2018 IL App (1st) 170689-U

No. 1-17-0689

Fourth Division
September 27, 2018

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

FRANKLIN A. COLE, as Trustee or Representative of the Franklin A. Cole IRA-PEN, Bank One N.A. Account No. 262093-1000, Plaintiff-Appellee, v. ALLISON S. DAVIS; GALLERY PARK PLACE, LLC; DAVIS GROUP V; DAVIS GROUP, LLC; ALL CHICAGO, LLC; NEW KENWOOD, LLC; and AMERICAN HOUSING, LLC, Defendants-Appellants.	Appeal from the Circuit Court of Cook County. No. 14 L 050986 The Honorable Brigid Mary McGrath, Judge Presiding.

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

ORDER

¶ 1 *Held:* The trial court's judgment reinstating a previously-vacated judgment is affirmed, where (1) the incompleteness of the record requires us to presume the trial court's judgment was in conformity with the law and had a sufficient factual basis and (2) the appellants' arguments fail even on the merits.

¶ 2 The instant appeal arises from defendants' alleged default on a promissory note issued by plaintiff, which contained a confession of judgment clause. After defendants' default, plaintiff filed a complaint for confession of judgment, and the trial court entered judgment in favor of plaintiff. Defendants sought to vacate the judgment, raising several arguments, including an argument that the confession of judgment clause was invalid because the note provided for a variable interest rate. The trial court vacated the judgment on the basis that the confession of judgment clause was invalid, and plaintiff filed an interlocutory appeal after the trial court agreed to certify the question concerning the clause's validity. On appeal, we answered the certified question and found the clause valid. *Cole v. Davis*, 2016 IL App (1st) 152716, ¶ 43. The trial court then found that the other bases for vacating the judgment had previously been ruled upon by a prior judge, and denied defendants' motion to vacate. Defendants now appeal, arguing that the trial court erred in denying their motion to vacate the judgment. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 As noted, this appeal is the second time the parties have been before this court with respect to this litigation. Accordingly, where relevant, we draw from our prior opinion for the background of the present dispute.

¶ 5 On December 24, 2014, plaintiff filed a verified complaint for confession of judgment on a promissory note that had been executed by defendants on November 17, 2000. A copy of the note, signed by defendants, was attached to the complaint; the note was for the principal amount of $100,000, and specified, in relevant part:

> "For value received, the Undersigned, and each of them, jointly and severally, promise to pay to the order of FRANKLIN A. COLE, IRA-PEN, BANK ONE N.A.

Account #262093-1000 ('Holder'), Chicago, Illinois, the principal sum of $100.000. The principal sum shall bear interest at the rate of the publicly announced prime rate of BANK ONE, N.A. (which is not intended to be its lowest or most favorable rate at any one time) in effect from time to time (the 'Prime Rate'), which rate of interest shall increase or decrease in a total amount equal to the amount by which the publicly announced Prime Rate of said bank is increased or decreased from time to time. Each change in the interest rate hereon shall take effect on the effective date of the change in the Prime Rate. Holder shall not be obligated to give notice of any change in the Prime Rate. The Prime Rate shall be computed on the basis of a year consisting of 360-days and shall be paid for the actual number of days elapsed from the date principal or part thereof is drawn down, the Undersigned shall give Holder 24 hours written notice of intention to draw on the principal sum. This note may be prepaid at any time without penalty. The Undersigned shall remit to Holder the outstanding principal sum and interest on December 15, 2000.

Any amount of the principal hereof which is not paid when due whether at stated maturity, by acceleration, or otherwise, shall bear interest payable on demand at an interest rate equal at all times to two per cent (2%) [being 200 basis points] above the applicable rate in effect on this note at such maturity. All payments hereunder shall be applied first to interest on the unpaid balance at the rate herein specified and then to principal."

¶ 6 The note also contained a "confession of judgment" clause which provided:

"The Undersigned and each of them irrevocably authorizes any attorney of any court of record to appear for it in term time or vacation, at any time and from time to

> time after payment is due hereof, whether by acceleration or otherwise, and confess judgment, without process, in favor of the holder hereof, for such sum as may appear to be due and unpaid thereon, together with interest, costs, and reasonable attorneys' fees, and to waive and release all errors which may intervene in such proceeding, and consents to immediate execution upon such judgment, hereby ratifying and confirming all that said attorney may do by virtue hereof."

