Not Reported in A.3d, 2010 WL 4340649 (N.J.Super.A.D.)
**(Cite as: 2010 WL 4340649 (N.J.Super.A.D.))**



Superior Court of New Jersey,
Appellate Division.
Gusto E. MANGIAPANE, Plaintiff-Respondent,
v.
CENTRAL JERSEY WASTE & RECYCLING, INC., Defendant-Appellant.

Argued Oct. 19, 2010.
Decided Nov. 4, 2010.

West KeySummary**Judgment 228 163**

228 Judgment
228IV By Default
228IV(B) Opening or Setting Aside Default
228k163 k. Hearing and Determination. Most Cited Cases

Trial court abused its discretion on a motion to vacate a default judgment for injured party by not considering whether company or its president acted in bad faith by ignoring a complaint. There was insufficient evidence regarding whether company had procedures in place for the service of summons. Further, there was no evidence that receptionist who received the complaint violated the procedure by not forwarding the summons and complaint to the president of the company.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-2827-05.
Franklin W. Boenning argued the cause for appellant (Franklin W. Boenning, LLC and The Law Office of John A. **Fialcowitz**, LLC, attorneys; John A. **Fialcowitz**, of counsel and on the briefs; Mr. Boenning, on the briefs).

Angelica Guzman argued the cause for respondent (Law Offices of Karim Arzadi, attorneys; Mr. Arzadi, on the brief).

Before Judges BAXTER and KOBLITZ.

PER CURIAM.

*1 Defendant Central Jersey Waste & Recycling, Inc. (Central Jersey or the company) appeals from a December 4, 2009 Law Division order that denied its motion to vacate the default judgment plaintiff Gusto Mangiapane had obtained against the company in February 2006. We conclude that defendant presented sufficient evidence of an office procedure requiring staff to immediately give a summons and complaint to the company president, and of a violation of that policy by the company's receptionist, as to warrant a hearing on whether defendant had demonstrated exceptional circumstances under *Rule* 4:50-1(f). We reverse and remand for further proceedings.

I.

On January 7, 2005, plaintiff was allegedly injured when the garbage truck he was operating was involved in a traffic accident. He asserted in his April 15, 2005 complaint that Central Jersey was the owner of the vehicle, it had maintained the vehicle negligently, and such negligent maintenance rendered the vehicle unsafe, thereby contributing to, or causing, his injuries. The complaint did not name any other driver or any other company as a defendant.

Plaintiff's counsel forwarded the summons and complaint to the Mercer County Sheriff in July 2005, requesting that the Sheriff serve the complaint on defendant at 235 Gibbs Avenue, Trenton. The Sheriff provided plaintiff's counsel with a return of service specifying that the summons and complaint had been served upon defendant on July 11, 2005 and the person served with the pleadings was Judy Mayhew, defendant's receptionist. At the bottom of the page, the deputy sheriff circled three items:

> Served person authorized to accept service/Managing agent
>
> Moved, no longer can be found at address given
>
> Other. 432 Stokes Ave., Ewing, NJ 08628.

Thus, as of July 2005, plaintiff was advised by the Mercer County Sheriff that Central Jersey's current

address and business office was 432 Stokes Ave, Ewing, and not 235 Gibbs Avenue, Trenton.

Several months later, on December 12, 2005, plaintiff submitted a request to the clerk in Middlesex County to enter default against defendant pursuant to *Rule* 4:43-1 because defendant had been served with the summons and complaint, the time for answering or filing a responsive pleading had expired without being extended, and defendant had not filed an answer to plaintiff's complaint. Despite having been notified of defendant's Ewing address some five months earlier, plaintiff sent a copy of the request for entry of default to defendant at the invalid Trenton address. The court entered the requested default on December 27, 2005.

