SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3769-22

DEFINED ALLIANCE, LLC,

Plaintiff-Appellant,

v.

BMW OF NORTH AMERICA, LLC, and BMW FINANCIAL SERVICES NA, LLC,

Defendants-Respondents,

and

CIRCLE MOTORSPORT, INC.,

Defendant,

and

BMW FINANCIAL SERVICES NA, LLC,

Third-Party Plaintiff-Respondent,

v.

GEORGE MAKHOUL,

Third-Party Defendant-
Appellant,

and

GEORGE MAKHOUL,

Fourth-Party Plaintiff-
Appellant,

v.

BMW OF NORTH AMERICA, LLC,
and BMW FINANCIAL SERVICES NA,
LLC, and FINANCIAL SERVICES
VEHICLE TRUST,

Fourth-Party Defendants-
Respondents.

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Submitted February 10, 2025 – Decided March 4, 2025

Before Judges Chase and Vanek.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-3625-20.

Hegge & Confusione, LLC, attorneys for appellants (Michael J. Confusione, on the briefs).

Biedermann Hoenig Semprevivo, PC, attorneys for respondent BMW of North America, LLC (Thomas J. Sateary and Christopher B. DeBlank, on the brief).

Husch Blackwell, LLP, attorneys for respondents BMW Financial Services NA, LLC, and Financial Services Vehicle Trust (Ryan L. DiClemente, of counsel and on the brief).

PER CURIAM

Defined Alliance, LLC ("Alliance") and George Makhoul ("George"),[1] appeal from the following Law Division orders: (1) the June 24, 2022 order dismissing Alliance's amended complaint and all other pleadings with prejudice; (2) the January 20, 2023 order for default judgment against Alliance; and (3) the June 30, 2023 orders granting summary judgment in favor of all defendants, and dismissing George's claims with prejudice. We affirm.

I.

Alliance is a New Jersey limited liability company that was formed in 2010. Dr. John Makhoul ("Johnny")[2] is the managing member, his wife Sandra Makhoul is also a member, and his brother George is Alliance's agent. George manages the day-to-day operations and has the authority to take any actions he deems necessary in the best interest of Alliance, including entering into vehicle

[1] Because plaintiff's family members share a common surname, we refer to them by their first names. No disrespect is intended.

[2] Johnny has lived in Kentucky for the past twenty-five years and has never lived in New Jersey.

leases. George is not paid by Alliance for any of the work he has done on their behalf, and any expenses incurred by George on behalf of Alliance get paid for or reimbursed by Alliance. Alliance's purpose, per its operating agreement, is "general business purposes including real estate transactions and leasing of office space and is authorized to do any and all things necessary, convenient, or incidental to that purpose, or any other business upon which the Members later agree."

Defendants are BMW North America, LLC ("BMW NA"), BMW Financial Services, LLC ("BMW FS"), and Financial Services Vehicle Trust ("FSVT").

Alliance entered into three motor vehicles lease agreements: (1) a 2014 lease with Circle BMW ("Lease I"); (2) a 2017 lease with Circle BMW ("Lease II"); and (3) a 2020 lease with BMW of Brooklyn ("Lease III"). Lease II and Lease III are the subjects of this case.

In March 2014, Alliance entered into Lease I with Circle BMW, which was subsequently assigned to BMW FS, for a new 2014 BMW 740Li xDrive (the "2014 Vehicle"). Johnny executed the business application for Lease I. George executed Lease I as the personal guarantor for Alliance.

Plaintiffs alleged that between October of 2016 and February of 2017, George was sent offers, containing numerous incentives, from Circle BMW, intended to induce George into leasing a new vehicle. These offers were alleged to include a discounted purchase price and the waiver of the lease end fees associated with Lease I.

In February 2017, Lease II was entered into, for a new 2017 BMW 740i xDrive (the "2017 Vehicle"), again naming Alliance as the lessee, and George as the guarantor. Lease II was a thirty-six-month lease, with a total term mileage of 45,005, and an excessive mileage rate of thirty cents per mile. Lease II required Alliance to make thirty-six monthly payments of $1,190. Further, Lease II allowed for the payment of "all fees and costs of collections, including reasonable attorneys' fees, court costs, interests, and other related expenses for all losses you incur in connection with my default of this Lease." As a result of entering Lease II, the 2014 vehicle was turned in, and on March 9, 2017, BMW FS sent Alliance a Notice and Invoice for Excess Wear and Use, for the 2014 vehicle, in the amount of $6,260.47.