¶ 7 The complaint alleged that the note was subsequently amended to extend the term. However, the complaint alleged that defendants failed to pay their debt under the note and defaulted on the note. Accordingly, the complaint sought a judgment in the sum of $93,000.03, with accrued interest in the amount of $59,859.02 through January 31, 2013.

¶ 8 Attached to the complaint was a confession of judgment, which provided:

> "[Defendants], by Robert P. Groszek, their attorney, waive service of process and confess that there is due from [defendants] to [plaintiff] the following:
>
> Principal $100,000.00 less amounts paid: $6,999.97
>
> Balance: $93,000.00
>
> Interest (to 5/5/14) $66,029.95
>
> Per Diem ($13.56 to 12/9/14 219 days[)]: $2,969.64
>
> Attorneys' Fee $500.00
>
> Total: $162,499.62"

The confession of judgment also provided that "[defendants] agree that judgment may be entered against them for the total of the above and for costs, release and waive all rights as

authorized in the warrant of attorney." The confession of judgment contains a signature from John P. Bergin, who is designated as the attorney for defendants.[1]

¶ 9 On January 7, 2015, the trial court entered judgment on behalf of plaintiff for $153,453.97.

¶ 10 On January 20, 2015, defendants filed an appearance and, on the same day, filed a motion to vacate and/or reopen the judgment. Defendants made six arguments for vacating or reopening the judgment: (1) that plaintiff did not post a bond as required by law; (2) that the power to confess judgment was invalid because the note contained a variable interest rate, which required the use of extrinsic evidence in order to determine the extent of defendants' liability; (3) that the complaint should be stricken because it was not signed; (4) that there was another action pending between the same parties for the same cause, because there had been a prior lawsuit that had been voluntarily dismissed but for which no costs had been paid, meaning that the prior action "should still be considered pending"; (5) that plaintiff had waived enforcement of the confession of judgment clause when he amended his complaint in the prior lawsuit to remove that cause of action; and (6) that plaintiff's authority to file the lawsuit on behalf of the holder of the note had not been established.

¶ 11 Attached to the motion to vacate were several exhibits. First, with respect to the prior lawsuit referenced by defendants, attached to the motion to vacate was a copy of a complaint filed on February 7, 2013, in case no. 13 L 050142. The plaintiff in that complaint was listed

[1] Neither of the two attorneys named in the confession of judgment appears to currently represent defendants in the instant litigation. The record does not indicate if or when defendants retained either attorney. However, defendants have never argued that the confession of judgment was executed by attorneys who did not actually represent them.

as "FRANKLIN A. COLE, IRA-PEN, BANK ONE N.A. ACCOUNT NO. 262093-1000,"[2] and the defendants were identical to the defendants in the instant litigation. The sole count of that complaint was for confession of judgment on the same promissory note at issue in the instant litigation. The only differences between the confession of judgment clause attached to that complaint and the one at issue in the instant litigation were the calculation of interest and the fact that the prior confession of judgment clause was signed by Robert P. Groszek, while the one in the instant litigation was signed by John P. Bergin.

¶ 12 Also attached to the motion to vacate was defendants' answer and affirmative defense to the prior complaint, which contained as an affirmative defense the same argument made in the instant litigation concerning the invalidity of the power to confess judgment due to the variable interest rate. Following the answer and affirmative defense, attached to the motion to vacate is an amended complaint in the prior lawsuit, which contains a single count for "Action on Promissory Note" and does not make reference to the confession of judgment clause.

¶ 13 Attached to the motion to vacate were also additional documents concerning the prior lawsuit. Specifically, defendants attached their response to a motion for summary judgment and their response to a motion "to clarify the designation of plaintiff" that had been filed in that case, and in both responses, defendants argued that the named plaintiff was a bank account and that "[a] bank account cannot bring a lawsuit." Accordingly, defendants requested that the complaint be dismissed.

[2] By comparison, the plaintiff in the instant litigation is "FRANKLIN A. COLE, AS TRUSTEE OR REPRESENTATIVE OF THE FRANKLIN A. COLE IRA-PEN, BANK ONE N.A. ACCOUNT NO. 262093-1000."

