FOURTH DIVISION
March 15, 2018

No. 1-16-1935

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

SHANDRA OUTLAW,	)	Appeal from the
	)	Circuit Court of
	)	Cook County
Plaintiff-Appellee,	)	
	)	
v.	)	No. 16 M1 700705
	)	
JAMES BROWN,	)	Honorable
	)	Diana Rosario
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ELLIS delivered the judgment of the court.
Presiding Justice Burke and Justice McBride concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court's judgment reversed and cause remanded. In forcible entry and detainer action, trial court abused its discretion in denying defendant's timely motion to vacate agreed order for possession and money damages under section 2-1301(e). In light of uncontradicted testimony of defendant that plaintiff's counsel misled him about contents of agreed order and that defendant refused timely payment of rent, existence of meritorious defenses to action, and in light of the hardship placed on defendant if agreed order were to stand, substantial justice dictated that agreed order be vacated.

¶ 2 In this forcible entry and detainer action, defendant, James Brown, moved under section 2-1301 of the Code of Civil Procedure (735 ILCS 5/2-1301 (West 2014)) to vacate an agreed order for possession and money damages on several grounds. For reasons we explain below, we hold that the circuit court abused its discretion in denying defendant's timely motion to vacate

the agreed order. We reverse the trial court's judgment and remand this cause for further proceedings.

¶ 3 I. BACKGROUND

¶ 4 A. Forcible Entry and Detainer Complaint

¶ 5 On January 13, 2016, plaintiff, Shandra Outlaw, filed a forcible entry and detainer action against defendant, James Brown. According to the complaint, plaintiff and defendant entered into a 12-month Chicago Apartment Lease on July 25, 2013. Plaintiff attached a copy of the lease agreement to the complaint. The agreement states, in pertinent part, that "[i]f the tenant fails to pay rent, the landlord, after giving 5 days written notice to the tenant, may terminate the lease."

¶ 6 Plaintiff alleged that defendant had breached the agreement by failing to pay rent for October, November and (by the time the complaint was filed and served) December, 2015. Plaintiff further alleged that she had "posted and mailed" a copy of a "5 Day Notice" (five-day notice) for non-payment of rent for October and November. Plaintiff attached a copy of the five-day notice to the complaint; it listed the sum due as $3,955. The attached sworn proof of service stated that plaintiff served the five-day notice on December 19, 2015, "by delivering a copy to" defendant.

¶ 7 Plaintiff requested possession of the occupied property and alleged that defendant was obligated to pay monthly rent of $1,200. Plaintiff sought $3,955 for rent due, plus late fees and costs.

¶ 8 B. February 23, 2016 Agreed Order

¶ 9 On February 23, 2016, defendant appeared *pro se*. The trial court entered an Agreed Order, signed by defendant, granting possession to plaintiff, as well as a monetary judgment of $6,000 for rent owed plus $553.99 for costs. The enforcement was stayed until March 30, 2016.

¶ 10 C. Motion to Vacate Agreed Order

¶ 11 On March 18, 2016, defendant, now represented by counsel, filed a "Motion to Quash [Service] and Vacate Order Entered February 23, 2016" (motion to vacate). The motion to vacate was timely filed pursuant to section 2-1301(e) of the Code of Civil Procedure. 735 ILCS 5/2-1301(e) (West 2014).

¶ 12 Defendant raised several arguments in his motion. In a nutshell, defendant argued that the Agreed Order should be vacated because:

- Defendant, who was appearing *pro se*, did not know he was giving up possession of the property when he signed the Agreed Order, because in discussions before presenting the Order to the court, plaintiff's counsel told him he could stay in the house if he simply paid the "past due" amount of rent by the end of March (about 5 weeks after the date of the Agreed Order), and plaintiff's counsel told him that plaintiff did not want him to move out;
- The amount plaintiff claimed was due was invalid for several reasons:
    - It failed to distinguish between rent payments owed by defendant versus moneys owed by the Chicago Housing Authority (CHA), as the lease operated under the CHA's Housing Choice Voucher Program, and plaintiff was demanding the payment of all rent from defendant, not merely defendant's share;
    - For several months, plaintiff had illegally and invalidly charged "late fees" against defendant, in violation of the language of the lease and in violation of the

