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2019 IL App (3d) 180484-U

Order filed April 26, 2019

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

2019

STATE FARM MUTUAL AUTOMOBILE	)	Appeal from the Circuit Court
INSURANCE COMPANY, as Subrogee of	)	of the 12th Judicial Circuit,
Leslie Grace Oglesby,	)	Will County, Illinois,
	)	
Plaintiff-Appellee,	)	
	)	Appeal No. 3-18-0484
v.	)	Circuit No. 18-SC-28
	)	
ALYSSA MARIE SYLVESTER,	)	Honorable
	)	Brian E. Barrett,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE O'BRIEN delivered the judgment of the court.  
Justice Wright concurred in the judgment.  
Justice Holdridge dissented.

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**ORDER**

¶ 1 *Held:* The circuit court did not err in finding that defendant did not file a timely jury waiver and waived her right to a jury trial.

¶ 2 Defendant, Alyssa Marie Sylvester, appeals the judgment entered against her in a small claims action, arguing that the court erred in finding that she did not file a timely jury demand and, thus, waived her right to a jury trial. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On January 3, 2018, plaintiff, State Farm Mutual Automobile Insurance Company, as subrogee of Leslie Grace Oglesby, filed a small claims complaint against defendant based on an automobile accident. Defendant was summoned to appear on February 9, 2018. When defendant did not appear, a default judgment was entered.

¶ 5 On February 22, 2018, defendant filed a motion to vacate the default judgment pursuant to section 2-1301 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1301 (West 2016)). The end of the motion stated, “Defendant, \*\*\* prays for an order vacating the Default entered herein on February 9, 2018, for leave to file her appearance and jury demand *nunc pro tunc* to February 22, 2018 and for such other and further relief as this Honorable Court deems appropriate and just.” A hearing on the motion was held on March 2, 2018. The only appearance was by plaintiff’s attorney, who stated, “I talked to counsel and we have agreed to vacate [the default judgment] and continue to \*\*\* trial \*\*\* on July 11th. This is just a bench trial.” The court said, “Okay. So this is no jury?” Plaintiff’s counsel agreed. The written order from that date states, “motion to vacate granted,” and set a bench trial for July 11, 2018.

¶ 6 On April 4, 2018, defendant filed a motion to strike bench trial. The motion stated that “on March 2, 2018, default was vacated against the Defendant and Defendant was granted leave to file her appearance and jury demand *nunc pro tunc* to February 22, 2018.” The motion alleged that the bench trial should be stricken because defendant filed a jury demand. At a hearing, the following exchange occurred:

“[DEFENSE COUNSEL]: We’re striking the bench trial because we filed a jury demand, so the jury—

THE COURT: When did you file a jury demand?

[DEFENSE COUNSEL]: We filed a jury demand for that case on—

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[DEFENSE COUNSEL]: —February 22nd.

THE COURT: When is your jury demand timely on a small claims case?

[DEFENSE COUNSEL]: Um, both parties just agree. I do believe we did file it timely.

THE COURT: Both parties agree we waive Supreme Court Rule?

[DEFENSE COUNSEL]: Um, we agreed, Um, to file our jury demand *nunc pro tunc*.

THE COURT: Don't you think that you're waiving a Supreme Court Rule that I would be involved in that?

[DEFENSE COUNSEL]: I don't know if we're waiving it, [Y]our Honor.

THE COURT: Well, if you're not appearing on the affidavit on the summons, then default judgment enters and it was set over for prove-up. How do you come in late and say we want a jury trial on this?

[DEFENSE COUNSEL]: Um, typically we'll file an appearance and jury demand—

\* \* \*

THE COURT: Why should I allow that?

[DEFENSE COUNSEL]: We're asking for lenience [*sic*] in the situation. The other side is not objecting to it in this matter.

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\*\*\* Can I ask what date the bench trial was scheduled because this says default was entered on February 9 and we vacated the default on March 2nd?

THE COURT: It was scheduled for July 11 on March 2nd.

[DEFENSE COUNSEL]: But that was the day we vacated our default.

THE COURT: Yes, so you vacated the default, you entered a bench trial date. Now you want to strike that for a jury trial date.

How is the defendant unduly prejudiced by vacating the default?

[DEFENSE COUNSEL]: Because typically we just like our cases to be heard in front of a, Um, in front of a jury of their peers. Not that they have anything against a bench trial being done. It's just typically we file a jury demand. At this point both sides are not contesting or the plaintiff is not contesting or trying to file a motion to argue against it. They've agreed to enter into a jury trial for this matter.

THE COURT: I think you waived it. Supreme Court Rule says you have to file your jury demand with the first appearance.”

