

2012 WL 1581117

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UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.

GREATER PATERSON PROPERTIES,
L.L.C., d/b/a Tax Lien Assignment
Fund 020301, Plaintiff–Appellant,

v.

Ramesh R. PATEL; Kantaben Patel, his wife; Anil
Patel; Dipika Patel, Defendants–Respondents,
and

Antonio Gagliostro; Francesca Gagliostro;
and Shivani Estates, L.L.C., Defendants.

Argued Sept. 20, 2011. | Decided May 8, 2012.

On appeal from Superior Court of New Jersey, Chancery
Division, Passaic County, Docket No. F–16021–08.

Attorneys and Law Firms

[Keith A. Bonchi](#) argued the cause for appellant (Goldenberg,
Mackler, Sayegh, Mintz, Pfeffer, Bonchi & Gill, attorneys;
Mr. Bonchi, of counsel and on the brief; Rosann Allen, on the
brief).

[Adam S. Kessler](#) argued the cause for respondents (David
Kessler & Associates, L.L.C., attorneys; Mr. Kessler, David
Kessler and [Matthew M. Fredericks](#), on the brief).

Before Judges [MESSANO](#), [YANNOTTI](#) and [ESPINOSA](#).

Opinion

PER CURIAM.

*1 Plaintiff, Greater Paterson Properties L.L.C., d/b/a Tax
Lien Assignment Fund 020301, appeals from orders that
vacated final judgment in its favor in a tax sale foreclosure
and awarded a counsel fee that it deemed inadequate. For
the reasons that follow, we affirm the order vacating final
judgment and reverse the award of attorney's fees and costs.

Title to the property in question was held by Ramesh and
Kantaben Patel and their son, Anil Patel.¹ In 1994, the elder

Patels moved to what has been described as a remote part of
India. Anil resides at the property with his wife, Dipika, and
two children.

Anil failed to pay the taxes owed on the property for the years
2000 and 2001, resulting in two tax sales for unpaid municipal
liens. Tax sale certificates were issued and plaintiff eventually
obtained the certificates by assignment on February 28, 2003.

Ramesh and Kantaben executed a power of attorney on
February 13, 2006, with regard to the subject property, which
stated in pertinent part that each of them did

hereby appoint constitute nominate and declare our son the
most trust worthy person namely:—

ANILKUMAR RAMESHCHANDRA PATEL,

...

As our Attorney and as an agent to do or to be done the
following Act/s, Thing/s and procedures in respect of our
property in U.S.A. described hereinafter.

(1) That, we the executors of this Power of Attorney are
Husband and wife. And our above named Attorney and as
Agent is our son. We the executors are now residing in
India and aged enough. So we are unable to run at U.S.A.
Therefor [sic] we have executed this Deed of General
Power of Attorney in favour of our son ANILKUMAR
RAMESHCHANDRA PATEL in respect of our property
in U.S.A. as described below owned to us.

....

(6) That if any such dispute arise in respect of the said
property then also to take shelter of court of law and to do
or to be done every such legal act/s, thing/s and procedures
through concern lawyer.

(7) That in short we have fully authorised [sic] our above
named Attorney and as an agent to do or to be done every
such legal act/s, things and procedures in respect of the
property discribed [sic] above, which we could have done
if personally present, and whatever such Act/s, Thing/s and
procedures done by our above named Attorney and as an
agent shall be binding to us.

This Power of Attorney was notarized by an Indian notary in
India in 2006, and was again notarized by an American notary
in India on August 6, 2009.

In the interim, plaintiff filed a complaint to foreclose the tax sale certificates on April 23, 2008. Based upon the information available to plaintiff's counsel at the time, he believed that Ramesh and Kantaben Patel continued to reside at the subject property and so, the summons and complaint for all defendants were served on Dipika at the subject property on May 12, 2008. However, the elder Patels never resided at the property after they left for India in 1994.

*2 None of the defendants filed an answer to the complaint. Instead, in June 2008, Anil wrote to plaintiff's attorney, stating he did not need to take any action because Anil was working with the City of Passaic to pay the outstanding taxes. Thereafter, plaintiff's counsel and Anil discussed Anil's efforts to redeem the tax sale certificates.

The court entered default judgment against defendants and fixed a final amount, time and place for redemption by order entered May 29, 2009, requiring redemption to take place on July 13, 2009. Defendants failed to redeem the property by that date and final judgment was entered on July 14, 2009, vesting fee simple ownership of the property in plaintiff.