Chicago Residential Landlord and Tenant Ordinance (RLTO), which were included in the rent claimed due by plaintiff in the lawsuit;

- Those legal errors aside, plaintiff's calculations of rent due were mathematically incorrect in any event;
- From October through December, 2015 (the time period that plaintiff claimed defendant failed to pay rent), defendant had offered, but plaintiff had refused to accept, rent payments from defendant that covered the base rent but did not include these late-fee charges;
- If the erroneous late fees previously paid by defendant were properly credited to defendant's payments, defendant either owed no additional money to plaintiff or, in fact, was owed money from plaintiff; and

- The Five-Day notice plaintiff attached to the complaint was never personally served on defendant, and in any event, the notice violated federal regulations governing evictions from subsidized housing.

¶ 13 The motion to vacate was supported by defendant's attached affidavit in which he stated, in relevant part, as follows:

"1. I have lived in the single family home located at 105 W. 113th Place, Chicago, Illinois (the 'Property') from on or about August 1, 2013 through the present.

* * *

4. During the entire time that I've lived in the Property, my rent has been partially subsidized through the Chicago Housing Authority's Housing Choice Voucher Program.

* * *

8. Beginning October 1, 2015, the contract rent for the Property increased to $1,200 per month.

9. Beginning October 1, 2015, and continuing through February 2016, the share of the rent that I was responsible to pay each month was $1,070.00 and the [Chicago Housing Authority (CHA)] was responsible to pay $130.00 each month. ***

10. Beginning March 1, 2016 and continuing through the present, the share of the rent that I was responsible to pay each month was $954.00 and the CHA was responsible to pay $246.00 each month.

11. For each month that I've lived in the Property, except for the month of September 2014, my landlord, Shandra Outlaw (the "Landlord") has charged me a late fee. Those late fees have ranged from $40 to $390 per month.

* * *

13. On or about October 12, 2015, my Landlord sent me a text message demanding that I pay a late fee of $165.00.

14. On or about October 14, 2015, I called my Landlord and told her that I had my rent in the amount of $1,070.00, but I didn't have the money to pay the late fee. My Landlord told me she would not accept my rent payment unless it included the full late fee.

15. On October 16, 2015, my Landlord gave me a 5 Day Notice demanding $1,070.00 in rent plus $205.00 in late fees. ***

16. On October 25, 2015, my Landlord sent me a text message demanding that I pay a late fee of $255.00. ***

17. On November 6, 2015, my Landlord gave me a "3 Day Pay or Quit Notice" demanding rent in the amount of $1,070.00 for October 2015 rent, $1,070.00 for November 2015 rent, plus $360.00 in late fees. ***

18. I never received the 5 Day Notice dated December 19, 2015 attached to my Landlord's Complaint. ***

* * *

20. On or about February 12, 2016, I spoke on the telephone with my Landlord's attorney, Terica Ketchum. She told me that if I paid $3,000.00 by February 19, 2016 plus an additional $1,000.00 per month, in addition to my regular rent payment, until the remaining $3,000.00 that my Landlord claimed that I owed was paid, that I could stay in the Property.

21. Sometime after February 12, 2016, but before the Court date of February 23, 2016, I called Ms. Ketchum to tell her that I didn't have the $3,000.00. Ms. Ketchum told me to bring the money to Court with me.

22. On February 23, 2016, in the hallway outside the Courtroom, I had a conversation with Ms. Ketchum. She told me that my Landlord doesn't want me to move. Ms. Ketchum also told me that if I paid the $3,000.00 before the end of March 2016, I could sit down with my Landlord and make a new agreement to pay the rest of the $$6,000.00 that my Landlord claimed that I owed, and then I could stay in the Property. Ms. Ketchum told me to make sure that I got the agreement with my Landlord in writing.

23. I understood my conversation with Ms. Ketchum to mean that if I paid the $6,000.00 that my Landlord claimed that I owed by March 30, 2016, the eviction lawsuit would be dismissed, and I wouldn't have to move.

24. I never understood from any of my conversations with Ms. Ketchum that an order of possession was being entered against me.

25. I was not represented by a lawyer when I was in Court on February 23, 2016. I did not understand that I could request a continuance to get a lawyer to represent me.

26. I did not understand that the Order being entered by the Court required me to vacate the Property. I thought I was agreeing to pay the amount my Landlord claimed that I owed and that I would be allowed to remain in the Property.

