

NOTICE
Decision filed 03/21/11. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

NO. 5-09-0662
IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

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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| CAVALRY PORTFOLIO SERVICES, LLC, |) | Appeal from the |
| |) | Circuit Court of |
| Plaintiff-Appellee, |) | Jackson County. |
| |) | |
| v. |) | No. 05-LM-221 |
| |) | |
| FRED L. CRIPPS, |) | Honorable |
| |) | William G. Schwartz, |
| Defendant-Appellant. |) | Judge, presiding. |

JUSTICE GOLDENHERSH delivered the judgment of the court.
Justices Welch and Donovan concurred in the judgment.

R U L E 2 3 O R D E R

Held: The default judgment entered by the circuit court of Jackson County is reversed and the cause remanded for further proceedings.

Defendant, Fred L. Cripps, appeals from a default judgment of the circuit court of Jackson County entered against him and in favor of plaintiff, Cavalry Portfolio Services, LLC, an assignee of MBNA, a credit card company. The issues raised by defendant on appeal are (1) whether defendant was bound to file his pleadings seeking to vacate the default judgment within two years of the entry of the default judgment, (2) whether the trial court erred in denying defendant's motion to vacate and strike, and (3) whether the trial court should have held an evidentiary hearing before denying defendant's motion to vacate. We reverse and remand.

FACTS

On May 9, 2005, plaintiff filed a complaint seeking damages for defendant's alleged failure to pay on a credit card debt. On June 30, 2005, defendant filed an answer in which

he denied the material allegations of the complaint; however, the answer was not signed, nor was there a proof-of-service page. On August 4, 2005, plaintiff filed a motion for the entry of a default judgment, alleging that defendant failed to file a response to the original complaint. On September 9, 2005, the trial court entered a default judgment in the amount of \$17,100.88, finding, "[N]o answer, motion or other pleadings have been served or filed in this action by the said defendant *** [.]" On October 26, 2009, defendant filed a motion to vacate the default judgment and to strike the citation to discover assets.

Defendant alleged that he never received any pleadings indicating that a motion for a default judgment had been filed or that any hearing on that matter had occurred. He further alleged that the first time he learned that a judgment had been entered against him was on September 23, 2009, when he was served with a citation to discover assets. On November 9, 2009, the trial court denied defendant's motion to vacate the default judgment and to strike the citation to discover assets. The trial court found that defendant's motion was not filed within the two years after the entry of the judgment as required by section 2-1401(c) of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401(c) (West 2008)). Defendant filed a timely notice of appeal.

ANALYSIS

The first issue we are asked to consider is whether defendant was bound to file his pleading seeking to vacate the default judgment within two years of the entry of the default judgment. We note that plaintiff declined to file a brief in this matter. After careful consideration, we agree with defendant that under the facts of this case, he was not required to file a motion to vacate within two years of the entry of the default judgment.

The trial court denied the petition for relief from judgment on procedural grounds as a matter of law. Therefore, the standard of review is *de novo*. See *Ford Motor Credit Co. v. Sperry*, 214 Ill. 2d 371, 379, 827 N.E.2d 422, 427 (2005).

Defendant relies on subsection (f) of section 2-1401 of the Code, which provides, "Nothing contained in this Section affects any existing right to relief from a void order or judgment, or to employ any existing method to procure that relief." 735 ILCS 5/2-1401(f) (West 2008). Section 2-1401(f) codifies a common law rule that allows litigants to attack a void judgment at any time. See *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 104-05, 776 N.E.2d 195, 201-02 (2002). When a petition to vacate a void judgment is brought pursuant to subsection (f) of section 2-1401 of the Code, the general rule that the petition must be filed within two years of the order of judgment does not apply. *Ford Motor Credit Co.*, 214 Ill. 2d at 379, 827 N.E.2d at 427-28.

This case presents us with a procedural predicament. Plaintiff filed a complaint against defendant for the failure to pay a credit card bill. Defendant filed an answer, but he failed to sign it or attach a proof of service. In his answer, defendant denied the allegations in the complaint, alleging that he did not even recall having a credit card issued by MBNA. The underlying issue of whether or not defendant actually owes the credit card company has never been addressed on the merits because the case was decided pursuant to a default judgment. Defendant asserts that he failed to receive notice of the filing of the motion for the entry of a default judgment. This case leaves us with many doubts, and we find the trial court's entry of the default judgment to be in error.

Plaintiff filed a motion for the entry of a default judgment in which it alleged that defendant failed to file a response to its original complaint filed on May 9, 2005. However, the record clearly shows that on June 30, 2005, defendant filed an answer to plaintiff's complaint. While the answer was not signed and there was no proof-of-service page attached, the record shows an answer on file. No pleadings were filed seeking to strike the answer on the basis that it was not signed and/or because there was no certificate of service attached. Thus, we agree with defendant that the default judgment was procured by fraud,

and a judgment procured by fraud is void and will not be enforced (*Siddens v. Industrial Comm'n*, 304 Ill. App. 3d 506, 511, 711 N.E.2d 18, 21 (1999)).

We find no need to belabor this issue or address at length the additional issues raised by plaintiff. Because petitions for relief from judgments filed pursuant to section 2-1401 of the Code invoke the equitable powers of the circuit court, which should prevent the enforcement of a judgment when it would be unfair, unjust, or unconscionable (*Ford Motor Credit Co.*, 214 Ill. 2d at 379, 827 N.E.2d at 427), we reverse the judgment of the circuit court and remand for further proceedings consistent with this order.

Reversed; cause remanded.