Defendants filed a motion to vacate the final judgment on or about October 12, 2009. In support of that motion, Anil filed a certification in which he stated that his parents had resided in India since 1994. Anil certified that he told his parents the power of attorney was necessary to obtain a mortgage to pay off tax liens on the property. Despite the authorizations to act as to all matters regarding the property given by the power of attorney, Anil certified that his parents were unaware of the tax foreclosure suit. In response, plaintiff's counsel filed a certification in which he set forth the efforts made to ascertain the residence of the elder Patels and that it was not until receipt of the motion that he learned that Ramesh and Kantaben did not reside at the subject property.

At oral argument, defendants argued that Ramesh and Kantaben were not properly served. They also argued that although Anil had a power of attorney over the property, Dipika did not have such authorization and therefore, service upon her was not proper service upon Ramesh and Kantaben. The court reserved decision on the motion and, on a later date, ordered defendants' attorney to provide an address for Ramesh and Kantaben in India that could be reached by Federal Express or DHL. Without ruling on the question of whether service on Ramesh and Kantaben was proper, the court ordered plaintiff to serve them by "some delivery service that provides you with tracking." Ramesh and

Kantaben would then have twenty days from being served to redeem or enter an appearance in court.

After sending the letter as required by the court, plaintiff's counsel was advised by UPS that it was unable to effect delivery because of the remoteness of the area where Ramesh and Kantaben lived. Plaintiff's counsel asked defendants' counsel for additional information to enable service but received no further information from him. As a result, plaintiff was thwarted in its effort to comply with the court's directive.

After the court was apprised of these difficulties, it ordered Anil to be present in court for a fourth hearing on the motion, on March 11, 2010. At that hearing, defendants' counsel stated that Anil did not have his parents' telephone number in India and, despite his best efforts, had been unable to obtain either the phone number or the address for them. The motion judge expressed her frustration at the apparent stonewalling by Anil, identifying the cause of the tax delinquency and the obstacle to proper service as follows:

*3 I believe that the rules are being utilized to the detriment of the plaintiff. I find very specifically that it is not the Patels seniors who are responsible for the failure to pay the taxes that led to this tax certificate being sold; I find that it is the defendant who is present who is responsible for that failure to pay those taxes.

....

[I]f there's any wrongdoing in this case, ... the wrongdoing is as a result of this defendant's conduct.

....

These are not independent people; this is a family. This is a son whose parents have gone back to their country of origin to reside. They certainly are in communication with their son. [Defense counsel has] made it very evident to this Court that they have communication; that he has communication with family members in the area; and that because of his conduct and the lack of information that was provided to the plaintiff, that the senior Patels do not reside in this residence.

I am troubled that our rules for process are being abused.

....

And I'm very troubled here. [Defendant] has made no effort himself to address this problem, to attempt to redeem, to make the plaintiff whole. And I seriously question whether or not he has notified his parents that because of his conduct they could lose their property here in New Jersey.

While Anil was present in court, the court directed plaintiff's counsel to provide him with a copy of the pleadings. Observing that such service upon one with a power of attorney would appear to be sufficient service, the court gave defense counsel five days to submit a brief in opposition. The court continued to reserve decision on whether the initial service upon Anil's wife constituted effective service upon Ramesh and Kantaben.

On March 26, 2010, the court entered an order vacating the final judgment as to Ramesh and Kantaben and ordering plaintiff to immediately serve them via personal service. The order did not include any reasons for the disposition or state that any reasons were placed on the record.

Plaintiff attempted to serve Ramesh and Kantaben by: requesting service through the Indian authorities pursuant to the Hague Convention; sending a letter by regular mail to defendants at the address provided by Anil; and sending a package by UPS delivery to the Ministry of Law and Justice, Department of Legal Affairs in New Delhi, requesting service of the summonses and complaints upon Ramesh and Kantaben pursuant to the Hague Convention. Ramesh and Kantaben received service and filed an answer dated June 22, 2010.

After a hearing on June 25, 2010, the court entered an order giving defendants "45 days to either redeem the Property or present proof of their ability to either redeem the Property to the Court and Plaintiff's counsel [.]" After requesting an extension of time, defendants notified the court on August 18, 2010, that \$100,000 had been received in their attorney's trust account in order to redeem the property.

*4 On August 26, 2010, the court entered an order vacating the final judgment as to all defendants. By order dated November 24, 2010, the court established the amounts required to redeem plaintiff's tax sale certificates as follows: \$86,167.27 for the 2000 tax sale certificate; \$6,560.89 for the 2001 tax sale certificate; \$4,452.55 for attorneys' fees and costs; \$2,978.83 for insurance costs, resulting in a total of \$100,159.54 as of October 1, 2010, with additional interest of \$26,275 after that date.

