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A-3676-93T2

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-3676-93T2

JOHN A. HARTMANN, III,

Plaintiff/Respondent,

v.

JANICE MARINUZZI,

Defendant/Appellant.

FILED
APPELLATE DIVISION
JUN 17 1996
Clerk

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Argued: April 24, 1996 - Decided: JUN 17 1996

Before Judges Stern, Wallace and Newman.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Hunterdon County.

Dennis Baarlaer, argued the cause for appellant (William J. Courtney, attorney).

Appellant Janice Marinuzzi submitted a pro se brief.

Lydia Fabbro Keephart, argued the cause for respondent (Pellettieri, Rabstein and Altman, attorneys; Ms. Keephart, on the brief).

**PER CURIAM**

Defendant Janice Marinuzzi appeals from a judgment entered on January 5, 1994 in the Chancery Division, Family Part, Hunterdon County and from an order denying her motion for reconsideration and vacation of the judgment under R. 4:50-1, entered on March 28, 1995. Defendant essentially contends that the trial judge erred in failing to grant her relief pursuant to R. 4:50-1. We are

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satisfied that the record demonstrates that defendant is entitled to judicial relief pursuant to R. 4:50-1(f). We reverse and remand for a new trial.

On June 12, 1992, plaintiff John Hartmann filed an action against defendant in Mercer County[1] seeking custody of Brandon Hartmann, the sole child born of their relationship, possession of the residence in which they lived, and supervised visitation for defendant. He asserted that the parties were not married but lived together from 1978 until May 1992, when he was "forced to move out of the residence due to [d]efendant's erratic and frightening behavior[,]" that with defendant's consent he had taken Brandon because defendant was neglecting him, and that defendant suffered from severe alcohol abuse and had recently threatened to commit suicide in front of Brandon, causing him to call the police. Pending a hearing, the trial court granted custody of Brandon to plaintiff and supervised visitation to defendant.

Defendant answered the complaint and counterclaimed seeking sole custody, child support, palimony, equitable distribution of property, continued medical, health, dental, and life insurance, continued payment of all household and auto expenses, exclusive occupancy of the residence, and compensatory and punitive damages deriving from allegations of domestic violence. In addition, in defendant's accompanying order to show cause she requested a

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[1] This action was originally filed in Mercer County but was transferred to Monmouth County, then to Somerset, and finally to Hunterdon County. Plaintiff is an attorney and his practice is largely in Mercer and Monmouth Counties.

$20,000 counsel fee retainer, a fund to retain experts, and "continued reasonable use of credit cards."

Following a hearing, on July 22, 1992, the trial judge entered an order changing venue to Somerset County; granting custody of Brandon to plaintiff with supervised visitation to defendant; imposing continued household and auto expenses on plaintiff but limiting his toll phone bills to $60 per month; requiring plaintiff to pay defendant $200 a week in support retroactive to July 2, 1992; imposing all expenses relating to Brandon on plaintiff; denying defendant's requests for continued use of plaintiff's credit cards and for expert fees; and requiring plaintiff to pay $2,500 in attorney's fees for defendant. Other forms of temporary relief were also contained in the order. On July 28, 1992, plaintiff answered defendant's counterclaim.

In August 1992, defendant filed harassment and domestic violence complaints against plaintiff. Following a hearing on September 16, 1992, the trial judge entered an order on January 19, 1993, restraining the parties from communicating; granting exclusive possession of the residence to defendant; ordering that plaintiff's sister be allowed to visually inspect the residence; ordering that supervised visitation by defendant be held at a mutually agreed upon location; and ordering that the Hunterdon County probation department conduct a custody investigation.

On July 14, 1993, plaintiff was ordered to turn over his tax returns for 1989 through 1992 and on July 23, 1993, the trial judge granted defendant's attorney's motion to withdraw as counsel.

On November 24, 1993, defendant was sent a summons and notice of a custody and palimony hearing to take place on December 21, 1993. A week later, on November 30, 1993, plaintiff filed a one count "amended complaint for partition" wherein he alleged that he and defendant were "owners as joint tenants" of the residence located at 18 Montague Avenue in Trenton; that he desired "a fair partition of such land"; that he was entitled to set-offs for expenses over a fourteen year period; that "[i]f an actual partition cannot be made without great prejudice to the parties," or if he "is not entitled to the entire property," he desired that the "land be sold and the proceeds divided in accordance with contributions."

