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PAUL SCIARRA, LLC, Plaintiff-Respondent, v. KENDALL S. FREEMAN a/k/a KENDALL FREEMAN, and his wife, MRS. FREEMAN, Defendants, and HSBC BANK USA, N.A., Defendant-Appellant.

DOCKET NO. A-0559-16T1

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

2017 N.J. Super. Unpub. LEXIS 359

January 24, 2017, Argued
February 15, 2017, Decided

NOTICE: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY *RULE 1:36-3* FOR CITATION OF UNPUBLISHED OPINIONS.

PRIOR HISTORY: [*1] On appeal from the Superior Court of New Jersey, Chancery Division, Hudson County, Docket No. F-009962-13.

COUNSEL: Joshua N. Howley argued the cause for appellant (Sills Cummis & Gross, P.C., attorneys; Mr. Howley, of counsel; Vincent Lodato, on the brief).

John W. McDermott argued the cause for respondent (Harwood Lloyd, LLC, attorneys; Mr. McDermott, of counsel and on the brief).

JUDGES: Before Judges Fisher and Vernoia.

OPINION

PER CURIAM

In this appeal, defendant HSBC Bank U.S., N.A., argues the trial judge erred in refusing to vacate a default - and in refusing to vacate the default judgment that quickly followed - by failing to liberally indulge its assertions of excusable neglect and its claim to a meritorious defense that its mortgage should have priority over plaintiff's. We agree defendant's contentions were not liberally indulged and, therefore, reverse.

Plaintiff NJM Bank, FSB, commenced this action on March 22, 2013, to foreclose a mortgage held on Jersey City property owned by Kendall Freeman. HSBC Bank was joined as a defendant because it, too, held a mortgage on the property. The complaint acknowledged plaintiff's and HSBC Bank's mortgages were recorded on the same day, July 22, 2011. Although not [*2] alleged in the complaint, there seems to be no dispute that plaintiff's mortgage was recorded a few hours before HSBC Bank's mortgage. Plaintiff also acknowledged in the complaint that the HSBC Bank mortgage was executed by Freeman *prior* to plaintiff's mortgage; Freeman executed HSBC Bank's mortgage on June 20, 2011, and plaintiff's mortgage on July 14, 2011.[1]

> 1 Plaintiff alleged Freeman defaulted by entering into a loan agreement with, and executing a mortgage in the interest of, HSBC Bank without plaintiff's consent. It's not clear why Freeman would have thought he needed plaintiff's consent when he borrowed those funds from HSBC Bank *before* contracting with plaintiff.

Complicating the interesting priority question posed by those facts was HSBC Bank's failure to timely respond

to the complaint. Nearly a year after serving HSBC Bank with the summons and complaint, plaintiff requested and obtained, on June 16, 2014,[2] entry of default. Nothing much occurred in either camp for the following twenty-one months. On March 9, 2016, plaintiff moved for entry of a default judgment against HSBC Bank. This galvanized HSBC Bank; it both opposed plaintiff's motion and cross-moved for relief from the default pursuant to *Rule 4:43-3*.

2 Two weeks earlier, plaintiff's mortgage was assigned to Paul Sciarra, LLC. To avoid confusion, we will simply continue to refer to the party holding that mortgage as "plaintiff."

In denying relief, the trial judge correctly noted that an application to vacate a default judgment, pursuant to *Rule 4:50-1*, is to 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 Constr. Co., 84 N.J. Super. 313, 319, 202 A.2d 175 (App. Div.), aff'd, 43 N.J. 508, 205 A.2d 744 (1964)*. And the judge also correctly [*3] recognized that an application to vacate a default, pursuant to *Rule 4:43-2*, is indulged with even greater liberality. *US Bank Nat'l Ass'n v. Guillaume, 209 N.J. 449, 466-67, 38 A.3d 570 (2012)*. Notwithstanding, the judge facilely concluded HSBC Bank's factual assertions about confusion with its mortgage servicer about responding to the complaint did not constitute excusable neglect, and that there was "no merit" to HSBC Bank's assertion that its mortgage should have priority over plaintiff's. An order denying HSBC Bank's motion was entered on June 2, 2016.

Final judgment by default was entered against Freeman and HSBC Bank on June 8, 2016. HSBC Bank moved for reconsideration of the June 2, 2016 order, as well as for the vacation of the default judgment pursuant to *Rule 4:50-1*. The judge denied these applications for reasons similar to those expressed when the motion to vacate the default was denied.[3]

3 In denying the motion to vacate default, the judge appears to have conflated the excusable-neglect and meritorious-defense aspects of HSBC Bank's required showing, i.e.: "the meritorious defense raised by [HSBC Bank] [is] insufficient in light of [HSBC Bank's] initial failure to defend itself in this action, filed over three years ago." And the judge appeared to allow the age of the case to inform his decision not only in that regard but also when he observed that to grant HSBC Bank relief would cause the "open[ing of] discovery, approximately two years after" default. Even assuming these were proper considerations, we do not see why the passage of time was placed at HSBC Bank's doorstep; plaintiff did not seek HSBC Bank's default for nearly a year after service of process and then did not seek default judgment until another twenty-one months elapsed.

HSBC Bank filed a notice of appeal. By way of an emergent application, we granted a stay of the judgment and expedited the disposition of this appeal.

