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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-1729-16T1

ROBERT U. DEL VECCHIO,
TRUSTEE OF THE ROBERT U.
DEL VECCHIO PENSION TRUST,

Plaintiff-Respondent/
Cross-Appellant,

v.

[HELEN V. SMITH], KATHLEEN
SMITH, WILLIAM E. SMITH,
ALARIS HEALTH F/K/A WEST
HUDSON HOSPITAL, and
CLARA MAASS MEDICAL CENTER,

Defendants,

and

DENISE V. BAMBER,

Defendant-Appellant/
Cross-Respondent.

Argued telephonically April 17, 2018 –
Decided May 15, 2018

Before Judges Simonelli and Gooden Brown.

On appeal from Superior Court of New Jersey,
Chancery Division, Hudson County, Docket No.
F-049034-13.

Cory Anne Cassidy argued the cause for appellant/cross-respondent (Riposta Lawyers, LLC, attorneys; Cory Anne Cassidy, of counsel and on the brief).

Keith A. Bonchi argued the cause for respondent/cross-appellant (Goldenberg, Mackler, Sayegh, Mintz, Pfeffer, Bonchi & Gill, PC, attorneys; Keith A. Bonchi, of counsel and on the brief; Elliott J. Almanza, on the brief).

PER CURIAM

In this tax sale foreclosure matter, defendant Denise V. Bamber appeals from the November 18, 2016 Chancery Division order, which denied her motion to vacate a January 22, 2016 final default judgment. Plaintiff Robert U. Del Vecchio, Trustee of the Robert U. Del Vecchio Pension Trust, cross-appeals from a separate November 18, 2016 order, which denied his cross-motion to enforce a January 15, 2015 consent order. We affirm both orders.

I.

We derive the following facts from the competent evidence in the record. Defendant's mother, Helen V. Smith (the decedent), held title to property in the Town of Kearny and failed to pay the property taxes for the year 2010. As a result, on July 6, 2011, the Town conducted a tax sale. On July 15, 2011, plaintiff purchased the tax sale certificate, paying a premium of \$9600. On October 18, 2011, plaintiff recorded the tax sale certificate with the Hudson County Register of Deeds.

The decedent died testate on June 8, 2012. Under her Last Will and Testament, her daughter, defendant Kathleen Smith, inherited "all [her] worldly possessions[,]" and was named as executrix of the estate. The decedent bequeathed her residuary estate equally to her grandson and plaintiff. Smith sent defendant a Notice of Probate of Will, advising the Will was probated on December 13, 2013. Although defendant later challenged Smith's appointment as executrix, there is no evidence she challenged the Will or inquired about the status of the property or Smith's handling of the estate or property taxes until over two years later.

The property taxes remained unpaid. As a result, plaintiff filed a complaint to foreclose the tax sale certificate. After learning of Smith's existence and that she was the decedent's daughter and lived in the property, on March 4, 2014, plaintiff filed an amended complaint, naming Smith as a defendant. Smith filed a contesting answer. Plaintiff filed a motion to strike the answer and deem the action uncontested.

The parties subsequently executed a consent order on January 15, 2015, which provided the matter would be "deemed noncontest[ed] and . . . returned to the Foreclosure Unit to proceed as an uncontested matter." The consent order precluded plaintiff from applying for final judgment before April 1, 2015, and Smith waived

her right to contest the foreclosure unless plaintiff failed to comply.

Defendant contacted plaintiff in early April 2015, and advised she was one of the decedent's children. Subsequently, plaintiff filed a second amended complaint, adding defendant to the litigation. On July 28, 2015, defendant was personally served with the summons and second amended complaint, but did not file an answer or other pleading.

On September 3, 2015, plaintiff filed a request to enter default against defendant. On October 23, 2015, the court entered an order setting the amount of redemption at \$38,013.78, and setting December 7, 2015 as the last day to redeem (the OST). On October 27, 2015, plaintiff sent copies of the request to enter default and OST to defendant, and defendant received them on November 4, 2015. Defendant did not move to vacate the entry of default or OST, and neither she nor any other defendant redeemed the tax sale certificate.

