SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3228-15T3

WISS & BOUREGY, P.C.,

Plaintiff-Respondent,

v.

ANGELO BISCEGLIE,

Defendant-Appellant.

Submitted February 28, 2017 – Decided March 13, 2017

Before Judges Fisher and Ostrer.

On appeal from the Superior Court of New Jersey, Law Division, Special Civil Part, Bergen County, Docket No. DC-24314-12.

Bisceglie & Associates, P.C., attorneys for appellant (Angelo R. Bisceglie, Jr., of counsel and on the briefs).

Wiss & Bouregy, P.C., attorneys for respondent (Raymond R. Wiss, of counsel and on the brief; Thomas K. Bouregy, Jr. and Timothy J. Wiss, on the brief).

PER CURIAM

This appeal involves a law firm's collection action against a client. In March 2013, plaintiff Wiss & Bouregy, P.C. (W&B) obtained a default judgment against defendant Angelo Bisceglie,

an attorney. W&B alleged it properly served Bisceglie with a pre-action notice under Rule 1:20A-6, the court served Bisceglie with W&B's subsequent summons and complaint, and Bisceglie did not respond. In February 2016, Bisceglie sought an order vacating default judgment, contending he had just learned of the judgment and neither the pre-action notice nor the summons and complaint were properly served. He appeals from the trial court's order denying his motion. We reverse and remand for a hearing on the issue of service.

The motion record reflects that in September 2011, W&B entered into a written retainer agreement with Bisceglie and his wife, and another couple. The four were neighbors. They retained W&B to represent them in connection with a matter involving a piece of real property.[1]

W&B alleged that Bisceglie failed to pay amounts due under the agreement. In a certification filed in opposition to the motion to vacate the default judgment, Raymond R. Wiss (Wiss), one of W&B's name partners, attached what he stated was a true and accurate copy of "the fee arbitration letter" that was sent to Bisceglie. The September 2012 letter from Wiss noted that

[1] The retainer agreement referred to the four persons collectively as "Clients" and stated their payment responsibilities were joint and several.

$12,118.09 remained unpaid despite monthly statements over an extended period of time. Wiss advised Bisceglie that, under Rule 1:20A-3(a), he could resolve W&B's claim by binding fee arbitration if he so chose within thirty days. The letter indicated that it was sent "VIA CERTIFIED MAIL RRR AND FIRST CLASS MAIL" to Bisceglie at the address listed in the retainer agreement.[2]

On November 7, 2012, W&B filed its summons and complaint against Bisceglie in Special Civil Part, seeking payment of the $12,118.09 plus interest under various contract and quasi-contract theories.[3] The complaint alleged that the pre-action notice was sent to Bisceglie. In his opposition to the motion to vacate, Wiss alleged the court properly served the summons and complaint. He submitted a copy of a postcard from the court, which reflected the caption of the suit against Bisceglie and stated "a summons was mailed to defendant(s) on 11-13-12." Wiss also submitted a copy of a printout from the Automated Case Management System (ACMS), which indicated: (1) a "serv issd date" of November 8, 2012; (2) "service type: cert mail"; (3) "actual service date: 11 13 2012"; and (4) "service status: served."

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[2] The letter was not addressed to Bisceglie's wife.

[3] The attached account reflected, without explanation, that all but $501.37 of the alleged balance due had accrued on or before December 29, 2010, notwithstanding that the retainer agreement was dated September 2011.

Neither the postcard nor the ACMS printout indicated the address where service was allegedly made, although the summons set forth the address in the retainer agreement. Wiss certified his "office" contacted "the Clerk of the Court," who "indicated" that the certified mail was returned as "unclaimed" and the regular mail was not returned. Wiss alleged, "I note Defendant was served at the same address as listed on the engagement letter . . . ." Bisceglie did not answer the complaint, and eventually default judgment was entered March 1, 2013. W&B docketed the judgment on January 15, 2014.

