JAY KRONBERG, Plaintiff-Respondent, v. SCOTT M. DONNENBERG, Defendant-Appellant, EMERGENCY MANAGEMENT SERVICES, INC., Defendants.	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO: A-004727-06T2 Civil Action On Appeal From: Superior Court, Law Division: Bergen County Docket No.: BER-L-5623-05 Sat Below: Hon. Joseph S. Conte, J.S.C.

MEMORANDUM OF LAW OF DEFENDANT-APPELLANT SCOTT M. DONNENBERG

Glenn R. Reiser
LOFARO & REISER, L.L.P.
55 Hudson Street
Hackensack, New Jersey 07601
Tel: (201) 498-0400
Fax: (201) 498-0016
E-mail: greiser@new-jerseylawyers.com
Attorneys for Defendant-Appellant,
Scott M. Donnenberg

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Rules

Statutes

Other Authorities

Defendant-Appellant Scott M. Donnenberg ("Donnenberg") respectfully submits this memorandum of law in support of his appeal from the April 2, 2007 Order of the Superior Court of New Jersey, Law Division, Bergen County (the "April 2, 2007 Order") denying Donnenberg's motion to vacate default judgment and writ of execution, and to grant leave to answer or otherwise plead in response to plaintiff's Complaint ("Motion to Vacate"). For the reasons set forth below, Donnenberg respectfully requests that this Court reverse the April 2, 2007 Order and remand the case to the Law Division for case management and trial.

PRELIMINARY STATEMENT

Donnenberg files this appeal in order to vacate a default judgment inappropriately entered against him on February 14, 2006 in the amount of $106,781 which is premised on a frivolous claim.[1] This lawsuit arises out of plaintiff's attempt to recover his capital investment in the defendant corporation in which he, Donnenberg and another individual were members. Plaintiff's capital investment is documented in several promissory notes signed by the corporate defendant which are not in dispute (Da21 to Da23). Donnenberg did not personally guarantee the corporate defendant's obligations to plaintiff under these promissory notes, and the trial court never adduced any evidence or articulated any legal or factual basis for the default judgment against Donnenberg.

The principal reasoning offered by the trial court for denying Donnenberg's Motion to Vacate is its conclusion that

[1] Donnenberg is not appealing the default judgment entered against the corporate defendant, Emergency Medical Management Services, Inc.

Donnenberg failed to establish excusable neglect or extraordinary circumstances. (Da142 to Da144). This interpretation is flawed. Donnenberg respectfully submits that the trial court's denial of his Motion to Vacate was an abuse of discretion and should be reversed. The trial court should not have entered default judgment against Donnenberg on the novel claims made by plaintiff without first conducting a proof hearing on the issue of Donnenberg's liability; i.e., how Donnenberg could be personally liable for the payment of a corporate debt to his former partner in the absence of any document establishing his liability. The trial court also abused its discretion in refusing to vacate the default judgment under either R. 4:50-1(a) based upon excusable neglect, or R. 4:50-1(f) based upon exceptional circumstances due to the questionable merits of plaintiff's claims.

Accordingly, and for the reasons set forth below, Donnenberg respectfully requests that this Court reverse the trial court's April 2, 2007 Order denying his Motion to Vacate and remand for further case management scheduling and trial.

PROCEDURAL HISTORY

On August 10, 2005 plaintiff filed an eight (8) count complaint in New Jersey Superior Court, Law Division, Bergen County ("Complaint"). (Da1). Personal service of the Complaint was made upon Donnenberg on August 23, 2005. (Da60). On the same day, Donnenberg faxed a copy of the Complaint to a law firm who had handled other matters for him and the corporate defendant. (Da105). Donnenberg did not answer the Complaint.

On October 13, 2005, the trial court clerk entered default against Donnenberg and EMSI. (Da24). On February 10, 2006, plaintiff applied for entry of default judgment. (Da28). On February 14, 2006, the trial court entered an Order For Final Judgment by Default as to both defendants ("Default Judgment"). (Da68). The Default Judgment, docketed as a lien in the Superior Court of New Jersey on February 24, 2006, does not specify which count of the Complaint upon which judgment was entered.

On November 13, 2006, a Writ of Execution was issued in furtherance of the Default Judgment. On December 8, 2006, the Hunterdon County Sheriff's Office levied on Donnenberg's motor vehicle. (Da84).

On January 2, 2007, Donnenberg filed his Motion to Vacate (Da35), which plaintiff opposed. (Da54). On March 22, 2007, the trial court conducted oral argument on the Motion to Vacate. (Da121). By Order entered on April 2, 2007, the trial court denied Donnenberg's Motion to Vacate on the basis that Donnenberg failed to establish excusable neglect as required by R. 4:50-1(a), and failed to establish exceptional circumstances under R. 4:50-1(f) (Da140 to Da144). Donnenberg's appeal ensued on May 15, 2007. (Da146).

For the reasons set forth below, Donnenberg respectfully submits that the trial court abused its discretion and that the order denying Donnenberg's motion to vacate should be reversed, and the case remanded for further disposition and trial.

STATEMENT OF FACTS

On or about December 7, 2003, plaintiff, Donnenberg and a third individual Rafet Kalic entered into an Operating Agreement with respect to the management of a New Jersey corporation named Emergency Management Services, Inc. ("EMSI") (Da10). EMSI was formed to provide environmental remediation and consulting services both for private industries as well as governmental agencies. (Da42, ¶5). Pursuant to the Operating Agreement, Donnenberg received a 34% interest in EMSI with plaintiff and Mr. Kalic each receiving a 33% interest. (Da¶13a). The Operating Agreement also appointed Donnenberg as irrevocable President and CEO of EMSI, and provided that he would be solely responsible for the day-to-day operations of EMSI. (Da12, ¶10i). Plaintiff and Mr. Kalic were also identified as members of EMSI. (Da12, ¶10ii-iii).