On December 10, 2015, plaintiff obtained the tax collector's certification of non-redemption and applied for final judgment. On January 22, 2016, the court entered a final default judgment against defendant,¹ and on January 25, 2016, served a copy of it

¹ The final judgment included all defendants.

on defendant. On May 5, 2016, the court issued a writ of possession.

Ten months after entry of the final judgment, on October 7, 2016, defendant filed a motion to vacate the final judgment pursuant to Rule 4:50-1 (a), (e), and (f) and equitable principles.² The motion was not supported by defendant's certification or affidavit, as required by Rule 1:6-6. Rather, plaintiff relied on her attorney's certification, which contained facts not based on the attorney's personal knowledge.

Plaintiff opposed the motion, arguing, as he does on appeal, that defendant's equitable arguments were not supported by competent evidence and lacked merit. He certified that since more than five years had passed since the tax sale certificate was sold, if the court vacated the final judgment, he could not recover the \$9600 premium he paid because it escheated to the Town under

² Prior to filing the motion to vacate, on June 15, 2016, defendant filed an order to show cause and verified complaint in the Chancery Division, Probate Part, seeking to remove Smith as executrix of the estate, eject Smith from the property, and set aside the final judgment entered in the foreclosure matter. The court entered an order on October 11, 2016, removing Smith as executrix, appointing defendant as successor executrix, and ejecting Smith and any other occupants from the property. The court dismissed the complaint as to plaintiff. Defendant's alleged dispute with Smith is irrelevant to this foreclosure matter.

N.J.S.A. 54:5-33.³ Plaintiff also filed a cross-motion to enforce the consent order.

The motion judge denied defendant's motion, finding it was untimely under N.J.S.A. 54:5-87, which provides, in pertinent part, that "no application shall be entertained to reopen the judgment after three months from the date thereof, and then only upon the grounds of lack of jurisdiction or fraud in the conduct of the suit." The judge also found defendant failed to show good cause to vacate under Rule 4:50-1, as she could not show any unexpected or extreme hardship as a result of the final judgment. The judge noted defendant did not live in the property, and thus, would not be removed from her home, and was not able to redeem the tax sale certificate and had no short term ability to secure the necessary funds to redeem.

The judge found defendant failed to show excusable neglect, as she knew about this action since July 2015, when she received

³ N.J.S.A. 54:5-33 provides as follows, in pertinent part:

Payment for the sale shall be made before the conclusion of the sale, or the property shall be resold. Any premium payment shall be held by the collector and returned to the purchaser of the fee if and when redemption is made. If redemption is not made within five years from date of sale the premium payment shall be turned over to the treasurer of the municipality and become a part of the funds of the municipality.

service of the second amended complaint, and failed to file an answer. The judge noted that even though defendant claimed she could not afford to retain counsel, she could have filed an answer or pleading as a pro se litigant. The judge also found defendant had not pled or asserted any meritorious defense to the tax sale foreclosure.

The judge denied plaintiff's cross-motion, finding the denial of defendant's motion to vacate rendered the consent order moot. The judge also found plaintiff provided no basis to enforce a consent order to which defendant was not a party, which was entered before she was joined as a party, and which named her individually, not as executrix of the estate. This appeal and cross-appeal followed.

II.

On appeal, relying on equitable reasons not supported by competent evidence in the record, defendant argues the judge's decision "must be reversed because it will lead to the sort of [draconian], unjust result not contemplated by our system of justice[.]"⁴ Defendant also argues that although N.J.S.A. 54:5-

⁴ Defendant relies on I.E.'s, L.L.C. v. Simmons, 392 N.J. Super. 520 (Law Div. 2006) to support her purported equitable reasons to vacate the final judgment. However, trial court opinions do not constitute precedent and are not binding on us. S & R Assocs. v. Lynn Realty Corp., 338 N.J. Super. 350, 355 (App. Div. 2001). In

87 provides a tax sale foreclosure can only be reopened three months after the date of the judgment, Rule 4:50-1 allows one year or a reasonable time for a motion to vacate, the rule governs, and she filed the motion within a reasonable time. Lastly, defendant argues she was entitled to relief under Rule 4:50-1(a), (e), and (f) based on the same unsupported equitable reasons.⁵

