2012 IL App (2d) 110464-U
No. 2-11-0464
Order filed April 16, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

ALEXIS DELGADO, Plaintiff-Appellant, v. LIFE TIME FITNESS, INC., Defendant-Appellee (JMC Healthcare Associates Corp. and Reality Fitness, Inc., Defendants).	)	Appeal from the Circuit Court of Du Page County. No. 10-AR-3348 Honorable Bruce R. Kelsey, Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices McLaren and Hutchinson concurred in the judgment.

ORDER

Held: The trial court erred in granting defendant's section 2-1401 petition, as defendant did not demonstrate facts that would establish a defense (that defendant was not plaintiff's employer) and defendant failed to establish that service of process on its managerial employee was improper as a matter of law.

¶ 1 This is an appeal from the grant of a petition under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2010)). The petition, brought by Life Time Fitness, Inc. (LTFI), sought vacatur of a judgment in favor of Alexis Delgado and against LTFI. Delgado's

damages were for lost wages, and the judgment depended on LTFI being legally her employer. The record shows that the court granted the vacatur on the basis that LTFI had raised a meritorious defense—that it was not her employer—and not on the primary basis that LTFI argued, namely that service on it had been ineffective. We hold that LTFI did not meet its burden to set out a meritorious defense. We further hold that LTFI has failed to show that ineffective service is a proper alternative basis for affirmance.

¶ 2 I. BACKGROUND

¶ 3 Confusion over the identity of various similar-named entities was at the heart of what occurred in these proceedings. To forestall further confusion, we now introduce all relevant entities.

¶ 4 LTFI is a publicly-traded Minnesota corporation. Its chief executive officer is Bahram Akradi. LTFI is not registered to do business in Illinois. It formerly was so registered, but that registration was revoked on January 2, 2007. Its Secretary of State listing nevertheless shows National Registered Agents, Inc., as its Illinois registered agent.

¶ 5 "Lifetime Fitness, Inc.," was the corporate name of JMC Healthcare Associates Corp. until 1993. "Lifetime Fitness, Inc.," then was the corporate name of Reality Fitness, Inc., until 2000. Both JMC Healthcare Associates Corp. and Reality Fitness, Inc., are duly registered Illinois corporations.

¶ 6 "Life Time Fitness" (no "Inc.") is one of the Illinois-registered assumed names of LTF Club Operations Company, Inc., a Minnesota corporation whose chief executive officer is Bahram Akradi. It also has National Registered Agents, Inc., as its Illinois registered agent.

¶ 7 LTF Club Management Company, LLC, is the name that appeared on Delgado's paycheck. It is a Delaware limited liability company that is registered in Illinois. It also has National Registered Agents, Inc., as its Illinois registered agent.

¶ 8 On September 19, 2010, Delgado filed a two-count complaint seeking damages for violations of the Illinois Equal Pay Act of 2003 (Act) (820 ILCS 112/1 *et seq*. (West 2010)) and the Personnel Record Review Act (820 ILCS 40/0.01 *et seq*. (West 2010)). As "defendant," she named "JMC Healthcare Associates, Corp[.], and Reality Fitness, Inc., a/k/a and/or d/b/a Life Time Fitness, Inc., & Lifetime Fitness, Inc.," the entire string of which she designated as "LTF." She alleged that "LTF" at 28141 Diehl Road in Warrenville had been her employer.

¶ 9 A special process server's return of service states that she served "Life Time Fitness Inc." with a summons through "Jason Freewalt (agent)" at 28141 Diehl Road in Warrenville. Other returns said that the same special process server had served JMC Healthcare Associates Corp. and Reality Fitness, Inc., at the same address, also purportedly through Freewalt.

¶ 10 On October 19, 2010, the court entered an order of default. Delgado filed an affidavit of damages, seeking $22,976.07. On November 4, 2010, the court entered judgment for that amount. Delgado then began collection proceedings.

