

## [First Horizon Home Loans v. Martinez](#)

Superior Court of New Jersey, Appellate Division

November 7, 2013, Submitted; September 12, 2014, Decided

DOCKET NO. A-1646-12T3

### Reporter

2014 N.J. Super. Unpub. LEXIS 2228 \*

FIRST HORIZON HOME LOANS, a Division of First Tennessee Bank, NA, Plaintiff-Respondent, v. [RAFAEL L. MARTINEZ](#), his/her heirs, devisees, and personal representatives, and his, her, their or any of their successors in right, title, and interest, RITZA Y. [MARTINEZ](#), his/her heirs, devisees, and personal representatives, and his, her, their or any of their successors in right, title, and interest, Defendants-Appellants.

**Notice:** NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

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**Prior History:** [\*1] On appeal from Superior Court of New Jersey, Chancery Division, Middlesex County, Docket No. F-29052-08.

### Core Terms

certifications, defendants', void, default judgment, vacate, affidavit of service, sheriff's sale, photographs, quotation, marks, trial court, foreclosure, circumstances, notice, hair

**Counsel:** Joseph A. Chang & Associates, LLC, attorneys for appellants (Joseph A. Chang, of counsel; Jeffrey Zajac, on the brief).

Powers Kirn, LLC, attorneys for respondent (Jeanette J. O'Donnell, on the brief).

**Judges:** Before Judges Waugh and Nugent.

### Opinion

#### PER CURIAM

In this residential foreclosure action, defendants [Rafael L. Martinez](#) and Ritza Y. [Martinez](#) appeal the denial of their motion to vacate a sheriff's sale and extend their right of redemption. They contend, among other things, that they were never served with process. Because the motion judge who denied their motion never addressed that issue, and because defendants presented sufficient evidence in support of their motion to raise a doubt as to the validity of the affidavits of service, we reverse the order denying defendants' motion and remand for a hearing.

I.

In January 2007, defendants refinanced their home with \$280,000 they borrowed from First Horizon Loan Corporation. In exchange for the loan, defendants gave First Horizon Loan Corporation a mortgage and signed a note in which they agreed to pay back the loan plus interest in monthly installments [\*2] over thirty years. Defendants defaulted in March 2008 and have made no payments on the note since then.

In July 2008, plaintiff First Horizon Home Loans, a Division of First Tennessee Bank, National Association, filed a foreclosure complaint, which it amended in December of that year. According to form affidavits of service bearing the letterhead of ProVest, LLC-New York, Thomas Carchia served defendants with summonses and copies of the complaint on December 17, 2008: [Rafael Martinez](#) "by leaving a copy thereof at the individual's dwelling place or usual place of abode with a competent member of the household of the age of 14 or over then residing therein"; and Ritza [Martinez](#) by "[d]eliver[ing] a copy to him/her personally, at his/her place of abode." (DA 59-60) The affidavit as to service on [Rafael Martinez](#) named Ritza [Martinez](#) as the household member with whom the summons and

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complaint were left. Both affidavits described Ritza **Martinez** as a white female who was thirty-six to forty years old, had brown "Hair/Eyes," stood five feet three inches tall, and weighed 130 pounds. Defendants would later deny being served and would aver in certifications, supported by photographs, that Ritza **Martinez** [\*3] is dark-skinned, Hispanic, and has black hair.

Defendants did not file an answer and the matter proceeded as uncontested. The court entered a final judgment on September 28, 2010, more than two years after the complaint had been filed. The judgment included a paragraph that "debarred and foreclosed" defendants "of and from all equity of redemption[.]" That same day, the court issued a writ of execution directing the County Sheriff to sell the property. **Rafael Martinez** acknowledges receiving in November 2010 "a notice advising that a foreclosure against my property had been filed." He also acknowledged in December 2010 that a notice of sheriff's sale was placed on his door, but claims at that point "we had submitted a HAMP application and had not received a decision, nor had we received any filed judgment permitting the Sheriff's Sale."