The hearing on the order to show cause was held on December 21, 1993. Defendant did not appear and the judge asked plaintiff's counsel to comment "as to the appropriateness of proceeding in her absence." Counsel stated that "a couple of days ago," she had received a call from defendant indicating that defendant had an attorney. Counsel said that defendant called again and stated that she did not have an attorney and "this morning she called the office, and had a conversation with [plaintiff's] secretary." Thus, counsel represented that defendant had notice of the hearing.

Addressing defendant's failure to appear, the judge stated:

> Okay. And Miss [Teresa] LaCosta who will also be [here] from Family Case Management had contact with her today. I understand we have the return so called green card, from service on her. There has also been a history of her non compliance with court appearances and the like. Which we will be discussing also. So I will indicate under all the circumstances I am concluding that her non appearance is voluntary on her part [and] [t]hat

she had notice of the hearing. That her non-appearance today is consistent with past behavior.

Given the fact that this is an extremely old case, involving custody issues that frankly cries out to be resolved prior to this time, and under all of the circumstances, as I know them, I am going to proceed in her absence. The record will be presumably fleshed out further in terms of the difficulties with this case, as we go along.

Following the hearing, the trial judge awarded custody of the infant child, Brandon, to plaintiff and vacated defendant's prior supervised visitation, limiting her to telephone visitation. The judge also permitted plaintiff to return to the residence but recognized that removing defendant from the residence might be "problematic," and stated that he would "give her 10 days from service of the order, on her, without prejudice or making an application for something else[,]" and that he was "not adverse to revisiting the issue, if she wants to formally present it." Additionally, the judge rejected defendant's request for palimony finding "no evidence to suggest that there ... was an agreement" between the parties.

I find no agreement express, implied, or in any kind of quasi contractual basis of any agreement for support, beyond the time that they were residing together.

The Court, however, is mindful that there was a -- a piece of real estate in Ewing Township bought as a residence to be shared by the parties. I find that [plaintiff] put down the majority of the down payment for that. And [defendant] putting down only approximately $8,000, that representing perhaps approximately a third of the total down payment. I find from the testimony that she's made virtually no contributions of a financial sort, since that time. That, as previously indicated there was no agreement for her support beyond the term of their relationship.

> I find that the property just referred to, the real estate was purchased as joint tenancy with a right of survivorship. It would appear that she would have some interest, by virtue of that initial investment. But nonetheless, the testimony is uncontroverted and I'll simply incorporate -- by reference. Since I have nothing contrary to [plaintiff's] testimony that she did not participate at all, as had been the agreement that she would participate, at least up to one half. And even after the separation, if we ignore what went on, which I understand is [plaintiff's] sole contribution during the term of the relationship, the 19 months that they had been separated there's been virtually no contribution from [defendant], to the outkeep of the -- upkeep of the household, and indeed [plaintiff] has been paying, as I understand it, $2,790 per month.

Furthermore, the judge found that plaintiff's offer to pay defendant $6,000 at the rate of $200 per week for thirty weeks was reasonable and ordered that, along with a $1,000 moving expense for defendant. Finally, defendant was ordered to convey her interest in the property to plaintiff by executing a deed within thirty days of service of the order. The judge's findings were memorialized by order entered on January 5, 1994.

Defendant filed a notice of appeal from the order on February 10, 1994, claiming that she had "no attorney, was medically incapable of attending the proceedings, and [that her] common law husband [plaintiff] is an attorney who was fully aware of [her] condition." On March 9, 1994, defendant moved for reconsideration, a stay of the order pending appeal, and for the appointment of counsel. Plaintiff cross-moved before us for an order terminating the support obligation and for other relief.

In April, defendant retained counsel and on April 21, 1994, we stayed that portion of the order compelling defendant to execute the deed and to convey her interest in the residence. On April 27,

1994, defendant, through counsel, again moved for reconsideration of the order and requested that it be vacated pursuant to R. 4:50-1. Plaintiff opposed the motion.

On June 7, 1994, we denied defendant's extension requests as well as the application for a stay and remanded for disposition on the reconsideration motion. We also denied plaintiff's cross motion for relief. Defendant then filed supplemental certifications in support of her motion for reconsideration pursuant to R. 4:50-1. Plaintiff filed a certification in response.