We review the trial court's decision on a motion to vacate a default judgment for abuse of discretion. Deutsche Bank Nat'l Tr. Co. v. Russo, 429 N.J. Super. 91, 98 (App. Div. 2012). The court should not grant the motion unless the defendant's failure to answer or appear was excusable, and the defendant has a meritorious defense. Marder v. Realty Constr. Co., 84 N.J. Super. 313, 318 (App. Div. 1964). "The trial court's determination under [Rule

any event, the case is distinguishable. There, unlike here, the decedent included her property in her residuary estate and bequeathed the residuary estate to her four children. Id. at 524. In addition, three children were not personally served with the summons and complaint and only became aware of the proceedings after the entry of final judgment, and two children lived in the premises. Id. at 524-26, 530. Defendant also relies on an unpublished opinion from this court. However, unpublished opinions do not constitute precedent or bind us. Trinity Cemetery Ass'n v. Twp. of Wall, 170 N.J. 39, 48 (2001); R. 1:36-3.

⁵ We decline to address defendant's argument that equity and justice require reversal even if we find the final judgment was entered due to her negligence. Defendant did not raise this issue before the motion judge, it is not jurisdictional in nature, and does not substantially implicate the public interest. Zaman v. Felton, 219 N.J. 199, 226-27 (2014).

4:50-1] warrants substantial deference, and the abuse of discretion must be clear to warrant reversal." Ibid. (alteration in original) (citations omitted). "[An] abuse of discretion only arises on demonstration of 'manifest error or injustice[,]'" Hisenaj v. Kuehner, 194 N.J. 6, 20 (2008) (quoting State v. Torres, 183 N.J. 554, 572 (2005)), and occurs when the trial judge's "decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" Milne v. Goldenberg, 428 N.J. Super. 184, 197 (App. Div. 2012) (quoting Flagg v. Essex Cty. Prosecutor, 171 N.J. 561, 571 (2002)). We discern no abuse of discretion here.

The Tax Sale Law, N.J.S.A. 54:5-1 to -137, provides a mechanism for individuals or entities to purchase tax liens from municipalities and initiate foreclosure actions against property owners who are delinquent in paying their property taxes. The foreclosure process begins when a property owner fails to pay the property taxes, as the unpaid balance becomes a municipal lien on the property. N.J.S.A. 54:5-6. "When unpaid taxes or any municipal lien . . . remains in arrears on the 11th day of the eleventh month in the fiscal year when the taxes or lien became in arrears, the collector . . . shall enforce the lien by selling the property[.]" N.J.S.A. 54:5-19. Upon completion of the sale,

a certificate of tax sale is issued to the purchaser. N.J.S.A. 54:5-46.

A tax foreclosure sale is subject to redemption. N.J.S.A. 54:5-32. If the certificate is not redeemed within two years from the date of the tax sale, the certificate holder can file an in personam foreclosure action to bar the right of redemption. N.J.S.A. 54:5-86(a). Prior thereto, the certificate holder must, through a "title search of the public record[,]" identify "any lienholder or other persons and entities with an interest in the property that is subject to foreclosure[,]" who then must be named as defendants in the action and served with the foreclosure complaint. R. 4:64-1(a).

If the defendants fail to plead or otherwise defend, Rule 4:64-1(c), "the court . . . shall enter an order fixing the amount, time and place for redemption upon proof establishing the amount due." R. 4:64-1(f). The order must then be served on each defendant. Ibid. Thereafter, "[t]he court, . . . on notice to all appearing parties including parties whose answers have been stricken, may enter final judgment upon proof of service of the order of redemption . . . and the filing by plaintiff of an affidavit of non-redemption." Ibid.

Defendant does not dispute that plaintiff complied with all statutory and rule requirements for tax sale foreclosure. The

only question is whether she is entitled to vacation of the final judgment.

