

FIFTH DIVISION
Modified order filed
September 6, 2013

No. 1-11-2139

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

HANSCOM FEDERAL CREDIT UNION,)	Appeal from the
)	Circuit Court of
Plaintiff – Appellee,)	Cook County.
)	
v.)	No. 10 M1 169050
)	
KELECHI OSUJI,)	Honorable
)	Sheryl A. Pethers,
Defendant – Appellant.)	Judge Presiding.

PRESIDING JUSTICE GORDON delivered the judgment of the court.
Justices Lampkin and Palmer concurred in the judgment.

ORDER

¶ 1 *Held:* We cannot find that the trial court abused its discretion in rejecting defendant's claim of lack of service of process and therefore dismissing his section 2-1401 petition, where he did not provide

another address at which he lived, where he admitted that his wife lived at the address at which service was made and that he used this address for his registered nurse license.

¶ 2 On August 2, 2010, plaintiff Hanscom Federal Credit Union sued defendant Kelechi Osuji for the outstanding balance on a credit card of \$43,341.89. After plaintiff obtained a default judgment, defendant filed a motion within 30 days to set aside the default and quash service, which the trial court denied. 735 ILCS 5/2-1301 (West 2008). Defendant then filed a petition to vacate the default judgment pursuant to section 2-1401 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-1401 (West 2008)), again claiming lack of service, which the trial court also denied. Defendant now appeals the denial of the section 2-1401 petition to vacate. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 I. Proceedings in Trial Court

¶ 5 On August 2, 2010, plaintiff Hanscom Federal Credit Union sued defendant Kelechi Osuji, alleging that it had issued a credit card to defendant on August 20, 1997. Plaintiff attached the credit card application to its complaint. The application was dated August 15, 1997, and it listed defendant's address as P.O. Box 608204 Chicago, IL 60626. In count I of its complaint, plaintiff alleges that the charges incurred by defendant are \$21,097.02 and that the interest and fees due

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on these charges are \$15,063.27. The complaint did not allege either the time period during which defendant incurred these charges; or whether defendant had ever made any payments. The complaint also did not state the address to which plaintiff had mailed defendant's statements. Plaintiff sought attorney fees and court costs for count I in the amount of \$5,274.25.

¶ 6 In count II, plaintiff alleges that the interest and fees due on an overdraft protection line of credit is \$1,525.88. The complaint did not allege the time period during which defendant incurred the overdraft fees. Plaintiff sought attorney fees and costs for count II in the amount of \$381.47.

¶ 7 The total amount sought by plaintiff in both counts I and II was \$43,341.89.

¶ 8 On August 21, 2010, the Cook County sheriff attempted to serve defendant unsuccessfully. On September 21, 2010, the trial court issued an alias summons, but service remained unsuccessful. On October 29, 2010, plaintiff filed an affidavit to demonstrate due diligence stating that E.L. Johnson Investigations had attempted service on defendant seven times in October 2010. The affidavit stated that defendant's last known address was 9030 Federal Court #2, Des Plaines, IL 60016, and that this was the address where service was attempted, but this is not the address listed on defendant's credit card application.

¶ 9 On November 16, 2010, plaintiff filed a motion for leave to serve defendant by special order of the court. On December 2, 2010, the trial court issued a written order that directed plaintiff “to provide additional information to the court/documentation from the U.S. Postal Service showing whether defendant currently receives mail at 9030 Federal Court #2, Des Plaines, IL 60616 address.” The record does not indicate whether plaintiff provided this information. On January 12, 2011, the trial court granted plaintiff’s motion to serve defendant by regular and certified mail. On January 18, 2011, the trial court issued another alias summons to serve defendant accordingly. There is an indication that the certified mail was returned not served.

¶ 10 On March 8, 2011, plaintiff filed a motion for default, stating that copies of the alias summons and complaint were mailed by regular and certified mail to defendant at his last known address, which plaintiff stated was the Federal Court address. On March 16, 2011, the trial court entered a default judgment for plaintiff and against defendant for \$43,907.45.

