THIRD DIVISION
June 28, 2017

No. 1-16-2424

IN THE APPELLATE
COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

CROWN CARS & LIMOUSINES, INC.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 15 L 11253
	)	
JOHN JANSEN,	)	The Honorable
	)	Margaret Ann Brennan,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Lavin and Cobbs concurred in the judgment.

ORDER

HELD: Trial court did not abuse its discretion in denying defendant's motion to vacate where defendant did not demonstrate by preponderance of the evidence that he had a meritorious defense to underlying claim and exercised diligence in raising it; trial court also did not abuse its discretion in denying defendant's motion to reconsider where evidence presented was not "newly discovered."

¶ 1 Upon plaintiff-appellee Crown Cars & Limousines, Inc.'s (plaintiff) motion, the trial court entered default judgment against defendant-appellant John Jansen (defendant). Defendant filed a motion to vacate and, upon its denial, a motion to reconsider, which was also denied.

Defendant appeals from both orders, contending that the trial court erred in refusing to vacate the default judgment. He asks that we vacate the trial court's denials of his motions or remand with directions that he be allowed to file an amendment or have an evidentiary hearing. For the following reasons, we affirm.

¶ 2 BACKGROUND

¶ 3 In November 2015, plaintiff filed a complaint against defendant for breach of contract, *quantum meruit*, unjust enrichment and fraud with respect to agreements the parties had formed regarding business transportation. After three failed attempts by the Cook County Sheriff in November 2015 to serve defendant at his listed home address on West 46th Place in Chicago, plaintiff moved to appoint a special process server. The trial court granted its motion. However, after five more failed attempts by the special process server to serve defendant in December 2015 and January 2016, plaintiff filed a motion for service by special order of court. Attached to its motion were affidavits from employees of the special process server detailing their attempts at service. For example, an employee stated that during one of his five attempts, he went to the address and a man who identified himself as Mike Pauling answered, explaining that he was house-sitting for defendant who would be out of town until February; Pauling refused service. Another affidavit stated that the special process server then conducted a database search for Mike Pauling, but could find no residential or business address for him. Additionally, a third affidavit attached to the motion presented a database search showing multiple addresses for defendant, including a former residential address at South Hoyne Avenue in Chicago and a current business address at West Armitage Avenue in Chicago.

¶ 4 The trial court granted plaintiff's motion for service by special order of court. The court gave plaintiff leave to serve defendant by posting the complaint and summons on the door of his home at the West 46th Place address and by sending the complaint and summons to that address via certified, return receipt and standard mail. The court also ordered plaintiff to send the complaint and summons by standard mail to defendant's South Hoyne and West Armitage addresses. Plaintiff complied with the trial court's order and served defendant accordingly on January 26, 2016. For the record, defendant does not appeal the trial court's ruling and has not disputed that he was served in accordance therewith.

¶ 5 Following this service, defendant failed to file an answer or appearance with the court. In March 2016, plaintiff moved for default judgment. The trial court granted plaintiff's motion and entered default judgment against defendant in the amount of $92,187.76, declaring that defendant had been served with the complaint and had failed to answer or appear.

¶ 6 On May 23, 2016, defendant filed a motion to vacate the default judgment. Following a hearing in court at which no court reporter was present, the trial court denied his motion, stating in its written order that defendant's affidavit and motion "fail to comply with 735 ILCS 5/2-1401." Defendant then filed a motion to reconsider and included therein facts and affidavits that had not been alleged or attached to his motion to vacate. Again, following a hearing at which no court reporter was present, the trial court denied his motion to reconsider.

¶ 7 ANALYSIS

¶ 8 Defendant appeals from both the trial court's denials of his motion to vacate and his motion to reconsider. He contends that the court erred in denying his motions because he set

forth the necessary elements required for a motion to vacate and/or he should have been allowed to replead or otherwise be heard upon reconsideration. We disagree.