Plaintiff invested $100,000 for the start-up costs of EMSI. (Da3, ¶7). Plaintiff's investment was characterized as a loan to EMSI as reflected in three (3) separate promissory notes signed by Donnenberg in his capacity as EMSI's President. The first promissory note dated December 7, 2003 obligated EMSI to repay plaintiff the principal sum of $22,500.00 in equal monthly installments of $1,017.61 including simple interest of 8% beginning on May 1, 2004 and continuing until May 1, 2006. (Da21). The second promissory note dated February 7, 2004 obligated EMSI to repay plaintiff the principal sum of $15,000 payable in equal monthly installments of $678.41 including simple interest of 8% beginning on May 1, 2004 and continuing until May

1, 2006. (Da22). And lastly, the third promissory note dated January 12, 2005 obligated EMSI to repay plaintiff the principal sum of $52,000 payable in equal monthly installments of $2,351.82 including simple interest of 8% beginning on May 1, 2004 and continuing until May 1, 2006. (Da24). Donnenberg did not personally guarantee payment of these promissory notes. Plaintiff received $10,000 from EMSI, but claims to have incurred additional company expenses on his credit card in the amount of $16,781 for which he was not reimbursed. (Da3, ¶¶9-11).

On or about July 21, 2005 plaintiff withdrew as a Member of EMSI. (Da45, ¶22). EMSI ceased operating in or about August 2005. (Da45, ¶23). Litigation ensued shortly thereafter when plaintiff filed his Complaint against EMSI and Donnenberg on August 23, 2005. (Da1).

Plaintiff's Complaint merits close scrutiny due to the vagueness of the allegations against Donnenberg that do not even remotely support a cause of action against him for the corporate debt obligations of EMSI. In Count One of the Complaint, plaintiff alleges that Donnenberg breached his obligations under the EMSI Operating Agreement because: (i) plaintiff was not reimbursed for charges placed upon his credit card;[2] (ii) plaintiff did not receive certified financial statements; (iii) Donnenberg failed to keep proper books of account; (iv) Donnenberg refused to allow his inspection of EMSI's books and accounts; (v) Donnenberg failed to cause EMSI to return

[2] The record below contains no proofs of the credit card charges claimed by plaintiff; i.e., monthly credit card account billing statements, credit card signature receipts, or invoices.

plaintiff's investment; and (vi) that Donnenberg failed to remain faithful to plaintiff. (Da1-4). The Complaint does not allege that these violations proximately caused plaintiff to sustain damages, however.

In Count Two of his Complaint, plaintiff summarily alleges that Donnenberg breached his fiduciary duties to each member of EMSI, including plaintiff. However, the Complaint fails to plead any specific facts of how Donnenberg allegedly breached his fiduciary duties or that such breaches proximately caused plaintiff to sustain damages.[3] (Da4, ¶¶19-21).

Aside from his breach of contract claim, plaintiff's tortuous allegations as against Donnenberg are premised "upon belief" that Donnenberg knowingly prevented the corporation from repaying plaintiff's investment in the company. To wit, in Count Three of his Complaint, plaintiff avers "upon belief" that Donnenberg misappropriated funds, monies, revenues and profits of EMSI and that such actions resulted in damages to each member of EMSI. The Complaint fails to plead any specific facts of this alleged misconduct, however. (Da5, ¶¶22-25). And in Count Four of his Complaint, plaintiff avers "upon belief" that Donnenberg misappropriated assets of EMSI by utilizing company funds to purchase assets unrelated to EMSI. Again, the Complaint fails to plead any specific facts of this alleged misconduct. (Da5-6, ¶¶26-29).

In Counts Five through Seven of his Complaint, plaintiff alleges that EMSI failed to repay him his investment as

[3] The trial court did not request any proofs demonstrating how Donnenberg specifically violated his fiduciary duties to plaintiff.

reflected in each of the three (3) promissory notes. Although plaintiff does not allege in the paragraphs of Count Five through Count Seven that Donnenberg is in any way personally responsible for payment on these notes, the prayer for relief in each Count seeks entry of judgment solely against Donnenberg. (Da6, ¶30 to Da8, ¶44).

Although plaintiff's Complaint alleges various causes of action against Donnenberg sounding in intentional torts and premised "upon belief", the Court did not conduct a proof hearing prior to entering Default Judgment on February 14, 2006 against EMSI and Donnenberg. Rather, the trial court improperly entered Default Judgment against Donnenberg based on the scant testimony set forth in plaintiff's Certification submitted with his application for entry of the judgment (the Default Judgment Certification") in which plaintiff simply regurgitated some of the boiler plate allegations from his Complaint. (Da29).[4] Further, the Default Judgment Certification fails to articulate

[4] There are only five (5) relevant paragraphs in plaintiff's Default Judgment Certification that the trial court conceivably could have relied upon in entering judgment against Donnenberg, to wit:

> 15. In violation of the Operating Agreement, Mr. Kronberg was never reimbursed for the charges placed upon his credit cards for the benefit of the Company.
>
> 16. Plaintiff, Mr. Kronberg has not received certified financial statements as required by the Operating Agreement.
>
> 17. Defendant, Scott M. Donnenberg has failed to keep proper books of account.
>
> 18. Despite due demand therefore, Scott M. Donnenberg has failed to provide certified financial statements.
>
> 19. Defendant Scott M. Donnenberg has failed to cause the corporation to return the investment of Plaintiff, Jay Kronberg.

(Da31, ¶¶ 15-19). The Default Judgment Certification recites no specific facts as to any of the above statements.

which Count of the Complaint that plaintiff was asking the Court to enter judgment; no such reference is contained in the trial court's February 14 2006 Order entering Default Judgment. (Da34). The trial court simply entered the Default Judgment based on the papers submitted without placing the reasons for its decision in writing or on the record.