The court stated that the jury demand needed to be filed before the default judgment was vacated and it was set for bench trial. Therefore, the court denied the motion.

¶ 7 Defendant filed a motion to reconsider the jury demand issue. The motion stated that the court erred in denying the motion to strike bench trial because the court had previously granted defendant leave to file her jury demand. A hearing was held on the motion to reconsider. Defense counsel stated,

“So essentially what I think what truly happened with that, on March 2nd when we stepped up to vacate or asked leave to file our appearance and jury demand,

only the plaintiff stepped up. The defendant—no one from defense counsel stepped up, and so for some reason the \*\*\* plaintiff's attorney added the language for the bench trial, but that was not a date that was discussed with the defendant at any time. And so because of that we then file our leave for our jury demand and our appearance because we were under the impression that we were going to go for a jury demand, but we did not agree to that date. And I am the only attorney from our office that comes to Will County, and I was in the annex building during that time, and so because of that which is an accident with a jury demand issue.”

Defense counsel further said,

“[The motion for leave to file a jury demand] was granted *nunc pro tunc* so [February 22] was the filing date. That was that we were given leave, but defendant, we did not step up on that. The plaintiff came over here when I was in the annex building. I never came over for that matter, and when we received the order, we saw that the plaintiff had set it for a bench trial.”

The following conversation was held:

“THE COURT: And where is this *nunc pro tunc* from? That's not something you just decide you're going to do. That's an order of Court. Where did I say yes, *nunc pro tunc* it to February 22nd?

[DEFENSE COUNSEL]: In our motion we actually put *nunc pro tunc*. You granted us leave. That was in our motion.

THE COURT: Do you have a transcript of that?

[DEFENSE COUNSEL]: It was the language that was in our motion.

THE COURT: That's fine, so on a routine motion to vacate a default I say fine, vacate the default?

[DEFENSE COUNSEL]: And we asked for leave *nunc pro tunc*—

\* \* \*

THE COURT: Is that in the transcript because I don't recall that?

[DEFENSE COUNSEL]: If it was in the motion, we served a copy on the Court. We would assume that the Court would have notice what we were asking for.

THE COURT: Okay, the assumption is the problem.

\* \* \*

[DEFENSE COUNSEL]: So the issue that I'm having with that, what you're essentially saying is that the Court did not read the motion to ask for the leave—

\* \* \*

THE COURT: This is exactly what I'm saying. On a routine motion to vacate a default judgment within 30 days, I did not scour your motion which is why I'm asking is there something in the record that I said yes, *nunc pro tunc* that was specifically brought up to me, or are you relying on the fact that you're pointing out that this Court on a routine motion within 30 days didn't properly read the motion?"

The court told defense counsel to obtain a transcript from that day and reset the hearing on the motion to reconsider. At the next court date, the court stated that it reviewed the transcript and noted that it had asked plaintiff's counsel if it was a jury trial, and plaintiff's counsel stated that it

was a bench trial. The request for leave to file a jury demand *nunc pro tunc* was never discussed. The court then said,

“Your motion to set the matter for jury trial is denied. The time is not appropriate. I understand the error in your belief that this was *nunc pro tunc*. It is absolutely inappropriate for you to stand here before this Court on a previous date and say, well, it’s your fault, Judge. You didn’t read my motion properly. Your motion on a standard 1301 motion to vacate in your prayer for relief asks for *nunc pro tunc*.

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\*\*\* This Court is busy. This Court has a lot of issues. On a [motion to vacate default pursuant to section 2-]1301 [of the Code] when you’re not even present for it, I understand that you’re busy, also. You don’t come in here and you put that on me as if I am not doing my job; however, I understand the error in your belief. The refund on the jury will be granted.

I’ve had this conversation with you about decorum in court. Your laughing and smiling and giggling is not helping you. I don’t know where you think that is appropriate. It is not.

In our profession, we represent our clients. We do it to the best of our ability. I understand that we get busy on occasion—

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\*\*\* You need to be clear about what you’re asking for and what it is that you’re doing.”

After a bench trial, judgment was entered in favor of plaintiff and against defendant in the amount of \$9932.29.

¶ 8 II. ANALYSIS

¶ 9 On appeal, defendant argues that the court erred in finding that she did not timely file a jury demand and, thus, waived her right to a jury trial. After reviewing the record as a whole, we find that the court never granted defendant’s request to file a jury demand *nunc pro tunc*. As defendant’s jury demand was not filed *nunc pro tunc*, it was not timely filed and defendant waived her right to a jury trial.