The sheriff's sale was adjourned and it was eventually scheduled to take place on July 11, 2012. Two days before the sale, **Rafael Martinez** made an emergent application for an adjournment of the sale. The court denied the motion but ordered defendants not be evicted before August 24, 2012. The sheriff's sale took place as scheduled, and the property was [\*4] sold to First Horizon Loan Corporation for \$168,000.

Two and one-half months after the sale, in October 2012, defendants filed a motion to set aside the sheriff's sale, vacate the default judgment, and extend the redemption period or, alternatively, dismiss the complaint. Defendants averred they had never been served with the original or amended complaints, or any other pleadings or orders associated with the foreclosure action, including the notice of intention. **Rafael Martinez** claimed that he was unaware a complaint had been filed until "[a] recent visit to the Middlesex County Clerk's office. . . ." As previously noted, defendants filed certifications that stated Ritza **Martinez** did not match the physical description of the individual who allegedly received service of process, despite the fact that the affidavit of service named her as the person served. Defense counsel also filed a certification that alleged numerous procedural and substantive defects with the amended complaint.

Failing to comprehend why defendants had taken no

action with respect to the foreclosure complaint in more than two years since it had been filed, the court denied the motion, giving this explanation:

At some [\*5] point there's got to be finality of judgment. I think that point has been reached. If there's something [defense counsel] hasn't told me, then - then I have to know that, but the bottom line is that the judgment was entered over two years ago. Why an argument is being raised four years later about lack of service that's not been fully explained.

The court filed an order denying defendants motion and they filed this appeal.

II.

Defendants contend that the default judgment against them is void because they were not served with the complaint or amended complaint. They argue, among other things, that because the judgment is void, the trial court erred by refusing to vacate it under [Rule 4:50-1](#).

The trial court identified neither the *Rule* nor the standard under which it analyzed defendants' motion. While objections to sheriff's sales are generally governed by [R. 4:65-5](#), the gist of defendants' challenge is that the default judgment is void because they were never served with process. For that reason, we review this appeal under the standards applicable to [R. 4:50-1](#). See [U.S. Bank Nat'l Ass'n. v. Guillaume, 209 N.J. 449, 466-67, 38 A.3d 570 \(2012\)](#). Our standard of review warrants substantial deference to the trial court's determination, which "should not be reversed unless it results in a clear [\*6] abuse of discretion." *Id. at 467* (citation omitted). An abuse of discretion occurs when a decision "is made without a rational explanation, inexplicably depart[s] from established policies, or rest[s] on an impermissible basis." *Ibid.* (citation and internal quotation marks omitted). Here, the trial court did not make any findings or conclusions as to defendants' claim that the judgment was void.

[Rule 4:50-1](#) provides various avenues for relief from a judgment or order. In relevant part, it reads:

On motion, with briefs, and upon such terms as are just, the court may relieve a party . . . from a final judgment or order for the following reasons: (a) mistake, inadvertence, surprise, or excusable neglect; . . . (c) fraud . . . , misrepresentation, or other misconduct . . . ; [or] the judgment or order is void . . . .

[\[R. 4:50-1\]](#)

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That *Rule* "is designed to reconcile the strong interests in finality of judgments and judicial efficiency with the equitable notion that courts should have authority to avoid an unjust result in any given case." [Guillaume, supra, 209 N.J. at 467](#) (citation and internal quotation marks omitted).

