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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

STEPHEN MUGG and LISA METZGER-MUGG,)	Appeal from the Circuit Court of
)	Cook County, Law Division
Plaintiffs-Appellees,)	
)	
v.)	No. 16 L 400
)	
JOHN DICIURCIO and ASHLEY DICIURCIO,)	Honorable Margaret Ann Brennan,
)	Judge Presiding.
Defendants-Appellants.)	

JUSTICE GRIFFIN delivered the judgment of the court.
Justices Harris and Mikva concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court did not abuse its discretion when it found that defendants' petition for relief from a judgment entered against them was not filed diligently. The trial court, thus, did not err when it dismissed the petition.
- ¶ 2 Plaintiffs Stephen Mugg and Lisa Metzger-Mugg agreed to sell their house to defendants John DiCiurcio and Ashley DiCiurcio. When the time for the closing arrived, defendants were unable to pay for the house and plaintiffs filed suit. Defendants never answered the complaint, and the trial court entered a default judgment in favor of plaintiffs. Several months later, defendants filed a petition for relief from the judgment. The trial court dismissed the petition,

finding that defendants, among other failings, did not act diligently in pursuing their defenses. Defendants appeal the dismissal of their petition, and we affirm.

¶ 3 **BACKGROUND**

¶ 4 Plaintiffs Stephen Mugg and Lisa Metzger-Mugg entered into an agreement to sell their home at 1520 N. Paulina Street in Chicago to defendants John DiCiurcio and Ashley DiCiurcio for \$845,000. The sales agreement called for the buyer-defendants to deposit \$5,000 in initial earnest money upon executing the contract. The plaintiff-sellers were required to accept the contract by June 8, 2015. Under the agreement, the earnest money would increase to 5% of the purchase price within two days after the expiration of the attorney approval period. The closing date was set for June 26, 2015.

¶ 5 The parties gathered at the title company for the closing. They executed all of the closing documents. However, the money to cover the purchase price was never delivered to the closer and, ultimately, to plaintiffs.

¶ 6 On January 13, 2016, plaintiffs filed this case for breach of contract and fraud. They allege that they are entitled to \$55,740 as a result of defendants not fulfilling the payment obligations and completing the sale. An attorney appeared in the case on defendants' behalf. The parties worked to settle the case. Defendants' attorney, however, moved to withdraw from the case, and two days later, on April 20, 2016, the trial court granted defendants' attorney's motion to withdraw. At the same court appearance, explicitly citing defendants' failure to have filed an answer, the trial court granted plaintiffs' motion for an order of default, but ordered defendants to file an appearance on or before May 5, 2016. The trial court set the matter for a prove up, to be held on May 18, 2016.

¶ 7 Defendants filed a pro se appearance in the time allotted by the court. They were present in court at the prove up. Judgment was entered in favor of plaintiffs for \$55,740. No transcript of

the proceeding is in the record on appeal. Plaintiffs began collection proceedings in just over five weeks of the judgment being entered.

¶ 8 Defendants retained a new attorney about four months after the judgment was entered and filed a petition for relief from the judgment under section 2-1401 of the Illinois Code of Civil Procedure (735 ILCS 5/2-1401) (West 2016). As it turns out, plaintiffs did not accept the contract at issue in the time that the contract provided that they must. The contract seems to provide that plaintiffs' failure to accept the agreement on the date of execution could lead to the contract being deemed cancelled. Defendants argue that plaintiffs waived their rights under the earnest money provision by failing to timely accept the agreement.

¶ 9 Plaintiffs moved to dismiss the section 2-1401 petition. After briefing and a hearing, the trial court granted the motion to dismiss. The trial judge noted at the hearing that "[t]he reason a default judgment was entered that day and in that amount was because your clients were present and did not voice any opposition at all after being explained what was going on." The trial court specifically found that defendants were not diligent, and found that the defense asserted in the petition did not rise to the level of ever being proved. Defendants appeal.

¶ 10 ANALYSIS

¶ 11 Section 2-1401 of the Illinois Code of Civil Procedure authorizes a party to seek relief from a final judgment beyond the normal 30-day period for postjudgment motions. 735 ILCS 5/2-1401 (West 2016). The petition must be supported by an affidavit and there must be a showing that the petitioner has: (1) a meritorious claim or defense; (2) diligently presented the defense or claim to the trial court in the original action; and (3) diligently filed the section 2-1401 petition itself. *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 221 (1986). Although there are circumstances where different standards of review might be applied to the dismissal of a section

2-1401 petition, where the issue concerns the due diligence requirement, we will only reverse if the trial court abused its discretion. *Id.*

¶ 12 Before defendants' counsel even moved to withdraw from the representation, defendants were technically in default for failing to answer. The trial court entered an order of default at the same time that it allowed defendants' counsel to withdraw, and the order specifically advised defendants that a prove up on the default would be held 28 days from that time. Defendants filed a pro se appearance, choosing to represent themselves, but did nothing else. They did not try to vacate the default order, or ask for more time, or anything of the sort. Then, defendants appeared in person at the prove up and did nothing to object to its entry. No objection was made to the amounts plaintiffs averred they were owed, and defendants have not provided a transcript of those proceedings. No posttrial motions were filed. It was not until four months later that defendants did anything to attack the judgment.

¶ 13 In their brief on appeal, defendants go through each element that is required for relief under section 2-1401. However, because it is clear that the trial court did not abuse its discretion when it dismissed the petition after finding that defendants failed to exercise the required diligence for relief under section 2-1401, we will focus primarily on the second and third prongs.