In this appeal, plaintiff presents the following arguments for our consideration:

POINT I

THE TRIAL COURT MUST BE REVERSED BECAUSE THE TRIAL COURT NEVER PERFORMED THE REQUIRED RULE 4:50-1 ANALYSIS

POINT II

ADDITIONALLY AND/OR ALTERNATIVELY, THE TRIAL COURT MUST BE REVERSED BECAUSE SERVICE OF PROCESS ON THE SON, ANIL PATEL, WAS VALID SERVICE UPON THE PARENTS, RAMESH AND KANTABEN PATEL

POINT III

ADDITIONALLY AND/OR ALTERNATIVELY, THE TRIAL COURT MUST BE REVERSED BECAUSE ANIL PATEL IS BARRED UNDER THE DOCTRINE OF UNCLEAN HANDS AND/OR ESTOPPED AS A MATTER OF PUBLIC POLICY FROM ARGUING THAT HIS PARENTS, RAMESH AND KANTABEN PATEL DID NOT KNOW ABOUT THE FORECLOSURE SO THAT ANIL COULD KEEP THE PROPERTY

POINT IV

ADDITIONALLY AND/OR ALTERNATIVELY, THE TRIAL COURT MUST BE REVERSED BECAUSE THE HAGUE SERVICE CONVENTION DOES NOT APPLY

POINT V

ALTERNATIVELY, APPELLANT SHOULD BE MADE WHOLE BY BEING COMPENSATED FOR ALL OF THE ATTORNEYS' FEES AND COSTS IT INCURRED IN THIS MATTER

The default judgment here was vacated pursuant to *Rule* 4:50-1, which provides in pertinent part:

On motion, with briefs, and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment or order for the following reasons:
(a) mistake, inadvertence, surprise,

or excuse and neglect; ... (d) the judgment or order is void; (e) the judgment or order has been satisfied, released or discharged, or a prior judgment or order upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or order should have prospective application; or (f) any other reason justifying relief from the operation of the judgment or order.

Defendants' motion to vacate default judgment did not specify the grounds relied upon. As noted, the certification submitted by Anil asserted that Ramesh and Kantaben were unaware of the tax foreclosure suit or final judgment, implicitly suggesting that the default judgment was void for lack of service.

Plaintiff's contention that the motion should be denied because service upon Anil constituted valid service upon his parents had colorable merit. *See ATFH Real Prop., LLC v. Winberry Realty P'ship*, 417 N.J.Super. 518, 525–26 (App.Div.2010), *certif. denied*, 208 N.J. 337 (2011). Yet, the motion judge continually reserved her decision as to whether service was proper while imposing additional and arguably unnecessary burdens upon plaintiff to effect service upon Ramesh and Kantaben. Indeed, the motion judge never provided any reasons for vacating the default judgment despite the well-established requirement in *Rule 1:7–4(a)* that a court “by an opinion or memorandum decision, either written or oral, find the facts and state its conclusions of law thereon ... on every motion decided by a written order that is appealable as of right[.]”

*5 We are mindful, however, that motions to vacate default judgments “should 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 (App.Div.), *aff'd* 43 N.J. 508 (1964); *see also Prof'l Stone, Stucco & Siding Applicators, Inc. v. Carter*, 409 N.J.Super. 64, 68 (App.Div.2009). The court “should be guided by equitable principles in determining whether relief should be granted or denied.” *Hous. Auth. of Morristown v. Little*, 135 N.J. 274, 283 (1994). “In the tax sale certificate foreclosure context considerations of public policy and equity are also taken into account.” *M & D Assocs. v. Mandara*, 366 N.J.Super. 341, 350 (App.Div.), *certif. denied*, 180 N.J. 151 (2004).

The trial court's decision to grant or deny an application to open a judgment will be left undisturbed unless it represents a clear abuse of discretion. *F.B. v. A.L.G.*, 176 N.J. 201, 207–208 (2003); *Little, supra*, 135 N.J. at 283. Moreover, the motion judge's failure to identify the specific subsections of *Rule 4:50–1* relied upon does not compel a conclusion that granting the motion constituted a clear abuse of discretion. *See Little, supra*, 135 N.J. at 283.

It does not appear that the court accepted defendants' argument regarding the lack of proper service. Although the court never rendered a decision regarding this issue, its letter decision on counsel fees stated, “there is no indication that Plaintiff served defendants improperly[.]” In the absence of a jurisdictional basis for vacating the default judgment, a defendant is generally required to show that “the neglect to answer was excusable under the circumstances and that he has a meritorious defense.” *Marder, supra*, 84 N.J. *supra*, at 318.

The salient fact here is that, however belatedly, defendants redeemed the property. Given our mandate to view motions to vacate default judgments with great liberality, that fact provides a rational basis for relaxing the general requirements of *Rule 4:50–1*, as well as a possible ground for relief under *R. 4:50–1(e)* and (f). *See Little, supra*, 135 N.J. at 285–90.