27. For each month that I've lived in the Property, including March 2016, CHA has paid the Landlord its share of the contract rent.

28. For each month that I've lived in the Property, through September 2015, I paid the Landlord my share of the contract rent.

29. The Landlord has refused to accept my rent for the Property for October 2015 through the present."

Defendant attached several exhibits to his affidavit including copies of the notices, a summary of the late charges, and copies of the text messages from plaintiff.

¶ 14 The motion to vacate was served on plaintiff by mail on March 18, 2016, and scheduled for hearing on April 12, 2016.

¶ 15 D. April 12, 2016 Hearing

¶ 16 On April 12, 2016, plaintiff's counsel requested that the motion to vacate be stricken and dismissed, because no appearance had been filed by defendant's counsel. When defendant's counsel told the court he would file an appearance that day, the court said, "No." The court also refused to allow counsel to file his appearance *instanter*. Defendant's counsel then requested leave to file an appearance, which the court did not allow. Concerned about the 30-day time limit

for the motion, defendant's counsel asked to be allowed to go downstairs to file an appearance "right this minute, and then run right back up." Defendant's counsel also requested "leave to refile the motion within 24 hours of our filing an appearance, which we will file today." These requests were also denied. Finally, defense counsel noted that defendant was present and that defendant "would like to be allowed to argue his own case because the motion was filed within 30 days." The court responded: "Call the next case." A written order was entered granting plaintiff's oral motion to strike and dismiss, denying defendant's oral motion for leave to file an appearance, denying defendant's motion to vacate the February 23, 2016 order, and denying defendant's motion to stay the order of possession.

¶ 17 E. Defendant's Motion to Vacate or Reconsider

¶ 18 On April 18, 2016, defendant's counsel, who had now filed his appearance, filed a motion to vacate and/or reconsider the April 12, 2016 order striking the motion to vacate and requesting a hearing on the motion to vacate. Defendant argued that "[c]lear error in the application of the law to this case took place in the April 12, 2016 Order."

¶ 19 The motion was scheduled for hearing on April 27, 2016.

¶ 20 F. April 27, 2016 Hearing

¶ 21 At the hearing, defendant's counsel informed the court that plaintiff's counsel had no objection to vacating the April 12, 2016 order (which struck the motion to vacate the Agreed Order). Plaintiff's counsel additionally informed the court that the April 12, 2016 order stated that defendant's motion to vacate the February 23, 2016 order had been "denied," but should have stated it had been "stricken and dismissed." The court entered an order vacating the April 12, 2016 order, set a briefing schedule on defendant's motion to vacate the Agreed Order of February 23, 2016, and scheduled the motion for hearing.

¶ 22 G. Plaintiff's "Response"

¶ 23 On May 24, 2016, instead of filing her response to defendant's motion to vacate the Agreed Order, plaintiff filed a "Motion to Strike and Dismiss" defendant's motion to vacate, pursuant to sections 2-615, 2-619, and 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-615, 2-619, 2-1401 (West 2014)). In her response, plaintiff did not file a counteraffidavit or rebut, in any way, the factual allegations made by defendant in his affidavit and motion, namely that plaintiff's counsel had misled defendant about the terms of the Agreed Order; the defendant offered to pay rent, but defendant refused to accept it without (supposedly invalid) late fees included; that defendant was never served with proper notice; and that plaintiff's mathematical calculations of rent were grossly inflated. (See *supra*, ¶¶ 12-13.)

¶ 24 Nor did plaintiff address the legal arguments raised in defendant's motion to vacate, such as the five-day notice's noncompliance with federal law; plaintiff's improper inclusion of CHA-owed rent as rent alleged to be owed by defendant; or the invalidity and illegality of the late fees plaintiff demanded from plaintiff.

¶ 25 Instead, plaintiff first argued that defendant's motion to vacate the Agreed Order should be "dismissed pursuant to 735 ILCS 5/2-615 because it fails to state a statute under which relief can be sought." Plaintiff also argued that the motion to vacate the Agreed Order was barred by *res judicata*, because defendant was attempting to relitigate the Agreed Order. Finally, plaintiff argued that, even though defendant moved to vacate the Agreed Order within 30 days of its entry, the motion to vacate was governed by section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2014)), and defendant had "fail[ed] to set forth specific allegations to support each of the elements" required under that provision.

