SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3426-21

NRZ PASS-THROUGH TRUST V, U.S. BANK NATIONAL ASSOCIATION, not in its individual capacity but solely as Pass-Through Trust Trustee,

Plaintiff,

v.

ALEX KOROGODSKY, YANA KOROGODSKY, SANTANDER BANK, NA, HSBC BANK USA, NA,

Defendants,

and

LOWENTHAL & KOFMAN, PC,

Defendant-Appellant,

and

GLOBAL DISCOVERIES, LTD.,

Respondent.

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Argued June 7, 2023 – Decided June 26, 2023

Before Judges Gooden Brown and DeAlmeida.

On appeal from the Superior Court of New Jersey, Chancery Division, Bergen County, Docket No. F-008753-15.

Mark F. Heinze argued the cause for appellant Lowenthal & Kofman, PC (Ofeck & Heinze, LLP, attorneys; Mark F. Heinze, on the briefs).

Glenn R. Reiser argued the cause for respondent Global Discoveries, Ltd. (Shapiro Croland Reiser Apfel & Di Iorio, LLP, attorneys; Glenn R. Reiser and Alexander G. Benisatto, on the brief).

PER CURIAM

Defendant Lowenthal & Kofman, P.C., now known as Lowenthal P.C. (Lowenthal), appeals from a May 27, 2022 Chancery Division order denying its motion to vacate a January 21, 2022 order awarding surplus monies to Global Discoveries, Ltd. (Global) in connection with a mortgage foreclosure action. We affirm.

We glean these facts from the motion record. In 2015, a foreclosure complaint was filed by plaintiff NRZ Pass-Through Trust V, U.S. Bank National Association, against borrower-defendants, Alex and Yana Korogodsky. The following lienholders were joined as defendants: (1) Santander Bank, N.A.

(Santander); (2) Lowenthal; and (3) HSBC Bank USA, N.A. Through its attorneys Ofeck & Heinze, LLP (Ofeck & Heinze), Lowenthal filed a non-contesting answer, reserving its "right to any surplus at the sale" of the property. The answer also "demand[ed] service of all papers and pleadings" in the foreclosure action to Ofeck & Heinze's office address in Hackensack.

On February 5, 2016, the trial court entered a final judgment of foreclosure, fixing the total indebtedness due plaintiff at $559,281.69, plus taxed costs and counsel fees of $5,742.81. The same day, the court issued a writ of execution. On January 5, 2018, the Bergen County Sheriff conducted a sheriff's sale and sold the foreclosed property for $1,103,000. A deed was issued to the successful bidder on January 15, 2018, and recorded on October 3, 2018. On June 7, 2018, the court docketed the Bergen County Sheriff's Execution Sale Statement, confirming that the sale had generated surplus funds of $465,637.75.

On July 9, 2018, Santander, which held a second mortgage on the foreclosed property, filed a motion for surplus funds. The motion was served on Lowenthal's counsel of record, Ofeck & Heinze. By order entered on August 3, 2018, the court granted Santander's unopposed motion and awarded $412,491.64 of surplus funds, leaving a net balance of $53,146.11 on deposit with the Superior Court Trust Fund Unit.

On January 3, 2022, Global moved to release the remaining surplus funds pursuant to Rules 4:64-3 and 1:34-6(a)(15), governing applications for surplus monies in foreclosure actions. Global was in the business of assisting former property owners in recovering surplus monies from residential foreclosure sales, and had obtained an assignment of rights from a third party who was the holder of a docketed civil judgment against the Korogodskys. Although the judgment had been docketed before the foreclosure was initiated, the third party was never joined as a defendant in the foreclosure suit. As required by Rule 4:64-3(c), Global served its motion on all parties, including Ofeck & Heinze and its partner, Mark F. Heinze, Esq., Lowenthal's counsel of record. In a January 21, 2022 order, the court granted Global's unopposed motion and awarded Global $53,146.11 in partial satisfaction of the civil judgment. The same day, notice of the order granting Global's motion was emailed to Heinze's and the firm's email addresses.

Almost four months later, on May 3, 2022, through the same counsel, Ofeck & Heinze, Lowenthal moved to vacate the January 21, 2022 order under Rules 4:43 and 4:50, claiming it was entitled to the surplus funds because it had an unpaid third mortgage against the foreclosed property which had priority over Global's judgment claim. In support, Lowenthal argued that service of Global's

January 3, 2022 motion on Ofeck & Heinze was defective and the resulting order void. Lowenthal asserted that because the foreclosure judgment was entered on January 7, 2016, and the time to appeal the judgment expired on February 21, 2016, under Rule 1:11-3, Ofeck & Heinze's representation of Lowenthal ended "by operation of law" almost six years before Global filed its motion in 2022.

