2014 IL App (1st) 132831-U

FIFTH DIVISION
August 8, 2014

No. 1-13-2831

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DORIS BROWN,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 11 M6 2844
	)	
PACE SUBURBAN BUS SERVICE,	)	Honorable
	)	Loretta Eadie-Daniels,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Gordon and Justice Taylor concurred in the judgment.

ORDER

¶ 1 *Held:* Court properly vacated default order against defendant upon timely vacatur motion; policy strongly favors such vacatur, and counsel's representation that she mistook the date of the defaulted hearing is not "fraud on the court" merely because counsel has duty to diligently follow proceedings and summons bore correct hearing date.

¶ 2 This case concerns a civil action by plaintiff Doris Brown against defendant Pace Suburban Bus Division ("Pace") of the Regional Transportation Authority ("RTA") for personal

injury arising from negligence. Plaintiff appeals *pro se* from the dismissal of her action, contending that the court erred in vacating an earlier default order against defendant.

¶ 3 Plaintiff filed her complaint on August 12, 2011, alleging that she was injured while exiting a Pace bus on August 14, 2009, and thereby suffered $100,000 in damages.

¶ 4 Defendant was served with process, with the summons noting a status hearing on September 20, 2011. The return of service bore a service date of August 22. On September 2, defendant filed its appearance and a motion to dismiss arguing that the complaint was untimely due to a one year limitation period for personal injury actions against the RTA. The motion hearing was noticed for September 21, 2011.

¶ 5 On September 20, 2011, the court entered a default order against defendant because it failed to appear in court that day. The court scheduled a prove-up hearing for October 18.

¶ 6 On September 23, defendant filed a motion to vacate the default order, alleging that it was under the mistaken impression that the status hearing was set for September 21 and thus had set its motion to dismiss for that day. Defendant alleged that it learned of the default order when its counsel attended court on the 21st and counsel would have attended court on the 20th but for her mistake. Plaintiff responded to the motion to vacate, arguing that defendant had notice of the September 20 status hearing in the summons so that the default should stand.

¶ 7 On October 18, 2011, the court granted defendant's motion to vacate the default order, setting a briefing schedule on defendant's motion to dismiss.

¶ 8 Plaintiff filed a motion for the court to reconsider its vacatur, arguing that defendant's counsel had committed fraud on the court by her claim of mistake regarding the status hearing, when it is counsel's duty to diligently follow the court's proceedings and schedule, so that the

vacatur should be itself vacated as the result of fraud. Plaintiff also argued that defendant had "failed to file an appearance, answer, or plea as summoned and required."

¶ 9 Plaintiff also responded to the motion to dismiss, arguing that the dismissal motion was "misleading" because Pace was aware of her claim before she filed her complaint, and that the RTA's one year limitation period does not apply to Pace.

¶ 10 On December 20, 2011, the court denied plaintiff's motion to reconsider the vacatur. On December 28, 2011, the court granted defendant's motion to dismiss "without prejudice."

¶ 11 Plaintiff filed a notice of appeal from the December 20 order. We dismissed that appeal as seeking review of a non-final order. *Brown v. Pace Suburban Bus Service*, No. 1-12-0353 (Sept. 28, 2012)(unpublished order under Supreme Court Rule 23).

¶ 12 In January 2012, while that appeal was pending, plaintiff filed a motion seeking additional time to file an amended complaint. On February 14, 2012, the court struck the motion due to the pending appeal. In October 2012, plaintiff filed a motion seeking to reopen the case on the grounds that the circuit court dismissal of December 28 was without prejudice and the appeal had been dismissed. On December 12, 2012, the court granted plaintiff leave to file an amended complaint.

¶ 13 Plaintiff filed an amended complaint adding an allegation that Pace and RTA are separate entities so that the RTA's one year limitation period does not bar her action against Pace.

¶ 14 On January 22, 2013, the court granted plaintiff leave to file a second amended complaint. Her second amended complaint was substantially identical to the first amended complaint. On July 11, 2013, the case was dismissed with prejudice. This appeal followed.

¶ 15 On appeal, plaintiff contends that the trial court erred in vacating the default order against defendant and in denying plaintiff's motion to reconsider the vacatur.

¶ 16 Section 2-1301(d) of the Code of Civil Procedure (Code) authorizes the trial court to enter a default judgment "for want of an appearance, or for failure to plead, but the court may in either case, require proof of the allegations of the pleadings upon which relief is sought." 735 ILCS 5/2–1301(d) (West 2012). However, it is a matter of public policy to prefer deciding legal issues on their merits, so that a default judgment is a drastic measure, generally discouraged and imposed only as a last resort. *Dupree v. Hardy*, 2011 IL App (4th) 100351, ¶¶ 57, 59. Moreover, once a party has filed an appearance and contested the allegations of the complaint, the court cannot enter a default judgment for merely failing to appear for a hearing or trial, but instead the plaintiff must prove the allegations of the complaint. *In re C.J.*, 2013 IL App (5th) 120474, ¶ 7.