Bisceglie moved to vacate the default judgment in February 2016. In a supporting certification, he denied he received the pre-action letter. He also alleged he never received the summons and complaint, or any notice of entry of default or default judgment. Regarding the pre-action notice, Bisceglie noted W&B did not present a certification of the person who actually mailed the letter, nor did it provide any proof of mailing from the U.S. Postal Service, or the returned item marked unclaimed. Notwithstanding the ACMS records that Wiss submitted, Bisceglie denied he received the summons and complaint. Bisceglie attached a proposed answer to the complaint in which he denied liability

and alleged as affirmative defenses W&B's failure to serve the pre-action notice and the summons and complaint.[4]

The trial court denied the motion. Relying on Wiss's certification, the court found that W&B satisfied the pre-action notice requirements by sending the letter to Bisceglie by regular mail to his proper address. The court also concluded the summons and complaint were properly served. The judge apparently relied on his inspection of documents in the actual court file, although the judge did not say so, and did not formally take judicial notice of the file. The judge stated:

> The certified mail, in this case, did not have any of the markings indicating that it had not been delivered; such as moved, left no address, attempted, addressee not known, no such number of street, insufficient address, not deliverable as addressed, unable to forward, or any other reason for the Court to believe that the service was not effective.

Having concluded that service was proper, the court found: Bisceglie's motion was untimely under Rule 4:50-2; he failed to present a meritorious defense; and he failed to present a sufficient showing to justify exceptional relief under Rule 4:50-1(f). This appeal followed.

[4] In his certification, as distinct from his proposed answer, Bisceglie contended that the amount W&B sought exceeded the reasonable value of services rendered to him.

The decision whether to grant a motion to vacate a default judgment is "left to the sound discretion of the trial court, and will not be disturbed absent an abuse of discretion." Mancini v. EDS, 132 N.J. 330, 334 (1993); see also U.S. Bank Nat'l Ass'n v. Guillaume, 209 N.J. 449, 467 (2012) (requiring "clear abuse of discretion"). However, an appellate court may reverse when the trial court gives insufficient deference to the principles governing the motion, see Davis v. DND/Fidoreo, Inc., 317 N.J. Super. 92, 100-01 (App. Div. 1998), certif. denied, 158 N.J. 686 (1999), or "when a decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." U.S. Bank Nat'l Ass'n, supra, 209 N.J. at 467 (internal quotations and citations omitted).

Although the movant bears the burden of demonstrating grounds to vacate a default judgment, Jameson v. Great Atl. & Pac. Tea Co., 363 N.J. Super. 419, 425-26 (App. Div. 2003), certif. denied, 179 N.J. 309 (2004), close issues should be resolved in a movant's favor. See Mancini, supra, 132 N.J. at 334 ("All doubts . . . should be resolved in favor of the parties seeking relief."). That is so because we value decisions on the merits. Davis, supra, 317 N.J. at 100-01 (stating that doubts should be resolved in favor of the applicant in order secure a trial upon the merits).

A motion to vacate a default judgment for lack of service is governed by Rule 4:50-1(d), which authorizes a court to relieve a party from a final judgment if "the judgment or order is void." Notwithstanding actual notice of the suit comporting with due process, a default judgment must be set aside if there was a substantial deviation from the service of process rules. See Sobel v. Long Island Entm't Prods., Inc., 329 N.J. Super. 285, 292-94 (App. Div. 2000). Even absent such a substantial deviation, where "'there is at least some doubt as to whether the defendant was in fact served with process, . . . the circumstances require a more liberal disposition of' the motion" to vacate a default judgment. Davis, supra, 317 N.J. Super. at 100 (quoting Goldfarb v. Roeger, 54 N.J. Super. 85, 92 (App. Div. 1959)).

"If defective service renders the judgment void, a meritorious defense is not required to vacate the judgment under R. 4:50-1(d)." Jameson, supra, 363 N.J. Super. at 425. Furthermore, although a motion under Rule 4:50-1(d) must be made within a "reasonable time," it is not subject to the absolute one-year time bar. R. 4:50-2.

With these principles in mind, we consider first the significance of the pre-action notice requirement. Rule 1:20A-6 prohibits a suit for fees unless attorneys first notify their clients they may opt for binding arbitration. The rule also

directs a court to dismiss a complaint that does not allege compliance with the pre-action notice requirement:

> No lawsuit to recover a fee may be filed until the expiration of the 30 day period herein giving Pre-Action Notice to a client . . . . Pre-Action Notice shall be given in writing, which shall be sent by certified mail and regular mail to the last known address of the client, or, alternatively, hand delivered to the client, and which shall contain the name, address and telephone number of the current secretary of the Fee Committee in a district where the lawyer maintains an office. . . . The attorney's complaint shall allege the giving of the notice required by this rule or it shall be dismissed.
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> [Ibid.]