Lowenthal also asserted that its failure to respond was inadvertent and its opposition to the motion had merit because its prior mortgage remained unpaid. In support, Lowenthal submitted two certifications, one prepared by Steven Lowenthal, the president and authorized representative of Lowenthal, and one prepared by Mark F. Heinze, Lowenthal's attorney and Ofeck & Heinze partner. In the Heinze certification, Heinze admitted that he had "received [Global's January 3, 2022 motion] through the eCourts system" but "did not appreciate the significance of the motion, as the case had been dormant for several years, and [he] had no active file on it." Heinze acknowledged that "[he] could and should have been more attentive to the motion" but "[he] genuinely overlooked it" in error. Heinze averred he did not become aware of the error until "late March 2022" through "a new lawsuit" by the Korogodskys "related to personal property they claim to have left a[t] the [foreclosed] property."

In the Lowenthal certification, Lowenthal admitted that the motion was "served through the eCourts system on [their] attorney Ofeck & Heinze . . . and [by] mailing." Lowenthal acknowledged that "the motion was not answered[] due to an oversight." Lowenthal averred that "[t]he default was unintentional and not willful," as they "had no reason to believe or expect that funds would be available" since "so much time had passed."

Global opposed the motion on various grounds. First, Global argued the motion was procedurally defective because Lowenthal had not submitted the requisite proofs for surplus funds motions required under Rule 4:64-3(c). Second, Global argued the motion was moot because the surplus funds had been dispersed and were no longer in the Superior Court's jurisdiction. Third, Global asserted Lowenthal's counsel was properly served with the motion and Lowenthal's own negligence in failing to follow up on the status of the foreclosure suit did not constitute excusable neglect.

In support, Glenn R. Reiser, Esq., Global's attorney, certified that "[i]n preparation for filing [the] motion for surplus funds on behalf of Global," he had "identified . . . [Lowenthal] as a necessary party entitled to receive service of the motion," confirmed through internet searches that Ofeck & Heinze maintained the same Hackensack street address listed in Lowenthal's April 23,

2015 "uncontested [a]nswer," and "observed that Santander . . . had previously served its foreclosure surplus motion on Ofeck & Heinze . . . at the same [Hackensack] address." Further, Reiser averred that an internet search of Lowenthal "did not reveal a website domain belonging to [Lowenthal]," and his investigation uncovered that Lowenthal's "former principal, Martin Kofman, Esq., [had been] suspended from the practice of law for [two]years due to pleading guilty to [a federal offense]." Thus, Reiser certified he mailed the motion to Ofeck & Heinze "by regular and certified mail" and Heinze's certification confirmed receipt.

In an order entered May 27, 2022, the judge denied Lowenthal's motion. In an accompanying statement of reasons, the judge determined that "[Lowenthal] ha[d] not made a showing of good cause to satisfy the [Rule] 4:43 standard, nor . . . established any of the grounds for vacating a judgment under [Rule] 4:50-1." In support, the judge explained that both the Lowenthal and the Heinze certifications "contain[ed] admissions by [Lowenthal] and its counsel that there was simply a lack of diligence in pursuing the surplus funds awarded to Global."

The judge expounded:

> Simply stated, [d]efendant admits that it failed to pursue the matter. Whether it was unintentional, not

> willful, and/or an oversight is irrelevant. Defendant filed its motion four months after Global's motion and years after Santander . . . received a bulk of the surplus funds. Defendant now asks th[e c]ourt to correct its error in failing to pursue the matter with diligence.
>
> But as has been said by New Jersey courts, "equity aids the vigilant, not those who sleep on their rights." Goodyear Tire & Rubber Co. v. Kin Props., Inc., 276 N.J. Super. 96, 103 (App. Div. 1994) (quoting Dunkin' Donuts of Am. v. Middletown Donut Corp., 100 N.J. 166, 182 (1985)).

This appeal followed.