Donnenberg does not dispute that he was served with the Complaint on August 23, 2005, nor that he received the additional mailings sent by plaintiff's counsel both prior and subsequent to the entry of the Default Judgment. On the same day that Donnenberg received plaintiff's Complaint he faxed it to a law firm that he and EMSI had used on several other occasions. (Da105 to Da106). Donnenberg certified to the trial court that he was operating under the belief that this law firm was representing him (despite his receiving mailings notifying him of the entry of Default Judgment and requesting post-judgment discovery in the form of an Information Subpoena), and that he placed numerous telephone calls and e-mails to the law firm which assured him they were handling the case. (Da43, ¶¶11-15; Da101, ¶6 to Da103, ¶9).[5] The law firm disputed these allegations in several certifications submitted by plaintiff in opposition to Donnenberg's Motion to Vacate. (Da92, Da115, Da117).

Shortly after learning that the Hunterdon County Sheriff had levied his vehicle in the latter part of December

[5] On April 24, 2006, Donnenberg e-mailed New Jersey attorney Frank Pisano, Esq. concerning the case with Mr. Kronberg. (Da108). On August 30, 2006, Donnenberg faxed a handwritten letter to Mr. Pisano concerning an Information Subpoena that he received from plaintiff's counsel. (Da110 to Da111). Mr. Pisano confirmed his firm's representation of Mr. Donnenberg in a letter to plaintiff's counsel dated December 18, 2006, in which he states, "[W]e are the attorneys for Scott Donnenberg regarding the referenced matter." (Da49).

2006, Donnenberg promptly retained present counsel and filed a motion to vacate the Default Judgment on January 2, 2007 ("Motion to Vacate") – within one (1) year from the entry of the Default Judgment. It is noteworthy that when plaintiff responded to the Motion to Vacate he did not proffer any evidence to support the merits of his claims against Donnenberg. Instead, plaintiff's opposition solely focused on providing the trial court with proof of service and other mailings that his counsel made upon Donnenberg as well as other materials that were irrelevant to the issues raised in the Motion to Vacate; i.e., such as Donnenberg's prior bankruptcy filing and other debts that had accumulated against him by other creditors.

As for a meritorious defense, in Donnenberg's initial Certification filed in support of his Motion to Vacate he testified that: (i) he never agreed to personally guarantee plaintiff's investment in EMSI; (ii) EMSI was unable to generate a profit due to inordinate delays in receiving payments from insurance companies; (iii) he and plaintiff communicated almost daily about the company's operations and cash flow problems; (iii) EMSI retained a factoring company in an effort to improve the company's cash flow, and that he was reluctant to continue accepting new projects for EMSI because of the company's poor cash flow; (iv) plaintiff had his own set of keys to EMSI's offices and he personally came to the company's office to obtain information at least once or twice per week; and (v) EMSI employed an accounting firm owned by Donnenberg's parents and plaintiff could have contacted them any time he wanted to access

information about EMSI's financial condition. (Da44, ¶17 to Da54, ¶28).

Notwithstanding Donnenberg's raising the complete inadequacies of the merits of plaintiff's claims and offering to reimburse plaintiff for his reasonable attorney's fees incurred in entering the Default Judgment, the trial court refused to vacate the Default Judgment. For the reasons set forth below, the trial court's April 2, 2007 Order should be reversed and this case should be remanded to the Law Division for case management and trial.

STANDARD OF REVIEW

The Law Division's denial of Donnenberg's Motion to Vacate is subject to the abuse of discretion standard of review. "A motion under R. 4:50-1 is addressed to the sound discretion of the trial court, which should be guided by equitable principles in determining whether relief should be granted or denied," and "the decision granting or denying an application to open a judgment will be left undisturbed unless it represents a clear abuse of discretion." Housing Authority of Town of Morristown v. Little, 135 N.J. 274, 283 (1994). "A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty v. Manalapan Tp. Comm., 140 N.J. 366, 378 (1995).

A request to vacate a default judgment brought pursuant to R. 4:50-1, as opposed to other relief sought under the rule, must be "viewed with great liberality, and every reasonable

ground for indulgence is tolerated to the end that a just result is reached." Marder v. Realty Const. Co., 84 N.J. Super. 313, 319 (App. Div. 1964), aff'd, 43 N.J. 508 (1964); see also Pressler, Current N.J. Court Rules, comment 1 on R. 4:50-1(2007)(noting, "[e]xcept for motions for relief from default judgments which are liberally viewed, . . . a motion for relief [under the rule] . . . should be granted sparingly").

Although relief afforded under R. 4:50-1(f) is reserved for "exceptional circumstances", in Saiber Schlesinger, et al. v. Chiappe (App. Div., July 11, 2007, Docket No. A-6384-05T1), this Court recently remarked, in a *per curiam* decision, "...we have repeatedly utilized it, along with general notions of fairness, to 'achieve equity and justice.'" Ibid at p. 9. Subsection (f) should be used "sparingly" and only "in situations in which, were it not applied, a grave injustice would occur." Housing Auth. of Town of Morristown v. Little, 135 N.J. at 286 (1994), quoted in First Morris Bank and Trust v. Roland Offset Service, Inc., 357 N.J. Super. 68, 71 (App. Div. 2003). Therefore, while the initial decision on an application under subsection (f) lies within the trial court's discretion, the appellate court will reverse where that discretion has been abused. Mancini v. E.D.S., 132 N.J. 330, 334 (1993).

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION BY ENTERING DEFAULT JUDGMENT AGAINST DONNENBERG BASED UPON THE PLAINTIFF'S NOVEL CLAIMS WITHOUT FIRST CONDUCTING A PROOF HEARING

The threshold question presented in this appeal is whether the trial court abused its discretion by failing to conduct a proof hearing prior to entering Default Judgment against Donnenberg premised only on the scant allegations plead in plaintiff's Complaint and repeated in his Default Judgment Certification. Donnenberg respectfully submits that the answer is in the affirmative. Careful examination of the record below demonstrates that plaintiff failed to proffer any proofs sufficient to sustain a *prima facie* claim that Donnenberg should be held individually liable for the corporate debt of EMSI. For this reason alone, the trial court should not have entered Default Judgment against Donnenberg in the first place without requiring plaintiff to prove his theory of liability against him.