¶ 14 On February 18, 2015, plaintiff filed a response to defendants' motion to vacate. With respect to the prior lawsuit, plaintiff explained that the loan was made using funds from plaintiff's individual retirement account (IRA) and that case law was not clear whether an IRA could be a proper plaintiff. To avoid any confusion, when defendants challenged the designation of the account as a plaintiff, the prior lawsuit was voluntarily dismissed and plaintiff filed the instant lawsuit with plaintiff filing suit as trustee or representative of the IRA. Plaintiff also argued that none of defendants' arguments provided a basis for vacating the judgment. In particular, plaintiff argued that the power to confess judgment was not invalidated by the note's variable interest rate; that the right to a judgment by confession had not been waived by the plaintiff's pursuing an alternative cause of action for breach of contract in the prior lawsuit; and that plaintiff had the authority to file the instant complaint.

¶ 15 On May 20, 2015, the trial court granted defendants' motion and reopened the January 7, 2015, judgment. The trial court's order provided, in full:

> "Cause coming on to be heard on motion to vacate or open judgment[,]
>
> It is ordered that the judgment entered 1-7-15 is opened based upon the fact that the note contains a variable interest rate requiring evidence de hors the record[.]
>
> This cause is transferred to presiding judge in 2005 for assignment to general commercial calendar."

¶ 16 On June 23, 2015, plaintiff filed a motion to certify a question of law under Illinois Supreme Court Rule 308 (eff. Jan. 1, 2015) concerning whether a confession of judgment containing a definite principal and variable interest rate can be valid. On September 25, 2015, the trial court certified the question, and we granted plaintiff's petition for leave to appeal. On appeal, we answered the certified question in the affirmative, finding that a note

containing a confession of judgment clause is valid where the note contains a definite principal sum but a variable interest rate. *Cole v. Davis*, 2016 IL App (1st) 152716.

¶ 17 On January 4, 2017, plaintiff filed a motion to advance the proceedings and reinstate the judgment for confession based on our opinion. On February 6, 2017, the trial court entered an order on plaintiff's motion, providing, in full:

> "This cause coming on to be heard on Plaintiff's motion for further proceedings to advance the case for status and for the reinstatement of judgment for ruling, and upon Defendants' objection to said motion[,] the court having requested and received all prior pleadings including Defendants' prior motion to vacate the confession judgment of January 7, 2015, Plaintiff's response thereto and Defendants' further reply, and upon due consideration of the same, the court finds that all prior substantive and procedural objections to oppose the motion to reinstate the judgment were heard and denied; it is ordered that judgment in favor of the Plaintiff previously entered on January 7, 2015 in the sum of one hundred fifty three thousand four hundred fifty three and 97/100 ($153,453.97) *** over Defendants' objection shall stand. This is a *final* order." (Emphasis in original.)

¶ 18 Defendants timely appealed, and this appeal follows.

¶ 19 ANALYSIS

¶ 20 On appeal, defendants argue that the trial court erred in finding that the arguments made in the motion to vacate had previously been considered and denied and ask that we remand so that the trial court may consider their arguments as to waiver and plaintiff's authority to bring the instant lawsuit, which they claim are meritorious. As an initial matter, although not discussed by the parties, we must determine what relief defendants were actually seeking in

their January 20, 2015, filing. While we have referred to the motion as a "motion to vacate" for the sake of brevity in our factual recitation, the full title of the motion filed was "Defendants' Motion to Vacate and/or Open Judgment by Confession Entered January 7, 2015." While, as a practical matter, they both lead to the same result in the instant case, a motion to vacate and a motion to open a judgment by confession are nevertheless two distinct filings, which lead to two distinct procedures that require two distinct analyses by the trial court.

¶ 21 Motions to vacate judgments are generally governed by section 2-1203 of the Code of Civil Procedure (Code), which provides that any party may file a motion to vacate a judgment in a nonjury case within 30 days of the entry of the judgment. 735 ILCS 5/2-1203(a) (West 2014). "The purpose of such a motion is to alert the trial court to errors it has committed and to afford it an opportunity to correct those errors." *Steiner v. Eckert*, 2013 IL App (2d) 121290, ¶ 16. The denial of a motion to vacate is reviewed for an abuse of discretion. *Steiner*, 2013 IL App (2d) 121290, ¶ 16. "In deciding whether the trial court abused its discretion in this context, the question is not whether we agree with the trial court, but whether the trial court acted arbitrarily without conscientious judgment, or, in view of all the circumstances, exceeded the bounds of reason and ignored recognized principles of law such that substantial prejudice resulted." *Steiner*, 2013 IL App (2d) 121290, ¶ 16.