Owners or occupants of the property who may have the right to redeem must exercise that right by paying the delinquent taxes before the time to redeem has been cut off. N.J.S.A. 54:5-54. The right to redeem continues "until barred by the judgment of the Superior Court." N.J.S.A. 54:5-86(a). "[T]he express policy of the [Tax Sale Law] is that it be liberally constructed so as to bar the right of redemption, not preserve it, the goal being that marketable titles to property be secured." Malone v. Midlantic Bank, N.A., 334 N.J. Super. 238, 250 (Ch. Div. 1999) (citing N.J.S.A. 54:5-85), aff'd o.b., 334 N.J. Super. 236 (App. Div. 2000). The judgment entered is final, "and no application shall be entertained to reopen the judgment after three months from the date thereof, and then only upon the grounds of lack of jurisdiction or fraud in the conduct of the suit." N.J.S.A. 54:5-87; see also N.J.S.A. 54:5-104.67. The judgment vests in the plaintiff "an absolute and indefeasible estate of inheritance in fee simple in the land[.]" N.J.S.A. 54:5-104.64(a).

Although N.J.S.A. 54:5-87 imposes a three-month limit to reopen a tax foreclosure judgment following its entry, we have held:

the standards in the court rules govern the motion to vacate a default judgment of foreclosure. While the tax sale law states in [N.J.S.A.] 54:5-87 that "no application shall be entertained to reopen the judgment after three months from the date thereof," the rules allow a period of one year to bring the motion based on [Rule] 4:50-1(a), (b), or (c). Otherwise, the motion to vacate must be brought within a reasonable time

[M & D Assocs. v. Mandara, 366 N.J. Super. 341, 351 (App. Div. 2004) (citations omitted).]

We concluded that "[i]n foreclosure actions, where there is a conflict between a statute regarding practice and procedure, the court rules are generally paramount." Ibid. (citation omitted). Accordingly, we find defendant's motion to vacate was not untimely under N.J.S.A. 54:5-87; however, it was untimely under Rule 4:50.

Rule 4:50-1 provides as follows:

On motion, with briefs, and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment or order for the following reasons: (a) mistake, inadvertence, surprise, or excusable neglect; (b) newly discovered evidence which would probably alter the judgment or order and which by due diligence could not have been discovered in time to move for a new trial under [Rule] 4:49; (c) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (d) the judgment or order is void; (e) the judgment or order has been satisfied, released or discharged, or a prior judgment or order upon which it is based has been reversed or otherwise vacated, or it is no longer

equitable that the judgment or order should have prospective application; or (f) any other reason justifying relief from the operation of the judgment or order.

"Regardless of the basis, vacation of a judgment under Rule 4:50-1 should be granted sparingly." In re Guardianship of J.N.H., 172 N.J. 440, 473-74 (2001) (citation omitted).

Defendant relies on reasons (a), (e), and (f). Under Rule 4:50-2, a motion to vacate "shall be made within a reasonable time, and for reason[] (a) . . . not more than one year after the judgment, order or proceeding was entered or taken." However, Rule 4:50-2

does not mean that it is reasonable to file such a motion within one year; the one-year period represents only the outermost time limit for the filing of a motion based on Rule 4:50-1(a) All [Rule] 4:50 motions must be filed within a reasonable time, which, in some circumstances, may be less than one year from entry of the order in question.

[Orner v. Liu, 419 N.J. Super. 431, 436-37 (App. Div. 2011).]

Defendant did not file her motion to vacate within a reasonable time. She was aware of these proceedings as of July 2015, and knew in November 2015 that default had been entered against her and December 7, 2015 was the last day to redeem. She also knew as of January 2016, that final judgment had been entered against her. She had more than ample time to respond to this

litigation since July 2015 as a pro se litigant, but instead, chose not to proceed in that capacity. Under the circumstances of this case, defendant's ten-month delay in filing her motion to vacate was unreasonable. Except for the fact that defendant finally retained an attorney, no new developments occurred in that ten-month period that would make the delay reasonable. Accordingly, the motion to vacate was untimely.