R. 4:43-2 governs the entry of final judgment by default, and states, in pertinent part:

> If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any allegations by evidence or to make an investigation of any other matter, the court may, on notice to the defaulting defendant or defendant's representative, conduct such proof hearings with or without a jury or take such proceedings as it deems appropriate.

Ibid. (Emphasis supplied).

While R. 4:43-2 expressly gives the trial court discretion to determine whether or not to require a proof hearing

prior to entering a default judgment, in Siewic v. Financial Resources, Inc., 375 N.J. Super. 212 (App. Div. 2005), which involved an appeal from the denial of a motion to vacate a default judgment entered in the Special Civil Part, this Court held that when a "plaintiff is asserting a novel theory of recovery, it is an abuse of discretion for the trial court not to require plaintiff to 'demonstrate legal grounds supporting his claim of a right to relief.'" *Id.*, at 218 (quoting Newman v. Isuzu Motors America, Inc., 367 N.J. Super. 141, 147 (App. Div. 2004). See also Perry v. Crundon, 79 N.J. Super. 285 (Law Div. 1963)(holding that in the context of a default judgment courts have broad discretion to conduct evidentiary hearings in furtherance of establishing the truth of any averment contained in the complaint, and can adopt such procedures as may be required to render substantial justice in each case).[6]

In Newman, supra, it was recognized that the court must ordinarily require the plaintiff to demonstrate his right to relief if the plaintiff's theory of recovery is novel. 367 N.J. Super. at 146. (Emphasis added). See also Edelstein v. Toyota Motors Distributors, 176 N.J. Super. 57 (App. Div. 1980)(court denied default judgment against a manufacturer for rescission of the purchase of an automobile because there was no proof that the

[6] This point is analogous to the standards required for adjudicating summary judgment motions under R. 4:46-2. Even if a court is presented with an uncontested summary judgment motion, a judgment can be entered only ". . . if the pleadings, depositions, answers to interrogatories and admissions on file together with the affidavits, if any, show that there is no genuine issue of material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." Ibid. Cf. Anchorage Assoc. v. Virgin Islands Bd. Of Tax Review, 922 F.2d 168, 175 (3rd Cir. 1990)(Under Fed. R. Civ. P. 56(e), "[I]f the adverse party does not . . . respond, summary judgment, if appropriate, shall be entered against the adverse party.").

plaintiff had contracted with the manufacturer or that the distributor or importer was an agent of the manufacturer); Estate of Sharp, 151 N.J. Super. 579, 582 (App. Div. 1978)(A court may, *sua sponte*, refuse to enter judgment for plaintiff if the complaint on its face fails to state a cause of action as to which relief can be granted); Metric Investment, Inc. v. Patterson, 98 N.J. Super. 130, 133 (Law Div. 1967), aff'd, 101 N.J. Super. 301 (App. Div. 1968)(the entry of default does not necessarily obviate the obligation of plaintiff to furnish proof on the issue of liability); Johnson v. Johnson, 92 N.J. Super. 457 (App. Div. 1966)(court reversed a default judgment because the terms of a written agreement disproved the liability claimed);.

In Newman, the plaintiff, an injured passenger in a motor vehicle accident, filed suit against multiple tortfeasors including some against whom liability was premised on the theory of agency. The plaintiff settled with several of the defendants, and a default was entered against another defendant (Dean) who had not answered the lawsuit. The trial court conducted a proof hearing to determine the extent of liability as to the defaulting party Dean, and initially entered a default judgment against Dean for $100,000. The trial court subsequently vacated the default judgment and entered judgment in Dean's favor, finding that the settlement release extinguished Dean's liability.

In the appeal filed by plaintiff Newman, the Appellate Division expressed concern with the trial court's lack of

consideration concerning Dean's liability under an agency theory and the lack of any evidence in the record to support that claim:

> At the outset, we express some doubt as to whether the theory of liability employed by Newman in seeking damages against Dean has been or should be recognized in the context presented. We assume that Newman sought to proceed on a theory of gratuitous agency and to hold Dean liable on a theory of respondeat superior, since there is no evidence in the record before us to support a claim that Dean had compensated or planned to compensate Rosalie Holmes for any of her services, and there is no evidence of independent negligence on Dean's part. However, we are unable to discern whether any legal support for the utilization of those theories in this case was proffered at the time that the default judgment was obtained or at any other time. Certainly, nothing in the meager record that has been supplied to us on appeal suggests that any consideration was given to the issue of liability, although the existence of an undefined agency relationship was recognized without further comment by the court.

376 N.J. Super. at 145-146. (Emphasis supplied). "Given the seemingly novel nature of Newman's theory of recovery, we find that it would constitute an abuse of discretion for the court not to require Newman to demonstrate legal grounds supporting his claim of a right to relief against Dean. Id., citing Douglas v. Harris, 35 N.J. 270, 276-281(1961)(discussing power of court to require proof of liability); Slowinski v. Valley Nat'l Bank, 264 N.J. Super. 172, 183(App. Div. 1993)(a successful plaintiff seeking a default judgment can be required to furnish some proof on the merits to show entitlement to the relief demanded); Edelstein v. Toyota Motors Distributors, supra.

As demonstrated herein, it is abundantly clear that the trial court abused its should have required plaintiff to proffer

evidence to establish liability against Donnenberg in the context of a proof hearing.

A. Plaintiff's Proofs Fail to Establish a Prima Facie Claim Against Donnenberg For Breach of Contract

In the case at bar, careful scrutiny of the proofs submitted by plaintiff in his application for entry of Default Judgment (which regurgitated the same vague allegations plead in his Complaint) reveal the lack of a *prima facie* claim against Donnenberg for the corporate debt obligations of EMSI. Count One of the Complaint avers a cause of action for breach of contract - that Donnenberg violated his duties to plaintiff under the terms of the Operating Agreement. (Da2).[7] A party's breach of contract may be material or minor. "The generally accepted rule is that '"[W]hether a breach is material is a question of fact.'" Model Jury Charges §4.10, n1. (Internal citation omitted). Although a plaintiff can sue for any breach, such breach must cause the plaintiff measurable injury or damage. Id., at §4.10.