The 2017 Vehicle included a New Vehicle Limited Warranty (the "warranty"). BMW NA was the warrantor, and the warranty period was forty-eight months or 50,000 miles "whichever occurs first." Additionally, the

warranty dictated "[t]o obtain warranty service coverage, the vehicle must be brought, upon discovery of a defect in material or workmanship, to the workshop of any authorized BMW center in the United States . . . ."

In April 2017, Alliance, through George, filed two small claims actions against BMW FS, the Circle BMW Dealer, and BMW NA, alleging that such defendants failed to "waive" the prior lease balance for Lease I as part of the Lease II transaction. Ultimately, the parties resolved the claims prior to trial and executed a settlement and release agreement through which Alliance and George released any and all claims "whether known or unknown, arising out of or relating to the 2014 Account, the 2017 Account, the 2014 Vehicle, the 2017 Vehicle, the Lease End Charges, and any warranties and/or guarantees related thereto" (the "Settlement and Release Agreement"). Pursuant to the Settlement and Release Agreement, Alliance remained in possession of the 2017 Vehicle, affirmed and accepted the terms of Lease II, and BMW FS preserved any and all claims it may have arising out of Alliance's continued use of the 2017 Vehicle.

On November 14, 2019, the 2017 vehicle was brought to Autobahn Automotive, after experiencing mechanical issues. The odometer at the time of repair read 62,554. Alliance wrote a check for the $8,986.93 repair costs; George signed the check. On January 15, 2020, George sent a letter to BMW

NA asking them to reimburse the cost of the repairs; in an email dated February 6, 2020, BMW NA refused to do so, noting that the vehicle, at the time of service, exceeded the 50,000 miles manufacturer's warranty, and that the vehicle was not repaired by an authorized BMW center.

In October 2019, and January 2020, Circle BMW sent letters to Alliance containing offers with various incentives if Alliance wanted to upgrade their 2017 Vehicle with a 2020 vehicle. The offers make no mention of waiving prior lease balances or fees, nor does it reference the possibility of avoiding additional mileage penalties. The January 15, 2020 letter estimates the over mileage of the 2017 Vehicle to be 32,868 miles. There are four asterisks in the line regarding the avoidance of additional milage fees, those asterisks lead the reader to the fine print on the back of the document, which reads:

> if you trade in your current vehicle to Circle BMW, please take NOTICE: trading in a vehicle will not eliminate your debt. Negative equity will be added to any purchase or lease. If instead, you turn in your current vehicle to BMW [FS] NA, LLC, you will be responsible for excess milage penalties, wear and tear, and other obligations due under your current lease.

Both letters make reference to loyalty credit, but do not mention any cash back incentives, and similar to the section regarding loyalty credits, it is marked with a cross symbol which leads the reader to the back of the document explaining

how the credits would work. Subsequently, George began communicating with BMW of Brooklyn, to get them to match the Circle BMW offers, to which BMW of Brooklyn allegedly offered a "more advantageous offer," on a smaller and less expensive vehicle model.

In January 2020, Lease III was entered into with BMW of Brooklyn, for the 2020 vehicle, which named Alliance as the lessee, and George as the guarantor. Lease III had a term of thirty-six months, a mileage cap of 45,000, with an over milage rate of twenty-five cents per mile, and allowed for the collection of reasonable attorneys' fees, not to exceed 15% of the amount due and payable under the lease. Additionally, George signed a document titled "We Owe," which, in capital letters, states: "nothing promised, nothing owed. BMW of Brooklyn is not responsible for any remaining payments, over mileage or wear and tear charges on any lease return unless otherwise noted on this document." George also signed a "Lease end or Trade in disclosure statement," which had similar statements regarding BMW of Brooklyn not being responsible for excess mileage, or wear and tear concerning the 2017 Vehicle. Under Lease III, in the event of a default by Alliance, BMW FS could terminate the lease and Alliance's rights to possess and use the 2020 Vehicle. Further, Lease III permits BMW FS to require Alliance to pay, among other things: (1) the sum of any

past due monthly payments; (2) BMW FS's costs for repossession, transportation, storage, and/or sale of the 2020 Vehicle; and (3) the difference between the adjusted lease balance at the end of the lease and the realized value of the 2020 Vehicle after its sale.

