

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

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-1992-16T2

LAUREN NEIDERT,

Plaintiff-Respondent,

v.

BRIAN NEIDERT,

Defendant-Appellant.

Argued November 13, 2017 – Decided December 1, 2017

Before Judges Sabatino and Whipple.

On appeal from Superior Court of New Jersey,
Chancery Division, Family Part, Burlington
County, Docket No. FM-03-1140-16.

Christine A. Dolan argued the cause for
appellant (Cordell Law, LLP, attorneys; Ms.
Dolan, on the briefs).

Matthew Podolnick argued the cause for
respondent (Sherman, Silverstein, Kohl, Rose
& Podolsky, P.A., attorneys; Mr. Podolnick,
on the brief).

PER CURIAM

Defendant Brian Neidert appeals from a November 30, 2016
default final judgment of divorce incorporating the proposed terms

of equitable distribution that had been presented to the court by his wife, plaintiff Lauren Neidert.

Plaintiff filed a complaint for divorce in the Family Part in May 2016. Defendant failed to answer the complaint. Nor did he appear at the scheduled default hearing in November 2016, despite being served personally with advance notice of that proceeding. At the hearing, the trial court adopted the terms set forth in plaintiff's notice of equitable distribution, including an award to plaintiff of exclusive ownership of the marital home.

Dissatisfied with the terms of divorce entered by the court in his absence, defendant retained counsel and sought relief from the final judgment. However, rather than moving before the Family Part to vacate the judgment pursuant to Rule 4:50-1, defendant filed the present appeal.¹ His brief contests various procedural and substantive aspects of the judgment. He further argues that the trial court failed to set forth adequate findings of fact and conclusions of law in support of the judgment, as required by Rule 1:7-4(a).

In her opposing brief, plaintiff argues that this appellate court presently lacks jurisdiction over her ex-husband's challenge

¹ At oral argument on the appeal, defendant's counsel explained that her client contacted her law firm only a few days before the forty-five-day deadline for an appeal was about to expire, and that the firm took prompt action to preserve defendant's rights.

to the default judgment. She maintains that the appropriate procedure would have been for defendant to attempt first to obtain relief from the trial court under Rule 4:50-1. If such a motion had been denied in full or in part, defendant could have then appealed that denial to this court. Defendant urges this court to excuse him from pursuing this trial level process, and to consider directly his various attacks upon the judgment.

Well-established authority clearly obligates a defendant in these circumstances to attempt to secure relief first from the trial court by filing a motion under Rule 4:50-1; a party may not directly appeal a judgment entered in default. See, e.g., Haber v. Haber, 253 N.J. Super. 413, 416 (App. Div. 1992) (citing McDermott v. Patterson, 122 N.J.L. 81, 84 (E. & A. 1939)). As was recognized long ago in McDermott, such a direct appeal is improper because the appellate tribunal may only correct "errors which a court below may have committed, and a court below cannot be said to have committed an error when its judgment was never called into exercise, and the point of law was never taken into consideration, but was abandoned by acquiescence or default of the party who raised it." McDermott, supra, 122 N.J.L. at 84 (citing Walter v. Keuthe, 98 N.J.L. 823, 826 (E. & A. 1923)).

The applicable grounds under Rule 4:50-1 may include: (a) mistake, inadvertence, surprise, or excusable neglect; (b) newly

discovered evidence that would probably alter the judgment, and which by due diligence could not have been discovered in time to move for a new trial; (c) the adverse party's fraud, misrepresentation, or other misconduct; (d) voidness; (e) satisfaction, release, or discharge of the judgment; or (f) any other reason justifying relief from the operation of the judgment. Rule 4:50-1. Such relief is not, of course, automatically granted on mere request. In general, 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[.]" Pressler & Verniero, Current N.J. Court Rules, comment 4.1 on R. 4:50-1 (2017). See also US Bank Nat. Ass'n v. Guillaume, 209 N.J. 449, 468 (2012).

We therefore agree with plaintiff that defendant's appeal is not properly before this court. Although it would have been preferable for plaintiff to have moved to dismiss the appeal before the parties incurred the expenses and devoted the time to brief and argue the matter in this court, the correct path is to dismiss the appeal without prejudice.

We suggest that the trial court convene a case management conference within thirty days to confer with counsel and plan the

next steps, including a motion by defendant under Rule 4:50-1.²
In advance of that conference, counsel should furnish the trial court with courtesy copies of their appellate briefs.

Appeal dismissed, without prejudice.

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



CLERK OF THE APPELLATE DIVISION

² In light of defendant's mistaken filing in the wrong forum, the one-year limitation in Rule 4:50-2 for motions under subsections (a), (b), and (c) of Rule 4:50-1 shall be deemed to have been tolled since the filing of the improvident notice of appeal. Hence, all six possible grounds for relief under Rule 4:50-1 are still available.