¶ 17 Section 2-1301(e) provides that the "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 2012). Generally, courts exercise a liberal policy towards vacating defaults under section 2–1301(e). *Wells Fargo Bank, N.A. v. McCluskey*, 2013 IL 115469, ¶ 16. The central issue in a section 2-1301(e) motion is whether substantial justice is being done between the parties and whether it is reasonable under the circumstances to compel the non-defaulted party to go to trial on the merits. *Id.* " 'What is just and proper must be determined by the facts of each case, not by a hard and fast rule applicable to all situations regardless of the outcome.' " *Id.*, quoting *Widicus v. Southwestern Electric Cooperative, Inc.*, 26 Ill. App. 2d 102, 109 (1960). A party seeking to vacate a default under section 2-1301(e) is not required to show a meritorious defense nor a reasonable excuse for failing to timely assert such a defense. *Id.*

¶ 18 Here, as a threshold matter, we note that defendant filed its appearance and motion to dismiss on September 2, 2011, following service of process on August 22. Therefore, plaintiff's allegation in her motion to reconsider that defendant "failed to file an appearance, answer, or plea as summoned and required" is incorrect.[1] Turning to the default order of September 20, 2011, defendant's counsel explained in the vacatur motion that she missed court that day due to a mistaken belief that the status hearing was set for the 21st. That she actually had such a belief is reasonably corroborated by the fact that she noticed the hearing on defendant's motion to dismiss for the 21st. Plaintiff is correct that a party and its counsel have a duty to diligently follow court proceedings, and the summons here indeed showed a September 20 status hearing. That said, counsel's arguable lack of diligence does not support plaintiff's grave allegation that counsel committed fraud against the court. Stated another way, a mistake does not become a lie simply because the mistake may be deemed unreasonable.

¶ 19 For the reasons described above, any failure by defendant's counsel to diligently track court proceedings did not bar defendant from obtaining vacatur upon its timely motion. Contrary to plaintiff's contention, defendant was not required to present a meritorious defense to obtain vacatur. The case she cites for that proposition, *M.L.C. Corp., Inc. v. Pallas*, 59 Ill. App. 3d 504 (1978), concerns Section 72 of the Civil Practice Act (Ill. Rev. Stat. ch. 110, § 72), the predecessor to Code section 2-1401. 735 ILCS 5/2-1401 (West 2012). Section 2-1401 governs vacatur of final judgments more than 30 days after entry, in distinct contrast to section 2-1301(e) governing vacatur of non-final default orders -- the order at issue here -- and final judgments less than 30 days old. Section 2-1401 petitions must show a meritorious defense or claim, due

[1] While the return date on the summons was August 30, defendant's appearance was due either at least 21 days after the summons's August 12 issuance – September 2, when defendant filed its appearance – or 30 days after its August 22 service. Supreme Court Rule 101(b)(1), (d) (eff. May 30, 2008).

diligence in presenting the defense or claim, and due diligence in the filing the vacatur petition. *Warren County Soil and Water Conservation Dist. v. Walters*, 2014 IL App (3d) 130087, ¶ 24, citing *Smith v. Airoom, Inc*., 114 Ill. 2d 209, 220–21 (1986).

¶ 20 Moreover, we find that defendant did timely present a meritorious defense. Before the default order, it filed a motion to dismiss raising its statute-of-limitations defense. That defense is meritorious, since Pace is an operating division of RTA (70 ILCS 3615/1.03, 3A.01 (West 2012)) subject to RTA's one-year limitation period for personal injury actions. 70 ILCS 3615/5.03 (West 2012).[2] Plaintiff's August 2011 complaint alleging an August 2009 injury is barred. Defendant also diligently filed its vacatur motion only three days after the default order.

¶ 21 In conclusion, we find that the court did not abuse its discretion in vacating the default order against defendant nor in denying plaintiff's motion to reconsider. Accordingly, the judgment of the circuit court is affirmed.

¶ 22 Affirmed.

[2]Cf. *Pace Suburban Bus Division v. Regional Transportation Authority*, 346 Ill. App. 3d 125 (2003), finding Pace and RTA to be separate entities *for purposes of Pace suing RTA* regarding RTA's financing of Pace on the basis that Pace has its own board of directors with corporate powers. That does not alter that the Regional Transportation Authority Act (70 ILCS 3615/1.01 *et seq*. (West 2012)) is the enabling statute for RTA and Pace and that the limitation section of the Act (70 ILCS 3615/5.03 (West 2012)) is one of its general or miscellaneous provisions.