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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-4523-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

FRANCISCO CARDOSO, TROY
C. OGLESBY and CYBER BAIL
BONDS, LLC,

Defendants,

and

FIRST INDEMNITY OF AMERICA
INSURANCE COMPANY,

Surety-Appellant.

Argued October 16, 2017 – Decided November 2, 2017

Before Judges Messano and Vernoia.

On appeal from the Superior Court of New
Jersey, Law Division, Camden County.

Samuel M. Silver argued the cause for
appellant.

Catherine Binowski, Assistant County Counsel,
argued the cause for respondent (Christopher
A. Orlando, Camden County Counsel, attorney;
Ms. Binowski, on the brief).

PER CURIAM

Appellant First Indemnity of America Insurance Co. is the surety on a \$50,000 bail bond that was forfeited when defendant Francisco Cardoso failed to appear at a scheduled pre-arraignment interview. First Indemnity appeals from an order denying its motion to vacate the forfeiture and for its exoneration as the surety, and directing remission of seventy-five percent of the bail forfeiture. It claims it was entitled to exoneration or, in the alternative, greater remission of the forfeiture. We disagree and affirm.

Cardoso was arrested on weapons and hindering apprehension charges, and held on \$50,000 bail. First Indemnity was the surety on the bail bond that was posted on August 18, 2014, for defendant's release.¹

Following the posting of the bond, defendant remained in custody in the Camden County jail because he had a detainer lodged by Immigration and Customs Enforcement (ICE).² On August 27, 2014, ICE took defendant into custody and removed him from the jail.

¹ The bond was posted by defendant Cyber Bail Bonds.

² In support of a motion First Indemnity later filed in this matter, its licensed recovery agent certified that defendant was not released from custody upon the posting of the bail bond because "defendant had an Immigration and . . . Customs Enforcement (ICE) hold."

Four months later, in late December 2014, defendant was deported to Mexico.

On July 17, 2015, defendant failed to appear for a scheduled court event, a bench warrant was issued and the court ordered forfeiture of defendant's bail. The court sent First Indemnity a notice advising that the bail was forfeited and a default judgment would be entered unless First Indemnity moved to set aside the forfeiture within seventy-five days. First Indemnity took no action and a \$50,000 default judgment was entered on October 15, 2015.

Three and one-half months later, First Indemnity moved to vacate the forfeiture and default judgment, exonerate the surety and discharge the bond. The motion was supported by First Indemnity's license recovery agent's certification stating he first received the file on January 27, 2016, and confirmed there was an active bench warrant for Cardoso. Within six days, the agent determined Cardoso was taken into ICE custody in August 2015 and subsequently deported.

The court heard argument during two proceedings and, in an oral decision, recognized Cardoso was not a fugitive when he was taken into ICE custody. The court found First Indemnity failed to monitor Cardoso following the posting of the bail bond and took no action during the four months following Cardoso's removal from

the Camden County jail and prior to his deportation to ensure his availability for the court proceedings on the pending criminal charges. The court noted First Indemnity's failure to make any recapture efforts until January 2016, thirteen months after Cardoso was deported and seventeen months after he was taken into ICE custody.

The court acknowledged it would have been difficult for First Indemnity to secure Cardoso's presence because he was in ICE custody and subject to deportation. The court also found First Indemnity failed to present any evidence showing it was impossible to do so.

The judge found First Indemnity was entitled to remission, and granted in part First Indemnity's motion, concluding that "remission should be [seventy-five] percent, given the fact that there was a bond posted [First Indemnity] will have to pay [twenty-five] percent of \$50,000, which is \$12,500[.]" The court entered an order vacating the default judgment, discharging the bond, and directing payment of \$12,500. This appeal followed.

First Indemnity contends it is entitled to exoneration because Cardoso was never released from custody and was in ICE custody until his deportation. It argues performance of its obligations was therefore rendered impossible and, for that reason, it is entitled to exoneration. It also argues it is

entitled to exoneration under general principles governing remission. Last, it argues that the forfeiture ordered by the court is not supported by law or facts.

Rule 3:26-6 regulates bail forfeiture, the setting aside of a forfeiture and remission.³ "[A] forfeiture may be vacated, 'in whole or in part, if its enforcement is not required in the interest of justice upon such conditions as [the court] imposes.'" State v. Ventura, 196 N.J. 203, 213 (2008) (quoting R. 3:26-6(b)); see also State v. Peace, 63 N.J. 127, 129 (1973). Pursuant to Rule 3:26-6(c), remission may be ordered in whole or in part in the interest of justice "even after entry of judgment of default". Peace, supra, 65 N.J. at 129; see also R. 3:26-6(c).

