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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-4861-15T3

HIGH PARK GARDENS COOPERATIVE,
INC., a corporation of the State
of New Jersey,

Plaintiff-Respondent,

v.

BABOU MAGASSOUBA,

Defendant-Appellant.

Argued October 16, 2017 – Decided January 18, 2018

Before Judges Messano and Accurso.

On appeal from Superior Court of New Jersey,
Law Division, Special Civil Part, Essex
County, Docket No. L-4042-15.

Ali Y. Ozbek argued the cause for appellant
(Rutgers Law Associates, attorneys; Will Kang
and Ali Y. Ozbek, on the briefs).

Anne P. Ward argued the cause for respondent
(Ehrlich, Petriello, Gudín & Plaza, PC,
attorneys; Anne P. Ward, on the brief).

PER CURIAM

Plaintiff High Park Gardens Cooperative, Inc., a non-profit corporation that manages an income-restricted, residential cooperative in Newark known as High Park Gardens, filed suit against one of its shareholder-occupants, defendant Babou Magassouba. Plaintiff alleged defendant owed \$1394 in various charges that continued to accrue, and it sought payment, termination of defendant's occupancy agreement and proprietary lease, possession of the unit and revocation and cancellation of defendant's stock certificate. Defendant was personally served with the summons and complaint but failed to answer. In August 2015, plaintiff moved for judgment by default. Defendant did not oppose the motion, and on September 18, 2015, the judge entered final judgment by default in plaintiff's favor.

Nearly six months later, on March 9, 2016, the Essex County Sheriff served defendant with a letter advising he must vacate his unit by March 29, 2016. Defendant sought an order to show cause, staying the writ of possession and vacating the default judgment.

In his certification, defendant claimed plaintiff's manager granted an extension permitting him to pay May and June fees in a lump sum on June 30. When defendant was unable to pay again on time in July, he sought a further extension but was informed plaintiff had taken "legal action against [him]." He acknowledged being served with the summons and complaint.

Defendant stated that he paid the outstanding balance for monthly carrying charges in July and August on August 31, 2015, and September's monthly charges on September 15. Plaintiff accepted these payments. Nonetheless, at the end of September, plaintiff's counsel served defendant with a letter advising of the final judgment and demanding he vacate the unit by October 5, 2015. Defendant asserted that he tried to pay the October and November fees, but plaintiff refused to accept payment unless the entire outstanding balance, which included "disputed attorney fees was satisfied." Defendant claimed he "made reasonable attempts in good faith to settle th[e] matter without litigation, but [plaintiff] ha[d] refused to cooperate with [him]."

Plaintiff's manager certified in opposition that defendant was advised at the time of the payment extension in May 2015 that late charges had accrued, the full amount must be paid by May 29 and any failure to pay would be a default and breach of defendant's occupancy agreement. Plaintiff produced a letter to defendant setting forth these terms. Defendant failed to pay by the end of May and plaintiff commenced legal proceedings.

The manager further certified that defendant's payment in June did not include counsel fees and costs, as required by the occupancy agreement, and, despite repeated conversations, defendant refused to pay counsel fees and other charges.

Plaintiff's manager stated it was "incomprehensible" that defendant thought the suit had been dismissed or that he was not expected to pay all charges as required by the occupancy agreement.

The judge issued the order to show cause, stayed the writ of possession and held a hearing on May 6, 2016. Defendant testified essentially in accord with his certification. He acknowledged that he continued to "negotiate" with management regarding the additional fees after they refused his payments for monthly charges in October and November.

The manager's testimony also reiterated the contents of her previously filed certification. Defendant never paid or offered to pay the full balance of monthly charges, late fees, attorney's fees and costs, and, as of the date of the hearing, owed more than \$12,000. The manager further testified that she advised defendant in August that his partial payments "did not resolve his account balance," and she "could not terminate that legal action until his account was completely satisfied." She also said that defendant never physically presented a payment after September 2015 and continued to dispute the fees. On cross-examination, the manager admitted accepting defendant's partial payments, contrary to the cooperative's written policies. But, she claimed the policy only applied if there was no pending legal action.

In her oral opinion, the judge found defendant failed to pay his monthly charges by the May 29, 2015 deadline, defendant was personally served with the complaint, and he did nothing to "contest it." The judge concluded the "issue of excusable neglect[,] meaning why [defendant] didn't answer the complaint is kind of moot." The judge further found that defendant never made "payments in full even of the basic carrying charges." The judge also concluded that under the circumstances, defendant presented no "meritorious defense."

