

2018 IL App (1st) 172397-U

No. 1-17-2397

June 29, 2018

Third Division

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

TANYA SPITZER n/k/a TANYA JOHNTZ,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	
)	No. 17 M1 40368
WINDY CITY JEWELRY & LOAN, LTD. d/b/a WINDY)	
CITY JEWELERS,)	Honorable
)	Leon Wool,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Justices Fitzgerald Smith and Lavin concurred in the judgment.

ORDER

¶ 1 *Held:* We affirm the judgment of the circuit court where defendant failed to seek vacatur of a default judgment in the circuit court.

¶ 2 Plaintiff, Tanya Spitzer n/k/a Tanya Johntz, filed a one-count *pro se* complaint against defendant Windy City Jewelry & Loan, Ltd. d/b/a Windy City Jewelers, based on defendant's failure to pay plaintiff the correct proceeds from a consignment sale. The circuit court granted an *ex parte* default judgment in favor of plaintiff for \$700 plus court costs. On appeal, defendant

argues *pro se* that this court should vacate the default judgment and remand for further proceedings. We affirm.

¶ 3 The common law record reflects that, on July 13, 2017, plaintiff filed a *pro se* complaint in small claims court against defendant. Plaintiff sought \$700 as well as court costs, alleging “defendant has failed and refuses to reimburse plaintiff’s money for the sale of plaintiff’s neon sculpture upon agreement defendant would pay the plaintiff after such sale was completed. Now plaintiff seeks to recover money back.”

¶ 4 Defendant was served on August 4, 2017. The record does not reflect that defendant appeared or otherwise answered the complaint. Following an August 30, 2017, hearing in which only plaintiff appeared, the circuit court entered an “ex parte default judgment” in favor of plaintiff for \$700 plus \$264.26 in court costs against defendant. Defendant did not file a notice in the circuit court seeking relief from the judgment.

¶ 5 Defendant filed a *pro se* notice of appeal on September 28, 2017, stating: “[p]lease reverse the decision. The amount owed is in question and is in dispute. Plaintiff has been unwilling to make arrangements for payment.” Plaintiff failed to file a brief on appeal. On our own motion, we ordered the case taken on appellant’s brief only, and we will decide the merits of the appeal without the benefit of the appellee’s brief. See *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976) (holding that a reviewing court can decide the merits of the appeal where the record is simple and the claimed errors can be decided without the aid of an appellee’s brief).

¶ 6 Citing sections 2-1301(e) and 2-1401 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-1301(e), 2-1401 (West 2016)), defendant argues this court should vacate the default

judgment entered against it. It asserts it had a meritorious defense to plaintiff's action but was unable to attend the court proceeding at which the court entered the default judgment due to a family emergency, and it has been diligent "in petitioning the Court to vacate." Defendant also requests that we remand in order that plaintiff be required to prove her damages and defendant have an opportunity to respond with its own evidence.

¶ 7 Defendant is correct that sections 2-1301(e) and 2-1401 of the Code provide a mechanism for litigants to challenge default orders and judgments entered against them. See *In re Haley D.*, 2011 IL 110886, ¶ 55. However, relief under these statutes must be obtained in the circuit court, not in the appellate court.

¶ 8 Under section 2-1301(d) of the Code, the circuit court may enter a default judgment for "want of an appearance, or for failure to plead." 735 ILCS 5/2-1301(d) (West 2016). A party may move to vacate a default judgment under section 2-1301(e), which provides: "The [circuit] 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." 735 ILCS 5/2-1301(e) (West 2016). Whether a section 2-1301(e) motion to vacate a default judgment should be granted lies exclusively within the sound discretion of the circuit court. *Wells Fargo Bank, N.A. v. Hansen*, 2016 IL App (1st) 143720, ¶ 14.