¶ 22 By contrast, Illinois Supreme Court Rule 276 (eff. July 1, 1982), specifically concerns the opening of a judgment of confession and sets forth the required procedures for such a motion. Rule 276 provides, in relevant part:

> "A motion to open a judgment by confession shall be supported by affidavit in the manner provided by Rule 191 for summary judgments, and shall be accompanied by a

> verified answer which defendant proposes to file. If the motion and affidavit disclose a *prima facie* defense on the merits to the whole or a part of the plaintiff's claim, the court shall set the motion for hearing. The plaintiff may file counteraffidavits. If, at the hearing upon the motion, it appears that the defendant has a defense on the merits to the whole or a part of the plaintiff's claim and that he has been diligent in presenting his motion to open the judgment, the court shall sustain the motion either as to the whole of the judgment or as to any part thereof as to which a good defense has been shown, and the case shall thereafter proceed to trial upon the complaint, answer, and any further pleadings which are required or permitted." Ill. S. Ct. R. 276 (eff. July 1, 1982).

"[O]n a motion to open judgment by confession, the trial court is only to determine whether the defendant's motion and affidavits disclose a *prima facie* defense. [Citation.] No inquiry into the controverted facts of the case are to be conducted; rather, the court must accept as true the facts asserted by the defendant in his affidavits. [Citation.] The trial court may not try the merits of the case on the affidavits or counteraffidavits because such a procedure would encroach upon the right to trial by jury." *Kim v. Kim*, 247 Ill. App. 3d 910, 913-14 (1993). Such a motion is addressed to the sound legal discretion of the trial court and will not be disturbed on review absent an abuse of that discretion; "[h]owever, when a *prima facie* defense is raised, the trial court has no discretionary authority but must open the judgment and proceed to trial." *Kim*, 247 Ill. App. 3d at 914.

¶ 23 "Some courts have suggested that the procedure contained in Rule 276 should be followed whenever a defendant seeks relief from a judgment by confession." *Kankakee Concrete Products Corp. v. Mans*, 81 Ill. App. 3d 53, 55 (1980). However, other cases have

treated a motion to open a judgment by confession as distinct from a motion to vacate the judgment. See, *e.g.*, *Charles v. Gore*, 248 Ill. App. 3d 441, 450 (1993); *Gromer, Wittenstrom & Meyer, P.C. v. Strom*, 140 Ill. App. 3d 349, 352 (1986); *Kankakee Concrete Products Corp.*, 81 Ill. App. 3d at 55-56; *Brunswick v. Mandel*, 59 Ill. 2d 502, 504-05 (1975). "How the court treats the motion is dependent upon the defendant. If the defendant puts the motion, whatever its caption, as a motion to open under Rule 276, then the procedure of that rule governs. If the defendant intends the motion to be an actual motion to vacate, and presents it as such, then the provisions of the Civil Practice Act apply." *Kankakee Concrete Products Corp.*, 81 Ill. App. 3d at 55-56.

¶ 24 In the case at bar, while defendants styled their motion as a motion "to vacate and/or open judgment by confession," it is apparent that they were seeking to vacate the judgment. There is no affidavit or verified answer attached to the motion, nor does the motion address defendants' diligence in seeking to reopen the judgment. While such procedural irregularities may be overlooked in certain circumstances (see, *e.g.*, *Ritz v. Karstenson*, 39 Ill. App. 3d 877, 880 (1976); *Mangiamele v. Terrana*, 42 Ill. App. 3d 305, 307 (1976)), their absence indicates that defendants were not concerned with complying with the requirements of Rule 276, as would be the case were they seeking to open the judgment by confession under that rule. Furthermore, neither defendants nor the trial court ever referenced Rule 276 during the course of the proceedings below, and defendant does not do so on appeal, citing only law concerning motions to vacate. Additionally, while the trial court order that led to the first appeal noted that the judgment was "opened," the order was "based upon the fact that the note contains a variable interest rate requiring evidence de hors the record." In other words, the order was based on the trial court's determination that defendants' argument concerning

the validity of the confession of judgment clause was *successful*, not whether defendants had established the *existence* of a meritorious defense to the confession of judgment complaint, which is the question to be considered by the trial court at a hearing to reopen a judgment by confession under Rule 276. Consequently, we consider defendants' filing to be a motion to vacate and consider the trial court's analysis through that lens.[3]

