



January 2, 2007

HAND DELIVERED

Bergen County Civil Motions Clerk
Bergen County Justice Center
10 Main Street
Hackensack, New Jersey 07601

**Re: Kronberg vs. Donnenberg, et al.
Docket No.: BER-L-5623-05
Judgment No.: J-050788-06
Defendant's Motion for Order Vacating Default Judgment and Writ
of Execution, and Granting Leave to File an Answer or Otherwise
Plead
Return Date: January 19, 2007**

Dear Sir/Madam:

My firm represents the defendant, Scott M. Donnenberg, in reference to the captioned civil matter. Kindly accept this letter brief in lieu of a more formal memorandum in support of my client's motion for entry of an Order vacating default judgment entered on February 14, 2006, vacating the Alias Writ of Execution issued on November 13, 2006, and granting leave to file an Answer or otherwise plead out of time (the "Motion"). In addition, defendant submits the Certification of Scott M. Donnenberg

(“Donnenberg Cert.”). Please deliver this letter brief and the accompanying pleadings to judge assigned to this matter.

STATEMENT OF FACTS

For a succinct factual statement the Court is referred to the Donnenberg Cert. submitted herewith. Plaintiff and Mr. Donnenberg were former shareholders/members in Emergency Management Services, Inc. (“EMSI”). Mr. Donnenberg invested money in EMSI and did not receive back his capital investment, which is certainly not unusual in private start-up companies. EMSI is no longer operating. In an effort to obtain the return of his failed investment, plaintiff’s Complaint fabricates general allegations of fraud and mismanagement by Mr. Donnenberg. Plaintiff’s Complaint offers no specific facts about the alleged fraud committed by Mr. Donnenberg.

Plaintiff believed that his prior lawyer was handling the matter. Unfortunately, plaintiff’s prior lawyer did nothing. On October 13, 2005 default was entered against Mr. Donnenberg. On February 14, 2006 the Clerk entered default judgment in the amount of \$106,781.00. The judgment should not have been entered by the Clerk without a proof hearing, however. *See* R. 4:43-2(b) An Alias Writ of Execution issued on November 13, 2006. In December 2006, the Hudson County Sheriff’s Department levied on defendant’s vehicle.

LEGAL ARGUMENT

POINT I

THE DEFAULT JUDGMENT ENTERED ON FEBRUARY 14, 2006 AND WRIT OF EXECUTION ISSUED ON NOVEMBER 13, 2006 SHOULD BE VACATED AS TO THE INDIVIDUAL DEFENDANT SCOTT M. DONNENBERG BASED ON EXCUSABLE NEGLIGENCE AND A MERITORIOUS DEFENSE

Pursuant to R. 4:43-3, “[F]or good cause shown, the court may set aside an entry of default, and if judgment by default has been entered, may likewise set it aside in accordance with R. 4:50.”. The motion must be filed within a reasonable time, but not

later than one (1) year from the date of entry of the judgment if the motion is based on excusable neglect. R. 4:50-2

An application to vacate a default judgment is “viewed with great liberality, and every reasonable ground for indulgence is tolerated to the end that a just result is reached.” *Marder v. Realty Construction Co.*, 84 N.J. Super. 313, 319 (App. Div. 1964), *aff’d* 43 N.J. 508 (1964). To set aside a default judgment, the defendant must demonstrate that its failure to answer or otherwise appear and defend was due to excusable neglect under the circumstances and that it has a meritorious defense either to the cause of action itself or the quantum of damages assessed. *Ibid.* “Excusable neglect” has been defined as carelessness “attributable to an honest mistake that is compatible with due diligence or reasonable prudence.” *Mancini v. EDS*, 132 N.J. 330, 335 (1993). The Appellate Division has held that a default judgment should be vacated where the plaintiff had produced inadequate proof of liability at a proof hearing directed by the court. *See Morales v. Santiago*, 217 N.J. Super. 496 (App. Div. 1987). The Appellate Division also has held that a client’s mistaken assumption that his attorney in other actions was addressing the matter at issue qualified as excusable neglect. *See Regional Const. Corp. v. Ray*, 364 N.J. Super. 534, 541 (App. Div. 2003).

The circumstances outlined in the *Donnenberg* Cert. unequivocally establish that defendant’s failure to answer plaintiff’s Complaint was based on excusable neglect and that defendant has a meritorious defense. The motion has been brought within a reasonable time, as required by R. 4:50-2 in that the default judgment was entered on February 14, 2006 and defendant has filed this motion within a year thereof.

None of the documents submitted by plaintiff in support of his application for entry of default judgment demonstrate the existence of any agreement by Mr. *Donnenberg* to personally reimburse plaintiff for the capital that plaintiff invested in EMSI. As such, there is no factual basis for the Clerk to have entered judgment

individually against Mr. Donnenberg. *See* R. 4:43-2(b). In fact, R. 4:5-8 requires that “[I]n all allegations of misrepresentation, fraud, mistake, willful default or undue influence, particulars of the wrong, with dates and items if necessary, shall be stated insofar as practicable.” *Ibid.* Plaintiff’s Complaint does not comply with the above requirement of R. 4:5-8.

Accordingly, the Court should set aside the default judgment and writ of execution so that this matter may be heard on the merits. In the absence of this relief, Mr. Donnenberg will sustain irreparable harm and prejudice.

POINT II

THE COURT SHOULD GRANT DEFENDANT LEAVE TO FILE AN ANSWER OR OTHERWISE PLEAD PURSUANT TO RULE 4:6-1(c)

Pursuant to R. 4:6-1(c), for good cause shown the Court may enlarge the time for a party to file its responsive pleadings. For the same reasons articulated in the Statement of Facts, *supra*, the Court should find that good cause exists for allowing defendants leave to file their responsive pleadings so that the case can proceed on its merits. In the absence of this relief, defendants will sustain irreparable harm and prejudice.

CONCLUSION

For the reasons and authorities cited, defendant respectfully requests that the Court vacate the default judgment entered on February 14, 2006, vacate the Alias Writ of Possession issued on November 13, 2006, and extend the time for the individual defendant Scott M. Donnenberg to file responsive pleadings to plaintiff’s Complaint.

Respectfully submitted,
Glenn R. Reiser
Glenn R. Reiser

Cc: Robert E. Berg, Esq. (w/encl.)(via regular mail)