SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2187-16T3

INTERSTATE RESTORATION, LLC,

Plaintiff-Respondent,

v.

METRO BUILDERS, LLC,
and CLERK OF BERGEN COUNTY,

Defendants,

and

METROPOLITAN BUILDERS OF
NY, INC.,

Defendant-Appellant.

Submitted February 6, 2018 – Decided February 27, 2018

Before Judges Reisner and Gilson.

On appeal from Superior Court of New Jersey, Chancery Division, Bergen County, Docket No. C-000344-15.

Barry M. Bordetsky, attorney for appellant.

Scarinci & Hollenbeck, LLC, attorneys for respondent (Joel N. Kreizman, on the brief).

PER CURIAM

Defendant Metropolitan Builders Of New York, Inc. appeals from a December 20, 2016 order denying its motion to vacate a default judgment for about $235,000 plus fees and costs, in favor of plaintiff Interstate Restoration, LLC, and denying its motion to compel arbitration.

We conclude that the motion record raised material factual disputes concerning service of process, and also potentially as to the issue of excusable neglect. Therefore, we remand this case to the trial court to hold an evidentiary hearing on those issues. In remanding, we note that the judgment is for a large sum, defendant has asserted a potentially meritorious defense, and there is some evidence that plaintiff failed to serve a courtesy copy of the complaint, or any other pleadings, on defendant's counsel despite knowing of the representation.

Plaintiff obtained a June 21, 2016 judgment against defendant, a construction company based in New York City, in connection with a contract for renovations to a bank in Bergen County, New Jersey. Defendant filed a motion to vacate the judgment on or about October 17, 2016. The motion was supported by legally competent evidence consisting of several certifications.

In his certification, Frank Porco, defendant's president and sole shareholder, outlined the history of the contract dispute

that led to the litigation. He detailed the factual basis for defendant's contention that it duly fulfilled its contractual obligations but plaintiff nonetheless wrongfully terminated defendant's work on the project. Porco also attested that before plaintiff filed its complaint on November 19, 2015, defendant's attorney and plaintiff's attorney had been trying to negotiate a settlement of the dispute.

According to Porco, contrary to plaintiff's affidavit of service, he never received a copy of the complaint at defendant's corporate office. Nor did he receive a copy from defendant's New York registered agent, Corporation Service Company (CSC), a company located in Albany, New York. Porco also attested that in March 2016, about two months after plaintiff claimed it served CSC with process, CSC suddenly resigned without notice as defendant's registered agent and designated agent for service of process. Porco's certification included, as an exhibit, the certificate of resignation CSC filed. According to the certificate, CSC sent its resignation notice to defendant at an address in Dobbs Ferry, New York, when according to Porco's certification, defendant's corporate offices were in New York City.

Porco attested that he knew nothing about the lawsuit until after the judgment was entered and plaintiff filed an application to domesticate the New Jersey judgment in New York. At that point,

in August 2016, Porco received a "random email" from a New York law firm offering to defend his company against the lawsuit. Porco immediately contacted his company's attorney, Jon D. Jekielek, who looked up the New York case file and discovered that Interstate had filed the New Jersey action and had obtained a judgment. According to Porco, neither defendant nor Jekielek was ever served with the complaint or any subsequent pleadings in the New Jersey action. Porco asserted that if defendant had been served with the complaint it would have invoked the arbitration clause in the parties' contract. However, he also attached to his certification defendant's proposed answer to the complaint. Defendant's defenses, as well as defendant's proposed counterclaims, were also set forth in great detail in the body of Porco's certification.

Defendant also filed a certification from its office manager, Lorraine Shepherd, attesting based on her personal knowledge as the person responsible for receiving and opening the company's mail, that defendant never received a copy of plaintiff's complaint or other pleadings. However, she attested that she directed and oversaw a comprehensive search of the corporate offices and found two unopened envelopes with a return address for Scarinci & Hollenbeck, postmarked June 21, 2016 and July 1, 2016. Those dates were on or after the date judgment was entered. The Scarinci firm represented plaintiff in the litigation. Shepherd's assistant in

the office also attested that she never signed for or accepted any legal documents during the relevant time period.