[A] motion to vacate or modify a judgment on the ground that it is no longer equitable that the judgment should have prospective application must be supported by evidence of changed circumstances. The party seeking relief bears the burden of proving that events have occurred subsequent to the entry of a judgment that, absent the relief requested, will result in “extreme” and “unexpected” hardship.

[*Id.* at 285 (internal citations omitted).]

A consideration of the equities here does not favor the granting of relief to Anil. As the motion judge repeatedly noted, his conduct created much of the problems. We agree with the court's assessment that he did “not come into the Court with clean hands nor is he entitled to anymore [sic] of an equitable consideration than” the court was giving.

*6 The same cannot be said of his parents. As to them, the record only shows an error of judgment in placing trust in their son to pay taxes when due and respond in a timely way to litigation. It is reasonable to conclude that a denial of the motion to vacate default would have resulted in hardship to them that was both extreme and unexpected. They had moved

to a remote part of India. Through no apparent fault of their own, they did not receive notice of the proceedings from plaintiff or their son. And, once they had such notice, they did redeem the property.

The redemption of the property provided plaintiff with what it was entitled to receive from defendants, i.e., the value of the tax certificates, including interest and costs, and reimbursement of any taxes paid. See *M & D Assocs., supra*, 366 N.J.Super. at 357. We are satisfied that, under the circumstances, it was no longer equitable for the judgment to be enforced against Ramesh and Kantaben and cause them to lose their property.” Although the equitable grounds for vacating the judgment only apply to Ramesh and Kantaben, it was necessary to vacate the entire judgment in order to afford them relief from inequitable hardship. See *id.* at 356–57. We therefore conclude that there was no clear abuse of discretion in granting the motion.²

However, Rule 4:50–1 also requires that relief be granted “upon such terms as are just[.]” To be just, the conditions imposed “ ‘should be judged against the relative strength or weakness of the movant's application’ “ and should “ameliorate the prejudice that would flow to plaintiff from the granting of relief[.]” *ATFH Real Prop., supra*, 417 N.J.Super. at 528 (App.Div.2010) (quoting *Reg'l Constr. Corp. v. Ray*, 364 N.J.Super. 534, 543 (App.Div.2003)). Relief will be sustained “when reasonably proportionate to the prejudice suffered by plaintiff.” *Ibid.*

The actions of the defendants, particularly Anil, resulted in delays, repeated court appearances and additional costs to plaintiff. The application to vacate the default judgment was not compelling and its success depended heavily upon our mandate to tolerate “every reasonable ground for indulgence[.]” *Marder, supra*, 84 N.J.Super. at 319. That indulgence should not extend to a consideration of the appropriate amount of fees and costs awarded to plaintiff to ameliorate the prejudice it suffered as a result of the relief being granted, particularly when the denial of the application

would not have constituted an abuse of discretion. See *ATFH Real Prop., supra*, 417 N.J.Super. at 528.

Plaintiff was prejudiced by the improper entry of an order vacating final judgment which divested the company of its fee simple ownership of the property and permitted defendants to redeem. Plaintiff was required to litigate over a protracted period of time that included more than six hearings and expend resources to re-serve defendants Ramesh and Kantaben in India, even though the court observed there was no evidence that earlier service had been improper.

*7 Plaintiff submitted an application for \$14,452.55 in counsel fees and costs which, the motion judge observed, complied with the requirements of Rule 4:42–9.³ On its face, the amount of the fee application for the work required appears to be entirely reasonable. Yet, although the court recognized “the very special set of circumstances and unusual amount of time counsel was required to spend in this case[.]” the court awarded only \$4,452.55, less than one-third of the amount sought. The court did not support its decision with any criticism of the reasonableness of the hourly rates charged, or the amount of time spent. The court provided no reasons why the award was so drastically reduced.

In light of the “very special set of circumstances and the unusual amount of time counsel was required to spend[.]” this award plainly did not ameliorate the prejudice suffered by plaintiff by the granting of relief to defendants and was, therefore, clearly inadequate. Because the award did not satisfy the requirement of Rule 4:50–1 that relief be granted upon such terms as are just, it constituted an abuse of discretion. Therefore, we affirm the order granting defendants' motion to vacate default judgment, reverse the order awarding \$4,452.55 and remand the matter for the court to reconsider the award of counsel fees.

Affirmed in part and reversed in part. We do not retain jurisdiction.

Footnotes

- 1 Because the defendants share a common surname, we refer to them by their first names to avoid confusion and intend no disrespect.
- 2 In light of the reasons for our decision, it is unnecessary for us to consider the arguments presented in plaintiff's Points II, III and IV.
- 3 The court properly acknowledged that the application for fees was not restricted to the amount permitted by Rule 4:42–9(a)(5).