If a pre-action notice is a jurisdictional requirement, then the failure to provide it would render a subsequent judgment void under Rule 4:50-1(d). However, our courts have not yet addressed this question, and we need not decide it here. See DuBois, Sheehan, Hamilton and DuBois v. DeLarm, 243 N.J. Super. 175, 179-80 (App. Div. 1990) (raising, but not deciding, whether defendant-client's late demand for fee arbitration divested the court of jurisdiction, notwithstanding defendant's participation in the subsequent trial).

Even if non-compliance with the pre-action notice requirement does not defeat jurisdiction, it constitutes a meritorious defense. Furthermore, we are satisfied that if an attorney fails

to comply with Rule 1:20A-6, and then obtains a default judgment against the client, the client should be able to seek relief from the judgment based on Rule 4:50-1(f) and avoid the strict one-year time bar of Rule 4:50-2. To rule otherwise would undermine the integrity of the fee arbitration system the Court established in Rule 1:20A-6.

A key issue is whether W&B complied with the pre-action notice requirement. Based on this record, we are convinced the trial court erred in determining that it did. There is no competent evidence of mailing. W&B did not present a copy of the certified mail receipt, the green return receipt card, nor the Postal Service's return of the unclaimed certified letter. W&B also does not explain why these common indicia of mailing are missing.

Wiss's assurance that the letter was "sent by Wiss & Bouregy, P.C." does not suffice. Wiss did not certify that he mailed the pre-action notice, nor did W&B provide a certification of the person who placed the notice in the mail. Wiss also does not rely on a business custom or practice of mailing, which would, in any event, require proof that W&B actually utilized the custom or practice in this case. See SSI Med. Servs. v. HHS, Div. of Med. Assistance & Health Servs., 146 N.J. 614, 624 (1996) (recognizing the general rule that "mailing based in part on evidence of business custom or practice also requires proof that the custom

or practice was actually followed on the specific occasion in order to establish the fact of mailing").[5]

Also, the mailing of the pre-action notice, absent a return receipt, only creates a presumption of receipt. See id. at 621 ("New Jersey cases have recognized a presumption that mail properly addressed, stamped, and posted was received by the party to whom it was addressed."). The presumption is rebuttable. Id. at 625. "[A] valid presumption can be used to establish a prima facie case, but the presumption normally disappears in the face of conflicting evidence." Jameson, supra, 363 N.J. Super. at 427 (internal quotation marks and citation omitted). We recognize that Bisceglie offers only a bald denial of receipt. But, that was sufficient to create a fact issue, especially in view of W&B's weak proofs.[6]

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[5] The Court in SSI Medical endorsed this rule "when the issue of mailing arises in a context where it would be expected that those charged with the duty of mailing would be capable of testifying that the documents at issue were actually mailed or that the custom or practice was actually followed." Ibid. However, the Court declined to apply the rule to a large business, with complex operations, that mailed "voluminous" items daily, because "it may not be possible for individuals engaged in mailing activities to recall actual mailing of a document or whether the custom or practice of mailing was followed on a given day." Ibid.

[6] Notably, an uncorroborated denial of receipt is insufficient to impeach a sheriff's return of service, Goldfarb, supra, 54 N.J. Super. at 90, which an objector must prove by clear and convincing evidence. See Jameson, supra, 363 N.J. Super. at 426. That higher

Even if the court finds the pre-action notice was properly served, Bisceglie would be entitled to relief from the judgment under Rule 4:50-1(d), if he can impeach service of the summons and complaint. Rule 6:2-3(d) authorizes initial service by mail in a Special Civil Part matter, and states in relevant part:

> Effective Service. Consistent with due process of law, service by mail pursuant to this rule shall have the same effect as personal service, and the simultaneous mailing shall constitute effective service unless the mail is returned to the court by the postal service with a marking indicating it has not been delivered, such as "Moved, Left No Address," "Attempted -- Addressee Not Known," "No Such Number/Street," "Insufficient Address," "Not Deliverable as Addressed -- Unable to Forward," or the court has other reason to believe that service was not effected. However, if the certified mail is returned to the court marked "unclaimed" or "refused," service is effective provided that the ordinary mail has not been returned.
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> [R. 6:2-3(d)(4).]