We review a bail remission decision under an abuse of discretion standard. Ibid. "[T]he decision to remit and the amount of remission lies essentially in the [equitable] discretion of the trial court." Ventura, supra, 196 N.J. at 213 (2008) (quoting Peace, supra, 63 N.J. at 129).

The exercise of that discretion must, however, be informed by the standards articulated by

³ Rule 3:26-6 was amended effective September 1, 2017. The amendments include changes to sections (b) and (c) which address setting aside of orders of forfeiture and judgment, and remission respectively. Because the court decided defendant's motion prior to the effective date of the amended rule, we apply the prior version. The parties do not argue otherwise. We offer no opinion as to whether the amendments would otherwise affect the outcome here.

the courts in State v. Hyers, 122 N.J. Super. 177, 180 (App. Div. 1973), and again in State v. Mercado, 329 N.J. Super. 265, 271 (App. Div. 2000), and must, moreover, be consistent with the policy concerns we identified in [State v. de la Hoya, 359 N.J. Super. 194, 198 (App. Div. 2003)]. Paramount among them is the necessity to provide a reasonable incentive to the surety to attempt the recapture of the non-appearing defendant and to assure that the onus placed on commercial sureties is not so great as to risk the impairment of a defendant's realistic right to post pretrial bail.

[State v. Harmon, 361 N.J. Super. 250, 254 (App. Div. 2003).]

"[T]he party seeking to set aside the judgment bears the burden to prove that forfeiture is inequitable." Ventura, supra, 196 N.J. at 213; accord State v. Fields, 137 N.J. Super. 79, 81 (App. Div. 1975). In Ventura, the Court identified factors that have been considered in determining if remission should be granted or denied, including

- (a) whether the applicant is a commercial bondsman;
- (b) the bondsman's supervision, if any, of defendant during the time of his release;
- (c) the bondsman's efforts to insure the return of the fugitive;
- (d) the time elapsed between the date ordered for the appearance of defendant and his return to court;
- (e) the prejudice, if any, to the State because of the absence of defendant;

(f) the expenses incurred by the State by reason of the default in appearance, the recapture of the fugitive and the enforcement of the forfeiture;

(g) whether reimbursement of the expenses incurred in (f) will adequately satisfy the interests of justice.

[Ibid. (quoting Hyers, supra, 122 N.J. Super. at 180).]

The Court also explained that other factors have been considered in assessing requests for remission. Id. at 213-14. For example, a surety's lack of effort in locating the defendant, the necessity of providing financial incentives to the surety to recapture the defendant, and the surety's level of supervision of the defendant prior to the failure to appear should be considered in making a remission decision. Ibid. (citations omitted). The Court further noted the factors and guidelines set forth in the Administrative Office of the Courts' Remittitur Guidelines for Superior Court and Municipal Courts must be considered in rendering a remission decision.⁴ Id. at 215-16.

⁴ The guidelines were revised following the Ventura decision. See Philip S. Carchman, P.J.A.D., Acting Administrative Director of the Courts, Supplement to Directive #13-04 (Oct. 9, 2007), http://infonet.courts.judiciary.state.nj.us/wps/wcm/connect/e2ef968041d340b080fe9e2e02aee3df/supp_dir_13_04.pdf?MOD=AJPERES&CACHEID=e2ef968041d340b080fe9e2e02aee3df.

The Court recognized that "our general principles concerning bail remission are not a perfect fit when a defendant is deported from the United States while on bail." Id. at 216. Under the Guidelines, a deported defendant would "come within the first starting point that presumes remission is not appropriate because the defendant essentially remains a fugitive." Ibid. The Court however reasoned that any impossibility of securing a defendant's presence that exists because of deportation should play a role in determining a "surety's motion for remission and in the appropriate case, relief may be granted." Ibid.

The Court found that a remission decision is "fact-driven and involves consideration of a multitude of factors." Id. at 218. The Court held that "[i]n most cases, remission of bail will not be appropriate unless the defendant has been returned to the jurisdiction of the court." Ibid. However, where deportation is the sole reason a defendant cannot appear, "a crucial factor" that must be considered is whether the defendant was a fugitive at the time he or she was captured and then deported. Ibid. Where a defendant was a fugitive who was captured and deported, "remission generally should be denied." Ibid. However, where, as here, the defendant was otherwise "compliant with the terms of his or her release" and was then deported, "some degree of remission should be considered." Ibid.