¶ 11 Less than a month later, on April 15, 2011, defendant filed a motion to quash summons and vacate the default judgment pursuant to section 2-1301 of the Code (735 ILCS 5/2-1301 (West 2008)). Defendant included an affidavit in which

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he stated that he did not live at 9030 Federal Court #2, Des Plaines, IL 60016, and that he was never served. On May 20, 2011, the trial court denied defendant's motion to quash service and vacate the default judgment.

¶ 12 On June 17, 2011, defendant filed a section 2-1401 petition to vacate the default judgment (735 ILCS 5/2-1401 (West 2008)), claiming that he was not served with process. In the petition to vacate, defendant claims that this matter is a refiled case from 2005 that was dismissed for plaintiff's lack of due diligence. Although defendant did not provide a copy of the dismissal order, defendant provided the case number: 2005 M1 107308. On July 20, 2011, the trial court denied defendant's section 2-1401 petition to vacate. On July 28, 2011, defendant filed a notice of appeal, which stated that "defendant-appellant seeks a reversal of the trial court's orders denying motion to quash summons and motion to vacate default."

¶ 13

II. Bystander's Report

¶ 14 On appeal to this court, the judgment creditor claimed that the trial court had held an evidentiary hearing deciding this issue. However, there was no transcript or bystander's report in the appellate record and defendant asked this court for leave to file a proposed bystander's report.

¶ 15 Illinois Supreme Court Rule 323(c) (eff. December 13, 2005) permits an appellant to serve a proposed bystander's report within 28 days after the notice of appeal. However, since that 28-day period had long since elapsed, defendant requested leave from this court to file a proposed report. Pursuant to Illinois Supreme Court Rule 329 (eff. December 13, 2005), which permits this court to correct material omissions in the appellate record, in an order dated February 7, 2013, we granted defendant leave to file a proposed bystander's report by February 15, 2013. Pursuant to this order, defendant filed his proposed report with this court on February 14, 2013.

¶ 16 Illinois Supreme Court Rule 323(c) (eff. December 13, 2005), which governs the preparation of a bystander's report for the appellate court, provides in relevant part:

"If no verbatim transcript of the evidence of proceedings is obtainable, the appellant may prepare a proposed report of proceedings from the best available sources, including recollection. *** The proposed report shall be served on all parties within 28 days after the notice of appeal is filed. Within 14 days after service of the

proposed report of proceedings, any other party may serve proposed amendments or an alternative proposed report of proceedings. Within 7 days thereafter, the appellant shall, upon notice, present the proposed report or reports and any proposed amendments *to the trial court* for settlement and approval." (Emphasis added.)

¶ 17 On this court's own motion and pursuant to the time periods provided in Supreme Court Rule 323(c) above, we ordered, on February 21, 2013, that plaintiff had 14 days from the date of that order to serve any proposed amendments or any alternative proposed report of proceedings; and that, "within 7 days thereafter, the [defendant-]appellant shall, upon notice, present the proposed report or reports and any proposed amendments *to the trial court* for approval." (Emphasis added.)

¶ 18 On March 6, 2013, and within 14 days, plaintiff filed its proposed bystander's report in the circuit court. (Plaintiff's attorney states that its proposed report was filed on March 7, 2013; however, the file stamp of the circuit court states March 6, 2013.)

¶ 19 On March 15, 2013, defendant filed in the appellate court a motion asking

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this court to approve his bystander's report on the ground that "Plaintiff-Appellee has not filed any amendment or its Proposed Bystander's Report *with this Court* pursuant to the Order of this Court[,] dated February 21, 2013." (Emphasis added.) The "Notice of Filing" stated that this motion was filed in the appellate court but it also listed the Honorable Sheryl A. Pethers of the circuit court of Cook County as one of its recipients.

¶ 20 Defendant included with his March 15th motion: (1) his objections and proposed amendments to plaintiff's proposed report; and (2) a copy of a letter addressed to the Honorable Sheryl A. Pethers of the circuit court of Cook County.

Defendant's letter to Judge Pethers, dated March 15, 2013, states in full:

"Your Honor,

Enclosed herewith please find Defendant-
Appellant's Proposed Bystander's Report, Plaintiff-
Appellee's Proposed Bystander's Report and Defendant-
Appellant's Objection or Amendment to Plaintiff-
Appellee's Bystander Report.

