Kronberg v. Donnenberg
N.J.Super.A.D.,2008.
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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey,Appellate Division.
Jay KRONBERG, Plaintiff-Respondent,
v.
Scott M. DONNENBERG, Defendant-Appellant,
andEmergency Management Services, Inc.,
Defendant.
Argued Jan. 30, 2008.
Decided April 2, 2008.

On appeal from Superior Court of New Jersey, Law Division, Bergen County, No. L-5623-05.

Glenn R. **Reiser** argued the cause for appellant (LoFaro & **Reiser**, attorneys; Mr. **Reiser**, on the brief).
Robert E. Berg argued the cause for respondent (Scipione, Berg & Associates, attorneys; Mr. Berg, of counsel and on the brief; Jeffrey Zajac, on the brief).

Before Judges WEFING, PARKER and LYONS.

PER CURIAM.
***1** Defendant Scott M. Donnenberg appeals from a trial court order denying his motion to set aside a default judgment entered against him. After reviewing the record in light of the contentions advanced on appeal, we affirm.

Plaintiff, defendant Donnenberg, and Rafet Kalic together formed defendant corporation Emergency Management Services, Inc. to provide environmental remediation and consulting services. The corporation was not successful, and plaintiff filed suit to recover monies he had advanced on behalf of the corporation. He attached to his complaint the operating agreement he and the other two principals had executed, as well as three promissory notes. Paragraph 10(b) of the Operating Agreement stated that each member would be

> entitled to full reimbursement of [his] initial investments. Members shall be reimbursed within a four year period, in equal monthly payments, beginning on month four of operation. Members shall be entitled to a[sic] eight percent interest rate on their initial investment.

The three promissory notes were each executed by defendant Donnenberg on behalf of the corporation, Emergency Management Services, Inc. The first, for $22,500, was executed December 7, 2003, the same date as the operating agreement. The second, for $15,000, was executed February 7, 2004, and the third, for $52,000, was executed January 12, 2005. The notes are identical; each called for repayment in equal monthly installments commencing May 1, 2004, with simple interest at 8%. Each stated that the entire amount of unpaid principal and interest would be due if any installment payment was not received within ten days of its due date. The notes were not guaranteed by Donnenberg and contain no indication that he executed them individually; each was clearly signed by Donnenberg in his capacity as president of the corporation.

The corporation ceased operations in August 2005; plaintiff filed suit that same month. Defendant Donnenberg was personally served on August 23, 2005. Neither Donnenberg nor the corporation filed an answer, and default was entered against both defendants on October 13, 2005. Although Donnenberg was notified that default had been entered against him, he took no immediate steps to cure that default. In February 2006 a default judgment was entered against both Donnenberg and the corporation for $106,781.

In May 2006 plaintiff sent defendant Donnenberg a copy of the judgment together with an information subpoena. *R.* 4:59-1(e). Donnenberg did not respond to the information subpoena and again took no steps to cure his default. On August 30, 2006, an order for his arrest was served on Donnenberg, and again he took no steps. Plaintiff's attorney wrote to Donnenberg in September 2006, notifying him that the debt had been referred to them for collection. Donnenberg did not respond. Finally, on December

8, 2006, Donnenberg's vehicle was levied upon. On January 2, 2007, Donnenberg filed a motion to vacate the default judgment and writ of execution and for leave to file an answer.

***2** Donnenberg supported his motion with a certification that he was not personally liable and that he had believed his attorney was "actively defending the case." He stated that after his vehicle was levied upon, he retained new counsel, who filed the motion to vacate. Donnenberg has appealed from the trial court order denying his motion.

We reject so much of defendant's argument as rests upon his contention that the trial court was required to hold a proof hearing before entering judgment against him. To the extent that this argument represents an appeal from that default judgment, it is unavailing. A party may not conduct a direct appeal from a default judgment entered against him. *Haber v. Haber*, 253 *N.J.Super.* 413, 416 (App.Div.1992). Further, the decision whether a proof hearing should be held before entry of a default judgment rests in the sound discretion of the court. *Douglas v. Harris*, 35 *N.J.* 270, 276-77 (1961).

Similarly, the decision whether to vacate a default judgment, brought under Rule 4:50-1, also rests in the discretion of the court. *Marder v. Realty Constr. Co.*, 84 *N.J.Super.* 313, 318 (App.Div.1964) ("It is well established that the decision granting or denying an application to open a judgment rests within the sound discretion of the trial court, exercised with equitable principles in mind, and will not be overturned in the absence of an abuse of that discretion.")

A defendant seeking to set aside a default judgment must generally establish two elements to obtain relief, excusable neglect and a meritorious defense. Defendant points to *Siwiec v. Fin. Res ., Inc.*, 375 *N.J.Super.* 212 (App.Div.2005), and *Morales v. Santiago*, 217 *N.J.Super.* 496 (App.Div.1987), to support his contention that the presence of a meritorious defense may obviate the need for a defendant to show excusable neglect in order to vacate a default judgment entered against him.

We consider both cases significantly distinguishable from the matter at hand, however. Both cases stressed that the motion to vacate a default judgment must be made within a reasonable time of the judgment having been entered. In *Siwiec*, the motion was made within two weeks of the proof hearing having been held. 375 *N.J.Super.* at 217.In *Morales*, the motion was made the month after the default judgment was entered. 217 *N.J.Super.* at 498.

Here, we cannot overlook Donnenberg's apparent blithe disregard of this lawsuit and his failure to respond to the many notices he received. He deigned to respond only when his automobile was levied upon. His contention to the trial court that he understood that his attorney was handling the matter for him is refuted by the attorney's certification that he was never retained in this respect. Donnenberg's contention, moreover, is belied by his silence after being notified of the default and default judgment. The record is barren of any indication that he contacted this attorney and questioned why a default had been entered against him. It is apparent that Donnenberg made a choice not to respond to this suit; we can perceive no basis to relieve him of the consequences of the choice he made.

***3** The trial court attached to its order a detailed statement of its reasons for denying defendant's motion to vacate the default judgment. We affirm substantially for the reasons stated by Judge Joseph S. Conte in his statement of April 2, 2007.

The order under review is affirmed.

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Not Reported in A.2d, 2008 WL 859691 (N.J.Super.A.D.)

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