¶ 25 As noted, the denial of a motion to vacate is reviewed for an abuse of discretion. *Steiner*, 2013 IL App (2d) 121290, ¶ 16. "In deciding whether the trial court abused its discretion in this context, the question is not whether we agree with the trial court, but whether the trial court acted arbitrarily without conscientious judgment, or, in view of all the circumstances, exceeded the bounds of reason and ignored recognized principles of law such that substantial prejudice resulted." *Steiner*, 2013 IL App (2d) 121290, ¶ 16.

¶ 26 In the case at bar, defendants' primary argument is that, after the first appeal, the trial court incorrectly reinstated the judgment after finding that "all prior substantive and procedural objections to oppose the motion to reinstate the judgment were heard and denied." Defendants argue that their arguments concerning waiver and plaintiff's authority had not been considered by the prior trial judge and ask that this case be remanded for the trial court to consider those arguments, which they claim are meritorious. First, we note that the trial court's order references "objections" to the motion to reinstate the judgment, but no such objections appear in the record on appeal—the record contains no written response to plaintiff's motion to reinstate the judgment, and there is no report of proceedings or bystander's report from the February 6, 2017, court date on which the trial court's order was

[3] We note that if the motion was a motion to reopen the judgment under Rule 276, we would be able to affirm the trial court's reinstatement of the judgment on the basis of defendants' complete noncompliance with the rule. See *Ray Dancer, Inc. v. DMC Corp.*, 230 Ill. App. 3d 40, 50 (1992) (we may affirm on any basis appearing in the record, whether or not the trial court relied on that basis or its reasoning was correct).

entered. On appeal, defendants contend that the trial court should not have reinstated the judgment because there remained unresolved several arguments from the underlying motion to vacate, but the record does not show whether defendants raised this as an issue before the trial court. It is well established that issues not raised in the trial court are forfeited and may not be raised for the first time on appeal. *Susman v. North Star Trust Co.*, 2015 IL App (1st) 142789, ¶ 41. Moreover, "an appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis." *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). In the case at bar, then, where it is unclear whether defendants raised this issue before the trial court, we must presume that the trial court's order was in conformity with the law.

¶ 27 Furthermore, even if defendants did, in fact, argue to the trial court that the judgment should not be reinstated because there remained several issues outstanding from the previously-filed motion to vacate, we would not find this as a basis for reversal. The trial court's May 20, 2015, order reopening the judgment stated only:

> "Cause coming on to be heard on motion to vacate or open judgment[,]
>
> It is ordered that the judgment entered 1-7-15 is opened based upon the fact that the note contains a variable interest rate requiring evidence de hors the record[.]
>
> This cause is transferred to presiding judge in 2005 for assignment to general commercial calendar."

Defendants assume from this order that the trial court granted its motion based on the presence of the variable interest rate and that the trial court declined to rule on the other

arguments made in the motion to vacate. While the first part of its analysis is certainly true—the court expressly stated that it was opening the judgment on that basis—the second does not necessarily follow. All of the issues raised in defendants' motion were fully briefed, and the matter came before the trial court for a hearing on May 20, 2015. Thus, the trial court had all of the issues raised by defendants before it at the time it entered its May 20 order. The fact that it found one issue meritorious does not mean that it declined to consider the other issues—once the court determined that it would grant the motion on one basis, it was unnecessary to issue findings on the other issues. The record does not contain a report of proceedings or bystander's report for the May 20, 2015, hearing, so we have no way of knowing whether the trial court explained its reasoning more fully to the parties in open court, as often occurs.

¶ 28 Compounding the issue, as noted, we also lack a report of proceedings or bystander's report from the February 6, 2017, court date at which the trial court found that the prior trial judge *had* considered the other arguments and denied them. Thus, we have no way of knowing what arguments the parties raised concerning the prior judge's consideration of those issues. We simply cannot do as defendants wish and cannot presume that the trial court's silence on the other issues in its May 20, 2015, order meant that it was declining to rule on them, as opposed to implicitly denying them, as the trial court found in its February 6, 2017, order. Accordingly, we cannot find that the trial court abused its discretion in reinstating the judgment.