A party seeking to prevail under [R. 4:50-1\(a\)](#) must demonstrate excusable neglect and the existence of a meritorious defense. [Guillaume, supra, 209 N.J. at 469](#) (citation and internal quotation marks [\*7] omitted). However, a party seeking to prevail under [R. 4:50-1\(d\)](#) need not demonstrate a meritorious defense, though the motion "must be filed within a reasonable time after entry of the judgment." [Deutsche Bank Nat'l Trust Co. v. Russo, 429 N.J. Super. 91, 98, 57 A.3d 18 \(App. Div. 2012\)](#) (citing [R. 4:50-2](#); [M & D Assocs. v. Mandara, 366 N.J. Super. 341, 351-52, 841 A.2d 441 \(App. Div.\), certif. denied, 180 N.J. 151, 849 A.2d 184 \(2004\)](#)). What constitutes a "reasonable time" under [R. 4:50-2](#) is necessarily dependent on the totality of the circumstances in a given case. Pressler & Verniero, *Current N.J. Court Rules*, comment 3 to [R. 4:50-2](#) (2014).

Though relief pursuant to [R. 4:50-1](#) "is not to be granted lightly[,] it is "more liberally granted . . . when the application is to vacate a default judgment." [Cho Hung Bank v. Kim, 361 N.J. Super. 331, 336, 825 A.2d 566 \(App. Div. 2003\)](#) (citing [Marder v. Realty Constr. Co., 84 N.J. Super. 313, 318, 202 A.2d 175 \(App. Div.\), aff'd, 43 N.J. 508, 205 A.2d 744 \(1964\)](#)). In fact, a void judgment "is a particularly worthy candidate for relief ([R. 4:50-1\(d\)](#)) provided that the time lapse is not unreasonable and an innocent third party's rights have not intervened." [Id. at 336](#) (citations omitted).

As we have previously pointed out, the trial court did not address defendants' argument that the judgment was void because they were never served. In support of that claim, defendants submitted certifications to which Ritza **Martinez's** New Jersey driver's license and a photograph are appended. They averred that defendant Ritza **Martinez** was not the individual served, and that the physical description on the affidavit [\*8] of service does not match her. She is not a "white woman" with "brown hair." The photographs corroborate that, as defendants further aver, she is a "dark-skinned Hispanic with black hair." (Da181). The photographs lend credence to defendants' argument that defendant Ritza **Martinez** "cannot and never has passed for white." DA181

Plaintiff's counterarguments are not compelling. Plaintiff asserts that defendant "has failed to offer any evidence in support of her claim that the affidavit is false and instead relies on her bald assertions that she does not fit the description in the affidavit of service." That statement entirely overlooks the photographic evidence and therefore is entirely unpersuasive.

Plaintiff also argues that "defendant fails to set forth a valid defense or meritorious claim to the foreclosure action." A party seeking to prevail under [R. 4:50-1\(d\)](#) need not, however, demonstrate a meritorious defense. [Russo, supra, 429 N.J. Super. at 98](#).

Plaintiff asserts - without citation to the record - that defendants were served with the entry of default, notice to residential debtors, and final judgment. Assuming those documents were properly presented to the trial court, the court should have considered them among the totality [\*9] of the circumstances in determining whether defendants had moved for relief under [Rule 4:50-1\(d\)](#) within a reasonable time after the default judgment was entered.

Indisputably, a return of service "raises a presumption that the facts recited therein are true." [Resolution Trust Corp. v. Associated Gulf Contractors, Inc., 263 N.J. Super. 332, 343, 622 A.2d 1324 \(App. Div.\)](#) (citation and internal quotation marks omitted), *certif. denied*, 134 N.J. 480, 634 A.2d 527 (1993). That presumption, however, is rebuttable upon clear and convincing evidence that the return is false. [Id. at 344](#) (citation and internal quotation marks omitted). The "uncorroborated testimony of the defendant alone is not sufficient to impeach the return." *Ibid.* (citation and internal quotation marks omitted). Nevertheless, "[i]f some evidence is presented tending to disprove the return, but is not sufficient to establish that the return is false, the presumption is nevertheless eliminated from the case." [Jameson v. Great Atl. & Pac. Tea Co., 363 N.J. Super. 419, 426-27, 833 A.2d 626 \(App. Div. 2003\)](#) (citing [Ahn v. Kim, 145 N.J. 423, 439, 678 A.2d 1073 \(1996\)](#)), *certif. denied*, 179 N.J. 309, 845 A.2d 134 (2004). In such circumstances, whether the presumed fact is true is a matter entrusted to the factfinder "unless reasonable persons would not differ as to the existence or non-existence of the presumed fact." [Ahn, supra, 145 N.J. at 439](#) (internal quotation marks omitted) (citing [N.J.R.E. 301](#)).