There is nothing in plaintiff's proofs from the record below that would support a claim of breach of contract against Donnenberg. Assuming *arguendo* that Donnenberg breached the EMSI Operating Agreement by not providing plaintiff with certified

[7] New Jersey law requires a plaintiff to establish four (4) elements to sustain a claim for breach of contract. These elements are:

1. The parties entered into a contract containing certain terms.
2. The plaintiff did what the contract required the plaintiff to do.
3. The defendant did not do what the contract required the defendant to do. This failure is called a breach of the contract.
4. The defendant's breach, or failure to do what the contract required, caused a loss to the plaintiff.

Model Jury Charges – Civil, §4.10a.

financial statements of EMSI and/or not allowing plaintiff to inspect EMSI's books and records, the trial court made no finding that such breaches were material or resulted in plaintiff not receiving the return of his investment and out of pocket expenses from EMSI.

B. Plaintiff's Proofs Fail to Establish a Prima Facie Claim Against Donnenberg For Breach of Fiduciary Duties

In Count Two of plaintiff's Complaint he alleges that Donnenberg breached his fiduciary duties. However, Count Two contains no specific allegations supporting such a claim; i.e., that Donnenberg failed to monitor EMSI's affairs, that Donnenberg manipulated EMSI's assets for his own personal benefit, or that Donnenberg looted the company's assets to the detriment of his partners and creditors of the company, etc.[8] Instead, Count Two incorporates by reference the same breach of contract allegations contained in Count One.

The essence of a fiduciary relationship is that one party places trust and confidence in another who is in a dominant or superior position." F.G. v. MacDonell, 150 N.J. 550, 563 (1997). The relationship arises when one party "is under a duty to act or give advice for the benefit of another on matters within the scope of their relationship." Ibid. Whether or not a fiduciary relationship exists is fact-sensitive. Id. at 563-564. In Daloisio v. Peninsula Land Co., 43 N.J. Super. 79, 90-91 (App.

[8] Pursuant to R. 4:5-8, "[I]n all allegations of misrepresentation, fraud, mistake, breach of trust, willful default or undue influence, particulars of the wrong, with dates and items if necessary, shall be stated insofar as practicable. Malice, intent, knowledge, and other condition of mind of a person may be alleged generally."

Div. 1956), the court succinctly explained the scope of loyalty owed by a corporate director to shareholders;

> Directors, when elected to office, become trustees of the entire body of corporate owners. They owe loyalty not only to the majority stockholders, or to the minority, but to all of them, represented by a corporate entity. To disregard the rights of either group, or of the corporation of such – even for a moment – is a violation of their fiduciary obligation.

Ibid.

A director may not only breach his or her duties by intentional acts, but also through mere negligence. Francis v. United Jersey Bank, 87 N.J. 15 (1981). In an action for breach of fiduciary duty, a plaintiff must establish a breach of duty and that the performance of such duty would have avoided the loss. Id. at 40 (citing N.J.S.A. 14A:6-12). On the face of Count Two of the Complaint, plaintiff does not meet the criteria to sustain a *prima facie* claim of breach of fiduciary duty against Donnenberg. Furthermore, plaintiff did not submit, nor did the trial court request, any proofs that would establish whether or not Donnenberg's performance of his duties as President of EMSI would have resulted in plaintiff receiving the return of his investment and out of pocket costs. As previously highlighted, in plaintiff's Default Judgment Certification he merely repeated the same allegations and submitted the same documents referenced in his Complaint. (Da29).

C. Plaintiff's Proofs Fail to Establish a Prima Facie Claim Against Donnenberg For Misappropriation

Count Three of plaintiff's Complaint pleads a cause of action for an accounting premised upon Donnenberg's alleged misappropriation of corporate assets. Specifically, in this Count plaintiff alleges "upon information" that Donnenberg misappropriated funds, monies, revenues and profits of EMSI. (Da5, ¶¶22-25).[9] In this context, the claim of "misappropriation" is synonymous with the tort of conversion, which is defined as "the wrongful exercise of dominion and control over property owned by another inconsistent with the owner's rights." 800 Port-O-San Corp. v. Teamsters Local Union No. 863 Welfare & Pension Funds, 363 N.J. Super. 431 (App. Div. 2003)(quoting Commercial Ins. Co. of Newark v. Apgar, 111 N.J. Super. 108 (Law Div. 1970)).

When money, as opposed to tangible property, is the subject of a conversion claim, New Jersey courts require that a plaintiff show something more than a contractual obligation on the part of a defendant to pay the plaintiff to establish conversion. Advanced Enterprises Recycling, Inc. v. Bercaw, 376 N.J. Super. 153 (App. Div. 2005)("An action for conversion will not lie in the context of a mere debt. . . ."). A plaintiff must show that the money in question was identifiably his/her property or that the defendant was obligated to segregate such money for plaintiff's benefit. See e.g., Hirsch v. Phily, 4 N.J.

[9] A corporate fiduciary may not purchase property for himself which he has the duty to purchase for the corporation. Daloisio v. Peninsula Land Co., 43 N.J. Super. 79, 92 (App. Div. 1956).

408(1950)(holding that plaintiff set forth a *prima facie* case of conversion of its money where defendant diverted proceeds from accounts receivable which were specifically assigned to plaintiff for its own use; Glenfeld Financial Corp. v. Penick Corp., 276 N.J. Super. 163 (App. Div. 1994)(finding that defendant converted plaintiff's property by "diverting payments from customers which it had agreed to place in a blocked account for [plaintiff's] benefit into [defendant's] operating accounts").