During the end of February 2020, Alliance returned the 2017 Vehicle with two remaining monthly payments, each payment was in the amount of $1,190. Subsequently, BMW FS had the 2017 vehicle inspected, in compliance with the lease terms; the odometer read 71,261 miles, which far exceeded the mileage allowance on the 2017 Vehicle. In March 2020, BMW FS sent a lease end statement to plaintiffs, in the amount of $12,935.89, which included $8,398.64 in charges for excess mileage. Plaintiffs never made this payment. Additionally, plaintiffs stopped making payments on Lease III in October 2020, and thus defaulted on the lease. Per the terms of the lease, upon default, BMW FS could terminate the lease and repossess the 2020 Vehicle.

In November 2020, Alliance filed a complaint against BMW NA, and BMW FS. Subsequently, in April 2021, after BMW FS successfully moved to dismiss the original complaint, Alliance filed an amended complaint against BMW FS, BMW NA, and the Circle BMW Dealer. Defendants answered and BMW FS filed a counterclaim against Alliance, and a third-party complaint

against George. Alliance filed its answer to BMW FS's counterclaim, and in November 2021, George, acting pro-se, filed his answer to the third-party complaint and a counterclaim against BMW FS, along with a fourth-party complaint against BMW NA and FS.

In February 2022, Alliance's counsel sent a letter in lieu of a formal motion, to the court, seeking leave of the court to allow him to withdraw as counsel, for good cause, and for the court to grant a thirty-day adjournment to allow Alliance to retain new counsel. On March 4, 2022, the court held a hearing where it granted counsel's request to withdraw and filed a rider giving Alliance twenty-one days to retain new counsel, and for that new counsel to file an appearance with the court. The rider expressly stated that Alliance, as a corporate plaintiff, had to retain new counsel because a corporation cannot represent itself, and should Alliance fail to retain new counsel, Alliance's complaint and all other pleadings would be stricken.

By April 28, 2022, George had still not retained counsel for Alliance, and the court granted BMW FS's motion for replevin. The court also granted BMW FS's motion to dismiss Alliance's case without prejudice, for failing to retain new counsel, stating "if there is continued non-compliance all parties do retain the right to seek dismissal with prejudice . . . ." In May, the 2020 Vehicle was

returned to BMW of Brooklyn and was eventually sold at auction, resulting in a $19,078.44 deficiency balance.

On June 24, 2022, the court held a hearing and dismissed with prejudice Alliance's complaint and all pleadings because after nearly 100 days since the motion to dismiss without prejudice, Alliance failed to retain new counsel. The court pointed out that its decision did not affect any of the claims George personally had in his own right. The court also informed George that if Alliance retained counsel, there was a mechanism under the Court Rules to potentially vacate the order. Alliance never retained counsel.

Nearly seven months later, a hearing was held on BMW FS's motion to enter default judgment against Alliance. Once again Alliance did not retain counsel, and George attempted to oppose the motion pro se. The court again pointed out the subject contract was between Alliance and the BMW entities and entered default judgment against Alliance in the amount of $37,427.60. The judgment amount was calculated by adding the lease end charges and applicable attorneys' fees for the 2017 Vehicle, and the deficiency balance and applicable attorneys' fees for the 2020 Vehicle.

In May 2023, BMW FS and FSVT filed a motion for summary judgment asking the court to dismiss George's claims and further sought that judgment be

entered against him as the guarantor in the amount of $37,427.60. George opposed BMW FS and FSVT's motion and cross-moved for summary judgment. On June 30, 2023, the trial court denied George's cross-motion, granted summary judgment in favor of BMW FS and FSVT, dismissed George's claims with prejudice, and entered judgment in the amount of $37,427.60.

On appeal, appellant argues:

> POINT I: THE LAW DIVISION ERRED IN STRIKING THE CLAIMS AND DEFENSES OF DEFINED ALLIANCE AND ENTERING JUDGMENT BY DEFAULT AGAINST IT, AND BY ENTERING SUMMARY JUDGMENT AGAINST GEORGE AND DISMISSING HIS CLAIMS FOR RELIEF.