As we have already observed, the judge was obligated to liberally indulge HSBC Bank's assertions and contentions. *Marder, supra, 84 N.J. Super. at 319*; *see also Housing Auth. of Morristown v. Little, 135 N.J. 274, 283-84, 639 A.2d 286 (1994)*. Although the judge recognized this, we view his determination that HSBC Bank failed to present a meritorious [*4] defense to have been based on some other, more stringent standard. To be sure, the judge recognized that the merit of HSBC Bank's asserted defense did not turn solely on the fact that plaintiff's mortgage was recorded first, albeit by only a few hours. The judge observed that being the first to record does not give priority when that mortgage holder is aware of an earlier, unrecorded mortgage. *See N.J.S.A. 46:26A-12(b)*[4]; *Cox v. RKA Corp., 164 N.J. 487, 496, 753 A.2d 1112 (2000)*; *Palamarg Realty Co. v. Rehac, 80 N.J. 446, 454, 404 A.2d 21 (1979)*. This would mean, as the judge understood, that if NJM Bank, which entered into the loan agreement with Freeman on July 11, 2014, was aware that Freeman had entered into a loan agreement with, and executed a mortgage on behalf of, HSBC Bank three weeks earlier, HSBC Bank would have priority even though its mortgage was recorded a few hours after plaintiff's mortgage.

4 By way of this statute, the Legislature declared that "[a] claim under a recorded document affecting the title to real property shall not be subject to the effect of a document that was later recorded or was not recorded unless the claimant was on notice of the later recorded or unrecorded document."

The standard the judge imposed on HSBC Bank in seeking vacatur - that it persuasively demonstrate NJM Bank entered into its loan agreement with knowledge of

Freeman's indebtedness to HSBC Bank - is more onerous than either *Rule 4:43-3* or *Rule 4:50-1* permit. Indeed, HSBC Bank was poorly positioned to persuade the trial judge that its mortgage had priority because the facts needed to make the showing were in the possession of others. *See, e.g.*, [*5] *Auto Lenders v. Gentilini Ford, 181 N.J. 245, 271-72, 854 A.2d 378 (2004)*; *Wilson v. Amerada Hess Corp., 168 N.J. 236, 253-54, 773 A.2d 1121 (2001)*. Without being permitted to file a responsive pleading, HSBC Bank was deprived of the right to seek out that information through compulsory discovery methods. We hold that it was enough that HSBC Bank asserted a colorable claim of priority; its defense "need not be ultimately persuasive at this stage." *Am. Alliance Ins. Co., Ltd. v. Eagle Ins. Co., 92 F.3d 57, 61 (2d Cir. 1996)*. And, although it has been recognized that the assertion of a meritorious defense must be "supported by a developed legal and factual basis," *Jones v. Phipps, 39 F.3d 158, 165 (7th Cir. 1994)*, courts must provide sufficient latitude when information required to make that showing is in the possession of others.[5]

> 5 Our decisional law has provided little other than generalities about the meritorious-defense requirement. For example, in an early case, we held that "[a] just, sufficient and valid defense to the original cause of action stated in clear and unmistakable terms is a prerequisite to opening a judgment." *Schulwitz v. Shuster, 27 N.J. Super. 554, 561, 99 A.2d 845 (App. Div. 1953)*. Nothing much about this requirement has been said by our courts since.

In short, HSBC Bank was not required to obtain relief to prove its meritorious defense would have succeeded, only that it could assert a defense worthy of consideration on its merits - a defense that would not render further proceedings futile. *US Bank Nat'l Ass'n, supra, 209 N.J. at 469*; *Ridge at Back Brook, LLC v. Klenert, 437 N.J. Super. 90, 100-01, 96 A.3d 310 (App. Div. 2014)*. The undisputed fact that its mortgage was executed prior to plaintiff's raises a sufficient ground for allowing further litigation on the subject.

We also observe that the spectrum of equitable relief available is not limited to a simple grant or denial of vacatur. A court may, for example, leave an order or judgment in place - but stayed - pending further examination or development [*6] of any uncertain factual or legal contentions. *See Regional Const. Corp. v. Ray, 364 N.J. Super. 534, 541-42, 837 A.2d 421 (App. Div. 2003)*. Or, a court may grant relief from an order or judgment, as *Rule 4:50-1* expressly permits, "upon such terms as are just," such as requiring HSBC Bank to reimburse plaintiff the fees and expenses incurred in seeking and obtaining the default judgment. *See ATFH Real Prop. v. Winberry Rlty., 417 N.J. Super. 518, 526-29, 10 A.3d 889 (App. Div. 2010), certif. denied, 208 N.J. 337, 27 A.3d 950 (2011)*. With a modicum of flexibility and the imposition of terms, a court may allow a movant a disposition of a matter on its merits - the ultimate goal of our court rules, *Ragusa v. Lau, 119 N.J. 276, 283-84, 575 A.2d 8 (1990)*; *Tumarkin v. Friedman, 17 N.J. Super. 20, 26-27, 85 A.2d 304 (App. Div. 1951), certif. denied, 9 N.J. 287, 88 A.2d 39 (1952)* - while alleviating or eliminating the prejudice caused to the opponent by delay and additional litigation.

In reversing the orders denying HSBC Bank's relief from the default and the default judgment,[6] we authorize the trial judge's consideration of such terms as are just.[7]

> 6 The relief granted today is limited to HSBC Bank. Our ruling has no impact on the judgment obtained by plaintiff against Freeman.
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> 7 nn7 We express no view as to whether terms must be imposed. We leave further consideration of whether or to what extent terms may be imposed, in the exercise of sound discretion, in order to alleviate any prejudice that may or will be suffered by plaintiff as a result of the vacating of the default and default judgment.

Reversed and remanded. We do not retain jurisdiction.