The motion also fails on the merits. Under Rule 4:50-1(a), "[a] defendant seeking to set aside a default judgment must establish that his failure to answer was due to excusable neglect and that he has a meritorious defense." Russo, 429 N.J. Super. at 98 (quoting Goldhaber v. Kohlenberg, 395 N.J. Super. 380, 391 (App. Div. 2007)). Excusable neglect refers to a default that is "attributable to an honest mistake that is compatible with due diligence or reasonable prudence." Ibid. (quoting U.S. Bank Nat'l Ass'n v. Guillaume 209 N.J. 449, 468 (2012)); see also Mancini v. EDS ex rel. N.J. Auto. Full Ins. Underwriting Ass'n, 132 N.J. 330, 335 (1993). The type of mistake entitled to relief under the Rule is one the party could not have protected themselves against. DEG, LLC v. Twp. of Fairfield, 198 N.J. 242, 263 (2009).

Defendant's inability to afford an attorney and redeem the tax sale certificate does not constitute excusable neglect in failing to file an answer. She was properly served with the

summons and complaint and could have filed an answer pro se and then sought an attorney. Her lack of sophistication in the law does not constitute excusable neglect or exceptional circumstances. See State v. Murray, 162 N.J. 240, 246 (2000) (citing State v. Dugan, 289 N.J. Super. 15, 22 (App. Div. 1996)). More importantly, defendant does not assert any meritorious defense or claim she can pay the delinquent taxes, which is necessary for redemption. See N.J.S.A. 54:5-54. Thus, she is not entitled to relief under Rule 4:50-1(a).

Defendant is not entitled to relief under Rule 4:50-1(e). "Rule 4:50-1(e) provides for relief from judgment where . . . 'it is no longer equitable that the judgment or order should have prospective application.'" DEG, 198 N.J. at 265 (quoting R. 4:50-1(e). "In essence, the rule is rooted in changed circumstances that call fairness of the judgment into question." Id. at 265-66.

Our Supreme Court has looked to federal jurisprudence to ascertain the meaning of Rule 4:50-1(e), and observed that under the federal counterpart to our rule, the "party seeking relief bears the burden of proving that events have occurred subsequent to the entry of a judgment that, absent the relief requested, will result in 'extreme' and 'unexpected' hardship.'" Id. at 266 (quoting Hous. Auth. of Morristown v. Little, 135 N.J. 274, 285

(1994)). Nevertheless, the Court observed that the United States Supreme Court has "moved towards a more flexible standard" than that provided in Little, that is, one "that does not require the additional showing of grievous hardship evoked by new and unforeseen conditions." Id. at 267 (citations omitted). However, even with the more flexible standard, modification of a judgment is not appropriate in every instance, and it would not be appropriate simply "because 'it is no longer convenient to live with the terms of [the] . . . decree.'" Ibid. (quoting Rufo v. Inmates of the Suffolk County Jail, 502 U.S. 367, 383 (1992)).

Under the relaxed standard, "[a] party seeking modification . . . may meet its initial burden by showing a significant change either in factual conditions or in law." Ibid. (quoting Rufo, 502 U.S. at 384). Under either the Little standard or the more relaxed Rufo standard, "relief from judgment should ordinarily not be granted where the so-called changed circumstances were actually anticipated [at the time of the decree]. In such a case, a party seeking relief has the 'heavy' burden of establishing . . . that it made a reasonable effort to comply with the judgment." Id. at 268 (quoting Rufo, 502 U.S. at 385).

Defendant has not shown that events occurred subsequent to entry of the final judgment that will result in extreme and unexpected hardship. She did not live in the property, did not

inherit it from her mother, and there is no competent evidence of its value. Defendant has not shown a significant change in factual conditions or the law, or that she made reasonable efforts to comply with the final judgment. That defendant retained an attorney and successfully removed Smith as executrix and substituted herself as executrix does not satisfy her burden under this rule.

Finally, defendant is not entitled to relief under Rule 4:50-1(f). Relief under this Rule "is available only when 'truly exceptional circumstances are present.'" Little, 135 N.J. at 286 (quoting Baumann v. Marinaro, 95 N.J. 380, 395 (1984)). "[I]n order to obtain relief under this subsection, the movant must ordinarily show that the circumstances are exceptional and that enforcement of the order or judgment would be unjust, oppressive or inequitable." Pressler & Verniero, Current N.J. Court Rules, cmt. 5.6.1 on R. 4:50-1 (2018) (citations omitted). "No categorization can be made of the situations which would warrant redress under subsection (f). . . . [T]he very essence of (f) is its capacity for relief in exceptional situations. And in such exceptional cases its boundaries are as expansive as the need to achieve equity and justice." DEG, 198 N.J. at 269-70 (alterations in original) (quoting Court Inv. Co. v. Perillo, 48 N.J. 334, 341 (1966)).

