

THIRD DIVISION
March 16, 2011

No. 1-10-1008

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ALLSTATE INSURANCE COMPANY,)	APPEAL FROM THE
Plaintiff-Appellee,)	CIRCUIT COURT OF
)	COOK COUNTY
)	
v.)	No. 06 L 9370
)	
)	
ROAD AMERICA AUTOMOTIVE, INC., TAREQ)	HONORABLE
AL-HINDI and AZAAM AL-HINDI,)	BILL TAYLOR,
Defendants-Appellants.)	JUDGE PRESIDING.

JUSTICE STEELE delivered the judgment of the court.

Presiding Justice Quinn and Justice Neville concurred in the judgment.

ORDER

HELD: The circuit court had personal jurisdiction over defendant Tareq al-Hindi. The circuit court did not abuse its discretion in denying defendants' petition to vacate the default judgment entered against them; and the court's judgment is affirmed.

Defendants Road America Automotive, Inc. (Road America), Tareq Al-Hindi and Azaam Al-Hindi appeal an order of the circuit court of Cook County denying their petition to vacate a default judgment entered against them in a case brought by plaintiff Allstate Insurance Company (Allstate), alleging various forms of fraud and unjust enrichment. Defendants argue that the

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circuit court lacked personal jurisdiction over Tareq and abused its discretion in denying their petition on the merits. For the following reasons, we disagree and affirm the judgment of the circuit court.

BACKGROUND

The record discloses the following facts. On September 5, 2006, Allstate filed a complaint against Road America (an automobile towing company) and Azaam al-Hindi (former president and registered agent for the company). The complaint alleged common law fraud, consumer fraud and deceptive business practices, insurance fraud, and unjust enrichment arising from alleged misrepresentation of authorization of towing charges and the inflation of towing charges. Road America and Azaam were served with summonses and copies of the complaint. Dennis L. Kuhl filed an appearance on behalf of the defendants.

On December 18, 2006, Allstate filed motions for a default judgment against both defendants based on their failure to answer Allstate's complaint. On January 5, 2007, the circuit court entered an order granting Road America and Azaam leave to file their answer by January 19, 2007. The circuit court also ordered that the parties initiate discovery and complete written discovery by March 7, 2007.

On February 22, 2007, Allstate filed another motion for a default judgment for presentment on March 7, 2007. The circuit court granted Road America and Azaam leave to file responsive pleadings *instanter* on March 7, 2007. Road America filed an answer; Azaam filed a motion to dismiss pursuant to section 2-615 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2006)).

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On July 26, 2007, Allstate filed a response to the motion to dismiss, as well as an amended complaint naming Tareq (current president and former secretary of Road America) as an additional defendant. On October 16, 2007, the circuit court entered an agreed order that the defendants would file responsive pleadings on or before November 12, 2007. On December 18, 2007, the circuit court entered another agreed order stating that Road America would file an answer and that Azaam and Tareq would file a motion to dismiss by January 8, 2008.

On February 21, 2008, after a scheduled hearing on Azaam and Tareq's motion to dismiss, the circuit court entered an order striking the motion to dismiss in its entirety for failure to file a written motion or provide courtesy copies. On February 25, 2008, the circuit court entered a default judgment against Road America, Azaam and Tareq for failing to file responsive pleadings and set the case for prove-up. On March 26, 2008, Kuhl filed a joint motion to vacate the default judgment as to all defendants. On April 17, 2008, the circuit court vacated the default judgment and directed the defendants to file their responsive pleadings on or before April 24, 2008.

Defendants filed their responsive pleadings on April 30, 2008. Road America filed an answer, verified by Tareq as president of the company. Kuhl filed a motion to dismiss Azaam and Tareq from the suit, arguing that Allstate failed to meet the heightened pleading requirements for a claim of fraud against them. On July 11, 2008, Allstate filed its response to the motion to dismiss. On June 30, 2008, following a hearing, the circuit court dismissed the complaint against Azaam and Tareq without prejudice.