On October 4, 1994, the trial judge entered an order that permitted defendant to have the property appraised; ordered her to inform plaintiff's attorney whether she had acquired insurance; denied defendant's requests for funds to establish a residence; denied her request for $350 a week in support; denied the request to appraise personal property in the house; restrained defendant from using plaintiff's name; ordered that the deed remain in escrow until further order; ordered expenses incurred by plaintiff for the storage of defendant's belongings to be set-off against the $6,000 ordered to be paid to her; denied defendant's counsel fee request; and granted defendant two hours of supervised visitation.

In defendant's July 27, 1994 letter brief, she essentially relied upon R. 4:50-1(f) in her effort to obtain relief from the judgment. On February 23, 1995, the judge held a hearing on defendant's R. 4:50-1 motion. Defendant's counsel initially argued that pursuant to R. 4:50-1(a), defendant had a meritorious position

in the palimony action. The judge inquired whether defendant had shown excusable neglect. Counsel argued that excusable neglect had been shown by evidence of defendant's alcohol abuse and her resulting condition. Regarding a meritorious claim, defendant stated that her strongest argument was that the property was jointly purchased as "title was taken as joint tenants with right of survivorship." She argued that "[plaintiff], as well as the Court," was aware of the import of taking title in that manner as "[i]t means that whoever survives ... has complete ownership of the home." Thus, she argued that "this suggests that [plaintiff] did contemplate taking care of [defendant], at least to the extent that she would be afforded with a home in the event that something was to happen to him."

Counsel explained that the three components of defendant's meritorious claim were (1) the joint tenancy with right of survivorship; (2) the "quantum meruit argument for the services that she provided to the plaintiff[;]" and (3) the oral promises, in the absence of a written agreement, to take care of defendant for the rest of her life pursuant to Kozlowski v. Kozlowski, 80 N.J. 378 (1979).

The trial judge rejected defendant's arguments and found that defendant had failed to show excusable neglect and to present a meritorious claim. He concluded:

> apparently her primary argument advanced is one of a joint tenancy on the deed. As has [sic] been pointed out be counsel, that joint tenancy status can be, of course, changed by the parties.

> I find no law to support the proposition that joint tenancy somehow is indicative of a -- some sort of a promise to leave something upon [plaintiff's] death and the like.
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> Also, the court did entertain proofs as to what would be reasonable compensation for that and what would be present. The other arguments -- there is no writing advanced on the part of the defendant as to any of her claim.
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> I am simply not persuaded that there is a basis after a careful review of her filing that meritorious offense [sic] does exist.

With this background, we turn now to address defendant's arguments. Our Supreme Court has recently explained the general principles that should be considered in deciding whether to grant relief from a default judgment in Mancini v. EDS, 132 N.J. 330, 334 (1994).

> A court should view "the opening of default judgments ... with great liberality," and should tolerate "every reasonable ground for indulgence ... 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). The decision whether to grant such a motion is left to the sound discretion of the trial court, and will not be disturbed absent an abuse of discretion. Court Inv. Co. v. Perillo, 48 N.J. 334, 341, 225 A. 2d 352 (1966). All doubts, however, should be resolved in favor of the parties seeking relief. Arrow Mfg. Co. v. Levinson 231 N.J. Super. 527, 534, 555 A. 2d 1165 (App. Div. 1989).

On the other hand, "[b]ecause of the importance that we attach to the finality of judgments, relief under Rule 4:50-1(f) is available only when 'truly exceptional circumstances are present.'" Housing Auth. of Town of Morristown v. Little, 135 N.J. 274, 286 (1994)(citing Baumann v. Marinaro, 95 N.J. 380, 395 (1984)).

However, "'[b]ecause R. 4:50-1(f) deals with exceptional circumstances, each case must be resolved on its own particular facts.'" Ibid.

Our review of the record discloses that defendant sought to vacate the judgment under R. 4:50-1(a), excusable neglect, and under R. 4:50-1(f), any other reason justifying relief. We need not determine whether the underlying facts entitled defendant to relief from the judgment pursuant to subsection (a), due to "mistake, inadvertence, surprise, or excusable neglect," as we find that relief was clearly warranted under subsection (f), which authorizes relief from a judgment for "any other reason justifying relief...." R. 4:50-1(f).

Subsection (f) "is the elusive 'catchall' category" providing relief from judgments in exceptional situations. See Pressler, Current N.J. Court Rules, comment 1 on R. 4:50-1 (1996). Its import was explained in Court Inv. Co. v. Perillo, 48 N.J. 334 (1966), in which the Court stated that "[n]o categorization can be made of the situations which would warrant redress under subsection (f)" as "the very essence of (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." Id. at 341. A motion under (f) is addressed to the discretion of the trial court to be exercised according to equitable principles and will be accepted by an appellate court in the absence of a mistake in the exercise of its discretion. Ibid. However, relief will be granted if enforcement of a judgment would

be unjust, oppressive or inequitable. See Quagliato v. Bodner, 115 N.J. Super. 133, 138 (App. Div. 1971).