The bare allegations taken from plaintiff's Complaint predicated upon "information and belief" and parroted in his Default Judgment Certification fail to state a *prima facie* claim of misappropriation or conversion. Again, the lower court's record in this regard is completely lacking. Following the Appellate Division's holding of Advanced Enterprises Recycling, Inc. v. Bercaw, supra, in order to establish a conversion claim against Donnenberg plaintiff was required to show the trial court more than just a contractual obligation on Donnenberg's part to repay him. As plaintiff must concede, however, no contractual obligation exists that requires Donnenberg to personally repay his capital investment in EMSI; not even the Operating Agreement (Da10) provides this contractual obligation. To the contrary, EMSI alone bears a contractual obligation to pay plaintiff under the express terms of the promissory notes (Da21 to Da23).

D. Plaintiff's Proofs Fail to Establish a Prima Facie Claim Against Donnenberg For a Constructive Trust

Count Four of plaintiff's Complaint pleads a cause of action for a constructive trust and generally alleges that

Donnenberg misappropriated funds, monies, revenues and profits of EMSI, that he utilized these funds to purchase assets unrelated to EMSI, and that plaintiff is entitled to impose a constructive trust over all such assets purchased with the misappropriated funds. (Da5,¶26 to Da6, ¶29). This Count is redundant to plaintiff's conversion claim plead in Count Three of his Complaint. (Da5, ¶¶22-25). In point of fact, plaintiff did not identify for the trial court any assets that Donnenberg allegedly purchased for his own benefit with EMSI's funds. Consequently, the trial court could not have entered Default Judgment on plaintiff's constructive trust claim.

A constructive trust is a remedial device by which the "conscience of equity finds expression," thereby preventing the retention of property where, under the circumstances, it would be against good conscience to do so. Stewart v. Harris Structural Steel Co., 198 N.J. Super. 255, 266 (App. Div. 1984) (internal citation omitted). Where "title to property is acquired by fraud, duress or undue influence, or is acquired or retained in violation of a fiduciary duty, a constructive trust may be impressed in appropriate circumstances." Hyland, 152 N.J. Super. at 575. The burden of proof imposed upon a party seeking to impress a constructive trust is by clear and convincing evidence. Dessel v. Dessel, 122 N.J. Super. 119, 121 (App. Div. 1972), *aff'd*, 62 N.J. 141 (1973). See also, Gray v. Bradley, 1 N.J.

102, 104 (1948) ("[A] constructive trust must be established by clear, definite, unequivocal and satisfactory evidence.").[10]

The trial court did not conduct any fact finding to determine whether plaintiff satisfied the evidentiary burden required to establish a constructive trust by clear and convincing evidence. In point of fact, other than plaintiff's unsupported allegations plead in his Complaint "upon information" and thereafter parroted in his Default Judgment Certification, there is nothing in the record below demonstrating by clear and convincing evidence that Donnenberg breached any fiduciary duty to plaintiff, his former partner.

E. Plaintiff's Complaint Fails to Plead a Prima Facie Claim Against Donnenberg For Breach of The Promissory Note Obligations of The Corporate Defendant EMSI

Counts Five through Seven of the Complaint aver separate breach of contract claims against the corporate defendant EMSI regarding each of the three (3) promissory notes. However, the prayer for relief for each count requests entry of judgment only against Donnenberg! Thus, the allegations on the

[10] A constructive trust has been imposed where there is wrongful conduct on the part of the party acquiring or retaining the property, though the wrongful act is not limited to fraud, mistake, undue influence, or breach of a confidential relationship. D'Ippolito v. Castoro, 51 N.J. 584, 589 (1968)(internal citations omitted); see also Hirsch v. Travelers Ins. Co., 134 N.J. Super. 466, 471 (App. Div. 1975); Hyland v. Simmons, 152 N.J. Super. 569, 575 (Ch. Div. 1977), aff'd, 163 N.J. Super. 137 (App. Div. 1978), certif. denied, 79 N.J. 479 (1979). A constructive trust has also been impressed to avoid unjust enrichment even though the property was not retained as the result of wrongful or illegal conduct. D'Ippolito, 51 N.J. at 589; Stewart, 198 N.J. Super. at 266. See also, Trs. of Clients' Sec. Fund v. Yucht, 243 N.J. Super. 97, 131 (Ch. Div. 1989) (imposing a constructive trust based upon unjust enrichment where the property was legally acquired but not used for the purposes intended by the beneficiary). A constructive trust may also be imposed as a result of a confidential relationship between the parties. See Moses v. Moses, 140 N.J. Eq. 575, 577 (E. & A. 1947).

face of Counts Five through Seven do not establish a *prima facie* breach of contract claim against Donnenberg.

Based on the foregoing authorities as applied to the facts of the case at bar, this Honorable Panel should conclude that the trial court abused its discretion by entering the Default Judgment against Donnenberg without conducting a proof hearing. The documents referenced in, and attached to, plaintiff's Complaint and Default Judgment Certification unequivocally demonstrate that EMSI was the sole obligor on the promissory note obligations to plaintiff. The meager allegations appearing in plaintiff's Complaint (Da1) and Default Judgment Certification (Da29) do not even establish a *prima facie* claim against plaintiff under the novel theories advanced by him; i.e., breach of fiduciary duty, conversion, etc.

At a minimum, the trial court should have required plaintiff to proffer evidence demonstrating why Donnenberg should be held individually liable to his ex-partner for the corporate debt obligations of EMSI. The record below is completely lacking in this regard, punctuated by plaintiff's failure to present any proofs addressing the merits of his claims when opposing Donnenberg's Motion to Vacate. Accordingly, the Default Judgment, improperly entered in the first place, should be vacated on the grounds of equity and fairness under R. 4:50-1(f).

II. THE TRIAL COURT ABUSED ITS DISRECTION IN CONCLUDING THAT PLAINTIFF'S FAILURE TO PRODUCE ADEQUATE PROOF OF LIABLITY AS TO A CAUSE OF ACTION AGAINST DONNENBERG DID NOT CONSTITUTE GROUNDS TO VACATE THE DEFAULT JUDGMENT AGAINST DONNENBERG UNDER R. 4:50-1(f).