¶ 26 H. Defendant's Reply

¶ 27 In his reply, defendant raised numerous arguments. Notably, defendant argued that plaintiff's response was "a thoroughly improper attempt to utilize inapplicable pleadings rules which clearly do not apply to motions—only to actual pleadings." Defendant also argued that plaintiff's claim that the standards of section 2-1401 applied to defendant's motion, rather than those of section 2-1301(e), was based on a misreading of the language of 2-1301(e), as well as a failure to cite relevant authority—namely, this court's decision in *Draper and Kramer, Inc. v. King*, 2014 IL App (1st) 132073 (holding that motion to vacate agreed order, made within 30 days of entry thereof, was governed by more lenient standards of section 2-1301, not more stringent standards of section 2-1401).

¶ 28 Defendant also argued that plaintiff's counsel had violated Illinois Supreme Court Disciplinary Rule 3.3(2) (eff. Jan. 1, 2010) which states that "[a] lawyer shall not knowingly *** fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." Defendant further claimed that plaintiff's counsel had violated Illinois Supreme Court Rule 137 (Ill. S. Ct. R. 137 (eff. July 1, 2013)) by failing to sign her motion.

¶ 29 I. June 22, 2016 Hearing

¶ 30 At the outset of the hearing on June 22, 2016, a different attorney appeared on behalf of plaintiff. That attorney orally moved to amend, on its face, plaintiff's motion to strike and dismiss defendant's motion to vacate and requested that it instead be considered an "objection" to defendant's original motion to vacate. The trial court denied the request to amend but nonetheless considered it as the response to defendant's motion to vacate.

¶ 31 The court heard argument from both sides on defendant's motion to vacate the February 23, 2016 order of possession. Defendant's argument was consistent with the arguments in his

motion to vacate and the factual statements in his affidavit, which we have already recounted above. Defendant further claimed that the lease had an inconsistency where, in the box entitled "late charge," the amount of $35 was inserted, but in a larger box entitled "Additional Agreements and Covenants," the plaintiff had typed: "Rent will be collected on the 1st Friday of each month. *Late fee or charges do not apply*." (Emphasis added.)

¶ 32 Defendant further noted that "[i]n response to all of this, the plaintiff ha[d] failed to provide any argument, facts, counter-affidavit or evidence whatsoever contesting the plaintiff's documentary evidence, law or affidavit." Defendant argued that it appeared that "plaintiff ha[d] conceded defendant's positions both in fact and in law in their entirety, raising only a meritless motion practice argument." Defendant contended that "[g]iven again that there was no counteraffidavit evidence or facts brought before the court in response ***, the facts are clear, and the law is clear, and the equities, most importantly in this case, are entirely clear that this order should be vacated."

¶ 33 Plaintiff argued that the five-day notice was valid and that it was notarized as an affidavit (and also asserted that there were, therefore, "competing affidavits"), that plaintiff failed to provide anything from the CHA regarding the federal regulation, and that the amounts defendant claimed he paid were "conflicting at best" with what plaintiff claimed was owed.

¶ 34 Plaintiff noted that defendant signed an agreed order. Plaintiff also contended that "to argue that [defendant] now is uneducated and doesn't understand how that process works, he seemed to be educated enough to understand how a convoluted CHA program works to get involved in it and to utilize it to his benefit and his family's benefit." Plaintiff claimed that a decision from the Second District of the Appellate Court, *In re Marriage of Rolseth*, 389 Ill. App. 3d 969 (2009), had not been rejected and remained good law for the proposition that the

more stringent requirements of section 2-1401 of the Code applied to a motion to vacate an agreed order, not the more lenient standards of section 2-1301.

¶ 35 Defendant, on the other hand, insisted that the *Rolseth* holding had been specifically rejected by the more recent decision of the First District Appellate Court in *Draper and Kramer*. See *Draper and Kramer*, 2014 IL App (1st) 132073, ¶ 25 ("[W]e respectfully decline to follow *Rolseth*. ***[W]e see no reason to impose the stricter section 2-1401 standard upon a movant who has filed a timely motion to vacate pursuant to section 2-1301 simply because the subject of the motion is an agreed order.").

¶ 36 After hearing arguments from both sides, the court took the matter under advisement.