¶ 9 Where a party seeks to vacate a default judgment more than 30 days after entry of the final judgment or order, section 2-1401 provides: "Relief from final orders and judgments, after 30 days from the entry thereof, may be had upon petition as provided in this Section." 735 ILCS 5/2-1401(a) (West 2016); *In re Haley D.*, 2011 IL 110886, ¶¶ 55-58. A section 2-1401 petition

initiates a new and separate cause of action pursuant to the rules of civil procedure and must be filed in the same circuit court in which the contested judgment was entered, preferably assigned to the same judge who heard the original action. *Price v. Philip Morris, Inc.*, 2015 IL 117687, ¶¶ 23, 25, 32. As with a section 2-1301(e) motion, whether a section 2-1401 petition should be granted lies within the sound discretion of the circuit court (*Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 221 (1986)), not the appellate court.

¶ 10 But defendant did not move to vacate the default judgment under either section 2-1301 or 2-1401 in the circuit court. Instead, he seeks such relief on appeal. As only the circuit court can grant defendant relief under sections 2-1301(e) and 2-1401, we are precluded from considering his argument. See *Price*, 2015 IL 117687, ¶ 41 (“Section 2-1401 is inapplicable to reviewing courts” and a determination otherwise would raise separation of powers concerns).

¶ 11 To the extent defendant contends the circuit court erred in granting a default judgment in favor of plaintiff for \$700 in damages plus court costs, defects in the record prevent us from addressing the propriety of the court’s judgment. There is no transcript, bystander’s report, or agreed statement of facts of the trial court proceedings in the record. See Ill. S. Ct. R. 323 (eff. Dec. 13, 2005). We therefore do not know whether the court heard evidence on plaintiff’s complaint or, most crucially, the basis for its decision.

¶ 12 “ ‘Without an adequate record preserving the claimed error, the court of review must presume the circuit court’s order conforms with the law.’ ” *Illinois Neurospine Institute, P.C. v. Carson*, 2017 IL App (1st) 163386, ¶ 33 (quoting *People v. Carter*, 2015 IL App (1st) 117709, ¶ 19). Defendant, as the appellant, has the burden to furnish a sufficiently complete record of the proceedings of the trial court. See *Foutch v. O’Bryant*, 99 Ill. 2d 389, 392 (1984) (“Any doubts

which may arise from the incompleteness of the record will be resolved against the appellant”). As defendant’s argument is not adequately supported by the record on appeal, we will presume the circuit court acted in conformity with the law and affirm its judgment. *Petalino v. Williams*, 2016 IL App (1st) 151861, ¶¶ 42-43.

¶ 13 Defendant asserts that, on September 28, 2017, within 30 days of the default judgment, its owner and president, David Perelgut, went to the Cook County Circuit Court 1st Municipal District “and told the clerk I [*sic*] want to vacate the default judgment and be heard on this matter. The clerk told [Perelgut] the only way to do so is to file this appeal.” It asserts it therefore has been diligent in its attempt to vacate the default judgment, since it “attempted to petition the Circuit Court in the original action to be heard, but the clerk told [Perelgut] the only way to do so is via the Appellate Court.” Defendant also asserts it has been diligent in pursuing this appeal.

¶ 14 While we are sympathetic with defendant’s position, our supreme court has found, “[i]t is well settled that all citizens are charged with knowledge of the law.” *People v. Lander*, 215 Ill. 577, 588 (2005). Although defendant was diligent in filing a timely appeal, an appeal is not the proper vehicle to seek an order vacating the default judgment on the basis of either section 2-1301(e) or 2-1401. Further, the record is inadequate for our review of defendant’s claim that the court erred in granting the default judgment in favor of plaintiff and assessing damages and costs against defendant. Accordingly, we affirm the judgment of the circuit court.

¶ 15 If defendant still seeks relief from the default judgment entered against it, it may do so in the circuit court via a section 2-1401 petition. See *Price*, 2015 IL 117687, ¶ 26 (“the fact that a circuit court judgment has been affirmed on appeal does not preclude the filing of a section 2-1401 petition”).

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¶ 16 For the reasons set forth above, we affirm the judgment of the circuit court of Cook County.

¶ 17 Affirmed.