On appeal, Lowenthal raises the following points for our consideration:

> POINT I
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> UNDER RULE 1:11-3, AFTER THE TIME TO APPEAL EXPIRES, A PARTY'S ATTORNEY CANNOT BE SERVED AND ANY ORDER BASED ON SUCH SERVICE IS VOID.
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> POINT II
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> LOWENTHAL DID NOT WAIVE OR ABANDON ITS CLAIM TO THE SURPLUS FUNDS OR TO SERVICE OF PROCESS GENERALLY.
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> POINT III
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> THE DEFAULT SHOULD HAVE BEEN VACATED FOR GOOD CAUSE AND IN THE INTEREST OF JUSTICE BECAUSE THE DEFAULT WAS INADVERTENT AND LOWENTHAL HAD PRIORITY.

Rule 4:50-1 provides for relief from an order "in six enumerated circumstances." In re Est. of Schifftner, 385 N.J. Super. 37, 41 (App. Div. 2006). Pertinent to this appeal, under Rule 4:50-1, "the court may relieve a party" from an order due to "(a) mistake, inadvertence, surprise, or excusable neglect;" or where "(d) the . . . order is void." A motion for relief under Rule 4:50-1 should be granted "'sparingly [and only] in exceptional situations . . . in which, were it not applied, a grave injustice would occur.'" Badalamenti ex rel. Badalamenti v. Simpkiss, 422 N.J. Super. 86, 103 (App. Div. 2011) (alterations in original) (quoting Hous. Auth. of Morristown v. Little, 135 N.J. 274, 289 (1994)).

The Rule is addressed to the sound discretion of the trial judge, whose determination will not be disturbed absent "a clear abuse of discretion." US Bank Nat'l Ass'n v. Guillaume, 209 N.J. 449, 467 (2012). "[A]buse of discretion only arises on demonstration of 'manifest error or injustice,'" Hisenaj v. Kuehner, 194 N.J. 6, 20 (2008) (quoting State v. Torres, 183 N.J. 554, 572 (2005)), and occurs when the trial judge's decision is "'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" Guillaume, 209 N.J. at 467 (quoting Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 123 (2007) (Rivera-Soto, J., dissenting)).

Here, we discern no abuse of discretion by the judge. Lowenthal argues that the January 21, 2022 order is void under Rule 4:50-1(d) and should have been vacated because Global's service of the January 3, 2022 motion on Ofeck & Heinze was defective. According to Lowenthal, Rule 1:11-3 rendered the service defective because Ofeck & Heinze ceased to represent Lowenthal on February 21, 2016, when the time to appeal the underlying foreclosure judgment expired.

Rule 1:11-3 provides:

> The responsibility of an attorney of record in any trial court with respect to the further conduct of the proceedings shall terminate upon the expiration of the time for appeal from the final judgment or order entered therein. For purposes of appeal or certification, however, the attorney of record for the adverse party in the court below shall be considered as attorney for the respondent, and notice and papers served upon that attorney shall be deemed good service until the appellant or petitioner is notified of an appearance entered by a new attorney or is given written notice by the respondent naming another attorney.

The purpose of Rule 1:11-3 is

> to avoid the situation in which an opposing party, seeking supplementary or modified relief long after the entry of judgment, as is often the case in matrimonial actions, made service of papers on the original attorney, who may have had no further communication with his [or her] client since entry of judgment, no longer has a

> professional relationship with the client, and may not even have know[n] of the client's whereabouts.
>
> [Pressler & Verniero, Current N.J. Court Rules, cmt. to R. 1:11-3 (2023).]

In the circumstances of this case, we are convinced that Rule 1:11-3 does not render the January 21, 2022 order void. Lowenthal's admission in his certification that Ofeck & Heinze represented Lowenthal when Global served Ofeck & Heinze with the motion for surplus funds confirmed that Ofeck & Heinze continued their professional relationship with Lowenthal, had further communications with Lowenthal since the entry of the underlying final judgment of foreclosure, and was aware of Lowenthal's whereabouts. Indeed, the Lowenthal certification expressly stated that "[t]he motion was . . . served through the eCourts system on [their] attorneys Ofeck & Heinze . . . and [by] mailing." In fact, Ofeck & Heinze continues to represent Lowenthal in this very appeal.

Lowenthal's argument taken to its logical conclusion would provide a basis for Lowenthal to seek to vacate the August 3, 2018 order granting Santander's motion for surplus funds because Santander also served its motion on Ofeck & Heinze after the February 21, 2016 cut-off date. We are satisfied that such an absurd result was not the intent of Rule 1:11-3. See Pressler &

Verniero, cmt. to R. 1:11-3. Rule 1:11-3 cannot be applied to relieve an attorney of the obligation to forward motion papers to his or her client if he or she continues to represent the client, is in communication with the client, and knows the client's whereabouts, merely because the time to appeal a judgment in the underlying action has expired.