¶ 37 J. Ruling on Defendant's Motion to Vacate

¶ 38 On July 7, 2016, the parties appeared for the court's ruling on the motion to vacate the Agreed Order. The court stated that, after reviewing the arguments and exhibits presented, the court "was going to deny the motion to quash and motion to vacate the [Agreed Order.]." Later, the following colloquy occurred between defendant's counsel and the Court:

COUNSEL: Your Honor, may we request the basis of the Court's ruling?

COURT: I'm just—that's my ruling.

COUNSEL: So the Court won't provide us with a basis?

COURT: No.

¶ 39 Defendant filed this timely appeal.

¶ 40 K. Stay

¶ 41 On August 22, 2016, the court granted defendant's motion to stay enforcement of the order of possession pending disposition of this appeal, conditioned on defendant's payment to

plaintiff of certain sums, including $477 per month for use and occupancy, and compliance of his remaining obligations of his tenancy pending disposition of this appeal.

¶ 42 II. ANALYSIS

¶ 43 A. Section 2-1301(e)

¶ 44 Whatever might have been said in the trial court, on appeal, plaintiff agrees with defendant that the motion to vacate the Agreed Order was governed by section 2-1301 of the Code of Civil Procedure. See 735 ILCS 5/2-1301 (West 2014); 735 ILCS 5/2-1401 (West 2014). That is the clear holding from *Draper and Kramer*, 2014 IL App (1st) 132073, ¶ 25, and consistent with the plain language of the section, which provides that "[t]he court may in its discretion, before final order or judgment, set aside any default, and may on motion filed within 30 days after entry thereof set aside *any* final order or judgment upon any terms and conditions that shall be reasonable." (Emphasis added.) 735 ILCS 5/2-1301(e) (West 2014). Though much of the case law construing section 2-1301 involves default judgments, section 2-1301 clearly applies to any final order, if the motion attacking the order is filed within 30 days of its entry—including a final agreed order. *Draper and Kramer*, 2014 IL App (1st) 132073, ¶ 25.

¶ 45 "It is well recognized that motions to vacate under section 2-1301 are routinely granted in order to achieve substantial justice." *Id*. Section 2-1301 "presents a much lower hurdle for the movant to overcome" than does section 2-1401, which governs motions attacking final judgments more than 30 days after their entry. *Id*. That stands to reason; it is "the movant's 'reward' for filing the motion in a more timely manner" (*id*.)—that is, within 30 days of the order's entry. Thus, while a section 2-1401 petition requires that the movant "affirmatively set forth specific factual allegations supporting each of the following elements: (1) a meritorious claim or defense; (2) due diligence in presenting the claim in the original action; and (3) due

diligence in filing" the petition (*id.* ¶ 24), a section 2-1301 petition "need not necessarily show the existence of a meritorious defense and a reasonable excuse for not having timely asserted such defense. [Citation.] Rather, the overriding consideration is simply whether or not substantial justice is being done between the litigants and whether it is reasonable, under the circumstances, to compel the other party to go to trial on the merits." *In re Haley D.*, 2011 IL 110886, ¶ 57; see also *Draper and Kramer*, 2014 IL App (1st) 132073, ¶ 23.

¶ 46 "Whether substantial justice is being achieved by vacating a judgment or order is not subject to precise definition, but relevant considerations include diligence or the lack thereof, the existence of a meritorious defense, the severity of the penalty resulting from the order or judgment, and the relative hardships on the parties from granting or denying vacatur." (Internal quotation marks omitted.) *Draper and Kramer*, 2014 IL App (1st) 132073, ¶ 23 (quoting *Jackson v. Bailey*, 384 Ill. App. 3d 546, 549 (2008)). So while the factors that are required for relief under section 2-1401 are not required under section 2-1301, they are certainly some of the factors we consider in determining whether "substantial justice" requires vacatur under section 2-1301. *Id.* ¶ 25; see also *John Isfan Construction., Inc. v. Longwood Towers, LLC*, 2016 IL App (1st) 143211, ¶ 51 (rejecting argument that lack of due diligence was sufficient grounds to deny motion to vacate because section 2-1301(e) movant is not required to show due diligence, and finding that, although court may take lack of due diligence into account, it did not outweigh injustice that would result from denying party its day in court).