¶ 9 Initially, there are two threshold matters we must address. First, plaintiff asserts that defendant's brief fails to comply with various Illinois Supreme Court rules, including the failure to properly cite to case law, to provide a copy of the motion to reconsider from which he appeals, and to identify the standard of review for this motion. See Ill. Sup. Ct. Rules 6, 341, 342 (eff. Feb. 6, 2013). Plaintiff is correct that our "rules of procedure are rules and not merely suggestions," that our mandates detailing the format and content of appellate briefs are compulsory, and that the result of failing to abide by them may be the dismissal of the appeal. *Ryan v. Katz*, 234 Ill. App. 3d 536, 537 (1992); accord *Voris v. Voris*, 2011 IL App (1st) 103814, ¶ 8; see *Oruta v. B.E.W. and Continental*, 2016 IL App (1st) 152735, ¶ 30. Admittedly, defendant's brief is technically not in complete compliance with formatting rules. However, his shortcomings are mainly minimal. Therefore, we choose, in our discretion, to review his claims. See *In re Estate of Jackson*, 354 Ill. App. 3d 616, 620 (2004) (reviewing court has choice to review merits, even in light of formulaic mistakes on litigant's part in his brief on appeal).

¶ 10 As to the second threshold matter, the parties disagree over the appropriate standard of review. With respect to the denial of his motion to vacate, defendant insists that review must proceed *de novo* because the trial court issued its ruling "*sua sponte*" and because it found that his motion and affidavit failed to comply with section 2-1401 of the Illinois Code of Civil Procedure (735 ILCS 5/2-1401) (West 2014)), a finding he claims presents a purely legal question. With respect to the denial of his motion to reconsider, defendant initially does not

present any standard of review in his opening brief; in his reply, he agrees it is generally an abuse of discretion standard when such motion is based upon newly discovered evidence, but he claims his cause should be reviewed *de novo* because his motion attacked the trial court's application of existing law. Then, he asserts he should prevail on his claims regardless of which standard applies.

¶ 11 A motion to vacate under section 2-1401 provides the procedure by which orders entered in a cause, having become final after 30 days from their entry, may nonetheless be vacated. See 735 ILCS 5/2-1401 (West 2014). The purpose of a section 2-1401 petition is to bring facts to the attention of the trial court which, if known at the time the court entered the order, would have prevented the order's entry. See *In re Marriage of Gorman*, 284 Ill. App. 3d 171, 182 (1996). To obtain this relief, the petitioner must set forth in his section 2-1401 petition specific factual allegations concerning: (1) the existence of a meritorious claim, (2) due diligence in presenting this claim to the trial court in the original action, and (3) due diligence in filing the petition for relief. See *S.C. Vaughan Oil Co. v. Caldwell, Troutt & Alexander*, 181 Ill. 2d 489, 496 (1998); *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 220-21 (1986). The petitioner must demonstrate each of these three elements by a preponderance of the evidence. See *Smith*, 114 Ill. 2d at 221. Ultimately, whether a section 2-1401 petition is granted and a final order vacated lies within the sound discretion of the trial court and will not be disturbed unless it is apparent that the court abused its discretion. See *Smith*, 114 Ill. 2d at 221.

¶ 12 Defendant cites *People v. Vincent*, 226 Ill. 2d 1, 18 (2007), in support of *de novo* review of his motion to vacate. However, that case involved a purely legal matter–a challenge to the

validity of a prison sentence of five consecutive life terms as a matter of law. See *Vincent*, 226 Ill. 2d at 17-18. In contrast, defendant's motion to vacate was not premised on a matter of law. Instead, as the record shows, he was asserting facts in an effort to dispute the trial court's original holding and show instead that he met the requirements of section 2-1401, namely, that he had a meritorious defense, he was diligent in asserting his defense, and he was diligent in filing his motion. Additionally, and again contrary to his insistence, the trial court did not act "*sua sponte*" here. Rather, its denial was in direct response to his actual petition; the trial court considered his motion to vacate and denied it. Clearly, defendant's motion to vacate presented a traditional fact-dependent challenge to a final judgment, thus invoking the abuse of discretion standard of review. See *Warren County Soil Conservation District v. Walters*, 2015 IL 117783, ¶ 52 (declining to abandon this standard in favor of *de novo* review where the latter is not applicable because the petition is based on facts and does not raise a legal question).