To prove service by mail, W&B relies on the statement of someone in the Clerk's office to someone in W&B's office, who then conveyed to Wiss that the regular mail was sent and the certified mail returned unclaimed. This double hearsay is not competent evidence to defeat Bisceglie's motion. See R. 1:6-6.

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standard is appropriate because the sheriff is a public officer and a disinterested third-party, and accomplishes service by hand.

W&B also relies on the court's postcard and the ACMS printout, but neither is conclusive evidence of proper mailing. Although the postcard states that a summons was mailed to defendant, it is uncertain the postcard would be admissible as a business or public record, N.J.R.E. 803(c)(6), (8), given the lack of foundational evidence. See R. 1:6-6 (requiring admissible evidence in support of motions). Furthermore, the postcard does not indicate the address where the summons was sent.

As for the ACMS printout, it too lacks details of the address where service was made. Additionally, the ACMS website contains a disclaimer, cautioning readers about its reliability:

> The information displayed on this Web Site is generated from computerized records in the custody and control of the New Jersey Judiciary and is intended for informational purposes only. The Judiciary provides this information as a public service and makes no warranties, either expressed or implied, regarding its accuracy, reliability, currency, completeness, or suitability for any particular purpose.
>
> [https://portal.njcourts.gov/webe6/ACMSPA/ entry (last visited Feb. 24, 2017).]

Thus, even if it otherwise qualified as a business record, its trustworthiness is at least subject to challenge. See N.J.R.E. 803(c)(6) (stating that a record of regularly conducted activity is admissible unless "the sources of information or the method,

purpose or circumstances of preparation indicate that it is not trustworthy").

We recognize the court apparently reviewed a court file that included the returned certified letter, which would constitute direct evidence of its mailing, address, and refusal, and would constitute persuasive circumstantial evidence that the regular mail was sent as well. However, the record does not include a copy of the returned certified letter. Although the judge was authorized to take judicial notice of documents in the court's file, N.J.R.E. 201(b)(4), he was also obliged to provide the parties an opportunity to be heard "as to the propriety of taking judicial notice and the tenor of the matter noticed." N.J.S.A. 201(e). The record does not indicate the judge did so.

Lastly, although Rule 6:2-3 authorizes service by mail, it does not preclude competent evidence to rebut the presumption of receipt. It would not be "[c]onsistent with due process of law," see Rule 6:2-3(d)(4), if, notwithstanding court mailing, neither delivery nor actual notice was accomplished — at least where the intended recipient did not affirmatively refuse delivery. See Coryell, L.L.C. v. Curry, 391 N.J. Super. 72, 81 (App. Div. 2006) (stating "the constitutional requirement of due process does not mandate perfect service" but does "contemplate[] effective service"); Rosa v. Araujo, 260 N.J. Super. 458, 463 (App. Div.

1992) (finding due process was satisfied where the defendant concededly received the summons and complaint, notwithstanding technical violations of the service of process rule), certif. denied, 133 N.J. 434 (1993). Bisceglie's certification that he did not receive the summons and complaint, and was unaware of the lawsuit was sufficient on this record to create a genuine issue of fact as to whether due process was satisfied and service accomplished. "[I]t remains [the] plaintiff's overall burden of persuasion to demonstrate that service . . . was achieved . . . ." Jameson, supra, 363 N.J. Super. at 429.

In sum, based on the disputed issues of service of the pre-action notice and summons and complaint, the trial court prematurely denied the motion to vacate default judgment. The court must first determine whether the pre-action notice was actually served. If not, then the default judgment should be vacated, and the complaint dismissed, consistent with Rule 1:20A-6. Even if the court finds that the pre-action notice was served, relief should be granted if W&B cannot meet its overall burden to demonstrate service of the summons and complaint.

Reversed and remanded. We do not retain jurisdiction.