¶ 47 We review the trial court's judgment for an abuse of discretion. *Id.* An abuse of discretion occurs when the circuit court " 'acts arbitrarily without the employment of conscientious judgment or if its decision exceeds the bounds of reason and ignores principles of

law such that substantial prejudice has resulted.' " *Draper and Kramer*, 2014 IL App (1st) 132073, ¶ 25 (quoting *Aurora Loan Services, LLC, v. Kmiecik*, 2013 IL App (1st) 121700, ¶ 26).

¶ 48 B. Analysis of Relevant Factors

¶ 49 As he did in the trial court, defendant relies on this court's decision in *Draper and Kramer*, 2014 IL App (1st) 132073, which also involved a forcible entry and detainer action for possession against a section 8 tenant for nonpayment of rent. *Id*. ¶ 1. There, as here, the defendant had appeared in court without an attorney, the court entered an agreed order granting possession and a money judgment, and the defendant signed the order. *Id*. ¶ 2. Within 30 days of the entry of the agreed order, the defendant's attorney filed a motion to vacate under section 2-1301. *Id*. ¶ 3. The defendant attached an affidavit in support of her motion. *Id*. ¶ 4.

¶ 50 The defendant argued that the agreed order should be vacated because "she did not know that she was agreeing to pay the amount due and also surrender possession of the apartment; she believed she was agreeing to pay the amount demanded and remain in the apartment." *Id*. ¶ 3. She also argued that the order should be vacated "because of the gross disparity in the parties' capacities and bargaining positions as defendant was not represented by counsel, was unsophisticated and unfamiliar with the law and courtroom procedures, the order was unreasonably favorable to plaintiff, and she had a meritorious defense to the eviction action." *Id*.

¶ 51 After explaining that section 2-1301, and not section 2-1401, applied to the motion to vacate, the court in *Draper and Kramer* proceeded to determine whether substantial justice would be achieved by vacating the order. *Id*. ¶¶ 23-25. The court began its analysis with the defendant's argument that that the agreed order should be vacated because there was no meeting of the minds. *Id*. ¶ 27.

¶ 52 The court in *Draper & Kramer* concluded that "the defendant reasonably believed, based on the evidence presented at the hearing on her motion to vacate the agreed order, that she was agreeing to pay the amounts demanded while retaining possession of the apartment." *Id*. ¶ 31. The court also explained that, considering the defendant's testimony, the property manager's testimony, and the statements of plaintiff's attorney, it was "understandable that defendant was under the impression that she had agreed she could remain in the apartment by paying the amounts demanded." *Id*. ¶ 31.

¶ 53 On the question of diligence, the court noted that "defendant diligently attempted to timely challenge the order by obtaining counsel and filing the motion to vacate within 30 days." *Id*. ¶ 32. As to the relative hardships of the parties and the severity of the penalty if the agreed order were allowed to stand, the court considered the defendant's argument that "her federal housing subsidy [was] tied to the particular apartment and she would lose it if evicted, and eviction would have grave consequences for her." *Id*. ¶ 33. In contrast, "if the motion to vacate were granted, plaintiff would continue to receive rent at the applicable rate based on a percentage of defendant's income while proceeding to a trial on the merits in this case." *Id*. Finally, the court considered the fact that the defendant had two viable defenses to the eviction action, namely, that she did not owe the amounts claimed in the notice, and that the five-day notice was defective because it had not been delivered to her personally. *Id*. ¶ 35.

¶ 54 The facts of this case are nearly identical to those in *Draper and Kramer*. Here, we likewise find that defendant demonstrated that he reasonably believed that he could remain in the property if he assented to the Agreed Order, based on defendant's conversation with plaintiff's counsel before entering the order.

¶ 55 Whereas there was competing testimony on this question in *Draper and Kramer*, and here there was only defendant's unrebutted affidavit, that distinction only favors defendant; plaintiff never challenged that testimony, though she could have done so via counteraffidavit, a request for an evidentiary hearing, or a motion to strike that affidavit. When a movant comes forward with material facts by affidavit, and the opposing party neither denies them via counteraffidavit nor attacks the sufficiency of the affidavit via a motion to strike, the facts contained in that affidavit should be taken as true. See, *e.g.*, *Barrett v. FA Group, LLC*, 2017 IL App (1st) 170168, ¶ 32; *Fooden v. Board of Governors of State Colleges & Universities*, 48 Ill. 2d 580, 587 (1971) ("the sufficiency of an affidavit cannot be tested for the first time on appeal where no objection was made either by motion to strike, or otherwise, in the trial court."); *Stone v. McCarthy*, 206 Ill. App. 3d 893, 899-900 (1990) (affidavit's sufficiency must be tested in trial court by "a motion to strike it, or by a motion to strike the [dispositive] motion" that "set[s] forth objections to the affidavit.").