In response to Donnenberg's Motion to Vacate, plaintiff failed to proffer any evidence to support the merits of his claims against Donnenberg. Instead, plaintiff focused exclusively on the issue of excusable neglect. Donnenberg's counsel openly questioned this tactic during oral argument before the trial court, and argued that the lack of such proofs should cause the trial court to vacate the Default Judgment under R. 4:50-1(f) even in the absence of a strong case of excusable neglect on Donnenberg's part.

In two (2) separate decisions, the Appellate Division has recognized that in cases where the merits of plaintiffs' claims are questionable the court may vacate a default judgment under R. 4:50-1(f) even in situations where defendants' excusable neglect is weak. See Siewic v. Financial Resources, Inc., 375 N.J. Super. 212 (App. Div. 2005); and Morales v. Santiago, 217 N.J. Super. 496 (App. Div. 1987).

Specifically, in Siwiec the Appellate Division held that in the context of a proof hearing conducted before entry of default judgment if a plaintiff is asserting a novel theory of recovery, it is an abuse of discretion for the trial court not to require plaintiff to demonstrate legal grounds supporting his claim of a right to relief. 375 N.J. Super. at 218 (citing Newman, 367 N.J. Super. at 147).

Where either the defendant's application to

> re-open the judgment or the plaintiffs' proofs presented at the proof hearing raise sufficient question as to the merits of plaintiffs' case, courts may grant the application even where defendant's proof of excusable neglect is weak.

Siwiec, 375 N.J. Super. at 220. Citing its earlier decision in Morales v. Santiago, supra, the Appellate Division in Siwiec remarked: " . . . in Morales . . ., pursuant to R. 4:50-1(f), we vacated a judgment entered after a proof hearing, due to our "misgivings" about the merits of plaintiff's claim, although defendant's attorney had 'failed to present their case adequately on the motion to vacate.'" Siwiec, 375 N.J. Super. at 220. [11]

With all due respect to the trial court in the case at bar, the motion judge misinterpreted the application of the Siwiec and Morales decisions. In the Rider to the April 2, 2007 Order denying Donnenberg's Motion to Vacate (Da142), the trial court misapplied the law by concluding:

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[11]During oral argument on the Motion to Vacate, counsel for Donnenberg stated, in relevant part:

> And I think if Your Honor were to look at all this evidence, if this today were a proof hearing - instead of vacating a default judgment, were [sic] hearing a proof hearing, and I came in and contested the fact the facts that have been submitted on this certification alone, with the promissory notes signed by a corporation, with vague allegations about my client breaching the - you know, the operating agreement, with the complaint that doesn't in all due respect meet the qualifications of Rule 4:50-8, it doesn't bring forth specificity, it doesn't give specific details of how my client breached his fiduciary duties, it just has bare allegations.

(note 11 continued)

> And if we were at a proof hearing today, most respectfully I believe the Court would deny entry of this judgment and set the matter down for a trial. And that's - that's what the Appellate Division in my opinion was getting at with these two decisions [Siwiec and Morales] that I've cited. That when you have a case presented by a plaintiff that is so weak, that in the interest of justice, the court can - can vacate the judgment under Rule 4:50-1F [sic], even when excusable neglect is on the weaker side.

(T11-15 to T12-15)

> To the extent that Siwiec is on point, certain important factual distinctions undercut Defendant's argument. First, it appears that the main justification for vacation of the default judgment in Siwiec was a failure to notify the defendant of a proof hearing. Such was not the case in this matter, as no proof hearing was held. To that end, the Siwiec court noted that there is no requirement that a proof hearing be held where there is no novel theory of recovery being presented by plaintiff. Surely, recovery of promissory notes, as was sought here, is not a novel theory of recovery."

(Da143). The trial court further distinguished Siwiec based upon the fact that the defendant there filed the motion to vacate default judgment within two (2) weeks of its entry, that Donnenberg was repeatedly served with documents pertaining to this lawsuit prior to Default Judgment being entered, and that Donnenberg waited eleven (11) months to move to vacate the Default Judgment. (Da143 to Da144).

The trial court erred in concluding that the case at bar is distinguishable from Siwiec because plaintiff's contractual claims against Donnenberg are not novel claims. While there is no novelty to plaintiff's breach of contract claims against the corporate obligor (EMSI) concerning the promissory note obligations (Da21 to Da23), the same cannot be said as to Donnenberg because he signed the notes in his corporate capacity as President of EMSI. Plaintiff does not dispute that Donnenberg signed these promissory notes in his capacity as an officer of EMSI, or that Donnenberg did not

personally guaranty the debt.[12] Thus, the Default Judgment entered as to Donnenberg could only have been predicated upon plaintiff's intentional tort claims against him – breach of fiduciary duty, conversion, etc. – and the record below is completely devoid of any evidence proving these allegations.

Not only did the trial judge fail to address the Morales decision when issuing the Rider to the April 2, 2007 Order denying Donnenberg's Motion to Vacate, he misapplied the law by limiting application of Siwiec to situations where proof hearings have been held prior to the entry of default judgment.[13] Further, the trial judge erred by not reading Siwiec in conjunction with Morales, where this Court applied the same test under R. 4:50-1(f) in vacating a default judgment entered after a proof hearing because of the Court's misgivings about the merits of plaintiff's claim. Most respectfully, when read together Siwiec and Morales stand for the proposition that if a default judgment is entered based upon inadequate proof of liability, the court should vacate the judgment even if a defendant's claim of excusable neglect is weak.

Donnenberg respectfully submits that this Appellate Panel should be guided by this Court's prior precedent in Siwiec and Morales and vacate the Default Judgment pursuant to R. 4:50-1(f), even in the absence of Donnenberg presenting a strong case

[12] The trial court overlooked this critical fact when concluding that plaintiff's claims against Donnenberg are not novel. If the Default Judgment was predicated on the promissory notes alone, then plaintiff's claims against Donnenberg clearly fail as a matter of law.

