2016 IL App (2d) 150576-U
No. 2-15-0576
Order filed November 15, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MIDWEST MASONRY, INC.,	)	Appeal from the Circuit Court
	)	of Lake County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 15-LM-23
	)	
CENTRAL IRRIGATION SUPPLY, INC.,	)	Honorable
	)	John J. Scully,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Presiding Justice Schostok concurred in the judgment.
Justice Burke dissented in the judgment.

ORDER

¶ 1 *Held*: Defendant was properly served with Five Day Notice of Default pursuant to the Illinois Forcible Entry and Detainer Act, giving the trial court jurisdiction in the matter. The trial court abused its discretion in denying defendant's petition to vacate default judgment: defendant's petition included meritorious defenses and a reasonable excuse for failing to act within the appropriate time, and denying defendant's petition due to a lack of due diligence would produce an unjust result. The trial court's orders granting Midwest attorney fees and costs of collection is vacated in light of this court's reversal of the trial court's order denying Central's petition to vacate default judgment.

¶ 2 Defendant, Central Irrigation Supply, Inc. ("Central"), appeals the trial court's denial of its 2-1401 petition to vacate default judgment entered in favor of plaintiff, Midwest Masonry,

Inc. ("Midwest"). Central also appeals the trial court's grant of attorney fees and costs of collection to Midwest.

¶ 3 I. BACKGROUND

¶ 4 On March 18, 2011, Midwest and Central entered into a lease agreement. The agreement allowed Central to lease the premises over a four-year period, beginning on April 1, 2011, and ending on April 30, 2014. The lease provided for rent to be paid in monthly installments. During the final year of the lease, Central was to pay Midwest $2708.33 per month. At the conclusion of the lease on April 30, 2014, Central and Midwest were engaged in negotiations related to renewal of the lease. Central remained in possession of the premises throughout these negotiations and continued paying monthly rent of $2708.33, which was accepted by Midwest.

¶ 5 At some point in November 2014, the negotiations between the parties ceased. On November 19, 2014, Central's president, Bernardo Luciano, received a letter from Midwest's counsel. Relevant here, the letter stated:

> "[t]he term of the Lease terminated on April 30, 2014. Since that date, [Central] has retained possession of, and has continued to occupy and use, the premises demised under the Lease *** as a holdover tenant.
>
> As attorney and agent for Midwest, this is to advise you that Midwest hereby exercises its right pursuant to Section 9.7 of the Lease to treat Central's holdover tenancy as a renewal of the Lease for one year, commencing May 1, 2014, and terminating April 30, 2015. Further, pursuant to Section 9.7 of the Lease, the base monthly rental due under the Lease for said one-year renewal period is twice the monthly rental that was in effect immediately prior to the termination of the term of the Lease in April 2014 (i.e., $2,708.33 X 2 = $5,416.66/month). ***."

¶ 6 Section 9.7 of the parties' lease agreement states:

> "Tenant will, at the termination of this Lease by lapse of time or otherwise, yield up immediate possession to Landlord. If Tenant retains possession of the Premises or any part thereof after such termination, then Landlord may, at its option at any time thereafter, serve written notice upon Tenant that such holdover constitutes any one of: (a) renewal of the Lease for one year at the then prevailing current rental rate; or (b) creation of a month to month tenancy upon the terms and conditions set forth in this Lease; or (c) creation of a tenancy at sufferance in any case upon the terms and conditions set forth in this Lease;
>
> PROVIDED, HOWEVER, that the monthly rental (or daily rental under (c)) shall, in addition to all other sums which are to be paid by Tenant hereunder, be equal to double the rental being paid monthly by Tenant under this Lease immediately prior to such termination ***."

¶ 7 On December 15, 2014, Midwest served central with Five Day Notice of Default pursuant to section 9-209 of the Illinois Forcible Entry and Detainer Act (the Act). The Notice stated that Central was delinquent in its payment of rent in the amount of $31,416.63. This amount included $2,708.33 for failure to pay the double rent from May 2014 through December 2014, as well as $9,749.99 in late fees. Notice was served on a person named Ed Ligas, an approximately 40 year old man at the premises. Central vacated the premises on December 26, 2014.

¶ 8 On January 6, 2015, Midwest filed a verified complaint for possession and damages against Central. The complaint sought $31,416.63 in unpaid rent and late fees related to Central's failure to pay double rent from May 2014 through December 2014. Additionally, the

complaint asked the court to award Midwest attorney fees related to the action. On January 14, 2015, the Sangamon County Sheriff's Office served Central's registered agent in Springfield with a copy of the summons and complaint. The summons directed Central to appear before the trial court on January 26, 2015.

¶ 9 Following Central's failure to appear on January 26, 2015, the trial court entered a default judgment against it in the amount of $24,581.30. On March 13, 2015, Central filed a petition to vacate judgment pursuant to section 2-1401 of the Illinois Code of the Civil Procedure. 735 ILCS 5/2-1401 (West 2012). In its petition, Central claimed they had meritorious defenses to Midwest's complaint. Central asserted that its continued occupancy of the premises after expiration of the lease coupled with Midwest's acceptance of monthly payments at the last rent amount created a month-to-month tenancy. In the alternative, Central's petition claimed that Midwest elected to treat Central as a holdover tenant and renew the lease for one year under section 9.7 of the lease at the then-prevailing current rental amount of $2708.33 per month.

¶ 10 A hearing on Central's 2-1401 petition to vacate default judgment was held on May 6, 2015. Central's president, Bernardo Luciano, testified that he oversaw all of Central's leasing agreements. Luciano and Midwest were engaged in discussions to renew the lease for several months after the lease expired in May 2014. Luciano testified that Central had last paid rent to Midwest in December 2014, in the amount of $2708.33 and that Central had vacated the premises on December 26, 2014, following receipt of the Five Day Notice of Default. He claimed that he did not learn of the default judgment until early February 2015, when Central's comptroller, Ralph Sepe, informed him. Luciano stated that he then entered into settlement talks with Midwest's attorney. He testified that Midwest's attorney continually failed to return his calls on proposed settlement amounts until 30 days after the date the default judgment was

entered. Midwest's attorney told Luciano that no settlement would be reached as it was too late. Luciano retained counsel for Central on March 6, 2015.

¶ 11 Ralph Sepe, Central's comptroller, testified that he reviews leases for Central and receives notices from Central's registered agents regarding properties they have an interest in. Sepe told the court that he received an email from Central's registered agent in Illinois, InCorps, on January 14, 2015, alerting him that Central had been served with process. The subject line of the email said "Service of Process for Central Irrigation Supply, Inc. Illinois." The email contained a link that directed Sepe to InCorps' website. Sepe maintained that the only matter shown on the website concerned an unrelated matter in Georgia. The website contained phone and fax numbers for inquiries about process as well as directions on how to request hard copies of any process that had been served. Sepe testified that he did not utilize these options. Sepe received another email from InCorps on February 2, 2015, alerting him to the default judgment entered against Central. He had no difficulty accessing that document.

¶ 12 Following Sepe's testimony, Central rested their case and Midwest made a motion for a directed verdict. The trial court granted Midwest's motion, and thereby denied Central's petition to vacate default judgment, finding that Central did not act with due dilligence. The trial court found that Central was clearly alerted that an action was pending in Illinois through the email received by Sepe via Central's registered agent on January 14, 2015, but "did not take steps beyond failing to click on and find anything there, * * * to get something in writing, something by email and, evidently, let [notice] sit there without really communicating to anybody." The trial court also found a lack of diligence in Central waiting over a month from learning of the default judgment and filing their petition to vacate. The trial court did not articulate any findings concerning Central's meritorious defenses.

¶ 13 On June 5, 2015, Midwest filed a motion for attorney fees pursuant to section 13.1 of lease. Section 13.1 states that "[t]enant shall pay all costs, expenses and reasonable attorney's fees that may be incurred by Landlord in enforcing the terms, covenants and obligations of the Lease on Tenant's part to be performed." The trial court granted Midwest's motion on October 27, 2015. Central timely appealed.

¶ 14 II. ANALYSIS

¶ 15 Central first contends that the trial court did not have jurisdiction over the forcible entry and detainer action brought by Midwest because the Five Day Notice of Default was not properly served. Central argues that Midwest was not in compliance with the statutory requirements of Section 9-211 of the Act. 735 ILCS 5/9–211 (West 2014). Whether there is substantial compliance with a statutory provision is a question of law and our standard of review is *de novo. Behl v. Gingerich*, 396 Ill. App. 3d 1078, 1086 (2009).

¶ 16 A forcible detainer action is a special statutory proceeding that is in derogation of the common law. Therefore, the party requesting this relief must comply with the requirements of the statute, especially those requirements establishing the court's jurisdiction. *Nance v. Bell*, 210 Ill.App.3d 97, 99 (1991). Where the statute includes a requirement that written demand is made prior to filing a complaint, the demand must be made in strict compliance with the statute or jurisdiction will not attach. *Id.* at 100.

¶ 17 Section 9–211 of the Act provides three methods of serving a notice of termination upon a tenant who is in actual possession of the premises. Specifically, section 9–211 provides:

> "Any demand may be made or notice served by delivering a written or printed, or partly written and printed, copy thereof to the tenant, or by leaving the same with some person of the age of 13 years or upwards, residing on or in possession of the premises; or by

> sending a copy of the notice to the tenant by certified or registered mail, with a returned receipt from the addressee; and in case no one is in the actual possession of the premises, then by posting the same on the premises." 735 ILCS 5/9–211 (West 2014).

¶ 18 The evidence presented in the present case shows that the Five Day Notice of Default was served on December 15, 2014, at the premises, on an approximately 40 year old man named Ed Ligas. In its petition to vacate judgment, Central admits that Midwest served a Five Day Notice pursuant to the Act on that date and even cite that notice as their reason for moving out of the premises. The affidavit of Bernardo Luciano, attached to the petition to vacate judgment, also admits receipt of the Five Day Notice of Default from Midwest. Later, at the hearing on Central's petition to vacate default judgment, Luciano testified that no one named Ed Ligas was employed by Central at the time notice was served. Sepe testified that he could not recall an employee named Ed Ligas at the premises. Central did not offer any evidence of what employees were actually at the premises on the day of service. Based on multiple admissions of receiving the Five Day Notice and their subsequent vacating of the premises, the statement of Luciano that Ed Ligas was not an employee, with nothing else to substantiate that testimony, is not enough to persuade us that service under section 9-211 of the Act was insufficient.

¶ 19 Central next contends that the trial court erred in denying its section 2-1401 petition to vacate default judgment. Central argues that the trial court erred in failing to consider its meritorious defenses when ruling on the petition.

¶ 20 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.

Smith v. Airoom, 114 Ill. 2d 209, 220-21 (1986). The typical section 2–1401 analysis is two-tiered: both a meritorious defense and due diligence must be pleaded and demonstrated. *Rockford Financial Systems, Inc. v. Borgetti*, 403 Ill. App. 3d 321, 327 (2010). The issue of a meritorious defense is a question of law, and it is properly subject to summary judgment and *de novo* review. *Id*. If the petitioner fails to allege the existence of a meritorious defense, the petition is properly denied, and due diligence need not be addressed. *Id*. However, if a meritorious defense probably exists, the court must address the issue of due diligence; this is a fact-intensive inquiry suited to balancing rather than bright lines, and the trial court's ruling is therefore reviewed for an abuse of discretion. *Id*.

¶ 21 We first examine whether Central pleaded meritorious defenses in its petition to vacate default judgment. Central argues that Midwest elected to treat Central's holdover as a renewal of the lease for one year pursuant to section 9.7 of the lease.

¶ 22 A holdover tenancy is created when a landlord elects to treat a tenant, after the expiration of his or her lease, as a tenant for another term upon the same provisions contained in the original lease. *Roth v. Dillavou*, 359 Ill. App. 3d 1023, 1027 (2005). Only the lessor, not the lessee, has the right to decide whether to treat the lessee as a holdover tenant. *Bransky v. Schmidt Motor Sales, Inc.*, 222 Ill. App. 3d 1056, 1061 (1991). While the landlord's acceptance of rent for the month following the expiration of the lease may by itself indicate the landlord's election to treat the tenant as a holdover, other facts and circumstances bearing on the landlord's intent should be considered as well. *A.O. Smith Corp. v. Kaufman Grain Co.*, 231 Ill. App. 3d 390, 398-99 (1992).

¶ 23 In the present case, section 9.7 of the Lease provides: "if Tenant does not vacate the Premises by the end of the term of the Lease, Landlord has the option, exercisable at any time by

written notice to Tenant, of converting the Tenant's holdover into a one-year renewal of the Lease." Central points out that Midwest exercised this option on November 19, 2014, when Midwest sent Central a letter stating, "* * * Midwest hereby exercises its right pursuant to Section 9.7 of the Lease to treat Central's holdover tenancy as a renewal of the Lease for one year, commencing May 1, 2014, and terminating April 30, 2015." If Midwest wished to treat Central's holdover as a renewal of the lease and Central had been paying Midwest the monthly rental amount of $2708.33 during the renewal period, Central has a meritorious defense to Midwest's complaint.

¶ 24 Central also argues that Midwest's acceptance of monthly rental payments, without objection, for seven months after the lease expired, created a month-to-month tenancy. Central maintains this argument is an additional meritorious defense.

¶ 25 Even when a holdover tenancy is not created, the parties' conduct may create a month-to-month tenancy. *A.O. Smith Corp.,* 231 Ill. App. 3d at 399. Acceptance of monthly rental payments by the landlord will generally create a month-to-month tenancy. *Id.* at 399; see also *Hoefler v. Erickson,* 331 Ill. App. 577, 584 (1947) ("it is the holding over and paying the same rent, without further agreement, that creates a tenancy from month to month"). Both a holdover tenancy and a month-to-month tenancy are governed by the terms of the original lease. *A.O. Smith Corp.,* 231 Ill. App. 3d at 399. However, a holdover tenancy lasts as long as the original lease term, while a month-to-month tenancy can last indefinitely, although it can be terminated on 30 days' notice. *Id.*

¶ 26 Here, Central remained in possession of the premises after the lease expired and continued to pay Midwest monthly rent in the amount of $2708.33. Midwest accepted these payments as they always had prior to the lease's expiration and raised no objection. From May

to December 2014, Midwest accepted Central's monthly rent payments while engaged in ongoing talks to negotiate a new lease. It wasn't until November 19, 2014, that Midwest raised an issue with Central's occupation of the premises. Certainly this conduct may have created a month-to-month tenancy. As such, Central has effectively pleaded another meritorious defense to Midwest's complaint. Having established that Central did have meritorious defenses, we now move on to the trial court's findings on Central's exercise of due diligence in presenting its section 2-1401 petition to vacate default judgment.

¶ 27 Due diligence requires the section 2–1401 petitioner to have a "reasonable excuse" for failing to act within the appropriate time. *Airoom*, 114 Ill. 2d 209, 222. Since section 2–1401 does not afford a litigant a remedy whereby he may be relieved of the consequences of his own mistake or negligence, a party relying on section 2–1401 is not entitled to relief unless he shows that through no fault or negligence of his own, the error of fact or the existence of a valid defense was not made to appear to the trial court. *Id*. In determining the reasonableness of the excuse offered by the petitioner, all of the circumstances attendant upon entry of the judgment must be considered, including the conduct of the litigants and their attorneys. *Id*. One of the guiding principles, however, in the administration of section 2–1401 relief is that the petition invokes the equitable powers of the circuit court, which should prevent enforcement of a default judgment when it would be unfair, unjust, or unconscionable. *Id*. at 225. Because a section 2–1401 petition is addressed to equitable powers, courts have not considered themselves strictly bound by precedent, and where justice and good conscience may require it, a default judgment may be vacated even though the requirement of due diligence has not been satisfied. *Id*.

¶ 28 In the present case, the trial court found that Central did not act with due diligence when they failed to take the steps to learn of the ongoing action in Illinois through the email regarding

service of process sent by their registered agent on January 14, 2015, and waiting over a month following receipt on February 2, 2015, of the default judgment before filing their section 2-1401 petition. We disagree.

¶ 29 We find the holding in *Cavalry Portfolio Services v. Rocha*, 2012 IL App (1st) 111690, to be instructive. In that case, a collection agency filed a breach of contract claim against a debtor, Rocha. *Id*. at ¶ 3. Although Rocha filed an appearance through counsel, he failed to file an answer to the complaint and neither he nor his counsel appeared for trial. *Id*. at ¶ 4. A judgment was entered against Rocha on February 28, 2011. *Id*. On May 2, 2011, Rocha became aware of the judgment and filed a section 2-1401 petition to vacate the judgment on May 5, 2011. *Id*. The petition raised a meritorious defense and stated that Rocha acted with due diligence in contesting the judgment by filing the petition as soon as he learned of the judgment. *Id*. The trial court denied Rocha's section 2-1401 petition. *Id*. The appellate court reversed, finding that Rocha pleaded a meritorious defense and acted with due diligence in filing the 2-1401 petition. *Id*. at ¶ 18. Most importantly, the appellate court found that the requirement of achieving substantial justice was more important than the due diligence requirement. *Id*. Rocha suffered an adverse judgment without having appeared at trial and it would have been unjust to enforce the judgment in light of his meritorious defense. *Id*. "[E]ven if we were to agree with Cavalry Portfolio that Rocha failed to fulfill the due diligence requirement of section 2–1401, we would reverse the trial court's order based on the merits of Rocha's defense. We hold that the trial court abused its discretion in denying Rocha's section 2–1401 petition to vacate the judgment." *Id*.

¶ 30 Here, Central was served with process through their registered agent in Springfield on January 14, 2015. The registered agent emailed Sepe a notice that contained a subject line reading "Service of Process for Central Irrigation Supply, Inc. Illinois." Sepe testified that when

he clicked the link in the email he saw only a notice concerning litigation in Georgia. When the registered agent sent Sepe an email on February 2, 2015, Sepe notified Luciano that Central had a default judgment entered against it in Illinois. Luciano quickly contacted Midwest's attorney in an attempt to resolve the matter. It seems from the testimony of Luciano that these attempts to settle with Midwest were sincere but Midwest and its attorney dragged the negotiations past the time in which Central could have filed a motion to set aside the default judgment. See 735 ILCS 5/2-1301 (West 2012). After being informed by Midwest's attorney that Central would then be required to pay the entire judgment due to the time bar, Central immediately sought legal representation and filed its 2-1401 petition. As discussed above, the petition contains meritorious defenses which should have proceeded to trial.

¶ 31 Additionally, the trial court's dismissal of Central's 2-1401 petition gave Midwest a potentially unjust award. Midwest had received and negotiated checks for rent from Central in the amount of $2708.33, the amount set by the lease, from May through December 2014. By denying the section 2-1401 petition, the trial court allowed Midwest to double that amount premised on a late election under the lease. The late election occurred after what appeared to be good faith negotiations by Central to extend the lease upon terms satisfactory to both parties. If section 2–1401 relief is to invoke the equitable powers of the circuit court to prevent enforcement of a default judgment when it would be unfair, unjust, or unconscionable, we determine that those equitable powers were not employed here and the trial court here abused its discretion in denying Central's petition to vacate default judgment. Accordingly, we reverse the trial court's judgment and remand for further litigation.

¶ 32 Finally, Central argues that the trial court's order granting attorney fees and costs of collection must be vacated. We agree. Our reversal of the trial court's denial of Central's

petition to vacate default judgment effectively makes the orders granting Midwest's attorney fees and costs of collection premature. *7-Eleven, Inc. v. Dar*, 363 Ill. App. 3d 41, 45 (2005). The substantive effect of our order reversing the trial court's denial of Central's petition is to restore the parties to their original status in the case, *i.e.*, as though the default judgment had never been entered. See *Id*. Accordingly, the trial court's orders granting Midwest attorney fees and costs of collection are vacated.

¶ 33 III.CONCLUSION

¶ 34 For the reasons stated, we reverse the judgment of the circuit court of Lake County denying Central's 2-1401 petition and remand to the trial court for resolution consistent with this order.

¶ 35 Reversed and remanded in part, vacated in part.

¶ 36 JUSTICE BURKE, dissenting.

¶ 37 In *Warren County Soil and Water Conservation District v. Walters*, 2015 IL 117783, ¶ 51, the supreme court reiterated that a section 2-1401 (735 ILCS 5/2-1401 (West 2012)) petitioner is required to plead and prove by a preponderance of the evidence the following elements: (1) the existence of a meritorious defense; (2) due diligence in presenting this defense; and (3) due diligence in filing the section 2-1401 petition for relief. See *Smith v. Airoom, Inc*., 114 Ill. 2d 209, 221 (1986).

¶ 38 In the present case, the trial court did not address the meritorious defense issue but found that defendant did not act with due diligence. From this finding we may presume that the trial court believed that there was some evidence of a meritorious defense. See *Rockford Financial Systems, Inc. v. Borgetti*, 403 Ill. App. 3d 321, 327 (2010) ("If the petitioner fails to allege the existence of a meritorious defense, the petition is properly denied, and due diligence need not be

addressed. However, if a meritorious defense probably exists, the court must address the issue of due diligence.") The majority has determined that the trial court abused its discretion either by finding a lack of due diligence or by failing to relax the due diligence requirement. I disagree and, therefore, dissent.

¶ 39 The evidence adduced at the hearing on defendant's section 2-1401 petition showed that defendant received notice of the lawsuit on January 14, 2015, and did nothing in response. When defendant received notice of the default judgment on February 2, 2015, it entered into settlement negotiations with plaintiff. According to defendant's president, plaintiff's attorney failed to return his calls until 30 days after the default was entered. Defendant filed its section 2-1401 petition on March 13, 2015. The majority's description of defendant's settlement attempts as "sincere" is of no import where defendant completely disregarded the court process in favor of an attempt to negotiate outside court.

¶ 40 In *Airoom*, the defendant relied on its attempts to settle the dispute outside court to excuse its delay in presenting defenses to the plaintiff's claims. The supreme court stated, "Although 'the law encourages out-of-court settlement of controversies, it is imperative that defendants not disregard their legal right and obligations. *** Relief under section [2-1401] is available only to those who diligently pursue their legal defenses and remedies in court, not to those who disregard these procedures on the gamble that better results can be obtained through other procedures or at a cheaper cost.' (*Abbell v. Munfield*, 76 Ill. App. 3d 384, 388 (1979)) When all of the circumstances of this case are viewed in their entirety, there is no doubt that Airoom's dilemma is the result of its own negligence and indifference to or disregard of the circuit court's process." *Airoom*, 114 Ill. 2d at 224-25.

¶ 41 The question here is not whether we would have determined that defendant satisfied the due diligence requirement, but whether the trial court abused its discretion in finding a lack of due diligence. A trial court abuses it discretion where its decision is arbitrary, fanciful, or unreasonable, such that no reasonable person would take the view adopted by the court. *Forest Preserve District of Cook County v. Chicago Title and Trust Co.*, 2015 IL App (1st) 131925, ¶ 70. Here, the trial court's findings, in essence, that defendant's dilemma was the result of its own negligence and indifference to or disregard of the circuit court's process was not arbitrary, fanciful, or unreasonable. When it received notice of the lawsuit, defendant did absolutely nothing. When it received notice of the default judgment, defendant attempted to negotiate with plaintiff but continued to disregard the court process. Defendant first appeared in court two months after receiving notice of the suit and some six weeks after notice of default.

¶ 42 The majority intimates that this is an appropriate case for the relaxation of the due diligence requirement in light of defendant's meritorious defense. In *Airoom*, the supreme court did state that a court may invoke its equitable powers and vacate a default judgment even where due diligence is not satisfied if justice and good conscience require such action. *Airoom*, 114 Ill. 2d at 225 (citing *American Consulting Association, Inc. v. Spencer*, 100 Ill. App. 3d 917, 923 (1981), *Manny Cab Co. v. McNeil Teaming Co.*, 28 Ill. App. 3d 1014, 1019 (1975), and *George F. Mueller and Sons, Inc. v. Ostrowski*, 19 Ill. App. 3d 973, 979 (1974)). The court held that the defendant failed to show that the alleged unfair, unjust, or unconscionable conduct of the plaintiff softened "the rigorous application of the due diligence standard." *Airoom*, 114 Ill. 2d at 226.

¶ 43 Likewise, in the cases cited in *Airoom*, the courts looked to whether the plaintiffs engaged in some type of fraud or unconscionable conduct to relax the due diligence requirement.

In *Spencer*, the court held that court processes were not used to gain an unconscionable advantage to relax due diligence. *Spencer*, 100 Ill. App. 3d at 923. In both *Manny Cab* and *Ostrowski*, the appellate court held that the trial courts did not abuse their discretion in granting section 2-1401 petitions where the plaintiffs' attorneys engaged in unfair conduct. *Manny Cab*, 28 Ill. App. 3d at 1019; *Ostrowski*, 19 Ill. App. 3d at 979-80.

¶ 44 As illustrated by the cases cited above, relaxation of the due diligence requirement is justified only under extraordinary circumstances. See *In re Marriage of Harnack and Fanady*, 2014 IL App. (1st) 121424, ¶ 60, see also *Warren County Soil*, 2015 IL 117783, ¶ 51 ("the trial court may also consider equitable considerations to relax the applicable due diligence standards under the appropriate limited circumstances"). *Harnack* identified three such extraordinary circumstances: (1) where a party has procured an unconscionable advantage through the extraordinary use of court processes; (2) where some fraud or fundamental unfairness has been shown; and (3) where the failure to exercise due diligence was caused by circumstances that occurred outside the record and were beyond the petitioner's control. *Harnack*, 2014 IL App. (1st) 121424, ¶ 60.

¶ 45 In requesting that this court relax the due diligence requirement, defendant has not cited any unconscionable conduct by plaintiff nor has he argued that any of the situations outlined in *Harnack* are applicable. Defendant cites to, and the majority relies on, *Cavalry Portfolio Services v. Rocha*, 2012 IL App (1st) 111690, for the proposition that the failure to fulfill the due diligence requirement may be overlooked where the defendant has a meritorious defense and, in light of that defense, enforcement of the judgment would be unjust.

¶ 46 *Rocha* cited *Airoom*, *Spencer*, *Manny Cab* and *Ostrowski*. The court then stated, "Like the defendants in the cases cited, Rocha suffered an adverse judgment without having appeared

at trial and it would be unjust to enforce the judgment in light of his meritorious defense." *Rocha*, 2012 IL App (1st) 111690, ¶ 18. The cases *Rocha* relies upon bear no resemblance whatsoever to its holding. The judgments against the defendants in *Airoom* and *Spencer* were affirmed where the courts saw no reason to relax due diligence. The judgments against the defendants in *Manny Cab* and *Ostrowski* were vacated based on the unfair conduct of the plaintiffs' counsel.

¶ 47 *Rocha* and now this majority decision stand for the proposition that due diligence should be relaxed where a defendant has a meritorious defense to the lawsuit. There is no basis in the law for that proposition. Due diligence and a meritorious defense are separate elements under section 2-1401. See *Warren County Soil*, 2015 IL 117783, ¶ 37, *Airoom*, 114 Ill. 2d at 220-21. The due diligence requirement may be relaxed under extraordinary circumstances such as fraud or unconscionable conduct. No case, other that *Rocha*, recognizes a meritorious defense as a reason to soften the rigorous application of the due diligence standard. See *Airoom*, 114 Ill. 2d at 226. Such a rule would, in essence, eliminate entirely the due diligence requirement. A judgment against a defendant who has a meritorious defense to the action is not unjust where that defendant through its own negligence or indifference completely disregards court proceedings. Based upon this record there is no basis for our court to hold that the trial court abused its discretion; therefore, I respectfully dissent.