¶ 14 The failure to file a timely answer to a complaint justifies the entry of a default judgment. *Wilkin Insulation Co. v. Holtz*, 186 Ill. App. 3d 151, 155-57. There is no dispute that defendants were in default when the trial court entered its order finding them to be in default. Defendants were given 28-days notice that a judgment would be entered, but defendants did nothing to resist it.

¶ 15 Due diligence requires the section 2-1401 petitioner to have a reasonable excuse for failing to act within the appropriate time. *Smith*, 114 Ill. 2d at 222. Specifically, "the petitioner

must show that his failure to defend against the lawsuit was the result of an excusable mistake and that under the circumstances he acted reasonably, and not negligently, when he failed to initially resist the judgment.” *Id.*

¶ 16 The only way that defendants try to argue that they were diligent is based on the disingenuous assertion that “[i]t was only when the appellants were not represented that appellants’ counsel obtained a default and a judgment by prove up.” That statement is inaccurate. The order of default was entered when defendants were still represented. Defendants were advised that the judgment would be entered at the next court appearance and they were given time to get an attorney. Defendants opted to represent themselves, filing a pro se appearance. Then, defendants “did not voice any opposition at all after being explained what was going on.” Defendants did not state that they failed to understand anything taking place, they did not ask for more time, and they did not state that they wanted to retain counsel. Defendants cannot explain what “excusable mistake” they made or how they “acted reasonably” when they simply altogether “failed to initially resist the judgment.”

¶ 17 Further, defendants then waited four months to do anything about the judgment that had been entered against them while they were present in open court. They apparently did not look into the possibility of filing a postjudgment motion or any other basis for relief from the judgment, at least they have not alleged that they did. Defendants delayed four months in seeking relief from the judgment even though plaintiffs had begun collection proceedings just five weeks after the judgment was entered. It was not until three months after collection proceedings began before defendants filed their first attempt at a section 2-1401 petition.

¶ 18 Parties are under a responsibility to follow their own lawsuit even if they are represented by counsel. *Illinois Marine Towing Corporation v. Black*, 74 Ill. App. 3d 909, 913 (1979). And

even where the defendants here attempt to shift the blame to their first attorney, litigants are not relieved of the consequences resulting from the mistakes or negligence of their attorney, and they are generally bound by the negligence of counsel that results in the entry of a default judgment. See *Ameritech Publishing of Illinois, Inc. v. Hadyeh*, 362 Ill. App. 3d 56, 60 (2005). Simply put, defendants offer nothing in their section 2-1401 petition that could be found to excuse: their delay in answering, their failure to object to the judgment when entered, or their months-long delay in challenging a judgment they were undoubtedly aware was entered against them. The trial court did not abuse its discretion when it dismissed the section 2-1401 petition on the basis that defendants failed to exhibit the required diligence to be entitled to relief from the judgment.

¶ 19 Even though the lack of diligence is a sufficient basis on its own to affirm the dismissal of the petition, a couple other of defendants' arguments are worthy of discussion. Defendants argue that the judgment should not have been entered for \$55,740 because the parties settled the claim for \$40,000. There is some evidence in the record that the parties attempted to settle the case. But, again, that is a matter that could have and should have been raised at or before the prove up in order to potentially prevent the judgment from being entered in the first instance. It was known to defendants well before judgment was entered. The record also demonstrates that defendants did not comply with the supposed settlement either.

¶ 20 Moreover, and more importantly, the existence of any settlement was not raised in defendants' section 2-1401 petition, so it is forfeited. See *U.S. Bank National Association v. Prabhakaran*, 2013 IL App (1st) 111224, ¶ 24 (failure to raise a putative defense in a section 2-1401 petition results in the forfeiture of that defense for purposes of appeal). Defendant John DiCiurcio similarly made no mention of any settlement agreement in his affidavit in support of the section 2-1401 petition. Defendants are not entitled to any relief on the basis of any supposed

settlement because the issue is forfeited.

¶ 21 Defendants also argue that there is no evidence to support the amount of the judgment that was entered. Defendants waived the ability to contest the amount of the judgment when they knowingly allowed it to be entered and did not contest the factual basis. See *Wilkin Insulation*, 186 Ill. App. 3d at 159 (“defendant was aware of both the entry and the amount of the default judgment, having been present at the hearing at which it was entered against him,” but did not file a postjudgment motion or do anything else to defend, so the defendant waived the issue of the amount of damages for purposes of appeal).

¶ 22 As to defendants’ argument that they have a meritorious defense, there is some support in the record that the contract could have been deemed cancelled on account of plaintiffs not accepting it on time. But contrary to plaintiffs waiving that provision as defendants argue, if anyone waived enforcement of that provision it was defendants who acted inconsistent with any intent to have the agreement be cancelled by going to the closing, executing all the documents, and then never mentioning that the contract might be cancelled until four months after the judgment against them was entered. See *Phillips v. Elrod*, 135 Ill. App. 3d 70, 74 (1985) (waiver can arise either expressly or by conduct inconsistent with an intent to enforce that right). Defendants admit that they failed to fulfill their obligations under the contract, and they never mentioned any alleged failure by plaintiffs under the contract until far too late.

¶ 23 As we have explained, due diligence requires the section 2-1401 petitioner to have a reasonable excuse for failing to act within the appropriate time. See *Smith*, 114 Ill. 2d at 222. Defendants offer next to no excuse for their failure to act, and the purported excuse they do offer (that it was their attorney’s fault), is insufficient as a matter of law. The trial court did not abuse its discretion when it found that defendants failed to exercise the requisite diligence to be entitled

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to relief under section 2-1401.

¶ 24

CONCLUSION

¶ 25 Accordingly, we affirm.

¶ 26 Affirmed.