¶ 29 Moreover, we may affirm the trial court's judgment on any basis appearing in the record, even if it was not the basis relied upon by the trial court. See *Ray Dancer, Inc.*, 230 Ill. App. 3d at 50. In the case at bar, neither of defendants' two remaining arguments would have

supported vacating the judgment of confession, even if considered on their merits. First, defendants argue that plaintiff waived his claim for confession of judgment by amending the complaint in the prior lawsuit. This argument is based on the fact that, in the prior lawsuit, the complaint was originally for confession of judgment, and then was amended to be for breach of contract before being voluntarily dismissed. We do not find this argument persuasive for several reasons. First, the plaintiff in the prior action was the IRA itself, while the plaintiff in the instant litigation is Franklin Cole as trustee or representative of the IRA. Thus, the parties are not identical—indeed, the entire point of dismissing the first lawsuit and filing the instant one was to substitute a more appropriate plaintiff. Defendants do not cite any authority supporting waiver in such a circumstance.

¶ 30 Additionally, even accepting defendants' position and treating the two lawsuits as connected, defendants point to no authority preventing a party from repleading a cause of action that had been omitted from an intermediary complaint. Defendants cite several cases for the proposition that if an amended complaint fails to adopt the allegations of a former complaint, those former allegations are deemed to be waived. See *Shaker & Associates, Inc. v. Medical Technologies Group, Ltd.*, 315 Ill. App. 3d 126, 133 (2000); *Happel v. Wal-Mart Stores, Inc.*, 316 Ill. App. 3d 621, 630 (2000). However, "[a]llegations in a former complaint not incorporated in the *final* amended complaint are deemed waived." (Emphasis added.) *Barnett v. Zion Park District*, 171 Ill. 2d 378, 384 (1996). Here, if the two lawsuits are interconnected, the instant complaint would be the "final" one and defendants have identified no bar to repleading the allegations from the initial complaint. The only way the prior lawsuit could have any effect on the instant lawsuit would be if there had been a final judgment on the merits, in which case *res judicata* could apply to bar the litigation of the confession of

judgment claim. However, the prior lawsuit was dismissed without prejudice, and "a dismissal 'without prejudice' signals that there was no final decision on the merits and that the plaintiff is not barred from refiling the action." *Richter v. Prairie Farms Dairy, Inc.*, 2016 IL 119518, ¶ 24. Accordingly, we do not find persuasive defendants' argument that the judgment should have been vacated because the confession of judgment claim had been waived.

¶ 31 Similarly, we find unpersuasive defendants' argument that plaintiff failed to allege sufficient facts to demonstrate plaintiff's authority to file the lawsuit. Defendants claim that the complaint does not set forth plaintiff's authority to file the lawsuit and further claim that plaintiff is not the holder of the note and therefore does not have the authority to confess judgment. However, plaintiff's complaint alleges that he is the holder and owner of the note, and the original note was in plaintiff's possession, as indicated in plaintiff's counsel's affidavit attached to the complaint; the record indicates that the original note was produced to the trial court. Plaintiff's deposition testimony from the prior lawsuit, attached to defendants' motion to vacate, also showed that the IRA was funded by plaintiff's funds, that plaintiff received distributions from the IRA, and that plaintiff had directed the bank serving as the IRA's custodian to pay the funds in the account to defendants. "An individual retirement account, or IRA, is a trust (or custodial account) created for the exclusive benefit of an individual or his or her beneficiaries." *In re Estate of Davis*, 225 Ill. App. 3d 998, 1006 (1992). Here, there is no dispute that the IRA was created for the exclusive benefit of plaintiff, and we cannot find that plaintiff failed to allege his authority to file the instant lawsuit. We also must note that, with this argument, defendants appear to want it both ways—they attacked the first complaint by claiming that the IRA could not be the plaintiff

and now, when the owner of the IRA files suit in his representative capacity, they argue that he has no authority to do so. We cannot find that this approach warranted vacating the judgment and accordingly, affirm the trial court's reinstatement of the judgment.

¶ 32 CONCLUSION

¶ 33 For the reasons set forth above, we find that the trial court did not abuse its discretion in reinstating the judgment against defendants.

¶ 34 Affirmed.