¶ 13 Similarly, with respect to his motion to reconsider, defendant insists *de novo*, rather than abuse of discretion, review is required here because his motion was "based upon the court's application of existing law," a question of law, and not on an assertion of newly discovered evidence, a question of fact. Yet, the purpose of a motion to reconsider is to bring to the trial court's attention newly discovered evidence, changes in the law or errors in the court's previous application of the law. See *Peregrine Financial Group, Inc. v. TradeMaven, L.L.C.*, 391 Ill. App. 3d 309, 320 (2009). Under any of these avenues, the applicable standard of review is abuse of discretion. See *Peregrine*, 391 Ill. App. 3d at 320 (decision to grant or deny motion to reconsider lies within sound discretion of trial court). Moreover, as the record reflects, his

motion to reconsider asserted new facts not contained in his motion to vacate, as well as an affidavit from a witness that had also not been presented in his original motion to vacate, all attempting to demonstrate, again, that he had a meritorious defense to plaintiff's action and that he was otherwise diligent in raising it and filing his motion to vacate. These are factual determinations invoking the abuse of discretion standard of review, and not, as he asserts, a claim of an error in the court's application of existing law.

¶ 14 Having established that the appropriate standard of review for defendant's claims on appeal is abuse of discretion, we now turn to the merits. Based upon our review of the record, we find that the trial court did not abuse its discretion in denying defendant's motion to vacate or in denying his motion to reconsider.

¶ 15 We have already discussed that, to prevail on a section 2-1401 motion to vacate, a petitioner must prove, by a preponderance of the evidence, essentially that he has a meritorious defense to the underlying action and that he exercised due diligence in presenting his claim to the court and in filing for this relief. See *S.C. Vaughan Oil Co.*, 181 Ill. 2d at 496; *Smith*, 114 Ill. 2d at 222. Due diligence requires that the petitioner have a "reasonable excuse for failing to act within the appropriate time." *Smith*, 114 Ill. 2d at 222. In other words, he must show that, through no fault or negligence of his own, his viable defense was not presented to the trial court. See *Smith*, 114 Ill. 2d at 222 (petitioner cannot obtain this relief as consequence of own mistake or negligence; he must show his failure to defend against the original claim was due to excusable mistake and he otherwise acted reasonably when he failed to defend that suit). In examining the reasonableness of the petitioner's excuse, we look to all the circumstances presented. See *Smith*,

114 Ill. 2d at 222.

¶ 16 In the instant cause, defendant does not meet the elements of section 2-1401. First, he does not present a meritorious defense to the original lawsuit filed by plaintiff against him asserting breach of contract, *quantum meruit*, unjust enrichment and fraud. In his motion to vacate, he did not present the trial court with any specific information as to his defenses to those claims. Instead, he stated only that he did not breach the deal struck between the parties, and then he asserted that "he will show" it was plaintiff who breached the contract, causing him damages. In his affidavit attached to his motion, he claimed he had "witnesses" to support these allegations and dispute those of plaintiff, but he did not name these witnesses nor did he provide affidavits from them. This is simply not enough for defendant to prove, by a preponderance of the evidence, that he had a meritorious defense to plaintiff's lawsuit. See *CitiMortgage, Inc. v. San Juan*, 2012 IL App (1st) 110626, ¶ 21 (to establish meritorious defense, petitioner must allege facts that would have prevented entry of judgment, had the facts been known by the trial court).

¶ 17 Even if defendant's claims could be said to amount to a meritorious defense, which they do not, he still does not meet the diligence requirements of section 2-1401. He stated in his motion and affidavit that he did not appear in the underlying cause because he "had no knowledge of the case" as he was not living in Chicago at the time and otherwise had health problems that rendered him "unable to attend to his usual business affairs" when that suit was filed. However, he provides no factual support for these claims. For example, he has never disputed that he was served with plaintiff's November 2015 lawsuit on January 26, 2016,

following the special order of court. Nor has he ever denied that he resided at that time at the West 46th Place address where plaintiff posted the complaint and summons and sent these via certified, return receipt and standard mail as the trial court ordered, nor that he was affiliated with the West Armitage address of his business or even the South Hoyne residential address, where plaintiff also sent the complaint and summons by standard mail as the trial court ordered. Defendant fails to explain at all why he was not receiving his mail from these address between November 2015 when the suit was filed and May 2016 when he finally appeared on his motion to vacate, other than to say he was "not living in Chicago."