After being notified that the clerk in Middlesex County had indeed entered the default, plaintiff sent a notice of proof hearing, *see Rule* 4:43-2(b), to defendant, but, as plaintiff had done with the request for entry of default, sent the notice of proof hearing to defendant at the defunct Trenton address, rather than to the Ewing address that the Mercer County Sheriff had provided on the return of service in July 2005.

***2** At the conclusion of the February 15, 2006 proof hearing, the judge entered judgment by default against Central Jersey in the amount of $106,670 with an additional $2,131 in pre-judgment interest. On May 25, 2006, plaintiff forwarded an Information Subpoena to Central Jersey notifying it that a default judgment in the amount of $106,670 had been entered and advising the company of its right to move to vacate that default judgment. The Information Subpoena also sought information about defendant's assets and where such assets were located. The Information Subpoena was again sent to the defunct Trenton address, rather than to the Ewing Township address that the Sheriff had provided on the July 11, 2005 return of service.

Receiving no response to its May 25, 2006 Information Subpoena, plaintiff submitted a request to the United States Postal Service for information about any change of address Central Jersey may have filed. By letter of November 28, 2006, the Postal Service notified plaintiff that there was "[n]o [c]hange of [a]ddress [o]rder on file."

Years passed before plaintiff took any further action. In particular, on November 4, 2008, two years after being notified by the Postal Service that it had no change of address on file for Central Jersey, plaintiff again sent a copy of the Information Subpoena to defendant, but, for the first time, sent the documents to Central Jersey at its correct Ewing Township address. Five weeks later, on December 11, 2008, plaintiff sent another copy of the Information Subpoena to defendant at defendant's correct Ewing address, this time bearing the words *SECOND AND FINAL NOTICE.*

When plaintiff's counsel was asked at oral argument why, after so many years, her firm had suddenly started sending notices to the correct Ewing Township address, counsel responded that when the firm received no response to its prior mailings, it had contacted the Department of Environmental Protection (DEP) because haulers such as Central Jersey are required to be licensed by DEP and to provide DEP with a current business address. DEP apparently provided defendant's Ewing Township address to the law firm.

Hearing nothing from Central Jersey in response to its November 4, 2008 and December 11, 2008 Information Subpoenas, plaintiff filed a motion for enforcement of litigant's rights on September 14, 2009. Plaintiff's motion sought an order requiring Central Jersey to immediately supply answers to the Information Subpoena. The motion also sought incarceration of Central Jersey's President pending receipt of these answers.

Defendant filed a cross-motion on October 1, 2009 seeking to vacate the default judgment that had been entered at the proof hearing on February 15, 2006. In support of its motion, Central Jersey provided the October 1, 2009 certification of its company president, Frank Fiumefreddo, who asserted that he had been the president of Central Jersey since 2003 and was responsible for the day-to-day operations of the company, including the supervision of office staff and of the waste collection activity the company conducted.

***3** He asserted that "[a]s the business grew after [his] purchase [of the company]," he had "instituted procedures to ensure that any important paperwork ... [would] be brought to [his] personal attention to ensure they [sic] were handled properly." Fiumefreddo maintained that he had advised each of his employees accordingly. According to Fiumefreddo, at the time

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the Sheriff apparently served receptionist Janet Mayhew with the summons and complaint in 2005, she was aware that "should anyone serving formal papers arrive at the company, only the President could accept such papers." He maintained that despite the policy regarding acceptance of legal papers, Mayhew "accepted the papers, and thereafter failed to advise [him] that the papers had arrived and did not provide a copy of the papers to [him]." Thus, according to Fiumefreddo, neither he nor his company had any knowledge of the pendency of the lawsuit or of the default judgment that had been entered in February 2006.