"In our judicial system, 'justice is the polestar and our procedures must ever be moulded and applied with that in mind.'" Salazar v. MKGC + Design, 458 N.J. Super. 551, 557 (App. Div. 2019) (quoting N.J. Highway Auth. v. Renner, 18 N.J. 485, 495 (1955)).

> In that vein, the Court Rules "shall be construed to secure a just determination, simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay." For that reason, "[u]nless otherwise stated, any rule may be relaxed or dispensed with by the court in which the action is pending if adherence to it would result in an injustice."
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> [Id. at 558 (alteration in original) (citation omitted) (quoting R. 1:1-2(a)).]

We are persuaded that such relaxation is warranted here.

"'[T]he only constitutional requirements of service of process' is '"notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections."'" U.S. Bank Nat'l Ass'n v. Curcio, 444 N.J. Super. 94, 111 (App.

Div. 2016) (alteration in original) (quoting O'Connor v. Altus, 67 N.J. 106, 126 (1975)). Here, the record amply demonstrates due process was satisfied because Global made diligent inquiry confirming Lowenthal's attorney's address, and then effected service to that address by regular and certified mail, return receipt requested. In addition, notice was electronically mailed to Heinze's and Ofeck & Heinze's email addresses. Because service of Global's motion by mail and electronic filing was "authorized by our Court Rules and did not offend due process . . . , the [order] was not void under Rule 4:50-1(d)." Curcio, 444 N.J. Super. at 112; see also R. 1:5-1(a) (requiring "written motions" in "civil actions" to "be served upon all attorneys of record in the action and upon parties appearing pro se"); R. 1:5-2 (permitting service on an attorney by mailing the motion to his or her office, handing it to the attorney, or leaving it with an employee at the attorney's office); Pressler & Verniero, cmt. to R. 1:5-2 (explaining that "Rule 1:5-2 was relaxed . . . to permit service . . . by electronic filing using an approved electronic filing system").

Lowenthal's request for relief under Rule 4:50-1(a) is equally unavailing. The standard of "excusable neglect" under Rule 4:50-1(a) is defined as "[c]arelessness . . . attributable to an honest mistake that is compatible with due diligence or reasonable prudence." Mancini v. EDS ex. rel N.J. Auto. Full Ins.

Underwriting Ass'n, 132 N.J. 330, 335 (1993). We have held that "[f]ailure on the part of an attorney through mere inadvertence or lack of proper diligence is insufficient" to establish "excusable neglect." Burns v. Belafsky, 326 N.J. Super. 462, 469 (App. Div. 1999) (citing Baumann v. Marinaro, 95 N.J. 380, 394 (1984)); see also Curcio, 444 N.J. Super. at 112 (holding that a party failed to establish excusable neglect when service of the motions was presumptively valid under Rule 1:5-2).

Here, the record supports the judge's conclusion that Lowenthal did not act diligently or with reasonable prudence in pursuing its rights to the surplus funds. Instead, as the judge explained, the certifications of Lowenthal and its attorney "contain[ed] admissions . . . that there was simply a lack of diligence in pursuing the surplus funds awarded to Global." Because a "lack of proper diligence is insufficient" to sustain a motion to vacate under Rule 4:50-1(a), we discern no abuse of discretion on the part of the judge in denying Lowenthal's motion on this ground. Burns, 326 N.J. Super. at 469.

Lowenthal's remaining contentions that it was entitled to relief under Rule 4:43-3 and that the judge erred by adjudicating the affirmative defenses of "laches" or "waiver" are without sufficient merit to warrant extended discussion in a written opinion. R. 2:11-3(e)(1)(E). Based on the record, the judge did not

adjudicate the motion under the doctrines of laches or waiver. And, although the judge addressed Lowenthal's motion to vacate alternatively under Rule 4:43-3, the January 21, 2022 order was not entered by default nor was it a default judgment. Instead, the order directed the release of surplus funds from the Superior Court Trust Fund Unit. Thus, Rule 4:43-3 did not apply. See R. 4:43-3 ("For good cause shown, the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with [Rule] 4:50.").

Affirmed.