¶ 18 Moreover, his claim of health problems, even presumably valid, does little to support his assertion of diligence in defending against plaintiff's suit. This is because they are remote in time to the suit. For example, he states that he "suffered a severe heart attack" and had surgery, and that he had "spine and/or neck surgery," as well as "intermittent problems relating to kidney stones" and "was on numerous medications during this time period." However, he admits in both his motion and affidavit that his heart surgery took place in 2014, his spine/neck surgery took place in 2011 and his other "intermittent" problems required a hospital stay in April 2016. Plaintiff filed its suit in November 2015–one year after defendant's heart problems, four years after his spinal issues, and five month before he was in the hospital. Additionally, defendant does not describe when he had kidney problems or how his medications affected his ability to appear and defend the lawsuit against him. Defendant's claims hardly constitute a reasonable excuse for failing to act within an appropriate time, and critically do not show, by a preponderance of the evidence, that he acted reasonably and was not negligent in defending the

underlying cause against him.

¶ 19 We would also note that defendant has failed to provide us with a complete record on appeal. No transcript of the proceedings was filed with this court, nor was a bystanders report. Because we are unaware of what was said before the trial court, we must presume that its denial of defendant's section 2-1401 motion was in conformity with the law and properly supported by the evidence. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 393 (1984).

¶ 20 Ultimately, the trial court wrote in its order denying defendant's motion to vacate that his "affidavit and motion fail to comply with 735 ILCS 5/2-1401." Defendant has provided us with nothing to indicate that this was improper. From our review of the limited record, it is clear that he did not have a meritorious defense to the lawsuit pending against him and, even if he did, he was not duly diligent in asserting that defense. Therefore, we find that the trial court's denial of defendant's motion to vacate was not an abuse of discretion.

¶ 21 The same is true with respect to defendant's motion to reconsider. Defendant filed this following the denial of his motion to vacate, asserting facts he did not allege and attaching affidavits from witnesses he did not present in his motion to vacate. These facts included, for example, details on the agreements between the parties such as dates of meetings, names of people with whom he had discussions, and amounts of monies that were exchanged; his views of what occurred; and the procedural posture of the lawsuit. He then attached his own affidavit, different than the one attached to his motion to vacate and elaborating on all these details, as well as the affidavit of William Lynch, one of his employees/business partners, which echoed his new affidavit.

¶ 22 When a movant's motion for reconsideration is, as here, based on newly discovered evidence, he must provide a reasonable explanation as to why the evidence he now presents was not available at the time of the original hearing. See *Simmons v. Reichardt*, 406 Ill. App. 3d 317, 324 (2010), citing *Stringer v. Packaging Corp. of America*, 351 Ill. App. 3d 1135, 1140 (2004) ("[t]o present newly discovered evidence, a party must show that the newly discovered evidence existed before the initial hearing but had not yet been discovered or was otherwise unobtainable"), citing *Gardner v. Navistar International Transportation Corp.*, 213 Ill. App. 3d 242, 248-49 (1991) (litigant cannot "stand mute, lose motion, and then frantically gather evidentiary material" to show court erred in its ruling). Nowhere in his motion to reconsider did defendant explain why he did not present in his motion to vacate the new facts he now alleged and the new affidavits he now attached to his motion to reconsider. After reading these, it is clear to us that this information most certainly was available at the time the trial court heard his motion to vacate. And, again, defendant provides no transcript of the hearing on his motion to reconsider. See *Foutch*, 99 Ill. 2d at 393 (without transcript of proceedings or bystanders report, reviewing court must presume trial court's ruling was in conformity with the law). From our review of the limited record before us, we find that defendant's facts and affidavits can hardly be considered newly discovered evidence that would justify the grant of his motion to reconsider. Therefore, we find no abuse of discretion in the trial court's denial of this motion.

¶ 23 CONCLUSION

¶ 24 For all the foregoing reasons, we affirm the judgment of the trial court.

¶ 25 Affirmed.