Fiumefreddo also submitted a supplemental November 16, 2009 certification, in which he proceeded to discuss the merits of the complaint plaintiff had filed. Fiumefreddo maintained that plaintiff was not his employee at the time of the alleged accident, but was instead an employee of East Coast Express, Inc. (ECE) because "[b]eginning in November 2004, Central Jersey subcontracted a number of its collection customers to East Coast Express, Inc. for garbage collection, invoicing and customer service." He also maintained that Central Jersey leased one of its trucks to ECE for a period of one year, and plaintiff was operating that vehicle on the day of the accident. Thus, according to Fiumefreddo, plaintiff "worked for East Coast Express" when the accident occurred, "which explains the fact that ... Central Jersey ... had no records of [plaintiff's] employment at that time [and] why plaintiff ... did not advise Central Jersey of the facts surrounding the accident." Significantly, the agreement between the two companies imposed upon ECE all responsibility for repairs and maintenance of the truck.

In addition to Fiumefreddo's certifications, Central Jersey made several additional arguments in support of its motion to vacate the default judgment: 1) Central Jersey had vacated its Trenton office as long ago as February 2001; 2) plaintiff had been told by the Sheriff of Mercer County in July 2005 that Central Jersey had moved its offices to Ewing Township, and plaintiff was therefore on notice of Central Jersey's correct address for all further mailings; 3) despite that knowledge, plaintiff had continued to send notices to the defunct Trenton address for the next three years; 4) in violation of *Rule* 4:43-1, which requires a plaintiff to serve a copy of a request for entry of default "to the defaulting defendant by ordinary mail addressed to the same *address at which defendant was served with process* " (emphasis added), defendant failed to serve Central Jersey with the request for default at the Ewing address, which was the address the Sheriff used to serve process on defendant; and 5) in violation of *Rule* 4:43-2(b), which requires a plaintiff to send the notice of proof hearing to the defaulting defendant at "the same *address at which process was served* unless the party entitled to judgment has actual knowledge of a different current address for the defaulting defendant" (emphasis added), plaintiff mailed the notice of the proof hearing to the defunct Trenton address rather than to the Ewing address.

***4** Defendant's motion to vacate the default judgment was apparently decided on the basis of the motion and affidavits alone without oral argument. In the statement of reasons the judge placed on the record, he noted that plaintiff's letters advising Central Jersey of the proof hearing were mailed in January and February 2006 to Central Jersey at 235 Gibbs Avenue, Trenton even though Central Jersey had vacated the Trenton premises in February 2001. The judge also noted that the Sheriff of Middlesex County notified plaintiff in July 2005 of defendant's current address. Nonetheless, the judge refused to vacate the default judgment because defendant had, in fact, been served with the summons and complaint. The judge reasoned:

> ... [W]hen the court ... looked at the proof of service that was submitted to the court, ... the defendant's assertion that they were not served at the Ewing, New Jersey address is belied by the proof of service attached to the summons and complaint; and, accordingly, the motion to vacate the default judgment is hereby denied.

Thus, as is evident from the judge's brief remarks, he did not expressly consider Fiumefreddo's contention that he was never personally made aware by Mayhew that the summons and complaint had been served upon his company, nor did the judge take into consideration plaintiff's apparent violation of *Rules* 4:43-1 and 4:43-2(b). The judge also did not determine whether Mayhew's apparent violation of company policy constituted grounds for relief under *Rule* 4:50-1(a) through (f).

On appeal, defendant argues:

I. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING CENTRAL JERSEY'S MOTION TO VACATE THE DEFAULT JUDGMENT BECAUSE IT DID NOT CONSIDER CENTRAL JERSEY'S EVIDENCE OF EXCUSABLE NEGLECT NOR ITS MERITORIOUS DEFENSES.

A. The Trial Court Overlooked Central Jersey's Evidence of Excusable Neglect.

B. The Trial Court Overlooked Central Jersey's Meritorious Defenses.

II. THE DEFAULT JUDGMENT IS VOID BECAUSE PLAINTIFF OBTAINED THE DEFAULT JUDGMENT WITHOUT PROVIDING CENTRAL JERSEY WITH NOTICE OF THE DEFAULT JUDGMENT PROCEEDINGS AS REQUIRED BY *RULES* 4:43-1, 4:43-2(a) and 4:43-2(c).