The trial judge's denial of defendant's request for relief from the judgment focused solely upon a failure of defendant to demonstrate a lack of excusable neglect pursuant to R. 4:50-1(a). However, the judge failed to analyze defendant's motion pursuant to R. 4:50-1(f), which we now undertake.

The record amply demonstrates that defendant was experiencing a fierce struggle in her life resulting from her abuse of alcohol. For instance, plaintiff acknowledged in his March 18, 1994 certification in opposition to defendant's motion that "defendant may indeed be an alcoholic." More importantly, at the hearing on December 21, 1993, probation officer, Teresa LaCosta, testified that she spoke with defendant that morning on the telephone and that defendant did not recall who LaCosta was despite the several contacts she previously had with her. Further, LaCosta stated that defendant began to cry and said that there was no way that she could get to the hearing because she had no transportation or family to assist her. LaCosta also testified that defendant asked to postpone the hearing.

A short while after the hearing, defendant sought treatment for her alcohol addiction. She was admitted to the Medical Center at Princeton on January 20, 1994. The discharge summary dated February 3, 1994, noted a provisional diagnosis of alcohol dependency, major depression, hypertension and hepatomegaly. Although the Center was "hoping to keep [defendant] for a long time

in the hospital to help her gain insight into her alcoholism, the medical insurance declined to cover a longer stay."

Concerning a meritorious claim, defendant disputes most of the evidence advanced by plaintiff at the hearing that was relied upon by the judge in his decision to enter judgment in favor of plaintiff. As noted, the parties acquired a residence in 1981 as joint tenants with the right of survivorship. Defendant argued that the purchase of this home in this manner was evidence of the plaintiff's interest or intention to provide for her in the event of their separation, voluntarily or otherwise.

The trial judge made findings of fact based solely on the evidence submitted by plaintiff in concluding that "there was no agreement for her support beyond the term of their relationship." However, the judge did not discuss Kozlowski v. Kozlowski, 80 N.J. 378 (1979). In Kozlowski, the Supreme Court addressed a situation similar to the case at hand. Specifically, the issue was whether a man and a woman who were not married to each other, and who lived together without a promise of marriage, may enter into a contract which, if otherwise valid, was enforceable. Id. at 380. The parties in Kozlowski cohabited for approximately fifteen years. Id. at 381. Based on the evidence submitted, the trial court found that defendant had agreed to support the plaintiff for life. Id. at 384. On appeal, the Supreme Court concluded that there was ample evidence to support the trial court's findings. Ibid. Further, the Court noted that:

> Whether we designate the agreement reached by the parties in 1968 to be expressed, as we do

> here, or implied is of no legal consequence. The only difference is in the nature of the proof of the agreement. Parties entering this type of relationship usually do not record their understanding in specific legalese. Rather, as here, the terms of their agreement are to be found in their respective versions of the agreement, and their acts and conduct in the light of the subject matter and the surrounding circumstances.
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> [Id. at 384 (emphasis added).]

In the present case, the purchase of the real property as joint tenants with the right of survivorship, and not as tenants in common, is at least consistent with defendant's contention. In our view, defendant should have the opportunity to attempt to establish that plaintiff agreed to support her for life. Moreover, the parties had a child together and considered themselves as a family unit for many years.

In any event, absent a complete record which would include all of the evidence that defendant could marshall in support of her claim, the trial judge could not fairly decide the issues in this case. In light of the proofs that defendant is prepared to present, the fact-finder may conclude that defendant's claim is meritorious.

We are satisfied that it was a mistaken exercise of the trial judge's discretion to deny defendant's motion to vacate the judgment pursuant to R. 4:50-1(f). On remand, a plenary hearing should be held on all of the issues raised by the pleadings. The judgment of December 21, 1993, memorialized by order entered on January 5, 1994, is vacated. Further, in light of the trial judge's previous findings of fact and credibility findings which

might be difficult to disregard after a rehearing, the matter is to be presented before a different trial judge. See In re Wolf, 231 N.J. Super. 365, 378 (App. Div.), certif. denied, 117 N.J. 138 (1989).

We reverse and we do not retain jurisdiction.