II.

We review the trial court's grant or denial of a motion for summary judgment de novo, applying the same standard used by the trial court. Samolyk v. Berthe, 251 N.J. 73, 78 (2022); Stewart v. N.J. Tpk. Auth./Garden State Parkway, 249 N.J. 642, 655 (2022); Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021). We consider "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in

favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

A motion for summary judgment must be granted if the moving party can demonstrate "there is no genuine issue as to any material fact challenged and that the moving party is entitled to judgment or order as a matter of law." R. 4:46-2(c). "To decide whether a genuine issue of material fact exists, the trial court must 'draw[] all legitimate inferences from the facts in favor of the non-moving party.'" Friedman v. Martinez, 242 N.J. 450, 472 (2020) (alteration in original) (quoting Globe Motor Co. v. Igdalev, 225 N.J. 469, 480 (2016)). "The court's function is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" Rios v. Meda Pharm., Inc., 247 N.J. 1, 13 (2021) (quoting Brill, 142 N.J. at 540).

Conversely, "[w]e review a motion under Rule 4:50-1 to vacate final judgment under an abuse of discretion standard." 257-261 20th Ave. Realty, LLC v. Roberto, 477 N.J. Super. 339, 366 (App. Div. 2023), petition for certif. granted, 256 N.J. 535 (2024) (citing U.S. Bank Nat'l Ass'n v. Guillaume, 209 N.J. 449, 467 (2012)). "Although the ordinary abuse of discretion standard defies precise definition, it arises when a decision is made without a rational explanation, inexplicably departed from established policies, or rested on an

impermissible basis." Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002) (internal quotation marks omitted). "[A] functional approach to abuse of discretion examines whether there are good reasons for an appellate court to defer to the particular decision at issue." Ibid.

III.

Plaintiffs first contend the dismissal without prejudice, dismissal with prejudice, and subsequent default were improperly granted because they did not fail to plead or defend. They posit since they filed a complaint, amended complaint, and answer to respondents' counterclaim, they defended the action. Alliance maintains that since it was their failure to retain new counsel that the trial court considered for their entry of default judgment, it was an abuse of discretion.

Rule 4:43-1 governs the entry of default and, in pertinent part, provides: "[i]f a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules or court order, or if the answer has been stricken with prejudice, the clerk shall enter a default on the docket as to such party." (emphasis added). "The basis for the entry of default under this rule is the litigant's failure to participate in the litigation[ ]by failing 'to plead or otherwise defend.'" N.J. Div. of Youth & Fam. Servs. v. M.G., 427

N.J. Super. 154, 168 (App. Div. 2012) (quoting R. 4:43-1). The rule "is fairly read to authorize default only when the . . . order in question concerns the party's obligation to defend." Id. at 169.

Under Rule 1:21-1(c), Prohibition on Entities, "an entity, however formed and for whatever purpose, other than a sole proprietorship shall neither appear nor file any paper in any action in any court of this State except through an attorney authorized to practice in this State." The Supreme Court has explained that where a plaintiff violates a court order, the assessment of the appropriate sanction requires consideration of "a number of factors, including whether the plaintiff acted willfully and whether the defendant suffered harm, and if so, to what degree." Gonzalez v. Safe & Sound Sec. Corp., 185 N.J. 100, 115 (2005). Dismissal of a complaint with prejudice as a sanction for a plaintiff's violation of a court order "is a drastic remedy, [that] should be invoked sparingly, such as when the plaintiff's violation of a rule or order evinces 'a deliberate and contumacious disregard of the court's authority.'" Ibid. (quoting Kosmowski v. Atl. City Med. Ctr., 175 N.J. 568, 575 (2003)).

In determining the sanction that should be imposed for violation of a court's order, the prejudice suffered by the party opposing the motion "also must enter into the calculus" if "the vindication of the court's authority standing alone

is not at issue . . . ." Id. at 116. In all cases, "the sanctions imposed for . . . non-compliance must be 'just and reasonable in the circumstances,'" M.G., 427 N.J. Super. at 170 (quoting Il Grande v. DiBenedetto, 366 N.J. Super. 597, 621 (App. Div. 2004)), and "[t]he 'overriding objective' remains to allow 'the defaulting party his [or her] day in court.'" Id. at 171 (quoting Il Grande, 366 N.J. Super. at 622).