Defendant's current attorney, Barry M. Bordetsky, also submitted a certification authenticating a series of court-filed documents. Among them was evidence of the history of the underlying contract dispute prior to the filing of litigation, including defendant's filing of a construction lien and plaintiff's filing of a bond to release the lien. Notably, a letter from plaintiff's attorney to the Clerk's Office about the lien was copied to defendant's then-counsel, Jekielek. That corroborates Porco's assertion that plaintiff's attorney was aware of Jekielek's representation.

When plaintiff applied for entry of default, it filed an affidavit of service attesting that it served CSC. However, Jekielek was not copied on the letter from plaintiff's counsel applying for the default. Moreover, the record contains a March 18, 2016 order approving plaintiff's application for permission to serve defendant with the summons and complaint by mail, based on an alleged diligent inquiry during which plaintiff was unable to serve defendant in New Jersey. There was no indication that plaintiff's attorney had contacted Jekielek about the service issue.

In opposition to defendant's motion to vacate the default judgment, plaintiff filed a certification from its attorney, attesting to his efforts to effectuate service on defendant and his unsuccessful efforts to have Porco served at his home. He attached as an exhibit a certification from a process server, attesting that the process server delivered the summons and complaint to defendant's corporate office and left the papers with a woman who refused to identify herself. The attorney also attached a certified mail card, addressed to defendant's New York office and bearing an illegible signature, as evidence that defendant received the notice of default and the application for the final judgment by default. The attorney did not address Porco's contention that the attorney never served Jekielek with a courtesy copy of any of the pleadings.

In response, defendant filed reply certifications from its office manager and her assistant, both refuting the allegations in plaintiff's counsel's certification. They both denied that any process server tried to serve them or that they refused to identify themselves. They also attested that neither of their signatures were on the certified mail receipt and noted that there was no printed name on the receipt. Porco also filed a reply certification, denying that he signed the receipt and denying that

a copy of the summons and complaint was delivered to his New York office.

In denying the motion to vacate, the trial court reasoned that there was proof of service and plaintiff had not produced clear and convincing evidence to rebut that proof of service. He also found no evidence of excusable neglect.

"A motion under Rule 4:50-1 is addressed to the sound discretion of the trial court . . . ." Hous. Auth. of Morristown v. Little, 135 N.J. 274, 283 (1994). We will not disturb the trial court's decision "unless it represents a clear abuse of discretion." DEG, LLC v. Twp. of Fairfield, 198 N.J. 242, 261 (2009) (citing Little, 135 N.J. at 283) (internal citation omitted). However, where the parties' submissions raise a "sharp factual dispute" about service of process, the trial court should hold an evidentiary hearing to resolve the dispute. First Nat'l Bank of Freehold v. Viviani, 60 N.J. Super. 221, 224-25 (App. Div. 1960).

As we find clear from the motion record, the legally competent evidence filed by the parties created material disputes of fact as to whether defendant was served with the summons and complaint, or with any of the other pleadings. The papers also raise a question as to whether plaintiff actually made a diligent inquiry, if it knew defendant was represented by counsel, but made no effort

to alert him that it was about to file a complaint and no effort to determine from him if defendant could be served in New Jersey.

The papers present a further issue as to whether, if CSC was the only entity served, and if CSC wrongfully failed to forward any of the papers to defendant, that might constitute excusable neglect on defendant's part. It is also abundantly clear from Porco's very detailed certification that defendant asserted a meritorious defense to the complaint.

Because the motion papers created material factual disputes, we conclude that the trial court mistakenly exercised discretion by denying the motion based on the papers, instead of holding a testimonial hearing to resolve the disputed issues. See Viviani, 60 N.J. Super. at 224-25. Accordingly, we vacate the order on appeal and remand this matter to the trial court to hold an evidentiary hearing.[1]

Remanded. We do not retain jurisdiction.

[1] In light of our disposition of this appeal, we do not address defendant's remaining appellate contentions. In particular, it is premature to determine whether defendant is entitled to invoke the arbitration clause.