and remand for further proceedings consistent with this opinion.¹

On April 14, 2015, plaintiff filed a complaint asserting that defendant and its board of directors (defendants) breached a contract with him. In support of that claim, plaintiff alleged that defendants induced him to join the Association's board of directors and "take care of matters for their building in Germany," which required him to make three trips to Germany. Plaintiff

¹ Plaintiff's motion (M-0187-17), asking this court to require defendant to post a bond as a condition of pursuing this appeal, is denied.

claimed that defendants caused him "great financial and psychological and emotional suffering" by refusing to reimburse him for his "thousands of dollars of trip expenses."

In a second count, plaintiff alleged, without asserting any additional relevant facts, that defendants violated the Consumer Fraud Act by engaging in unspecified "unconscionable, deceptive, false commercial practices." In a third count, and again without asserting any additional facts, plaintiff asserted a claim for emotional distress due to the breach of contract. A fourth count asserted that defendants wrongfully removed him from the board of directors without notice, and wrongfully referred to him as "a thief," causing him emotional distress. Count six² asserted in general terms that defendants "gave Plaintiff negligently false information" causing him "astronomical monetary damages."

The Association filed an answer on July 13, 2015, admitting that it operated a bed and breakfast facility in Germany, that plaintiff was a board member, and that he traveled to Germany "in connection with the Association." The answer denied all other allegations in the complaint.

On July 25, 2016, the court entered an order suppressing defenses due to defendant's failure to appear on the scheduled

² There was no count five in the complaint.

trial date. The court issued a further order on August 3, 2016, entering default and directing that a date be set for a proof hearing on notice to the Association. That order also noted that the individual defendants were previously dismissed from the case for lack of prosecution.

Plaintiff's counsel sent the Civil Assignment Office a letter dated August 16, 2016, confirming an August 23, 2016 proof hearing. Defense counsel was copied on the letter. There is no documentation as to when the letter was mailed. Plaintiff's appellate brief inexplicably asserts that defendant had "10 days notice" of the proof hearing, when that is clearly not the case.

Defendant's counsel did not appear for the proof hearing, and the trial court entered a judgment on August 23, 2016, awarding \$100,000 in unliquidated damages for intentional infliction of emotional distress and \$1989.53 for plaintiff's travel expenses. Neither party provided us with the transcript of the August 23, 2016 hearing or the judge's oral statement of reasons for the default judgment.

Defendant filed a motion to vacate the default, supported by a certification of its attorney, Stephen M. Winning.³ In his

³ The motion, which sought to vacate the July 25, 2016 order entering default, was apparently filed before defense counsel received the August 23, 2016 default judgment. Defense counsel's

certification, Winning attested that neither side had taken any discovery in the case, and he had not received any written notice of the scheduled July 25, 2016 trial. Instead, on July 21, 2016 – while he was "on a prepaid family vacation" – Winning received a phone call from the court telling him that the trial would commence on July 25. He "immediately requested a continuance of the trial due to the fact that he was on [a] prepaid family vacation," and called his adversary for consent. The adversary never responded to the call, and the court denied the adjournment request as "untimely." Winning asserted that defendant had a meritorious defense, in that plaintiff was not legally entitled to emotional distress damages due to unreimbursed travel expenses.

Although defendant requested oral argument, the motion was decided on the papers. In the September 30, 2016 order, the court handwrote "lack of excusable neglect" as its reason for denying the motion.

We review the trial court's decision of a motion under Rule 4:50-1 for abuse of discretion. Mancini v. EDS ex rel. N.J. Auto. Full Ins. Underwriting Ass'n, 132 N.J. 330, 334 (1993). However, the trial court is bound to view such a motion "with great liberality" and to resolve all doubts "in favor of the parties

certification of service attested that the motion was served on plaintiff's counsel on August 16, 2016.

seeking relief." Ibid. (citations omitted). A defendant seeking relief from a default judgment due to excusable neglect must also show that it has a meritorious defense. Ibid.

On this appeal, defendant contends that the trial court misapplied its discretion in denying his motion, because defense counsel did not receive notice of the scheduled July 25, 2016 trial date until July 21, 2016. At that point, he could not attend the trial because he was away on a prepaid family vacation. We agree that the attorney's reason for failing to attend the trial constituted excusable neglect, due to lack of timely notice of the trial. Moreover, it appears that defendant may have a meritorious defense, because emotional distress damages are not usually available in a breach of contract action. See Noye v. Hoffman-LaRoche Inc., 238 N.J. Super. 430, 433 (App. Div. 1990).

Accordingly, we reverse the September 30, 2016 order, vacate the August 23, 3016 default judgment, and remand this case to the trial court for further proceedings consistent with this opinion.

Reversed, vacated, 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