In contrast, plaintiff urges us to affirm the order under review, maintaining that defendant was served with the summons and complaint on July 11, 2005 and that plaintiff had thereafter mailed the request for entry of default and notice of proof hearings to Central Jersey at an address that had been "verified by the U.S. Postal Service as [an] appropriate address[ ] for this defendant." Plaintiff maintains that defendant was provided with "ample notice for both dates of the proof hearing." Plaintiff provides no proof, by certified mail or any other method, that defendant actually received those notices.

II.

As we have observed, judges should adopt a hospitable approach to motions that seek to vacate default judgments:

> A motion to vacate a default judgment "should be viewed with great liberality, and every reasonable ground for indulgence is tolerated to the end that a just result is reached. Although the decision is generally left in the sound discretion of the trial court, that court must recognize that all doubts ... should be resolved in favor of the parties seeking relief."

***5** [ *Davis v. DND Fidoreo, Inc.*, 317 *N.J.Super.* 92, 99, 721 A.2d 312 (App.Div.1998) (quotations and citations omitted), *certif. denied*, 158 *N.J.* 686, 731 A.2d 45 (1999).]

We will not disturb the trial judge's decision on a motion to vacate a default judgment unless the judge mistakenly exercised his or her discretion. *Id.* at 100.

Central Jersey argued before the Law Division, and argues again before us on appeal, that it was entitled to relief from the judgment because of excusable neglect, *R.* 4:50-1(a), or, because the circumstances surrounding the entry of default judgment were exceptional, *R.* 4:50-1(f).

Corporate defendants, such as Central Jersey, are expected to have in place procedures within their organization for receiving and responding to lawsuits. *Mancini v. EDS*, 132 *N.J.* 330, 335-36, 625 A.2d 484 (1993). Service of process was proper in this case. As the United States Supreme Court observed sixty years ago in the seminal case of *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 *U.S.* 306, 314 70 *S.Ct.* 652, 657, 94 *L. Ed.* 865, 873 (1950), service of process satisfies constitutional standards so long as the notice is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." In a corporate context, "it is sufficient if the [s]heriff's officer serves a person whom he can reasonably expect will deliver the process to the appropriate person." *Davis, supra*, 317 *N.J.Super.* at 98, 721 A.2d 312 (citing *O'Connor v. Altus*, 67 *N.J.* 106, 127-28, 335 A.2d 545 (1975)). The Sheriff is not required to effect service upon the president of the company. *Ibid.* Here, the Mercer County Sheriff delivered the summons and complaint to the receptionist at defendant's place of business in Ewing. Defendant should not now be allowed to complain of service made at that address, to its receptionist, who has never denied that she received the suit papers from the Sheriff.

Therefore, we are satisfied that under the circumstances of this case, the notice given was reasonably calculated to advise defendant of the pendency of the action. Because service of process was proper, we turn to defendant's principal claim, which is that the judge erred in denying its motion to vacate the default judgment.

Relying on *Rule* 4:50-1(a), defendant claims it was entitled to relief from the judgment because of

excusable neglect. We cannot agree. Defendant states that Mayhew had been instructed before July 2005 that any documents pertaining to lawsuits or any documents served by a Sheriff should be delivered to Fiumefreddo, yet, for some unexplained reason, Mayhew did not forward the summons and complaint to him for response. Instead, the summons and complaint appear to have been misplaced.

