

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

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PNC Bank, N.A. s/b/m to National City Mortgage,  
a Division of National City Bank of Indiana,

Plaintiff-Appellee,

v.

Terry West a/k/a Terry S. West; Edna West a/k/a  
Edna R. West; Unknown Owners and Non Record  
Claimants,

Defendants-Appellants.

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)  
) Appeal from the Circuit Court  
) of Cook County.  
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)  
) No. 11 CH 32920  
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)  
) The Honorable  
) Alfred M. Swanson, Jr.,  
) Judge, presiding.  
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PRESIDING JUSTICE HYMAN delivered the judgment of the court.  
Justices Neville and Pucinski concurred in the judgment.

**ORDER**

¶ 1 Did the trial court abuse its discretion by denying a timely filed section 2-1301(e) motion on the basis that the defendants failed to allege a meritorious defense with specificity? 735 ILCS 5/2-1301(e) (West 2012). While a movant under section 2-1401 must set forth a meritorious defense supported by an affidavit, under 2-1301(e) an affidavit is not necessary, and the issues to

be decided differ as well. Section 2-1301(e) considers whether "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, ¶ 69. We reverse.

¶ 2

#### Background

¶ 3

Defendants defaulted on the mortgage on their home at 2012 S. 23rd Ave., Broadview, IL. PNC Bank, N.A. filed a complaint to foreclose mortgage, and on September 25, 2011, served defendant Edna West by personal service at the property and served her husband, defendant Terry West, by substitute service on Edna. Several months later, on April 5, 2012, PNC filed a motion for order of default, a motion for judgment for foreclosure and sale, and a motion to appoint selling officer. PNC did not place the motions for service until two weeks later, with a notice of presentment set for April 30. When the Wests did not appear on April 30, the trial court entered all the orders.

¶ 4

On May 30, 2012, within 30 days of entry of the default, the Wests filed an appearance and motion to vacate under section 2-1301(e), which they noticed for hearing on July 9, 2012. The accompanying affidavit from the Wests' counsel stated that he "believes that there exists a meritorious defense" to the complaint. The trial court denied the motion, partly because it lacked factual or legal grounds of a meritorious defense. The Wests moved to reconsider on August 8, 2012, but before that motion could be heard PNC filed, and on September 18, 2012, presented, a motion for entry of an order approving the report of sale and distribution and order of possession and eviction. The trial court set a briefing schedule on the motion for reconsideration and a hearing on the motion for reconsideration and PNC's motions. At the hearing on November 13, 2012, the trial court denied the motion for reconsideration, and granted PNC's motions.

¶ 5 On this record, the Wests' claim the trial court abused its discretion when it refused to grant the motion to vacate.

¶ 6 Analysis

¶ 7 As a preliminary matter, after this case was decided, the Illinois supreme court issued *Wells Fargo Bank, A. v. McCluskey*, 2013 IL 115469, in which it held that a trial court could consider the motion to vacate under the standards of section 2-1301(e) as long as the motion preceded the filing of a motion to confirm the judicial sale. In *McCluskey*, the court reiterated that under section 2-1301(e), "traditional considerations of due diligence and whether there is a meritorious defense [] remain relevant in the court's consideration of whether substantial justice has been done between the parties and whether it is reasonable to vacate the default." The Wests timely filed their motion to vacate.

¶ 8 The decision to grant a timely filed motion to vacate a default judgment is committed to the trial court's sound discretion. 735 ILCS 5/2-1301(e) (West 2010). As a general matter, however, the entry of a default judgment is a drastic remedy disfavored by the courts. *In re Haley D.*, 2011 IL 110886, ¶ 69. In deciding a 2-1301(e) motion, the trial court must apply the "substantial justice" standard. The "overriding consideration," as the supreme court explained in *Haley D.*, 2011 IL 110886, ¶ 57, is simple—"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." *Larson v. Pedersen*, 349 Ill. App. 3d 203, 207-08 (2004) (same).