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On August 20, 2008, Allstate filed a second amended complaint against Road America, Azaam and Tareq. On October 30, 2008, the circuit court entered a default judgment against the defendants for failure to answer or otherwise plead. The circuit court also found defendants in violation of the case management order governing discovery and barred defendants from presenting evidence or testimony at the prove-up. On May 4, 2009, following a prove-up hearing, the circuit court entered a judgment against defendants in the amount of \$340,010, plus costs.

On January 15, 2010, Road America and Azaam filed a petition to vacate the judgment pursuant to section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2008)). The petition was filed by the law firm of Zane D. Smith & Associates. In the motion, Road America and Azaam argued: (1) defendants' reliance on prior counsel was excusable under section 2-1401 of the Code; and (2) Tareq was never subject to the circuit court's jurisdiction, because a summons was never issued to or served upon him. On February 24, 2010, Allstate filed its response to the section 2-1401 petition. On March 15, 2010, Road America and Azaam filed a reply. The following day, the circuit court entered an order denying the petition, ruling that the defendants were not diligent in presenting their defense in the original action. On April 9, 2010, the defendants filed a timely notice of appeal to this court.

DISCUSSION

On appeal, defendants argue that the circuit court erred in denying their section 2-1401 petition to vacate the default judgment and lacked jurisdiction over Tareq. We turn first to the jurisdictional question.

I. Personal Jurisdiction

Defendants first argue that the circuit court lacked personal jurisdiction over Tareq and that the default judgment against him should be vacated as void *ab initio*. Allstate argues that Road America and Azaam lacked standing to raise the jurisdictional issue. A party may "object to personal jurisdiction or improper service of process only on behalf of himself or herself, since the objection may be waived." See *Fanslow v. Northern Trust Co.*, 299 Ill. App. 3d 21, 29, 700 N.E.2d 692, 698 (1998) (applying Pennsylvania law). Although we have found no Illinois cases expressly stating this principle, Allstate correctly notes the general rule is that a party must assert its own rights and interests and may not base its allegations of error on the rights of third parties. *Burton v. Ramos*, 341 Ill. App. 3d 122, 127, 792 N.E.2d 362, 366 (2003). Moreover, like Pennsylvania law, Illinois law provides that a party can, by his or her actions, consent to or waive personal jurisdiction. *Owens v. Snyder*, 349 Ill. App. 3d 35, 40, 811 N.E.2d 738, 743 (2004).

However, Allstate did not raise the standing argument in its response to the petition. Our supreme court has stated that "lack of standing in a civil case is an affirmative defense, which will be waived if not raised in a timely fashion in the trial court." *Greer v. Illinois Housing Development Authority*, 122 Ill. 2d 462, 508, 524 N.E.2d 561, 582 (1988); see also *Lebron v. Gottlieb Memorial Hosp.*, 237 Ill. 2d 217, 252-53, 930 N.E.2d 895, 916 (2010) (the defendant has the burden to plead and prove the affirmative defense of lack of standing, which will be forfeited if not timely raised in the trial court). Furthermore, a judgment rendered by a court

which fails to acquire jurisdiction of either the parties or the subject matter of the litigation may be attacked and vacated at any time or in any court, either directly or collaterally. *State Bank of Lake Zurich v. Thill*, 113 Ill. 2d 294, 309, 497 N.E.2d 1156, 1162 (1986). Accordingly, we consider whether the circuit court had personal jurisdiction over Tareq.

Defendants argue that the circuit court lacked personal jurisdiction over Tareq because a summons was never issued to or served on him. A judgment rendered without service of process, where there has been neither a waiver of process nor a general appearance by the defendant, is void regardless of whether the defendant had actual knowledge of the proceedings. *Thill*, 113 Ill. 2d at 308, 497 N.E.2d at 1161. Allstate responds that Tareq waived all objections to the circuit court's personal jurisdiction by filing a motion to dismiss before filing a proper objection to the court's jurisdiction. See 735 ILCS 5/2-301(a-5) (West 2008). Defendants reply that Tareq never authorized Kuhl to file the motion to dismiss on his behalf.

The existence of any agency relationship and its nature and extent may be shown by circumstantial evidence. *Sakun v. Taffer*, 268 Ill. App. 3d 343, 351, 643 N.E.2d 1271, 1277 (1994). Where a party stands by silently and allows an attorney to act on his behalf in dealing with another in a situation where the attorney may be presumed to have authority, the party is estopped from denying the attorney's apparent authority to a third person. *E.g., Kulchawik v. Durabla Manufacturing Co.*, 371 Ill. App. 3d 964, 971, 864 N.E.2d 744, 751 (2007). Where an attorney appears on behalf of a party, there is a presumption that the attorney was authorized to do so, which may be rebutted by the evidence. However, the circuit court may reject a defendant's claim that the attorney was unauthorized, where warranted by the circumstances.

See, e.g., *Pinnacle Arabians, Inc. v. Schmidt*, 274 Ill. App. 3d 504, 509-10, 654 N.E.2d 262, 265-66 (1995). Determining whether the attorney's appearance was unauthorized is a question of fact. *Eckel v. Bynum*, 240 Ill. App. 3d 867, 876, 608 N.E.2d 167, 174 (1992).

In this case, defendants submitted an affidavit from Tareq stating that he did not "authorize, retain or request" Kuhl's representation. However, the affidavit does not claim that Tareq did not know Kuhl was representing Tareq's individual interest and did not acquiesce in that representation. Defendants rely on *Gray v. First Nat'l Bank of Chicago*, 388 Ill. 124, 57 N.E.2d 363 (1944). In that case, however, the law firm representing other defendants admitted that it was not authorized to represent its purported client in the action in question and the purported client had no knowledge of the suit. See *Schmidt*, 274 Ill. App. 3d at 508, 654 N.E.2d at 265. Here, defendants submitted no affidavit from Kuhl attesting to lacking authority or the purported client's lack of knowledge. The trial court was also aware that Tareq had verified an answer (albeit in his capacity as Road America's president) prepared by Kuhl to a complaint naming Tareq as a defendant and alleging that he made and continued existing policy for Road America.¹ Thus, unlike *Gray*, here there was no admission from the attorney claiming unauthorized action. Furthermore, unlike *Gray*, there was evidence that Tareq knew about the complaint against him and knew that Kuhl purported to represent Tareq personally.

Given the specific facts and circumstances of this case, we conclude the trier of fact could

¹ Indeed, during oral argument, defendants' current counsel conceded that Tareq was at court prior to the amendment of Allstate's complaint.

find that Kuhl had apparent authority to act for Tareq and that defendants failed to rebut the presumption that Kuhl was authorized to represent Tareq. Accordingly, the circuit court did not commit reversible error in declining to vacate the judgment against Tareq for lack of personal jurisdiction.

II. The Section 2-1401 Petition

We now address the merits of the appeal regarding the denial of relief under section 2-1401 of the Code. Section 2-1401 of the Code provides a comprehensive procedure by which final orders, judgments, and decrees may be vacated "after 30 days from the entry thereof." 735 ILCS 5/2-1401(a) (West 2006). Generally, a section 2-1401 petition must set forth allegations supporting the existence of a meritorious claim or defense; due diligence in presenting the claim or defense to the circuit court in the original action; and due diligence in filing the petition. *Paul v. Gerald Adelman & Associates, Ltd.*, 223 Ill. 2d 85, 94, 858 N.E.2d 1, 7 (2006).² Whether a section 2-1401 petition should be granted lies within the sound discretion of the trial court, depending on the facts and equities presented. *Robinson v. Ryan*, 372 Ill. App. 3d 167, 173, 865

² We note that defendants' affidavits raised no meritorious defense to the underlying cause of action. However, when ruling on a section 2-1401 petition, it is not the trial court's responsibility to determine the merits of the underlying causes of action. The central facts a petitioner is required to plead are not those facts which would establish his or her entitlement to relief in the underlying lawsuit, but those facts which would establish his or her entitlement to have the judgment vacated. See *Paul*, 223 Ill. 2d at 107, 858 N.E.2d at 14.

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N.E.2d 400, 406 (2007). A trial court abuses its discretion if it fails to apply the proper criteria when it reviews the facts and a reviewing court must consider both the legal adequacy of the way the trial court reached its result as well as whether the result is within the bounds of reason. *Robinson*, 372 Ill. App. 3d at 173, 865 N.E.2d at 406.

Defendants claim the judgment against them should be vacated because Kuhl failed to adequately represent them. Generally, it is the duty of every litigant to follow the process of litigation to which he or she is a party. *Flisk v. Central Area Park District*, 203 Ill. App. 3d 253, 256, 560 N.E.2d 1160, 1162 (1990). Section 2-1401 "does not afford a remedy to relieve a litigant of the consequences of his own mistakes or his counsel's negligence." *La Rabida Children's Hosp. & Research Center v. Harrison*, 263 Ill. App. 3d 790, 796, 635 N.E.2d 575, 579 (1994); *American Reserve Corp. v. Holland*, 80 Ill. App. 3d 638, 643-44, 400 N.E.2d 102, 106 (1980). However, a court may refuse to impute such negligence to the client who seeks to vacate a default judgment when mitigating circumstances are present. *Eastman Kodak Co. v. Guasti*, 68 Ill. App. 3d 484, 487-88, 386 N.E.2d 291, 294 (1979) (*pro se* representation); *Department of Public Works & Buildings v. O'Hare Int'l Bank*, 44 Ill. App. 3d 934, 938, 358 N.E.2d 1308, 1312 (1976).

In determining whether the petitioner's lack of diligence results in an excusable mistake, for the purpose of a motion to vacate under a section 2-1401 petition, the court considers all the circumstances surrounding the entry of the judgment, including the litigant's conduct. *Community 1st Credit Union v. Boswell*, 302 Ill. App. 3d 739, 744, 706 N.E.2d 520, 523-24 (1999). Relaxation of the due diligence requirement thereby entitling a defendant to a motion to

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vacate a judgment is justified only under extraordinary circumstances. *All-Steel Employees Credit Union v. Singh*, 345 Ill. App. 3d 1005, 1008, 804 N.E.2d 657, 659 (2004).

Defendants rely on *Yates v. Barnaby's of Northbrook*, 218 Ill. App. 3d 128, 578 N.E.2d 174 (1991), where plaintiff failed to respond to various discovery requests and, upon hearing defendant's motion for sanctions *ex parte*, the trial court dismissed plaintiff's complaint with prejudice. However, the section 2-1401 petition, filed with supporting affidavits, indicated that there was a lack of cooperation between Yates' first and second attorneys, with the successor attorney receiving no cooperation from the initial counsel. Additionally, there appeared to be confusion regarding the time of hearing on defendant's motion for sanctions and the inability of the new counsel to locate and review court files regarding the dismissal. *Yates*, 218 Ill. App. 3d at 129-30, 578 N.E.2d at 175.

In this case, there was no evidence of a conflict between counsel at the time the default judgment was entered. Indeed, Azaam's affidavit merely states that he learned of the judgment after the fact and that Kuhl did not answer his telephone calls. Tareq's affidavit, directed to the jurisdictional issue, necessarily does not address the adequacy of representation. Road America submitted no affidavit in support of the petition. Accordingly, defendants have not shown the sort of extraordinary circumstances that would be an exception to the rule requiring them to follow the progress of the case. Thus, the circuit court did not abuse its discretion in denying the section 2-1401 petition on its merits.

CONCLUSION

In sum, we conclude that the circuit court had personal jurisdiction over Tareq and did

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not abuse its discretion in denying defendants' section 2-1401 petition. For all of the
aforementioned

reasons, the judgment of the circuit court of Cook County is affirmed.

Affirmed.