¶ 56 In our case, a contested evidentiary hearing was never held or requested, and absent a counteraffidavit from plaintiff (or a motion to strike defendant's affidavit), the factual allegations in defendant's affidavit stand uncontradicted in the trial court. So the uncontradicted facts are that defendant, acting *pro se*, was misled by plaintiff's counsel into believing that he could remain in the property as long as he complied with the payment plan contained in the Agreed Order.

¶ 57 "[A]n agreed order is considered to be a contract between the parties." *Draper & Kramer*, 2014 IL App (1st), ¶ 27; see also *Elliott v. LRSL Enterprises, Inc.*, 226 Ill. App. 3d 724, 728 (1992)). Thus, "its construction is governed by principles of contract law." (Internal quotation marks omitted.) *Id*. (quoting *Elliott*, 226 Ill. App. 3d at 728-29). Also, "[s]ettlement agreements

are binding only if there is an offer, an acceptance, and a meeting of the minds as to the terms of the agreement." *Draper and Kramer*, 2014 IL App (1st) 132073, ¶ 28. A meeting of the minds exists if the parties "truly assent to the same things in the same sense on all of [the agreement's] essential terms and conditions." *LaSalle National Bank v. International Ltd*., 129 Ill. App. 2d 381, 394 (1970).

¶ 58 In light of defendant's uncontradicted testimony via affidavit, we reach the same result as in *Draper and Kramer* and find that defendant came forward with sufficient evidence to demonstrate that the parties did not agree on all essential terms and conditions of the Agreed Order. We further find that the additional considerations relevant to a section 2-1301 claim also support defendant's position.

¶ 59 For one, defendant certainly showed diligence in seeking to vacate the Agreed Order. Less than a month after its entry, defendant moved to vacate it, and when that initial motion was stricken when the court denied counsel leave to file his appearance *instanter*, within six days defendant re-filed the motion to vacate with an appearance by counsel.

¶ 60 The relative hardship to the parties likewise favors defendant's position. As we noted in *Draper and Kramer*, 2014 IL App (1st) 132073, ¶ 33, the loss of a housing voucher and a place to live is a heavy burden to bear compared to the landlord being forced to keep a tenant in housing and receiving rent from that tenant. (We recognize that the court later entered a stay order that set a use-and-occupancy rent, but that came well after the hearing on the motion to vacate.)

¶ 61 We also find that the motion to vacate, and the uncontradicted affidavit testimony, set forth arguably meritorious defenses to plaintiff's suit. For one, defendant noted plaintiff's typewritten language in the lease that late fees could not be charged, which contradicted other

contractual language that late rent was subject to a late fee. Second, contract language aside, defendant argued that late fees were illegal under state law in whole or in part, and that plaintiff had illegally charged those late fees for so long that, if credited against his alleged debt, defendant might not owe plaintiff a single dollar in unpaid rent and might even be owed money back.

¶ 62 Third, defendant argued that plaintiff was miscalculating fees in various ways, including charging defendant for the subsidized portion of the rent and in some cases committing flat-out mathematical errors that defendant detailed in his motion to vacate. Fourth, defendant swore in his affidavit that he offered the base rent—absent late fees—to plaintiff for each of the months that plaintiff claimed were unpaid, yet plaintiff refused to accept the base rent without the late fees. Fifth and finally, defendant challenged the validity of service of the five-day notice, swearing by affidavit that he never received it and claiming, in argument, that the notice failed to comply with federal regulations regarding the eviction of a subsidized-housing tenant.

¶ 63 We express no opinion on the validity of any of these defenses. That is for the trial court to determine. But given these arguably meritorious defenses, the diligence shown by defendant in seeking to vacate this order, the relative hardship to the parties, and the fact that defendant put forth uncontradicted evidence that he was affirmatively misled into agreeing to the Agreed Order, substantial justice dictates that the Agreed Order should be vacated.