As the Court observed in *Mancini, supra,* 132 N.J. at 335, 625 A.2d 484, such "neglect" or "carelessness" is not excusable unless the employee in question exercised "due diligence" or "reasonable prudence." Mayhew's carelessness and failure to follow office procedure is, quite simply, not compatible with an exercise of "due diligence" or "reasonable prudence," *ibid.,* and therefore does not constitute excusable neglect entitling defendant to relief from judgment under *Rule* 4:50-1(a). *Ibid.*

***6** We turn to defendant's alternative claim that it was entitled to relief under *Rule* 4:50-1(f). Although defendant failed to prove excusable neglect, we are satisfied that defendant was potentially entitled to relief under subsection (f) of *Rule* 4:50-1. "The essence of subsection (f) is 'its capacity for relief in exceptional situations. And in such exceptional cases its boundaries are as expansive as the need to achieve equity and justice.' " *Davis, supra,* 317 *N.J.Super.* at 100, 721 A.2d 312 (quoting *Palko v. Palko,* 73 *N.J.* 395, 398, 375 A.2d 625 (1977)) (internal quotation and citation omitted).

The judge denied defendant's motion to vacate the default judgment, based only upon the fact that defendant was served with a copy of the summons and complaint. The fact that a defendant was properly served does not foreclose the granting of relief under subsection (f). *Ibid.* Thus, even though service was valid, there was some doubt about whether Fiumefreddo actually received the summons and complaint. Under such circumstances, "a more liberal disposition" of a motion to vacate the default judgment is required. *Ibid.* (quoting *Goldfarb v. Roeger,* 54 *N.J.Super.* 85, 92, 148 A.2d 189 (App.Div.1959)). Even when the neglect is inexcusable, the motion judge shall also consider whether there is any evidence "establishing willful disregard of the court's process...." *Ibid.* Nothing presented by plaintiff in opposition to defendant's motion even remotely suggests that Fiumefreddo or his company acted in bad faith by ignoring the summons and complaint that was served in July 2005.

The judge does not appear to have considered the absence of bad faith by defendant or the fact that Fiumefreddo appears to have been unaware of plaintiff's complaint at the time the default judgment was entered. *Davis* requires consideration of these factors when a *Rule* 4:50-1(f) motion is made.

However, we stop short of reversing the December 4, 2009 order and remanding for the entry of an order vacating the default judgment. Instead, we deem it more appropriate to reverse the denial of defendant's motion to vacate the default judgment, but we do so with instructions that the judge conduct a hearing during which plaintiff shall have the opportunity to test the veracity of Fiumefreddo's claim that he had procedures in place and Mayhew violated them.[FN1] As we have noted, Mayhew has never explained what she did with the summons and complaint.

> FN1. We were advised at oral argument that Mayhew is still employed by defendant.

On remand, the court should conduct a hearing on these subjects and, if satisfied that Fiumefreddo had a policy in place and that Mayhew violated that policy by not immediately forwarding the summons and complaint to him, then the court shall enter an order vacating the default judgment. If the judge believes the parties should conduct discovery prior to any such hearing, the court shall be free to so order.

In determining that defendant is at least entitled to a hearing on whether exceptional circumstances were presented under *Rule* 4:50-1(f), we also conclude that defendant has presented evidence of a meritorious defense. If plaintiff was operating a truck leased by defendant to ECE and the agreement between defendant and ECE imposed all responsibility for maintaining and servicing that truck upon ECE, then defendant likely has a meritorious defense to plaintiff's claim that his injuries were caused by defendant's negligent maintenance of the truck.

***7** We are not insensitive to plaintiff's claim that because of the delay, the statute of limitations has passed, thereby preventing plaintiff from filing a complaint against any other entities or parties who may be responsible for his injuries. Not all of the

delay, however, can be laid at defendant's feet, as the record demonstrates that two years elapsed between the time plaintiff obtained the entry of default in 2006 and the time plaintiff sent the Information Subpoena to defendant in 2008. Moreover, as we have noted, plaintiff was advised by the Sheriff in July 2005 of defendant's correct address, yet carelessly failed to take note of it.

In sum, we reverse the December 4, 2009 order denying defendant's motion to vacate the default judgment and remand we for further proceedings consistent with this opinion. On remand, the court may entertain any motion for costs that plaintiff may choose to file.

Reversed and remanded.

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