Moreover, in State v. Poon, 244 N.J. Super. 86 (App. Div. 1990), we identified factors that should be considered in determining remission where the defendant fails to appear because of deportation:

(1) whether "the indictment was dismissed for reasons not related to [the] defendant's non-appearance";

(2) "the State's position regarding the need for defendant's return to the forum for prosecution" including, "if the State elects, for example, not to extradite or return [the] defendant for prosecution . . . when it can";

(3) any "prejudice" to the State by the "defendant's non-appearance at the trial" of any codefendant; and

(4) "[t]he efforts of the defendant and the surety to return [the] defendant to this jurisdiction."

[Id. at 101-02.]

In Ventura, the Court further explained a surety's obligation to make efforts to obtain the return of a defendant who has been deported: "[a] surety's essential responsibility is to guarantee not only the defendant's appearance at the scheduled court proceedings, but that if the defendant is deported to make every effort to re-apprehend the defendant." Ventura, supra, 196 N.J. at 221.

Applying these principles, we discern no basis to reverse the court's discretionary decision ordering remission. The motion

court expressly considered that Cardoso was not a fugitive when he was taken into ICE custody and subsequently deported. Consistent with the holding in Ventura, the motion court recognized that "some degree of remission" was required and ordered a substantial remission of seventy-five percent of the bail bond. See *ibid.* We reject First Indemnity's contention that because Cardoso was never released from the Camden County jail and was compliant with the conditions of his release on bail that exoneration was required because production of defendant was impossible. Its position is inconsistent with the holding in Ventura that only some level remission is required where a surety fails to produce a defendant who was not a fugitive when taken into custody and deported. Ibid.

Moreover, in Poon we found that "[t]he efforts of the defendant and the surety to return defendant to this jurisdiction are relevant in determining the equities" of a remission motion where the defendant was deported. Poon, *supra*, 244 N.J. Super. at 102. We noted that in weighing the surety's efforts the court must consider whether the surety took steps "to prevent deportation until after [the] defendant's" court appearances or "to request a delay of the immigration proceedings until after disposition of the charges here." Ibid.

Here, First Indemnity took no action concerning Cardoso's deportation proceedings to ensure his appearance in court. Cardoso was in ICE custody for four months prior to his deportation and First Indemnity failed to act. We are unpersuaded by First Indemnity's argument that it did not take any action because the State failed to notify it that Cardoso was in ICE custody. It was First Indemnity's failure to monitor defendant and not any failure of the State that resulted in First Indemnity's ignorance of defendant's status. The record shows there was an ICE detainer against defendant at the time the bail bond was posted, and First Indemnity never monitored Cardoso's whereabouts until it made its motion to vacate the default judgment seventeen months after the bond was posted.

The record also shows the court carefully considered the Poon factors and First Indemnity's failure to make any effort to ensure Cardoso's appearance. The court found one Poon factor in favor of granting remission: the State did not seek to extradite Cardoso. The court found the third Poon factor, prejudice to codefendants, inapplicable. The court, however, found two factor's that weigh against remission: the indictment was dismissed solely due to Cardoso's nonappearance and First Indemnity failed to make any effort to return Cardoso to the jurisdiction.

The court also assessed the Hyers and Guideline factors.⁵ Hyers, supra, 122 N.J. Super. at 180. The court found the following factors weighed against remission: First Indemnity was a commercial surety, First Indemnity failed to supervise and monitor Cardoso, First Indemnity took no steps to secure Cardoso's return or appearance, and the State was prejudiced in its ability to prosecute. The court also found other factors were either inapplicable (e.g., the time that elapsed between the date ordered for Cardoso's appearance and his return), or supported remission (e.g., the absence of evidence showing expenses incurred by the State).

In sum, we are satisfied the record supports the court's findings and its careful application of the remission standards. There has been no showing the court's decision rests on an impermissible basis and First Indemnity fails to satisfy its burden of showing the forfeiture is inequitable. See Ventura, supra, 196 N.J. at 213. We therefore conclude the court did not abuse its discretion in ordering a seventy-five percent remission of the bail bond. See United States v. Scurry, 193 N.J. 492, 504 (2008) (finding there is an abuse of discretion where a "decision [is]

⁵ The court addressed the factors at the first of the two days of oral argument on First Indemnity's motion.

made without a rational explanation, inexplicably depart[s] from established policies, or rest[s] on an impermissible basis").

Affirmed.

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



CLERK OF THE APPELLATE DIVISION