¶ 10 Under Illinois Supreme Court Rule 285 (eff. Jan. 1, 1964), “A small claim shall be tried by the court unless a jury demand is filed by the plaintiff at the time the action is commenced or by the defendant not later than the date he is required to appear.”

¶ 11 Here, a default judgment was entered against defendant. In her motion to vacate the default judgment, defendant included a request for leave to file a jury demand *nunc pro tunc* to February 22, 2018. At the hearing, defendant and defense counsel did not show up. Plaintiff’s attorney, stated to the court, “I talked to counsel and we have agreed to vacate [the default judgment] and continue to \*\*\* trial \*\*\* on July 11th. This is just a bench trial.” The court said, “Okay. So this is no jury?” Plaintiff’s counsel agreed. No mention of leave to file a jury demand *nunc pro tunc* was ever made at the hearing or in the order.

¶ 12 At the April 4, 2018, hearing on defendant’s motion to strike bench trial, the court asked defendant, “When did you file a jury demand?” It further asked defendant, “When is your jury demand timely on a small claims case?” Defense counsel stated, “[B]oth parties just agree. I do believe we did file it timely.” The court stated, “Both parties agree we waive Supreme Court Rule?” When defense counsel stated that the parties agreed to file the jury demand *nunc pro tunc*, the court stated, “Don’t you think that you’re waiving a Supreme Court Rule that I would be involved in that?” The court found that defendant waived the jury trial.

¶ 13 Subsequently, defendant filed a motion to reconsider and another hearing was held. The court specifically stated to defendant, “And where is this *nunc pro tunc* from? That’s not something you just decide you’re going to do. That’s an order of Court. Where did I say yes, *nunc pro tunc* it to February 22nd?” Defense counsel stated that it asked for leave to file the jury demand *nunc pro tunc* in its written motion. The court stated, “I’m asking is there something in the record that I said yes, *nunc pro tunc* that was specifically brought up to me, or are you relying on the fact that you’re pointing out that this Court on a routine motion within 30 days didn’t properly read the motion?” The court told defense counsel to get a transcript of the hearing. After reviewing the transcript, the court stated that leave to file a jury demand *nunc pro tunc* was never discussed and plaintiff’s counsel had specifically stated that it was a bench trial when the court asked if it was a jury trial. The court stated that it understood defense counsel’s error in believing leave had been granted to file the jury demand *nunc pro tunc* and refunded the costs of filing the jury demand. However, the court admonished defense counsel that, if he wished to ask for leave to file the jury demand *nunc pro tunc*, he should have been present to ask in court and should not have relied on the court’s reading of his written motion. The court stated, “You need to be clear about what you’re asking for and what it is that you’re doing.”

¶ 14 Review of the record of these hearings makes it clear that the court had not granted leave for defendant to file a jury demand *nunc pro tunc*. The court referenced multiple times that the record did not include any indication that leave to file *nunc pro tunc* was ever raised in court. The court’s refunding of defendant’s fee for filing the jury demand further clarifies this. While defendant in her briefs states multiple times that the court had granted such a motion, this is

belied by the record. There was no requirement that the court grant every relief requested by defendant in her motion to vacate default judgment.

¶ 15 Accordingly, we find defendant did not file a timely jury demand, thereby waiving her right to a jury trial.

¶ 16 III. CONCLUSION

¶ 17 The judgment of the circuit court of Will County is affirmed.

¶ 18 Affirmed.

¶ 19 JUSTICE HOLDRIDGE, dissenting:

¶ 20 The majority finds that the circuit court never granted the defendant's request to file a jury demand *nunc pro tunc*. They, thus, find that the defendant's jury demand was not timely filed and the defendant waived her right to a jury trial. In doing so, the majority places the onus on defense counsel to have orally raised the request to file the jury demand *nunc pro tunc* in court, even though it was contained in the defendant's written motion. I disagree. Had the court fully read the defendant's written motion, it would have known that the defendant had requested to file a jury demand. Moreover, at the hearing on the motion to vacate the default judgment, the plaintiff's counsel stated that they had agreed to vacate the default judgment. The plaintiff's counsel then misrepresented the defendant's trial preferences to the court, stating that the case would proceed to a bench trial. Based on the court's failure to read the written motion and the plaintiff's counsel's misrepresentation to the court, the court should have realized the mistake, granted the defendant's motion to strike bench trial, and allowed the case to proceed to a jury trial. Therefore, I would (1) vacate the court's final judgment entered for the plaintiff and against the defendant, (2) vacate the court's order denying the motion to reconsider the defendant's jury

demand, (3) reverse the court's order denying the motion to strike the bench trial, and (4) set the cause for a jury trial.