¶ 11 On January 13, 2011, Delgado filed a "Motion to Vacate Judgment as to Certain Defendants." She stated that she had learned that JMC Healthcare Associates Corp. and Reality Fitness, Inc., were improper defendants. The court vacated the judgment as requested.[1]

[1]Although Delgado styled her motion as one to "Vacate Judgment as to Certain Defendants" it is clear from the body of the motion that she simply intended to remove JMC Healthcare Associates Corp. and Realty Fitness, Inc. because they were "improper defendants." Such a motion

¶ 12 On February 4, 2011, LTFI filed a "Motion to Vacate Default Judgment." According to the "Motion" as amended, "Plaintiff *** was hired by Defendant on October 12, 2006."

> "Defendant's website identifies it as 'Life Time Fitness, Inc.[]' However, Defendant simply 'does business as' Life Time Fitness, Inc. in Illinois. The entity that actually employs Defendant's employees *** is 'LTF Club Management Company, LLC,' which is a subsidiary of Life Time Fitness, Inc."

Moreover, Delgado "was paid by LTF Club Management Company, LLC," and this was the name that had appeared on her pay slips and W2s.

¶ 13 LTFI stated that the special process server had "appeared at the club and asked either for a manager or the individual in charge." Another employee brought the process server to Freewalt, the acting general manager of "Defendant's Warrenville, Illinois club." Freewalt was not a registered agent or corporate officer of "Defendant Life Time Fitness, Inc." Freewalt had opened the envelope and scanned its contents. He understood that the documents were legal, but had never dealt with a summons before, did not understand its importance, and was puzzled by the incident. Freewalt averred that his practice would have been to give "all potentially legal documents" to the club's business administrator for forwarding to the corporate office. Nevertheless, the corporate office had

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was actually a "designation of parties – misnomer" motion under section 401 of the Code of Civil Procedure which could have been filed at any time, either before or after judgment. See 735 ILCS 5/2-401 (*2010); Wabash County v. Illinois Municipal Retirement Fund*, 408 Ill. App. 3d 924 (2011 (quoting *Savage v. Mui Pho*, 312 Ill. App. 3d 553 (2000) ("[t]he character of a motion should be determined from its content, and a court is not bound by the title of a document given by a party.")

no record of receiving the summons. LTFI therefore argued that Freewalt was not a proper person to serve to obtain service on it.

¶ 14 Although LTFI suggested that it was not Delgado's employer, all the cases it cited related only to the issue of what persons are agents of a corporation.

¶ 15 Freewalt's affidavit stated that some entity—he did not say which—had terminated Delgado for cause.

¶ 16 Delgado responded to the initial motion and then filed a further response to the amended motion. She asserted that LTFI had made a binding admission that it employed her. She further asserted that a photograph showed that the facility at which she had worked held itself out as "Life Time Fitness, Inc." (We see a photograph of a building with a sign that says "Lifetime Fitness.") Delgado noted that a search of the Secretary of State's records showed that "the license of the entity known as Life Time Fitness, Inc., was revoked as of 1/2/07." She attached a copy of an internet record similar to what is currently available. It lists the entity status as "revoked," but nevertheless reports the name and address of the registered agent.

¶ 17 Delgado also attached the affidavit of the special process server, who averred that she had gone to the front desk of Life Time Fitness in Warrenville and asked for the "manager in charge." Another person at the club took the process server to Freewalt, who said that he was the manager. She then served him with a copy of the summons and complaint. Delgado pointed out that nothing in the law requires service on a registered agent.

¶ 18 On April 13, 2011, the court vacated the default. Delgado's counsel asked, "Based on lack of service? The court responded, "No. I'm just going to say I'm vacating the judgment and let them file an answer." Counsel for LTFI said, "If you filed an amended complaint naming LTF Club

management—," but the court interrupted her, saying, "She is submitting jurisdiction is what I think I hear." Counsel for Delgado then asked for more time. The court then granted costs to Delgado, seemingly on the basis that LTFI's practice of using its corporate name in Illinois business despite not being registered had been the cause of Delgado's confusion about the proper defendant. The written order said that the court vacated the default judgment and that it gave Delgado leave to file an amended complaint. Delgado filed a notice of appeal within 30 days of the vacatur of the default.