¶ 9 Reversal does not require our determining whether trial court abused its discretion. *Lettvin v. Suson*, 62 Ill. App. 3d 215, 218 (1978) (reviewing court must only resolve the question of whether justice has been served); *Hoffman v. Hoffman*, 37 Ill. App. 3d 415, 417 (1976) (same).

¶ 10 In applying the substantial justice standard, "[t]he litigant need not necessarily show the existence of a meritorious defense and a reasonable excuse for not having timely asserted such defense." *In re Haley D.*, 2011 IL 110886, ¶ 57 (citing *Stotlar Drug Co. v. Marlow*, 239 Ill. App. 3d 726, 728 (1993)); *Heller Financial Inc. v. Christopher LaSalle & Co.*, 168 Ill.App.3d 852, 854 (1988) (default judgment may be vacated even in absence of due diligence). Instead, what courts look to in answering the substantial justice inquiry are the severity of the penalty as a result of the default judgment and the hardship which the plaintiff would suffer in proceeding to a trial on the merits. *Id.*

¶ 11 Our courts construe 2-1301(e) motions liberally in favor of the moving party. *Wells Fargo Bank, N.A. v. McCluskey*, 2013 IL 115469, ¶ 16; *Bank & Trust Co. v. Line Pilot Bungee, Inc.*, 323 Ill. App. 3d 412, 414 (2001); *Heller Financial Inc.*, 168 Ill. App. 3d at 854 (trial court should be liberal in setting aside default judgment brought within 30 days of entry of judgment).

¶ 12 The Wests argue substantial justice warrants vacating the default judgment because the penalty against them is severe—a judgment order foreclosing on their home without the opportunity to defend their legal title and possessory interests. PNC's response relies on a list of "relevant factors in determining whether a judgment should be vacated," identified in *Mann v. Upjohn Co.*, 324 Ill. App. 3d 367, 377 (2001). One of those factors is due diligence, which PNC points out was not raised by the Wests either before the trial court or in their appellate brief. Another factor is the existence of a meritorious defense. PNC acknowledges the Wests claimed to have a meritorious defense, but that claim, PNC asserts, is insufficient without some allegations of a factual or legal basis for it. PNC's reliance on *Mann* is misplaced since it is contrary to our supreme court's pronouncement in *In re Haley D.*, that whether substantial justice has been achieved takes precedence over a showing of due diligence or a meritorious defense. *In*

*re Haley D.*, 2011 IL 110886, ¶ 69. Even the case PNC relies on, *Mann v. Upjohn Co.*, 324 Ill. App. 3d at 377, says "The guiding principle is to prevent dismissal when it would be unfair, unjust, and inequitable."

¶ 13 Moreover, PNC's cases for the proposition that something more than a bare bone statement of a meritorious defense is necessary are distinguishable. The case *Keller v. Hyland Builders Corp.*, 38 Ill. App. 2d 209 (1962), concerned an affidavit in support of setting aside a judgment of confession, a wholly different situation. *Miura v. Famous Cab. Co.*, 107 Ill. App. 3d 803 (1982), involved a motion "unsupported by affidavit," which "contained hearsay and a number of legal conclusions." And, *In re Marriage of Garde*, 118 Ill. App. 3d 303 (1983), involved an unsigned motion to vacate which also lacked an affidavit. Thus, none of PNC's cases involve either affidavits like that proffered by West's counsel or support ignoring the affidavit for 2-1301(e) purposes. At the very least, the affidavit disputes PNC's assumption that no real issue exists.

¶ 14 The test—substantial justice plus the desirability of having the case heard on the merits—employs a low threshold. Not only does a 2-1301(e) motion to vacate not require an affidavit, but by rejecting the affidavit as not going far enough in establishing a meritorious defense, the trial court applied the wrong test. At a minimum, the affidavit here asserts the potential existence of a meritorious defense. Considering what is at stake, that foreclosure proceedings rarely go to trial, that the Wests indicated that they have a meritorious defense even though they are not required to do so, that courts favor a liberal construction of 2-1301(e), it would be "unfair, unjust, and inequitable" to let the default stand. Accordingly, the denial of the 2-1301 (e) motion is reversed.

¶ 15 Reversed and remanded.