She orally denied defendant's motion to vacate the default judgment and entered an order for orderly removal, staying execution of the warrant until May 31, 2016. The judge entered a conforming order denying the motion to vacate default on May 11, 2016. She subsequently denied defendant's motion for reconsideration.¹

Before us, defendant argues the judge failed to exercise her discretion liberally in considering his motion to vacate the default judgment, and that she "mistook the plenary hearing . . . for a trial on the merits," thereby applying "the wrong standards

¹ Defendant does not seek review of the denial of his motion for reconsideration.

for review of defendant's meritorious defense." We disagree and affirm.²

A party seeking to vacate a judgment must meet the standard of Rule 4:50-1. US Bank Nat. Ass'n v. Guillaume, 209 N.J. 449, 467 (2012). "The trial court's determination under the rule warrants substantial deference, and should not be reversed unless it results in a clear abuse of discretion." Ibid. The court should consider a motion to vacate a default judgment "with great liberality, and every reasonable ground for indulgence is tolerated to the end that a just result is reached." Marder v. Realty Constr. Co., 84 N.J. Super. 313, 319 (App. Div.), aff'd, 43 N.J. 508 (1964).

Before the trial court, defendant seemingly relied upon subsection (a) of the rule, which permits relief from a default judgment based upon "mistake, inadvertence, surprise, or excusable neglect." R. 4:50-1(a). "[A] defendant seeking to reopen a default judgment must show that the neglect to answer was excusable under the circumstances and that he has a meritorious defense." Marder, 84 N.J. Super. at 318. "'Excusable neglect' may be found when the default was 'attributable to an honest mistake that is

² Because we affirm on the merits, we do not address plaintiff's argument that the appeal is moot in so far as defendant seeks to reverse the order granting possession of the unit.

compatible with due diligence or reasonable prudence.'" Guillaume, 209 N.J. at 468 (quoting Mancini v. EDS, 132 N.J. 330, 335 (1993)).

Here, defendant admitted receipt of the complaint and his failure to respond. His "excuse" for failing to answer or oppose the entry of default judgment was a belief that the partial payments he tendered, once accepted by plaintiff, acted as an accord and satisfaction, thereby ending the litigation.³ See Zeller v. Markson Rosenthal & Co., 299 N.J. Super. 461, 463 (App. Div. 1997) (defining elements of accord and satisfaction). In other words, defendant's neglect of the litigation was inextricably related to, and not separate from, his claimed meritorious defense.

Defendant argues the judge mistakenly considered the actual merits of his defense, not whether he had a colorable claim of accord and satisfaction, thereby holding him to a higher standard of proof than necessary to successfully vacate a default judgment. We conclude the argument lacks sufficient merit to warrant extensive discussion. R. 2:11-3(e)(1)(E).

³ Defendant never actually articulated a claim of "accord and satisfaction" during the hearing. Those terms appear for the first time in the appellate record in the judge's order denying defendant's motion for reconsideration.

Succinctly stated, there could be no excusable neglect unless defendant established he never responded to or defended the litigation because he believed plaintiff no longer intended to continue with the ejectment action after accepting his partial payment. As we see it, the judge accorded defendant every opportunity to establish this excuse by holding a plenary hearing, particularly since defendant's own certification admitted he failed to answer the complaint or contest the entry of judgment. See Pressler & Verniero, Current N.J. Court Rules, cmt. 3 on R. 4:50-1 (2018) ("If the relief is sought on contested facts, an evidential hearing must be provided."). The judge's factual findings, made after an opportunity to consider the testimony and assess credibility, are entitled to our deference. Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011) (citing Cesare v. Cesare, 154 N.J. 394, 411-12 (1998)).


Finally, in his appellate brief, defendant never cited a specific subsection of Rule 4:50-1 in support of the appeal. To the extent he argues subsection (f) applies, we disagree. That provision permits the judge to grant a motion to vacate for "any other reason justifying relief from the operation of the judgment or order." R. 4:50-1(f). "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, LLC v. Twp. of Fairfield, 198 N.J. 242, 269-270 (2009) (emphasis added) (quoting Court Inv. Co. v. Perillo, 48 N.J. 334, 341 (1966)). This subsection of the rule should be used "sparingly" and "in situations in which, were it not applied, a grave injustice would occur." Hous. Auth. of Morristown v. Little, 135 N.J. 274, 289 (1994).

This case presents no exceptional circumstances requiring such extraordinary relief.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION