2016 IL App (2d) 151228-U
No. 2-15-1228
Order filed December 12, 2016

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

RAFAEL SILVA, an individual, and GREAT AMERICAN TRUCKING, INC., An Illinois Corporation,	)	Appeal from the Circuit Court of Du Page County.
Plaintiffs-Appellants,	)	
v.	)	No. 12-AR-2334
ALBERT CHAN,	)	
Defendant-Appellee,	)	
and	)	
JPMORGAN CHASE BANK, N.A.,	)	Honorable Brian R. McKillip,
Defendant.	)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Hudson and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's decision vacating a default judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2014)) could not be adequately reviewed where the trial court failed to consider all of the elements required to grant such relief; trial court order vacated and cause remanded.

¶ 2 Plaintiffs, Mario Silva and Great American Trucking, Inc., appeal from an order of the trial court granting the petition of defendant, Albert Chan, brought pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2014)) to vacate a default judgment entered against defendant and in favor of plaintiffs. On appeal, plaintiffs argue: (1) the trial court erred by vacating the default judgment on the basis that section 2-1301(d) of the Code did not authorize the court to enter a default judgment; and (2) the motion to vacate failed the standards under section 2-1401. We vacate the trial court's order and remand for further proceedings.

¶ 3 I. BACKGROUND

¶ 4 On November 1, 2012, plaintiffs filed a complaint against defendant and JPMorgan Chase (Chase)[1], alleging fraud, securities fraud, breach of fiduciary duty, and breach of contract. On November 7, 2012, attorney Kenneth Ditkowsky filed an appearance on defendant's behalf and an answer to plaintiffs' complaint. On October 15, 2013, plaintiffs filed an amended complaint, which defendant, through Ditkowsky, answered on November 6, 2013. On March 19, 2014, plaintiffs' counsel informed the trial court, Judge James D. Orel, presiding, that plaintiffs received "notice yesterday that [Ditkowsky] has since been suspended from practicing law for four years." Plaintiffs' attorney told the trial court that plaintiffs were going to notify defendant via certified mail regarding Ditkowsky's suspension. The trial court stated, "Put in the order that I ordered that under the circumstances. [*sic*] And let's set it for a little quicker so we can get [defendant] in here to get a supplemental appearance from somebody." Plaintiffs'

[1] Although Chase was named as a defendant in plaintiffs' original complaint, it settled with plaintiffs, and Chase was dismissed from the case. Chase is not a party to this appeal because it is not subject to the default judgment at issue here. Thus, for purposes of this appeal, we do not refer to Chase as a defendant.

attorney agreed. The trial court's written order of March 19, 2014, stated only that defendant did not appear, plaintiffs' "counsel to provide notice of status date to [defendant]," and that the case was "continued to April 23, 2014." On March 19, 2014, plaintiffs filed a notice of mailing indicating that they "sent, via United States [First Class] Mail, the Court Order entered March 19, 2014," to defendant's home address.

¶ 5 On April 23, 2014, only plaintiffs' counsel appeared before the trial court. Plaintiffs' counsel represented to the court that that defendant's counsel "had issues with the ARDC" and that plaintiffs notified defendant "by certified mail," to give him time "to file an appearance *pro se* or [to] have another attorney file an appearance," but that nothing had been filed. The trial court set the next court date for May 21, 2014, and stated that the order must be sent to defendant certified mail. The trial court's April 23, 2014, order stated that the case was continued to May 21, 2014; defendant was "to file *pro se* appearance or appearance of counsel on or before May 14, 2014, plaintiffs' counsel has leave to communicate order to [defendant]." On May 1, 2014, plaintiffs filed a notice of mailing indicating that they "sent, via United States [First Class] Mail, the Court Order entered April 23, 2014," to defendant's home address.

¶ 6 On May 21, 2014, only plaintiffs' counsel appeared. Plaintiffs' counsel stated "If you enter a default judgment *** it's going to have to be set for prove-up *** because we didn't have a verified complaint." The trial court gave plaintiffs a June 25, 2014, date to move for a default judgment. The court's written order stated that the case was continued to June 25, 2014, for motion for default. On May 21, 2014, plaintiffs filed a notice of mailing indicating that they "sent, via United States first class mail and certified mail, return receipt requested," the court's orders entered April 23, 2014, and May 21, 2014, to defendant's home address.

¶ 7 On June 13, 2014, plaintiffs filed their motion to default and a notice of motion noticing the matter for presentation on June 25, 2014. Plaintiffs' motion for order of default and

judgment was brought pursuant to section 2-1301(d) of the Code of Civil Procedure (Code) (735 ILCS 5/2-1301(d) (West 2014)). The notice of motion indicated that the notice of motion and motion for default were mailed both to Ditkowsky and defendant's home via "first class United States Mail, and via certified mail, return receipt requested."

¶ 8 On September 22, 2014, the trial court entered default judgment against defendant in the amount of $45,831.61 plus attorney's fees of $6,585, plus costs in the amount of $192.65. On September 26, 2014, plaintiff filed a notice of mailing indicating that the default judgment had been mailed to defendant and Ditkowsky.

¶ 9 On May 4, 2015, plaintiffs served a citation to discover assets on defendant. The citation was returnable on June 2, 2015. On June 2, 2015, the citation was called before the trial court, Judge Brian McKillip, now presiding. Defendant appeared in court and requested a continuance to obtain counsel. Plaintiffs' counsel did not object, and the trial court continued the matter to July 7, 2015.

¶ 10 On July 7, 2015, defendant was present in court with retained counsel, Edward Witas, who requested leave to file his appearance on behalf of defendant and asked for 28 days to file a section 2-1401 petition, which the trial court granted. On August 3, 2015, defendant filed a motion to vacate the default judgment pursuant to section 2-1401 of Code. On October 15, 2014, plaintiffs filed a response to defendant's motion to vacate.

¶ 11 On November 4, 2015, defendant filed a reply arguing that he had a meritorious defense in that he was employed by Chase as a personal banker, he did not manage any business accounts, and he did not actively participate in the transaction that gave rise to the underlying litigation. Defendant also argued that he had been diligent because: (1) upon being served in the underlying action, he immediately sought counsel who he reasonably believed was representing him in the matter; (2) he believed that substitute counsel was representing him upon

learning that original counsel had been suspended; (3) he was unaware that a default judgment had been entered against him until around May 2015, when he was served by a special process server with a notice of the citation to discover assets; (4) any correspondence that he may have received throughout the litigation he believed was being handled by his attorney; (5) after he received notice of the citation to discover assets, he immediately took steps to retain replacement counsel; (6) he is not familiar with the procedures of "this Court;" and (7)his highest level of education is a high school diploma. He did not intend to ignore the order of the court or avoid the proceedings against him. Defendant attached an affidavit to his reply.

¶ 12 On November 20, 2015, the trial court vacated the default judgment. The trial court questioned: "Why was a default judgment entered when a guy's represented by an attorney that [has] an answer on file?" The trial court concluded, "I am going to vacate the default judgment."

¶ 13 II. ANALYSIS

¶ 14 The parties dispute the applicable standard of review regarding the grant or denial of a section 2-1401 petition. Plaintiffs argue that the standard of review is *de novo,* whereas defendants contend that the deferential "abuse of discretion" standard applies to review of an order granting a section 2-1401 petition.

¶ 15 Our supreme court has explained that "a section 2-1401 petition can present either a factual or legal challenge to a final judgment or order" and that the nature of the challenge presented "dictates the proper standard of review on appeal." *Warren County Soil & Water Conservation District v. Walters,* 2015 IL 117783, ¶ 31. A fact-dependant judgment under section 2-1401 will not be reversed absent an abuse of discretion. *Id.* at ¶ 37 (citing *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 220-21 (1986)). In contrast, a purely legal-based judgment is reviewed *de novo*. *Id.* (citing *People v. Vincent,* 226 Ill. 2d 1, 15-18 (2007)).

¶ 16 *Warren County Soil* noted that the "seminal decision on section 2-1401 practice is" *Airoom*, 114 Ill. 2d 209. *Id.* at ¶ 36. To be entitled to relief from a final judgment or order under section 2-1401, the petitioner must set forth specific factual allegations supporting each of the following elements: (1) the existence of a meritorious defense; (2) due diligence in presenting this defense or claim to the trial court in the original action; and (3) due diligence in filing the section 2-1401 petition for relief. *Airoom,* 114 Ill. 2d 220-21. "The quantum of proof necessary to sustain a section 2-1401 petition is a preponderance of the evidence." *Id.* at 221.

¶ 17 In addition, "[o]ne of the guiding principles * * * in the administration of section 2-1401 relief is that the petition invokes the equitable powers of the circuit court * * *." *Id.* at 225. The power to set aside a judgment, and thus allow a litigant to have his or her day in court, "is based upon substantial principles of right and wrong and is to be exercised for the prevention of injury and [for the] furtherance of justice." (Internal quotation marks omitted.) *Id.* Therefore, the issue of whether relief should be granted pursuant to section 2-1401 "lies within the sound discretion of the circuit court, depending on the facts and equities presented." *Id* at 221.

¶ 18 In this case, the parties disagree on whether defendant's section 2-1401 petition sufficiently alleged the requirements of the existence of a meritorious defense and due diligence. The parties also disagree on whether section 2-1301(d) of the Code authorized the default judgment. Section 2-1301(d) provides:

> "Judgment by default may be entered for want of an appearance, or for failure to plead, but the court may in either case, require proof of the allegations of the pleadings upon which relief is sought." 735 ILCS 5/2-1301(d) (West 2014).

¶ 19 In this case, although the trial court may have considered some of the facts and may have based its decision on the equities of the case, the record indicates that the trial court failed to

consider all of the elements required to grant the relief requested pursuant to section 2-1401. See *Airoom,* 114 Ill. 2d at 221. Particularly, the trial court failed to consider whether defendant set forth specific *factual* allegations supporting each of 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 *id.*

¶ 20 Regarding a petitioner's need to establish due diligence, our supreme court has stated that due diligence requires a "reasonable excuse for failing to act within the appropriate time." *Warren County Soil,* 2015 IL 117783, ¶ 38 (citing *Airoom,* 114 Ill. 2d at 222). When assessing the reasonableness of the petitioner's excuse, the trial circuit court "must consider all the surrounding circumstances, including the conduct of the litigants and their attorneys." *Id.* In addition, the trial court may consider equitable principles "to relax the applicable due diligence standards under the appropriate limited circumstances." *Id.,* ¶ 51 (citing *Airoom,* 114 Ill. 2d at 226-29). Further, although the record indicates that the parties waived an evidentiary hearing, our supreme court has stated that when "the facts supporting the section 2-1401 petition are challenged by the respondent, a full and fair evidentiary hearing should be held." *Id.*, ¶ 51 (citing *Airoom,* 114 Ill. 2d at 223).

¶ 21 Therefore, we are unable to reliably determine whether the trial court's vacation of the judgment was an abuse of discretion or against the manifest weight of the evidence. Instead, we remand the cause for further proceedings to permit the trial court to review the cause under the proper standards.

¶ 22 III. CONCLUSION

¶ 23 Accordingly, we vacate the trial court's order vacating the default judgment and remand for further proceeding consistent with this disposition.

¶ 24 Vacated and remanded.