There is no competent evidence in the record to support a finding of "truly exceptional circumstances" in this case. The court entered final judgment because defendant failed to file an answer or other pleading when she had ample opportunity to do so. Her inability to afford an attorney is not an extraordinary circumstance warranting relief under Rule 4:50-1(f). See In re Estate of Schiffner, 385 N.J. Super. 37, 44 (App. Div. 2006).

III.

On cross-appeal, plaintiff argues the motion judge erred in refusing to enforce the consent order against defendant. We disagree.

"Mootness is a threshold justiciability determination rooted in the notion that judicial power is to be exercised only when a party is immediately threatened with harm." Stop & Shop Supermarket Co., LLC v. Cty. of Bergen, 450 N.J. Super. 286, 291 (App. Div. 2017) (quoting Betancourt v. Trinitas Hosp., 415 N.J. Super. 301, 311 (App. Div. 2010)). "[F]or reasons of judicial economy and restraint, courts will not decide cases in which the issue is hypothetical, [or] a judgment cannot grant effective relief[.]" Ibid. (alterations in original) (quoting Cinque v. N.J. Dep't of Corr., 261 N.J. Super. 242, 243 (App. Div. 1993)). Moreover, "[a] case is moot if the disputed issue was resolved, at least with respect to the parties who instituted the

litigation." Matthew G. Carter Apartments v. Richardson, 417 N.J. Super. 60, 67 (App. Div. 2010) (alteration in original) (quoting Advance Inc. v. Montgomery Twp., 351 N.J. Super. 160, 166 (App. Div. 2002)). Furthermore, "[a]n issue is 'moot' when the decision sought in a matter, when rendered, can have no practical effect on the existing controversy." Comando v. Nugiel, 436 N.J. Super. 203, 219 (App. Div. 2014) (alteration in original) (quoting Greenfield v. N.J. Dep't of Corr., 23 N.J. Super. 254, 257-58 (App. Div. 2006)).

Because the final judgment was not vacated, enforcing the consent order would have no practical legal effect on the case. Consequently, the consent order is moot and there was no reason to enforce it.

In any event, plaintiff cites no authority supporting his position that defendant, as successor executrix, is bound by the actions of a former executrix. Although plaintiff cites to Jansen v. Salomon Smith Barney, Inc., 342 N.J. Super. 254 (App. Div. 2001) and In re Estate of Lange, 75 N.J. 464 (1978), these cases do not apply.

In Jansen, we decided "whether the putative beneficiaries of a retirement account are bound by an arbitration clause signed by decedent and his financial advisors." 342 N.J. Super. at 255. We held that "[a]lthough plaintiffs did not sign the arbitration

provision, they were the intended successors" to the interests in the accounts and thus, found they were bound by the arbitration clause. Id. at 261.

In In re Estate of Lange, the Court contemplated "the propriety of surcharging executrices for acts beyond the scope of their powers under the will but validated by the effective consent of all parties in interest to those acts." 75 N.J. at 469. The Court held "that the members of the . . . classes of potential takers of the respective shares of the trust remainder were bound by their predecessors-in-interest's validation of the loan transaction" because there was "a sufficient nexus between the representatives and the members of each class of potential takers in remainder to justify a conclusion that the class members are bound by the representatives' validation of the loan transaction." Id. at 486-87.

In contrast, the present case does not involve enforcement of an arbitration agreement against intended successors, as in Jansen, or enforcement of an act the predecessor in interest consented to and the potential takers were known at the time of consent, as in Estate of Lange. Rather, defendant was not a named party in this litigation when the consent order was executed, and her identity as a successor executrix was not known or intended at that time. Moreover, plaintiff sued defendant individually,

not as executrix of the estate. We are satisfied there was no basis to enforce the consent order against her.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION