No. 1-09-0384

SIXTH DIVISION
FEBRUARY 10, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

AARON KEMPER, Plaintiff-Appellant, v. ALBERT WEATHERSPOON, Defendant-Appellee.	)	Appeal from the Circuit Court of Cook County.
ALBERT WEATHERSPOON, Counterplaintiff-Appellee, v. AARON KEMPER, Counterdefendant-Appellant,	)	No. 05 M1 14343 Honorable Raymond Funderburk, Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Garcia and Justice Cahill concurred in the judgment.

O R D E R

Held: Where the trial court did not fail to do substantial

justice between the parties when it denied Aaron Kemper's motion to vacate a default judgment entered against him, and dismissed his complaint for want of prosecution, the trial court's judgment was affirmed.

Plaintiff/counterdefendant Aaron Kemper appeals from an order of the circuit court denying his motion to vacate the default judgment entered in favor of defendant/counterplaintiff, Albert Weatherspoon, in this property damage action. Kemper also appeals from the order dismissing his complaint for want of prosecution (DWP). On appeal, Kemper contends that the trial court erred by failing to do substantial justice between the parties when it denied the aforesaid motions. We affirm.

This matter arose from a car accident between Kemper and Weatherspoon near West 103rd Street and South Emerald Avenue in Chicago on March 31, 2005. On May 9, 2005, Kemper filed a complaint alleging that Weatherspoon collided with his car when Weatherspoon attempted to make an illegal left turn in front of him onto Emerald Avenue, causing about $5,000 in damage to his car.[1] On July 13, 2005, Weatherspoon filed a countercomplaint against Kemper alleging that Kemper was at fault for the accident, causing damages to his car in the amount of $7,474.25.

[1] The complaint is incorrectly dated March 9, 2005, but the memorandum of orders indicates that it was filed on May 9, 2005.

On January 13, 2006, Kemper filed an amended complaint alleging, in pertinent part, that Weatherspoon was guilty of failing to keep a proper lookout, maintain proper lane position, yield the right of way when making a left turn, and reduce speed to avoid an accident. As a result of Weatherspoon's actions, his car collided with Kemper's vehicle causing great damage to Kemper's vehicle, and injuries to Kemper which required medical attention. Kemper thus requested a judgment against Weatherspoon in the amount of $15,000.

Following arbitration, where Kemper appeared with his counsel but Weatherspoon failed to appear, an award was entered in favor of Kemper on his complaint and against Weatherspoon on his counterclaim. A judgment was entered on the award of the arbitrators in favor of Kemper in the sum of $7,500 on Kemper's complaint, and in favor of Kemper on Weatherspoon's counterclaim. This judgment, however, was later vacated and the matter was set for further proceedings. The matter was set for status on September 4, 2008, but was continued to September 18, 2008, for trial.

On September 18, Weatherspoon appeared in court, but Kemper failed to appear. The court then dismissed Kemper's complaint for want of prosecution, held Kemper in default on Weatherspoon's

counterclaim, and set prove-up in this matter, by affidavit only, for October 3, 2008.

On October 3, an employee of Affirmative Insurance Company filed an affidavit attesting that, due to Kemper's negligence, Weatherspoon sustained property damage to his vehicle in the amount of $7,474.25, and the insurance company paid that amount in order to repair it. Kemper again failed to appear, and the court entered an *ex parte* judgment in favor of Weatherspoon and against Kemper in the amount of $7,474.25.

On October 17, 2008, Kemper, through his attorney, filed a motion to vacate the DWP order entered on September 18, 2008. In it, Kemper contended that the matter at bar was assigned to attorney Timothy Winslow, then of Kemper's counsel's office (Pomper and Goodman) on September 18, 2008. The matter was not docketed in the central docket of Pomper and Goodman for September 18th. In addition, Winslow did not return to the office on September 29, 2008, and Kemper's counsel was unable to inquire as to the circumstances surrounding the case. Pomper and Goodman also failed to receive a postcard notifying it of the DWP. Furthermore, Kemper was diligent in prosecuting this matter, and thus requested that the trial court vacate the DWP.

On October 31, 2008, Kemper, through his attorney, filed a

"motion to vacate default judgment" pursuant to section 2-1301 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1301 (West 2008)). In that motion, Kemper alleged that the default judgment entered against him on October 3, 2008, and the DWP order entered against him on September 18, 2008, should be vacated. He specifically maintained that after the court proceeding on September 4, Kemper's file was returned to Winslow of Pomper and Goodman for continued prosecution of Kemper's claim and defense of the counterclaim. However, unknown to Pomper and Goodman, September 26, 2008, was Winslow's final day at the firm. On September 30, 2008, the firm received a "text message" from Winslow announcing his separation from Pomper and Goodman. Furthermore, opposing counsel did not provide Kemper's counsel a copy of the DWP or any order defaulting Kemper on the counterclaim. In addition, because Howard Pomper was away from his office from September 29 until October 3, 2008, he did not receive the postcard from the clerk of the court notifying him of the prove-up date until it had already concluded. In support of his motion, Kemper attached his own affidavit describing the car accident. He also attached the affidavit of his counsel, Chris Goodman, who restated the circumstances regarding Winslow's departure from the firm.

On November 26, 2008, Kemper, through his attorney, filed a motion to adopt evidentiary material in support of his motions to vacate. The trial court allowed Kemper's motion and, on December 9, 2008, he submitted photographs and an affidavit of Tony Williams in support of his motions to vacate. The photographs depicted the area where the accident allegedly occurred, and damage to Kemper's vehicle. In Tony Williams' affidavit, he attested that he was a clerk at Pomper and Goodman on September 30 and October 3, 2008, and that he spoke with Jessie Kemper on October 3 in response to an inquiry concerning Aaron Kemper's case. Williams further attested that he observed at 10:15 a.m. on October 3 that the matter of Aaron Kemper was set for a hearing on that date, spoke to J. Chris Goodman about the matter, and saw Goodman immediately depart from the office.

On December 23, 2008, Weatherspoon, through his attorneys, filed responses to Kemper's motions to vacate the default judgment and the DWP. In the responses, Weatherspoon stated that Goodman attended the September 4, 2008 status date and thus had notice of the trial date of September 18. Furthermore, Weatherspoon maintained that Kemper's discussion of the circumstances involving Winslow's employment at Pomper and Goodman was irrelevant to the events in question and demonstrated

a lack of due diligence on the part of Pomper and Goodman in following the case. In support of his responses, Weatherspoon attached an affidavit from Justin Borawski, the trial attorney for Weatherspoon, who attested that Goodman appeared on behalf of Kemper on September 4, 2008, and helped choose the trial date.

On January 16, 2009, the trial court denied Kemper's motions to vacate the DWP and the default judgment entered against him. It also held that the order "regarding [Kemper's] motion to adopt evidentiary material to stand." On February 11, 2009, Kemper filed a notice of appeal from the order of the trial court denying both motions to vacate.

On appeal, Kemper first contends that the trial court erred by refusing to vacate the DWP entered on September 18, 2008. Kemper specifically argues that the trial court failed to do substantial justice between the parties when it denied his motion to vacate the DWP because he alleged a meritorious claim that Weatherspoon caused the accident in question, and the occurrences at Pomper and Goodman were unforeseeable.

Our jurisdiction to entertain this issue on appeal is called into question. Generally, a trial court retains jurisdiction over a cause of action until all issues of fact and law have been finally determined and a final judgment has been entered.

Progressive Universal Insurance Company, v. Hallman, 331 Ill. App. 3d 64, 67 (2002). Section 13-217 of the Code provides that when an action is dismissed for want of prosecution, the plaintiff "may commence a new action within one year or within the remaining period of limitation, whichever is greater." 735 ILCS 5/13-217 (West 2008). The Illinois Supreme Court has held that a DWP is not a final and appealable order until the period for refiling provided by section 13-217 expires. *S.C. Vaughan Oil Company, v. Caldwell, Troutt & Alexander*, 181 Ill. 2d 489, 508 (1998).

Here, the DWP order was entered on September 18, 2008, and when Kemper filed a notice of appeal from the denial of his motion to vacate that order on February 11, 2009, his right to refile under section 13-217 had not yet expired. Generally, because the period for refiling had not expired, the DWP would not be a final and appealable order. *Flores v. Dugan*, 91 Ill. 2d 108, 114 (1982). However, in this case, a counterclaim was on file that ultimately created an event that resulted in the DWP becoming final prior to the passage of one year from the date of entry of the order.

The facts show that the trial court entered a DWP order against Kemper, a default judgment in favor of Weatherspoon on

his counterclaim, and subsequently awarded Weatherspoon a monetary judgment on his counterclaim. Kemper filed motions to vacate the default judgment and DWP order, but both motions were ultimately denied. The trial court's denial of Kemper's motion to vacate the default judgment entered against him on Weatherspoon's counterclaim constituted a final appealable order. Because that order was final, Kemper could not effectively refile his action against Weatherspoon regarding the accident in question without it being barred by *res judicata*.

In order for *res judicata* to bar a subsequent action, three requirements must be met, including a final judgment on the merits, identity of the causes of action, and an identity of the parties. *Rein v. David A. Noyes & Company et al.*, 172 Ill. 2d 325, 337 (1996). Here, there was a default judgment in favor of Weatherspoon on the merits which resulted in monetary damages being awarded to him and against Kemper. Furthermore, if Kemper refiled his complaint it would involve the same set of facts with the same theories of recovery as the default judgment entered on the counterclaim, and, lastly, there would have been an identity of parties, *i.e.*, Kemper and Weatherspoon. Therefore, the default judgment entered on Weatherspoon's counterclaim was a final order that effectively made the DWP order final because

Kemper would be barred by *res judicata* if he attempted to refile his action. We thus have jurisdiction to hear Kemper's contention that the trial court erred by refusing to vacate his DWP order.

In reaching this conclusion, we find *Vaughan*, 181 Ill. 2d at 489 and *Marren Builders, Inc. v. Lampert*, 307 Ill. App. 3d 937 (1999), distinguishable from the case at bar. In both cases, unlike the case at bar, there were no other events that could have resulted in the DWP orders becoming final, except the passage of one year from the date of entry of the orders. *Vaughan*, 181 Ill. 2d at 508-09; *Marren*, 307 Ill. App. 3d at 941. Neither *Vaughan* nor *Marren* considered the situation here, *i.e.*, that a judgment on another pleading created a situation where a non-final DWP order became final and appealable based on *res judicata* considerations.

We now to the merits of Kemper's argument that the trial court erred by refusing to vacate the dismissal for want of prosecution of his amended complaint. We review a trial court's decision on a motion to vacate for an abuse of discretion. *Deutsche Bank National v. Burtley*, 371 Ill. App. 3d 1, 5 (2006). In our review, we must determine whether the decision to deny a motion to vacate was a fair and just result, which did not deny

the moving party substantial justice. *Mann v. Upjohn Company*, 324 Ill. App. 3d 367, 377 (2001).

Here, we find that the trial court's decision to refuse to vacate the DWP order was a fair and just result. The record shows that Kemper and his counsel were simply not diligent in following the case at bar. On September 18, Kemper failed to appear in court resulting in the DWP order. On October 3, Kemper again failed to appear, and the court entered an *ex parte* judgment in favor of Weatherspoon and against Kemper in the amount of $7,474.25. Kemper's motion to vacate the DWP order was a list of excuses as to why he and his attorneys failed to appear in court, but, contrary to Kemper's argument, these excuses do not show that he was diligent in prosecuting this matter. See *Paul v. Gerald Adelman & Associates, Ltd.*, 223 Ill. 2d 85, 105 (2006) (stating that a party must follow the progress of her case, and that a section 2-1401 petition will not relieve a party of the consequences of her or her attorney's neglect of the matter). Therefore, under the circumstances of this case, we find that the trial court's decision to refuse to vacate the DWP order was fair and just, and that it did not abuse its discretion in so ruling.

Kemper also contends that the trial court erred in denying

his section 2-1301(e) motion to vacate the default judgment entered against him on September 18, 2008, and the resulting monetary damages imposed on him during the prove-up held on October 3, 2008. He maintains that the trial court failed to do substantial justice between the parties when it denied this motion because Pomper and Goodman did not have knowledge of the trial date, and it was unforeseeable that the attorney assigned to the matter would not appear and leave without notice.

Section 2-1301(e) of the Code provides that a trial 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 2008). We again review a trial court's decision on a motion to vacate for an abuse of discretion. *Burtley*, 371 Ill. App. 3d 1, 5 (2006).

We must first address exactly what type of judgment Weatherspoon obtained against Kemper with regard to this issue. The trial court order from September 18, 2008, stated that Kemper was "held in default on the counter complaint" due to his failure to appear in person or by counsel following repeated calls for trial. On October 3, 2008, the court entered an "*ex parte*

judgment" in favor of Weatherspoon and against Kemper in the amount of $7,474.25. Thereafter, Kemper filed a motion to vacate the "default judgment" and Weatherspoon filed a response to Kemper's motion to "vacate default judgment." The briefs on appeal refer to the judgment as a "default judgment."

A default judgment may generally be granted only when the defaulted party fails to file an answer or an appearance, and the failure of a party to appear at trial generally does not justify a default judgment. 735 ILCS 5/2-1301(d) (West 2008); *In re Marriage of Drewitch*, 263 Ill. App. 3d 1088, 1094 (1994). However, where a defendant that has appeared and responded to the complaint fails to appear for trial, a plaintiff may proceed with its case and a trial court may enter an *ex parte* judgment. *Drewitch*, 263 Ill. App. 3d at 1094; *Teitelbaum v. Reliable Welding Company*, 106 Ill. App. 3d 651, 658-59 (1982). "When this proper procedure is followed, an incorrect notation calling the resulting *ex parte* judgment a default is not fatal." *Drewitch*, 263 Ill. App. 3d at 1094, citing *Teitelbaum*, 106 Ill. App. 3d at 659.

The trial court in this case entered an *ex parte* judgment. Kemper previously appeared in court, responded to Weatherspoon's countercomplaint, and the trial court specifically stated that an

ex parte judgment was entered against Kemper in its October 3, 2008 order. The fact that Kemper and Weatherspoon refer to this ruling as a "default judgment" instead of one entered *ex parte* has no effect on an otherwise valid judgment. *Teitelbaum*, 106 Ill. App. 3d at 659.

In turning to Kemper's contention that the trial court improperly denied his motion to vacate the *ex parte* judgment, Weatherspoon argues that because the trial court proceedings are absent from the record, Kemper has not provided a sufficiently complete record to support any claim of error. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984) (finding that in the absence of an adequate record, we will presume that the trial court's decision conformed to the law and "had a sufficient factual basis"). However, we find that because the trial court ruled on the affidavits only, which are included in the record, the missing trial proceedings are not fatal to Kemper's appeal. Nevertheless, to the limited extent that the omitted proceedings could be material, we presume that they favor Weatherspoon's position. *Cambridge Engineering, Inc. v. Mercury Partners 90 BI, Inc.*, 378 Ill. App. 3d 437, 446 (2007).

Turning to the merits of Kemper's argument, we find that the trial court did not abuse its discretion in denying his motion to

vacate the *ex parte* judgment entered against him. The evidentiary material supplied by Kemper in support of his motion to vacate the *ex parte* judgment included photographs of his car after the accident, and the location where the accident occurred. These photographs do not depict who was at fault for the accident. Furthermore, Williams' affidavit shows that Pomper and Goodman failed to appear in court on behalf of Kemper on October 3, 2008. However, as Weatherspoon stated in his pleadings, Kemper's discussion of the problems at Pomper and Goodman is irrelevant to the events in question. Therefore, the evidentiary material supplied by Kemper does not show that the trial court denied him substantial justice when it denied his motion to vacate the *ex parte* judgment.

For the foregoing reasons, we affirm the judgment of the trial court.

Affirmed.