¶ 19 II. ANALYSIS

¶ 20 The parties agree that this appeal is one from the grant of LTFI's section 2-1401 petition. What neither side discusses is the type of section 2-1401 petition that the court granted. One kind of section 2-1401 petition is the classic one that the supreme court described in *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 220-21 (1986):

> "To be entitled to relief under section 2-1401, the petitioner must affirmatively set forth specific factual allegations supporting each of the following elements: (1) the existence of a meritorious defense or claim; (2) due diligence in presenting this defense or claim to the circuit court in the original action; and (3) due diligence in filing the section 2-1401 petition for relief."

The other type is that which the supreme court recognized in *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 103 (2002); the *Sarkissian* court held that a motion to quash service (or other motion to vacate a judgment as void) *must*, at least in civil cases, be brought under section 2-1401.[2] Before *Sarkissian*, defaulted defendants typically raised such matters in filings with titles

[2]This is assuming that the trial court has otherwise lost jurisdiction of the case.

such as "Motion to Vacate Void Judgment" or "Motion to Quash Service." For a *Sarkissian*-type section 2-1401 petition, the only necessary allegation is that the judgment is void.

¶ 21 LTFI's "Motion" was largely focused on *Sarkissian*-type elements, with only peripheral concern to set out the three *Airoom* elements. Nevertheless, the record strongly suggests that the court granted the petition on *Airoom* grounds. The parties' appellate briefs fail to recognize any distinction between the two types of petitions. We consider the two types separately, *Airoom*-type first. Because the court granted the petition on *Airoom* grounds, we treat the discussion of the *Sarkissian*-type as argument relating to a possible alternative basis for affirmance.

¶ 22 The parties disagree on the applicable standard of review. We hold that review is *de novo*. An element of disunity exists within this court on the issue, as suggested by the contrasting opinions in *Mills v. McDuffa*, 393 Ill. App. 3d 940, 948 (2009), and *Rockford Financial Systems, Inc. v. Borgetti*, 403 Ill. App. 3d 321, 323-28 (2010). Despite the contrast in those opinions, the rules in the two cases point to a single result under these circumstances.

¶ 23 *Mills* holds that, when a court grants or denies a petition in summary-judgment-like fashion, with no evidentiary hearing and considering only the pleadings and associated exhibits, review is *de novo*. We rooted this holding in a relatively broad reading of *People v. Vincent*, 226 Ill. 2d 1, 18 (2007). That rule would produce *de novo* review whenever the court resolves the petition without an evidentiary hearing.

¶ 24 *Borgetti* stated the following:

> "Generally, [disposition of a] petition is directed to the sound discretion of the trial court, and the court's decision will not be disturbed on review unless the court has abused its discretion.

> [Citation.] This can be so even where an issue addressed by the trial court is a question of law." *Borgetti*, 403 Ill. App. 3d at 323.

It further stated:

> "While the issues of a meritorious defense and the timeliness of a section 2-1401 petition are clearly amenable to a *de novo* review, we do not understand how the issue of due diligence, both in presenting the defense originally and in filing the section 2-1401 petition, can be given a *de novo* review. Due diligence in all its aspects is a mixed question of law and fact." *Borgetti*, 403 Ill. App. 3d at 324.

Thus, the rule in *Borgetti* produces *de novo* review when the only issue is the existence of a meritorious defense. Delgado does not dispute diligence in either of her appellate briefs; she disputes only LTFI's claim that it did not employ her and she thus disputes that it has a meritorious defense.

¶ 25 The question of whether service was proper was not one on which the trial court ruled. In fact, the trial court specifically declined to rule on the service issue. This court's affirmance on the alterative basis of improper service would be proper only if defendant had demonstrated that service was improper. This is equivalent to *de novo* review.