Here, defendants have done more than make an uncorroborated assertion that they were never served with the original [\*10] or amended complaints. They

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have demonstrated through their certifications and through the photographic evidence that, contrary to the statements in the affidavits of service, defendant Ritza **Martinez** is not a white female with brown hair. The certifications and photographs are "some evidence . . . tending to disprove the return." [Jameson, supra, 363 N.J. Super. at 426-27](#). That evidence entitles defendants to an evidentiary hearing.

If, after the hearing, the court concludes defendants were never served with the summons and complaint, they may be entitled to have the default judgment vacated pursuant to [R. 4:50-1\(d\)](#). *Id.* at 425 (noting that default judgment taken in the face of defective personal service is generally void and will usually be set aside under [R. 4:50-1\(d\)](#)); [Rosa v. Araujo, 260 N.J. Super. 458, 462, 616 A.2d 1328 \(App. Div. 1992\)](#), cert. denied, 133 N.J. 434, 627 A.2d 1140 (1993); see also [Driscoll v. Burlington-Bristol Bridge Co., 8 N.J. 433, 492-93, 86 A.2d 201](#) (observing that the rules regarding service of process "go to the jurisdiction of the court and must be strictly complied with," and that substantial defects "leave the court without jurisdiction and its judgment void."), cert. denied, 344 U.S. 838, 73 S. Ct. 25, 97 L. Ed. 652 (1952). A default judgment may be set aside if there is substantial deviation from the rules regarding service of process, even if the party has actual notice of the suit through other means. See [Sobel v. Long Island Entm't Prods., Inc., 329 N.J. Super. 285, 292-94, 747 A.2d 796 \(App. Div. 2000\)](#). If the court determines the defendants [\*11] were not served, it must then decide whether defendants timely moved to vacate the judgment. If it concludes they did not, then "the consequences of defendants' failure to do so must be determined by balancing the weight of estoppel and laches considerations favoring each party in the circumstances." Pressler & Verniero, *Current N.J. Court Rules*, comment 5.4.2 on [R. 4:50-1](#) (2014).

Defendants' arguments that they are entitled to relief under [R. 4:50-1\(a\)](#) and [\(c\)](#) are without sufficient merit to warrant extended discussion. [R. 2:11-3\(e\)\(1\)\(E\)](#). Motions invoking those subsections must be filed within one year of the entry of the judgment. [R. 4:50-2](#).

We need not address defendants' remaining arguments concerning other potential defenses they may have. Those arguments may be moot, depending on the outcome of the court's decision on remand as to whether the judgment should be vacated. Moreover, our opinion should not be construed as restricting in any manner the scope of the remand hearing. The court may choose to have the parties present evidence not

only on the issue of service of process, but also on whether defendants' motion to vacate was filed within a reasonable time after the judgment was entered, the consequences of either doing so [\*12] or not doing so, or any other issue. The scope of the hearing is a matter that rests within the court's sound discretion.

We conclude by emphasizing the narrow scope and self-evident nature of our holding. Where, as here, defendants have adduced competent evidence, other than uncorroborated denials, that the information in an affidavit of service concerning how service was made is wrong, the plaintiff is no longer entitled to the presumption that the facts are true. Absent some countervailing consideration explained by the trial court as required by [Rule 1:7-4](#), and supported by competent evidence in the record or decided as a matter of law, defendants in those circumstances are entitled to a hearing.

Reversed and remanded for an evidentiary hearing. We do not retain jurisdiction.

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