With these submissions, we are seeking for your
approval and/or amendment."

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The letter is not file-stamped as received by the clerk of the circuit court.

¶ 21 On March 15, 2013, plaintiff also filed a motion in the appellate court. Its motion asked this court to deny defendant's petition for rehearing on the ground that defendant had "failed to file a bystander's report reviewed and signed by the trial court."

¶ 22 On April 4, 2013, this court ordered that, by May 3, 2013, plaintiff and defendant shall, upon notice, obtain an order from the trial court concerning their proposed bystander's reports.

¶ 23 On May 2, 2013, plaintiff filed with the appellate court a bystander's report signed by the trial court. The concluding line of the report stated, "I hereby settle and certify this Bystander's Report Pursuant to Supreme Court Rule 323(c) and the Appellate Court's Order of April 4, 2013," and the report was then signed by the trial judge.

The report stated in full:

"The Plaintiff-Appellee Hanscom Federal Credit Union (hereafter 'Credit Union') filed a two-count complaint against the Defendant-Appellant Kelechi Osuji (hereinafter 'Osuji') for breach of contract on

August 2, 2010. On November 16, 2010, the Credit Union filed a motion for leave to serve Osuji by special order of Court, pursuant to 735 ILCS 5/2-203.1. On January 12, 2011, the Honorable Judge Pethers, after reviewing the accompanying affidavit(s), found that despite Plaintiff's diligent efforts, service on the defendant was impractical and granted the Credit Union's motion to serve by regular and certified mail. The Credit Union then served Osuji by regular and certified mail per Judge Pether's January 12, 2011 order. On March 16, 2011, after defendant failed to appear, Judge Pethers entered a default judgment against Osuji.

On April 15, 2011, Osuji filed a motion to quash summons. Judge Pethers reviewed the motion and attached affidavit, heard oral arguments from both counsel for Osuji and counsel for the Credit Union, and denied Osuji's motion to quash summons. Having found the motion and affidavit insufficient as a matter of law,

the court did not conduct an evidentiary hearing. Osuji did not file a notice of appeal or motion for reconsideration of Judge Pethers' May 20, 2011 order within 30 days of its entry.

On June 17, 2011, Osuji filed a 2-1401 motion to vacate the default judgment entered on March 16, 2011. On July 20, 2011, Judge Pethers held an evidentiary hearing on the 2-1401 motion, but stated at the beginning of the hearing that she would also consider it a rehearing on the motion to quash service of summons. Judge Pethers took oral testimony from Osuji and asked Osuji questions regarding the 2-1401 motion and the new affidavit attached to Osuji's 2-1401 motion to vacate. Counsel for the Credit Union also asked Osuji questions regarding the 2-1401 motion and the affidavit attached. Osuji claimed not to live at the address used by the Credit Union for service. Osuji did not offer another address at which he lived either in his affidavit or at the

hearing. Osuji admitted that his wife lived at the address and that Osuji used the address for his Registered Nurse license. Judge Pethers also heard oral arguments from both counsel for Osuji and counsel for the credit union. Based on these admitted facts, the pleadings and arguments, she again ruled that service was proper and that Osuji had failed to exercise due diligence and therefore denied Osuji's 2-1401 motion to vacate the default judgment entered on March 16, 2011. Osuji then filed his notice of appeal on July 28, 2011 and seeks to overturn the orders on May 20, 2011 and July 20, 2011."

¶ 24

ANALYSIS

¶ 25 On appeal, defendant argues that the trial court erred in denying his section 2-1401 petition to vacate because his affidavit and supporting exhibits show that he did not reside at the Federal Court address. However, defendant does not state where he did reside.

¶ 26 In response, plaintiff argues that defendant waived his right to appeal the May 20, 2011, court order, which denied defendant's section 2-1301 motion and

which entered final judgment. However, defendant is appealing only the denial of the 2-1401 petition. Plaintiff argues, second, that the trial court decided the issue of defendant's residence at an evidentiary hearing and that the trial court's ruling was not an abuse of discretion.