Alliance does not and cannot dispute that pursuant to Rule 1:21-1(c), corporate entities can only appear or file papers in court through a licensed attorney. Alliance was aware of this per the court order and rider. Moreover, the trial court gave Alliance an extension to find counsel and when it dismissed the matter without prejudice, instructed Alliance that they could still obtain counsel. They did not.

Alliance also cannot contest that the default judgment against it was not entered until nearly a year after the trial court initially ordered it to secure new counsel. Alliance admits they failed to retain new counsel, and avers they contacted numerous attorneys and that all of them refused to take the case. They also assert for the first time that they could not get counsel because Johnny was sick. However, this argument is belied by the record. Johnny lives in Kentucky and has never lived in New Jersey. Additionally, it was stated that George, as

the agent for Alliance, had the authority to file lawsuits on its behalf. Johnny also stated in his deposition that he was unaware if George had filed prior lawsuits on behalf of Alliance. The dismissal of a case with prejudice is a severe sanction, however, here it appears to be reasonable, considering the circumstances.

Plaintiffs next argue whether George or Alliance was the lessee of the three vehicle lease agreements, is an issue of material fact and that "a reasonable jury, considering the summary judgment evidence, and the facts that [George] contributed to the leases' expenses and down payments, can conclude that [George] was the lessee under the agreements." They argue given the testimony and documentary proof, a reasonable jury could find respondents fraudulently altered all three lease applications, and that fraud was a "serious violation[] of Federal and State lease laws." However, this fundamental premise is contradicted by Alliance and George's repeated admissions and the overwhelming evidence that shows the subject leases were always intended as business leases on behalf of Alliance.

George has failed to show that he was the lessee of any of the leases. The leases, and business applications all expressly designate Alliance as the lessee, and George as the guarantor. During his deposition, George admitted that he

signed Lease II and Lease III as the guarantor. He again stated in court that he was the guarantor. Additionally, BMW NA's interrogatory No. 29 asked and was answered as follows:

> Interrogatory No. 29: State whether [George] in his individual capacity, entered into a motor vehicle lease agreement as alleged in the Fourth-Party Complaint.
>
> No, [George], in his individual capacity did not enter into any of the lease agreements specified [ ] above, he was authorized to execute these motor vehicle lease agreements for and on behalf of [Alliance]. A written authorization was provided to BMW FS at that time but [George] cannot find a copy at present. [George] executed these leases as a guarantor.

This is also supported by Alliance's complaint and George's individual complaint where they state that Alliance entered into the Lease II and Lease III through its "representative" and these leases were agreements made between "[p]laintiff [Alliance] on one hand and BMW NA and BMW FS on the other hand." This clearly supports the conclusion that Alliance is the lessee, and George the guarantor.

George points to his certification in support of summary judgment to argue that it was him individually that entered into the leases, not Alliance. However, it is well-accepted that a party's self-serving assertions cannot create an issue of fact sufficient to survive summary judgment. See Puder v. Buechel,

183 N.J. 428, 440-41 (2005). There is nothing to suggest that the trial court "disregarded" Alliance's and George's evidence, but rather found evidence establishing Alliance as the Lessee was overwhelming based on the record before it.

"Under our law, there is no special relationship created between a guarantor and the creditor." DeAngelis v. Rose, 320 N.J. Super. 263, 278 (App. Div. 1999). Moreover, in general, "one may not ordinarily claim standing to assert the rights of a third party under a contract," and "one who is not a party to a contract may not sue to enforce it merely because he or she happens to receive a benefit from it." Tirgan v. Mega Life & Health Ins., 304 N.J. Super. 385, 389 (Law Div. 1997) (citations omitted). Here, George is the guarantor, which functions as a "contingent creditor," and as such, he had no standing to sue in his individual capacity. See DeAngelis, 320 N.J. Super. at 279.

To the extent we have not specifically addressed any other contentions raised by plaintiffs, they lack sufficient merit to warrant discussion in this opinion. R. 2:11-3(e)(1)(E).

Affirmed.

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

M.C. Harley

Clerk of the Appellate Division