[13] As the threshold issue on appeal, Donnenberg argues that it was improper for the trial court to have entered the Default Judgment without first conducting a proof hearing.

of excusable neglect. To allow the Default Judgment to remain against Donnenberg would constitute an extreme injustice in light of the specious nature of plaintiff's claims that are wholly unsupported by the record below. Donnenberg recognizes and accepts that a vacation of the Default Judgment would be conditioned upon reimbursing plaintiff for reasonable attorney's fees and costs incurred with respect to the Default Judgment, and Donnenberg submits that such a remedy would restore the parties to a level playing field.[14]

III. THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO VACATE THE DEFAULT JUDGMENT ON THE GROUNDS OF EXCUSABLE NEGLECT PURSUANT TO R. 4:50-1(a)

The term "excusable neglect" has been defined as excusable carelessness "attributable to an honest mistake that is compatible with due diligence or reasonable prudence." Mancini v. E.D.S., 132 N.J. at 335. In Regional Const. Corp. v. Ray, 364 N.J. Super. 534, 541 (App. Div. 2003), it was held that a client's mistaken assumption that his attorney in other actions involving the same parties was addressing the matter at issue qualified as excusable neglect. While Regional Const. Corp. is factually distinguishable from the present case on many grounds,

[14] In Regional Const. Corp. v. Ray, 364 N.J. Super. 534, 544-545 (App. Div. 2003), the Court extensively commented on the remedy of awarding counsel fees and costs to the party whom obtained the default judgment:

> ". . . we conclude that the term which will ordinarily suffice to alleviate any prejudice to the plaintiff is the reimbursement of plaintiff's fees and expenses as a condition of vacating the default judgment. This is particularly true where the judgment has been in effect for only a brief period of time before the motion to vacate is filed. In that circumstance, a plaintiff's expectations regarding the legitimacy of the judgment and the court's interest in the finality of judgments are at their nadir. Accordingly, in most cases the only terms which are, in the words of *R.* 4:50-1, "just" are those which restore plaintiff to the status quo ante, namely the reimbursement of the fees and costs expended in seeking the default judgment and in opposing the motion to vacate.

it nevertheless illustrates the principle that excusable neglect can be found in instances where a client mistakenly assumes that a lawyer he's familiar with is handling his case. As demonstrated infra, this is Donnenberg's exact contention.

The trial court erroneously concluded that Donnenberg did not establish excusable neglect based on his claim that he thought another attorney (Frank Pisano, Esq.) whom he and EMSI had used for other legal matters was handling this particular case. Specifically, the trial court found that "[D]efendant provides no documentation to support this allegation, and Mr. Pisano's Certification directly refutes any insinuation that his firm had undertaken representation of the Defendant." (DA143). "In the face of repeated service, Defendant's actions do not qualify as 'excusable neglect' as that term is contemplated by R. 4:50-1(a) or the applicable case law." (Da143).

To the contrary, Donnenberg demonstrated that he and Mr. Pisano were not in an attorney-client relationship for the very first time, and that he communicated with Mr. Pisano's firm on several occasions regarding this lawsuit beginning with a 31-page fax bearing the notation "new suit" that he sent to Mr. Pisano's partner on August 23, 2005 - the very same date that he was served with plaintiff's Complaint. (Da101, ¶6; Da105). In addition, on April 24, 2006, Mr. Donnenberg sent Mr. Pisano an e-mail concerning the plaintiff asking him to contact plaintiff to determine what he wanted. (Da101, ¶7; Da108).[15] Further,

[15] Donnenberg certified to the trial court that he "... communicated with Mr. Pisano on multiple occasions concerning this case. Unfortunately, I did not save all of my e-mails and faxes. I've produced what I have been able to find

Donnenberg faxed Mr. Pisano a copy of plaintiff's Information Subpoena on August 30, 2006 asked Mr. Pisano, "what am I to do?" (Da102, ¶8, Da110). Lastly, and perhaps most tellingly, Mr. Pisano sent plaintiff's counsel a letter on December 18, 2006 claiming that Donnenberg was entitled to an exemption for the vehicle which had just been levied by the Hunterdon County Sheriff. (Da49). In point of fact, Mr. Pisano admitted that he invoiced Donnenberg for this letter. (DA93, ¶4)

Notwithstanding these undisputed communications with Donnenberg, Mr. Pisano denied that his firm was ever retained to represent Donnenberg in this case. (Da92, Da115). While Mr. Pisano's certifications dispute the notion that Donnenberg retained his firm, it is significant that Mr. Pisano did not refute that his firm communicated with Donnenberg on the above-referenced dates. In addition, Mr. Pisano admitted that his firm had represented Donnenberg in the past. (Da93, ¶3).

Donnenberg concedes that he should have acted more diligently with respect to this Complaint, however given his prior relationship with Mr. Pisano it was not unreasonable for Donnenberg to have believed that Mr. Pisano's firm was representing him. Such reasonable belief is buttressed by Donennberg's actions – he faxed Mr. Pisano's firm a copy of plaintiff's Complaint on the same date that he received it and communicated with Mr. Pisano and/or his partner on several other occasions throughout the course of this case.

The trial court abused its discretion by finding that

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thus far. In any event, I maintain that I was under the belief that Mr. Pisano's firm was representing me in this case." (Da101, ¶9).

Donnenberg's actions under these circumstances did not constitute excusable neglect, and therefore the April 2, 2007 Order should be reversed and the case remanded for further disposition and trial.

CONCLUSION

For the foregoing reasons and authorities cited, Donnenberg respectfully requests that the April 2, 2007 Order denying his Motion to Vacate be reversed on such conditions as are "just", and that the case be remanded for case management and trial.

Respectfully submitted
LOFARO & REISER L.L.P.

Dated: July 29, 2007

By:_____
Glenn R. Reiser