¶ 27 The bystander's report, quoted above in full, settled the issue of whether the trial court had held an evidentiary hearing on defendant's section 2-1401 petition: it had. After we received the bystander's report, defendant filed with the appellate court a document entitled: "Defendant-Appellant's Objections to the Settled and Certified Bystander's Report." In this document, he claims: "There is no record as to the court conducting an evidentiary hearing." The record is the bystander's report itself in which the trial judge found that she had, in fact, conducted an evidentiary hearing on his 2-1401 petition on July 20, 2011. Pursuant to Supreme Court Rule 323(c), a bystander's report is a court-sanctioned substitute for a "verbatim transcript" and is evidence of the proceedings themselves. Ill. S. Ct. R. 323 (eff. Dec. 13, 2005).

¶ 28 For the following reasons, we affirm.

¶ 29 I. Jurisdiction

¶ 30 This court derives its jurisdiction in this case pursuant to Illinois Supreme

Court Rule 304(b)(3) (eff. Feb. 26, 2010), which states that an appeal may be taken from “a judgment or order granting or denying any of the relief prayed in a petition under section 2-1401 of the Code of Civil Procedure.” Section 2-1401 allows a party to seek relief from a final order that was entered more than 30 days before the petition to vacate was filed. 735 ILCS 5/2-1401(a) (West 2008); *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 220 (1986). The statute provides that petitions must be filed not later than two years after the entry of the order. 735 ILCS 5/2-1401(c) (West 2008). In the case at bar, defendant’s petition was filed well under the two-year time limit; thus, we have jurisdiction to review this appeal.

¶ 31

II. Standard of Review

¶ 32 The standard of review for a section 2-1401 ruling, which is made after an evidentiary hearing, is whether the trial court abused its discretion. *Smith*, 114 Ill. 2d at 221. “An abuse of discretion occurs when no reasonable person would take the view adopted by the court.” *Trettenero v. Police Pension Fund*, 333 Ill. App. 3d 792, 801 (2002) (citing *In re Marriage of Blunda*, 299 Ill. App. 3d 855, 865 (1998)).

¶ 33 Our standard of review for section 2-1401 rulings varies depending on the stage reached by the section 2-1401 petition at the time the trial court ruled on it.

People v. Vincent, 226 Ill. 2d 1, 17 (2007). There are, in essence, three possible stages: (1) the filing of the petition; (2) the filing of a response and any supplementary records or affidavits; and (3) an evidentiary hearing. *Vincent*, 226 Ill. 2d at 8-9. Our standard of review varies depending on whether the petition was dismissed after the first, second or third stage. *Vincent*, 226 Ill. 2d at 17.

¶ 34 In the first stage, when the plaintiff files a petition, it may be subject to dismissal for want of legal or factual sufficiency. *Vincent*, 226 Ill. 2d at 8. The standard of review for an appeal of a dismissal in the first stage is *de novo*.

Vincent, 226 Ill. 2d at 14. In the second stage, when the respondent files a response, the trial court may decide the case on the pleadings, affidavits, exhibits and supporting material before it, and the standard of review is also *de novo*.

Vincent, 226 Ill. 2d at 9, 18. The third stage occurs when a material issue of fact exists and an evidentiary hearing is required to rule on the contents of the petition in order to make factual determinations. *Vincent*, 226 Ill. 2d at 9. As stated above, the standard of review for a ruling after an evidentiary hearing is abuse of discretion. *Smith*, 114 Ill. 2d at 221.

¶ 35 III. No Abuse of Discretion

¶ 36 We cannot find that the trial court abused its discretion, in light of the

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evidence that the bystander's report states was presented at the hearing. In particular, the bystander's report established that: "Osuji did not offer another address at which he lived either in his affidavit or at the hearing. Osuji admitted that his wife lived at the address and that Osuji used the address for his Registered Nurse license." In light of these facts, we cannot find that the trial court abused its discretion in rejecting defendant's claim of lack of service of process and in dismissing his section 2-1401 motion.

¶ 37

CONCLUSION

¶ 38 For the foregoing reasons, we affirm.

¶ 39 Affirmed.