¶ 26 We start by considering the grant of the petition on the grounds used by the court. As we noted, the only *Airoom* element at issue in this appeal is the existence of a meritorious defense. A proper section 2-1401 petition in its classic form " 'serves to bring before the court that rendered judgment "facts not appearing of record which, if known to the court at the time judgment was entered, would have prevented its rendition." ' " *In re Marriage of Johnson*, 339 Ill. App. 3d 237, 241 (2003) (quoting *In re Marriage of Broday*, 256 Ill. App. 3d 699, 705 (1993), quoting *In re*

Marriage of Travlos, 218 Ill. App. 3d 1030, 1035 (1991)). This statement is a clarification of, or an addition to, the "meritorious defense" element of *Airoom*. "To prove the existence of a meritorious defense or claim, a petitioner must allege facts that would have prevented entry of the judgment if they had been known by the trial court." *Blutcher v. EHS Trinity Hospital*, 321 Ill. App. 3d 131, 136 (2001). The granting of the petition must be supported by a preponderance of the evidence. *Airoom*, 114 Ill. 2d at 223.

¶ 27 We deem that LTFI failed to meet its burden to set out a meritorious defense. LTFI suggested two potential defenses in its petition. The first was that it fired Delgado "for cause." However, all it has in support of that is Freewalt's bare assertion that this was the case. We see nothing in its filings that even says what the "cause" was. There is simply *no* evidence or explanation of what the "cause" was, *justifiable for otherwise*.

¶ 28 The other defense that LTFI suggested is that it was not Delgado's employer, but it did not sufficiently plead this. Most important, it made a binding admission that it hired her. However, contrary to what both parties imply, the admission is not decisive; "hiring" is not identical to "employing."

¶ 29 LTFI has stated that it "hired" Delgado in most of its filings. It states on page 2 of its appellate brief that "Plaintiff Alexis Delgado (Plaintiff) was hired by Defendant [a term that it previously defined as Life Time Fitness, Inc.] on October 12, 2006." It said exactly the same thing on page 2 of its original "Motion" and on page 2 of its amended "Motion." Nevertheless, it asserts that it did not *admit* that it hired Delgado. This is incorrect.

¶ 30 "Judicial admissions are 'deliberate, clear, unequivocal statements by a party about a concrete *fact* within that party's knowledge' "; mixed matters of law and fact, such as whether an individual

is a surety, cannot be admitted. (Emphasis added.) *JPMorgan Chase Bank, N.A. v. Earth Foods, Inc.*, 238 Ill. 2d 455, 475 (2010) (quoting *In re Estate of Rennick*, 181 Ill. 2d 395, 406 (1998)). Whether someone is an *employee* is a mixed question of law and fact, as it turns on matters such as the distinction between employees and contractors. See, *e.g., Anderson v. First American Group of Companies, Inc.*, 353 Ill. App. 3d 403, 407 (2004) (whether a person was an "employee" for purposes of the Wage Payment and Collection Act was a mixed question of law and fact). Saying that one *hired* someone is essentially a pure statement of fact: it just states the existence of a decision to use someone's services for pay. It does not identify the legal classification of the relationship. It does not even say who the hirer of services is, just the one making the decision; the one making the hiring decision may be the agent of the hirer, and not the hirer itself.

¶ 31 LTFI asserts that its statement that it hired Delgado is not an unequivocal statement of fact. It says that, because "LTF Club Management Corp. [*sic*] LLC is a *subsidiary*" of LTFI and the whole does business as "Life Time Fitness," it must be that, "by stating that 'Defendant' hired Plaintiff, LTF was simply stating that Delgado was hired to work at 'Life Time Fitness.' "[3] (Emphasis in original.) This is contrary to LTFI's own filings. LTFI thus admitted that it hired Delgado—that it made the hiring decision.

¶ 32 No one has suggested that Delgado was an independent contractor or other nonemployee hiree. Therefore, when she was hired she became an employee either of the entity that made the

[3]Keep in mind that, according to filings with the Secretary of State, "Life Time Fitness" (no "Inc.") is one of the Illinois-registered assumed names of LTF Club Operations Company, Inc. It is not an assumed name of LTFI proper or of LTF Club Management Co., LLC.

hiring decision, that is, LTFI, or of some entity of which LTFI was the agent for purposes of hiring decisions. No evidence exists that LTFI was the agent of LTF Club Management Co., LLC.