¶ 64 In her appellate brief, plaintiff casts doubt on the sincerity of defendant's position, suggesting that defendant was going to lose his housing voucher, anyway, for an unrelated reason, and that he only objected to this Agreed Order after realizing he could not move his voucher from one property to another (one of a few claims plaintiff makes "on information and belief"). Plaintiff says that, now that defendant is paying less rent during the stay period, plaintiff

faces the specter of foreclosure. Plaintiff also complains that items such as the snow blower and lawn mower are missing from the garage. Plaintiff fears that fines are forthcoming from the city for building-code violations for defendant's failure to cut the grass and defendant's supposed operation of an auto repair shop from the garage.

¶ 65 Defendant moved to strike these portions of plaintiff's brief pursuant to Illinois Supreme Court Rule 342(a)(3) (Ill. S. Ct. R. 342(a)(3) (eff. Jan. 1, 2005)). Specifically, defendant moved to strike: (1) the documents attached to the brief as "exhibits" that were not part of the record; (2) the argumentative "Disputed Statements of Fact" section that referenced these non-record documents, and also contained several speculations, *i.e.*, statements made "on information and belief"; and (3) plaintiff's arguments that relied on the non-record documents and contained no support in the record or citation to authority.

¶ 66 "Attachments to briefs not included in the record are not properly before the reviewing court and cannot be used to supplement the record." *Koshinski v. Trame*, 2017 IL App (5th) 150398, ¶ 9 (quoting *Zimmer v. Melendez*, 222 Ill. App. 3d 390, 394-95 (1991)). Though defendant's arguments are well-taken, and we would be within our rights to grant defendant's motion, we have instead disregarded the noncompliant portions of plaintiff's brief. We will not strike them—the motion to strike is denied—but we will ignore the exhibits attached to plaintiff's brief that were not part of the record below, and we will disregard arguments and factual assertions based on information not contained in the record.

¶ 67 In sum, the trial court erred in denying the motion to vacate the Agreed Order. That order is reversed. The cause is remanded with instructions to vacate the Agreed Order and to set the matter for further proceedings.

¶ 68 C. Defendant's Request for New Judge On Remand

¶ 69 Defendant also requests that this court order that a different judge preside over further proceedings on remand. Defendant claims that the record contains a number of instances showing that the trial judge failed to appear interested in, or concerned about, the equities in this case. He claims also that the trial judge treated defendant's counsel and this case in a cavalier manner. In support of these contentions, defendant states that the trial judge: (1) dismissed the motion to vacate without a legal basis and instead on "something as ministerial as not filing a written appearance"; (2) "refus[ed] to ask a single substantive question of the parties"; (3) "refus[ed] to provide some basis for a ruling against a motion that appeared to be based on uncontradicted facts"; and (4) failed to assist defendant in obtaining a bystander's report from the February 23 hearing.

¶ 70 Supreme Court Rule 366(a)(5) permits a reviewing court to make any order or grant any relief that a case may require. Ill. S. Ct. R. 366(a)(5) (eff. Feb. 1, 1994). "This authority includes the power to reassign a matter to a new judge on remand." *Eychaner v. Gross*, 202 Ill. 2d 228, 279 (2002). Moreover, this court has granted such a request where, as here, the request is unopposed. See *People v. Tally*, 2014 IL App (5th) 120349, ¶ 45.

¶ 71 But defendant cites to no cases in support of his request for a new judge on remand. "A trial judge is presumed to be impartial, and the burden of overcoming this presumption rests on the party making the charge of prejudice." *Eychaner*, 202 Ill. 2d at 280. Moreover, "erroneous findings and rulings by the trial court are insufficient reasons to believe that the court has a personal bias for or against a litigant." *Id.*

¶ 72 Though we have found that the trial court abused its discretion in not granting defendant's motion to vacate the agreed order, we see no indication that the court will not fairly consider the issues on remand. Thus, we decline to reassign this matter to a different judge.

¶ 73 III. CONCLUSION

¶ 74 For the reasons stated, we reverse the judgment of the circuit court of Cook County and remand the matter for further proceedings consistent with this order.

¶ 75 Defendant's motion to strike denied.

¶ 76 Reversed and remanded with instructions.