¶ 33 The hiring decision is significant because control is most important in deciding whether an entity is an employer, and making the hiring decision strongly suggests control. LTFI never discusses what "employer" means under the Act. The Act includes a limited definition:

> " 'Employer' means an individual, partnership, corporation, association, business, trust, person, or entity for whom 4 or more employees are gainfully employed in Illinois and includes the State of Illinois, any state officer, department, or agency, any unit of local government, and any school district." 820 ILCS 112/5 (West 2010).

This formulation assumes that the term "employer" is already understood; the formulation serves only to exclude employers with fewer than four employees in Illinois. We therefore must look to how the law usually defines "employer." Where "employer" is not defined in a statute, it should be interpreted in its common-law sense. *Landers-Scelfo v. Corporate Office Systems, Inc.*, 356 Ill. App. 3d 1060, 1069 (2005). "Under the common law, the most important factor in deciding whether a putative employer is a common-law employer is whether it has the right to control the manner and method in which the work is to be carried out." *Landers-Scelfo*, 356 Ill. App. 3d at 1069-70. Although the identity of the entity that issues the paycheck is likely to be relevant, control is central.

¶ 34 Given LTFI's limited admission of control, it has failed to establish the existence of a meritorious defense. When, as here, the section 2-1401 pleadings are complete (petition, response, and reply), the court should review them in a procedure akin to the deciding of a motion for summary judgment. *Klein v. La Salle National Bank*, 155 Ill. 2d 201, 205 (1993). "[R]elief should be granted on the basis of the pleadings, affidavits, and the record of the prior proceeding alone if no factual

dispute is raised and the allegations of the petition are thereby proven." *Klein*, 155 Ill. 2d at 205. If any of the "central facts" are controverted, the court must hold an evidentiary hearing. *Ostendorf v. International Harvester Co.*, 89 Ill. 2d 273, 286 (1982). "Central facts are those that are sufficient to support an order vacating the judgment, not those that must be proven to succeed in the underlying action on its merits." *Blutcher*, 321 Ill. App. 3d at 136. Thus, petitioners need not prove that their defenses would necessarily be successful at trial, but they must demonstrate facts that, if true, would establish a defense. LTFI fell short of this standard. Although it showed that it had evidence that might *support* a defense—the issuance of Delgado's paychecks by another entity—that showing, especially in the face of countervailing facts, falls well short of establishing the *existence* of a defense.

¶ 35 LTFI has argued that it is entitled to its judgment on the alternative ground that the service on it was ineffective.

¶ 36 The rule for who is an agent of a corporation comes from section 2-204 of the Code of Civil Procedure (Code) (735 ILCS 5/2-204 (West 2010)). That section states:

> "A private corporation may be served (1) by leaving a copy of the process with its registered agent *or any officer or agent of the corporation found anywhere in the State*; or (2) in any other manner now or hereafter permitted by law." (Emphasis added.) 735 ILCS 5/2-204 (West 2010).

Case law points to a meaning of "agent" in this provision that is approximately that of "corporate agent." Black's Law Dictionary defines a "corporate agent" as "[a]n agent authorized to act on behalf of a corporation; broadly, all employees and officers who have the power to bind the corporation." Black's Law Dictionary 69 (8th ed. 2004).

¶ 37 As we noted, LTFI had to allege sufficient facts to show that service was improper. Here, LTFI claims simply that the club manager was not authorized to accept service and lacked the necessary understanding. This claim, standing alone, does not establish improper service under the law. We hold that LTFI has failed to make the requisite showing that service was improper. We therefore hold that the trial court should have denied the petition.

¶ 38 Delgado has asked that the court strike LTFI's statement of facts; she complains that it is argumentative. It is indeed argumentative, but mostly in word choice. The flaws do not cause confusion. We do not strike the statement, but urge that counsel take more care to conform to the rules.

¶ 39 III. CONCLUSION

¶ 40 For the reasons stated, we reverse the grant of LTFI's section 2-1401petition.

¶ 41 Reversed.